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ORIGINAL

FILED
CLERK, U.S. DISTRICT COURT
MAR - 7 2013
CENTRAL DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 THERMOLIFE INTERNATIONAL, LLC,
12 Plaintiff,
13 vs.
14 REDEFINE NUTRITION, LLC; and
NUTRAPLANET,
15 Defendants

Case No. 2:13-cv-01272-GAF(FFMx)

**FIRST AMENDED COMPLAINT FOR
PATENT INFRINGEMENT**

JURY TRIAL DEMANDED

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21 RECEIVED BUT NOT FILED
CLERK, U.S. DISTRICT COURT
22 **MAR - 7 2013**
23 CENTRAL DISTRICT OF CALIFORNIA
24 BY *[Signature]* DEPUTY
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1 Plaintiff Thermolife International, LLC (“Plaintiff”) hereby alleges for its First
2 Amended Complaint against Redefine Nutrition, LLC d/b/a Finaflex and Nutraplanet
3 (“Defendants”), on personal knowledge as to its own activities and on information and
4 belief as to the activities of others, as follows:

5 **I. THE PARTIES**

6 1. Plaintiff is a limited liability company organized and existing under the
7 laws of Arizona, with a place of business at 1811 Ocean Front Walk in Venice,
8 California, 90291.

9 2. Plaintiff is the owner and assignee of United States Patent No. 8,202,908
10 (“the ‘908 patent”) titled “D-Aspartic Acid Supplement,” and Plaintiff licenses the ‘908
11 patent to several third-parties.

12 3. Plaintiff is the owner and assignee of United States Patent No. 8,034,836
13 (“the ‘836 patent”) titled “Amino Acid Compounds,” and Plaintiff licenses the ‘836
14 patent to several third-parties.

15 4. Redefine Nutrition, LLC d/b/a Finaflex is a company organized and
16 existing under the laws of Georgia with a principal place of business at 2955 Fantasy
17 Lane in Decatur, Georgia, 30033-5818.

18 5. Nutraplanet is an organization or entity organized, existing, and/or
19 operating under the laws of Georgia with a principal place of business at 111 Bethea
20 Road, Suite 101 in Fayetteville, Georgia, 30214.

21 **II. JURISDICTION AND VENUE**

22 6. This is an action for patent infringement arising under the patent laws of
23 the United States, Title 35 of the United States Code. Accordingly, this Court has
24 subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

25 7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

26 8. This Court has personal jurisdiction over Defendants. By way of example
27 and without limitation, Defendants, directly or through intermediaries (including
28 distributors, retailers, and others), ship, distribute, offer for sale, sell, and advertise

1 “Pure Test,” “Revolution PCT,” and “Ignite 2”-branded dietary supplement products
2 (hereinafter the “accused DAA products”) and “Max Pump”-branded dietary
3 supplement products (hereinafter the “accused Max Pump products”), or have done so
4 in the past, in the United States, the State of California, and the Central District of
5 California.

6 9. Defendants have purposefully and voluntarily placed the accused DAA
7 products and the accused Max Pump products into the stream of commerce with the
8 expectation that they will be purchased in the Central District of California, and the
9 products are actually purchased in the Central District of California and by consumers
10 located in this District.

11 **III. THE DEFENDANTS’ INFRINGING DAA PRODUCTS**

12 10. The accused DAA products purport to and do increase the levels of
13 testosterone in adult male humans.

14 11. The accused DAA products are administered by oral ingestion.

15 12. The accused DAA products contain a D-aspartic acid compound
16 comprised from D-aspartic acid, D-Aspartate salts, or D-aspartate esters.

17 13. The accused DAA products branded are intended to be taken by adult male
18 humans and are taken primarily by adult male humans.

19 14. The accused DAA products purport to contain and actually contain a D-
20 aspartic acid compound which is, according to the products’ instructions for use, to be
21 administered and is administered in an amount and for a time sufficient to increase the
22 levels of testosterone in end-users.

23 15. Defendants manufacture, market, advertise, offer for sale, and/or sell the
24 accused DAA products, or have done so in the past.

