

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

SI03, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MUSCLEGEN’S ANSWER,
	)	AFFIRMATIVE DEFENSES,
	)	AND COUNTERCLAIM
	)	Case No. 1:16-cv-00274-RLW
	)	
MUSCLEGEN RESEARCH INC.	)	
	)	
	)	
Defendant.	)	

Pursuant to Rules 7, 8, and 12 of the Federal Rules of Civil Procedure, Defendant Musclegen Research, Inc. (“Musclegen”) provides the following Answer, Affirmative Defenses, and Counterclaims to Plaintiff SI03, Inc.’s (“SIO3”) Complaint. (Doc. 1). Except as expressly admitted herein, Musclegen denies each and every allegation set forth in SIO3’s complaint and the allegations admitted by Musclegen are only admitted to the extent expressly stated herein.

ANSWER

Musclegen responds to the individually numbered paragraphs in the Complaint as follows:

1. Admitted, on information and belief.

2. Musclegen admits that it is a North Carolina corporation with principal place of business at 2425 Kildaire Farm Road, Suite 407, Cary, North Carolina 27518; in all other respects the allegations are denied.

3. The allegations of Paragraph 3 do not require a response in that they state only conclusions of law and that certain information is outside of the knowledge of SIO3; to the extent a response is deemed required, the allegations are denied.

4. Denied.

5. Denied.

6. It is admitted that Musclegen conducts business using a website that is available to be accessed in Missouri; in all other respect, the allegations are denied.

7. The allegations of Paragraph 7 state legal conclusions to which no response is required; to the extent a response is deemed required, the allegations are denied.

8. The allegations of Paragraph 8 state legal conclusions to which no response is required; to the extent a response is deemed required, the allegations are denied.

9. The allegations of Paragraph 9 only state what SIO3 seeks in this action and legal conclusions to which no response is required; to the extent a response is deemed required, the allegations are denied.

10. The allegations of Paragraph 10 state legal conclusions to which no response is required; to the extent a response is deemed required, the allegations are denied.

11. Admitted, on information and belief.

12. Denied for lack of knowledge, information or belief.

13. Denied for lack of knowledge, information or belief.

14. Denied for lack of knowledge, information or belief.

15. Denied for lack of knowledge, information or belief.

16. Admitted that Musclegen sells its products under the Genepro brand and through the internet accessible in Missouri; in all other respects, the allegations are denied.

17. Denied.

18. Denied. Musclegen, however, admits that the front of its Genepro product states that Genepro has “3X BETTER ** ABSORPTION” than traditional whey protein and that the “**” directs the reader to the bottom of the trade dress and the statement “30g Equivalencies based on US Clinical Trial NCT02919657.” Musclegen further admits that the back of its Genepro product states “1 SCOOP EQUATES TO 30g PROTEIN**” and that the “**” directs the reader to the statement “Equivalencies based on the clinical trial NCT02919657.” Attached as **Exhibit 1** is a true and correct copy of the front and back of the current trade dress for Genepro which demonstrates these statements.

19. Musclegen admits that 1 tablespoon of its Genepro product does not contain 10 grams of protein and further admits that its Genepro product has three times the protein absorption rate as traditional whey protein—meaning that consuming one scoop of Genepro is the functional equivalent of consuming 30 grams of whey protein. Attached as **Exhibit 2** is a true and correct copy of the clinical trial NCT02919657, which supports this equivalency statement; in all other respects the allegations are denied.

20. Musclegen admits that its Genepro product has three times the equivalency rate of traditional whey protein, such that consumption of one scoop of Genepro is the

functional equivalent of consuming 30 grams of traditional whey protein; in all other respects the allegations are denied.

21. Denied.

22. Denied.

23. Denied.

24. Musclegen admits that there is no industry or FDA standard for “medical grade” or “medical” protein; in all other respects the allegations are denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

First Claim for Relief – False Advertising Under the Lanham Act

30. Musclegen incorporates by reference Paragraphs 1 through 29 above as though fully set forth herein.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

Second Claim for Relief – Missouri Common Law Unfair Competition

39. Musclegen incorporates by reference Paragraphs 1 through 38 above as though fully set forth herein.

40. Denied.

41. Denied.

42. The allegations of Paragraph 42 are directed at “Blue Buffalo.” Assuming that Musclegen was the intended subject of the allegations of Paragraph 42, the allegations are denied.

