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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PROMERA HEALTH, LLC,

Plaintiff,

v.

VIREO SYSTEMS, INC.,

Defendant.

Civil Action No. 1:15-cv-10595-NMG

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

For its complaint against defendant Vireo Systems, Inc. (“Vireo”), plaintiff, ProMera Health, LLC (“ProMera”), alleges as follows:

1. ProMera seeks a declaratory judgment that its use of its federally registered CON-CRET and CON-CRET REINFORCED trademarks has not and does not infringe or otherwise interfere with the asserted rights of Vireo, and ProMera’s acts have not violated and do not violate federal or state laws relating to trademark infringement, unfair competition, or deceptive trade practices, including without limitation Sections 32 and 43(a) of the Lanham Act 15 U.S.C. §§ 1114 and 1125(a), or the statutory or common law of the Commonwealth of Massachusetts or the laws of other states.

PARTIES

2. ProMera is a Massachusetts limited liability company with its principal place of business in Norwell, Massachusetts.

3. Vireo is a Tennessee corporation with its principal place of business in Madison, Tennessee.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this complaint pursuant to 28 U.S.C. §§ 1121, 1331, 1338, 2201 and 2202.

5. This Court has personal jurisdiction over Vireo because, *inter alia*, Vireo has purposefully availed itself of the laws of Massachusetts, the claims at issue arise out of or are related to Vireo's Massachusetts activities, and the exercise of personal jurisdiction over Vireo is reasonable. More specifically, Vireo is a Member of ProMera and party to a contract with ProMera, regularly transacts business with ProMera, consistently communicates with ProMera and other Massachusetts entities, and its owner and representatives have repeatedly traveled to Massachusetts, including to litigate separate federal and state-court actions against ProMera and/or ProMera's affiliates.

6. Venue is proper in this forum pursuant to 28 U.S.C. §§ 1391(b) and (c), and the applicable law of this Court.

CASE OR CONTROVERSY

7. ProMera is a leading developer and marketer of dietary supplements used by athletes to enhance performance and maximize work-out results. Since 2007, ProMera's product line has grown into over 40 high quality products including a variety of supplements that aid in increasing energy, endurance, strength, weight loss, fat burn, and decreasing post-workout recovery intervals while remaining compliant with the regulations of organized amateur and professional sporting organizations.

8. One of the dietary supplements marketed by ProMera is creatine hydrochloride (HCl). Creatine HCl is believed to improve strength, increase lean muscle mass, and help the muscles recover more quickly during exercise.

9. ProMera's creatine HCl supplements are distributed under the ProMera CON-CRET and CON-CRET REINFORCED brands.

10. ProMera is the exclusive owner of incontestable U.S. Trademark Registration No. 3,222,738 for CON-CRET, listed on the Principal Register, granted March 27, 2007, and used for goods included within International Class 5. A copy of the registration from the records of the United States Patent and Trademark Office is attached to this complaint as Exhibit 1.

11. ProMera is the exclusive owner of U.S. Trademark Registration No. 4,112,219 for CON-CRET REINFORCED, listed on the Principal Register, granted March 13, 2012, and used for goods included within International Class 5. A copy of the registration from the records of the United States Patent and Trademark Office is attached to this complaint as Exhibit 2.

12. ProMera is the exclusive owner of U.S. Trademark Application Serial No. 86,387,745 for CON-CRET BLACK, filed September 8, 2014 for goods included within International Class 5. A copy of the application status from the records of the United States Patent and Trademark Office is attached to this complaint as Exhibit 3.

13. The trademarks that are the subject of the foregoing registrations and application are referred to collectively hereinafter as ProMera's "CON-CRET Marks."

14. ProMera has invested substantial time, money, and effort in building the business conducted in connection with the CON-CRET Marks and in promoting its goods and services offered and to be offered in connection with the CON-CRET Marks.

15. In addition, ProMera has expended hundreds of thousands of dollars in marketing its goods and services under the marks. For example, ProMera promotes its goods and services under the CON-CRET Marks on its website located at promerasports.com, in print advertising,

at industry trade shows, and through social media. The stores that offer the CON-CRET products display advertising that bear the CON-CRET Marks and the product is delivered in packaging bearing the CON-CRET Marks. A copy of the labelling included with the current CON-CRET creatine HCl product is included as Exhibit 4.

16. On or about March 22, 2011, ProMera and Vireo entered into a certain Product Development and Marketing Agreement (“PDMA”) under the terms of which Vireo would serve as the sole provider of bulk creatine HCl to ProMera. The parties operated under this arrangement until early February 2015.

17. On February 4, 2015, Vireo sent a letter to ProMera terminating the PDMA and informing ProMera that Vireo had initiated litigation in Tennessee state court against ProMera for alleged breaches of the PDMA. Vireo refused to supply ProMera with further deliveries of creatine HCl. In its February 4 letter, Vireo further demanded that ProMera cease using ProMera’s CON-CRET and CON-CRET REINFORCED marks arguing that the marks had become inextricably associated with the creatine HCl sourced from Vireo and alleging that any sale of third-party creatine HCl under the CON-CRET Marks would “be a violation of the federal and state trademark laws and will constitute an [sic] deceptive and unfair act by ProMera by passing off other products as the patent-protected products that are exclusively manufactured by Vireo.” A true and correct copy of Vireo’s February 4, 2015 letter is attached as Exhibit 5.

18. As a result of Vireo’s actions, ProMera is forced to identify alternate sources of high-quality creatine HCl for its CON-CRET products. Vireo, however, is seeking to prevent ProMera from using any source of creatine HCl.

19. On February 10, 2015, Vireo again wrote to ProMera threatening “willful and knowing infringement of Vireo’s patent rights” as to U.S. Patent Nos. 8,354,450 (“the ‘450

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