

ESTTA Tracking number: **ESTTA415110**

Filing date: **06/17/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding.	91199446
Applicant	Plaintiff Troy Healthcare, LLC
Other Party	Defendant NutraMarks, Inc.

Motion for Suspension in View of Civil Proceeding With Consent

The parties are engaged in a civil action which may have a bearing on this proceeding. Accordingly, Troy Healthcare, LLC hereby requests suspension of this proceeding pending a final determination of the civil action. Trademark Rule 2.117.

Troy Healthcare, LLC has secured the express consent of all other parties to this proceeding for the suspension and resetting of dates requested herein.

Troy Healthcare, LLC has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Respectfully submitted,
/Steven E. Klein/

Steven E. Klein, Attorney for Plaintiff

seklein@stoel.com, awglazer@stoel.com, pphartigan@stoel.com

tgetzoff@hollandhart.com, ncbosch@hollandhart.com, jguy@hollandhart.com, docket@hollandhart.com

06/17/2011

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TROY HEALTHCARE, LLC, a
Pennsylvania limited liability company,

Plaintiff,

v.

NUTRACEUTICAL CORPORATION, a
Delaware corporation; NUTRACEUTICAL
INTERNATIONAL CORPORATION, a
Delaware corporation; NUTRAMARKS,
INC., a Delaware corporation;
NUTRAPURE, INC., a Delaware
corporation; and HEALTHY PLANET
ENTERPRISES, INC., a Washington
corporation d/b/a VitaminLife,

Defendants.

No. 2:11-cv-844

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Troy Healthcare, LLC (“Plaintiff” or “Troy”) for its complaint against
Defendants Nutraceutical International Corporation, Nutraceutical Corporation, NutraMarks,
Inc., NutraPure, Inc., and Healthy Planet Enterprises, Inc. (collectively “Defendants”) states and
alleges as follows:

I. PLAINTIFF TROY HEALTHCARE LLC

1
2 1. Troy is a limited liability company organized under the laws of Pennsylvania and
3 based in Hazleton, Pennsylvania. Troy is a subsidiary of Troy Manufacturing, Inc., (“Troy
4 Manufacturing”), a New York corporation based in Hazelton, Pennsylvania.

5 2. Troy sells over-the-counter topical analgesics under the STOPAIN® mark.
6 STOPAIN®, Troy’s only product line, contains the topical analgesic menthol as its active
7 ingredient, and is sold as a spray, roll-on, and gel.

8 3. In January 2010 Troy acquired DRJ Group, Inc. (“DRJ Group”), a California
9 corporation, which sold STOPIAN® products since its founding in 1991. Prior to being acquired
10 by Troy, DRJ Group sold the STOPAIN® line of topical analgesics, and owned federal
11 trademark registrations for the mark STOPAIN®. Troy Manufacturing manufactured the
12 STOPAIN® products for DRJ Group from 2002 until Troy's acquisition of DRJ Group.

II. DEFENDANTS

13
14 4. Upon information and belief, Nutraceutical International Corporation (“NIC”) is a
15 corporation organized under the laws of Delaware with its principal place of business at 1400
16 Kearns Boulevard, Second Floor, Park City, Utah 84060

17 5. Upon information and belief, Nutraceutical Corporation (“NTC”) is a corporation
18 organized under the laws of Delaware with its principal place of business at 1400 Kearns
19 Boulevard, Park City, Utah 84060, and is a subsidiary of NIC.

20 6. Upon information and belief, Defendant NutraMarks, Inc. (“NMI”) is a
21 corporation organized under the laws of Delaware with its principal place of business at 1500
22 Kearns Boulevard, Suite B-200, Park City, Utah 84060, and is a subsidiary of NIC.

23 7. Upon information and belief, NutraPure, Inc. (“NutraPure”) is a corporation
24 organized under the laws of Delaware with its principal place of business at 1500 Kearns
25 Boulevard, Suite B-200, Park City, Utah 84060. Upon information and belief, NutraPure is a
26

1 subsidiary of NIC. Defendants NIC, NTC, NMI, and NutraPure are collectively referred to as
2 the “Nutraceutical Defendants” below.

3 8. Upon information and belief, Healthy Planet Enterprises, Inc. (hereafter
4 “VitaminLife”) is a corporation organized under the laws of the State of Washington, with its
5 principal place of business in Woodinville, Washington, does business under the assumed
6 business names VitaminLife and VitaminLife.com, and is the registered owner of the Internet
7 domain name <vitaminlife.com>.

8
9 **III. JURISDICTION AND VENUE**

10 9. This action arises under the Lanham Act, 15 U.S.C. §§ 1114 and 1125. This
11 Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and
12 1338. This Court has supplemental jurisdiction over Plaintiff’s state law claims pursuant to
13 pursuant to 28 U.S.C. § 1367(a).

14 10. VitaminLife is subject to personal jurisdiction in the State of Washington because
15 VitaminLife has its principal place of business in Washington, is doing business in Washington
16 and in this judicial district, and is engaged in the continuous and systematic sale of its products in
17 Washington and in this judicial district, including the products that give rise to this case.
18 VitaminLife has committed acts of trademark and trade dress infringement, unfair competition,
19 and false and misleading advertising in the State of Washington and in this district.