Third Claim for Relief – Missouri Common Law Unjust Enrichment

43. Musclegen incorporates by reference Paragraphs 1 through 42 above as though fully set forth herein. Musclegen notes that this claim has been dismissed without prejudice and Musclegen provides these responses nonetheless.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

The material following paragraph 47 until the signature line of the pleading is Prayer for Relief or other matter to which no response is required; to the extent any response may be deemed required any and all allegations are denied. Musclegen further denies that SIO3 is entitled to damages, equitable relief, injunctive relief, attorneys’ fees,

expenses, or other relief, including, but not limited to, any and all relief demanded by SIO3 in its Prayer for Relief.

AFFIRMATIVE AND RULE 12 DEFENSES

Musclegen asserts the following affirmative defenses to SIO3's Complaint. In asserting these defenses, Musclegen does not assume the burden of establishing any fact or proposition where that burden is imposed on SIO3, as Plaintiff.

FIRST DEFENSE

SIO3's claims fail to state a cause of action upon which relief can be granted.

SECOND DEFENSE

SIO3's claims fail because the statements that one scoop of Genepro contains the equivalent of 30 grams of traditional whey protein and that Genepro has three times the absorption rate as traditional whey protein are true and supported by the clinical study, attached as **Exhibit 2**, which is referenced in multiple locations on the Genepro trade dress, attached as **Exhibit 1**.

THIRD DEFENSE

SIO3's claims fail as moot, given that Musclegen removed the "medical grade" protein language from the Genepro trade dress before SIO3 filed its complaint in this suit, with the exception of one use of that phrase that was inadvertently left in very small font of the back of the Genepro trade dress and has since been removed.

FOURTH DEFENSE

SIO3's request for equitable relief should be denied, and SIO3 should be denied equitable relief and all relief, under the doctrine of unclean hands, in that SIO3 is marketing

is products, including Nectar Medical, as “medical” proteins—the very conduct that it brings this suit against Musclegen for. This is evidenced by **Exhibits 3 and 4**, which are true and correct copies of screenshots from SIO3’s website demonstrating how its products are marketed as “medical.” Musclegen removed references to “medical grade” from the Genepro trade dress before this suit was filed, while SIO3 is still marketing its products as “medical” protein.

FIFTH DEFENSE

Musclegen reserves the right to amend its Answer and Defenses to assert additional defenses and counterclaims that are discovered during the course of this litigation.

WHEREFORE, having fully responded to the Complaint, Musclegen respectfully requests that:

1. All claims be dismissed with prejudice;
2. SIO3’s demand for damages, equitable relief, injunctive relief, trebled damages, attorney’s fees, expenses, or other relief be denied;
3. SIO3 recover nothing from Musclegen through this action;
4. Musclegen recovers from SIO3 the costs and attorney’s fees that it incurs and has incurred in defending this action; and
5. Musclegen receive other relief that this Court deems just and proper.

COUNTERCLAIM

Musclegen incorporates herein by reference the admissions, allegations, denials, and Affirmative Defenses contained in its Answer above as if set forth fully herein.

Further, Musclegen maintains that it is not liable for any claims related to the “medical grade” protein language that was previously on Musclegen’s trade dress. However, while Musclegen has removed that language from the Genepro trade dress, SIO3 continues to market to its products as “medical” proteins. As such, these counterclaims are brought in the alternative, and also in the event that SIO3 seeks to abandon its claims—if Musclegen’s use of the phrase “medical grade” protein would ground liability, then SIO3 must be liable for its ongoing references to its products as “medical” proteins. For its Counterclaims, Musclegen makes the following allegations against SIO3:

NATURE OF SUIT

1. This is a counterclaim against SIO3 for false advertising under the Lanham Act and Missouri common law.

PARTIES

2. On information and belief, SIO3 is a Delaware corporation with its principal place of business in Cape Girardeau County, Missouri.

3. Musclegen is a North Carolina corporation with its principal place of business in Raleigh, North Carolina.

4. On information and belief, SIO3 conducts business and manufactures and/or distributes products in this district.

JURISDICTION AND VENUE

5. This court has jurisdiction over this action pursuant to 15 U.S.C. § 1331 (federal question), 15 U.S.C. § 1121 (Lanham Act claims), and pursuant to the principles of supplemental jurisdiction under 28 U.S.C. § 1367.

6. This Court has personal jurisdiction over SIO3.

7. Venue is proper in this jurisdiction for this Counterclaim pursuant to 28 U.S.C. § 1391(b) & (c) and because SIO3 is subject to personal jurisdiction in this district.

8. Upon information and belief, SIO3 is a resident of this district due to the location of its principal place of business in this state. Furthermore, personal jurisdiction over SIO3 is proper based on the commencement of this action.

