

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
ZABRINA COLLAZO
and JOHN DOES 1-100, on behalf of
themselves and others similarly situated,

Plaintiffs,

- against -

NOW HEALTH GROUP, INC.
d/b/a NOW NATURAL FOODS,
d/b/a NOW INTERNATIONAL,
d/b/a HEALTHCO,
d/b/a NATURE'S DELIVERY,
d/b/a NHG,
d/b/a NOW FOODS,

Defendant,
-----X

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U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

CLASS ACTION COMPLAINT

Case No. **CV 15 - 0328**
JURY TRIAL DEMANDED

GLASSER, J.

MANH. N.J.

Plaintiffs ZABRINA COLLAZO and JOHN DOES 1-100, individually and on behalf of all other persons similarly situated, by their undersigned attorneys, as and for their Complaint against the Defendant, allege the following based upon personal knowledge as to themselves and their own action, and, as to all other matters, respectfully allege, upon information and belief, as follows (Plaintiffs believe that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery):

NATURE OF THE ACTION

1. This action seeks redress for a deceptive and otherwise improper business practices that Defendant, NOW HEALTH GROUP, INC. (hereinafter, "NOW FOODS" or "Defendant"), engages in with respect to the packaging of its NOW® Vitamin C supplement Product, which is produced in the form of 100% ascorbic acid (Vitamin C) powder with a net weight of 3 lbs (1361 grams).

2. Defendant manufactures, markets and sells the Vitamin C powder Product with non-functional slack-fill in violation of the Federal Food Drug & Cosmetic Act ("FDCA") Section 502 (21 U.S.C. 352(i)), New York Edn. Law § 6815 and New York General Business Code § 349 and various consumer laws of all fifty states and the District of Columbia.

3. Defendant sold Plaintiffs and Class members and continues to sell consumers 3 lb. NOW® Vitamin C Crystals (hereinafter, the "Product").

4. Defendant sold and continues to sell the Product under the NOW® brand. Each of the Product (i) contains the same product packaging, as described herein, (ii) contains non-functional slack-fill and (iii) violates 21 U.S.C. 352(i), N.Y. EDN. Law § 6815 and 24 R.C.N.Y. Health Code § 71.05, and New York's Deceptive Acts or Practices Law, Gen. Bus. Law § 349 as described herein.

5. The Product is packaged in non-transparent white plastic containers and is used primarily to supplement a healthy diet as well as treat and prevent a wide range of diseases, disorders, and deficiencies in the human body, such as the common cold, stomach ulcers caused by *Helicobacter pylori* bacteria, and depression. The size of the container in comparison to the volume of the Product contained therein makes it appear as if the consumer is buying more than what is actually being sold. By increasing the size of the Product packaging, Defendant maximizes the shelf presence of its Product over competitor Products.

6. Plaintiffs and Class members viewed Defendant's misleading Product packaging, reasonably relied in substantial part on the representations and were thereby deceived in deciding to purchase the Product for a premium price.

7. Plaintiffs bring this proposed consumer class action on behalf of themselves and all other persons nationwide, who from the applicable limitations period up to and including the present (the “Class Period”), purchased for consumption and not resale the Product.

8. During the Class Period, Defendant manufactured, marketed and sold the Product throughout the United States. Defendant purposefully sold the Product with non-functional slack-fill.

9. Defendant’s actions constitute violations of the federal Food Drug & Cosmetic Act (“FDCA”) Section 502 (21 U.S.C. 352(i)), New York Edn. Law § 6815, Title 24 of the Rules of the City of New York § 71.05, New York’s Deceptive Acts or Practices New York Gen. Bus. Law § 349, California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, California’s Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.*, Illinois’s Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*, Florida’s Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*, Texas’ Deceptive Trade Practices Act, Texas Stat. Ann. §§ 17.41, *et seq.*, Michigan’s Consumer Protection Act, §§ 445.901, *et seq.*, Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. § § 201-1, *et seq.*, and New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et seq.*, as well as those similar deceptive and unfair practices/and/or consumer protection laws in other states.

10. Defendant violated statutes enacted in each of the fifty states and the District of Columbia that are designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising. These statutes are:

- a. Alabama Deceptive Trade Practices Act, Ala. Statues Ann. §§ 8-19-1, *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Ak. Code § 45.50.471, *et seq.*;
- c. Arizona Consumer Fraud Act, Arizona Revised Statutes, §§ 44-1521, *et seq.*;
- d. Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.*;

