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12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15

16 **THERMOLIFE INTERNATIONAL, LLC**

17 Plaintiff,

18 vs.

19 **4EVER FIT,**

20 Defendant.
21
22

Case No. '13CV2142 JAH BLM

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

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1 Plaintiff Thermolife International, LLC (“Plaintiff”) hereby alleges for its
2 Complaint against 4Ever Fit (“Defendant”), on personal knowledge as to its own
3 activities and on information and belief as to the activities of others, as follows:

4 **I. THE PARTIES**

5 1. Plaintiff is a limited liability company organized and existing under
6 the laws of Arizona, with a place of business at 1811 Ocean Front Walk in Venice,
7 California, 90291.

8 2. Plaintiff is and was at all relevant times the exclusive licensee of
9 United States Patent No. 6,117,872, titled “Enhancement of Exercise Performance
10 by Augmenting Endogenous Nitric Oxide Production or Activity,” referred to
11 herein as the “patent in suit.”

12 3. The above patent is and was owned by The Board of Trustees of the
13 Leland Stanford Junior University (“Stanford University”) and Plaintiff exclusively
14 licenses and licensed at all relevant times the patent from Stanford University.

15 4. Plaintiff has been given the right by Stanford University to institute
16 suit with respect to infringements of the patent in suit, including this suit against
17 Defendant.

18 5. Defendant is a corporation organized and existing under the laws of
19 Arizona with a principal place of business at 24654 N. Lake Pleasant Pkwy. #103-
20 196 in Peoria, Arizona, 85383.

21 **II. JURISDICTION AND VENUE**

22 6. This is an action for patent infringement arising under the patent laws
23 of the United States, Title 35 of the United States Code. Accordingly, this Court has
24 subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

25 7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and
26 1400.

27 8. This Court has personal jurisdiction over Defendant. By way of
28 example and without limitation, Defendant, directly or through intermediaries

1 (including distributors, retailers, and others), makes, manufactures, ships,
 2 distributes, advertises, markets, offers for sale, and/or sells dietary supplement
 3 products that infringe on one or more claims of the patent in suit (hereinafter the
 4 “accused products”), which include without limitation products sold under the
 5 “AKG2” and “L-Arginine 500 mg” brand names, in the United States, the State of
 6 California, and the Southern District of California.

7 9. By way of further example and without limitation, Defendant has
 8 purposefully and voluntarily placed the accused products into the stream of
 9 commerce with the expectation that they will be purchased in the Southern District
 10 of California, and the products are actually purchased in the Southern District of
 11 California.

12 **III. THE DEFENDANT’S INFRINGEMENTS**

13 10. Defendant has committed the tort of patent infringement within the
 14 State of California, and more particularly, within the Southern District of
 15 California, by virtue of the fact that Defendant has formulated, made,
 16 manufactured, shipped, distributed, advertised, offered for sale, and/or sold the
 17 accused products in this District, and continues to do so.

18 **A. DIRECT INFRINGEMENTS**

19 11. Defendant’s employees, agents, representatives and other persons
 20 sponsored by or who endorse Defendant and Defendant’s products in advertising
 21 and marketing activities, have taken, used, and orally administered the accused
 22 products.

23 12. 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
 26 claims of one or more of the patent in suit.

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

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1 ingredients for certain purposes that, by virtue of their inclusion in the products for
2 such purposes, infringe one or more claims of the patent in suit, and as a result,
3 when Defendant's employees, agents, representatives and other persons sponsored
4 by or who endorse Defendant and Defendant's products in advertising and
5 marketing activities orally administer the accused products, they are practicing and
6 they practiced the methods disclosed in those claims.

7 14. The purposes for which these ingredients are included in the accused
8 products are and were, without limitation, to enhance nitric oxide production, to
9 improve nitric oxide activity, to produce nitric oxide, to boost nitric oxide levels in
10 the body, and to enhance physical performance.

11 15. Defendant encouraged and/or is aware of the fact that its employees,
12 agents, representatives and other persons sponsored by Defendant or who endorse
13 Defendant and Defendant's products in advertising and marketing activities orally
14 administered and administer the accused products and practice and practiced the
15 methods disclosed in one or more claims of the patent in suit, and these employees,
16 agents, representatives and other persons sponsored by Defendant or who endorse
17 Defendant and Defendant's products in advertising and marketing activities are and
18 were acting under Defendant's direction and control when practicing those
19 methods.

20 16. Therefore, Defendant is and was a direct infringer of one or more
21 claims of the patent in suit, and Defendant practices and practiced the methods as
22 set forth in one or more claims of the patent in suit.

23 **B. INDIRECT INFRINGEMENTS**

24 17. End-users of Defendant's accused products were and are also direct
25 infringers of one or more claims of the patent in suit.

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

28 19. The accused products are and were formulated, made, manufactured,

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1 shipped, distributed, advertised, offered for sale, and/or sold by Defendant to
2 include certain ingredients that, by virtue of their inclusion in the products, infringe
3 and infringed one or more claims of the patent in suit.

