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 14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA**
 16

18 ISABELLA BATISTA, individually and
 19 on behalf of all others similarly situated,

20 Plaintiff,

21 v.

22 IRWIN NATURALS,

Defendant.

Case No. 2:20-cv-10737

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Isabella Batista (“Plaintiff”) brings this action on behalf of
2 themselves and all others similarly situated Defendant Irwin Naturals (“Defendant”).

3 **NATURE OF THE ACTION**

4 1. This is a class action suit brought against Irwin Naturals arising out of
5 Defendant’s false advertising of its Ginkgo Smart Products (“Ginkgo Smart” or
6 “Products”). Defendant claims that Ginkgo Smart will provide actual, meaningful,
7 and significant benefits for the memory, concentration, mental sharpness of all
8 consumers who ingest the Products. These advertising claims are false, misleading,
9 and reasonably likely to deceive the public. The purported cognitive health benefits
10 of Ginkgo Smart are the only reason a consumer would purchase the Products, and
11 had Plaintiff and putative class members known the truth about the Products’
12 effectiveness, they would not have purchased Ginkgo Smart.

13 2. Defendant distributes, markets, and sells Ginkgo Smart. Through an
14 extensive and widespread nationwide marketing campaign, Defendant makes claims
15 that Ginkgo Smart, a ginkgo biloba-based herbal supplement, provides an
16 appreciable benefit for improving memory and concentration for all consumers who
17 ingest the Products. Defendant represents that ginkgo biloba extract and powder,
18 provides these significant cognitive benefits.

19 3. The product packaging for the Ginkgo Smart represents that Ginkgo
20 Smart will provide “Maximum Focus & Memory” and is a “Powerful Brain Booster
21 for Memory & Mental Clarity:”
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11 4. Defendant communicates the same substantive message throughout its
12 advertising and marketing for the Ginkgo Smart Products, including at point of sale,
13 on the front of the Ginkgo Smart Products packaging. The Product labels claim that
14 Ginkgo Smart will provide improved cognitive acuity through memory and
15 concentration benefits that are clinically meaningful.

16 5. Each consumer who has purchased Ginkgo Smart has been exposed to
17 Defendant's misleading advertising. For example, the front panel of the Ginkgo
18 Smart label states in all capital letters that the product will provide "MAXIMUM
19 FOCUS & MEMORY" and will serve as "Powerful Brain Boosters for Memory &
20 Mental Clarity." Similarly, the side panels of the Ginkgo Smart labeling repeat and
21 reinforce the false and deceptive cognitive claims. The cognitive claims are material
22 to consumers, who purchase Ginkgo Smart to obtain the advertised cognitive
23 benefits, which Ginkgo Smart cannot provide.

24 6. All available, reliable scientific evidence demonstrates that Ginkgo
25 Smart has no efficacy, is ineffective in the improvement of cognitive health, and
26 provides no benefits related to increasing the memory or concentration of
27 consumers' brains. Numerous scientific studies, performed by independent
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1 researchers and published in reputable medical journals, have been conducted on
2 ginkgo biloba, and they have universally demonstrated that ginkgo biloba does not
3 improve cognitive function, and is not effective in the treatment or improvement of
4 memory or concentration.

5 7. Indeed, the National Center for Complementary and Integrative Health
6 advises that there is no conclusive evidence that ginkgo is beneficial for *any* health
7 condition.

8 8. As a result of the express and implied misleading cognitive benefits
9 message conveyed its marketing campaign, Defendant has caused Plaintiff and
10 consumers to purchase a product which does not, and cannot, perform as represented.
11 Plaintiff and other similarly situated consumers have been harmed in the amount
12 they paid for the Ginkgo Smart.

13 **PARTIES**

14 9. Plaintiff Isabella Batista is a citizen of New York who resides in
15 Ravena, New York. In June 2019, Plaintiff purchased Defendant's Ginkgo Smart
16 Products from CVS in Glenmont, New York. Before purchasing Ginkgo Smart
17 Plaintiff reviewed information about the Product, including the representation that
18 the Product would provide "Maximum Focus & Memory," and would work as a
19 "Booster[] for Memory & Mental Clarity." When purchasing Ginkgo Smart,
20 Plaintiff also reviewed the accompanying labels, disclosures, warranties, and
21 marketing materials, and understood them as representations and warranties by
22 Defendant that the Ginkgo Smart would improve her memory and focus.

