

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Capricorn Pharma, Inc.
6900 English Muffin Way
Unit A
Frederick, Maryland 21703

PLAINTIFF,

v.

Matrixx Initiatives, Inc.
4742 North 24th Street
Suite 455
Phoenix, Arizona 85016

and

Zicam, LLC
4742 North 24th Street
Suite 455
Phoenix, Arizona 85016

DEFENDANTS.

Civil Action No. 08-873-JJF
Jury Trial Demanded

CAPRICORN PHARMA INC.'S FIRST AMENDED COMPLAINT AGAINST
MATRIXX INITIATIVES, INC. AND ZICAM, LLC

Plaintiff, Capricorn Pharma, Inc. ("Capricorn"), by and through its undersigned counsel, brings this First Amended Complaint for patent infringement, trademark infringement, breach of contract, specific performance, misappropriation of trade secrets, common law fraud and negligent misrepresentation against defendants Matrixx Initiatives, Inc. ("Matrixx") and its wholly owned subsidiary Zicam, LLC ("Zicam"), and hereby alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Capricorn is a Maryland corporation with its principal place of business at 6900 English Muffin Way, Unit A, Frederick, Maryland 21703.
2. On information and belief, Defendant Matrixx Initiatives, Inc., f/k/a Gum Tech International, Inc., is a Delaware corporation with its principal place of business at 4742 North 24th Street, Suite 455, Phoenix, Arizona 85016. On information and belief, Defendant Matrixx Initiatives, Inc. conducts business throughout the United States, including in the State of Delaware.
3. On information and belief, Defendant Zicam, LLC (“Zicam”), f/k/a/Gel Tech, LLC, is an Arizona Limited Liability Company which is a wholly owned and controlled subsidiary of Matrixx Initiatives, Inc., (Defendants Zicam and Matrixx Initiatives, Inc. are collectively referred to as “Matrixx”). On information and belief, Defendant Zicam conducts business throughout the United States, including in the State of Delaware.
4. Jurisdiction is proper in this Court under 28 U.S.C. §§ 1331, 1332, and 1338(a) as this case is between citizens of different states and the amount in controversy exceeds the jurisdictional requirement and because this case arises under the patent laws of the United States, 35 U.S.C. §§ 271 and 281, and the trademarks laws of the United States, 15 U.S.C. § 1125. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 as the state law claims are so related to the claims falling within this Court’s original jurisdiction that they form part of the same case or controversy under Article III of the Constitution of the United States.

5. This Court has personal jurisdiction over Matrixx because, among other things, Defendant Matrixx Initiatives, Inc. is incorporated under Delaware law, and both Defendants Matrixx Initiatives, Inc. and Zicam, LLC conduct a substantial amount of business in this state, engage in a persistent course of conduct in Delaware, and expect, or should reasonably expect, their acts to have legal consequences in Delaware.

6. Venue is proper in this Court under 28 U.S.C. §§ 1391 and 1400(b).

BACKGROUND

I. Capricorn Ownership of U.S. Patent 6,375,982

7. Capricorn is the assignee and owner of U.S. Patent No. 6,375,982 entitled “Rapid-Melt Semi-Solid Compositions, Methods of Making Same and Method of Using Same” (“the ‘982 patent”).

8. On April 23, 2003, the ‘982 patent was duly and legally issued and assigned to Capricorn. A true and correct copy of the ‘982 patent is appended hereto as Exhibit “A”.

9. The claims of the ‘982 patent are directed toward compositions of rapidly disintegrating tablets and methods of making the same (the “disintegrating tablets”).

10. Capricorn is the owner by assignment of the ‘982 patent, its subject matter, and the rights of recovery flowing therefrom.

II. Capricorn’s Ownership of the Mark RAPIDMELT™

11. Capricorn created, owns and has been exclusively and continuously using, by itself and through authorized third parties, the marks RAPIDMELT, RAPID-MELT and RAPID MELT (together, “RAPIDMELT”) since at least as early as 2000, in connection with the development, manufacturing, and supply of disintegrating tablets.

12. In 2001, Matrixx and Capricorn began discussions regarding Capricorn's manufacture and supply of certain tablet products for Matrixx, which Matrixx would market and sell under the trade name ZICAM®.

