UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JUAN VELASQUEZ, JOSHUA ARCE, GIANCARLO BOLLO, MICHAEL CAMPOS, JENNIFER SOUTHWICK, Each Individually and on Behalf of All Persons Similarly Situated,

Plaintiffs,

-v-

USPLABS, LLC, and GNC CORPORATION

Defendants.

Case No. 4:13-cv-00627-RH-CAS

JURY TRIAL DEMANDED

SECOND AMENDED CLASS ACTION COMPLAINT FOR:

1.) VIOLATIONS OF THE FLORIDA DRUG AND COSMETIC ACT FLORIDA STATUTES §499 *et. seq.;*
***2.)* VIOLATIONS OF FLORIDA CONSUMER PROTECTION STATUTES §501.201-§501.213, FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT;**
3.) VIOLATION OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT
4.) VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200, *et. seq.;*
5.) VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17500, *et. seq.;*
6.) VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT
7.) BREACH OF THE MAGNUSON MOSS WARRANTY ACT
8.) BREACH OF EXPRESS WARRANTY
9.) BREACH OF IMPLIED WARRANTY
10.) UNJUST ENRICHMENT

Plaintiffs, Juan Velasquez, Joshua Arce, Giancarlo Bollo, Michael Campos and Jennifer Southwick (collectively known as "Plaintiffs") bring this action on behalf of themselves, all others similarly situated, against defendants USPLabs, LLC ("USP" or "USPLabs") and

GNC Corporation ("GNC") (collectively "Defendants"), and states:

NATURE OF ACTION

1. This is a consumer rights class action lawsuit about Defendants' false and misleading advertising of weight loss supplements containing extremely dangerous and potentially lethal ingredients. Defendants manufacture, distribute, market and sell Jack3d, Versa-1, and OxyELITE Pro containing DMAAA and/or aegeline (the "SUBJECT PRODUCTS").

2. Defendants worked together to sell the SUBJECT PRODUCTS to consumers, and achieved this success through broad-based advertising and marketing campaigns that promised the SUBJECT PRODUCTS were proven to be safe and effective supplements providing weight loss and energy health benefits.

3. In reality, no such proof exists. Contrary to Defendants' implied and express representations, the SUBJECT PRODUCTS are dangerous and not effective, and Defendants lacked any adequate substantiation for their advertising claims, including clinical support. Instead of being the safe and effective weight loss products that Defendants promised, the SUBJECT PRODUCTS cause dangerous cardiovascular side effects, including without limitation liver damage, elevated blood pressure and heart rate, stroke, heart attack, atrial fibrillation, heart palpitations, shakiness, dizziness, and loss of consciousness. Despite knowing for years that the SUBJECT PRODUCTS resulted in severe injury and even death, Defendants marketed and sold the SUBJECT PRODUCTS to unsuspecting consumers. Further, while claiming the SUBJECT PRODUCTS are clinically proven to reduce weight, no such proof exists. Plaintiffs, and all others similarly situated, did not bargain for a product that causes adverse health effects in exchange for their payment of the purchase price.

4. As a result of misrepresentations and omissions to their customers about the safety and efficacy of the SUBJECT PRODUCTS, Defendants have taken millions of dollars from these consumers.

5. Defendants' advertising campaign has been extensive and comprehensive, and conveyed these deceptive messages of safety and efficacy to consumers throughout the United States. Defendants conveyed and continue to convey their deceptive claims about the SUBJECT PRODUCTS through a variety of media, including point of sale displays, magazines, the Internet and on the SUBJECT PRODUCTS' packaging. The only reason a consumer would buy SUBJECT PRODUCTS is to obtain the advertised benefits.

6. As a result of the misleading messages conveyed through its campaign, Defendants have sold products that do not perform as advertised, and can cause serious, life-threatening harm to people who consume them. Further, Defendants have been able to charge a premium price for their unsafe and ineffective nutritional supplement products. A 250 gram container of Jack3d retails for approximately $44.99, and a 90-count bottle of OxyELITE Pro retails for approximately $59.99.

7. On April 27, 2012, the FDA warned USPLabs, and others that it had received 42 adverse event reports on products containing DMAA (defined below), including cardiac disorders, nervous system disorders, and death. On February 2, 2012, and following the deaths of two soldiers after heart attacks during fitness exercises, the Defense Department removed the SUBJECT PRODUCTS and other dietary supplements containing DMAA from stores on military bases in the United States. In addition, regulatory agencies in the United Kingdom, Canada, New Zealand, France, Germany, Sweden, and Italy have also launched investigations and/or banned products containing DMAA, specifically including Jack3d and OxyELITE Pro.

In April 2012, New Zealand banned all products containing DMAA. As of August 8, 2012, the use of DMAA is illegal in Australia. New South Wales has classified DMAA as a "highly dangerous substance" on the poisons list. DMAA is also on the World Anti-Doping Agency and Major League Baseball lists of banned substances.

8. OxyElite Pro, one of Defendants' products, was recalled after the FDA issued an administrative detention order. However, after purportedly removing DMAA from its products, Defendants substituted Aegeline in certain OxyElite Pro products for DMAA. Aegeline is harmful and should not have been used. Several adverse reactions have been reported from consumers who have purchased and ingested the substituted Aegeline product, including but not limited to serious liver injury, acute liver failure, hepatitis, liver transplants, and death.

9. On September 13, 2013, the FDA found seven Hawaii residents with acute liver failure and non-viral hepatitis. An investigation by the Department of Health and CDC revealed that all of the patients had consumed OxyElite Pro products. The FDA also identified patients outside of Hawaii with similar liver dysfunction after using OxyElite Pro. As of October 2013, there were 56 nationwide cases of acute liver failure or acute hepatitis linked to OxyElite Pro.[1]

10. Plaintiffs bring this action on behalf of themselves, other similarly situated consumers who purchased the SUBJECT PRODUCTS in order to halt the dissemination of this false and misleading advertising message, correct the false and misleading perception Defendants have created in the minds of consumers, and to obtain redress for those who have purchased the SUBJECT PRODUCTS. Plaintiff alleges violations of the Consumers Legal Remedies Act, the Unfair Competition Law, breach of implied warranty, breach of express warranty, and unjust enrichment.

PARTIES

[1] www.fda.gov/forconsumers/consumerupdates

11. Plaintiffs, Juan Velasquez, Joshua Arce, and Giancarlo Bollo are individuals and residents of Florida; while Plaintiffs Michael Campos and Jennifer Southwick are individuals and residents of California (collectively known as "Plaintiffs"). During the class period, and before making their purchases, Plaintiffs were exposed to and read Defendants' advertising claims, including the SUBJECT PRODUCT's product labeling and Internet websites, including USP's websites. Plaintiffs were led to believe that the SUBJECT PRODUCTS were safe and effective. Plaintiffs purchased the SUBJECT PRODUCTS for the first time in or about January 2013, and made subsequent purchases until July 2013. Unbeknownst to Plaintiffs, the SUBJECT PRODUCTS contained DMAA or contained Aegeline as a substitute for DMAA. Plaintiffs purchased and used the SUBJECT PRODUCTS as directed, believing it was reasonably safe and effective as a dietary supplement. Plaintiffs did not know the SUBJECT PRODUCTS posed serious adverse health risks and was not proven effective when they purchased them.

Defendant USPLabs, LLC

12. Defendant USPLabs, LLC is a Texas corporation, headquartered in Dallas, TX and has been and still currently is regularly engaged in the business of licensing, manufacturing, formulating, packaging, distributing, marketing, advertising, and/or selling, either directly or indirectly, through third parties or related entities, non-prescription nutritional/dietary supplements for sale to, and use by, members of the general public, and as a part of their business, USPLabs, LLC, directly or indirectly was and is engaged in the manufacturing/formulating/distributing/selling/marketing/ advertising of purported nutritional/dietary supplements under the proprietary, trademarked names, Jack3d and OxyELITE Pro in interstate commerce and in Florida, which Plaintiff and the Class purchased as alleged herein.

