

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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

Case No.: 05-2972 (JNE/JJG)

Plaintiffs,

v.

IMMUDYNE, INC., a Delaware corporation,

Defendant.

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**SECOND AMENDED COMPLAINT**

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

**JURISDICTION AND VENUE**

1. This is an action for patent infringement, deceptive trade practices and false advertising pursuant to the laws as set forth in Title 35 of the United States Code, the trademark laws of the United States, 15 U.S.C. § 1114 *et seq.*, and the Minnesota Deceptive Trade Practices Act (Minn. Stat. §§ 325D.44-45). Jurisdiction in this Court is based on 28 U.S.C. §§ 1331, 1338, 1367 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 Immudyne, Inc. (“Immudyne”) is a Delaware corporation having its principal place of business at 7453 Empire Drive, Suite 300, Florence, Kentucky 41042.

**FACTUAL BACKGROUND**

5. 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.

6. 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.

7. On September 30, 1999, Biothera entered into an exclusive licensing agreement with Byron A. Donzis for United States Patent Nos. 5,519,009 (the “‘009 Patent”); 5,397,773 (the “‘773 Patent”); 5,576,015 (the “‘015 Patent”); 5,702,719 (the “‘719 Patent”); and 5,705,184 (the “‘184 Patent”).

8. On June 8, 2000, Byron Donzis assigned the ‘009 Patent, the ‘773 Patent, the ‘491 Patent, the ‘015 Patent, the ‘719 Patent and the ‘184 Patent from Byron Donzis to PSA, Incorporated. The United States Patent and Trademark Office, Assignment Division recorded the assignment. The recorded assignment is publicly available to Defendant from the United States Patent and Trademark Office.

9. On December 5, 2001, PSA, Incorporated assigned, among other things, the ‘009 Patent, the ‘773 Patent, the ‘491 Patent, the ‘015 Patent, the ‘719 Patent and the ‘184 Patent to Biothera.

10. The assignment of the ‘009 Patent, the ‘773 Patent, the ‘491 Patent, the ‘015 Patent, the ‘719 Patent and the ‘184 Patent from PSA to Biothera was recorded with the United States Patent and Trademark Office.

11. Defendant is aware that Biothera owns the ‘009 Patent, the ‘773 Patent, the ‘491 Patent, the ‘015 Patent, the ‘719 Patent and the ‘184 Patent. In a letter dated July 12, 2002, Biothera notified Defendant,

through its legal counsel, that Biothera owned each of these patents by way of assignment.

12. In 2005, Defendant initiated a lawsuit in Bexar County, Texas (Case No. 2005-CI-16991), including allegations regarding ownership of intellectual property, including the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent.

13. As of December 20, 2005, Defendant's website ([www.immudyne.com](http://www.immudyne.com)) was a single web page without links to other web pages containing a press release dated February 11, 2005, stating that :"[a]s a result of the ongoing audit of Immudyne's books and records by our independent auditors, PKF (New York), adjustments have been made which resulted in our net income being reduced to \$291,327 for the year ended August 31,2004."

14. At some point after December 20, 2005, defendant modified its web page with new content including the statement that: "During the last 10 years Immudyne has been assigned a number of patents for the isolation, purification and use of yeast -glucan." As examples, despite notice regarding proper ownership by Biothera, Defendant's modified website falsely claims that Defendant is the owner by assignment of the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent. ([www.immudyne.com/nutrition.htm](http://www.immudyne.com/nutrition.htm)).

15. Upon information and belief, Defendant has offered to sell and/or sold yeast derived beta glucan products, including MacroForce, to potential customers in this district and elsewhere within the United States.

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

16. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 15 and incorporates them by reference.

17. 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, Byron A. Donzis.

18. 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 Byron A. Donzis.

19. Defendant has infringed the ‘015 Patent by making, using, offering for sale, selling, or importing MacroForce within the District of Minnesota and elsewhere within the United States, without the consent of Biothera, and will continue to do so unless enjoined by this Court.

20. Upon information and belief, Defendant’s infringement of the ‘015 Patent has been willful and wanton.

21. Defendant's infringement of the '015 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

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

22. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 21 and incorporates them by reference.

23. 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 the inventor, Byron A. Donzis.

24. 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 Byron A. Donzis.

25. Defendant has infringed the '719 Patent by making, using, offering for sale, selling, or importing MacroForce within the District of Minnesota and elsewhere within the United States, without the consent of Biothera, and will continue to do so unless enjoined by this Court.

