UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL CLEMENT, on his own behalf and on behalf of all others similarly situated, **Plaintiff,** **-against-** **REXALL SUNDOWN, INC. and THE NATURE'S BOUNTY COMPANY, INC.,** **Defendants.**	**C.A. No. _____**

CLASS ACTION COMPLAINT

Plaintiff Daniel Clement ("Plaintiff"), through his undersigned counsel, alleges as follows on actual knowledge as to his own acts, and on information and belief as to all other allegations, after due investigation by counsel, as follows:

FACTUAL ALLEGATIONS

1. Defendants Rexall Sundown, Inc. ("Rexall") and its corporate parent, Nature's Bounty Company, Inc. ("NBTY"), are leading producers of nutritional supplements which are sold at retail outlets throughout the United States.

2. While Rexall and NBTY have repeatedly been accused by private plaintiffs of selling products that simply do not work as advertised to relieve pain or improve health, they do market one product that contains an ingredient clinically

demonstrated to ease the pain and discomfort of swollen, stiff joints. This product is known as "Osteo Bi-Flex" with "Joint Shield."

3. Unfortunately, as discussed below, Defendants have knowingly and systematically *underdosed* consumers seeking relief from Osteo Bi-Flex, while falsely claiming that such products contain a "triple strength dose." By doing so, Defendants unlawfully save on the cost of ingredients, while shortchanging the consumers who are in the greatest physical discomfort (and thus seeking out an enhanced "triple strength" product which they do not receive). In short, Defendants sell a single strength dose while foisting it off as triple strength dose. Indeed, no matter what product "strength" Defendants tout—single, double or triple—consumers always get the same dose: 100 mg.

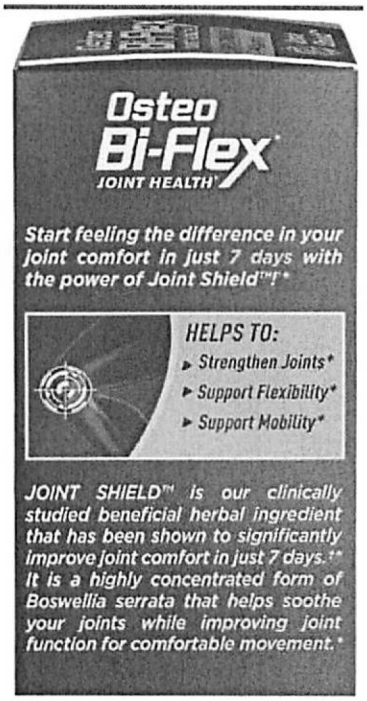
4. Osteo Bi-Flex Joint Health ("Osteo-Bi-Flex") is sold in at least eight different variants, usually in tablet form.

5. Plaintiff herein twice purchased Osteo-Bi-Flex with Vitamin D, as he was seeking relief from achy, stiff joints. The front of the package contained the following representations:

6. Most relevant here are three prominent features: (a) the product is "TRIPLE STRENGTH"; (b) it "Shows Improved Joint Comfort Within 7 Days!"; and (c) it contained "JOINT SHIELD™."

7. "Joint Shield" is a trademarked name for the one product within Osteo-Bi-Flex which works: an extract of the *Boswellia serrata* plant, which is native to India and Pakistan. There are numerous types of admixtures of *Boswellia serrata* used in holistic medicine. The one used in Osteo Bi-Flex is referred to as "5-Loxin." (Also sometimes called, "Indian Frankincense.").

8. Defendants describe the benefits of Joint Shield (which contains 5-Loxin) on the side of the Osteo Bi-Flex box:



9. That Joint Shield is "clinically Proven" and "beneficial" is correct. This has been shown in studies led by Dr. Krishanu Sengupta, a Fellow of the America College of Nutrition and Senior Scientist at the Laila Impex Research and Development Center, Vijayawada, India, since 2005.

