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**T. JAMES TRUMAN & ASSOCIATES**

Tracy James Truman (State Bar No. 3620)  
3654 North Rancho Drive, Suite 101  
Las Vegas, Nevada 89130  
Telephone: (702) 256-0156  
Facsimile: (702) 396-3035  
E-Mail: tjamestruman@gmail.com

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

L. Timothy Fisher (*pro hac vice* pending)  
Annick M. Persinger (*pro hac vice* pending)  
1990 North California Boulevard, Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: ltfisher@bursor.com  
apersinger@bursor.com

*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

NIKA RAET BEY, on behalf of herself and all  
others similarly situated,

Plaintiff,

v.

MUSCLEPHARM CORPORATION,

Defendant.

Case No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiff Nika Raet Bey, by and through her attorneys, brings this action on behalf of herself  
2 and all others similarly situated against Defendant MusclePharm Corporation. Plaintiff makes the  
3 following allegations upon information and belief, except as to allegations specifically pertaining  
4 to herself, which are based on personal knowledge.  
5

6 **SUMMARY OF THE ACTION**

7 1. This is a class action on behalf of purchasers of FitMiss Fat-Burning supplements<sup>1</sup>  
8 that are purportedly designed for “all women who are striving to become a more fit and healthy  
9 FitMiss.” Defendant markets the products as a method of “Rapid Weight Loss – Visible Changes  
10 in Less Than 2 Weeks” as well as a way to “reduce[] body fat,” to “boost” and “promote”  
11 metabolism, “to burn [] fat,” and to “turn your body into a fat burning machine.” To bestow  
12 FitMiss fat burning products with an aura of legitimacy, Defendant also represents that the  
13 products contain “clinically tested ingredients.” Each of these representations is false and  
14 misleading.  
15

16 2. The products are not, in fact, effective for fat burning or weight control. Indeed, as  
17 explained by the National Institutes of Health: “There are no foods that can burn fat.”<sup>2</sup>  
18

19 3. Plaintiff Bey asserts claims on behalf of herself and a nationwide class of purchasers  
20 of the FitMiss fat burning products for violation of the Magnuson-Moss Warranty Act, 15 U.S.C.  
21 §§ 2301, *et seq.*, and for breach of express and implied warranties. Plaintiff further asserts a claim  
22 on behalf of herself and a class Pennsylvania purchasers of the FitMiss fat burning products for  
23 violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTCPL”).  
24  
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27 <sup>1</sup> Referred to herein as the “fat burning products,” “Fat Loss products” or “products.”

28 <sup>2</sup> See *National Institutes of Health*, “Information about Energy Balance” (*available at* <http://science.education.nih.gov/supplements/nih4/energy/guide/info-energy-balance.htm>)

1 **THE PARTIES**

2 4. Plaintiff Nika Raet Bey is a citizen of Pennsylvania, residing in Easton. In or  
3 around May of 2013, Ms. Bey purchased FitMiss Burn at Vitamin World for \$39.99 after reading  
4 the representations on the label, such as that the supplement would help her “burn the fat and lose  
5 weight” and cause “Rapid Weight Loss – Visible Changes In Less Than 2 Weeks.” The  
6 representations on the label were substantial factors influencing Ms. Bey’s decision to purchase the  
7 purportedly fat burning product. Even though Ms. Bey followed the directions on the label, she did  
8 not experience *any* weight loss or fat burning effects, and certainly did not experience “rapid  
9 weight loss” with “visible changes in less than 2 weeks.”  
10

11 5. Defendant MusclePharm Corp. is a Nevada corporation with its principal place of  
12 business in Denver, Colorado.  
13

14 **JURISDICTION AND VENUE**

15 6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A)  
16 because this case is a class action where the aggregate claims of all members of the proposed class  
17 are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiff, as well as most  
18 members of the proposed class, are citizens of states different from the state of Defendant.  
19

20 7. This Court also has subject matter jurisdiction under 28 U.S.C. § 1331 (federal  
21 question). This Court has supplemental jurisdiction over this action pursuant to 28 U.S.C. § 1367.

