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Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWIN ACUNA, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

MYOGENIX INCORPORATED; and
DOES 1-10, Inclusive,

Defendants.

Case No.: '13CV2673 JAH WVG

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff EDWIN ACUNA ("Plaintiff"), individually and on behalf of all others similarly situated, alleges the following on information and belief:

I. INTRODUCTION

1. MYOGENIX, INCORPORATED (hereinafter referred to as "Defendant") manufactures, markets, and sells "Hypershock" ("the Product") as an "Extreme Pre-Workout Product" which Defendant advertises as containing Citrulline Malate. Defendant claims that the Citrulline Malate in the Product, along with the other ingredients, is "engineered to accomplish 1 thing: RESULTS. Within 15 minutes of consumption, you'll experience a furious desire to Rage through a workout, and a pump you've probably never felt before in your life. At the end of your workout, the results will be obvious (keep track of your workout!) as you count up the sets, reps, and weight lifted." In reality, a laboratory analysis conducted utilizing state-of-the-art High

1 Pressure Liquid Chromatography (HPLC) protocol shows that the Product contains *no*
2 bio-available amount of Citrulline Malate, and certainly not at the limits stated on the
3 Defendant's Product label. The Product therefore cannot provide the results promised,
4 cannot perform as Defendant claims, and does not contain the active ingredients
5 promised.

6 2. Plaintiff brings this class action lawsuit to enjoin the ongoing deception of
7 tens of thousands of California and United States consumers by Defendant, and to
8 recover the money taken by this unlawful practice.

9 II. THE PARTIES

10 A. Plaintiff.

11 3. Plaintiff is a resident of California and purchased Defendant's Product in
12 2013. Plaintiff relied on Defendant's representations regarding the ingredients and
13 efficacy of the Product, as detailed herein, and but for those representations, Plaintiff
14 would not have purchased or paid as much for the Product.

15 B. Defendant.

16 4. Upon information and belief, Myogenix, Incorporated is a California
17 corporation that manufactures, markets, and sells the Product and does business across
18 the United States.

19 5. The true names and capacities of the Defendants sued herein as DOES 1
20 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such
21 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is
22 legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of
23 Court to amend this Complaint to reflect the true names and capacities of the DOE
24 Defendants when such identities become known.

25 6. At all relevant times, each and every Defendant was acting as an agent
26 and/or employee of each of the other Defendants and was acting within the course
27 and/or scope of said agency and/or employment with the full knowledge and consent of
28 each of the Defendants. Each of the acts and/or omissions complained of herein were

1 alleged and made known to, and ratified by, each of the other Defendants (Myogenix,
2 Incorporated and DOE Defendants will hereafter collectively be referred to as
3 “Defendant”).

4 **III. JURISDICTION AND VENUE**

5 7. A Court has diversity jurisdiction over this class action pursuant to 28
6 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the
7 amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a
8 class action in which some members of the class are citizens of different states than the
9 Defendant. *See* 28 U.S.C. §1332(d)(2)(A).

10 8. This Court also has personal jurisdiction over Defendant because
11 Defendant currently does business in this state.

12 9. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391 because
13 Defendant is subject to personal jurisdiction in this District and a substantial portion of
14 the conduct complained of herein occurred in this District.

15 **IV. FACTS**

16 10. Defendant manufactures, markets, and sells “Hypershock” as an “Extreme
17 Pre-Workout Product” that is “engineered to accomplish 1 thing: RESULTS. Within 15
18 minutes of consumption, you’ll experience a furious desire to Rage through a workout,
19 and a pump you’ve probably never felt before in your life. At the end of your workout,
20 the results will be obvious (keep track of your workout!) as you count up the sets, reps,
21 and weight lifted.”

22 11. Defendant further claims the Product underwent “12 months of
23 development, and much trial and error”, and specifically claims that its Product
24 contains Citrulline Malate. Indeed, Defendant lists Citrulline Malate as its *first*
25 ingredient its proprietary blend.

26 12. In reality, Defendant’s Product *contains no* bio-available amount of
27 Citrulline Malate, and certainly not at the limits stated on the Defendant’s Product label
28 – as confirmed by a recent laboratory analysis utilizing state-of-the-art High Pressure

1 Liquid Chromatography (HPLC) protocol. Thus, all of Defendant's claims based on
2 the ingredient's capabilities are completely false.

