

2012 WL 12893758

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United States District Court,
C.D. California.

The Tawnsaura Group, LLC

v.

Maximum Human Performance, LLC

Applies to All Coordinated Actions

SA CV 12-07189 SJO (AGRx)

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Filed 12/26/2012**Attorneys and Law Firms**

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**PROCEEDINGS (in chambers): ORDER DENYING
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S COMPLAINT PURSUANT
TO FED. R. CIV. P. 12(b)(6) [Docket No. 27]**

THE HONORABLE [S. JAMES OTERO](#), UNITED
STATES DISTRICT JUDGE

*1 A number of Defendants¹ ("Defendants") have
joined in a Motion to Dismiss Plaintiff's Complaint
Pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#)
("Motion"), filed November 19, 2012. The Motion
seeks dismissal on the grounds that the patents-in-suit
claim matter that is not eligible for patent protection
under [35 U.S.C. § 101](#). Plaintiff The Tawnsaura Group,
LLC ("Plaintiff" or "Tawnsaura") filed an Opposition
("Opposition") on December 6, 2012. Defendants filed a
Reply ("Reply") on December 17, 2012. Acting on the
stipulation for a briefing schedule submitted by the parties
on November 11, 2012, the Court vacated the previously
set hearing date. The Court finds this matter suitable for
disposition without oral argument. See [Fed. R. Civ. P.](#)

[78\(b\)](#). For the following reasons, the Court DENIES the
Motion.

¹ The Defendants who have joined in the Motion
are: Maximum Human Performance LLC, Physicians
Formulas, Inc., Gaspari Nutrition Inc., Beautyfit
Inc., Labrada Bodybuilding Nutrition, Inc., BNC
Nutrition LLC, Force Factor LLC, Irwin Naturals,
Kingfisher Media LLC, Nutricology, Inc., Puritan's
Pride, Inc., Serious Nutrition Solutions LLC,
Vitacost.com, Inc., NOW Foods Inc., Montiff
Inc., Swanson Health Products Inc., Solaray Inc.,
Twinlab Corporation, Ultimate Nutrition Products
Inc., Universal Nutrition, Inc., Musclepharm
Corporation, Infinite Labs, LLC, All American
Pharmaceutical & Natural Foods Corporation,
Driven Sports, Inc., Beverly International Nutrition,
LLC, Betancourt Nutrition, Inc., Advanced
Nutraceutical Engineers and Marketers, LLC,
Guthy Renker LLC, Get Fit Nutrition, Gamma
Enterprises LLC, Fahrenheit Group Corporation,
Isatori, Inc., Isatori Technologies, Inc., Isatori
Technologies, LLC, ABB Performance, LLC, NBTY
Inc., Optimum Nutrition, Inc., Bio-Engineered
Supplements and Nutrition, Inc., CytoSport, Inc.,
Sechel Holdings, Inc., World Health Products, LLC,
ISS Research, LLC, Anabol Naturals, Exclusive
Nutrition Products, Inc., Vital Pharmaceuticals, Inc.,
and Evogen, Inc.

**I. FACTUAL AND PROCEDURAL
BACKGROUND**

Beginning on August 21, 2012, Tawnsaura filed a series of
complaints in this District alleging infringement of [United
States Patents 5,874,471](#) ("the '471 Patent") and [6,028,107](#)
("the '107 Patent"). All such cases have been related and
coordinated. (Order Relating, Transferring, Coordinating
and Staying Cases, Nov. 29, 2012, ECF No. 12.) Both
patents are titled "Orthomolecular Medical Use of L-
Citrulline For Vasoprotection, Relaxative Smooth Muscle
Tone and Cell Protection." While it issued earlier, the ['471
Patent](#) is a continuation-in-part of the application that
resulted in the ['107 Patent](#). The Abstract of the ['471 Patent](#)
describes the invention as follows:

This invention is a novel method
in orthomolecular health to sustain
favorable amounts of L-arginine
efficiently within the human body
for preservation of good health
and amelioration of various disease

states. The method provides administration of sizable amounts of L-citrulline as precursor substance for bioconversion to L-arginine in order to maintain greater blood plasma concentrations of L-arginine as potential substrate for various metabolic functions

*2 The '[107 Patent](#)'s abstract contains the same language, but substitutes “orthomolecular medicine” for “orthomolecular health.” The patents state that

'471 Patent claim 1

A method of improving the health of a subject to increase the plasma level of arginine in the subject to a level from a low or normal fasting level to a level which is up to three times an average overnight fasting level, comprising orally administering a substance selected from the group consisting of L-citrulline and the calcium salt of L-citrulline.

The dependent claims are further limited to use with various health states or particular modes of administration, including particular dosing, particular product form, and the presence or absence of other ingredients.

II. DISCUSSION

A. Legal Standard

A motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) tests the legal sufficiency of the claims asserted in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-200 (9th Cir. 2003). In evaluating a motion to dismiss, a court accepts the plaintiff's material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

Patent eligibility under [35 U.S.C. § 101](#) can be decided at the motion to dismiss stage. *Ulramercial, LLC v. Hulu, LLC*, 2010 U.S. Dist. LEXIS 93453 (C.D. Cal. Aug. 13, 2010), *rev'd on other grounds*, 657 F.3d 1323 (Fed. Cir. 2011). Notwithstanding the broad phrasing of

“[o]rthomolecular medicine is the term coined by Linus Pauling for the preservation of good health and the treatment of disease by varying the concentrations in the body of substances that are normally present in the body and are required for optimal or better health.” ([107 Patent](#) 1:19-23.)

