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10 Attorneys for Plaintiffs Zest IP Holdings, LLC
11 and Zest Anchors, LLC

12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**
14

15 ZEST IP HOLDINGS, LLC, a Delaware limited
liability company; ZEST ANCHORS, LLC, a
16 Delaware limited liability company

17 Plaintiffs,

18 v.

19 IMPLANT DIRECT MFG. LLC, a Nevada
limited liability company; IMPLANT DIRECT
20 LLC, a Nevada limited liability company;
IMPLANT DIRECT INT'L, a Nevada
21 corporation

22 Defendants.
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Case No. 10-cv-0541 LAB (WVG)

**FIRST AMENDED COMPLAINT FOR
PATENT INFRINGEMENT,
TRADEMARK INFRINGEMENT,
FALSE DESIGNATION OF ORIGIN,
FALSE ADVERTISING, CALIFORNIA
STATUTORY UNFAIR COMPETITION
AND FALSE ADVERTISING AND
COMMON LAW UNFAIR
COMPETITION**

JURY TRIAL REQUESTED

1 Plaintiffs Zest IP Holdings, LLC and Zest Anchors, LLC file this First Amended
2 Complaint against Implant Direct MFG. LLC, Implant Direct LLC and Implant Direct Int'l and
3 state as follows:

4 **THE PARTIES**

5 1. Plaintiff Zest IP Holdings, LLC (“Zest Holdings”) is a limited liability company
6 organized under the laws of Delaware with a place of business at 2061 Wineridge Place,
7 Escondido, California.

8 2. Plaintiff Zest Anchors, LLC (“Zest Anchors”) is a limited liability company
9 organized under the laws of Delaware with a place of business at 2061 Wineridge Place
10 Escondido, California. Zest Holdings and Zest Anchors are hereinafter jointly referred to as
11 “Zest”.

12 3. Upon information and belief, Defendant Implant Direct MFG. LLC is a limited
13 liability company organized and existing under the laws of Nevada with a place of business at
14 27030 Malibu Hills Rd., Calabasas Hills, California. Implant Direct MFG. LLC is a business
15 entity registered with the State of California.

16 4. Upon Information and belief, Implant Direct LLC is a limited liability company
17 organized and existing under the laws of Nevada with a place of business at 27030 Malibu Hills
18 Rd., Calabasas Hills, California.

19 5. Upon information and belief, Defendant Implant Direct Int'l is a corporation
20 organized and existing under the laws of Nevada with a place of business at 27030 Malibu Hills
21 Road, Calabasas Hills, California. Implant Direct, LLC, Implant Direct Int'l and Implant Direct
22 MFG, LLC, are hereinafter referred to as “Implant Direct”.

23 6. Implant Direct manufactures, offers for sale and sells a dental attachment product,
24 the “GoDirect.” Implant Direct offers the “GoDirect” product for sale on its website
25 www.implantdirect.com and sells the product nationwide to clinicians, oral surgeons, dental
26 laboratories and dentists including within the State of California and this judicial district. The
27 packaging and labeling of the “GoDirect” product lists the manufacturer as Implant Direct, LLC,
28 27030 Malibu Hills Rd., Calabasas Hills, California.

1 7. Implant Direct manufactures, offers for sale and sells a dental attachment product,
2 the “GPS” or GoDirect Prosthetic System. The “GPS” is offered by Implant Direct on its
3 website www.implantdirect.com to customers nationwide including clinicians, oral surgeons,
4 dental laboratories and dentists including within the State of California and this judicial district.

5 **JURISDICTION AND VENUE**

6 8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and
7 1338(a)-(b) and 15 U.S.C. § 1121, as this is an action arising under the patent and trademark
8 laws of the United States. Zest’s patent infringement claims arise under the United States Patent
9 Laws, 35 U.S.C. § 1 *et seq.*, while the trademark infringement, false designation of origin and
10 false advertising claims arise under 15 U.S.C. § 1051 *et seq.* (the “Lanham Act”). This Court has
11 subject matter jurisdiction over the pendant state claims pursuant to 28 U.S.C. § 1367.

12 9. This Court has jurisdiction over Implant Direct as it has conducted and does
13 conduct business within the State of California and within this judicial district. Implant Direct
14 directly or through intermediaries (including distributors, retailers, and others), manufactures,
15 ships, distributes, offers for sale, sells, and advertises its products in the United States, the State
16 of California, and within this judicial district. Implant Direct has purposefully and voluntarily
17 offered for sale and sold one or more of its infringing products with the expectation that they will
18 be purchased by consumers in the Southern District of California.

19 10. Venue is proper in the Southern District of California under 28 U.S.C. §§ 1391
20 and 1400(b), as Implant Direct has done business in this judicial district, has committed, and
21 continues to commit, acts of patent and trademark infringement in the State of California and in
22 this judicial district and is subject to personal jurisdiction in this State and district.

