

1 Amy B. Alderfer (SBN 205482)
aalderfer@cozen.com
2 Brett N. Taylor (SBN 274400)
btaylor@cozen.com
3 COZEN O'CONNOR
601 S. Figueroa Street, Suite 3700
4 Los Angeles, CA 90017
Telephone: 213.892.7900
5 Facsimile: 213.892.7999

6 Attorneys for Defendant
VITAMIN SHOPPE, INC.

7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ANDREA NATHAN, on behalf of
herself, all others similarly situated and
12 the general public,

13 Plaintiffs,

14 vs.

15 VITAMIN SHOPPE, INC.,

16 Defendant.
17

Case No. **'17CV1590 DMS RBB**

**DEFENDANT VITAMIN SHOPPE,
INC.'S NOTICE OF REMOVAL**

[28 U.S.C. § 1332, 1446, AND 1453]

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT AND COUNSEL OF RECORD FOR ALL PARTIES:

PLEASE TAKE NOTICE that Defendant Vitamin Shoppe, Inc. (“Defendant” or “Vitamin Shoppe”) hereby removes this action filed in the California Superior Court for the County of San Diego (“State Court”) to the United States District Court for the Southern District of California (“District Court”) pursuant to 28 U.S.C. §§ 1332, 1446, and 1453. Defendant’s removal of this matter is based on the grounds set forth below.

I. BACKGROUND

1. Plaintiff Andrea Nathan (“Plaintiff” or “Nathan”) originally filed suit against Defendant on May 8, 2017 in the Southern District of California, case number 17CV0948 BEN KSC (hereinafter the “Federal Action”). The Federal Action was assigned to the Honorable Roger T. Benitez. Styled as a putative class action, the Federal Action pleaded claims against Defendant for Violations of Cal. Bus. & Prof. Code §§17200 *et seq.*; Cal. Bus. & Prof. Code §§ 17500 *et seq.*, Cal. Civil Code §§ 1750 *et seq.* and breach of express and implied warranties. The Federal Action sought a class of persons in California only. (Exh. A, ¶ 88.)

2. On June 7, 2017, Defendant filed a Motion to Dismiss the Federal Action which was set for hearing on July 10, 2017.

3. On June 26, 2017, the day Plaintiff’s Opposition to the Motion to Dismiss was due, Plaintiff filed a Notice of Voluntary Dismissal of the Federal Action pursuant to Federal Rule of Civil Procedure 41(a). (Exh. B.)

4. That very same day (June 26, 2017), Plaintiff filed a putative class action, case number 37-2017-00023258-C-BT-CTL, in the Superior Court of the State of California, County of San Diego (the “State Action”) against Vitamin Shoppe. (Exh. C.) The State Action pleads causes of action for: Violations of Cal. Bus. & Prof. Code §§17200 *et seq.*; Cal. Bus. & Prof. Code §§ 17500 *et seq.*, Cal. Civil Code §§ 1750 *et seq.* and breach of express and implied warranties.

1 5. The State Action seeks a nationwide class. (Exh. C, ¶ 90.)

2 6. The State Action asserts claims against Vitamin Shoppe relating to its
3 Garcinia Cambogia extract, also known as HCA (the “Product”). Essentially, Plaintiff
4 claims that the Product is ineffective. (Exh. C, *passim*.) The Federal Action involved
5 the same product and basic claims. (Exh. A, *passim*.)

6 7. Plaintiff now seeks injunctive relief as well as disgorgement, punitive
7 damages, costs, and attorney’s fees in the State Action. (Exh. C, ¶ 141.)

8 8. On July 11, 2017, Plaintiff filed a “Consumers Legal Remedies Act
9 Venue Affidavit” in the State Action. (Exh. D.)

10 9. Plaintiff served the summons for the State Action on Vitamin Shoppe on
11 July 12, 2017. (Exhs. E, F.) As this Notice of Removal is filed within 30 days of
12 service of the State Action Complaint on Defendant, it is timely under 28 U.S.C. §§
13 1446(b) and 1453. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.* 526 U.S. 344,
14 354 (1999).

15 **II. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER CAFA**

16 10. The Court has original jurisdiction over this action under the Class
17 Action Fairness Act (“CAFA”), codified in relevant part in 28 U.S.C. § 1332(d)(2),
18 for the following reasons: (i) any member of a class of plaintiffs is a citizen of a State
19 different from any defendant, (ii) the amount in controversy exceeds \$5,000,000,
20 exclusive of interest and costs, and (iii) the number of members of all proposed
21 plaintiff classes in the aggregate is more than 100. 28 U.S.C. § 1332(d)(5)(B).

22 **A. Diversity of Citizenship Exits.**

23 11. The diversity of citizenship for removal under CAFA is proper when
24 “any member of a class of plaintiffs is a citizen of a State different from any
25 defendant.” 28 U.S.C. § 1332(d)(2)(A). Thus, in order to satisfy CAFA’s diversity
26 requirement, the party seeking removal need only show that minimal diversity exists,
27 that is, one putative class member is a citizen of a different state than one defendant.
28 *Id.*; see also *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. &*

Serv. Workers Int’l Union, AFL-CIO, CLC v. Shell Oil Co., 602 F.3d 1087, 1090-1091 (9th Cir. 2010) (noting that CAFA provides expanded original diversity jurisdiction for class actions meeting the amount in controversy and minimal diversity and numerosity requirements pursuant to 28 U.S.C. § 1332(d)(2)); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684 (9th Cir. 2005).

1. Plaintiff is a Citizen of California.

12. To establish citizenship for diversity purposes, a natural person must be both (1) a citizen of the United States, and (2) domiciled in the state. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983). “A natural person is deemed to be a citizen of the state where he or she is domiciled, which is where he or she resides with the intention to remain.” *Zavala v. Deutsche Bank Trust Co. Ams.*, 2013 U.S. Dist. LEXIS 96719 (N.D. Cal. July 10, 2013) (citing *Kantor*, 704 F.2d at 1090 and *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001)). For purposes of diversity of citizenship, citizenship is determined by the individual’s domicile at the time the lawsuit is filed. *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986) (citing *Hill v. Roller*, 615 F.2d 886, 889 (9th Cir. 1980)).

13. Plaintiff’s Complaint alleges that she “resides in” San Diego, California. (Exh. C, ¶¶ 5, 11.)

14. In a Consumer Legal Remedies Act Venue Affidavit filed in the State Action, Plaintiff’s counsel declared under penalty of perjury that Plaintiff “lives . . . within the County of San Diego.” (Exh. D.)

15. Thus, based on Plaintiff’s own allegations, one can conclude that she is a citizen of California for purposes of diversity jurisdiction. Plaintiff does not allege any alternative state of citizenship.

2. Defendant Is Not A Citizen of California.

16. A corporation is a citizen of the state where (i) it has been incorporated; and (ii) its principal place of business is located. 28 U.S.C. § 1332(c). The principal place of business for a corporation is determined by the location of its “nerve center,”

1 which includes the location of its headquarters and the location where its “officers
2 direct, control, and coordinate the corporation's activities.” *Hertz Corp. v. Friend*, 559
3 U.S. 77, 78 (2010).

4 17. Plaintiff alleges that Defendant is incorporated in and existing under the
5 laws of the State of Delaware. (Exh. C, ¶ 6.) Defendant confirms that this allegation
6 is correct. (Declaration of Carlos Lopez (“Lopez Decl.”) ¶ 3.)

7 18. Plaintiff also alleges that Defendant’s principal place of business is in
8 New Jersey. (Exh. C, ¶ 6.) Defendant confirms that this is correct. (Lopez Decl. ¶ 4.)

9 19. Defendant is not now, nor ever has been, a citizen and/or resident of the
10 state of California within the meaning citizenship and/or residency relating to the
11 removal of class actions. (Lopez Decl. ¶ 5.) 28 U.S.C. § 1332(c)(1); *Hertz*, 559 U.S.
12 at 97. Defendant is not considered to be a citizen of California for the purposes of
13 determining diversity.

14 20. Accordingly, based on the Complaint, at least one member of the putative
15 class is a citizen of a different state than Defendant and the minimal diversity
16 requirement is satisfied. 28 U.S.C. § 1332(d)(2)(A).

17 **B. The Size of the Proposed Class Exceeds One Hundred (100)**
18 **Members.**

19 21. According to the Complaint, the proposed class includes “all persons in
20 the United States who, on or after from June 26, 2013 . . . purchased, for personal or
21 household use, and not for resale or distribution purposes Vitamin Shoppe’s Garcinia
22 Cambogia.” (Exh. C, ¶ 90.) Plaintiff also refers to the class as being “so numerous”
23 that individual joinder is impractical. (Exh. C, ¶ 91.)