13. Commencing in or around 2003, Capricorn began manufacturing its RAPIDMELT disintegrating tablets for the subsequent packaging and sale by Matrixx under Matrixx's ZICAM brand.

14. In letters dated May 2, 2003 and May 23, 2003, however, Matrixx's Director of Administration, Lynn Romero, sought permission to use Capricorn's RAPIDMELT trademark, requesting that Capricorn countersign the letters as an acknowledgement of Matrixx's intentions to use and register "RapidMelt", "RapidMelts" and "Cold Remedy RapidMelts". True and correct copies of the May 2003 letters are appended hereto as Exhibit "B".

15. The letters further sought Capricorn's covenant not to oppose such "use" by Matrixx, based on the false premise that Capricorn had "abandoned the trademark."

16. Capricorn neither countersigned nor otherwise responded to the letters, nor did it provide the authorization sought by Matrixx. So long as the manufacturing relationship continued, however, Capricorn maintained requisite trademark quality control and impliedly allowed the use of RAPIDMELTS and COLD REMEDY RAPIDMELTS to continue.

17. After the manufacturing relationship was terminated, however, putting an end to any license to use RAPIDMELTS and COLD REMEDY RAPIDMELTS, Matrixx continued its holdover use of RAPIDMELTS and COLD REMEDY RAPIDMELTS to

market and sell its products, without any form of authorization from Capricorn, implied or otherwise.

18. Matrixx's holdover use of Capricorn's RAPIDMELT trademark continues today in the identical or confusingly similar RAPIDMELTS and COLD REMEDY RAPIDMELTS marks.

19. By using marks identical or confusingly similar to that of Capricorn, Matrixx is deliberately conveying to consumers the false message that it has a continued affiliation with Capricorn, and Matrixx is trading off of Capricorn's proprietary rights and goodwill in its longstanding RAPIDMELT mark.

III. The Mutual Confidential Disclosure Agreement between Capricorn and Matrixx

20. As contemplated in the 2001 discussions, Capricorn's development and manufacture of ZICAM products would use Capricorn's proprietary technology, including, but not limited to, Capricorn's formulations, designs, processes, equipment and analytical methods, as well as the technology disclosed and claimed in the '82 patent, and various other Capricorn trade secrets developed and owned by Capricorn.

21. On January 22, 2002, in conjunction with the ongoing discussions, Capricorn and Matrixx entered into a Mutual Confidential Disclosure Agreement (the "Confidentiality Agreement"). A true and correct copy of the Confidentiality Agreement is appended hereto as Exhibit "C".

22. The Confidentiality Agreement protects Capricorn's "Confidential Information," which is defined as follows: "collectively, all technical, financial and business information of any kind whatsoever including, where appropriate and without limitation, all

data, compilations, product specifications, strategies, projections, processes, techniques, formulae, models, trade secret and patent disclosures, and all tangible and intangible embodiments thereof of any kind whatsoever, including, where appropriate and without limitation, all composition of or samples of products, product development or manufacturing processes, machinery, apparatus, records, reports, drawings, patent and trade secret applications and documents, in each case disclosed by the Disclosing Party to the other party hereto.”

23. The Confidentiality Agreement allows Matrixx to disclose Confidential Information received from Capricorn only on a “need to know basis” as reasonably necessary to directors, officers, employees and advisors who are bound by written agreement or otherwise under obligation of confidentiality to Matrixx.

24. In addition, the Confidentiality Agreement states that all inventions, discoveries, and improvements that are developed from or based upon Confidential Information received from Capricorn are the property of Capricorn.

25. The restrictions under the Confidentiality Agreement apply for five (5) years from the date information was disclosed under the Confidentiality Agreement and apply to Matrixx, and all officers, agents, employees, affiliates and successors of Matrixx.

26. On or about April 25, 2003, Capricorn produced a letter to Matrixx, reminding Matrixx of the Confidentiality Agreement between the parties. In particular, the April 25, 2003 letter specifically reminded Matrixx of the fact that any and all improvements made by Matrixx to Capricorn’s proprietary technology were the rightful property of Capricorn. Furthermore, the April 25, 2003 letter informed Matrixx that Capricorn would

be willing to license its proprietary formulations to Matrixx as part of a separate licensing agreement, but no such license agreement was executed among the parties.

