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

11 THERMOLIFE INTERNATIONAL, LLC,
12 Plaintiff,
13 vs.
14 LEADING EDGE HERBALS,
15 Defendant

Case No. '13CV0884 WQHKSC
**COMPLAINT FOR PATENT
INFRINGEMENT**
JURY TRIAL DEMANDED

1 Plaintiff Thermolife International, LLC (“Plaintiff”) hereby alleges for its
2 Complaint against Leading Edge Herbals (“Defendant”), on personal knowledge as to
3 its own activities and on information and belief as to the activities of others, as follows:

4 **I. THE PARTIES**

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

8 2. Plaintiff is the exclusive licensee of the following United States Patents:

9 a. Patent No. 6,646,006, titled “Enhancement of Vascular Function By
10 Modulation of Endogenous Nitric Oxide Production or Activity”; and

11 b. Patent No. 5,891,459, titled “Enhancement of Vascular Function By
12 Modulation of Endogenous Nitric Oxide Production or Activity”; and

13 3. The above patents are owned by The Board of Trustees of the Leland
14 Stanford Junior University (“Stanford University”) and Plaintiff exclusively licenses
15 the patents from Stanford University.

16 4. The above patents are referred to herein as the “patents in suit.”

17 5. Plaintiff has been given the right by Stanford University to institute suit
18 with respect to infringement of the patents in suit, including this suit against Defendant.

19 6. Defendant is an organization existing under the laws of Colorado with a
20 principal place of business at 2414 4th Avenue in Greeley, Colorado, 80631.

21 **II. JURISDICTION AND VENUE**

22 7. 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 8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

26 9. This Court has personal jurisdiction over Defendant. By way of example
27 and without limitation, Defendant, directly or through intermediaries (including
28 distributors, retailers, and others), makes, manufactures, ships, distributes, advertises,

1 markets, offers for sale, and/or sells dietary supplement products that infringe on one or
2 more claims of the patents in suit (hereinafter the “accused products”), which include
3 without limitation products sold under the “ExtenZe” brand name in the United States,
4 the State of California, and the Southern District of California.

5 10. By way of further example and without limitation, Defendant has
6 purposefully and voluntarily placed the accused products into the stream of commerce
7 with the expectation that they will be purchased in the Southern District of California,
8 and the products are actually purchased in the Southern District of California.

9 **III. THE DEFENDANT’S INFRINGEMENTS**

10 11. Defendant has committed the tort of patent infringement within the State
11 of California, and more particularly, within the Southern District of California, by
12 virtue of the fact that Defendant has formulated, made, manufactured, shipped,
13 distributed, advertised, offered for sale, and/or sold the accused products in this District,
14 and continues to do so.

15 **A. DIRECT INFRINGEMENTS**

16 12. 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 products.

19 13. The accused products are formulated, made, manufactured, shipped,
20 distributed, advertised, offered for sale, and sold by Defendant to include certain
21 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
22 of one or more of the patents in suit.

23 14. The accused products are formulated, made, manufactured, shipped,
24 distributed, advertised, offered for sale, and sold by Defendant to include specific
25 ingredients for certain purposes that, by virtue of their inclusion in the products for such
26 purposes, infringe one or more claims of one or more of the patents in suit, and as a
27 result, when Defendant’s employees, agents, representatives and other persons
28 sponsored by or who endorse Defendant and Defendant’s products in advertising and

1 marketing activities orally administer the accused products, they are practicing the
2 methods disclosed in those claims.

3 15. These infringing ingredients, and/or combinations thereof, include, without
4 limitation, L-Arginine, L-Arginine HCl, Gingko Biloba, Ginseng, Cnidium Monnier,
5 and Vitamin C, as set forth on Defendant's labels for the accused products.

6 16. The purposes for which these ingredients are included in the accused
7 products are, without limitation, to enhance nitric oxide production, to improve nitric
8 oxide activity, to produce nitric oxide, to boost nitric oxide levels in the body, and to
9 enhance physical performance.

