

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

QIU-YUN ZHANG, On Behalf of Herself
and All Others Similarly Situated,

Plaintiff,

v.

PHYSICIAN'S FORMULA COSMETICS,
INC AND PHYSICIAN'S FORMULA,
INC.

Defendants.

Case No. 16-7705

CLASS ACTION

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Qiu-Yun Zhang ("Ms. Zhang" or "Plaintiff"), by her counsel, alleges upon personal knowledge as to her own acts and as to all other matters upon information and belief based upon, *inter alia*, the investigation made by and through her counsel, as follows:

INTRODUCTION

Cosmetics industry participants have become acutely aware in recent years that women are trending toward "natural" and "organic" products. Numerous market studies have confirmed this trend, one of which concludes as follows:

The market research firm is quick to point out that 2015 sales in the facial skin care and anti-aging categories were down, 'after years of slow but steady growth.' And it's mild, natural, and anti-pollution products that are capturing consumer attention just now.¹

¹ <http://www.cosmeticsdesign.com/Hot-Topics/Anti-Aging/Natural-skin-care-and-anti-aging-beauty-products-still-gaining-popularity>

Importantly, consumers seek *both* healthier and ethically superior performance in preferring natural and organic products.

Responsive to trending consumer preferences for natural and organic products, in 2008 Defendants Physician's Formula Cosmetics, Inc. and Physicians Formula, Inc. (hereinafter "Physician's Formula" or "PFC") created an "Organic wear®" line of cosmetics ("Products"), purporting to be "100% Natural." PFC has perpetrated a massive deception on the American consumer through marketing as "100% Natural" its Organic wear® line of Products.

JURISDICTION AND VENUE

1. Claims asserted herein arise under the laws of the State of New York.
2. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because the matter in controversy, upon information and belief, exceeds \$5,000,000, exclusive of interest and costs, and this is a class action in which certain of the Class members and Defendants are citizens of different states.
3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), because many of the acts and transactions alleged herein occurred in substantial part in this District.

PARTIES

4. Plaintiff is a resident of the Borough of Manhattan, New York County, New York and, hence, a resident of the State of New York. She purchased Organic wear® 100% Natural Origin CC Color + Correction Cream SPF 20 ("CC cream,") and Organic wear® 100% Natural Lash Boosting Mascara ("Mascara") from Rite Aid Pharmacy, 408 Grand St., New York, New York 10002 on August 27, 2016. Exhibit 1.

As with all members of the CC cream Class, Ms. Zhang paid a premium for the CC cream i.e. beyond the price for comparable products not purporting to be 100% Natural.

5. Plaintiff is highly allergic, has experienced severe rashes from irritants, and had not purchased foundation for many years prior to shopping at her local Rite Aid in late August 2016.² But for the “100% Natural” and “100% Natural Origin” claims on the PFC packaging (both referred to at times as “100% Natural” hereinafter), Plaintiff would not have purchased CC cream.

6. Plaintiff was disappointed with the performance of the Mascara and, prior to using the CC cream, she applied a small amount on her hand to test for sensitivity. She found that CC cream had a very strong odor and created dryness on her hand.³ She ascertained that citrus-based ingredients in the formula are indeed irritants likely to trigger dryness and rash on her face. She ascertained additional issues of concern, as set forth in ¶¶39-46 *infra*. So finding, Ms. Zhang did not use the CC cream on her face at all; and she is offended (to put it mildly) that Defendant, a large international company, routinely deceives the public and places its customers at unknown risks which, by purchasing “100% Natural,” those customers are attempting to avoid.

² “I used this for a couple of days and broke out in a horrible allergic reaction on my face and on my wrist where I tested the product. I was so disappointed as I thought physicians formula, especially the organic line was for sensitive skin.” See savvy review at <https://www.makeupalley.com/product/showreview.asp/ItemId=168674/SortBy=rating-asc/AgeRange=/SkinToneType=/Organic-Wear-CC-Cream-SPF-20/Physicians-Formula/BB-Cr>

³ “Unlike PF's Super CC Cream, this CC cream is not a good product. The lightest shade oxidizes immediately upon application, and becomes so dark. I made a test, and put a small amount on my hand. After about 30 seconds, the very nice light color changes from light beige to dark orange. The feeling on the face is unbelievably good, and the lasting power is excellent as well. The smell is odd, however.” See review of sbender at *id*.

7. Physician's Formula is a California corporation headquartered in Azuza, California. The cosmetics manufacturer markets its products in the so-called mass market channel online through its website <<http://www.physiciansformula.com>>, through numerous ecommerce sites of third parties, on social media, and on the shelves of most major retailers stocking cosmetic products.

**PRIOR FEDERAL TRADE COMMISSION PROCEEDINGS
CONCERNING 100% NATURAL COSMETIC CLAIMS**

8. The Federal Trade Commission has made clear in its official pronouncements, rules and litigation that it is false and deceptive to refer to a product as "100% Natural" if it contains one or more synthetic products. <https://www.ftc.gov/news-events/blogs/business-blog/2016/04/are-your-all-natural-claims-all-accurate>.

9. The Federal Trade Commission has made clear in its official pronouncements, rules and litigation that "100% Natural" used in the product name itself can create a culpable representation and deceptive practice. *Id.*

10. The Federal Trade Commission has made clear in its official pronouncements, rules and litigation that "[i]f companies market their products as 'all natural' or '100% natural,' consumers have a right to take them at their word." *Id.*

11. The Federal Trade Commission has thus taken definitive remedial action to define and enforce a prohibition of "100% Natural" as to cosmetics with one or more synthetic ingredients.

12. The Federal Trade Commission has provided as a uniform parameter of "100% Natural" the absence of *any* synthetic ingredient.

