Tyler J. Woods (State Bar No. 232464) 1 twoods@trialnewport.com Richard H. Hikida (State Bar No. 196149) rhikida@trialnewport.com Scott J. Ferrell (State Bar No. 202091) 2012 OCT 22 PM 1: 36 2 CLERK. U.S. DISTRIG : COURT CENTRAL DIST. OF CALIF. LOS ANGELES 3 sferrell@trialnewport.com NEWPORT TRIAL GROUP 4 A Professional Corporation 895 Dove Street, Suite 425 Newport Beach, CA 92660 5 Tel: (949) 706-6464 6 Fax: (949) 706-6469 7 Attorneys for Plaintiff 8 9 UNITED STATES DISTRICT COURT 10 CENTRAL DISTRICT OF CALIFORNIA 11 12 THE TAWNSAURA GROUP, LLC, Case No. SACV12-1467 SJO(AGRx) 13 Plaintiff, FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT 14 VS. JURY TRIAL DEMANDED 15 TWINLAB CORPORATION, 16 Defendant 17 18 19 20 21 22 23 24 25 26 2.7 28

Plaintiff The Tawnsaura Group, LLC ("Plaintiff") hereby alleges for its First Amended Complaint against Twinlab Corporation ("Defendant"), on personal knowledge as to its own activities and on information and belief as to the activities of others, as follows:

I. THE PARTIES

- 1. Plaintiff is a limited liability company organized and existing under the laws of Nevada, with a registered office at 50 West Liberty Street, Suite 1100, Reno, Nevada 89501.
- 2. Plaintiff is the owner and assignee of United States Patent No. 5,874,471 ("the '471 patent") titled "Orthomolecular Medical Use of L-Citrulline for Vasoprotection, Relaxative Smooth Muscle Tone and Cell Protection," and United States Patent No. 6,028,107 ("the '107 patent") titled "Orthomolecular Medical Use of L-Citrulline for Vasoprotection, Relaxative Smooth Muscle Tone and Cell Protection," and Plaintiff licenses the '471 patent and the '107 patent to at least one third-party and is in negotiations to license the patents to numerous other parties.
- 3. Upon information and belief, Defendant Twinlab Corporation is a corporation organized and existing under the laws of New York with a principal place of business at 632 Broadway, Suite 201 in New York, New York, 10012.

II. JURISDICTION AND VENUE

- 4. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. Accordingly, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.
 - 5. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.
- 6. This Court has personal jurisdiction over Defendant. Defendant, directly or through intermediaries (including distributors, retailers, and others), ships, distributes, offers for sale, sells, and advertises its nutritional supplement products in the United States, the State of California, and the Central District of California, including the products sold as "Nitric Fuel Strength & Pump Dual Layer Tablets."

Defendant has purposefully and voluntarily placed these products into the stream of commerce with the expectation that they will be purchased in the Central District of California.

III. THE DEFENDANT'S INFRINGING PRODUCTS

- 7. The label and/or advertisements for Defendant's Nitric Fuel Strength & Pump Dual Layer Tablets state that the products contain, <u>inter alia</u>, the ingredient "Citrulline Malate" and "kick-starts your workout using breakthrough fast-dissolve technology to flood muscles with cell-volumizing nitric oxide." Nitric Fuel Strength & Pump Dual Layer Tablets contains the ingredient l-citrulline.
- 8. As set forth herein, the above products infringe the claimed methods of the '471 patent and the '107 patent, and are therefore referred to herein as "the products that infringe the claimed methods."
- 9. Defendant has committed the tort of patent infringement within the State of California, and more particularly, within the Central District of California, by virtue of the fact that Defendant has shipped, distributed, offered for sale, sold, and advertised, and continues to ship, distribute, offer for sale, sell, and advertise the products that infringe the claimed methods in this District.