- e. California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.*;
- f. Colorado Consumer Protection Act, Colo. Rev. Stat. § 6 - 1-101, *et seq.*;
- g. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.*;
- h. Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et seq.*;
- i. District of Columbia Consumer Protection Procedures Act, D.C. Code § 28 3901, *et seq.*;
- j. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*;
- k. Georgia Fair Business Practices Act, § 10-1-390 *et seq.*;
- l. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statutes § 480 1, *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statutes § 481A-1, *et seq.*;
- m. Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.*;
- n. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*;
- o. Indiana Deceptive Consumer Sales Act, Indiana Code Ann. §§ 24-5-0.5-0.1, *et seq.*;
- p. Iowa Consumer Fraud Act, Iowa Code §§ 714.16, *et seq.*;
- q. Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et seq.*;
- r. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §§ 365.020, *et seq.*;
- s. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § § 51:1401, *et seq.*;
- t. Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et seq.*, and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et seq.*;
- u. Maryland Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq.*;
- v. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- w. Michigan Consumer Protection Act, § § 445.901, *et seq.*;
- x. Minnesota Prevention of Consumer Fraud Act, Minn. Stat §§ 325F.68, *et seq.*; and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43, *et seq.*;
- y. Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*;
- z. Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;
- aa. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code §30-14-101, *et seq.*;
- bb. Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59 1601, *et seq.*, and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et seq.*;
- cc. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et seq.*;
- dd. New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et seq.*;
- ee. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et seq.*;
- ff. New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57 12 1, *et seq.*;
- gg. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law § § 349, *et seq.*;
- hh. North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et seq.*;
- ii. North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes § § 75-1, *et seq.*;
- jj. Ohio Deceptive Trade Practices Act, Ohio Rev. Code. Ann. §§ 4165.01. *et seq.*;
- kk. Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.*;
- ll. Oregon Unfair Trade Practices Act, Rev. Stat § 646.605, *et seq.*;
- mm. Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. § § 201-1, *et seq.*;
- nn. Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1, *et seq.*;
- oo. South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.*;

- pp.* South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 1, *et seq.*;
- qq.* Tennessee Trade Practices Act, Tennessee Code Annotated §§ 47-25-101, *et seq.*;
- rr.* Texas Stat. Ann. §§ 17.41, *et seq.*, Texas Deceptive Trade Practices Act, *et sep.*;
- ss.* Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1, *et seq.*;
- tt.* Vermont Consumer Fraud Act, Vt. Stat. Ann. tit.9, § 2451, *et seq.*;
- uu.* Virginia Consumer Protection Act, Virginia Code Ann. §§59.1-196, *et seq.*;
- vv.* Washington Consumer Fraud Act, Wash. Rev. Code § 19.86.010, *et seq.*;
- ww.* West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-6-101, *et seq.*;
- xx.* Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100. 18, *et seq.*;
- yy.* Wyoming Consumer Protection Act, Wyoming Stat. Ann. §§40-12-101, *et seq.*

11. Defendant has deceived Plaintiffs and other consumers nationwide by mischaracterizing the size of its Product. Defendant has been unjustly enriched as a result of its conduct. Plaintiffs bring this action to stop Defendant's misleading practice.

JURISDICTION AND VENUE

12. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B) whereby: (i) the proposed class consists of over 100 class members, (ii) a member of the putative class is a citizen of a different state than Defendant, and (iii) the amount in controversy exceeds the sum or value of \$5,000,000, excluding interest and costs.

13. The Court has jurisdiction over the federal claims alleged herein pursuant to 28 U.S.C § 1331 because it arises under the laws of the United States.

14. The Court has jurisdiction over the state law claims because they form part of the same case or controversy under Article III of the United States Constitution.

15. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C § 1332 because the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of different states.

16. This Court has personal jurisdiction over Plaintiffs because Plaintiffs submit to the Court's jurisdiction. This Court has personal jurisdiction over Defendant, pursuant to New

York Statute N.Y. CVP. Law § 302, because they conduct substantial business in this District, some of the actions giving rise to the Complaint took place in this District, and some of Plaintiffs' claims arise out of Defendant operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state; committing a tortious act in this state; and causing injury to person or property in this state arising out of Defendant's acts and omissions outside this state.

17. Additionally, this court has personal jurisdiction over Defendant because its Product is advertised, marketed, distributed, and sold throughout New York State; Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State; and Defendant has sufficient minimum contacts with New York and/or otherwise has intentionally availed themselves of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendant is engaged in substantial and not isolated activity within New York State.

18. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to these claims occurred in this District, the Defendant has caused harm to class members residing in this District, and the Defendant are residents of this District under 28 U.S.C. 1391(c)(2) because they are subject to personal jurisdiction in this district.

PARTIES

19. Plaintiff ZABRINA COLLAZO is, and at all relevant times hereto has been, a citizen of the State of New York and resides in Queens County. Plaintiff COLLAZO has purchased the Product for personal consumption within the State of New York. Plaintiff

COLLAZO purchased the Product from the health food and dietary supplements chain GNC. Plaintiff COLLAZO purchased the Product at a premium price and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

20. Defendant, NOW FOODS, is a domestic corporation organized under the laws of Illinois with its headquarters at 244 Knollwood Drive, Suite 300, Bloomingdale, IL 60108. NOW FOODS manufactured, advertised, marketed and sold the Product and other health food supplements and products to tens of thousands of consumers nationwide, including in New York.

