

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

NOSTRUM LABORATORIES, INC., and)
NOSTRUM PHARMACEUTICALS, LLC)

Plaintiffs,)

v.)

Case No. 4:16-cv-01040-ODS

BALBOA CAPITAL CORPORATION,)

JURY TRIAL DEMANDED

Defendant.)

FIRST AMENDED COMPLAINT

Plaintiff, Nostrum Laboratories, Inc. and Nostrum Pharmaceuticals, LLC, for their First Amended Complaint against defendant, Balboa Capital Corporation, state as follows:

The Parties

1. Plaintiff Nostrum Laboratories, Inc. (“Nostrum Laboratories”) is a New Jersey corporation with its principal place of business in Somerset, New Jersey.

2. Plaintiff Nostrum Pharmaceuticals, LLC (“Nostrum Pharmaceuticals”) is a Delaware limited liability company with its principal place of business in Somerset, New Jersey.

3. Defendant Balboa Capital Corporation (“Defendant”) is a California corporation with its principal place of business in Irvine, California.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction of this action under 28 U.S.C. § 1332(a) because it is an action between citizens of different states and because the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

5. This Court has personal jurisdiction over Defendant under Mo. Rev. Stat. § 506.500.1(1)-(2) because Defendant transacted business within Missouri and made numerous contracts in Missouri, and the causes of action in this Complaint arise from those acts.

6. Venue is appropriate in this District under 28 U.S. C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims in this Complaint occurred in this District, and because the property that is the subject of this action is situated in this District.

7. While there is an agreement between the parties that provides that Nostrum Laboratories agrees that it is subject to the jurisdiction of the courts of the State of California, nothing in that agreement deprives this Court of jurisdiction or makes the courts of the State of California the exclusive jurisdiction and venue for resolving the parties' disputes.

Generally Applicable Facts

8. Nostrum Laboratories is, and was at all relevant times, principally engaged in the specialty pharmaceutical business.

9. From 2007 through the present, Nostrum Laboratories has operated an office and manufacturing facilities for the manufacture of generic pharmaceutical products in Kansas City, Missouri, located at 1800 N. Topping Avenue, Kansas City, Missouri 64120 (the "Kansas City Facility").

10. From time to time, Nostrum Laboratories has acquired and operated equipment through capital leases and other means for the manufacture of drug products that were operated and maintained in the Kansas City Facility.

11. The equipment acquired by Nostrum Laboratories through capital leases with Defendant that are the subject of this action are located in the Kansas City Facility and essential to the Kansas City Facility's operations.

12. Specifically, on or about August 1, 2011, Defendant offered an equipment lease proposal to Nostrum Laboratories for the financing of equipment consisting of various laboratory, manufacturing and other equipment for the Kansas City Facility.

13. Based on the representations made by Defendant's authorized representative, Donald F. Hansen, Jr. ("Hansen"), Defendant led Nostrum Laboratories to believe that the proposed agreement for such lease would be a customary capital lease, on the basis of which Nostrum Laboratories would be able upon expiration of the lease to obtain ownership of the equipment for a nominal fee.

14. In reliance on the representations regarding the nature, terms and operations of the proposed lease by Hansen and Defendant, Nostrum Laboratories entered into a master lease agreement with Defendant dated September 6, 2011 (the "Master Lease Agreement"), pursuant to which Nostrum Laboratories, under Lease No. 140869-001, acquired equipment and related services, paid Defendant pre-fund charges and fully paid all quarterly payments through and including the term of said lease.

15. In reliance of these same representations, Plaintiff Nostrum Pharmaceuticals executed a guaranty for the Master Lease Agreement.

16. At the time of execution of the Master Lease Agreement, and at the time thereafter when the parties entered into the leases thereunder and Nostrum Pharmaceuticals executed its guaranty for the Master Lease Agreement, Hansen and Defendant knew and were well aware that Nostrum Laboratories and Nostrum Pharmaceuticals assumed and understood that the Master Lease Agreement and the leases thereunder were customary capital leases pursuant to which Nostrum Laboratories would have the right upon expiration thereof to obtain ownership of the equipment for a nominal fee.

