

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

DIETGOAL INNOVATIONS LLC,

*Plaintiff,*

v.

MRS. FIELDS FAMOUS BRANDS, LLC

*Defendant.*

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Civil Action No. 2:13-cv-00042

Jury Trial Demanded

**PLAINTIFF’S COMPLAINT FOR PATENT INFRINGEMENT**

Plaintiff DietGoal Innovations LLC files this Complaint against Mrs. Fields Famous Brands, LLC (“Defendant”) and alleges as follows:

**PARTIES**

1. Plaintiff DietGoal Innovations LLC (“DietGoal”) is a Texas Limited Liability Company based in Austin, Texas.

2. Upon information and belief, Defendant is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 2855 E. Cottonwood Pkwy, Suite 400, Salt Lake City, Utah 84121-7050. Defendant may be served with process through its registered agent Michael R. Ward at 1141 W. 2400 S., Salt Lake City, Utah 84119.

**JURISDICTION AND VENUE**

3. This is an action for patent infringement arising under the patent laws of the United States of America, Title 35, United States Code.

4. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

5. Upon information and belief, Defendant is subject to this Court's general and/or specific personal jurisdiction because it (a) is a resident of the State of Texas; and/or (b) has designated an agent for service of process in the State of Texas; and/or (c) has committed acts of infringement in the State of Texas as alleged below; and/or (d) is engaged in continuous and systematic activities in the State of Texas. Therefore, this Court has personal jurisdiction over Defendant under the Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE §17.042.

6. Venue is proper in this district under 28 U.S.C. §§ 1391(c) and 1400(b). On information and belief, Defendant has a regular and established place of business in this district, and/or has transacted business in this district and has committed and/or induced acts of patent infringement in this district.

### **THE PATENT-IN-SUIT**

7. On July 1, 2003, the United States Patent and Trademark Office issued United States Patent No. 6,585,516 ("the '516 Patent") entitled "Method and System for Computerized Visual Behavior Analysis, Training, and Planning," a true copy of which is attached as Exhibit A.

8. DietGoal is the owner by assignment of the '516 Patent and possesses all rights to sue for and recover all past, present and future damages for infringement of the '516 Patent.

### **BACKGROUND**

9. On September 15, 2011, DietGoal filed a complaint in *DietGoal Innovations LLC v. Arby's Restaurants Group, Inc., et al.*, Cause No. 2:11-cv-418 ("*Arby's Action*"), naming TCBY Enterprises, Inc. ("TCBY Enterprises") as a Defendant. Exhibit B.

10. In the *Arby's Action* DietGoal alleged that TCBY Enterprises infringed the '516 Patent in violation of 35 U.S.C. § 271, by making and/or using in the United States the computer

implemented website [www.tcby.com](http://www.tcby.com), which has a computerized meal planning interface at <http://tcby.com/menu-nutrition/soft-serve/>. Exhibit B (*Arby's Action* Complaint, Dkt. 1 at 13).

11. In response to DietGoal's complaint, TCBY Systems, LLC ("TCBY Systems"), a non-party and subsidiary of Mrs. Fields Famous Brands, LLC ("Mrs. Fields"), filed a motion to dismiss, contending that TCBY Enterprises was no longer in existence and that TCBY Systems did not own or operate the website [www.tcby.com](http://www.tcby.com). Exhibit C (TCBY Systems Motion to Dismiss at 1; Ward Declaration at 1).

12. TCBY Systems alleged that Mrs. Fields owns and operates [www.tcby.com](http://www.tcby.com). Exhibit C, Ward Declaration at 2.

13. Based on TCBY Systems' representation, DietGoal filed a voluntary notice of dismissal of TCBY Enterprises without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). Exhibit D (Plaintiff's Notice of Dismissal).

14. Thus, Mrs. Fields has had knowledge of the '516 Patent and DietGoal's allegations of its infringing activities at least as early as the filing of the complaint in the *Arby's Action* or September 15, 2011.

#### **CLAIM 1 -- INFRINGEMENT OF U.S. PATENT NO. 6,585,516**

15. Defendant has been and now is directly infringing one or more claims of the '516 Patent, in violation of 35 U.S.C. § 271(a), by making and/or using in the United States the computer implemented website [www.tcby.com](http://www.tcby.com), which has a computerized meal planning interface at <http://tcby.com/menu-nutrition/soft-serve/> and its related webpages ("Meal Builder").

16. In addition and/or in the alternative, the Defendant has been and/or is now indirectly infringing one or more claims of the '516 Patent, in violation of 35 U.S.C. § 271(b), by inducing visitors to its website and its Meal Builder ("End Users") to directly infringe the '516

Patent through their use of the infringing instrumentality. The Defendant induces such infringement by at least making its website available to End Users and providing links and/or other directions on its website and/or the internet for End Users to visit its Meal Builder. The Defendant engages in such activities knowingly and, at least from the time of receipt of the complaint in the *Arby's Action*, has done so with the knowledge that such activity encourages End Users to directly infringe the '516 Patent.

17. As a direct and proximate consequence of the acts and practices of the Defendant in infringing, directly and/or indirectly, one or more claims of the '516 Patent, DietGoal has suffered, is suffering, and will continue to suffer injury and damages for which it is entitled to relief under 35 U.S.C. § 284 in an amount to be determined at trial.

18. The limitation of damages provision of 35 U.S.C. § 287(a) is not applicable to DietGoal.

19. In addition, Mrs. Field's infringement has been and continues to be willful and deliberate, entitling DietGoal to additional damages as authorized by 35 U.S.C. § 284. Mrs. Fields, with knowledge of the '516 Patent, at least from the time of receipt of the complaint in the *Arby's Action*, engaged in reckless conduct that amounted to an objectively high likelihood that its activities constituted infringement of the '516 Patent when it continued to (1) make and/or use in the United States the computer implemented website [www.tcby.com](http://www.tcby.com), which has a computerized meal planning interface at <http://tcby.com/menu-nutrition/soft-serve/> and its related webpages; and (2) induce visitors to its website and its Meal Builder to directly infringe the '516 Patent through their use of the infringing instrumentality. Mrs. Field's engaged in such conduct with subjective knowledge of the risk of infringement. Alternatively, given its prior

knowledge of the '516 Patent and its involvement in the co-pending cases, Mrs. Fields should have known of the risk of infringement.

20. This case presents exceptional circumstances within the meaning of 35 U.S.C. § 285 and DietGoal is thus entitled to an award of its reasonable attorneys' fees.

### **DEMAND FOR JURY TRIAL**

21. DietGoal, under Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable.

### **PRAYER FOR RELIEF**

WHEREFORE, DietGoal requests entry of judgment that:

1. Defendant has infringed the patent-in-suit;
2. Defendant accounts for and pays to Plaintiff all damages caused by its respective infringement of the patent-in-suit; and
3. Plaintiff be granted pre-judgment and post-judgment interest on the damages caused to it by reason of one or more of Defendant's patent infringement;
4. The Court declare this an exceptional case and that Plaintiff be granted reasonable attorneys' fees in accordance with 35 U.S.C. § 285;
5. Costs be awarded to Plaintiff; and
6. Plaintiff be granted such other and further relief as the Court may deem just and proper under the circumstances.

Dated: January 22, 2013

Respectfully submitted,

**BUETHER JOE & CARPENTER, LLC**

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