13. At all relevant times, USPLabs transacted, solicited, and conducted business whether through retail stores or through internet merchants in the State of Florida and derived substantial revenue from such business.

14. At all relevant times, USPLabs expected or should have expected that its acts would have consequences within the United States of America and within the State of Florida.

15. Jonathan Vincent Doyle and Jacob Geissler (sometimes reported as Jacobo Geissler), who live in Denton, TX, are individuals having ownership interest in and executive positions in USPLabs, LLC, as well as UPSLABS OXYELITE, LLC. USPLABS OXYEPHEDRINE PRO, LLC, USPLABSPOWERFUL HOLDSING, LLC, USPLABS POWERFULL, LLC, and USPLABS PRIME, LLC (collectively, the "USP entities"). Upon information and belief, Jonathan Vincent Doyle and Jacob Geissler are shareholders in each of the USP entities, are corporate officers in each of the USP entities, direct and participate in the day to day operations of the USP entities, were responsible for the acts of the USP entities and for all intents and purposes own, operate and act through the USP entities.

16. Furthermore, the USP entities were at all times alleged herein under the control of their founders and dominant principals, Jonathan Vincent Doyle and Jacob Geissler. The Corporate filing for USPLabs, LLC with the Texas Secretary of State states "The limited liability company is to be managed by managers, the names and addresses of the governing persons are set forth below" wherein Jonathan Vincent Doyle and Jacob Geissler are named.

17. At all times herein alleged, each of the acts of the employees, including but not limited to Jonathan Vincent Doyle and Jacob Geissler, were on behalf of, for the benefit of, at the direction of, and at the behest of USPLabs, LLC and were ratified by USPLabs, LLC. Further, each of the acts of the employees, including but not limited to Jonathan Vincent

Doyle and Jacob Geissler were done pursuant to an in accordance with corporate policy.

Defendant GNC Corporation

18. Defendant GNC Corporation ("GNC") is a Delaware corporation with its principal place of business located in Pittsburgh, Pennsylvania.

19. Defendant GNC conducted regular and sustained business in the State of Florida and throughout the nation, including through the sale of the SUBJECT PRODUCTS by its retail outlets, affiliates and franchisees. During the class period GNC was regularly engaged in the business of packaging, distributing, marketing, and/or selling, either directly or indirectly, through third parties or related entities, non-prescription nutritional/dietary supplements for sale to, and use by, members of the general public, and as a part of their business GNC sold and continues to sell the SUBJECT PRODUCTS purchased by Plaintiff and the Class as alleged herein.

20. At all times herein alleged, each of the Defendants was the agent, servant, partner, aider and abettor, co-conspirator and joint venture of each of the remaining Defendants herein and was at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy and joint venture and rendered substantial assistance and encouragement to the other Defendants, knowing that their conduct constituted a breach of duty owed to Plaintiffs.

JURISDICTION AND VENUE

21. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of $5,000,000 and is a class action in which some of the members of the class of plaintiffs are citizens of states different from Defendants. Further, greater than two-thirds of the class members reside in states other than the state in which Defendants are citizens.

22. Venue is proper in this Court pursuant to 28 U.S.C. §1391 in that many of the

acts and transactions giving rise to this action occurred in this district and because Defendants:

(a) are authorized to conduct business in this district and has intentionally availed itself of the laws and markets within this district through the promotion, marketing, distribution and sale of its products in this district;

(b) do substantial business in this district; and

(c) are subject to personal jurisdiction in this district

FACTUAL ALLEGATIONS

23. Jack3d is a trademarked product sold and marketed by USP.]ack3d contained 1,3-dimethylamylamine (also known as, and hereinafter referred to, as "DMAA"). DMAA was later substituted for Aegeline, also referred to as N-[2-hydroxy-2(4-methoxyphenyl) ethyl]-3-phenyl-2-propenamide.[2] Both DMAA and Aegeline are known to be active ingredients that lead to serious adverse health consequences as previously stated.

24. OxyELITE Pro, a trademarked product also sold and marketed by USP. OxyELITE Pro contained 1,3-dimethylamylamine (also known as, and hereinafter referred to, as "DMAA"). DMAA was later substituted for Aegeline, also referred to as N-[2-hydroxy-2(4-methoxyphenyl) ethyl]-3-phenyl-2-propenamide. Both DMAA and Aegeline are known to be active ingredients that lead to serious adverse health consequences as previously stated.

25. Throughout the class period, both of the SUBJECT PRODUCTS contained overlapping ingredients that caused them to be dangerous. They also did not work as advertised.

26. The SUBJECT PRODUCTS also contain caffeine, which increases the sympathomimetic qualities and dangers of DMAA and Aegeline.

27. Jack3d and OxyELITE Pro additionally do not work as advertised or marketed.

28. Jack3d and OxyELITE Pro are sold through retailers such as GNC in Florida and

[2] http://www.stack3d.com/2013/10/international-usp-jack3d-advanced.html

across the country.

29. DMAA, also known as methlhexanamine (MHA) and Geranamine, is an aliphatic amine compound that has properties mimicking those of the endogenous neurotransmitters of the sympathetic nervous system. As such it belongs to a group of compounds known as "sympathomimetics." Members of this class include ephedrine and amphetamines.

30. Aegeline is an alkaloid with sympathomimetic properties, and as such is in the same class as ephedrine and amphetamines. Aegeline has produced the stimulation of respiration and contraction in anesthetized cats.

31. Aegeline is considered adulterated per 21 U.S.C. 342(f) because it is a "new dietary ingredient" (not marketed in the United States before October 15 1994).

32. While sympathomimetics are used by physicians to increase blood pressure and to constrict blood vessels, they are also widely abused because of their perceived ability to enhance athletic performance and in some cases induce euphoria.

33. Sympathomimetics compounds were originally developed in the 19th century as drugs for the treatment of cold symptoms. Compounds capable of constricting blood vessels were actively sought. First cocaine, then epinephrine, and in 1925 ephedrine, were used for this purpose. However, the adverse effects, inability to provide long term relief and addictiveness eventually resulted in the search for a similarly structured chemical. Through trial and error, it was eventually determined that slight modification of the ephedrine molecule would result in molecules having equivalent vasoconstrictor properties to ephedrine. These modifications eventually led to the development of DMAA, originally named "Fouramine".

34. In 1943, DMAA was introduced as a nasal decongestant by Eli Lilly under the trade name of Forthane. For unexplained reasons Eli Lilly voluntarily withdrew Forthane from

the market in 1983. No other prescription or over-the-counter drugs or dietary supplements used DMAA from1983. No other prescription or over-the-counter drugs or dietary supplements used DMAA from 1983 until approximately 2005. In 2005, Patrick Arnold, a chemist convicted for his role in the BALCO baseball steroid scandal, reintroduced MHA/DMAA as an over-the-counter dietary supplement with amphetamine-like qualities. It was marked as an alternative to ephedrine. The use of DMAA in dietary supplements spread and eventually found its way into SUBJECT PRODUCTS.

35. Animal testing in a variety of models demonstrated that DMAA was a potent pressor drug causing increase in blood pressure that is comparable to ephedrine. The structure of and mechanism by which DMAA increases blood pressure is thus similar to ephedrine. Dietary supplements containing ephedra, the natural form of ephedrine, were ordered off the market by the FDA in 2004, because the blood pressure and heart rate effects were associated with a number of serious adverse events to users including heart attack, stroke and death.

36. Aegeline is not reasonably expected to be safe when used under the conditions recommended on the Products' labeling, and public health officials throughout the United States are actively investigating a number of severe illnesses characterized by hepatotoxicity by consumers of the Product. Several findings suggest a causal connection exist between ingestion of the Product and the illnesses reported.