IV. THE DEFENDANT'S INFRINGEMENTS

10. Defendant's employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant's products in advertising and marketing activities, including the football player Ray Lewis, have taken, used, and orally administered the products that infringe the claimed methods which have the effect, without limitation, of increasing the plasma level of arginine in the persons taking the products from a low or normal fasting level to a level which is up to three times an average overnight fasting level and increasing the plasma concentration of arginine in the persons taking the products from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma. These persons included persons who, without

- limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities. Defendant has encouraged and/or is aware of these persons' oral administration of the products that infringe the claimed methods for these purposes, and these persons are acting under Defendant's direction and control. Therefore, Defendant practices the methods as set forth in the '471 patent and the '107 patent and is a direct infringer of the patents.
- also direct infringers of the '471 patent and the '107 patent, because they have taken, used, and orally administered the products that infringe the claimed methods which have the effect, without limitation, of increasing the plasma level of arginine in the persons taking the products from a low or normal fasting level to a level which is up to three times an average overnight fasting level and/or increasing the plasma concentration of arginine in the persons taking the products from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma. These persons included persons who, without limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities. Therefore, they practice the methods as set forth in the '471 patent and the '107 patent.
- 12. For example and without limitation, a consumer known as "kwilliamson" wrote a review regarding his/her use of Nitric Fuel Strength & Pump Dual Layer Tablets on http://reviews.bodybuilding.com/Twinlab/Nitric_Fuel and indicated that "I always get a great pump off of this product." This is just one of many end-users of Defendant's infringing products who has practiced the methods as set forth in the '471 patent and the '107 patent and is directly infringing the patents.
- 13. Defendant's labels and advertising for the products that infringe the claimed methods explain the elements and essential elements of the methods disclosed

in the '471 patent and the '107 patent to end-users and encourage, urge, and induce the products' end-users to purchase and orally administer the products to practice those methods, and end-users do practice those methods. Defendant has therefore specifically intended to cause these end-users to directly infringe the claimed methods of the patents, and has urged them to do so.

- 14. Defendant's products that infringe the claimed methods are not suitable for non-infringing uses, and none of Defendant's labels or advertisements for the products disclose any uses for the products nor for the citrulline in those products that do not infringe upon the methods disclosed in the '471 patent and the '107 patent. The inclusion of the citrulline content in the products are, in fact, material to practicing the methods disclosed in the '471 patent and the '107 patent.
- 15. Defendant has knowledge that its products that infringe the claimed methods are especially adapted by end-users of the products for the practicing of the methods disclosed in the '471 patent and '107 patent, and, indeed, Defendant encourages, urges, and induces the products' end-users to purchase and orally administer the products to practice those methods, and has done so in the past.
- 16. Defendant has intentionally and knowingly induced, encouraged, and urged end-users of the products that infringe the claimed methods to purchase and orally administer the products for the purpose, without limitation, of increasing the plasma level of arginine in the persons taking the products from a low or normal fasting level to a level which is up to three times an average overnight fasting level and increasing the plasma concentration of arginine in the persons taking the products from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma, including by end-users who, without limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities.

the '471 patent and the '107 patent as early as the time Defendant launched each of the

products that infringe the claimed methods in the marketplace. Defendant employs and

Defendant, through its counsel, conducts or should conduct due diligence on the

On information and belief, Defendant had actual, first-hand knowledge of

1 2 3 engages sophisticated, experienced legal counsel with expertise in patent law. 4 5 potential for Defendant's products to infringe on patents and knew or should have 6 7 known that the products that infringe the claimed methods actually infringe or could infringe on the '471 patent and '107 patent, but Defendant decided to infringe the 8 patents anyway or ignored the risk of infringement. 9 10 11 12 13 14 15

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- 18. In the alternative, Plaintiff pleads that Defendant subjectively believed at the time Defendant launched each of the products that infringe the claimed methods in the marketplace that there is or was a high probability of the fact that patents existed that covered the use of citrulline as in the products and that Defendant took deliberate actions to avoid confirming that fact, including not conducting due diligence as to potential patent infringements. Defendant therefore willfully blinded itself to the infringing nature of its sales of the products that infringe the claimed methods.
- At a minimum, Defendant became aware of the '471 patent and the '107 patent at the time of the filing of the initial Complaint in this matter and the receipt of Plaintiff's counsel's letter regarding the suit. Defendant has not ceased its own direct infringement, contributory infringement, or inducement of infringements by end-users despite such knowledge.
- The earliest exact date Defendant obtained knowledge of the '471 patent 20. and the '107 patent is within the exclusive possession and control of Defendant. However, Defendant specifically induces end-users to use its products, and particularly the citrulline component in the products, for increasing nitric oxide levels, "pump," and muscle volume and Defendant knows and intends that end-users achieve those objectives by practicing the methods as set forth in the '471 and '107 patents. This is why Defendant includes citrulline in its products – for the purposes of improving of the

health of end-users to increase the plasma level of arginine in end-users to a level from a low or normal fasting level to a level which is up to three times an average overnight fasting level, and improving the health of end-users to increase the plasma concentration of arginine in the subject to a level from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma — and Defendant knows that end-users purchase and ingest the products, and particularly the citrulline content of the products, for those purposes. Defendant's infringing activities have not stopped despite its knowledge of the patents' existence.

