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

MELANIE BARBER, on behalf of herself,  
all others similarly situated and the general  
public,

Plaintiff,

v.

TARGET CORPORATION, a Minnesota  
Corporation,

Defendant.

Case No:

CLASS ACTION

**COMPLAINT FOR VIOLATIONS OF:**

- **CALIFORNIA UNFAIR COMPETITION LAW;**
- **CALIFORNIA FALSE ADVERTISING LAW;**
- **CALIFORNIA CONSUMERS LEGAL REMEDIES ACT;**

DEMAND FOR JURY TRIAL

1 Plaintiff Melanie Barber, on behalf of herself, all others similarly situated, and the  
2 general public, by and through her undersigned counsel, hereby sues Defendant Target  
3 Corporation (“Defendant” or “Target”), and alleges the following upon her own knowledge,  
4 or where she lacks personal knowledge, upon information and belief and the investigation  
5 of her counsel.

### 6 INTRODUCTION

7 1. Target markets and sells herbal supplements under the generic brand name “Up  
8 & Up.” Defendant’s supplement product line includes Up & Up Gingko Biloba. (“the  
9 Product.”)

10 2. Defendant falsely markets and sells the Up & Up Gingko Biloba Supplement  
11 as being able to provide “memory support.” According to the product’s label it “helps  
12 support memory, concentration, and circulation, enhancing blood flow to the arms, legs, and  
13 brain.” Plaintiff Barber saw and relied on these labeling claims when purchasing the Up &  
14 Up Gingko Biloba product.

15 3. Target’s advertising claims are false and misleading because **Up & Up Gingko**  
16 **Biloba does not contain any Gingko Biloba and is actually adulterated with potentially**  
17 **harmful, undisclosed ingredients.**

18 4. On February 2, 2015, the Attorney General of the State of New York sent  
19 Target’s President and CEO a cease and desist letter demanding that Target stop selling  
20 adulterated and mislabeled herbal supplements.

21 5. The New York Attorney General concluded that Target’s Up & Up Gingko  
22 Biloba tested “negative” because “No ginkgo biloba DNA was identified” in the product.  
23 Target was then informed that “the only DNA identified was allium (x2), ‘oryza’ (x2)  
24 (commonly known as rice), [and] mung/French bean”— none of which are disclosed as  
25 ingredients on the product’s label. Moreover, the Attorney General’s investigation  
26 concluded that “ten of the tests revealed no plant DNA whatsoever.”  
27  
28

1           6.     The New York Attorney General’s findings confirmed what consumer  
2 advocacy groups have been saying for years about herbal supplements such as Up & Up—  
3 major retailers like Target are “not providing the public with authentic products without  
4 substitution, contamination, or fillers.”

5           7.     Even if the Up & Up supplements did actually contain Ginkgo biloba (they do  
6 not), the Products would still be falsely and deceptively labeled.

7           8.     All available, reliable, scientific evidence demonstrates that Ginkgo biloba  
8 products have no efficacy at all, are ineffective in the improvement of cognitive health, and  
9 provide no benefits related to increasing the memory and healthy functioning of consumers’  
10 brains. Numerous scientifically valid studies, performed by independent researchers and  
11 published in reputable medical journals have been conducted on the Ginkgo biloba  
12 products. These studies have universally demonstrated that the supplement has absolutely  
13 no scientific value in the improvement of brain function, treatment of memory problems or  
14 cognitive health.

15           9.     Plaintiff brings this action challenging Target’s claims relating to the Up & Up  
16 Ginkgo Biloba Supplement on behalf of herself and all others similarly situated. Plaintiff  
17 Barber is asserting claims under California’s Unfair Competition Law, False Advertising  
18 Law, and Consumer Legal Remedies Act.

19           10.    Plaintiff seeks an order compelling Target to (1) cease marketing the Products  
20 using the misleading tactics complained of herein, (2) conduct a corrective advertising  
21 campaign, (3) restore the amounts by which Defendant has been unjustly enriched, and to  
22 (4) destroy all misleading and deceptive materials.

### **JURISDICTION & VENUE**

24           11.    The Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2), the  
25 Class Action Fairness Act, because the matter in controversy exceeds the sum or value of  
26 \$5,000,000 exclusive of interest and costs and because more than two-thirds of the members  
27 of the class reside in states other than the state in which Defendant resides.

