UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SCOTT KEATLEY and JOSEPH VILLARI, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. LIFEWAY FOODS, INC., Defendants.	**Case No. 12CV3521** **JURY TRIAL DEMANDED**

CLASS ACTION COMPLAINT

Plaintiffs Scott Keatley and Joseph Villari (collectively "Plaintiffs"), by their attorneys, bring this action against Defendant Lifeway Foods, Inc., on behalf of themselves and all others similarly situated. Plaintiffs make the following allegations pursuant to the investigation of their counsel and based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge, as follows:

NATURE OF THE ACTION

1. This is a class action against Lifeway Foods, Inc. ("Lifeway" or the "Defendant") seeking redress for Defendant's deceptive practices in falsely marketing its line of various Kefir food products containing "ProBoost," an exclusive blend of live and active probiotic cultures.

2. Lifeway claims that its products containing ProBoost, including but not limited to Lifeway's "Original Kefir," "BioKefir," "Low Fat Kefir" and "Nonfat Kefir," (collectively, "ProBoost Products") will "enhance the immune system" and "balance digestive health." Specifically, Lifeway claims its ProBoost Products will provide clinically proven therapeutic benefits for various health conditions, including Antibiotic Diarrhea, Autoimmune Disorders,

Bad Breath, Celiac Disease, Crohn's and Colitis, High Cholesterol, Immune Deficiency, Infantile Colic, Irritable Bowel Syndrome, Lactose Intolerance, Seasonal Allergies, Traveler's Diarrhea and Yeast Infections.

3. In fact, Lifeway's ProBoost Products are not clinically proven to be effective for the benefits Lifeway represents in its media and advertising of the ProBoost Products. Moreover, the two strains Lifeway touts in its ProBoost Products, *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, which must be at certain dosage levels to provide any claimed health enhancing benefits, are not even in the ProBoost Products. Nonetheless, as a result of Lifeway's deceptive advertising campaign, Plaintiffs and other customers are induced into buying the ProBoost Products because of the misrepresentations. Plaintiffs would not have purchased the ProBoost Products had they known the truth regarding the ProBoost Products and the ProBoost Products did not have the quality, health benefits or value as promised.

4. Plaintiffs seek relief in this action individually, and as a class action on behalf of all purchasers of ProBoost Products in the United States from January 1, 2010 to the present ("Class Period"), for Lifeway's violations of the Magnuson-Moss Act, 15 U.S.C. § 2301, *et. seq.*, for unjust enrichment, breach of express warranty, intentional misrepresentation, fraudulent concealment and violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/2 *et seq*, violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 58:8-1 *et seq.*, violation of the New York General Business Law §349, *et seq*, and violation of the New York General Business Law §350, *et seq.*

THE PARTIES

5. Plaintiff Scott Keatley ("Keatley") is a resident of New York. Plaintiff Keatley purchased ProBoost Products during the Class Period in New York. Plaintiff saw and read

Defendant's Health Claims and misrepresentations that ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and relied on such misrepresentations in deciding to purchase the ProBoost Products. Plaintiff would not have purchased ProBoost Products but for Defendant's misrepresentations.

6. Plaintiff Joseph Villari ("Villari") is a resident of New Jersey. Plaintiff Villari purchased ProBoost Products during the Class Period in New Jersey. He saw and read Defendant's Health Claims and misrepresentations that ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and relied on such misrepresentations in deciding to purchase the ProBoost Products. Plaintiff would not have purchased ProBoost Products but for Defendant's misrepresentations.

7. Defendant Lifeway is an Illinois corporation with its principal executive offices located at 6431 West Oakton St., Morton Grove, Illinois 60053. Lifeway is one of the country's leading manufacturers of Kefir products.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question). This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

9. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are hundreds of thousands of class members and the aggregate amount in controversy exceeds $5,000,000.00, exclusive of interest and costs, and at least one Class member is a citizen of a state different from Defendant.

10. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this District. Lifeway maintains its headquarters in this District, and Defendant

distributed, advertised and sold its ProBoost Products, which are the subject of the present complaint, in this District.

FACTS COMMON TO ALL CLAIMS

A. Lifeway's ProBoost Products

11. Lifeway produces, markets and sells probiotic food products, including various Kefir products. Kefir, a fermented milk-based cultured beverage, is similar to drinkable yogurt. Although Kefir is similarly processed by fermenting milk, it contains more and different types of bacteria and yeast than yogurt. Kefir is marketed by Lifeway as containing a higher content of probiotics than yogurt. Specifically, "While yogurt contains only two to three strains of 'live and active' cultures, Lifeway is packed with a unique blend of 12 probiotic cultures."[1]

12. Lifeway produces and sells a number of varieties and flavors of Kefir products including low fat, nonfat, and organic versions as well as a line of children's Kefir products. The ProBoost products are sold at supermarkets, grocery stores as well as natural and specialty retailers.

