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9  
10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

2011 DEC 19 PM 3:38  
CLEAN U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
SANTA ANA  
BY 

13 JOHNNIE PACHECO, individually, and on  
14 behalf of all others similarly situated,

15 Plaintiff,

16 vs.

17 USPLabs, LLC; and DOES 1-25, Inclusive,

18 Defendants.

Case No.: **EDCV11-02015 VAP (SPx)**

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

19  
20 Plaintiff JOHNNIE PACHECO ("Plaintiff"), individually and on behalf of all others similarly  
21 situated, alleges the following on information and belief:

22  
23 **I. INTRODUCTION**

24 1. USPLabs, LLC ("Defendant") manufactures, markets, and sells Jack3d and OxyELITE  
25 Pro (collectively "the Products") as "Ultra-Premium supplements" that can provide "safe and  
26 effective" weight loss and muscle building. Defendant claims their Products are "University Studied"  
27 and that research supports the efficacy and safety claims about their Products. Defendant also  
28 advertises the Products as "completely legal."

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1 inclusive are presently unknown to Plaintiff at this time, and are therefore sued by such fictitious  
2 names pursuant to California Code of Civil Procedure § 474. Plaintiff will amend this Complaint to  
3 allege the true names and capacities of DOES 1 through 25 when the same have been ascertained.  
4 Plaintiff are further informed and believe and based thereon allege that DOES 1 through 25 were  
5 and/or are, in some manner or way, responsible for and liable to Plaintiff for the events, happenings,  
6 and damages hereinafter set forth below.

7 **III. JURISDICTION AND VENUE**

8 8. This Court has jurisdiction over the subject matter presented by this Complaint because  
9 it is a class action arising under the Class Action Fairness Act (“CAFA”), Pub. L. No. 109-2, 119 Stat.  
10 4 (2005), which explicitly provides for the original jurisdiction of the Federal Courts over any class  
11 action in which any member of the Plaintiff Class is a citizen of a state different from any Defendant,  
12 and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,0000, exclusive of  
13 interest and costs.

14 9. Plaintiff alleges that the total damages of the individual members of the Plaintiff Class  
15 in this action are in excess of \$5,000,000 in the aggregate, exclusive of interest and costs, as required  
16 by 28 U.S.C. § 1332(d)(2), (5).

17 10. As set forth above, Plaintiff is a citizen of California and Defendant is a citizen of  
18 Texas. Therefore, diversity of citizenship exists under CAFA, as required by 28 U.S.C.  
19 § 1332(d)(2)(A).

20 11. Venue is proper in this Court because Plaintiff purchased the Product in this Judicial  
21 District and because Defendant has received substantial compensation from sales in this Judicial  
22 District. Specifically, Defendant knowingly engages in activities directed at consumers in this Judicial  
23 District, and Defendant obtains substantial benefits from its scheme perpetrated in this Judicial  
24 District. The declaration of venue required by California Civil Code § 1780(d) is attached hereto as  
25 Exhibit 1.

26 **IV. FACTS**

27 12. Defendant manufactures, markets, and sells Jack3d and OxyELITE Pro as “Ultra-  
28 Premium supplements” that can provide “safe and effective” weight loss and muscle building.

1 Defendant claims their Products are “University Studied” and that research supports their efficacy and  
2 safety claims about their Products. Defendant advertises the Products as “completely legal” dietary  
3 supplements.

4 13. The form of DMAA Defendant sells in the Products is a synthetic form that is both  
5 illegal and dangerous. Defendant’s advertising statements regarding the safety and legality of the  
6 Products are false and misleading, and the research relied upon by Defendant is inadequate and/or  
7 seriously flawed with regard to Defendant’s safety and efficacy claims.

9 14. Defendant's DMAA is manufactured synthetically, and therefore unlawfully on the  
10 market as an ingredient in Defendant's Products which, because they include Defendant's DMAA, are  
11 both "adulterated" dietary supplements pursuant to the Food, Drug, and Cosmetic Act. Assuming,  
12 *arguendo*, Defendant's DMAA is not synthetically manufactured and it is instead naturally extracted  
13 from the geranium plant (as Defendant has also claimed), Defendant's DMAA, by virtue of its  
14 inclusion in Defendant's Products, makes the Products nevertheless "adulterated" dietary supplements  
15 and unlawfully on the market pursuant to the Food, Drug, and Cosmetic Act. Support for these  
16 allegations include without limitation the following:

18 (a) Defendant’s DMAA, because it is synthetic, cannot be a “constituent” of a  
19 botanical and cannot qualify as a dietary ingredient and be legally sold in a  
20 dietary supplement under 21 U.S.C. § 321(ff)(1)(F), nor could it be an extract of  
21 a botanical under 21 U.S.C. § 321(ff)(1)(F) because it was not actually  
22 extracted from the botanical, as clarified in the Food and Drug Administration’s  
23 “Draft Guidance for Industry: Dietary Supplements: New Dietary Ingredient  
24 Notifications and Related Issues” (July 2011) at Section IV.D.2;

26 (b) Assuming Defendant's DMAA is a dietary ingredient, it is a new dietary  
27 ingredient pursuant to 21 U.S.C. § 350b(c) because it is an ingredient that was  
28

1 not marketed as a dietary ingredient in the United States before October 15,  
2 1994;

3 (c) Assuming Defendant's DMAA is a dietary ingredient, a proper notification was  
4 not submitted to the Food and Drug Administration by Defendant with respect  
5 to Defendant's DMAA at least seventy-five days prior to the first sale of  
6 Defendant's Products, even though such a notification would have been required  
7 by virtue of the ingredient's inclusion in the Products pursuant to 21 U.S.C.  
8 § 350b(a)(2), assuming Defendant's DMAA is a dietary ingredient;

10 (d) Even if Defendant's DMAA is a dietary ingredient and was marketed as a  
11 dietary ingredient in the United States before October 15, 1994, it was not  
12 marketed in the same chemical composition or structure as in Defendant's  
13 Products, as clarified in the Food and Drug Administration's "Draft Guidance  
14 for Industry: Dietary Supplements: New Dietary Ingredient Notifications and  
15 Related Issues" (July 2011) at Section IV.A.11;

17 (e) Defendant's DMAA is not present in the food supply as an article used for food  
18 in a form in which the food has not been chemically altered, as would otherwise  
19 be allowed by 21 U.S.C. § 350b(a)(1), because Defendant's claims that  
20 Defendant's DMAA "is a natural constituent of the geranium flower" is false  
21 (because Defendant's DMAA is synthetic); and/or

23 (f) Defendant's DMAA is a component of dietary supplements that have not been  
24 prepared, packed, or held under conditions that meet current good  
25 manufacturing practice regulations, as required by 21 U.S.C. § 342(g)(1).

26  
27 15. Defendant also makes numerous efficacy and safety assertions which Defendant claims  
28 are supported by University studies, testing and other "research." Some of the claims include:

- 1 (a) "USPLabs Athletes – Real People Real Results";
- 2 (b) "Jack3d is THE original University Studied Ultra-Concentrated Pre-
- 3 Workout...";
- 4 (c) "Jack3d is now backed by multiple University studies, including double-blind,
- 5 placebo-controlled research";
- 6 (d) "Of course, Jack3d has already been "put to the test" by lifters all around the
- 7 globe...";
- 8 (e) "Needless to say, if you want the best, look no further than Jack3d – proven in
- 9 the real world & in the lab...";
- 10 (f) "NOTHING delivers consistent workout domination for such a great price –
- 11 NOTHING!";
- 12 (g) "Perfectly-executed matrix of energy-spawning, muscle-engorging compounds
- 13 only found in Jack3d";
- 14 (h) "From Day 1, USPLabs has been focused on YOU – delivering cutting edge
- 15 products that allow you to kick ass & take names..."; and
- 16 (i) Introducing a burner coined the "Super Thermogenic™" by those familiar with
- 17 its effectiveness... It's called OxyELITE Pro™ & It's absolutely unmatched!"

18 16. In reality, no reliable clinical research or University Testing can support the above

19 claims made by Defendant. Those "tests" and "studies" purportedly relied upon by Defendant used

20 testing samples too small to conclusively show any real results,<sup>1</sup> failed to accurately report the results,<sup>2</sup>

21 and were produced *on the same day by the same open-access, online journal*, Nutrition and Metabolic

22 Insights.<sup>3</sup>

23

24 <sup>1</sup> Cameron G. McCarthy, et al., "A Finished Dietary Supplement Stimulates Lipolysis and Metabolic Rate in Young Men

25 and Women," Nutrition and Metabolic Insights (Dec. 6, 2011) (study only had twelve test subjects over two days of testing,

26 <sup>2</sup> Cameron G. McCarthy, et al., "Biochemical and Anthropometric Effects of a Weight Loss Dietary Supplement in Healthy

27 Men and Women," Nutrition and Metabolic Insights (Dec. 6, 2011) (study merely reported all differences in appetite, body

weight, body fat percentage, and skinfold thickness with blanket statements of being more than 5%, failing to give any real

28 placebo to product ratios).