27. Following execution of the Confidentiality Agreement, the parties began to work together so that Capricorn could manufacture, supply and develop the ZICAM products for Matrixx. In January 2003, Capricorn and Matrixx entered into an Exploratory Development Agreement Term Sheet, where Capricorn agreed to use its competencies in formulation, process and ingredients related to chew, rapid-dissolving and other technologies for development of products for use with Zinc Acetate, Zinc Gluconate, and other Zinc compounds. This Exploratory Development Agreement was signed by Tim Clarot, Director of Operations, on behalf of Zicam, LLC.

28. Later in 2003, Capricorn provided information in writing to Matrixx that was marked as proprietary and confidential, and which contained formulation information developed at Capricorn of rapid disintegrating zinc tablets and ingredient lists for ZICAM chews and tablets. This information is owned by Capricorn and was clearly covered by the January 2002 Confidentiality Agreement, and its subsequent addendums.

29. Capricorn developed, manufactured and supplied ZICAM products for Matrixx from 2003 until 2008.

30. On April 30, 2003, shortly after receiving the proprietary and confidential information owned by Capricorn, Zicam, LLC filed two U.S. provisional patent applications, 60/466,956 and 60/467,010, titled "Cold Remedy Composition Comprising Zinc Salts" and "Chewable Lozenge Cold Remedy Composition and Method for Making Same," respectively. On April 30, 2004, two PCT applications (PCT/US04/13388 and

PCT/US04/13421) were filed claiming benefit of priority from the two provisional applications. Both PCT applications were published on November, 18, 2004 as WO/2004/098571 and WO/2004/098566. The two PCT applications subsequently entered into U.S. national phase on November 13, 2006. These two U.S. non-provisional patent applications (10/556,738 and 10/556,739, the "Patent Applications") were published as US20070092583 and US20070092552 on April 26, 2007, and Timothy L. Clarot, an officer of Matrixx, was listed as the sole inventor. The Patent Applications were assigned to Zicam, LLC. The published patent applications contained Capricorn's Confidential Information, including tables that were copied directly from materials provided by Capricorn to Matrixx and marked as proprietary and confidential. By publishing this information, Matrixx made public Capricorn's Confidential Information in breach of paragraph 2 of the Confidentiality Agreement.

31. In addition, the inventions disclosed by the Patent Applications derived directly from Capricorn's proprietary information. Pursuant to paragraph 11 of the Confidentiality Agreement, these Patent Applications are the property of Capricorn.

32. In addition, Matrixx has stopped using Capricorn as its supplier and manufacturer and is using a third party contract manufacturer who is currently unknown to Capricorn to manufacture ZICAM rapid dissolving tablet products. Matrixx has begun to manufacture additional formulations of ZICAM rapid disintegrating tablets, manufactured by the unknown third party contract manufacturer, including several flavors of ZICAM COLD REMEDY RAPIDMELTS, ZICAM COLD REMEDY RAPIDMELTS WITH VITAMIN C, and ZICAM COLD REMEDY RAPIDMELTS WITH VITAMIN C AND

ECHINACEA. These formulations are modifications or improvements of Capricorn's technology. Pursuant to paragraph 11 of the Confidentiality Agreement, these improvements are the property of Capricorn.

33. Throughout its entire relationship with Capricorn, Matrixx continually and falsely represented to Capricorn that it was abiding by the terms of the Confidentiality Agreement so as to conceal from Capricorn the fact that Matrixx had misappropriated Capricorn's trade secrets and breached the Confidentiality Agreement.

34. For example, on August 31, 2005, the parties executed an Addendum to the Confidentiality Agreement stating that any Capricorn Confidential Information relating to Zicam's RAPIDMELTS-branded tablets that provide zinc acetate and zinc gluconate would be used or disclosed only for purposes of submitting that information to relevant regulatory authorities as part of Zicam's regulatory filing. A true and correct copy of the August 31, 2005 Addendum to Confidentiality Agreement dated January 2, 2002 is appended hereto as Exhibit "D."