13. Probiotics are live microorganisms (e.g., bacteria) that are either the same as or similar to microorganisms found naturally in the human body. Also referred to as "good bacteria" or "helpful bacteria," probiotics are available to consumers in oral products such as dietary supplements and yogurts, as well as other products such as suppositories and creams. The U.S. Food and Drug Administration ("FDA") has *not* approved any health claims for probiotics. The rapid growth in marketing and consumer interest and use has outpaced scientific research on the safety and efficacy of probiotics for specific health applications.

14. Prior to Lifeway introducing its line of Kefir products containing ProBoost, Lifeway marketed its Kefir products as containing 10 live and active probiotic cultures. No later

[1] http://www.lifeway.net/Probiotics/ last visited on April 24, 2012.

than January 2010, Lifeway began marketing its Kefir products as containing a newly added blend of 2 proprietary probiotic strains, *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, or "10 +2" in the advertisements and packaging of the kefir products. Lifeway added ProBoost to all its Kefir products except "Green Kefir" and "ProBugs."[2]

15. Lifeway markets this blend of 12 probiotic strains as ProBoost – as the 10 original Lifeway probiotic strains are "boosted" by the addition of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, the "+2." *Lactobacillus acidophilus* NCFM (also known as "HOWARU Dophilus" or "NCFM") is a proprietary probiotic strain owned by The North Carolina Agricultural Foundation ("NCAF"). *Bifidobacterium lactis* HN019 (also known as "HOWARU Bifidio" or "HN019") is a proprietary probiotic strain owned by Fonterra TM Limited Co. ("Fonterra"). Lifeway purchased the rights to use the two premium probiotic strains that are marketed under the HOWARU brand by Danisco USA, Inc. ("Danisco"), which exclusively licenses worldwide manufacturing and marketing rights of the two probiotic strains.

16. Danisco provided Lifeway with marketing information including the required amounts of the probiotic strains needed to make claims of efficacy that are supported by clinical studies. Danisco informed Lifeway there is a minimum dosage level of two probiotic strains and that it was necessary to test the ProBoost Products at the beginning and end of shelf life to ensure the proper levels are being met. As more detailed below, Lifeway did not include the necessary amount of the two HOWARU probiotic strains necessary to support their claims of efficacy as advertised.

B. Lifeway's Misrepresentations And False Advertising Of The ProBoost Products

[2] *See* http://lifeway.net/LifewayWorld/KefirProbiotics/ProBoost.aspx (last accessed April 24, 2012).

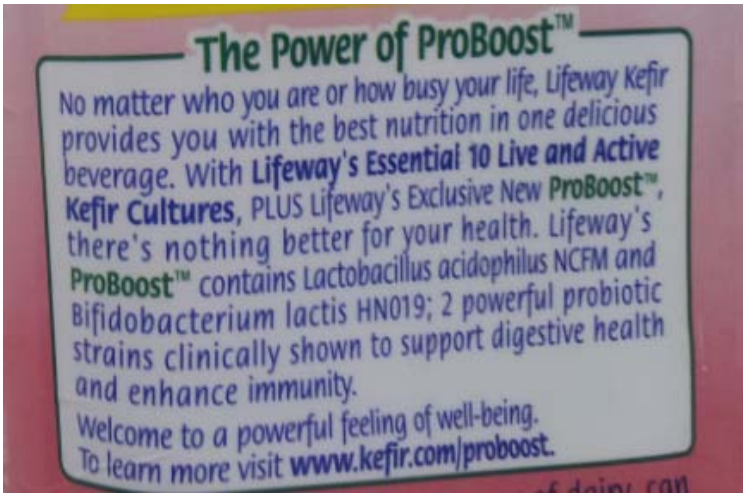
17. Lifeway claims that ProBoost is an exclusive blend of 2 probiotic strains clinically prove to "support immunity and enhance digestion." Specifically Lifeway represents on its website:

> Lifeway Kefir has always contained 10 powerful **live and active probiotic cultures** – they're what make Kefir so effective for strengthening your immune and digestive systems. But recently, we added two new clinically proven probiotic vultures to all Lifeway Kefir varieties (with the exception of Green Kefir and ProBugs™). We call this exclusive blend of probiotics "ProBoost™", because the cultures it contains have been clinically proven to support immunity and enhance digestion, as well as boost your well-being in several ways. ProBoost™ consists of:
>
> **Bifidobacterium lactis HN019**
> This live and active probiotic culture is especially good at enhancing immunity. It does this by balancing the level of good bacteria in your digestive tract and strengthening the function of your intestinal lining. A well-balanced digestive tract is a big part (up to 70%) of a strong immune system. This is because good bacteria in the gut, known as intestinal microflora, help prevent the overgrowth of harmful bacteria and also form a barrier so that germs cannot enter into the blood and lymph systems.
>
> **Lactobacillus acidophilus NCFM**
> Lactobacillus acidophilus NCFM is a live and active probiotic culture that is clinically proven to enhance digestion. It helps balance your intestinal ecosystem, which also helps improve immune response. This culture has been shown to help break down lactose, making dairy products – including Kefir – easier to digest. It is especially helpful at alleviating diarrhea and other symptoms of irritable bowel syndrome. It can even have a positive effect on reducing allergies, lowering cholesterol and fighting cancer.

