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

Proceeding	92058417
Party	Defendant Kythera Biopharmaceuticals, Inc.
Correspondence Address	KYTHERA BIOPHARMACEUTICALS INC 27200 WEST AGOURA ROAD , SUITE 200 CALABASAS, CA 91301 UNITED STATES
Submission	Motion to Suspend for Civil Action
Filer's Name	John J. Dabney
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Signature	/s/ John J. Dabney
Date	01/21/2014
Attachments	Lithera - 92058417.pdf(11747 bytes) Kythera v. Lithera Complaint.pdf(802739 bytes) Lithera's MTD.pdf(71012 bytes)

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

Lithera, Inc.)		
)		
)		
Petitioner,)		
)		
v.)	Cancellation No.	92058417
)		
Kythera Biopharmaceuticals, Inc.,)		
)		
Registrant.)		

REGISTRANT’S MOTION TO SUSPEND

Registrant Kythera Biopharmaceuticals, Inc. (“Kythera”) hereby moves for an Order suspending this Cancellation pending the disposition of Civil Action No. CV13-6338 RSWL, *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, in the U.S. District Court for the Central District of California. In the California action, Registrant filed a complaint alleging that Petitioner’s use of LITHERA for pharmaceutical preparations constitutes trademark infringement of Registrant’s KYTHERA mark, which Registrant has used in connection with its pharmaceutical goods and services since early 2006. Petitioner filed a motion to dismiss alleging the identical grounds as those Petitioner alleged in its Petition for Cancellation. Copies of Registrant’s complaint and Petitioner’s motion to dismiss are attached. Registrant requests that this Cancellation be suspended because the pending civil action has a direct bearing on this proceeding.

Dated: January 21, 2014

OREGON BREWING COMPANY

By _____/s/
John J. Dabney
Mary D. Hallerman
Katie Bukrinsky

McDermott Will & Emery LLP
500 North Capitol Street
Washington, DC 20001
Attorneys for Registrant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address of record, by first class mail, on January 21, 2014.

Respectfully submitted,

/John J. Dabney/
John J. Dabney
Attorney for Registrant

COPY

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FILED
CLERK, U.S. DISTRICT COURT
AUG 29 2013
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

11 *Attorneys for Plaintiff*
12 *KYTHERA BIOPHARMACEUTICALS, INC.*

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION

16 **KYTHERA**
17 **BIOPHARMACEUTICALS, INC.,**

18 **Plaintiff,**

19 v.

20 **LITHERA, INC.,**

21 **Defendant.**

22 **CV 13- 6338 PSM (SS)**

23 **COMPLAINT FOR TRADEMARK**
24 **INFRINGEMENT, UNFAIR**
25 **COMPETITION, FALSE**
26 **DESIGNATION OF ORIGIN,**
27 **TRADE NAME INFRINGEMENT**
28 **AND TRADEMARK**
CANCELLATION

DEMAND FOR JURY TRIAL

Plaintiff Kythera Biopharmaceuticals, Inc. ("Kythera") brings this Complaint against Defendant Lithera, Inc. ("Defendant") and alleges as follows:

Complaint

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ATTORNEYS AT LAW
WASHINGTON

MCDERMOTT WILL & EMERY LLP
ATTORNEYS AT LAW
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STATEMENT OF THE CASE

1. This is an action for trademark infringement, false designation of origin, unfair competition, trade name infringement and trademark cancellation. Since at least as early as 2006, Kythera has continuously used the mark and trade name KYTHERA in connection with the advertising and promotion of pharmaceutical research and development services and related goods and services. Kythera’s lead product candidate is an injectable drug (ATX-101), which is currently in Phase III clinical development for the aesthetic reduction of localized subcutaneous fat deposits in humans. Kythera owns an incontestable federal trademark registration for KYTHERA for, among other things, the development of pharmaceutical preparations and medicines. Despite Kythera’s registration, Defendant commenced use and secured registration of the confusingly similar mark and trade name, LITHERA, for pharmaceutical preparations. Lithera is also in the process of developing an injectable drug (LIPO-202), which is currently in Phase II clinical development for the aesthetic reduction of localized subcutaneous fat deposits in humans.

PARTIES

2. Kythera is a Delaware corporation with its principal place of business in California.

1 8. Kythera owns common law marks and trade names for KYTHERA for
2
3 a variety of goods and services, including medical research and development in
4 connection with pharmaceutical preparations and biotechnology; pharmaceutical
5 drug development services and product evaluation, including conducting clinical
6 trials, testing and inspection of pharmaceuticals, and related goods and services.
7

8 9. Kythera owns a federal trademark registration for KYTHERA for:

9
10 Chemical research; Chemical, biochemical, biological and
11 bacteriological research and analysis; Conducting early
12 evaluations in the field of new pharmaceuticals; Development
13 and test of chemical production methods; Development of new
14 technology for others in the field of biotechnology;
15 Development of pharmaceutical preparations and medicines;
16 Medical and scientific research in the field of biotechnology;
17 medical and scientific research, namely, conducting clinical
18 trials; Pharmaceutical drug development services;
19 Pharmaceutical product evaluation; Pharmaceutical research
20 and development; Pharmaceutical research services; Research
21 on the subject of pharmaceuticals; Testing, inspection or
22 research of pharmaceuticals, cosmetics or foodstuff.

23 U.S. Reg. No. 3357920 (registered Dec. 18, 2007) (attached as Exhibit A).

24 10. Kythera’s registration for KYTHERA (U.S. Reg. No. 3357920) has
25 achieved “incontestable” status under the Lanham Act, meaning that it is
26 “conclusive evidence” of Kythera’s “ownership” of this mark, of the registration of
27 this mark, the “validity” of this mark,” and of Kythera’s “exclusive right” to use the
28 KYTHERA mark in commerce for the goods and services specified in the
 registration. *See* 15 U.S.C. §§ 1065, 1115(b).

 11. Kythera also owns a federal trademark registration for KYTHERA for:

1 Research and development of pharmaceutical preparations and
2 aesthetic preparations; medical and scientific research information in
3 the fields of pharmaceutical preparations, aesthetic preparations and
4 clinical trials; and providing a website featuring information about
5 investigational pharmaceutical preparations and aesthetic
6 preparations.

