

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

THERMOLIFE INTERNATIONAL, LLC,

Case No. 6:21-CV-00144-ADA

Plaintiff,

v.

HUMAN POWER OF N COMPANY, d/b/a
HUMANN, f/k/a NEOGENIS LABS, INC.,

Defendant.

**HUMAN POWER OF N COMPANY D/B/A HUMANN'S SECOND
AMENDED ANSWER, DEFENSES, COUNTERCLAIMS
AND REQUEST FOR INJUNCTIVE RELIEF**

Defendant Human Power of N Company, d/b/a HumanN, f/k/a Neogenis Labs, Inc. ("Defendant" or "HumanN") answers and asserts defenses to Plaintiff ThermoLife International, LLC's ("Plaintiff" or "ThermoLife") Original Complaint and asserts counterclaims and requests injunctive relief against Plaintiff/Counter-Defendant ThermoLife as follows:

HUMANN'S ANSWER TO THERMOLIFE'S COMPLAINT

NATURE AND BASIS OF THE ACTION

1. Paragraph 1 purports to describe the existence of Plaintiff's allegations and claims, to which no response is required. To the extent a response is required, HumanN denies the allegations of Paragraph 1.

2. HumanN denies the allegations of Paragraph 2 because they do not accurately describe the Asserted Patents.

3. HumanN admits that it sells products within the United States. The remaining allegations in Paragraph 3 purport to state conclusions of law, to which no responses are required. To the extent a response is required, HumanN denies the allegations of Paragraph 3.

4. Paragraph 4 purports to describe the remedies and damages sought by Plaintiff, to which no response is required. To the extent a response is required, HumanN denies any liability to Plaintiff and further denies that Plaintiff is entitled to the relief it seeks or to any other relief against HumanN.

THE PARTIES

5. HumanN admits that Plaintiff in this action is named as such, but HumanN is without sufficient knowledge or information to form a belief as to truth of the remaining allegations in Paragraph 5, and therefore denies them.

6. HumanN is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 6, and therefore denies them.

7. HumanN is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 7, and therefore denies them.

8. HumanN admits the allegations of Paragraph 8.

9. HumanN no longer has a place of business at the stated address, and thus denies the allegations of Paragraph 9.

10. HumanN admits that Joel J. Kocher is its registered agent, but denies the remaining allegations of Paragraph 10.

11. HumanN admits that it was previously known as Neogenis Laboratories, Inc., and currently does business as "HumanN." HumanN admits that this name change occurred in 2016. The remaining allegations of Paragraph 11 purport to state legal conclusions, to which no response is required. To the extent a response is necessary, HumanN denies the remaining allegations in Paragraph 11.

12. HumanN admits that ThermoLife filed suit against HumanN in the District of Arizona on June 17, 2016 for the alleged infringement of the '140 Patent, and that the case was

dismissed without prejudice in January 2018 before HumanN filed an answer to the complaint. HumanN also admits that Exhibits 7 and 7A-7J purport to be a copy of the complaint in that case and the exhibits thereto. HumanN denies the remaining allegations of Paragraph 12.

JURISDICTION AND VENUE

13. HumanN admits the allegations of Paragraph 13.

14. HumanN admits that its principal place of business is in Texas and that it is incorporated in Texas. HumanN does not challenge the exercise of personal jurisdiction in the state.

15. The allegations of Paragraph 15 purport to state legal conclusions regarding venue, to which no response is required. To the extent a response is necessary, HumanN admits that this Court is a proper venue for this matter.

16. The allegations of Paragraph 16 purport to state legal conclusions, to which no response is required. To the extent a response is necessary, HumanN admits that it transacts business in Texas and has sold SuperBeets, BeetElite, and Neo40 in Texas, but otherwise denies the allegations in Paragraph 16.

THE ACCUSED PRODUCTS

17. The allegations of Paragraph 17 purport to state legal conclusions, to which no response is required. To the extent a response is necessary, HumanN admits that it sells products, including its SuperBeets, BeetElite, and Neo40 products, but otherwise denies the allegations contained in Paragraph 17.

18. HumanN admits that it advertises, offers to sell, and sells the Accused Products in the United States, including in this district. HumanN denies the remaining allegations of Paragraph 18.

19. HumanN admits that the product labeling for each Accused Product accurately describes the product. HumanN denies the remaining allegations of Paragraph 19.

20. HumanN admits that product labeling for the Neo40 product accurately describes the product. HumanN denies the remaining allegations of Paragraph 20.

21. HumanN admits that the Accused Products are sold and offered for sale over the phone, through HumanN's website, and through third-parties Amazon and GNC Corporation. HumanN denies the remaining allegations of Paragraph 21.

22. HumanN admits that it markets and advertises the Accused Products, including marketing and advertising on the Internet. HumanN denies the remaining allegations of Paragraph 22.

23. HumanN denies the allegations in Paragraph 23.

THE ASSERTED PATENTS

24. HumanN admits that Exhibit 1 to the Complaint purports to be a copy of U.S. Patent No. 9,180,140 ("the '140 Patent") and that on its face the document includes the title "Performance enhancing composition and use thereof." HumanN denies that the '140 Patent is valid and enforceable. HumanN is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 24, and therefore denies them.

25. HumanN admits that Exhibit 3 to the Complaint purports to be a copy of U.S. Patent No. 10,555,968 ("the '968 Patent") and that on its face the document includes the title "Performance enhancing composition and use thereof." HumanN denies that the '968 Patent is valid and enforceable. HumanN is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 25, and therefore denies them.

26. HumanN denies that it has infringed any valid and enforceable claim of any Asserted Patent. HumanN is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 26, and therefore denies them.

27. HumanN admits that Exhibit 2 to the Complaint purports to be a copy of U.S. Patent No. 8,455,531 (“the ’531 Patent”) and that on its face the document includes the title “Amino acid compositions.” HumanN denies that the ’531 Patent is valid and enforceable. HumanN is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 27, and therefore denies them.

COUNTS OF PATENT INFRINGEMENT

28. Paragraph 28 contains legal conclusions to which no response is required. To the extent a response is necessary, HumanN denies the allegations contained in Paragraph 28.

COUNT ONE

(Infringement of the ’140 Patent by all Accused Products)

29. HumanN restates and incorporates by reference each and every response contained in the preceding paragraphs of this Answer as if fully set forth herein.

30. To the extent this Paragraph purports to characterize the contents of the ’140 Patent, HumanN denies that this description of the ’140 Patent is complete or accurate.

31. To the extent this Paragraph purports to reproduce the contents of claim 1 of the ’140 Patent, that document speaks for itself and no further response is required.

32. Paragraph 32 contains legal conclusions to which no response is required. To the extent a response is necessary, HumanN denies the allegations contained in Paragraph 32.

33. HumanN denies the allegations in Paragraph 33.

34. HumanN admits that it sells the Accused Products. HumanN denies the remaining allegations of Paragraph 34.

35. To the extent the allegations in Paragraph 35 purport to characterize the contents of a public paper of Dr. Jon Ivy, HumanN responds that the paper speaks for itself and it should be read in its entirety and in context. HumanN denies the allegations in Paragraph 35 to the extent inconsistent with that paper. HumanN otherwise denies the allegations in Paragraph 35.

36. HumanN denies the allegations in Paragraph 36.

37. HumanN denies the allegations in Paragraph 37.

38. HumanN denies the allegations in Paragraph 38.

39. HumanN denies the allegations in Paragraph 39.

40. HumanN denies the allegations in Paragraph 40.

41. HumanN denies the allegations in Paragraph 41.

42. To the extent the allegations in Paragraph 42 purport to characterize the contents of HumanN's website, the contents of HumanN's website speaks for itself and HumanN denies the allegations in this Paragraph to the extent inconsistent with the referenced portions thereof. HumanN denies the remaining allegations in Paragraph 42.

43. HumanN denies the allegations in Paragraph 43.

44. HumanN denies the allegations in Paragraph 44.

45. HumanN denies the allegations in Paragraph 45.

46. HumanN denies the allegations in Paragraph 46.

47. HumanN lacks sufficient knowledge or information to form a belief as to the truth of Plaintiff's allegations in Paragraph 47, and therefore denies the allegations in Paragraph 47.

48. HumanN denies the allegations in Paragraph 48.

49. HumanN denies the allegations in Paragraph 49.

COUNT TWO

(Infringement of the '531 Patent by the Neo40 product)

50. HumanN restates and incorporates by reference each and every response contained in the preceding paragraphs of this Answer as if fully set forth herein.

51. To the extent this Paragraph purports to characterize the contents of the '531 Patent, HumanN denies that this description of the '531 Patent is complete or accurate.

52. To the extent this Paragraph purports to reproduce the contents of claim 62 of the '531 Patent, that document speaks for itself and no further response is required.

