

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

RONALD SAITTA and NEVINA SAITTA,  
Individually and On Behalf of All Others  
Similarly Situated,

Plaintiffs,

v.

PROTALUS, LLC, PROTALUS USA, LLC and  
PROTALUS HOLDINGS, LLC,

Defendants.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

C.A. No:

**INTRODUCTION**

Plaintiffs, Ronald Saitta (“Mr. Saitta”) and Nevina Saitta (“Ms. Saitta”) (“Plaintiffs”), by and through their undersigned counsel of record, on behalf of themselves and all others similarly situated, submit this class action complaint (“Complaint”) against Defendants Protalus, LLC, Protalus USA, LLC, and Protalus Holdings, LLC (collectively, “Protalus” or “Defendants”), and based upon personal knowledge as to their own acts and circumstances and based upon information and belief as to all other matters, allege as follows.

1. This case pertains to the false representations by Defendants which have been made in a concerted and orchestrated effort to prey on consumers’ hope that products exist that can quickly and effortlessly treat their adverse conditions and injuries and alleviate their pain.

2. Defendants manufacture, market, and sell a line of non-custom insoles or shoe inserts, sometimes referred to as orthotics, made to be inserted into and worn with the customers' footwear. These products are referred to collectively herein as "Protalus Insoles."<sup>1</sup>

3. Protalus Insoles are not sold in stores, but can only be purchased online,<sup>2</sup> including at the Protalus website, [www.protalus.com](http://www.protalus.com), and at [www.amazon.com](http://www.amazon.com).

4. Defendants have deceptively represented that by simply wearing Protalus Insoles in any type of footwear,<sup>3</sup> consumers can obtain relief from pain and receive treatment from a myriad of common injuries such as neuropathy, plantar fasciitis, back pain, heel spurs, diabetic foot, high arches, blisters, heel pain, hammer toes, and swelling.<sup>4</sup>

5. Indeed, Defendants have not only made representations about the benefits and performance of Protalus Insoles, but they have, on the Protalus website, [www.protalus.com](http://www.protalus.com), "guaranteed" relief from the conditions listed in the preceding paragraph (among other conditions).<sup>5</sup>

6. Protalus has also made the following claim on its website, in large, bold type: "**Immediate Relief. Long-Term Benefits. Guaranteed,**" and the website stated that "we achieve . . . proven, lasting relief."<sup>6</sup>

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<sup>1</sup> The term "Protalus Insoles," as used herein, includes the Protalus Max Series (M100 and M75); Thin Series (T100 and T75); Heel Series (H75); and Extra-Thin Series (ET75).

<sup>2</sup> <https://www.protalus.com/collections/shop> (last visited 10/3/19).

<sup>3</sup> "We make a patented Protalus insole for almost every type of shoe." <https://www.protalus.com> (last visited 10/3/19).

<sup>4</sup> <https://www.protalus.com/pages/neuropathy-relief> (as of 10/11/18).

<sup>5</sup> *Id.* The "guaranteed relief" claims are no longer on the Protalus website and are believed to have been removed as part of a revision of the website on or about June 13, 2019.

<sup>6</sup> <https://www.protalus.com> (as of May 20, 2019). These statements no longer appear on the website. *See* note 5, *supra*.

7. Defendants claim that the Protalus Insoles work by correcting misalignment of the body (and in particular, the ankle) and that “Our proven Tri-Planar technology aligns your body with every step you take.”<sup>7</sup>

8. Contrary to Defendants’ representations, Protalus Insoles do not provide the claimed benefits. As discussed in greater detail herein, numerous studies, reviews and articles by experts demonstrate the falsity of Defendants’ claims.

9. To the extent that Protalus Insoles provide any pain relief or treatment or other benefits (which they do not), they do not provide any greater benefit than insoles costing substantially less. Protalus Insoles currently sell for \$79.95,<sup>8</sup> and during the relevant time period, they sold for as much as \$99.95 a pair (the price paid by Plaintiffs), while many insoles can be purchased for as little as \$10 to \$30 a pair. For example: Dr. Scholl’s Pain Relief for Plantar Fasciitis Insoles for Women are available at Target for \$14.59 (*see* <https://www.target.com>); Dr. Scholl’s Men’s Pain Relief Orthotics for Plantar Fasciitis are available at CVS for \$19.99 (*see* <https://www.cvs.com>); and Dr. Scholl’s PLANTAR FASCIITIS Pain Relief Orthotics (offering “Clinically Proven Relief and Prevention of Plantar Fasciitis Pain”) are available at <https://www.amazon.com> for \$12.97 (list price \$18.99) (as of October 3, 2019).