23 **BACKGROUND AND GENERAL ALLEGATIONS**

24 11. Zest is a global leader in the research, development and manufacturing of dental
25 attachment systems for securing prosthetic overdentures. The original Zest Anchor attachment
26 was introduced in 1971 followed by a number of highly successful products, including the
27 LOCATOR[®] attachment system, which was introduced to consumers after regulatory approval in
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1 2001. Since that time, the LOCATOR[®] product line of attachments has achieved worldwide
2 acceptance as the premier overdenture attachment system in the dental industry.

3 12. In order to protect its valuable, proprietary technology, Zest Anchors, Inc.
4 (predecessor company) obtained United States Patent No. 6,030,219 and United States Patent
5 No. 6,299,447 (collectively “the Asserted Patents” or the “Patents-in-Suit” and attached hereto as
6 Exhibit A and Exhibit B, respectively). The Patents-in-Suit issued to inventors Paul Zuest and
7 Scott Mullaly, both employees of Zest Anchors. The inventions described and claimed in the
8 Patents-in-Suit cover a variety of novel improvements in the field of dental attachments. The
9 novel dental attachment system described and claimed therein, which is marketed and sold under
10 the brand LOCATOR[®] has become the gold standard within the dental industry.

11 13. Zest’s LOCATOR[®] attachment system is sold by Zest and a worldwide network
12 of distributors, who are authorized to market and sell the LOCATOR[®] line of products pursuant
13 to the terms and conditions of a Distribution Agreement. The Distribution Agreement provides a
14 limited right to market and sell the LOCATOR[®] attachment system under Zest’s well-known
15 brand. All Zest products, including the Zest LOCATOR[®] attachment system, are manufactured
16 solely by Zest. Zest ensures the quality of its products and protects the value of its goodwill by
17 maintaining a distribution program through which distributors can sell the authentic LOCATOR[®]
18 attachment system from Zest.

19 14. Zest Anchors, Inc. also registered its valuable trademark rights with the U.S.
20 Patent and Trademark Office, receiving registrations for ZEST[®] (U.S. Registration Nos. 989,049
21 and 1,251,485) and LOCATOR[®] (U.S. Registration No. 2,559,602), among others. Copies of the
22 ZEST[®] and LOCATOR[®] registrations are attached hereto as Exhibit C and Exhibit D,
23 respectively.

24 15. U.S. Registration 989,049 for ZEST[®], which registered on July 23, 1974, covers
25 “Anchor for use in support and retention of full and partial dentures” in International Class 10. It
26 claims a first use date of at least as early as October 31, 1971. This registration has been
27 renewed since its registration date, and it became incontestable on October 29, 1979.
28

1 16. U.S. Registration 1,251,485 for ZEST[®], which registered on September 20, 1983,
2 covers “Gel for treatment of exposed tooth surfaces involved in overdenture retention” in
3 International Class 05. It claims a first use date of at least as early as October 7, 1981. This
4 registration has been renewed since its registration date, and it became incontestable on
5 December 8, 1988.

6 17. Through decades of use, Zest has also accrued substantial common law rights and
7 significant goodwill in the name and trademark ZEST[®] used in connection with dental
8 attachments.

9 18. U.S. Registration No. 2,559,602 for LOCATOR[®], which registered on April 9,
10 2002, covers “dental implants and attachments” in International Class 10. It claims a first use
11 date of at least as early as September 9, 1999. This registration has been renewed since its
12 registration date, and it became incontestable on November 23, 2007.

13 19. Zest Holdings acquired all rights and title to U.S. Patent No. 6,030,219 and U.S.
14 Patent No. 6,299,447, U.S. Registration Nos. 989,049; 1,251,485 and 2,559,602 as well as all
15 common law and other intellectual property rights, via assignment in December 2009. Zest
16 Anchors is the exclusive licensee of Zest Holdings’ intellectual property rights.

17 20. Upon information and belief, Implant Direct began offering for sale and/or selling
18 the “GoDirect” product in December 2009, and began marketing the product in conjunction with
19 Zest’s marks at least as early as late 2008. The “GoDirect” product is manufactured by Implant
20 Direct and is advertised for sale through direct mailings, advertisements and online at
21 www.implantdirect.com. The “GoDirect” product is sold directly through the website also.
22 Upon information and belief, the product is also offered for sale and sold nationwide to
23 clinicians, oral surgeons, dental laboratories and dentists directly by Implant Direct.

24 21. Upon information and belief, Implant Direct began offering for sale and/or selling
25 the “GPS” product in August 2010, and began marketing the product in conjunction with Zest’s
26 marks at that time. Upon information and belief, the “GPS” product is manufactured by Implant
27 Direct and is advertised for sale through direct mailings, advertisements and online at
28 www.implantdirect.com. The “GPS” product is sold directly through the website also. Upon

1 information and belief, the product is also offered for sale and sold nationwide to clinicians, oral
2 surgeons, dental laboratories and dentists directly by Implant Direct.

3 22. At the time Implant Direct began offering the “GoDirect” product for sale it was a
4 Distributor of the Zest LOCATOR[®] Attachment system, as the distributorship relationship began
5 in January 2008. The distributorship relationship between Zest and Implant Direct was
6 terminated as of May 27, 2010.

