

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

**PACIFIC BIOSCIENCE LABORATORIES,
INC., a Washington Corporation,**

Plaintiff,

v.

**NUTRA LUXE MD, LLC, a Florida Limited
Liability Company; and**

**NUTRA BOTANICAL MD, INC., a Florida
Corporation,**

Defendants.

Case No.: 2:10-cv-00230-JLR

**FIRST AMENDED COMPLAINT FOR
PATENT INFRINGEMENT,
FALSE ADVERTISING, AND
TRADE DRESS INFRINGEMENT**

JURY DEMAND

Plaintiff Pacific Bioscience Laboratories, Inc., (“PBL”) through its attorneys Faegre & Benson, LLP, submits this First Amended Complaint (“Amended Complaint”) in this action for patent infringement, false advertising, and trade dress infringement, and for its Amended Complaint against Nutra Luxe MD, LLC and Nutra Botanical MD, Inc. (collectively “Nutra Luxe”), states as follows:

INTRODUCTION

1. PBL created a market for technically advanced skin cleansing products with its patented Clarisonic skin cleansing system (“the Clarisonic System”), which PBL launched in 2004. After seeing PBL’s success with the Clarisonic System, Nutra Luxe introduced its knock-off Nutra Sonic product (the “Nutra Sonic”) in late 2009. This case is about Nutra Luxe’s infringement of PBL’s patent that relates to

1 advanced skin cleansing products through Nutra Luxe's sale, offer for sale, import, manufacture, and use
2 of the Nutra Sonic.

3 2. As part of Nutra Luxe's attempt to trade off of PBL's goodwill and the reputation of the
4 Clarisonic System, Nutra Luxe has also attempted to deceive the public into thinking that its Nutra Sonic
5 is a superior product to the Clarisonic System through literally false comparative advertising. Through its
6 pervasive advertising campaign in print, national television, and internet ads and websites, Nutra Luxe
7 has falsely claimed that the Nutra Sonic: (a) is "better" than the Clarisonic System because it is
8 "clinically tested and shown to be the most effective skin cleansing product on the market;" (b)
9 "oscillates up to 400 times/second, 33% greater than [the Clarisonic system]"; (c) has "70% more brush
10 surface than [the Clarisonic System brush head] for better and more effective skin cleansing"; (d) because
11 of its alleged (but untrue) performance advantages is a better product for less money; (e) is the "#1
12 dermatologist recommended" brand; (f) is "[t]he ONLY Sonic cleansing system available for the
13 consumer, with 4 oscillation speeds . . ."; and (g) the Nutra Sonic operates at "400 oscillations per
14 second." Nutra Luxe is also attempting to confuse consumers and unfairly take away PBL's market share
15 by copying the trade dress of the Clarisonic System, which the relevant public identifies with a single
16 source.

17 PARTIES

18 3. Plaintiff Pacific Bioscience Laboratories, Inc., is a Washington corporation having its
19 principal place of business at 13222 SE 30th Street #A1 Bellevue, WA 98005.

20 4. PBL is in the business of developing and marketing technically advanced skin care
21 products, including the Clarisonic System.

22 5. On information and belief, Nutra Luxe MD, LLC is a Florida limited liability company
23 with its principal place of business at 6835 International Center Blvd., Suite 5, Ft. Meyers, Florida 33912.

24 6. On information and belief, Nutra Botanical MD, Inc. is a Florida corporation with its
25 principal place of business at 6835 International Center Blvd., Suite 5, Ft. Meyers, Florida 33912.
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THE '691 PATENT AND THE CLARISONIC SKIN CLEANSING SYSTEM

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2 13. Plaintiff PBL invented devices and methods for treatment of early stage acne and for the
3 effective cleansing of skin. These devices and methods employ motion and forces at sonic frequencies to
4 cleanse, soften and smooth skin. The cleansing is gentle, yet more effective than manual cleansing. It
5 alleviates clogged pores and removes debris from the skin more gently and effectively than other
6 alternatives.

7 14. PBL invested heavily in the development of its sonic facial brush technology, engaging in
8 extensive laboratory and clinical testing and design-optimization efforts from 2001 through 2004.

