

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

WILLIAM KEMPER, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 PRIME TANNING CORP., et al.,)
)
 Defendants.)

Case No. 09CN-CV00333

FILED
MAR - 4 2010

MOLLY LIVINGSTON
CLERK OF CIRCUIT COURT

**ANSWER OF DEFENDANT ELEMENTIS LTP L.P.
TO PLAINTIFFS' FIRST AMENDED PETITION FOR DAMAGES**

Defendant Elementis LTP L.P., for its answer to plaintiffs' First Amended
Petition for Damages, states as follows:

Parties

1. This defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 and, therefore, denies the same.

2. This defendant denies the allegation in paragraph 8 that Wismo's principal place of business is at 546 S. Water Street in Milwaukee, Wisconsin. This defendant is without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 8 and, therefore, denies the same.

3. This defendant admits the allegations contained in paragraph 9.

4. This defendant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 10 and, therefore, denies the same.

Jurisdiction and Venue

5. This defendant denies the allegations contained in paragraphs 11 and 12.

Facts

6. This defendant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 13, 14 and 15 and, therefore, denies the same.

7. This defendant denies the allegation contained in paragraph 16 as it fails to consider dose, duration, method and/or route of exposure.

8. This defendant denies the allegations contained in paragraph 17.

9. This defendant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 18 and, therefore, denies the same.

10. This defendant denies the allegations contained in paragraphs 19, 20 and 21.

11. This defendant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 22 and, therefore, denies the same.

12. This defendant denies the allegations contained in paragraphs 23 and 24.

13. This defendant is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 25 and, therefore, denies the same.

14. This defendant denies the allegations contained in paragraphs 26 and 27.

15. This defendant denies the allegations contained in paragraphs 28 and 29.

COUNT I

16. In response to paragraph 30, this defendant incorporates by reference its answers and responses to paragraphs 1 through 29.

17. This defendant denies each of the allegations contained in paragraph 31, including all subparts thereof.

18. This defendant denies the allegations contained in paragraph 32.

19. This defendant denies that plaintiffs are entitled to the relief requested in the "WHEREFORE" clause immediately following paragraph 32.

COUNT II

20. In response to paragraph 33, this defendant incorporates by reference its answers and responses to each and every allegation contained in paragraphs 1 through 32.

21. This defendant denies each of the allegations contained in paragraph 34, including all subparts thereof.

22. This defendant denies the allegations contained in paragraph 35.

23. This defendant denies that plaintiffs are entitled to the relief requested in the "WHEREFORE" clause immediately following paragraph 35.

COUNT III

24. In response to paragraph 36, this defendant incorporates by reference its answers and responses to paragraphs 1 through 35.

25. This defendant denies each of the allegations contained in paragraph 37, including all subparts thereof.

26. This defendant denies the allegations contained in paragraph 38.

27. This defendant denies that plaintiffs are entitled to the relief requested in the "WHEREFORE" clause immediately following paragraph 38.

COUNT IV

28. In response to paragraph 39, this defendant incorporates by reference its answers and responses to paragraphs 1 through 38.

29. This defendant denies the allegations contained in paragraphs 40 and 41.

30. This defendant denies each of the allegations contained in paragraph 42, including all subparts thereof.

31. This defendant denies the allegations contained in paragraphs 43 and 44.

32. This defendant denies that plaintiffs are entitled to the relief requested in the "WHEREFORE" clause immediately following paragraph 46.

33. This defendant denies each and every allegation contained in plaintiffs' First Amended Petition for Damages which is not specifically admitted herein.

AFFIRMATIVE AND/OR FURTHER DEFENSES

Defendant Elementis LTP L.P., for its affirmative and/or further defenses, states as follows:

1. Plaintiffs' First Amended Petition for Damages fails to state a claim upon which relief may be granted.
2. Plaintiffs' claims are barred by the applicable statute of limitations.
3. Venue is improper in this Court.
4. Plaintiffs have failed to join all the parties necessary for a just adjudication of this matter in their First Amended Petition for Damages.
5. Plaintiffs' claims for damages are barred in whole or in part by their failure to mitigate their damages.
6. Pleading in the alternative, if plaintiffs have suffered any injury or damage, which is not hereby admitted, such injury or damage may have been caused or contributed to by the negligence or fault of persons or entities over whom this defendant

had no control, and such injuries or damages were not caused or contributed to by the negligence or fault of this defendant or any of its agents, servants or employees.

7. Pleading in the alternative, any injuries or damages sustained by plaintiffs, which this defendant expressly denies, were not caused or contributed by any negligence or fault on the part of this defendant.