7 23. At the time Implant Direct began offering the “GPS” product for sale, it was not a
8 Distributor of the Zest LOCATOR[®] Attachment system or any Zest product, as any relationship
9 with Zest was previously terminated.

10 24. Upon information and belief, Implant Direct is infringing the Asserted Patents
11 through its manufacture, use, offer for sale and sale of the “GoDirect” product and is inducing
12 and/or contributing to the infringement of the Asserted Patents literally and/or under the doctrine
13 of equivalents, in violation of 35 U.S.C. § 271. Upon information and belief, Implant Direct is
14 also infringing the Asserted Patents through its manufacture, use, offer for sale and sale of the
15 “GPS” product and is inducing and/or contributing to the infringement of the Asserted Patents
16 literally and/or under the doctrine of equivalents in violation of 35 U.S.C. § 271.

17 25. Implant Direct had knowledge of the Patents-in-Suit, as it was provided notice by
18 Zest of the Asserted Patents prior to offering the “GoDirect” and the “GPS” for sale, as well as
19 notice of the fact that Zest considered the “GoDirect” and the “GPS” an infringement of its
20 patent rights. Implant Direct began manufacturing, offering for sale and selling the “GoDirect”
21 and “GPS” products in disregard of Zest’s patent rights. In both instances, Implant Direct acted
22 despite an objectively high likelihood that its actions constituted infringement and that Implant
23 Direct knew of this likelihood.

24 26. Upon information and belief, Implant Direct offers and sells the “GoDirect”
25 components to clinicians, oral surgeons, dentists and practitioners with the specific intention that
26 the GoDirect is to be used in, and is adapted for use in, a dental attachment system (for attaching
27 dental appliance or overdenture) that embodies the invention of the Asserted Patents. Through
28 marketing materials, informational seminars and videos provided on the Implant Direct website

1 and through the Internet (e.g., through You Tube) Implant Direct encourages use and provides
2 instructions for use of the “GoDirect”, and specifically its use as part of the proprietary multi-
3 component Zest system, to clinicians, oral surgeons, dentists and practitioners in a manner that
4 infringes the Asserted Patents including, at least, claims 1 and 22 of U.S. Patent No. 6,030,219
5 and claim 1 of U.S. No. Patent 6,299,447. One example of such video is found at
6 www.implantdirect.com/us/swf/tour/product_overview_2009/09_godirect_imp.html.

7 Furthermore, upon information and belief, the “GoDirect” product is manufactured, offered for
8 sale and sold by Implant Direct with the specific intention that it be used as part of an infringing
9 dental attachment system that embodies the invention of the Asserted Patents and has no
10 substantial non-infringing uses.

11 27. Upon information and belief, Implant Direct offers and sells the “GPS”
12 components to clinicians, oral surgeons, dentists and practitioners with the specific intention that
13 the GPS is to be used in, and is adapted for use in, a dental attachment system (for attaching
14 dental appliance or overdenture) that embodies the invention of the Asserted Patents. Through
15 marketing materials and videos provided on the Implant Direct website and posted on the
16 Internet, Implant Direct encourages use and provides instructions for use of the “GPS”, and
17 specifically its use as part of the proprietary Zest system, to clinicians, oral surgeons, dentists and
18 practitioners in a manner that infringes the Asserted Patents including, at least, claims 1 and 22
19 of U.S. Patent No. 6,030,219 and claim 1 of U.S. No. Patent 6,299,447. Furthermore, upon
20 information and belief, the “GPS” product is manufactured, offered for sale and sold by Implant
21 Direct with the specific intention that it be used as part of an infringing dental attachment system
22 that embodies the invention of the Asserted Patents and has no substantial non-infringing uses.

23 28. Implant Direct is marketing and distributing the “GoDirect” and “GPS” products
24 in conjunction with the trademarks ZEST[®] and LOCATOR[®] in a prominent manner that falsely
25 and unfairly implies that the products are genuine Zest LOCATOR[®] products or are affiliated
26 with, licensed or sponsored by Zest.

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29. For instance, set forth below is an illustrative example of Implant Direct’s use of the LOCATOR® trademark to advertise the “GoDirect” product (also attached hereto as Exhibit E):

GoDirect - Locator® Attachment Compatible Implant

The GoDirect 1-piece implant includes a snap-on plastic transfer and comfort cap. The Locator® Attachment, consisting of a metal housing and a selection of plastic retentive caps can be purchased from Implant Direct or directly from Zest Anchor Company. The GoDirect implant, transfer and comfort cap will cost just \$150, the same price as the 5 other Implant Direct's Spectra-System implants with all having the same body design and surgical protocol.

Implant Direct is accepting Pre-orders for the GoDirect Implants with expected delivery dates posted on the Shopping Cart. Pre-orders will be shipped in the order received.

Locator® is a registered trademark of Zest Anchors

Launch date for 3.2mmD GoDirect Implants: August 31, 2009
 Launch date for 3.7mmD & 4.7mmD Implants: September 30, 2009

GoDirect Tour
[Hi Res](#) [Low Res](#)

GoDirect™ One-Piece Implant
 Implant Packaged with Extender, Snap-on Transfer and Snap-on Healing Cap
* 4.7mmD Only available in short height, 8mm, 10mm, and 13mm.

