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8 NEW AGE PERFORMANCE, INC.

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12

13  
14 NEW AGE PERFORMANCE, INC., a ) **Civil Action No.: 4:24-cv-710**  
Canadian corporation )  
15 ) **COMPLAINT FOR PATENT**  
Plaintiff, ) **INFRINGEMENT, TRADE DRESS**  
16 ) **INFRINGEMENT AND UNFAIR**  
v. ) **COMPETITION**  
17 )  
18 DIVERSIFIED PRODUCT SOLUTIONS, LLC ) **DEMAND FOR JURY TRIAL**  
(d/b/a) Berkland Goods, a California LLC )  
19 )  
20 Defendant. )  
21 )

22 Plaintiff, New Age Performance, Inc. (“NAP”), by and through its undersigned attorneys, for  
23 its Complaint against Defendant Diversified Product Solutions, LLC (“DPS”), alleges as follows:

24 **NATURE OF THE ACTION**

25 1. This is a civil action for patent infringement, injunctive relief, and damages arising  
26 under the United States Patent Act, 35 U.S.C. §§ 1, et seq., to enjoin infringement and obtain  
27 damages resulting from Defendant’s unauthorized manufacture, use, sale, offer to sell and/or  
28 importation into the United States for subsequent use or sale of products, methods, processes,

1 services and/or systems that infringe one of more claims of U.S. Patent No. 9,022,903 (“the ‘903  
2 Patent”) (attached as Exhibit A) entitled “ORAL APPLIANCE FOR IMPROVING STRENGTH  
3 AND BALANCE,”and U.S. Design Patent No. D743,109 (“the D109 Patent”) (attached as Exhibit  
4 B) entitled “MOUTHPIECE.” The patents are referred to individually or collectively as “Patent(s)-  
5 in-suit.” NAP seeks injunctive relief to prevent Defendant from continuing to infringe the Patents-  
6 in-suit. In addition, Plaintiff seeks to recover monetary damages resulting from Defendant’s past  
7 infringement of the Patents-in-suit. Plaintiff NPA further asserts that DPS has infringed NPA’s  
8 valuable, protectable trade dress rights in the distinctive, non-functional design and appearance of  
9 its 6DS mouthpiece products in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).  
10 Plaintiff NPA also asserts that DPS is in violation of California Business and Professions Code §  
11 17200 et seq.) because of its infringement of NPA’s trade dress rights.

12 2. The case involves mouthpieces and more particularly performance enhancing  
13 mouthpieces designed to promote desired jaw alignment and establish a gap between the jaws of  
14 athletes or amateurs when clenching during high intensity workout activities. The parties compete  
15 directly and sell mouthpieces online including via the Amazon marketplace.

16 3. This action for patent infringement, Lanham Act violations and California Business  
17 and Professions Code § 17200 et seq. violations involves Defendant DPS’s manufacture, use, sale,  
18 offer to sell and/or importation into the United States of products and/or systems that are primarily  
19 used or primarily adapted for use as performance enhancing oral appliances or mouthpieces that  
20 infringe the Patents-in-suit and NPA’s trade dress rights(“infringing products”). Examples of  
21 infringement are set forth below.

22 **THE PARTIES**

23 4. Plaintiff NAP is an Ontario Business Corporation existing under the laws of the  
24 Province of Ontario, Canada, having a principal place of business at 1102 Aerowood Drive,  
25 Mississauga, Ontario L4W 1Y5.

26 5. Plaintiff NAP is the lawful assignee of all right, title and interest in and to the Patents-  
27 in-suit, including rights to sue for acts of past and future infringement, and is the owner of the  
28 asserted trade dress rights.



1 assigned on a district-wide basis.  
2

3 **GENERAL ALLEGATIONS**

4 11. NAP is the exclusive owner of all right, title, and interest in and to the Patents-in-suit,  
5 which are valid and subsisting. The Patents-in-suit are directed to performance enhancing  
6 mouthpieces.

7 12. The ‘903 Patent was duly and legally issued on May 5, 2015, and the D109 Patent  
8 was duly and legally issued on November 10, 2015.

9 13. NAP has the legal right to enforce the Patents-in-suit against Defendant.

10 14. NAP has spent considerable time, effort, and resources developing and promoting  
11 products embodying the inventions of the Patents-in-suit.

12 15. Without authorization, Defendant copied protected functional and non-functional  
13 elements of NAP’s Products and in so doing infringed the Patents-in-suit and trade dress causing  
14 harm and damages to NAP.

15 16. NAP has marked its commercial products (and/or packaging and website) with the  
16 Patents-in-suit. NAP began marking its products with the D109 patent in 2015. NAP began marking  
17 its products with the ‘903 Patent in 2018. By doing so, NAP put its competitors, including DPS, on  
18 constructive notice of its patents through actual and virtual marking. Being on notice of the ‘903  
19 and D109 Patents while selling infringing products amounts to willful conduct under the U.S. Patent  
20 laws.

21 17. Moreover, NAP put DPS on actual notice of the Patents-in-suit and of DPS’s  
22 infringement by letter dated August 4, 2023 (“Notice Letter”). Accordingly, at least since August 4,  
23 2023, DPS’s continuing infringement of the patents is knowing and willful.

24  
25 **THE PATENTS-IN-SUIT**

26 18. The ‘903 Patent relates to and covers “oral appliances for improving strength and  
27 balance.” The ‘903 Patent is directed to “neuromuscular oral appliances...for placement in a mouth  
28 of a user to improve balance and strength.”