See Exh. A.

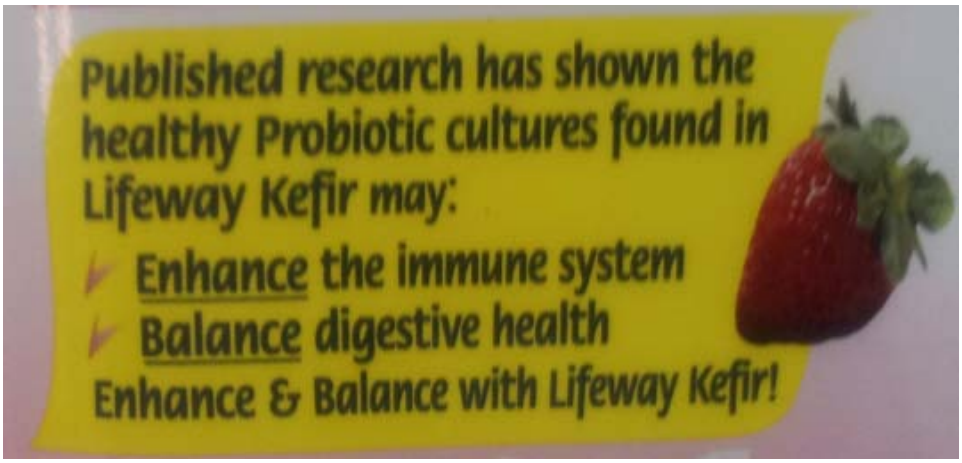
18. Each packaging of ProBoost Products states in large letters "Probiotic" and prominently represents that the products contain ProBoost. The product packaging further represents:

> **The Power of ProBoost**
>
> Lifeway's Exlusice new **ProBoost™**, there's nothing better for your health. Lifeway's **ProBoost™** contains Lactobacillus acidophilus NCFM and Bifidobacterium lactis HN019; 2 powerful probiotic strains clinically shown to support digestive health and enhance immunity.



19. In fact testing shows that Lifeway's ProBoost products contain little to no *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019.

20. The packaging of Lifeway's ProBoost Products, Lifeway prominently represents :



21. Lifeway also represents that its ProBoost products will provide a number of health benefits and that Lifeway's ProBoost Products are "proven to aid in weight loss." Specifically, on the section of Lifeway's website entitled "Health & Wellness," Lifeway represents:

> Health and beauty go hand in hand. And Lifeway Kefir just makes so much sense. It allows you to be proactive about your health, filling your digestive system with friendly bacteria to ward off illness. But it's also loaded with nutritious ingredients and proven to aid in weight loss. Check out the info at or below for the full skinny.

See Exh. B.

22. Additionally, Lifeway's website makes further misrepresentations in a table entitled "How Lifeway Kefir Helps You," which lists a number of health conditions Lifeway represents are addressed by using the ProBoost products, including:

- Antibiotic Diarrhea
- Autoimmune Disorders
- Bad Breath
- Celiac Disease
- Crohn's and Colitis
- High Cholesterol
- Immune Deficiency

- Infantile Colic
- Irritable Bowel Syndome
- Lactose Intolerance
- Seasonal Allergies
- Traveler's Diarrhea
- Yeast Infections.

See Exh. C.

23. Lifeway also misrepresents on its website that its ProBoost Products "even have a positive effect on reducing allergies, lowering cholesterol and fighting cancer." *See* Exh A.

24. Lifeway's marketing campaign also includes false representations made in video advertisements. For example in one video entitled "Introducing BioKefir,"[3] Lifeway displays a bottle of BioKefir, one of its ProBoost Products, with the word "Immunity" on the bottle. The commercial and its voiceover represent that the ProBoost product is clinically proven to boost immunity, digestive health, and heart health.

[3] Available at http://www.youtube.com/watch?v=IeltRFdOhQk&list=UUJenA8uG5uhiYNMLrzZkBPQ&index=8&feature=plcp (last accessed on April 24, 2012).

25. In fact, Lifeway's ProBoost Products are not clinically proven to enhance the immune system, balance digestive health, aid in weight loss or the other as advertised misrepresentations. No such clinical proof exists.

