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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Ron Kramer, an Arizona resident; Sal
10 Abraham, a Florida resident; ThermoLife
International LLC, an Arizona limited
liability company,

11 Plaintiffs,

12 v.

13 Creative Compounds LLC, a Nevada
14 limited liability company,

15 Defendant.

No. CV-11-01965-PHX-JAT (Lead)
No. CV-11-02033-PHX-JAT (Con)

ORDER

16
17 Pending before the Court is Ron Kramer's, Sal Abraham's, and ThermoLife
18 International LLC's (collectively, "ThermoLife") Motion for Summary Judgment on
19 Defendant's Declaratory Judgment Complaint and Plaintiff's Claim for Patent
20 Infringement, Creative Compounds LLC's ("Creative") Motion for Summary Judgment,
21 and ThermoLife's Cross-Motion for Summary Judgment on Creative's Newly Asserted
22 Defense of Invalidity Pursuant to 102(a) and (b). Additionally, the Court examines the
23 ripeness of ThermoLife's patent infringement claims *sua sponte*.

24 **I. Background**

25 Ron Kramer and Sal Abraham are the sole inventors listed on U.S. Patent No.
26 7,919,533 ("the '533 Patent"). (CV 11-1965, Doc. 52-1, Exhibit 2). The '533 Patent
27 generally concerns the use of diiodothyroacetic acid ("DIAC") as a dietary supplement to
28 promote lean body mass. *See id.* The claim at issue in this suit, Claim 11 of the '533

1 Patent, reads “[a] dietary supplement comprising [DIAC].” *Id.*

2 On September 23, 2011, Creative filed a complaint in the Eastern District of
3 Missouri seeking a declaratory judgment that Creative did not infringe the ’533 Patent
4 and that the ’533 Patent is invalid. (CV 11-02033, Doc. 1). In response, ThermoLife
5 filed a complaint in this Court alleging that Creative infringes the ’533 Patent, induces
6 infringement of the ’533 Patent, contributes to infringement of the ’533 Patent, and
7 falsely advertises its products in violation 15 U.S.C. § 1125(a)(1)(B). (CV 11-1965, Doc.
8 1). These two actions were eventually consolidated and assigned to this Court. (CV 11-
9 1965, Doc. 12).

10 In the pending motions for summary judgment, ThermoLife now admits that
11 Creative has not sold any products containing DIAC. (CV 11-1965, Doc. 51 at 2 n.1).
12 Instead, ThermoLife now asserts that Creative infringed the ’533 Patent by offering
13 DIAC for sale through emails with attached advertisements. *Id.* at 4.

14 In response, Creative requests that the Court grant summary judgment that the
15 ’533 Patent is invalid under 35 U.S.C. § 102(a) and (b) because the invention was both
16 publicly used and on sale before the patent was filed.¹ (CV 11-1965, Doc. 53 at 6-10). In
17 particular, Creative alleges that, sometime in the year 2000, Derek Cornelius, currently a
18 consultant to Creative, received and used a sample of DIAC from Francisco Tabak as part
19 of an offer by Mr. Tabak to sell DIAC to Syntrox, Mr. Cornelius’s company. *Id.*
20 Creative contends that these actions invalidate the ’533 Patent because DIAC was used
21 by others and offered for sale more than one year before the ’533 Patent was filed on
22 October 20, 2004. *Id.*

23 **II. Analysis and Conclusions**

24 In the motions before the Court, the parties seek summary judgment on
25 ThermoLife’s claims of direct, contributory, and induced patent infringement and
26

27 ¹ Although Creative has cited to 35 U.S.C. §102(a) and (b), 35 U.S.C. § 102 has
28 recently been amended. The two defenses to patent validity Creative alleges, however,
have been included in the new version of 35 U.S.C. §102, under subsection (a)(1). Thus,
the Court will refer to the new version of the statute from this point forward.

1 Creative’s claims that the ’533 Patent is invalid as anticipated under 35 U.S.C.
2 §102(a)(1). But, the Court is concerned that it lacks jurisdiction over ThermoLife’s
3 claims of direct, contributory, and induced infringement because ThermoLife has
4 admitted that Creative has not sold any DIAC. Thus, the Court will first examine the
5 ripeness of ThermoLife’s direct, contributory, and induced patent infringement claims
6 and then determine whether summary judgment is appropriate on any remaining issues.

