

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BIOPOLYMER ENGINEERING, INC., d/b/a
BIOTHERA, a Minnesota corporation, and
MASSACHUSETTS INSTITUTE OF
TECHNOLOGY,

Case No.: 05-536 (JNE/SRN)

Plaintiffs,

v.

IMMUNOCORP, a California corporation,
and BIOTEC PHARMACON ASA.,
a Norwegian corporation,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs, BIOPOLYMER ENGINEERING, INC., d/b/a BIOTHERA
("Biothera") and MASSACHUSETTS INSTITUTE OF TECHNOLOGY
("MIT"), for their complaint state and allege as follows:

JURISDICTION AND VENUE

1. This is an action for, among other things, patent infringement pursuant to the laws as set forth in Title 35 of the United States Code. Jurisdiction in this Court is based on 28 U.S.C. §§ 1331 and 1338 and under the doctrine of pendant and ancillary jurisdiction. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b), (c) and 1400(b).

PARTIES

2. Biothera is a Minnesota corporation having its principal place of business at 3388 Mike Collins Drive, Eagan, Minnesota 55121.

3. MIT is a non-profit educational institution located at 77 Massachusetts Avenue, Cambridge, Massachusetts 02139.

4. Upon information and belief, Defendant Immunocorp is a California corporation, having its principal place of business at 1582 W. Deere Ave., Irvine, CA 92606.

5. Upon information and belief, Defendant Biotec Pharmacon ASA. (“Biotec”) is a Norwegian corporation, having its principal place of business at Strandgata 3, N-9008 Tromsø, Norway.

FACTUAL BACKGROUND

6. Biothera is a biotechnology company that engineers complex carbohydrates for a wide range of therapeutic, diagnostic and industrial applications. Biothera is a leading developer of complex carbohydrate biopolymers — molecular strands of sugars that are essential to life in every cell.

7. Biothera develops beta glucan compounds, including whole glucan particles and neutral soluble glucans, for use as nutritional supplements and pharmaceuticals. Beta Glucan is derived from the cell walls of baker's yeast.

8. Upon information and belief, Defendants have offered to sell and/or sold Immutol and Immupet to potential customers in this district and elsewhere within the United States.

9. Upon information and belief, Defendants have offered to sell and/or sold Immuderm to potential customers in this district and elsewhere within the United States.

10. Defendants have imported soluble beta glucan ("SBG") into the United States.

11. On September 14, 2006, Biothera issued a press release in which it stated, accurately, that the Amended Complaint added MIT as a party and added claims regarding soluble beta glucan ("SBG") to the case.

12. After Biothera's press release, Defendants launched a public smear campaign against Biothera.

13. Representatives of Defendant Biotec Pharmacon ASA ("Biotec") were quoted in several Norwegian magazine articles.

14. Biotec's comments to the Norwegian media included improper and defamatory statements about Biothera. Biotec claimed that Biothera was "trying to frighten" Norwegian shareholders to push down the value of Biotec's stock, stating as follows:

They are trying to frighten Norwegian investors, but there is no validity in the matter. This is a tactical maneuver. I am

really not concerned about the case, except for perhaps, the American legal system.

15. One article stated that Biotec is “very critical of Biothera,” and that Biotec “comes close to calling them thieves”:

“We have been far too polite and decent in this case. The main character in Biothera is someone who has no background in biotechnology, but who has made money selling mobile phones in the Ukraine,” says [Jan] Raa, and feels that this does not exactly make [Biothera’s] founder Daniel K. Connors believable.

16. In another article, Biotec did call Biothera thieves. Biotec claimed that the reason Biothera has won lawsuits in the past is that the competitors in those cases did not have “the financial capability to defend themselves.”

17. Biotec specifically referred to Biothera as “gold-diggers,” and Biotec’s CEO, Gunnar Røstad, described Biothera as “highway robbers” that live off of suing others.

18. Biotec also misrepresented the status of the lawsuit between Biothera and ImmuDyne, stating: “Earlier this year, the courts declared that ImmuDyne is the rightful owner of these patents.”

COUNT 1: INFRINGEMENT OF U.S. PATENT NO. 4,992,540

19. Plaintiffs hereby restate and reallege the allegations set forth in paragraphs 1 through 18 and incorporate them by reference.

