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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	Other Motions/Papers
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Signature	/John J. Dabney/
Date	02/24/2014
Attachments	Kythera TTAB Notice - 92058417.pdf(913117 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 NOTICE REGARDING PENDING CIVIL ACTION
FOR TRADEMARK INFRINGEMENT AND CANCELLATION**

In September 2013, Registrant Kythera Biopharmaceuticals, Inc. (“Kythera”) commenced an action in the United States District Court for the Central District of California against Petitioner Lithera, Inc. *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, Civil Action No. 13cv6338 (C.D. Cal.) (“Civil Action”). (See Exhibit A (Complaint).) In that action, Kythera alleges, among other things, trademark infringement, false designation of origin and unfair competition arising from Lithera’s use and registration of the mark LITHERA. (*Id.*) Kythera requests, among other things, a Court order cancelling Lithera’s registrations for LITHERA. In response, Lithera filed a motion to dismiss Kythera’s Complaint under Rule 12(b)(6) for failure to state a claim.

On December 20, 2013, Lithera filed this proceeding alleging, among other things, that Kythera had abandoned its federally registered marks for KYTHERA. Kythera filed an Answer denying the salient allegations in the petitions. (Dkt. No. 6.) In addition, Kythera filed a motion to suspend this proceeding in view of the related Civil Action involving the same parties and

marks. (Dkt. No. 5.) Lithera opposed that motion largely because the Court had, at that time, not yet ruled on Lithera's Motion to Dismiss in the pending Civil Action. (Dkt. No. 7.)

On February 20, 2014, the Court denied Lithera's Motion to Dismiss. (See Exhibit B (Opinion).) Thus, Kythera's Civil Action alleging trademark infringement and trademark cancellation will proceed. Because Lithera's opposition to Kythera's motion to suspend largely rested on the fact that Lithera's motion to dismiss the Civil Action remained pending, because the allegations alleged in the petitions for cancellation are affirmative defenses to Kythera's claims in the Civil Action, and because the Court has now denied Lithera's Motion to Dismiss, Kythera respectfully requests the Board to suspend these proceedings pending resolution of *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, Civil Action No. 13cv6338 (C.D. Cal.).

Dated: February 24, 2014

Kythera Biopharmaceuticals, Inc.

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 February 24, 2014.

Respectfully submitted,

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

DM_US 49925245-1.087931.0011

EXHIBIT A

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.**

CV 13- 6338 PSM (SS)

**COMPLAINT FOR TRADEMARK
INFRINGEMENT, UNFAIR
COMPETITION, FALSE
DESIGNATION OF ORIGIN,
TRADE NAME INFRINGEMENT
AND TRADEMARK
CANCELLATION**

DEMAND FOR JURY TRIAL

22
23 Plaintiff Kythera Biopharmaceuticals, Inc. ("Kythera") brings this Complaint
24 against Defendant Lithera, Inc. ("Defendant") and alleges as follows:
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27
28

Complaint

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ATTORNEYS AT LAW
WASHINGTON

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

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

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

1 34. Defendant’s wrongful conduct has caused Kythera to lose control over
2 the reputation and goodwill associated with Kythera’s KYTHERA marks and
3 names.
4

5 35. Defendant’s wrongful conduct is causing Kythera irreparable harm and
6 damages. Defendant has been unjustly enriched by its unlawful conduct.
7

8 36. Unless Defendant is enjoined from its wrongful conduct, Kythera will
9 continue to suffer irreparable injury and harm, for which Kythera has no adequate
10 remedy at law.
11

12 **COUNT III**

13 **TRADEMARK CANCELLATION**
14 **(15 U.S.C. §§ 1052(d), 1119)**

15 37. Kythera re-alleges and incorporates the allegations in the paragraphs
16 above as if fully set forth herein.
17

18 38. Defendant’s U.S. Trademark Registration No. 4067542 for LITHERA
19 is likely to cause confusion, deception and/or mistake with respect to Kythera’s
20 KYTHERA marks and names. *See* 15 U.S.C. §§ 1052(d), 1119.
21

22 39. Kythera is likely to be damaged by Defendant’s maintenance of U.S.
23 Trademark Registration No. 4067542.
24

25 **COUNT IV**

26 **TRADEMARK INFRINGEMENT, UNFAIR COMPETITION, FALSE**
27 **DESIGNATION OF ORIGIN AND TRADE NAME INFRINGEMENT**
28 **UNDER CALIFORNIA LAW**

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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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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:

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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.
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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	PERSONAL PROPERTY	<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"/> 370 Other Fraud	<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"/> 371 Truth in Lending	<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"/> 380 Other Personal Property Damage	<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).

