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TriPharma, LLC
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**
11

12 TRIPHARMA, LLC, a Delaware
limited liability company,

13 Plaintiffs,

14 vs.
15

16 MAX INTERNATIONAL, LLC, a
Utah limited liability corporation;
STEVE SCOTT, an individual; FRED
17 NINNOW, an individual; GREG
FULLERTON, an individual; PETER
18 NORDBERG, an individual; MIKE
LARKINS, an individual; DAVID
19 BAGLEY, an individual; ERIC
ANDERSON, an individual; CRAIG
20 CASE, an individual; WILLIAM
GUTHY, an individual; GREGORY
21 RENKER, an individual; JEANNE
JELSOMENO, an individual; DR.
22 DARIA DAVIDSON, an individual;
RICK TEAGUE, an individual;
23 MICHELLE TEAGUE, an individual;
SCOTT UNCLEBACH, an individual;
24 DARLENE UNCLEBACH, an
individual; ALAN SICKMAN, an
25 individual; JEAN SICKMAN an
individual; KEN DUNN, an
26 individual; JULIE DUNN, an
individual; BILL ANDERSEN, an
27 individual; CINDY ANDERSEN, an
individual; Dr. HEIDI REITANO, an
28 individual; Dr. JOE REITANO, an

Case No.: SACV10-00196 JVS (Anx)

Action Filed : February 17, 2010

Pre-Trial Date: [TBD]

Trial Date: [TBD]

**FIRST AMENDED COMPLAINT
FOR:**

- 1) **Violation of 35 U.S.C. §271, et seq.
[Patent Infringement and
Injunctive Relief]**
- 2) **Violation of 35 U.S.C. §292 [False
Marking]**
- 3) **Violation of 15 U.S.C. §1114, et seq.
[Trademark Dilution]**
- 4) **Violation of 15 U.S.C. §1125, et seq.
[False Advertising, False
Designation of Origin, and
Injunctive Relief]**
- 5) **Violation of 15 U.S.C. §1125, et seq.
[Unfair Competition]**
- 6) **Violation of California Business &
Professions Code §17200, et seq.
[Unlawful, Unfair and Fraudulent
Business Practices]**
- 7) **Violation of California Business &**



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; JOHN HUTCHINSON, an individual; FOREST TOWNSLEY, an individual; Dr. CHERYL TOWNSLEY, an individual; CHARLENE RAGSDALE, 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; 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; IMAGENETIX, INC., a Nevada corporation; and DOES 1 through 10, inclusive,

Defendants.

Professions Code §17500, et seq. [False Advertising]

- 8) Violation of California Civil Code §3344 [Unauthorized Commercial Use of Name, Voice, Signature, Photograph or Likeness]**
- 9) Unfair Competition - Palming Off**
- 10) Preliminary and Permanent Injunctive Relief**
- 11) Unjust Enrichment and Imposition of Constructive Trust**
- 12) Breach of Contract**
- 13) Declaratory Relief**
- 14) Promissory Fraud**
- 15) Accounting**
- 16) Negligence**

DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1
2
3 1. Subject Matter Jurisdiction: This Court has subject matter jurisdiction
4 over these patent and trademark claims under 35 U.S.C. Sections 100 *et seq.*, 15
5 U.S.C. Sections 1114 and 1125(a), and 28 U.S.C. Section 1338(a). This Court has
6 federal question jurisdiction under 28 U.S.C. Sections 1331 and 1335. This Court
7 may exercise ancillary and pendent jurisdiction over the related state law claims.
8

9 2. Personal Jurisdiction: This Court has personal jurisdiction over each of
10 the defendants because at all times relevant to this complaint they each conduct
11 significant business in California and in this District through seminars, meetings,
12 trade shows and professional expositions; by directing their marketing and sales
13 efforts to California residents through interactive internet websites to advertise and
14 sell their products, and to recruit potential product distributors; and by blogging
15 about their business to California residents at *www.maxgxl.com*,
16 *www.livingamaxlife.com*, *www.maxinternationalteam.com*, *www.blog.max.com* and
17 *www.maxinternationalreview.com*, *maxinternational.com*, and other sites.
18

19 3. Venue: Venue is proper in this Court under 28 U.S.C. Sections
20 1391(b), 1395 and 1400(b), since numerous defendants reside in and/or are
21 conducting substantial business activities within this District, and because a
22 substantial part of the events and omissions giving rise to the claims for relief
23 occurred within this District, and because the defendants' patent infringement
24 occurred within this District.
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THE PARTIES

4. Plaintiff TriPharma, LLC (“TriPharma”) is at all times relevant to this action a limited liability company organized under the laws of the State of Delaware with its principal place of business in Laguna Beach, California; and is at all times relevant to this action authorized to conduct and conducting business in California.

5. Defendant Max International, LLC (“Max”) is at all times relevant to this action a limited liability company organized under the laws of the State of Utah with its principal place of business in Salt Lake City, Utah.

6. TriPharma alleges on information and belief that Defendant Steve Scott is at all times relevant to this action an individual residing in Salt Lake City, Utah. Steve Scott is a founder of Max.

7. TriPharma alleges on information and belief that Defendant Fred Ninnow is at all times relevant to this action an individual residing in Salt Lake City, Utah. Fred Ninnow is a founder of Max.

8. TriPharma alleges on information and belief that Defendant Greg Fullerton is at all times relevant to this action an individual residing in Salt Lake City, Utah. Greg Fullerton is a founder of Max.

9. TriPharma alleges on information and belief that Defendant Peter Nordberg is at all times relevant to this action an individual residing in Salt Lake City, Utah. Peter Nordberg is the Chief Executive Officer of Max.



1 10. TriPharma alleges on information and belief that Defendant Mike
2 Larkins is at all times relevant to this action an individual residing in Salt Lake City,
3 Utah. Mike Larkins is the President of Max.

4
5 11. TriPharma alleges on information and belief that Defendant David
6 Bagley is at all times relevant to this action an individual residing in Salt Lake City,
7 Utah. David Bagley is the Vice President of Product Development of Max.

8
9 12. TriPharma alleges on information and belief that Defendant Eric
10 Anderson is at all times relevant to this action an individual residing in Salt Lake
11 City, Utah. Eric Anderson is the Vice President of Sales and Support of Max.

12
13 13. TriPharma alleges on information and belief that Defendant Craig Case
14 is at all times relevant to this action an individual residing in Salt Lake City, Utah.
15 Craig Case is the Executive Vice President of Field Development and Strategy of
16 Max.

17
18 14. TriPharma alleges on information and belief that Defendant William
19 Guthy is at all times relevant to this action an individual residing in Riverside
20 County, California. William Guthy is an owner of Max who is and at all relevant
21 times was substantially involved in making management decisions on behalf of
22 Max, including decisions with respect to the MaxWLX product.

23
24 15. TriPharma alleges on information and belief that Defendant Gregory
25 Renker is at all times relevant to this action an individual residing in Riverside
26 County, California. Gregory Renker is an owner of Max who is and at all relevant
27 times was substantially involved in making management decisions on behalf of
28 Max, including decisions with respect to the MaxWLX product.



1 16. Defendants Steve Scott, Fred Ninnow, Greg Fullerton, Peter Nordberg,
2 Mike Larkins, David Bagley, Eric Anderson, Craig Case, William Guthy and
3 Gregory Renker are collectively referred to as the “Max Executives.”
4

5 17. TriPharma alleges on information and belief that Defendant Jeanne
6 Jelsomeno is at all times relevant to this action an individual residing in Frisco,
7 Texas. Jeanne Jelsomeno is and at all relevant times was a member of Max’s
8 Advisory Council, an entity that is consulted by the Max Executives and is
9 substantially involved in making management decisions on behalf of Max, including
10 decisions with respect to the MaxWLX product.
11

12 18. TriPharma alleges on information and belief that Defendant Dr. Daria
13 Davidson is at all times relevant to this action an individual residing in Seattle,
14 Washington. Dr. Daria Davidson is and at all relevant times was a member of
15 Max’s Advisory Council.
16

17 19. TriPharma alleges on information and belief that Defendants Rick and
18 Michelle Teague are at all times relevant to this action individuals residing in
19 Mansfield, Texas, and distributors of MaxWLX. Rick Teague is and at all relevant
20 times was a member of Max’s Advisory Council.
21

22 20. TriPharma alleges on information and belief that Defendants Scott and
23 Darlene Unclebach are at all times relevant to this action individuals residing in
24 Frisco, Texas, and distributors of MaxWLX. Scott Unclebach is and at all relevant
25 times was a member of Max’s Advisory Council.
26

27 21. TriPharma alleges on information and belief that Defendants Alan and
28 Jean Sickman are at all times relevant to this action an individual residing in the



1 State of Virginia, and distributors of MaxWLX. Alan Sickman is and at all relevant
2 times was a member of Max's Advisory Council.

3
4 22. Defendants Jeanne Jelsomeno, Dr. Daria Davidson, Rick Teague, Scott
5 Unclebach, and Alan Sickman are collectively referred to as the "Advisory Council
6 Defendants."

