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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DR. GREENS, INC.,

Plaintiff,

v.

JAMES MATTHEW STEPHENS, an  
individual, and SPECTRUM  
LABORATORIES, LLC,

Defendants.

Case No. 11cv638 JAH (KSC)

**ORDER DENYING DEFENDANT  
SPECTRUM’S MOTION FOR  
SUMMARY JUDGMENT**

[Doc. No. 130]

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Related Counterclaims.

**INTRODUCTION**

Pending before the Court is defendant Spectrum Laboratories, LLC’s motion for summary judgment of direct infringement of defendant Spectrum’s ‘776 patent by Plaintiff Dr. Greens (“Plaintiff”). Plaintiff opposes the motion. After a careful review of the pleadings and relevant exhibits submitted by the parties along with the entire record in this matter, and, after considering the oral argument presented at the hearing, this Court **DENIES** defendant Spectrum’s motion for summary judgment in its entirety.

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1 BACKGROUND

2 **A. Factual Background - '776 Patent**

3 The patent-in-suit, U.S. Patent No. 7,192,776 (“776 patent”), was issued on  
4 March 20, 2007. The ‘776 patent claims a synthetic urine solution and method for  
5 manufacturing said solution. A significant feature of the invention is the inclusion of  
6 biocides to prevent the solution from undergoing sepsis (i.e., bacterial growth) and  
7 decomposition. Through the use of biocides, the solution is able to maintain its viability  
8 and utility (i.e., shelf-life). The solution also includes creatinine, a protein that occurs in  
9 human urine and is accounted for in most current methods of urinalysis. The ‘776  
10 patent was invented by James Matthew Stephens, who serves as a managing member of  
11 defendant Spectrum, an assignee of the patent.

12 Plaintiff is a California corporation that markets and distributes a synthetic urine  
13 product entitled Dr. Green’s Agent X (“Agent X”). Defendant Spectrum is its  
14 competitor and markets a synthetic urine product entitled Quick Fix.

15 In June 2004, defendant Spectrum acquired a sample of Agent X sold as part of its  
16 ongoing efforts to monitor the synthetic urine market. In 2012, Spectrum submitted the  
17 Agent X sample for testing to Dr. Thanedar of Avomeen Analytical Services, a chemical  
18 analysis laboratory. Following the commencement of the instant suit, Plaintiff submitted  
19 their own sample of Agent X for testing to FAI Materials Testing Laboratory, Inc. The  
20 parties’ laboratory tests of Agent X yielded different results. Among other things,  
21 defendant Spectrum’s analysis demonstrated the presence of the biocide carbamic acid  
22 methyl ester in the product, but Plaintiff’s analysis did not.

23 **B. Markman Hearing**

24 On August 13, 2014, a *Markman* hearing was held by this Court. Only two claim  
25 terms from the ‘776 patent were at issue: “a biocide” and “carbamates.” In both  
26 instances, the Court adopted defendant Spectrum’s proposed construction. Whereas  
27 Plaintiff had argued that “a biocide” should be construed to mean “only one biocide,”  
28 the Court held, in light of general patent parlance as well as the language of the patent

1 and the prosecution history, that “a biocide” means “one or more biocides.” Moreover,  
2 whereas Plaintiff had proposed a construction of “carbamates” that would have limited  
3 them to compounds containing the monovalent ion  $\text{NH}_2\text{COO}^-$ , the Court noted that  
4 Plaintiff ended up withdrawing this limitation based on “subsequent research,” and held  
5 that “carbamates” simply means “organic compounds derived from carbamic acid,” the  
6 construction proposed by defendant Spectrum.

7 **D. Procedural History**

8 On March 29, 2011, Plaintiff filed a complaint against defendants Spectrum and  
9 James Matthew Stephens seeking declaratory judgment of non-infringement and  
10 invalidity of Defendants' '776 patent. Plaintiff also asserts claims for patent misuse,  
11 federal statutory unfair competition, common law unfair competition, interference with  
12 business relations, and interference with prospective economic advantage.

13 On August 15, 2011, defendant Spectrum filed an answer to Plaintiff's complaint,  
14 along with counterclaims for patent infringement and for violations of the Lanham Act,  
15 15 U.S.C. § 1125 (a)(1)(B); Ohio's Deceptive Trade Practices Act; California's Unfair  
16 Competition Law; and malicious litigation under Ohio common law. Plaintiff filed an  
17 answer to the counterclaim on September 23, 2011. Thereafter, defendants Stephens  
18 and Spectrum separately filed motions to dismiss Plaintiff's complaint. The Court  
19 granted both motions to dismiss, allowing Plaintiff leave to amend.