23 10. Plaintiff relied on Defendant's representations and warranties in
24 deciding to purchase Ginkgo Smart over comparable products. Accordingly, these
25 representations and warranties were part of the basis of the bargain, in that she would
26 not have purchased Ginkgo Smart on the same terms had she known Defendant's
27 representations were not true.

1 11. Plaintiff remains interested in purchasing memory aid products and
2 would consider Ginkgo Smart in the future if the products actually improved
3 memory and focus.

4 12. In making her purchases, Plaintiff paid a substantial price premium due
5 to the false and misleading claims concerning Ginkgo Smart’s memory and focus
6 benefits (the “Cognitive Claims”). However, Plaintiff did not receive the benefit of
7 her bargain, because Defendant’s Product cannot improve memory or focus.
8 Plaintiff also understood that in making her purchase, that the retailer selling her the
9 Product was acting with the knowledge and approval of Defendant and/or as the
10 agent of Defendant. Plaintiff further understood that each purchase involved a direct
11 transaction between herself and Defendant, because her Product came with
12 packaging, labeling, and other materials prepared by Defendant, including
13 representations and warranties regarding the Cognitive Claims.

14 13. Defendant Irwin Naturals is a Nevada corporation that at all material
15 times maintained its principal place of business in Los Angeles, California, where it
16 has been registered to do business since 2002. Defendant manufactures, sells, and
17 nationally distributes Ginkgo Smart. Defendant manufactured, marketed, and sold
18 Ginkgo Smart during the relevant Class period. The planning and execution of the
19 advertising, marketing, labeling, packaging, testing, and/or business operations
20 concerning the Ginkgo Smart and the Memory Claims was primarily carried out at
21 Defendant’s headquarters and facilities within California, as is most, or all, of
22 Ginkgo Smart’s manufacturing.

1 **JURISDICTION AND VENUE**

2 14. This Court has subject matter jurisdiction over this action pursuant to 28
3 U.S.C. § 1332(d)(2)(A) because this case is a class action where the aggregate claims
4 of all members of the proposed class are in excess of \$5,000,000.00, exclusive of
5 interest and costs, and a least one member of the proposed class is a citizen of a state
6 different from Defendant.

7 15. This Court has personal jurisdiction over Defendant because it has
8 continuous and systematic contacts with the State of California as to essentially
9 render it “at home” in this State, and Defendant’s principal places of business is
10 located in this State. Moreover, Defendant has purposefully availed themselves of
11 the laws and benefits of doing business in this State, and Plaintiff’s claims arise out
12 of the Defendant’s forum-related activities.

13 **FACTUAL ALLEGATIONS**

14 16. Ginkgo Smart is sold at a variety of retail chains, including CVS
15 Pharmacy, Walgreens, The Vitamin Shoppe, and Bed Bath & Beyond, as well as
16 many online retailers.

17 17. Defendant claims through its marketing, advertising, and product
18 labeling that “Ginkgo Biloba is one of the very best botanicals for the brain,” and
19 “can enhance blood flow to the brain, improve cognitive function, and enhance
20 memory.” The Ginkgo Smart label also states that “[t]he Ginkgo extract used in this
21 formula is standardized to contain 24% flavone glycosides and 6% terpene lactones
22 for optimum potency.”

23 18. Ginkgo biloba is one of the oldest living tree species. Ginkgo biloba
24 extract, like that found in Ginkgo Smart, is made from the dried green leaves of the
25 ginkgo tree.

26 19. Through its advertising and labeling, Defendant has consistently
27 claimed that consuming Ginkgo Smart will meaningfully improve cognitive health.
28 That is not true.

1 20. Scientific evidence demonstrates that use of ginkgo biloba does not
2 provide the cognitive benefits represented by Defendant. Defendant’s advertising
3 and labeling claims are therefore false and misleading.

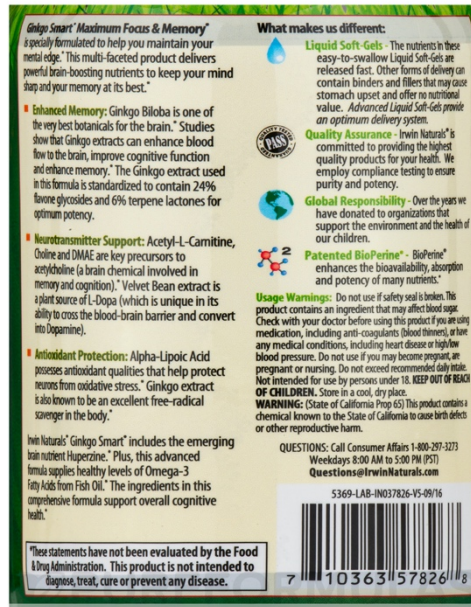
4 21. Defendant intends that consumers will read and rely on the Cognitive
5 Claims made in Defendant’s advertising and labeling, and Plaintiffs and putative
6 class members did read and rely on those claims to their detriment.