13. PFC is keenly aware of its regulatory environment and the risks associated with non-compliance:

We are subject to regulation by the U.S. Food and Drug Administration, or the “FDA,” the U.S. Federal Trade Commission, or the “FTC,” as well as various other Federal, state, local and foreign regulatory authorities. These regulations principally relate to the safety of our ingredients and to the proper packaging, labeling, marketing, and advertising of our products. We believe that we are in substantial compliance with these regulations.

. . . .

Our failure to comply with FDA, FTC, EPA or state laws and regulations, or with laws and regulations in foreign markets, that cover our advertising, including direct claims and advertising by us, may result in enforcement actions and imposition of penalties or otherwise materially adversely affect the distribution and sale of our products and our business.

See 10-K Report, cited n.2 *supra*, at pp. 9,16.

14. The Federal Trade Commission has challenged many personal care products manufacturers by reason of “All Natural” or “100% Natural” representations, thereby affording definitive guidance to the industry. PFC has violated the law for many years and has not heeded the FTC’s focused warnings.

FACTS

15. Headquartered in Azusa, California, Physicians Formula is a top-line growth cosmetics company that operates in the mass market prestige, known as “Masstige,”⁴ offering a premium-priced brand. Physicians Formula products are sold in over 25,000 stores including those operated by Wal-Mart, Target, CVS and Rite Aid. All of PFC’s business operations subject of this Complaint are consumer-oriented and broadly impact the consuming public at large.

⁴ “Masstige” describes a retail category that includes products that are priced below the high-end prestige segment and above the low-end mass market segment, and that are distributed through the mass market channel. See PFC’s 2012 Form 10-K at p. 2, reproduced at <https://www.bamsec.com/filing/126987112000007?cik=1269871>

16. Markwins International Corporation, a private company, acquired Defendants on December 12, 2012.

17. Historically the Company has spent as much as 15 percent of its annual gross sales revenue in aggressively promoting its Physicians Formula products and creating brand awareness. Its advertising strategy includes print in major beauty, lifestyle and women service publications, digital advertising on key websites and social media, non-traditional advertising and freestanding inserts in Sunday newspapers.

18. From its inception in 1937, “Physician’s Formula” has relied heavily upon uniquely designed packaging and product displays containing strong suggestions and imagery wrought from the play of words and letters, their placement, size, and color, and consumer perception thereof.⁵ For example, the trade name “Physician’s Formula” in and of itself imparts a suggestion of medical endorsement. *Physicians Formula Cosmetics, Inc. v. West Cabot Cosmetics, Inc.*, 857 F.2d 80, 84 (2d Cir. N.Y. 1988).

19. PFC further “educates” the consumer online with a plethora of claims, at times false and deceptive. For example, PFC states under its “About Us” homepage tab: “We never allow fragrance, PABA, or any of the 100+ known skin irritants into anything we make.” Yet, PFC’s disclaimers of fragrance and irritants are false, as it scents some products (including the CC cream and Mascara purchased by Plaintiff) with extracts of

⁵ “We believe our uniquely designed product displays and packaging provide an immediate visual impact while serving as an important merchandising, communication and education tool.” See 2012 Form 10-K cited n.2 at p. 7.

citus,⁶ appearing first and throughout the ingredients list, which are well-known skin irritants.⁷ Lavender oil, a fragrance often used in perfume, is also an ingredient.

20. Defendant maintains supply chain control over the manufacture of its products, boasting “a flexible, low-cost business model that allows us to rapidly change production schedules, adopt new technologies and switch to lower-cost suppliers.”

PFC’s 2012 Form 10-K, cited n.2 *supra* at p. 5.

21. Of primary significance, PFC’s Organic wear® line uses in its advertising and on its packaging the wording “100% Natural Origin,” words whose meanings have been adjudicated:⁸

I do find that ORIGINS is a relatively strong mark. It is more than merely "descriptive," rather it is "suggestive" in that it "requires imagination, thought and perception to reach a conclusion as to the nature of the goods." *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968); *see also Bigstar Entertainment v. Next Big Star, Inc.*, 105 F. Supp. 2d 185, 195-96 (S.D.N.Y. 2000).

. . . .

The definition of "natural" is: . . . 2b: having or constituting a classification based on features existing in nature . . . " Merriam-Webster's Collegiate Dictionary, 10th Edition (1999).

⁶ One reviewer (robynbird28) stated: “2 words: Orange. Paint.” See cite to makeupalley, n.2 *supra*.

⁷ http://www.paulaschoice.com/expert-advice/sensitive-skin/_/skin-irritation-your-worst-enemy

⁸ Estee Lauder had earlier branded the term “Origins” vis-à-vis cosmetics:

In the late 80s, Origins stood out among a culture of excess with our minimal approach to beauty. We harnessed the power of plants to create high performance skincare. And in the process revolutionized the beauty business with our return to Nature and commitment to the environment.

<http://www.origins.com/our-history>

Origins Natural Res., Inc. v. Kotler, 2001 U.S. Dist. LEXIS 5906 **10-11 (S.D.N.Y. 2001).

22. “100% Natural” is a material factor in a reasonable consumer’s selection of Products.⁹ Consumers acting reasonably under the circumstances, however, cannot detect the presence of synthetic products and, hence, may use such Products for months or years unwittingly, thereby bioaccumulating synthetic and possibly toxic chemicals.

23. “Expert review” from popular online blogs observe that CC cream has “[o]verblown natural and organic claims.”¹⁰

24. The FTC has announced and warned publicly that “100% Natural” as to personal care products means the absence of synthetic ingredients:

If companies market their products as “all natural” or “100% natural,” consumers have a right to take them at their word. . . . According to the FTC, the companies pitched their products as “all natural” or “100% natural,” but included synthetic ingredients. . . . If you advertise your product as “all-natural” or “100% natural” and it contains artificial ingredients or chemicals, now is the natural time for a compliance check.

