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MICHAEL J. OTTO individually, and
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the public similarly situated

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

MICHAEL J. OTTO, individually, and on behalf of other members of the general public similarly situated,

Plaintiff,

vs.

ABBOTT LABORATORIES, INC., a Delaware Corporation, d/b/a Abbott Nutrition,

Defendant.

Case Number: 5:12-cv-01411-SVW(DTBx)

CLASS ACTION

SECOND AMENDED COMPLAINT:

(1) Violation of the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*);

(2) Violation of Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*);

(3) Violation of False Advertising Law (Cal. Bus. & Prof. Code §§ 17500 *et seq.*);

(4) Negligent Misrepresentation;

(5) Violation of Ohio Consumer Sales Practices Act (Ohio Rev. Code §§ 1345 *et seq.*); and

(6) Violation of Ohio Deceptive Trade Practices Act (Ohio Rev. Code §§ 4165 *et seq.*)

Jury Trial Demanded

Plaintiff MICHAEL J. OTTO ("Plaintiff"), individually and on behalf of all other members of the public similarly situated, alleges as follows:

NATURE OF THE ACTION

1. This action is brought on behalf of Plaintiff and a class of consumers who purchased "Ensure® Muscle Health Shake" and "Ensure® Clinical Strength" drinks (the "Products"). Plaintiff's claims concern the deceptive and misleading practices conducted by Defendant Abbott Laboratories, Inc. d/b/a Abbott Nutrition ("Defendant" or "Abbott") in connection with the marketing of the Products, in violation of California and Ohio state law, and the common law.

2. Harkening back to the Eighteenth Century, when traveling doctors and snake oil peddlers ran wild, Abbott capitalizes on the fears of a growing population of baby boomers, the elderly, and other individuals who are concerned about loss of strength.

3. To gain credibility with potential consumers of the Products, Abbott touts the purported health benefits of its supposed miracle elixir with pseudo-scientific terms and proclamations like, the "#1 doctor recommended brand." Abbott takes advantage of this this emerging market, and specifically targets consumers who are worried about the effects of aging. In particular, the packaging for Abbott's panacea boldly promises, without qualification, that the Products will "help rebuild muscle and strength naturally lost over time." According to Abbott, this astonishing scientific achievement comes from Revigor® -- Abbott's "proprietary ingredient" -- a source of the "Amino Acid Metabolite HMB."

4. Unfortunately, although the world has become more advanced, so too have the scams used to obtain money from unsuspecting consumers. Abbott's representations on the packaging for the Products are nothing more than false and misleading claims designed to increase sales by deceiving consumers into believing that purchasing and consuming the Products alone will deliver health and wellness benefits that the Products do not, and cannot, provide.

5. Despite Abbott's unqualified representations, the Revigor®/HMB in the Products cannot rebuild strength in the general population of consumers to whom the Products are sold. Therefore, Abbott's unqualified statement that the Products will "help rebuild muscle *and* strength" (emphasis added) is false and misleading.

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of $5,000,000 and is a class action in which members of the class of plaintiffs are citizens of states different from Defendant. Further, greater than two-thirds of members of the Class reside in states other than the states in which Defendant is a citizen. In addition, under 28 U.S.C. § 1367, this Court may exercise supplemental jurisdiction over the state law claims because all of the claims are derived from a common nucleus of operative facts and are such that plaintiffs ordinarily would expect to try them in one judicial proceeding.

7. Venue lies within this judicial district under 28 U.S.C. § 1391(b)(1) and (c)(2) because Defendant's contacts are sufficient to subject it to personal jurisdiction in this District, and therefore, Defendant resides in this District for purposes of venue.

8. Additionally, venue lies within this judicial district under 28 U.S.C. § 1391(b)(2) because certain acts giving rise to the claims at issue in this Complaint occurred, among other places, in this District.

PARTIES

9. Plaintiff Michael J. Otto is an individual and a citizen of California.

10. Defendant Abbott Laboratories, Inc. is a Delaware corporation, with the headquarters for its Abbott Nutrition division in Columbus, Ohio.[1]

11. Defendant Abbott Laboratories, Inc. is authorized to do and, in fact, is doing business in the State of California, because, among other things, its expansive product lines are offered for sale in retail outlets throughout the state, and it operates a manufacturing plant located in Fairfield, California.

12. Whenever, in this Complaint, reference is made to any act, deed, or conduct of Defendant, the allegation means that Defendant engaged in the act, deed, or conduct by or through one or more of its officers, directors, agents, employees or representatives who was actively engaged in the management, direction, control or transaction of the ordinary business and affairs of Defendant.

FACTUAL BACKGROUND

13. Abbott is a global healthcare company in the business of developing a variety of products, ranging from nutritional supplements to pharmaceutical therapies and medical devices.[2]

14. Abbott's Abbott Nutrition division is responsible for over twenty five different brands of "nutrition products."

15. According to Abbott, "[t]he Ensure family of products provides active adults with a source of nutrition that can help them focus on specific nutritional goals."[3]

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[1] *See* http://abbottnutrition.com/Careers/Careers-At-Abbott-Nutrition.aspx (last visited Mar. 25, 2013).

[2] Abbott Laboratories, *About Abbott* (2012), available at http://abbott.com/global/url/content/en_US/10:10/general_content/General_Content_00004.htm (last visited June 29, 2012).

[3] Abbott Nutrition, *Ensure® Complete, Balanced Nutrition®* (2012), available at http://abbottnutrition.com/our-products/abbott-brands.aspx?s=2 (last visited June 29, 2012).

16. On September 16, 2010, Abbott announced, "[r]esponding to the growing needs of America's aging baby boomer population, the global health care company Abbott today introduced two new nutrition shakes - Ensure® Muscle Health and Ensure Clinical Strength."[4] As divisional vice president Rob Miller stated at the time of launch, the Products were primarily intended for "people over 40 who are naturally losing muscle with age."[5]

17. Capitalizing upon a potentially large market of consumers from the baby boomer generation who may be concerned about loss of strength as they age, Abbott offered two new products that purported to provide what other nutritional products could not: rebuilding strength.

18. In its marketing materials and advertisements, Abbott expressly represents that the Products' ability to rebuild strength comes from Revigor®. Revigor® is the trademarked name Abbott uses for its formulation of beta-hydroxy-beta-methylbutyrate ("HMB"), an amino acid metabolite, which is derived from the amino acid leucine.

