

1 **THE LAW OFFICE OF**
2 **PAUL K. JOSEPH, PC**
3 PAUL K. JOSEPH (SBN 287057)
4 *paul@pauljosephlaw.com*
5 4125 W. Pt. Loma Blvd., No. 206
6 San Diego, CA 92110
7 Phone: (619) 767-0356
8 Fax: (619) 331-2943

9 *Counsel for Plaintiff and the Proposed Class*

10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 ANDREA NATHAN, on behalf of herself,
14 all others similarly situated and the general
15 public,

16 Plaintiff,

17 v.

18 VITAMIN SHOPPE, INC.,

19 Defendant.

20 Case No: '17CV0948 BEN KSC

21 CLASS ACTION

22 **COMPLAINT FOR VIOLATIONS OF:**
23 CAL. BUS. & PROF. CODE §§17200 *et*
24 *seq.*; CAL. BUS. & PROF. CODE §§17500
25 *et seq.*; CAL. CIV. CODE §§ 1750 *et seq.*;
26 BREACH OF EXPRESS WARRANTIES;
27 and BREACH OF IMPLIED
28 WARRANTIES

DEMAND FOR JURY TRIAL

1 Plaintiff Andrea Nathan, on behalf of herself, all others similarly situated, and the
2 general public, by and through her undersigned counsel, hereby sues Vitamin Shoppe Inc.,
3 (“Defendant”), and alleges the following upon her own knowledge, or where she lacks
4 personal knowledge, upon information and belief and the investigation of her counsel.

5 **INTRODUCTION**

6 1. Defendant markets Vitamin Shoppe brand “Garcinia Cambogia Extract,” (the
7 “Product”), a dietary supplement that Defendant falsely claims is an effective aid in “weight
8 management” and “appetite control” despite that the Product’s only purportedly active
9 ingredients, Hydroxycitric Acid (“HCA”) and chromium are scientifically proven to be
10 incapable of providing such weight-loss benefits.

11 2. Plaintiff read and relied upon Defendant’s claims when purchasing the Product
12 and was damaged as a result.

13 3. Plaintiff brings this action challenging Defendant’s misleading weight-loss
14 claims relating to the Product on behalf of herself and all others similarly situated consumers
15 in California, alleging violations of the California Consumer Legal Remedies Act, Cal. Civ.
16 Code §§ 1750 *et seq.* (“CLRA”), Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200
17 *et seq.* (“UCL”), and False Advertising Law, *id.* §§ 17500 *et seq.* (“FAL”). Plaintiff further
18 alleges that Defendant breached express and implied warranties under state law.

19 4. Plaintiff seeks an order compelling Defendant to (a) cease marketing the Product
20 using the misleading and unlawful tactics complained of herein, (b) destroy all misleading,
21 deceptive, and unlawful materials, (c) conduct a corrective advertising campaign, (d) restore
22 the amounts by which it has been unjustly enriched, and (e) pay restitution damages and
23 punitive damages, as allowed by law.

24 **JURISDICTION & VENUE**

25 5. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)(2)
26 (The Class Action Fairness Act) because the matter in controversy exceeds the sum or value
27
28

1 of \$5,000,000, exclusive of interest and costs, and because more than two-thirds of the
2 members of the Class reside in states other than the state of which any defendant is a citizen.

3 6. The Court has personal jurisdiction over Defendant because it has purposely
4 availed itself of the benefits and privileges of conducting business activities within California,
5 and consented to personal jurisdiction by registering to do business in California.

6 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Plaintiff
7 resides in and suffered injuries as a result of Defendant's acts in this District, many of the
8 acts and transactions giving rise to this action occurred in this District, and Defendant (1) has
9 intentionally availed itself of the laws and markets of this District through the promotion,
10 marketing, distribution, and sale of the Product in this District, and (2) is subject to personal
11 jurisdiction in this District.

12 **PARTIES**

13 8. Plaintiff Andrea Nathan is a resident of San Diego, California.

14 9. Defendant Vitamin Shoppe Inc., is a Delaware corporation with its principal
15 place of business in New Jersey. Defendant is registered to do business in California as entity
16 number C3656948.

17 **FACTS**

18 **I. Scientific Research Demonstrates that Garcinia Cambogia Extract (HCA) Is Not**
19 **Effective in Supporting Weight Loss, Weight Management or Appetite Control**

20 10. Numerous randomized, placebo controlled scientific studies demonstrate that
21 Garcinia Cambogia extract and/or HCA does not provide weight-loss or appetite control
22 benefits in humans. In fact, the only reliable scientific evidence demonstrates it is no more
23 effective as a weight-management aid than a placebo.