“Are your ‘all natural’ claims all accurate?” <https://www.ftc.gov/news-events/blogs/business-blog/2016/04/are-your-all-natural-claims-all-accurate>. Thus, the cited authorities view “100% Natural Origin” as meaning a manufactured product consisting solely of ingredients found in nature, without any synthetic ingredients.

⁹ “The survey involved 1,000 Millennial women, aged 18 to 29, and the results included a chance for participants to express the key reasons that inform their purchasing decisions. Eighty percent of those polled said ‘value’ and ‘product quality’ were the most important factors. ‘When asked to write in other drivers not mentioned, **naturals**/organics came up most frequently,’ Tong said. ‘Many brands were named, but Burt’s Bees and **Origins** were the two most cited.’ At premium prices (emphasis added) <http://wwd.com/beauty-industry-news/marketing-trends/millennials-top-beauty-brands-10148834/>

¹⁰ http://www.paulaschoice.com/beautypedia-skin-care-reviews/by-brand/physicians-formula/_/Organic-Wear-100-Natural-Origin-CC-Color-Correction-Cream-SPF-20

25. Although each of the products in its Organic wear® line contains synthetic ingredients, PFC deceptively and misleadingly packages, labels, describes and markets at least 10 such Products as “100% Natural Origin,” including the following products with noted synthetic ingredients:

- NEW! Organic wear® 100% Natural Origin Work It! Full! Flared! Fit! Mascara \$9.95: Microcrystalline Cellulose, Cellulose, Glyceryl Stearate SE
- NEW! Organic wear® 100% Natural Origin Work It! Marathonista Tinted Moisturizer™ SPF 40 \$14.95: Titanium Dioxide, Polyglyceryl-4, Polyglyceryl-2 Oleate, Polyglyceryl-4 Isostearate, Dodecane, Glycerin
- Organic wear® 100% Natural Origin BB Bigger! Better! Lashes Mascara \$9.95: Iron Oxides, Glyceryl Stearate SE, Microcrystalline Cellulose
- Organic wear® 100% Natural Origin All-in-1 Beauty Balm Cream SPF 20 \$14.95: Titanium Dioxide, Polyglyceryl-4 Diisostearate/Polyhydroxystearate/Sebacate, Polyglyceryl-4 Isostearate, Dodecane, Glycerin
- Organic wear® 100% Natural Origin CC Color + Correction Cream SPF 20 \$14.95: Polyglycerl-4 Isosterate, Polyglycerl-4, Dodecane, Glycerin and Titanium dioxide
- Organic wear® 100% Natural Origin CC Curl + Care Mascara \$9.95: Iron Oxides, Glyceryl Stearate SE, Microcrystalline Cellulose, Glycerin
- Organic wear® 100% Natural Lash Boosting Mascara \$9.95:¹¹ Stearic Acid, Microcrystalline Cellulose, Titanium dioxide and Glycerin
- Organic wear® 100% Natural Origin Jumbo Lash Mascara \$9.95: *, Iron Oxides, Microcrystalline Cellulose, Glyceryl Stearate SE, Glycerin

¹¹ PFC appears to have added the word “Origin” to the packaging of this product at some recent time but until recently was packaging the product without the word “Origin” in the product’s name. Such conduct shows a high level of conscious behavior by PFC to measure and calculate its representations, and skirt the law. See backside product image at <http://nouveaucheap.blogspot.com/2012/07/review-physicians-formula-organic-wear.html>

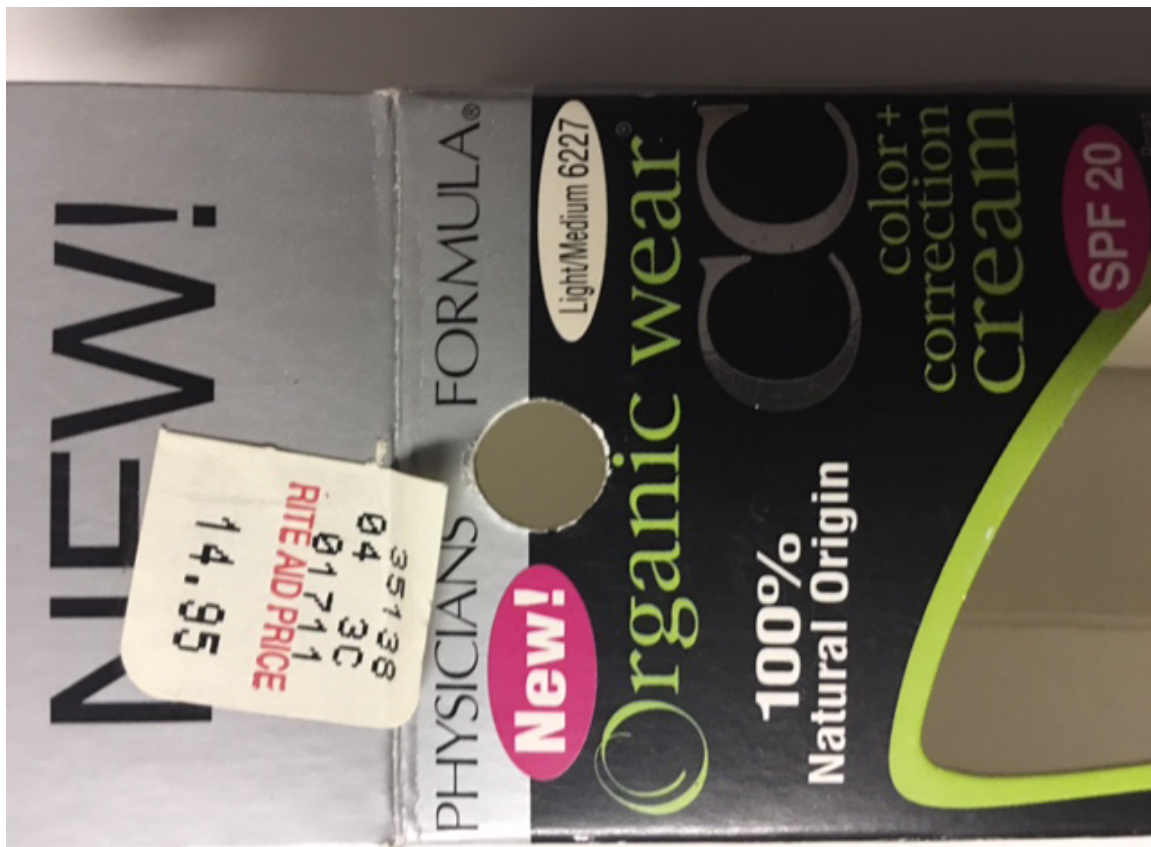
- Organic wear® 100% Natural Origin Mascara \$9.95 : Microcrystalline Cellulose, Glycerin
- Organic wear® 100% Natural Origin Tinted Moisturizer SPF 15 \$11.95: Titanium Dioxide, Polyglyceryl-4, Polyglyceryl-2 Oleate, Polyglyceryl-4 Isostearate