3 13. Defendant's misrepresentations regarding the Product's ingredients, and
4 therefore the efficacy assertions of its Product were designed to, and did, lead Plaintiff
5 and others similarly situated (collectively the "Class") to believe that the Product
6 contained Citrulline Malate, and thus could cause intense muscle building. Plaintiff and
7 members of the Class relied on Defendant's misrepresentations and would not have
8 paid as much, if at all, for the Product but for Defendant's misrepresentations.

9 14. Defendant sells a *one-month* supply of the Product for approximately
10 \$64.99 based on the preceding false advertising claims. As a result, Defendant has
11 wrongfully taken millions of dollars from consumers nationwide.

12 15. Plaintiff brings this class action lawsuit to enjoin the ongoing deception of
13 thousands of consumers by Defendant, and to recover the money taken by this unlawful
14 practice.

15 V. CLASS ACTION ALLEGATIONS

16 16. Plaintiff brings this class action for damages and other monetary relief on
17 behalf of the following class:

18 All persons located within the United States who purchased
19 Hypershock during the four years preceding the filing of this
20 complaint through the date of final judgment in this action
21 (the "Class").

22 17. This action is brought and may be properly maintained as a class action
23 pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(1)-
24 (3). This action satisfies the numerosity, typicality, adequacy, predominance and
25 superiority requirements of those provisions.

26 18. The Class is so numerous that the individual joinder of all of its members
27 is impractical. *See* Fed. R. Civ. P. 23(a)(1). While the exact number and identities of
28 Class members are unknown to Plaintiff at this time and can only be ascertained

1 through appropriate discovery, Plaintiff is informed and believes the Class includes tens
2 of thousands of members. Plaintiff alleges that the Class may be ascertained by the
3 records maintained by Defendant.

4 19. Common questions of fact and law exist as to all members of the Class
5 which predominate over any questions affecting only individual members of the Class.
6 *See* Fed. R. Civ. P. 23(a)(2). These common legal and factual questions, which do not
7 vary from class member to class member, and which may be determined without
8 reference to the individual circumstances of any class member, include, but are not
9 limited to, the following:

- 10 a. Whether Defendant's Product contains an active amount of
11 Citrulline Malate;
- 12 b. Whether Defendant's Product can provide the results promised;
- 13 c. Whether Defendant's representations regarding the Product were
14 false;
- 15 d. Whether Defendant knew that its representations were false;
- 16 e. Whether Defendant's conduct constitutes a violation of California's
17 false advertising law (Cal. Bus. & Prof. Code §§ 17500, et seq.);
- 18 f. Whether Defendant's conduct constitutes an unfair, unlawful, and/or
19 fraudulent business practice in violation of California's unfair
20 competition law (Cal. Bus. & Prof. Code §§ 17200, et seq.);
- 21 g. Whether Defendant's conduct constitutes a violation of California's
22 Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750, et seq.);
- 23 h. Whether Plaintiff and Class members are entitled to compensatory
24 damages, and if so, the nature of such damages;
- 25 i. Whether Plaintiff and Class members are entitled to restitutionary
26 relief; and
- 27 j. Whether Plaintiff and Class members are entitled to injunctive
28 relief.

1 20. Plaintiff's claims are typical of the claims of the members of the Class.
2 *See* Fed. R. Civ. P. 23(a)(3). Plaintiff and all members of the Class have sustained
3 injury and are facing irreparable harm arising out of Defendant's common course of
4 conduct as complained of herein. The losses of each member of the Class were caused
5 directly by Defendant's wrongful conduct as alleged herein.

6 21. Plaintiff will fairly and adequately protect the interests of the members of
7 the Class. *See* Fed. R. Civ. P. 23(a)(4). Plaintiff has retained attorneys experienced in
8 the prosecution of class actions, including complex consumer and mass tort litigation.

