

1 Michael McShane (SB 127944)  
Jonas P. Mann (SB 263314)  
2 Dana M. Isaac (SB 278848)  
AUDET & PARTNERS, LLP  
3 221 Main Street, Suite 1460  
San Francisco, CA 94105  
4 Tel: (415) 568-2555  
Fax: (415) 568-2556  
5

Shane Rowley (*Pro hac vice* to be filed)  
6 Nancy A. Kulesa (*Pro hac vice* to be filed)  
Matthew Rand (*Pro hac vice* to be filed)  
7 LEVI & KORSINSKY, LLP  
30 Broad Street, 24th Floor  
8 New York, New York 10004  
Tel: (212) 363-7500  
9 Fax: (212) 363-7171  
srowley@zlk.com  
10

11 *Attorneys for Plaintiff*

12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 VERNON STANTON, individually and on )  
behalf of all others similarly situated, )

Case No. 3:14-cv-00294

16 Plaintiff, )

**CLASS ACTION COMPLAINT**

17 v. )

18 23ANDME, INC., )

JURY TRIAL DEMANDED

19 Defendant. )  
20 )  
21 )

22 Plaintiff Vernon Stanton (“Plaintiff”), by and through undersigned counsel, on behalf of  
23 himself and all others similarly situated, brings this Class Action Complaint against 23andMe, Inc.  
24 (“23” or the “Company”). Plaintiff makes the following allegations pursuant to the investigation of  
25 his counsel and based upon information and belief, except as to allegations specifically pertaining to  
26 himself, which are based on personal knowledge.  
27  
28

**Introduction and Summary of Action**

1  
2 1. This is a consumer class action brought on behalf of all persons and entities in the  
3 United States who have purchased 23’s Personal Genome Service (“PGS”) to find out about their  
4 genetics-related health problems (“Health Kit”).

5 2. 23 sells the Health Kit through its website, www.23andme.com, and third party  
6 vendors such as Amazon.com. When one of 23’s customers purchase any PGS, including the  
7 Health Kit, 23 sends the customer a DNA Collection Kit (“DNA Kit”), which includes a saliva  
8 swab. The customer uses the swab to collect a saliva sample, places the swab back in the DNA Kit,  
9 and mails the Kit to 23. 23 then purportedly runs a series of scientific analyses on the DNA  
10 contained in the saliva sample. 23 asserts that this analysis can provide its customers with accurate  
11 information about their genetic predisposition to a range of health factors such as coronary artery  
12 disease and arthritis.

13  
14 3. Though 23’s claims are designed to sound scientific, they are not in fact based on  
15 any scientific testing. The Company provides no clinical data to establish that its Health Kit is  
16 accurate, reliable, or safe for its advertised use. Indeed, 23 failed to obtain the necessary  
17 authorization from the Food and Drug Administration (“FDA”) to market, promote, and advertise  
18 the Health Kit.

19  
20 4. 23 continued its marketing—a clear violation of the Federal Food, Drug, and  
21 Cosmetic Act (“FDC Act”)—until December 6, 2013, when the FDA demanded that 23 suspend its  
22 health-related genetic tests until the FDA could complete its regulatory review.

23  
24 5. 23’s customers reasonably relied on 23’s false and unsubstantiated claims when they  
25 purchased the Health Kits. As a result of their reliance, 23’s customers have been wronged and  
26 financially harmed.

**The Parties**

1  
2 6. Plaintiff Vernon Stanton is a resident of Hobbs, New Mexico.

3 7. Plaintiff purchased two Health Kits from 23 on September 22, 2013 from  
4 23andMe.com. Plaintiff paid \$193.15 for his Kits, including \$14.95 for shipping.

5 8. 23andMe, Inc. is a privately held Delaware Corporation with its headquarters and  
6 principal place of business in Mountain View, Santa Clara County, California.

7  
8 **Jurisdiction**

9 9. This Court has subject matter jurisdiction over this action pursuant to the Class  
10 Action Fairness Act, 28 U.S.C. § 1332(d), because Plaintiff and Defendant are citizens of different  
11 states, Plaintiff has alleged a class action, and the amount in controversy exceeds \$5,000,000,  
12 exclusive of interest and costs, and there are more than 100 members of the prospective class.

