

1 **BURSOR & FISHER, P.A.**

2 L. Timothy Fisher (State Bar No. 191626)  
3 Yeremey O. Krivoshey (State Bar No. 295032)  
4 1990 North California Boulevard, Suite 940  
5 Walnut Creek, CA 94596  
6 Telephone: (925) 300-4455  
7 Facsimile: (925) 407-2700  
8 E-Mail: ltfisher@bursor.com  
9 ykrivoshey@bursor.com

10 *Attorneys for Plaintiff-Intervenors*  
11 *(additional counsel appears on signature page)*

12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF SANTA BARBARA

14 DANIEL GARCIA, on behalf of himself and all  
15 others similarly situated,

16 Plaintiff-Intervenors,

17 v.

18 IOVATE HEALTH SCIENCES U.S.A. INC., a  
19 Delaware corporation and DOES 1-10, Inclusive,

20 Defendants.

Case No. 1402915

**AMENDED CLASS ACTION  
COMPLAINT IN INTERVENTION**

Hon. Pauline Maxwell

Dept.: SB 6

21 KEVIN BRANCA, an individual on behalf of  
22 himself and all others similarly situated,

23 Intervenor.

24 CHRIS LEATON and LINDSEY DUNN, on  
25 behalf of themselves and all others similarly  
26 situated,

27 Plaintiff-Intervenors,

1 Plaintiff-Intervenors Dunn and Leaton (“Plaintiff-Intervenors”), by and through their attorneys  
2 bring this action on behalf of themselves and all others similarly situated against Defendant Iovate  
3 Health Sciences U.S.A., Inc. Plaintiff-Intervenors make the following allegations upon information  
4 and belief, except as to allegations specifically pertaining to themselves, which are based on their  
5 personal knowledge.

### 6 SUMMARY OF THE ACTION

7 1. This is a class action on behalf of purchasers of Hydroxycut branded weight loss  
8 products (the “Product(s)”)<sup>1</sup>. As the manufacturer and seller of “America’s #1 Selling Weight Loss  
9 Supplement Brand,” a representation prominently plastered on nearly every Products’ label,  
10 Defendant has sold millions of the purported weight-loss Products touting false and misleading  
11 marketing buzzwords like “Scientifically Researched” and “Clinically Proven - Key Ingredient.” In  
12 fact, the purportedly “scientifically researched” and “clinically proven” key ingredients do not  
13 promote weight loss. As a result, Defendant’s representations and advertising that the Products cause  
14 weight loss are false and misleading.

15 2. Plaintiff-Intervenors assert claims on behalf of themselves and a nationwide class of  
16 purchasers of Pro Clinical Hydroxycut for violation of Cal. Bus. & Prof. Code § 17500, the False  
17 Advertising Law (“FAL”), violation of the Cal. Bus. & Prof. Code § 17200, the Unfair Competition  
18 Law (“UCL”), violation of the Cal. Civil Code § 1750, the Consumer Legal Remedies Act (“CLRA”),  
19 violation of 15 U.S.C. §§ 2301, *et seq.*, the Magnuson Moss Warranty Act, and for breach of express  
20 and implied warranties.

---

21  
22  
23 <sup>1</sup> “Products” shall refer to Hydroxycut Pro Clinical, Hydroxycut Pro Clinical Drink mix;  
24 Hydroxycut Pro Clinical 99% Caffeine Free, Hydroxycut Pro Clinical Caffeine Free, Hydroxycut  
25 Pro Clinical Gummies, Hydroxycut Advanced, Hydroxycut Gummies, Hydroxycut Bars,  
26 Hydroxycut Lean Shakes, Hydroxycut Green Coffee, Hydroxycut Zero Weight Loss Protein,  
27 Hydroxycut Appetite Control, Hydroxycut Ultra, Hydroxycut Premium CLA, Hydroxycut All-in-  
28 One, Hydroxycut Results, Hydroxycut Black, Hydroxycut SX-7, Hydroxycut SX 7 Thermo  
Powder, Hydroxycut SX-7 Non-Stimulant, Hydroxycut SX-7 Black Onyx, Hydroxycut SX-7  
Black Onyx Ultra Probiotic, Hydroxycut SX-7 Black Onyx Non-stimulant, Hydroxycut  
Maximo, Hydroxycut Max, Hydroxycut Max Pro Clinical, Hydroxycut Max SX-7 Black Onyx,  
Hydroxycut Hardcore, Hydroxycut Hardcore Next Gen, Hydroxycut Hardcore Pro Series Ignition  
Stix, Hydroxycut Hardcore Elite, Hydroxycut Hardcore Elite Sport, and Hydroxycut Hardcore Elite  
Non-Stimulant.

