

ESTTA Tracking number: **ESTTA399547**

Filing date: **03/23/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052897
Party	Plaintiff Thomas SkÅ¶ld
Correspondence Address	ARTHUR E JACKSON MOSER IP LAW GROUP 1030 BROAD STREET, SUITE 203 SHREWSBURY, NJ 07702 UNITED STATES docketing@moseriplaw.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Arthur E Jackson
Filer's e-mail	ajackson@moseriplaw.com, docketing@moseriplaw.com
Signature	/Arthur E Jackson/
Date	03/23/2011
Attachments	AMENDED PET.pdf (39 pages)(3473147 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration Nos. 2985751; and 3394514

Dated: August 16, 2005 & March 11, 2008, Respectively

Thomas Sköld,)	
Petitioner,)	
)	
v.)	
)	Cancellation No. 92052897
Galderma Laboratories, Inc.,)	
Registrant)	
)	

BOX TTAB/FEE
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

AMENDED PETITION FOR CANCELLATION

Thomas Sköld an individual who is a citizen of Sweden, and resident at Björnö Gård, S-761 41, Norrtälje, Sweden, believes that he will be damaged by Registration No. 2985751 as it relates to goods in Class 5, namely therapeutic skin care preparations and treatment for skin disorders, and by Registration No. 3394514 as it relates to goods in Class 3, namely non-medicated skin care preparations, and hereby petitions to cancel the registration of the mark RESTORADERM for these goods.

As grounds therefor, it is alleged that:

1. Petitioner has adopted and continuously used the trademark RESTORADERM, since at least as early as December, 2001 to the present, in connection with presentations and promotions

of a technology utilizing phospholipid and/or ceramide, cholesterol and fatty acid for dermally and transdermally delivering bioactive substances ("RESTORADERM Technology").

2. Collagenex Pharmaceuticals Inc. ("Collagenex") is the predecessor in interest to the current record owner of said '751 and '514 registrations, Registrant. In 2008, Registrant acquired all outstanding stock of Collagenex. See <http://www.prnewswire.com/news-releases/galderma-reaches-agreement-to-acquire-collagenex-pharmaceuticals-57139647.html> (Exhibit 1).
3. The change of ownership from Collagenex to Registrant was recorded at Reel/Frame: 4109/0411, on 12/08/2009.
4. Petitioner is the first to use the mark in the United States, and has continuously used the mark in the United States to this time. Therefore, Petitioner seeks cancellation of Registrant's registrations.
5. Registrant has abandoned the '751 registration by abandoning its plans to use the mark in connection with a therapeutic skin preparation, and by not using the mark in connection with a therapeutic skin preparation for longer than three years. Therefore, Petitioner seeks cancellation of Registrant's '751 registration.
6. Registrant has used the mark nominally acquired from Collagenex in a manner divorced from the goodwill associated with the mark, such that Registration Nos. 2985751 and 3394514 should both be cancelled under Lanham Act §10, 15 U.S.C. §1060 as perpetrating a fraud on the purchasing public.
7. The product for which Registrant is using the mark is so different from the old product that continued use of the mark would "work a deception upon the public.," Accordingly,

Registration Nos. 2985751 and 3394514 should both be cancelled under Lanham Act §2(d), 15 U.S.C. §1052(d) as perpetrating a deception on the purchasing public.

8. Under either contract theory supported below, Registrant no longer owns the trademark RESTORADERM. So Petitioner, the true owner, seeks cancellation of Registrant's registrations.

Factual Background

9. In mid-2001, Petitioner began development work on the composition that would soon be termed RESTORADERM, the work done at Institute of Surface Chemistry (a division within the Royal Institute of Technology in Stockholm Sweden). Thereafter Petitioner began marketing a RESTORADERM Technology that was based on compositions of stratum corneum lipids (phospholipids/ceramide/cholesterol/fatty acid) and the presence of different macromolecular aggregates formed of the lipids, and consulting services in connection therewith.

RESTORADERM Technology is among other things for delivering pharmaceutically active substances into or through the dermis of a patient.

10. On information and belief, samples of such compositions RESTORADERM and/or "Restoraderm/Lipoid" were sent in 2001 to dermatology professors in the United States.

11. In late 2001, Petitioner presented to Collagenex the technology, which he labeled the "Restoraderm Technology." Prior to such presentation, on information and belief, Collagenex did not use the trademark RESTORADERM.

12. In late 2001, Jeff Day, Vice President for Dermatology at Collagenex began negotiations for exclusive license to the RESTORADERM Technology.

13. Petitioner licensed the trademark RESTORADERM and the associated RESTORADERM Technology to Collagenex Pharmaceuticals Inc. ("Collagenex"), the

predecessor in interest to the current owner of said '751 and '514 registrations, Galderma Laboratories Inc. ("Galderma"), in an Agreement effective February 11, 2002 (the "2002 Agreement", to be provided as Exhibit 2, subject to a protective order). (Note: it is well settled that "[w]hether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions." Vaupel Textilmaschinen KG v. Meccanica Euro Italia SPA, 944 F.2d 870, 875 (CAFC 1991), quoting Waterman v. Mackenzie, 138 U.S. 252, 255 (1891).)

14. Thereafter, Collagenex filed the application leading to the '751 registration in late February 2002, and collaborated with Petitioner on the filing of a first provisional patent application on the RESTORADERM Technology in March, 2002. The resulting '751 registration was in International Class 005 and was for THERAPEUTIC SKIN CARE PREPARATIONS AND TREATMENT FOR SKIN DISORDERS.

15. The 2002 Agreement was for development services and formulations. Collagenex undertook in the 2002 Agreement to pay Petitioner notable amounts of money for three deliverables, and a notable annual consulting fee. The amounts of these payments could not reasonably be termed "token" payments. Moreover, other, more substantial payment obligations are set forth in the 2002 Agreement that are inextricably tied to the deliverables and the consulting services.

16. The deliverables were conveyed by Petitioner under the labeling RESTORADERM to Collagenex in Newtown, Pennsylvania, USA ("Collagenex Worksite"), and payments therefor were made to Petitioner from the JP Morgan Chase Bank NA bank of 1 Chase Manhattan Plaza, NY 10081 New York, USA.

17. The consulting services, labeled RESTORADERM Technology, were delivered both by phone and fax to the Collagenex Worksite and via in person visits by Petitioner to the Collagenex Worksite, and payments therefor were made to Petitioner from the JP Morgan Chase Bank NA bank of 1 Chase Manhattan Plaza, NY 10081 New York, USA. Payments (made first under the 2002 Agreement, then under the Consulting Agreement identified below) were made on a quarterly basis from February 2002 throughout May 2007 to an amount which cannot be termed "token."

18. The 2002 Agreement permitted, and thereby acknowledged, the continued use of RESTORADERM by Petitioner.

19. Throughout a period from about February 2002 until about November 2007, Petitioner applied his consulting services as part of the development team, in connection with which he used his own lab facility, drafted clinical studies to be conducted by U.S. dermatologists, published clinical studies, supervised third party laboratories and manufacturing plants, presented and promoted to many pharmaceutical companies, presented to opinion leaders mostly in the United States, attended scientific committee meetings and acted as an ambassador for the RESTORADERM Technology at small and large medical conventions in the U.S. and elsewhere. These presentations included presentations to Ferndale Lab (presentation at Ferndale, Ferndale, MI), Johnson & Johnson (presentation at New Jersey, NJ), Medicis (presentation at Scottsdale, AZ), Novartis (presentation at East Hanover, NJ), Pfizer (presentation at Newtown, PN), Ranbaxy (presentation at Princeton, NJ), Stiefel (meeting at Waldorf Astoria Hotel, New York, NY), Valeant (presentation at the Grand Hotel Stockholm, Sweden), and more. Such meetings promoted interest in RESTORADERM Technology, including the RESTORADERM consulting services of Petitioner.

20. On information and belief, one or more posters on RESTORADERM was exhibited at the American Academy of Dermatology 2004 (Washington, DC) and 2005 (New Orleans, LA). A poster was exhibited at the American Contact Dermatitis Society, 16th Annual Meeting, February 17, 2005 (New Orleans, LA) (titled "A Comparator Study of an Adjunctive Dermal Lipid Replacement Foam (Restoraderm®) in the Management of Refractory Hand Contact Dermatitis"). The Poster presented at the meeting is attached as Exhibit 9. The Poster showed the RESTORADERM composition, without added medicament, effective in reducing or eliminating irritant and/or allergic contact dermatitis. Starting at about this timeframe onwards, presentations by Petitioner noted this non-medicated effectiveness. Such meetings promoted interest in RESTORADERM Technology, including the RESTORADERM consulting services of Petitioner.

21. RESTORADERM Technology has been presented a various scientific meetings during the period from 2002-2011, and to various disease unions (such as the Rocesea Society). All such meetings promoted interest in RESTORADERM Technology, including the RESTORADERM consulting services of Petitioner.