53. HumanN admits that it markets, offers to sell, and sells the Accused Products. HumanN denies the remaining allegations of Paragraph 53.

54. HumanN denies the allegations in Paragraph 54.

55. To the extent this Paragraph purports to characterize the contents HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies that the description in Paragraph 55 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 55.

56. Paragraph 56 contains legal conclusions to which no response is required. To the extent a response is necessary, HumanN denies the allegations contained in Paragraph 56.

57. HumanN admits that Paragraph 57 purports to contain a screenshot of an image of the Neo40 label excerpted from HumanN's website. The image speaks for itself and should be read in its entirety and in context. HumanN denies the allegations of Paragraph 57 to the extent inconsistent with cited material, and otherwise denies the remaining allegations contained in Paragraph 57.

58. HumanN denies the allegations in Paragraph 58.

59. HumanN denies the allegations in Paragraph 59.

60. HumanN denies the allegations in Paragraph 60.

61. HumanN lacks sufficient knowledge or information to form a belief as to the truth of Plaintiff's allegations in Paragraph 61, and therefore denies the allegations in Paragraph 61.

62. HumanN denies the allegations in Paragraph 62.

63. HumanN admits that it received a letter from ThermoLife referencing the '531 Patent on December 30, 2016, but otherwise denies the remaining allegations in Paragraph 63.

64. HumanN denies the allegations in Paragraph 64.

COUNT THREE

(Infringement of the '968 Patent by the SuperBeets and BeetElite products)

65. HumanN restates and incorporates by reference each and every response contained in the preceding paragraphs of this Answer as if fully set forth herein.

66. To the extent this Paragraph purports to characterize the contents of the '968 Patent, HumanN denies that this description of the '968 Patent is complete or accurate.

67. To the extent this Paragraph purports to reproduce the contents of claim 45 of the '968 Patent, that document speaks for itself and no further response is required.

68. HumanN admits that it markets, offers for sale, and sells the Accused Products. HumanN denies the remaining allegations in Paragraph 68.

69. HumanN denies the allegations in Paragraph 69.

70. HumanN denies the allegations of Paragraph 70 at least because the claim term "composition" has not yet been construed, nor has ThermoLife disclosed how it contends the term should be interpreted.

71. HumanN admits that sodium nitrite is a nitrite salt. To the extent this Paragraph purports to characterize the contents of the '968 Patent, HumanN denies that it is complete or accurate.

72. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies that the allegations of Paragraph 72 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 72.

73. HumanN admits that the product labeling for the Accused Products accurately describes the products. HumanN denies the remaining allegations in Paragraph 73.

74. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and denies the allegations of Paragraph 74 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 74.

75. HumanN restates and incorporates by reference each and every response contained in the preceding paragraphs of this answer as if fully set forth herein.

76. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies the allegations of Paragraph 76 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 76.

77. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies the allegations of Paragraph 77 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 77.

78. HumanN denies the allegations in Paragraph 78.

79. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies the allegations of Paragraph 79 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 79.

80. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies the allegations of Paragraph 80 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 80.

81. HumanN denies the allegations in Paragraph 81.

82. HumanN denies the allegations in Paragraph 82.

83. HumanN lacks sufficient knowledge or information to form a belief as to the truth of Plaintiff's allegations in Paragraph 83, and therefore denies the allegations in Paragraph 83.

84. HumanN denies the allegations in Paragraph 84.

85. To the extent this Paragraph purports to characterize the contents of HumanN's First Amended Answer and Counterclaims, ECF No. 117, filed in Cause No. 2:18-cv-02980-DWL

before the United States District Court for the District of Arizona, that document speaks for itself and HumanN denies the allegations of Paragraph 85 are a complete or accurate description of the document, and otherwise denies the remaining allegations contained in Paragraph 85.

86. HumanN admits that it received a letter from Plaintiff's counsel on December 27, 2019 and that it continued to sell its SuperBeets and BeetElite products after receiving Plaintiff's letter, but HumanN otherwise denies the remaining allegations in Paragraph 86.

87. HumanN denies the allegations in Paragraph 87.

JURY DEMAND

88. Plaintiff's Jury Demand does not contain allegations of fact, and therefore no responsive pleading is required. To the extent a response is necessary, HumanN admits that Plaintiff has requested a jury trial.

RELIEF REQUESTED

89. Plaintiff's "Relief Requested" paragraph does not contain allegations of fact, and therefore no responsive pleading is required. To the extent a response is necessary, HumanN denies that Plaintiff is entitled to any of the relief requested in its prayer for relief or any relief whatsoever.

HUMANN'S AFFIRMATIVE DEFENSES

HumanN incorporates by reference as if fully set forth herein its responses to ThermoLife's Complaint. HumanN denies any allegations in the Complaint not expressly admitted above. Without assuming any burden other than that imposed by operation of law and without reducing or removing ThermoLife's burdens of proof on its affirmative claims, HumanN alleges and asserts the following defenses in response to ThermoLife's Complaint and its assertion that HumanN infringes the Asserted Patents. In addition, HumanN reserves the right to amend its Answer to add

additional Defenses and Counterclaims that become known as a result of discovery or otherwise.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted because, *inter alia*, it has not alleged plausible allegations of infringement.

SECOND AFFIRMATIVE DEFENSE

HumanN has not and does not infringe, under any theory of infringement, including directly (whether individually or jointly), indirectly (whether contributorily or by inducement), willfully, or otherwise, any valid and enforceable claim of the Asserted Patents, including the '140 Patent, '531 Patent, and '968 Patent.

THIRD AFFIRMATIVE DEFENSE

Each claim of the Asserted Patents is invalid for failing to comply with one or more of the requirements of the United States Code, Title 35, including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and 112, and the rules and regulations pertaining thereto.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims for relief are barred in whole or in part by prosecution history estoppel and/or prosecution disclaimer. Specifically, ThermoLife is precluded from construing any valid claim of the patents-in-suit to be infringed, literally or under the doctrine of equivalents, due to admissions, arguments, amendments, representations, and/or statements made to the U.S. Patent and Trademark Office (a) during prosecution of the patents-in-suit, (b) in the specification and claims of the patents-in-suit, and/or (c) during the prosecution of patents and applications related to the patents-in-suit.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims for relief are barred by doctrines of equity, including, without limitation, laches, estoppel, waiver, ratification, unclean hands and/or inequitable conduct.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims for relief are barred in whole or in part by 35 U.S.C. §§ 286 and 287.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred in whole or in part from recovering damages under 35 U.S.C. § 287 to the extent ThermoLife or any licensee of the patents-in-suit failed to mark any of their relevant products as required by 35 U.S.C. § 287 or otherwise provide proper notice of any alleged infringement of the patents-in-suit. ThermoLife's claims for relief are statutorily limited in whole or in part by 35 U.S.C. § 286, and ThermoLife is barred from recovering costs in connection with this action by 35 U.S.C. § 288.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's demand to enjoin HumanN is barred because Plaintiff has suffered neither harm nor irreparable harm from HumanN's actions and Plaintiff cannot meet the other requirements for injunctive relief.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's demand for enhanced damages is barred because HumanN has had and continues to have an objectively reasonable basis to believe that the Accused Products do not infringe any valid and enforceable claim of the Asserted Patents.

**HUMANN'S SECOND AMENDED COUNTERCLAIMS
AND REQUEST FOR INJUNCTIVE RELIEF**

Counter-Plaintiff Human Power of N Company (formerly known as Neogenis Laboratories, Inc.) (“HumanN”) brings the following Second Amended Counterclaims and Request for Injunctive Relief against Counter-Defendant ThermoLife International, L.L.C. (“ThermoLife”) pursuant to Federal Rule of Civil Procedure 13 and alleges as follows:

NATURE AND BASIS OF THE SECOND AMENDED COUNTERCLAIMS

1. This is a counter-action for declaratory judgments, permanent injunctive relief, damages, punitive and additional damages, and further relief based on ThermoLife’s false advertising in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), its malicious tortious interference with HumanN’s prospective business relations in violation of Texas common law, HumanN’s non-infringement of U.S. Patent Nos. 9,180,140 (“’140 Patent”), 8,455,531 (“’531 Patent”), 10,555,968 (“’968 Patent”), and 10,842,813 (“’813 Patent”) and the invalidity of the ‘140 Patent, the ‘531 Patent, and the ‘968 Patent.

2. HumanN develops, markets, and sells a variety of high-quality foods and dietary supplements including Neo40® (“Neo40”), BeetElite® (“BeetElite”), and the SuperBeets® (“SuperBeets”) family of products that include SuperBeets powders, SuperBeets Heart Chews, and others. In its Complaint, filed with the Court on February 11, 2021, ThermoLife accuses HumanN’s SuperBeets, BeetElite, and Neo40 products (collectively, the “Accused Products”) of infringing the ’140 Patent, the ’531 Patent, and the ’968 Patent (collectively, the “Asserted Patents”), and asks the Court to enjoin HumanN from engaging in any further acts of infringement. ThermoLife also has accused HumanN’s SuperBeets Heart Chews (and Neo40 and SuperBeets powder when bundled with the Chews) of infringing the ’813 with Amazon.

