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2010 FEB 17 PM 2:52
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8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

12 TRIPHARMA, LLC, a Delaware
limited liability company,

13 Plaintiffs,

14 vs.

15 MAX INTERNATIONAL, LLC, a
16 Utah limited liability corporation;
17 STEVE SCOTT, an individual; FRED
18 NINNOW, an individual; GREG
19 FULLERTON, an individual; PETER
20 NORDBERG, an individual; MIKE
21 LARKINS, an individual; DAVID
22 BAGLEY, an individual; ERIC
23 ANDERSON, an individual; CRAIG
24 CASE, an individual; KEN DUNN, an
25 individual; JULIE DUNN, an
26 individual; BILL ANDERSEN, an
27 individual; CINDY ANDERSEN, an
28 individual; Dr. HEIDI REITANO, an
individual; Dr. JOE REITANO, an
individual; JOSE MARIE ABILAY,
an individual; RYAN
VANDERPOOL, an individual;
BRENDA BRIDGFORTH, an
individual; DAVID BRIDGFORTH,
an individual; CARL STANITZKY;
WINDER LYONS, an individual;
TAMMY SELLARS, YO
FUJIKAWA, an individual; JAMIE
FUJIKAWA, an individual;

(Caption continues on next page)

Case No.: SACV10-00196 JVS (ANx)

COMPLAINT FOR:

- 1) Patent Infringement and Injunctive Relief;
- 2) Trademark Dilution;
- 3) Lanham Act - False Advertising and False Designation of Origin;
- 4) Lanham Act - Unfair Competition;
- 5) Breach of Contract;
- 6) Declaratory Relief;
- 7) Promissory Fraud;
- 8) Unfair Competition Under California Bus. & Prof. Code § 17200;
- 9) Unfair Competition - California Bus. & Prof. Code Section 17200 *et seq.* Based on Violations of California Health and Safety Code Sections 110660 and 110390;
- 10) False Advertising - California Bus. & Prof. Code Section 17500 *et seq.*;
- 11) Unfair Competition - Palming Off;

MckennonSchindler LLP
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JOHN HUTCHINSON, an individual;
RAJA SETHI, an individual; FOREST
TOWNSLEY, an individual;
Dr. CHERYL TOWNSLEY, an
individual; DORINA LANZA, an
individual; ALAN SICKMAN, an
individual; JEAN SICKMAN an
individual; CHARLENE
RAGSDALE, an individual; RICK
TEAGUE, an individual; MICHELLE
TEAGUE, an individual; SCOTT
UNCLEBACH, an individual;
DARLENE UNCLEBACH, an
individual; MIKE UNCLEBACH, an
individual; JIM MARSHALL, an
individual; STEVE LEE, an
individual; Dr. TIM
KERSHENSTEIN, an individual;
STEVE KENT, an individual; MITCH
EDLAND, an individual; STACY
CHAPMAN, an individual;
MICHAEL BISCOTTI, an individual;
DEBBIE BISCOTTI, an individual;
ESTRELLA HARRINGTON, an
individual; NINA HARDWICK, an
individual; GREG HICKS, an
individual; EMILY HICKS, an
individual; DIANA KLEIST, an
individual; RIK WAHLRAB, an
individual; and DOES 1 through 10,
inclusive,

Defendants.

- 12) Preliminary and Permanent Injunctive Relief;**
 - 13) Unjust Enrichment and Imposition of Constructive Trust;**
 - 14) Accounting;**
- DEMAND FOR JURY TRIAL**

JURISDICTION AND VENUE

1
2
3 1. This action for, *inter alia*, patent infringement, trademark dilution and
4 violation of the Lanham Act arises under the patent and trademark laws of the
5 United States, 35 U.S.C. Sections 100 *et seq.*, 15 U.S.C. Sections 1114 and 1125(a),
6 and jurisdiction exists under 28 U.S.C. Sections 1331 and 1338(a). The state claims
7 in this action are brought pursuant to this Court’s ancillary and pendent jurisdiction
8 over such claims.

9
10 2. This Court also has personal jurisdiction over Defendants in California
11 because they conduct business in this District by conducting seminars, meetings,
12 trade shows and professional expositions, by directing their marketing and sales
13 efforts to residents of California in part by using multiple interactive Internet
14 websites used to market themselves, advertise and sell their products, and recruit
15 potential product distributors, and blog about their business including but not limited
16 to *www.maxxl.com*, *www.livingamaxlife.com*, *www.maxinternationalteam.com*,
17 *www.blog.max.com* and *www.maxinternationalreview.com*, *maxinternational.com*.
18 This Court has personal jurisdiction over each of the Defendants for the additional
19 reasons set forth below and for other reasons that will be presented to the Court if
20 jurisdiction is challenged.

21
22 3. Venue is proper in this Court pursuant to 28 U.S.C. Sections 1391(b)
23 and 1400(b), since Defendants reside and are conducting substantial business
24 activities within this District and because a substantial part of the events and
25 omissions giving rise to the claims for relief occurred within this District and
26 because the alleged patent infringement occurred within this District.



THE PARTIES

1
2
3 4. Plaintiff Tripharma, LLC (“Tripharma”) is and was at all times relevant
4 to this action a corporation organized under the laws of the State of Delaware with
5 its principal place of business at 1278 Glenneyre, Suite 285, Laguna Beach,
6 California and is and was at all times relevant to this action authorized to conduct,
7 and was in fact conducting, business in California.

8
9 5. Defendant Max International, LLC, a Utah limited liability company
10 (“Max”), is and was at all times relevant to this action a limited liability company
11 organized under the laws of the State of Utah with its principal place of business at
12 7090 S. Union Park Avenue, Suite 500, Salt Lake City, Utah.

13
14 6. Tripharma is informed and believes, and thereon alleges, that
15 Defendant Steve Scott is and was at all times relevant to this action an individual
16 residing in Salt Lake City, Utah. Steve Scott a founder of Max.

17
18 7. Tripharma is informed and believes, and thereon alleges, that
19 Defendant Fred Ninnow is and was at all times relevant to this action an individual
20 residing in Salt Lake City, Utah. Fred Ninnow is a founder of Max.

21
22 8. Tripharma is informed and believes, and thereon alleges, that
23 Defendant Greg Fullerton is and was at all times relevant to this action an individual
24 residing in Salt Lake City, Utah. Greg Fullerton is a founder of Max.

25
26 9. Tripharma is informed and believes, and thereon alleges, that
27 Defendant Peter Nordberg is and was at all times relevant to this action an
28



1 individual residing in Salt Lake City, Utah. Peter Nordberg is the Chief Executive
2 Officer of Max.

3

4 10. Tripharma is informed and believes, and thereon alleges, that
5 Defendant Mike Larkins is and was at all times relevant to this action an individual
6 residing in Salt Lake City, Utah. Mike Larkins is the President of Max.

7

8 11. Tripharma is informed and believes, and thereon alleges, that
9 Defendant David Bagley is and was at all times relevant to this action an individual
10 residing in Salt Lake City, Utah. David Bagley is the Vice President of Product
11 Development of Max.

12

13 12. Tripharma is informed and believes, and thereon alleges, that
14 Defendant Eric Anderson is and was at all times relevant to this action an individual
15 residing in Salt Lake City, Utah. Eric Anderson is the Vice President of Sales and
16 Support of Max.

17

18 13. Tripharma is informed and believes, and thereon alleges, that
19 Defendant Craig Case is and was at all times relevant to this action an individual
20 residing in Salt Lake City, Utah. Craig Case is the Executive Vice President of
21 Field Development and Strategy of Max.

22

23 14. Steve Scott, Fred Ninnow, Greg Fullerton, Peter Nordberg, Mike
24 Larkins, David Bagley, Eric Anderson, Craig Case are collectively referred to herein
25 as the “Max Executives.”

26

27

28



1 15. Tripharma is informed and believes, and thereon alleges, that
2 Defendants Ken and Julie Dunn are and were at all times relevant to this action
3 individuals residing in Toronto, Canada.

4
5 16. Tripharma is informed and believes, and thereon alleges, that
6 Defendant Bill and Cindy Andersen are and were at all times relevant to this action
7 individuals residing in the State of Utah.

8
9 17. Tripharma is informed and believes, and thereon alleges, that
10 Defendants Drs. Heidi and Joe Reitano are and were at all times relevant to this
11 action individuals residing in the State of Arizona.

12
13 18. Tripharma is informed and believes, and thereon alleges, that
14 Defendant Jose Marie Abilay is and was at all times relevant to this action an
15 individual residing in the State of Utah.

