



Center that, for nearly seventy years, has been devoted to medical and scientific research; particularly with respect to the diagnosis, treatment and prevention of cancer. Through the hard work of thousands of researchers, the selfless contributions of tens of thousands of donors, and the additional funding provided by millions of Texas taxpayers, M. D. Anderson has earned a reputation as one of the premier cancer treatment and research institutions in the world.

3. The M. D. ANDERSON Marks embody this reputation; identifying the medical and educational services that M. D. Anderson provides and the great esteem in which it is held. The M. D. ANDERSON Marks also embody the institution's reputation for unbiased research; patients, the public, and scientists have come to understand that results of studies conducted by M. D. Anderson can be trusted because they are done without regard to profit or in the hopes that they will please a particular company or industry.

4. UT is informed and believes and thereupon alleges that defendants HealthH2O and Evolv are working together to misuse the M. D. ANDERSON Marks in support of an enhanced water beverage called "Evolv" (basically City of Houston tap water that has been infused with HealthH2O's Archaea Active formula). Specifically, defendants are misleading consumers and cancer patients into believing that UT's M. D. Anderson conducted extensive testing of the main formula in the Evolv product, known as "Archaea Active." Defendants' misuse of the M. D. ANDERSON Marks creates, at a minimum, a likelihood that consumers and cancer patients will falsely believe that defendants' product is sponsored or endorsed by UT's M. D. Anderson, when, in fact, M. D. Anderson does not endorse or recommend the use of the defendants' product.

5. As a result of defendants' actions, the value of UT's trademarks is being diminished, and consumers and cancer patients are being misled and confused. This action seeks injunctive relief, damages, costs and attorneys' fees, for the harm defendants have caused to date

arising from defendants' violation of: (1) 15 U.S.C. § 1114(1); (2) Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (3) common law trademark infringement; and (4) trademark dilution under Texas Business and Commerce Code § 16.29.

#### Jurisdiction and Venue

6. Subject matter jurisdiction over the claims asserted in this Complaint is based upon 28 U.S.C. §§ 1331 and 1338(a) as an action arising under the Lanham Act, 15 U.S.C. §§ 1051 *et. seq.* Subject matter jurisdiction over those of UT's claims that arise under state law is based upon the principles of supplemental jurisdiction set forth in 28 U.S.C. § 1367.

7. UT is informed and believes and thereupon alleges that venue of this action is proper in the district pursuant to 28 U.S.C. § 1391(b).

#### The Parties

8. Plaintiff UT is a non-profit state agency with its principal place of business located at 201 West 7<sup>th</sup> Street, Austin, Texas 78701. UT's M. D. Anderson is headquartered in the Texas Medical Center in Houston, Texas.

9. On information and belief defendant HealthH2O is a limited liability company organized and existing under the laws of the State of Texas, with its principal place of business located at 13455 Noel Road, 23<sup>rd</sup> Floor, Dallas, Texas 75240.

10. On information and belief defendant Evolv is a limited liability company organized and existing under the laws of the State of Texas, with its principal place of business located at 13455 Noel Road, 23<sup>rd</sup> Floor, Dallas, Texas 75240.

#### UT and its Business

11. UT is a state agency comprised of fifteen (15) member institutions, including M. D. Anderson, an extremely well-respected and renowned institution for cancer research, prevention, treatment and education across the nation and around the world. M. D. Anderson has

a reputation for unbiased research; instilling in it the public's trust and an expectation of premium medical and educational services.

12. M. D. Anderson is one of the original three comprehensive cancer centers designated by the National Cancer Act of 1971 and is one of 40 NCI-designated comprehensive cancer centers today.

13. Since 1944, nearly 800,000 patients have turned to M. D. Anderson for cancer care in the form of surgery, chemotherapy, radiation therapy, immunotherapy, or combinations of these and other treatments. This multidisciplinary approach to treating cancer was pioneered at M. D. Anderson. Because of its experts' focus on cancer, M. D. Anderson is renowned for its ability to treat all types of cancer, including rare or uncommon diseases.

14. M. D. Anderson ranks first in the United States in the number of research grants awarded and total amount of grants given by NCI. The center holds 11 NCI grants: brain, breast, genitourinary, head and neck, leukemia, lung, melanoma, ovarian, pancreatic, prostate and uterine. The M. D. Anderson research program is considered one of the most productive efforts in the world aimed solely at cancer.