25 16. As part of their transaction of business in this jurisdiction, Defendants also
26 sell the accused DAA products to various distributors and retailers with places of
27 business within the Central District of California, or directly to consumers located in
28 this District.

1 17. The labels and advertisements for the product Pure Test state, as relevant
2 to this matter and without limitation, as follows:

- 3 a. The product contains "Aspartic Acid (DAA)"
4 b. It is to be taken by oral ingestion.
5 c. "PURE TEST is PURE TESTOSTERONE, free from anything inferior,
6 totally refined, clean, true TESTOSTERONE. PURE TEST is made
7 from 100% HPLC verified D-Aspartic Acid (DAA). D-Aspartic Acid is
8 a NATURAL TESTOSTERONE boosting POWERHOUSE that has
9 been shown to SIGNIFICANTLY increase TESTOSTERONE levels
10 after prolonged use. D-Aspartic Acid has been shown to BOOST
11 TESTOSTERONE in actual HUMAN studies, not in plant, animal, or
12 some bull*%#* laboratory study other supplement companies use to
13 "validate" their latest ingredients. Taken regularly PURE TEST results
14 in increased strength, energy levels, and sex drive. Boost your test with
15 the best, FINAFLEX PURE TEST!"
16 d. "Serving Size: 1 Capsule"
17 e. "As a dietary supplement take 4-6 capsules daily for 30 days
18 consecutively. Take FINAFLEX PURE TEST every night at bedtime
19 to maximize effectiveness as a testosterone elevator. For optimal
20 results use PURE TEST for 6-12 weeks. For extreme results take two
21 servings of PURE TEST, spaced 12 hours apart, for 4-8 weeks."
22 f. The product provides 500 mg of DAA per serving.
23 g. Instructions are to take at least 2 capsules, but up to 6, per day, which
24 equals or well exceeds 1 gram per day.

25 18. The labels and advertisements for the product Revolution PCT state, as
26 relevant to this matter and without limitation, as follows:

- 27 a. The product contains "D-Aspartic Acid (DAA) (as part of a
28 "Testosterone Amplification Blend")"

- 1 b. It is to be taken by oral ingestion.
- 2 c. "PCT Revolution will revitalize testosterone levels leading to increased
- 3 energy, strength, and sex drive"
- 4 d. "Amplify Testosterone"
- 5 e. "As a dietary supplement take 2-4 capsules at night before bed. For
- 6 best results continue use of PCT Revolution for 4-8 weeks. DO NOT
- 7 exceed 8 weeks of continued use."

8 19. The labels and advertisements for the product Ignite 2 state, as relevant to
9 this matter and without limitation, as follows:

- 10 a. The product contains "AMINOSTERONE (d-Aspartic Acid Diethyl
- 11 Ester HCL), d-Aspartic Salt"
- 12 b. It is to be taken by oral ingestion.
- 13 c. "Built with AMINOSTERONE a revolutionary new amino acid
- 14 derivative that skyrockets total testosterone in under 30 days"
- 15 d. "Built with AMINOSTERONE a revolutionary new d-Aspartic Acid
- 16 derivative that skyrockets total testosterone in under 30
- 17 days...AMINOSTERONE has been shown to be 400 times more
- 18 soluble than regular d-Aspartic Acid when mixed into solution, leading
- 19 to higher absorption and bioavailability in the body."
- 20 e. "As a dietary supplement, mix 1 scoop with 6-12 ounces of cold water
- 21 and consume 5-15 minutes prior to workout....For best results consume
- 22 IGNITE 2 on training and non-training days to maximize effectiveness
- 23 of ingredients AMINOSTERONE & Crea-Trona"

24 **IV. THE DEFENDANTS' INFRINGING MAX PUMP PRODUCTS**

25 20. The accused Max Pump products contain 3 grams per serving of "Betaine
26 Nitrate (trimethylglycine NO3)."

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1 21. The accused Max Pump products are amino acid compounds consisting
2 essentially of a nitrate or nitrite of an amino acid selected from the group consisting of
3 Aspartic Acid, Cysteine, Glycine, Lysine, Proline, Tyrosine, or Phenylalanine.