**THE PARTIES**

1  
2           3.       Plaintiff-Intervenor Leaton is a citizen of California, residing in Temecula. Mr. Leaton  
3 purchased Pro Clinical Hydroxycut several times between 2008 and 2009 from GNC and Vitamin  
4 Store locations based on Defendant’s false representations that it would Significantly Reduce BMI,  
5 that the “clinically proven” ingredients in the Product would cause weight and fat loss, and that the  
6 formula was clinically proven in two studies. Plaintiff-Intervenor Leaton also purchased Hydroxycut  
7 Hardcore Liquid Caplets several times from GNC and Vitamin Store locations based on Defendant’s  
8 false representations that it would cause him to lose weight and get ripped, and that the formula was  
9 clinically proven in two studies. Absent Defendant’s weight loss and clinically proven  
10 representations, Mr. Leaton would not have purchased the Products. The price of the Products he  
11 purchased varied from \$29.99 and \$64.99. Even though Mr. Leaton followed the directions on the  
12 labels of the Products, he did not experience the advertised weight loss.

13           4.       Plaintiff-Intervenor Dunn is a citizen of California, residing in Ventura. Ms. Dunn  
14 purchased Pro Clinical Hydroxycut in late 2009 from GNC in Camarillo based on Defendant’s false  
15 representations that it would Significantly Reduce BMI, that the “clinically proven” ingredients in the  
16 Products would cause weight and fat loss, and that the formula was clinically proven in two studies.  
17 Absent Defendant’s weight loss and clinically proven representations, Ms. Dunn would not have  
18 purchased the Product. The price of the Product she purchased was approximately \$40.00 to \$50.00.  
19 Even though Ms. Dunn followed the directions on the labels of the Products, she did not experience  
20 the advertised weight and fat loss.

21           5.       Defendant Iovate Health Sciences U.S.A., is a Delaware corporation with its principal  
22 place of business in New York. Defendant participated in the marketing, development, and sale of the  
23 Products.  
24  
25  
26  
27  
28

1 **FACTUAL BACKGROUND**

2 **A. Background**

3 6. According to a Federal Trade Commission Staff Report,<sup>2</sup> the number of Americans  
4 who are overweight or obese have reached epidemic proportions; it afflicts six out of every ten  
5 Americans. At the same time, nearly 29% of men and 44% of women are trying to lose weight (an  
6 estimated 68 million American adults). Consumers spent an estimated \$34.7 billion in 2000 on  
7 weight-loss products and programs. The marketplace has responded with a proliferation of products  
8 and services, and many promise miraculous, quick-fix remedies. Indeed, the FTC found that “[t]he  
9 use of false or misleading advertising claims in weight-loss advertising is rampant.”

10 7. Prior to 1994, weight-control products were regulated as drugs. Unless they were  
11 either generally recognized as safe and effective or an approved new drug, over-the-counter (“OTC”)  
12 products labeled for weight control were misbranded under Section 502 of the Food, Drug, and  
13 Cosmetic Act. With some limited exceptions not pertinent here, an OTC product labeled for weight  
14 control required some form of pre-market review and approval by the Food and Drug Administration  
15 (“FDA”) to determine safety and effectiveness. “In 1994, the passage of the Dietary Supplement  
16 Health and Education Act of 1994 (DSHEA) dramatically changed the regulatory framework for  
17 weight-loss supplements, shifting FDA’s role from premarket clearance to post-market enforcement  
18 and shifting the responsibility from government to industry to ensure products were safe and  
19 effective.” According to the FTC, “this change in regulatory structure has coincided with a dramatic  
20 increase in the number of dietary supplement weight-loss products as well as the amount of weight-  
21 loss product advertising.”<sup>3</sup>

22 8. America’s epidemic of obesity finds consumers willing to try almost anything to lose  
23 weight. It is this desperate struggle with obesity that makes consumers so vulnerable to Defendant’s  
24 miracle weight-loss Products. Defendant is taking advantage of the 1994 regulatory change to market  
25 its fat burning Products to consumers who are unable to decipher and debunk the junk science behind  
26

27 <sup>2</sup> Richard L. Cleland, *et al.*, “Weight Loss Advertising: An Analysis of Current Trends, A Federal  
28 Trade Commission Staff Report,” September 2002 (hereafter, “FTC Staff Report”), *available at*  
[www.ftc.gov/reports/weight-loss-advertising-an-analysis-current-trends/](http://www.ftc.gov/reports/weight-loss-advertising-an-analysis-current-trends/).