16
17 19. Tripharma is informed and believes, and thereon alleges, that
18 Defendant Ryan Vanderpool is and was at all times relevant to this action an
19 individual residing in the State of California.

20
21 20. Tripharma is informed and believes, and thereon alleges, that
22 Defendants Brenda and David Bridgforth are and were at all times relevant to this
23 action individuals residing in the State of Texas.

24
25 21. Tripharma is informed and believes, and thereon alleges, that
26 Defendant Carl Stanitzky is and was at all times relevant to this action an individual
27 residing in the State of Louisiana.
28

1 22. Tripharma is informed and believes, and thereon alleges, that
2 Defendant Winder Lyons is and was at all times relevant to this action an individual
3 residing in the State of South Carolina.
4

5 23. Tripharma is informed and believes, and thereon alleges, that
6 Defendants Yo and Jaime Fujikawa are and were at all times relevant to this action
7 individuals residing in the State of Oregon (Eugene).
8

9 24. Tripharma is informed and believes, and thereon alleges, that
10 Defendant John Hutchinson is and was at all times relevant to this action an
11 individual residing in the State of Pennsylvania.
12

13 25. Tripharma is informed and believes, and thereon alleges, that
14 Defendant Raja Sethi is and was at all times relevant to this action an individual
15 residing in the State of Florida.
16

17 26. Tripharma is informed and believes, and thereon alleges, that
18 Defendants Forest and Dr. Cheryl Townsley are and were at all times relevant to this
19 action individuals residing in the State of Colorado.
20

21 27. Tripharma is informed and believes, and thereon alleges, that
22 Defendant Dorina Lanza is and was at all times relevant to this action an individual
23 residing in the State of Massachusetts.
24

25 28. Tripharma is informed and believes, and thereon alleges, that
26 Defendants Alan and Jean Sickman are and were at all times relevant to this action
27 an individual residing in the State of Virginia.
28



1 29. Tripharma is informed and believes, and thereon alleges, that
2 Defendant Charlene Ragsdale is and was at all times relevant to this action an
3 individual residing in the State of Nevada.
4

5 30. Tripharma is informed and believes, and thereon alleges, that
6 Defendants Rick and Michelle Teague are and were at all times relevant to this
7 action individuals residing in Mansfield, Texas.
8

9 31. Tripharma is informed and believes, and thereon alleges, that
10 Defendants Scott and Darlene Unclebach are and were at all times relevant to this
11 action individuals residing in Frisco, Texas.
12

13 32. Tripharma is informed and believes, and thereon alleges, that
14 Defendant Mike Unclebach is and was at all times relevant to this action an
15 individual residing in Sherman, Texas.
16

17 33. Tripharma is informed and believes, and thereon alleges, that
18 Defendant Jim Marshall is and was at all times relevant to this action an individual
19 residing in Brunswick, Maine.
20

21 34. Tripharma is informed and believes, and thereon alleges, that
22 Defendant Steve Lee is and was at all times relevant to this action an individual
23 residing in Honolulu, Hawaii.
24

25 35. Tripharma is informed and believes, and thereon alleges, that
26 Defendant Dr. Tim Kershenstein is and was at all times relevant to this action an
27 individual residing in San Antonio, Texas.
28



1 36. Tripharma is informed and believes, and thereon alleges, that
2 Defendant Steve Kent is and was at all times relevant to this action an individual
3 residing in Kaneohe, Hawaii.

4
5 37. Tripharma is informed and believes, and thereon alleges, that
6 Defendant Mitch Edland is and was at all times relevant to this action an individual
7 residing in Carrollton, Texas.

8
9 38. Tripharma is informed and believes, and thereon alleges, that
10 Defendant Stacy Chapman is and was at all times relevant to this action an
11 individual residing in Houston, Texas.

12
13 39. Tripharma is informed and believes, and thereon alleges, that
14 Defendants Michael and Debbie Biscotti are and were at all times relevant to this
15 action individuals residing in Anaheim, California.

16
17 40. Tripharma is informed and believes, and thereon alleges, that
18 Defendant Estrella Harrington is and was at all times relevant to this action an
19 individual residing in San Clemente, California.

20
21 41. Tripharma is informed and believes, and thereon alleges, that
22 Defendant Nina Hardwick is and was at all times relevant to this action an
23 individual residing in Aliso Viejo, California.

24
25 42. Tripharma is informed and believes, and thereon alleges, that
26 Defendants Greg and Emily Hicks are and were at all times relevant to this action
27 individuals residing in San Juan Capistrano, California.

28

1 43. Tripharma is informed and believes, and thereon alleges, that
2 Defendant Diana Kleist is and was at all times relevant to this action an individual
3 residing in Temecula, California.

4
5 44. Tripharma is informed and believes, and thereon alleges, that
6 Defendant Rik Wahrab, M.D. is and was at all times relevant to this action an
7 individual residing in Laguna Niguel, California.

8
9 45. The Defendants described in Paragraphs 3 through 43, above, are
10 referred to collectively hereinafter as the “Defendants.”

11
12 46. The Defendants described in Paragraphs 15 through 43 above, are
13 referred to collectively hereinafter as the “Defendant distributors/associates.” The
14 Defendant distributors/associates named herein are and at all relevant times were
15 distributors for Max involved with the sales and distribution of Max products,
16 including MaxWLX. Tripharma alleges that none of the Defendant
17 distributors/associates were aware of the actions alleged herein which represent
18 fraudulent and deceptive activities, including the false advertising and product
19 labeling. These Defendants are made Defendants herein solely for the purpose of
20 enjoining their actions in selling, marketing and distributing MaxWLX as it is
21 presently formulated and from further using or referring to the clinical studies and
22 the marketing materials featuring lead University of Connecticut clinical researcher
23 William Kraemer, PhD.

24
25 47. Defendants are regularly conducting substantial business activity within
26 this District, including marketing themselves and their images, soliciting customers,
27 and recruiting potential Max distributors/associates in person, and by and through
28 other selling and marketing activities, including but not limited to the use of print



1 copy materials and interactive Internet websites that are accessible and in fact
2 accessed by individuals residing in this District.

3
4 48. Evidence which will be gathered during discovery and presented at trial
5 will show that Max and each of the Max Executives was at all times relevant hereto
6 a controlling person, agent, and/or alter ego of each other, and in doing the acts as
7 herein alleged, was acting within the course and scope of his or its authority as such
8 with the expressed and implied permission, instruction, knowledge, consent, and
9 ratification of each other. Max and each of the Max Executives did influence and
10 govern each other with such a degree of unity of interest and ownership so that the
11 individuality, and/or separateness, of each of them has ceased to exist.

12
13 49. Tripharma alleges that the facts hereafter are such that an adherence to
14 the fiction of the separate existence of Max and each of the Max Executives would
15 sanction a fraud or promote a miscarriage of justice.

16
17 50. Max and each of the Max Executives controlled, approved, ratified,
18 sponsored, and condoned the business activities of Defendant distributors/associates,
19 including but not limited to those activities related to the sales, marketing,
20 advertisement, distribution and dissemination of Max products. Further, Max and
21 each of the Max Executives controlled, approved, ratified, sponsored, and condoned
22 the activities alleged herein to be illegal. Max and each of the Max Executives
23 engaged in the fraudulent and deceptive actions alleged herein by in part concealing
24 their actions from the Defendant distributors/associates, all of whom unwittingly
25 sold, marketed and distributed MaxWLX in the manner alleged herein to be
26 fraudulent, deceptive and false.

27
28





1 label the diet supplement MaxWLX as the product which was tested under those
2 certain studies conducted at the University of Connecticut (“UConn”), University of
3 Minnesota and Pennington Biomedical Research Laboratory, Published in the
4 European of Applied Physiology (collectively, “the Studies”). Tripharma, among
5 other rights, has the exclusive right to sell, market and distribute any products which
6 are based upon the 892 Patent (“Original Product”) and has the exclusive right to
7 refer to and to utilize the Studies to sell, market and distribute the Original Product.
8 In addition, the Defendants continue to distribute the Revised Product (as identified
9 below), which contains a portion of the active ingredients of the Original Product
10 with no right to sell, market or distribute the Original Product or the Revised
11 Product in any form.

12
13 54. Defendants are actively using internet websites and other marketing
14 techniques such as distributor conventions to falsely advertise en masse that the
15 Revised Product was the subject matter of the Studies.