22 8. This Court has personal jurisdiction over Defendant because Defendant is  
23 incorporated in and has significant continuous and pervasive contacts with the State of Nevada.

24 9. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because  
25 Defendant transacts significant business within this District.  
26  
27  
28

1 **FACTS COMMON TO ALL CAUSES OF ACTION**

2 **A. Background**

3 10. According to a Federal Trade Commission Staff Report,<sup>3</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). Thus, the potential market for sellers of female targeted  
7 weight-loss products and services is huge. Consumers spent an estimated \$34.7 billion in 2000 on  
8 weight-loss products and programs. The marketplace has responded with a proliferation of  
9 products and services, and many promise miraculous, quick-fix remedies. Indeed, the FTC found  
10 that “[t]he use of false or misleading advertising claims in weight-loss advertising is rampant.”  
11

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

1 coincided with a dramatic increase in the number of dietary supplement weight-loss products as  
2 well as the amount of weight-loss product advertising.”<sup>4</sup>

3  
4 12. America’s epidemic of obesity finds consumers willing to try almost anything to  
5 lose weight. It is this desperate struggle with obesity that makes consumers so vulnerable to  
6 Defendant’s miracle weight-loss products. Defendant is taking advantage of the 1994 regulatory  
7 change to market its fat burning products to consumers who are unable to decipher and debunk the  
8 junk science behind the products. However, physicians, scientists, and dieticians agree – long  
9 lasting weight loss comes through a healthy diet and exercise, not fad diets and magic pills.

10 **B. The FitMiss Fat Burning Products**

11 13. The FitMiss line of purportedly fat burning products that Defendant represents are  
12 “Dosed + Formulated Specifically For Women,” “fit your active lifestyle, and [] are specifically  
13 designed [for all] women who are striving to become a more fit and healthy FitMiss” includes the  
14 following “Fat Loss” component products: FitMiss Burn Women’s 6 Stage Fat Burning System,  
15 and FitMiss Tone Women’s Mid-Section Fat Metabolizer.  
16



28 <sup>4</sup> See FTC Staff Report at 27-28.

1 14. The pink themed product labels, shown below, are targeted at the 44% of women in  
2 America attempting to lose weight. The labels feature the FitMiss logo of a slim woman, as well as  
3 an image of a toned bare stomach wrapped with a measuring tape to emphasize the fat loss that  
4 could be realized by consuming the products.

5  
6 15. Both Fat Loss products are uniformly labeled as containing “clinically tested  
7 ingredients” that provide an effective way to “burn fat” as follows:

- 8 a. **FitMiss Burn Women’s 6 Stage Fat Burning System: Clinically Tested**  
9 **Ingredients ▪ Rapid Weight Loss – Visible Changes In Less Than 2 Weeks ▪**  
10 **Appetite Suppressant & Mood Balancer ▪ Boosts Metabolism & Increases Energy;**  
11 **FOCUS. BURN. AMAZE. To burn the fat and lose weight, you have to curb**  
12 **cravings and increase energy levels. With FitMiss Burn and its revolutionary 6-**  
13 **stage approach, you can kick-start your metabolism while saying “NO” to pesky**  
14 **cravings, seeing visible changes in less than 2 weeks. It’s time to get fit and get**  
15 **sexy! (emphasis added).**
- 16 b. **FitMiss Tone Women’s Clinically Proven CLA Weight Loss Blend: Clinically**  
17 **Tested Ingredients ▪ Reduces Body Fat ▪ Supports Body Shaping & Toning ▪**  
18 **Promotes Healthy Metabolism; TRIM. SHAPE. GORGEOUS! FitMiss Tone is**  
19 **what you need to turn your body into a fat-burning machine! The active**  
20 **ingredients in FitMiss Tome will help you blast away fat and boost your**  
21 **metabolism. So while you are out there turning heads, remember FitMiss Tone**  
22 **helped you get there. (emphasis added).**