13 10. The Company has its principal place of business in the State of California. 23  
14 conducts substantial business in California, including the sale and distribution of the Health Kits  
15 that are the subject of this suit. Because 23 has sufficient contacts with California and it  
16 purposefully availed itself of California's laws and markets, this Court may exercise personal  
17 jurisdiction over the Company.

18  
19 11. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of  
20 the events, omissions, and acts giving rise to the claims occurred in this District. 23 has its principal  
21 place of business in this District.

22 **Class Action Allegations**

23  
24 12. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules  
25 of Civil Procedure on behalf of a class consisting of all persons within the United States who  
26 purchased the Health Kit (the "Class").

1 13. Excluded from the Class are: defendants; the officers, directors, or employees of any  
2 defendant; the parent companies and subsidiaries of 23; and 23's legal representatives and heirs or  
3 assigns. Also excluded from the class are any federal, state, or local governmental entities, any  
4 judicial officer presiding over this action and the members of his/her immediate family and judicial  
5 staff, and any juror assigned to this action.

6 14. This action is properly maintainable as a class action.

7  
8 15. The Class is so numerous that joinder of all members is impracticable. Though the  
9 exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained  
10 through discovery, Plaintiff believes that there are thousands of members in the Class.

11 16. Question of law and fact common to the Class include, *inter alia*:

12 a. Whether 23's Health Kit used proven scientific methods to obtain the  
13 analysis promised for Class members;

14 b. Whether the results obtained from the Health Kit are reliable and valid;

15 c. Whether 23 advertised and sold the Health Kit with knowledge that it was not  
16 proven by scientific methods, was unreliable, and/or not valid;

17 d. Whether the arbitration clause in 23's Terms of Service is unconscionable  
18 and/or whether it applies to the entire Class;

19 e. Whether 23's Terms of Service contain unconscionable and/or illusory terms  
20 and language;

21 f. Whether 23 obtained appropriate and timely approval from the FDA to  
22 market and sell the Health Kits;

23 g. Whether Class members detrimentally relied on 23's representations about its  
24 Health Kit when making their purchases;

25 h. Whether 23 was unjustly enriched;

1 i. Whether 23 engaged in unfair, false, misleading, and/or deceptive trade  
2 practices; and

3 j. Whether the Class is entitled to damages and/or other relief as a result of 23's  
4 wrongful conduct.

5 17. Plaintiff's claims are typical of the claims of the other members of the Class.  
6 Plaintiff and the other members of the Class have sustained damages as a result of 23's wrongful  
7 conduct as alleged herein.

8 18. Plaintiff is committed to prosecuting this action, will fairly and adequately protect  
9 the interests of the Class, and has no interests contrary to it or in conflict with those of the Class that  
10 Plaintiff seeks to represent.

11 19. The prosecution of separate actions by individual members of the Class would create  
12 the risk of inconsistent or varying adjudications for the members of the Class. Inconsistent rulings  
13 in separate actions might also establish incompatible standards of conduct for 23.  
14

15 20. Conflicting adjudications for individual Class members might, as a practical matter,  
16 be dispositive of the interests of the other members who are parties to the adjudication or  
17 substantially impair or impede their ability to protect their interests.

18 21. 23 has acted on grounds generally applicable to the Class, making appropriate final  
19 relief with respect to the Class as a whole.  
20

21 **Further Substantive Allegations**

22 *23's Business Model*

23 22. 23 sells two different types of PGS kits, the Health Kit and an ancestry kit. Each kit  
24 tests a customer's DNA for certain types of information. The Health Kit tests a customer's health-  
25 related genetic information and the ancestry kit tests a customer's genetic lineage.  
26  
27  
28

1           23.     Once a customer purchases a PGS kit from 23, 23 sends the customer a DNA Kit.  
2 The DNA Kit comes with a saliva swab, mailing materials, and instructions. The customer uses the  
3 swab to take a sample of his or her saliva. Then, using the mailing materials, the customer sends  
4 the swab back to 23, where 23 purportedly performs a series of scientific tests on the customer's  
5 DNA. Which tests 23 performs is based on the PGS kit that the customer purchased. If the  
6 customer bought the Health Kit, 23 asserts that it performs tests designed to determine an  
7 individual's genetics-related health traits, including over 240 "conditions."  
8

9           24.     Once 23 has allegedly performed these analyses through undisclosed testing  
10 methods, the Company sends a "report" back to the customer that 23 claims to be scientifically  
11 accurate.

