

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

XYMOGEN, INC., an Illinois
corporation,

Plaintiff,

v.

Case No.: 6:17-cv-869-Orl-31KRS

DIGITALEV, LLC, a Colorado
limited liability company,
d/b/a PURE THERAPEUTICS,

Defendant.

FIRST AMENDED COMPLAINT

Plaintiff, XYMOGEN, Inc. (“XYMOGEN” or “Plaintiff”), by counsel, sues Digitalev, LLC, d/b/a Pure Therapeutics (“Digitalev”), and alleges as follows:

JURISDICTION, PARTIES, AND VENUE

1. This is an action at law and in equity for false designation of origin under Section 43(a) of the Trademark Act of 1946 (the “Lanham Act”), and for trademark infringement and unfair competition under Florida common and statutory law.

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 39 of the Lanham Act, 15 U.S.C. § 1121, 28 U.S.C. §§ 1331 and 1338, 28 U.S.C. § 1332, and 28 U.S.C. § 1367(a).

3. This Court has personal jurisdiction over defendant because it is transacting business in the state of Florida and otherwise has purposeful contacts with this Judicial District sufficient to permit the exercise of personal jurisdiction. Among other things:

- a. Defendant maintains a website, www.purethera.com, that is accessible to residents in this Judicial District;
- b. Defendant advertises and markets its products on its website, which includes advertising and marketing in this Judicial District;
- c. Defendant's website is a fully interactive website through which customers can shop for and purchase products;
- d. Defendant conducts business throughout the United States, including within this Judicial District, through the operation of its fully interactive commercial website;
- e. Defendant offers for sale its products within this Judicial District through the operation of its fully interactive commercial website;
- f. Florida residents are able to shop for and purchase products through defendant's website;
- g. Florida residents purchased products from defendant through defendant's website;
- h. Defendant processed sales to Florida residents;
- i. Defendant's website, defendant's use of Google AdWords, defendant's Keywords, and defendant's Search Engine Marketing are intended to divert business from XYMOGEN's website for defendant's commercial advantage;
- j. Defendant maintains a healthcare blog which is available to residents within this Judicial District;

- k. Defendant maintains a Facebook account that is available to residents within this Judicial District;
- l. Defendant maintains a Twitter account that is available to residents within this Judicial District;
- m. Defendant's Twitter account is followed by Florida residents;
- n. Defendant follows Florida residents on its Twitter account; and
- o. Defendant knowingly caused XYMOGEN harm within this Judicial District.

4. Plaintiff, XYMOGEN, is an Illinois corporation with its principal place of business, mailing address, and registered agent in Orlando, Orange County, Florida.

5. Defendant, Digitalev, is a foreign limited liability company with its principal place of business in Denver, Denver County, Colorado.

6. Venue in the Middle District of Florida is proper pursuant to 28 U.S.C. § 1391(b) and (c). Among other things, the causes of action set forth below accrued in the Middle District of Florida and, because defendant is subject to this Court's personal jurisdiction with respect to this action for the reasons set forth above, defendant is deemed to reside in the Middle District of Florida for venue purposes.

OPERATIVE FACTS

I. XYMOGEN's Trademark.

7. XYMOGEN is an independent health sciences company that manufactures and sells nutritional and dietary supplements exclusively to licensed healthcare practitioners and their authorized patients.

8. XYMOGEN manufactures and sells a broad line of nutritional and dietary supplements relating to neurological and cognitive care, immune system support, cardiovascular support, and many other health-related products.

9. At the time XYMOGEN sells its nutritional and dietary supplements to its customers, the licensed healthcare practitioners, XYMOGEN and its customers enter into a “Customer Protection Agreement” pursuant to which, among other things, XYMOGEN’s customer agrees that it will not sell XYMOGEN’s products on the internet, unless the customer’s web page is password protected, and the customer posts a disclaimer provided by XYMOGEN.

10. The XYMOGEN Customer Protection Agreement further provides that XYMOGEN’s customer, the health care practitioner, will recommend XYMOGEN’s products to his or her patient only after a direct one-on-one consultation with the patient.

11. One of the goals of XYMOGEN’s Customer Protection Agreement is to protect consumers from contaminated and counterfeit supplements. Another goal of the XYMOGEN Customer Protection Agreement is to protect the health care practitioner and his or her exclusive relationship with XYMOGEN.