20. On February 12, 1991, United States Patent No. 4,992,540 entitled “Glucan Composition and Process for Preparation Thereof” (the “540 Patent”) was duly and legally issued to Massachusetts Institute of Technology, as the assignee of the inventors Spiros Jamas, ChoKyun Rha, and Anthony J. Sinskey.

21. MIT granted Biothera an exclusive license for the ‘540 Patent, including the right to pursue infringers and to join MIT as a necessary party to such action.

22. Defendants have infringed, and still are infringing, the ‘540 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiffs, and will continue to do so unless enjoined by this Court.

23. Upon information and belief, Defendants’ infringement of the ‘540 Patent has been willful and wanton.

24. Defendants’ infringement of the ‘540 Patent has injured Plaintiffs and will continue to do so unless enjoined by this Court.

COUNT 2: INFRINGEMENT OF U.S. PATENT NO. 5,037,972

25. Plaintiffs hereby restate and reallege the allegations set forth in paragraphs 1 through 24 and incorporate them by reference.

26. On August 6, 1991, United States Letters Patent No. 5,037,972 entitled “Glucan Composition and Process for Preparation Thereof” (the “’972 Patent”) was duly and legally issued to Massachusetts Institute of Technology, as the assignee of the inventors Spiros Jamas, ChoKyun Rha, and Anthony J. Sinsky.

27. MIT granted Biothera an exclusive license for the ‘972 Patent, including the right to pursue infringers and to join MIT as a necessary party to such action.

28. Defendants have infringed the ‘972 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiffs, and will continue to do so unless enjoined by this Court.

29. Upon information and belief, Defendants’ infringement of the ‘972 Patent has been willful and wanton.

30. Defendants’ infringement of the ‘972 Patent has injured Plaintiffs and will continue to do so unless enjoined by this Court.

COUNT 3: INFRINGEMENT OF U.S. PATENT NO. 5,576,015

31. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 30 and incorporates them by reference.

32. On November 19, 1996, United States Letters Patent No. 5,576,015 entitled “Substantially Purified Beta (1,3) Finely Ground Yeast Cell Wall Glucan Composition With Dermatological and Nutritional Uses” (the “’015 Patent”) was duly and legally issued to the inventor Bryon A. Donzis.

33. Biothera is the owner of the ‘015 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Bryon A. Donzis.

34. Defendants have infringed the ‘015 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

35. Upon information and belief, Defendants’ infringement of the ‘015 Patent has been willful and wanton.

36. Defendants’ infringement of the ‘015 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 4: INFRINGEMENT OF U.S. PATENT NO. 5,702,719

37. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 36 and incorporates them by reference.

38. On December 30, 1997, United States Letters Patent No. 5,702,719 entitled “Substantially Purified Beta (1,3) Finely Ground Yeast Cell Wall Glucan Composition With Dermatological and Nutritional Use” (the “719 Patent”) was duly and legally issued to was duly and legally issued to the inventor Bryon A. Donzis.

39. Biothera is the owner of the ‘719 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Bryon A. Donzis.

40. Defendants have infringed the ‘719 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

41. Upon information and belief, Defendants’ infringement of the ‘719 Patent has been willful and wanton.

42. Defendants’ infringement of the ‘719 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 5: INFRINGEMENT OF U.S. PATENT NO. 6,020,324

43. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 42 and incorporates them by reference.

44. On February 1, 2000, United States Letters Patent No. 6,020,324 entitled “Glucan Dietary Additives” (the “324 Patent”) was duly and legally issued to The Collaborative Group, Ltd., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Bruce R. Bistrrian.

45. Biothera is the owner of the ‘324 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from The Collaborative Group, Ltd.

46. Defendants have infringed of the ‘324 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

47. Upon information and belief, Defendants’ infringement of the ‘324 Patent has been willful and wanton.

48. Defendants’ infringement of the ‘324 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 6: INFRINGEMENT OF U.S. PATENT NO. 6,143,731

49. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 48 and incorporates them by reference.

50. On November 7, 2000, United States Letters Patent No. 6,143,731 entitled “Glucan Dietary Additives” (the “731 Patent”) was duly and legally issued to The Collaborative Group, Ltd., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Bruce R. Bistrrian.