6 U.S. Reg. No. 4012388 (registered Aug. 16, 2011) (attached as Exhibit B).

7 12. Kythera has invested considerable resources to advertise and promote
8 its goods and services under its KYTHERA marks and trade names.
9

10 13. Kythera's KYTHERA marks and trade names are inherently
11 distinctive and have acquired secondary meaning in the marketplace as designating
12 goods and services emanating exclusively from Kythera.
13

14 14. Long after Kythera's first use of its KYTHERA marks and trade
15 names, Defendant filed an intent-to-use application in the U.S. Patent and
16 Trademark Office ("USPTO") for LITHERA for "pharmaceutical preparations for
17 reducing the size and appearance of adipose deposits in a body." Defendant
18 advertises its good and services at lithera.com.
19

20 15. Defendant's trademark application alleged a date of first use of
21 LITHERA in commerce of September 2011. The USPTO registered Defendant's
22 LITHERA mark, Reg. No. 4067542 on December 6, 2011.
23

24 16. Defendant's LITHERA mark and trade name is similar to Kythera's
25 KYTHERA marks and trade names in sight, sound, meaning and overall visual
26 impression.
27
28

1 17. Defendant’s goods and services in connection with which it uses the
2 mark and trade name LITHERA are similar and related to, and overlap with the
3 goods and services with which Kythera uses its KYTHERA marks and trade names.

4
5 18. The parties’ respective goods which will be sold in connection with
6 their respective marks will be marketed through the same channels of trade,
7 advertised in the same mediums, target the same customers and serve similar
8 functions.

9
10 19. Defendant’s use of LITHERA has caused confusion, mistake and/or
11 deception in the marketplace, including among sophisticated individuals in the field
12 of pharmaceuticals and in the press. Attached as Exhibit C is a copy of a “Letter to
13 the Editor” published in the March 2013 edition of the “Aesthetic Surgery Journal”
14 in which the authors confuse the KYTHERA and LITHERA products.

15
16 20. The parties’ goods and services are discussed and presented under the
17 KYTHERA and LITHERA marks and names in the same publications, including
18 investor publications and at the same conferences. At the AAD annual conference
19 in Miami, Florida earlier this year, a presenter used the name KYTHERA when
20 referring to LITHERA and vice versa.

21
22 21. Defendant’s use of LITHERA is likely to cause confusion, mistake,
23 and/or deception as to the affiliation, connection, or association of Defendant with
24 Kythera and as to whether Kythera approves, sponsors, or endorses Defendant’s
25 goods and services.
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ATTORNEYS AT LAW
WASHINGTON

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2. That this Court issue a permanent injunction:
- a. enjoining Defendant, its employees, owners, agents, officers, directors, attorneys, representatives, affiliates, subsidiaries, successors, and assigns, and all those in active concert or participation with them or having knowledge of the causes of action, including Defendant’s dealers, from using the mark or trade name LITHERA, alone or in combination with any other word(s), term(s), designation(s), mark(s) and/or design(s) as well as all similar marks and names;
 - b. requiring Defendant to deliver up for destruction all literature, signs, billboards, labels, prints, packages, wrappers, containers, advertising materials, stationery, and other items in their possession, custody or control that use LITHERA pursuant to 15 U.S.C. § 1118;
 - c. requiring Defendant to transfer its domain name **lithera.com** and all similar names to Kythera;
 - d. requiring the United States Patent and Trademark Office to cancel Defendant’s U.S. Trademark Registration No. 4067542 for LITHERA, 15 U.S.C. § 1119; and
 - e. requiring Defendant to file with the Court and serve on Kythera, within thirty (30) days after entry of an injunction, a report in

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writing under oath setting forth in detail the manner in which Defendant has complied with the Court’s injunction.

- 3. That this Court grant monetary relief in the form of:
 - a. an accounting to Kythera of any and all profits derived by Defendant from the acts complained of herein;
 - b. Kythera’s general, special, and/or actual damages, along with any other damages allowable under 15 U.S.C. § 1117 and any other applicable statute or at common law, according to proof at trial;
 - c. a trebling of the damages awarded to Kythera and an enhanced award of Defendant’s profits to Kythera, as provided for by 15 U.S.C. § 1117(a);
 - d. Kythera’s costs and reasonable attorneys’ fees pursuant to 15 U.S.C. § 1117(a) and California common and statutory law; and
 - e. punitive or exemplary damages, as permitted by California law.
- 4. That this Court grant Kythera such other and further relief, in law or in equity, as it should deem just and proper.

JURY DEMAND

Kythera respectfully demands a trial by jury on all claims and issues so triable.

1 Dated: August 29, 2013

Respectfully submitted,

2 McDERMOTT WILL & EMERY LLP

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By: 
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KYTHERA
BIOPHARMACEUTICALS, INC.

MCDERMOTT WILL & EMERY LLP
ATTORNEYS AT LAW
WASHINGTON

Exhibit A

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

United States Patent and Trademark Office

Reg. No. 3,357,920

Registered Dec. 18, 2007

SERVICE MARK
PRINCIPAL REGISTER

KYTHERA

AESTHERX INC (DELAWARE CORPORATION)
6303 OWENSMOUTH AVE
WOODLAND HILLS, CA 91367

FOR: CHEMICAL RESEARCH; CHEMICAL, BIO-CHEMICAL, BIOLOGICAL AND BACTERIOLOGICAL RESEARCH AND ANALYSIS; CONDUCTING EARLY EVALUATIONS IN THE FIELD OF NEW PHARMACEUTICALS; DEVELOPMENT AND TEST OF CHEMICAL PRODUCTION METHODS; DEVELOPMENT OF NEW TECHNOLOGY FOR OTHERS IN THE FIELD OF BIOTECHNOLOGY; DEVELOPMENT OF PHARMACEUTICAL PREPARATIONS AND MEDICINES; MEDICAL AND SCIENTIFIC RESEARCH IN THE FIELD OF BIOTECHNOLOGY; MEDICAL AND SCIENTIFIC RESEARCH, NAMELY, CONDUCTING CLINICAL TRIALS; PHARMACEUTICAL DRUG DEVELOPMENT SERVICES;

PHARMACEUTICAL PRODUCT EVALUATION; PHARMACEUTICAL RESEARCH AND DEVELOPMENT; PHARMACEUTICAL RESEARCH SERVICES; RESEARCH ON THE SUBJECT OF PHARMACEUTICALS; TESTING, INSPECTION OR RESEARCH OF PHARMACEUTICALS, COSMETICS OR FOODSTUFF, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 7-24-2006; IN COMMERCE 7-24-2006.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 78-909,668, FILED 6-15-2006.