3. HumanN does not infringe the Asserted Patents or the '813 Patent, and the Asserted Patents are not enforceable. HumanN is therefore entitled to declaratory relief of noninfringement and invalidity.

4. ThermoLife's infringement claims are just the latest front of the self-described "war" ThermoLife declared on HumanN after HumanN rebuffed ThermoLife's demands that it pay millions of dollars to sublicense a valueless patent portfolio. ThermoLife's campaign of harassment against HumanN began years ago, and has included a series of three federal lawsuits—the first two of which ThermoLife voluntarily dismissed—as well as false advertisements and repeated, intentional, and malicious efforts to disrupt HumanN's business relationship with Amazon one of its key sales partners.

5. ThermoLife's efforts, though unsuccessful in coercing license payments from HumanN, nevertheless injured HumanN's business and cost it sales. In particular, ThermoLife's targeted efforts in 2019 to disrupt HumanN's business relationship with Amazon caused HumanN to lose sales of its SuperBeets, BeetElite, and Neo40 products, and forced HumanN to expend considerable resources and effort to regain product listings that were temporarily removed from Amazon's site (amazon.com). And even after it filed the instant suit, ThermoLife has continued its efforts to disrupt HumanN's business with Amazon, invoking Amazon's Neutral Patent Evaluation Process ("PEP") three times for patents and products in or related to this suit. HumanN is entitled to injunctive relief to stop ThermoLife's continuing false advertising and tortious interference, and for damages under the federal Lanham Act and Texas common law.

PARTIES

6. Human Power of N Company d/b/a HumanN is a Texas corporation, with its principal place of business at 1250 S. Capital of Texas Highway, Building I-360, Austin, Texas 78746.

7. Counter-Defendant ThermoLife is a limited liability company organized and existing under the laws of Arizona. According to Arizona Secretary of State filings, ThermoLife's registered agent is Ronald L. Kramer, who states that his address is 1334 E. Chandler Blvd., #5-D76, Phoenix, Arizona 85048; however, this location is a Mailboxes & More store.

8. Upon information and belief, ThermoLife has an additional business address located at 1811 Ocean Front Walk, Third Floor, Venice, California 90291.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332, 1338(a), 1367, 2201, and 2202. The Court has federal question jurisdiction because these Counterclaims arise under the Lanham Act, 15 U.S.C. § 1125(a), and the Patent Laws of the United States, 35 U.S.C. §§ 1 *et seq.* The Court has jurisdiction over HumanN's requests for declaratory relief under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction over HumanN's state law claims pursuant to 28 U.S.C. § 1367 and the doctrine of supplemental jurisdiction. The Court also enjoys diversity jurisdiction under 28 U.S.C. § 1332, because there is complete diversity between the parties, and the amount in controversy exceeds \$75,000.

10. This Court has personal jurisdiction over ThermoLife because ThermoLife submitted itself to the jurisdiction of this Court by filing its Complaint in this judicial district.

11. Venue in this judicial district is proper under 28 U.S.C. §§ 1391 and 1400.

FACTS

A. HumanN is a leader in innovative N-O supplements and functional foods

12. Nitric oxide, or “N-O,” is an essential cardiovascular signaling molecule. Nitric oxide signals the endothelial layer of human blood vessels to relax, helping to counteract arterial constriction and thereby increase circulation. Our bodies metabolize nitric oxide from dietary nitrates and nitrites. A rich source of dietary nitrates is found in green, leafy vegetables and beets. However, many individuals do not consume enough high nitrate vegetables, and become N-O deficient.

13. Functional foods and dietary supplements may help increase nitric oxide levels. Founded in 2009, HumanN is committed to bringing the best nitric oxide products to people across every phase of life. In pursuing this mission, HumanN develops, markets, and sells a variety of high-quality functional foods and dietary supplements including Neo40, BeetElite, and HumanN’s SuperBeets line of products. HumanN also offers nitric oxide indicator strips, a non-invasive and simple way for consumers to see if they are getting enough nitrates in their diets.

14. HumanN is the exclusive licensee of several patents related to nitric oxide technology held by the University of Texas (UT), and HumanN pays royalties to UT for practicing those licensed patents and employing its technology. HumanN has also spent a significant amount of money and numerous employee-hours researching its products to ensure their efficacy. HumanN has supported clinical studies evaluating its products, and HumanN further maintains a seven-member scientific advisory board, that includes scientists who are experts in the areas of nutrition, kinesiology, functional foods, supplements, and in nitric oxide research, including a holder of the 1998 Nobel Prize in medicine for his co-discovery of the N-O molecule’s mechanism of action in the human body.

15. HumanN also has expended significant resources promoting, marketing, and advertising its products, so that they are seen by the market as signifying quality and excellence. Because of its enormous investments, HumanN and its Neo40, BeetElite, and SuperBeets line have built up tremendous consumer recognition, trust, and goodwill.

16. HumanN sells its products through a variety of retail channels including brick and mortar stores like GNC and on online platforms including amazon.com. Each year, HumanN sells a substantial amount of its inventory on amazon.com.

B. ThermoLife forces companies to license patents or face ruinous litigation

17. ThermoLife does not develop or sell its own supplements or foods. Instead, ThermoLife holds a patent portfolio, including the Asserted Patents and the '813 Patent, and makes money by forcing companies wishing to market nitric oxide supplement products to purchase non-exclusive sub-licenses and/or ingredients from ThermoLife, whether or not the companies actually practice the patents ThermoLife licensed, and whether or not those licensed patents are enforceable.

18. ThermoLife's single-page website, www.thermolife.com, is focused exclusively on its patents and the ingredients it claims are covered by those patents. The website advises visitors thinking of making a "dietary supplement with nitrates in it" that "there is a very good chance" the product will infringe a ThermoLife patent, and admonishes those businesses to negotiate a license with it:

The advertisement is a black rectangular graphic with white and orange text. At the top, the ThermoLife International logo is on the left, and three website URLs (WWW.NO3-T.COM, WWW.MAXNOX.INFO, INFO@THERMOLIFE.COM) are on the right. The main title 'PATENTED NITRATE TECHNOLOGY' is centered in large white letters. Below it, a banner states '19 NITRATE RELATED PATENTS • MORE THAN 450 VALID CLAIMS • PATENT COVERAGE IN 26 COUNTRIES'. A row of logos follows: NPA, MAX/NOX, FDA-NDIN with a checkmark, NO3 T NITRATE, and cGMP. Two columns of amino acid nitrates are listed: CREATINE NITRATE, ARGININE NITRATE, BCAA NITRATE, CITRULLINE NITRATE, BEETROOT NITRATE, BETAINE NITRATE, BETA ALANINE NITRATE, PEA NITRATE, GLUTAMINE NITRATE, and GLYCINE NITRATE. A paragraph at the bottom explains the patent coverage and encourages licensing. The footer text 'Speak with us about licensing, custom formulations, and exclusive compounds.' is in italics.

ThermoLife
INTERNATIONAL

WWW.NO3-T.COM WWW.MAXNOX.INFO INFO@THERMOLIFE.COM

PATENTED NITRATE TECHNOLOGY

19 NITRATE RELATED PATENTS • MORE THAN 450 VALID CLAIMS • PATENT COVERAGE IN 26 COUNTRIES

NPA MAX/NOX FDA-NDIN ✓ NO3 T NITRATE cGMP

CREATINE NITRATE BETAINE NITRATE
ARGININE NITRATE BETA ALANINE NITRATE
BCAA NITRATE PEA NITRATE
CITRULLINE NITRATE GLUTAMINE NITRATE
BEETROOT NITRATE GLYCINE NITRATE

If you are interested in making a dietary supplement with nitrates in it there is a very good chance your intended use or composition is covered by one or more of the 450 valid claims in our patent portfolio, so make sure to speak with us about a license. We are the only legitimate source for patented and licensed amino acid nitrates.

Speak with us about licensing, custom formulations, and exclusive compounds.

ThermoLife sues companies that refuse to purchase licenses from it, both to coerce those companies into paying licensing fees, and as a warning to other targeted competitors.

19. Upon information and belief, ThermoLife has filed numerous lawsuits against dietary supplement manufacturers and retailers for the sole purpose of coercing settlements, licensing agreements, and supply contracts for allegedly patented ingredients, and has received significant sums of money as a result of this coercion. However, courts have held that ThermoLife's litigation tactics are improper. E.g., *ThermoLife Int'l, LLC v. GNC Corp.*, 922 F.3d

1347, 1355 (Fed. Cir. 2019) (ThermoLife and counsel brought ““frivolous claims,”” and their ““motivation was seemingly to extract nuisance-value settlements””).

