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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 NUTRAPLANET,

22 Defendants

Case No. 13-cv-2259 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 Nutraplanet (“Defendant”), on personal knowledge as to their own activities  
4 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  
14 United States Patent No. 6,117,872, titled “Enhancement of Exercise Performance by  
15 Augmenting Endogenous Nitric Oxide Production or Activity,” referred to herein as  
16 the “patent in suit.”

17 4. The above patent is and was owned by Stanford University and  
18 ThermoLife exclusively licenses and licensed at all relevant times the patent from  
19 Stanford University. ThermoLife is pursuing this action and ThermoLife has the right  
20 to join Stanford as a necessary party.

21 5. ThermoLife has been given the right by Stanford University to institute  
22 suit with respect to infringements of the patent in suit, including this suit against  
23 Defendant.

24 6. Defendant is an entity organized and existing under the laws of Georgia  
25 with a principal place of business at 111 Bethea Road, Suite 101 in Fayetteville,  
26 Georgia, 30214.

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## **II. JURISDICTION AND VENUE**

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

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

9. This Court has personal jurisdiction over Defendant. By way of example and without limitation, Defendant, directly or through intermediaries (including distributors, retailers, and others), makes, manufactures, ships, distributes, advertises, markets, offers for sale, and/or sells dietary supplement products that infringe on one or more claims of the patent in suit (hereinafter the “accused products”), which include without limitation products sold under the “AAKG Powder” brand name and products sold by Defendant in its function as a retailer of other brands, in the United States, the State of California, and the Southern District of California.

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

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

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

### **A. DIRECT INFRINGEMENTS**

12. 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.

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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 patent 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 the patent in suit, and as a result, when  
9 Defendant's employees, agents, representatives and other persons sponsored by or  
10 who endorse Defendant and Defendant's products in advertising and marketing  
11 activities orally administer the accused products, they are practicing and they practiced  
12 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 claims of the patent in suit, and these employees,  
22 agents, representatives and other persons sponsored by Defendant or who endorse  
23 Defendant and Defendant's products in advertising and marketing activities are and  
24 were acting under Defendant's direction and control when practicing those methods.

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

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**B. INDIRECT INFRINGEMENTS**

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

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

20. 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.

21. 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.

22. 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.

23. 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.

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

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

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

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

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

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

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

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

1 agents, and representatives have seen these labels and advertisements and, thus,  
2 Defendant has and had direct knowledge of the patent in suit.

3 32. By way of further example and without limitation, Defendant received  
4 written notice of the patent in suit from Plaintiffs in April 2013.

5 33. Defendant brazenly and willfully decided to infringe the patent in suit  
6 despite knowledge of the patent's existence and its knowledge of the accused  
7 products' infringements of the patent.

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

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

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

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

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

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

22 38. In addition to the fact that Defendant makes, uses, sells, and offers for  
23 sale the accused products, further examples of Defendant's direct infringements  
24 include, without limitation, the fact that Defendant has encouraged and/or is aware of  
25 the fact that its employees, agents, representatives and other persons sponsored by or  
26 who endorse Defendant and Defendant's products in advertising and marketing  
27 activities orally administer the accused products and practice the methods disclosed in  
28 one or more claims of United States Patent No. 6,117,872, and these employees,



1 agents, representatives and other persons sponsored by or who endorse Defendant and  
2 Defendant's products in advertising and marketing activities are acting under  
3 Defendant's direction and control when practicing those methods.

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

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

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

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

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

23 44. Defendant's labels and advertising for the accused products explain the  
24 elements and essential elements of the methods disclosed in United States Patent No.  
25 6,117,872, and those labels and advertising statements encourage, urge, and induce the  
26 accused products' end-users to purchase and orally ingest the products to practice  
27 those methods, and end-users do practice those methods.

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

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

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

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

15       49. Defendant has intentionally and knowingly induced, encouraged, and  
16 urged end-users of the accused products to purchase and orally administer the accused  
17 products for the purposes disclosed in one or more claims of United States Patent No.  
18 6,117,872, by having them orally ingest the compounds disclosed in such claims.

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

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

24       52. Defendant's activities have been without express or implied license by  
25 Plaintiffs.

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

28       ///

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

55. 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.

## **V. PRAYER FOR RELIEF**

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

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

2. That injunctions, preliminary and permanent, be issued by this Court restraining Defendant, its officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from directly or indirectly infringing, or inducing or contributing to the infringement by others of, the patent in suit;

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

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

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

/ / /

Respectfully submitted,  
NEWPORT TRIAL GROUP  
A Professional Corporation

Dated: February 13, 2014

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

**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