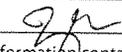
County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	San Diego County

(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))

EXHIBIT B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Kythera Biopharmaceuticals, Inc.,)	CV 13-6338 RSWL (SSx)
)	
Plaintiff,)	ORDER re: Defendant's
)	Motion to Dismiss the
v.)	Complaint [20]
)	
Lithera, Inc.,)	
)	
)	
Defendant.)	
)	
)	
)	

Currently before the Court is Defendant Lithera, Inc.'s ("Defendant") Motion to Dismiss the Complaint [20]. Plaintiff Kythera Biopharmaceuticals, Inc. ("Plaintiff") filed its Opposition on December 17, 2013 [30]. Defendant filed a Reply on December 23, 2013 [31]. This matter was taken under submission on January 2, 2014 [32]. Having reviewed all papers submitted pertaining to the Motion, and having considered all arguments presented to the Court, the

1 Court **NOW FINDS AND RULES AS FOLLOWS:**

2 Defendant's Motion to Dismiss is hereby **DENIED.**

3 **I. Background**

4 Plaintiff is a Delaware corporation with its
5 principal place of business in California. Compl. ¶ 2.
6 Defendant is also a Delaware corporation with its
7 principal place of business in California. Id. at ¶ 3.

8 Plaintiff is a biopharmaceutical company dedicated
9 to researching and developing pharmaceuticals used in
10 aesthetic medicine, including pharmaceuticals to reduce
11 human body fat. Id. at ¶ 6. Plaintiff was founded in
12 2005. Id. Since 2006, Plaintiff has used the mark
13 KYTHERA for its pharmaceutical research and
14 development, including in connection with its lead
15 product candidate, ATX-101, which is designed to reduce
16 human body fat. Id. at ¶ 7.

17 Plaintiff owns a federal trademark registration for
18 KYTHERA, U.S. Reg. No. 3357920, registered December 18,
19 2007.¹ Id. at ¶ 9. Plaintiff also owns a federal
20

21 ¹ Specifically, the service mark registration was
22 granted for: "Chemical research; Chemical, biochemical,
23 biological and bacteriological research and analysis;
24 Conducting early evaluations in the field of new
25 pharmaceuticals; Development and test of chemical
26 production methods; Development of new technology for
27 others in the field of biotechnology; Development of
28 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;

1 trademark registration for KYTHERA, U.S. Reg. No.
2 4012388, registered August 16, 2011.² Id. at ¶ 11.

3 Plaintiff has invested considerable resources to
4 advertise and promote its goods and services under its
5 KYTHERA marks and trade names. Id. at ¶ 12.

6 After Plaintiff first used its KYTHERA marks and
7 trade names, Defendant filed an intent to use
8 application in the United States Patent and Trademark
9 Office ("USPTO") for LITHERA for "pharmaceutical
10 preparations for reducing the size and appearance of
11 adipose deposits in a body." Id. at ¶ 14. Defendant
12 received a federal trademark registration for LITHERA,
13 U.S. Reg. No. 4067542, registered December 6, 2011.
14 Id. at ¶ 15. Defendant's trademark application alleges
15 a date of first use of Lithera in commerce of September
16 2011. Id. Defendant advertises its goods and services
17 at lithera.com. Id. at ¶ 14.

18

19

20 Pharmaceutical research and development; Pharmaceutical
21 research services; Research on the subject of
22 pharmaceuticals; Testing, inspection or research of
23 pharmaceuticals, cosmetics or foodstuff." Compl. Ex.
24 A.

23

24 ² Specifically, a service mark was granted for:
25 "Research and development of pharmaceutical
26 preparations and aesthetic preparations; medical and
27 scientific research information in the fields of
28 pharmaceutical preparations, aesthetic preparations and
clinical trials; and providing a website featuring
information about investigational pharmaceutical
preparations and aesthetic preparations." Compl. Ex.
B.

1 The Parties' goods and services are discussed and
2 presented under the KYTHERA and LITHERA marks and names
3 in the same publications, including investor
4 publications, and at the same conferences. Id. at ¶
5 20. Plaintiff has demanded that Defendant cease and
6 desist all use of LITHERA and similar names and marks,
7 but Defendant has refused to do so. Id. at ¶ 23.

8 Plaintiff filed its Complaint on August 29, 2013
9 [1], alleging trademark infringement, unfair
10 competition, and false designation of origin under 15
11 U.S.C. §§ 1114, and 1125, and under California law.
12 Plaintiff also included a claim for trademark
13 cancellation under 15 U.S.C. §§ 1052(d), and 1119 [1].

14 Defendant filed the instant Motion to Dismiss the
15 Complaint on November 25, 2013 [20].

16 II. Legal Standard

17 A. Motion to Dismiss Pursuant to Rule 12(b)(6)

18 Federal Rule of Civil Procedure 12(b)(6) allows a
19 party to move for dismissal of one or more claims if
20 the pleading fails to state a claim upon which relief
21 can be granted. Dismissal can be based on a lack of
22 cognizable legal theory or lack of sufficient facts
23 alleged under a cognizable legal theory. Balistreri v.
24 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
25 1990). However, a party is not required to state the
26 legal basis for its claim, only the facts underlying
27 it. McCalden v. Cal. Library Ass'n, 955 F.2d 1214,
28 1223 (9th Cir. 1990). In a Rule 12(b)(6) motion to

1 dismiss, a court must presume all factual allegations
2 of the complaint to be true and draw all reasonable
3 inferences in favor of the non-moving party. Klarfeld
4 v. United States, 944 F.2d 583, 585 (9th Cir. 1991).