10. In his seminal study, which has been relied upon by Defendants herein, Dr. Sengupta found that a dose of 100 mg. of 5-Loxin was beneficial, but that: "Interestingly, significant improvements in pain score and functional ability were recorded in the treatment group supplemented with ***250 mg*** 5-Loxin ***as early as 7 days after the start of treatment."***[1] The 100 mg. dose worked as quickly, but

[1] K. Sengupta, *et al.*, "A double blind, randomized, placebo controlled study of the efficacy and safety of 5-Loxin for treatment of osteoarthritis of the knee.", Arthritis Res Ther. 2008;10(4):R85. doi: 10.1186/ar2461, available at: https://arthritis-research.biomedcentral.com/articles/10.1186/ar2461

nowhere near as well. *Id.*

11. Thus, while a 100 mg., single dose is helpful, the best relief is brought about by ingestion of at least 250 mg., essentially a triple strength dose. The product Plaintiff purchased lists the dosage per serving on the back of the box:

Supplement Facts

Serving Size 2 Tablets
Servings Per Container 40

Amount Per Serving		%Daily Value
Calories	10	
Total Carbohydrate	2 g	1%**
Vitamin D (as D3 Cholecalciferol)	2,000 IU	500%
Sodium	20 mg	1%
Glucosamine HCl	1,500 mg (1.5 g)	***
Joint Shield™ 5-LOXIN Advanced® *Boswellia serrata* Extract (resin)	100 mg	***
Chondroitin/MSM Complex Chondroitin Sulfate and Methylsulfonylmethane (MSM)	275 mg	***

**Percent Daily Values are based on a 2,000 calorie diet
***Daily Value not established.

12. As seen above a 2 tablet "serving" per day of the "triple strength" Osteo Bi-Flex provides only 100 mg. of 5-Loxin. This is not a triple strength dose. It is a single strength dose.

13. Indeed, the Defendants' "One Per Day", single strength version of Osteo Bi-Flex contains the same exact dosage and the same representations on the front of the box:

14. The One Per Day ingredients are listed as follows:

Supplement Facts

Serving Size 1 Tablet

Amount Per Serving		%Daily Value
Calories	5	
Total Carbohydrate	1 g	
Sodium	10 mg	
Vitamin D (as D3 Cholecalciferol)	10 mcg (400 IU)	50%
Glucosamine HCl	1,500 mg (1.5 g)	***
Joint Shield™ 5-LOXIN Advanced® *Boswellia serrata* Extract (resin)	100 mg	

**Percent Daily Values are based on a 2,000 calorie diet.
***Daily Value not established.

15. It is noteworthy that the dosage provided of 5-Loxin (100 mg.) and the dosage provided of Glucosamine HCI (1500 mg.), a purportedly effective ingredient, remain constant between single strength and "triple strength."[2]

[2] There is no claim made by Defendants, or in the scientific literature, of relief within 7 days from Glucosamine HCI. Thus, 5-Loxin is the key, fast-acting, and only proven ingredient.

16. Another key fact about 5-Loxin is that it contains "AKBA", known to be the most effective form of what are termed "boswellic acids." A 100 mg. dose of 5-Loxin is said (in industry terminology) to be 30% "standardized" with AKBA, meaning every 100 mg, dose has 30 mg. of AKBA.

17. Thus, a triple dose of 300 mg. would have 90 mg of AKBA.[3] Osteo Bi-Flex "Triple Strength" was tested in 2018 by ConsumerLab.com, an independent testing concern. ConsumerLab found the "Triple Strength" to contain 29.6 mg. of AKBA per two tablet serving, a finding consistent with a *single strength*, 100 mg. dose. (ConsumerLab did not undertake to opine on the accuracy of Osteo Bi-Flex's "triple strength" claim).

18. In sum, consumers have paid for fast-acting, 7 day, *triple strength* relief, but were given a different, much less effective product.

19. Defendants have previously pulled a very similar scam when marketing *children's vitamins.* In 2010, Defendants were caught by the FTC marketing Disney/Marvel children's vitamins to unsuspecting children and their unsuspecting parents, claiming the vitamins contained 100 mg. of DHA, a supplement needed for healthy brain and eye development. Defendants not only shortchanged the children,

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[3] See "Frankincense's Efficacy in Treating Osteoarthritis", Dr. Jeremy Appleton, ND, 5:5 Natural Medicine Journal, May 2013, available at: https://www.naturalmedicinejournal.com/journal/2013-05/frankincenses-efficacy-treating-osteoarthritis

but provided them with only a trace of DHA, according to an FTC press release and complaint.[4] The December 10, 2010 press release recounted the wrongdoing:

> Product packaging and print ads promoting the vitamins had bold graphics highlighting that the products contained DHA, but in reality, the products allegedly had only a trace amount of DHA. While the vitamins' packaging touted the purported health benefits of 100 milligrams of DHA, *a daily serving of the Disney and Marvel multivitamins for children ages four years and older contained only one thousandth of that amount (0.1 mg or 100 mcg), according to the FTC's complaint.*

20. The Defendants agreed to a Consent Order and a $2.1 million penalty.

21. The scheme alleged herein constitutes knowing and intentional recidivist conduct. Instead of victimizing children, the Defendants have turned to victimizing older people with joint issues.

