



102320520

To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

OFFICE OF PUBLIC RECORDS

1. Name of conveying party(ies): **David Newman**  
 Individual - United States  
 General Partnership  Limited Partnership  
 Corporation  Association  
 Other: \_\_\_\_\_  
 Additional name(s) of conveying party(ies) attached?  Yes  No

2. Name and address of receiving party(ies):  
 Name: **Elima IP Holdings, LLC**  
 Street Address: **1100 W. Littleton Boulevard**  
**Suite 360**  
 City: **Littleton** State: **CO** ZIP: **80120**  
 Individual(s) citizenship: \_\_\_\_\_  
 Association \_\_\_\_\_  
 General Partnership of: \_\_\_\_\_  
 Limited Partnership of: \_\_\_\_\_  
 Corporation-State: \_\_\_\_\_  
 Other: **Limited Liability Company of Delaware**  
 If assignee is not domiciled in the United States, a domestic representative designation is attached?  Yes  No  
 (Designations must be a separate document from Assignment)  
 Additional name(s) & address(es) attached?  Yes  No

3. Nature of conveyance:  
 Assignment  Merger  
 Security Agreement  Change of Name  
 Other: \_\_\_\_\_  
 Execution Date: **August 16, 2002**

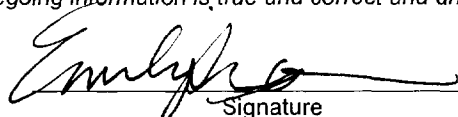
4. Application number(s) or registration number(s):  
 A. Trademark Application No.(s)  
**75/705,475**

B. Trademark Registration No.(s)

5. Name and address of party to whom correspondence concerning document should be mailed:  
 Name: **Emily C. Sexton, Esq.**  
 Internal Address: **PIPER RUDNICK LLP**  
 Street Address: **1200 Nineteenth Street, NW**  
 City: **Washington** State: **DC** ZIP: **20036**

6. Total number of applications and registrations involved: **1**  
 7. Total fee (37 C.F.R. § 3.41). . . . . \$ **40.00**  
 Enclosed  
 Authorized to be charged to deposit account  
 8. Deposit account number:  
 (Attach duplicate copy of this page if paying by deposit account)

DO NOT USE THIS SPACE

9. Statement and signature.  
*To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.*  
**Emily C. Sexton, Esq.**  **12/03/2002**  
 Name of Person Signing Signature Date

Total no. of pages incl. cover sheets, attachments, and document: **11**

Mail documents to be recorded with required cover sheet information to:  
 Commissioner of Patents & Trademarks, Box Assignments  
 Washington, D.C. 20231

12/23/2002 610W11 00000179 75705475

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40.00 OP

TRADEMARK  
 REEL: 002638 FRAME: 0067

## TECHNOLOGY AND TRADEMARK ASSIGNMENT AGREEMENT

This Technology and Trademark Assignment Agreement (this "*Agreement*"), effective as of the \_\_\_ day of August, 2002 (the "*Effective Date*") is entered into by and between Elima IP Holdings, LLC, a Delaware limited liability company with offices located at 1100 W. Littleton Blvd. Suite 360, Littleton, Colorado 80120 ("*Assignee*"), Dr. Timothy Kuss, an individual residing at 1100 W. Littleton Blvd. Suite 360, Littleton, Colorado 80120 ("*Kuss*") and David Newman, an individual residing at 4 Channel Landing, Tiburon California 94920 ("*Newman*"). Kuss and Newman are sometimes referred to herein collectively as the "*Assignors*." Assignors and Newman are sometimes referred to herein individually as a "*Party*" or collectively as the "*Parties*".

### BACKGROUND

A. Assignors own all right, title and interest in and to a compound which is designed to enhance sexual performance that combines active constituents derived from vitamins, minerals, botanicals, organic sources and homeopathic remedies, as more fully described in Exhibit 1 (the "*Product*"), and associated Intellectual Property Rights (as defined below) contained therein and pertaining thereto.

B. Newman owns all right, title and interest in and to the registered trademark "OpusX," Serial No. 75/705,475 (the "*Trademark*") under which the Product will be marketed and sold.

C. This Agreement implements the transfer and assignment of the Product and associated Intellectual Property Rights from Assignors to Assignee, and the Trademark from Newman to Assignee, pursuant to the terms and conditions of this Agreement.

NOW THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **DEFINITIONS.** For the purpose of this Agreement, each of the following terms shall have these meanings:

1.1 "*Assignors Intellectual Property*" means, collectively, the Transferred Copyrights and Transferred Technology.

