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06-CV-00060-CMP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

James Childers d/b/a Artemis Solutions
Group, a Washington sole proprietorship,

Plaintiff,

vs.

Sagem Morpho, Inc., a Delaware corporation
d/b/a E-Software SAS d/b/a XELIOS (a
subsidiary of the SAFRAN Group (a French
registered company)),

Defendant.

Case No.:

06-0060JPD

COMPLAINT FOR VIOLATIONS OF
LANHAM ACT §§ 32(1), 43(a), AND
STATE AND COMMON LAW
UNFAIR COMPETITION

JURY DEMAND

Plaintiff, James Childers d/b/a Artemis Solutions Group, by and through the undersigned
counsel, alleges as follows:

I. NATURE OF THE ACTION

1. This is a Complaint for: (i) Defendant's trademark/ trade name infringement,
and unfair competition under the United States Trademark Act of 1946 ("Lanham Act"), as
amended, 15 U.S.C. §§ 1114 and 1125(a); and (ii) related claims under the laws of the state of
Washington.

II. THE PARTIES

2. Plaintiff James Childers is a resident of the state of Washington and operates a
business Artemis Solutions Group, a sole proprietorship (hereafter "ASG") with a principal

COMPLAINT FOR VIOLATIONS OF LANHAM ACT §§ 32(1),
43(a), AND STATE AND COMMON LAW UNFAIR
COMPETITION - 1

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1 place of business at 1635 East Main Street, Suite A-8 Freeland, WA 98249 and a mailing
2 address of PO Box 403, Freeland, WA 98249.

3 3. Upon information and belief, Defendant Sagem Morpho, Inc. is a corporation
4 organized and existing under the laws of the state of Delaware, and wholly owns E-Software
5 SAS, which does business as XELIOS (hereinafter "SAGEM"). SAGEM's principal place of
6 business is 1145 Broadway, Suite 200, Tacoma, WA 98402. SAGEM's registered agent for
7 service is CT Corporation System 520 Pike Street, Seattle, WA 98101.

8 4. Upon information and belief, SAGEM is a wholly owned subsidiary of
9 SAFRAN Group, a multinational enterprise led by SAFRAN, a French registered company,
10 with an address at 2, boulevard du Général Martial Valin, 75724 Paris Cedex 15, France.

11 **III. JURISDICTION AND VENUE**

12 5. This Court has original jurisdiction over the subject matter of Plaintiff's claims
13 arising under the Lanham Act pursuant to 15 U.S.C. § 1121, 28 U.S.C. §1331, and 28 U.S.C.
14 §1338. Supplemental jurisdiction exists over Plaintiff's state law claims under 28 U.S.C. §
15 1367.

16 6. This Court has personal jurisdiction over the Defendant because it is located in
17 and/or conducts business in this District and because it committed acts of infringement or
18 unfair competition in this District.

19 7. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because, upon
20 information and belief, a substantial part of the acts of infringement or unfair competition
21 complained of occurred and continues to occur within this District.

22 **IV. INTRODUCTORY ALLEGATION**
23 **BACKGROUND OF THE CONTROVERSY**

24 8. Plaintiff ASG is the owner of the trade mark BIOCERT, as shown in United
25 States Trademark Registration No.: 2,817,357 (hereinafter the "357 Registration"), and as
26 used in connection with computer software and hardware to authenticate end users via
27

1 biometrics interface. A true and correct copy of the '357 Registration is attached hereto and
2 incorporated herein by this reference as Exhibit A.

3 9. Plaintiff ASG has continuously used the mark BIOCERT in interstate
4 commerce to promote its computer software and hardware products to authenticate end users
5 via biometrics interface since at least as early as 2002, and the trade name BioCert, which has
6 been registered with the State of Washington, since at least as early as 2003. A true and
7 correct copy of ASG's registered trade name is attached hereto as Exhibit B.

8 10. Plaintiff ASG has licensed use of its mark BIOCERT to Intelligent Biometric
9 Solutions, LTD, a registered Hong Kong SAR company (hereinafter "IBSL"). ASG owns
10 forty percent (40%) of IBSL and has a fifty percent (50%) voting right privilege in IBSL. All
11 rights in the BIOCERT mark that are licensed to IBSL inure solely to the benefit of ASG.