24 22. Based on Plaintiff’s own allegations, there is no doubt that the number of
25 consumers who purchased the Product on a nationwide basis over the last four years
26 far exceeds 100 persons. Defendant’s own research confirms this. (Lopez Decl. ¶ 6.)

27 23. Accordingly, the putative class is well in excess of one hundred (100)
28 persons in the aggregate as required under CAFA. 28 U.S.C. § 1332(d)(5)(B).

C. The Amount-In-Controversy Requirement Is Satisfied.

24. The U.S. Supreme Court held that, as specified in 28 U.S.C. § 1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions. *Dart Cherokee Basin Operating Co. LLC v. Owens*, 135 S. Ct. 547, 554 (U.S. 2014).

25. Plaintiff defines the class period as beginning June 26, 2013 and going forward and alleges a nationwide class. (Exh. C, ¶ 90.)

26. Defendant's review of sales information for this Product on a nationwide basis over the last four years demonstrates that the nationwide sales for the product at issue for the time specified exceeds \$5,000,000. (Lopez Decl. ¶ 6.)

D. Plaintiff's Complaint Also Seeks the Recovery of Attorneys' Fees and Punitive Damages.

27. Attorneys' fees are properly included in determining the amount in controversy. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007) (holding that "the amount-in-controversy requirement excludes only 'interest and costs' and therefore includes attorneys' fees").

28. Plaintiff includes requests for attorneys' fees in its Complaint. (Exh. C, ¶ 92(j) and Prayer for Relief ¶ H.)

29. The Ninth Circuit has recognized a "25% [] benchmark award for attorney fees." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

30. Further, Plaintiff seeks punitive damages, which are to be included in calculating the amount in controversy. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) ("It is well established that punitive damages are part of the amount in controversy in a civil action."); accord *Romo v. FFG Ins. Co.*, 397 F. Supp. 2d 1237, 1240 (C.D. Cal. 2005) ("In an amount in controversy inquiry for diversity purposes, punitive damages, where authorized, are counted toward the requirement.")

1 31. Here Plaintiff seeks punitive damages for a nationwide class for a
2 product which Plaintiff claims Defendant labeled, marketed and sold knowing it is
3 ineffective.

4 32. The inclusion of attorneys' fees and punitive damages is unnecessary for
5 purposes of determining the amount in controversy in this action, because, as
6 discussed above, Plaintiff's alleged causes of action alone, without the inclusion of
7 attorneys' fees, well exceeds the CAFA removal requirements. However, in any
8 event, any calculation of attorneys' fees and punitive damages on a putative
9 nationwide class would only add to the amount in controversy.

10 **III. THE OTHER PREREQUISITES FOR REMOVAL ARE SATISFIED**

11 33. Consent of other parties is not required for removal under CAFA's mass
12 action jurisdiction. *See* 28 U.S.C. § 1453(b). Additionally, here there are no parties
13 other than Plaintiff and removing Defendant.

14 34. This Court is a proper venue for this action pursuant to 28 U.S.C. §
15 1441(a). The United States District Court for the Southern District of California
16 embraces the County of San Diego, in which the State Action is now pending. *See* 28
17 U.S.C. § 84(c)(2).

18 35. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and
19 orders served upon Defendant, including the summons and Complaint, is attached
20 hereto as Exhibits C-G.

21 36. Pursuant to 28 U.S.C. § 1446(d), a Notice of Filing Notice of Removal,
22 attached hereto as Exhibit H, together with the Notice of Removal, will be served
23 upon counsel for Plaintiff and will be filed with the clerk of the Superior Court for the
24 County of San Diego.

1 Dated: August 8, 2017

COZEN O'CONNOR

2
3 By: /s/ Amy B. Alderfer
4 Amy B. Alderfer
5 Brett N. Taylor
Attorneys for Defendant
VITAMIN SHOPPE, INC.

6 LEGAL\32021833\1

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

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Paul K. Joseph (SBN 287057); paul@pauljoseph.com

The Law Office of Paul K. Joseph PC

4125 W. Pt. Loma Blvd., No. 206

San Diego, CA 92110

Telephone: 619.767.0356; Facsimile 619.331.2943

DEFENDANTS VITAMIN SHOPPE, INC.

'17CV1590 DMS RBB

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Amy B. Alderfer (SBN 205482), aalderfer@cozen.com

Brett N. Taylor (SBN 274400), btaylor@cozen.com

COZEN O'CONNOR

601 S. Figueroa Street, Suite 3700, Los Angeles, CA 90017

Telephone: 213.892.7900, Facsimile: 213.892.7999

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 ☒ PTF ☐ DEF

Citizen of Another State ☐ 2 ☐ 2

Citizen or Subject of a Foreign Country ☐ 3 ☐ 3

Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4

Incorporated and Principal Place of Business In Another State ☐ 5 ☒ 5

Foreign Nation ☐ 6 ☐ 6

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

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities-Employment <input type="checkbox"/> 446 Amer. w/Disabilities-Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

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-Transfer

☐ 8 Multidistrict Litigation - Direct File

(specify)

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. §§ 1332, 1446, and 1453

Brief description of cause: False advertising statutes; Breach of express and implied warranties

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
5,000,000

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Roger T. Benitez

DOCKET NUMBER 17CV0948 BEN KSC

DATE August 8, 2017

SIGNATURE OF ATTORNEY OF RECORD /s/ Amy B. Alderfer

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 there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).

- V. **Origin.** Place an "X" in one of the seven 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 – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.

- 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.

EXHIBIT A

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

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

INTRODUCTION

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

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

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

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

JURISDICTION & VENUE

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

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

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

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

PARTIES

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

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

FACTS

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

10. Numerous randomized, placebo controlled scientific studies demonstrate that Garcinia Cambogia extract and/or HCA does not provide weight-loss or appetite control benefits in humans. In fact, the only reliable scientific evidence demonstrates it is no more 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.”

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

26 ² *Id.*

27 ³ *Id.*

28 ⁴ *Id.* at 1599.

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

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

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

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

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

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

⁵ *Id.* at 1598.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1599.

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).

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

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

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

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

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

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

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

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

¹² *Id.* at 868.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 870.

¹⁶ *Id.* at 872.

¹⁷ *Id.* at 873.

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.

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

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

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

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

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

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

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

²⁰ *Id.*

²¹ *Id.* at 1448.

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

²³ *Id.* at 1088.

²⁴ *Id.* at 1087.

²⁵ *Id.* at 1091.

²⁶ *Id.* at 1087.

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

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

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

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

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

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

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

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

²⁷ *Id.* at 1092.

²⁸ *Id.* at 1091.

²⁹ *Id.* at 1093.

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. Biochem. Nutr. 89, 101 (2008).

³¹ *Id.* at 100.

³² *Id.* at 90.

³³ *Id.* at 101.

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*
muscle strength and lean body mass in untrained men, 28 Med. & Sci. Sports & Exercise
 28 139, 139 (1993).

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

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

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

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

III. Defendant’s Sale and Marketing of the Product

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

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

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).

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

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

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

IV. Defendant's Misleading Labeling Claims

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

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

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

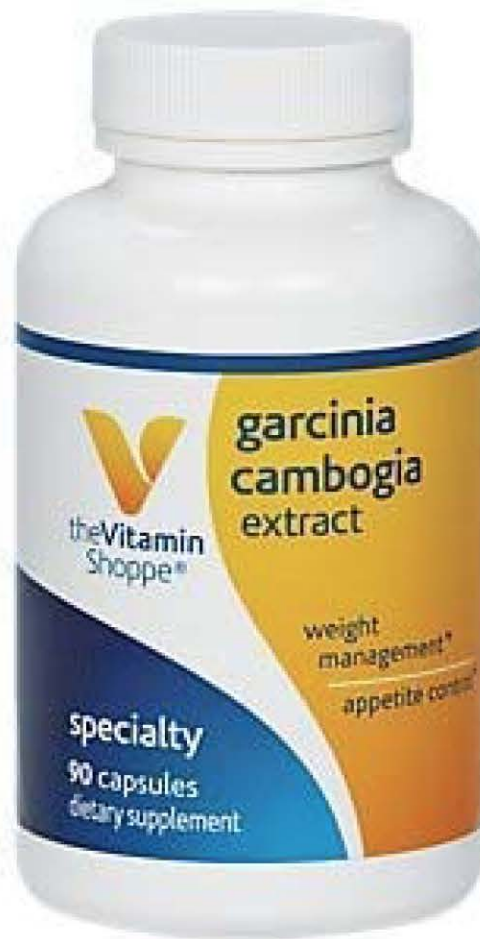


Figure 1.

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

misleading because the Product's only "active" ingredients are incapable of providing any weight-loss benefits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**

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

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

Unlawful

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

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

Unfair

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

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

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

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.