19. To explain to consumers that the Products' ability to help rebuild strength comes from Revigor®, Abbott features a talking Ensure® Muscle Health bottle in its television advertisements. In particular, Abbott's advertisements use the following dialogue, which occurs between cartoon food products, in a scene inside a refrigerator:

> Ensure® Muscle Health bottle: "I've got Revigor®."
>
> Tomato: "What's Revigor®?"
>
> Ensure® Muscle Health bottle: "It's the amino acid metabolite HMB to help rebuild muscle and strength naturally lost over time."

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[4] Abbott Nutrition, *Abbott Launches New Ensure® Shakes with Focus on Helping Baby Boomers Regain Muscle and Strength* (September 16, 2010), available at http://www.abbott.com/news-media/press-releases/Press_Release_0893.htm (last visited June 28, 2012).

[5] *Id.* (quote by Rob Miller, divisional vice president, Global R&D and Scientific Affairs, Abbott).

20. Abbott's message that the Products' ability to help rebuild strength comes from Revigor®/HMB is further communicated through the following images in its television commercial:

21. The technical, scientific-sounding name Revigor® -- a combination of "re" + "vigor" (*i.e.*, strength) -- was intentionally selected to imply scientific significance and add credibility to Abbott's false and misleading representations, telling consumers that by consuming the HMB in Products, consumers can rebuild strength.

22. In effect, by luring consumers in with its false and misleading promises about Revigor®/HMB, Abbott convinces consumers of the Products to pay $32 per gallon for what is basically chocolate milk.[6] Indeed, if consumers are merely looking for high protein, vitamin-fortified foods alone, there are countless other, significantly cheaper options.

23. Abbott's representation on the packaging for the Products concerning the rebuilding of strength is made without qualification. Nowhere on the packaging for the Products does Abbott inform consumers about any limitations concerning the Products' ability to help rebuild strength.

24. Abbott further misleads consumers about the scientific efficacy of the Products by representing on the packaging for the Products, among other things, that they provide "Clinical Strength," that they are the "#1 Doctor Recommended Brand," and that the Products are manufactured by "Abbott Laboratories," a well-known pharmaceutical company. These representations contribute to the false and misleading nature of the Products because the representations are designed to reinforce Abbott's claims and build credibility with respect to Abbott's deceptive message that the Products will help the target population of consumers rebuild strength.

25. Because of Abbott's unqualified representations on the Packaging for the Products, reasonable consumers must accept Abbott's claims regarding Revigor®/HMB, and they have no choice but to also rely on Abbott's unequivocal claim that the HMB in the Products will help them rebuild strength. Unaware that Revigor® is nothing more than Abbott's clever marketing name, reasonable consumers are led to believe that, with the inclusion of this "proprietary ingredient," consuming the Products will help them rebuild strength.

26. The central message of Abbott's representations on the packaging for the Products is that Abbott's proprietary ingredient Revigor®/HMB provides everyday

[6] There are 128 oz. per gallon, and the Products are sold in packages of four 8 oz. bottles for $7.99.

consumers of the Products with a scientifically proven health benefit -- the rebuilding of strength -- that other products do not and cannot provide. Because this message is prominently featured on the packaging for the Products, indeed, it is the defining characteristic of the Products, and it is material to consumers, each person who has purchased the Products sees and relies on Abbott's misleading advertising messages when they purchase or consume the Products.

27. Despite the above representations, nowhere on the packaging for the Products does Abbott disclose any other factors that could limit the Products' ability to help consumers rebuild strength.

28. Abbott's false and misleading labeling of the Products has allowed them to reap enormous profits at the expense of the consumers they have misled. Furthermore, Abbott has been able to charge consumers a substantial premium for the Products over similar products.

29. When they purchased and consumed the Products, Plaintiff and members of the Class, as defined below, relied upon Abbott's representations on the packaging for the Products, which communicated to reasonable consumers that Revigor® would help them "rebuild . . . strength." Therefore, Plaintiff and the members of the Class were damaged because they did not receive the benefit of the bargain. Plaintiff and members of the Class paid for products that expressly promised to help rebuild muscle *and* strength, but the Products did not, and could not, provide this benefit.

30. Abbott's consumer deception is both knowing and willful. Abbott is well aware of the nature of the representations it makes on the packaging for the Products. Each Product prominently represents, directly below the name of the Product, that it contains Revigor® and, without qualification, that it will "help rebuild muscle and strength naturally lost over time." And, as discussed in detail below, Abbott is aware that scientific studies conducted by its subsidiary have found that, contrary to Abbott's representations, consuming an HMB supplement does not help people rebuild strength.

31. As a result, Abbott's false and misleading representations violate the common law, and state law, as detailed below, including California's Unfair Competition Law, California's False Advertising Law, California's Consumers Legal Remedies Act, Ohio Consumer Sales Practices Act, and the Ohio Deceptive Trade Practices Act.

Abbott's Unqualified Representation that the Products Will Rebuild Strength Is False and Misleading

32. Abbott's representation to the general population of consumers -- claiming, without qualification, that the Products will "rebuild muscle *and* strength" (emphasis added) -- is false and misleading. Contrary to Abbott's claims, studies and scientific bodies have found that HMB does not increase or build strength.

The Panton Study

33. In 1998, a team of scientists led by Dr. Lynn B. Panton, Ph.D. conducted a study to evaluate the effect of HMB on elderly subjects who engaged in a resistance training program (the "Panton Study").[7] Dr. Panton noted that HMB had been shown to increase strength in young subjects, under 40, when they took HMB in conjunction with an intensive resistance training program, but she questioned whether a similar response could be obtained in older adults who are the target market for Abbott's Products.[8] "Therefore, the purpose of the [Panton Study] was to evaluate the effects of HMB on muscle strength and functional ability in a group of elderly subjects participating in a resistance training program."[9]

[7] *See* Panton L, Rathmacher J, Fuller J, Gammon J, Cannon L, Stettler S, Nissen S: Effect of β-hydroxy-β-methylbutyrate and resistance training on strength and functional ability in the elderly. Medicine & Science in Sports & Exercise 1998, 30(5):194.