9 22. A class action is superior to other available methods of fair and efficient
10 adjudication of this controversy, since individual litigation of the claims of all Class
11 members is impracticable. *See* Fed. R. Civ. P. 23(b)(3). Even if every Class member
12 could afford individual litigation, the court system could not. It would be unduly
13 burdensome to the courts in which individual litigation of numerous issues would
14 proceed. Individualized litigation would also present the potential for varying,
15 inconsistent, or contradictory judgments, and would magnify the delay and expense to
16 all parties and to the court system resulting from multiple trials of the same complex
17 factual issues. By contrast, the conduct of this action as a class action, with respect to
18 some or all of the issues presented herein, presents fewer management difficulties,
19 conserves the resources of the parties and of the court system, and protects the rights of
20 each Class member.

21 23. The prosecution of separate actions by thousands of individual Class
22 members would create the risk of inconsistent or varying adjudications with respect to,
23 among other things, the need for and the nature of proper notice, which Defendant must
24 provide to all Class members. *See* Fed. R. Civ. P. 23(b)(1)(A).

25 24. The prosecution of separate actions by individual class members would
26 create a risk of adjudications with respect to them that would, as a practical matter, be
27 dispositive of the interests of the other Class members not parties to such adjudications
28 or that would substantially impair or impede the ability of such non-party Class

1 members to protect their interests. *See* Fed. R. Civ. P. 23(b)(1)(B).

2 25. Defendant has acted or refused to act in respects generally applicable to
3 the Class, thereby making appropriate final injunctive relief with regard to the members
4 of the Class as a whole. *See* Fed. R. Civ. P. 23(b)(2).

5 **VI. CAUSES OF ACTION**

6 **FIRST CAUSE OF ACTION**

7 **VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW**

8 **(CAL. BUS. & PROF. CODE §§ 17500, *ET SEQ.*)**

9 **(By Plaintiff and on Behalf of the Class Against Defendants)**

10 26. Plaintiff incorporates by this reference the allegations contained in the
11 paragraphs above as if fully set forth herein.

12 27. Plaintiff has standing to pursue this cause of action because Plaintiff has
13 suffered injury in fact and has lost money as a result of Defendant's actions as set forth
14 herein. Specifically, Plaintiff purchased the Product in reliance on Defendant's false
15 labeling, ingredient claims, and marketing claims.

16 28. Defendant has engaged in false advertising as it has disseminated false
17 and/or misleading labeling and representations about the Product and its ingredients.

18 29. Defendant knew or should have known by exercising reasonable care that
19 its representations were false and/or misleading. During the Class Period, Defendant
20 engaged in false advertising in violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*, by
21 misrepresenting in its labeling, advertising, and marketing of the Product to Plaintiff,
22 Class members, and the consuming public, that its Product contained certain ingredients
23 when it did not.

24 30. By disseminating and publishing these statements in connection with the
25 sale of the Product, Defendant has engaged in and continues to engage in false
26 advertising in violation of Bus. & Prof. Code §§ 17500, *et seq.*

27 31. As a direct and proximate result of Defendant's conduct, as set forth
28 herein, Defendant has received ill-gotten gains and/or profits, including but not limited

1 to, money. Therefore, Defendant has been unjustly enriched. Pursuant to Cal. Bus. &
 2 Prof. Code § 17535, Plaintiff requests restitution and restitutionary disgorgement for all
 3 sums obtained in violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.* Plaintiff seeks
 4 injunctive relief, restitution, and restitutionary disgorgement of Defendant's ill-gotten
 5 gains as specifically provided in Cal. Bus. & Prof. Code § 17535.

6 32. Plaintiff and Class members seek to enjoin Defendant from engaging in
 7 these wrongful practices, as alleged herein, in the future. There is no other adequate
 8 remedy at law and if an injunction is not ordered, Plaintiff and the Class will suffer
 9 irreparable harm and/or injury.

10 **SECOND CAUSE OF ACTION**

11 **UNLAWFUL, FRAUDULENT & UNFAIR BUSINESS PRACTICES**

12 **(CAL. BUS. & PROF. CODE §§ 17200, *ET SEQ.*)**

13 **(By Plaintiff and on Behalf of the Class Against Defendants)**

14 33. Plaintiff incorporates by this reference the allegations contained in the
 15 paragraphs above as if fully set forth herein.