37. In a review of twenty (20) medical records initially submitted to FDA by the Hawaii Department of Health, fourteen (14) patients (70%) had ingested Defendants' products containing Aegeline prior to becoming ill. There were no other consistent commonalities among the fourteen (14) patients other than exposure to the SUBJECT PRODUCTS. Several patients sustained injuries to the liver that required transplantation, and one patient died before

transplantation could be undertaken. And finally, rigorous clinical protocols were followed in the care of the patients to exclude and/or rule out known causes of liver disease. The absence of these causes of liver disease increases the likelihood that the SUBJECT PRODUCTS resulted in hepatotoxicity in these patients.

38. Defendants conveyed their deceptive claims about the SUBJECT PRODUCTS through a variety of media, including magazines, the Internet, and on the SUBJECT PRODUCTS' label and packaging. In addition, retailers, including Defendant GNC promote, market and sell the SUBJECT PRODUCTS in stores, on their websites and through other advertising media.

39. On the Jack3d label, a representative sample of which is reproduced above, Defendants prominently claimed:

- **"UNIVERSITY STUDIED"**
- **"**For the result of the clinical studies, visit: www.USPLabsDirect.com/research**

40. On the OxyELITE Pro label, a representative sample of which is reproduced above, Defendants prominently claimed:

- **"PHARMACIST FORMULATED"**
- **"Super Thermogenic ™"**
- **"University Studied"**
- **"For the results of the clinical studies, visit: www/USPLabsDirect.com/research"**

41. In their advertisements and on their website, USP makes the following representation about OxyELITE Pro:

- "Introducing a burner coined the 'Super Thermogenic™' by those familiar with its effectiveness…"
- "Backed by 3 Peer Reviewed Clinical University Research Studies"
- "Potent 'Super Thermogenic"

42. In their advertisements and on their website, USP represents that the safety and efficacy of Jack3d is proven and supported by clinical research, including stating:

- "Backed by 2 Peer-Reviewed Published Clinical University Research Studies"
- "Jack3d is now backed by multiple University studies, **including double-blind, placebo-controlled research."**
- "Jack3d is THE original University Studies Ultra-Concentrated Pre-Workout…"
- "Jack3d – **proven in the real world & in the lab…"**

43. USP also advertises on fitness blogs and websites such as bodybuilding .com throughout these blogs and websites. USP makes similar claim and misrepresentations. In fact, USP's Jacob Geissler also writes letters on such sites claiming Jack3d:

- will make "everyone dominate the weights and have crazy, lasting energy along with sick, muscle engorging pumps."
- contains a "synergistic combination (which) is KEY"
- is not like other products, which are "a bunch of ingredients thrown together haphazardly, "and
- uses "only the highest quality ingredients."

However these like the other misrepresentations with respect to the safety, efficacy, and purity of SUBJECT PRODUCTS, are false, misleading and deceptive.

44. USP also issued press releases, which promote the purported safety and efficacy

of the SUBJECT PRODUCTS, even after FDA issued warnings regarding the SUBJECT PRODUCTS.

45. USP also utilized false and deceptive print and Internet advertisements, which reinforced and promoted the purported scientific studies demonstrating the safety of Jack3d.

46. USP owns and operates another website, www.dmaaresearch.com, where it makes similar statements about the purported research supporting the safety and efficacy of DMAA. For example, on its dmaaresearch.com website USP states: "USPLabs has invested heavily in clinical and analytical research on 1,3 DMAA. We made four submissions to FDA providing the most up to date information regarding the safety and legality of the ingredient. This included 11 peer-reviewed, published clinical and analytical studies." [3]

47. Additionally, USPLabs provides the following content and press release on its dmaaresearch.com website:

FOR IMMEDIATE RELEASE

Dallas, TX – **April 16, 2013** – USPLabs stands by the safety and legality of its products containing the dietary ingredient 1, 3-DMAA. Despite being among the most studied ingredients ever with 11 published peer-reviewed clinical & analytical studies, the FDA has urged the industry to discontinue the use of 1, 3-DMAA in dietary supplements. We disagree with FDA's position. The company has never-the-less concluded for business reasons to **phase-out products containing 1,3-DMAA and replace them with new advanced formulations**. USPLabs would like to take this opportunity to thank its loyal customers who can continue to expect safe and effective products developed through cutting-edge research and development.[4]

The company stands by the safety and legality of 1,3 DMAA when used as directed and points to the substantial scientific, medical, and analytical support that appears on this website.[5]

48. USP's website, including www.USPLabsDirect.com and www.DMAAResearch.comare available to the general public and USP's advertisements in other media promote these websites.

[3] http://dmaaresearch.com/
[4] http://dmaaresearch.com/docs/USPlabs%20Press%20Release.pdf
[5] http://dmaaresearch.com/

49. In addition to its own independent misleading advertising about the SUBJECT PRODUCTS. Defendant GNC participated in, controlled, enabled, and adopted USP's representations concerning the safety and efficacy of the SUBJECT PRODUCTS. GNC, which sold the SUBJECT PRODUCTS, adopted and is responsible for the representations made on the packaging and labeling of the SUBJECT PRODUCTS regarding the safety and efficacy, when it decided to place such SUBJECT PRODUCTS on its store shelves and retail websites, and thereafter advertised and sold such SUBJECT PRODUCTS to Plaintiff and other members of the Class.

50. Further, GNC advertised and included a prominent link on its own website to USP's Jack3d and OxyELITE Pro websites. GNC also engaged in Internet marketing, including through email blasts for the SUBJECT PRODUCTS. GNC also controlled the content of any advertising for GNC's promotions of Jack3d.

51. GNC also utilized in-store, point of sale displays to market to SUBJECT PRODUCTS.

52. GNC's marketing and advertising further reinforces these claims of safety and efficacy. For example, it states that it "OxyELITE Pro is Pharmacist-formulated to deliver fast results" and that Jack3d is **"University Studied."** GNC's representation that Jack3d is **"University Studied"** reasonably implies that the studies demonstrate the product's safety. In truth, studies involving Jack3d demonstrate that consuming Jack3d at the recommended levels is unsafe, including because it leads to elevated blood pressure and heart rate.

53. Despite the overwhelming evidence that Jack3d and OxyELITE Pro are neither safe nor effective, GNC continues to make public statements to the contrary, assuring consumers that DMAA and Aegeline is safe.

54. Without requisite proof, Defendants also claim that SUBJECT PRODUTS are safe, effective, and proven by research. For the types of marketing claims at issue, the Federal Trade Commission rules, mirroring common law duties of fair representation, require the Defendants actually have the level of proof claimed, here clinical proof, at the time the claims are made. However, Defendants did not, and have never possessed the requisite proof.

55. The health problems associated with SUBJECT PRODUCTS manifest themselves when consumers consume the SUBJECT PRODUCTS at recommended dosage levels.

56. Despite the evidence of significant health risks. Defendants continue to make material misrepresentations and omissions in their advertising for the SUBJECT PRODUCTS, including on the SUBJECT PRODUCTS' packaging and labeling, and on Defendants' websites. Moreover, as stated herein, Defendants continue to downplay the true health risks involved with consuming the SUBJECT PRODUCTS.

57. For example, in a further attempt to downplay the true risks of consuming the SUBJECT PRODUCTS, USP has even filed suit in the Northern District of Texas (Case 3:12-cv-01605-O) against an individual and entity for allegedly making false and disparaging statements about Jack3d. The allegedly false statements included well-known, incontrovertible facts about Jack3d such as that it is an "amphetamine-like compound," and that it "speeds up your heart rate." USP continues to not only make misrepresentations to the public about the nature of DMAA and Aegeline in SUBJECT PRODUCTS as alleged above. It so vehemently denies their sympathomimetic qualities that it is suing individuals for defamation.