1           **C.     The FitMiss Fat Burning Products Do Not Burn Fat or Cause Weight Loss**

2           16.     Contrary to Defendant’s representations, there are no fat-burning miracles, and  
3 Defendant’s statements are absolutely false. Any doctor knows that fat-burning miracles do not  
4 exist and such statements are reckless and harmful to public health. As stated by the National  
5 Institutes of Health (“NIH”), “[t]here are no foods that can burn fat.”<sup>5</sup>  
6

7           17.     Because there are no foods that can burn fat, consuming caffeine, for example,  
8 “does not constitute an effective strategy for weight loss.” Instead, the NIH explains, maintaining a  
9 healthy body weight requires “balancing calories consumed with calories used for activities.” The  
10 NIH also explicates that:

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

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

                  How much physical activity *is* necessary? The Dietary Guidelines for Americans  
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>6</sup>

22           Indeed, exercise and controlled food intake are the *only* means to promote weight loss.  
23 That fact alone unambiguously shows that Defendant’s representations about the Fat Loss  
24 products are false.

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27           <sup>5</sup> See *National Institutes of Health*, “Information about Energy Balance” (*available at*  
<http://science.education.nih.gov/supplements/nih4/energy/guide/info-energy-balance.htm>)

28           <sup>6</sup> *Id.* at 16.



1 18. Defendant’s representation that the FitMiss Fat Loss products contain “clinically  
2 tested ingredients” is also false and misleading. As the FTC has explained:

3 The world of weight-loss advertising is a virtual fantasy land where pounds “melt  
4 away” while “you continue to eat your favorite foods”; “amazing pills ... seek and  
5 destroy enemy fat” ...

6 And for those [consumers] who remain skeptical, there is an answer. The products  
7 are backed by “clinical studies” or are “**clinically tested**” ...

8 Phrases like “the clinically proven healthy way to lose weight,” “clinically tested,”  
9 “scientifically proven,” and “studies confirm” bestow products with an aura of  
10 scientific legitimacy and aim to persuade consumers that they should feel confident  
11 that the product will work.<sup>7</sup> (emphasis added).

12 19. Defendant’s claims that the products “cause rapid weight loss” and “blast away fat”  
13 are also false. As the FDA warns, signs of fraudulent weight-loss dietary supplements include  
14 “promises of quick action, such as ‘lose 10 pounds in one week.’”<sup>8</sup>

15 **1. The Ingredients in the Products Do Not Burn Fat**

16 20. In addition to the fact that weight loss can only be achieved by achieving energy  
17 balance – that is by controlling food intake and physical activity level – the purportedly active  
18 ingredients in the products have been shown to be ineffective for weight loss.

19 21. Defendant represents on the FitMiss Burn product label and on its website that the  
20 purportedly “key ingredients” that provide a “Fat Metabolizer” effect and “All Day Energy-NO  
21 CRASH” are green tea extract and Caffeine. But the FDA has determined that “there are  
22 inadequate data to establish the general recognition of the safety and effectiveness” of caffeine for  
23 the specified use of weight control.<sup>9</sup> Likewise, a 2012 Cochrane Systematic Review of 13  
24 randomized controlled trials, of at least 12 weeks duration, concluded that green tea preparations  
25 (catechins and caffeine) had no statistically significant effect on weight loss or the maintenance of

26 <sup>7</sup> Federal Trade Commission Staff Report, “Weight-Loss Advertising: An Analysis of Current  
27 Trends” (Sept. 2002).

28 <sup>8</sup> <http://www.fda.gov/forconsumers/consumerupdates/ucm246742.htm>

<sup>9</sup> See 21 C.F.R. § 310.545(20).