26. Lifeway makes reference to a study done at the University of Tennessee that suggests 3 to 4 servings of dairy products in general may help in weight loss. This study was paid for by grants from the National Dairy Council, and the breakfast cereal and yogurt industries, and is the subject of much scrutiny.[4]

27. This cited study falls short of the Federal Trade Commission's ("FTC") requirements regarding advertising substantiation. Specifically, a company like Lifeway must have competent and reliable scientific evidence for the types of weight loss, immunity and health benefit it makes in its advertising.[5]

[4] In 2005 the Physicians Committee for Responsible Medicine filed petitions with the FDA and FTC to prohibit certain dairy companies, including Lifeway, from making false and misleading representations based on the University of Tennessee study that their dairy products aid in weight loss. *See* Exhs. D & E.

[5] See FTC Policy Statement Regarding Advertising Substantiation (Appended to Thompson Medical Co., 104 F.T.C 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir.1986), cert. denied, 479 U.S. 1086 (1987) at http://www.ftc.gov/bcp/guides/ad3subst.htm (last visited on April 24, 2012).

28. Notwithstanding the fact that Lifeway's ProBoost products lack any detectable levels of the two probiotic strains Lifeway claims fills its ProBoost products with various health benefits, there is no reliable scientific evidence that supports Lifeway's health claims.

29. Probiotics are live microorganisms (e.g., bacteria) that are either the same as or similar to microorganisms found naturally in the human body. Probiotics commonly used in the United States include *Lactobacillus* and *Bifidobacterium*. There are many specific types of bacteria within each of these two broad groups, and health benefits associated with one type may not hold true for others. Although some probiotic formulations have shown promise in research, strong scientific evidence to support specific uses of probiotics for most conditions is lacking.

30. The National Center for Complementary and Alternative Medicine (the "NCCAM"), a division of the U.S. Department of Health and Human Services, has recently stated that "[a]dditonal clinical studies are needed to investigate the safety and efficacy of probiotics for specific uses."[6] The NCCAM also warned that probiotics should not be used in place of conventional medical care or to delay seeking care. Nonetheless, Lifeway represents specific uses for its ProBoost Products for numerous medical conditions ranging from bad breath to cancer.

31. There is widespread consensus within the scientific community concerning the proper research and testing that must be conducted to substantiate a claim made for a given effect ascribed to a probiotic bacteria. As the American Society for Microbiology concluded in a symposium focusing on purported probiotic bacteria used in food:

> There is a pronounced need for large, carefully designed (randomized, placebo controlled) clinical trials of probiotics that undertake broad sampling of host microbiota, have clear end points, and have well informed participants who consent to treatment. Investigations like these are needed to overcome the placebo

[6] *See* "Oral Probiotics: An Introduction," available at http://nccam.nih.gov/health/probiotics/introduction.htm (last accessed April 24, 2012).

effect [of probiotic treatments] and other barriers to the thorough investigation of probiotic products.[7]

32. The concept behind probiotics was introduced in the early 20th century, when Nobel laureate Elie Metchnikoff, known as the "father of probiotics," proposed in *The Prolongation of Life: Optimistic Studies* that ingesting microorganisms could have substantial health benefits for humans. Lifeway fails to provide any clinical studies proving its ProBoost Products are safe and effective to be used for the medical conditions advertised on its website and product packaging. Instead, Lifeway provides a link on its website to the 1908 speech awarding Elie Metchnikoff with the Nobel Prize as support for its various misrepresentations.[8]

33. A properly conducted clinical or scientific trial – *e.g.*, one capable of providing substantiation for Lifeway's claims – is the well-designed, randomized controlled trail ("RCT").[9] In RCTs, human study subjects similar to each other are randomly assigned to receive either the test substance or a placebo. Double-blind RCTs, where neither the patient nor the administering researcher knows which intervention is placebo, are preferred and considered to be more accurate than single-blind RCTs, particularly where the manufacturer pays for the studies. Lifeway has done no such studies.

34. The FDA has not approved any health claims for probiotics. Indeed, the FDA has recently warned Lifeway against continuing to mislabel its products by making the same misrepresentations of health benefits described in this complaint, which Lifeway continues to make, and which are relied upon by Plaintiffs and the other members of the class. *See* Exh. F.

---

[7] R. Walker & M. Buckley, Probiotic Microbes: The Scientific Basis, at 19 (Colloquium convened before the American Society of Microbiology, Nov. 5-7 2005).

[8] Available at http://lifeway.net/CustomerService/FAQ.aspx (last accessed April 24, 2012).

[9] M. Araya, et al., *Guidelines for the Evaluation of Probiotics in Food* (Food and Agriculture Organization of the United Nations and World Health Organization, Report of a Joint Working Group, April 1 and May 1, 2002), *available at* http://www.who.int/entity/foodsafety/fs_management/en/probiotic_guidelines.pdf (last accessed April 24, 2012).

