

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85919168
LAW OFFICE ASSIGNED	LAW OFFICE 102
MARK SECTION (no change)	
ARGUMENT(S)	
<p>In a March 14, 2014 Final Office Action, the Examining Attorney maintained the refusal of the application under Sections 2(d) and 2(a). Applicant respectfully requests reconsideration of this decision in view of the new information provided below.</p> <p><u>Section 2(d) Refusal</u> Registration of the mark is refused on the basis that the mark BIOPURE O3 OILS for dietary supplements; herbal supplements; herbal topical liniment for the relief of aches and pain; suppositories, is likely to be confused with U.S. Registration No. 2,483,934 for BIOPURE PROTEIN for a dietary supplement containing bioactive pure whey protein concentrate.</p> <p>Submitted herewith is a copy of an executed co-existence Agreement between Applicant and Metagenics, Inc., the owner of the cited registration. Under the Agreement, Applicant has agreed to restrict its use of BIOPURE to products other than dietary or nutritional supplement products marketed as a protein supplement or which feature protein as the principle active ingredient and Metagenics has agreed to never use the BIOPURE mark other than as part of the full BIOPURE PROTEIN mark, among other terms of the Agreement. In view of the differences in the products and marks, and the various agreed upon terms to distinguish their respective marks, the parties believe there is no confusion and have consented to the registration of each other's marks. In view of the parties' understanding of the marketplace, applicant respectfully requests that the Examining Attorney accept the consent agreement as evidence that there is no likelihood of confusion, and withdraw this basis for refusal.</p> <p><u>Section 2(a) Refusal</u> The Examining Attorney also maintains the refusal under Section 2(a) on the grounds that BIOPURE O3 OILS is believed to consist of or include deceptive matter in relation to the identified goods.</p> <p>In response to this refusal, Applicant notes that the oils are in fact infused with ozone and the description of the products on its website is inaccurate. Applicant has confirmed this information with the owner of the manufacturer of the products, who is also the formulator of the oils. As the formulator is in a position to know for certain the process by which the oils are made, applicant requests that the Examiner accept the explanation that the oils are, in fact, infused with ozone, and that the use of "O3" is not deceptive, as it accurately reflects the nature of the goods. Applicant intends to correct the description of the products on its website to accurately reflect this fact.</p> <p>In view of the above, Applicant believes its application is now in condition for publication. If questions remain, the Examining Attorney is invited to contact Applicant's counsel, Lorraine Linford, by email at LorraineL.docketing@SeedIP.com or by telephone at (206) 622-4900.</p>	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF	evi_38100227210-20140915124649487496_.agreement.pdf

FILE	
CONVERTED PDF FILE(S) (11 pages)	\\TICRS\EXPORT16\IMAGEOUT16\859\191\85919168\xml10\RFR0002.JPG
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DESCRIPTION OF EVIDENCE FILE	Executed co-existence Agreement between Applicant and Metagenics, Inc.
SIGNATURE SECTION	
RESPONSE SIGNATURE	/Lorraine Linford/
SIGNATORY'S NAME	Lorraine Linford
SIGNATORY'S POSITION	Attorney for Applicant, Washington State Bar Member
SIGNATORY'S PHONE NUMBER	206-622-4900
DATE SIGNED	09/15/2014
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Mon Sep 15 16:41:59 EDT 2014
TEAS STAMP	USPTO/RFR-38.100.227.210-20140915164159869691-85919168-500f883b26b418799d07b974ef0682352225d3cf365cb3ddd63b592e8c42dbd69-N/A-

Request for Reconsideration after Final Action To the Commissioner for Trademarks:

Application serial no. **85919168** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

In a March 14, 2014 Final Office Action, the Examining Attorney maintained the refusal of the application under Sections 2(d) and 2(a). Applicant respectfully requests reconsideration of this decision in view of the new information provided below.