22. Collagenex acquired modified rights in the technology, labeled "Restoraderm Technology," in an agreement effective August 19, 2004 (the "2004 Agreement", to be provided as Exhibit 3, subject to a protective order). The 2004 Agreement superseded the 2002 Agreement as to the Restoraderm Technology.

23. The 2004 Agreement references a Consulting Agreement (to be provided as Exhibit 10, subject to a protective order) to be executed on date even therewith. Again Petitioner's services were to be annually paid for with non-token payments.

24. In June 2005, Collagenex filed a Statement of Use in the application leading to the '751 registration, providing specimens that indicated that the material was a "foam for the delivery of skin care preparations..."
25. In July 2007, Collagenex filed the application leading to the '514 registration. The resulting registration was in International Class 003 and was for NON-MEDICATED SKIN CARE PREPARATIONS. This application was filed with a specimen which incompletely shows the labeling of the product. On information and belief, that labeling indicated only a moisturizing use, not a pharmaceutical use.
26. In November 2007, Greg Ford, Director of Business Development at Collagenex, announced and later emailed that the company did not have the resources to continue development and promotion of RESTORADERM Technology. The email was in reply from an email by Petitioner seeking certainty so that he could "start talking to various parties that might have an interest in the technology." (Email exchange to be provided as Exhibit 11, subject to a protective order.)
27. From December 2007 to March 2011 the RESTORADERM Technology was marketed by Petitioner to many dermatological companies in the world, with a majority of the marketing efforts made in person in the United States. In 2008 a number of potential deals were terminated due to uncertainties of whether or not the rights to patents and trademarks were to be returned to Petitioner by Collagenex/Galderma (Registrant) without litigation. Negotiations with parties in the United States and elsewhere are in progress. The floor terms of these negotiations are at valuations for among other things the consulting services of Petitioner are for values that could not be termed "token."

28. Citing breach of contract, Petitioner sent a termination letter to Collagenex (2004 Agreement) on January the 29, 2008 requesting patents and patent applications, trademarks to be returned together with a settlement on outstanding milestones. In seeking the milestone payment settlement, in effect, Petitioner was seeking payments that were inextricably linked to his RESTORADERM consulting services and RESTORADERM Technology compositions.
29. On February 12, 2008, Collagenex responded (to be provided as Exhibit 4, subject to a protective order), asserting that it was not in breach.
30. On February 26, 2008, Collagenex announced to Petitioner that Collagenex had been acquired by Galderma.
31. In March 2008, Petitioner sent a letter to Collagenex giving Galderma time to decide whether the RESTORADERM Technology was of interest to it. In a Conference call in March between Petitioner and Art Clapp of Galderma, Galderma stated that it needed three to six months to make such a decision.
32. In or about March 2009, Petitioner enquired of Quintin Cassady, Vice President and General Counsel at Galderma, of about his having heard that Galderma had decided not to pursue the RESTORADERM Technology but had interest in the trademark RESTORADERM. Mr. Cassady said that this was nonsense and that Petitioner should take no notice to such "rumors."
33. In August 2009, filed a U.S. Trademark Application No. 77805846 in International Class 003 for RESTORADERM for COSMETICS AND SKIN CARE PREPARATIONS, NAMELY, FACE, HAND AND BODY SOAPS, CLEANSERS AND MOISTURIZERS; HAIR SHAMPOOS AND CONDITIONERS; SUNBLOCKS AND SUNSCREENS.

34. In November 27th, 2009, Galderma sent Petitioner a notice of termination of the 2004 Agreement (letter to be provided as Exhibit 5, subject to protective order), in which it stated that per a Paragraph 8.5(b) of the 2004 Agreement that it was returning all applicable materials, documents, and/or information to Petitioner. Among the things set forth in the cited provision is "all goodwill" relating to "Restoraderm Intellectual Property." Among the things returned to Petitioner pursuant to this letter was an international portfolio of patent applications and about 1,000 products and samples labeled RESTORADERM. Patents and patent applications were returned to Petitioner on February 22nd 2010. This letter made clear to Petitioner, that while payments due for past services and products may be in dispute, Petitioner's RESTORADERM Technology and services needed to be even more actively marketed elsewhere.

35. The United States Patent and Trademark Office received on December 8, 2009, and recorded at Reel/Frame: 4109/0411, an assignment from Collagenex Pharmaceuticals, Inc. to Galderma Laboratories, Inc. (Registrant) of Registration Nos. 2985751 and 3394514, the assignment having an execution date of August 1, 2008.

36. During 2010, beginning on or about February 16, 2010, Petitioner was paid for travel and paid additional fees in connection with his RESTORADERM consulting services. Also during this period, samples labeled RESTORADERM were sent to multiple pharmaceutical companies. Also during 2010, PowerPoint presentations on RESTORADERM Technology were made to multiple pharmaceutical companies. A copy of the PowerPoint presentation is attached as Exhibit 12. Slide presentations that identify the natural components of the RESTORADERM Technology compositions and their excellent skin penetration were made to pharmaceutical companies throughout the period from late 2001 to today.

37. RESTORADERM Technology, as that terminology is used by Petitioner, is well known among U.S. dermatology physicians regarded as opinion leaders as well as by most pharmaceutical companies working in the dermatology field.
38. Petitioner has received on or about 100 or more phone calls and e-mails from people in the U.S., most of from dermatologists, making enquiries about whether RESTORADERM refers to a lipid composition based on natural skin lipids (as the terminology is used by Petitioner) or a more traditional dermatological suave (as the term "Restoraderm" is now used by Galderma).
39. The evident confusion started, Petitioner noticed, during the summer of 2010 when rumors spread that Galderma was in the process of launching "Cetaphil Restoraderm" in Canada (Cetaphil being a trademark owned by Galderma) and later on would also be launching the same in the U.S.
40. "Cetaphil Restoraderm," according to <http://www.cetaphil.com/WhereToBuy/Default.aspx> (Exhibit 13), is now being offered for sale in the U.S. According to Exhibit 13, this product contains (emphasis added): water, glycerin, caprylic/capric triglyceride, helianthus annuus (sunflower) seed oil, pentylene glycol, butyrospermum parkii (shea butter), sorbitol, cyclopentasiloxane, cetearyl alcohol, behenyl alcohol, glyceryl stearate, tocopheryl acetate, hydroxypalmitoyl sphinganine, niacinamide, allantoin, panthenol, arginine, disodium ethylene dicocamide PEG-15 disulfate, glyceryl stearate citrate, sodium PCA, cetareth-20, sodium polyacrylate, caprylyl glycol, citric acid, dimethiconol, disodium EDTA, sodium hyaluronate, cetyl alcohol. RESTORADERM Technology however is dependent on significant amounts of phospholipid and/or ceramide, cholesterol and free fatty acids. RESTORADERM Technology is also incompatible with significant amounts of oils, such as those underlined above. Thus, clearly, "Cetaphil Restoraderm" is not RESTORADERM Technology.

41. Objective evidence of the confusion is provided by <http://rosacea-support.org/cetaphil-restoraderm-for-extra-dry-skin-and-eczema.html>, attached as Exhibit 8, where it is written with respect to the "Cetaphil Restoraderm" that (emphasis added): "When Galderma acquired Collagenex in 2008, Collagenex listed a technology known as Restoraderm (along with Oracea and Sansrosa) as one of the assets acquired. RESTORADERM Technology at that time was described as a 'proprietary, foam-based, topical drug delivery technology'. It isn't clear to me whether this product [Cetaphil Restoraderm] is related to this technology or is something else entirely."

42. Petitioner attended the Caribbean Dermatology Symposium on Aruba in January 2011, along with about 300 U.S. dermatologists. One of the lectures was sponsored by Galderma and mentioned Cetaphil Restoraderm and some of its components. It was clear to Petitioner that attendees were looking around in the audience for Petitioner wondering what this was all about. After the lecture dermatologists came up to Petitioner and wondered why Petitioner had changed the composition and dropped the basic idea behind RESTORADERM Technology.

Cause 1: Priority of Use

43. Recitations on the history and use of RESTORADERM, ¶¶1 – 36 above, are adopted and re-alleged here.

44. Petitioner has used RESTORADERM in the United States in connection with a dermatology product, and in connection with consulting services for a dermatology product, from a time prior to any conception of that mark by Registrant or its predecessor.

45. Petitioner has continuously used RESTORADERM in this country from his first use in the United States until today.

46. The RESTORADERM services and Technology are integrally connected with the goods described in the '751 registration, and the RESTORADERM services are, within the small world of dermatological product developers, well identified as associated with Petitioner. Therefore, those in small world of dermatological product developers will be likely to confuse any goods sold under the '751 registration as being associated with Petitioner.