1 11. In 1998, Dr. Steven Heymsfield and his colleagues published the first study to
2 “examine the effectiveness of hydroxycitric acid for weight loss and fat mass reduction in a
3 rigorous controlled trial.”¹

4 12. Dr. Heymsfield and his team of researchers specifically noted that, at that time,
5 the “evidence of human hydroxycitric acid efficacy for weight control is based largely on
6 studies with small sample sizes, studies that failed to include a placebo-treated group, and use
7 of inaccurate measures of body lipid change.” Therefore, their “investigation was designed
8 to overcome limitations of earlier studies and examine the effectiveness of hydroxycitric acid
9 for weight loss and fat mass reduction in a rigorous controlled trial.”²

10 13. The study was “carried out using accepted clinical trial design procedures and
11 applying accurate body composition [measurement] methods,” and was designed “to evaluate
12 the efficacy of *G. cambogia* for body weight and fat mass loss in overweight human
13 subjects.”³

14 14. The “study, carried out during a 12-week evaluation period and using accepted
15 experimental design and in vivo analytic methods, failed to support the hypothesis that
16 hydroxycitric acid as prescribed promotes either additional weight or fat mass loss beyond
17 that observed with placebo.”⁴

18 15. “Specifically, body weight and fat mass change during the 12-week study period
19 did not differ significantly between placebo and treatment groups.”

20 16. “Additionally, there were no observed selective fat-mobilizing effects
21 specifically attributable to the active agent, hydroxycitric acid.”

22
23
24
25 ¹ S. Heymsfield et al., *Garcinia Cambogia (Hydroxycitric Acid) as a potential antiobesity*
agent, 280 J. Am. Med. Assoc. 1596, 1596 (1998).

26 ² *Id.*

27 ³ *Id.*

28 ⁴ *Id.* at 1599.

1 17. The researchers specifically noted that the difference in weight loss between the
2 subjects that received the HCA supplementation and those that received the placebo was “not
3 statistically significant.”⁵

4 18. Further, “[b]ody weight change differences remained nonsignificant after
5 controlling for patient starting weight, sex, and age,”⁶ and “[i]n no case did any secondary
6 analysis indicate any statistically significant effect for the active compound to produce more
7 weight loss than placebo.”⁷

8 19. In addition, the study found that *Garcinia Cambogia* had no effect on fat loss.⁸
9 Rather, “the percentage of fat mass differences also was nonsignificant,” and “in no case did
10 analysis indicate any statistically significant effect for the active compound to produce a
11 different percentage of body fat mass loss than the placebo.”⁹

12 20. In sum, this rigorous study, which “was designed to overcome limitations of
13 earlier studies,” “failed to support a specific weight loss effect of *G Cambogia*.”¹⁰

14 21. The next year, the *International Journal of Obesity* published a “double blind,
15 placebo controlled, randomized, crossover study” that likewise concluded that HCA
16 supplementation was not an effective weight loss agent in people consuming a typical mixed
17 diet.¹¹

18 22. The authors of the study noted that “[t]here are reports to support the role of (-)-
19 HCA in promoting weight loss during a *de novo* lipogenic state in rodent studies, however,
20 most people taking these weight loss supplements are not consuming diets that produce
21

22 ⁵ *Id.* at 1598.

23 ⁶ *Id.*

24 ⁷ *Id.*

25 ⁸ *Id.*

26 ⁹ *Id.*

27 ¹⁰ *Id.* at 1599.

28 ¹¹ AD Kriketos et al., *-hydroxycitric acid does not affect energy expenditure and substrate
oxidation in adult males in a post-absorptive state*, 23 *Int. J. Obesity* 867 (1999).

1 substrate de novo lipogenesis.”¹² Therefore, they designed their study to examine “the effect
2 of (–)-HCA on the regulation of metabolism in humans consuming a typical Western diet
3 (approx. 30 ± 35% total calories as fat).”¹³

4 23. Once again, after conducting a rigorous trial, the “results d[id] not support (–)-
5 HCA supplementation as an effective weight loss agent in people consuming a typical mixed
6 diet.”¹⁴

7 24. The study found no effect on weight loss or fat metabolism.

8 25. In fact, “[b]ody weight did not change over the course of the study.”¹⁵

9 26. Further, HCA supplementation had no effect “on circulating concentrations of
10 blood substrates associated with fat oxidation and regulation of glucose metabolism.”¹⁶

11 27. Therefore, the authors concluded that “the inability to demonstrate metabolic
12 changes consistent with citrate lyase inhibition suggests that this mechanism is not operable
13 to promote weight reduction”¹⁷

14 28. In 2000, the American Journal of Clinical Nutrition published a study that found
15 that “HCA, even when provided in large quantities, does not increase total fat oxidation in
16 vivo.”¹⁸

17 29. The “study showed that large doses of G. Cambogia extract [(18 ± 0.4 g HCA)]
18 do get absorbed in the intestine and can lead to a substantial increase in plasma HCA
19 concentrations. However, this does not affect fat and carbohydrate oxidation rates.”¹⁹

21
22 ¹² *Id.* at 868.

23 ¹³ *Id.*

24 ¹⁴ *Id.*

25 ¹⁵ *Id.* at 870.

26 ¹⁶ *Id.* at 872.

27 ¹⁷ *Id.* at 873.

28 ¹⁸ Van Loon L et al., *Effects of acute (–)-hydroxycitrate supplementation on substrate
metabolism at rest and during exercise in humans*, 72 Am. J. Clin. Nutr. 1445, 1445 (2000).

¹⁹ *Id.* at 1449.

