

1 Tyler J. Woods (State Bar No. 232464)
twoods@trialnewport.com
2 Richard H. Hikida (State Bar No. 196149)
rhikida@trialnewport.com
3 Scott J. Ferrell (State Bar No. 202091)
sferrell@trialnewport.com
4 **NEWPORT TRIAL GROUP**
A Professional Corporation
5 4100 Newport Place, Suite 800
Newport Beach, CA 92660
6 Tel: (949) 706-6464
Fax: (949) 706-6469
7

8 **HIDEN, ROTT & OERTLE, LLP**
A Limited Liability Partnership
Including Professional Corporations
9 ERIC M. OVERHOLT, ESQ. (C.S.B. 248762)
eoverholt@hrollp.com
10 2635 Camino del Rio South, Suite 306
San Diego, California 92108
11 Telephone: (619) 296-5884
Facsimile: (619) 296-5171
12

13 Attorneys for Plaintiffs

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

16 THERMOLIFE INTERNATIONAL, LLC,
17 and THE BOARD OF TRUSTEES OF
18 THE LELAND STANFORD JUNIOR
UNIVERSITY,

19 Plaintiffs,

20 vs.

21 FIT FOODS, LTD. d/b/a MUTANT,

22 Defendants

Case No. 13-cv-2193 JLS (MDD)

**AMENDED COMPLAINT FOR
PATENT INFRINGEMENT**

JURY TRIAL DEMANDED

1 Plaintiffs ThermoLife International, LLC and The Board of Trustees of the
 2 Leland Stanford Junior University (“Plaintiffs”) hereby allege for their Complaint
 3 against Fit Foods, Ltd. d/b/a Mutant (“Defendant”), on personal knowledge as to their
 4 own activities and on information and belief as to the activities of others, as follows:

5 **I. THE PARTIES**

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

9 2. Plaintiff The Board of Trustees of the Leland Stanford Junior University
 10 (“Stanford University”) is an institution of higher education having powers under the
 11 laws of the State of California, with a place of business at 1705 El Camino Real in
 12 Palo Alto, California, 94306-1106.

13 3. ThermoLife is and was at all relevant times the exclusive licensee of the
 14 following United States Patents:

- 15 a. Patent No. 6,646,006, titled “Enhancement of Vascular Function By
- 16 Modulation of Endogenous Nitric Oxide Production or Activity”;
- 17 b. Patent No. 6,117,872, titled “Enhancement of Exercise Performance
- 18 by Augmenting Endogenous Nitric Oxide Production or Activity”;
- 19 c. Patent No. 5,891,459, titled “Enhancement of Vascular Function By
- 20 Modulation of Endogenous Nitric Oxide Production or Activity”; and
- 21 d. Patent No. 7,452,916, titled “Enhancement of Vascular Function By
- 22 Modulation of Endogenous Nitric Oxide Production or Activity.”

23 4. The above patents are and were owned by Stanford University and
 24 ThermoLife exclusively licenses and licensed the patents from Stanford University.
 25 ThermoLife is pursuing this action and ThermoLife has the right to join Stanford as a
 26 necessary party.

27 5. The above patents are referred to herein as the “patents in suit.”

28 ///

1 6. ThermoLife has been given the right by Stanford University to institute
2 suit with respect to past, current, and future infringement of the patents in suit,
3 including this suit against Defendant.

4 7. Defendant is a corporation organized and existing under the laws of
5 British Columbia, Canada with a principal place of business at 101-1551 Broadway
6 Street in Port Coquitlam, British Columbia, V3C 6N9, Canada.

7 **II. JURISDICTION AND VENUE**

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

11 9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

12 10. This Court has personal jurisdiction over Defendant. By way of example
13 and without limitation, Defendant, directly or through intermediaries (including
14 distributors, retailers, and others), makes, manufactures, ships, distributes, advertises,
15 markets, offers for sale, and/or sells dietary supplement products that infringe on one
16 or more claims of the patents in suit (hereinafter the “accused products”), which
17 include without limitation products sold under the “Pump” and “Mayhem” brand
18 names, in the United States, the State of California, and the Southern District of
19 California.

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

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

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

28 ///

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

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

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

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

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

A. DIRECT INFRINGEMENTS

18. Defendant's employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant's products in advertising and marketing activities, have taken, used, and orally administered the accused products.

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

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

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

22. Defendant encouraged and/or is aware of the fact that its employees, agents, representatives and other persons sponsored by Defendant or who endorse Defendant and Defendant's products in advertising and marketing activities orally administered and administer the accused products and practice and practiced the methods disclosed in one or more claim of one or more of the patents in suit, and these employees, agents, representatives and other persons sponsored by Defendant or who endorse Defendant and Defendant's products in advertising and marketing activities

1 are and were acting under Defendant's direction and control when practicing those
2 methods.

