

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

---

UNITED NATURALS INC.  
132 – Main Street  
Vancouver, BC  
V5T 3E2

*Plaintiff,*

v.

LXR BIOTECH, LLC  
4225 N. Atlantic Blvd.  
Auburn Hills, MI 48326

CAPITAL SALES COMPANY  
1471 E. 9 Mile Rd.  
Hazel Park, MI 48030-1960

CAPITAL SALES DISTRIBUTING, LLC  
1471 E. 9 Mile Rd.  
Hazel Park, MI 48030-1960

*and*

CAPITAL SALES II, LLC  
1471 E. 9 Mile Rd.  
Hazel Park, MI 48030-1960

*Defendants.*

---

Civil Action No.

**COMPLAINT AND JURY DEMAND**

Plaintiff United Naturals Inc. (“UNITED NATURALS”), by its undersigned counsel, for its complaint against LXR Biotech, LLC (“LXR BIOTECH”), Capital Sales Company (“CAPITAL SALES”), Capital Sales Distributing, LLC, and Capital Sales II, LLC (LXR BIOTECH and CAPITAL SALES collectively “Defendants”), hereby alleges as follows:

### **NATURE OF THE CASE**

1. This is an action for trademark infringement and trade dress infringement of UNITED NATURALS' highly successful VIVAZEN herbal dietary supplement beverage, as well as related false designation of origin, unfair competition, unjust enrichment and state and common law claims. Defendants are wrongfully manufacturing, selling and distributing VIVAZEN products, using UNITED NATURALS' VIVAZEN trademark and trade dress. UNITED NATURALS seeks injunctive relief and monetary damages for: (i) federal trademark infringement, trade dress infringement, false designation of origin, and unfair competition under the Trademark Act of 1946 (the "Lanham Act"), 15 U.S.C. §§ 1051 *et seq.*, and (ii) state and common law trademark infringement, trade dress infringement, unlawful trade practices, counterfeiting of an identifying mark, unfair competition, and unjust enrichment under the laws of the State of Michigan.

### **PARTIES**

2. Plaintiff UNITED NATURALS is a leading herbal products company with a principal place of business in Vancouver, Canada. UNITED NATURALS researches, develops, contract manufactures and sells its products through convenience and other consumer channel markets. UNITED NATURALS is the exclusive licensee in the United States for intellectual property associated with VIVAZEN branded products.

3. On information and belief, Defendant LXR BIOTECH is a Michigan limited liability company with a principal place of business at 4225 N. Atlantic Boulevard, Auburn Hills, Michigan 48326. On information and belief, LXR BIOTECH was organized in or around 2011 and its primary line of business is the contract manufacturing and bottling of liquid supplements and enhancements including energy drinks. Through its own conduct and the conduct of its

officers, employees, representatives, agents and others whose conduct LXR BIOTECH bears liability for, LXR BIOTECH has engaged in the manufacturing and distribution of products with UNITED NATURALS' VIVAZEN trademark and trade dress.

4. On information and belief, Defendant CAPITAL SALES is a Michigan corporation with a principal place of business at 1471 East 9 Mile Road, Hazel Park, Michigan 48030-1930. On information and belief, CAPITAL SALES was organized in or around 2007 and its primary line of business is wholesale product distribution. On information and belief, through its own conduct and the conduct of its officers, employees, representatives, agents and others whose conduct CAPITAL SALES bears liability for, CAPITAL SALES has engaged in the distribution of products with UNITED NATURALS' VIVAZEN trademark and trade dress.

5. On information and belief, Defendant Capital Sales Distributing, LLC is a Michigan limited liability company with a principal place of business at 1471 East 9 Mile Road, Hazel Park, Michigan 48030-1930. On information and belief, through its own conduct and the conduct of its officers, employees, representatives, agents and others whose conduct Capital Sales Distributing, LLC bears liability for, Capital Sales Distributing, LLC has engaged in, performed, conducted or conspired in the activities attributed to Defendant CAPITAL SALES as described herein, including engaging in the distribution of products with UNITED NATURALS' VIVAZEN trade mark and trade dress.

6. On information and belief, Defendant Capital Sales II, LLC is a Michigan limited liability company with a principal place of business at 1471 East 9 Mile Road, Hazel Park, Michigan 48030-1930. On information and belief, through its own conduct and the conduct of its officers, employees, representatives, agents and others whose conduct Capital Sales II, LLC bears liability for, Capital Sales II, LLC has engaged in, performed, conducted or conspired in

the activities attributed to Defendant CAPITAL SALES as described herein, including engaging in the distribution of products with UNITED NATURALS' VIVAZEN trademark and trade dress.

### **NATURE OF ACTION AND JURISDICTION**

7. This Court has subject matter jurisdiction over the claims in this action which relate to trademark infringement and trade dress infringement pursuant to, *inter alia*, 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338 and 1367. UNITED NATURALS' claims are, in part, based on violations of the Lanham Act, as amended, 15 U.S.C. §§ 1051-1127.

8. As more fully described below, UNITED NATURALS seeks a temporary restraining order, a preliminary injunction, and a permanent injunction to prohibit Defendants from infringing and otherwise unfairly competing with UNITED NATURALS, by use of the VIVAZEN trademark and trade dress, and manufacturing and sale of VIVAZEN products. UNITED NATURALS also seeks actual damages, punitive and/or statutory damages, reimbursement of attorney fees and costs, and other appropriate relief.

