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

14 MICHAEL TUBBS, EBONY BAKER,  
15 STACY PORRAS, JOSH HALL,

16 Plaintiff,

17 v.

18 ADVOCARE INTERNATIONAL, LP &  
19 DOES 1-10,

20 Defendant.

CASE NO. 2:17-cv-4454

**NOTICE OF REMOVAL**

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**NOTICE OF REMOVAL OF ACTION TO FEDERAL COURT**

TO THE CLERK OF THE ABOVE-TITLED COURT:

PLEASE TAKE NOTICE that Defendant AdvoCare International, L.P.  
("AdvoCare"), by and through its undersigned counsel, hereby removes the above-  
captioned action from the Superior Court of the State of California for the County  
of Los Angeles, in which it is now pending, to the United States District Court for  
the Central District of California, pursuant to 28 U.S.C. §§ 1441, 1446, and 1453,  
on the grounds that federal jurisdiction exists under the Class Action Fairness Act

1 (“CAFA”), 28 U.S.C. § 1332(d). Pursuant to 28 U.S.C. § 1446(a), set forth below  
 2 is a statement of the grounds for removal, and attached hereto is a copy of all  
 3 process, pleadings, and orders served to date in this case.

#### 4 **I. PROCEDURAL HISTORY**

5 1. On March 28, 2017, Plaintiffs Michael Tubbs, Ebony Baker, Stacy  
 6 Porras, and Josh Hall (collectively, “Plaintiffs”), individually and on behalf of all  
 7 others similarly situated, filed this action, captioned *Michael Tubbs, Ebony Baker,*  
 8 *Stacy Porras, Josh Hall v. AdvoCare International, LP & DOES 1-10*, Civ. Action  
 9 No. BC 655398, in the Superior Court of the State of California for the County of  
 10 Los Angeles (the “Action”). A true and correct copy of Plaintiffs’ Summons and  
 11 Complaint for Damages and Equitable Relief (the “Complaint”) is attached hereto  
 12 as “Exhibit A.”

13 2. Service of the Summons and Complaint was completed on April 26,  
 14 2017, when AdvoCare executed a Notice and Acknowledgement of Receipt  
 15 pursuant to Cal. Civ. Code § 415.30. A true and correct copy of the executed  
 16 Notice and Acknowledgment of Receipt is attached hereto as “Exhibit B.”

17 3. On May 16, 2017, AdvoCare accepted service of Plaintiffs’ First  
 18 Amended Complaint for Damages and Equitable Relief, filed May 5, 2017 (the  
 19 “Amended Complaint”). True and correct copies of the Amended Complaint and  
 20 an email thread, dated June 13, 2017, between AdvoCare’s counsel and Plaintiffs’  
 21 counsel regarding acceptance of service are attached hereto as “Exhibit C” and  
 22 “Exhibit D,” respectively.

23 4. On June 13, 2017, Plaintiffs’ counsel emailed AdvoCare’s counsel the  
 24 following orders and notice from the Superior Court of California: (1) a Court  
 25 Order Regarding Newly Filed Class Action, dated April 25, 2017; (2) an Initial  
 26 Status Conference Order (Complex Litigation Program), dated April 25, 2017; and  
 27 (3) a Notice Re: Continuance of Hearing, dated May 16, 2017. *See* Ex. D at p. 1.  
 28 True and correct copies of each of the foregoing orders and notice are attached

hereto as “Exhibit E,” “Exhibit F,” and “Exhibit G,” respectively.

5. The Amended Complaint alleges a variety of claims against AdvoCare arising out of its marketing and sale of a variety of products AdvoCare collectively refers to as the “24-Day Challenge” (the “24-Day Products”), and also a product called Spark (together with the 24-Day Products, the “Products”). *See* Am. Compl. ¶¶ 1, 3. Based on these Products, Plaintiffs assert claims for alleged violations of California’s Consumer Legal Remedies Act, False Advertising Law, Unfair Competition Law, as well as for alleged breaches of implied and express warranty and unjust enrichment. *See id.* ¶¶ 2, 47-99.

6. The Amended Complaint purports to seek relief on behalf of “[a]ll individuals in California who purchased the 24-Day Challenge products within four (4) years of filing this lawsuit” (the “24-Day Challenge Class”), and also on behalf of “[a] sub Class of all individuals in California who purchased Spark within four (4) years of filing this lawsuit” (the “Spark Class,” and, together with the 24-Day Challenge Class, the “Classes”). *Id.* at ¶¶ 15(a)-(b). The relief sought includes: (i) restitution; (ii) injunctive relief; (iii) refund of the purchase price of the Products; (iv) consequential and incidental damages; (v) disgorgement; (vi) prejudgment interest; and (vii) costs, expenses, and attorneys’ fees. *Id.* at ¶¶ 53, 57, 59, 72, 78, 85, 92-93, 99, & Request for Judgment ¶¶ 2-6.

7. AdvoCare has not yet filed an Answer or other responsive pleading to the Complaint or Amended Complaint, and no discovery has issued or been commenced in this Action.

8. The undersigned counsel has been retained to represent AdvoCare in this Action.

## **II. REMOVAL IS PROPER BECAUSE THIS COURT HAS JURISDICTION UNDER CAFA.**

9. AdvoCare files this Notice of Removal pursuant to CAFA, which grants federal courts original subject matter jurisdiction over class actions and

putative class actions in which: (1) the class has more than 100 members; (2) the parties are minimally diverse; and (3) the amount in controversy exceeds \$5,000,000. *See Gutierrez v. Stericycle, Inc.*, No. LA CV15-08187 JAK (JEMx), 2017 WL 599412, at \*9 (C.D. Cal. Feb. 14, 2017); 28 U.S.C. § 1332(d)(2). This Action satisfies all three of CAFA’s requirements.

10. First, the putative Classes consist of at least 100 members. Plaintiffs contend that the 24-Day Challenge Class and the Spark Class each amount to “more than sixty.” *See* Am. Compl. ¶¶ 15, 18, 20. Based on its own information, AdvoCare advises the Court that the putative Classes for purchasers of the 24-Day Products and Spark in California during the period of March 2013 through March 2017 both number into the tens of thousands. *See* Declaration of Robert White in Support of Defendant AdvoCare International, L.P.’s Notice of Removal, dated June 14, 2017 (“White Decl.,” attached hereto as “Exhibit H”), ¶ 9.

11. Second, at least one class member and one defendant are citizens of different states: Plaintiffs Michael Tubbs, Stacy Porras, and “John Hall” [sic] are each citizens of California, while AdvoCare is a Delaware limited partnership and has its principal place of business in Plano, Texas. Am. Compl. ¶¶ 9, 11-13; White Decl. ¶ 3. Under § 1332(d)(10), “[f]or purposes of this subsection [*i.e.*, § 1332(d)] and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.” *See also Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1028 (9th Cir. 2009) (for purposes of CAFA, “[a] limited partnership or a corporation is a citizen of (1) the state under whose laws it is organized or incorporated; and (2) the state of its principal place of business.”) (citation omitted); *see also Moss v. Infinity Ins. Co.*, No. 15-CV-03456-JSC, 2015 WL 7351395, at \*2, n. 1 (N.D. Cal. Nov. 20, 2015) (noting that the “only exception” to the rule that partnerships, limited liability companies, and other unincorporated associations take their citizenship from that of their owners and members “is for

1 class actions brought pursuant to [CAFA], 28 U.S.C. § 1332(d)(10)”). Therefore,  
2 AdvoCare is a citizen of Delaware and Texas for purposes of CAFA removal, and  
3 there is minimal diversity between it and Plaintiffs Tubbs, Porras, and Hall.<sup>1</sup>

4 12. Third, the amount in controversy in this Action exceeds \$5,000,000 in  
5 the aggregate, exclusive of interest and costs. *See* 28 U.S.C. 1332(d)(2), (d)(6).  
6 Neither the Complaint nor the Amended Complaint allege an amount in  
7 controversy. *See generally* Compl.; Am. Compl. Instead, Plaintiffs demand, on  
8 behalf of themselves and the putative Classes, “a refund of the purchase price of  
9 the products,” as well as restitution and disgorgement. *See* Am. Compl. ¶¶ 78, 85,  
10 93, 99. Plaintiffs also seek injunctive relief, consequential and incidental damages,  
11 prejudgment interest, and costs, expenses, and attorneys’ fees. *Id.* at ¶¶ 59, 78, 85,  
12 92-93, & Request for Judgment ¶¶ 2-6.

13 13. AdvoCare denies any liability to Plaintiffs and the putative Classes  
14 and also denies that they have incurred any recoverable damages. However, based  
15 on AdvoCare’s estimated total standalone sales of Spark in California during the  
16 alleged class period, the amount in controversy as defined by the relief Plaintiffs  
17 seek exceeds CAFA’s \$5,000,000 jurisdictional threshold. *See* 28 U.S.C.  
18 § 1332(d)(2). Specifically, as demonstrated in the attached Declaration of Robert  
19 White, the Vice President and Controller of AdvoCare, AdvoCare estimates that its  
20 total standalone sales of Spark in California from March 2013 through March 2017  
21 – the alleged Spark Class period – totaled at least approximately \$29,994,612.55.

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22  
23 <sup>1</sup> Even if AdvoCare’s citizenship were taken from its general and limited partners, as is  
24 done in non-CAFA diversity cases, there would still be minimal diversity in this Action.  
25 AdvoCare’s general and limited partners are a Delaware limited liability company, a Delaware  
26 limited partnership, and a Texas limited liability company, respectively. *See* White Decl. ¶ 3.  
27 Each of those entities are, in turn, owned by Texas trusts whose trustees are domiciled in Texas  
28 and Louisiana. *Id.* Therefore, even under non-CAFA diversity analysis, there is minimal  
diversity because AdvoCare would be a citizen of Texas and Louisiana. *See Johnson v.*  
*Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (holding that “like a  
partnership, an LLC is a citizen of every state of which its owners/members are citizens” and  
stating that “[a] trust has the citizenship of its trustee or trustees”).

1 See White Decl. ¶¶ 1, 6, 8.

2 14. Therefore, this Action falls within the original subject matter  
3 jurisdiction of this Court under § 1332(d)(2) because (1) the putative Classes  
4 consist of at least 100 members, (2) at least one putative Class member and  
5 AdvoCare are citizens of different states, and (3) the amount in controversy  
6 exceeds \$5,000,000. Accordingly, this Action is removable pursuant to 28 U.S.C.  
7 §§ 1441, 1446, and 1453.

### 8 **III. THIS NOTICE OF REMOVAL IS TIMELY FILED**

9 15. Section 1446(b) identifies two thirty-day periods for removing an  
10 action if removability can be ascertained from the pleadings or other papers: (1)  
11 “[t]he first thirty-day removal period is triggered if the case stated by the initial  
12 pleading is removable on its face;” and (2) “[t]he second thirty-day removal period  
13 is triggered if the initial pleading does not indicate that the case is removable, and  
14 the defendant receives a copy of an amended pleading, motion, order or other  
15 paper from which removability may first be ascertained.” *Kuxhausen v. BMW Fin.*  
16 *Servs. NA LLC*, 707 F.3d 1136, 1139 (9th Cir. 2013) (citations omitted).

17 16. However, the Ninth Circuit has held that “the ground for removal  
18 must be revealed affirmatively in the initial pleading in order for the first thirty-day  
19 clock under § 1446(b) to begin.” *Id.* at 1139 (citation omitted). If a pleading is  
20 “‘indeterminate’ in the sense that the face of the complaint does not make clear  
21 whether the required jurisdictional elements [for removal] are present,” including  
22 under CAFA, the first thirty-day removal period under § 1446(b)(1) is never  
23 triggered. *See id.* (citation omitted); *see also Roth v. CHA Hollywood Med. Ctr.,*  
24 *L.P.*, 720 F.3d 1121, 1125 (9th Cir. 2013) (holding that “[w]e conclude that  
25 §§ 1441 and 1446, read together, permit a defendant to remove outside the two  
26 thirty-day periods on the basis of its own information, provided that it has not run  
27 afoul of either of the thirty-day deadlines.”).

