IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPTOPICS LABORATORIES CORPORATION, et al.	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
FRANK C. NICHOLAS, et al.	:	
Defendants.	:	NO. 96-8169

Newcomer, J. September , 1997

<u>FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>

After a bench trial of this case on July 22-23, 1997, and after considering the testimony of the witnesses, the admitted exhibits and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

<u>FINDINGS OF FACT</u>

1. Plaintiff Optopics Laboratories Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Fairton, New Jersey.

2. Plaintiff Nutramax Products, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Gloucester, Massachusetts.

3. Defendant Frank C. Nicholas is an adult individual who is a citizen of Pennsylvania.

4. Defendant Jeffrey H. Nicholas is an adult individual who is a citizen of Pennsylvania.

5. Defendant Scott H. Nicholas is an adult individual who is a citizen of Pennsylvania.

6. Defendant Peter K. Nicholas is an adult individual who is a citizen of Pennsylvania.

7. Lilex Partners is a limited partnership organized and existing under the laws of the Commonwealth of Pennsylvania with its principal offices in Line Lexington, Pennsylvania. Lilex Partners was a Controlling Shareholder of the Predecessor Corporation.

8. This case arises out of a merger transaction whereby on June 7, 1993, NutraMax Acquisition Corporation (the "Surviving Corporation")[1] acquired Optopics Laboratories Corporation (the "Predecessor Corporation") pursuant to an Agreement and Plan of Merger (the "Merger Agreement") dated March 2, 1993.

9. Pursuant to the Merger Agreement, the Surviving Corporation became the owner of the business, assets and most of the liabilities of the Predecessor Corporation in exchange for, among other things, shares of stock in the Surviving Corporation's parent company, NutraMax Products, Inc. ("NutraMax"), which were delivered and to be delivered to the shareholders of the Predecessor Corporation.

10. The defendants in this action, as the controlling shareholders of the Predecessor Corporation, made numerous

---

1.After the Surviving Corporation acquired the Predecessor Corporation, the Surviving Corporation changed its name to Optopics Laboratories Corporation — one of the plaintiffs in this case.

representations and warranties concerning the business of the Predecessor Corporation to representatives of the Surviving Corporation and NutraMax prior to the consummation of this transaction.

11. The various representations and warranties made by the defendants are contained in the Merger Agreement and in various statements and writings furnished to the buyers pursuant to the Merger Agreement and in connection with the contemplated transaction.

12. The plaintiffs claim that when the Surviving Corporation took over the operations of the business, it discovered that the defendants had breached their warranties and that they had fraudulently misrepresented and concealed important information about the business from the plaintiffs. As a result, the plaintiffs claim that defendants grossly overvalued the worth of the Predecessor Corporation and incurred significant out of pocket costs and lost profits.

13. As part of the merger transaction, the Surviving Corporation acquired certain ongoing litigation involving the Predecessor Corporation known as the GMP Litigation.

14. The parties agreed that in the event the GMP Litigation yielded any recovery, the Surviving Corporation would cause NutraMax to issue additional shares to the defendants pursuant to a formula set forth in Section 5A(d) of the Merger Agreement. The GMP Litigation settled in November 1993.

15. However, no shares have been issued to the defendants, in part because the parties have been unable to agree on the proper construction of Section 5A(d) and the appropriate number of shares which should be issued pursuant to the formula contained therein.

16. On June 6, 1996, NutraMax and the Surviving Corporation filed a four count Complaint in the United States District Court for the District of New Jersey, alleging the following claims: (1) Count I -- indemnification; (2) Count II -- breach of contract; (3) Count III -- fraud; and (4) Count IV -- declaratory judgment.

17. Each of the claims in the first three counts of the Complaint arise out of the alleged misrepresentations and breaches of warranties made by the defendants in connection with merger transaction.

18. In Count IV, the plaintiffs seek a declaratory judgment with respect to the number of shares of NutraMax stock defendants would be entitled to receive under the terms of Section 5A(d) of the Merger Agreement.

19. The defendants filed a Counterclaim in which they alleged claims for breach of contract, reformation and unjust enrichment, each of which relates solely to the issues raised in Count IV of the plaintiffs' Complaint for declaratory judgment.

20. On December 9, 1996, the Honorable Joseph E. Irenas ruled that Counts I and II of the plaintiffs' Complaint for indemnification and breach of contract should be referred to

arbitration, and he stayed all of the plaintiffs' claims, except for Count IV for declaratory judgment, pending completion of the arbitration. Furthermore, lacking the authority to compel arbitration in Philadelphia, the forum for arbitration specified by the parties, Judge Irenas directed that this case be transferred to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

21. On May 9, 1997, this Court denied the plaintiffs' motion for summary judgment with respect to Count IV of the Complaint and the defendants' Counterclaims.

22. On July 17, 1997, this Court ordered Count III of plaintiffs' Complaint to be arbitrated in the same proceeding as Counts I and II of plaintiffs' Complaint. Thus, only Count IV of plaintiffs' Complaint and defendants' Counterclaims remain before this Court.

With respect to the specific facts constituting the parties' instant dispute, the Court makes the following findings of fact.

23. In late 1992, representatives of NutraMax and the defendants, as the officers and controlling shareholders of the Predecessor Corporation, entered into negotiations for the sale of the Predecessor Corporation.

24. Eugene Schloss, Donald Lepone, David Stewart and Michael Sandler were the main individuals who participated in negotiating this merger transaction on behalf of Nutramax.

25. Jeffrey Nicholas, Frank Nicholas and Susan Maslow were the main individuals who participated in negotiating this merger transaction on behalf of the Predecessor Corporation and its shareholders.

26. All parties to the merger transaction were represented by counsel during the negotiation, drafting and execution of the Merger Agreement, as well as at the closing of the merger transaction. NutraMax and the Surviving Corporation were represented by Eugene Schloss. Defendants and the Predecessor Corporation were represented by Susan Maslow and Jeffrey Nicholas. Jeffrey Nicholas held the dual role of counsel and shareholder throughout the events leading up to the consummation of the merger. Frank Nicholas is also an attorney.

27. After the parties reached an understanding as to the basic economic terms of the transaction, Eugene Schloss prepared the initial draft of the Merger Agreement and circulated it to all parties and their counsel for comment. Thereafter, Mr. Schloss received comments from those involved and incorporated the comments into a new draft of the agreement, which he again circulated to all parties and their counsel. This procedure of circulating drafts and soliciting comments continued until all parties and their counsel agreed upon and approved the language contained in the executed Merger Agreement.