4 22. The accused Max Pump products have pharmaceutically acceptable
5 additives, wherein the additives are one of a carrier, excipient, binder, colorant,
6 flavoring agent, preservative, buffer, diluent, and combinations thereof.

7 23. The accused Max Pump products come in the form of a capsule.

8 24. Defendants manufacture, market, advertise, offer for sale, and/or sell the
9 accused Max Pump products, or have done so in the past.

10 25. As part of their transaction of business in this jurisdiction, Defendants also
11 sell the accused Max Pump products to various distributors and retailers with places of
12 business within the Central District of California, and directly to consumers located in
13 this District.

14 **V. THE DEFENDANTS' INFRINGEMENTS**

15 26. Defendants have committed the tort of patent infringement within the State
16 of California, and more particularly, within the Central District of California, by virtue
17 of the fact that Defendants have shipped, distributed, offered for sale, sold, and
18 advertised, have done so in the past and/or continue to ship, distribute, offer for sale,
19 sell, and advertise the accused DAA products and the accused Max Pump products in
20 this District.

21 **A. DIRECT INFRINGEMENTS**

22 27. Defendants' employees, agents, representatives and other persons
23 sponsored by or who endorse Defendants and Defendants' products in advertising and
24 marketing activities, have taken, used, and orally administered the accused DAA
25 products, which Defendants have formulated and/or distributed and/or sold to include a
26 D-aspartic acid compound as defined in the '908 patent for the specific reason of
27 increasing the levels of testosterone in adult male humans taking the products, by
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1 having them orally ingest the D-aspartic acid compound present in the products in an
2 amount and for a time sufficient to increase the levels of testosterone.

3 28. Defendants have encouraged and/or are aware of these persons' oral
4 administration of the accused DAA products for these purposes, and these employees,
5 agents, representatives and other persons sponsored by or who endorse Defendants and
6 Defendants' products in advertising and marketing activities are acting under
7 Defendants' direction and control when practicing the method disclosed in the '908
8 patent.

9 29. Therefore, Defendants directly practice the method as set forth in the '908
10 patent and they are direct infringers of the '908 patent.

11 30. Defendants have also infringed and are still infringing one or more claims
12 of the '836 patent by using, selling, and offering for sale the accused Max Pump
13 products which embody the patented invention.

14 31. Defendants have knowledge of the '908 patent and the '836 patent, though
15 the earliest exact dates Defendants obtained knowledge of these patents are within the
16 exclusive possession and control of Defendants.

17 **B. INDIRECT INFRINGEMENTS**

18 32. End-users of Defendants' accused DAA products are also direct infringers
19 of the '908 patent, because they have taken, used, and orally ingested the accused DAA
20 products which Defendants have formulated to include a D-aspartic acid compound as
21 defined in the '908 patent for the specific reason of increasing the levels of testosterone
22 in adult male humans taking the products, by having them orally ingest the a D-aspartic
23 acid compound as defined in the '908 patent present in the products in an amount and
24 for a time sufficient to increase their levels of testosterone.

25 33. These end-users practice the method as set forth in the '908 patent and are
26 direct infringers of the patent.

27 34. Defendants' labels and advertising for the accused DAA products explain
28 the elements and essential elements of the method disclosed in the '908 patent to end-

1 users and encourage, urge, and induce the accused DAA products' end-users to
2 purchase and orally ingest the products to practice that method, and end-users do
3 practice that method.

4 35. Defendants have therefore specifically intended to cause these end-users to
5 directly infringe the claimed methods of the patent, and have in fact urged them to do
6 so.

7 36. The accused DAA products are not suitable for non-infringing uses, and
8 none of Defendants' labels or advertisements for the accused DAA products disclose
9 any uses for the products nor for the D-aspartic acid compound as defined in the '908
10 patent in those products that do not infringe upon the method disclosed in the '908
11 patent.

12 37. The inclusion of the D-aspartic acid compound in the products is material
13 to practicing the method disclosed in the '908 patent.

