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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 **21ST CENTURY HEALTHCARE, INC.,**

20 Defendant.
21

Case No. **'13CV2447 MMADHB**

**COMPLAINT FOR PATENT
INFRINGEMENT**

JURY TRIAL DEMANDED

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1 Plaintiff Thermolife International, LLC (“Plaintiff”) hereby alleges for its
2 Complaint against 21st Century HealthCare, Inc. (“Defendant”), on personal
3 knowledge as to its own activities and on information and belief as to the activities
4 of others, as follows:

5 **I. THE PARTIES**

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

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

11 a. Patent No. 6,117,872, titled “Enhancement of Exercise
12 Performance by Augmenting Endogenous Nitric Oxide Production
13 or Activity.”

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

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

18 5. Plaintiff has been given the right by Stanford University to institute
19 suit with respect to past, current, and future infringement of the patent in suit,
20 including this suit against Defendant.

21 6. Defendant is a corporation organized and existing under the laws of
22 Arizona with a principal place of business at 2119 South Wilson Street in Tempe,
23 Arizona, 85282.

24 **II. JURISDICTION AND VENUE**

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

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1 8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and
2 1400.

3 9. This Court has personal jurisdiction over Defendant. By way of
4 example and without limitation, Defendant, directly or through intermediaries
5 (including distributors, retailers, and others), makes, manufactures, ships,
6 distributes, advertises, markets, offers for sale, and/or sells dietary supplement
7 products that infringe on one or more claims of the patent in suit (hereinafter the
8 “accused products”), which include without limitation products sold under the “L-
9 Arginine 1000 mg” brand name, in the United States, the State of California, and
10 the Southern District of California.

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

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

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

22 **A. DIRECT INFRINGEMENTS**

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

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

1 ingredients that, by virtue of their inclusion in the products, infringe one or more
2 claims of one or more of the patent in suit.

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

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

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

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

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B. INDIRECT INFRINGEMENTS

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

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

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

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

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

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

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

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

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

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

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

17 29. Defendant has and had direct, firsthand knowledge of the patent in
18 suit.

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

26 31. By way of further example and without limitation, Defendant sold its
27 products through retailers, including online retailers, and those retailers have sold
28 other companies' products whose labels and/or advertisements have been

1 prominently marked with one or more of the patent in suit, by patent number,
2 including without limitation, upon information and belief, the products
3 manufactured and sold by Herbalife, Daily Wellness, and Vitality Research Labs.
4 Defendant's employees, agents, and representatives have seen these labels and
5 advertisements and, thus, Defendant has and had direct knowledge of the patent in
6 suit.

7 32. By way of further example and without limitation, Defendant received
8 written notice of the patent in suit from Plaintiff in April 2013.

9 33. Defendant brazenly and willfully decided to infringe the patent in suit
10 despite knowledge of the patents' existence and its knowledge of the accused
11 products' infringements of the patents.

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

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

18 IV. FIRST CAUSE OF ACTION

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

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

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

27 38. In addition to the fact that Defendant makes, uses, sells, and offers for
28 sale the accused products, further examples of Defendant's direct infringements

1 include, without limitation, the fact that Defendant has encouraged and/or is aware
2 of the fact that its employees, agents, representatives and other persons sponsored
3 by or who endorse Defendant and Defendant's products in advertising and
4 marketing activities orally administer the accused products and practice the
5 methods disclosed in one or more claims of United States Patent No. 6,117,872,
6 and these employees, agents, representatives and other persons sponsored by or
7 who endorse Defendant and Defendant's products in advertising and marketing
8 activities are acting under Defendant's direction and control when practicing those
9 methods.

10 39. Defendant has encouraged and is aware of these persons' oral
11 administration of the accused products for these purposes, these persons are acting
12 under Defendant's direction and control, and therefore Defendant is directly
13 practicing the methods disclosed in United States Patent No. 6,117,872.

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

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

18 42. The accused products are formulated, made, manufactured, shipped,
19 distributed, advertised, offered for sale, and sold by Defendant to include certain
20 ingredients that, by virtue of their inclusion in the products, infringe one or more
21 claims of United States Patent No. 6,117,872.

22 43. The accused products is formulated, made, manufactured, shipped,
23 distributed, advertised, offered for sale, and sold by Defendant to include specific
24 ingredients for purposes that, by their inclusion in the products for such purposes,
25 infringe one or more claims of United States Patent No. 6,117,872, and as a result,
26 when end-users of Defendant's accused products orally administer the accused
27 products, they are practicing the methods disclosed in one or more claims of that
28 patent.

1 44. Defendant's labels and advertising for the accused products explain the
2 elements and essential elements of the methods disclosed in United States Patent
3 No. 6,117,872, and those labels and advertising statements encourage, urge, and
4 induce the accused products' end-users to purchase and orally ingest the products to
5 practice those methods, and end-users do practice those methods.

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

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

13 47. The inclusion of these specific infringing compounds in the products is
14 material to practicing such methods.

15 48. Defendant has knowledge that the accused products are especially
16 adapted by end-users of the products for the practicing of such methods, and,
17 indeed, Defendant encourages, urges, and induces the accused products' end-users
18 to purchase and orally administer the accused products to practice such methods,
19 and have done so in the past.

20 49. Defendant has intentionally and knowingly induced, encouraged, and
21 urged end-users of the accused products to purchase and orally administer the
22 accused products for the purposes disclosed in one or more claims of United States
23 Patent No. 6,117,872, by having them orally ingest the compounds disclosed in
24 such claims.

25 50. Defendant has knowledge of the fact that the accused products,
26 particularly as administered, infringe on one or more claims of United States Patent
27 No. 6,117,872.

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1 51. Defendant also has direct, firsthand knowledge of United States Patent
2 No. 6,117,872.

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

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

7 54. As a result of Defendant's acts of infringement, Plaintiff has been and
8 will continue to be irreparably harmed by Defendant's infringements, which will
9 continue unless Defendant is enjoined by this Court.

10 55. 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. PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff prays for entry of judgment against Defendant as
16 follows:

17 1. A declaration that Defendant has infringed the patent in suit, under 35
18 U.S.C. §§ 271 *et seq.*;

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

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

28 4. That the damages awarded to Plaintiff with regard to the patent in suit

1 be increased up to three times, in view of Defendant's willful infringement, in
2 accordance with 35 U.S.C. § 284;

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

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

8 7. Compensatory damages;

9 8. Punitive damages; and

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

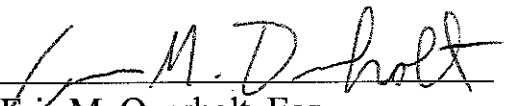
12 **DEMAND FOR JURY TRIAL**

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

15 DATED: October 10, 2013

16 **HIDEN, ROTT & OERTLE, LLP**

17 By:

18 
19 Eric M. Overholt, Esq.
20 Attorneys for Plaintiff
21

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
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

SEE ATTACHMENT

DEFENDANTS

21ST CENTURY HEALTHCARE, INC

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'13CV2447 MMADHB

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	PERSONAL INJURY <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	PERSONAL INJURY <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 PERSONAL PROPERTY <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 LABOR <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 IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <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)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<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
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<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	<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	Habeas Corpus: <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 Other: <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			

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

10/10/13

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

ATTACHMENT TO CIVIL COVER SHEET

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