58. Making their actions even more unfair and reprehensible is that USP's own funded studies, which make conclusions that are consistent with the FDA's 2012 warning letter to USP concede that DMAA and Aegeline is a "simple aliphatic amine with sympathomimetic

properties."[6]

59. Despite claims made by USP in its marketing and advertising, as detailed above, the SUBJECT PRODUCTS are not scientifically tested or proven to provide, and do not provide the advertised health benefits of **"<u>increase</u>**[d]…fat breakdown **<u>and</u>** energy expenditure," "reduced fat mass," "weight loss" and other similar benefits. Accordingly, USP's marketing claims that the SUBJECT PRODUCTS are proven, including because they are "UNIVERSITY STUDIED," SCIENTIFICALLY REVIEWED," "ADVANCED FORMULA," and "PHARMACIST FORMULATED" are false, misleading, and likely to deceive the ordinary consumer.

60. Properly-conducted human studies do not demonstrate the safety or efficacy of the SUBJECT PRODUCTS, Aegeline, or DMAA. In fact, human data regarding the safety or efficacy of DMAA or Aegeline are few and are the majority are funded by the USP Defendants.

61. Even the Defendants' own purported clinical proof demonstrates the falsity of its claims. On its websites, usplabsdirect.com (which is referred to on the SUBJECT PRODUCTS' labeling) and dmaaresearch.com, USP lists "eleven" studies on DMAA and/or Aegeline containing products. USP admits its involvement and funding at least five studies. Furthermore, none of these studies provide substantiation for the marketing claims.

62. However, While USP claims on its website that two studies conducted by Dr. Richard Bloomer were conducted by an "independent scientist without the involvement of the company," these studies like the other five are ***all*** from the same laboratory at the University of Memphis. Dr. Bloomer was a lead researcher in each of the studies cited by USP. Moreover, Bloomer, Harvey *et al* 2011, which USP claims was conducted by an independent scientists,

[6] *See* Whitehead, PN, Schilling, BK, Farney, TM, Bloomer, Rj. Impact of a dietary supplement containing 1,3-dimethylamulamine on blood pressure and bloodborne markers of health: a 10-week intervention study. Nutrition and Metabolic h1sights 2012:533-39.

concedes that the opposite is true by stating at the conclusion of the study "CONFLICT OF INTEREST STATEMENT – Richard J. Bloomer, PhD discloses conflicts of interest with… USPLabs"[7]

63. Dr. Bloomer has received $524,332 in funding from USPLabs: $132,860 (2010-2011), $225,600 (2011-2012), $128,860 (2012-2013), $31,036 (2013) and ($92,298 (2013-2014).[8]

64. Even this so-called "independent" study conducted by Bloomer reported that consumption of DMAA results "in a significant increase in blood pressure." This was a placebo-controlled study of a DMAA supplement, the result of which showed a significant increase in systolic blood pressure in the DMAA group over the controls.

65. In studies known to and funded by USP, the acute ingestion of proprietary DMAA or Aegeline products such as Jack3d and OxyELITE Pro is associated with highly significant increases in blood pressure and RPP within 30 minutes. [9] These findings represent the effect of the drug at rest. Indeed, the authors conclude that the drug increase myocardial work.

66. USP does not adequately warn of the sympathomimetic effects, specifically including the statistically significant increased blood pressure found by one study[10] caused by

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[7] *See* Bloomer RJ. Harvey IC, Farney TM, Bell ZW, and Canale RE. Effects of 1,3- dimethylamylamine and caffeine alone or in combination on heart rate and blood pressure in healthy men and women. *PJ ys Sportsmed39:* 111-120, 2011.

[8] *See* http://umwa.memphis.edu/fcv/viewprofile.php?uuid=rbloomer (last visited August 22, 2012).

[9] McCarthy CG, Farney TM, Canale RE, Jr RJA, and Bloomer RJ. A Finished Dietary Supplement Stimulates Lipolysis and Metabolic Rate in Young Men and Women. *NutJition and Metabolic Insights* 5: 23, 2011.

[10] McCarthy CG, Farney TM, Canale RE, Jr RJA, and Bloomer RJ. Hemodynamic and Hematologic Profile of Health Adults Ingesting Dietary Supplements Containing 1,3- Dimethylamylamine and Caffeine. *Nutrition and Metabolic h1sights* 5: 1, 2012.

Jack3d and OxyELITE Pro, by comparing the risk to mild amounts of coffee:

> The Hemodynamic response to ***acute*** ingestion was assessed as well. OxyElite Pro did not result in a statistically significant change in heart rate or diastolic pressure, but did cause a statistically significant change in systolic blood pressure from baseline. This increase was mild and transient, and was similar to the changes reported in the scientific literature for subjects ingesting an amount of caffeine equivalent to 2-3 cups of coffee (emphasis added).

67. The statement with respect to acute ingestion is misleading given the study results demonstrate that "compared to pre-ingestion and in general, both supplements resulted in an increase in SBP, DBP, and RPP from 5%-15%, with a peak occurring at the 60 or 90 minute post-ingestion time." The study went onto highlight the acute cardiovascular risk:

> As expected based on the pharmacologic profiles of caffeine and of 1, 3-dimethylamylamine, acute intake of dietary supplements containing these agents results in an increase in myocardial work. Specifically, SBP is increased significantly in response to treatment, while DBP, and RPP increase to a lesser extent.

68. In making this and similar representations, USP mislead users about the risks of SUBJECT PRODUCTS. USP attempted to mislead consumer about the health dangers of increased blood pressure and consequent risks caused by DMAA, and the health dangers of liver damage and hepatitis and consequent risks caused by Aegeline, by comparing the risk to consumption of mild to moderate amounts of caffeine, a universally regarded safe sympathomimetic when used in isolation. USP also failed to adequately warn users of the potential serious dangers of DMAA and/or Aegeline toxicity in susceptible users which USP knew or should have known might results from consuming the SUBJECT PRODUCTS. USP widely and successfully marketed the product throughout the United States by, among other things conducting a marketing campaign which misrepresented the testing efficacy and potential risks of the products in order to induce widespread consumption.

69. Accordingly, and contrary to the marketing and promotional campaign

disseminated by USP, including the language on the SUBJECT PRODUCTS labels and websites, DMAA nor Aegeline has not been demonstrated to be safe. For example, DMAA products such as the SUBJECT PRODUCTS are unsafe and unfit for human consumption because they cause serious injury from cardiovascular toxicity in susceptible users. Aegeline was substituted for DMAA in SUBJECT PRODUCTS, and also is unsafe and unfit for human consumption because Aegeline cause harm including but not limited to serious liver injury, acute liver failure, hepatitis, liver transplants, and death. This potential hazard was not disclosed on the SUBJECT PRODUCTS' packaging nor included in the materials made available to potential purchases, including Plaintiff and the Class.

70. The advertising, marketing and promotion of SUBJECT PRODUCTS was deceptive and misleading, in that it concealed the risks of cardiovascular injury and other serious health risks that USP knew or should have known.

71. The "eleven" cited studies do not constitute substantiation for Defendants' claims relating to safety and efficacy, and in fact, are proof that the SUBJECT PRODUCTS are unsafe and ineffective. First, there are no independent studies performed by researchers without conflicts: each of the studies come from a single laboratory funded by USP, and are led by a researcher who has received over $500,000 from USP. Second, the studies, which contain a total of 99 subjects, are grossly underpowered (a fact repeatedly conceded in the reports themselves), restricted to a very young population, and there is no attempt to characterize the pharmacokinetics or purity of the drugs. Despite the lack of reliability or validity of the purportedly independent studies, the studies present a relatively consistent picture. DMAA, particularly when combined with caffeine or other agents, causes highly significant increases in blood pressure in healthy, resting individuals within one hour of consumption in a manner

consistent with its known action as a vasoconstrictor. Aegeline causes significant increases in serious liver injury, acute liver failure, hepatitis, liver transplants, and death. Vasoconstriction during exercise would increase myocardial oxygen consumption leading to an increased risk for ischemia and triggers coronary vasospasm in vulnerable subjects. In other words, the studies themselves, flawed as they are, demonstrate the dangerous and synergistic sympathomimetic effects of the DMAA or Aegeline formulation contained in the SUBJECT PRODUCTS. In fact, Defendants do not deny the synergistic effects of DMAA or Aegeline and caffeine stating on their website "a common synergistic combination."