20 11. The Nutraceutical Defendants are subject to personal jurisdiction in the State of
21 Washington because they have purposefully directed their illegal activities that form the basis of
22 this action into the State of Washington and into this judicial district. Upon information and
23 belief, the Nutraceutical Defendants have purposefully sold and directed the infringing products
24 and false and misleading advertising at issue in this case into the State of Washington and to
25 VitaminLife, a retailer and distributor doing business in this judicial district, and have
26 intentionally caused those products to be resold to Washington residents and others.

1 12. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because a
2 substantial part of the events or omissions giving rise to the claims asserted occurred in this
3 district. Venue is also proper in this district under 28 U.S.C. § 1391(b)(1) and (c) because each
4 Defendant may be found in this district for purposes of personal jurisdiction, as alleged above.

5 **IV. TROY'S STOPAIN® TRADEMARK AND TRADE DRESS RIGHTS**

6 13. Troy is the owner of three federal trademark registrations for the STOPAIN®
7 marks:

8 a. Trademark Registration No. 1,744,224 (the "'224 Registration"), issued by
9 the U.S. Patent and Trademark Office ("USPTO") on January 5, 1993 for the mark
10 STOPAIN®, which is incontestable pursuant to 15 U.S.C. §§ 1065 and 1115;

11 b. Trademark Registration No. 3,445,830 (the "'830 Registration"), issued by
12 the USPTO on June 10, 2008 for the mark STOPAIN®. PUTS PAIN IN ITS PLACE®;
13 and

14 c. Trademark Registration No. 3,952,695 (the "'695 Registration") issued by
15 the USPTO on April 26, 2011 for the mark STOPAIN. EXACTLY WHAT IT DOES®.

16 14. True and complete copies of the certificates for the '224, '830, and '695
17 Registrations are attached hereto as Exhibits 1-3, respectively.

18 15. The '224, '830, and '695 Registrations are each valid and subsisting, and have not
19 been cancelled.

20 16. The '224, '830, and '695 Registrations each constitute *prima facie* evidence of the
21 validity of the registered mark, and of Troy's ownership of each registration and mark.

22 17. The '224 and '830 Registrations were originally obtained by DRJ Group, Inc.,
23 and were assigned by DRJ Group to Troy in connection with Troy's acquisition of DRJ Group.
24 A true and complete copy of the agreement assigning ownership of the '224 and '830
25 Registrations from DRJ Group to Troy is attached hereto as Exhibit 4.
26

1 18. Troy, and its predecessor DRJ Group, (referred to collectively as “Troy/DRJ”)
2 have continuously used the STOPAIN® mark in connection with the sale of topical analgesics
3 since 1991.

4 19. In June 2003, Troy’s predecessor, DRJ Group, began selling STOPAIN®
5 products using the logo shown below. Design elements of this logo include the word
6 STOPAIN® in a sans serif typeface with the first three letters in white over a red stop sign, the P
7 in gradient red type at the edge of the stop sign, and the final three letters in red type to the right
8 of the stop sign figure.



17 20. Troy, like its predecessor DRJ Group, relies on certain distinctive characteristics
18 of its product packaging for the LifeTime co-branded products to distinguish these products from
19 competitors in the marketplace and build brand identification. The design elements that
20 comprise Troy’s distinctive trade dress for the co-branded STOPAIN® products include:

- 21 • A horizontal blue bar with the LIFETIME mark at the top of the container;
- 22 • A white background area below the blue bar featuring the red and white stop sign
23 STOPAIN® logo (the word “Stopain” imposed over and to the right of a red stop
24 sign with the first three letters, “Sto” in white type over the stop sign, the “p” in
25 gradient red type at the edge of the stop sign, and the last three letters, “ain” in red
26 type to the right of the stop sign);

- 1 • A two-tone blue area beginning at a diagonal (rising from left to right) below the
2 STOPAIN® logo;
- 3 • A description of the product (“Extra Strength Topical Analgesic Spray”) set in
4 two lines of black text (with the top line bolded) at top of the blue area set at the
5 same diagonal as the line between the blue and white backgrounds;
- 6 • A description of the product’s inactive ingredients in horizontal white bold text in
7 the blue background area below the product description;
- 8 • Four bullet points, describing the product’s attributes set in horizontal black type
9 with red bullets below the white inactive ingredients description; and
- 10 • A description of the product size in black horizontal text centered just above the
11 bottom of the blue background area. (Collectively the “STOPAIN® Trade
12 Dress”).

13 21. For many years, Troy/DRJ invested heavily in the STOPAIN® brand. In the last
14 year alone, Troy has advertised STOPAIN® on nationally syndicated television shows such as
15 “Jeopardy,” “Wheel of Fortune” and “Dr. Phil” and on cable spots including on “Fox News” and
16 The Weather Channel.