28. At the time of the merger, the Predecessor Corporation was a plaintiff in certain ongoing litigation known as the GMP Litigation. From the beginning of the parties' negotiations in

late 1992 through the signing of the Merger Agreement in March 1993, the parties understood and agreed that the benefits and expenses of the GMP litigation would not pass to Nutramax as part of the sale of the Predecessor Corporation, but rather the benefits and expenses would be retained by the shareholders of the Predecessor Corporation.

29. During the first several months of the negotiations, the agreed-upon structure for the treatment of the GMP Litigation was to have the Predecessor Corporation assign all rights in that case to its shareholders, which included the defendants, prior to the merger. A memorandum, dated December 10, 1992, from Jeffrey Nicholas to Donald Lepone, Nutramax's president, confirmed that the Predecessor Corporation would assign all the rights to the GMP Litigation to the existing shareholders of the Predecessor Corporation. In addition, all the drafts of the Merger Agreement before March 2, 1993 provided for an assignment of the GMP Litigation to shareholders of the Predecessor Corporation prior to the merger. Initially, the assignees were all of the Predecessor Corporation's shareholders; however, the assignees eventually were just the Nicholases.

30. At various meetings in February 1993, Nutramax's representatives, primarily Stewart, Nutramax's Director of Taxes, and Sandler, the Chief Financial Officer, expressed concern that if there was an assignment of the GMP Litigation, and if the Nicholases thereafter received a substantial settlement or award, the tax-free status of the merger could be jeopardized.

Nutramax's representatives stated that a loss of the tax-free status after the merger was consummated would have an adverse impact on both the buyers and sellers.

31. Nutramax's representatives then proposed an approach to the handling of the GMP Litigation which they said would avoid jeopardizing the tax-free status of the merger. The representatives of Nutramax proposed that the GMP Litigation be retained by the Predecessor Corporation and become, as a result of the merger, an asset of the Surviving Corporation. The cash from any settlement or damage award from the GMP Litigation would be received by the Surviving Corporation, and then Nutramax would issue to the Nicholases additional shares of Nutramax stock equal in value to the cash received.

32. Before these additional shares were issued to the Nicholases, NutraMax would deduct from the GMP Litigation proceeds any unpaid litigation expenses and a specified amount relating to tax expenses to be incurred by NutraMax.

33. The representatives of Nutramax felt it was necessary to deduct from the GMP Litigation proceeds an amount equal to the tax expenses to be incurred by Nutramax through the receipt of the GMP Litigation proceeds.

34. According to the representatives from the Predecessor Corporation, Susan Maslow and Jeffrey Nicholas, the specific tax effect that Nutramax's representatives raised during these negotiations was that the receipt of the GMP Litigation proceeds would result in consumption of net operating losses ("NOLs") of

the Predecessor Corporation which would have otherwise been available to shelter income of the Surviving Corporation from taxation.

35. According to Maslow and Nicholas, the Nutramax representatives stated that the NOLs of the Predecessor Corporation were an asset that had potential value to Nutramax and proposed that the Nicholases reimburse Nutramax for the cost to Nutramax of the loss to the Surviving Corporation of any NOLs due to the receipt of the GMP Litigation proceeds.

36. On behalf of the Nicholases, Jeffrey Nicholas advised Nutramax's representatives that this proposal seemed fair in that it retained the basic concept that the benefits of the GMP Litigation belonged to the Nicholases. Indeed, in a February 18, 1993 memorandum to Mr. Lepone, Mr. Nicholas confirmed that "[u]pon any settlement or damage award, Nicholas would receive additional Nutramax stock, net of any tax effect to Optopics and net of expenses incurred."

37. Although the parties had agreed by February 18, 1993 to change the form by which the benefits of the GMP Litigation would devolve to the Nicholases, the language in the drafts of the Merger Agreement, which were prepared and distributed by Eugene Schloss, Nutramax's General Counsel, continued to show an assignment of the GMP Litigation.

38. The language reflecting the agreed-upon change was first proposed in a meeting held on March 2, 1993, the day the merger agreement was scheduled to be signed. It was dictated by

Sandler and transcribed by Schloss late in the day on March 2, 1993. Before this language was incorporated into the Merger Agreement, Maslow and Sandler, earlier on this day, had referred to § 382 of the Internal Revenue Code ("IRC"), which deals with the computation of NOLs, but decided not to include any reference to this section or its formula in the Merger Agreement because it was simply too complicated. Stewart, who was present at the negotiations, stated that the parties did not consider using any reference to the NOL formula in the Merger Agreement because it was simply too complicated in that actual tax impact, under the NOL formula, could not be determined for years.

39. Thus, instead of referring to Section 382 of the IRC in the Merger Agreement, the parties agreed to the formula contained in Section 5A(d) of the Merger Agreement to measure the tax expenses to be incurred by NutraMax. It was generally believed among all parties to the negotiations that Section 5A(d) would best effectuate the intent of the parties in devolving the GMP Litigation proceeds and ensuring that all benefits and expenses related to the GMP Litigation were borne by the Nicholases.

40. The last clause of Section 5A(d), which reads "net of any federal tax benefit then available to the Surviving Corporation as a separate company," was included in the Merger Agreement for the purpose of offsetting the benefit of any federal tax deduction to which NutraMax and the Surviving Corporation may become entitled as a result of having paid state income taxes on the income derived from the GMP Litigation.

41. Drafts of the Merger Agreement containing the language in Section 5A(d), as executed, were distributed to all parties and their counsel for their review and comment. The final language of Section 5A(d) was reviewed and approved by all parties and their counsel.

42. The Merger Agreement was executed on March 2, 1993. A formal closing for this transaction was held on June 7, 1993.

43. In relevant part, Section 5A(d) of the Merger Agreement provides as follows:

> . . . . if the Surviving Corporation shall be successful in obtaining an actual recovery in the GMP Litigation, then and in that event the Surviving Corporation shall cause NutraMax to issue to the Controlling Shareholders pro rata . . . that number of NutraMax Shares which shall be equal in value (valued at the average of the high and low prices on NASDAQ of NutraMax shares on the date such recovery is actually received by Surviving Corporation) to the amount of such recovery, less any unpaid Litigation Costs, less an amount equal to (x) <u>the amount of the recovery, multiplied by (y) the consolidated federal incremental tax rate of NutraMax plus the incremental state tax rate net of any federal tax benefit then available to the Surviving Corporation as a separate company.</u>

(Emphasis added).