5 The question presented by a motion to dismiss is
6 not whether the plaintiff will prevail in the action,
7 but whether the plaintiff is entitled to offer evidence
8 in support of its claim. Swierkiewica v. Sorema N.A.,
9 534 U.S. 506, 511 (2002). "While a complaint attacked
10 by a Rule 12(b)(6) motion to dismiss does not need
11 detailed factual allegations, a plaintiff's obligation
12 to provide the 'grounds' of his 'entitle[ment] to
13 relief' requires more than labels and conclusions, and
14 a formulaic recitation of a cause of action's elements
15 will not do." Bell Atl. Corp. v. Twombly, 550 U.S.
16 544, 555 (2007) (internal citation omitted). Although
17 specific facts are not necessary if the complaint gives
18 the defendant fair notice of the claim and the grounds
19 upon which the claim rests, a complaint must
20 nevertheless "contain sufficient factual matter,
21 accepted as true, to state a claim to relief that is
22 plausible on its face." Ashcroft v. Iqbal, 556 U.S.
23 662, 678 (2009) (internal quotation marks omitted).

24 If dismissed, a court must then decide whether to
25 grant leave to amend. The Ninth Circuit has repeatedly
26 held that a district court should grant leave to amend
27 even if no request to amend the pleadings was made,
28 unless it determines that the pleading could not

1 possibly be cured by the allegation of other facts.
2 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

3 **III. Discussion**

4 **A. Request for Judicial Notice**

5 Defendant requests that this Court take judicial
6 notice of Plaintiff's federal service mark
7 registrations, the USPTO's records of the
8 registrations, and Plaintiff's Securities and Exchange
9 Commission public filings. Mot. 3:18-4:14.

10 "A court may . . . consider certain
11 materials-documents attached to the complaint,
12 documents incorporated by reference in the complaint,
13 or matters of judicial notice-without converting [a]
14 motion to dismiss into a motion for summary judgment."
15 United States v. Ritchie, 342 F.3d 903, 907-08 (9th
16 Cir. 2003) (citing Van Buskirk v. CNN, 284 F.3d 977,
17 980 (9th Cir. 2002); Barron v. Reich, 13 F.3d 1370,
18 1377 (9th Cir. 1994)). The incorporation by reference
19 doctrine permits the Court to "take into account
20 documents 'whose contents are alleged in a complaint
21 and whose authenticity no party questions, but which
22 are not physically attached to the [plaintiff's]
23 pleading.'" Knieval v. ESPN, 393 F.3d 1068, 1076 (9th
24 Cir. 2005) (quoting In re Silicon Graphics Inc. Sec.
25 Litig., 183 F.3d 970, 986 (9th Cir. 1999)); see also
26 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.
27 2001). The Ninth Circuit has "extended the
28 'incorporation by reference' doctrine to situations in

1 which the plaintiff's claim depends on the contents of
2 the document, the defendant attaches the document to
3 its motion to dismiss, and the parties do not dispute
4 the authenticity of the document." Id. (citing Parrino
5 v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)).

6 Plaintiff's service mark registrations are attached
7 to its Complaint (Compl. Exs. A-B), and these
8 registrations form the basis of some of Plaintiff's
9 claims of trademark infringement (see e.g., Compl. ¶¶
10 31-36). As such, the Court takes judicial notice of
11 the trademark records for Plaintiff's trademark
12 registrations.

13 Furthermore, "[o]n a motion to dismiss, a court may
14 take judicial notice of matters of public record
15 outside the pleadings." Plevy v. Haggerty, 38 F. Supp.
16 2d 816, 821 (C.D. Cal. 1998) (citing MGIC Indem. Corp.
17 v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986); Kramer
18 v. Time Warner, Inc., 837 F.2d 767, 774 (2d Cir.
19 1991)). Such public records include Securities and
20 Exchange Commission ("SEC") filings. Id. Accordingly,
21 the Court also takes judicial notice of Plaintiff's SEC
22 filings.

23 **B. Trademark Infringement**

24 In its Complaint, Plaintiff has alleged causes of
25 action for: (1) trademark infringement, (2) unfair
26 competition, and (3) false designation of origin under
27 the Lanham Act, 15 U.S.C. §§ 1114 & 1125, and under
28 California law. Compl. ¶¶ 25-36, 40-44.