9 15. This research and development culminated in several patent applications, and on January
10 22, 2008, the United States Patent and Trademark Office issued Patent Number 7,320,691 (the "'691
11 patent"). A copy of the '691 patent is attached as **Exhibit 1**.

12 16. The '691 patent was assigned by the inventors to Pacific Bioscience Laboratories, Inc., on
13 January 13, 2003.

14 17. Put simply, the '691 patent claims devices for treatment of acne and for treatment and/or
15 cleansing of skin. The '691 patent covers devices that contact the skin, and that move in a way that
16 unclogs pores and cleanse the skin. One way a device may achieve the necessary skin movement is by
17 moving the element that contacts the skin (for example, a brush) back and forth at approximately 80–200
18 Hertz (cycles per second), at a particular amplitude that causes desirable forces on the skin without
19 stretching or otherwise damaging the skin. This movement on the skin has the effect of unclogging pores
20 and cleansing the skin.

21 18. PBL subsequently created the Clarisonic System. Launched in 2004, the product line
22 currently includes the original Clarisonic device, now called the Clarisonic Classic; an enhanced 3 speed
23 model called the Clarisonic Plus; a smaller model for travel use called the Clarisonic Mia; and a 4 speed
24 professional model, the Clarisonic Pro, distributed exclusively by skin care professionals. A true and
25 accurate depiction of the product line is displayed below:
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The Clarisonic Classic



The Clarisonic Plus



The Clarisonic Mia



The Clarisonic Pro

19. Prior to the introduction of the Clarisonic System, there were no sonic facial cleansing devices on the market. Indeed, before development of the Clarisonic System, there existed no market for sonic skin care devices. Accordingly, PBL invested millions of dollars to create the sonic skin care market. For example, PBL expended significant resources both to educate the public regarding facial cleansing and to market sonic facial cleansing devices.

20. PBL devoted significant resources to obtaining high quality materials, developing innovative technology, testing its products thoroughly, and creating a superior customer service experience in order to develop the sonic skin cleansing market.

21. Clarisonic System products are widely available nationwide at prestige retailers including Sephora, Nordstrom, Saks Fifth Avenue, Ulta, Beauty.com and SkinStore.com, as well as through

1 dermatologists, cosmetic surgeons and spas. Clarisonic System products are also advertised and sold on
2 the QVC television network.

3 22. The Clarisonic System has been an enormous success. It has been recognized as one of
4 Oprah’s Favorite Things in 2007 on the Oprah Winfrey Show, Best of Sephora in 2007 and 2008, and as
5 QVC Customer Choice in 2008, 2009 and 2010. In addition, PBL was named on Inc 500’s Fastest
6 Growing Private Companies List in 2010.

7 23. The ’691 patent underwent two ex parte reexamination proceedings at the United States
8 Patent and Trademark Office in 2011, bearing control Nos. 90/009,797 and 90/011,343. The Patent
9 Office reaffirmed all claims of the patent without any amendments, and twelve new claims were added.

10 NUTRA LUXE’S NUTRA SONIC PRODUCTS

11 24. In late 2009, Nutra Luxe launched a device similar in name, function, and appearance, to
12 the Clarisonic System—the Nutra Sonic.

13 25. Similar to the Clarisonic System line of products, Nutra Sonic also has four speed standard
14 size products called the Essential or Professional, a two speed product called the Bella and a smaller,
15 travel-friendly brush that it calls the Travel Companion. The Nutra Sonic product line is displayed
16 below:



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26 “Nutra Sonic Essential/Professional Face
Brush Cleansing System”



“Nutra Sonic Bella
Face Brush Cleansing System”



“Nutra Sonic Travel Companion”

26. At least some forms of Nutra Luxe’s packaging for the Nutra Sonic specifically states that the Nutra Sonic can be used to treat acne, as highlighted in red below:

DISCOVER BEAUTIFUL AND HEALTHY SKIN...