7 22. The front panel of Ginkgo Smart packaging and labeling states in
8 capital letters, printed in large font, that Ginkgo Smart is for “MAXIMUM FOCUS
9 & MEMORY” and is a “Powerful Brain Booster for Memory & Mental Clarity:”



20 23. The side panel promises that Ginkgo Smart is “specially formulated to
21 help you maintain your mental edge,” and that “Ginkgo extracts can enhance blood
22 flow to the brain, improve cognitive function and enhance memory:”
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24. Defendant’s marketing representations in other media repeat and reinforce the false and misleading cognitive benefit claims made on the packaging and labeling for Ginkgo Smart. For example, on Defendant’s website irwinnaturals.com, Defendant repeat the false and misleading Cognitive Claims at issue. Defendant’s website claims “Ginkgo Smart Maximum Focus & Memory* supplement is specially formulated to help you maintain your mental edge[,]” and “Enhanced Memory: Ginkgo Biloba is one of the very best botanicals for the brain. Studies show that Ginkgo extracts can enhance blood flow to the brain, improve cognitive function and enhance memory.”

25. Despite Defendant’s representations, Ginkgo Smart – and ginkgo biloba – do not provide the promised benefits. Numerous studies have confirmed that ginkgo biloba does not protect against cognitive decline or otherwise improve an individual’s cognitive abilities or brain function. Despite scientific evidence demonstrating that ginkgo biloba does not provide the advertised benefits, Defendant continues to advertise that it does, leading Plaintiff and other consumers to believe that Ginkgo Smart actually provides the promised cognitive benefits.

1 26. In 2009, the Journal of the American Medical Association (“JAMA”) in
2 2009 published a study entitled *Ginkgo biloba for preventing cognitive decline in*
3 *older adults: a randomized trial*, 302(24) JAMA 2663-2670 (2009) (the “Ginko
4 Evaluation of Memory or “GEM Study”). This study is the largest clinical study to
5 date testing the effectiveness of ginkgo biloba to improve cognitive health and brain
6 function. It was designed and funded the National Center for Complementary and
7 Alternative Medicine (today, the National Center for Complementary and Integrative
8 Health) (“NCCIH”), the federal government’s lead agency for scientific research on
9 complementary and integrative health practices. The NCIH also assisted with the
10 analysis and interpretation of the data and the preparation and approval of the GEM
11 Study manuscript. The GEM Study was conducted over a span of eight years and
12 included 3,069 participants, aged 72-96 years, who did not have dementia.
13 Participants were randomized to twice-daily doses of 120 mg of a ginkgo biloba
14 supplement supplied by Schwabe Pharmaceuticals (EGb 761) or an identical
15 appearing placebo for an average duration of 6.1 years. The authors of the GEM
16 Study concluded that consumption of 240 mg daily of ginkgo biloba extract does not
17 result in less cognitive decline either on a global cognitive score basis or in terms of
18 any individual cognitive domains, including memory and attention, than placebo.
19 There were no differences in results by age, sex, race, education, or baseline
20 cognitive status.

21 27. In 2002, JAMA published a study by Solomon *et al.* entitled *Ginkgo for*
22 *memory enhancement: a randomized controlled trial* 288(7) JAMA 835-840 (2002),
23 in which 203 participants, over the age of 60 and in generally good health, were
24 evaluated for six week periods, with half receiving 120 mg of ginkgo and the other
25 half a placebo control. Dr. Solomon and his co-authors concluded that ginkgo biloba
26 did not improve performance on standard neuropsychological tests that evaluated
27 learning, memory, attention, and concentration. There was no improvement on
28 naming and verbal fluency. There was no difference from the control group for

1 those consuming ginkgo biloba on self-reported memory function or on global rating
2 by spouses, friends, and relatives. According to Solomon *et al.*, the “data suggest[s]
3 that when taken following the manufacturer’s instructions, ginkgo provides no
4 measurable benefit in memory or related cognitive function to adults with healthy
5 cognitive function.” Furthermore, the study authors also concluded that “[d]espite
6 the manufacturer’s claims of improved memory in healthy adults, we were unable to
7 identify any well-controlled studies that document this claim.”