16 34. Plaintiff has standing to pursue this cause of action because Plaintiff has
 17 suffered an injury in fact and has lost money as a result of Defendant's actions as set
 18 forth herein. Specifically, Plaintiff purchased the Product in reliance on Defendant's
 19 ingredient claims and efficacy assertions based thereon. Plaintiff used the Product as
 20 directed, but it was not of the standard, quality and grade advertised.

21 35. Defendant's actions as alleged in this Complaint constitute an unfair or
 22 deceptive business practice within the meaning of California Business and Professions
 23 Code §§ 17200, *et seq.*, the Unfair Competition Law ("UCL"), in that Defendant's
 24 actions are unfair, unlawful, and fraudulent, and because Defendant has made unfair,
 25 deceptive, untrue, or misleading statements in advertising media, including the Internet,
 26 within the meaning of California Business and Professions Code §§ 17200, *et seq.*

27 36. Defendant knew or should have known by exercising reasonable care that
 28 its representations were false and/or misleading. During the Class Period, Defendant

engaged in unfair, unlawful, and fraudulent business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, by misrepresenting in its labeling, advertising, and marketing of the Product to Plaintiff, Class members, and the consuming public that, the Product contained the ingredients claimed and was effective based thereon.

37. Each of the aforementioned representations alleged in this Complaint was false and misleading because the Product did not contain ingredients Defendant explicitly labeled the Product as containing.

38. Defendant's business practices, as alleged herein, are unfair because they offend established public policy and/or are immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to consumers in that consumers are misled by the claims made with respect to the Product as set forth herein.

39. Defendant's business practices, as alleged herein, are unlawful because they violate the False Advertising Law, as alleged in the preceding section.

40. Similarly, Defendant's business practices, as alleged herein, violate provisions of California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law"), Cal. Health & Safety Code § 109875 *et seq.*¹ The Sherman Law incorporates "[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the [FDCA]" as "the food labeling regulations of this state." *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1087 (2008); *see also* Cal. Health & Safety Code § 110100(a). Defendant has violated the Sherman Law in the following respects:

- a. Defendant has misbranded the Product in violation of Cal. Health & Safety Code § 110760: "It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded." Under the Sherman Law, "Any food is misbranded if

¹ California's UCL prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the [FAL]." In essence, "[s]ection 17200 borrows violations from other laws by making them independently actionable as unfair competitive practices ... [and] a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999).

its labeling is false or misleading in any particular” (Cal. Health & Safety Code § 110660), or if “... its labeling does not conform with the requirements for nutrition labeling as set forth in Section 403(q) (21 U.S.C. Sec. 343(q))² of the federal act and the regulations adopted pursuant thereto.” (Cal. Health & Safety Code § 110665.)

b. Defendant has also violated the Sherman Law by disseminating false advertising of a food or selling a food that is falsely advertised. (See Cal. Health & Safety Code § 110390 (“It is unlawful for any person to disseminate any false advertisement of any food An advertisement is false if it is false or misleading in any particular.”); Cal. Health & Safety Code § 110395 (“It is unlawful for any person to manufacture, sell, . . . or offer for sale any food . . . that is falsely advertised.”); Cal. Health & Safety Code § 110398 (“It is unlawful for any person to advertise any food . . . that is adulterated or misbranded.”))

c. Defendant has also violated several of the food labeling regulations promulgated by the Food & Drug Administration, which California’s Sherman Law incorporates, with respect to its Product. Cal. Health & Safety Code § 110100(a). Namely, the label of a dietary supplement that is offered for sale is required to bear nutrition labeling in compliance with 21 C.F.R. § 101.36. See 21 C.F.R. § 101.36(a). Defendant’s label for the Product is therefore

² 21 U.S.C. § 343(q)(5)(F) provides, “A dietary supplement product . . . shall comply with the requirements of subparagraphs (1) and (2) in a manner which is appropriate for the product and which is specified in regulations of the Secretary which shall provide that—(i) nutrition information shall first list those dietary ingredients that are present in the product in a significant amount and for which a recommendation for daily consumption has been established by the Secretary, except that a dietary ingredient shall not be required to be listed if it is not present in a significant amount, and shall list any other dietary ingredient present and identified as having no such recommendation; (ii) the listing of dietary ingredients shall include the quantity of each such ingredient (or of a proprietary blend of such ingredients) per serving” 21 U.S.C. § 343(q)(5)(F)(i)-(ii).