FACTUAL ALLEGATIONS

Federal & State Regulations Regarding Misbranded Drugs

21. The FDCA, 21 U.S.C. §§ 301 *et seq.*, governs the sale of foods, drugs and cosmetics in the United States. The classification of a product as a food, drug, or cosmetic, affects the regulations by which the product must abide.

22. The FDCA defines drugs, in part, by their intended use, as "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease," or "articles (other than food) intended to affect the structure or function of the body of man or other animals," 21 U.S.C. § 321(g)(1).

23. Under 21 U.S.C. § 352(i)(1), a drug or device shall be deemed to be misbranded "[i]f it is a drug and its container is so made, formed, or filled as to be misleading..." New York Edn. Law § 6815 identically provides that "[a] drug or device shall be deemed to be misbranded:...h.(1)If it is a drug and its container is so made, formed or filled as to be misleading. Further, Title 24 of the Rules of the City of New York § 71.05 provides that "[a] drug shall be deemed misbranded as set forth in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §352) or the State Education Law (§6815)..."

Defendant's Product Contain Non-Functional Slack-Fill

24. Defendant develops, manufactures, markets, distributes and sells dietary supplements, food and nutritional products, body hygiene and hair care products and active pharmaceutical ingredients under the brand name NOW®. The Vitamin C Crystal Product is sold at most health food stores and online retailers throughout the United States, including but not limited to Vitamin Shoppe, GNC, and iherb.com.

25. Defendant has routinely employed slack-filled packaging containing non-functional slack-fill to mislead customers into believing that they were receiving more product than they actually were.

26. Non-functional slack-fill is the difference between the actual capacity of a container and the **volume** of product contained within. Plaintiffs were (and a consumer would reasonably be) misled about the volume of the product contained within the container in comparison to the size of the Product's packaging. The size of the container in relation to the actual volume of the Vitamin C powder contained therein was intended to mislead the consumer into believing the consumer was getting more of the Product than what was actually in the container.

27. Defendant sold and continues to sell the Vitamin C Crystal Product with non-functional slack-fill during the class period.

28. In the twelve month period prior to the filing of this Complaint, Plaintiff COLLAZO purchased the Vitamin C Crystal Product in Queens County. Plaintiff COLLAZO purchased the Vitamin C Crystal Product from a GNC in Flushing, Queens for \$59.99.

29. The Vitamin C Crystal Product is packaged in a non-transparent white container that is approximately 8.625 inches in height and 4.75 inches in diameter. The bottle cap is about