44. The GMP Litigation settled in November 1993.

45. Defendants delivered to NutraMax a total of $500,827.07 from the settlement of the GMP Litigation.

46. After the deduction of litigation expenses, the settlement proceeds totaled $477, 601.89.

47. Although Nutramax received the proceeds from the GMP Litigation in partial payments over a period of time, for the purpose of simplifying the calculation under Section 5A(d) of the

Merger Agreement, the parties have stipulated that November 26, 1993 would be used as the date on which NutraMax received all of the GMP Litigation proceeds.[2]

48. The average of the high and low prices on NASDAQ of NutraMax shares on November 26, 1993 was $11.50 per share.

49. The settlement proceeds from the GMP Litigation which NutraMax received were reported as income on the final state and federal tax returns of the Predecessor Corporation.

50. In each fiscal year since the merger, NutraMax has paid a flat income tax rate of 34% for federal tax purposes.

51. NutraMax files a consolidated federal tax return on behalf of itself and all of its subsidiaries, including the Surviving Corporation.

52. The Surviving Corporation files an independent New Jersey state income tax return. In the short period ended May 31, 1993 - the tax period in which the proceeds from the GMP Litigation were accrued – the Surviving Corporation reported a loss on its New Jersey state tax return and therefore paid no state income taxes in that year.

53. The parties have agreed that under Section 5A(d), the "incremental state tax rate" is zero, and therefore, that issue is not presently before the Court.

---

2. Nutramax actually received the settlement proceeds in installments on or about the following dates: November 26, 1993 ($344,677.76), November 29, 1993 ($100,000.00), November 30, 1993 ($55,000), and August 30, 1995 ($1,149.31).

CONCLUSIONS OF LAW

1. The parties to this action have complete diversity of citizenship. The matter in controversy exceeds $75,000, exclusive of interest and costs. Thus, the Court has jurisdiction over this diversity action under 28 U.S.C. § 1332. Venue is proper in this district by virtue of 28 U.S.C. § 1391(a)(1) because the defendants reside in this state.

2. Pursuant to Section 32 of the Merger Agreement, Delaware law governs this case.

3. The dispute among the parties to this action is a narrow one. The parties concede that the language of Section 5A(d) of the Merger Agreement is the language ratified by them and their counsel. Furthermore, the parties admit that this language accurately sets forth their agreement. Additionally, the following facts are undisputed: (a) the amount that the defendants delivered to NutraMax and the Surviving Corporation in settlement proceeds from the GMP Litigation, net of unpaid litigation expenses; (b) the dates on which the delivery of these proceeds took place; (c) the price of NutraMax stock on these delivery dates; and (d) that the "incremental state tax rate" is zero.

4. Thus, the only dispute between the parties is the proper meaning of the term "federal incremental tax rate of NutraMax" within the context of Section 5A(d), and whether the language "net of any federal tax benefit then available to the Surviving Corporation as a separate company" modifies this term.

Under Delaware law, the proper interpretation of a contract is a question of law for the Court. Pellaton v. Bank of New York, 592 A.2d 473, 478 (Del. 1991).

5. The plaintiffs argue that the language "federal incremental tax rate of NutraMax" is clear and unambiguous and must be interpreted to mean exactly what it says. The plaintiffs contend that this clause can only have one meaning - the federal tax rate which NutraMax would have had to pay on the next increment of income in the year in which the proceeds from the GMP Litigation were recovered.

6. Although the Court finds that the term "federal incremental tax rate of NutraMax" is clear and unambiguous, this Court has already determined, by way of prior decision, that the language "net of any federal tax benefit then available to the Surviving Corporation as a separate company" is ambiguous. See Optopics Laboratories, Corp. v. Frank C. Nicholas, Civil Action No. 96-8169, slip op. at 16-17 (E.D. Pa. May 9, 1997) (holding that the language "net of any federal tax benefit then available to the Surviving Corporation as a separate entity" in Section 5A(d) is ambiguous).

7. When a court determines that the contract language is ambiguous or uncertain, the court may "consider testimony pertaining to antecedent agreements, communications and other factors which bear on the proper interpretation of the contract." Pellaton v. Bank of New York, 592 A.2d 473, 478 (Del. 1991).

8. At trial, all of plaintiffs' witnesses testified that the disputed language in Section 5A(d) refers to the federal tax rate which NutraMax would have paid on the next increment of income it received in the year the GMP proceeds were recovered because this dispute tax language speaks in terms of tax rate. Because NutraMax paid federal income tax at a flat rate of 34% for that year, and because each and every dollar of income was taxed at 34%, NutraMax's "federal incremental tax rate" was 34%.

9. However, the defendants' witnesses testified that the last clause of Section 5A(d), "net of any federal tax benefit then available to the Surviving Corporation as a separate company," modifies the meaning of the term "federal incremental tax rate of NutraMax." According to the defendants, the language "net of any federal tax benefit" refers to the net operating losses or "NOLs" of the Predecessor Corporation and requires that the proceeds from the GMP Litigation be reduced by an amount equal to the actual economic cost to NutraMax, discounted to present value, of losing the NOLs which were used to shelter the GMP recovery from tax in the reporting year.

10. The only evidence defendants offer in support of their interpretation of this language is testimony that in negotiating the Merger Agreement the parties discussed NutraMax's concern that it might lose the use of the Predecessor Corporation's NOLs if the GMP Litigation yielded any recovery. Thus, defendants contend that the term "any federal tax benefit" was a reference to these discussions between the parties. However, the

defendants did not testify that the parties directly discussed and agreed that the language "any federal tax benefit" would be a reference to the lost NOLs, or that this language was intended to modify the phrase "federal incremental tax rate."

11. Indeed, Susan Maslow testified that the parties chose not to incorporate Section 382 of the IRC, or for that matter, any reference to NOLs, into the Merger Agreement because it was too complicated. Ms. Maslow's testimony is consistent with the testimony of Dave Stewart, the Director of Taxes for Nutramax.

12. Mr. Stewart testified that the parties did not consider using any reference to NOLs in Section 5A(d) because it was too complicated in that the actual tax benefit of using NOLS could not be determined until sometime in the future, which, in Stewart's opinion, could take years.

