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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON
9 AT SPOKANE

10 GENETIC VETERINARY SCIENCES, INC., d/b/a
11 PAW PRINT GENETICS

12 Plaintiff,

13 v.

14 CANINE EIC GENETICS, LLC

15 Defendant.

No. CV-13-422-RMP

COMPLAINT FOR
DECLARATORY JUDGMENT,
UNFAIR COMPETITION, TRADE
LIBEL, AND TORTIOUS
INTERFERENCE

JURY TRIAL DEMANDED

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18 Plaintiff GENETIC VETERINARY SCIENCES, INC., d/b/a PAW PRINT GENETICS
19 (“PPG”) for its complaint against CANINE EIC GENETICS, LLC (“Canine Genetics”) hereby
20 alleges as follows:

21
22 **NATURE OF THE ACTION**

23 1. This action arises under 28 U.S.C. §§ 1331, 2201, and 2202 and the United States
24 Patent Act, 35 U.S.C. § 1 et. seq.

25 2. PPG brings this action for a declaration that no activities relating to its genetic test
26 for Exercise-Induced Collapse (“EIC”) in dogs directly or indirectly infringe (either literally or

1 under the doctrine of equivalents) any valid claim of U.S. Patent No. 8,178,297 (“the ’297
2 patent”) and for damages caused by unfair competition in violation of the Washington State
3 Unfair Business Practices and Consumer Protection Act, RCW § 19.86 et. seq., trade libel under
4 the common law of the State of Washington, and tortious interference with a business
5 expectancy under the common law of the State of Washington.

6 **PARTIES**

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8 3. PPG is a Washington corporation with a principal place of business at 850 E.
9 Spokane Falls Blvd., Suite 200, Spokane, Washington, 99202.

10 4. Canine Genetics is a Minnesota limited liability company with a principal place of
11 business at 849 Fairmount Ave, Saint Paul, MN 55105-3341.

12 **JURISDICTION AND VENUE**

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14 5. This court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a)
15 and (b) because this is a civil action arising under the Patent Act, 35 U.S.C. § 1 et. seq. This
16 court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 2202
17 because an immediate and substantial controversy exists between PPG and Canine Genetics
18 whether the PPG test for canine EIC infringes any valid claim of the ’297 patent.

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20 6. Venue is appropriate in this judicial district pursuant to 28 U.S.C. §§ 1400(b),
21 1391(b), and 1391(c) because this is a patent case and a substantial part of the events giving rise
22 to the claim occurred in this judicial district and because Canine Genetics is subject to personal
23 jurisdiction in this judicial district. Specifically, Canine Genetics sells or offers for sale EIC tests
24 for dogs covered by one or more claims of the ’297 patent in direct competition with PPG to
25 residents of Washington State.

26 7. PPG is informed and believes and on that basis alleges that Canine Genetics has
communicated with PPG’s actual and potential customers, incorrectly stating or suggesting that

1 PPG is not authorized to conduct DNA testing for canine EIC and that any such genetic testing
2 conducted by PPG is unlawful and in violation of Canine Genetics' exclusive rights granted by
3 the '297 Patent.

4 8. PPG is informed and believes and on that basis alleges that Canine Genetics'
5 statements that PPG is not authorized to conduct DNA testing for canine EIC free of liability for
6 infringement under '297 patent are false, misleading, and made in bad faith because no
7 reasonable litigant could conclude that the claims of the '297 patent are valid and enforceable
8 against PPG's test for canine EIC. These statements have also caused PPG harm in Washington
9 State.

10
11 **FACTS**

12 **Background Facts Relevant to Canine EIC**

13
14 9. Canine EIC is a genetic syndrome typically associated with Labrador Retrievers
15 but observed in other breeds as well. Dogs who suffer from EIC usually develop signs of an
16 episode five to fifteen minutes after initiation of strenuous exercise, such as that typical for
17 hunting dogs undergoing strenuous training. At the beginning of an EIC episode, the dog starts
18 to lose coordination and develops a wobbly gait, which soon progresses to a loss of control of the
19 hind legs. In some cases, the entire body is unable to move during an EIC episode. The collapse
20 period usually lasts five to ten minutes. After thirty minutes, the dog will usually be fully
21 recovered. Dogs affected with EIC usually cannot continue with intense retriever training but
22 can live relatively normal lives as house pets.

23
24 10. Dogs that have EIC are typically noticed to be afflicted during heavy training,
25 usually between seven months and three years of age. Dogs of either sex can be affected. Dogs
26 with this condition are almost always observed to be normal while at rest and are usually
described as being extremely fit and in prime athletic condition. Moreover, examinations of the

1 nervous, cardiovascular, and musculoskeletal systems of afflicted dogs are typically normal as is
2 routine blood analysis.