17 22. Troy/DRJ advertised STOPAIN® in national magazines including “Newsweek”
18 and in industry publications including “Mass Marketing Retailers,” “Drug Store News” and
19 others.

20 23. Troy/DRJ placed STOPAIN® print advertising in the yearbooks for certain Major
21 League Baseball teams including the Boston Red Sox, the Philadelphia Phillies, the San Diego
22 Padres and others.

23 24. For several years Troy/DRJ advertised in programs distributed at PGA
24 Champions Tour events. At tour events where the program is distributed, free samples of
25 STOPAIN® are also distributed.

26

Complaint - 6

1 25. Over the last three years, Troy/DRJ has promoted STOPAIN® products through
2 Catalina, a target marketing company that uses coupons at super market checkout to encourage
3 the purchase of certain products to targeted consumers. For example, if someone buys a
4 STOPAIN® product, at checkout he or she may receive a coupon for a given amount off the next
5 purchase of the STOPAIN® product. Or, if the customer buys a competitor's brand, they may
6 receive a coupon for money off if they purchase STOPAIN®.

7 26. Troy also works with a public relations firm to prepare press releases and place
8 information about STOPAIN® in various industry publications such as "Chain Drug Review"
9 and "Mass Market Retailers." Having gained a substantial market share, industry publications
10 sometime approach Troy for data or other information about STOPAIN®.

11 27. The well established reputation of the STOPAIN® brand is also reflected in the
12 many unpaid mentions and features in national and regional publications, such as product
13 reviews in Los Angeles based "Great Health" magazine and New England based "Senior
14 Beacon." STOPAIN® has also been featured in "Today's Health & Wellness" magazine as a
15 community tested product.

16 28. STOPAIN® turns up occasionally in random mentions in the press, such as
17 during the Beijing Olympics when USA sprinter Tyson Gay mentioned using the product, as
18 reported in the August 11, 2008 edition of the Chicago Tribune.

19 29. STOPAIN® receives regular mentions on twitter, in blog posts and via other
20 aspects of social media.

21 30. With some regularity, Troy/DRJ receives unsolicited testimonials from
22 STOPAIN® customers.

23 31. In addition to television advertising, social media, a public relations campaign,
24 national magazine advertising, the Catalina coupon program and other marketing efforts
25 described above, Troy also partners with the Arthritis Foundation, hosts sampling events at
26

1 health fairs and Arthritis Foundation events such as its annual Arthritis Walk and engages in
2 email campaigns.

3 32. Troy projects 2011 sales revenue for the STOPAIN® products at about \$7.5
4 million, up from less than \$3 million in 2005. Sales have increased annually for eight
5 consecutive years. The marketing investment of Troy/DRJ has also increased annually for five
6 consecutive years and Troy projects advertising and promotional expenditures for the
7 STOPAIN® product at about \$3.5 million for 2011.

8 33. According to data compiled by Nielsen Information Research Inc. for the 52
9 weeks ending April 17, 2011, STOPAIN® is the number seven best selling topical analgesic
10 brand in the country. During that same period, STOPAIN® dollar sales increased 11.3% and
11 unit sales increased 9.6%, well exceeding average growth for the category. Troy anticipates
12 ending the calendar year 2011 with over 300,000 loyal STOPAIN® customers (defined as those
13 who purchase STOPAIN® at least five times a year) nationwide.

14 34. As a result of Troy/DRJ's continuous and (but for infringement) exclusive use of
15 its distinctive STOPAIN® trademarks, and the commercial success of its goods and services
16 provided under those marks, Troy has achieved significant brand name recognition in the
17 STOPAIN® marks.

18 35. Troy's STOPAIN® marks have come to represent the valuable goodwill and
19 reputation of Troy in the market for high quality topical analgesics. As a result, the consuming
20 public has come to expect that such goods marketed and sold under the STOPAIN® marks, or
21 confusingly similar marks, are associated with Troy.

22 36. As a result of Troy's continuous use of the STOPAIN® marks, logos, and Trade
23 Dress, and Troy's extensive marketing efforts for STOPAIN® products, purchasers of topical
24 analgesic products recognize the STOPAIN® marks, logos, and Trade Dress as indicators of
25 source associated with the high quality products offered for years by DRJ and Troy. The public
26

1 goodwill associated with the STOPAIN® marks, logos, and Trade Dress is Troy’s most valuable
2 asset.

3 **V. DISTRIBUTION OF STOPAIN® PRODUCTS THROUGH NUTRITIONAL**
4 **SPECIALTIES, INC.**

5 37. Beginning in 2001 DRJ Group, Inc. supplied packaged and labeled STOPAIN®
6 products to Nutritional Specialties, Inc. (“NSI”) for distribution to health food, vitamin, and
7 nutritional product retailers and wholesalers.

8 38. The products DRJ Group supplied to NSI were labeled with the STOPAIN® mark
9 and logo displayed on the DRJ products plus the LIFETIME mark owned by NSI.

10 39. NSI and its successor NTC continued to send purchase orders to Troy/DRJ which
11 continued to supply co-branded STOPAIN® products to NSI and NTC through summer 2010.