NUTRA SONIC[®] Professional

THE NEXT GENERATION OF SONIC FACE AND BODY CLEANSING

A message from the doctor ...
NUTRA SONIC[®] is the perfect product for my practice... I have my patients use it before all of my procedures and treatments and have them use it on a regular basis to keep skin clean and healthy. I can recommend **NUTRA SONIC[®]** to everybody who wants to have softer, smoother and more radiant skin.
 A. Hawrych, MD
 Board Certified
 Facial Plastic Surgeon

Oscillates Over 400x per second

Dermatologist Recommended for Healthy & Beautiful Looking Skin

- Gentle enough to be used every day
- Helps eliminate fine LINES and WRINKLES
- Removes makeup better than manual cleansing
- Removes 3 times more oil and dirt
- Reduces oily patches
- Clears impurities
- Visibly reduces large pores
- **Helps reduce Acne**
- Removes blackheads
- Deep cleans and visibly reduces pores

GET SOFTER, SMOOTHER AND MORE RADIANT SKIN WITH NUTRA SONIC[®]

NUTRA SONIC[®] comes with 4 SPEEDS:
 Low Frequency for even the most sensitive skin
 High Frequency for normal skin
 Jitter Mode Frequency for deep cleansing and microdermabrasion – also recommended for MEN’s skin to prevent razor burn

#1 Recommended by Professionals

Professional Results in the Privacy of Your Home

NUTRA LUXE'S FALSE ADVERTISING

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2 27. Since its launch, Nutra Luxe has focused its advertising primarily on the message that
3 Nutra Sonic is a lower cost alternative to the Clarisonic System with similar performance benefits.

4 28. In 2010, Nutra Luxe launched a more aggressive comparative advertising campaign,
5 claiming performance superiority to the Clarisonic System in a number of significant respects.

6 29. For example, in a letter to skin care professionals ("the Nutra Luxe Letter to Doctors"),
7 Nutra Luxe states that Nutra Sonic is a "BETTER PRODUCT" than the Clarisonic System (the "Better
8 Product Claim") based on several alleged performance benefits including: (1) "Nutra Sonic is clinically
9 tested and shown to be the most effective skin cleansing product on the market" (the "Comparative
10 Clinical Claim"); (2) "Where Clarisonic has only an oscillating mode, which goes from low to high at a
11 rate of 300 times/second, Nutra Sonic oscillates up to 400 times/second, 33% greater than competition"
12 (the "Faster Oscillation Claim"); and (3) Nutra Sonic has a "70% larger [] oscillating head [which] allows
13 for faster and deeper cleansing" (the "Larger Brush Head Claim"). A true and accurate copy of the Nutra
14 Luxe Letter to Doctors is attached as **Exhibit 2**.

15 30. On information and belief, Nutra Luxe has distributed the Nutra Luxe Letter to Doctors
16 nationwide through both regular mail and electronic mail.

17 31. The Better Product Claim, Comparative Clinical Claim, Faster Oscillation Claim and
18 Larger Brush Head Claim have appeared in substantially similar form in other Nutra Luxe advertising,
19 including Nutra Luxe websites, consumer brochures and/or online videos. A copy of the former Nutra
20 Sonic product page for its Nutra Sonic Professional model on its www.nutraluxemdonline.com website is
21 attached as **Exhibit 3**. Copies of two consumer brochures for Nutra Sonic are attached as **Exhibit 4**.
22 NutraLuxe also posts online video commercials on its YouTube web page at
23 <http://www.youtube.com/user/nutraluxemd>.

24 32. The Clinical Superiority Claim is literally false. On information and belief, Nutra Luxe
25 has no reliable clinical study directly comparing the Nutra Sonic to the Clarisonic System that
26 demonstrates that Nutra Sonic is more effective for skin cleansing than the Clarisonic System.

1 33. The Faster Oscillation Claim is literally false. Nutra Sonic does not oscillate at 400 times
2 per second. In addition, Nutra Sonic does not oscillate 33% faster than the Clarisonic System. In fact,
3 Nutra Sonic oscillates at a substantially lower frequency than the Clarisonic System.