7 **A. Ripeness**

8 “[I]nquiring whether the court has jurisdiction is a federal judge’s first duty in
9 every case.” *Belleville Catering Co. v. Champaign Mkt. Place, L.L.C.*, 350 F.3d 691, 693
10 (7th Cir. 2003); *see also Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004).
11 In order for a federal court to have jurisdiction, the action before it must meet the case or
12 controversy requirement of Article III of the Constitution. *See Caraco Pharm. Labs.,*
13 *Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1290 (Fed. Cir. 2008). “[A]n action is
14 justiciable under Article III only where . . . the issues presented are ripe for judicial
15 review.” *Id.* at 1291.

16 In the Federal Circuit,

17 [w]hether an action is “ripe” requires an evaluation of both
18 the fitness of the issues for judicial decision and the hardship
19 to the parties of withholding court consideration. As to the
20 first prong, an action is fit for judicial review where further
21 factual development would not significantly advance a court’s
22 ability to deal with the legal issues presented. As to the
23 second prong, withholding court consideration of an action
24 causes hardship to the plaintiff where the complained-of
25 conduct has an immediate and substantial impact on the
26 plaintiff.

23 *Id.* at 1294-95 (internal citations and quotations omitted). Here, the Court is particularly
24 concerned with the second prong of the ripeness test because Creative has not actually
25 sold any DIAC.

26 **1. The Ripeness of ThermoLife’s Direct and Contributory Patent**
27 **Infringement Claims**

28 ThermoLife has alleged that Creative has infringed the ’533 Patent under 35

1 U.S.C. § 271(a). 35 U.S.C. § 271(a) provides that “whoever without authority makes,
2 uses, offers to sell, or sells any patented invention, within the United States or imports
3 into the United States any patented invention during the term of the patent therefor,
4 infringes the patent.” But, ThermoLife concedes that Creative has not made, used, or
5 sold any infringing product and that ThermoLife is not seeking any monetary damages.
6 (CV 11-1965, Doc. 51 at 2 n.1).

7 Instead, the “complained-of conduct” ThermoLife points to is an email and
8 attached product sheet that Creative sent to approximately eleven potential customers. *Id.*
9 at 4. The full text of the email is presented below:

10 Creative Compounds is pleased to introduce *DIActive* brand
11 of diiodothyroacetic acid (DIAC), one of the most exciting
12 dietary supplements of the decade. Having worked
13 extensively with this novel ingredient, Creative Compounds
14 knows all of the intricacies surrounding its pharmacology and
15 usage. We have the unique ability to help your company
16 properly formulate and integrate this ingredient into a top
17 selling product on the market. Beware of other
18 diiodothyroacetic acid products on the market that are not
19 pure! Beware of other products on the market that are highly
20 diluted but sell for an extremely high price. DIActive is the
21 most pure, highest quality DIAC in the industry and is
22 GUARANTEED to be the lowest price diiodothyroacetic acid
23 in the industry.

24 Please see attached product summary and contact Creative
25 Compounds for more info today.

26 (CV 11-1965, Doc. 51-1 at 13) (emphasis in original). The attached product summary
27 contained language similar to the above email. *Id.* at 14. It further included a brief
28 description of the effects of DIAC. *Id.* The product summary ended with a request to
“[c]ontact Creative Compounds and get the best quality at the lowest price.” *Id.*

As an initial matter, it is difficult to see how an advertisement which resulted in
zero actual sales has a “substantial and immediate harm” on ThermoLife, particularly
when the product was not advertised to the general market but only to eleven specific
potential customers. But, 35 U.S.C. § 271(a) does provide that a patent can be infringed
by “offers to sell.” Accordingly, the Court will examine whether the Creative email
constitutes an offer to sell.

1 In *Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246 (Fed. Cir. 2000), the
2 Federal Circuit examined the meaning of the offer to sell language of 35 U.S.C. § 271(a).
3 After a thorough analysis, the Federal Circuit concluded that “the meaning of ‘offer to
4 sell’ is to be interpreted according to its ordinary meaning in contract law, as revealed by
5 traditional sources of authority.” *Id.* at 255. One such traditional source of authority, the
6 Restatement (Second) of Contracts, defines an offer as “the manifestation of willingness
7 to enter into a bargain, so made as to justify another person in understanding that his
8 assent to that bargain is invited and will conclude it.” Restatement (Second) of Contracts
9 § 24.