1 30. “Accordingly, a direct effect of HCA on fat oxidation seems unlikely to
2 contribute to its claimed antiobesity or ergogenic potential.”²⁰

3 31. Thus, the authors “conclude[d] that plasma HCA availability does not increase
4 energy expenditure or stimulate skeletal muscle fat oxidation.”²¹

5 32. In 2001, a study published in the International Journal of Obesity that tested the
6 effect of HCA, found that “Two-week supplementation with HCA . . . did not result in
7 increased satiety, fat oxidation, 24 h EE [energy expenditure] or BW [body weight] loss.”²²

8 33. The study employed a “double-blind, placebo-controlled, randomized, cross-
9 over design” and specifically examined the effects of HCA *alone* and HCA in combination
10 medium-chain triglycerides on “satiety, fat oxidation, energy expenditure and body
11 weight.”²³

12 34. Like other controlled human trials, the study found that HCA “did not result in
13 increased satiety, fat oxidation, 24 h EE [energy expenditure] or BW [body weight] loss.”²⁴

14 35. The authors specifically noted that “BW [body weight] reduction was not
15 different between treatments,” and that “no difference in body fat loss was found between
16 treatments.”²⁵

17 36. In addition, “[t]he results did not support the hypothesis that HCA
18 supplementation may be effective on appetite and weight control by increasing fat
19 oxidation.”²⁶

20
21
22 ²⁰ *Id.*

23 ²¹ *Id.* at 1448.

24 ²² E. Kovacs et al., *The effects of 2-week ingestion of (–)-hydroxycitrate and (–)-*
25 *hydroxycitrate combined with medium-chain triglycerides on satiety, fat oxidation, energy*
26 *expenditure and body weight*, 25 *Int. J. Obes.* 1087, 1087 (2001).

27 ²³ *Id.* at 1088.

28 ²⁴ *Id.* at 1087.

²⁵ *Id.* at 1091.

²⁶ *Id.* at 1087.

1 37. To the contrary, “no effect of HCA on fat oxidation or 24 h energy expenditure
2 was found.”²⁷

3 38. Further, “There was no difference in SMR [sleeping metabolic rate], RMR
4 [resting metabolic rate], DIT [diet-induced thermogenesis] and AEE [activity-induced energy
5 expenditure] between treatments.”²⁸

6 39. Put simply, “HCA was not effective.”²⁹

7 40. The results of more recent studies have been the same: “Garcinia cambogia
8 extract did not show dietary efficacy.”³⁰

9 41. A 2008 study published in the Journal of Clinical Biochemistry and Nutrition,
10 found that “hydroxycitric acid had no significant effect on the body component” and that
11 “dietary efficacy was not indicated.”³¹

12 42. That study, which employed a “double-blind, non-cross-matching test,”³² found
13 that “Garcinia cambogia extract did not show dietary efficacy.”³³

14 43. A 2011 study published in the prominent Nutrition Journal found that Garcinia
15 Cambogia extract supplementation “failed to promote weight-loss or any clinically
16 significant change in % body fat.”³⁴

17 44. The researchers noted that “the evidence for the effectiveness of natural food
18 supplements to promote weight-loss and improve health is largely derived from animal
19

20 ²⁷ *Id.* at 1092.

21 ²⁸ *Id.* at 1091.

22 ²⁹ *Id.* at 1093.

23 ³⁰ Yoshikazu Yonei et. al, *Effects on the Human Body of a Dietary Supplement Containing*
L-Carnitine and Garcinia Cambogia Extract: A Study using Double-blind Tests, 42 J. Clin.
24 Biochem. Nutr. 89, 101 (2008).

25 ³¹ *Id.* at 100.

26 ³² *Id.* at 90.

27 ³³ *Id.* at 101.

28 ³⁴ Kim et al., *Does Glycine max leaves or Garcinia Cambogia promote weight-loss or lower*
plasma cholesterol in overweight individuals: a randomized control trial, 10 Nutr. J. 94, 94
(2011).

1 studies. Therefore, it is essential randomized double-blind placebo-controlled trials (RCTs)
2 are conducted to determine the effectiveness of natural food supplements to promote weight-
3 loss.”³⁵

4 45. The randomized double-blind placebo-controlled trial found that “GCE
5 supplementation was not effective in promoting weight-loss in overweight individuals.”³⁶

6 46. Further, “[i]n agreement with past studies the present study provided no
7 evidence that [garcinia cambogia extract] GCE supplementation can modify calorie intake in
8 overweight individuals consuming their habitual diet.”³⁷

9 47. Like the previous studies, “neither EGML nor GCE supplementation alone can
10 promote weight-loss in overweight individuals.”³⁸

11 48. These studies, all of which were controlled human trials, affirmatively
12 demonstrate that Garcinia Cambogia extract (HCA) does not and cannot aid weight
13 management or appetite control.

14 **II. Scientific Research Demonstrates that Chromium Is Not Effective in Supporting**
15 **Weight Loss, Weight Management, or Appetite Control**

16 49. Like Garcinia Cambogia or HCA, scientific studies demonstrate that chromium
17 is not effective in aiding weight loss, weight management or appetite control.

18 50. One of the first rigorous studies of the effect of chromium supplementation on
19 weight loss and fat metabolism found that “12 weeks of chromium supplementation in
20 conjunction with strength training does not increase lean body mass and muscle strength or
21 decrease percent body fat.”³⁹

23 ³⁵ *Id.* at 94-95.