Locator Compatible Attachment Platforms
Locator is a registered trademark of Zest Anchor Inc.

3.2mmD 13mm	3.2mmD 12mm	3.2mmD 11.5mm	3.2mmD 11.5mm	3.2mmD 10mm	3.2mmD 10mm	3.2mmD 10mm	3.2mmD 10mm	3.2mmD 10mm	3.2mmD 10mm	4.7mmD 13mm
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30. Such use of the LOCATOR® trademark, as well as the advertising used in connection therewith, is likely to cause confusion, deception or mistake because the prominence of the LOCATOR® mark in such advertisements suggests to consumers that the “GoDirect” product is authorized, endorsed or sponsored by Zest.

31. In addition, such use of the LOCATOR® trademark, as well as the advertising used in connection therewith, is likely to cause confusion, deception or mistake because the “GoDirect” product is not in fact “compatible” with the Zest LOCATOR® attachment system, but is instead a copy of one or more of the components of the Zest LOCATOR® attachment system, which is a patented multi-component system covered by the Asserted Patents.

32. Implant Direct is also marketing and distributing its newly-launched “GPS” product in conjunction with the trademarks ZEST® and LOCATOR® in a prominent manner that falsely and unfairly implies that the product is a genuine Zest LOCATOR® product or is affiliated with, licensed or sponsored by Zest.

33. For instance, set forth below is an illustrative example of Implant Direct’s use of the LOCATOR® trademark to advertise the “GPS” product (also attached hereto as Exhibit F):



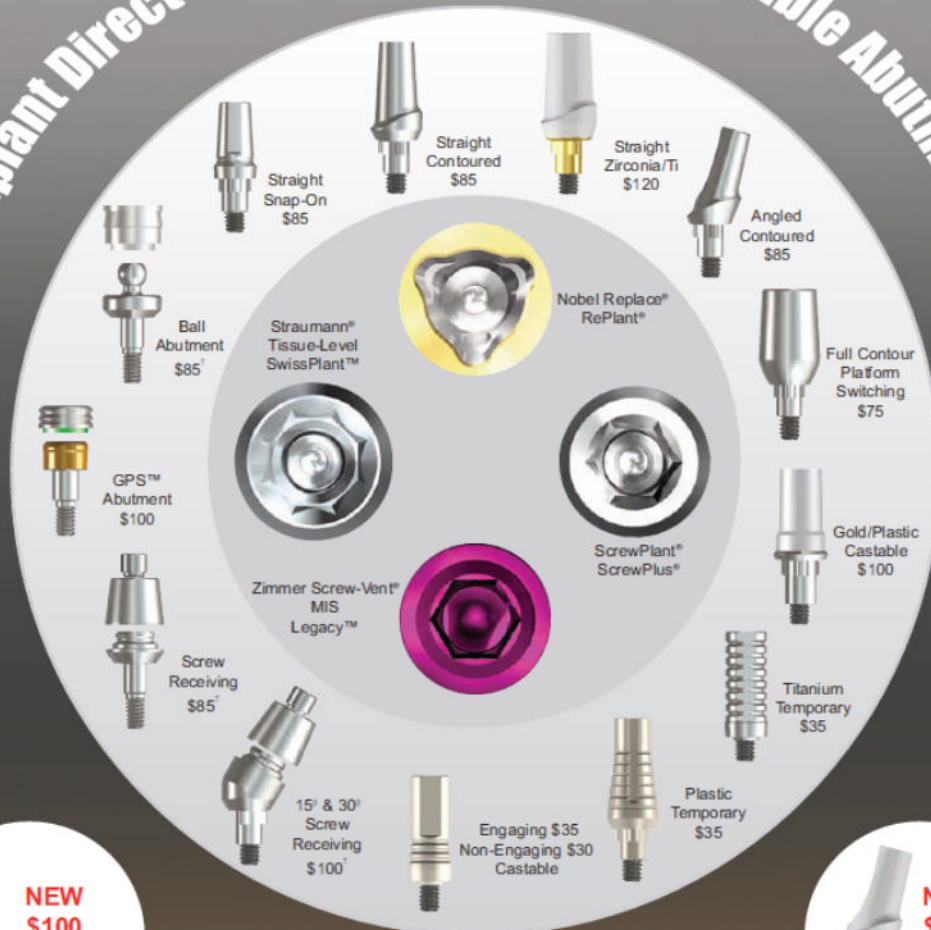
Implant Direct™

simply smarter.

Ask about our new 0°, 8°, and 15° Zirconia/Titanium Abutments and GPS™ Overdenture Abutments*.

*Compatible with Zest Locator® System

Implant Direct's line of Industry Compatible Abutments



NEW \$100
GPS™ Abutment & Cap for Overdentures

NEW \$120
0°, 8°, & 15° Zirconia/Ti Abutments

A complete line of prosthetic components for NobelBiocare Tri-Lobe, Straumann Internal Octagon and Zimmer/BioHorizons/MIS Internal Hex implants.