C. ThermoLife targets HumanN for harassment, intimidation, and serial litigation

20. By early 2016, ThermoLife had set its sights on HumanN. On March 2, 2016 ThermoLife’s counsel sent a demand letter to HumanN, asserting that HumanN’s Neo40 product infringed the ’140 Patent.

21. On March 18, 2016, HumanN responded to ThermoLife’s counsel correspondence, detailing why ThermoLife’s counsel’s contentions regarding infringement were incorrect. ThermoLife thus knew by March 2016 that HumanN does not practice (and cannot infringe) the ’140 Patent, and that HumanN had no interest in a ThermoLife license.

i. ThermoLife files, then voluntarily dismisses, its first suit against HumanN

22. Notwithstanding HumanN detailed response, on June 27, 2016, ThermoLife filed suit in the District of Arizona, Case No. 16-cv-2070, accusing HumanN’s SuperBeets, BeetElite, and Neo40 of infringing the ’140 Patent (“*ThermoLife I*”).

23. ThermoLife did not, however, litigate its first infringement suit against HumanN. Instead, the case was stayed on September 2, 2016. Notwithstanding this stay, on December 31, 2016, ThermoLife sent HumanN a letter threatening to bring more meritless litigation against HumanN if it did not acquiesce to ThermoLife’s demands.

24. HumanN refused to be cowed, and on January 3, 2018, ThermoLife voluntarily dismissed its first infringement suit.

ii. ThermoLife files, then voluntarily dismisses, its second suit against HumanN

25. The dismissal of *ThermoLife I* did not, however, deter ThermoLife from continuing to demand that HumanN license patents it did not practice. On September 3, 2018, ThermoLife’s owner, Ronald Kramer, sent an email to Joel Kocher, HumanN’s co- founder and CEO, threatening

that if he did not “grasp what is going to happen next” and “make a deal with us and take a license before that happens and it’s too late” then ThermoLife would “crippl[e] HumanN.” See Exhibit 1 attached hereto.

26. ThermoLife demanded a substantial royalty and up-front payment from HumanN, declaring: “We say the price, and either you agree, or we sue you. That is all.”

27. In the email, ThermoLife threatened to put HumanN “out of business.” (“YOU are not sharing any of the golden eggs with us so why should we care about killing your Golden Goose?”). Bragging that “[a] full legal assault is now 1000% ready to implement in case we need to declare war,” and that it would be “fun” “to implement the strategy we have prepared to systematically dismantle You and HumanN,” ThermoLife told HumanN it had “10 days to salvage the future of your company[.]” ThermoLife then declared that: “we have no problem killing your proverbial goose, by skinning it alive, then gutting it and eating it for ourselves.”¹

28. HumanN refused to surrender to ThermoLife’s oddly vivid and personal threats, and on September 20, 2018, ThermoLife again sued HumanN in the District of Arizona, Case No. 18-cv-2980, this time asserting violations of the Lanham Act, 15 U.S.C. § 1125(a), as well as

¹ ThermoLife’s explicitly violent threats are made more ominous by the reputation of the sender. Ron Kramer, ThermoLife’s owner, started that business after his felony conviction for illegally selling steroids. Kramer later pled guilty to a charge of possession of controlled substances, and after sentencing was placed on a one-year probation. Kramer also has an established history of violence, having been charged with aggravated assault in Maricopa County, and later pleading guilty to a charge of endangerment in a separate incident. Kramer also was charged with assault related to an incident at the Phase 54 nightclub in Chandler, Arizona. Notably, Kramer’s felony conviction may explain why ThermoLife sells licenses and ingredients but not finished products. The Centers for Medicare & Medicaid Services do not do business with companies run by felons. 42 C.F.R. § 424.530(a)(3) & § 424.535 (a)(3) (provider or supplier’s enrollment in Medicare disallowed due to owner or managing employee’s felony conviction); 42 U.S.C. § 1320a-7(a)(4) (mandatory exclusion based on felony drug convictions).

raising claims of false patent marking—alleging HumanN did not practice the patents it had licensed from UT, and for which it was paying royalties—and other torts (“*ThermoLife II*”).

29. On April 1, 2019, the Court granted HumanN’s motion to dismiss ThermoLife’s newest complaint, and dismissed without prejudice all of the claims ThermoLife had brought against HumanN. *ThermoLife Int’l, LLC v. Neogenis Labs, Inc.*, Case No. 18-cv-2980, 2019 WL 1438293 (D. Ariz. Apr. 1, 2019). ThermoLife was given leave to amend its pleading, and after ThermoLife did so, the Court again granted in part HumanN’s motion to dismiss the amended pleading. *ThermoLife Int’l, LLC v. Neogenis Labs, Inc.*, 411 F. Supp. 3d 486 (D. Ariz. 2019) (holding, in part, that: “Plaintiff has alleged no factual support for its contention that Neo40 does not practice the three patents.”)

30. On July 1, 2021, after filing a Second Amended Complaint in *ThermoLife II*, ThermoLife voluntarily dismissed—again without prejudice—its claims in *ThermoLife II*.

iii. ThermoLife files its third suit against HumanN

31. On February 11, 2021, while *ThermoLife II* was still pending, ThermoLife filed the instant suit in this Court (“*ThermoLife III*”). *ThermoLife III* asserts that HumanN’s Neo40, BeetElite, and SuperBeets products infringe the Asserted Patents. But consistent with its pattern of filing—but not litigating—suits against HumanN, ThermoLife never served its newest infringement action on HumanN.

D. ThermoLife repeatedly interferes with HumanN’s business relationship with Amazon

32. At the same time ThermoLife was raising (and then abandoning) serial lawsuits against HumanN, it was also engaging in extra-judicial efforts to damage HumanN’s business—and in particular, its business relationship with Amazon.

i. ThermoLife’s false claims of infringement to Amazon in 2019 caused HumanN to lose sales

33. HumanN has built an online customer base for its nitric oxide supplementation products, including Neo40, BeetElite, and its SuperBeets line of products, through amazon.com that includes many repeat customers.

34. In March 2019—before Amazon adopted the PEP mechanism ThermoLife has since repeatedly exploited—Amazon notified HumanN that ThermoLife had accused HumanN’s SuperBeets, BeetElite, and Neo40 of infringing the ’531 Patent. During the course of *ThermoLife II*, ThermoLife produced a letter it claims to have sent to Amazon, dated February 26, 2019, that accused a number of companies, including HumanN, of infringing on a variety of ThermoLife’s patents. In a chart attached to this letter, ThermoLife accused HumanN’s SuperBeets, BeetElite, and Neo40 of infringing the ’140 Patent and demanded that Amazon “take immediate action to stop the sale” of the accused products “on Amazon.com.” For its part, Amazon apparently understood ThermoLife’s claim to invoke the ’531 patent and not the ’140 patent.

35. Regardless of which patent ThermoLife actually invoked, ThermoLife’s assertions were false. HumanN does not infringe the ’531 Patent, which purports to teach a combination of enumerated amino acids with a nitrite or a nitrate. Notably, SuperBeets and BeetElite demonstrably are not formulated with any of the enumerated amino acids claimed in the ’531 Patent. *See infra* ¶¶ 75-81.

36. HumanN also does not infringe any valid and enforceable claim of the ’140 Patent. *See infra* ¶¶ 62-68. ThermoLife knew that HumanN does not infringe the ’140 Patent by March 2016, years before it sent its February 26, 2019 letter to Amazon.

37. However, as a result of ThermoLife’s misrepresentations of infringement, Amazon removed certain listings for HumanN’s products, including SuperBeets, BeetElite, and Neo40, from its website. HumanN was then forced to expend significant efforts to restore its product pages

and was unable to sell some of its top selling products on amazon.com during this time. It was not until April 4, 2019 that these products were reinstated.

38. In addition to the revenue HumanN lost and the time HumanN spent as a result of ThermoLife's false claims to Amazon, HumanN's seller ranking declined causing further harm.

ii. ThermoLife continues its effort to interfere with HumanN's business relationship with Amazon by falsely claiming infringement

39. Since its first effort to interfere with HumanN's business relationship with Amazon, ThermoLife has gone back to the online giant at least three more times, continuing to claim that HumanN's products infringe ThermoLife's patents when they do not, in an attempt to interfere with Human's business relationship with Amazon. Notably, each of these three recent efforts took place *after* ThermoLife filed *ThermoLife III* in this Court.

40. ThermoLife has never served its Complaint in this action. Nevertheless, on April 1, 2021, when this suit was almost two months old, ThermoLife initiated Amazon's PEP against HumanN, in which it accused HumanN's BeetElite and SuperBeets products of infringing claim 45 of the '968 Patent—one of the patents in suit.