35. In addition, on or about August 17, 2007, Capricorn sent a letter to Matrixx stating that the parties have continued to operate under the terms of the Confidentiality Agreement and proposing an amendment to extend the term of the Confidentiality Agreement.

36. Matrixx responded to Capricorn's letter on or about August 23, 2007, and acknowledged that the parties continued to act under and be bound by the Confidentiality Agreement.

37. Capricorn relied on Matrixx's misrepresentations, and thus believed that Matrixx was fully abiding by the Confidentiality Agreement and its subsequent amendment.

38. Each time Matrixx breached the Confidentiality Agreement, Matrixx had actual knowledge of the wrong done. Further, by making these fraudulent misrepresentations, Matrixx wrongfully and intentionally concealed from Capricorn the facts that would have allowed Capricorn to discover the causes of action arising from the breaches.

39. Specifically, Matrixx concealed its breach of the Confidentiality Agreement by (1) continuing its business relationship with Capricorn after receiving Capricorn's letter of April 25, 2003, leading Capricorn to believe that Matrixx was complying with the Confidentiality Agreement; (2) executing an Addendum to the Confidentiality Agreement in or around August of 2005, affirming that all provisions of the Confidentiality Agreement remain in full force; and (3) providing affirmative assurances to Capricorn that the parties continued to act under and be bound by the Confidentiality Agreement in a letter dated on or about August 23, 2007.

40. Matrixx engaged in these affirmative acts, misrepresentations, and omissions intending that Capricorn would rely on these acts, misrepresentations, and omissions, and Capricorn did rely on Matrixx's acts, misrepresentations, and omissions. As a result of Matrixx's acts, misrepresentations, and omissions, Capricorn did not discover Matrixx's breach of the Confidentiality Agreement until approximately October of 2008.

41. Each time Matrixx misappropriated Capricorn's trade secrets, Matrixx had actual knowledge of the wrong done. Further, Matrixx fraudulently concealed from

Capricorn the facts that would have allowed Capricorn to discover the cause of action arising from the misappropriation.

42. Specifically, Matrixx concealed its misappropriation of Capricorn's trade secrets by: (1) continuing its business relationship with Capricorn after receiving Capricorn's letter of April 25, 2003, leading Capricorn to believe that Matrixx was complying with the Confidentiality Agreement; (2) executing an Addendum to the Confidentiality Agreement in or around August of 2005, affirming that all provisions of the Confidentiality Agreement remain in full force; and (3) providing affirmative assurances to Capricorn that the parties continued to act under and be bound by the Confidentiality Agreement in a letter dated August 23, 2007.

43. Matrixx engaged in these affirmative acts, misrepresentations, and omissions intending that Capricorn would rely on these acts, misrepresentations, and omissions, and Capricorn did rely on Matrixx's acts, misrepresentations, and omissions. As a result of Matrixx's acts, misrepresentations, and omissions, Capricorn did not discover Matrixx's theft of its trade secrets until approximately October of 2008.

44. Matrixx engaged in these affirmative acts, misrepresentations, and omissions with the specific purpose of stealing Capricorn's trade secrets and proprietary technology, and then using that technology to illegally form the basis for Matrixx's Patent Applications with the USPTO.

COUNT I
PATENT INFRINGEMENT
Against All Defendants

45. Capricorn incorporates by reference the allegations of paragraphs 1 through 44 as though fully set forth herein.

46. Capricorn is the assignee and owner of the '982 patent.

47. On information and belief, Matrixx has manufactured, and continues to manufacture rapid disintegrating tablets in the United States.

48. On information and belief, Matrixx has sold or offered for sale, and continues to sell or offer for sale, disintegrating tablets throughout the United States, including in this judicial district.

49. On information and belief, Matrixx causes to be manufactured disintegrating tablets, including but not limited to ZICAM COLD REMEDY RAPIDMELTS, ZICAM COLD REMEDY RAPIDMELTS WITH VITAMIN C, and ZICAM COLD REMEDY RAPIDMELTS WITH VITAMIN C AND ECHINACEA, in accordance with a method that infringes one or more valid and enforceable claims of the '982 patent.

