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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

| | | |
|--------------------------------------|---|-----------------------------|
| XLEAR, INC., a Utah corporation, | : | |
| | : | |
| Plaintiff, | : | COMPLAINT |
| | : | |
| vs. | : | |
| | : | Civil No. 2:19-cv-00518-RJS |
| WHOLE FOODS MARKET, INC., a Texas | : | |
| Corporation; JOHN and JANE DOES 1-10 | : | Judge Robert J. Shelby |
| | : | |
| Defendant. | : | |

Plaintiff Xlear, Inc. (“**Xlear**”), through its undersigned counsel, brings this complaint against Defendants Whole Foods Market, Inc. and John Does 1-10 (“**Defendants**”) as follows:

PARTIES

1. Xlear is a Utah corporation doing business in the State of Utah and having a principal place of business at 723 South Auto Mall Drive, American Fork, Utah 84003.

2. On information and belief, Defendant Whole Foods Market, Inc. is a Texas corporation, having a principal place of business and/or principal office at 550 Bowie Street Austin, Texas 78703-4644.

3. Defendant(s) John and Jane Does 1-10 are individuals and or business entities who reside in or conduct business in the State of Utah and whose names and/or identities are currently unknown. They are sued in their individual and business capacities.

JURISDICTION AND VENUE

4. This is a civil action for patent infringement under the patent laws of the United States and, more specifically, under 35 U.S.C. §§ 271, 281, 283, 284 and 285. Jurisdiction is conferred by 28 U.S.C. § 1331 because this action arises under federal law.

5. Venue is proper in this district pursuant to 28 U.S.C. §§ 1400 and 1391(b) and (c).

GENERAL ALLEGATIONS

6. U.S. Patent No. 6,054,143 (“**the ‘143 Patent**”) issued on April 25, 2000 bearing the title “Xylitol Delivery.” A copy of the ‘143 Patent is attached hereto as **Exhibit A**. The ‘143 Patent relates generally to a method of nasal administration of xylitol.

7. U.S. Patent No. 6,258,372 (“**the ‘372 Patent**”) issued on July 10, 2001 bearing the title “Xylitol Nose Spray.” A copy of the ‘372 Patent is attached hereto as **Exhibit B**. The ‘372 Patent relates generally to a nasal spray containing xylitol.

8. U.S. Patent No. 6,599,883 (“**the ‘883 Patent**”) issued on July 29, 2003 bearing the title “Nasal Delivery of Xylitol.” A copy of the ‘883 Patent is attached hereto as **Exhibit C**. The ‘883 Patent relates generally to a method and pharmaceutical composition for prevention

and/or treatment of upper respiratory infections including otitis media by nasal administration of xylitol.

9. Dr. Alonzo H. Jones (“**Dr. Jones**”), the named inventor of the technologies claimed in the ‘143 Patent and the ‘372 Patent, began his research on the effects of xylitol in response to his granddaughter’s frequently recurring earaches.

10. Dr. Jones, who was an independent family physician practicing in Hale Center, Texas, studied the research pointing to the anti-bacterial effects of xylitol in the prevention of tooth decay. Dr. Jones also recognized that many infection-causing bacteria enter through the nose, and that chronic inadequate nasal hygiene accounts for most upper respiratory infections including Otitis media (middle ear infections), asthma, sinusitis and allergies.

11. Applying the information obtained in his research in a novel way, Dr. Jones experimented on the effects and benefits of nasal sprays containing xylitol.

12. Through his experimentation, Dr. Jones discovered that xylitol administered through the nose did have a beneficial and/or preventative effect on a variety of upper respiratory bacterial infections.

13. As a result of his discovery of the benefits of the nasal administration of Xylitol, Dr. Jones filed an application for a patent, which ultimately resulted in the issuance of the ‘143 Patent.

14. Due to the long felt need for Dr. Jones’ invention, sales of Xlear nasal washes and sprays incorporating the patented technology were and continue to be substantial.

15. Xlear has at all times relevant hereto marked its xylitol nasal washes and sprays with the patent number for the ‘143 Patent and the ‘372 Patent.

16. Xlear has recently become aware that Defendant has sold, is selling, or offering to sell nasal sprays containing xylitol through its stores and its website www.instacart.com/whole-foods/products/18373618-365-nasal-mist-with-xylitol-2-ct. Copies of representative sales materials are attached hereto as **Exhibit D**.

17. Defendants' nasal sprays instruct and actively induce users to nasally administer an effective amount of xylitol/xylose in solution, and therefore infringe either literally, equivalently or contributorily one or more claims in the '143 Patent.

18. Defendants' nasal sprays contain xylitol in amounts that infringe either literally, equivalently or contributorily one or more claims in the '372 Patent.

