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[ADDITIONAL PLAINTIFF’S COUNSEL
ON SIGNATURE PAGE]

Attorneys for Plaintiff,
Toni Welk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TONI WELK, Individually and
On Behalf of All Others Similarly
Situated,**

Plaintiff,

v.

**NUTRACEUTICAL
CORPORATION D/B/A
BIOGENESIS
NUTRACEUTICALS, INC. d/b/a
NUTRABIOGENESIS d/b/a
BIOGENESIS,**

Defendant.

Case No.: '17CV2266 BEN KSC

**CLASS ACTION COMPLAINT
FOR:**

- 1) **VIOLATION OF THE
CONSUMERS LEGAL
REMEDIES ACT (CAL. CIVIL
CODE §§ 1750, ET SEQ.);**
- 2) **CALIFORNIA BUS. & PROF. §§
17500 ET SEQ.;**
- 3) **CALIFORNIA’S HEALTH AND
SAFETY CODE § 110660;**
- 4) **CALIFORNIA BUS. & PROF. §§
17200 ET SEQ.;**
- 5) **NEGLIGENT
MISREPRESENTATION;**
- 6) **INTENTIONAL
MISREPRESENTATION.**

JURY TRIAL DEMANDED

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INTRODUCTION

1. TONI WELK (“Plaintiff” or “Ms. Welk”) brings this Class Action Complaint to challenge the deceptive advertising and business practices of NUTRACEUTICAL CORPORATION d/b/a BIOGENESIS NUTRACEUTICALS, INC. d/b/a NUTRABIOGENESIS d/b/a BIOGENESIS, (“Defendant”) with regard to Defendant’s false and misleading promotion of its consumable liquid B vitamin supplements (the “Products”).¹
2. Defendant promotes that its Products contain a certain amount of vitamin B12 as Methylcobalamin (“MeCO”) per serving, when in fact, Defendant’s Products become unstable upon opening and degrade over time; and, therefore Defendant’s Products fail to provide the amount of vitamin B12 as MeCO as stated on the Products’ label’s serving size. The unlawfully labeled consumable Products are sold online and in various stores throughout the United States.
3. Plaintiff alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.
4. As stated by the California Supreme Court in *Kwikset v. Superior Court* (January 27, 2011) 51 Cal. 4th 310, 328-29:

Simply stated: labels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities...

¹ Although Plaintiff purchased Defendant’s mislabeled “Biogenesis – Methyl Factors 2 oz” product, which is advertised via its label as, among others, containing 1,000 micrograms of liquid vitamin B12 per serving, Plaintiff seeks class wide relief on behalf of all purchasers of any of Defendant’s Products that are substantially similar to the product purchased by Plaintiff (i.e., all of Defendant’s liquid vitamin B12 products, regardless of the brand they are advertised under and the exact amount of liquid B12 vitamin advertised per serving).

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- 1 5. This nationwide sale and advertising of deceptively labeled products constitutes
 2 violations of: (1) California’s Consumer Legal Remedies Act (“CLRA”), Cal.
 3 Civ. Code §§ 1750 *et seq.*; (2) California’s False Advertising Law (“FAL”),
 4 Bus. & Prof. Code §§ 17500 *et seq.*; (3) California’s Health and Safety Code §
 5 110660; (4) California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code
 6 §§ 17200 *et seq.*; (5) negligent misrepresentation; and (6) intentional
 7 misrepresentation. This conduct caused Plaintiff, and others similarly, situated
 8 damages, and requires restitution and injunctive relief to remedy and prevent
 9 further harm.
- 10 6. Unless otherwise indicated, the use of Defendant’s name in this Complaint
 11 includes all agents, employees, officers, members, directors, heirs, successors,
 12 assigns, principals, trustees, sureties, subrogees, representatives and insurers of
 13 the named Defendant.

14 **JURISDICTION AND VENUE**

- 15 7. This Court has jurisdiction over this matter pursuant to the Class Action
 16 Fairness Act (CAFA) because the amount in controversy in this matter exceeds
 17 \$5,000,000.00² as to all putative Class members, inclusive of attorneys’ fees
 18 and costs, and injunctive relief. *See* 28 U.S.C. § 1332(d).
- 19 8. Venue is proper in the United States District Court for the Southern District of
 20 California pursuant to 28 U.S.C. § 1391 for the following reasons: (i) Plaintiff
 21 resides in the State of California, and within this judicial district; (ii) the
 22 conduct complained of herein occurred within this judicial district; and, (iii)
 23

24

25 _____

26 ² On information and belief, Defendant sells its Products in bricks and mortar
 27 stores and on websites throughout the Nation. Based upon the advertised price of
 28 Defendant’s Products and their nationwide availability, Plaintiff is informed,
 believes, and thereon alleges the class damages exceed the \$5,000,000 threshold
 as set by 28 U.S.C. § 1332(d).

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1 many of the acts and transactions giving rise to this action occurred in this
2 district because Defendant:

- 3 (a) is authorized to conduct business in this district and has
- 4 intentionally availed itself of the laws and markets within this
- 5 district;
- 6 (b) does substantial business within this district;
- 7 (c) is subject to personal jurisdiction in this district because it has
- 8 availed itself of the laws and markets within this district; and,
- 9 (d) the harm to Plaintiff occurred within this district.

10 **PARTIES**

11 9. Plaintiff is an individual residing in El Cajon, California.

12 10. Upon information and belief, Defendant is a corporation that is organized and
13 exists under the laws of the State of Delaware with a principal place of business
14 in Utah, and does business within the State of California and within this district.

15 11. Upon information and belief, NUTRACEUTICAL CORPORATION purchased
16 NUTRABIOGENESIS in 2014.

17 12. Defendant is an American conglomerate that manufactures and/or distributes
18 various products, including consumable consumer packaged goods such as
19 dietary supplements and over the counter pharmaceutical products. Defendant
20 conducts business through Internet sales and enjoys wide retail distribution at
21 numerous stores within the United States.

22 **NATURE OF THE CASE**

23 13. At all times relevant, Defendant made, and continues to make, affirmative
24 misrepresentations regarding the liquid B vitamin supplement it manufactures,
25 markets and sells. Specifically, Defendant packaged, advertised, marketed,
26 promoted, and sold its Products to Plaintiff and other consumers similarly
27 situated with the false representation that its Products contains a specified
28 amount of liquid B vitamins per serving.

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1 14. Defendant's Products, however, do not contain the amount of vitamin B per
2 serving as represented on their labels, as the Products become unstable
3 immediately upon opening, starts degrading over time such that the amount of
4 vitamin B12 becomes negligible and ineffective.

5 15. In some of Defendant's Products Defendant used MeCO—as opposed to other
6 forms of vitamin B12 that may have been more stable, but less appealing to
7 consumers. Defendant prominently displays MeCO both on the front panel and
8 Supplement Facts panel of its Products because Defendant knows and
9 understands consumers' preference for MeCO as opposed to other forms of
10 vitamin B12. Furthermore, Defendant created vitamin B12 as a liquid because it
11 knows many consumers that need vitamin B12 are also unable to swallow
12 tablets or capsules, which may have been more stable.

13 16. Defendant advertises the benefits of its Methyl Factors on amazon.com, stating
14 that it, "provides support your body needs to produce optimal homocysteine
15 levels for improved cardiovascular health...promotes proper neurological
16 function...helps give your body what it needs for normal production of red
17 blood cells." However, Defendant does not clarify that these benefits are not
18 obtainable once the MeCO form of vitamin B12 is degraded to a negligible
19 amount.

20 17. As a consequence of Defendant's unfair and deceptive practices, Plaintiff and
21 other similarly situated consumers purchased Defendant's Products under the
22 false impression that the Products contained a specific amount of micrograms of
23 vitamin B per serving as stated on their labels.

24 18. Each consumer, including Plaintiff, was exposed to virtually the same material
25 misrepresentations, as the identical labels were prominently placed on all of
26 bottles of Defendant's liquid B12 vitamin Products that were sold, and are
27 currently being sold, throughout the United States and the State of California.
28

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1 19. As a result of Defendant's misrepresentations, Plaintiff and other consumers
2 similarly situated overpaid for the Products, and/or purchased the Products
3 under the false belief that the supplement they purchased would deliver the
4 specific amount of B12 vitamins per serving advertised on Defendant's labels.
5 Had Plaintiff and other consumers similarly situated been informed that
6 Defendant's Products becomes unstable and degrades as soon as it is opened,
7 they would not have purchased the Products, would have paid less for them, or
8 would have purchased different B vitamin products.

9 20. As a result of Defendant's false and misleading statements and failure to
10 disclose (or adequately disclose), as well as Defendant's other conduct
11 described herein, Plaintiff and other similarly situated consumers purchased
12 thousands, if not millions, of bottles of Defendant's liquid B vitamin Products
13 and have suffered, and continue to suffer, injury in fact including the loss of
14 money and/or property.

15 21. Defendant's conduct as alleged herein violates several California laws, as more
16 fully set forth herein.

17 22. This action seeks, among other things, equitable and injunctive relief;
18 restitution of all amounts illegally retained by Defendant; and disgorgement of
19 all ill-gotten profits from Defendant's wrongdoing alleged herein.

20 **FACTUAL ALLEGATIONS**

21 23. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
22 this Complaint as though fully stated herein.

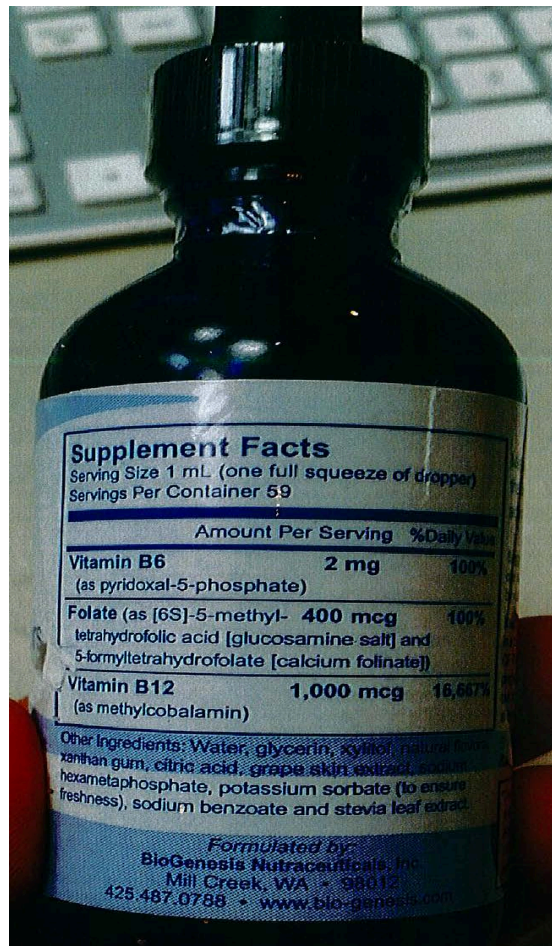
23 24. Defendant manufactures, markets and/or sells a licensed healthcare
24 professional-only line with over one hundred nutritional supplement products
25 prescribed by healthcare providers nationwide. Specific to this Complaint,
26 Defendant sells Products containing liquid B12 vitamin supplement and
27 advertises, via the Products' labels, that it contains a specific amount of
28 micrograms of B12 per serving.

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1 25. Vitamin B12 is believed to be important to maintaining the health of one's
2 metabolism, blood cells, and nerves, as serious vitamin B12 deficiency may
3 result in stomach/intestine problems, low red blood cell count (anemia), and
4 permanent nerve damage. Vitamin B12 deficiency may occur in certain health
5 conditions, such as: poor nutrition, cancer, HIV infection, pregnancy, old age,
6 and alcoholism. It may also occur in people who follow a strict vegetarian or
7 vegan diet. Although most people receive enough vitamin B12 through their
8 diet, special circumstances may require some individuals to supplement their
9 vitamin B12 intake.

10 26. On or about July 15, 2015, Plaintiff purchased a bottle of Defendant's
11 "BioGenesis —Methyl Factors 2 oz" liquid B12 vitamin supplement for \$21.50
12 from the online store amazon.com.

13 27. The following label was attached to Defendant's Methyl Factors 2 oz vitamin
14 B12 supplement:



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1 28. In making the decision to purchase Defendant’s supplement, Plaintiff relied
2 upon Defendant’s labeling and packaging materials prepared and approved by
3 Defendant and/or its agents and disseminated through its Product’s packaging
4 containing the misrepresentations alleged herein.

5 29. Based on these misrepresentations that the supplement contained 1,000
6 micrograms of liquid vitamin B12 per serving, Plaintiff believed Defendant’s
7 supplement actually contained that advertised amount of vitamin B12 and
8 maintained this amount throughout its shelf life, and relied upon said
9 misrepresentations when purchasing Defendant’s product.

10 30. Furthermore, Defendant advertises on amazon.com that its Product, “provides
11 support your body needs to produce optimal homocysteine levels for improved
12 cardiovascular health...promotes proper neurological function...helps give your
13 body what it needs for normal production of red blood cells.” Plaintiff believed
14 Defendant’s supplement would provide these benefits until the contents of the
15 Product were exhausted.

16 31. Plaintiff is informed and believes, and thereupon alleges, that vitamin B12 as
17 MeCO, in liquid form, undergoes degradation at an unknown rate.

18 32. Plaintiff’s claim does not seek to bring a private action against the Product’s
19 formal name and labeling in areas for which the Food and Drug Administration
20 (“FDA”) has promulgated regulations implementing the Federal Food and Drug
21 and Cosmetic Act (“FFDCA”). Plaintiff’s claim is, instead, predicated on the
22 fact that the labeling and associated advertising is misleading and deceptive
23 even if in compliance with the minimum requirements set forth by the FDA.
24 Indeed, compliance with the minimum requirements is necessary, but it is not
25 sufficient to determine whether a product’s label is false and misleading, and
26 simply does not provide a shield from liability. *See e.g., Wyeth v. Levine*, 129
27 S. Ct 1187, 1202 (2009).
28

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1 33. As a result of Defendant’s misrepresentations regarding its liquid B vitamin
2 supplements, Plaintiff and other putative class members were induced into
3 purchasing and overpaying for Defendant’s Products under the belief that the
4 supplements they purchased contained the specified amount of B vitamins per
5 serving, as stated on the Products’ label, and maintained that specific advertised
6 amount of B vitamins for the duration of the Products’ shelf life. Had Plaintiff
7 and putative class members been informed that Defendant’s Products did not in
8 fact contain and maintain the amount of B vitamins per serving as advertised,
9 they would not have purchased the Products, would have paid less for it, or
10 would have purchased a different product. In other words, Plaintiff would not
11 have purchased Defendant’s liquid B12 vitamin supplement, but for the
12 representations on the Products’ label and on amazon.com.

13 34. During the “Class Period,” as defined below, Plaintiff and others similarly
14 situated were exposed to and saw Defendant’s advertising, marketing, and
15 packaging claims disseminated by Defendant for the purpose of selling goods.
16 Plaintiff and putative class members purchased Defendant’s Products in
17 reliance on these claims, and thereby suffered injury in fact and lost money
18 and/or property as a result of Defendant’s unfair, misleading and unlawful
19 conduct described herein.

20 35. Defendant’s misleading advertising was and is publicly disseminated on a
21 widespread and continuous basis during the Class Period as the offending
22 labels, containing the inaccurate amount per serving of B vitamins, were affixed
23 to all of Defendant’s liquid B vitamin supplement bottles Defendant sold
24 throughout the State of California and throughout the United States.

25 36. Defendant’s label was untrue, false, and misleading to Plaintiff and putative
26 class members, as a reasonable consumer would expect Defendant’s Products to
27 contain and maintain the advertised amount of vitamin B. Specifically,
28 Plaintiff, a reasonable consumer, expected Defendant’s claim of 1,000

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1 micrograms of vitamin B12 per serving to mean that the product contained such
2 amount of vitamin B12 when purchased and maintained that amount for the
3 duration of its shelf life. Accordingly, the reasonable consumer would have
4 been misled into believing Defendant's B vitamin supplements contain and
5 maintain the specified amount of B vitamin per serving, when in fact
6 Defendant's Products do not.

7 37. Defendant received a demand letter from Plaintiff's counsel on or about July
8 31, 2015, informing the Defendant that their conduct was in violation of several
9 California laws and that Defendant needed to take corrective action. Defendant
10 has yet to take any meaningful response.

11 38. Defendant knew, or in the exercise of reasonable care should have known, its
12 labels were misleading. Defendant could have easily disclosed on its packaging
13 that its Product become unstable upon opening and degrade over time, such that
14 the amount of B vitamins becomes negligible and ineffective. However,
15 Defendant deliberately chose to omit such text and intentionally or negligently
16 retained a false claim within its Products' packaging for the purpose of selling
17 its Products.

18 39. Defendant made a tactical decision to deceive consumers with the intent of
19 reaping the financial benefit of the false, misleading, and deceptive advertising
20 regarding the amount per serving of B vitamin contained and maintained in its
21 Products, intentionally capitalizing on a reasonable consumer's trust in a
22 nationally branded company perceived to supply quality vitamin products.

23 **CLASS ACTION ALLEGATIONS**

24 40. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
25 this Complaint as though fully stated herein.

26 41. Plaintiff brings this action individually and on behalf of all others similarly
27 situated against Defendant, pursuant to Federal Rules of Civil Procedure, Rules
28 23(a), 23(b)(1), 23(b)(2) and 23(b)(3).

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1 42. Subject to additional information obtained through further investigation and/or
2 discovery, the proposed “Class” consists of:

3 All persons within California who purchased one or more of
4 Defendant’s Products within the four years prior to the filing of
5 this Complaint, regardless of the brand under which Defendant
6 markets the Product, and regardless of the specific amount of B
7 vitamins advertised on the Products’ label.

8 43. Excluded from the Class are Defendant and any of its officers, directors, and
9 employees, or anyone who purchased Defendant’s Products for the purposes of
10 resale. Plaintiff reserves the right to modify or amend the Class definition
11 before the Court determines whether certification is appropriate.

12 44. The “Products” include “BioGenesis —Methyl Factors 2 oz”, and substantially
13 similar products, including but not limited to BioGenesis —Methyl Factors 2 oz
14 (2,500 mcg of Methylcobalamin); LifeTime – Liquid B-Complex with Vitamin
15 C; Kal – B12 Methylcobalamin ActivSpray; Kal – B12 ActiveSpray; and All
16 Once – Liquid Life.

17 45. The “Class Period” means four years prior to the filing of the Complaint in this
18 action.

19 46. Ascertainability. The members of the Class are readily ascertainable from
20 Defendant’s records and/or Defendant’s agent’s records regarding retail and
21 online sales, as well as through public notice.

22 47. Numerosity. The members of the Class are so numerous that their individual
23 joinder is impracticable. Plaintiff is informed and believes, that the product is
24 an Amazon’s choice product, and on that basis alleges, that the proposed class
25 consists of thousands of members, if not millions.

26 48. Existence and Predominance of Common Questions of Law and Fact. Common
27 questions of law and fact exist as to all members of the Class and predominate
28 over any questions affecting only individual Class members. All members of

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1 the Class have been subject to the same conduct and their claims are based on
2 the same standardized marketing, advertisements and promotions. The common
3 legal and factual questions include, but are not limited to, the following:

- 4 a. Whether Defendant’s liquid B vitamin supplements becomes
5 unstable upon opening and degrade over time;
- 6 b. Whether Defendant’s liquid B vitamin supplements actually contain
7 the advertised amount of B vitamins per serving;
- 8 c. Whether Defendant’s liquid B vitamin supplements maintain the
9 advertised amount of B vitamins per serving throughout their shelf
10 life;
- 11 d. Whether Defendant’s claims and representations above are untrue,
12 or are misleading, or reasonably likely to deceive;
- 13 e. Whether Defendant’s conduct violates California Civil Code §§
14 1750;
- 15 f. Whether Defendant’s advertising is false, untrue, or misleading
16 within the meaning of California Business & Professions Code §§
17 17500 *et seq.*;
- 18 g. Whether Defendant’s conduct is an unlawful act or practice within
19 the meaning of California Business & Professions Code §§ 17200 *et*
20 *seq.*;
- 21 h. Whether Defendant’s conduct is a fraudulent act or practice within
22 the meaning of California Business & Professions Code §§ 17200 *et*
23 *seq.*;
- 24 i. Whether Defendant’s conduct is in violation of California’s Health
25 and Safety Code § 110660;
- 26 j. Whether Defendant’s conduct is an unfair act or practice within the
27 meaning of California Business & Professions Code §§ 17200 *et*
28 *seq.*;

- 1 k. Whether Defendant’s advertising is unfair, deceptive, untrue or
- 2 misleading within the meaning of California Business & Professions
- 3 Code §§ 17200 *et seq.*;
- 4 l. Whether Defendant acted negligently or intentionally in making the
- 5 misrepresentations contained in its Products’ label;
- 6 m. Whether Defendant, through its conduct, received money that, in
- 7 equity and good conscience, belongs to Plaintiff and members of the
- 8 Class;
- 9 n. Whether Plaintiff and proposed members of the Class are entitled to
- 10 equitable relief, including but not limited to restitution and/or
- 11 disgorgement; and
- 12 o. Whether Plaintiff and proposed members of the Class are entitled to
- 13 injunctive relief sought herein.

14 49. Typicality. Plaintiff’s claims are typical of the claims of the members of the

15 Class in that Plaintiff is a member of the Class that Plaintiff seeks to represent.

16 Plaintiff, like members of the proposed Class, purchased Defendant’s liquid B

17 vitamin supplement after exposure to the same material misrepresentations

18 and/or omissions appearing in the Products’ labeling, and received a Product

19 that becomes unstable and degrades upon opening such that the amount of

20 vitamin B becomes negligible and ineffective over time. Plaintiff is advancing

21 the same claims and legal theories on behalf of herself and all absent members

22 of the Class. Defendant has no defenses unique to the Plaintiff.

23 50. Adequacy of Representation. Plaintiff will fairly and adequately protect the

24 interests of the members of the Class. Plaintiff has retained counsel

25 experienced in consumer protection law, including class actions. Plaintiff has

26 no adverse or antagonistic interest to those in the Class, and will fairly and

27 adequately protect the interests of the Class. Plaintiff’s attorneys are aware of

28 no interests adverse or antagonistic to those of Plaintiff and proposed Class.

1 51. Superiority. A class action is superior to all other available means for the fair
2 and efficient adjudication of this controversy. Individualized litigation would
3 create the danger of inconsistent and/or contradictory judgments arising from
4 the same set of facts. Individualized litigation would also increase the delay and
5 expense to all parties and the court system. The damages or other financial
6 detriment suffered by individual Class members may be relatively small
7 compared to the burden and expense that would be entailed by individual
8 litigation of the claims against the Defendant. The injury suffered by each
9 individual member of the proposed class is relatively small in comparison to the
10 burden and expense of individual prosecution of the complex and extensive
11 litigation necessitated by Defendant's conduct. It would be virtually impossible
12 for members of the proposed Class to individually redress effectively the
13 wrongs to them. Even if the members of the proposed Class could afford such
14 litigation, the court system could not. Individualized litigation of the complex
15 legal and factual issues of such a case increases the delay and expense to all
16 parties, including the court. By contrast, the class action device presents far
17 fewer management difficulties, and provides the benefits of single adjudication,
18 economy of scale, and comprehensive supervision by a single court. Therefore,
19 a class action is maintainable pursuant to Fed. R. Civ. P. 23(b)(3).

20 52. Unless the Class is certified, Defendant will retain monies received as a result
21 of Defendant's unlawful and deceptive conduct alleged herein. Unless a class-
22 wide injunction is issued, Defendant will also likely continue to, or allow its
23 resellers to, advertise, market, promote and package Defendant's liquid B
24 vitamin Product in an unlawful and misleading manner, and members of the
25 Class will continue to be misled, harmed, and denied their rights under
26 California law.

27 53. Further, Defendant has acted or refused to act on grounds that are generally
28 applicable to the class so that declaratory and injunctive relief is appropriate to

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1 the Class as a whole, making class certification appropriate pursuant to Fed. R.
2 Civ. P. 23(b)(2).

3 **FIRST CAUSE OF ACTION**

4 **VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT**

5 **CAL. CIV. CODE SECTION 1750, ET SEQ.**

6 54. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
7 this Complaint as though fully stated herein.

8 55. California Civil Code Section 1750 *et seq.*, entitled the Consumers Legal
9 Remedies Act (hereinafter “CLRA”), provides a list of “unfair or deceptive”
10 practices in a “transaction” relating to the sale of “goods” or “services” to a
11 “consumer.” The Legislature’s intent in promulgating the CLRA is expressed
12 in Civil Code Section 1760, which provides, *inter alia*, that its terms are to be:

13 Construed liberally and applied to promote its underlying
14 purposes, which are to protect consumers against unfair
15 and deceptive business practices and to provide efficient
and economical procedures to secure such protection.

16 56. Defendant’s products constitute “goods” as defined pursuant to Civil Code
17 Section 1761(a).

18 57. Plaintiff, and the Class members, are each a “consumer” as defined pursuant to
19 Civil Code Section 1761(d).

20 58. Each of Plaintiff’s and the Class members’ purchases of Defendant’s products
21 constituted a “Transaction” as defined pursuant to Civil Code Section 1761(e).

22 59. Civil Code Section 1770(a)(2), (5), (7) and (9) provide that:

23 The following unfair methods of competition and unfair
24 or deceptive acts or practices undertaken by any person
25 in a transaction intended to result or which results in the
26 sale or lease of goods or services to any consumer are
27 unlawful:
[m]isrepresenting the source, sponsorship, approval, or
28 certification of goods or services,

1 [r]epresenting that goods or services have sponsorship,
2 approval, characteristics, ingredients, uses, benefits, or
3 quantities which they do not have,
4 [r]epresenting that goods or services are of a particular
5 standard, quality, or grade... if they are of another, [and]
6 [a]dvertising goods or services with intent not to sell
7 them as advertised.”

8
9
10 60. Defendant violated Civil Code Section 1770(a)(2), (5), (7) and (9) by
11 marketing and representing that its Products have a certain amount of B
12 vitamins in liquid form, when, in fact, each and every liquid dietary supplement
13 containing vitamin B12 produced and sold by Defendant does not contain the
14 amount of vitamin B12 per serving as advertised.

15
16
17 61. On information and belief, Defendant’s Product degrade or become unstable
18 immediately upon opening, rapidly degrading over time such that the amount of
19 liquid B12 vitamins become negligible, thereby rendering Defendant’s Product
20 ineffective and misbranded.

21
22
23 62. On information and belief, Defendant’s violations of the CLRA set forth herein
24 were done with awareness of the fact that the conduct alleged was wrongful and
25 was motivated solely for Defendant’s self-interest, monetary gain and increased
26 profit. Plaintiff further alleges that Defendant committed these acts knowing
27 the harm that would result to Plaintiff and Defendant engaged in such unfair
28 and deceptive conduct notwithstanding such knowledge.

63. Plaintiff suffered an “injury in fact” because Plaintiff’s money was taken by
Defendant, as a result of Defendant’s false representations set forth on
Defendant’s actual Products’ label, specifically the Supplemental Facts.

64. As a direct and proximate result of Defendant’s violations of the CLRA,
Plaintiff and members of the Class are entitled to a declaration that Defendant
violated the Consumer Legal Remedies Act.

1 65.As of the filing of this Complaint, Defendant has not complied with Plaintiff’s
2 demand letter pursuant to California Civil Code § 1782, which was served on or
3 about July 31, 2015 via United States Postal Service return receipt requested.

4 66.Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting
5 such conduct in the future and to recover money damages.

6
7 **SECOND CAUSE OF ACTION**
8 **VIOLATION OF BUSINESS & PROFESSIONS CODE**
9 **BUS. & PROF. CODE, SECTION 17500 *ET SEQ.***

10 67.Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
11 this Complaint as though fully stated herein.

12 68.Plaintiff and Defendant are both “person[s]” as defined by California Business
13 & Professions Code § 17506. California Business & Professions Code § 17535
14 authorizes a private right of action on both an individual and representative
15 basis.

16 69.Defendant states that Biogenesis-Methyl Factors 2 oz contains 1,000 micrograms
17 of vitamin B12 in MeCO form, when, in fact, it contains much less due to the
18 its degradation. Defendant makes similar statements regarding specific amounts
19 of vitamin B12 in its Products, despite all of them degrading.

20 70.These misrepresentations, acts, and non-disclosures by Defendant of the
21 material facts detailed above constitute false and misleading advertising and
22 therefore violate Business & Professions Code §§ 17500 *et seq.*

23 71.At all times relevant, Defendant’s advertising and promotion regarding its
24 Products were untrue, misleading and likely to deceive the reasonable consumer
25 and the public; and, in fact, Defendant has deceived Plaintiff and consumers
26 similarly situated by representing that its Products contained a specific amount
27 of micrograms of liquid B vitamins per serving when Defendant knew and
28

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1 failed to disclose that its Products become unstable once opened and degrade
2 over time until the amount of vitamin B is negligible and ineffective.

3 72.State law claims based on a food product’s misleading and deceptive labels are
4 expressly permitted when they impose legal obligations identical to those of the
5 Federal Food, Drug, and Cosmetic Act (“FFDCA”) and its implementing FDA
6 regulations, including FDA regulations concerning naming and labeling. *See*
7 e.g., *In re Farm Raised Salmon Cases*, 22 Cal. 4th 1077, 1094-95 (2008).
8 Plaintiff’s § 17500 claim that the labels of Defendant’s Products are false or
9 misleading imposes legal obligations identical to 21 U.S.C. § 343(a) of the
10 FFDCA, which states that, “a food shall be deemed to be misbranded...[i]f (1)
11 its labeling is false or misleading in any particular[.]” Further, section 343(a) of
12 the FFDCA is not subject to express preemption provision set forth in 21 U.S.C.
13 § 343-1 of the FFDCA.

14 73.Defendant engaged in the false and/or misleading advertising and marketing as
15 alleged herein with the intent to directly or indirectly induce the purchase of its
16 Products that Defendant knew, or had reason to know, did not contain and
17 maintain the advertised micrograms of B vitamins per serving.

18 74.In making and publicly disseminating the statements and/or omissions alleged
19 herein, Defendant knew or should have known that the statements and/or
20 omissions were untrue or misleading, and acted in violation of California
21 Business & Professions Code §§ 17500 *et seq.*

22 75.Plaintiff and members of the putative Class have suffered injury in fact and
23 have lost money and/or property as a result of Defendant’s false advertising, as
24 more fully set forth herein. Plaintiff and members of the Class have been
25 injured because they were induced to purchase Defendant’s Products on the
26 belief that Defendant’s Products contained and maintained a specific amount of
27 micrograms of B vitamins per serving. Plaintiff and members of the putative
28 Class have been injured because if they were informed that Defendant’s liquid

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1 vitamin B Products become unstable upon opening and degrade thereafter, they
2 would not have purchased the supplements, would have paid less for them, or
3 would have purchased a different product from another manufacturer.

4 76. At a date presently unknown to Plaintiff, but at least four years prior to the
5 filing of this action, and as set forth above, Defendant has committed acts of
6 untrue and misleading advertising and promotion of its Products, as defined by
7 Business & Professions Code §§ 17500 *et seq.*, by engaging in the false
8 advertising and promotion of its supplements as containing and maintaining a
9 certain amount of micrograms of B vitamins per serving on its Product’s
10 labeling.

11 77. The false and misleading advertising of Defendant, as described above, presents
12 a continuing threat to consumers, as Defendant continues to use the deceptive
13 labels and advertising, which will continue to mislead consumers who purchase
14 Defendant’s liquid vitamin B Products under false premises.

15 78. As a direct and proximate result of the aforementioned acts and representations
16 of Defendant, Defendant received and continues to hold monies rightfully
17 belonging to Plaintiff and other similarly situated consumers who were led to
18 purchase Defendant’s Products, due to the unlawful acts of Defendant, during
19 the Class Period.

20 **THIRD CAUSE OF ACTION**

21 **VIOLATION OF CALIFORNIA’S SHERMAN LAW**

22 **CAL. HEALTH & SAFETY CODE §§ 110660**

23
24 79. Plaintiff repeats, re-alleges and incorporates by reference the above allegations
25 as if fully stated herein.

26 80. Section 110660 states, “any food is misbranded if its labeling is false or
27 misleading in any particular.” Section 110660 is part of California's Sherman
28

1 Food, Drug and Cosmetic law, California Health & Safety Code § 109875, *et*
 2 *seq.* (the “Sherman law”).

3 81. Defendant has violated Section 110660 by labeling its consumable supplement
 4 Products as containing a specific amount of micrograms of vitamin B12, despite
 5 knowing that this vitamin begins degrading rapidly after the container is
 6 opened. These Products’ label misleads and deceives consumers into believing
 7 that Defendant’s Products contain and maintain a 1,000 mcg of B vitamins.

8 82. State law claims based on a food product’s misleading and deceptive label are
 9 expressly permitted when they impose legal obligations identical to the FFDCA
 10 and its implementing FDA regulations, including FDA regulations concerning
 11 naming and labeling. *See e.g., In re Farm Raised Salmon Cases*, 22 Cal. 4th
 12 1077, 1094-95 (2008). The Sherman law expressly incorporates into California
 13 law all of the food labeling regulations adopted pursuant to the FFDCA.
 14 Plaintiff’s claim that the labels of Defendant’s Products violate California
 15 Health & Safety Code § 110660 imposes legal obligations identical to 21
 16 U.S.C. § 343(a) of the FFDCA. Since § 110660 imposes the identical legal
 17 obligation that “any food is misbranded if its labeling is false or misleading in
 18 any particular,” part of Plaintiff’s section 17200 claim (*infra*), which is based in
 19 part on § 110660, is expressly permitted and not preempted by the FFDCA.
 20 Further, § 343(a) of the FFDCA is not subject to express preemption provision
 21 set forth in 21 U.S.C. § 343-1 of the FFDCA.

22 **FOURTH CAUSE OF ACTION**

23 **VIOLATION OF BUSINESS & PROFESSIONS CODE**

24 **BUS. & PROF. CODE, SECTION 17200, *ET SEQ.***

25
 26 83. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
 27 this Complaint as though fully stated herein.
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1 84. Plaintiff and Defendant are each “person[s]” as defined by California Business
2 & Professions Code § 17201. California Business & Professions Code § 17204
3 authorizes a private right of action on both an individual and representative
4 basis.

5 85. “Unfair competition” is defined by Business and Professions Code Section §
6 17200 as encompassing several types of business “wrongs,” including: (1) an
7 “unlawful” business act or practice, (2) an “unfair” business act or practice, (3)
8 a “fraudulent” business act or practice, and (4) “unfair, deceptive, untrue or
9 misleading advertising.” The definitions in § 17200 are drafted in the
10 disjunctive, meaning that each of these “wrongs” operates independently from
11 the others.

12 86. By and through Defendant’s conduct alleged in further detail above and herein,
13 Defendant engaged in conduct which constitutes unlawful, unfair, and/or
14 fraudulent business practices, and unfair, deceptive, untrue or misleading
15 advertising prohibited by Bus. & Prof. Code § 17200 *et seq.*

16 **A. “Unlawful” Prong**

17 87. Beginning at a date currently unknown through the time of the filing of this
18 Complaint, Defendant has committed acts of unfair competition, including
19 those described above, by engaging in a pattern of “unlawful” business
20 practices, within the meaning of Bus. & Prof. Code § 17200 *et seq.* by
21 manufacturing, distributing, and/or marketing Defendant’s Products in violation
22 of California’s Consumers Legal Remedies Act, Civil Code Section 1759, *et*
23 *seq.*, California’s False Advertising Law, Business & Professions Code §§
24 17500 *et seq.* and California’s Health & Safety Code §§ 110660 by falsely
25 representing that the Products referenced herein contain a specific amount of
26 micrograms of B vitamins per serving, when, in fact, the Products do not
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1 contain or maintain the advertised amount, as they become unstable upon
2 opening and degrade over time.

3 **B. “Unfair” Prong**

4 88. Beginning at a date currently unknown and continuing up through the time of
5 this Complaint, Defendant has committed acts of unfair competition that are
6 prohibited by Bus. & Prof. Code section 17200 *et seq.* Defendant engaged in a
7 pattern of “unfair” business practices that violate the wording and intent of the
8 abovementioned statutes by engaging in conduct and practices that threaten an
9 incipient violation of law/s or violate the policy or spirit of law/s by
10 manufacturing, distributing, and/or marketing Defendant’s Products as
11 containing a specific amount of micrograms of B vitamins per serving, when, in
12 fact, the Products do not contain or maintain the advertised amount, as they
13 become unstable upon opening and degrade over time.

14 89. Alternatively, Defendant engaged in a pattern of “unfair” business practices that
15 violate the wording and intent of the abovementioned statute/s by engaging in
16 practices that are immoral, unethical, oppressive or unscrupulous, the utility of
17 such conduct, if any, being far outweighed by the harm done to consumers and
18 against public policy by manufacturing, distributing, and/or marketing
19 Defendant’s Products as containing 1,000 micrograms of B vitamins per
20 serving, when, in fact, the Products do not contain or maintain that advertised
21 amount, as they become unstable upon opening and degrade over time.

22 90. Alternatively, Defendant engaged in a pattern of “unfair” business practices that
23 violate the wording and intent of the abovementioned statute/s by engaging in
24 practices, including manufacturing, distributing, marketing, and/or advertising
25 Defendant’s Products as containing a certain amount of B vitamins per serving,
26 when, in fact, the Products do not contain or maintain that advertised amount,
27 as they become unstable upon opening and degrade over time; wherein: (1) the
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1 injury to the consumer was substantial; (2) the injury was not outweighed by
2 any countervailing benefits to consumers or competition; and (3) the injury was
3 not of the kind that consumers themselves could not have reasonably avoided.

4 **C. “Fraudulent” Prong**

5 91. Beginning at a date currently unknown and continuing up through the time of
6 this Complaint, Defendant engaged in acts of unfair competition, including
7 those described above and herein, prohibited and in violation of Bus. & Prof.
8 Code § 17200 *et seq.*, by engaging in a pattern of “fraudulent” business
9 practices within the meaning of Bus. & Prof. Code § 17200 *et seq.*, by
10 manufacturing, distributing, and/or marketing Defendant’s Products in violation
11 of California’s Consumers Legal Remedies Act, Civil Code Section 1759, *et*
12 *seq.*, California’s False Advertising Law, Business & Professions Code §§
13 17500 *et seq.* and California’s Health & Safety Code §§110660 by falsely
14 representing that the Products referenced herein contain a certain amount of B
15 vitamins per serving, when, in fact, the Products do not contain or maintain the
16 advertised amount, as they become unstable upon opening and degrade over
17 time.

18 92. Plaintiff reserves the right to allege further conduct that constitutes other
19 fraudulent business acts or practices. Such conduct is ongoing and continues to
20 this date.

21 **D. “Unfair, Deceptive, Untrue or Misleading Advertising” Prong**

22 93. Defendant’s advertising is unfair, deceptive, untrue or misleading in that
23 consumers are led to believe that Defendant’s Products contain a certain amount
24 of B vitamins per serving, when, in fact, the Product does not contain or
25 maintain the advertised amount, as they become unstable upon opening and
26 degrade over time.
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1 94. Plaintiff, a reasonable consumer, and the public would likely be, and, in fact
2 were, deceived and misled by Defendant’s advertising as they would, and did,
3 interpret the representation in accord with its ordinary usage, that the Product
4 contains the advertised number of micrograms of B vitamins per serving.

5 95. Defendant’s unlawful, unfair, and fraudulent business practices and unfair,
6 deceptive, untrue or misleading advertising presents a continuing threat to the
7 public in that Defendant continues to engage in unlawful conduct resulting in
8 harm to consumers.

9 96. Defendant engaged in these unlawful, unfair, and fraudulent business practices
10 motivated solely by Defendant’s self-interest with the primary purpose of
11 collecting unlawful and unauthorized monies from Plaintiff and all others
12 similarly situated; thereby unjustly enriching Defendant.

13 97. Such acts and omissions by Defendant are unlawful and/or unfair and/or
14 fraudulent and constitute a violation of Business & Professions Code section
15 17200 *et seq.* Plaintiff reserves the right to identify additional violations by
16 Defendant as may be established through discovery.

17 98. As a direct and proximate result of the aforementioned acts and representations
18 described above and herein, Defendant received and continues to receive
19 unearned commercial benefits at the expense of its competitors and the public.

20 99. As a direct and proximate result of Defendant’s unlawful, unfair and fraudulent
21 conduct described herein, Defendant has been and will continue to be unjustly
22 enriched by the receipt of ill-gotten gains from customers, including Plaintiff,
23 who unwittingly provided money to Defendant based on Defendant’s
24 misleading representations.

25 100. Plaintiff suffered an “injury in fact” because Plaintiff’s money was taken by
26 Defendant as a result of Defendant’s false representations set forth on the
27 Defendant’s Products.
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1 101. In prosecuting this action for the enforcement of important rights affecting
2 the public interest, Plaintiff seeks the recovery of attorneys' fees, which is
3 available to a prevailing plaintiff in class action cases such as this matter.

4 **FIFTH CAUSE OF ACTION FOR**
5 **NEGLIGENT MISREPRESENTATION**

6 102. Plaintiff repeats, re-alleges and incorporates by reference the above
7 allegations as if fully stated herein.

8 103. At a date presently unknown to Plaintiff, but at least four years prior to the
9 filing of this action, and as set forth above, Defendant represented to the public,
10 including Plaintiff, by packaging and other means, that Defendant's Products
11 contain a certain amount B vitamins per serving as described herein.

12 104. Defendant made the representations herein alleged with the intention of
13 inducing the public, including Plaintiff and putative class members, to purchase
14 Defendant's Products because the misrepresentations were placed on the
15 product itself, as well as, in the Products' descriptions online.

16 105. Plaintiff and other similarly situated persons saw, believed, and relied upon
17 Defendant's advertising representations and, in reliance on them, purchased the
18 Product, as described herein.

19 106. At all times relevant, Defendant made the misrepresentations herein alleged
20 when Defendant should have known these representations to be untrue, and
21 Defendant had no reasonable basis for believing the representations to be true.

22 107. As a proximate result of Defendant's negligent misrepresentations, Plaintiff
23 and other consumers similarly situated were induced to purchase, purchase
24 more of, or pay more for Defendant's Products, due to the unlawful acts of
25 Defendant, in an amount to be determined at trial, during the Class Period.
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**SIXTH CAUSE OF ACTION FOR
INTENTIONAL MISREPRESENTATION**

108. Plaintiff repeats, re-alleges and incorporates herein by reference the above allegations as if fully stated herein.

109. At a date presently unknown to Plaintiff, but at least four years prior to the filing of this action, and as set forth above, Defendant intentionally represented to the public, including Plaintiff, by promoting and other means, that Defendant's Products contain a certain amount of B vitamins per serving in the Products' labeling, as described herein. Defendant's representations were untrue.

110. Defendant made the representations herein alleged with the intention of inducing the public, including Plaintiff, to purchase Defendant's Product, for Defendant's own financial gain.

111. Defendant intentionally made such misrepresentations by printing a specified amount of liquid vitamin B under the amount per serving on its Products' label, including, but not limited to, 1,000 micrograms of liquid B12 vitamin.

112. The statement regarding Defendant's Products containing a specific amount of B vitamins per serving was misleading because vitamin B, in liquid form, becomes unstable and degrades over time. The supplement therefore does not contain the advertised amount of vitamin B per serving as Defendant advertises on its Products' label.

113. Plaintiff and other similarly situated persons saw, believed, and relied upon Defendant's advertising representations and, in reliance on such representations, purchased the Products, as described above.

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1 114. At all times relevant, Defendant intentionally made the misrepresentations
2 herein alleged, allowed the misrepresentations to continue to be made by its
3 resellers and Defendant knew the representations to be false.

4 115. As a proximate result of Defendant’s intentional misrepresentations, Plaintiff
5 and other consumers similarly situated were induced to spend an amount of
6 money to be determined at trial on Defendant’s misrepresented Products.

7 116. Defendant knew that its Products did not contain the advertised amount of B
8 vitamins per serving, but nevertheless made representations that it did with the
9 intention that consumers rely on Defendant’s representations.

10 117. Defendant also knew that retailers were advertising its Products as
11 containing a certain amount of B vitamins per serving, as Defendant designed,
12 manufactured, and affixed the product labeling to its Products before supplying
13 them to the retailers.

14 118. Plaintiff and other consumers similarly situated, in purchasing and using the
15 Products as herein alleged, did rely on Defendant’s representations, including
16 the representations on Defendant’s Products’ label, all to their damage and/or
17 detriment as herein alleged.

18 119. Plaintiff alleges the “who, what, when, where, and how” of the alleged
19 deception by Defendant as follows:

- 20 i. The “who” is Defendant;
- 21 ii. The “what” is the representation that Defendant’s liquid B vitamin
22 Products contain a specific amount of micrograms of B vitamins per
23 serving;
- 24 iii. The “when” is the date Plaintiff purchased the product and the Class
25 Period of four years prior to the filing of the Complaint;
- 26 iv. The “where” is in Defendant’s product labeling; and
- 27 v. The “how” is the allegation that Defendant did not disclose that its
28 Products do not actually deliver the advertised micrograms of B

1 vitamins per serving because they become unstable and degrade over
2 time.

3 120. By engaging in the acts described above, Defendant is guilty of malice,
4 oppression, and fraud, and Plaintiff and the Class are therefore entitled to
5 recover exemplary or punitive damages.

6 **PRAYER FOR RELIEF**

7 **WHEREFORE**, Plaintiff respectfully requests the Court grant Plaintiff and
8 the Class members the following relief against Defendant:

- 9 • That this action be certified as a Class Action, Plaintiff be appointed as
10 the representatives of the Class, and Plaintiff's attorneys be appointed
11 Class counsel;
- 12 • That Defendant's wrongful conduct alleged herein be adjudged and
13 decreed to violate the consumer protection statutory claims asserted
14 herein;
- 15 • A temporary, preliminary and/or permanent order for injunctive relief
16 requiring Defendant to: (i) discontinue advertising, marketing and
17 otherwise representing its liquid B vitamin Products as containing a
18 specified amount of B vitamins per serving; (ii) disclose the instability
19 and degradation that Defendant's liquid B vitamin Products undergo when
20 opened; (iii) correct any erroneous impression consumers may have
21 derived concerning the amount of vitamin B contained in Defendant's
22 Products, including without limitation, the placement of corrective
23 advertising and providing written notice to the public;
- 24 • An order requiring imposition of a constructive trust and/or disgorgement
25 of Defendant's ill-gotten gains and to pay restitution to Plaintiff and all
26 members of the Class and, also, to restore to Plaintiff and members of the
27 class all funds acquired by means of any act or practice declared by this
28 court to be an unlawful, fraudulent, or unfair business act or practice, in

1 violation of laws, statutes or regulations, or constituting unfair
2 competition;

- 3 • Distribution of any monies recovered on behalf of members of the Class
- 4 via fluid recovery or *cy pres* recovery where necessary and as applicable,
- 5 to prevent Defendant from retaining the benefits of their wrongful
- 6 conduct;
- 7 • Prejudgment and post judgment interest;
- 8 • Special, general, and compensatory damages to Plaintiff and the Class for
- 9 negligent and/or intentional misrepresentations;
- 10 • Exemplary and/or punitive damages for intentional misrepresentations
- 11 pursuant to, *inter alia*, Cal. Civ. Code § 3294;
- 12 • Costs of this suit;
- 13 • Reasonable attorneys’ fees pursuant to, *inter alia*, California Code of
- 14 Civil Procedure § 1021.5; and
- 15 • Awarding any and all other relief that this Court deems necessary or
- 16 appropriate.

17 **TRIAL BY JURY**

18 121. Pursuant to the Seventh Amendment to the Constitution of the United States
19 of America, Plaintiff is entitled to, and demands, a trial by jury.

20
21 Dated: November 7, 2017

Respectfully submitted,

22 **KAZEROUNI LAW GROUP, APC**

23
24 By: /s/ **ABBAS KAZEROUNIAN**
25 **ABBAS KAZEROUNIAN, ESQ.**
26 **ATTORNEYS FOR PLAINTIFF**

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