9. This Court has personal jurisdiction over LXR BIOTECH because LXR BIOTECH is a citizen of the state of Michigan, has conducted business and commercial activities in this judicial district, and has committed acts of infringement in this judicial district.

10. This Court has personal jurisdiction over CAPITAL SALES because CAPITAL SALES is a citizen of the state of Michigan, has conducted business and commercial activities in this judicial district, and has committed acts of infringement in this judicial district.

11. This Court has personal jurisdiction over Capital Sales Distributing, LLC because Capital Sales Distributing, LLC is a citizen of the state of Michigan, has conducted business and commercial activities in this judicial district, and has committed acts of infringement in this

judicial district.

12. This Court has personal jurisdiction over Capital Sales II, LLC because Capital Sales II, LLC is a citizen of the state of Michigan, has conducted business and commercial activities in this judicial district, and has committed acts of infringement in this judicial district.

13. Venue is proper pursuant to 28 U.S.C. § 1391(b) and (c) because LXR BIOTECH, CAPITAL SALES, Capital Sales Distributing, LLC, and Capital Sales II, LLC reside in this judicial district, a substantial part of the events giving rise to the claims in this action occurred in this judicial district, the infringing products which are the subject of this litigation are and have been distributed and offered for sale in this judicial district, and LXR BIOTECH and CAPITAL SALES, Capital Sales Distributing, LLC, and Capital Sales II, LLC transact business in this judicial district.

14. This Court has supplemental jurisdiction over the claims in this Complaint that arise under the statutory and common law of the State of Michigan pursuant to 28 U.S.C. §§ 1338(b) and 1367(a) because the state law claims are so related to the federal law claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

### **FACTUAL ALLEGATIONS**

#### **UNITED NATURALS' BUSINESS AND TRADE DRESS**

15. UNITED NATURALS was founded in 2002, and is a natural remedy manufacturer and research company. UNITED NATURALS sources, grows, researches, manufactures and sells unique herbal products that help support those with stress, minor muscle pain following exercise and occasional sleeplessness.

16. UNITED NATURALS' VIVAZEN product is an herbal dietary supplement beverage featuring a unique blend of botanical and herbal extracts for helping to relieve minor

muscle pain and soreness naturally.

17. Since 2013, UNITED NATURALS has used the VIVAZEN trademark in the United States under exclusive license from certain affiliates and continues to use the mark.

18. UNITED NATURALS has sold and promoted products in interstate commerce under the VIVAZEN trademark. By reason of such sales and promotion, the distinctive VIVAZEN trademark has become a valuable asset and has developed substantial and valuable goodwill.

19. UNITED NATURALS' VIVAZEN products are marketed and sold in a distinctive product packaging that consumers associate with UNITED NATURALS (the "VIVAZEN Trade Dress"). The VIVAZEN Trade Dress features, among other things, the following eye-catching, non-functional elements:

- a. A distinctive black background comprising substantially all of the bottle;
- b. A red heart-shaped winged design in the center of the bottle;
- c. "VIVAZEN" in white stylized block lettering with a black outline, over the red heart-shaped winged design, with the letters "VIVA" displayed directly above the letters "ZEN";
- d. A banner with lettering on the top of the product, indicating the type of pain alleviated;
- e. A red banner with stylized white block lettering below the VIVAZEN logo bearing the words "FEEL GOOD RELIEF."

20. UNITED NATURALS Trade Dress elements described above are not functional. Rather, they are aesthetic, distinctive and serve as a source identifier.

21. UNITED NATURALS created and promoted the VIVAZEN Trade Dress at

considerable expense. It made significant investment in research and development to develop product packaging that is distinctive, memorable and appealing to consumers.

22. UNITED NATURALS began using the distinctive black background, the wing-shaped logo and white-lettering indicating the product for the VIVAZEN Trade Dress as early as 2013. Examples of VIVAZEN products packaged with the VIVAZEN Trade dress are provided below.



23. Since at least 2013, UNITED NATURALS has expended tens of millions of dollars in developing, making, and selling its products under the VIVAZEN trademark. UNITED NATURALS advertises its goods through the Internet, and its other channel partners.

24. As a result of UNITED NATURALS' substantial and continuous use of the VIVAZEN trademark in connection with its products and UNITED NATURALS' substantial advertising and promotional efforts and related expenditures in connection with the VIVAZEN trademark, the consuming public has come to associate the VIVAZEN trademark with identifying the source of products and services of high quality, reliability, and value. The

VIVAZEN trademark is therefore a valuable asset of UNITED NATURALS.

25. As a result of UNITED NATURALS' work in developing the unique VIVAZEN Trade Dress, and its extensive investment and expenditures to promote the VIVAZEN Trade Dress, consumers readily identify the VIVAZEN Trade Dress as identifying a product of the highest quality that originates from a single source. UNITED NATURALS' continued and extensive use of the VIVAZEN Trade Dress for several years has built up substantial goodwill and consumer brand loyalty.