50. Matrixx has infringed, and continues to infringe, literally and/or under the doctrine of equivalents, the '982 patent by, *inter alia*, practicing, or by inducing others or contributing to others practicing one or more valid and enforceable claims of the '982 patent.

51. As a direct and proximate result of Matrixx's acts of infringement of the '982 patent, Capricorn has suffered injury and damages for which it is entitled to relief, including, but not limited to, monetary damages including lost profits and a reasonable royalty.

52. On information and belief, Matrixx has knowingly, willfully, and deliberately infringed the '982 patent in conscious disregard of Capricorn's rights, making this case exceptional within the meaning of 35 U.S.C. § 285 and justifying treble damages pursuant to 35 U.S.C. § 284.

53. On information and belief, Matrixx will continue to infringe the '982 patent, causing immediate and irreparable harm unless this Court enjoins and restrains its activities.

54. On information and belief, the infringement by Matrixx has deprived, and will further deprive, Capricorn of profits, royalties, and other related revenue which Capricorn would have made or would enjoy in the future; has injured Capricorn in other respects; and will cause Capricorn added injury and damage, including loss of profits, royalties, and other related revenue in the future unless Matrixx is enjoined from infringing the '982 patent.

COUNT II
VIOLATION OF LANHAM ACT, 15 U.S.C. § 1125(A);
False Designation of Origin, False Description and False Representation
Against All Defendants

55. Capricorn incorporates by reference the allegations of paragraphs 1 through 54 as though fully set forth herein.

56. Matrixx, with knowledge of Plaintiff's exclusive rights in and to the RAPIDMELT mark, and intending to trade on the goodwill and reputation of Plaintiff in the marketplace, has adopted and is using the marks RAPIDMELTS and COLD REMEDY RAPIDMELTS.

57. Matrixx's use of the RAPIDMELTS and COLD REMEDY RAPIDMELTS marks constitutes a false designation of origin, a false or misleading description of fact, and a false or misleading representation of fact that Matrixx's goods originate with, are sponsored

by or approved by Capricorn, or that Matrixx and its goods are affiliated with, connected to, or associated with Capricorn.

58. Matrixx's unlawful conduct constitutes a violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

59. As a result of Matrixx's conduct, Capricorn has suffered and continues to suffer irreparable damage.

60. Matrixx's actions are unlawful and have damaged Capricorn in an amount not yet calculated.

61. Capricorn has no adequate remedy at law and, therefore, is entitled to preliminary and permanent injunctive relief.

COUNT III
VIOLATION OF LANHAM ACT, 15 U.S.C. § 1125(A)
Infringement of a Common Law Mark
Against All Defendants

62. Capricorn incorporates by reference the allegations of paragraphs 1 through 61 as though fully set forth herein.

63. Capricorn enjoys common law rights in the RAPIDMELT mark throughout the United States. Capricorn's rights are superior to any rights Matrixx may claim with respect to the RAPIDMELT mark in any form or style.

64. Matrixx, with knowledge of Plaintiff's exclusive rights in and to the RAPIDMELT Mark and intending to trade on the goodwill and reputation of Capricorn in the marketplace, has adopted and used the trademarks, RAPIDMELTS and COLD REMEDY RAPIDMELTS, with the intent of confusing the public.

65. Matrixx's infringing use of these nearly identical trademarks is likely to cause consumer confusion to the detriment of Plaintiff.

66. Matrixx's unlawful conduct constitutes a violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

67. As a result of Matrixx's conduct, Capricorn has suffered and continues to suffer irreparable damage.

68. Matrixx's actions are unlawful and have damaged Capricorn in an amount not yet calculated.

69. Capricorn has no adequate remedy at law and, therefore, is entitled to preliminary and permanent injunctive relief.

COUNT IV
VIOLATION OF DELAWARE TRADEMARK ACT
Infringement of Common Law Mark, Unfair Competition, Dilution
Against All Defendants

70. Capricorn incorporates by reference the allegations of paragraphs 1 through 69 as though fully set forth herein.

71. Matrixx engaged in conduct which is contrary to honest, industrial and commercial practice. Matrixx's acts are calculated to procure an unfair competitive advantage by misappropriating the valuable goodwill and intellectual property developed by Capricorn at substantial effort and expense.