13. In addition, the Court finds that the testimony of Jeffrey Nicholas, with respect to the interpretation of the language of Section 5A(d), is not credible. The Court reaches this conclusion based on the fact that Mr. Nicholas admitted that he was not a "tax lawyer" and did not really understand exactly how the computation of NOLs worked and how Section 5A(d) specifically addressed the tax impact on the Surviving Corporation. At most, Mr. Nicholas, who was defendants' chief negotiator, can only testify to the general fact that Section 5A(d) was the formula by which the tax impact on the Surviving Corporation would be considered in the overall computation of the

number of shares defendants would receive from Nutramax for the GMP Litigation proceeds.

14. The plaintiffs, on the other hand, introduced testimony that the language found in the very last clause of Section 5A(d) was intended by the parties to offset any federal income tax deduction to which NutraMax and the Surviving Corporation might become entitled as a result of having paid state income taxes on the proceeds recovered from the GMP Litigation. In other words, because a taxpayer can claim a federal tax deduction for an amount equal to any state income taxes paid, to calculate a taxpayer's net state income tax liability, one must reduce the state income tax paid in light of the federal tax deduction. This type of language is commonly used in transactions which require the calculation of federal and state income taxes. Thus, the language "net of any federal tax benefit" found in Section 5A(d) is generic language intended to adjust the taxpayer's state tax liability in light of the available federal tax deduction.

15. The Court finds credible the plaintiffs' testimony with regard to the intended meaning of the language "any federal tax benefit," and it rejects the defendants' proffered interpretations as being not credible and inconsistent with the language of the agreement.

16. Moreover, in a letter dated October 12, 1995, Jeffrey Nicholas expressly stated that, after having "reviewed the Agreement, our memories, the correspondence and all relevant facts," the defendants "do not dispute the deduction for federal

taxes." This statement is an unequivocal admission by the defendants that the plaintiffs' interpretation is correct.

17. In addition, the defendants' own calculations show that the "actual economic impact" on the plaintiffs of receiving the GMP Litigation proceeds is that they will have to pay an additional $162,385 in federal income taxes. The only difference between the parties' calculations is that the defendants contend that one must determine the year in which the taxes will be paid and then discount them to "present value" as of the time the proceeds were received. There is nothing in the language of the Merger Agreement or the extrinsic evidence introduced at trial to support that interpretation.

18. For all of these reasons, the Court adopts the plaintiffs' interpretation of the phrase "net of any federal tax benefit then available to the Surviving Corporation as a separate company," and finds that it was intended only to offset any federal income tax deduction to which NutraMax and the Surviving Corporation might become entitled as a result of having paid state income taxes on the proceeds recovered from the GMP Litigation. The clause was intended by the parties to modify only the phrase "incremental state tax rate," and it does not alter or modify the meaning of the phrase "federal incremental tax rate of NutraMax" found in Section 5A(d).

19. There exist separate and distinct grounds for rejecting the defendants' purported interpretation — the calculation which the defendants set forth under their interpretation is based on

unreliable and invalid assumptions and is inconsistent with the defendants' purported interpretation.

20. The defendants contend that Section 5A(d) must be interpreted in such a way as to compensate NutraMax for the actual tax effect it will incur in the future as a result of losing its ability to use some of the NOLs of the Predecessor Corporation. Defendants argue that the actual tax effect on NutraMax is to be calculated by predicting the amount of extra taxes that NutraMax will have to pay in the years 2002 through 2005 as a result of the receipt of the GMP Litigation proceeds, and then calculating the "present value" of NutraMax's reduced operating loss deductions for those years.

21. The defendants argue that NutraMax would not have been able to use the NOLs consumed by the recovery from the GMP Litigation until the years 2002 through 2005 and that the appropriate federal tax deduction under Section 5A(d) is equal to $68,979.88. In order to arrive at this result, the defendants make a number of unreliable economic and legal assumptions, including <u>inter</u> <u>alia</u> the following: (a) that the maximum amount of NOLs NutraMax will be able to use in each of its tax years between 1993 and 2005 is $156,245; (b) that NutraMax's accrued income less other available deductions in each of the tax years from 1993 through 2005 will be sufficient to apply $156,245 in NOLs from this merger transaction; (c) that NutraMax will not use up the NOLs it currently has available from this merger transaction until the year 2002; (d) that NutraMax will continue

to pay federal income taxes at a flat rate of 34% until the year 2005; and (e) that the NOL limitation currently imposed by Section 382 of the tax code will remain the same until the year 2005.[3]

22. The errors in the defendants' assumptions have been demonstrated over time by NutraMax's actual use of the Predecessor Corporation's NOLs as reported on its federal income tax returns.

23. According to the testimony of David Stewart, NutraMax will probably use up the last of the NOLs it acquired from the Predecessor Company in its tax return for the fiscal year ending September 30, 1996. Thus, NutraMax would have been able to use the NOLs consumed by the reporting of the GMP proceeds as early as the fiscal year ending September 30, 1997. These facts emphasize the errors in the defendants' assumptions and the flaws in their calculation.

24. Moreover, the legal assumptions made by the defendants also cannot be predicted with any certainty. The tax code can be revised at any time. Thus, it is unreasonable for the defendants to assume that the corporate tax rate and the Section 382 NOL limitation will remain static for a period of twelve years.

3.To the extent the Court reserved ruling on plaintiffs' motion to exclude the testimony of Mark Boyer and J. Mark Penny, the Court orders that said Motion is denied, plaintiffs having failed to set forth any reasons that justify the exclusion of such testimony.

25. Based on the reasons set forth above, the Court rejects both the interpretation of Section 5A(d) offered by the defendants and the calculation defendants propose under their interpretation of Section 5A(d).