10. Accordingly, as a result of Defendants’ false claims about the benefits of Protalus Insoles, consumers, including Plaintiffs and Class and Subclass members, have paid a substantial premium price for a product that does not perform as claimed and advertised.

11. Defendants have thus been able to charge, and consumers have paid, a price premium for Protalus Insoles over insoles costing substantially less. Defendants have used

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<sup>7</sup> *See* <https://www.protalus.com> and [https://www.protalus.com/pages/alignment\\_](https://www.protalus.com/pages/alignment_) (last visited 10/3/19).

<sup>8</sup> <https://www.protalus.com/collections/shop> (last visited 10/3/19).

deceptive claims regarding the purported benefits of Protalus Insoles (and the purported science behind those claimed benefits) to charge a premium substantially in excess of the price charged for other insoles that also claim to relieve pain and provide various health benefits. *See* examples cited in Paragraph 9, *supra*.

12. Defendants' false, deceptive, and misleading representations about the pain-relieving properties and health benefits of Protalus Insoles are material; there would be no reason for a consumer to purchase a pair of Protalus Insoles and pay a premium price for the product if not for the claims and representations about the ability of Protalus Insoles to relieve pain and treat a variety of conditions.

13. Plaintiffs bring this lawsuit against Defendants on behalf of themselves and a Class (and a Massachusetts Subclass) of similarly situated purchasers of Protalus Insoles, alleging claims of unjust enrichment, untrue and misleading advertising in violation of G. L. c. 266 §91, unfair and deceptive conduct in violation of G.L. c. 93A, § 2, breach of express warranty, and breach of implied warranty of merchantability.

#### **PARTIES**

14. Ronald Saitta is an individual residing in Chelsea, Suffolk County, Massachusetts.

15. Nevina Saitta is an individual residing in Chelsea, Suffolk County, Massachusetts.

16. Defendant Protalus, LLC is a limited liability company, organized under the laws of Delaware, with a principal place of business at 1750 Blankenship Road, Suite 125, West Linn, Oregon 97068.

17. Defendant Protalus USA, LLC is a limited liability company, organized under the laws of Delaware, with a principal place of business at 1750 Blankenship Road, Suite 125, West Linn, Oregon 97068.

18. Defendant Protalus Holdings, LLC is a limited liability company, organized under the laws of California, with a principal place of business at 1750 Blankenship Road, Suite 125, West Linn, Oregon 97068.

**JURISDICTION AND VENUE**

19. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class members and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from that of Defendants.

20. This Court has personal jurisdiction over Defendants pursuant to M.G. L. c. 223A, § 3(a), because: (a) Defendants regularly transact and have transacted business in the Commonwealth of Massachusetts by selling products to Massachusetts consumers; (b) Defendants have committed torts within the Commonwealth of Massachusetts; (c) Defendants solicit business within the Commonwealth of Massachusetts; and (d) the acts or conduct that are the subject matter of this action arose from Defendants' transaction of business in Massachusetts.

21. Pursuant to 28 U.S.C. § 1391, venue is proper in this Court because: (a) a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this District; (b) Defendants distributed, advertised and sold Protalus Insoles, which are the subject of the present Complaint, in this District; and (c) Plaintiffs reside in this District.

**SUBSTANTIVE ALLEGATIONS**

22. Defendants began selling Protalus Insoles in the United States in or around 2004.

23. Defendants have sold Protalus Insoles to consumers in Massachusetts and throughout the United States by means of false, deceptive and misleading advertising, marketing and promotion. Defendants make claims in their advertising for Protalus Insoles that are false

and intended to mislead consumers into believing, and do mislead consumers into believing, that Protalus Insoles have special properties, unlike any other insoles or orthotic products.

24. Defendants have consistently claimed throughout the Class Period that Protalus Insoles relieve pain and treat a variety of conditions.