28 17. Likewise, service of an amended complaint does not trigger the

second thirty-day removal period under § 1446(b)(3) if the amended pleading is also indeterminate as to removability. *See Roth*, 720 F.3d at 1125 (finding that an amended complaint did not trigger § 1446(b)(3)’s removal period because it was “at best ‘indeterminate’” because “[i]t did not reveal on its face that there was diversity of citizenship or that there was sufficient amount in controversy to support jurisdiction under CAFA”) (citation omitted).

18. Thus, where a complaint and amended complaint are not removable on their faces and the defendant removes under CAFA based on its own information, the case may be removed at any time. *See id.* at 1126 (“A CAFA case may be removed at any time, provided that neither of the two thirty-day periods under § 1446(b)(1) and (b)(3) has been triggered.”); *Gutierrez*, 2017 WL 599412 at \*9 (same).

19. Here, the Complaint demands restitution, injunctive relief, a refund of the purchase price of the Products, consequential and incidental damages, disgorgement, prejudgment interest, and costs, expenses, and attorneys’ fees on behalf of the putative Classes. *See* Compl. ¶¶ 53, 57, 59, 72, 78, 85, 92, 99, & Request for Judgment ¶¶ 2-6. It does not, however, allege an amount in controversy or information from which an amount in controversy can be determined. The Complaint’s only allegations regarding specific amounts Plaintiffs spent on the Products are that Plaintiff Ebony Barker “spent over \$200 on the products” and that Plaintiff Stacy Porras “spent over \$500 on the products.” *See id.* ¶ 46. The difference between their alleged amounts paid demonstrates that no fixed refund amount can be applied across either Class. Moreover, even assuming that the aggregated Classes equal 120 members and that each member (including Plaintiff Barker) spent approximately \$500 as Plaintiff Porras alleges she did, that amount would only equal \$60,000, which is well below CAFA’s jurisdictional threshold. *See id.* ¶¶ 18, 46; 28 U.S.C. § 1332(d)(2). Similarly, Plaintiffs allege that “[a] single ‘pouch’ of AdvoCare’s Spark . . . costs

approximately \$1.64,” but they do not allege how many Spark pouches were sold in California during the Spark Class period. *See* Compl. ¶ 39. There are no further allegations in the Complaint providing specific dollar amounts or numbers of Products sold from which AdvoCare could calculate an amount in controversy. Because the Complaint does not plead an amount in controversy that meets CAFA’s jurisdictional threshold, it did not trigger the first thirty-day removal period set forth in 28 U.S.C. § 1446. *See Kuxhausen*, 707 F.3d at 1141.

20. The Amended Complaint also demands restitution, injunctive relief, a refund of the purchase price of the Products, consequential and incidental damages, disgorgement, prejudgment interest, and costs, expenses, and attorneys’ fees on behalf the putative Classes. *See* Am. Compl. ¶¶ 53, 57, 59, 72, 78, 85, 92-93, 99, & Request for Judgment ¶¶ 2-6. However, like the Complaint, it fails to allege an amount in controversy or information from which an amount in controversy can be determined. *See generally id.* Therefore, it did not trigger the second thirty-day removal period under § 1446(b)(3). *See Roth*, 720 F.3d at 1125-26.

21. To date, AdvoCare has not received any other pleading or paper from which the amount in controversy can be ascertained. AdvoCare files this Notice of Removal based on its own information and investigation. *See* White Decl. ¶¶ 1, 5-9. Because neither of the thirty-day periods under § 1446(b) has been triggered and AdvoCare removes based on its own information, this Notice of Removal is timely filed. *See Roth*, 720 F.3d at 1125; *Kuxhausen*, 707 F.3d at 1141-42; *Gutierrez*, 2017 WL 599412 at \*9, \*11.

#### **IV. ALL OTHER STATUTORY REQUIREMENTS FOR REMOVAL HAVE BEEN SATISFIED.**

22. Plaintiffs filed this Action in the Superior Court of the State of California for the County of Los Angeles. Therefore, venue in the United States District Court for the Central District of California is proper because it is the “district and division embracing the place where such action is pending.” *See* 28

1 U.S.C. § 1441(a).

2 23. By this Notice, AdvoCare consents to removal of this Action. *See* 28  
3 U.S.C. § 1453(b).

4 24. No previous application has been made for the relief requested herein.

5 25. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, and  
6 orders served on AdvoCare in this case are attached hereto.

7 26. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal  
8 will be promptly served on Plaintiffs and promptly filed with the clerk of the  
9 Superior Court of the State of California for the County of Los Angeles.

10 27. No admission of fact, law, or liability is intended by this Notice of  
11 Removal, and AdvoCare expressly reserves all defenses, counterclaims, and  
12 motions otherwise available to it.

13 WHEREFORE, Defendant AdvoCare International, L.P. respectfully  
14 removes this Action from the Superior Court of the State of California for the  
15 County of Los Angeles, bearing Civil Action No. BC 655398, to this Court.

16  
17 Dated: June 15, 2017

Venable LLP

18 By: /s/ Angel A. Garganta

19 Angel A. Garganta  
20 Attorneys for Defendant  
21 ADVOCARE INTERNATIONAL,  
22 L.P.  
23  
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28

CONFORMED COPY  
OF ORIGINAL FILED  
Los Angeles Superior Court

MAR 28 2017

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By Shaunya Bolden, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MICHAEL TUBBS, EBONY BAKER,  
STACY PORRAS, JOSH HALL  
Plaintiffs,

v.

ADVOCARE INTERNATIONAL, LP &  
DOES 1-10,  
Defendants.

CASE NO.:

BC 655398

CLASS ACTION

COMPLAINT FOR DAMAGES  
AND EQUITABLE RELIEF

1. Unlawful, Unfair and Fraudulent Practices (Cal. Bus. & Prof. Code § 17200 *et seq.*);
2. Unfair, Deceptive, and Misleading Advertising (Cal. Bus. & Prof. Code § 17500 *et seq.*);
3. Breach of Implied Warranty (CAL. U. COMM. CODE §§ 2314, 2315);
4. Breach of Express Warranty (CAL. U. COM. CODE § 2313);
5. Violation of the Consumer Legal Remedies Act (CAL. CIV. CODE § 1750 *et seq.*);
6. and; Restitution.

Plaintiffs Demand a Trial By Jury

By Fax



1 supporting your brain's ability to receive and send messages.”www.advocare.com, Accessed on  
 2 8/8/2016. It in fact does none of this as it does not increase mental focus or alertness, the  
 3 minerals and nutrients do not add anything to an otherwise healthy and balanced meal plan, and  
 4 do in fact burden and over stimulate one’s body.

5 4. Advocare also markets a 24-day Challenge encompassing additional products,  
 6 including "AdvoCare Spark", (hereinafter "Spark") which they represent, when consumed in  
 7 conjunction with a healthy diet and exercise, will help to rid your body of waste and prepare your  
 8 body to better absorb nutrients.

9 5. Defendants further fail to honor their warranty obligations by providing a product  
 10 that: (1) fails to pass without objection in the trade under the description provided; (2) is not fit  
 11 for the ordinary purpose for which such goods are used and marketed; (3) is not fit for the  
 12 particular purpose for which it was sold; (4) is not adequately contained, packaged, and labeled;  
 13 (5) does not conform to the promises or affirmations of fact made on the container or label; (6)  
 14 fails to provide the 100% risk free money back guarantee; (7) fails to provide the free trial period;  
 15 and/or (8) violates the warranties contained in the California *Uniform Commercial Code*, §§  
 16 2313, 2314, and 2315.

### 17 **JURISDICTION AND VENUE**

18 6. Venue is proper in this Court pursuant to California *Code of Civil Procedure* § 395  
 19 as Defendants are foreign entities which have not designated a principal place of business in  
 20 California. Additionally, Defendants entered into transactions made the subject of this Complaint  
 21 with Plaintiffs in this county.

22 7. This Court has subject matter jurisdiction over this Class action pursuant to Article  
 23 VI, Section 10 of the California Constitution and Section 410.10 of the Code of Civil Procedure.  
 24 Jurisdiction is also proper under *Bus. & Prof. Code* §§ 17200, 17500, *Civ. Code* § 1750, *et seq.*,  
 25 *Code of Civil Procedure* § 382, and other provisions of the California Codes.

26 8. Jurisdiction over Defendants is proper because Advocare has purposely availed  
 27 itself of the privilege of conducting business activities in California and because Advocare  
 28 currently maintain systematic and continuous business contacts with this State and have many

1 consumers of its products in this State. Defendants have significant contact or aggregation of  
2 contacts to the claims at issue herein. Defendants regularly do business in California through  
3 direct advertising and through its multi-level marketing program. Defendants regularly transacted  
4 business with Plaintiffs and Class members in California by communicating with them, accepting  
5 their payments from California, and by shipping directly to the California based Plaintiffs and  
6 Class members.

### 8 **PARTIES**

9 9. Individual and representative Plaintiff Michael Tubbs is a citizen of Los Angeles  
10 County, California.

11 10. Individual and representative Plaintiff Ebony Baker is currently a citizen of Harris  
12 County, Texas but at all times relevant was a citizen of San Diego County, California.

13 11. Individual and representative Plaintiff Stacy Porras is a citizen of Los Angeles  
14 County, California.

15 12. Individual and representative Plaintiff John Hall is a citizen of Los Angeles  
16 County, California.

17 13. Defendant AdvoCare International, LP is a foreign corporation doing business in  
18 the State of California and can be served at its corporate headquarters located at 2801 Summit  
19 Avenue, Plano, TX 75074.

20 14. The true names and capacities, whether individual, corporate, association or  
21 otherwise of defendants named herein as DOES I THROUGH 10, inclusive, are unknown to  
22 Plaintiffs and therefore Plaintiffs sue such DOES by fictitious names. Plaintiffs are informed,  
23 believe, and on that basis allege that these DOE defendants are California residents or  
24 corporations or entities doing business in the State of California, and that each is the agent of the  
25 other Defendants and that each is responsible for some or all of the acts and omissions alleged  
26 herein. Plaintiffs will amend this complaint to show the true names and capacities of these DOE  
27 defendants when they have been determined.  
28

**CLASS ACTION ALLEGATIONS**

15. Plaintiffs bring this action as a Class action on behalf of all those similarly situated pursuant to Code of Civil Procedure Section 382 and Civil Code Section 1781, and propose the following Class and sub Classes.

a. All individuals in California who purchased the 24-Day Challenge products within four (4) years of filing this lawsuit.

b. A sub Class of all individuals in California who purchased Spark within four (4) years of filing this lawsuit.

16. Plaintiffs maintain the right under Rule 3.765(b) of the California Rules of Court amend or modify the class description with greater specificity by further division into subclasses or by limitation to particular issues and to create additional subclasses or classes, if necessary, and to revise these definitions to maintain a cohesive Class that does not require individual inquiry to determine liability.

17. Excluded from the proposed classes are Defendants, any entity in which any Defendant has a controlling interest, any agents, employees, officers and directors of Defendants, any entities or persons currently in bankruptcy, any entity or person whose obligations have been discharged in bankruptcy, and any governmental agency, entity, or judicial officer which presides over this case.

18. Each Plaintiff is a member of the Class and Plaintiffs' claims are typical of the claims of the Class. The exact number of Class members is unknown to Plaintiffs at this time, but is more than sixty for each, and such information can be ascertained through appropriate discovery. All information necessary to identify Class members and the damages suffered by each Class member can be found in records maintained by Advocare and its agents.

