

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIO ALIANO, individually, and)
on behalf of all others similarly situated,)
)
) Civil Action No. 16-cv-03372
)
) Plaintiff,) District Judge Sharon Johnson Coleman
)
) v.) Magistrate Judge Jeffrey Cole
)
)
) CVS PHARMACY, INC., a Rhode Island)
) Corporation,)
)
) Defendant.)
_____)

AMENDED CLASS ACTION COMPLAINT

Plaintiff MARIO ALIANO (“Plaintiff”), individually, and on behalf of all others similarly situated, by and through counsel at Zimmerman Law Offices, P.C., brings this Amended Class Action Complaint (“Complaint”) against Defendant CVS PHARMACY, INC. (“CVS” or “Defendant”), as follows:

INTRODUCTION

1. Plaintiff brings this suit on behalf of himself and a Class of similarly situated individuals who purchased Defendant’s Algal-900 DHA dietary supplement product (“Algal-900 DHA”).
2. Defendant aggressively markets and sells Algal-900 DHA as a treatment for memory improvement and brain health. Defendant continuously represents to consumers that docosahexaenoic acid (“DHA”), the primary ingredient in Algal-900 DHA, is “clinically shown” to improve brain and memory functions.

3. The sole study on which Defendant bases its claim that Algal-900 DHA is “clinically shown” to improve memory has been discredited by the Federal Trade Commission (“FTC”), who concluded that the study does “not reveal any improvement in working memory[.]” The FTC declared that “clinical-proof claims [based on the study] are false and misleading.”

4. Several clinical studies definitively conclude that DHA has no positive effect on adults’ cognitive performance any greater than that of a placebo.

5. Defendant engages in unlawful, unfair, and deceptive business practices by ignoring scientific evidence and misrepresenting to consumers that Algal-900 DHA can improve brain and memory function, and that DHA has been clinically proven to do so, in order to induce consumers to reasonably rely on those misrepresentations and purchase Defendant’s Product.

PARTIES

6. Plaintiff MARIO ALIANO (“Mr. Aliano”) is a natural person and citizen of Illinois.

7. Defendant CVS PHARMACY, INC. is a Rhode Island corporation with its principal place of business in Woonsocket, Rhode Island, that does business nationwide, including in the state of Illinois. Defendant owns and operates over 7,000 CVS stores in the United States and over 270 stores in the State of Illinois.¹

8. At all relevant times, Defendant was the registered marketer, retailer, and distributor of Algal-900 DHA. Defendant was responsible for the manufacturing, packaging, labeling, marketing, and sale of Algal-900 DHA products.

9. At all relevant times, Defendant sold Algal-DHA on its website and in thousands of CVS stores nationwide.

¹ See “Store Locator,” CVS Pharmacy, *available at*: <http://www.cvs.com/stores/cvs-pharmacy-locations/Illinois>

JURISDICTION AND VENUE

10. This Court has general jurisdiction over Defendant because Defendant engages in business in the State of Illinois. Defendant owns and operates over 270 CVS stores located in Illinois.

11. This Court also has specific jurisdiction over Defendant because this suit arises out of Defendant's transaction of business, in which Plaintiff purchased Algal-900 DHA at a CVS store in Illinois.

12. Pursuant to 28 U.S.C. § 1332, this Court has subject matter jurisdiction over this class action because the aggregate amount in controversy exceeds \$5 million, class membership is no less than 100, and some members of the Class are citizens of states different than Defendant. Defendant readily admits the Court has subject matter jurisdiction, as it removed this case from Illinois state court on that basis.

13. Venue is proper in this District because Defendant transacts business in the Northern District of Illinois. CVS products are sold at over 270 CVS stores located in this District. Further, a substantial part of the events occurred in this District because the case arises out of CVS products that Plaintiff purchased in this District.

FACTUAL ALLEGATIONS

Clinical Testing of DHA

14. DHA, the primary ingredient in Algal-900 DHA, is a type of Omega-3 fatty acid.

15. Comprehensive, high-quality clinical studies have shown that Omega-3 fatty acids, including DHA, do not work any better than a placebo to improve adult memory and brain function.

16. A 2005 study from the National Institute of Health tested the health benefits of Omega-3 fatty acids and concluded that their findings were “inadequate to conclude that Omega-3 fatty acids protect cognitive function with aging or the incident or clinical progression of dementia (including Alzheimer’s disease), multiple sclerosis, and other neurological diseases.”² The results of the study were included in a literature review conducted by the National Institute of Health.³

17. A 2014 peer-reviewed analysis from the American Journal of Clinical Nutrition of thirty-four (34) randomized, controlled trials of Omega-3 fatty acids concluded that Omega-3 fatty acids do not improve cognitive performance – including memory, immediate and delayed word recall, verbal fluency, and reaction times – in children, adults, or the elderly.⁴ The trials involved 12,999 subjects that were treated with omega-3 fatty acids for more than three (3) months.

