

VERDICTS & SETTLEMENTS

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INTELLECTUAL PROPERTY

TRADEMARK INFRINGEMENT Unfair Competition

VERDICT: \$3,300,000.

CASE/NUMBER: EarthLite
Massage Tables Inc. v. LifeGear
Inc., et al. / 05 CV 0667-DMS
(PJB).

COURT/DATE: USDC Southern /
March 28, 2007.

JUDGE: Hon. Dana M. Sabraw.

ATTORNEYS: Plaintiff - Shawn D.
Morris, William A. Lemkul (Morris
& Sullivan, LLP, San Diego).

Defendant - Daniel M. Cislo, Kelly
W. Cunningham (Cislo & Thomas,
LLP, Santa Monica).

TECHNICAL EXPERTS: Plaintiff
- Howard Marylander, marketing,
Encino; David Nolte, forensic
accounting, Los Angeles; Mark
Tratos, Esq., trademark, Las Vegas,
Nev.

Defendant - Sandra Cogan,
marketing, Torrance; Jill Pietrini,
Esq., trademark, Los Angeles;
Robert Trout, CFA, economics,
Cardiff.

FACTS: Plaintiff EarthLite
Massage Tables Inc. is a California
corporation with its principal place
of business in Vista, Calif. Since
October of 1987, EarthLite has
been in the business of designing,
manufacturing, advertising,
distributing and selling a wide
variety of goods bearing its
Registered Trademark - a stylized
logo of the Earth together with the
descriptive term: "EarthLite."

EarthLite is the premier
manufacturer of massage tables
(and related products) in the
U.S. and worldwide. EarthLite
manufactures and sells not only
high-end professional and/or
massage therapist use massage
tables, but also less expensive,
portable end-user massage
tables as well. EarthLite has
enjoyed a considerable amount
of commercial success from the
sales of its portable massage tables
in the United States. EarthLite is
routinely recognized as the best
massage table manufacturer in the
world. EarthLite tables have been
widely advertised and shown on
such popular TV shows as Friends,
In Living Color, and in several
feature films.

Defendant LifeGear Inc. is a New
Jersey company with its principal
place of business in Ontario,
Calif. LifeGear manufactures and
distributes exercise and fitness
equipment throughout the world.

In 1997, LifeGear Inc. began to
manufacture and import portable
massage tables from China by a
Taiwanese immigrant. In 2002,
LifeGear Inc. opened a new
company division to manufacture
and distribute its massage tables.
LifeGear named this new division:
"EarthGear." LifeGear obtained
several federally registered
trademarks for its "EarthGear"
mark from 2002 through 2005.

Plaintiff EarthLite learned of
LifeGear's use of the EarthGear
mark in the fall of 2003 and issued
a cease and desists on Aug. 4, 2003.
LifeGear refused to discontinue use
of the EarthGear mark citing its
federal registration and disclaiming
any likelihood of consumer
confusion.

The plaintiff alleged that in 2004,
LifeGear changed its mark to even
more closely resemble plaintiff's
EarthLite trademark. As a result
of LifeGear's refusal to discontinue
use of the EarthGear mark,
coupled with its 2004 modification,
EarthLite filed a complaint against
LifeGear on April 1, 2005. The
plaintiff also alleged that LifeGear
infringed upon a third parties'
Life Fitness® mark for exercise
equipment.

Although disputed by LifeGear,
EarthLite believed LifeGear's
adoption and use of the EarthGear
mark was intentional and designed
to capture and capitalize on
EarthLite's market dominance
and goodwill. The case proceeded
to trial on March 12, 2007
after several failed settlement
conferences.

At trial, EarthLite argued that
LifeGear had hired former
EarthLite employees and
copied and reverse-engineered
EarthLite's products in order to
create a commercial impression
that LifeGear's EarthGear brand
was affiliated in some way with
EarthLite. The plaintiff requested
damages of \$1.9 million.

In defense of the action, LifeGear
argued that it had received a valid
trademark from the Patent and
Trademark Office for its EarthGear
mark, that it had received proper
advice of counsel, and that there
was no intentional conduct,
likelihood of confusion or actual
confusion between the two marks.
As to damages, LifeGear argued
that any damages in excess of \$1.1
million lacked causation and were
merely speculative.

The trial of the case concluded on
March 22, 2007.

JURY TRIAL: Length, eight days;
Deliberation, three days.

RESULT: The jury returned a
verdict in plaintiff EarthLite's
favor for \$3.3 million. The jury also
found defendant Lifegear Inc.'s
conduct to be intentional.

OTHER INFORMATION: Post-trial
motions for attorney fees and costs.
Prejudgment interest is pending.