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

PAIGE PETKEVICIUS, PETER
RIPLEY on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

NBTY, Inc., a Delaware Corporation;
NATURE'S BOUNTY, INC., a New
York Corporation; REXALL
SUNDOWN, INC., a Florida
Corporation,

Defendants.

Case No. '17CV1152 JLS BGS

CLASS ACTION COMPLAINT FOR:

1. VIOLATION OF UNFAIR
COMPETITION LAW, Business
and Professions Code § 17200, *et*
seq.;
2. VIOLATION OF UNFAIR
COMPETITION LAW, Business
and Professions Code § 17200, *et*
seq.;
3. VIOLATION OF UNFAIR
COMPETITION LAW, Business
and Professions Code § 17200, *et*

seq.;

- 4. FALSE AND MISLEADING ADVERTISING, Business and Professions Code § 17500, *et seq.*;
- 5. VIOLATION OF CALIFORNIA LEGAL REMEDIES ACT, Civil Code § 1750, *et seq.*;
- 6. BREACH OF CALIFORNIA EXPRESS WARRANTY;
- 7. VIOLATION OF NEW YORK GENERAL BUSINESS LAW, N.Y. Gen. Bus. Law § 349;
- 8. VIOLATION OF NEW YORK GENERAL BUSINESS LAW, N.Y. Gen. Bus. Law § 350; and
- 9. BREACH OF CALIFORNIA EXPRESS WARRANTY.

DEMAND FOR JURY TRIAL

Plaintiff Paige Petkevicius and Plaintiff Peter Ripley, individually and on behalf of all others similarly situated (hereinafter collectively “Plaintiffs” or the “Class”), bring this consumer class action against NBTY, Inc. (“NBTY”), Nature’s Bounty, Inc. (“Nature’s Bounty”), and Rexall Sundown, Inc. (“Sundown”) (hereinafter collectively “Defendants”), for unlawful, unfair, and deceptive business practices in violation of California Business & Professions Code Section 17200 *et seq.*, California Business & Professions Code Section 17500 *et seq.*, California Civil Code Section 1750 *et seq.*, Breach of California Express Warranty, violation of New York’s General Business Law Sections 349 & 3505, and Breach of New York’s Express Warranty and allege as follows:

1 **NATURE OF THE ACTION**

2 1. Defendants distribute, market and sell:

- 3 a. "Nature's Bounty Double Strength Standardized Extract Ginkgo
4 Biloba 120 mg" (100 Capsules);
5 b. "Nature's Bounty Standardized Strength Ginkgo Biloba 60 mg"
6 (200 Capsules);
7 c. "Nature's Bounty Standardized Strength Ginkgo Biloba 60 mg"
8 (60 Tablets); and
9 d. "Nature's Bounty Whole Herb Ginkgo Biloba 400 mg plus 60
10 mg Standardized Extract" (120 Tablets)

11 (collectively, "Nature's Bounty Products").

12 2. Additionally, Defendants distribute, market and sell:

- 13 a. "Sundown Naturals Ginkgo Biloba 60 mg" (200 Tablets);
14 b. "Sundown Naturals Ginkgo Biloba 60 mg" (120 Tablets); and
15 c. "Sundown Naturals Ginkgo Biloba 60 mg" (100 Tablets).

16 (collectively, "Sundown Naturals Products").

17 3. Defendants represent that the primary active ingredient in the Nature's
18 Bounty and Sundown Naturals Products (collectively, the "Ginkgo biloba
19 Products") is Ginkgo biloba extract.

20 4. Defendants advertise and market the Ginkgo biloba Product and their
21 active ingredients as purportedly providing a variety of health benefits and relief
22 from various symptoms. Specifically, through an extensive and uniform nationwide
23 advertising campaign, Defendants make the following representations and
24 warranties on the Ginkgo biloba Products' labels:

- 25 • "Supports Healthy Brain Function and Circulation"
26 • "Supports Healthy Brain Function"
27 • "Promotes Healthy Brain Function & Circulation"

- 1 • "helps support memory, especially occasional mild memory problems
- 2 associated with aging"
- 3 • "Clinically Studied Dosage for Brain Function"
- 4 • "Helps Support Mental Alertness"
- 5 • ". . . Ginkgo helps improve memory, *especially occasional mild memory*
- 6 *problems associated with aging*"
- 7 • "Promotes Healthy Brain Function" and
- 8 • "Helps Support Mental Alertness"

9 See Exs. A-G.

10 5. However, to the detriment of consumers, all available, reliable,
11 scientific evidence demonstrates that the Ginkgo biloba Products have no efficacy
12 at all, are ineffective in the improvement of cognitive health, and provide no benefits
13 related to increasing the memory and healthy functioning of consumers' brains.
14 Numerous scientifically valid studies, performed by independent researchers and
15 published in reputable medical journals, have been conducted on the Ginkgo biloba
16 Products, and they have universally demonstrated that the supplement has absolutely
17 no scientific value in the improvement of brain function, treatment of memory
18 problems or cognitive health.

19 6. Defendants convey their uniform, deceptive message to consumers
20 through a variety of media including their website and online promotional materials,
21 and at the point of purchase, on the Ginkgo biloba Products' packaging/labeling,
22 where it cannot be missed by consumers. The only reason a consumer would
23 purchase the Ginkgo biloba Products is to obtain the advertised cognitive health
24 benefits and brain function support, which the Ginkgo biloba Products do not
25 provide.

26 7. As a result of Defendants' deceptive advertising and false claims
27 regarding the efficacy of the Ginkgo biloba Products, Plaintiffs and the proposed
28

1 class have purchased products which do not perform as represented, and they have
2 been harmed in the amount they paid for the Ginkgo biloba Products.

3 8. Plaintiffs bring this action on behalf of themselves and other similarly
4 situated consumers who have purchased Defendants' Ginkgo biloba Products, to halt
5 the dissemination of this false, misleading and deceptive advertising message; to
6 correct the false and misleading perception Defendants have created and fostered in
7 the minds of consumers; and to obtain redress for those who have purchased
8 Defendants' Ginkgo biloba Products. Based on violations of California and New
9 York state laws and Defendants' breaches of express warranties, Plaintiffs seek
10 monetary relief for consumers who purchased the Ginkgo biloba Products.

11 **JURISDICTION**

12 9. This Court has subject matter jurisdiction under the Class Action
13 Fairness Act, 28 U.S.C. section 1332(d) in that: (1) this is a class action involving
14 more than 100 class members; (2) Plaintiff Petkevicius is a citizen of the State of
15 California, Plaintiff Ripley is a citizen of the State of New York, and Defendants are
16 citizens of the States of Delaware, New York, and Florida; and (3) the amount in
17 controversy exceeds the sum of \$5,000,000, exclusive of interest and costs.

18 10. This Court has personal jurisdiction over Defendants because
19 Defendants conduct business in California. Defendants have marketed, promoted,
20 distributed, and sold the Ginkgo biloba Products in California, and Defendants have
21 sufficient minimum contacts with this State and/or have sufficiently availed
22 themselves of the markets in this State through their promotion, sales, distribution
23 and marketing within this State to render the exercise of jurisdiction by this Court
24 permissible.

25 **VENUE**

26 11. Venue is proper in this Court pursuant to 28 U.S.C. §§1391(a) and (b)
27 because a substantial part of the events or omissions giving rise to Plaintiffs' claims
28

1 occurred while Plaintiff Petkevicius resided in this judicial district.

2 **PARTIES**

3 12. Plaintiff Paige Petkevicius is, and at all times relevant hereto was, an
4 individual residing in San Diego County, California. Plaintiff Petkevicius purchased
5 Nature's Bounty Products and Sundown Naturals Products in or about March 2014
6 at the CVS pharmacy located at 8813 Via La Jolla Drive, La Jolla, California 92037.
7 In doing so, Plaintiff Petkevicius relied upon Defendants' advertising and other
8 promotional materials, including information on the Products' packaging,
9 containing the misrepresentations alleged herein, including the claims that the
10 Ginkgo biloba Products will promote, improve or support improved memory and
11 brain functioning. Plaintiff Petkevicius consumed the Ginkgo biloba Products as
12 directed by Defendants and did not receive any of the advertised benefits associated
13 with the Ginkgo biloba Products. She would not have purchased the Ginkgo Biloba
14 Products had she known Defendants' representations were false.