35. Specifically, the FDA identified certain health benefit claims made by Lifeway, including the same representations complained of herein, such as the health benefits listed on the table with the heading "How Lifeway Kefir Helps You," and further noted that the "unlawful disease treatment and prevention claims on [Lifeway's] website were too numerous to list." The FDA warned that the health benefit claims Lifeway made, and continues to make, on its website, product labels, and other labeling ad promotional materials are promoted for conditions that cause the product to be drugs under Section 201(g)(1) of the FDCA, 21 U.S.C. § 321(g)(1)

36. The FDA warned Lifeway that the marketing of the ProBoost Products with the misrepresentations claimed herein violates the FDCA because the ProBoost Products are offered for conditions not amenable to self-diagnosis and treatment by individuals other than medical practitioners.

37. Moreover, despite Lifeway's claims that its ProBoost Products contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, tests show that the ProBoost Products contain little to none of these probiotic strains. Danisco, NCAF and Fonterra (collectively the "HOWARU Plaintiffs") recently sued Lifeway for violating the Lanham Act, 15 U.S.C. §1125(a). The HOWARU Plaintiffs allege Lifeway has made false and misleading descriptions and representations of fact and false designations of origin in its commercial advertising and promotion concerning the nature, characteristics, and qualities of Lifeway's ProBoost Products. *See* Exh. G.

38. Lifeway purchased a small amount of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 from Danisco, and subsequently declined to purchase sufficient quantities of the probiotic strains to meet the clinically tested levels to make any claims of efficacy as to the health benefits provided by the inclusion of these probiotic strains.

39. Nonetheless, Lifeway marketed its ProBoost Products as containing Danisco's HOWARU probiotic strains, *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019. Lifeway represents in its marketing and advertising that the inclusion of these strains provides consumers with clinically proven benefits. They do not. *See eg.*, Exh. A.

40. Indeed, Danisco subsequently performed testing on Lifeway's ProBoost products and found that based on industry standards, Lifeway's ProBoost Products contained no detectable levels of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, despite Lifeway's repeated representations otherwise. *See* Exh. G. Thus, the ProBoost Products cannot provide any of the health benefits Lifeway attributes to the inclusion of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019.

CLASS ACTION ALLEGATIONS

41. Plaintiffs bring this class action pursuant to Fed. R. Civ. P. 23 (a), (b)(1), (b)(2), and (b)(3) on behalf of all purchasers of mislabeled ProBoost Products in the United States (the "Class").

42. Plaintiffs also seek to represent a subclass defined as all members of the Class who purchased mislabeled ProBoost Products in New York ("the New York Subclass").

43. Plaintiffs also seek to represent a subclass defined as all members of the Class who purchased mislabeled ProBoost Products in New Jersey ("the New Jersey Subclass").

44. Members of the Class, the New York Subclass, and the New Jersey Subclass are so numerous that their individual joinder herein is impracticable. Members of each of these classes number in the thousands. The precise number of Class members and their identities are unknown to Plaintiffs at this time but will be determined through discovery. Class members may

be notified of the pendency of this action by mail and/or publication through the distribution records of Lifeway and third party retailers and vendors.

45. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

(a) whether Lifeway violated the Magnuson-Moss Act, 15 U.S.C. § 201, *et seq.*,

(b) whether Lifeway was unjustly enriched by its conduct;

(c) whether Lifeway breached an express warranty made to Plaintiffs and the Class;

(d) whether Lifeway advertises, or markets its ProBoost Product in a way that is false or misleading;

(e) whether Lifeway's ProBoost Products fail to conform to the representations, which were published, disseminated and advertised to Plaintiffs and the Class;

(f) whether Lifeway concealed from Plaintiffs and the Class that its line of ProBoost Products did not conform to its stated representations;

(g) whether, by the misconduct set forth in this Complaint, Lifeway has engaged in unfair, fraudulent or unlawful business practices with respect to the advertising, marketing and sales of its ProBoost Products;

(h) whether Lifeway violated the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/2 *et seq.*;

(i) whether Lifeway violated the New York General Business Law, § 349, *et seq.*;

(j) whether Lifeway violated the New York General Business Law, § 350, *et seq.*;

(k) whether Lifeway violated the New Jersey Consumer Fraud Act, N.J.S.A. § 58:8-1 *et seq.*, whether, as a result of Lifeway's misconduct as alleged herein, Plaintiffs and Class members are entitled to restitution, injunctive and/or monetary relief and, if so, the amount and nature of such relief.

46. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Lifeway's wrongful conduct. Plaintiffs have no interests antagonistic to the interests of the other members of the Class. Plaintiffs and all members of the Class have sustained economic injury arising out of Lifeway's violations of common and statutory law as alleged herein.

47. Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the Class members they seek to represent, they have retained counsel competent and experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiffs and their counsel.

48. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiffs and Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Lifeway's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of

Lifeway's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT 1

(Violation of Magnuson-Moss Act (15 U.S.C. § 2301, *et seq.*))

1-48. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 1-48 of Court I.

49. Plaintiffs bring this claim individually and on behalf of the members of the Class against defendant Lifeway.

50. Lifeway's ProBoost Products are consumer products as defined in 15 U.S.C. §2301(1).

51. Plaintiffs and Class members are consumers as defined in 15 U.S.C. §2301(3).

52. Defendant Lifeway is a supplier and warrantor as defined in 15 U.S.C. §2301(4) and (5).

53. In connection with the sale of Lifeway ProBoost Products, Defendants issued written warranties as defined in 15 U.S.C. §2301(6), which warranted that Lifeway's ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

54. By reason of Lifeway's breach of its express written warranties stating that Lifeway's ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, Lifeway has violated

the statutory rights due Plaintiffs and Class members pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq.*, thereby damaging Plaintiffs and Class members.

COUNT 2

(Unjust Enrichment)

55-102. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 55-102 of Count 2.

103. Plaintiffs bring this claim individually and on behalf of the members of the Class, the New York Subclass, and the New Jersey Subclass against defendant Lifeway.

104. Plaintiffs and Class members conferred a benefit on Lifeway by purchasing mislabeled ProBoost Products.

105. Lifeway has been unjustly enriched in retaining the revenues derived from Class members' purchases of its ProBoost Products, which retention under these circumstances is unjust and inequitable because Lifeway misrepresented that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, when in fact they did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, which caused injuries to Plaintiffs and Class members because they would not have purchased the ProBoost Products on the same terms if the true facts concerning their actual composition and effectiveness had been known.

106. Because Lifeway's retention of the non-gratuitous benefit conferred on it by Plaintiffs and Class members is unjust and inequitable, Lifeway must pay restitution to Plaintiffs and the Class members for its unjust enrichment, as ordered by the Court.

COUNT 3

(For Breach of Express Warranty)

107-154. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 107-154 of Count 3.

155. Plaintiffs bring this claim individually and on behalf of the members of the Class, the New York Subclass, and the New Jersey Subclass against defendant Lifeway.

156. Lifeway, as the designer, manufacturer, marketer, distributor, or seller expressly warranted that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

157. In fact, Lifeway's ProBoost Products did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions. As a result, Lifeway's ProBoost Products did not possess the quality, health benefits or value represented and warranted by Lifeway.

158. Plaintiffs and Class Members were injured as a direct and proximate result of Lifeway's breach because: (a) they would not have purchased the ProBoost Products on the same terms if the true facts concerning their actual composition and effectiveness had been

known and (b) the ProBoost Products did not have the quality, health benefits or value as promised.

COUNT 4

(Intentional Misrepresentation)

159-206. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 159-206 of Count 4.

207. Plaintiffs bring this claim individually and on behalf of the members of the Class, the New York Subclass, and the New Jersey Subclass against defendant Lifeway.

208. At all times herein referred to, Lifeway was engaged in the business of designing, processing, marketing, manufacturing, distributing or selling its ProBoost Products which are the subject of the present litigation.

209. Lifeway, acting through its officers, agents, servants, representatives or employees, delivered ProBoost Products to retail stores, distributors and various other distribution channels.

210. Lifeway willfully, falsely, and knowingly misrepresented material facts relating to the character and quality of its ProBoost Products. These misrepresentations were contained in Lifeway's website, television commercials, advertising, coupons, product brochures, packaging, product inserts, product descriptions and other marketing materials disseminated or caused to be disseminated by Lifeway, and such misrepresentations were reiterated and disseminated by officers, agents, representatives, servants or employees of Lifeway, acting within the line and scope of their authority, so employed by Lifeway to merchandise and market the ProBoost Product.

211. Lifeway's representations were made with the intent that the general public, including Plaintiffs and Class members, would rely upon them. Lifeway's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof.

212. In actual and reasonable reliance upon Lifeway's misrepresentations, Plaintiffs and Class members purchased Lifeway's ProBoost Products for their intended and reasonably foreseeable purposes. Plaintiffs and Class members were unaware of the existence of facts that Lifeway suppressed and failed to disclose. If they had been aware of the suppressed facts, Plaintiffs and Class members would not have purchased the ProBoost Products.

213. Plaintiffs and Class members are informed and believe, and thereon allege, that Lifeway misrepresented material facts with the intent to defraud Plaintiffs and Class members. Plaintiffs and Class members were unaware of the intent of Lifeway and relied upon the representations of Lifeway in deciding to purchase the ProBoost Products.

