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ACACIA, INC.



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SACV11-01329 JST (ANX)

ACACIA, INC., a California corporation,

Plaintiff,

vs.

NEOMED, INC., a Georgia corporation,

Defendant.

Case No.

**COMPLAINT FOR DECLARATORY RELIEF AND CANCELLATION OF FEDERAL TRADEMARK REGISTRATION**

**DEMAND FOR JURY TRIAL**

## COMPLAINT

Plaintiff Acacia, Inc. ("Plaintiff" or "Acacia") alleges as follows:

## THE PARTIES

1. Acacia is a California corporation with its principal place of business in Brea, California.

2. Acacia – formerly known as MPS Acacia – was founded in 1990. Acacia designs, develops and manufactures medical devices. Acacia focuses on four key product categories – neonatal products, pain management, pharmacy dispensing and infusion therapy.

3. Plaintiff is informed and believes and thereon alleges that defendant NeoMed, Inc. ("NeoMed") is a Georgia corporation with its principal place of business in Woodstock, Georgia.

4. Plaintiff is informed and believes and thereon alleges that NeoMed was formed in or around 2007. Plaintiff is informed and believes and thereon alleges that NeoMed is a distributor and manufacturer of medical devices.

## JURISDICTION AND VENUE

5. This is a complaint for declaratory relief under the trademark laws of the United States and a civil action for cancellation of United States Supplemental Trademark No. 3,478,363. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§ 1331, 1338(a), 2201 et seq. and 15 U.S.C. §§ 1119, 1121(a).

6. This Court has personal jurisdiction over NeoMed because NeoMed has had substantial, continuous and systematic contacts with California and the case arises out of NeoMed's forum-related acts.

7. Plaintiff is informed and believes and thereon alleges that NeoMed is registered to do business in California as entity number C3325272.

8. Plaintiff is informed and believes and thereon alleges that NeoMed has a registered agent for service of process in California – National Registered Agents,

Inc., 2875 Michelle Dr., Suite 100, Irvine, CA 92606.

9. NeoMed operates a website – www.neomedinc.com – that is directed to customers and potential customers in California. The website, inter alia, (a) depicts, markets and describes NeoMed products available in California (including the NeoMed products in issue in this dispute); (b) provides information about and a means of contacting NeoMed's dedicated California distributor, Pacific Biomedical Equipment, Inc.; and (c) has a form that enables customers in California to order product samples directly from NeoMed.

10. Plaintiff is informed and believes and thereon alleges that NeoMed has sold and marketed a substantial quantity of products – including but not limited to the products in issue in this dispute – to customers in California.

11. Plaintiff is informed and believes and thereon alleges that NeoMed currently has, and at relevant times had, long-term relationships with a variety of customers in California, including but not limited to the California-based health provider Kaiser, Kaiser-affiliated hospitals and doctors in California, Catholic Healthcare West in San Francisco, Miller Children's Hospital in Long Beach, Good Samaritan Hospital in Los Angeles, Western Medical Center in Santa Ana and Valley Presbyterian Hospital in Van Nuys.

12. NeoMed has sent multiple "cease-and-desist" letters to Plaintiff's headquarters in Brea, California, as described in more detail below.

13. Plaintiff does substantial business with customers in California, including the marketing and sales of the products in issue in this case to customers in California and in this district.

14. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c) in that NeoMed is a resident of and does substantial business in California and within this district, and the events or omissions giving rise to the claim occurred within this district.

## BACKGROUND OF THIS DISPUTE

### A. Use Of The Color Orange On Enteral Tubing, Catheters And Syringes Has Served An Important Function In Enhancing Patient Safety For Over A Decade.

15. Health care professionals use tubing, catheters and syringes on a regular basis for a variety of patient care functions, including but not limited to the delivery of medications and fluids to patients.

16. "Enteral" tubing, catheters and syringes are designed to be administered orally. In other words, an "enteral" syringe is attached to a tube that enters through the patient's mouth or nose and delivers fluids to her stomach.

17. "Intra-venous" or "I-V" tubing, catheters and syringes, on the other hand, are designed to be administered directly into the patient's blood stream through her veins.

18. Until recently, many enteral devices could connect to I-V devices and vice versa.

19. While convenient, the interconnectivity of enteral and I-V tubing, catheters and syringes at times had unintended adverse – and sometimes devastating – consequences. For example, an enteral syringe containing breast milk could inadvertently be connected to an intravenous catheter intended for medication and vice versa. When "mis-connection" occurs, patients may suffer rapid and serious adverse consequences to their health. Mis-connection has even resulted in patient deaths. Mis-connections also can cause infections, which can be detrimental to the patient's health and exponentially increase the patient's health care expense.

20. Medical device manufacturers, among others, recognized the gravity of mis-connection problems many years ago and began to attempt to modify their products to attempt to eliminate those problems.

21. Color-coding of syringes, tubing and connections was one technique

used to mitigate the risk of inadvertent mis-connection.

22. In the early 2000s, several medical device manufacturers began utilizing the color orange on their tags, connectors and tubes. Among them were Children's Medical Venture, Neo Devices and Churchill Medical Systems.

23. The use of the color orange was intended to catch the attention of the medical professional selecting and administering the device. Orange was intended to signal that the device was for enteral use only, not I-V. After all, it is far less likely that a tired nurse will confuse a bright orange enteral tube with a clear I.V. tube, as opposed to two clear tubes – one enteral and one I.V. Appended hereto as Exhibit 1 and incorporated herein by reference are brochures and marketing materials published by third parties describing their intentional use of the color orange on enteral feeding systems.

