

1 **STEPTOE & JOHNSON LLP**
2 **201 E. Washington St., Ste. 1600**
3 **Phoenix, AZ 85004-2382**
4 **Telephone 602.257.5200**
5 **Facsimile 602.257.5299**

6 **Nicholas J. Wallwork (9582)**
7 **nwallwork@steptoe.com**
8 **Fredric D. Bellamy (10767)**
9 **fbellamy@steptoe.com**
10 **Peter S. Kozinets (19856)**
11 **pkozinets@steptoe.com**
12 **Tyson Y. Winarski (19369)**
13 **twinarski@steptoe.com**

14 **Attorneys for Plaintiff**

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

19 **Heaven Sent Naturals, Inc.,**

20 Plaintiff,

21 vs.

22 **Church & Dwight Co., Inc.; Armkel,**
23 **LLC; and Church & Dwight Virginia**
24 **Co., Inc.,**

25 Defendants.

) No.

) **COMPLAINT**

) **(Jury Trial Demanded)**

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Plaintiff Heaven Sent Naturals, Inc. (Heaven Sent), by its undersigned attorneys, for its claims for relief against defendants, Church & Dwight Co., Inc. (Church & Dwight), Armkel, LLC (Armkel), and Church & Dwight Virginia Co., Inc. (CDV) (collectively, Defendants), alleges as follows:

Introduction

1. This is an action for trademark infringement, trade dress infringement and unfair competition in violation of Section 43(a) of the United States Trademark Act (Lanham Act), 15 U.S.C. § 1125(a), and for related state law claims.

2. Since 1999, Heaven Sent has marketed and sold dietary supplements for the enhancement of male and female sexual performance under the trademark ELEXIA. This

1 year, in direct violation of Heaven Sent's trademark rights, Defendants introduced a related
2 line of products and services under the confusingly similar mark, ELEXA. Moreover,
3 Defendants' ELEXA products use packaging that is confusingly similar to the trade dress
4 of ELEXIA products.

5 3. Defendants' adoption and use of ELEXA is likely to cause substantial
6 consumer confusion in the market for sexual performance goods and services. To prevent
7 Defendants from confusing the purchasing public about the source, sponsorship and
8 affiliation of the parties' goods and services, and to protect its substantial investment and
9 goodwill in ELEXIA, Heaven Sent seeks monetary damages and preliminary and
10 permanent injunctive relief, as alleged below.

11 **Parties**

12 4. Plaintiff Heaven Sent Naturals, Inc. is an Arizona corporation having its
13 principal place of business in Tempe, Arizona. Heaven Sent is engaged, directly or
14 indirectly, in the manufacture, marketing, sale and distribution of dietary supplements,
15 including tablets for enhancing female sexual sensitivity and male sexual stamina. Heaven
16 Sent sells such dietary supplements under the trademark ELEXIA.

17 5. On information and belief, defendant Church & Dwight Co., Inc. is a
18 Delaware corporation having its principal place of business in Princeton, New Jersey.
19 Church & Dwight is identified as the distributor of Defendants' ELEXA-branded products
20 on the packaging for those products, and consumers with questions or comments about
21 such products are directed to Church & Dwight's Consumer Relations Department. On
22 information and belief, Church & Dwight is the owner or licensee of the trademarks that
23 are used in connection with Defendants' ELEXA-branded products. On information and
24 belief, Church & Dwight is the registered owner of www.elexabytrojan.com, an Internet
25 website that advertises, markets and sells ELEXA products and services nationally.

26 6. On information and belief, defendant Armkel, LCC is a Delaware
27 corporation having its principal place of business in Princeton, New Jersey. On information
28 and belief, Armkel is a wholly-owned subsidiary of Church & Dwight. On information and

1 belief, Armkel is the operating division of Church & Dwight that has overall responsibility
2 for Defendants' ELEXA-branded products and services.

3 7. On information and belief, defendant Church & Dwight Virginia Co., Inc. is
4 a Delaware corporation having its principal place of business in Colonial Heights, Virginia.
5 On information and belief, CDV is a wholly-owned subsidiary of Church & Dwight. CDV
6 is listed on the www.elexabytrojan.com website, and on information and belief it is
7 responsible for operating the website, advertising and promoting ELEXA products and
8 services on the website, and transmitting and receiving data with prospective ELEXA
9 purchasers via the website. CDV has submitted four applications to the United States
10 Patent and Trademark Office concerning the trademark ELEXA.

11 8. Defendants manufacture, sell and distribute contraceptives and other
12 products relating to sexual activity, such as Trojan® condoms.