7
8 23. TriPharma alleges on information and belief that Defendants Ken and
9 Julie Dunn are at all times relevant to this action individuals residing in Toronto,
10 Canada, and distributors of MaxWLX.

11
12 24. TriPharma alleges on information and belief that Defendant Bill and
13 Cindy Andersen are at all times relevant to this action individuals residing in the
14 State of Utah, and distributors of MaxWLX.

15
16 25. TriPharma alleges on information and belief that Defendants Drs. Heidi
17 and Joe Reitano are at all times relevant to this action individuals residing in the
18 State of Arizona, and distributors of MaxWLX.

19
20 26. TriPharma alleges on information and belief that Defendant Jose Marie
21 Abilay is at all times relevant to this action an individual residing in the State of
22 Utah, and a distributor of MaxWLX.

23
24 27. TriPharma alleges on information and belief that Defendant Ryan
25 Vanderpool is at all times relevant to this action an individual residing in the State
26 of California, and a distributor of MaxWLX.



1 28. TriPharma alleges on information and belief that Defendants Brenda
2 and David Bridgforth are at all times relevant to this action individuals residing in
3 the State of Texas, and distributors of MaxWLX.

4
5 29. TriPharma alleges on information and belief that Defendant Carl
6 Stanitzky is at all times relevant to this action an individual residing in the State of
7 Louisiana, and a distributor of MaxWLX.

8
9 30. TriPharma alleges on information and belief that Defendant Winder
10 Lyons is at all times relevant to this action an individual residing in the State of
11 South Carolina, and a distributor of MaxWLX.

12
13 31. TriPharma alleges on information and belief that Defendants Yo and
14 Jaime Fujikawa are at all times relevant to this action individuals residing in the
15 State of Oregon, and distributors of MaxWLX.

16
17 32. TriPharma alleges on information and belief that Defendant John
18 Hutchinson is at all times relevant to this action an individual residing in the State of
19 Pennsylvania, and a distributor of MaxWLX.

20
21 33. TriPharma alleges on information and belief that Defendants Forest and
22 Dr. Cheryl Townsley are at all times relevant to this action individuals residing in
23 the State of Colorado, and distributors of MaxWLX.

24
25 34. TriPharma alleges on information and belief that Defendant Charlene
26 Ragsdale is at all times relevant to this action an individual residing in the State of
27 Nevada, and a distributor of MaxWLX.



1 35. TriPharma alleges on information and belief that Defendant Mike
2 Unclebach is at all times relevant to this action an individual residing in Sherman,
3 Texas, and a distributor of MaxWLX.

4
5 36. TriPharma alleges on information and belief that Defendant Jim
6 Marshall is at all times relevant to this action an individual residing in Brunswick,
7 Maine, and a distributor of MaxWLX.

8
9 37. TriPharma alleges on information and belief that Defendant Steve Lee
10 is at all times relevant to this action an individual residing in Honolulu, Hawaii, and
11 a distributor of MaxWLX.

12
13 38. TriPharma alleges on information and belief that Defendant Dr. Tim
14 Kershenstein is at all times relevant to this action an individual residing in San
15 Antonio, Texas, and a distributor of MaxWLX.

16
17 39. TriPharma alleges on information and belief that Defendant Steve Kent
18 is at all times relevant to this action an individual residing in Kaneohe, Hawaii, and
19 a distributor of MaxWLX.

20
21 40. TriPharma alleges on information and belief that Defendant Mitch
22 Edland is at all times relevant to this action an individual residing in Carrollton,
23 Texas, and a distributor of MaxWLX.

24
25 41. TriPharma alleges on information and belief that Defendants Michael
26 and Debbie Biscotti are at all times relevant to this action individuals residing in
27 Anaheim, California, and distributors of MaxWLX.



42. TriPharma alleges on information and belief that Defendant Estrella Harrington is at all times relevant to this action an individual residing in San Clemente, California, and a distributor of MaxWLX.

43. TriPharma alleges on information and belief that Defendant Nina Hardwick is at all times relevant to this action an individual residing in Aliso Viejo, California, and a distributor of MaxWLX.

44. TriPharma alleges on information and belief that Defendants Greg and Emily Hicks are at all times relevant to this action individuals residing in San Juan Capistrano, California, and distributors of MaxWLX.

45. TriPharma alleges on information and belief that Defendant Diana Kleist is at all times relevant to this action an individual residing in Temecula, California, and a distributor of MaxWLX.

46. TriPharma alleges on information and belief that Defendant Rik Wahlrab, M.D. is at all times relevant to this action an individual residing in Laguna Niguel, California, and a distributor of MaxWLX.

47. The defendants described in paragraphs 5 through 46 above are collectively referred to as the “Defendants.”

48. The Defendants described in paragraphs 23 through 46 above are collectively referred to as the “Max Distributors.” The Max Distributors are at all relevant times distributors for Max involved in the marketing, advertising, distribution, and sale of the Max weight and fat loss supplement “MaxWLX,” also referred to as “Leptivin.”

1 49. Tripharma alleges on information and belief that defendant Imagenetix,
2 Inc., is at all times relevant to this action a Nevada corporation licensed to do
3 business and doing business in California and in this District. Tripharma joins
4 Imagenetix pursuant to Fed.R.Civ.Pro. Rule 19(a) for purposes of prosecuting the
5 first claim for relief for patent infringement and injunctive relief, and asks the Court
6 to re-align Imagenetix as an involuntary plaintiff in that regard.
7

8 50. Defendants at all times relevant to this action are regularly conducting
9 substantial business activities within this District, including marketing themselves
10 and their images, soliciting customers, and recruiting potential Max
11 distributors/associates in person, and by and through other selling and marketing
12 activities, including but not limited to the use of print copy materials and interactive
13 Internet websites that are accessible and in fact accessed by individuals residing in
14 this District. Moreover, despite receiving notice of this complaint and TriPharma's
15 rights asserted in it, Defendants have continued to market, advertise, distribute and
16 sell MaxWLX in reckless — if not knowing — disregard of TriPharma's rights.
17 Since the filing of the original complaint, Max's main corporate websites continue
18 to refer to MaxWLX, continue to offer it for sale and continue to reference the
19 clinical studies described below. Since then, Max has instructed its distributors not
20 to refer to the patent at issue in this litigation and it has dead-linked several links to
21 information about the product, including Defendant Steve Scott's video that markets
22 the product and refers to the clinical studies and to the patent. However, Max
23 continues to promote the sale of the Sham Supplement and distributors continue to
24 refer to the patent and clinical studies in selling, marketing and distributing the
25 Sham Supplement.
26
27
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1 51. Tripharma is further alleges on information and belief that the Max
2 Executives and the Advisory Council Defendants are the alter-ego of Max and that
3 the obligations of Max as set forth in the claims for relief are also the obligations of
4 the Max Executives and the Advisory Council Defendants in that (a) Max is
5 influenced and governed by the Max Executives and the Advisory Council
6 Defendants; (b) Max was at all material times herein a corporate instrumentality
7 used for the benefit of the Max Executives and the Advisory Council Defendants;
8 (c) the Max Executives and the Advisory Council Defendants personally directed
9 and participated in the wrongful conduct alleged against Max; (d) the corporate
10 form, entity, and structure of Max was at all times disregarded by the Max
11 Executives and the Advisory Council Defendants; and (e) an adherence to the fiction
12 of Max' separate existence as a corporation would sanction a fraud and promote
13 injustice.

14
15 52. Max and each of the Max Executives and the Advisory Council
16 Defendants controlled, approved, ratified, sponsored, and condoned the business
17 activities of Max Distributors, including but not limited to those activities related to
18 the sales, marketing, advertisement, distribution and dissemination of Max products.
19 Further, Defendants controlled, approved, ratified, sponsored, and condoned the
20 activities alleged herein to be illegal.

21
22 53. The true names and capacities, whether individual, corporate, associate
23 or otherwise of the defendants named herein as DOES 1 through 10, inclusive, are
24 unknown to TriPharma at this time, who therefore sue DOES 1 through 10 by
25 fictitious names and will ask leave of the Court to amend this Complaint to show the
26 true names and capacities of DOES 1 through 10 when the same are ascertained;
27 DOES 1 through 10 are sued as principals and/or agents, servants, attorneys, and
28 employees of said principals, and all the acts performed by them were within the

1 course and scope of their authority and employment. TriPharma is informed and
 2 believes and thereupon alleges that each of DOES 1 through 10 is legally
 3 responsible in some manner for the events and happenings referred to herein, and
 4 directly and proximately caused the damages and injuries to TriPharma as
 5 hereinafter alleged.