Section 2(d) Refusal

Registration of the mark is refused on the basis that the mark BIOPURE O3 OILS for dietary supplements; herbal supplements; herbal topical liniment for the relief of aches and pain; suppositories, is likely to be confused with U.S. Registration No. 2,483,934 for BIOPURE PROTEIN for a dietary supplement containing bioactive pure whey protein concentrate.

Submitted herewith is a copy of an executed co-existence Agreement between Applicant and Metagenics, Inc., the owner of the cited registration. Under the Agreement, Applicant has agreed to restrict its use of BIOPURE to products other than dietary or nutritional supplement products marketed as a protein supplement or which feature protein as the principle active ingredient and Metagenics has agreed to never use the BIOPURE mark other than as part of the full BIOPURE PROTEIN mark, among other terms of the Agreement.

In view of the differences in the products and marks, and the various agreed upon terms to distinguish their respective marks, the parties believe there is no confusion and have consented to the registration of each other's marks. In view of the parties' understanding of the marketplace, applicant respectfully requests that the Examining Attorney accept the consent agreement as evidence that there is no likelihood of confusion, and withdraw this basis for refusal.

Section 2(a) Refusal

The Examining Attorney also maintains the refusal under Section 2(a) on the grounds that BIOPURE O3 OILS is believed to consist of or include deceptive matter in relation to the identified goods.

In response to this refusal, Applicant notes that the oils are in fact infused with ozone and the description of the products on its website is inaccurate. Applicant has confirmed this information with the owner of the manufacturer of the products, who is also the formulator of the oils. As the formulator is in a position to know for certain the process by which the oils are made, applicant requests that the Examiner accept the explanation that the oils are, in fact, infused with ozone, and that the use of "O3" is not deceptive, as it accurately reflects the nature of the goods. Applicant intends to correct the description of the products on its website to accurately reflect this fact.

In view of the above, Applicant believes its application is now in condition for publication. If questions remain, the Examining Attorney is invited to contact Applicant's counsel, Lorraine Linford, by email at LorraineL.docketing@SeedIP.com or by telephone at (206) 622-4900.

EVIDENCE

Evidence in the nature of Executed co-existence Agreement between Applicant and Metagenics, Inc. has been attached.

Original PDF file:

[evi_38100227210-20140915124649487496_.agreement.pdf](#)

Converted PDF file(s) (11 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

[Evidence-8](#)

[Evidence-9](#)

[Evidence-10](#)

[Evidence-11](#)

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /Lorraine Linford/ Date: 09/15/2014

Signatory's Name: Lorraine Linford

Signatory's Position: Attorney for Applicant, Washington State Bar Member

Signatory's Phone Number: 206-622-4900

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85919168

Internet Transmission Date: Mon Sep 15 16:41:59 EDT 2014

TEAS Stamp: USPTO/RFR-38.100.227.210-201409151641598

69691-85919168-500f883b26b418799d07b974e

f0682352225d3cf365cb3ddd63b592e8c42dbd69

-N/A-N/A-20140915163841394106

SETTLEMENT AND COEXISTENCE AGREEMENT

This Settlement and Coexistence Agreement is made and entered into effective this 28 day of March, 2014, by and between Metagenics, Inc., a Delaware corporation having a principal place of business at 25 Enterprise, Suite 200, Aliso Viejo, California 92656 (hereinafter referred to as "Metagenics"), and Biopure Healing Products, LLC, a Delaware limited liability company with a principal place of business located at 15315 NE 90th Street, Redmond, Washington 98052 (hereinafter referred to as "Biopure"), in recognition of the following facts and representations:

WHEREAS, Metagenics represents that it has been using and has registered the trademark BIOPURE PROTEIN, Reg. No. 2,483,934, in Class 5 for use in connection with dietary supplements;

WHEREAS, Metagenics represents that it has been using the BIOPURE PROTEIN trademark for dietary supplements since at least April 16, 1999;