3
4 11. Given the lack of any medical signs or symptoms of EIC until the dog undergoes
5 strenuous exercise, genetic testing for EIC presents the most useful approach for those who seek
6 to identify service or working dogs for training in a vocation that will require strenuous exercise.

7 **PPG's Business and Development of its EIC Test for Dogs**

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9 12. PPG was founded in 2012 in Spokane, Washington by Dr. Lisa Shaffer. Dr.
10 Shaffer is a geneticist and successful entrepreneur. She has authored over 300 scholarly articles,
11 almost two dozen book chapters, and four books in various aspects of clinical genetics. She
12 serves on a number of professional, academic, and community boards and has won several
13 industry awards, including the honor of being named one of the top 10 women CEOs by *Inc.*
14 *Magazine*. The company she co-founded in 2003, Signature Genomics Laboratories, grew
15 rapidly and was sold to PerkinElmer, Inc., in 2010.

16 13. PPG's laboratory developed, validated, and launched seventy tests for various
17 genetic disorders for canines in May 2013 and launched an additional forty-five tests in July
18 2013.

19
20 14. PPG's test for EIC was develop by Dr. Blake Ballif, PPG's Laboratory and
21 Scientific Director, along with PPG's Senior Manager of Development and Laboratory
22 Operations, Kyle Sundin. Dr. Ballif and Mr. Sundin also worked with a genetic counselor,
23 Abigail Hata, who was responsible for identifying in the public literature the allele associated
24 with EIC in dogs.

25 15. Once PPG knew from public literature the location of the DMN1 gene and the
26 mutation giving rise to EIC in dogs, PPG developed a genotyping technique to screen genomic

1 DNA in a particular sample to determine whether a particular dog has a mutation known to be
2 responsible for causing or predisposing a dog to develop EIC.

3
4 16. According to PPG's test for EIC, DNA is isolated from cheek cells collected by
5 PPG's customers who, after taking the sample with three separate swabs per dog, enclose each
6 swab in a sterile test tube affixed with a label to identify the dog. After genomic DNA is
7 harvested, quantified, and checked for quality, it is screened for its EIC genotype.

8
9 17. According to PPG's test for EIC, two independent tests are performed
10 simultaneously for the EIC gene and known mutations using routine methods known to those of
11 ordinary skill in the art.

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13 18. PPG has made significant financial investments in the development of its tests,
14 including the test for EIC. PPG has been conducting tests for EIC since August 2013 and will
15 continue to conduct tests for EIC in the future.

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Recent Decisions Concerning Patent Eligibility

19. On March 20, 2012, the U.S. Supreme Court decided the case *Mayo v. Prometheus*, 566 U.S. ___, 132 S. Ct. 1289 (2012). This case considered patent claims for a method of giving a drug to a patient, where the patented method included measuring metabolites of the drug in the patient's blood with a known threshold in mind. According to the patented method, if metabolites were over the threshold, the patient had been given a sufficient dose of the drug. And if metabolites were below the threshold, this indicated that the patient should be given a larger dose.

20. The Court in *Prometheus* held that the claim under consideration was invalid because the level of metabolites in a patient's blood and its correlation to a certain condition in the body (i.e., whether a drug was dosed appropriately) is a natural law for which patent protection is unavailable. *Id.* at 1305.

1 21. According to the Court in *Prometheus*, only *applications* of a natural law are
2 eligible for patent protection, but those “applications” must be genuine and not those which
3 result from drafting efforts designed to monopolize the natural correlations. For example, the
4 claim at issue in *Prometheus* was technically an “application” of the natural law because it
5 instructed doctors to make a determination regarding appropriate dosing, but this was not a
6 “genuine application” that could transform the natural law into something eligible for patent
7 protection. *Id.* at 1299-1300.

8 22. The Court reasoned in *Prometheus*, that instructions for making such
9 determinations were well known in the art. And because “[t]hese instructions add nothing
10 specific to the laws of nature other than what is well-understood, routine, conventional activity,
11 previously engaged in by those in the field,” it was not a sufficient application of the natural law
12 to transform the claim into one that is eligible for patent protection. *Id.*

13 23. On June 13, 2013, the U.S. Supreme Court decided the case *Association for*
14 *Molecular Pathology v. Myriad Genetics*, 569 U.S. ___, 133 S. Ct. 2107 (2013). This case
15 considered whether claims to DNA isolated from a human cell were eligible for patent
16 protection.