MATTHEW PAPPAS, EXAMINING ATTORNEY

Exhibit B

United States of America
United States Patent and Trademark Office

KYTHERA

Reg. No. 4,012,388

Registered Aug. 16, 2011

Int. Cl.: 42

SERVICE MARK

PRINCIPAL REGISTER

KYTHERA BIOPHARMACEUTICALS, INC. (DELAWARE CORPORATION)
27200 WEST AGOURA ROAD, SUITE 200
CALABASAS, CA 91301

FOR: RESEARCH AND DEVELOPMENT OF PHARMACEUTICAL PREPARATIONS AND AESTHETIC PREPARATIONS; MEDICAL AND SCIENTIFIC RESEARCH INFORMATION IN THE FIELDS OF PHARMACEUTICAL PREPARATIONS, AESTHETIC PREPARATIONS AND CLINICAL TRIALS; AND PROVIDING A WEBSITE FEATURING INFORMATION ABOUT INVESTIGATIONAL PHARMACEUTICAL PREPARATIONS AND AESTHETIC PREPARATIONS, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 0-0-2006; IN COMMERCE 0-0-2006.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 3,357,920.

SER. NO. 85-225,218, FILED 1-25-2011.

JORDAN BAKER, EXAMINING ATTORNEY



David J. Kyffes

Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*
What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date.* See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*
What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or
reminder of these filing requirements.**

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

Exhibit C

Aesthetic Surgery Journal

<http://aes.sagepub.com/>

A Future for Injection Lipolysis?

Brent Tanner, Tony Barabas, David Crook and Colin Link

Aesthetic Surgery Journal 2013 33: 456

DOI: 10.1177/1090820X13477104

The online version of this article can be found at:

<http://aes.sagepub.com/content/33/3/456>

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American Society for Aesthetic Plastic Surgery

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>> Version of Record - Mar 20, 2013

What is This?



Letter to the Editor

A Future for Injection Lipolysis?

Brent Tanner, MA, FRCS; Tony Barabas, BM, BSc, MRCS, FRCS (plast);
David Crook, PhD; and Colin Link, MBBS, BSc

Aesthetic Surgery Journal
33(3) 456-457
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www.aestheticsurgeryjournal.com



Nearly a decade has passed since we first began our audit of clinical outcomes using multiple subcutaneous injections of the lipodissolve agent Lipostabil N (Sanofi-Aventis, Frankfurt, Germany) to reduce adipose deposits in the abdomen and other areas.¹ That lipodissolve agent contained phosphatidylcholine (PC) and deoxycholate (DC) as active ingredients. These derivatives of soya bean and bile extracts respectively had regulatory approval for certain applications, but neither had been formally approved for subcutaneous injection. However, this mixture gained early support as an off-label, minimally invasive alternative to traditional lipoplasty techniques.²

By 2006, regulatory agencies such as the US Food and Drug Administration (FDA) and the United Kingdom's Medicines and Healthcare products Regulatory Agency (MHRA) had restricted the import of Lipostabil N for cosmetic applications. They were concerned about the lack of clinical testing and the apparent misrepresentation of benefit by some weight loss clinics.³

PC-DC subcutaneous injections are not target specific. Instead, this detergent-like mixture kills any tissue into which it is injected. Late consequences of injecting a DC formula into fat can include necrobiosis of the adjacent reticular dermis, with death of adnexal glands, blood vessels, and nerves in the deep dermal layer.⁴ When used in excess, skin contour irregularities have been reported,⁴ which are essentially a result of the product working too well. For this reason, our own treatment policy is to use a small amount of the product in an initial treatment session, followed by repeat treatments as required. With this treatment protocol, our patients experience none of the theoretical complications documented elsewhere.

Almost all of our patients experience temporary and minor side effects after treatment, including reddening, swelling, and bruising at the injection sites. These symptoms can last up to a week. In our audit, in which we analyzed over 100 patient responses, subjective ratings showed a bimodal distribution, with over 75% being very satisfied and less than 25% reporting no visible improvement. There was a statistically significant ($P < .05$ by χ^2 test) positive outcome in all body areas treated, independent of body mass index.¹

Our patient satisfaction level was over 85% when lipodissolve was used to treat excess orbital fat compartments, neck, submental, and jowl fat. In these applications, the treatment cost and downtime compare favorably to the surgical alternative. In the majority of cases, the improvements began to show after the swelling had resolved, with the optimal reduction of fat evident after about 6 weeks.

The advantages of PC-DC injections include cost-effectiveness and the lack of need for any specialized equipment. However, a caveat is that nonphysician injectors may not possess the anatomical knowledge and training to reduce the risk of complications. In the past decade, many patients were treated in clinics staffed by nurses, but the tide turned when the gravity of potential treatment complications became known.

Now, there are companies investing in new lipodissolve products. Lithera (San Diego, California) offers Lipo 102, which contains only the DC component and is reportedly not associated with any risk of skin necrosis or loss of eccrine glands in the deep dermis. Kythera (Calabasas, California) is also conducting rigorous clinical trials of a lipodissolve product called ATX-101.^{5,6}

As our own findings on lipodissolve injections were positive, we are convinced that this technology may have value for certain cosmetic and reconstructive applications. Therefore, we await the results of these trials with interest.

Editor's Note: Please see results from a Level 3 clinical trial entitled "Metabolic and Structural Effects of Phosphatidyl-choline and Deoxycholate Injections on Subcutaneous Fat: A Randomized, Controlled Trial" in this same issue.

