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23
24 **UNITED STATES DISTRICT COURT**
25 **CENTRAL DISTRICT OF CALIFORNIA**

26 VICTORIA KISSEL, individually and on
27 behalf of all others similarly situated,

28 Plaintiff,

v.

OMEGA NATURAL SCIENCE, INC., a
Nevada corporation; and DOES 1 – 10,
inclusive,

Defendants.

Case No. 2:16-cv-02770

CLASS ACTION COMPLAINT FOR:

1. VIOLATIONS OF CALIFORNIA’S.
AUTOMATIC RENEWAL LAW
(BUSINESS AND PROFESSIONS
CODE §§ 17600-17604); and
2. VIOLATIONS OF CALIFORNIA’S
UNFAIR COMPETITION LAW
(BUSINESS AND PROFESSIONS
CODE §§ 17200-17204).

1 Plaintiff Victoria Kissel (“Plaintiff”), on behalf of herself and all others similarly
2 situated, complains and alleges as follows:

3 **INTRODUCTION & OVERVIEW OF CLAIMS**

4 1. Plaintiff brings this class action on behalf of herself and a class of others
5 similarly situated consisting of all persons in California who, within the applicable
6 statute of limitations period, purchased subscriptions for any products (such as the
7 OmegaBrite dietary supplements) from Omega Natural Science, Inc. (“Omega” or
8 “Defendant”). The class of others similarly situated to Plaintiff is referred to herein as
9 “Class Members.” The claims for damages, restitution, injunctive and/or other
10 equitable relief, and reasonable attorneys’ fees and costs arise under California
11 Business and Professions Code (hereinafter “Cal. Bus. & Prof. Code”) §§ 17602,
12 17603, and 17604) and 17200, *et seq.*, and California Code of Civil Procedure § 1021.5.
13 Plaintiff and Class Members are consumers for purposes of Cal. Bus. & Prof. Code §§
14 17600-17606.

15 2. During the Class Period, Defendant made automatic renewal or continuous
16 service offers to consumers in and throughout California and failed to provide an
17 acknowledgment that includes the automatic renewal or continuous service offer terms,
18 cancellation policy, and information regarding how to cancel in a manner that is
19 capable of being retained by the consumer in violation of Cal. Bus. & Prof. Code §
20 17602(a)(3). As a result, all goods, wares, merchandise, or products sent to Plaintiff
21 and Class Members under the automatic renewal of continuous service agreements are
22 deemed to be an unconditional gift pursuant to Cal. Bus. & Prof. Code § 17603.

23 3. As a result of the above, Plaintiff, on behalf of herself and Class Members,
24 seeks damages, restitution, declaratory relief, injunctive relief and reasonable attorneys’
25 fees and costs pursuant to Cal. Bus. & Prof. Code, §§ 17603, 17203, and 17204, and
26 Code of Civil Procedure § 1021.5.

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1 **JURISDICTION AND VENUE**

2 4. This Court has diversity jurisdiction over this class action pursuant to 28
3 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the
4 amount in controversy exceeds five million dollars (\$5,000,000.00), exclusive of
5 interest and costs, and is a class action in which some members of the class are citizens
6 of different states than Defendant. *See* 28 U.S.C. § 1332(d)(2)(A).

7 5. This Court also has personal jurisdiction over Defendant because
8 Defendant currently does business in this state.

9 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because
10 Defendant is subject to personal jurisdiction in this District and a substantial portion of
11 the conduct complained of herein occurred in this District.

12 **PARTIES**

13 7. Plaintiff purchased a subscription plan from Defendant in California
14 during the Class Period. Plaintiff and Class Members are consumers as defined under
15 Cal. Bus. & Prof. Code § 17601(d).

16 8. Defendant Omega Natural Science, Inc. is a Nevada corporation with its
17 principal place of business located at 8275 S. Eastern Ave., Suite 121, Las Vegas,
18 Nevada 89123. Defendant operates in California and has done business throughout
19 California at all times during the Class Period. Also during the Class Period, Defendant
20 made, and continues to make, automatic renewal or continuous service offers to
21 consumers in California. Defendant operates a website which markets subscriptions for
22 products, including the OmegaBrite Gelcaps, that purport to improve one’s “cardiac
23 health”, “emotional wellbeing”, “joint health”, and “cognitive clarity”.

24 9. The true names and capacities of the Defendants sued herein as DOES 1
25 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such
26 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is
27 legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of
28

1 Court to amend this Complaint to reflect the true names and capacities of the DOE
2 Defendants when such identities become known.