1 weight loss.<sup>10</sup> As such, the systematic review demonstrates that Defendant’s representations about  
2 FitMiss Burn are false and misleading because it *does not* cause “Rapid-Weight Loss – Visible  
3 Changes in Less Than 2 Weeks” or provide any fat loss or fat burning benefits.

4  
5 22. Defendant further represents on the FitMiss Burn product label and on its website  
6 that glucomannan (amorphophallus konjac) and raspberry ketones provide “weight management  
7 control” and “aid[] in the breakdown of fat molecules.”<sup>11</sup> But glucomannan is a soluble fiber that  
8 is not absorbed in the bloodstream, and does not cause any chemical response in the human body.  
9 As a result, glucomannan does not cause material loss of body fat in a person who does not reduce  
10 calories or increase exercise. Further, despite Defendant’s claim that the product contains  
11 “clinically tested ingredients” there has never been a human study on the purported weight loss  
12 effects of raspberry ketones (natural or synthetic).<sup>12</sup> Indeed, “[e]xperts say that investing anywhere  
13 from \$12 to \$20 in a bottle of raspberry ketone supplements amounts to little more than wishful  
14 thinking. And doing so may or may not be harmful.”<sup>13</sup>

15  
16 23. Defendant falsely claims on the FitMiss Tone product label and on its website that  
17 its “CLA Fit Blend” is a “clinically proven” “Mid-section Fat Metabolizer.” Conjugated Linoleic  
18  
19  
20

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21 <sup>10</sup> Green tea for weight loss and weight maintenance (Dec. 12, 2012) (*abstract available at*  
22 <http://www.ncbi.nlm.nih.gov/pubmed/23235664>).

23 <sup>11</sup> Raspberry ketone has long been used as a chemical additive in perfumes and cosmetics due to its  
24 sweet fruity aroma. Raspberry ketone is only found in trace amounts in raspberries (less than  
25 0.1%), which likely makes the natural material from raspberries too costly for use in  
26 supplements. As a result, raspberry ketone rarely comes from raspberries and is instead artificially  
27 synthesized. Synthetic raspberry ketone is very cheap. It only costs a couple of dollars per pound,  
28 which means that despite the high selling price, even a large bottle contains just pennies of  
raspberry ketone. Clearly then, the real benefits from raspberry ketone are experienced by those  
who sell it and not those who use it. *See* <http://www.wordsonwellness.com/post/2012/06/13/With-All-Due-Respect-to-Dr-Oz-Raspberry-Ketone-is-not-a-Fat-Burning-Miracle.aspx>

<sup>12</sup> <http://www.wordsonwellness.com/post/2012/06/13/With-All-Due-Respect-to-Dr-Oz-Raspberry-Ketone-is-not-a-Fat-Burning-Miracle.aspx>

<sup>13</sup> <http://www.snopes.com/inboxer/scams/ultradrops.asp>

1 Acid (“CLA”) does not reduce body fat mass or sagittal abdominal diameter<sup>14</sup> and does not cause  
2 weight loss. In that connection, Zambell et al. (2000) found no statistical difference between the  
3 body compositions of participants in a CLA supplemented group and a control group. Zambell et  
4 al. tightly controlled energy intake and activity levels in a metabolic ward study. The high level of  
5 control in the Zambell et al. study substantially increases the quality of their results. Thus, 14 years  
6 ago, Zambell et al. showed that, contrary to Defendant’s claims, CLA does no more than a placebo  
7 pill.<sup>15</sup> Similarly, as stated by Whigham et al. (2007), “when the body of evidence is considered as a  
8 whole, CLA does not have a beneficial effect on human body composition.”<sup>16</sup> Likewise, Larsen et  
9 al. (2006) found that, after one year of CLA supplementation, CLA did not result in a difference in  
10 body weight or body fat.<sup>17</sup> In an earlier study, Larsen et al. (2003) also concluded that:

11  
12 Although CLA appears to attenuate increase in bodyweight and body fat in several  
13 animal models, CLA isomers sold as dietary supplements are not effective as weight  
14 loss agents in humans and may actually have adverse effects on human health.<sup>18</sup>

15 24. In short, the well-established energy balance equation (energy intake and energy  
16 output), and scientific research demonstrate that Defendant’s claims about the efficacy of its  
17 products are false.