26. UNITED NATURALS has advertised and promoted its goods featuring the VIVAZEN Trade Dress and VIVAZEN mark, and has achieved substantial and rapidly-growing sales and success, with annual sales of VIVAZEN products in the tens of millions of dollars.

27. As a result of its extensive promotional efforts, advertising, and sales, UNITED NATURALS enjoys a highly valuable reputation and goodwill that is symbolized by the VIVAZEN Trade Dress and VIVAZEN trademark.

#### **LXR BIOTECH's Acts of Infringement**

28. In April 2014, LXR BIOTECH became a bottler of UNITED NATURALS' VIVAZEN product. LXR BIOTECH was subcontracted by Phoenix Contract Packaging. However, LXR BIOTECH ceased to be a bottler for VIVAZEN product on or around August 2014.

29. In or around August 2015, UNITED NATURALS discovered knock-offs of VIVAZEN products for sale in the United States. It diligently sought to locate the source of these knock-off products, and only recently traced such knock-off products to LXR BIOTECH.

30. On September 23, 2015, UNITED NATURALS became aware of a trademark application for VIVAZEN (Application Serial No. 86648142) filed by Ryan Olness. UNITED



NATURALS' counsel sent a cease and desist letter to Ryan Olness on September 25, 2015. Ryan Olness abandoned that trademark application on October 5, 2015.

31. On November 9, 2015, UNITED NATURALS became aware of a second trademark application for VIVAZEN (Application Serial No. 86803760) filed by LXR BIOTECH, LLC. The LXR BIOTECH application was filed on October 29, 2015.

32. On November 10, 2015, UNITED NATURALS' counsel sent a cease and desist letter to LXR BIOTECH demanding that the company abandon its VIVAZEN application and cease and desist using the VIVAZEN trademark. Subsequently, UNITED NATURALS' counsel followed up with LXR BIOTECH, but LXR BIOTECH has not responded.

33. Notwithstanding the cease and desist letter, on information and belief, LXR BIOTECH is marketing and selling in the United States, including in this District, products using packaging that blatantly copied the VIVAZEN trademark and elements of the VIVAZEN Trade Dress identically or nearly identically, and is likely to cause confusion among consumers.

34. Upon information and belief, as part of its investigation into this matter and based on information provided by third parties, the VIVAZEN products sold by Defendants are counterfeit, and not genuine articles manufactured by or with permission of UNITED NATURALS.

35. Upon information and belief, LXR BIOTECH has continued to manufacture and distribute VIVAZEN product. As shown below, LXR copies wholesale the most distinctive elements of the VIVAZEN trade dress. In particular, LXR BIOTECH copies the overall layout of the text and visuals of the VIVAZEN Trade Dress, as well as the actual colors, color pattern, design pattern and text from the VIVAZEN label, so that the overall impression of the LXR knock-off product is nearly identical to that of UNITED NATURALS' legitimate VIVAZEN

product. The photos below show a comparison of UNITED NATURALS' legitimate VIVAZEN product and LXR's knock-off product:



36. UNITED NATURALS adopted and used its VIVAZEN mark long before LXR BIOTECH began use of the VIVAZEN trademark. LXR BIOTECH's adoption and use of the VIVAZEN mark is likely to cause confusion with respect to UNITED NATURALS' VIVAZEN trademark.

37. LXR BIOTECH has also copied key features of the VIVAZEN trade dress in an apparent effort to imitate the VIVAZEN product. As shown in the pictures directly above, LXR BIOTECH adopted a distinctive black background comprising substantially all of the bottle; a red heart-shaped winged design in the center of the bottle; "VIVAZEN" in white stylized block

lettering with a black outline, over the red heart-shaped winged design, with the letters “VIVA” displayed directly above the letters “ZEN”; and a banner with lettering on the top of the product, indicating the type of pain alleviated.

38. The LXR infringing trade dress and the VIVAZEN Trade Dress are used in connection with the same type of goods, herbal supplement beverages, and in the same marketing channels to the same class of consumers.

39. LXR BIOTECH adopted its infringing trade dress with knowledge of UNITED NATURALS’ prior rights in the VIVAZEN Trade Dress and with the intent to mislead and confuse consumers into believing that LXR BIOTECH’s counterfeit goods are provided, authorized or approved by UNITED NATURALS.

40. Upon information and belief, LXR BIOTECH has made false representations, to prospective customers and other persons, that LXR BIOTECH is or was the maker, manufacturer, distributor and developer of authentic VIVAZEN products.

41. Given the distinctiveness of the VIVAZEN Trade Dress, LXR’s use of nearly identically packaging for similar products, and in the same marketing channels to the same class of consumers has caused, and is likely to continue to cause, confusion regarding the source and nature of LXR BIOTECH’s products, and/or that LXR BIOTECH’s products come from, are affiliated with, or are authorized and endorsed by UNITED NATURALS, when in fact no such affiliation, association, sponsorship, or endorsement exists. As a result of LXR BIOTECH’s wrongful activities, consumers have been misled, will continue to be misled, and UNITED NATURALS has suffered and will continue to suffer irreparable harm and economic injury.

#### **CAPITAL SALES’ Acts of Infringement**

42. CAPITAL SALES has been advertising and offering for sale, without a license,

VIVAZEN products. On its website, on or around October 2015, Capital Sales offered for sale “VIVA ZEN RAPID RELIEF SHOT HERBAL SUPPLIMENT.” See **Exhibit A**.