[8] *Id.*

[9] *Id.*

34. In the Panton Study, male and female study subjects were divided into two groups, with one group taking a placebo, and another group taking an HMB supplement.[10] The age of the group taking the placebo was 74 ± 4 years, and the age of the group taking the HMB supplement was 71 ± 5 years.[11] During the time they consumed either the placebo or the HMB supplement, both groups engaged in 8 weeks of resistance training, which was "designed to isolate all major muscle groups."[12] Measurements of leg strength and chest press strength were taken before and after training.[13]

35. At the end of the study period, Dr. Panton and her colleagues found that the HMB supplement did not help build strength, as compared to the placebo. Specifically, Panton et al. explained that "[t]he adjusted means were not significantly different between the two groups with respect to leg extension (P: 60.5; HMB: 59.5 kg) and chest press (P: 51.8; HMB: 50.5 kg) in relative strength changes."[14] In fact, as shown by the figures above, the group taking the placebo actually had higher average improvements in strength than the group taking the HMB supplement.

The Baier Study

36. Similarly, in 2009, another study was published concerning the effects of HMB on elderly subjects aged 76 ± 1.6 years (the "Baier Study").[15] The Baier Study studied subjects who consumed a supplement containing HMB for one year.[16]

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See* Baier S, Johannsen D, Abumrad N, Rathmacher JA, Nissen S, Flakoll P. Year-long changes in protein metabolism in elderly men and women supplemented with a nutrition cocktail of beta-hydroxy-betamethylbutyrate (HMB), L-arginine, and L-lysine. JPEN J Parenter Enteral Nutr 2009;33:71–82.

[16] *Id.* at 72.

37. Plaintiff is informed and believes, and on that basis, alleges that the Baier Study is the longest such study. Therefore, it is particularly significant.

38. The Baier Study evaluated 77 subjects who consumed either a placebo or a supplement containing HMB along with the amino acids L-arginine and L-lysine (the "HMB/Arg/Lys Supplement").[17]

39. At the beginning of the study period, participants in the Baier Study were divided into two treatment groups.[18] Then, over the course of a 12 month period, one of the treatment groups consumed a placebo, and the other treatment group consumed the HMB/Arg/Lys Supplement.[19] During the course of the study, the subjects' strength was measured in the upper and lower extremities.[20]

40. At the end of the study period, the researchers found that "[m]easures of functionality and strength were not different among the treatment groups."[21] In fact, the Baier Study reported that "there was a gradual loss of handgrip and leg strength in both the control-supplemented and HMB/Arg/Lys-supplemented groups over the 12-month study."[22] Accordingly, the authors explained that although an increase in lean body mass was shown, the HMB/Arg/Lys "failed to induce any treatment effects on strength and functionality."[23]

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[17] *Id.*

[18] *Id.*

[19] *Id.* at 73.

[20] *Id.* at 75.

[21] *Id.* at 79.

[22] *Id.*

[23] *Id.*

The Fuller Study

41. Subsequently, in 2011, some of the authors of the Baier Study performed and published a self-described "post hoc analysis" of the data from the Baier Study (the "Fuller Study").[24] The Fuller Study was funded, in part, through a grant provided by Metabolic Technologies, Inc., a company owned by Abbott. Additionally, four of the six authors of the study were employed by Abbott's Metabolic Technologies, Inc. subsidiary at the time the study was published.

42. The authors of the Fuller Study acknowledged that the year-long Baier Study had "failed to show an effect of the HMB/ARG/LYS in increasing muscle strength or functionality."[25]

43. The Fuller Study proposed three explanations for why the Baier Study failed to show an increase in muscle strength: (1) the lack of an exercise protocol that accompanied the supplement program; (2) the fact that "an increase in strength is not always concomitant with an increase in FFM [fat free mass]"; and (3) the possibility that people suffered from a dietary insufficiency not met by the HMB/ARG/LYS supplement.[26] The authors further explained that it was "likely" that the lack of an exercise protocol contributed to the lack of an increase in muscle function, and they identified other research that had recently demonstrated that an increase in strength does not always accompany an increase in FFM.[27] Significantly, none of these limitations are disclosed to consumers on the packaging for the Products.

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[24] *See* Fuller JC Jr, Baier S, Flakoll P, Nissen SL, Abumrad NN, Rathmacher JA. Vitamin D status affects strength gains in older adults supplemented with a combination of {beta}-hydroxy-{beta}-methylbutyrate, arginine, and lysine: a cohort study. JPEN J Parenter Enteral Nutr 2011;35: 757–62.

[25] *Id.* at 758.

[26] *Id.* at 758.

[27] *Id.*

44. Determined to try and find some correlation between HMB and increased strength, the authors of the Fuller Study then focused on the subjects' vitamin D status.[28] To that end, the authors noted that "a recently characterized deficiency symptom of vitamin D is skeletal muscle weakness, which is quite prevalent in older adults."[29] "Consequently, we hypothesized that the failure to improve strength with HMB/ARG/LYS was due to poor vitamin D intake, resulting in an insufficient vitamin D status of the participants."[30] Thus, "the objective [of the Fuller Study] was to determine if vitamin D insufficiency may have prevented the accompanying strength increases in those supplemented with HMB/ARG/LYS over the yearlong [Baier] study."[31]

45. Significantly, the Fuller Study found that "[i]n the absence of vitamin D sufficiency, supplementation with HMB/ARG/LYS results in only increased FFM but not strength."[32] And, with respect to those participants who were not vitamin D insufficient and took the HMB/ARG/LYS supplement, they achieved muscle strength only if they had a blood serum vitamin D level of greater than or equal to 30 nanograms per milliliter, using the 25OH-vitD$_3$ test.[33]

46. Nowhere on the packaging for the Products, however, does Abbott disclose to consumers that they must have a blood serum vitamin D level of greater than or equal to 30 nanograms per milliliter before they can expect to "rebuild strength." This is particularly significant because, as expressly discussed in the Fuller Study, "at least 60% or more of elderly adults [the target group to whom the Products are sold] are vitamin D insufficient."[34] Indeed, according to the study's authors, "[t]he elderly have multiple

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 758.

[34] *Id.* at 761.

factors contributing to vitamin D insufficiency, including lack of sun exposure, loss of vitamin D receptors in muscle, and loss of function and number of neuromuscular junctions (NMJ)."[35]

47. Ultimately, the Fuller Study concluded:[36]

> The nutrient cocktail of HMB/ARG/LYS increases FFM in nonexercising adults; however, increased FFM alone was not sufficient to improve muscle strength and function. Our cohort study demonstrated that HMB/ARG/LYS alone was effective in increasing muscle mass regardless of vitamin D status; however, accompanying strength increases were observed only when participants also had serum 25OH-vitD$_3$ levels $\geq$30 ng/mL, demonstrating a synergy between vitamin D and the supplementation.