72. Thus, USP knew, or in the exercise of reasonable care ought to have known from their own studies that DMAA or Aegeline, when used in isolation or in conjunction with the other ingredients contained in the SUBJECT PRODUCTS including caffeine, is dangerous and could injure or kill consumers.

73. USP similarly knew, or in the exercise of reasonable care ought to have known, that the SUBJECT PRODUCTS are not effective for weight loss or any other health benefits claimed by USP.

74. In fact, USP knew or should have known long before its own studies that DMAA or Aegeline could cause cardiovascular adverse effect based on the fact DMAA and Aegeline are in the same class of chemicals as amphetamines.

75. USP knew that consumers believe that natural supplements are more healthful and less dangerous than synthetic, chemically produced supplements. USP represented in its advertising and marketing that its SUBJECT PRODUCTS were natural dietary supplements, when in fact it knew that the active ingredient DMAA, or later substituted Aegeline, was not a natural ingredient but was a chemically compounded, synthetic ingredient. In fact, in a response

letter to FDA on May 15, 2012, it acknowledged DMAA was synthetically created. USP further knew that DMAA is not contained in natural substances like geranium oil. It made these false representations that the SUBJECT PRODUCTS were natural products to mislead and falsely reassure consumers that the SUBJECT PRODUCTS were safe products. Additionally, although Aegeline was originally extracted from plants, it is also created in the laboratory and Aegeline in dietary supplements is synthetic.

76. Daniel Fabricant, Ph.D., Director of FDA's Division of Dietary Supplement Programs, commented on the synthetic Aegeline in OxyElite Pro stating:

> The illnesses were linked to certain OxyElite Pro dietary supplement products made by Texas-based USPLabs. Certain OxyElite Pro products and a second product, VERSA-1, contain a new dietary ingredient that has not been shown to be safe for use by consumers. This ingredient, aegeline, **is a synthetic version** of an alkaloid that exists, in natural form, in a tree that grows in parts of Asia.[11]

77. Daniel Fabricant further stated:

> "Before marketing products containing DMAA, manufacturers and distributors have a responsibility under the law to provide evidence of the safety of their products. They haven't done that and that makes the products adulterated." Finally, the FDA denied that DMAA is a natural as opposed to synthetically-created compound: "The agency additionally warned the companies that synthetically-produced DMAA is not a 'dietary ingredient' and, therefore, is not eligible to be used as an active ingredient in a dietary supplement. DSHEA defines a dietary ingredient as a vitamin, mineral, amino acid, herb or other botanical, a dietary substance for use by man to supplement the diet, or a concentrate, metabolite, constituent, extract, or combination of these substances."

78. The purpose of these submission requirements for dietary supplements is to protect consumers from exposure to new, synthetically created dietary supplements which are not demonstrated to be safe and effective, the exact situation here with regard to DMAA and Aegeline.

79. Likewise, GNC knew or should have known that DMAA could cause

[11] http://blogs.fda.gov/fdavoice/index.php/tag/aegeline/#sthash.0HZYXYr4.dpuf

cardiovascular adverse effects based on the fact DMAA is in the same class of chemicals as amphetamines. GNC knew or should have known that Aegeline could cause liver damage and liver failure due to also being in the same class of chemicals as amphetamines.

80. GNC joined in the misrepresentations about DMAA and Aegeline, by asserting in its marketing of the SUBJECT PRODUCTS that GNC conducts a review and has a requirement that the products it sells have labels that truthfully disclose health and safety issues and that the ingredients are safe. GNC represents that it exercises the highest standard of care in the nutritional supplement industry by "demanding truth in labeling, ingredient safety." Moreover, on information and belief, GNC considered, reviewed and rejected the idea of selling its own propriety products containing DMAA with knowledge that DMAA could injure consumers.

81. USP attempted to mitigate concerns from critics, the FDA, and concerned consumers about the safety of DMAA and Aegeline by suggesting DMAA comes from a naturally occurring herb and Aegeline from a citrus fruit tree (Bael) and therefore safe, However, DMAA and Aegeline are dangerous synthetically-created chemical known by industry insiders like USP to display sympathomimetic side effects. A single Chinese study claims that DMAA occurs naturally in geranium oil.[12] However, the New Zealand National Measurement Institute performed a rigorous evaluation of this claim and found it impossible to substantiate.[13] Health Canada likewise could find no evidence that DMAA occurs in nature. [14]

82. Additionally, in a study published June 25, 2012, the authors concluded, after

[12] Ping Z, Jun Q, and Qing L. A study on the chemical constituents of geranium oil. Journal of Guizhou Institute of Technology 25: 1996.

[13] Lisi A. Hasick N, Kazlauskas R. and Goebel C. Studies of methylhexaneamine in supplements and geranium oil. Drug Test Anal 2011.

[14] Health Canada, Health Products and Food Branch. Classification of 1,3- dimethylamylamine (DMAA). http://www.scribd.com/dod82744576/DMAA-Health- Canada-2011 (last visited March 22, 2012).

numerous and varied tests of geranium oils and plants, that geranium oils and plants contain ***no*** detectable levels of DMAA.[15] This research refutes any claims that synthetic DMAA is identical to naturally derived ingredients. It is impossible for synthetic DMAA to be identical to the natural geranium plant and oil since geranium plant and oil do not contain detectable levels of DMAA. Similar evidence exists concerning Aegeline.

83. Despite these facts, USPLabs has publicized a letter purporting to have proof form two laboratories claiming that DMAA can be found in geranium oil. The data are allegedly not available for review because they have been submitted for publications. USP persists in its representation that DMAA is a natural chemical to reassure consumers that the product is safe and natural, when in fact it is neither. USP similarly persists in its representation that Aegeline is a natural chemical, also to reassure consumers that the product is safe and natural, when in fact it is neither.

84. USP further attempted to deflect attention away from safety concerns and to misrepresent the actual risks of DMAA and Aegeline by stating numerous times on its website that "no serious adverse events were noted in the study." USP failed to inform consumers and the public, including Plaintiff herein who relied on USP's representations and misleading comments, that in fact the FDA had received dozens of serious adverse events from people taking DMAA and Aegeline, including death.

CLASS DEFINITION AND ALLEGATIONS

85. The proposed, ascertainable Class consists of:

All consumers within the United States who purchased products containing either DMAA

[15] ElSohly, MA, et al., Pelargonium oil and Methyl Hexaneamine (MHA): Analytical approaches supporting the absence of MHA in authenticated Pelargonium graveolens plant material and oil. Journal of Toxicology: published online.

or aegeline including Jack3d, Versa-1, and OxyELITE Pro (the SUBJECT PRODUCTS) not for resale from August 17, 2012 to the present. Excluded from the Class are Defendants and their officers, directors and employees and those who purchased the SUBJECT PRODUCTS for the purpose of resale.

86. ***Numerosity***. The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class contains many thousands of members. The precise number of Class members in unknown to Plaintiff.

87. ***Existence and Predominance of Common Questions of Law and Fact*** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

a) Whether Defendants had adequate substantiation for their claims prior to marking them;

b) Whether the SUBJECT PRODUCTS were reasonably safe for consumption;

c) Whether Defendants concealed or omitted material information concerning the safety of the SUBJECT PRODUCTS:

d) Whether the claims discussed above are true, or are misleading, or reasonably likely to deceive;

e) Whether Defendants' alleged conduct violates public policy

f) Whether the alleged conduct constitutes violations of the laws asserted herein:

g) Whether Defendants engaged in false or misleading advertising:

h) Whether Plaintiff and Class members have sustained monetary loss and proper measure of that loss;

i) Whether Plaintiff and Class members are entitled to an award of punitive damages; and

j) Whether Plaintiff and Class members are entitled to declaratory and injunctive relief

88. ***Typicality.*** Plaintiffs' claims are typical of the claims of the members of the Class in that Plaintiff asserts the same claims.

