

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MEDICINE STORE PHARMACY, INC.
d/b/a RXPRESS PHARMACY,

Plaintiff,

v.

AFGIN PHARMA LLC,

Defendant.

CASE NO. 3:14-cv-2255

JURY TRIAL DEMANDED

**COMPLAINT FOR DECLARATORY JUDGMENT
OF NON-INFRINGEMENT AND INVALIDITY**

Plaintiff Medicine Store Pharmacy, Inc. d/b/a RXpress Pharmacy (“RXpress”), through its attorneys, brings this action against Defendant AfGin Pharma LLC (“Defendant”) and alleges as follows:

NATURE OF THE ACTION

1. RXpress seeks a declaratory judgment of non-infringement of United States Patent No. 8,329,734 (“the ’734 patent”), attached as Exhibit A, under the patent law of the United States, 35 U.S.C. § 101, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

THE PARTIES

2. Plaintiff Medicine Store Pharmacy is a Texas corporation with its principal place of business in Fort Worth, Texas.

3. Upon information and belief, Defendant AfGin Pharma LLC is a Florida limited liability company with its principal place of business in Sarasota, Florida.

JURISDICTION AND VENUE

4. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1332, 1338(a), 2201 and 2202 because this action arises under the patent laws of the United States, Title 35 of the United States Code, and seeks relief under the Federal Declaratory Judgment Act.

5. Defendant is subject to the Court's personal jurisdiction because, on information and belief, the Defendant regularly solicits business from, does substantial business with, and derives revenue from goods and services provided to customers in the District. Defendant also has directed infringement accusations to RXpress in this District.

6. Venue is proper in this district under 28 U.S.C. §§ 1391 (b) and (c) and § 1400(b) because Defendant engages in significant business activity in this District as set forth above, and a substantial part of the events or omissions giving rise to the claims occurred in this District.

FACTUAL ALLEGATIONS

7. RXpress is a Class A pharmacy that has been doing business in Texas since 1997. It provides both retail and compounding/specialty needs services to its customers and has state-of-the-art compounding facilities in the Dallas/Fort Worth area with specialized pharmaceutical equipment designed to create premium-grade, customized medications. RXpress offers a wide variety of retail and compounded treatments including those for pain, scarring, migraines, allergies, dieting, and hormone therapies, and does regular business with doctors and patients in Dallas County.

8. The U.S. Patent and Trademark Office issued the '734 patent, entitled "Topical Therapy for Migraine," on or around December 11, 2012. Ronald Aung-Din is listed as the sole inventor. Defendant claims to be the owner of all rights in and to the '734 patent.

9. Upon information and belief, Defendant was founded by Dr. Aung-Din and is the patent holder of the '734 Patent.

10. Upon information and belief Defendant develops, supplies, and through its agents and licensees provides a topical therapy using sumatriptan, which it calls "migraderm," for the treatment of migraine headaches to customers nationally, including customers in the Northern District of Texas. Upon information and belief, Defendant derives substantial revenue from its sales and licensing activities in Texas.

11. On or about May 14, 2014, Robert P. Watrous, counsel for Defendant, sent a letter to RXpress with several attachments. A true and correct copy of the letter and attachments are attached as Exhibit B to this Complaint.

12. In this letter, counsel for Defendant expressly identifies the '734 patent and alleges that use of RXpress's "Migraine Cream" product(s), as identified on its prescription pad, infringes the '734 patent. Defendant also suggests that if RXpress is interested, it is willing to negotiate a license to the '734 patent.

13. Attached to this letter was an email chain discussing RXpress's alleged infringement and refers to RXpress as "local TX infringers." It also states, "One of our better guys in Texas ... is expanding his sales force around migraderm and he wants something done about these guys right now." It further requests confirmation "as soon as this is actioned [sic] on."

14. Defendant's letter to RXpress alleging that RXpress is an infringer and use of RXpress's product(s) is covered by the '734 patent constitutes affirmative acts by Defendant related to the enforcement of the '734 patent against RXpress.

15. Contrary to the assertions of Defendant, RXpress does not infringe any claim of the '734 patent.

16. Furthermore, contrary to Defendant's contentions, one or more claims of the '734 patent are invalid for failing to satisfy one or more conditions for patentability under 35 U.S.C. §§ 101, 102, 103 and/or 112.

17. Based on the communication from Defendant asserting the '734 patent, RXpress has reasonable apprehension that Defendant will institute litigation against RXpress. Further, based on at least the facts asserted herein, the dispute between RXpress and Defendant regarding the infringement and validity of the '734 patent is real, substantial, definite and concrete.

COUNT I – DECLARATION OF NON-INFRINGEMENT OF THE '734 PATENT

18. RXpress incorporates by reference and re-alleges each of the allegations above.

19. As a result of the above-described communications from Defendant, RXpress has reasonable apprehension that Defendant will commence action against it for infringement of the '734 patent.

20. RXpress has not and is not infringing, directly or indirectly, any valid and enforceable claim of the '734 patent.

21. An actual and justiciable controversy exists between Defendant and RXpress as to RXpress's alleged infringement of the '734 patent. This controversy is substantial, immediate and real.

22. RXpress is entitled to a judgment declaring that use of RXpress's "Migraine Cream" product(s) does not infringe the '734 patent.

COUNT II – DECLARATION OF INVALIDITY OF THE '734 PATENT

23. RXpress incorporates by reference and re-alleges each of the allegations above.
24. Defendant has asserted that the claims of the '734 patent are valid.
25. RXpress contends that the claims of the '734 patent are invalid for failing to satisfy one or more conditions for patentability under 35 U.S.C. §§ 101, 102, 103 and/or 112 because, *inter alia*, as asserted the '734 patent is invalid as obvious in view of U.S. Patent No. 5,807,571 as combined with U.S. Patent Nos. 5,855,907 and 6,962,691.
26. An actual and justiciable controversy exists between Defendant and RXpress as to the validity of the '734 patent. This controversy is substantial, immediate and real.
27. RXpress is entitled to a judgment declaring that the '734 patent is invalid.

PRAYER FOR RELIEF

WHEREFORE, RXpress respectfully requests that the Court:

- A. Find and declare that RXpress does not infringe, directly or indirectly, any valid and enforceable claim of the '734 patent;
- B. Find and declare that the claims of the '734 patent are invalid;
- C. Enter judgment in favor of RXpress and against Defendant on each of RXpress's claims for relief;
- D. Find that this is an exceptional case under 35 U.S.C. § 285 and award RXpress its costs and reasonable attorneys' fees;
- E. Grant RXpress such other relief as the Court deems just and proper.

JURY DEMAND

RXpress hereby demands a trial by jury on all issues so triable.

Dated: June 20, 2014

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