47. The goods described in the '514 registration are extremely related to the RESTORADERM services and Technology. On information and belief, the many in the field of dermatological product development familiar with RESTORADERM services and Technology, and particularly those who have seen the many slide presentations made by Petitioner to that industry, particularly those made from about the time of the presentation of the Poster of Exhibit 9, would posit that because RESTORMADERM is made with native skin lipids, and because it has excellent skin penetration properties, it would be an excellent treatment for skin even without medicament. Therefore, those in small world of dermatological product developers will be likely to confuse any goods sold under the '514 registration as being associated with Petitioner.

48. Accordingly, Registration Nos. 2985751 and 3394514 should both be cancelled under Lanham Act §2(d), 15 U.S.C. §1052(d).

Cause 2: Abandonment of the '751 Registration

49. The recitations on abandoning Registrant's RESTORADERM Technology, ¶26 above, is adopted and re-alleged here.

50. According to the "Cetaphil Restoraderm" website (Exhibit 13), this product is a moisturizer and/or body wash. On information and belief, Registrant does not itself promote this product as a therapeutic skin care preparation, and thus its use of "Cetaphil Restoraderm" is not

in keeping with the description of goods in the '751 Registration. (The webpage has a scroll-over pop-up message that notes that the product has the National Eczema Association (NEA) Seal of Acceptance, but Registrant itself very carefully does not market treating eczema.)

51. On information and belief, Registrant has no regulatory approval from the Food and Drug Administration that would allow it to market a therapeutic skin care preparation related to its "Cetaphil Restoraderm" product.

52. On information and belief, Registrant has conducted no clinical trials of a therapeutic skin care preparation related to Restoraderm or "Cetaphil Restoraderm" since on or about July, 2007.

53. On information and belief, the only product Registrant markets in the United States using "Restoraderm" is the "Cetaphil Restoraderm" product.

54. On information and belief, Registration No. 2985751 was abandoned, with no intention to revive, on or about July, 2007, well over three years in the past. As recited at section 45 of the Lanham Act (15 U.S.C. §1127), nonuse for three consecutive years shall be prima facie abandonment.

55. Accordingly, Registration Nos. 2985751 and 3394514 should both be cancelled under Lanham Act §45, 15 U.S.C. §1127.

Cause 3: Improper Assignment Under Section 10 of the Lanham Act

56. On information and belief, Restoraderm, as distributed by Collagenex, and as promoted by Collagenex and Petitioner, was directed to sales that would be substantially guided by dermatology healthcare providers. More specifically, such over-the-counter ("OTC") compositions as were developed were anticipated to be sold via specific endorsement from

dermatology healthcare providers. By mid-2006, the decision was made to only market prescription compositions, requiring consultation with dermatology healthcare providers.

57. Such healthcare providers were educated, or would be educated, that "Restoraderm" was a particular formulation based on native lipids and defined macromolecular aggregates, and particularly effective delivering such lipids and potential pharmaceutical actives into the skin. This was the goodwill associated with "Restoraderm" prior to its purported assignment to Registrant in 2008. Further recitals relevant to this point are found at ¶¶36 to 42 above, which are adopted and re-alleged here.

58. "Use of the mark by the assignee in connection with a different goodwill and different product would result in a fraud on the purchasing public who reasonably assume that the mark signifies the same thing, whether used by one person or another." Marshak v. Green, 746 F.2d 927, 929, 223 USPQ 1099, 1100 (2d Cir.1984). Therefore, "if consumers are not to be misled from established associations with the mark, [it must] continue to be associated with the same or similar products after the assignment." Visa, U.S.A., Inc. v. Birmingham Trust Nat., 696 F.2d 1371, 1375 (quoting Raufast S.A. v. Kicker's Pizzazz, Ltd., 208 U.S.P.Q. 699, 702 (E.D.N.Y.1980)).

59. As outlined in ¶40 above, "Cetaphil Restoraderm" bears no similarity to the RESTORADERM product for which goodwill was purported to be transferred to Galderma. A dermatologist seeking to recommend a product that has a special mechanism of delivering skin-restoring lipids and actives would be deceived if he or she recommended "Cetaphil Restoraderm," a product with the standard mixture of fatty substances.

60. Evidence that this deception is happening in fact is provided by ¶¶38-42 above, which are adopted and re-alleged here.

61. On information and belief, Petitioner nominally acquired the "Restoraderm" mark without any plan or concrete intention to continue the business for which goodwill had formed around the term "Restoraderm." On information and belief, the filing of U.S. Trademark Application No. 77805846 in August 2009, about 1 ½ years after the nominal acquisition (see, ¶33 above, adopted and re-alleged here), provides evidence that Petitioner even at this early date sought to use the mark in a manner divorced from its associated goodwill.

62. Accordingly, Registration Nos. 2985751 and 3394514 should both be cancelled under Lanham Act §10, 15 U.S.C. §1060 (a mark "shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark") as perpetrating a fraud on the purchasing public.

Cause 4: Deception Under Section 2(d) of the Lanham Act

63. If a new product is so different from the old that continued use of the mark would "work a deception upon the public," then the original right to the mark is abandoned. See, Bambu Sales Inc. v. Sultana Crackers Inc., 683 F.Supp. 899, 7 USPQ2d 1177, 1182 (E.D.N.Y. 1988); McCarthy on Trademarks §17:24.

64. Paragraphs 56, 57, 59, 60 and 61 above are adopted and re-alleged here.

65. Accordingly, Registration Nos. 2985751 and 3394514 should both be cancelled under Lanham Act §2(d), 15 U.S.C. §1052(d) as perpetrating a deception on the purchasing public.

Cause 5: First Contract Theory

66. The recitation on the 2002 Agreement, ¶13 above, is adopted and re-alleged here.

67. Petitioner cannot locate a copy of Exhibit A to the 2002 Agreement. On information and belief, either such exhibit was not part of the agreement, or it listed the RESTORADERM trademark. Based on Section 4.2 of the 2002 Agreement, the RESTORADERM trademark was clearly part of the subject matter of the agreement.

68. The recitation on the 2004 Agreement, ¶22 above, is adopted and re-alleged here.

69. Whether the 2004 Agreement superseded the 2002 Agreement as to the RESTORADERM trademark depends on whether one interprets Section 2.1(d) of the 2004 Agreement as covering the trademark. If yes, then the analysis under the first theory is foreclosed, but the analysis under the second theory is strengthened; if no, then the 2004 Agreement is silent as to the trademark, which as outlined below will lead to the conclusion that the trademark element of the 2002 Agreement is not superseded. This analysis under the first contract theory presumes that the answer is no. Hence, per the analysis below, the trademark RESTORADERM remained licensed under the 2002 Agreement, and is subject to the "terms and conditions" of that agreement. The most basic condition and purpose of the 2002 Agreement was that Collagenex participate in and control the development of the technology. See, second whereas recital of the 2002 Agreement, and the Collagenex participation outlined in Sections 3.1 and 7 thereof.

70. Since specific provisions usually take precedence over general language¹, Section 9.12 of the 2004 Agreement governs what portions of the 2002 Agreement were superseded. Per this Section 9.12, only prior agreements *respecting the subject matter of the 2004 Agreement* are superseded. This specific language governs over the general language of the introductory whereas recitals drafted when trademarks were part of the initial discussions on forming 2004

¹ Williston on Contracts § 32.10 (4th ed. 2007)

Agreement. Moreover, specific terms in the body of a contract control over recitals contained in an introductory "whereas" clause. See, Neal D. Ivey Co. v. Franklin Associates, 87 A.2d 236, 239 (Pa. 1952). Since the 2004 Agreement is not respecting the trademark, it does not supersede the trademark agreement, i.e., this aspect of the 2002 Agreement.

71. The recitation on Petitioner's seeking to terminate, ¶28 above, is adopted and re-alleged here.

72. Collagenex in the letter dated February 12, 2008 ("February 2008 Letter", Exhibit 4), clearly acknowledged that it had a duty to Sköld with respect to the trademark

73. On information and belief, Registrant is the successor in interest in the registrations and in the 2002 and 2004 Agreements.

74. In the letter dated November 27, 2009 ("November 2010 Letter"), Registrant terminated the 2004 Agreement (Exhibit 5). Such termination must necessarily also terminate the surviving portion of the 2002 Agreement licensing the trademark. The very purpose of the 2002 Agreement is negated by the termination of the 2004 Agreement.

Cause 6: Second Contract Theory

75. If the fact finder deems the first theory incorrect, Petitioner submits that it would be because the fact finder deems the first "whereas" recital in the 2004 Agreement to terminate the 2002 Agreement, or deems the 2004 Agreement to cover trademarks. If so, Registrant nonetheless submits that the trademark RESTORADERM is owned by him due to (a) the trademark being part of that recited in Section 2.1 of the 2004 Agreement or (b) a fatal ambiguity in the 2004 Agreement as to the trademark subject matter, which in turn implicates parole

evidence which clearly indicates that trademark RESTORADERM was a subject of the 2004 Agreement.