1 required to contain information on dietary ingredients that have a
2 Reference Daily Intake (RDI) or a Daily Reference Value (DRV)
3 and their subcomponents as well as information on dietary
4 ingredients for which RDI's and DRV's have not been established
5 ("other dietary ingredients").³ *Id.* §§ 101.36(b)(2), (b)(3). "The
6 quantitative amount by weight per serving of other dietary
7 ingredients shall be presented in the same manner as the
8 corresponding information required" for information on dietary
9 ingredients that have a RDI or DRV or "shall be presented
10 immediately following the name of the other dietary ingredient." *Id.*
11 § 101.36(b)(3)(ii). The dietary ingredients that have a RDI or DRV
12 are required to be declared on a nutrition label "when they are
13 present in a dietary supplement in quantitative amounts by weight
14 that exceed the amount that can be declared as zero in nutrition
15 labeling of foods." *Id.* § 101.36(b)(2). Dietary ingredients
16 contained in a proprietary blend "shall be declared in descending
17 order of predominance by weight." *Id.* § 101.36(c)(2). According
18 to 21 C.F.R. § 101.4(a), "Ingredients required to be declared on the
19 label or labeling of a food ... shall be listed by common or usual
20 name **in descending order of predominance by weight....**"
21 Defendant has failed to meet these requirements as it lists as its first
22 ingredient in its proprietary blend, Citrulline Malate, amidst other
23 ingredients when HPLC has revealed there is *no* bio-available
24 amount of Citrulline Malate contained in the Product. Therefore, *all*

25
26
27 ³ The dietary ingredients that have a RDI or a DRV and are to be declared are total
28 calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total
carbohydrate, dietary fiber, sugars, protein, vitamin A, vitamin C, calcium and iron. 21
C.F.R. § 101.36(b)(2).

1 ingredients are falsely listed in violation of 21 C.F.R. §§ 101.4(a)
2 and 101.36(c)(2).

3 d. Defendant similarly violated the Sherman Law by failing to test its
4 Product in accordance with 21 C.F.R. § 111.70(e) to “ensure the
5 quality of the dietary supplement.” This requirement must be read
6 in conjunction with 21 C.F.R. § 111.75(a) which demands that
7 “Before you use a component, you must: (1)(i) Conduct at least one
8 appropriate test or examination to verify the identity of any
9 component that is a dietary ingredient....” Thus, even if ingredients
10 are present in products in small amounts, they are nonetheless
11 dietary ingredients and finished products which must be tested to
12 verify their actual presence. As the HPLC test confirms, there is *no*
13 bio-available amount Citrulline Malate in the Product and as such,
14 either Defendant completely failed to perform the required tests and
15 is *unaware* of the falsity of its labeling, or Defendant put its Product
16 on the market claiming certain ingredients were present even though
17 test results affirmatively confirmed they were not present in the
18 Product.

19 e. Defendant lastly violates the Sherman Law with respect to both 21
20 C.F.R. § 111.70(e) and 21 C.F.R. § 111.75(a), which are part of the
21 Food & Drug Administration’s Good Manufacturing Practices
22 requirements, by producing, marketing, and selling adulterated
23 products. *See* 21 C.F.R. § 111 *et seq.* A supplement is
24 “adulterated” if “it has been prepared, packed, or held under
25 conditions that do not meet current good manufacturing practice
26 regulations....” 21 U.S.C. § 342(g)(1). Further, if a supplement is
27 adulterated, it is not a proper “dietary supplement” and cannot be
28 labeled as such. Here, Defendant has labeled each its Product as a

1 “dietary supplement” thereby mandating that Defendant comport
2 with the good manufacturing practice regulations. Defendant has
3 blatantly and illegally failed to do so and thus, the Product is an
4 adulterated substance according to the FDCA regulations.

5 41. Defendant’s business practices, as alleged herein, are fraudulent because
6 they are likely to, and did, deceive customers—including Plaintiff and members of the
7 Class—into believing that the Product has characteristics, ingredients, and benefits it
8 does not have.

9 42. Defendant’s wrongful business practices constituted, and constitute, a
10 continuing course of conduct of unfair competition since Defendant is marketing and
11 selling its Product in a manner likely to deceive the public.