4 34. The Larger Brush Head Claim is literally false. The Nutra Sonic brush surface is not 70%
5 larger than the oscillating portion of the Clarisonic System brush head. The Larger Brush Head Claim is
6 also literally false because the larger size of the oscillating portion of the Nutra Sonic brush head does not
7 provide better or more effective cleansing performance than the Clarisonic System. Finally, in some
8 cases, Nutra Sonic does not adequately qualify the Larger Brush Head Claim to refer only to the
9 oscillating portion of the two brush surfaces (e.g. Exhibit 4). In this unqualified form, the Larger Brush
10 Head Claim is also literally false because the Clarisonic System and Nutra Sonic brush heads are
11 approximately the same size.

12 35. The Better Product Claim is literally false because it is based on the Clinical Superiority
13 Claim, Faster Oscillation Claim and/or the Larger Brush Head Claim, all of which are literally false.

14 36. Nutra Sonic also claims that it is “#1 Dermatologist Recommended” (the “#1
15 Dermatologist Recommended Claim”). This claim has appeared, for example, on the home page of its
16 www.trynutrasonic.com website, a copy of which is attached as **Exhibit 5**.

17 37. The #1 Dermatologist Recommended Claim is literally false. Nutra Sonic is not the #1
18 dermatologist recommended sonic cleansing system and, on information and belief, Nutra Luxe does not
19 possess any reliable substantiation for this claim.

20 38. In addition to direct false comparative advertising, Nutra Luxe also claims that it is “[t]he
21 ONLY Sonic cleansing system available for the consumer, **with 4 oscillation speeds**” (emphasis in
22 the original) (the “4 Speeds Claim”). This claim appears on the recently revamped
23 nutraluxemdonline.com and replaced the Superior Product Claim after this action was initiated. A copy
24 of a recent Nutra Sonic product page for its Nutra Sonic Professional model on its
25 www.nutraluxemdonline.com website is attached as **Exhibit 6**.

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1 39. The 4 Speeds Claim is false. The Clarisonic Pro model, which is sold to consumers
2 through skin care professionals and spas, also has four speeds (low, normal, high and pro), plus a fifth
3 body mode (normal and pulse).

4 40. The Faster Oscillation Claim has been modified to simply state that the Nutra Sonic
5 operates at 400 oscillations per second (“the 400 Oscillations Claim”). This claim has appeared in
6 various advertising and promotional media for Nutra Sonic. This claim is literally false. Nutra Sonic
7 does not oscillate at 400 times per second.

8 41. Nutra Luxe’s false advertising has caused irreparable harm to PBL. These widely-
9 disseminated false advertisements necessarily diminish the value of the Clarisonic System in the mind of
10 the consumer, for which PBL has no adequate legal remedy.

11 42. Nutra Luxe also partners with third parties, including HSN, to advertise and sell the Nutra
12 Sonic.

13 43. Most of the false claims referenced in paragraphs 28, 35, 37 and 39 have appeared in
14 national television advertisements for Nutra Sonic on HSN. For example, the advertisements for Nutra
15 Sonic that appear on HSN frequently tout both the larger oscillating surface of Nutra Sonic compared to
16 the Clarisonic System and the alleged higher frequency of Nutra Sonic compared to the Clarisonic
17 System as performance advantages for Nutra Sonic.

18 44. For example, in a January 8, 2011 segment on HSN, the HSN announcer made a direct
19 comparison between the Nutra Sonic and the Clarisonic System (presenting both systems as shown
20 below) and claims: “at this speed, [the Nutra Sonic is] unclogging pores; no one else can make that
21 statement.”

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In the same video, the HSN announcer states: “Nutra Sonic is the only skin cleansing system on the market that has 4 speeds.” (6:53).

45. In a January 4, 2011 HSN segment concerning the Nutra Sonic Travel Companion brush, the HSN announcer stated that the Nutra Sonic operates at “400 oscillations per second.”

46. In a September 9, 2010 HSN segment concerning the Nutra Sonic 4-Speed Facial System, the announcer showed the below photograph and compared the Clarisonic System where only “the little bitty part in the center works . . . kind of like a grout cleaner” to the Nutra Sonic where the “whole brush moves” so that it “really cleans the pores” and “gives you a real sonic cleanse.”



