

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA**

**BTL INDUSTRIES, INC.**, a Delaware corporation

Plaintiff,

v.

**NEXTWELLNESS USA LLC**, a Florida limited liability company,

Defendant.

Case No. \_\_\_\_\_

**DEMAND FOR JURY TRIAL**

Plaintiff BTL Industries, Inc. (“BTL”), by its attorneys, for its Complaint against NextWellness USA LLC (“NextWellness”), alleges as follows:

**NATURE OF THIS ACTION**

1. This is a civil action by BTL arising out of NextWellness’s patent infringement in violation of the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.*; trademark infringement, unfair competition, false designation of origin, and false advertising under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a)); and trademark infringement and unfair competition under the Florida Deceptive and Unfair Trade Practices Act (Fla. Stat § 501.201) (“FDUTPA”), and the common law of the State of Florida.

2. BTL and its affiliates pioneered the application of high-intensity, focused electromagnetic technology in non-invasive aesthetic body-contouring devices. In June 2018, BTL launched the ground-breaking EMSCULPT® aesthetic body-contouring device that uses this technology in the United States, after the device was cleared by the U.S. Food and Drug Administration (FDA). BTL and its affiliates protected the EMSCULPT device—and the

technology used in the device—with numerous patents and federally registered trademarks and copyrights.

3. NextWellness promotes and sells the XTONE AIR device in the United States. On information and belief, NextWellness has and continues to infringe BTL’s patents directed to body-contouring methods and devices by importing, offering for sale, or selling its XTONE AIR device. On information and belief, NextWellness advertises its XTONE Air device by improperly using BTL’s trademarks in its promotional and informational materials related to its XTONE AIR device. NextWellness also markets its XTONE Air device by using altered versions of marketing materials that BTL provides exclusively to its customers under license to use in promoting services related to BTL devices, and by referencing the clinical studies that BTL has conducted on its EMSCULPT device.

#### **PARTIES**

4. BTL is a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 362 Elm Street, Marlborough, Massachusetts 01752.

5. On information and belief, NextWellness is a limited liability company organized and existing under the laws of the State of Florida with its principal place of business at 8600 Commodity Circle, Suite 162, Orlando, Florida 32819.

#### **JURISDICTION AND VENUE**

6. This Court has subject-matter jurisdiction over BTL’s claims arising under the patent laws of the United States, 35 U.S.C. §§ 100, *et seq.* and the Lanham Act, 15 U.S.C. §§ 1051, 1121, pursuant to 28 U.S.C. §§ 1331, 1332, and 1338(a)-(b).

7. This Court has supplemental jurisdiction over BTL’s claims arising under the laws of Florida, pursuant to 28 U.S.C. § 1367(a), because BTL’s state-law claims are so related

to BTL's federal law claims that they form part of the same case or controversy and derive from a common nucleus of operative fact.

8. On information and belief, this Court has personal jurisdiction over NextWellness because NextWellness is a corporation formed under the laws of the State of Florida and has committed acts of patent infringement under 35 U.S.C. § 271(a), (b), or (c) and intends a future course of conduct that includes acts of patent infringement in this District. On information and belief, NextWellness has purposefully directed the offers for sale, sale, importation, and distribution of the XTONE AIR devices knowing that they will be sold and used in the State of Florida and has made the product available for sale in the State of Florida. Further, NextWellness has offered its XTONE AIR devices for sale and advertised its devices for sale using BTL's trademarks. NextWellness has committed acts of trademark infringement, and false, misleading, and deceptive advertising under the Lanham Act and FDUTPA, and intends a future course of conduct that includes acts of infringement, and false, misleading, and deceptive advertising in this District. BTL's causes of action arise out of these activities. These acts have led and will lead to foreseeable harm and injury to BTL in the State of Florida. On information and belief, NextWellness has derived, and will derive, substantial revenue from the sale of the XTONE AIR device in the State of Florida.

9. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400 at least because NextWellness is a resident of this District and is subject to personal jurisdiction in this District.

### **BACKGROUND**

10. BTL specializes in the innovation, development, and sale of equipment and treatments for the aesthetics industry in the United States. BTL and its affiliates developed proprietary technology that uses high-intensity electromagnetic stimulation to tone and strengthen muscles in targeted areas. BTL applied its technology to develop a series of new and

innovative FDA-cleared devices and developed protocols for using the technology for aesthetic therapies. As described above, BTL denotes its products and services that feature this technology with its HIFEM brand and other trademarks.

11. The first such device that BTL developed was the EMSCULPT® device (shown below), a standalone, non-invasive, aesthetic body-contouring device. *See, Ex. A* (BTL Press Release). BTL's patent-protected EMSCULPT device uses high-intensity electromagnetic energy to induce powerful muscle contractions in a patient. BTL has developed specifically configured EMSCULPT applicators, tailoring each type of applicator to a specific target area.



12. The EMSCULPT device uses innovative and patent-protected protocols for aesthetic therapies. BTL's proprietary protocols create repetitive muscle contractions that result

in a non-invasive method of toning muscle and body sculpting.

<https://bodybybtl.com/solutions/emsculpt-neo/>.

13. In June 2018, BTL received clearance from the FDA for its EMSCULPT device with large applicators and began to sell the device in the United States for the improvement of abdominal tone, strengthening of the abdominal muscles, development of firmer abdomen, and for strengthening, toning, and firming buttocks and thighs.

<https://bodybybtl.com/solutions/emsculpt-neo/>. In October 2018, BTL received FDA clearance for an additional indication for the improvement of muscle tone and firmness and for strengthening muscles in arms. *Id.* In July 2019, BTL received FDA clearance for the EMSCULPT device with both large and small applicators for the improvement of abdominal tone, strengthening of abdominal muscles, development of firmer abdomen, strengthening, toning, and firming of buttocks, thighs, and calves, as well as improvement of muscle tone and firmness, for strengthening muscles in arms. *Id.* The smaller applicators are intended for smaller treatment areas.

14. BTL markets and distributes its non-invasive aesthetic body-contouring EMSCULPT device to healthcare professionals, and BTL licenses these healthcare professionals to provide the associated treatment services administered via authentic EMSCULPT devices that incorporate its proprietary technology, muscle toning protocols, and applicators in the United States.

15. BTL's EMSCULPT device created a new market in which it quickly became the innovative industry leader. Before BTL launched the EMSCULPT device in 2018, no other product used high-intensity, focused electromagnetic technology to tone and firm muscle for non-invasive aesthetic body contouring. Prior devices in the aesthetics market used different

technology to reduce fat or treat cellulite. BTL continues to market and distribute the EMSculpt device throughout the United States.

16. The aesthetic industry has recognized BTL's innovation, hailing it as having taken "the aesthetics industry by storm"; praising BTL as being the first to apply high-intensity, focused electromagnetic energy technology for aesthetics; and lauding the EMSculpt device as having "transformed treatment protocols." Ex. A (BTL Press Release). Patients recognized EMSculpt treatments as one of the 2019 "Most Worth It Surgical and Nonsurgical Aesthetic Procedures." Ex. B (RealSelf Press Release). The EMSculpt device has been described as "[o]ne of the newest and most progressive body-shaping technologies" on the market. Ex. C (NewBeauty 2019 Award Winners: Best Innovations).

17. BTL's market success and superior performance are by-products of its technological innovations over the past several decades. BTL continues to implement these innovations today. BTL has protected its investment into its innovations and its brand with patents, trademarks, and copyrights. BTL lists the patents that cover its products on its website at [www.btl.net.com/patents](http://www.btl.net.com/patents).

**A. The Asserted Patents**

18. On November 19, 2019, the United States Patent and Trademark Office (USPTO) duly and lawfully issued U.S. Patent No. 10,478,634 (the "'634 patent"), entitled "Aesthetic Method of Biological Structure Treatment by Magnetic Field." A true and correct copy of the '634 patent is attached hereto as Exhibit D. The '634 patent was exclusively licensed to BTL, and BTL possesses the exclusive right of recovery for any past, present, or future infringements of the '634 patent, including equitable relief and damages.

19. On June 30, 2020, the United States Patent and Trademark Office (USPTO) duly and lawfully issued U.S. Patent No. 10,695,575 (the "'575 patent"), entitled "Aesthetic Method

of Biological Structure Treatment by Magnetic Field.” A true and correct copy of the ’575 patent is attached hereto as Exhibit E. The ’575 patent was exclusively licensed to BTL, and BTL possesses the exclusive right of recovery for any past, present, or future infringements of the ’575 patent, including equitable relief and damages.

