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11

*Attorneys for Plaintiff*

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

16 **THERMOLIFE INTERNATIONAL, LLC**  
17 Plaintiff,  
18 vs.  
19 **APPLIED NUTRICEUTICALS, INC.,**  
20 Defendant.  
21

Case No. '13CV2146 AJB NLS

**COMPLAINT FOR PATENT  
INFRINGEMENT**

**JURY TRIAL DEMANDED**

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

5 **I. THE PARTIES**

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

9 2. Plaintiff is and was at all relevant times the exclusive licensee of the  
10 following United States Patents:

- 11 a. Patent No. 6,646,006, titled “Enhancement of Vascular Function  
12 By Modulation of Endogenous Nitric Oxide Production or  
13 Activity”; and
- 14 b. Patent No. 5,891,459, titled “Enhancement of Vascular Function  
15 By Modulation of Endogenous Nitric Oxide Production or  
16 Activity”.

17 3. The above patents are and were owned by The Board of Trustees of  
18 the Leland Stanford Junior University (“Stanford University”) and Plaintiff  
19 exclusively licenses and licensed the patents from Stanford University.

20 4. The above patents are referred to herein as the “patents in suit.”

21 5. Plaintiff has been given the right by Stanford University to institute  
22 suit with respect to past, current, and future infringement of the patents in suit,  
23 including this suit against Defendant.

24 6. Defendant is a corporation organized and existing under the laws of  
25 North Carolina with a principal place of business at 8112 Statesville Road, Suite G,  
26 in Charlotte, North Carolina, 28269.

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**II. JURISDICTION AND VENUE**

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

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

9. This Court has personal jurisdiction over Defendant. By way of example and without limitation, Defendant, directly or through intermediaries (including distributors, retailers, and others), makes, manufactures, ships, distributes, advertises, markets, offers for sale, and/or sells dietary supplement products that infringe on one or more claims of the patents in suit (hereinafter the “accused products”), which include without limitation products sold under the “RPM” brand name, in the United States, the State of California, and the Southern District of California.

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

**III. THE DEFENDANT’S INFRINGEMENTS**

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

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**A. DIRECT INFRINGEMENTS**

1  
2 12. Defendant's employees, agents, representatives and other persons  
3 sponsored by or who endorse Defendant and Defendant's products in advertising  
4 and marketing activities, have taken, used, and orally administered the accused  
5 products.

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

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

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

22 16. Defendant encouraged and/or is aware of the fact that its employees,  
23 agents, representatives and other persons sponsored by Defendant or who endorse  
24 Defendant and Defendant's products in advertising and marketing activities orally  
25 administered and administer the accused products and practice and practiced the  
26 methods disclosed in one or more claim of one or more of the patents in suit, and  
27 these employees, agents, representatives and other persons sponsored by Defendant  
28 or who endorse Defendant and Defendant's products in advertising and marketing

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

3 17. Therefore, Defendant is and was a direct infringer of one or more  
4 claims of one or more of the patents in suit, and Defendant practices and practiced  
5 the methods as set forth in one or more claims of one or more of the patents in suit.

6 **B. INDIRECT INFRINGEMENTS**

7 18. End-users of Defendant’s accused products were and are also direct  
8 infringers of one or more claims of one or more of the patents in suit.

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

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

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

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

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

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

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

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

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

19 28. Defendant has and had knowledge of the fact that the accused  
20 products, particularly as administered, infringe on one or more claims of the patents  
21 in suit.

22 29. Defendant has and had direct, firsthand knowledge of the patents in  
23 suit.

24 30. For example and without limitation, Plaintiff believes Defendant has  
25 had knowledge of the patents in suit since November 2006, when an ongoing  
26 settlement of a patent infringement case relating to at least some of the patents in  
27 suit against Herbalife, a well-known company in Defendant's industry, was  
28 announced in press releases issued in a highly publicized manner. Plaintiff believes

1 Defendant's employees, agents, and representatives saw the press releases and were  
2 aware of the settlement and thus the patents in suit.

3 31. By way of further example and without limitation, Defendant sold its  
4 products through retailers, including online retailers, and those retailers have sold  
5 other companies' products whose labels and/or advertisements have been  
6 prominently marked with one or more of the patents in suit, by patent number,  
7 including without limitation, upon information and belief, the products  
8 manufactured and sold by Herbalife, Daily Wellness, and Vitality Research Labs.  
9 Defendant's employees, agents, and representatives have seen these labels and  
10 advertisements and, thus, Defendant has and had direct knowledge of the patents in  
11 suit.

12 32. By way of further example and without limitation, Defendant received  
13 written notice of the patents in suit from Plaintiff in April 2013.