76. Under Pennsylvania law, a contract will be found to be ambiguous if, and only if, it is reasonably or fairly susceptible to different constructions, is capable of being understood in more senses than one, is obscure in meaning through indefiniteness of expression, or has a double meaning. Erie Insurance Company/Erie Insurance Exchange v. Flood, 649 A.2d 736, 738 (Pa. Cmwlth. 1994).
77. The 2004 Agreement identifies the Intellectual Property by the trademark RESTORADERM, using the phrase "Restoraderm Intellectual Property," yet does not recite that the trademark is part of the batch of rights defined as Restoraderm Intellectual Property.
78. The items subject to the 2004 Agreement include that identified in Section 2.1(d), which by its plain meaning must include the trademark RESTORADERM.
79. Since items subject to the 2004 Agreement included the trademark RESTORADERM, then pursuant to Section 8.5(b)(iii), the trademark must be transferred to Sköld as a result of the November 2009 Letter (Exhibit 5). Consistent with Section 8.5(b)(iii) the patent estate in the Technology has been transferred to Sköld (see assignment, attached as Exhibit 6).
80. Parole evidence confirming that the trademark RESTORADERM was intended to be included in the items subject to the 2004 Agreement includes the discussion of trademark diligence in the February 2008 Letter (Exhibit 4). Further evidence is provided by an early draft of the 2004 Agreement that included an Exhibit B that was an unconditional trademark assignment (to be provided as Exhibit 7, subject to a protective order).

Damage and Relief

81. Since the Board cannot order the transfer of the trademarks, Petitioner seeks to remove any stain of Registrant's apparent ownership of RESTORADERM on Petitioner's applications for BASED ON RESTORADERM LIPOGRID TECHNOLOGY (Serial No. 85037342) and RESTORADERM LIPIDGRID (Serial No. 85037362).
82. If the Registrant is permitted to retain the registrations sought to be cancelled, and thereby, the *prima facie* exclusive right to use in commerce the mark *RESTORADERM* on the recited subject matter, its use of the mark will continue to confuse dermatologists and pharmaceutical companies familiar with the RESTORADERM Technology.
83. Recitations on confusion, ¶¶ 37-42 above, are adopted and re-alleged here.
84. Physicians are likely to consider the goods of Registrant sold under the mark RESTORADERM as emanating from Petitioner, and direct patients to purchase such goods as those of the Petitioner, resulting in loss of development opportunities to Petitioner, and deceiving physicians as to the nature and quality of the goods.
85. Concurrent use of the mark by the Registrant and Petitioner may result in irreparable damage to Petitioner's reputation and goodwill, if the goods sold by the Registrant are inferior, since purchasers are likely to attribute the source of the Registrant's goods to the Petitioner.
86. If the Registrant is permitted to retain the registrations sought to be cancelled, a cloud will be placed on Petitioner's title in and to its trademark, *RESTORADERM*, and on its right to enjoy the free and exclusive use thereof in connection with the sale of its goods, all to the great injury of Petitioner.

87. Accordingly, for the reasons set forth above, Petitioner seeks the cancellation of Registration Nos. 2985751 and 3394514.

Additional

88. Exhibits 2, 3, 4, 5, 7, 10 and 11 are withheld from this submission to the Board pending resolution of any potential issues of confidentiality. These exhibits have been earlier served upon the Registrant in a separate envelop labeled "CONFIDENTIAL EXHIBITS", and Exhibits 10 and 11 have now been so served upon Registrant. Exhibits 1, 6 and 8 have already been delivered to the Board, and Exhibits 9, 12 and 13 are being delivered herewith.

WHEREFORE, Petitioner deems that it is or will be damaged by Registration Nos. 2985751 and 3394514, and petitions for cancellation thereof as they relate to goods in Classes 5 and 3, respectively.

Respectfully submitted,

Date: March 23, 2011

By:



Arthur E. Jackson, Ph.D., Esq.
New Jersey Bar No. 00288-1995
ajackson@moseriplaw.com
MOSER IP LAW GROUP
1030 Broad Street, Suite 203
Shrewsbury, NJ 07702
(732) 935-7100
(732) 935-7122
Attorney for Petitioner

Exhibits:

- 1: Press Release (Merger)(previously provided)
- 2: 2002 Agreement (Confidential, previously provided to Registrant)
- 3: 2004 Agreement (Confidential, previously provided to Registrant)
- 4: February 2008 Letter (Confidential, previously provided to Registrant)
- 5: November 2009 Letter (Confidential, previously provided to Registrant)
- 6: Patent Assignment (previously provided)
- 7: Exhibit B (Confidential, previously provided to Registrant)
- 8: Rosacea Support Web Page (previously provided)
- 9: 2005 Fowler Poster
- 10: Consulting Agreement (Confidential)
- 11: November 2007 Email Exchange (Confidential)
- 12: PowerPoint Presentation
- 13: Cetaphil Restoraderm Webpage

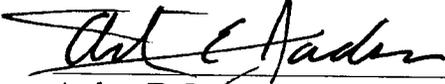
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Thomas Sköld,)	
Petitioner,)	
)	
v.)	
)	Cancellation No. 92052897
Galderma Laboratories, Inc.,)	
Registrant)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Cancellation, together with all Exhibits 9-13 was sent first class mail, was sent first class mail, postage pre-paid on this 23rd of March, 2011 to:

Attn: JEFFREY M. BECKER
HAYES AND BOONE, LLP
2323 VICTORY AVENUE, SUITE 700
DALLAS, TX 75219
UNITED STATES



Arthur E. Jackson

Exhibit 9
(2005 Fowler Poster)

Sköld v. Galderma
Cancellation No. 92052897
Re Registration Nos. 2985751 and 3394514

A Comparator Study of an Adjunctive Dermal Lipid Replacement Foam (Restoraderm™) in the Management of Refractory Hand Contact Dermatitis

Fowler JF, Perryman JH; University of Louisville, Louisville, Kentucky

ABSTRACT

Background: Dermatitis (irritant, allergic, or both) is the most common occupational skin disease. Although many "barrier creams" with high concentrations of petrolatum are sold, none have shown consistent effectiveness.

Restoraderm is composed of an exclusive non-alcohol, water-based formulation of lipids that mimics the body's own natural skin barrier system. It contains ceramides, cholesterol, palmitic acid and two biologic precursors, mevalonic acid and hydroxycholecalciferol. It does not contain petrolatum, and is a non-greasy formulation. Many occupational hand dermatitis patients find it difficult to work when using a product with petrolatum as its greasy residue can negatively affect grip and impair the protection of latex gloves.

Objective: To measure the effectiveness of Restoraderm in reducing or eliminating chronic hand contact dermatitis. The primary endpoints were mean percent change from baseline in the Clinician's Global Assessment Score and mean change in frequency of topical steroid use.

Methods: Thirty-one patients were randomized to receive either Restoraderm or a comparator (ointment or lotion) at the baseline visit. Each patient received Restoraderm for a 3 week period followed by comparator or vice versa. There was a two-week washout between study phases.

Results: Restoraderm proved to be effective in reducing or eliminating chronic hand contact dermatitis caused by occupational exposures. It was preferred by patients over the comparators. The non-greasy foam formulation of Restoraderm may contribute to compliance, ease of use, and patient satisfaction in patients with chronic hand dermatitis.

INTRODUCTION

Dermatologic conditions account for the majority of reported occupational illness in the United States. Dermatitis (irritant, allergic, or both) is the most common occupational skin disease. Although many "barrier creams" are sold none have shown consistent effectiveness in preventing occupational hand dermatitis. Some occupational hand dermatitis patients, such as beauticians, nurses, mechanics, and culinary workers, are not able to work when using a product with a high concentration of petrolatum to treat the condition. Petrolatum leaves a greasy residue which can negatively effect grip and render latex gloves ineffective for bacterial protection.

Restoraderm (CollaGenex Pharmaceuticals) is a dermal lipid replacement foam composed of an exclusive non-alcohol, water-based formulation of lipids that mimics the body's own natural skin barrier system. Restoraderm does not contain petrolatum. Restoraderm is a non-greasy formulation.

OBJECTIVE

The objective of this study is to measure the effectiveness of Restoraderm in reducing or eliminating irritant and/or allergic contact dermatitis of the hands in patients with chronic hand dermatitis caused by occupational exposures. The primary endpoints were mean percent change from baseline in the Clinician's Global Assessment Score and mean change in frequency of topical steroid use from baseline.

METHODS

Study Design: Prospectively randomized, cross-over design

Inclusion Criteria: Normal healthy males or females with chronic hand dermatitis verified by a score of 3 to 8 on the Clinician's Global Assessment Scale (Table 1).