12 **VI. DEFENDANTS’ INFRINGEMENT OF PLAINTIFF’S TRADE DRESS AND**
13 **TRADEMARKS, AND FALSE ADVERTISING**

14 40. On September 10, 2010, NMI filed an intent to use trademark application with the
15 USPTO seeking to register DROPAIN in connection with the sale of “[t]opical medicated
16 preparations, namely, analgesics and analgesic preparations, namely, topical analgesic spray,
17 topical analgesic roll-on and topical analgesic cream for the relief of arthritis, muscle and back
18 pain, tendonitis, muscle sprains, strains, bruises and cramps.”

19 41. On March 15, 2011 Troy discovered NMI’s DROPAIN application.

20 42. By letter dated March 30, 2011, Troy demanded that NMI withdraw its
21 application because use of the mark DROPAIN would likely cause confusion with Troy’s
22 STOPAIN® marks.

23 43. NMI refused to abandon its application to register the mark DROPAIN, and on
24 April 15, 2011, Troy filed an Opposition proceeding in the USPTO’s Trademark Trial and
25 Appeal Board.

26 44. On May 9, 2011, Troy learned from performing an Internet search for “dropain”
that a product was being offered for sale under the DROPAIN mark using a logo largely identical

1 to Troy's STOPAIN® logo and in product packaging largely identical to Troy's STOPAIN®
2 Trade Dress.

3 45. The label for DROPAIN products available for sale indicate that DROPAIN is
4 manufactured for defendant NutraPure.

5 46. Upon information and belief, one or more of the Nutraceutical Defendants, acting
6 in concert with one another, are responsible for the manufacture, marketing, name, packaging,
7 logos, labeling, distribution, and sale of DROPAIN.

8 47. Defendant VitaminLife is actively selling and promoting DROPAIN through the
9 Internet and at its retail store in Redmond, Washington.

10 48. The STOPAIN® and DROPAIN products are in direct competition in the
11 marketplace. Defendants' DROPAIN products are identical in type, size, and method of delivery
12 (*i.e.* roll-on, spray, or gel) to co-branded STOPAIN® products supplied to Defendants by Troy/
13 DRJ.

14 49. The marketing and distribution channels through which Defendants are promoting
15 and offering for sale the DROPAIN topical analgesics overlap substantially with Troy's
16 marketing and distribution channels for its STOPAIN® products.

17 50. Troy distributes its STOPAIN® products through retail stores such as Walgreens,
18 CVS Stores, Rite Aid, Kerr Drug, WalMart, Meijer, Price Chopper, and Stop & Shop, and
19 through online websites including Stopain.com, Drugstore.com, AmericaRX.com, WalMart.com,
20 Walgreens.com, and CVS.com and online marketplaces Amazon.com, eBay.com and
21 Nextag.com.

22 51. Troy's LifeTime co-branded STOPAIN® products continue to be available
23 through nutritional and health food stores and on-line

24 52. Defendants' DROPAIN products are available online including through online
25 marketplaces Amazon.com, eBay.com, and Nextag.com, as well as through the VitaminLife.com
26 website. Troy's STOPAIN® products are or were recently offered for sale through each of these

1 websites. Defendants' DROPAIN products and authentic co-branded STOPAIN® products are
2 both being offered for sale at Defendant VitaminLife's retail store in Redmond, Washington.

3 53. Like STOPAIN®, DROPAIN is offered in 8 ounce spray, 4 ounce spray and 3
4 ounce roll-on. Each of the DROPAIN products is priced very closely to STOPAIN® retail
5 pricing:

	8 oz. Spray	4 oz. Spray	3 oz. Roll-On
6 STOPAIN®	\$13.99 (Walgreens)	\$8.76 (Walmart)	\$8.76 (Walmart)
7 DROPAIN	\$13.59 (VitaminLife)	\$7.87 (Amazon)	\$8.34 (Amazon)

8
9 54. Purchasers of topical analgesics such as STOPAIN® use a relatively low degree
10 of care in selecting products, typically making an on-the-spot decision about which brand to buy
11 after a brief review of the brands on a store shelf.

12 55. Defendants are actively trading on the goodwill Troy has developed in its
13 STOPAIN® marks and products by falsely marketing their DROPAIN products as a rebranding
14 of Troy's STOPAIN® products.

15 56. One or more Defendants have advertised and described their DROPAIN products
16 as "formerly Stopain."

17 57. Defendants' DROPAIN products are not associated in any way with Troy or its
18 authentic STOPAIN® products or marks.

19 58. DROPAIN comes from a wholly different source than STOPAIN® and
20 DROPAIN's manufacturer has never manufactured STOPAIN®.

21 59. Defendants' false marketing of their DROPAIN products as "formerly
22 STOPAIN" is likely to deceive and mislead consumers as well as current retailers and
23 distributors of STOPAIN® products. In particular, consumers are likely to believe that Troy has
24 changed the name of its STOPAIN® products to DROPAIN and that the DROPAIN product
25 derives from the same source as and is identical to the STOPAIN® product.
26

1 60. Defendants' use of Troy's STOPAIN® marks and trade dress is without the
2 permission or authorization of Troy and Troy has never licensed or otherwise authorized
3 Defendants to use the intellectual property at issue.