1.2 "*Intellectual Property Rights*" means all U.S. and foreign copyrights, patents, patent rights, trademarks, service marks, trade secrets and other proprietary, intellectual, industrial and moral rights of whatever nature, including all applications therefore.

1.3 "*Technology*" means the all tangible or intangible know-how, trade secrets, formulations, inventions (whether or not patentable), data, clinical and preclinical results, development protocols, analytical reference materials and all confidential and/or

proprietary chemical substances, biological materials, assays, technical information, vendors, which has been developed or acquired before or after the Effective Date (with the right to disclose and sublicense and subject to the rights of third parties as of the Effective Date) by Assignors to the extent such Technology is necessary or useful for the development, manufacture, use, import, offer for sale or sale of the Product, and any improvements to any of the foregoing.

1.4 "***Transferred Copyrights***" means the U.S. and foreign copyrights, whether or not registered, owned by Assignors pertinent to the Product listed in Exhibit 2.

1.5 "***Transferred Technology***" means the Technology as listed on Exhibit 3 to this Agreement.

1.6 "***Transferred Trademark Rights***" means the Trademark, including any corresponding U.S. or foreign registrations and registration applications, and all goodwill associated therewith.

## **2. TRANSFER OF INTELLECTUAL PROPERTY RIGHTS; CONSIDERATION**

2.1 Assignors Intellectual Property. Subject to the terms and conditions of this Agreement, Assignors hereby sell, assign and transfer to Assignee, its successors and assigns, all right, title and interest held by Assignors in and to the Transferred Copyrights and Transferred Know How. The manner in which delivery of the Transferred Copyrights and Transferred Know How shall occur is set forth in Exhibits 2 and 3 respectively.

2.2 Transferred Trademark Rights. Subject to the terms and conditions of this Agreement, Newman hereby sells, assigns and transfers to Assignee, its successors and assigns, all right, title and interest held by Newman in and to the Transferred Trademark Rights.

2.3 Consideration. In consideration of the assignments set forth in Sections 2.1 and 2.2 above, Assignee hereby agrees to pay each of Assignors and Newman the amount of \$10.00 which amount shall be due and payable on the Effective Date.

## **3. REPRESENTATIONS AND WARRANTIES**

3.1 Assignors Representations and Warranties. With respect to the Assignors Intellectual Property, Assignors represent and warrant that:

(a) the Assignors Intellectual Property constitutes all of the intellectual property which is necessary for Assignee to design, manufacture, market and sell the Product;

(b) the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby, including without limitation the continued design, manufacture, marketing and sale by Assignee of the Product will not breach, violate or conflict with any instrument or agreement to which the Assignors, either individually or collectively, are a party;

(c) the transfer of the Assignors Intellectual Property from Assignors to Assignee as contemplated under this Agreement does not and will not infringe any copyright, patent, trade secret or other Intellectual Property Right of any third party;

(d) to Assignors' knowledge, there is no pending or threatened litigation contesting the validity, ownership or right to use, sell, license or dispose of any of the Assignors Intellectual Property nor is there any basis for any such claim, nor have Assignors received any notice asserting that any such Assignors Intellectual Property or the proposed use, sale, license or disposition thereof conflicts or will conflict with the rights of any third party, nor is there any basis for any such assertion;

(e) Assignors have taken reasonable steps, including, without limitation, entering into confidentiality and nondisclosure agreements with those individuals and companies that had at any time access to or knowledge of the Assignors Intellectual Property to maintain the confidentiality of and their proprietary rights in, the Assignors Intellectual Property;

(f) all fees to maintain Assignors' rights in the Assignors Intellectual Property, including, without limitation, all professional fees in connection therewith have been paid, and no lien or other encumbrance exists with respect to the Assignors Intellectual Property that would impair in any manner Assignee's rights thereto following the consummation of the transactions contemplated under this Agreement.

3.2 Newman Representations and Warranties. With respect to the Transferred Trademark Rights, Newman represents and warrants that:

(a) the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby, including without limitation the continued marketing and sale by Assignee of the Product under the Trademark will not breach, violate or conflict with any instrument or agreement to which Newman is a party;

(b) the transfer of the Transferred Trademark Rights from Newman to Assignee as contemplated under this Agreement does not and will not infringe any trademark or other Intellectual Property Right of any third party;

(c) to Newman's knowledge, there is no pending or threatened litigation contesting the validity, ownership or right to use, sell, license or dispose of the Transferred Trademark Rights nor is there any basis for any such claim, nor has Newman received any notice asserting that the Transferred Trademark Rights or the proposed use, sale, license or disposition thereof conflicts or will conflict with the rights of any third party, nor is there any basis for any such assertion; and

(d) all fees to maintain Newman's rights in the Transferred Trademark Rights, including, without limitation, trademark registration and prosecution fees and all professional fees in connection therewith pertaining to the Transferred Trademark Rights, have been paid by Newman, and no lien or other encumbrance exists with respect to the Transferred Trademark Rights that would impair in any manner Assignee's rights thereto following the consummation of the transactions contemplated under this Agreement.