26. During the Class Period Plaintiff purchased Organic wear® 100% Natural Origin CC Color + Correction Cream SPF 20 for \$14.95. Exhibit 2.

27. During the Class Period Plaintiff purchased Organic wear® 100% Natural Lash Boosting Mascara for \$9.95,¹² but paid nothing out of pocket after application of Rite-Aid's promotional discount. Exhibit 3.

28. Throughout the Class Period and long before, PFC systematically and prominently advertised, labeled and packaged its Products as "100% Natural Origin" such that any consumer shopping the Products is necessarily exposed to this misrepresentation; and any reasonable consumer would believe the products to be natural and not synthetic.

¹²Sales documentation annexed as Exhibit 1.



29. Influential online blogs routinely speak of Product as 100% Natural:

This is the first time I'm using something from Physicians Formula. I know about their skin care range but was pleasantly surprised to learned about their Organic wear line where all the products are said to be 100 percent natural and 70 percent organic. The products do not contain toxic chemicals, synthetic preservatives and fragrance. In addition, they are also gluten-free, GMO-free and cruelty-free.¹³

30. Plaintiff has witnessed PFC's uniform, widespread, and continuous promotional and advertising campaigns for many years. In particular, Plaintiff viewed the "Physician's Formula" trade name as evincing authenticity and product claim integrity; and she viewed its "100% Natural" claims as evincing care for both the

¹³ <http://www.vivawoman.net/2014/08/why-i-like-the-physicians-formula-organic-cc-cream/>; see also <http://sweetsorrow2025.blogspot.com/2014/02/review-physicians-formula-organic-wear.html>

environment and the integrity of the products. Her purchase at Rite Aid on August 27, 2016, however, was her first purchase of PFC products.

31. "100% Natural Origin" is printed on the CC cream package in a distinctive typeface including initial upper case lettering, that is clear, conspicuous and proximate to (or part of) the Product name so as to be a description of the product itself. *Cf. Origins Natural, Inc., supra.*

32. Any (anticipated) claim that "Origin" modifies or references a product's pre-processed ingredients rather than the product itself is contrary to the above-cited decisional law and plain English. At no point does PFC disclose the intervention of chemical processes that catalyze substances nowhere found in nature.

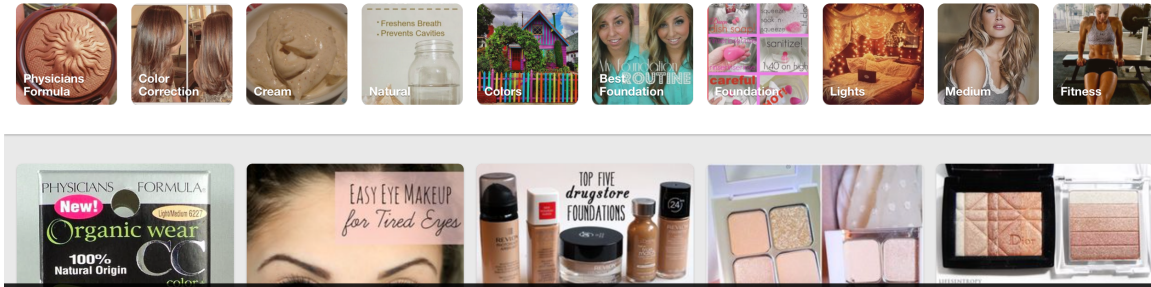
33. PFC uses "100% Natural Origin" and "100% Natural" (i.e. without the word "Origin") interchangeably on labels, product packaging, and third-party Internet advertising. See n.10 *supra*. For example, its Organic wear CC color + correction cream (image above ¶28, hereinafter at times "CC cream") is simultaneously referred to as "100% Natural Origin" at top, proximate to or in the Product name, while being described as "100% Natural" lower on the Product Display Panel:



34. PFC strengthens its deceptive practice, so as to underscore by implied representation that “100 Natural Origin” means the same thing as “100% Natural,” by disassociating its product with anything “synthetic,” e.g. as best illustrated on the backside of its Lash Boosting Mascara packaging. Exhibit 3. No reasonable consumer would consider the product as described to contain synthetic substances.

35. Similarly Pinterest, a web application inspiring people to “go out and do that thing,” references CC cream as “100% Natural:”

Explore Correction Cream, 100 Natural, and more!



See <https://www.pinterest.com/pin/375980268863518112/>¹⁴

A. SYNTHETIC INGREDIENTS IN CC CREAM AND MASCARA

36. PFC knowingly and willingly deceives and misleads consumers by labeling and marketing its products as “100% Natural” because it knows that all products in the Organic wear® line are made with one or more *unnatural* ingredients.