**I. Common Questions of Law and Fact Predominate**

19. There are questions of law and fact common and of general interest to the Classes. These common questions of law and fact predominate over any questions affecting only individual members of the Class. Said common questions include, but are not limited to, the following:

- a. Whether Defendants omitted material information from its marketing of the 24-Day Challenge Products (which include Spark);
- b. Whether Defendants provided inaccurate material information in its marketing of the 24-Day Challenge Products (which include Spark);
- c. Whether Defendants falsely advertised the 24-Day Challenge Products;
- d. Whether Defendants' mass media advertising and/or the packaging for the 24-Day Challenge Products is misleading and deceptive;
- e. Whether Defendants falsely claim that the 24-Day Challenge Products, individually and/or collectively, are "clinically tested" and/or "medically approved;"
- f. Whether Defendants' labeling and/or packaging for the 24-Day Challenge Products is misleading, false, and/or illegal;
- g. Whether Defendants represent to consumers that the 24-Day Challenge Products, individually and/or collectively, have, whether used singly or in conjunction, a characteristic, use, benefit, or quality that the product does not have;
- h. Whether Defendants knew or should have known the 24-Day Challenge Products, individually and/or collectively, have, whether used singly or in conjunction, do not have the characteristics, uses, benefits, or qualities for which Defendants advertised and marketed the product;
- i. Whether Defendants engaged in unfair, unlawful, and/or fraudulent business practices in marketing and distributing the 24-Day Challenge Products;
- j. Whether Defendants engaged in false advertising with respect to the 24-Day Challenge Products;
- k. Whether Defendants have violated express and/or implied warranty statutes;
- l. Whether Defendants have been unjustly enriched;
- m. The nature and extent of damages and other remedies to which the wrongful conduct of Defendants entitle the Plaintiffs and Class members;
- n. Whether members of the Class are likely to be deceived by Defendants' representations, concealments, and non-disclosures concerning the 24-Day Challenge Products;

o. Whether Defendants' representations, concealments, and non-disclosures concerning the 24-Day Challenge Products violate the CLRA, FAL, and/or the UCL;

p. Whether the Class is entitled to injunctive relief prohibiting the challenged wrongful practices and enjoining such practices in the future;

q. Whether the Class is entitled to punitive damages; and,

r. Whether Plaintiffs and the Class are entitled to attorney's fees and expenses; and, in what amount.

## **II. Typicality and Numerosity**

20. The claims of the named Plaintiffs are typical of the claims of the putative classes and Defendants' defenses to Plaintiffs' claims are typical of its defenses to the claims of the putative Class. The number of members in each of the putative Class exceeds sixty (60) members.

## **III. Adequate Representation**

21. Plaintiffs will fairly and adequately protect the interests of the members of the Classes and have no interest antagonistic to those of other Class members. Plaintiffs have retained Class counsel competent to prosecute Class actions and such Class counsel are financially able to represent the classes.

## **IV. Superiority**

22. The class action is superior to other available methods for the fair and efficient adjudication of this controversy since individual joinder of all members of the Class is impracticable. The interests of judicial economy favor adjudicating the claims for the Plaintiffs' Class rather than on an individual basis. The class action mechanism provides the benefit of unitary adjudication, economies of scale, and comprehensive supervision by a single court.

## **FACTUAL ALLEGATIONS**

### **I. General Facts**

21. In today's world, members of the general public need and/or perceive themselves as being in need of, products that provide boosts of energy to cope with the demands and stresses of daily jobs, family, and social life. While a simple cup of coffee, or other source of caffeine,

1 has for generations been seen as a way to begin the day, stimulate energy, or provide relief from  
 2 fatigue, in recent years a new category of beverages, commonly referred to as “energy drinks,”  
 3 has come to the market and battled for market share by marketing and promoting such drinks as  
 4 superior sources of energy and a way to enhance mental and physical performance via unique  
 5 blends of ingredients, or additional ingredients beyond caffeine. AdvoCare’s Spark energy  
 6 supplement is one such product. However, it is now coming to light that such products actually  
 7 do not provide any superior benefits over just ingesting caffeine, and they certainly do not justify  
 8 their premium prices.

9 22. AdvoCare promises consumers that Spark “sharpens mental focus” and that the  
 10 24-day challenge, “in conjunction with a healthy diet and exercise, help to rid your body of waste  
 11 and prepare your body to better absorb nutrients” by providing a mixture of ingredients that,  
 12 when ingested, significantly improve a consumer’s physiological and mental performance.

13 23. AdvoCare’s Spark further promises that,  
 14 Spark is a unique blend of 20 vitamins, minerals and nutrients that work  
 15 synergistically to provide a healthy and balanced source of energy. Spark contains  
 16 an effective amount of caffeine to give you a quick boost, B vitamins to enhance  
 17 your body’s natural ability to produce and sustain its own energy, and neuroactive  
 18 amino acids that help increase your mental focus and alertness.  
 19 Spark’s ingredients include caffeine and taurine, an ingredient alleged to provide extra  
 20 stimulation, although scientific research strongly questions taurine’s benefits.

21 24. AdvoCare bases its claims upon and touts “scientific knowledge” it claims  
 22 demonstrates the superior nature of AdvoCare branded products.

23 25. Indeed, AdvoCare state on its website that,  
 24 AdvoCare relies on the latest scientific knowledge and highest quality ingredients  
 25 to create safe and effective products. The AdvoCare Science team includes  
 26 Doctors dedicated to product research & development as well as training and  
 27 education for AdvoCare Independent Distributors. The science behind AdvoCare  
 28 products helps improve lives through superior nutrition and wellness.

26 26. Upon information and belief, there is no genuine scientific research or  
 27 scientifically reliable studies in existence that support the extraordinary claims of Defendants that  
 28 AdvoCare branded products provide the benefits claimed. The Defendants know or should know  
 that said claims are untrue.

1           27.     Although Defendants point to purported scientific studies and research to back up  
2 their claims that the unique blend of ingredients is responsible for the claimed superior benefits of  
3 using AdvoCare products, the well-regarded scientific journal *Nutrition Reviews* published an  
4 evaluation of various studies of energy drink ingredients and their efficacy and found that:

5           With the exception of some weak evidence for glucose and guarana extract, there  
6 is an overwhelming lack of evidence to substantiate claims that components of  
7 [energy drinks], **other than caffeine**, contribute to the enhancement of physical  
or cognitive performance.

8 Tom M. McLellan, et al., “Do Energy Drinks Contain Active Components Other Than  
9 Caffeine?”, *Nutrition Reviews*, Vol. 70, pp. 730-44 (2012) (emphasis added).

10           28.     The New York Times published an article titled “Energy Drinks Promise Edge, but  
11 Experts Say Proof is Scant” (Barry Meier, January 1, 2013), citing widespread scientific and  
12 governmental criticism of the notion that energy drinks provide any more benefit than the average  
13 dose of caffeine consumed from a cup of coffee. The article notes that Massachusetts  
14 congressman Edward J. Markey has called for a U.S. government investigation into the energy  
15 drink industry’s marketing claims.

16           29.     The European Food Safety Authority concluded in 2011 that there is a lack of  
17 scientific support for the claimed benefits of taurine, a key ingredient of AdvoCare’s Spark  
18 energy supplement, stating it could find no cause and effect relationship between taurine and its  
19 purported benefits. European Food Safety Authority, *EFSA Journal* 2011; 9(4):2035.

20           30.     Such deceptive conduct and practices take Defendants’ advertising and marketing  
21 beyond mere “puffery” and to an actionable level for deceptive practices and fraud.

22           31.     Upon information and belief, AdvoCare spends millions of dollars misleading  
23 consumers about the superiority of its products and its products’ abilities.

24           32.     Defendants’ prodigious advertising, marketing, and promotional spending has  
25 misled customers into believing that AdvoCare’s Spark and other products are superior products,  
26 worthy of a premium price, and have the ability to “sharpen[ ] mental focus” and provide energy  
27 and vitality.  
28

1           33. The New York Times article pointed out that energy drinks are really just  
2 “caffeine delivery systems” and manufacturers of energy drinks do not want to claim their  
3 products are the equivalent of a cup of coffee or a “NoDoz” tablet “because that is not a very sexy  
4 sales message.”

5           34. Defendants take advantage of numerous marketing platforms in order to ensure  
6 their false and deceptive marketing message permeates the general consumer consciousness.  
7 Defendants use television advertising, internet marketing, and social media, as well as celebrity  
8 sports figure endorsements, and glossy print brochures. Defendants sponsor events such as  
9 NCAA College Football games, NASCAR’s Sprint Cup and Nationwide Series, Major League  
10 Soccer, and NCAA College Basketball invitational tournaments. Regardless of which marketing  
11 avenue reaches a consumer, Defendants drive home the false and deceptive claims of superior  
12 results from using AdvoCare’s products through each of its advertising platforms.

13           35. AdvoCare’s marketing promises that “We Build Champions,” that Spark “delivers  
14 energy and enhanced mental focus with 20 vitamins, minerals and nutrients,” and its website  
15 states, “The science behind AdvoCare products helps improve lives through superior nutrition and  
16 wellness.” These statements and AdvoCare’s marketing materials all promote the false message  
17 that the products improve performance and/or mental acuity, such that a reasonable consumer  
18 would be led to believe that AdvoCare branded products are a superior way for a consumer to  
19 gain energy, obtain and maintain wellness, and/or enhance performance, thereby misleading  
20 consumers that these are superior products, of a superior nature, and worthy of a premium price.

21           36. Indeed, Plaintiffs were lured into becoming consumers of AdvoCare products by  
22 its marketing message, delivered via its packaging, website, advertisements, and promotional  
23 events. Plaintiffs have regularly purchased and consumed AdvoCare products and, specifically,  
24 its Spark energy supplement because of Defendants’ marketing message and themes.

25           37. Despite the medium that AdvoCare has used to deliver its marketing message, the  
26 theme has been the same, such that any one of these marketing and promotional mediums has  
27 influence over the consumer, including Plaintiffs and Class Members, such that a consumer  
28

1 would make the decision to buy the products in the first place, or to pay a premium for the  
2 products over less expensive sources of “energy” due to the products’ purported superior nature.

3 38. AdvoCare delivers the same or substantially similar marketing and advertising  
4 claims and themes across each of its product divisions sold in the United States. AdvoCare’s  
5 Spark energy supplement is marketed the same for all variations of it, with only slight editing of  
6 the marketing materials to account for flavor varieties. Thus, consumers such as Plaintiff(s) and  
7 Class Members have been misled and deceived in the same manner no matter which variety or  
8 size product he or she bought.

9 39. Despite a lack of genuine scientific support for a claim that AdvoCare’s products,  
10 including specifically its Spark energy supplement, provide any more benefit to a consumer than  
11 a cup of coffee, AdvoCare persistently and pervasively markets its products as a superior source  
12 of “energy” worthy of a premium price over a cup of coffee or other sources of caffeine. A single  
13 “pouch” of AdvoCare’s Spark, which is mixed with eight ounces of water for drinking, costs  
14 approximately \$1.64 and contains 120 mg of caffeine, whereas a regular strength tablet of NoDoz  
15 costs approximately \$.15 and contains 200 mg of caffeine. A seven ounce cup of drip coffee  
16 contains approximately 115 to 175 mg of caffeine, depending on the blend. Even a twelve ounce  
17 serving of Starbucks’ coffee costs \$1.85 and contains approximately 235 mg of caffeine, far more  
18 than AdvoCare’s Spark.

19 40. Thus, AdvoCare’s Spark delivers less of the ingredient (caffeine) scientific studies  
20 maintain provides the benefits claimed by AdvoCare for a substantially higher price than  
21 consumers could spend on alternative sources of caffeine.