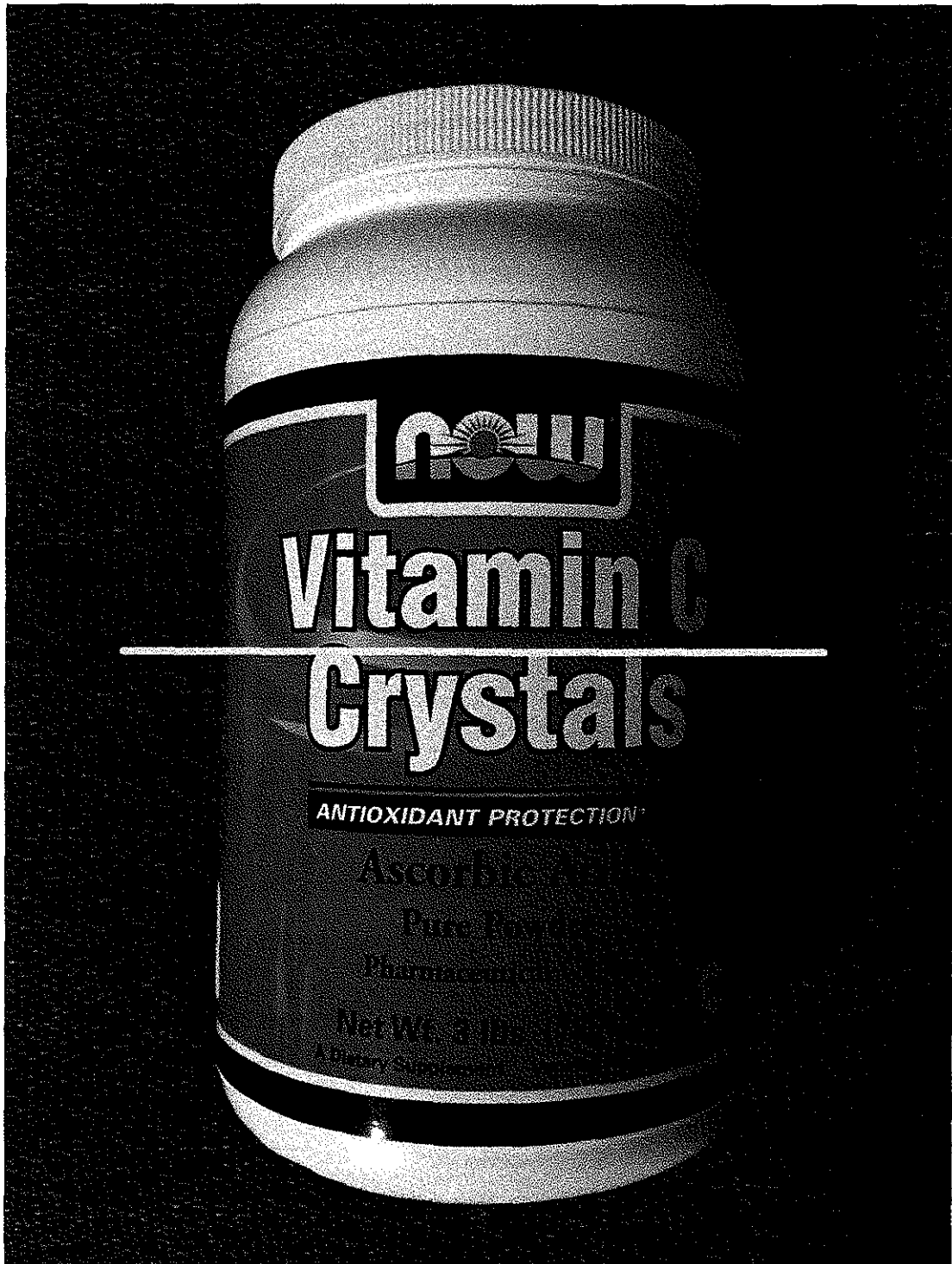
0.5 inches in height and the crystals inside the container only measures up to approximately 4.375 inches from the bottom of the bottle. Thus, each container of the Product has roughly 4.25 inches of non-functional slack-fill in height. The Vitamin C Crystal Product is sold for approximately \$59.99 (or more).

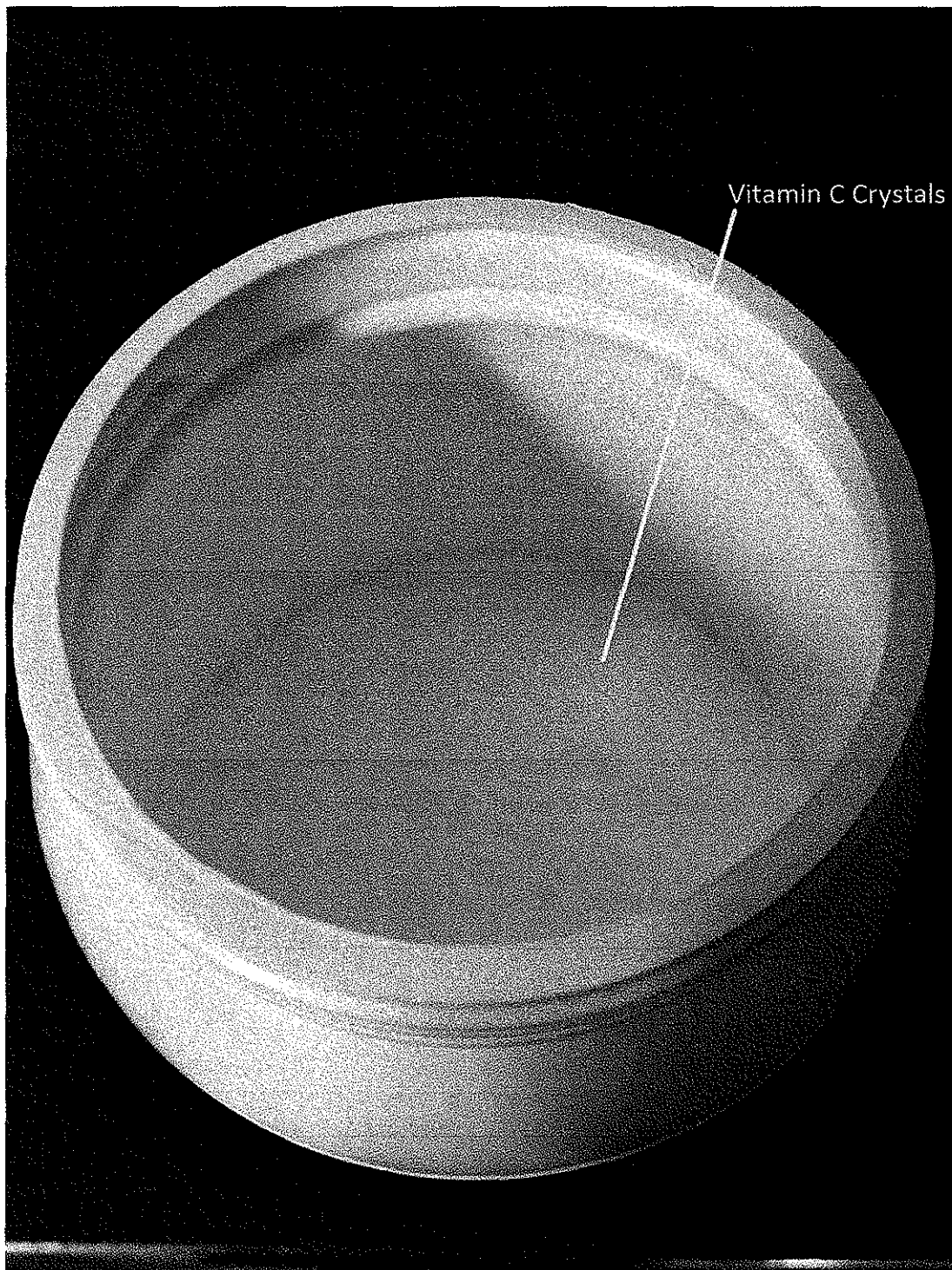
30. The volume capacity of the cylindrical portion of the Vitamin C Crystal Product container is approximately 152.84 cubic inches. The actual volume of the powder contained within the container is approximately 77.53 cubic inches, leaving a difference of 75.31 cubic inches or approximately 49% non-functional slack-fill. Thus, the size of the container is designed to give the impression that there is more in the packaging than there actually is.