37. The Ingredient List for Organic wear® 100% Natural Lash Boosting Mascara is as follows:

¹⁴ Discovery will address the extent to which PFC pays for collaboration and exposure through popular blogs, lifestyle magazines and other social media outlets such as Pinterest. E.g. <http://stylecaster.com/10-things-we-learned-about-the-business-of-blogging-from-chiara-ferragnis-harvard-study/>; see also claims of “organic:” <http://makeup.allwomenstalk.com/best-organic-makeup-brands>

Citrus Aurantium Dulcis (Orange) Fruit Water*, Glycerin+, Iron Oxides, Water, Glyceryl Stearate Se, Beeswax*Oryza Sativa (Rice) Extract*, Tapioca Starch*, Copernicia Cerifera (Carnuba) Wax*, Oryza Sativa, (Rice) Powder*, Jojoba Esters, Stearic Acid, Microcrystalline Cellulose, Yogurt Extract*, Saccharomyces/Copper Ferment, Saccharomyces/Iron Ferment, Saccharomyces/Magnesium Ferment, Saccharomyces/Silicon Ferment, Saccharomyces/Zinc Ferment, Glycine Soja (Soybean) Oil*, Olea Europaea (Olive) Leaf Extract*, Aloe Barbadensis Leaf Extract*, Cucumis Sativus (Cucumber) Fruit Extract*, Glyceryl Caprylate, Glycerin, Magnesium Aluminum Silicate, Superoxide Dismutase, Soybean Peroxidase, Leuconostoc Ferment Filtrate, Leuconostoc/Radish Root Ferment Filtrate may Contain: Titanium Dioxide* Ingredients From Organic Farming + Made Using Organic Ingredients

38. Among this Mascara's synthetic ingredients are Stearic Acid, Microcrystalline Cellulose, Titanium dioxide (see ¶41 *infra*) and Glycerin. Microcrystalline cellulose ("MCC") is pure partially depolymerized cellulose *synthesized* from α -cellulose precursor. The MCC can be synthesized by different processes such as reactive extrusion, enzyme mediated, steam explosion and acid hydrolysis. The later process can be done using mineral acids such as H₂SO₄, HCl and HBr as well as ionic liquids. Sodium hypochlorite bleaching and delignification with hot sodium hydroxide, commonly known as lye and caustic soda, are two processes oft employed.

39. The Ingredient List for Organic wear® 100% Natural Origin CC Color + Correction Cream SPF 20 is set forth at this point:

Active Ingredients: Titanium Dioxide 3.90% (Sunscreen), Zinc Oxide 1.00% (Sunscreen)

Inactive Ingredients: Citrus Aurantium Dulcis Fruit Water (Orange, From Organic Farming), Dodecane, Simmondsia Chinensis Seed Oil (Jojoba, From Organic Farming), Titanium Dioxide, Polyglyceryl-4, Diisostearate/Polyhydroxystearate/Sebacate, Silica, Glycerin (Made Using Organic Ingredients), Lecithin (From Organic Farming), Water, Magnesium Sulfate, Polyglyceryl-4 Isostearate, Beeswax (From Organic Farming), Porphyra Umbilicalis Extract, Citrus Limon Peel Extract (Lemon, From Organic Farming), Euterpe Oleracea Fruit Extract (From Organic Farming), Agave Tequilana Leaf Extract (From Organic Farming), Helianthus Annuus Seed Oil (Sunflower, From

Organic Farming), Copernicia Cerifera Wax (Carnauba, From Organic Farming), Cyamopsis Tetragonolobus Gum (Guar, From Organic Farming), Lauroyl Lysine, Leuconostoc Ferment Filtrate, May Contain: Iron Oxides

40. CC cream's synthetic ingredients include Polyglycerl-4 Isosterate, Polyglycerl-4, Dodecane, Glycerin and Titanium dioxide, which latter substance is most often purified from the mineral ilmenite. Sulfuric acid is used in the purification process to remove iron oxide, which is a naturally occurring compound in ilmenite ore. Traces of iron oxide (as indicated in the ingredient list) may be found in commercial sources of titanium dioxide, depending upon the efficiency of the purification process.

41. CC cream's ingredient list specifies Titanium dioxide *twice*, likely meaning that both forms of titanium dioxide used in personal care products, being rutile and anatase, are present. Anatase is a naturally occurring mineral form of titanium dioxide. As used in personal care products, however, Anatase titanium dioxide results from an extraction process employing highly corrosive synthetic chemicals, *sulfuric acid* most frequently. The anatase form of titanium dioxide (and in particular nano-scale anatase titanium dioxide) can increase the formation of free radicals when exposed to sunlight and water, and a number of scientists have questioned the safety of their use in sunscreens and other skin products. The rutile titanium dioxide is normally purified by converting it to Titanium tetrachloride, an inorganic compound with the formula $TiCl_4$, using a chlorine process, followed by oxidation to titanium dioxide in a pure oxygen flame. Titanium tetrachloride is highly irritating to the skin, eyes, mucous membranes,

and respiratory tract in humans.¹⁵ See <http://www.sterlingminerals.com/are-titanium-dioxide-zinc-oxide-minerals-or-chemicals/>

42. PFC's conduct harms consumers by inducing them to purchase at premium prices¹⁶ and utilize Organic wear® Products on the false premise that they are 100% Natural when, in fact, Products contain ingredients that are not natural.

43. PFC has individuated its Organic wear® line of Products, claiming "100% Natural," to enable, unjustly, "above-average for retailers due to their higher price points." See n.16 *supra*. Such unjust profits directly benefit PFC with enhanced profits and access to wall display space in the nation's leading mass market retail establishments.