43. On November 20, 2015, UNITED NATURALS notified CAPITAL SALES in writing that CAPITAL SALES was using the VIVAZEN trademark and trade dress in violation of federal law and demanded that CAPITAL SALES cease and desist using the trademark and trade dress. To date, CAPITAL SALES has not provided a substantive response to the cease and desist letter, and has not agreed to stop use of the VIVAZEN trademark or trade dress.

44. CAPITAL SALES offered for sale VIVAZEN counterfeit products using the VIVAZEN trademark and trade dress, including nearly identical product packaging of UNITED NATURALS’ legitimate VIVAZEN product. In particular, the CAPITAL SALES knock-off product copies the overall layout of the text and visuals of the VIVAZEN Trade Dress, as well as the actual colors, color pattern, design pattern and text from the VIVAZEN label, so that the overall impression of the CAPITAL SALES knock-off product is nearly identical to that of authentic VIVAZEN.





45. CAPITAL SALES used and is using the VIVAZEN trademark with actual knowledge of UNITED NATURALS' prior rights to the VIVAZEN trademark. UNITED NATURALS did not consent to CAPITAL SALES' adoption and use of the mark. On information and belief, Capital Sales intends to trade and capitalize on the goodwill generated by UNITED NATURALS' extensive and exclusive use of the VIVAZEN trademark.

46. By infringing the VIVAZEN trademark and VIVAZEN Trade Dress, LXR BIOTECH and CAPITAL SALES intend to make, promote, distribute and sell herbal beverage products and counterfeit VIVAZEN product throughout the United States in a way that is intended to cause, and will cause, a likelihood of confusion among consumers.

47. By copying the overall look, feel and commercial impression of the VIVAZEN product, LXR BIOTECH and CAPITAL SALES intend to, and are likely to, falsely suggest to

consumers that some connection exists between the products manufactured and distributed by LXR BIOTECH and CAPITAL SALES and UNITED NATURALS' products.

48. LXR BIOTECH's and CAPITAL SALES' actions have been deliberate, willful and intentional, undertaken in bad faith and with the intent of trading on the goodwill and reputation of UNITED NATURALS and the distinctive VIVAZEN brand, with full knowledge of and in conscious disregard of UNITED NATURALS' rights.

49. LXR BIOTECH and CAPITAL SALES, by their acts described above, have taken advantage of the knowledge and skill of UNITED NATURALS, and of the goodwill developed by UNITED NATURALS, and have capitalized on the commercial market created by UNITED NATURALS for products associated with the VIVAZEN trademark and distinctive VIVAZEN Trade Dress.

50. By LXR BIOTECH's and CAPITAL SALES' unauthorized copying of products and marks that are substantially the same as the VIVAZEN trademark, LXR BIOTECH and CAPITAL SALES have been able to pass off and sell herbal beverage products including counterfeit VIVAZEN products bearing unauthorized reproductions of copyrighted VIVAZEN designs and distinctive VIVAZEN Trade Dress.

51. Upon information and belief, LXR BIOTECH and CAPITAL SALES have profited from the sales of herbal beverage products including counterfeit VIVAZEN products which make use of VIVAZEN trademark and distinctive VIVAZEN Trade Dress.

52. Upon information and belief, LXR BIOTECH and CAPITAL SALES, unless enjoined by this Court, intend to continue its course of conduct and to wrongfully use, infringe upon, distribute, and otherwise profit from VIVAZEN trademark and distinctive VIVAZEN Trade Dress.

53. Upon information and belief, UNITED NATURALS is losing sales of genuine products, is suffering a loss of the enormous goodwill and value created in the VIVAZEN trademark, and/or may suffer such loss if Defendants are permitted to continue their unlawful actions.

**COUNT I**  
**Federal Trademark Infringement**  
**in violation of 15 U.S.C. §1125(a)**  
**(Against All Defendants)**

54. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

55. CAPITAL SALES and LXR BIOTECH's acts as described above constitute use in commerce of a word, term, name, symbol, or device, or combination thereof, or false designation of original, false or misleading description of fact, or false or misleading representation of fact that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of CAPITAL SALES or LXR BIOTECH with UNITED NATURALS, or as to the origin, sponsorship, or approval of Defendants' goods, services, or commercial activities by UNITED NATURALS in violation of 15 U.S.C. § 1125(a).

56. UNITED NATURALS has extensively and exclusively used the VIVAZEN trademark in commerce throughout the United States in connection with herbal beverage products and other products and services.

57. The public associates the VIVAZEN trademark exclusively with the VIVAZEN product and related products and services. This is the result of the VIVAZEN trademark's inherent distinctiveness and of distinctiveness acquired through sales and use in commerce throughout the United States in connection with the VIVAZEN products and other products and services bearing or using the VIVAZEN trademark.



58. UNITED NATURALS is the exclusive licensee in the United States of the VIVAZEN Trademark.

59. LXR BIOTECH and CAPITAL SALES are creating, manufacturing and/or distributing herbal beverage products including counterfeit VIVAZEN products that bear marks that are at least substantially similar, if not identical to, the VIVAZEN trademark.