13 **Jurisdiction and Venue**

14 9. The Court has subject matter jurisdiction over this Lanham Act action under
15 15 U.S.C. §§ 1121(a) and 1125(a), and under 28 U.S.C. §§ 1331, 1338 and 1367(a). Because
16 this is an action between citizens of different states where the amount in controversy
17 exceeds \$75,000 exclusive of interest and costs, the Court also has jurisdiction under 28
18 U.S.C. § 1332.

19 10. This Court has personal jurisdiction over Defendants because they have
20 conducted and continue to conduct business in Arizona, they have availed themselves of
21 the benefits of the laws of Arizona, and they have committed acts that have caused injury
22 to Heaven Sent in Arizona.

23 11. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial
24 part of the events or omissions giving rise to the claims set forth herein occurred in the
25 District of Arizona, and a substantial part of the property that is the subject of this action
26 is situated in this District.

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General Allegations

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2 12. Since 1999, Heaven Sent has used the trademark ELEXIA in interstate
3 commerce, and has continued to use the mark without interruption up to the present time,
4 in connection with the sale, offering for sale, distribution, marketing, advertising and
5 promotion of sexual enhancement products.

6 13. Specifically, from 1999 to the present, Heaven Sent has marketed and sold
7 “ELEXIA Maximum Stamina Formula for Men,” a dietary supplement for increasing
8 sexual stamina, performance and sensitivity. ELEXIA Maximum Stamina Formula for Men
9 is sold in a black rectangular box, with a semi-oval green overlay and a stylized ELEXIA
10 mark. The mark appears in all capital letters, and the letter X has an elongated, cursive-type
11 leg that ends in a circle. The lettering on the box is white against green and black
12 backgrounds. A color copy of the front of the ELEXIA Maximum Stamina Formula for
13 Men packaging is attached as Exhibit A.

14 14. From 1999 to the present, Heaven Sent has also marketed and sold
15 “ELEXIA Maximum Sensitivity Formula for Women,” a dietary supplement for enhancing
16 sexual stimulation and response. ELEXIA Maximum Sensitivity Formula for Women is
17 sold in a black rectangular box, with a semi-oval pink overlay and a stylized ELEXIA mark.
18 The mark ELEXIA appears in all capital letters, and the “X” has an elongated, cursive-type
19 leg that ends in a circle. The lettering on the box is white against pink and black
20 backgrounds. A copy of the front of the package for ELEXIA Maximum Sensitivity
21 Formula for Women is attached as Exhibit B.

22 15. ELEXIA is a strong trademark. It is an arbitrary and fanciful mark that is
23 inherently distinctive of goods marketed, sold and distributed by Heaven Sent.

24 16. Heaven Sent markets and sells its ELEXIA products nationally through
25 General Nutrition Centers, Inc. (“GNC”) stores. On information and belief, GNC operates
26 more than 4,800 retail outlets throughout the United States, and has more than 1,300
27 domestic franchise locations and more than 1,000 store-within-a-store locations under a
28 strategic alliance with Rite Aid Corporation, one of the nation’s leading retail drug store

1 chains. ELEXIA products are also sold nationally on the Internet through several web sites,
2 including hsnaturals.com and drugstore.com.

3 17. During the period in which Heaven Sent has used ELEXIA in connection
4 with such products, Heaven Sent has diligently sought to establish and maintain the
5 goodwill and distinctiveness associated with ELEXIA. Heaven Sent has expended
6 substantial sums of money to market, advertise and promote ELEXIA-branded products.
7 Among other things, Heaven Sent has promoted its ELEXIA products through radio
8 advertising, print advertising and other means. As a result, ELEXIA has acquired
9 substantial and valuable goodwill.

10 18. In 2005, Defendants started to sell, offer for sale, or otherwise distribute
11 related sexual enhancement products and services, *not* originating from Heaven Sent,
12 bearing the confusingly similar mark ELEXA.

13 19. Defendants' adoption and use of ELEXA has been without permission or
14 authority from Heaven Sent.

15 20. Defendants have adopted and used ELEXA with knowledge of – or with
16 reckless disregard for – Heaven Sent's longstanding nationwide use of the strikingly similar
17 mark, ELEXIA, on related goods.

18 21. Defendants describe ELEXA as "a premium line of sexual well-being
19 products created from a woman's perspective and designed to help you realize a more
20 fulfilling sex life." Exhibit C. Defendants' ELEXA products includes ELEXA Stimulating
21 Lubricant Condoms, ELEXA Natural Feel Condoms, ELEXA Ultra Sensitive Condoms,
22 ELEXA Intimacy Gel, ELEXA Vibrating Ring and ELEXA Freshening Cloths.