<sup>3</sup> See FTC Staff Report at 27-28.

1 the Products. However, physicians, scientists, and dieticians agree – long-lasting weight loss comes  
2 through a healthy diet and exercise, not fad diets and magic pills.

3  
4 **B. Defendant’s Common Marketing of the Products As Weight Loss Supplements**

5 9. Defendant markets each of the Products with substantially similar advertising  
6 representations concerning the Products’ ability to promote or assist with weight loss. The Products  
7 are marketed via the same mediums, including but not limited to television, print media (newspapers  
8 and magazines), and the Internet. Further, each of the Products represents on its labeling that the  
9 product aids in weight loss. The following chart is illustrative of the statements concerning weight  
10 loss on each of the labels of each of the Products:

11 <b>Hydroxycut Pro Clinical</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Advanced Weight Loss,” “Powerful Weight Loss,” “Lose Weight.” The labels also contain a seal stating 12 “Weight Loss – Scientifically Researched – Key 13 Ingredient.”
14 <b>Hydroxycut Pro Clinical Drink Mix</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Advanced Weight Loss.” The labels also contain a seal 15 stating “Weight Loss – Scientifically Researched – Key Ingredient.”
16 <b>Hydroxycut Pro Clinical 99% Caffeine Free</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Advanced Weight Loss.” The labels also contain a seal 17 stating “Weight Loss – Scientifically Researched – Key Ingredient.”
18 <b>Hydroxycut Pro Clinical Caffeine Free</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Lose More Weight Than Dieting Alone,” “Significantly 19 Reduce BMI.” The labels also contain a seal stating “Weight Loss – Clinically Proven – Key Ingredient.”
20 <b>Hydroxycut Pro Clinical Gummies</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Lose Weight.”
21 <b>Hydroxycut Advanced</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Lose Weight Fast,” “Clinically Research Primary 22 Ingredient.”
23 <b>Hydroxycut Gummies</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Lose Weight.” The labels also contain a seal stating 24 “Weight Loss – Scientifically Researched – Key Ingredient.”
25 <b>Hydroxycut Bars</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Satisfy Your Hunger.”
26 <b>Hydroxycut Lean Shakes</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Satisfy Your Hunger.”
27 <b>Hydroxycut Green Coffee</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Helps Support Weight Loss.” The labels also contain a 28 seal stating “Weight Loss – Scientifically Researched – Support.”