10 Examining the Creative email under this standard, it is clear, as a matter of law,
11 that Creative did not make an offer to sell under the meaning of 35 U.S.C. § 271(a). An
12 important requirement for a communication to be an offer is that the reader understands
13 that assent by them will conclude the deal. In the present case, both the email and the
14 attached product summary instruct the recipient to contact Creative for more information.
15 Thus, a recipient of the email would understand that more than their assent is required to
16 conclude the deal, *i.e.* additional communication with Creative.

17 Next, the email is missing key information typically associated with an offer for
18 sale. In particular, price and quantity information, which typically accompany any offer,
19 are noticeably absent from the Creative email. These absent terms show that a reader of
20 the email could not believe that only his or her assent was required to create a binding
21 contract. Thus, the Creative email is not an offer and could not have produced the
22 substantial and immediate harm of direct patent infringement. Accordingly, the Court
23 will dismiss ThermoLife’s direct patent infringement claim without prejudice for failing
24 to meet the jurisdictional requirement of ripeness.²

25 ThermoLife’s contributory patent infringement claim similarly rests on the
26 Creative emails being offers for sale. *See* 35 U.S.C. § 271(b). Accordingly, the Court

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28 ² It is worth noting that Creative appears to concede that it made an offer to sell
DIAC. (CV 11-1965, Doc. 56 at 4). Whether a communication is an offer, however, is a
question of law. Thus, Creative’s concession is not binding on this Court.

1 will dismiss ThermoLife’s contributory patent claim without prejudice for failing to meet
2 the jurisdictional requirement of ripeness.

3 **2. The Ripeness of ThermoLife’s Induced Infringement Claim**

4 ThermoLife also claims that Creative has induced infringement of the ’533 Patent.
5 35 U.S.C. §271(b) provides that “[w]hoever actively induces infringement of a patent
6 shall be liable as an infringer.” “To establish liability under section 271(b), a patent
7 holder must prove that once the defendants knew of the patent, they actively and
8 *knowingly* aided and abetted another’s direct infringement.” *DSU Med. Corp. v. JMS*
9 *Co., Ltd.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (emphasis in original) (internal citations
10 and quotations omitted). Notably, induced infringement does not require “offers to sell,”
11 distinguishing induced infringement from direct and contributory infringement.

12 Under this lesser standard, the Creative email could have produced the substantial
13 immediate harm of induced patent infringement simply by informing and encouraging the
14 public how to use DIAC in an infringing way. The Creative email explains that DIAC is
15 “one of the most exciting dietary supplements of the decade” and that Creative has “the
16 unique ability to help your company properly formulate and integrate this ingredient into
17 a top selling product on the market.” (CV 11-1965, Doc. 51-1 at 13). This arguably
18 induces others to infringe Claim 11 of the ’533 Patent. Thus, the Court concludes that
19 ThermoLife’s claim for induced infringement is ripe and will reach the merits of
20 Creative’s motion for summary judgment that there was no induced infringement

21 **B. Summary Judgment**

22 In summary, after the Court’s examination of jurisdiction, the remaining issues are
23 ThermoLife’s allegations of induced infringement and Creative’s defenses of patent
24 invalidity under 35 U.S.C. §102(a)(1). The Court will now examine whether either party
25 is entitled to summary judgment on these issues.

26 Summary judgment is appropriate when “the movant shows that there is no
27 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
28 of law.” Fed.R.Civ.P. 56(a). “A party asserting that a fact cannot be or is genuinely

1 disputed must support that assertion by . . . citing to particular parts of materials in the
2 record, including depositions, documents, electronically stored information, affidavits, or
3 declarations, stipulations . . . admissions, interrogatory answers, or other materials,” or by
4 “showing that materials cited do not establish the absence or presence of a genuine
5 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
6 Fed.R.Civ.P. 56(c)(1)(A)&(B). Thus, summary judgment is mandated “against a party
7 who fails to make a showing sufficient to establish the existence of an element essential
8 to that party’s case, and on which that party will bear the burden of proof at trial.”
9 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

