

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

1. DON BERGER, Individually and on behalf of those similarly situated,)

Plaintiff,)

vs.)

1. WALMART STORES INC.)

2. WALGREEN CO.)

Defendant.)

**CLASS ACTION COMPLAINT
CASE NO.**

COMPLAINT

Don Berger ("Plaintiff"), individually, and on behalf of all others similarly situated, alleges against WALMART STORES INC. ("Walmart" or "Defendant") and WALGREEN CO. ("Walgreens" or "Defendant" or collectively "Defendants"), as follows:

I. NATURE OF THE ACTION

1. Walmart, headquartered in Bentonville, Arkansas, is a multinational retail corporation that operates a chain of discount department stores and warehouse stores.

2. Walmart proclaims in its corporate statement that Walmart helps people around the world save money and live better. (corporate.walmart.com/our-story).

3. Walmart sells and markets vitamins and herbal supplements under its own store brand Spring Valley.

4. Walmart manufactured, caused to be manufactured, marketed and distributed millions of herbal supplements under its own Spring Valley brand that did not contain the herbs on their labels. (www.nytimes.com/2015/02/03/new-york-attorney-general-targets-supplements-at-major-retailers).

5. Tests have shown that the Spring Valley products including Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto, did not contain the herbs on their labels, or if they did, contained less than what was represented on the labels. (www.nytimes.com/2015/02/03/sidebar-whats-in-those-supplements)

6. Four (4) percent of tests conducted on the Spring Valley brand herbal supplements yielded DNA matching the product label; 40% tested for botanical material other than what was on the label; and 56% yielded no plant DNA at all. (February 2, 2015 Letter from the Attorney General of New York to Doug McMillon, Preident/CEO, Walmart Stores Inc.)

7. The lack of purity in herbal products being sold and marketed by Walmart and other large retailers has raised serious public health and safety concerns. (February 2, 2015 Letter from the Attorney General of New York to Doug McMillon, Preident/CEO, Walmart Stores Inc.)

8. The Attorney General of New York's testing included the following results of Walmart's Spring Valley branded herbal supplements (February 2, 2015 Letter from the Attorney General of New York to Doug McMillon, Preident/CEO, Walmart Stores Inc.):

Ginkgo Biloba. Negative. No ginkgo biloba DNA was identified. The only DNA identified was "oryz" (commonly known as rice) in 6 of the fifteen tests, with other tests identifying dracaena (a tropical houseplant), mustard, wheat, and radish. Four of the tests revealed no plant DNA whatsoever.

St. John's Wort. Negative. No St. John's Wort was identified. Of the 15-tests performed, only four identified any DNA, and it included allium, oryz (x2), and cassava (garlic, rice, and tropical root crop)

Ginseng. Negative. No ginseng DNA was identified. The testing yielded identification of oryza, dracaena, pinus strobus, wheat/grass, and citrus spp., with 10 of the tests identifying no gentic material at all.

Garlic. Qualified negative. While one of 15 tests did identify the presence of allium, it was clearly not predominate. The other tests identified oryza(x6), and pinus spp. Genetic material of palm, dracaena, wheat, and oryza was located, with only 1/15 of the tests identifying allium as present in the product. Ten of the 15 tests showed no identifiable genetic plant material.

Echinacea. Negative. No plant genetic material of any sort was identified in the product labeled Echinacea.

Saw Palmetto. Qualified negative. Three of 15 tests did identify the presence of saw palmetto, but it did not predominate. Three tests identified allium DNA, and six other tests identified the presence of oryza. Four tests were unable to identify any botanic DNA in the samples.

9. The testing of Walmart's ginkgo biloba, a Chinese plant that assists as a memory enhancer, contained wheat - despite a claim on the label that the product was wheat and gluten free.

10. Walgreens, headquartered in Illinois, is a multinational retail corporation that operates a chain of 8300 stores including Oklahoma and throughout the United States.

11. Walgreens manufactures, markets, distributes and/or sells its own line of herbal supplements under its own brand name Finest Nutrition. Walgreens has been and still is engaged in the business of manufacturing and selling Herbal Supplements in Oklahoma and throughout the United States.

12. Walgreens manufactured, caused to be manufactured, marketed and distributed millions of herbal supplements under its own Finest Nutrition brand that did not contain the herbs on their labels. (www.nytimes.com/2015/02/03/new-york-attorney-general-targets-supplements-at-major-retailers).