1           19. The ‘903 Patent is a seminal patent covering performance mouthpiece products,  
2 including NAP’s Products. Unlike basic mouthguard products designed to protect teeth from injury  
3 in contact sports, the invention of the ‘903 Patent is directed to establishing and maintaining  
4 positioning of teeth and jaw to open the airway and enhance performance during exercise and in  
5 contact and non-contact sporting activities.

6           20. As described in the ‘903 Patent, the inventors recognized a connection between  
7 positioning of the jaw and providing a biting surface to enhance performance in a number of  
8 applications. For example, the Background section at col. 1 states: “Strength and balance are two  
9 key attributes of athletes, laborers, first responders, and other individuals whose work requires  
10 physical exertion. It has been observed that the relative positioning of the lower and upper jaw can  
11 affect both strength and balance. It would be desirable to have an appliance to position the jaws  
12 relative to one another such that one or both of strength and balance is increased and/or maximized.  
13 However, dental anatomy and bite patterns of users vary widely. Fabricating an oral appliance fitted  
14 to the mouth for any reason, such as to alleviate breathing problems or align crooked teeth, requires  
15 customization on an individual level, which can be expensive and inconvenient.”

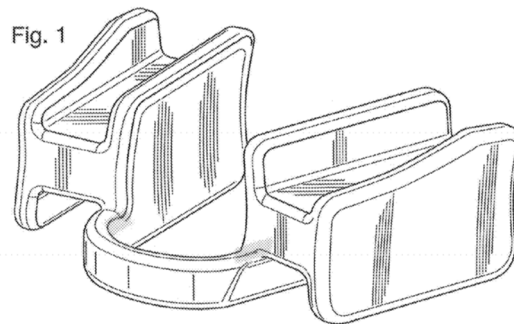
16           21. As described in the ‘903 Patent at col. 1, lines 30-40, the inventors conceived and  
17 reduced to practice a mouthpiece designed to enhance performance and in one exemplary  
18 embodiment: “...the oral appliance comprises a channel with a base adapted to accept teeth from  
19 one of a lower jaw and an upper jaw of the mouth. The channel is deformable to at least partially  
20 conform to a shape of the accepted teeth upon heating of the channel. The oral appliance further  
21 comprises a pliable, elastic bite pad extending opposite the channel. The bite pad is adapted to  
22 contact teeth from the other of the lower jaw and the upper jaw when the oral appliance is placed in  
23 the mouth and partially collapse such that a gap between the lower jaw and the upper jaw is  
24 preferably maintainable within a predefined range.”

25           22. Exemplary claim 2 of the ‘903 Patent is consistent with this embodiment and recites:  
26 “A neuromuscular oral appliance for placement in a mouth of a user comprising: a channel adapted  
27 to accept teeth from one of a lower jaw and an upper jaw of the mouth; wherein the channel is  
28 deformable to at least partially conform to a shape of the accepted teeth; a pair of bite pads

1 extending adapted to contact teeth from the other of the lower jaw and the upper jaw when the oral  
2 appliance is placed in the mouth; wherein the pair of bite pads is adapted to partially collapse upon  
3 contact with the teeth such that a gap between the lower jaw and the upper jaw is maintainable  
4 within a predefined range.”

5 23. At the time the ‘903 Patent was filed, mouthguards were primarily used to protect  
6 teeth and tongue from injury in contact sports. At that time little was known of the relationship  
7 between relative positioning of the jaw and bite and formation of the airwave to enhance an  
8 athlete’s performance. The invention of the ‘903 Patent fulfilled a long-felt but unmet need for a  
9 safe and effective way to improve athletic performance. Dr. Makkar’s groundbreaking discovery  
10 opened the path for NAP to create a market for performance mouthpiece products designed to  
11 increase the quality of performance and raise personal enjoyment in a wide array of exercise and  
12 sporting activities.

13 24. The D109 Patent covers the aesthetic features of NAP’s mouthpiece product designs  
14 and relates directly to the 6DS product, which is shown side-by-side with exemplary Figure 1  
15 below.



22  
23 **THE NAP 6DS MOUTHPIECE PRODUCT**

24 25. Since 2013, NAP has been engaged in the development and sale of high-quality,

25 //  
26 //  
27 //  
28 //

1 high-performance mouthpiece products. Prior to the development of performance enhancing  
2 mouthpieces, mouthguards were primarily used to protect teeth and tongue from injury in contact  
3 sports. NAP developed a revolutionary “boil-and-bite” version of the ‘903 Patent invention and set  
4 about cultivating a market for the revolutionary product and theory behind it. Once brought to  
5 market, the revolutionary NAP Products fulfilled a long-felt but unmet need for a safe and effective  
6 way to improve athletic performance. NAP created a new market for performance mouthpiece  
7 products designed to increase the quality of performance and raise personal enjoyment in a wide  
8 array of exercise and sporting activities. NAP developed and released a commercial embodiment of  
9 the functions and features disclosed and claims in the Patents-in-suit to provide a “neuromuscular  
10 oral appliances...for placement in a mouth of a user to improve balance and strength.”

11 26. NAP’s performance mouthpiece, once custom fit and placed in the mouth of a user,  
12 establishes and maintains positioning of teeth and jaw to open the airway and enhance performance  
13 during exercise. Since 2013, NAP has spent millions of dollars in creating, cultivating and growing  
14 a new market for performance-enhancing mouthpieces where previously no such market existed.

