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Ready For Your Next Trade Show? The TRO Trend Continues

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Earlier this year we wrote a Law360 Expert Analysis article noting an apparent developing trend in the United States District Court for the District of Nevada: granting temporary restraining orders against non-U.S. companies accused of patent infringement on the eve or at the beginning of trade shows where they planned to exhibit. On at least four occasions in the past year in Las Vegas, orders have issued mandating U.S. Marshals or other federal, state, or local law enforcement to storm trade shows and literally shut down company booths. These same orders required law enforcement to seize any products, laptops, mobile phones, and other electronic devices (including their passwords) that could be or contain evidence of patent infringement.[1]


Tammy Dunn

Apparently this trend has continued, at least with respect to one increasingly notorious defendant in the krill oil industry, Luhua BioMarine (Shandong) Co. Ltd., who recently, for the second year in a row, was slapped with a trade show TRO, this time initiated by a different patent owner.

This article takes a look at this most recent example in this continuing trend and what has become a growing need to have well-crafted legal strategy for your next trade show season.


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Brief Historical Background

As discussed in our previous article, at about this same time last year, the district court in Nevada issued a TRO against Luhua on the eve of the SupplySide West trade show in Las Vegas, in a case styled Neptune Tech. & Bioressources Inc. v. Luhua Biomarine (Shandong) Co. Ltd., Case No. 2:15-cv-1911, ECF No. 6 (D. Nev. Oct. 7, 2015).

The patent owner in that case was Neptune, a self-proclaimed leader and innovator in the krill oil industry. Defendant Luhua was a relatively unknown krill oil manufacturer based in China with no known presence in the U.S. and no known distributors. Luhua had announced plans to attend the SupplySide West trade show, reputed to be the krill oil industry's biggest annual event, where it would feature its new product, a product Neptune had accused of infringing Neptune's patents in previous cease-and-desist letters.[2]

Notably, in the days and weeks leading up to the trade show, Neptune notified Luhua of its infringement, demanded Luhua cease and desist its infringing conduct, and offered Luhua a license with specific proposed terms to avoid costly litigation. Despite Neptune's attempts to negotiate a license, however, and after stating that it found Neptune's royalty rate too high, Luhua simply became nonresponsive. It quickly became clear to Neptune that Luhua had no intention of licensing from Neptune, and every intention of attending the SupplySide West trade show.[3]

To protect itself, on the eve of the trade show, Neptune filed a patent infringement lawsuit against Luhua in the District of Nevada. Simultaneously, Neptune also filed an emergency motion asking for a temporary restraining order. Historically, TROs are extraordinarily difficult to obtain in patent infringement cases. For example, in 2015 the only granted TRO in the entire United States was issued to Neptune against Luhua. An intellectual property rights holder has to establish, among other things, not only that it is substantially likely to succeed in proving patent infringement at trial, but also that it will suffer irreparable harm that money will not cure if a TRO does not issue. In the vast majority of cases, companies are unable to present sufficient specific evidence showing harm suffered if the new competitor is permitted to proceed would be irreparable. Courts, therefore, often conclude that an eventual award of a money judgment after a successful jury trial (which could be a year and a half or two years later) will have to suffice to compensate for any harm suffered by the aggrieved IP rights holder.

Neptune overcame those odds. In its emergency motion, Neptune argued and presented evidence that Luhua was infringing Neptune's patents and that Luhua was a likely flight risk with no recoverable assets in the U.S.[4] According to Neptune, the only recourse was to prevent Luhua from participating at the trade show. The court agreed and issued a TRO preventing Luhua from participating in the trade show and authorizing U.S. Marshals to seize all evidence from Luhua's booth at the show. Within less than six months, the parties settled, the case was dismissed, and the temporary restraining and seizure order was terminated.

One Year Later — Same Trade Show, Same Company, Same Result

Having still not learned its lesson, Luhua again became the target of a nearly identical TRO on the eve of the same trade show last month. This time, Luhua found itself in the cross hairs of another leader and innovator in the krill oil industry, Aker BioMarine Antarctic AS.[5] Aker owns U.S. Patent No. 9,320,765 ("the '765 patent") and sells various patented krill oil products under the Superba brand.[6] According to Aker, its patented a krill oil composition solves the issue of rapid decay of krill nutrients and allows Aker to provide consumers premium krill oil with higher levels of phospholipids, astaxanthin esters, and/or omega-3 fatty acids than any other krill oil on the market.

According to the complaint, Aker has invested substantial resources into its infrastructure to protect and practice its intellectual property. For example, Aker invested approximately $300 million into its supply chain for its Superba products.[7] Aker also reported owning highly customized fishing vessels that harvest krill near Antarctica utilizing specialized processing methods, and purchasing a processing plant in Houston, which serves as Aker's sole manufacturer.[8] To protect its investments and its research and development, Aker has obtained patents, which in turn provide Aker with a competitive advantage.