18. A 2015 study from the National Institute of Health tested the effect of Omega-3 fatty acids and other dietary supplements on cognitive functions in the elderly and concluded that “oral supplementation with [omega-3 fatty acids] had no statistically significant effect on cognitive function.”⁵

² NIH, *Omega-3 Fatty Acids and Health: Fact Sheet for Health Professionals*, available at: <https://goo.gl/5dUJHr> (visited Feb. 10, 2016).

³ Catherine H. MacLean, et al., *Effects of Omega-3 Fatty Acids on Cognitive Function with Aging, Dementia, and Neurological Diseases*, National Center for Biotechnology Information, available at: <http://www.ncbi.nlm.nih.gov/books/NBK11893/>

⁴ Jiangjian Jiao et al., *Effect of n-3 PUFA Supplementation on Cognitive Function Throughout the Life Span from Infancy to Old Age: A Systematic Review and Meta-Analysis of Randomized Controlled Trials*, 102 Am. J. Clinical Nutrition 1422 (Dec. 2014), available at: <http://goo.gl/ISghfV> (viewed Feb. 10, 2016).

⁵ Emily Y. Chew et al., *Effect of Omega-3 Fatty Acids, Lutein/Zeaxanthin, or Other Nutrient Supplementation on Cognitive Function*, 314 JAMA 791 (Aug. 25, 2015), <http://goo.gl/ySGXDB> (viewed Feb. 10, 2016).

The MIDAS Study

19. The only study on which Defendant bases its claims that DHA improves cognitive and memory function is the “MIDAS Study.”⁶

20. The MIDAS Study was funded by Martek Biosciences Corporation (“Martek”) for the purpose of promoting “BrainStrong Adult,” Martek’s own DHA dietary supplement product.

21. The MIDAS Study’s author and principal investigator was an employee of Martek.

22. An FTC complaint (“FTC Complaint”) was filed against companies that advertised that DHA is “clinically shown to improve memory” based on the MIDAS Study, prompting an FTC investigation of the MIDAS Study.

23. In response to the FTC Complaint, the FTC concluded that the MIDAS Study does “not reveal any improvement in working memory.”⁷ The FTC found that companies’ “clinical-proof claims” that DHA improves memory were “false and misleading.” The FTC did not believe the companies “possessed the evidence necessary to back up such reasonable interpretations by consumers.”

24. The FTC held that advertisements for DHA dietary supplement products that use the phrases “clinically shown” or “clinically proven,” in reference to the MIDAS Study’s findings regarding DHA and memory, misrepresent the results of the MIDAS Study. The FTC enjoined companies from making such misrepresentations.

⁶ Karin Yurko-Mauro, Beneficial Effects of Docosahexaenoic Acid on Cognition in Age-Related Cognitive Decline, 6 *Alzheimer’s & Dementia* 456 (2010).

⁷ FTC, *Statement of Chairwoman Edith Ramirez and Commission Julie Brill: In the Matter of i-Health, Inc. and Martek Biosciences Corp.* (June 6, 2014), available at: <https://goo.gl/BdKT70> (viewed Feb. 9, 2016).

Defendant's Misleading Advertising

25. Despite substantial scientific evidence to the contrary, Defendant advertises that Algal-900 DHA improves adult memory and brain function and is clinically proven to do so.

26. The front and back of packages for Defendant's Algal-900 DHA products read, "CLINICALLY SHOWN MEMORY IMPROVEMENT."

27. The front of the package for Defendant's Algal-900 DHA products reads, "The only DHA form & dosage clinically shown to improve memory[.]"

28. The back of the package for Defendant's Algal-900 DHA includes a section entitled "FACTS ABOUT ALGAL DHA," under which Defendant claims, "CVS/pharmacy Algal-900 DHA is an algae-sourced omega-3, and is clinically shown to improve memory[.]"

29. Defendant does not have a reasonable basis for the claims it makes regarding Algal-900 DHA's potential effect on adult memory to ensure that its claims are truthful and non-deceptive.

FDA Required Disclaimers

30. The Food and Drug Administration ("FDA") enacted section 101.93 of the Code of Federal Regulations, which requires statements regarding the health benefits of dietary supplements that are printed on the dietary supplement's label to be accompanied by a disclaimer. *See* 21 C.F.R. § 101.93(b); *see also* 21 U.S.C. § 343(r)(6).

31. The required disclaimer must state the following:

This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

See 21 C.F.R. § 101.93(c).

32. The required disclaimer must be either placed adjacent to the statement regarding the dietary supplement or linked to the statement regarding the dietary supplement with a symbol, such as an asterisk. *See* 21 C.F.R. § 101.93(d).

33. Defendant was required by the Code of Federal Regulations and the FDA to place such a disclaimer with each of the above-described statements placed on Algal-900 DHA's packaging.