12 11. Plaintiff ASG is in the business of the development and sales of custom and
13 packaged software, software toolkits, hardware and integrated consumer products that
14 incorporate security features that identify individuals through the use of fingerprint biometric
15 authentication. ASG develops markets and distributes numerous products under the trade
16 name BioCert® including, but not limited to:

17 (a) BioCert® Authenticator™ Software Development Toolkit – A highly secure 1 to
18 many (1:m) toolkit that is designed for novice to advanced software developers to
19 integrate secure fingerprint biometric authentication within their software and database
20 programs. See: <http://www.biocert.us>

21 (b) BioCert® Intelligent Identity Manager – The BioCert® BIIM allows users to log
22 into their network and PC's with secure fingerprint authentication, Disk and file/folder
23 encryption and smart card functionality with PKI (Public Key Infrastructure)
24 functionality. See: <http://www.mybiocert.com>. A true and correct screen shot of the
25 initialization graphic for the program with the appropriate BioCert® trade mark
26
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1 designation is attached hereto and incorporated herein by this reference as Exhibit C.

2 This graphic is displayed every time a PC boots with the BIIM software.

3 (c) BioCert® Odyssey™ ClipBio Secure USB Key – A secure USB key with a
4 fingerprint reader that is OEM'd (Original Equipment Manufactured – meaning
5 supplied with ASG's logo and custom packaging from the original manufacturer under
6 license) from Memory Experts International. ASG has been packaging and
7 distributing this product under the BioCert® label in a private label marketing
8 agreement (OEM relationship) under the BioCert® label since mid 2003. This
9 hardware is most often bundled for sale with the BioCert® BIIM software or
10 BioCert® Authenticator™ Toolkit. A true and correct image of the BioCert®
11 Odyssey™ ClipBio USB Memory Key with appropriately applied BioCert® logo is
12 attached hereto and incorporated herein by this reference as Exhibit D. *See also:*

13 <http://www.clipbio.com>

14 (d) BioCert® TravelDisc™ Secure Hard Disk – A secure fingerprint encrypted hard
15 disk drive supplied to ASG under the BioCert label by Memory Experts pursuant to
16 the same above listed joint marketing agreement. A true and correct image of the
17 BioCert® TravelDisc™ with the appropriately attached BioCert logo is attached
18 hereto and incorporated herein by this reference as Exhibit E. *See also:*

19 <http://www.biometricsdirect.com/Products/SW/LockBox.htm>

20 (e) BioCert® Hamster, Optimouse and Keyboard – These devices attach to the PC and
21 verify a user's identity by using the BIIM software, BioCert Authenticator or other
22 available software. *See:* <http://www.mybiocert.com/peripherals>

23 (f) BioCert® iQBio™ Guardian XL Fingerprint Door Lock – A secure fingerprint
24 door lock that is designed for home or office use. *See:* <http://www.iqbiolock.com>



1 (g) Other BioCert products are currently in varying stages of development for global
2 distribution and sale incorporating fingerprint identification technology. Some of
3 these products will also include Smart Card and PKI technology.

4 12. Plaintiff ASG has consistently promoted its BioCert® products and vigorously
5 defended its exclusive right to the BioCert® trade mark both domestically and globally since
6 the introduction of the BioCert® trade name into the marketplace. ASG has extensively
7 promoted its BioCert® branded products directly and through its agents through ASG owned
8 and operated websites; through a global network of authorized resellers; through domestic and
9 international trade shows and through the cooperative marketing efforts of its affiliated
10 companies. Additionally, BioCert® products have been featured in print magazines, web
11 reviews, newspapers, television and motion pictures including ABC's Extreme Make-Over
12 Home Edition and 20th Century Fox's Movie "I, Robot" starring Will Smith.

13 13. Press coverage of ASG's BioCert® products has been substantially growing
14 over the last 3 years with appearances of BioCert® branded products as product reviews in
15 "Continental Flyer" in flight magazine and the Chicago Tribune print and online edition.
16 David Harnett of Microsoft has publicly claimed that "Artemis is a leader in the biometrics
17 industry." A true and correct copy of the Chicago Tribune product review is attached hereto
18 and incorporated herein by this reference as Exhibit F.