8 28. A similar study, entitled *Safety and efficacy of a Ginkgo biloba-*
9 *containing dietary supplement on cognitive function, quality of life, and platelet*
10 *function in healthy, cognitively intact older adults*, 107(3) J Am Diet Assoc 422-32
11 (2007) shared these findings. Carlson *et al.*, performed a randomized, double-blind,
12 placebo-controlled study involving 90 healthy, older adults (65-84 years old) who
13 were randomly assigned to placebo or 160 mg ginkgo biloba from Schwabe (EGb
14 761) daily for four months. After four months of consuming either placebo or
15 ginkgo, the subjects were analyzed for cognitive and quality of life improvements.
16 Using six standardized tests for cognitive function, including tests analyzing
17 memory, attention, and concentration, the researchers found that consuming ginkgo
18 was not effective versus placebo based on any of the cognitive function tests. In fact,
19 consuming placebo was found more effective than ginkgo biloba for one of the
20 cognitive function tests, which was designed to measure delayed memory.
21 Consumption of ginkgo also did not result in improvement of quality of life
22 measures over placebo. The authors concluded their data demonstrated a “lack of an
23 effect” and did “not support the use of a commercial ginkgo biloba-containing
24 supplement to improve cognitive function or quality of life in healthy 65- to 85-
25 year-old cognitively intact healthy adults with average to above-average cognitive
26 function.”

27 29. Nathan *et al.* (2002), *The acute nootropic effects of Ginkgo biloba in*
28 *healthy older human subjects: a preliminary investigation*, 17(1) Hum

1 Psychopharmacol, 45-49 (2002), also demonstrates that consumption of ginkgo
2 biloba does not result in improvements of cognitive function, including memory or
3 concentration. Nathan *et al.* performed a double-blind, placebo-controlled trial
4 involving eleven healthy adults aged 50-72 who consumed 120 mg ginkgo biloba
5 and placebo at different times and separated by a washout period. The researchers
6 analyzed the acute cognitive effects of ginkgo biloba and placebo consumption using
7 multiple memory tests. The researchers concluded that consumption of ginkgo did
8 not improve cognitive function as measured by any memory test: “The data revealed
9 no evidence of acute effects of Ginkgo biloba on cognitive functioning. The
10 repeated measures ANOVA showed no significant drug interactions for either the
11 accuracy (%), response speed (ms) measure of spatial working memory, numeric
12 working memory, picture recognition, choice reaction time or simple reaction time.
13 Similarly no significant drug interactions were found for the auditory verbal learning
14 tests of verbal learning and short and long-term memory.”

15 30. Canter and Ernst (2002), *Ginkgo biloba: a smart drug? A systematic*
16 *review of controlled trials of the cognitive effects of ginkgo biloba extracts in healthy*
17 *people*, 36(3) *Psychopharmacol Bull* 108-23 (2002) shared a similar sentiment. The
18 review was based on an analysis of all controlled clinical trials of ginkgo biloba for
19 cognitive function in healthy subjects with a mean age less than 60 years and
20 published up to November 2001. Based on their review, which included nine clinical
21 studies, Drs. Canter and Ernst concluded “these studies indicate no marked or
22 consistent positive effects of Ginkgo biloba on any particular objective measure of
23 cognitive function.”

24 31. In 2007, Canter and Ernst conducted a sequel systematic review of their
25 2002 study, analyzing all randomized, placebo-controlled clinical trials of ginkgo
26 biloba for cognitive function carried out in healthy subjects less than 60 years of age.
27 *See* Canter and Ernst (2007), *Ginkgo biloba is not a smart drug: an updated*
28 *systematic review of randomized clinical trials testing the nootropic effects of G.*

1 *biloba extracts in healthy people*, 22(5) *Hum Psychopharmacology*. 265-278 (2007).
2 Their clinical study search identified 43 potentially relevant articles from six
3 databases. After excluding 9 randomized, controlled trials previously analyzed in
4 their 2002 systematic review, Drs. Canter and Ernst reviewed the resulting 15
5 relevant clinical trials. Noting that “[t]he negative conclusions drawn in [their]
6 original [2002] review are strengthened by the results of the newly added studies,”
7 the 2007 study analysis concluded that evidence from clinical trials “provides no
8 convincing evidence that [ginkgo] biloba extracts ingested either as a single dose or
9 over a longer period has a positive effect on any aspect of cognitive performance in
10 healthy people under the age of 60 years.”