15  
16 **DEFENDANT’S ACTS INFRINGE NAP’S PATENTS**

17 27. Well after NAP released its 6DS product and created a new market for performance  
18 enhancing mouthpiece products, DPS recently entered the niche performance mouthpiece market  
19 and began selling products in direct competition with NAP via DPS’s Amazon online storefront.  
20 Specifically, DPS, under the DBA Berkland, sells “performance mouthpiece” products for sports  
21 and fitness activities using the “PowerGuard” brand name.

22 28. Defendant makes, uses, imports, exports, distributes, sells and/or offers for sale  
23 PowerGuard products that directly infringe, contributorily infringe, and/or induce others to infringe  
24 one or more claims of each of the Patents-in-suit.

25 29. Alerted by the striking similarity of the PowerGuard mouthpiece product design to  
26 the appearance and design of the NAP 6DS mouthpiece and the D109 Patent, NAP obtained a  
27 sample PowerGuard mouthpiece from DPS’s offerings on the Amazon.com online marketplace.  
28 Upon examination, NAP determined DPS copied NAP’s product designs and that such products

1 infringed the Patents-in-suit.

2 30. The following paragraphs provide exemplary comparisons of the design of the  
3 infringing products with the design of the NAP products as protected by the D109 Patent.

4 31. The DPS PowerGuard mouthpiece is sold in and across the United States and in this  
5 judicial district and is shown below alongside NAP's 6DS mouthpiece product also sold on the  
6 Amazon online market.

7 32. The visual comparison reveals that DPS copied NAP's 6DS product, both the product  
8 design and the functional features protected by NAP's patent rights. See photographs of side-by-  
9 side comparisons below.



17 DPS PowerGuard Product (left) vs NAP 6DS Product (right) – top/front view



24 DPS PowerGuard Product (left) vs NAP 6DS Product (right) – bottom/rear view

25 //  
26 //  
27 //  
28 //





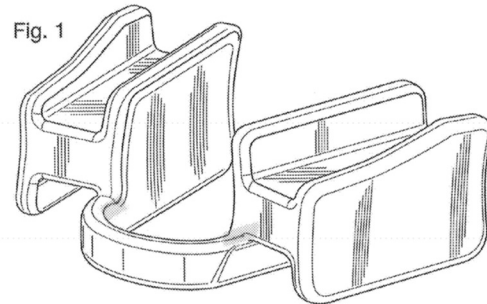
DPS PowerGuard Product (left) vs NAP 6DS Product (right) – top/down view

33. NAP owns valuable, protectable trade dress rights in the distinctive, non-functional design and appearance of its 6DS mouthpiece products as depicted in the photos included herein. Through its continuous use, publicity, marketing and extensive sales, NAP’s 6DS product design has acquired secondary meaning and NAP owns a protected right against unauthorized copying of the design. A side-by-side comparison of the DPS PowerGuard and NAP 6DS mouthpiece products reveals DPS’s copying and infringement of NAP’s product design and trade dress rights. Exemplary design elements of the 6DS product copied by DPS include the black color of the product, the shape and position of the bar connecting the side channels, the “H”-shaped rear profile of each side base/channel, and the upraised bite pad features extending upward from each base/channel.

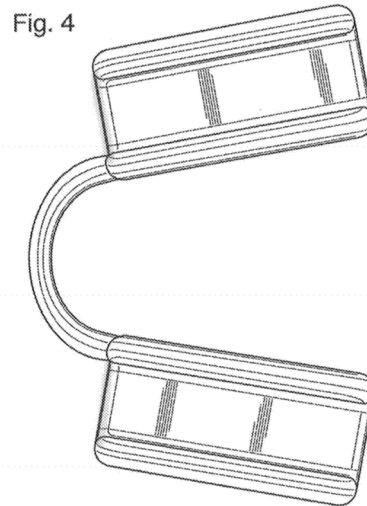
34. Defendant has marketed and sold its PowerGuard Product in interstate commerce in the U.S., including in California. As shown above, the PowerGuard product incorporates a design that is confusingly similar to NAP’s trade dress for its 6DS product. Defendant’s use of NAP’s trade dress and/or a confusingly similar variation thereof, is likely to cause harmful consumer confusion as to the source and origin or sponsorship of Defendant’s products. Defendant’s actions constitute trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and constitute trade dress infringement and unfair competition under California Business and Professions Code § 17200 et seq.

35. Exemplary figures from the NAP’s D109 patent show and highlight the copying of

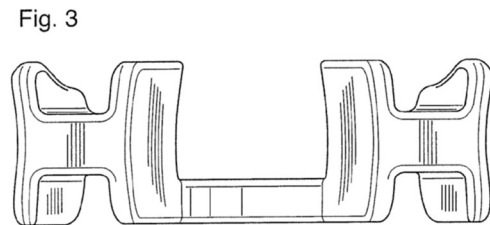
1 NAP's 6DS design and DPS's infringement of the D109 Patent. See following series of side-by-side  
2 comparisons of the DPS PowerGuard Product with figures from the D109 Patent.



10 DPS PowerGuard Product (left) vs Fig. 1 of D109 Patent (right) – top/front view



20 DPS PowerGuard Product (left) vs Fig. 4 of D109 Patent (right) – top/down view



26 DPS PowerGuard Product (left) vs Fig. 3 of D109 Patent (right) – rear view

27 36. A comparison of the two designs when shown side-by-side shows the designs are not  
28 sufficiently distinct but rather are substantially the same in overall appearance and the D109 Patent

1 is infringed under the "ordinary observer" test established by the Supreme Court.