26. The Court holds that application of the formula set forth in Section 5A(d) of the Merger Agreement yields the following result:

Aggregate Net Proceeds Remitted to NutraMax		$500,827.07
Litigation Costs:		
Pitney, Hardin	15,752.93	
Antheil Nicholas Maslow & MacMinn	6,017.25	
The Evidence Store	1,455.00	
		(23,225.18)
Adjusted Aggregate Net Proceeds (C)		$477,601.89
Incremental State Tax Rate (NJ) net of federal tax benefits		0
State Tax Expense (A)		0
Consolidated Federal Incremental Tax Rate of NutraMax		0.34
Federal Tax Expense (B)		$162,384.64
Total Tax Expense (A + B); (D)		$162,384.64
Net Aggregate Proceeds (C - D); (E)		$315,217.25
Average High/Low Price on NASDAQ for NutraMax Common Stock on November 26, 1993		$11.50
Number of shares of NutraMax Common Stock to be Issued		27,410

27. Thus, plaintiffs are entitled to judgment in their favor on Count IV of the Complaint. Pursuant to the provisions of Section 5A(d) of the Merger Agreement, the Court declares that the defendants shall be entitled to receive 27,410 shares of NutraMax common stock.

28. As part of their Counterclaim, the defendants have asserted a breach of contract claim in which they seek to recover 35,597 shares of NutraMax common stock.

29. The issues posed by the defendants' breach of contract claim and the plaintiffs' declaratory judgment action, namely the proper construction of Section 5A(d) and the determination of the number of NutraMax shares to which defendants are entitled pursuant to that Section, are identical.

30. Consequently, the Court's ruling on the plaintiffs' declaratory judgment Count resolves and moots all issues raised by the defendants' Counterclaim for breach of contract. Therefore, judgment is properly entered in favor of the plaintiffs on the defendants' Counterclaim for breach of contract.

31. The defendants assert, in the alternative, a claim for reformation of contract.

32. However, because the Court has already considered all of the evidence offered by the parties and ruled on the proper construction to be given to Section 5A(d) of the Merger Agreement, the Court declines to reform the contract as requested by the defendants.

33. Reformation is an exceptional remedy that is only available when the party seeking to reform the contract can establish, by clear and convincing evidence, that the contract does not reflect the parties' actual intentions because of fraud or mutual mistake. Matter of ENSTAR Corp., 604 A.2d 404, 413

(Del. 1992); Collins v. Burke, 418 A.2d 999, 1002 (Del. 1980); Colvocoresses v. W. S. Wasserman Co., 28 A.2d 588, 589-90 (Del. Ch. 1942).[2]

34. The defendants have presented no evidence, much less clear and convincing evidence, that the plaintiffs committed fraud. In fact, the defendants have not pointed to a single "misrepresentation" that the plaintiffs allegedly made concerning Section 5A(d).

35. Moreover, fraud cannot be proven without a showing of justifiable reliance. J. A. Moore Constr. Co. v. Sussex Assoc. Ltd., 688 F. Supp. 982, 989 (D. Del. 1988). The defendants could not have justifiably relied on any representations by the plaintiffs that were contrary to the terms of the Merger Agreement because, inter alia: (a) all parties to the contract are knowledgeable and sophisticated attorneys and/or business persons who were represented by counsel; (b) the contract was heavily negotiated, with numerous drafts exchanged between the parties; (c) Section 5A(d) was drafted after lengthy discussions, and was reviewed and approved by the defendants and their attorneys; and (d) the contract contains an integration clause (Section 28) which provides that there are no other agreements or understandings between the parties. See J. A. Moore Constr. Co.,

2. Some older cases, and cases from Delaware's lower courts, have stated that a unilateral mistake can be a sufficient basis for reforming a contract when it is coupled with the other party's "knowing silence." See, e.g., Collins, 418 A.2d at 1002; Colvocoresses, 28 A.2d at 589-90. In ENSTAR, however, the Delaware Supreme Court expressly stated that "[a] unilateral mistake cannot be a basis for reforming a contract." 604 A.2d at 413. The Court need not resolve this discrepancy in the law because the defendants failed to offer any evidence to establish that the plaintiffs were silently aware that the defendants were interpreting Section 5A(d) of the Merger Agreement in a completely different and inconsistent manner. Furthermore, a claim of unilateral mistake must fail for the very same reasons as a fraud claim in this context.

688 F. Supp. at 990-91 (where knowledgeable business people negotiated contract at arms'-length over a number of months and duly executed the contract, claimant cannot prove fraud because no genuine issue of fact exists as to the element of justifiable reliance).

36. Likewise, the defendants have not presented clear and convincing evidence that they are entitled to reformation of the contract on the grounds of a "mutual mistake." Most importantly, the defendants concede that Section 5A(d) accurately sets forth the language that the parties intended to include in the Merger Agreement. Moreover, in view of the formalities that were observed during the execution of this contract, there can be no doubt that the terms of the Merger Agreement are the exact terms that the parties negotiated and approved. See Colvocoresses, 28 A.2d at 592 (court focused on complainant's experience in drafting similar contracts, his familiarity with the contract, and the lengthy discussions and negotiations preceding the signing of the contract in rejecting complaint's reformation claim); J. A. Moore Constr. Co., 688 F. Supp. at 990-91.

37. Additionally, the heightened burden of proof imposed by Delaware law on reformation claimants ensures that the Court does not create a new contract between the parties. Collins, 418 A.2d at 1002; Colvocoresses, 28 A.2d at 590. The evidence produced by the claimant must tell the Court exactly what language it must insert into the contract. Collins, 418 A.2d at 1002. Because the plaintiffs contend that the plain meaning of Section 5A(d)

accurately reflects the parties' intent, while the defendants argue that a completely different meaning is warranted, the parties cannot be operating under a "mutual" mistake. There exists absolutely no basis for inserting any language into the contract to replace the language that the parties themselves agreed upon. Thus, if the Court were to "reform" the existing contact language in accordance with the defendants' purported interpretation, the Court would be creating a new contract between the parties. The remedy of reformation cannot be used to produce such a result.

38. Consequently, the defendants failed to show by clear and convincing evidence that the parties were laboring under a "mutual mistake" as to the language that was set forth in the Merger Agreement or as to its clear meaning. Furthermore, the defendants failed to establish any other basis which would entitle them to the remedy of reformation.

39. For the reasons stated above, the plaintiffs are entitled to judgment in their favor on defendants' Counterclaim for reformation of contract.

40. In Count III of their Counterclaim, the defendants have asserted a claim for unjust enrichment. The defendants allege that NutraMax has been unjustly enriched because it has retained the proceeds recovered from the GMP Litigation and failed to deliver to the defendants any shares under Section 5A(d) of the Merger Agreement.