60. LXR BIOTECH has copied the VIVAZEN trademark.

61. By producing, distributing, marketing and selling competitive herbal beverage products including counterfeit VIVAZEN products that copy the VIVAZEN trademark, LXR BIOTECH and CAPITAL SALES are benefitting and profiting from the VIVAZEN trademark.

62. LXR BIOTECH's and CAPITAL SALES' actions constitute trademark infringement in violation of 15 U.S.C. §1125(a).

63. LXR BIOTECH's and CAPITAL SALES' infringement of the VIVAZEN trademark is willful and deliberate.

64. LXR BIOTECH's and CAPITAL SALES' actions have directly and proximately caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

65. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

66. In light of the foregoing, UNITED NATURALS is entitled to the remedies provided for in 15 U.S.C. §§ 1116 - 1118.



**COUNT II**  
**Federal Trade Dress Infringement**  
**in violation of 15 U.S.C. §1125(a)**  
**(Against All Defendants)**

67. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

68. The VIVAZEN Trade Dress is entitled to trade dress protection. The VIVAZEN Trade Dress is famous, is inherently distinctive, and has acquired distinctiveness.

69. UNITED NATURALS has extensively and exclusively used the VIVAZEN trademark in commerce throughout the world in connection with herbal beverage products and other products and services.

70. The public associates the VIVAZEN Trade Dress exclusively with the VIVAZEN product and related products and services. This is the result of the VIVAZEN Trade Dress inherent distinctiveness and of distinctiveness acquired through extensive sales, promotion and use in commerce throughout the United States in connection with VIVAZEN products and other products and services bearing or using the VIVAZEN Trade Dress.

71. UNITED NATURALS is the exclusive licensee in the United States of all rights and title to the distinctive VIVAZEN Trade Dress.

72. LXR BIOTECH's and CAPITAL SALES' design, manufacture (either direct or indirect), distribution, and/or sale of herbal beverage products including counterfeit VIVAZEN product that copy the VIVAZEN Trade Dress is likely to cause confusion, mistake, or deception as to: (i) affiliation, connection or association of LXR BIOTECH or CAPITAL SALES with UNITED NATURALS; and/or (ii) the origin, sponsorship, or approval by UNITED NATURALS of goods, services or commercial activities manufactured, distributed or performed by LXR BIOTECH or CAPITAL SALES.

73. LXR BIOTECH's and CAPITAL SALES' design, manufacture (either direct or indirect), distribution, and/or sale of herbal beverage products including counterfeit VIVAZEN product that copy the VIVAZEN Trade Dress enables LXR BIOTECH to benefit unfairly from the reputation and success of UNITED NATURALS' products sold under the VIVAZEN brand, thereby giving LXR BIOTECH's and CAPITAL SALES' infringing products commercial value that they would not otherwise have.

74. LXR BIOTECH's and CAPITAL SALES' actions constitute trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

75. LXR BIOTECH's and CAPITAL SALES' actions have directly and proximately caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

76. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

77. In light of the foregoing, UNITED NATURALS is entitled to the remedies provided for in 15 U.S.C. §§ 1116-1118.

**COUNT III**  
**Federal False Designation Of Origin**  
**(Against Defendant LXR BIOTECH)**

78. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

79. Since long prior to the acts of LXR BIOTECH and CAPITAL SALES complained of herein, UNITED NATURALS has sold and continues to sell its VIVAZEN

products in the United States with the distinctive VIVAZEN Trade Dress.

80. LXR BIOTECH's and CAPITAL SALES' use of a copy, variation, simulation, or colorable imitation of the VIVAZEN Trade Dress infringes UNITED NATURALS' exclusive rights in the VIVAZEN Trade Dress, is likely to cause confusion, mistake, or deception and constitutes false designation of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

81. LXR BIOTECH and CAPITAL SALES have used a copy, variation, simulation, or colorable imitation of the VIVAZEN trade dress with full knowledge of the extensive prior use of the VIVAZEN Trade Dress by UNITED NATURALS.

82. LXR BIOTECH's and CAPITAL SALES' actions have directly and proximately caused irreparable harm to UNITED NATURALS, including losing sales of genuine products, and UNITED NATURALS will suffer further harm to its name, reputation and goodwill unless Defendants are preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by Defendants.

83. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

84. In light of the foregoing, UNITED NATURALS is entitled to the remedies provided for in 15 U.S.C. §§ 1116-1118.

**COUNT IV**  
**Federal Unfair Competition**  
**(Against All Defendants)**

85. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

86. LXR BIOTECH's and CAPITAL SALES' design, manufacture (either direct or indirect), distribution, and/or sale of herbal beverage products including counterfeit VIVAZEN product that copy the VIVAZEN Trade Dress enables LXR BIOTECH to benefit unfairly from the reputation and success of the VIVAZEN brand, thereby giving LXR BIOTECH's and CAPITAL SALES' infringing products commercial value that they would not otherwise have.

87. LXR BIOTECH's and CAPITAL SALES' actions constitute unfair competition, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

88. LXR BIOTECH's and CAPITAL SALES' actions have directly and proximately caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

89. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from its unlawful actions.