17 24. For decades leading up to this decision, the United States Patent and Trademark
18 Office (USPTO) had allowed claims to isolated DNA sequences on a theory that those
19 sequences, once isolated from a cell and found to have a certain use, e.g., for determining a
20 particular disease state or disease risk factor, were eligible for patent protection as “compositions
21 of matter.” The Court in *Myriad* rejected traditional USPTO rationale for allowing claims to
22 isolated DNA, holding in relevant part that “genes and the information they encode are not patent
23 eligible under [35 U.S.C.] § 101 simply because they have been isolated from surrounding
24 genetic material.” 133 S. Ct. at 2120.
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26

1 25. In view of the recent decisions with respect to patent eligibility for diagnostic
2 testing methods and isolated DNA, several claims in thousands of U.S. patents are no longer
3 valid and the USPTO has implemented new guidelines for examination for claims drawn to
4 genetic material and diagnostic testing methods.

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6 **Canine Genetics' Patent and Litigation History**

7 26. The '297 patent is entitled "Method of Detecting Canine Exercise-Induced
8 Collapse." The '297 patent lists May 15, 2012 as the date of issue. A true and correct copy of
9 the '297 patent is attached as **Exhibit A**.

10 27. PPG is informed and believes and on that basis alleges that Canine Genetics is the
11 exclusive licensee of the '297 patent.

12
13 28. Canine Genetics has filed two lawsuits to enforce the '297 patent. The first case
14 is *Canine EIC Genetics, LLC v. Animal Genetics, Inc.*, No. 0:12-cv-01668-DWF-AJB and the
15 second is *Canine EIC Genetics, LLC v. DNA Diagnostic Center, Inc.*, No. 0:12-cv-01667-DWF-
16 AJB. Both cases were filed in the U.S. District Court, District of Minnesota at Saint Paul,
17 Minnesota.

18 29. In both cases, Canine Genetics alleged that it "is the owner of the entire right, title
19 and interest in and to [the '297 patent]." And in both cases, Canine Genetics characterized the
20 infringing services as "DNA testing services to detect whether a dog has or is predisposed to
21 developing Canine Exercise-Induced Collapse."
22

23 **Evidence of a Definite and Concrete Dispute Between Canine Genetics and PPG**

24 30. PPG's test for canine EIC is designed to determine whether a particular dog has or
25 is predisposed to canine EIC. Canine Genetics believes that PPG's test for canine EIC infringes
26 the '297 patent.

1 31. On June 17, 2013, Dr. Shaffer of PPG had discussions with two principals of
2 Canine Genetics, Dr. Edward Patterson and Dr. James Mickelson, where the topic of licensing
3 the '297 patent was discussed. In addition to being principals of Canine Genetics, Dr. Patterson
4 and Dr. Mickelson are named inventors of the '297 patent.

5 32. During discussions held with Dr. Shaffer of PPG, Dr. Patterson and Dr.
6 Mickelson, speaking as principals of Canine Genetics and as co-inventors of the '297 patent,
7 offered to license PPG's test for EIC under the '297 patent in exchange for a 50% royalty.
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9 33. PPG did not accept Canine Genetics' offer to license the PPG test for EIC under
10 the '297 patent. Accordingly, PPG's test for EIC is currently being sold under a genuine threat
11 of a patent infringement lawsuit brought by Canine Genetics to enforce alleged exclusive rights
12 under the '297 patent.

13 34. The threat posed to PPG's business by a possible infringement lawsuit from
14 Canine Genetics asserting the '297 patent is further underscored by public statements made by
15 Katie Minor, another inventor of the '297 patent and principal of Canine Genetics. Ms. Minor
16 has stated publicly that the '297 patent will provide exclusive rights to test for canine EIC and
17 that companies like PPG who offer such tests are "proceeding at their own risk of potential
18 infringement lawsuits in the future."
19

20 35. The threat to PPG's business by a possible infringement lawsuit from Canine
21 Genetics asserting the '297 patent is further underscored by numerous online discussions where
22 actual and potential consumers have said the following or something similar: "I was told by
23 Katie Minor at the University Of Minnesota that the filing for Patent Rights on the EIC Test was
24 approved by the Government a month or so ago and that the U Of M is the only licensed
25 provider now for EIC testing. All others are in Violation of US Patent Laws." The quoted
26 passage is but one example from several similar online discussion forums, where one can

1 routinely see statements being made by participants indicating that Canine Genetics is the only
2 firm authorized to provide DNA testing services for canine EIC.

3
4 **Facts Supporting Unfair Competition, Tortious Interference, and Trade Libel**

5 36. PPG is informed and believes and on that basis alleges that Canine Genetics has
6 communicated directly or indirectly with PPG's actual and potential customers, using false or
7 misleading statements concerning Canine Genetics' rights under the '297 patent, wherein such
8 statements expressly or impliedly communicated to PPG's actual or potential customers that PPG
9 is not authorized to conduct DNA testing for canine EIC and that any such genetic testing
10 conducted by PPG is unlawful and in violation of Canine Genetics' rights granted by the '297
11 Patent.