19 14. In 2005, ASG initiated legal action against Microsoft Corporation subsidiary
20 Microsoft IP Ventures in the Eastern District of Texas to prevent the infringement of its trade
21 mark BioCert®. *ASG v. Microsoft Corp.*, Civil Action No. 2-05CV-3 (E.D. Tex. 2005), was
22 settled amicably and both parties are satisfied with the outcome of this action. The settlement
23 agreement and its terms are confidential. This case was prevalent in the media wire outlets
24 during the months of June, July and August of 2005, with a final disposition of the case being
25 advertised globally by ASG and Microsoft through extensive media outlets with Microsoft
26 reaffirming ASG's exclusive claim to the BioCert® trade mark. A true and correct copy of
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1 the press release from Microsoft discussing the final disposition of the case is attached hereto
2 and incorporated herein by this reference as Exhibit G. True and correct copies of a sampling
3 of the press coverage of the case are attached hereto and incorporated herein by this reference
4 as Exhibits H and I.

5 15. As a result of extensive sales, use, and promotion, the BioCert® trademark has
6 achieved a favorable reputation within the biometrics industry and to consumers as an
7 identifier of its products, quality, and workmanship and is thus entitled to broad protection
8 under the Lanham Act and at common law.

9 16. ASG continues to invest substantial effort and monies into sales and marketing
10 efforts under the BioCert® brand identity and continues to improve upon its favorable
11 reputation among its growing base of customers and potential customers.

12 17. Upon information and belief, Defendant SAGEM is in the business of selling
13 security products that incorporate biometric technology through its wholly owned division E-
14 Software SAS under the trade name Xelios. SAGEM's stated headquarters in the United
15 States is located in Tacoma, Washington. A true and correct copy of the webpage announcing
16 the contact information for Xelios and SAGEM is attached hereto and incorporated herein by
17 this reference as Exhibit J. A true and correct copy of the Washington Secretary of State
18 business registration record for SAGEM is attached hereto and incorporated herein by this
19 reference as Exhibit K.

20 18. Beginning in February 2004, James Childers as owner of ASG began a series
21 of face-to-face and email communications with a paid international biometric development
22 and sales representative of SAGEM - one Christian Moussier
23 (christian.moussier@sagem.com.hk). Mr. Childers, while attending a meeting during
24 February 2004 in the IBSL office in Hong Kong, did display to Mr. Moussier a BioCert®
25 Odyssey™ ClipBio Drive and further showed him the functionality on his laptop of the
26 BioCert® Intelligent Identity Manager properly branded as BioCert® on both the CD and
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1 installed software. Mr. Moussier stated at that meeting that "SAGEM's core business was in
2 their optical fingerprint sensor and its associated algorithm, not in a capacitive sensor as in the
3 BioCert® Odyssey™ ClipBio Drive, but that he saw great potential for this product in the
4 marketplace and the BioCert® BIIM software." The IBSL / SAGEM meeting ended with the
5 stated intent by all parties to pursue future discussions on how IBSL (ASG) and SAGEM
6 could cooperatively market SAGEM's biometric products through IBSL's Hong Kong office,
7 sales agents, and global distribution network.

8 19. At the February 2004 meeting referenced in paragraph 18 herein, Mr. Moussier
9 stated that he was an owner in a product development company based in Hong Kong
10 (Smartgem) and his new product was using the SAGEM sensors as part of a new biometric
11 access control product called the "MSmart". A similar product is now sold globally by
12 SAGEM as MorphoAccess™. Mr. Moussier inquired as to the ability of IBSL to sell this and
13 similar products through its distribution channels both in Hong Kong and the USA. To this
14 end, and resulting from further discussions with Mr. Moussier, a signed non-disclosure
15 agreement (NDA) to protect the intellectual properties of both companies was entered into
16 between Mr. Christian Moussier (Smartgem) and IBSL, a true and correct copy of which is
17 attached hereto and incorporated herein by this reference as Exhibit L. Mr. Moussier was
18 presenting to IBSL the MSmart biometric device currently sold by SAGEM worldwide with a
19 verbal offer to potentially provide a version to ASG branded under the BioCert brand identity.
20 A true and correct copy of an email with tracking validation to ASG and IBSL from Mr.
21 Moussier's SAGEM email account is attached hereto and incorporated herein as Exhibit M.
22 ASG and IBSL purchased 2 sample units of the aforementioned MSmart devices for testing,
23 and IBSL currently has one of these devices installed at its new IBSL location in Hong Kong.
24 The second of these devices was brought back to the USA by James Childers and continues to
25 be in his possession at ASG's headquarters in Freeland.



