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8 Attorneys for Plaintiffs  
9 UNITHER PHARMA, INC.,  
THE BOARD OF TRUSTEES OF THE  
10 LELAND STANFORD JUNIOR UNIVERSITY,  
and NEW YORK MEDICAL COLLEGE

11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION

15 UNITHER PHARMA, INC., THE BOARD  
OF TRUSTEES OF THE LELAND  
16 STANFORD JUNIOR UNIVERSITY, and  
NEW YORK MEDICAL COLLEGE,

17 Plaintiffs and Counter-Defendants,  
18 v.

19 THE DAILY WELLNESS COMPANY fka  
20 THE WELLNESS BEVERAGE COMPANY,

21 Defendant and Counter-Claimant.

Case No. CV 02-05284 JW and Related Case  
No. CV 03-0415 JW

**SECOND AMENDED COMPLAINT FOR  
PATENT INFRINGEMENT**

**DEMAND FOR JURY TRIAL**

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23 Plaintiffs Unither Pharma, Inc., the Board of Trustees of the Leland Stanford Jr. University,  
24 and New York Medical College hereby allege as follows:

25 **THE PARTIES**

26 1. Unither Pharma, Inc. (“Unither”) is incorporated under the laws of the state of  
27 Delaware, and has a regular and established place of business at 1110 Spring Street, Silver Spring,  
28 Maryland 20910. Unither is the successor in interest of Cooke Pharma, Inc. (“Cooke Pharma”),

1 which was incorporated under the laws of the state of California and located at the same address as  
2 Unither.

3 2. The Board of Trustees of the Leland Stanford Jr. University (“Stanford”) is a body  
4 having corporate powers under the laws of the state of California with a location in Stanford,  
5 California.

6 3. New York Medical College (“NYMC”) is a body having corporate powers under the  
7 laws of the state of New York with a location in Valhalla, New York.

8 4. Upon information and belief, the Daily Wellness Company (“Daily Wellness”),  
9 formerly known as the Wellness Beverage Company, is incorporated under the laws of the State of  
10 California, and has a regular and established place of business at 271 Santa Ana Court, Sunnyvale,  
11 California 94085.

12 **JURISDICTION AND VENUE**

13 5. This Court has subject matter jurisdiction of this action under 28 U.S.C. § 1338(a), in  
14 which the district courts have original and exclusive jurisdiction of any civil action for patent  
15 infringement.

16 6. This Court has personal jurisdiction over Defendant because Defendant Daily  
17 Wellness is located in and is doing business in this judicial district.

18 7. Venue is proper in this Court under 28 U.S.C. §§ 1391 (b), (c) and 1400 because  
19 Defendant Daily Wellness resides in this judicial district.

20 **GENERAL ALLEGATIONS**

21 8. Stanford is the assignee of certain patents related to the use of L-arginine in treating  
22 vascular disorders and improving vascular function and physical performance. These patents  
23 include U.S. Patent No. 5,428,070 (“the ’070 patent,” attached as “Exhibit A”), issued June 27,  
24 1995, U.S. Patent No. 5,891,459 (“the ’459 patent,” attached as “Exhibit B”), issued April 6, 1999,  
25 U.S. Patent No. 6,117,872 (“the ’872 patent,” attached as “Exhibit C”), issued September 12, 2000,  
26 and U.S. Patent No. 6,646,006 (“the ’006 patent,” attached as “Exhibit D”), issued November 11,  
27 2003.

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1 9. NYMC is the assignee of U.S. Patent No. 5,217,997 (“the ’997 patent,” attached as  
2 “Exhibit E”), issued June 8, 1993, related to the use of L-arginine in treating high vascular  
3 resistance disorders.

4 10. Stanford and Cooke Pharma entered into agreements under which Stanford granted  
5 Cooke Pharma an exclusive license under the ’872, ’070, ’459, and ’006 patents for the use and sale  
6 of amino acid–based dietary supplements or pharmaceuticals to enhance the level of endogenous  
7 nitric oxide in the vascular system. Under the same agreements, Stanford provided Cooke Pharma  
8 with a right to institute actions and recover damages for infringement of the ’872, ’070, ’459, and  
9 ’006 patents and the right to join Stanford as a plaintiff in any such action. Unither is the successor  
10 in interest to all rights granted by Stanford to Cooke Pharma under the agreements.

11 11. NYMC and Cooke Pharma entered into an agreement under which NYMC granted  
12 Cooke Pharma an exclusive worldwide license under the ’997 patent for the manufacture, use, and  
13 sale of amino acid–based functional foods, dietary supplements, medical foods, or pharmaceuticals.  
14 Under the same agreement, NYMC provided Cooke Pharma with a right to institute actions and  
15 recover damages for infringement of the ’997 patent and the right to join NYMC as a plaintiff in  
16 any such action. Unither is the successor in interest to all rights granted to Cooke Pharma under  
17 that agreement.