14 33. Defendant brazenly and willfully decided to infringe the patents in suit  
15 despite knowledge of the patents' existence and its knowledge of the accused  
16 products' infringements of the patents.

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

19 35. Defendant did not cease its own direct infringement, nor its  
20 contributory infringement or inducement of infringement by end-users, despite its  
21 knowledge of the patents in suit and the end-users' infringing activities with respect  
22 to the patents in suit.

23 **IV. FIRST CAUSE OF ACTION**

24 **Infringement of U.S. Patent No. 6,646,006**

25 36. Plaintiff repeats and re-alleges the allegations of the foregoing  
26 paragraphs of this Complaint as if fully set forth herein.

27 37. Defendant has in the past literally and directly infringed or directly  
28 infringed under the doctrine of equivalents one or more claims of United States

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1 Patent No. 6,646,006 by making, using, selling, and offering for sale the accused  
2 products, or any one of those products.

3 38. In addition to the fact that Defendant makes, uses, sells, and offers for  
4 sale the accused products, and did so in the past, further examples of Defendant's  
5 direct infringements include, without limitation, the fact that Defendant encouraged  
6 and/or is aware of the fact that its employees, agents, representatives and other  
7 persons sponsored by or who endorse Defendant and Defendant's products in  
8 advertising and marketing activities orally administer the accused products and  
9 practice the methods disclosed in one or more claims of United States Patent No.  
10 6,646,006, and these employees, agents, representatives and other persons  
11 sponsored by or who endorse Defendant and Defendant's products in advertising  
12 and marketing activities acted under Defendant's direction and control when  
13 practicing those methods.

14 39. Defendant encouraged and was aware of these persons' oral  
15 administration of the accused products for these purposes, these persons are acting  
16 under Defendant's direction and control, and therefore Defendant directly practiced  
17 the methods disclosed in United States Patent No. 6,646,006.

18 40. End-users of Defendant's accused products were also direct infringers  
19 of one or more claims of United States Patent No. 6,646,006.

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

22 42. The accused products were formulated, made, manufactured, shipped,  
23 distributed, advertised, offered for sale, and sold by Defendant to include certain  
24 ingredients that, by virtue of their inclusion in the products, infringed one or more  
25 claims of United States Patent No. 6,646,006.

26 43. The accused products were formulated, made, manufactured, shipped,  
27 distributed, advertised, offered for sale, and sold by Defendant to include specific  
28 ingredients for purposes that, by their inclusion in the products for such purposes,



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1 infringed one or more claims of United States Patent No. 6,646,006, and as a result,  
2 when end-users of Defendant’s accused products orally administered the accused  
3 products, they were practicing the methods disclosed in one or more claims of that  
4 patent.

5 44. Defendant’s labels and advertising for the accused products explained  
6 the elements and essential elements of the methods disclosed in United States  
7 Patent No. 6,646,006, and those labels and advertising statements encouraged,  
8 urged, and induced the accused products’ end-users to purchase and orally ingest  
9 the products to practice those methods, and end-users did practice those methods.

10 45. Defendant therefore specifically intended to cause these end-users to  
11 directly infringe the claimed methods of United States Patent No. 6,646,006, and  
12 had in fact urged them to do so.

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

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

19 48. Defendant had knowledge that the accused products were especially  
20 adapted by end-users of the products for the practicing of such methods, and,  
21 indeed, Defendant encouraged, urged, and induced the accused products’ end-users  
22 to purchase and orally administer the accused products to practice such methods.

23 49. Defendant intentionally and knowingly induced, encouraged, and  
24 urged end-users of the accused products to purchase and orally administer the  
25 accused products for the purposes disclosed in one or more claims of United States  
26 Patent No. 6,646,006, by having them orally ingest the compounds disclosed in  
27 such claims.

28 ///

1 50. Defendant had knowledge of the fact that the accused products,  
2 particularly as administered, infringed on one or more claims of United States  
3 Patent No. 6,646,006.

4 51. Defendant also had direct, firsthand knowledge of United States Patent  
5 No. 6,646,006 itself.

6 52. Defendant's activities were without express or implied license by  
7 Plaintiff.

8 53. As a result of Defendant's acts of infringement, Plaintiff suffered and  
9 will continue to suffer damages in an amount to be proved at trial.

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

14 **V. SECOND CAUSE OF ACTION**

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

16 55. Plaintiff repeats and re-alleges the allegations of the foregoing  
17 paragraphs of this Complaint as if fully set forth herein.

18 56. Defendant has in the past literally and directly infringed or directly  
19 infringed under the doctrine of equivalents one or more claims of United States  
20 Patent No. 5,891,459 by making, using, selling, and offering for sale the accused  
21 products, or any one of those products.