11 32. A 2012 meta-analysis published in *Human Psychopharmacology*:
12 *Clinical and Experimental, Laws et al.* reported on the search of numerous databases
13 and recent qualitative reviews for randomized controlled trials examining the effects
14 of ginkgo biloba on cognitive function (memory, executive function, and attention)
15 in healthy people across all age groups. *See Is Ginkgo biloba a cognitive enhancer*
16 *in healthy individuals? A meta-analysis* 27(6) *Human Psychopharmacology* 527-533
17 (2012). The study’s authors, Dr. Laws and his co-researchers, who based their
18 review and meta-analysis on thirteen clinical studies that collectively involved over
19 2,500 healthy individuals, concluded that ginkgo biloba had no ascertainable positive
20 effects on the abovementioned cognitive functions in healthy individuals. The
21 randomized, controlled trials included in the meta-analysis included: Burns *et al.*
22 (2006), Carlson *et al.* (2007), Cieza *et al.* (2003), Elsabagh *et al.* (2005a), Elsabagh
23 *et al.* (2005b), Hartley *et al.* (2003), Mix and Crews (2000), Moulton *et al.* (2001),
24 and Solomon *et al.* (2002). According to the researchers, and based on their
25 scientific analysis of thirteen randomized, controlled trials, “[t]he key findings from
26 this meta-analysis are that [*ginkgo*] *biloba* has no significant impact on memory,
27 executive function or attention with all effect sizes non-significant and effectively at
28 zero ... Indeed, none of the 13 studies assessing memory revealed an overall

1 significant effect size.” Citing Canter and Ernst (2007), discussed above, Laws *et al.*
2 noted their conclusion was in “accord[] with the conclusions of previous systematic
3 qualitative reviews.” The authors also noted that they contrasted the results of the
4 clinical studies analyzing memory and attention involving ginkgo biloba
5 formulations from Schwabe (EGb 761) and the LI 1370 formulation “to show these
6 did not differ significantly.”

7 33. Similarly, in a 2009 study performed in connection with the
8 internationally prestigious Cochrane Collaboration and entitled *Ginkgo biloba for*
9 *cognitive impairment and dementia*, researchers reviewed 36 trials, nine of which
10 were six months long (2016 participants total). *See Birks and Grimley, Ginkgo*
11 *biloba for cognitive impairment and dementia*, (1) Cochrane Database Syst. Rev.
12 Art. No. : CD003120 (2009). Most trials reviewed tested the same ginkgo biloba
13 preparation used by Schwabe (EGb761). According to the study authors, in the more
14 recent and more reliable trials, three out of four found no benefits for cognitive
15 decline. The researchers concluded that evidence that ginkgo biloba has predictable
16 and clinically significant benefit for people with dementia or cognitive impairment is
17 inconsistent and unreliable.

18 34. Vellas *et al.* (2012) presents the results from a randomized, doubleblind,
19 placebo-controlled clinical trial known as the “GuidAge Study.” *See Vellas et al.,*
20 *Long-term use of standardised ginkgo biloba extract for the prevention of*
21 *Alzheimer’s disease: a randomised placebo-controlled trial*, 11(10) *Lancet Neurol*
22 851-859 (2012). The authors of the GuidAge Study analyzed 2,854 participants aged
23 70 or older who had reported memory complaints to their primary care physicians.
24 The study subjects were randomly allocated to groups receiving either a twice daily
25 dose of 120 mg of ginkgo biloba or placebo for a five-year period, and underwent
26 annual cognitive assessments. The study authors concluded that long-term use of
27 ginkgo biloba does not reduce the risk of progression of Alzheimer’s disease.
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1 35. Franke *et al.* (2014), examined the evidence from randomized placebo-
2 controlled trials testing the cognitive enhancement effects, including attention,
3 concentration and memory by healthy subjects, from various substances, including
4 ginkgo biloba. *See Substances used and prevalence rates of pharmacological*
5 *cognitive enhancement among healthy subjects*, 264 Suppl 1, Eur. Arch Psychiatry
6 Clin. Neurosci. 83-90 (Nov. 2014). Franke *et al.*, concluded that ginkgo biloba does
7 not provide cognitive health benefits for healthy persons:

8 With respect to healthy subjects, large RCTs and meta-analyses
9 have shown that Ginkgo biloba has no cognitively enhancing
10 effects neither in younger nor in older healthy subjects: There
11 are no positive effects on vigilance, attention, reaction time or
12 higher cognitive functioning such as memory, no matter which
13 amount of Ginkgo was used or how frequently.