Dr Tanner is a Consultant Plastic Surgeon at Spire Hospital, Tunbridge Wells, UK. Dr Barabas is a Plastic Surgery Registrar at Queen Victoria Hospital, East Grinstead, UK. Dr Crook is a Senior Research Fellow at the University of Brighton, Brighton, UK. Dr Link is a Senior House Officer at Guys Hospital, London, UK.

Disclosures

The authors declared no potential conflicts of interest with respect to the research, authorship, and publication of this article.

REFERENCES

1. Tanner B. Phosphatidyl choline (PC): has it a role in reconstructive plastic surgery? Presented at the Winter Meeting of the British Association of Plastic, Reconstructive and Aesthetic Surgeons; December 2006; London, UK.
2. Duncan D, Hasengschwandtner F. Lipodissolve for subcutaneous fat reduction and skin retraction. *Aesthetic Surg J*. 2005;25:530-543.
3. Atiyeh BS, Ibrahim AE, Dibo SA. Cosmetic mesotherapy: between scientific evidence, science fiction, and lucrative business. *Aesthetic Plast Surg*. 2008;32:842-849.
4. Duncan D, Palmer M. Fat reduction using phosphatidylcholine/sodium deoxycholate injections: standard of practice. *Aesthetic Plast Surg*. 2008;32:858-872.
5. Goodman G. Reduction of submental fat with ATX-101: a pooled analysis of two international multicenter, double-blind, randomized, placebo-controlled studies. *J Am Acad Dermatol*. 2012;66(suppl 1):AB11.
6. <http://clinicaltrials.gov/ct2/results?term=ATX-101&Search=Search/>. Accessed October 26, 2012.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES JUDGES

This case has been assigned to District Judge Ronald S.W. Lew and the assigned Magistrate Judge is Suzanne H. Segal.

The case number on all documents filed with the Court should read as follows:

2:13CV6338 RSWL SSx

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge.

Clerk, U. S. District Court

August 29, 2013

Date

By J.Prado

Deputy Clerk

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

- | | | |
|--|--|---|
| <input checked="" type="checkbox"/> Western Division
312 N. Spring Street, G-8
Los Angeles, CA 90012 | <input type="checkbox"/> Southern Division
411 West Fourth St., Ste 1053
Santa Ana, CA 92701 | <input type="checkbox"/> Eastern Division
3470 Twelfth Street, Room 134
Riverside, CA 92501 |
|--|--|---|

Failure to file at the proper location will result in your documents being returned to you.

ORIGINAL

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Central District of California

Kythera Biopharmaceuticals, Inc.

Plaintiff(s)

v.

Lithera, Inc.

Defendant(s)

CV13- 6338 RSWL(SSX)
Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Lithera, Inc.
9191 Towne Centre Drive
Suite 400
San Diego, CA 92122

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Philip Ou
McDermott Will & Emery LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

AUG 29 2013

Date: _____

CLERK OF COURT

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify):* _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

COPY

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I. (a) PLAINTIFFS (Check box if you are representing yourself)
Kythera Biopharmaceuticals, Inc.

DEFENDANTS (Check box if you are representing yourself)
Lithera, Inc.

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
Philip Ou
McDermott Will & Emery LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025; Telephone: (650) 815-7434

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)

II. BASIS OF JURISDICTION (Place an X in one box only.)

1. U.S. Government Plaintiff
 2. U.S. Government Defendant
 3. Federal Question (U.S. Government Not a Party)
 4. Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES-For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant)

- | | | | | | |
|---|--------------------------------|--------------------------------|---|--------------------------------|--------------------------------|
| Citizen of This State | PTF <input type="checkbox"/> 1 | DEF <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in this State | PTF <input type="checkbox"/> 4 | DEF <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN (Place an X in one box only.)

1. Original Proceeding
 2. Removed from State Court
 3. Remanded from Appellate Court
 4. Reinstated or Reopened
 5. Transferred from Another District (Specify)
 6. Multi-District Litigation

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check "Yes" only if demanded in complaint.)

CLASS ACTION under F.R.Cv.P. 23: Yes No **MONEY DEMANDED IN COMPLAINT:** \$ 1,000,000.00

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
15 U.S.C. Sections 1052(d), 1114, 1119, and 1125: trademark and trade name infringement

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES	CONTRACT	REAL PROPERTY CONT.	IMMIGRATION	PRISONER PETITIONS	PROPERTY RIGHTS
<input type="checkbox"/> 375 False Claims Act	<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 462 Naturalization Application	<input type="checkbox"/> Habeas Corpus: 463 Alien Detainee	<input type="checkbox"/> 820 Copyrights
<input type="checkbox"/> 400 State Reapportionment	<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 830 Patent
<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 530 General	<input checked="" type="checkbox"/> 840 Trademark
<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 140 Negotiable Instrument			<input type="checkbox"/> 535 Death Penalty	SOCIAL SECURITY
<input type="checkbox"/> 450 Commerce/ICC Rates/Etc.	<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	TORTS	TORTS	Other:	<input type="checkbox"/> 861 HIA (1395ff)
<input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 151 Medicare Act	PERSONAL INJURY	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 540 Mandamus/Other	<input type="checkbox"/> 862 Black Lung (923)
<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Org.	<input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Vet.)	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 863 DIWC/DIWW (405 (g))
<input type="checkbox"/> 480 Consumer Credit	<input type="checkbox"/> 153 Recovery of Overpayment of Vet. Benefits	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 560 Civil Detainee Conditions of Confinement	<input type="checkbox"/> 865 RSI (405 (g))
<input type="checkbox"/> 850 Securities/Commodities/Exchange	<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 330 Fed. Employers' Liability	BANKRUPTCY	FORFEITURE/PENALTY	FEDERAL TAX SUITS
<input type="checkbox"/> 890 Other Statutory Actions	<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
<input type="checkbox"/> 891 Agricultural Acts	<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
<input type="checkbox"/> 893 Environmental Matters	REAL PROPERTY	<input type="checkbox"/> 350 Motor Vehicle	CIVIL RIGHTS	LABOR	
<input type="checkbox"/> 895 Freedom of Info. Act	<input type="checkbox"/> 210 Land	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 710 Fair Labor Standards Act	
<input type="checkbox"/> 896 Arbitration	<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 720 Labor/Mgmt. Relations	
<input type="checkbox"/> 899 Admin. Procedures Act/Review of Appeal of Agency Decision	<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 362 Personal Injury-Med Malpractice	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 740 Railway Labor Act	
<input type="checkbox"/> 950 Constitutionality of State Statutes		<input type="checkbox"/> 365 Personal Injury-Product Liability	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 751 Family and Medical Leave Act	
		<input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability	<input type="checkbox"/> 445 American with Disabilities-Employment	<input type="checkbox"/> 790 Other Labor Litigation	
		<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 446 American with Disabilities-Other	<input type="checkbox"/> 791 Employee Ret. Inc. Security Act	
			<input type="checkbox"/> 448 Education		