12 37. Canine Genetics' statements and representations concerning its alleged rights
13 under the '297 patent are false and misleading and have caused actual harm to PPG's business
14 and reputation.

15 38. Canine Genetics' statements and representations concerning its alleged rights
16 under the '297 patent are also in bad faith because no reasonable litigant could realistically
17 conclude that the '297 patent is valid and enforceable against PPG's genetic test for canine EIC.
18

19 **CLAIM FOR RELIEF**

20
21 **COUNT ONE—DECLARATORY JUDGEMENT OF INVALIDITY**

22 39. PPG re-alleges and incorporates by reference all allegations contained in
23 paragraphs 1-38 above.

24 40. PPG seeks a declaration from this Court that the claims of the of the '297 patent
25 are invalid for failing to meet one or more requirements for patentability found in the Patent Act,
26 35 U.S.C. § 101, 102, 103, or 112.

1 **COUNT TWO—DECLARATORY JUDGEMENT OF NON INFRINGEMENT**

2 41. PPG re-alleges and incorporates by reference all allegations contained in
3 paragraphs 1-38 above.

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5 42. PPG seeks a declaration from this Court that no activities relating to its tests for
6 canine EIC directly infringe (either literally or under the doctrine of equivalents), contribute to
7 infringement, or induce infringement of any valid claim of the '297 patent.

8 **COUNT THREE—UNFAIR COMPETITION**

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10 43. PPG re-alleges and incorporates by reference all allegations contained in
11 paragraphs 1-38 above.

12 44. Canine Genetics has engaged in an unfair or deceptive act or practice within the
13 meaning of RCW § 19.86.020, namely by making false or misleading statements concerning its
14 exclusive rights under the '297 patent, wherein such statements expressly or impliedly
15 communicated to PPG's actual or potential customers that PPG is not authorized to conduct
16 DNA testing for canine EIC and that any such genetic testing conducted by PPG is unlawful and
17 in violation of Canine Genetics' rights granted by the '297 patent. Such statements were made
18 within a trade or business; they affected the public interest and caused injury to the business or
19 property of PPG.

20 **COUNT FOUR—TRADE LIBEL**

21
22 45. PPG re-alleges and incorporates by reference all allegations contained in
23 paragraphs 1-38 above.

24
25 46. Canine Genetics has made unprivileged, false or misleading statements
26 concerning its rights under the '297 patent, wherein such statements expressly or impliedly
communicated to PPG's actual or potential customers that PPG is not authorized to conduct

1 DNA testing for canine EIC and that any such genetic testing conducted by PPG is unlawful and
2 in violation of Canine Genetics' rights granted by the '297 patent. Such statements were made at
3 a time when Canine Genetics knew or should have known that the claims of the '297 patent were
4 invalid; Canine Genetics is at fault in connection with such statements, and the statements have
5 caused damage to PPG's business or reputation.

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COUNT FIVE—TORTIOUS INTERFERENCE

47. PPG re-alleges and incorporates by reference all allegations contained in paragraphs 1-38 above.

48. PPG has a valid business expectancy with certain consumers of genetic testing services, specifically those who have purchased and those who intend to purchase genetic testing for canine EIC. Canine Genetics has knowledge of PPG's business expectancy and Canine Genetics intentionally interfered with that business expectancy having an improper purpose or by using improper means, thereby causing damage to PPG's business or reputation.

PRAYER FOR RELIEF

Wherefore, PPG prays for the following relief from this Court.

A. Judgment in its favor on all claims for relief;

B. A declaration that no activities relating to PPG's test for canine EIC directly or indirectly infringe any valid claim (either literally or under the doctrine of equivalents) of the '297 patent;

C. A declaration that the claims of the '297 patent are invalid for failing to meet one or more requirements for patentability found in the Patent Act, 35 U.S.C. § 101, 102, 103, or 112;

1 D. An award to PPG of money damages sufficient to compensate PPG for damage to
2 its business, reputation, and property caused by Canine Genetics' unfair competition, trade libel,
3 and tortious interference, in an amount to be proved at trial;

4 E. Punitive damages, enhanced damages, attorneys fees, and costs, consistent with
5 the remedies provided by RCW § 19.86.090 for a violation of RCW § 19.86.020;

7 F. An injunction against any further deceptive acts or practices by Canine Genetics
8 in violation of RCW § 19.86.020 and against any further acts of trade libel and tortious
9 interference;

10 G. An award to PPG of its costs and reasonable expenses to the fullest extent
11 permitted by law;

13 H. A declaration that this case is exceptional pursuant to 35 U.S.C. § 285, and award
14 of attorney's fees and costs; and

15 I. Such other and further relief as the court may deem just and proper.
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17 DATED this 20th day of December, 2013.

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