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10 Attorneys for Plaintiff ThermoLife International, LLC

11 UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

13 ThermoLife International, LLC, an
14 Arizona limited liability company,

No.

15 Plaintiff,

COMPLAINT

v.

16 MusclePharm Corporation, a Nevada
17 corporation,

(Jury Trial Demanded)

18 Defendant.

19 Plaintiff ThermoLife International, LLC, for its complaint against defendant
20 MusclePharm Corporation (“MusclePharm”) alleges upon personal knowledge with
21 respect to itself and its own acts, and upon information and belief with respect to all other
22 matters, as follows:

NATURE OF ACTION

23 1. Plaintiff ThermoLife International, LLC (“ThermoLife”) brings claims for
24 patent infringement, inducement of patent infringement, and contributory patent
25 infringement against its competitor MusclePharm Corporation. MusclePharm is openly
26 violating ThermoLife’s U.S. Patent No. 7,777,074 (the “‘074 Patent”), which protects and
covers amino acid compounds including creatine nitrate. A true and accurate copy of the

1 '074 Patent is attached as Exhibit A. Creatine nitrate is a powerful and effective
2 compound for increasing vasodilatation in humans, and is therefore a desirable additive to
3 dietary supplements for athletes and others.

4 2. Competition in the dietary supplement industry is fierce, with each company
5 seeking to discover and market the next breakthrough product that will help build muscle
6 and/or decrease fat. Faced with stiff competition and the ever-increasing desire of the
7 market for the next great muscle building supplement, dietary supplement makers
8 frequently copy the successful products and ingredients offered by other makers, even if
9 protected by United States patent laws.

10 3. In this case, MusclePharm has violated ThermoLife's '074 Patent by
11 including creatine nitrate in its appropriately named MusclePharm "Creatine."

12 4. MusclePharm's website touts its "Creatine" as including a "Creatine Matrix."
13 A true and accurate print-out of MusclePharm's website is attached as Exhibit B.
14 According to MusclePharm, the "Creatine Matrix" consists of five different types of
15 creatine: Creapure Creatine AAB, DiCreatineMalate, Creatine Nitrate, Con-Cret®
16 Creatine HCL (100% Concentrated Creatine), and Cinnulin PF®.

17 5. ThermoLife brings this action to enjoin MusclePharm from continuing to
18 violate the '074 Patent and to recover a reasonable royalty and treble damages for its lost
19 sales resulting from MusclePharm's willful infringement. In addition, MusclePharm
20 should be made to disgorge its illegal profits made by violating ThermoLife's valid patent.

21 **PARTIES, JURISDICTION AND VENUE**

22 6. Plaintiff ThermoLife is an Arizona limited liability company. ThermoLife's
23 principal place of business is 3914 E. Chandler Blvd, Phoenix, Arizona 85048.

24 7. Defendant MusclePharm is a Nevada Corporation. MusclePharm does
25 business throughout the United States.

26 8. MusclePharm's corporate office is located at 3200 Cherry Creek Drive South,

1 Suite 430 in Denver, Colorado.

2 9. Through its website, musclepharm.com, MusclePharm sells its products
3 nationwide, including in Arizona.

4 10. MusclePharm's products are available at over 5,000 retail outlets in the
5 United States, including General Nutrition Centers ("GNC"), The Vitamin Shoppe, and
6 Vitamin World. Many of these retail stores are located in Arizona.

7 11. MusclePharm's products are also sold in over 100 online stores, including
8 bodybuilding.com, Amazon.com and Vitacost.com. Many of these online stores ship
9 products, including MusclePharm's products, to consumers in Arizona.

10 12. The Court has jurisdiction over Plaintiff's federal claims under 28 U.S.C. §§
11 1331 and 1338 because this action, at least in part, is for patent infringement and arises
12 under the patent laws of the United States, Title 35, Section 271 *et seq.* of the United
13 States Code.

14 13. This Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1332
15 because MusclePharm is diverse in citizenship from ThermoLife and the amount in
16 controversy exceeds \$75,000, exclusive of interests and costs.

17 14. Venue is proper in this District under 28 U.S.C. § 1391(b)-(c), because a
18 substantial part of the events or omissions giving rise to ThermoLife's claims occurred in
19 this District. Venue with respect to MusclePharm is also proper in this district because
20 defendant is subject to personal jurisdiction in this district.

21 **FACTUAL ALLEGATIONS**

22 **A. ThermoLife**

23 15. Ron Kramer ("Kramer") founded ThermoLife in 1998. Prior to founding
24 ThermoLife, Kramer was a gym owner who had competed in bodybuilding and later
25 promoted professional bodybuilding competitions for the International Federation of
26 Bodybuilders.