1	<b>Hydroxycut Zero Weight Loss Protein</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Weight Loss.”
2	<b>Hydroxycut Appetite Control</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Helps Curb Hunger for Hours!,” “Lose Weight With Green Coffee.”
3	<b>Hydroxycut Ultra</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Powerful Weight Loss.” The labels also contain a seal stating “Weight Loss – Scientifically Researched – Key Ingredient.”
4	<b>Hydroxycut Premium CLA</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Lose More Weight.” The labels also contain a seal stating “Weight Loss – Clinically Proven – Key Ingredients.”
5	<b>Hydroxycut All-in-One</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Lose Weight.” The labels also contain a seal stating “Weight Loss – Scientifically Researched – Key Ingredient.”
6	<b>Hydroxycut Results</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Weight Loss.” The labels also contain a seal stating “Weight Loss – Scientifically Researched – Key Ingredient.”
7	<b>Hydroxycut Black</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Intense Weight Loss,” “Lose Weight Fast.” The labels also contain a seal stating “Weight Loss – Scientifically Researched – Key Ingredient.”
8	<b>Hydroxycut SX-7</b>	“The Most Advanced Weight Loss & Clean Sensory Experience,” “Premium green Coffee for Weight Loss.”
9	<b>Hydroxycut SX-7 Thermo Powder</b>	“The Most Advanced Weight Loss & Clean Sensory Experience,” “Premium Green Coffee for Weight Loss.”
10	<b>Hydroxycut SX-7 Non-Stimulant</b>	“The Most Advanced Non-Stimulant Clean Weight Loss Experience,” “Premium Green Coffee for Weight Loss.”
11	<b>Hydroxycut SX-7 Black Onyx</b>	“The Most Hardcore Weight Loss & Ultimate Sensory Experience.”
12	<b>Hydroxycut SX-7 Black Onyx Ultra Probiotic</b>	“Scientifically Advanced Weight Loss Plus Probiotic Formula,” “Scientifically Studied Weight Loss,” “Weight Loss.”
13	<b>Hydroxycut SX-7 Black Onyx Non-stimulant</b>	“Next Generation Non-Stimulant Weight Loss,” “Powerful Scientifically Tested Weight Loss.”
14	<b>Hydroxycut Maximo</b>	“America’s #1 Selling Weight Loss Supplement Brand” (in Spanish), “Lose Weight” (in English).
15	<b>Hydroxycut Max</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Powerful Weight Loss.”
16	<b>Hydroxycut Max Pro Clinical</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Powerful Weight Loss.”
17	<b>Hydroxycut Max SX-7 Black Onyx</b>	“Scientifically Studied Weight Loss,” “Scientifically Backed Weight Loss You Can Trust,” “Double the Weight Loss.”
18	<b>Hydroxycut Hardcore</b>	“America’s #1 Selling Weight Loss Supplement Brand,” “Hardcore Weight Loss.”
19	<b>Hydroxycut Hardcore Next Gen</b>	“Next Generation Weight Loss,” “Advanced, Scientifically Tested Weight Loss.”
20	<b>Hydroxycut Hardcore Pro Series Ignition Stix</b>	“Lose Weight,” “Proven Weight-Loss Results in 2 Clinical Studies.”
21	<b>Hydroxycut Hardcore Elite</b>	“Lose Weight,” “Scientifically Tested Key Ingredient.”

<b>Hydroxycut Hardcore Elite Sport</b>	“Ultimate Weight Loss Formula,” “Scientifically Researched Weight Loss.”
<b>Hydroxycut Hardcore Elite Non-Stimulant</b>	“Premium Green Coffee for Weight Loss,” “Scientifically Tested Key Ingredient.”

**C. The Products Do Not Promote Weight Loss**

10. According to Defendant’s advertising and labeling statements, the key ingredient in 30 of the Products that purportedly assists with the weight loss process is *C. canephora robusta*, a green coffee bean extract. The following Products contain *C. canephora robusta* as one of the purported key ingredients: Hydroxycut Pro Clinical, Hydroxycut Pro Clinical Drink mix; Hydroxycut Pro Clinical 99% Caffeine Free, Hydroxycut Pro Clinical Caffeine Free, Hydroxycut Advanced, Hydroxycut Gummies, Hydroxycut Bars, Hydroxycut Lean Shakes, Hydroxycut RTD, Hydroxycut Green Coffee, Hydroxycut Zero Weight Loss Protein, Hydroxycut Appetite Control, Hydroxycut Ultra, Hydroxycut All-in-One, Hydroxycut Results, Hydroxycut Black, Hydroxycut SX-7, Hydroxycut SX 7 Thermo Powder, Hydroxycut SX-7 Non-Stimulant, Hydroxycut SX-7 Black Onyx, Hydroxycut SX-7 Black Onyx Ultra Probiotic, Hydroxycut SX-7 Black Onyx Non-stimulant, Hydroxycut Maximo, Hydroxycut Max, Hydroxycut Max Pro Clinical, Hydroxycut Max SX-7 Black Onyx, Hydroxycut Hardcore, Hydroxycut Hardcore Next Gen, Hydroxycut Hardcore Pro Series Ignition Stix, Hydroxycut Hardcore Elite, Hydroxycut Hardcore Elite Sport, and Hydroxycut Hardcore Elite Non-Stimulant.