Implant Direct Int'l 8840 W. Russell Road #210, Las Vegas, NV 89148 Manufacturing/Sales: 1-818-444-3333

www.implantdirect.com

*Price excludes Prosthetic Coping and Attachments.

Locator® is a registered trademark of Zest Anchor Company. All trademarks are the property of their respective companies.

1 34. Such uses of the ZEST[®] and LOCATOR[®] trademarks, as well as the advertising
2 used in connection therewith, are likely to cause confusion, deception or mistake because the
3 prominence of the LOCATOR[®] mark in such advertisements suggests to consumers that the
4 “GPS” product is authorized, endorsed or sponsored by Zest.

5 35. In addition, such use of the ZEST[®] and LOCATOR[®] trademarks, as well as the
6 advertising used in connection therewith, is likely to cause confusion, deception or mistake
7 because the “GPS” product is not in fact “compatible” with the Zest LOCATOR[®] attachment
8 system, but is instead a copy of one or more components of Zest LOCATOR[®] attachment
9 system.

10 36. In addition Implant Direct has posted on its website, as well as on the Internet, a
11 number of advertisements, including pamphlets and videos, that use the ZEST[®] and LOCATOR[®]
12 trademarks in a manner that is likely to cause confusion, deception or mistake among consumers.
13 For instance, upon information and belief, in a video advertisement on the Implant Direct
14 website (available at www.implantdirect.com/us/pop-out/Locator_Abutment_HiQ.htm), Implant
15 Direct is using its IMPLANT DIRECT trademark, as well as the ZEST[®] and LOCATOR[®]
16 trademarks, to advertise what appears to be an actual Zest LOCATOR[®] attachment system. (A
17 printout of this advertisement from the Implant Direct website is attached hereto as Exhibit G).
18 Because Implant Direct is not an authorized distributor of the Zest LOCATOR[®] attachment
19 system, such use by Implant Direct of the ZEST[®] and LOCATOR[®] trademarks is likely to cause
20 confusion, deception or mistake. Further, the words “Featuring ZEST[®] LOCATOR[®] Compatible
21 Platform” are also likely to cause confusion, deception or mistake because, upon information and
22 belief, the product being advertised is not in fact “compatible” with the Zest LOCATOR[®]
23 attachment system, but is itself the Zest LOCATOR[®] attachment system, albeit sold without
24 authorization, and thus not subject to Zest’s quality control procedures.

25 37. Upon information and belief, in another video advertisement on the Implant
26 Direct website (available at www.implantdirect.com/us/pop-out/GoDirect_Surgical_HiQ.htm),
27 Implant Direct is using the ZEST[®] and LOCATOR[®] trademarks in a prominent manner in
28 connection with the “GoDirect” product such that consumers are likely to be confused into

1 believing that the “GoDirect” product is authorized, endorsed or sponsored by Zest. (A printout
2 of this advertisement from the Implant Direct website is attached hereto as Exhibit H). Further,
3 the words “Featuring ZEST[®] LOCATOR[®] Compatible Platform” are also likely to cause
4 confusion, deception or mistake because the “GoDirect” product is not in fact “compatible” with
5 the Zest LOCATOR[®] attachment system, but is instead a copy of one or more of the components
6 of the Zest LOCATOR[®] attachment system. Furthermore, the use of the same words “Featuring
7 Zest[®] LOCATOR[®] Compatible Platform” in describing the “Go Direct” and the Zest Locator[®] is
8 likely to cause confusion, deception or mistake among consumers.

9 38. Implant Direct’s use of marks that are identical to Zest’s marks will cause
10 confusion, deception, or mistake because consumers are likely to assume that Zest has
11 sponsored, authorized, or approved such use. In fact, consumers who have seen Implant Direct’s
12 promotional materials for the “GoDirect” product have contacted Zest under the mistaken belief
13 that Zest sponsors or endorses Implant Direct’s “GoDirect” product.

14 39. Implant Direct’s unauthorized use of Zest’s incontestable marks in connection
15 with identical and highly similar goods and services through identical marketing channels has
16 caused actual consumer confusion, and unless enjoined, will continue to do so.

17 40. Also, Implant Direct’s advertising and other materials contain false and
18 misleading representations about Implant Direct’s products which are likely to influence
19 consumers’ purchasing decisions, including, without limitation, the false and misleading
20 statements identified in paragraphs 29, 33, 36, and 37. These misrepresentations have confused
21 and deceived consumers and unless enjoined, will continue to do so.

22 41. Implant Direct began using, and continues to use, Zest’s marks with full and
23 actual knowledge and awareness of Zest’s use of and rights to those marks. Moreover, Zest’s
24 federal registration of ZEST[®] (U.S. Registration Nos. 989,049 and 1,251,485) and LOCATOR[®]
25 (U.S. Registration No. 2,559,602) provides constructive notice of Zest’s ownership of those
26 marks. Thus, Implant Direct is using Zest’s trademarks, without authorization, despite having
27 both actual and constructive knowledge of Zest’s rights.

