

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OCT 14 PM 3:10

DENNIS CHRISTENSEN and
DEBRA CHRISTENSEN,

Plaintiffs,

vs.

MATRIX INITIATIVES, INC., a
Delaware Corporation, formerly
known as Gumtech International,
INC., and ZICAM, LLC, formerly known as
Gel Tech, LLC an Arizona Limited
Liability Company

Defendants.

Case No.

4:03CV0146

Hon.

Wendell A. Miles
Senior, U.S. District Judge

William P. Webster, Jr. (P63144)
CHAMBERS, STEINER & STURM, P.L.C.
Attorneys for Plaintiffs
141 East Michigan Avenue, Suite 400
Kalamazoo, MI 49007
(269) 385-4300

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF
THE SAME TRANSACTION OR OCCURRENCE AS ALLEGED IN THE COMPLAINT

**COMPLAINT
AND
DEMAND FOR JURY TRIAL**

NOW COME the Plaintiffs, Dennis Christensen and Debra Christensen, by and through their attorneys, CHAMBERS, STEINER & STURM, P.L.C., and for their complaint against the Defendants, state as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are residents of the Township of Almena, County of Van Buren, State of Michigan.

2. Defendant Matrixx Initiatives, Inc., is a Delaware Corporation which conducts business in and throughout the State of Michigan.

3. Defendant Zicam, L.L.C. is an Arizona Limited Liability Company which is a wholly owned and controlled subsidiary of Matrixx Initiatives, Inc., and which conducts business in and throughout the State of Michigan.

4. All of the acts or occurrences giving rise to this complaint occurred in the Counties of Kalamazoo and Van Buren, State of Michigan.

5. Jurisdiction in this Court is based upon diversity of jurisdiction.

6. The amount in controversy exceeds \$75,000.00 exclusive of interest, costs and attorney fees.

FACTUAL ALLEGATIONS

7. Plaintiffs herein reallege and incorporate by reference each and every paragraph set forth above and further state as follows:

8. Defendant Matrixx Initiatives, Inc. is engaged in the development, manufacture and marketing of over the counter pharmaceuticals, including Zicam Cold Remedy.

9. Zicam, L.L.C. is a wholly owned subsidiary of Matrixx Initiatives, Inc. and Zicam, L.L.C. produces, markets and sells Zicam Cold Remedy Nasal Gel, a patented "homeopathic" remedy.

10. Matrixx Initiatives, Inc. and Zicam, L.L.C., hereinafter collectively referred to as Defendant Matrixx, produce, develop, manufacture and market Zicam Cold Remedy Nasal Gel.

11. Zicam Cold Remedy Nasal Gel is packaged in various manners and with various delivery systems, all of which are developed, manufactured and marketed by or with the express consent of Defendant Matrixx.

12. One such version of Zicam Cold Remedy Nasal Gel is developed, marketed and manufactured by Defendant Matrixx in a nasal spray format.

13. The nasal pump by which Zicam is administered is intended to "splatter" the Zicam

Cold Remedy within the nose.

14. The nasal pump utilized by Defendant Matrixx in delivering the Zicam nasal spray to the user's nose is capable of propelling the Zicam approximately ten feet.

15. Zicam Cold Remedy Nasal Spray contains divalent ionized zinc in the form of zinc gluconate, which is listed on the product's active ingredients under the trade name of "zincum gluconium 2x".

16. Zinc gluconate contains a divalent zinc ion.

17. Zinc gluconate is a chemical compound characterized as a "zinc salt".

18. If used as directed, Zicam Cold Remedy Nasal Spray delivers the Zicam Cold Remedy Gel containing zinc gluconate to the nasal membranes of the user of the product.

19. Zicam Cold Remedy is not a "drug" as that term is defined in §201 of the Federal Food, Drug and Cosmetic Act, Chapter 675, 52 Stat. 1040, 21 USC 321.

20. Zicam Cold Remedy Nasal Spray, hereinafter also referred to as "the product", is not and never has been approved for safety and/or efficacy by the United States Food and Drug Administration.

21. Zicam Cold Remedy's labeling has never been approved by the United States Food and Drug Administration.

22. Defendant Matrixx, as the successor corporation to Gumtech International, Inc., is liable for any negligence of Gumtech International, Inc. under the doctrine of successor liability. Likewise, Zicam, LLC, as the successor to Gel Tech, LLC, is liable for any negligence of Gel Tech, LLC under the doctrine of successor liability.