1 In the same video, the HSN announcer claimed that Nutra Sonic is “a better sonic cleanser for your face”
2 stating that it is the “only one with four speeds.”

3 47. On information and belief, the television advertisements for Nutra Sonic products
4 appearing on HSN and/or the content appearing therein are reviewed, approved, controlled and/or
5 directed by Nutra Luxe or its agents such that they are Nutra Luxe advertisements.

6 48. On information and belief, Nutra Luxe or its agents provide scripts, talking points, product
7 descriptions, advertising and/or other similar information to HSN that HSN is directed, encouraged
8 and/or authorized to use when advertising the Nutra Sonic. On information and belief, Nutra Luxe or its
9 agents has induced HSN to make false advertisements because the information that Nutra Luxe provides
10 to HSN includes the above described false advertising claims.

11 **THE CLARISONIC SYSTEM TRADE DRESS AND NUTRA LUXE’S INFRINGEMENT**

12 49. The Clarisonic System possesses a combination of elements that together serve to identify
13 to relevant consumers that the Clarisonic System comes from a single source. This combination of
14 elements, the “Clarisonic System Trade Dress,” consists of the following:

- 15 a. The overall hourglass shape of the Clarisonic System;
16 b. The shape of the head unit of the Clarisonic System;
17 c. Identical molded arcs on each side of the head unit;
18 d. An oblong shaped soft grip pad on the front of the product;
19 e. One or more control buttons located within the perimeter of the soft grip pad;
20 f. A contrasting gray color for the soft grip pad;
21 g. The product name printed horizontally across the back of the head of the unit; and
22 h. A contrasting colored ring of bristles located inside of the outer two rows of bristles of
23 the brush head.

24 50. The Clarisonic System Trade Dress is non-functional and serves to distinguish PBL’s
25 Clarisonic System from competitive products. The Clarisonic System Trade Dress is ornamental and has
26 no utilitarian advantage. Furthermore, the myriad different brush styles and handles in existence today

1 and throughout the past show the unique nature of the Clarisonic System Trade Dress and how other
2 styles are available to competing skin cleansing brush manufacturers.

3 51. PBL intentionally created its Clarisonic System Trade Dress to distinguish its Clarisonic
4 System from any other skin cleansing brush that would emerge on the market and to communicate to
5 consumers that the Clarisonic System came from a single source. On information and belief, no other
6 manufacturer had used the Clarisonic System Trade Dress for a skin care brush prior to its introduction
7 into and success in the market by PBL.

8 52. PBL sells its Clarisonic System through a wide range of distribution channels. PBL's
9 advertising and marketing efforts focus on the visual image of its skin cleansing products which
10 exemplifies the Clarisonic System Trade Dress, as depicted in the following sample advertising images:



17 53. Because of the inherent distinctiveness of the Clarisonic System Trade Dress, as well as
18 the extensive sales, advertising and promotion making use of the Clarisonic System Trade Dress, the
19 Clarisonic System Trade Dress has secondary meaning, namely that it has become known among relevant
20 consumers throughout the United States as designating products from a single source.

21 54. The Nutra Sonic line of products is likely to cause confusion as to source because of its
22 incorporation of and substantial similarity to the Clarisonic System Trade Dress.

23 55. Nutra Luxe's intentional imitation of the Clarisonic System Trade Dress in order to trade
24 on PBL's goodwill and success, as well as the resulting high volume of infringing sales, demonstrates that
25 the Clarisonic System Trade Dress has acquired secondary meaning.

CLAIM I

PATENT INFRINGEMENT – 35 U.S.C. § 1, ET SEQ.

56. Plaintiff hereby incorporates each of the preceding paragraphs as if fully set forth herein.

57. Nutra Luxe markets and sells the infringing Nutra Sonic.

58. Nutra Luxe markets and sells its infringing products on its website, at http://www.nutraluxemd.com/nutra_sonic.html. On information and belief, Nutra Luxe has made sales and deliveries to customers in the Western District of Washington. On information and belief, Nutra Luxe also markets the Nutra Sonic device through other third-party resellers. On information and belief, Nutra Luxe also rebrands the Nutra Sonic product and sells the rebranded products to third-parties, who in turn sell the rebranded products through retailers.