1 12. Personal jurisdiction is derived from the fact that Defendant conducts business  
2 within the State of California and within this judicial district.

3 13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because many of  
4 the acts and transactions giving rise to this action occurred in this District. Moreover,  
5 Defendant resides in this district, is authorized to conduct business in this District, has  
6 intentionally availed itself of the laws and markets of this District through the promotion,  
7 marketing, distribution, and sale of the Products in this District; and is subject to personal  
8 jurisdiction in this District.

9 **PARTIES**

10 14. Plaintiff Melanie Barber is a resident of Lake Forrest, California. Plaintiff  
11 Barber purchased Target's Up & Up Gingko Biloba in or around September of 2014.

12 15. Defendant Target Corporation is a Minnesota corporation that maintains its  
13 principal place of business in Minneapolis, Minnesota. Defendant conducts continuous and  
14 systematic business in this judicial district as to essentially render it at home in this judicial  
15 district.

16 **FACTUAL ALLEGATIONS**

17 **Up & Up Gingko Biloba**

18 16. Target has distributed, marketed, and sold the Up & Up Gingko Biloba product  
19 on a nationwide basis, both online and at its retail store locations. Up & Up Gingko Biloba  
20 is available in a bottle of 90 capsules and retails for approximately \$8.00.

21 17. The label of the Up & Up Gingko Biloba supplement claims that product can  
22 be used for "memory support" and contains a "standardized extract" of "120 mg per  
23 capsule" of "Gingko Biloba." The label further states that it "helps support, memory,  
24 concentration, and circulation enhancing blood flow to the arms, legs, and brain." These  
25 statements are false and misleading for the reasons described herein.



18. The Up & Up Ginkgo Biloba supplement does not actually contain any Ginkgo Biloba as indicated by recent scientific tests conducted by the New York Attorney General's Office.

19. Even if the Up & Up Ginkgo Biloba product did actually contain Ginkgo Biloba (it does not), Target's labeling claims are still false and misleading.

20. Three separate meta-studies on Ginkgo biloba published in 2002, 2007, and 2012 evaluated all known published credible human scientific studies.<sup>1</sup> The studies

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<sup>1</sup> A meta-analysis contrasts and combines results from different studies in an attempt to identify patterns among study results, sources of disagreement, and other relationships between the studies.

1 uniformly conclude Ginkgo biloba supplements have no positive effect on cognitive  
2 functions in healthy individuals.<sup>2</sup>

3 a. In 2002, PH Canter and E. Ernst published “Ginkgo biloba: a smart drug? A  
4 systematic review of controlled trials of the cognitive effects of ginkgo  
5 biloba extracts in healthy people” in the University of Exeter  
6 Psychopharmacology Bulletin.<sup>3</sup> The meta-study evaluates data in six  
7 computerized databases for placebo-controlled, double-blind trials of the  
8 effect of standardized Ginkgo biloba extracts on cognitive function in  
9 healthy subjects. The study concludes “[t]he use of Ginkgo biloba as a  
10 “smart” drug cannot be recommended on the basis of the evidence available  
11 to date, and there is a particular need for further long-term trials with  
12 healthy subjects.”<sup>4</sup>

13 b. In 2007, PH Canter and E. Ernst published an update to their 2002 study  
14 titled, “Ginkgo biloba is not a smart drug: an updated systematic review of  
15 randomized clinical trials testing the nootropic effects of G. biloba extracts  
16 in healthy people.”<sup>5</sup> The 2007 meta-study reviews available research added  
17 to the then-existing data set from the previous 2002 meta-study. Canter and  
18 Ernst conclude; “[t]he collated evidence from 15 randomized clinical trials  
19 provides no convincing evidence that G. biloba extracts ingested either as a  
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21 <sup>2</sup> K. R. Laws et al., UK, *Is Ginkgo biloba a cognitive enhancer in healthy individuals? A*  
22 *meta- analysis*, 27 *Human Psychopharmacology* 527, (2012), available at  
23 <http://dx.doi.org/10.1002/hup.2259>.

24 <sup>3</sup> PH Canter & E. Ernst, *Ginkgo biloba: a smart drug? A systematic review of controlled*  
25 *trials of the cognitive effects of ginkgo biloba extracts in healthy people*, 36  
26 *Psychopharmacol Bulletin* 108, (2002), available at  
27 <http://www.ncbi.nlm.nih.gov/pubmed/12473969>.

28 <sup>4</sup> *Id.*

<sup>5</sup> PH Canter & E. Ernst, *Ginkgo biloba is not a smart drug: an updated systematic review*  
29 *of randomized clinical trials testing the nootropic effects of G. biloba extracts in healthy*  
30 *people*, 22 *Human Psychopharmacology* 265, (2007), available at  
31 <http://dx.doi.org/10.1002/hup.843>.

1 single dose or over a longer period has a positive effect on any aspect of  
2 cognitive performance in healthy people under the age of 60 years.”<sup>6</sup>

- 3 c. In 2012, K. Laws, H. Sweetnam and T. Kondel published a meta-study  
4 titled “*Is Ginkgo biloba a cognitive enhancer in healthy individuals? A*  
5 *meta-analysis*” in the journal of Human Psychopharmacology at the  
6 University of Hertfordshire, UK.<sup>7</sup> This meta-study, similar to the  
7 aforementioned meta-studies of 2002 and 2007, gathered data from all  
8 relevant credible studies on Ginkgo biloba’s effect as a cognitive enhancer.  
9 Here, the authors emphasize, “[g]iven that G. biloba is marketed worldwide  
10 as a memory enhancer or touted to at least ‘maintain memory’, it is crucial  
11 to establish the validity for such claims.”<sup>8</sup> This meta-study concludes “[g].  
12 biloba has no significant impact on memory, executive function or attention  
13 with all effect sizes nonsignificant and effectively at zero.”<sup>9</sup> Further, “we  
14 found no evidence that G. biloba improves memory, executive or attention  
15 functioning in healthy individuals.”<sup>10</sup>

16 21. Overwhelmingly, the consensus of reliable scientific studies concludes Ginkgo  
17 biloba supplements do nothing to enhance memory or cognitive abilities in healthy adults.

- 18 a. A 2002 study conducted by P. Solomon, PhD and published in the Journal of  
19 the American Medical Association titled “*Ginkgo for Memory Enhancement,*”  
20 studied the effects of over-the-counter Ginkgo biloba products in 203 subjects  
21 in a six-week randomized, double-blind, placebo-controlled, parallel group  
22 trial.<sup>11</sup> Solomon and co-researchers conclude “[t]he results of this 6-week study

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24 <sup>6</sup> *Id.* at 277.

25 <sup>7</sup> Laws, et al., *supra* note 7.

26 <sup>8</sup> *Id.*

27 <sup>9</sup> *Id.*

28 <sup>10</sup> *Id.*

<sup>11</sup> P. R. Solomon et al., *Ginkgo for Memory Enhancement* 288 JAMA 835, (2002), available at  
<http://jama.jamanetwork.com/article.aspx?articleid=195207>.

1 indicate that ginkgo did not facilitate performance on standard  
2 neuropsychological tests of learning, memory, attention and concentration or  
3 naming and verbal fluency in elderly adults without cognitive impairment.”<sup>12</sup>

4 The authors found, “[t]he ginkgo group also did not differ from the control  
5 group in terms of self-reported memory function or global rating by spouses,  
6 friends, and relatives. These data suggest that when taken following the  
7 manufacturer’s instructions, ginkgo provides no measurable benefit in memory  
8 or related cognitive function to adults with healthy cogitative function.”<sup>13</sup>

9 Solomon notes, “[d]espite the manufacturer’s claims of improved memory in  
10 healthy adults, we were unable to identify any well-controlled studies that  
11 document this claim.”<sup>14</sup> Solomon further concludes “this study does not support  
12 the manufacture’s claims of the benefits of ginkgo on learning and memory.”<sup>15</sup>

- 13 b. In a 2002 article on the Cleveland Clinic Center for Continuing Education  
14 Pharmacotherapy Update, titled “*Ginkgo Biloba and Memory*,” the Department  
15 of Pharmacy observe, “[d]espite the lack of well-controlled studies to support  
16 the use of Ginkgo biloba leaf extract for prevention and treatment of memory  
17 impairment, ginkgo products continue to be heavily marketed and widely  
18 used.”<sup>16</sup> The article concludes “[t]he use of ginkgo biloba leaf extract for  
19 memory impairments marketed and targeted at the healthy adult that  
20 experiences forgetfulness. Currently, the claims that Ginkgo biloba has  
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24 <sup>12</sup> *Id.*

25 <sup>13</sup> *Id.*

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

27 <sup>15</sup> *Id.*

28 <sup>16</sup> A. Popa, Pharmacology Update, *Ginkgo Biloba and Memory*, available at  
<http://www.clevelandclinicmeded.com/medicalpubs/pharmacy/sepoct02/ginkgo.htm>\_(last  
visited Jan. 26, 2015).



1 beneficial effects on learning and memory are not supported by the  
2 literature.”<sup>17</sup>

- 3 c. In 2009, the Journal of the American Medical Association published the largest  
4 study to date entitled “*Ginkgo biloba for preventing cognitive decline in older*  
5 *adults: a randomized trial.*”<sup>18</sup> The 8 year study included 3069 participants aged  
6 72-96 years. Researchers concluded that 240 mg of Ginkgo biloba extract did  
7 not result in less cognitive decline in older adults with normal cognition or with  
8 mild cognitive impairment than in the placebo control group.<sup>19</sup>
- 9 d. In the 2009 study “*Ginkgo biloba for cognitive impairment and dementia,*”  
10 researchers reviewed 36 trials, nine of which were six months long (2016  
11 participants total).<sup>20</sup> In the more recent and more reliable trials, three out of  
12 four found no benefits for cognitive decline.<sup>21</sup> Researchers concluded that  
13 while Ginkgo biloba might be safe to ingest, “. . . evidence that [it] has  
14 predictable and clinically significant benefit for people with dementia or  
15 cognitive impairment is inconsistent and unreliable.”<sup>22</sup>
- 16 e. In 2013, Support Care Cancer journal published “*The use of Ginkgo biloba for*  
17 *the prevention of chemotherapy-related cognitive dysfunction in women*  
18 *receiving adjuvant treatment for breast cancer.*”<sup>23</sup> Researchers found that in  
19  
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21 <sup>17</sup> *Id.*

22 <sup>18</sup> B.E. Snitz et al, *Ginkgo biloba for preventing cognitive decline in older adults: a*  
23 *randomized trial*, 302 JAMA 2663 (2009).

24 <sup>19</sup> *Id.*

25 <sup>20</sup> Jacqueline Birks and John Grimley Evans, *Ginkgo biloba for cognitive impairment*  
26 *and dementia*, Cochrane Database Systematic Review, Jan. 21, 2009.

27 <sup>21</sup> *Id.*

28 <sup>22</sup> *Id.*

<sup>23</sup> Debra L. Barton et al., *The use of Ginkgo biloba for the prevention of chemotherapy-*  
*related cognitive dysfunction in women receiving adjuvant treatment for breast cancer*, 21  
Support Care Cancer 1185 (2013).

1 166 women, 120 mg a day for up to 12 months did not provide any evidence  
2 that Ginkgo biloba can help prevent cognitive changes from chemotherapy.<sup>24</sup>

3 f. In 2014, the authors of “*Substances used and prevalence rates of*  
4 *pharmacological cognitive enhancement among healthy subjects*” studied 176  
5 participants who ingested 120 mg daily of Ginkgo biloba over a six-month  
6 period.<sup>25</sup> The results indicated that there was no evidence that an average dose  
7 of Ginkgo biloba extract created any benefit in mild to moderate dementia.

8 22. To date, although there are some studies that purport to claim that the ingestion  
9 of Ginkgo biloba can provide cognitive health benefits, those studies suffer severe,  
10 unmitigated scientific deficiencies, including utilizing a scientifically unreliable sample  
11 size, not utilizing scientifically sound testing procedures, and suffering from publication  
12 bias, *i.e.* the funding, publication or sponsorship of the study was provided by a party who  
13 stood to benefit from a positive finding.

14 23. In addition to the lack of positive cognitive benefits, Ginkgo biloba may have  
15 negative carcinogenic effects. The National Toxicology Program (“NTP”) studied the  
16 effects of Ginkgo biloba on rats and mice in small and large doses. In the *NTP Technical*  
17 *Report on the Toxicology and Carcinogenesis Studies of Ginkgo Biloba Extract in F344/N*  
18 *Rats and B6C3F1/N Mice*, researchers concluded that Ginkgo biloba extract causes cancers  
19 of the thyroid gland in male and female rats and male mice and cancers of the liver in male  
20 and female mice.<sup>26</sup>

21 24. As a result of the serious implications of the NTP study, and the lack of  
22 scientific evidence supporting safe use and positive effects of Ginkgo biloba, the Center for  
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24 <sup>24</sup> *Id.*

25 <sup>25</sup> AG Franke et al., *Substances used and prevalence rates of pharmacological cognitive*  
26 *enhancement among healthy subjects*, 264 Suppl 1, Eur. Arch Psychiatry Clin. Neurosci.  
83-90 (2014).

27 <sup>26</sup> Nat’l Inst. Of Health, *Technical Report on the Toxicology and Carcinogenesis Studies*  
28 *of Ginkgo Biloba Extract in F344/N Rats and B6C3F1/N Mice*, NTP TR 578, Publication  
No. 13- 5920, available at [http://ntp.niehs.nih.gov/ntp/htdocs/lt\\_rpts/tr578\\_508.pdf](http://ntp.niehs.nih.gov/ntp/htdocs/lt_rpts/tr578_508.pdf).

1 Science in the Public Interest addressed the director of the Food and Drug Administration  
2 (“FDA”), emphasizing that claims regarding Ginkgo biloba's supposed health benefits,  
3 including those related to memory and cognitive function, are false and should be stopped  
4 and imploring him to issue a directive that Ginkgo is no longer “Generally Recognized As  
5 Safe.”

6 25. The widespread popularity of Ginkgo biloba is simply a testament to the power  
7 of marketing rather than to any measurable brain benefits.<sup>27</sup>

8 26. Accordingly, Target’s marketing is deceptive and misleading as the claims are  
9 specifically refuted by competent and reliable scientific evidence as set forth above.

10 **Target’s Up & Up Ginkgo Biloba Is a Misbranded Dietary Supplement**

11 27. Pursuant to Title 21 of the Code of Federal Regulations, Part 101.4 (21 CFR §  
12 101.4) all dietary supplement products shall list their ingredients “by common or usual  
13 name in descending order of predominance by weight on either the principal display panel  
14 or information panel...”

15 28. The Up & Up Ginkgo Biloba product violates 21 CFR § 101.4 because it lists  
16 Ginkgo biloba as an ingredient in the product when there is actually no Ginkgo biloba in the  
17 product whatsoever. The Up & Up Ginkgo Biloba product further violates 21 CFR § 101.4  
18 because it contains undisclosed ingredients such as allium, oryza, and mung/ French Bean.

19 29. California Health and Safety Code, Division 104, Part 5, contains the Sherman,  
20 Food, Drug, and Cosmetic Law (“Sherman Law,” located at Cal. Health & Safety Code §§  
21 109875-111915). The Sherman Law imposes identical requirements to the federal FDCA.

22 30. The Sherman Law is explicitly authorized by the FDCA. 21 U.S.C. § 343-1.  
23  
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26 <sup>27</sup> Kirk R. Daffner (ed.), Harvard Medical School, *Improving Memory – Understanding*  
27 *age- related memory loss*” (2012)(“Harvard Report”), at 46, available at  
28 <http://www.health.harvard.edu/mind-and-mood/improving-memory> (last visited Jan. 26,  
2015).

1 31. Plaintiff and the members of the Class would not have purchased the Product if  
 2 it were known to them that the Product is misbranded pursuant to FDA and California  
 3 regulations.

#### 4 CLASS ACTION ALLEGATIONS

5 32. Plaintiff bring this action as a class action pursuant to Federal Rule of Civil  
 6 Procedure 23. Plaintiff Barber seeks to represent the following class:

7 All consumers within the State of California, and states with similar consumer  
 8 protection laws,<sup>28</sup> who purchased the Up & Up Gingko Biloba Product during the  
 9 applicable statute of limitations period for their personal use, rather than for resale or  
 10 distribution. Excluded from the California Class are Defendants' current or former  
 11 officers, directors, and employees; counsel for Plaintiff and Defendant; and the  
 12 judicial officer to whom this lawsuit is assigned.

13 33. The members in the proposed classes are so numerous that individual joinder  
 14 of all members is impracticable, and the disposition of the claims of all class members in a  
 15 single action will provide substantial benefits to the parties and Court.

16 34. Questions of law and fact common to plaintiff and the class include:

17 A. whether Defendant contributed to, committed, and/or is  
 18 responsible for the conduct alleged herein;

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19 <sup>28</sup> While discovery may alter the following, Plaintiff preliminarily avers that the other states with similar  
 20 consumer fraud laws under the facts of this case include, but are not limited to: Arkansas (Ark. Code § 4-88-  
 21 101, *et seq.*); Colorado (Colo. Rev. Stat. § 6-1-101, *et seq.*); Connecticut (Conn. Gen. Stat. § 42-110, *et*  
 22 *seq.*); Delaware (Del. Code tit. 6, § 2511, *et seq.*); District of Columbia (D.C. Code § 28-3901, *et seq.*);  
 23 Florida (Fla. Stat. § 501.201, *et seq.*); Georgia (Ga. Code Ann. §§ 10-1-391(a), *et seq.*); Hawaii (Haw. Rev.  
 24 Stat. § 480-1, *et seq.*); Idaho (Idaho Code § 48-601, *et seq.*); Illinois (815 ICLS § 505/1, *et seq.*); Maine  
 25 (Me. Rev. Stat. tit. 5 § 205-A, *et seq.*); Massachusetts (Mass. Gen. Laws Ch. 93A, *et seq.*); Michigan  
 26 (Mich. Comp. Laws § 445.901, *et seq.*); Minnesota (Minn. Stat. § 325F.67, *et seq.*); Missouri (Mo. Rev.  
 27 Stat. § 407.010, *et seq.*); Montana (Mont. Code. § 30-14-101, *et seq.*); Nebraska (Neb. Rev. Stat. § 59-1601,  
 28 *et seq.*); Nevada (Nev. Rev. Stat. § 598.0915, *et seq.*); New Hampshire (N.H. Rev. Stat. § 358-A:1, *et seq.*);  
 New Jersey (N.J. Stat. § 56:8-1, *et seq.*); New Mexico (N.M. Stat. § 57-12-1, *et seq.*); New York (N.Y. Gen.  
 Bus. Law § 349, *et seq.* & § 350 *et seq.*); North Dakota (N.D. Cent. Code § 51-15-01, *et seq.*); Oklahoma  
 (Okla. Stat. tit. 15, § 751, *et seq.*); Oregon (Or. Rev. Stat. § 646.605, *et seq.*); Rhode Island (R.I. Gen. Laws  
 § 6-13.1-1, *et seq.*); South Dakota (S.D. Code Laws § 37-24-1, *et seq.*); Virginia (VA Code § 59.1-196, *et*  
*seq.*); Vermont (Vt. Stat. tit. 9, § 2451, *et seq.*); Washington (Wash. Rev. Code § 19.86.010, *et seq.*); West  
 Virginia (W. Va. Code § 46A-6-101, *et seq.*); and Wisconsin (Wis. Stat. § 100.18, *et seq.*).

1 B. Whether Defendant's conduct constitutes the violations of law  
2 alleged herein;

3 C. Whether Defendant acted willfully, recklessly, negligently, or  
4 with gross negligence in the violations of law alleged herein;  
and

5 D. Whether Class members are entitled to injunctive, and/or other  
6 equitable relief;

7 35. Plaintiff's claims are typical of class members' claims in that they are based on  
8 the same underlying facts, events, and circumstances relating to Defendant's conduct.

9 36. Absent Defendant's deceptive claims, Plaintiff and the Class members would  
10 not have purchased the Products.

11 37. Plaintiff will fairly and adequately represent and protect the interests of the  
12 classes, have no interests incompatible with the interests of the classes, and have retained  
13 counsel competent and experienced in class action litigation.

14 38. The class is sufficiently numerous, as the class contains at least hundreds of  
15 thousands of members who purchased the Up & Up Ginkgo Product in multiple states  
16 across the United States.

17 39. Class treatment is superior to other options for resolution of the controversy  
18 because the relief sought for each class member is small such that, absent representative  
19 litigation, it would be infeasible for class members to redress the wrongs done to them.

20 40. Questions of law and fact common to the class predominate over any questions  
21 affecting only individual class members.

22 41. Defendant has acted on ground applicable to the Class, thereby making  
23 appropriate final injunctive and declaratory relief concerning the Class as a whole.

24 42. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ.  
25 P. 23(a), (b)(2), and (b)(3).

**FIRST CAUSE OF ACTION**

**Violations of the Unfair Competition Law, Unlawful Prong**

**Cal. Bus. & Prof. Code § 17200 *et seq.***

43. Plaintiff Barber realleges and incorporates the allegations elsewhere in the Complaint as set forth in full herein.

44. California Business and Professional Code § 17200 prohibits any “unlawful, unfair or fraudulent business act or practice.”

45. The acts, omissions, misrepresentations, practices, and non-disclosures of Defendant as alleged herein constitute “unlawful” business acts and practices in that Defendant’s conduct violates the False Advertising Law, the Consumer Legal Remedies Act.

46. Defendant’s conduct is further “unlawful” because it violates the FDCA and its implementing regulations in the following ways:

- a. Defendant’s deceptive statements violate 21 U.S.C. §§ 343(a) and 352, which deem a food or drug (including nutritional supplements) misbranded when the label contains a statement that is “false or misleading in any particular”;
- b. Defendant’s deceptive statements violate 21 C.F.R. § 101.14(b)(3)(i), which mandates “substances” in dietary supplements consumed must contribute and retain “nutritive value,” as defined under 21 C.F.R. § 101.14(a)(2)(3) when consumed at levels necessary to justify a claim;
- c. Defendant’s deceptive statements violate 21 CFR § 101.4 because the Product’s ingredient list contain ingredients that are not actually found in the product. Moreover, the Product contains ingredients that are not disclosed on the ingredients list.

47. Defendant’s conduct is further “unlawful” because it violates the California Sherman Food, Drug, and Cosmetic Law, *see* Cal. Health & Safety Code § 109875-111900, which incorporates the provisions of the FDCA. *See id.* §§ 110110-110115.

1 48. Defendant profited from its sales of the falsely, deceptively, or unlawfully  
2 advertised Product to unwary consumers.

3 49. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order  
4 enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or  
5 fraudulent acts and practices, and to commence a corrective advertising campaign.

6 **SECOND CAUSE OF ACTION**

7 **Violations of the Unfair Competition Law, Unfair and Fraudulent Prongs**

8 **Cal. Bus. & Prof. Code § 17200 *et seq.***

9 50. Plaintiff Barber realleges and incorporates the allegations elsewhere in the  
10 Complaint as set forth in full herein.

11 51. California Business and Professional Code § 17200 prohibits any “unlawful,  
12 unfair or fraudulent business act or practice.”

13 52. The acts, omissions, misrepresentations, practices, and non-disclosures of  
14 Defendant as alleged herein also constitute “unfair” business acts and practices under the  
15 UCL in that Defendant’s conduct is immoral, unscrupulous, and offends public policy by  
16 seeking to profit from male vulnerability to false or deceptive virility or aphrodisiac claims.  
17 Further, the gravity of Defendant’s conduct outweighs any conceivable benefit of such  
18 conduct.

19 53. The acts, omissions, misrepresentations, practices, and non-disclosures of  
20 Defendant as alleged herein constitute “fraudulent” business acts and practices under the  
21 UCL in that Defendant’s claims are false, misleading, and have a tendency to deceive the  
22 Class and the general public, as detailed herein.

23 54. Defendant profited from its sales of the fraudulently, falsely and deceptively  
24 advertised Product to unwary consumers.

25 55. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order  
26 enjoining Defendant from continuing to conduct business through unlawful, unfair, and/or  
27 fraudulent acts and practices, and to commence a corrective advertising campaign.

1 56. Plaintiff further seeks an order for the disgorgement and restitution of all profit  
2 earned from the sale of the Defendant's Products, which were acquired through acts of  
3 unlawful, unfair, and/or fraudulent competition by Defendant.

4 **THIRD CAUSE OF ACTION**

5 **Violations of the False Advertising Law,**

6 **Cal. Bus. & Prof. Code § 17500 *et seq.***

7 57. Plaintiff Barber realleges and incorporates the allegations elsewhere in the  
8 Complaint as set forth in full herein.

9 58. In violation of California Business and Professional Code § 17500 *et seq.*, the  
10 advertisements, labeling, policies, acts, and practices described herein were designed to, and  
11 did, result in the purchase and use of Up & Up Ginkgo Biloba and St. John's Wort products.

12 59. Defendant knew and reasonably should have known that the labels on  
13 Defendant's Products were untrue and/or misleading.

14 60. Defendant profited from its sales of the falsely and deceptively advertised  
15 Product to unwary consumers.

16 61. As a result, Plaintiff Barber, the Class, and the general public are entitled to  
17 injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by  
18 which Defendants were unjustly enriched.

19 **FOURTH CAUSE OF ACTION**

20 **Violations of the Consumer Legal Remedies Act,**

21 **Cal. Civ. Code § 1750, *et seq.***

22 62. Plaintiff Barber realleges and incorporates the allegations elsewhere in the  
23 Complaint as set forth in full herein.

24 63. The CLRA prohibits deceptive practices in connection with the conduct of a  
25 business that provides goods, property, or services primarily for personal, family, or  
26 household purposes.



1 64. Defendant's false and misleading labeling and other policies, acts, and  
2 practices were designed to, and did, induce the purchase and use of Defendant's Product for  
3 personal, family, or household purposes by Plaintiff and class members, and violated and  
4 continue to violate the following sections of the CLRA:

- 5 a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits  
6 which they do not have;
- 7 b. § 1770(a)(7): representing that goods are of a particular standard, quality, or  
8 grade if they are of another;
- 9 c. § 1770(a)(9): advertising goods with intent not to sell them as advertised; and  
10 d. § 1770(a)(16): representing the subject of a transaction has been supplied in  
11 accordance with a previous representation when it has not.

12 65. Defendant profited from its sales of the falsely, deceptively and unlawfully  
13 advertised Product to unwary consumers.

14 66. As a result, Plaintiff and the Class have suffered irreparable harm.

15 67. Defendant's wrongful business practices regarding the Product constituted, and  
16 constitute, a continuing course of conduct in violation of the CLRA since Defendant is still  
17 representing that the Product has characteristics, uses, benefits, and abilities which are false  
18 and misleading, and have injured Plaintiff and the Class.

19 68. Plaintiff Barber and the class seek equitable relief for their CLRA claims and  
20 attorneys' fees and costs as allowed by statute.

21 **PRAYER FOR RELIEF**

22 98. Wherefore, Plaintiff, on behalf of themselves, all others similarly situated and  
23 the general public, pray for judgment against Defendant as to each and every cause of  
24 action, and the following remedies:

25 A. An Order declaring this action to be a proper class action and appointing  
26 undersigned counsel as class counsel;

27 B. An Order requiring Defendant to bear the cost of class notice;

1 C. An Order compelling Defendant to conduct a corrective advertising  
2 campaign and to re-label the product;

3 D. For the UCL and FAL, an Order requiring Defendant to disgorge all  
4 monies, revenues, and profits obtained by means of any wrongful act or practice;

5 E. An Order compelling Defendant to destroy all misleading and deceptive  
6 advertising materials and Product labels;

7 F. For the UCL and FAL, an Order requiring Defendant to pay restitution  
8 to restore all funds acquired by means of any act or practice declared by this Court to be an  
9 unlawful, unfair, or fraudulent business act or practice, untrue or misleading advertising,  
10 plus pre-and post-judgment interest thereon;

11 G. For attorneys' fees and costs as allowed by statute;

12 F. Any other and further relief that Court deems necessary, just, or proper.

13  
14 **JURY DEMAND**

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

16  
17 Dated: February 5, 2015

/s/ Ronald A. Marron  
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24 *Attorney for Plaintiff and the  
Proposed Class*