**B. Beginning in December 2003, Acacia Uses The Color Orange On Its Enteral Feeding System To Help Protect Against Mis-Connections.**

24. Beginning in December 2003, Acacia too began to utilize the color orange in its efforts to increase patient safety through the avoidance of mis-connections. In December 2003, Acacia began marketing an enteral safety device consisting of orange-striped tubing with tags stamped with the phrase "For Enteral Feeding Only" in orange. Acacia subsequently replaced the white "Christmas tree adapter" used with the device with a Christmas tree adapter that was orange. Appended hereto as Exhibit 2 and incorporated herein by reference is a true and correct photograph of the aforementioned Acacia enteral safety device.

25. Acacia chose orange for several safety-related reasons. As stated previously, other manufacturers had begun to use orange on enteral devices, and therefore Acacia believed health professionals would more readily recognize Acacia's orange tubes as signifying enteral use.

26. Orange also is a bright color that is more likely to grab the attention of

health care professionals.

27. Acacia had also for many years used colors other than orange to signify other things to its customers. For example, Acacia used the color white on clamps to signify the attached tube should be used for lipids; Acacia used the color yellow on clamps to signify the attached tube should be used for total parenteral nutrition – i.e., TPN; Acacia used blue and green clamps to signify the attached tubes should be used with patient medication; and Acacia used purple clamps to indicate high pressure injection. Appended hereto as Exhibit 3 and incorporated herein by reference is an Acacia brochure evidencing Acacia's use of color-coded clamps.

28. Over the last several years, Acacia has continued to make additional strides in enhancing patient safety through the prevention of mis-connections.

29. For example, Plaintiff's enteral feeding system (a) utilizes secure locking connections to eliminate misconnections and disconnections; (b) requires the user to consciously twist the hubs of its tubes together to ensure a firm connection that will not break if, for example, a patient moves around; and (c) is designed to be incompatible with I.V. devices.

30. As when it was initially adopted by Acacia in 2003, the use of the color orange by Acacia continues to serve an important role in the enhancement of patient safety through the avoidance of mis-connections.

31. Appended hereto as Exhibit 4 and incorporated herein by reference is a true and correct copy of a brochure depicting and describing Acacia's "Nutrio TwistLok" product.

32. Appended hereto as Exhibit 5 and incorporated herein by reference is a true and correct copy of a brochure depicting and describing Acacia's "Nutrio GraviFeed" product.

33. This month, Acacia plans to introduce the first non-electro-mechanical pump for enteral feeding in the neonatal intensive care unit – i.e., NICU. Acacia's

pump is prominently colored orange for the reasons discussed above. Appended hereto as Exhibit 6 and incorporated herein by reference is an Acacia brochure displaying and describing its Nutrio Enteral Pump.

**C. NeoMed's Affiliate And Assignor Defrauds The USPTO Into Issuing A Supplemental Trademark Registration For A Mark That Is Unprotectable.**

34. Plaintiff is informed and believes and thereon alleges that on January 17, 2007, NeoMed's affiliate, Specialty Medical Products, Inc. ("SMP"), filed with the United States Patent and Trademark Office ("USPTO") an application to register a trademark in the use of the color orange on the graduation markings and text or text box of the barrel of a syringe (the "Mark").

35. Plaintiff is informed and believes that the Mark was ultimately granted registration on the Supplemental Trademark Register as No. 3,478,363. Appended hereto as Exhibit 7 and incorporated herein by reference is a true and correct copy of the Registration Certification for Supplemental Trademark No. 3,478,363.

36. Plaintiff is informed and believes and thereon alleges that on September 18, 2008, SMP assigned all its right, title and interest in Supplemental Trademark No. 3,478,363 and the Mark to NeoMed. The signatory as both the assignor for SMP and the assignee for NeoMed was Anthony Lair.

37. Plaintiff is informed and believes and thereon alleges that at all relevant times, Mr. Lair was the CEO of both SMP and NeoMed.

38. Plaintiff is informed and believes and thereon alleges that during the prosecution of the Mark, the trademark examiner three times rejected the Mark as functional.

39. Appended hereto as Exhibit 8 and incorporated herein by reference is an April 22, 2007 USPTO office action related to the Mark.

40. Appended hereto as Exhibit 9 and incorporated herein by reference is a

November 24, 2007 USPTO final refusal of the application related to the Mark.

41. Appended hereto as Exhibit 10 and incorporated herein by reference is the USPTO's denial of the request for reconsideration of the application to register the Mark dated January 5, 2008.

42. Plaintiff is informed and believes and thereon alleges that a functional mark may not be registered on the Principal Register or Supplemental Register. TMEP § 1202.02(a)(1).

43. Plaintiff is informed and believes and thereon alleges that on April 22, 2007 and November 24, 2007, during the prosecution of the Mark, the trademark examiner required that the applicant provide "a statement as to whether the proposed mark is or has been the subject of either a design or utility patent, including existing and/or expired patents. Applicant must also state whether the proposed mark is or has been the subject of a patent application for either a design or utility patent, including both pending and abandoned patent applications. For any of the above for which a positive response is provided, the applicant must provide copies of the patent(s) or pending or abandoned patent application(s)."

44. Plaintiff is informed and believes and thereon alleges that the trademark examiner requested information regarding utility and design patent applications because "[e]vidence that the proposed mark is the subject of a utility patent that discloses the utilitarian advantages of the configuration at issue can be sufficient in itself to support a functionality refusal." TMEP § 1202.02(a)(v).

45. On information and belief, on January 10, 2007, U.S. Provisional Utility Patent Application No. 60/884,408, entitled "Enteral Safety System and Methods," was filed with the USPTO. Anthony Lair was listed as the sole inventor. The utility of the invention is to "eliminate or at least reduce the factors and circumstances that lead to errors in tubing and catheter connection." The exemplary embodiment of the invention is shown in Figure 1 which "illustrates an exemplary

embodiment of an enteral safety system 10 **using a particular shade of orange (Pantone 021)** as a matching feature among the system elements. In particular, the system elements of the exemplary enteral safety system 10 include a syringe 12 (with plunger in barrel) . . . For example, syringes 12, 26 of the enteral safety system 10 include barrels that are transparent, but use the color orange for all of the markings on the syringe. **Thus, the measurement marks on the syringe are orange as well as the text for the trademark**, place and identity of manufacture." (emphasis added) A true and correct copy of the file wrapper of Provisional Application No. 60/844,408 is appended hereto as Exhibit 11 and incorporated herein by reference.