12 *23's False and Misleading Representations Concerning the Health Kit's Benefits*

13           25.     23 makes the following false and misleading claims concerning the efficacy of the  
14 Health Kit on its website:

15                   Learn hundreds of things about your health. Using your DNA  
16 information, 23andMe helps you know more about your health so you  
17 can take an active role in managing it. With reports on over 240+  
18 health conditions and traits, here are a few of the things you'll learn  
about you.

19   \*\*\*\*\*

20                   Plan for the future. Find out if your children are at risk for inherited  
21 conditions, so you can plan for the health of your family.

22   \*\*\*\*\*

23                   Living well starts with knowing your DNA.

24   \*\*\*\*\*

25                   Health tools – Document your family health history, track inherited  
26 conditions, and share the knowledge.

27   \*\*\*\*\*

1 Drug response – Arm your doctor with information on how you might  
2 respond to certain medications.

3 \*\*\*\*\*

4 Below are a few examples [(diabetes, arthritis, coronary heart disease,  
5 breast cancer, plavis, lactose intolerance)] where we can help you  
6 learn more. And when you know more, you can make better lifestyle  
7 choices, look out for common conditions and take steps toward  
8 mitigating serious diseases.

9 23andMe is a DNA analysis service providing information and tools  
10 for individuals to learn about and explore their DNA. We use the  
11 Illumina HumanOmniExpress-24 format chip . . . . Our chip consists  
12 of a fully custom panel of probes for detecting single nucleotide  
13 polymorphisms (SNPs) selected by our researchers. The selection  
14 was made to maximize the number of actionable health and ancestry  
15 features available to customers as well as offer flexibility for future  
16 research.

17 *The FDA Bars 23 from Selling its Health Kit*

18 26. Under the FDC Act, the FDA is authorized to ensure that the marketing and  
19 advertising made by companies like 23 are generally backed up by scientific proof and valid  
20 research. The FDA ensures that the tests that comprise the Health Kits live up to the assertions  
21 made about them by 23 in its marketing materials.

22 27. On November 22, 2013, the FDA sent 23 a Warning Letter (the “November Letter”).  
23 In sum and substance, the FDA informed 23 that it had not received approval to market its Health  
24 Kit and, as such, it was in violation of the FDC Act.

25 28. Specifically, in the November Letter, the FDA expressed doubts about whether the  
26 PGS tests, especially the tests associated with the Health Kit, performed as 23 warranted that they  
27 did. The FDA also said that it was concerned about the public danger surrounding false positives  
28 and negatives for serious health conditions purportedly tested by the Health Kit.

29 29. The FDA stated that, “[t]o date, [23] has failed to provide adequate information to  
30 support a determination that the [Health Kits are] substantially equivalent to a legally marketed

1 predicate for any of the uses for which you are marketing it; no other submission for the [Health  
2 Kits] that you are marketing has been provided under section 510(k) of the [FDC] Act, 21 U.S.C. §  
3 360(k).”

4 30. The FDA also said in the November Letter that, “The risk of serious injury or death  
5 is known to be high when patients are either non-complaint or not properly dosed; combined with  
6 the risk that a direct-to-customer test result may be used by a patient to self-manage, serious  
7 concerns are raised if test results are not adequately understood by patients or if incorrect results are  
8 reported.”  
9

10 31. Because 23 failed to satisfy the FDA’s demands, the FDA ordered 23 to cease selling  
11 the Health Kit on December 6, 2013. The Company’s website states: “At this time, we have  
12 suspended our health-related genetic tests to comply with the [FDA’s] directive to discontinue new  
13 consumer access during our regulatory review process. In the future, you may be able to receive  
14 health-related results, dependent upon FDA marketing authorization.”  
15

16 32. Thus, the November Letter—and the Company’s response to it—make clear that the  
17 Company lacked the necessary scientific data to backup its wide-ranging claims about the Health  
18 Kit’s efficacy.