10 17. Defendant has encouraged and/or is aware of the fact that its employees,
11 agents, representatives and other persons sponsored by Defendant or who endorse
12 Defendant and Defendant's products in advertising and marketing activities orally
13 administer the accused products and practice the methods disclosed in one or more
14 claim of one or more of the patents in suit, and these employees, agents, representatives
15 and other persons sponsored by Defendant or who endorse Defendant and Defendant's
16 products in advertising and marketing activities are acting under Defendant's direction
17 and control when practicing those methods.

18 18. Therefore, Defendant is a direct infringer of one or more claims of one or
19 more of the patents in suit, and Defendant practices the methods as set forth in one or
20 more claims of one or more of the patents in suit.

21 **B. INDIRECT INFRINGEMENTS**

22 19. End-users of Defendant's accused products are also direct infringers of one
23 or more claims of one or more of the patents in suit.

24 20. End-users of Defendant's accused products have taken, used, and orally
25 administered the accused products.

26 21. The accused products are formulated, made, manufactured, shipped,
27 distributed, advertised, offered for sale, and/or sold by Defendant to include certain
28 ingredients that, by virtue of their inclusion in the products, infringe one or more claims

1 of one or more of the patents in suit.

2 22. The accused products are formulated, made, manufactured, shipped,
3 distributed, advertised, offered for sale, and/or sold by Defendant to include specific
4 ingredients for certain purposes that, because of their inclusion in the products for such
5 purposes, infringe one or more claims of one or more of the patents in suit, and as a
6 result, when end-users of Defendant's accused products orally administer the accused
7 products, they are practicing the methods disclosed in those claims.

8 23. Defendant's labels and advertising for the accused products explain the
9 elements and essential elements of one or more of the methods disclosed in the patents
10 in suit, and those labels and advertising statements encourage, urge, and induce the
11 accused products' end-users to purchase and orally ingest the products to practice those
12 methods, and end-users do practice those methods.

13 24. Defendant has therefore specifically intended to cause these end-users to
14 directly infringe the claimed methods of these patents, and has in fact urged them to do
15 so.

16 25. The accused products are not suitable for non-infringing uses, and none of
17 Defendant's labels or advertisements for the accused products disclose any uses for the
18 products, nor for the compounds disclosed in the claimed methods of the patents in suit,
19 that do not infringe upon such methods.

20 26. The inclusion of the specific infringing compounds in the products is
21 material to practicing such methods.

22 27. Defendant has knowledge that the accused products are especially adapted
23 by end-users of the products for the practicing of such methods, and, indeed, Defendant
24 encourages, urges, and induces the accused products' end-users to purchase and orally
25 administer the accused products to practice such methods, and has done so in the past.

26 28. Defendant has intentionally and knowingly induced, encouraged, and
27 urged end-users of the accused products to purchase and orally administer the accused
28 products for the purposes of practicing the claimed methods, by having them orally

1 ingest the compounds disclosed in such claims.

2 29. Defendant has knowledge of the fact that the accused products, particularly
3 as administered, infringe on one or more claims of the patents in suit.

4 30. Defendant has direct, firsthand knowledge of the patents in suit.

5 31. For example and without limitation, Defendant has had knowledge of the
6 patents in suit since November 2006, when an ongoing settlement of a patent
7 infringement case relating to at least some of the patents in suit against Herbalife, a
8 well-known company in Defendant's industry, was announced in press releases issued
9 in a highly publicized manner. Defendant's employees, agents, and representatives saw
10 the press releases and were aware of the settlement and thus the patents in suit.

11 32. By way of further example and without limitation, Defendant has sold its
12 products through retailers, including online retailers, and those retailers have sold other
13 companies' products whose labels and/or advertisements have been prominently
14 marked with one or more of the patents in suit, by patent number, including without
15 limitation the products manufactured and sold by Herbalife, Daily Wellness, and
16 Vitality Research Labs. Defendant's employees, agents, and representatives have seen
17 these labels and advertisements and, thus, Defendant has direct knowledge of the
18 patents in suit.