3.3 Authority. Each Party hereto warrants and represents to the other Party that it has full power and authority to enter into this Agreement and to undertake the transactions contemplated hereunder.

#### 4. INDEMNIFICATION

4.1 Indemnification by Assignors. Assignors jointly and severally will indemnify and hold Assignee and its directors, employees, agents and affiliates harmless from and against all damages, costs and expenses, including without limitation reasonable attorney's fees, and losses in connection with any third party action or claim ("**Claim**") to the extent arising out of a breach, by Assignors of any covenant or warranty made by Assignors under this Agreement.

4.2 Indemnification by Newman. Newman will indemnify and hold Assignee and its directors, employees, agents and affiliates harmless from and against all damages, costs and expenses, including without limitation reasonable attorney's fees, and losses in connection with any Claim to the extent arising out of any covenant or warranty made by Newman under this Agreement.

4.3 Indemnification Procedure. In the event of any Claim giving rise to the indemnification obligations set forth in Sections 4.1 or 4.2 above, (a) Assignee must give Assignors or Newman, as the case may be, prompt written notice of the Claim, (b) Assignors or Newman shall reasonably cooperate with Assignee at Assignee's request and expense, in the defense or settlement of such Claim, and (c) Assignee shall control the defense or settlement of such Claim, except that Assignee will not enter into any settlement that affects Assignors' or Newman's rights or obligations without the prior express written approval of Assignors or Newman, as the case may be, which will not be unreasonably withheld or delayed.

#### 5. CONFIDENTIALITY; NON-COMPETITION

5.1 Confidential Information For purposes of this Agreement, "**Confidential Information**" means any non-public information of a Party that it reasonably considers to be of a confidential, proprietary or trade secret nature, including but not limited to the Assignors Intellectual Property; marketing, engineering and other plans; financial statements and projections; customer and supplier information; research, designs, plans, compilations, methods, techniques, processes and procedures pertaining to the Product, in

each case, whether in tangible or intangible form, and whether or not stored, compiled or memorialized physically, electronically, graphically, photographically, or in writing. Confidential Information shall not include information which is: (a) as of the time of its disclosure or thereafter becomes part of the public domain through no fault of the receiving Party; (b) rightfully known to the receiving Party prior to the time of its disclosure or was independently developed by the receiving Party; (c) subsequently learned from a third party not under a confidentiality obligation to the disclosing Party; or (d) required to be disclosed pursuant to a duly authorized subpoena, court order, or government authority, provided that the receiving Party has provided prompt written notice and assistance to the disclosing Party prior to such disclosure, so that such Party may seek a protective order or other appropriate remedy to protect against disclosure.

**5.2 Obligations.** Each Party agrees to secure and protect the Confidential Information of the other in a manner consistent with the maintenance of the other Party's rights therein, using at least as great a degree of care as it uses to maintain the confidentiality of its own Confidential Information of a similar nature, but in no event use less than reasonable efforts. Without in any manner limiting the foregoing, neither Assignors nor Newman shall sell, transfer, publish, disclose, or otherwise make available any portion of the Assignors Intellectual Property to third party, except as necessary to perform its obligations under this Agreement or as expressly authorized in this Agreement.

**5.3 Non-Disclosure Agreements.** Assignors represent and warrant that set forth in Exhibit 4 is a true and complete list of all individuals, companies and organizations to whom Confidential Information pertaining to the Product was disclosed prior to the Effective Date. Assignors further represent and warrant that with respect to each of these individuals, companies or organizations, there is in place a signed non-disclosure agreement that protects the confidentiality of the disclosed Confidential Information.

**5.4 Non-Competition.** During the term of this Agreement, neither Assignors nor Newman will, on their own or through or with any third party, design, market, promote or sell the Product or any product or formula that is similar to the Product, whether such similarity is based on functionality, purpose, design, trade name or the like.