41. On information and belief, the purpose of Amazon's PEP is to evaluate the merits of patent infringement claims against products listed on amazon.com. A patent owner or exclusive licensee initiates Amazon's PEP unilaterally by submitting a Patent Neutral Evaluation Agreement ("Agreement") to Amazon that identifies products listed on amazon.com that allegedly infringe a specified claim of the patent holder's asserted patent. Once submitted, Amazon sends that Agreement to the accused infringer, who lists the accused products on amazon.com, with an ultimatum to either: (1) submit to the evaluation by executing the Agreement within three weeks and paying \$4,000; or (2) have their listings on accused products removed from amazon.com. If

an accused infringer chooses not to participate in the evaluation, Amazon will remove its accused products from amazon.com.

42. If the seller executes the Agreement, the Amazon-appointed evaluator then reviews the patent holder's patent infringement claim and makes a yes or no decision about whether the patent covers the product listings. There is no discovery, trial, or hearing allowed. The only two defenses other than non-infringement based on failure to meet one or more claim limitations are: (i) a court has already found the asserted claim invalid or unenforceable; or (ii) that the accused products were on sale one year or more before the asserted patent's earliest effective filing date.

43. By instituting Amazon's PEP against HumanN after filing the instant action, ThermoLife attempted to obtain from Amazon what it had already chosen to seek from this Court: an injunction against HumanN's sales of the Accused Products.

44. Finding a "substantial risk of irreparable harm to HumanN, and to the jurisdiction of this Court, if ThermoLife were to attempt to enforce or further pursue extrajudicial review of patent infringement claims relating to the products already accused of infringement in this litigation," this Court granted HumanN's Emergency Application for Temporary Restraining Order. See ECF 33 (Apr. 21, 2021), at 2 ("effective immediately, ThermoLife shall refrain from taking any action to further pursue evaluation through Amazon's Patent Evaluation Process any of its patent infringement claims already pending in this case (i.e., any claims involving any of the asserted patents and accused products in this case) until further order of this Court").

45. On April 30, 2021, the Court denied HumanN's request for a preliminary injunction on the grounds that the "Neutral Patent Evaluation Process at issue has been suspended by Amazon.com." ECF No. 41 at 1. However, the Court warned that "if the Neutral Patent Evaluation

Process at issue is resumed after this Order, the Court will exercise its discretion to resolve all issues in this case on an expedited schedule.” *Id.* at 2.

46. On July 6, 2021, HumanN received another notice that ThermoLife had indeed resumed the Amazon PEP. Ruling from the bench, the Court extended its previously issued temporary restraining order, barring ThermoLife from pursuing the process with Amazon. *See* Minute Entry, ECF 45 (Jul. 8, 2021); *see also* Tr. of Proceeding held July 8, 2021, ECF 47 (Jul. 21, 2021), at 4:15–22. Before the Court could issue a written Order, Amazon rejected ThermoLife’s request to resurrect the PEP.

47. In spite of these previous Orders, on November 2, 2021, HumanN received notice that ThermoLife *yet again* reengaged the Amazon’s PEP against HumanN, this time asserting that HumanN had infringed the ’813 Patent. Amazon initially refused to entertain ThermoLife’s latest PEP. However, after receiving “additional information” (coming, upon information and belief, from *ex parte* communications with ThermoLife’s counsel), Amazon subsequently reversed its decision.

48. HumanN does not infringe the ’813 Patent, but would prefer to adjudicate all of ThermoLife’s allegations of infringement in an appropriate forum. On November 24, 2021, HumanN sought leave to amend its Counterclaims to formally add the ’813 Patent to this litigation.

49. A hearing on HumanN’s motion for leave to amend its Counterclaims and for its renewed application for a TRO On December 7, 2021. On December 21, 2021, the Court granted HumanN leave to file the First Amended Counterclaims, and also enjoined ThermoLife from further pursuing evaluation of any of the patents at issue in this case through Amazon’s PEP. ECF 89.

50. On information and belief, if not enjoined by this Court, ThermoLife would

continue to attempt to maliciously interfere with HumanN's business relationship with Amazon by falsely claiming infringement of patents ThermoLife knows HumanN does not infringe, to HumanN's ongoing economic and reputational injury.

E. ThermoLife has disparaged HumanN and its products in false commercial advertising

51. Immediately after it filed its complaint in *ThermoLife II*, and months before it effected service of its initial pleading in that action, ThermoLife issued a "press release," in which ThermoLife made a number of literally false or misleading statements, with an intent to inflict a competitive injury on HumanN. These included but were not limited to ThermoLife's assertions that

- A. "HumanN unfairly competes with ThermoLife in the emerging nitrate/nitrite supplementation market by falsely advertising and falsely marking its products with patent numbers that HumanN's products do not practice."
- B. "Through the use of sophisticated internet marketing tools, HumanN's massive internet presence spreads HumanN's lies to anyone who runs a Google search for 'Nitric Oxide.'"
- C. "[A]fter tricking potential customers about the need for HumanN's 'Nitric Oxide' supplements, HumanN falsely advertises that it has the 'patented' 'Nobel Prize winning' cure for Nitric Oxide deficiency"
- D. "[I]n many instances, [HumanN's] products do not practice any patent held by HumanN."
- E. "Human's falsely advertised method for testing Nitric Oxide levels is not 'patent pending' as claimed in HumanN's advertising . . . and, worse still, it just doesn't work."
- F. "In layman's terms, contrary to HumanN's false advertising, you cannot test whether an individual is 'N-O deficient' by simply testing their saliva."
- G. "HumanN is fully aware of these facts and they are just blatantly and intentionally lying to consumers to try and fool them into buying HumanN's products."
- H. "HumanN's advertising makes at least four separate and distinct false claims: (1) that HumanN's top-selling SuperBeets, BeetElite, and Neo40

products practice six patents that HumanN exclusively licensed from the University of Texas; (2) that the licensed patents protect ‘patented Nitric Oxide technology’; (3) that HumanN’s research is ‘Nobel- Prize winning’; and (4) ‘there is not any product out there, despite the dozens if not hundreds of products, Nitric Oxide products on the market (food or supplement), that do what our technology does.’”

- I. “HumanN is fully aware that its advertising statements are false.”
- J. “HumanN’s SuperBeets and BeetElite products . . . do not, and have not ever, practiced one single patent claim covered by any of the six patents listed on the products [sic] packaging”
- K. “[N]one of patents [sic] that HumanN licenses and falsely marks on its products protect ‘patented Nitric Oxide technology.’”
- L. “[C]ontrary to HumanN’s massive and willful false advertising campaign, no one, especially HumanN . . . holds a patent ‘for increasing the Nitric Oxide in an individual.’”
- M. “When reached for comment, ThermoLife’s founder, Ron Kramer, offered the following statement: “ThermoLife is the market leader in nitrate/nitrite technology HumanN relies on false representation after false representation to deceive consumers into purchasing HumanN’s products, instead of products sold and licensed by ThermoLife. ThermoLife holds the patents for the technology in HumanN’s products, not HumanN. HumanN is stealing from ThermoLife and intentionally lying to its customers yet I personally gave HumanN every opportunity to do the right thing here before filing suit but to no avail. HumanN’s thinks they are above the law and entitled to steal from us and lie to consumers”

PR Newswire, ThermoLife Serves HumanN a Beet Down (Sept. 24, 2018), Exhibit 2 attached hereto. ThermoLife’s Press Release—which remains published and accessible to HumanN’s customers, potential customers, and business associates to this day—then solicited other companies to buy a license from ThermoLife to market HumanN’s products: “If there are any legitimate companies out there who want to fill the upcoming void and market HumanN’s formulas with a license from ThermoLife, or vastly improve on HumanN’s products and take the market share with our new high nitrate beet root extract, please do not hesitate to contact me.” *Id.*

52. ThermoLife’s advertising is false and misleading. HumanN does not unfairly compete, it does not “lie” to or “trick” its customers, and its products practice the patents with which they are marked. Indeed, as reflected in the *ThermoLife II* Court’s April 1, 2019 Order, when ThermoLife published its Press Release, ThermoLife in fact had asserted no viable claims against HumanN. *ThermoLife Int’l, LLC v. Neogenis Labs, Inc.*, Case No. 18-cv-2980, 2019 WL 1438293 (D. Ariz. Apr. 1, 2019) (dismissing all claims).

53. HumanN’s reputation has suffered as a result of ThermoLife’s false advertising. For example, a radio station and a creative agency refused to work with HumanN, citing the press release as the key reason. Further, HumanN received messages of concern from customers who had read the press release and, on information and belief, lost business as a result.

F. ThermoLife falsely advertises its own products

54. In addition to sublicensing its portfolio of patents, ThermoLife, acting as a middleman, re-sells ingredients to supplement manufacturers that it purchases from manufacturers abroad. In its own pleadings against HumanN in *ThermoLife II*, ThermoLife represents it competes with HumanN through its sales of ingredients to HumanN’s direct competitors in the N-O supplement market.

