

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA

FORTRESS SYSTEMS LLC

Plaintiff,

v.

IOVATE HEALTH SCIENCES,  
INCORPORATED; IOVATE HEALTH  
SCIENCES USA, INCORPORATED; PUMP  
FORMULATIONS, LIMITED; and CELL US  
TRADEMARK, LIMITED

Defendants.

CIVIL NO. 4:07-cv-262

VERIFIED COMPLAINT  
JURY TRIAL DEMANDED

The Plaintiff in the above-captioned matter, Fortress Systems LLC, submits the following as its Verified Complaint against the Defendants, Iovate Health Sciences, Incorporated and Iovate Health Sciences USA, Incorporated, Pump Formulations, Limited, and Cell US Trademark, Limited.

**COMPLAINT**

**NATURE OF THE CASE**

1. This is an action for patent infringement under 35 U.S.C. § 271(a) and trademark infringement under 15 U.S.C. § 1114.
2. Plaintiff seeks to permanently enjoin certain Defendants' patent infringement under 35 U.S.C. section 283 and certain Defendants' trademark infringement under 15 U.S.C. section 1116 and seeks actual damages attributable to infringement, Defendant's profits attributable to infringement, Plaintiff's interests and attorney's fees pursuant to 35 U.S.C. sections 284 and 285 and 15 U.S.C. section 1117.

**PARTIES**

3. Plaintiff Fortress Systems LLC ("FSI") is a Nebraska limited liability corporation

with its principal place of business at 2132 South 156<sup>th</sup> Circle, Omaha, NE 68130. Michael Carnazzo is the president of FSI.

4. On information and belief, Defendant Iovate Health Sciences, Incorporated is a corporation of Canada, with its principal place of business at 5100 Spectrum Way, 4W 5S2 Mississagua, Ontario, Canada, (hereinafter referred to as "Iovate Canada").

5. On information and belief, Defendant Iovate Health Sciences USA, Incorporated is a Delaware corporation with its principal place of business at 3880 Jeffrey Boulevard, Blasdell, New York 14219. (hereinafter referred to as "Iovate USA").

6. On information and belief, Defendant Pump Formulations, Limited is a corporation of Canada, with its principal place of business at 5100 Spectrum Way, 4W 5S2 Mississagua, Ontario, Canada. (hereinafter referred to as "Pump Formulations").

7. On information and belief, Defendant Cell US Trademark, Limited is a corporation of Canada, with its principal place of business at 5100 Spectrum Way, 4W 5S2 Mississagua, Ontario, Canada. (hereinafter referred to as "Cell US").

8. On information and belief, Defendants are each wholly owned subsidiaries of Iovate Health Sciences Group, Incorporated, a corporation of Canada, with its principal place of business at 5100 Spectrum Way, 4W 5S2 Mississagua, Ontario, Canada.

#### **JURISDICTION AND VENUE**

9. This is an action for patent infringement based on 35 U.S.C. section 271(a-c) and trademark infringement based on 15 U.S.C. sections 1114 and 1115, and this Court has subject matter jurisdiction pursuant to 28 U.S.C. section 1338(a) and 15 U.S.C. section 1121.

10. Personal jurisdiction is based on Federal Rule of Civil Procedure 4(e), and on sufficient minimum contacts between the Defendants and this jurisdiction such that the exercise

of personal jurisdiction by this Court comports with the applicable state, federal, and constitutional requirements.

11. Iovate USA, through its retailers, sells and distributes products in this jurisdiction, including the allegedly infringing products herein. A copy of a receipt for purchase of an infringing product is attached as **Exhibit A**.

12. Iovate Canada owns and maintains an interactive website, [www.muscletech.com](http://www.muscletech.com), that is accessible to citizens of this jurisdiction and advertises, promotes, and markets the infringing products herein, displays infringing trademarks, and directs potential consumers to third party retailers offering the infringing products for sale. Further, the site invites visitors to submit personal information for use by Iovate for targeting messages and to subscribe to a newsletter delivered to the subscriber's email address. A copy of a page of Iovate Canada's website is attached as **Exhibit B**. A copy of the domain name registrations for the website is attached as **Exhibit C**.

13. Pump Formulations maintains an interactive website, [www.vaporexperience.com](http://www.vaporexperience.com), that is accessible to citizens of this jurisdiction and advertises, promotes, and markets the infringing products herein, and directs potential consumers to third party retailers offering the infringing products for sale. In exchange for providing personal and contact information, the Pump Formulations website offers visitors a chance to enter a sweepstakes for a chance to win a year's supply of product. A copy of a page of Pump Formulations's website is attached as **Exhibit D**. A copy of the domain name registrations for the website is attached as **Exhibit E**.