1 16. Between 1994 and 1997, Kramer opened and operated a Gold's Gym in Santa
2 Cruz, California.

3 17. During his time as a bodybuilder, promoter, and gym owner, Kramer
4 discovered that many dietary supplements failed to meet any quality control standards.
5 Often supplements are spiked with hidden ingredients and labeled incorrectly. Many were
6 ineffective.

7 18. At the time ThermoLife was established, few supplements were clinically
8 researched or field tested. Even today, relatively few supplements have been proven to
9 work as advertised.

10 19. In 1998, Kramer founded ThermoLife in order to provide the public with
11 quality proven supplements. ThermoLife is committed to selling only the purest, most
12 effective and innovative products.

13 20. By relying on supposedly proprietary formulas, supplement companies often
14 hide the ingredients in their products from consumers. Unlike other supplement
15 companies, ThermoLife develops unique and novel products and formulas that it fully
16 discloses to the public. In this way, ThermoLife allows consumers to know exactly what
17 products and raw materials they consume.

18 21. ThermoLife has been awarded patents on twenty individual compounds.
19 These patents protect ThermoLife's innovative and proven products from being copied by
20 ThermoLife's competitors.

21 22. By fully disclosing its formulas and relying on scientifically proven and
22 protected formulas and ingredients, ThermoLife has taken a lead role in ending the
23 deceptive business practices that have plagued the supplement industry.

24 23. One of the patents owned by ThermoLife is U.S. Patent 7,777,074 (the "'074
25 Patent"). On August 17, 2010, the '074 Patent was duly and legally issued to Kramer, *et*
26 *al.* ThermoLife is the assignee of all rights in and title to the '074 Patent. A true and

1 correct copy of the '074 Patent is attached as Exhibit A, and incorporated herein by this
2 reference.

3 24. ThermoLife's supplements are sold nationwide on the internet and in vitamin
4 and dietary supplement stores such as The Vitamin Shoppe.

5 **B. MusclePharm's Infringement**

6 25. MusclePharm started doing business in 2006 under the name Tone in Twenty.

7 26. On February 18, 2010, MusclePharm acquired Muscle Pharm, LLC.

8 27. After acquiring Muscle Pharm, LLC, MusclePharm Corporation was founded.
9 Muscle Pharm, LLC is a wholly owned subsidiary of MusclePharm Corporation.

10 28. MusclePharm is a publically traded company traded under the symbol MSLP.

11 29. MusclePharm markets its products to athletes, bodybuilders and health-
12 minded individuals. MusclePharm regularly enters into endorsement deals with
13 professional athletes to sell and market MusclePharm's products.

14 30. In late 2010, MusclePharm began marketing and selling its MusclePharm
15 "Creatine" product.

16 31. MusclePharm's website touts its MusclePharm "Creatine" as including a
17 "Creatine Matrix." A true and accurate print-out of MusclePharm's website is attached as
18 Exhibit B.

19 32. According to MusclePharm, the "Creatine Matrix" consists of five different
20 types of creatine: Creapure Creatine AAB, DiCreatineMalate, Creatine Nitrate, Con-
21 Cret® Creatine HCL (100% Concentrated Creatine), and Cinnulin PF®.

22 33. GNC sells MusclePharm's "Creatine" through its website. On GNC's
23 website, MusclePharm's "Creatine" is advertised as "including 5 pure and diverse
24 Creatine Complexes." A true and accurate print-out of GNC's advertisement for
25 "Creatine" is attached as Exhibit C.

26 34. GNC's website also includes a copy of the label for MusclePharm's

1 “Creatine.” A true and accurate print-out of the label is attached as Exhibit D.

2 35. The label for MusclePharm’s “Creatine” specifically identifies the five
3 different creatines included in MusclePharm’s “Creatine,” including creatine nitrate.

4 36. Since its launch in late 2010, MusclePharm’s “Creatine” has enjoyed
5 remarkable success.

6 37. The website bodybuilding.com sells and markets dietary supplements.
7 Bodybuilding.com is the largest sports nutrition company in the world and it is the most
8 visited bodybuilding and fitness website on the internet. Bodybuilding.com is the top
9 sports nutrition internet retailer.

10 38. Bodybuilding.com lists its 50 top selling supplements. Since its launch in late
11 2010, MusclePharm’s “Creatine” has consistently been among bodybuilding.com’s top
12 selling supplements.