19 *23 Should Have Known that its Representations Were Misleading*

20 33. The sheer volume and consistency of the complaints made by customers should have  
21 alerted 23 to the misleading nature of its marketing.  
22

23 34. Such reviews include:

24 I ordered a kit several weeks ago, but I have yet to return it. Why?  
25 Because I read the (incredibly detailed) fine print of their privacy  
26 policy and started doing some research on genetic privacy. Even if  
27 you decide to opt-out of 23andMe's research program and don't give  
28 them any "Self-Reported" information, 23andMe still sells their  
partners more than enough data to connect your name and location  
(among other things) to your genetic information. For instance,  
23andMe collects your "Web Behavior Information"...including your  
IP address, operating system, your ISP, browser type, cookies,



1 anything you mention in your emails to customer support, and worst  
2 of all: web beacons. These are special cookies that track all of your  
3 browsing history. A cookie from Facebook can instantly give  
4 23andMe access to your FB profile name. Any profile picture you  
5 post on 23andMe can be downloaded by an app developer. App  
6 developers are given access to your traits. How many people in a  
7 specific zip code of a small town have 1) red, curly hair 2) are good at  
8 sprinting 3) have bad teeth 4) poor memory 5) and diabetes? All of  
9 this data -- combined with your "web behavior and genetic  
10 information -- makes it incredibly easy for any app developer (or drug  
11 company) to identify you (even if the developer (technically) only has  
12 access to your "anonymous" id number). It is especially easy to  
13 identify males who have some sort of relatively uncommon disease.  
14 This is a big issue in politics right now. It is called "re-identification"  
15 in case you want to learn more about it. You can also google  
16 "23andMe's API." Overall, 23andMe's privacy FAQ is very  
17 misleading, and possibly illegal.

18 \*\*\*\*\*

19 Even after sending me a replacement test they can't read my DNA.  
20 They are offering to refund the money I paid for the test but offered  
21 NO explanation as to why they couldn't read it. I followed the  
22 directions to the letter both times. This concerns me.

23 \*\*\*\*\*

24 Let's start with the lack of a phone number. If you can find the contact  
25 page, then you're lucky. A friend got the link to contact them through  
26 another site, and that was the only way I could. Anyway.. my ancestry  
27 results were vague and totally missed the mark. My health report was  
28 amusing to say the least. Apparently I have curly red hair and I'm  
likely to have either brown or green eyes. Well, I have straight jet  
black hair and my eyes are as dark, too. For my husband's it claims he  
doesn't have the bald gene ---- tell that to his bald spot. It claims I can  
eat dairy. Nope. Never could. The list goes on and on. It's a waste of  
money and I'm glad the FDA stepped in to stop them. All of the  
supporters of 23andme blindly accept their results, but most are not  
able to read raw data and decipher what is what. I cannot express my  
disappointment more, really. If only I could give this product a zero  
rating for a big fat fail.

\*\*\*\*\*

Not worth the risk of a very questionable study. The Terms of  
Agreement are invasive and not like any requirements for a legitimate  
study. I was very concerned about my private information, how it  
would be used, and to whom it would be made available.

**Plaintiff's Individual Allegations**

1  
2 35. On September 22, 2013, Plaintiff purchased two Health Kits from 23's website,  
3 23andMe.com.

4 36. Plaintiff spent \$193.15 on the two Kits, \$99.00 for the first and \$79.20 for the  
5 second. The shipping cost was \$14.95.

6 37. Plaintiff purchased one Kit for himself and the second for his wife.

7  
8 38. Plaintiff purchased the Kits so that he and his wife could learn more about their  
9 genetics-based health conditions.