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

1 5,891,459, and these employees, agents, representatives and other persons  
2 sponsored by or who endorse Defendant and Defendant's products in advertising  
3 and marketing activities acted under Defendant's direction and control when  
4 practicing those methods.

5 58. Defendant encouraged and was aware of these persons' oral  
6 administration of the accused products for these purposes, these persons are acting  
7 under Defendant's direction and control, and therefore Defendant directly practiced  
8 the methods disclosed in United States Patent No. 5,891,459.

9 59. End-users of Defendant's accused products were also direct infringers  
10 of one or more claims of United States Patent No. 5,891,459.

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

13 61. The accused products were formulated, made, manufactured, shipped,  
14 distributed, advertised, offered for sale, and sold by Defendant to include certain  
15 ingredients that, by virtue of their inclusion in the products, infringed one or more  
16 claims of United States Patent No. 5,891,459.

17 62. The accused products were formulated, made, manufactured, shipped,  
18 distributed, advertised, offered for sale, and sold by Defendant to include specific  
19 ingredients for purposes that, by their inclusion in the products for such purposes,  
20 infringed one or more claims of United States Patent No. 5,891,459, and as a result,  
21 when end-users of Defendant's accused products orally administered the accused  
22 products, they were practicing the methods disclosed in one or more claims of that  
23 patent.

24 63. Defendant's labels and advertising for the accused products explained  
25 the elements and essential elements of the methods disclosed in United States  
26 Patent No. 5,891,459, and those labels and advertising statements encouraged,  
27 urged, and induced the accused products' end-users to purchase and orally ingest  
28 the products to practice those methods, and end-users did practice those methods.

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1 64. Defendant therefore specifically intended to cause these end-users to  
2 directly infringe the claimed methods of United States Patent No. 5,891,459, and  
3 had in fact urged them to do so.

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

8 66. The inclusion of these specific infringing compounds in the products  
9 was material to practicing such methods.

10 67. Defendant had knowledge that the accused products were especially  
11 adapted by end-users of the products for the practicing of such methods, and,  
12 indeed, Defendant encouraged, urged, and induced the accused products' end-users  
13 to purchase and orally administer the accused products to practice such methods.

14 68. Defendant intentionally and knowingly induced, encouraged, and  
15 urged end-users of the accused products to purchase and orally administer the  
16 accused products for the purposes disclosed in one or more claims of United States  
17 Patent No. 5,891,459, by having them orally ingest the compounds disclosed in  
18 such claims.

19 69. Defendant had knowledge of the fact that the accused products,  
20 particularly as administered, infringed on one or more claims of United States  
21 Patent No. 5,891,459.

22 70. Defendant also had direct, firsthand knowledge of United States Patent  
23 No. 5,891,459 itself.

24 71. Defendant's activities were without express or implied license by  
25 Plaintiff.

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

28 ///

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

5 **VI. PRAYER FOR RELIEF**

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

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

10 2. That Defendant be required to provide to Plaintiff an accounting of all  
11 gains, profits, and advantages derived by Defendant's infringement of the patents in  
12 suit, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the  
13 wrongful infringing acts by Defendant, in accordance with 35 U.S.C. § 284;

14 3. That the damages awarded to Plaintiff with regard to the patents in suit  
15 be increased up to three times, in view of Defendant's willful infringement, in  
16 accordance with 35 U.S.C. § 284;

17 4. That this case be declared to be exceptional in favor of Plaintiff under  
18 35 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and  
19 other expenses incurred in connection with this action;

20 5. That Plaintiff be awarded its interest and costs of suit incurred in this  
21 action;

22 6. Compensatory damages;

23 7. Punitive damages; and

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

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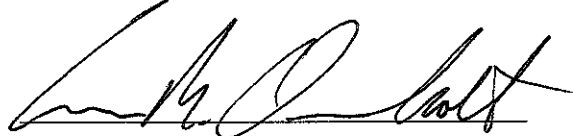
**DEMAND FOR JURY TRIAL**

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

APPLIED NUTRICEUTICALS, INC.

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) '13CV2146 AJB NLS

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: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

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

Large grid of categories for nature of suit: CONTRACT, REAL PROPERTY, TORTS, GENERAL RIGHTS, PERSONAL INJURY, PERSONAL PROPERTY, LABOR, IMMIGRATION, FORFEITURE/PENALTY, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, 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; 15:1126
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

FOR OFFICE USE ONLY: RECEIPT #, AMOUNT, APPLYING IFP, JUDGE, MAG. JUDGE

ATTACHMENT TO CIVIL COVER SHEET

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