20. On March 8, 2022, the USPTO duly and lawfully issued U.S. Patent No. 11,266,852 (the “’852 patent”), entitled “Aesthetic Method of Biological Structure Treatment by Magnetic Field.” A true and correct copy of the ’852 patent is attached hereto as Exhibit F. The ’852 patent was exclusively licensed to BTL, and BTL possesses the exclusive right of recovery for any past, present, or future infringements of the ’852 patent, including equitable relief and damages.

21. On May 2, 2017, the United States Patent and Trademark Office (USPTO) duly and lawfully issued U.S. Patent No. 9,636,519 (the “’519 patent”), entitled “Magnetic Stimulation Methods and Devices for Therapeutic Treatments.” A true and correct copy of the ’519 patent is attached hereto as Exhibit G. The ’519 patent was exclusively licensed to BTL, and BTL possesses the exclusive right of recovery for any past, present, or future infringements of the ’519 patent, including equitable relief and damages.

**B. BTL’s Trademarks**

22. BTL uses and licenses registered and unregistered trademarks and trade dress to market its aesthetic equipment and treatments in the United States (the “BTL Trademarks”), including the following federally registered marks:

<b>Reg. No.</b>	<b>Mark</b>	<b>Reg. Date</b>	<b>First Use in Commerce or Priority Date</b>	<b>Goods / Services</b>
5,688,619	<b>HIFEM</b>	March 5, 2019	September 19, 2017	Class 10: Medical and aesthetic apparatus and instruments

Reg. No.	Mark	Reg. Date	First Use in Commerce or Priority Date	Goods / Services
				<p>generating electromagnetic, magnetic, electrical, mechanical, radiofrequency or thermal energy for use in skin treatment procedures; medical apparatus and instruments for body toning and body shaping; medical apparatus and instruments for the removal of fat, circumference reduction, tightening of skin, reduction of wrinkles, reduction of scars, reduction of stretch marks, rejuvenation of skin, treatment of pigmentation spots, increase in muscle volume, increase in number of muscle fibres and increase in muscle tonus; medical apparatus and instruments for the treatment of cellulite; therapeutic facial masks; facial toning machines for cosmetic use; electric stimulation and magnetic stimulation apparatus for physical therapy purposes for the treatment of nerve and muscle pain and elimination of muscular spasms; gynecological and urological apparatus and instruments, namely for genital rejuvenation, treatment sexual dysfunction, gynecological treatment and pelvic floor treatment.</p> <p>Class 44: Medical services; medical equipment rental; cosmetic and plastic surgery; beauty salons; liposuction services; medical removal of</p>

Reg. No.	Mark	Reg. Date	First Use in Commerce or Priority Date	Goods / Services
				body cellulite.
5,915,636	<b>EM</b>	November 19, 2019	March 14, 2018	<p>Int'l Class: 10, 44</p> <p>(Int'l Class: 10) Physical therapy devices for treating muscle spasms and pain management; medical apparatus and instruments, in particular apparatus and instruments for the treatment of cellulite, apparatus and instruments for body toning and body shaping, and apparatus and instruments for the removal of fat, circumference reduction; medical devices for use in treating gynecological disorders, pelvic area disorders, bladder disorders and incontinence.</p> <p>(Int'l Class: 44) Health assessment services; medical services, namely, providing treatment for patients with gynecological disorders, pelvic area disorders, bladder disorders and incontinence; gynecological services; urology medical care services; rental of medical apparatus and equipment; cosmetic and plastic surgery; beauty salon services; liposuction and surgical body shaping services; medical services, namely, removal of body cellulite; physical therapy services.</p>

23. BTL has continuously and exclusively used its HIFEM and EM trademarks and has never abandoned them. The HIFEM and EM trademarks are validly registered in the United States and are in full force and effect. A true and correct “status” copy of the HIFEM trademark registration, obtained from the Trademark Status Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office, is attached to this Complaint as Exhibit H. A true and correct “status” copy of the EM trademark registration, obtained from the Trademark Status Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office, is attached to this Complaint as Exhibit I. These registrations constitute prima facie evidence of validity of the HIFEM trademark and the EM trademark of BTL’s exclusive right to use the HIFEM and EM trademarks under 15 U.S.C. § 1057(b).

24. The HIFEM and EM trademarks therefore perform an important source-identifying function for BTL’s aesthetic body-countering devices like the EMSCULPT and associated treatment services. The HIFEM and EM trademarks signify to purchasers that the body-contouring devices come from BTL, and the body-contouring services are rendered by BTL’s devices and administered by BTL-trained and BTL-authorized service providers. The HIFEM and EM trademarks are inherently distinctive and are associated with BTL’s innovative aesthetic body-contouring devices that have acquired considerable brand loyalty through BTL’s sales and promotion, and direct word-of-mouth promotion by consumers. In addition, BTL has expended significant time, money, and resources in developing, marketing, advertising, promotion, and selling its products and services under its trademarks, including the HIFEM and EM trademarks, in the United States. The market reputation and consumer goodwill associated with BTL’s HIFEM and EM trademarks are of significant value to BTL.

**C. NextWellness’s Unlawful Conduct**

25. On information and belief, NextWellness recently began competing with BTL in the non-invasive body-contouring industry by manufacturing and selling non-invasive body-contouring devices, which utilize electromagnetic waves to generate muscle contractions. Specifically, NextWellness markets and sells the XTONE AIR device, shown below.

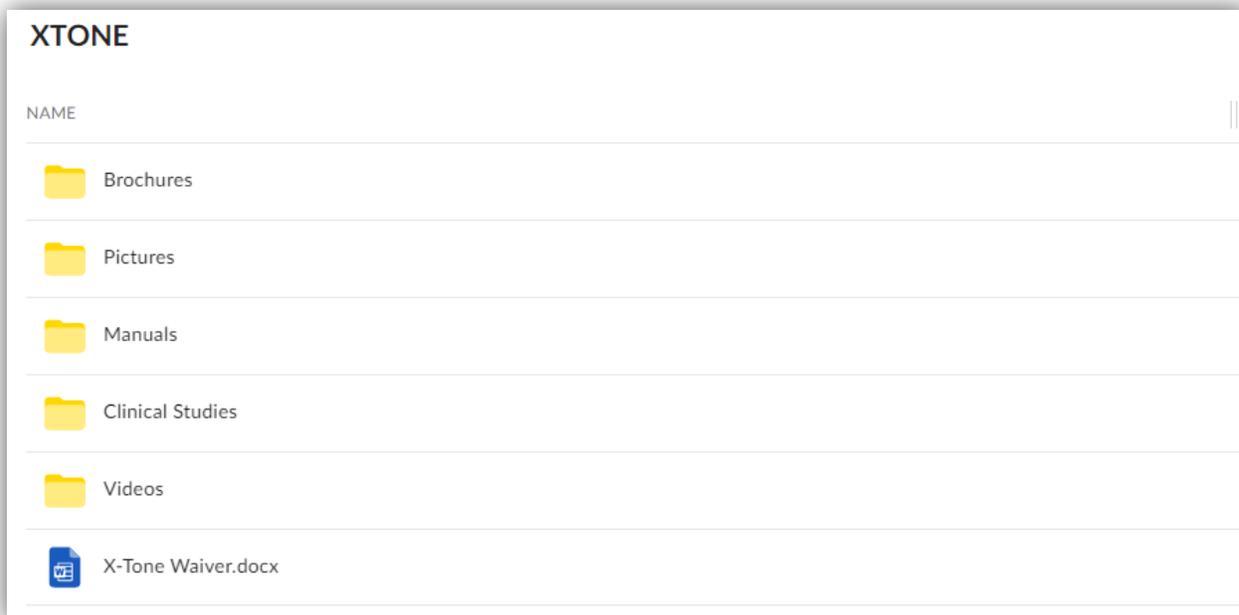


26. On information and belief, NextWellness began offering its XTONE AIR device for sale before February 2021. For example, on February 24, 2021, NextWellness posted a 30-second video (“XTONE YouTube Video”) on its YouTube channel titled, “NEXT Wellness presents the XTONE (MMS).” [https://www.youtube.com/watch?v=fO\\_TCjs-MJs](https://www.youtube.com/watch?v=fO_TCjs-MJs).

27. NextWellness’s webpage for the XTONE AIR device includes a link titled, “XTONE AIR Resources” (the “XTONE Resources Folder”). The link directs users to what appears to be a DropBox folder (shown below) containing informational and promotional

materials relating to the XTONE AIR device.

<https://nextwellness.app.box.com/s/n5dg250oidaljacp1z1viewd6if85mba>.



28. On information and belief, NextWellness’s XTONE AIR device includes or performs each and every limitation of at least one claim of the Asserted Patents, either literally or under the doctrine of equivalents. By making, offering to sell, selling, and/or importing into the United States the XTONE AIR device, NextWellness has directly infringed, and continues to directly infringe, literally or by doctrine of equivalents, one or more claims of the Asserted Patents under 35 U.S.C. § 271(a).

29. On information and belief, NextWellness actively encourages, promotes, distributes, provides instruction for, and supports the use of the XTONE AIR device by its customers in a manner that directly infringes, either literally or under the doctrine of equivalents, one or more claims of the Asserted Patents under 35 U.S.C. § 271(b), knowing and intending that NextWellness customers will commit acts in such a manner as to directly infringe the Asserted Patents.

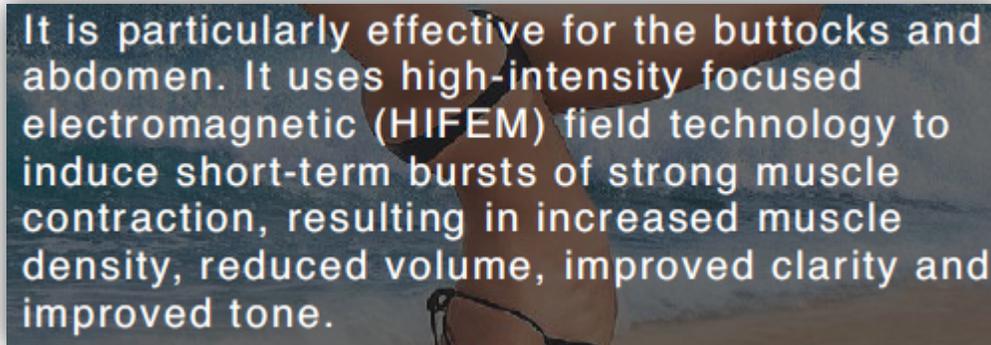
30. On information and belief, NextWellness has known of the Asserted Patents since at least May 5, 2022, when BTL sent NextWellness a cease-and-desist letter informing NextWellness that its marketing and promotional activities for the XTONE AIR device were infringing BTL’s trademarks, patents, and copyrighted works. NextWellness did not respond to BTL’s letter. BTL sent a follow-up letter on May 27, 2022, but NextWellness did not respond. BTL’s “Patent Labeling” webpage also lists the ’634, ’575, ’852, and ’519 patents and identifies them as covering the EMSculpt device. <https://www.btl.net.com/patents>.

31. NextWellness has used and continues to use BTL trademarks in its informational and promotional materials for the XTONE AIR device. The XTONE YouTube Video, at time-marker 0:01, explicitly references the EM trademark in captioned language that reads “EM Contouring---An innovative solution”:



32. When NextWellness began to sell the XTONE AIR device in the United States, NextWellness published and circulated on its website a brochure for the XTONE AIR device

(the “XTONE Brochure”) that explicitly referenced BTL’s HIFEM trademark in the following passage. Ex. J.



33. On information and belief, the version of the XTONE Brochure, which contains the explicit reference to BTL’s HIFEM trademark seen above, remains in circulation. This version of the XTONE Brochure was available on NextWellness’s website in printable pdf format for months before NextWellness removed the explicit reference to “HIFEM.”

34. NextWellness has used and continues to use BTL materials in its informational and promotional materials for the XTONE AIR device. For example, the “Clinical Studies” folder within the XTONE Resources Folder contains a 2018 study, (the “BTL Study”), titled “Study of Electro Magnetic Muscle Stimulation in Body Sculpting.” Ex. K. Dr. Brian Kinney and Dr. David Kent conducted the BTL Study, which was sponsored by BTL, and the original study was published in the Aesthetic Surgery Journal. The BTL Study in Exhibit K is a loosely reformatted version of that study. The focus of the BTL Study was to evaluate “a novel High-Intensity Focused Electro-Magnetic” technology applied to the abdominal area. *Id.* at 1. The BTL Study explicitly references BTL’s EMSCULPT device as well as its use of its proprietary technology. Specifically, the BTL Study discusses the results of a study in which 22 subjects were treated with BTL’s technology using BTL’s EMSCULPT device. *Id.* at 1.

35. The BTL Study reports the efficacy and safety of using the EMSCULPT device to increase muscle mass and decrease fat. The BTL Study reports, for example, that 95% of subjects treated with BTL's EMSCULPT device experienced "[a]n increase in the abdominal muscle mass" and that all patients experienced a decrease in fat tissue. Ex. K at 6. The BTL Study also reports that the majority of the subjects tolerated the treatment and that none of the subjects experienced any adverse events as a result of their treatment with BTL's EMSCULPT device. *Id.* at 5.

36. NextWellness never requested from BTL, nor did BTL give, permission for NextWellness to use the BTL Study in connection with NextWellness's promotion or advertising of the XTONE AIR device. On information and belief, NextWellness never conducted any research or testing to establish that the XTONE AIR device provides patient results equivalent to those provided by the EMSCULPT device.

37. The "Brochures" folder within the XTONE Resources Folder contains a marketing brochure for the XTONE AIR device. Ex. J; *see supra* ¶ 32. Page 11 of the XTONE Brochure (shown below) depicts several images, which purportedly show a subject receiving treatment with an XTONE AIR "operating handle." Ex. J.



38. These photographs are, in fact, owned by BTL and are used by BTL to promote its EMSculpt device. NextWellness, without BTL's knowledge or permission, copied and

altered BTL's photographs and used them to advertise its XTONE AIR device. A comparison of the original BTL photographs (the "BTL Photos") with the photographs in the XTONE Brochure is shown below.

BTL Photos	XTONE Brochure
	
	

**COUNT I: INFRINGEMENT OF U.S. PATENT NO. 10,695,575**

39. BTL repeats and re-alleges paragraphs 1-38 as if fully set forth herein.

40. The '575 patent is directed toward methods for toning muscles in a patient using time-varying magnetic fields. Exemplary Claim 1 of the patent recites:

A method for toning muscles of a patient, comprising:

positioning a first applicator on the patient, the first applicator housing a first magnetic field generating coil having an inductance;

independently positioning a second applicator on the patient, the second applicator housing a second magnetic field generating coil having the same inductance as the first magnetic field generating coil;

charging a first energy storage device and a second energy storage device;

discharging the first energy storage device to the first magnetic field generating coil such that a first impulse of a first time-varying magnetic field is generated;

discharging the second energy storage device to the second magnetic field generating coil such that a first impulse of a second time-varying magnetic field is generated,

wherein the first impulse of the first time-varying magnetic field and the first impulse of the second time-varying magnetic field each have a magnetic flux density in a range between 0.1 Tesla and 7 Tesla, and wherein the first impulse of the first time-varying magnetic field and the first impulse of the second time-varying magnetic field each have an impulse duration in a range between 3  $\mu$ s and 3 ms;

establishing a first pulse duration beginning at the beginning of the first impulse generated by the first magnetic field generating coil and ending at the beginning of a second impulse generated by the first magnetic field generating coil, wherein

the first impulse generated by the second magnetic field generating coil is generated during the first pulse duration;

cooling each of the first and the second magnetic field generating coils; and

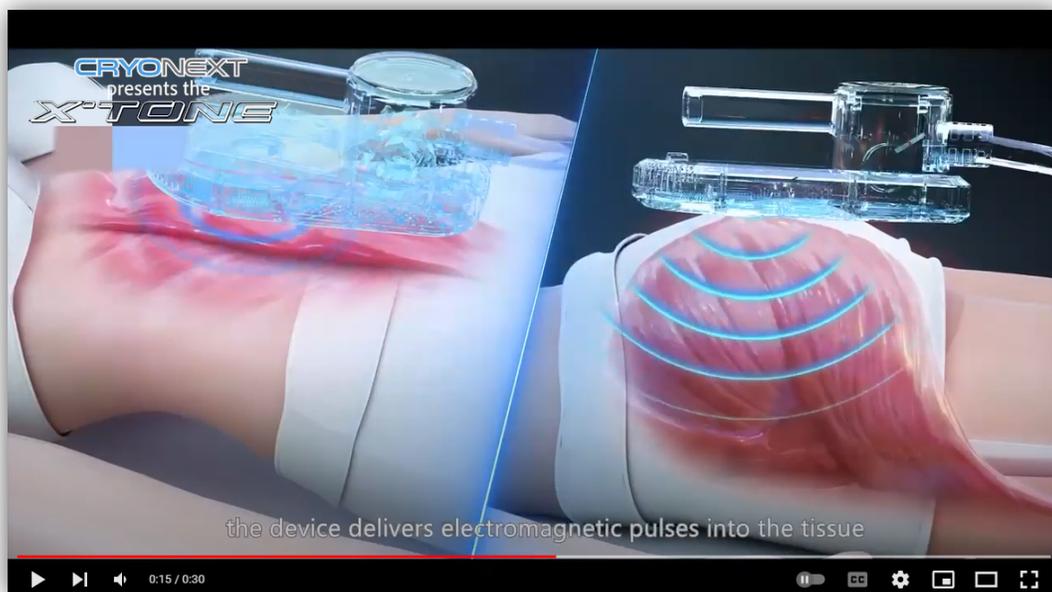
applying a first plurality of impulses generated by the first magnetic field generating coil and applying a second plurality of impulses generated by the second magnetic field generating coil, to muscle fibers, neuromuscular plates, or nerves innervating muscle fibers in a body region of the patient to cause muscles of the body region to contract such that the muscles are toned.

41. NextWellness has induced infringement and continues to induce direct infringement, literally or under the doctrine of equivalents, of at least claim 1 of the '575 patent by making, using, offering to sell, selling, or importing the XTONE AIR device in the United States and by encouraging, promoting, and instructing customers to use the XTONE AIR device in a manner that directly infringes the '575 patent.

42. NextWellness has and continues to encourage, promote, and instruct customers to perform the preamble of claim 1 of the '575 patent, which recites “a method for toning muscles of a patient.” The User Treatment Manual for the XTONE AIR device (“XTONE User Treatment Manual”) states that the XTONE AIR device is “intended for a variety of treatments including but not limited to muscle toning.” Ex. I.

43. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “positioning a first applicator on the patient, the first applicator housing a first magnetic field generating coil having an inductance.” The XTONE Brochure represents that the XTONE AIR device comes with at least three different “treatment handles,” which can be used for different body regions. Ex. K. A NextWellness Catalog (“XTONE

Catalog”), which contains information on the XTONE AIR device, also states that “[t]he XTONE comes with 5 paddles: Two small paddles for muscle groups like the calves or arms, two large paddles for the core or glutes, and a pelvic floor stimulator.” Ex. J. On information and belief, the XTONE AIR device’s “treatment handles” or “paddles” are applicators that include magnetic coils that each generate magnetic fields and have an inductance. The XTONE Catalog for example, advertises the XTONE AIR device as “a magnetic muscle-stimulation” device and states that “[t]he impulses generated by the XTONE are delivered through Tesla coil paddles that are either placed on the skin or over the clothing.” Ex. J. The XTONE YouTube Video also depicts a split-screen image (shown below) of two applicators generating what appear to be electromagnetic fields, with a caption that states, “the device delivers electromagnetic pulses into the tissue.” The XTONE User Treatment Manual states that the XTONE “can be effectively used to tone and exercise most areas of the body. Most typical treatment areas are the abs, buttocks and thighs.” Ex. L at 1. It further instructs users to “[p]lace the handle to [sic] the treatment area and secure with the Velcro belt.” *Id.* at 3.



44. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “independently positioning a second applicator on the patient, the second applicator housing a second magnetic field generating coil having the same inductance as the first magnetic field generating coil.” On information and belief, the XTONE AIR device’s “treatment handles” or “paddles” are applicators that house magnetic coils, which generate magnetic fields for the same reasons stated in paragraph 43. The XTONE User Treatment Manual moreover encourages, promotes, and instructs customers to position a second applicator on a patient. The XTONE User Treatment Manual, on page 3, depicts an image (reproduced below) showing two applicators placed on a patient’s body region.

(4) Place the handle to the treatment area and secure with the Velcro belt.

(5) Start treatment after adjusting the initial treatment parameters.



45. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “charging a first energy storage device and a second energy storage device.” On information and belief, the XTONE AIR device contains at least two energy storage devices. The XTONE YouTube Video, at time-marker 0:13, represents that the XTONE AIR device contains “energy storage components.” On information and belief, a reasonable opportunity for further investigation or discovery will show that these energy storage devices must be charged for the XTONE AIR device to operate.

46. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “discharging the first energy storage device to the first magnetic field generating coil such that a first impulse of a first time-varying magnetic field is generated.” The XTONE Catalog states that “[t]he impulses generated by the XTONE are delivered through Tesla coil paddles that are either placed on the skin or over the clothing.” Ex. M at 9. The XTONE YouTube Video, at time-marker 0:15, depicts a split-screen image of two applicators discharging what appear to be electromagnetic impulses, with a caption that states, “the device delivers electromagnetic pulses into the tissue.” The XTONE User Treatment Manual also instructs users to set the “energy and frequency” of the handles to “a modest power during the first treatment” to “allow the muscles to warm up before more intense work out in order to avoid discomfort and possible tissue damage,” which indicates the presence of a first impulse of a first time-varying magnetic field. Ex. L at 3.

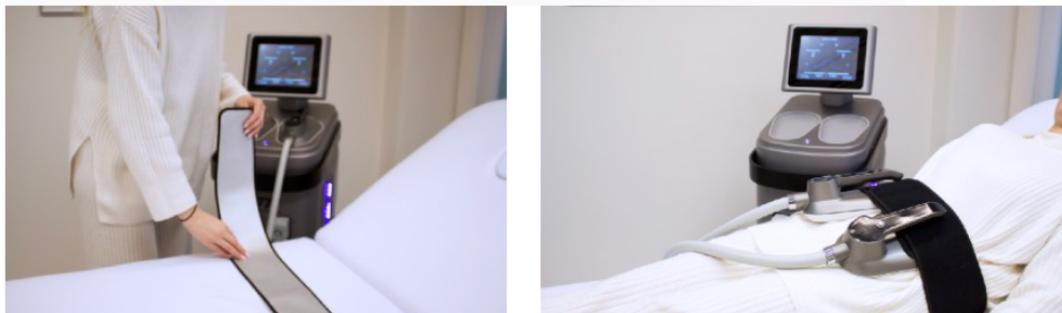
47. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “discharging the second energy storage device to the second magnetic field generating coil such that a first impulse of a second time-varying magnetic field is generated” for the same reasons stated in paragraph 46.

48. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step “wherein the first impulse of the first time-varying magnetic field and the first impulse of the second time-varying magnetic field each have a magnetic flux density in a range between 0.1 Tesla and 7 Tesla, and wherein the first impulse of the first time-varying magnetic field and the first impulse of the second time-varying magnetic field each have an impulse duration in a range between 3  $\mu$ s and 3 ms.” The “[t]echnical specification” section of the XTONE Brochure depicts the “[m]agnetic wave (energy)” of the XTONE AIR device as

ranging from 0-7 Tesla. Ex. J at 13. The XTONE Brochure further represents that a 30-minute treatment with the XTONE AIR devices results in 49,500 muscle contractions. *Id.* at 4. On information and belief, achieving this number of muscle contractions in a 30-minute session would require the XTONE AIR device's applicators to generate impulses that last between 3 microseconds and 3 milliseconds.

49. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of "establishing a first pulse duration beginning at the beginning of the first impulse generated by the first magnetic field generating coil and ending at the beginning of a second impulse generated by the first magnetic field generating coil, wherein the first impulse generated by the second magnetic field generating coil is generated during the first pulse duration." According to the XTONE User Treatment Manual, on page 3, the image (reproduced below) shows two applicators placed on a patient's body region. Ex. L.

- (4) Place the handle to the treatment area and secure with the Velcro belt.
- (5) Start treatment after adjusting the initial treatment parameters.



50. The XTONE YouTube Video, at time-marker 0:04, also depicts two applicators, which on information and belief, are configured to be operated at the same time.



51. Therefore, on information and belief, the patient is treated by the first magnetic field generating coil and second magnetic field generating coil in a manner that the first impulse generated by the second magnetic field generating coil is generating during the first pulse duration.

52. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “cooling each of the first and the second magnetic field generating coils.” The XTONE YouTube Video, at time-marker 0:07, represents that the XTONE AIR device’s handles contain “safe air cooling system[s].”

53. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “applying a first plurality of impulses generated by the first magnetic field generating coil and applying a second plurality of impulses generated by the second magnetic field generating coil, to muscle fibers, neuromuscular plates, or nerves innervating muscle fibers in a body region of the patient to cause muscles of the body region to contract such that the muscles are toned.” The XTONE AIR device’s applicators contain magnetic field

generating coils, and generate pluralities of electromagnetic impulses, for the same reasons stated in paragraphs 43 and 46. The XTONE User Treatment Manual encourages and instructs users to use the XTONE AIR device in a manner that induces muscle contractions in a patient's targeted body region. The XTONE User Treatment Manual states that one of the main advantages of the XTONE AIR device is that it "induces strong bursts resulting in intense muscle contractions" and it represents that this "the only way to build muscle and destroy fat cells simultaneously." Ex. L at 1-2.

54. NextWellness has induced infringement and continues to induce direct infringement, literally or under the doctrine of equivalents, of at least claim 1 of the '575 patent by making, using, offering to sell, selling, or importing the XTONE AIR device in the United States and by encouraging customers to use the device in a manner that directly infringes the '575 patent. On information and belief, NextWellness was aware of the '575 patent since before the filing of this Complaint. On information and belief, NextWellness has known that the XTONE AIR device is designed for a use that infringes one or more claims of the '575 patent, and the XTONE AIR device lacks a substantial non-infringing use. On information and belief, NextWellness has, and will continue to, intentionally encourage acts of direct infringement with knowledge of the '575 patent and knowledge that its acts are encouraging infringement.

55. NextWellness's indirect infringement of the '575 patent has been, and continues to be, willful. On information and belief, NextWellness has been aware of the '575 patent since before the filing of this Complaint and has infringed the '575 patent willfully and deliberately and with knowledge that such conduct violates 35 U.S.C. § 271.

56. NextWellness's indirect infringement of the '575 patent has damaged, and continues to damage, BTL in an amount yet to be determined, of at least a reasonable royalty

and/or lost profits that BTL would have made but for NextWellness's infringing acts as provided by 35 U.S.C. § 284.

57. BTL will suffer irreparable harm unless NextWellness is enjoined from infringing the '575 patent.

**COUNT II: INFRINGEMENT OF U.S. PATENT NO. 11,266,852**

58. BTL repeats and re-alleges paragraphs 1-57 as if fully set forth herein.

59. The '852 patent is directed towards methods and devices for treating a patient using time-varying magnetic fields. Exemplary Claim 9 of the '852 patent recites:

A treatment device for enhancing a visual appearance of a patient, the treatment device comprising:

a first magnetic field generating coil and a second magnetic field generating coil, wherein

both of the first and second magnetic field generating coils are planar;

a first applicator, wherein the first applicator comprises the first magnetic field generating coil,

wherein the first magnetic field generating coil is configured to generate a first time-varying magnetic field with a repetition rate in a range of 1 Hz to 300 Hz and a magnetic flux density in a range of 0.1 Tesla to 7 Tesla on a surface of the first magnetic field generating coil,

wherein the second magnetic field generating coil is configured to generate a second time-varying magnetic field with a repetition rate in a range of 1 Hz to 300 Hz and a magnetic flux density in a range of 0.1 Tesla to 7 Tesla on a surface of the second magnetic field generating coil,

wherein the first magnetic field generating coil is configured to generate the first time-varying magnetic field independently of the second time-varying magnetic field,

wherein each of the first and the second magnetic field generating coils is configured to generate a plurality of pulses,  
wherein each of the plurality of pulses comprises a first plurality of pulses having a first repetition rate and a second plurality of pulses having a second repetition rate,  
wherein the first repetition rate differs from the second repetition rate,  
wherein each pulse comprises an impulse,  
wherein each pulse lasts for a time period lasting from a beginning of a first impulse of the time-varying magnetic field to a beginning of a next consecutive impulse of the time-varying magnetic field,  
wherein the first and the second magnetic field generating coils are configured to be placed proximate to a body region of the patient such that the first and the second time-varying magnetic fields are each applied to the body region to cause a contraction of at least one muscle in the body region to enhance the visual appearance of the patient, and  
wherein the body region comprises one of a buttocks or an abdomen.

60. The XTONE AIR device includes or performs each and every limitation of at least claim 9 of the '852 patent, either literally or under the doctrine of equivalents.

61. The XTONE AIR device includes the preamble of claim 9 of the '852 patent, which recites “[a] treatment device for enhancing a visual appearance of a patient.” NextWellness has marketed and sold the XTONE AIR device as an aesthetic and beauty product designed to enhance muscle volume and reduce fat in patients. Ex. J.

62. The XTONE AIR device includes the claimed element “a first magnetic field generating coil and a second magnetic field generating coil, wherein both of the first and second magnetic field generating coils are planar” for the same reasons stated in paragraph 43.

63. The XTONE AIR device includes the claimed element “a first applicator, wherein the first applicator comprises the first magnetic field generating coil” for the same reasons stated in paragraph 43.

64. The XTONE AIR device includes the claimed element “wherein the first magnetic field generating coil is configured to generate a first time-varying magnetic field with a repetition rate in a range of 1 Hz to 300 Hz and a magnetic flux density in a range of 0.1 Tesla to 7 Tesla on a surface of the first magnetic field generating coil.” The “[t]echnical specification” section of the XTONE Brochure depicts the “[f]requency” of the XTONE device as ranging from 1-100 Hz and depicts the “[m]agnetic wave (energy)” of the XTONE AIR device as ranging from 0-7 Tesla. Ex. J.

65. The XTONE AIR device includes the claimed element “wherein the second magnetic field generating coil is configured to generate a second time-varying magnetic field with a repetition rate in a range of 1 Hz to 300 Hz and a magnetic flux density in a range of 0.1 Tesla to 7 Tesla on a surface of the second magnetic field generating coil” for the same reasons stated in paragraph 64.

66. The XTONE AIR device includes the claimed element “wherein the first magnetic field generating coil is configured to generate the first time-varying magnetic field independently of the second time-varying magnetic field.” On information and belief, the XTONE AIR device contains at least two separate energy storage devices for the same reasons

stated in paragraph 45, which generate the first and second time-varying magnetic fields independently.

67. The XTONE AIR device includes the claimed element “wherein each of the first and the second magnetic field generating coils is configured to generate a plurality of pulses” for the same reasons stated in paragraphs 43 and 46.

68. The XTONE AIR device includes the claimed element “wherein each of the plurality of pulses comprises a first plurality of pulses having a first repetition rate and a second plurality of pulses having a second repetition rate, wherein the first repetition rate differs from the second repetition rate.” According to the XTONE User Treatment Manual, the XTONE AIR device is preconfigured to follow one of three different treatment “modes”: professional mode, recovery mode, and preset mode. Ex. L at 5-6. For professional mode, the XTONE User Treatment Manual includes a table breaking down the “[r]ecommended treatment parameters” for patients based on their body fat percentage and gender. *Id.* at 5. This table represents that, during a 30 minute “professional mode” treatment session, the patient is exposed to at least two different frequencies: a “[m]ain frequency” and a “[s]ub-frequency.” *Id.*

69. The XTONE AIR device includes the claimed element “wherein each pulse comprises an impulse.” The XTONE Catalog states that the XTONE AIR device’s handles generate “impulses,” Ex. M at 9, while the XTONE YouTube Video represents, at time-marker 0:15, that the XTONE AIR device’s handles generate “pulses.”

70. The XTONE AIR device includes the claimed element “wherein each pulse lasts for a time period lasting from a beginning of a first impulse of the time-varying magnetic field to a beginning of a next consecutive impulse of the time-varying magnetic field” for the same reasons stated in paragraph 49-51.

71. The XTONE AIR device includes the claimed element “wherein the first and the second magnetic field generating coils are configured to be placed proximate to a body region of the patient such that the first and the second time-varying magnetic fields are each applied to the body region to cause a contraction of at least one muscle in the body region to enhance the visual appearance of the patient” for the same reasons stated in paragraph 53.

72. The XTONE AIR device includes the claimed element “wherein the body region comprises one of a buttocks or an abdomen.” The XTONE YouTube Video, at time-marker 0:15, depicts a split-screen image of one XTONE applicator being applied to the abdomen and one XTONE applicator being applied to the buttocks.

73. NextWellness’s direct infringement of the ’852 patent has been, and continues to be, willful. On information and belief, NextWellness has been aware of the ’852 patent since before the filing of this Complaint and has infringed the ’852 patent willfully and deliberately and with knowledge that such conduct violates 35 U.S.C. § 271.

74. NextWellness’s infringement of the ’852 patent has damaged, and continues to damage, BTL in an amount yet to be determined, of at least a reasonable royalty and/or lost profits that BTL would have made but for NextWellness’s infringing acts as provided by 35 U.S.C. § 284.

75. BTL will suffer irreparable harm unless NextWellness is enjoined from infringing the ’852 patent.

**COUNT III: INFRINGEMENT OF U.S. PATENT NO. 10,478,634**

76. BTL repeats and re-alleges paragraphs 1-75 as if fully set forth herein.

77. The ’634 patent is directed towards a method for toning muscles in a patient using time-varying magnetic fields. Exemplary Claim 1 of the patent recites:

A method for toning muscles in a patient using time-varying magnetic fields, the method comprising:

placing a first applicator comprising a magnetic field generating coil in contact with a

patient's skin or clothing at a body region of the patient, wherein the body region is an abdomen or a buttock;

coupling the first applicator to the patient with an adjustable flexible belt so that the belt

holds the first applicator to the patient's skin or clothing;

providing energy to the magnetic field generating coil in order to generate a time-varying

magnetic field; and

applying a magnetic fluence of  $50 \text{ T cm}^2$  to  $1,500 \text{ T cm}^2$  to the body region,

wherein the time-varying magnetic field is applied to the body region with a magnetic

flux density sufficient to cause a muscle contraction in the body region.

78. NextWellness has induced infringement and continues to induce direct infringement, literally or under the doctrine of equivalents, of at least claim 1 of the '634 patent by making, using, offering to sell, selling, or importing the XTONE AIR device in the United States and by encouraging, promoting, and instructing customers to use the XTONE AIR device in a manner that directly infringes the '634 patent.

79. NextWellness has and continues to encourage, promote, and instruct customers to perform the preamble of claim 1 of the '634 patent, which recites "[a] method for toning muscles in a patient using time-varying magnetic fields." The XTONE User Treatment Manual, for example, states that the XTONE AIR device "uses non-invasive focused electromagnetic energy" and states further that the XTONE AIR device "is intended for a variety of treatments

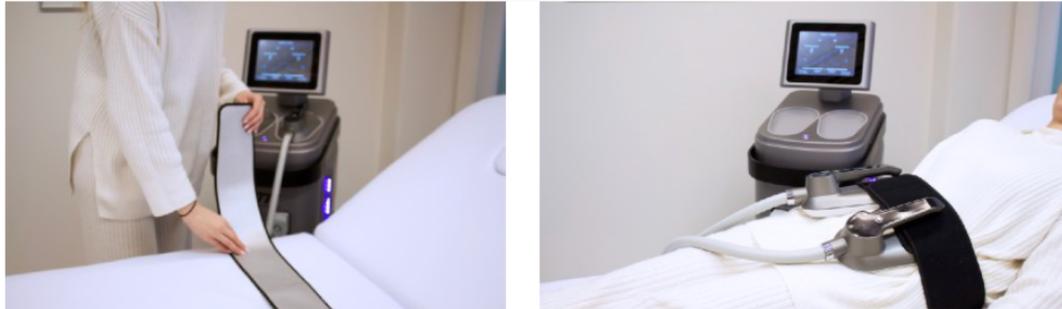
including but not limited to muscle toning, fat reduction (body sculpting) and physiotherapy and recovery.” Ex. L at 1.

80. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “placing a first applicator comprising a magnetic field generating coil in contact with a patient’s skin or clothing at a body region of the patient, wherein the body region is an abdomen or a buttock.” On information and belief, the XTONE AIR device’s “treatment handles” or “paddles” are applicators that include magnetic coils that generate magnetic fields. The XTONE Catalog advertises the XTONE AIR device as “a magnetic muscle-stimulation” device and states that “[t]he impulses generated by the XTONE are delivered through Tesla coil paddles that are either placed on the skin or over the clothing.” Ex. M at 9. The XTONE YouTube Video also depicts a split-screen image, at time-marker 0:15, of two applicators generating what appear to be electromagnetic fields, with a caption that states, “the device delivers electromagnetic pulses into the tissue.” The XTONE User Treatment Manual states that the XTONE “can be effectively used to tone and exercise most areas of the body. Most typical treatment areas are the abs, buttocks and thighs.” Ex. L at 1. It further instructs users to “[p]lace the handle to [sic] the treatment area and secure with the Velcro belt.” *Id.* at 3.

81. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “coupling the first applicator to the patient with an adjustable flexible belt so that the belt holds the first applicator to the patient’s skin or clothing.” The XTONE User Treatment Manual depicts an image (reproduced below) showing two “handles” placed on a patient’s body region, with the handles secured by a “belt.” Ex. L at 3. It further instructs users to “[p]lace the handle to [sic] the treatment area and secure with the Velcro belt.” *Id.* at 3.

(4) Place the handle to the treatment area and secure with the Velcro belt.

(5) Start treatment after adjusting the initial treatment parameters.



82. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “providing energy to the magnetic field generating coil in order to generate a time-varying magnetic field.” The XTONE User Treatment Manual, for example, instructs users to set the “energy and frequency” of the handles to a “modest power during the first treatment” to “allow the muscles to warm up before more intense work out in order to avoid discomfort and possible tissue damage.” Ex. L at 3.

83. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step of “applying a magnetic fluence of 50 T cm<sup>2</sup> to 1,500 T cm<sup>2</sup> to the body region.” The XTONE User Treatment Manual includes a “[r]ecommended treatment parameters” section, which depicts several tables that recommend different “fluence” ranges users should apply to patients depending on the patient’s gender or body type and the training session type. Ex. L at 5-6. The XTONE User Treatment Manual recommends fluence ranges from 50% to 100% depending on the patient’s gender and weight. *Id.* On information and belief, a fluence range of 50% to 100% falls within the claimed fluence range of 50 T cm<sup>2</sup> to 1,500 T cm<sup>2</sup>.

84. NextWellness has and continues to encourage, promote, and instruct customers to perform the claimed step “wherein the time-varying magnetic field is applied to the body region

with a magnetic flux density sufficient to cause a muscle contraction in the body region.” The XTONE User Treatment Manual encourages and instructs users to use the XTONE AIR device in a manner that induces muscle contractions in a patient’s targeted body region. The XTONE User Treatment Manual, for example, states that one of the main advantages of the XTONE AIR device is that it “induce[s] strong bursts resulting in intense muscle contractions” and it represents that this is “the only way to build muscle and destroy fat cells simultaneously.” Ex. L at 1-2.

85. NextWellness has induced infringement and continues to induce direct infringement, literally or under the doctrine of equivalents, of at least claim 1 of the ’634 patent by making, using, offering to sell, selling, or importing the XTONE AIR device in the United States and by encouraging customers to use the device in a manner that directly infringes the ’634 patent. On information and belief, NextWellness was aware of the ’634 patent since before the filing of this Complaint. On information and belief, NextWellness has known that the XTONE AIR device is designed for a use that infringes one or more claims of the ’634 patent, and the XTONE AIR device lacks a substantial non-infringing use. On information and belief, NextWellness has, and will continue to, intentionally encourage acts of direct infringement with knowledge of the ’634 patent and knowledge that its acts are encouraging infringement.

86. NextWellness’s indirect infringement of the ’634 patent has been, and continues to be, willful. On information and belief, NextWellness has been aware of the ’634 patent before the filing of this Complaint and has infringed the ’634 patent willfully and deliberately and with knowledge that such conduct violates 35 U.S.C. § 271.

87. NextWellness’s indirect infringement of the ’634 patent has damaged, and continues to damage, BTL in an amount yet to be determined, of at least a reasonable royalty

and/or lost profits that BTL would have made but for NextWellness's infringing acts as provided by 35 U.S.C. § 284.

88. BTL will suffer irreparable harm unless NextWellness is enjoined from infringing the '634 patent.

**COUNT IV: INFRINGEMENT OF U.S. PATENT NO. 9,636,519**

89. BTL repeats and re-alleges paragraphs 1-88 as if fully set forth herein.

90. The '519 patent is directed towards a device for producing a time varying magnetic field for treatment. Exemplary Claim 1 of the '519 patent recites:

A magnetic stimulation device producing a time varying magnetic field for treatment, comprising:

a connection to an energy source, a switch, a coil, an energy storage device, at least one blower and a casing;

with the blower arranged on a circumference of the coil; and

wherein the coil and the casing are arranged in a manner that fluid can flow in-between them and wherein the coil is cooled by fluid flow over at least upper and lower sides of the coil.

91. The XTONE AIR device includes or performs each and every limitation of at least claim 1 of the '519 patent, either literally or under the doctrine of equivalents.

92. The XTONE AIR device includes the preamble of claim 1 of the '519 patent, which recites "[a] magnetic stimulation device producing a time varying magnetic field for treatment." The XTONE User Treatment Manual, for example, states that the XTONE AIR device "uses non-invasive focused electromagnetic energy" and states further that the XTONE AIR device "is intended for a variety of treatments including but not limited to muscle toning, fat reduction (body sculpting) and physiotherapy and recovery." Ex. L at 1.

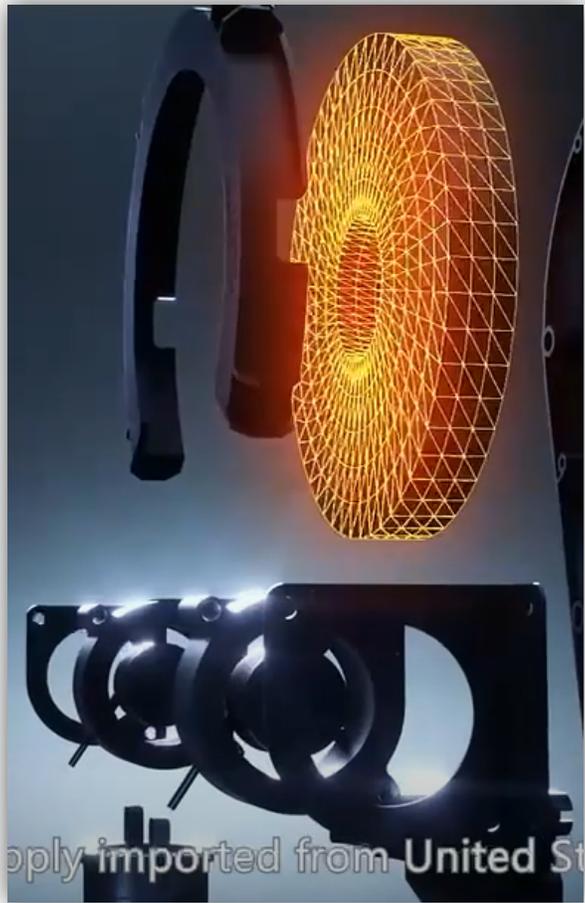
93. The XTONE AIR device includes the claimed element “a connection to an energy source.” The XTONE YouTube Video, for example, references a “power supply” component at time-marker 0:10.

94. The XTONE AIR device includes the claimed element “a connection to . . . a switch.” On information and belief, a reasonable opportunity for further investigation or discovery will show that the XTONE AIR device requires a power switching mechanism to generate electromagnetic energy.

95. The XTONE AIR device includes the claimed element “a connection to . . . a coil” for the same reasons stated in paragraph 43.

96. The XTONE AIR device includes the claimed element “a connection to . . . an energy storage device” for the same reasons stated in paragraph 45.

97. The XTONE AIR device includes the claimed element “a connection to . . . at least one blower.” The XTONE YouTube Video, at time-marker 0:10, depicts a deconstructed image (shown below) of an XTONE AIR device applicator, showing what appears to be a series of fans located under a coil, which is highlighted in orange.



98. The XTONE AIR device includes the claimed element “a connection to . . . a casing.” Photographs of the XTONE AIR device applicators (shown below) depict casings with air vents to allow for circulation of air.



99. The XTONE AIR device includes the claimed element “with the blower arranged on a circumference of the coil; and wherein the coil and the casing are arranged in a manner that fluid can flow in-between them and wherein the coil is cooled by fluid flow over at least upper and lower sides of the coil.” The XTONE YouTube Video, at time-marker 0:07, represents that the XTONE AIR device’s handles contain “safe air cooling system[s].” The XTONE YouTube Video, at time-marker 0:10, a deconstructed image of this “safe air cooling system” (reproduced above on page 36) which shows what appears to be a series of fans located under a coil. On information and belief, this series of fans generates an air flow, which circulates in-between the casing of the applicator and the upper and lower sides of the coil.

100. NextWellness’s direct infringement of the ’519 patent has been and continues to be willful. On information and belief, NextWellness has been aware of the ’519 patent since before the filing of this Complaint and has infringed the ’519 patent willfully and deliberately and with knowledge that such conduct violates 35 U.S.C. § 271.

101. NextWellness’s infringement of the ’519 patent has damaged, and continues to damage, BTL in an amount yet to be determined, of at least a reasonable royalty and/or lost profits that BTL would have made but for NextWellness’s infringing acts as provided by 35 U.S.C. § 284.

102. BTL will suffer irreparable harm unless NextWellness is enjoined from infringing the ’519 patent.

**COUNT V: TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114**

103. BTL repeats and re-alleges paragraphs 1-102 as if fully set forth herein.

104. BTL owns exclusive rights to the EM trademark in the United States. The United States trademark registration for the EM trademark is in full force and effect.

105. NextWellness, without BTL’s permission or consent, has used and continues to use the EM trademark in connection with the advertising, promotion, sale, and offer for sale of the XTONE AIR device.

106. The XTONE YouTube Video, at time marker 0:01, explicitly references BTL’s EM trademark in captioned language that reads “EM Contouring---An innovative solution”:



107. On information and belief, NextWellness’s unauthorized use of the EM trademark in the XTONE YouTube Video to describe the XTONE AIR device has caused and is likely to cause confusion, mistake, and deception among the public as to the origin and quality of NextWellness’s XTONE AIR device; the XTONE AIR device’s affiliation, connection, or association with BTL; and the sponsorship or approval by BTL of NextWellness’s infringing XTONE AIR device.

108. On information and belief, NextWellness has had knowledge of BTL’s rights in the EM trademark. Under 15 U.S.C. § 1072, NextWellness has had constructive knowledge of the BTL’s rights in the EM trademark since at least November 19, 2019—the date the registration for the EM trademark first issued to BTL. Moreover, a straightforward Google search for “BTL” and “trademarks” lists the EM trademark as one of the 40 trademarks associated with BTL. <https://www.trademarkia.com/company-btl-industries-inc-3618568-page-2-2>. Finally, NextWellness has known that BTL is the owner of a variety trademarks relating to body-contouring devices and services since at least May 5, 2022, when BTL sent NextWellness a cease-and-desist letter informing NextWellness that its promotional materials infringed BTL’s HIFEM trademark.

109. The knowing and intentional nature of the acts set forth herein renders this an exceptional case under 15 U.S.C. § 1117(a).

110. NextWellness’s trademark infringement has damaged, and continues to damage, BTL in an amount yet to be determined, but of at least the profits that NextWellness has made as a result of its infringement, plus the cost of this action. NextWellness’s trademark infringement is the direct and proximate cause of BTL’s damages.

111. BTL is entitled to an injunction restraining NextWellness, its officers, agents, and employees, and all persons acting in concert with NextWellness, from engaging in any further such acts in violation of federal trademark law.

**COUNT VI: FEDERAL UNFAIR COMPETITION, FALSE DESIGNATION OF ORIGIN, AND FALSE ADVERTISING UNDER 15 U.S.C. § 1125**

112. BTL repeats and re-alleges paragraphs 1-111 as if fully set forth herein.

113. NextWellness includes in its promotional and marketing materials the BTL Trademarks, the BTL Study, and the BTL Photos, which would likely cause an objectively reasonable consumer to confuse the XTONE AIR device with BTL, which in turn would likely confuse, mislead, or deceive that consumer as to the origin and quality of the XTONE AIR device and its association with BTL and BTL's EMSCULPT device.

114. NextWellness's unauthorized, intentional, and willful use of the BTL Trademarks, the BTL Study, and the BTL Photos to promote, market, offer for sale, and sell the XTONE AIR device constitutes false or misleading descriptions or representations of fact that are likely to cause confusion, mistake, or to deception among the general public as to the origin and quality of NextWellness's XTONE AIR device, the XTONE AIR device's affiliation, connection, or association with BTL or BTL's EMSCULPT device, and the sponsorship or approval by BTL of NextWellness's infringing XTONE AIR device. On information and belief, NextWellness's deceptive actions have influenced and are likely to influence the consuming public's purchasing decisions. NextWellness's unfair competition jeopardizes the goodwill created by BTL.

115. NextWellness's unauthorized, intentional, and willful use of the BTL Trademarks, the BTL Study, and the BTL Photos to promote, market, offer for sale, and sell the XTONE AIR device constitute intentionally misleading descriptions and misrepresentations of fact in commerce that, in commercial advertising and promotion, misrepresent the nature,

characteristics, and quality of NextWellness's XTONE AIR device in violation of the Lanham Act, 15 U.S.C. § 1125.

116. NextWellness's actions constitute a willful violation of 15 U.S.C. § 1125.

117. NextWellness's unauthorized, intentional, and willful use of the BTL Trademarks, the BTL Study, and the BTL Photos has injured and, if permitted to continue, will continue to harm BTL's business and the goodwill associated with its brand, as well as BTL's reputation for providing high-quality and safe body-contouring aesthetic devices and procedures subject to strict quality control standards that have been cleared by the FDA.

118. BTL has no adequate remedy at law, and if NextWellness's actions are not enjoined, BTL will continue to suffer irreparable harm to its reputation and the goodwill of the BTL brand.

**COUNT VII: VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICE ACT UNDER FLA. STAT. § 501.201**

119. BTL repeats and re-alleges paragraphs 1-118 as if fully set forth herein.

120. NextWellness's unauthorized, intentional, and willful use of the HIFEM and EM trademarks to promote, market, offer for sale, and sell the XTONE AIR device constitutes a deceptive and unfair trade practice in violation of FDUTPA, Fla. Stat. §501.201 *et seq.* NextWellness's use of the HIFEM and EM trademarks in connection with the marketing and sale of the XTONE AIR device would deceive an objectively reasonable consumer as to the affiliation, connection, or association with BTL or the origin, sponsorship, or approval of NextWellness's infringing XTONE AIR device by BTL. On information and belief, NextWellness's deceptive actions have influenced and are likely to influence the consuming public's purchasing decisions. NextWellness's unfair competition jeopardizes the goodwill created by BTL in its HIFEM and EM trademarks.

121. NextWellness's actions are deliberate and willful and have been done with the intention of trading upon the valuable goodwill created by BTL in the HIFEM and EM trademarks.

122. BTL has sustained injury, damage, and loss in Florida based on NextWellness's use of the HIFEM and EM trademarks to promote, market, offer for sale, and sell the XTONE AIR device.

123. NextWellness's unauthorized, intentional, and willful use of the BTL Study to promote, market, offer for sale, and sell its XTONE AIR device constitutes a deceptive and unfair trade practice in violation of FDUTPA, Fla. Stat. §501.201 *et seq.* NextWellness's use of the BTL Study in connection with the marketing and sale of the XTONE AIR device would deceive an objectively reasonable consumer as to the affiliation, connection, or association with BTL or the origin, sponsorship, or approval of NextWellness's infringing XTONE AIR device by BTL. On information and belief, NextWellness's unfair and deceptive actions have influenced and are likely to influence the consuming public's purchasing decisions. NextWellness's unfair competition jeopardizes the goodwill created by BTL.

124. NextWellness's actions are deliberate and willful and have been done with the intention of trading upon the valuable goodwill created by BTL.

125. BTL has sustained injury, damage, and loss in Florida based on NextWellness's use of the BTL Study to promote, market, offer for sale, and sell the XTONE AIR device.

126. NextWellness's unauthorized, intentional, and willful use of the BTL Photos to promote, market, offer for sale, and sell the XTONE AIR device constitutes a deceptive and unfair trade practice in violation of FDUTPA, Fla. Stat. §501.201 *et seq.* NextWellness's use of the BTL Photos in connection with the marketing and sale of the XTONE AIR device would

deceive an objectively reasonable consumer as to the affiliation, connection, or association with BTL or the origin, sponsorship, or approval of NextWellness's infringing XTONE AIR device by BTL. On information and belief, NextWellness's unfair and deceptive actions have influenced and are likely to influence the consuming public's purchasing decisions. NextWellness's unfair competition jeopardizes the goodwill created by BTL.

127. NextWellness's actions are deliberate and willful and have been done with the intention of trading upon the valuable goodwill created by BTL.

128. BTL has sustained injury, damage, and loss in Florida based on NextWellness's use of the BTL Photos to promote, market, offer for sale, and sell the XTONE AIR device.

129. Pursuant to Sections 501.2105 and 501.211, BTL is entitled to recover its actual damages, plus reasonable attorneys' fees and costs.

**COUNT VIII: COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

130. BTL repeats and re-alleges paragraphs 1-129 as if fully set forth herein.

131. BTL is the prior user of the HIFEM and EM trademarks. BTL registered the HIFEM trademark on May 5, 2019, nearly two years before NextWellness developed and launched its XTONE AIR device. BTL registered the EM trademark on November 19, 2019, also well before the launch of the XTONE AIR device.

132. For reasons stated in Counts V-VII of this Complaint, NextWellness has, without authorization, intentionally and willfully used the HIFEM and EM trademarks, the BTL Study and the BTL Photos to market and promote the XTONE AIR device.

133. For reasons stated in Counts V-VII of this Complaint, NextWellness's actions have caused and are likely to cause consumer confusion.

134. As a proximate result of NextWellness's actions, BTL has suffered and will continue to suffer damages.

135. BTL has no adequate remedy at law and will continue to suffer irreparable harm unless NextWellness is enjoined.

136. By reason of NextWellness's unlawful conduct as alleged above, BTL has been substantially injured and is entitled to damages and NextWellness's profits attributable to its unlawful conduct, which are presently indeterminate, and the costs of this action.

### **PRAYER FOR RELIEF**

WHEREFORE BTL requests entry of judgment against NextWellness as follows:

A. A judgment that NextWellness has infringed one or more claims of the Asserted Patents in violation of 35 U.S.C. § 271(b)-(c);

B. An award of damages for infringement of the Asserted Patents, with said damages to be trebled because of the intentional and willful nature of NextWellness's infringement, as provided by 35 U.S.C. § 284;

C. A judgment that NextWellness has willfully infringed one or more claims of the Asserted Patents;

D. A determination that this case is "exceptional" under 35 U.S. § 285 and an award of BTL's reasonable attorneys' fees;

E. An order permanently enjoining NextWellness, its officers, directors, employees, agents, and all persons acting in concert with them, from infringing the Asserted Patents;

F. A judgment that NextWellness has violated the Lanham Act, 15 U.S.C. § 1114, by committing acts of trademark infringement;

G. A judgment that NextWellness has violated the Lanham Act, 15 U.S.C. § 1125(a), by committing acts of federal unfair competition, false designation of origin, and false

advertising;

H. An award of damages for NextWellness's infringement of BTL's EM trademark, including NextWellness's profits, any damages sustained by BTL, and the costs of the action as provided by 15 U.S.C. § 1117(a), with said damages to be trebled because of the intentional and willful nature of NextWellness's infringement, as provided by 15 U.S.C. § 1117(b);

I. A judgment that this case is "exceptional" under 15 U.S.C. § 1117(a) and an award of reasonable attorneys' fees;

J. A judgment that NextWellness has violated the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 *et seq.*;

K. A judgment that NextWellness has violated Florida common law;

L. An award of damages against NextWellness as a result of its wrongful acts against BTL in an amount to be proved at trial;

M. An award of any and all of NextWellness's profits arising from the foregoing acts;

N. An award of pre-and post-judgment interest of any monetary damages at the highest rate allowed by law;

O. Permanent injunctive relief enjoining NextWellness from:

- i. using the EM trademark or any reproductions, copies, or colorable imitations thereof, in any manner in connection with the promotion, marketing, advertising, offering for sale, or sale of any good or service that is not a good or service offered by a genuine BTL product, or is not authorized by BTL to be offered in connection with the EM trademark
- ii. passing off, inducing, or enabling others to sell or pass off any good or service

as a good or service offered by a genuine BTL product, or any other good or service offered by BTL, that is not BTL's or not offered under the authorization, control, or supervision of BTL and approved by BTL for sale under the EM trademark

- iii. committing any acts calculated to cause consumers to believe that NextWellness's goods or services are those sold under the authorization, control or supervision of BTL, or are sponsored by, approved by, or otherwise connected with BTL; and
  - iv. further infringing BTL's EM trademark and damaging BTL's goodwill.
- P. An award of BTL's costs and expenses in this action; and
- Q. For such other relief as the Court may deem just and proper.

**JURY DEMAND**

Under Rule 38 of the Federal Rules of Civil Procedure, Plaintiff BTL Industries, Inc. respectfully demands a trial by jury of any issues triable of right by a jury.

Dated: August 18, 2022

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