B. HARSH CHEMICALS IN CC CREAM AND MASCARA

44. PFC makes a related false claim by marketing the CC cream (purchased by Plaintiff) as "100% Free of Harsh Chemicals:"



¹⁵ The International Agency for Research on Cancer (IARC) has classified titanium dioxide to be a possible human carcinogen, thus a group 2B carcinogen. In Canada, titanium dioxide is listed under WHMIS class D2A (carcinogen) as a result of the IARC designation (ccohs.ca). See <http://articles.mercola.com/sites/articles/archive/2016/01/20/titanium-dioxide-nanoparticles-health-risks.aspx>

¹⁶ "We believe our products provide above-average profitability for retailers due to their higher price points and sales per linear foot." *Id.*

45. Contrary to PFC's "Free of Harsh Chemicals" representation, a number of natural plant/fruit extracts appearing on the ingredient list were processed with harsh chemicals, some of which raise concerns in the health science community. Traces of such chemicals often remain following extraction.¹⁷

46. Titanium dioxide as discussed in ¶41 *infra* is synthetic and, in any and all cases, is processed with harsh chemicals. Residual amounts from use of corrosive chemicals as a processing solvent during manufacture, or as a byproduct from the synthesis of an ingredient, may be permissible for use in Products; but the aggressive representation of "100% Free Of Harsh Chemicals" is false.

47. Euterpe Oleracea Fruit Extract (Acai), a listed ingredient, yields phenolic compounds using extractors as follows: ethanol proportion between 70% and 80%, *hydrochloric acid* concentration between 0.065 and 0.074 mol/L and a temperature of 58 °C. Hydrochloric acid is synthetic and highly corrosive. In addition, Chloroform (HPLC grade) is often used to maximize the extraction of fatty acids from Acai. The representation "100% Free Of Harsh Chemicals" is false.

48. Product packaging represents "Fragrance Free" which, as shown above in ¶19, is false.

C. FALSE CLAIM OF REVOLUTIONARY PRODUCT DEVELOPMENT

49. As in the images at ¶33 *supra*, PFC claims "New" and "1ST Ever 100% Natural CC cream," a material representation; yet, CC cream is neither 100% Natural nor a "New" form of personal care product. The first tinted moisturizer marketed as a CC

¹⁷ In the early 20th century, Dr. Edmond Locard, a forensic science pioneer in France, formulated the theory which states, "Every contact leaves a trace". This became known as Locard's exchange principle and is the basis for all forensic science as we know it today.

cream appeared in 2010, the product of Singapore-based brand Rachel K. PFC introduced its CC Cream subsequent to the Rachel K rollout.

50. Mascara is marketed under the same deceptive practice. See Exhibit 3 at p.2. L’Oreal offered a lash boosting product as early as 2009, while PFC’s product was introduced in or about early 2012.

51. PFC’s incentive for abusing the ‘New’ and ‘1st Ever’ claims is clear: “[n]ew products are a very important part of our business and have contributed, on average, approximately 33.3% of our gross sales from 2009 to 2011.” See 10-K Report, cited n.2 *supra*, at p. 1

D. INJURY AND DAMAGES

52. Plaintiff brings this lawsuit for injunctive relief, individually, to stem the ongoing deceptive practices, in contemplation of N.Y. Gen. Bus. Law § 349(h), attendant to PFC’s Organic wear® line’s use of “100% Natural Origin,” and restore a measure of commercial decency where it is wanting.

53. There are many reasons consumers purchase “100% Natural” products, e.g. health concerns and ethical living, including a fear of bodily contamination during pregnancy:

The only reason why this product caught my eye however is because I am pregnant on my first trimester and wanted to be more careful about what i've been putting on my body of course. I previously had makeup with salicylic acid and retinol which now had become a no no. So I opted for more natural, vegan or organic chemical free products to use and stumbled across this wonderful CC cream.

<https://www.makeupalley.com/product/showreview.asp/page=4/pagesize=10/ItemID=168674/>

54. Plaintiff also brings this lawsuit for damage relief, individually and on behalf of a New York CC Cream Class, pursuant to Section 349(h) of the Business Code, to recover statutory damages.

55. Based on PFC's representations that the products were 100% Natural, Plaintiff and the Class paid a "Masstige" premium for the products over comparable "Mass Channel" products that did not purport to be 100% Natural.

56. Plaintiff paid \$14.95 for a 1.2 oz. container of CC cream, i.e. \$12.50 per ounce; whereas, had she not been deceived into thinking the Product as "100% Natural," she could have selected a preferable all-in-one CC cream from Andalou Naturals All-in-One Beauty Balm Sheer Tint, SPF 30, which sells for approximately \$10.00 per ounce at CVS, as little as \$5.39 per ounce online,¹⁸ and is well-reviewed,¹⁹ or other competitive products containing synthetic ingredients.

57. Plaintiff elected to pay \$9.95 for a .26 oz. container of Mascara, i.e. \$38.80 per ounce; whereas, had she not been deceived into thinking the product was "100% Natural," she could have selected a .44 oz. container of Cover Girl Lash Blast Volume Blasting Mascara, Very Black 800, for \$8.99, or about \$20.50 per ounce; or, she could have selected a .28 oz. container of L'Oreal Voluminous Original Mascara, Volume, Blackest Black for \$8.29, i.e. \$29.60 per ounce. See <https://shop.riteaid.com/beauty/makeup-accessories/eye/mascara>

CLASS ACTION ALLEGATIONS

¹⁸ <http://www.supplementwarehouse.com/sw/all-in-one-beauty-balm-sheer-tint-with-spf30.html?gclid=COykvtyP-80CFdgJgQodXf8FFQ>

¹⁹ http://www.paulaschoice.com/beautypedia-skin-care-reviews/by-brand/andalou-naturals/_/All-in-One-Beauty-Balm-Sheer-Tint-with-SPF-30

58. Plaintiff brings this action on behalf of herself (injunction) as a Private Attorney General, addressing PFC's deceptive practices utilizing "100% Natural" and "100% Natural Origin," as alleged above.²⁰

59. Plaintiff also brings this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of herself and one New York statewide Class, defined as:

All persons who have purchased Organic wear® 100% Natural Origin CC Color + Correction Cream SPF 20 at any time within the applicable statute of limitations (the "Class Period") within the State of New York

60. As used herein, the term "Class Member(s)" shall mean and refer to the members of the Class described above.

61. Plaintiff reserves the right to amend the Class definitions as warranted by facts discovered.

62. Excluded from the Class are PFC; all persons who make a timely election to be excluded from the Class; governmental entities; and the judge(s) to whom this case is assigned and any immediate family members thereof.

63. Class-wide treatment is appropriate because Plaintiff can prove the elements of her damage claim on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claim.

64. Numerosity—Federal Rule of Civil Procedure 23(a)(1). The members of the Class are so numerous that joinder is impracticable. Upon information and belief, there are thousands of individual purchasers of the product at issue. The precise number of class members is unknown to Plaintiff, but may be ascertained, including by objective

²⁰ "To the extent the consumer protection acts authorize individuals to act as private attorneys general, it is sensible to interpret the acts to permit an individual to obtain broad injunctive relief." *Schatz v. Celco P'ship*, 842 F. Supp. 2d 594, 610 (S.D.N.Y. 2012).

criteria. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods.

65. Commonality and Predominance—Federal Rules of Civil Procedure 23(a)(2) & 23(b)(3). This action involves common questions of law or fact, which predominate over any questions affecting individual members of the Class. Common questions include:

- (a) Whether PFC represented and continues to represent that CC cream is 100% Natural, made without harsh chemicals, and “New . . . 1st Ever;”
- (b) Whether PFC’s marketing representations are false, deceptive, and misleading;
- (c) Whether the net effect of CC cream packaging is likely to mislead a reasonable consumer;
- (d) Whether PFC had knowledge that its representations were false, deceptive, and misleading;
- (e) Whether PFC continues to disseminate its representations despite knowledge that the representations are false, deceptive, and misleading;
- (f) Whether a representation that a product is 100% Natural, made without harsh chemicals or “New . . . 1st Ever,” is a material representation to a reasonable consumer;
- (g) Whether PFC violated Section 349 of New York Business Code;
- (h) Whether PFC’s marketing and pricing of CC cream causes reasonable consumers to pay more for such products, as opposed to comparable products not claimed to be “100% Natural;” and
- (i) Whether Plaintiff and members of the Class are entitled to recover statutory damages of \$50 per class member, per purchase, under Section 349(h).

66. PFC engaged in a common course of conduct giving rise to the legal rights sought to be enforced by Plaintiff individually and on behalf of the other members of the Class. Identical statutory violations and business practices and harms are involved.

Individual questions, if any, are not prevalent in comparison to the numerous, case-driving common questions that dominate this action.

67. Typicality—Federal Rule of Civil Procedure 23(a)(3). Plaintiff's claims are typical of the claims of the other members of the Class because, among other things, all members of the Class were comparably injured through the uniform misconduct described above and were subject to PFC's false, deceptive, misleading, and unfair labeling and marketing practices, including the false claims that CC cream is 100% Natural. Further, there are no defenses available to PFC unique to individual Class Members.

68. Adequacy of Representation—Federal Rule of Civil Procedure 23(a)(4). Plaintiff is an adequate representative of the members of the Class because her interests do not conflict with the interests of the other members of the Class she seeks to represent; she has retained competent counsel with experience in complex class action litigation; and Plaintiff will prosecute this action vigorously. Plaintiff and her counsel will fairly and adequately protect Class Members' interests.

69. Superiority—Federal Rule of Civil Procedure 23(b)(3). A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other members of the Class are relatively small compared to the burden and expense that would be required to individually litigate their claims against PFC, so it would be impracticable for members of the Class to seek redress for PFC's wrongful conduct on an individual basis. Individualized litigation would also pose the threat of significant

administrative burden to the court system. Individual cases would create the potential for inconsistent or contradictory judgments, and would increase delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the streamlined benefits of singular adjudication and comprehensive supervision by one court. Given the similar nature of the class members' claims, the Class will be easily managed by the Court and the parties and will be managed more efficiently in this integrated class action than through multiple separate actions.

COUNT I:
New York Consumer Protection from Deceptive Acts and Practices Act
(N.Y. Gen. Bus. Law §§ 349)
On Behalf of the New York Class

54. Plaintiff re-alleges all preceding allegations as though set forth at length.

55. New York General Business Law ("NYGBL") §349 provides: Deceptive acts or practices in the conduct of any business, trade or commerce or the furnishing of any service in this state are hereby declared unlawful."

56. PFC's representations of its CC cream are consumer oriented.

57. As above alleged, PFC engaged in deceptive acts and practices within the meaning of NYGBL §349 including, *inter alia*, statements on the CC cream packaging as follows:

- a. the representation that the product is "100% Natural Origin was deceptive;
- b. the representation that the product is "100% Natural" was deceptive;
- c. the representation that the product is free of harsh chemicals is deceptive;

- d. the representation that the product was “New” or a “1st Ever 100% natural CC cream” is deceptive; and
- e. PFC did not have “competent and reliable evidence,” sufficient in quality and quantity based on standards generally accepted in the relevant fields when considered in light of the entire body of relevant and reliable evidence, to substantiate that the representations a. thru d. are true. This is a critical prerequisite, for example, to PFC’s claim that no harsh chemicals are present in the CC cream, when traces of industrial strength acids, volatile solvents and the like were used as intermediate substances to process ingredients.

58. Plaintiff read and reviewed the packaging prior to purchase and the “100% Natural” representation was material to Plaintiff’s decision to purchase CC cream.

59. PFC violated NYGBL §349 and, as a consequence of PFC’s conduct, Plaintiff and the other members of the Class suffered injury and were actually damaged in an amount equal to the Masstige premium; and all are entitled to recover statutory damages of \$50 for each purchase made of CC cream.