12 43. As a direct and proximate result of Defendant’s wrongful business
13 practices in violation of Business and Professions Code §§ 17200, *et seq.*, Plaintiff and
14 members of the Class have suffered economic injury by losing money as a result of
15 purchasing the Product. Plaintiff and members of the Class would not have purchased
16 or would have paid less for the Product had they known that it was not as represented.

17 44. Pursuant to Business and Professions Code § 17203, Plaintiff and the Class
18 seek an order of this Court enjoining Defendant from continuing to engage in unlawful,
19 unfair, or deceptive business practices and any other act prohibited by law, including
20 those set forth in the Complaint. Plaintiff and the Class also seek an order requiring
21 Defendant to make full restitution of all moneys they wrongfully obtained from
22 Plaintiff and the Class.

23 **THIRD CAUSE OF ACTION**

24 **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**

25 **(CAL. CIV. CODE §§ 1750, *ET SEQ.*)**

26 **(By Plaintiff and on Behalf of the Class Against Defendants)**

27 45. Plaintiff incorporates by this reference the allegations contained in the
28 paragraphs above as if fully set forth herein.

1 46. Plaintiff has standing to pursue this cause of action because Plaintiff has
2 suffered an injury in fact and has lost money as a result of Defendant's actions as set
3 forth herein. Specifically, Plaintiff purchased the Product in reliance on Defendant's
4 claims about the Product's ingredients, and the efficacy assertions based thereon.
5 Plaintiff used the Product as directed, but it was ineffective because it lacked the
6 ingredient, Citrulline Malate, advertised by Defendant.

7 47. Defendant has engaged in and continues to engage in business practices in
8 violation of California Civil Code §§ 1750, *et seq.* (the "Consumers Legal Remedies
9 Act") by making false representations concerning the Product's ingredients and
10 capabilities based thereon. These business practices are misleading and/or likely to
11 mislead consumers and should be enjoined.

12 48. Defendant has engaged in deceptive acts or practices intended to result in
13 the sale of the Product in violation of Civil Code § 1770. Defendant knew and/or
14 should have known that its representations of fact concerning the ingredients of the
15 Product were material and likely to mislead the public. Defendant affirmatively
16 misrepresented that the Product contained certain ingredients and benefits which it did
17 not have.

18 49. Defendant's conduct alleged herein violates the Consumers Legal
19 Remedies Act, including but not limited to, the following provisions: (1) using
20 deceptive representations in connection with goods or services in violation of Civil
21 Code § 1770(a)(4); (2) representing that goods or services have sponsorship, approval,
22 characteristics, ingredients, uses, benefits, or quantities which they do not have in
23 violation of Civil Code § 1770(a)(5); and/or (3) advertising goods or services with
24 intent not to sell them as advertised in violation of Civil Code § 1770(a)(9). As a direct
25 and proximate result of Defendant's conduct, as set forth herein, Defendant has
26 received ill-gotten gains and/or profits, including but not limited to, money. Therefore,
27 Defendant has been unjustly enriched.

1 5. For both pre-judgment and post-judgment interest at the maximum
2 allowable rate on any amounts awarded;

3 6. For Plaintiff's costs of the proceedings herein;

4 7. For reasonable attorneys' fees as allowed by statute; and

5 8. For any and all such other and further relief that this Court may deem just
6 and proper.

7 **DEMAND FOR JURY TRIAL**

8 Plaintiff hereby demands a trial by jury of all claims and causes of action so
9 triable in this lawsuit.

10 Dated: November 6, 2013

NEWPORT TRIAL GROUP
A Professional Corporation
Scott J. Ferrell

11
12
13
14
15 By: _____

Scott J. Ferrell
Attorney for Plaintiff and the Class

EXHIBIT 1

NEWPORT TRIAL GROUP

A Professional Corporation

October 28, 2013

CERTIFIED MAIL – Return Receipt Requested

Myogenix Corp.
2309 A Street
Santa Maria, CA 93455

*Re: Notification Pursuant to California Civil Code §1782 and UCC Notice
Requirements*

To whom it may concern:

Please be advised that this demand letter is meant to comply with the requirements of California Civil Code §1782 and similar statutes of other states on behalf of our client and a nationwide class of consumers (“Plaintiffs”). This letter includes a summary of Plaintiffs’ claims regarding the practices of Myogenix Corp. (hereafter referred to as “Defendant”) that Plaintiffs allege are false and misleading and violate the Consumer Legal Remedies Act (“CLRA”) and companion statutes in other states.