90. In light of the foregoing, UNITED NATURALS is entitled to the remedies provided for in 15 U.S.C. §§ 1116-1118.

**COUNT V**  
**State/Common Law Trademark Infringement**  
**(Against All Defendants)**

91. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

92. As the exclusive licensee in the United States for VIVAZEN, UNITED NATURALS has valid and enforceable common law trademark rights in the VIVAZEN trademark.

93. The VIVAZEN trademark is distinctive and primarily non-functional and UNITED NATURALS has built up valuable goodwill in the VIVAZEN trademark.

94. LXR BIOTECH's and CAPITAL SALES' conduct deceived or is likely to deceive, and caused or is likely to cause, confusion or mistake among actual and prospective consumers of UNITED NATURALS' VIVAZEN products by passing off LXR BIOTECH's and CAPITAL SALES' products as being designed, manufactured, sponsored, or otherwise approved by or connected with UNITED NATURALS.

95. As a direct and proximate result of LXR BIOTECH's and CAPITAL SALES' infringement of common law trademark rights to VIVAZEN under the laws of the State of Michigan and other common law, LXR BIOTECH's and CAPITAL SALES' actions have caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

96. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

97. In light of the foregoing, UNITED NATURALS is entitled to all damages available to it at law.

**COUNT VI**  
**State/Common Law Trade Dress Infringement**  
**(Against All Defendants)**

98. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

99. As the exclusive licensee in the United States for VIVAZEN, UNITED

NATURALS has valid and enforceable common law trade dress rights in the VIVAZEN Trade Dress.

100. The VIVAZEN Trade Dress is distinctive and primarily non-functional and UNITED NATURALS has built up valuable goodwill in the VIVAZEN Trade Dress.

101. LXR BIOTECH's and CAPITAL SALES' conduct deceived or is likely to deceive, and caused or is likely to cause, confusion or mistake among actual and prospective consumers of UNITED NATURALS' VIVAZEN products by passing off LXR BIOTECH's and CAPITAL SALES' products as being designed, manufactured, sponsored, or otherwise approved by or connected with UNITED NATURALS.

102. As a direct and proximate result of LXR BIOTECH's and CAPITAL SALES' infringement of UNITED NATURALS' common law trade dress rights under the laws of the State of Michigan and other common law, LXR BIOTECH's and CAPITAL SALES' actions have caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

103. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

104. In light of the foregoing, UNITED NATURALS is entitled to all damages available to it at law.

**COUNT VII**  
**Violation of Michigan Consumer Protection Act,**  
**Mich. Comp. Laws § 445.901 *et seq.***  
**(Against All Defendants)**

105. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if

fully set forth herein.

106. LXR BIOTECH and CAPITAL SALES have engaged in unfair, unconscionable and deceptive trade practices by causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, including herbal beverage products and counterfeit VIVAZEN product manufactured or distributed by LXR BIOTECH or CAPITAL SALES.

107. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by using deceptive representations or deceptive designations of geographic origin in connection with goods or services, by representing herbal beverage products and counterfeit VIVAZEN product manufactured or distributed by LXR BIOTECH or CAPITAL SALES as authentic VIVAZEN products.

108. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by representing that herbal beverage products and counterfeit VIVAZEN product manufactured or distributed by LXR BIOTECH or CAPITAL SALES have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.

109. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by representing that herbal beverage products and counterfeit VIVAZEN product manufactured or distributed by LXR BIOTECH or CAPITAL SALES are of a particular standard, quality, or grade, or are of a particular style or model, when they are of another.

110. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by disparaging the goods, services, business, or

reputation of UNITED NATURALS by false or misleading representation of fact.

111. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

112. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

113. LXR BIOTECH and CAPITAL SALES have further engaged in unfair, unconscionable and deceptive trade practices by failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

114. LXR BIOTECH's and CAPITAL SALES' false and misleading representations and unfair, unconscionable and deceptive conduct are material in that such representations and conduct have caused and are likely to cause prospective consumers of UNITED NATURALS' products to be deceived as to the identity of the entity to which the VIVAZEN rights belong and as to the level of quality of the products.

115. By reasons of LXR BIOTECH's and CAPITAL SALES' knowingly false and misleading misrepresentations of fact and conduct, LXR BIOTECH and CAPITAL SALES have each violated Michigan's Consumer Protection Act including multiple provisions under Mich. Comp. Laws § 445.903.

116. As a direct and proximate result of LXR BIOTECH's and CAPITAL SALES' misleading and deceptive conduct, UNITED NATURALS, as well as consumers, have sustained



and are likely to sustain damages.

117. LXR BIOTECH's and CAPITAL SALES' actions have caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

118. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

119. Pursuant to Michigan's Consumer Protection Act, including Mich. Comp. Laws §§ 445.903 and 445.911, UNITED NATURALS is entitled to enjoin LXR BIOTECH's and CAPITAL SALES' unlawful conduct as well as obtain compensatory damages, attorney's fees, and any other appropriate relief.

**COUNT VIII**  
**Counterfeiting Identifying Mark,**  
**Mich. Comp. Laws § 750.263**  
**(Against Defendant LXR BIOTECH)**

120. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

121. UNITED NATURALS' VIVAZEN products bear identifying marks consisting of trademark, service marks, trade names, names, labels, devices, designs, symbols and words which, individually and in combination, have been lawfully adopted and used by UNITED NATURALS to identify items of property manufactured, sold, or licensed by UNITED NATURALS. UNITED NATURALS is the exclusive licensee in the United States of such identifying marks.

