

1 Tyler J. Woods (State Bar No. 232464)
twoods@trialnewport.com
2 Richard H. Hikida (State Bar No. 196149)
rhikida@trialnewport.com
3 Scott J. Ferrell (State Bar No. 202091)
sferrell@trialnewport.com
4 **NEWPORT TRIAL GROUP**
A Professional Corporation
5 4100 Newport Place, Suite 800
Newport Beach, CA 92660
6 Tel: (949) 706-6464
Fax: (949) 706-6469

7 Attorneys for Plaintiffs
8

9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 THERMOLIFE INTERNATIONAL, LLC
and THE BOARD OF TRUSTEES OF
12 THE LELAND STANFORD JUNIOR
UNIVERSITY,

13 Plaintiffs,

14 vs.

15 SAN NUTRITION CORP.,

16 Defendant
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Case No. **'13CV2121 MMAWMC**

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

1 Plaintiff ThermoLife International, LLC and The Board of Trustees of the Leland
2 Stanford Junior University (collectively “Plaintiffs”) hereby alleges for their Complaint
3 against SAN Nutrition Corp. (“Defendant”), on personal knowledge as to their own
4 activities and on information and belief as to the activities of others, as follows:

5 **I. THE PARTIES**

6 1. Plaintiff ThermoLife International, LLC (“ThermoLife”) is a limited
7 liability company organized and existing under the laws of Arizona, with a place of
8 business at 1811 Ocean Front Walk in Venice, California, 90291.

9 2. Plaintiff The Board of Trustees of the Leland Stanford Junior University
10 (“Stanford University”) is an institution of higher education having powers under the
11 laws of the State of California, with a place of business at 1705 El Camino Real in Palo
12 Alto, California, 94306-1106.

13 3. Plaintiff ThermoLife is the exclusive licensee of the following United
14 States Patents:

- 15 a. Patent No. 6,117,872, titled “Enhancement of Exercise Performance by
16 Augmenting Endogenous Nitric Oxide Production or Activity”;
17 b. Patent No. 5,891,459, titled “Enhancement of Vascular Function By
18 Modulation of Endogenous Nitric Oxide Production or Activity”; and
19 c. Patent No. 7,452,916, titled “Enhancement of Vascular Function By
20 Modulation of Endogenous Nitric Oxide Production or Activity.”

21 4. The above patents are owned by Plaintiff Stanford University and Plaintiff
22 ThermoLife exclusively licenses the patents from Plaintiff Stanford University.

23 5. The above patents are referred to herein as the “patents in suit.”

24 6. Plaintiff ThermoLife has been given the right by Plaintiff Stanford
25 University to institute suit with respect to infringement of the patents in suit, including
26 this suit against Defendant.

27 7. ThermoLife is pursuing this action and has the right to join Plaintiff
28 Stanford University as a party to this action.

A. DIRECT INFRINGEMENTS

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2 14. Defendant's employees, agents, representatives and other persons
3 sponsored by or who endorse Defendant and Defendant's products in advertising and
4 marketing activities, have taken, used, and orally administered the accused products.

5 15. The accused products are formulated, made, manufactured, shipped,
6 distributed, advertised, offered for sale, and sold by Defendant to include certain
7 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
8 of one or more of the patents in suit.

9 16. The accused products are formulated, made, manufactured, shipped,
10 distributed, advertised, offered for sale, and sold by Defendant to include specific
11 ingredients for certain purposes that, by virtue of their inclusion in the products for such
12 purposes, infringe one or more claims of one or more of the patents in suit, and as a
13 result, when Defendant's employees, agents, representatives and other persons
14 sponsored by or who endorse Defendant and Defendant's products in advertising and
15 marketing activities orally administer the accused products, they are practicing the
16 methods disclosed in those claims.