1 This Court analyzes these claims together for the
2 purposes of this Motion. "[T]he courts have uniformly
3 held that common law and statutory trademark
4 infringement are merely specific aspects of unfair
5 competition." Hokto Kinoko Co. v. Concord Farms, Inc.,
6 810 F. Supp. 2d 1013, 1031 (C.D. Cal. 2011) (citing New
7 West Corp. v. NYM Co. of California, Inc., 595 F.2d
8 1194, 1201 (9th Cir. 1979)); see also Grey v. Campbell
9 Soup Co., 650 F. Supp. 1166, 1173 (C.D. Cal. 1986)
10 ("The tests for infringement of a federally registered
11 mark under § 32(1), 15 U.S.C. § 1114(1), infringement
12 of a common law trademark, unfair competition under §
13 43(a), 15 U.S.C. § 1125(a), and common law unfair
14 competition involving trademarks are the same"). A
15 claim for false designation of origin under 15 U.S.C. §
16 1125 requires proof of the same elements as a claim for
17 trademark infringement under 15 U.S.C. § 1114.
18 Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.,
19 174 F.3d 1036, 1046 n.6 (9th Cir. 1999) (citing 15
20 U.S.C. §§ 1114(1) & 1125; AMF Inc. v. Sleekcraft Boats,
21 599 F.2d 341, 348 (9th Cir. 1979)). Furthermore, the
22 Ninth Circuit "has consistently held that state common
23 law claims of unfair competition . . . are
24 'substantially congruent' to claims made under the
25 Lanham Act." Cleary v. News Corp., 30 F.3d 1255, 1262-
26 63 (9th Cir. 1994) (citing Academy of Motion Picture
27 Arts & Scis. v. Creative House Promotions, Inc., 944
28 F.2d 1446, 1457 (9th Cir. 1991)).

1 To prove a claim of trademark infringement, a
2 plaintiff must show: (1) that it has a valid,
3 protectable trademark, and (2) that defendant's use of
4 the mark is likely to cause confusion. Applied Info.
5 Scis. Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir.
6 2007) (citing Brookfield Commc'ns, 174 F.3d at 1047,
7 1053)); Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d
8 1126, 1134 (9th Cir. 2006) ("A claim of trademark
9 infringement under § 1114(1)(a) of the Lanham Act
10 requires a trademark holder to demonstrate: (1)
11 ownership of a valid mark (i.e., a protectable
12 interest), and (2) that the alleged infringer's use of
13 the mark is likely to cause confusion, or to cause
14 mistake, or to deceive consumers") (internal quotes
15 omitted) (quoting KP Permanent Make-Up, Inc. v. Lasting
16 Impression I, Inc., 408 F.3d 596, 602 (9th Cir. 2005)).

17 1. Validity of the Trademarks

18 Defendant contends that Plaintiff has no
19 protectable interest in the KYTHERA marks because
20 Plaintiff does not use those marks in connection with
21 performing services for the benefit of others. Mot.
22 8:1-13; Reply 13:19-21. Plaintiff avers that its
23 federal trademark registrations show the incontestible
24 status and validity of its rights in the KYTHERA marks.
25 Opp'n 8:2-13.

26 The Lanham Act defines a trademark as:
27 any word, name, symbol, or device, or any
28 combination thereof--

1 (1) used by a person, or
2 (2) which a person has a bona fide intention to
3 use in commerce and applies to register on the
4 principal register established by this chapter,
5 to identify and distinguish his or her goods,
6 including a unique product, from those
7 manufactured or sold by others and to indicate
8 the source of the goods, even if that source is
9 unknown.

10 15 U.S.C. § 1127. Service marks are similarly defined;
11 in fact "the only difference between a trademark and a
12 service mark is that a trademark identifies goods while
13 a service mark identifies services. . . . Service
14 marks and trademarks are identified by identical
15 standards." Chance v. Pac-Tel Teletrac, Inc., 242 F.3d
16 1151, 1156 (9th Cir. 2001) (citing West & Co., Inc. v.
17 Arica Inst., Inc., 557 F.2d 338, 340 n.1 (2d Cir.
18 1977); Caesars World, Inc. v. Caesar's Palace, 490 F.
19 Supp. 818, 822 (D.N.J. 1980)).

20 Typically, "[r]egistration of a mark 'on the
21 Principal Register in the Patent and Trademark Office
22 constitutes prima facie evidence of the validity of the
23 registered mark and of [the registrant's] exclusive
24 right to use the mark on the goods and services,
25 specified in the registration.'" Applied Info. Scis.
26 Corp. v. eBay, Inc., 511 F.3d 966, 970 (9th Cir. 2007)
27 (quoting Brookfield Commc'ns, W. Coast Entm't Corp.,
28 174 F.3d 1036, 1047 (9th Cir. 1999)). Accordingly,

1 "the registrant is granted a presumption of ownership,
2 dating to the filing date of the application for
3 federal registration." Sengoku Works v. RMC Int'l, 96
4 F.3d 1217, 1219-20 (9th Cir. 1996) (citing Vuitton et
5 Fils S.A. v. J. Young Enters., 644 F.2d 769, 775-76
6 (9th Cir. 1981); Rolley, Inc. v. Younghusband, 204 F.2d
7 209 (9th Cir. 1953)). The presumption can be rebutted
8 "by showing that the registrant had not established
9 valid ownership rights in the mark at the time of
10 registration." Id. In this case, both of Plaintiff's
11 marks are federally registered service marks; they are
12 therefore entitled to a presumption of validity. See
13 Compl. ¶¶ 9, 11 Exs. A-B. Nevertheless, Defendant
14 contends that Plaintiff has no valid rights in the
15 marks.