3 10. At all relevant times, each and every Defendant was acting as an agent
4 and/or employee of each of the other Defendants and was acting within the course
5 and/or scope of said agency and/or employment with the full knowledge and consent of
6 each of the Defendants. Each of the acts and/or omissions complained of herein were
7 alleged and made known to, and ratified by, each of the other Defendants (Omega
8 Natural Science, Inc. and DOE Defendants will hereafter collectively be referred to as
9 “Defendant”).

10 **FACTUAL BACKGROUND**

11 **California Business Professions Code §§ 17600-17606**

12 11. On December 1, 2010, sections 17600-17606 of the Cal. Bus. & Prof.
13 Code came into effect. The Legislature’s stated intent for this Article was to end the
14 practice of ongoing charges to consumers’ Payment Methods without consumers’
15 explicit consent for ongoing shipments of a product or ongoing deliveries of service.
16 *See* Cal. Bus. & Prof. Code § 17600.

17 12. Cal. Bus. & Prof. Code § 17602(a) makes it unlawful for any business
18 making an automatic renewal or continuous service offer to a consumer in this state to
19 do any of the following:

20 Fail to provide an acknowledgment that includes the
21 automatic renewal or continuous service offer terms,
22 cancellation policy, and information regarding how to cancel
23 in a manner that is capable of being retained by the consumer.
24 If the offer includes a free trial, the business shall also
disclose in the acknowledgment how to cancel and allow the
consumer to cancel before the consumer pays for the goods or
services.

25 13. Cal. Bus. & Prof. Code § 17601(a) defines the term “Automatic renewal”
26 as a “plan or arrangement in which a paid subscription or purchasing agreement is
27 automatically renewed at the end of a definite term for a subsequent term.”
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2 14. Section 17602(b) provides: “A business making automatic renewal or
3 continuous service offers shall provide a toll-free telephone number, electronic mail
4 address, a postal address only when the seller directly bills the consumer, or another
5 cost-effective, timely, and easy-to-use mechanism for cancellation that shall be
6 described in the acknowledgment specified in paragraph (3) of subdivision (a).”

7 15. Section 17603 of Cal. Bus. & Prof. Code provides: “In any case in which a
8 business sends any goods, wares, merchandise, or products to a consumer, under a
9 continuous service agreement or automatic renewal of a purchase, without first
10 obtaining the consumer’s affirmative consent as described in Section 17602, the goods,
11 wares, merchandise, or products shall for all purposes be deemed an unconditional gift
12 to the consumer, who may use or dispose of the same in any manner he or she sees fit
13 without any obligation whatsoever on the consumer’s part to the business, including,
14 but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares,
15 merchandise, or products to the business.”

16 **Defendant’s Business**

17 16. Defendant provides an “AutoRefill” monthly subscription for its
18 OmegaBrite Gelcaps product, which, for consumers who select the monthly
19 subscription option, \$30.59, plus shipping and handling, per month. Defendant’s
20 product and services plan constitutes an automatic renewal and/or continuous service
21 plan or arrangement for the purposes of Cal. Bus. & Prof. Code § 17601.

22 **Defendant Failed to Provide an Acknowledgment as Required by Cal. Bus. &**
23 **Prof. Code §§ 17602(a)(3) and 17602(b)**

24 17. After Plaintiff and Class Members subscribed to one of Defendant’s
25 subscription plans, Defendant sent to Plaintiff and Class Members documents entitled
26 “OmegaBrite thanks you”, but has failed, and continues to fail, to provide an
27 acknowledgement that includes the automatic renewal or continuous service offer
28 terms, cancellation policy, and information on how to cancel in a manner that is capable


1 of being retained by Plaintiff and Class Members in violation of Cal. Bus. & Prof. Code
2 § 17602(a)(3). Moreover, Defendant failed to provide Plaintiff and Class Members
3 with an acknowledgement regarding how to cancel the subscription and allow Plaintiff
4 and Class Members to cancel before payment, as required by Cal. Bus. & Prof. Code §
5 17602(b).

6 [Redacted]
From: **OmegaBrite** <updates@omegabrite.com>
Date: Thursday, December 31, 2015
7 Subject: Order # [Redacted] -- OmegaBrite thanks you.
To: [Redacted]

9 Dear [Redacted],

10 Thank you for shopping at OmegaBrite! This message confirms your order, number [Redacted]. Please use this number in all
correspondence regarding this order. You can check your order status at any time by visiting your [order status page](#).