31. Plaintiffs and the members of the Class relied on the sizes of the container to believe that the entire volume of the packaging would be filled to capacity with Vitamin C powder.

32. The size of the bottles of the Product in relation to the volume of the Product actually contained therein gives the false impression that the consumer is buying more than they are actually receiving.

33. Visual estimates below show that the contents of the Product do not fill up the entirety of the dispensing bottles. In fact, each container contains significant non-functional slack-fill in violation of federal and state laws. As an example, photographs of the Product and packaging are shown below, with the horizontal line indicating the amount of powder contained within:





34. As a result of Defendant's deception, consumers – including Plaintiff and members of the proposed Class – have purchased a Product that contains non-functional slack-fill. Moreover, they have paid a premium for the Product over other Vitamin C ascorbic acid

powder nutritional supplements sold in the market. At \$59.99, the 3 lb. (48 ounce) Product costs \$1.25 per ounce. A sample of other Vitamin C powder products are shown below:

BRAND	PRICE	SELLER
BulkSupplements Pure Ascorbic Acid (Vitamin C) Powder	\$23.96/35 ounces - \$0.68/ounce	Amazon
Swanson Premium 100% Pure Vitamin C Powder	\$14.99/16 ounces - \$0.94/ounce	Amazon

35. In the alternative, Plaintiff and members of the Class are damaged by the percentage of non-functional slack-fill relative to the purchase price. Thus, given the 49% non-functional slack-fill for a \$59.99 container, Plaintiff and members of the Class are owed \$29.39 for each container purchased.

Plaintiffs Were Injured as a Result of Defendant's Misleading and Deceptive Conduct

36. Defendant's Product packaging as alleged herein is deceptive and misleading and was designed to increase sales of the Product. By increasing the size of the containers in which the Vitamin C Crystals are contained, Defendant maximizes the shelf presence of its Product over competitor Products. Defendant's misrepresentations are part of its systematic Product packaging practice.

37. Plaintiffs and Class members paid the full price of the Product and received less of what Defendant represented they would be getting due to the non-functional slack-fill in the Product. In order for Plaintiffs and Class members to be made whole, Plaintiffs and Class members would have to receive enough of the Vitamin C powder so that there is no non-functional slack-fill or have paid less for the Product. In the alternative, Plaintiffs and members

of the Class are damaged by the percentage of non-functional slack-fill relative to the purchase price they paid.

38. There is no practical reason for the non-functional slack-fill used to package the Product other than to mislead consumers as to the actual volume of the Product being purchased by consumers.

39. As a result of Defendant's deception, consumers – including Plaintiffs and members of the proposed Class – have purchased Product that contains non-functional slack-fill. Moreover, and Class members have paid a premium for the Product over other Vitamin C powder Product sold on the market.