14. According to the Official Rules posted on the site, Iovate Canada is the sponsor of a sweepstakes on the Pump Formulation website, [www.vaporexperience.com](http://www.vaporexperience.com).

15. Iovate USA provides infringing products to third party retailers who make these

products available to the residents of this jurisdiction through on-line purchases. A copy of selected pages from a third party website, www.gnc.com, is attached as **Exhibit F**.

16. On information and belief, Cell US is the owner and licensor of the mark "CREA-EDGE" in the United States which appears on products sold by third party retailers either on-line or directly to customers in this jurisdiction and which infringes trademarks owned by Plaintiff.

17. Venue in this Court is proper pursuant to 28 U.S.C. section 1391 and 28 U.S.C. section 1400, since FSI resides in this judicial district and Iovate USA resides in this judicial district by virtue of their doing business in this district, and since the acts of which FSI complains occurred in this district.

18. Venue is proper in this district as to Iovate Canada, Pump Formulations, and Cell US pursuant to 28 U.S.C. section 1391 (d) and since Iovate Canada, Pump Formulations, and Cell US reside in this judicial district by virtue of their doing business in this district, and since the acts of which FSI complains occurred in this district.

### **FACTUAL BACKGROUND**

#### **US. Patent No. 5,925,368**

19. Plaintiff FSI is the assignee and owner of U.S. Letters Patent 5,925,368 entitled Method for Enhancing Delivery and Uniformity of Concentration of Cellular Creatine, duly and legally issued on July 20, 1999 (hereinafter referred to as "the '368 patent"). This patent is in full force and effect to this day and Fortress Systems has the right to enforce this patent. A copy of the '368 patent is attached as **Exhibit G**.

20. The '368 patent covers the use of and the combination of creatine and an effervescent to deliver creatine in a human.

21. Plaintiff marks its creatine products covered by the '368 with the patent number.

A copy of one of FSI's product labels displaying the patent number is attached as **Exhibit H**.

22. On information and belief, Iovate USA produces and sells products containing creatine and an effervescent in direct infringement of certain claims of the '368 patent, including without limitation claims 9-17. A copy of the product label for the infringing product "Cell-Tech RTD" is attached as **Exhibit J**, a copy of the product information for the infringing product "naNo Vapor" is attached as **Exhibit K**.

23. On information and belief, Iovate USA, by producing and selling these products that infringe the '368 patent, induces and contributes to infringement of certain claims of the '368 patent, including without limitation claims 1-4 and 7-8. See **Exhibits J, and K**.

24. On information and belief, Iovate Canada induces infringement of the '368 patent by advertising, marketing, and promoting the infringing products produced and sold by Iovate USA. See **Exhibit B**.

25. On information and belief, Pump Formulations induces infringement of the '368 patent by advertising, marketing, and promoting the infringing products produced and sold by Iovate USA. See **Exhibit D**.

26. On information and belief, Defendants will continue to directly and indirectly infringe the '368 patent unless enjoined by this Court.

27. On information and belief, the president of FSI, Michael Carnazzo, spoke with a representative of Muscletech Research and Development, Incorporated, in 2002, regarding the '368 patent. See Affidavit of Michael Carnazzo, **Exhibit L ¶ 8**.

28. On information and belief, Muscletech Research and Development, Incorporated no longer exists and has been reincorporated as Defendant Iovate Health Sciences, Incorporated. See **Exhibit L ¶ 12**.

**US. Patent No. 6,294,579**

29. Plaintiff FSI holds the right to enforce U.S. Letters Patent 6,294,579 entitled Method for Improving Delivery of Tyrosine Supplementation, duly and legally issued on September 25, 2001 (hereinafter referred to as "the '579 patent"). This patent is in full force and effect to this day and Fortress Systems has the right to enforce this patent as the sole licensee of patentee, Joseph W. Carnazzo. A copy of U.S. the '579 patent is attached as **Exhibit M**.

30. The '579 patent covers the use of and the combination of tyrosine and an effervescent to deliver tyrosine in a human.

31. Plaintiff marks its tyrosine products covered by the '579 patent with the patent number. See **Exhibit F**.

32. On information and belief, Iovate USA produces and sells products containing tyrosine and an effervescent in direct infringement of certain claims of the '579 patent, including without limitation claims 12 and 14-17. See copy of the product information for the infringing product "naNo Vapor" attached as **Exhibit K**.

33. On information and belief, Iovate USA, by producing and selling products that infringe the '579 patent, induces and contributes to infringement of certain claims of the '579 patent, including without limitation claims 1, 2, 4, 6-7, and 11. See **Exhibit K**.