10 39. After receiving his DNA Kit in the mail, Plaintiff and his wife each collected their  
11 saliva samples, making sure to follow the instructions carefully. Plaintiff then returned the DNA  
12 Kits to 23 through the mail.

13 40. On December 6, 2013, Plaintiff received an email from the Chief Executive Officer  
14 of the Company stating: "23andMe has complied with the FDA's directive and stopped offering  
15 new consumers access to health-related genetic results while the company moves forward with the  
16 agency's regulatory review processes. Be sure to refer to our 23andMe blog for updates."

17  
18 41. After receiving the December 6, 2013 email, Plaintiff wanted to call 23 to express  
19 his frustration. However, after scouring the website, Plaintiff could not find a method to contact the  
20 Company.

21  
22 **First Cause of Action**  
23 **California False Advertising Law**  
24 **Cal. Bus. & Prof. Code §§ 17500 *et seq.***

25 42. Plaintiff repeats and realleges each and every allegation contained above as if fully  
26 set forth herein.

27 43. 23 is a "person" within the meaning of Cal. Bus. & Prof. Code § 17506.  
28

1 44. 23's Terms of Service state that "any disputes with 23andMe arising out of or  
2 relating to the Agreement [ ] shall be governed by California law regardless of your country of  
3 origin or where you access 23andMe, and notwithstanding of any conflicts of law principles and the  
4 United Nations Convention for the International Sale of Goods."

5 45. The Company engaged in false and misleading advertising—the very type of  
6 practices prohibited by the California False Advertising Law. The Company represented that  
7 customers who bought the Health Kit could "[l]earn hundreds of things about [their] health" and  
8 "[f]ind out if [their] children are at risk for inherited conditions." The Company also advertised that  
9 its customers could use the Health Kit to "[a]rm [their] doctor with information on how [they] might  
10 respond to certain medications."

12 46. The Company's representations are misleading in that they have the capacity,  
13 likelihood, and tendency to deceive and confuse consumers, including the Class members.

14 47. The Company knew or should have known that its representations and  
15 advertisements about the Health Kit were false and misleading.

17 48. The Company made these false and misleading advertisements with the intent of  
18 inducing customers to purchase the Health Kit.

19 49. Plaintiff purchased his Health Kit in reliance on the Company's false and misleading  
20 representations about the product. Had Plaintiff known the truth about the Health Kit—*i.e.*, that it is  
21 not based on scientifically accepted principles and did not produce valid and reliable results—he  
22 would not have purchased one.

24 50. As a result of 23's acts, omissions, and practices, the Class members have suffered  
25 actual damages.

26 51. Pursuant to Business & Professions Code §§ 17203 and 17535, Plaintiff seeks an  
27 injunction from this Court, barring 23 from continuing with the advertisements and representations  
28

1 about its Health Kit. Plaintiff also requests an order awarding Plaintiff and the Class members  
2 restitution of money wrongfully acquired by the Company.

3 **Second Cause of Action**  
4 **Negligent Misrepresentation**

5 52. Plaintiff repeats and realleges each and every allegation contained above as if fully  
6 set forth herein.

7 53. The Company made misrepresentations to the Class members including, without  
8 limitation, the misrepresentation that the Health Kits were effective, based on widely accepted  
9 scientific principles, and would produce results that were reliable and valid.

10 54. The Company made these representations without reasonable grounds for believing  
11 that they were true. The Company, and its authorized agents, made these representations directly on  
12 the Health Kit's packaging and in various written materials directed to the public. The purpose of  
13 these representations was to induce customers to purchase Health Kits.

14 55. Plaintiff and the Class members purchased the Health Kits in reliance on the  
15 Company's misrepresentations. Plaintiff and the Class members would not have purchased the  
16 Health Kits had they known the true facts about their efficacy.

17 56. Plaintiff's reliance on 23's misrepresentations was justified and reasonable because  
18 they were made by individuals who held themselves out as experts in the field of DNA testing.  
19

20 57. As a result of the foregoing acts, omissions, and practices, Plaintiff and the Class  
21 members have suffered actual damages. The Class members are entitled to recover such damages,  
22 including punitive damages, equitable relief, injunctive relief, diminution of value, reasonable  
23 attorneys' fees, costs for the suit, and such other relief as set forth below.  
24  
25  
26  
27  
28

**Third Cause of Action**  
**Unjust Enrichment**

1  
2 58. Plaintiff repeats and realleges each and every allegation contained above as if fully  
3 set forth herein.