6 7 PATENT AT ISSUE

8
 9 54. TriPharma is the exclusive licensee under United States Patent and
 10 Trademark Office Patent No. 6,899,892, entitled “Methods to Reduce Body Fat,”
 11 issued in May 2005 to the Regents of the University of Minnesota (“UMinn”),
 12 covering methods and compositions for reducing the percentage of body fat in a
 13 mammal and the level of leptin in the bloodstream of the mammal (the “892
 14 Patent”). An accurate copy of the 892 Patent is attached as **Exhibit A** and
 15 incorporated by reference. Leptin is a signaling hormone secreted by fat cells. It
 16 regulates body fat storage through the central nervous system by modulating
 17 satiation, appetite, glycemic control, and metabolism. Leptin is also a mediator of
 18 long-term regulation of energy balance, suppressing food intake and thereby
 19 inducing weight loss. The 892 Patent works by administering specified amounts of
 20 certain high viscosity polysaccharides for a specified period of time sufficient to
 21 lower serum levels of leptin and the percentage of body fat in the mammal.

22 23 SUMMARY OF THE CASE

24
 25 55. This case arises out of a long-standing conspiracy among Defendants to
 26 falsely mark, label, market, advertise, distribute and sell a sham weight and fat loss
 27 supplement called “MaxWLX,” also referred to as “Leptivin” (the “Sham
 28 Supplement”), as (i) patented under the 892 Patent; (ii) studied at UMinn and at the



1 Pennington Biomedical Research Laboratory, and the subject of a matched, double-
2 blind, placebo-controlled clinical trial at the University of Connecticut (“UConn”)
3 that is reported in the prestigious peer-reviewed European Journal of Applied
4 Physiology (2009) 105:665-672 (“EJAP”) (collectively the “Studies”); and (iii) the
5 subject of videos, photographs, brochures, and audio tapes which TriPharma created
6 and owns which depict lead UConn clinical researcher, William Kraemer, Ph.D.,
7 explaining the successful results of the Studies of Original Supplement (“the Dr.
8 Kraemer Materials”). Copies of the UCONN study and the publication of the
9 UCONN study in the EJAP are attached hereto as **Exhibit “I”** and are incorporated
10 herein by reference. The Defendants have gone so far as to falsify an early draft of
11 the EJAP article on UConn letterhead by forging Max’s name in the credits and
12 pasting “Leptivin” over “Trisynex,” the trade name of the real patented supplement.
13 Defendants post the falsified article on the internet to advertise and sell the Sham
14 Supplement to deceptively create the impression that Max sponsored the clinical
15 studies and that MaxWLX was the subject of the study when in fact it was not. An
16 accurate copy of the doctored article on UConn letterhead is attached as **Exhibit F**.

17
18 56. In fact, the Sham Supplement is a watered-down, adulterated knock-off
19 of “Trisynex,” the real fat and weight loss supplement that is patented under the 892
20 Patent and the subject of the Studies and the Dr. Kraemer Materials. TriPharma,
21 among other things, owns (i) the exclusive right to manufacture, market, advertise,
22 distribute and sell Trisynex and any product which is based upon or derived from
23 the 892 Patent (“Original Supplement”); and (ii) the exclusive right to refer to and
24 use the Studies and the Dr. Kraemer Materials to market, advertise, distribute, and
25 sell Original Supplement.

26
27 57. Defendants are actively using internet websites and other marketing
28 techniques, such as distributor conventions, to falsely advertise to the general public

1 that the Sham Supplement is the subject of the Studies and the Dr. Kraemer
2 Materials. Moreover, despite receiving notice of this complaint and TriPharma's
3 rights asserted in it, Defendants have continued to market, advertise, distribute and
4 sell MaxWLX in reckless—if not knowing—disregard of TriPharma's rights.

5
6 58. Defendants have no right to distribute the Original Supplement or the
7 Sham Supplement in any form.

8
9 59. TriPharma neither sponsors nor approves of Defendants' use of the
10 Studies or Defendants' distribution of Original Supplement as an ingredient in the
11 Sham Supplement.

12
13 60. Defendants, acting in concert and conspiracy, are trading intentionally
14 and wrongfully on the 892 Patent, the Studies, the Dr. Kraemer Materials, and the
15 distinguished reputation and goodwill of TriPharma and the Original Supplement by
16 falsely advertising and marketing to the general public the Sham Supplement as the
17 Original Supplement by interactive internet websites and videos, internet blogs,
18 online "chat" forums, regular regional meetings, DVDs for sale on the internet and
19 other mass marketing schemes. Defendants are using Original Supplement and the
20 Studies without TriPharma's permission in a manner that is likely to deceive,
21 confuse and mislead the general public as to the origin, affiliation, and/or
22 sponsorship of the Sham Supplement.

23
24 61. Defendants' conduct constitutes, among other things, patent
25 infringement, unfair competition, false advertising and unjust enrichment. As a
26 direct result of Defendants' conduct, TriPharma has suffered and will continue to
27 suffer irreparable injury and, accordingly, brings this action for damages, restitution
28 and injunctive relief.

FACTUAL ALLEGATIONS

62. The University of Minnesota, a Minnesota constitutional corporation (“UMinn”), and Imagenetix, Inc., a Nevada corporation (“Imagenetix”), entered into an Exclusive Patent License Agreement, effective September 2, 2005, in which UMinn granted Imagenetix an exclusive license to the 892 Patent along with substantially all of the rights associated with the 892 Patent (“UMinn Contract”). A true and correct copy of the UMinn Contract is attached as **Exhibit H** and incorporated by reference. From this patented formulation, Imagenetix developed and manufactured the Original Supplement.

63. Under section 7.1 of the UMinn Contract, Imagenetix is granted the right to commence an action enforce the 892 Patent against third party infringement. UMinn retains the right, but not the duty, to commence an action to enforce the 892 Patent against third party infringement.

64. Imagenetix and TriPharma subsequently entered into an Amended and Restated Exclusive Marketing and Supply Agreement dated October 1, 2007, and amendments thereto (the “Imagenetix Contract”), in which Imagenetix granted TriPharma exclusive sublicense rights associated with the 892 Patent. Under the Imagenetix Contract, TriPharma at all relevant times owns, among other things, (i) the exclusive rights to utilize the 892 Patent and to market, distribute, and sell worldwide (subject to certain exclusivity limitations not relevant here) products based on the 892 Patent (i.e., Original Supplement); (ii) the exclusive rights to the original trademark associated with the Original Supplement; (iii) the exclusive rights to refer to and use the Studies to market, advertise, distribute, and sell Original Supplement; and (iv) the marketing photographs, dialogue, and videos TriPharma created which depict lead UConn clinical researcher, William Kraemer, Ph.D.,

1 explaining the successful results of the Studies of Original Supplement (“the Dr.
2 Kraemer Materials”). An accurate copy of the Imagenetix Contract is attached as
3 **Exhibit B** and incorporated by reference.

4
5 65. Section 1.1(c) of the Imagenetix Contract requires that Imagenetix
6 “shall use its best efforts to prevent any party other than TRIPHARMA from
7 seeking customers for the Product, from establishing any branch related to the
8 distribution of the Product, or from maintaining any distribution depot with respect
9 to the Product.”

10
11 66. Section 1.3 of the Imagenetix Contract requires Imagenetix to refer any
12 party inquiring about the purchase of Original Supplement to Tripharma for
13 handling.

14
15 67. TriPharma subsequently entered into an Exclusive Marketing and
16 Supply Agreement dated April 8, 2008 with Max (the “Max Contract”), in which
17 TriPharma granted Max a limited, exclusive sublicense to distribute the capsule
18 form of the Original Supplement. An accurate copy of the Max Contract is attached
19 as **Exhibit C** and incorporated by reference. Prior to entering into the Max
20 Contract, Max conducted its due diligence of TriPharma and the Original
21 Supplement to ensure itself that TriPharma and the Original Supplement were
22 appropriate and viable for the business relationship that Max wanted.

23
24 68. Under the Max Contract, in order to maintain Max's exclusivity, Max
25 was required to make the following minimum number of orders of Original
26 Supplement at the specified price on or before the expiration of the following time
27 periods: (a) 7,200 kilograms of powdered formula in various forms (bulk powder,
28 encapsulated pills; encapsulated and bottled pills) ("Powdered Formula") on or

1 before April 9, 2008; (b) an additional 4,320 kilograms of Powdered Formula on or
 2 before July 1, 2008; (c) an additional 4,320 kilograms of Powdered Formula by the
 3 first day of each succeeding calendar month during the remainder of the initial term
 4 of the Max Contract for a minimum term of five years.

5
 6 69. Section 1.8 of the Max Contract provides in pertinent part:

7
 8 Except as provided herein, MAX shall have no right, title, or
 9 interest in the Patents or the Studies. MAX shall take no actions
 10 and shall not allow any of its Affiliates to take any action to
 11 infringe on the Patents or the Studies. MAX shall take no action
 12 and shall not direct any other person or entity to take any action
 13 to reverse engineer the Product. MAX shall not use and shall not
 14 direct any other person or entity to use any derivative of the
 15 Powdered Formula to create or design any new products which
 16 compete with the Product.

17 70. Max placed an order for 4,320 kgs. of raw ingredient form of the
 18 Powdered Formula on or around July 29, 2008 (the "August 08 Order"). Max owed
 19 TriPharma a balance of \$177,120 for the July 2008 Order, which was due on or
 20 around September 5, 2008. Max failed and has continued to fail to pay the balance
 21 due on the August 2008 Order.