10 Initially, the movant bears the burden of pointing out to the Court the basis for the
11 motion and the elements of the causes of action upon which the non-movant will be
12 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to
13 the non-movant to establish the existence of material facts. *Id.* The non-movant “must
14 do more than simply show that there is some metaphysical doubt as to the material facts”
15 by “com[ing] forward with ‘specific facts showing that there is a *genuine* issue for trial.”
16 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting
17 Fed.R.Civ.P. 56(e) (1963) (amended 2010)). A dispute about a fact is “genuine” if the
18 evidence is such that a reasonable jury could return a verdict for the nonmoving party.
19 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant’s bare
20 assertions, standing alone, are insufficient to create a material issue of fact and defeat a
21 motion for summary judgment. *Id.* at 247-48. However, in the summary judgment
22 context, the Court construes all disputed facts in the light most favorable to the non-
23 moving party. *OddzOn Products, Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1401 (Fed. Cir.
24 1997).

25 **1. Induced Patent Infringement (Count II in CV 11-1965)**

26 Creative argues that the Court should grant summary judgment to Creative that no
27 induced patent infringement occurred because ThermoLife has not shown evidence of
28 another direct infringer. (CV 11-1965, Doc. 56 at 4). ThermoLife has provided no

1 argument in response. As the Court has already stated, induced infringement requires
2 that “once the defendants knew of the patent, they actively and *knowingly* aided and
3 abetted another’s direct infringement.” *DSU Med. Corp.*, 471 F.3d at 1305 (emphasis in
4 original) (internal citations and quotations omitted). Because ThermoLife has provided
5 no evidence of “another’s direct infringement,” the Court grants summary judgment to
6 Creative on ThermoLife’s induced infringement claim.

7 **2. Creative’s Declaratory Judgment Action (CV 11-2033)**

8 Having considered ThermoLife’s claims for patent infringement, the Court now
9 turns to Creative’s request that the Court issue a declaratory judgment that the ’533
10 Patent is invalid.

11 In the context of patent law, a court has jurisdiction over a declaratory judgment
12 action under 28 U.S.C. § 2201 when “the facts alleged, under all the circumstances, show
13 that there is a substantial controversy, between parties having adverse legal interests, of
14 sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”
15 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Here, Creative has
16 actually been sued for patent infringement, despite the dismissal of some claims as
17 unripe. This suit for of patent infringement creates sufficient controversy to support an
18 examination of the ’533 Patent’s validity. *See Benitec Australia, Ltd. v. Nucleonics, Inc.*,
19 495 F.3d 1340, 1345 (Fed. Cir. 2007). Accordingly, the Court will now examine whether
20 either party is entitled to summary judgment on Creative’s defenses of patent invalidity.

21 **a. Anticipation under 35 U.S.C. §102(a)(1) through Prior**
22 **Public Use**

23 Creative asserts that the ’533 Patent is invalid as anticipated under 35 U.S.C.
24 §102(a) through public use. (CV 11-1965, Doc. 53 at 6-9). 35 U.S.C. §102(a)(1)
25 provides that a patent is invalid if the invention “was . . . in public use . . . before the
26 effective filing date of the claimed invention.” In particular, Creative argues that the
27 claimed invention was in public use before the filing date of the invention because Mr.
28 Cornelius and Mr. Cornelius’s employee Brenda Nixon used DIAC as a nutritional

1 supplement before the patent was filed. (CV 11-1965, Doc. 53 at 8-9). Creative relies on
2 the deposition of testimony of Mr. Cornelius and Ms. Nixon for this argument. *Id.*
3 Creative has also produced three emails between Mr. Tabak and Mr. Cornelius discussing
4 the sale of DIAC to Syntrax, Mr. Cornelius' company. *See* (CV 11-1965, Doc. 54-2);
5 (CV 11-1965, Doc. 54-3).

6 In response, ThermoLife asserts that Creative has failed to meet the clear and
7 convincing standard required to prove invalidity because Mr. Cornelius' and Ms. Nixon's
8 testimony is uncorroborated. (CV 11-1965, Doc. 57 at 12-14). Further, ThermoLife
9 contends that Mr. Cornelius and Ms. Nixon could not have used "the invention" because
10 Mr. Cornelius and Ms. Nixon did not know how DIAC would act a nutritional
11 supplement. *Id.* at 9-12.