48. Notably, other nutritional scientists who have analyzed both the Baier Study and the Fuller Study have questioned whether one's vitamin D status truly explains why the study subjects who consumed HMB in the yearlong study did not build strength. A recent publication specifically warns against extrapolating the Fuller Study's findings regarding vitamin D status and HMB to the general population:[37]

> Obviously, the number of patients in the [Fuller Study] cohort (n = 11) that received the HMB/Arg/Lys with adequate vitamin D status is so small that it prevents strong conclusions and points to the need for a larger study.

In fact, even the authors of the Fuller Study agree. In their write-up of the Fuller Study,

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[35] *Id.*

[36] *Id.* at 761.

[37] *See* J Krenitsky. Nutrition and Nutraceuticals for Muscle Maintenance and Recovery: Hero or Hokum? Nutrition Issues in Gastroenterology, Series #10. Practical Gastroenterology, 2012, at p 29.

the authors expressly stated that "[t]hese data support the need for further prospective studies of the synergy between HMB and vitamin D in improving muscle strength and function."[38]

49. Furthermore, the fact that the Products themselves contain some amount of vitamin D does not relieve Abbott of its full disclosure obligations. Indeed, mere consumption of a vitamin D supplement does not mean that one will achieve a blood serum vitamin D level of greater than or equal to 30 nanograms per milliliter. On the contrary, as the Vitamin D Council has explained:[39]

> Much individual variation exists in response to supplemental vitamin D. The amount needed to raise and/or maintain blood serum levels for one person may not be enough for another. This is due to various factors such as age, weight, absorption, overall health, and amount of sun exposure. Recent research has determined that genetic variants are also a factor.

Nevertheless, Abbott makes no such disclosures on the packaging for the Products.

50. At bottom, consistent with the Baier Study, the Fuller Study observed that, contrary to Abbott's claim that the Revigor®/HMB in the Products will help rebuild strength, "[t]he nutrient cocktail of HMB/ARG/LYS increases FFM in nonexercising elderly adults; however, increased FFM alone was not sufficient to improve muscle strength and function."[40]

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[38] *See* 2011 Fuller Study at 761

[39] *See* http://www.vitamindcouncil.org/about-vitamin-d/how-to-get-your-vitamin-d/vitamin-d-supplementation/ (last visited Mar. 25, 2013).

[40] *Id.* at 761.

EFSA Scientific Opinion

51. In 2011, the European Food Safety Authority ("EFSA") published a "Scientific Opinion" concerning the use of health claims related to HMB.[41] The EFSA is an independent European agency funded by the EU budget, which, among other things, "provides independent scientific advice" to "ensure a high level of consumer protection."[42]

52. The EFSA was asked by the European Commission to render its scientific opinion on a list of potential health claims concerning HMB-supplemented food products.[43] Included among these health claims was whether HMB could provide an "increase in muscle strength."[44] Before issuing its opinion, the EFSA reviewed information provided to it by European Commission Member States and HMB stakeholders.[45] In its report, the EFSA defined the target population as "adults performing resistance training to improve muscle strength."[46]

53. Consistent with the studies discussed above, after reviewing, analyzing, and weighing the evidence, the EFSA "conclude[d] that a cause and effect relationship has not been established between the consumption of HMB, either alone or in combination with KIC [α-ketoisocaproic acid], and increase in muscle strength."[47]

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[41] *See* EFSA Journal 2011;9(6):2227, available at http://www.efsa.europa.eu/en/efsajournal/doc/2227.pdf (last visited Mar. 22, 2013).

[42] *See* http://www.efsa.europa.eu/en/aboutefsa.htm (last visited Mar. 22, 2013).

[43] EFSA Journal 2011;9(6):2227, at p 1.

[44] *Id.*

[45] *Id.*

[46] *Id.* at p 2.

[47] *Id.* at p 10.

Abbott's "Rebuild Muscle and Strength" Representation

54. Abbott's "rebuild muscle *and* strength" (emphasis added) representation is the defining feature of the Products. The "rebuild muscle and strength" representation is prominently featured on all of the packaging for the Products.

55. Abbott's representation that the Products will "rebuild muscle and strength" benefit distinguishes the Products from other products on the market, including others within Abbott's Ensure® line of products.

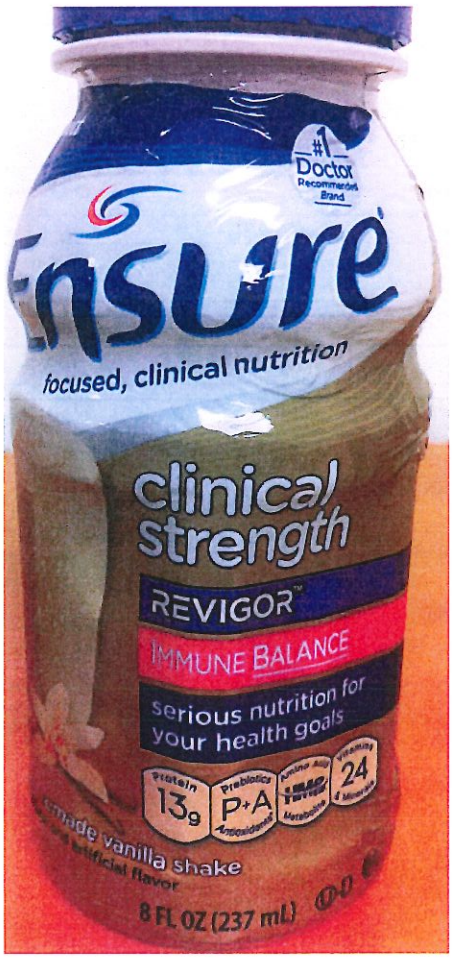
56. The packaging for Muscle Health appears as follows:

57. As discussed above, the packaging for Muscle Health expressly promises to "help rebuild . . . strength lost naturally over time." Additionally, the packaging for Muscle Health states, "[y]ou can lose 8% of your muscle every 10 years after you turn 40." The product label further represents that "Muscle Health has Revigor® ([a] source of HMB®, an amino acid metabolite)."

58. Furthermore, Abbott's misrepresentation that Muscle Health will rebuild strength is compounded by other representations on the packaging, which are designed to convey to reasonable consumers that Abbott's claims are widely accepted in the scientific community.