12. XYMOGEN is the owner of United States Trademark Registration (“USPTO”) Nos. 3061636, 4541755, 4509330, and 4436255 for the mark XYMOGEN®.

13. Since at least December of 2002, XYMOGEN has used the mark XYMOGEN® as a trademark in connection with the sale of its nutritional and dietary supplements.

14. XYMOGEN has used its XYMOGEN® mark continuously, notoriously, and extensively with respect to and in association with its products since at least December 2002.

15. Consumers have come to know, rely upon, and recognize XYMOGEN’s mark as identifying XYMOGEN’s nutritional and dietary supplements.

16. As a result of XYMOGEN's substantial promotional, advertising, publicity, and public relations activities, its XYMOGEN® mark has acquired substantial goodwill and is a valuable commercial asset.

17. Plaintiff's XYMOGEN® mark is distinctive and inherently distinctive, serving to identify and indicate the source of XYMOGEN's products to the consuming public, and to distinguish XYMOGEN's nutritional and dietary supplements from those of others.

II. Defendant's Infringing Activities.

18. Digitalev is in the business of selling nutritional and dietary supplements, branded "Pure Therapeutics," to customers.

19. Digitalev is not a customer of XYMOGEN and has not entered into a Customer Protection Agreement with XYMOGEN.

20. Digitalev offers the nutritional and dietary supplements for sale to consumers through its website, www.purethera.com, and also on www.amazon.com.

21. Internet users have one primary tool to find a website for a particular company. The user types the company's name in a search engine such as Google.

22. Google offers a program called "AdWords" which allows advertisers to bid for their advertising hyperlinks to appear in response to particular search terms input by Internet users (hereafter, "Keywords"). The advertising hyperlinks, called "sponsored links", appear either to the right of the search results, or immediately above the search results. A sponsored link is a hyperlink, which contains the text of the advertiser's ad, and allows the Internet user to "click" on the link, which brings the Internet user directly to the advertiser's commercial website. The advertisers pay Google based upon the number of "clicks" on these sponsored links.

Advertisers bid for placement of their advertisements for each possible variation of a Keyword, as there is limited space on Google search results page.

23. The so-called “sponsored links” do not always clearly identify themselves as advertisements, and Google’s layout of the ads does not conspicuously identify them as such. This is particularly true of the sponsored links which appear at the top of the search results. These ads at the top of the search results are designed to look like part of the “non-sponsored” search results, and by virtue of the fact that they appear at the top of the list of Search Results, Internet users may infer that they are the most relevant websites on the Search Results page.

24. Other search engines also offer online advertising programs associated with specific words or phrases, commonly referred to as Search Engine Marketing (“SEM”). Through SEM, an advertiser’s advertisements will appear among the sponsored search engine results when an Internet user inputs a specific Keyword in a search engine’s search bar. Generally, the search engine will award the first sponsored result to the advertiser that has placed the highest bid on the Keyword, i.e. the advertiser that has agreed to pay to the search engine operator the highest amount each time an independent internet user takes a particular action (such as searching a term or clicking on a link in the advertisement). Google AdWords, Yahoo! Search Marketing, and Microsoft (Bing) AdCenter are popular SEM programs in the United States.

25. XYMOGEN’s mark is an often-searched term on the Internet. As part of XYMOGEN’s advertising strategy, XYMOGEN submits to Google and other search engines XYMOGEN® as a Keyword, alone and in combination with other words. Whenever an internet user searches on Google or another search engine for “XYMOGEN”, one of XYMOGEN’s sponsored links will appear either immediately above or to the immediate right of the search results. If the internet user clicks on this link, the user will be brought to XYMOGEN’s website.

26. Digitalev also advertises its competing products on the internet, through the Google AdWords program and other search engine advertising programs.

27. In an effort to mislead consumers searching for XYMOGEN products, upon information and belief, Digitalev purchased Google ads, and have submitted “XYMOGEN” to search engines, to direct consumers searching for XYMOGEN and XYMOGEN’s product to www.purethera.com and to Pure Therapeutics products on www.amazon.com.

28. Additionally, in its further effort to mislead consumers searching for XYMOGEN products, Digitalev has substantially copied labels from XYMOGEN products and placed the labels on Pure Therapeutics products. The copied labels include identified ingredients in Pure Therapeutics products that are identical or nearly identical to ingredients in similar XYMOGEN products.