<sup>3</sup> *Id.* See also fn. 1 and Tyler M. Farney, et al., "Hemodynamic and Hematologic Profile of Healthy Adults Ingesting

Dietary Supplements Containing 1,3-Dimethylamylamine and Caffeine," Nutrition and Metabolic Insights (Dec. 6, 2011).



1 All persons located within California who purchased Jack3d and/or  
2 OxyELITE Pro at any time during the four years preceding the filing of  
3 this Complaint (the "Class").

4 23. Excluded from the Class are governmental entities, Defendant, any entity in which  
5 Defendant has a controlling interest, and Defendant's officers, directors, affiliates, legal  
6 representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from  
7 the Class is any judge, justice, or judicial officer presiding over this matter and the members of their  
8 immediate families and judicial staff.

9 24. The proposed Class is so numerous that individual joinder of all its members is  
10 impracticable. Due to the nature of the trade and commerce involved, however, Plaintiff believes that  
11 the total number of Class members is at least in the tens of thousands and members of the Class are  
12 numerous and geographically dispersed across California. While the exact number and identities of  
13 the Class members are unknown at this time, such information can be ascertained through appropriate  
14 investigation and discovery. The disposition of the claims of the Class members in a single class  
15 action will provide substantial benefits to all parties and to the Court.

16 25. There is a well-defined community of interest in the questions of law and fact involved  
17 affecting the plaintiff class and these common questions predominate over any questions that may  
18 affect individual Class members. Common questions of fact and law include, but are not limited to,  
19 the following:

- 20 a. Whether Defendant's efficacy, safety and legality claims are accurate;
- 21 b. Whether Defendant's efficacy, safety and legality claims are properly  
22 substantiated;
- 23 c. Whether Defendant has falsely represented that Jack3d and OxyELITE Pro  
24 have uses and benefits which they do not have;
- 25 d. Whether Defendant knew that its efficacy, safety and legality claims were false;
- 26 e. Whether Defendant's conduct constitutes a violation of the Consumers Legal  
27 Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*);
- 28 f. Whether Defendant's conduct constitutes a violation of California's false



1 advertising law (Cal. Bus. & Prof. Code §§ 17500, et seq.);

2 g. Whether Defendant's conduct constitutes an unfair, unlawful, and/or fraudulent  
3 business practice in violation of California's unfair competition law (Cal. Bus.  
4 & Prof. Code §§ 17200, et seq.);

5 h. Whether Plaintiff and Class members are entitled to compensatory damages,  
6 and if so, the nature of such damages;

7 i. Whether Plaintiff and Class members are entitled to restitutionary relief; and

8 j. Whether Plaintiff and Class members are entitled to injunctive relief.

9 26. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and all  
10 members of the Class have been similarly affected by Defendant's common course of conduct since  
11 they all relied on Defendant's representations concerning the Products and purchased them based on  
12 those representations.

13 27. Plaintiff will fairly and adequately represent and protect the interests of the Class.  
14 Plaintiff has retained counsel with substantial experience in handling complex class action litigation.  
15 Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the Class and  
16 have the financial resources to do so. Plaintiff has retained a law firm who is widely recognized as one  
17 of the most successful and effective class action litigators in California, and whose victories have been  
18 publicized on CNN, Fox News, MSNBC, and nearly every major California newspaper. The firm has  
19 also been certified as lead class counsel in similar class actions, including a suit involving a  
20 homeopathic product. (*See DeLaRosa v. Boiron, Inc.*, Case No. 8:10-CV-1569-JST (CWx) (C.D.  
21 Cal.)).

22 28. Plaintiff and the members of the Class suffered, and will continue to suffer, harm as a  
23 result of Defendant's unlawful and wrongful conduct. A class action is superior to other available  
24 methods for the fair and efficient adjudication of the present controversy. Individual joinder of all  
25 members of the class is impracticable. Even if individual class members had the resources to pursue  
26 individual litigation, it would be unduly burdensome to the courts in which the individual litigation  
27 would proceed. Individual litigation magnifies the delay and expense to all parties in the court system  
28 of resolving the controversies engendered by Defendant's common course of conduct. The class

1 action device allows a single court to provide the benefits of unitary adjudication, judicial economy,  
2 and the fair and efficient handling of all class members' claims in a single forum. The conduct of this  
3 action as a class action conserves the resources of the parties and of the judicial system and protects  
4 the rights of the class members. Furthermore, for many, if not most, a class action is the only feasible  
5 mechanism that allows an opportunity for legal redress and justice.

6 29. Adjudication of individual class members' claims with respect to Defendant would, as a  
7 practical matter, be dispositive of the interests of other members not parties to the adjudication, and  
8 could substantially impair or impede the ability of other class members to protect their interests.

9 **VI. CAUSES OF ACTION**

10 **FIRST CAUSE OF ACTION**

11 **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**

12 **(CAL. CIV. CODE §§ 1750, ET SEQ.)**

13 **(By Plaintiff and on Behalf of the Class Against Defendant)**

14 30. Plaintiff incorporates by this reference the allegations contained in the paragraphs  
15 above as if fully set forth herein.

16 31. Plaintiff has standing to pursue this cause of action because Plaintiff has suffered injury  
17 in fact and has lost money as a result of Defendant's actions as set forth herein. Specifically, Plaintiff  
18 purchased the Products in reliance on Defendant's marketing claims with respect to efficacy, safety  
19 and legality. Plaintiff used the Products as directed, but it did not work as advertised and was not of  
20 the quality and standard advertised by Defendant.

21 32. Defendant has engaged in and continue to engage in business practices in violation of  
22 California Civil Code §§ 1750, *et seq.* (the "Consumers Legal Remedies Act") by making false and  
23 unsubstantiated representations concerning the efficacy, safety and legality of the Products. These  
24 business practices are misleading and/or likely to mislead consumers and should be enjoined.

25 33. Defendant has engaged in deceptive acts or practices intended to result in the sale of  
26 Jack3d and OxyELITE PRO in violation of Civil Code § 1770. Defendant knew and/or should have  
27 known that their representations of fact concerning the efficacy, safety and legality of the Products  
28 were material and likely to mislead the public. Defendant affirmatively misrepresented that the

1 Products were of a certain standard and quality with certain benefits which they did not have.

2 34. Defendant's conduct alleged herein violates the Consumers Legal Remedies Act,  
3 including but not limited to, the following provisions: (1) using deceptive representations in  
4 connection with goods or services in violation of Civil Code § 1770(a)(4); (2) representing that goods  
5 or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which  
6 they do not have in violation of Civil Code § 1770(a)(5); and/or (3) advertising goods or services with  
7 intent not to sell them as advertised in violation of Civil Code § 1770(a)(9). As a direct and proximate  
8 result of Defendant's conduct, as set forth herein, Defendant has received ill-gotten gains and/or  
9 profits, including but not limited to, money. Therefore, Defendant has been unjustly enriched.

10 35. There is no other adequate remedy at law, and Plaintiff and Class members will suffer  
11 irreparable harm unless Defendant's conduct is enjoined.

12 36. In conjunction with filing this action, Plaintiff's counsel mailed to Defendant, by  
13 certified mail, return receipt requested, the written notice required by Civil Code Section 1782(a). A  
14 copy of this letter is attached hereto as Exhibit 2. Should Defendant fail to respond within thirty days,  
15 Plaintiffs will amend to seek damages under the California Consumer Legal Remedies Act.

16 37. The declaration of venue required by Civil Code § 1780(d) is attached hereto as Exhibit  
17 One.

18 38. Defendant's wrongful business practices constituted, and constitute, a continuing  
19 course of conduct in violation of the Consumers Legal Remedies Act since Defendant is still  
20 representing that their Products have characteristics, uses, benefits, and abilities which are false and  
21 misleading, and have injured Plaintiff and the Class.

22 **SECOND CAUSE OF ACTION**

23 **VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW**

24 **(CAL. BUS. & PROF. CODE §§ 17500, ET SEQ.)**

25 **(By Plaintiff and on Behalf of the Class Against Defendant)**

26 39. Plaintiff incorporates by this reference the allegations contained in the paragraphs  
27 above as if fully set forth herein.

28 40. Plaintiff has standing to pursue this cause of action because Plaintiff has suffered injury

1 in fact and has lost money as a result of Defendant's actions as set forth herein. Specifically, Plaintiff  
2 purchased Jacck3d and OxYELITE Pro in reliance on Defendant's marketing claims. Plaintiff used  
3 the Products as directed, but it did not work as advertised and did not provide any of the promised  
4 benefits.

5 41. Defendant has engaged in false advertising as it has disseminated false and/or  
6 misleading representations about the Products.

7 42. Defendant knew or should have known by exercising reasonable care that its  
8 representations were false and/or misleading. During the Class Period, Defendant engaged in false  
9 advertising in violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*, by misrepresenting in its  
10 advertising and marketing of the Products to Plaintiff, Class members, and the consuming public that  
11 their Products are effective, safe, and legal.

12 43. Each of the aforementioned representations alleged in this Complaint was false and  
13 misleading because the Products are not of the standard, quality or grade advertised, and are in reality  
14 unsafe, ineffective, and illegal.

15 44. By disseminating and publishing these statements in connection with the sale of the  
16 Products, Defendant has engaged in and continue to engage in false advertising in violation of Bus. &  
17 Prof. Code §§ 17500, *et seq.*

18 45. As a direct and proximate result of Defendant's conduct, as set forth herein, Defendant  
19 has received ill-gotten gains and/or profits, including but not limited to, money. Therefore, Defendant  
20 has been unjustly enriched. Pursuant to Cal. Bus. & Prof. Code § 17535, Plaintiff requests restitution  
21 and restitutionary disgorgement for all sums obtained in violation of Cal. Bus. & Prof. Code §§ 17500,  
22 *et seq.*

23 46. Plaintiff seeks injunctive relief, restitution, and restitutionary disgorgement of  
24 Defendant's ill-gotten gains as specifically provided in Cal. Bus. & Prof. Code § 17535.

25 47. Plaintiff and Class members seek to enjoin Defendant from engaging in these wrongful  
26 practices, as alleged herein, in the future. There is no other adequate remedy at law and if an  
27 injunction is not ordered, Plaintiff and the Class will suffer irreparable harm and/or injury.  
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**THIRD CAUSE OF ACTION**

**UNLAWFUL, FRAUDULENT & UNFAIR BUSINESS PRACTICES**

**(CAL. BUS. & PROF. CODE §§ 17200, ET SEQ.)**

**(By Plaintiff and on Behalf of the Class Against Defendant)**

48. Plaintiff incorporates by this reference the allegations contained in the paragraphs above as if fully set forth herein.

49. Plaintiff has standing to pursue this cause of action because Plaintiff has suffered injury in fact and has lost money as a result of Defendant's actions as set forth herein. Specifically, Plaintiff purchased the Jack3d and OxyELITE Pro in reliance on Defendant's marketing claims. Plaintiff used the Products as directed, but it did not work as advertised and were not of the standard, quality and grade advertised.

50. Defendant's actions as alleged in this Complaint constitute an unfair or deceptive business practice within the meaning of California Business and Professions Code §§ 17200, *et seq.*, in that Defendant's actions are unfair, unlawful, and fraudulent, and because Defendant has made unfair, deceptive, untrue, or misleading statements in advertising media, including the Internet, within the meaning of California Business and Professions Code §§ 17200, *et seq.*

51. Defendant knew or should have known by exercising reasonable care that its representations were false and/or misleading. During the Class Period, Defendant engaged in unfair, unlawful, and fraudulent business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*, by misrepresenting in its advertising and marketing of the Products to Plaintiff, Class members, and the consuming public that, the Products were effective, safe and legal.

52. Each of the aforementioned representations alleged in this Complaint was false and misleading because the Products are not of the standard, quality or grade advertised, and are in reality both unsafe and illegal.

53. Defendant's business practices, as alleged herein, are unfair because they offend established public policy and/or are immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to consumers in that consumers are misled by the claims made with respect to the Products as set forth herein.



1 unlawful, and/or fraudulent practices alleged in the Complaint;

2 5. For both pre-judgment and post-judgment interest at the maximum allowable rate on  
3 any amounts awarded;

4 6. For Plaintiff's costs of the proceedings herein;

5 7. For reasonable attorneys' fees as allowed by statute; and

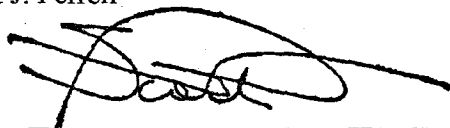
6 8. For any and all such other and further relief that this Court may deem just and proper.  
7

8 **DEMAND FOR JURY TRIAL**

9 Plaintiff hereby demands a trial by jury of all claims and causes of action so triable in this  
10 lawsuit.

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12  
13 Dated: December 19, 2011

NEWPORT TRIAL GROUP  
A Professional Corporation  
Scott J. Ferrell



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16 By: \_\_\_\_\_  
Scott J. Ferrell

17 Attorney for Plaintiff and the Class  
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