22 71. Shortly after the contract was executed, Max and the Max Executives,
 23 surreptitiously contacted Imagenetix in an attempt to circumvent TriPharma and to
 24 secure better pricing on the Original Supplement. Fred Ninnow met with William
 25 Spencer (Imagenetix' CEO) and Derek Boosey of Imagenetix. In this meeting,
 26 Ninnow and Max discussed purchasing the Original Supplement at a lower price.
 27 That effort failed. Thereafter, Max and the Max Executives attempted to coerce
 28 TriPharma into substantially lowering the price of the Original Supplement, making
 threats that if TriPharma refused, they would develop their own product using some
 of the formulation contained in the Original Supplement. Once that effort failed,

1 Max, the Max Executives and the Advisory Council Defendants embarked on a
 2 scheme to develop their *own* lower priced sham Supplement, which turned out to be
 3 the Sham Supplement.

4
 5 72. Pursuant to the Max Contract, TriPharma was provided a business
 6 position in the Max International Network Marketing Down line Tree ("MIN
 7 Downline Position"). The MIN Downline Position was sponsored by Strategic
 8 Marketing and located in the power leg, directly below the position occupied by Jim
 9 Britt dba Strategic Marketing. The MIN Downline Position was intended to be fully
 10 eligible for all forms of compensation from inception, pursuant to the MAX
 11 compensation plan. The position was not intended to be moved or altered for the
 12 life of MAX. The MIN Downline Position was not intended to be revoked by MAX
 13 due to the termination of the Max Contract. Section 9 of the Max Contract states:

14
 15 Additional Consideration. As additional consideration for
 16 TRIPHARMA entering into this Agreement, MAX shall provide
 17 TRIPHARMA or any of its designees a business position in the
 18 Max International Network Marketing Downline Tree ("**MIN**
 19 **Downline Position**"). The MIN Downline Position shall be
 20 sponsored by Strategic Marketing and located in the Power Leg,
 21 directly below the position occupied by Jim Britt dba Strategic
 22 Marketing. The MIN Downline Position shall be fully eligible
 23 for all forms of compensation from inception, pursuant to the
 24 MAX compensation plan. The position cannot be moved or
 25 altered for the life of MAX. The MIN Downline Position shall
 26 not be revoked by MAX due to the termination of this
 27 Agreement.

28
 29 73. In September 2008 Max unilaterally and without cause terminated
 30 TriPharma's MIN Downline Position in violation of the Max Contract. This was the
 31 second and final termination of TriPharma's MIN Downline Position; the prior
 32 termination nullified by Max and TriPharma's position was reinstated after protest
 33 by TriPharma.



74. Due to Max's multiple breaches of the Max Contract, TriPharma terminated the Max Contract on or about October 13, 2008. Prior to this date, TriPharma, through its attorneys, sent letters dated July 9 and October 8, 2008 to Max and the Max Executives outlining Max's multiple breaches. An accurate copy of the July 9, 2008, and October 8, 2008, letters is attached as **Exhibit D** and incorporated by reference.

75. Defendants have no right to use the Studies in connection with the sale, marketing and distribution of the Sham Supplement. The Sham Supplement only contains approximately 15% of Original Supplement. Max and the Max Executives have openly admitted that they substantially altered the Original Supplement. Moreover, the Advisory Council Defendants were involved with and ratified the Sham Supplement. In an email to Evan Dameshek, the Managing Member of TriPharma, Fred Ninnow, a "founder" of Max, on September 28, 2008 1:34 p.m. (PDT), made the following statement regarding the Sham Supplement:

We just finished a very successful convention. Over 2000 people there. We released a new kit around WLX with a Rosedale video. It sold real [sic] well. We meet [sic] with our 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 WLX at the convention I believe there is a [sic] opportunity to make it work. Many are not losing [sic] weight, but those that are seem very happy. We are going to have some of the improved version of WLX next week to see if it is better. Assuming it helps we could continue to promote the product. But the challenge is we will have to unpackage the pills, grind them up and mix them with a new blend. We can only use 15% of the current product to produce the new product. We already have a huge amount of product with more to purchase

76. The foregoing email is consistent with a chemical analysis performed on the Sham Supplement by American Analytical Labs for TriPharma on May 11, 2009 and by an analysis by William Spencer, Imagenetix' President, on March 9,



1 2010 confirming that Max adulterated the product and that MaxWLX is an
 2 adulterated, watered-down and very differently formulated product. Accurate
 3 copies of the chemical analysis and Mr. Spencer's March 9, 2010 letter to Mr.
 4 Dameshek are attached as **Exhibit G**.

5
 6 77. Despite the termination of the Max Contract, Defendants have
 7 continued to sell the Sham Supplement without any right or authority to do so, and
 8 have continued a long-standing campaign to deceptively market and advertise the
 9 Sham Supplement as Original Supplement and the subject of the Studies and the Dr.
 10 Kraemer Materials without any right or authority to do so. For example, Defendants
 11 have been misappropriating and continue to misappropriate TriPharma's intellectual
 12 property by specifically referencing the Studies and the 892 Patent on their websites
 13 at *www.max.com/wlx* and in other websites operated by Defendants, and they have
 14 been making and continue to make false and deceptive statements on their websites
 15 regarding the Sham Supplement, including the use and reference to the Dr. Kraemer
 16 Materials as follows:

17
 18 Developed at the University of Minnesota after seven years of
 19 scientific research, Max International has obtained worldwide
 20 distribution rights for this patented formula backed by hard-
 science, painstaking research and extensive clinical trials.

21 **What's In It?**

22 8-week Clinical Trial Results in a 21.6 lb. Average Weight Loss!
 23 The double-blind, placebo controlled study conducted under
 physician supervision at the University of Connecticut revealed
 extraordinary results in just eight weeks."

24 **UCONN Clinical Results – MaxWLX™ Weight Loss Accelerator**

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

- 26 • 21.5 lbs. of Body Fat in 8 weeks!
- 27 • 3.96 inches off their waist
- 3.28 inches off their hips
- 1.20 inches off each thigh
- 28 90% More Effective than diet and exercise alone!



1
2
3 78. TriPharma alleges on information and belief that at some point prior to
4 its termination of the Max Contract, Defendants substantially altered the Original
5 Supplement by cutting it with filler ingredients on at least a six-to-one ratio, so that
6 the Sham Supplement being sold by Defendants contains approximately fifteen
7 percent (15%) of the Original Supplement.

8
9 79. Despite the fact that the Sham Supplement is comprised of significantly
10 adulterated Original Supplement, Defendants have continued to market, advertise,
11 distribute and sell the Sham Supplement as Original Supplement that is the subject
12 of the Studies and the Dr. Kraemer Materials.

13
14 80. Due to the change in the ingredients of the Original Supplement, the
15 efficacy of the Sham Supplement has been substantially diminished. The
16 overexposure of the Sham Supplement by virtue of Defendants' unauthorized
17 marketing and sale of the Sham Supplement is causing dilution of the efficacy of the
18 Original Supplement in the minds of the consuming public and is making it less
19 coveted among other potential licensees with whom TriPharma has attempted to
20 contract to market, distribute and sell the Original Supplement.

21
22 **Overview of TriPharma and the Original Supplement**

23
24 81. TriPharma is a well-established, recognized company that possesses
25 exclusive rights to market, advertise, distribute, and sell the Original Supplement
26 and to use the Studies, including the Dr. Kraemer Materials, in connection
27 therewith. TriPharma has the exclusive right to further sublicense rights to
28



1 distribute the Original Supplement and use the Studies and the Dr. Kraemer
2 Materials in connection therewith.

3
4 82. One of the private label products TriPharma has distributed is a weight
5 and fat loss supplement called XelleX™, a registered trademark of TriPharma.
6 XelleX™ is comprised of the **same** ingredients as the Original Supplement.
7 TriPharma also has an exclusive license to use, market and sell Trisynex™, a
8 registered trademarked product, which is comprised of the **same** ingredients as the
9 Original Supplement. In addition, TriPharma recently launched SoLeau™ (a
10 registered trademark of TriPharma), the world's first weight loss water that contains
11 efficacious doses of the Original Supplement. The association of the Studies to the
12 Sham Supplement and its reduced efficacy causes loss of goodwill in the XelleX™,
13 SoLeau™ and Trisynex™ names/products and any other private label product
14 comprised of the same ingredients as the Original Supplement that TriPharma or its
15 sublicensees currently distributes or will distribute in the future.

16
17 83. As a result of the Studies, the Dr. Kraemer Materials, and the successes
18 of the Original Supplement facilitated by TriPharma's exclusive efforts and
19 financing, professionals and consumers in the diet supplement industry regularly
20 associate XelleX™, SoLeau™ and Trisynex™ with the Studies and the Dr. Kraemer
21 Materials.