The '[471 patent](#)' has a single independent claim and 29 dependent claims. The '[107 patent](#)' has a single independent claim and 18 dependent claims. The independent claims are as follows:

'107 Patent claim 1

A method of improving the health of a subject to increase the plasma concentration of arginine in the subject to a level from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 μ mole per liter of plasma, comprising orally administering L-citrulline as precursor substance.

patentable subject matter given in [35 U.S.C. § 101](#) (“any new and useful process”), there are three categories that are not patentable: “laws of nature, natural phenomena, and abstract ideas.” *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).

B. Application

Defendants argue that the Patents claim the use of “a naturally occurring substance that people have been consuming for thousands of years,” simply relying on the body's “natural, biological response” to ingesting that substance, and “observing alleged, unspecified improved health.” (Mot. 1.) Defendants note that the patents state that “L-citrulline is a naturally occurring amino acid present in melon juices and as a protein constituent in food plants of the Cucurbiaceae family, such as melons, cucumbers, squash and pumpkin,” and that the human body naturally converts L-citrulline into L-arginine. (Mot. 3-4 (quoting '[471 Patent](#)' 11:53-56).) Thus, Defendants argue that “anyone enjoying pumpkin pie at Thanksgiving or some watermelon on the Fourth of July” would be practicing the claimed invention. (Mot. 4.)

Defendants argue that “[i]t is apparent that Plaintiff believes its patents cover any product that includes any form of L-citrulline intended to be ingested in any dosage.” (Mot. 2.) But, it is not clear that the claims are in fact so broad. Certainly, the dependent claims requiring particular dosages or forms are not. Nor, necessarily, are the independent claims requiring a dosage that increases arginine levels to above a “normal level.” The specification notes that the “invention relates to the peroral administration of L-citrulline to humans in daily amounts **greater than** that ingested usually by dietary means as constituents of food proteins and in food juices.” (Opp’n 12 (quoting [‘471 Patent](#) 11:38-42).)² Defendants respond that the statement is qualified—“greater than that ingested **usually** by dietary means”—such that the claims could overlap with the prior art dietary ingestion of L-Citrulline in amounts greater than “usual.” (Reply 4.) Defendants’ arguments raise scientific issues that the Court requires evidence, perhaps including expert testimony, to resolve.

² The Court disregards Plaintiff’s factual argument about how many pounds of watermelon it would take to infringe the specific claims that require ingestion of a particular amount of L-Citrulline. (Opp’n 12.) The arguments are not supported by evidence, and indeed could not be when considering a motion to dismiss. Likewise, Plaintiff goes beyond the pleadings in arguing that the L-Citrulline in Defendants’ products is synthetic, rather than natural. (Opp’n 10-11.) Even if the Court could consider that factual argument at this point, the claims, at least on their face, do not require synthetic L-Citrulline, so it is unclear what Defendants’ products have to do with the subject matter eligibility of the claims.

*3 There is no question that the claimed methods rely in part on the human body’s natural response to L-citrulline. But that is the case with any medication. The question is whether the challenged claims encompass nothing but a natural phenomena, or one merely coupled with “well-understood, routine, conventional activity already engaged in by the scientific community.” [Mayo Collaborative Servs. v. Prometheus Labs., Inc.](#), 132 S. Ct. 1289, 1298 (2012). Defendants argue that “[t]o the extent the alleged invention is simply the oral administration of L-Citrulline ... it is not patentable” because *Mayo*

invalidated an “administering” claim. (Reply 5-6.) But in *Mayo*, the drug was previously in use for the precise purpose recited in the claim. [Mayo](#), 132 S. Ct. at 1295. It is not clear that is the case here. Defendants cite to the disclosure in the [‘471 Patent](#)’s specification that at the time of the invention, “[c]itrulline malate (a salt of citrulline) [was] provided in slight amounts in a few European proprietary preparations for ill-defined or vague purposes in aesthenia (weakness) or as a tonic.” (Reply 8 (quoting [‘471 Patent](#) 5:40-43).) But, it is not clear whether those “slight amounts” are greater than normal dietary amounts, and the question cannot be resolved on a motion to dismiss.

It is also possible that, as Plaintiffs argue, claim construction will be required to resolve the patentable subject matter issue. (Opp’n 1, 9.) For example, claim 1 of each patent requires increasing a subject’s plasma concentration of arginine from a low or normal fasting concentration. Defendants contend that those claims would be infringed “every time a person eats watermelon.” (Mot. 10.) Defendants likewise argue that the independent claims only require increasing arginine to a level “**up to** three times an average overnight fasting level.” (Reply 5.) That suggests that a fairly small increase could infringe the claims, but again, it could depend on what “normal” means.

At this stage, the Court cannot determine whether or not the claims at issue are “an **application** of a law of nature or mathematical formula to a known structure or process,” “which may well be deserving of patent protection.” [Bilski v. Kappos](#), 130 S. Ct. 3218, 3230 (2010). The patents might, or might not, claim a new way of using an existing substance. See [Mayo](#), 132 S. Ct. at 1302. At this stage, the Court cannot determine whether the patents’ claimed use of L-Citrulline was “routine” or “conventional.” *Id.* at 1298.

III. RULING

The Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

All Citations

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