13. Tests have shown that the Finest Nutrition products including Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto, did not contain the herbs on their labels, or if they did, contained less than what was represented on the labels. (www.nytimes.com/2015/02/03/sidebar-whats-in-those-supplements)

14. In a February 2, 2015 letter to Walgreens' President, Alexander Gourlay, the New York Attorney General, Eric T. Schneiderman, stated that it purchased six Walgreens brand "Finest Nutrition" Herbal Supplements from three different New York state Walgreens locations. The Walgreens Herbal Supplements purchased were Ginkgo Biloba, St. John's Wort, Ginseng, Garlic, Echinacea and Saw Palmetto. The NY AG then conducted genetic testing on each bottle, which yielded 90 results.

15. The results of the genetic testing showed that 37% of the samples contained *no* plant DNA whatsoever. Further, 45% of the samples contained botanical material other than what appeared on the label. And finally, a mere 18% of the sample set yielded DNA that actually matched the contents of the product label.

16. For example, with respect to the Finest Nutrition Ginkgo Biloba, none of the samples tested contained *any* Ginkgo. The only botanic material that was found in the Ginkgo samples was rice. The presence of the rice was not disclosed on the Finest Nutrition packaging.

17. With respect to the Finest Nutrition St. John's Wort tested by the NY AG, *none* of the samples contained any St. John's Wort whatsoever, and many of the samples tested showed no presence of any plant material at all. Several of the tests revealed the presence of rice, allium, and dracaena, all of which are unrelated to St. John's Wort. The presence of these ingredients was not disclosed on the Finest Nutrition St. John's Wort packaging.

18. With respect to the Finest Nutrition Echinacea tested by the NY AG, *none* of the samples contained any Echinacea whatsoever, and many of the samples tested showed no presence of any plant material at all. Several of the tests revealed the presence of allium, oryza, and daisy, all of which are unrelated to Echinacea. The presence of these ingredients was not disclosed on the Finest Nutrition Echinacea packaging.

19. Eric T. Schneiderman, the New York Attorney General stated that "Mislabeling, contamination and false advertising are illegal. They also pose unacceptable risks to New York families - especially those with allergies to hidden ingredients." (www.nytimes.com/2015/02/03/new-york-attorney-general-targets-supplements-at-major-retailers).

20. In 2013 there were widespread questions raised about labeling fraud in the supplement industry. Research at the University of Guelph in Canada found that as many as a third of herbal supplements tested did not contain the plants listed on their labels - only cheap fillers. (www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html)

23. "Americans spend an estimated \$5 billion a year on unproven herbal supplements that promise everything from fighting off colds to curbing hot flashes and boosting memory... Buyers beware: DNA tests show that many pills labeled as healing herbs are little more than powdered rice and weeds." (www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html)

24. "Using a test called DNA barcoding, a kind of genetic fingerprinting that has also been used to help uncover labeling fraud in the commercial seafood industry, Canadian researchers tested 44 bottles of popular supplements sold by 12 companies. They found that many were not what they claimed to be, and that pills labeled as popular herbs were often diluted — or replaced entirely — by cheap fillers like soybean, wheat and rice." (www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html)

25. "Consumer advocates and scientists say the research provides more evidence that the herbal supplement industry is riddled with questionable practices. Industry representatives

argue that any problems are not widespread." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

26. "Among their findings were bottles of echinacea supplements, used by millions of Americans to prevent and treat colds, that contained ground up bitter weed, Parthenium hysterophorus, an invasive plant found in India and Australia that has been linked to rashes, nausea and flatulence." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

27. "Two bottles labeled as St. John's Wort, which studies have shown may treat mild depression, contained none of the medicinal herb. Instead, the pills in one bottle were made of nothing but rice, and another bottle contained only Alexandrian senna, an Egyptian yellow shrub that is a powerful laxative. Ginkgo Biloba supplements, promoted as memory enhancers, were mixed with fillers and black walnut, a potentially deadly hazard for people with nut allergies." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

28. "Of 44 herbal supplements tested, one-third showed outright substitution, meaning there was no trace of the plant advertised on the bottle — only another plant in its place." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

29. "Many were adulterated with ingredients not listed on the label, like rice, soybean and wheat, which are used as fillers." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