22
23 84. TriPharma has been attempting to identify potential licensees in several
24 sales and distribution channels, including without limitation, "multi-level
25 marketing" ("MLM") companies, Direct Response Television, Direct Response
26 Radio and Retail industries for the Original Supplement, but its efforts have been
27 thwarted by the fact that Defendants continue to deceptively sell and market the
28 Sham Supplement as the Original Supplement with no right to distribute either the



1 Sham Supplement or the Original Supplement. After Max breached the Max
2 Contract, TriPharma licensed the product to a large direct response marketing
3 company who sold TriPharma's product via national television commercials, yet
4 during this time Defendants were aware of the marketing campaign and yet
5 continued to sell, market and distribute the Sham Supplement as being proprietary,
6 exclusive and patented to Max. Max Distributors were aware that they were
7 improperly and deceptively selling, marketing and distributing Sham Supplement
8 based on this marketing campaign, based on discussions held by the Max Executives
9 with the Advisory Council Defendants and Max Distributors, based upon the fact
10 that the EJAP study and the original, non-falsified UCONN study did not mention or
11 reference Max or Leptivin and based upon the fact that they knew the Original
12 Supplement was originally named XelleX™, *before* Max acquired its rights to the
13 product.

14
15 85. TriPharma has expended significant efforts and resources over the
16 years to promote, advertise and use the Original Supplement so as to make the
17 Original Supplement and the patent and trademarks associated with it highly
18 recognizable and distinguished to the consuming public. TriPharma's diligence has
19 resulted in the public readily identifying products utilizing the Studies as originating
20 from a source sponsored, affiliated or connected with TriPharma and the trademarks
21 associated with it.

22
23 86. The amount of goodwill TriPharma has amassed in connection with the
24 Original Supplement and the trademarks associated with it as a result of its diligence
25 and expended resources is so great it cannot reasonably be quantified. TriPharma
26 also has dedicated significant amounts of time and resources to promoting the
27 Original Supplement and the patent and trademarks associated with it and protecting
28

1 its exclusive right to distribute the Original Supplement, including filing this action
2 against Defendants.

3
4 87. TriPharma's election to enter into a contract with Max for the exclusive
5 distribution of the Original Supplement came at the expense of rejecting other
6 business opportunities for TriPharma and losing other business opportunities.
7 Defendants' continued sale of the Sham Supplement has made it virtually
8 impossible for TriPharma to garner commitments from other companies who could
9 and would market and distribute the Original Supplement. Most large companies,
10 particularly MLMs, want exclusivity so they can recruit distributors. Although
11 TriPharma can offer exclusivity, as long as Defendants are marketing and
12 distributing the Sham Supplement, TriPharma cannot locate other companies to
13 market and distribute the Original Supplement as a direct result of Defendants'
14 actions and false and deceptive marketing.

15 16 **Overview of Max and its Multi-Level Marketing Business Structure**

17
18 88. Max contracts for the manufacture of and supply of, as well as sells,
19 markets and distributes, dietary supplements. As set forth herein, Defendants are
20 actively and falsely advertising the Sham Supplement as the Original Supplement
21 which was the subject matter of the Studies, despite the fact that Defendants' rights
22 to distribute the Original Supplement were long ago terminated.

23
24 89. Defendants operate through an MLM business distribution model. Max
25 is the parent multi-level marketing company which markets its products directly to
26 consumers by means of relationship referral and direct selling. According to Max's
27 parent website, *www.maxinternational.com*, the Sham Supplement is sold and
28

distributed throughout the world, including the United States and Canada, the Philippines and Australia.

Max representatives solicit individuals to become salespersons, or “distributors / associates,” of Max products. Distributors receive a commission on each sale of Max products.

90. Max distributors/associates are encouraged to recruit as many people as possible to join their “downline.” Distributors also earn bonus compensation for the sales activity of those individuals in their “downline.”

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

92. Defendant Max, the Max Executives and the Advisory Council Defendants maintain and exert control over the business conduct of Max Distributors by requiring the Max Distributors to comply with the “Statement of Policies and Procedures” (the “Max Policies”), an accurate copy of which is attached as **Exhibit E** and incorporated by reference. This document is readily available for viewing on many Defendants’ websites.

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

3.2 - Advertising

3.2.1 - General

All Associates shall safeguard and promote the good reputation of Max and its products. The marketing and promotion of Max, the Max opportunity, the Marketing and Compensation Plan, and

Max products shall be consistent with the public interest, and must avoid all discourteous, deceptive, misleading, unethical or immoral conduct or practices.

To promote both the products and services, and the tremendous opportunity Max offers, Associates must use the sales tools and support materials produced by Max. Max has carefully designed its products, product labels, Marketing and Compensation Plan, and promotional materials to ensure that each aspect of Max is fair, truthful, substantiated, and complies with the vast and complex legal requirements of federal and state laws. If Max 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, Associates must not produce their own literature, advertisements, sales tools and promotional materials, or Internet web pages.

3.2.2 - Associate Web Sites

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

3.2.3 - Online Auctions and other Online Forums

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

3.2.4 - Domain Names

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

3.2.5 - Trademarks and Copyrights

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

* * *

3.6.2 - Product Claims

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.

94. Max, the Max Executives and the Advisory Council Defendants have explicitly and/or implicitly approved and/or ratified the business conduct of the Max Distributors, including the tools, techniques, methods, forums and statements used in connection with Max Distributors' sales, marketing and advertising of Max and Max products. The Max Distributors' sales, marketing and advertising of Max and Max products through the use of the internet and other communications methods constitute patent infringement and unfair, deceptive, fraudulent and unlawful business practices.

Defendants' Patent Infringement, False Marking, Trademark Dilution, and False Advertising Concerning the Sham Supplement

95. At all times relevant to this action, Defendants were and are operating interactive websites to market, advertise, and sell the Sham Supplement, which they claim is the subject of the Studies. The websites allow the general public to contact the site owner, make product purchases, inquire about the products, watch videos, and even sign up to become a Max distributor/associate. Defendants also sponsor and hold large-scale conferences throughout the country, including within this



1 District, where individuals may buy and sell Max products and enlist as a
2 distributor.

3
4 96. Max, the Max Executives and the Advisory Council Defendants are
5 allowing and approving Max distributors/associates, including Max Distributors, to
6 engage in a long-standing campaign to falsely advertise and market the Sham
7 Supplement as the Original Supplement. Moreover, despite receiving notice of this
8 complaint and TriPharma's rights asserted in it, Defendants have continued to
9 market, advertise, distribute and sell MaxWLX, the Sham Supplement, in reckless—
10 if not knowing—disregard of TriPharma's rights.

11
12 97. Defendants are not only deceptively mass marketing and selling the
13 Sham Supplement as the subject of the Studies, they are actively recruiting other
14 individuals to join the Max marketing force in furtherance of the deceptive
15 marketing.

16
17 98. In light of the exponential rate of Max distributor expansion, and the
18 fact that distributors are actively using the Studies to support the efficacy of the
19 Sham Supplement and recruiting myriad individuals to join their network and make
20 the same false advertising claims, the true number of existing Max
21 distributors/associates who are actually falsely advertising the Sham Supplement
22 with the Studies and the Dr. Kraemer Materials are numerous, but unknown.

23
24 99. Defendants, acting in concert and conspiracy, are infringing upon
25 TriPharma's rights by misappropriating, falsely advertising, imitating,
26 counterfeiting, trading on, and otherwise using the Original Supplement, Sham
27 Supplement and the Studies without TriPharma's permission, in a manner likely to
28 cause confusion, mistake, and deception to the public as to the source and quality of

1 the Sham Supplement. Defendants are diluting, tarnishing, diminishing, and blurring
2 the distinctiveness and strength of the 892 Patent, TriPharma's trademarks, and the
3 Original Supplement through their wrongful conduct.

4
5 100. Defendants also are actively advertising on their websites the Studies in
6 support of the efficacy of the Sham Supplement, and Defendants are doing so to
7 confuse and deceive the consuming public into believing that the Sham Supplement
8 is the subject of the Studies and the Dr. Kraemer Materials.

9
10 101. Defendants' conduct is at all times intentional, willful, wanton,
11 malicious, oppressive, and reckless. The conduct of Defendants, and all of them,
12 acting in concert and as each other's controlling person, controlling entity, agent,
13 and alter ego, violates 35 U.S.C. Section 100 *et seq.*, and the laws of the State of
14 California as set forth herein. Defendants' conduct further constitutes unfair
15 competition and unjust enrichment at TriPharma's expense.

16
17 102. As a result of Defendants' conduct, TriPharma has suffered and will
18 continue to suffer irreparable injury and, accordingly, brings this action for
19 damages, restitution and injunctive relief.

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

104. Despite TriPharma's continued demands to Imagenetix to enforce (i) the 892 Patent and (ii) TriPharma's exclusive rights under the 892 Patent, the Studies and the Dr. Kraemer Materials against Max and other third party infringers, Imagenetix has failed to do so.

FIRST CLAIM FOR RELIEF

Violation of 35 U.S.C. §271, *et seq.*

[Patent Infringement and Injunctive Relief]

(TriPharma and Imagenetix as an Involuntary Plaintiff

Against Defendants and Does 1 through 10)

105. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

106. Defendants have used, sold or offered to sell, and will continue to use, sell or offer to sell, the Sham Supplement that infringes each of the elements of one or more claims of the 892 Patent, without license from TriPharma or Imagenetix, in this judicial district and elsewhere throughout the United States.