17 17. These infringing ingredients, and/or combinations thereof, include, without
18 limitation, L-Arginine, Di-L-Arginine-L-Malate, Di-L-Arginine Orotate, Grape,
19 Ornithine AKG, Arginine AKG, Glutamine, and L-Valine, as set forth on Defendant's
20 labels for the accused products.

21 18. The purposes for which these ingredients are included in the accused
22 products are, without limitation, to enhance nitric oxide production, to improve nitric
23 oxide activity, to produce nitric oxide, to boost nitric oxide levels in the body, and to
24 enhance physical performance.

25 19. Defendant has encouraged and/or is aware of the fact that its employees,
26 agents, representatives and other persons sponsored by Defendant or who endorse
27 Defendant and Defendant's products in advertising and marketing activities orally
28 administer the accused products and practice the methods disclosed in one or more

1 claim of one or more of the patents in suit, and these employees, agents, representatives
2 and other persons sponsored by Defendant or who endorse Defendant and Defendant's
3 products in advertising and marketing activities are acting under Defendant's direction
4 and control when practicing those methods.

5 20. Therefore, Defendant is a direct infringer of one or more claims of one or
6 more of the patents in suit, and Defendant practices the methods as set forth in one or
7 more claims of one or more of the patents in suit.

8 **B. INDIRECT INFRINGEMENTS**

9 21. End-users of Defendant's accused products are also direct infringers of one
10 or more claims of one or more of the patents in suit.

11 22. End-users of Defendant's accused products have taken, used, and orally
12 administered the accused products.

13 23. The accused products are formulated, made, manufactured, shipped,
14 distributed, advertised, offered for sale, and/or sold by Defendant to include certain
15 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
16 of one or more of the patents in suit.

17 24. The accused products are formulated, made, manufactured, shipped,
18 distributed, advertised, offered for sale, and/or sold by Defendant to include specific
19 ingredients for certain purposes that, because of their inclusion in the products for such
20 purposes, infringe one or more claims of one or more of the patents in suit, and as a
21 result, when end-users of Defendant's accused products orally administer the accused
22 products, they are practicing the methods disclosed in those claims.

23 25. Defendant's labels and advertising for the accused products explain the
24 elements and essential elements of one or more of the methods disclosed in the patents
25 in suit, and those labels and advertising statements encourage, urge, and induce the
26 accused products' end-users to purchase and orally ingest the products to practice those
27 methods, and end-users do practice those methods.

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1 26. Defendant has therefore specifically intended to cause these end-users to
2 directly infringe the claimed methods of these patents, and has in fact urged them to do
3 so.

4 27. The accused products are not suitable for non-infringing uses, and none of
5 Defendant's labels or advertisements for the accused products disclose any uses for the
6 products, nor for the compounds disclosed in the claimed methods of the patents in suit,
7 that do not infringe upon such methods.

8 28. The inclusion of the specific infringing compounds in the products is
9 material to practicing such methods.

10 29. Defendant has knowledge that the accused products are especially adapted
11 by end-users of the products for the practicing of such methods, and, indeed, Defendant
12 encourages, urges, and induces the accused products' end-users to purchase and orally
13 administer the accused products to practice such methods, and has done so in the past.

14 30. Defendant has intentionally and knowingly induced, encouraged, and
15 urged end-users of the accused products to purchase and orally administer the accused
16 products for the purposes of practicing the claimed methods, by having them orally
17 ingest the compounds disclosed in such claims.

18 31. Defendant has knowledge of the fact that the accused products, particularly
19 as administered, infringe on one or more claims of the patents in suit.

20 32. Defendant has direct, firsthand knowledge of the patents in suit.

21 33. For example and without limitation, Defendant has had knowledge of the
22 patents in suit since November 2006, when an ongoing settlement of a patent
23 infringement case relating to at least some of the patents in suit against Herbalife, a
24 well-known company in Defendant's industry, was announced in press releases issued
25 in a highly publicized manner. Defendant's employees, agents, and representatives saw
26 the press releases and were aware of the settlement and thus the patents in suit.