214. Plaintiffs' and Class members' reliance on the representations of Lifeway was reasonable.

215. In actual and reasonable reliance upon Lifeway's misrepresentations, Plaintiffs and Class members purchased ProBoost Products, the direct and proximate result of which was injury and harm to the Plaintiffs and Class members because: (a) they would not have purchased the ProBoost Products on the same terms if the true facts concerning their actual composition and effectiveness had been known (b) the ProBoost Products did not have the quality, health benefits or value as promised.

COUNT 5

(Fraudulent Concealment / Nondisclosure)

216-263. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 216-263 of Count 5.

264. Plaintiffs bring this claim individually and on behalf of the members of the Class, the New York Subclass, and the New Jersey Subclass against defendant Lifeway.

265. Lifeway knew at the time of sale that its ProBoost Products did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

266. Lifeway fraudulently concealed from and/or intentionally failed to disclose to Plaintiff, the Class and all others in the chain of distribution (*e.g.*, concealments and omissions in Lifeway's communications with wholesalers, retailers and others in the chain of distribution that were ultimately passed on to Plaintiffs and the Class) that its ProBoost Products did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

267. Lifeway had exclusive knowledge that its ProBoost Products did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions. The defect, i.e., the lack of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and inability to perform as advertised is latent and not something that Plaintiffs or Class members could, in the exercise of reasonable diligence, have

discovered independently prior to purchase, because it is not feasible for individual consumers to conduct their own laboratory analysis of the ProBoost Products prior to purchase.

268. Lifeway had the capacity to, and did, deceive consumers into believing that they were purchasing a kefir beverage that contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

269. Lifeway undertook active and ongoing steps to conceal the ProBoost Products' lack of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and inability to perform as advertise. Plaintiffs are aware of nothing in Lifeway's advertising, publicity or marketing materials that discloses the truth about the ProBoost Products' lack of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and inability to perform as advertised, despite Lifeway's awareness of the problem.

270. The facts concealed and/or not disclosed by Lifeway to Plaintiffs and the Class are material facts in that a reasonable person would have considered them important in deciding whether to purchase (or to pay the same price for) the ProBoost Products.

271. Since Lifeway elected to make representations regarding the contents and quality of its ProBoost, i.e., that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, Lifeway had a duty to accurately disclose the ProBoost Products' lack of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and inability to perform as advertised in its marketing, advertising and at the time of sale.

272. Lifeway intentionally concealed and/or failed to disclose the ProBoost Products' lack of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and inability to perform as advertised for the purpose of inducing the Plaintiffs and the Class to act thereon.

273. Plaintiffs and the Class justifiably acted or relied upon the concealed and/or non-disclosed facts to their detriment, as evidenced by their purchase of Lifeway's ProBoost Products.

274. Had Plaintiffs and the Class known of the ProBoost Products' lack of *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and inability to perform as advertised they would not have purchased the ProBoost Products.

COUNT 6

(Violation of the Illinois Consumer Fraud and Deceptive Practice Act)

275-322. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 275-322 of Count 6.

323. Plaintiffs bring this claim individually and on behalf of the members of the Class against defendant Lifeway.

324. Lifeway was at all relevant times engaged in trade or commerce as defined by the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1, *et seq*.

325. Lifeway's representations set forth above were made with the intent that Plaintiffs and the other members of the Class rely on the, and Plaintiffs and the other members of the Class did justifiably rely on them.

326. Upon information and belief, the misrepresentations set forth above were known to be untrue at the time they were made by Lifeway.

327. The conduct set forth above constitutes unfair and deceptive conduct in violation of the Illinois Consumer Fraud and Deceptive Practices Act.

328. The unlawful and unfair business practices set forth above have and continue to injure the Class and cause damage in fact and the loss of money.

COUNT 7

(Violation of New York General Business Law § 349)

329-376. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 329-376 of Count 7.

377. Plaintiffs bring this claim on behalf of the New York Subclass under New York law.

378. Lifeway engaged in a false and misleading marketing and advertising claim, by representing that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, when in fact they did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

379. As set for above, by advertising, marketing, distributing and/or selling its ProBoost Products to Plaintiffs and the New York Subclass, Lifeway engaged in, and continues to engage in, deceptive acts and practices.

380. Plaintiffs and other members of the New York Subclass further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the members of the New

York Subclass will be irreparably harmed unless the unlawful actions of Lifeway are enjoined in that Lifeway will continue to falsely and misleadingly advertise that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions. Therefore, Plaintiffs and the New York Subclass request an order granting them injunctive relief ordering appropriate disclosures and/or disclaimers in the advertising, marketing and promotion of Lifeway's ProBoost Products.