2 37. Under the "ordinary observer" test the ordinary observer is deemed to view and  
3 compare the two designs side-by-side with the focus on the overall similarities in appearance  
4 between the accused design and the patented design, not small or trivial differences. The DPS  
5 PowerGuard mouthpiece is substantially similar in overall visual appearance and aesthetic effect to  
6 that of the NAP 6DS mouthpiece with any minor differences being merely trivial.

7 38. Beyond the aesthetic similarities, the DPS PowerGuard product functions in the  
8 manner claimed in the '903 Patent and also infringes that patent.

9 39. Both the DPS PowerGuard and the NAP 6DS mouthpieces are made of Polyolefin  
10 elastomer ("POE,"), which is a versatile material capable of offering strength and flexibility via a  
11 balance of properties common for both plastic and rubber. POEs are used to make products tough  
12 and resilient while flexible at the same time. DPS's products are performance-enhancing  
13 mouthpieces intended to be received in the mouth of a user and placed between the teeth and  
14 respective jaws of the user to maintain a gap and desired jaw positioning when the user "clenches"  
15 and bites on the mouthpiece during exertion.

16 40. Attached herewith and incorporated by reference is Exhibit 3 ("Exh. 3") consisting of  
17 eight pages referred to as "figures" showing a sample of the DPS PowerGuard mouthpiece  
18 ("Accused Product"), its packaging, along with excerpts from DPS's Amazon listing. An exemplary  
19 claim from the '903 Patent, claim 2, is provided to show an example of correspondence between the  
20 DPS product and the claim to show one example of infringement of the '903 Patent.

21 41. NAP obtained the sample product shown in Exh. 3 for inspection by placing an order  
22 via DPS's Amazon listing. Upon inspection of the Accused Product and associated packaging and  
23 online listing descriptions, NAP determined that the products infringed its patent rights. The  
24 correspondence provided in Exh. 3 shows an example of infringement of exemplary claim 2 of the  
25 '903 Patent. Figures 1-7 provide correspondence between the Accused Product and each and every  
26 limitation recited in claim 2. Figure 8 is included to show DPS was on notice of NAP's patent rights  
27 by the association of NAP's 6DS product with the DPS listing.

28 42. Figure 1 of Exh. 3 shows the packaging received with the sample Accused Product

1 and highlights statements made by DPS to describe its product and how it functions. Claim 2 is  
2 provided to illustrate the relatedness of DPS's statements with claim limitations. Figures 2 and 3 of  
3 Exh. 3 show the sample Accused Product in a series of views to illustrate the various features of the  
4 product and provide a correspondence with limitations recited in claim 2. As observed, the Accused  
5 Product is made from thermoplastic material that is a class of polymer that can be softened through  
6 heating and then formed or "deformed" in a molding process to cause the device to take on a new  
7 shape conforming to the user's mouth, jaw and teeth.

8 43. Figures 4-6 of Exh. 3 show excerpts from DPS's Amazon product listing with  
9 statements describing features of its product. Claim 2 is included with reference arrows and  
10 comments to help show correspondence between the listed product and the claim limitations. Figure  
11 5 includes a close up of one of the two bite pad features of the Accused Product with  
12 correspondence to the claim. The sample Accused Product was prepared for fitting and use in the  
13 manner described in the packaging materials and with the online listing. Figure 6 includes a portion  
14 of the online listing detailing "Molding instructions" as a process for heating the product and using  
15 its thermoplastic properties to custom fit the device to a user's mouth and teeth as a prelude to use.

16 44. Figure 7 of Exh. 3 provides a top ("Front View In Use") view showing the sample  
17 Accused Product when placed in the mouth of a user in a biting position after the product has been  
18 customized to fit the user's mouth following the "Molding instructions" process described in the  
19 excerpt of Figure 6. The bottom ("Top View Post-Use) view of Figure 7 shows a top view of the  
20 Accused Product looking down onto the bite pads of the appliance after the product has been  
21 molded when placed in the user's mouth and pressure applied by the user's teeth in biting or  
22 clenching to custom fit the device to the user's mouth, teeth and jaw condition.

23 45. The Accused product is a "neuromuscular oral appliance for placement in a mouth of  
24 a user" as recited in claim 2. With reference to the Figures included as Exh. 3, the Accused Products  
25 are oral appliances in the form of "mouthpieces" intended to be placed in the mouth of a user to  
26 enhance performance in a variety of activities, including weightlifting. As stated in the Summary  
27 section of the '903 Patent, "Embodiments of the present invention are directed to neuromuscular  
28 oral appliances and methods for use therewith, for placement in a mouth of a user to improve

1 balance and strength.”

2 46. The ‘903 Patent, see Exh. 1 at col. 3, line 63 – col. 4, line 20, explains how the  
3 relative position of the jaws and providing a gap when clenching can enhance athletic activity. The  
4 excerpt states: “It has been observed that an individual's strength and balance can benefit from a  
5 relative arrangement of the upper and lower jaw that produces three physiological results: 1) an  
6 arrangement of the temporomandibular joints (“TMJ”) so that compression or undesirable contact  
7 of the condyle on each side of the mandible with the trigeminal nerve (i.e. the fifth cranial nerve,  
8 CNV), and more specifically the mandibular nerve (V3), is prevented or resisted, 2) relaxation of  
9 the facial muscles associated with the upper and lower jaw, and 3) arrangement of the neck such that  
10 the cervical vertebrae are aligned so that the spine is approximately erect. Typically, when an  
11 individual closes his or her mouth, the relative arrangement of the upper and lower jaw is influenced  
12 by the anatomical imperfections in the individual's bite pattern and does not produce the three  
13 beneficial physiological results. For example, when the mouth is closed, the lower jaw is commonly  
14 positioned so that the neck tends to bend forward. Further, when the mouth is closed the lower jaw  
15 is commonly positioned so that the condyles of the mandible compress the articular disc of the  
16 TMJs. Clenching of the jaws can compress the articular disc of the TMJs and apply undesirable  
17 pressure on the trigeminal nerve. Still further, when the mouth is closed, the muscles of the face are  
18 commonly placed in tension, rather than relaxed.”

