

INTELLECTUAL PROPERTY
Unfair Competition
False and Misleading Advertising

Verdict: \$4,865,332

Case/Number: Derm-Tech Labs, Inc. dba GD Labs v. Cobe Chemical Co., Inc. dba Cobe Chem Labs; Clinical Resolution Laboratory, Inc. dba Elizabeth Halen Corporation and dba I2B Infocapital/ VC052641

Court/Date: Los Angeles County Superior Court - Southeast District Norwalk/ Jan. 6, 2011

Judge: Hon. Patrick T. Meyers,

Plaintiff's Attorneys: David L. Evans, Daniel J. Quisenberry and Justin F. Cronin (Hamrick & Evans, LLP, Universal City)

Defendant Attorneys: Paul S. Saghera, Sherwood Tung (The Chugh Firm, Cerritos) for Defendant Cobe Chemical Co., Inc.; Ephraim O. Obi (The Law Offices of Ephraim O. Obi, Los Angeles) for Defendant Clinical Resolution Laboratory, Inc.

Expert Testimony: For Plaintiff: Jules H. Kamin, Ph.D. economics and econometric analysis, Los Angeles; Sally H. Villalobos custom and practice for cosmetic, skin care and over-the-counter consumer product industries, Torrance.

For Defendant Cobe Chemical Co., Inc.: Jack H. Raber, Pharm. D. custom and practice in cosmetic, skin care and over-the-counter consumer products industries.

Facts: Plaintiff Derm-Tech Labs, Inc. ("Derm-Tech") is the owner and producer of two successful over-the-counter numbing creams known as "Numb & Number" and "Numb & Number Plus." Derm-Tech produced proprietary formulas for each of these products which it provided to Defendant Cobe Chemical Co., Inc. ("Cobe"), a contract manufacturer, to manufacture pursuant to a confidentiality agreement. Derm-Tech also developed unique trademarks, labeling and packaging for "Numb & Number" and "Numb & Number Plus." The numbing creams became successful and Derm-Tech sold them to medical professionals and distributors like Defendant Clinical Resolution Laboratory, Inc. ("Clinical"). Derm-Tech then learned that someone was selling knock-off "Numb & Number" and "Numb & Number Plus" utilizing Derm-Tech's proprietary formulations, unique trademarks, packaging and labeling, thereby interfering with Derm-Tech's current and prospective business.

Later, Derm-Tech learned that it was Clinical, its own customer, that was selling the infringing knock-off products, and that Cobe, despite the confidentiality agreement with Derm-Tech, was selling to Clinical the proprietary numbing creams which Clinical then sold as its own products, and under its own name, at a reduced price, including to Derm-Tech's own customers, using infringing labeling, packaging, trade names and slogans, effectively forcing Derm-Tech to compete with its own products.

CONTENTIONS -

Plaintiffs' Contentions: Derm-Tech contended at trial that Defendants Cobe and Clinical were engaged in a scheme to defraud Derm-Tech and effectively steal the successful market that Derm-Tech had developed for its products "Numb & Number" and "Numb & Number Plus." Additionally, Derm-Tech contended that Cobe misappropriated Derm-Tech's trade secrets, breached the confidentiality agreement and its implied covenant of good faith and fair dealing by providing Clinical with Derm-Tech's proprietary formulas (at the same time it was making production batches for Derm-Tech), intentionally interfered with Derm-Tech's prospective business as Derm-Tech attempted to expand into new markets, and engaged in unfair competition.

As to Clinical, Derm-Tech contended at trial that Clinical infringed upon Derm-Tech's unique trademarks, trade names and trade dress for "Numb & Number" and "Numb & Number Plus," and that in so doing engaged in false and misleading advertising with the intent to deceive consumers.

Defendants' Contentions: Defendants Cobe and Clinical contended that Derm-Tech's formulas were not trade secrets and were not protected under the confidentiality agreement. Specifically, Defendants contended that the specific formulas developed by Derm-Tech were generic and therefore not protectable. Cobe also contended at trial that it effectively owned the formulations for "Numb & Number" and "Numb & Number Plus" because it made changes to the formulations before production commenced.

Further, Defendants contended at trial that Derm-Tech's trademarks, packaging, trade names, labeling and slogans for "Numb & Number" and "Numb & Number Plus" were not protectable since they were not registered as U.S. trademarks. Defendants also contended that they did not act in concert with one another.

Jury Trial: Length 12 Days

Settlement Notes: Plaintiff Derm-Tech Labs, Inc. made pre-trial Statutory Offers to Compromise pursuant to California Code of Civil Procedure section 998 as follows: to Cobe Chemical Co., Inc. - \$299,999.99; and to Clinical Resolution Laboratory, Inc. - \$199,999.99. These were both rejected by the Defendants prior to the commencement of trial.

Result: \$4,865,332 (\$1,073,733 past economic damages, including lost profits; \$276,320 future economic damages, including lost profits; \$2,658,220 unjust enrichment; \$500,000 punitive damages against Clinical; \$300,000 punitive damages against Cobe; \$57,059 costs).

Other Information: The trial proceeded in three phases, the first as to liability on legal causes of action, the second as to punitive damages, and the third a bench trial as to the equitable causes of action.

In the first phase, the jury returned a verdict in favor of Derm-Tech on all causes of action except Intentional Interference with Prospective Economic Relations as to Clinical only. The jury found Cobe breached its confidentiality agreement with Derm-Tech and the implied covenant of good faith and fair dealing arising therefrom, that both Cobe and Clinical engaged in misappropriation of Derm-Tech's proprietary and trade secret formulas for the products "Numb & Number" and "Numb & Number Plus," that Clinical infringed upon Derm-Tech's protectable trademarks, trade

names and trade dress (including the packaging, labeling and advertising slogans) for "Numb & Number" and "Numb & Number Plus" and attempted to "pass off" Derm-Tech's products as its own, that Cobe intentionally interfered with Derm-Tech's prospective business as it attempted to expand into new markets, that both Cobe and Clinical perpetrated fraud on Derm-Tech and did so in furtherance of a conspiracy to defraud Derm-Tech, that Cobe was negligent in its conduct towards Derm-Tech and lastly that Cobe and Clinical acted with fraud, oppression and malice warranting exemplary damages.

In the second phase, the jury awarded punitive damages in favor of Derm-Tech in the amount of \$500,000 against Clinical and in the amount of \$300,000 against Cobe.

In the third phase, Judge Patrick T. Meyers found for Plaintiff Derm-Tech on all counts, ruling that Clinical engaged in false and misleading advertising under the California Business and Professions Code, that both Cobe and Clinical were engaged in unfair competition under the California Business and Professions Code and granted permanent injunctive and declaratory relief against Defendants.

Post Trial Motions: On March 4, 2011, the trial court denied Cobe's Motions for Judgment Notwithstanding the Verdict and, Alternatively for a New Trial finding sufficient substantiality of credible evidence to support the jury's special verdicts.