40. Under the Federal Food Drug and Cosmetic Act (herein "FDCA"), the term "false" has its usual meaning of "untruthful," while the term "misleading" is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire food is misbranded. No other statement in the labeling cures a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

41. Defendant's packaging and advertising of the Product violate various state laws against misbranding. New York State law broadly prohibits the misbranding of drugs in language identical to that found in regulations promulgated pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 352 *et seq.* Under New York Edn. Law § 6815, "[a] drug or device shall be deemed to be misbranded:...h.(1)If it is a drug and its container is so made, formed or filled as to be misleading."

42. NY GBL § 349 provides that “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful.”

43. Defendant’s Product is misbranded under consumer protection laws of the fifty states and District of Columbia because it misled Plaintiffs and Class members about the volume of the product contained in comparison to the size of the Product’s packaging. The size of the container in relation to the actual amount of the product contained therein gives the false impression that the consumer is buying more than they are actually receiving.

44. The types of misrepresentations made above would be considered by a reasonable consumer when deciding to purchase the Product. A reasonable person would attach importance to whether Defendant’s Product are “misbranded,” *i.e.*, not legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

45. Plaintiffs and Class members did not know, and had no reason to know, that the Product contained non-functional slack-fill.

46. Defendant’s Product packaging was a material factor in Plaintiffs’ and Class members’ decisions to purchase the Product. Based on Defendant’s Product packaging, Plaintiffs and Class members believed that they were getting more of the Product than was actually being sold. Had Plaintiffs and Class members known Defendant’s Product contained non-functional slack-fill, they would not have bought the Product.

47. At the point of sale, Plaintiffs and Class members did not know, and had no reason to know, that the Product contained non-functional slack-fill as set forth herein, and would not have bought the Product had they known the truth about them.

48. Defendant has reaped enormous profits from its false, misleading and deceptive marketing and sale of the Product.

49. Plaintiffs bring this action on behalf of themselves and other similarly situated consumers who have purchased the Product to stop the dissemination of this false, misleading and deceptive advertising message, correct the false and misleading perception it has created in the minds of consumers, and obtain redress for those who have purchased the Product. Plaintiffs allege unjust enrichment and violations of consumer protection laws in all states and the District of Columbia.

50. Through this action, Plaintiffs seek injunctive relief, actual damages, restitution and/or disgorgement of profits, statutory damages, attorneys' fees, costs and all other relief available to the Class as a result of Defendant's unlawful conduct.

CLASS ACTION ALLEGATIONS

51. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class (the "Class"):

All persons or entities in the United States who made retail purchases of Product during the applicable limitations period, and/or such subclasses as the Court may deem appropriate. Excluded from the Class are current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, assigns, and any entity in which they have or have had a controlling interest. Also excluded from the Class is the judicial officer to whom this lawsuit is assigned.

52. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through the appropriate discovery, Plaintiffs believe that there are thousands of members in the proposed Class. Other members of the Class may be identified from records maintained by Defendant and may be notified of the pendency of this action by mail, or

by advertisement, using the form of notice similar to that customarily used in class actions such as this.

53. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendant's wrongful conduct.

54. Plaintiffs will fairly and adequately protect the interests of the members of the Class in that Plaintiffs have no interests antagonistic to those of the other members of the Class. Plaintiffs have retained experienced and competent counsel.

55. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages sustained by individual Class members may be relatively small, the expense and burden of individual litigation make it impracticable for the members of the Class to individually seek redress for the wrongful conduct alleged herein. If Class treatment of these claims were not available, Defendant would likely unfairly receive millions of dollars or more in improper charges.

56. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the common questions of law fact to the Class are:

- i. Whether Defendant labeled, packaged, marketed, advertised and/or sold Product to Plaintiffs and Class members, using false, misleading and/or deceptive packaging and labeling;
- ii. Whether Defendant's actions constitute violations of 21 U.S.C. § 352(i)(1);
- iii. Whether Defendant's actions constitute violations of New York Edn. Law § 6815;

- iv. Whether Defendant's actions constitute violations of Title 24 of the Rules of the City of New York § 71.05;
- v. Whether Defendant's actions constitute violations of the New York General Business Law § 349;
- vi. Whether Defendant's actions constitute violations of the consumer protection laws of the fifty states and District of Columbia;
- vii. Whether Defendant omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising and/or sale of Product;
- viii. Whether Defendant's labeling, packaging, marketing, advertising and/or selling of Product constituted an unfair, unlawful or fraudulent practice;
- ix. Whether the packaging of the Product during the relevant statutory period constituted unlawful non-functional slack-fill;
- x. Whether, and to what extent, injunctive relief should be imposed on Defendant to prevent such conduct in the future;
- xi. Whether the members of the Class have sustained damages as a result of Defendant's wrongful conduct;
- xii. The appropriate measure of damages and/or other relief;
- xiii. Whether Defendant has been unjustly enriched by its scheme of using false, misleading and/or deceptive labeling, packaging or misrepresentations, and;
- xiv. Whether Defendant should be enjoined from continuing its unlawful practices.