22 41. As a result of the foregoing, Defendants’ claims regarding AdvoCare’s Spark and  
23 other products are deceptive and misleading. Had Plaintiffs and other members of the proposed  
24 Classes been aware of the truth about Defendants’ products, they would not have purchased the  
25 same, or would not have paid a premium price for the products.

26 42. Indeed, Defendants were in a superior position to know, and did know, that its  
27 claims and advertisements were deceptive and false and they failed to inform consumers that their  
28 Spark branded energy drinks and other products cannot perform as advertised and promised.

1           43.     Instead, Defendants allow their deceptive and misleading marketing to permeate  
2 the consumer advertising consciousness and perpetuate Defendants' false claims and promises.

3           44.     Because of such deceptive practices and conduct, Defendants command a  
4 substantial premium for their products over readily available and much lower priced sources of  
5 caffeine that provide the same or substantially similar results. Thus, Defendants reap profits on  
6 products where consumers are induced to pay an unwarranted, substantial premium.

7           45.     All conditions precedent necessary for the filing of this Complaint have been  
8 satisfied and/or such conditions have been waived by the conduct of Defendants.

9           **II.     Plaintiffs' Specific Facts**

10          46.     Plaintiff Michael Tubbs was influenced by Defendants' advertising of the 24 Day  
11 Challenge to purchase and use the products which specifically included Spark. He spent  
12 hundreds of dollars on the products. Defendants suggested to him that it would "restart his  
13 metabolism" and that it was a "magical solution that would kick start his body to where it was  
14 when he was younger and healthier." Defendants also suggested to him that after purchasing and  
15 consuming the 24 Day Challenge "he was going to feel wonderful and have a new outlook on  
16 life." Defendants told him that the first round of the 24 Day Challenge was a "cleanse"  
17 suggesting that he continue to use the product after the first 24 Days. The products Defendants  
18 shipped him contained a listing of ingredients that Defendants falsely advertised to: "sharpen  
19 mental focus," provide "long lasting energy," support "heart health," be a "high powered portable  
20 energy source that sharpens mental focus," be a "quick and complete great tasting nutrition," be  
21 "wholesome and easy to digest," an "excellent addition to weigh management program," and to  
22 "provide protein and nutrition to stay at your best." None of this was true. In fact, Plaintiff  
23 realized none of the alleged benefits. Plaintiff Ebony Baker was also influenced by Defendants'  
24 advertising of the 24 Day Challenge to purchase and use the products which specifically included  
25 Spark. She spent over \$200 on the products. She received the same type and nature of products  
26 with the same type and nature of misleading and unsupported claims of health benefits that  
27 Plaintiff Tubbs received. She found that none of Defendants' unsupported advertisements and  
28 claims were true. Plaintiff Stacy Porras was also influenced by Defendants' advertising of the 24

Day Challenge to purchase and use the products which specifically included Spark. She and Plaintiff Tubbs attempted the 24 Day Challenge together at Defendants suggestion because they suggested it would be easier and better to do it together. She received the same type and nature of products with the same type and nature of misleading and unsupported claims of health benefits that Plaintiff Tubbs received. She spent over \$500 on the products and received “specialized” female assistance from Defendants. Specifically she received a “Female Cleanse Guide” to assist her with the deceptive and unsupported claim that one needs to “cleanse” themselves with the products contained in the 24 Day Challenge. She found that none of Defendants’ unsupported advertisements and claims were true. Plaintiff Josh Hall was also influenced by Defendants’ advertising of the 24 Day Challenge to purchase and use the products which specifically included Spark. He received the same type and nature of products with the same type and nature of misleading and unsupported claims of health benefits that Plaintiff Tubbs received. He found that none of Defendants’ unsupported advertisements and claims were true.

### **FIRST CAUSE OF ACTION**

#### **UNLAWFUL, UNFAIR AND FRAUDULENT BUSINESS PRACTICES**

*(Cal. Bus. & Prof. § 17200, et seq.)*

47. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

48. Plaintiffs bring this claim individually, on behalf of the Classes and on behalf of the general public.

49. Through the conduct and scheme described herein, and particularly through the marketing and selling of 24-Day Challenge Products to Plaintiffs and members of the public, Defendants engaged in unlawful, deceptive, and unfair business acts within the meaning of California *Business and Professions Code* § 17200*et seq.* Defendants' acts and practices offend an established public policy, and Defendants engage in immoral, un-ethical, oppressive, and unscrupulous activities that are substantially injurious to consumers including Plaintiffs.

50. Plaintiffs and the Class members were misled into purchasing 24-Day Challenge Products by Defendants’ deceptive conduct as alleged herein. Plaintiffs and the Class members

1 were subject to Defendants' mass media advertising which included but was not limited to  
 2 statements that the 24-Day Challenge Products would enhance mental energy and focus, were  
 3 healthy, would not overburden or overstimulate their body, and would provide a consistent energy  
 4 source that would not burn out. Plaintiffs relied upon such advertising in agreeing to pay for the  
 5 products, thereby suffering economic damage.

6 51. Defendants have unlawfully manufactured, packaged, labeled and/or distributed  
 7 the 24-Day Challenge Products in violation of California *Health & Safety Code*, in that:

8 a. Defendants have disseminated false advertisements of the 24-Day Challenge  
 9 Products in that the product advertising and packaging contain false and/or misleading statements  
 10 as to the purported ability of these products to do what Defendants claim they do, in violation of  
 11 California *Health & Safety Code* §§ 110290 and 110390 *et seq.*

12 b. The 24-Day Challenge Products are misbranded because their labeling does not  
 13 conform with the requirements for nutrition labeling as required by California *Health & Safety*  
 14 *Code* §§ 110665 and 110705;

15 c. The 24-Day Challenge Products are misbranded because their labeling does not  
 16 conform with the requirements for nutrient content or health claims as required by California  
 17 *Health & Safety Code* § 110670;

18 d. The 24-Day Challenge Products are unlawfully labeled in violation of California  
 19 *Health & Safety Code* § 114089;

20 e. The 24-Day Challenge Products are unlawfully labeled in violation of California  
 21 law as the labeling is false and/or misleading in claiming that the product is recommended and  
 22 approved by a scientific and medical advisory board; and

23 f. The 24-Day Challenge Products are unlawfully labeled in violation of California  
 24 law as the labeling and marketing suggests that the product is safe and effective for its intended  
 25 use when such evidence has not been established.

26 52. Plaintiffs and other Class members were misled and, because misrepresentations  
 27 and omission were uniform and material, believed the Defendants' statements.  
 28

1           53. Plaintiffs request that this Court enter such orders or judgments as may be  
2 necessary to restore to any person money and interest which may have been acquired by means of  
3 such unfair practices as provide in *Bus. & Prof. Code* § 17203, and for such other relief as set  
4 forth below.

5           54. Plaintiffs reserve the right to allege other violations which constitute other  
6 unlawful business acts or practices. Upon information and belief, Defendants' wrongful conduct  
7 in violation of § 17200, *et seq.* is ongoing and continues to this date.

8           55. There were reasonably available alternatives to further Defendants' legitimate  
9 business interests, other than the conduct described herein.

10           56. Defendants' actions, claims, nondisclosures, and misleading statements, as alleged  
11 in this Complaint, likely to deceive Plaintiffs and the public, and were intended to deceive  
12 Plaintiffs and members of the public. Plaintiffs and Class members have in fact been deceived  
13 and have relied on Defendants' representations and omissions. This reliance has caused harm to  
14 Plaintiffs and Class members. Plaintiffs and Class members have suffered injury in fact and lost  
15 money as a result of Defendants' unlawful, unfair, and fraudulent practices.

16           57. As a result of its deception, Defendants have reaped unjust revenue and profit.  
17 Restitution is, therefore, appropriate and the Plaintiffs ask that this Court order restitution.  
18 Further, upon information and belief, unless restrained and enjoined, Defendants will continue to  
19 engage in the above-described conduct. Accordingly, injunctive relief is appropriate.

20           58. Plaintiff and Class Members have suffered injury in fact and lost money and/or  
21 property as a result of Defendants' and Does 1 through 10's unlawful business acts and practices  
22 by engaging in the above-described conduct.

23           59. Plaintiffs engaged counsel to prosecute this action and are entitled to recover costs  
24 and reasonable attorneys' fees according to proof at trial.  
25  
26  
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**SECOND CAUSE OF ACTION**

**UNFAIR, DECEPTIVE AND MISLEADING ADVERTISING**

***(Cal. Bus. & Prof. § 17500, et seq.)***

60. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

61. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

62. Through the conduct and scheme described herein, and particularly through the marketing of 24-Day Challenge Products to Plaintiffs and members of the public, Defendants engaged in unlawful, deceptive, and unfair business acts within the meaning of California *Business and Professions Code* § 17500 *et seq.* Defendants' acts and practices offend an established public policy, and Defendants engage in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers including Plaintiffs.

63. Defendants engaged in the deceptive conduct alleged herein, which included deceptive and untrue advertisements regarding the 24-Day Challenge products and representations made to induce the public to purchase the products.

64. Defendants' advertisements claimed that the 24-Day Challenge Products would enhance mental energy and focus, were healthy, would not overburden or overstimulate their body, and would provide a consistent energy source that would not burn out. Plaintiffs relied upon such advertising in agreeing to pay for the products, thereby suffering economic damage.

65. Defendants made and disseminated false and misleading statements to Plaintiffs and members of the public regarding the nature, purpose, and effect of the 24-Day Challenge Products. Defendants created false impressions which it failed to correct, and concealed material information regarding the products.

66. Defendants were aware or should have been aware by the exercise of reasonable care that the representations were untrue and/or misleading.

1           67. Plaintiffs reserve the right to allege other violations which constitute other  
2 unlawful business acts or practices. Upon information and belief, Defendants' wrongful conduct  
3 in violation of § 17500. *et seq.* is ongoing and continues to this date.

4           68. There were reasonably available alternatives to further Defendants' legitimate  
5 business interests, other than the conduct described herein.

6           69. Defendants' actions, claims, nondisclosures, and misleading statements, as alleged  
7 in this Complaint, likely to deceive Plaintiffs and the public, and were intended to deceive  
8 Plaintiffs and members of the public. Plaintiffs and Class members have in fact been deceived  
9 and have relied on Defendants' representations and omissions. This reliance has caused harm to  
10 Plaintiffs and Class members. Plaintiffs and Class members have suffered injury in fact and lost  
11 money as a result of Defendants' unlawful, unfair, and fraudulent practices.

12           70. Defendants' actions, claims, nondisclosures, and misleading statements, as alleged  
13 in this Complaint, are likely to deceive Plaintiffs and the public, and were intended to deceive  
14 Plaintiffs and members of the public. Plaintiffs have in fact been deceived and have relied on  
15 Defendants' representations and omissions. This reliance has caused harm to Plaintiffs and  
16 Plaintiffs have suffered injury in fact and lost money as a result of Defendants unlawful, unfair,  
17 and fraudulent practices.

18           71. Plaintiff and Class Members have suffered injury in fact and lost money and/or  
19 property as a result of Defendants' and Does 1 through 10's unfair, deceptive, and misleading  
20 advertising by engaging in the above-described conduct.

21           72. As a result of its deception, Defendants have been able to reap unjust revenue and  
22 profit. Restitution is therefore appropriate and the Plaintiffs asks that Court order restitution.  
23 Further, upon information and belief, unless restrained and enjoined, Defendants will continue to  
24 engage in the above-described conduct. Accordingly, injunctive relief is appropriate.  
25  
26  
27  
28

**THIRD CAUSE OF ACTION**

**BREACH OF IMPLIED WARRANTY**

**(*CAL. U. COMM. CODE* §§ 2314, 2315 and Common Law)**

73. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

74. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

75. The 24-Day Challenge Products were sold with the implied warranty of merchantability that the product would pass without objection in the trade, is fit for the ordinary purpose for which it is used, is adequately contained, packaged, and labeled, and conforms to the promises or affirmations of fact made on the container and label. The 24-Day Challenge Products do not meet with foregoing criteria.