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1 42. Implant Direct's acts of infringement have been and continue to be egregious,
2 willful, intentional, and in wanton disregard of Zest's rights.

3 43. By misappropriating Zest's patented technology and by utilizing Zest's registered
4 trademarks in connection with the "GoDirect" and "GPS" products in such a way that is likely to
5 cause consumer confusion as to the source, sponsorship or affiliation of the products, Implant
6 Direct is infringing Zest's intellectual property and is wrongfully and unfairly exploiting Zest's
7 name and reputation.

8 **FIRST CLAIM**

9 **INFRINGEMENT OF U.S. PATENT NO. 6,030,219**

10 44. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

11 45. Zest Holdings is the owner by assignment of all right, title and interest in and to
12 United States Patent No. 6,030,219 ("the '219 patent").

13 46. The '219 patent is entitled "Dental Attachment Assembly." A true and correct
14 copy of the '219 patent is attached hereto as Exhibit A. On February 29, 2000, the United States
15 Patent and Trademark Office ("USPTO") duly and legally issued the '219 patent and it was
16 assigned to Zest Anchors, Inc. In December 2009, the '219 patent was assigned to Zest
17 Holdings.

18 47. By virtue of its ownership of the '219 patent, Zest Holdings has the right to sue
19 for infringement of the '219 patent and to recover damages for infringement of such patent. Zest
20 Anchors, as the exclusive licensee of the '219 patent, has the right to sue for infringement of the
21 '219 patent and to recover damages for infringement of such patent.

22 48. Zest alleges, upon information and belief, that Implant Direct has directly
23 infringed, actively induced infringement of, and/or contributorily infringed the '219 patent
24 literally and/or under the doctrine of equivalents in violation of 35 U.S.C. § 271 by making,
25 using, selling, offering for sale, and/or importing into the United States dental attachment
26 products, and in particular, the GoDirect and GPS products covered by the '219 patent.
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1 57. Upon information and belief, Implant Direct’s infringement of the ‘447 patent has
2 been willful, entitling Zest to increased damages under 35 U.S.C. § 284 and to attorneys’ fees
3 and costs under 35 U.S.C. § 285.

4 58. Upon information and belief, Implant Direct will continue to infringe and
5 willfully infringe the ‘447 patent unless it is enjoined from doing so by this Court.

6 59. Upon information and belief, Implant Directs’ infringement of the ‘447 patent is
7 irreparably injuring and damaging Zest, and such injury and damage will continue unless Implant
8 Direct is permanently enjoined by this Court from further infringement and willful infringement
9 of the ‘447 patent.

10 **THIRD CLAIM**

11 **TRADEMARK INFRINGEMENT (15 U.S.C. § 1114(1)(A))**

12 60. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

13 61. Zest owns various registered trademarks pertaining to its dental attachment
14 products, including registrations for ZEST® (U.S. Registration Nos. 989,049 and 1,251,485) and
15 LOCATOR® (U.S. Registration No. 2,559,602), attached hereto as Exhibit C and Exhibit D,
16 respectively.

17 62. These marks are valid and legally protectable, and are incontestable under 15
18 U.S.C. §§ 1065 and 1115(b). Implant Direct is using Zest’s registered trademarks, without
19 Zest’s authorization, in interstate commerce in connection with the sale, offering for sale,
20 distribution, and advertising of goods and services which compete with Zest’s goods offered in
21 connection with its registered trademarks.

22 63. Zest’s use of the ZEST and LOCATOR marks predates Implant Direct’s use of
23 those marks.

24 64. Implant Direct’s unauthorized use of Zest’s registered marks in connection with
25 goods and services that compete with Zest’s goods has caused, and will continue to cause,
26 confusion, mistake and deceit such that it constitutes trademark infringement in violation of §
27 32(a) of the Lanham Act, 15 U.S.C. § 1114(1)(A).
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1 65. Implant Direct's acts as described herein infringe Zest's registered marks and
2 irreparably injure Zest's business, reputation, and good will, and unless restrained and enjoined,
3 will continue to do so.

4 66. Implant Direct's infringement of the Zest trademarks as alleged herein is willful
5 and intentional and thus constitutes an exceptional case, which entitles Zest to an award of
6 Implant Direct's profits, Zest's damages, costs and attorneys' fees, pursuant to 15 U.S.C.
7 §1117(a).

8 **FOURTH CLAIM**

9 **FALSE DESIGNATION OF ORIGIN (15 U.S.C. § 1125(A))**

10 67. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

11 68. Zest has common law trademark rights in the marks ZEST[®] and LOCATOR[®],
12 among others. These marks are valid and legally protectable, because they have become well
13 and favorably known throughout the United States, including California, as indicators of goods
14 and services emanating from or authorized by a single source—Zest.

15 69. Implant Direct has caused goods and services to enter into interstate commerce
16 bearing Zest's common law trademarks and service marks. Implant Direct's use of Zest's
17 trademarks in connection with identical or highly similar goods and services falsely suggests that
18 these goods and services are connected with, sponsored by, or affiliated with Zest.

