

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VELCERA, INC. AND FIDOPHARM, INC.,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. _____
)	
MERIAL LIMITED,)	
)	
Defendant.)	DEMAND FOR JURY TRIAL

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs Velcera, Inc. (“Velcera”) and FidoPharm, Inc. (“FidoPharm”) (collectively, “Plaintiffs”) file the following Complaint for Declaratory Relief against Merial Limited (“Merial”) and, in support thereof, allege as follows:

THE PARTIES

1. Plaintiff Velcera is a Delaware corporation with its principal place of business in Yardley, Pennsylvania.
2. Plaintiff FidoPharm is a wholly-owned subsidiary of Velcera, and is also a Delaware corporation with its principal place of business in Yardley, Pennsylvania.
3. On information and belief, Defendant Merial is a company limited by shares registered in England and Wales with a registered office in England. Merial is domesticated in the State of Delaware as Merial LLC. On information and belief, Merial’s principal place of business is in Duluth, Georgia.

JURISDICTION AND VENUE

4. This is a civil action for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.
5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338 because Plaintiffs’ claims for declaratory relief arise under the patent laws of the United States, 35 U.S.C. §§ 101, *et seq.*

6. This Court has personal jurisdiction over Merial because, on information and belief, Merial is domesticated in Delaware, has designated an agent for service of process in Delaware, and does and has done business in this judicial district, including regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from products and services to individuals and entities in this District, including without limitation offering for sale and selling the FRONTLINE® series of products, which are purportedly covered by the patents-in-suit.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c).

GENERAL ALLEGATIONS

8. Plaintiffs Velcera and FidoPharm are small, start-up companies that seek to provide high quality, affordable and more readily accessible pharmaceutical and parasiticide products for pets.

9. Defendant Merial is a multi-billion dollar company that produces and sells animal health products for pets, livestock, and other wildlife, including the dominant line of products for elimination of fleas and ticks in pets, FRONTLINE®. On information and belief, the FRONTLINE® series is among Merial's most successful product lines. The active ingredient in FRONTLINE® products is fipronil.

10. According to Merial, aspects of Merial's fipronil-containing animal health products are covered by a portfolio of patents, including U.S. Patent No. 6,096,329 ("the '329 patent"), U.S. Patent No. 6,620,943 ("the '943 patent"), and U.S. Patent No. 6,881,848 ("the '848 patent") (collectively, "the Merial Patents").

11. The '329 patent, entitled "Insecticidal Combination to Control Mammal Fleas, In Particular Fleas on Cats and Dogs," was issued on August 1, 2000. On information and belief, Merial S.A.S., Merial's parent company, is the owner of the '329 patent. On information and belief, Merial is the exclusive licensee of the '329 patent in the animal health field and has rights to enforce the '329 Patent in the animal health field. A true and correct copy of the '329 patent is attached hereto as Exhibit A.

12. On September 30, 2010, the United States Patent and Trademark Office determined that a “a substantial new question of patentability” exists regarding the validity of all 70 claims of the ‘329 patent and accordingly granted an *ex parte* request to reexamine all of the claims of the ‘329 patent. *See* Exhibit B.

13. The ‘943 patent, entitled “Process for Preparing 4-Trifluoromethylsulfinylpyrazole Derivative,” was issued on September 16, 2003. On information and belief, BASF Agro B.V., Arnhem (NL), Wadenswil Branch (“BASF Agro”), is the owner of the ‘943 patent. On information and belief, Merial is the exclusive licensee of the ‘943 Patent in the animal health field and has rights to enforce the ‘943 Patent in the animal health field. A true and correct copy of the ‘943 patent is attached hereto as Exhibit C.

14. The ‘848 patent, entitled “Process for Preparing 4-Trifluoromethylsulfinylpyrazole Derivative,” was issued on April 19, 2005. On information and belief, BASF Agro, is the owner of the ‘848 patent. On information and belief, Merial is the exclusive licensee of the ‘848 Patent in the animal health field and has rights to enforce the ‘848 Patent in the animal health field. A true and correct copy of the ‘848 patent is attached hereto as Exhibit D.