34. Defendant's statements on the packaging of Algal-900 DHA are not accompanied by the disclaimers required by the Code of Federal Regulations and the FDA. Such disclaimers appear nowhere on Algal-900 DHA's packaging.

Facts Relevant to Plaintiff

35. Plaintiff purchased Algal-900 DHA from Defendant's pharmacy store on several occasions, and as recently as February 2016.

36. Plaintiff purchased Algal-900 DHA falsely believing that the product was clinically proven to improve adult memory, and he purchased Algal-900 DHA in order to improve his own memory in reliance on Defendant's misrepresentations and omissions set forth above.

37. The Algal-900 DHA purchased by Plaintiff contained false and misleading statements on its packaging that represented that DHA could improve adult memory and brain functions and has been clinically proven to do so, as set forth above.

38. The statements on Algal-900 DHA's packaging did not contain the disclaimers required by the Code of Federal Regulations and the FDA, as set forth above.

39. Plaintiff experienced no improvement in his memory after consuming Algal-900 DHA. The product does not work, and it is worthless.

CLASS ALLEGATIONS

40. Plaintiff brings this action pursuant to Fed. R. Civ. P. Rule 23, on behalf of a nationwide class of similarly situated individuals and entities (the “Class”), defined as follows:

All persons who purchased Algal-900 DHA in the United States.

Excluded from the Class are: (1) Defendant, Defendant’s agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest, and those entities’ current and former employees, officers, and directors; (2) the Judge to whom this case is assigned and the Judge’s immediate family; (3) any person who executes and files a timely request for exclusion from the Class; (4) any persons who have had their claims in this matter finally adjudicated and/or otherwise released; and (5) the legal representatives, successors and assigns of any such excluded person.

41. Plaintiff also brings this action pursuant to Fed. R. Civ. P. Rule 23, on behalf of a subclass of similarly situated individuals and entities (the “Illinois Subclass”), defined as follows:

All persons who purchased Algal-900 DHA in the state of Illinois.

Excluded from the Illinois Subclass are: (1) Defendant, Defendant’s agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest, and those entities’ current and former employees, officers, and directors; (2) the Judge to whom this case is assigned and the Judge’s immediate family; (3) any person who executes and files a timely request for exclusion from the Illinois Subclass; (4) any persons who have had their claims in this matter finally adjudicated and/or otherwise released; and (5) the legal representatives, successors and assigns of any such excluded person.

42. Fed. R. Civ. P. Rule 23(a) provides that four prerequisites must be satisfied for a class to be certified: (1) that the proposed Class is so numerous that joinder of all members is impracticable; (2) that there are questions of law or fact common to the Class; (3) that the claims of the representative party are typical of the claims of the Class; and (4) that the representative party will fairly and adequately protect the interests of the Class. Fed. R. Civ. P. 23(a). This case satisfies all of those factors. Additionally, to be entitled to class certification, one of the subsections of Fed. R. Civ. P. Rule 23(b) must be satisfied.

43. **Numerosity.** The Class and Illinois Subclass are so numerous that joinder of all individual members in one action would be impracticable. CVS is the second largest pharmacy chain in the United States and has over 7,000 stores nationwide,⁸ each of which serve hundreds of customers daily. Therefore, it is reasonable to assume that the Class and Illinois Subclass comprise of thousands of CVS customers, if not more.

44. Class members can be easily identified through Defendant's records or by other means. Upon information and belief, Defendant has means by which it can identify customers who bought specific items.

45. **Typicality.** Plaintiff's claims are typical of the claims of the Class members. All are based on the same legal theories and arise from Defendant's same unlawful conduct, to wit: Defendant's misrepresentations in its marketing and selling of Algal-900 DHA. Defendant's misconduct was common and uniform to all Class members.

46. **Commonality and Predominance.** There is a well-defined community of interest in the questions of law and fact presented in this case. The questions of law and fact common to the proposed Class members predominate over questions, if any, that affect only individual Class members, and these common questions of law and fact include, but are not limited to:

- a. Whether Algal-900 DHA can improve adult memory and brain functions;
- b. Whether Algal-900 DHA is "clinically shown" to improve adult memory and brain functions;
- c. Whether Defendant's advertisements that Algal-900 DHA can improve adult memory and brain function and is "clinically shown" to do so are misrepresentations;
- d. Whether Defendant was required to print a disclaimer alongside its marketing statements on Algal-900 DHA's packaging;

⁸ "Top 100 Retailers," National Retail Federation, *available at*: <https://nrf.com/resources/annual-retailer-lists/top-100-retailers>

- e. Whether Defendant's misrepresentations to consumers constitute deceptive acts or practices within the meaning of the Illinois Consumer Fraud and Deceptive Trade Practices Act;
- f. Whether Defendant's misrepresentations to consumers violate the Consumer Fraud and Deceptive Trade Practices Acts of the various states and District of Columbia;
- g. Whether Defendant's misrepresentations to consumers constitute fraud;
- h. Whether Defendant's misrepresentations to consumers constitute fraudulent misrepresentation; and
- i. Whether Defendant unjustly retained a benefit to the detriment of Plaintiff and Class members, and violated the fundamental principles of justice, equity, and good conscience.

47. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained competent counsel experienced in class action litigation in state and federal courts nationwide, and Plaintiff has no interest adverse to any member of the Class. Plaintiff intends to prosecute this case vigorously on behalf of himself and the Class.

48. **Superiority.** A class action is superior to other available means for the fair and efficient adjudication of the claims of the Class members. Individual actions are not economically feasible.

COUNT I

(on Behalf of the Illinois Subclass)

Violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act (815 ILCS § 505/1, *et seq.*)

49. Plaintiff repeats and re-alleges the allegations in Paragraphs 1-48 with the same force and effect as though fully set forth herein.

50. The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS §§ 505/1, *et seq.*, provides protection to consumers by mandating fair competition in commercial markets for goods and services.

51. The ICFA prohibits any deceptive, unlawful, unfair, or fraudulent business acts or practices using deception, fraud, false pretenses, false promises, false advertising, misrepresentation, or the concealment, suppression, or omission of any material fact, or the use or employment of any practice described in Section 2 of the “Uniform Deceptive Trade Practices Act”. 815 ILCS § 505/2.

52. The ICFA applies to Defendant’s acts as described herein because it applies to transactions involving the sale of goods or services to consumers.

53. Defendant is a “person,” as defined by 815 ILCS § 505/1(c).

54. Algal-900 DHA is a consumer good.

55. Plaintiff and each member of the Illinois Subclass are “consumers,” as defined by 815 ILCS § 505/1(e), because they purchased Algal-900 DHA for personal use.

56. Algal-900 DHA constitutes “merchandise,” as defined by 815 ILCS § 505/1(b).

57. Defendant made false and fraudulent statements, and misrepresented material facts, regarding Algal-900 DHA sold to consumers, including the misrepresentation that DHA can improve adult memory and brain function and the misrepresentation that DHA is “clinically shown” to improve adult memory and brain function.

58. Defendant omitted material facts regarding Algal-900 DHA, including the fact that several clinical studies found that DHA has no positive effect on adult memory and brain functions, the fact that Defendant’s alleged clinical support that DHA can improve memory is based solely on the MIDAS Study, the fact that the FTC found that the MIDAS Study does not actually show that DHA improves memory, and the fact that the FTC enjoined companies from misrepresenting that the MIDAS Study clinically shows that DHA improves adult memory.

59. Defendant further misrepresents the quality and effect of Algal-900 DHA by failing to include the disclaimer required by the FDA and the Code of Federal Regulations.

60. Defendant's misrepresentations and omissions regarding Algal-900 DHA constitute deceptive and unfair acts or practices prohibited by the ICFA.

61. Defendant's misrepresentations and omissions possess the tendency or capacity to mislead and create the likelihood of deception.

62. Defendant's actions are unfair business practices because they offend an established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers.

63. Defendant's aforementioned misrepresentations and omissions were made in the course of Defendant's business relative to operating CVS stores, and Defendant continues to make the aforementioned misrepresentations and omissions.

64. Defendant intended that Plaintiff and Illinois Subclass members rely on the false statements, misrepresentations, and omissions of material facts in purchasing Algal-900 DHA.

65. Plaintiff and Illinois Subclass members reasonably relied on Defendant's misrepresentations and omissions when they purchased Algal-900 DHA, and they purchased the product based on Defendant's misrepresentations and omissions.

66. Acting as reasonable consumers, had Plaintiff and Illinois Subclass members been aware of the true facts regarding Algal-900 DHA, they would have declined to purchase Algal-900 DHA. The only reason a consumer would purchase Algal-900 DHA is to improve adult memory and brain function. This product is worthless, because it does not do so.

67. As such, Plaintiff and Illinois Subclass members suffered injuries in fact – *i.e.*, the loss of the money they paid for Algal-900 DHA.

68. As a direct and proximate result of Defendant's unfair and deceptive acts or practices, Plaintiff and members of the Illinois Subclass suffered damages by purchasing Algal-900 DHA because they would not have purchased Algal-900 DHA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MARIO ALIANO, individually, and on behalf of the Illinois Subclass, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. Rule 23 and certifying the Illinois Subclass defined herein;
- B. Designating Plaintiff as representative of the Illinois Subclass and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and the Illinois Subclass and against Defendant;
- D. Enjoining Defendant from making false representations and omissions concerning Algal-900 DHA that will be sold to customers;
- E. Awarding Plaintiff and the Illinois subclass damages equal to the amount of actual damages that they sustained;
- F. Awarding Plaintiff and the Illinois Subclass attorneys' fees and costs, including interest thereon, as allowed or required by law; and
- G. Granting all such further and other relief as the Court deems just and appropriate.