16
17 55. Defendants have no right, however, to use the Studies in connection
18 with the sale, marketing and distribution of the Revised Product. The Revised
19 Product only contains approximately 15% of the ingredients which were the subject
20 matter of the Studies. Max and the Max Executives have openly admitted that they
21 have substantially altered the Original Product. In an email to Evan Dameshek, the
22 Managing Member of Tripharma, Fred Ninow, a “founder” of Max, on September
23 28, 2008 1:34 p.m. (PDT), made the following statement regarding MaxWLX:

24
25 “We just finished a very successful convention. Over 2000
26 people there. We released a new kit around WLX with a
27 Rosedale video. It sold real [sic] well. We meet [sic]with our
28 associate advisory council and shared the problems we have with
WLX as a product and the challenges with our volume
requirements. The common consciences [sic] was to move on to
the new diet product. After speaking to hundreds of people about

1 WLX at the convention I believe there is a [sic] opportunity to
2 make it work. Many are not loosing [sic] weight, but those that
3 are seem very happy. We are going to have some of the
4 improved version of WLX next week to see if it is better.
5 Assuming it helps we could continue to promote the product. But
6 the challenge is we will have to unpackage the pills, grind them
7 up and mix them with a new blend. We can only use 15% of the
8 current product to produce the new product. We already have a
9 huge amount of product with more to purchase”

6 56. Defendants have no right to distribute the Original Product or the
7 Revised Product in any form.

9 57. Tripharma neither sponsors nor approves of Defendants’ use of the
10 Studies or Defendants’ distribution of the Original Product as part of the Revised
11 Product.

13 58. Max and the Max Executives, acting in concert and conspiracy, are
14 trading intentionally and wrongfully on the 892 Patent and the Studies and the
15 distinguished reputation and goodwill of Tripharma and the Original Product by
16 falsely advertising and marketing to the general public the Revised Product as the
17 Original Product via interactive Internet websites and videos, Internet blogs, online
18 “chat” forums, regular regional meetings, DVDs for sale on the Internet and other
19 mass marketing schemes. Max and the Max Executives, and all of them,
20 intentionally are using the Original Product and the Studies without Tripharma’s
21 permission in a manner that is likely to deceive, confuse and mislead the public as to
22 the affiliation, sponsorship and/or the Original Product with the Revised Product.

24 59. Max’s and the Max Executives’ conduct as alleged herein constitutes
25 patent infringement in violation of federal law and under the laws of the State of
26 California as set forth herein, including patent infringement, unfair competition, and
27 unjust enrichment. As a result of Max’s and the Max Executives’ conduct,
28



1 Tripharma has suffered and will continue to suffer irreparable injury and
2 accordingly brings this action for restitution and monetary and injunctive relief.

3
4 **ACTS GIVING RISE TO CLAIMS FOR RELIEF**

5
6 60. The University of Minnesota, a Minnesota constitutional corporation
7 (“UMinn”), and Imagenetix, Inc., a Nevada corporation (“Imagenetix”), entered into
8 that certain Exclusive Patent License Agreement effective as of September 2, 2005,
9 wherein UMinn granted Imagenetix an exclusive license to the 892 Patent, along
10 with substantially all of the rights associated with the 892 Patent. From this
11 patented formulation, Imagenetix developed and manufactured the Original Product.

12
13 61. Imagenetix and Tripharma subsequently entered into an Amended and
14 Restated Exclusive Marketing and Supply Agreement dated October 1, 2007, and
15 amendments thereto (the “Imagenetix Contract”), wherein Imagenetix granted
16 Tripharma exclusive sublicense rights associated with the 892 Patent. Tripharma,
17 among other rights, has had at all relevant times the exclusive right to market, sell
18 and distribute products worldwide which are based upon the 892 Patent (i.e., the
19 Original Product) and has the exclusive sublicense rights associated with the
20 original trademark associated with the Original Product. Under the Imagenetix
21 Contract, Tripharma also has had at all relevant times the exclusive license to refer
22 to and to utilize: 1) the Studies to sell, market and distribute the Original Product
23 and 2) the marketing photographs, dialogue and videos it created which depict lead
24 UConn clinical researcher William Kraemer, PhD (“the Dr. Kraemer materials”)
25 touting the successful results of the Studies of the Original Product. A copy of the
26 Imagenetix Contract is attached hereto as Exhibit “B” and is incorporated herein by
27 reference.
28



1 62. Tripharma subsequently entered into that certain Exclusive Marketing
2 and Supply Agreement dated April 8, 2008 with Max (the “Max Contract”), wherein
3 Tripharma granted Max a limited, exclusive right to distribute the capsule form of
4 the Original Product. A copy of the Max Contract is attached hereto as Exhibit “C”
5 and is incorporated herein by reference. Prior to entering into the Max Contract,
6 Max conducted its due diligence of Tripharma and the Original Product to ensure
7 itself that Tripharma and the Original Product were appropriate and viable for the
8 business relationship it wanted.

9
10 63. Under the Max Contract, in order to maintain Max's exclusivity, Max
11 was required to make the following minimum number of orders of the Original
12 Product on or before the expiration of the following time periods: (a) 7,200
13 kilograms of powdered formula in various forms (bulk powder, encapsulated pills;
14 encapsulated and bottled pills) ("Powdered Formula") on or before April 9, 2008; b)
15 An additional 4,320 kilograms of Powdered Formula on or before July 1, 2008; (c)
16 An additional 4,320 kilograms of Powdered Formula by the first day of each
17 succeeding calendar month during the remainder of the initial term of the Max
18 Contract for a minimum term of five years.

19
20 64. Section 1.8 of the Max Contract provides in pertinent part:

21
22 “Except as provided herein, MAX shall have no right, title, or
23 interest in the Patents or the Studies. MAX shall take no actions
24 and shall not allow any of its Affiliates to take any action to
25 infringe on the Patents or the Studies. MAX shall take no action
26 and shall not direct any other person or entity to take any action
27 to reverse engineer the Product. MAX shall not use and shall not
28 direct any other person or entity to use any derivative of the
Powdered Formula to create or design any new products which
compete with the Product.”



1 65. Max placed an order for 4,320 kgs. of raw ingredient form of the
2 Powdered Formula on or around July 29, 2008 (the “August 08 Order”). Max owed
3 Tripharma a balance of \$177,120 for the July 2008 Order, which was due on or
4 around September 5, 2008. Max failed and has continued to fail to pay the balance
5 due on the August 2008 Order.

6
7 66. Pursuant to the Max Contract, Tripharma was provided a business
8 position in the Max International Network Marketing Downline Tree (“MIN
9 Downline Position”). The MIN Downline Position was sponsored by Strategic
10 Marketing and located in the power leg, directly below the position occupied by Jim
11 Britt dba Strategic Marketing. The MIN Downline Position was intended to be fully
12 eligible for all forms of compensation from inception, pursuant to the MAX
13 compensation plan. The position was not intended to be moved or altered for the
14 life of MAX. The MIN Downline Position was not intended to be revoked by MAX
15 due to the termination of the Max Contract. Section 9 of the Max Contract states:

16
17 “Additional Consideration. As additional consideration for
18 TRIPHARMA entering into this Agreement, MAX shall provide
19 TRIPHARMA or any of its designees a business position in the
20 Max International Network Marketing Downline Tree (“**MIN
21 Downline Position**”). The MIN Downline Position shall be
22 sponsored by Strategic Marketing and located in the Power Leg,
23 directly below the position occupied by Jim Britt dba Strategic
24 Marketing. The MIN Downline Position shall be fully eligible
25 for all forms of compensation from inception, pursuant to the
26 MAX compensation plan. The position cannot be moved or
27 altered for the life of MAX. The MIN Downline Position shall
28 not be revoked by MAX due to the termination of this
Agreement.”

25 67. In contravention of the Max Contract, on or around September 2008,
26 Max unilaterally and without cause terminated Tripharma’s MIN Downline Position
27 in violation of the Max Contract. This was the second and final termination of
28

1 Tripharma’s MIN Downline Position; the prior termination nullified by Max and
2 Tripharma’s position was reinstated after protest by Tripharma.

3
4 68. Due to Max’s multiple breaches of the Max Contract, Tripharma
5 terminated the Max Contract on or around October 13, 2008. Prior to this date,
6 Tripharma, through its attorneys, sent letters dated July 9 and October 8, 2008 to the
7 Max Executives outlining Max’s multiple breaches. Copies of the letters dated July
8 9, 2008 and October 8, 2008 are attached hereto as Exhibit “D” and are incorporated
9 herein by reference.