14 38. Defendants have knowledge that the accused DAA products are especially
15 adapted by end-users of the products for the practicing of the method disclosed in the
16 '908 patent, and, indeed, Defendants encourage, urge, and induce the products' end-
17 users to purchase and orally administer the accused DAA products to practice that
18 method, and has done so in the past.

19 39. Defendants have intentionally and knowingly induced, encouraged, and
20 urged end-users of the accused DAA products to purchase and orally administer the
21 accused DAA products for the purpose, without limitation, of increasing the levels of
22 testosterone in adult male humans taking the products, by having them orally ingest the
23 D-aspartic acid compound as defined in the '908 patent present in the products in an
24 amount and for a time sufficient to increase the levels of testosterone.

25 40. Defendants had actual, first-hand knowledge of the '908 patent after the
26 June 19, 2012 issuance of the patent, the day of which a very publicly available and
27 widely known press release was issued by Plaintiff announcing the issuance of the
28 patent. The press release stated as follows:

1 “ThermoLife International, LLC (ThermoLife) announced today
2 that the United States Patent and Trademark Office (USPTO)
3 issued U.S. Patent No. 8,202,908 (the ‘908 patent) for
4 ThermoLife’s novel use of D-Aspartic acid (DAA). The patented
5 method uses a DAA compound to increase the levels of
6 testosterone, growth hormone, and/or insulin-like growth factor 1
7 in adult males. The potential benefits of DAA are astounding and
8 the patented method will transform testosterone boosting dietary
9 supplements and methods.

10 ThermoLife has a long history of developing innovative and
11 proven products and processes. With the addition of the ‘908
12 patent, ThermoLife has been awarded seven patents covering
13 more than 20 various compounds and methods of use, and still
14 has many pending applications in the pipeline and new
15 technologies at various stages of development.

16 These patents protect ThermoLife’s innovative and proven
17 products and methods, as well as validate ThermoLife’s market
18 leadership in new dietary ingredient research. These patents also
19 allow ThermoLife to continue building confidence with its
20 licensing partners and give consumers and companies that work
21 with ThermoLife assurance that they are buying one-of-a-kind
22 products that they cannot get elsewhere.

23 **About Thermolife**

24 Founded in 1998, ThermoLife is dedicated to developing real
25 products and methods that work. ThermoLife is a leading
26 manufacturer in the sports nutrition and supplement industry.
27 ThermoLife is committed to developing only the purest, most
28 effective, and innovative products. For more information about

1 ThermoLife and its patents, or to license any of ThermoLife's
2 patented ingredients contact Ron Kramer at
3 Ron(at)ThermoLife(dot)com.”

4 41. Plaintiff has sent detailed communications to Defendants to notify
5 Defendants of the '908 patent and the '836 patent and their infringements prior to the
6 filing of this complaint.

7 42. Plaintiff actually began potential licensing discussions with Defendants,
8 thereby cementing their actual, first-hand knowledge of the existence of the '908 patent
9 and the '836 patent, but those discussions were not fruitful.

10 43. Defendants brazenly and willfully decided to infringe the '908 patent and
11 the '836 patent despite knowledge of the patents' existence and each of their
12 infringements of the patents.

13 44. At a minimum, and in the alternative, Plaintiff pleads that Defendants
14 willfully blinded themselves to the infringing nature of the accused DAA and accused
15 Max Pump products' sales.

16 45. Defendants did not cease their own direct infringements, contributory
17 infringements, or inducements of infringements by end-users despite their clear
18 knowledge of the '908 patent and the '836 patent.

19 46. In sum, with respect to the '908 patent, Defendants specifically induce
20 end-users, or did so in the past, to use the accused DAA products, and particularly the
21 d-aspartic acid compound in these products, for increasing the levels of testosterone in
22 adult male humans taking the products, by having them orally ingest the d-aspartic acid
23 compound present in the products in an amount and for a time sufficient to increase the
24 levels of testosterone, which is the very method described in the '908 patent.

25 47. This method is the sole reason Defendants included the d-aspartic acid
26 compound in their accused DAA products, and end-users' experiences are consistent
27 with the fact that they have practiced the method, in that end-users have increased their
28

1 levels of testosterone by ingesting the d-aspartic acid compound present in the accused
2 DAA products.