46. On information and belief, on November 6, 2007, U.S. Utility Patent Application No. 11/935,510, entitled "Enteral Safety System and Methods," was filed with the USPTO. Anthony Lair was listed as the sole inventor, and the application claims priority to U.S. Provisional Application No. 60/844,408, now expired. This patent application was published on July 10, 2008, and currently all claims have been rejected. A true and correct copy of U.S. Patent Application No. 11/935,510 is appended hereto as Exhibit 12 and is incorporated herein by reference.

47. U.S. Patent Application No. 11/935,510 states: "The oral dispensers 12, 26 of the enteral safety system 10 include barrels that are substantially transparent, but use the color orange for all of the markings on the oral dispenser 13, 15 and 25, 29. **Thus, the measurement marks 13, 25 on the oral dispensers 12, 26 are orange as well as the graphics and texts 15, 29 for the trademark**, place and identity of manufacture. The graphics and texts 15, 29 are represented by orange stripes on the respective oral dispensers 12, 26." (emphasis added).

48. It also states: "**[T]he use of the orange color as the matching feature is particularly advantageous. The oral dispenser with orange markings may be easily, quickly, and most importantly, correctly matched to the orange enteral**

**only feeding hub.** Advantageously, the common matched feature among the elements of a system according to the inventions facilitates the easy and proper connection of the elements of the system." (emphasis added).

49. On information and belief, on November 26, 2007, during the prosecution of the Mark, SMP stated to the trademark examiner "the mark is not and has not been *the subject of either a design or utility patent*, including existing and/or expired patents. The mark is not and has not been the subject of a patent application for either a design or utility patent, including both pending and abandoned patent applications." Appended hereto as Exhibit 13 and incorporated herein by reference is SMP's November 26, 2007 request for reconsideration after final action.

50. The applicant, SMP, represented that "all statements in the original application and this submission made of the declaration's signer's knowledge are true."

51. Thus, SMP stated and/or represented to the USPTO that the Mark was not the subject of a utility patent application at least ten months after Anthony Lair, CEO of SMP and NeoMed, filed a provisional utility application and weeks after Mr. Lair filed a utility application.

52. Both the provisional and utility application disclosed the Mark as part of a safety system for enteral feeding, making SMP's statement a misrepresentation of material fact.

53. Upon information and belief, SMP made this false statement knowingly and/or SMP should have known the statement was false.

54. Furthermore, had the trademark examiner known of the utility patent application, there is high likelihood that the examiner would have maintained its functionality rejection and never allowed the Mark to be registered on the Supplemental Register.

**D. NeoMed Demands That Acacia Take Steps To Avoid Continued Alleged Infringement Of NeoMed's Purported Trademark And Trade Dress Rights.**

55. On or around June 8, 2011, NeoMed's attorney sent Acacia a letter regarding "Trademark Infringement". In the letter NeoMed's attorney represented that Acacia's Nutrio Enteral Feeding System "appears from the images on your web site to have the color orange applied both to the graduation markings and to the text 'GRAVIFEED by Acacia' and 'FOR ENTERAL USE ONLY' on the barrel of the syringe." NeoMed's attorney requested that Acacia contact him "[i]f Acacia would like to license the right to use orange markings on the syringes of its enteral feeding systems" or let NeoMed know "what steps Acacia will be taking, and when, to avoid any further infringement of NeoMed's rights." Appended hereto as Exhibit 14 and incorporated herein by reference is a true and correct copy of the June 8 letter from NeoMed's attorney to Acacia.

56. On June 20, 2011, Acacia's attorney responded to the June 8 NeoMed letter. Acacia's attorney explained why Acacia was not infringing upon any trademark rights purportedly owned by NeoMed and invited NeoMed's attorney to provide actual proof of necessary elements of NeoMed's claim, such as acquired distinctiveness of the Mark and confusion caused by Acacia's alleged infringement. Appended hereto as Exhibit 15 and incorporated herein by reference is a true and correct copy of the June 20 letter from Acacia's attorney to NeoMed's attorney.

57. On July 11, 2011, NeoMed's attorney responded to the June 20 letter. NeoMed's attorney responded to certain substantive statements made by Acacia's attorney in the June 20 letter. NeoMed's attorney concluded by implying that NeoMed would be willing to engage in "an injunction battle" with Acacia. He also noted that "[t]he use of other colors would not infringe NeoMed's trademark/dress rights." Appended hereto as Exhibit 16 and incorporated herein by reference is a

true and correct copy of the July 11 e-mail from NeoMed's attorney to Acacia's attorney.

58. On July 29, 2011, Acacia's attorney responded to NeoMed's attorney's July 11 e-mail with a letter, inter alia, seeking further clarification regarding the scope of NeoMed's claimed trademark and trade dress rights. Appended hereto as Exhibit 17 and incorporated herein by reference is a true and correct copy of the July 29 letter from Acacia's attorney to NeoMed's attorney.

59. On August 15, 2011, NeoMed's attorney responded to the July 29 letter. In this letter, NeoMed's attorney stated that NeoMed's trademark and trade dress include "orange gradation markings and orange text, or an orange text box, on the barrel of a syringe." In other words, according to the August 15 letter, a syringe with black gradation markings and an orange text box infringes, as does a syringe with orange gradation markings and orange text. Consistent with that stance, NeoMed's attorney represented that NeoMed contends that at least two products being sold by Acacia – the "Nutrio TwistLok" and the "Nutrio GraviFeed" (depicted in Exhibits 4 & 5 hereto) – both infringe upon NeoMed's trademark and trade dress rights. NeoMed's attorney again requested that Acacia either license "the right to use orange markings on the syringes of its enteral feeding systems" or take steps to avoid "further infringement of NeoMed's rights." Appended hereto as Exhibit 18 and incorporated herein by reference is a true and correct copy of the August 15 from NeoMed's attorney to Acacia's attorney.