23. Sometime during the autumn of 2001, Debra Christensen purchased a bottle of Zicam Cold Remedy Nasal Spray from a Meijer Thrifty Acres store located on M-43 in Kalamazoo County, Michigan.

24. During the month of April, 2002, Plaintiff Dennis Christensen felt a cold coming on.

25. When Plaintiff Dennis Christensen informed his wife that he felt that he was

becoming sick, the Plaintiff, Debra Christensen told her husband, Dennis Christensen that she had purchased some Zicam Cold Remedy Nasal Spray and that he should use it.

26. Plaintiff Christensen then used, as directed on the packaging of the product, the Zicam Cold Remedy Nasal Spray that was purchased by his wife.

27. After applying the Zicam Cold Remedy Nasal Spray to both nostrils, Plaintiff Dennis Christensen felt an intense stinging and/or burning sensation in his nose.

28. Since this one and only use of Zicam Cold Remedy Nasal Spray, Plaintiff Dennis Christensen has totally lost his sense of smell.

29. Plaintiff, Dennis Christensen's loss of his sense of smell ("anosmia") has continued to the date of this complaint.

30. That despite medical consultations and treatments, Mr. Christensen's sense of smell has yet to return.

31. Mr. Christensen has been informed that the sense of smell is in all likelihood permanent, total and irreversible.

32. As a result of the total, irreversible loss of smell, Mr. Christensen's ability to taste has been severely diminished and his likewise permanent, total and irreversible.

33. The product Zicam Cold Remedy Nasal Spray, when used as directed by Plaintiff Dennis Christensen, caused a permanent, total and irreversible loss of one or more vital bodily functions of Plaintiff Dennis Christensen, namely, his ability to smell and taste.

34. The limitations on damages set forth in MCL 600.2946a(1) do not apply because the injuries sustained by Plaintiffs Dennis and Debra Christensen were due to the gross negligence of Defendants.

35. Plaintiffs Dennis and Debra Christensen did not alter the product or its packaging at any time.

36. Plaintiffs Dennis and Debra Christensen did not misuse the product at any time.

37. Plaintiff Dennis Christensen was not aware that the use of the product created an

unreasonable risk of personal injury. Plaintiff further did not voluntarily expose himself to any known, unreasonable risk of harm in using this product, as he was not aware, prior to his one and only use of it that it posed an unreasonable risk of personal injury.

38. Plaintiff Dennis Christensen is not a “sophisticated user” as that term is used in MCL 600.2947(4).

39. The unreasonably dangerous aspect of the product could easily be eliminated by defendants without compromising its usefulness or desirability, if any such usefulness or desirability even exists.

40. At the time of the product’s manufacture and distribution, Defendant Matrixx had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of this cause of action; Defendant Matrixx further willfully disregarded that knowledge in the manufacture and/or distribution of this product.

41. Defendant Matrixx continues to disregard the knowledge that intranasal application of Zicam Cold Remedy Nasal Spray causes total, permanent and irreversible anosmia when used as directed.

COUNT I
DESIGN DEFECT PRODUCT LIABILITY
AGAINST DEFENDANT MATRIXX ON BEHALF OF
PLAINTIFF DENNIS CHRISTENSEN

42. The Plaintiffs herein reallege and incorporate by reference each and every paragraph set forth above, and further state as follows:

43. Defendants Matrixx Initiatives, Inc. and Zicam, L.L.C. and their predecessor entities owed a duty to Plaintiff, Dennis Christensen, and all others similarly situated, to use due care and caution in the design of its Zicam Cold Remedy Nasal Spray to avoid unreasonable risks of injury during reasonably foreseeable uses of the product.

44. Using the product as directed on its packaging is a reasonably foreseeable use of the product.

45. The Defendants, Matrixx Initiatives, Inc. and Zicam, L.L.C. breached this duty

through acts and/or omissions which include, but are not necessarily limited to, the following:

- a. By designing a product intended to and instructing its users to apply Zicam Cold Remedy Nasal Spray intranasally;
- b. By failing to engage in proper and adequate testing of this product and its long term effects on the sense of smell;
- c. By failing to conduct an even minimal investigation into the historical and scientific evidence that relates intranasal zinc application to permanent, total and irreversible anosmia;
- d. By failing to adequately warn users of the product that use of the product as directed could potentially cause permanent total and irreversible anosmia;
- e. By otherwise failing to design the product in accordance with prevailing industry and scientific standards in a manner that would have eliminated unreasonable risks of injury during reasonably foreseeable uses.