19 47. The ‘903 Patent, see Exh. 1 at col. 4, lines 23-32, describes the benefit of the  
20 invention as follows: “The oral appliance 100 provides a pliable intermediate surface between the  
21 upper and lower jaws that partially yields to the anatomical imperfections in the individual's bite  
22 pattern to thereby encourage the lower jaw to arrange itself in a more balanced position relative to  
23 the upper jaw. The oral appliance 100 also defines a target gap between the bite surfaces of the  
24 upper and lower jaw so that the condyles of the mandible are urged away from the maxilla to  
25 decompress the articular disc of the TMJs and avoid applying undesirable pressure on the trigeminal  
26 nerve.”

27 48. The Accused Product performs in a manner as described in the ‘903 Patent to achieve  
28 the same goals and in fact includes promotional statements to that effect on its packaging and

1 listing. For example, both the online product listing and the packaging state the Accused Product  
2 mouthpiece is placed between the teeth of a user to “help improve alignment” and “stabilize” the  
3 jaw and to “help protect against teeth grinding and cracking while lifting.” The Accused Product  
4 “provides instant jaw stabilization and helps promote proper alignment” and the listing cites to  
5 research showing proper bite is related to body alignment and “removes restrictions during  
6 weightlifting.” See Fig. 1, Exh. 3. Accordingly, the Accused Products are a “neuromuscular oral  
7 appliance for placement in a mouth of a user” as recited in claim 2.

8 49. The Accused Product includes “a channel adapted to accept teeth from one of a lower  
9 jaw and an upper jaw of the mouth” as recited in claim 2. The embodiments shown in the ‘903  
10 Patent and the Accused Products include two channels, one on each side (left/right) of the oral  
11 appliance. See highlighted portions of Figures 2 and 3 of Exh. 3 related to the “channel” limitation.  
12 In the context of claim 2, “one of a lower jaw and an upper jaw” simply means alternatively one or  
13 the other of the upper and lower jaw, or the upper jaw or the lower jaw. The device may be  
14 configured with the channel on the upper or the lower portion of the oral appliance. In the Accused  
15 Products the “channel” feature is shown on the bottom of the appliance with the bite pads shown on  
16 the upper portion.

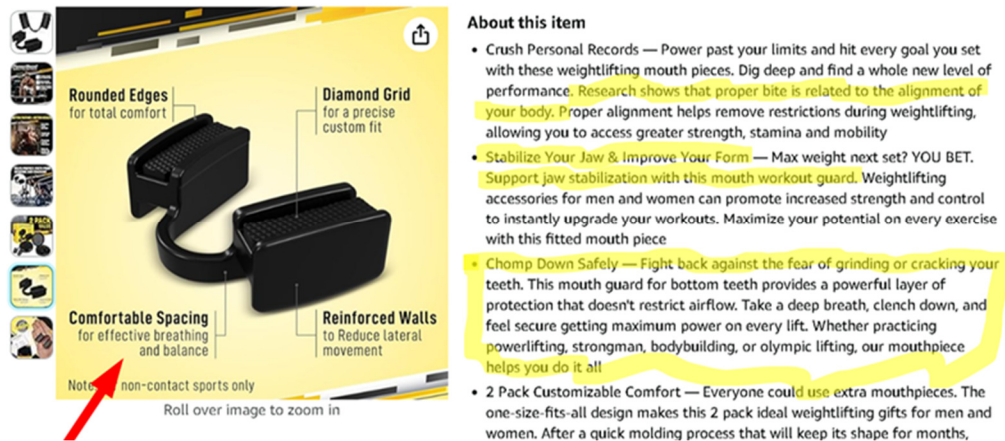
17 50. The Accused Product includes “wherein the channel is deformable to at least partially  
18 conform to a shape of the accepted teeth” as recited in claim 2. Fig. 7 of Exh.3 illustrates the  
19 Accused Product in the mouth of a user and showing a front view of the appliance in use and placed  
20 between the user’s teeth. The teeth on the lower jaw contact the material that forms the channel on  
21 each side of the appliance. The material is a polymer-based material, Polyolefin Elastomer (“POE”),  
22 and has a degree of elasticity and plasticity that allows the material and the channel formed therein  
23 to deform to receive and conform to the shape of the user’s teeth to result in a unique and  
24 comfortable “fit” for the user. As described in the “Molding instructions” process of Figure 6, the  
25 appliance is heated prior to being initially placed in the user’s mouth. The user is instructed to  
26 prepare boiling water, place the appliance in the bowl of boiling water, “carefully place the guard in  
27 your mouth and align the U-shaped bar behind lower teeth...bite down and press your tongue  
28 through your front teeth [NOTE – thereby ensuring a “gap”]...hold for 10 seconds...remove guard

1 and inspect to ensure teeth imprints are within [channel] sidewalls.” Running cool water then sets  
2 the thermoplastic material and the appliance is now molded to fit the user’s mouth for proper bite  
3 with a gap within a predefined range – i.e., using the tongue in the molding process to ensure a  
4 sufficient gap is formed. Accordingly, the Accused Product provides a channel that “is deformable  
5 to at least partially conform to a shape of the accepted teeth” and provides a gap within a  
6 predetermined range as recited in claim 2.