59. The Nutra Sonic packaging claims that the device “Helps Reduce Acne” and “Removes Blackheads.”

60. The Nutra Sonic has a circular brush. The brush head has bristles, bristle tufts, and rows of bristle tufts that contact a user’s skin. The Nutra Sonic also has an assembly that moves the brush head (including the bristles, bristle tufts, and rows of bristle tufts) back and forth. When a row of bristles moves the skin back and forth, it causes the skin directly underlying the row of bristles to also move back and forth. The skin resists this motion; therefore, the device produces tension, compression, and shear forces in the skin. These forces have the effect of unclogging pores and cleansing the skin.

61. The Nutra Sonic device causes its brush head to move within a frequency range claimed by the ’691 Patent. Moreover, the brush bristles have characteristics claimed by the ’691 Patent, and move at an amplitude claimed by the ’691 Patent.

62. On information and belief, the Nutra Sonic device is manufactured, in whole or in part, in China, and then imported, in whole or in part, into the United States.

63. From a time not yet known, Nutra Luxe, without a license or any other right recognized by law, has infringed one or more claims of the ’691 Patent.

1 82. Nutra Luxe has caused HSN to misrepresent the nature, characteristics, and qualities of its
2 goods.

3 83. Nutra Luxe's wrongful acts are likely to deceive and have deceived a substantial number
4 of consumers.

5 84. Nutra Luxe's wrongful acts are material, in that they are likely to influence the decisions
6 of consumers and, on information and belief, have influenced the decisions of many purchasers of its
7 products.

8 85. HSN's false advertisements were made in interstate commerce through its nationwide
9 television station and through its website.

10 86. Nutra Luxe's actions were intentional, deliberate, willful and done with full knowledge
11 that they would cause HSN to make false advertisements.

12 87. Nutra Luxe knew, or could have reasonably anticipated or expected, that its actions would
13 cause HSN to commit acts of false advertising in violation of the Lanham Act.

14 88. HSN's false advertising, as induced by Nutra Luxe, has caused and will continue to cause
15 PBL substantial and irreparable injury, for which PBL is entitled to all of the relief provided by 15 U.S.C.
16 §§ 1116 and 1117, including but not limited to injunctive relief and compensatory damages.

17 89. Nutra Luxe's intentional and willful violations entitle PBL to recover three times its actual
18 damages, pursuant to 15 U.S.C. § 1117(a).

19 90. This is an exceptional case under 15 U.S.C. § 1117(a), thus entitling PBL to an award of
20 reasonable attorney's fees.

21 91. Plaintiff has no adequate remedy at law for Nutra Luxe's continuing violations of its
22 rights.

23 **CLAIM IV**

24 **TRADE DRESS INFRINGEMENT – 15 U.S.C. § 1125(a)(1)(A)**

25 92. Plaintiff hereby incorporates each of the preceding paragraphs as if fully set forth herein.
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1 93. PBL owns and is the senior user of the Clarisonic System Trade Dress for its facial
2 cleansing brush, which is entitled to protection under 15 U.S.C. § 1125(a).

3 94. PBL owns common law trademark rights in the Clarisonic System Trade Dress. These
4 rights are superior to any rights that Nutra Luxe may claim with respect to its infringing products. The
5 Clarisonic System Trade Dress is nonfunctional and has acquired secondary meaning among the relevant
6 public in that it identifies products emanating from a single source.

7 95. Nutra Luxe is promoting, offering for sale, and selling products that intentionally copy and
8 imitate the Clarisonic System Trade Dress.

9 96. Nutra Luxe's sale and advertising of Nutra Sonic is likely to cause confusion, or to cause
10 mistake, or to deceive as to the affiliation, connection, or association of Nutra Luxe with PBL, or as to
11 the origin, sponsorship, or approval of Nutra Sonic product PBL in violation of section 43(a) of the
12 Lanham Act, 15 U.S.C. § 1125(a).