10
11 69. Despite the termination of the Max Contract, Max and the Max
12 Executives have continued to sell an encapsulated form of the Product branded as
13 “MaxWLX,” which Max and the Max Executives caused to be bottled using the
14 Original Product previously purchased from Tripharma without any right or
15 authority to do so and have continued to utilize the Studies of the Original Product,
16 without any right or authority to do so. For example, Max and the Max Executives
17 have been misappropriating and continue to misappropriate Tripharma’s intellectual
18 property by specifically referencing the Studies and the 892 Patent on their website
19 at *www.max.com/wlx* and they have been making and continue to make false and
20 deceptive statements on their websites regarding MaxWLX, including use and
21 reference to the Dr. Kraemer materials as follows:

22
23 “Developed at the University of Minnesota after seven years of
24 scientific research, Max International has obtained worldwide
25 distribution rights for this patented formula backed by hard-
26 science, painstaking research and extensive clinical trials.

27 **What’s In It?**

28 8-week Clinical Trial Results in a 21.6 lb. Average Weight Loss!
The double-blind, placebo controlled study conducted under
physician supervision at the University of Connecticut revealed
extraordinary results in just eight weeks.”



1 “UCONN Clinical Results – MaxWLX™ Weight Loss
2 Accelerator

3 Participants at the University of Connecticut lost an average of:

- 4 • 21.5 lbs. of Body Fat in 8 weeks!
 - 5 • 3.96 inches off their waist
 - 6 • 3.28 inches off their hips
 - 7 • 1.20 inches off each thigh
- 8 90% More Effective than diet and exercise alone!”

9
10 70. At or about the date of the termination of the Max Contract and the
11 Max Executives, without the knowledge of the Defendant distributors/associates,
12 altered the composition of the Original Product by substantially modifying its
13 ingredients. Tripharma is informed and believes, and thereon alleges, that Max and
14 the Max Executives, diluted the original ingredients of the Original Product by
15 cutting it with other ingredients on at least a six-to-one ratio, so that the Revised
16 Product currently being sold by Defendants now contains approximately fifteen
17 percent of the original ingredients of the Original Product.

18
19 71. Despite the fact that the Revised Product is comprised of significantly
20 altered and adulterated ingredients, Max and the Max Executives have continued to
21 market the Revised Product under the same “MaxWLX” brand and have continued
22 to use the Studies in promoting the Revised Product, falsely representing to
23 consumers and the general public that the Revised Product was the subject matter of
24 the Studies.

25
26 72. Due to the change in the ingredients of the Original Product, the
27 efficacy of the Revised Product has been substantially diminished. The
28 overexposure of the Revised Product by virtue of Max's unauthorized marketing and
sale of the Revised Product is causing dilution of the efficacy of the Original
Product in the minds of the consuming public and is making it less coveted among



1 other potential licensees with whom Tripharma has attempted to contract to market,
2 distribute and sell the Original Product.

3
4 **Overview of Tripharma and the Original Product**

5
6 73. Tripharma is a well-established, recognized company that possesses
7 exclusive rights to distribute the Original Product and use the Studies and the Dr.
8 Kraemer materials in connection therewith. Tripharma has the right to further
9 sublicense rights to distribute the Original Product and use the Studies and the Dr.
10 Kraemer materials in connection therewith.

11
12 74. One of the private label products Tripharma distributes is XelleX™, a
13 registered trademark of Tripharma. XelleX™ is comprised of the **same** ingredients
14 as the Original Product. Tripharma also has an exclusive license to use, market and
15 sell Trysinex™, a registered trademarked product, which is comprised of the **same**
16 ingredients as the Original Product. In addition, Tripharma recently launched
17 SoLeau™ (a registered trademark of Tripharma), the world's first weight loss water
18 that contains efficacious doses of the Original Product. The association of the
19 Studies to the Revised Product and its reduced efficacy causes loss of goodwill in
20 the XelleX™, SoLeau™ and Trysinex™ names/products and any other private label
21 product comprised of the same ingredients as the Original Product that Tripharma or
22 its sublicensees currently distributes or will distribute in the future.

23
24 75. As a result of the Studies, the Dr. Kraemer materials, and the successes
25 of the Original Product facilitated by Tripharma's exclusive efforts, professionals
26 and consumers in the diet supplement industry regularly associate XelleX™,
27 SoLeau™ and Trysinex™ with the Studies and the Dr. Kraemer materials.
28

1 76. Tripharma has been attempting to identify potential licensees in several
2 sales and distribution channels, including without limitation, “multi-level
3 marketing” (“MLM”) companies, Direct Response Television, Direct Response
4 Radio and Retail industries for the Original Product, but its efforts have been
5 thwarted by the fact that Max continues to deceptively sell and market the Revised
6 Product as the Original Product with no right to distribute either the Revised Product
7 or the Original Product.

8
9 77. Tripharma has expended significant efforts and resources over the years
10 to promote, advertise and use the Original Product so as to make the Original
11 Product and the patent and trademarks associated with it highly recognizable and
12 distinguished to the consuming public. Tripharma’s diligence has resulted in the
13 public readily identifying products utilizing the Studies as originating from a source
14 sponsored, affiliated or connected with Tripharma and the trademarks associated
15 with it.

16
17 78. The amount of goodwill Tripharma has amassed in connection with the
18 Original Product and the trademarks associated with it as a result of its diligence and
19 expended resources is so great it cannot reasonably be quantified. Tripharma also
20 has dedicated significant amounts of time and resources to promoting the Original
21 Product and the patent and trademarks associated with it and protecting its exclusive
22 right to distribute the Original Product, including filing this action against
23 Defendants.

24
25 79. Tripharma’s election to enter into a contract with Max for the exclusive
26 distribution of the Original Product came at the expense of rejecting other business
27 opportunities for Tripharma and losing other business opportunities. Max's
28 continual sale of the Revised Product has made it virtually impossible for Tripharma



1 to garner commitments from other companies who could and would market and
2 distribute the Original Product. Most large companies, particularly MLMs, want
3 exclusivity so they can recruit distributors. Although Tripharma can offer
4 exclusivity, as long as Max is marketing and distributing the Revised Product, it
5 cannot locate other companies to market and distribute the Original Product given
6 Max's actions and false and deceptive marketing.

7
8 **Overview of Max and its Multi-Level Marketing Business Structure**

9
10 80. Max contracts for the manufacture of and supply of, as well as sells,
11 markets and distributes, dietary supplements. As set forth in greater detail below,
12 Max and the Max Executives are actively and falsely advertising MaxWLX as the
13 Original Product which was the subject matter of the Studies, despite the fact that
14 Max's rights to distribute the Original Product were long ago terminated.

15
16 81. Defendants operate through a MLM business distribution model. Max
17 is the parent multi-level marketing company which markets its products directly to
18 consumers by means of relationship referral and direct selling. According to Max's
19 parent website, *www.maxinternational.com*, Max-WLX is sold and distributed
20 throughout the world, including the United States and Canada, the Phillipines and
21 Australia.

22
23 Max representatives solicit individuals to become salespersons,
24 or "distributors / associates," of Max products. Distributors
25 receive a commission on each sale of Max products.

26 82. Max distributors/associates are encouraged to recruit as many people as
27 possible to join their "downline." Distributors also earn bonus compensation for the
28 sales activity of those individuals in their "downline."

1 83. Max distributors/associates are located all over the world and market
2 Max products globally using, among other methods, various interactive distributor
3 websites.

4
5 84. The Max Executives maintain and exert control over the business
6 conduct of Max distributors/associates by requiring the Defendant
7 distributors/associates to comply with the “Statement of Policies and Procedures”
8 (the “Max Policies”), a copy of which is marked and attached hereto as Exhibit “E”
9 and is incorporated herein by reference. This document is readily available for
10 viewing on many distributors’ websites.

11
12 85. Sections 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5 and 3.6.2 of the Max Policies,
13 under the Section heading “Advertising,” provide in pertinent part:

14
15 **3.2 - Advertising**

16 **3.2.1 - General**

17 All Associates shall safeguard and promote the good reputation
18 of Max and its products. The marketing and promotion of Max,
19 the Max opportunity, the Marketing and Compensation Plan, and
20 Max products shall be consistent with the public interest, and
must avoid all discourteous, deceptive, misleading, unethical or
immoral conduct or practices.

21 To promote both the products and services, and the tremendous
22 opportunity Max offers, Associates must use the sales tools and
23 support materials produced by Max. Max has carefully designed
24 its products, product labels, Marketing and Compensation Plan,
25 and promotional materials to ensure that each aspect of Max is
26 fair, truthful, substantiated, and complies with the vast and
27 complex legal requirements of federal and state laws. If Max
28 Associates develop their own sales tools and promotional
materials, or to promote Max’s products or the Max opportunity
on blog sites, social networks, or other forums, notwithstanding
their integrity and good intentions, there is a considerable
likelihood that they would unintentionally violate any number of
statutes or regulations affecting a Max business. These
violations, although they may be relatively few in number, would
jeopardize the Max opportunity for all Associates. Accordingly,

1 Associates must not produce their own literature, advertisements,
2 sales tools and promotional materials, or Internet web pages.

