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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 SIZE BIONICS RESEARCH, LLC,  
20 Defendant.  
21  
22

Case No. '13CV2435 H 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 Size Bionics Research, LLC (“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  
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 an entity organized and existing under the laws of  
20 California with a principal place of business in Oakland, California, 94601.

21 **II. JURISDICTION AND VENUE**

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

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

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

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

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

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

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

#### 18 **A. DIRECT INFRINGEMENTS**

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

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

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

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

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

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

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

23 **B. INDIRECT INFRINGEMENTS**

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

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

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

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

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

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

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

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

27           25. Defendant has and had knowledge that the accused products are and  
28 were especially adapted by end-users of the products for the practicing of such

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

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

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

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

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

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

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

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

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

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

#### 12 **IV. FIRST CAUSE OF ACTION**

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

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

16 36. Defendant has in the past literally and directly infringed or directly  
17 infringed under the doctrine of equivalents one or more claims of United States  
18 Patent No. 6,646,006 by making, using, selling, and offering for sale the accused  
19 products, or any one of those products.

20 37. In addition to the fact that Defendant makes, uses, sells, and offers for  
21 sale the accused products, and did so in the past, further examples of Defendant's  
22 direct infringements include, without limitation, the fact that Defendant encouraged  
23 and/or is aware of the fact that its employees, agents, representatives and other  
24 persons sponsored by or who endorse Defendant and Defendant's products in  
25 advertising and marketing activities orally administer the accused products and  
26 practice the methods disclosed in one or more claims of United States Patent No.  
27 6,646,006, and these employees, agents, representatives and other persons  
28 sponsored by or who endorse Defendant and Defendant's products in advertising

1 and marketing activities acted under Defendant's direction and control when  
2 practicing those methods.

3 38. Defendant encouraged and was 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 directly practiced  
6 the methods disclosed in United States Patent No. 6,646,006.

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

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

11 41. The accused products were 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, infringed one or more  
14 claims of United States Patent No. 6,646,006.

15 42. The accused products were 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 infringed one or more claims of United States Patent No. 6,646,006, and as a result,  
19 when end-users of Defendant's accused products orally administered the accused  
20 products, they were practicing the methods disclosed in one or more claims of that  
21 patent.

22 43. Defendant's labels and advertising for the accused products explained  
23 the elements and essential elements of the methods disclosed in United States  
24 Patent No. 6,646,006, and those labels and advertising statements encouraged,  
25 urged, and induced the accused products' end-users to purchase and orally ingest  
26 the products to practice those methods, and end-users did practice those methods.

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28 ///



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

4 45. 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 46. The inclusion of these specific infringing compounds in the products  
9 was material to practicing such methods.

10 47. 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 48. 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. 6,646,006, by having them orally ingest the compounds disclosed in  
18 such claims.

19 49. 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. 6,646,006.

22 50. Defendant also had direct, firsthand knowledge of United States Patent  
23 No. 6,646,006 itself.

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

26 52. 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 53. 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 **V. 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 patent 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 patent 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 patent 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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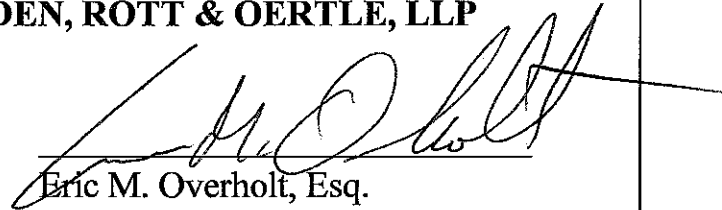
**DEMAND FOR JURY TRIAL**

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: October 9, 2013

**HIDEN, ROTT & OERTLE, LLP**

By:



Eric M. Overholt, Esq.  
*Attorneys for Plaintiff*

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# CIVIL COVER SHEET

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

SIZE BIONICS RESEARCH, LLC

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) '13CV2435 H NLS

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

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 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)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISON PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609		

## 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:  Yes  No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Hon. Janis L. Sammartino

DOCKET NUMBER 13-CV-651

DATE 10/9/13

SIGNATURE OF ATTORNEY OF RECORD

ATTACHMENT TO CIVIL COVER SHEET

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