89. ***Adequacy of Representation.*** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel highly experienced in complex consumer class action litigation, as well as large, complex, multi-Plaintiff litigation involving dietary supplements, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no averse or antagonistic interests to those of the Class

90. ***Superiority.*** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against the Defendants. It would thus be virtually impossible for the Class, on an individual basis, to obtain effective redress for the wrongs done to them.

91. Unless a class is certified Defendant will retain monies received as a result of their conduct that was taken from Plaintiff and proposed Class members. Unless a class wide Injunction is issued, Defendants will continue to commit the violations alleged, and the members

of the Class and the general public will continue to be misled.

92. Defendants have acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

COUNT I

VIOLATIONS OF THE FLORIDA DRUG AND COSMETIC ACT FLORIDA CIVIL CODE §499 *ET SEQ.*

93. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

94. This cause of action is brought pursuant to Chapter 499 of the Florida Drug and Cosmetic Act §499 et. seq. (the "Act"). *See* Florida Statutes §499.001 to §499.067 (2012). Plaintiff is a consumer as defined by. The SUBJECT PRODUCTS are goods within the meaning of the Act.

95. Defendants violated and continue to violate the Act by engaging in the following practices proscribed by §499.001 to §499.067 Florida Statues (2012):

(a) the dissemination of any false advertisement of [the SUBJECT PRODUCT]…. [the] advertisement is false if it is false or misleading in any way

(b) the distribution in commerce of [the SUBJECT PRODUCT with] labeling or advertis[ment that] is in violation of this part.

(c) the manufacturing, repackaging, packaging, selling, delivery, holding, or offering for sale of [the SUBJECT PRODUCT in]which the advertising or labeling is false or misleading.

(d) the advertising of [the SUBJECT PRODUCT] that is adulterated or misbranded.

(e) the receiving in commerce of [the SUBJECT PRODUCT] that is falsely

advertised or labeled or the delivering or proffering for delivery of [the SUBJECT PRODUCT].

96. Defendants violated the Act by representing through their advertisements the SUBJECT PRODUCTS were safe and effective as described above when they knew, or should have known, that the representations and advertisements were unsubstantiated, false and misleading.

97. Pursuant to §499.001 to §499.067 Florida Statues (2012) Plaintiffs and the Class seeks a Court order enjoining the above-described wrongful acts and practices of Defendants and for restitution and disgorgement.

COUNT II

VIOLATIONS OF FLORIDA CONSUMER PROTECTION STATUES §501.201-§501.213, FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

98. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

99. Florida Consumer Protection Statue §501.204 (2012) prohibits any "unlawful," "fraudulent" or "unfair" business act or practice and any false or misleading advertising. For the reasons discussed above, and through statements including but not limited to that SUBJECT PRODUCTS were safe and effective, university studied and approved, were made from natural substances, did not cause adverse side effect, etc., Defendants have engaged in unfair, deceptive, untrue and misleading advertising in violation of Florida Consumer Protection Statue§501.

100. The Florida Deceptive and Unfair Trade Practices Act also prohibits any "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Defendants have violated §501.204's

prohibition against engaging in unlawful acts and practices by, *inter alia*, making the representations and omissions of material facts, as set forth more fully herein, and have violated 21 U.S.C. §343. 21 U.S.C. §379aa-1, 15 U.S.C. §45 (a)(I), 49 Fed. Reg. 30999 (Aug. 2, 1984), Federal Food, Drug and Cosmetic Act §402(f)(1)(A) (21 U.S.C. §342), and the common law.

101. Plaintiff and the Class reserve the right to allege other violations of law which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

102. Defendants' acts, omissions, misrepresentations, practices and non-disclosures as alleged herein also constitute "unfair" business acts and practices within the meaning of The Florida Deceptive and Unfair Trade Practices Act §501.201-§501.213 *et. seq.* in that their conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct.

103. As stated in this Complaint, Plaintiff alleges violations of consumer protection, unfair competition, and truth-in-advertising laws in Florida resulting in harm to consumers. Defendants' conduct constitutes violations of the public policies against engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers as proscribed by Florida Deceptive and Unfair Trade Practices Act §§501.201-501.213.

104. There were reasonably available alternatives to further Defendants' legitimate business interests, other than the conduct described herein

105. Defendants' claims, nondisclosures and misleading statements, as more fully set forth above and collectively as a scheme, were false, misleading and likely to deceive the consuming public within the meaning of Florida Deceptive and Unfair Trade Practices Act.

106. Defendants' conduct caused and continues to cause substantial injury to Plaintiff and the other Class members. Plaintiff and Class members have suffered injury in fact and have lost money as a result of Defendants' unlawful, unfair and fraudulent conduct.

107. Unless restrained and enjoined, Defendants will continue to engage in the above-described conduct. Accordingly, injunctive relief is appropriate.

108. Plaintiff, on behalf of himself, all other similarly situated, and the general public, seeks restitution and disgorgement of all money obtained from Plaintiff and the members of the Class collected as a result of unfair competitions, an injunction prohibiting Defendants from containing such practices, corrective advertising, including providing notification of the SUBJECT PRODUCTS' health risks, and all other relief this Court deems appropriate, consistent with Florida Deceptive and Unfair Trade Practices Act.

COUNT III

VIOLATIONS OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT

109. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

110. This cause of action is brought pursuant to the Consumers Legal Remedies Act, California Civil Code § 1750, et seq. (the "Act"). Plaintiffs are consumers as defined by California Civil Code § 1781(d). The product is a good within the meaning of the Act.

111. Defendants violated and continue to violate the Act by engaging in the following practices proscribed by California Civil Code § 1770(a) in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of Complete Care:

> (5) Representing that it has … characteristics … uses [or] benefits … which it does not have ….

(7) Representing that it is of a particular standard, quality or grade … if it is of another.

(9) Advertising goods … with intent not to sell them as advertised.

(16) Representing that the product has been supplied in accordance with a previous representation when [it has] not.

112. Defendants violated the Act by making claims, through its advertisements, about the products that it knew, or should have known, were unsubstantiated, false and misleading.

113. Pursuant to § 1782 of the Act, Plaintiffs have notified both of the Defendants in writing by certified mail of the particular violations of § 1770 of the Act and demand that Defendants rectify the problems associated with the actions detailed above and give notice to all affected consumers of its intent to act.

114. Pursuant to California Civil Code § 1782(d), Plaintiffs and the Class seek an order enjoining the above-described wrongful acts and practices of the Defendant and for restitution and disgorgement.

115. Defendants' conduct is malicious, fraudulent and wanton.

116. If Defendants fail to rectify or does not agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within thirty days of the written notice pursuant to § 1782 of the Act, Plaintiff will seek to amend his claims to seek actual, punitive and statutory damages, as appropriate. Defendants' conduct is malicious, fraudulent and wanton and provides misleading information to the Plaintiffs, Class members and the general public.

117. Pursuant to Civil Code § 1780(d), attached hereto as is the affidavit showing that this action has been commenced in the proper forum.

COUNT IV

VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200, et seq.

118. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

119. California Business & Professions Code § 17200 prohibits any "unfair, deceptive, untrue or misleading advertising." For the reasons discussed above, Defendants have engaged in unfair, deceptive, untrue and misleading advertising in violation of California Business & Professions Code § 17200.

120. California Business & Professions Code § 17200 also prohibits any "unlawful … business act or practice." Defendant has violated § 17200's probation against engaging in unlawful acts and practices by, *inter alia*, making the representations and omissions of material facts, as set forth more fully herein, and violating California Civil Code §§ 1572, 1573, 1709, 1710, 1711, 1770, Business & Professions Code § 17200 et seq., 21 U.S.C. § 343, California Health and Safety Code §§ 110660, 110765, 21 U.S.C. § 343, Federal Food, Drug and Cosmetic Act § 402(f)(1)(A), and the common law.