30. "In some cases, these fillers were the only plant detected in the bottle — a health concern for people with allergies or those seeking gluten-free products, said the study's lead author, Steven G. Newmaster, a biology professor and botanical director of the Biodiversity

Institute of Ontario at the University of Guelph." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

31. "The findings, published in the journal BMC Medicine, follow a number of smaller studies conducted in recent years that have suggested a sizable percentage of herbal products are not what they purport to be. But because the latest findings are backed by DNA testing, they offer perhaps the most credible evidence to date of adulteration, contamination and mislabeling in the medicinal supplement industry, a rapidly growing area of alternative medicine that includes an estimated 29,000 herbal products and substances sold throughout North America." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

32. "This suggests that the problems are widespread and that quality control for many companies, whether through ignorance, incompetence or dishonesty, is unacceptable," said David Schardt, a senior nutritionist at the Center for Science in the Public Interest, an advocacy group. "Given these results, it's hard to recommend any herbal supplements to consumers." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

33. "The Food and Drug Administration has used bar-coding technology to warn and in some cases prosecute sellers of seafood found to be "misbranded." The DNA technique has also been used in studies of herbal teas, which showed that a significant percentage contain herbs and ingredients that are not listed on their labels." ([www.nytimes.com /2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html](http://www.nytimes.com/2013/11/05/science/herbal-supplements-are-often-not-what-they-seem.html))

34. Plaintiff brings this action individually and on behalf of a proposed Nationwide and Oklahoma State Class, as more fully defined below, for the benefit and protection of all current and former consumers of the identified Walgreens brand Finest Nutrition herbal

supplements. Through this class action complaint, Plaintiff seeks damages and/or restitution and/or injunctive relief on behalf of himself and all other similarly situated persons.

35. This class action is brought for violations of Oklahoma consumer protection law; breach of implied warranty of merchantability; and, fraudulent concealment under Oklahoma law.

II. PARTIES

A. Plaintiff

25. Plaintiff and proposed Nationwide and Oklahoma Class Representative is, and all times relevant to this Complaint, a citizen and resident of Mayes County, State of Oklahoma. Plaintiff has and currently consumes and buys the Walgreens Finest Nutrition brand of herbal supplements. Plaintiff also has and currently consumes and buys the Walmart Spring Valley brand of herbal supplements.

B. Defendant

26. Defendant, Walgreens, has its principal place of business and home office located at 108 Wilmott Road, Deerfield, Illinois.

27. At all relevant times, Walgreens was engaged in Oklahoma in the branding of Finest Nutrition herbal supplements, marketing, distributing, advertising and selling them.

Walgreens was and is engaged significant business throughout Oklahoma.

28. Defendant, Walmart, has its principal place of business and home office located at 702 SW 8th Street, Bentonville, AR 72716-8611.

29. At all relevant times, Walmart was engaged in Oklahoma in the branding of Spring Valley herbal supplements, marketing, distributing, advertising and selling them.

Walmart was and is engaged significant business throughout Oklahoma.

III. JURISDICTION AND VENUE

30. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because diversity of citizenship exists between members of the proposed Plaintiff Class (“Class Members”) and Defendant, and the aggregate amount in controversy substantially exceeds \$5,000,000, exclusive of interest and costs.

29. Plaintiff is a resident of Oklahoma and Defendants have their principal place of business in Arkansas and Illinois.

30. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because Defendants conduct substantial business in this District and have caused harm to Plaintiff and Class Members in this District.

IV. FACTS COMMON TO ALL CAUSES OF ACTION

31. At all relevant times, Walmart was engaged in Oklahoma in the branding of Spring Valley herbal supplements, Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto marketing, distributing, advertising and selling them. Walmart was and is engaged significant business throughout Oklahoma.

32. Walmart's Spring Valley branded herbal supplements including Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto, did not contain the herbs on their labels, or if they did, contained less than what was represented on the labels.

33. Four (4) percent of tests conducted on the Spring Valley brand herbal supplements yielded DNA matching the product label; 40% tested for botanical material other than what was on the label; and 56% yielded no plant DNA at all. (February 2, 2015 Letter from the Attorney General of New York to Doug McMillon, Preident/CEO, Walmart Stores Inc.)