25. During the Class Period, the website [www.protalus.com](http://www.protalus.com) contained prominent misrepresentations concerning the capacity of Protalus Insoles to provide “lasting relief” from a wide variety of conditions, including swelling.<sup>9</sup>

26. During the Class Period, the Protalus website also claimed that Protalus Insoles provided “guaranteed relief from,” among other conditions, the following:

- Neuropathy
- Plantar fasciitis
- Back pain
- heel spurs
- diabetic foot
- high arches
- blister
- swelling
- heel pain
- hammer toes<sup>10</sup>

27. During the Class Period, the Protalus website also contained the following claims and representations:

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<sup>9</sup> <https://www.protalus.com/> (as of 10/11/18). *See* note 5, *supra*.

<sup>10</sup> *Id.* *See* note 5, *supra*.

- “Improve performance, increase comfort, and relieve pain with one simple addition: Protalus® insoles.”
- **“Our insoles will provide the relief you need, guaranteed.”** (bold in original)
- “Our insoles realign your body from the feet up to evenly distribute the force of each step and ease the pain, tingling, sensitivity, and throbbing experienced by many people with neuropathy.”
- “If you have pain related to neuropathy, you know that it can affect more than your mobility, but also your sleep and general quality of life. Our Tri-Planar Technology gently realigns your ankle and heel to support you properly, helping to reduce pain in your feet, knees, hip, and back.
- “Protalus® insoles replicate the benefits of both custom insoles and custom orthopedics”
- “Our exclusive, patented, Tri-Planar technology unlocks possibilities not even found today in custom orthopedic insoles.”<sup>11</sup>
- “our insoles are the only over the counter orthotic guaranteed to improve alignment by up to 31%.”<sup>12</sup>

28. Contrary to Defendants’ claims that Protalus Insoles provide “Guaranteed” and “Lasting” relief and can be used to treat various conditions, Protalus Insoles do not provide such benefits. Defendants’ claim that a variety of conditions can be effectively treated by Protalus Insoles is false, not supported by scientific evidence, and not accepted by the medical community.

29. Various studies, reviews, and articles by experts demonstrate the falsity of Defendants’ claims about the pain-relieving properties and health benefits of Protalus Insoles, including the claims of “lasting relief” and “guaranteed” relief.

30. According to Dr. Benno Nigg, Professor of Biomechanics and co-director of the Human Performance Laboratory at the University of Calgary, Alberta, the idea that orthotics “are

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See note 5, *supra*.

supposed to correct mechanical alignment problems [the primary theory behind Defendants' claims about the benefits of Protalus Insoles] does not hold up."<sup>13</sup> Dr. Nigg also says that "'corrective orthotics' do not correct so much as lead to a reduction in muscle strength."<sup>14</sup>

31. "Dr. Joseph Hamill, a professor of kinesiology and the director of the biomechanics laboratory at the University of Calgary, [stated that] orthotics have little effect on kinematics-the movement of the skeleton during a very intense activity such as a run-but they can have large effects on muscles and joints, often making muscles work as much as 50 percent harder for the same movement and increasing stress on joints by a similar amount."<sup>15</sup> Dr. Heather Vincent, director of the University of Florida Health Performance Center in Gainesville, Florida, agrees with [Dr. Hamill's] assessment and makes the point that foot orthotics often do not correct the underlying biomechanical problems that cause the pain and dysfunction for which they are prescribed. In fact, orthotics can actually worsen the conditions they are meant to treat if they are worn too long, she says."<sup>16</sup>

32. Dr. Vincent has also stated that "alleviating knee, hip, or back pain with foot orthotics might simply shift the stress to a different joint, causing new pain there."<sup>17</sup>

33. More specifically, Defendants' claims about the effectiveness of Protalus Insoles in preventing and treating back pain have been debunked:

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<sup>13</sup> "Close Look at Orthotics Raises a Welter of Doubts," *The New York Times*, Gina Kolata, January 17, 2011.

<sup>14</sup> *Id.*

<sup>15</sup> "Orthotic Inserts: Why Traditional Advice is Wrong," (posted Dec. 28, 2017), <http://shop.kybun.us/blogs/studies-and-reports/the-problem-with-orthotics> (last visited 10/18/19).

<sup>16</sup> *Id.*

<sup>17</sup> "Do Orthotics for Foot Injuries Really Work?" Laird Harrison, May 26, 2016, <http://www.medscape.com/viewarticle/863746> (last visited 10/18/19).