3 48. Defendants' infringing activities, particular Defendant Redefine's
4 activities, have not stopped despite their knowledge of the '908 patent's existence.

5 **VI. FIRST CAUSE OF ACTION**

6 **Infringement of U.S. Patent No. 8,202,908**

7 49. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs
8 of this First Amended Complaint as if fully set forth herein.

9 50. The Defendants have in the past and still are literally infringing or
10 infringing under the doctrine of equivalents, directly and indirectly through
11 contributory and/or induced infringement, claims 1 and 2 (claim 2 as to the Pure Test
12 product only) of the '908 patent by making, using, selling, and offering for sale dietary
13 supplements embodying claims 1 and 2 (claim 2 as to the Pure Test product only) of the
14 patented invention, and will continue to do so unless enjoined by this Court.

15 51. Examples of Defendant's direct infringement include, without limitation,
16 the fact that Defendant's employees, agents, representatives and other persons
17 sponsored by or who endorse Defendant and Defendant's products in advertising and
18 marketing activities, have taken, used, and orally administered the accused DAA
19 products which have the effect, without limitation, of increasing the levels of
20 testosterone in adult male humans taking the products, by having them orally ingest the
21 D-aspartic acid compound present in the products in an amount and for a time sufficient
22 to increase the levels of testosterone, and when administered pursuant to the accused
23 DAA products' instructions for use, leading to an ingestion of about 1 to 20 grams of
24 the D-aspartic acid compound daily.

25 52. Defendant has encouraged and is aware of these persons' oral
26 administration of the accused for these purposes, these persons are acting under
27 Defendant's direction and control, and therefore Defendant is directly practicing the
28 method set forth in the '908 patent.

1 53. End-users of the accused DAA products are also direct infringers of the
2 '908 patent, because they have taken, used, and orally ingested the accused DAA
3 products which have the effect, without limitation, of increasing the levels of
4 testosterone in adult male humans taking the products, by having them orally ingest the
5 D-aspartic acid compound present in the products in an amount and for a time sufficient
6 to increase the levels of testosterone, and when administered pursuant to the accused
7 DAA products' instructions for use, leading to an ingestion of between about 1 to 20
8 grams of the D-aspartic acid compound daily.

9 54. Therefore, these end-users practice the method as set forth in the '908
10 patent and directly infringe the patent.

11 55. Defendants' labels and advertising explain the elements or essential
12 elements of the method disclosed in the '908 patent to end-users and encourage, urge,
13 and induce the products' end-users to purchase and orally administer the accused DAA
14 products to practice that method.

15 56. The accused DAA products are not suitable for non-infringing uses, and
16 none of Defendants' labels or advertisements for the products disclose any uses for the
17 D-aspartic acid compound in the products that do not infringe upon the method
18 disclosed in the '908 patent.

19 57. Defendants have knowledge that the accused DAA products are especially
20 adapted by end-users of the products for increasing the levels of testosterone in adult
21 male humans taking the accused DAA products, by having them orally ingest the D-
22 aspartic acid compound present in the products in an amount and for a time sufficient to
23 increase the levels of testosterone.

24 58. Defendants encourage, urge, and induce the accused DAA products' end-
25 users to purchase and orally administer the products to increase the levels of
26 testosterone in adult male humans taking the products, by having them orally ingest the
27 D-aspartic acid compound present in the products in an amount and for a time sufficient
28 to increase the levels of testosterone – and/or Defendants have done so in the past.

1 59. Defendants are therefore liable for contributory infringement of claims 1
2 and 2 (claim 2 as to the Pure Test product only) of the '908 patent.

3 60. Defendants have intentionally and knowingly induced, encouraged, and
4 urged end-users of the accused DAA products to purchase and orally administer the
5 products for the purpose, without limitation, of increasing the levels of testosterone in
6 adult male humans taking the products, by having them orally ingest the D-aspartic acid
7 compound present in the products in an amount and for a time sufficient to increase the
8 levels of testosterone, and instructing them to do so in a daily amount of between about
9 1 and 20 grams of the compound daily.