COUNT II

(on Behalf of the Nationwide Class)

**Violation of the Consumer Fraud and Deceptive Trade
Practices Acts of the Various States and District of Columbia**

69. Plaintiff repeats and re-alleges the allegations in Paragraphs 1-48 with the same force and effect as though fully set forth herein.

70. Plaintiff brings this Count individually, and on behalf of all similarly situated residents of each of the 50 states and the District of Columbia for violations of the respective statutory consumer protection laws, as follows:

- a. the Alabama Deceptive Trade Practices Act, Ala.Code 1975, § 8–19–1, *et seq.*;
- b. the Alaska Unfair Trade Practices and Consumer Protection Act, AS § 45.50.471, *et seq.*;
- c. the Arizona Consumer Fraud Act, A.R.S §§ 44-1521, *et seq.*;
- d. the Arkansas Deceptive Trade Practices Act, Ark.Code §§ 4-88-101, *et seq.*;
- e. the California Unfair Competition Law, Bus. & Prof. Code §§17200, *et seq.* and 17500 *et seq.*;
- f. the California Consumers Legal Remedies Act, Civil Code §1750, *et seq.*;
- g. the Colorado Consumer Protection Act, C.R.S.A. §6-1-101, *et seq.*;
- h. the Connecticut Unfair Trade Practices Act, C.G.S.A. § 42-110, *et seq.*;
- i. the Delaware Consumer Fraud Act, 6 Del. C. § 2513, *et seq.*;
- j. the D.C. Consumer Protection Procedures Act, DC Code § 28-3901, *et seq.*;
- k. the Florida Deceptive and Unfair Trade Practices Act, FSA § 501.201, *et seq.*;
- l. the Georgia Fair Business Practices Act, OCGA § 10-1-390, *et seq.*;
- m. the Hawaii Unfair Competition Law, H.R.S. § 480-1, *et seq.*;
- n. the Idaho Consumer Protection Act, I.C. § 48-601, *et seq.*;
- o. the Indiana Deceptive Consumer Sales Act, IN ST § 24-5-0.5-2, *et seq.*;
- p. The Iowa Private Right of Action for Consumer Frauds Act, Iowa Code Ann. § 714H.1, *et seq.*;
- q. the Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq.*;
- r. the Kentucky Consumer Protection Act, KRS 367.110, *et seq.*;

- s. the Louisiana Unfair Trade Practices and Consumer Protection Law, LSA-R.S. 51:1401, *et seq.*;
- t. the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A, *et seq.*;
- u. the Maryland Consumer Protection Act, MD Code, Commercial Law, § 13-301, *et seq.*;
- v. the Massachusetts Regulation of Business Practices for Consumers Protection Act, M.G.L.A. 93A, *et seq.*;
- w. the Michigan Consumer Protection Act, M.C.L.A. 445.901, *et seq.*;
- x. the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68, *et seq.*;
- y. the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1, *et seq.*;
- z. the Missouri Merchandising Practices Act, V.A.M.S. § 407, *et seq.*;
- aa. the Montana Unfair Trade Practices and Consumer Protection Act of 1973, Mont. Code Ann. § 30-14-101, *et seq.*;
- bb. the Nebraska Consumer Protection Act, Neb.Rev.St. §§ 59-1601, *et seq.*;
- cc. the Nevada Deceptive Trade Practices Act, N.R.S. 41.600, *et seq.*;
- dd. the New Hampshire Regulation of Business Practices for Consumer Protection, N.H.Rev.Stat. § 358-A:1, *et seq.*;
- ee. the New Jersey Consumer Fraud Act, N.J.S.A. 56:8, *et seq.*;
- ff. the New Mexico Unfair Practices Act, N.M.S.A. §§ 57-12-1, *et seq.*;
- gg. the New York Consumer Protection from Deceptive Acts and Practices, N.Y. GBL (McKinney) § 349, *et seq.*;
- hh. the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen Stat. § 75-1.1, *et seq.*;
- ii. the North Dakota Consumer Fraud Act, N.D. Cent.Code Chapter 51-15, *et seq.*;
- jj. the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.*;
- kk. the Oklahoma Consumer Protection Act, 15 O.S.2001, §§ 751, *et seq.*;
- ll. the Oregon Unlawful Trade Practices Act, ORS 646.605, *et seq.*;