15. In addition to research and treatment, M. D. Anderson offers educational programs to health students and professionals. More than 1,000 clinical residents and fellows come to M. D. Anderson each year to receive specialized training in the investigation, treatment and prevention of cancer.

16. Approximately one-third of new patients at M. D. Anderson come to Houston from outside of Texas in order to reap the benefits of the research and medical services for which M. D. Anderson is so widely known.

17. For nearly seventy years, M. D. Anderson has served as the gold standard in the cancer care field. UT has spent substantial time, effort and money advertising and promoting the M. D. ANDERSON Marks and the premium services associated with them. In 2009, U.S. News & World Report's "America's Best Hospitals" survey ranked M. D. Anderson as the top hospital in the United States for cancer care. This number one ranking continued two decades of M. D. Anderson being ranked as one of the top hospitals in the nation for cancer care.

18. Since at least as early as 1942, UT has used M. D. ANDERSON® as a designation of source for its medical and related services. Indeed, UT owns federal trademark registrations for its M. D. ANDERSON Marks, two of which, Registration No. 2,594,012 for "M. D. ANDERSON" and Registration No. 2,614,346 for "THE UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER," are now incontestable.

Defendants' Misappropriation and Misuse of the M. D. ANDERSON Marks

19. In or about January 2009, defendant HealthH2O contracted with M. D. Anderson to conduct limited *in vitro* testing of HealthH2O's Archaea Active formula, which was to be used in HealthH2O's enhanced water beverage; no tests were conducted on humans. M. D. Anderson was only to test the anti-inflammatory effect of the formula, not the safety, efficacy, medicinal or beneficial health value or any other aspect of the formula. In particular, M. D. Anderson did not test whether the water product was beneficial in the treatment or prevention of cancer. Because the testing was preliminary in nature, the report prepared by M. D. Anderson following the testing of the formula specifically indicated that more full and complete testing would need to be conducted in order to confirm the findings of the preliminary study. In particular, the report specifically indicated that any follow-up investigation should address the possible affect of City of Houston tap water, which is used as a source of the Evolv product and which is hard, has high

levels of carbonates and minerals, and may also contain low levels of heavy metals and organic compounds.

20. Upon information and belief, HealthH2O is the owner of the Archaea Active formula and manufacturing process and manufactures the Evolv water product using City of Houston tap water.

21. Upon information and belief, HealthH2O entered into a license agreement with Evolv through which Evolv agreed to market and distribute HealthH2O's water beverage under the "EVOLV" brand. Despite this agreement, HealthH2O has been actively participating in the marketing decisions relating to the water beverage—including the decisions as to the use and the manner of use of UT's M. D. ANDERSON Marks.

22. Upon information and belief, Evolv is a newly formed direct multi-level-marketing company which has been formed to sell the Evolv water product and which has been actively recruiting a cadre of pyramid-based sales people over the last several months. In August 2009, UT learned that defendants, in promotional materials and recruitment efforts, were representing that the Evolv product had "undergone rigorous testing with The University of Texas M. D. Anderson..." On August 25, 2009, UT wrote to Evolv inquiring as to the basis upon which such representations were being made. HealthH2O, rather than Evolv, responded to UT's inquiry, and stated that its representations were based upon the preliminary and limited *in vitro* testing that M. D. Anderson had conducted on the Archaea Active formula. Thereafter, UT terminated all testing of the Archaea Active formula until issues relating to the use of the M. D. ANDERSON Marks could be resolved.

23. Defendants currently use the M. D. ANDERSON Marks, without UT's authorization, on the label of the Evolv product and on a number of websites operated by Evolv

and/or Health2O, in a context that is likely to cause patients and consumers to believe—falsely—that M. D. Anderson performed more extensive testing than actually occurred, and that M. D. Anderson has made scientific findings regarding the Evolv product's efficacy, safety, or beneficial value in treating or preventing cancer. This misuse of the M. D. ANDERSON Marks is particularly harmful because it threatens M. D. Anderson's hard-won reputation for impartiality and objectivity in conducting medical research.