4 20. The accused products are and were formulated, made, manufactured,
5 shipped, distributed, advertised, offered for sale, and/or sold by Defendant to
6 include specific ingredients for certain purposes that, because of their inclusion in
7 the products for such purposes, infringe and infringed one or more claims of the
8 patent in suit, and as a result, when end-users of Defendant's accused products
9 orally administer and administered the accused products, they are and were
10 practicing the methods disclosed in those claims.

11 21. Defendant's labels and advertising for the accused products explain
12 and explained the elements and essential elements of one or more of the methods
13 disclosed in the patent in suit, and those labels and advertising statements
14 encourage, urge, and induce the accused products' end-users, and did so in the past,
15 to purchase and orally ingest the products to practice those methods, and end-users
16 do and did practice those methods.

17 22. Defendant has therefore specifically intended to cause these end-users
18 to directly infringe the claimed methods of this patent, and in fact urged them to do
19 so.

20 23. The accused products are and were not suitable for non-infringing
21 uses, and none of Defendant's labels or advertisements for the accused products
22 disclose or disclosed any uses for the products, nor for the compounds disclosed in
23 the claimed methods of the patent in suit, that do not infringe upon such methods.

24 24. The inclusion of the specific infringing compounds in the products is
25 and was material to practicing such methods.

26 25. Defendant has and had knowledge that the accused products are and
27 were especially adapted by end-users of the products for the practicing of such
28 methods, and, indeed, Defendant encourages, urges, and induces the accused

1 products' end-users to purchase and orally administer the accused products to
2 practice such methods, and has done so in the past.

3 26. Defendant intentionally and knowingly induced, encouraged, and
4 urged end-users of the accused products to purchase and orally administer the
5 accused products for the purposes of practicing the claimed methods, by having
6 them orally ingest the compounds disclosed in such claims.

7 27. Defendant has and had knowledge of the fact that the accused
8 products, particularly as administered, infringe on one or more claims of the patent
9 in suit.

10 28. Defendant has and had direct, firsthand knowledge of the patent in
11 suit.

12 29. For example and without limitation, Plaintiff believes Defendant has
13 had knowledge of the patent in suit since November 2006, when an ongoing
14 settlement of a patent infringement case relating to the patent suit and other related
15 patents against Herbalife, a well-known company in Defendant's industry, was
16 announced in press releases issued in a highly publicized manner. Plaintiff believes
17 Defendant's employees, agents, and representatives saw the press releases and were
18 aware of the settlement and thus the patent in suit.

19 30. By way of further example and without limitation, Defendant sold its
20 products through retailers, including online retailers, and those retailers have sold
21 other companies' products whose labels and/or advertisements have been
22 prominently marked with the patent in suit and/or related patents, by patent number,
23 including without limitation, upon information and belief, the products
24 manufactured and sold by Herbalife, Daily Wellness, and Vitality Research Labs.
25 Defendant's employees, agents, and representatives have seen these labels and
26 advertisements and, thus, Defendant has and had direct knowledge of the patent in
27 suit.

28 31. By way of further example and without limitation, Defendant received

1 written notice of the patent in suit from Plaintiff in April 2013.

2 32. Defendant brazenly and willfully decided to infringe the patent in suit
3 despite knowledge of the patent's existence and its knowledge of the accused
4 products' infringements of the patent.

5 33. At a minimum, and in the alternative, Plaintiff pleads that Defendant
6 willfully blinded itself to the infringing nature of the accused products' sales.

7 34. Defendant did not cease its own direct infringement, nor its
8 contributory infringement or inducement of infringement by end-users, despite its
9 knowledge of the patent in suit and the end-users' infringing activities with respect
10 to the patent in suit.

11 **IV. FIRST CAUSE OF ACTION**

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

13 35. Plaintiff repeats and re-alleges the allegations of the foregoing
14 paragraphs of this Complaint as if fully set forth herein.

15 36. Defendant has in the past and still is literally and directly infringing or
16 directly infringing under the doctrine of equivalents one or more claims of United
17 States Patent No. 6,117,872 by making, using, selling, and offering for sale the
18 accused products, or any one of those products, and will continue to do so unless
19 enjoined by this Court.

20 37. In addition to the fact that Defendant makes, uses, sells, and offers for
21 sale the accused products, further examples of Defendant's direct infringements
22 include, without limitation, the fact that Defendant has encouraged and/or is aware
23 of the fact that its employees, agents, representatives and other persons sponsored
24 by or who endorse Defendant and Defendant's products in advertising and
25 marketing activities orally administer the accused products and practice the
26 methods disclosed in one or more claims of United States Patent No. 6,117,872,
27 and these employees, agents, representatives and other persons sponsored by or
28 who endorse Defendant and Defendant's products in advertising and marketing

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1 activities are acting under Defendant's direction and control when practicing those
2 methods.