MERIAL’S HISTORY OF LITIGATING ITS FIPRONIL-RELATED PATENT RIGHTS

15. Merial has consistently and aggressively litigated its fipronil-related patent rights to stop perceived competitors from bringing to market, or even attempting to develop, products that could potentially compete with its FRONTLINE® series of products. In the last several years alone, Merial has brought at least four separate lawsuits in four different jurisdictions alleging infringement of its fipronil-related patent rights. *See BASF Agro, Merial Ltd. et al. v. CIPLA Ltd., et al.*, No. 07-125 (M.D. Ga. filed Nov. 13, 2007) (closed); *BASF Agro, Merial Ltd. et al. v. Humane Society of Inverness, Inc.*, No. 08-357 (M.D. Fla. filed Aug. 29, 2008) (closed); *Merial Ltd., BASF Agro et al. v. Virbac S.A. et al.*, No. 10-181 (N.D. Tex. filed Mar. 18, 2010) (dismissed); *BASF Agro, Merial Ltd. et al. v. Cheminova, Inc.*, No. 10-274 (M.D.N.C. filed Apr. 8, 2010) (pending).

16. For example, in late 2007, Merial, Merial S.A.S and BASF Agro sued a number of entities, including an Indian company CIPLA, in the Middle District of Georgia for allegedly infringing its rights in two fipronil-related patents, including the '329 patent. In its complaint, Merial asserted that its FRONTLINE® PLUS product is covered by the '329 patent, which Merial asserted “generally relates to formulations containing a compound that is a derivative of an n-phenylpyrazole, e.g., fipronil, and an insect growth regulator, e.g., methoprene.” Merial asserted that CIPLA’s “PROTEKTOR PLUS” animal-health products included a combination of fipronil and methoprene and therefore infringed the '329 patent. On March 6, 2008, Merial obtained a default judgment against CIPLA and several other defendants, as well as a permanent injunction preventing CIPLA from making, using, selling or offering to sell in the United States infringing products, importing infringing products into the United States, or inducing others to infringe the asserted patents, including the '329 patent.

17. On March 18, 2010, Merial and BASF Agro filed a patent infringement action in the Northern District of Texas against Virbac S.A., a French company, and its U.S. affiliate, after learning that Virbac had commissioned studies of fipronil-containing animal health compositions. Based only on what future uses Merial speculated Virbac might make of these studies, Merial sought a preliminary injunction to enjoin Virbac from ever using the data, even after the expiration of the asserted patent. Although the court rejected Merial’s request for a preliminary injunction, Merial continued to pursue the litigation until Virbac filed a motion for summary judgment. Soon thereafter, the Court dismissed the parties’ claims and defenses with prejudice pursuant to a stipulation of dismissal.

18. In another display of its heavy-handed litigation tactics against anyone who may encroach on Merial’s FRONTLINE® products, in 2008 Merial, Merial S.A.S. and BASF Agro sued the Humane Society of Inverness, Florida (the “Humane Society”). The Humane Society is a small non-profit animal rescue and adoption organization with a stated mission “to aid in the reduction of the suffering of unwanted animals through education and promoting responsible pet ownership.” That lawsuit, filed in the Middle District of Florida, claimed that a fipronil-based

animal health product made, used, offered for sale or sold by the Humane Society of Inverness infringed Merial's fipronil-related patent rights and various trademarks. Merial sought and obtained a permanent injunction against the Humane Society.

19. Based on Merial's aggressive litigation history and on the events described below, Plaintiffs have formed a reasonable belief that Merial is now actively preparing to utilize the same aggressive litigation tactics against Velcera and FidoPharm to prevent their entry into the market for fipronil-based animal health products.

**PATENT INFRINGEMENT SUIT BROUGHT AGAINST VELCERA'S AND
FIDOPHARM'S WOULD-BE SUPPLIER OF FIPRONIL**

20. Recently, Velcera and FidoPharm recognized an opportunity to bring more affordable pet flea and tick treatments with greater consumer access to the market and began exploring possibilities for new fipronil-containing products.

21. In support of Velcera's and FidoPharm's plans to enter the market for fipronil-based animal health products, in December 2009 FidoPharm entered into an agreement with Cheminova, A/S, a European chemical manufacturer, and its U.S. subsidiary Cheminova, Inc. (collectively, "Cheminova"), under which Cheminova agreed to supply technical fipronil for the benefit of FidoPharm (the "Supply Agreement"). Cheminova expressly represented in the Supply Agreement that its fipronil manufacturing process would not infringe any third party patents.

22. The Supply Agreement and other agreements among Velcera, FidoPharm, and Cheminova contained strict confidentiality provisions preventing any of the parties from disclosing the other parties' proprietary information.

23. On April 8, 2010, Merial's litigation partners, BASF Agro B.V., Arnhem (NL), Wadenswil Branch, and Bayer S.A.S (collectively, "BASF"), sued Cheminova, Inc. for patent infringement in the United States District Court for the Middle District of North Carolina (the "North Carolina Action"), alleging that Cheminova, Inc. infringes patents that purportedly cover methods and processes for using and manufacturing fipronil, including the '848 and '943 patents.