27 34. By way of further example and without limitation, Defendant has sold its
28 products through retailers, including online retailers, and those retailers have sold other

1 companies' products whose labels and/or advertisements have been prominently
2 marked with one or more of the patents in suit, by patent number, including without
3 limitation the products manufactured and sold by Herbalife, Daily Wellness, and
4 Vitality Research Labs. Defendant's employees, agents, and representatives have seen
5 these labels and advertisements and, thus, Defendant has direct knowledge of the
6 patents in suit.

7 35. Defendant has brazenly and willfully decided to infringe the patents in suit
8 despite knowledge of the patents' existence and its knowledge of the accused products'
9 infringements of the patents.

10 36. At a minimum, and in the alternative, Plaintiffs plead that Defendant
11 willfully blinded itself to the infringing nature of the accused products' sales.

12 37. Defendant has not ceased its own direct infringement, nor its contributory
13 infringement or inducement of infringement by end-users, despite its knowledge of the
14 patents in suit and the end-users' infringing activities with respect to the patents in suit.

15 38. United States Patent No. 5,428,070 and Patent No. 5,945,452 and Patent
16 No. 6,646,006, patents which Defendant has had prior knowledge of, are also licensed
17 exclusively to Plaintiff ThermoLife by Stanford University, to include the right to sue
18 for infringement, and Plaintiffs will seek to amend this Complaint if facts revealing
19 Defendant's infringements of these patents are ascertained.

20 **IV. FIRST CAUSE OF ACTION**

21 **Infringement of U.S. Patent No. 5,891,459**

22 39. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs
23 of this Complaint as if fully set forth herein.

24 40. Defendant has in the past and still is literally and directly infringing or
25 directly infringing under the doctrine of equivalents one or more claims of United
26 States Patent No. 5,891,459 by making, using, selling, and offering for sale the accused
27 products, and will continue to do so unless enjoined by this Court.
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1 41. In addition to the fact that Defendant makes, uses, sells, and offers for sale
2 the accused products, further examples of Defendant's direct infringements include,
3 without limitation, the fact that Defendant has encouraged and/or is aware of the fact
4 that its employees, agents, representatives and other persons sponsored by or who
5 endorse Defendant and Defendant's products in advertising and marketing activities
6 orally administer the accused products and practice the methods disclosed in one or
7 more claims of United States Patent No. 5,891,459, and these employees, agents,
8 representatives and other persons sponsored by or who endorse Defendant and
9 Defendant's products in advertising and marketing activities are acting under
10 Defendant's direction and control when practicing those methods.

11 42. Defendant has encouraged and is aware of these persons' oral
12 administration of the accused products for these purposes, these persons are acting
13 under Defendant's direction and control, and therefore Defendant is directly practicing
14 the methods disclosed in United States Patent No. 5,891,459.

15 43. End-users of Defendant's accused products are also direct infringers of one
16 or more claims of United States Patent No. 5,891,459.

17 44. End-users of Defendant's accused products have taken, used, and orally
18 administered the accused products.

19 45. The accused products are formulated, made, manufactured, shipped,
20 distributed, advertised, offered for sale, and sold by Defendant to include certain
21 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
22 of United States Patent No. 5,891,459.

23 46. The accused products is formulated, made, manufactured, shipped,
24 distributed, advertised, offered for sale, and sold by Defendant to include specific
25 ingredients for purposes that, by their inclusion in the products for such purposes,
26 infringe one or more claims of United States Patent No. 5,891,459, and as a result,
27 when end-users of Defendant's accused products orally administer the accused
28 products, they are practicing the methods disclosed in one or more claims of that patent.

1 47. Defendant's labels and advertising for the accused products explain the
2 elements and essential elements of the methods disclosed in United States Patent No.
3 5,891,459, and those labels and advertising statements encourage, urge, and induce the
4 accused products' end-users to purchase and orally ingest the products to practice those
5 methods, and end-users do practice those methods.