34. Walmart has successfully concealed from Plaintiff and the class members as well as the general public the true composition of these identified products. Plaintiff, the general public and others similarly situated were and/or are prevented from knowing of such unlawful, unfair, fraudulent, untrue, and/or deceptive conduct or of facts that might have led to the discovery thereof.

35. At all relevant times, Walgreens was engaged in Oklahoma in the branding of Finest Nutrition herbal supplements, Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto marketing, distributing, advertising and selling them. Walgreens was and is engaged significant business throughout Oklahoma.

36. Walgreens Finest Nutrition branded herbal supplements including Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto, did not contain the herbs on their labels, or if they did, contained less than what was represented on the labels.

37. Walgreens has successfully concealed from Plaintiff and the class members as well as the general public the true composition of these identified products. Plaintiff, the general public and others similarly situated were and/or are prevented from knowing of such unlawful, unfair, fraudulent, untrue, and/or deceptive conduct or of facts that might have led to the discovery thereof.

VI. CLASS ACTION ALLEGATIONS

34. Plaintiff brings this action on behalf of himself, and all others similarly situated, and seeks to certify and maintain it as a nationwide class action under Fed.R.Civ.P. 23(a), (b)(1) and/or (b)(2), and (b)(3).

35. The nationwide class that Plaintiff seeks to represent is defined as follows: All consumers who purchased, the following Walgreens Finest Nutrition branded herbal

supplements, Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto. All consumers who purchased, the following Walmart Spring Valley branded herbal supplements, Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto.

36. The Oklahoma class that Plaintiff seeks to represent is defined as follows: All Oklahoma residents who purchased, the following Walgreens Finest Nutrition branded herbal supplements, Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto. All consumers who purchased, the following Walmart Spring Valley branded herbal supplements, Ginkgo Biloba, St. Johns Wort, Ginseng, Garlic, Echinacea, and Saw Palmetto.

37. Excluded from the Classes are Defendants, their employees, officers, directors, legal representatives, heirs, successors and wholly or partly owned subsidiaries or affiliated companies; class counsel and their employees; and the judicial officers and their immediate family members and associated court staff assigned to this case, and all other persons within the third degree of relationship to any such person. Also excluded are all persons claiming damages from personal injuries or wrongful death arising from the defective airbags.

38. Plaintiff reserves the right to amend or otherwise alter the Class definitions presented to the Court, or to propose additional classes and/or sub-classes.

39. Plaintiff is a member of each Class.

40. This consumer class action is brought for violations of the Oklahoma Consumer Protection Act; for breach of implied warranty of merchantability under Oklahoma law and U.C.C.; for fraudulent concealment under Oklahoma law.

41. There is a well-defined community of interest and the Class is readily ascertainable.

42. Numerosity: The Class is so numerous that joinder of all members is impracticable. Due to the nature of the trade and commerce involved, the members of the Class are geographically dispersed throughout the United States and the State of Oklahoma, and joinder of all Class members would be impracticable. While the exact number of Class members is unknown to Plaintiff at this time, Plaintiff believes that there are, at least, hundreds of thousands of members of the State Class, and millions in the Nationwide Class. Class members may be notified by the pendency of the action by the Internet, or published notice.

43. Ascertainability: The proposed Class is ascertainable in that it is objectively defined and the members can be identified and located using information contained in Defendants' records. The proposed class definition is sufficiently precise so that each Class member can determine that they are a member of the proposed Class.

44. Typicality: Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and other Class members were subject to the same standardized mislabeling, implied warranties, false marketing, and nondisclosure about the quality of the Finest Nutrition herbal supplements and Spring Valley herbal supplements.

45. Adequacy: Plaintiff is qualified to, and will, fairly and adequately protect the interests of each Class member with whom there is a shared, well-defined community of interest and typicality of claims, as demonstrated herein. Plaintiff is unaware of any conflicts between him and the other members of the proposed Class. Plaintiff has retained counsel competent and experienced in complex class action litigation and Plaintiff intends on prosecuting this action vigorously. The interests of absent members of the Class will be fairly and adequately protected by Plaintiff and his counsel.