11. Defendant’s substantiation for each of the Products’ efficacy claims is substantially similar and relies upon largely the same groups of evidence. Specifically, the substantiation for the Products that contain *C. canephora robusta* as a purported key ingredient rests entirely on two studies. According to Defendant’s advertising and labeling of the Products, in the first study, subjects taking *C. canephora robusta* purportedly lost, on average, 10.95 lbs. versus the placebo group, which lost an average of 5.40 lbs., over a period of 60 days. Both groups followed a low-calorie diet. In the second study, subjects taking *C. canephora robusta* purportedly lost an average of 3.7 lbs. versus subject using a placebo, who lost an average of 1.25 lbs., over the course of eight weeks. Both groups followed a calorie-reduced diet and performed moderate exercise.

1           12. Defendant’s substantiation for the remaining Products that do not contain *C.*  
2 *canephora robusta* rests on two separate studies. In the first study, subjects taking the blend of  
3 active ingredients found in the relevant Products purportedly lost an average of 20.94 lbs. versus  
4 those using the placebo, who lost an average of 1.70 lbs., over the course of twelve weeks. Both  
5 groups followed a calorie-reduced diet. In the second study, subjects taking the blend of active  
6 ingredients found in the relevant Covered Products purportedly lost an average of 16.50 lbs.  
7 versus those using the placebo. Both groups followed a calorie-reduced diet.

8           13. Contrary to Defendant’s representations, *none* of the ingredients in the Products cause  
9 weight or fat loss.

10           14. As the National Institutes of Health (“NIH”) explains, maintaining a healthy body  
11 weight requires “balancing calories consumed with calories used for activities.” The NIH also  
12 explicates that:

13           Attention to energy balance *over time* is required for promoting health and maintaining  
14 a stable body weight. For overweight people, steps must be taken to stop weight gain  
15 and reduce weight to a healthy level, and then to maintain that healthy weight.  
16 Accomplishing these goals requires an understanding of energy balance – that is, of the  
17 general concept of energy in and energy out. Individuals have direct control over both  
18 their food (calorie) intake and their physical activity level. .... People are generally  
surprised to learn just how small a contribution of sedentary activities, such as  
watching TV or playing video games, make to daily calorie expenditures. On the other  
hand, any type of physical activity, from running or playing sports to walking or  
household work, increases the number of calories the body uses.

19           As emphasized by the National Institute of Diabetes and Digestive and Kidney  
20 Disorders, the key to successful weight control and improved overall health is making  
physical activity a part of our daily routine.

21           How much physical activity *is* necessary? The Dietary Guidelines for Americans  
22 recommends 30 minutes a day for adults and 60 minutes a day for children and  
adolescents. A new report from the National Academy of Sciences recommends a goal  
of one-hour-a-day total exercise for adults.<sup>4</sup>

23  
24 Further, consuming caffeine, for example, “does not constitute an effective strategy for weight  
25 loss.” Indeed, exercise and controlled food intake are the *only* means to promote weight loss.  
26 That fact alone unambiguously shows that Defendant’s representations about the Products are  
27 false.

28           

---

  
<sup>4</sup> *Id.* at 16.





1           19.     Members of the Class and California Subclass are so numerous that their individual  
2 joinder herein is impracticable. The precise number of Class members and their identities are  
3 unknown to Plaintiff-Intervenors at this time but will be determined through discovery of Defendant's  
4 records. Class members may be notified of the pendency of this action by mail, email and/or  
5 publication.

6           20.     Common questions of law and fact exist as to all Class members and predominate over  
7 questions affecting only individual Class members. These common legal and factual questions  
8 include, but are not limited to:

9                   (a)     Whether the marketing and advertisements for the Products included false and  
10 misleading statements;

11                   (b)     Whether Defendant's conduct violated the CLRA;

12                   (c)     Whether Defendant's conduct violated the FAL;

13                   (d)     Whether Defendant's conduct violated the UCL's unlawful, unfair, and  
14 fraudulent and deceptive prongs.

15                   (e)     Whether Defendant's conduct violated the Magnuson-Moss Warranty Act, 15  
16 U.S.C. §§ 2301, *et seq.*;

17                   (f)     Whether Defendant breached an express warranty made to Plaintiff-Intervenors  
18 and the Classes;

19           21.     Plaintiff-Intervenors' claims are typical of the claims of the proposed Class and  
20 California Subclass. Each class member was subjected to the same illegal conduct, was harmed in the  
21 same way and has claims for relief under the same legal theories.