122. LXR BIOTECH has counterfeited identifying marks owned by UNITED

NATURALS by using a copy or imitation of such identifying marks without authorization by UNITED NATURALS, and by using those identifying marks on items of property without authorization by UNITED NATURALS.

123. LXR BIOTECH's counterfeiting of the identifying marks was willful and intentional.

124. Section 750.263 of the Michigan Compiled Laws was intended to protect the lawful owners of trademark and identifying marks such as plaintiff UNITED NATURALS.

125. LXR BIOTECH's actions have directly and proximately caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH.

126. Furthermore, LXR BIOTECH is realizing profit and will continue to realize a profit from its unlawful actions.

127. UNITED NATURALS has been damaged by LXR BIOTECH's violation of Mich. Comp. Laws § 750.263 and is entitled to injunctive relief to prevent further violations of that section.

**COUNT IX**  
**State/Common Law Unfair Competition**  
**(Against All Defendants)**

128. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

129. LXR BIOTECH and CAPITAL SALES have engaged in false and misleading misrepresentations and omissions of material fact and have engaged in unfair, unethical and

deceptive conduct with respect to herbal beverage products including counterfeit VIVAZEN product.

130. LXR BIOTECH's and CAPITAL SALES' false and misleading representations and unfair, unethical and deceptive conduct are material in that they falsely represent the source of herbal beverage products including counterfeit VIVAZEN products manufactured or distributed by LXR BIOTECH or CAPITAL SALES. LXR BIOTECH's and CAPITAL SALES' conduct harms UNITED NATURALS' legitimate business interests and the general public by deceiving actual and prospective customers into believing that herbal beverage products including counterfeit VIVAZEN product manufactured or distributed by LXR BIOTECH or CAPITAL SALES are of the same nature and quality as UNITED NATURALS' VIVAZEN products.

131. LXR BIOTECH's and CAPITAL SALES' conduct as described above violates principles of common business integrity and is fraudulent, deceptive and tends to mislead the public.

132. LXR BIOTECH's and CAPITAL SALES' use of the VIVAZEN trademark and VIVAZEN Trade Dress is in bad faith in that LXR BIOTECH and CAPITAL SALES have failed to cease use of the protected VIVAZEN trademark and trade dress, even after having been provided with notice of UNITED NATURALS' rights to those marks.

133. As a direct result of LXR BIOTECH's and CAPITAL SALES' deceptive conduct, UNITED NATURALS has sustained and is likely to continue to sustain damages.

134. LXR BIOTECH's and CAPITAL SALES' unauthorized use of the VIVAZEN trademark and VIVAZEN Trade Dress constitutes unfair competition under the common law of the State of Michigan.

135. LXR BIOTECH's and CAPITAL SALES' actions have directly and proximately caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

136. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

137. UNITED NATURALS is entitled to compensatory, exemplary and punitive damages by reason of LXR BIOTECH's and CAPITAL SALES' willful, reckless, deliberate, and intentional conduct.

**COUNT X**  
**Civil Conspiracy**  
**(Against All Defendants)**

138. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

139. On information and belief, LXR BIOTECH and CAPITAL SALES, through their own conduct and the conduct of their officers, employees, representatives, agents and others for whom they bear liability for, jointly, intentionally and wrongfully devised a plan or scheme to manufacture and distribute counterfeit VIVAZEN products.

140. In doing so, LXR BIOTECH and CAPITAL SALES have engaged in combined and concerted action to accomplish a criminal or unlawful purpose, or to accomplish a lawful purposes by criminal or unlawful means.

141. LXR BIOTECH and CAPITAL SALES have acted tortiously pursuant to a common design, including by and through the tortious conduct alleged herein, and thus are

jointly and severally liable for all conduct alleged herein.

**COUNT XI**  
**Unjust Enrichment**  
**(Against All Defendants)**

142. UNITED NATURALS repeats the allegations in the foregoing paragraphs as if fully set forth herein.

143. By wrongfully misappropriating the goodwill that UNITED NATURALS has developed in the VIVAZEN brand through deliberate copying of the VIVAZEN trademark and VIVAZEN Trade Dress and deliberate distribution of such counterfeit products, LXR BIOTECH and CAPITAL SALES have been unjustly enriched to the material detriment of UNITED NATURALS.

144. LXR BIOTECH's and CAPITAL SALES' actions have directly and proximately caused irreparable harm to UNITED NATURALS and to its goodwill, and will continue to so harm UNITED NATURALS unless preliminarily and permanently enjoined. UNITED NATURALS has no adequate remedy at law to compensate it for the injuries already inflicted and further threatened by LXR BIOTECH and CAPITAL SALES.

145. Furthermore, LXR BIOTECH and CAPITAL SALES are realizing profit and will continue to realize a profit from their unlawful actions.

146. UNITED NATURALS has been damaged by LXR BIOTECH's and CAPITAL SALES' actions and conduct and is entitled to compensatory damages in the form of restitution and such other and further relief as the Court deems equitable and just.

