

FILED

MAY 22 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IOWA STATE UNIVERSITY RESEARCH
FOUNDATION, INC., an Iowa Corporation,
VANDERBILT UNIVERSITY (THE), a
Tennessee Corporation, and
METABOLIC TECHNOLOGIES, INC., an
Iowa Corporation,

Plaintiffs,

v.

ULTIMATE NUTRITION, INC. a California
Corporation, and **PROSTAR, INC. a
Connecticut Corporation,**

Defendants.

Civil Action No. 4:01-CV-40370

SECOND AMENDED COMPLAINT

Plaintiffs Iowa State University Research Foundation, Inc., Vanderbilt University (The),
and Metabolic Technologies Inc. state, as their Complaint versus Ultimate Nutrition, Inc. and
ProStar, Inc., the following:

**DIVISION I - THE PARTIES, NATURE OF ACTION,
JURISDICTION AND VENUE**

1. Plaintiff, Iowa State University Research Foundation, Inc. (hereinafter referred to
as "ISURF"), is an Iowa non-profit corporation with its principal place of business at 310 Lab of
Mechanics, Ames, Iowa 50011-2131.

49

2. Plaintiff, Vanderbilt University (The) (hereinafter referred to as “Vanderbilt”), is a Tennessee corporation with its principal place of business at 405 Kirkland Hall, Nashville, Tennessee 37240.

3. Plaintiff, Metabolic Technologies Inc. (hereinafter referred to as “MTI”), is an Iowa corporation with its principal place of business at 2625 North Loop Drive, Ames, Iowa 50010.

4. Defendant, Ultimate Nutrition, Inc., is, upon information and belief, a Connecticut corporation with a business address of 7 Corporate Avenue, Farmington, Connecticut 06034, which has advertised its products in Iowa via the internet, and presumably has sold products to residents of the State of Iowa.

5. **Defendant, ProStar, Inc., is, upon information and belief, a Connecticut corporation with a mailing address of P.O. Box 643, Farmington, Connecticut 06034-0643, which is owned in common with Defendant, Ultimate Nutrition, Inc., and is the entity that purchases product for Defendant.**

6. This action is for patent infringement, based on 35 U.S.C. §271.

7. As such, subject matter jurisdiction is exclusive to this Court based upon 28 U.S.C. §1338(a).

8. Personal jurisdiction is based on Federal Rule of Civil Procedure 4(e), and on sufficient minimum contacts between the Defendants and this jurisdiction such that the exercise of personal jurisdiction by this Court comports with the applicable state, federal, and constitutional requirements. To that end, Defendants maintains contacts within this jurisdiction,

does business in this jurisdiction, and committed in this jurisdiction certain acts alleged herein to constitute the violations of Plaintiffs' rights.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 and 28 U.S.C. §1400.

DIVISION II – PATENT INFRINGEMENT

9. ISURF is the owner of the following United States Letters Patents:

4,992,470 entitled "Method of Enhancing Immune Response of Mammals," duly and legally issued on February 12, 1991;

5,348,979 entitled "Method of Promoting Nitrogen Retention in Humans," duly and legally issued on September 20, 1994 (co-owned by Vanderbilt);

5,360,613 entitled "Method of Reducing Blood Levels of Total Cholesterol and Low-Density Lipoprotein Cholesterol," duly and legally issued on November 1, 1994;
6,103,764 entitled "Method for Increasing the Aerobic Capacity of Muscle," duly and legally issued on August 15, 2000; and

6,291,525 entitled "Method for Improving a Human's Perception of His Emotional State," duly and legally issued on September 18, 2001.

(Hereinafter collectively referred to as the "ISURF Patents"). Each of the ISURF Patents continues in full force and effect to this day, and ISURF has the right to enforce the ISURF Patents.

10. By and through a license agreement between ISURF and MTI entered into on May 16, 1990, and a license agreement entered between ISURF and Vanderbilt entered into on May

29, 1996, MTI is the exclusive licensee of the ISURF PATENTS, and MTI has the right to enforce the ISURF Patents and to collect any damages resulting from any such enforcement.

11. To the best of the Plaintiffs' knowledge, the ISURF Patents cover all known uses of the substance β -hydroxy- β -methylbutyrate (hereinafter referred to as HMB), in both animals and humans, and in all forms of HMB including its free acid, salt, ester, and lactone forms. Accordingly, HMB is not a staple article of commerce as that term is used and understood in 35 U.S.C. §271(c).

12. Plaintiffs have taken reasonable steps to ensure that all authorized products incorporating the patented technology have been marked in accordance with the notice provisions of 35 U.S.C. §287.

13. Defendants actively sell HMB, and have sold HMB within this jurisdiction, and **Defendant, Ultimate Nutrition, Inc.**, maintains a commercial interactive Internet Web site for the purpose of selling, *inter alia*, HMB. The Web site is accessible at the following address: <http://www.ultimatenutrition.com>. Defendants advertise and promote HMB as a Sports Nutrition product. Defendants have profited from its commercial activities related to HMB.

14. Defendants' aforementioned commercial activities related to HMB constitute an infringement of one or all of the ISURF Patents under 35 U.S.C. §271(b) and/or (c), **and the use of HMB by the end users of Defendants' product constitutes infringement under 35 U.S.C. §271(a).**

15. Defendant, **Ultimate Nutrition, Inc.**, was notified in writing of the Plaintiffs' rights in the ISURF Patents on, or about March 30, 2000, and thereby had actual notice of the

ISURF Patents at least as early as said date. To the extent that Defendant continued its infringing conduct after said date, **or either Defendant continued such conduct after learning of the ISURF Patents**, such conduct constitutes willful infringement of the ISURF Patents.

16. As a result of Defendants' infringing conduct, Plaintiffs have been irreparably damaged and denied the benefit of the protections afforded to Plaintiffs under the ISURF Patents.

WHEREFORE, Plaintiffs demand the following relief:

- a) that this Court adjudge that MTI is the exclusive licensee, and that ISURF is the lawful owner, of the ISURF Patents and that both are entitled to the right of recovery thereunder;
- b) that this Court adjudge that the ISURF Patents are good and valid in law and that Defendants **have** infringed one or all of the ISURF Patents;
- c) that a temporary and permanent injunction be issued enjoining Defendants and its subsidiaries, affiliates, agents, servants, and employees, and all other persons in active concert with them from further infringing conduct;
- d) that an accounting be had for the damages arising out of Defendants' infringing conduct and that damages so ascertained be trebled and awarded to Plaintiffs together with interest thereon;
- e) that Plaintiffs be awarded its reasonable attorneys' fees, costs, and expenses incurred in this action under 35 U.S.C. §285 due to the exceptional nature of this case; and
- f) that this Court grant Plaintiffs such other and further relief as it may deem just and appropriate.

JURY DEMAND

Plaintiffs, Iowa State University Research Foundation, Inc., Vanderbilt University (The), and Metabolic Technologies Corporation demand a jury to hear all issues so triable in this action.

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PROOF OF SERVICE	
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on <u>04/03</u> , 20 <u>02</u> by:	
<input checked="" type="checkbox"/> US Mail	<input type="checkbox"/> FAX
<input type="checkbox"/> Hand Delivered	<input type="checkbox"/> Overnight Courier
<input type="checkbox"/> Federal Express	<input type="checkbox"/> Other:
Signature: _____	

William Kaliff
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ATTORNEYS FOR DEFENDANT