20 Plaintiff subsequently filed an amended complaint seeking declaratory judgment  
21 that it does not directly infringe, induce infringement, or contribute to infringement of  
22 the '776 patent. Plaintiff also asserts claims for patent misuse, federal statutory unfair  
23 competition, common law unfair competition, interference with business relations, and  
24 interference with prospective economic advantage. Defendants separately filed answers,  
25 along with counterclaims, to Plaintiff's amended complaint on May 7, 2012. Defendant  
26 Spectrum asserts counterclaims for patent infringement and for violations of the Lanham  
27 Act, Ohio's Deceptive Trade Practices Act, California's Unfair Competition Law, and  
28 unfair competition under Ohio common law.

1 On January 22, 2013, the parties filed a joint claim construction chart and  
2 *Markman* hearing statement. Plaintiff and defendant Spectrum filed their opening  
3 *Markman* briefs on March 4, 2013 and their responses on March 18, 2013. A technical  
4 tutorial was held before this Court on June 28, 2013.

5 On February 28, 2013, defendant Spectrum filed an unopposed motion for leave  
6 to amend its preliminary infringement contentions, which this Court granted on July 11,  
7 2013. Defendant Spectrum also filed a motion to amend its counterclaims, which this  
8 Court granted on December 5, 2013.

9 Defendant Spectrum filed a motion for summary judgment on April 3, 2014,  
10 which this Court denied without prejudice as premature on the ground that claim  
11 construction issues had not yet been resolved in the instant case. The parties appeared  
12 before this Court for a *Markman* hearing on August 13, 2014.

13 On September 11, 2014, defendant Spectrum renewed its motion for summary  
14 judgment. The Court set a hearing date for November 17, 2014, which was continued  
15 on defendant Spectrum's motion to December 15, 2014. Plaintiff filed their response in  
16 opposition to the motion on November 24, 2014 and defendant Spectrum filed a reply  
17 on December 3, 2014.

18 After hearing the arguments of counsel on December 15, 2014, the Court  
19 continued the hearing to February 17, 2015 to allow parties to file supplemental  
20 briefing. On February 17, 2015, a second hearing was held on the motion. After hearing  
21 the arguments of counsel, the Court took the matter under submission.

## 22 DISCUSSION

### 23 I. Legal Standard

24 Determination of patent infringement is a two-step process: first, the court must  
25 determine as a matter of law the meaning of the particular patent claim or claims at  
26 issue; and second, it must consider whether the accused product infringes one or more of  
27 the properly construed claims. Markman v. Westview Instruments, Inc., 517 U.S. 370,  
28 384 (1996); see also Allen Eng'g Corp. v. Bartell Indus., Inc., 299 F.3d 1336, 1344 (Fed.

1 Cir. 2002). The second inquiry is a question of fact and, like all civil cases, summary  
2 judgment of infringement or noninfringement is only appropriate when no genuine  
3 dispute of material fact exists. Irdeeto Access, Inc. v. Echostar Satellite Corp., 383 F.3d  
4 1295, 1299 (Fed. Cir. 2004), quoting Bai v. L & L Wings, Inc., 160 F.3d 1350, 1353  
5 (Fed. Cir. 1998).

6 A fact is material when, under the governing substantive law, it could affect the  
7 outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986);  
8 Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact  
9 is genuine if “the evidence is such that a reasonable jury could return a verdict for the  
10 nonmoving party.” Anderson, 477 U.S. at 248.

11 A party seeking summary judgment always bears the initial burden of establishing  
12 the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S.  
13 317, 323 (1986). The moving party may satisfy this burden in two ways: (1) by  
14 presenting evidence that negates an essential element of the nonmoving party's case or  
15 (2) by demonstrating that the nonmoving party failed to make a showing sufficient to  
16 establish an element essential to that party's case on which that party will bear the  
17 burden of proof at trial. Id. at 322-23.