51. Biothera is the owner of the ‘731 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from The Collaborative Group, Ltd.

52. Defendants have infringed of the ‘731 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

53. Upon information and belief, Defendants’ infringement of the ‘731 Patent has been willful and wanton.

54. Defendants’ infringement of the ‘731 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 7: INFRINGEMENT OF U.S. PATENT NO. 4,962,094

55. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 54 and incorporates them by reference.

56. On October 9, 1990, United States Letters Patent No. 4,962,094 entitled “Glucan Dietary Additives” (the “’094 Patent”) was duly and legally issued to Alpha Beta Technology, Inc. as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Bruce R. Bistrrian.

57. Biothera is the owner of the ‘094 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

58. Defendants have infringed of the ‘094 Patent by making, using, offering for sale, selling, or importing Immutol and Immupet within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

59. Upon information and belief, Defendants’ infringement of the ‘731 Patent has been willful and wanton.

60. Defendants’ infringement of the ‘094 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 8: INFRINGEMENT OF U.S. PATENT NO. 5,532,223

61. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 60 and incorporates them by reference.

62. On July 2, 1996, United States Letters Patent No. 5,532,223 entitled "Use of Aqueous Soluble Glucan Preparations to Stimulate Platelet Production" (the "223 Patent") was duly and legally issued to Alpha Beta Technology, Inc., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Gary R. Ostroff.

63. Biothera is the owner of the '223 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

64. Defendants have infringed of the '223 Patent by making, using, offering for sale, selling, or importing SBG within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

65. Upon information and belief, Defendants' infringement of the '223 Patent has been willful and wanton.

66. Defendants' infringement of the '223 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 9: INFRINGEMENT OF U.S. PATENT NO. 5,811,542

67. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 66 and incorporates them by reference.

68. On September 22, 1998, United States Letters Patent No. 5,811,542 entitled “Method for Producing Soluable Glucans” (the “’542 Patent”) legally issued to Alpha Beta Technology, Inc., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Gary R. Ostroff.

69. Biothera is the owner of the ‘542 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

70. Defendants have infringed of the ‘542 Patent by making, using, offering for sale, selling, or importing SBG and Immuderm within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

71. Upon information and belief, Defendants’ infringement of the ‘542 Patent has been willful and wanton.

72. Defendants’ infringement of the ‘542 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 10: INFRINGEMENT OF U.S. PATENT NO. 5,849,720

73. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 72 and incorporates them by reference.

74. On December 15, 1998, United States Letters Patent No. 5,849,720 entitled “Enhancement of Non-Specific Immune Defenses by Administration of Underivatized, Aqueous Soluble Glucans” (the “720 Patent”) was duly and legally issued to Alpha Beta Technology, Inc., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Gary R. Ostroff.

75. Biothera is the owner of the ‘720 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

76. Defendants have infringed of the ‘720 Patent by making, using, offering for sale, selling, or importing SBG and Immuderm within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

77. Upon information and belief, Defendants’ infringement of the ‘720 Patent has been willful and wanton.

78. Defendants’ infringement of the ‘720 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 11: INFRINGEMENT OF U.S. PATENT NO. 5,622,939

79. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 78 and incorporates them by reference.

80. On April 22, 1997, United States Letters Patent No. 5,622,939 entitled “Glucan Preparation” (the “’939 Patent”) was duly and legally issued to Alpha Beta Technology, Inc., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Gary R. Ostroff.

81. Biothera is the owner of the ‘939 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

82. Defendants have infringed of the ‘939 Patent by making, using, offering for sale, selling, or importing SBG and Immuderm within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

83. Upon information and belief, Defendants’ infringement of the ‘939 Patent has been willful and wanton.

84. Defendants’ infringement of the ‘939 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 12: INFRINGEMENT OF U.S. PATENT NO. 5,817,643

85. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 84 and incorporates them by reference.

86. On October 6, 1998, United States Letters Patent No. 5,817,643 entitled “Underivatized, Aqueous Soluble $\beta(1-3)$ Glucan, Composition and Method of Making Same” (the “643 Patent”) was duly and legally issued to Alpha Beta Technology, Inc., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Gary R. Ostroff.