Table 1. Clinician's Global Assessment Scale

0	Clear
1	Almost Clear: Minimal scattered erythema and/or scaling (<10% involved)
2	Minimal Dermatitis: Minimal scattered scaling and/or erythema (<50% involved)
3	Mild Dermatitis: Mild scattered scaling with mild to minimal erythema (<50%)
4	Mild to Moderate Dermatitis: Same as #3 but more extensive, ± a few papules or vesicles
5	Moderate Dermatitis: Moderate scaling with moderate erythema, some papules, vesicles, and/or early fissures (<50%)
6	Moderate Dermatitis: Same as #5 but more extensive
7	Moderate to Severe Dermatitis: Scaling and deeper fissures and/or confluent papules, vesicles and moderate to severe erythema (<50%)
8	Moderate to Severe Dermatitis: Same as #7 but more extensive
9	Severe Dermatitis: Severe scaling and fissures, papules, and/or vesicles with erythema (<50%)
10	Severe Dermatitis: Severe scaling and fissures and/or vesicles and crusting with erythema, covering most of the hand surface

Week 0: Thirty-one patients randomized to receive Restoraderm Foam or a comparator (Aquaphor Ointment or Lubriderm Lotion) for a 3-week period

Week 3 – Week 5: Washout period

Week 5: Patients on Restoraderm receive either of the two comparators and individuals on comparator receive Restoraderm for an additional 3-week period

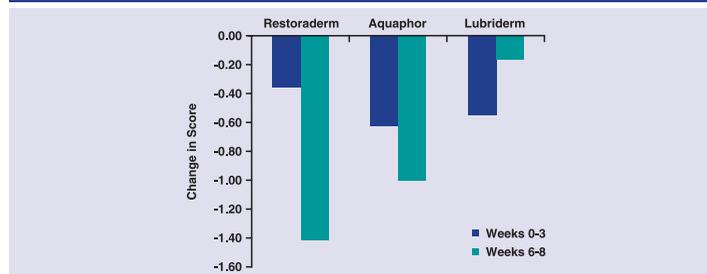
Week 8: Last observation

Investigator Evaluation: Occurred at weeks 0, 3, 5, and 8. Parameters evaluated on a scale of 0-5: erythema, scaling, cracking and fissuring, vesicles. Nail changes indicated as either present or absent. Location of activity noted. Global evaluation on a scale of 0-10 recorded.

RESULTS

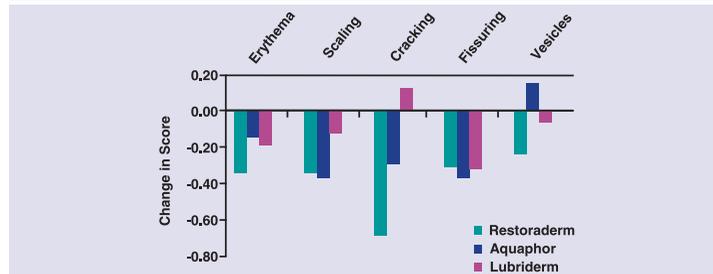
Patients who received Restoraderm during the second treatment period exhibited a significant improvement in Global Assessment Score vs comparator groups (Figure 1).

Figure 1. Investigator Global Assessment Score – Change From Baseline



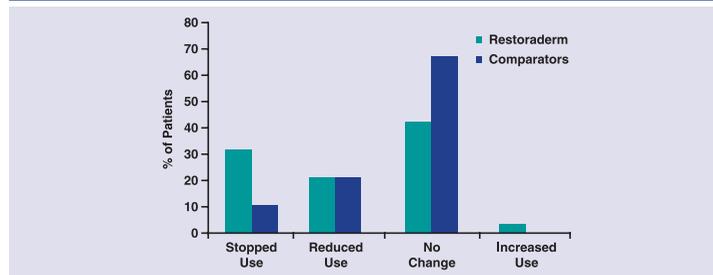
Patients who received Restoraderm exhibited consistent improvement in all five categories and significant improvement in erythema and cracking vs comparator groups (Figure 2).

Figure 2. Skin Irritancy Scores – Cumulative Change From Baseline Following Both Treatment Periods



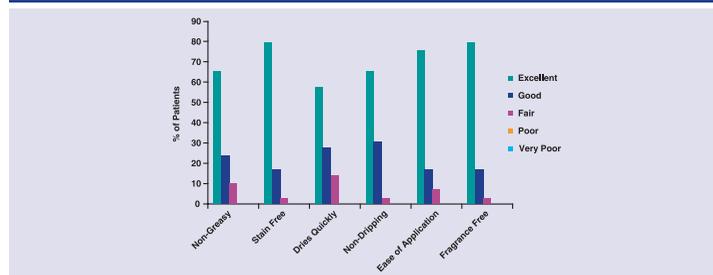
Patients who received Restoraderm were 3-fold more likely to stop concomitant use of steroids vs comparator groups (Figure 3).

Figure 3. Steroid Usage – Cumulative Change From Baseline Following Both Treatment Periods



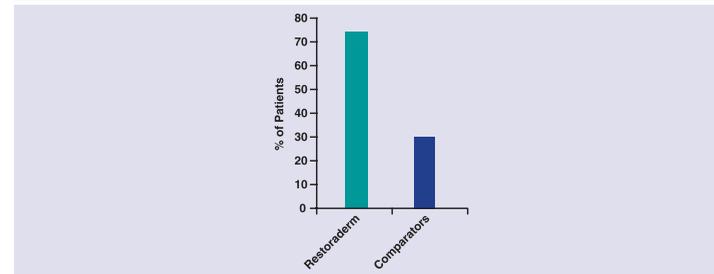
Restoraderm received an excellent rating from at least 60% of patients in all characteristics (Figure 4).

Figure 4. Rating the Cosmetic Characteristics of Restoraderm



Restoraderm was preferred by 71% of patients vs 29% for comparators (Figure 5).

Figure 5. Overall Patient Preference For Restoraderm and Comparators



Photos of one patient in the study are displayed in Figure 6.

Figure 6. Overall Patient Preference For Restoraderm and Comparators



CONCLUSIONS

- Restoraderm proved to be effective in reducing or eliminating chronic hand contact dermatitis caused by occupational exposures.
- Restoraderm users exhibited an overall improvement in Skin Irritancy & Global Assessment Scores.
- Restoraderm users were more likely to stop steroid usage than those receiving comparators.
- Restoraderm received excellent ratings in 5 major cosmetic categories from the majority of patients.
- The non-greasy foam formulation of Restoraderm may contribute to compliance, ease of use, and satisfaction in patients with chronic hand dermatitis.
- Restoraderm was preferred by patients by a margin greater than 2:1 vs comparators.

Disclosure of Support: Dr. Fowler has received consulting fees from CollaGenex Pharmaceuticals. This study was supported by an unrestricted grant from CollaGenex Pharmaceuticals, Inc.

Exhibit 12
(PowerPoint Presentation)

Sköld v. Galderma
Cancellation No. 92052897
Re Registration Nos. 2985751 and 3394514

Overview of Restoraderm Technology

**A Technologically Advanced System for
Controlled Topical Drug Delivery**

A Collaboration between Thomas Sköld
And
The Institute of Surface Chemistry, Sweden, M. Silvander PhD
and the Department of Dermatology University of California,
San Francisco, USA, Ruby Ghadially, MD

Restoraderm Technology is based on self-assembled lipid structures.

The selected lipids and lipid precursors and their ratios resembles the complexity of biological membranes.

The balanced mixture of differentiated matrix structures provides unique possibilities to control release and penetration rates of a drug.

Due to its different micro compartments Restoraderm Technology is able to encompass both hydrophilic and hydrophobic actives.