FACTS

9. This action seeks redress for SIO3's deliberate, ongoing, and unlawful false and misleading representations regarding its products, including a product called Syntrax Nectar Medical ("Nectar Medical"), which are advertised as: "MEDICAL," for "People with medical needs . . .," and made "with the medical needs of customers in mind," while attempting to constrain the use of the "medical grade" protein phrase that Musclegen as long-since ceased using. In addition, SIO3 markets its Nectar Medical product as "exceed[ing] even the most stringent and demanding requirements of the medical community." Attached as **Exhibits 3 and 4** are true and accurate copies of screenshots from SIO3's website demonstrating how its products, including Nectar Medical, are marketed.

I. Musclegen Research, Inc.

10. Musclegen is, among other things, a manufacturer and seller of protein powder for sale within the United States.

11. Musclegen produces and sells various protein powders and dietary supplements and has been doing so since March 16, 2014.

12. There are numerous competitors to Musclegen in the protein powder and dietary supplements market and Musclegen succeeds in the market because of the quality of its products.

13. In particular, Musclegen's Genepro protein powder is a popular product on the market because it was carefully designed so that it has three times the protein absorption rate as traditional whey protein powder—as such, consuming one scoop of Genepro is the effective equivalent of consuming 30 grams of whey protein.

14. Musclegen's claims regarding its absorption rate have been validated by scientific study. Attached as **Exhibit 2** is a true and correct copy of the clinical trial NCT02919657, which supports Musclegen's equivalency statement.

II. SIO3 and its False Advertising of its Products as “Medical”

15. SIO3 is based in Missouri, and Musclegen is informed and believes that SIO3 markets, distributes, and sells its products, including its Nectar Medical product, in stores in Missouri and throughout the United States through internet retailers, including Amazon, to the entire United States.

16. SIO3 markets its products by claiming that they are “medical” proteins. For example, SIO3's website states refers to SIO3's protein products as “MEDICAL,” as being for “People with medical needs . . .,” and as being made “with the medical needs of customers in mind.” Further, SIO3's website states that Nectar Medical is “an ideal product to be used in feeding tube applications due to its ease of use and health promoting benefits,” that Nectar Medical is “designed to exceed even the most stringent and demanding requirements of the medical community” and that Nectar Medical

“[a]bsolutely” offers distinct medical benefits. **Exhibits 3 and 4** demonstrate how SIO3’s products, including Nectar Medical, are marketed as “medical.”

17. There is no industry or FDA standard for “medical” protein, and as such designation of its products, including Nectar Medical, as “medical” proteins is incorrect, false and misleading and intended to impress consumers that the quality of protein in SIO3’s products, including Nectar Medical, is different or conforms to a higher standard than other protein products on the market.

18. Purchasers of SIO3’s products, including Nectar Medical, are likely to be misled and deceived by SIO3’s product labeling, marketing, and advertising.

19. SIO3’s false and misleading advertising of its products, including Nectar Medical, is damaging to the reputation and goodwill of Musclegen and is damaging to the consuming public. These false and misleading representations are designed to entice consumers to purchase SIO3’s product over the products of others in the market, including Musclegen. Specifically, SIO3’s false and misleading representations regarding the “medical” nature of its products deceives consumers, causing them to falsely believe that SIO3’s products, including Nectar Medical, are superior to other protein powders, which they are not.

20. In this way, SIO3 entices consumers who might otherwise buy Musclegen’s product (which makes no representation about “medical”) to buy SIO3’s products instead. In doing so, SIO3 wrongfully misleads and deceives consumers and tricks them into believing that they are getting a product that has unique medical qualities or will promote health as medicine might, when in fact they are not.

21. The natural, probable, and foreseeable result of SIO3's wrongful conduct has been to cause confusion, deception, and mistake in the protein powder market as a whole, to deprive Musclegen of business and goodwill, and to injure Musclegen's relationships with existing and prospective customers.

22. Musclegen is informed and believes that SIO3's wrongful conduct has resulted in increased sales of SIO3's own protein powder products, including Nectar Medical, while hindering the sales of Musclegen's protein powder products, including Genepro, and damaging Musclegen's goodwill. Plaintiff has sustained and will sustain damages as a result of SIO3's wrongful conduct.

**First Claim for Relief – False Advertising Under Lanham Act § 43(a), 15
U.S.C. § 1125(a)**

23. Musclegen incorporates by reference Paragraphs 1 through 22 above as though fully set forth herein.

24. Upon information and belief, SIO3 has made and distributed, in interstate commerce and in this District, advertisements that contain false or misleading statements of fact regarding their products. These advertisements contain actual misstatements and/or misleading statements and failures to disclose that there is nothing uniquely medical about its products.

