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Attorneys for Plaintiff,
METAGENICS, INC.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

METAGENICS, INC.,)
a California corporation,)
)
Plaintiff,)
)
vs.)
)
SYMBIOTICS, INC.,)
an Arizona corporation,)
)
Defendant.)
)
)

FIRST AMENDED COMPLAINT

Civil No. 2:01CV0048 S

COMES NOW Plaintiff, by and through counsel, and hereby files this Complaint and
hereby alleges as follows:

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IDENTITY OF PARTIES

1. Plaintiff Metagenics, Inc., (hereinafter "Metagenics") is a California corporation having its principal place of business located at 100 Avenida La Pata, San Clemente, California 92673.

2. Upon information and belief, Defendant Symbiotics, Inc., (hereinafter "Symbiotics") is an Arizona corporation having its principal place of business located at 2301 West Highway 89A, Suite 107, Sedona, Arizona 86336.

JURISDICTION AND VENUE

3. This Complaint arises under the patent laws of the United States, including title 35 U.S.C. §§ 271 & 281, et seq. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400(b).

5. This court has personal jurisdiction over Symbiotics in that, upon information and belief, Symbiotics has regularly transacted business within the State of Utah and has solicited sales of and/or sold in the State of Utah the nutritional supplements out of which Plaintiff's claims in this action arise.

GENERAL ALLEGATIONS

6. Plaintiff Metagenics is engaged in the business of developing, manufacturing, marketing and selling nutritional supplements. As part of its business, Plaintiff Metagenics and/or its licensee manufactures and/or sells nutritional supplements which have been very well received in the marketplace.

7. Plaintiff Metagenics is the owner of United States Patent No. 5,531,988 (hereinafter the '988 patent") issued on July 2, 1996, for a nutritional supplement containing immunoglobulins and a beneficial human intestinal microorganism (see copy of the '988 patent attached as Exhibit A).

8. Defendant Symbiotics is likewise engaged in the business of selling and/or manufacturing nutritional supplements.

9. Defendant Symbiotics is selling and/or manufacturing a nutritional supplement as the "New Life Colostrum + *Candida* Antibody" (hereinafter the "Colostrum + *Candida* Antibody") (see copy of pertinent promotional material and photographs of the Colostrum + *Candida* Antibody package, attached as Exhibit B).

10. Defendant Symbiotics has been selling, offering for sale, and/or manufacturing the Colostrum + *Candida* Antibody after the issue date of the '988 patent.

11. Upon information and belief, the Colostrum + *Candida* Antibody has been manufactured in accordance with the principles taught in the '988 patent and falls within the scope of at least one of the claims of the '988 patent. As such, Defendant Symbiotics is directly infringing the claims of the '988 patent.

12. Defendant Symbiotics is distributing promotional material showing the Colostrum + *Candida* Antibody in use and instructing others to use the Colostrum + *Candida* Antibody in accordance with the principles and claims of the '988 patent (see Exhibit B). As such, Defendant Symbiotics' actions constitute inducement to infringe the '988 patent.

13. Upon information and belief, the Colostrum + *Candida* Antibody also forms a component of the nutritional supplement in accordance with the principles and claims of the '988 patent. The Colostrum + *Candida* Antibody is not a staple article or commodity of commerce suitable for substantial noninfringing use. As such, Defendant Symbiotics' actions constitute contributory infringement of the '988 patent.

14. Upon information and belief, the actions of Defendant Symbiotics constitute direct infringement, inducement to infringe, and contributory infringement of the '988 patent. Defendant Symbiotics' actions have resulted in significant past and present damage to Plaintiff Metagenics.

15. Plaintiff Metagenics is the owner of United States Patent No. 5,531,989 (hereinafter the '989 patent") issued on July 2, 1996, for a nutritional supplement containing immunoglobulins and dietary fiber (see copy of the '989 patent attached as Exhibit C).

16. Upon information and belief, Defendant Symbiotics is manufacturing and selling a nutritional supplement known either as the "New Life Colostrum Body Bar" or as the "New Life Colostrum Snack Food Bar" (hereinafter the "Colostrum Bars") (see copy of promotional material and photographs of the Colostrum Bar packaging attached as Exhibit D).

17. Defendant Symbiotics has been selling, offering for sale, and/or manufacturing the Colostrum Bars after the issue date of the '989 patent.

18. Plaintiff Metagenics is the owner of United States Patent No. 6,180,099 (hereinafter the '099 patent") issued on January 30, 2001, for a nutritional supplement containing immunoglobulins and dietary fiber (see copy of the '099 patent attached as Exhibit E).

19. Upon information and belief, Defendant Symbiotics is manufacturing and selling a nutritional supplement known either as the "New Life Colostrum Body Bar" or as the "New Life Colostrum Snack Food Bar" (hereinafter the "Colostrum Bars") (see copy of promotional material and photographs of the Colostrum Bar packaging attached as Exhibit D).