60. Based on the aforementioned letters from NeoMed's attorney, Acacia has a reasonable apprehension that NeoMed is preparing to file a lawsuit against Acacia seeking a judgment that (a) Acacia is infringing upon the Mark; (b) Acacia is infringing upon NeoMed's alleged trade dress; and (c) Acacia should be enjoined from infringing upon the Mark and NeoMed's alleged trade dress and should be ordered to pay damages for prior infringement. Acacia believes that NeoMed does

not own any rights in the Mark and does not own a protectable trade dress. Acacia also believes that its products would not infringe upon NeoMed's Mark and alleged trade dress, even if the mark and dress were protectable. As explained above, Acacia has plans to market in the near future additional products related to enteral feeding that also incorporate the color orange. Under these circumstances, an actual controversy exists between NeoMed and Acacia, and a judicial determination of NeoMed's rights in the Mark and alleged trade dress and Acacia's alleged infringement is necessary and appropriate.

**CLAIM NO. 1: FOR DECLARATION OF NO TRADEMARK INFRINGEMENT**

61. Acacia incorporates by reference each and every allegation contained in the preceding paragraphs.

62. Upon information and belief, the Mark is registered on the Supplemental Register and purports to consist of "the color orange as applied to the graduation markings and text or text box on the barrel of the syringe" for "medical syringes" and is owned by NeoMed.

63. An actual and justiciable controversy exists between Acacia and NeoMed as to the alleged infringement of the Mark.

64. Acacia has a reasonable apprehension of suit because of NeoMed's letters accusing Acacia of infringement of the Mark.

65. Acacia denies that NeoMed has any rights in the Mark.

66. The Mark is functional in that it is essential to the use or purpose of the article and affects the cost and quality of the article, and giving NeoMed the rights to exclude others from using the Mark would put competitors, including Acacia, at a significant non-reputation-related disadvantage. The Mark is also the subject of a utility patent application. NeoMed has also touted in its marketing materials the functional benefits of the orange markings on its syringes. Further, only certain

colors can be used for graduation markings on syringes. For example, white, yellow, light blue or pink are too light to be seen, and certain colors blend in with the liquids normally utilized in the syringes. Giving a single company exclusive use of the color orange (and any confusingly similar colors) on graduation markings on any syringe would result in an impermissible monopoly and unfair competitive advantage to that company.

67. The Mark is not distinctive. Use of the color orange was and continues to be common in the industry. Plaintiff is informed and believes and thereon alleges that NeoMed did not establish any secondary meaning in the Mark by the date of Plaintiff's allegedly infringing use of the Mark.

68. There is no likelihood of confusion between NeoMed's Mark and Plaintiff's devices. Among other things, (a) both parties' products are clearly and conspicuously labeled with their dissimilar trade names, (b) NeoMed's syringes utilize a plunger whereas Plaintiff's syringes have the ability to utilize GraviFeed, which eliminates the need for a plunger, (c) Plaintiff's connectors utilize a twist lock system, whereas NeoMed's do not, (d) the connector tip on Plaintiff's syringes are centered whereas NeoMed's connector tips are offset, (e) NeoMed's syringes have a bar code on them, whereas Plaintiff's do not, (f) both companies sell to medical professionals who are sophisticated purchasers and recognize the difference between medical devices such as Plaintiff's and NeoMed's, (g) Plaintiff is unaware of any instances of customers being actually confused and NeoMed has represented that it too is unaware of actual confusion, (h) the companies use different product numbers and coding, and (i) Plaintiff is informed and believes and thereon alleges that the parties' products are packaged in distinguishable boxes that also feature the respective trade name of each company.

69. Pursuant to 28 U.S.C. §§2201 & 2202, a declaratory judgment is necessary to confirm that Acacia has not and does not infringe the Mark.

**CLAIM NO. 2: FOR DECLARATION OF NO TRADE DRESS INFRINGEMENT**

70. Acacia incorporates by reference each and every allegation contained in the preceding paragraphs.

71. Upon information and belief, NeoMed claims to own a protectable trade dress related to the use of the color orange on syringes.

72. An actual and justiciable controversy exists between Acacia and NeoMed as to the alleged infringement of the Mark.

73. Acacia has a reasonable apprehension of suit because of NeoMed's letters accusing Acacia of infringement of the alleged trade dress.

74. Acacia denies that NeoMed has any rights in the alleged trade dress.

75. The alleged trade dress is functional in that it is essential to the use or purpose of the article and affects the quality of the article and giving NeoMed the rights to exclude others from using the alleged trade dress would put competitors, including Acacia, at a significant non-reputation-related disadvantage. The alleged trade dress is also the subject of a utility patent application. NeoMed has also touted in its marketing materials the functional benefits of the orange markings on its syringes. Further, only certain colors can be used for graduation markings on syringes. For example, white, yellow, light blue or pink are too light to be seen, and certain colors blend in with the liquids normally utilized in the syringes. Giving a single company exclusive use of the color orange (and any confusingly similar colors) on graduation markings on any syringe would result in an impermissible monopoly and unfair competitive advantage to that company.

76. The alleged trade dress is not distinctive. Use of the color orange was and continues to be common in the industry. Plaintiff is informed and believes and thereon alleges that NeoMed did not establish any secondary meaning in the alleged trade dress by the date of Plaintiff's allegedly infringing use of the Mark.