18 12. Unither manufactures and sells products containing L-arginine designed to improve  
19 vascular health, improve human sexual performance, and treat erectile dysfunction, which are  
20 covered by the ’872, ’070, ’459, ’006, and ’997 patents.

21 13. Upon information and belief, Defendant Daily Wellness competes with Unither and  
22 manufactures and sells at least three products, ArginMax™ for Men, ArginMax™ for Women, and  
23 FertilityBlend™ for Women, that contain L-arginine as the primary active ingredient.

24 14. Upon information and belief, Defendant Daily Wellness advertises, inter alia, that its  
25 L-arginine-based products improve vascular health and support healthy erectile functioning and  
26 blood pressure.

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**FIRST CAUSE OF ACTION**

**(INFRINGEMENT OF THE '872 PATENT)**

15. Each allegation contained in paragraphs 1-14 above is incorporated herein by reference.

16. Defendant Daily Wellness has had actual notice that the use of its products are covered by the claims of the '872 patent since at least May 1, 2001 (Letter to Daily Wellness attached as "Exhibit F").

17. Defendant Daily Wellness is currently and has been infringing, inducing and/or contributing to the infringement of the claims of the '872 patent by making, using, selling, offering to sell and/or importing its products containing L-arginine without the consent of Unither.

18. Defendant Daily Wellness will continue to infringe, induce and/or contribute to the infringement of the claims of the '872 patent unless enjoined by this Court.

19. Defendant Daily Wellness has willfully and deliberately infringed, induced and/or contributed to the infringement of the claims of the '872 patent with full knowledge and disregard of Plaintiffs' rights thereunder, rendering this an "exceptional" case within the meaning of 35 U.S.C. § 285.

20. As a result of Defendant Daily Wellness's acts, Plaintiffs have suffered damages.

**SECOND CAUSE OF ACTION**

**(INFRINGEMENT OF THE '070 PATENT)**

21. Each allegation contained in paragraphs 1-20 above is incorporated herein by reference.

22. Defendant Daily Wellness has had actual notice that the use of its products are covered by the claims of the '070 patent since at least January 20, 2000 (Letter to Daily Wellness attached as "Exhibit G").

23. Defendant Daily Wellness is currently and has been infringing, inducing and/or contributing to the infringement of the claims of the '070 patent by making, using, selling, offering to sell and/or importing its products containing L-arginine without the consent of Unither.

1 24. Defendant Daily Wellness will continue to infringe, induce and/or contribute to the  
2 infringement of the claims of the '070 patent unless enjoined by this Court.

3 25. Defendant Daily Wellness has willfully and deliberately infringed, induced and/or  
4 contributed to the infringement of the claims of the '070 patent with full knowledge and disregard  
5 of Plaintiffs' rights thereunder, rendering this an "exceptional" case within the meaning of 35  
6 U.S.C. § 285.

7 26. As a result of Defendant Daily Wellness's acts, Plaintiffs have suffered damages.

8 **THIRD CAUSE OF ACTION**  
9 **(INFRINGEMENT OF THE '459 PATENT)**

10 27. Each allegation contained in paragraphs 1-26 above is incorporated herein by  
11 reference.

12 28. Defendant Daily Wellness has had actual notice that the use of its products are  
13 covered by the claims of the '459 patent since at least May 1, 2001 (Letter to Daily Wellness  
14 attached as "Exhibit F").

15 29. Defendant Daily Wellness is currently and has been infringing, inducing and/or  
16 contributing to the infringement of the claims of the '459 patent by making, using, selling, offering  
17 to sell and/or importing its products containing L-arginine without the consent of Unither.

18 30. Defendant Daily Wellness will continue to infringe, induce and/or contribute to the  
19 infringement of the claims of the '459 patent unless enjoined by this Court.

20 31. Defendant Daily Wellness has willfully and deliberately infringed, induced and/or  
21 contributed to the infringement of the claims of the '459 patent with full knowledge and disregard  
22 of Plaintiffs' rights thereunder, rendering this an "exceptional" case within the meaning of 35  
23 U.S.C. § 285.

24 32. As a result of Defendant Daily Wellness's acts, Plaintiffs have suffered damages.

25 **FOURTH CAUSE OF ACTION**  
26 **(INFRINGEMENT OF THE '997 PATENT)**

27 33. Each allegation contained in paragraphs 1-32 above is incorporated herein by  
28 reference.

1 34. Defendant Daily Wellness has had actual notice that the use of its products are  
2 covered by the claims of the '997 patent since at least January 20, 2000 (Letter to Daily Wellness  
3 attached as "Exhibit G").

4 35. Defendant Daily Wellness is currently and has been infringing, inducing and/or  
5 contributing to the infringement of the claims of the '997 patent by making, using, selling, offering  
6 to sell and/or importing its products containing L-arginine without the consent of Unither.

7 36. Defendant Daily Wellness will continue to infringe, induce and/or contribute to the  
8 infringement of the claims of the '997 patent unless enjoined by this Court.