1 20. Mr. Moussier came to Seattle during early 2005 to discuss the MSmart project
2 and gave James Childers new (diedad enrollment) software to control the demonstration
3 MSmart device. During these meetings and subsequent email conversations, Mr. Moussier
4 was made aware of the ownership status of the trademark and trade name BIOCERT by ASG
5 and its affiliated company IBSL and further was made aware of the *ASG v. Microsoft* case.
6 Mr. Moussier congratulated Mr. Childers upon the successful settlement of *ASG v. Microsoft*
7 with full knowledge of ASG's claim to the BIOCERT mark.

8 21. ASG claims the BioCert® trademark as registered on its websites and in every
9 email communication sent from its office in the form of an email signature which in part
10 reads: "... Biometrics Direct™, BioCert®, BioSaf™, iQBio™, Intelligent Biometric
11 Solutions™ ... are registered or unregistered trademarks of Artemis-Solutions Group
12 (USA)... all rights are hereby reserved." A true and correct copy of James Childers' email
13 signature claiming the registered ownership status of the BIOCERT mark is attached hereto
14 and incorporated herein by this reference as Exhibit N. Numerous email messages bearing the
15 trademark claim were sent from Mr. James Childers and Mr. Mac McGolpin to Mr. Christian
16 Moussier to his SAGEM and blackberry accounts in addition to the presentation to Mr.
17 Moussier of marketing material bearing the BioCert trademark using the ® symbol as
18 required by 15 U.S.C. §1111.

19 22. Upon information and belief, on or about June 2, 2005, SAGEM, through its
20 wholly owned subsidiary E-Software, began marketing a suite of products under the Xelios
21 brand called PC Login Pro Suite 5 that incorporates fingerprint encryption technology under
22 the SAGEM claimed X-BIOCERT mark. ASG claims the use of the SAGEM X-BIOCERT
23 mark is confusingly similar to the BIOCERT trademark shown in the '357 Registration owned
24 and used in commerce exclusively by ASG and is likely to cause confusion among customers
25 and allows SAGEM to unlawfully trade upon the goodwill and reputation generated under the
26 trade name and trademark BIOCERT by ASG at great expense and effort. A true and correct
27



1 copy of a marketing brochure and a copy of the website for PC Login Pro Suite 5
 2 incorporating the infringing mark are attached hereto and incorporated herein by this
 3 reference as Exhibit O and Exhibit P respectively.

4 23. Upon information and belief on or about June 2, 2005, SAGEM through its
 5 wholly owned subsidiary E-Software under the Xelios™ brand began marketing the Xelios™
 6 Secure Bio Drive which is exactly the same product marketed as ASG and is the same product
 7 shown to Mr. Moussier (as a representative of the SAGEM company) in February 2004 under
 8 the trade name BioCert® Odyssey™ ClipBio. This product is similarly procured by SAGEM
 9 under a joint OEM marketing agreement with Memory Experts International. A true and
 10 correct copy of the marketing brochure for the Xelios Secure Bio Drive is attached hereto and
 11 incorporated herein by this reference as Exhibit Q. The marketing brochure shown in Exhibit
 12 Q incorporates the statement "Compatible with XELIOS PC PRO LOGIN 5" thus directing
 13 customers buying a device exactly the same as the BioCert® Odyssey™ ClipBio shown to
 14 Mr. Moussier in 2004 to purchase a similar software product to the BioCert BIIM (the product
 15 incorporating the infringing claimed X-BioCert™ mark by SAGEM), thus causing further
 16 confusion, dilution and loss of profits to ASG by SAGEM's misappropriation of the
 17 BioCert® mark owned by ASG.

18 24. SAGEM's claimed mark of X-BioCert™ is deceptively and confusingly
 19 similar to ASG's owned trademark BIOCERT including both the capitalization of the B and
 20 the C. The placement of an X- in front of the term "biocert" is an attempted adaptation of the
 21 mark BioCert® in violation of the Lanham Act and thus is specifically designed to cause
 22 confusion among customers and allow SAGEM to trade upon the reputation and goodwill of
 23 the BioCert® mark owned by ASG. The use of the mark X-BIOCERT by SAGEM has and
 24 continues to cause irreparable damage to ASG and its exclusive right to use its mark
 25 BIOCERT in connection with its computer software and hardware to authenticate end users
 26 via biometrics interface products. If allowed to continue, the misappropriated mark will allow
 27



1 SAGEM to further trade upon the good will and reputation associated with the BIOCERT
2 mark by ASG and not solely based upon SAGEM's own efforts.