WHEREAS, Biopure represents that it has a U.S. Trademark Application Ser. No. 85/609,417 for BIOPURE in Class 5 for "Electrolytes; Nutritionally fortified water; Suppositories" (as well as for products in Classes 3 and 35);

WHEREAS, Metagenics filed Opposition No. 91209155, against Application Ser. No. 85/609,417, alleging confusing similarity between the parties' trademarks;

WHEREAS, the parties wish to resolve their dispute relating to the use of the mark BIOPURE PROTEIN and BIOPURE in connection with dietary supplements;

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of

which is acknowledged, the parties agree as follows:

1. Within 10 business days of the effective date of this Agreement, the parties agree to the execution of the Combined Stipulated Request to Amend Application Ser. No. 85/609,417, to Suspend the Opposition Action and Conditional Motion for Withdrawal of the Notice of Opposition Action, as seen attached hereto as Exhibit A.

2. Within 14 business days of the effective date of this Agreement, Metagenics agrees to file the fully executed Motion referenced in Paragraph 1 with the Trademark Trial and Appeal Board.

3. If the proposed amended language as seen in Exhibit A is not acceptable to the Board, the parties agree to work together in a prompt fashion to develop alternative proposed wording acceptable to both parties consistent with the language used and the spirit of this Agreement.

4. Shortly thereafter, but in no event longer than 30 days after any refusal by the Board to accept the wording in the Motion referenced in Paragraph 1, the parties agree to execute and file another Combined Stipulated Request to Amend Application Ser. No. 85/609,417, to Suspend the Opposition Action and Conditional Motion for Withdrawal of the Notice of Opposition Action with wording that has been approved by both parties and pre-approved by the Board, if possible. Metagenics agrees to file said motion.

5. Biopure agrees to restrict its use of the trademark BIOPURE to products other than dietary or nutritional supplement products marketed as a protein supplement or which feature protein as the principal active ingredient.

6. Biopure specifically agrees never to use the BIOPURE trademark for any dietary or nutritional supplement products marketed as a protein supplement or which feature protein as the principal active ingredient.

7. Metagenics consents to use and future registration by Biopure of the mark BIOPURE for dietary and nutritional supplement products that are not marketed as a protein supplement or which do not feature protein as the principal active ingredient.

8. Biopure consents to use and registration by Metagenics of the trademark BIOPURE PROTEIN for dietary or nutritional supplements marketed as a protein supplement or which feature protein as the principal active ingredient, and agrees not to object to, oppose or petition to cancel any application to register same.

9. Metagenics specifically agrees never to use the trademark BIOPURE other than as part of its BIOPURE PROTEIN mark.

10. The parties to this Agreement do not believe that their concurrent use of their respective marks in connection with their respective goods as discussed in the body of the agreement is likely to cause confusion. Should either party become aware of any instances of actual confusion, it shall promptly notify the other party thereof. The parties shall thereafter work together in good faith to examine the circumstances surrounding the confusion, and to take reasonable action as necessary to reduce further the possibility of such confusion.

11. Each party shall retain the right to enforce and/or defend its marks and related rights hereunder against third parties as it, in its sole discretion, deems appropriate.

12. Biopure represents and warrants that it owns all right, title and interest in U.S. Application Ser. No. 85/609,417 for BIOPURE and that it has authority to enter into this Agreement.

13. At a party's request, the other party shall provide such reasonable assistance as may be necessary to enable the requesting party to use and register its respective marks discussed herein in accordance with this agreement, including pending applications and possible future registrations, such as by the timely provision or execution of a letter or agreement of consent or

similar document to a relevant government office, or such other documentation as the other party may reasonably require to obtain such a trademark registration. Due to the differences in the marketplace, target markets, and the sophistication of the purchasers of the goods, the parties believe that there is no likelihood of confusion in connection with the marks for the goods listed in the body of this agreement.

14. This Agreement is binding upon and inures to the benefit of the parties, their respective subsidiaries and affiliates, successors, and assigns.