55. These direct competitors and their customers—the consumers who ultimately purchase and take these supplements—insist that the ingredients used in these products are lawful, safe and pure. In order to communicate this message of legality, safety and purity, on its website, ThermoLife advertises that the ingredients it sells are the subject of New Dietary Ingredient Notifications (“NDIN”) with the U.S. Food and Drug Administration (“FDA”), and that the ingredients are “cGMP Certified.”

56. The Federal Food, Drug, and Cosmetic Act (the FD&C Act) requires that manufacturers and distributors who wish to market supplements that contain “new dietary

ingredients” notify the FDA about these ingredients. 21 U.S.C. 350b(a), (c), & (d). Generally, the notification must include information that is the basis on which the manufacturer or distributor has concluded that a supplement containing a new dietary ingredient will reasonably be expected to be safe under the conditions of use recommended or suggested in the labeling. *Id.* § 350b(a)(2).

57. The FDA maintains a publicly-available list of ingredients that are the subject of an NDIN. Of the ten ingredients ThermoLife advertises as having an “FDA-NDIN,” *only* creatine nitrate is actually the subject of an NDIN. ThermoLife’s advertising of its remaining nine ingredients, including arginine nitrate, BCAA nitrate, citrulline nitrate, beetroot nitrate, betaine nitrate, beta alanine nitrate, peat nitrate, glutamine nitrate, and glycine nitrate, as being the subject of an FDA NDIN is literally false.

58. The FDA also promulgates regulations regarding current Good Manufacturing Practices, or “cGMP.” *See* 21 C.F.R. part 111. These cGMPs help ensure that foods and supplements are pure and safe. Pursuant to these regulations, any person who manufactures, packages, labels, or holds a dietary supplement must establish and follow cGMP.

59. ThermoLife’s representation that its ingredients are “cGMP certified” is also literally false. ThermoLife has admitted, on the record, that it does not actually know who manufactures its nitrate ingredients. *See ThermoLife Int’l, LLC v. Neogenis Labs, Inc.*, Case No. 18-cv-2980, Tr. of Proceeding held on Jul. 6, 2021, ECF 233, at 57:9-58:2 (Hearing on Discovery Disputes). Without knowing the identity of the manufacturer of its ingredients, ThermoLife cannot truthfully certify that the ingredients are manufactured under the cGMP standards that ensure its ingredients are pure and safe.

60. On information and belief, ThermoLife’s false representations that the ingredients it provides to HumanN’s competitors are the subject of NDINs and are cGMP compliant gives

companies incorporating those falsely advertised ingredients a competitive advantage. Consumers purchasing N-O supplementation products would be less likely to purchase products if they knew that the ingredients are not compliant with cGMP standards and had not been vetted by the FDA. ThermoLife's false assurances to its customers and to consumers are thus material.

61. On information and belief, ThermoLife's false representations that its products are cGMP certified and the subject of NDINs have allowed ThermoLife to make sales it otherwise would not have made, and have injured HumanN.

COUNT I

Declaratory Judgment of Non-Infringement of the '140 Patent

62. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

63. ThermoLife has alleged that it is the exclusive licensee of the '140 Patent.

64. By asserting the '140 Patent against HumanN, ThermoLife has taken the position that HumanN infringes at least one claim of the '140 Patent.

65. HumanN has not and does not infringe any valid and enforceable claim of the '140 Patent, either directly or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever. By way of example and without limitation, HumanN does not infringe at least claim 1 of the '140 Patent because none of the Accused Products satisfy the following claim limitation: "administration of said inorganic nitrate and/or nitrite will result in reduced oxygen consumption (V02) in and enhanced physical performance of said mammal during the physical exercise as compared with the physical performance of said mammal during the physical exercise in the absence of administration of the 25 inorganic nitrate and/or nitrite."

66. An actual controversy exists between HumanN and ThermoLife as to HumanN's non-infringement of the '140 Patent as evidenced by ThermoLife's Complaint and HumanN's Answer, Defenses, Counterclaims and Request for Injunctive Relief in this action.

67. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the '140 Patent.

68. HumanN seeks, and is entitled to, a declaration from this Court that HumanN has not and does not infringe any valid and enforceable claim of the '140 Patent, either directly, or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever.

COUNT II

Declaratory Judgment of Invalidity of the '140 Patent

69. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

70. By asserting the '140 Patent against HumanN, ThermoLife has taken the position that the '140 Patent is valid and enforceable.

71. Each claim of the '140 Patent is invalid for failing to comply with the patent laws, including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and 112, and the rules and regulations pertaining thereto. By way of example and without limitation, the claims are invalid under 35 U.S.C. §§ 102 and/or 103. Beet root was a known supplement for improving athletic performance, and beet root inherently includes inorganic nitrates. See, e.g., https://web.archive.org/web/20060521193831/http://www.nutraceutical.com/search/view_product.cfm?product_index=7661441 (605 mg capsule available at least as early as May 2006); https://www.amazon.com/Solaray-Beet-605mg-100-Capsules/dp/B00014ELDW/ref=cm_cr_arpd_product_top?ie=UTF8. The recommended dosage on the archived Neutraceutical webpage

overlaps with the dosage recited in claim 1 of the '140 Patent. The above Amazon page explicitly suggests taking beet root before exercise: "Beet Root may be a beneficial supplement to take before a workout or other strenuous exercise." And the Archived Nutraceutical page suggests daily intake, so a person taking for improved athletic performance would inherently be within 1-3 days of exercise. Finally, the effects during exercise are purported to be an inherent effect of the dosage of beetroot, so the effects are inherent. Further, the claims of the '140 Patent, including claim 1, are invalid under 35 U.S.C. § 112 for being indefinite because, for example and without limitation, the specification fails to describe with reasonable certainty the scope of the claim with respect to the limitation "administration of said inorganic nitrate and/or nitrite will result in reduced oxygen consumption (V_{O2}) in and enhanced physical performance of said mammal during the physical exercise as compared with the physical performance of said mammal during the physical exercise in the absence of administration of the 25 inorganic nitrate and/or nitrite."

72. An actual controversy exists between HumanN and ThermoLife as to the invalidity of the '140 Patent as evidenced by ThermoLife's Complaint and HumanN's Answer, Defenses, Counterclaims and Request for Injunctive Relief in this action.

73. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the '140 Patent.

74. HumanN seeks, and is entitled to, a declaration from this Court that each claim of the '140 Patent is invalid.

COUNT III

Declaratory Judgment of Non-Infringement of the '531 Patent

75. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

76. ThermoLife has alleged that it is the owner of the '531 Patent.

77. By asserting the '531 Patent against HumanN, ThermoLife has taken the position that HumanN infringes at least one claim of the '531 Patent.

78. HumanN has not and does not infringe any valid and enforceable claim of the '531 Patent, either directly or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever. By way of example and without limitation, HumanN does not infringe at least claim 62 of the '531 Patent because none of the Accused Products satisfy the following claim limitations: "at least one isolated amino acid compound selected from the group consisting of Agmatine, Beta Alanine, Citrulline, Creatine, Glutamine, L-Histidine, Isoleucine, Leucine, Norvaline, Ornithine, Valine, Aspartic Acid, Cysteine, Glycine, Lysine, Methionine, Praline, Tyrosine, and Phenylalanine."

79. An actual controversy exists between HumanN and ThermoLife as to HumanN's non-infringement of the '531 Patent as evidenced by ThermoLife's Complaint and HumanN's Answer, Defenses, Counterclaims and Request for Injunctive Relief in this action.

80. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the '531 Patent.

81. HumanN seeks, and is entitled to, a declaration from this Court that HumanN has not and does not infringe any valid and enforceable claim of the '531 Patent, either directly, or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever.

COUNT IV

Declaratory Judgment of Invalidity of the '531 Patent

82. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

83. By asserting the '531 Patent against HumanN, ThermoLife has taken the position that the '531 Patent is valid and enforceable.