- mm. the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*;
- nn. the Rhode Island Deceptive Trade Practices Act, G.L.1956 § 6-13.1-5.2(B), *et seq.*;
- oo. the South Carolina Unfair Trade Practices Act, SC Code 1976, §§ 39-5-10, *et seq.*;
- pp. the South Dakota Deceptive Trade Practices and Consumer Protection Act, SDCL § 37-24-1, *et seq.*;
- qq. the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, *et seq.*;
- rr. the Texas Deceptive Trade Practices-Consumer Protection Act, V.T.C.A., Bus. & C. § 17.41, *et seq.*;
- ss. the Utah Consumer Sales Practices Act, UT ST § 13-11-1, *et seq.*;
- tt. the Vermont Consumer Fraud Act, 9 V.S.A. § 2451, *et seq.*;
- uu. the Virginia Consumer Protection Act of 1977, VA ST § 59.1-196, *et seq.*;
- vv. the Washington Consumer Protection Act, RCWA 19.86.010, *et seq.*;
- ww. the West Virginia Consumer Credit And Protection Act, W.Va.Code § 46A-1-101, *et seq.*;
- xx. the Wisconsin Deceptive Trade Practices Act, WIS.STAT. § 100.18, *et seq.*; and
- yy. the Wyoming Consumer Protection Act, WY ST § 40-12-101, *et seq.*

71. Algal-900 DHA is a consumer good.

72. As set forth above, Defendant engaged in unfair or deceptive acts or practices when, in marketing and selling Algal-900 DHA, Defendant misrepresents that Algal-900 DHA can improve adult memory and brain functions and has been clinically proven to do so.

73. Defendant further misrepresents the quality and effect of Algal-900 DHA by failing to include the disclaimer required by the FDA and the Code of Federal Regulations.

74. Defendant intended that Plaintiff and the members of the Class rely upon Defendant's misrepresentations and omissions concerning the quality, characteristics, and reliability of Algal-900 DHA.

75. Defendant's misrepresentations and omissions possess the tendency or capacity to mislead and create the likelihood of deception.

76. Defendant's actions are unfair business practices because they offend an established public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers.

77. The above-described deceptive and unfair acts and practices were used or employed in the conduct of trade or commerce, namely, the marketing, sale, and distribution of Algal-900 DHA to Plaintiff and Class members.

78. Defendants' aforementioned misrepresentations and omissions were made in the course of Defendant's business relative to operating CVS stores, and Defendant continues to make the aforementioned misrepresentations and omissions.

79. Plaintiff and Class members reasonably relied on Defendant's misrepresentations and omissions when they purchased Algal-900 DHA, and they purchased the product based on Defendant's misrepresentations and omissions.

80. Acting as reasonable consumers, had Plaintiff and Class members been aware of the true facts regarding Algal-900 DHA, they would have declined to purchase Algal-900 DHA. The only reason a consumer would purchase Algal-900 DHA is to improve adult memory and brain function. This product is worthless, because it does not do so.

81. As such, Plaintiff and Class members suffered injuries in fact – *i.e.*, the loss of the money they paid for Algal-900 DHA.

82. As a direct and proximate result of Defendant's unfair and deceptive acts or practices, Plaintiff and members of the Class suffered damages by purchasing Algal-900 DHA because they would not have purchased Algal-900 DHA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MARIO ALIANO, individually, and on behalf of the Class, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. Rule 23, and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Enjoining Defendant from making false representations and omissions concerning Algal-900 DHA that will be sold to customers;
- E. Awarding Plaintiff and the Class damages equal to the amount of actual damages that they sustained;
- F. Awarding Plaintiff and the Class attorneys' fees and costs, including interest thereon, as allowed or required by law; and
- G. Granting all such further and other relief as the Court deems just and appropriate.

COUNT III
(on Behalf of the Nationwide Class)
Fraud

83. Plaintiff repeats and re-alleges the allegations in Paragraphs 1-48 with the same force and effect as though fully set forth herein.

84. The elements of a cause of action for fraud are: "(1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the

statement induce the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement." *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 496 (1996) (citing *Bd. of Educ. of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 452 (1989)).

85. Defendant made false statements of material fact through its advertising for Algal-900 DHA. Defendant misrepresented, and continues to misrepresent, that Algal-900 DHA can improve adult memory and brain functions and has been clinically proven to do so.

86. Defendant's misrepresented facts that Algal-900 DHA can improve adult memory and brain functions and has been clinically proven to do so are material facts.

87. The fact that clinical studies have shown that DHA has no positive effect on memory, the fact that several clinical studies found that DHA has no positive effect on adult memory and brain functions, the fact that Defendant's alleged clinical support that DHA can improve memory is based solely on the MIDAS Study, the fact that the FTC found that the MIDAS Study does not actually show that DHA improves memory, and the fact that the FTC enjoined companies from misrepresenting that the MIDAS Study clinically shows that DHA improves adult memory are all facts that Defendant has actively concealed.

88. Defendant further misrepresents material facts by failing to include the disclaimer required by the FDA and the Code of Federal Regulations.