11 Invoice

Product	Qty	Unit Price	Ext Price
 OmegaBrite Gelcaps AutoRefill Every 30 Days: [Redacted]	1	\$30.59	\$30.59
Subtotal			\$30.59
Sales Tax			\$0.00
Shipping			\$13.95
Order Total			\$44.54

13 Ship To: [Redacted]
14 Ship Via: **UPS Ground**

15 You will receive an additional e-mail when your order has been shipped.

16 Again, thank you for shopping with OmegaBrite.

17 OmegaBrite
18 <http://omegabrite.com>
19 1-800-383-2030
20 updates@omegabrite.com

21 The OmegaBrite Online Store is powered by the [Nexternal eCommerce Platform](#) – Your Brand is Your Passion.
22 eCommerce is Ours.


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[Redacted]
From: **OmegaBrite** <updates@omegabrite.com>
Date: Saturday, January 30, 2016
Subject: Order # [Redacted] -- OmegaBrite thanks you.
To: [Redacted]

Dear [Redacted],

Thank you for shopping at OmegaBrite! This message confirms your order, number [Redacted]. Please use this number in all correspondence regarding this order. You can check your order status at any time by visiting your [order status page](#).

Invoice

Product	Qty	Unit Price	Ext Price	
 OmegaBrite Gelcaps AutoRefill Every 30 Days: [Redacted]	1	\$30.59	\$30.59	Ship To: [Redacted] Ship Via: UPS Ground
			Subtotal	\$30.59
			Sales Tax	\$0.00
			Shipping	\$13.95
			Order Total	\$44.54

You will receive an additional e-mail when your order has been shipped.

Again, thank you for shopping with OmegaBrite.

OmegaBrite
<http://omegabrite.com>
1-800-383-2030
updates@omegabrite.com

The OmegaBrite Online Store is powered by the [Nexternal eCommerce Platform](#) – Your Brand is Your Passion. eCommerce is Ours.

CLASS ACTION ALLEGATIONS

18. Plaintiff brings this action, on behalf of herself and all others similarly situated, as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure. The proposed Class (the “Class”) that Plaintiff seeks to represent is composed of and defined as:

“All persons within California that, within the applicable statute of limitations period, purchased any product or service in response to an offer constituting an “Automatic Renewal” as defined by § 17601(a) from Omega Natural Science, Inc., its predecessors, or its affiliates.”

19. This action is brought and may be properly maintained as a class action pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(1)-

1 (3). This action satisfies the numerosity, typicality, adequacy, predominance and
2 superiority requirements of those provisions.

3 20. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual
4 joinder of all of its members is impractical. While the exact number and identities of
5 Class members are unknown to Plaintiff at this time and can only be ascertained
6 through appropriate discovery, Plaintiff is informed and believes the Class includes
7 hundreds of thousands of members. Plaintiff alleges that the Class may be ascertained
8 by the records maintained by Defendant.

9 21. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all
10 members of the Class which predominate over any questions affecting only individual
11 members of the Class. These common legal and factual questions, which do not vary
12 from class member to class member, and which may be determined without reference to
13 the individual circumstances of any class member, include, but are not limited to, the
14 following:

- 15 i) Whether Defendant failed to provide an acknowledgment that
16 describes a cost-effective, timely, and easy-to-use mechanism for
17 cancellation in violation of Cal. Bus. & Prof. Code § 17602(b);
- 18 ii) Whether Defendant failed to provide an acknowledgement that
19 included the automatic renewal or continuous service offer terms,
20 cancellation policy, and information on how to cancel in a manner
21 that is capable of being retained by Plaintiff and Class Members, in
22 violation of Cal. Bus. & Prof. Code § 17602(a)(3);
- 23 iii) Whether Plaintiff and the Class Members are entitled to restitution
24 of money paid in circumstances where the goods and services
25 provided by Defendant are deemed an unconditional gift in
26 accordance with Cal. Bus. & Prof. Code § 17603;
- 27 iv) Whether Plaintiff and Class Members are entitled to restitution in
28 accordance with Cal. Bus. & Prof. Code §§ 17200, 17203;

- 1 v) Whether Plaintiff and Class Members are entitled to attorneys' fees
2 and costs under California Code of Civil Procedure § 1021.5; and
3 vi) The proper formula(s) for calculating the restitution owed to Class
4 Members.