24 ³⁶ *Id.* at 101.

25 ³⁷ *Id.* at 102.

26 ³⁸ *Id.*

27 ³⁹ Hallmark, M. A., et al., *Effects of chromium supplementation and resistive training on*
28 *muscle strength and lean body mass in untrained men*, 28 *Med. & Sci. Sports & Exercise*
139, 139 (1993).

1 51. Similarly, in a 1996 study published in the prominent American journal of
2 clinical nutrition found that “routine chromium supplementation has no beneficial effects on
3 body- composition change.”⁴⁰

4 52. Similarly, a 2001 study found that chromium supplementation “did not
5 significantly affect body composition. . . in moderately obese women placed on an exercise
6 program.”⁴¹

7 53. While initial interest in chromium as a weight loss aid was generated “based on
8 unpublished, flawed studies that have not been subjected to the peer review process,” attempts
9 to replicate these results using “better experimental design” have shown that chromium
10 supplementation “does not increase lean muscle mass or decrease body fat.”⁴²

11 54. In short, “the limited studies to date indicate that chromium supplements do not
12 promote general muscle gain and fat loss, as determined by various methods of body-
13 composition assessment.”⁴³

14 **III. Defendant’s Sale and Marketing of the Product**

15 55. Defendant has distributed, marketed, and sold the Product on a nationwide basis,
16 including California, for at least the past several years.

17 56. The Product comes in “caplets” form and are sold in various quantities,
18 including bottles of 90 and 180 caplets.

19
20
21
22
23 ⁴⁰ Lukaski, H., et al., *Chromium supplementation and resistance training: Effects on body
composition, strength, and trace element status of men*, 63 Am. J. Clin. Nutr. 954 (1996).

24 ⁴¹ Vople et al., *Effect of chromium supplementation and exercise on body composition,
resting metabolic rate and selected biochemical parameters in moderately obese women
25 following an exercise program*, 20 J. Am. Coll. Nutr. 293 (2001).

26 ⁴² Melvin Williams, *Dietary Supplements and Sports Performance*, 2 Int. Soc. Sports Nutr.
43, 46 (2005).

27 ⁴³ Lukaski, *Magnesium, zinc, and chromium nutriture and physical activity*, 72 Am. J. Clin.
28 Nutr. 585, 590 (2000).

1 **IV. Defendant’s Misleading Labeling Claims**

2 **A. Defendant Markets the Product with False and Misleading Labeling Claims**

3 57. Defendant markets and advertises the Product as an effective weight-loss
4 supplement through claims placed directly on the bottle Product despite that it provides no
5 such benefits.

6 58. Below is a true and correct exemplar the Product labeling.



22 Figure 1.

23
24 59. **Misleading “Weight Management” claim:** Defendant prominently labels the
25 Product with the phrase “Weight Management.” This claim conveys that the Product is
26 capable of aiding consumers lose weight and will actually help consumers lose weight.
27 However, this claim, taken individually and especially in context of the label as a whole, is
28

1 misleading because the Product’s only “active” ingredients are incapable of providing any
2 weight-loss benefits.

3 60. **Misleading “Appetite Control” claim:** Defendant prominently labels the
4 Product with the phrase “Appetite Control.” This claim conveys that the Product is capable
5 of aiding consumers lose weight and will actually help consumers lose weight, by suppressing
6 appetite. However, this claim, taken individually and especially in context of the label as a
7 whole, is misleading because the Product’s only “active” ingredients are incapable of
8 providing any weight-loss benefits.

9 61. In short, the claims on the packaging of the Product convey the concrete overall
10 message that the Product by means of its HCA and chromium content, can effectively help
11 consumers lose weight. Defendant intended consumers to rely upon this message, which is
12 false and misleading for the reasons stated herein.

13 **IV. The Labeling of the Product Violates California and Federal Statutes and**
14 **Regulations**

15 **A. Any Violation of Federal Food Labeling Statutes or Regulations is a**
16 **Violation of California Law**

17 62. Pursuant to the California Sherman Food, Drug, and Cosmetic Law, Cal. Health
18 & Safety Code §§ 109875 *et. seq.* (the “Sherman Law”), California has adopted the federal
19 food and dietary supplement labeling requirements as its own. *See id.* § 110665 (“Any food
20 is misbranded if its labeling does not conform with the requirements for nutrition labeling as
21 set forth in Section 403(q) (21 U.S.C. Sec. 343(q)) of the federal act and the regulation
22 adopted pursuant thereto.”); *id.* § 110670 (“Any food is misbranded if its labeling does not
23 conform with the requirements for nutrient content or health claims as set forth in Section
24 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulations adopted pursuant
25 thereto.”).

26 63. For the purposes of labeling, “a dietary supplement shall be deemed to be a
27 food.” *See* 21 U.S.C. § 321(ff).
28

1 64. The Federal Food Federal Food, Drug, and Cosmetic Act expressly authorizes
2 state regulations, such as the Sherman Law, that are “identical to the requirement[s]” of the
3 FDCA and federal regulations. *See* 21 U.S.C. § 343-1.