13 39. On January 30, 2012, MusclePharm’s “Creatine” was the number 15 top
14 selling product on bodybuilding.com. A true and accurate print-out of
15 bodybuilding.com’s website displaying the top 50 supplements is attached as Exhibit E.

16 40. On January 30, 2012, ThermoLife purchased MusclePharm’s “Creatine” from
17 a GNC store in Chandler, Arizona. A true and accurate copy of ThermoLife’s receipt for
18 the purchase is attached as Exhibit F. A true and accurate picture of the product and the
19 product’s label is attached as Exhibit G.

20 41. The label for the MusclePharm “Creatine” product that ThermoLife received
21 on January 30, 2012, indicates that the product includes ThermoLife’s patented creatine
22 nitrate.

23 42. As a member of the nutritional supplement and bodybuilding industries,
24 MusclePharm appreciates the scope of the ‘074 Patent, as well as the other patents
25 assigned to ThermoLife.

26 43. When Kramer received notice that the ‘074 Patent would issue, Kramer

1 contacted Jeremy DeLuca to inform him of the '074 Patent.

2 44. Jeremy DeLuca is now the Co-President and Chief Marketing Officer of
3 MusclePharm.

4 45. Notwithstanding MusclePharm's appreciation of the value and scope of the
5 '074 Patent, MusclePharm has sold, manufactured, imported and/or used infringing
6 creatine nitrate compositions.

7 46. MusclePharm has manufactured and sold, and continues to manufacture and
8 sell, infringing products at least under the product designation of MusclePharm
9 "Creatine."

10 47. MusclePharm "Creatine" has at least one compositional feature corresponding
11 to an Amino Acid Compound consisting essentially of a nitrate or nitrite of an Amino
12 Acid elected from the group consisting of Arginine Beta Alanine, Agmatine, Citrulline,
13 Creatine, Glutamine, L-Histidine, Isoleucine, Leucine, Norvaline, or Ornithine. Here,
14 MusclePharm "Creatine" includes creatine nitrate.

15 48. MusclePharm sells its infringing MusclePharm "Creatine" over the internet
16 and elsewhere. MusclePharm seeks generally to sell Infringing Products to retailers,
17 distributors, dealers, and/or the general public, including the general public in the State of
18 Arizona and this District. MusclePharm has sold its infringing MusclePharm "Creatine"
19 in the State of Arizona and this District.

20 49. MusclePharm is aware of its infringing activity.

21 50. Despite notice of its infringing activity, MusclePharm continues to sell and
22 market its infringing MusclePharm "Creatine."

23 51. The activities of MusclePharm with regard to its sales, importation,
24 manufacture and/or use of its MusclePharm "Creatine" are and have been without
25 authorization from Thermolife.

26 **COUNT I – PATENT INFRINGEMENT**

1 52. ThermoLife repeats and realleges each and every allegation contained in
2 Paragraphs 1 through 51 of this Complaint, as if fully set forth herein.

3 53. This cause of action arises under the Laws of the United States, Title 35,
4 United States Code, in particular under 35 U.S.C. § 271(a).

5 54. The '074 Patent is a valid and enforceable patent.

6 55. MusclePharm, acting through and by its respective officers and owners, have,
7 without authority, consent, right or license, and in direct infringement of the '074 Patent,
8 imported, made, used, and/or sold its infringing MusclePharm "Creatine" in this country,
9 and its infringing MusclePharm "Creatine" has been sold and used in this jurisdiction and
10 district.

11 56. MusclePharm's infringing conduct is willful, intentional and unlawful and,
12 upon information and belief, will continue unless enjoined by this Court.

13 57. ThermoLife has no adequate remedy at law for the harm caused by
14 defendants' acts.

15 58. By reason of MusclePharm's acts complained of herein, ThermoLife has
16 suffered monetary damages in an amount that has not yet been determined, but upon
17 information and belief, is substantially in excess of the sum or value of \$75,000, exclusive
18 of interest and costs.

19 59. Due to the intentional nature of MusclePharm's acts, this is an exceptional
20 case in which ThermoLife is entitled to treble damages, attorneys' fees and costs pursuant
21 to 35 U.S.C. §§ 284 and 285.

22 60. Pursuant to 35 U.S.C. § 284, ThermoLife is entitled to: an accounting by
23 MusclePharm of funds comprising all revenues received through the commercial
24 exploitation of MusclePharm "Creatine"; the imposition of a constructive trust for the
25 benefit of ThermoLife for all such funds in the custody or control of MusclePharm; and to
26 such other damages to which ThermoLife may be determined to be entitled.