- “[t]here is strong evidence against using insoles for the prevention of back pain.”<sup>18</sup>
- “There is insufficient evidence to support the use of insoles or foot orthoses as either a treatment for [lower back pain] or in the prevention of [lower back pain].”<sup>19</sup>
- “the available evidence around orthotics . . . does not support insoles or foot orthotics preventing or treating back pain.”<sup>20</sup>

34. Though the “guaranteed relief” statements are no longer present on the Protalus website, Defendants continue to make deceptive and misleading claims (for the same reasons as stated above) about Protalus Insoles in the same vein on the website including the following:

- “Protalus insoles have evolved to become an accessible and effective solution for a variety of conditions ranging from plantar fasciitis to low back pain.”<sup>21</sup>
- “Comfort and Relief Begin With a Single Step.”<sup>22</sup>

35. During the Class Period, statements and representations similar to those made on the Protalus website also appeared on the [www.amazon.com](http://www.amazon.com) website. *See* <https://www.amazon.com/M100-pain-relief-plantar-fasciitis/product-reviews/B074KSDF> (as of October 3, 2018) (“M75-Pain Relief” for “Back” and “Plantar Fasciitis”) (“M100-[same]”). The [amazon.com](http://www.amazon.com) website contains a link with the words, “Protalus storefront,” which leads to a series of Protalus Insoles offered for sale. Under the heading “Product Description” for Protalus M-100

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<sup>18</sup> “Insoles for prevention and treatment of back pain (Review),” © 2010 The Cochrane Collaboration, Published by John Wiley & Sons, Ltd., *Cochrane Database of Systematic Reviews* 2007, Issue 4 Art. No.: CD005275.

<sup>19</sup> “The effectiveness of shoe insoles for the prevention and treatment of low back pain: a systematic review and meta-analysis of randomized controlled trials,” Chuter, *et al.*, *BMC Musculoskeletal Disorders* 2014, 15:140.

<sup>20</sup> “Orthotic Inserts: Why Traditional Advice is Wrong,” *supra*, note 15.

<sup>21</sup> <https://www.protalus.com/pages/about-us> (last visited 10/3/19).

<sup>22</sup> <https://www.protalus.com/collections/shop> (last visited 10/3/19).

insoles, there is a list of conditions that Protalus Insoles are claimed to treat including, among other things: “Plantar Fasciitis . . . High Arch [and] Diabetes.”<sup>23</sup>

**PLAINTIFFS’ PURCHASE AND EXPERIENCE WITH PROTALUS INSOLES**

36. Prior to purchasing the Protalus Insoles, Ms. Saitta saw, read and relied on Defendants’ misrepresentations on the Protalus website as described more fully herein, including the claims that Protalus Insoles will relieve low back pain and that they will provide “lasting relief” and “guaranteed relief.” These claims and representations were material to Plaintiffs’ purchase of Protalus Insoles.

37. Plaintiffs purchased Protalus Insoles based on Defendants’ material misrepresentations and would not have purchased Protalus Insoles, or they would not have paid a premium price for them, had Defendants not made such false, misleading and deceptive claims and instead disclosed the true nature of Protalus Insoles.

38. Ms. Saitta, aware that her husband, Mr. Saitta, suffered from low back pain, purchased a pair of Protalus M-100 Insoles for him on or about November 18, 2018 on the website [www.amazon.com](http://www.amazon.com) for \$99.95 (plus tax), hoping that it would relieve his pain as represented by Protalus on its website.

39. Although Plaintiffs purchased the Protalus Insoles for the purpose of relieving Mr. Saitta’s back pain, the Protalus Insoles were completely ineffective in relieving his pain.

40. Despite Mr. Saitta’s use of Protalus Insoles for low back pain as claimed, the Protalus Insoles did not perform as claimed and advertised.

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<sup>23</sup> [https://www.amazon.com/M100-Pain-Relief-Plantar-Fasciitis/dp/B074KQZJZH/ref=sr\\_1\\_1?m=A250HXMP5KVC1N&marketplaceID=ATVPDKIKX0DER&qid=1567522090&s=merchant-items&sr=1-1&th=1](https://www.amazon.com/M100-Pain-Relief-Plantar-Fasciitis/dp/B074KQZJZH/ref=sr_1_1?m=A250HXMP5KVC1N&marketplaceID=ATVPDKIKX0DER&qid=1567522090&s=merchant-items&sr=1-1&th=1) (last visited 8/27/19).

**CLASS ALLEGATIONS**

41. Plaintiffs bring this action as a class action, pursuant to Fed. R. Civ. P. 23, on behalf of a Class consisting of:

All persons who purchased Protalus Insoles in the United States on or after October 18, 2015 (the “Class”).