5 22. [Fed. R. Civ. P. 23(a)(3)] Plaintiff's claims are typical of the claims of the
6 members of the Class. Plaintiff and all members of the Class have sustained injury and
7 are facing irreparable harm arising out of Defendant's common course of conduct as
8 complained of herein. The losses of each member of the Class were caused directly by
9 Defendant's wrongful conduct as alleged herein.

10 23. [Fed. R. Civ. P. 23(a)(4)] Plaintiff will fairly and adequately protect the
11 interests of the members of the Class. Plaintiff has retained attorneys experienced in the
12 prosecution of class actions, including complex consumer and mass tort litigation.

13 24. [Fed. R. Civ. P. 23(b)(3)] A class action is superior to other available
14 methods of fair and efficient adjudication of this controversy, since individual litigation
15 of the claims of all Class members is impracticable. Even if every Class member could
16 afford individual litigation, the court system could not. It would be unduly burdensome
17 to the courts in which individual litigation of numerous issues would proceed.
18 Individualized litigation would also present the potential for varying, inconsistent, or
19 contradictory judgments and would magnify the delay and expense to all parties and to
20 the court system resulting from multiple trials of the same complex factual issues. By
21 contrast, the conduct of this action as a class action, with respect to some or all of the
22 issues presented herein, presents fewer management difficulties, conserves the
23 resources of the parties and of the court system, and protects the rights of each Class
24 member.

25 25. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by
26 thousands of individual Class members would create the risk of inconsistent or varying
27 adjudications with respect to, among other things, the need for and the nature of proper
28 notice, which Defendant must provide to all Class members.

1 26. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by
2 individual class members would create a risk of adjudications with respect to them that
3 would, as a practical matter, be dispositive of the interests of the other Class members
4 not parties to such adjudications or that would substantially impair or impede the ability
5 of such non-party Class members to protect their interests.

6 27. [Fed. R. Civ. P. 23(b)(2)] Defendant has acted or refused to act in respects
7 generally applicable to the Class, thereby making appropriate final injunctive relief with
8 regard to the members of the Class as a whole.

9 **FIRST CAUSE OF ACTION**

10 **FAILURE TO PROVIDE ACKNOWLEDGMENT**

11 **WITH AUTOMATIC RENEWAL TERMS**

12 **AND INFORMATION REGARDING CANCELLATION POLICY**

13 **(CAL. BUS. & PROF. CODE §§ 17602(a)(3), 17602(b))**

14 **(By Plaintiff, on her own behalf and on behalf of the Class, against All Defendants)**

15 28. The foregoing paragraphs are alleged herein and are incorporated herein
16 by reference.

17 29. Cal. Bus. & Prof. Code § 17602(a)(3) provides:

18 (a) It shall be unlawful for any business making an automatic renewal or
19 continuous service offer to a consumer in this state to do any of the
20 following:

21 (3) Fail to provide an acknowledgment that includes the
22 automatic renewal or continuous service offer terms,
23 cancellation policy, and information regarding how to cancel in
24 a manner that is capable of being retained by the consumer. If
the offer includes a free trial, the business shall also disclose in
the acknowledgment how to cancel and allow the consumer to
cancel before the consumer pays for the goods or services.

25 Cal. Bus. & Prof. Code § 17602(b) provides:

26 “A business making automatic renewal or continuous service offers
27 shall provide a toll-free telephone number, electronic mail address, a
28 postal address only when the seller directly bills the consumer, or

1 another cost-effective, timely, and easy-to-use mechanism for
2 cancellation that shall be described in the acknowledgment specified
in paragraph (3) of subdivision (a).”

3 30. Defendant failed to provide an acknowledgement that includes the
4 automatic renewal or continuous service offer terms, cancellation policy, and
5 information on how to cancel in a manner that is capable of being retained by Plaintiff
6 and Class Members.

7 31. As a result of Defendant’s violations of Cal. Bus. & Prof. Code §§
8 17602(a)(3) and 17602(b), Defendant is subject to all civil remedies under Cal. Bus. &
9 Prof. Code § 17604 that apply to a violation of Article 9, of Chapter 1 of Part 3, of
10 Division 7 of the Cal. Bus. & Prof. Code.

11 32. Plaintiff, on behalf of herself and Class Members, requests relief as
12 described below.

13 **SECOND CAUSE OF ACTION**

14 **VIOLATION OF THE UNFAIR COMPETITION LAW**

15 **(CAL. BUS. & PROF. CODE § 17200 *et. seq.*)**

16 **(By Plaintiff, on her own behalf and on behalf of the Class, against All Defendants)**

17 33. The foregoing paragraphs are alleged herein and are incorporated herein
18 by reference.