16 To acquire ownership of a trademark, "[i]t is not
17 enough to have invented the mark first or even to have
18 registered it first; the party claiming ownership must
19 have been the first to actually use the mark in the
20 sale of goods or services." Halicki Films, LLC v.
21 Sanderson Sales & Mktg., 547 F.3d 1213, 1226 (9th Cir.
22 2008) (quoting Sengoku Works Ltd. v. RMC Int'l, Ltd.,
23 96 F.3d 1217, 1219 (9th Cir. 1996)). Use of a mark
24 means the bona fide use of such mark in the ordinary
25 course of trade, and not made merely to reserve a right
26 in a mark. 15 U.S.C. § 1127. The term "use in
27 commerce" is congruent with this definition as well.
28 See Electro Source, LLC v. Bradess-Kalt-Aetna Group,

1 Inc., 458 F.3d 931, 936 (9th Cir. 2006). Consequently,
2 "[f]or both goods and services, the 'use in commerce'
3 requirement includes (1) an element of actual use, and
4 (2) an element of display." Rearden LLC, 683 F.3d at
5 1204 (quoting Chance, 242 F.3d at 1159).

6 As a preliminary matter, Plaintiff has alleged that
7 it has used its KYTHERA marks both in connection with
8 goods and with services. In this respect, it is
9 crucial to determine whether Plaintiff has plausibly
10 alleged that it has used the KYTHERA marks in commerce
11 in connection with both its goods and its services.

12 The Court first finds that Plaintiff has alleged
13 sufficient facts to show that it has a protectable
14 trademark interest. Shipments of drugs for clinical
15 testing may be a sufficient use in commerce to show a
16 protectable interest. See G.D. Searle & Co. v.
17 Nutrapharm, Inc., No. 98 Civ. 6890 TPG, 1999 WL 988533,
18 at *3 (S.D.N.Y. Nov. 1, 1999) (citing S. REP. 100-515,
19 44-45 (1998), reprinted in 1988 U.S.C.C.A.N. 5577,
20 5607; H.R. No. 100-1028, at 15 (1998)) (noting that the
21 legislative history for the 1989 amendment to the
22 Lanham Act specifically cited shipments for clinical
23 trials as a sufficient use in commerce). Here, because
24 Plaintiff alleges that its "lead product candidate" is
25 "currently in Phase III clinical development," such
26 activity may be sufficient to show that Plaintiff used
27 the KYTHERA trademark on goods in commerce. Compl. ¶
28 1. Specifically, it is plausible that Plaintiff has

1 shipped ATX-101 under its KYTHERA marks in connection
2 with its clinical trials. As the Lanham Act protects
3 registered and unregistered marks (see 15 U.S.C. §
4 1125), Plaintiff has properly alleged a protectable
5 interest, even if that interest is not registered.

6 It is less clear whether Plaintiff has sufficiently
7 alleged facts showing that it has a valid, protectable
8 interest in its service marks.

9 Defendant cites to In re Canadian Pacific Ltd., 754
10 F.2d 992, 994 (Fed. Cir. 1985), for the proposition
11 that a service means "the performance of labor for the
12 benefit of another." Mot. 8:1-7. Several courts have
13 cited to Canadian Pacific for the idea that services
14 "must not be 'solely for the benefit of the performer;
15 the services must be rendered to others.'" See e.g.,
16 Morningside Group Ltd. v. Morningside Capital Group,
17 L.L.C., 182 F.3d 133, 137-38 (2d Cir. 1999); In re
18 Adver. & Mktg. Dev., Inc., 821 F.2d 614, 619 (Fed. Cir.
19 1987); see also Cottonwood Fin. Ltd. v. Cash Store Fin.
20 Servs., Inc., 778 F. Supp. 2d 726, 139 (N.D. Tex.
21 2011); Huthwaite, Inc. v. Sunrise Assisted Living,
22 Inc., 261 F. Supp. 2d 502, 513 (E.D. Va. 2003).