77. There is no likelihood of confusion between NeoMed's trade dress and Plaintiff's devices. Among other things, (a) both parties' products are clearly and conspicuously labeled with their dissimilar trade names, (b) NeoMed's syringes utilize a plunger whereas Plaintiff's syringes have the ability to utilize GraviFeed, which eliminates the need for a plunger, (c) Plaintiff's connectors utilize a twist lock system, whereas NeoMed's do not, (d) the connector tip on Plaintiff's syringes are centered whereas NeoMed's connector tips are offset, (e) NeoMed's syringes have a bar code on them, whereas Plaintiff's do not, (f) both companies sell to medical professionals who are sophisticated purchasers and recognize the difference between medical devices such as Plaintiff's and NeoMed's, (g) Plaintiff is unaware of any instances of customers being actually confused and NeoMed has represented that it too is unaware of actual confusion, (h) the companies use different product numbers and coding, and (i) Plaintiff is informed and believes and thereon alleges that the parties' products are packaged in distinguishable boxes that also feature the respective trade name of each company.

78. Pursuant to 28 U.S.C. §§2201 & 2202, a declaratory judgment is necessary to confirm that Acacia has not and does not infringe the allege trade dress.

**CLAIM NO. 3: FOR CANCELLATION OF SUPPLEMENTAL TRADEMARK REGISTRATION NO. 3,478,363**

79. Acacia incorporates by reference each and every allegation contained in the preceding paragraphs.

80. Acacia has a real interest in the cancellation of the Mark as NeoMed has contended that Acacia infringes on the Mark.

81. The Mark is functional, has not acquired distinctiveness, is ornamental and/or is generic. Based on any of these grounds, the Supplemental Trademark Registration for the Mark should be canceled.

82. On information and belief, the Mark was procured through false and

fraudulent statements.

83. SMP made a false representation regarding a material fact during prosecution of the Mark in stating that the Mark "is not and has not been the subject of either a design or utility patent, including existing and/or expired patents. The mark is not and has not been the subject of a patent application for either a design or utility patent, including both pending and abandoned patent applications."

84. As the CEO of SMP, Anthony Lair filed for a utility patent application repeatedly referencing the Mark and its important functionality. Therefore, at the time when SMP represented to the USPTO that the Mark had not been the subject of a utility patent application, SMP knew that the statement was false.

85. Plaintiff is informed and believes and thereon alleges that SMP made the statement with an intent to defraud the USPTO into reconsidering its position regarding the functionality of the Mark and issuing a registration.

86. Plaintiff is informed and believes and thereon alleges that but for the misrepresentation, the registration of the Mark would not have issued because the USPTO would have maintained its position that the Mark is functional.

87. Pursuant to 15 U.S.C. §§ 1119, 1121(a), Plaintiff requests that the Court order the cancellation of the Mark.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

1. A declaration from the Court that NeoMed does not own any rights in the Mark or alleged trade dress because the Mark and alleged trade dress are functional and/or non-distinctive.

2. A declaration from the Court that Acacia is not infringing upon NeoMed's Mark or alleged trade dress because there is no likelihood of consumer confusion.

3. An Order to the Director of the USPTO to cancel United States

Supplemental Registration No. 3,478,363.

4. Monetary damages in an amount to be determined at trial.

5. Reasonable attorney's fees, costs and expenses.

6. Such other relief as the Court deems just and proper.

Dated: September 1, 2011 BROWNE WOODS GEORGE LLP

By _____
Keith J. Wesley

Attorneys for Plaintiff ACACIA, INC.

**DEMAND FOR JURY TRIAL**

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

Dated: September 1, 2011 BROWNE WOODS GEORGE LLP

By _____
Keith J. Wesley
Attorneys for Plaintiff ACACIA, INC.

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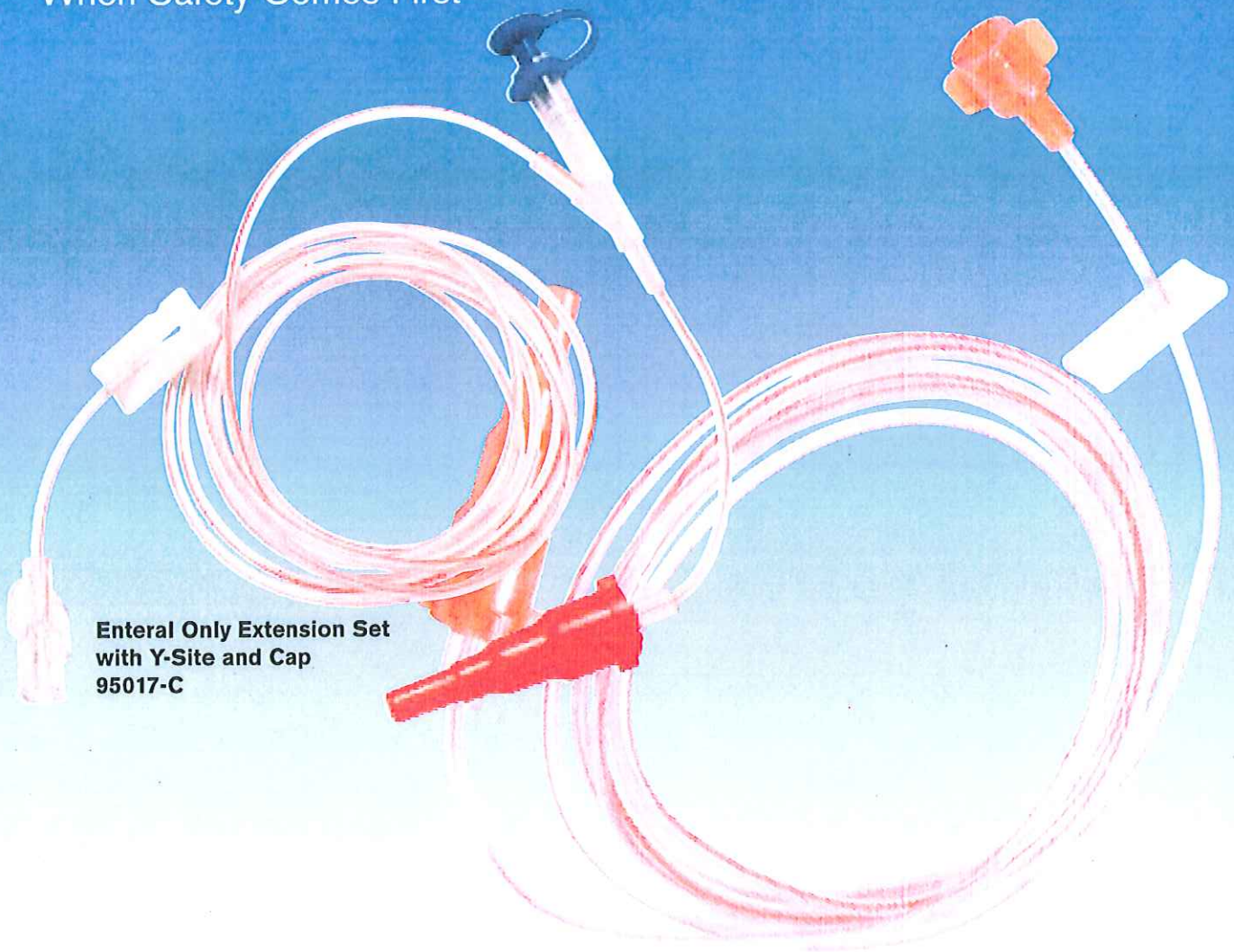
# Enteral Only Extension Sets