6 48. Defendant has therefore specifically intended to cause these end-users to
7 directly infringe the claimed methods of United States Patent No. 5,891,459, and has in
8 fact urged them to do so.

9 49. The accused products are not suitable for non-infringing uses, and none of
10 Defendant's labels or advertisements for the accused products disclose any uses for the
11 products, nor for the compounds disclosed in the claimed methods, that do not infringe
12 upon such methods.

13 50. The inclusion of these specific infringing compounds in the products is
14 material to practicing such methods.

15 51. Defendant has knowledge that the accused products are especially adapted
16 by end-users of the products for the practicing of such methods, and, indeed, Defendant
17 encourages, urges, and induces the accused products' end-users to purchase and orally
18 administer the accused products to practice such methods, and have done so in the past.

19 52. Defendant has intentionally and knowingly induced, encouraged, and
20 urged end-users of the accused products to purchase and orally administer the accused
21 products for the purposes disclosed in one or more claims of United States Patent No.
22 5,891,459, by having them orally ingest the compounds disclosed in such claims.

23 53. Defendant has knowledge of the fact that the accused products, particularly
24 as administered, infringe on one or more claims of United States Patent No. 5,891,459.

25 54. Defendant also has direct, firsthand knowledge of United States Patent No.
26 5,891,459.

27 55. Defendant's activities have been without express or implied license by
28 Plaintiff.

1 56. As a result of Defendant's acts of infringement, Plaintiffs have suffered
2 and will continue to suffer damages in an amount to be proved at trial.

3 57. As a result of Defendant's acts of infringement, Plaintiffs have been and
4 will continue to be irreparably harmed by Defendant's infringements, which will
5 continue unless Defendant is enjoined by this Court.

6 58. Defendant's past infringements and/or continuing infringements have been
7 deliberate and willful, and this case is therefore an exceptional case, which warrants an
8 award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

9 **V. SECOND CAUSE OF ACTION**

10 **Infringement of U.S. Patent No. 7,452,916**

11 59. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs
12 of this Complaint as if fully set forth herein.

13 60. Defendant has in the past and still is literally and directly infringing or
14 directly infringing under the doctrine of equivalents one or more claims of United
15 States Patent No. 7,452,916 by making, using, selling, and offering for sale the accused
16 products, and will continue to do so unless enjoined by this Court.

17 61. In addition to the fact that Defendant makes, uses, sells, and offers for sale
18 the accused products, further examples of Defendant's direct infringements include,
19 without limitation, the fact that Defendant has encouraged and/or is aware of the fact
20 that its employees, agents, representatives and other persons sponsored by or who
21 endorse Defendant and Defendant's products in advertising and marketing activities
22 orally administer the accused products and practice the methods disclosed in one or
23 more claims of United States Patent No. 7,452,916, and these employees, agents,
24 representatives and other persons sponsored by or who endorse Defendant and
25 Defendant's products in advertising and marketing activities are acting under
26 Defendant's direction and control when practicing those methods.

27 62. Defendant has encouraged and is aware of these persons' oral
28 administration of the accused products for these purposes, these persons are acting

1 under Defendant's direction and control, and therefore Defendant is directly practicing
2 the methods disclosed in United States Patent No. 7,452,916.

3 63. End-users of Defendant's accused products are also direct infringers of one
4 or more claims of United States Patent No. 7,452,916.

5 64. End-users of Defendant's accused products have taken, used, and orally
6 administered the accused products.

7 65. The accused products are formulated, made, manufactured, shipped,
8 distributed, advertised, offered for sale, and sold by Defendant to include certain
9 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
10 of United States Patent No. 7,452,916.

11 66. The accused products is formulated, made, manufactured, shipped,
12 distributed, advertised, offered for sale, and sold by Defendant to include specific
13 ingredients for purposes that, by their inclusion in the products for such purposes,
14 infringe one or more claims of United States Patent No. 7,452,916, and as a result,
15 when end-users of Defendant's accused products orally administer the accused
16 products, they are practicing the methods disclosed in one or more claims of that patent.