3 3.2.2 - Associate Web Sites

4 If an Associate desires to utilize an Internet web page to promote
5 his or her business, he or she must use an official Max replicated
6 website. No websites other than Max provided replicated
7 websites are permitted. Team Sites used for information and
8 training are exempt.

9 3.2.3 - Online Auctions and other Online Forums

10 Associates may not sell Max's products through online auction,
11 barter, or brokerage sites, including but not limited to Craig's
12 List and ebay.

13 3.2.4 - Domain Names

14 Associates may not use or attempt to register any of Max's trade
15 names, trademarks, service names, service marks, product
16 names, the Company's name, or any derivative thereof, for any
17 Internet domain name, URL or email address.

18 3.2.5 - Trademarks and Copyrights

19 Max will not allow the use of its trade names, trademarks,
20 designs, or symbols by any person, including Max Associates,
21 without its prior, written permission. Associates may not produce
22 for sale or distribution any recorded Company events and
23 speeches without written permission from Max nor may
24 Associates reproduce for sale or for personal use any recording
25 of Company-produced audio or video tape presentations.

26 * * *

27 3.6.2 - Product Claims

28 No claims (which include personal testimonials) as to
therapeutic, curative or beneficial properties of any products
offered by Max may be made except those contained in official
Max literature. In particular, no Associate may make any claim
that Max products are useful in the cure, treatment, diagnosis,
mitigation or prevention of any diseases. Such statements can be
perceived as medical or drug claims. Not only so such claims
violate Max policies, but they potentially violate federal and state
laws and regulations, including the federal Food, Drug, and
Cosmetic Act and Federal Trade Commission Act.

86. Max and the Max Executives have explicitly and/or implicitly approved
and/or ratified the business conduct of Defendant distributors/associates, including
the tools, techniques, methods, forums and statements used in connection with



1 Defendant distributors/associates' sales, marketing and advertising of Max and Max
2 products.

3
4 **Max's and the Max Executives' Patent Infringement, Trademark Dilution and**
5 **False Advertising Concerning MaxWLX**

6
7 87. At all times relevant to this action, Defendants were and are operating
8 interactive websites to market, advertise, and sell MaxWLX, which they claim was
9 the subject matter of the Studies. The websites allow the general public to contact
10 the site owner, make product purchases, inquire about the products, watch videos,
11 and even sign up to become a Max distributor/associate. Max also sponsors and
12 holds large-scale conferences throughout the country, including within this District,
13 where individuals may buy and sell Max products and enlist as a distributor.

14
15 88. Max and the Max Executives are allowing and approving Max
16 distributors/associates, including Defendant distributors/associates, to falsely
17 advertise and market MaxWLX as alleged above.

18
19 89. Max and the Max Executives not only are mass marketing and selling
20 MaxWLX under the false advertisement of the support of the Studies, they actively
21 are recruiting other individuals to join the Max marketing force in furtherance of the
22 forgoing deceptive marketing.

23
24 90. In light of the exponential rate of Max distributor expansion, and the
25 fact that distributors are actively using the Studies to support the efficacy of
26 MaxWLX and recruiting myriad individuals to join their network and make the
27 same advertising claims, the true number of existing Max distributors/associates
28



1 who are actually falsely advertising MaxWLX with the Studies are numerous but
2 unknown.

3
4 91. Upon information and belief, Max and the Max Executives, acting in
5 concert and conspiracy, are knowingly infringing upon Tripharma's rights by
6 misappropriating, falsely advertising, imitating, counterfeiting, trading on, and
7 otherwise using the Revised Product and the Studies without Tripharma's
8 permission, in a manner likely to cause confusion, mistake, and deception to the
9 public as to the source and quality of MaxWLX. Max and the Max Executives
10 further are knowingly diluting, tarnishing, diminishing, and blurring the
11 distinctiveness and strength of the 892 Patent, Tripharma's trademarks and the
12 Original Product through their wrongful conduct, particularly by touting the
13 effectiveness of the Revised Product while falsely advertising its efficacy.

14
15 92. Max and the Max Executives also are actively advertising on their
16 websites the Studies in support of the efficacy of MaxWLX, and Max and the Max
17 Executives are doing so to confuse and deceive the consuming public into believing
18 that MaxWLX was the subject matter of the Studies and the Dr. Kraemer materials.

19
20 93. Max and the Max Executives are using the Original Product which Max
21 purchased from Tripharma to create a watered down version of the Original Product
22 and are working in concert and conspiracy with the other named Max and the Max
23 Executives wrongfully to use the Revised Product to enrich themselves at
24 Tripharma's expense.

25
26 94. The Federal Trade Commission ("FTC") has broad powers to enjoin
27 such practices. Section 5 of the Federal Trade Commission Act prohibits "unfair
28 methods of competition in commerce." 15 USC § 45(a). It is one of the most potent

1 weapons in the FTC's arsenal. The FTC has the power to attack objectionable
2 advertising, such as that alleged herein, on three grounds: (a) as an “unfair method
3 of competition,” (b) as a “deceptive practice,” or (c) if foods, drugs, cosmetics or
4 devices are involved, as “misleading in a material respect.” *See generally Note, The*
5 *Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1025 (1956). There is no
6 requirement that actual deception must be proven. *See Progress Tailoring Co. v.*
7 *FTC*, 153 F2d 103, 105 (7th Cir. 1946).

8
9 95. Max’s and the Max Executives’ conduct was and is intentional, willful,
10 wanton, malicious, oppressive, and reckless. The conduct of Max and the Max
11 Executives, and all of them, acting in concert and as each other’s controlling person,
12 controlling entity, agent, and alter ego, constitutes violations of federal law under 35
13 U.S.C. Sections 100 *et seq*, and of the laws of the State of California as set forth
14 herein. Max’s and the Max Executives’ conduct further constitutes unfair
15 competition and unjust enrichment at Tripharma’s expense.

16
17 96. As a result of Max’s and the Max Executives’ conduct, Tripharma has
18 suffered and will continue to suffer irreparable injury and accordingly brings this
19 action for monetary, restitution and injunctive relief.

20
21 97. As a result of Max’s and the Max Executives’ conduct, Tripharma has
22 suffered damages, and will continue to suffer compensatory damages, in an amount
23 according to proof but believed to be in excess of One Hundred Fifty Million
24 Dollars (\$150,000,000.00). An award of punitive damages against Max and the
25 Max Executives up to a ratio of nine-to-one to compensatory damages is appropriate
26 and necessary to force Max and the Max Executives to alter their behavior.
27 Moreover, unless the declaratory and injunctive relief requested herein is granted,
28

1 Tripharma will likely suffer irreparable injury as a result of Max's and the Max
2 Executives' conduct.

3
4 **FIRST CLAIM FOR RELIEF**

5 Patent Infringement and Injunctive Relief

6 (Against Max and the Max Executives and Does 1 through 10)

7
8 98. Tripharma realleges and reasserts each allegation set forth above as if
9 fully set forth herein.

10
11 99. Max and the Max Executives have used, sold or offered to sell, and will
12 continue to use, sell or offer to sell, the Products that infringe each of the elements
13 of one or more claims of the 892 Patent, without license from Tripharma, in this
14 judicial district and elsewhere throughout the United States.

15
16 100. By using, selling, and/or offering for sale MaxWLX, Max and the Max
17 Executives have directly and contributorily infringed, and will continue to directly
18 and contributorily infringe, one or more claims of the 892 Patent under 35 U.S.C.
19 Section 271(a),(b),(c), and/or (f), literally and/or under the doctrine of equivalents.

20
21 101. By making, using, selling, and/or offering for sale MaxWLX Max and
22 the Max Executives have induced infringement of, and will continue to induce
23 infringement of, one or more claims of the 892 Patent under 35 U.S.C. Section 271
24 (b), and/or (f), literally and/or under the doctrine of equivalents.

25
26 102. Max's and the Max Executives' infringement of the 892 Patent has
27 been and continues to be willful and deliberate.

28

1 103. As a direct and proximate consequence of the acts and practices of Max
2 and the Max Executives, unless such acts and practices are enjoined by the Court,
3 Tripharma will continue to be injured in its business and property rights, and has
4 suffered, is suffering, and will continue to suffer injury and damages for which it is
5 entitled to relief under 35 U.S.C. Section 284, including treble damages.

6
7 104. As a direct and proximate consequence of the acts and practices of
8 Max and the Max Executives, they have also caused, are causing and, unless such
9 acts and practices are enjoined by the Court, will continue to cause irreparable harm
10 to Tripharma for which there is no adequate remedy at law, and for which
11 Tripharma is entitled to injunctive relief under 35 U.S.C. Section 283.