24. After complaints from UT, defendants attempted to secure from UT, a non-exclusive, worldwide, royalty-free license to use the M. D. ANDERSON Marks in relation to the Evolv water beverage. Although UT has not agreed to license its M. D. ANDERSON Marks, defendants continue to improperly use the M. D. ANDERSON Marks to promote the Evolv product.

25. On November 4, 2009, UT sent a letter to defendants informing them that their use of the M. D. ANDERSON Marks violates UT's rights in such marks, and demanded that defendants cease using the M. D. ANDERSON Marks. Defendants, however, refused to comply with UT's demand. As a result, consumers and cancer patients are likely to believe that M. D. Anderson sponsors or endorses defendants' water beverage, and/or that UT has given defendants permission to use the M.D. ANDERSON Marks, and the value and distinctiveness of the M. D. ANDERSON Marks is being diminished. UT is informed and believes and thereupon alleges that, absent the intervention of this Court, defendants' illegal actions will continue, and UT and consumers and cancer patients will continue to be harmed.



**First Claim for Relief**

**Infringement of Federally Registered Trademarks**

**(15 U.S.C. § 1114(1))**

26. UT specifically realleges and incorporates herein by reference each and every allegation set forth above in paragraphs 1 through 25.

27. The United States Patent and Trademark Office has granted federal trademark registrations to UT for the M. D. ANDERSON<sup>®</sup> (Reg. No. 2,594,012), THE UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER<sup>®</sup> (Reg. No. 2,614,346), and THE UNIVERSITY OF TEXAS MD ANDERSON CANCER CENTER<sup>®</sup> (Reg. No. 3,253,552) trademarks. Registration No. 2,594,012 for "M. D. ANDERSON" and Registration No. 2,614,346 for "THE UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER," have become incontestable within the meaning of 15 U.S.C. § 1065.

28. UT uses the M. D. ANDERSON Marks as designations of source and quality for its services.

29. Defendants' use in interstate commerce of the M. D. ANDERSON Marks is likely to cause confusion, to cause mistake or to deceive consumers and cancer patients and therefore infringes UT's rights in the registered trademarks identified above in violation of 15 U.S.C. § 1114(1). UT is informed and believes and thereupon alleges that defendants have continued to use the M.D. ANDERSON Marks with full knowledge of UT's rights.

30. UT has no adequate remedy at law for defendants' infringement of the registered trademarks identified above in that: (i) such marks are unique and valuable property, injury to which cannot adequately be compensated by monetary damages; (ii) the damages to UT resulting from the infringement are not precisely and fully ascertainable; (iii) the infringement injures and threatens to continue to injure UT's reputation and goodwill; and (iv) the damage resulting to UT



from defendants' wrongful conduct, and the conduct itself, are continuing and UT would be required to bring a multiplicity of suits to achieve full redress for the injuries caused thereby.

31. Unless restrained, the foregoing wrongful acts of defendants will continue to cause irreparable injury to UT, both during the pendency of this action and thereafter. Therefore, this Court should preliminarily and permanently enjoin defendants and their agents, employees and others acting in concert with them from directly or indirectly using any of UT's registered trademarks, including but not limited to the M. D. ANDERSON Marks, and any other marks that are confusingly similar thereto, in connection with the sale, lease, offer for sale or lease, advertising or promotion of any goods or services.

32. UT is further entitled to recover damages sustained as a consequence of defendants' wrongful conduct, in an amount to be determined; to recover defendants' profits; and, as this is an extraordinary case, to recover UT's attorneys' fees and other costs herein pursuant to 15 U.S.C. § 1117. Based upon the circumstances of this case, including the willful, deliberate and intentional nature of defendants' conduct, UT is further entitled to recover triple the amount found as actual damages pursuant to 15 U.S.C. § 1117.

**Second Claim for Relief**

**Violation of Section 43(a) of the Lanham Act**

**(15 U.S.C. § 1125(a))**

33. UT specifically realleges and incorporates herein by reference each and every allegation set forth above in paragraphs 1 through 32.

34. The acts of HealthH2O and Evolv alleged herein, including their use of the M. D. ANDERSON Marks, are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendants or defendants' products and services with

UT, or as to the sponsorship, endorsement or approval of defendants' goods, services or commercial activities by UT in violation of 15 U.S.C. § 1125(a).