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

FOURTH CAUSE OF ACTION

Breach of Express Warranties,

Cal. Com. Code § 2313(1)

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

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

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

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

FIFTH CAUSE OF ACTION

Breach of Implied Warranty of Merchantability,

Cal. Com. Code § 2314

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

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

135. Plaintiff and the Class bought the Product manufactured, advertised, and sold by 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;
28

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

EXHIBIT B

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, California 92110
7 Phone: (619) 767-0356
8 Fax: (619) 331-2943

9 *Counsel for Plaintiff and the Proposed Class*

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

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

17 Plaintiff,

18 v.

19 VITAMIN SHOPPE, INC.,
20 Defendant.

Case No: 17-cv-0948-BEN-KSC

21 **NOTICE OF VOLUNTARY**
22 **DISMISSAL**

23 [Fed. R. Civ. Proc. 41(a)]

24 Judge: Hon. Roger T. Benitez

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), plaintiff
3 Andrea Nathan hereby dismisses her individual claims and the class claims *without*
4 *prejudice*.

5
6 Dated: June 26, 2017

Respectfully submitted,

7 /s/ Paul K. Joseph

8 **THE LAW OFFICE OF PAUL K. JOSEPH, PC**

9 PAUL K. JOSEPH

paul@pauljosephlaw.com

10 4125 W. Point Loma Blvd. No. 206

11 San Diego, California 92110

12 Phone: (619) 767-0356

13 Fax: (619) 331-2943

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I served the foregoing **NOTICE OF VOLUNTARY DISMISSAL** on counsel of record for all parties in this action, by notice of electronic filing, which was automatically generated by the Court's CM/ECF system at the time the document was filed with the Court.

Dated: June 26, 2017

/s/ Paul K. Joseph

Paul K. Joseph

EXHIBIT C

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

06/26/2017 at 03:08:20 PM

Clerk of the Superior Court
By Carla Brennan, Deputy Clerk

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

Counsel for Plaintiff and the Proposed Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO**

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

Plaintiff,

v.

VITAMIN SHOPPE, INC.,

Defendant.

Case No: 37-2017-00023258-CU-BT-CTL

CLASS ACTION

COMPLAINT FOR:

**VIOLATIONS OF CAL. BUS. & PROF.
CODE §§17200 et seq.; CAL. BUS. &
PROF. CODE §§17500 et seq.; CAL.
CIV. CODE §§ 1750 et seq.; and**

**BREACH OF EXPRESS & IMPLIED
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) restore the amounts by
21 which it has been unjustly enriched, and (c) pay restitution damages and punitive damages,
22 as allowed by law.

23 PARTIES

24 5. Plaintiff Andrea Nathan is a resident of San Diego, California.

25 6. Defendant Vitamin Shoppe Inc., is a Delaware corporation with its principal
26 place of business in New Jersey. Defendant is registered to do business in California as entity
27 number C3656948.

JURISDICTION & VENUE

7. The California Superior Court has jurisdiction over this matter as a result of defendant's violations of the California Business and Professions Codes, California Civil Codes, and California common law principles.

8. The aggregate monetary damages and restitution sought herein exceed the minimum jurisdictional limits for the Superior Court and will be established at trial, according to proof.

9. The California Superior Court also has jurisdiction in this matter because there is no federal question at issue, as the issues herein are based solely on California statutes and law.

10. The Court has personal jurisdiction over Vitamin Shoppe because it has purposely availed itself of the benefits and privileges of conducting business activities within California.

11. Venue is proper in San Diego County because plaintiff resides in San Diego, California, and a substantial part of the events or omissions giving rise to the claims occurred in San Diego.

FACTS

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

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

1 13. 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 14. 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 15. 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 16. 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 17. “Specifically, body weight and fat mass change during the 12-week study period
19 did not differ significantly between placebo and treatment groups.”

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

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 19. 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 20. 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 21. 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 22. 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 23. 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 24. 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 25. 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 26. The study found no effect on weight loss or fat metabolism.

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

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

11 29. 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 30. 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 31. 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

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.

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

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

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

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

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

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

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

²⁰ *Id.*

²¹ *Id.* at 1448.

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

²³ *Id.* at 1088.

²⁴ *Id.* at 1087.

²⁵ *Id.* at 1091.

²⁶ *Id.* at 1087.

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

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

41. Put simply, “HCA was not effective.”²⁹

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

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

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

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

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

²⁷ *Id.* at 1092.

²⁸ *Id.* at 1091.

²⁹ *Id.* at 1093.

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. Biochem. Nutr. 89, 101 (2008).

³¹ *Id.* at 100.

³² *Id.* at 90.

³³ *Id.* at 101.

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

6 48. 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 49. Like the previous studies, “neither EGML nor GCE supplementation alone can
 10 promote weight-loss in overweight individuals.”³⁸

11 50. 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 51. Like Garcinia Cambogia or HCA, scientific studies demonstrate that chromium
 17 is not effective in aiding weight loss, weight management or appetite control.

18 52. 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).

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

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

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

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

III. Defendant’s Sale and Marketing of the Product

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

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

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).

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

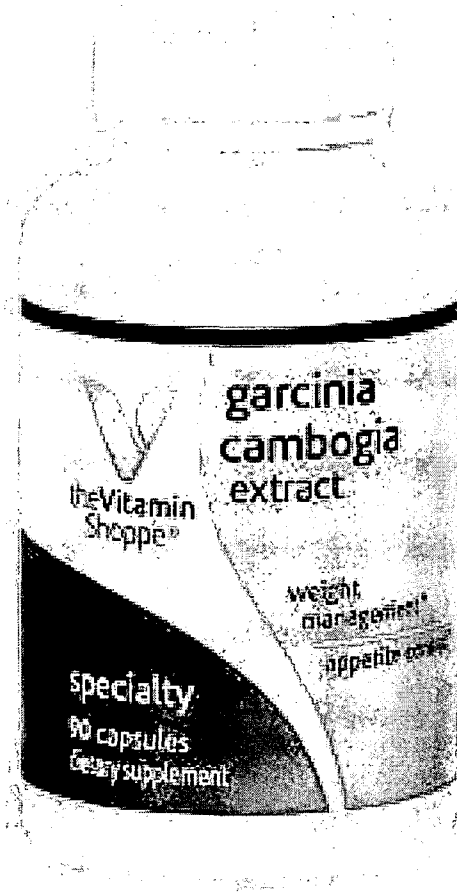
⁴² Melvin Williams, *Dietary Supplements and Sports Performance*, 2 Int. Soc. Sports Nutr. 43, 46 (2005).

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

1 **IV. Defendant Markets the Product with False and Misleading Labeling Claims**

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

5 60. Below is a true and correct exemplar of the Product labeling.



21 Figure 1.

22
23 61. **Misleading “Weight Management” claim:** Defendant prominently labels the
24 Product with the phrase “Weight Management.” This claim misleadingly conveys that the
25 Product is capable of aiding consumers lose weight and will actually help consumers lose
26 weight. However, this claim, taken individually and especially in context of the label as a
27 whole, is misleading because the Product’s only “active” ingredients are incapable of
28 providing any weight-loss benefits.

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

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

IV. The Labeling of the Product Violates California and Federal Law

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

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

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

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

1 67. Because the Sherman Law's requirements are identical to the requirements of
2 the Federal Food, Drug, and Cosmetic Act and FDA regulations the Sherman law is explicitly
3 authorized by the FDCA.

4 **B. The Product's False and Misleading Labeling Claims Render it**
5 **Misbranded Under California and Federal Law**

6 68. Defendant's deceptive statements described herein violate Cal. Health & Safety
7 Code §§ 110390 and 110660, and 21 U.S.C. § 343(a), which deem a food or dietary
8 supplement misbranded if its labeling is "false or misleading in any particular."

9 69. Further, Defendant's labeling of the Product is misleading, and thus misbranded,
10 because "it fails to reveal facts that are material in light of other representations." 21 C.F.R. §
11 1.21. For example, in light of the Product's weight-loss claims the labeling fails to reveal the
12 fact that numerous randomized, controlled human trials demonstrate that Garcinia Cambogia
13 and Chromium are not effective or capable of aiding weight loss.

14 **C. The Product is Misbranded Because it Bears Unauthorized Structure**
15 **Function Claims**

16 70. The Product is further misbranded because its labeling and packaging bear
17 structure function claims even though the Product does not meet the requirements to make
18 such claims.

19 71. Specifically, the statements "Weight Management" and "Appetite Control" are
20 structure function claims.

21 72. These claims violate 21 U.S.C. 343(r)(6) because the weight of scientific
22 evidence does not support these claims as being "truthful and not misleading" as required.
23 See 21 U.S.C. 343(r)(6). To the contrary, scientific evidence, as alleged herein, affirmatively
24 demonstrates that the Product's purportedly "active" ingredients are incapable of providing
25 any dietary benefits.