4 65. Because the Sherman Law’s requirements are identical to the requirements of
5 the Federal Food, Drug, and Cosmetic Act and FDA regulations the Sherman law is explicitly
6 authorized by the FDCA.

7 **B. The Product’s False and Misleading Labeling Claims Render it**
8 **Misbranded Under California and Federal Law**

9 66. Defendant’s deceptive statements described herein violate Cal. Health & Safety
10 Code §§ 110390 and 110660, and 21 U.S.C. § 343(a), which deem a food or dietary
11 supplement misbranded if its labeling is “false or misleading in any particular.”

12 67. Further, Defendant’s labeling of the Product is misleading, and thus misbranded,
13 because “it fails to reveal facts that are material in light of other representations.” 21 C.F.R §
14 1.21. For example, in light of the Product’s weight-loss claims the labeling fails to reveal the
15 fact that numerous randomized, controlled human trials demonstrate that Garcinia Cambogia
16 and Chromium are not effective or capable of aiding weight loss.

17 **C. The Product is Misbranded Because it Bears Unauthorized Structure**
18 **Function Claims**

19 68. The Product is further misbranded because its labeling and packaging bear
20 structure function claims even though the Product does not meet the requirements to make
21 such claims.

22 69. Specifically, the statements “Weight Management” and “Appetite Control” are
23 structure function claims.

24 70. These claims violate 21 U.S.C. 343(r)(6) because the weight of scientific
25 evidence does not support these claims as being “truthful and not misleading” as required.
26 *See* 21 U.S.C. 343(r)(6). To the contrary, scientific evidence, as alleged herein, affirmatively
27
28

1 demonstrates that the Product’s purportedly “active” ingredients are incapable of providing
2 any dietary benefits.

3 **IV. Plaintiff’s Purchase, Reliance, and Injury**

4 71. Ms. Nathan purchased a 180-caplet bottle of Defendant’s Garcinia Cambogia
5 Extract in reliance on the Product’s misleading dietary claims.

6 72. Plaintiff purchased the Product, Vitamin Shoppe Brand Garcinia Cambogia
7 Extract, from Vitamin Shoppe in San Diego, California in February of 2017.

8 73. When deciding to purchase the Product, Plaintiff read and relied on the claims
9 “Weight Management” and “Appetite Control,” which appear directly on the Product’s label
10 and packaging.

11 74. Based on these representations, Plaintiff believed the Product was an effective
12 dietary aid that would provide weight-loss benefits and would help her lose weight and help
13 control her appetite.

14 75. When purchasing the Product, Plaintiff was seeking a product that had the
15 qualities described on the Product’s label, namely, an effective “weight management” and
16 “appetite control” supplement that aids in weight loss.

17 76. The representations on the Product’s label were and are false and misleading,
18 and had the capacity, tendency, and likelihood to confuse or confound Plaintiff and other
19 consumers acting reasonably (including the putative Class) because, as described in detail
20 herein, the Product cannot deliver the purported benefits and is no more effective than a
21 placebo.

22 77. Plaintiff acted reasonably in relying on the challenged claims that Defendant
23 intentionally placed on the Product’s label and packaging with the intent to induce average
24 consumers into purchasing it.

25 78. Instead of receiving a product that had actual beneficial weight-loss properties,
26 the Product that Plaintiff and the Class received was one that does not and cannot deliver the
27 claimed benefits.

1 79. The Product, which has the sole intended purpose is as a dietary aid, is worthless
2 since it is incapable of providing any such benefits.

3 80. The Product costs more than similar products without misleading labeling, and
4 would have cost less absent the false and misleading statements.

5 81. Plaintiff paid more for the Product, and would only have been willing to pay
6 less, or unwilling to purchase it at all, absent the false and misleading labeling statements
7 complained of herein.

8 82. For these reasons, the Product was worth less than what Plaintiff paid for it.

9 83. Plaintiff would not have purchased the Product if she knew it was misbranded
10 pursuant to California and FDA regulations and could not be legally sold or held and thus is
11 legally worthless.

12 84. Plaintiff would not have purchased the Product if she knew that its labeling
13 claims were false or misleading, or that the Product is incapable of providing the claimed
14 benefits.

15 85. Plaintiff lost money as a result of Defendant's deceptive claims and practices in
16 that she did not receive what she paid for when purchasing the Product.

17 86. Plaintiff detrimentally altered her position and suffered damages in an amount
18 equal to the amount she paid for the Product.

19 87. The senior officers and directors of Defendant allowed the Product to be sold
20 with full knowledge or reckless disregard that the challenged claims are fraudulent, unlawful,
21 and misleading.

22 **CLASS ACTION ALLEGATIONS**

23 88. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks to represent a
24 Class of all persons in California who purchased the Product, for personal or household use,
25 and not for resale or distribution (the "Class").
26
27
28

1 89. The members in the proposed Class are so numerous that individual joinder of
2 all members is impracticable, and the disposition of the claims of all Class Members in a
3 single action will provide substantial benefits to the parties and Court.