## When Safety Comes First



**Enteral Only Extension Set with Y-Site and Cap 95017-C**

**Enteral Only Extension Set with Oral Adapter 1017080**

Children's Medical Ventures
RESPIRONICS

Children's Medical Ventures' Enteral Only Extension Sets add a measure of safety to routine procedures. Our sets help reduce the possibility of connection errors that can occur when an infant is surrounded by lines, tubing and support equipment. The patented safety tip fits only into feeding tubes, not IV lines, helping to eliminate incorrect connections. The sets are also available with an oral adapter that accepts an oral dose syringe – another added safety feature and timesaving measure.

EXHIBIT 1

# Enteral Only Extension Sets

The Enteral Only Extension Sets are designed to help minimize the potential for inadvertent delivery of enteral feedings through the intravenous route. The unique safety tip connects easily to most naso-gastric (NG) tubes and enteral lines but is NOT compatible with IV tubing or stop-cocks. Our Enteral Only Extension Sets are also available with an oral adapter that easily accepts an oral dose syringe directly from the pharmacy, helping to make administration of medications fast, easy and safe.

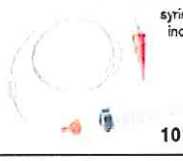
### Safety Features

- Safety tip connects only to feeding tubes and enteral lines
- Orange striping provides easy and quick identification of enteral feeding lines
- "Enteral Only" tag and slide clamp provide additional safety assurance

### Specifications

- Microbore PVC tubing
- Individual, sterile packaging
- Latex and DEHP-free

### Five Specialty Sets Available

| | ENTERAL ONLY EXTENSION SETS | ENTERAL ONLY EXTENSION SETS WITH ORAL ADAPTER |
|---|---|---|
| **60" extension set**<br>Priming volume: approx. 1.8 ml |  <br>95017-A |  <br>1017080 |
| **60" extension set with stopcock**<br>Priming volume: approx. 2.2 ml |  <br>95017-B |  <br>1018516 |
| **60" extension set with Y-site and cap**<br>Priming volume: approx. 2.5 ml |  <br>95017-C |  <br>1018517 |
| **60" extension set with male luer end**<br>Priming volume: approx. 1.8 ml |  <br>95017-D | Not Available in This Configuration |
| **36" extension set**<br>Priming volume: approx. 1.3 ml |  <br>95017-E |  <br>syringe not included<br>1018514 |

**ordering information**

| Item no. | description | quantity |
|---|---|---|
| **Enteral Only Extension Sets** | | |
| 95017-A | 60" extension set | 50/cs |
| 95017-B | 60" extension set with stopcock | 50/cs |
| 95017-C | 60" extension set with Y-site and cap | 50/cs |
| 95017-D | 60" extension set with male luer end | 50/cs |
| 95017-E | 36" extension set | 50/cs |
| **Enteral Only Extension Sets with Oral Adapter** | | |
| 1017080 | 60" extension set | 50/cs |
| 1018516 | 60" extension set with stopcock | 50/cs |
| 1018517 | 60" extension set with Y-site and cap | 50/cs |
| 1018514 | 36" extension set | 50/cs |

Children's Medical Ventures

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1021698 KB 5/24/04 G


# Your oral/enteral solution for the NICU

## Oral/enteral syringe, sterile

In response to the Joint Commission's Sentinel Event Alert, Issue 36, April 2006 – Tubing misconnections, a persistent and potentially deadly occurrence – Philips Children's Medical Ventures has collaborated with healthcare professionals to develop a line of oral/enteral syringes for use with neonatal, infant and pediatric patients throughout the hospital.

**Key advantages**

- Sterile and individually packaged
- Bright orange coloring to alert caregivers to enteral only use
- Can help avoid dangerous feeding and medication errors that can pose a significant risk to the infant and the hospital

PHILIPS

Children's Medical Ventures

sense and simplicity

# Oral/enteral syringes

## The oral/enteral solution for neonatal, infant and pediatric patients

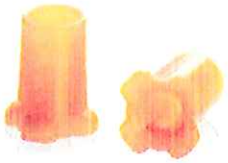
Philips Children's Medical Ventures' complete line of oral/enteral syringes has been developed to help reduce feeding errors and to avoid tubing misconnections that can pose a significant risk to the patient and the hospital.