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

6 **B. INDIRECT INFRINGEMENTS**

7 24. 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 25. End-users of Defendant's accused products have taken, used, and orally
10 administered the accused products.

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

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

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

28 ///

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

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

7 31. The inclusion of the specific infringing compounds in the products is and
8 was material to practicing such methods.

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

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

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

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

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

28 ///

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

38. By way of further example and without limitation, Defendant received written notice of the patents in suit from Plaintiffs in April 2013.

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

40. At a minimum, and in the alternative, Plaintiffs plead that Defendant willfully blinded itself to the infringing nature of the accused products' sales.

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

IV. FIRST CAUSE OF ACTION

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

42. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs of this Complaint as if fully set forth herein.

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

///

1 44. 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 persons
5 sponsored by or who endorse Defendant and Defendant's products in advertising and
6 marketing activities orally administer the accused products and practice the methods
7 disclosed in one or more claims of United States Patent No. 6,646,006, and these
8 employees, agents, representatives and other persons sponsored by or who endorse
9 Defendant and Defendant's products in advertising and marketing activities acted
10 under Defendant's direction and control when practicing those methods.

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

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

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

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

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

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

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

8 51. 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 had
10 in fact urged them to do so.

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

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

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

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

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

28 / / /

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

3 58. Defendant's activities were without express or implied license by
4 Plaintiffs.

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

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

11 **V. SECOND CAUSE OF ACTION**

12 **Infringement of U.S. Patent No. 5,891,459**

13 61. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs
14 of this Complaint as if fully set forth herein.

15 62. Defendant has in the past literally and directly infringed or directly
16 infringed under the doctrine of equivalents one or more claims of United States Patent
17 No. 5,891,459 by making, using, selling, and offering for sale the accused products, or
18 any one of those products.

19 63. In addition to the fact that Defendant makes, uses, sells, and offers for
20 sale the accused products, and did so in the past, further examples of Defendant's
21 direct infringements include, without limitation, the fact that Defendant encouraged
22 and/or is aware of the fact that its employees, agents, representatives and other persons
23 sponsored by or who endorse Defendant and Defendant's products in advertising and
24 marketing activities orally administer the accused products and practice the methods
25 disclosed in one or more claims of United States Patent No. 5,891,459, and these
26 employees, agents, representatives and other persons sponsored by or who endorse
27 Defendant and Defendant's products in advertising and marketing activities acted
28 under Defendant's direction and control when practicing those methods.

1 64. Defendant encouraged and was aware of these persons' oral
2 administration of the accused products for these purposes, these persons are acting
3 under Defendant's direction and control, and therefore Defendant directly practiced
4 the methods disclosed in United States Patent No. 5,891,459.

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

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

9 67. The accused products were formulated, made, manufactured, shipped,
10 distributed, advertised, offered for sale, and sold by Defendant to include certain
11 ingredients that, by virtue of their inclusion in the products, infringed one or more
12 claims of United States Patent No. 5,891,459.

13 68. The accused products were formulated, made, manufactured, shipped,
14 distributed, advertised, offered for sale, and sold by Defendant to include specific
15 ingredients for purposes that, by their inclusion in the products for such purposes,
16 infringed one or more claims of United States Patent No. 5,891,459, and as a result,
17 when end-users of Defendant's accused products orally administered the accused
18 products, they were practicing the methods disclosed in one or more claims of that
19 patent.

20 69. Defendant's labels and advertising for the accused products explained the
21 elements and essential elements of the methods disclosed in United States Patent No.
22 5,891,459, and those labels and advertising statements encouraged, urged, and induced
23 the accused products' end-users to purchase and orally ingest the products to practice
24 those methods, and end-users did practice those methods.

25 70. Defendant therefore specifically intended to cause these end-users to
26 directly infringe the claimed methods of United States Patent No. 5,891,459, and had
27 in fact urged them to do so.

28 ///

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

5 72. The inclusion of these specific infringing compounds in the products was
6 material to practicing such methods.

7 73. Defendant had knowledge that the accused products were especially
8 adapted by end-users of the products for the practicing of such methods, and, indeed,
9 Defendant encouraged, urged, and induced the accused products' end-users to
10 purchase and orally administer the accused products to practice such methods.

11 74. Defendant intentionally and knowingly induced, encouraged, and urged
12 end-users of the accused products to purchase and orally administer the accused
13 products for the purposes disclosed in one or more claims of United States Patent No.
14 5,891,459, by having them orally ingest the compounds disclosed in such claims.

15 75. Defendant had knowledge of the fact that the accused products,
16 particularly as administered, infringed on one or more claims of United States Patent
17 No. 5,891,459.

18 76. Defendant also had direct, firsthand knowledge of United States Patent
19 No. 5,891,459 itself.

20 77. Defendant's activities were without express or implied license by
21 Plaintiffs.

22 78. As a result of Defendant's acts of infringement, Plaintiffs have suffered
23 and will continue to suffer damages in an amount to be proved at trial.