35. UT has no adequate remedy at law for the foregoing wrongful conduct of defendants, in that: (i) defendants' actions harm and threaten to continue to harm UT's unique and valuable property, injury to which cannot adequately be compensated by monetary damages; (ii) the injury to UT from defendants' wrongful actions is not precisely and fully ascertainable; (iii) the wrongful acts of defendants injure and threaten to continue to injure UT's reputation and goodwill; and (iv) the injury resulting to UT from defendants' wrongful conduct, and the conduct itself, are continuing, and UT would be required to bring a multiplicity of suits to achieve full compensation for the injuries caused thereby.

36. Unless restrained, defendants' infringement will continue to cause irreparable injury to UT, both during the pendency of this action and thereafter. UT is therefore entitled to an order from this Court preliminarily and permanently enjoining defendants and their agents, employees and others acting in concert with them, from directly or indirectly: (i) using the name or mark M. D. ANDERSON, or any other mark that is confusingly similar to the M. D. ANDERSON Marks; and/or (ii) making any false description or representation of origin concerning any services or products offered by defendants.

37. UT is further entitled to recover damages sustained as a consequence of defendants' wrongful conduct, in an amount to be determined; to recover defendants' profits; and, as this is an extraordinary case, to recover UT's attorneys' fees and other costs herein pursuant to 15 U.S.C. § 1117. Based upon the circumstances of the case, including the willful, deliberate and intentional nature of defendants' conduct, UT is further entitled to recover triple the amount found as actual damages pursuant to 15 U.S.C. § 1117.

**Third Claim for Relief**

**(Common Law Trademark Infringement)**

38. UT specifically realleges and incorporates herein by reference each and every allegation set forth above in paragraphs 1 through 37.

39. Defendants are using plaintiff's marks in connection with goods and services that are not provided, sponsored or endorsed by UT. Such unauthorized use of plaintiff's marks is likely to cause confusion and mistake in the minds of the trade and the public as to the source of the parties' goods and services, and to cause the public to believe such goods and services are associated with, sponsored or endorsed by UT when, in fact, they are not.

40. Defendants are improperly trading upon the reputation and goodwill of UT, and are impairing the distinctiveness of UT's valuable rights in and to the M. D. ANDERSON Marks.

41. UT has been damaged by defendants' infringement and has no adequate remedy at law. If not enjoined, defendants' conduct will cause irreparable damage to UT and its business, reputation, and goodwill.

**Fourth Claim for Relief**

**Trademark Dilution Under Texas Law**

**(Texas Business & Commerce Code § 16.29)**

42. UT specifically realleges and incorporates herein by reference each and every allegation set forth above in paragraphs 1 through 41.

43. By virtue of UT's long and continuous use of the M.D. ANDERSON Marks, they have become and continue to be "distinctive" within the meaning of Texas Business & Commerce Code § 16.29.

44. Defendants have made and continue to make commercial use in commerce of the M. D. ANDERSON Marks in a manner that is likely to cause dilution of the distinctive quality of

such marks, and lessens the capacity of such marks to identify and distinguish UT's goods and services.

45. UT is entitled to an order from this Court preliminarily and permanently enjoining defendants, its agents, employees and others acting in concert with them, from directly or indirectly making any further commercial use of the M. D. ANDERSON Marks, or any other names, marks or logos that are confusingly similar thereto.

**PRAYER FOR RELIEF**

WHEREFORE, UT prays for judgment as follows:

1. On each and every Claim for Relief alleged herein, for preliminary and permanent injunctive relief as hereinabove described;
2. On its First and Second Claims for Relief alleged herein, for damages according to proof; enhanced damages as provided by law; attorneys' fees as provided by law; and disgorgement of profits;
3. For its costs of suit herein, including its reasonable attorneys' fees; and
4. For such other, further or different relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury of all issues raised in this Complaint that are triable by a jury as of right.

Date: November 16, 2009

Respectfully submitted,

BRACEWELL & GIULIANI LLP

By: /s/ John C. Rawls

John C. Rawls  
Texas State Bar No. 24060930  
Southern District ID No. 413953

711 Louisiana, Suite 2300  
Houston, Texas 77002  
(713) 223-2300 (Telephone)  
(713) 221-1212 (Telecopier)

ATTORNEY-IN-CHARGE FOR PLAINTIFF  
BOARD OF REGENTS, THE UNIVERSITY OF  
TEXAS SYSTEM