17. Thereafter, in reliance on the foregoing representations by Hansen and Defendant, Nostrum Laboratories entered into six additional leases pursuant to the Master Lease Agreement with Defendant (Lease Nos. 140869-002, -003, -004, -005, -006, -007), in connection with which Nostrum Laboratories acquired equipment and related services, paid Defendant pre-fund charges and paid all quarterly payments through and including the term of said leases.

18. In each instance, Defendant assigned all of its interests in the equipment and rights under the leases to third parties, from whom Defendant had borrowed money to finance a portion of the equipment purchases.

19. Pursuant to Lease No. 140869-001, Defendant funded \$416,808.49 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$47,987.90 for pre-fund charges and \$456,005.16 over the stipulated 12 quarters either to Defendant or its assignee.

20. Pursuant to Lease No. 140869-002, Defendant funded \$409,935.48 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$43,281.30 for pre-fund charges and \$448,484.81 over the stipulated 12 quarters either to Defendant or its assignee.

21. Pursuant to Lease No. 140869-003, Defendant funded \$549,974.25 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$71,444.65 for pre-fund charges and \$601,693.80 over the stipulated 12 quarters either to Defendant or its assignee.

22. Pursuant to Lease No. 140869-004, Defendant funded \$700,000 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$63,109.90 for

pre-fund charges and \$765,828.00 over the stipulated 12 quarters either to Defendant or its assignee.

23. Pursuant to Lease No. 140869-005, Defendant funded \$342,393.89 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$45,114.34 for pre-fund charges and \$374,592.61 over the stipulated 12 quarters either to Defendant or its assignee.

24. Pursuant to Lease No. 140869-006, Defendant funded \$273,707.16 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$31,022.08 for pre-fund charges and \$299,446.58 over the stipulated 12 quarters either to Defendant or its assignee.

25. Pursuant to Lease No. 140869-007, Defendant funded \$320,569.44 for the acquisition of equipment and services, and Nostrum Laboratories paid Defendant \$127,349.83 for pre-fund charges and \$365,144.72 over the stipulated 8 quarters either to Defendant or its assignee.

26. Upon the expiration of each of the seven leases pursuant to the Master Lease Agreement, Nostrum Laboratories notified Defendant that it intended to take ownership of the equipment financed thereunder at the end of the lease term for a nominal fee.

27. With the exception of Lease No. 140869-001, Defendant did not respond to Nostrum Laboratories' notices of its intent to take ownership of the equipment.

28. With regard to Nostrum Laboratories' April 30, 2014 notice to take possession of the equipment pursuant to Lease No. 140869-001, Defendant provided to Nostrum Laboratories a "Payoff Quote" dated September 15, 2014 purportedly offering a payoff to be made in the outlandish, unreasonable and unsupported amount of \$257,950.35, consisting of \$240,850.00 as

a “Residual” (without specification, explanation or justification) and a “Sales Tax on Residual” of \$17,100.35.

29. Nostrum Laboratories promptly objected to the “Payoff Quote” as a violation of the representations given by Hansen and Defendant regarding Nostrum Laboratories’ ability to pay for the equipment for a nominal fee given that Nostrum Laboratories would pay (and did pay) off the entire lease costs in accordance with the schedule of payments provided in the leases, and there was no obligation to make a payment to Defendant for this purpose other than for a nominal fee.

30. When requested by Nostrum Laboratories, Defendant failed and refused to provide any basis or explanation for the claimed “Residual” amount.

31. Indeed, there could not have been a residual amount given that Nostrum Laboratories paid Defendant pursuant to Lease No. 140869-001 \$503,993.06, where Defendant funded the acquisition of equipment and services in the amount of \$416,808.49.

32. Further, the nature of the installation, services and depreciable equipment that were the subject of the lease do not possibly support Defendant’s claimed payoff quote in any respect.

33. In May 6, 2016, Defendant again, without justification or excuse, provided to Nostrum Laboratories an identical “Payoff Quote” claimed to have been made “pursuant to your request.”