20. Defendant Symbiotics has been selling, offering for sale, and/or manufacturing the Colostrum Bars after the issue date of the '099 patent.

21. Upon information and belief, the Colostrum Bars have been manufactured in accordance with the principles taught in the '099 patent and falls within the scope of at least one of the claims of the '099 patent. As such, Defendant Symbiotics is directly infringing the claims of the '099 patent.

22. Defendant Symbiotics is distributing promotional material instructing others to use the Colostrum Bars in accordance with the principles and claims of the '099 patent (see Exhibit D). As such, Defendant Symbiotics' actions constitute inducement to infringe the '099 patent.

23. Upon information and belief, the Colostrum Bars also form a component of a nutritional supplement in accordance with the principles and claims of the '099 patent. The Colostrum Bars are not a staple article or commodity of commerce suitable for substantial noninfringing use. As such, Defendant Symbiotics' actions constitute contributory infringement of the '099 patent.

24. Upon information and belief, the actions of Defendant Symbiotics constitute direct infringement, inducement to infringe, and contributory infringement of the '099 patent. Defendant Symbiotics' actions have resulted in significant past and present damage to Plaintiff Metagenics.

FIRST CAUSE OF ACTION

(Direct Infringement of the '988 Patent under 35 U.S.C. § 271(a))

25. Plaintiff Metagenics hereby incorporates by this reference paragraphs 1 to 24 as if fully set forth herein.

26. The '988 patent for Bacteria and Immunoglobulin-Containing Composition for Human Gastrointestinal Health is and has been fully enforceable since the issue date. Metagenics is the assignee and holds all rights under the '988 patent, including the right to bring a civil action for infringement.

27. Subsequent to the issue date of the '988 patent, Defendant Symbiotics has manufactured, used, sold and continues to manufacture, use and sell the Colostrum + *Candida* Antibody.

28. The Colostrum + *Candida* Antibody comes within the scope of and infringes one or more claims of the '988 patent.

29. Upon information and belief, Defendant Symbiotics will continue to infringe the '988 patent unless enjoined by this Court.

30. The manufacture, use and sale of the infringing Colostrum + *Candida* Antibody by Defendant Symbiotics has been without authority or license from Plaintiff Metagenics, and in violation of Plaintiff Metagenics' rights.

31. Upon information and belief, Plaintiff Metagenics has been significantly damaged by Defendant Symbiotics' wrongful conduct. The amount of money damages that Plaintiff Metagenics has suffered as a result of Defendant Symbiotics' acts will be shown at trial.

32. The harm to Plaintiff Metagenics arising from Defendant Symbiotics' acts is not fully compensable by money damages. Plaintiff Metagenics has suffered, and continues to suffer, irreparable harm which has no adequate remedy at law and which will continue unless Defendant Symbiotics' conduct is enjoined.

SECOND CAUSE OF ACTION

(Inducement of Infringement of the '988 Patent under 35 U.S.C. § 271(b))

33. Plaintiff hereby incorporates by this reference paragraphs 1 to 32 as if fully set forth herein.

34. Upon information and belief, Defendant Symbiotics has actively induced and is currently inducing infringement of the '988 patent by selling the infringing Colostrum + *Candida* Antibody in the United States and teaching others to use the infringing Colostrum + *Candida* Antibody in a manner which infringes one or more claims of the '988 patent.

35. Upon information and belief, Defendant Symbiotics has unlawfully derived, and continues to unlawfully derive income and profits by inducing others to infringe the '988 patent.

As a result of Defendant Symbiotics' inducement, Plaintiff Metagenics has suffered and continues to suffer damage.

36. Upon information and belief, Plaintiff Metagenics has suffered and will continue to suffer irreparable damage for which there is no adequate remedy at law because of Defendant Symbiotics' inducing of others to infringe the '988 patent, unless Defendant Symbiotics is enjoined from further acts of inducement.

THIRD CAUSE OF ACTION

(Contributory Infringement of the '988 Patent under 35 U.S.C. § 271(c))

37. Plaintiff hereby incorporates by this reference paragraphs 1 to 36 as if fully set forth herein.

38. Upon information and belief, Defendant Symbiotics has sold and offered to sell and continues to sell and offer to sell the infringing Colostrum + *Candida* Antibody, which is a component of the patented Bacteria and Immunoglobulin-Containing Composition for Human Gastrointestinal Health according to the principles and claims of the '988 patent. The Colostrum + *Candida* Antibody constitutes a material part of the patented composition according to the principles and claims of the '988 patent.

39. Upon information and belief, Defendant Symbiotics knows the Colostrum + *Candida* Antibody is especially made or adapted for use in a method of restoring and maintaining gastrointestinal health (see Exhibit B). The Colostrum + *Candida* Antibody is not a staple article or commodity of commerce suitable for substantial noninfringing use.