Oral/enteral syringes come in seven different sizes (1 ml, 3 ml, 5 ml, 10 ml, 20 ml, 30 ml and 60 ml) with additional features that include highly visible labeling that reads "ORAL/ENTERAL ONLY," a bright orange plunger that immediately distinguishes it from medication syringes, and a syringe tip that will not securely attach to a standard luer lock connector. In addition, the 1 ml syringe – the size commonly used to administer medication in the hospital setting – is a highly noticeable orange color, with labeling that reads "ORAL/ENTERAL ONLY."

## Features

- Sterile, individual packaging and barcode labeling
- Bright orange plunger alerts clinician that syringe is for oral use only
- Large, highly visible labeling on side of barrel to easily distinguish enteral feeding, even during gavage feeding when plunger is removed
- Pointer plunger tip on 1 ml, 3 ml, and 5 ml sizes helps minimize medication or expressed breast milk waste
- One-piece barrel construction assures syringe is more secure than adhesive-secured tips and eliminates separation during filling
- Will not allow connection to a luer lock connector
- Highly visible color of 1 ml oral syringe distinguishes it as an orally administered medication syringe and is ideal for administering Sweet-Ease sucrose solution
- Compatible with the most commonly used hospital syringe pumps

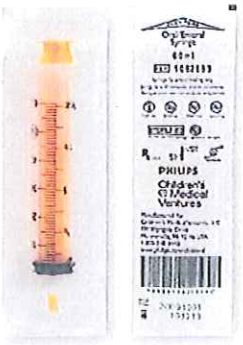

Highly visible labeling on side of barrel marked ORAL/ENTERAL ONLY and bright orange plunger easily distinguishes syringe for feeding.



## Syringe caps

- Airtight cap will not allow water in, or breast milk out, during prep, storage and warming
- Cap stands on end for stability when prepping milk on a counter or other surface
- Bright orange color prevents caps from getting lost in bedding

One-piece design eliminates separation during filling and pointed plunger tip on 1 ml, 3 ml, and 5 ml sizes allows for all contents to be delivered.



Individual packaging protects syringe during shipping and storage and is labeled with a barcode for easy inventory management.

## Ordering information

| Item no. | Description | Quantity |
|---|---|---|
| 1062677 | 1 ml oral/enteral syringe, sterile | 100/box |
| 1062678 | 3 ml oral/enteral syringe, sterile | 100/box |
| 1062679 | 5 ml oral/enteral syringe, sterile | 100/box |
| 1062680 | 10 ml oral/enteral syringe, sterile | 100/box |
| 1062681 | 20 ml oral/enteral syringe, sterile | 100/box |
| 1062682 | 30 ml oral/enteral syringe, sterile | 100/box |
| 1062683 | 60 ml oral/enteral syringe, sterile | 100/box |
| 1078782 | Sample pack, oral/enteral syringe, sterile | 1/each |



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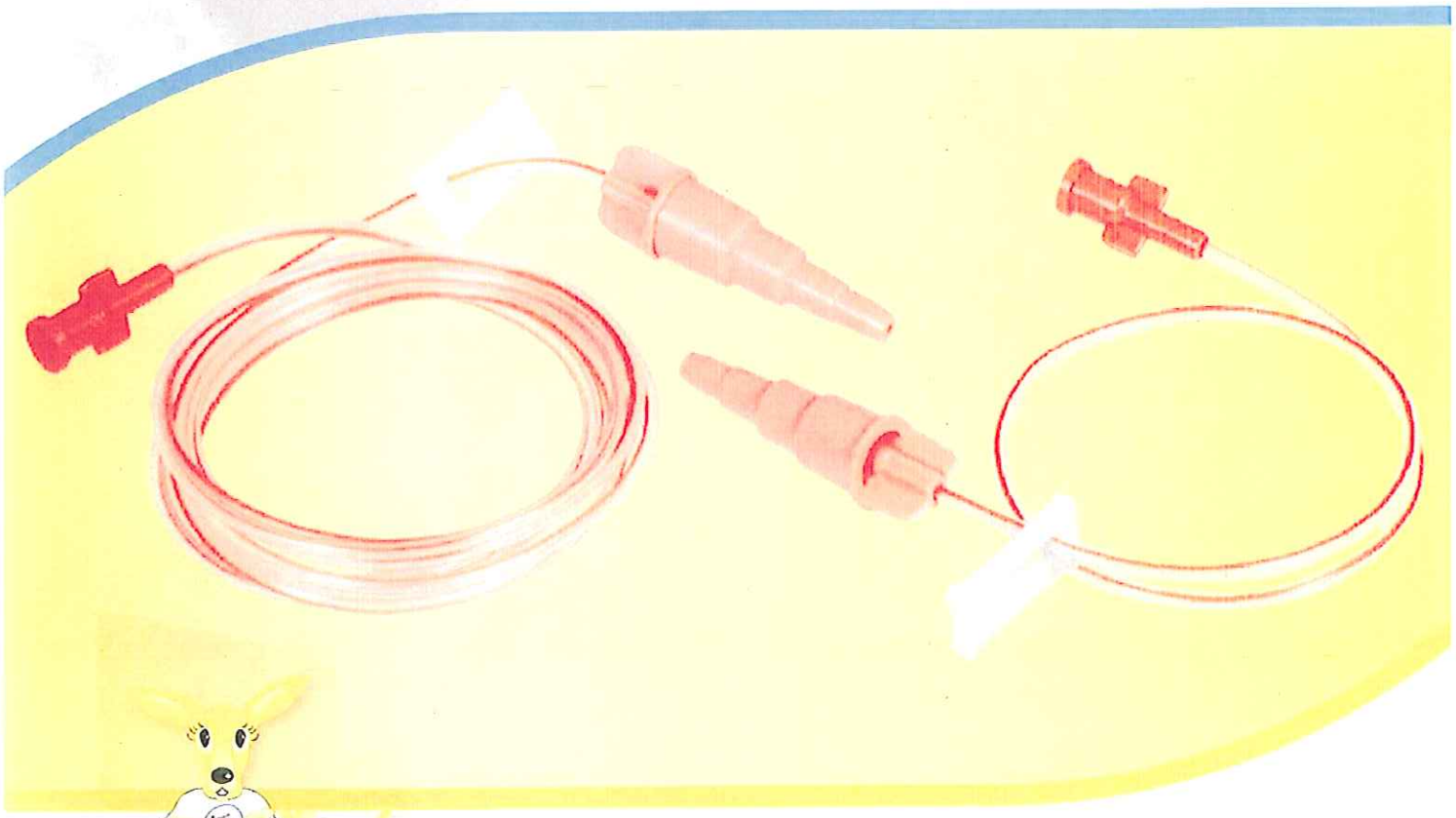
# AMERITUS ENTERAL EXTENSION SETS