IV. Plaintiff's Purchase, Reliance, and Injury

73. In or around February 2017 in San Diego, Ms. Nathan purchased a 180-caplet bottle of Defendant's Garcinia Cambogia Extract for approximately \$20 from Vitamin Shoppe, in reliance on the Product's misleading dietary claims.

74. When deciding to purchase the Product, Plaintiff read and relied on the claims "Weight Management" and "Appetite Control," which appear directly on the Product's label and conveyed the message to the reasonable consumer that the Product was an effective dietary aid that would aid weight loss.

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

76. When purchasing the Product, Plaintiff was seeking a product that had the qualities described on the Product's label, namely, an effective "weight management" and "appetite control" supplement that aids in weight loss.

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

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

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

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

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

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

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

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

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

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

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

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

CLASS ACTION ALLEGATIONS

89. California Code of Civil Procedure section 382 provides that “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”

90. While reserving the right to redefine or amend the class definition prior to seeking class certification, plaintiff brings this suit as a class action pursuant to Cal. Code Civ. P. § 382 on behalf of herself and a Class of all persons in the United States who, on or

1 after from June 26, 2013 (the “Class Period”), purchased, for personal or household use, and
2 not for resale or distribution purposes Vitamin Shoppe’s Garcinia Cambogia (the “Class”).

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

6 92. Questions of law and fact common to plaintiff and the Class include:

- 7 a. whether Defendant communicated a message regarding weight-
8 management and appetite-control benefits of the Product through its
9 packaging and advertising;
10 b. whether that message was material, or likely to be material to a reasonable
11 consumer;
12 c. whether the challenged claims discussed above are false, misleading, or
13 reasonably likely to deceive a reasonable consumer;
14 d. whether Defendant’s conduct violates public policy;
15 e. whether Defendant’s conduct violates state and federal food statutes or
16 regulations;
17 f. whether the Product is misbranded;
18 g. the proper amount of damages, including punitive damages;
19 h. the proper amount of restitution;
20 i. the proper injunctive relief, including a corrective advertising campaign;
21 and
22 j. the proper amount of attorneys’ fees.

23 93. These common questions of law and fact predominate over questions that affect
24 only individual Class Members.

25 94. Plaintiff’s claims are typical of Class Members’ claims because they are based
26 on the same underlying facts, events, and circumstances relating to Defendant’s conduct.
27 Specifically, all Class Members, including Plaintiff, were subjected to the same misleading
28

1 and deceptive conduct when they purchased the challenged products, and suffered economic
 2 injury because the products were and are misrepresented. Absent Defendant's business
 3 practice of deceptively and unlawfully labeling its Product, Plaintiff and Class Members
 4 would not have purchased the Product.

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

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

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

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

16 **CAUSES OF ACTION**

17 **FIRST CAUSE OF ACTION**

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

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

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

22 100. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice."
 23 Cal. Bus. & Prof. Code § 17200.

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

Fraudulent

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

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

Unlawful

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

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

Unfair

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

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

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

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

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

5 109. 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.

9 110. 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.

12 111. 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.

15 112. 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.***

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

22 114. 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.

1 115. 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.*

4 116. 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.

7 117. 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.

11 118. 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.

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

17 120. 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.

20 121. 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.

THIRD CAUSE OF ACTION

Violations of the Consumer Legal Remedies Act,

Cal. Civ. Code §§ 1750 *et seq.*

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

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

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

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

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

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION

Breach of Express Warranties,

Cal. Com. Code § 2313(1)

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

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

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

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

FIFTH CAUSE OF ACTION

Breach of Implied Warranty of Merchantability,

Cal. Com. Code § 2314

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

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

1 136. Plaintiff and the Class bought the Product manufactured, advertised, and sold by
2 Defendant, as described herein.

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

6 138. However, Defendant breached that implied warranty in that the Product does not
7 aid in weight management and appetite control.

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

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

14 **PRAYER FOR RELIEF**

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

- 18 A. An Order declaring this action to be a proper class action, appointing
19 Plaintiff as class representative, and appointing undersigned counsel as
20 class counsel;
- 21 B. An Order requiring Defendant to bear the cost of class notice;
- 22 C. An Order compelling Defendant to conduct a corrective advertising
23 campaign;
- 24 D. An Order compelling Defendant to destroy all misleading and deceptive
25 advertising materials and product labels, and to recall all offending
26 Products;
- 27
28

- 1 E. An Order requiring Defendant to disgorge all monies, revenues, and profits
2 obtained by means of any wrongful act or practice;
3 F. An Order requiring Defendant to pay restitution to restore all funds acquired
4 by means of any act or practice declared by this Court to be an unlawful,
5 unfair, or fraudulent business act or practice, untrue or misleading
6 advertising, plus pre-and post-judgment interest thereon;
7 G. An Order requiring Defendant to pay actual and punitive damages where
8 permitted under law;
9 H. An award of attorneys' fees and costs; and
10 I. Any other and further relief that Court deems necessary, just, or proper.

11 **JURY DEMAND**

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

13
14 Dated: June 26, 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

EXHIBIT D

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

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

07/11/2017 at 01:03:00 PM

Clerk of the Superior Court
By E- Filing, Deputy Clerk

7 *Counsel for Plaintiff and the Proposed Class*

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO**

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

Plaintiff,

15 v.

16 VITAMIN SHOPPE INC.,
17

18 Defendant.

**CONSUMERS LEGAL REMEDIES
ACT VENUE AFFIDAVIT**

[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 11th day of July, 2017, in San Diego, California.

19
20
21
22
23
24
25
26
27
28


Paul K. Joseph

EXHIBIT E

SUM-100

SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

Vitamin Shoppe Inc.

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

Andrea Nathan, on behalf of herself, all others similarly situated, and the general public

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

ELECTRONICALLY FILED

Superior Court of California,
County of San Diego

06/26/2017 at 03:08:20 PM

Clerk of the Superior Court
By Carla Brennan, Deputy Clerk

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): San Diego Hall of Justice
330 West Broadway
San Diego, CA 92110

CASE NUMBER:
(Número del Caso):

37-2017-00023258-CU-BT-CTL

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Paul Joseph, 4125 W. Point Loma, Blvd. No. 206, San Diego CA 92110; 619-767-0356

DATE: 06/27/2017
(Fecha)

Clerk, by
(Secretario)

C. Brennan

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☒ on behalf of (specify): Vitamin Shoppe, Inc.
under: ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (specify):
4. ☐ by personal delivery on (date):

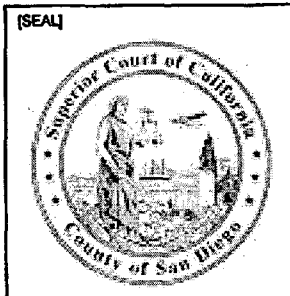


EXHIBIT F

POS-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Paul Joseph, 287057 Law Office of Paul K. Joseph, PC 4125 West Point loma blvd, No. 206 san diego, CA 92110 TELEPHONE NO.: (619) 767-0356 ATTORNEY FOR (Name):	FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 07/18/2017 at 12:07:00 PM Clerk of the Superior Court By E- Filing, Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Superior Court of California, San Diego County 330 W. Broadway San Diego, CA 92101-3409	CASE NUMBER: 37-2017-00023258-CU-BT-CTL
PLAINTIFF/PETITIONER: ANDREA NATHAN DEFENDANT/RESPONDENT: VITAMIN SHOPPE, INC.	Ref. No. or File No.:
PROOF OF SERVICE OF SUMMONS	

1. At the time of service I was a citizen of the United States, at least 18 years of age and not a party to this action. **BY FAX**
2. I served copies of: Complaint, Summons, Civil Case Cover Sheet, Notice of Case Assignment and Case Management Conference on Mandatory eFile Case, Statement of Venue, ADR Information Packet
3. a. Party served: Vitamin Shoppe, Inc.

b. Person Served: CSC - Becky DeGeorge - Person Authorized to Accept Service of Process

4. Address where the party was served: 2710 N Gateway Oaks Dr, Ste 150
Sacramento, CA 95833

5. I served the party
- a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on (date): 07/12/2017 (2) at (time): 1:54PM
6. The "Notice to the Person Served" (on the summons) was completed as follows:

d. on behalf of:

Vitamin Shoppe, Inc.
under: CCP 416.10 (corporation)

7. Person who served papers

- a. Name: Spenser G. Fritz
- b. Address: One Legal - 194-Marin
504 Redwood Blvd #223
Novato, CA 94947
- c. Telephone: 415-491-0606
- d. The fee for service was: \$ 39.95
- e I am:
- (3) registered California process server.
- (i) Employee or independent contractor.
- (ii) Registration No.: 2016-05
- (iii) County: Sacramento

8. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.
Date: 07/12/2017

Spenser G. Fritz
(NAME OF PERSON WHO SERVED PAPERS)


(SIGNATURE)

EXHIBIT G

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address). The Law Office of Paul K. Joseph, PC Paul K. Joseph (SBN 287057) 4125 W. Point Loma, Blvd. No. 206 San Diego CA 92110 TELEPHONE NO.: 619-767-0356 FAX NO.: ATTORNEY FOR (Name): Andrea Nathan		FOR COURT USE ONLY ELECTRONICALLY FILED Superior Court of California, County of San Diego 06/26/2017 at 03:08:20 PM Clerk of the Superior Court By Carla Brennan, Deputy Clerk	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY AND ZIP CODE: San Diego 92101 BRANCH NAME: Central - Hall of Justice		CASE NAME: Andrea Nathan v. Vitamin Shoppe, Inc.	
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)		<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	
<input type="checkbox"/> Counter		<input type="checkbox"/> Joinder	
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		CASE NUMBER 37-2017-00023258-CU-BT-CTL	
Judge Joel R. Wohlfeil		DEPT:	

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input checked="" type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
---	--	---

2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve c. <input type="checkbox"/> Substantial amount of documentary evidence	d. <input type="checkbox"/> Large number of witnesses e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court f. <input checked="" type="checkbox"/> Substantial postjudgment judicial supervision
--	---

3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☒ punitive

4. Number of causes of action (specify): Five

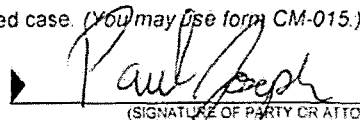
5. This case ☒ is ☐ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: June 26, 2016

Paul Joseph

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

CM-010

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death
Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/Wrongful Death
Product Liability (*not asbestos or toxic/environmental*) (24)
Medical Malpractice (45)
Medical Malpractice—Physicians & Surgeons
Other Professional Health Care Malpractice
Other PI/PD/WD (23)
Premises Liability (e.g., slip and fall)
Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Other PI/PD/WD

Non-PI/PD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)
Civil Rights (e.g., discrimination, false arrest) (*not civil harassment*) (08)
Defamation (e.g., slander, libel) (13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice (*not medical or legal*)
Other Non-PI/PD/WD Tort (35)

Employment

Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease Contract (*not unlawful detainer or wrongful eviction*)
Contract/Warranty Breach—Seller Plaintiff (*not fraud or negligence*)
Negligent Breach of Contract/Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections Case
Insurance Coverage (*not provisionally complex*) (18)
Auto Subrogation
Other Coverage

Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property (*not eminent domain, landlord/tenant, or foreclosure*)

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) (*if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential*)

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court Case Matter
Writ—Other Limited Court Case Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor
Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims (*arising from provisionally complex case type listed above*) (41)
Enforcement of Judgment
Enforcement of Judgment (20)
Abstract of Judgment (Out of County)
Confession of Judgment (*non-domestic relations*)
Sister State Judgment
Administrative Agency Award (*not unpaid taxes*)
Petition/Certification of Entry of Judgment on Unpaid Taxes
Other Enforcement of Judgment Case

Miscellaneous Civil Complaint RICO (27)

Other Complaint (*not specified above*) (42)
Declaratory Relief Only
Injunctive Relief Only (*non-harassment*)
Mechanics Lien
Other Commercial Complaint Case (*non-tort/non-complex*)
Other Civil Complaint (*non-tort/non-complex*)

Miscellaneous Civil Petition

Partnership and Corporate Governance (21)
Other Petition (*not specified above*) (43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult Abuse
Election Contest
Petition for Name Change
Petition for Relief From Late Claim
Other Civil Petition

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS: 330 W Broadway
 MAILING ADDRESS: 330 W Broadway
 CITY AND ZIP CODE: San Diego, CA 92101-3827
 BRANCH NAME: Central
 TELEPHONE NUMBER: (619) 450-7073

PLAINTIFF(S) / PETITIONER(S): Andrea Nathan

DEFENDANT(S) / RESPONDENT(S): Vitamin Shoppe Inc

ANDREA NATHAN VS VITAMIN SHOPPE INC [E-FILE]

**NOTICE OF CASE ASSIGNMENT AND CASE MANAGEMENT
CONFERENCE on MANDATORY eFILE CASE**

CASE NUMBER:

37-2017-00023258-CU-BT-CTL

CASE ASSIGNMENT

Judge: Joel R. Wohlfeil

Department: C-73

COMPLAINT/PETITION FILED: 06/26/2017

TYPE OF HEARING SCHEDULED	DATE	TIME	DEPT	JUDGE
Civil Case Management Conference	12/15/2017	01:30 pm	C-73	Joel R. Wohlfeil

A case management statement must be completed by counsel for all parties or self-represented litigants and timely filed with the court at least 15 days prior to the initial case management conference. (San Diego Local Rules, Division II, CRC Rule 3.725).

All counsel of record or parties in pro per shall appear at the Case Management Conference, be familiar with the case, and be fully prepared to participate effectively in the hearing, including discussions of ADR* options.

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT), THE ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION FORM (SDSC FORM #CIV-730), A STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (ADR) (SDSC FORM #CIV-359), AND OTHER DOCUMENTS AS SET OUT IN SDSC LOCAL RULE 2.1.5.

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil cases consist of all civil cases except: small claims proceedings, civil petitions, unlawful detainer proceedings, probate, guardianship, conservatorship, juvenile, parking citation appeals, and family law proceedings.

COMPLAINTS: Complaints and all other documents listed in SDSC Local Rule 2.1.5 must be served on all named defendants.

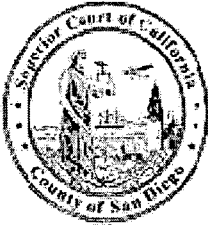
DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than 15 day extension which must be in writing and filed with the Court.) (SDSC Local Rule 2.1.6)

JURY FEES: In order to preserve the right to a jury trial, one party for each side demanding a jury trial shall pay an advance jury fee in the amount of one hundred fifty dollars (\$150) on or before the date scheduled for the initial case management conference in the action.

MANDATORY eFILE: Case assigned to mandatory eFile program per CRC 3.400-3.403 and SDSC Rule 2.4.11. All documents must be eFiled at www.onelegal.com. Refer to General Order in re procedures regarding electronically imaged court records, electronic filing, and access to electronic court records in civil and probate cases or guidelines and procedures.

COURT REPORTERS: Court reporters are not provided by the Court in Civil cases. See policy regarding normal availability and unavailability of official court reporters at www.sdcourt.ca.gov.

*ALTERNATIVE DISPUTE RESOLUTION (ADR): THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO TRIAL, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. PARTIES MAY FILE THE ATTACHED STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (SDSC FORM #CIV-359).



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION

CASE NUMBER: 37-2017-00023258-CU-BT-CTL

CASE TITLE: Andrea Nathan vs Vitamin Shoppe Inc [E-FILE]

NOTICE: All plaintiffs/cross-complainants in a general civil case are required to serve a copy of the following three forms on each defendant/cross-defendant, together with the complaint/cross-complaint:

- (1) this Alternative Dispute Resolution (ADR) Information form (SDSC form #CIV-730),
- (2) the Stipulation to Use Alternative Dispute Resolution (ADR) form (SDSC form #CIV-359), and
- (3) the Notice of Case Assignment form (SDSC form #CIV-721).

Most civil disputes are resolved without filing a lawsuit, and most civil lawsuits are resolved without a trial. The courts, community organizations, and private providers offer a variety of Alternative Dispute Resolution (ADR) processes to help people resolve disputes without a trial. The San Diego Superior Court expects that litigants will utilize some form of ADR as a mechanism for case settlement before trial, and it may be beneficial to do this early in the case.

Below is some information about the potential advantages and disadvantages of ADR, the most common types of ADR, and how to find a local ADR program or neutral. A form for agreeing to use ADR is attached (SDSC form #CIV-359).

Potential Advantages and Disadvantages of ADR

ADR may have a variety of advantages or disadvantages over a trial, depending on the type of ADR process used and the particular case:

Potential Advantages

- Saves time
- Saves money
- Gives parties more control over the dispute resolution process and outcome
- Preserves or improves relationships

Potential Disadvantages

- May take more time and money if ADR does not resolve the dispute
- Procedures to learn about the other side's case (discovery), jury trial, appeal, and other court protections may be limited or unavailable

Most Common Types of ADR

You can read more information about these ADR processes and watch videos that demonstrate them on the court's ADR webpage at <http://www.sdcourt.ca.gov/adr>.