19 70. Such use of Zest's marks is a false designation of origin which has caused and
20 will continue to cause confusion and mistake and to deceive as to the affiliation, connection or
21 association of Implant Direct with Zest in violation of § 43(a) of the Lanham Act, 15 U.S.C. §
22 1125(a).

23 71. As a direct and proximate result of Implant Direct's activities, Zest has suffered
24 damages and, unless Implant Direct is enjoined, Zest will continue to suffer monetary loss and
25 irreparable injury to its business, reputation and goodwill.

26 72. Implant Direct's false designation of origin as alleged herein is intentional and
27 constitutes an exceptional case. Accordingly, Zest is entitled to an award of Implant Direct's
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1 profits, Zest's damages, costs and attorneys' fees, pursuant to 15 U.S.C. § 1117(a) and as
2 otherwise provided by law.

3 **FIFTH CLAIM**

4 **FALSE ADVERTISING (15 U.S.C. § 1125(A)(1)(B))**

5 73. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

6 74. Implant Direct's use of Zest Anchor's trademarks set forth herein has led to actual
7 confusion in the marketplace.

8 75. The actual confusion created in the marketplace can only be attributable to Implant
9 Direct's false and misleading representations that it or its "GoDirect" and "GPS" product are
10 affiliated with Zest and that its goods are authorized by Zest, and that its goods are "compatible"
11 with the Zest LOCATOR[®] attachment system, all of which constitutes false advertising in
12 violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B).

13 76. Implant Direct is using false or misleading descriptions or representations of fact,
14 as stated herein, in interstate commerce and in connection with goods and services in commercial
15 advertising or promotion.

16 77. Implant Direct's false or misleading descriptions or representations of fact
17 concerning its GoDirect and GPS products and their source, sponsorship or affiliation with Zest,
18 misrepresent Implant Direct's commercial activities, and are likely to deceive a substantial
19 portion of the intended audience.

20 78. Implant Direct's false or misleading descriptions or representations of fact are
21 material because they are likely to influence consumers' purchasing decisions.

22 79. Implant Direct is a direct competitor of Zest, and its actions are causing irreparable
23 injury to Zest's business, reputation and goodwill, and unless enjoined, will continue to do so,
24 both by direct diversion of sales and by a lessening of the goodwill associated with Zest's
25 business. Accordingly, Zest has suffered damages in an amount to be proved at trial.

26 **SIXTH CLAIM**

27 **UNFAIR COMPETITION (CAL. BUS. & PROF. CODE § 17200, ET SEQ.)**

28 80. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

1 81. Zest has not consented to Implant Direct's use of its trademarks including ZEST
2 and LOCATOR on its products, namely the "GoDirect" and "GPS" products, nor has Zest
3 authorized Implant Direct to make the deceptive and misleading statements complained of herein,
4 which Implant Direct knew, or by the exercise of reasonable care should have known, were
5 deceptive and misleading.

6 82. Implant Direct's conduct, namely, its intentional unauthorized use of Zest's
7 trademarks in a manner that is likely to cause consumer confusion and its deceptive and
8 misleading advertising constitutes unfair competition under California Business and Professions
9 Code § 17200, *et seq.*

10 83. Implant Direct's actions are unlawful, unfair and/or fraudulent, and present a
11 continuing threat to the public because of the consumer confusion that they are causing.

12 84. As a result of Implant Direct's unfair competition, Zest has suffered economic
13 injury in an amount to be determined at trial.

14 85. As a result of Implant Direct's unfair competition, Zest has suffered irreparable
15 injury to its business, reputation, and goodwill. Zest will continue to suffer irreparable injury
16 unless Implant Direct's misconduct is enjoined by this Court.

17 **SEVENTH CLAIM**

18 **FALSE ADVERTISING (CAL. BUS. & PROF. CODE § 17500, ET SEQ.)**

19 86. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

20 87. The untrue and misleading statements of Implant Direct, which Implant Direct
21 knew, or by the exercise of reasonable care should have known, were untrue and misleading,
22 constitute false advertising under California Business and Professions Code § 17500, *et seq.*

23 88. Implant Direct's false advertising is likely to deceive a significant portion of the
24 targeted consumers and therefore presents a continuing threat to the public.

25 89. As a result of Implant Direct's false advertising, Zest has suffered economic injury
26 in an amount to be determined at trial.

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28

1 90. As a result of Implant Direct’s false advertising, Zest has suffered irreparable
2 injury to its business, reputation, and goodwill. Zest will continue to suffer irreparable injury
3 unless Implant Direct’s misconduct is enjoined by this Court.

4 **EIGHTH CLAIM**

5 **COMMON LAW UNFAIR COMPETITION**

6 91. Zest incorporates by reference paragraphs 1 – 43 as if fully set forth herein.

7 92. Zest has not consented to Implant Direct’s use of its trademarks including ZEST
8 and LOCATOR on its products, namely the “GoDirect” and “GPS” products, nor has Zest
9 authorized Implant Direct to make the false and misleading statements complained of herein,
10 which Implant Direct knew, or by the exercise of reasonable care should have known, were false
11 and misleading.