10 61. Defendants have actual, first-hand knowledge of the '908 patent, but have
11 not ceased their contributory infringement or inducement of infringements by end-users
12 despite their knowledge of the '908 patent.

13 62. Defendants are therefore liable for induced infringement of claims 1 and 2
14 (claim 2 as to the Pure Test product only) of the '908 patent.

15 63. Defendants' activities have been without express or implied license by
16 Plaintiff.

17 64. The infringements by Defendants have been and continue to be willful,
18 since the infringements have not ceased.

19 65. As a result of Defendants' acts of infringement, Plaintiff has suffered and
20 will continue to suffer damages in an amount to be proved at trial.

21 66. As a result of Defendants' acts of infringement, Plaintiff has been and will
22 continue to be irreparably harmed by Defendants' infringements and inducements,
23 which will continue unless Defendants are enjoined by this Court.

24 67. Plaintiff believes that Defendants' past infringements and/or continuing
25 infringements have been deliberate and willful, and that this case is therefore an
26 exceptional case, which warrants an award of treble damages and attorneys' fees in
27 accordance with 35 U.S.C. § 285. Plaintiff repeats and re-alleges the allegations of the
28 foregoing paragraphs of this First Amended Complaint as if fully set forth herein.

VII. SECOND CAUSE OF ACTION

Infringement of U.S. Patent No. 8,034,836

68. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs of this First Amended Complaint as if fully set forth herein.

69. Defendants have in the past and still are literally and directly infringing or directly infringing under the doctrine of equivalents claims 1, 2 and 3 of the '836 patent by using, selling, and offering for sale the accused Max Pump products, all of which embody the patented invention, and will continue to do so unless enjoined by this Court.

70. Defendants' activities have been without express or implied license by Plaintiff.

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

72. As a result of Defendants' acts of infringement, Plaintiff has been and will continue to be irreparably harmed by Defendants' infringements, which will continue unless Defendants are enjoined by this Court.

73. Defendants' past infringement and/or continuing infringement has been deliberate and willful, and 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.

VIII. PRAYER FOR RELIEF

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

1. A declaration that Defendants have infringed the '908 patent and the '836 patent under 35 U.S.C. §§ 271 *et seq.*;

3. That injunctions, preliminary and permanent, be issued by this Court restraining Defendants, their respective officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from directly or

1 indirectly infringing, or inducing or contributing to the infringement by others of, the
2 '908 patent and the '836 patent;

3 4. That Defendants be required to provide to Plaintiff an accounting of all
4 gains, profits, and advantages derived by Defendants' infringement of the '908 patent
5 and the '836 patent, and that Plaintiff be awarded damages adequate to compensate
6 Plaintiff for the wrongful infringing acts by Defendants, in accordance with 35 U.S.C. §
7 284;

8 5. That the damages awarded to Plaintiff with regard to the '908 patent and
9 the '836 patent be increased up to three times, in view of Defendants' willful
10 infringement, in accordance with 35 U.S.C. § 284;

11 6. That this case be declared to be exceptional in favor of Plaintiff under 35
12 U.S.C. § 285, and that Plaintiff be awarded its reasonable attorneys' fees and other
13 expenses incurred in connection with this action;

14 7. That Plaintiff be awarded its interest and costs of suit incurred in this
15 action;


16 8. Compensatory damages;

17 9. Punitive damages; and

18 10. That Plaintiff be awarded such other and further relief as this Court may
19 deem just and proper.

20 Respectfully submitted,
21 NEWPORT TRIAL GROUP
22 A Professional Corporation

23 Dated: March 6, 2013

24 
25 By: Tyler J. Woods
26 Attorneys for Plaintiff
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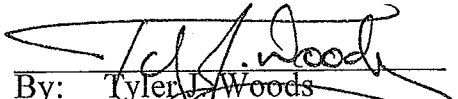
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DEMAND FOR JURY TRIAL

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: March 6, 2013


By: Tyler L. Woods
Attorneys for Plaintiff