4 61. Defendants' use of Plaintiff's STOPAIN® marks and trade dress is likely to cause
5 and is causing consumer confusion. Users are likely to assume that Defendants are authorized to
6 use Plaintiff's STOPAIN® marks, or is affiliated with and has permission to offer STOPAIN®
7 products. Furthermore, Defendants have introduced a competitive line of topical analgesics for
8 sale. Consumers are likely to assume that Defendants' products have the same qualities and
9 attributes as products sold under the STOPAIN® marks and/or are sponsored or licensed by, or
10 affiliated with, the source of authentic STOPAIN® products.

11 62. Defendants seek and receive a direct material benefit from their use of Troy's
12 STOPAIN® marks and STOPAIN® Trade Dress.

13 63. Troy is suffering irreparable harm caused by Defendants' distribution of
14 DROPAIN products using STOPAIN® marks, logos, and Trade Dress, and by Defendants' false
15 and misleading advertising of their DROPAIN products as "formerly STOPAIN."

16 64. As a result of Defendants' conduct, Troy is losing control over the valuable
17 goodwill it has built in its STOPAIN® brand, marks, logos, and Trade Dress, as well as losing
18 sales from customers who believe they are buying the same STOPAIN® product they have
19 grown to rely upon.

20 65. Upon information and belief, loyal STOPAIN® customers are being converted to
21 DROPAIN by virtue of Defendants' trademark and trade dress infringement and false and
22 misleading advertising.

23 66. Even after DROPAIN is enjoined from using STOPAIN®, the STOPAIN® brand
24 will continue to suffer because product name changes result in brand instability.

1 67. Upon information and belief, some customers who see or purchase the DROPAIN
2 product, upon seeing the STOPAIN® product, will assume the latter is out of date because it is
3 being sold under the name by which the product was “formerly known.”

4 **First Claim for Relief**

5 **Federal Trademark Infringement – 15 U.S.C. § 1114**

6 68. Troy realleges paragraphs 1 through 67 as if fully set forth herein.

7 69. Defendants’ use of the STOPAIN® marks is a use in commerce of Plaintiff’s
8 marks that is likely to cause consumer confusion or mistake, or to deceive.

9 70. Defendants are thus liable under 15 U.S.C. § 1114(1)(a) for infringement of
10 Troy’s registered STOPAIN® marks.

11 71. Pursuant to 15 U.S.C. § 1117(a), Plaintiff is entitled to recover its actual damages,
12 Defendants’ profits, and the costs of the action.

13 72. Because Defendants’ actions in using Troy’s registered STOPAIN® marks were
14 intentional and in bad faith, the court should enter an award of enhanced damages under 15
15 U.S.C. § 1117(a)(3) in an amount up to three times the actual damages.

16 73. This case is exceptional under 15 U.S.C. § 1117(a)(3), and Troy should be
17 awarded its reasonable attorneys fees.

18 74. In addition, because Troy’s remedies under 15 U.S.C. § 1117(a), while necessary,
19 are not sufficient to fully protect Troy’s continuing interest in preserving its marks against future
20 infringement by Defendants, Troy is entitled to an injunction against Defendants’ use in the
21 future of Troy’s STOPAIN® marks, or any colorable imitation or confusingly similar variation
22 of Troy’s STOPAIN® marks, in any advertisement for the sale of any product other than genuine
23 Troy products.

24 **Second Claim for Relief**

25 **Unfair Competition/Trademark Infringement – 15 U.S.C. § 1125(a)**

26 75. Troy realleges paragraphs 1 through 74 as if fully set forth herein.

1 76. Defendants’ use of the STOPAIN® logos described above violates Section 43(a)
2 of the Lanham Act, 15 U.S.C. § 1125(a), because it constitutes willful and deliberate use in
3 commerce of Troy’s STOPAIN® logos, which is likely to cause confusion, mistake, and
4 deception as to the approval, origin, or sponsorship by Troy of products and services provided by
5 Defendants, and which accordingly constitutes unfair competition and infringement of the
6 STOPAIN® marks and logos.

7 77. Pursuant to 15 U.S.C. § 1117(a), Plaintiff is entitled to recover its actual damages
8 Defendants’ profits and the costs of the action.

9 78. Because Defendants’ actions in using Troy’s STOPAIN® logos were, upon
10 information and belief, intentional and in bad faith, the court should enter an award of enhanced
11 damages under 15 U.S.C. § 1117(a)(3) in an amount up to three times the actual damages.

12 79. This case is exceptional under 15 U.S.C. § 1117(a)(3), and Troy should be
13 awarded its reasonable attorneys fees.

14 80. In addition, because Troy’s remedies under 15 U.S.C. § 1117(a), while necessary,
15 are not sufficient to fully protect Troy’s continuing interest in preserving its marks and logos
16 against future infringement by Defendants, Troy is entitled to an injunction against Defendants’
17 use in the future of Troy’s STOPAIN® logos, or any colorable imitation or confusingly similar
18 variation of the same, in any advertisement for the sale of any product other than genuine Troy
19 products.