4  
5 59. As a result of their unlawful conduct, as described above, 23 was unjustly enriched.

6 60. The Company benefited from their unlawful acts and it would be inequitable for it to  
7 be permitted to retain any of the ill-gotten gains resulting from payments made by the Class  
8 members in reliance on 23's false, misleading, and unlawful representations.

9 61. Plaintiff and the Class members are entitled to the amount of the Company's ill-  
10 gotten gains resulting from the Company's unlawful, unjust, and inequitable conduct.

11 62. Plaintiff and Class members may have no adequate remedy at law.

12  
13 **Fourth Cause of Action**  
14 **Breach of Warranty of Merchantability and Fitness**  
15 **For a Particular Purpose**

16 63. Plaintiff repeats and realleges each and every allegation contained above as if fully  
17 set forth herein.

18 64. The Company developed, designed, tested, manufactured, inspected, labeled,  
19 distributed, marketed, promoted, and sold the Health Kits.

20 65. The Company impliedly warranted that its Health Kits were of merchantable quality  
21 and fit for the ordinary, common, and intended uses for which they sold the Health Kits.  
22 Specifically, the Company falsely implied that the Kits could be used to identify whether a  
23 customer had any genetics-based health concerns.

24 66. The Company knew, or should have known, that the Class members purchased the  
25 Health Kits for the purposes described above.

1 67. The Company also knew, or should have known, that the Class members were  
2 relying on its expertise and judgment to furnish a product that lived up to the representations that  
3 the Company made.

4 68. The Company breached this implied warranty when it sold the Health Kits to the  
5 Class members because the Kits were not fit for the purpose for which they were sold.

6 69. As a direct and foreseeable result of the foregoing acts, omissions, and practices,  
7 Plaintiff and the Class members have suffered actual damages as described herein, and the Class  
8 members are entitled to recover such damages, including punitive damages, equitable relief,  
9 injunctive relief, diminution of value, reasonable attorneys' fees, costs for the suit, and such other  
10 relief set forth herein.  
11

12 **Fifth Cause of Action**  
13 **Deceit by Concealment**  
14 **Cal. Civ. Code §§ 1709, 1710**

15 70. Plaintiff repeats and realleges each and every allegation contained above as if fully  
16 set forth herein.

17 71. The Company made false and misleading material representations and omissions to  
18 the public, including Plaintiff and the Class members, about the Health Kits.

19 72. The Company knew, or should have known, that its representations were untrue.

20 73. The Company made these false representations with the intent of inducing Plaintiff  
21 and the Class members to rely on them and purchase a Health Kit.

22 74. The Company willfully deceived the Class members by concealing the true facts  
23 about its Health Kits.

24 75. Plaintiff and the Class members reasonably believed that 23's representations about  
25 the Health Kits were true and, in reliance on those representations, the Class members purchased a  
26 Health Kit from 23.  
27  
28

1 76. Plaintiff would not have purchased the Health Kit had he known that it was not based  
2 on scientific evidence and that it did not produce results that were reliable and valid.

3 77. As a result of the foregoing acts, omissions, and practices, Plaintiff and the Class  
4 members suffered actual damages as described herein, and these Class members are entitled to  
5 recover such damages, together with punitive damages, equitable relief, injunctive relief, and  
6 reasonable attorneys' fees.

7  
8 **Sixth Cause of Action**  
9 **Violations of California Consumer Legal Remedies Act**  
10 **Cal. Civ. Code §§ 1750 *et seq.***

11 78. Plaintiff repeats and realleges each and every allegation contained above as if fully  
12 set forth herein.

13 79. The Company is a "person" within the meaning of Cal. Civ. Code § 1761.

14 80. Plaintiff and the Class members are "consumers" within the meaning of Cal. Civ.  
15 Code § 1761.