18 Where the party moving for summary judgment does not bear the burden of proof  
19 at trial, it may show that no genuine issue of material fact exists by demonstrating “there  
20 is an absence of evidence to support the non-moving party's case.” Id. at 325. The  
21 moving party is not required to produce evidence showing the absence of a genuine issue  
22 of material fact, nor is it required to offer evidence negating the nonmoving party's  
23 claim. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); United Steelworkers  
24 v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989). “Rather, the motion may,  
25 and should, be granted so long as whatever is before the District Court demonstrates  
26 that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied.”  
27 Lujan, 497 U.S. at 885 (quoting Celotex, 477 U.S. at 323). If the moving party fails to  
28 discharge this initial burden, summary judgment must be denied and the court need not

1 consider the nonmoving party's evidence. See Adickes v. S.H. Kress & Co., 398 U.S.  
2 144, 159-60 (1970).

3 If the moving party meets the initial burden, the nonmoving party cannot defeat  
4 summary judgment merely by demonstrating “that there is some metaphysical doubt as  
5 to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.  
6 574, 586 (1986); see also Anderson, 477 U.S. at 252 (“The mere existence of a scintilla  
7 of evidence in support of the nonmoving party’s position is not sufficient.”). Rather, the  
8 nonmoving party must “go beyond the pleadings and by her own affidavits, or by the  
9 depositions, answers to interrogatories, and admissions on file, designate specific facts  
10 showing that there is a genuine issue for trial.” Celotex, 477 U.S. at 324 (quoting Fed.  
11 R. Civ. P. 56(e)) (internal quotations omitted).

12 “Disputes over irrelevant or unnecessary facts will not preclude a grant of  
13 summary judgment.” T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d  
14 626, 630 (9th Cir. 1987). “The district court may limit its review to the documents  
15 submitted for purpose of summary judgment and those parts of the record specifically  
16 referenced therein.” Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030  
17 (9th Cir. 2001). Therefore, the court need not “scour the record in search of a genuine  
18 issue of triable fact.” Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing  
19 Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)).

20 The court may not make credibility determinations, and inferences to be drawn  
21 from the facts must be viewed in the light most favorable to the party opposing the  
22 motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991); see Anderson,  
23 477 U.S. at 255; Matsushita, 475 U.S. at 587.

24 In the endeavor to establish the existence of a factual dispute, the opposing party  
25 need not establish a material issue of fact conclusively in its favor. It is sufficient that  
26 “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
27 differing versions of the truth at trial.” First Nat’l Bank of Ariz. v. Cities Service Co., 391  
28 U.S. 253, 289-90 (1968); Giles v. General Motors Acceptance Corp., 494 F.3d 865, 872

1 (9th Cir. 2007). Thus, the “purpose of summary judgment is to ‘pierce the pleadings  
2 and to assess the proof in order to see whether there is a genuine need for trial.’ ”  
3 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) Advisory Committee Note to  
4 1963 amendments).

5 **II. Analysis**

6 **A. Evidentiary Issues**

7 **i. Objections to Declarations**

8 Plaintiff objects to Dr. Shri Thanedar’s Declaration pursuant to Rules 702 and  
9 703 of the Federal Rules of Evidence on the grounds that the testimony is unreliable and  
10 lacks specialized knowledge. Defendant Spectrum objects to and moves to strike  
11 portions of Stefanie Eick’s Declaration and Gary Eastman’s declaration on the grounds  
12 that the declarations lack personal knowledge, is inadmissible hearsay, and improper  
13 opinion testimony.

14 The Court found it unnecessary to consider the objected to portions of the  
15 declarations in making its determination on the motion. As such, the parties’ objections  
16 are DENIED AS MOOT.

17 **ii. Requests for Judicial Notice**

18 Pursuant to Federal Rule of Evidence 201(b), Plaintiff requests that the Court  
19 take judicial notice of two documents: United States Patent No. 5,534,649, entitled  
20 “Process for Preparing Dialkyl Carbonates” and International Patent Application No.  
21 WO2014/072803. Defendant Spectrum opposes the requests and argues taking judicial  
22 notice of the truth of the documents’ contents is improper.

23 The Court found it unnecessary to consider the documents that are the subject of  
24 Plaintiff’s requests in making its determination on the motion. As such, Plaintiff’s  
25 requests for judicial notice are DENIED AS MOOT.

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1           **B. Defendant’s Motion for Summary Judgment**

2           Defendant Spectrum moves for summary judgment on the grounds that the  
3 synthetic urine products sold by Plaintiff literally meets the limitations of independent  
4 claim 1 and dependent claims 2, 3, and 4 of the ‘776 patent.