## FOR ENTERAL FEEDING ONLY





Neonatal & Infant PRODUCTS

## ENTERAL ONLY EXTENSION SETS

Ameritus offers a full line of dedicated extension sets assuring patient safety, ease of use and versatility.

AMERITUS® Medical Products

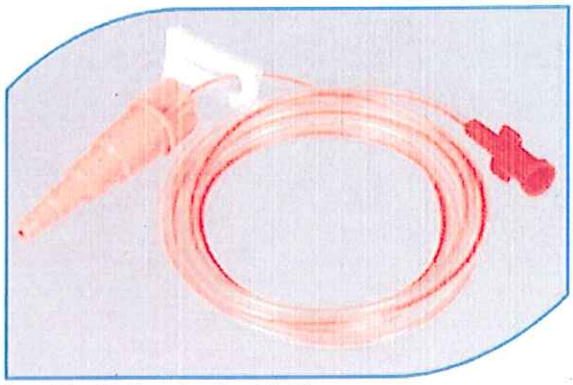
# AMERITUS ENTERAL EXTENSION SETS

## FOR ENTERAL FEEDING ONLY

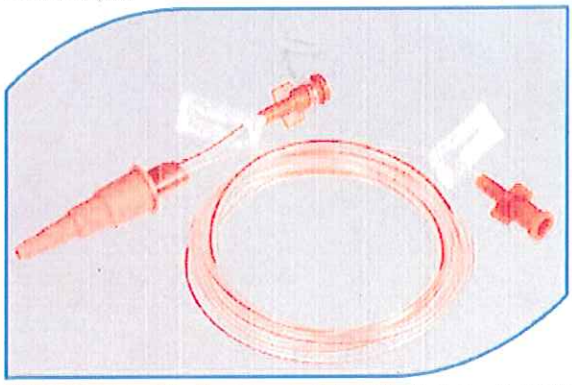
### ASSURE PATIENT SAFETY

**Features**

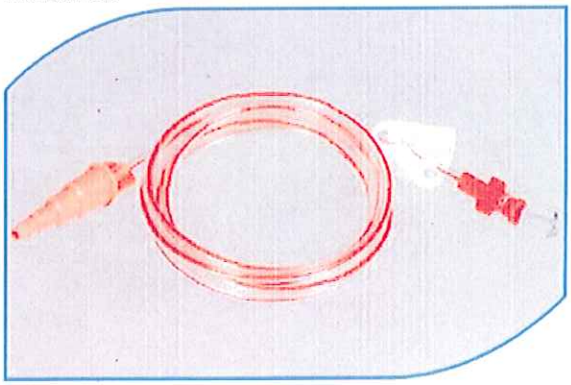
- AMERITUS Enteral Only Extension Sets have orange color coding and striped tubing to provide quick and easy visual identification of enteral feeding lines and connections
- Both Male and Female connectors are designed to prevent misconnections to standard IV lines and stopcocks
- **OC-ENT** Series Extension Sets are available in 2 standard lengths, custom lengths may be provided upon request
- **YOC-ENT-060** Extension Sets have an additional side medication port that eliminates the need to disconnect the feeding line
- **LBOC-ENT-060** Extension Sets feature large bore tubing to improve flow rates when feeding with fortified formula or breast milk
- Sterile and single packed
- Latex Free and Non-DEHP
- Made in the USA



Enteral Feeding Extension Sets 36", 60"
**OC-ENT SERIES**



BIFURCATED Enteral Feeding Extension Set w/ Side Medication Port, 60"
**YOC-ENT-060**



LARGE BORE Enteral Feeding Extension Set, 60"
**LBOC-ENT-060**

**ORDERING INFORMATION**

| Catalog Number | Description | Quantity |
|---|---|---|
| OC-ENT-036 | Enteral Feeding Extension Set, Length **36"** Orange-Striped Minibore Tubing, **Approximate Priming Volume = 1.30mL**, Oral Female Connector, Universal Enteral Male Connector, Non-Removable Slide Clamp, Non-DEHP, Latex Free, Sterile | 100/Case |
| OC-ENT-060 | Enteral Feeding Extension Set, Length **60"** Orange-Striped Minibore Tubing, **Approximate Priming Volume = 1.70mL**, Oral Female Connector, Universal Enteral Male Connector, Non-Removable Slide Clamp, Non-DEHP, Latex Free, Sterile | 100/Case |
| YOC-ENT-060 | Bifurcated Enteral Feeding Extension Set With Med Port, Length **60"** Orange-Striped Minibore Tubing, **Approximate Priming Volume = 2.10mL**, Oral Female Connector, Universal Enteral Male Connector, Non-Removable Slide Clamps, Non-DEHP, Latex Free, Sterile | 100/Case |
| LBOC-ENT-060 | Large Bore Enteral Feeding Extension Set, Length **60"** Orange-Striped Tubing, **Approximate Priming Volume = 5.00mL**, Oral Female Connector, Universal Enteral Male Connector, Pinch Clamp, Non-DEHP, Latex Free, Sterile | 100/Case |

Please contact our customer service department for additional information.

AMERITUS® Medical Products

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