15. In the event a party to this Agreement believes the other party is in breach hereof, it will promptly notify that party of its belief in writing, discussing the reasons why it believes a breach has occurred. If a breach has occurred, the party in breach shall have sixty (60) days from the date it receives notice of the breach to cure any such breach. If the breach is not cured within sixty (60) days, the party that believes it has been harmed by the breach or believes it will be harmed by the breach shall then have the right to seek legal redress as that party deems appropriate.

16. Except as otherwise set forth in this Agreement, the provisions of this Agreement are severable, and if any one or more such provisions shall be determined to be invalid, illegal or unenforceable, in whole, or in part, the validity, legality and enforceability of any remaining provisions or portions thereof shall not in any way be affected thereby and shall nevertheless be binding between the parties hereto. Any such invalid, illegal or unenforceable provision or portion thereof shall be changed and interpreted so as best to accomplish the objectives of such provision or portion thereof within the limits of applicable law.

17. This Agreement and all exhibits associated herewith represent the entire agreement between the parties, supersede all prior written or oral representations, inducements, commitments and agreements, and may not be amended or modified except in writing, signed by

all of the parties.

18. All correspondence or notices concerning this Agreement shall be in writing and shall be mailed by first-class mail in the case of Metagenics to:

Dennis H. Cavanaugh, Esq.
D H Cavanaugh Associates
555 Fifth Avenue, 17th Floor
New York, New York 10017

in the case of Biopure to:

Lorraine Linford, Esq.
Seed Intellectual Property Law Group PLLC
701 Fifth Avenue, Suite 5400
Seattle, WA 98104

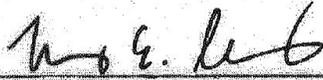
The above addresses may be changed by a party by written notice mailed to the other party. The date of such notice shall be deemed to be the date on which such notice or report was received.

19. Any disputes arising under the terms of this Agreement are to be resolved in U.S. courts under the laws of the State of California, without regard to its conflict-of-law rules, with jurisdiction and venue being in California.

20. Each of the signatories to this Agreement warrants, covenants and agrees that she or he is authorized and has the power to enter into and execute this Agreement for and on behalf of the party she or he represents.

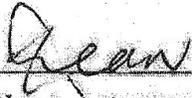
IN WITNESS WHEREOF, the parties hereto have executed this Agreement consisting of six (6) pages, including this page, a preamble, twenty (20) numbered paragraphs, and Exhibit A, as of the dates below written.

METAGENICS, INC.



Printed Name: Mary E. Chowning
Title: COO / CFO
Date: Metagenics, Inc. 3-28-2014

BIOPURE HEALING PRODUCTS, LLC



Printed Name: JOHANNA DEAN
Title: OWNER CEO BIOPURE
Date: 2/4/14

EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
Metagenics, Inc., :
 :
 Opposer, : Opposition No.: 91209155
 :
 v. :
 :
 Biopure Healing Products, LLC, :
 :
 Applicant, :
-----X

**COMBINED STIPULATED REQUEST FOR AMENDMENT OF APPLICATION
AND CONDITIONAL MOTION FOR THE WITHDRAWAL OF OPPOSITION AND
STIPULATED MOTION TO SUSPEND OPPOSITION PROCEEDING**

I. Stipulated Request for Amendment

Pursuant to 37 C.F.R. 2.133 (a), Opposer hereby files this Stipulated Request for Amendment of Application Ser. No. 85/609,417, with the consent of Applicant pursuant to the Settlement Agreement entered into between the parties in this matter attached hereto. Opposer hereby requests the identification of goods in Class 5 be amended as follows:

**BIOPURE, Application Ser. No. 85/609,417 -- "Electrolytes,
Nutritionally fortified water and Suppositories that are not
marketed as protein supplement products."**

The foregoing Amendment proposes to more narrowly define the identification of goods in Class 5 in this application. The Amendment is being filed pursuant to a Settlement Agreement with Opposer. The amendment does not affect the substance of the Applicant's mark and more narrowly defines the scope of the goods covered by the application. Therefore, it is submitted the amendment can be entered without republication.