13 97. Nutra Luxe copied the Clarisonic System Trade Dress with the intent to trade on the
14 goodwill developed by PBL in the Clarisonic System Trade Dress. Nutra Luxe's intentional copying is
15 evidenced by the high degree of similarity between Nutra Sonic and the Clarisonic System Trade Dress.

16 98. Nutra Luxe has willfully taken these actions with the intent to confuse or deceive
17 consumers and unfairly profit from the goodwill PBL has developed in the Clarisonic System Trade
18 Dress.

19 99. Nutra Luxe's intentional and willful actions have infringed PBL's common law trademark
20 rights in the Clarisonic System Trade Dress in violation of 15 U.S.C. § 1125(a).

21 100. As a result of Nutra Luxe's actions, Nutra Luxe has been and will continue to be unjustly
22 enriched by profits made through the sale of its infringing products.

23 101. Nutra Luxe's infringement of the Clarisonic System Trade Dress has caused and will
24 continue to cause PBL substantial and irreparable injury, for which PBL is entitled to all of the relief
25 provided by 15 U.S.C. §§ 1116 and 1117, including but not limited to injunctive relief, compensatory
26 damages and Nutra Luxe's profits.

1 102. Nutra Luxe's intentional and willful violations entitle PBL to recover three times its actual
2 damages, pursuant to 15 U.S.C. § 1117(a).

3 103. This is an exceptional case under 15 U.S.C. § 1117(a), thus entitling PBL to an award of
4 reasonable attorney's fees.

5 104. PBL has no adequate remedy at law for Nutra Luxe's continued infringement.

6 **CLAIM V**

7 **VIOLATION OF WASHINGTON STATE CONSUMER PROTECTION ACT – RCW § 19.86.020**

8 105. Plaintiff hereby incorporates each of the preceding paragraphs as if fully set forth herein.

9 106. The state of Washington has an important interest in ensuring that domestic corporations
10 doing business with Washington residents fully comply with Washington laws.

11 107. Nutra Luxe's advertising complained of herein is an unfair act or practice that has the capacity
12 to and does in fact deceive consumers into believing that Nutra Luxe's products are superior to PBL's
13 products, when this is not the case.

14 108. Nutra Luxe's unauthorized use of the Clarisonic System Trade Dress is an unfair act or
15 practice that has the capacity to and does in fact deceive consumers into believing that Nutra Luxe is
16 affiliated, connected or associated with PBL, or that the Nutra Sonic product comes from or is sponsored or
17 approved by PBL.

18 109. Nutra Luxe's conduct occurred in the conduct of trade or commerce or the sale of products in
19 the state of Washington.

20 110. Nutra Luxe's unfair and deceptive acts and practices implicate the public interest because of
21 the widespread deception they are causing on the consuming public.

22 111. All the conduct alleged herein occurs and continues to occur in the course of Nutra Luxe's
23 business. The conduct is part of a pattern or generalized course of conduct repeated on numerous occasions
24 daily.

25 112. Nutra Luxe has engaged and continues to engage in these activities knowingly, willfully and
26 deliberately.

1 113. Plaintiff has been directly and proximately injured in its business and property by Nutra
2 Luxe's conduct complained of herein, in violation of Plaintiff's rights under RCW §19.86.020.

3 114. Nutra Luxe's violations of RCW §19.86.020 have caused and will continue to cause Plaintiff
4 to sustain damage, loss and injury in an amount that cannot be fully measured or compensated in economic
5 terms.

6 115. Pursuant to RCW §19.86.090, Plaintiff is entitled to reasonable attorneys' fees and costs of
7 suit.

8 116. Plaintiff has no adequate remedy at law, unless the acts of Nutra Luxe are enjoined during the
9 pendency of this action and thereafter.

10 **CLAIM VI**

11 **COMMON LAW UNFAIR COMPETITION**

12 117. Plaintiff hereby incorporates each of the preceding paragraphs as if fully set forth herein.

13 118. Nutra Luxe has used and continues to use in advertising and commerce false and
14 misleading descriptions of fact, or false and misleading representation of fact, concerning its
15 merchandise. Nutra Luxe has further displayed, distributed, sold and used merchandise that infringes the
16 Clarisonic System Trade Dress, thereby taking advantage of the good will and business reputation of
17 PBL by unfair means. These activities constitute unfair competition.