12
13 **SECOND CLAIM FOR RELIEF**

14 Trademark Dilution

15 (Against Max and the Max Executives and Does 1 through 10)

16
17 105. Tripharma realleges and reasserts each allegation set forth above as if
18 fully set forth herein.

19
20 106. Max's and the Max Executives' conduct as alleged herein constitutes
21 dilution and blurring of Tripharma's trademarks all of which are associated with the
22 892 Patent and the Original Product, in violation of Section 32 of the Lanham Act,
23 15 U.S.C. Section 1114. As a direct and proximate result of this conduct, Tripharma
24 has been harmed in an amount according to proof, and will suffer further,
25 irreparable injury unless the requested relief is granted.

26
27 107. Max's and the Max Executives' conduct as alleged herein was
28 intentional, willful, wanton, malicious, oppressive, and reckless, thus warranting



1 enhanced and/or treble damages and attorneys' fees pursuant to 15 U.S.C. Section
2 1117(a).

3
4 **THIRD CLAIM FOR RELIEF**

5 Lanham Act - False Advertising and
6 False Designation of Origin and Injunctive Relief
7 (Against Max and the Max Executives and Does 1 through 10)
8

9 108. Tripharma realleges and reasserts each allegation set forth above as if
10 fully set forth herein.

11
12 109. Max's and the Max Executives' conduct as alleged herein constitutes
13 false advertising and false designation of origin, in violation of Section 43 of the
14 Lanham Act, 15 U.S.C. Section 1125(a).

15
16 110. The false statements actually deceived or had the tendency to deceive a
17 substantial segment of Defendants' intended audience. The deception was material,
18 in that it was likely to influence the consumers' purchasing decision.

19
20 111. Max and the Max Executives caused the false statements to enter
21 interstate commerce.

22
23 112. Tripharma and consumers have been or are likely to be injured as a
24 result of the false statements either by a direct diversion of sales from Tripharma to
25 Max and by a lessening of the goodwill associated with its products.
26
27
28



1 113. As a direct and proximate result of Max's and the Max Executives'
2 conduct, Tripharma has been harmed in an amount according to proof, and will
3 suffer further, irreparable injury unless the requested relief is granted.

4
5 114. Max's and the Max Executives' conduct as alleged herein was
6 intentional, willful, wanton, malicious, oppressive and reckless, thus warranting
7 enhanced and/or treble damages and attorneys' fees pursuant to 15 U.S.C. Section
8 1117(a).

9
10 115. Tripharma is also entitled to injunctive relief to enjoin Defendants
11 from the actions identified herein regarding the continued sales, marketing and
12 distribution of MaxWLX.

13
14 **FOURTH CLAIM FOR RELIEF**

15 Lanham Act - Unfair Competition

16 (Against Max and the Max Executives and Does 1 through 10)

17
18 116. Tripharma realleges and reasserts each allegation set forth above as if
19 fully set forth herein.

20
21 117. Max's and the Max Executives' conduct as alleged herein constitutes
22 unfair competition, in violation of Section 43 of the Lanham Act, 15 U.S.C. Section
23 1125(a). As a direct and proximate result of Max's and the Max Executives'
24 conduct, Tripharma has been harmed in an amount according to proof, and will
25 suffer further, irreparable injury unless the requested relief is granted.

26
27 118. Max's and the Max Executives' conduct as alleged herein was
28 intentional, willful, wanton, malicious, oppressive, and reckless, thus warranting

1 enhanced and/or treble damages and attorneys' fees pursuant to 15 U.S.C. Section
2 1117(a).

3
4 **FIFTH CLAIM FOR RELIEF**

5 Breach of Contract

6 (Against Defendant Max and Does 1 through 10)

7
8 119. Tripharma realleges and reasserts each allegation set forth above as if
9 fully set forth herein.

10
11 120. Tripharma has performed all conditions and covenants required of it
12 under the Max Contract, except for those conditions and covenants that it was
13 prevented and/or excused from performing.

14
15 121. Max breached the Max Contract by, *inter alia*, failing to pay
16 Tripharma for the Product they purchased, by marketing the Revised Product under
17 the "MaxWLX" brand which is comprised of significantly altered and adulterated
18 ingredients while continuing to market the Revised Product and using the Studies in
19 promoting the Revised Product, by failing and refusing to meet the purchase
20 requirements under the Max Contract for the five year term of the contract, by
21 falsely representing to consumers and the general public that the Revised Product
22 was the subject matter of the Studies and is the subject of the 892 Patent, and by
23 terminating Tripharma's MIN Downline Position, failing to provide a downline
24 genealogy report and failing to pay Tripharma the bonuses and commissions to
25 which it was and is entitled.

26
27 122. As a proximate result of the breach of the Max Contract by Max and
28 the Max Executives, Tripharma has suffered damages and will continue to suffer

1 damages in an amount according to proof, including but not limited to lost profits,
2 Max's profits on the sale of Revised Product and consequential damages.

3
4 **SIXTH CLAIM FOR RELIEF**

5 Declaratory Relief

6 (Against Max and the Max Executives and Does 1 through 10)

7
8 123. Tripharma realleges and reasserts each allegation set forth above as if
9 fully set forth herein.

10
11 124. A dispute has now arisen between the parties regarding the respective
12 rights of each of the parties. Tripharma contends that all Defendants have no right
13 to continue to distribute MaxWLX as currently formulated and no right to continue
14 to refer to the 892 Patent, the Studies or the Dr. Kraemer materials in support of the
15 efficacy of MaxWLX. Tripharma also contends that Defendant Max breached the
16 Max Contract as alleged above. Tripharma is informed and believes that Max
17 contend that it did not breach the Max Contract and that they dispute Tripharma's
18 other contentions.

19
20 125. A judicial declaration is therefore required declaring that: (1)
21 Defendants have no right to continue to sell, market or distribute MaxWLX as
22 currently formulated; (2) Defendants have no right to continue to use the Studies or
23 the Dr. Kraemer materials in support of the efficacy of MaxWLX; (3) Tripharma is
24 entitled to be compensated by Max and the Max Executives for the wrongful
25 distribution of MaxWLX after the termination of the Max Contract and the wrongful
26 use of the Studies and the Dr. Kraemer materials, and (4) Max breached the Max
27 contract and must compensate Tripharma for the damages caused thereby.
28

1 **SEVENTH CLAIM FOR RELIEF**

2 Promissory Fraud

3 (Against Max and the Max Executives and Does 1 through 10)

4
5 126. Tripharma realleges and reasserts each allegation set forth above as if
6 fully set forth herein.

7
8 127. In or about January, March and April 2008, Steve Scott, Fred Ninnow,
9 and Peter Nordberg, acting on behalf of Max and with full authority to do so, made,
10 *inter alia*, the following oral representations to Tripharma: 1) Max would comply
11 with the terms of the Max Contract, including performing all of the purchase
12 obligations under the Max Contract regarding the Original Product and that it would
13 pay for the goods it purchased according to the terms of the Max Contract, 2) Max
14 would exclusively market the Original Product and not adulterate it; and 3) Max
15 would give Tripharma a favorable MIN Downline Position, paying it the appropriate
16 bonuses and commissions to which it was entitled at this position and that Max
17 would maintain this position for Tripharma even if the Max Contract was
18 terminated.

19
20 128. At the time Max, through the Max Executives above, made these
21 promises/representations, it and the Max Executives knew the representations were
22 false and that Max had no intention of performing them. These representations were
23 made to induce Tripharma to enter into the Max Contract.

24
25 129. The representations were material and Tripharma justifiably relied on
26 them and entered in the Max Contract. But for these representations, Tripharma
27 would not have entered into the Max Contract. As a proximate result of the
28



1 fraudulent conduct of Max and the Max Executives, Tripharma has suffered actual
2 damages and is entitled to damages according to proof.

3
4 130. Max's and the Max Executives' representations and actions constituted
5 fraud, oppression and/or malice and Tripharma is entitled to punitive damages.

6
7 **EIGHTH CLAIM FOR RELIEF**

8 Unfair Competition - California Bus. & Prof. Code Section 17200 *et seq.*

9 (Against Max and the Max Executives)

10
11 131. Tripharma realleges and reasserts each allegation set forth above as if
12 fully set forth herein.

13
14 132. Max and the Max Executives engaged in unfair, unlawful and/or
15 fraudulent business practices and such conduct as alleged herein constitutes unfair
16 competition in violation of California Business and Professions Code
17 Section 17200. As a direct and proximate result of their conduct, Tripharma has
18 been harmed in an amount according to proof, and will suffer further, irreparable
19 injury unless the requested relief is granted.