FOR OFFICE USE ONLY: Case Number: **CV13- 6338**

AFTER COMPLETING PAGE 1 OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED ON PAGE 2.

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET**

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? NO YES

If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? NO YES

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply)
- A. Arise from the same or closely related transactions, happenings, or events; or
 - B. Call for determination of the same or substantially related or similar questions of law and fact; or
 - C. For other reasons would entail substantial duplication of labor if heard by different judges; or
 - D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.

Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.

Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

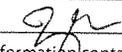
County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	San Diego County

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose. **NOTE: In land condemnation cases, use the location of the tract of land involved.**

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

*Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR SELF-REPRESENTED LITIGANT):  DATE: 08/29/13

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet).

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405 (g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405 (g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405 (g))

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6 2040 Main Street, Fourteenth Floor
7 Irvine, CA 92614
8 Phone: (949) 760-0404
9 Facsimile: (949) 760-9502

10 Attorneys for Defendant
11 LITHERA, INC.

12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

12 KYTHERA 13 BIOPHARMACEUTICALS, INC., 14 15 Plaintiff, 16 17 v. 18 LITHERA, INC. 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 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TABLE OF CONTENTS

Page No.

I. INTRODUCTION..... 1

II. LEGAL STANDARD 2

III. ARGUMENT 2

 A. The Court may consider Plaintiff’s Trademark Office records and SEC filings at the motion to dismiss stage..... 3

 B. The Complaint, Trademark Office records, and SEC filings show that both parties are clinical-stage pharmaceutical companies who do not provide services to others or offer any commercially available products 4

 C. Plaintiff has alleged facts that establish there is no likelihood of confusion 5

 D. Plaintiff has not acquired any service mark rights because its research services are solely performed for its own benefit..... 8

 E. As a practical matter, Plaintiff’s claims are premature because the Court could not even conduct the likelihood of confusion analysis 9

IV. CONCLUSION 11

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TABLE OF AUTHORITIES

Page No(s).

AMF Inc. v. Sleekcraft Boats,
599 F.2d 341 (9th Cir. 1979)..... 9, 10

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 2, 11

Aycock Eng’g, Inc. v. Airflite, Inc.,
560 F.3d 1350 (Fed. Cir. 2009)..... 8, 9

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 2, 11

Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.,
174 F.3d 1036 (9th Cir. 1999)..... 9

Chance v. Pac-Tel Teletrac, Inc.,
242 F.3d 1151 (9th Cir. 2001)..... 8

Daniels-Hall v. Nat’l Educ. Ass’n,
629 F.3d 992 (9th Cir. 2010)..... 2, 9

Entrepreneur Media, Inc. v. Smith,
279 F.3d 1135 (9th Cir. 2002)..... 7

GoTo.com, Inc. v. Walt Disney Co.,
202 F. 3d 1199 (9th Cir. 2000)..... 5

In re Canadian Pacific Ltd.,
754 F.2d 992 (Fed. Cir. 1985)..... 8

Mister Donut of Am., Inc. v. Mr. Donut, Inc.,
418 F.2d 838 (9th Cir. 1969)..... 6

Playboy Enters., Inc. v. Netscape Commc’ns Corp.,
55 F. Supp. 2d 1070 (C.D. Cal. 1999)..... 7

Plevy v. Haggerty,
38 F. Supp. 2d 816 (C.D. Cal. 1998)..... 4

TABLE OF AUTHORITIES

(continued)

Page No(s).

1
2
3
4
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11
12
13
14
15
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Pollution Denim & Co. v. Pollution Clothing Co.,
547 F. Supp. 2d 1132 (C.D. Cal. 2007)..... 4

Rearden LLC v. Rearden Commerce, Inc.,
683 F.3d 1190 (9th Cir. 2012)..... 7

U.S. v. Ritchie,
342 F.3d 903 (9th Cir. 2003)..... 3

OTHER AUTHORITIES

15 U.S.C. §§ 1057 9

Restatement (Third) of Unfair Competition § 20, comment 7

1 Defendant Lithera, Inc. submits this Memorandum in support of its Motion
2 to Dismiss the Complaint filed by Plaintiff Kythera Biopharmaceuticals, Inc.

3 **I. INTRODUCTION**

4 Plaintiff's Complaint for trademark infringement and trademark
5 cancellation should be dismissed for two reasons. First, Plaintiff does not allege
6 any facts that could plausibly establish a likelihood of confusion. Second, the facts
7 Plaintiff does allege establish that Plaintiff lacks any enforceable trademark rights
8 in the asserted service marks.

9 Plaintiff and Defendant are both early stage pharmaceutical companies.
10 They are both in the process of conducting clinical trials for their respective
11 product candidates, and neither of them has any commercially available products.
12 Neither offers to perform pharmaceutical research services for others. Since
13 neither party sells any goods or service to customers, there are no goods or
14 services over which any customers could be confused. In addition, as neither party
15 has any customers, there are no customers who could possibly be confused. Thus,
16 the allegation of likelihood of confusion, which forms the basis of Plaintiff's
17 causes of action, is implausible.

18 In addition, Plaintiff lacks any enforceable rights in its alleged service
19 marks. In order to develop protectable trademark rights in a service mark, a
20 company must use a mark in connection with services performed *for others*.
21 Plaintiff performs pharmaceutical research and development services solely for
22 itself, for the purpose of developing its own products. Services performed solely
23 for a company's own benefit do not give rise to enforceable trademark rights in a
24 service mark.