Meanwhile, according to the complaint, Luhua has undercut Aker's business model and competitive advantage by launching products that directly compete with Aker's product by unlawfully using Aker's patented compositions.

After discovering that Luhua planned to attend the SupplySide West trade show featuring its infringing products, Aker asked the court in the District of Nevada to step in and issue a temporary restraining order.[9] Noting that Luhua had already been subject to a TRO for nearly identical conduct last year, Aker presented evidence that Luhua was even more of a threat now because of its recent partnership with a U.S. nutraceutical distributor, Infiniti Marketing Group Inc. d/b/a Infiniti Nutraceuticals.[10] Aker identified Infiniti as a co-defendant in the request for TRO and asked that both be prevented from participating at the trade show.[11]

Taking a page out of Neptune's TRO playbook, Aker provided the court with specific evidence (in the form of a declaration from the general manager of Aker's U.S. division) that Aker would suffer irreparable harm if Luhua and Infiniti were not immediately stopped from offering Luhua's infringing products at the upcoming trade show.[12] According to Aker, if allowed to participate in the trade show, Luhua and Infiniti would be offering infringing krill oil products to Aker's target market, thus competing directly with Aker using Aker's patented technology.[13] This would harm Aker's reputation as the only company able to legally offer or license krill oil with the patented levels of nutrients.[14] Aker also faced the risk that Luhua would able to form customer relationships that would last for years and could potentially destroy already existing relationships Aker had worked for years to establish, thus costing Aker an incalculable amount of goodwill.[15]

As in Neptune, the court agreed with Aker and granted a TRO immediately enjoining Luhua and Infiniti from participating in the SupplySide West trade show and from transferring, moving, and/or destroying any evidence of patent infringement.[16] The order included a seizure order, mandating the U.S. Marshals Service to seize from Luhua and Infiniti's trade show booths any evidence of infringement, "including any documents in any form or format and any portable media or device (such as CDs, DVDs, flash drives, cellphones, PDAs, hard disk drives, laptop computers, memory cards, etc.)" and give possession of seized evidence to Aker's counsel.[17] The court further ordered Luhua and Infiniti to provide any passwords necessary to access any electronically stored documents or electronic devices.[18]

The day after the original TRO issued, after learning that the local U.S. Marshals Service personnel were busy working on a criminal jury trial, the court issued an amended order that allowed any federal, state, or local law enforcement officer to seize evidence, instead of only the U.S. Marshals Service. The court was also informed that Luhua did not actually show up at the trade show, even though they were listed as a participant, and therefore modified the seizure order to be executed only if Luhua was to appear at the show. The court also modified the seizure order not to be executed against Infiniti.

Since the time these orders issued, the parties have proceeded towards preparing for a hearing on the preliminary injunction Aker is seeking, which would prevent both defendants from making, using, selling, offering to sell, or importing into the U.S. any infringing products until trial in the case.

The Takeaway

Companies who depend on revenues generated from their participation in trade shows have enough market and business challenges under ordinary circumstances. Add to the mix a new player who is infringing the company's patents and, therefore, able to offer competing products at a fraction of the company's price, and the stakes increase exponentially.

This most recent case against Luhua has shown that trade show TROs remain a viable weapon for IP asset owners and a legitimate threat to exhibitors who have been accused of infringing a U.S. patent.

What appeared as perhaps an anomaly a year ago is now steadfastly becoming a trend, at least in Las Vegas, home to a countless number of trade shows spanning across a multitude of industries. As can be seen, a trade show can make the difference between a company surviving and thriving on one hand, or crashing and burning, on the other. Whether your company owns IP rights or not, the results of not being sufficiently prepared to deal with these critical IP issues can be devastating. Given the high stakes, having a properly crafted legal strategy and executing it is paramount.

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[1] See Tammy Terry & Jeffery P. Langer, The Hottest Product at Your Next Trade Show – A TRO, Law360, New York (March 7, 2016, 9:19 AM EST), http://www.law360.com/articles/766318/the-hottest-product-at-your-next-trade-show-a-tro.

[2] Neptune Tech. & Bioressources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd., Case No. 2:15-cv-1911, ECF No. 5 (D. Nev. Oct. 7, 2015)

[3] Neptune v. Luhua, ECF No. 5.

[4] Id.

[5] Aker Biomarine Antarctic, AS v. Luhua Biomarine (Shandong) Co., Ltd. and Infiniti Marketing Group, Inc. d/b/a Infiniti Nutraceuticals, Case No. 2:16-cv-2314, ECF No. 3 (D. Nev. Oct. 3, 2016)

[6] Aker v. Luhua, ECF No. 3, 4.

[7] Id. at 5.

[8] Id.

[9] Id.

[10] Id. at 4-5.

[11] Id. (generally)

[12] Id., ECF No. 3-8.

[13] Id. at 10.

[14] Id.

[15] Id. at 10-11.

[16] Aker v. Luhua, ECF No. 9 (D. Nev. Oct. 5, 2016).

[17] Id.

[18] Id.