22           22.     Plaintiff-Intervenors are adequate representatives of the Class and California Subclass  
23 because their interests do not conflict with the interests of the Class members they seek to represent,  
24 they have retained counsel competent and experienced in prosecuting class actions, and they intend to  
25 prosecute this action vigorously. The interests of Class members will be fairly and adequately  
26 protected by Plaintiff-Intervenors and their counsel.  
27  
28







1 typically requires claims about the efficacy or safety of dietary supplements to be supported with  
2 ‘competent and reliable scientific evidence,’ defined in FTC cases as ‘tests, analyses, research,  
3 studies, or other evidence based on the expertise of professionals in the relevant area, that have been  
4 conducted and evaluated in an objective manner by persons qualified to do so, using procedures  
5 generally accepted in the profession to yield accurate and reliable results.’”<sup>6</sup> Such support was  
6 lacking here, thus Defendant’s claims concerning the efficacy of the Products were unsupported and  
7 deceptive in violation of the FTC Act.

8 44. Plaintiff-Intervenors and the members of the California Subclass have suffered harm as  
9 a result of these violations of the unlawful prong of the UCL because they have incurred charges  
10 and/or paid monies for the Products they otherwise would not have incurred or paid.

11 45. Pursuant to Bus. & Prof. Code § 17203, Plaintiff-Intervenors seek an order of this  
12 Court permanently enjoining Defendant from continuing to engage in its unlawful conduct as alleged  
13 herein. Plaintiff-Intervenors also seek an order requiring Defendant to:

- 14 (a) immediately cease the conduct described herein;  
15 (b) make full restitution of all monies wrongfully obtained; and  
16 (c) disgorge all ill-gotten revenues and/or profits.

17  
18 **COUNT IV**  
19 **Unlawful Business Practices In Violation Of California’s Unfair Competition Law (“UCL”),**  
20 **Business & Professions Code §§ 17200 *et seq.***  
21 **(Unfair Practices)**

22 46. Plaintiff-Intervenors incorporate by reference and re-allege each and every allegation  
23 set forth above as though fully set forth herein.

24 47. Plaintiff-Intervenors bring this claim individually and on behalf of the members of the  
25 proposed Class and California Subclass against Defendant.

26 48. Defendant’s conduct, described herein, violated the unfair prong of the UCL because  
27 such conduct violated various laws and policies recognized by the California Legislature and the

28 <sup>6</sup> Federal Trade Commission, *Dietary Supplements: An Advertising Guide for Industry*, p. 9, available at  
[http://business.ftc.gov/sites/default/files/pdf/bus09-dietary-supplements-advertising-guide-  
industry.pdf](http://business.ftc.gov/sites/default/files/pdf/bus09-dietary-supplements-advertising-guide-industry.pdf) (“FTC Advertising Guide”).

1 California courts, including without limitation, the CLRA and FAL, because the utility of Defendant's  
2 conduct is significantly outweighed by the gravity of the harms it imposed on consumers, and because  
3 Defendant's business practices described herein are oppressive, unscrupulous or substantially  
4 injurious to consumers.

5 49. Plaintiff-Intervenors and the members of the California Subclass have suffered harm as  
6 a result of these violations of the unfair prong of the UCL because they have incurred charges and/or  
7 paid monies for the Products they otherwise would not have incurred or paid.

8 50. Pursuant to Bus. & Prof. Code § 17203, Plaintiff-Intervenors seek an order of this  
9 Court permanently enjoining Defendant from continuing to engage in its unfair and unlawful conduct  
10 as alleged herein. Plaintiff-Intervenors also seek an order requiring Defendant to:

- 11 (a) immediately cease its unfair and unlawful acts and practices;
- 12 (b) make full restitution of all monies wrongfully obtained; and
- 13 (c) disgorge all ill-gotten revenues and/or profits.

14  
15 **COUNT V**  
16 **Unlawful Business Practices In Violation Of California's Unfair Competition Law ("UCL"),**  
17 **Business & Professions Code §§ 17200 *et seq.***  
18 **(Fraudulent and Deceptive Practices)**

19 51. Plaintiff-Intervenors incorporate by reference and re-allege each and every allegation  
20 set forth above as though fully set forth herein.

21 52. Plaintiff-Intervenors bring this claim individually and on behalf of the members of the  
22 proposed Class and California Subclass against Defendant.