7 51. The Accused Product includes “a pair of bite pads extending adapted to contact teeth  
8 from the other of the lower jaw and the upper jaw when the oral appliance is placed in the mouth”  
9 as recited in claim 2. Fig. 7 of Exh. 3, illustrates the Accused Product in the mouth of a user and  
10 showing when in use and placed between the user’s teeth the pair of bite pads contact the user’s  
11 teeth on one side of the appliance. In the instance of the Accused Product, as shown the bite pads  
12 contact the teeth on the upper jaw of the user and the teeth on the lower jaw contact the material that  
13 forms the channel on the opposite side of the of the bite pads. This occurs 1) when initially custom  
14 fitting the appliance in the user’s mouth and 2) later, after being set to maintain a gap between the  
15 jaws, when using the appliance is used as a performance aid when weightlifting, for example.

16 52. The Accused Product includes “wherein the pair of bite pads is adapted to partially  
17 collapse upon contact with the teeth such that a gap between the lower jaw and the upper jaw is  
18 maintainable within a predefined range” as recited in claim 2. As stated at the product listing and on  
19 packaging, the Accused Products are placed between the teeth of a user resulting in a gap between  
20 the upper and lower jaw and a proper or improved bite position. The stated purpose is to “help  
21 improve alignment” and “stabilize” the jaw and to “help protect against teeth grinding and cracking  
22 while lifting.” By molding the appliance to maintain a gap between the jaws, the appliance acts as a  
23 performance aid and “provides instant jaw stabilization and helps promote proper alignment” in  
24 accordance with the cited research showing proper bite being related to body alignment and  
25 “removes restrictions during weightlifting.” See Fig. 1, Exh. 3. Again, Fig. 7 of Exh. 3, illustrates  
26 the Accused Product in the mouth of a user and, after molding, is placed between the user’s jaws  
27 and teeth so that a gap is maintained between the upper and lower jaws. The original molding  
28 process, the thickness of the material used to form the bite pads, and the plasticity/elasticity of the

1 material used provides a predefined range of the gap that is maintainable during use. The  
 2 PowerGuard Product includes bite pads that partially collapse when in use to provide a gap within a  
 3 predefined range as described in the '903 Patent. As stated in DPS's product materials that  
 4 accompany its products (see excerpt from Amazon listing below), the PowerGuard product is  
 5 intended for the user to "Chomp Down Safely" without "fear of grinding or cracking your teeth."  
 6 This is because the PowerGuard product "provides a layer of protection that doesn't restrict  
 7 airflow." This "layer" of protection between the user's teeth necessarily forms a gap between the  
 8 teeth – thus the avoidance of "grinding" or "cracking" of the user's teeth. The gap that results from  
 9 the bite pads between the user's teeth separate the upper jaw and lower jaw to not "restrict airflow"  
 10 and provide "Comfortable Spacing for effective breathing and balance."

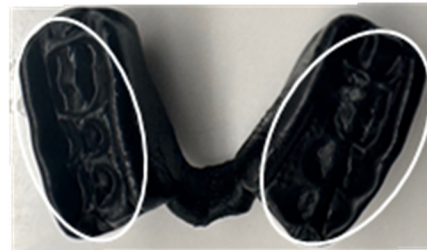


DPS PowerGuard Amazon Product Lising

21 54. As readily apparent when viewing the PowerGuard product before and after use, the  
 22 bite pads do most definitely "partially collapse" when in use and evidence of this collapsing is  
 23 apparent from an inspection of the product after use. See comparison below.



POWERGUARD BITE PADS PRIOR TO USE



POWERGUARD BITE PADS AFTER USE





1 patented inventions threatens the value of the Patents-in-suit by diminishing Plaintiff's lawful patent  
2 rights to exclude others from making, using, selling, offering to sell and/or importing the patented  
3 inventions.

4 62. Defendant's disregard for NAP's property rights similarly threatens Plaintiff's  
5 relationships with potential and existing customers and licensees of the Patents-in-suit. Defendant  
6 has enjoyed and continues to derive a competitive advantage over Plaintiff and will derive a  
7 competitive advantage over Plaintiff and any potential future licensees from using Plaintiff's  
8 patented technology without paying compensation for such use. Accordingly, unless and until  
9 Defendant's acts of infringement are enjoined, Plaintiff will suffer irreparable harm for which there  
10 is no adequate remedy at law.

11 **COUNT I**

12 **(Infringement of United States Patent No. 10,398,903)**

13 63. Plaintiff hereby incorporates by reference paragraphs 1 through 62 as if fully restated  
14 herein.

15 64. NAP is the lawful owner of and continues to maintain all right, title and interest in  
16 and to the '903 Patent, including the right to sue thereon and the right to recover for infringement  
17 thereof

18 65. Defendant makes, uses, sells, offers to sell and/or imports into the United States for  
19 subsequent sale or use products that infringe, directly and/or indirectly one or more of the claims of  
20 the '903 Patent.