19 33. Defendant has brazenly and willfully decided to infringe the patents in suit
20 despite knowledge of the patents' existence and its knowledge of the accused products'
21 infringements of the patents.

22 34. At a minimum, and in the alternative, Plaintiff pleads that Defendant
23 willfully blinded itself to the infringing nature of the accused products' sales.

24 35. Defendant has not ceased its own direct infringement, nor its contributory
25 infringement or inducement of infringement by end-users, despite its knowledge of the
26 patents in suit and the end-users' infringing activities with respect to the patents in suit.

27 36. Plaintiff also believes Defendant is infringing on one or more claims of
28 United States Patent No. 5,428,070 and Patent No. 5,945,452, patents which Defendant

1 has had prior knowledge of and are also licensed exclusively to Plaintiff by Stanford
2 University, to include the right to sue for infringement, and Plaintiff will seek to amend
3 this Complaint once facts confirming that belief are ascertained.

4 **IV. FIRST CAUSE OF ACTION**

5 **Infringement of U.S. Patent No. 6,646,006**

6 37. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs
7 of this Complaint as if fully set forth herein.

8 38. Defendant has in the past and still is literally and directly infringing or
9 directly infringing under the doctrine of equivalents one or more claims of United
10 States Patent No. 6,646,006 by making, using, selling, and offering for sale the accused
11 products, and will continue to do so unless enjoined by this Court.

12 39. In addition to the fact that Defendant makes, uses, sells, and offers for sale
13 the accused products, further examples of Defendant's direct infringements include,
14 without limitation, the fact that Defendant has encouraged and/or is aware of the fact
15 that its employees, agents, representatives and other persons sponsored by or who
16 endorse Defendant and Defendant's products in advertising and marketing activities
17 orally administer the accused products and practice the methods disclosed in one or
18 more claims of United States Patent No. 6,646,006, and these employees, agents,
19 representatives and other persons sponsored by or who endorse Defendant and
20 Defendant's products in advertising and marketing activities are acting under
21 Defendant's direction and control when practicing those methods.

22 40. Defendant has encouraged and is aware of these persons' oral
23 administration of the accused products for these purposes, these persons are acting
24 under Defendant's direction and control, and therefore Defendant is directly practicing
25 the methods disclosed in United States Patent No. 6,646,006.

26 41. End-users of Defendant's accused products are also direct infringers of one
27 or more claims of United States Patent No. 6,646,006.

28 42. End-users of Defendant's accused products have taken, used, and orally

1 administered the accused products.

2 43. The accused products are formulated, made, manufactured, shipped,
3 distributed, advertised, offered for sale, and sold by Defendant to include certain
4 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
5 of United States Patent No. 6,646,006.

6 44. The accused products is formulated, made, manufactured, shipped,
7 distributed, advertised, offered for sale, and sold by Defendant to include specific
8 ingredients for purposes that, by their inclusion in the products for such purposes,
9 infringe one or more claims of United States Patent No. 6,646,006, and as a result,
10 when end-users of Defendant's accused products orally administer the accused
11 products, they are practicing the methods disclosed in one or more claims of that patent.

12 45. Defendant's labels and advertising for the accused products explain the
13 elements and essential elements of the methods disclosed in United States Patent No.
14 6,646,006, and those labels and advertising statements encourage, urge, and induce the
15 accused products' end-users to purchase and orally ingest the products to practice those
16 methods, and end-users do practice those methods.

17 46. Defendant has therefore specifically intended to cause these end-users to
18 directly infringe the claimed methods of United States Patent No. 6,646,006, and has in
19 fact urged them to do so.

20 47. The accused products are not suitable for non-infringing uses, and none of
21 Defendant's labels or advertisements for the accused products disclose any uses for the
22 products, nor for the compounds disclosed in the claimed methods, that do not infringe
23 upon such methods.