12 CLASS ALLEGATIONS

13 36. Plaintiff seeks to represent a class defined as all persons in the United
14 States who purchased Ginkgo Smart (the “Class”). Excluded from the Class are
15 Defendant, Defendant’s affiliates, parents, subsidiaries, employees, officers,
16 directors, and co-conspirators, and anyone who purchased the Products for resale.
17 Also excluded is any judicial officer presiding over this matter and the member of
18 their immediate families and judicial staff.

19 37. Plaintiff also seeks to represent a subclass of all Class Members who
20 purchased Ginkgo Smart in the State of New York (the “New York Subclass”).

21 38. Members of the Class are so numerous that their individual joinder
22 herein is impracticable. On information and belief, members of the Class number in
23 the millions. The precise number of Class Members and their identities are unknown
24 to Plaintiff at this time but may be determined through discovery. Class Members
25 may be notified of the pendency of this action by mail and/or publication through the
26 distribution records of Defendant and the sales records of retailers.

1 39. Common questions of law and fact exist as to all Class Members and
2 predominate over questions affecting only individual Class Members. Common legal
3 and factual questions include, but are not limited to:

- 4 a. Whether the marketing labeling and advertisements for the Products
5 included false and/or misleading statements;
- 6 b. Whether Defendant's conduct violated New York's General Business
7 Laws §§ 349 and 450; and
- 8 c. Whether Defendant has committed other tortious acts as described
9 herein.

10 40. The claims of the named Plaintiff are typical of the claims of the Class
11 in that the named Plaintiff purchased Ginkgo Smart in reliance on the representations
12 and warranties described above and suffered a loss as a result of that purchase.

13 41. Plaintiff is an adequate representatives of the Class and Subclass
14 because her interests do not conflict with the interests of the Class and Subclass
15 Members she seek to represent, she has retained competent counsel experienced in
16 prosecuting class actions, and she intends to prosecute this action vigorously. The
17 interests of Class Members will be fairly and adequately protected by Plaintiff and
18 her counsel.

19 42. The class mechanism is superior to other available means for the fair
20 and efficient adjudication of the claims of Class Members. Each individual Class
21 Member may lack the resources to undergo the burden and expense of individual
22 prosecution of the complex and extensive litigation necessary to establish
23 Defendant's liability. Individualized litigation increases the delay and expense to all
24 parties and multiplies the burden on the judicial system presented by the complex
25 legal and factual issues of this case. Individualized litigation also presents a
26 potential for inconsistent or contradictory judgments. In contrast, the class action
27 device presents far fewer management difficulties and provides the benefits of single
28 adjudication, economy of scale, and comprehensive supervision by a single court on

1 the issue of Defendant’s liability. Class treatment of the liability issues will ensure
2 that all claims and claimants are before this Court for consistent adjudication of the
3 liability issues.

4 43. Plaintiff bring all claims in this action individually and on behalf of
5 members of the Class and Subclass against Defendant.

6 **COUNT I**
7 **(Breach Of Express Warranty)**

8 44. Plaintiff hereby incorporates by reference the allegations contained in
9 all preceding paragraphs of this complaint.

10 45. Plaintiff brings this claim individually and on behalf of the members of
11 the proposed Class and the New York Subclass against Defendant.

12 46. As the designer, manufacturer, marketer, distributor, and/or seller,
13 Defendant expressly warranted that the Ginkgo Smart would provide “Maximum
14 Focus & Memory” and is a “Powerful Brain Booster for Memory & Mental Clarity.”

15 47. However, clinical studies show that Ginkgo Biloba cannot provide any
16 appreciable cognitive benefit to consumers. Ginkgo Smart therefore cannot provide
17 “Maximum Focus & Memory” and is not a “Powerful Brain Booster for Memory &
18 Mental Clarity” as Defendant claims.

19 48. As a direct and proximate cause of Defendant’s breach of express
20 warranty, Plaintiff and Class Members have been injured and harmed because: (a)
21 they would not have purchased the Ginkgo Smart on the same terms if the true facts
22 were known about the product; (b) they paid a price premium for the Ginkgo Smart
23 due to Defendant’s promises that it would improve focus and memory; and (c)
24 Ginkgo Smart did not have the characteristics as promised by Defendant.