Defendant manufactures, markets, and sells “Hypershock” (the “Product”) as containing citrulline malate. However, a laboratory test conducted via high pressure liquid chromatography (HPLC) protocol revealed that the Product contains no citrulline malate at the quantitation limit stated on the Product’s label. Indeed, the HPLC protocol revealed there was no bio-effective amount of citrulline malate contained in the Product.

As such, Defendant’s Product has no ability to provide the results promised, cannot perform as Defendant claims, and does not contain the active ingredients promised. Defendant is aware the Product does not contain detectable amounts of the ingredient claimed and that the Product cannot cause the exaggerated results stated, and further, that there exists no proven results. Even knowing the foregoing, Defendant continued to market and sell the Product as before.

By misrepresenting its Product and its qualities, Defendant has violated California’s consumer protection laws and companion statutes in other states. Specifically, in addition to violating Sections 17200 and 17500 et seq. of the California Business and Professions Code and various common laws, Defendant has violated the Consumer Legal Remedies Act in at least the following respects:

- a. in violation of Civil Code § 1770(a)(5), Defendant has represented that its products have certain characteristics and/or benefits, when in fact they do not;

Myogenix Corp.

Page 2

- b. in violation of Civil Code § 1770(a)(7), Defendant has represented that its products are of a particular standard, quality, or grade when they are in fact of another; and
- c. in violation of Civil Code § 1770(a)(9), Defendant has advertised its products with the intent not to sell them as advertised.

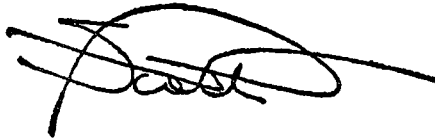
Pursuant to California Civil Code § 1780(a)(2), Plaintiffs request that:

- i. Defendant publicly discloses accurate statements regarding the true quality and ingredients of its Product, Defendant refunds to all customers the amounts that were wrongly charged, within the statutory allowable period for class actions, due to Defendant's improper practices; and
- ii. Defendant halts all unlawful practices described above.

Please advise me if you will accept service of the Complaint in this action in return for a standard extension of time to respond.

Very truly yours,

NEWPORT TRIAL GROUP
A Professional Corporation

A handwritten signature in black ink, appearing to read "Scott J. Ferrell", with a long horizontal stroke extending to the right.

Scott J. Ferrell, Esq.

SJF/ka

EXHIBIT 2

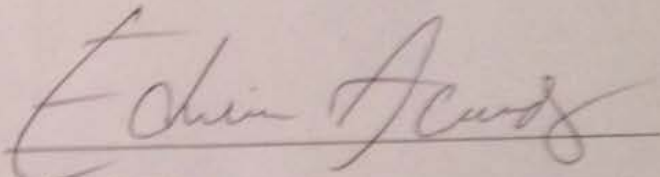
1 I, Edwin Acuna, declare as follows:

2 1. I am a Plaintiff in this action, and am a citizen of the State of California. I have
3 personal knowledge of the facts herein and, if called as a witness, I could and would testify
4 competently thereto.
5

6 2. The Complaint in this action, filed concurrently with this Declaration, is filed in the
7 proper place for trial under Civil Code Section 1780(d) in that San Diego County is a county in which
8 Defendants are doing business.
9

10 I declare under penalty of perjury under the laws of the State of California that the foregoing is
11 true and correct.

12
13 Dated: November 6, 2013

14 
Edwin Acuna

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

EDWIN ACUNA, individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Newport Trial Group
4100 Newport Place Dr., Suite 800
Newport Beach, CA 92660

DEFENDANTS

MYOGENIX INCORPORATED; and DOES 1-10, Inclusive

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'13CV2673 JAH WVG**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|---------------------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input checked="" type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Class Action Fairness Act, 25 USC §1332 ; 28:1331 - Federal Question
 Brief description of cause:
False advertising; Unfair Competition law; Consumer Legal Remedies Act

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE
11/06/2013

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____