8. Pleading in the alternative, if plaintiffs suffered any injury or damage, which is not hereby admitted, the negligence or fault of the parties to this case should be compared by the trier-of-fact; further, any negligence or fault apportioned to plaintiffs should act to bar any recovery or reduce any recovery in direct proportion to any such assessment of fault, all in accordance with the laws of the State of Missouri.

9. Pleading in the alternative, if plaintiffs have suffered any injury or damage, which is not admitted, this defendant requests that the negligence alleged by plaintiffs against others, though not hereby admitted, be compared to the negligence or fault of this defendant, to the extent that any such negligence is found to have caused or contributed to cause any injuries or damages alleged by plaintiffs, and recovery against this defendant should be reduced in direct proportion to such assessment of fault.

10. This defendant is entitled to a set-off or credit for any judgment, settlement, or proceeds paid to plaintiffs involving other persons, entities, defendants, other defendants' representatives, or third-parties.

11. Pursuant to R.S.Mo. 537.060, if and to the extent that any other defendant or party enter into a release agreement, covenant not to sue or note to enforce a judgment, or any other type of settlement agreement with plaintiffs, this defendant is entitled to

have any judgments that may be rendered against it reduced by the stipulated amount of the agreement, or the amount of the consideration paid, whichever is greater.

12. If plaintiffs sustained the injuries alleged in the petition, which is denied, there was an intervening, superseding cause or causes leading to the alleged injuries, and therefore, any act or omission on the part of this defendant was not the proximate cause and/or competent producing cause of the alleged injuries.

13. Plaintiffs' purported claims are barred because, at all relevant times, this defendant did not create a dangerous or unsafe condition on farmland where fertilizer was spread.

14. For other and further answer in defense to Plaintiffs' First Amended Petition for Damages, plaintiffs' claims for punitive damages should be stricken and dismissed in that they violate both the Missouri Constitution and the United States Constitution as follows:

a. The standards for determining both the amount and/or the subsequent imposition of punitive damages are vague, supply no notice to this defendant of the potential repercussions of its alleged conduct and are subject to the unbridled discretion of the jury, thereby denying due process under the Missouri Constitution, Article 1, Section 10, as well as the United States Constitution.

b. The standards for determining both the amount and/or the subsequent imposition of punitive damages are vague, supply no notice to this defendant of the repercussions of its alleged conduct and are subject to the unbridled discretion of the jury, thereby denying due process under the Fifth and Fourteenth Amendments of the United States Constitution.

c. Plaintiffs' claims for punitive damages are criminal in nature and the rights given this defendant in criminal proceedings under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution are applicable.

d. Plaintiffs' claims for punitive damages are criminal in nature and the rights given this defendant in criminal proceedings under the Missouri Constitution, including but not limited to Article 1, Sections 18A, 19, 21, and 22A, are applicable.

e. Plaintiffs' claims for punitive damages constitute a request for and/or imposition of an excessive fine in violation of the Eighth Amendment of the United States Constitution.

f. Plaintiffs' claims for punitive damages constitute a request for and/or imposition of an excessive fine in violation of Missouri Constitution, Article 1, Section 21.

g. Plaintiffs' claims for punitive damages constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

h. Plaintiffs' claims for punitive damages constitute cruel and unusual punishment in violation of the Missouri Constitution, Article 1, Section 21.

i. Plaintiffs' claims for punitive damages discriminate against this defendant and constitute a denial of equal protection under the law in violation of the Fifth and Fourteenth Amendments of the United States Constitution to the extent that defendant's wealth or net worth may be requested to be considered by the jury in determining the amount of any such damage awards.

j. Plaintiffs' claims for punitive damages discriminate against this defendant and constitute a denial of equal protection under the law in violation of Article 1, Sections 2 and 10 of the Missouri Constitution.

k. Plaintiffs' claims for punitive damages constitute a subsequent imposition of punitive-type damages against this defendant and they cannot protect against multiple punishments for the same alleged conduct or wrong, thereby denying due process under Article 1, Sections 2 and 10 of the Missouri Constitution.

l. Missouri Law does not provide an adequate procedure for the determination of damages in the nature of aggravating circumstances or punitive damages in violation of the equal protection and substantive and procedural due process requirements of both the Missouri Constitution and the United States Constitution and in violation of the United States Supreme Court decisions in *Pacific Mutual Insurance Company v. Haslip*; *BMW of North American, Inc. vs. Gore*; *State Farm v. Campbell*

m. The granting of relief requested by plaintiffs would be unconstitutional under the Missouri and the United States constitutions in that it would violate due process and equal protection guarantees, place an undue burden on interstate commerce, and violate constitutional proscriptions against excessive fines.