87. Biothera is the owner of the ‘643 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

88. Defendants have infringed of the ‘643 Patent by making, using, offering for sale, selling, or importing SBG and Immuderm within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

89. Upon information and belief, Defendants’ infringement of the ‘643 Patent has been willful and wanton.

90. Defendants’ infringement of the ‘643 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 13: INFRINGEMENT OF U.S. PATENT NO. 5,622,940

91. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 90 and incorporates them by reference.

92. On April 22, 1997, United States Letters Patent No. 5,622,940 entitled “Inhibition of Infection-Stimulated Oral Tissue Destruction by $\beta(1-3)$ Glucan” (the “940 Patent”) was duly and legally issued to Alpha Beta Technology, Inc., as the assignee of the inventor Gary R. Ostroff.

93. Biothera is the owner of the ‘940 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

94. Defendants have infringed of the ‘940 Patent by making, using, offering for sale, selling, or importing SBG within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

95. Upon information and belief, Defendants’ infringement of the ‘940 Patent has been willful and wanton.

96. Defendants’ infringement of the ‘940 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 14: INFRINGEMENT OF U.S. PATENT NO. 5,783,569

97. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 96 and incorporates them by reference.

98. On July 21, 1998, United States Letters Patent No. 5,783,569 entitled "Uses For Underivatized, Aqueous Soluble $\beta(1-3)$ Glucan and Compositions Comprising Same" (the "'569 Patent") was duly and legally issued to Alpha Beta Technology, Inc., as the assignee of the inventors Spiros Jamas, D. Davidson Easson, Jr., and Gary R. Ostroff.

99. Biothera is the owner of the '569 Patent and any and all causes of action for infringement, including this cause of action, by way of assignment from Alpha Beta Technology, Inc.

100. Defendants have infringed of the '569 Patent by making, using, offering for sale, selling, or importing SBG and Immuderm within the District of Minnesota and elsewhere within the United States, without the consent of Plaintiff, and will continue to do so unless enjoined by this Court.

101. Upon information and belief, Defendants' infringement of the '569 Patent has been willful and wanton.

102. Defendants' infringement of the '569 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

COUNT 15: DEFAMATION

103. Plaintiffs hereby restate and reallege the allegations set forth in paragraphs 1 through 102 and incorporate them by reference.

104. Defendants published false statements to Norwegian media outlets, including that Biothera is a “highway robber” or a “gold-digger.”

105. Defendants’ statements harm Biothera by lowering Biothera’s esteem in the community, subjecting Biothera to distrust, and/or deterring third parties from doing business with Biothera.

106. Because Defendants’ false statements to Norwegian media outlets harm Biothera’s business reputation, damages are presumed.

107. As a result of Defendants’ defamation, Biothera is entitled to damages in an amount to be determined at trial.

COUNT 16: UNFAIR COMPETITION

108. Plaintiffs hereby restate and reallege the allegations set forth in paragraphs 1 through 107 and incorporate them by reference.

109. Defendants’ false statements about Biothera and the ownership of the patents in suit constitute unfair competition.

110. As a result of Defendants’ unfair competition, Biothera is entitled to damages in an amount to be determined at trial.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs ask this Court to:

- a. Enter judgment for Plaintiffs on their complaint;
- b. Enter a preliminary and permanent injunction to enjoin

Defendants and those in privity with or acting in concert with Defendants from further infringement of the '540, '972, '015, '719, '324, '731, '094, '223, '542, '720, '939, '643, '940, and '569 Patents during the remainder of the term for which each patent has been granted;

- c. Award Plaintiffs damages against Defendants adequate to compensate Plaintiffs for such acts of infringement, and to increase the damages to three times the amount found or assessed in accordance with 35 U.S.C. § 284;

- d. Award Biothera damages against Defendants adequate to compensate Biothera for Defendants' defamation and unfair competition;

- e. Award Plaintiffs their reasonable attorneys' fees pursuant to the contracts and also in accordance with 35 U.S.C. § 285;

- f. Award Plaintiffs their interest and costs; and

- g. Award Plaintiffs such other and further relief as is just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated: November 28, 2006

s/ Grant D. Fairbairn
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Darren B. Schwiebert (#0260642)
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