## **6. LIMITATIONS OF LIABILITY**

With the exception of any liability arising out of the indemnification obligations set forth in Section 4 above, or breach of the representations and warranties or confidentiality obligations set forth in Sections 3 or 5 respectively, under no circumstances will either Party be liable to the other for any consequential, incidental, indirect or punitive damages in connection with this Agreement, regardless of the legal or equitable basis for such damages, whether in contract, tort or otherwise, even if such Party has been advised of the possibility of such damages.

## 7. MISCELLANEOUS

7.1 Assignment and Binding Effect. Neither Assignors nor Newman may transfer or assign this Agreement or any of the rights or obligations granted hereunder without the prior written consent of Assignee. Any purported transfer or assignment in violation of this section will be void. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective permitted successors and assigns.

7.2 Term. The term of this Agreement will commence upon the Effective Date and will expire upon the last surviving Intellectual Property Right in or to the Assignors Intellectual Property and Transferred Trademark Rights.

7.3 Waiver. If at any time a Party hereto shall elect not to assert its rights under any provision of this Agreement, such action or lack of action in that respect shall not be construed as a waiver of the provision or any other provision of this Agreement. Any such waiver must be in writing and signed by the Party against which the waiver is sought to be enforced. A waiver of any breach under any provision of this Agreement shall not be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement.

7.4 Injunctive Relief. The Parties agree that any breach of their obligations regarding confidentiality, and intellectual property would result in irreparable harm for which there is no adequate remedy at law. Therefore, in the event of any breach or threatened breach of a Party's obligation regarding confidentiality or intellectual property, the aggrieved Party will be entitled to seek immediate injunctive relief in addition to its other available legal remedies.

7.5 Governing Law. This Agreement and the relationships between the Parties shall be governed in all respects by the laws of the State of Delaware and the United States of America, and the Parties hereby consent to the jurisdiction of the appropriate state and federal courts located in the State of Delaware.

7.6 Further Assurances. Upon request by one Party, the other Party shall, at any time or from time to time, perform reasonable acts to execute, acknowledge, and deliver or cause to be delivered, further assurances, instruments, or documents as may be reasonably necessary or appropriate to fulfill the terms and conditions of this Agreement. The expense of such acts shall be borne by the party requesting execution of such acts.

7.7 Entire Understanding. This Agreement embodies the entire understanding between the Parties relating to the subject matter hereof, whether written or oral, and there are no prior representations, warranties or agreements between the Parties not contained in this Agreement.

7.8 Amendments. Any amendment or modification of any provision of this Agreement must be in writing, dated and signed by each Party hereto.

7.9 **Headings.** Any headings contained herein are for directory purposes only, do not constitute a part of this Agreement, and shall not be employed in interpreting this Agreement.

7.10 **Invalidity.** If any provision of this Agreement is declared invalid or unenforceable by a court having competent jurisdiction, then it is mutually agreed that this Agreement shall endure except for the part declared invalid or unenforceable by order of such court. The Parties shall consult and use their best efforts to agree upon a valid and enforceable provision which shall be a reasonable substitute for such invalid or unenforceable provision in light of the intent of this Agreement.

7.11 **Notices.** All reports, notices, and other communications provided under this Agreement shall be in writing and shall be deemed duly given on the date on which the same is hand delivered, received by facsimile or, if mailed, ten business days after the same is sent by registered or certified express air mail, return receipt requested and postage prepaid, addressed as follows:

If to Assignors:

Dr Timothy Kuss  
1100 W. Littleton Blvd. Suite 360  
Littleton, Colorado 80120

If to Newman

David Newman  
4 Channel Landing  
Tiburon California 94920

If to Assignee:

Elima IP Holdings, LLC  
1100 W. Littleton Blvd. Suite 360  
Littleton, Colorado 80120

7.12 **Counterparts.** This Agreement may be executed in any number of counterparts and each such counterpart shall be deemed to be an original.

*[signatures appear on the following page]*



IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and delivered by their respective duly authorized representatives as of the above noted Effective Date.

**DR. TIMOTHY KUSS:**

**DAVID NEWMAN:**

*T. Kuss*

Date: 8/16/02

Date: \_\_\_\_\_

**ELIMA IP HOLDINGS, LLC:**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and delivered by their respective duly authorized representatives as of the above noted Effective Date.

**DR. TIMOTHY KUSS:**

\_\_\_\_\_

Date: \_\_\_\_\_

**DAVID NEWMAN:**



Date: 8/16/02

**ELIMA IP HOLDINGS, LLC:**

By: Malcolm Casselle

Name: MALCOLM CASSELLE

Title: PRESIDENT

Date: 8-16-02