16 81. Plaintiff brings this cause of action for declaratory and injunctive relief.

17 82. Plaintiff purchased a Health Kit from 23 for personal, family, or household use. This  
18 purchase, and the purchases by the Class members, constitutes a "transaction" within the meaning  
19 of Cal. Civ. Code § 1761.

20 83. The Company's marketing, labeling, advertising, and sales of the Health Kits  
21 violated the Consumer Legal Remedies Act in the following ways:

22 a. The Company represented that the Health Kits have characteristics, uses, and  
23 benefits which they lacked;

24 b. The Company represented that the Health Kits were of a particular standard,  
25 quality, or grade, which they were not; and  
26  
27  
28

1 c. The Company advertised the Health Kits with an intent not to sell them as  
2 advertised.

3 84. The Company's actions were done with a conscious disregard for the rights of  
4 Plaintiff and the Class members.

5 85. The Company's wrongful business practices constituted, and constitute, a continuing  
6 course of conduct in violation of the Consumer Legal Remedies Act because the Company  
7 continues to represent that the Health Kits have characteristics and abilities which they lack.

8 86. Pursuant to Civil Code § 1782, Plaintiff will notify Defendant in writing by certified  
9 mail of the alleged violations of § 1770 and demand that the same be corrected.  
10

11 87. Any waiver of a claim under the Consumer Legal Remedies Act by Plaintiff and/or  
12 members of the Class is unenforceable and void.

13 88. Plaintiffs request the Court enjoin 23 from further violations.

14 89. .  
15

16 **Seventh Cause of Action**  
17 **Violation of California Unfair Competition Law**  
18 **Cal. Civ. Code §§ 17200 *et seq.***  
19 **"Unlawful" element**

20 90. Plaintiff repeats and realleges each and every allegation contained above as if fully  
21 set forth herein.

22 91. The Company is a "person" within the meaning of Cal. Bus. & Prof. Code § 17201.

23 92. The Company unfairly, unlawfully, deceptively, and misleadingly represented what  
24 the Health Kits could do. The Company represented that customers who bought the Health Kit  
25 could "[l]earn hundreds of things about [their] health" and "[f]ind out if [their] children are at risk  
26 for inherited conditions." The Company also advertised that its customers could use the Health Kit  
27 to "[a]rm [their] doctor with information on how [they] might respond to certain medications."  
28



1 93. In fact, the Health Kits could not do any of these things and the results they provided  
2 were not scientifically reliable or valid.

3 94. Plaintiff and the Class members bought the Health Kits in reliance on the Company's  
4 unlawful, deceptive, unfair, and misleading representations about the Kits.

5 95. Plaintiff would not have purchased the Health Kits had he known that they were not  
6 reliable or valid.

7 96. The Company's business practices—as alleged herein—are unlawful because they  
8 violate the FDC Act and California law.

9 97. As a result of the foregoing acts, omissions, and practices, Plaintiff and the Class  
10 members have suffered actual damages as described herein and are entitled to recover such  
11 damages, together with punitive damages, equitable relief, injunctive relief, and reasonable  
12 attorneys' fees.

13 98. Pursuant to § 17203 of the California Business and Professions Code, Plaintiff seeks  
14 an order from this Court enjoining 23 from continuing to engage, use, or employ its unfair and  
15 fraudulent advertising and marketing the sale and use of the Health Kits.  
16

17  
18 **Eighth Cause of Action**  
19 **Violation of California Unfair Competition Law**  
20 **Cal. Civ. Code §§ 17200 *et seq.***  
21 **“Unfair” and “fraudulent” elements**

22 99. Plaintiff repeats and realleges each and every allegation contained above as if fully  
23 set forth herein.

24 100. Plaintiff bought a Health Kit in reliance on 23's false and misleading advertisements  
25 and representations about the Kit. Plaintiff would not have purchased the Kit had he known that the  
26 Kit was unreliable.  
27  
28

1           101. The Company's false and misleading representations about the Health Kit's benefits  
2 violate the long standing public policy of the State of California that businesses must provide  
3 scientific evidence to substantiate the health benefits that they claim that their product provides.