Balanced Matrix

Phosphatidylcholine, Ceramides III , Cholesterol,
Palmitic Acid, Lipid precursors like Mevalonic Acid,
25-hydroxycholecalciferol, Ascorbyl Palmitate or others

Enables penetration through stratum corneum and Epidermis
without disturbing/disrupting the skin barrier function

Enables design of a variety of micro carriers within the formulation
in order to control release and penetration depth

Lipid precursors promote skin lipid biosynthesis at a functional level

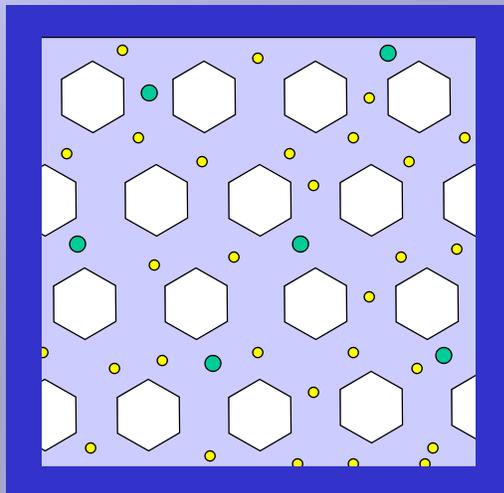
Lipoid micro compartments

Hydro phase

Foam phase

Lipid particles

Vesicles



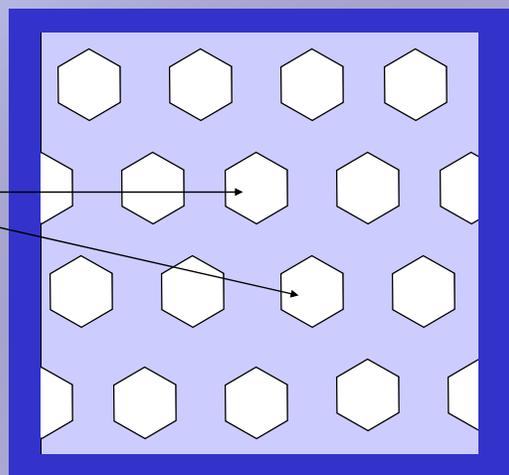
Hydro phase

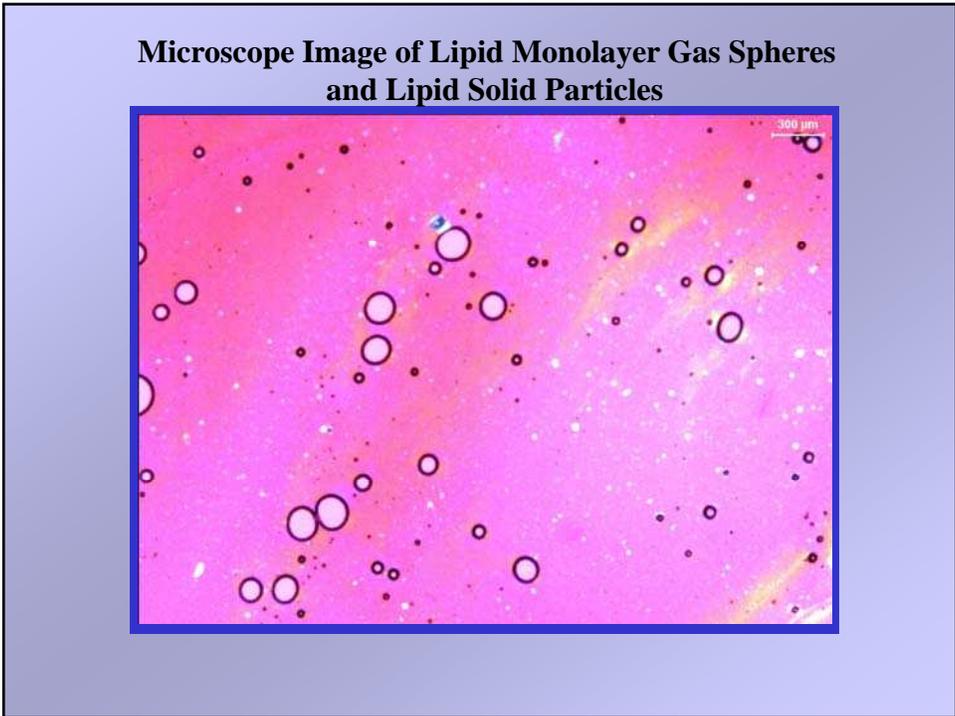
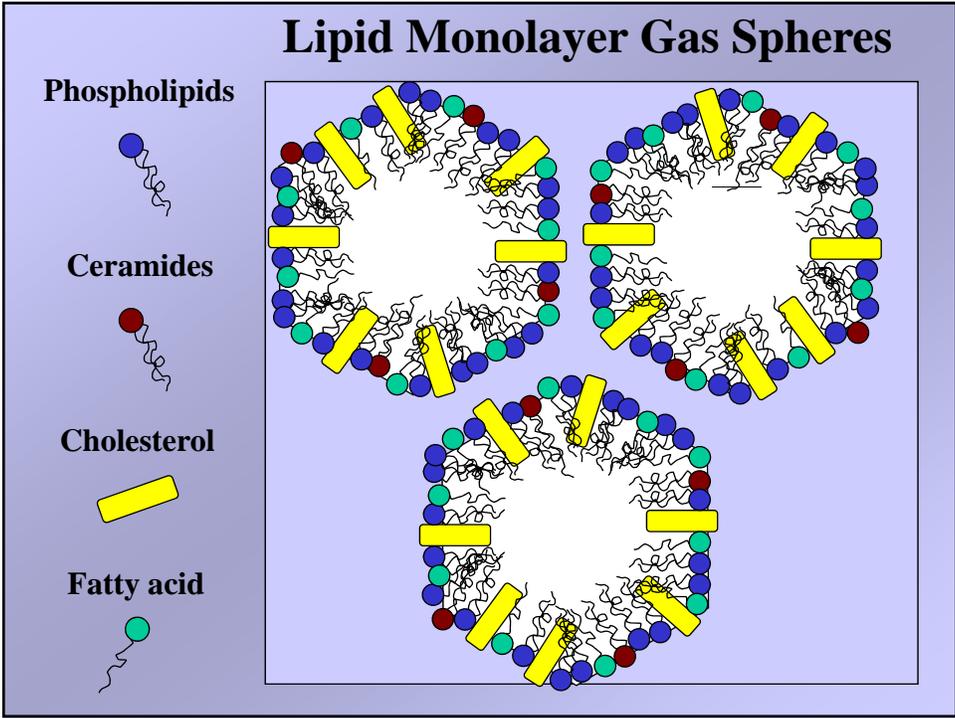
**Thickener (Xanthan Gum)
and
other components (e.g. glycerol)**

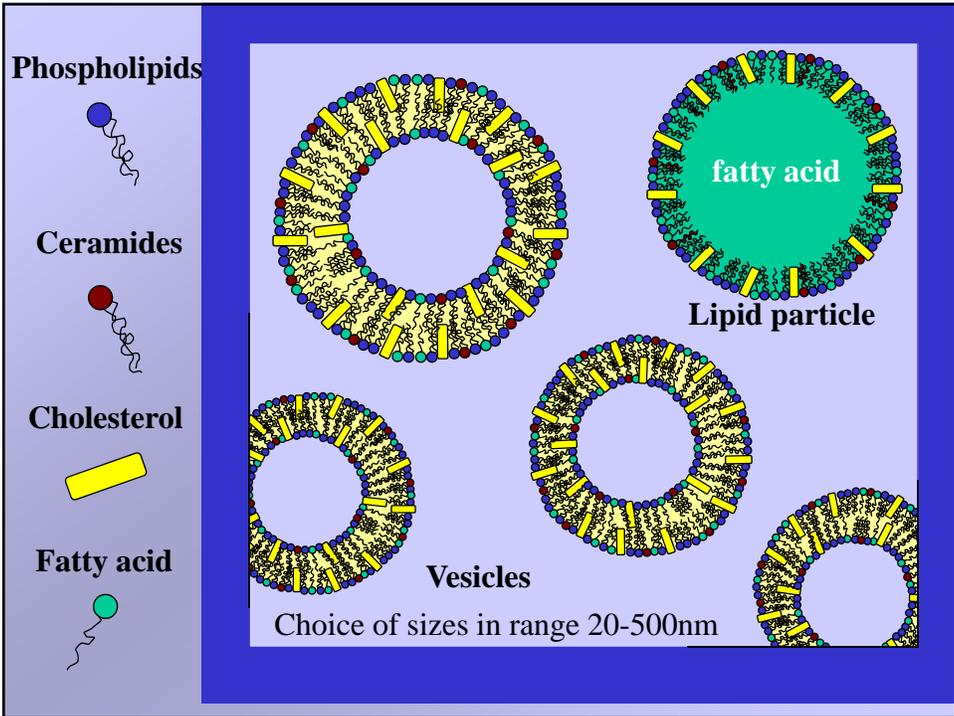
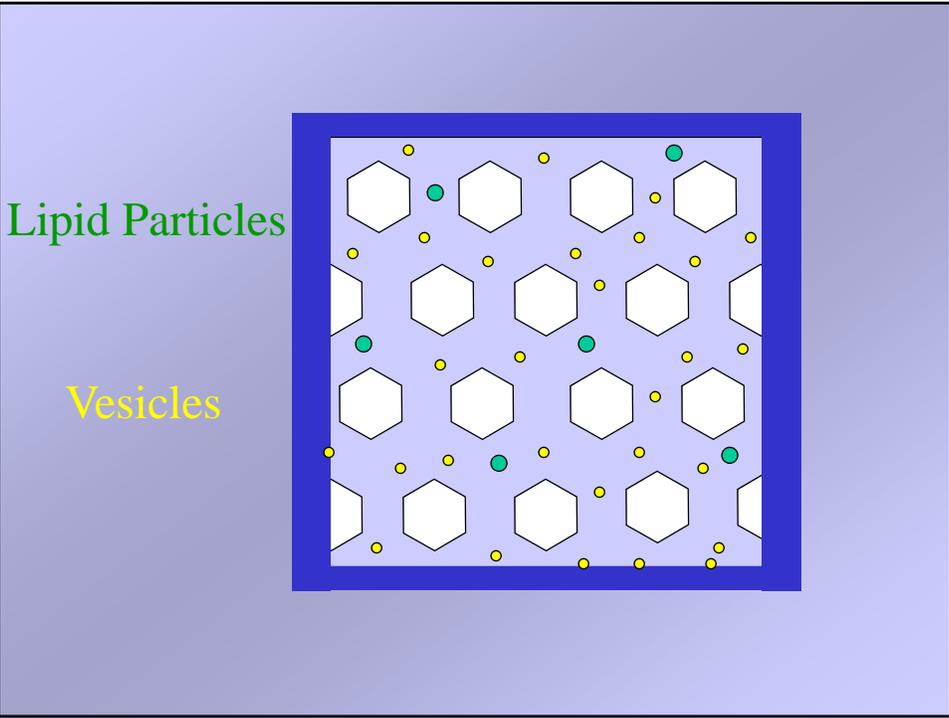
**give the right texture
and
skin-feel to the product**