24. Shortly after BASF brought the North Carolina Action, Cheminova, Inc. inexplicably chose to stipulate to a preliminary injunction enjoining itself and its parent from conducting virtually any activities related to fipronil worldwide, even in jurisdictions where BASF does not have patent coverage.

25. Based on the stipulated preliminary injunction, Cheminova, Inc. refused to supply any fipronil in accordance with its December 2009 agreement with FidoPharm, and accordingly rejected the initial orders placed by FidoPharm for fipronil.

26. Although Velcera and FidoPharm are not parties to the North Carolina Action, the suit has resulted in significant consequences for their respective businesses. In August 2010, in view of the preliminary injunction, Cheminova purported to terminate the Supply Agreement with FidoPharm based on previously unidentified alleged material and incurable breaches by FidoPharm.

27. Contemporaneously with its purported termination of the Supply Agreement, Cheminova, Inc. informed FidoPharm and Velcera that Cheminova intended to provide BASF with Velcera and FidoPharm's confidential information, in direct violation of the confidentiality agreements entered into between the parties.

28. Unable to dissuade Cheminova, Inc. from its plans to produce their confidential information, FidoPharm and Velcera brought suit against Cheminova, Inc. in the Delaware Court of Chancery and sought a temporary restraining order to prevent Cheminova, Inc.'s disclosure of Velcera's and FidoPharm's highly confidential and sensitive business plans and strategies.

29. Later, Velcera and FidoPharm learned that Cheminova, Inc. had already produced certain of Velcera's and FidoPharm's highly confidential and sensitive business plans and strategies. The court denied the request for a TRO on September 16, 2010, and Cheminova, Inc. produced the remaining confidential documents to BASF the very next day.

MERIAL PURSUES ITS AGGRESSIVE LITIGATION STRATEGY AGAINST CHEMINOVA

30. Shortly after Cheminova, Inc.'s disclosure of Velcera's and FidoPharm's highly confidential and sensitive business plans and strategies for the animal health market to BASF's counsel under a protective order, Merial sought leave to intervene in the *Cheminova* action as a co-plaintiff in order to allege infringement of the '943 and '848 Patents for animal health purposes. On October 15, 2010, with no opposition from Cheminova, Inc. or BASF, Merial intervened and filed an Amended Complaint seeking a declaratory judgment that Cheminova, Inc. infringes the '943 patent and the '848 patent.

31. Consistent with Merial's practice of filing suit upon the mere suspicion that infringing activities may occur in the future, Merial alleges in the Amended Complaint only that Cheminova, Inc. has made *preparations* to sell, use, or offer for sale fipronil material or products in the United States, identifying Cheminova, Inc.'s activities with Velcera and FidoPharm as examples of Cheminova, Inc.'s purported preparations to infringe in the animal-health field of use. There is no assertion in the Amended Complaint that Cheminova, Inc. has actually engaged in any infringing activities. Merial attempts to cast actions as innocuous as Cheminova, Inc.'s EPA applications, as well as its corporate representative's statement that Cheminova "is looking into the business of Fipronil in the US," as evidence of a "real and immediate controversy" over Cheminova, Inc.'s potential future infringement.

AS VELCERA AND FIDOPHARM PREPARE TO ENTER THE MARKET FOR FIPRONIL-BASED ANIMAL HEALTH PRODUCTS, MERIAL SERVES INVASIVE SUBPOENAS AND ACCUSES THEM OF INFRINGEMENT

32. On November 23, 2010, Merial served both Velcera and FidoPharm with third-party Subpoenas for deposition testimony and document production in connection with the North Carolina Action. The Subpoenas were invasive, overbroad, and sought largely irrelevant information. They demanded production not only of documents related to FidoPharm's now defunct plans with Cheminova, but of virtually all documents related to *any* ideas, plans, or activities concerning fipronil. The Subpoenas further sought information about any third parties

with whom Velcera or FidoPharm had had discussions regarding any fipronil-related plans or ideas. In addition, the Subpoenas were facially invalid because they noticed the depositions and document production to take place outside the district of issuance.

33. Counsel for Velcera and FidoPharm met and conferred with Merial's counsel in an attempt to reach agreement to narrow the scope of discovery to be focused on the claims and defenses at issue in the *Cheminova* litigation.

34. Signaling Merial's true goal of using the Subpoenas to build a case against Velcera and FidoPharm, Merial's counsel refused to negotiate narrower requests and made clear that Merial intended to aggressively force Velcera and FidoPharm to turn over vast amounts of highly sensitive business information. Velcera and FidoPharm therefore served written objections to the Subpoenas.