23 22. Defendants' ELEXA-branded products and services are complimentary or
24 related to the products sold by Heaven Sent under the ELEXIA trademark, and are sold to
25 the same or similar class of purchasers.

26 23. Defendants have also launched an Internet-based service, Club ELEXA, to
27 promote its ELEXA-branded goods and provide related sexual health news, advice "from a
28 leading sexologist" and other information. Exhibit D.

1 24. On information and belief, Defendants have launched a national campaign to
2 promote their ELEXA-branded products and services by purchasing television, radio, print
3 and Internet-based advertising. Defendants' advertising campaign threatens to overwhelm
4 the marketplace power and value of Heaven Sent's ELEXIA trademark.

5 25. Defendants' ELEXA mark appears in cursive-style script, making it difficult
6 for prospective purchasers to determine whether the letter X in ELEXA is followed by the
7 letter I.

8 26. Internet search engines, such as the engine used by walgreens.com, redirect
9 prospective purchasers to ELEXA products when ELEXIA is the search term. *See* Exhibit
10 E.

11 27. Defendant CDV has filed four federal trademark applications concerning
12 ELEXA, Serial Nos. 78560873, 78560867, 78560860 and 78576362. On November 1, 2005,
13 the first application, Serial No. 78560873, was published for opposition. On November 15,
14 2005, Serial No. 78560867 was published for opposition. Heaven Sent intends to oppose
15 these applications, and shall oppose any other applications by Defendants for any marks
16 that are confusingly similar to Heaven Sent's ELEXIA trademark.

17 **COUNT I – TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

18 **Violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)**

19 28. Since approximately mid-2005, Defendants have used the mark ELEXA in
20 interstate commerce, and have continued to use the mark without interruption up to the
21 present time, in connection with the sale, distribution, marketing, advertising and
22 promotion of sexual enhancement products and services.

23 29. Defendants' ELEXA mark is confusingly similar to Heaven Sent's ELEXIA
24 mark.

25 30. Defendants' use in commerce of ELEXA in connection with the sale and
26 distribution of sexual enhancement products and services as described above constitutes
27 the use in commerce of words, terms, names, symbols or devices, false designations of
28 origin or false or misleading descriptions and representations of fact, that are likely to cause

1 confusion, to cause mistake, or to deceive as to the affiliation, connection or association of
2 Defendants with Heaven Sent, or as to the origin, sponsorship, or approval of Defendants'
3 goods, services or commercial activities.

4 31. Defendants' use in commerce of ELEXA, including its recent nationwide
5 campaign to promote Defendants' new line of ELEXA products and services, also is likely
6 to cause reverse confusion by inducing consumers to believe mistakenly that Heaven Sent's
7 ELEXIA goods are from the same source as those connected with Defendants' ELEXA
8 goods and services.

9 32. Defendants' acts infringe Heaven Sent's ELEXA trademark and constitute
10 unfair competition in violation of 15 U.S.C. § 1125(a).

11 33. On information and belief, Defendants' acts have caused actual confusion or
12 deception among members of the purchasing public who were prospective purchasers of
13 Heaven Sent products bearing the mark ELEXIA.

14 34. As a direct and proximate cause of Defendants' conduct, Heaven Sent has
15 suffered and will continue to suffer actual and other damages in an amount to be proven at
16 trial.

17 35. As a result of Defendants' infringement and unfair competition, Heaven
18 Sent has suffered, and unless the Court preliminarily and permanently enjoins Defendants,
19 will continue to suffer, irreparable harm to Heaven Sent and its property rights, goodwill
20 and business reputation for which there is no adequate remedy at law. Heaven Sent is
21 entitled to an injunction to prevent Defendants from using the ELEXA or any other mark
22 that is confusingly similar to Heaven Sent's ELEXIA mark.

23 **COUNT II – TRADE DRESS INFRINGEMENT**

24 36. ELEXIA Maximum Sensitivity Formula for Women is sold in a black
25 rectangular box, with a semi-oval pink overlay and a stylized ELEXIA mark. The lettering
26 on the box is white against pink and black backgrounds. Taken together, the overall effect
27 and appearance of the packaging for ELEXIA Maximum Sensitivity Formula for Women
28 serves to identify the ELEXIA brand or product source.

1 37. The packaging for ELEXIA Maximum Sensitivity Formula for Women is not
2 functional.

3 38. The packaging for ELEXIA Maximum Sensitivity Formula for Women is
4 arbitrary, fanciful and inherently distinctive. Alternatively, the packaging has acquired
5 secondary meaning such that consumers have come to associate the unique packaging of
6 Heaven Sent's ELEXIA products with goods that originate from or are affiliated with the
7 ELEXIA brand or Heaven Sent.