20 **Third Claim for Relief**

21 **Unfair Competition/Trade Dress Infringement – 15 U.S.C. § 1125**

22 81. Troy realleges paragraphs 1 through 80 as if fully set forth herein.

23 82. The STOPAIN® Trade Dress includes one or more non-functional features that,
24 prior to Defendants’ misappropriation, in the public’s eye had come to be associated with and to
25 identify the source of Troy’s products.

26

1 83. By misappropriating the STOPAIN® Trade Dress without Troy's consent, and by
2 falsely claiming credit that properly belongs to Troy, Defendants have created confusion or a
3 likelihood of confusion, deception, and mistake in the marketplace, and in the minds of the
4 public, as to the origin, sponsorship, and/or affiliation of the DROPAIN products. As a result,
5 customers and potential consumers are likely to erroneously conclude that Troy sponsors,
6 approves, or is associated with the DROPAIN products, or that the STOPAIN® product was
7 developed by, or originates from, Defendants. Those consumers may have occasion to purchase
8 the DROPAIN product erroneously believing that Troy's standards of quality and service apply
9 to the DROPAIN product, thereby doing great and irreparable harm to Troy's reputation and
10 goodwill.

11 84. Defendants' actions as herein alleged constitute trade dress infringement, false
12 designation of origin, and/or a false or misleading representation or description of the infringing
13 products, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

14 85. Defendants' conduct as herein alleged has caused, and unless restrained and
15 enjoined will continue to cause, irreparable harm to Troy that cannot be adequately compensated
16 or measured by money alone. Troy has no adequate remedy at law. Pursuant to 15 U.S.C.
17 § 1116, Troy is entitled to a temporary restraining order and to preliminary and permanent
18 injunctive relief stopping Defendants' continued infringement of the STOPAIN® Trade Dress.

19 86. In addition, as a direct and proximate result of Defendants' conduct, Troy has
20 suffered and will continue to suffer damages in an amount that is presently unknown but that will
21 be determined according to proof at trial.

22 87. Defendants' conduct as herein alleged constitutes a willful violation of Section
23 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and is an exceptional case within the meaning of
24 Section 35 of the Lanham Act, 15 U.S.C. § 1117.

25 88. Upon information and belief, as a direct and proximate result of Defendants'
26 wrongful conduct, Defendants have realized and will continue to realize profits, gains, and other

1 advantages from their infringing activities, all to the detriment of Troy. As a direct and
2 proximate result of Defendants' wrongful conduct, Troy has been damaged and is entitled to
3 recover Defendants' wrongful profits and Troy's actual damages, together with Troy's attorneys'
4 fees incurred in this action.

5 **Fourth Claim for Relief**

6 **False and Misleading Advertising – 15 U.S.C. § 1125(a)(1)(B)**

7 89. Troy realleges paragraphs 1 through 88 as if fully set forth herein.

8 90. Defendants, by their conduct described above, have made and are making in their
9 commercial advertisements and promotions, materially false and misleading statements,
10 including the statement that DROPAIN is "Formerly Stopain" relating to Defendants' products,
11 Troy's STOPAIN® products, and the relationship between the parties and/or their products that
12 actually has deceived and is deceiving or has the tendency to deceive a substantial segment of the
13 ordinary consuming public.

14 91. As the result of Defendants' false and misleading advertising statements described
15 above, Troy has been or is likely to be injured, either by direct diversion of sales from Troy to
16 Defendants, or by a lessening of goodwill associated with Troy and its STOPAIN® products.

17 92. Defendants' actions as herein alleged constitute false and misleading advertising
18 in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

19 93. Defendants' conduct as herein alleged has caused, and unless restrained and
20 enjoined will continue to cause, irreparable harm to Troy that cannot be adequately compensated
21 or measured by money alone. Troy has no adequate remedy at law. Pursuant to 15 U.S.C.
22 § 1116, Troy is entitled to preliminary and permanent injunctive relief preventing Defendants
23 from continuing to engage in false and misleading advertising.

24 94. In addition, as a direct and proximate result of Defendants' conduct, Troy has
25 suffered and will continue to suffer damages in an amount that is presently unknown but that will
26 be determined according to proof at trial.

1 95. Defendants' conduct as herein alleged constitutes a willful violation of Section
2 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and is an exceptional case within the meaning of
3 Section 35 of the Lanham Act, 15 U.S.C. § 1117.

4 96. Troy is informed and believes, and based thereon alleges, that as a direct and
5 proximate result of Defendants' wrongful conduct, Defendants have realized and will continue to
6 realize profits, gains, and other advantages from their false statements, all to the detriment of
7 Troy. As a direct and proximate result of Defendants' wrongful conduct, Troy has been
8 damaged and is entitled to recover Defendants' wrongful profits and Troy's actual damages,
9 together with Troy's attorneys' fees incurred in this action.