72. Matrixx's use of the marks RAPIDMELTS and COLD REMEDY RAPIDMELTS is likely to cause injury to Capricorn's business reputation and dilution of the distinctive quality of Capricorn's mark RAPIDMELT.

73. Matrixx's activities constitute unfair competition in violation of the common laws of the State of Delaware.

74. As a result of Matrixx's conduct, Capricorn has suffered and continues to suffer irreparable damage.

75. Capricorn has no adequate remedy at law and, therefore, is entitled to preliminary and permanent injunctive relief.

76. Matrixx's actions are unlawful and have damaged Capricorn in an amount not yet calculated.

COUNT V
BREACH OF CONTRACT
Against All Defendants

77. Capricorn incorporates by reference the allegations of paragraphs 1 through 76 as though fully set forth herein.

78. On January 22, 2002, Capricorn and Matrixx entered into the Confidentiality Agreement.

79. At all times, the Confidentiality Agreement was and is a valid and enforceable contract, supported by mutual assent and consideration.

80. Capricorn has satisfied all of the conditions of the obligations of the Confidentiality Agreement, except as to performance that has been excused by the acts, conduct and/or omissions of Matrixx.

81. Matrixx has breached the Confidentiality Agreement by publishing Capricorn's confidential information and trade secrets in the Patent Applications in brazen violation of paragraph 2 of the Confidentiality Agreement.

82. As a result of Matrixx's breach of the Confidentiality Agreement, Capricorn has suffered damages in an amount to be proven at trial.

COUNT VI
SPECIFIC PERFORMANCE - ASSIGNMENT OF OWNERSHIP
Against All Defendants

83. Capricorn incorporates by reference the allegations of paragraphs 1 through 82 as though fully set forth herein.

84. This claim charges Matrixx with breach of contract and seeks specific performance.

85. At all times, the Confidentiality Agreement was and is a valid and enforceable contract, supported by mutual assent and consideration.

86. The Confidentiality Agreement specifically provides that pursuant to paragraph 11, any improvements made to Capricorn's technology by Matrixx are the sole property of Capricorn.

87. As set forth above, Matrixx has improved upon Capricorn's technology and, as such, the Confidentiality Agreement dictates that such improvements are the rightful property of Capricorn.

88. Capricorn is therefore entitled to specific performance under the Confidentiality Agreement and must be assigned ownership of the Patent Applications, and any and all resulting patents issued by the USPTO, or any valid international body, that are based on the trade secrets and proprietary technology disclosed under the Confidentiality Agreement.

89. Capricorn is further entitled to specific performance of the Confidentiality Agreement and, as a result, Matrixx must cooperate with Capricorn for the filing of an updated Information Disclosure Statement and other necessary petitions with the USPTO explaining the facts and circumstances of inventorship and ownership of the technology disclosed in the Patent Applications.

COUNT VII
SPECIFIC PERFORMANCE - PETITION OF INVENTORSHIP
Against All Defendants

90. Capricorn incorporates by reference the allegations of paragraphs 1 through 89 as though fully set forth herein.

91. This claim charges Matrixx with breach of contract and seeks specific performance.

92. At all times, the Confidentiality Agreement was and is a valid and enforceable contract, supported by mutual assent and consideration.

93. The Patent Applications unlawfully use the confidential information disclosed in the Confidentiality Agreement.

94. The Patent Applications list the sole inventor of the disclosed technology as Timothy L. Clarot, an officer of Matrixx.

95. As set forth in paragraph 11 of the Confidentiality Agreement, all improvements to Capricorn technology by Matrixx are the rightful property of Capricorn.

96. Capricorn is therefore entitled to specific performance of this provision of the Confidentiality Agreement and is entitled to have S. Rao Cherukuri listed as the sole inventor.

COUNT VIII
MISAPPROPRIATION OF TRADE SECRETS
Against all Defendants

97. Capricorn incorporates by reference the allegations of paragraphs 1 through 96 as though fully set forth herein.

98. Capricorn is the rightful owner of the trade secrets, proprietary technology and confidential information disclosed in the Confidentiality Agreement.

99. The Confidentiality Agreement protected Capricorn's trade secrets from disclosure and included a compilation of information that Capricorn used in its business to obtain an advantage over its competitors.