42. Plaintiffs also bring this action as a class action, pursuant to Fed. R. Civ. P. 23, on behalf of a Subclass consisting of:

All persons who purchased Protalus Insoles in the Commonwealth of Massachusetts on or after October 18, 2015 (the “Massachusetts Subclass” or “Subclass”).

43. Excluded from the Class and Subclass are Defendants and their subsidiaries and affiliates, governmental entities, and the judge to whom this case is assigned and any immediate family members thereof. Plaintiffs reserve the right to modify or amend the Class and Subclass definitions, as appropriate.

44. Certification of Plaintiffs’ claims for class-wide treatment is appropriate because Plaintiffs can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

45. **Numerosity – Fed. R. Civ. P. 23(a)(1).** The Class and Subclass are so numerous that individual joinder of all Class and Subclass members is impracticable. Plaintiffs are informed and believe that there are at least hundreds, if not thousands, of Class and Subclass members. The precise number of Class and Subclass members and their addresses are unknown to Plaintiffs, but may be ascertained from Defendants’ books and records. Class and Subclass members may be notified of the pendency of this action by recognized, Court-approved notice

dissemination methods, which may include U.S. mail, electronic mail, Internet postings, and/or published notice.

46. **Commonality and Predominance – Fed. R. Civ. P. 23(a)(2) and 23(b)(3).** This action involves common questions of law and fact, which predominate over any questions affecting only individual Class and Subclass members. All Class and Subclass members were subject to the same business practices complained of, Defendants’ marketing and sales of Protalus Insoles. All Class members were exposed to the same false and misleading claims and representations about the ability of Protalus Insoles to treat a variety of injuries and conditions, and they all purchased Protalus Insoles as a result of those claims and representations.

47. There are questions of law and fact common to the Class and Subclass, which predominate over any issues specific to individual Class and Subclass members. The principal common questions include:

- a) whether Protalus advertised and marketed (and continues to advertise and market) Protalus Insoles in a way that is false, deceptive, or misleading;
- b) whether, by the misconduct set forth in this Complaint, Protalus has engaged in unfair, deceptive or unlawful business practices with respect to the labeling, advertising, marketing and sales of Protalus Insoles;
- c) whether Protalus failed to disclose material facts regarding Protalus Insoles;
- d) whether Protalus violated M.G.L., c. 93A, § 2, and regulations promulgated thereunder;
- e) whether Protalus was unjustly enriched by its conduct;
- f) whether Defendants’ conduct, as alleged herein, constituted untrue and deceptive advertising, pursuant to M.G.L., c. 266, § 91;
- g) whether Defendants’ conduct, as alleged herein, constituted a breach of express warranty with respect to Protalus Insoles;
- h) whether Defendants’ conduct, as alleged herein, constituted a breach of the implied warranty of merchantability with respect to Protalus Insoles; and

- i) whether, as a result of Defendants' misconduct as alleged herein, Plaintiffs and Class and Subclass members are entitled to restitution, injunctive and/or monetary relief and, if so, the amount and nature of such relief.

48. **Typicality – Fed. R. Civ. P. 23(a)(3).** Plaintiffs' claims are typical of the claims of the other members of the Class and Subclass because, among other things, all Class and Subclass members were similarly injured through the uniform misconduct described herein, and all Class and Subclass members have the same claims, *i.e.*, that Defendants made false and misleading product claims.

49. **Adequacy of Representation – Fed. R. Civ. P. 23(a)(4).** Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other members of the Class and Subclass they seek to represent; they have retained counsel competent and experienced in class action litigation; and Plaintiffs intend to prosecute this action vigorously. The Class' and Subclass' interests will thus be fairly and adequately protected by Plaintiffs and their counsel.

50. **Superiority – Fed. R. Civ. P. 23(b)(3).** A class action is superior to any other available methods for fairly and efficiently adjudicating this controversy, and no unusual difficulties are likely to be encountered in the management of this case as a class action. The damages or other financial detriment suffered by Plaintiffs and the other members of the Class and Subclass are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendants, so it would be impracticable for Class and Subclass members to individually seek redress for Defendants' wrongful conduct. Even if the Class and Subclass members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and it increases the delay and expense to all parties and the court system. By contrast, the class action

device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

**CLAIMS FOR RELIEF**

**COUNT I**  
**UNJUST ENRICHMENT**  
**(ON BEHALF OF THE CLASS OR, IN THE**  
**ALTERNATIVE, THE MASSACHUSETTS SUBCLASS)**

51. Plaintiffs incorporate paragraphs 1-50 of this Complaint as if fully set forth herein.

52. Plaintiffs and the other Class members conferred a benefit upon Defendants, in the form of the excess prices they paid for Protalus Insoles over and above the actual value of the product.