10 **Fifth Claim for Relief**

11 **Common Law Trademark Infringement**

12 97. Troy realleges paragraphs 1 through 96 as if fully set forth herein.

13 98. Defendants' actions constitute unfair competition under applicable state common
14 law, in that Defendants' DROPAIN marks, logos, and packaging are deceptively similar to
15 Troy's STOPAIN® marks, logos, packaging and the STOPAIN® Trade Dress, and Defendants'
16 use of such marks, logos, and packaging is creating or increasing confusion between goods
17 provided by Troy and Defendant, to the detriment of Troy and the public.

18 99. Defendants' use of DROPAIN is likely to unfairly divert trade and to damage
19 TROY's goodwill and business reputation.

20 100. Defendants' conduct as herein alleged has caused, and unless restrained and
21 enjoined will continue to cause, irreparable harm to Troy that cannot be adequately compensated
22 or measured by money alone. Troy has no adequate remedy at law. Troy is entitled to a
23 temporary restraining order and to preliminary and permanent injunctive relief preventing
24 Defendants from continuing to infringe and trade on the STOPAIN® marks, logos, and Trade
25 Dress.
26

1 101. In addition, as a direct and proximate result of Defendants' conduct, Troy has
2 suffered and will continue to suffer damages in an amount that is presently unknown but that will
3 be determined according to proof at trial.

4 **Sixth Claim for Relief**

5 **Violation of the Washington Unfair Business Practices and Consumer Protection Act**

6 102. Troy realleges paragraphs 1 through 101 as if fully set forth herein.

7 103. Defendants' misappropriation of Plaintiff's trademarks, logos, trade dress, and
8 false and misleading advertising constitute unfair business practices.

9 104. Defendants' actions have been willful, negatively impact the public interest, and
10 will be injurious to the public in Washington as well as to Plaintiff in violation of RCW
11 19.86.010, *et seq.*

12 105. Plaintiff is entitled to recover damages, treble damages, and attorneys' fees and
13 costs pursuant to RCW 19.86.090.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff Troy Healthcare, LLC prays for judgment as follows:

16 A. Awarding Plaintiff up to three times Defendants' profits and up to three times the
17 amount found as actual damages for Defendants' infringement of Plaintiff's registered
18 STOPAIN® marks, unfair competition, and false and misleading advertising as stated herein;

19 B. Entering an injunction against (a) Defendants' use in the future of Plaintiff's
20 STOPAIN® marks, logos or Trade Dress, or any colorable imitation or confusingly similar
21 variation of Plaintiff's STOPAIN® marks, logos or Trade Dress, in connection with the sale of
22 or any advertisement for the sale of any product other than genuine STOPAIN® products and (b)
23 Defendants' making any materially false or misleading statement, claim, or assertion with
24 respect to Plaintiff, Plaintiff's STOPAIN® products, Defendants, Defendants' DROPAIN
25 products, or the relationship between Plaintiff and Defendants or between Plaintiff's and
26 Defendants' products;

1 C. Awarding Plaintiff its costs of the action and its reasonable attorney fees; and

2 D. Awarding Plaintiff such other and further relief as the court deems equitable, just,
3 and appropriate.

4 **JURY DEMAND**

5 Troy hereby demands a trial by jury on all issues raised by the Complaint so triable.

6 DATED: May 18, 2011.

7 STOEL RIVES LLP

8 s/ Brian C. Park

9 Brian C. Park, WSBA No. 25584
10 600 University Street, Suite 3600
11 One Union Square
12 Seattle, WA 98101
13 Email: bcpark@stoel.com
14 Tel.: (206) 386-7542
15 Fax: (206) 386-7500

16 Of Counsel:
17 Steven T. Lovett
18 Nathan C. Brunette
19 900 SW Fifth Avenue, Suite 2600
20 Portland, OR 97215
21 Tel.: (503) 224-3380
22 Fax: (503) 220-2480

23 Attorneys for Plaintiff Troy Healthcare, LLC
24
25
26

Int. Cl.: 5

Prior U.S. Cl.: 18

United States Patent and Trademark Office **Reg. No. 1,744,224**
Registered Jan. 5, 1993

**TRADEMARK
PRINCIPAL REGISTER**

STOPAIN

DRJ GROUP, INC. (CALIFORNIA CORPORATION)
4900 ATHERTON STREET
LONG BEACH, CA 90815, ASSIGNEE OF SPINELLI, JOSEPH (UNITED STATES CITIZEN),
DBA VIMCO LONG BEACH, CA 90815

FOR: TOPICAL ANALGESIC SPRAY, IN CLASS 5 (U.S. CL. 18).
FIRST USE 8-29-1990; IN COMMERCE 1-7-1991.

SER. NO. 74-135,651, FILED 2-1-1991.