17 67. Defendant's labels and advertising for the accused products explain the
18 elements and essential elements of the methods disclosed in United States Patent No.
19 7,452,916, and those labels and advertising statements encourage, urge, and induce the
20 accused products' end-users to purchase and orally ingest the products to practice those
21 methods, and end-users do practice those methods.

22 68. Defendant has therefore specifically intended to cause these end-users to
23 directly infringe the claimed methods of United States Patent No. 7,452,916, and has in
24 fact urged them to do so.

25 69. The accused products are not suitable for non-infringing uses, and none of
26 Defendant's labels or advertisements for the accused products disclose any uses for the
27 products, nor for the compounds disclosed in the claimed methods, that do not infringe
28 upon such methods.

1 70. The inclusion of these specific infringing compounds in the products is
2 material to practicing such methods.

3 71. Defendant has knowledge that the accused products are especially adapted
4 by end-users of the products for the practicing of such methods, and, indeed, Defendant
5 encourages, urges, and induces the accused products' end-users to purchase and orally
6 administer the accused products to practice such methods, and have done so in the past.

7 72. Defendant has intentionally and knowingly induced, encouraged, and
8 urged end-users of the accused products to purchase and orally administer the accused
9 products for the purposes disclosed in one or more claims of United States Patent No.
10 7,452,916, by having them orally ingest the compounds disclosed in such claims.

11 73. Defendant has knowledge of the fact that the accused products, particularly
12 as administered, infringe on one or more claims of United States Patent No. 7,452,916.

13 74. Defendant also has direct, firsthand knowledge of United States Patent No.
14 7,452,916.

15 75. Defendant's activities have been without express or implied license by
16 Plaintiff.

17 76. As a result of Defendant's acts of infringement, Plaintiffs have suffered
18 and will continue to suffer damages in an amount to be proved at trial.

19 77. As a result of Defendant's acts of infringement, Plaintiffs have been and
20 will continue to be irreparably harmed by Defendant's infringements, which will
21 continue unless Defendant is enjoined by this Court.

22 78. Defendant's past infringements and/or continuing infringements have been
23 deliberate and willful, and this case is therefore an exceptional case, which warrants an
24 award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

25 **VI. THIRD CAUSE OF ACTION**

26 **Infringement of U.S. Patent No. 6,117,872**

27 79. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs
28 of this Complaint as if fully set forth herein.

1 80. Defendant has in the past and still is literally and directly infringing or
2 directly infringing under the doctrine of equivalents one or more claims of United
3 States Patent No. 6,117,872 by making, using, selling, and offering for sale the accused
4 products, and will continue to do so unless enjoined by this Court.

5 81. In addition to the fact that Defendant makes, uses, sells, and offers for sale
6 the accused products, further examples of Defendant's direct infringements include,
7 without limitation, the fact that Defendant has encouraged and/or is aware of the fact
8 that its employees, agents, representatives and other persons sponsored by or who
9 endorse Defendant and Defendant's products in advertising and marketing activities
10 orally administer the accused products and practice the methods disclosed in one or
11 more claims of United States Patent No. 6,117,872, and these employees, agents,
12 representatives and other persons sponsored by or who endorse Defendant and
13 Defendant's products in advertising and marketing activities are acting under
14 Defendant's direction and control when practicing those methods.

15 82. Defendant has encouraged and is aware of these persons' oral
16 administration of the accused products for these purposes, these persons are acting
17 under Defendant's direction and control, and therefore Defendant is directly practicing
18 the methods disclosed in United States Patent No. 6,117,872.

19 83. End-users of Defendant's accused products are also direct infringers of one
20 or more claims of United States Patent No. 6,117,872.

21 84. End-users of Defendant's accused products have taken, used, and orally
22 administered the accused products.

