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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 **ADVOCARE INTERNATIONAL, LP,**

20 Defendant.
21
22

Case No. '13CV2144 GPC DHB

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

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1 Plaintiff Thermolife International, LLC (“Plaintiff”) hereby alleges for its
2 Complaint against Advocare International, LP (“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. 6,117,872, titled “Enhancement of Exercise
12 Performance by Augmenting Endogenous Nitric Oxide Production
13 or Activity”;
- 14 b. Patent No. 5,891,459, titled “Enhancement of Vascular Function
15 By Modulation of Endogenous Nitric Oxide Production or
16 Activity”; and
- 17 c. Patent No. 7,452,916, titled “Enhancement of Vascular Function
18 By Modulation of Endogenous Nitric Oxide Production or
19 Activity.”

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

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

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

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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. 5,891,459**

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

1 Patent No. 5,891,459 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 5,891,459, 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. 5,891,459.

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

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. 5,891,459.

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. 5,891,459, 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. 5,891,459, 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. 5,891,459, 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. 5,891,459, by having them orally ingest the compounds disclosed in
27 such claims.

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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. 5,891,459.

4 51. Defendant also had direct, firsthand knowledge of United States Patent
5 No. 5,891,459 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. 7,452,916**

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. 7,452,916 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.

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1 7,452,916, 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. 7,452,916.

9 59. End-users of Defendant's accused products were also direct infringers
10 of one or more claims of United States Patent No. 7,452,916.

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. 7,452,916.

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. 7,452,916, 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. 7,452,916, 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.

1 64. Defendant therefore specifically intended to cause these end-users to
2 directly infringe the claimed methods of United States Patent No. 7,452,916, 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. 7,452,916, 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. 7,452,916.

22 70. Defendant also had direct, firsthand knowledge of United States Patent
23 No. 7,452,916 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.

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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. THIRD CAUSE OF ACTION**

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

7 74. Plaintiff repeats and re-alleges the allegations of the foregoing
8 paragraphs of this Complaint as if fully set forth herein.

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

14 76. In addition to the fact that Defendant makes, uses, sells, and offers for
15 sale the accused products, further examples of Defendant's direct infringements
16 include, without limitation, the fact that Defendant has encouraged and/or is aware
17 of the fact that its employees, agents, representatives and other persons sponsored
18 by or who endorse Defendant and Defendant's products in advertising and
19 marketing activities orally administer the accused products and practice the
20 methods disclosed in one or more claims of United States Patent No. 6,117,872,
21 and these employees, agents, representatives and other persons sponsored by or
22 who endorse Defendant and Defendant's products in advertising and marketing
23 activities are acting under Defendant's direction and control when practicing those
24 methods.

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

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

3 79. End-users of Defendant's accused products have taken, used, and
4 orally administered the accused products.

5 80. 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
8 claims of United States Patent No. 6,117,872.

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

16 82. Defendant's labels and advertising for the accused products explain the
17 elements and essential elements of the methods disclosed in United States Patent
18 No. 6,117,872, and those labels and advertising statements encourage, urge, and
19 induce the accused products' end-users to purchase and orally ingest the products to
20 practice those methods, and end-users do practice those methods.

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

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

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

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

8 87. Defendant has intentionally and knowingly induced, encouraged, and
9 urged end-users of the accused products to purchase and orally administer the
10 accused products for the purposes disclosed in one or more claims of United States
11 Patent No. 6,117,872, by having them orally ingest the compounds disclosed in
12 such claims.

13 88. Defendant has knowledge of the fact that the accused products,
14 particularly as administered, infringe on one or more claims of United States Patent
15 No. 6,117,872.

16 89. Defendant also has direct, firsthand knowledge of United States Patent
17 No. 6,117,872.

18 90. Defendant's activities have been without express or implied license by
19 Plaintiff.

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

22 92. As a result of Defendant's acts of infringement, Plaintiff has been and
23 will continue to be irreparably harmed by Defendant's infringements, which will
24 continue unless Defendant is enjoined by this Court.

25 93. Defendant's past infringements and/or continuing infringements have
26 been deliberate and willful, and this case is therefore an exceptional case, which
27 warrants an award of treble damages and attorneys' fees in accordance with
28 U.S.C. § 285.

1 **VII. PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for entry of judgment against Defendant as
3 follows:

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

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

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

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

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

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

23 7. Compensatory damages;

24 8. Punitive damages; and

25 9. That Plaintiff be awarded such other and further relief as this Court
26 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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