107. By using, selling, and/or offering for sale the Sham Supplement, Defendants have directly and contributorily infringed, and will continue to directly and contributorily infringe, one or more claims of the 892 Patent under 35 U.S.C. Section 271(a),(b),(c), and/or (f), literally and/or under the doctrine of equivalents.

108. By making, using, selling, and/or offering for sale the Sham Supplement, Defendants have induced infringement of, and will continue to induce infringement of, one or more claims of the 892 Patent under 35 U.S.C. Section 271 (b), and/or (f), literally and/or under the doctrine of equivalents.

109. Defendants' infringement of the 892 Patent has been and continues to be willful and deliberate.

110. As a direct and proximate consequence of Defendants' acts and practices, unless such acts and practices are enjoined by the Court, TriPharma and Imagenetix will continue to be injured in its business and property rights, and has suffered, is suffering, and will continue to suffer injury and damages for which it is entitled to relief under 35 U.S.C. Section 284, including treble damages.

111. As a direct and proximate consequence of Defendants' acts and practices, they have also caused, are causing and, unless such acts and practices are enjoined by the Court, will continue to cause irreparable harm to TriPharma and Imagenetix for which there is no adequate remedy at law, and for which TriPharma and Imagenetix are entitled to injunctive relief under 35 U.S.C. Section 283.

SECOND CLAIM FOR RELIEF

Violation of 35 U.S.C. §292 [False Marking]

(TriPharma Against Defendants and Does 1 through 10)

112. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

113. Defendants, without TriPharma's consent, marked and continue to mark, used and continue to use in advertising, offered and continue to offer for sale, and/or sold and continue to sell the Sham Supplement in the United States and in this District with "US Patent #6,899,892," the 892 Patent number, the word "patent, and/or the word "patented" with the intent of counterfeiting or imitating the Original Supplement and/or deceiving the public and inducing them to believe that the Sham



Supplement was made, offered for sale, and/or sold by or with the consent of TriPharma. Moreover, Defendants marked, affixed upon and/or used in advertising in connection with the unpatented Sham Supplement the 892 Patent number when in fact the Sham Supplement is not patented and for which no patent application has been made. At all relevant times, Max's Sham Supplement was never patented and was never the subject of the 892 Patent and at no time did TriPharma ever consent to allowing Max to use or refer to the 892 Patent.

114. Defendants' false marking of the Sham Supplement with the 892 Patent has been and continues to be willful and deliberate.

115. As a direct result of Defendants' false marking, TriPharma has suffered and will continue to suffer injury and damages for which it is entitled to relief under 35 U.S.C. Section 292, including, but not limited to, a fine up to \$500 for every such offense based on the number of bottles/articles sold. In prosecuting this claim for relief, TriPharma is acting on behalf of the United States of America and is entitled to receive 50% of the damages recovered herein.

THIRD CLAIM FOR RELIEF

Violation of 15 U.S.C. Section 1114, *et seq.* [Trademark Dilution]

(TriPharma Against Defendants and Does 1 through 10)

116. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

117. Defendants' conduct constitutes dilution and blurring of TriPharma's trademarks, all of which are associated with the 892 Patent and the Original Supplement, in violation of Section 32 of the Lanham Act, 15 U.S.C. Section 1114.

118. As a direct and proximate result of Defendants' conduct, TriPharma has been harmed in an amount according to proof, and will suffer further, irreparable injury unless the requested relief is granted.

119. Defendants' conduct is intentional, willful, wanton, malicious, oppressive, and reckless, thus warranting enhanced and/or treble damages and attorneys' fees pursuant to 15 U.S.C. Section 1117(a).

FOURTH CLAIM FOR RELIEF

Violation of 15 U.S.C. §1125, *et seq.* [False Advertising,
False Designation of Origin, and Injunctive Relief]
(TriPharma Against Defendants and Does 1 through 10)

120. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

121. Defendants' conduct constitutes false advertising and false designation of origin in violation of Section 43 of the Lanham Act, 15 U.S.C. Section 1125(a).

122. The false statements actually deceived and/or had the tendency to deceive a substantial segment of Defendants' intended audience. The deception was material, in that it was likely to influence the consumers' purchasing decisions.

123. Defendants caused the false statements to enter interstate commerce.

124. TriPharma and consumers have been or are likely to be injured as a result of the false statements either by a direct diversion of sales from TriPharma to Defendants or by a lessening of the goodwill associated with TriPharma's products.

125. As a direct and proximate result of Defendants' conduct, TriPharma has been harmed in an amount according to proof, and will suffer further, irreparable injury unless the requested relief is granted.

126. Defendants' conduct as alleged herein was intentional, willful, wanton, malicious, oppressive and reckless, thus warranting enhanced and/or treble damages and attorneys' fees pursuant to 15 U.S.C. Section 1117(a).

127. TriPharma is also entitled to injunctive relief to enjoin Defendants from the actions identified herein regarding the continued marketing, advertising, distribution, and sales of the Sham Supplement.

FIFTH CLAIM FOR RELIEF

Violation of 15 U.S.C. §1125, *et seq.* [Unfair Competition]
(TriPharma Against Defendants and Does 1 through 10)

128. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

129. Defendants' conduct constitutes unfair competition in violation of Section 43 of the Lanham Act, 15 U.S.C. Section 1125(a).

130. As a direct and proximate result of Defendants' conduct, TriPharma has been harmed in an amount according to proof, and will suffer further, irreparable injury unless the requested relief is granted.

131. Defendants' conduct is intentional, willful, wanton, malicious, oppressive, and reckless, thus warranting enhanced and/or treble damages and attorneys' fees pursuant to 15 U.S.C. 1117(a).

SIXTH CLAIM FOR RELIEF

Violation of California Business & Professions Code §17200, *et seq.*

[Unlawful, Unfair, and Fraudulent Business Practices]

(TriPharma Against Defendants and Does 1 through 10)

132. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

133. California Business & Professions Code Section 17200 *et seq.* (the "UCL") prohibits unlawful, unfair and fraudulent business practices.

134. Defendants engaged and continue to engage in unlawful, unfair and fraudulent business practices in violation of the UCL as alleged herein.

135. More specifically, Defendants' conduct is unlawful because it violates, without limitation, the following statutes and federal regulations:

a) California Health and Safety Code Section 110660, which provides that: "Any food is misbranded if its labeling is false or misleading in any particular;"

b) California Health and Safety Code Section 110390, which provides that: "It is unlawful for any person to disseminate any false

advertisement¹ of any food, drug, device or cosmetic. An advertisement is false if it is false or misleading in any particular;"

c) 16 CFR Section 255, et seq. (Guides Concerning Use of Endorsements and Testimonials in Advertising), which prohibits the false and deceptive use of endorsements in advertising; and

d) 16 CFR Section 310.3(a)(1)(iii) [implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. Sections 1601-1608], which provides that: "It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct: [¶] Before a customer pays for goods or services offered, failing to disclose truthfully in a clear and conspicuous matter, the following material information. . . [¶] Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer."

136. Defendants' unlawful, unfair and fraudulent business practices are likely to deceive and have deceived the reasonable consumer.

137. Defendants' unlawful, unfair and fraudulent conduct is part of an ongoing pattern or systematic course of conduct which is repeated daily in the United States, in California and in this District.

138. Defendants' unlawful, unfair and fraudulent conduct is the direct cause of financial harm and injury in fact to TriPharma and consumers of the Sham Supplement.

¹ California Health & Safety Code Section 109885 provides that: "'Advertisement' means any representations, including, but not limited to, statements upon the



139. Defendants' conduct unlawfully, unfairly and fraudulently benefits Defendants by effectively shutting TriPharma's Original Supplement out of the marketplace and eliminating competition against Max's Sham Supplement as alleged herein. Accordingly, Defendants' conduct significantly threatens or harms competition.

140. TriPharma requests that the Court enter such orders as may be necessary to restore all sums which Defendants wrongfully acquired from TriPharma by means of the unlawful, unfair and fraudulent conduct, as provided in Business & Professions Code Section 17203 and Section 17535, and for other appropriate relief.

141. TriPharma requests that the Court enter such orders as may be necessary to enjoin Defendants' unlawful, unfair and fraudulent conduct as provided in Business & Professions Code Section 17203 and Section 17535, and for other appropriate relief.

SEVENTH CLAIM FOR RELIEF

Violation of California Business & Professions Code §17500, *et seq.*

[False Advertising]

(TriPharma Against Defendants and Does 1 through 10)

142. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

products, its packages, cartons, and any other container, disseminated in any manner or by any means, for the purpose of inducing, or that is likely to induce, directly or indirectly, the purchase or use of any food, drug, device, or cosmetic"

1 143. California Business & Professions Code Section 17500 *et seq.* makes it
2 unlawful for anyone to make an untrue or misleading statement to the public about
3 or in connection with the advertising or sale of a product which is known or should
4 be known by that person to be untrue or misleading with the intent not to sell the
5 product as advertised.