1 entitled.

2 **COUNT III – CONTRIBUTORY PATENT INFRINGEMENT**

3 70. ThermoLife repeats and realleges each and every allegation contained in
4 Paragraphs 1 through 69 of this Complaint, as if fully set forth herein.

5 71. This cause of action arises under the Patent Laws of the United States, Title
6 35, United States Code, in particular under 35 U.S.C. § 271(c).

7 72. The '074 is a valid and enforceable patent.

8 73. Upon information and belief, MusclePharm is liable for contributory
9 infringement, pursuant to 35 U.S.C. § 271(c), in that MusclePharm has imported, made,
10 and/or sold within the United States a component of a patented combination or
11 composition, consisting of a material part of the invention, knowing the same to be
12 especially made or adapted for use in the infringement of the '074 Patent and not a staple
13 article or commodity of commerce suitable for substantial non-infringing use.

14 74. MusclePharm's infringing conduct is willful, intentional and unlawful and,
15 upon information and belief, will continue unless enjoined by this Court.

16 75. ThermoLife has no adequate remedy at law for the harm caused by
17 MusclePharm's acts.

18 76. By reason of MusclePharm's acts complained of herein, ThermoLife has
19 suffered monetary damages in an amount that has not yet been determined, but upon
20 information and belief, is substantially in excess of the sum or value of \$75,000, exclusive
21 of interest and costs.

22 77. Due to the intentional nature of MusclePharm's acts, this is an exceptional
23 case in which ThermoLife is entitled to treble damages, attorneys' fees and costs pursuant
24 to 35 U.S.C. §§ 284 and 285.

25 78. Pursuant to 35 U.S.C. § 284, ThermoLife is entitled to: an accounting by
26 MusclePharm of funds comprising all revenues received through the commercial

1 exploitation of its infringing MusclePharm “Creatine”; the imposition of a constructive
2 trust for the benefit of ThermoLife for all such funds in the custody or control of
3 MusclePharm; and to such other damages to which ThermoLife may be determined to be
4 entitled.

5 **JURY TRIAL DEMAND**

6 79. Plaintiff requests a trial by jury on all aspects of the Complaint.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff ThermoLife International, LLC prays for relief and
9 judgment against Defendant MusclePharm as follows:

10 A. For a judicial determination and declaration that the ‘074 Patent is valid and
11 enforceable;

12 B. That a preliminary and permanent injunction issue against MusclePharm, its
13 agents, officers, directors, employees, attorneys, successors and assigns, all parent and
14 subsidiary entities, and all those acting for or on the behalf of MusclePharm, or in active
15 concert, participation, or combination with them, including customers and distributors,
16 prohibiting MusclePharm from:

- 17 i. continuing acts of infringement of ThermoLife’s ‘074 Patent;
18 ii. making, using, selling and/or importing Infringing Products, to
19 include any colorable imitation thereof; and
20 iii. otherwise infringing upon ThermoLife’s patents.

21 C. That an Order issue from this Court requiring MusclePharm, its officers,
22 agents, servants and employees, to deliver up to this Court for destruction all articles and
23 materials infringing upon the rights of ThermoLife and all formulations and other matter
24 or materials for reproducing such Infringing Products;

25 D. That defendant be required to file with the Court within thirty (30) days after
26 entry of an injunctive order or final judgment a written statement under oath setting forth

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the manner in which defendant has complied with the order or final judgment;

E. Awarding ThermoLife its damages sustained due to MusclePharm’s infringement of the ‘074 Patent;

F. In the alternative, ordering MusclePharm to pay ThermoLife all profits, gains, and advantages defendant has received or obtained from their unlawful conduct, in an amount to be determined at trial;

G. In the alternative, that a reasonable royalty for defendant’s infringement be awarded to ThermoLife pursuant to 35 U.S.C. § 284;

H. That, due to defendant’s willful infringement of ThermoLife’s patent rights, defendant be ordered to pay ThermoLife treble damages pursuant to 35 U.S.C. §284;

I. An award of the costs of this action, including pre- and post-judgment interest, pursuant to 35 U.S.C. § 284;

J. That, due to defendant’s willful and flagrant disregard of ThermoLife’s patent rights, defendant be ordered to pay ThermoLife its reasonable attorneys’ fees and experts’ fees pursuant to 35 U.S.C. § 285; and

K. For such other and further relief as this Court deems necessary, just and proper under the circumstances.

1 DATED this 1st day of February, 2012.

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3 KERCSMAR & FELTUS PLLC

4
5 By s/ Gregory B. Collins

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