76. The 24-Day Challenge Products were sold with the implied warranty of fitness in that Defendants had reason to know of the particular purpose for which the product was required (i.e., as a nutrient to make one healthier and more mentally focused) and Plaintiffs and the Class members relied upon Defendants' advertised skill and judgment to furnish suitable goods. It is not suitable for the purpose for which it was required and sold.

77. The defects in the 24-Day Challenge Products existed prior to the delivery of the product to Plaintiffs and the Class members.

78. Plaintiffs and the Class members have incurred damages as described herein as a direct and proximate result of the defective product and Defendants' and Does 1 through 10's breach of the implied warranties, in that Plaintiffs and the Class members paid the purchase price for the defective product. Plaintiffs, on behalf of themselves and the Class members, have demanded that Defendants correct the defect and Defendants have failed and/or refused. Plaintiffs and the Class members are entitled to a refund of the purchase price of the products, consequential and incidental damages, costs and expenses, including attorney's fees.

**FOURTH CAUSE OF ACTION**  
**BREACH OF EXPRESS WARRANTY**  
***(CAL. U. COM. CODE § 2313)***

79. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

80. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

81. The 24-Day Challenge Products were sold with an express warranty as Defendants made express affirmations of fact and promises regarding the health benefits of the products.

82. Defendants guaranteed the health benefits and especially the mental benefits of using the products.

83. They were sold with an express warranty because Defendants' express description of the product on the packaging and in mass media advertising was intended to become part of the basis of the bargain. The 24-Day Challenge Products are not suitable for the purpose for which they were required and sold as the products do not in fact benefit one's health as described.

84. The defect in the products existed prior to delivery of the product to Plaintiffs and the Class members.

85. Plaintiffs and Class members have incurred damages as described herein as a direct and proximate result of the defective products and Defendants' and Does 1 through 10's breach of the express warranties, in that the Plaintiffs and the Class have paid the purchase price for the defective products. Plaintiffs, on behalf of themselves and the Class members, have demanded that Defendants correct the defect and Defendants have failed and/or refused. Plaintiffs and the Class members are entitled to a refund of the purchase price of the product, consequential and incidental damages, costs and expense, including attorneys' fees.

**FIFTH CAUSE OF ACTION**

**VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**

***(CAL. CIV. CODE § 1750 et seq.)***

86. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

87. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

88. Plaintiffs and the Class are individuals who purchased goods (i.e., 24-Day Challenge Products) for personal use.

89. Defendants have represented that the 24-Day Challenge Products have characteristics, uses, benefits, and/or qualities that the products do not have.

90. Plaintiffs and the Class have each been directly and proximately injured by the conduct of the Defendants, and such injury includes payment for the 24-Day Challenge Products they purchased.

91. Plaintiffs, contemporaneously with the filing of this Complaint, provided Defendants notice of their Consumer Legal Remedies Act claims, on behalf of themselves and the Class members, through a Notice as required by California Consumer Legal Remedies Act.

92. The Court should enjoin Defendants and Does 1 through 10 from any further sales, marketing, or advertisement of the 24-Day Challenge Products which contain the misrepresentations detailed herein as to the standards, characteristics, uses, benefits, and/or qualities of the products. Plaintiffs request that this Court enter a permanent injunction enjoining Defendants, and their agents, servants, employees, and all persons acting under or in concert with them, to cease and desist from the following acts: (a) selling, marketing, or advertising the 24-Day Challenge Products in the illegal manner they are now doing; (b) selling, marketing, or advertising the 24-Day Challenge Products in the illegal manner they are now doing without any adequate and reliable scientific basis for such claims; (c) selling, marketing, or advertising the 24-Day Challenge Products as a supplement or drug that has specific medicinal benefits; (d) selling, marketing, or advertising the 24-Day Challenge Products with any representation or suggestion

1 that a scientific and medical review board has approved or recommended the products for use; (e)  
 2 concealing information regarding the true nature and origin of the herbal nutrients contained in  
 3 the 24-Day Challenge Products; (f) selling, marketing, or advertising that the 24-Day Challenge  
 4 Products are guaranteed in any way; (g) engaging in any of the illegal, fraudulent, misleading,  
 5 unlawful, unfair and/or deceptive conduct described herein; and (h) engaging in any other  
 6 conduct found by the Court to be illegal, fraudulent, misleading, unlawful, unfair and/or deceptive  
 7 conduct.

8 93. Plaintiffs are not seeking damages under this Cause of Action at this time.

### 9 **SIXTH CAUSE OF ACTION**

#### 10 **COMMON LAW RESTITUTION FOR UNJUST ENRICHMENT**

11 94. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the  
 12 Complaint, as though fully set forth herein.

13 95. To the extent necessary, this claim is pled in the alternative to those claims  
 14 asserted on behalf of the putative Class and/or is asserted on behalf of Plaintiffs alone.

15 96. Defendants have benefit and have been unjustly enriched by their wrongful  
 16 conduct alleged herein. Defendants have sold the 24-Day Challenge Products to Plaintiffs and the  
 17 Class based upon deceptive conduct and misrepresentations as to the uses and qualities which the  
 18 product does not possess and which Defendants were, and still are, aware the product does not  
 19 possess.

20 97. Defendants have knowledge of this benefit, and have voluntarily accepted and  
 21 retained this benefit.

22 98. The circumstances as described herein are such that it would be inequitable for  
 23 Defendants to retain these ill-gotten benefits without paying the value thereof to Plaintiffs and the  
 24 Class.

25 99. Plaintiffs and the Class are entitled to the amount of Defendants' and Does 1  
 26 through 10's ill-gotten gains, including interest, resulting from their unlawful, unjust, and  
 27 inequitable conduct as described above.  
 28

**REQUEST FOR JUDGMENT**

Plaintiffs asks for judgment against Defendants and each of them, in its and the putative Class's favor as follows:

1. For an order certifying this action as a Class action;
2. For actual and compensatory damages in such amount as the Court or jury deems just and proper;
3. For attorney's fees and costs for all causes of action alleged herein for which such amounts are permissible under applicable law, including California Code of Civil Procedure § 1021.5, in such amount as the Court or jury deems just and proper;
4. For prejudgment interest;
5. For an order requiring Defendants to provide notice to the Class and to pay for such notice;
6. For imposition of a constructive trust, recessionary relief, injunctive relief, including prohibition of Defendants' unfair, illegal and fraudulent business practices set forth herein, and including restitution and disgorgement of ill-gotten profits; and
7. All other relief which the Court and/or jury deems equitable and just.

**DEMAND FOR JURY TRIAL**

Plaintiffs on their own behalf and on behalf of the putative Class, demands a jury trial in the above captioned matter.

DATED: March 27, 2017



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County of Los Angeles

MAY 05 2017

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Sherri R. Carter, Executive Office/Clerk  
By: Bethany Smith, Deputy  
Bethany Smith

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 FOR THE COUNTY OF LOS ANGELES

17 MICHAEL TUBBS, EBONY BAKER,  
18 STACY PORRAS, JOSH HALL  
19 Plaintiffs,

20 v.

21 ADVOCARE INTERNATIONAL, LP &  
22 DOES 1-10,  
23 Defendants.

CASE NO.: BC 655398

D-309

CLASS ACTION

FIRST AMENDED COMPLAINT FOR  
DAMAGES AND EQUITABLE RELIEF

1. Unlawful, Unfair and Fraudulent Practices (Cal. Bus. & Prof. Code § 17200 *et seq.*);
2. Unfair, Deceptive, and Misleading Advertising (Cal. Bus. & Prof. Code § 17500 *et seq.*);
3. Breach of Implied Warranty (CAL. U. COMM. CODE §§ 2314, 2315);
4. Breach of Express Warranty (CAL. U. COM. CODE § 2313);
5. Violation of the Consumer Legal Remedies Act (CAL. CIV. CODE § 1750 *et seq.*);
6. and; Restitution.

Plaintiffs Demand a Trial By Jury

By Fax

1           Plaintiffs Michael Tubbs, Ebony Baker, Stacy Porras, and Josh Hall (“Plaintiffs”),  
 2 individually and on behalf of all others similarly situated, bring this putative consumer Class  
 3 action against Defendants AdvoCare International, LP (“Advocare”) and DOES 1-10, inclusive  
 4 (hereinafter collectively referred to as “Defendants”), and allege as follows:

5                           **SUMMARY OF THE FIRST AMENDED COMPLAINT**

6           1.       This action arises from actions and inactions perpetrated by Defendants in the  
 7 manufacturing, marketing, sales, and distribution of its product line, the “24-Day Challenge,”  
 8 which Defendants have sold and continue to sell as “a comprehensive supplementation and  
 9 nutrition program designed to give your body the jumpstart it needs to help you reach your  
 10 goals.” It is marketed as a “weight management, energy, overall body composition or overall  
 11 wellness” product. In fact, it is none of these.

12           2.       In the course of manufacturing, marketing, selling, and distributing the 24-Day  
 13 Challenge, and AdvoCare Spark, a product Defendants market as a stand-alone product and as a  
 14 component of the 24-Day Challenge, Defendants have committed and continue to commit illicit  
 15 business practices, in violation of California’s *Consumer Legal Remedies Act* (“CLRA,” *Civil*  
 16 *Code* §§ 1750-1784), California’s False Advertising Law (“FAL,” *Business and Professional*  
 17 *Code* § 17500-17536), California’s Unfair Competition Act (“UCL,” *Business and Professions*  
 18 *Code* § 17200 *et seq.*), California’s Sherman Food, Drug, & Cosmetic Act (the “Sherman Law,”  
 19 *Health & Safety Code* §§ 108975-111915), and California’s warranty laws, by making unlawful  
 20 claims regarding the 24-Day Challenge, through package labeling and mass media marketing, that  
 21 are illegal, false, misleading and/or omit material facts.

22           3.       Defendants made the following false representations through mass media  
 23 advertising: that “AdvoCare Spark” as a “unique multi-nutrient system that was developed as a  
 24 nutritional source of energy and enhanced mental focus,” it “enhances mental energy and focus,”  
 25 it contains “more than 20 vitamins, minerals and nutrients that work synergistically to provide a  
 26 healthy, balanced and effective source of energy that won’t overburden or over stimulate your  
 27 body,” it is a “source of long-lasting energy and heightened mental focus and performance,” and  
 28 it contains “neuroactive amino acids that help increase your mental focus and alertness by

1 supporting your brain's ability to receive and send messages.”www.advocare.com, Accessed on  
 2 8/8/2016. It in fact does none of this as it does not increase mental focus or alertness, the  
 3 minerals and nutrients do not add anything to an otherwise healthy and balanced meal plan, and  
 4 do in fact burden and over stimulate one’s body.

5 4. Advocare also markets a 24-day Challenge encompassing additional products,  
 6 including "AdvoCare Spark", (hereinafter "Spark") which they represent, when consumed in  
 7 conjunction with a healthy diet and exercise, will help to rid your body of waste and prepare your  
 8 body to better absorb nutrients.

9 5. Defendants further fail to honor their warranty obligations by providing a product  
 10 that: (1) fails to pass without objection in the trade under the description provided; (2) is not fit  
 11 for the ordinary purpose for which such goods are used and marketed; (3) is not fit for the  
 12 particular purpose for which it was sold; (4) is not adequately contained, packaged, and labeled;  
 13 (5) does not conform to the promises or affirmations of fact made on the container or label; (6)  
 14 fails to provide the 100% risk free money back guarantee; (7) fails to provide the free trial period;  
 15 and/or (8) violates the warranties contained in the California *Uniform Commercial Code*, §§  
 16 2313, 2314, and 2315.