41. The defendants' unjust enrichment claim fails to state a cause of action because "unjust enrichment" does not constitute an independent ground for relief under Delaware law. See Topps Chewing Gum, Inc. v. Fleer Corp., No. CIV.A.6781, 1983 WL 102621, at *2 (Del. Ch. Sept. 1, 1983) (citing 66 AM. JUR. 2D Restitution and Implied Contracts § 3).

42. Unjust enrichment is merely a necessary element of two different causes of action -- an action for restitution and an action for implied contract. 66 AM. JUR. 2D Restitution and Implied Contracts §§ 3, 4 (1973). The defendants cannot pursue a cause of action for implied contract because the parties entered into an express contract which specifically addresses the issue in dispute. See Wood v. Coastal States Gas Corp., 401 A.2d 932, 942 (Del. 1979) (because preferred shareholders' right to receive dividends was set forth in a written contract, they could not recover under an unjust enrichment theory independent of the contract); 66 AM. JUR. 2D Restitution and Implied Contracts § 11 ("doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract"). Additionally, in a breach of contract case, it is inappropriate to include an independent cause of action for restitution because "restitution is simply an alternative remedy for the breach which [defendants] may elect under certain circumstances." R. M. Williams Co., Inc. v. Frabizzio, No. 90C-MY-10, 1993 WL 54423, at *14 (Del. Super. Ct. Feb. 8, 1993) (citing RESTATEMENT (SECOND) OF CONTRACTS § 344(c) & cmts a, d).

43. Because the defendants have failed to state a cause of action for unjust enrichment, the plaintiffs are entitled to judgment in their favor on Count III of the defendants' Counterclaim.

44. Plaintiffs seek to set off the damages they may recover from the defendants in Counts I through III of their Complaint against the NutraMax shares to which defendants are entitled under Section 5A(d) of the Merger Agreement.

45. Presently, Counts I, II and III of the plaintiffs' Complaint have been referred to contractual arbitration. In the arbitration proceeding, the plaintiffs are seeking indemnification from the defendants, pursuant to Section 13 of the Merger Agreement, for damages that they sustained as a result of numerous misrepresentations and breaches of the warranties and covenants made by the defendants in connection with the Merger Agreement. In their fraud claim, plaintiffs seek to recover damages they sustained as a result of defendants' fraudulent acts and omissions in connection with the Merger Agreement.

46. Plaintiffs contend that Count IV and the Counterclaims currently before this Court and the Counts which have been referred to arbitration and stayed pending arbitration all arose out of the same business transaction and are part of the same Complaint by the same plaintiffs against the same defendants. As such, plaintiffs claim that they are entitled to set off any damages awarded to defendants under Count IV against any damages that they may be awarded in the arbitration proceeding.

47. In contrast, defendants argue that plaintiffs are not entitled to set off any damages that they may be awarded in arbitration against the shares awarded to defendants under Count IV of plaintiffs' Complaint. Defendants contend that a set-off is not appropriate under the facts of this case because the claims are not factually related.

48. A claim cannot be validly set off against an undisputed obligation where the claim and obligation are factually unrelated. See, e.g., Greenblatt v. Prescription Plan Services Corp., 783 F. Supp. 814, 823 (S.D.N.Y. 1992); Schieffelin & Co. v. Valley Liquors, Inc., 823 F.2d 1064 (7th Cir. 1987). In this case, the arbitration claims in Counts I, II and III of the Complaint, which are based upon alleged fraudulent misrepresentations by the Nicholases, are factually unrelated to claim in Count IV, which relates solely to the GMP Litigation. Thus, plaintiffs should not be permitted to set off against the shares awarded to defendants under Count IV of plaintiffs' Complaint.

49. Nonetheless, plaintiffs argue that they are entitled to a set-off because the "debts arise out of the same business transaction." (Pls.' Br. at 7). In making this argument, plaintiffs cite to Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co., 840 F.2d 546, (7th Cir. 1988). However, a review of this case indicates that plaintiffs herein are not entitled to a set-off.

50. In Soo Line, the Soo Line Railroad Company and Escanaba & Lake Superior Railroad Company were parties to an arbitration proceeding, in which the Escanaba railroad sought damages from the Soo railroad resulting from the deferred conveyance of a railroad line to Escanaba. The two railroads also were parties to a lawsuit, in which the Soo sought to recover the payment of interline balances. The Seventh Circuit held that Soo was entitled to summary judgment on its claim for interline balances, and that enforcement of the judgment should not be stayed pending completion of the arbitration proceeding. Id. at 551-52.

Although arbitration and the lawsuit in Soo Line happened to involve two separate transactions, there is nothing in the Soo Line opinion to suggest that the result would have been different if the two factually unrelated claims arose out of the same contract. The critical factor in Soo Line was that there was no factual overlap between the two claims. Indeed, the Soo Line court noted that debts arising at different times out of different circumstances are not mutual, and as such, they cannot be the subject of a valid set-off. Id. at 551; see also Greenblatt, 783 F. Supp. at 823 ("Although plaintiffs' claim and defendants' counterclaim may be said to relate to the PPS Contract, the counterclaim is separate and distinct from plaintiffs' claim to the cash reserve, having no identity of elements of proof.").

51. In this case, although the declaratory judgment claim arises out of the Merger Agreement, it simply is not factually

related to Counts I, II and III of plaintiffs' Complaint which also arise out of the Merger Agreement. Counts I-III are based on allegations that defendants breached warranties and covenants in the Merger Agreement by making certain fraudulent misrepresentations and omissions with respect to certain information about the Predecessor Corporation. On the other hand, Count IV asks this Court to determine the number of shares owed to defendants by plaintiffs due to the receipt of the GMP Litigation proceeds. As described above, the facts surrounding the devolution of the GMP Litigation proceeds in the form of shares from plaintiffs to defendants are separate and distinct from the facts surrounding plaintiffs' other claims. Indeed, plaintiffs cannot point to any facts from Count IV that are involved with Counts I-III; there simply is no factual overlap between Count IV and Counts I-III. In sum, the claim in Count IV is wholly separate and distinct from the claims in Counts I-III. As such, plaintiffs cannot prove that the claims are mutual, and thus that they are entitled to a set-off.