23 However, the Ninth Circuit has held that "trademark
24 rights can vest even before any goods or services are
25 actually sold." Brookfield Commc'ns, 174 F.3d at 152
26 (quoting New West Corp. v. NYM Co. of California, Inc.,
27 595 F.2d 1194, 1200 (9th Cir. 1979)). The Ninth
28 Circuit employs the "'totality of the circumstances'

1 approach" to determine "whether the two prongs of the
2 'use in commerce' test have been satisfied." Id. at
3 1205. Under this approach, the Court may consider
4 certain pre-sales activities "to determine whether a
5 service mark has been adequately used in commerce so as
6 to gain the protection of the Lanham Act." Chance, 242
7 F.3d at 1159. Such a determination is "highly fact
8 specific." Rearden LLC, 683 F.3d at 1208; Electro
9 Source, 458 F.3d at 940.

10 Actually rendering a service to third parties is
11 not necessarily required to acquire a protectable
12 interest. Rearden LLC, 683 F.3d at 1204; Brookfield
13 Commc'ns, 174 F.3d at 1052; Macy's, Inc. v. Strategic
14 Marks, LLC, No. 11-6198 SC, 2013 WL 1149570, at *4
15 (N.D. Cal. Mar. 19, 2013)). "'The purpose of a
16 trademark is to help consumers identify the source'" of
17 a good or service, and a mark "'is not meritorious of
18 trademark protection until it is used in public in a
19 manner that creates an association among consumers
20 between the mark and the mark's owner.'" Id. (quoting
21 Brookfield Commc'ns, 174 F.3d at 1051). What matters
22 is whether Plaintiff's pre-sales activities
23 "constituted 'use in a way sufficiently public to
24 identify or distinguish the [services] in an
25 appropriate segment of the public mind as those of the
26 adopter of the mark.'" Brookfield Commc'ns, 174 F.3d
27 at 1052 (quoting New West, 595 F.2d at 1200). Of
28 course, if a party only provides services internally

1 and does not provide or offer services to outsiders,
2 that party likely "would fail to show use in a way
3 sufficiently public in nature to identify or
4 distinguish those services in an appropriate segment of
5 the public mind." Rearden LLC, 683 F.3d at 1206-07
6 (citing Brookfield Commc'ns, 174 F.3d at 1052).
7 Nevertheless, it is at least possible that a party
8 could use its marks in such a way as to identify its
9 services to the public under that mark without offering
10 commercial services to the public.

11 Here, Plaintiff has alleged that it has engaged in
12 some activities to identify its research services. For
13 example, Plaintiff alleges that doctors writing a
14 letter to the editor in the Aesthetic Surgery Journal
15 reference both Plaintiff and Defendant by their KYTHERA
16 and LITHERA names, as well as the Parties' current
17 research. Compl. ¶ 19 Ex. C. Moreover, a presenter at
18 the "AAD annual conference" mixed up KYTHERA and
19 LITHERA when referencing the Parties' goods and
20 services. Id. at ¶ 20. In short, Plaintiff has
21 alleged instances where individuals have actually
22 identified the KYTHERA mark with certain research
23 services Plaintiff rendered.

24 Moreover, the very public records Defendant
25 presents show that Plaintiff actually offers its
26 research services to others. For example, the excerpt
27 from the trademark records for U.S. Trademark
28 Registration No. 4,012,388 - U.S. Application Ser. No.

1 85/225,218 specifically states that "[i]n August 2010,
2 KYTHERA announced a *licensing and development agreement*
3 worth up to \$373 million granting Intendis, Bayer
4 HealthCare's dermatology business, commercialization
5 rights to ATX-101 outside of the US and Canada."
6 Sauter Decl. Ex. 2 p.42 (emphasis added). The
7 application further states that "KYTHERA and Intendis
8 are *collaborating on the development* of ATX-101 in
9 Europe." Id. (emphasis added). The excerpt from the
10 trademark records for U.S. Trademark Registration No.
11 3,357,920 similarly indicates that Plaintiff and Bayer
12 are collaborating on research for ATX-101. Id. Ex. 3
13 p.57. Such statements indicate that Plaintiff
14 plausibly provides research services to Intendis and
15 Bayer in connection with ATX-101. It is plausible that
16 Plaintiff renders its research services to such
17 partners under its KYTHERA mark. As such, the Court
18 rejects Defendant's arguments that Plaintiff does not
19 have a valid service mark for failure to provide
20 services to others.

21 2. Likelihood of Confusion

22 Defendant also argues that the Court should dismiss
23 the Complaint because Plaintiff has not alleged any
24 facts that could plausibly suggest a likelihood of
25 confusion by the relevant consuming public. Mot. 7:20-
26 25; Reply 5:18-22. Plaintiff avers that not only has
27 it alleged substantial facts supporting its claims of
28 likelihood of confusion, but also that consumer

1 confusion is not the only relevant type of confusion.
2 Opp'n 12:1-16.