Mediation: A neutral person called a "mediator" helps the parties communicate in an effective and constructive manner so they can try to settle their dispute. The mediator does not decide the outcome, but helps the parties to do so. Mediation is usually confidential, and may be particularly useful when parties want or need to have an ongoing relationship, such as in disputes between family members, neighbors, co-workers, or business partners, or when parties want to discuss non-legal concerns or creative resolutions that could not be ordered at a trial.

Settlement Conference: A judge or another neutral person called a "settlement officer" helps the parties to understand the strengths and weaknesses of their case and to discuss settlement. The judge or settlement officer does not make a decision in the case but helps the parties to negotiate a settlement. Settlement conferences may be particularly helpful when the parties have very different ideas about the likely outcome of a trial and would like an experienced neutral to help guide them toward a resolution.

Arbitration: A neutral person called an "arbitrator" considers arguments and evidence presented by each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are usually relaxed. If the parties agree to binding arbitration, they waive their right to a trial and agree to accept the arbitrator's decision as final. With nonbinding arbitration, any party may reject the arbitrator's decision and request a trial. Arbitration may be appropriate when the parties want another person to decide the outcome of their dispute but would like to avoid the formality, time, and expense of a trial.

Other ADR Processes: There are several other types of ADR which are not offered through the court but which may be obtained privately, including neutral evaluation, conciliation, fact finding, mini-trials, and summary jury trials. Sometimes parties will try a combination of ADR processes. The important thing is to try to find the type or types of ADR that are most likely to resolve your dispute. Be sure to learn about the rules of any ADR program and the qualifications of any neutral you are considering, and about their fees.

Local ADR Programs for Civil Cases

Mediation: The San Diego Superior Court maintains a Civil Mediation Panel of approved mediators who have met certain minimum qualifications and have agreed to charge \$150 per hour for each of the first two (2) hours of mediation and their regular hourly rate thereafter in court-referred mediations.

On-line mediator search and selection: Go to the court's ADR webpage at www.sdcourt.ca.gov/adr and click on the "Mediator Search" to review individual mediator profiles containing detailed information about each mediator including their dispute resolution training, relevant experience, ADR specialty, education and employment history, mediation style, and fees and to submit an on-line Mediator Selection Form (SDSC form #CIV-005). The Civil Mediation Panel List, the Available Mediator List, individual Mediator Profiles, and Mediator Selection Form (CIV-005) can also be printed from the court's ADR webpage and are available at the Mediation Program Office or Civil Business Office at each court location.

Settlement Conference: The judge may order your case to a mandatory settlement conference, or voluntary settlement conferences may be requested from the court if the parties certify that: (1) settlement negotiations between the parties have been pursued, demands and offers have been tendered in good faith, and resolution has failed; (2) a judicially supervised settlement conference presents a substantial opportunity for settlement; and (3) the case has developed to a point where all parties are legally and factually prepared to present the issues for settlement consideration and further discovery for settlement purposes is not required. Refer to SDSC Local Rule 2.2.1 for more information. To schedule a settlement conference, contact the department to which your case is assigned.

Arbitration: The San Diego Superior Court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. Refer to SDSC Local Rules Division II, Chapter III and Code Civ. Proc. § 1141.10 et seq or contact the Arbitration Program Office at (619) 450-7300 for more information.

More information about court-connected ADR: Visit the court's ADR webpage at www.sdcourt.ca.gov/adr or contact the court's Mediation/Arbitration Office at (619) 450-7300.

Dispute Resolution Programs Act (DRPA) funded ADR Programs: The following community dispute resolution programs are funded under DRPA (Bus. and Prof. Code §§ 465 et seq.):

- In Central, East, and South San Diego County, contact the National Conflict Resolution Center (NCRC) at www.ncrconline.com or (619) 238-2400.
- In North San Diego County, contact North County Lifeline, Inc. at www.nclifeline.org or (760) 726-4900.

Private ADR: To find a private ADR program or neutral, search the Internet, your local telephone or business directory, or legal newspaper for dispute resolution, mediation, settlement, or arbitration services.

Legal Representation and Advice

To participate effectively in ADR, it is generally important to understand your legal rights and responsibilities and the likely outcomes if you went to trial. ADR neutrals are not allowed to represent or to give legal advice to the participants in the ADR process. If you do not already have an attorney, the California State Bar or your local County Bar Association can assist you in finding an attorney. Information about obtaining free and low cost legal assistance is also available on the California courts website at www.courtinfo.ca.gov/selfhelp/lowcost.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY, STATE, & ZIP CODE: San Diego, CA 92101-3827 BRANCH NAME: Central	FOR COURT USE ONLY
PLAINTIFF(S): Andrea Nathan	
DEFENDANT(S): Vitamin Shoppe Inc	
SHORT TITLE: ANDREA NATHAN VS VITAMIN SHOPPE INC [E-FILE]	
STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (ADR)	CASE NUMBER: 37-2017-00023258-CU-BT-CTL

Judge: Joel R. Wohlfeil

Department: C-73

The parties and their attorneys stipulate that the matter is at issue and the claims in this action shall be submitted to the following alternative dispute resolution (ADR) process. Selection of any of these options will not delay any case management timelines.

- | | |
|---|--|
| <input type="checkbox"/> Mediation (court-connected) | <input type="checkbox"/> Non-binding private arbitration |
| <input type="checkbox"/> Mediation (private) | <input type="checkbox"/> Binding private arbitration |
| <input type="checkbox"/> Voluntary settlement conference (private) | <input type="checkbox"/> Non-binding judicial arbitration (discovery until 15 days before trial) |
| <input type="checkbox"/> Neutral evaluation (private) | <input type="checkbox"/> Non-binding judicial arbitration (discovery until 30 days before trial) |
| <input type="checkbox"/> Other (specify e.g., private mini-trial, private judge, etc.): _____ | |

It is also stipulated that the following shall serve as arbitrator, mediator or other neutral: (Name) _____

Alternate neutral (for court Civil Mediation Program and arbitration only): _____

Date: _____

Date: _____

Name of Plaintiff

Name of Defendant

Signature

Signature

Name of Plaintiff's Attorney

Name of Defendant's Attorney

Signature

Signature

If there are more parties and/or attorneys, please attach additional completed and fully executed sheets.

It is the duty of the parties to notify the court of any settlement pursuant to Cal. Rules of Court, rule 3.1385. Upon notification of the settlement, the court will place this matter on a 45-day dismissal calendar.

No new parties may be added without leave of court.

IT IS SO ORDERED.

Dated: 06/27/2017

JUDGE OF THE SUPERIOR COURT

EXHIBIT H

1 **TO ALL PARTIES AND TO THE CLERK OF THE SUPERIOR COURT:**

2 **PLEASE TAKE NOTICE** that Defendant Vitamin Shoppe, Inc. filed a Notice of Removal
3 in the United States District Court, for the Southern District of California, pursuant to 28 U.S.C. §§
4 1332, 1446, and 1453. A true and correct copy of the Notice of Removal is attached as **Exhibit 1**
5 (without exhibits).

6 **PLEASE TAKE FURTHER NOTICE** that pursuant to 28 U.S.C. § 1446(d), the filing of
7 the Notice of Removal in the United States District Court, together with the filing of this notice with
8 this Court, effects removal of this action. Therefore, this Court may proceed no further with
9 Plaintiffs' action unless and until the action is remanded.

10 Dated: August 8, 2017

COZEN O'CONNOR

11
12 By: 

13 Amy B. Alderfer
14 Brett N. Taylor
15 Attorneys for Defendant
16 Vitamin Shoppe, Inc.
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

Amy B. Alderfer (SBN 205482)
aalderfer@cozen.com
Brett N. Taylor (SBN 274400)
btaylor@cozen.com
COZEN O'CONNOR
601 S. Figueroa Street, Suite 3700
Los Angeles, CA 90017
Telephone: 213.892.7900
Facsimile: 213.892.7999

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT AND COUNSEL OF RECORD FOR ALL PARTIES:

PLEASE TAKE NOTICE that Defendant Vitamin Shoppe, Inc. (“Defendant” or “Vitamin Shoppe”) hereby removes this action filed in the California Superior Court for the County of San Diego (“State Court”) to the United States District Court for the Southern District of California (“District Court”) pursuant to 28 U.S.C. §§ 1332, 1446, and 1453. Defendant’s removal of this matter is based on the grounds set forth below.

I. BACKGROUND

1. Plaintiff Andrea Nathan (“Plaintiff” or “Nathan”) originally filed suit against Defendant on May 8, 2017 in the Southern District of California, case number 17CV0948 BEN KSC (hereinafter the “Federal Action”). The Federal Action was assigned to the Honorable Roger T. Benitez. Styled as a putative class action, the Federal Action pleaded claims against Defendant for Violations of Cal. Bus. & Prof. Code §§17200 *et seq.*; Cal. Bus. & Prof. Code §§ 17500 *et seq.*, Cal. Civil Code §§ 1750 *et seq.* and breach of express and implied warranties. The Federal Action sought a class of persons in California only. (Exh. A, ¶ 88.)