89. Defendant knew that it had no reasonable basis to represent that Algal-900 DHA could improve adult memory or that it has been clinically proven to do so. Defendant knew that several clinical studies found that DHA had no positive effect on memory. Defendant knew that it was unreasonable to rely on the MIDAS Study because the FTC found that the MIDAS Study

does “not reveal any improvement in working memory” and that “clinical-proof claims [based on the MIDAS Study] are false and misleading.”

90. Defendant affirmatively misrepresented and actively concealed material facts regarding Algal-900 DHA with the intent that Plaintiff and the members of the Class rely on its misrepresentations and omissions and purchase Algal-900 DHA.

91. Acting as reasonable consumers, Plaintiff and Class members were unaware of these misrepresented and omitted material facts, and if they had been aware of the truth, Plaintiff and Class members would not have purchased Algal-900 DHA. The only reason a consumer would purchase Algal-900 DHA is to improve adult memory and brain function. This product is worthless, because it does not do so.

92. It was reasonable for Plaintiff and the Class to rely on Defendant’s misrepresentations and omissions and believe that Algal-900 DHA could improve adult memory and brain function, and that DHA had been clinically proven to improve adult memory and brain function, and they purchased the product based on Defendant’s misrepresentations and omissions.

93. As such, Plaintiff and Class members suffered injuries in fact – *i.e.*, the loss of the money that they paid for Algal-900 DHA.

94. As a direct and proximate result of Defendant’s fraud, Plaintiff and members of the Class suffered damages by purchasing Algal-900 DHA because they would not have purchased Algal-900 DHA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MARIO ALIANO, individually, and on behalf of the Class, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. Rule 23, and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Enjoining Defendant from making false representations and omissions concerning Algal-900 DHA that will be sold to customers;
- E. Awarding Plaintiff and the Class damages equal to the amount of actual damages that they sustained;
- F. Awarding Plaintiff and the Class attorneys' fees and costs, including interest thereon, as allowed or required by law; and
- G. Granting all such further and other relief as the Court deems just and appropriate.

COUNT IV
(On Behalf of the Nationwide Class)
Fraudulent Misrepresentation

95. Plaintiff repeats and re-alleges the allegations in Paragraphs 1-48 with the same force and effect as though fully set forth herein.

96. To succeed on a claim of fraudulent misrepresentation, a plaintiff “must establish the following elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance.” *Doe v. Dilling*, 228 Ill.2d 324, 342-43 (2008) (internal citations omitted).

97. Defendant made false statements of material fact through its advertising for Algal-900 DHA. Defendant misrepresented, and continues to misrepresent, that Algal-900 DHA can improve adult memory and brain functions and has been clinically proven to do so.

98. Defendant's misrepresented facts that Algal-900 DHA can improve adult memory and brain functions and has been clinically proven to do so are material facts.

99. The fact that clinical studies have shown that DHA has no positive effect on memory, the fact that several clinical studies found that DHA has no positive effect on adult memory and brain functions, the fact that Defendant's alleged clinical support that DHA can improve memory is based solely on the MIDAS Study, the fact that the FTC found that the MIDAS Study does not actually show that DHA improves memory, and the fact that the FTC enjoined companies from misrepresenting that the MIDAS Study clinically shows that DHA improves adult memory are all facts that Defendant has actively concealed.

100. Defendant further misrepresents material facts by failing to include the disclaimer required by the FDA and the Code of Federal Regulations.

101. Defendant knew that it had no reasonable basis to represent that Algal-900 DHA could improve adult memory and brain function or that it has been clinically proven to do so. Defendant knew that several clinical studies found that DHA had no positive effect on memory. Defendant knew that it was unreasonable to rely on the MIDAS Study because the FTC found that the MIDAS Study does "not reveal any improvement in working memory" and that "clinical-proof claims [based on the MIDAS Study] are false and misleading."

102. Defendant affirmatively misrepresented and actively concealed material facts regarding Algal-900 DHA with the intent that Plaintiff and the members of the Class rely on its misrepresentations and omissions and purchase Algal-900 DHA.

103. Acting as reasonable consumers, Plaintiff and Class members were unaware of these misrepresented and omitted material facts, and if they had been aware of the truth, Plaintiff and Class members would not have purchased Algal-900 DHA. The only reason a consumer

would purchase Algal-900 DHA is to improve adult memory and brain function. This product is worthless, because it does not do so.

104. It was reasonable for Plaintiff and the Class to rely on Defendant's misrepresentations and omissions and believe that Algal-900 DHA could improve adult memory and brain function, and that DHA had been clinically proven to improve adult memory and brain function, and they purchased the product based on Defendant's misrepresentations and omissions.

105. As such, Plaintiff and Class members suffered injuries in fact – *i.e.*, the loss of the money that they paid for Algal-900 DHA.