### 17 **JURISDICTION AND VENUE**

18 6. Venue is proper in this Court pursuant to California *Code of Civil Procedure* § 395  
 19 as Defendants are foreign entities which have not designated a principal place of business in  
 20 California. Additionally, Defendants entered into transactions made the subject of this Complaint  
 21 with Plaintiffs in this county.

22 7. This Court has subject matter jurisdiction over this Class action pursuant to Article  
 23 VI, Section 10 of the California Constitution and Section 410.10 of the Code of Civil Procedure.  
 24 Jurisdiction is also proper under *Bus. & Prof. Code* §§ 17200, 17500, *Civ. Code* § 1750, *et seq.*,  
 25 *Code of Civil Procedure* § 382, and other provisions of the California Codes.

26 8. Jurisdiction over Defendants is proper because Advocare has purposely availed  
 27 itself of the privilege of conducting business activities in California and because Advocare  
 28 currently maintain systematic and continuous business contacts with this State and have many

1 consumers of its products in this State. Defendants have significant contact or aggregation of  
 2 contacts to the claims at issue herein. Defendants regularly do business in California through  
 3 direct advertising and through its multi-level marketing program. Defendants regularly transacted  
 4 business with Plaintiffs and Class members in California by communicating with them, accepting  
 5 their payments from California, and by shipping directly to the California based Plaintiffs and  
 6 Class members.

### 8 **PARTIES**

9 9. Individual and representative Plaintiff Michael Tubbs is a citizen of Los Angeles  
 10 County, California.

11 10. Individual and representative Plaintiff Ebony Baker is currently a citizen of Harris  
 12 County, Texas but at all times relevant was a citizen of San Diego County, California.

13 11. Individual and representative Plaintiff Stacy Porras is a citizen of Los Angeles  
 14 County, California.

15 12. Individual and representative Plaintiff John Hall is a citizen of Los Angeles  
 16 County, California.

17 13. Defendant AdvoCare International, LP is a foreign corporation doing business in  
 18 the State of California and can be served at its corporate headquarters located at 2801 Summit  
 19 Avenue, Plano, TX 75074.

20 14. The true names and capacities, whether individual, corporate, association or  
 21 otherwise of defendants named herein as DOES I THROUGH 10, inclusive, are unknown to  
 22 Plaintiffs and therefore Plaintiffs sue such DOES by fictitious names. Plaintiffs are informed,  
 23 believe, and on that basis allege that these DOE defendants are California residents or  
 24 corporations or entities doing business in the State of California, and that each is the agent of the  
 25 other Defendants and that each is responsible for some or all of the acts and omissions alleged  
 26 herein. Plaintiffs will amend this complaint to show the true names and capacities of these DOE  
 27 defendants when they have been determined.  
 28

**CLASS ACTION ALLEGATIONS**

15. Plaintiffs bring this action as a Class action on behalf of all those similarly situated pursuant to Code of Civil Procedure Section 382 and Civil Code Section 1781, and propose the following Class and sub Classes.

a. All individuals in California who purchased the 24-Day Challenge products within four (4) years of filing this lawsuit.

b. A sub Class of all individuals in California who purchased Spark within four (4) years of filing this lawsuit.

16. Plaintiffs maintain the right under Rule 3.765(b) of the California Rules of Court amend or modify the class description with greater specificity by further division into subclasses or by limitation to particular issues and to create additional subclasses or classes, if necessary, and to revise these definitions to maintain a cohesive Class that does not require individual inquiry to determine liability.

17. Excluded from the proposed classes are Defendants, any entity in which any Defendant has a controlling interest, any agents, employees, officers and directors of Defendants, any entities or persons currently in bankruptcy, any entity or person whose obligations have been discharged in bankruptcy, and any governmental agency, entity, or judicial officer which presides over this case.

18. Each Plaintiff is a member of the Class and Plaintiffs' claims are typical of the claims of the Class. The exact number of Class members is unknown to Plaintiffs at this time, but is more than sixty for each, and such information can be ascertained through appropriate discovery. All information necessary to identify Class members and the damages suffered by each Class member can be found in records maintained by Advocare and its agents.

**I. Common Questions of Law and Fact Predominate**

19. There are questions of law and fact common and of general interest to the Classes. These common questions of law and fact predominate over any questions affecting only individual members of the Class. Said common questions include, but are not limited to, the following:

- a. Whether Defendants omitted material information from its marketing of the 24-Day Challenge Products (which include Spark);
- b. Whether Defendants provided inaccurate material information in its marketing of the 24-Day Challenge Products (which include Spark);
- c. Whether Defendants falsely advertised the 24-Day Challenge Products;
- d. Whether Defendants' mass media advertising and/or the packaging for the 24-Day Challenge Products is misleading and deceptive;
- e. Whether Defendants falsely claim that the 24-Day Challenge Products, individually and/or collectively, are "clinically tested" and/or "medically approved;"
- f. Whether Defendants' labeling and/or packaging for the 24-Day Challenge Products is misleading, false, and/or illegal;
- g. Whether Defendants represent to consumers that the 24-Day Challenge Products, individually and/or collectively, have, whether used singly or in conjunction, a characteristic, use, benefit, or quality that the product does not have;
- h. Whether Defendants knew or should have known the 24-Day Challenge Products, individually and/or collectively, have, whether used singly or in conjunction, do not have the characteristics, uses, benefits, or qualities for which Defendants advertised and marketed the product;
- i. Whether Defendants engaged in unfair, unlawful, and/or fraudulent business practices in marketing and distributing the 24-Day Challenge Products;
- j. Whether Defendants engaged in false advertising with respect to the 24-Day Challenge Products;
- k. Whether Defendants have violated express and/or implied warranty statutes;
- l. Whether Defendants have been unjustly enriched;
- m. The nature and extent of damages and other remedies to which the wrongful conduct of Defendants entitle the Plaintiffs and Class members;
- n. Whether members of the Class are likely to be deceived by Defendants' representations, concealments, and non-disclosures concerning the 24-Day Challenge Products;

o. Whether Defendants' representations, concealments, and non-disclosures concerning the 24-Day Challenge Products violate the CLRA, FAL, and/or the UCL;

p. Whether the Class is entitled to injunctive relief prohibiting the challenged wrongful practices and enjoining such practices in the future;

q. Whether the Class is entitled to punitive damages; and,

r. Whether Plaintiffs and the Class are entitled to attorney's fees and expenses; and, in what amount.

## **II. Typicality and Numerosity**

20. The claims of the named Plaintiffs are typical of the claims of the putative classes and Defendants' defenses to Plaintiffs' claims are typical of its defenses to the claims of the putative Class. The number of members in each of the putative Class exceeds sixty (60) members.

## **III. Adequate Representation**

21. Plaintiffs will fairly and adequately protect the interests of the members of the Classes and have no interest antagonistic to those of other Class members. Plaintiffs have retained Class counsel competent to prosecute Class actions and such Class counsel are financially able to represent the classes.

## **IV. Superiority**

22. The class action is superior to other available methods for the fair and efficient adjudication of this controversy since individual joinder of all members of the Class is impracticable. The interests of judicial economy favor adjudicating the claims for the Plaintiffs' Class rather than on an individual basis. The class action mechanism provides the benefit of unitary adjudication, economies of scale, and comprehensive supervision by a single court.

## **FACTUAL ALLEGATIONS**

### **I. General Facts**

21. In today's world, members of the general public need and/or perceive themselves as being in need of, products that provide boosts of energy to cope with the demands and stresses of daily jobs, family, and social life. While a simple cup of coffee, or other source of caffeine,

1 has for generations been seen as a way to begin the day, stimulate energy, or provide relief from  
 2 fatigue, in recent years a new category of beverages, commonly referred to as “energy drinks,”  
 3 has come to the market and battled for market share by marketing and promoting such drinks as  
 4 superior sources of energy and a way to enhance mental and physical performance via unique  
 5 blends of ingredients, or additional ingredients beyond caffeine. AdvoCare’s Spark energy  
 6 supplement is one such product. However, it is now coming to light that such products actually  
 7 do not provide any superior benefits over just ingesting caffeine, and they certainly do not justify  
 8 their premium prices.

9         22. AdvoCare promises consumers that Spark “sharpens mental focus” and that the  
 10 24-day challenge, “in conjunction with a healthy diet and exercise, help to rid your body of waste  
 11 and prepare your body to better absorb nutrients” by providing a mixture of ingredients that,  
 12 when ingested, significantly improve a consumer’s physiological and mental performance.

13         23. AdvoCare’s Spark further promises that,  
 14 Spark is a unique blend of 20 vitamins, minerals and nutrients that work  
 15 synergistically to provide a healthy and balanced source of energy. Spark contains  
 16 an effective amount of caffeine to give you a quick boost, B vitamins to enhance  
 17 your body’s natural ability to produce and sustain its own energy, and neuroactive  
 18 amino acids that help increase your mental focus and alertness.  
 19 Spark’s ingredients include caffeine and taurine, an ingredient alleged to provide extra  
 20 stimulation, although scientific research strongly questions taurine’s benefits.

21         24. AdvoCare bases its claims upon and touts “scientific knowledge” it claims  
 22 demonstrates the superior nature of AdvoCare branded products.

23         25. Indeed, AdvoCare state on its website that,  
 24 AdvoCare relies on the latest scientific knowledge and highest quality ingredients  
 25 to create safe and effective products. The AdvoCare Science team includes  
 26 Doctors dedicated to product research & development as well as training and  
 27 education for AdvoCare Independent Distributors. The science behind AdvoCare  
 28 products helps improve lives through superior nutrition and wellness.

29         26. Upon information and belief, there is no genuine scientific research or  
 30 scientifically reliable studies in existence that support the extraordinary claims of Defendants that  
 31 AdvoCare branded products provide the benefits claimed. The Defendants know or should know  
 32 that said claims are untrue.

1           27.     Although Defendants point to purported scientific studies and research to back up  
2     their claims that the unique blend of ingredients is responsible for the claimed superior benefits of  
3     using AdvoCare products, the well-regarded scientific journal *Nutrition Reviews* published an  
4     evaluation of various studies of energy drink ingredients and their efficacy and found that:

5           With the exception of some weak evidence for glucose and guarana extract, there  
6           is an overwhelming lack of evidence to substantiate claims that components of  
7           [energy drinks], **other than caffeine**, contribute to the enhancement of physical  
            or cognitive performance.

8     Tom M. McLellan, et al., “Do Energy Drinks Contain Active Components Other Than  
9     Caffeine?”, *Nutrition Reviews*, Vol. 70, pp. 730-44 (2012) (emphasis added).

10           28.     The New York Times published an article titled “Energy Drinks Promise Edge, but  
11     Experts Say Proof is Scant” (Barry Meier, January 1, 2013), citing widespread scientific and  
12     governmental criticism of the notion that energy drinks provide any more benefit than the average  
13     dose of caffeine consumed from a cup of coffee. The article notes that Massachusetts  
14     congressman Edward J. Markey has called for a U.S. government investigation into the energy  
15     drink industry’s marketing claims.

16           29.     The European Food Safety Authority concluded in 2011 that there is a lack of  
17     scientific support for the claimed benefits of taurine, a key ingredient of AdvoCare’s Spark  
18     energy supplement, stating it could find no cause and effect relationship between taurine and its  
19     purported benefits. European Food Safety Authority, *EFSA Journal* 2011; 9(4):2035.

20           30.     Such deceptive conduct and practices take Defendants’ advertising and marketing  
21     beyond mere “puffery” and to an actionable level for deceptive practices and fraud.

22           31.     Upon information and belief, AdvoCare spends millions of dollars misleading  
23     consumers about the superiority of its products and its products’ abilities.