Foam phase

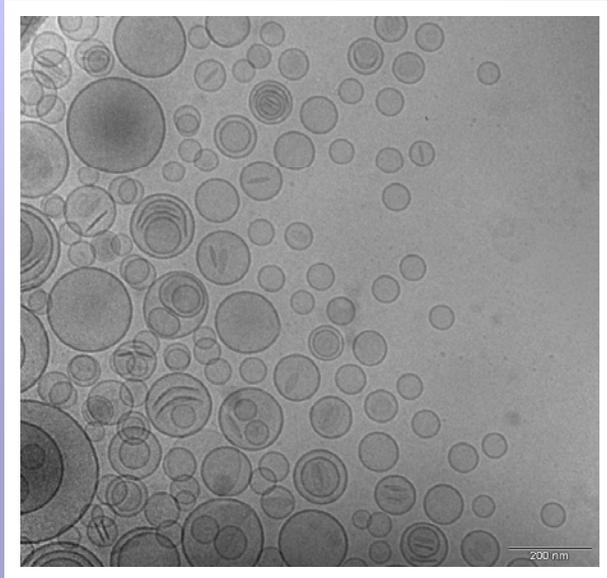
Lipid Monolayer
Gas Spheres







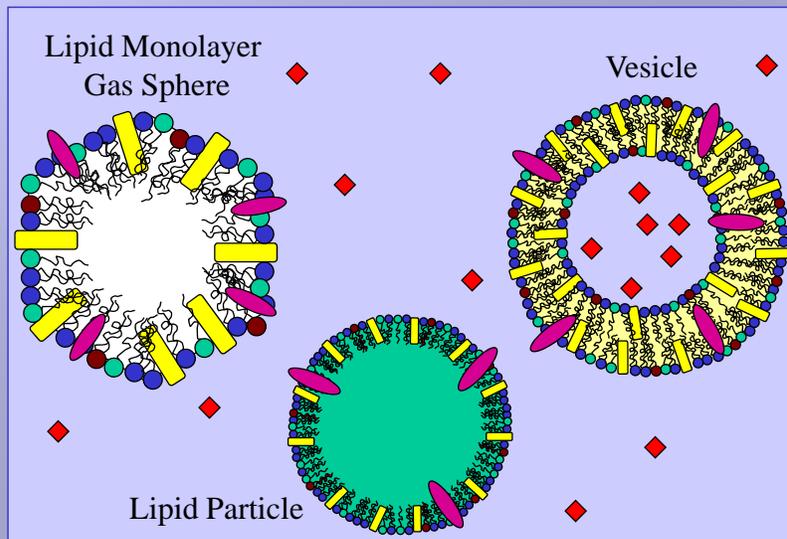
Cryo-Transmission Electron Micro graph



Delivery of Actives

Water Soluble Active ◆

Fat Soluble Active ◊

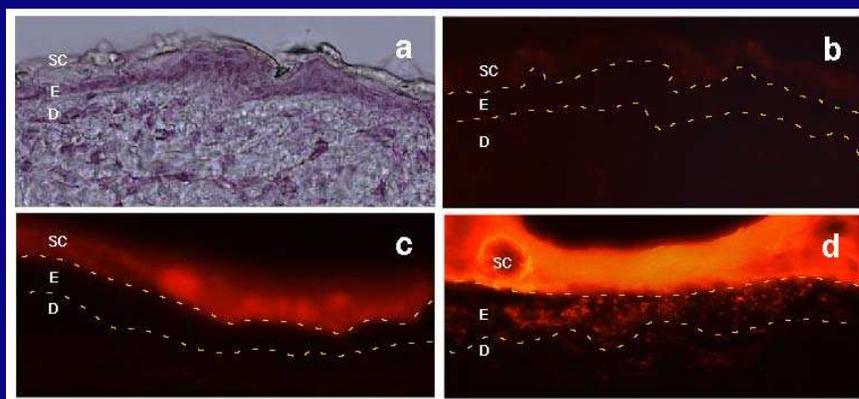


Restoraderm/L – Penetration Study

Ruby Ghadially, MD

- **HYPOTHESIS:**
 - Restoraderm contains physiologic lipids in self-assembled structures and will penetrate into the viable epidermis whereas lipid emulsion does not.
- **SPECIFIC OBJECTIVE:**
 - To determine penetration of Restoraderm into the viable epidermis, utilizing fluorescent labeled tracers amounts added to Restoraderm.
- **METHOD:**
 - Restoraderm suspension vs. an emulsion (control) was applied to the hairless mouse epidermis. Samples were taken after 2 hours for fluorescence microscopy.
 - Fluorescence microscopy was used to determine the degree of permeation.

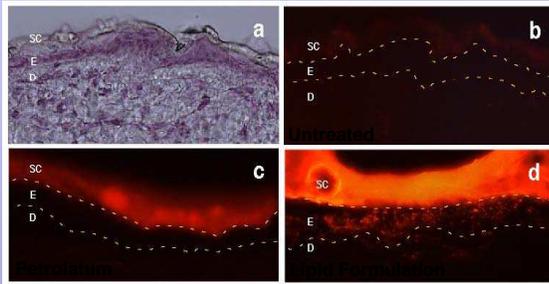
Restoraderm penetrates easily into viable epidermis (two hours after application)



- a - normal skin
- b - normal skin - minimal auto fluorescence
- c – lipid emulsion fluorescence in the sc
- d - Restoraderm fluorescence in epidermis and sc

Dermal Studies

A penetration fluorescence study made with Restoraderm three structure matrix – A lipid emulsion and an alcohol based vehicle



Enhanced Absorption

a - normal skin
 b – normal skin - minimal fluorescence
 c-lipid emulsion - stays in stratum corneum
 d-lipid suspension with a three structure matrix – easily down to epidermis and even down to dermis

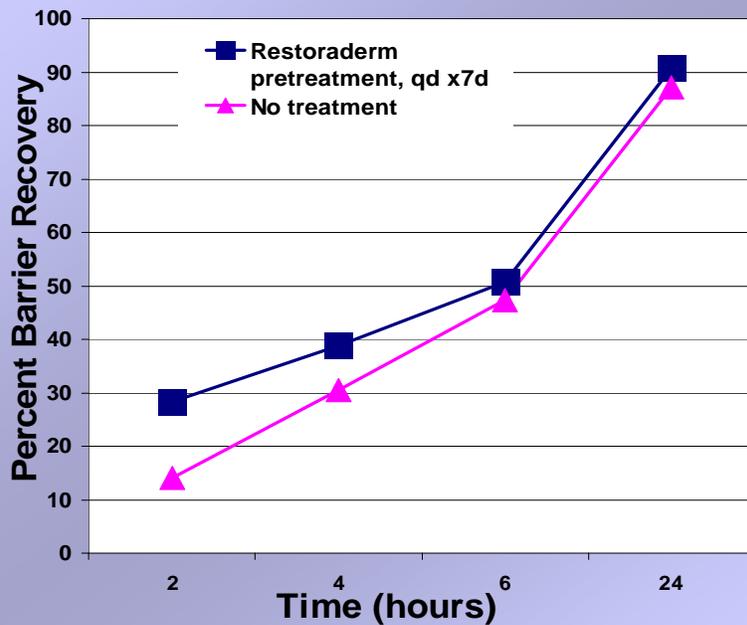
Improved Tolerance

To enable similar penetration levels as in picture d above a alcohol based vehicle will be required. With such alcohol formulation the skin gets disrupted