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23 <sup>14</sup> Sagittal Abdominal Diameter is the distance from the small of the back to the upper abdomen  
and a measure of visceral obesity (the amount of fat in the gut region).

24 <sup>15</sup> Zambell, K. et al.: “Conjugated linoleic acid supplementation in humans: effects on body  
composition and energy expenditure.” *Lipids* 2000, 35: 777-782.

25 <sup>16</sup> Whigham, L. et al.: “Efficacy of conjugated linoleic acid for reducing fat mass: a meta-analysis  
in humans” *American Journal of Clinical Nutrition* 2007, 85: 1203-1211.

26 <sup>17</sup> Larsen T. et al.: “Conjugated linoleic acid supplementation for 1 year does not prevent weight or  
27 body fat regain” *American Journal of Clinical Nutrition* 2006, 83: 606-612.

28 <sup>18</sup> Larsen T. et al.: “Efficacy and safety of dietary supplements containing CLA for the treatment of  
obesity: evidence from animal and human studies” *Journal of Lipid Research* 2003, 44: 2234-2241.

**CLASS ACTION ALLEGATIONS**

1  
2           25. Plaintiff Bey seeks to represent a class defined as all persons in the United  
3 States who purchased a FitMiss Fat Loss product (the “Class”).

4           26. Plaintiff also seeks to represent a subclass of all persons who purchased a  
5 FitMiss Fat Loss product in Pennsylvania (the “SubClass”).

6           27. Excluded from the Classes are persons who made such purchase for purpose  
7 of resale, as well governmental entities, Defendant, Defendant’s affiliates, parents,  
8 subsidiaries, employees, officers, directors, and co-conspirators. Also excluded is any  
9 judicial officer presiding over this matter and the members of their immediate families and  
10 judicial staff.

11           28. The members of the Class are so numerous and geographically dispersed that  
12 joinder of all members is impracticable. While the exact number of Class Members remains  
13 unknown at this time, Plaintiff believes that there are hundreds of thousands of members of the  
14 proposed Class. Notice will be afforded using the best notice practicable under the circumstances,  
15 such as by publication, and posting online. Since the text of Fed. R. Civ. P. 23(c)(2)(B) only  
16 requires individual notice to class members “who can be identified through reasonable effort,”  
17 direct notice need only be provided where possible.

18           29. Common questions of law and fact exist as to all Class Members and predominate  
19 over questions affecting only individual Class Members. These common legal and factual  
20 questions include, but are not limited to:

- 21           a. Whether Defendant’s marketing and advertising of the FitMiss Fat Loss products  
22 includes false and misleading statements;  
23           b. Whether Defendant’s conduct violated the Magnuson-Moss Warranty Act;

1 c. Whether Defendant's conduct violated Pennsylvania's Unfair Trade Practices and  
2 Consumer Protection Law; and

3 d. Whether Defendant's conduct breached express or implied warranties.

4 30. Plaintiff's claims are typical of the claims of all Class Members. Plaintiff is situated  
5 identically to all members of the Class with respect to the issues presented in this case. The claims  
6 of Plaintiff are based on the same fundamental factual allegations and legal theories as the claims  
7 of all other members of the Class.  
8

9 31. Plaintiff will adequately represent and protect the interests of the Class and has no  
10 interests that conflict with or are antagonistic to the interests of the Class. She has also retained  
11 counsel experienced in prosecuting class actions, and she intends to prosecute this action  
12 vigorously. The interests of Class Members will be fairly and adequately protected by Plaintiff and  
13 her counsel.  
14