**PRAYER FOR RELIEF**

WHEREFORE, UNITED NATURALS prays for relief against LXR BIOTECH and CAPITAL SALES, Capital Sales Distributing, LLC, and Capital Sales II, LLC as follows:

a. That each of the Defendants and their servants, agents, employees, and all those in active concert or participation with the Defendants, be permanently enjoined and restrained from:

(i) using in any manner, on, or in connection with any of the Defendants' manufacturing or distribution of herbal beverage products, including counterfeit VIVAZEN product, the VIVAZEN trademark, the VIVAZEN Trade Dress, or any designs that are identical or substantially similar thereto; and

(ii) using in any manner, on, or in connection with any of the Defendants' manufacturing or distribution of herbal beverage products, including counterfeit VIVAZEN product, the VIVAZEN trademark, the VIVAZEN Trade Dress, or any trade dress confusingly similar thereto, that is likely to cause confusion, deception, or mistake or that dilutes or is likely to dilute the distinctive quality thereof;

b. That UNITED NATURALS recover all damages sustained as a result of the Defendants' unlawful activities and that said damages be trebled for willful infringement;

c. That an accounting be directed to determine each of the Defendants' profits resulting from their and their affiliates' unlawful activities and that such profits be paid over to UNITED NATURALS, increased as this Court finds to be just under the circumstances of this case;

d. That UNITED NATURALS recover its reasonable attorneys' fees under 35 U.S.C. § 285 and/or 15 U.S.C. §1117(a);

e. That UNITED NATURALS recover punitive and/or statutory damages and its costs of this action, together with prejudgment and post-judgment interest;

f. That each of the Defendants be ordered to deliver to UNITED NATURALS for destruction all labels, signs, prints, packages, wrappers, receptacles, advertising materials, or products that bear marks confusingly similar to the VIVAZEN trademark or VIVAZEN Trade Dress or that result in any unfair competition by the Defendants against UNITED NATURALS;

g. That each of the Defendants be ordered to make a written report within a reasonable period, to be filed with the Court, detailing the manner of their compliance with the requested injunctive and mandatory relief above; and

h. That UNITED NATURALS recover such other and further relief as this Court deems just and proper.

**JURY TRIAL DEMAND**

UNITED NATURALS demands a trial by jury of all issues so triable.

Dated: December 10, 2015

By: /s/ Marc L. Newman

Marc L. Newman (Mich. Bar No. P51393)  
THE MILLER LAW FIRM  
950 West University Drive, Suite 300  
Rochester, MI 48307  
Telephone: (248) 841-2200  
Facsimile: (248) 652-2852  
mln@millerlawpc.com

Andrew L. Hurst (D.C. Bar No. 455471)\*  
Michael B. Roberts (D.C. Bar No. 976409)\*  
REED SMITH LLP  
1301 K Street, N.W., Suite 1000 East Tower  
Washington, DC 20005  
Telephone: (202) 414-9200  
Facsimile: (202) 414-9299  
ahurst@reedsmith.com  
mroberts@reedsmith.com

Sharon A. Lai (CA Bar No. 249122)\*  
Nina Habib Borders (CA Bar No. 291921)\*  
REED SMITH LLP  
1510 Page Mill Road, Suite 110  
Palo Alto, CA 94304  
Telephone: (650) 352-0500  
Facsimile: (650) 352-0699  
salai@reedsmith.com  
nborders@reedsmith.com

\* Applications for admission to be filed

*Attorneys for Plaintiff United Naturals*



**EXHIBIT A**

Source: Capital Sales Website:

<http://www.capitalcsc.com/ItemDetail.aspx?ItemNo=0824&ReturnURL=http%3a%2f%2fwww.capitalcsc.com%2fItemSearch.aspx%3fSearch%3dviva> (accessed on November 23, 2015)

The screenshot shows the Capital Sales Company website interface. At the top right, there are navigation links: Home, About, Services, Register, and Contact Us. Below these is a search bar with the placeholder text "Enter Keyword or Item #" and a magnifying glass icon. To the right of the search bar are links for "Create Account" and "Sign In", and a shopping cart icon with a "0" inside. On the left side, there is a vertical menu with various product categories: Automotive, Baby Products, Beverages, Candy, Cell Phone Accessories, Food & Grocery, Health Care, Hispanic Products, Household Products, Novelties, Outdoor Items, Personal Care, Pet Supplies, Restaurant Supplies, School & Office, Smoke Accessories, Snacks, Store Supplies, and Tobacco. The main content area displays the product "VIVA ZEN RAPID RELIEF SHOT HERBAL SUPPLEMENT" with a note: "\*NOT FOR SALE IN WI, TN, VT, IN\*\*". Below the note are the item details: Item No:0824, UPC:409465149219, and Pack:12/12CT. There is a quantity input field set to "1" and a red "Add to Cart" button. A product image shows a box and several bottles of the supplement. At the bottom of the page, there is a footer with the company logo, contact information (phone numbers 248.542.4400, 248.291.5891, 248.291.5892 and email info@capitalcsc.com), a physical address (1471 E. Nine Mile Rd, Hazel Park, MI 48030), a map, and a "Send Us a Message" form with fields for Full Name, Company, and E-Mail, and a "Submit" button.