46. Superiority: A class action is superior to other available means for the fair and efficient adjudication of Plaintiff's and the other Class members' claims. The damages suffered by each individual Class member may be limited. Damages of such magnitude are small given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. Further, it would be virtually impossible for the Class members to redress the wrongs done to them on an individual basis. Even if members of the Class themselves could afford such individual litigation, the court system could not. Individualized litigation increases the delay and expense to all parties and the court system, due to the complex legal, factual and scientific issues presented by the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

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

- a. Whether the products sold by Defendants were or are mislabeled
- b. Whether Defendants knew or should have known of the mislabeling
- c. Whether Defendants concealed the defect in the products identified herein
- d. Whether Defendants misrepresented the quality of the products identified herein
- e. Whether Defendants represented the products contained certain herbs and when they did not
- f. Whether Defendants advertised the herbal supplements with the intent not to sell them as advertised
- g. Whether Defendants had duty to disclose the actual quality of the ingredients contained in the herbal supplements
- h. Whether Defendants represented that some of its herbal supplements were wheat and gluten free when in fact they were not
- i. Whether Defendants business practices - including the manufacture, marketing, advertising, sale, and distribution of branded herbal supplements that Defendants failed to adequately test, investigate, disclose and remedy - offend established public policy and caused harm to consumers

- j. Whether Defendants breached the implied warranty of merchantability because their own branded herbal supplements were not fit for their ordinary purpose
 - k. Whether Defendants were unjustly enriched at the expense of its consumers
 - l. Whether Plaintiff and Class Members are entitled to disgorgement of all profits wrongfully obtained as result of Defendants' deceptive sales of herbal supplements
 - m. Whether, as result of Defendants business practices, Plaintiff and Class Members are entitled to damages, restitution, equitable relief and other relief, and the nature and amount of such relief
 - n. The appropriate amount of disgorgement of profits, damages, restitution, or monetary penalties resulting from Defendants violations of law
49. In the alternative, the Class should be certified 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 Class members which would establish incompatible standards of conduct for Defendants;
 - b. The prosecution of separate actions by individual members of the Class would create a risk of adjudications with respect to them, which would, as a practical matter, be dispositive of the interests of the other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and
 - c. Defendants have acted or refused to act on grounds generally applicable to the Class, and/or the general public, thereby making appropriate final and injunctive relief with respect to the Class as a whole

VII. CAUSES OF ACTION

FIRST CLAIM FOR RELIEF UNFAIR AND DECEPTIVE ACTS IN VIOLATION OF THE OKLAHOMA CONSUMER PROTECTION ACT (On behalf of the Oklahoma Class) (15 O.S. § 752 et seq.)

48. Plaintiff incorporates by reference, as though fully set forth herein, each and every allegation and statement in the foregoing paragraphs.

49. Plaintiff brings this claim on behalf of himself and the Oklahoma Class.

50. The Oklahoma Consumer Protection Act prohibits unlawful practices, 15 O.S. § 753(20), that are unfair or deceptive as defined in Section 752.

51. Section 752(13) provides: "'Deceptive trade practice' means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person. Such a practice may occur before, during or after a consumer transaction is entered into and may be written or oral." Section 752(14) provides: "'Unfair trade practice' means any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

52. As Plaintiff alleges in the preceding paragraphs, Defendants have violated the Oklahoma Consumer Protection Act by engaging in unconscionable commercial practices, using deception and fraud, false pretenses, false promises, misrepresentations, and knowingly concealing, suppressing, and omitting material facts, intending that others rely upon the concealment, suppression and omission of such facts, in connection with the sale of its herbal supplements.

53. Defendants' misrepresentations and omissions regarding safety, compliance and labeling of the herbal supplements were likely to deceive a reasonable consumer, and the

information would be material to a reasonable consumer. Plaintiff and Class Members expected that the herbal supplements would indeed contain the ingredients for which they were labeled.

54. The quality and quantity of the herbal ingredients are not obvious and are hidden to average consumer and would only manifest itself in a scientific test analysis such as conducted by the New York Attorney General.

55. Plaintiff and the Oklahoma Class Members have suffered an injury in fact, including the loss of money or property, as a result of Defendants' unfair, unlawful and/or deceptive practices.

56. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of Defendants' business. Defendants' wrongful conduct is a part of a pattern of generalized course of conduct that is still perpetuated and repeated, in the State of Oklahoma and throughout the United States.