35. Shortly after Velcera and FidoPharm filed objections, Merial filed a motion to compel and a supporting brief, which was filed under seal. The copy of the brief sent to Velcera and FidoPharm's counsel was so heavily redacted that it did not provide Velcera and FidoPharm an opportunity to respond fully to many of the arguments made by Merial in support of the motion. Merial and Cheminova refused Velcera and FidoPharm's request for an unredacted version of the brief, despite Velcera and FidoPharm's counsel's written assurances that the brief would be maintained on an outside-counsel's-eyes-only basis.

36. Even in heavily redacted form, Merial's brief in support of its motion to compel made clear to Velcera and FidoPharm that the Subpoenas are just a preliminary step in Merial's plan to harass Velcera and FidoPharm and cast a cloud over their business.

37. Merial averred in its motion that Velcera "is not just any third party," but that it "plays a vital role in bringing Cheminova's Fipronil-based products into the United States animal health market." Merial also directly accuses Velcera of acting "in concert with" and "collud[ing]" with Cheminova to import the infringing Fipronil-based products."

38. With Merial still unwilling to acknowledge the facial invalidity of the Subpoenas or negotiate any limitation on their invasive scope, Velcera and FidoPharm moved to quash the Subpoenas.

39. Merial's brief in opposition to the motion to quash, which was also heavily redacted, further underscores its view that Velcera and FidoPharm are equally culpable in Cheminova's fipronil-related plans, referring to Cheminova and Velcera's "joint actions" to infringe Merial's purported patent rights and claiming that "Velcera is responsible for formulating Cheminova's Fipronil into animal health products and importing, marketing, and selling those products in the United States."

40. Merial's opposition brief clearly asserts that it considers Velcera's efforts directed to bringing fipronil-based animal health products to the U.S. market to be an infringement of Merial's purported patent rights: "[Velcera and FidoPharm are] clearly attempting to reinstate [their] business relationship with Cheminova in order to bring Fipronil-based animal health products to the United States market *in violation of Merial's patent rights*" (emphasis added).

41. As a result of the stipulated preliminary injunction against Cheminova, Inc. and Cheminova's purported termination of the Supply Agreement, Velcera and FidoPharm secured a new supplier of non-infringing technical fipronil necessary to produce their planned fipronil-based animal health products. In early January 2011, Velcera's and FidoPharm's planned fipronil-based animal health products were approved for sale by the EPA in the United States through applications filed by their affiliate LoradoChem, and such approval was publicly disclosed by the EPA in mid-January 2011. Having secured EPA approval, Velcera and FidoPharm anticipate that they will begin importing and selling fipronil-based animal health products, including animal health products combining fipronil and methoprene, in the United States in the near future.

42. Given Merial's pattern of conduct, explicit accusations against Velcera and FidoPharm in its briefings to enforce its Subpoenas, and its demonstrated history of initiating premature infringement litigation against entities making preparations to enter the market for

fipronil-based animal health products, including products combining fipronil and methoprene, all of the circumstances demonstrate that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

COUNT I

DECLARATORY JUDGMENT OF NONINFRINGEMENT OF THE '329 PATENT

43. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 42 of this Complaint as though fully set forth herein.

44. Plaintiffs have not directly infringed any valid and enforceable claim of the '329 patent.

45. Plaintiffs have not induced, and do not now induce, infringement of any valid and enforceable claim of the '329 patent.

46. Plaintiffs have not contributorily infringed, and do not now contributorily infringe, any valid claim of the '329 patent.

47. An actual and justiciable case or controversy exists between Plaintiffs and Merial as to whether Plaintiffs infringe the '329 patent, which requires a declaration of rights by this Court.

48. Plaintiffs are entitled to a judicial determination and declaration that Plaintiffs have not infringed and are not infringing, directly, indirectly, contributorily, by active inducement or otherwise, any valid and enforceable claim of the '329 Patent.

COUNT II

DECLARATORY JUDGMENT OF INVALIDITY OF THE '329 PATENT

49. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 48 of this Complaint as though fully set forth herein.

50. An actual and justiciable case or controversy exists between Plaintiffs and Merial concerning the invalidity of the '329 patent, which requires a declaration of rights by this Court.

51. The '329 patent is invalid for failure to satisfy one or more of the conditions of

patentability set forth in Title 35 of the United State Code, including, but not limited to, 35 U.S.C. §§ 101, 102, 103 and/or 112.

52. On information and belief, Merial contends that each and every claim of the '329 patent is valid.

53. Plaintiffs are entitled to a judicial determination and declaration that one or more claims of the '329 patent is invalid.