34. On information and belief, Pump Formulations induces infringement of the '579 patent by advertising, marketing, and promoting the infringing products produced and sold by Iovate USA. See **Exhibit D**

35. On information and belief, Defendants will continue to directly and indirectly infringe the '579 patent unless enjoined by this Court.

**Trademarks**

36. Plaintiff FSI is the assignee and owner of U.S. Trademark Registration No. 2,668,652 for the mark "CREATINE EDGE EFFERVESCENT" and design for use with dietary supplements in International Class 5. This registration is in full force and effect to this day and the mark of the registration is currently in use in interstate commerce. A copy of the trademark registration certificate is attached as **Exhibit N**. An example of FSI's use of its registered trademark is shown in **Exhibit H**.

37. FSI has been actively using its registered mark in interstate commerce in association with its nutritional supplement products containing creatine since at least 1998. *See Exhibit L, ¶ 7.*

38. FSI has been actively using the common law mark "CREATINE EDGE" in interstate commerce in association with its products containing creatine since at least 1996. *See Exhibit L, ¶ 6.* A copy of a portion of FSI's webpage showing use of the mark "CREATINE EDGE" is attached as **Exhibit O**.

39. On information and belief, Defendants have been using the mark "CREA-EDGE" since at least as early as 2006 and are currently using the mark "CREA-EDGE" on labels and packaging for dietary nutritional supplements. As examples, the mark "CREA-EDGE" appears on Iovate USA's product label, **Exhibit J**, and on Iovate Canada's website, a page of which, [www.muscletech.com/PRODUCTS/CELL-Tech/cell\\_tech.shtml](http://www.muscletech.com/PRODUCTS/CELL-Tech/cell_tech.shtml) is attached at **Exhibit P**.

40. On information and belief, Cell US has applied for federal registration of the mark "CREA-EDGE" with the United States Patent and Trademark Office. A copy of Application Serial Number 78/534,398 is attached as **Exhibit Q**.

41. At no time have Defendants been authorized or licensed by FSI to use the mark

“CREA-EDGE” in association with dietary nutritional supplements.

42. On information and belief, Defendants' continued use of the mark “CREA-EDGE” is likely to cause confusion among consumers as to the source of Defendants' goods.

43. Defendants' continued use of the mark “CREA-EDGE” will irreparably injure the reputation and hard-earned goodwill of Plaintiff in its common law mark “CREATINE EDGE” and its registered mark “CREATINE EDGE EFFERVESCENT.”

44. On information and belief, Defendants' wrongful use of the mark “CREA-EDGE” places the control, goodwill and reputation of FSI's common law mark “CREATINE EDGE” and its registered mark “CREATINE EDGE EFFERVESCENT” out of the hands of FSI and into the hands of Defendants.

45. Defendants' wrongful use of the mark “CREA-EDGE” causes a likelihood of consumer confusion as to source and quality of the goods sold thereunder.

46. FSI has no adequate remedy at law for the infringement of its marks, including the registered mark.

### **Count I**

#### **Patent Infringement of U.S. 5,925,368**

47. Plaintiff FSI restates and incorporates by reference herein paragraphs 1 through 46 of this Complaint.

48. Upon information and belief, Iovate USA knowingly and willfully produces and sells products that infringe the '368 Patent under 35 U.S.C. section 271(a).

49. Upon information and belief, Iovate USA knowingly and willfully induces infringement of the '368 patent by selling products the directed use of which infringes combinations and methods claimed in the '368 patent under 35 U.S.C. section 271(b).



50. Upon information and belief, Iovate Canada induces and contributes to Iovate USA's and the end users' infringement of the '368 patent.

51. Upon information and belief, Pump Formulations induces and contributes to Iovate USA's and the end users' infringement of the '368 patent..

52. Upon information and belief, Defendants continue to infringe the '368 patent, and unless preliminarily and permanently enjoined by this Court, Defendants will continue to infringe said patent, all to FSI's irreparable injury. FSI is without an adequate remedy at law.

## **Count II**

### **Patent Infringement of U.S. 6,294,579**

53. Plaintiff FSI restates and incorporates by reference herein paragraphs 1 through 52 of this Complaint.

54. Upon information and belief, Iovate USA knowingly and willfully produces and sells products that directly infringe the '579 patent under 35 U.S.C. section 271(a).

55. Upon information and belief, Iovate USA knowingly and willfully induces infringement of the '579 patent by selling products the directed use of which infringes combinations and methods claimed in the '579 patent under 35 U.S.C. section 271(b).

56. Upon information and belief, Pump Formulations induces and contributes to Iovate USA's and the end users' infringement of the '579 patent.

57. Upon information and belief, Defendants continue to infringe the '579 patent, and unless preliminarily and permanently enjoined by this Court, Defendants will continue to infringe said patent, all to FSI's irreparable injury. FSI is without an adequate remedy at law.