II. Stipulated Motion to Suspend the Opposition Proceeding

The parties respectfully request that the opposition proceeding be suspended so that the Board and Examiner can evaluate the proposed amendment to the application.

III. Stipulated Conditional Motion for Withdrawal

Petitioner requests that the Notice of Opposition that it filed in connection with Application Ser. No. 85/609,417 against BIOPURE be withdrawn conditioned upon the Trademark Trial and Appeal Board's and/or Examiner's acceptance of the Request to Amend the Identification of Goods in said application.

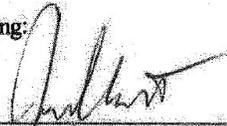
Metagenics, Inc. and Biopure Healing Products, LLC stipulate that the opposition proceeding shall be dismissed without prejudice upon the Board's acceptance of the Request to Amend the Identification of Goods in Application Ser. No. 85/609,417.

The undersigned consented to all of the foregoing:


Dennis H. Cavanaugh, Esq.
D H Cavanaugh Associates
555 Fifth Avenue, 17th Floor
New York, NY 10017
(212) 856-7210

Attorneys for Opposer

Dated: _____


for Lorraine Linford, Esq.
Seed Intellectual Property Law Group PLLC
701 Fifth Avenue, Suite 5400
Seattle, WA 98104
(206) 622-4900

Attorneys for Applicant

Dated: 5/13/14

CERTIFICATE OF MAILING

I hereby certify that a copy of the attached **COMBINED STIPULATED REQUEST FOR AMENDMENT OF APPLICATION AND CONDITIONAL MOTION FOR THE WITHDRAWAL OF OPPOSITION AND STIPULATED MOTION TO SUSPEND OPPOSITION PROCEEDING and SETTLEMENT AGREEMENT** are being submitted electronically to the Trademark Trial and Appeal Board.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached **COMBINED STIPULATED REQUEST FOR AMENDMENT OF APPLICATION AND CONDITIONAL MOTION FOR THE WITHDRAWAL OF OPPOSITION AND STIPULATED MOTION TO SUSPEND OPPOSITION PROCEEDING and SETTLEMENT AGREEMENT** was served on the Applicant's counsel by email, pursuant to prior agreement, addressed to the following on _____, 2014: LorraineL@SeedIP.com.

By: _____
Dennis H. Cavanaugh

MODIFICATION OF SETTLEMENT AND COEXISTENCE AGREEMENT

This Modification of Settlement and Coexistence Agreement ("Modification"), is by and between Metagenics, Inc., a Delaware corporation having a principal place of business at 25 Enterprise, Suite 200, Aliso Viejo, California 92656 (hereinafter referred to as "Metagenics"), and Biopure Healing Products, LLC, a Delaware limited liability company with a principal place of business located at 15315 NE 90th Street, Redmond, Washington 98052 (hereinafter referred to as "Biopure");

WHEREAS Metagenics and Biopure are parties to a Settlement and Coexistence Agreement effective as of March 28, 2014 ("the Agreement");

NOW THEREFORE, in consideration of the mutual promises made below, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Metagenics and Biopure agree to modify the Agreement as follows:

Insert the following section:

21. This Settlement and Coexistence Agreement and all rights and obligations hereunder are effective only in the United States, its territories and possessions.

Nothing in this Modification shall be construed to supersede or alter portions of the Agreement not hereby amended. The Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Modification through their duly authorized representatives, effective as of the last date signed below:

Metagenics, Inc.

Signature: W. E. Cheung

Name: W. E. Cheung

Title: COO/CTO

Date: 5-8-2014

Biopure Healing Products, LLC

Signature: [Signature]

Name: Veronica Dean

Title: CEO/OWNER Biopure LLC

Date: 7-5-14