COUNT II

Violation of §§349-350 of the New York General Business Law (Injunction) On Behalf of Plaintiff, Individually

60. Plaintiff re-alleges all preceding allegations as though set forth at length.

61. Plaintiff is entitled to obtain injunctive relief to protect the public from PFC’s deceptive practices:

Given the afore cited purpose of the statute, to encourage private enforcement of consumer protection, to strongly deter deceptive business practices, and to supplement the activities of the New York State Attorney General in prosecuting consumer fraud complaints, I hold that the Legislature intended the irreparable injury at issue to be irreparable injury to the public at large, not just to one consumer.

Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 608 (S.D.N.Y. 2012), citing *McDonald v. North Shore Yacht Sales, Inc.*, 134 Misc. 2d 910, 513 N.Y.S.2d 590 (Sup. Ct. 1987).

WHEREFORE Plaintiff, on behalf of herself and the Class, prays as follows:

- a. An order certifying this case as a class action, designating Plaintiff as the representative of the Class, and designating her counsel as class counsel;
- b. A permanent injunction against Defendants Physician's Formula Cosmetics, Inc. and Physicians Formula, Inc., enjoining and restraining them from representing within New York, in advertising, packaging or labeling of its Organic wear® line of products, or any of them, as "100% Natural" or "100% Natural Origin;"
- c. Statutory damages pursuant to NYGBL §349;
- d. Attorney fees; and
- e. Costs.

JURY DEMAND

Plaintiff demands a trial by jury as to all triable issues.

/s/Mark Schlachet _____
Mark Schlachet
Law Offices of Mark Schlachet
3515 Severn Road
Cleveland, Ohio 44118
Telephone: (216) 225-7559
Facsimile: (216) 932-5390
markschlachet@me.com

***Attorney for Plaintiff and
the Class***

Filed 10/6/2

10/6/2

90

B

PHYSICIANS

Light/Medium

100% Natural Origin**CC****Color + Correction Cream***How Green is Your Makeup?*

- **100% of the Ingredients are from Natural Origin**
- **70% of the Ingredients are Organic**

Not Even 100% Natural Origin CC Cream

- Color-correction and skin-nourishing benefits from natural and organic ingredients deliver brightening and complexion-enhancing properties for naturally perfected skin.
- Ultra-lightweight cream glides on effortlessly, evening out skin tone and texture for a radiant and youthful glow.

Multi-Tasking CC Formula

- Our proprietary blend of natural & organic botanicals helps Correct + Care for your skin, instantly and long-term

✓ Correcting Actives

- **Organic Lemon**-potent antioxidant helps reduce dullness and reveal brighter-looking skin
- **Red MicroAlgae**-helps reduce and tone down the appearance of redness from irritation
- **Light-Reflecting Pigments**-help blur imperfections for a flawless finish

✓ Care Actives

- **Organic Blue Agave**-powerful hydrator draws moisture close to skin
- **Organic Acai Palm**- helps improve surface barrier function for intense hydration
- **Organic Orange Water**-helps restore skin's moisture balance
- **SPF 20**- protects against UVA/UVB damage

DIRECTIONS: Remove protective seal. Shake before each use. Lightly squeeze a small amount of product and apply directly onto face and neck using fingertips to blend. Use alone or under makeup.

Natural Origin Ingredients*EXP 150C**

Made in USA from domestic and foreign parts.

For information in the USA 1-800-227-0333
www.PhysiciansFormula.com

Physicians Formula, Inc. City of Industry, CA 91789

©2013 PHYSICIANS FORMULA, INC., DIST. SINCE 1937.

6227

New!

Light/Medium 6227

100%
Natural Origin

SPF

Broad
Spectrum
Protection

100% Natural

70%
Organic

100%
natural

cream

Color + Correction
Hydrating
Naturally Perfect Skin

1.2 Fl. Oz. 35 mL

RITE

4H

71

100%
saw enhanced
lashes
INSTANTLY!

Net Wt.

0.2475g

48183!

Organic Wear®

Ultra Black

100% Natural Origin Lash Boosting Mascara

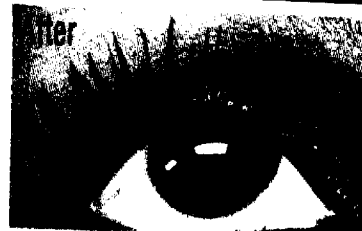
How Green is Your Makeup?™

- 100% of the Ingredients are of a Natural Origin
- 70% of the Ingredients are Organic

1st EVER 100% Natural Origin Lash Boosting Formula

- Enhances the appearance of lash length, thickness and volume for dramatic lashes instantly and long-term. No side effects!
- Delivers ingredients to the base of the lashes for best results!

100% SAW ENHANCED LASHES INSTANTLY!*



100% saw thicker & longer-looking lashes instantly!*



94% saw extended & fuller looking lashes after 4 weeks!*

SuperNatural Boosting Blend™ = Safe & Effective

- BioActive Minerals nourish & strengthen hair
- ProBiotic Protein can encourage protein synthesis for healthy hair.

ashes	- can cause dry brittle	<input checked="" type="checkbox"/> 100% Natural Origin Mascara
		100% Free of Synthetic Solvents - coats lashes without breakage & drying. Organic Orange Water - hydrates and moisturizes. Organic Aloe and Cucumber Extracts - soothes & moisturizes.
& build-up on brush	- can cause lash clumping	100% Natural Origin Biopolymers - provides clump-free lashes.
and extend mascara shelf life	- used to preserve	100% Natural Origin Preservatives - reduces the risk of irritation.
cause eye irritation	- used to volumize & can	100% Natural Origin Rice Protein & Organic Tapioca Starch - naturally boosts volume. Organic Beeswax - provides buildable formula.
		100% Natural Origin Color Pigments
	- can cause irritation	100% Free of Petroleum By Products, Parabens, GMO's & Synthetic Fragrances

DIRECTIONS: Sweep mascara brush from lash base to tips. Apply multiple coats for added volume. Can be removed with soap and water