12 In *Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728, 740-44 (Fed. Cir. 2002),
13 the Federal Circuit decided whether the testimony of six witnesses, without any
14 corresponding documentation, was sufficient evidence as a matter of law to invalidate a
15 patent. All of the witnesses were either defendants or business associates of the
16 defendants and the events the witnesses described happened eight to twelve years before
17 trial. *Id.* at 743. The Federal Circuit explained that the witness's credibility must be
18 examined under the *Reuter* factors. *Id.* at 741. These factors include:

- 19 (1) delay between event and trial, (2) interest of witness, (3)
20 contradiction or impeachment, (4) corroboration, (5)
21 witnesses' familiarity with details of the alleged prior
22 structure, (6) improbability of prior use considering state of
the art, (7) impact of the invention on the industry, and (8)
relationship between the witness and alleged prior user.

23 *Id.* (citing *In re Reuter*, 670 F.2d 1015, 1021 n.9 (C.C.P.A. 1981)). Examining only the
24 delay between the event and trial and the interest of the witnesses, the Federal Circuit
25 concluded that the witnesses' testimony "was insufficient as a matter of law to surmount
26 the clear and convincing evidence hurdle" required to invalidate a patent.

27 In the present case, Mr. Cornelius is employed as a consultant by defendant
28 Creative and Ms. Nixon was a previous employee of Mr. Cornelius. Thus, Mr. Cornelius

1 and Ms. Nixon are interested witness for the purpose of the *Reuter* factors. *See id.* at 743;
2 *see also Oney v. Ratliff*, 182 F.3d 893, 896 (Fed. Cir. 1999) (“The uncorroborated oral
3 testimony of [the accused infringer], as the inventor, and his close associates would be
4 insufficient to prove invalidity.”). Further, the events described by Mr. Cornelius and
5 Ms. Nixon occurred in the year 2000, approximately 13 years before any possible trial
6 date. Taken together, these two factors weigh heavily in favor of a finding that Creative
7 has not provided the necessary clear and convincing evidence to prove invalidity.

8 Next, the emails between Mr. Cornelius and Mr. Tabak do not corroborate any of
9 Mr. Cornelius’ or Ms. Nixon’s testimony. No email ever mentions that Mr. Cornelius or
10 Ms. Nixon used DIAC. The emails only contemplate the sale of DIAC. Thus, the emails
11 do not sufficiently corroborate Mr. Cornelius’s and Ms. Nixon’s testimony. *See Finnigan*
12 *Corp. v. Int’l Trade Comm’n*, 180 F.3d 1354, 1370 (Fed. Cir. 1999) (holding that an
13 article written by a witness describing the use of every claim limitation except one was
14 insufficient to corroborate that witness’ oral testimony that he had practiced the final
15 limitation). Accordingly, the Court finds that, as a matter of law, Creative has failed to
16 produce clear and convincing evidence of prior use.

17
18 **b. Anticipation under 35 U.S.C. §102(a)(1) through the On
Sale Bar**

19 Alternatively, Creative asserts that the ’533 Patent is invalid as anticipated under
20 35 U.S.C. §102(a)(1) because the invention was on sale before the patent was filed. (CV
21 11-1965, Doc. 53 at 9-10). 35 U.S.C. §102(a)(1) provides that a patent is invalid if the
22 invention “was . . . on sale . . . before the effective filing date of the claimed invention.”
23 Creative particularly alleges that an email sent from Mr. Tabak to Mr. Cornelius was a
24 commercial offer to sell the invention before the filing date of the patent. (CV 11-1965,
25 Doc. 53 at 9-10).

26 In *Pfaff v. Wells Electronics*, 525 U.S. 55, 67 (1998), the Supreme Court
27 interpreted the “on sale” bar of the previous version of 35 U.S.C. §102. The Supreme
28 Court explained that the on sale bar requires that “the product must be a commercial offer

1 for sale” and the “invention must be ready for patenting.” *Id.* ThermoLife argues that
2 Creative has failed as a matter of law to meet the second prong of this test. (CV 11-1965,
3 Doc. 57 at 7-9). But, the Court must first consider, as a matter of law, whether the email
4 sent by Mr. Tabak is a commercial offer for sale.