15 32. The class mechanism is superior to other available means for the fair and efficient  
16 adjudication of the claims of Class Members. Each individual Class Member may lack the  
17 resources to undergo the burden and expense of individual prosecution of the complex and  
18 extensive litigation necessary to establish Defendant's liability. Individualized litigation increases  
19 the delay and expense to all parties and multiplies the burden on the judicial system presented by  
20 the complex legal and factual issues of this case. Individualized litigation also presents a potential  
21 for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer  
22 management difficulties and provides the benefits of single adjudication, economy of scale, and  
23 comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment  
24 of the liability issues will ensure that all claims and claimants are before this Court for consistent  
25 adjudication of the liability issues.  
26  
27  
28

1 33. Unless a class is certified, Defendant will retain monies received as a result of its  
2 unlawful conduct that were taken from Plaintiff and proposed Class Members.

3 **FIRST CLAIM FOR RELIEF**

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

5 34. Plaintiff incorporates by reference each and every allegation set forth above as  
6 though fully set forth herein.

7  
8 35. The FitMiss Fat Loss products are consumer products within the meaning of the  
9 Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

10 36. Plaintiff and the Class Members are “consumers” within the meaning of the  
11 Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

12 37. Defendant is both a supplier and a warrantor within the meaning of the Magnuson-  
13 Moss Warranty Act, 15 U.S.C. § 2301(4) and (5).

14 38. Defendant’s statements as set forth herein (including, *inter alia*, statements that the  
15 FitMiss Fat Loss products contain “clinically tested ingredients,” cause “rapid weight loss – visible  
16 changes in less than 2 weeks,” “reduce[] body fat,” “burn [] fat,” and “blast away fat”) are “written  
17 warranties” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6)(A).

18 39. Defendant provides 90 capsules of FitMiss Burn per bottle and directs as follows:  
19 “Take one serving (2 capsules) with an 8 oz. glass of water 30-45 minutes before breakfast, and/or  
20 lunch. Morning: Take two (1-2) capsules with 8 ounces of water 30-45 minutes before breakfast.  
21 Afternoon: Take two (1-2) capsules with 8 ounces of water 30-45 minutes before lunch.”  
22 Similarly, Defendant provides 60 capsules of FitMiss Tone per bottle and directs users to  
23 “consume 1 softgel with morning, noon, and evening meals ....” As such, Defendant warrants that  
24 the products will cause fat and weight loss in “2 weeks” and in 20 days at the very latest.  
25  
26  
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28

1 40. As alleged herein, Defendant has breached its written warranties by selling  
2 consumers the FitMiss Fat Loss products, which have not been clinically tested and which do not  
3 burn or reduce fat as warranted.

4 41. As a foreseeable, direct and proximate result of Defendant's breach of its written  
5 warranties, Plaintiff and each Class Member suffered damages.  
6

7 **SECOND CLAIM FOR RELIEF**

8 **(Breach of Express Warranty)**

9 42. Plaintiff incorporates by reference each and every allegation set forth above as  
10 though fully set forth herein.

11 43. Plaintiff, and each Class Member, formed a contract with Defendant at the time  
12 Plaintiff and each Class Member purchased a FitMiss Fat Loss product. The terms of the contract  
13 include the promises and affirmations of fact relating to fat burning and loss on Defendant's  
14 product packaging and online, as described above. Defendant's affirmative representations  
15 concerning weight and fat loss as described herein became part of the basis of the bargain and are  
16 part of a contract between Plaintiff and the members of the Class on the one hand, and Defendant  
17 on the other, and thus constituted express warranties.  
18

19 44. Defendant, as the designer, manufacturer, marketer, distributor and/or seller  
20 expressly warranted, among other things, the following material terms about the FitMiss Fat Loss  
21 products:  
22

- 23 a. Clinically tested ingredients;
- 24 b. Clinically proven weight loss;
- 25 c. Rapid Weight Loss – Visible Changes in Less Than 2 Weeks;
- 26 d. Reduces body fat;
- 27 e. Blast[s] away fat;
- 28

- 1 f. Burn the fat and lose the weight;
- 2 g. Turn your body into a fat-burning machine;
- 3 h. Boosts metabolism; and
- 4 i. Dosed + formulated for women.