25 As a practical matter, Plaintiff's allegations are simply premature. Even if
26 the Court wanted to, there would be no way to apply the test for likelihood of
27 confusion in a situation like this where neither party has any goods or services
28 commercially available in a marketplace. Evaluating likelihood of confusion

1 involves considering factors that, at a minimum, require knowing information
2 such as the names of the products, how those products are marketed and to whom
3 they are marketed. Where, as here, there are no commercially available services or
4 goods about which the public could be confused, and no relevant consuming
5 public who could be confused, there can be no likelihood of confusion.

6 Accordingly, Plaintiff's allegations of likelihood of confusion and
7 ownership of enforceable service marks are implausible, and do not state a claim
8 for relief.

9 **II. LEGAL STANDARD**

10 To survive a motion to dismiss, a complaint must allege facts sufficient "to
11 raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550
12 U.S. 544, 555 (2007). The complaint must "contain sufficient factual matter . . . to
13 state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662,
14 678 (2009). A complaint must allege more than just legal conclusions and
15 "[t]hreadbare recitals of the elements of a cause of action." *Id.*

16 Courts are not required to accept as true "allegations that contradict exhibits
17 attached to the Complaint or matters properly subject to judicial notice, or
18 allegations that are merely conclusory, unwarranted deductions of fact, or
19 unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998
20 (9th Cir. 2010).

21 **III. ARGUMENT**

22 The complaint asserts four causes of action.¹ (Complaint, ¶¶ 25-44.) A
23 courtesy copy of the complaint is attached as Exhibit 1 to the Declaration of Emily
24 K. Sauter ("Sauter Dec."). Each claim relies on two assertions that are

25
26 ¹ Three causes of action allege essentially the same conduct (trademark and
27 trade name infringement, unfair competition and false designation of origin) under
28 two federal statutes and California law. (Complaint (Ex. 1), ¶¶ 25-36, 40-44.) The
fourth seeks cancellation of Defendant's Federal trademark registration for
pharmaceutical preparations. (Complaint (Ex. 1), ¶¶ 37-39.)

1 contradicted by the allegations in the Complaint and other matters of public
2 record. First, Plaintiff alleges that Defendant's actions are likely to cause
3 confusion, deception and/or mistake with Plaintiff's marks and names. (*See*
4 Complaint (Ex. 1), ¶¶ 27, 33, 38, 41 (alleging likelihood of confusion).) Second,
5 Plaintiff alleges that it has protectable trademark rights in its service marks. (*See*
6 Complaint (Ex. 1), ¶¶ 26, 32, 38, 40 (alleging protectable trademark rights) & Exs.
7 A & B (attaching Plaintiff's service mark registrations).)

8 Neither of Plaintiff's assertions is plausible. As discussed in more detail
9 below, the allegations in the Complaint establish that neither party offers any
10 commercially available goods or services about which consumers could be
11 confused. The allegations in the Complaint also demonstrate that Plaintiff has not
12 used its marks in connection with providing services to others. Additional
13 documents that are properly considered on this Motion, including the government
14 records of Plaintiff's service mark applications and Plaintiff's SEC filings, further
15 confirm the impossibility of Plaintiff's conclusory allegations. Accordingly,
16 because Plaintiff's Complaint has not alleged a plausible claim for relief, the
17 Court should grant Defendant's Motion to Dismiss.

18 **A. The Court may consider Plaintiff's Trademark Office records and SEC**
19 **filings at the motion to dismiss stage**

20 When considering a Rule 12(b)(6) motion to dismiss, a court can consider
21 documents attached to the complaint, documents incorporated by reference in the
22 complaint, and matters of which the Court may take judicial notice, without
23 converting the motion to dismiss into a motion for summary judgment. *U.S. v.*
24 *Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). Documents are incorporated by
25 reference in a complaint when they are explicitly referred to in the complaint
26 or when they form the basis of the plaintiff's claim. *Id.* at 908.

27 Plaintiff's Complaint specifically attaches and refers to the records of
28 Plaintiff's asserted federal service mark registrations, and those service mark

1 registrations are central to at least some of Plaintiff's claims of trademark
2 infringement. Accordingly, the court may take judicial notice of the official
3 Trademark Office records of the asserted registrations.

4 In addition, "[o]n a motion to dismiss, a court may take judicial notice of
5 matters of public record outside the pleadings". *Plevy v. Haggerty*, 38 F. Supp. 2d
6 816, 821 (C.D. Cal. 1998). Records from the United States Patent and Trademark
7 Office, as well as SEC filings, are matters of public record that courts may
8 properly consider in resolving a motion to dismiss. *Pollution Denim & Co. v.*
9 *Pollution Clothing Co.*, 547 F. Supp. 2d 1132, n.11 (C.D. Cal. 2007) (taking
10 judicial notice of facts from trademark records maintained by the United States
11 Patent and Trademark Office); *Plevy*, 38 F. Supp. 2d at 821 (finding that, because
12 SEC filings "are public records required by the SEC to be filed, the Court may
13 take judicial notice of them"). Accordingly, the Court may consider statements
14 Plaintiff made in its Trademark Office and SEC filings.

15 **B. The Complaint, Trademark Office records, and SEC filings show that**
16 **both parties are clinical-stage pharmaceutical companies who do not**
17 **provide services to others or offer any commercially available products**

18 The Complaint establishes that the parties are clinical-stage pharmaceutical
19 companies that do not provide services for others or sell any commercially
20 available goods. For example, the Complaint states that Plaintiff has one "lead
21 product candidate" that is "currently in Phase III clinical development."
22 (Complaint (Ex. 1), ¶ 1.) The Complaint alleges that the parties' goods "*will be*
23 *sold*" and "*will be* marketed" at some unspecified time in the future. (Complaint
24 (Ex. 1), ¶ 18 (emphases added).) The Complaint does not allege that Plaintiff or
25 Defendant has ever provided research services for the benefit of others, or sold
26 any commercially available goods to others.