52. In this case, there is another additional reason why the plaintiffs have no right to set off their arbitration claims against the shares owed in exchange for the GMP litigation proceeds. Twenty-five percent of the Nutramax shares owed to the Nicholases for the sale of Optopics were placed in an escrow account as security for any indemnification claims that the plaintiffs might assert. There are still more than 24,000 shares of Nutramax stock in that escrow account, which the plaintiffs

have refused to release to the Nicholases. The current market value of that stock is $275,000. Having bargained for and received security for their indemnification claims, it is highly inappropriate for the plaintiffs to refuse to deliver other shares that are completely unrelated to those claims. Thus, the Court will not stay the execution and enforcement of the judgment on Count IV.

53. Finally, defendants claim that they are entitled to prejudgment interest on the shares that are to be awarded to them under Count IV. Defendants first argue that the law of Delaware applies to prejudgment interest. From this point, defendants contend that this Court can award them prejudgment interest, at the rate of 8%, despite the fact that they seek specific performance. Defendants further contend that if this Court should so find that they are not entitled to prejudgment interest because they seek specific performance, then they will drop their claim for specific performance and seek solely monetary damages, with prejudgment interest.

Plaintiffs rejoin that the law of Pennsylvania governs the award of prejudgment interest, and as such, the rate for prejudgment interest is 6%. More importantly, plaintiffs argue that defendants are not entitled to prejudgment interest because defendants seek specific performance.

54. To begin, the Court finds that the law of Pennsylvania governs the award of prejudgment interest. In Yohannon v. Keene Corp., 924 F.2d 1255 (3d Cir. 1991), the Third Circuit noted

that, pursuant to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), a federal court sitting in diversity must apply the forum state's law to determine what law governs the issue of prejudgment interest. Yohannon, 924 F.2d at 1265. In Yohannon, the Third Circuit affirmed the district court's determination that Pennsylvania courts would apply New Jersey law to decide "'substantive' issues of liability and damages" with respect to the underlying claim. Id.

Nevertheless, the Court held that the application of New Jersey law to decide the substantive issues of liability and damages was not dispositive of the specific question of whether a Pennsylvania court would apply its own or foreign law as to prejudgment interest. Id. With respect to that question, the Third Circuit held that the Supreme Court of Pennsylvania would view prejudgment interest as a matter of procedure, and therefore, it "predict[ed] that the Supreme Court of Pennsylvania will forego application of its usual conflicts analysis to determine the rule of decision" for prejudgment interest. Id. at 1267. As such, the Court held that Pennsylvania law shall "determine the amount and availability of pre-judgment interest in all cases brought in a Pennsylvania forum." Id.

55. The only difference between Yohannon and this case is that the underlying claim at issue in Yohannon was a tort claim (for injuries suffered as a result of asbestos exposure), and therefore, the issue of prejudgment interest was governed by

Pennsylvania Rule of Civil Procedure 238, which applies in tort cases, rather, than by 41 Pa. Cons. Stat. Ann. § 202, which applies here. That distinction, however, is irrelevant. Pennsylvania state courts have treated these provisions as being analogous to one another. See, e.g., Metropolitan Edison Co. v. Olde Home Manor, Inc., 334 Pa. Super. 25, 31, 482 A.2d 1062, 1065 (1985). Moreover, the purposes underlying prejudgment interest in both instances are the same — to discourage delay and effect prompt payment to deserving litigants. See Yohannon, 924 F.2d at 1266; Somerset Community Hosp. v. Allan B. Mitchell & Assocs., Inc., 685 A.2d 141, 148 (Pa. Super. 1996). Thus, the reasoning of Yohannon applies with equal force to the issue of prejudgment interest in contract cases.

56. Defendants' reliance on Kruzits v. Okuma Machine Tool Inc., 40 F.3d 52 (3d Cir. 1994), is misplaced. That case addressed the general choice of law rules applicable in Pennsylvania contract cases where the contract at issue contains a choice of law provision. Yohannon expressly predicted, however, that Pennsylvania courts "will forego application of its usual conflicts analysis" with regard to prejudgment interest. 924 F.2d at 1267 (emphasis added). Thus, Yohannon held that Pennsylvania courts would apply Pennsylvania law on prejudgment interest "without regard to its usual rules on choice of law . . . ." Id. (emphasis added). Thus, defendants' reliance on the statement in Kruzits that "Pennsylvania courts generally honor the intent of the contracting parties and enforce choice of law

provisions in contracts executed by them," 40 F.3d at 55, simply misses the mark because Pennsylvania's "general" or "usual" choice of law rules do not apply to the specific issue of prejudgment interest. As Yohannon makes clear, Pennsylvania prejudgment interest law applies to cases brought in Pennsylvania, even if another state's law will govern the substance of the underlying claim. For all of these reasons, Pennsylvania law governs the availability and amount of prejudgment interest, if any, that defendants may be entitled to in this action.

57. Plaintiffs contend that defendants cannot be awarded prejudgment because they seek specific performance. In support of this position, they cite to the case of Whitney Bros. Co. v. Sprafkin, 3 F.3d 530 (1st Cir. 1993). In Whitney Bros., the parties had entered into an agreement (governed by New Hampshire law) whereby the defendants would sell certain stocks to the plaintiffs. The basic issues before the trial court were the price of the stocks and other terms of the consideration. The trial court ordered the specific performance of the agreement, i.e., the sale and purchase of the stock, at terms reflective of the court's rulings. The court also specifically held that the defendants were not entitled to prejudgment interest on the purchase price.

The Court of Appeals for the First Circuit held that:

> Under [the section of New Hampshire law which provides for prejudgment interest], when a party wins pecuniary damages, he is entitled to prejudgment interest on the award.

> Defendants argue that by finding the stocks' purchase price to be that advocated by defendants, the court granted them pecuniary damages, however. Rather, plaintiffs were awarded specific performance of the contract at the price that the court found stipulated in their cross-motion for summary judgment.

3 F.3d at 535. Based on this reasoning, plaintiffs, in this case, argue that defendants are not entitled to prejudgment interest because defendants seek specific performance — the delivery of shares due to them under Count IV.

58. Under the circumstances of this case, the Court finds that it would be even less appropriate to award prejudgment interest. The complaining parties in Whitney Bros. at least were seeking the specific performance of the payment of funds, which served as the basis of their argument that the court had granted them pecuniary damages. Here, the defendants are actually seeking the specific performance of the issuance of stock certificates by the plaintiffs. Thus, the defendants lack even less of a colorable basis for their argument for prejudgment interest.