5 The Federal Circuit, interpreting *Pfaff*, has explained that “the language used [in
6 *Pfaff*] strongly suggests that the offer must meet the level of an offer for sale in the
7 contract sense, one that would be understood as such in the commercial community.
8 Such a reading leaves no room for activity which does not rise to the level of a formal
9 offer under contract law principles.” *Grp. One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d
10 1041, 1046-47 (Fed. Cir. 2001) (internal quotations omitted). The “contract law
11 principles” expressed in the Restatement (Second) of Contracts, as already explained,
12 require an offer to be immediately acceptable by the person who receives it. *See*
13 Restatement (Second) of Contracts § 24.

14 The email sent by Mr. Tabak purports to describe the “terms” for an “exclusive”
15 on the purchase of DIAC. The terms are expressed as follows:

- 16 1) As far as we can control end usage, it will be restricted to
17 [DIAC] used for nutritional purposes in the US.
- 18 2) An expiry date for the exclusive should be fixed, with a
19 way to extend it if necessary or convenient.
- 20 3) You will give me an idea of how much [DIAC] you
21 estimate you will be using after you launch your product with
22 it. Once your product is in the market, a minimum sale
23 amount should be agreed upon.
- 24 4) The exclusive arrangement will not be valid from the
25 moment another firm starts supplies of [DIAC] to the US
26 nutraceutical market. If this occurs you agree to buy only
27 from us if price and quality are comparable to those of any
28 competitor.
- 29 5) You will advise us immediately if, for any reason, you
30 drop the [DIAC] project or do not need an exclusive any
31 more.
- 32 6) If you have not yet launched your product, there should be
33 some compensation for [Mr. Tabak’s company] if we have to
34 reject eventual quotation requests or orders for [DIAC] during
35 the exclusive period. I have not thought about the way to
36 calculate such a compensation; probably the best [sic] will be
37 to discuss it when the moment comes.

38 (Doc. 54-3, Exhibit C). The email concludes with the statement: “Please let me have

1 your ideas on this. Once we reach an adequate agreement, I will have to ask the possible
2 future owner of 50% of the company to give his approval.” *Id.*

3 Examining the contents of the email, the Court determines, as a matter of law, that
4 the email is not a commercial offer for sale. The email specifically requests that Mr.
5 Cornelius provide Mr. Tabak with more information, and contemplates a discussion of
6 terms “when the moment comes.” Further, Mr. Tabak explains that any deal will require
7 the approval of the “future owner of 50% of the company.” Thus, the email specifically
8 contemplates additional discussion and approval before any contract is made.
9 Accordingly, the Tabak email is not an offer for sale and the ’533 Patent is not invalid as
10 anticipated.

11 **III. Conclusion**

12 Based on the foregoing,

13 **IT IS ORDERED** that Creative’s Motion for Summary Judgment (Doc. 53)
14 asking this Court to declare the ’533 Patent invalid is denied; Creative’s Motion for
15 Summary Judgment (Doc. 53) on Counts I and III is denied. Creative’s Motion for
16 Summary Judgment (Doc. 53) on Count II only is granted.

17 **IT IS FURTHER ORDERED** that ThermoLife’s Motion for Summary Judgment
18 (Doc. 51) is denied as to Count II. Consistent with this Order, Counts I and III are
19 dismissed, without prejudice, because they are not ripe.

20 **IT IS FURTHER ORDERED** that ThermoLife’s Cross-Motion for Summary
21 Judgment (Doc. 57) on CV 11-2033 (in CV 11-2033 Creative seeks a declaration that the
22 ’533 Patent is invalid) is granted. ThermoLife shall submit a proposed form of judgment
23 for CV 11-2033 within 17 days of the date of this order. Creative may file any objections
24 to the judgment within 14 days of when it is filed.

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1 **IT IS FINALLY ORDERED** that because neither party moved for summary
2 judgment on Count IV in CV 11-1965, the Court will proceed to trial on that claim. An
3 Order setting final pretrial conference will follow.

4 Dated this 15th day of November, 2013.

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9 James A. Teilborg
10 Senior United States District Judge
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