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Attorneys for Plaintiff

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

16 **THERMOLIFE INTERNATIONAL, LLC**

17 Plaintiff,

18 vs.

19 **BNC NUTRITION, LLC d/b/a**
20 **PRIMAFORCE,**

21 Defendant.
22

Case No. '13CV2148 GPC BGS

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

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1 Plaintiff Thermolife International, LLC (“Plaintiff”) hereby alleges for its
2 Complaint against BNC Nutrition, LLC d/b/a PrimaForce (“Defendant”), on
3 personal knowledge as to its own activities and on information and belief as to the
4 activities 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. 6,117,872, titled “Enhancement of Exercise
15 Performance by Augmenting Endogenous Nitric Oxide Production
16 or 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 1448 Industry Drive in
26 Burlington, North Carolina, 27215.

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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 “AAKG” 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.

A. DIRECT INFRINGEMENTS

12. Defendant’s employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant’s products in advertising

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1 and marketing activities, have taken, used, and orally administered the accused
2 products.

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

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

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

19 16. Defendant encouraged and/or is aware of the fact that its employees,
20 agents, representatives and other persons sponsored by Defendant or who endorse
21 Defendant and Defendant's products in advertising and marketing activities orally
22 administered and administer the accused products and practice and practiced the
23 methods disclosed in one or more claim of one or more of the patents in suit, and
24 these employees, agents, representatives and other persons sponsored by Defendant
25 or who endorse Defendant and Defendant's products in advertising and marketing
26 activities are and were acting under Defendant's direction and control when
27 practicing those methods.

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

4 **B. INDIRECT INFRINGEMENTS**

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

7 19. End-users of Defendant's accused products have taken, used, and
8 orally administered the accused products.

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

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

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

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

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

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

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

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

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

19 29. Defendant has and had direct, firsthand knowledge of the patents in
20 suit.

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

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

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

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

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

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

21 **IV. FIRST CAUSE OF ACTION**

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

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

25 37. Defendant has in the past literally and directly infringed or directly
26 infringed under the doctrine of equivalents one or more claims of United States
27 Patent No. 6,646,006 by making, using, selling, and offering for sale the accused
28 products, or any one of those products.

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

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

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

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

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

24 43. The accused products were formulated, made, manufactured, shipped,
25 distributed, advertised, offered for sale, and sold by Defendant to include specific
26 ingredients for purposes that, by their inclusion in the products for such purposes,
27 infringed one or more claims of United States Patent No. 6,646,006, and as a result,
28 when end-users of Defendant's accused products orally administered the accused

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1 products, they were practicing the methods disclosed in one or more claims of that
2 patent.

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

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

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

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

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

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

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

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

3 52. Defendant's activities were without express or implied license by
4 Plaintiff.

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

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

11 **V. SECOND CAUSE OF ACTION**

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

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

15 56. 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 57. 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 58. 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 59. 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 60. End-users of Defendant's accused products have taken, used, and
10 orally administered the accused products.

11 61. 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 62. 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 63. 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.

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

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

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

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

15 68. Defendant has 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 disclosed in one or more claims of United States
18 Patent No. 6,117,872, by having them orally ingest the compounds disclosed in
19 such claims.

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

23 70. Defendant also has direct, firsthand knowledge of United States Patent
24 No. 6,117,872.

25 71. Defendant's activities have been without express or implied license by
26 Plaintiff.

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

1 73. As a result of Defendant's acts of infringement, Plaintiff has been and
2 will continue to be irreparably harmed by Defendant's infringements, which will
3 continue unless Defendant is enjoined by this Court.

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

8 **VI. PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff prays for entry of judgment against Defendant as
10 follows:

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

13 2. That injunctions, preliminary and permanent, be issued by this Court
14 restraining Defendant, its officers, agents, servants, directors, and employees, and
15 all persons in active concert or participation with each, from directly or indirectly
16 infringing, or inducing or contributing to the infringement by others of, United
17 States Patent No. 6,117,872;

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

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

25 5. That this case be declared to be exceptional in favor of Plaintiff under
26 35 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and
27 other expenses incurred in connection with this action;

28 6. That Plaintiff be awarded its interest and costs of suit incurred in this

1 action;

2 7. Compensatory damages;

3 8. Punitive damages; and

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

6 **DEMAND FOR JURY TRIAL**

7 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands
8 a jury trial for all issues in this case that properly are subject to a jury trial.
9

10 DATED: September 12, 2013

HIDEN, ROTT & OERTLE, LLP

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12 By: 
13 Eric M. Overholt, Esq.
14 *Attorneys for Plaintiff*
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