59. As a result of the above, Abbott's messages on the packaging for Muscle Health are false and misleading, and reasonably likely to, and do in fact, deceive the consuming public.

60. The packaging for Clinical Strength appears as follows:



61. Clinical Strength is intended to appeal to consumers who are or may be concerned about loss of strength. The packaging for Clinical Strength informs consumers that it contains Revigor®, a source of the amino acid metabolite HMB, and that it will "help rebuild . . . strength lost naturally over time."

62. In addition, to reinforce Abbott's claims about rebuilding strength and to convey an impression of scientific support, Abbott represents that Clinical Strength provides "focused, clinical nutrition," and "[f]ocused clinical nutrition for your health goals." Abbott also represents Clinical Strength as being the "#1 Doctor Recommended Brand," and as being manufactured by "Abbott Laboratories." Abbott describes Clinical Strength as providing "serious nutrition for your health goals." These representations, taken as a whole, contribute to the deceptive nature of the packaging for Clinical Strength, suggesting that Abbott's claims have wide acceptance in the scientific community.

63. Furthermore, reasonable consumers -- unaware that "clinical strength" and "clinical" are nothing more than clever marketing terms -- are further led to believe that Abbott's claims have a basis in science. And, reasonable consumers, who are likewise unaware that "Revigor®" is nothing more than a made up marketing name, are deceived into believing that this ingredient, "proprietary" to Abbott, will help rebuild muscle and strength.

64. As a result of the above, Abbott's messages on the packaging for Clinical Strength are false and misleading, and reasonably likely to, and do in fact, deceive the consuming public.

Abbott Is Aware that its Representations on the Packaging for the Products Are False and Misleading

65. As discussed above, Abbott's representation that the Revigor®/HMB in the Products will "help rebuild muscle *and* strength" (emphasis added) is false and misleading because studies and scientific bodies have found that HMB does not increase or build strength.

66. The Baier Study found that consumption of an HMB supplement did not improve strength as compared to a placebo. The Fuller Study confirmed that the Baier Study "failed to show an effect of the HMB/ARG/LYS [supplement] in increasing muscle strength or functionality."[48] The Fuller Study further noted that "[i]n the absence of vitamin D sufficiency, supplementation with HMB/ARG/LYS resulted in only increased FFM but not strength."[49]

67. Both of these studies were funded with a grant through Metabolic Technologies, Inc. Additionally, four of the six authors of the Baier Study are or were executives or employees of Metabolic Technologies, Inc. Five of the six authors of the Fuller Study are or were employees of Metabolic Technologies, Inc.

68. On or about October 21, 2008, before both of these studies were published, Abbott acquired Metabolic Technologies, Inc., the rights to HMB, and the trademark RE-VIGOR. Therefore, at the time these studies were published, the entity who funded the studies and employed a majority of the authors of the studies was owned by Abbott.

69. Plaintiff is informed and believes, and on that basis, alleges that as a result of Abbott's ownership interest in Metabolic Technologies and HMB, Abbott was aware of the information discussed in the Fuller Study and Baier Study.

[48] 2011 Fuller Study at 758.

[49] *Id.* at 760.

70. Nevertheless, notwithstanding Abbott's knowledge that the longest running study concerning HMB had "failed to show an effect of the HMB/ARG/LYS [supplement] in increasing muscle strength or functionality,"[50] Abbott continued to claim on the packaging for the Products that they would "help rebuild muscle *and* strength" (emphasis added).

71. Furthermore, as a result of the above, Abbott also was aware of at least three explanations for why the Baier Study failed to show an increase in muscle strength, including: (1) the lack of an exercise protocol that accompanied the supplement program; (2) the fact that "an increase in strength is not always concomitant with an increase in FFM [fat free mass]"; and (3) that "an increase in strength was observed only if there was an accompanying vitamin D sufficiency" in subjects' blood serum of greater than or equal to 30 nanograms per milliliter.[51] Again, however, despite its knowledge of this material information, Abbott failed to inform consumers of such information on the Packaging for the products, where they are sure to see it.

72. In sum, notwithstanding Abbott's knowledge of these material facts, rather than disclose the truth to consumers, Abbott continues to profit from its consumer deception, using the packaging to repeat its false and misleading claims.

PLAINTIFF'S CLAIMS AGAINST ABBOTT

73. Plaintiff is a resident of Murrieta, California, in Riverside County, California.

74. Plaintiff first purchased Muscle Health on or around June of 2011, and thereafter, purchased Muscle Health at least six times, including at Walgreens in Temecula, California, CVS Pharmacy in Murrieta, California, Stater Bros. Markets in Murrieta, California, and Vons in Murrieta, California.

75. In deciding to purchase Muscle Health, Plaintiff saw and relied on the statement on the packaging, representing that it would "help rebuild muscle and strength

[50] 2011 Fuller Study at 758.

[51] *Id.* at 758 and 760.

naturally lost over time." This representation was material to Plaintiff, particularly as a 69-year-old concerned about loss of strength, and Plaintiff believed that Muscle Health would "help rebuild muscle and strength," as advertised.

76. Plaintiff was denied the benefit of the bargain when he decided to purchase Muscle Health over competitor products, because he paid for a product that purportedly would "help rebuild muscle and strength," but he received a product that did not, and could not, provide the benefits it promised to provide. Accordingly, Plaintiff suffered injury in fact and lost money as a result of Abbott's false and misleading representation that Muscle Health would help rebuild muscle.

77. Had Abbott disclosed to Plaintiff and members of the Class that that the Products cannot help rebuild strength in the general population of consumers, they would have seen and been aware of the disclosure. But for Abbott's misrepresentations, Plaintiff and members of the Class would not have purchased and consumed the Products. Instead, had they known the truth, Plaintiff and members of the Class would not have purchased the Products at all, or they would have paid less.

CLASS ACTION ALLEGATIONS

78. Plaintiff brings this action, on behalf of himself and all others similarly situated, as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiff is informed and believes and on that basis, alleges that Defendant has sold thousands of units of the Products, if not more, in California and throughout the United States. Plaintiff is informed and believes and on that basis, alleges that the representations on the packaging for the Products has been uniform throughout the class period.

79. The groups of similarly situated individuals Plaintiff seeks to represent (the "Class") are defined as follows:

> All residents of the United States of America who purchased Ensure® Muscle Health Shake or Ensure® Clinical Strength during the period of August 14, 2008 continuing through the date of final disposition of this action (the "Nationwide Subclass").
>
> All residents of California who purchased Ensure® Muscle Health Shake or Ensure® Clinical Strength during the period of August 14, 2008 continuing through the date of final disposition of this action (the "California Statutory Subclass").