57. Plaintiff and the Oklahoma Class Members request that the Court award threefold the damages sustained, as well as attorney's fees, costs, and expenses, pursuant to Oklahoma law as well as any and all such additional legal and/or equitable relief to which Plaintiff and the Oklahoma Class Members may be entitled.

**SECOND CLAIM FOR RELIEF BREACH OF IMPLIED WARRANTY OF
MERCHANTABLITY
(On behalf of the National and Oklahoma Class)
(U.C.C. and 12A O.S. § 2-314)**

58. Plaintiff incorporates by reference, as though fully set forth herein, each and every allegation and statement in the foregoing paragraphs.

59. Plaintiff brings this claim on behalf of himself and the Oklahoma Class.

60. Defendants are, and were at all relevant times, "merchants" as defined in Oklahoma Stat. 12A O.S. § 2-104(1).

61. A warranty that the Defendants herbal supplements were in merchantable condition was implied by law in connection with the sale of the herbal supplements. Title 12A O.S. § 2-314 provides: (2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) *conform to the promises or affirmations of fact made on the container or label if any.*

62. These herbal supplements, when sold and at all times thereafter, were not in merchantable condition, did not conform to the promises or affirmations of fact made on the container or label, and are not fit for the ordinary purpose for which they are used.

63. As a direct and proximate result of Defendants' breach of implied warranties, Plaintiff and members of the Oklahoma Class have suffered damages.

**THIRD CLAIM FOR RELIEF FRAUD BY CONCEALMENT
(On behalf of the National Class)**

64. Plaintiff incorporates by reference, as though fully set forth herein, each and every allegation and statement in the foregoing paragraphs.

65. Plaintiff brings this claim on behalf of himself and the Oklahoma Class.

66. As alleged in detail herein, Defendants made material omissions and affirmative misrepresentations concerning the ingredient labeling of the herbal supplements. They made these material omissions and misrepresentations to continue to sell the herbal supplements, continue to profit from those sales, and to avoid expenses, public criticism, governmental and

private legal actions, and other anticipated and foreseeable results of the truth about the mislabeling being made public.

67. When those omissions and misrepresentations were made, Defendants knew they were false, or recklessly disregarded the truth or falsity of their omissions and misrepresentations.

68. Defendants had a duty to properly test, analyze, and properly label the herbal supplements and Defendants failed to do this.

69. The Plaintiff and Class Members rely on the labeling of herbal ingredients and consumers in general must rely on the labeling of herbal supplements as there is no way for the consumer to determine the veracity of the label without extensive scientific analysis of the herbal supplement - something consumers would not do, and should not have to do.

70. As a result of their detrimental reliance on Defendants fraudulent concealment, misrepresentations, omissions, fraudulent labeling, Plaintiff and the Oklahoma Class Members have been injured in an amount to be proven at trial, including their lost benefit of the bargain, overpayment for and/or diminished value of the product, the disgorgement of profits from the Defendant and expenses associated with compliance with any recalls.

71. As alleged in detail herein, Defendants fraudulent conduct was knowing, intentional, with malice, demonstrated a complete lack of care, and was in reckless disregard for the safety, well-being, and legal rights of Plaintiff and the Oklahoma Class Members. Plaintiff and the Oklahoma Class Members are thus entitled to an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and all Class members pray for judgment against Defendants, as follows:

- A. An order certifying this case as a class action and appointing Plaintiff and his counsel to represent the Class;
- B. For actual damages according to proof;
- C. For compensatory damages as permitted by law;
- D. For consequential damages as permitted by law;
- E. For punitive damages as permitted by law;
- F. For equitable relief, including restitution;
- G. For restitution and disgorgement of all profits Defendants obtained as a result of its unfair and deceptive business practices;
- H. For unjust enrichment including legal restitution and/or disgorgement of profits;
- I. For interest as permitted by law;
- J. For declaratory relief;
- K. For a prohibitory injunction forbidding Defendants from distributing and selling herbal supplements without truthful labeling;
- L. For a mandatory injunction requiring Defendants to issue a notice program advising all purchasers and consumers of herbal supplements during the liability period of the existence and consequences of the false labeling and advising them of their rights under Oklahoma consumer protection laws;
- M. For reasonable attorneys' fees and costs; and
- N. For such other relief as is just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

ATTORNEY LIEN CLAIMED

Dated: March 11, 2015

Respectfully submitted,

/s/ Wilfred K. Wright Jr.
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