381. Absent such injunctive relief, Lifeway will continue to advertise, market and sell ProBoost Products as containing *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and being clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, even though the ProBoost products lack *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and are not clinically proven to perform as advertised, to the detriment of consumers.

382. In this regard, Lifeway has violated, and continue to violate, G.B.L. § 349, which makes deceptive acts and practices unlawful. As a direct and proximate result of Lifeway's violation of G.B.L. § 349 as alleged above, Plaintiffs and other members of the New York Subclass have suffered damages, in an amount to be determined at trial.

COUNT 8

(Violation of New York General Business Law § 350)

383-430. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 383-430 of Count 8.

431. Plaintiffs bring this claim on behalf of the New York Subclass under New York law.

432. Lifeway engaged in a false and misleading marketing and advertising claim, by representing that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, when in fact they did not contain *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and were not clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions.

433. New York G.B.L. § 350-a defines "false advertising" as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect."

434. As set for above, by advertising, marketing, distributing and/or selling Lifeway's ProBoost Products to Plaintiffs and the New York Subclass, Lifeway engaged in, and continues to engage in, false advertising.

435. Plaintiffs and other members of the New York Subclass further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the members of the New York Subclass will be irreparably harmed unless the unlawful actions of Lifeway are enjoined in that Lifeway will continue to falsely and misleadingly advertise that its ProBoost Products contained *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and that Lifeway's ProBoost Products were clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions. Therefore,

Plaintiffs and the New York Subclass request an order granting them injunctive relief ordering appropriate disclosures and/or disclaimers in the advertising, marketing and promotion of Lifeway's ProBoost Products.

436. Absent such injunctive relief, Lifeway will continue to advertise, market and sell ProBoost Products as containing *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and being clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various medical conditions, even though the ProBoost products lack *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and are not clinically proven to perform as advertised, to the detriment of consumers.

437. In this regard, Lifeway has violated, and continue to violate, G.B.L. § 350, which makes deceptive acts and practices unlawful. As a direct and proximate result of Lifeway's violation of G.B.L. § 350 as alleged above, Plaintiffs and other members of the New York Subclass have suffered damages, in an amount to be determined at trial.

COUNT 9

(Violation of New Jersey Consumer Fraud Act, N.J.S.A. § 58:8-1 *et seq.*)

438-485. Plaintiffs and Class members reallege and incorporate paragraphs 1-48 of this Complaint as if fully set forth herein as paragraphs 438-485 of Count 9.

486. Plaintiffs bring this claim on behalf of the New Jersey Subclass under New Jersey law.

487. Lifeway misrepresented its ProBoost Products as containing *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019, and being clinically proven to "enhance the immune system" and "balance digestive health," aid in weight loss and benefit various

medical conditions, even though the ProBoost products lack *Lactobacillus acidophilus* NCFM and *Bifidobacterium lactis* HN019 and are not clinically proven to perform as advertised.

488. Plaintiffs and other members of the New Jersey Subclass have suffered an ascertainable loss caused by Lifeway's misrepresentations because: (a) they would not have purchased Lifeway's ProBoost Products on the same terms if the true facts concerning their actual contents and quality had been known and (b) the ProBoost Products did not have the quality, health benefits or value as promised.

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Lifeway, as follows:

A. For an order certifying the nationwide Class, the New York Subclass, and the New Jersey Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as Class Representatives and their attorneys as Class Counsel to represent the Class members;

B. For an order declaring that Lifeway's conduct violates the statutes referenced herein;

C. For an order finding in favor of the Plaintiffs, the nationwide Class, the New York Subclass, and the New Jersey Subclass on all counts asserted herein;

D. For an order awarding compensatory, treble, and punitive damages in amounts to be determined by the Court and/or jury;

E. For prejudgment interest on all amounts awarded;

F. For an order of restitution and all other forms of equitable monetary relief;

G. For injunctive relief as pleaded or as the Court may deem proper; and

H. For an order awarding Plaintiffs and the Class and subclasses their reasonable attorneys' fees and expenses and costs of suit.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable in this action.

Dated: May 8, 2012

BELONGIA SHAPIRO, LLP

By: /s Mark D. Belongia

Mark D. Belongia (ARDC#6269391)
Richard K. Hellerman (ARDC#6196915)
Harry O. Channon (ARDC#6282644)
Two First Financial Plaza
20 South Clark Street, Suite 300
Chicago, Illinois 60603
Tel: 312-662-1030
Fax: 312.662.1040
mbelongia@belongialaw.com
hchannon@belongialaw.com

FARUQI & FARUQI, LLP
Antonio Vozzolo
Jamie R. Mogil
369 Lexington Avenue, 10th Floor
New York, New York 10017
Tel: 212-983-9330
Fax: 212-983-9331
avozzolo@faruqilaw.com
jmogil@faruqilaw.com