80. Plaintiff reserves the right to amend the Class definitions if discovery and further investigation reveal that the Class should be expanded or otherwise modified.

81. Plaintiff reserves the right to establish sub-classes as appropriate.

82. This action is brought and properly may be maintained as a class action under the provisions of Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(1), (b)(2) or (b)(3), and satisfies the requirements thereof. As used herein, the term "Class Members" shall mean and refer to the members of the Class.

83. Community of Interest: There is a well-defined community of interest among members of the Class, and the disposition of the claims of these members of the Class in a single action will provide substantial benefits to all parties and to the Court.

84. Numerosity: While the exact number of members of the Class is unknown to Plaintiff at this time and can only be determined by appropriate discovery, membership in the Class is ascertainable based upon the records maintained by Defendant. At this time, Plaintiff is informed and believes that the Class includes thousands of members. Therefore, the Class is sufficiently numerous that joinder of all members of the Class in a single action is impracticable under Federal Rule of Civil Procedure Rule 23(a)(1), and the resolution of their claims through the procedure of a class action will be of benefit to the parties and the Court.

85. Ascertainablity: Names and addresses of members of the Class are available from Defendant's records. Notice can be provided to the members of the Class through direct mailing, publication, or otherwise using techniques and a form of notice similar to those customarily used in consumer class actions arising under California state law and federal law.

86. Typicality: Plaintiff's claims are typical of the claims of the other members of the Class which he seeks to represent under Federal Rule of Civil Procedure 23(a)(3) because Plaintiff and each member of the Class have been subjected to the same deceptive and improper practices and have been damaged in the same manner thereby.

87. Adequacy: Plaintiff will fairly and adequately represent and protect the interests of the Class as required by Federal Rule of Civil Procedure Rule 23(a)(4). Plaintiff is an adequate representative of the Class, because he has no interests which are adverse to the interests of the members of the Class. Plaintiff is committed to the vigorous prosecution of this action and, to that end, Plaintiff has retained counsel who are competent and experienced in handling class action litigation on behalf of consumers.

88. Superiority: A class action is superior to all other available methods of the fair and efficient adjudication of the claims asserted in this action under Federal Rule of Civil Procedure 23(b)(3) because:

(a) The expense and burden of individual litigation make it economically unfeasible for members of the Class to seek to redress their "negative value" claims other than through the procedure of a class action.

(b) If separate actions were brought by individual members of the Class, the resulting duplicity of lawsuits would cause members to seek to redress their "negative value" claims other than through the procedure of a class action; and

(c) Absent a class action, Defendant likely would retain the benefits of its wrongdoing, and there would be a failure of justice.

89. Common questions of law and fact exist as to the members of the Class, as required by Federal Rule of Civil Procedure 23(a)(2), and predominate over any questions which affect individual members of the Class within the meaning of Federal Rule of Civil Procedure 23(b)(3).

90. The common questions of fact include, but are not limited to, the following:

(a) Whether Defendant's practice of misleading consumers who purchase Muscle Health and Clinical Strength products violates one or more provisions of the CLRA;

(b) Whether Defendant engaged in unlawful, unfair, misleading, or deceptive business acts or practices;

(c) Whether Defendant engaged in consumer fraud, deceptive trade practices, or other unlawful acts;

(d) Whether Plaintiff and members of the Class justifiably relied on the representations Defendant made in connection with its Muscle Health and Clinical Strength products;

(e) Whether Defendant's conduct was willful or reckless;

(f) Whether Plaintiff and members of the Class are entitled to an award of reasonable attorneys' fees, pre-judgment interest, and costs of this suit; and

(g) Whether Defendant engaged in unlawful and unfair business practices in violation of California Business & Professions Code sections 17200 *et seq*. and 17500 *et seq*.

91. In the alternative, this action is certifiable under the provisions of Federal Rule(s) of Civil Procedure 23(b)(1) and/or 23(b)(2) because:

(a) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Defendant.

(b) The prosecution of separate actions by individual members of the Class would create a risk of adjudications as to them which would, as a practical matter, be dispositive of the interests of the other members of the Class not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and

(c) Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole and necessitating that any such relief be extended to members of the Class on a mandatory, class-wide basis.

92. Plaintiff is not aware of any difficulty which will be encountered in the management of this litigation which should preclude its maintenance as a class action.

FIRST CAUSE OF ACTION
Brought on Behalf of the California Statutory Subclass
Violation of the California Consumers Legal Remedies Act
(Cal. Civil Code §§ 1750 *et seq.*)

93. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

94. Plaintiff brings this cause of action on behalf of himself and the other members of the California Statutory Subclass.

95. This cause of action is brought under the California Consumers Legal Remedies Act, California Civil Code sections 1750 *et seq.* ("CLRA"). Plaintiff and members of the California Statutory Subclass are consumers as defined by California Civil Code section 1761(d). The Products are goods within the meaning of California Civil Code section 1761(a).

96. Defendant violated and continues to violate the CLRA by engaging in the following practices proscribed by California Civil Code section 1770(a) in transactions with Plaintiff and members of the California Statutory Subclass, which were intended to result in, and did result in, the sale of the Products:

> (5) Representing that [the Products have]… characteristics…[and] uses…which they do not have….
>
> (7) Representing that [the Products] are of a particular standard…if they are of another.
>
> (9) Advertising goods…with intent not to sell them as advertised.

97. Defendant violated the CRLA by representing and advertising that the Products, as discussed above, would help consumers to rebuild muscle and strength. However, Defendant knew, or should have known, that this representation was false and misleading.

98. In order to conceal the fact that its claims of "rebuild[ing] muscle and strength" are untrue, and to deceptively imply that these false claims actually have

scientific support, Defendant labels the Products with phrases such as "clinical strength," "focused, clinical nutrition," "targeted, specialized nutrition," and other representations discussed above.

99. On July 9, 2012, via certified mail, return receipt requested, under Section 1782 of the CLRA, Plaintiff notified Abbott in writing of the particular violations of Section 1770, and demanded that Abbott rectify the problems associated with the behavior detailed above, which acts and practices are in violation of Section 1770.

100. Abbott failed to rectify the violations identified by Plaintiff. Therefore, under Section 1780(a) of the CLRA, Plaintiff and members of the Class seek actual and punitive damages.