4 90. Questions of law and fact common to Plaintiff and the Class include:

5 a. whether Defendant communicated a message regarding weight-
6 management and appetite-control benefits of the Product through its packaging and
7 advertising;

8 b. whether that message was material, or likely to be material to a reasonable
9 consumer;

10 c. whether the challenged claims discussed herein are false, misleading, or
11 reasonably likely to deceive a reasonable consumer;

12 d. whether Defendant's conduct violates public policy;

13 e. whether Defendant's conduct violates state and federal food statutes or
14 regulations;

15 f. whether the Product is misbranded;

16 g. the proper amount of restitution, damages, and punitive damages;

17 h. the proper injunctive relief, including a corrective advertising campaign;

18 and

19 i. the proper amount of attorneys' fees.

20 91. These common questions of law and fact predominate over questions that affect
21 only individual Class Members.

22 92. Plaintiff's claims are typical of Class Members' claims because they are based
23 on the same underlying facts, events, and circumstances relating to Defendant's conduct.
24 Specifically, all Class Members, including Plaintiff, were subjected to the same misleading
25 and deceptive conduct when they purchased the Product, and suffered economic injury
26 because the Product was and still is misrepresented. Absent Defendant's business practice of
27
28

1 deceptively and unlawfully labeling the Product, Plaintiff and Class Members would not have
2 purchased the Product.

3 93. Plaintiff will fairly and adequately represent and protect the interests of the
4 Class, has no interests incompatible with the interests of the Class, and has retained counsel
5 competent and experienced in class action litigation, and specifically in litigation involving
6 the false and misleading advertising.

7 94. Class treatment is superior to other options for resolution of the controversy
8 because the relief sought for each Class Member is small relative to the cost of litigation such
9 that, absent representative litigation, it would be infeasible for Class Members to redress the
10 wrongs done to them.

11 95. Questions of law and fact common to the Class predominate over any questions
12 affecting only individual Class Members.

13 96. Defendant has acted on grounds applicable to the Class, thereby making
14 appropriate final injunctive and declaratory relief concerning the Class as a whole.

15 97. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.
16 23(b)(2), and 23(b)(3).

17 **CAUSES OF ACTION**

18 **FIRST CAUSE OF ACTION**

19 **Violations of the Unfair Competition Law,**

20 **Cal. Bus. & Prof. Code §§ 17200 *et seq.***

21 98. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
22 as if set forth in full herein.

23 99. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.”
24 Cal. Bus. & Prof. Code § 17200.

25 100. The acts, omissions, misrepresentations, practices, and non-disclosures of
26 Defendant as alleged herein constitute business acts and practices.

27 **Fraudulent**

1 101. A statement or practice is “fraudulent” under the UCL if it is likely to mislead
2 or deceive the public, applying an objective reasonable consumer test.

3 102. As set forth herein, Defendant’s claims relating to the Product are likely to
4 mislead reasonable consumers to believe the Product can provide weight-loss benefits, when
5 it cannot.

6 **Unlawful**

7 103. The acts alleged herein are “unlawful” under the UCL in that they violate at least
8 the following laws:

- 9 • Cal. Bus. & Prof. Code § 12606.2 and 21 C.F.R. § 100.100;
10 • The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
11 • The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*;
12 • The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*; and
13 • The California Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety
14 Code §§ 110100 *et seq.*

15 **Unfair**

16 104. Defendant’s conduct with respect to the labeling, advertising, and sale of the
17 Product was “unfair” because Defendant’s conduct was immoral, unethical, unscrupulous, or
18 substantially injurious to consumers and the utility of its conduct, if any, does not outweigh
19 the gravity of the harm to its victims.

20 105. Defendant’s conduct with respect to the labeling, advertising, and sale of the
21 Product was and is also unfair because it violates public policy as declared by specific
22 constitutional, statutory or regulatory provisions, including but not limited to the Consumers
23 Legal Remedies Act, the False Advertising Law, portions of the Federal Food, Drug, and
24 Cosmetic Act, and portions of the California Sherman Food, Drug, and Cosmetic Law.

25 106. Defendant’s conduct with respect to the labeling, advertising, and sale of the
26 Product was and is also unfair because the consumer injury was substantial, not outweighed
27
28

1 by benefits to consumers or competition, and not one consumers themselves could reasonably
2 have avoided.

3 107. Defendant profited from its sale of the falsely, deceptively, and unlawfully
4 advertised and packaged Product to unwary consumers.

5 108. Plaintiff and Class Members are likely to continue to be damaged by
6 Defendant's deceptive trade practices, because Defendant continues to disseminate
7 misleading information on the Product's packaging. Thus, injunctive relief enjoining
8 Defendant's deceptive practices is proper.

9 109. Defendant's conduct caused and continues to cause substantial injury to Plaintiff
10 and the other Class Members. Plaintiff has suffered injury in fact as a result of Defendant's
11 unlawful conduct.

12 110. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order enjoining
13 Defendant from continuing to conduct business through unlawful, unfair, and/or fraudulent
14 acts and practices, and to commence a corrective advertising campaign.

15 111. Plaintiff and the Class also seek an order for and restitution of all monies from
16 the sale of the Product, which were unjustly acquired through acts of unlawful competition.

17 **SECOND CAUSE OF ACTION**

18 **Violations of the False Advertising Law,**

19 **Cal. Bus. & Prof. Code §§ 17500 *et seq.***

20 112. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
21 as if set forth in full herein.