3 "The likelihood of confusion is the central element
4 of trademark infringement." GoTo.com, Inc. v. Walt
5 Disney Co., 202 F.3d 1199, 1205 (9th Cir. 2000)
6 (quoting Official Airline Guides v. Goss, 6 F.3d 1385,
7 1391 (9th Cir. 1993)). Courts in the Ninth Circuit
8 typically apply the eight factors set out in AMF, Inc.
9 v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979) to
10 determine whether a defendant's use of a mark or name
11 creates a likelihood of confusion. See Rearden LLC,
12 683 F.3d at 1199; Lahoti v. Vericheck, Inc., 636 F.3d
13 501, 507 (9th Cir. 2011); GoTo.com, 202 F.3d at 1205.
14 Those factors are: (1) the strength of the mark; (2)
15 the proximity of the goods; (3) the similarity of the
16 marks; (4) evidence of actual confusion; (5) marketing
17 channels used; (6) type of goods and the degree of care
18 likely to be exercised by the purchaser; (7)
19 defendant's intent in selecting its mark; and (8)
20 likelihood of expansion into other markets. Id.;
21 Sleekcraft, 599 F.2d at 348.

22 Plaintiff has alleged facts supporting its
23 allegations of a likelihood of confusion. For example,
24 Plaintiff has alleged that the Parties' marks are
25 similar, are used on the same types of goods and
26 services, and that their goods will be marketed through
27 the same channels of trade, advertised in the same
28 mediums, target the same customers, and serve similar

1 functions. Compl. ¶¶ 16-18. Plaintiff has also
2 alleged instances of actual confusion. Id. at ¶¶ 19-
3 20. These alleged facts tend to show a likelihood of
4 confusion and therefore plausibly support Plaintiff's
5 claims.

6 Nevertheless, Defendant avers that Plaintiff's
7 claims fail because Plaintiff simply cannot show that
8 consumers will be confused because there are no actual
9 consumers at this time. Reply 2:22-3:11, 3:21-25, 4:4-
10 5, 4:14-16.

11 Defendant is correct that the Ninth Circuit's
12 likelihood of confusion analysis focuses on "whether a
13 'reasonably prudent consumer' in the marketplace is
14 likely to be confused as to the origin of the good or
15 service bearing one of the marks." Rearden LLC, 683
16 F.3d at 1214 (quoting Entrepreneur Media, Inc. v.
17 Smith, 279 F.3d 1135, 1140 (9th Cir. 2002)). In fact
18 "the *sine qua non* of trademark infringement is consumer
19 confusion." Hokto Kinoko Co. v. Concord Farms, Inc.,
20 738 F.3d 1085, 1096 (9th Cir. 2013).

21 However, Plaintiff is also correct that "non-
22 consumer confusion may also be relevant to the
23 'likelihood of confusion' inquiry." Rearden LLC, 683
24 F.3d at 1214; see also Beacon Mut. Ins. Co. v.
25 OneBeacon Ins. Group, 376 F.3d 8, 16 (1st Cir. 2004)
26 (citing Landscape Forms, Inc. v. Columbia Cascade Co.,
27 113 F.3d 373, 382 (2d Cir. 1997); Insty*Bit, Inc. v.
28 Poly-Tech Indus., Inc., 95 F.3d 663, 672 (8th Cir.

1 1996); Champions Golf Club, Inc. v. The Champions Golf
2 Club, Inc., 78 F.3d 1111, 1119-20 (6th Cir. 1996);
3 Perini Corp v. Perini Constr., Inc., 915 F.2d 121, 128
4 (4th Cir. 1990); In re Arctic Elec. Co., Ltd., 220
5 U.S.P.Q. 836, 838, 1983 WL 51896 (T.T.A.B. 1983);
6 Restatement (Third) of Unfair Competition § 20 cmt. b
7 (1995); CMM Cable Rep., Inc. v. Ocean Coast Props.,
8 Inc., 888 F. Supp. 192, 200 (D. Me. 1995)).

9 Specifically, non-consumer confusion may be relevant
10 "where there is confusion on the part of: (1) potential
11 consumers; (2) non-consumers whose confusion could
12 create an inference that consumers are likely to be
13 confused; and (3) non-consumers whose confusion could
14 influence consumers." Id. It is clear that

15 confusion on the part of at least certain
16 non-consumers could either: (1) turn into actual
17 consumer confusion (i.e., potential consumers);
18 (2) serve as an adequate proxy or substitute for
19 evidence of actual consumer confusion (i.e.,
20 non-consumers whose confusion could create an
21 inference of consumer confusion); or (3)
22 otherwise contribute to confusion on the part of
23 the consumers themselves (i.e., non-consumers
24 whose confusion could influence consumer
25 perceptions and decision-making).

26 Id. at 1216. In other words, while the focus of the
27 Court's inquiry is on whether actual consumers are
28 confused, that does not necessarily mean that evidence

1 of confusion amongst non-consumers is irrelevant.