100. The Confidential Information that is disclosed by Capricorn in the Confidentiality Agreement derives actual economic value from its secrecy and this information has been maintained by Capricorn, at all times, as a secret.

101. Capricorn has at all times made reasonable efforts to maintain the secrecy of its trade secrets and proprietary information. The Confidentiality Agreement between Capricorn and Matrixx constitutes a reasonable effort by Capricorn to maintain the secrecy of its confidential information and proprietary technology.

102. The Confidentiality Agreement specifically maintained that Matrixx disclose Confidential Information received from Capricorn only on a "need to know basis" as reasonably necessary to directors, officers, employees and advisors who are bound by written agreement or otherwise under obligation of confidentiality to Matrixx.

103. Matrixx willfully and maliciously misappropriated the trade secrets and proprietary technology contained in the Confidentiality Agreement by breaching the

Confidentiality Agreement and then intentionally, and without Capricorn's permission, using the trade secrets obtained in the Confidentiality Agreement to file the Patent Applications with the USPTO, as well as various other international patent offices.

104. Under the Confidentiality Agreement, Matrixx had an absolute duty to maintain the secrecy of the confidential information that Capricorn disclosed to it.

105. Matrixx used the Capricorn trade secret and confidential information to its economical advantage.

106. As a result of Matrixx's theft of Capricorn's trade secrets and proprietary technology, Capricorn has suffered damages in an amount to be proven at trial.

COUNT IX
COMMON LAW FRAUD
Against All Defendants

107. Capricorn incorporates by reference the allegations of paragraphs 1 through 106 as though fully set forth herein.

108. Matrixx fraudulently misrepresented to Capricorn that it was abiding by the terms of the Confidentiality Agreement while at the same time misappropriating Capricorn's confidential and proprietary technology to file the Patent Applications with the USPTO, in strict violation of the Confidentiality Agreement.

109. Matrixx intentionally made these misrepresentations to Capricorn so as to conceal from Capricorn that Matrixx was breaching the Confidentiality Agreement and stealing Capricorn's trade secrets and proprietary technology.

110. But for these misrepresentations, Capricorn would not have continued to divulge its proprietary technology to Matrixx.

111. Matrixx, through its officers and directors, actively made fraudulent representations and omissions to Capricorn in an effort to conceal the fact that it had stolen Capricorn's trade secrets.

112. Matrixx failed to modify or correct these misrepresentations and engaged in a course of conduct to conceal the misrepresentations that were made.

113. Matrixx made these representations falsely, with full knowledge of their falsity or with recklessness as to whether the statements were true or false.

114. Capricorn was unaware that Matrixx's representations were false and justifiably relied on these misrepresentations to Capricorn's detriment.

115. Matrixx's fraudulent and deceitful misrepresentations and omissions are a direct and proximate cause of Capricorn's injury.

116. Matrixx's wanton, willful and outrageous conduct warrants punitive damages.

COUNT X
NEGLIGENT MISREPRESENTATION
Against All Defendants

117. Capricorn incorporates by reference the allegations of paragraphs 1 through 116 as though fully set forth herein.

118. Matrixx negligently misrepresented to Capricorn that it was abiding by the terms of the Confidentiality Agreement.

119. Matrixx knew or should have known that it was not abiding by the terms of the Confidentiality Agreement because Matrixx had unlawfully published Capricorn's trade secret information when it filed the Patent Applications with the USPTO.

120. But for these misrepresentations, Capricorn would not have divulged its trade secrets and proprietary technology to Matrixx.

121. As a direct and proximate result of Matrixx's negligent misrepresentations and omissions, Capricorn has been damaged in an amount to be proven at trial.