57. The class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiffs know of no difficulty which will be

encountered in the management of this litigation which would preclude its maintenance as a Class action.

58. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by any individual class member are too small to make it economically feasible for an individual class member to prosecute a separate action, and it is desirable for judicial efficiency to concentrate the litigation of the claims in this forum. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action.

59. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

60. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Class predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

61. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interest of all members of the Class, although certain Class members are not parties to such actions.

62. Defendant's conduct is generally applicable to the Class as a whole and Plaintiffs seek, inter alia, equitable remedies with respect to the Class as a whole. As such, Defendant's

systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

CAUSES OF ACTION

COUNT I

INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

63. Plaintiff COLLAZO repeats and realleges each and every allegation contained above as if fully set forth herein and further alleges the following:

64. Plaintiff COLLAZO brings this claim individually and on behalf of the other members of the Class for an injunction for violations of New York's Deceptive Acts or Practices Law, General Business Law ("NY GBL") § 349.

65. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

66. Under the New York Gen. Bus. Code § 349, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law [§] 349 . . . claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

67. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Product in packaging resulting in slack-fill are unfair, deceptive and misleading and are in violation of the NY GBL § 349. Moreover, New York State law broadly prohibits the misbranding of drugs in language identical to that found in regulations promulgated pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 352 *et seq.* Under New York

Edn. Law § 6815, “[a] drug or device shall be deemed to be misbranded: . . . h.(1) If it is a drug and its container is so made, formed or filled as to be misleading.”

68. The foregoing deceptive acts and practices were directed at consumers.

69. Defendant should be enjoined from packaging its Product with slack-fill as described above pursuant to NY GBL § 349, New York Edn. Law § 6815, and 21 U.S.C. § 352(i).

70. Plaintiff COLLAZO, on behalf of herself and all others similarly situated, respectfully demands a judgment enjoining Defendant’s conduct, awarding costs of this proceeding and attorneys’ fees, as provided by NY GBL, and such other relief as this Court deems just and proper.

COUNT II

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

71. Plaintiff COLLAZO repeats and realleges each and every allegation contained above as if fully set forth herein.

72. Plaintiff COLLAZO brings this claim individually and on behalf of the other members of the Class for Defendant’s violations of NY GBL § 349.

73. Any person who has been injured by reason of any violation of NY GBL § 349 may bring an action in her own name to enjoin such unlawful act or practice, an action to recover her actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney’s fees to a prevailing plaintiff.

74. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misbranding its Product as seeming to contain more in the packaging than is actually included.

75. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Product in packaging resulting in non-functional slack-fill are unfair, deceptive and misleading and are in violation of the NY GBL § 349, New York Edn. Law § 6815 and Federal Food Drug & Cosmetic Act ("FDCA") Section 502 (21 U.S.C. 352(i)) in that said Product is misbranded.

76. The foregoing deceptive acts and practices were directed at consumers.

77. Plaintiff COLLAZO and the other Class members suffered a loss as a result of Defendant's deceptive and unfair trade acts. Specifically, as a result of Defendant's deceptive and unfair acts and practices, Plaintiff COLLAZO and the other Class members suffered monetary losses associated with the purchase of Product, i.e., receiving less than the capacity of the packaging due to non-functional slack-fill in the Product. In order for Plaintiff COLLAZO and Class members to be made whole, they need to receive either the price premium paid for the Product or a refund of the purchase price of the Product equal to the percentage of non-functional slack-fill in the Product.

COUNT III

NEGLIGENT MISREPRESENTATION (All States)

78. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

79. Defendant, directly or through its agents and employees, made false representations, concealment and nondisclosures to Plaintiffs and members of the Class.

Defendant, through its deceptive packaging of the Product, makes uniform representations regarding the Product.

80. Defendant, as the manufacturer, packager, labeler and initial seller of the Product purchased by the Plaintiffs, had a duty to disclose the true nature of the Product and not sell the Product with non-functional slack-fill. Defendant had exclusive knowledge of material facts not known or reasonably accessible to the Plaintiffs; Defendant actively concealed material facts from the Plaintiffs and Defendant made partial representations that are misleading because some other material fact has not been disclosed. Defendant's failure to disclose the information it had a duty to disclose constitutes material misrepresentations and materially misleading omissions which misled the Plaintiffs who relied on Defendant in this regard to disclose all material facts accurately and truthfully and fully.

81. Plaintiffs and members of the Class reasonably relied on Defendant's representation that its Product contains more product than actually packaged.

82. In making the representations of fact to Plaintiffs and members of the Class described herein, Defendant has failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendant's negligence and carelessness.

83. Defendant, in making the misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true. Defendant made and intended the misrepresentations to induce the reliance of Plaintiffs and members of the Class.