COUNT III
DECLARATORY JUDGMENT OF NONINFRINGEMENT OF THE '943 PATENT

54. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 42 of this Complaint as though fully set forth herein.

55. Plaintiffs have not directly infringed any valid and enforceable claim of the '943 patent.

56. Plaintiffs have not induced, and do not now induce, infringement of any valid and enforceable claim of the '943 patent.

57. Plaintiffs have not contributorily infringed, and do not now contributorily infringe, any valid claim of the '943 patent.

58. An actual and justiciable case or controversy exists between Plaintiffs and Merial as to whether Plaintiffs infringe the '943 patent, which requires a declaration of rights by this Court.

59. Plaintiffs are entitled to a judicial determination and declaration that Plaintiffs have not infringed and are not infringing, directly, indirectly, contributorily, by active inducement or otherwise, any valid and enforceable claim of the '943 Patent.

COUNT IV
DECLARATORY JUDGMENT OF INVALIDITY OF THE '943 PATENT

60. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 42 and 54-59 of this Complaint as though fully set forth herein.

61. An actual and justiciable case or controversy exists between Plaintiffs and Merial concerning the invalidity of the '943 patent, which requires a declaration of rights by this Court.

62. The '943 patent is invalid for failure to satisfy one or more of the conditions of patentability set forth in Title 35 of the United State Code, including, but not limited to, 35 U.S.C. §§ 101, 102, 103 and/or 112.

63. On information and belief, Merial contends that each and every claim of the '943 patent is valid.

64. Plaintiffs are entitled to a judicial determination and declaration that one or more claims of the '943 patent is invalid.

COUNT V
DECLARATORY JUDGMENT OF NONINFRINGEMENT OF THE '848 PATENT

65. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 42 of this Complaint as though fully set forth herein.

66. Plaintiffs have not directly infringed any valid and enforceable claim of the '848 patent.

67. Plaintiffs have not induced, and do not now induce, infringement of any valid and enforceable claim of the '848 patent.

68. Plaintiffs have not contributorily infringed, and do not now contributorily infringe, any valid claim of the '848 patent.

69. An actual and justiciable case or controversy exists between Plaintiffs and Merial as to whether Plaintiffs infringe the '848 patent, which requires a declaration of rights by this Court.

70. Plaintiffs are entitled to a judicial determination and declaration that Plaintiffs have not infringed and are not infringing, directly, indirectly, contributorily, by active inducement or otherwise, any valid and enforceable claim of the '848 Patent.

COUNT VI
DECLARATORY JUDGMENT OF INVALIDITY OF THE '848 PATENT

71. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 42 and 65-70 of this Complaint as though fully set forth herein.

72. An actual and justiciable case or controversy exists between Plaintiffs and Merial concerning the invalidity of the '848 patent, which requires a declaration of rights by this Court.

73. The '848 patent is invalid for failure to satisfy one or more of the conditions of patentability set forth in Title 35 of the United State Code, including, but not limited to, 35 U.S.C. §§ 101, 102, 103 and/or 112.

74. On information and belief, Merial contends that each and every claim of the '848 patent is valid.

75. Plaintiffs are entitled to a judicial determination and declaration that one or more claims of the '848 patent is invalid.

WHEREFORE, Plaintiffs request that the Court enter a judgment in their favor and against Merial as follows:

- A.** The Court enter judgment that Plaintiffs have not infringed and do not infringe any valid and enforceable claim of the '329 patent;
- B.** The Court enter judgment that the claims of the '329 patent are invalid;
- C.** The Court enter judgment that Plaintiffs have not infringed and do not infringe any valid and enforceable claim of the '943 patent;
- D.** The Court enter judgment that the claims of the '943 patent are invalid;
- E.** The Court enter judgment that Plaintiffs have not infringed and do not infringe any valid and enforceable claim of the '848 patent;
- F.** The Court enter judgment that the claims of the '848 patent are invalid;
- G.** The Court enjoin Merial, and its affiliates, subsidiaries, officers, directors, agents, counsel, servants, employees, and all persons in active concert or participation

with any of them, from attempting to enforce the Merial Patents against Velcera and FidoPharm, or against their subsidiaries or customers by reason of such subsidiary or customer's sale or use of Velcera's and/or FidoPharm's products and/or services;

- H.** Find this case to be an exceptional case pursuant to 35 U.S.C. § 285 and award Plaintiffs their attorneys' fees and expenses;
- I.** Award Plaintiffs their costs; and
- J.** Grant Plaintiffs such other and further relief as the Court deems just and proper.

ASHBY & GEDDES

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