27 Excerpts from the Trademark Office records for Plaintiff's federal service
28 mark registration confirm that Plaintiff does not provide any services to others.

1 Plaintiff describes itself as a “clinical-stage biopharmaceutical company[.]”
2 (Sauter Decl., Ex. 2, p. 11, Ex. 3, p. 8.) Plaintiff also states that its “*objective is to*
3 *develop* first-in-class, prescription products” (*Id.* Ex. 3, p. 8 (emphases
4 added).) Plaintiff states that it “develop[s] prescription therapeutics[.]” (*id.* Ex. 4,
5 p. 6), and is “focused on the discovery, development and commercialization of
6 novel prescription products for the aesthetic medicine market[.]” (*id.*, Ex. 2, p. 17,
7 Ex. 3, p. 8). Plaintiff never suggests that it has sold any commercially available
8 products or provided any services *for others*. (*See id.* at Exs. 2-4.) Plaintiff also
9 confirms that its product candidate, ATX-101, is not commercially available
10 because it is still in clinical trials. (*Id.* at Ex. 2, p. 11, Ex. 3, p. 8.)

11 Plaintiff’s regulatory filings similarly show that Plaintiff has not provided
12 services to others. Plaintiff’s 2012 SEC 10-K Annual Report describes the
13 company as a “*clinical-stage* biopharmaceutical company focused on the
14 discovery, development and commercialization of novel prescription products for
15 the aesthetic medicine market.” (Sauter Decl., Ex. 5, p.1 (emphasis added).)
16 Plaintiff’s Annual Report elaborates that its objective “is to develop first-in-class,
17 prescription products” and that it has one “product candidate, ATX-101”, that is
18 still in Phase III clinical development. (*Id.*)

19 Thus, the record available on this Motion establishes two critical facts: (1)
20 neither party has any commercially available products or services; and (2) Plaintiff
21 performs research services only for its own benefit and to develop its own
22 products.

23 **C. Plaintiff has alleged facts that establish there is no likelihood of**
24 **confusion**

25 Plaintiff bases its causes of action on allegations of likelihood of consumer
26 confusion in the marketplace. (*See* Complaint (Ex. 1), ¶¶ 27, 33, 38, 41 (alleging
27 likelihood of confusion)); *see also GoTo.com, Inc. v. Walt Disney Co.*, 202 F. 3d
28 1199 (9th Cir. 2000) (likelihood of confusion is the central element of trademark

1 infringement). However, Plaintiff's Complaint fails to allege facts that could
2 plausibly support a finding of a likelihood of confusion. To the contrary, the
3 Complaint alleges facts that establish there is no possibility, let alone a likelihood,
4 of confusion. Accordingly, the Court should dismiss Plaintiff's claims.

5 As discussed above, Plaintiff alleges that it is still in the "clinical
6 development" phase for its "lead product candidate" for an injectable drug.
7 (Complaint (Ex. 1), ¶ 1.) Plaintiff similarly alleges that Defendant "is also in the
8 process of developing an injectable drug" that is "currently in Phase II clinical
9 development" for use in humans. (*Id.*) These allegations establish that the parties
10 do not have any commercially available products or services. Plaintiff further
11 alleges that, "[t]he parties' respective goods ... **will be** sold" and "**will be**
12 marketed" at some unspecified point in the future. (*Id.*, ¶ 18 (emphases added).)
13 These allegations confirm that there can be no confusion, and any potential future
14 competition or confusion between the parties' products is entirely speculative at
15 this point because neither has an FDA approved product.

16 There can be no likelihood of confusion where there are no competing
17 commercially available goods and/or services that could be confused in a
18 marketplace. It has been the law in the Ninth Circuit for more than half a century
19 that, "[p]erhaps the most important element of unfair trade is that there be
20 **competition in the sale of like merchandise** and that there is, or is likelihood of,
21 confusion as to which **competitive article** is being purchased." *Mister Donut of*
22 *Am., Inc. v. Mr. Donut, Inc.*, 418 F.2d 838, 843 (9th Cir. 1969) (emphases added).
23 Thus, where, like here, there is absolutely no competition between the parties,
24 there can be no likelihood of confusion.

25 Nor can there be any likelihood of confusion where there is no consuming
26 public that could be confused. The Ninth Circuit has similarly observed that,
27 "[t]he test for likelihood of confusion is whether a reasonably prudent **consumer**
28 **in the marketplace** is likely to be confused as to the origin of the good or service

1 bearing one of the marks.” *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1140
2 (9th Cir. 2002) (emphasis added). Thus, when there are no purchasers of goods
3 and/or services in any marketplace, there can be no likelihood of confusion.

4 Plaintiff’s concern seems to be related to its allegation that “sophisticated
5 individuals in the field of pharmaceuticals and in the press” have confused the
6 mechanism of action of the parties’ respective clinical-stage products. (*See*
7 Complaint (Ex. 1), ¶ 19.) Scientific confusion about the way the parties’ potential
8 products function in the body does not give rise to any cause of action and does
9 not establish a likelihood of confusion in a trademark sense.

10 The only type of confusion that is relevant to trademark law is whether the
11 consuming public is likely to be confused as to the source of the goods or services.
12 *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1214 (9th Cir. 2012).
13 This is because “trademark infringement protects only against mistaken
14 purchasing decisions and not against confusion generally.” *Id.* (internal quotation
15 omitted). As Judge Stotler has observed, “[s]ome people are always confused.”
16 *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 55 F. Supp. 2d 1070, 1083
17 (C.D. Cal. 1999). “Accordingly, to impose liability, the plaintiff must show
18 confusion of *a significant number of prospective purchasers.*” *Id.* (emphasis
19 added).

20 In the absence of any commercially available goods or services, there are no
21 prospective purchasers who could be confused. Where there is no relevant
22 consuming public that *could be* confused, there is certainly no consuming public
23 that is *likely* to be confused. Accordingly, Plaintiff has not alleged any facts that
24 plausibly suggest a likelihood of confusion by the relevant consuming public, and
25 the Court should dismiss the Complaint.