53. Defendants had an appreciation or knowledge of the excess prices paid for Protalus Insoles by Plaintiffs and the other members of the Class, as demonstrated by the fact that Protalus Insoles do not perform as represented and guaranteed by Defendants and they fail to offer benefits that are not available from similar products costing substantially less and unaccompanied by such claims.

54. Defendants' acceptance or retention of these benefits is inequitable under the circumstances as outlined above.

55. Plaintiffs, on behalf of themselves and the other members of the Class, seek restitution or, in the alternative, imposition of a constructive trust on the funds inequitably received and retained.

**COUNT II**  
**UNTRUE AND MISLEADING ADVERTISING UNDER G. L. c. 266, § 91**  
**(ON BEHALF OF THE MASSACHUSETTS SUBCLASS)**

56. Plaintiffs incorporate paragraphs 1-50 of this Complaint as if fully set forth herein.

57. Defendants' advertising, promotion, and marketing of Protalus Insoles is untrue, deceptive and misleading, in violation of G. L. c. 266, § 91.

58. At all times relevant to this action, Defendants knew, or could, upon reasonable investigation have ascertained that their advertising, marketing, and promotion of Protalus Insoles was untrue, deceptive and misleading.

59. Defendants' untrue, deceptive and misleading advertising, marketing and promotion of Protalus Insoles has continued throughout the Class Period, and it is continuing as of the present date.

60. As purchasers of Protalus Insoles who were aggrieved by Defendants' untrue and misleading advertising (in that Plaintiffs and the other Massachusetts Subclass members purchased a product that did not conform to the claims and representations made about it by Defendants, including claims about "lasting relief," "guaranteed relief" and other claims and representations), Plaintiffs are entitled to bring this class action to seek all available remedies under G. L. c. 266, § 91, including injunctive relief. The injunctive relief would include an Order directing Defendants to cease their false and misleading marketing and advertising, retrieve existing false and misleading advertising and promotional materials, and publish corrective advertising.

**COUNT III**  
**UNFAIR AND DECEPTIVE CONDUCT IN VIOLATION OF G. L. c. 93A, §2**  
**(ON BEHALF OF THE MASSACHUSETTS SUBCLASS)**

61. Plaintiffs incorporate paragraphs 1-50 of this Complaint as if fully set forth herein.

62. Defendants' conduct, as alleged herein, constitutes unfair or deceptive acts or practices and unfair methods of competition in trade or commerce in violation of G. L. c. 93A, § 2 and the regulations promulgated thereunder, including, without limitation, 940 C.M.R. §§ 3.02, 3.05(1), 3.05(2), 3.08(2) and 3.16(2).

63. Defendants' unlawful conduct includes their false and misleading statements, representations, and depictions in their advertising for Protalus Insoles, as alleged in greater detail above. Such conduct injured Plaintiffs and each of the other Massachusetts Subclass members, in that: (a) they paid more for the falsely advertised Protalus Insoles than they would have paid either for Protalus Insoles, absent the false and misleading claims, or for many other, lower-priced insoles; or (b) they purchased Protalus Insoles that, absent the false and misleading claims, they would not have purchased at all.

64. Defendants' unfair or deceptive acts or practices, as alleged herein, were willful or knowing violations of G. L. c. 93A, § 2, within the meaning of G. L. c. 93A, § 9(3).

65. Plaintiffs and the other members of the Massachusetts Subclass have been injured by Defendants' unfair or deceptive acts or practices and unfair methods of competition, as described above.

66. Pursuant to G. L. c. 93A, §§ 9(3) and 9(4), Plaintiffs and each of the other members of the Massachusetts Subclass are entitled to recover statutory damages or actual

damages, including recovery of double or treble the amount of their actual damages, plus their reasonable attorneys' fees and the costs of this action.

67. Plaintiffs and the other members of the Massachusetts Subclass are also entitled to injunctive relief in the form of an order directing Defendants to cease their false and misleading advertising, retrieve existing false and misleading labeling, advertising and promotional materials, and publish corrective advertising.