15 13. Plaintiff Peter Ripley is, and at all times relevant hereto was, an
16 individual residing in Brooklyn, New York. Plaintiff Ripley most recently purchased
17 Nature's Bounty Products in or about early May of 2017 from Amazon.com. In
18 doing so, Plaintiff Ripley relied upon advertising and other promotional materials,
19 including information on the Nature's Bounty Products' packaging, containing the
20 misrepresentations alleged herein, including the claims the Nature's Bounty
21 Products will promote, improve or support improved memory and brain functioning.
22 Plaintiff Ripley consumed the Nature's Bounty Products as directed by Defendants
23 and did not receive any of the advertised benefits associated with the Nature's
24 Bounty Products. He would not have purchased the Nature's Bounty Products had
25 he known Defendants' representations were false.

26 14. Defendant NBTY, Inc. is a corporation organized under the laws of
27 Delaware with its principal place of business at 2100 Smithtown Avenue,
28

1 Ronkonkoma, New York. NBTY manufactures vitamins and dietary supplements,
2 including the Gingko Biloba Products, and markets its products under various name
3 brands. NBTY created and/or authorized the false, misleading and deceptive
4 advertisements and packaging of the Gingko Biloba Products. NBTY, directly and
5 through its agents, has substantial contacts with and receives substantial benefits and
6 income from and through the States of California and New York.

7 15. Defendant Nature's Bounty, Inc. ("Nature's Bounty") is a corporation
8 organized under the laws of New York with its principal place of business at 2100
9 Smithtown Avenue, Ronkonkoma, New York. Nature's Bounty manufactures the
10 Nature's Bounty Products. Nature's Bounty created and/or authorized the false,
11 misleading and deceptive advertisements and packaging of the Nature's Bounty
12 Products. Nature's Bounty, directly and through its agents, has substantial contacts
13 with and receives substantial benefits and income from and through the States of
14 California and New York. On information and belief, Nature's Bounty is wholly
15 owned by Defendant NBTY, Inc.

16 16. Defendant Rexall Sundown, Inc. ("Sundown") is a corporation
17 organized under the laws of Florida with its principal place of business at 2100
18 Smithtown Avenue, Ronkonkoma, New York. Sundown manufactures the Sundown
19 Naturals Products. Sundown created and/or authorized the false, misleading and
20 deceptive advertisements and packaging of the Sundown Naturals Products.
21 Sundown, directly and through its agents, has substantial contacts with and receives
22 substantial benefits and income from and through the States of California and New
23 York. On information and belief, Sundown is wholly owned by Defendant NBTY,
24 Inc.

25 17. Plaintiffs are informed and believe, and thus allege, that at all times
26 herein mentioned, each of the Defendants was the agent, employee, representative,
27 partner, joint venturer, and/or alter ego of the other Defendants and, in doing the
28

1 things alleged herein, was acting within the course and scope of such agency,
2 employment, or representation, on behalf of such partnership or joint venture, and/or
3 as such alter ego, with the authority, permission, consent, and/or ratification of the
4 other Defendants.

5 **SUBSTANTIVE ALLEGATIONS**

6 **A. Background**

7 18. Few things are more unnerving than memory lapses. According to a
8 survey by the Marist Institute for Public Opinion, Alzheimer's is the most feared
9 disease – more than cancer, stroke, heart disease or diabetes.¹

10 19. A growing trend in the supplement industry is single ingredient dietary
11 supplement products claiming to improve memory loss. Sales of these products have
12 exploded in recent years due in large part to media reports of “miracle” memory loss
13 and brain enhancing supplements.

14 20. Not surprisingly, this lucrative market has attracted a variety of
15 hucksters seeking to “cash in” on America's fear of memory loss by hawking an
16 array of products and services, many promising miraculous results.

17 21. Ginkgo biloba fossils date back 250 million years, and the use of
18 Ginkgo biloba leaf extract as a folk medicine dates back centuries to traditional
19 Chinese medicine. Today, Ginkgo biloba leaf extract is marketed in the United States
20 as a dietary supplement, thereby escaping the United States Food and Drug
21 Administration's (“FDA”) requirement for manufacturers to test the effectiveness of
22 their products prior to their marketing and sale.

23 22. On information and belief, Defendants' market research shows that the
24 number one reason consumers use Ginkgo biloba is for brain health, specifically for
25

26 ¹ Marist Poll, Alzheimer's Most Feared Disease (Nov. 15, 2012), *available at*
27 <http://maristpoll.marist.edu/1114-alzheimers-most-feared-disease/>.

1 memory and mental focus.

2 23. Defendants seek to take advantage of the public's desire for these
3 "miracle" supplements by promising to elevate mental capacities.

4 24. Defendants manufacture, market and sell:

- 5 a. Nature's Bounty Ginkgo Biloba 120 mg (100 Capsules)
- 6 b. Nature's Bounty Ginkgo Biloba 60 mg (200 Capsules)
- 7 c. Nature's Bounty Ginkgo Biloba 60 mg (60 Tablets)
- 8 d. Nature's Bounty Ginkgo Biloba 400 mg plus 60 mg Standardized
9 Extract (120 Tablets)
- 10 e. Sundown Naturals Ginkgo Biloba 60 mg (200 Tablets)
- 11 f. Sundown Naturals Ginkgo Biloba 60 mg (120 Tablets)
- 12 g. Sundown Naturals Ginkgo Biloba 60 mg (100 Tablets)

13 25. Defendants specifically target the elderly by claiming: "Ginkgo helps
14 improve memory, especially occasional mild memory problems associated with
15 aging." *See* Exs. A-G.

16 26. Unfortunately, the promise of enhanced mental acuity and prevention
17 of memory loss is nothing but a sham.

18 27. Unbiased, randomized, double blind clinical human studies conclude
19 that Ginkgo biloba supplements do not promote, improve, or support memory or
20 cognitive function.

21 28. Throughout the liability period, as defined below, Defendants have
22 engaged in advertising and marketing campaigns that utilize claims of improved
23 memory and cognitive ability, conveying the message to consumers the Ginkgo
24 biloba Products will provide health benefits, irrespective of whether the claims are
25 factually and scientifically accurate.

26 29. As a result of these deceptive claims, Defendants sell hundreds of
27 thousands of units of the Ginkgo biloba Products through stores such as Albertsons,
28

1 Safeway, CVS Pharmacy, Walgreens, Whole Foods, and many other retail and on-
2 line stores.

3 **B. Defendants' Advertising and Marketing of the Products**

4 30. In the now ultra-competitive market for supplements, those who
5 manufacture and sell such supplements, including Defendants, conduct extensive
6 consumer research, upon which they base advertising claims they know will
7 differentiate their products from others in the marketplace.

8 31. Upon information and belief, Defendants have expert knowledge of the
9 consumer market for supplements and have designed coordinated, uniform
10 advertising and marketing for the Ginkgo biloba Products using a variety of
11 deceptive claims.

12 32. Since launching the Ginkgo biloba Products, Defendants have
13 consistently conveyed the message to consumers throughout the United States,
14 including California and New York, that the Ginkgo biloba Products provide
15 cognitive health benefits, and/or memory benefits, and/or brain functioning support.

16 33. Defendants advertise their Nature's Bounty Products will promote,
17 improve or support memory and cognitive ability. Specifically:

18 a. Prior to 2012, the Nature's Bounty Products' labels contained the
19 following representations:

- 20 i. "Promotes Healthy Brain Function & Circulation;"
21 ii. "Helps Support Mental Alertness;" and
22 iii. "Ginkgo helps improve memory, especially occasional
23 mild memory problems associated with aging."

24 b. From 2012 to 2015, the Nature's Bounty Products' labels
25 contained the following representations:

- 26 i. "Supports Healthy Brain Function & Circulation;"
27 ii. "Clinically Studied Dosage for Brain Function;" and
28

1 iii. “Ginkgo helps support memory, especially occasional
2 mild memory problems associated with aging.”

3 c. In 2016, Nature’s Bounty Ginkgo Biloba 60 mg (200 Capsules)
4 Products’ labels were changed to state, “Supports Healthy Brain
5 Function & Mental Alertness.”

6 d. In 2016, the Nature’s Bounty Ginkgo Biloba 120 mg (100
7 Capsules) Products’ labels were changed to state, “Supports
8 Healthy Brain Function & Circulation.”

9 *See Exs. A-D.*

10 34. Defendants advertise their Sundown Naturals Products similarly.

11 Specifically:

12 a. As late as 2009, the Sundown Naturals Products’ labels
13 contained the following representations:

14 i. “Promotes Healthy Brain Function;”

15 ii. “Ginkgo helps improve memory, especially occasional
16 mild memory problems associated with aging.”

17 b. From 2010 to 2015, the Sundown Naturals Products’ labels
18 contained the following representations:

19 i. “Supports Healthy Brain Function;” and

20 ii. “Ginkgo helps support memory, especially occasional
21 mild memory problems associated with aging.”

22 c. In 2016, all of the Sundown Naturals Products’ labels stated,
23 “Supports Healthy Brain Function,” while the Sundown Naturals
24 Ginkgo Biloba 60 mg (100 Tablets) also stated “Helps support
25 memory, especially occasional mild memory problems
26 associated with aging.”

27 *See Exs. E-G.*

1 35. The label on the bottle for Nature’s Bounty Ginkgo Biloba 120 mg (100
2 Capsules) lists the sole active ingredient as “Ginkgo Biloba Extract (Ginkgo biloba)
3 (leaf) (Standardized to contain 24% Ginkgo Flavone Glycosides, 28mg).” *See Ex.*
4 *A.*

5 36. The label on the bottle for Nature’s Bounty Ginkgo Biloba 60 mg (200
6 Capsules) lists the sole active ingredient as “Ginkgo Biloba Extract (Ginkgo biloba)
7 (leaf) (Standardized to contain 24% Ginkgo Flavone Glycosides, 14.4mg).” *See Ex.*
8 *B.*

9 37. The label on the bottle for Nature’s Bounty Ginkgo Biloba 60 mg (60
10 Tablets) lists the sole active ingredient as “Ginkgo Biloba Extract (Ginkgo biloba)
11 (leaf) (Standardized to contain 24% Ginkgo Flavone Glycosides, 14.4mg).” *See Ex.*
12 *C.*

13 38. The label on the bottle for Nature’s Bounty Ginkgo Biloba 400 mg plus
14 60mg Standardized Extract (120 Tablets) lists the active ingredients as “Ginkgo
15 Biloba Extract (Ginkgo biloba) (leaf) (Standardized to contain 24% Ginkgo Flavone
16 Glycosides, 14.4mg)” and “Ginkgo Biloba (Ginkgo Biloba)(leaf).” *See Ex. D.*

17 39. The label on the bottle for Sundown Naturals Ginkgo Biloba 60 mg
18 (200 Tablets) lists the sole active ingredient as “Ginkgo Biloba Extract (Ginkgo
19 biloba) (leaf) (Standardized to contain 24% Ginkgo Flavone Glycosides, 14.4mg).”
20 *See Ex. E.*

21 40. The label on the bottle for Sundown Naturals Ginkgo Biloba 60 mg
22 (120 Tablets) lists the sole active ingredient as “Ginkgo Biloba Extract (Ginkgo
23 biloba) (leaf) (Standardized to contain 24% Ginkgo Flavone Glycosides, 14.4mg).”
24 *See Ex. F.*

25 41. The label on the bottle for Sundown Naturals Ginkgo Biloba 60 mg
26 (100 Tablets) lists the sole active ingredient as “Ginkgo Biloba Extract (Ginkgo
27 biloba) (leaf) (Standardized to contain 24% Ginkgo Flavone Glycosides, 14.4mg).”
28

1 *See* Ex. G.

2 42. Plaintiffs and members of the Class have been, and will continue to be,
3 deceived or misled by Defendants' deceptive advertising claims. Each Class member
4 purchased and consumed the Ginkgo biloba Products during the liability period and
5 in doing so, read and considered the advertising claims on the Ginkgo biloba
6 Products' labels and based their decisions to purchase the Ginkgo biloba Products
7 on the advertising claims. Defendants' advertising claims were a material factor, and
8 in fact, the only factor in influencing Plaintiffs' decisions to purchase and use the
9 Ginkgo biloba Products. Plaintiffs and the Class members would not have purchased
10 the Ginkgo biloba Products had they known that they did not provide the improved
11 memory and brain function support as advertised.

12 43. Unfortunately for Plaintiffs and Class members, Defendants'
13 advertising claims, in their entirety, are false and deceptive.

14 **C. Defendants' Advertising Claims for the Ginkgo biloba Products**
15 **are False and Deceptive**

16 44. Despite Defendants' foregoing representations and warranties to the
17 contrary, Ginkgo biloba does not promote, improve or support memory or mental
18 acuity.

19 45. Independent scientific studies confirm that the advertising claims that
20 Defendants made on the Ginkgo biloba Products' labels, and that Plaintiffs and the
21 members of the Class relied upon in making their purchases, were false and
22 misleading. Despite knowledge of these studies, Defendants continued to make the
23 advertising claims, misleading Plaintiffs and members of the Class into believing the
24 Ginkgo biloba Products had an efficacy and would provide the benefits described in
25 their advertising.

26 46. Defendants knew or should have known that the Ginkgo biloba extract
27 present in the Ginkgo biloba Products does not provide any of the warranted benefits
28

1 as represented by Defendants' Ginkgo biloba Products' labels. To the contrary,
2 competent and reliable scientific evidence has repeatedly demonstrated Ginkgo
3 biloba supplements fail to show any improvement in mental cognition.

4 47. Three separate meta-studies on Ginkgo biloba published in 2002, 2007,
5 and 2012 evaluated all known published credible human scientific studies.² The
6 studies uniformly conclude Ginkgo biloba supplements have no positive effect on
7 cognitive functions in healthy individuals.³

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

19
20 ² A meta-analysis contrasts and combines results from different studies in an
21 attempt to identify patterns among study results, sources of disagreement, and
22 other relationships between the studies.

23 ³ K. R. Laws et al., UK, *Is Ginkgo biloba a cognitive enhancer in healthy*
individuals? A meta-analysis, 27 *Human Psychopharmacology* 527, (2012),
24 available at <http://dx.doi.org/10.1002/hup.2259>.

25 ⁴ PH Canter & E. Ernst, *Ginkgo biloba: a smart drug? A systematic review of*
controlled trials of the cognitive effects of ginkgo biloba extracts in healthy people,
26 36 *Psychopharmacol Bulletin* 108, (2002), available at
<http://www.ncbi.nlm.nih.gov/pubmed/12473969>.

27 ⁵ *Id.*

1 b. In 2007, PH Canter and E. Ernst published an update to their
2 2002 study titled, “Ginkgo biloba is not a smart drug: an updated
3 systematic review of randomized clinical trials testing the
4 nootropic effects of G. biloba extracts in healthy people.”⁶ The
5 2007 meta-study reviews available research added to the then-
6 existing data set from the previous 2002 meta-study. Canter and
7 Ernst conclude; “[t]he collated evidence from 15 randomized
8 clinical trials provides no convincing evidence that G. biloba
9 extracts ingested either as a single dose or over a longer period
10 has a positive effect on any aspect of cognitive performance in
11 healthy people under the age of 60 years.”⁷

12 c. In 2012, K. Laws, H. Sweetnam and T. Kondel published a meta-
13 study titled “*Is Ginkgo biloba a cognitive enhancer in healthy*
14 *individuals? A meta-analysis*” in the journal of Human
15 Psychopharmacology at the University of Hertfordshire, UK.⁸
16 This meta-study, similar to the aforementioned meta-studies of
17 2002 and 2007, gathered data from all relevant credible studies
18 on Ginkgo biloba’s effect as a cognitive enhancer. Here, the
19 authors emphasize, “[g]iven that G. biloba is marketed
20 worldwide as a memory enhancer or touted to at least ‘maintain
21

22
23 ⁶ PH Canter & E. Ernst, *Ginkgo biloba is not a smart drug: an updated systematic*
24 *review of randomized clinical trials testing the nootropic effects of G. biloba*
25 *extracts in healthy people*, 22 Human Psychopharmacology 265, (2007), available at
<http://dx.doi.org/10.1002/hup.843>.

26 ⁷ *Id.* at 277.

27 ⁸ Laws, et al., *supra* note 5.

1 memory’, it is crucial to establish the validity for such claims.”⁹
2 This meta-study concludes “[g]. biloba has no significant impact
3 on memory, executive function or attention with all effect sizes
4 nonsignificant and effectively at zero.”¹⁰ Further, “we found no
5 evidence that G. biloba improves memory, executive or attention
6 functioning in healthy individuals.”¹¹

7 48. Overwhelmingly, the consensus of reliable scientific studies concludes
8 Ginkgo biloba supplements do nothing to enhance or support memory or cognitive
9 abilities in healthy adults.

10 a. A 2002 study conducted by P. Solomon, PhD and published in
11 the Journal of the American Medical Association titled “*Ginkgo*
12 *for Memory Enhancement*,” studied the effects of over-the-
13 counter Ginkgo biloba products in 203 subjects in a six-week
14 randomized, double-blind, placebo-controlled, parallel group
15 trial.¹² Solomon and co-researchers conclude “[t]he results of this
16 6-week study indicate that ginkgo did not facilitate performance
17 on standard neuropsychological tests of learning, memory,
18 attention and concentration or naming and verbal fluency in
19 elderly adults without cognitive impairment.”¹³ The authors
20 found, “[t]he ginkgo group also did not differ from the control
21

22 ⁹ *Id.*

23 ¹⁰ *Id.*

24 ¹¹ *Id.*

25 ¹² P. R. Solomon et al., *Ginkgo for Memory Enhancement* 288 JAMA 835, (2002),
available at

26 <http://jama.jamanetwork.com/article.aspx?articleid=195207>.

27 ¹³ *Id.*

1 group in terms of self-reported memory function or global rating
2 by spouses, friends, and relatives. These data suggest that when
3 taken following the manufacturer’s instructions, ginkgo provides
4 no measurable benefit in memory or related cognitive function to
5 adults with healthy cogitative function.”¹⁴ Solomon notes,
6 “[d]espite the manufacturer’s claims of improved memory in
7 healthy adults, we were unable to identify any well-controlled
8 studies that document this claim.”¹⁵ Solomon further concludes
9 “this study does not support the manufacture’s claims of the
10 benefits of ginkgo on learning and memory.”¹⁶

11 b. In a 2002 article on the Cleveland Clinic Center for Continuing
12 Education Pharmacotherapy Update, titled “*Ginkgo Biloba and*
13 *Memory*,” the Department of Pharmacy observed, “[d]espite the
14 lack of well-controlled studies to support the use of Ginkgo
15 biloba leaf extract for prevention and treatment of memory
16 impairment, ginkgo products continue to be heavily marketed
17 and widely used.”¹⁷ The article concludes “[t]he use of ginkgo
18 biloba leaf extract for memory impairments marketed and
19 targeted at the healthy adult that experiences forgetfulness.
20 Currently, the claims that Ginkgo biloba has beneficial effects on
21

22
23 ¹⁴ *Id.*

24 ¹⁵ *Id.*

25 ¹⁶ *Id.*

26 ¹⁷ A. Popa, Pharmacology Update, *Ginkgo Biloba and Memory*, available at
27 [http://www.clevelandclinicmeded.com/medicalpubs/pharmacy/sep0ct02/ginkgo.ht](http://www.clevelandclinicmeded.com/medicalpubs/pharmacy/sep0ct02/ginkgo.htm)
28 [m](http://www.clevelandclinicmeded.com/medicalpubs/pharmacy/sep0ct02/ginkgo.htm) (last visited Nov. 8, 2012).

learning and memory are not supported by the literature.”¹⁸

1
2 c. In 2009, the Journal of the American Medical Association
3 published the largest study to date entitled “*Ginkgo biloba for*
4 *preventing cognitive decline in older adults: a randomized*
5 *trial.*”¹⁹ The 8 year study included 3069 participants aged 72-96
6 years. Researchers concluded that 240 mg of Ginkgo biloba
7 extract did not result in less cognitive decline in older adults with
8 normal cognition or with mild cognitive impairment than in the
9 placebo control group.²⁰

10 d. In the 2009 study “*Ginkgo biloba for cognitive impairment and*
11 *dementia,*” researchers reviewed 36 trials, nine of which were six
12 months long (2016 participants total).²¹ In the more recent and
13 more reliable trials, three out of four found no benefits for
14 cognitive decline.²² Researchers concluded that while Ginkgo
15 biloba might be safe to ingest, “. . . evidence that [it] has
16 predictable and clinically significant benefit for people with
17 dementia or cognitive impairment is inconsistent and
18 unreliable.”²³

19 e. In 2013, the Support Care Cancer published “The use of Ginkgo
20 biloba for the prevention of chemotherapy-related cognitive
21

22 ¹⁸ *Id.*

23 ¹⁹ B.E. Snitz et al, *Ginkgo biloba for preventing cognitive decline in older adults: a randomized trial*, 302 JAMA 2663 (2009).

24 ²⁰ *Id.*

25 ²¹ Jacqueline Birks and John Grimley Evans, *Ginkgo biloba for cognitive impairment and dementia*, Cochrane Database Systematic Review, Jan. 21, 2009.

26 ²² *Id.*

27 ²³ *Id.*

1 dysfunction in women receiving adjuvant treatment for breast
2 cancer.”²⁴ Researchers found that in 166 women, 120 mg a day
3 for up to 12 months did not provide any evidence that Ginkgo
4 biloba can help prevent cognitive changes from chemotherapy.²⁵

5 f. In 2014, the authors of “*Substances used and prevalence rates of*
6 *pharmacological cognitive enhancement among healthy*
7 *subjects*” studied 176 participants who ingested 120 mg daily of
8 Ginkgo biloba over a six-month period.²⁶ The results indicated
9 that there was no evidence that an average dose of Ginkgo biloba
10 extract created any benefit in mild to moderate dementia.

11 49. To date, although there are some studies that purportedly support the
12 notion that ingestion of Ginkgo biloba can provide cognitive health benefits, those
13 studies suffer myriad fatal methodological deficiencies, including utilizing
14 scientifically unreliable sample sizes, not utilizing scientifically sound testing
15 procedures, and suffering from publication bias, i.e., the funding, publication or
16 sponsorship of the study was provided by a party who stood to benefit from a positive
17 finding. Or, alternatively, the studies used a larger supplementation of Ginkgo biloba
18 than that provided by Defendants' suggested, or recommended consumption.

19 50. In contrast, Plaintiffs' allegations are based upon scientifically valid
20 peer-reviewed studies, which have been published in independent, reputable
21 scientific journals, and which conclusively demonstrate that the Ginkgo biloba
22

23 ²⁴ Debra L. Barton et al., *The use of Ginkgo biloba for the prevention of*
24 *chemotherapy-related cognitive dysfunction in women receiving adjuvant*
treatment for breast cancer, 21 Support Care Cancer 1185 (2013).

25 ²⁵ *Id.*

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

1 Products do not provide the benefits advertised by Defendants and may even cause
2 harm to consumers.

3 51. In addition to the lack of positive cognitive benefits, Ginkgo biloba may
4 have negative carcinogenic effects. The National Toxicology Program ("NTP")
5 studied the effects of Ginkgo biloba on rats and mice in small and large doses. In the
6 *NTP Technical Report on the Toxicology and Carcinogenesis Studies of Ginkgo*
7 *Biloba Extract in F344/N Rats and B6C3F1/N Mice*, researchers concluded that
8 Ginkgo biloba extract causes cancers of the thyroid gland in male and female rats
9 and male mice and cancers of the liver in male and female mice.²⁷

10 52. As a result of the serious implications of the NTP study, and the lack of
11 scientific evidence supporting safe use and positive effects of Ginkgo biloba, the
12 Center for Science in the Public Interest addressed the director of the Food and Drug
13 Administration ("FDA"), emphasizing that claims regarding Ginkgo biloba's
14 supposed health benefits, including those related to memory and cognitive function,
15 are false and should be stopped and imploring him to issue a directive that Ginkgo
16 is no longer "Generally Recognized As Safe." *See* Ex. H.

17 53. The widespread popularity of Ginkgo biloba is simply a testament to
18 the power of marketing rather than to any measurable brain benefits.²⁸

19
20 ²⁷ Nat'l Inst. Of Health, *Technical Report on the Toxicology and Carcinogenesis*
21 *Studies of Ginkgo Biloba Extract in F344/N Rats and B6C3F1/N Mice*, NTP TR
22 578, Publication No. 13-5920, available at
http://ntp.niehs.nih.gov/ntp/htdocs/lt_rpts/tr578_508.pdf.

23 ²⁸ Kirk R. Daffner (ed.), Harvard Medical School, *Improving Memory –*
24 *Understanding age-related memory loss*” (2012) (“Harvard Report”), at 46,
25 available at [http://www.health.harvard.edu/special_health_reports/improving-](http://www.health.harvard.edu/special_health_reports/improving-memory?utm_source=promo&utm_medium=email&utm_content=body1b&utm_campaign=PA111812&j=2979281)
26 [memory?utm_source=promo&utm_medium=email&utm_content=body1b&utm_ca](http://www.health.harvard.edu/special_health_reports/improving-memory?utm_source=promo&utm_medium=email&utm_content=body1b&utm_campaign=PA111812&j=2979281)
27 [mpaign=PA111812&j=2979281](http://www.health.harvard.edu/special_health_reports/improving-memory?utm_source=promo&utm_medium=email&utm_content=body1b&utm_campaign=PA111812&j=2979281)
[6&e=wolchansky@halunenlaw.com&l=16223912_HTML&u=347687378&mid=1](http://www.health.harvard.edu/special_health_reports/improving-memory?utm_source=promo&utm_medium=email&utm_content=body1b&utm_campaign=PA111812&j=2979281)
[48797&jb=0](http://www.health.harvard.edu/special_health_reports/improving-memory?utm_source=promo&utm_medium=email&utm_content=body1b&utm_campaign=PA111812&j=2979281) (last visited Nov. 19, 2012).

1 54. Accordingly, Defendants’ marketing is deceptive and misleading as the
2 claims are specifically refuted by competent and reliable scientific evidence as set
3 forth above.

4 55. As a result, Plaintiffs and the Class members have been damaged by
5 their purchases of the Ginkgo biloba Products and have been deceived into
6 purchasing a product that they believed, based on Defendants’ representations,
7 provided benefits when, in fact, they did not.

8 56. Defendants have reaped enormous profits from their false marketing
9 and sale of the Ginkgo biloba Products.

10 **D. The Class’ Claims are Subject to Equitable Tolling**

11 57. Plaintiff Petkevicius incorporates by reference and realleges all
12 allegations set forth in the preceding paragraphs.

13 58. The statute of limitations applicable to Plaintiff Petkevicius’s and the
14 California Class’s complaint should be tolled pursuant to the doctrine of equitable
15 tolling.

16 59. Equitable tolling is a judge-created doctrine that suspends a statute of
17 limitations to ensure fairness to litigants and avoid forfeiture of claims. The doctrine
18 also extends to unnamed class members in class actions because without it,
19 “potential class members would be induced to file protective actions to preserve their
20 claims, thus depriving class actions of their ability to secure efficiency and economy
21 of litigation.” *Hatfield v. Halifax*, 564 F.3d 1177, 1187 (9th Cir. 2009) (internal
22 citations and quotations omitted).

23 60. California’s equitable tolling principles apply where there has been “(1)
24 timely notice to the defendant in the filing of the first claim; (2) lack of prejudice to
25 the defendant in gathering evidence to defend against the second claim; and (3) good
26 faith and reasonable conduct by the plaintiff in filing the second claim.” *Hatfield*,
27 564 F.3d at 1185.

1 counsel for Plaintiffs and Defendants; and the judicial
2 officer to whom this lawsuit is assigned.

3 B. The “New York Class,” which consists of: All consumers
4 within the State of New York who purchased the Ginkgo
5 biloba Products during the applicable liability period for
6 their personal use, rather than for resale or distribution.
7 Excluded from the New York Class are Defendants’
8 current or former officers, directors, and employees;
9 counsel for Plaintiffs and Defendants; and the judicial
10 officer to whom this lawsuit is assigned.

(collectively the “Class”).

11 61. The requirements of Federal Rule of Civil Procedure 23 are satisfied
12 because:

13 A. Numerosity: The members of each class are so numerous that
14 joinder of all members is impracticable. While the exact number of class members
15 is presently unknown to Plaintiffs, based on Defendants’ volume of sales, Plaintiffs
16 estimate that each class numbers in the thousands.

17 B. Commonality: There are questions of law and fact that are
18 common to the class members and that predominate over individual questions. These
19 include the following:

- 20 i. Whether Defendants falsely advertise and misrepresent
21 the benefits of the Ginkgo biloba Products;
- 22 ii. Whether Defendants’ mass media advertising and/or the
23 packaging for the Ginkgo biloba Products is misleading
24 and deceptive;
- 25 iii. Whether Defendants’ labeling and/or packaging for the
26 Ginkgo biloba Products is misleading, false and/or illegal;
- 27 iv. Whether Defendants represent to consumers that the
28 Ginkgo biloba Products have characteristics, uses,

1 benefits or qualities that the Ginkgo biloba Products do
2 not have;

3 v. Whether Defendants knew or should have known that the
4 Ginkgo biloba Products do not have the characteristics,
5 uses, benefits or qualities for which Defendants advertised
6 the Ginkgo biloba Products;

7 vi. Whether Defendants represented that the Ginkgo biloba
8 Products are of a particular standard, quality, or grade,
9 when they are of another;

10 vii. Whether Defendants advertised the Ginkgo biloba
11 Products with intent to sell them not as advertised;

12 viii. Whether Defendants engaged in unfair, unlawful and/or
13 fraudulent business practices in marketing and distributing
14 the Ginkgo biloba Products;

15 ix. Whether Defendants engaged in false advertising with
16 respect to the Ginkgo biloba Products;

17 x. The nature and extent of damages and other remedies to
18 which the wrongful conduct of Defendants entitles the
19 Class members;

20 xi. Whether Defendants' representations, concealments and
21 non-disclosures concerning the Ginkgo biloba Products
22 violate the CLRA, FAL and/or the UCL;

23 xii. Whether Defendants' representations, concealments and
24 non-disclosures concerning the Ginkgo biloba Products
25 violate the N.Y. Gen. Bus. Law §§ 349 & 3450;

26 xiii. Whether the Class is entitled to restitution; and

27 xiv. Whether Plaintiffs and the Class are entitled to attorneys'
28

1 fees and expenses, and in what amount.

2 C. Typicality: Plaintiffs' claims are typical of the claims of the class
3 members because Plaintiffs suffered the same injury as the class members—*i.e.*,
4 Plaintiffs purchased the Ginkgo biloba Products based on Defendants' misleading
5 advertising claims.

6 D. Adequacy: Plaintiffs will fairly and adequately represent and
7 protect the interests of the members of each class. Plaintiffs do not have any interests
8 that are adverse to those of the class members. Plaintiffs have retained competent
9 counsel experienced in class action litigation and intend to prosecute this action
10 vigorously.

11 E. Superiority: A class action is superior to other available methods
12 for the fair and efficient adjudication of this controversy. Class action treatment will
13 permit a large number of similarly situated persons to prosecute their common
14 claims in a single forum simultaneously, efficiently, and without the unnecessary
15 duplication of effort and expense that numerous individual actions would engender.
16 Since the damages suffered by individual class members are relatively small, the
17 expense and burden of individual litigation make it virtually impossible for the class
18 members to seek redress for the wrongful conduct alleged, while an important public
19 interest will be served by addressing the matter as a class action.

20 62. If necessary, notice of this action may be affected to the proposed
21 class through publication.

22 63. Unless a Class is certified, Defendants will retain monies received as a
23 result of its conduct that were taken from Plaintiffs and Class members.

24 **FIRST CAUSE OF ACTION**
25 **VIOLATION OF UNFAIR COMPETITION LAW**
26 **(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**
27 **Unlawful Business Acts and Practices**

1 64. Plaintiff Petkevicius incorporates by reference and realleges all
2 allegations set forth in the preceding paragraphs.

3 65. Plaintiff Petkevicius brings this claim individually and on behalf of the
4 proposed California Class against Defendants.

5 66. As alleged herein, Plaintiff Petkevicius has standing to pursue this
6 claim as Plaintiff Petkevicius has suffered injury in fact and has lost money or
7 property as a result of Defendants' actions. Specifically, Plaintiff Petkevicius
8 purchased the Ginkgo biloba Products for her own personal use. In so doing,
9 Plaintiff Petkevicius relied upon the false representations that the Ginkgo biloba
10 Products would cause or assist in improved memory and brain function as referenced
11 above. Plaintiff Petkevicius used the Ginkgo biloba Products as directed and did not
12 receive any of the advertised benefits. Plaintiff Petkevicius would not have
13 purchased the Ginkgo biloba Products had she known Defendants' advertising
14 claims were false.

15 67. The actions of Defendants, as alleged herein, constitute illegal and
16 unlawful practices committed in violation of the Business & Professions Code
17 §17200.

18 68. Defendants have unlawfully marketed and advertised the Ginkgo biloba
19 Products because Defendants: (1) violate sections 1770(a)(5), 1770(a)(7) and
20 1770(a)(9) of the CLRA, *Civil Code* § 1750, *et seq.*; (2) violate sections 17200 *et seq.*
21 and 17500 *et seq.* of the Business & Professions Code; and (3) violate sections 111330
22 and 111445 of the California Health & Safety Code.

23 69. Moreover, Defendants' manufacturing, marketing, advertising,
24 packaging, labeling, distributing, and selling of the Ginkgo biloba Products violates
25 California's Sherman Act, Cal. Health & Safety Code §109875, *et seq.* The Sherman
26 Act defines a "person" as "any individual, firm, partnership, trust, corporation,
27 limited liability company, company, estate, public or private institution, association,
28

1 organization, group, city, county, city and county, political subdivision of this state,
2 other governmental agency within the state, and any representative, agent, or agency
3 of any of the foregoing.” *Cal. Health & Safety Code*, §109995. Defendants are
4 corporations and, therefore, are “persons” within the meaning of the Sherman Act.

5 70. In relevant part, a drug is misbranded if its labeling is false or
6 misleading in any particular way. *Cal. Health & Safety Code* §§111330, 111445.

7 71. Plaintiff Petkevicius and other California Class members were misled
8 and, because the misrepresentations were uniform and material, believed that the
9 Ginkgo biloba Products would provide cognitive benefits as advertised.

10 72. There were reasonably available alternatives to further Defendants
11 legitimate business interests, other than the conduct described herein.

12 73. Plaintiff Petkevicius and the California Class reserve the right to allege
13 other violations of law which constitute other unlawful business acts or practices.
14 Such conduct is ongoing and continues to this date.

15 74. THEREFORE, Plaintiff Petkevicius prays for the relief as set forth
16 below.

17 **SECOND CAUSE OF ACTION**
18 **VIOLATION OF UNFAIR COMPETITION LAW**
19 **(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**
20 **Unfair Business Acts and Practices**

21 75. Plaintiff Petkevicius incorporates by reference and realleges all
22 allegations set forth in the preceding paragraphs.

23 76. Plaintiff Petkevicius brings this claim individually and on behalf of the
24 proposed California Class against Defendants.

25 77. As alleged herein, Plaintiff Petkevicius has standing to pursue this
26 claim as Plaintiff Petkevicius has suffered injury in fact and has lost money or
27 property as a result of Defendants’ actions. Specifically, Plaintiff Petkevicius
28

1 purchased the Ginkgo biloba Products for her own personal use. In so doing, Plaintiff
2 Petkevicius relied upon the false representations that the Ginkgo biloba Products
3 would cause or assist in improved memory and brain function as referenced above.
4 Plaintiff Petkevicius used the Ginkgo biloba Products as directed and did not receive
5 any of the advertised benefits. Plaintiff Petkevicius would not have purchased the
6 Ginkgo biloba Products had she known Defendants’ advertising claims were false.

7 78. California Business & Professions Code § 17200 prohibits any “unfair
8 ... business act or practice.”

9 79. Defendants’ acts, misrepresentations and practices as alleged herein
10 constitute “unfair” business acts and practices within the meaning of Business &
11 Professions Code § 17200 *et seq.*, in that their conduct is substantially injurious to
12 consumers, offends public policy, and is immoral, unethical, oppressive, and
13 unscrupulous as the gravity of the conduct outweighs any alleged benefits
14 attributable to such conduct.

15 80. There were reasonably available alternatives to further Defendants’
16 legitimate business interests, other than the conduct described herein.

17 81. THEREFORE, Plaintiff Petkevicius prays for the relief as set forth
18 below.

19 **THIRD CAUSE OF ACTION**
20 **VIOLATION OF UNFAIR COMPETITION LAW**
21 **(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**
22 **Fraudulent Business Acts and Practices**

23 83. Plaintiff Petkevicius incorporates by reference and realleges all
24 allegations set forth in the preceding paragraphs.

25 84. Plaintiff Petkevicius brings this claim individually and on behalf of the
26 proposed California Class against Defendants.

27 85. As alleged herein, Plaintiff Petkevicius has standing to pursue this
28 claim as Plaintiff Petkevicius has suffered injury in fact and has lost money or

1 property as a result of Defendants’ actions. Specifically, Plaintiff Petkevicius
2 purchased the Ginkgo biloba Products for her own personal use. In so doing, Plaintiff
3 Petkevicius relied upon the false representations that the Ginkgo biloba Products
4 would cause or assist in improved memory and brain function as referenced above.
5 Plaintiff Petkevicius used the Ginkgo biloba Products as directed and did not receive
6 any of the advertised benefits. Plaintiff Petkevicius would not have purchased the
7 Ginkgo biloba Products had she known Defendants’ advertising claims were false.

8 86. California Business & Professions Code § 17200 prohibits any
9 “fraudulent business act or practice.”

10 87. Defendants’ claims, nondisclosures, and misleading statements with
11 respect to the Ginkgo biloba Products, as more fully set forth above, were false,
12 misleading, and/or likely to deceive the consuming public within the meaning of
13 Business & Professions Code § 17200.

14 88. Defendants’ conduct caused and continues to cause injury to Plaintiff
15 Petkevicius and the other California Class members. Plaintiff Petkevicius has
16 suffered injury in fact and has lost money as a result of Defendants’ deceptive
17 conduct.

18 89. THEREFORE, Plaintiff Petkevicius prays for the relief as set forth
19 below.

20 **FOURTH CAUSE OF ACTION**
21 **FALSE AND MISLEADING ADVERTISING**
(CAL. BUS. & PROF. CODE § 17500, *et seq.*)

22 90. Plaintiff Petkevicius incorporates by reference and realleges all
23 allegations set forth in the preceding paragraphs.

24 91. Plaintiff Petkevicius brings this claim individually and on behalf of the
25 proposed California Class against Defendants.

26 92. As alleged herein, Plaintiff Petkevicius has standing to pursue this
27
28

1 claim as Plaintiff Petkevicius has suffered injury in fact and has lost money or
2 property as a result of Defendants' actions. Specifically, Plaintiff Petkevicius
3 purchased the Ginkgo biloba Products for her own personal use. In so doing, Plaintiff
4 Petkevicius relied upon the false representations that the Ginkgo biloba Products
5 would cause or assist in improved memory and brain function as referenced above.
6 Plaintiff Petkevicius used the Ginkgo biloba Products as directed and did not receive
7 any of the advertised benefits. Plaintiff Petkevicius would not have purchased the
8 Ginkgo biloba Products had they known Defendants' advertising claims were false.

9 93. Defendants violated Business & Professions Code § 17500 by publicly
10 disseminating false, misleading, and unsubstantiated advertisements regarding the
11 Ginkgo biloba Products.

12 94. Defendants' false, misleading and unsubstantiated advertisements were
13 disseminated to increase the sales of the Ginkgo biloba Products.

14 95. Defendants knew or should have known their advertisements for the
15 Ginkgo biloba Products were false and misleading.

16 96. Plaintiff Petkevicius and the members of the California Class have
17 suffered harm as a result of these violations of the FAL because they have incurred
18 charges and/or paid monies for the Ginkgo biloba Products that they otherwise
19 would not have incurred or paid.

20 97. Defendants are aware, or by the exercise of reasonable care should have
21 been aware, that the representations were untrue or misleading.

22 98. Plaintiff Petkevicius and the members of the California Class have
23 suffered injury in fact and have lost money as a result of Defendants' false
24 representations and false advertising.

25 99. Plaintiff Petkevicius and the members of the California Class seek an
26 order awarding Plaintiff Petkevicius and other members of the California Class
27 restitution of the money wrongfully acquired by Defendants by means of
28

1 responsibility attached to Defendants' failure to disclose the existence and
2 significance of said misrepresentations.

3 100. THEREFORE, Plaintiff Petkevicius prays for the relief as set forth
4 below.

5 **FIFTH CAUSE OF ACTION**
6 **VIOLATION OF CALIFORNIA LEGAL REMEDIES ACT**
7 **(CAL. CIV. CODE § 1750, *et seq.*)**

8 101. Plaintiff Petkevicius incorporates by reference and realleges all
9 allegations set forth in the preceding paragraphs.

10 102. Plaintiff Petkevicius brings this claim individually and on behalf of the
11 proposed California Class against Defendants.

12 103. As alleged herein, Plaintiff Petkevicius have standing to pursue this
13 claim as Plaintiff Petkevicius has suffered injury in fact and has lost money or
14 property as a result of Defendants' actions. Specifically, Plaintiff Petkevicius
15 purchased the Ginkgo biloba Products for her own personal use. In so doing, Plaintiff
16 Petkevicius relied upon the material, false representations that the Ginkgo biloba
17 Products would cause or assist in improved memory and brain functioning, as set
18 forth above. Plaintiff Petkevicius used the Ginkgo biloba Products as directed and
19 did not receive any of the advertised benefits. Plaintiff Petkevicius would not have
20 purchased the Ginkgo biloba Products had she known Defendants' advertising
21 claims were false.

22 104. Plaintiff Petkevicius has concurrently filed the declaration of venue
23 required by Civil Code §1780(d) with this complaint.

24 105. Defendants have violated and continue to violate the CLRA by
25 engaging in the following practices proscribed by California Civil Code §1770(a) in
26 transactions with Plaintiff Petkevicius and the California Class, which were intended
27 to result in, and did result in, the sale of the Ginkgo biloba Products:
28

1 §1770(a) (5) Representing that [The Ginkgo biloba Products have] ...
2 characteristics, ... uses [or] benefits ... which [they do] not have

3 §1770(a) (7) Representing that [The Ginkgo biloba Products are] of a
4 particular standard, quality or grade ... if [they are] of another.

5 §1770(a) (9) Advertising goods or services with intent not to sell them
6 as advertised.

7 106. On information and belief, Defendants' actions were willful, wanton,
8 and fraudulent.

9 107. On information and belief, officers, directors, or managing agents at
10 Defendants authorized the use of the misleading statements about the Ginkgo biloba
11 Products.

12 108. CLRA SECTION 1782 NOTICE. On December 23, 2013, Plaintiff
13 Petkevicius, through counsel, sent a CLRA demand letter to Defendants that
14 provided notice of Defendants' violation of the CLRA and demanded Defendants
15 correct, repair, replace, or otherwise rectify the unlawful, unfair, false, and deceptive
16 practices complained of herein. The letter also stated that if Defendants refused to
17 do so, Plaintiff Petkevicius would file a complaint seeking damages in accordance
18 with the CLRA. Defendants failed to comply with the letter. For the foregoing
19 reasons, pursuant to Civil Code section 1780(a)(3), Plaintiff Petkevicius,
20 individually and on behalf of all other members of the California Class, seeks
21 compensatory damages, punitive damages, and restitution of any ill-gotten gains due
22 to Defendants' acts and practices.

23 109. In addition, the CLRA has enhanced penalties for acts perpetrated
24 against senior citizens and disabled persons. If the Defendants' conduct is directed
25 at a class of persons who are senior citizens and/or disabled, a \$5,000.00 civil penalty
26 may be awarded to "each class member." Civ. Code § 1780(b). A "disabled person"
27 is someone who has a "physical or mental impairment which substantially limits one
28

1 or more major life activities.” Civ. Code §1761(f), (g). Under California law,
2 individuals suffering from Alzheimer’s are “disabled.” Defendants’ conduct is
3 clearly directed at senior citizens and the disabled (i.e., those with Alzheimer’s), as
4 Defendants represent and warrant that the Ginkgo biloba Products treat and/or
5 prevent memory loss. Accordingly, the Court may award a civil penalty of up to
6 \$5,000 for each class member.

7 110. Plaintiff Petkevicius engaged counsel to prosecute this action and is
8 entitled to recover costs and reasonable attorney’s fees according to proof at trial.

9 111. THEREFORE, Plaintiff Petkevicius prays for the relief as set forth
10 below.

11 **SIXTH CAUSE OF ACTION**
12 **BREACH OF CALIFORNIA EXPRESS WARRANTY**
13 **(CAL. COMM. CODE § 2313)**

14 110. Plaintiff Petkevicius incorporates by reference and realleges all
15 allegations set forth in the preceding paragraphs.

16 111. Plaintiff Petkevicius brings this claim individually and on behalf of the
17 proposed California Class against Defendants.

18 112. Plaintiff Petkevicius and the California Class members formed a
19 contract with Defendants at the time they purchased the Ginkgo biloba Products. As
20 part of that contract, Defendants represented that the Ginkgo biloba Products would
21 cause or assist in improved memory and brain functioning, as described above.
22 These representations constitute express warranties and became part of the basis of
23 the bargain between Plaintiff Petkevicius and the California Class members, on the
24 one hand, and Defendants, on the other.

25 113. Defendants made the above-described representations to induce
26 Plaintiff Petkevicius and the California Class members to purchase the Ginkgo
27 biloba Products, and Plaintiff Petkevicius and the California Class members relied
28

1 on the representations in purchasing the Ginkgo biloba Products.

2 114. All conditions precedent to Defendants’ liability under the above-
3 referenced contract have been performed by Plaintiff Petkevicius and the other
4 California Class members.

5 115. Defendants breached their express warranties about the Ginkgo biloba
6 Products because, as alleged above, the Ginkgo biloba Products do not cause or
7 assist in improved memory or brain functioning. Consequently, Defendants
8 breached California’s warranty laws. Cal. Comm. Code section 2313.

9 116. As a result of Defendants’ breaches of express warranty, Plaintiff
10 Petkevicius and the other members of the California Class were damaged in the
11 amount of the purchase price they paid for the Ginkgo biloba Products, in amounts
12 to be proven at trial.

13 117. Within a reasonable time after they knew or should have known of such
14 breach, Plaintiff Petkevicius, on behalf of herself and the other members of the
15 California Class, placed Defendants on notice thereof.

16 118. THEREFORE, Plaintiff Petkevicius prays for the relief as set forth
17 below.

18 **SEVENTH CAUSE OF ACTION**
19 **VIOLATION OF NEW YORK GENERAL BUSINESS LAW**
20 **(N.Y. GEN. BUS. LAW § 349)**

21 119. Plaintiff Ripley incorporates by reference and realleges all allegations
22 set forth in the preceding paragraphs.

23 120. Plaintiff Ripley brings this claim individually and on behalf of the
24 proposed New York Class against Defendants.

25 121. New York General Business Law Section 349 declares unlawful
26 “[d]eceptive acts or practices in the conduct of any business, trade, or commerce or
27 in the furnishing of any service in this state . . .”
28

1 122. The conduct of Defendants alleged herein constitutes recurring,
2 “unlawful” deceptive acts and practices in violation of New York General Business
3 Law Section 349, and as such, Plaintiff Ripley and the New York Class members
4 seek monetary damages.

5 123. There is no adequate remedy at law.

6 124. Defendants misleadingly, inaccurately and deceptively market the
7 Ginkgo biloba Products to consumers.

8 125. Defendants’ improper consumer-oriented conduct—including labeling
9 and advertising that the Ginkgo biloba Products would cause or assist in improved
10 memory and brain functioning —is misleading in a material way in that it, *inter*
11 *alia*, induced Plaintiff Ripley and the New York Class to purchase and/or pay a
12 premium for Defendants’ Ginkgo biloba Products and to use Ginkgo biloba
13 Products when they otherwise would not have.

14 126. Defendants made its illegal, untrue and/or misleading statements and
15 representations willfully, wantonly, and with reckless disregard for the truth.

16 127. Plaintiff Ripley and the New York Class have been injured inasmuch
17 as they purchased and/or paid a premium for Ginkgo biloba Products that were
18 contrary to Defendants’ representations. Accordingly, Plaintiff Ripley and the New
19 York Class members received less than what they bargained and/or paid for.

20 128. Defendants’ advertising and Ginkgo biloba Products’ packaging and
21 labeling induced the Plaintiff Ripley and the New York Class members to buy
22 Defendants’ Ginkgo biloba Products and/or to pay a premium price for them.

23 129. Defendants’ deceptive, illegal, and misleading practices constitute a
24 deceptive act and practice in the conduct of business in violation of New York
25 General Business Law §349(a) and Plaintiff Ripley and the New York Class have
26 been damaged thereby.

27 130. As a result of Defendants’ recurring, unlawful deceptive acts and
28

1 practices, Plaintiff Ripley and the New York Class are entitled to monetary,
2 compensatory, treble and punitive damages, restitution and disgorgement of all
3 moneys obtained by means of Defendants' unlawful conduct, interest, and attorneys'
4 fees and costs.

5 131. THEREFORE, Plaintiff Ripley prays for the relief as set forth below.

6 **EIGHTH CAUSE OF ACTION**
7 **VIOLATION OF NEW YORK GENERAL BUSINESS LAW**
8 **(N.Y. GEN. BUS. LAW § 350)**

9 132. Plaintiff Ripley incorporates by reference and realleges all allegations
10 set forth in the preceding paragraphs.

11 133. Plaintiff Ripley brings this claim individually and on behalf of the
12 proposed New York Class against Defendants.

13 134. N.Y. Gen. Bus. Law § 350 provides, in part, as follows:

14 False advertising in the conduct of any business, trade or
15 commerce or in the furnishing of any service in this state is
hereby declared unlawful.

16 135. N.Y. Gen. Bus. Law § 350a(1) provides, in part, as follows:

17 The term 'false advertising, including labeling, of a commodity,
18 or of the kind, character, terms or conditions of any employment
19 opportunity if such advertising is misleading in a material
20 respect. In determining whether any advertising is misleading,
21 there shall be taken into account (among other things) not only
22 representations made by statement, word, design, device, sound
23 or any combination thereof, but also the extent to which the
24 advertising fails to reveal facts material in the light of such
25 representations with respect to the commodity or employment to
26 which the advertising relates under the conditions proscribed in
27 said advertisement, or under such conditions as are customary or
28 usual . . .

136. Defendants' labeling and advertisements contain untrue, illegal, and
materially misleading statements concerning Defendants' Ginkgo biloba Products

1 inasmuch as they misrepresent that the Ginkgo biloba Products would cause or
2 assist in improved memory and brain functioning.

3 137. Plaintiff Ripley and the New York Class have been injured inasmuch
4 as they relied upon the labeling, packaging and advertising and purchased and/or
5 paid a premium for Ginkgo biloba Products that—contrary to Defendants’
6 representations— do not cause or assist in improved memory and brain
7 functioning. Accordingly, Plaintiff Ripley and the New York Class received less
8 than what they bargained and/or paid for.

9 138. Defendants’ advertising, packaging and labeling induced Plaintiff
10 Ripley and the New York Class to buy Defendants’ Ginkgo biloba Products.

11 139. Defendants made untrue and/or misleading statements and
12 representations willfully, wantonly, and with reckless disregard for the truth.

13 140. Defendants’ conduct constitutes multiple, separate violations of N.Y.
14 Gen. Bus. Law § 350.

15 141. Defendants made the material misrepresentations described in this
16 Complaint in Defendants’ advertising, and on the Ginkgo biloba Products’
17 packaging and labeling.

18 142. Defendants’ material misrepresentations were substantially uniform in
19 content, presentation, and impact upon consumers at large. Moreover, all
20 consumers purchasing the Ginkgo biloba Products were and continue to be
21 exposed to Defendants’ material misrepresentations.

22 143. As a result of Defendants’ recurring, “unlawful” deceptive acts and
23 practices, Plaintiff Ripley and the New York Class members are entitled to
24 monetary, compensatory, treble and punitive damages, restitution and disgorgement
25 of all moneys obtained by means of Defendants’ unlawful conduct, interest, and
26 attorneys’ fees and costs.

27 144. THEREFORE, Plaintiff Ripley prays for the relief as set forth below.
28

1 of the purchase price and/or premium they paid for the Ginkgo biloba Products, in
2 amounts to be proven at trial.

3 152. Within a reasonable time after they knew or should have known of such
4 breach, Plaintiff Ripley, on behalf of himself and the other members of the New
5 York Class, placed Defendants on notice thereof.

6 153. THEREFORE, Plaintiff Ripley prays for the relief as set forth below.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly
9 situated, pray for judgment against Defendants as follows:

10 A. For an order requiring Defendants to disgorge and make restitution of
11 all monies Defendants acquired by means of the unlawful practices set forth above;

12 B. For an order declaring Defendants financially responsible for notifying
13 the Class members of the pendency of this suit;

14 C. For compensatory damages according to proof;

15 D. For punitive damages according to proof;

16 E. For reasonable attorneys' fees and costs of suit;

17 F. For pre-judgment interest; and

18 G. For such other relief as the Court deems proper.

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20 ///

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury on all claims so triable.

Date: June 8, 2017

Respectfully submitted,

**CARLSON LYNCH SWEET
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