6
7 144. Defendants' representations that the Sham Supplement is the Original
8 Supplement, backed by the 892 Patent, and the subject of the Studies and the Dr.
9 Kraemer Materials are untrue and misleading within the meaning of Section 17500.

10
11 145. Defendants' misrepresentations are likely to deceive a reasonable
12 consumer and have deceived consumers of the Sham Supplement.

13
14 146. Defendants' misrepresentations are part of an ongoing pattern or
15 systematic course of conduct which is repeated daily in the United States, in
16 California and in this District.

17
18 147. Defendants' misrepresentations are the direct cause of financial harm
19 and injury in fact to TriPharma and consumers of the Sham Supplement.

20
21 148. Defendants' misrepresentations unlawfully, unfairly and fraudulently
22 benefit Defendants by effectively shutting TriPharma's Original Supplement out of
23 the marketplace and eliminating competition against Max's Sham Supplement as
24 alleged herein. This has had the impact of lessening competition in the weight loss
25 supplement industry and has allowed Max to artificially maintain high prices for the
26 Sham Supplement. Accordingly, Defendants' conduct significantly threatens or
27 harms competition.

149. TriPharma requests that the Court enter such orders as may be necessary to restore to TriPharma all sums which Defendants wrongfully acquired by means of the false advertising as provided in Business & Professions Code Section 17203 and Section 17535, and for other appropriate relief.

150. TriPharma requests that the Court enter such orders as may be necessary to enjoin Defendants' unlawful, unfair and fraudulent conduct as provided in Business & Professions Code Section 17203 and Section 17535, and for other appropriate relief.

EIGHTH CLAIM FOR RELIEF

Violation of California Civil Code §3344 [Unauthorized Commercial Use of Name, Voice, Signature, Photograph or Likeness]
(TriPharma Against Defendants and Does 1 through 10)

151. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

152. TriPharma owns the exclusive rights to the Dr. Kraemer Materials, including the right to use Dr. Kraemer's name, voice, signature, photographs, video images, and likeness in the Dr. Kraemer Materials for the purpose of advertising, selling, distributing the Original Supplement.

153. California Civil Code Section 3344 provides in pertinent part:

§ 3344. Unauthorized commercial use of name, voice, signature, photograph or likeness

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in

1 products, merchandise, or goods, or for purposes of advertising
2 or selling, or soliciting purchases of, products, merchandise,
3 goods or services, without such person's prior consent, or, in the
4 case of a minor, the prior consent of his parent or legal guardian,
5 shall be liable for any damages sustained by the person or
6 persons injured as a result thereof. In addition, in any action
7 brought under this section, the person who violated the section
8 shall be liable to the injured party or parties in an amount equal
9 to the greater of seven hundred fifty dollars (\$750) or the actual
10 damages suffered by him or her as a result of the unauthorized
11 use, and any profits from the unauthorized use that are
12 attributable to the use and are not taken into account in
13 computing the actual damages. In establishing such profits, the
14 injured party or parties are required to present proof only of the
15 gross revenue attributable to such use, and the person who
16 violated this section is required to prove his or her deductible
17 expenses. Punitive damages may also be awarded to the injured
18 party or parties. The prevailing party in any action under this
19 section shall also be entitled to attorney's fees and costs.

11 154. Without TriPharma's prior consent, Defendants knowingly used and
12 continue to use Dr. Kraemer's name, voice, signature, photographs, video images
13 and likeness from the Dr. Kraemer Materials for purposes of advertising or selling,
14 or soliciting purchases of, the Sham Supplement.

16 155. Defendants 'unauthorized commercial use of Dr. Kraemer's name,
17 voice, signature, photographs, video images and likeness from the Dr. Kraemer
18 Materials for use in marketing, selling and distributing the Sham Supplement is a
19 substantial factor in directly causing injury and harm to TriPharma.

21 156. TriPharma is entitled to statutory damages or actual damages and
22 Defendants 'profits, whichever is greater, and attorney's fees and costs under
23 California Civil Code Section 3344(a).

25 157. Defendants' violations under California Civil Code Section 3344(a)
26 constitute fraud, oppression and/or malice, and TriPharma is also entitled to punitive
27 damages.
28

NINTH CLAIM FOR RELIEF

Unfair Competition – Palming Off

(TriPharma Against Defendants and Does 1 through 10)

158. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

159. TriPharma is currently a competitor of Max. Through their actions, Defendants have simulated and imitated the Original Supplement sold or to be sold by TriPharma with the purpose of deceiving the general public into buying the Sham Supplement under the impression that it is purchasing TriPharma's Original Supplement. Defendants have intentionally engaged in this conduct to deceive the general public into buying the Sham Supplement, and not TriPharma's Original Supplement, the exclusive marketing and distribution rights to which are held by TriPharma.

160. Defendants' conduct constitutes common law unfair competition and palming off.

161. As a direct and proximate result of Defendants' conduct, TriPharma has suffered, and will continue to suffer, damages to its business, reputation and goodwill, in an amount to be established at trial.

162. Defendants' conduct constituted fraud, oppression and/or malice and TriPharma is entitled to punitive damages.

TENTH CLAIM FOR RELIEF

Preliminary and Permanent Injunctive Relief
(TriPharma Against Defendants and Does 1 through 10)

163. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

164. Defendants have intentionally or negligently interfered with TriPharma's future and prospective sales and have attained ill-gotten profits from the marketing and distribution of the Sham Supplement using unfair, deceptive and fraudulent business activities as alleged herein. These acts have caused and, unless restrained by this Court by a preliminary injunction and permanent injunction, will continue to cause TriPharma to suffer irreparable injury.

165. Defendants have intentionally or negligently interfered with TriPharma's future and prospective sales and have attained ill-gotten profits from the marketing, advertising and sale of Original Supplement. These acts have caused and, unless restrained by this Court by a preliminary injunction and permanent injunction, will continue to cause TriPharma to suffer irreparable injury.

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

167. TriPharma has no adequate remedy at law. Damages at law are inadequate. TriPharma therefore seeks injunctive and/or other appropriate equitable relief from this Court.

ELEVENTH CLAIM FOR RELIEF

Unjust Enrichment and Imposition of Constructive Trust
(TriPharma Against Defendants and Does 1 through 10)

168. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

169. Defendants 'conduct as alleged herein constitutes unjust enrichment under the laws of the State of California.

170. As a direct and proximate result of Defendants 'conduct, TriPharma has been harmed in an amount according to proof, and will suffer further, irreparable injury unless the requested relief is granted. Accordingly, TriPharma demands that a constructive trust be imposed for TriPharma's benefit on all revenues derived from the sale of any of the Sham Supplement.

171. Defendants 'conduct as alleged herein was intentional, willful, wanton, malicious, oppressive, and reckless, thus warranting enhanced and punitive damages and attorneys' fees.

TWELFTH CLAIM FOR RELIEF

Breach of Contract
(TriPharma Against Defendant Max and Does 1 through 10)

172. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

1 173. TriPharma has performed all conditions and covenants required of it
2 under the Max Contract except for those conditions and covenants that it was
3 prevented and/or excused from performing.
4

5 174. Max breached the Max Contract by, *inter alia*, failing to pay
6 TriPharma for the Original Supplement they purchased, by marketing the Sham
7 Supplement under the “MaxWLX “and “Leptivin” brand, which is comprised of
8 significantly altered and adulterated ingredients, while continuing to market the
9 Sham Supplement and using the Studies in promoting the Sham Supplement, by
10 failing and refusing to meet the purchase requirements under the Max Contract for
11 the five year term of the contract, by falsely representing to consumers and the
12 general public that the Sham Supplement is the subject matter of the Studies and is
13 the subject of the 892 Patent and the Dr. Kraemer Materials, and by terminating
14 TriPharma’s MIN Downline Position, failing to pay TriPharma for its downline
15 position, and failing to provide TriPharma with the opportunity to build out its high
16 and coveted position in the downline from which it would have assuredly generated
17 a large downline genealogy report and failing to pay TriPharma the bonuses and
18 commissions to which it was and is entitled.
19

20 175. As a proximate result of the breach of the Max Contract by Max and
21 the Max Executives, TriPharma has suffered damages and will continue to suffer
22 damages in an amount according to proof, including but not limited to all
23 compensatory damages, including lost profits, compensation for its place in the Max
24 downline and consequential damages.
25
26
27
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THIRTEENTH CLAIM FOR RELIEF

Declaratory Relief

(TriPharma Against Defendants, Imagenetix, and Does 1 through 10)

176. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

177. A dispute has now arisen between the parties regarding the respective rights of each of the parties. TriPharma contends that the Defendants have no right to continue to distribute the Sham Supplement and no right to continue to refer to the 892 Patent, the Studies or the Dr. Kraemer Materials in support of the efficacy of the Sham Supplement. TriPharma also contends that Defendant Max willfully breached the Max Contract. TriPharma is informed and believes that Defendants dispute TriPharma's contentions.

178. TriPharma contends that Imagenetix owes a duty to Tripharma under the Imagenetix Contract to bring an action to enforce the 892 Patent against Defendants as third party infringers.