5           Plaintiff argues, among other things, that “the evidence before the Court is  
6 insufficient to determine that no genuine issue of material fact remains as to whether the  
7 alleged Agent X sample relied on by [defendant] Spectrum here is a true and correct  
8 representation of the accused product sold by Dr. Greens in 2004” and this Court agrees.  
9 See Doc. No. 151 at 7.

10           In order to test Agent X for direct infringement, defendant Spectrum obtained a  
11 sample of a 2004 box of Agent X. Kusala Decl. ¶13, Doc. No. 101-2 at 3. Once  
12 obtained, defendant Spectrum performed an inspection of Agent X consistent with its  
13 regular business practice of examining competitor’s products. Kusala Decl. ¶¶12, 14,  
14 Doc. No. 101-2 at 3-4. Specifically, defendant Spectrum personnel opened the black  
15 box and observed the following contents inside of the box: a capped plastic bottle  
16 holding a liquid, an instruction sheet dated June 2004, a heat pad, and a rubber band.  
17 Kusala Decl. ¶15, Doc. No. 101-2 at 4. Defendant Spectrum asserts they did not open  
18 the capped plastic bottle during this time. Kusala Decl. ¶16; Doc. No. 101-2 at 4. The  
19 contents, including the capped plastic bottle were placed back inside the box. Kusala  
20 Decl. ¶¶14-16, Doc. No. 101-2 at 3. In 2008, when defendant Spectrum moved to a  
21 new office, defendant Spectrum moved the box of Agent X to a secure location in the  
22 new office. Kusala Decl. ¶14-16, Doc. No. 101-2 at 3. The box remained in its new  
23 location until September 28, 2012 when the Agent X sample was sent for testing. Kusala  
24 Decl. ¶19-20, Doc. No. 101-2 at 4; see also Thanedar Decl. ¶6, Doc. No. 101-3 at 2-3.

25           In opposition, Plaintiff asserts that in 2004 Agent X was only sold in a powder  
26 form, and was not premixed with a liquid. Green Decl. ¶3-4, Doc. No. 139-2 at 2.  
27 Plaintiff asserts that the black box of Agent X sold by Plaintiff contained the following  
28 contents: a small vial of powdered synthetic urine, an instruction sheet, a heating pad, a



1 rubber band, and an empty 3 ounce plastic bottle with a temperature strip and flip-top  
2 cap. Green Decl. ¶17, Doc. No. 139-2 at 3.

3 Plaintiff contends that although they currently sell a liquid form of Agent X, the  
4 product was not introduced on the market until March 2005. Green Decl. ¶18, Doc. No.  
5 139-2 at 3. As opposed to the black box entitled Agent X which contains the powder,  
6 Plaintiff contends that the liquid form of Agent X is sold in a grey box and labeled  
7 “Agent-X Premixed.” Green Decl. ¶18, Doc. No. 139-2 at 3. As sold, the grey box  
8 contains the following items: a 3 ounce bottle of liquid synthetic urine with a  
9 temperature strip and flip-top cap, a heating pad, rubber band, and instruction sheet.  
10 Green Decl. ¶18, Doc. No. 139-2 at 3.

11 Accordingly, Plaintiff asserts that the liquid Agent X sample tested by defendant  
12 Spectrum could not have been produced by Plaintiff because the product did not exist at  
13 the time. Green Decl. ¶17, Doc. No. 139-2 at 3. Additionally, Plaintiff argues that that  
14 the sample was tampered with and its chain of custody is questionable. See Doc. No.  
15 139 at 4-5, 9-10. With respect to the sample’s chain of custody, Plaintiff argues that  
16 defendant Spectrum has not established the following facts: who and where defendant  
17 Spectrum “obtained” the alleged Agent X box from, who first opened the box, who had  
18 access to the box after it was opened, and who first inspected the contents of the box.  
19 See Doc. No. 139 at 7. Plaintiff also argues that a gap in the chain of custody exists  
20 because Fran Kusala, the employee defendant Spectrum relies on to testify to the  
21 sample’s chain of custody, did not work for defendant Spectrum from December 31,  
22 2004 to December 31, 2007. Id. at 6-7.