24 79. Defendant's past infringements and/or continuing infringements have
25 been deliberate and willful, and this case is therefore an exceptional case, which
26 warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C.
27 § 285.

28 ///

VI. THIRD CAUSE OF ACTION

Infringement of U.S. Patent No. 7,452,916

80. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs of this Complaint as if fully set forth herein.

81. Defendant has in the past literally and directly infringed or directly infringed under the doctrine of equivalents one or more claims of United States Patent No. 7,452,916 by making, using, selling, and offering for sale the accused products, or any one of those products.

82. In addition to the fact that Defendant makes, uses, sells, and offers for sale the accused products, and did so in the past, further examples of Defendant's direct infringements include, without limitation, the fact that Defendant encouraged and/or is aware of the fact that its employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant's products in advertising and marketing activities orally administer the accused products and practice the methods disclosed in one or more claims of United States Patent No. 7,452,916, and these employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant's products in advertising and marketing activities acted under Defendant's direction and control when practicing those methods.

83. Defendant encouraged and was aware of these persons' oral administration of the accused products for these purposes, these persons are acting under Defendant's direction and control, and therefore Defendant directly practiced the methods disclosed in United States Patent No. 7,452,916.

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

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

///

///

1 86. The accused products were formulated, made, manufactured, shipped,
2 distributed, advertised, offered for sale, and sold by Defendant to include certain
3 ingredients that, by virtue of their inclusion in the products, infringed one or more
4 claims of United States Patent No. 7,452,916.

5 87. The accused products were formulated, made, manufactured, shipped,
6 distributed, advertised, offered for sale, and sold by Defendant to include specific
7 ingredients for purposes that, by their inclusion in the products for such purposes,
8 infringed one or more claims of United States Patent No. 7,452,916, and as a result,
9 when end-users of Defendant's accused products orally administered the accused
10 products, they were practicing the methods disclosed in one or more claims of that
11 patent.

12 88. Defendant's labels and advertising for the accused products explained the
13 elements and essential elements of the methods disclosed in United States Patent No.
14 7,452,916, and those labels and advertising statements encouraged, urged, and induced
15 the accused products' end-users to purchase and orally ingest the products to practice
16 those methods, and end-users did practice those methods.

17 89. Defendant therefore specifically intended to cause these end-users to
18 directly infringe the claimed methods of United States Patent No. 7,452,916, and had
19 in fact urged them to do so.

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

24 91. The inclusion of these specific infringing compounds in the products was
25 material to practicing such methods.

26 92. Defendant had knowledge that the accused products were especially
27 adapted by end-users of the products for the practicing of such methods, and, indeed,
28

1 Defendant encouraged, urged, and induced the accused products' end-users to
2 purchase and orally administer the accused products to practice such methods.

3 93. Defendant intentionally and knowingly induced, encouraged, and urged
4 end-users of the accused products to purchase and orally administer the accused
5 products for the purposes disclosed in one or more claims of United States Patent No.
6 7,452,916, by having them orally ingest the compounds disclosed in such claims.

7 94. Defendant had knowledge of the fact that the accused products,
8 particularly as administered, infringed on one or more claims of United States Patent
9 No. 7,452,916.

10 95. Defendant also had direct, firsthand knowledge of United States Patent
11 No. 7,452,916 itself.

12 96. Defendant's activities were without express or implied license by
13 Plaintiff.

14 97. As a result of Defendant's acts of infringement, Plaintiffs have suffered
15 and will continue to suffer damages in an amount to be proved at trial.

16 98. Defendant's past infringements and/or continuing infringements have
17 been deliberate and willful, and this case is therefore an exceptional case, which
18 warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C.
19 § 285.

20 **VII. FOURTH CAUSE OF ACTION**

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

22 99. Plaintiffs repeat and re-allege the allegations of the foregoing paragraphs
23 of this Complaint as if fully set forth herein.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 112. Defendant has intentionally and knowingly induced, encouraged, and
23 urged end-users of the accused products to purchase and orally administer the accused
24 products for the purposes disclosed in one or more claims of United States Patent No.
25 6,117,872, by having them orally ingest the compounds disclosed in such claims.

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

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

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

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

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

10 118. 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 U.S.C.
13 § 285.

14 **VIII. PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs pray for entry of judgment against Defendant as
16 follows:

17 1. A declaration that Defendant has infringed the patents 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 all
21 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 States
23 Patent No. 6,117,872;

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

28 ///

DEMAND FOR JURY TRIAL

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

Respectfully submitted,

NEWPORT TRIAL GROUP
A Professional Corporation

Dated: February 13, 2014

/s/Tyler J Woods
By: Tyler J. Woods
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2014, I electronically filed the foregoing **THERMOLIFE INTERNATIONAL, LLC GROUP, LLC'S AMENDED COMPLAINT FOR PATENT INFRINGEMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/Tyler J Woods
Tyler J Woods