JULIA A. HARDY, EXAMINING ATTORNEY

EXHIBIT 1

PAGE 20 of 24

Int. Cl.: 5

Prior U.S. Cls.: 6, 18, 44, 46, 51, and 52

Reg. No. 3,445,830

United States Patent and Trademark Office

Registered June 10, 2008

**TRADEMARK
PRINCIPAL REGISTER**

**STOPAIN. PUTS PAIN IN ITS
PLACE.**

DRJ GROUP, INC. (CALIFORNIA CORPORATION)
171 SAXONY ROAD, SUITE 202
ENCINITAS, CA 92024

FOR: TOPICAL ANALGESIC SPRAY, TOPICAL ANALGESIC ROLL-ON AND TOPICAL ANALGESIC CREAM ALL OF THE FOREGOING FOR RELIEF OF ARTHRITIS, MUSCLE AND BACK PAIN, TENDONITIS, MUSCLE SPRAINS, STRAINS, BRUISES AND CRAMPS, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 5-4-2007; IN COMMERCE 5-4-2007.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 1,744,224.

SN 77-052,716, FILED 11-29-2006.

BERYL GARDNER, EXAMINING ATTORNEY

EXHIBIT 2
PAGE 21 of 24

United States of America

United States Patent and Trademark Office

STOPAIN. EXACTLY WHAT IT
DOES.

Reg. No. 3,952,695

Registered Apr. 26, 2011

Int. Cl.: 5

TRADEMARK

PRINCIPAL REGISTER

TROY HEALTHCARE, LLC (PENNSYLVANIA LIMITED LIABILITY COMPANY)
130 LIONS DRIVE
HAZLETON, PA 18202

FOR: ANALGESICS; ANALGESIC PREPARATIONS; TOPICAL ANALGESIC SPRAY, TOPICAL ANALGESIC ROLL-ON, AND TOPICAL ANALGESIC GEL, ALL OF THE FOREGOING FOR RELIEF OF ARTHRITIS, MUSCLE AND BACK PAIN, TENDONITIS, MUSCLE SPRAINS, STRAINS, BRUISES, AND CRAMPS, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

FIRST USE 10-0-2010; IN COMMERCE 10-0-2010.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 1,744,224 AND 3,445,830.

SN 85-081,646, FILED 7-9-2010.

BRIAN PINO, EXAMINING ATTORNEY



David J. Kyros

Director of the United States Patent and Trademark Office

EXHIBIT 3
PAGE 22 of 24

ASSIGNMENT OF INTELLECTUAL PROPERTY

This ASSIGNMENT OF INTELLECTUAL PROPERTY (“Assignment”) is made *nunc pro tunc*, effective as of January 19, 2010, between DRJ Group, Inc., a California corporation (“Assignor”), and Troy Healthcare, LLC, a Pennsylvania limited liability company (“Assignee”).

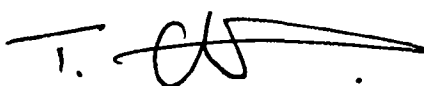
For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby transfers and assigns to Assignee, and Assignee hereby accepts the transfer and assignment of, all of Assignor’s right, title and interest in, to and under all intellectual property owned or licensed by Assignor, including, without limitation, all formulas, recipes, specifications and manufacturing processes, procedures and parameters developed by Assignor, all other know-how, trade secrets, confidential or proprietary information, customer lists, technical information, data, process technology, plans, drawings and blue prints in which Assignor has a proprietary interest, and those trademarks listed on Schedule A hereto. Notwithstanding the foregoing, Assignor’s name is excluded from this Assignment and shall remain the property of Assignor.

Except to the extent that federal law preempts state law with respect to the matters covered hereby, this Assignment shall be governed by and construed according to the laws of the State of California, excluding its conflicts of law principles that would require the application of the laws of any other state.

IN WITNESS WHEREOF, Assignor and Assignee do hereby sign this Assignment on April 29, 2011.

Assignor:

DRJ GROUP, INC.

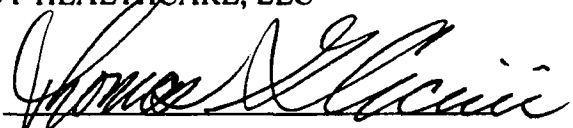
By:  _____

Name: Thomas M. Clydesdale

Title: President

Assignee:

TROY HEALTHCARE, LLC

By:  _____

Name: Thomas G. Cicini

Title: President

SCHEDULE A
TRADEMARKS

- STOPAIN® - U.S. Registration #1,744,224 – Registration Date: January 5, 1993.
- STOPAIN. Puts Pain in Its Place® - U.S. Registration #3,445,830 – Registration Date: June 10, 2008.

EXHIBIT 4
PAGE 24 of 24

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
 TROY HEALTHCARE, LLC, a Pennsylvania limited liability company,

(b) County of Residence of First Listed Plaintiff Luzerne County
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
 Brian C. Park, Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, WA 98101, (206) 624-0900

DEFENDANTS
 NUTRACEUTICAL CORPORATION, a Delaware corporation, et al.

County of Residence of First Listed Defendant Summit County
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
			FEDERAL TAX SUITS	
			<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Lanham Act, 15 U.S.C. §§ 1114 and 1125

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: 05/18/2011

SIGNATURE OF ATTORNEY OF RECORD: s/ Brian C. Park

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____