23 In reply, defendant Spectrum argues that there is no evidence that any tampering  
24 occurred and Plaintiff’s assertion to the contrary is mere speculation and does not create  
25 a genuine issue of material fact. See Doc. No. 156 at 5. Even if tampering did occur,  
26 defendant Spectrum argues that Plaintiff lacks evidence that tampering would have  
27 introduced the carbamate biocide into Agent X. Id. Defendant Spectrum also contends  
28 that there is no evidence of a broken chain of custody. See Doc. No. 146 at 3.

1 Specifically, defendant Spectrum argues that Kusala was employed by defendant at all  
2 material times: the time it acquired Agent X in 2004 and again in 2008 when it relocated  
3 to a new office. See Doc. No. 146 at 3.<sup>1</sup>

4 After commencement of the instant suit, Plaintiff located in its warehouse a vial of  
5 the accused product which had not been sold in several years and observed that the  
6 sample appeared to be clumped and contaminated by humidity. See Green Decl. ¶21,  
7 Doc 139-2 at 5-6. Plaintiff asserts that these observations are in part due to the two  
8 year shelf-life of the product, which is the standard for the industry and the shelf-life of  
9 defendant Spectrum’s Quick Fix synthetic urine product. See Green Decl. ¶14, Doc 139-  
10 2 at 4. As such, Plaintiff argues that the results from Dr. Thanedar’s tests of the alleged  
11 Agent X sample, which sat on a shelf for more than seven years and was exposed to the  
12 elements, are not reliable. See Doc. No. 139 at 10.

13 In reply, defendant Spectrum argues that Plaintiff does not specify what effect the  
14 expiration of the accused product’s shelf life had on the product, if any. See Doc. No.  
15 146 at 5. Specifically, defendant Spectrum points out that Plaintiff has not argued that  
16 the expiration of the shelf-life could have resulted in the added presence of carbamic acid  
17 methyl ester into the product. Id. Defendant Spectrum goes on to argue that Plaintiff’s  
18 testimony does not counter Dr. Thanedar’s observation that the sample he tested  
19 showed no signs of spoliation. Id.

20 Here, the evidence presented by the parties makes clear that defendant Spectrum  
21 obtained the black box of Agent X without the words “Premixed” on the outside of the  
22 box. The record evidences that the box of Agent X that defendant Spectrum obtained  
23 included a liquid sample and subsequently, defendant Spectrum tested the liquid sample  
24 to establish its infringement claim. The record also shows that the box itself was moved  
25

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26 <sup>1</sup> During oral argument, Plaintiff asserted that the chain of custody is broken on this fact  
27 alone in that defendant Spectrum has not presented any witnesses with personal knowledge of  
28 the storage and integrity of defendant Spectrum’s sample for the three year period during  
Kusala’s absence.

1 when defendant Spectrum moved to a new office location in 2008 and there is no  
2 evidence that anyone has personal knowledge regarding the safe keeping or integrity of  
3 the box for the three year period prior to the move when Kusala did not work for  
4 defendant Spectrum. Lastly, the record shows that industry standards calls into question  
5 the integrity of the accused product.

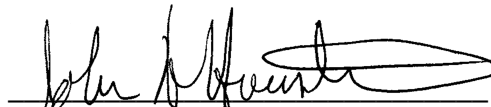
6 Having considering all of the evidence, and all reasonable inferences to be drawn  
7 therefrom, in the light most favorable to the non-moving party, the Court finds there are  
8 genuine issues of material facts that defeat granting summary judgment in this case,  
9 including, without limitation, the reliability of the test results of the accused product,  
10 shelf-life of the products, defendant Spectrum's chain of custody, and credibility  
11 determinations. These issues must be determined by the trier of fact. Defendant  
12 Spectrum's motion for summary judgment is DENIED.<sup>2</sup>

13 **CONCLUSION AND ORDER**

14 For the foregoing reasons, **IT IS HEREBY ORDERED** that:

- 15 1. Defendant Spectrum's motion for summary judgment is DENIED [doc. no.  
16 130]; and  
17 2. The parties are directed to contact the Magistrate Judge within three business  
18 days to reset the case management dates previously vacated pending the  
19 Court's ruling on this motion.

20 Dated: September 25, 2015

21   
22 JOHN A. HOUSTON  
23 United States District Judge

24  
25  
26 \_\_\_\_\_  
27 <sup>2</sup> Because a genuine issue exists as to the threshold question of the authenticity and  
28 integrity of the accused Agent X product, the Court will not address Defendant's other  
arguments, including its infringement claim, premised on the authenticity of the same product.