101. Plaintiff filed a Declaration of Venue in accordance with Civil Code section 1780(d).

102. Under Section 1782(d) of the CLRA, Plaintiff seeks an order enjoining the act and practices described above, restitution of property, and any other relief that the court deems proper.

103. Defendant's conduct is malicious, fraudulent, and wanton, and Defendant intentionally misleads and withholds material information from consumers in order to increase the sale of the Products.

104. Defendant's misrepresentations and omissions were material to Plaintiff and members of the California Statutory Subclass. Plaintiff and members of the California Statutory Subclass would not have purchased and consumed the Products had it not been for Defendant's misrepresentations and concealment of material facts. Plaintiff and members of the California Statutory Subclass were damaged as a result of Defendant's material misrepresentations and omissions.

SECOND CAUSE OF ACTION

Brought on Behalf of the California Statutory Subclass

Violation of the California Unfair Business Practices Act

(California Business & Professions Code §§ 17200 *et seq.*)

105. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

106. Plaintiff brings this cause of action on behalf of himself and the other members of the California Statutory Subclass.

107. California Business and Professions Code section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." For the reasons described above, Defendant has engaged in unlawful, unfair, and/or fraudulent business acts or practices in violation of California Business and Professions Code section 17200.

108. Defendant's misrepresentations and omissions of material facts, as set forth herein, constitute an unlawful practice because they violate California Civil Code sections 1572, 1573, 1709, 1710, 1711, and 1770, California Health & Safety Code section 109875 *et seq.*, and the common law.

109. Defendant's misrepresentations and omissions of material facts, as set forth herein, also constitute "unfair" business acts and practices within the meaning of California Business and Professions Code sections 17200 *et seq.*, in that Defendant's conduct was injurious to consumers, offended public policy, and was unethical and unscrupulous. Plaintiff also asserts a violation of public policy by withholding material facts from consumers. Defendant's violation of California's consumer protection and unfair competition laws in California resulted in harm to consumers.

110. There were reasonable alternatives available to Defendant to further Defendant's legitimate business interests, other than the conduct described herein.

111. California Business and Professions Code section 17200 also prohibits any "fraudulent business act or practice."

112. Defendant's misrepresentations and concealment of material facts, as set

forth above, were false, misleading, and/or likely to deceive the public within the meaning of California Business and Professions Code section 17200.

113. Defendant's misrepresentations and concealment were made with knowledge of their effect, and were done to induce Plaintiff and members of the California Statutory Subclass to purchase the Products. Plaintiff and members of the California Statutory Subclass saw and justifiably relied on Defendant's misrepresentations on the packaging when purchasing the Products.

114. Defendant's conduct caused and continues to cause injury to Plaintiff and members of the California Statutory Subclass. Defendant's misrepresentations and omissions were material to Plaintiff and members of the California Statutory Subclass. Plaintiff and members of the California Statutory Subclass would not have purchased and consumed the Products had it not been for Defendant's misrepresentations and concealment of material facts. Plaintiff and members of the California Statutory Subclass have suffered injury in fact and have lost money as a result of Defendant's fraudulent conduct.

115. Defendant's misrepresentations and omissions alleged herein are objectively material to the reasonable consumer, and they were material to Plaintiff. Reliance upon the misrepresentations and omissions discussed herein may therefore be presumed as a matter of law. The materiality of such representations and omissions also establishes causation between Defendant's conduct and Plaintiff's and the members of the California Statutory Subclass' injuries.

116. Defendant has thus engaged in unlawful, unfair, and fraudulent business acts entitling Plaintiff and members of the California Statutory Subclass to judgment and equitable relief against Defendants, as set forth in the Prayer for Relief.

117. Additionally, under Business and Professions Code section 17203, Plaintiff and members of the California Statutory Subclass seek an order requiring Defendant to immediately cease such acts of unlawful, unfair, and fraudulent business practices, and requiring Defendant to correct its actions.

THIRD CAUSE OF ACTION
Brought on Behalf of the California Statutory Subclass
Violation of the California False Advertising Law
(California Business & Professions Code §§ 17500 *et seq.*)

118. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

119. Plaintiff brings this cause of action on behalf of himself and the members of the California Statutory Subclass.

120. California Business and Professions Code section 17500 prohibits "unfair, deceptive, untrue or misleading advertising."

121. Defendant violated California Business and Professions Code section 17500 by, *inter alia*, (a) misleadingly advertising that the Products would "help rebuild muscle and strength"; and (b) concealing material information about the true nature of the Products, in that the Products cannot rebuild strength.

122. Defendant's deceptive practices were specifically designed to induce Plaintiff and members of the California Statutory Subclass to purchase the Products over those of its competitors. Defendant's deceptive practices were carried out on the labels for the Products in order to induce Plaintiff and members of the California Statutory Subclass to purchase the Products.

123. Plaintiff and members of the California Statutory Subclass would not have purchased and consumed the Products had it not been for Defendant's misrepresentations and concealment of material facts. Plaintiff and members of the California Statutory Subclass were denied the benefit of the bargain when they decided to purchase the Products over competitor products, which are less expensive or do not unlawfully claim to rebuild strength. Had Plaintiff and members of the California Statutory Subclass been aware of Defendant's false and misleading advertising tactics, they would have paid less than what they paid for the Products, or they would not have purchased the Products at all.

124. The content of the labels, as alleged herein, were of a nature likely to deceive reasonable consumers.

125. Defendant knew, or in the exercise of reasonable care, should have known, that the representations were untrue or misleading and likely to deceive reasonable consumers.

126. Defendant's misrepresentations and omissions alleged herein are objectively material to the reasonable consumer, and reliance upon such misrepresentations and omissions may therefore be presumed as a matter of law. The materiality of such representations and omissions also establishes causation between Defendant's conduct and Plaintiff's and the California Statutory Subclass members' injuries.

127. Unless restrained by this Court, Defendant will continue to engage in misleading advertising, as alleged above, in violation of California Business and Professions Code section 17500.

128. As a result of the foregoing, Plaintiff and members of the California Statutory Class have been injured in fact and lost money or property, and they are entitled to restitution and injunctive relief.

FOURTH CAUSE OF ACTION
Brought on Behalf of the Nationwide Subclass
Negligent Misrepresentation

129. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

130. Defendant, directly or through its agents and employees, made false representations, concealments, and nondisclosures to Plaintiff and members of the Nationwide Subclass.