21 66. Defendant has been and continues infringing one or more claims of the '903 Patent  
22 through the aforesaid acts, and will continue to do so unless enjoined by this Court. Defendant's  
23 wrongful conduct has caused Plaintiff to suffer irreparable harm resulting from the loss of its lawful  
24 patent rights to exclude others from making, using, selling, offering to sell and importing the  
25 patented inventions.

26 67. Defendant's infringement of the '903 Patent is knowing, willful and deliberate.

27 68. NAP is entitled to recover damages, including its lost profits, adequate to compensate  
28 NAP for Defendant's infringement.

**COUNT II**

**(Infringement of United States Design Patent No. D743,109)**

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3 69. Plaintiff hereby incorporates by reference paragraphs 1 through 68 as if fully restated  
4 herein.

5 70. NAP is the lawful owner of and continues to maintain all right, title and interest in  
6 and to the D109 Patent, including the right to sue thereon and the right to recover for infringement  
7 thereof.

8 71. Defendant makes, uses, sells, offers to sell and/or imports into the United States for  
9 subsequent sale or use products, including the PowerGuard mouthpiece, that infringe, directly and/or  
10 indirectly the claim of the D109 Patent.

11 72. Defendant has infringed and continues to infringe the claim of the D109 Patent  
12 through the aforesaid acts, and will continue to do so unless enjoined by this Court. Defendant's  
13 wrongful conduct has caused Plaintiff to suffer irreparable harm resulting from the loss of its lawful  
14 patent rights to exclude others from making, using, selling, offering to sell and importing the  
15 patented invention.

16 73. Defendant's infringement of the D109 Patent is knowing, willful and deliberate.

17 74. NAP is entitled to recover damages, including its lost profits, adequate to compensate  
18 NAP for Defendant's infringement.

**COUNT III**

**(Willful Infringement of the Patents-in-suit)**

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20  
21 75. Plaintiff hereby incorporates by reference paragraphs 1 through 74 as if fully restated  
22 herein.

23 76. Defendant has had actual knowledge of the Patents-in-suit since no later than August  
24 of 2023, at which time Plaintiff put Defendant on actual notice of its patents and other rights and  
25 well prior to that time as NAP has continuously marked its commercial products covered by the  
26 Patents-in-suit pursuant to 35 U.S.C. §287(a) putting Defendant on constructive notice of the  
27 Patents-in-suit.

28 77. Defendant's past and continuing infringement with actual knowledge of and in

1 conscious and reckless disregard of the Patents-in-suit is willful and deliberate under 35 U.S.C.  
2 §284 and at least for these reasons makes this an exceptional case under 35 U.S.C. §285.

3 78. NAP is entitled to enhanced damages and reasonable attorney's fees adequate to  
4 compensate for Defendant's infringement and other conduct.

5 **COUNT IV**

6 **(Trade Dress Infringement Under Section 43(a) of the Lanham Act)**

7 79. Plaintiff hereby incorporates by reference paragraphs 1 through 77 as if fully restated  
8 herein.

9 80. NAP owns valuable, protectable trade dress rights in the distinctive, non-functional  
10 design and appearance of its 6DS mouthpiece products, including by acquiring secondary meaning  
11 through continuous use, publicity, marketing and extensive sales. A side-by-side comparison of the  
12 DPS PowerGuard and NAP 6DS mouthpiece products reveals the former incorporates design  
13 elements of the latter in violation of NAP's trade dress rights.

14 81. Defendant has marketed and sold its PowerGuard Product in interstate commerce in  
15 the U.S., including in California. The PowerGuard product incorporates a design that is confusingly  
16 similar to NAP's trade dress for its 6DS product. Defendant's use of NAP's trade dress and/or a  
17 confusingly similar variation thereof, is likely to cause harmful consumer confusion as to the source  
18 and origin or sponsorship of Defendant's products. Defendant's actions constitute trade dress  
19 infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

20 **COUNT V**

21 **(Trade Dress Infringement and Unfair Competition Under**  
22 **California Business and Professions Code § 17200 et seq.)**

23 82. Plaintiff hereby incorporates by reference paragraphs 1 through 81 as if fully restated  
24 herein.

25 83. NAP owns valuable, protectable trade dress rights in the distinctive, non-functional  
26 design and appearance of its 6DS mouthpiece products, including by acquiring secondary meaning  
27 through continuous use, publicity, marketing and extensive sales. A side-by-side comparison of the  
28 DPS PowerGuard and NAP 6DS mouthpiece products reveals the former incorporates design

1 elements of the latter in violation of NAP's trade dress rights.

2 84. Defendant has marketed and sold its PowerGuard Product in California. The  
3 PowerGuard product incorporates a design that is confusingly similar to NAP's trade dress for its  
4 6DS product. Defendant's use of NAP's trade dress and/or a confusingly similar variation thereof, is  
5 likely to cause harmful consumer confusion as to the source and origin or sponsorship of  
6 Defendant's products. Defendant's actions constitute trade dress infringement and unfair  
7 competition under California Business and Professions Code § 17200 et seq. NAP seeks  
8 compensatory and punitive damages as well as injunctive relief against Defendant's unfair  
9 competition.