WHEREFORE, Capricorn prays that judgment be entered in its favor and against Matrixx and that the Court issue orders as follows:

(a) Enter judgment for Capricorn that the '982 patent was duly and legally issued, is valid and enforceable, and has been infringed by Matrixx;

(b) Enter judgment for Capricorn that Matrixx has willfully infringed, and is willfully infringing, one or more claims of the '982 patent;

(c) Issue a permanent injunction restraining Matrixx, its directors, officers, agents, employees, successors, subsidiaries, assigns, and affiliates, and all persons acting in privy or in concert or participation with any of them from the continued infringement, direct or contributory, or active inducement of infringement by others of the '982 patent;

(d) Order Matrixx to account for in written form and to pay to Capricorn actual damages suffered by reason of Matrixx's infringement of the '982 patent, including, but not limited to, monetary damages including lost profits and a reasonable royalty, and further order that such damages be trebled due to Matrixx's deliberate, willful, and knowing conduct;

(e) Enter judgment for Capricorn that Matrixx's use of Capricorn's marks constitutes a false designation of origin, a false or misleading description of fact, and a false or misleading representation of fact that Matrixx's goods originate with, are sponsored by or

approved by Capricorn, and that Matrixx and its goods are affiliated with, connected to, or associated with Capricorn;

(f) Enter judgment for Capricorn that Matrixx has willfully infringed, and is willfully infringing Capricorn's trademark RAPIDMELT;

(g) Issue a permanent injunction restraining Matrixx, its directors, officers, agents, employees, successors, subsidiaries, assigns, and affiliates, and all persons acting in privity or in concert with any of them from the continued infringement of the RAPIDMELT trademark;

(h) Enter judgment for Capricorn that Matrixx has breached a valid and enforceable contract with Capricorn;

(i) Enter judgment for Capricorn that Matrixx has breached the Confidentiality Agreement and must therefore, pursuant to paragraph 11 of the Confidentiality Agreement, assign ownership of the patent applications 10/556,738, titled "Cold Remedy Composition Comprising Zinc Salts", and 10/556,739, titled "Chewable Lozenge Cold Remedy Composition and Method for Making Same," and any patent issued as a result, to Capricorn;

(j) Enter judgment for Capricorn that Matrixx has breached the Confidentiality Agreement and that Matrixx's patent applications 10/556,738 and 10/556,739 be assigned to Capricorn, and Matrixx to cooperate with Capricorn to name S. Rao Cherukuri as the sole inventor on those patent applications;

(k) Enter judgment for Capricorn that Matrixx has willfully and maliciously misappropriated Capricorn's trade secrets, and order Matrixx pay to Capricorn its costs, expenses, and fees, including reasonable attorneys' fees, and pre-judgment and post-

judgment interest at the maximum rate allowed by law, for Matrixx's misappropriation of Capricorn's trade secrets;

(l) Enter judgment for Capricorn that Matrixx has committed common law fraud upon Capricorn;

(m) Enter judgment for Capricorn that Matrixx has made negligent misrepresentations to Capricorn, and that Capricorn suffered damages as a direct and proximate result,

(n) Direct Matrixx to file with this Court, and serve on Capricorn, a written report under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;

(o) Order Matrixx to pay to Capricorn its costs, expenses, and fees, including reasonable attorneys' fees pursuant to 35 U.S.C. § 285, and pre-judgment and post-judgment interest at the maximum rate allowed by law;

(p) Order Matrixx to pay to Capricorn damages for all counts, in an amount to be proven at trial;

(q) Order Matrixx to pay to Capricorn punitive damages for its fraudulent misrepresentations and unlawful theft of Capricorn's trade secrets; and

(r) Grant Capricorn such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff Capricorn Pharma, Inc. demands a jury trial on all issues so triable.

Respectfully Submitted,

BLANK ROME LLP

/s/ Alisa E. Moen

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Dated: February 11, 2009

Attorneys for Plaintiff Capricorn Pharma, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2009, I served **CAPRICORN PHARMA INC.'S FIRST AMENDED COMPLAINT AGAINST MATRIXX INITIATIVES, INC. AND ZICAM, LLC** using CM/ECF, which will send notification of such filing to the following:

Melanie K. Sharp
YOUNG CONAWAY STARGATT & TAYLOR, LLP
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

I also certify that, on this 11th day of February, 2009, I served the aforementioned document, by email to the following:

Brett L. Dunkelman
David B. Rosenbaum
Erick S. Ottoson
OSBORN MALEDON, P.A.
The Phoenix Plaza
2929 North central Ave., 21st Floor
Phoenix, AZ 83012-2793

/s/ Alisa E. Moen
Alisa E. Moen (I.D. No. 4088)