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1 **D. Plaintiff has not acquired any service mark rights because its research**
2 **services are solely performed for its own benefit**

3 The Complaint should also be dismissed for the independent reason that
4 Plaintiff has alleged facts that establish Plaintiff lacks any enforceable trademark
5 rights in its service marks. In order to acquire trademark rights in a service mark,
6 the mark must be used for the benefit *of others*. *In re Canadian Pacific Ltd.*, 754
7 F.2d 992, 994 (Fed. Cir. 1985). If the use is solely for the benefit of the alleged
8 owner of the mark, the use does not give rise to trademark rights. *Id.*

9 Use of the mark in connection with performing services for the benefit of
10 others is a necessary predicate both to establishing common-law trademark rights,
11 *see Chance v. Pac-Tel Teletrac, Inc.*, 242 F.3d 1151, 1156 (9th Cir. 2001), and to
12 receiving a federal registration for a service mark, *see Aycock Eng'g, Inc. v.*
13 *Airflite, Inc.*, 560 F.3d 1350, 1357-58 (Fed. Cir. 2009). “At the very least, in order
14 for an applicant to meet the use requirement, there must be an open and notorious
15 public offering of the services to those for whom the services are intended.” *Id.* at
16 1358. Advertising or publicizing a service that the applicant intends to perform in
17 the future will not support registration. *Id.* Adopting a mark and preparing to begin
18 its use are similarly insufficient to claim ownership of a mark or apply for its
19 registration. *Id.*

20 Plaintiff uses its mark as the name of its company. (Sauter Decl., Ex. 2.)
21 However, Plaintiff does not perform or offer to perform any research services for
22 others. Because Plaintiff has not performed services for the benefit of others, it has
23 no enforceable service mark rights, and its service mark registrations for research
24 services are void *ab initio*. *Id.* at 1357. As discussed above, the Complaint,
25 Plaintiff’s representations to the United States Patent and Trademark Office in
26 connection with obtaining the asserted service mark registrations, and Plaintiff’s
27 public SEC filings, all show that Plaintiff has not used its asserted marks in
28 connection with any services for the benefit of others. Plaintiff’s research services

1 are performed solely for its own benefit. Thus, Plaintiff's conclusory allegation
2 that it has enforceable service mark rights is contradicted by other allegations in
3 the Complaint as well as by matters of public record.

4 If the allegations in the Complaint had not established Plaintiff's lack of
5 bona fide use for others, and if the lack of use for others were not a matter of
6 public record, Plaintiff might have been able to rely on the mere existence of its
7 federal registrations as prima facie evidence of actual service mark rights. *See* 15
8 U.S.C. §§ 1057(b); 1115(a); *Brookfield Commc'ns, Inc. v. West Coast Entm't*
9 *Corp.*, 174 F.3d 1036, 1047 (9th Cir. 1999). However, where, as here, the
10 allegations in the Complaint and available public records establish the mark was
11 not used in connection with services performed for others, the registration is void
12 *ab initio*. *Aycock Engineering*, 560 F.3d at 1357. Accordingly, the Court need not,
13 and should not, accept Plaintiff's allegations of enforceable service mark rights as
14 true. *See Daniels-Hall*, 629 F.3d at 998.

15 Plaintiff has failed to allege facts sufficient to establish a plausible claim
16 that it has enforceable trademark rights in its alleged service marks. This is yet
17 another reason the Court should dismiss Plaintiff's claims.

18 **E. As a practical matter, Plaintiff's claims are premature because the**
19 **Court could not even conduct the likelihood of confusion analysis**

20 Plaintiff's Complaint also appears to ask the Court to speculate regarding
21 whether there will be any likelihood of confusion among relevant consumers
22 regarding the parties' respective lead product candidates if both products reach the
23 market. This issue is both premature and unanswerable. Many of the factors the
24 Court would apply in determining whether there is a likelihood of confusion
25 simply cannot be applied where there are no commercially available goods or
26 services. *See AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-355 (9th Cir. 1979)
27 (discussing eight factors to be applied).

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1 For example, one of the eight factors this Court would consider in assessing
2 likelihood of confusion is the proximity of the goods and/or services in the
3 marketplace. *Id.* The Court cannot analyze the proximity of unavailable goods
4 and/or services in a non-existent marketplace. Another factor the Court would
5 consider is the similarity of the marks. *Id.* The Court cannot analyze this factor
6 without knowing the names of the products. The parties' product candidates are
7 currently known by clinical research identifiers ATX-101 and LIPO-202. Before
8 they are launched commercially, they will be given product names and trade dress
9 that could eliminate any possibility of confusion. It would be pointless to
10 speculate as to what the product names and packaging might be, or how those
11 unknown details might impact consumers in a hypothetical future market.

12 In assessing likelihood of confusion, the Court may also consider evidence
13 of actual confusion in the marketplace. *Id.* However, the Court would not be able
14 to analyze whether there is any actual confusion in the relevant marketplace until
15 there is a commercial market for the products. Another factor is the marketing
16 channels used. *Id.* Again, the Court could not evaluate this factor unless and until
17 there are commercially available products and actual marketing channels being
18 used. Another factor is the degree of care likely to be exercised by a purchaser of
19 the goods and/or services. *Id.* It would be difficult, if not impossible, to
20 meaningfully assess the likely degree of care exercised by potential consumers
21 without knowing who those consumers are going to be.

22 At this point, any attempt to guess what the parties' products might be
23 called, how they might be marketed, to whom they will be marketed, or how they
24 might be positioned in their respective markets, would be pure speculation. The
25 Court would not be able to offer anything more than an unconstitutional advisory
26 opinion as to how likely confusion might be under various potential scenarios. A
27 court simply cannot assess the likelihood of confusion where, as here, no goods
28 and/or services have been sold by either party.

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IV. CONCLUSION

Plaintiff’s Complaint does not suffice under *Iqbal* and *Twombly* because it does not allege any facts that, if true, would plausibly give rise to enforceable trademark rights or a likelihood of confusion by consumers. Plaintiff’s conclusory allegations are contradicted by the facts in the Complaint and by available government records. Accordingly, the Court should dismiss the Complaint.

Respectfully submitted,
KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: November 25, 2013

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