15. To the extent that any defense arising out of the Missouri Tort Reform Act and Mo. Rev. Stat. Sec. 510.265 accrues to the benefit of this defendant, this defendant hereby reserves the right to assert the same should the facts warrant it.

16. If the decedent was exposed to any product allegedly connected to this defendant, which is specifically denied, then such exposure was inconsequential or *de minimis*, thus barring any recovery by the plaintiffs.

17. This defendant was at all times in full compliance with all applicable industry and regulatory standards and, therefore, had no further duty to warn.

18. This defendant states that plaintiffs' claims against it are barred because plaintiffs failed to allege facts with sufficient specificity to provide this defendant with sufficient information regarding the basis of plaintiffs' claims against this defendant to allow this defendant to reasonably develop and present its defenses to those claims in that plaintiffs failed to provide reasonable notice of the time, place, nature and manner of its allegedly wrongful conduct.

19. This defendant states that plaintiffs' claims are barred to the extent any product which it produced was materially altered after the sale and prior to the alleged exposure.

20. Plaintiffs' claims may be preempted in whole or in part by federal and/or state statutes and/or regulations.

21. Plaintiffs' claims are barred or limited by some or all of the provisions of R.S.Mo. Sections 537.760 *et seq.*, including but not limited to Sections 537.764 and 537.765.

22. Plaintiffs' claims are barred, in whole or in part, because this defendant was involved in no unreasonable activity or use of property that affected plaintiffs or decedent.

23. Plaintiffs' claims are barred, in whole or in part, because the acts complained of by plaintiffs, though denied, are in compliance with industry standards as well as state and/or federal statutes and regulations, and have been authorized by state and/or federal agencies that have regulatory authority over those activities.

24. Plaintiffs' claims are barred against this defendant insofar as any product it produced met or exceeded "state of the art" as defined by law.

25. Plaintiffs' claims are barred against this defendant because any product it produced was neither defective nor unsafe for its intended purpose.

26. Plaintiffs' claims are barred to the extent that a post-production material modification or alteration was made to a product it allegedly produced.

27. Plaintiffs' claims are barred to the extent that this defendant had no duty to warn of any open and obvious danger.

28. Plaintiffs are improperly joined in this action.

29. This defendant was, at most, a seller in the stream of commerce as provided by statute.

30. This action has not been brought by the real parties in interest.

31. This defendant states that any injury or damages allegedly sustained by plaintiffs were the direct and unavoidable consequence of one or more plaintiff's pre-existing and/or unrelated medical condition and were not caused or contributed by any entity's or individual's negligence or fault.

32. Plaintiffs have released or waived their right to seek damages in this action, or are otherwise estopped from pursuing this action.

33. This defendant specifically reserves the right to plead additional affirmative defenses as they become known and available throughout the pendency of this case.

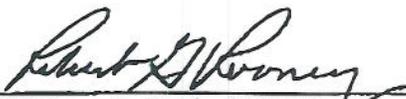
WHEREFORE, Defendant Elementis LTP L.P. prays that plaintiffs take nothing by their First Amended Petition for Damages, that judgment be entered against plaintiffs

and in favor of this defendant for costs, attorneys fees and expenses, and for such other relief that the Court deems just and proper.

Respectfully submitted,

Dated: March 2, 2010

LATHROP & GAGE LLP

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States Mail, Postage Prepaid, on the following counsel of record this 2nd day of ~~February~~ ^{March}, 2010:

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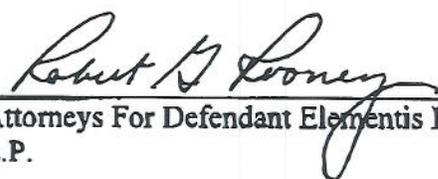
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March 2, 2010

From: Robert G. Rooney

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Number of Pages Transmitted (including this cover sheet): 15

Message: William Kemper, et al. v. Prime Tanning Corp., et al.

Case No. 09CN-CV00333

Please find attached Answer of Defendant Elementis LTP L.P. to Plaintiffs' First Amended Petition for Damages and Entry of Appearance for fax filing.

Thank you for your assistance. If you need anything further, please feel free to contact Maureen Lobdell at 816-460-5761.

If you have a problem receiving this facsimile, please call: (816) 292-2000

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