26. Upon information and belief, Defendant's infringement of the '719 Patent has been willful and wanton.

27. Defendant's infringement of the '719 Patent has injured Biothera and will continue to do so unless enjoined by this Court.

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

28. Plaintiffs hereby restate and reallege the allegations set forth in paragraphs 1 through 27 and incorporate them by reference.

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

30. 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.

31. Defendant has infringed, and still is infringing, the ‘540 Patent by making, using, offering for sale, selling, or importing MacroForce 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.

32. Upon information and belief, Defendant’s infringement of the ‘540 Patent has been willful and wanton.

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

**COUNT IV: INFRINGEMENT OF U.S. PATENT NO. 5,097,972**

34. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 33 and incorporates them by reference.

35. 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 MIT, as the assignee of the inventors, Spiros Jamas, ChoKyun Rha, and Anthony J. Sinskey.

36. 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.

37. Defendant has infringed the ‘972 Patent by making, using, offering for sale, selling, or importing MacroForce 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.

38. Upon information and belief, Defendant’s infringement of the ‘972 Patent has been willful and wanton.

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

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

40. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 39 and incorporates them by reference.

41. 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.

42. 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.

43. Defendant has infringed the ‘324 Patent by making, using, offering for sale, selling, or importing MacroForce within the District of Minnesota and elsewhere within the United States, without the consent of Biothera, and will continue to do so unless enjoined by this Court.

44. Upon information and belief, Defendant’s infringement of the ‘324 Patent has been willful and wanton.

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

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

46. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 45 and incorporates them by reference.

47. 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.

48. 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.

49. Defendant has infringed the ‘094 Patent by making, using, offering for sale, selling, or importing MacroForce within the District of Minnesota and elsewhere within the United States, without the consent of Biothera, and will continue to do so unless enjoined by this Court.

50. Upon information and belief, Defendant’s infringement of the ‘094 Patent has been willful and wanton.

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

**COUNT VII: VIOLATION OF  
MINNESOTA DECEPTIVE TRADE PRACTICES ACT**

52. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 51 and incorporates them by reference.

53. Biothera is the owner of the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent.

54. Defendant's statement that it owns the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent is likely to cause confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

55. Defendant's statement on its website that Defendant owns the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent is likely to cause confusion or misunderstanding as to any affiliation, connection, or association between Biothera and Defendant.

56. Defendant's actions violate Minn. Stat. § 325D.44.

57. Defendant has willfully engaged in the above-described trade practices, knowing them to be deceptive. Biothera notified Defendant in July 2002 that Biothera owns the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent.

58. As a result of Defendant's conduct, Biothera is entitled to an injunction and attorneys' fees under Minn. Stat. § 325D.45.

**COUNT VIII: FALSE ADVERTISING UNDER LANHAM ACT**

59. Biothera hereby restates and realleges the allegations set forth in paragraphs 1 through 58 and incorporates them by reference.

60. Defendant has made false and misleading statements of fact in their promotional materials – namely that Defendant owns the ‘009 Patent, the ‘773 Patent, the ‘491 Patent, the ‘015 Patent, the ‘719 Patent and the ‘184 Patent. In fact, Biothera put Defendant on notice that Biothera owns those patents in July 2002.

61. Defendant’s false and misleading statements have actually deceived a substantial segment of the audience for the advertisement, or have the capacity to deceive such segment.

62. The deception caused by Defendant’s false and misleading statements is material because it is likely to influence purchasing decisions.

63. Biothera is likely to be injured as a result of Defendant’s false claims because of a potential decline in sales or loss of goodwill.

64. Defendant’s goods have traveled in interstate commerce.

65. Biothera is entitled to damages and attorneys’ fees because of Defendant’s false advertising in an amount to be proven 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 Defendant and those in privity with or acting in concert with Defendant from further infringement of the '015 Patent, the '719 Patent, the '540 Patent, the '972 Patent, the '324 Patent, and the '094 Patent during the remainder of the term for which each patent has been granted;
- c. Award Plaintiffs damages against Defendant adequate to compensate Plaintiffs for such acts of infringement, and increase the damages to three times the amount found or assessed in accordance with 35 U.S.C. § 284;
- d. Enter a preliminary and permanent injunction to enjoin Defendant and those in privity with or acting in concert with Defendant from advertising that Defendant owns the '009 Patent, the '773 Patent, the '491 Patent, the '015 Patent, the '719 Patent and the '184 Patent;
- e. Award Plaintiffs their reasonable attorneys' fees in accordance with 35 U.S.C. § 285 and Minn. Stat. § 325D.45;
- 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: April 20, 2006

s/ Grant D. Fairbairn  
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