29. Digitalev’s purchase of or bidding on XYMOGEN’s mark as part of its SEM campaign constitutes unauthorized use of XYMOGEN’s mark in commerce, that is intended to cause consumer confusion about the source of Defendant’s services and/or the relationship or affiliation between Digitalev and XYMOGEN, and which serves to benefit Digitalev financially.

30. Digitalev has misappropriated the XYMOGEN® mark merely in an effort to increase traffic to Digitalev’s products, and to mislead consumers searching for XYMOGEN product to Pure Therapeutics product on www.purethera.com and Pure Therapeutics product available for sale on www.amazon.com.

31. Digitalev knows that its use of the XYMOGEN® mark in connection with nutritional and dietary supplements infringes upon XYMOGEN’s trademark.

32. Digitalev’s unauthorized use of XYMOGEN® mark is likely to cause confusion, to cause mistake, and/or deceive customers and potential customers of the respective parties, as

to some presumed but nonexistent affiliation, connection, sponsorship, or association between XYMOGEN and Digitalev, or as to the origin, sponsorship, or approval of Digitalev's products by XYMOGEN.

33. Digitalev's unauthorized use of the XYMOGEN® mark indicates to the purchasing public that Digitalev, its products, and/or its services originate with XYMOGEN, or are affiliated, connected, or associated with XYMOGEN, or are sponsored, endorsed, or approved by XYMOGEN.

34. Digitalev's unauthorized use of the XYMOGEN® mark enables Digitalev to call attention to Digitalev and its products and services, and to trade on and receive the benefit of the good will built up by XYMOGEN at great labor and expense over many years, and to gain acceptance for Digitalev's products and services not solely on its own merits, but instead on the reputation and good will of XYMOGEN and its mark.

35. Digitalev's unauthorized use of the XYMOGEN® mark places the valuable reputation and goodwill of XYMOGEN in the hands of Defendant, over whom XYMOGEN exercises no quality control nor over whom XYMOGEN has a right to exercise quality control.

36. Unless this Court restrains Digitalev's acts with respect to its use of XYMOGEN® and infringement on XYMOGEN's mark, Digitalev will continue to cause irreparable injury to XYMOGEN and to the public, for which there is no adequate remedy at law.

37. XYMOGEN has retained Burr & Forman LLP to represent it in this action and has agreed to pay the firm costs and attorneys' fees for pursuing this action on its behalf. XYMOGEN is entitled to recover its costs and attorneys' fees from Defendant pursuant to the

Lanham Act, 15 U.S.C. § 1117(a) and the Florida Deceptive and Unfair Trade Practices Act, section 501.2105, Florida Statutes.

COUNT I
(False Designation of Origin)

38. XYMOGEN realleges its allegations set forth in paragraphs 1 through 37, above.

39. Digitalev's acts described herein constitute unfair competition and trade name infringement in violation of 15 U.S.C. § 1125(a).

40. Digitalev is using the mark XYMOGEN® with full knowledge of XYMOGEN's rights, and in bad faith with willful and deliberate intent to trade on XYMOGEN's goodwill. Given the willful nature of Digitalev's infringement and unfair competition, this is an exceptional case within the meaning of 15 U.S.C. § 1117(a).

COUNT II
(Common Law Trademark Infringement Under Florida Law)

41. XYMOGEN realleges its allegations set forth in paragraphs 1 through 37, above.

42. Digitalev's acts described herein constitute trademark and trade name infringement in violation of Florida common law.

COUNT III
(Common Law Unfair Competition)

43. XYMOGEN realleges its allegations set forth in paragraphs 1 through 37, above.

44. Digitalev's acts described herein constitute unfair competition in violation of Florida common law.

COUNT IV
(Violation of the Florida Deceptive and Unfair Trade Practices Act)

45. XYMOGEN realleges its allegations set forth in paragraphs 1 through 37, above.

46. Florida's legislature enacted section 501.201, *et. seq.*, Florida Statutes ("FDUTPA") "[t]o protect the consuming public and legitimate business enterprises from those

who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” §501.202(2), *Fla. Stat.*

47. FDUTPA provides, in pertinent part, as follows:

- (1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

§501.211(1), *Fla. Stat.*

48. FDUTPA further provides as follows:

- (2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney’s fees and court costs as provided in s. 501.2105. However, damages, fees, or costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