106. As a direct and proximate result of Defendant's fraudulent misrepresentation, Plaintiff and members of the Class suffered damages by purchasing Algal-900 DHA because they would not have purchased Algal-900 DHA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MARIO ALIANO, individually, and on behalf of the Class, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. Rule 23, and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Enjoining Defendant from making false representations and omissions concerning Algal-900 DHA that will be sold to customers;
- E. Awarding Plaintiff and the Class damages equal to the amount of actual damages that they sustained;

- F. Awarding Plaintiff and the Class attorneys' fees and costs, including interest thereon, as allowed or required by law; and
- G. Granting all such further and other relief as the Court deems just and appropriate.

COUNT V
(on Behalf of the Nationwide Class)
Unjust Enrichment

107. Plaintiff repeats and re-alleges the allegations in Paragraphs 1-48 with the same force and effect as though fully set forth herein.

108. When a specific contract does not govern the relationship of the parties, and, therefore, no adequate remedy at law is applicable, an equitable remedy under a theory of unjust enrichment is available. *Guinn v. Hoskins Chevrolet*, 361 Ill.App.3d 575, 604 (1st Dist. 2005) (internal citations omitted).

109. Unjust enrichment “is a condition that may be brought about by unlawful or improper conduct as defined by law[.]” *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25 (quoting *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill.App.3d 1017, 1024 (3rd Dist. 2009); *Alliance Acceptance Co. v. Yale Insurance Agency, Inc.*, 271 Ill.App.3d 483, 492 (1st Dist. 1995)).

110. To prevail on a claim of unjust enrichment, a plaintiff must prove: (1) “that the defendant has unjustly retained a benefit to the plaintiff’s detriment,” and (2) “that defendant’s retention of the benefit violates the fundamental principles of justice, equity, and good conscience.” *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 518 (7th Cir.2011) (quoting *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 160 (1989)).

111. Plaintiff and members of the Class paid a retail price for Algal-900 DHA believing that Algal-900 DHA could improve adult memory and brain functions and had been

clinically proven to do so. However, substantial scientific evidence shows that Algal-900 DHA has no positive effect on adult memory and brain function.

112. Defendant has unjustly received and retained a benefit at the expense of Plaintiff and the Class because Defendant unlawfully acquired its profits for Algal-900 DHA appreciating and knowing that the Algal-900 DHA could not improve adult memory and brain function, as Defendant's misrepresentations led consumers to believe.

113. Defendant has acquired and retained money belonging to Plaintiff and the Class as a result of its wrongful conduct, to wit: Defendant's misrepresentations that DHA can improve adult memory and brain function and has been clinically proven to do so, and Defendant's failure to include the disclaimer required by the FDA and the Code of Federal Regulations. Each individual sale of Algal-900 DHA nets Defendant profit at the expense of the consumer.

114. Acting as reasonable consumers, Plaintiff and the Class were unaware of these misrepresented material facts, and they would not have purchased Algal-900 DHA. The only reason a consumer would purchase Algal-900 DHA is to improve adult memory and brain function. This product is worthless, because it does not do so.

115. Plaintiff and the members of the Class purchased Algal-900 DHA based on Defendant's misrepresentations and omissions.

116. Plaintiff and the members of the Class have suffered damages as a direct result of Defendant's conduct in the form of the money they paid for the product.

117. Defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience because Defendant misled Plaintiff and the Class into falsely believing that Algal-900 DHA can improve adult memory and brain function and has been clinically proven to do so.

118. Under the principles of equity, Defendant should not be allowed to keep the money belonging to Plaintiff and the members of the Class because Defendant has unjustly received it as a result of Defendant's unlawful actions described herein.

119. Plaintiff, individually and on behalf of the Class, seeks restitution for Defendant's unlawful conduct, as well as interest and attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MARIO ALIANO, individually, and on behalf of the Class, prays for an Order as follows:

- A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. Rule 23, and certifying the Class defined herein;
- B. Designating Plaintiff as representative of the Class and his undersigned counsel as Class Counsel;
- C. Entering judgment in favor of Plaintiff and the Class and against Defendant;
- D. Enjoining Defendant from making false representations and omissions concerning Algal-900 DHA that will be sold to customers;
- E. Awarding Plaintiff and the Class damages equal to the amount of actual damages that they sustained;
- F. Awarding Plaintiff and the Class attorneys' fees and costs, including interest thereon, as allowed or required by law; and
- G. Granting all such further and other relief as the Court deems just and appropriate.

JURY DEMAND

Plaintiff demands a trial by jury on all counts so triable.

Plaintiff MARIO ALIANO, individually, and on behalf of all others similarly situated,

By: s/ Thomas A. Zimmerman, Jr.
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Counsel for the Plaintiff and Class

CERTIFICATE OF SERVICE

Thomas A. Zimmerman, Jr., an attorney, hereby certifies that he caused the above and foregoing Amended Class Action Complaint to be served upon counsel of record in this case via the U.S. District Court CM/ECF System on this 15th day of April, 2016.

s/ Thomas A. Zimmerman, Jr.