**Count III**

**Federal Trademark Infringement**

58. Plaintiff restates and incorporates by reference herein paragraphs 1 through 57 of this Complaint.

59. Defendants use of the mark "CREA-EDGE" in advertising, promoting, and selling dietary nutritional supplements in interstate commerce constitutes infringement of FSI's registered mark "CREATINE EDGE EFFERVESCENT" within the meaning of 15 U.S.C. §1114(1). Such conduct is likely to cause confusion in the marketplace with FSI's registered mark and will result in customers believing Iovate USA's goods originated with FSI and/or FSI endorses Iovate USA's goods.

60. Defendants' conduct of trademark infringement will continue unless Defendants are restrained and enjoined by this Court.

**Count IV**

**Federal Unfair Competition**

61. FSI restates and incorporates by reference herein paragraphs 1 through 60 of this Complaint.

62. Defendants' use of the mark "CREA-EDGE" in advertising, promoting, and selling dietary nutritional supplements in interstate commerce constitutes infringement of FSI's common law mark "CREATINE EDGE" within the meaning of 15 U.S.C. §1125(a). Such conduct is likely to cause confusion in the marketplace and will deceive or is likely to deceive the market segments to which FSI directs its commercial endeavors into believing that Defendants have an affiliation or association with FSI and/or FSI endorses Iovate USA's goods.

63. Defendants use in the marketplace of the mark "CREA-EDGE" is undertaken in

bad faith.

64. Defendants' conduct of unfair competition will continue unless it is restrained and enjoined by this Court.

**Count V**

**Common Law Trademark Infringement**

65. FSI restates and incorporates by reference herein paragraphs 1 through 64 of this Complaint.

66. Defendants' conduct as specified above constitutes trademark infringement in violation of FSI's trademark rights at common law under Iowa Code section 548.116.

**Demand for Relief**

WHEREFORE, the Plaintiff FSI, prays this Court for the following relief:

- a) a preliminary and permanent injunction under 35 U.S.C. section 283 against the Defendants and their officers, directors, agents, servants, employees, licensees, successors, assigns, and all those controlled by them, or in active concert or participation with them, permanently enjoining them from further infringing patent U.S. 5,925,368;
- b) a preliminary and permanent injunction under 35 U.S.C. section 283 against the Defendants and their officers, directors, agents, servants, employees, licensees, successors, assigns, and all those controlled by them, or in active concert or participation with them, permanently enjoining them from further infringing patent U.S. 6,294,579;
- c) an award of damages with respect to Count I including costs, interest, and treble damages due to the knowing, willful, and wanton nature of the Defendants'

- conduct pursuant to 35 U.S.C. section 284;
- d) an award of damages with respect to Count II including costs, interest, and treble damages due to the knowing, willful, and wanton nature of the Defendants' conduct pursuant to 35 U.S.C. section 284;
- e) a preliminary and permanent injunction pursuant to 15 U.S.C. section 1116 restraining the Defendants, its officers, directors, employees, agents, servants and other persons in active concert or participation with Defendants from further use of the mark "CREA-EDGE" or any confusingly similar terms in connection with the advertising, promotion or sale of dietary nutritional supplements;
- f) an award of damages with respect to count III and IV, including costs and treble damages due to the knowing, willful and wanton nature of Defendants' conduct under 15 U.S.C. section 1117;
- g) an award for damages with respect to count V;
- h) an award of Plaintiff's attorneys' fees in this action under any and all applicable statutes, including without limitation 15 U.S.C. section 1117 and 35 U.S.C. and 285; and
- i) such other and further relief as this Court deems equitable under the circumstances, including where appropriate punitive damages for the Defendants' conduct.

**JURY DEMAND**

COMES NOW, Plaintiff and hereby demands a trial by jury of all issues herein.

DATED June 14, 2007

FORTRESS SYSTEMS LLC

By: /s/ Camille L. Urban

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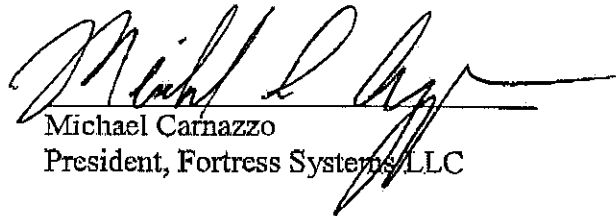
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**VERIFICATION**

Michael Carnazzo does hereby declare and state: I am the president of Fortress Systems LLC in the above action; I have read the foregoing Verified Complaint and know the contents thereof to be true, except as to those matters therein stated on information and belief, and as to those matters I believe them to be true.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: June 3, 2007



Michael Carnazzo  
President, Fortress Systems LLC