19 34. Cal. Bus. & Prof. Code § 17200, *et seq.* (the “UCL”) prohibits unfair
20 competition in the form of any unlawful or unfair business act or practice. Cal. Bus. &
21 Prof. Code § 17204 allows “a person who has suffered injury in fact and has lost money
22 or property” to prosecute a civil action for violation of the UCL. Such a person may
23 bring such an action on behalf of himself or herself and others similarly situated who
24 are affected by the unlawful and/or unfair business practice or act.

25 35. Since December 1, 2010, and continuing to the present, Defendant has
26 committed unlawful and/or unfair business acts or practices as defined by the UCL, by
27 violating Cal. Bus. & Prof. Code §§ 17602(a)(1), 17602(a)(2), 17602(a)(3), and
28 17602(b). The public policy which is a predicate to a UCL action under the unfair

1 prong of the UCL is tethered to a specific statutory provision. *See* Cal. Bus. & Prof.
2 Code §§ 17600, 17602.

3 36. As a direct and proximate result of Defendant's unlawful, and/or unfair
4 acts and practices described herein, Defendant has received, and continues to hold,
5 unlawfully obtained property and money belonging to Plaintiff and Class Members in
6 the form of payments made for subscription agreements by Plaintiff and Class
7 Members. Defendant has profited from its unlawful and/or unfair acts and practices in
8 the amount of those business expenses and interest accrued thereon.

9 37. Plaintiff and similarly-situated Class Members are entitled to restitution
10 pursuant to Cal. Bus. & Prof. Code § 17203 for all monies paid by Class Members
11 under the subscription agreements from December 1, 2010, to the date of such
12 restitution at rates specified by law. Defendant should be required to disgorge all the
13 profits and gains it has reaped and restore such profits and gains to Plaintiff and Class
14 Members, from whom they were unlawfully taken.

15 38. Plaintiff and similarly situated Class Members are entitled to enforce all
16 applicable penalty provisions pursuant to Cal. Bus. & Prof. Code § 17202, and to obtain
17 injunctive relief pursuant to Cal. Bus. & Prof. Code § 17203.

18 39. Plaintiff has assumed the responsibility of enforcement of the laws and
19 public policies specified herein by suing on behalf of herself and other similarly-
20 situated Class Members. Plaintiff's success in this action will enforce important rights
21 affecting the public interest. Plaintiff will incur a financial burden in pursuing this
22 action in the public interest. An award of reasonable attorneys' fees to Plaintiff is thus
23 appropriate pursuant to California Code of Civil Procedure § 1021.5.

24 40. Plaintiff, on behalf of herself and Class Members, request relief as
25 described below.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

A. That the Court determine that this action may be maintained as a class action under Rule 23(a) of the Federal Rules of Civil Procedure, and define the Class as requested herein;

B. That the Court find and declare that Defendant has violated Cal. Bus. & Prof. Code § 17602(b) by failing to provide an acknowledgment that describes a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation.

C. That the Court find and declare that Defendant has violated Cal. Bus. & Prof. Code § 17602(a)(3) by failing to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members;

D. That the Court find and declare that Defendant has violated the UCL and committed unfair and unlawful business practices by violating Cal. Bus. & Prof. Code § 17602.

E. That the Court award to Plaintiff and Class Members damages and full restitution in the amount of the subscription payments made by them pursuant to Cal. Bus. & Prof. Code § 17603, in an amount to be proved at trial;

F. That Defendant be ordered to pay restitution to Plaintiff and the Class due to Defendant's UCL violations, pursuant to Cal. Bus. & Prof. Code §§ 17200-17205 in the amount of their subscription agreement payments;

G. That the Court find that Plaintiff and Class Members are entitled to injunctive relief pursuant to Cal. Bus. & Prof. Code § 17203;

1 H. That Plaintiff and the Class be awarded reasonable attorneys' fees and
2 costs pursuant to California Code of Civil Procedure § 1021.5, and/or other applicable
3 law; and

4 I. That the Court award such other and further relief as this Court may deem
5 appropriate.

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7 Dated: April 22, 2016

MILSTEIN ADELMAN, LLP

8 By: /s/ Gillian M. Wade

9 Gillian M. Wade

10 Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed the foregoing **CLASS ACTION COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Gillian M. Wade
Gillian M. Wade