20
21 133. Tripharma is informed and believes, and on that basis alleges, that
22 Max's and the Max Executives' conduct was unlawful, unfair and/or fraudulent and
23 has the potential to cause confusion in the marketplace.

24
25 134. Tripharma requests that the court enter such orders as may be
26 necessary to restore to it all sums which Max and the Max Executives wrongfully
27 acquired by means of unfair and fraudulent conduct, as provided in Business and
28 Professions Code Sections 17203 and 17535, and for other appropriate relief.



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135. Tripharma requests that the court enter such orders as may be necessary to enjoin Max’s and the Max Executives’ false, fraudulent, and misleading labeling and advertising, as provided in Business and Professions Code Sections 17203 and 17535, and for other appropriate relief, including attorneys fees pursuant to, *inter alia*, CCP Section 1021.5, including restitution and disgorgement of profits, injunctive relief from Defendants. Tripharma additionally requests that such funds be impounded by the Court or that an asset freeze or constructive trust be imposed upon such revenues and profits to avoid dissipation and/or fraudulent transfer or concealment of such monies by Max and the Max Executives. Tripharma may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

NINTH CLAIM FOR RELIEF

Unfair Competition - California Bus. & Prof. Code Section 17200 *et seq.* Based on Violations of California Health and Safety Code Sections 110660 and 110390 (Against Max and the Max Executives)

136. Tripharma realleges and reasserts each allegation set forth above as if fully set forth herein.

137. California Health and Safety Code Section 110660 provides: "Any food is misbranded if its labeling is false or misleading in any particular."

138. California Health and Safety Code Section 110390 prohibits the dissemination of false advertising in connection with the sale of food and drug products.

1 139. California Health and Safety Code Section 110390 provides that: "It is
2 unlawful for any person to disseminate any false advertisement of any food, drug,
3 device or cosmetic. An advertisement is false if it is false or misleading in any
4 particular."

5
6 140. Max and the Max Executives, while marketing and distributing
7 MaxWLX with the Revised Product, misbranded it and engaged in false advertising
8 because of the following:

- 9
- 10 a) The MaxWLX label contains a reference to the 892 Patent
11 despite the fact that MaxWLX consisting of the Revised Product
12 is not the subject of the 892 Patent;
 - 13
14 b) The MaxWLX label and the product packaging for MaxWLX
15 consisting of the Revised Product refers to a "clinically proven
16 and patented formula" despite the fact that MaxWLX consisting
17 of the Revised Product was never the subject of the Studies; and
18
 - 19 c) The product packaging for MaxWLX consisting of the Revised
20 Product refers to the clinical data of the Studies (lbs. of body fat
21 lost, inches lost, etc.) and contains the picture of the lead clinical
22 researcher William Kraemer, PhD with a direct quote from him
23 despite the fact that MaxWLX consisting of the Revised Product
24 was never the subject of the Studies.

25
26 141. As a result of such labeling, promotional materials and advertisements
27 used for the sale of the Revised Product, the formula changes from the Original
28 Product were not known to, and would not have been recognized by, a reasonably

1 prudent consumer or user, including members of the public for whom the product
2 was intended.

3
4 142. As a result of the conduct described above, Max and the Max
5 Executives have been and will be unjustly enriched at the expense of the consuming
6 public. Specifically, they have been unjustly enriched by receipt of millions of
7 dollars in profits from the wrongful sales of the Revised Product both in California
8 and throughout the United States, Canada and abroad, which were sold through
9 advertisements and marketing which affirmatively misrepresent the true nature and
10 efficacy of the Revised Product.

11
12 143. Pursuant to Section 17203 of the California Business and Professions
13 Code, Tripharma seeks an order from the Court requiring Max and the Max
14 Executives to disgorge all ill-gotten profits and awarding Tripharma restitution of all
15 profits wrongfully acquired by Max and the Max Executives by means of such false
16 advertising, which has resulted in Tripharma's inability to market the Original
17 Product. Tripharma additionally requests that such funds be impounded by the
18 Court or that an asset freeze or constructive trust imposed upon such revenues and
19 profits to avoid dissipation and/or fraudulent transfers or concealment of such
20 monies by Max and the Max Executives.

21
22 144. Pursuant to Section 17535 of the California Business and Professions
23 Code, Tripharma seeks an order of this Court requiring Max and the Max
24 Executives to disgorge all ill-gotten profits and awarding Tripharma full restitution
25 of all profits wrongfully acquired by Max and the Max Executives by means of such
26 false advertising, plus interest and attorneys' fees pursuant to Section 1021.5 of the
27 California Code of Civil Procedure, so as to restore any and all monies to Tripharma
28 which were acquired and attained by means of such untrue and misleading

1 advertising, and which ill-gotten gains are still retained by Max and the Max
2 Executives. Tripharma additionally requests that such funds be impounded by the
3 Court or that an asset freeze or constructive trust be imposed upon such revenues
4 and profits to avoid dissipation and/or fraudulent transfer or concealment of such
5 monies by Max and the Max Executives. Tripharma may be irreparably harmed
6 and/or denied an effective and complete remedy if such an order is not granted.

7
8 **TENTH CLAIM FOR RELIEF**

9 False Advertising - California Bus. & Prof. Code Section 17500 *et seq.*
10 (Against Max and the Max Executives)

11
12 145. Tripharma realleges and reasserts each allegation set forth above as if
13 fully set forth herein.

14
15 146. California Business and Professions Code Section 17500 *et seq.*
16 prohibits the making or disseminating or actions that caused to be disseminated
17 before the general public in the State of California in any promotional materials and
18 advertisements any statement regarding a consumer product that are untrue,
19 deceptive, unfair or misleading.

20
21 147. Max and the Max Executives made, disseminated and/or caused to be
22 disseminated before the general public in this state, promotional materials and
23 advertisements contained statements regarding a consumer product that are untrue,
24 deceptive, unfair or misleading, thus causing members of the public to be deceived.

25
26 148. As a result of such labeling, promotional materials and advertisements
27 used for the sale of the Revised Product, the formula changes from the Original
28 Product were not known to, and would not have been recognized by, a reasonably

1 prudent consumer or user, including members of the public for whom the product
2 was intended.

3
4 149. As a result of the conduct described above, Max and the Max
5 Executives have been and will be unjustly enriched at the expense of the consuming
6 public. Specifically, they have been unjustly enriched by receipt of millions of
7 dollars in profits from the wrongful sales of the Revised Product in California,
8 throughout the United States, and abroad which were sold through advertisements
9 and marketing which affirmatively misrepresent the true nature and efficacy of the
10 Revised Product.

11
12 150. Pursuant to Section 17203 of the California Business and Professions
13 Code, Tripharma seeks an order from the Court requiring Max and the Max
14 Executives to disgorge all ill-gotten profits and awarding Tripharma restitution of all
15 profits wrongfully acquired by them by means of such false advertising, which has
16 resulted in Tripharma's inability to market its products or the Original Product.
17 Tripharma additionally requests that such funds be impounded by the Court or that
18 an asset freeze or constructive trust imposed upon such revenues and profits to avoid
19 dissipation and/or fraudulent transfers or concealment of such monies by Max and
20 the Max Executives.

21
22 151. Pursuant to Section 17535 of the California Business and Professions
23 Code, Tripharma seeks an order of this Court requiring Max and the Max
24 Executives to disgorge all ill-gotten profits and awarding Tripharma full restitution
25 of all profits wrongfully acquired by them by means of such false advertising, plus
26 interest and attorneys' fees pursuant to Section 1021.5 of the California Code of
27 Civil Procedure, so as to restore any and all monies to Tripharma which were
28 acquired and attained by means of such untrue and misleading advertising, and

1 which ill-gotten gains are still retained by Max and the Max Executives. Tripharma
2 additionally requests that such funds be impounded by the Court or that an asset
3 freeze or constructive trust be imposed upon such revenues and profits to avoid
4 dissipation and/or fraudulent transfer or concealment of such monies by Max and
5 the Max Executives. Tripharma may be irreparably harmed and/or denied an
6 effective and complete remedy if such an order is not granted. Tripharma also
7 requests an injunction ordering that Max and the Max Executives and their agents,
8 employees, servants, representatives, successors in interest, to refrain from the
9 conduct set forth herein

10
11 **ELEVENTH CLAIM FOR RELIEF**

12 **Unfair Competition – Palming Off**

13 **(Against Max and the Max Executives and Does 1 through 10)**

14
15 152. Tripharma realleges and reasserts each allegation set forth above as if
16 fully set forth herein.