179. A judicial declaration is therefore required declaring that: (1) Defendants have no right to continue to market, advertise, distribute and sell the Sham Supplement or the Original Supplement; (2) Defendants have no right to continue to use the Studies or the Dr. Kraemer Materials in support of the efficacy of the Sham Supplement; (3) TriPharma is entitled to be compensated by Defendants for the wrongful distribution of the Sham Supplement after the termination of the Max Contract and the wrongful use of the Studies and the Dr. Kraemer Materials, and (4) Max breached the Max contract and must compensate TriPharma for the damages caused thereby.

180. A judicial declaration is also required declaring that Imagenetix owes a duty to Tripharma under the Imagenetix Contract to bring an action to enforce the 892 Patent against Defendants as third party infringers, and that Imagenetix is properly joined in this action as an involuntary plaintiff to confer standing on TriPharma to prosecute Count 1 against Defendants.

FOURTEENTH CLAIM FOR RELIEF

Promissory Fraud

(TriPharma Against Defendant Max; Max Executives Steve Scott, Fred Ninnow, Peter Nordberg; and Does 1 through 10)

181. TriPharma incorporates paragraphs 1 through 106 in support of this claim for relief.

182. In or about January, March and April 2008, Max Executives Steve Scott, Fred Ninnow. and Peter Nordberg, acting on behalf of Max and with full authority to do so, made, *inter alia*, the following oral representations to TriPharma: (i) Max would comply with the terms of the Max Contract, including performing all of the purchase obligations under the Max Contract regarding the Original Supplement and that it would pay for the goods it purchased according to the terms of the Max Contract; (ii) Max would exclusively market the Original Supplement and not adulterate it; and (iii) Max would give TriPharma a favorable MIN Downline Position, paying it the appropriate bonuses and commissions to which it was entitled at this position and that Max would maintain this position for TriPharma even if the Max Contract was terminated.

183. At the time Max, through these Max Executives, made these promises/representations, Max and these Max Executives knew the representations

1 were false and that Max had no intention of performing them. These representations
2 were made to induce TriPharma to enter into the Max Contract.

3
4 184. The representations were material and TriPharma justifiably relied on
5 them and entered in the Max Contract. But for these representations, TriPharma
6 would not have entered into the Max Contract.

7
8 185. As a proximate result of the wrongful conduct of Defendant Max and
9 these Max Executives, TriPharma has suffered actual damages and is entitled to
10 damages according to proof.

11
12 186. Max's and these Max Executives' representations and actions
13 constituted fraud, oppression and/or malice, and TriPharma is entitled to punitive
14 damages.

15
16 **FIFTEENTH CLAIM FOR RELIEF**

17 Accounting

18 (TriPharma Against Defendants and Does 1 through 10)

19
20 187. TriPharma incorporates paragraphs 1 through 106 in support of this
21 claim for relief.

22
23 188. Due to the Defendants' misconduct, TriPharma is entitled to all of the
24 profits derived by them from the sale of the Sham Supplement. TriPharma also
25 contends that due to the Max's and the Max Executives' unlawful termination of
26 TriPharma's MIN Downline Position, they owe TriPharma the compensation it
27 would have received if it had not been improperly terminated. An accounting is
28

1 therefore required to determine the amount of such compensation owed from
2 Defendants.

3
4 **SIXTEENTH CLAIM FOR RELIEF**

5 Negligence

6 (TriPharma Against Defendants and Does 1 through 10)

7
8 189. TriPharma incorporates paragraphs 1 through 106 in support of this
9 claim for relief.

10
11 190. Defendants falsely represented and continue to represent to TriPharma,
12 the public, and consumers of the Sham Supplement that the Sham Supplement is the
13 Original Supplement, backed by the 892 Patent, and the subject of the Studies and
14 the Dr. Kraemer Materials, and to negligently market, advertise, distribute and sell
15 the Sham Supplement.

16
17 191. Defendants should reasonably have known that these representations
18 are false.

19
20 192. Defendants' negligence is a substantial factor in directly causing
21 damages to TriPharma.

22
23 **PRAYER FOR RELIEF**

24
25 Tripharma prays for an order and judgment thereon as against Imagenetix that
26 Imagenetix owes a duty to Tripharma under the Imagenetix Contract to bring an
27 action to enforce the 892 Patent against Defendants as third party infringers, and that
28

1 Imagenetix is properly joined in this action as an involuntary plaintiff to confer
2 standing on TriPharma to prosecute Count 1 against Defendants.

3
4 TriPharma prays for an order and judgment thereon jointly and severally as
5 against all Defendants as follows:

- 6
7 1) For general, special, compensatory, and statutory damages;
- 8
9 2) For damages under 35 U.S.C. Section 284, including treble damages;
- 10
11 3) For fines under 35 U.S.C. Section 282 in an amount up to \$500 for
12 each offense based on the numbers of bottles/articles sold;
- 13
14 4) For temporary and permanent injunctive relief under 35 U.S.C. Section
15 283 enjoining Defendants from continuing to manufacture, market, advertise,
16 distribute and sell the Sham Supplement;
- 17
18 5) For a temporary and permanent injunction ordering Defendants to
19 refrain from continuing to manufacture, market, advertise, distribute and sell the
20 Sham Supplement;
- 21
22 6) For a mandatory injunction requiring Max to reinstate its MIN
23 Downline Position in accordance with the Max Contract.
- 24
25 7) For compensatory damages in an amount to be determined at the time
26 of trial but believed to be in excess of one hundred fifty million dollars
27 (\$150,000,000), and that these damages be enhanced and/or trebled pursuant to 15
28 U.S.C. Section 1117(b) together with reasonable attorneys' fees;

1 8) For injunctive relief, restitution and any other appropriate relief under
2 Sections 17203 and 17535 of the California Business & Professions Code Sections
3 17203 and 17535;

4
5 9) For punitive damages;

6
7 10) For all profits earned by Defendants through the time of trial as a result
8 of their infringing, diluting, and otherwise wrongful conduct alleged herein, based
9 on an accounting, and thereafter disgorged and held in constructive trust and paid
10 over to TriPharma, and enhanced in the form of compensatory damages as
11 appropriate under the exceptional circumstances of this case;

12
13 11) For all damages representing the amount TriPharma would have been
14 compensated if its MIN Downline Position had not been improperly terminated;

15
16 12) That TriPharma recover its reasonable attorneys' fees, costs, and
17 expenses incurred herein, as appropriate under the exceptional circumstances of this
18 case, and under California Civil Code Section 3344(a);

19
20 13) That TriPharma be awarded prejudgment and post-judgment interest at
21 the legal rate; and
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1 14) That TriPharma recover such other and further relief as this Court
2 deems just and proper.

3
4 Dated: April 16, 2010

McKENNON | SCHINDLER LLP

5
6 Bv: 

7 ROBERT J. McKENNON
8 ERIC J. SCHINDLER
9 M. SCOTT KOLLER
10 Attorneys for Plaintiff
11 TriPharma, LLC
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JURY TRIAL DEMAND

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

Dated: April 16, 2010

McKENNON | SCHINDLER LLP

Bv:


ROBERT J. McKENNON
ERIC J. SCHINDLER
M. SCOTT KOLLER
Attorneys for Plaintiff
TriPharma, LLC

CERTIFICATE OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 384 Forest Avenue, Suite 20, Laguna Beach, California 92651; Fax 949-464-9714; E-mail address: jw@mslawllp.com.

I hereby certify that on April 16, 2010, I served the foregoing documents described as: **FIRST AMENDED COMPLAINT; DEMAND FOR JURY TRIAL** on the interested parties (listed on the attached **SERVICE LIST**) as follows:

☒ **ELECTRONICALLY:** I caused a true and correct copy thereof to be electronically filed using the Court's Electronic Court Filing ("ECF") System and service was completed by electronic means by transmittal of a Notice of Electronic Filing on the registered participants of the ECF System. I served those parties who are not registered participants of the ECF System as indicated below.

☐ I placed the ☐ original ☐ a true copy thereof enclosed in sealed envelope(s) to the notification address(es) of record and caused such envelope(s) to be delivered by ☐ **U.S POSTAL SERVICE** ☐ **OVERNIGHT DELIVERY**.

☐ **BY E-MAIL:** I electronically transmitted a true and correct copy thereof to the notification electronic mail address(es) of record before close of business for the purpose of effecting service and the transmission was reported as complete and without error.

☐ **FACSIMILE TRANSMISSION:** Based on ☐ courtesy ☐ court order ☐ agreement of the parties, I caused a true copy thereof to be served by transmitting via facsimile machine to the notification facsimile number(s) of record before close of business. The transmission was reported as complete, without error.

☐ **PERSONAL DELIVERY:** I caused ☐ the original ☐ a true copy thereof to be delivered by hand to the notification address(es) of record by an employee or independent contractor of a registered process service.

I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America and the State of California that the above is true and correct. Executed at Laguna Beach, California on April 16, 2010.

NAME: Joanne M. Wagner

(Signature)

SERVICE LIST

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Max International, LLC, et al.

☒ Registered participant of ECF.