10  
11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff prays for judgment as follows:

13 (A) That this Court adjudge and decree that the '903 Patent is not invalid and enforceable  
14 against Defendant;

15 (B) That this Court adjudge and decree that the D109 Patent is not invalid and enforceable  
16 against Defendant;

17 (C) That Defendant be held to have infringed each of the Patents-in-suit;

18 (D) That Defendant and its subsidiaries, affiliates, parents, successors, assigns, officers,  
19 agents, servants, employees, attorneys, and all persons acting in concert or in participation with it, be  
20 temporarily and preliminarily enjoined during the pendency of this action, and permanently enjoined  
21 thereafter from infringing, contributing to the infringement of, and inducing infringement of the  
22 Patents-in-suit, and specifically from directly or indirectly making, using, selling, importing or  
23 offering for sale, any products embodying the inventions of the Patents-in-suit during the life of the  
24 claims of the Patents-in-suit, without the express written authority of Plaintiff;

25 (E) That Defendant be directed to give a full accounting, including post-verdict  
26 accounting, to determine an award to fully compensate NAP for all damages attributable to  
27 Defendant's infringement of the Patents-in-suit in an amount consistent with proof at trial and in no  
28 event less than a reasonable royalty;

1 (H) That this case be deemed exceptional, and that Plaintiff be awarded its reasonable  
2 attorney's fees in accordance with 35 U.S.C. §285;

3 (I) That Defendant's infringement be found to be willful and that all damages awarded be  
4 trebled in accordance with 35 U.S.C. §284;

5 (J) That Defendant be ordered to deliver to Plaintiff, for destruction at Plaintiff's option,  
6 any and all molds, tooling, and equipment fabricated for manufacture of the infringing products and  
7 all products that infringe the Patents-in-suit;

8 (K) That Defendant be required to account for all gains, profits, advantages, and unjust  
9 enrichment derived from its violations of law;

10 (L) That this Court assess pre-judgment and post-judgment interests and costs against  
11 Defendant, together with an award of such interest and costs, in accordance with 35 U.S.C. §284;

12 (M) An injunction ordering Defendant, and its officers, directors, members, agents,  
13 servants, employees, and attorneys, and all other persons acting in concert or participating  
14 with them (collectively, the "Enjoined Parties"), who receive actual notice of the injunction  
15 order by personal or other service, to:

- 16 i. cease all use and never use NAP's trade dress, or any other trade dress likely  
17 to cause confusion with NAP's trade dress;
- 18 ii. never use any false designation of origin, false representation, or any false or  
19 misleading description of fact, that can, or is likely to, lead the consuming public or  
20 individual members thereof, to believe that any products or services produced, offered,  
21 promoted, marketed, advertised, provided, sold or otherwise distributed by the  
22 Enjoined Parties is in any manner associated or connected with NAP, or are licensed,  
23 approved, or authorized in any way by NAP;
- 24 iii. never represent, suggest in any fashion to any third party, or perform any act  
25 that may give rise to the belief, that the Enjoined Parties, or any of its products or  
26 services, are related to, or authorized or sponsored by, NAP;
- 27 iv. never unfairly compete with NAP in any manner whatsoever, or engage in any  
28 unfair, fraudulent, or deceptive business practices that relate in any way to the

1 production, distribution, marketing, and/or sale of products and services bearing  
2 NAP's trade dress or any other trade dress likely to cause confusion with NAP's trade  
3 dress; and

4 v. never apply for or seek to register the NAP trade dress, or any other trade  
5 dress likely to cause confusion with the NAP trade dress, including any variation of  
6 the NAP trade dress.

7 (N) An order, pursuant to 15 U.S.C. § 1118, requiring the Enjoined Parties to  
8 deliver and destroy within thirty days all prints, advertising, packaging, goods, and other  
9 materials bearing the Infringing trade dress.

10 (O) An order pursuant to 15 U.S.C. § 1116(a), directing the Enjoined Parties to  
11 file with the Court and serve upon NAP's counsel, within thirty (30) days after service of the  
12 order of injunction, a report in writing under oath setting forth in detail the manner and form  
13 in which the Enjoined Parties have complied with the injunction.

14 (P) An order finding that, by the acts complained of above, Defendant has  
15 infringed NAP's unregistered trade dress and has created a false designation of origin and  
16 false representation of association in violation of 15 U.S.C. § 1125(a).

17 (Q) An order finding that, by the acts complained of above, Defendant has  
18 engaged in unfair competition.

19 (R) An order awarding NAP damages pursuant to 15 U.S.C. § 1117(a) of NAP's  
20 actual damages, as well as all of Defendant's profits or gains of any kind from its acts of  
21 trade dress infringement, false designation of origin, and unfair competition, including a  
22 trebling of those damages; and punitive damages pursuant to California common law.

23 (S) An order pursuant to 15 U.S.C. § 1117(a), finding that this is an exceptional  
24 case and awarding NAP its reasonable attorneys' fees.

25 (T) An order pursuant to 15 U.S.C. § 1117(a), awarding NAP all of its costs,  
26 disbursements, and other expenses incurred due to Defendant's unlawful conduct.

27 and

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2 (U) That Plaintiff have such other, further, and different relief as this Court deems proper  
3 under the circumstances.

4

5 Dated: February 6, 2024

DERGOSITS & NOAH LLP

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By: /Michael E. Dergosits/  
Michael E. Dergosits  
Attorneys for Plaintiff  
NEW AGE PERFORMANCE, INC.

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**JURY DEMAND**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Civil Local Rule 3-6,  
Plaintiff hereby demands a trial by jury for all issues so triable.

Dated: February 6, 2024

DERGOSITS & NOAH LLP

By: /Michael E. Dergosits/  
Michael E. Dergosits  
Attorneys for Plaintiff  
NEW AGE PERFORMANCE, INC.