22 113. The FAL provides that “[i]t is unlawful for any person, firm, corporation or
23 association, or any employee thereof with intent directly or indirectly to dispose of real or
24 personal property or to perform services” to disseminate any statement “which is untrue or
25 misleading, and which is known, or which by the exercise of reasonable care should be
26 known, to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500.

1 114. It is also unlawful under the FAL to disseminate statements concerning property
2 or services that are “untrue or misleading, and which is known, or which by the exercise of
3 reasonable care should be known, to be untrue or misleading.” *Id.*

4 115. As alleged herein, the advertisements, labeling, policies, acts, and practices of
5 Defendant relating to the Product misled consumers acting reasonably as to the effectiveness
6 and weight-loss properties of the Product.

7 116. Plaintiff suffered injury in fact as a result of Defendant’s actions as set forth
8 herein because she purchased the Product in reliance on Defendant’s false and misleading
9 labeling claims that the Product, among other things, aids in weight management and provides
10 appetite control.

11 117. Defendant’s business practices as alleged herein constitute deceptive, untrue,
12 and misleading advertising pursuant to the FAL because Defendant has advertised the Product
13 in a manner that is untrue and misleading, which Defendant knew or reasonably should have
14 known, and omitted material information from its advertising.

15 118. Defendant profited from its sale of the falsely and deceptively advertised
16 Product to unwary consumers.

17 119. As a result, Plaintiff, the Class, and the general public are entitled to injunctive
18 and equitable relief, restitution, and an order for the disgorgement of the funds by which
19 Defendant was unjustly enriched.

20 120. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiff, on behalf of herself and
21 the Class, seeks an order enjoining Defendant from continuing to engage in deceptive
22 business practices, false advertising, and any other act prohibited by law, including those set
23 forth in this Complaint.

24 **THIRD CAUSE OF ACTION**

25 **Violations of the Consumer Legal Remedies Act,**

26 **Cal. Civ. Code §§ 1750 *et seq.***

1 121. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
2 as if set forth in full herein.

3 122. The CLRA prohibits deceptive practices in connection with the conduct of a
4 business that provides goods, property, or services primarily for personal, family, or
5 household purposes.

6 123. Defendant's false and misleading labeling and other policies, acts, and practices
7 were designed to, and did, induce the purchase and use of the Product for personal, family,
8 or household purposes by Plaintiff and Class Members, and violated and continue to violate
9 the following sections of the CLRA:

10 a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits
11 which they do not have;

12 b. § 1770(a)(7): representing that goods are of a particular standard, quality, or
13 grade if they are of another;

14 c. § 1770(a)(9): advertising goods with intent not to sell them as advertised; and

15 d. § 1770(a)(16): representing the subject of a transaction has been supplied in
16 accordance with a previous representation when it has not.

17 124. Defendant profited from the sale of the falsely, deceptively, and unlawfully
18 advertised Product to unwary consumers.

19 125. Defendant's wrongful business practices constituted, and constitute, a
20 continuing course of conduct in violation of the CLRA.

21 126. As a result, Plaintiff and the Class have suffered harm, and therefore seek (a)
22 actual damages in the amount of the total retail sales price of the Product sold to all Class
23 Members, (b) punitive damages in an amount sufficient to deter and punish, (c) injunctive
24 relief in the form of modified advertising and a corrective advertising plan, and (d) restitution.

25 127. Pursuant to California Civil Code § 1782, Plaintiff notified Defendant in writing
26 by certified mail, return receipt requested, of her claims, and of the particular violations of §
27 1770 of the CLRA, but Defendant failed to remedy the violations within 30 days.

1 128. In compliance with Cal. Civ. Code § 1780(d), Plaintiff's affidavit of venue is
2 filed concurrently herewith.

3 **FOURTH CAUSE OF ACTION**

4 **Breach of Express Warranties,**

5 **Cal. Com. Code § 2313(1)**

6 129. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
7 as if set forth in full herein.

8 130. Through the Product's label and advertising, Defendant made affirmations of
9 fact or promises, or description of goods, described above in paragraph 73, which were "part
10 of the basis of the bargain," in that Plaintiff and the Class purchased the Product in reasonable
11 reliance on those statements. Cal. Com. Code § 2313(1).

12 131. Defendant breached the express warranties by selling a Product that does not
13 and cannot provide the promised benefits.

14 132. That breach actually and proximately caused injury in the form of the lost
15 purchase price that Plaintiff and Class members paid for the Product.

16 **FIFTH CAUSE OF ACTION**

17 **Breach of Implied Warranty of Merchantability,**

18 **Cal. Com. Code § 2314**

19 133. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
20 as if set forth in full herein.

21 134. Defendant, through its acts and omissions set forth herein, in the sale, marketing,
22 and promotion of the Product, made representations to Plaintiff and the Class that, among
23 other things, the Product would aid in weight management and appetite control.

24 135. Plaintiff and the Class bought the Product manufactured, advertised, and sold by
25 Defendant, as described herein.

1 136. Defendant is a merchant with respect to the goods of this kind which were sold
2 to Plaintiff and the Class, and there was, in the sale to Plaintiff and other consumers, an
3 implied warranty that those goods were merchantable.