24           32.     Defendants’ prodigious advertising, marketing, and promotional spending has  
25     misled customers into believing that AdvoCare’s Spark and other products are superior products,  
26     worthy of a premium price, and have the ability to “sharpen[ ] mental focus” and provide energy  
27     and vitality.  
28

1           33. The New York Times article pointed out that energy drinks are really just  
2 “caffeine delivery systems” and manufacturers of energy drinks do not want to claim their  
3 products are the equivalent of a cup of coffee or a “NoDoz” tablet “because that is not a very sexy  
4 sales message.”

5           34. Defendants take advantage of numerous marketing platforms in order to ensure  
6 their false and deceptive marketing message permeates the general consumer consciousness.  
7 Defendants use television advertising, internet marketing, and social media, as well as celebrity  
8 sports figure endorsements, and glossy print brochures. Defendants sponsor events such as  
9 NCAA College Football games, NASCAR’s Sprint Cup and Nationwide Series, Major League  
10 Soccer, and NCAA College Basketball invitational tournaments. Regardless of which marketing  
11 avenue reaches a consumer, Defendants drive home the false and deceptive claims of superior  
12 results from using AdvoCare’s products through each of its advertising platforms.

13           35. AdvoCare’s marketing promises that “We Build Champions,” that Spark “delivers  
14 energy and enhanced mental focus with 20 vitamins, minerals and nutrients,” and its website  
15 states, “The science behind AdvoCare products helps improve lives through superior nutrition and  
16 wellness.” These statements and AdvoCare’s marketing materials all promote the false message  
17 that the products improve performance and/or mental acuity, such that a reasonable consumer  
18 would be led to believe that AdvoCare branded products are a superior way for a consumer to  
19 gain energy, obtain and maintain wellness, and/or enhance performance, thereby misleading  
20 consumers that these are superior products, of a superior nature, and worthy of a premium price.

21           36. Indeed, Plaintiffs were lured into becoming consumers of AdvoCare products by  
22 its marketing message, delivered via its packaging, website, advertisements, and promotional  
23 events. Plaintiffs have regularly purchased and consumed AdvoCare products and, specifically,  
24 its Spark energy supplement because of Defendants’ marketing message and themes.

25           37. Despite the medium that AdvoCare has used to deliver its marketing message, the  
26 theme has been the same, such that any one of these marketing and promotional mediums has  
27 influence over the consumer, including Plaintiffs and Class Members, such that a consumer  
28

1 would make the decision to buy the products in the first place, or to pay a premium for the  
2 products over less expensive sources of “energy” due to the products’ purported superior nature.

3 38. AdvoCare delivers the same or substantially similar marketing and advertising  
4 claims and themes across each of its product divisions sold in the United States. AdvoCare’s  
5 Spark energy supplement is marketed the same for all variations of it, with only slight editing of  
6 the marketing materials to account for flavor varieties. Thus, consumers such as Plaintiff(s) and  
7 Class Members have been misled and deceived in the same manner no matter which variety or  
8 size product he or she bought.

9 39. Despite a lack of genuine scientific support for a claim that AdvoCare’s products,  
10 including specifically its Spark energy supplement, provide any more benefit to a consumer than  
11 a cup of coffee, AdvoCare persistently and pervasively markets its products as a superior source  
12 of “energy” worthy of a premium price over a cup of coffee or other sources of caffeine. A single  
13 “pouch” of AdvoCare’s Spark, which is mixed with eight ounces of water for drinking, costs  
14 approximately \$1.64 and contains 120 mg of caffeine, whereas a regular strength tablet of NoDoz  
15 costs approximately \$.15 and contains 200 mg of caffeine. A seven ounce cup of drip coffee  
16 contains approximately 115 to 175 mg of caffeine, depending on the blend. Even a twelve ounce  
17 serving of Starbucks’ coffee costs \$1.85 and contains approximately 235 mg of caffeine, far more  
18 than AdvoCare’s Spark.

19 40. Thus, AdvoCare’s Spark delivers less of the ingredient (caffeine) scientific studies  
20 maintain provides the benefits claimed by AdvoCare for a substantially higher price than  
21 consumers could spend on alternative sources of caffeine.

22 41. As a result of the foregoing, Defendants’ claims regarding AdvoCare’s Spark and  
23 other products are deceptive and misleading. Had Plaintiffs and other members of the proposed  
24 Classes been aware of the truth about Defendants’ products, they would not have purchased the  
25 same, or would not have paid a premium price for the products.

26 42. Indeed, Defendants were in a superior position to know, and did know, that its  
27 claims and advertisements were deceptive and false and they failed to inform consumers that their  
28 Spark branded energy drinks and other products cannot perform as advertised and promised.

1           43. Instead, Defendants allow their deceptive and misleading marketing to permeate  
2 the consumer advertising consciousness and perpetuate Defendants' false claims and promises.

3           44. Because of such deceptive practices and conduct, Defendants command a  
4 substantial premium for their products over readily available and much lower priced sources of  
5 caffeine that provide the same or substantially similar results. Thus, Defendants reap profits on  
6 products where consumers are induced to pay an unwarranted, substantial premium.

7           45. All conditions precedent necessary for the filing of this Complaint have been  
8 satisfied and/or such conditions have been waived by the conduct of Defendants.

9           **II. Plaintiffs' Specific Facts**

10          46. Plaintiff Michael Tubbs was influenced by Defendants' advertising of the 24 Day  
11 Challenge to purchase and use the products which specifically included Spark. He spent  
12 hundreds of dollars on the products. Defendants suggested to him that it would "restart his  
13 metabolism" and that it was a "magical solution that would kick start his body to where it was  
14 when he was younger and healthier." Defendants also suggested to him that after purchasing and  
15 consuming the 24 Day Challenge "he was going to feel wonderful and have a new outlook on  
16 life." Defendants told him that the first round of the 24 Day Challenge was a "cleanse"  
17 suggesting that he continue to use the product after the first 24 Days. The products Defendants  
18 shipped him contained a listing of ingredients that Defendants falsely advertised to: "sharpen  
19 mental focus," provide "long lasting energy," support "heart health," be a "high powered portable  
20 energy source that sharpens mental focus," be a "quick and complete great tasting nutrition," be  
21 "wholesome and easy to digest," an "excellent addition to weigh management program," and to  
22 "provide protein and nutrition to stay at your best." None of this was true. In fact, Plaintiff  
23 realized none of the alleged benefits. Plaintiff Ebony Baker was also influenced by Defendants'  
24 advertising of the 24 Day Challenge to purchase and use the products which specifically included  
25 Spark. She spent over \$200 on the products. She received the same type and nature of products  
26 with the same type and nature of misleading and unsupported claims of health benefits that  
27 Plaintiff Tubbs received. She found that none of Defendants' unsupported advertisements and  
28 claims were true. Plaintiff Stacy Porras was also influenced by Defendants' advertising of the 24

Day Challenge to purchase and use the products which specifically included Spark. She and Plaintiff Tubbs attempted the 24 Day Challenge together at Defendants suggestion because they suggested it would be easier and better to do it together. She received the same type and nature of products with the same type and nature of misleading and unsupported claims of health benefits that Plaintiff Tubbs received. She spent over \$500 on the products and received “specialized” female assistance from Defendants. Specifically she received a “Female Cleanse Guide” to assist her with the deceptive and unsupported claim that one needs to “cleanse” themselves with the products contained in the 24 Day Challenge. She found that none of Defendants’ unsupported advertisements and claims were true. Plaintiff Josh Hall was also influenced by Defendants’ advertising of the 24 Day Challenge to purchase and use the products which specifically included Spark. He received the same type and nature of products with the same type and nature of misleading and unsupported claims of health benefits that Plaintiff Tubbs received. He found that none of Defendants’ unsupported advertisements and claims were true.

### **FIRST CAUSE OF ACTION**

#### **UNLAWFUL, UNFAIR AND FRAUDULENT BUSINESS PRACTICES**

*(Cal. Bus. & Prof. § 17200, et seq.)*

47. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

48. Plaintiffs bring this claim individually, on behalf of the Classes and on behalf of the general public.

49. Through the conduct and scheme described herein, and particularly through the marketing and selling of 24-Day Challenge Products to Plaintiffs and members of the public, Defendants engaged in unlawful, deceptive, and unfair business acts within the meaning of California *Business and Professions Code* § 17200*et seq.* Defendants' acts and practices offend an established public policy, and Defendants engage in immoral, un-ethical, oppressive, and unscrupulous activities that are substantially injurious to consumers including Plaintiffs.

50. Plaintiffs and the Class members were misled into purchasing 24-Day Challenge Products by Defendants’ deceptive conduct as alleged herein. Plaintiffs and the Class members

1 were subject to Defendants' mass media advertising which included but was not limited to  
 2 statements that the 24-Day Challenge Products would enhance mental energy and focus, were  
 3 healthy, would not overburden or overstimulate their body, and would provide a consistent energy  
 4 source that would not burn out. Plaintiffs relied upon such advertising in agreeing to pay for the  
 5 products, thereby suffering economic damage.

6 51. Defendants have unlawfully manufactured, packaged, labeled and/or distributed  
 7 the 24-Day Challenge Products in violation of California *Health & Safety Code*, in that:

8 a. Defendants have disseminated false advertisements of the 24-Day Challenge  
 9 Products in that the product advertising and packaging contain false and/or misleading statements  
 10 as to the purported ability of these products to do what Defendants claim they do, in violation of  
 11 California *Health & Safety Code* §§ 110290 and 110390 *et seq.*

12 b. The 24-Day Challenge Products are misbranded because their labeling does not  
 13 conform with the requirements for nutrition labeling as required by California *Health & Safety*  
 14 *Code* §§ 110665 and 110705;

15 c. The 24-Day Challenge Products are misbranded because their labeling does not  
 16 conform with the requirements for nutrient content or health claims as required by California  
 17 *Health & Safety Code* § 110670;

18 d. The 24-Day Challenge Products are unlawfully labeled in violation of California  
 19 *Health & Safety Code* § 114089;

20 e. The 24-Day Challenge Products are unlawfully labeled in violation of California  
 21 law as the labeling is false and/or misleading in claiming that the product is recommended and  
 22 approved by a scientific and medical advisory board; and

23 f. The 24-Day Challenge Products are unlawfully labeled in violation of California  
 24 law as the labeling and marketing suggests that the product is safe and effective for its intended  
 25 use when such evidence has not been established.

26 52. Plaintiffs and other Class members were misled and, because misrepresentations  
 27 and omission were uniform and material, believed the Defendants' statements.  
 28

1           53. Plaintiffs request that this Court enter such orders or judgments as may be  
2 necessary to restore to any person money and interest which may have been acquired by means of  
3 such unfair practices as provide in *Bus. & Prof. Code* § 17203, and for such other relief as set  
4 forth below.

5           54. Plaintiffs reserve the right to allege other violations which constitute other  
6 unlawful business acts or practices. Upon information and belief, Defendants' wrongful conduct  
7 in violation of § 17200, *et seq.* is ongoing and continues to this date.

8           55. There were reasonably available alternatives to further Defendants' legitimate  
9 business interests, other than the conduct described herein.

10           56. Defendants' actions, claims, nondisclosures, and misleading statements, as alleged  
11 in this Complaint, likely to deceive Plaintiffs and the public, and were intended to deceive  
12 Plaintiffs and members of the public. Plaintiffs and Class members have in fact been deceived  
13 and have relied on Defendants' representations and omissions. This reliance has caused harm to  
14 Plaintiffs and Class members. Plaintiffs and Class members have suffered injury in fact and lost  
15 money as a result of Defendants' unlawful, unfair, and fraudulent practices.