24 48. The inclusion of these specific infringing compounds in the products is
25 material to practicing such methods.

26 49. Defendant has knowledge that the accused products are especially adapted
27 by end-users of the products for the practicing of such methods, and, indeed, Defendant
28 encourages, urges, and induces the accused products' end-users to purchase and orally

1 administer the accused products to practice such methods, and have done so in the past.

2 50. Defendant has intentionally and knowingly induced, encouraged, and
3 urged end-users of the accused products to purchase and orally administer the accused
4 products for the purposes disclosed in one or more claims of United States Patent No.
5 6,646,006, by having them orally ingest the compounds disclosed in such claims.

6 51. Defendant has knowledge of the fact that the accused products, particularly
7 as administered, infringe on one or more claims of United States Patent No. 6,646,006.

8 52. Defendant also has direct, firsthand knowledge of United States Patent No.
9 6,646,006.

10 53. Defendant's activities have been without express or implied license by
11 Plaintiff.

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

14 55. As a result of Defendant's acts of infringement, Plaintiff has been and will
15 continue to be irreparably harmed by Defendant's infringements, which will continue
16 unless Defendant is enjoined by this Court.

17 56. Defendant's past infringements and/or continuing infringements have been
18 deliberate and willful, and this case is therefore an exceptional case, which warrants an
19 award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

20 **V. SECOND CAUSE OF ACTION**

21 **Infringement of U.S. Patent No. 5,891,459**

22 57. Plaintiff repeats and re-alleges the allegations of the foregoing paragraphs
23 of this Complaint as if fully set forth herein.

24 58. Defendant has in the past and still is literally and directly infringing or
25 directly infringing under the doctrine of equivalents one or more claims of United
26 States Patent No. 5,891,459 by making, using, selling, and offering for sale the accused
27 products, and will continue to do so unless enjoined by this Court.

28 59. In addition to the fact that Defendant makes, uses, sells, and offers for sale

1 the accused products, further examples of Defendant's direct infringements include,
2 without limitation, the fact that Defendant has encouraged and/or is aware of the fact
3 that its employees, agents, representatives and other persons sponsored by or who
4 endorse Defendant and Defendant's products in advertising and marketing activities
5 orally administer the accused products and practice the methods disclosed in one or
6 more claims of United States Patent No. 5,891,459, and these employees, agents,
7 representatives and other persons sponsored by or who endorse Defendant and
8 Defendant's products in advertising and marketing activities are acting under
9 Defendant's direction and control when practicing those methods.

10 60. Defendant has encouraged and is aware of these persons' oral
11 administration of the accused products for these purposes, these persons are acting
12 under Defendant's direction and control, and therefore Defendant is directly practicing
13 the methods disclosed in United States Patent No. 5,891,459.

14 61. End-users of Defendant's accused products are also direct infringers of one
15 or more claims of United States Patent No. 5,891,459.

16 62. End-users of Defendant's accused products have taken, used, and orally
17 administered the accused products.

18 63. The accused products are formulated, made, manufactured, shipped,
19 distributed, advertised, offered for sale, and sold by Defendant to include certain
20 ingredients that, by virtue of their inclusion in the products, infringe one or more claims
21 of United States Patent No. 5,891,459.

22 64. The accused products is formulated, made, manufactured, shipped,
23 distributed, advertised, offered for sale, and sold by Defendant to include specific
24 ingredients for purposes that, by their inclusion in the products for such purposes,
25 infringe one or more claims of United States Patent No. 5,891,459, and as a result,
26 when end-users of Defendant's accused products orally administer the accused
27 products, they are practicing the methods disclosed in one or more claims of that patent.

28 65. Defendant's labels and advertising for the accused products explain the

1 elements and essential elements of the methods disclosed in United States Patent No.
2 5,891,459, and those labels and advertising statements encourage, urge, and induce the
3 accused products' end-users to purchase and orally ingest the products to practice those
4 methods, and end-users do practice those methods.