2. On June 7, 2017, Defendant filed a Motion to Dismiss the Federal Action which was set for hearing on July 10, 2017.

3. On June 26, 2017, the day Plaintiff’s Opposition to the Motion to Dismiss was due, Plaintiff filed a Notice of Voluntary Dismissal of the Federal Action pursuant to Federal Rule of Civil Procedure 41(a). (Exh. B.)

4. That very same day (June 26, 2017), Plaintiff filed a putative class action, case number 37-2017-00023258-C-BT-CTL, in the Superior Court of the State of California, County of San Diego (the “State Action”) against Vitamin Shoppe. (Exh. C.) The State Action pleads causes of action for: Violations of Cal. Bus. & Prof. Code §§17200 *et seq.*; Cal. Bus. & Prof. Code §§ 17500 *et seq.*, Cal. Civil Code §§ 1750 *et seq.* and breach of express and implied warranties.

1 5. The State Action seeks a nationwide class. (Exh. C, ¶ 90.)

2 6. The State Action asserts claims against Vitamin Shoppe relating to its
3 Garcinia Cambogia extract, also known as HCA (the “Product”). Essentially, Plaintiff
4 claims that the Product is ineffective. (Exh. C, *passim*.) The Federal Action involved
5 the same product and basic claims. (Exh. A, *passim*.)

6 7. Plaintiff now seeks injunctive relief as well as disgorgement, punitive
7 damages, costs, and attorney’s fees in the State Action. (Exh. C, ¶ 141.)

8 8. On July 11, 2017, Plaintiff filed a “Consumers Legal Remedies Act
9 Venue Affidavit” in the State Action. (Exh. D.)

10 9. Plaintiff served the summons for the State Action on Vitamin Shoppe on
11 July 12, 2017. (Exhs. E, F.) As this Notice of Removal is filed within 30 days of
12 service of the State Action Complaint on Defendant, it is timely under 28 U.S.C. §§
13 1446(b) and 1453. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.* 526 U.S. 344,
14 354 (1999).

15 **II. THE COURT HAS SUBJECT MATTER JURISDICTION UNDER CAFA**

16 10. The Court has original jurisdiction over this action under the Class
17 Action Fairness Act (“CAFA”), codified in relevant part in 28 U.S.C. § 1332(d)(2),
18 for the following reasons: (i) any member of a class of plaintiffs is a citizen of a State
19 different from any defendant, (ii) the amount in controversy exceeds \$5,000,000,
20 exclusive of interest and costs, and (iii) the number of members of all proposed
21 plaintiff classes in the aggregate is more than 100. 28 U.S.C. § 1332(d)(5)(B).

22 **A. Diversity of Citizenship Exits.**

23 11. The diversity of citizenship for removal under CAFA is proper when
24 “any member of a class of plaintiffs is a citizen of a State different from any
25 defendant.” 28 U.S.C. § 1332(d)(2)(A). Thus, in order to satisfy CAFA’s diversity
26 requirement, the party seeking removal need only show that minimal diversity exists,
27 that is, one putative class member is a citizen of a different state than one defendant.
28 *Id.*; see also *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. &*

Serv. Workers Int’l Union, AFL-CIO, CLC v. Shell Oil Co., 602 F.3d 1087, 1090-1091 (9th Cir. 2010) (noting that CAFA provides expanded original diversity jurisdiction for class actions meeting the amount in controversy and minimal diversity and numerosity requirements pursuant to 28 U.S.C. § 1332(d)(2)); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 684 (9th Cir. 2005).

1. Plaintiff is a Citizen of California.

12. To establish citizenship for diversity purposes, a natural person must be both (1) a citizen of the United States, and (2) domiciled in the state. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983). “A natural person is deemed to be a citizen of the state where he or she is domiciled, which is where he or she resides with the intention to remain.” *Zavala v. Deutsche Bank Trust Co. Ams.*, 2013 U.S. Dist. LEXIS 96719 (N.D. Cal. July 10, 2013) (citing *Kantor*, 704 F.2d at 1090 and *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001)). For purposes of diversity of citizenship, citizenship is determined by the individual’s domicile at the time the lawsuit is filed. *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986) (citing *Hill v. Roller*, 615 F.2d 886, 889 (9th Cir. 1980)).

13. Plaintiff’s Complaint alleges that she “resides in” San Diego, California. (Exh. C, ¶¶ 5, 11.)

14. In a Consumer Legal Remedies Act Venue Affidavit filed in the State Action, Plaintiff’s counsel declared under penalty of perjury that Plaintiff “lives . . . within the County of San Diego.” (Exh. D.)

15. Thus, based on Plaintiff’s own allegations, one can conclude that she is a citizen of California for purposes of diversity jurisdiction. Plaintiff does not allege any alternative state of citizenship.

2. Defendant Is Not A Citizen of California.

16. A corporation is a citizen of the state where (i) it has been incorporated; and (ii) its principal place of business is located. 28 U.S.C. § 1332(c). The principal place of business for a corporation is determined by the location of its “nerve center,”

1 which includes the location of its headquarters and the location where its “officers
2 direct, control, and coordinate the corporation's activities.” *Hertz Corp. v. Friend*, 559
3 U.S. 77, 78 (2010).

4 17. Plaintiff alleges that Defendant is incorporated in and existing under the
5 laws of the State of Delaware. (Exh. C, ¶ 6.) Defendant confirms that this allegation
6 is correct. (Declaration of Carlos Lopez (“Lopez Decl.”) ¶ 3.)

7 18. Plaintiff also alleges that Defendant’s principal place of business is in
8 New Jersey. (Exh. C, ¶ 6.) Defendant confirms that this is correct. (Lopez Decl. ¶ 4.)

9 19. Defendant is not now, nor ever has been, a citizen and/or resident of the
10 state of California within the meaning citizenship and/or residency relating to the
11 removal of class actions. (Lopez Decl. ¶ 5.) 28 U.S.C. § 1332(c)(1); *Hertz*, 559 U.S.
12 at 97. Defendant is not considered to be a citizen of California for the purposes of
13 determining diversity.

14 20. Accordingly, based on the Complaint, at least one member of the putative
15 class is a citizen of a different state than Defendant and the minimal diversity
16 requirement is satisfied. 28 U.S.C. § 1332(d)(2)(A).

17 **B. The Size of the Proposed Class Exceeds One Hundred (100)**
18 **Members.**

19 21. According to the Complaint, the proposed class includes “all persons in
20 the United States who, on or after from June 26, 2013 . . . purchased, for personal or
21 household use, and not for resale or distribution purposes Vitamin Shoppe’s Garcinia
22 Cambogia.” (Exh. C, ¶ 90.) Plaintiff also refers to the class as being “so numerous”
23 that individual joinder is impractical. (Exh. C, ¶ 91.)

24 22. Based on Plaintiff’s own allegations, there is no doubt that the number of
25 consumers who purchased the Product on a nationwide basis over the last four years
26 far exceeds 100 persons. Defendant’s own research confirms this. (Lopez Decl. ¶ 6.)

27 23. Accordingly, the putative class is well in excess of one hundred (100)
28 persons in the aggregate as required under CAFA. 28 U.S.C. § 1332(d)(5)(B).

C. The Amount-In-Controversy Requirement Is Satisfied.

24. The U.S. Supreme Court held that, as specified in 28 U.S.C. § 1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions. *Dart Cherokee Basin Operating Co. LLC v. Owens*, 135 S. Ct. 547, 554 (U.S. 2014).

25. Plaintiff defines the class period as beginning June 26, 2013 and going forward and alleges a nationwide class. (Exh. C, ¶ 90.)

26. Defendant's review of sales information for this Product on a nationwide basis over the last four years demonstrates that the nationwide sales for the product at issue for the time specified exceeds \$5,000,000. (Lopez Decl. ¶ 6.)

D. Plaintiff's Complaint Also Seeks the Recovery of Attorneys' Fees and Punitive Damages.

27. Attorneys' fees are properly included in determining the amount in controversy. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir. 2007) (holding that "the amount-in-controversy requirement excludes only 'interest and costs' and therefore includes attorneys' fees").

28. Plaintiff includes requests for attorneys' fees in its Complaint. (Exh. C, ¶ 92(j) and Prayer for Relief ¶ H.)

29. The Ninth Circuit has recognized a "25% [] benchmark award for attorney fees." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

30. Further, Plaintiff seeks punitive damages, which are to be included in calculating the amount in controversy. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001) ("It is well established that punitive damages are part of the amount in controversy in a civil action."); accord *Romo v. FFG Ins. Co.*, 397 F. Supp. 2d 1237, 1240 (C.D. Cal. 2005) ("In an amount in controversy inquiry for diversity purposes, punitive damages, where authorized, are counted toward the requirement.")