22. The Defendants should be made to pay both actual damages, and punitive damages.

23. Accordingly, Plaintiff seeks relief on behalf of himself and a Class of all purchasers of "Triple Strength" Osteo Bi-Flex for: (a) common law fraud; (b) breach of an express warranty; (c) breach of N.Y. Gen. Bus. Law § 349; and (d) for recovery of unjust enrichment.

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[4] *In the Matter of NBTY, Inc., NatureSmart, LLC (an affiliated company) and Rexall Sundown, Inc.*, Docket No. C-4318 (FTC Consent Order March 22, 2011), available at: https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213nbtyagreeorder.pdf

JURISDICTION AND VENUE

24. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d), enacted pursuant to the Class Action Fairness Act ("CAFA"). Plaintiff has alleged a nationwide class and as such the citizenship of at least one Class member is different from that of at least one of the Defendants. The amount in controversy exceeds the sum of $5,000,000. Accordingly, the minimal diversity required under the CAFA is easily satisfied.

25. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Defendants are citizens of this district, and the principal place of business for each Defendant is located in this district. Moreover, Defendants regularly transact and continue to transact business in this district.

26. This Court has *in personam* jurisdiction over the Defendants because, inter alia, Defendants are present with this District in that they: (a) are headquartered in this district; (b) transacted business in this district; (c) maintain continuous and systematic contacts in this District at all relevant times; and (d) purposefully availed themselves of the benefits of doing extensive business in this District. Accordingly, the Defendants maintain minimum contacts with this District which are more than sufficient to subject them to service of process and to comply with due process of law requirements.

THE PARTIES

27. Plaintiff Daniel Clement purchased Osteo Bi-Flex Joint Health Triple Strength with Vitamin D in late 2018 and in the beginning of 2019, read the label prior to purchase, and completed those purchases in reliance on the representations on the box, including that he was being provided with a triple strength dose that could provide relief in a soon as seven days.

28. Defendant Rexall Sundown, Inc. is a Florida Corporation with its principal place of business located at 110 Orville Drive, Bohemia, New York 11716. Defendant manufactures, advertises, markets, distributes, and sells the relevant Osteo Bi-Flex Products to tens of thousands of consumers throughout the United States.

29. Defendant The Nature's Bounty Company, Inc. ("NBTY") is a Delaware corporation, with corporate headquarters are located at 110 Orville Drive, Bohemia, New York 11716. NBTY manufactures, advertises, markets, distributes, and/or sells the Osteo Bi-Flex Products to tens of thousands of consumers throughout the United States.

CLASS ALLEGATIONS

30. Plaintiff brings this action on behalf of himself and all other similarly situated consumers pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure for damages, and seeks certification of the following Class and Sub-Class:

Nationwide Class: all consumers who in any state, within the applicable statute of limitations period until the date that class notice is disseminated, purchased Osteo Bi-Flex Joint Health Triple Strength (the "Product"). Excluded from this Nationwide Class are Defendants and their officers, directors, employees and those who purchased NBC Biotin Products for the purpose of resale. The Nationwide Class applies to the common law claims asserted herein.

Sub-Class: All persons within this group who reside in New York shall constitute the "New York Sub-Class."

31. **Numerosity.** The Class Members are so numerous that joinder of all Members is impracticable. Plaintiff believes that the proposed Classes contains many thousands of purchasers of the Product who have been damaged by Defendants' conduct as alleged herein. The Product is sold by Defendants nationwide in stores and also over the Internet. The precise number of Class and Sub-Class members is unknown to Plaintiffs but may be sufficiently determined through discovery.

32. **Common Questions of Law and Fact Predominate.** This action involves common questions of law and fact, which predominate over any questions affecting individual Class and Sub-Class members. These common legal and factual questions include, but are not limited to, the following:

(a) Whether Defendants' actions amount to a common law fraud committed by uniform misrepresentations likely to be relied upon by Class Members;

(b) Whether Defendants made and then violated an express warranty;

(c) Whether Defendants were unjustly enriched;

(d) Whether, as to the New York Sub-Class, Defendants violated N.Y. Gen. Bus. Law Sect. 349; and

(e) The measure of damages.

33. **Typicality.** Plaintiff's claims are typical of the claims of the members of the Class and Sub-Classes because, *inter alia,* all Class Members were injured through the uniform misconduct described above and were subject to Defendants' deceptive representations on the front of each and every Product container. Plaintiffs' claims and legal theories on behalf of herself are the same as all Class Members.

34. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the interests of the Class and Sub-Class Members. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff will vigorously prosecute this action. Plaintiff has no adverse or antagonistic interests to those of the Classes.

35. **Superiority.** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class and Sub-Class Members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Defendants. It would thus be virtually impossible for members of the Classes, on an individual basis, to obtain effective redress for the

wrongs done to them. Furthermore, even if Class and Sub-Class Members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION
(For Common Law Fraud)

36. Plaintiff repeats and realleges all previous allegations.

37. Defendants marketed the Product using material uniform representations. These included that the Product provided a "triple strength dose" that could provide relief within 7 days. Buyers would of necessity see these representations, and rely upon them, and Plaintiff did so.

38. The Defendants knew that the Product did not provide a triple strength dose of the ingredient, 5-Loxin, that had been clinically shown to provide the best relief within 7 days at a dose of 250 mg., roughly the equal of a triple strength dose. Defendants knew of Dr. Sengupta's research, and his conclusions. In addition, the

triple-strength claim was materially false since product versions such as One-Per-Day contained the same serving amount of 5-Loxin.

39. Defendants have committed a common law fraud, which has damaged Plaintiff and all Class members.

SECOND CAUSE OF ACTION
(For Breach of Express Warranty)

40. Plaintiff repeats and realleges all previous allegations.

41. Defendants marketed the Product using material uniform representations, which constituted an express warranty. The warranty included that the Product provided a "triple strength dose" that could provide relief within 7 days. Buyers would of necessity see these representations, and rely upon them, and Plaintiff did so. In addition, the triple-strength claim constitutes a warranty and was materially false since the product versions such as One-Per-Day contained the same serving amount of 5-Loxin.

42. What Defendants warranted was not the case: the Product did not provide a triple strength dose of the ingredient, 5-Loxin, that had been clinically shown to provide the best relief within 7 days at a dose of 250 mg., roughly the equal of a triple strength dose. In addition, the triple-strength claim was materially false since the product versions such as One-Per-Day contained the same serving amount of 5-Loxin. Thus the Defendants were unjustly enriched by selling a product which was not what was promised and was more expensive than the non-triple-strength

versions..

43. Defendants made and did not fulfill these express warranties.

44. Plaintiff and the Class have been damages by these breaches of the express warranties.

THIRD CAUSE OF ACTION
(For Unjust Enrichment)

45. Plaintiff repeats and realleges all previous allegations.

46. Defendants marketed a Product that did not provide a triple strength dose of the ingredient, 5-Loxin, that had been clinically shown to provide the best relief within 7 days at a dose of 250 mg., roughly the equal of a triple strength dose.

47. Defendants have intentionally provided an underdose of a product to ailing customers thereby saving the costs of manufacturing the product properly and enjoying profits it should not have earned.

48. Defendants' actions are unjust, and they have been unjustly enriched.

49. Defendants must disgorge to Plaintiff and the Class their quantum of unjust enrichment.

FOURTH CAUSE OF ACTION
(Violation of N.Y. Gen. Bus. Law § 349: New York Sub-Class)

50. Plaintiff repeats and realleges all previous allegations.

51. Defendants deceived the public consumers using material uniform representations. These included that the Product provided a "triple strength dose". A

dose that can provide the best relief within 7 days. In addition, the triple-strength claim was materially false since the product versions such as One-Per-Day contained the same serving amount of 5-Loxin.

52. These representations were material.

53. Plaintiff and Sub-Class members suffered injury by reason of being induced to purchase a product that was materially different in quality, efficacy and dosage than represented.

54. Defendants caused Plaintiff and the Sub-Class damages, and must be ordered to pay either actual, statutory or treble damages, as permitted by statute.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests relief as follows:

A. An Order that this action shall be certified as a class action, that Plaintiff be designated the class representative; and his counsel as class counsel;

B. An Order awarding Plaintiff and the class compensatory damages for fraud and breach of express warranty, as proved at trial with punitive damages, and pre-judgment interest as appropriate;

C. An Order declaring that Defendants have been unjustly enriched and ordering them to disgorge such unjust gains;

D. An Order declaring that that the Defendants' conduct violates the New York General Business Law § 349 and awarding damages as appropriate including

actual damages, statutory damages and (where permissible) treble damages for violations found to be willful;

E. An Order awarding attorneys' fees and reimbursement all costs incurred in the prosecution of this action; and

F. An Order granting such other relief as this Court deems just and proper.

Dated: New York, New York
February 21, 2019

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