84. Each claim of the '531 Patent is invalid for failing to comply with the patent laws, including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and 112, and the rules and regulations pertaining thereto. By way of example and without limitation, beet root was a known supplement for improving athletic performance, and beet root inherently includes inorganic nitrates. See, e.g., https://web.archive.org/web/20060521193831/http://www.nutraceutical.com/search/view_product.cfm?product_index=7661441 (605 mg capsule available at least as early as May 2006); https://www.amazon.com/Solaray-Beet-605mg-100-Capsules/dp/B00014ELDW/ref=cm_cr_arpd_product_top?ie=UTF8. Ornithine was also a well-known supplement for improving athletic performance. See, e.g., <https://pubmed.ncbi.nlm.nih.gov/2770269/> (increase total strength and lean body mass relative to placebo); <https://web.archive.org/web/20061110082314/http://www.sourcenaturals.com/products/GP1182/> (commercially available November 10, 2006, “a precursor of arginine, which is necessary for the synthesis of creatine, an important energy provider for muscles” and “Use before exercise...”). Ornithine was also commercially available, as a separate compound from nitrate) at least as early as November 10, 2006 (see above) and November 15, 2006. See, e.g., https://web.archive.org/web/20061115072009/http://www.nutraceutical.com/search/view_product.cfm?product_index=3264541 (500 mg capsule). It would have been obvious for a person of ordinary skill in the art to simply combine these two well-known ingredients as a combined supplement for improving athletic performance. A solid form was one of a limited number of options (i.e., liquid or solid). Further, the claims of the '531 Patent, including claim 62, are invalid under 35 U.S.C. § 112 for being indefinite because, for example and without limitation, the

specification fails to describe with reasonable certainty the scope of the claim with respect to the limitation “wherein the at least one isolated amino acid compound is a separate compound than the at least one non-ester nitrate compound.”

85. An actual controversy exists between HumanN and ThermoLife as to the invalidity of the ’531 Patent as evidenced by ThermoLife’s Complaint and HumanN’s Answer, Defenses, Counterclaims and Request for Injunctive Relief in this action.

86. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the ’531 Patent.

87. HumanN seeks, and is entitled to, a declaration from this Court that each claim of the ’531 Patent is invalid.

COUNT V

Declaratory Judgment of Non-Infringement of the ’968 Patent

88. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

89. ThermoLife has alleged that it is the exclusive licensee of the ’968 Patent.

90. By asserting the ’968 Patent against HumanN, ThermoLife has taken the position that HumanN infringes at least one claim of the ’968 Patent.

91. HumanN has not and does not infringe any valid and enforceable claim of the ’968 Patent, either directly or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever.

92. An actual controversy exists between HumanN and ThermoLife as to HumanN’s non-infringement of the ’968 Patent as evidenced by ThermoLife’s Complaint and HumanN’s Answer, Defenses, Counterclaims and Request for Injunctive Relief in this action.

93. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the '968 Patent.

94. HumanN seeks, and is entitled to, a declaration from this Court that HumanN has not and does not infringe any valid and enforceable claim of the '968 Patent, either directly, or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever.

COUNT VI

Declaratory Judgment of Invalidity of the '968 Patent

95. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

96. By asserting the '968 Patent against HumanN, ThermoLife has taken the position that the '140 Patent is valid and enforceable.

97. Each claim of the '968 Patent is invalid for failing to comply with the patent laws, including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and 112, and the rules and regulations pertaining thereto. By way of example and without limitation, the use of beet root and/or beet root juice as a supplement for improving athletic performance was known before the critical date of the '968 Patent. Beet root and beet root juice are botanicals that inherently include nitrate. The use of sodium nitrite (a nitrite salt) as a preservative for food products was also known before the critical date of the '968 Patent. The creation of a supplement containing beet root and/or beet root juice and using sodium nitrite as a preservative at the ratios recited in claim 45 of the '968 patent would have been obvious to a person of skill in the art at the time.

98. An actual controversy exists between HumanN and ThermoLife as to the invalidity of the '968 Patent as evidenced by ThermoLife's Complaint and HumanN's Answer, Defenses, Counterclaims and Request for Injunctive Relief in this action.

99. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the '968 Patent.

100. HumanN seeks, and is entitled to, a declaration from this Court that each claim of the '968 Patent is invalid.

COUNT VII

Declaratory Judgment of Non-Infringement of the '813 Patent

101. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

102. Upon information and belief, ThermoLife is the exclusive licensee of the '813 Patent.

103. By engaging in Amazon's PEP, ThermoLife has taken the position that HumanN infringes at least one claim of the '813 Patent.

104. HumanN has not and does not infringe any valid and enforceable claim of the '813 Patent, either directly or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever. For example, and without limitation, HumanN's SuperBeets Heart Chews, SuperBeets Energy Chews, SuperBeets Memory + Focus Chews, D3 Chews, and SuperBeets Black Cherry products, alone or in combination, do not infringe the '813 Patent directly or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever.

105. An actual controversy exists between HumanN and ThermoLife as to HumanN's non-infringement of the '813 Patent as evidenced by ThermoLife's engagement of Amazon's PEP and HumanN's filing of the Petition for Post-Grant Review and this Counterclaim

106. A judicial decision is necessary and appropriate so that HumanN may ascertain its rights with respect to the '813 Patent.

107. HumanN seeks, and is entitled to, a declaration from this Court that HumanN has not and does not infringe any valid and enforceable claim of the '813 Patent, either directly, or indirectly, contributorily or by inducement, literally or under the doctrine of equivalents, or in any manner whatsoever.

COUNT VIII

Request for Preliminary and Permanent Injunction

108. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

109. ThermoLife filed this patent infringement action against HumanN on February 11, 2021, in the United States District Court for the Western District of Texas.

110. In so doing, ThermoLife assented to this Court's jurisdiction over its patent infringement claims against the Accused Products, including its claims that HumanN's SuperBeets and BeetElite products infringe its patents.

111. In its Complaint, ThermoLife also requests that the Court grant an injunction against HumanN to prohibit further alleged infringement of the Asserted Patents.

112. After filing its Complaint in this action, however, ThermoLife filed a claim with Amazon through which it again accuses HumanN's SuperBeets and BeetElite products of infringing the '968 Patent and '813 Patents and seeks institution of Amazon's Patent Process against HumanN.

113. Immediate and irreparable harm will result from ThermoLife's invocation and use of Amazon's PEP against HumanN. If HumanN either (i) refuses to participate in the Patent Neutral Evaluation or (ii) agrees to participate in the PEP and is found to infringe the '968 Patent or '813 Patent by the evaluator, then HumanN will no longer be able to sell its SuperBeets, BeetElite, or Neo40 products on Amazon's website.

114. If HumanN is prohibited from selling its SuperBeets and BeetElite products on www.amazon.com, HumanN will suffer monetary loss, reputational damage, and loss of goodwill. Because HumanN has no adequate remedy at law, it seeks preliminary and permanent injunctive relief.

115. ThermoLife's conduct supports granting preliminary and permanent injunctive relief to prevent it from further pursuing, requesting, or initiating evaluation through Amazon's PEP of ThermoLife's claims that HumanN's SuperBeets, BeetElite, and Neo40 products infringe any patent for which ThermoLife is the assignee and/or exclusive licensee, including but not limited to, U.S. Patent Nos. 10,555,968, 9,180,140, 8,455,531, and 10,842,813.

116. Accordingly, HumanN seeks an order enjoining ThermoLife, and all others in active concert or participation with them, from further pursuing requesting, or initiating evaluation through Amazon's PEP of ThermoLife's claims that HumanN's SuperBeets, BeetElite, and Neo40 products infringe any patent for which ThermoLife is the assignee and/or exclusive licensee, including but not limited to, U.S. Patent Nos. 10,555,968, 9,180,140, 8,455,531, and 10,842,813.

COUNT IX

False Advertising Under § 43(a) of the Lanham Act 15 U.S.C. § 1125(a)(1)(B)

117. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

118. ThermoLife's conduct as alleged herein constitutes false advertising in violation of the Lanham Act, which provides a right to a civil action against:

- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

....

- (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

And provides that such person "shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C. § 1125(a)(1)(B).

119. In commercial speech published to a national audience, ThermoLife made false and misleading statements concerning HumanN and its products, including SuperBeets, BeetElite, and Neo40, including but not limited to the statements made in its Press Release identified above.

120. ThermoLife's commercial speech constitutes "advertising." While the commercial speech falsely and misleadingly disparaged both HumanN and the quality of HumanN's products, ThermoLife undertook this false advertising for the purpose of influencing its own customers and potential customers—including supplement manufacturers and distributors—into entering and/or maintaining patent sub-licenses with ThermoLife, and for consumers to purchase products manufactured and distributed by ThermoLife's other sub-licensees.

121. In addition, on its own website, ThermoLife falsely advertises its ingredients as the subjects of NDINs and as cGMP certified. But only one of the ingredients listed by ThermoLife is the subject of an NDIN, and ThermoLife's advertising and promotion of its other nine ingredients as the subject of NDINs is literally false.

122. Moreover, ThermoLife has admitted it does not know who actually manufactures its ingredients. Without knowing the identity of the manufacturers, ThermoLife cannot truthfully certify that the ingredients are cGMP compliant.

123. ThermoLife's false and misleading statements have deceived or have the capacity to deceive a substantial segment of potential consumers.

124. ThermoLife's false and misleading statements are likely to influence the purchasing decisions of the consuming public and are thus material.

125. ThermoLife's false and misleading statements have an effect on interstate commerce, as its commercial speech, including its Press Release and its website, was distributed and consumed nationwide. Moreover, HumanN's products and ThermoLife's ingredients are sold and shipped to customers nationwide.