16           57. As a result of its deception, Defendants have reaped unjust revenue and profit.  
17 Restitution is, therefore, appropriate and the Plaintiffs ask that this Court order restitution.  
18 Further, upon information and belief, unless restrained and enjoined, Defendants will continue to  
19 engage in the above-described conduct. Accordingly, injunctive relief is appropriate.

20           58. Plaintiff and Class Members have suffered injury in fact and lost money and/or  
21 property as a result of Defendants' and Does 1 through 10's unlawful business acts and practices  
22 by engaging in the above-described conduct.

23           59. Plaintiffs engaged counsel to prosecute this action and are entitled to recover costs  
24 and reasonable attorneys' fees according to proof at trial.  
25  
26  
27  
28

**SECOND CAUSE OF ACTION**

**UNFAIR, DECEPTIVE AND MISLEADING ADVERTISING**

***(Cal. Bus. & Prof. § 17500, et seq.)***

60. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

61. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

62. Through the conduct and scheme described herein, and particularly through the marketing of 24-Day Challenge Products to Plaintiffs and members of the public, Defendants engaged in unlawful, deceptive, and unfair business acts within the meaning of California *Business and Professions Code* § 17500 *et seq.* Defendants' acts and practices offend an established public policy, and Defendants engage in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers including Plaintiffs.

63. Defendants engaged in the deceptive conduct alleged herein, which included deceptive and untrue advertisements regarding the 24-Day Challenge products and representations made to induce the public to purchase the products.

64. Defendants' advertisements claimed that the 24-Day Challenge Products would enhance mental energy and focus, were healthy, would not overburden or overstimulate their body, and would provide a consistent energy source that would not burn out. Plaintiffs relied upon such advertising in agreeing to pay for the products, thereby suffering economic damage.

65. Defendants made and disseminated false and misleading statements to Plaintiffs and members of the public regarding the nature, purpose, and effect of the 24-Day Challenge Products. Defendants created false impressions which it failed to correct, and concealed material information regarding the products.

66. Defendants were aware or should have been aware by the exercise of reasonable care that the representations were untrue and/or misleading.

1           67. Plaintiffs reserve the right to allege other violations which constitute other  
2 unlawful business acts or practices. Upon information and belief, Defendants' wrongful conduct  
3 in violation of § 17500. *et seq.* is ongoing and continues to this date.

4           68. There were reasonably available alternatives to further Defendants' legitimate  
5 business interests, other than the conduct described herein.

6           69. Defendants' actions, claims, nondisclosures, and misleading statements, as alleged  
7 in this Complaint, likely to deceive Plaintiffs and the public, and were intended to deceive  
8 Plaintiffs and members of the public. Plaintiffs and Class members have in fact been deceived  
9 and have relied on Defendants' representations and omissions. This reliance has caused harm to  
10 Plaintiffs and Class members. Plaintiffs and Class members have suffered injury in fact and lost  
11 money as a result of Defendants' unlawful, unfair, and fraudulent practices.

12           70. Defendants' actions, claims, nondisclosures, and misleading statements, as alleged  
13 in this Complaint, are likely to deceive Plaintiffs and the public, and were intended to deceive  
14 Plaintiffs and members of the public. Plaintiffs have in fact been deceived and have relied on  
15 Defendants' representations and omissions. This reliance has caused harm to Plaintiffs and  
16 Plaintiffs have suffered injury in fact and lost money as a result of Defendants unlawful, unfair,  
17 and fraudulent practices.

18           71. Plaintiff and Class Members have suffered injury in fact and lost money and/or  
19 property as a result of Defendants' and Does 1 through 10's unfair, deceptive, and misleading  
20 advertising by engaging in the above-described conduct.

21           72. As a result of its deception, Defendants have been able to reap unjust revenue and  
22 profit. Restitution is therefore appropriate and the Plaintiffs asks that Court order restitution.  
23 Further, upon information and belief, unless restrained and enjoined, Defendants will continue to  
24 engage in the above-described conduct. Accordingly, injunctive relief is appropriate.  
25  
26  
27  
28

**THIRD CAUSE OF ACTION**

**BREACH OF IMPLIED WARRANTY**

**(*CAL. U. COMM. CODE* §§ 2314, 2315 and Common Law)**

73. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

74. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

75. The 24-Day Challenge Products were sold with the implied warranty of merchantability that the product would pass without objection in the trade, is fit for the ordinary purpose for which it is used, is adequately contained, packaged, and labeled, and conforms to the promises or affirmations of fact made on the container and label. The 24-Day Challenge Products do not meet with foregoing criteria.

76. The 24-Day Challenge Products were sold with the implied warranty of fitness in that Defendants had reason to know of the particular purpose for which the product was required (i.e., as a nutrient to make one healthier and more mentally focused) and Plaintiffs and the Class members relied upon Defendants' advertised skill and judgment to furnish suitable goods. It is not suitable for the purpose for which it was required and sold.

77. The defects in the 24-Day Challenge Products existed prior to the delivery of the product to Plaintiffs and the Class members.

78. Plaintiffs and the Class members have incurred damages as described herein as a direct and proximate result of the defective product and Defendants' and Does 1 through 10's breach of the implied warranties, in that Plaintiffs and the Class members paid the purchase price for the defective product. Plaintiffs, on behalf of themselves and the Class members, have demanded that Defendants correct the defect and Defendants have failed and/or refused. Plaintiffs and the Class members are entitled to a refund of the purchase price of the products, consequential and incidental damages, costs and expenses, including attorney's fees.

**FOURTH CAUSE OF ACTION**  
**BREACH OF EXPRESS WARRANTY**  
***(CAL. U. COM. CODE § 2313)***

79. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

80. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

81. The 24-Day Challenge Products were sold with an express warranty as Defendants made express affirmations of fact and promises regarding the health benefits of the products.

82. Defendants guaranteed the health benefits and especially the mental benefits of using the products.

83. They were sold with an express warranty because Defendants' express description of the product on the packaging and in mass media advertising was intended to become part of the basis of the bargain. The 24-Day Challenge Products are not suitable for the purpose for which they were required and sold as the products do not in fact benefit one's health as described.

84. The defect in the products existed prior to delivery of the product to Plaintiffs and the Class members.

85. Plaintiffs and Class members have incurred damages as described herein as a direct and proximate result of the defective products and Defendants' and Does 1 through 10's breach of the express warranties, in that the Plaintiffs and the Class have paid the purchase price for the defective products. Plaintiffs, on behalf of themselves and the Class members, have demanded that Defendants correct the defect and Defendants have failed and/or refused. Plaintiffs and the Class members are entitled to a refund of the purchase price of the product, consequential and incidental damages, costs and expense, including attorneys' fees.

**FIFTH CAUSE OF ACTION**

**VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**

***(CAL. CIV. CODE § 1750 et seq.)***

86. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

87. Plaintiffs bring this claim individually, on behalf of the Class and on behalf of the general public.

88. Plaintiffs and the Class are individuals who purchased goods (i.e., 24-Day Challenge Products) for personal use.

89. Defendants have represented that the 24-Day Challenge Products have characteristics, uses, benefits, and/or qualities that the products do not have.

90. Plaintiffs and the Class have each been directly and proximately injured by the conduct of the Defendants, and such injury includes payment for the 24-Day Challenge Products they purchased.

91. Plaintiffs, contemporaneously with the filing of the initial Complaint in this action, provided Defendants notice of their Consumer Legal Remedies Act claims, on behalf of themselves and the Class members, through a Notice as required by California Consumer Legal Remedies Act. On March 22, 2017, more than thirty (30) days prior to the filing of this Amended Complaint Defendant received notice from the Plaintiffs of the particular alleged violations of Section 1750 et seq.

92. The Court should enjoin Defendants and Does 1 through 10 from any further sales, marketing, or advertisement of the 24-Day Challenge Products which contain the misrepresentations detailed herein as to the standards, characteristics, uses, benefits, and/or qualities of the products. Plaintiffs request that this Court enter a permanent injunction enjoining Defendants, and their agents, servants, employees, and all persons acting under or in concert with them, to cease and desist from the following acts: (a) selling, marketing, or advertising the 24-Day Challenge Products in the illegal manner they are now doing; (b) selling, marketing, or advertising the 24-Day Challenge Products in the illegal manner they are now doing without any

adequate and reliable scientific basis for such claims; (c) selling, marketing, or advertising the 24-Day Challenge Products as a supplement or drug that has specific medicinal benefits; (d) selling, marketing, or advertising the 24-Day Challenge Products with any representation or suggestion that a scientific and medical review board has approved or recommended the products for use; (e) concealing information regarding the true nature and origin of the herbal nutrients contained in the 24-Day Challenge Products; (f) selling, marketing, or advertising that the 24-Day Challenge Products are guaranteed in any way; (g) engaging in any of the illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct described herein; and (h) engaging in any other conduct found by the Court to be illegal, fraudulent, misleading, unlawful, unfair and/or deceptive conduct.

93. Plaintiffs and Class members have incurred damages as described herein as a direct and proximate result of the defective products and Defendants' and Does 1 through 10's violations of the Consumer Legal Remedies Act. Plaintiff and Class members demand actual damages, restitution, punitive damages, and any other relief the Court deems proper. Plaintiffs, on behalf of themselves and the Class members, have demanded that Defendants correct the defect and Defendants have failed and/or refused. Plaintiffs and the Class members are entitled to a refund of the purchase price of the product, consequential and incidental damages, costs and expense, including attorneys' fees, and any other relief the Court deems proper.

### **SIXTH CAUSE OF ACTION**

#### **COMMON LAW RESTITUTION FOR UNJUST ENRICHMENT**

94. Plaintiffs adopt, re-allege and incorporate herein each and every allegation in the Complaint, as though fully set forth herein.

95. To the extent necessary, this claim is pled in the alternative to those claims asserted on behalf of the putative Class and/or is asserted on behalf of Plaintiffs alone.

96. Defendants have benefit and have been unjustly enriched by their wrongful conduct alleged herein. Defendants have sold the 24-Day Challenge Products to Plaintiffs and the Class based upon deceptive conduct and misrepresentations as to the uses and qualities which the

1 product does not possess and which Defendants were, and still are, aware the product does not  
2 possess.

3 97. Defendants have knowledge of this benefit, and have voluntarily accepted and  
4 retained this benefit.

5 98. The circumstances as described herein are such that it would be inequitable for  
6 Defendants to retain these ill-gotten benefits without paying the value thereof to Plaintiffs and the  
7 Class.

8 99. Plaintiffs and the Class are entitled to the amount of Defendants' and Does 1  
9 through 10's ill-gotten gains, including interest, resulting from their unlawful, unjust, and  
10 inequitable conduct as described above.

### 11 **REQUEST FOR JUDGMENT**

12 Plaintiffs asks for judgment against Defendants and each of them, in its and the putative  
13 Class's favor as follows:

- 14 1. For an order certifying this action as a Class action;
- 15 2. For actual and compensatory damages in such amount as the Court or jury deems  
16 just and proper;
- 17 3. For attorney's fees and costs for all causes of action alleged herein for which such  
18 amounts are permissible under applicable law, including California Code of Civil  
19 Procedure § 1021.5, in such amount as the Court or jury deems just and proper;
- 20 4. For prejudgment interest;
- 21 5. For an order requiring Defendants to provide notice to the Class and to pay for  
22 such notice;
- 23 6. For imposition of a constructive trust, recessionary relief, injunctive relief,  
24 including prohibition of Defendants' unfair, illegal and fraudulent business  
25 practices set forth herein, and including restitution and disgorgement of ill-gotten  
26 profits; and
- 27 7. All other relief which the Court and/or jury deems equitable and just.
- 28

**DEMAND FOR JURY TRIAL**

Plaintiffs on their own behalf and on behalf of the putative Class, demands a jury trial in the above captioned matter.

DATED May 4, 2017



Attorney for Plaintiffs

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