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

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

9 40. End-users of Defendant's accused products have taken, used, and
10 orally administered the accused products.

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

15 42. The accused products is formulated, made, manufactured, shipped,
16 distributed, advertised, offered for sale, and sold by Defendant to include specific
17 ingredients for purposes that, by their inclusion in the products for such purposes,
18 infringe one or more claims of United States Patent No. 6,117,872, and as a result,
19 when end-users of Defendant's accused products orally administer the accused
20 products, they are practicing the methods disclosed in one or more claims of that
21 patent.

22 43. Defendant's labels and advertising for the accused products explain the
23 elements and essential elements of the methods disclosed in United States Patent
24 No. 6,117,872, and those labels and advertising statements encourage, urge, and
25 induce the accused products' end-users to purchase and orally ingest the products to
26 practice those methods, and end-users do practice those methods.

27 44. Defendant has therefore specifically intended to cause these end-users
28 to directly infringe the claimed methods of United States Patent No. 6,117,872, and

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1 has in fact urged them to do so.

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

6 46. The inclusion of these specific infringing compounds in the products is
7 material to practicing such methods.

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

13 48. Defendant has intentionally and knowingly induced, encouraged, and
14 urged end-users of the accused products to purchase and orally administer the
15 accused products for the purposes disclosed in one or more claims of United States
16 Patent No. 6,117,872, by having them orally ingest the compounds disclosed in
17 such claims.

18 49. Defendant has knowledge of the fact that the accused products,
19 particularly as administered, infringe on one or more claims of United States Patent
20 No. 6,117,872.

21 50. Defendant also has direct, firsthand knowledge of United States Patent
22 No. 6,117,872.

23 51. Defendant's activities have been without express or implied license by
24 Plaintiff.

25 52. As a result of Defendant's acts of infringement, Plaintiff has suffered
26 and will continue to suffer damages in an amount to be proved at trial.

27 53. As a result of Defendant's acts of infringement, Plaintiff has been and
28 will continue to be irreparably harmed by Defendant's infringements, which will

1 continue unless Defendant is enjoined by this Court.

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

6 **V. PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff prays for entry of judgment against Defendant as
8 follows:

9 1. A declaration that Defendant has infringed the patent in suit, under 35
10 U.S.C. §§271 et seq.;

11 2. That injunctions, preliminary and permanent, be issued by this Court
12 restraining Defendant, its officers, agents, servants, directors, and employees, and
13 all persons in active concert or participation with each, from directly or indirectly
14 infringing, or inducing or contributing to the infringement by others of, the patent
15 in suit;

16 3. That Defendant be required to provide to Plaintiff an accounting of all
17 gains, profits, and advantages derived by Defendant's infringement of the patent in
18 suit, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the
19 wrongful infringing acts by Defendant, in accordance with 35 U.S.C. §284;

20 4. That the damages awarded to Plaintiff with regard to the patent in suit
21 be increased up to three times, in view of Defendant's willful infringement, in
22 accordance with 35 U.S.C. §284;

23 5. That this case be declared to be exceptional in favor of Plaintiff under
24 35 U.S.C. §285, and that Plaintiff be awarded its reasonable attorneys' fees and
25 other expenses incurred in connection with this action;

26 6. That Plaintiff be awarded its interest and costs of suit incurred in this
27 action;

28 7. Compensatory damages;

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8. Punitive damages; and

9. That Plaintiff be awarded such other and further relief as this Court may deem just and proper.

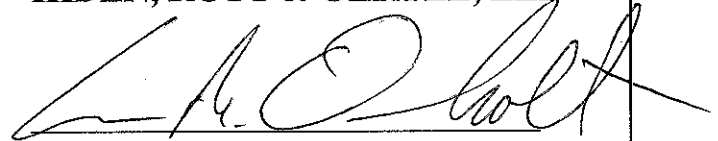
DEMAND FOR JURY TRIAL

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

DATED: September 12, 2013

HIDEN, ROTT & OERTLE, LLP

By:



Eric M. Overholt, Esq.
Attorneys for Plaintiff

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The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

THERMOLIFE INTERNATIONAL, LLC

(b) County of Residence of First Listed Plaintiff Los Angeles County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

SEE ATTACHMENT

DEFENDANTS

4EVER FIT

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) '13CV2142 JAH BLM

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status. Includes categories like Citizen of This State, Citizen of Another State, and Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large grid table for nature of suit with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PERSONAL INJURY, PERSONAL PROPERTY, LABOR, IMMIGRATION, FOREIGN LIABILITY, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. section 1331, 1338, 1367, 5:1126. Brief description of cause: Patent Litigation

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: X Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Hon. Janis L. Sammartino DOCKET NUMBER 13-CV-651

DATE 9/12/13 SIGNATURE OF ATTORNEY OF RECORD [Signature]

ATTACHMENT TO CIVIL COVER SHEET

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