68. On or about May 29, 2019, Plaintiffs sent a written demand for relief to Defendants, pursuant to G.L. c. 93A, §9(3). Defendants have failed to make a reasonable offer of relief in response to Plaintiffs' demand.

**COUNT IV**  
**BREACH OF EXPRESS WARRANTY**  
**(ON BEHALF OF THE CLASS OR, IN THE**  
**ALTERNATIVE, THE MASSACHUSETTS SUBCLASS)**

69. Plaintiffs incorporate paragraphs 1-50 of this Complaint (except the class allegations) as if fully set forth herein.

70. Defendants provided Plaintiffs and Class Members with an express warranty in the form of written affirmations of fact promising and representing that Protalus Insoles would provide "guaranteed relief" and "lasting relief" from a wide variety of conditions.

71. The above affirmations of fact were not couched as "belief" or "opinion," and were not "generalized statements of quality not capable of proof or disproof."

72. These affirmations of fact became part of the basis for the bargain and were material to the Plaintiffs' and Class Members' transactions.

73. Plaintiffs and Class Members reasonably relied upon Defendants' affirmations of fact and justifiably acted in ignorance of the material facts omitted or concealed when they decided to buy the Protalus Insoles.

74. Within a reasonable time after they knew or should have known of Defendants' breach, Plaintiffs, on behalf of themselves and Class Members, placed Defendants on notice of their breach, giving Defendants an opportunity to cure their breach, which Defendants refused to do.

75. Defendants breached the express warranty because the Protalus Insoles did not, and do not, provide the promised health benefits.

76. As a direct and proximate result of Defendants' breach of express warranty, Plaintiffs and Class Members have been damaged in an amount to be proven at trial.

**COUNT IV**  
**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**  
**(ON BEHALF OF THE CLASS OR, IN THE**  
**ALTERNATIVE, THE MASSACHUSETTS SUBCLASS)**

77. Plaintiffs incorporate paragraphs 1-50 of this Complaint as if fully set forth herein.

78. Defendants are in the business of distributing, marketing, advertising and selling the Protalus Insoles they claim provide the promised health benefits described herein.

79. Under the Uniform Commercial Code's implied warranty of merchantability, Defendants warranted to Plaintiffs and Class Members that the Protalus Insoles would provide the promised health benefits described herein.

80. Defendants breached the implied warranty of merchantability in that Defendants' Protalus Insoles deviate from the product descriptions, and reasonable consumers expecting a product that provided the health benefits claimed by Defendants would not purchase Defendants' Protalus Insoles if they knew they did not provide the promised health benefits.

81. Within a reasonable time after they knew or should have known of Defendants' breach, Plaintiffs, on behalf of themselves and Class Members, placed Defendants on notice of

their breach, giving Defendants an opportunity to cure their breach, which Defendants refused to do.

82. The inability of Defendants' Protalus Insoles to provide the promised health benefits was wholly due to Defendants' distribution, marketing, advertising and sale of the Protalus Insoles to the public.

83. As a direct and proximate result of Defendants' breach of implied warranty, Plaintiffs and Class Members have been damaged in an amount to be proven at trial.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of the other members of the Class and Subclass proposed in this Complaint, respectfully request that the Court order the following relief:

- A. An Order certifying the Class and Subclass as requested herein;
- B. An Order awarding restitution and disgorgement of Defendants' revenues to Plaintiffs and the other members of the proposed Class and Subclass;
- C. An Order awarding equitable relief, including: enjoining Defendants from continuing the unlawful false advertising practices as set forth herein, directing Defendants to retrieve existing false and misleading advertising and promotional materials, directing Defendants to engage in a corrective advertising campaign, directing Defendants to identify, with Court supervision, victims of their conduct and pay them restitution, and disgorgement of all monies acquired by Defendants by means of any act or practice declared by this Court to be wrongful;
- D. An Order awarding statutory damages or actual damages, whichever results in a greater recovery, and double or treble damages as allowable by law;
- E. An Order awarding attorneys' fees and costs to Plaintiffs and the other members of the Class and Subclass; and
- F. Such other and further relief as may be just and proper.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all issues so triable.

Dated: October 18, 2019

Respectfully submitted,

**PASTOR LAW OFFICE, LLP**

/s/ David Pastor

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