25 49. On or about September 23, 2020, prior to filing this action a pre-suit
26 notice letter was served on Defendant which complied in all respects with U.C.C. §
27 2-607. Plaintiff and the Class sent Defendant a letter via certified mail, return receipt
28 requested, advising Defendant that it breached numerous warranties and violated

1 state consumer protection laws, and demanding that Defendant cease and desist from
2 such violations and make full restitution by refunding the monies received therefrom.
3 A true and correct copy of Plaintiff's letter is attached hereto as **Exhibit A**.

4 **COUNT II**
5 **(Breach Of Implied Warranty Of Merchantability)**

6 50. Plaintiff hereby incorporates by reference the allegations contained in
7 all preceding paragraphs of this complaint.

8 51. Plaintiff brings this claim individually and on behalf of the members of
9 the proposed Class and the New York Subclass against Defendant.

10 52. As the designer, manufacturer, marketer, distributor, and/or seller,
11 Defendant impliedly warranted that Ginkgo Smart would provide cognitive benefits.

12 53. Defendant breached the warranty implied in the contract for the sale of
13 Ginkgo Smart because it could not pass without objection in the trade under the
14 contract description, the goods were not of fair average quality within the
15 description, the goods were not fit for the ordinary purposes for which such goods
16 are used, and the goods do not conform to the promises or affirmations of fact made
17 on the label. As a result, Plaintiff and Class Members did not receive the goods as
18 impliedly warranted by Defendant to be merchantable.

19 54. Plaintiff and Class Members purchased Ginkgo Smart in reliance upon
20 Defendant's skill and judgment and the implied warranties of fitness for the purpose.

21 55. Ginkgo Smart was not altered by Plaintiff or Class Members.

22 56. Ginkgo Smart was defective when the Products left the exclusive
23 control of Defendant.

24 57. Defendant knew that the Ginkgo Smart would be purchased and used
25 without additional testing by Plaintiff and Class Members.

26 58. Ginkgo Smart was defectively designed and unfit for its intended
27 purpose, and Plaintiff and Class Members did not receive the goods as warranted.
28

1 59. As a direct and proximate cause of Defendant’s breach of express
2 warranty, Plaintiff and Class Members have been injured and harmed because: (a)
3 they would not have purchased the Ginkgo Smart on the same terms if the true facts
4 were known about the product; (b) they paid a price premium for the Ginkgo Smart
5 due to Defendant’s promises that it would improve focus and memory; and (c)
6 Ginkgo Smart did not have the characteristics as promised by Defendant.

7 **COUNT III**
8 **(Unjust Enrichment)**

9 60. Plaintiff hereby incorporates by reference the allegations contained in
10 all preceding paragraphs of this complaint.

11 61. Plaintiff brings this claim individually and on behalf of the members of
12 the proposed Class and the New York Subclass against Defendant.

13 62. Plaintiff and Class Members conferred benefits on Defendant by
14 purchasing Ginkgo Smart.

15 63. Defendant has been unjustly enriched in retaining the revenues derived
16 from Plaintiff’s and Class Members’ purchases of Ginkgo Smart. Retention of those
17 monies under these circumstances is unjust and inequitable because Defendant
18 misrepresented that Ginkgo Smart would provide cognitive benefits such as
19 “Maximum Focus & Memory.” This misrepresentation caused injuries to Plaintiff
20 and Class Members, because they would not have purchased Ginkgo Smart if the
21 true facts regarding the effectiveness of the Product were known.

22 64. Because Defendant’s retention of the non-gratuitous benefits conferred
23 on it by Plaintiff and Class Members is unjust and inequitable, Defendant must pay
24 restitution to Plaintiff and Class Members for its unjust enrichment, as ordered by the
25 Court.

COUNT IV

(Violation of New York’s General Business Law § 349)

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3 59. Plaintiff hereby incorporates by reference the allegations contained in
4 all preceding paragraphs of this complaint.

5 60. Plaintiff brings this claim individually and on behalf of the members of
6 the proposed New York Subclass against Defendant.

7 61. New York’s General Business Law § 349 prohibits deceptive acts or
8 practices in the conduct of any business, trade, or commerce.

9 62. In their sale of goods throughout the State of New York, Defendant
10 conducts business and trade within the meaning and intendment of New York’s
11 General Business Law § 349.

12 63. Plaintiff and members of the New York Subclass are consumers who
13 purchased products from Defendant for their personal use.

14 64. By the acts and conduct alleged herein, Defendant has engaged in
15 deceptive, unfair, and misleading acts and practices, which include, without
16 limitation, misrepresenting that Ginkgo Smart would provide cognitive benefits.

17 65. The foregoing deceptive acts and practices were directed at consumers.