59. A review of the standards for awarding prejudgment interest under both Pennsylvania and Delaware law reveals that, like New Hampshire, both states limit prejudgment interest to pecuniary damages awarded for breach of contract, and thus, as in Whitney Bros., the defendants should be precluded from recovering such interest in a specific performance action. See Daset Mining Corp. v. Industrial Fuels Corp., 326 Pa. Super. 14, 35, 473 A.2d 584, 595 (1984); Citadel Holding Corp. v. Roven, 603 A.2d 818,

825-26 (Del. 1992). Indeed, the defendants have not cited a single case where a party was awarded prejudgment interest in conjunction with an order of specific performance of a contract. Thus, the Court will not order that defendants are entitled to prejudgment interest in this case.

60. Defendants argue that if the Court does not award them prejudgment interest because they seek specific performance, then they will drop their claim for specific performance and seek only monetary damages and prejudgment interest on these damages.

61. Under Pennsylvania law, "interest is allowable at the legal rate from the time payment is withheld after it has become the duty of the debtor to make such payment; allowance of such interest does not depend upon discretion but is a legal right." Palmgreen v. Palmer's Garage, Inc., 383 Pa. 105, 108, 117 A.2d 721, 722 (1955).

62. To determine when interest would be allowable in this case, the Court must perforce determine at what point plaintiffs became obligated to deliver the shares to defendants. To begin, the Court first notes that Section 5A(d) does not set forth a date on which the shares have to be delivered to defendants. In light of this fact, the Court must examine the evidence at trial to determine when, under the Merger Agreement, the plaintiffs became obligated to deliver the shares to defendants.

63. A review of the evidence indicates to this Court that plaintiffs and defendants assumed that the shares would be delivered once the calculations under Section 5A(d) were made and

all the parties confirmed that they were satisfied with these calculations. Indeed, plaintiffs' exhibits one through five demonstrate that the parties did not contemplate the delivery of the shares until the calculations were made. In a letter dated March 22, 1994, Eugene Schloss stated that he would deliver the shares promptly after Jeffrey Nicholas approved the calculations under Section 5A(d). However, Jeffrey Nicholas, by letter dated May 20, 1994, informed Schloss that defendants did not approve of the calculations under Section 5A(d); specifically, defendants believed that the calculations should not reflect a deduction for New Jersey state income tax. Nowhere in this initial correspondence preceding the receipt of the GMP Litigation proceeds did Mr. Nicholas ever demand delivery or partial delivery of the shares. It appears that the parties were acting under the assumption that delivery did not have to be made until the number of shares due under Section 5A(d) had been calculated.

64. It was not until October 12, 1995 that defendants, by a letter from Jeffrey Nicholas to Eugene Schloss, demanded that plaintiffs deliver to defendants all of the shares which were not the subject of the "state tax issue." Thus, it was not until this point in time that defendants could make a colorable argument that plaintiffs were obligated to deliver the shares under Section 5A(d). However, defendants' argument that the shares should have been delivered at the latest by October 12, 1995 is undermined by the fact that defendants raised a new issue with respect to the calculations in December 1995. In December

1995, it appears that the defendants challenged, for the first time, the calculations based on the fact that the calculations did not accurately reflect the consumption of NOLs by Nutramax on the federal level. Thus, even though defendants demanded the delivery of the shares that were not disputed as of October 12, 1995, the number of shares owing to defendants was changed by defendants' new challenge to the calculations. Thus, the Court finds that plaintiffs were not obligated to deliver the shares to defendants in December 1995 because the calculations under Section 5A(d) were still under dispute.

65. After December 1995, the parties continued to dispute the calculations under Section 5A(d). The new dispute, however, did not focus on the state income tax deduction, but rather it focussed on the federal tax deduction. In light of this continuing disagreement, and in light of the alleged misrepresentations made by defendants with respect to the Merger Agreement, plaintiffs filed suit in June 1996. The Court cannot find a date, between December 1995 and the commencement of this suit in June 1996, on which plaintiffs became obligated to deliver the shares to defendants. Indeed, the contract provided no time for the delivery of the shares under Section 5A(d), and the parties' conduct during this period does not indicate that the parties ever agreed on a date that the shares had to be delivered. Indeed, it was primarily defendants' incorrect interpretation of Section 5A(d) that caused the delay of the delivery of the Nutramax shares.

66. In sum, the Court finds that defendants have simply failed to produce any evidence upon which this Court can make a determination as to when the accruing of prejudgment interest should begin; any attempt to determine such a date would be arbitrary and capricious in the light of the fact that plaintiffs have failed to introduce any evidence as to the date on which any entitlement to prejudgment interest shall accrue. As such, the Court denies defendants' request for prejudgment interest.[3]

67. For the reasons set forth above, the Court hereby enters judgment in favor of the plaintiffs and against the defendants on Count IV of the plaintiffs' Complaint and all of the Counts of the defendants' Counterclaim. Pursuant to the provisions of Section 5A(d) of the Merger Agreement, the defendants are entitled to receive 27,410 shares of NutraMax common stock.

An appropriate Order follows.

____
Clarence C. Newcomer, J.

3. Further, the award of prejudgment interest is generally allowed for the purpose of discouraging delay and encouraging prompt payment of debts. In this case, the award of prejudgment interest would serve none of these purposes because defendants were primarily responsible for the delay in the delivery of the shares under § 5A(d).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPTOPICS LABORATORIES CORPORATION, et al. Plaintiffs, v. FRANK C. NICHOLAS, et al. Defendants.	: : : : : : : :	CIVIL ACTION NO. 96-8169

O R D E R

AND NOW, this day of September, 1997, upon consideration of the testimony of the witnesses, the admitted exhibits and the arguments of counsel, and consistent with the Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. Judgment is hereby entered in favor of the plaintiffs and against the defendants on Count IV of the plaintiffs' Complaint;

2. Judgment is hereby entered in favor of the plaintiffs and against the defendants on all Counts of the defendants' Counterclaim;

3. Pursuant to the provisions of Section 5A(d) of the Agreement and Plan of Merger dated March 2, 1993 by and among Nutramax Products, Inc., Nutramax Acquisition Corporation, and Optopics Laboratories Corporation, the defendants are entitled to 27,410 shares of Nutramax common stock; and

4. Execution and enforcement of this judgment shall not be stayed pending resolution of the arbitration proceeding on Counts I, II and III of plaintiffs' Complaint.

AND IT IS SO ORDERED.

____

Clarence C. Newcomer, J.