§501.211(2), *Fla. Stat.*

49. Digitalev has misappropriated XYMOGEN’s mark in an effort to mislead consumers searching for XYMOGEN’s product.

50. Digitalev’s conduct, as described above, deceived or has the tendency to deceive the targeted audience.

51. Digitalev’s deception is material.

52. XYMOGEN has been, or is likely to be, injured as a result of Digitalev’s false and misleading conduct.

COUNT V
(Injunctive Relief)

53. XYMOGEN realleges its allegations set forth in paragraphs 1 through 37, above.

54. The XYMOGEN® mark is a strong and inherently distinctive mark because 1) XYMOGEN registered XYMOGEN® as a trademark with the USPTO, and 2) the mark is arbitrary and fanciful. Accordingly, the mark is entitled to the highest degree of protection.

55. Digitalev's unauthorized use of XYMOGEN's mark falsely indicates to consumers that Digitalev and its Pure Therapeutics product are connected or related to XYMOGEN.

56. A likelihood of confusion exists as a result of: a) Digitalev's use of XYMOGEN's mark as a Google AdWord; b) Digitalev's copying of XYMOGEN's ingredients on similar products; and c) Digitalev's use of labels that are substantially similar to labels on certain XYMOGEN products.

57. Without XYMOGEN's consent, Digitalev has been using and continues to use the XYMOGEN® mark with the intent of capitalizing on XYMOGEN's reputation and goodwill.

58. Digitalev's continued use of XYMOGEN® as a Google AdWord misleads consumers and is a deceptive trade practice.

59. XYMOGEN will be irreparably harmed if Digitalev is not enjoined from infringing on XYMOGEN's trademark.

60. XYMOGEN does not have an adequate remedy at law for Digitalev's infringement of the XYMOGEN® mark.

61. XYMOGEN is substantially likely to succeed on the merits of its trademark and trade name infringement claims against Digitalev.

62. Entry of an injunction will serve the public interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, XYMOGEN, Inc., respectfully requests that this Court enter

Final Judgment in its favor and against defendant, Digitalev, LLC, d/b/a Pure Therapeutics, and find as follows:

- a) Digitalev, LLC, d/b/a Pure Therapeutics, by and through its improper use of the XYMOGEN® mark, has infringed the rights of XYMOGEN;
- b) Declaring that Digitalev's conduct, as described herein, constitutes an unfair method of competition, an unconscionable act or practice, or unfair or deceptive act or practice in the trade of commerce;
- c) Digitalev, its officers, agents, servants, employees, attorneys, affiliated companies, and all persons in active concert or participation with it, be preliminarily and permanently enjoined and restrained from using, registering, or applying to register any trade name, Internet domain name, Internet metatag, Google AdWord, corporation name, trademark, or service mark which incorporates the word XYMOGEN®;
- d) Digitalev provide an accounting of the illegal profits obtained from its infringing activities and hold in trust for the benefit of XYMOGEN such illegal profits;
- e) XYMOGEN be awarded all general, special, and actual damages, as provided under the Lanham Act and Florida law.
- f) Digitalev be ordered to file with this Court, and to serve upon XYMOGEN, within thirty (30) days after entry and service on it of an injunction, a report in writing, and under oath setting forth in detail the manner and form in which Digitalev has complied with the injunction;
- g) XYMOGEN recover its costs, prejudgment and post-judgment interest, and attorneys' fees from Digitalev; and

- h) XYMOGEN recover such other relief as the Court deems just and proper to protect Plaintiff's rights.

REQUEST FOR JURY TRIAL

XYMOGEN requests a trial by jury of all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 13, 2017, I electronically filed the foregoing with the Clerk of the Court, U.S. District Court, Middle District of Florida, Orlando Division, by using the CM/ECF system which will effectuate service on all counsel of record.

/s/ John A. Schifino

John A. Schifino, Esq.

Florida Bar No. 0072321

Harvey S. Kauget, Esq.

Florida Bar No. 116254

BURR & FORMAN LLP

Post Office Box 380

Tampa, Florida 33601-0380

(813) 221-2626 (telephone)

(813) 221-7335 (facsimile)

jschifino@burr.com (primary)

hkauget@burr.com (primary)

ccook@burr.com (secondary)

Attorneys for Plaintiff, XYMOGEN, Inc.