23 53. Defendant violated the fraudulent and deceptive prong of the UCL by disseminating  
24 false and misleading advertisements and marketing materials regarding the effectiveness of the  
25 Products.

26 54. Plaintiff-Intervenors and the members of the California Subclass have suffered harm as  
27 a result of these violations of the fraudulent and deceptive prong of the UCL because they have  
28 incurred charges and/or paid monies for the Products they otherwise would not have incurred or paid.







1 Products, which are “goods” within the meaning of the UCC. Consequently, Defendant impliedly  
2 warranted that the Products were merchantable, including that they could pass without objection in the  
3 trade under the contract description, that they were fit for the ordinary purposes for which such goods  
4 are used, that they were of fair average quality within the description, that they were adequately  
5 labeled, and that they would conform to the promises or affirmations of fact made on their containers  
6 or labels. However, each of these implied warranties was false with respect to the goods of the kind  
7 sold to Plaintiff-Intervenors and members of the Class.

8 74. In reliance upon Defendant’s skill and judgment and the implied warranties of fitness  
9 for the purpose, Plaintiff-Intervenors and the Class members purchased the Products for the purpose  
10 of losing weight.

11 75. The Products were not altered by Plaintiff-Intervenors or the Class members.

12 76. The Products were defective when they left Defendant’s exclusive control.

13 77. Defendant knew the Products would be purchased and consumed by Plaintiff-  
14 Intervenors and the Class members. The Products were unfit for their intended purpose, and Plaintiff-  
15 Intervenors and the Class members did not receive the goods as warranted.

16 78. More specifically, Defendant breached its implied warranty of merchantability to  
17 Plaintiff-Intervenors and the Class members because the Products would not pass without objection in  
18 the trade because they were incapable of performing the functions they were intended to perform.

19 79. As a direct and proximate cause of Defendant’s breach of the implied warranty,  
20 Plaintiff-Intervenors and the Class members were injured because (a) they would not have purchased  
21 the Products if they had known that the Products were not effective for weight loss. As a result,  
22 Plaintiff-Intervenors and the Class members have been damaged either in the full amount of the  
23 purchase prices of the Products.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff-Intervenors pray for judgment and relief as follows:

26 A. An order certifying that this lawsuit is properly maintainable as a class action and  
27 certifying Plaintiff-Intervenors as the representative of the Class and California Subclass;  
28

- 1 B. For all forms of relief set forth above;
- 2 C. Damages against Defendant in an amount to be determined at trial, together with pre-
- 3 and post-judgment interest at the maximum rate allowable by law on any amounts awarded;
- 4 D. Restitution and/or disgorgement in an amount to be determined at trial;
- 5 E. Punitive damages;
- 6 F. An order enjoining Defendant from continuing to engage in the unlawful conduct and
- 7 practices described herein;
- 8 G. Reasonable attorneys' fees and costs;
- 9 H. Granting such other and further relief as may be just and proper.

10 **DEMAND FOR TRIAL BY JURY**

11 Plaintiff-Intervenors demand a trial by jury of all issues so triable.

12  
13 Dated: May 17, 2017

**BURSOR & FISHER, P.A.**

14  
15  
16 By:   
L. Timothy Fisher

17 L. Timothy Fisher (State Bar No. 191626)  
18 Yeremey O. Krivoshey (State Bar No. 295032)  
19 1990 North California Boulevard, Suite 940  
20 Walnut Creek, CA 94596  
21 Telephone: (925) 300-4455  
22 Facsimile: (925) 407-2700  
23 E-Mail: ltfisher@bursor.com  
ykrivoshey@bursor.com

24 **BURSOR & FISHER, P.A.**  
25 Scott A. Bursor (State Bar No. 276006)  
26 888 Seventh Avenue  
27 New York, NY 10019  
28 Telephone: (212) 989-9113  
Facsimile: (212) 989-9163  
E-Mail: scott@bursor.com

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

**CLARKSON LAW FIRM**  
Ryan J. Clarkson (State Bar No. 257074)  
448 S. Hill St., Suite 701  
Los Angeles, CA 90013  
Telephone: (213) 788-4059  
Facsimile: (213) 788-4070  
E-Mail: rclarkson@clarksonlawfirm

*Attorneys for Plaintiff-Intervenors*