1 31. Here Plaintiff seeks punitive damages for a nationwide class for a
2 product which Plaintiff claims Defendant labeled, marketed and sold knowing it is
3 ineffective.

4 32. The inclusion of attorneys' fees and punitive damages is unnecessary for
5 purposes of determining the amount in controversy in this action, because, as
6 discussed above, Plaintiff's alleged causes of action alone, without the inclusion of
7 attorneys' fees, well exceeds the CAFA removal requirements. However, in any
8 event, any calculation of attorneys' fees and punitive damages on a putative
9 nationwide class would only add to the amount in controversy.

10 **III. THE OTHER PREREQUISITES FOR REMOVAL ARE SATISFIED**

11 33. Consent of other parties is not required for removal under CAFA's mass
12 action jurisdiction. *See* 28 U.S.C. § 1453(b). Additionally, here there are no parties
13 other than Plaintiff and removing Defendant.

14 34. This Court is a proper venue for this action pursuant to 28 U.S.C. §
15 1441(a). The United States District Court for the Southern District of California
16 embraces the County of San Diego, in which the State Action is now pending. *See* 28
17 U.S.C. § 84(c)(2).

18 35. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and
19 orders served upon Defendant, including the summons and Complaint, is attached
20 hereto as Exhibits C-G.

21 36. Pursuant to 28 U.S.C. § 1446(d), a Notice of Filing Notice of Removal,
22 attached hereto as Exhibit H, together with the Notice of Removal, will be served
23 upon counsel for Plaintiff and will be filed with the clerk of the Superior Court for the
24 County of San Diego.

1 Dated: August 8, 2017

COZEN O'CONNOR

2
3 By: /s/ Amy B. Alderfer
4 Amy B. Alderfer
5 Brett N. Taylor
Attorneys for Defendant
VITAMIN SHOPPE, INC.

6 LEGAL\32021833\1
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **601 South Figueroa Street, Suite 3700, Los Angeles, California 90017.**

On August 8, 2017, I served the **NOTICE TO STATE COURT AND ADVERSE PARTIES OF REMOVAL TO FEDERAL COURT AND OF STAY OF STATE COURT PROCEEDINGS** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope addressed as follows:

Paul K. Joseph, Esq.
THE LAW OFFICE OF PAUL K. JOSEPH, PC
4125 W. Pt. Loma Blvd., No. 206
San Diego, California 92110

Attorneys for Plaintiff and the Proposed Classes
Tel.: (619) 767-0356;
Fax: (619) 331-2943
Email: paul@pauljosephlaw.com

☒ **(BY FIRST CLASS MAIL)**

☐ I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

☒ I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

☐ **(BY OVERNIGHT DELIVERY)**

I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **(BY FACSIMILE)**

I transmitted the foregoing document(s) by facsimile sending number. Pursuant to rule 2009(i)(4), I caused the machine to print a transmission record of the transmission, a true and correct copy of which is attached to this declaration.

☐ **(BY PERSONAL SERVICE)**

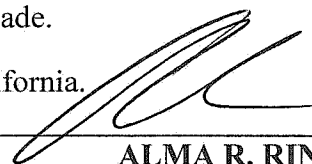
The envelope was delivered by hand to the offices listed above.

Executed on August 8, 2017, at Los Angeles, California.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 8, 2017, at Los Angeles, California.



ALMA R. RINCON

1 Amy B. Alderfer (SBN 205482)
aalderfer@cozen.com
2 Brett N. Taylor (SBN 274400)
btaylor@cozen.com
3 COZEN O'CONNOR
601 S. Figueroa Street, Suite 3700
4 Los Angeles, CA 90017
Telephone: 213.892.7900
5 Facsimile: 213.892.7999

6 Attorneys for Defendant
VITAMIN SHOPPE, INC.

7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ANDREA NATHAN, on behalf of
12 herself, all others similarly situated and
the general public,

13 Plaintiffs,

14 vs.

15 VITAMIN SHOPPE, INC.,

16 Defendant.

Case No. **'17CV1590 DMS RBB**

**DECLARATION OF CARLOS
LOPEZ, ESQ. IN SUPPORT OF
DEFENDANT VITAMIN SHOPPE,
INC.'S NOTICE OF REMOVAL**

[28 U.S.C. § 1332, 1446, AND 1453]

DECLARATION OF CARLOS LOPEZ, ESQ.

I, Carlos Lopez, Esq., declare as follows:

1. I am an attorney at law licensed to practice in the state of New York and the state of New Jersey. I am Associate General Counsel at The Vitamin Shoppe. This declaration is submitted in support of Defendant Vitamin Shoppe, Inc.'s ("Defendant" or "Vitamin Shoppe") Notice of Removal.

2. The following facts are within my personal knowledge and, if called as a witness herein, I can and will competently testify thereto.

3. Defendant is incorporated in and existing under the laws of the state of Delaware.

4. Defendant's principal place of business is in New Jersey.

5. Defendant is not now, nor ever has been, a citizen and/or resident of the state of California.

6. I have reviewed the nationwide sales history for the product identified in Plaintiff's lawsuit, Garcinia Cambogia extract, also known as HCA (the "Product"). The number of consumers who purchased the Product on a nationwide basis over the last four years far exceeds 100 persons. Additionally, the nationwide sales of the Product for this same time period exceeds \$5,000,000.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 1st day of August, 2017 at Secaucus, New Jersey.

By: 

Carlos Lopez, Esq.

LEGAL31979580\1

1 Amy B. Alderfer (SBN 205482)
aalterfer@cozen.com
2 Brett N. Taylor (SBN 274400)
btaylor@cozen.com
3 COZEN O'CONNOR
601 S. Figueroa Street, Suite 3700
4 Los Angeles, CA 90017
Telephone: 213.892.7900
5 Facsimile: 213.892.7999

6 Attorneys for Defendant
VITAMIN SHOPPE, INC.

7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ANDREA NATHAN, on behalf of
herself, all others similarly situated and
12 the general public,

13 Plaintiffs,

14 vs.

15 VITAMIN SHOPPE, INC.,

16 Defendant.
17
18
19
20
21
22
23
24
25
26
27
28

Case No. '17CV1590 DMS RBB

**DEFENDANT VITAMIN SHOPPE,
INC.'S PROOF OF SERVICE**

PROOF OF SERVICE

**STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **601 South Figueroa Street, Suite 3700, Los Angeles, California 90017.**

On August 8, 2017, I served the following documents:

- 1. DEFENDANT VITAMIN SHOPPE, INC.'S NOTICE OF REMOVAL;**
- 2. DECLARATION OF CARLOS LOPEZ, ESQ. IN SUPPORT OF**
- DEFENDANT VITAMIN SHOPPE, INC.'S NOTICE OF REMOVAL;**
- 3. CIVIL COVER SHEET;**
- 4. DEFENDANT VITAMIN SHOPPE INC.'S NOTICE OF PARTY**
- WITH FINANCIAL INTEREST; AND**
- 5. NOTICE OF RELATED CASES.**

on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope addressed as follows:

Paul K. Joseph, Esq.
THE LAW OFFICE OF PAUL K.
JOSEPH, PC
4125 W. Pt. Loma Blvd., No. 206
San Diego, California 92110

*Attorneys for Plaintiff and the Proposed
Classes*
Tel.: (619) 767-0356;
Fax: (619) 331-2943
Email: paul@pauljosephlaw.com

☒ **(BY FIRST CLASS MAIL)**

☐ I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

☒ I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

☐ **(BY OVERNIGHT DELIVERY)**

I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons above. I placed the envelope or

1 package for collection and overnight delivery at an office or a regularly utilized
2 drop box of the overnight delivery carrier.

3 ☐ **(BY FACSIMILE)**

4 I transmitted the foregoing document(s) by facsimile sending number. Pursuant
5 to rule 2009(i)(4), I caused the machine to print a transmission record of the
6 transmission, a true and correct copy of which is attached to this declaration.

7 ☐ **(BY PERSONAL SERVICE)**

8 The envelope was delivered by hand to the offices listed above.

9 Executed on August 8, 2017, at Los Angeles, California.

10 ☐ **(STATE)** I declare under penalty of perjury under the laws of the State of
11 California that the foregoing is true and correct.

12 ☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and
13 correct, and that I am employed at the office of a member of the
14 bar of this Court at whose direction the service was made.

15 Executed on August 8, 2017, at Los Angeles, California.

16 
17 _____
18 ALMA R. RINCON
19
20
21
22
23
24
25
26
27
28