131. In making the representations of fact to Plaintiff and members of the Nationwide Subclass described herein, Defendant has failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of said failure to

disclose was the negligence and carelessness of Defendant.

132. In making the representations and omissions, and in doing the acts alleged above, Defendant acted without any reasonable grounds for believing the representations were true, and intended by said representations to induce the reliance of Plaintiff and members of the Nationwide Subclass.

133. Plaintiff and members of the Nationwide Subclass relied upon these false representations, concealments and nondisclosures by Defendant when purchasing the products at issue herein, which reliance was justified.

134. As a result of Defendant's wrongful conduct, Plaintiff and members of the Nationwide Subclass have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for Muscle Health or Clinical Strength, and any interest that would have been accrued on those monies, all in an amount to be determined according to proof at time of trial.

FIFTH CAUSE OF ACTION
Brought on Behalf of the Nationwide Subclass
Violation of Ohio Consumer Sales Practices Act
(Ohio Revised Code §§ 1345 *et seq.*)

135. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

136. Plaintiff brings this cause of action on behalf of himself and the other members of the Nationwide Subclass.

137. This cause of action is brought pursuant to the Ohio Consumer Sales Practices Act, Ohio Revised Code section 1345 *et seq.* (the "CSPA").

138. Plaintiff is a "consumer" as defined by Ohio Revised Code section 1345.01(D).

139. Abbott is a "supplier" as defined by Ohio Revised Code section 1345.01(C). Abbott's conduct described herein involves "consumer transactions" as defined in Ohio Revised Code section 1345.01(A).

140. Abbott violated and continues to violate the CSPA by engaging in the following practices proscribed by Ohio Revised Code section 1345.02 in consumer transactions with Plaintiff and members of the Nationwide Subclass, which were intended to result in, and did result in, the sale of the Products:

> (A) by "commit[ting] an unfair or deceptive act or practice in connection with a consumer transaction";
>
> (B)(1) by representing that the Products have "sponsorship, approval, performance characteristics, accessories, uses, or benefits that [they] do not have";
>
> (B)(2) by representing that the Products are "of a particular standard, quality, grade, style, prescription, or model, if [they] are not"; and
>
> (B)(5) by representing that the Products "ha[ve] been supplied in accordance with a previous representation, if [they] have not"

141. Abbott violated and continues to violate the CSPA by engaging in the following practices proscribed by Ohio Revised Code § 1345.03 in consumer transactions with Plaintiff and the Nationwide Subclass, which were intended to result in, and did result in, the sale of the Products:

> (A) because Abbott has engaged in and is engaging in "unconscionable act[s] or practice[s] in connection with a consumer transaction";
>
> (B)(3) because Abbott "knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction"; and
>
> (B)(6) because Abbott "knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment"

142. Abbott violated the CSPA by representing the nature of Products, as described above, when it knew, or should have known, that the representations on the packaging for the Products were false and misleading.

143. Under Ohio Revised Code section 1345.09(A), Plaintiff and the Nationwide Subclass are entitled to rescind the consumer transactions.

144. Under Ohio Revised Code section 1345.09(D), Plaintiff and the Nationwide Subclass seek an order enjoining the above-described wrongful acts and practices of Defendant and for restitution and disgorgement.

145. Under Ohio Revised Code section 1345.09(E), the clerk of court shall serve a copy of this Complaint upon the attorney general.

146. Plaintiff and the Nationwide Subclass reserve the right to allege further violations of the CSPA as Abbott's conduct is ongoing.

SIXTH CAUSE OF ACTION
Brought on Behalf of the Nationwide Subclass
Violation of Ohio Deceptive Trade Practices Act
(Ohio Rev. Code §§ 4165 *et seq.*)

147. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

148. Plaintiff brings this cause of action on behalf of himself and the other members of the Nationwide Subclass.

149. Abbott is a "person" as defined in Ohio Revised Code section 4165.01(D).

150. For the reasons discussed above, Abbott has engaged in unfair, deceptive, untrue and misleading advertising in violation of the Ohio Deceptive Trade Practices Act section 4165.02 because Abbott, in the course of its business:

> (A)(1) "Passes off goods or services as those of another;"
>
> (A)(4) "Uses deceptive representations . . . in connection with goods or services;"
>
> (A)(7) "Represents that goods . . . have sponsorship, approval, characteristics, ingredients, uses, benefits . . . that they do not have;"
>
> (A)(9) "Represents that goods or services are of a particular standard, quality, or grade . . . [when] they are of another;"

> (A)(11) "Advertises goods or services with intent not to sell them as advertised[.]"

151. Plaintiff and the Nationwide Subclass reserve the right to allege other violations of the law under the Ohio Deceptive Trade Practices Act because Abbott's conduct is ongoing.

152. Abbott's conduct caused and continues to cause substantial injury to Plaintiff and the Nationwide Subclass. Plaintiff has suffered injury in fact and has lost money as a result of Abbott's deceptive conduct.

153. Plaintiff and the Nationwide Subclass seek equitable relief and to enjoin Abbott on the terms that the Court considers reasonable.

PRAYER FOR RELIEF

Plaintiff, on behalf of himself and all others similarly situated, requests the Court to enter judgment against Defendant, as follows:

1. Certifying the Class, including the California Statutory Subclass and the Nationwide Subclass, as requested herein, certifying Plaintiff as the representative of the Class, and appointing Plaintiff's counsel as counsel for the Class;

2. Ordering that Defendant is financially responsible for notifying all members of the Class of the alleged misrepresentations and omissions discussed herein;

3. Awarding Plaintiff and the members of the Class compensatory damages in an amount according to proof at trial;

4. Awarding restitution and disgorgement of Defendant's revenues and/or profits to Plaintiff and members of the Class;

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

6. Awarding to Plaintiff and the Class punitive damages;

7. Ordering Defendant to engage in corrective advertising;

8. Awarding interest on the monies wrongfully obtained from the date of collection through the date of entry to judgment in this action;

9. Awarding attorneys' fees, expenses, and recoverable costs reasonably incurred in connection with the commencement and prosecution of this action; and

10. For such other and further relief as the Court deems just and proper.

Dated: March 28, 2013

BARON & BUDD, P.C.

By: _____
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on behalf of other members of the
public similarly situated

DEMAND FOR JURY TRIAL

Plaintiff requests trial by jury on all issues so triable.

Respectfully submitted,

Dated: March 28, 2013

BARON & BUDD, P.C.

By: _____
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