V. FIRST CAUSE OF ACTION

Infringement of U.S. Patent No. 5,874,471

- 21. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs of this First Amended Complaint as if fully set forth herein.
- 22. Defendant has in the past and still is literally infringing or infringing under the doctrine of equivalents, directly and indirectly through contributory and/or induced infringement, one or more claims of the '471 patent by making, using, selling, and offering for sale nutritional supplements embodying the patented invention, and will continue to do so unless enjoined by this Court.
- 23. The claims of the '471 patent infringed by Defendant include claims 1, 2, 20, 21, and 28.
- 24. Examples of Defendant's direct infringement includes, without limitation, the fact that Defendant's employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant's products in advertising and marketing activities, have taken, used, and orally administered the products that infringe the claimed methods which have the effect, without limitation, of increasing the plasma level of arginine in the persons taking the products from a low or normal fasting level to a level which is up to three times an average overnight fasting level. These persons included persons who, without limitation, were in good health, were in a

condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities. Defendant has encouraged and/or is aware of these persons' oral administration of the products that infringe the claimed methods for these purposes, these persons are acting under Defendant's direction and control, and therefore Defendant is directly practicing the methods set forth in the '471 patent.

- 25. End-users of Defendant's products that infringe the claimed methods are also direct infringers of the '471 patent, because they have taken, used, and orally administered the products that infringe the claimed methods which have the effect, without limitation, of increasing the plasma level of arginine in the persons taking the products from a low or normal fasting level to a level which is up to three times an average overnight fasting level. These persons included persons who, without limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities. Therefore, they practice the methods as set forth in the '471 patent.
- 26. Defendant's labels and advertising for the products that infringe the claimed methods explain the elements or essential elements of the methods disclosed in the '471 patent to end-users and encourage, urge, and induce the products' end-users to purchase and orally administer the products to practice those methods. Defendant's products that infringe the claimed methods are not suitable for non-infringing uses, and none of Defendant's labels or advertisements for the products disclose any uses for the relevant ingredients in the products that have a use that does not infringe upon the methods disclosed in the '471 patent. Defendant has knowledge that its products that infringe the claimed methods are especially adapted by end-users of the products for the practicing of the method disclosed in the '471 patent, as Defendant encourages, urges, and induces the products' end-users to purchase and orally administer the products to practice those methods, and has done so in the past. Defendant therefore is liable for contributory infringement of one or more claims of the '471 patent.

- 27. Defendant has intentionally and knowingly induced, encouraged, and 1 urged end-users of the products that infringe the claimed methods to purchase and 2 orally administer the products for the purpose, without limitation, of increasing the 3 plasma level of arginine in the persons taking the products from a low or normal fasting 4 level to a level which is up to three times an average overnight fasting level, including 5 by end-users who, without limitation, were in good health, were in a condition of 6 increased or continuing brain or neural activities, or were in a condition of increased or 7 continuing muscular activities. On information and belief, Defendant had actual, first-8 hand knowledge of the '471 patent as early as the time Defendant launched each of the 9 products that infringe the claimed methods in the marketplace. In the alternative, and 10 on information and belief, Plaintiff pleads that Defendant subjectively believed at the 11 time Defendant launched each of the products that infringe the claimed methods in the 12 marketplace that there is or was a high probability of the fact that patents existed that 13 covered the use of citrulline as in the products that infringe the claimed methods, and 14 that Defendant took deliberate actions to avoid confirming that fact. 15 Defendant therefore willfully blinded itself to the infringing nature of its sales of the products that 16 infringe the claimed methods. At a minimum, Plaintiff pleads that Defendant became 17 aware of the '471 patent at the time of the filing of the initial Complaint in this matter, 18 and the issuance of a correspondence from Plaintiff's counsel regarding the suit. 19 Defendant has not ceased its contributory infringement or inducement of infringements 20 by end-users despite such knowledge. Defendant is therefore liable for induced 21 infringement of one or more of claims of the '471 patent. 22 28. Defendant's activities have been without express or implied license by 23
 - Plaintiff.
 - The infringement by Defendant has been and continues to be willful, since 29. the infringement has not ceased, particularly after the filing of the initial suit in this matter.