12 93. Implant Direct’s use of Zest’s marks is being conducted with the intent to deceive
13 the public into believing that Implant Direct’s goods and services are affiliated with Zest. Implant
14 Direct’s unauthorized use of Zest’s marks, and its false and misleading advertising, constitutes
15 unfair competition in violation of the common law of California.

16 94. As a result of Implant Direct’s common law unfair competition, Zest has suffered
17 damages in an amount to be determined at trial.

18 95. As a result of Implant Direct’s common law unfair competition, Zest has suffered
19 irreparable injury to its business, reputation, and goodwill. Zest will continue to suffer irreparable
20 injury unless Implant Direct’s misconduct is enjoined by this Court.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Zest prays for the following relief:

23 1. A judgment finding that Implant Direct has infringed, induced the infringement
24 and/or contributed to the infringement and infringes, induces the infringement and/or contributes
25 to the infringement of the ‘219 patent and the ‘447 patent;

26 2. A judgment finding that Implant Direct has infringed and infringes Zest’s
27 registered and common law trademarks, including ZEST and LOCATOR, and finding that
28 Implant Direct is liable for all of the other claims asserted herein, including false designation of

1 origin, false advertising and unfair competition;

2 3. An order permanently enjoining Implant Direct, its agents, officers, directors,
3 assigns and others acting in concert with any of them from infringing, inducing and/or
4 contributing to the infringement of the '219 patent and the '447 patent;

5 4. A order permanently enjoining Implant Direct, its agents, officers, directors,
6 assigns and others acting in concert with any of them from using, including but not limited to
7 selling, or otherwise exploiting or attempting to exploit, Zest's trademarks listed herein for
8 and/or in connection with any business involving the offer or sale of the "GoDirect" and "GPS"
9 products, and permanently enjoining Implant Direct, its agents, officers, directors, assigns and
10 others acting in concert with any of them from engaging in any of the conduct complained of
11 herein, including false designation of origin, false advertising and unfair competition;

12 5. An award of damages to compensate Zest for Implant Direct's infringement of the
13 '219 patent and the '447 patent;

14 6. An award of damages to compensate Zest for Implant Direct's infringement of
15 Zest's trademarks ZEST[®] and LOCATOR[®], and for all additional conduct by Implant Direct
16 complained of herein, including false designation of origin, false advertising and unfair
17 competition;

18 7. An award of prejudgment interest and post-judgment interest on the damages
19 awarded for Implant Direct's infringement of the '229 patent and the '447 patent and Zest's
20 trademarks and on the damages awarded for all of the other unlawful conduct complained of
21 herein;

22 8. A judicial determination that Implant Direct has willfully infringed the '229 and
23 '447 patents and Zest's trademarks, and that treble damages should be awarded pursuant to 35
24 U.S.C. § 284;

25 9. That this case be deemed an exceptional case and Zest be awarded its attorneys'
26 fees and costs pursuant to 35 U.S.C. § 285;

27 10. That this case be deemed an exceptional case within the meaning of 15 U.S.C.
28 §1117(a) and Zest be awarded its attorneys' fees and costs;

1 11. A judgment ordering Implant Direct, pursuant to 15 U.S.C. § 1116(a), to file with
2 this Court and serve upon Zest within thirty (30) days after entry of the injunction, a report in
3 writing under oath setting forth in detail the manner and form in which Implant Direct has
4 complied with the injunction and implemented adequate and effective means to discontinue
5 services under Zest’s intellectual property and to discontinue the other acts complained of herein,
6 including false designation of origin, false advertising and unfair competition;

7 12. A judgment ordering Implant Direct, pursuant to 15 U.S.C. § 1118, to deliver up
8 for destruction all brochures, flyers, signs, stationary, insignia, premiums, marketing materials,
9 and advertisements, whether electronic, in hardcopy, or otherwise in Implant Direct’s possession
10 or under Implant Direct’s control bearing the trademarks ZEST[®] and/or LOCATOR[®] or bearing
11 the false advertising complained of herein;

12 13. A judgment that Implant Direct, pursuant to 15 U.S.C. § 1117(a), account for and
13 disgorge to Zest all of the profits realized by Implant Direct, or others acting in concert or
14 participating with Implant Direct, resulting from Implant Direct’s acts of trademark
15 infringement, false advertising and false designation of origin and unfair competition;

16 14. A judgment that Implant Direct be enjoined pursuant to Cal. Business and
17 Professions Code § 17203, and that the Court make such orders as to restore to Zest any money
18 or property acquired by means of such unfair competition.

19 15. Awarding Zest such other and further relief that the Court deems just and proper.

20 **JURY DEMAND**

21 Zest hereby demands a jury trial on all issues triable to the jury.

22
23 Date: August ___, 2010

MAYER BROWN LLP

24
25 By: _____/s/

Brandon Baum

26 Attorneys for Plaintiffs Zest IP Holdings, LLC
27 and Zest Anchors, LLC
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