4           102. The Company's false promises that the Health Kit will help its customers determine  
5 if their "children are at risk for inherited conditions" and "[u]nderstand [their] genetic health risks"  
6 are improper and unfounded.

7           103. The Company knew or should have known that its claims about the Health Kits were  
8 untrue and likely to deceive the public into believing that the Health Kits have uses and benefits that  
9 they do not actually possess.

10           104. Plaintiff and the Class members' injuries are substantial and not outweighed by any  
11 real benefits to the consumers. Plaintiff and the Class members could not reasonably have avoided  
12 the information because the Company intentionally misled the consuming public by means of the  
13 claims made with respect to the Health Kits as set forth herein.

14           105. The Company's wrongful business practices and procedures constituted, and  
15 continue to constitute, unfair competition.

16           106. As a result of the foregoing acts, omissions, and practices, Plaintiff and the Class  
17 members have suffered actual damages as described herein.

18           107. Pursuant to § 17203 of the California Business & Professions Code, Plaintiff and the  
19 Class members seek an order of this Court enjoining the Company from continuing to engage, use,  
20 or employ its unfair and fraudulent practice of advertising the sale and use of the Health Kits.

21           108. Plaintiff and the Class members seek an order requiring the Company to cease  
22 making the unfair and fraudulent claims about its Health Kits that are described above.

23           109. Plaintiff requests an order awarding Plaintiff and the Class members restitution of  
24 the money wrongfully acquired by 23 by means of 23's false and misleading representations.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment as follows:

- A. For an order certifying that the action may be maintained as a class action, certifying Plaintiff as representative of the Class, and designating his attorneys as Class counsel;
- B. For an award of equitable relief as follows:
  - i. Enjoining the Company from making any claims about the Health Kits found to violate California or federal law, including but not limited to, the FDA rules and regulations,
  - ii. Requiring the Company to make full restitution of all monies wrongfully obtained as a result of its conduct;
- C. For an award of attorneys' fees;
- D. For actual damages in the amount to be determined at trial;
- E. For actual, statutory, and punitive damages as may be provided for by statute if the demand corrections do not occur within the thirty day notice period;
- F. Costs of this suit;
- G. Pre- and post-judgment interest on any amounts awarded; and
- H. For such further relief as may be just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

DATED: January 15, 2014

AUDET & PARTNERS, LLP

By:  /s/ Jonas P. Mann

Michael McShane (SB 127944)  
Jonas P. Mann (SB 263314)  
Dana M. Isaac (SB 278848)  
AUDET & PARTNERS, LLP  
221 Main Street, Suite 1460

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

San Francisco, CA 94105  
Tel: (415) 568-2555  
Fax: (415) 568-2556  
mmcshane@audetlaw.com  
jmann@audetlaw.com  
disaac@audetlaw.com

Shane Rowley (*Pro hac vice* to be filed)  
Nancy A. Kulesa (*Pro hac vice* to be filed)  
Matthew Rand (*Pro hac vice* to be filed)  
LEVI & KORSINSKY, LLP  
30 Broad Street, 24th Floor  
New York, New York 10004  
Tel: (212) 363-7500  
Fax: (212) 363-7171  
srowley@zlk.com  
nkulesa@zlk.com  
mrand@zlk.com

*Attorneys for Plaintiff*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Affidavit of Venue

1. I, Vernon Stanton, declare as follows:

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

3. This District is the proper venue for this action under California Civil Code Section 1780(d) in that Defendants maintain their headquarters and principal place of business in Mountain View, Santa Clara County, California.

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

Executed this 17<sup>th</sup> Day of January, 2014 at Hobbs, New Mexico.

  
Vernon Stanton

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

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

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

DEFENDANTS

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)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 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)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

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

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Lists various legal categories and codes.

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, 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):

Brief description of cause:

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 SIGNATURE OF ATTORNEY OF RECORD

05/4+

(Place an "X" in One Box Only) ( ) SAN FRANCISCO/OAKLAND ( ) SAN JOSE ( ) EUREKA

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.





Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_ .

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: