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

MICHELE MCCARTHY, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

ELIXINOL, LLC a Colorado Limited
Liability Company,

Defendant.

Civil Action

No.: _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Michele McCarthy (“Plaintiff”), through her undersigned attorneys,
Barbat, Mansour & Suciu PLLC, Kohn, Swift & Graf, P.C. and Greg Coleman
Law PC, brings this Class Action Complaint against Defendant Elixinol, LLC
 (“Defendant”), individually and on behalf of all others similarly situated, and

1 complains and alleges upon personal knowledge as to herself and her own acts and
2 experiences and, as to all other matters, upon information and belief, including
3 investigation conducted by her attorneys:
4

5 **NATURE OF THE ACTION**

6 1. This is a civil class action brought individually by Plaintiff on behalf
7 of consumers who purchased Defendant’s “CBD Capsules”, “CBD Tinctures”,
8 “Liposomes”, “Respira Tinctures”, “X-Pen”, and “CBD Dog Treats” (collectively
9 the “CBD Products” or the “Products”)¹ all of which are promoted as products
10 containing cannabidiol (CBD), for personal use and not for resale.
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12 2. Defendant’s Products, however, are illegal to sell.
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14 3. Defendant formulates, manufactures, advertises, and sells the CBD
15 Products throughout the United States, including in the State of California.
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17 4. The CBD (cannabidiol) Product market is a multibillion-dollar business
18 enterprise that is lucrative for its market participants and is expected to further
19 expand into a \$16 billion-dollar industry by 2025.²
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21 5. With knowledge of growing consumer demand for CBD Products,
22 Defendant has intentionally marketed and sold illegal CBD products.
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25 ¹ The Products contain numerous different flavors and dosages.

26 ² <https://www.forbes.com/sites/irisdorbian/2019/03/12/cbd-market-could-pull-in-16-bln-by-2025-says-study/#69e764bb3efd> Last Visited on December 4, 2019.
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1 Plaintiff knew the Products were not legally sold in the United States, Plaintiff would
2 have not purchased them.

3 14. Defendant Elixinol, LLC is a Colorado limited liability company with
4 its principal place of business at 10170 Church Ranch Way, ste 400, Westminster,
5 CO 80021.
6

7 **FACTUAL ALLEGATIONS**
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9 15. At all relevant times, Defendant has marketed its Products in a
10 consistent and uniform manner. Defendant sells the Products in all 50 states on its
11 website and through various distributors.
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13 **DEFENDANT'S ILLEGAL PRODUCTS**

14 16. On November 22, 2019, the United States Food & Drug Administration
15 sent roughly 15 Warning Letters discussing numerous violations of CBD products,
16 including but not limited to; Dietary Supplement Labeling, Unapproved New Drugs,
17 Misbranded Drugs, Adulterated Human Foods, Unapproved New Animal Drugs,
18 and Adulterated Animal Foods. All of these violations of the Food, Drug and Cosmetic
19 Act make CBD products illegal to sell.³
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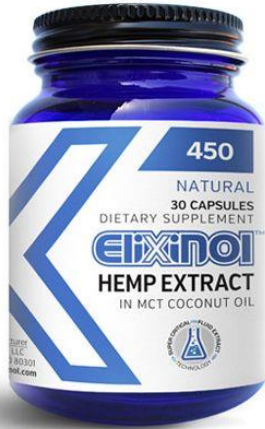
24 ³ See https://www.fda.gov/news-events/press-announcements/fda-warns-15-companies-illegally-selling-various-products-containing-cannabidiol-agency-details?utm_campaign=112519_Statement_FDA%20warns%20companies%20for%20illegally%20selling%20various%20products%20containing%20cannabidiol&utm_medium=email&utm_source=Eloqua Last visited November 27, 2019.
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1 **Dietary Supplement Labeling**

2 17. Defendant’s “CBD Capsules”, “CBD Tinctures”, “Liposomes”,
3 “Respira Tinctures”, and “X-Pen” products are mislabeled as Dietary Supplements
4 or contain the illegal dietary ingredient CBD. Every product contains a
5 Supplement Facts section on the back of the container which is reserved for dietary
6 Supplements and explicitly state “Dietary Supplement” on the front of the
7 packaging:
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1 18. The FDA has stated that CBD may not be labeled as a dietary
2 ingredient or legally be contained within a dietary supplement⁴:

- 3 • The FDA has approved only one CBD product, a prescription drug product to treat
- 4 two rare, severe forms of epilepsy.
- 5 • It is currently illegal to market CBD by adding it to a food or labeling it as a dietary
- 6 supplement.
- 7 • The FDA has seen only limited data about CBD safety and these data point to real
- 8 risks that need to be considered before taking CBD for any reason.

9 19. Defendant's Products cannot be dietary supplements because they do
10 not meet the definition of a dietary supplement under section 201(ff) of the FD&C
11 Act, 21 U.S.C. 321(ff). The FDA has concluded, based on available evidence, that
12 CBD products are excluded from the dietary supplement definition under sections
13 201(ff)(3)(B)(i) and (ii) of the FD&C Act, 21 U.S.C. 321(ff)(3)(B)(i) and (ii).
14 Under those provisions, if an article (such as CBD) is an active ingredient in a drug
15 product that has been approved under section 505 of the FD&C Act, 21 U.S.C.
16 355, or has been authorized for investigation as a new drug for which substantial
17 clinical investigations have been instituted and for which the existence of such
18 investigations has been made public, then products containing that substance are
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26 ⁴ See [https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-](https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis)
27 [working-find-out-about-products-containing-cannabis-or-cannabis](https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis)
28 Last Visited November 27, 2019.

1 outside the definition of a dietary supplement.⁵ There is an exception if the
2 substance was “marketed as” a dietary supplement or as a conventional food before
3 the new drug investigations were authorized; however, based on the evidence
4 available to the FDA, the FDA has concluded that this is not the case for
5 CBD. The FDA is not aware of any evidence that would call into question its
6 current conclusion that CBD products are excluded from the dietary supplement
7 definition under sections 201(ff)(3)(B)(i) and (ii) of the FD&C Act.
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10 **Misbranded Drugs**

11 20. Defendant’s “CBD Capsules”, “CBD Tinctures”, “Liposomes”,
12 “Respira Tinctures”, and “X-Pen” products are also misbranded within the
13 meaning of section 502(f)(1) of the FD&C Act, 21 U.S.C. 352(f)(1), in that their
14 labeling fails to bear adequate directions for use. “Adequate directions for use”
15 means directions under which a layperson can use a drug safely and for the
16 purposes for which it is intended. (See 21 CFR 201.5.) The Products are offered for
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21 ⁵ CBD is the active ingredient in the approved drug product Epidiolex. Furthermore, the
22 existence of substantial clinical investigations regarding CBD has been made public. For
23 example, two such substantial clinical investigations include GW Pharmaceuticals’
24 investigations regarding Sativex and Epidiolex. (See [Sativex Commences US Phase II/III
Clinical Trial in Cancer Pain](#)External Link Disclaimer and [GW Pharmaceuticals Receives
Investigational New Drug \(IND\) from FDA for Phase 2/3 Clinical Trial of Epidiolex in the
Treatment of Dravet Syndrome](#)External Link Disclaimer). FDA considers a substance to be
25 “authorized for investigation as a new drug” if it is the subject of an Investigational New Drug
26 application (IND) that has gone into effect. Under 21 CFR 312.2, unless a clinical investigation
27 meets the limited criteria in that regulation, an IND is required for all clinical investigations of
28 products that are subject to section 505 of the FD&C Act.

1 conditions that are not amenable to self-diagnosis and treatment by individuals
2 who are not medical practitioners; therefore, adequate directions for use cannot be
3 written so that a layperson can use these drugs safely for their intended purposes.
4
5 FDA-approved prescription drugs that bear their FDA-approved labeling are
6 exempt from the requirements that they bear adequate directions for use by a
7 layperson. However, your products are not exempt from the requirement that their
8 labeling bear adequate directions for use, 21 CFR 201.100(c)(2) and 201.115,
9 because no FDA-approved applications are in effect for them. The introduction or
10 delivery for introduction into interstate commerce of these misbranded drugs
11 violates section 301(a) of the FD&C Act, 21 U.S.C. 331(a).
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14 **301(II) and Adulterated Animal Foods**

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16 21. Defendant's use of CBD in animal foods in their "CBD Dog Treats" is
17 a prohibited act under section 301(II) of the FD&C Act, 21 U.S.C. 331(II), to
18 introduce or deliver for introduction into interstate commerce any animal food to
19 which has been added a drug approved under section 505 of the FD&C Act or for
20 which substantial clinical investigations have been instituted and for which the
21 existence of such investigations has been made public. Based on available
22 evidence, FDA has concluded that the prohibition in section 301(II) applies to
23 CBD, as described above.
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1 22. As defined in section 201(s) of the FD&C Act (21 U.S.C. 321(s)), the
2 term “food additive” refers to any substance the intended use of which results in its
3 becoming a component of any animal food, unless the substance is generally
4 recognized as safe (GRAS) among qualified experts under the conditions of its
5 intended use, or unless the substance meets a listed exception.
6

7 23. There is no animal food additive regulation that authorizes the use of
8 CBD. The FDA is not aware of any information to indicate that CBD is the subject
9 of a prior sanction (i.e., a sanction or approval granted prior to the enactment of the
10 Food Additives Amendment of 1958 under the FD&C Act, the Poultry Products
11 Inspection Act, or the Meat Inspection Act). There is no basis to conclude that
12 CBD is GRAS for use in animal foods. The FDA’s regulations in 21 CFR
13 570.30(a)-(c) describe the criteria for eligibility for classification of an animal food
14 ingredient as GRAS. The use of an animal food substance may be GRAS based on
15 either scientific procedures or, for a substance used in animal food before 1958,
16 through experience based on common use in animal food. *See* 21 CFR 570.30).
17

18 There is no basis for general recognition of safety for CBD based either on
19 scientific procedures or common use in animal food prior to January 1, 1958.
20 Based on our review of the publicly available literature, the data and information
21 necessary to support the safe use of CBD in animal foods are lacking. In fact,
22 literature reports have raised safety concerns for animals consuming CBD,
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1 including, but not limited to, male reproductive toxicity and liver toxicity.

2 Therefore, based on the FDA's review, the use of CBD in animal products does not
3 satisfy the criteria for GRAS status under 21 CFR 570.30.
4

5 24. Under section 409, an animal food additive is deemed unsafe unless it
6 is approved by FDA for its intended use prior to marketing. CBD is not approved
7 for use in any animal food. Animal food containing an unsafe food additive within
8 the meaning of section 409 is adulterated within the meaning of section
9 402(a)(2)(C)(i) of the FD&C Act. Introduction of an adulterated animal food into
10 interstate commerce is prohibited under section 301(a) of the FD&C Act, 21
11 U.S.C. 331(a).
12
13

14 25. Defendant's conduct is also deceptive, unfair, and unlawful in that it
15 violates the prohibition against the sale of adulterated and misbranded products
16 under California's Sherman Laws, which adopt the federal labeling regulations as
17 the food labeling requirements of the state. Cal. Health & Safety Code § 110100.
18

19 26. The introduction of adulterated and misbranded food into interstate
20 commerce is prohibited under the FDCA and the parallel state statute cited in this
21 Class Action Complaint.
22

23 27. Plaintiff and Class Members would not have purchased the Products or
24 would have paid less for the Products if they were aware of the misleading labeling
25 of the Products by Defendant.
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1 28. Defendant intended for Plaintiff and the Class members to be deceived
2 or misled.

3 29. Defendant's deceptive and misleading practices proximately caused
4 harm to the Plaintiff and the Class.
5

6 30. Plaintiff and Class members would not have purchased the Products, or
7 would have not paid as much for the Products, had they known the truth about the
8 mislabeled and falsely advertised Products.
9

10 **CLASS ACTION ALLEGATIONS**

11 31. Plaintiff brings this action individually and as representatives of all
12 those similarly situated, pursuant to Federal Rule of Civil Procedure 23, on behalf
13 of the below-defined Class:
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15 **National Class: All persons in the United States who purchased the**
16 **Products.**

17 32. In the alternative, Plaintiff brings this action on behalf of the following
18 State Class:
19

20 **California State Subclass: All persons in the State of California who**
21 **purchased the Products.**

22 33. Excluded from the Classes are: (1) Defendant, and any entity in which
23 Defendant has a controlling interest or which have a controlling interest in
24 Defendant; (2) Defendant's legal representatives, assigns and successors; and (3) the
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1 judge(s) to whom this case is assigned and any member of the judge's immediate
2 family.

3 34. Plaintiff reserves the right to redefine the Class(es), and/or requests for
4 relief.
5

6 35. Certification of Plaintiff's claims for class-wide treatment is
7 appropriate because Plaintiff can prove the elements of her claims on a class-wide
8 basis using the same evidence as would be used to prove those elements in individual
9 actions alleging the same claims.
10

11 36. The members of the proposed Class(es) are so numerous that joinder of
12 all members is impracticable.
13

14 37. The exact number of Class members is unknown. Due to the nature of
15 the trade and commerce involved, as well as the number of online and direct
16 complaints, Plaintiff believes the Class consists of thousands of consumers.
17

18 38. Common questions of law and fact affect the right of each Class
19 member, and a common relief by way of damages is sought for Plaintiff and Class
20 members.
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22 39. Common questions of law and fact that affect Class members include,
23 but are not limited to:
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- 25 a. Whether the Products, when used by consumers in a normal and
26 customary manner and/or in accordance with Defendant's suggested
27 use, works as advertised, marketed, and conveyed to consumers;

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- b. Whether, in the course of business, Defendant represented that the Products have characteristics, uses, benefits, or qualities that they do not have when used by consumers in a normal and customary manner and/or in accordance with Defendant's suggested use;
 - c. Whether the claims Defendant made and is making regarding the Products are unfair or deceptive; specifically, whether the Products were illegally labeled as dietary supplements;
 - d. Whether Defendant knew at the time the consumer transactions took place that consumers would not receive the promised benefits of the Products that Defendant was claiming they would receive;
 - e. Whether Defendant knowingly made misleading statements in connection with consumer transactions that reasonable consumers were likely to rely upon to their detriment;
 - f. Whether Defendant knew or should have known that the representations and advertisements regarding the Products were unsubstantiated, false, and misleading;
 - g. Whether Defendant has breached express and implied warranties in the sale and marketing of the Products;
 - h. Whether Defendant's conduct violates public policy;
 - i. Whether Defendant's acts and omissions violates California law;
 - j. Whether Defendant has been unjustly enriched by the sale of the Products to the Plaintiff and the Class Members;
 - k. Whether Plaintiff and the Class Members did not receive the benefit of their bargain when purchasing the Products;
 - l. Whether the Plaintiff and the Class Members suffered monetary damages, and, if so, what is the measure of those damages;

1 m. Whether Plaintiff and the Class Members are entitled to an injunction,
2 damages, restitution, equitable relief, and other relief deemed
3 appropriate, and, if so, the amount and nature of such relief.

4 40. Defendant engaged in a common course of conduct giving rise to the
5 legal rights sought to be enforced by Plaintiff, on behalf of herself and the other
6 Class members. Similar or identical statutory and common law violations, business
7 practices, and injuries are involved. Individual questions, if any, are pale by
8 comparison, in both quality and quantity, to the numerous common questions that
9 dominate this action.
10

11 41. Additionally, the factual basis of Defendant's conduct is common to all
12 Class members and represents a common thread of misconduct resulting in injury
13 and damages to all members of the Class.
14

15 42. The named Plaintiff will fairly and adequately assert and protect the
16 interests of the Class. Specifically, she has hired attorneys who are experienced in
17 prosecuting class action claims and will adequately represent the interests of the
18 Class; and they have no conflict of interests that will interfere with the maintenance
19 of this class action.
20
21

22 a. The common questions of law and fact set forth herein predominate
23 over any questions affecting only individual Class members;

24 b. The Class is so numerous as to make joinder impracticable but not so
25 numerous as to create manageability problems;
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- 1 c. There are no unusual legal or factual issues which would create
2 manageability problems, and depending on discovery, manageability
3 will not be an issue as much information is solely in Defendant's
4 possession;
- 5 d. Prosecution of separate actions by individual members of the Class
6 would create a risk of inconsistent and varying adjudications against
7 Defendant when confronted with incompatible standards of conduct;
- 8 e. Adjudications with respect to individual members of the Class could,
9 as a practical matter, be dispositive of any interest of other members
10 not parties to such adjudications, or substantially impair their ability to
11 protect their interests; and
- 12 f. The claims of the individual Class members are small in relation to the
13 expenses of litigation, making a Class action the only procedure in
14 which Class members can, as a practical matter, recover. However, the
15 claims of individual Class members are collectively large enough to
16 justify the expense and effort in maintaining a class action.

17 **CAUSES OF ACTION**

18 **COUNT I**

19 **California's Unfair Competition Law**
20 **Cal. Bus. & Prof. Code § 17200 et seq. ("UCL")**
21 **(On Behalf of the California State Subclass)**

22 43. Plaintiff realleges and incorporates by reference the allegations
23 contained in Paragraphs 1 through 42, as though set forth fully herein.

24 44. The UCL prohibits any "unlawful, unfair or fraudulent business act or
25 practice." Cal. Bus. & Prof. Code § 17200.

26 45. The acts, omissions, misrepresentations, practices, and non-disclosures
27 of Defendant as alleged herein constitute business acts and practices.

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

3 a. The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 et seq.;

4 b. The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq.;

5 c. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq.;

6 and

7 d. The California Sherman Food, Drug, and Cosmetic Law, Cal. Health &
8 Safety Code §§ 110100 et seq.

9 47. Unfair: Defendant’s conduct with respect to the labeling, advertising,
10 and sale of the Products was “unfair” because Defendant’s conduct was immoral,
11 unethical, unscrupulous, or substantially injurious to consumers and the utility of
12 their conduct, if any, does not outweigh the gravity of the harm to their victims.

13 48. Defendant’s conduct with respect to the labeling, advertising, and sale
14 of the Products was and is also unfair because it violates public policy as declared
15 by specific constitutional, statutory or regulatory provisions, including but not
16 limited to the applicable sections of: the Consumers Legal Remedies Act, the False
17 Advertising Law, the Federal Food, Drug, and Cosmetic Act, and the California
18 Sherman Food, Drug, and Cosmetic Law.

19 49. Defendant’s conduct with respect to the labeling, advertising, and sale
20 of the Products was and is unfair because the consumer injury was substantial, not
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1 outweighed by benefits to consumers or competition, and not one consumer
2 themselves could reasonably have avoided.

3 50. Fraudulent: A statement or practice is “fraudulent” under the UCL if it
4 is likely to mislead or deceive the public, applying an objective reasonable consumer
5 test.
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7 51. As set forth herein, Defendant’s claims relating the ingredients stated
8 on the Products’ labeling and moreover that the Products are labeled as illegal dietary
9 supplements is likely to mislead reasonable consumers to believe the Products are
10 legal to purchase.
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12 52. Defendant profited from its sale of the falsely, deceptively, and
13 unlawfully advertised and packaged Products to unwary consumers.
14

15 53. Plaintiff and Class Members are likely to continue to be damaged by
16 Defendant’s deceptive trade practices, because Defendant continues to disseminate
17 misleading information on the Products’ packaging. Thus, injunctive relief
18 enjoining Defendant’s deceptive practices is proper.
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21 54. Defendant’s conduct caused and continues to cause substantial injury
22 to Plaintiff and the other Class Members. Plaintiff has suffered injury in fact as a
23 result of Defendant’s unlawful conduct.
24

25 55. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order
26 enjoining Defendant from continuing to conduct business through unlawful, unfair,
27

1 and/or fraudulent acts and practices, and to commence a corrective advertising
2 campaign.

3 56. Plaintiff and the Class also seek an order for and restitution of all
4 monies from the sale of the Products, which were unjustly acquired through acts of
5 unlawful competition.
6

7 **COUNT II**
8 **California's False Advertising Law**
9 **Cal. Bus. & Prof. Code § 17500 ("FAL")**
10 **(On Behalf of the California State Subclass)**

11 57. Plaintiff realleges and incorporates by reference paragraphs 1 through
12 42 as if fully set forth herein.

13 58. The FAL provides that "[i]t is unlawful for any person, firm,
14 corporation or association, or any employee thereof with intent directly or indirectly
15 to dispose of real or personal property or to perform services" to disseminate any
16 statement "which is untrue or misleading, and which is known, or which by the
17 exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus.
18 & Prof. Code § 17500.
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20 59. It is also unlawful under the FAL to disseminate statements concerning
21 property or services that are "untrue or misleading, and which is known, or which
22 by the exercise of reasonable care should be known, to be untrue or misleading." Id.
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1 60. As alleged herein, the advertisements, labeling, policies, acts, and
2 practices of Defendant relating to the Products misled consumers acting reasonably
3 as to the ingredients and effectiveness of the Products and moreover because the
4 Products are illegally labeled as dietary supplements.
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6 61. Plaintiff suffered injury in fact as a result of Defendant's actions as set
7 forth herein because she purchased the Products in reliance on Defendant's false and
8 misleading labeling claims that the Products, among other things, contained the
9 ingredients stated on the Products' labeling and moreover that the Products were
10 legal dietary supplements as claimed on the Products' labeling and Defendant's
11 website.
12

13 62. Defendant's business practices as alleged herein constitute deceptive,
14 untrue, and misleading advertising pursuant to the FAL because Defendant has
15 advertised the Products in a manner that is untrue and misleading, which Defendant
16 knew or reasonably should have known, and omitted material information from its
17 advertising.
18

19 63. Defendant profited from its sale of the falsely and deceptively
20 advertised Products to unwary consumers.
21

22 64. As a result, Plaintiff, the California Subclass, and the general public are
23 entitled to injunctive and equitable relief, restitution, and an order for the
24 disgorgement of the funds by which Defendant was unjustly enriched.
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1 d. § 1770(a)(16): representing the subject of a transaction has been
2 supplied in accordance with a previous representation when it has not.

3 69. Defendant profited from the sale of the falsely, deceptively, and
4 unlawfully advertised Products to unwary consumers.
5

6 70. Defendant's wrongful business practices constituted, and constitute, a
7 continuing course of conduct in violation of the CLRA.
8

9 71. Pursuant to the provisions of Cal. Civ. Code § 1782(a), Plaintiff will
10 provide a letter to Defendant concurrently with the filing of this Class Action
11 Complaint or shortly thereafter with notice of its alleged violations of the CLRA,
12 demanding that Defendant correct such violations, and providing it with the
13 opportunity to correct its business practices. If Defendant does not thereafter correct
14 its business practices, Plaintiff will amend (or seek leave to amend) the complaint to
15 add claims for monetary relief, including restitution and actual damages under the
16 Consumers Legal Remedies Act.
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19 72. Pursuant to California Civil Code § 1780, Plaintiff seeks injunctive
20 relief, her reasonable attorney fees and costs, and any other relief that the Court
21 deems proper.
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COUNT IV
Breach of Express Warranties
Cal. Com. Code § 2313(1)
(On Behalf of the California State Subclass)

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4 73. Plaintiff realleges and incorporates by reference paragraphs 1 through
5 42 as if fully set forth herein.

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7 74. Through the Products' labels and advertising, Defendant made
8 affirmations of fact or promises, or description of goods, described above, which
9 were "part of the basis of the bargain," in that Plaintiff and the Class purchased the
10 Products in reasonable reliance on those statements. Cal. Com. Code § 2313(1).

11
12 75. Defendant breached the express warranties by selling Products that do
13 not and cannot provide the promised benefits and moreover by selling Products that
14 are illegally labeled as dietary supplements.

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16 76. Plaintiff and the Class Members would not have purchased the Products
17 had they known the true nature of the Products' ingredients and what the Products
18 contained and that the Products are illegally labeled as dietary supplements.

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20 77. That breach actually and proximately caused injury in the form of the
21 lost purchase price that Plaintiff and Class members paid for the Products.

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23 78. Furthermore, Defendant had actual knowledge of the defect in the
24 Products purchased by Plaintiff, as well as the Products purchased by other members
25 of the Class, because it had actual knowledge of the nature, ingredients and qualities
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1 of the ingredients in its Products by virtue of its own Products' testing and it knows
2 that the affirmations and representations it makes concerning the nature, benefits,
3 ingredients and quantities on the Products' labeling and Defendant's website and
4 advertising is false.

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6 79. As a result of Defendant's breach of warranty, Plaintiff and Class
7 Members have been damaged in the amount of the purchase price of the Products
8 and any consequential damages resulting from the purchases.

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10 **COUNT V**
11 **Breach of Implied Warranty of Merchantability**
12 **Cal. Com. Code § 2314**
13 **(On Behalf of the California State Subclass)**

14 80. Plaintiff realleges and incorporates by reference paragraphs 1-42 as if
15 fully set forth herein.

16 81. Defendant, through its acts and omissions set forth herein, in the sale,
17 marketing, and promotion of the Products, made representations to Plaintiff and the
18 Class that, among other things, the Products were labeled as legal dietary
19 supplements.

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21 82. Plaintiff and the Class bought the Products manufactured, advertised,
22 and sold by Defendant, as described herein.
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1 83. Defendant is a merchant with respect to the goods of this kind which
2 were sold to Plaintiff and the Class, and there was, in the sale to Plaintiff and other
3 consumers, an implied warranty that those goods were merchantable.
4

5 84. However, Defendant breached that implied warranty in that the
6 Products provide no benefits, as set forth in detail herein, and moreover that the
7 Products are actually labeled as illegal dietary supplements.
8

9 85. As an actual and proximate result of Defendant's conduct, Plaintiff and
10 the Class did not receive goods as impliedly warranted by Defendant to be
11 merchantable in that they did not conform to promises and affirmations made on the
12 container or label of the goods nor are they fit for their ordinary purpose of providing
13 the benefits as promised.
14

15 86. Plaintiff and the Class have sustained damages as a proximate result of
16 the foregoing breach of implied warranty in the amount of the Products' purchase
17 prices.
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COUNT VI

**Declaratory Relief Under the Declaratory Judgment Act
(On Behalf of the Nationwide Class or,
Alternatively, the California State Subclass)**

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3
4 87. Plaintiff realleges and incorporates by reference paragraphs 1-42 as if
5 fully set forth herein.

6
7 88. Plaintiff brings this cause of action on behalf of the Nationwide Class
8 and/or the California State Subclass.

9
10 89. Declaratory relief is intended to minimize “the danger of avoidable loss
11 and unnecessary accrual of damages.” 10B Charles Alan Wright, Arthur R. Miller
12 & Mary Kay Kane, Federal Practice and Procedure § 2751 (3d ed. 1998).

13
14 90. Pursuant to 28 U.S.C. § 2201, et seq., there is an actual controversy
15 between Defendant and Plaintiff concerning whether:

- 16 a. Defendant has misrepresented the nature, ingredients and effectiveness
17 of the Products; and
18 b. Defendant knew or should have known of the misrepresentations
19 regarding the efficacy of the Products.

20 91. Pursuant to 28 U.S.C. § 2201, the Court may “declare the rights and
21 legal relations of any interested party seeking such declaration, whether or not
22 further relief is or could be sought.”

23
24 92. Despite findings which have proven Defendant’s representations false,
25 Defendant continues to represent the nature, ingredients and effectiveness of the
26

1 Products, specifically labeling the Products as illegal “dietary supplements” and has
2 otherwise failed to correct those misrepresentations.

3 93. Accordingly, based on Defendant’s repeated and continued
4 misrepresentations, Plaintiff seeks a declaration that Defendant has misrepresented
5 the nature, ingredients and effectiveness of the Products and that its actions are
6 unlawful.
7

8 94. The declaratory relief requested herein will generate common answers
9 that will settle the controversy related to the misrepresented labeling of the Products.
10 There is an economy to resolving these issues as they have the potential to eliminate
11 the need for continued and repeated litigation.
12

13
14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff prays that this case be certified and maintained as a
16 class action and for judgment to be entered against Defendant as follows:
17

- 18
- 19 A. Enter an order certifying the proposed Class (and subclasses, if
20 applicable), designating Plaintiff as the class representative, and
designating the undersigned as class counsel;
 - 21 B. Enter an order awarding Plaintiff and the class members their actual
22 damages, treble damages, and/or any other form of monetary relief
23 provided by law, except that no monetary relief is presently sought for
24 violations of the Consumers Legal Remedies Act;
 - 25 C. Declare that Defendant is financially responsible for notifying all Class
26 members of the problems with the Products;
- 27

- 1 D. Declare that Defendant must disgorge, for the benefit of the Class, all
2 or part of the ill-gotten profits it received from the sale of the Products,
3 or order Defendant to make full restitution to Plaintiff and the members
4 of the Class, except that no monetary relief is presently sought for
5 violations of the Consumers Legal Remedies Act;
6
7 E. Defendant shall audit and reassess all prior customer claims regarding
8 the Products, including claims previously denied in whole or in part;
9
10 F. An order awarding Plaintiff and the classes pre-judgment and post-
11 judgment interest as allowed under the law;
12
13 G. For reasonable attorneys' fees and reimbursement of all costs for the
14 prosecution of this action, including expert witness fees; and
15
16 H. For such other and further relief as this Court deems just and
17 appropriate.

18 **JURY DEMAND**

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

20 Dated: December 4, 2019

21 Respectfully Submitted,

22 By: /s/ Jonathan Shub
23 Jonathan Shub (CA Bar
24 #237708)
25 Kevin Laukaitis*
26 **KOHN, SWIFT & GRAF,**
27 **P.C.**

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**Pro Hac Vice Application
Forthcoming*

*Counsel For Plaintiff
And The Class*