34. Once again, Nostrum Laboratories objected to the “Payoff Quote” on May 26, 2016, rejecting Defendant’s offer for the reasons set forth above, and confirmed its position that it owned the equipment upon expiration of the lease for a nominal fee, as stated in Nostrum Laboratories’ aforesaid letter dated April 30, 2014.

35. On September 20, 2016, Defendant's counsel emailed to Nostrum Laboratories a letter and a proposed complaint asserting claims under the Master Lease Agreement demanding Nostrum Laboratories to pay Defendant \$2,418,347.11, making the false and unsupported allegations that rental payments continue *ad infinitum* despite the fact that each of the seven leases was expired, there is no provision in the Master Lease Agreement providing for such an absurd result, and Defendant did not quote any price for the equipment under any six of the leases except in the case of Lease No. 140869-001.

36. Defendant's purported "Payoff Quote" and demand letter were issued entirely in bad faith.

37. Defendant's proposed complaint incorrectly alleges that Nostrum Laboratories has converted the equipment under the seven leases for the reason that Defendant has never demanded nor requested that Nostrum Laboratories return the equipment to Defendant and Nostrum Laboratories is, and at all relevant times, has been in lawful and rightful possession of the equipment.

Count I: Declaratory Judgment

38. Plaintiffs hereby re-allege and incorporate by reference the allegations in Paragraphs 1-37.

39. A justiciable controversy exists between Plaintiffs and Defendant concerning the rights under the parties' agreements.

40. Nostrum Laboratories has a legally protectable interest at stake in that it has paid for the equipment in full, and with interest, under the parties' agreements, and Defendant has threatened to deny Nostrum Laboratories the right to acquire full ownership of the equipment for a nominal fee.

41. The controversy concerning the parties' rights and obligations under the agreements is ripe for determination, as Defendant has disputed Nostrum Laboratories' right to acquire the equipment for a nominal fee and, instead, insisted that Nostrum Laboratories first pay an absurd payoff amount that bears no reasonable relation to Defendant's initial payment for the equipment or the equipment's fair market value.

42. Moreover, a controversy exists in that Defendant has demanded payment and performance under leases that Defendant has assigned to third parties, and for which Defendant no longer has any standing to enforce such agreements to Defendant's benefit.

43. Plaintiffs do not have an adequate remedy at law.

44. Plaintiffs accordingly seek relief from this Court in the form of a declaration of Nostrum Laboratories' existing and ongoing contractual rights to acquire full ownership of the equipment for a nominal fee, determining that Nostrum Laboratories owes no further amounts except for a nominal fee under each of the leases, that Nostrum Pharmaceuticals owes nothing, and that Defendant is not the correct party in interest to demand any payment under the leases—even the nominal fee—because the leases have been assigned to third parties.

45. A declaration in favor of Plaintiffs is warranted to protect them from immediate injury as a result of the Defendant's actions and threatened actions.

46. Under the terms of the parties' agreement, Nostrum Laboratories is entitled to its attorneys' fees and expenses incurred in bringing this action.

Count II - Breach of Covenant of Good Faith and Fair Dealing

47. Plaintiffs hereby re-allege and incorporate by reference the allegations in Paragraphs 1-46.

48. Defendant is intentionally and purposely preventing Nostrum Laboratories from realizing the benefit under the parties' agreements by refusing to recognize Nostrum Laboratories' right to acquire the equipment, which it has paid for in full with interest, for a nominal fee at the conclusion of the lease payments.

49. Defendant's insistence that Nostrum Laboratories pay an absurd "payoff amount" for a purported "residual" would garner Defendant with a much greater benefit than it bargained to receive.

50. Accordingly, Defendant's conduct has deprived and continues to deprive Nostrum Laboratories of its bargained for benefits under the lease agreements and Defendant's representation that Nostrum Laboratories would be entitled to acquire the equipment for a nominal fee at the conclusion of the scheduled lease payments.

51. Nostrum Laboratories has been damaged by Defendant's bad faith conduct, whereby Defendant used its discretion in such a manner that evaded the spirit of the parties' agreements and understanding.

Count III: Reformation Based on Mutual Mistake

52. Plaintiffs hereby re-allege and incorporate by reference the allegations in Paragraphs 1-51.

53. Nostrum Laboratories and Defendant entered into the Master Lease Agreement and seven leases pursuant to that agreement.

54. Nostrum Laboratories and Defendant's authorized representative, Donald F. Hansen, Jr., consistent with their understanding that Nostrum Laboratories wanted a standard capital lease arrangement, agreed that Nostrum Laboratories would be able to acquire full ownership of the equipment at the conclusion of the scheduled lease payments for a nominal fee.

55. This purchase option was a basic assumption upon which Defendant and Nostrum Laboratories based their bargain.

56. Nostrum Laboratories and Defendant's authorized representative, Donald F. Hansen, Jr., were mutually mistaken in believing that the formal lease agreements—which contain several pages of miniscule and blurry writing—contained an express provision reflecting the parties' agreement for the purchase option.

57. As written, the Master Lease Agreement and subsequent leases do not accurately set forth the terms of the actual agreement and fail to incorporate the true prior intentions of the parties.

58. Reformation by this Court is required to avoid a manifest injustice and further damage to Nostrum Laboratories.

Count IV: Reformation Based on Unilateral Mistake

59. Plaintiffs hereby re-allege and incorporate by reference the allegations in Paragraphs 1-58.

60. Nostrum Laboratories and Defendant entered into the Master Lease Agreement and seven leases pursuant to that agreement.

61. Nostrum Laboratories and Defendant's authorized representative, Donald F. Hansen, Jr., consistent with their understanding that Nostrum Laboratories wanted a standard capital lease arrangement, agreed that Nostrum Laboratories would be able to acquire full ownership of the equipment at the conclusion of the scheduled lease payments for a nominal fee.

62. This purchase option was a basic assumption upon which Defendant and Nostrum Laboratories based their bargain.

63. Nostrum Laboratories was mistaken in believing that the formal lease agreements—which contain several pages of miniscule and blurry writing—contained an express provision reflecting the parties’ agreement for the purchase option.

64. Defendant’s authorized representative, Donald F. Hansen, Jr., was either additionally mistaken as to the specifics of the formal lease agreement, or wrongfully proceeded with the transaction knowing that Nostrum Laboratories was mistaken about the specifics of the formal lease agreement.

65. As written, the Master Lease Agreement and subsequent leases do not accurately set forth the terms of the actual agreement and fail to incorporate the true prior intentions of the parties.

66. Reformation by this Court is required to avoid a manifest injustice and further damage to Nostrum Laboratories.

Count V – Promissory Estoppel

67. Plaintiffs hereby re-allege and incorporate by reference the allegations in Paragraphs 1-66.

68. Based on the promises made by Defendant’s authorized representative, Donald F. Hansen, Jr., Defendant led Plaintiffs to believe that, upon the expiration of the leases, Nostrum Laboratories would be able to obtain ownership of the equipment for a nominal fee.

69. Without these express promises and understandings, Nostrum Laboratories never would have agreed to enter into the leases and obtain the equipment in this manner.

70. Defendant has now repudiated its promise, thereby damaging Nostrum Laboratories.

WHEREFORE, plaintiffs, Nostrum Laboratories, Inc. and Nostrum Pharmaceuticals, LLC accordingly seek relief from this Court in the form of a declaration of Nostrum Laboratories' existing and ongoing contractual rights to acquire full ownership of the equipment for a nominal fee, determining that Nostrum Laboratories owes no further amounts except for a nominal fee under each of the leases, that Nostrum Pharmaceuticals, LLC owes nothing, and that Defendant is not the correct party in interest to demand any payment under the leases—even the nominal fee—because the leases have been assigned to third parties. Plaintiffs also pray for an order reforming the Master Lease Agreement and the leases thereunder to conform to the parties' understanding, for a judgment awarding actual damages in an amount not less than \$75,000, for Nostrum Laboratories' attorneys' fees and costs in bringing this action, and granting such other and further relief as the Court deems just and proper under the circumstances.

Jury Demand

Plaintiffs demand a trial by jury on all issues triable to a jury.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following this 24th day of April, 2017:

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