126. As a direct and proximate result of ThermoLife's false advertising, HumanN has suffered, and will continue to suffer, lost sales and damage to its business, reputation, and goodwill. Pursuant to 15 U.S.C. § 1117, HumanN is entitled to damages for ThermoLife's Lanham Act violations, in an amount to be determined at trial, and recovery of HumanN's costs in this action.

127. ThermoLife's acts are willful, wanton, and calculated to deceive, and are undertaken in bad faith, making this an exceptional case under 15 U.S.C. § 1117(a), entitling HumanN to recover its reasonable attorneys' fees.

128. Unless enjoined by this Court, ThermoLife's acts will irreparably injure HumanN's goodwill and erode its market share. Pursuant to 15 U.S.C. § 1116, HumanN is entitled to permanent injunctive relief to prevent ThermoLife's continuing acts.

COUNT X

Tortious Interference with Prospective Business Relations

129. HumanN incorporates by reference the preceding paragraphs as though fully set forth herein.

130. For years, HumanN has had a valid contractual relationship or business expectancy with third parties, including the on-line retailer Amazon, and consumers who purchase HumanN's products through Amazon. HumanN sells many of its functional foods and dietary supplements on Amazon and has built an online customer base through Amazon that includes many repeat

customers. HumanN had a reasonable expectation of continuing to sell products to new and existing customers through Amazon.

131. ThermoLife knew that HumanN had this valid contractual relationship and business expectancy with Amazon and consumers who purchase HumanN's products through Amazon.

132. Notwithstanding this knowledge—and, indeed, because it knew of this relationship, and wished to injure HumanN—ThermoLife intentionally induced or caused a breach or termination of HumanN's relationship or business expectancy with Amazon and HumanN's customers who purchase HumanN's products through Amazon.

133. Between February 26, 2019 and March 8, 2019, ThermoLife told Amazon that at least three of HumanN's listings on Amazon's site supposedly infringed a ThermoLife patent, including HumanN's products SuperBeets, BeetElite, and Neo40.

134. SuperBeets, Beet Elite, and Neo40 do not infringe on ThermoLife's patents, including the '531 Patent and '140 Patent. ThermoLife knew or should have known that HumanN's products do not infringe these patents, and at the time it sent its February 26, 2019 letter to Amazon, or otherwise communicated its allegations of infringement to Amazon by March 8, 2019, ThermoLife had no good faith belief, or any objective basis for a good faith belief, that HumanN's products infringe these patents. To the contrary, at the time it sent this letter or made these communications, ThermoLife had already sued and voluntarily dismissed a suit against HumanN claiming infringement of the '140 Patent, and it was at that time in litigation against HumanN in *ThermoLife II*. ThermoLife thus knew or should have known that the ingredients of SuperBeets and BeetElite did not include one of the amino acids identified in Claim 1 of the '531 Patent, and that the products did not reduce consumption of oxygen, as is required for the '140 Patent.

ThermoLife thus sent its letter to or communicated with Amazon knowing that its accusations of infringement were false, and it did so maliciously and with an intent to injure HumanN.

135. ThermoLife's scheme worked. As a result of ThermoLife's misrepresentations to Amazon, Amazon removed listings for several of HumanN's products, including SuperBeets, BeetElite, and Neo40. Because of this, customers who typically purchase HumanN's products through Amazon were unable to make their purchases. HumanN lost sales and, on information and belief, lost customers as a result of ThermoLife's actions.

136. HumanN expended significant amounts of time, effort, and money on legal fees to remedy this situation. HumanN was also forced to spend significant effort to restore its product pages and was unable to sell its top selling products on Amazon during this time. It was not until April 4—nearly an entire month later—that these products were reinstated.

137. HumanN is entitled to damages for ThermoLife's tortious conduct.

138. ThermoLife's actions were willful, malicious, and undertaken with the purpose of injuring HumanN. Because ThermoLife knew or should have known that its conduct was reasonably likely to result in injury, damage, or other harm, the award of punitive damages is warranted.

RELIEF REQUESTED

WHEREFORE, HumanN, reserving its right to amend its pleadings and to add additional defenses, affirmative defenses, and counterclaims, respectfully requests that this Court enter judgment in its favor as follows and award HumanN the following relief:

- (a) adjudge and declare that HumanN has not infringed and is not infringing any valid and enforceable claim of the '140 Patent, '531 Patent, '968 Patent, or '813 Patent;
- (b) adjudge and declare that the claims of the '140 Patent, '531 Patent, and '968 Patent are invalid;

- (c) enter an order enjoining ThermoLife, and all others in active concert or participation with it, from further pursuing, requesting, or initiating evaluation through Amazon's PEP of ThermoLife's claims that HumanN's SuperBeets, BeetElite, and Neo40 products infringe any patent for which ThermoLife is the assignee and/or exclusive licensee, including but not limited to, U.S. Patent Nos. 10,555,968, 9,180,140, 8,455,531, and 10,842,813;
- (d) enter judgment in favor of HumanN and against ThermoLife on each of HumanN's counterclaims;
- (e) enter an order under 15 U.S.C. § 1116 permanently enjoining ThermoLife and its agents, servants, employees, attorneys, successors and assigns, and all others in active concert or participation with it from making false or misleading statements in advertising regarding HumanN and/or HumanN's products, and to enjoin them from making false or misleading statements in advertising regarding ThermoLife's own products;
- (f) enter an order requiring ThermoLife to take action to correct any erroneous impression persons may have derived concerning the nature, characteristics or qualities of HumanN and/or its products as a result of ThermoLife's false advertising, including without limitation the placement of corrective advertising;
- (g) enter an order granting HumanN such other relief as the Court may deem appropriate to prevent the public from deriving any erroneous impression concerning the nature, characteristics, qualities or benefits of HumanN's products as a result of ThermoLife's false advertising;
- (h) award HumanN damages under 15 U.S.C. § 1117(a), including treble damages;

- (i) enter an order requiring ThermoLife to pay HumanN damages in an amount sufficient to compensate HumanN for injury it has sustained as a consequence of ThermoLife's unlawful acts in violation of Texas law;
- (j) enter an order finding that ThermoLife acted maliciously, wantonly and/or fraudulently, requiring ThermoLife to pay HumanN punitive damages pursuant to the common law of the State of Texas;
- (k) order an accounting to determine ThermoLife's profits resulting from its illegal activities and such profits be paid over to HumanN, increased as the Court finds to be just under the circumstances of this case pursuant to 15 U.S.C. § 1117(a);
- (l) enter an order finding that this case is an exceptional case and requiring ThermoLife to pay all of HumanN's reasonable attorneys' fees, costs and expenses, including those available under 15 U.S.C. § 1117(a), and any other applicable law;
- (m) enter an order requiring ThermoLife to pay HumanN pre-judgment and post-judgment interest on the damages awarded;
- (n) deny ThermoLife's request for damages, attorneys' fees, costs, and expenses;
- (o) deny ThermoLife's request for injunctive relief;
- (p) dismiss, with prejudice, ThermoLife's Complaint against HumanN; and
- (q) award all other and further relief as the Court may deem just and proper.

Dated: December 22, 2021

Respectfully submitted,

s/Saul Perloff

Brett C. Govett

Texas Bar No. 08235900

Jacqueline G. Baker

Texas Bar No. 24109609

Norton Rose Fulbright US LLP

2200 Ross Avenue, Suite 3600

Dallas, Texas 75201

Telephone: (214) 855-8000

Facsimile: (214) 855-8200

brett.govett@nortonrosefulbright.com

jackie.baker@nortonrosefulbright.com

Stephanie DeBrow

Texas Bar No. 24074119

Michael Pohl

Texas Bar No. 24105942

Gabriel Culver

Texas Bar No. 24116240

Norton Rose Fulbright US LLP

98 San Jacinto Boulevard, Suite 1100

Austin, Texas 78701-4255

Telephone: (512) 536-3094

Facsimile: (512) 536-4598

stephanie.debrow@nortonrosefulbright.com

michael.pohl@nortonrosefulbright.com

gabriel.culver@nortonrosefulbright.com

Saul Perloff

Texas Bar No. 00795128

Bob Rouder

Texas Bar No. 24037400

SHEARMAN & STERLING LLP

300 West 6th Street, Suite 2250

Austin, Texas 78701

Telephone: (512) 647-1970

saul.perloff@shearman.com

bob.rouder@shearman.com

**ATTORNEYS FOR DEFENDANT
HUMAN POWER OF N COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document and Exhibits 1-2 thereto to be electronically filed with the Clerk of the Court using the CM/ECF system for the Western District of Texas and that ECF-system will send a Notice of Electronic Filing to the CM/ECF participants in this case on this the 22nd day of December, 2021.

s/Saul Perloff

Saul Perloff

Attorney for Defendant