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

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16 **THERMOLIFE INTERNATIONAL, LLC**

17 **Plaintiff,**

18 **vs.**

19 **SECHEL HOLDINGS, INC. d/b/a**
20 **ERGOGENIX,**

21 **Defendant.**

Case No. **'13CV2309 GPC 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 Sechel Holdings, Inc. d/b/a Ergogenix ("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
10 United States Patent No. 6,646,006, titled "Enhancement of Vascular Function By
11 Modulation of Endogenous Nitric Oxide Production or Activity," referred to herein
12 as the "patent in suit."

13 3. The above patent is and was owned by The Board of Trustees of the
14 Leland Stanford Junior University ("Stanford University") and Plaintiff exclusively
15 licenses and licensed the patent from Stanford University.

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

19 5. Defendant is a corporation organized and existing under the laws of
20 Delaware with a principal place of business at 2711 Centerville Road in
21 Wilmington, Delaware, 19808.

22 II. JURISDICTION AND VENUE

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

26 7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and
27 1400.

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

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

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

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

20 **A. DIRECT INFRINGEMENTS**

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

25 12. The accused products are formulated, made, manufactured, shipped,
26 distributed, advertised, offered for sale, and sold by Defendant to include certain
27 ingredients that, by virtue of their inclusion in the products, infringe one or more
28 claims of one or more of the patent in suit.

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

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

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

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

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B. INDIRECT INFRINGEMENTS

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

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

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

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

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

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

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1 23. 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 patent in suit, that do not infringe upon such methods.

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

7 25. 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 26. 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 27. Defendant has and had knowledge of the fact that the accused
17 products, particularly as administered, infringe on one or more claims of the patent
18 in suit.

19 28. Defendant has and had direct, firsthand knowledge of the patent in
20 suit.

21 29. For example and without limitation, Plaintiff believes Defendant has
22 had knowledge of the patent in suit since November 2006, when an ongoing
23 settlement of a patent infringement case relating to the patent suit and other related
24 patents 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 patent in suit.

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1 30. 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 the patent in suit and/or related patents, 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 patent in
9 suit.

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

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

15 33. 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 34. 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 patent in suit and the end-users' infringing activities with respect
20 to the patent in suit.

21 **IV. FIRST CAUSE OF ACTION**

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

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

25 36. 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 37. 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 38. 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 39. 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 40. End-users of Defendant's accused products have taken, used, and
19 orally administered the accused products.

20 41. 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 42. 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

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

3 43. 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 44. 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 45. 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 46. The inclusion of these specific infringing compounds in the products
16 was material to practicing such methods.

17 47. 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 48. 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 49. 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.

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

6. Compensatory damages;

1 7. Punitive damages; and

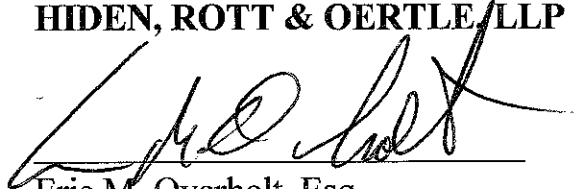
2 8. That Plaintiff be awarded such other and further relief as this Court
3 may deem just and proper.

4 **DEMAND FOR JURY TRIAL**

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

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8 DATED: September 25, 2013

HIDEN, ROTT & OERTLE, LLP

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10 By: 

Eric M. Overholt, Esq.
Attorneys for Plaintiff