18 119. Nutra Luxe has engaged in unfair competition willfully and with a bad faith intent to
19 injure PBL.

20 120. PBL has sustained, and will continue to sustain, substantial injuries, loss and damage to its
21 business by reason of the unfair competition of Nutra Luxe.

22 121. On information and belief, unless restrained and enjoined, Nutra Luxe will continue to
23 engage in unfair competition that injures PBL and thereby causes irreparable damage to PBL, as it would
24 be unreasonably difficult to ascertain the amount of compensation that could afford PBL adequate relief
25 for such continuing infringement. PBL has no adequate remedy at law.

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DEMAND FOR JURY TRIAL

122. Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Pacific Bioscience Laboratories, Inc., prays that this Court enter judgment in favor of the Plaintiff and against the Nutra Luxes as follows:

A. Find that Nutra Luxe has infringed and is infringing the claims of the '691 Patent;

B. Award Pacific Bioscience Laboratories its compensatory damages resulting from Nutra Luxe's infringement of the '691 patent, together with interest and costs as fixed by the Court, as provided by 35 U.S.C. § 284;

C. Issue an injunction enjoining Nutra Luxe, its employees, agents, and all others acting in concert with Nutra Luxe from further infringement of the claims of the '691 Patent, as provided by 35 U.S.C. § 283;

D. Preliminarily and permanently enjoin Nutra Luxe, its employees, principals, agents, subsidiaries, related companies, affiliates and all others acting in concert with any of them from making any further false and misleading claims about its products, including without limitation the Better Product Claim, Comparative Clinical Claim, Faster Oscillation Claim, Larger Brush Head Claim, #1 Recommended Dermatologist Claim, 4 Speeds Claim and the 400 Oscillations Claim, including all substantially similar variations of any of these claims, as provided by 15 U.S.C. § 1116;

E. Direct Nutra Luxe to forthwith use its best efforts to identify and recall from any third party, including but not limited to HSN, any and all false marketing, advertising, and promotional materials used in connection herewith;

F. Direct Nutra Luxe to issue a corrective advertisement or notice to all third parties that Nutra Luxe has solicited with false advertisements, making clear that Nutra Luxe's false statements were false;

1 G. Direct Nutra Luxe to file with the Court and serve on PBL's counsel, within 30 days after
2 entry of the Court's injunction, a sworn statement as provided in 15 U.S.C. § 1116, setting forth in detail
3 the manner in which Nutra Luxe has complied with the injunction;

4 H. Direct Nutra Luxe to provide an accounting of all sales and profits from its false
5 advertisements;

6 I. Award PBL its compensatory damages resulting from Nutra Luxe's false advertising and
7 trade dress infringement, together with prejudgment and post-judgment interest and costs as fixed by the
8 Court, as provided by 15 U.S.C. § 1117;

9 J. Award PBL Nutra Luxe's profits from its false advertising and trade dress infringement, as
10 provided by 15 U.S. C. § 1117;

11 K. Declare that Nutra Luxe's false advertising, infringement and other wrongful acts herein
12 alleged be determined deliberate, willful, and in conscious disregard of PBL's rights pursuant to 15
13 U.S.C. §§ 1117 and 1125(a) and at common law;

14 L. Award PBL any other remedies to which it may be entitled, including treble damages and
15 all other remedies provided for in 15 U.S.C. § 1117 and under state statutory and common law;

16 M. A declaration that this case is exceptional, and, in conjunction therewith, an award of
17 reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1117(a) and RCW §19.86.090; and

18 N. Grant such other and further relief as the court may find just and proper, including
19 reasonable attorneys fees where appropriate.

20
21 Dated: November 10, 2011

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

**PACIFIC BIOSCIENCE LABORATORIES,
INC. a Washington Corporation,**

Plaintiff,

v.

**NUTRA LUXE MD, LLC, a Florida Limited
Liability Company,**

Defendant.

Case No.: 2:10-cv-00230-JLR

CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 10th day of November, 2011, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

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7 Executed on this 10th day of November, 2011.

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