46. At the time Defendants Matrixx Initiatives, Inc. and Zicam, L.L.C. designed the product, the severity of injury to users was foreseeable to Defendants.

47. At the time Defendants Matrixx Initiatives, Inc. and Zicam, L.L.C. designed the product, there was one or more reasonable alternative designs available.

48. The aforementioned available alternative designs were practicable.

49. The available practical and reasonable design alternatives would have reduced or completely eliminated the foreseeable risk of harm posed by the nasally introduced Zicam Cold Remedy.

50. Failure to use the available, practical and reasonable alternative designs rendered the product not reasonably safe for its intended use.

51. As a direct and proximate result of Defendants Matrixx Initiatives, Inc. and Zicam, L.L.C.'s breach of the aforementioned duties and negligence described above, the Plaintiff, Dennis Christensen, suffered complete, total, permanent and irreversible loss of his sense of smell.

52. As a direct and proximate result of Defendants Matrixx Initiatives, Inc. and Zicam, L.L.C.'s breach of the aforementioned duties and negligence described above, the Plaintiff, Dennis Christensen, suffered a permanent and irreversible severely diminished sense of taste.

53. As a direct and proximate result of the negligence of the Defendants Matrixx

Initiatives, Inc. and Zicam, L.L.C., and the injuries suffered by the Plaintiff, Dennis Christensen, the Plaintiff, Dennis Christensen, has suffered damages which are continuing in nature and include, but are not necessarily limited to, the following:

- a. Complete, total, permanent and irreversible loss of the sense of smell;
- b. Permanent and irreversible diminution of the sense of taste;
- c. The need to undergo several fruitless medical procedures and treatments;
- d. Mental and emotional distress;
- e. Mortification and humiliation;
- f. Physical pain and suffering;
- g. Medical expenses;
- h. Loss of enjoyment of everyday activities and severely diminished quality of life given the fact that two of his five senses are gone forever;
- i. Increased susceptibility to risks generally avoidable by a person with an intact sense of smell;
- i. Other damages not specifically identified above.

WHEREFORE, the Plaintiff, Dennis Christensen, respectfully requests that this Honorable Court grant him judgment against Defendants Matrixx Initiatives, Inc. and Zicam, L.L.C., in whatever amount above Seventy-five Thousand Dollars (\$75,000.00) he is found to be entitled, together with interest, costs and attorney fees.

COUNT II
LOSS OF CONSORTIUM CLAIM MADE BY
PLAINTIFF DEBRA CHRISTENSEN

54. The Plaintiffs herein reallege and incorporate by reference each and every paragraph set forth above, and further state as follows:

55. Plaintiff, Debra Christensen, is the spouse of Plaintiff, Dennis Christensen.

56. As a direct and proximate result of the injuries to Plaintiff, Dennis Christensen, proximately caused by the Defendants named herein, Plaintiff, Debra Christensen has been deprived of the support, comfort, society and companionship of her husband, Dennis Christensen,

and those other pleasures and rights growing under the marriage relationship known as consortium.


WHEREFORE, the Plaintiff, Debra Christensen, respectfully requests that this Honorable Court grant her judgment against all Defendants, in whatever amount above Seventy-five Thousand Dollars (\$75,000.00) she is found to be entitled, together with interest, costs and attorney fees.

Respectfully submitted,

Dated: October 13, 2003

CHAMBERS, STEINER & STURM, P.L.C.
Attorneys for Plaintiffs

By:


William P. Webster, Jr. (P63144)

BUSINESS ADDRESS:

141 East Michigan Avenue, Suite 400
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DEMAND FOR JURY TRIAL


NOW COME the Plaintiffs, Dennis Christensen and Debra Christensen, by and through their attorneys, CHAMBERS, STEINER & STURM, P.L.C., and hereby demand a trial by jury.

Respectfully submitted,

Dated: October 13, 2003

CHAMBERS, STEINER & STURM, P.L.C.
Attorneys for Plaintiffs

By:


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