5  
6 45. Defendant breached the terms of its contracts, including the express warranties, with  
7 Plaintiff and the Class Members by failing to provide a product that provides the promised weight  
8 and fat loss benefits.

9 46. As a foreseeable, direct and proximate result of these breaches, Plaintiff and each  
10 Class Member suffered damages.

11 **THIRD CLAIM FOR RELIEF**

12 **(Breach of Implied Warranty of Merchantability)**

13 47. Plaintiff incorporates by reference each and every allegation set forth above as  
14 though fully set forth herein.

15  
16 48. Defendant is and was at all times a “merchant” within the meaning of the Uniform  
17 Commercial Code (“UCC”). Defendant manufactured, distributed and marketed the Fat Loss  
18 products, which are “goods” within the meaning of the UCC. Consequently, Defendant impliedly  
19 warranted that the products were merchantable, including that they could pass without objection in  
20 trade under the contract description, that they were fit for the ordinary purposes for which such  
21 goods are used, that they were of fair average quality within the description, that they were  
22 adequately labeled, and that they would conform to the promises or affirmations of fact made on  
23 the container labels. However, Defendant breached each of these implied warranties because  
24 Defendant’s Fat Loss products are not fit for the ordinary purpose for which weight loss  
25 supplements are used – causing weight and fat loss.  
26  
27  
28



1 49. Plaintiff and the Class Members purchased the products for the purpose of burning  
2 fat and losing weight.

3 50. The products were not altered by the Plaintiff or Class Members. The products  
4 were unmerchantable when they left the exclusive control of Defendant. This unmerchantability is  
5 inherent in the products.  
6

7 51. Plaintiff notified Defendant of the acts constituting breach of the implied warranties,  
8 both for herself and the Class.

9 52. As a foreseeable, direct and proximate result of these breaches, Plaintiff and each  
10 Class Member suffered damages.  
11

12 **FOURTH CLAIM FOR RELIEF**

13 **(Violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law “UTCPL”**

14 **73 Pa. Cons. Stat. §§ 201-2 et seq.)**

15 53. Plaintiff incorporates by reference each and every allegation set forth above as  
16 though fully set forth herein.

17 54. Plaintiff brings this claim individually and on behalf of the members of the  
18 proposed Pennsylvania Subclass against Defendant.

19 55. Defendant’s false advertising of FitMiss directly affected Plaintiff and other  
20 consumers in Pennsylvania.  
21

22 56. Defendant’s conduct, described herein, constitutes unfair methods of competition  
23 and deceptive practices as described in 73 P.S. § 201-2(4)(ii), (v), (vii), (ix), and (xxi) because  
24 Defendant made false and misleading statements about the products, and did not intend to sell them  
25 as advertised.  
26

27 57. Defendant’s practices also constitute unfair methods of competition as described in  
28 73 P.S. § 201-2(4)(xiv) because the products do not perform as warranted.

1           58. The unfair methods of competition, and unfair deceptive practices employed by  
2 Defendant are unlawful under 73 P.S. § 201-3.

3           59. As a direct and proximate result of Defendant's violations of Pennsylvania's Unfair  
4 Trade Practices and Consumer Protection Law, Plaintiff and the Pennsylvania Subclass have  
5 suffered economic loss.  
6

7           60. Pursuant to 73 P.S. § 201-4.1, Plaintiff seeks an order of this Court permanently  
8 enjoining Defendant from continuing to engage in violations of the UTPCPL and for payment of  
9 costs and restitution.