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30. As a result of Defendant's acts of infringement, Plaintiff has suffered and will continue to suffer damages in an amount to be proved at trial.

- 31. As a result of Defendant's acts of infringement, Plaintiff has been and will continue to be irreparably harmed by Defendant's infringement and inducement, which will continue unless Defendant is enjoined by this Court.
- 32. Plaintiff believes that Defendant's past infringement and/or continuing infringement has been deliberate and willful, and that this case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

VI. SECOND CAUSE OF ACTION

Infringement of U.S. Patent No. 6,028,107

- 33. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs of this First Amended Complaint as if fully set forth herein.
- 34. Defendant has in the past and still is literally infringing or infringing under the doctrine of equivalents, directly and indirectly through contributory and/or induced infringement, one or more claims of the '107 patent by making, using, selling, and offering for sale nutritional supplements embodying the patented invention, and will continue to do so unless enjoined by this Court.
- 35. The claims of the '107 patent infringed by Defendant include claims 1, 2, 15, and 16.
- 36. Examples of Defendant's direct infringement includes, without limitation, the fact that Defendant's employees, agents, representatives and other persons sponsored by or who endorse Defendant and Defendant's products in advertising and marketing activities, have taken, used, and orally administered the products that infringe the claimed methods which have the effect, without limitation, of increasing the plasma concentration of arginine in the persons taking the products from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma. These persons included

persons who, without limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities. Defendant has encouraged and/or is aware of these persons' oral administration of the products that infringe the claimed methods for these purposes, these persons are acting under Defendant's direction and control, and therefore Defendant is directly practicing the methods set forth in the '107 patent.

- 37. End-users of Defendant's products that infringe the claimed methods are also direct infringers of the '107 patent, because they have taken, used, and orally administered the products that infringe the claimed methods which have the effect, without limitation, of increasing the plasma concentration of arginine in the persons taking the products from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma. These persons included persons who, without limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing muscular activities. Therefore, they practice the methods as set forth in the '107 patent.
- 38. Defendant's labels and advertising for the products that infringe the claimed methods explain the elements or essential elements of the methods disclosed in the '471 patent to end-users and encourage, urge, and induce the products' end-users to purchase and orally administer the products to practice those methods. Defendant's products that infringe the claimed methods are not suitable for non-infringing uses, and none of Defendant's labels or advertisements for the products disclose any uses for the relevant ingredients in the products that have a use that does not infringe upon the methods disclosed in the '107 patent. Defendant has knowledge that its products that infringe the claimed methods are especially adapted by end-users of the products for the practicing of the method disclosed in the '107 patent, as Defendant encourages, urges, and induces the products' end-users to purchase and orally administer the products to

practice those methods, and has done so in the past. Defendant therefore is liable for contributory infringement of one or more claims of the '107 patent.

- Defendant has intentionally and knowingly induced, encouraged, and urged end-users of the products that infringe the claimed methods to purchase and orally administer the products for the purpose, without limitation, of increasing the plasma concentration of arginine in the persons taking the products from a low or normal fasting concentration to a level which is up to three times an average overnight fasting arginine level of about 90 mu.mole per liter of plasma, including by end-users who, without limitation, were in good health, were in a condition of increased or continuing brain or neural activities, or were in a condition of increased or continuing On information and belief, Defendant had actual, first-hand muscular activities. knowledge of the '107 patent as early as the time Defendant launched each of the products that infringe the claimed methods in the marketplace. In the alternative, and on information and belief, Plaintiff pleads that Defendant subjectively believed at the time Defendant launched each of the products that infringe the claimed methods in the marketplace that there is or was a high probability of the fact that patents existed that covered the use of citrulline as in the products that infringe the claimed methods, and that Defendant took deliberate actions to avoid confirming that fact. therefore willfully blinded itself to the infringing nature of its sales of the products that infringe the claimed methods. At a minimum, Plaintiff pleads that Defendant became aware of the '107 patent at the time of the filing of the initial Complaint in this matter and the issuance of a correspondence from Plaintiff's counsel regarding the suit. Defendant has not ceased its contributory infringement or inducement of infringements by end-users despite such knowledge. Defendant is therefore liable for induced infringement of one or more of claims of the '107 patent.
- 40. Defendant's activities have been without express or implied license by Plaintiff.

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- 1 41. The infringement by Defendant has been and continues to be willful, since 2 the infringement has not ceased, particularly after the filing of the initial suit in this 3 matter.
 - 42. As a result of Defendant's acts of infringement, Plaintiff has suffered and will continue to suffer damages in an amount to be proved at trial.
 - 43. As a result of Defendant's acts of infringement, Plaintiff has been and will continue to be irreparably harmed by Defendant's infringement and inducement, which will continue unless Defendant is enjoined by this Court.
 - 44. Plaintiff believes that Defendant's past infringement and/or continuing infringement has been deliberate and willful, and that this case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of judgment against Defendant as follows:

- 1. A declaration that Defendant has infringed the '471 patent and the '107 patent under 35 U.S.C. §§ 271 et seq.;
- 3. That injunctions, preliminary and permanent, be issued by this Court restraining Defendant, its respective officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from directly or indirectly infringing, or inducing or contributing to the infringement by others of, the '471 patent and the '107 patent;
- 4. That Defendant be required to provide to Plaintiff an accounting of all gains, profits, and advantages derived by Defendant's infringement of the '471 patent and the '107 patent, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the wrongful infringing acts by Defendant, in accordance with 35 U.S.C. § 284;

5. That the damages awarded to Plaintiff with regard to the '471 patent and 1 the '107 patent be increased up to three times, in view of Defendant's willful 2 infringement, in accordance with 35 U.S.C. § 284; 3 That this case be declared to be exceptional in favor of Plaintiff under 35 4 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and other 5 expenses incurred in connection with this action; 6 That Plaintiff be awarded its interest and costs of suit incurred in this 7. 7 action; 8 Compensatory damages; 8. 9 Punitive damages; and 9. 10 That Plaintiff be awarded such other and further relief as this Court may 10. 11 deem just and proper. 12 13 14 Respectfully submitted, NEWPORT TRIAL GROUP 15 A Professional Corporation 16 Dated: October 22, 2012 17 By: Scott J Ferrell Attorneys for Plaintiff 18 19 20 21 22 23 24 25 26 27 28

DEMAND FOR JURY TRIAL Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a jury trial for all issues in this case that properly are subject to a jury trial. Respectfully submitted, NEWPORT TRIAL GROUP A Professional Corporation Dated: October 22, 2012 By: Scott J Ferrell Attorneys for Plaintiff

NAME, ADDRESS AND TELEPHONE NUMBER OF ATTORNEY(S) Tyler J Woods, Bar No. 232464 Scott J Ferrell, Bar No. 202091 NEWPORT TRIAL GROUP 895 Dove Street, Suite 425, Newport Beach, CA 92660 UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA CASE NUMBER THE TAWNSAURA GROUP, LLC SACV12-1467 SJO(AGRx) PLAINTIFF(S). ٧. TWINLAB CORPORATION PROOF OF SERVICE - ACKNOWLEDGMENT OF SERVICE DEFENDANT(S). I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of **ORANGE** __, State of California, and not a party to the above-entitled cause. On October 22 ____, I served a true copy of FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT by personally delivering it to the person (s) indicated below in the manner as provided in FRCivP 5(b); by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following: (list names and addresses for person(s) served. Attach additional pages if necessary.) Place of Mailing: Daniel S Silverman, Venable LLP, 2049 Century Park East, Suite 2100, Los Angeles, CA 90067 Executed on October 22 . 20 12 at Newport Beach , California Please check one of these boxes if service is made by mail: ☐ I hereby certify that I am a member of the Bar of the United States District Court, Central District of California. 🗷 I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. ☑ I hereby certify under the penalty of perjury that the foregoing is true and correct. Signature of Person Making Service ACKNOWLEDGEMENT OF SERVICE , received a true copy of the within document on

CV-40 (01/00)

Signature

Party Served