18 66. The foregoing deceptive acts and practices are misleading in a material
19 way because they fundamentally misrepresent the characteristics of Ginkgo Smart to
20 induce consumers to purchase same.

21 67. By reason of this conduct, Defendant engaged in deceptive conduct in
22 violation of New York’s General Business Law.

23 68. Defendant’s action is the direct, foreseeable, and proximate cause of the
24 damages that Plaintiff and members of the New York Subclass have sustained from
25 having paid for and used Defendant’s products.

26 69. As a result of Defendant’s violations, Plaintiff and members of the New
27 York Subclass have suffered damages because: (a) they would not have purchased
28 Ginkgo Smart on the same terms if the true facts were known about the Product; (b)

1 they paid a price premium for Ginkgo Smart due to Defendant’s promises that it
2 would improve focus and memory; and (c) Ginkgo Smart did not have the
3 characteristics promised by Defendant.

4 70. On behalf of herself and other members of the New York Subclass,
5 Plaintiff seeks to recover her actual damages or fifty dollars, whichever is greater,
6 three times actual damages, and reasonable attorneys’ fees.

7 **COUNT V**

8 **(Violation of New York’s General Business Law § 350)**

9 71. Plaintiff hereby incorporates by reference the allegations contained in
10 all preceding paragraphs of this complaint.

11 72. Plaintiff brings this claim individually and on behalf of the members of
12 the proposed New York Subclass against Defendant.

13 73. New York’s General Business Law § 350 prohibits false advertising in
14 the conduct of any business, trade, or commerce.

15 74. Pursuant to said statute, false advertising is defined as “advertising,
16 including labeling, of a commodity ... if such advertising is misleading in a material
17 respect.”

18 75. Based on the foregoing, Defendant has engaged in consumer-oriented
19 conduct that is deceptive or misleading in a material way which constitutes false
20 advertising in violation of Section 350 of New York’s General Business Law.

21 76. Defendant’s false, misleading, and deceptive statements and
22 representations of fact were and are directed to consumers.

23 77. Defendant’s false, misleading, and deceptive statements and
24 representations of fact were and are likely to mislead a reasonable consumer acting
25 reasonably under the circumstances.

26 78. Defendant’s false, misleading, and deceptive statements and
27 representations of fact have resulted in consumer injury or harm to the public
28 interest.

1 79. As a result of Defendant's false, misleading, and deceptive statements
2 and representation of fact, Plaintiff and the New York Subclass have suffered and
3 continue to suffer economic injury.

4 80. As a result of Defendant's violations, Plaintiff and members of the New
5 York Subclass have suffered damages due to said violation because: (a) they would
6 not have purchased Ginkgo Smart on the same terms if the true facts were known
7 about the product; (b) they paid a price premium for Ginkgo Smart due to
8 Defendant's promises that it would improve focus and memory; and (c) Ginkgo
9 Smart did not have the characteristics promised by Defendant.

10 81. On behalf of herself and other members of the New York Subclass,
11 Plaintiff seeks to recover her actual damages or five hundred dollars, whichever is
12 greater, three times actual damages, and reasonable attorneys' fees.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff, individually and on behalf of all others similarly
15 situated, seek judgment against Defendant, as follows:

- 16 a. For an order certifying the nationwide Class and the New
17 York Subclass under Rule 23 of the Federal Rules of Civil
18 Procedure and naming Plaintiff as representative of the
19 Class and the New York Subclass, and appointing
20 Plaintiff's attorneys as Class Counsel to represent the Class
21 and New York Subclass Members;
- 22 b. For an order declaring the Defendant's conduct violates the
23 statutes referenced herein;
- 24 c. For an order finding in favor of Plaintiff, the Class, and the
25 Subclasses on all counts asserted herein;
- 26 d. For compensatory and punitive damages in amounts to be
27 determined by the Court and/or jury;
- 28 e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable
monetary relief;

- 1 g. For an order awarding Plaintiff and the Class and Subclass
- 2 their reasonable attorneys’ fees and expenses and costs of
- 3 suit;
- 4 h. For injunctive relief as pleaded or as the Court may deem
- 5 proper;
- 6 i. Damages, restitution, and/or disgorgement in an amount to
- 7 be determined at trial; and
- 8 j. For such other and further relief as the Court may deem
- 9 proper.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury of all issues so triable.

Dated: November 24, 2020

Respectfully submitted,

BURSOR & FISHER, P.A.

By: /s/ Brittany S. Scott
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