121. Plaintiffs and the Class reserve the right to allege other violations of law which constitute other unlawful business acts or practices. Defendants' conduct, specifically its false and misleading advertising and marketing of the products, is ongoing and continues to this date. Moreover, the Class has not received any refund for purchasing these products.

122. Defendants' acts, omissions, misrepresentations, practices and nondisclosures as alleged herein also constitute "unfair" business acts and practices within the meaning of Business & Professions Code § 17200 *et seq.* in that its conduct is substantially injurious to consumers,

offends public policy, and is immoral, unethical, oppressive, and unscrupulous as to gravity of conduct that outweighs any alleged benefits attributable to such conduct.

123. As stated in this Complaint, Plaintiffs allege violations of consumer protection, unfair competition and truth in advertising laws in California and other states resulting in harm to consumers. Plaintiffs assert violation of the public policy of engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers. This conduct constitutes of violations of the unfair prong of California Business & Professions Code § 17200 *et seq.*

124. There were reasonably available alternatives to further Defendants' legitimate business interests, other than the conduct described herein.

125. Business & Professions Code § 17200 also prohibits any "fraudulent business act or practice."

126. Defendants' claims, nondisclosures and misleading statements, as more fully set forth above, were false, misleading and/or likely to deceive the consuming public within the meaning of Business & Professions Code § 17200.

127. Defendants' conduct caused and continues to cause substantial injury to Plaintiffs and the other Class members. Plaintiffs have suffered injury in fact and have lost money as a result of the Defendants' unfair conduct.

128. Defendants have thus engaged in unlawful, unfair and fraudulent business acts and practices and false advertising, entitling Plaintiffs to judgment and equitable relief against Defendants as set forth in the Prayer for Relief.

129. Additionally, pursuant to Business & Professions Code § 17203, Plaintiffs seek an order requiring Defendants to immediately cease such acts of unlawful, unfair and fraudulent business practices and requiring Defendants to engage in a corrective advertising campaign.

COUNT V

VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17500, et seq.

130. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

131. California Business & Professions Code § 17500 provides that it is unlawful for any person, firm, corporation, or association, or any employee thereof to intentionally directly, or indirectly perform services, professional or otherwise, or to induce the public to enter into any obligation relating thereto, to make or disseminate in any manner any statement which is untrue or misleading, or which, by the exercise of reasonable care should be known to be untrue or misleading.

132. Throughout the time Defendants marketed and sold the subject products, Defendants have committed acts of untrue and misleading advertising as defined by Business and Professions Code § 17500, by claiming that their products are safe and effective. Defendants made these statements and claims with the intent to induce members of the public to purchase the subject products. Indeed, these statements have a "tendency to deceive" a reasonable person from an objective standpoint.

133. These acts of untrue and misleading advertising by Defendants present a continuing threat to members of the public in that they mislead, and are likely to mislead, the public into believing that the use of its products are safe and effective.

134. Defendants' conduct was unfair, unlawful, or fraudulent, as described herein, and presents a continuing threat to members of the public. Thus, consumers are paying for products that do not work as advertised. Plaintiffs have no other adequate remedy of law to correct this misleading advertising.

135. Wherefore, Plaintiffs prays for the relief as set forth hereinafter.

COUNT VI

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT
(Tex. Bus. & Com. Code §§ 17.41 et seq.)

136. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

137. The Texas Deceptive Trade Practices Act ("DTPA") creates statutory remedies for false, misleading, or deceptive acts or practices that are cumulative of other remedies. *See Vailv. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 136* (Tex. 1988). Its self-declared purpose is to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection. Tex. Bus. & Com. Code § 17.44. The DTPA was designed to be liberally constructed and applied in favor of consumers to promote its underlying purposes. Id.

138. Plaintiffs and members of the Class are consumers, as described in § 17.45(4) of the DTPA, who purchased or south to purchase goods or services from Defendant.

139. Defendant employed false, misleading, or deceptive act or practices, as specifically enumerated in § 17.46 of the DTPA, which were relied on by Plaintiffs to their detriment and which were the producing cause of Plaintiffs' injury.

140. More specifically, Plaintiffs allege that Defendant has violated subdivisions 5 and 7 of Texas Business and Commerce Code § 17.46(b):

a. Defendant has represented that its goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have. Tex. Bus. & Com. Code § 17.46(b)(5).

b. Defendant has represented that its goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. Tex. Bus. & Com. Code § 17.46 (b)(7).

141. As a result of reliance of Defendants' false, misleading, or deceptive acts or practices, Plaintiffs and all consumers who purchased Defendants' products have suffered damage and lost money in that they paid for a Product that did not have the characteristics and benefits as represented. Plaintiffs seeks and are entitled to an order enjoining Defendant from continuing to engage in the false, misleading, or deceptive acts or practices alleged herein.

142. Defendants' actions impact the public interest because Plaintiffs and the Class were injured in exactly the same way as thousands of others purchasing Defendants' Products containing DMAA.

COUNT VII

BREACH OF MAGNUSON MOSS WARRANTY ACT

143. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

144. The Products are consumer products as defined in 15 U.S.C. § 2301(1).

145. Plaintiffs and all the members of the Class are consumers as defined in 15 U.S.C. §2301(3).

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

147. Because Defendant knew that it as in breach of the written and implied warranties at the time they sold the Products to Plaintiffs and the Class, and because the failure of the Products to fulfill the warranties cannot be cured, Plaintiffs were under no obligation to give Defendant an opportunity to cure pursuant to 15 U.S.C. § 2310(e).

148. In connection with its sale of the Products, Defendant issued written warranties as defined in 15 U.S.C. § 2301(6) via their written advertisements and product labeling which warranted that the Products were safe and legal such as statements that there had been multiple University studies, including double-blind, placebo-controlled research and that the Products had been put to the test.

149. In connection with the sale of the Products, Defendant gave an implied warranty as defined in 15 U.S.C. § 2301(7); namely, the implied warranty of merchantability. Specifically, Defendant warranted that the Products were fit for their ordinary purpose, would pass without objection in the trade, and would conform to the promises and affirmations of fact made on their containers or labels.

150. Defendant is liable to Plaintiffs and the Class pursuant to 15 U.S.C. §2310(d)(1),because they failed to comply with its written warranties and the implied warranty of merchantability as the Products are not safe or legal because of the DMAA ingredient within them.

151. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiffs and the Class are entitled to recover the damages caused to them by Defendants' breach of written and implied warranties, which damages either constitute a refund of the fill purchase prices of the Products or the difference in value between the Products as warranted and the Products as actually sold. In addition, pursuant

to 15 U.S.C. § 2310(d)(2), Plaintiffs and the Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by Plaintiffs and the Class for and in connection with the commencement and prosecution of this action.

COUNT VIII

BREACH OF EXPRESS WARRANTY
(Nationwide Class)

152. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

153. Plaintiffs and the Class formed a contract with Defendants when they purchased the products. The terms of that contract include the promises and affirmations of fact make by Defendants on the packaging and through their marketing campaign. The packaging and advertising constitute express warranties that are a part of the contract, basis for the bargain, between the consumers and Defendants.

154. Defendants expressly warranted that the products were safe, effective and fit for use. Defendants also expressly warranted that the products were of merchantable quality, that they did not produce dangerous side effects, that they were made from natural ingredients (i.e., geranium), and that they were adequately tested and fit for their intended purpose.

155. Defendants knew or should have known that despite the warranties, they had breached the terms of the contract with the consumers by not providing safe and effective products for weight loss and performance because:

i. Studies demonstrated that the products were unsafe and ineffective;

ii. Studies relating to DMAA found statistically increased blood pressure and myocardial work;

iii. Aegeline was not a suitable replacement for DMAA;

iv. USP's claims of safety and efficacy were not supported by the studies it itself conducted because the studies were biased and the researchers were financially interested;

v. Geranium plants and oil do not contain detectable amounts of DMAA and therefore synthetic DMAA cannot be equivalent to geranium;

vi. The FDA had received 42 serious adverse events from DMAA products;

vii. GNC stopped selling the subject products at its stores on military bases;

viii. USP failed to provide notification to the FDA or provide evidence of safety of either DMAA or aegeline.

