

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

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TRADEMARK TRIAL AND APPEAL BOARD

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Applicant: Alltech, Inc. :

Mark: **BIOPLEX** :

Opposition No.:

Ser. No.: 76/381,236 :

Filed: March 12, 2002 :

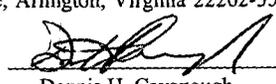
Published: November 5, 2002 :

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Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

Attn: BOX TTAB FEE

CERTIFICATE OF EXPRESS MAILING 37 C.F.R. 1.10
I hereby certify that the attached paper or fee is being deposited with the U.S. Postal Service as Express Mail, No. ET 983 781 281 US, postage pre-paid, on 11/24/02, addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513, BOX TTAB FEE.

Dennis H. Cavanaugh

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NOTICE OF OPPOSITION

Pursuant to Trademark Rule 2.102, Metagenics, Inc., a California corporation having an office and place of business at 100 Avenida La Pata, San Clemente, California 92672 ("Opposer"), believes that it is and will be damaged by registration of the shown in Serial Number 76/381,236 in International Class 5 and opposes the same. As grounds for the opposition it is alleged that:

1. The applicant, Alltech, Inc. ("Applicant"), is upon information and belief, a Kentucky corporation, with offices located at 3031 Catnip Hill Pike, Nicholasville, Kentucky 40356.
2. On or about March 12, 2002, Applicant filed the above-referenced trademark application

to register the mark BIOPLEX for “Organic mineral animal feed nutritional supplements in loose, liquid or block form” in International Class 5, based upon an alleged date of first use of 1990.

3. Opposer adopted and has been using the mark PROBIOPLEX in interstate commerce since at least as early as June 1989, as a trademark to identify its nutritional and dietary supplements. Opposer continues to use the mark PROBIOPLEX to identify its nutritional and dietary supplements and such use has never been abandoned.

4. Opposer is the owner of the following registration for the mark PROBIOPLEX on the Principal Register, which registration is valid and subsisting and has never been abandoned: Registration No. 1,986,754 for PROBIOPLEX, issued July 16, 1996, for “nutritional supplements” in Class 5.

5. Applicant’s filing date of March 12, 2002 is subsequent to both Opposer’s date of first use of its PROBIOPLEX mark, June 1989, and the date of its first registration therefor, July 16, 1996. Thus, priority is not at issue.

6. Applicant’s mark BIOPLEX is confusingly similar in sight, sound and meaning, to Opposer’s PROBIOPLEX mark. Applicant’s mark is virtually identical to Opposer’s mark. Consequently, Applicant’s mark so closely resembles Opposer’s mark as to be likely to be confused with and mistaken for Applicant’s mark. As a result, there is a significant likelihood of confusion between Applicant’s mark and Opposer’s mark.

7. Applicant’s goods are identical to those of Opposer, thus increasing the likelihood of confusion that may result from registration and use of Applicant’s mark.

8. Opposer has invested substantial time, effort and money in using and promoting its PROBIOPLEX mark and the goods bearing it. Through such prior use, promotion and advertising,

Opposer has built up a valuable and protectable goodwill associated therewith. By virtue of Opposer's continuous, exclusive and widespread use of its PROBIOPLEX mark it has become well-known by the relevant purchasing public as a trademark of Opposer.

9. Registration of Applicant's mark is likely to cause the public to be confused, misled or deceived, and to falsely believe that Applicant's goods are affiliated, associated, approved, sponsored, licensed or authorized by Opposer or others authorized or licensed by Opposer to use the PROBIOPLEX mark. Persons familiar with Opposer's mark are likely to purchase Applicant's goods believing they are marketed by, affiliated with or endorsed by Opposer, when in fact they are not.

10. Registration of Applicant's mark is likely to cause harm and damage to Opposer and its mark by causing confusion, mistake and/or deception as to the respective rights of the parties and as to the source of the goods marketed and provided under the Applicant's mark, and by constituting a cloud on Opposer's prior established rights in its PROBIOPLEX mark. Such registration would give Applicant at least a prima facie right to use Applicant's mark, thereby causing continuing serious and irreparable harm to Opposer's rights in its mark, its business and to the goodwill of such business symbolized by Opposer's mark. Registration of Applicant's mark will also tend to reduce the distinctiveness, value and goodwill of Opposer's mark.

WHEREFORE, Opposer believes that it will be damaged by registration of the Applicant's mark in Class 5, Application Serial No. 76/381,236 and opposes registration thereof on the grounds set forth above. Opposer further prays that Application Serial No. 76/381,236 be rejected, and that registration of Applicant's mark therein sought for the goods specified therein in Class 5 be denied and refused.

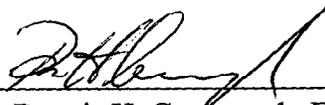
This Notice of Opposition is being filed in triplicate, and the \$300 fee required under § 2.6(a)(17)

is enclosed herewith.

Respectfully submitted,

METAGENICS, INC.

Dated: 11/24/02

By: 

Dennis H. Cavanaugh, Esq.
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POWER OF ATTORNEY

Applicant hereby appoints Dennis H. Cavanaugh, Esq. and Marc S. Ullman, Esq., both members of the Bar of the State of New York, of the law firm Ullman, Shapiro & Ullman, LLP, 299 Broadway, Suite 1700, New York, New York 10007, as its attorneys, with full powers of substitution and revocation, to file this Notice of Opposition, to receive all related communications, to transact all business in the U.S. Patent and Trademark Office and/or Trademark Trial and Appeal Board in connection therewith, and to represent it in all proceedings and appeals that may arise in the U.S. Patent and Trademark Office or the courts concerning this Notice of Opposition.

METAGENICS, INC.

Date: 4/24/02

By: Susan Y. Campbell
Name: Susan Y. Campbell
Title: General Counsel
By Dennis H. Cavanaugh, Attorney