2 In any event, as indicated, *supra*, it appears that
3 Plaintiff has used its KYTHERA marks in commerce by
4 engaging in clinical trials and thereby likely shipping
5 ATX-101 under its KYTHERA mark (Compl. ¶ 1), and by
6 rendering its research and development services to its
7 strategic partners (see Sauter Decl. Ex. 2 p.42, Ex. 3
8 p.57). Contrary to Defendant's assertions (see Mot.
9 9:23-27; Reply 6:3-8), Plaintiff *has* alleged commercial
10 use of its marks. At this stage of the litigation, the
11 Court finds that it cannot categorically conclude that
12 there are no consumers to be confused, especially given
13 that Plaintiff has plausibly alleged that it has used
14 its marks in commerce. As such, the Court finds that
15 Plaintiff has sufficiently and plausibly alleged its
16 claims for trademark infringement.

17 3. Whether Plaintiff's Claims are Premature

18 Defendant contends, however, that Plaintiff's
19 claims are premature because a likelihood of confusion
20 analysis cannot be performed at this time. Mot. 9:18-
21 10:28; Reply 5:23-10:7. Furthermore, Defendant
22 contends that Plaintiff's claims are not ripe for
23 adjudication because they rest "upon contingent future
24 events that may not occur as anticipated, or indeed may
25 not occur at all." Reply 5:24-6:3 (quoting Texas v.
26 United States, 523 U.S. 296, 300 (1998) (internal
27 quotation marks omitted). The crux of Defendant's
28 argument lies in its contention that neither Plaintiff

1 nor Defendant has commercially available products or
2 services. Mot. 10:13-28; Reply 6:3-8. Plaintiff, on
3 the other hand, argues that the Court may grant
4 injunctive relief where trademark infringement is
5 threatened or imminent. Opp'n 15:14-24.

6 Defendant's contentions are misplaced. Simply
7 because some of the Sleekcraft factors are not ripe for
8 disposition at this time does not mean that the Court
9 cannot conduct a Sleekcraft analysis. See Chesebrough-
10 Pond's, Inc. v. Faberge, Inc., 666 F.2d 393, 399 (9th
11 Cir. 1982) (affirming a district court's finding that
12 no likelihood of confusion existed even though the
13 fourth and eighth Sleekcraft factors were not ripe for
14 disposition). In fact, although the parties in
15 Chesebrough had engaged in marketing and developing
16 products under their respective marks, there was no
17 discussion of whether the parties had already engaged
18 in product sales. Id.

19 Moreover, it is clear that Plaintiff *has* alleged
20 facts pertaining to the likelihood of confusion
21 analysis that are ripe for disposition. For example,
22 Plaintiff has alleged that the marks are similar "in
23 sight, sound, meaning and overall visual impression."
24 Compl. ¶ 16. Plaintiff has also alleged two instances
25 of actual confusion. Id. at ¶¶ 19-20. Plaintiff
26 alleges that both Plaintiff and Defendant have taken
27 pronounced steps in taking their respective products to
28 market. Id. at ¶ 1.

1 At this point, Plaintiff has sufficiently alleged
2 that it is currently using its marks in commerce and
3 that Defendant's use of its mark is likely to cause
4 confusion. Such is enough to state a claim for
5 trademark infringement. See Network Automation, Inc.
6 v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144
7 (9th Cir. 2011) (quoting Dep't of Parks & Recreation v.
8 Bazaar Del Mundo Inc., 448 F.3d 1118, 1124 (9th Cir.
9 2006)).

10 In any event, to the extent Defendant contests the
11 justiciability of this Action, such an argument is more
12 properly presented as a challenge to this Court's
13 subject matter jurisdiction. See Gemtel Corp. v. Cmty
14 Redevelopment Agency, 23 F.3d 1542, 1544 n.1 (9th Cir.
15 1994) (finding mootness and ripeness properly
16 challenged under Fed. R. Civ. P. 12(b)(1)); Jackson v.
17 City and Cnty. of San Francisco, 829 F. Supp. 2d 867,
18 870 (N.D. Cal. 2011) (citing White v. Lee, 227 F.3d
19 1214, 1242 (9th Cir. 2000); St. Clair v. City of Chico,
20 880 F.2d 199, 201 (9th Cir. 1989)). This is especially
21 true because a court is allowed to consider facts and
22 need not assume the truthfulness of a complaint in

23 ///

24 ///

25 ///

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28

1 deciding a Rule 12(b)(1) motion. See Americopters, LLC
2 v. FAA, 411 F.3d 726, 732 n.4 (9th Cir. 2006).

3 **IV. Conclusion**

4 For the foregoing reasons, the Court hereby **DENIES**
5 Defendant's Motion to Dismiss the Complaint [20].

6
7 **IT IS SO ORDERED.**

8 DATED: February 20, 2014

9
10 RONALD S.W. LEW

11 **HONORABLE RONALD S.W. LEW**
12 Senior, U.S. District Court Judge