17
18 153. Tripharma is currently a competitor of Max. Through their actions,
19 Max and the Max Executives have simulated and imitated goods sold or to be sold
20 by Tripharma with the purpose of deceiving the general public into buying the
21 imitation product under the impression that it is purchasing the goods of Tripharma.
22 Max and the Max Executives have intentionally engaged in such conduct to deceive
23 the general public into buying the Revised Product, and not its products or the
24 Original Product, the exclusive marketing and distribution rights to which are held
25 by Tripharma.

1 154. Max's and the Max Executives' conduct constitutes common law
2 unfair competition and unlawful, unfair and deceptive practices under California
3 Business and Professional Code Sections 17200 *et seq.* and 17500 *et seq.*

4
5 155. As a direct and proximate result of Max's and the Max Executives'
6 conduct, Tripharma has suffered, and will continue to suffer, damages to its
7 business, reputation and goodwill, in an amount to be established at trial.

8
9 156. Max's and the Max Executives' conduct constituted fraud, oppression
10 and/or malice and Tripharma is entitled to punitive damages.

11
12 **TWELFTH CLAIM FOR RELIEF**

13 Preliminary and Permanent Injunctive Relief

14 (Against All Defendants)

15
16 157. Tripharma realleges and reasserts each allegation set forth above as if
17 fully set forth herein.

18
19 158. Max and the Max Executives have intentionally or negligently and
20 improperly interfered with Tripharma's future and prospective sales and have
21 attained ill-gotten profits from the marketing and distribution of the Revised Product
22 using unfair, deceptive and fraudulent business activities as alleged above. These
23 acts have caused and, unless said acts are restrained by this Court, via a preliminary
24 injunction and Permanent Injunction, will continue to cause Tripharma to suffer
25 irreparable injury.

26
27 159. Tripharma is also entitled to a mandatory injunction requiring Max to
28 reinstate its MIN Downline Position in accordance with the Max Contract.

1 160. Tripharma has no adequate remedy at law. Damages at law are
2 inadequate. Tripharma therefore seeks injunctive equitable relief from this Court.

3
4 **THIRTEENTH CLAIM FOR RELIEF**

5 Unjust Enrichment and Imposition of Constructive Trust
6 (Against Max and the Max Executives)
7

8 161. Tripharma realleges and reasserts each allegation set forth above as if
9 fully set forth herein.

10
11 162. Max's and the Max Executives' conduct as alleged herein constitutes
12 unjust enrichment under the laws of the State of California. As a direct and
13 proximate result of Max's and the Max Executives' conduct, Tripharma has been
14 harmed in an amount according to proof, and will suffer further, irreparable injury
15 unless the requested relief is granted. Accordingly, Tripharma demands that a
16 constructive trust be imposed for Tripharma's benefit on all revenues derived from
17 the sale of any products manufactured by Max based on, arising out of, or otherwise
18 derived from Max's and the Max Executives' wrongful conduct, including but not
19 limited to patent and trademark infringement, trademark dilution, false advertising
20 and unfair competition.

21
22 163. Max's and the Max Executives' conduct as alleged herein was
23 intentional, willful, wanton, malicious, oppressive, and reckless, thus warranting
24 enhanced and punitive damages and attorneys' fees.
25
26
27
28



FOURTEENTH CLAIM FOR RELIEF

Accounting

(Against Max and the Max Executives and Does 1 through 10)

164. Tripharma realleges and reasserts each allegation set forth above as if fully set forth herein.

165. Tripharma contends that due to the Max’s and the Max Executives’ misconduct, Tripharma is entitled to all of the profits derived by them from the sale of MaxWLX after termination of the Max Contract. Tripharma also contends that due to the Max’s and the Max Executives’ unlawful termination of its MIN Downline Position, they owe Tripharma compensation it would have received if it had not been improperly terminated. An accounting is therefore required to determine the amount of such compensation.

DEMAND/PRAAYER FOR RELIEF

WHEREFORE, Tripharma prays for judgment as to Max and the Max Executives, and all of them, jointly and severally, as follows:

- 1) For general damages, including statutory damages, in a sum in excess of the jurisdictional minimum of this Court, according to proof;
- 2) For compensatory damages in excess of the jurisdictional minimum of this Court, according to proof;
- 3) For consequential damages in excess of the jurisdictional minimum of this Court, according to proof;



1 4) For damages for which it is entitled to relief under 35 U.S.C. Section
2 284, including treble damages.

3
4 5) Injunctive relief under 35 U.S.C. Section 283 enjoining Max and the
5 Max Executives from continuing to sell the Revised Product without any rights to
6 do so and regarding the following:

- 7
- 8 a) Max and the Max Executives, and their agents, employees,
9 servants, representatives, successors in interest, and all those in
10 concert with them, be permanently enjoined from engaging in the
11 conduct set forth herein;
 - 12
13 b) Advertising, marketing, counterfeiting, or otherwise using in any
14 manner the Original Product or the Revised Product without
15 Tripharma's permission and approval;
 - 16
17 c) Manufacturing, creating, designing, marketing, selling,
18 advertising producing, making, or otherwise using in any manner
19 any product, that is likely to cause confusion, deception, or
20 mistake or that dilutes or is likely to infringe upon the 892 Patent
21 and/or Tripharma's trademarked products;
 - 22
23 d) Engaging in any other conduct that tends to falsely represent, or
24 is likely to confuse, mislead, or deceive purchasers, Defendants'
25 customers, Tripharma's customers, and other members of the
26 public to believe that Max's and the Max Executives' products
27 are connected with Studies, the 892 Patent or Triapharma's
28 trademarked products;

- 1 e) Further damaging Tripharma's goodwill;
- 2
- 3 f) Further engaging in unfair competition against Tripharma; and
- 4
- 5 g) Assisting, aiding, or abetting any other person or business entity
- 6 in engaging in or performing any of the activities referred to
- 7 herein;
- 8

9 6) This Court to issue a permanent injunction ordering that Max and Max

10 Executives issue and distribute a written mandate ordering each and all of its

11 distributors, and their agents, employees, servants, representatives, successors in

12 interest, to refrain from the conduct set forth herein, or be subject to sanctions as

13 deemed appropriate by this Court;

14

15 7) Tripharma be awarded compensatory damages in an amount to be

16 determined at the time of trial but believed to be in excess of One Hundred Fifty

17 Million Dollars and Zero Cents (\$150,000,000) and that such damages be enhanced

18 and/or trebled pursuant to 15 U.S.C. Section 1117(b) together with reasonable

19 attorneys' fees.

20

21 8) Tripharma be awarded statutory remedies pursuant to Sections 17203

22 and 17535 of the California Business and Professions Code, including restitution

23 and injunctive relief in accordance with the above-requested injunctive relief;

24

25 9) Tripharma be awarded punitive damages;

26

27 10) All profits earned by Max and the Max Executives through the time of

28 trial s a result of their infringing, diluting, and otherwise wrongful conduct alleged

1 herein be determined in an accounting, and thereafter disgorged and held in
2 constructive trust and paid over to Tripharma, and enhanced in the form of
3 compensatory damages as appropriate under the exceptional circumstances of this
4 case;

5
6 11) All damages representing the amount Tripharma would have been
7 compensated if its MIN Downline Position had not been improperly terminated;

8
9 12) Tripharma recover its reasonable attorneys' fees, costs, and expenses
10 incurred herein, as appropriate under the exceptional circumstances of this case;

11
12 13) Tripharma be awarded prejudgment and post-judgment interest at the
13 legal rate; and

14
15 14) Tripharma recover such other and further relief as this Court deems just
16 and proper.

17
18 WHEREFORE, Tripharma prays for judgment as to the Defendant
19 distributors/associates, and all of them, jointly and severally, as follows:

20
21 This Court to issue a temporary and permanent injunction enjoining them
22 from further marketing, selling or distributing MaxWLX and that they be enjoined
23
24
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1 from relying upon or using the Studies and the Dr. Kreamer materials as long as
2 MaxWLX is comprised of the Revised Product.

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Dated: February 17, 2010

McKENNON | SCHINDLER LLP

Bv: 
ROBERT J. McKENNON
ERIC J. SCHINDLER
M. SCOTT KOLLER
Attorneys for Plaintiff
Tripharma, LLC

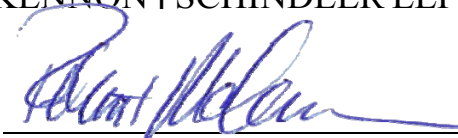


JURY TRIAL DEMAND

Tripharma hereby demands a jury trial on all claims for relief.

Dated: February 17, 2010

McKENNON | SCHINDLER LLP

Bv: 

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