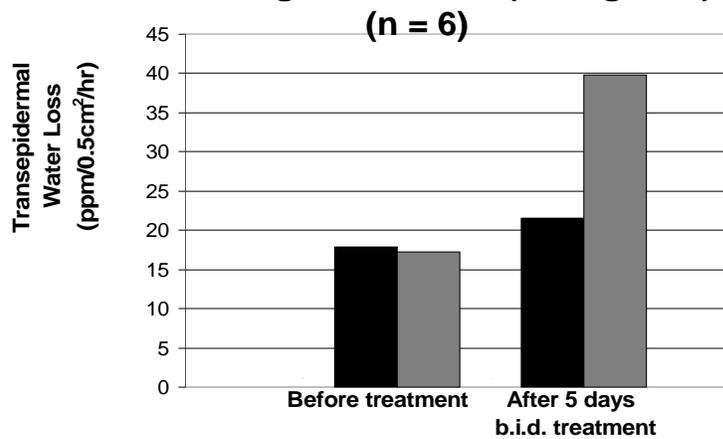


Lipid Matrix Formulation

Alcohol-based Formulation

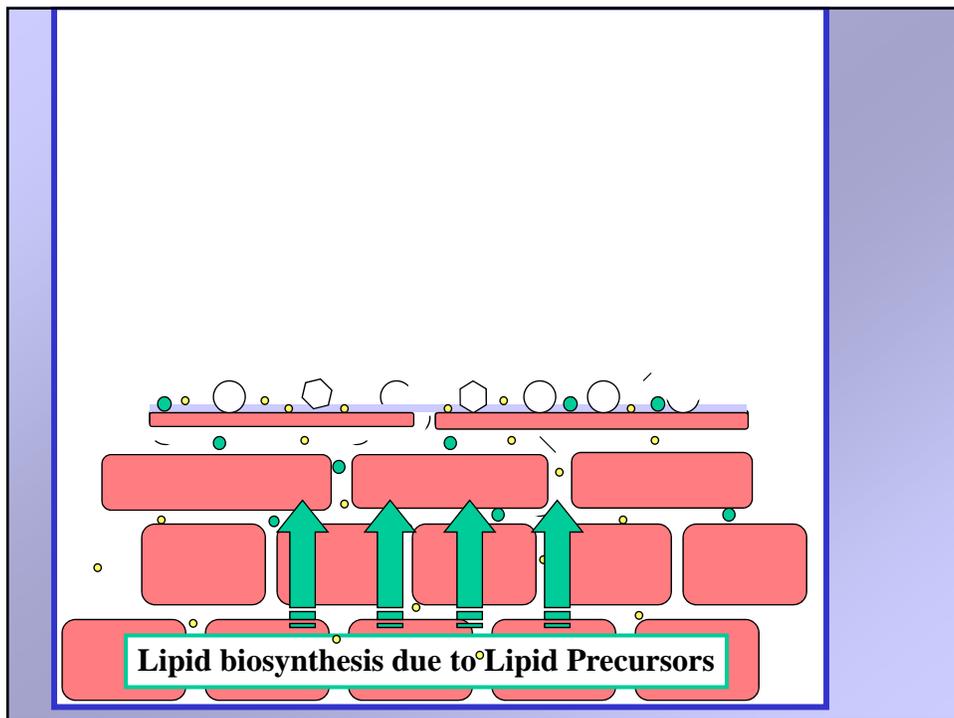
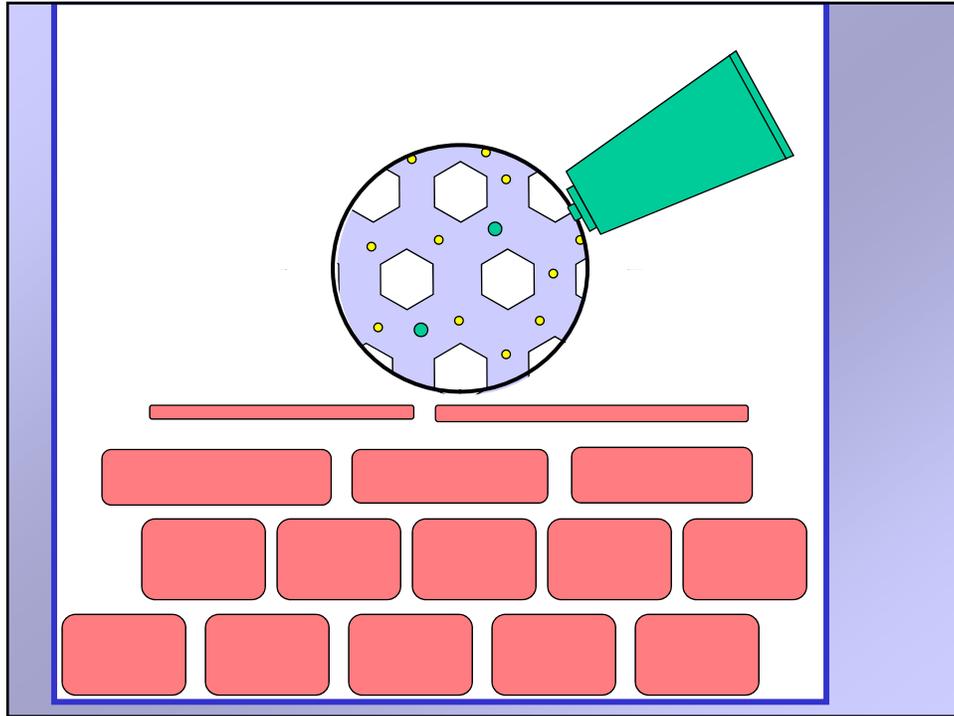


**Alcohol-containing clobetasol foam
(Olux) perturbs the skin barrier
significantly more than a non-alcohol-
containing formulation (Collagenex)**



Restoraderm/Lipoid – Intellectual Property

- “Water-Based Topical Delivery System”
- Inventor: Thomas Skold
- Filed 03/13/02 US Provisional Patent
- Filed 03/13/03 US Patent



Summary

Restoraderm/Lipoid is a Technologically Advanced System for Controlled Topical Drug Delivery

The differentiated micro carrier system within the formulation allows for control of release and penetration depth

Restoraderm enables penetration through stratum corneum and epidermis without disturbing/disrupting the skin barrier function

The system is suitable for both water soluble and fat soluble drugs

Exhibit 13
(Cetaphil Restoraderm Webpage)

Sköld v. Galderma
Cancellation No. 92052897
Re Registration Nos. 2985751 and 3394514



#1

Dermatologist and Pediatrician recommended brand of cleansers and moisturizers

cetaphil restoradem



RESTORADERM® SKIN RESTORING BODY WASH
RESTORADERM® SKIN RESTORING MOISTURIZER

Effective, long-lasting moisture.

Cetaphil® RESTORADERM® Skin Restoring Moisturizer with patented Filaggrin technology™ and ceramide technology is formulated to hydrate and soothe very dry, eczema-prone skin.

Developed to help replenish and protect the skin's natural moisture barrier, this nourishing moisturizer offers gentle yet effective hydration for dry, itchy skin. Free of fragrances, parabens and nut oils, Cetaphil® RESTORADERM® Skin Restoring Moisturizer is easily-absorbed and is for anyone three months of age and older with eczema-prone skin. Used after cleansing with Cetaphil® RESTORADERM® Skin Restoring Body Wash, it helps repair the skin's barrier as part of a dermatologist-recommended, daily skin care routine for the management of eczema. Look for it with other Cetaphil® products in the skin care aisle today!

INGREDIENTS

Read what others are saying about Cetaphil® Products



CLICK TO SAVE

ICK LINKS
click tabs
PROMOTIONS
CETAPHIL® PRODUCTS
JOIN THE CLUB!



Every Age. Every Stage. Every Day.™



#1 Dermatologist and Pediatrician recommended brand of cleansers and moisturizers

cetaphil restoraderm

RESTORADERM® SKIN RESTORING BODY WASH

RESTORADERM® SKIN RESTORING MOISTURIZER

Effective, long-lasting moisture.

Cetaphil®
ceramide
Developed
moisturizer
parabens a
and is for a
with Cetaphil
as part of a
eczema. L

The National Eczema Association (NEA) Seal of Acceptance is awarded to products that have been created or developed for use by persons with Eczema or severe sensitive skin conditions and have satisfied the NEA Seal of Acceptance Criteria. The NEA has awarded the Seal of Acceptance to Cetaphil® RESTORADERM® Skin Restoring Moisturizer with a 4 out of 5 rating. Read the label to determine if this product may contain ingredients that may be irritating to your skin.

...y™ and
...in.
...shing
...bes.
...y-absorbed
...cleansing
...in's barrier
...t of

INGREDIENTS

Read what others are saying about Cetaphil® Products



CLICK TO SAVE



JOIN THE CLUB!

CETAPHIL® PRODUCTS

PROMOTIONS

CLICK LINKS