23 85. The accused products are formulated, made, manufactured, shipped,
24 distributed, advertised, offered for sale, and sold by Defendant to include certain
25 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
26 of United States Patent No. 6,117,872.

27 86. The accused products is formulated, made, manufactured, shipped,
28 distributed, advertised, offered for sale, and sold by Defendant to include specific

1 ingredients for purposes that, by their inclusion in the products for such purposes,
2 infringe one or more claims of United States Patent No. 6,117,872, and as a result,
3 when end-users of Defendant's accused products orally administer the accused
4 products, they are practicing the methods disclosed in one or more claims of that patent.

5 87. Defendant's labels and advertising for the accused products explain the
6 elements and essential elements of the methods disclosed in United States Patent No.
7 6,117,872, and those labels and advertising statements encourage, urge, and induce the
8 accused products' end-users to purchase and orally ingest the products to practice those
9 methods, and end-users do practice those methods.

10 88. Defendant has therefore specifically intended to cause these end-users to
11 directly infringe the claimed methods of United States Patent No. 6,117,872, and has in
12 fact urged them to do so.

13 89. The accused products are not suitable for non-infringing uses, and none of
14 Defendant's labels or advertisements for the accused products disclose any uses for the
15 products, nor for the compounds disclosed in the claimed methods, that do not infringe
16 upon such methods.

17 90. The inclusion of these specific infringing compounds in the products is
18 material to practicing such methods.

19 91. Defendant has knowledge that the accused products are especially adapted
20 by end-users of the products for the practicing of such methods, and, indeed, Defendant
21 encourages, urges, and induces the accused products' end-users to purchase and orally
22 administer the accused products to practice such methods, and have done so in the past.

23 92. Defendant has intentionally and knowingly induced, encouraged, and
24 urged end-users of the accused products to purchase and orally administer the accused
25 products for the purposes disclosed in one or more claims of United States Patent No.
26 6,117,872, by having them orally ingest the compounds disclosed in such claims.

27 93. Defendant has knowledge of the fact that the accused products, particularly
28 as administered, infringe on one or more claims of United States Patent No. 6,117,872.

1 94. Defendant also has direct, firsthand knowledge of United States Patent No.
2 6,117,872.

3 95. Defendant's activities have been without express or implied license by
4 Plaintiff.

5 96. As a result of Defendant's acts of infringement, Plaintiffs have suffered
6 and will continue to suffer damages in an amount to be proved at trial.

7 97. As a result of Defendant's acts of infringement, Plaintiffs have been and
8 will continue to be irreparably harmed by Defendant's infringements, which will
9 continue unless Defendant is enjoined by this Court.

10 98. Defendant's past infringements and/or continuing infringements have been
11 deliberate and willful, and this case is therefore an exceptional case, which warrants an
12 award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

13 **VIII. PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiffs pray for entry of judgment against Defendant as
15 follows:

16 1. A declaration that Defendant has infringed the patents in suit, under 35
17 U.S.C. §§ 271 *et seq.*;

18 2. That injunctions, preliminary and permanent, be issued by this Court
19 restraining Defendant, its officers, agents, servants, directors, and employees, and all
20 persons in active concert or participation with each, from directly or indirectly
21 infringing, or inducing or contributing to the infringement by others of, the patents in
22 suit;

23 3. That Defendant be required to provide to Plaintiffs an accounting of all
24 gains, profits, and advantages derived by Defendant's infringement of the patents in
25 suit, and that Plaintiffs be awarded damages adequate to compensate Plaintiffs for the
26 wrongful infringing acts by Defendant, in accordance with 35 U.S.C. § 284;

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DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs hereby demand a jury trial for all issues in this case that properly are subject to a jury trial.

Respectfully submitted,

NEWPORT TRIAL GROUP
A Professional Corporation



By: Tyler J. Woods
Attorneys for Plaintiffs

Dated: September 10, 2013

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