19. Defendants' nasal sprays teach a method and contain a pharmaceutical composition that infringe either literally, equivalently or contributorily one or more claims in the '883 Patent.

20. Defendant's products, packaging and/or websites provide instruction on the method that users of its products should follow to nasally administer an effective amount of xylitol/xylose to the nasopharynx of a human. *See* Exhibit D.

21. Xlear is the assignee of all right, title and interest in the '143 Patent, the '372 Patent and the '883 Patent.

22. The '143 Patent, the '372 Patent and the '883 Patent have not expired and are in full force and effect.

FIRST CAUSE OF ACTION
(Direct Infringement of U.S. Pat. No. 6,054,143)

23. Plaintiff incorporates the preceding allegations as though set forth fully herein.

24. The '143 Patent has at all times subsequent to its issue date been fully enforceable and is now fully enforceable.

25. Xlear is the assignee of the '143 Patent and holds all rights under the '143 Patent, including the right to sue for infringement.

26. Defendants have designed, manufactured, promoted, sold and used nasal sprays containing xylitol that infringe the '143 Patent.

27. Defendants had actual or constructive knowledge of the '143 Patent at the times they engaged in their infringing conduct.

28. The infringement by Defendants has been willful and deliberate.

29. As a result of Defendants' infringing conduct, Defendants have damaged Plaintiff. Defendants are liable to Plaintiff in an amount that adequately compensates Plaintiff for Defendants' infringement, together with interest and costs as fixed by this Court under 35 U.S.C. § 284.

30. On information and belief, Defendants will continue to willfully, wantonly and deliberately engage in acts of infringement either literally, equivalently or contributorily without regard to Xlear's rights under the '143 Patent and will continue to do so unless otherwise enjoined by this court under 35 U.S.C. § 283.

SECOND CAUSE OF ACTION
(Inducement to Infringe U.S. Pat. No. 6,054,143)

31. Plaintiff incorporates the preceding allegations as though set forth fully herein.

32. Defendants have knowledge of the existence of the '143 Patent and the claims contained therein.

33. Defendants actively instruct purchasers and potential purchasers of its xylitol nasal sprays how to nasally administer an effective amount of xylitol/xylose to the nasopharynx of a human, which use infringes the '143 Patent.

34. Defendants have knowledge, and intend, that users of their xylitol nasal sprays will use Defendants' xylitol sprays to nasally administer an effective amount of xylitol/xylose to the nasopharynx of a human in violation of the '143 Patent.

35. Defendants' instructions on the use of its xylitol nasal sprays induce others to infringe the '143 Patent.

36. Defendants have unlawfully derived, and continue to unlawfully derive, income and profits by inducing others to infringe the '143 Patent. Plaintiff has suffered, and continues to suffer, damages as a result of Defendants' inducement to infringe the '143 Patent.

37. Plaintiff has suffered and will continue to suffer irreparable damage for which there is no adequate remedy at law as a direct result of Defendants' inducing others to infringe the '143 Patent unless Defendants are enjoined from further acts of inducing infringement of the '143 Patent.

THIRD CAUSE OF ACTION
(Direct Infringement of U.S. Pat. No. 6,258,372)

38. Plaintiff incorporates the preceding allegations as though set forth fully herein.

39. The '372 Patent has at all times subsequent to its issue date been fully enforceable and is now fully enforceable.

40. Xlear is the assignee of the '372 Patent and holds all rights under the '372 Patent, including the right to sue for infringement.

41. Defendants have designed, manufactured, promoted, sold and used nasal sprays containing xylitol that infringe the '372 Patent.

42. Defendants had actual or constructive knowledge of the '372 Patent at the times they engaged in their infringing conduct.

43. The infringement by Defendants has been willful and deliberate.

44. As a result of Defendants' infringing conduct, Defendants have damaged Plaintiff. Defendants are liable to Plaintiff in an amount that adequately compensates Plaintiff for Defendants' infringement, together with interest and costs as fixed by this Court under 35 U.S.C. § 284.

45. On information and belief, Defendants will continue to willfully, wantonly and deliberately engage in acts of infringement either literally, equivalently or contributorily without regard to Xlear's rights under the '372 Patent and will continue to do so unless otherwise enjoined by this court under 35 U.S.C. § 283.

FOURTH CAUSE OF ACTION
(Inducement to Infringe U.S. Pat. No. 6,258,372)

46. Plaintiff incorporates the preceding allegations as though set forth fully herein.

47. Defendants have actual or constructive knowledge of the existence of the '372 Patent and the claims contained therein.

48. Defendants offer purchasers and potential purchasers nasal sprays that contain xylitol in amounts that infringe the '372 Patent.