25. Upon information and belief, these false statements actually deceive, or have a tendency to deceive, a substantial segment of Musclegen's customers and potential customers. This deception is material in that it is likely to influence the purchasing decisions of Musclegen's customers.

26. SIO3's false and misleading advertising statements and omissions injure both consumers and Musclegen.

27. SIO3's false and misleading advertising statements and omissions violate the Lanham Act § 43(a) , 15 U.S.C. § 1125(a).

28. SIO3 has caused, and will continue to cause, immediate and irreparable injury to Musclegen, including injury to its business, reputation, and goodwill, for which there is no adequate remedy at law. As such, Plaintiff is entitled to an injunction under 15 U.S.C. § 1116 restraining SIO3, its agents, employees, representative and all persons acting in concert with them from engaging in further acts of false advertising, and ordering removal of all of SIO3's false advertisements.

29. Pursuant to 15 U.S.C. § 1117, Musclegen is entitled to recover from SIO3 the damages sustained by Musclegen as a result of SIO3's acts in violation of Lanham Act § 43(a). Musclegen is at present unable to ascertain the full extent of the monetary damages it has suffered by reason of SIO3's acts.

30. Pursuant to 15 U.S.C. § 1117, Musclegen is further entitled to recover from SIO3 the gains, profits and advantages that they have obtained as a result of their acts. Musclegen is at present unable to ascertain the full amount of the gains, profits, and advantages SIO3 has obtained by its acts.

31. Pursuant to 15 U.S.C. § 1117, Musclegen is further entitled to recover the costs of this action. Moreover, Musclegen is informed and believes, and on that basis, alleges SIO3's conduct was undertaken willfully and with the intention of causing confusion, mistake or deception, making this an exceptional case entitling Musclegen to

recover additional damages and reasonable attorneys' fees. This is especially true given that SIO3 brought suit against Musclegen for the same conduct, that Musclegen has ceased (indeed, had ceased prior to SIO3's complaint being filed) while SIO3 still markets its products as medical.

Second Claim for Relief – Missouri Common Law Unfair Competition

32. Musclegen incorporates by reference Paragraphs 1 through 31 above as though fully set forth herein.

33. SIO3 has engaged in and continues to engage in unfair competition by making false, misleading and deceptive statements about its products. SIO3's misleading and deceptive statements have caused and continue to cause consumers to purchase SIO3's products over the products of competitors, including Musclegen.

34. SIO3 has acted, and continues to act, in bad faith in making claims about its products that it knew, and knows, to be materially false and deceptive.

35. SIO3's acts constitute false advertising and unfair competition under the common law of the State of Missouri.

Prayer for Relief

WHEREFORE, Musclegen prays for judgment against SIO3 as follows:

1. For temporary, preliminary and permanent injunctive relief prohibiting SIO3, its agents, or anyone working for, in concert with, or on behalf of SIO3 from engaging in false or misleading advertising with respect to SIO3's products, including Nectar Medical, and/or violating Lanham Act § 43(a), which relief includes, but is not limited to

removal of all false or misleading advertisements and corrective advertising to remedy the effects of SIO3's false and misleading advertising.

2. For an order requiring SIO3 to correct any erroneous or misleading impressions persons may have derived concerning the nature, characteristics, or qualities of its products, including Nectar Medical, including without limitation, the placement of corrective advertising and providing written notice to the public.

3. That SIO3 be adjudged to have violated 15 U.S.C. § 1125(a) by unfairly competing against Plaintiff by using false, deceptive, or misleading statements of fact that misrepresent the nature, quality, and characteristics of SIO3's products, including Nectar Medical.

4. That SIO3 be adjudged to have unlawfully and unfairly competed against Musclegen under the laws of the State of Missouri.

5. That Musclegen be awarded damages that Musclegen has sustained in consequence of SIO3's conduct.

6. That Musclegen be awarded SIO3's profits obtained by SIO3 as a consequence of SIO3's false and misleading conduct.

7. That such damages and profits be trebled and awarded to Musclegen as a result of SIO3's willful, intentional, and deliberate acts in violation of Lanham Act § 43(a).

8. That Musclegen recover its costs and reasonable attorneys' fees.

9. That all of SIO3's misleading and deceptive materials and products be destroyed as allowed under 15 U.S.C. § 1118.

10. That Musclegen be granted pre-judgment and post-judgment interest.

11. That Musclegen have such other and further relief as the Court deems just and proper.

This the 27th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, May 27, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send notification of such filing to all attorneys of record by electronic means.

By: Gabriel E. Gore
Attorneys for Defendant