156. Members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendants, and upon the express warranties in purchasing the subject products.

157. Plaintiffs and the Class purchased the products for their intended purpose.

158. Defendants breached these express warranties because the products were not safe, effective and fit for their intended purpose, were not of merchantable quality, and in fact, caused serious and potentially lethal side effects to consumers when taken in their recommended dose.

159. Due to Defendants' wrongful conduct, Plaintiffs and the Class could not have known about the true nature of the risks and side effects associated with the subject products.

160. As a direct and proximate result of Defendants' breach of their contract, including the breach of express warranties, Plaintiffs suffered injuries entitled Plaintiffs to judgment and equitable relief against Defendants, as well as restitutions, including all monies paid for the subject products and disgorgement of profits form Defendants received from sales of the subject products, attorneys' fees, punitive damages, and costs, as set forth in the Prayer for Relief.

161. All conditions precedent to Defendants' liability under this contract, including notice, has been performed by Plaintiffs and the Class.

162. In purchasing the Defendants' product, Plaintiffs and the Class Members relied on the representations of the Defendants and had no reason to doubt or dispute those representations. Indeed, due to the uniformity of the representations to all Class Members, Plaintiffs and the Class at all times are presumed to have reasonably and justifiably relied both directly and indirectly on the actions and representations of the Defendant.

163. As a direct and proximate result of Defendants' fraud, Plaintiffs and the Class have suffered actual damages in an amount not presently known, but have acted on grounds applicable to all purchasers of all relevant products.

COUNT IX

BREACH OF IMPLIED WARRANTY
(Nationwide Class)

164. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

165. The Uniform Commercial Code § 2-314 provides that, unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

166. At all times, California and the following 48 states, including the District of Columbia, have codified and adopted the provisions of the Uniform Commercial Code governing the implied warranty of merchantability: Ala. Code §7-2-314; Alaska Stat, §45.02.314; Ariz. Rev. Stat. Ann. §47-2314; Ark. Code Ann §4-2-314; Cal. Comm. Code §2314; Colo. Rev. St. §4.2-314; Conn. Gen. Stat. Ann. §42a 2314; 6 Del. C. §2-314; D.C. Code §28:2-314; Fla. Stat. Ann §672.314; Ga. Code Ann. §11-2-314; Haw. Rev. Stat. §490; Id. Code §28-2-314; Ill.

Comop. Stat. Ann. Ch 810, 5/2-314; Ind. Code. Ann. §26-1-2-314; Iowa Code Ann. §554.2314; Kansas Stat. Ann. §84-2-314; Ky. Rev. Stat. Ann §355.2-314; Mass. Gen. Laws Ch. 106 §2-314; Mich. Comp. Laws Ann. §400.2.314; Miss. Stat. Ann. §336.2-314; Miss. Code Ann. §75-2-314; Missouri Rev. Stat §400.2-314; Mont. Code Ann. §30-2-314; Nev. Rev. Stat. U.C.C. §104.2314; N.H. Rev. Ann. §382-A:2-314; N.J. Stat. Ann. §12A:2-314; N.M. Stat. Ann. §55-2-314; N.Y. U.C.C. Law 2-314; N.C. Gen. Stat. Ann §25-2-314; N.D. Stat. §41-02-314; Ohio Rev. Code Ann. §1302.27; Okla. Stat. §2-314; Or. Rev. Stat. §72.3140; Pa. Stat. Ann. §2314; R.I. Gen Laws §6A-2-314; S.C. Code Ann. §36-2-314; S.D. Stat. 57A-2-314; VA Code §8.2-314; Tenn. Code Ann. §47-2-314; Tex. Bus. & Com. Code Ann. §2-314; Ut. Code Ann. §70A-2-314; VA Code §8.2-314; Vt. Stat. Ann. §9A-2-314; W. Va Code §46-2-314; Wis. Stat. Ann. §402.314; and Wyo. Stat. §34.1-2-314.

167. The subject products are "goods" as defined in the various states' commercial codes governing the implied warranty of merchantability.

168. By placing the products in the stream of commerce, Defendants impliedly warranted that the products were reasonably safe, effective and adequately tested for their intended use, i.e., weight loss, fat-burning, energy-enhancing, and as diet aids, and that they were of merchantable quality.

169. Defendants knew that purchasers relied upon them to design, manufacture, license and sell dietary supplements that were reasonably safe and effective, and in fact members of the public, including Plaintiffs, reasonably relied upon the skill and judgment of Defendants and upon the implied warranties in purchasing and consuming the subject products.

170. Plaintiffs and the Class purchased the products for their intended purpose and use.

171. In breach of their implied warranty, the subject products are unsafe, ineffective and not merchantable, in that they cause serious and even fatal health problem, have not been proven effective for their intended uses, and are not effective for their intended uses.

172. The subject products were not reasonably safe for their intended use when they left Defendants' control and entered the marketplace.

173. The defects were not open or obvious to consumers, including Plaintiffs and the Class, who could not have known about the nature of the risks and side effects associated with the subject products until after they purchased or used them.

174. As a direct and proximate result of Defendants' breach of implied warranties, Plaintiffs and Class Members have sustained injuries by purchasing the subject products, which were not safe or effective as represented, thus entitling Plaintiffs to judgment and equitable relief against Defendants, as well as restitution, including all monies paid for the subject products, and disgorgement of profits from the sale of the subject products, attorneys' fees, punitive damages, and costs, as set forth in the Prayer for Relief.

COUNT X

UNJUST ENRICHMENT
(Nationwide Class)

175. Plaintiffs reallege and incorporate the allegations contained in the paragraphs 1-92 above as if fully set forth herein.

176. Defendants designed, manufactured, licensed, produced, promoted, marketed, and/or sold the ineffective and dangerous products.

177. Plaintiffs and Class Members conferred upon Defendants non-gratuitous payments for the products that were not safe and effective as advertised, and many expose them to serious illness, which can be fatal. Defendants accepted or retained the non-gratuitous

benefits conferred by Plaintiffs and Class Members with full knowledge and awareness that, as a result of Defendants' unconscionable wrongdoing, Plaintiffs and the Class Members were not receiving products of the quality, nature, fitness or value that had been represented by Defendants and reasonable consumers would have expected.

178. Retaining the non-gratuitous benefits conferred upon Defendants by Plaintiffs and Class Members under these circumstances made Defendants' retention of the non-gratuitous benefits unjust and inequitable.

179. Defendants' retention of the non-gratuitous benefits conferred by Plaintiffs and Class Members is unjust and inequitable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment:

A. Certifying the Class as requested herein;

B. That the Court adjudge and decree that Defendants have engaged in the conduct alleged herein;

C. Awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Defendants from continuing the unlawful practices as set forth herein, and directing Defendants to identify, with Court supervision, victims of their conduct and pay them restitution and disgorgement of all monies acquired by Defendants by means of any act or practice declared by this Court to be wrongful;

D. Ordering Defendants to engage in a corrective advertising campaign;

E. Awarding Plaintiffs and the proposed Class members damages;

F. Awarding restitution and disgorgement to Plaintiffs and the other Class members;

G. Awarding Plaintiffs and the Classes punitive damages;

H. Awarding Plaintiffs treble damages;

I. Awarding attorneys' fees and costs; and

J. Providing such further relief as may be just and proper

JURY DEMAND

Plaintiffs demands a trial by jury on all issues so triable.

Dated: August 21, 2014

Respectfully submitted,

/s/ Tim Howard

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CERIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's CM/ECF system this 21th day of August, 2014, which will serve the following counsel of record:

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Respectfully submitted,

/s/ Tim Howard
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