49. Defendants have knowledge, and intend, for users to purchase and use nasal sprays that contain xylitol in amounts that infringe the '372 Patent.

50. Defendants' xylitol nasal sprays induce others to infringe the '372 Patent.

51. Defendants have unlawfully derived, and continue to unlawfully derive, income and profits by inducing others to infringe the '372 Patent. Plaintiff has suffered, and continues to suffer, damages as a result of Defendants' inducement to infringe the '372 Patent.

52. Plaintiff has suffered and will continue to suffer irreparable damage for which there is no adequate remedy at law as a direct result of Defendants' inducing others to infringe the '372 Patent unless Defendants are enjoined from further acts of inducing infringement of the '372 Patent.

FIFTH CAUSE OF ACTION
(Direct Infringement of U.S. Pat. No. 6,599,883)

53. Plaintiff incorporates the preceding allegations as though set forth fully herein.

54. The '883 Patent has at all times subsequent to its issue date been fully enforceable and is now fully enforceable.

55. Xlear is the assignee of the '883 Patent and holds all rights under the '883 Patent, including the right to sue for infringement.

56. Defendants have designed, manufactured, promoted, sold and used nasal sprays containing xylitol that infringe the '883 Patent.

57. Defendants had actual or constructive knowledge of the '883 Patent at the times they engaged in their infringing conduct.

58. The infringement by Defendants has been willful and deliberate.

59. As a result of Defendants' infringing conduct, Defendants have damaged Plaintiff. Defendants are liable to Plaintiff in an amount that adequately compensates Plaintiff for Defendants' infringement, together with interest and costs as fixed by this Court under 35 U.S.C. § 284.

60. On information and belief, Defendants will continue to willfully, wantonly and deliberately engage in acts of infringement either literally, equivalently or contributorily without regard to Xlear's rights under the '883 Patent and will continue to do so unless otherwise enjoined by this court under 35 U.S.C. § 283.

SIXTH CAUSE OF ACTION

(Inducement to Infringe U.S. Pat. No. 6,599,883)

61. Plaintiff incorporates the preceding allegations as though set forth fully herein.

62. Defendants have actual or constructive knowledge of the existence of the '883 Patent and the claims contained therein.

63. Defendants offer purchasers and potential purchasers nasal sprays that contain xylitol that infringe the '883 Patent.

64. Defendants have knowledge, and intend, for users to purchase and use nasal sprays that contain xylitol that infringe the '883 Patent.

65. Defendants actively instruct purchasers and potential purchasers of its xylitol nasal sprays to prevent and/or treat upper respiratory infections by nasally delivering xylitol in a pharmaceutically acceptable carrier, which use infringes the '883 Patent.

66. Defendants have knowledge, and intend, that users of their xylitol nasal sprays will use Defendants' xylitol sprays to prevent and/or treat upper respiratory infections by nasally delivering xylitol in a pharmaceutically acceptable carrier in violation of the '883 Patent

67. Defendants' xylitol nasal sprays induce others to infringe the '883 Patent.

68. Defendants have unlawfully derived, and continue to unlawfully derive, income and profits by inducing others to infringe the '883 Patent. Plaintiff has suffered, and continues to suffer, damages as a result of Defendants' inducement to infringe the '883 Patent.

69. Plaintiff has suffered and will continue to suffer irreparable damage for which there is no adequate remedy at law as a direct result of Defendants' inducing others to infringe the '883 Patent unless Defendants are enjoined from further acts of inducing infringement of the '883 Patent.

DEMAND FOR JURY TRIAL

Xlear demands a trial by jury on all issues so triable.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

A. For a judgment holding Defendants liable for infringement of the '143 Patent, the '372 Patent and the '883 Patent;

B. For a preliminary and permanent injunctive relief enjoining Defendants, their officers, agents, servants, employees and attorneys and all other persons in acts of concert or participation with Defendants from further infringement of the '143 Patent, the '372 Patent and the '883 Patent;

C. For an award to Xlear of its damages and that such damages be trebled in view of the willful and deliberate nature of Defendants' infringement;

D. For an order requiring that Defendants account to Xlear for all the gains, profits and advantages realized from their infringement and unlawful use of the inventions patented and described in the '143 Patent, the '372 Patent and the '883 Patent;

E. That this be declared an exceptional case and that Plaintiff be awarded its attorney's fees;

F. For an award of Plaintiff's costs of this action;

G. For an award of Plaintiff's prejudgment interest on any amounts of actual damages; and

H. For such other and further relief to which this court deems Plaintiff may be entitled in law and in equity.

Dated this 28th day of June, 2018

JONES WALDO HOLBROOK & McDONOUGH PC

By: /s/ Kenneth A. Okazaki
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