4 137. However, Defendant breached that implied warranty in that the Product does not
5 aid in weight management and appetite control.

6 138. As an actual and proximate result of Defendant's conduct, Plaintiff and the Class
7 did not receive goods as impliedly warranted by Defendant to be merchantable in that it did
8 not conform to promises and affirmations made on the container or label of the goods nor is
9 it fit for its ordinary purpose, aiding in weight management and appetite control.

10 139. Plaintiff and Class have sustained damages as a proximate result of the foregoing
11 breach of implied warranty in the amount of the Product's purchase prices.

12 **PRAYER FOR RELIEF**

13 140. Wherefore, Plaintiff, on behalf of herself, all others similarly situated and the
14 general public, prays for judgment against Defendant as to each and every cause of action,
15 and the following remedies:

16 A. An Order declaring this action to be a proper class action, appointing Plaintiff
17 as class representative, and appointing undersigned counsel as class counsel;

18 B. An Order requiring Defendant to bear the cost of class notice;

19 C. An Order compelling Defendant to conduct a corrective advertising campaign;

20 D. An Order compelling Defendant to destroy all misleading and deceptive
21 advertising materials and product labels, and to recall all offending Products;

22 E. An Order requiring Defendant to disgorge all monies, revenues, and profits
23 obtained by means of any wrongful act or practice;

24 F. An Order requiring Defendant to pay restitution to restore all funds acquired by
25 means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent
26 business act or practice, untrue or misleading advertising, plus pre-and post-judgment interest
27 thereon;

1 G. An Order requiring Defendant to pay actual and punitive damages where
2 permitted under law;

3 H. An award of attorneys' fees and costs; and

4 I. Any other and further relief that Court deems necessary, just, or proper.

5 **JURY DEMAND**

6 Plaintiff hereby demands a trial by jury on all issues so triable.

7
8 Dated: May 4, 2017

/s/ Paul K. Joseph

THE LAW OFFICE OF PAUL K. JOSEPH, PC

PAUL K. JOSEPH

paul@pauljosephlaw.com

4125 W. Point Loma Blvd., No. 206

San Diego, CA 92110

Phone: (619) 767-0356

Fax: (619) 331-2943

Counsel for Plaintiff and the Proposed Class

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
ANDREA NATHAN, on behalf of herself, all others similarly situated, and the general public
(b) County of Residence of First Listed Plaintiff San Diego
(c) Attorneys (Firm Name, Address, and Telephone Number)
Paul K. Joseph
4125 W. Pt. Loma Blvd., No. 206 San Diego, CA 92110 / (619) 767-0356

DEFENDANTS
VITAMIN SHOPPE, INC.
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)
'17CV0948 BEN KSC

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation
PTF DEF
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. s. 1332(d)(2) (the Class Action Fairness Act)
Brief description of cause:
False Advertising (Violation of California UCL, FAL, CLRA & Breach of Warranties)

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 05/04/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ Paul K. Joseph

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. **(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 - United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 - Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

- IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

- V. **Origin.** Place an "X" in one of the six boxes.
 - Original Proceedings. (1) Cases which originate in the United States district courts.
 - Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 - Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

1 **THE LAW OFFICE OF**
2 **PAUL K. JOSEPH, PC**
3 PAUL K. JOSEPH (SBN 287057)
4 *paul@pauljosephlaw.com*
5 4125 W. Pt. Loma Blvd. No. 206
6 San Diego, CA 92110
7 Phone: (619) 767-0356
8 Fax: (619) 331-2943

9 *Counsel for Plaintiff and the Proposed Class*

10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 ANDREA NATHAN, on behalf of herself,
13 all others similarly situated, and the general
14 public,

15 Plaintiff,

16 v.

17 VITAMIN SHOPPE INC.,

18 Defendant.

19 '17CV0948 BEN KSC

20 **CONSUMERS LEGAL REMEDIES**
21 **ACT VENUE AFFIDAVIT**

22 **[Cal. Civ. Code § 1780(d)]**

1 I, Paul K. Joseph, declare as follows:

2 1. I am an attorney with The Law Office of Paul K. Joseph, PC, counsel for plaintiff
3 in this action. I am admitted to practice law in California and before this court, and a member
4 in good standing of the state bar of California. This declaration is made pursuant to California
5 Civil Code section 1780(d). I make this declaration based on my research of public records
6 in upon personal knowledge and, if called upon to do so, could and would testify competently
7 thereto.

8 2. Based on my research and personal knowledge, defendant Vitamin Shoppe Inc.
9 does business within the County of San Diego and plaintiff Andrea Nathan lives and
10 purchased defendant's products within the County of San Diego, as alleged in the class action
11 complaint.

12 3. The Complaint in this action is further filed in a proper place for the trial of this
13 action because the transactions that are the subject of the action occurred in this county.

14
15 I declare under penalty of perjury under the laws of the United States and California
16 that the foregoing is true and correct the best of my knowledge.

17
18 Executed this 4th day of May, 2017, in San Diego, California.

19
20 /s/ Paul K. Joseph

21 Paul K. Joseph

22

23

24

25

26

27

28