3 25. SAGEM, as the "the industry leader in multi-biometric solutions", could have
4 chosen any other name to represent their technology or any other hardware product to sell to
5 their customers. Instead they chose a product exactly the same as the BioCert® Odyssey™
6 ClipBio and a software product using a confusingly similar name to ASG's highly reputed
7 mark BioCert® - X-BioCert™.

8 26. As shown above and as will be shown at trial by ASG, SAGEM Executives,
9 and specifically Mr. Christian Moussier, were without a doubt aware of the BioCert®
10 products produced by ASG, and yet they chose the X-BioCert™ name for their technology.

11 27. In addition to the actual knowledge by SAGEM Executives of ASG's mark
12 BIOCERT, a cursory search using any Internet search engine (for example, Google
13 <http://www.google.com>) would have revealed over 37,000 references to the ASG owned
14 BIOCERT trademark and any search within the Washington State DOL database would have
15 revealed the State of Washington registration of the BioCert fictitious trade name by ASG.
16 Also, a simple search of the USPTO database at <http://www.uspto.gov> would have revealed
17 that ASG had exclusive rights to this mark in connection with computer software and
18 hardware to authenticate end users via biometrics interface -- the very same class of goods as
19 the offending product by SAGEM. All of these registries are freely available on any
20 computer connected to the Internet anywhere in the world.

21 28. Plaintiff is entitled to and shall pray upon the court at a future date to cause
22 Defendant to produce to ASG and its Counsel as to the methods of decision to use deceptively
23 similar names and products and the process by which Defendant communicated, stored and
24 distributed the information and knowledge of ASG's ownership of the mark BIOCERT.

25 29. Defendant's infringement of Plaintiff's BIOCERT trademark and trade name
26 has caused, is causing, and will continue to cause, a likelihood of confusion, deception and

1 mistake on the part of consumers. This confusion has caused, is causing, and will continue to
2 cause irreparable harm to Plaintiff ASG.

3 30. Defendant is directly, vicariously and/or contributorily liable for the
4 aforementioned actions.

5 31. Plaintiff ASG has suffered harm and damages as a result of the acts of
6 Defendant in an amount not yet determined. The harm and damages have been directly and
7 proximately caused by the Defendant's wrongful advertising, promotion, marketing, display,
8 sale and offers for sale of their products using Plaintiff's BIOCERT trademark and trade
9 name.

10 **V. COUNT I**
11 **FEDERAL TRADEMARK INFRINGEMENT**
12 **§ 32(1) OF THE LANHAM ACT (15 U.S.C. § 1114(1))**

13 32. Plaintiff repeats, realleges, and incorporates herein by reference each and every
14 allegation as set forth in Paragraphs 1-31 as if stated in full.

15 33. As stated above, the U.S. Patent and Trademark Office determined that
16 Plaintiff's mark BIOCERT met all requirements for federal registration and issued the '357
17 Registration for the mark.

18 34. Defendant had constructive notice of the Plaintiff's '357 Registration pursuant
19 to 15 U.S.C. § 1072 at least as early as February 24, 2004.

20 35. Defendant has no association with Plaintiff, nor does Defendant have
21 Plaintiff's consent to use the mark BIOCERT or any similar mark, such as X-BIOCERT.

22 36. Notwithstanding Plaintiff's continuous and exclusive use and its prior rights in
23 the mark BIOCERT, Defendant has appropriated, subsequent to Plaintiff's first use, the nearly
24 identical and confusingly similar designation X-BIOCERT as a mark to identify Defendant's
25 biometrics software and hardware.

26 37. Upon information and belief, Defendants adopted and used the nearly identical
27 and confusingly similar X-BIOCERT mark with the intention of diverting consumers and

1 customers to it, and to trade on the Plaintiff's mark BIOCERT, thereby wrongfully usurping
2 the Plaintiff's goodwill.

3 38. Defendant's continued use of the nearly identical and confusingly similar X-
4 BIOCERT mark in conjunction with biometrics software and hardware falsely creates the
5 impression that Defendant's business is affiliated with Plaintiff and that Plaintiff's goods
6 offered under the BIOCERT trademark and BioCert trade name are available from Defendant,
7 causing confusion or mistake among the public as to the true origin, source, sponsorship, or
8 affiliation of Defendant's products in violation of 15 U.S.C. §1114(1).