84. Plaintiffs and members of the Class would have acted differently had they not been misled – i.e. they would not have paid money for the Product in the first place.

85. Defendant has a duty to correct the misinformation it disseminated through the deceptive packaging of the Product. By not informing Plaintiffs and members of the Class, Defendant breached its duty. Defendant also profited financially as a result of this breach.

86. Plaintiffs and members of the Class relied upon these false representations and nondisclosures by Defendant when purchasing the Product, upon which reliance was justified and reasonably foreseeable.

87. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs and members of the Class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for the Product, and any interest that would have been accrued on all those monies, all in an amount to be determined according to proof at time of trial.

88. Defendant acted with intent to defraud, or with reckless or negligent disregard of the rights of Plaintiff and members of the Class.

89. Plaintiffs and members of the Class are entitled to damages, including punitive damages.

COUNT XIII

UNJUST ENRICHMENT (All States and the District of Columbia)

90. Plaintiffs reallege and incorporate by reference the above paragraph as if set forth herein.

91. As a result of Defendant's deceptive, fraudulent and misleading labeling, packaging, advertising, marketing and sales of Product, Defendant was enriched, at the expense of and members of the Class, through the payment of the purchase price for Defendant's Product.

92. Plaintiffs and members of the Class conferred a benefit on Defendant through purchasing the Product, and Defendant has knowledge of this benefit and has voluntarily accepted and retained the benefits conferred on it.

93. Defendant will be unjustly enriched if it is allowed to retain such funds, and each Class member is entitled to an amount equal to the amount they enriched Defendant and for which Defendant has been unjustly enriched.

94. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiffs, and all others similarly situated, in light of the fact that the volume of the Product purchased by Plaintiffs and the Class, was not what Defendant purported it to be by its labeling and packaging. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiffs, and all others similarly situated, for selling its Product in packaging resulting in slack-fill. In order for Plaintiffs and Class members to be made whole, they need to receive either the price premium paid for the Product or a refund of the purchase price of the Product equal to the percentage of non-functional slack-fill in the Product.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, prays for relief and judgment against Defendant as follows:

(A) For an Order certifying the nationwide Class and under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representatives of the Class and Plaintiffs' attorneys as Class Counsel to represent members of the Class;

(B) For an Order declaring the Defendant's conduct violates the statutes referenced herein;

- (C) For an Order finding in favor of Plaintiffs and members of the Class;
- (D) For compensatory and punitive damages in amounts to be determined by the Court and/or jury;
- (E) For prejudgment interest on all amounts awarded;
- (F) For an Order of restitution and all other forms of equitable monetary relief;
- (G) For injunctive relief to repackage the Product without non-functional slack-fill as pleaded or as the Court may deem proper;
- (H) For an Order awarding Plaintiffs and members of the Class their reasonable attorneys' fees and expenses and costs of suit; and
- (I) For such other and further relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiffs, on behalf of themselves and all others similarly situated, hereby demand a jury trial on all claims so triable.

Dated: January 21, 2015

Respectfully submitted,

LEE LITIGATION GROUP, PLLC

C.K. Lee (CL 4086)

30 East 39th Street, Second Floor

New York, NY 10016

Tel.: 212-465-1188

Fax: 212-465-1181

Attorneys for Plaintiffs and the Class

BY: C.K. Lee



CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

ZABRINA COLLAZO

(b) County of Residence of First Listed Plaintiff Queens

(EXCEPT IN U.S. PLAINTIFF CASES)

CV 15 - 0328

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

C.K. Lee, Esq., Lee Litigation Group, PLLC
30 East 39th Street, Second Floor, New York, NY 10016
Tel: (212) 465-1188

DEFENDANTS

NOW HEALTH GROUP, INC. d/b/a/ NOW FOODS

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)

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

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

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

(For Diversity Cases Only)

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT E.D.N.Y.

Citizen of Another State

JAN 21 2015

Citizen or Subject of a Foreign Country

- PTF DEF
- ☒ 1 ☐ 1 Incorporated in Principal Place of Business in This State
- ☐ 2 ☐ 2 Incorporated in Another State
- ☐ 3 ☐ 3 Foreign Nation
- ☐ 4 ☐ 4
- ☐ 5 ☒ 5
- ☐ 6 ☐ 6

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

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

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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. 1332(d)

Brief description of cause:
Defendants' Product misleadingly contains non-functional slack-fill

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

1-21-15

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

465 308 3688

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, C.K. Lee, counsel for Zabrina Collazo, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- ☒ monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- ☒ the complaint seeks injunctive relief,
- ☐ the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that "A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
- a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? No
- b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? _____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

☒ Yes ☐ No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐ Yes (If yes, please explain) ☒ No

I certify the accuracy of all information provided above.

Signature: _____