8 39. Defendants' ELEXA-branded products are sold in packaging that is
9 confusingly similar to the packaging used for Heaven Sent's ELEXIA-branded goods.

10 40. Like Heaven Sent's ELEXIA products, Defendants' ELEXA products are
11 sold in black rectangular boxes that feature white lettering on pink and black backgrounds.
12 Both product packages use rounded shapes. Both packages prominently feature the
13 products' brand names, which are confusingly similar in sound and appearance.

14 41. The overall impression of Defendants' packaging for its ELEXA-branded
15 goods is confusingly similar to Heaven Sent's packaging for its ELEXIA products.

16 42. Defendants' use in commerce of ELEXA packaging in connection with the
17 sale and distribution of sexual enhancement products and services as described above
18 constitutes the use in commerce of words, terms, names, symbols or devices, false
19 designations of origin or false or misleading descriptions and representations of fact, that
20 are likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection
21 or association of Defendants with Heaven Sent, or as to the origin, sponsorship, or
22 approval of Defendants' goods, services or commercial activities.

23 43. Defendants' use in commerce of ELEXA packaging, including its recent
24 nationwide campaign to promote Defendants' new line of ELEXA products and services,
25 also is likely to cause reverse confusion by inducing consumers to believe mistakenly that
26 Heaven Sent's ELEXIA goods are from the same source as those connected with
27 Defendants' ELEXA goods and services.

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1 44. Defendants' acts infringe Heaven Sent's ELEXIA trade dress and constitute
2 unfair competition in violation of 15 U.S.C. § 1125(a).

3 45. On information and belief, Defendants' acts have caused actual confusion or
4 deception among members of the purchasing public who were prospective purchasers of
5 Heaven Sent products.

6 46. As a direct and proximate cause of Defendants' conduct, Heaven Sent has
7 suffered and will continue to suffer actual and other damages in an amount to be proven at
8 trial.

9 47. As a result of Defendants' continued trade dress infringement and unfair
10 competition, Heaven Sent has suffered and, unless the Court preliminarily and permanently
11 enjoins Defendants, will continue to suffer, irreparable harm to Heaven Sent and its
12 property rights, goodwill and business reputation for which there is no adequate remedy at
13 law. Heaven Sent is entitled to an injunction to prevent Defendants from using product
14 packaging that is confusingly similar to Heaven Sent's ELEXIA trade dress.

15 **COUNT III – COMMON LAW TRADEMARK INFRINGEMENT**
16 **AND UNFAIR COMPETITION**

17 48. Defendant's use of the ELEXA mark as described above constitutes (i)
18 trademark infringement, (ii) passing off Defendants' products and services as those of
19 Heaven Sent's through false representation tending to induce buyers to believe that the
20 ELEXA products and services are products and services of Heaven Sent, (iii) reverse
21 confusion calculated to overwhelm the goodwill and value of Heaven Sent's mark through
22 advertising and promotion tending to induce purchasers to believe that the sources or
23 sponsors of Heaven Sent's ELEXIA goods are Defendants, (iv) trade dress infringement
24 and/or (v) unfair competition under the common law of Arizona.

25 49. By engaging in this conduct, Defendants have threatened to confuse and, on
26 information and belief, have confused third parties regarding the source, affiliation or
27 sponsorship of Defendants' and Heaven Sent's goods and services.

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goods or services are Defendants' or are sponsored or approved by Defendants, or doing anything else that would otherwise injure the goodwill and business reputation of Heaven Sent;

B. Award Heaven Sent actual damages arising from Defendants' wrongful acts;

C. Order an accounting and award to Heaven Sent all profits attributable to Defendants' infringement and unfair competition pursuant to 15 U.S.C. §1117 and the common law;

D. Award Heaven Sent up to three times the amount found as actual damages pursuant to 15 U.S.C. §1117;

E. Award Heaven Sent its attorneys' fees and costs of bringing this action pursuant to 15 U.S.C. §1117;

F. Award Heaven Sent its taxable costs and disbursements in this action; and

G. Award Heaven Sent such other and further relief as may be just and proper.

Dated this 30th day of November, 2005.

STEPTOE & JOHNSON LLP

By /s/ Nicholas J. Wallwork
Nicholas J. Wallwork
Fredric D. Bellamy
Peter S. Kozinets
Tyson Y. Winarski
Collier Center
201 East Washington Street
Suite 1600
Phoenix, Arizona 85004-2382

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2005, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing.

/s/ Michele L. Galvez
Michele L. Galvez, Legal Secretary