9 39. As a result of Defendant's acts of infringement as alleged above, Plaintiff has
10 suffered and will continue to suffer irreparable harm in the form of damage and injury to its
11 business, reputation, goodwill, and the strength of its mark. The injury to Plaintiff is and
12 continues to be ongoing and irreparable. An award of monetary damages alone cannot fully
13 compensate Plaintiff for its injuries and Plaintiff lacks an adequate remedy at law.

14 40. The foregoing acts of infringement have been and continue to be deliberate,
15 willful and wanton, making this an exceptional case within the meaning of 15 U.S.C. § 1117.

16 41. Plaintiff is entitled to a permanent injunction against Defendant, as well as all
17 other remedies available under the Lanham Act, including but not limited to, compensatory
18 damages; treble damages; disgorgement of profits; and costs of attorney's fees.

19
20 **COUNT II**
21 **FALSE DESIGNATION OF ORIGIN**
22 **§ 43(a) OF THE LANHAM ACT (15 U.S.C. § 1125(a))**

23 42. Plaintiff realleges and incorporates herein by reference each and every
24 allegation set forth in Paragraphs 1-41 as if stated in full.

25 43. Defendant's use of the infringing X-BIOCERT mark in connection with
26 biometrics computer software and hardware constitutes use in commerce of false designations
27 of origin, false and misleading descriptions of fact, and false and misleading representations
of fact, which are likely to cause confusion, or cause mistake, or to deceive the public as to

COMPLAINT FOR VIOLATIONS OF LANHAM ACT §§ 32(1),
43(a), AND STATE AND COMMON LAW UNFAIR
COMPETITION - 12

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 ORIGINAL

1 the affiliation, connection, or association of Defendant with Plaintiff, or as to the origin,
2 sponsorship, or approval of Defendant's products or commercial activities by Plaintiff, in
3 violation of 15 U.S.C. § 1125(a)(1).

4 44. Upon information and belief, Defendant's acts of infringement complained of
5 herein were intended to cause and are likely to cause confusion and deception of the public,
6 including misleading prospective consumers as to the true source, connection, sponsorship,
7 affiliation or approval of Defendant's products, and have been committed in reckless
8 disregard of Plaintiff's rights, of which Defendant had actual and constructive notice.

9 45. Upon information and belief, Defendant used the X-BIOCERT mark with full
10 knowledge of Plaintiff's prior rights in its mark BIOCERT. Thus, Defendant has willfully
11 violated Plaintiff's rights under 15 U.S.C. § 1125(a).

12 46. As a result of Defendant's acts of infringement as alleged above, Plaintiff has
13 suffered and will continue to suffer irreparable harm in the form of damage and injury to its
14 business, reputation, and goodwill, and will continue to do so unless Defendant is
15 preliminarily and permanently restrained and enjoined by this Court from further violating
16 Plaintiff's rights.

17
18 **COUNT III**
19 **UNFAIR BUSINESS PRACTICES**
20 **VIOLATION OF RCW § 19.86.010 ET SEQ.**

21 47. Plaintiff realleges and incorporates herein by reference each and every
22 allegation set forth in Paragraphs 1- 46 as if stated in full.

23 48. Defendant's use of Plaintiff's mark to promote, market, or sell its products,
24 including those in direct competition with Plaintiff's products, constitutes an Unfair Business
25 Practice pursuant to RCW § 19.86.010 et seq. Defendant's use of Plaintiff's mark is an unfair
26 method of competition and an unfair and/or deceptive practice occurring in the conduct of
27 trade or commerce that impacts the public interest and affects the people of the state of
Washington. Defendant's unfair business practice has caused and will continue to cause

COMPLAINT FOR VIOLATIONS OF LANIAM ACT §§ 32(1),
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COMPETITION - 13

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1 damage to Plaintiff, and is causing irreparable harm to Plaintiff for which there is no adequate
2 remedy at law.

3
4 **COUNT IV**
WASHINGTON COMMON LAW UNFAIR COMPETITION

5 49. Plaintiff realleges and incorporates herein by reference each and every
6 allegation set forth in Paragraphs 1- 48 as if stated in full.