5 66. Defendant has therefore specifically intended to cause these end-users to
6 directly infringe the claimed methods of United States Patent No. 5,891,459, and has in
7 fact urged them to do so.

8 67. The accused products are not suitable for non-infringing uses, and none of
9 Defendant's labels or advertisements for the accused products disclose any uses for the
10 products, nor for the compounds disclosed in the claimed methods, that do not infringe
11 upon such methods.

12 68. The inclusion of these specific infringing compounds in the products is
13 material to practicing such methods.

14 69. Defendant has knowledge that the accused products are especially adapted
15 by end-users of the products for the practicing of such methods, and, indeed, Defendant
16 encourages, urges, and induces the accused products' end-users to purchase and orally
17 administer the accused products to practice such methods, and have done so in the past.

18 70. Defendant has intentionally and knowingly induced, encouraged, and
19 urged end-users of the accused products to purchase and orally administer the accused
20 products for the purposes disclosed in one or more claims of United States Patent No.
21 5,891,459, by having them orally ingest the compounds disclosed in such claims.

22 71. Defendant has knowledge of the fact that the accused products, particularly
23 as administered, infringe on one or more claims of United States Patent No. 5,891,459.

24 72. Defendant also has direct, firsthand knowledge of United States Patent No.
25 5,891,459.

26 73. Defendant's activities have been without express or implied license by
27 Plaintiff.

28 74. As a result of Defendant's acts of infringement, Plaintiff has suffered and

1 will continue to suffer damages in an amount to be proved at trial.

2 75. As a result of Defendant's acts of infringement, Plaintiff has been and will
3 continue to be irreparably harmed by Defendant's infringements, which will continue
4 unless Defendant is enjoined by this Court.

5 76. Defendant's past infringements and/or continuing infringements have been
6 deliberate and willful, and this case is therefore an exceptional case, which warrants an
7 award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

8 **VI. PRAYER FOR RELIEF**

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

11 1. A declaration that Defendant has infringed the patents in suit, under 35
12 U.S.C. §§ 271 *et seq.*;

13 3. That injunctions, preliminary and permanent, be issued by this Court
14 restraining Defendant, its officers, agents, servants, directors, and employees, and all
15 persons in active concert or participation with each, from directly or indirectly
16 infringing, or inducing or contributing to the infringement by others of, the patents in
17 suit;

18 4. That Defendant be required to provide to Plaintiff an accounting of all
19 gains, profits, and advantages derived by Defendant's infringement of the patents in
20 suit, and that Plaintiff be awarded damages adequate to compensate Plaintiff for the
21 wrongful infringing acts by Defendant, in accordance with 35 U.S.C. § 284;

22 5. That the damages awarded to Plaintiff with regard to the patents in suit be
23 increased up to three times, in view of Defendant's willful infringement, in accordance
24 with 35 U.S.C. § 284;

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

28 7. That Plaintiff be awarded its interest and costs of suit incurred in this

1 action;

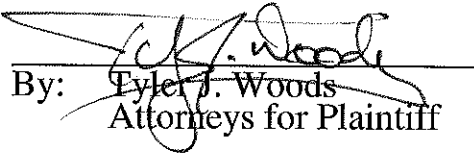
2 8. Compensatory damages;

3 9. Punitive damages; and

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

6 Respectfully submitted,
7 NEWPORT TRIAL GROUP
8 A Professional Corporation

9 Dated: April 12, 2013

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11 By: Tyler J. Woods
12 Attorneys for Plaintiff

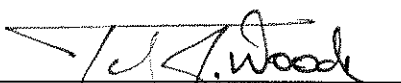
1 **DEMAND FOR JURY TRIAL**

2 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a
3 jury trial for all issues in this case that properly are subject to a jury trial.

4 Respectfully submitted,

5 NEWPORT TRIAL GROUP
6 A Professional Corporation

7 Dated: April 12, 2013

8 
9 By: Tyler J. Woods
10 Attorneys for Plaintiff