9 37. Defendant Daily Wellness has willfully and deliberately infringed, induced and/or  
10 contributed to the infringement of the claims of the '997 patent with full knowledge and disregard  
11 of Plaintiffs' rights thereunder, rendering this an "exceptional" case within the meaning of 35  
12 U.S.C. § 285.

13 38. As a result of Defendant Daily Wellness's acts, Plaintiffs have suffered damages.

14 **FIFTH CAUSE OF ACTION**

15 **(INFRINGEMENT OF THE '006 PATENT)**

16 39. Each allegation contained in paragraphs 1-38 above is incorporated herein by  
17 reference.

18 40. Defendant Daily Wellness is currently and has been infringing, inducing and/or  
19 contributing to the infringement of the claims of the '006 patent by making, using, selling, offering  
20 to sell and/or importing its products containing L-arginine without the consent of Unither.

21 41. Defendant Daily Wellness will continue to infringe, induce and/or contribute to the  
22 infringement of the claims of the '006 patent unless enjoined by this Court.

23 42. Defendant Daily Wellness has willfully and deliberately infringed, induced and/or  
24 contributed to the infringement of the claims of the '006 patent with full knowledge and disregard  
25 of Plaintiffs' rights thereunder, rendering this an "exceptional" case within the meaning of 35  
26 U.S.C. § 285.

27 43. As a result of Defendant Daily Wellness's acts, Plaintiffs have suffered damages.  
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**SIXTH CAUSE OF ACTION**

**(PROVISIONAL RIGHTS UNDER THE '006 PATENT)**

44. Each allegation contained in paragraphs 1-43 above is incorporated herein by reference.

45. The United States Patent and Trademark Office published U.S. Patent Application No. 10/060,252 (“the ’252 application”), now the ’006 patent, pursuant to 35 U.S.C. § 122(b), 37 C.F.R. § 1.211, et seq., on October 17, 2002, Publication No. US 2002/0151592 A2 (attached as “Exhibit H”).

46. The invention as claimed in the ’006 patent is substantially identical to the invention as claimed in the published ’252 application.

47. Defendant Daily Wellness has had actual notice of the ’252 application since at least November 6, 2002 (Letter to Daily Wellness attached as “Exhibit I”).

48. Defendant Daily Wellness violated Plaintiffs’ provisional rights under the ’006 patent by making, using, selling, offering to sell and/or importing its products containing L-arginine without the consent of Unither.

49. As a result of Defendant Daily Wellness’s acts, Plaintiffs have suffered damages and are entitled to a reasonable royalty.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request the following relief:

- a. That this Court adjudge and declare that Defendant Daily Wellness has infringed, induced and/or contributed to the infringement of the ’997, ’872, ’070, ’459, and ’006 patents;
- b. That this Court adjudge and declare that Defendant Daily Wellness has violated Plaintiffs’ provisional rights under the ’006 patent;
- c. That this Court preliminarily enjoin Defendant Daily Wellness, its officers, directors, employees, agents, licensees, servants, successors and assigns, and any and all persons acting in privity or in concert with them from infringing, actively inducing

1 infringement or contributing to infringement of the '997, '872, '070, '459, and '006  
2 patents;

3 d. That this Court permanently enjoin Defendant Daily Wellness, its officers, directors,  
4 employees, agents, licensees, servants, successors and assigns, and any and all  
5 persons acting in privity or in concert with them from infringing, actively inducing  
6 infringement and/or contributing to infringement of the '997, '872, '070, '459, and  
7 '006 patents;

8 e. That this Court award to Plaintiffs damages adequate to compensate them for  
9 Defendant Daily Wellness's acts of infringement, inducement of and/or contributions  
10 to infringement of the '997, '872, '070, '459, and '006 patents, together with interest  
11 thereon;

12 f. That this Court award to Plaintiffs reasonable royalties for Defendant Daily  
13 Wellness's violation of Plaintiffs' provisional rights under the '006 patent;

14 g. That this Court award treble damages against Defendant Daily Wellness for its  
15 willful infringement, inducement of and/or contribution to infringement of the '997,  
16 '872, '070, '459, and '006 patents;

17 h. That this Court order Defendant Daily Wellness to pay Plaintiffs their reasonable  
18 attorneys' fees for this action;

19 i. That this Court order Defendant Daily Wellness to pay Plaintiffs any and all costs of  
20 this action; and,

21 j. That this Court grant to Plaintiffs such other and further relief as it may deem just  
22 and equitable.

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1 A JURY TRIAL IS DEMANDED BY PLAINTIFFS.  
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3 Dated: November 17, 2003

FISH & RICHARDSON P.C.

4  
5 By:  /s/  
6 Karen I. Boyd

7 Attorney for Plaintiffs  
8 UNITHER PHARMA, INC., THE BOARD  
9 OF TRUSTEES OF THE LELAND  
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