7 50. Defendant's activities complained of constitute common law unfair
8 competition and violation of the state of Washington's law of unfair competition.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff respectfully demands that this Court:

11 1. Pursuant to 15 U.S.C. §1116, issue a preliminary injunction and thereafter a
12 permanent injunction restraining and enjoining Defendant and any principals, officers, agents,
13 servants, employees, attorneys, representatives, successors and assigns of Defendant, and all
14 those in privity, concert or participation with Defendant, from:

15 a. imitating, copying, duplicating, or otherwise using the marks X-BIOCERT,
16 BIOCERT, or any version thereof, in connection with the description, marketing, promotion,
17 advertising, sale, or offer for sale of any goods or services, as a trade name, domain name, or
18 otherwise;

19 b. using any false designation of origin or description that can or is likely to lead
20 the trade or public, or individual members thereof, to believe mistakenly that any product or
21 service advertised, promoted, offered or sold by Defendant is sponsored, endorsed, connected
22 with, approved, or authorized by Plaintiff;

23 c. causing likelihood of confusion or injury to Plaintiff's business reputation and
24 to the distinctiveness of the mark BIOCERT®, or the trade name BioCert;

25 d. engaging in any other activity constituting unfair competition or infringement
26 of the mark BIOCERT®, or the trade name BioCert;



1 e. from destroying any materials that might be germane to the case including, but
2 not limited to, emails, electronic or physical documents or copies of such documents and
3 communications even if these materials would be destroyed as a normal course of business
4 and that a thorough accounting of Defendant's activities with regard to safeguarding these
5 materials for discovery be documented and provided to the court;

6 f. deliver to the court for immediate destruction any infringing product,
7 marketing materials, advertisements, computer code, sample programs, or other material
8 within Defendant's custody or control that bears the infringing mark or other marks
9 confusingly similar to Plaintiff's mark; and

10 g. assisting, aiding, or abetting any person or entity in engaging or performing
11 any activity enumerated in paragraphs (a) through (f) above.

12 2. Issue an order that all rights in Plaintiff's Registration '357 is valid, enforceable and
13 has been infringed by Defendant and that Defendant's above-described acts constitute federal
14 unfair competition and trademark infringement or are a violation of other relevant federal and
15 state laws and regulations.

16 3. Issue an order requiring Defendant and any principals, officers, agents, servants,
17 employees, attorneys, successors, and assigns, and all those in active privity or concert with
18 Defendant who received actual notice of said order, to deliver to Plaintiff or this Court for
19 destruction all infringing merchandise, advertisements, or otherwise, in their possession or
20 under their control which bears unauthorized simulations, copies or colorable imitations of
21 Plaintiff's mark BIOCERT, pursuant to 15 U.S.C. §1118.

22 4. Issue an order requiring recall of any infringing merchandise sold and requiring
23 Defendant to give written notice of the injunction to all those who previously offered the
24 infringing goods or services and those to whom the infringing goods or services have been
25 sold.



5. Direct Defendant to file with this Court and serve on counsel for Plaintiff, within thirty (30) days after entry of the injunction, a written report under oath setting forth in detail the manner in which Defendant has complied with the foregoing paragraphs.

6. Find Defendant liable and award to Plaintiff monetary relief in an amount to be fixed by the Court in its discretion as just, including all damages of any kind sustained by Plaintiff resulting from Defendants' infringement and unfair competition.

7. Order an accounting and render judgment against Defendant for all profits wrongfully derived by reason of their infringement and unfair competition pursuant to 15 U.S.C. §1114(1) and 15 U.S.C. §1117.

9. Award treble damages due to the deliberate, intentional, and willful nature of Defendant's actions pursuant to 15 U.S.C. §1117.

10. Award to Plaintiff its attorney's fees and costs due to the exceptional nature of this case under 15 U.S.C. §1117.

11. Order an award of punitive damages in an amount sufficient to punish Defendant.

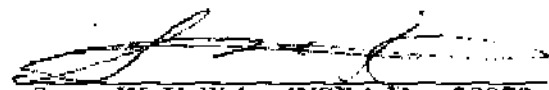
12. Grant to Plaintiff such other and further relief as the Court may deem just, proper and equitable under the circumstances.

DEMAND FOR JURY TRIAL

13. Plaintiff demands a trial by jury trial on all issues so triable.

Dated this 13th day of January, 2006

HALLISKY & PHILIPP



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