10           61. Pursuant to 73 P.S. § 201-9.2, Plaintiff is entitled to judgment in an amount up to  
11 three times the actual damages sustained, but not less than one hundred (\$100.00), and is entitled to  
12 reimbursement for all reasonable attorney's fees and costs incurred. Also, the Court may provide  
13 such additional relief as it deems necessary and proper, including punitive damages.  
14

15   **PRAAYER FOR RELIEF**

16           WHEREFORE, Plaintiff demands judgment:

- 17           A. Determining this action is a proper class action, and certifying Plaintiff as class  
18           representative;  
19           B. Awarding compensatory damages against Defendant in favor of Plaintiff and the  
20           Class for damages sustained as a result of Defendant's wrongdoing together with  
21           interest thereon;  
22           C. Awarding prejudgment interest;  
23           D. Awarding punitive damages as appropriate;  
24           E. Awarding extraordinary, equitable and/or injunctive relief as permitted by law  
25           (including but not limited to disgorgement);  
26  
27  
28

- 1 F. Awarding Plaintiff and the Class their costs and disbursements of this suit, including  
2 reasonable attorneys' fees, accountants' fees, and experts' fees; and  
3  
4 G. Awarding such other and further relief as may be just and proper.

5 **JURY DEMAND**

6 Plaintiff demands a trial by a jury on all of the triable issues of this complaint.

7 Dated: April 29, 2014

Respectfully submitted,

8 **T. JAMES TRUMAN & ASSOCIATES**

9  
10 By: /s/ Tracy James Truman

Tracy James Truman

11 Tracy James Truman (State Bar No. 3620)  
12 3654 North Rancho Drive, Suite 101  
13 Las Vegas, Nevada 89130  
14 Telephone: (702) 256-0156  
Facsimile: (702) 396-3035  
E-Mail: tjamestruman@gmail.com

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

16 L. Timothy Fisher (*pro hac vice* pending)  
17 Annick M. Persinger (*pro hac vice* pending)  
18 1990 North California Boulevard, Suite 940  
19 Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: ltfisher@bursor.com  
apersinger@bursor.com

20 *Attorneys for Plaintiff*

**CIVIL COVER SHEET**

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

**I. (a) PLAINTIFFS**

NIKA RAET BEY, on behalf of herself and all others similarly situated.

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

(c) Attorney's (Firm Name, Address, and Telephone Number)

Tracy James Truman, T. James Truman & Assoc., 3654 N. Rancho Dr., Suite 101, Las Vegas, NV 89130 (702) 256-0156

**DEFENDANTS**

MUSCLEPHARM CORPORATION

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

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

Attorneys (If Known)

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

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

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

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

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	IMMIGRATION
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions

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

- 1 Original Proceeding  
 2 Removed from State Court  
 3 Remanded from Appellate Court  
 4 Reinstated or Reopened  
 5 Transferred from another district (specify)  
 6 Multidistrict Litigation  
 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
15 U.S.C. Section 2301

Brief description of cause:  
Breach of warranties and false advertising.

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ \_\_\_\_\_  
 CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions): JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE \_\_\_\_\_ SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

04/29/2014 /s/ Tracy James Truman

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

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**UNITED STATES DISTRICT COURT**

for the

District of Nevada

NIKA RAET BEY, on behalf of herself and all others	)	
similarly situated,	)	
_____	)	
<i>Plaintiff(s)</i>	)	
v.	)	Civil Action No.
MUSCLEPHARM CORPORATION,	)	
_____	)	
<i>Defendant(s)</i>	)	

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant’s name and address)*

MusclePharm Corporation  
4721 Ironton Street, Bldg. A  
Denver, CO 80239

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff’s attorney, whose name and address are:

Tracy James Truman  
T. James Truman & Associates  
3654 N. Rancho Dr., Suite 101  
Las Vegas, NV 89130

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*CLERK OF COURT*

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

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

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

**PROOF OF SERVICE**

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

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

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

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

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

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

Other *(specify)*:

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_.

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

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

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

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

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

Additional information regarding attempted service, etc: