

CAUSE NO. \_\_\_\_\_

<p>STATE OF TEXAS,</p> <p style="text-align: center;"><b>Plaintiff,</b></p> <p style="text-align: center;">vs.</p> <p>MARK NUTRITIONALS, Inc.;</p> <p>HARRY SISKIND, individually;</p> <p>EDWARD G. D’ALESSANDRO, Jr.;</p> <p>individually; PATTI MONTANA SISKIND,</p> <p>individually; and GILBERT R. KAATS,</p> <p>Ph.D., individually; and RESEARCH</p> <p>FOUNDATION, Inc.</p> <p style="text-align: center;"><b>Defendants.</b></p>	<p>§</p>	<p><b>IN THE DISTRICT COURT OF</b></p> <p><b>DALLAS COUNTY, T E X A S</b></p> <p style="text-align: center;">_____ <b>JUDICIAL DISTRICT</b></p>
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**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Texas Attorney General by and through his Consumer Protection Division in the name of the STATE OF TEXAS ("State"), Plaintiff, and files Plaintiff’s Original Petition complaining of MARK NUTRITIONALS, INC.; HARRY SISKIND, individually; EDWARD G. D’ALESSANDRO, Jr., individually; PATTI MONTANA SISKIND, individually; GILBERT R. KAATS, Ph.D., individually; and RESEARCH FOUNDATION, Inc., Defendants, (hereinafter referred to collectively as "Defendants"), and would respectfully show the court the following.

## I. DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under Level 2 of Texas Civil Procedure Rule 190.

## II. JURISDICTION

2. This court has jurisdiction over the parties and subject matter pursuant to §17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”), TEX. BUS. & COM. CODE § 17.41 *et seq.* (West 2002).

3. This court also has jurisdiction over the parties and subject matter pursuant to §431.047(a) and (b) of the Texas Food, Drug and Cosmetic Act (“TFDCA”), TEX. HEALTH AND SAFETY CODE ANN. §§ 431.001 *et seq.* (Vernon 1992 & Supp. 2000).

## III. VENUE

4. Venue of this action is proper in Dallas County on the basis of §17.47(b) of the DTPA because Defendants have conducted business in Dallas County.

5. Venue of this action is also proper in Dallas County on the basis of §431.047(c) of the TFDCA because violations or the threat of violations have occurred in Dallas County.

6. Venue of this action also lies in Dallas County on the basis of §15.002(a)(1) and (3) of the TEX. CIV. PRAC. & REM. CODE (West 2001) because all or a substantial part of the events or omissions giving rise to this cause of action occurred in Dallas County.

## IV. THE PARTIES

7. Plaintiff, the STATE OF TEXAS, is represented by and through the ATTORNEY GENERAL through his Consumer Protection Division. Article 4 §22 of the Constitution of the State of Texas charges the Attorney General, *inter alia*, with taking such action in the courts in the name

of the State as may be proper and necessary... and as may be required by law. The ATTORNEY GENERAL, through his Consumer Protection Division, in the name of the STATE OF TEXAS, and in the public interest is authorized to bring this suit under the authority granted to him by:

- A. §17.47 of the DTPA, upon the grounds that Defendants have engaged in false, misleading or deceptive acts and practices in the conduct of trade or commerce as defined and declared unlawful by §17.46 (a) and (b) of the DTPA; and
- B. §431.047(a) and (b) TFDCA upon the grounds that the Commissioner of Health of the State of Texas and his authorized agents find that Defendants have violated and are currently violating provisions of §431.021 of the TFDCA.

8. Defendant MARK NUTRITIONALS, Inc. (“MARK”), is a Texas corporation with its headquarters and principal place of business at 13311 San Pedro, San Antonio, Texas 78216 and may be served with process by serving it President Harry Siskind at that address. MARK transacts or has transacted business in Dallas County, Texas through the advertising, marketing, and sale of Body Solutions in Dallas County.<sup>1</sup>

9. Defendant HARRY SISKIND (“SISKIND”) is the President, Chief Executive Officer, director and 50% shareholder of the corporate Defendant MARK and may be served with process at his residence at 202 Bluff Hollow, San Antonio, Texas 78217 or at his place of business at 13311 San Pedro, San Antonio, Texas 78216. Defendant SISKIND is one of two officers, directors and shareholders of the corporate Defendant MARK. At all times relevant to this Petition, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control or

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<sup>1</sup> Defendant MARK filed for Chapter 11 Bankruptcy on September 17, 2002. The State of Texas is exempt from the automatic stay pursuant to 11 U.S.C. §362 of the U.S. Bankruptcy Code. Section 362 provides that the “commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power” is exempted from the stay.

participated in the acts and practices of Defendant MARK, including the acts and practices set forth in this Petition. He transacts or has transacted business in Dallas County, Texas through the advertising, marketing, and sale of Body Solutions in Dallas County.

10. Defendant EDWARD G. D’ALESSANDRO, Jr., (“D’ALESSANDRO”) is the Secretary and Treasurer, director and 50% shareholder of the corporate Defendant MARK and may be served with process at his residence at 410 24<sup>th</sup> Street 14B, New York, New York 10011. Defendant D’ALESSANDRO is one of two officers, directors and shareholders of the corporate Defendant MARK. At all times relevant to this Petition, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control or participated in the acts and practices of Defendant MARK, including the acts and practices set forth in this Petition. He transacts or has transacted business in Dallas County, Texas through the advertising, marketing, and sale of Body Solutions in Dallas County.

11. Defendant PATTI MONTANA SISKIND (“PATTI MONTANA SISKIND”), is Executive Vice President of corporate Defendant MARK and may be served with process at her residence at 202 Bluff Hollow, San Antonio, Texas 78217 or at her place of business at 13311 San Pedro, San Antonio, Texas 78216. At all times relevant to this Petition, acting alone or in concert with others, she has formulated, directed, controlled, had the authority to control or participated in the acts and practices of Defendant MARK, including the acts and practices set forth in this Petition. She transacts or has transacted business in Dallas County, Texas through the advertising, marketing, and sale of Body Solutions in Dallas County.

12. Defendant GILBERT R. KAATS, Ph.D., is the executive director and one of two shareholders of Defendant RESEARCH FOUNDATION, Inc., and may be served with process at

his residence at 105 Arvin Drive, San Antonio, Texas 78209 or at his place of business at 4900 Broadway, Suite 200, San Antonio, Texas 78209. At all times relevant to this Petition, acting alone or in concert with others, Defendant KAATS has formulated, directed, controlled, had the authority to control, participated in, or facilitated the acts and practices of Defendant MARK, including the acts and practices set forth in the Petition. Defendant KAATS transacts or has transacted business in Dallas County, Texas through the marketing and sale of Body Solutions in Dallas County.

13. Defendant RESEARCH FOUNDATION, Inc., (“FOUNDATION” is a Texas corporation with its headquarters and principal place of business at 4900 Broadway, Suite 200, San Antonio, Texas 78209 and may be served with process by serving its registered agent, Jeffrey W. Tschirhart at 4900 Broadway, Suite 700, San Antonio, Texas 78209. Defendant FOUNDATION was formerly known as Health and Medical Research Foundation until the company’s incorporation on November 8, 2001. Defendant FOUNDATION aids corporate Defendant MARK in product evaluation and conducts ongoing research on the safety, efficacy and marketability of nutraceutical and dietary supplements. At all times relevant to this Petition, acting alone or inconcert with others, Defendant FOUNDATION has participated in or facilitated, the acts or practices of Defendant MARK, including the acts and practices set forth in the Petition. Defendant FOUNDATION transacts or has transacted business in Dallas County, Texas through the marketing and sale of Body Solutions in Dallas County.

## V. PUBLIC INTEREST

14. By reason of the institution and operation of the unlawful practices set forth herein, Defendants have and will cause immediate and irreparable injury, loss, and damage to the STATE

OF TEXAS and its citizens, and will also cause adverse effects to legitimate business enterprise, which conducts its trade and commerce in a lawful manner in this State. Therefore, the Attorney General of the STATE OF TEXAS believes and is of the opinion that these proceedings are in the public interest.

## **VI. TRADE AND COMMERCE**

15. Defendants are engaged in “trade” and “commerce” as defined by § 17.45(6) of the DTPA, in that they manufacture and distribute dietary supplements and food products in the STATE OF TEXAS.

## **VII. NOTICE BEFORE SUIT**

16. Pursuant to §17.47(a) of the Deceptive Trade Practices Act, contact has been made with the Defendants herein to inform Defendants of the unlawful conduct alleged herein, in person or by letter mailed by certified mail, return receipt requested.

## **VIII. ACTS OF AGENTS**

17. Wherever in this Petition it is alleged that Defendants did any act or thing, it is meant that Defendants performed or participated in such acts or thing or that such acts were performed by the officers, agents, or employees of Defendants, and in each instance, the officers, agents, or employees of said Defendants were then authorized to and did in fact, act on behalf of Defendants or otherwise acted under the guidance and direction of Defendants.

## **IX. NATURE OF DEFENDANTS’ CONDUCT**

18. Defendants MARK NUTRITIONALS, Inc., HARRY SISKIND, individually, EDWARD G. D’ALESSANDRO, Jr., individually, and PATTIMONTANA SISKIND, individually, manufacture and distribute dietary supplements and food products. Defendant MARK

NUTRITIONALS, Inc.'s establishment is located at 13311 San Pedro, San Antonio, Texas 78216. Defendants advertise and sell their products directly to consumers in the Dallas-Fort Worth area.

19. Defendant SISKIND, individually, and Defendant D'ALESSANDRO, individually, are the sole officers, directors and shareholders of corporate Defendant MARK. Defendant PATTI MONTANA SISKIND, individually, is the Executive Vice President of corporate Defendant MARK and the spouse of Defendant SISKIND. As such, Defendants SISKIND, D'ALESSANDRO, and PATTI MONTANA SISKIND, have the responsibility for the overall management and oversight of corporate Defendant MARK, including compliance with all state and federal statutes regulating dietary supplements. As a result, Defendants SISKIND, D'ALESSANDRO, and PATTI MONTANA SISKIND, direct and control or have the authority to direct and control and have personal knowledge of the day-to-day activities of the company.

20. Defendant KAATS is the executive director and one of two shareholders of Defendant FOUNDATION formerly known as Health and Medical Research Foundation. Defendant KAATS aids corporate Defendant MARK in product evaluation and conducts ongoing research on the safety, efficacy and marketability of nutraceutical and dietary supplements. In addition, Defendant KAATS through Defendant FOUNDATION hires individuals on behalf of corporate Defendant MARK and at the direction of Defendant SISKIND to review customer complaints and problems, and to print the product labels.

#### **A. Defendants' Dietary Supplement Business and Products**

21. Since at least January of 1999, Defendants have engaged in the manufacture, distribution, advertising, promotion, offering for sale and sale of a purported weight loss product called Body Shaper and/or Body Solutions Evening Weight Loss Formula ("Evening Formula") to

consumers throughout the United States. Defendants market Evening Formula through radio and television advertising, via the Internet, and through other means. Consumers may order Evening Formula by calling a toll-free telephone number or by ordering over the Internet.

22. Evening Formula is a liquid product, the active ingredients of which have changed over time. Evening Formula's active ingredients currently include stevia, conjugated linoleic acid, and "proprietary blends" of chromium (as chromium picolinate, chromium polynicotinate, and chromium cruciferate), aloe vera gel, hydrolyzed collagen, chicory, plant teas, and amino acids (L-lysine, L-ornithine, L-arginine, L-carnitine, L-glycine and trimethylglycine). Evening Formula labeling instructs consumers to take one tablespoon (15 ml.) of the product with eight ounces of water before going to bed and at least three hours after consuming any food or liquid (other than Evening Formula and another of Defendants' products, Body Solutions Nutrition Spray).

23. Defendants have charged approximately \$48, plus shipping and handling, for one 15-ounce bottle of Evening Formula. One bottle is approximately one month's supply of the product. Defendants' advertising and marketing indicate that consumers must take the product for 60 to 90 days in order to see "results."

#### **B. Defendants' Products Are Mislabeled and Make False Health Claims**

24. This matter was referred to the ATTORNEY GENERAL by the Texas Department of Health ("TDH") for violations of the TFDC. TDH conducted inspections of Defendant MARK's facilities on August 23, 2002, and August 29, 2002. During its inspections, TDH observed that Defendant MARK's products, promotional literature, and internet website make false and misleading health or drug claims. TDH also observed that Defendant MARK's products have incomplete labeling and were misbranded.

### C. Defendants Deceptively Advertise their Product

25. To induce consumers to purchase Evening Formula, Defendants have disseminated or caused to be disseminated advertisements for the product on over 650 radio stations in 110 cities nationwide. Thirty- to sixty-second radio “spots” for Evening Formula in English and Spanish air daily on radio stations across the United States. Typically, the radio spots are “live reads” or taped spots by radio personalities who have used Evening Formula, and who purport to present their personal experience and/or the personal experience of other consumers who have used the product. The English radio spots contain, *inter alia*, the following statements and representations (The complete text of each English radio advertisement is attached as Exhibit A):

- A. “It helped me lose 36 pounds and it helps me maintain through the holidays. I mean, I ate so much over Thanksgiving, I still have turkey burps. But thanks to Body Solutions, I keep the weight off and now I’m ready for Christmas. So, bring it on, Grandma. The honey-baked ham, the apple pie, the Christmas cookies. I’m not afraid because I’ve got Body Solutions Evening Weight Loss Formula. . . . Get on the Body Solutions Evening Weight Loss Formula right now and you’ll be ready for Christmas.” (Jeff Kaye, KKMR, Dallas, TX, December 2000)
- B. “I’m on the way to 40 pounds of weight loss. I am at 18 pounds now. . . . And you can start losing weight just like I have, so what are you doing? Are you trying to get on a diet you don’t need to be worried about? Are you trying to go out to the gym five, six times a week? You don’t need to do that. Your solution to your weight loss is just like I have decided to do. It’s Body Solutions. One tablespoon at night three hours after your last meal and you’re gonna start taking off the pounds just as I did.” (Rudy V, KRNB, Dallas, TX, in or around June 2001)
- C. “Body Solutions Evening Weight Loss Formula is an all-natural solution, when taken every night on an empty stomach right before you go to bed, will help you to lose weight while you sleep. It’s that easy. No dangerous drugs, no diet, no side effects. Just the right combination of nutrients to help you build muscle and burn fat while you sleep.” (Charles Osgood, Westwood One Radio Network with over 400 affiliates nationwide, July 2001)

26. The Spanish-language radio spots for Evening Formula contain, *inter alia*, the following statements and representations (an English-language translation follows each quote) (The complete text both in Spanish and English of each radio advertisement is attached as Exhibit B):

- A. “Bien sencillo, Héctor, solamente con una cucharada sopera de Body Solutions diluído en ocho onzas de agua es suficiente para que tú bajes tallas, pierdas peso. Y ésto es durante la noche. Tú vas a perder peso durante la noche. Así que tómallo porque, ¿sabes qué? No hay ninguna necesidad de hacer una dieta especial o drástica, ni dramática, para perder de peso. No te mueras de hambre, mejor toma Body Solutions durante en la noche.”

(Translation: It's easy, Hector. Just one tablespoon of Body Solutions in eight ounces of water is enough for you to have to change your dress size and lose weight. And this happens during the night. You are going to lose weight during the night. So take it; do you know why? It requires no special, drastic nor dramatic diet in order to slim down. Don't kill yourself going hungry; it is better to take Body Solutions at bed time.) (unidentified radio personality)

- B. “¡Qué tal! Te saluda Pepe Duarte, el hombre mas feliz del mundo. . . . Aquí donde está precisamente el lugar en donde se vende el líquido milagroso de Body Solutions. . . . Solo deja de comer tres horas antes de irte a dormir y al acostarte tómate una cucharada de Body Solutions con un vaso de agua. Y a bajar de peso durmiendo. A mí me preguntan que si estoy enfermo, que si estoy ahí en el gimnasio todos los días. No. Yo simplemente como lo regular, pero antes de irme a acostar tres horas antes de dejar de comer. Y entonces al acostarme ahí estoy tomando mi Body Solutions. ¿El resultado? Ven a ver este cuerpo escultural que tenemos ahora con trece libras menos. Y sin exagerarte.”

(Translation: Hello there! This is Pepe Duarte, the most happy man in the whole world. . . . Here where we sell the magic liquid called Body Solutions. . . . You only need to stop eating three hours before retiring to bed; before bed time take one tablespoon of Body Solutions in a glass of water. And you'll lose weight while sleeping. A lot of people ask me if I am sick, or if I go every day to the gym. No! I simply eat as usual, but I stop eating food three hours before my bed time. And then when I am ready to go to bed I take my Body Solutions. The result? Come and look at my shapely body with thirteen pounds less. And we are not exaggerating.) (Pepe Duarte, KCOR, FM-95.1, San Antonio, Texas)

- C. “Pero principalmente queremos convencerte de que Body Solutions es el producto ideal para bajar de peso. Body Solutions, baja de peso mientras usted duerme. Es muy sencillo de tomarlo. Simplemente hágalo tres horas antes de que se vaya a dormir. Y al acostarse tómese una cucharada de Body Solutions con un vaso de agua. Así de sencillo y fácil. No tiene usted que andarse esmerando en dietas fuertes. Tampoco con ejercicios drásticos y mucho menos como, por ejemplo, estar allí en los gimnasios. Pero, no, no, no. Simplemente usted trabaja su vida normal y lo único que tiene que hacer es simplemente antes de irse a dormir, tres horas antes no comer nada y luego tomarse una cucharada de Body Solutions.”

(Translation: But, most of all, we want to convince you that Body Solutions is the ideal product to lose weight. Body Solutions, lose weight while you sleep. It's very easy to take. Take it simply three hours before bed time. And when you are ready to go to bed take a tablespoon of Body Solutions in a glass of water. It's easy and simple to take. You don't have to follow any diets, or go through drastic exercises nor, for example, go to the gym. No, no, no! Just continue with your normal life. The only thing you would do is simply before going to bed is to stop eating three hours before, and then you take a tablespoon of Body Solutions.) (Pepe Duarte, KCOR, FM-95.1, San Antonio, Texas)

- D. “A ustedes, chicos y chicas, si son de las personas que al igual que yo padecen del problema de peso. Que es difícil bajar de peso. Yo les recomiendo algo que, de verdad, es la solución. Body Solutions! . . . Trabaja mientras duermes. Yo en lo personal no lo siento como una dieta. Yo bajé más de diez libras y super-contenta porque ningún otro producto, ninguna otra dieta, me ha resultado como Body Solutions. Porque si acaso bajaba de peso, en cuanto lo dejaba de usar volvía a subir hasta el doble de lo que había perdido. Y Body Solutions ha cambiado mi vida porque ahora hasta visto diferente mi ropa, que la verdad que siempre quería usar y mas ahora que viene el verano. ¡A lucir buena figura!”

(Translation: To you, guys and gals, if you are people like me suffering from a weight problem. It's very difficult to lose weight. I recommend to you something that is truly the solution. Body Solutions! . . . It works while you sleep. Personally, I don't feel like I am on a diet. I already lost more than ten pounds and I am very happy because no other product nor diet has been so effective like Body Solutions. Because when I used to lose weight before, when I stopped, I regained double of what I lost before. And Body Solutions changed my life because now I can wear my different outfits, clothes that I wanted to use before. Especially now that summer is around the corner. Show-off a shapely body!) (Kelly Granados, New 106.5)

27. Defendants also advertise, promote and market Evening Formula via an Internet Website at [www.bodysolutions.com](http://www.bodysolutions.com). The Body Solutions website includes, *inter alia*, the following statements and representations:

- A. “Johnny Ramirez Lost: 56 pounds Kept Off: 6 months . . . Fat, according to Johnny Ramirez, is the enemy of Hispanics. . . . To date, Ramirez has dropped 56 pounds . . . using the Body Solutions Evening Weight Loss Formula . . . . The culprit for the weight problems of Texan Hispanics, says Ramirez, ‘. . . are all the wrong kinds of foods . . . the greasy and fried foods that we love . . . I’m one of them and they know I love the same foods they do. I’m one of the overweight Hispanics who works very hard at his job but who hates to work out.’ Ramirez hasn’t changed his diet but has curbed his late night eating tendencies. Despite dropping off the product for one six month period he has dropped from 287 pounds to 231 pounds. . . . ‘Some guy will say ‘hey . . . . Do you still love to eat?’ and of course they can see that I do because they are always bringing tacos and donuts to the broadcast booth.” (Johnny Ramirez)(10/22/01 web site)
  
- B. “Vernon Copp Lost: 70 pounds Kept Off: 10 months . . . ‘I was 290 pounds in the photo and I said ‘that’s it!’ he remembers. He began taking Body Solutions Evening Weight Loss Formula™ and set his sights on success. . . . ‘Nothing dramatic happened for about a month and a half and then all of a sudden, over two or three weeks, I lost 25 pounds,’ said Copp, who lost a grand total of 70 pounds in six months.” (Vernon Copp)(10/22/01 web site)
  
- C. “Chuck Davies Lost: 45 pounds Kept Off: 18 months . . . ‘I pretty much ate what I wanted . . . and took the night time product at least three hours after dinner, and right before I went to bed.’ . . . Chuck also watched what he ate for dinner . . . to accelerate the effects of the Evening Weight Loss Formula. . . . ‘I lost 17 pounds in the first month’ he says. ‘I could hardly believe it because I was never starving to death like I was on all the other diets I’d tried.” (Chuck Davies)(10/22/01 web site)
  
- D. “Body Solutions Evening Weight Loss Formula has helped thousands of people lose weight. Take it on an empty stomach at bedtime. The formula is a blend of collagen, aloe vera, trace minerals, and conjugated linoleic acid that allows your body to lose weight while helping it build lean.” (10/22/01 web site)

E. “Frequently Asked Questions . . .

Q: Do I have to diet and /or exercise when using this?

A: While diet and exercise will always be good for you, they are not required for your body to use the Body Solutions Evening Weight Loss Formula. The body is looking to repair itself every evening, and these are the tools it needs to build muscle and burn fat during this cycle . . .

Q: Is the weight going to come back after I stop using the Evening Formula?

A: Our products were specifically designed to be slow and gradual so that when the weight comes off it will stay off. The ‘bounce back’ or ‘Yo-Yo’ effect will not manifest itself . . .” (6/11/01 web capture)

F. “Users take the Evening Formula on an empty stomach immediately before going to sleep after not eating for at least three hours. This minimizes interference from the digestion and elimination of food, and maximizes absorption of its nutrients during sleep.” (10/22/01 web site)

G. “One tablespoon of the pleasant tasting, fruit flavored Weight Loss Formula on an empty stomach, (3-hrs after eating) ‘right before going to sleep’ provides the optimum utilization. A ‘fuel for the body’ at its prime time for healing & repair - the first 90-minutes of sound sleep.” (6/11/01 web capture)

H. “Evening Weight Loss Formula™ When taken on an empty stomach without eating at least 3 hours before going to sleep, clinical trials found people lost fat without losing lean and the more closely they followed the system, the more success they had.” (6/11/01 web capture)

I. “The Research Studies Mark Nutritionals has conducted more research in its first two years of operation than almost any nutritional company in America during its beginning years - 10 studies, 8 of which were clinical trials conducted by independent research teams. Taken together, these studies provide compelling evidence that, when used as instructed, the Body Solutions Weight Management System has minimal adverse side effects and can:

- Reduce excess body fat
- Maintain or enhance lean muscle mass . . .” (10/22/01 web site)

28. Defendants also advertise, promote and market Evening Formula through the use of product brochures. A June 1, 1999-product brochure for “Body Shaper,” an early name for the Evening Formula product, includes, *inter alia*, the following statements and representations (The complete text of the portion of the brochure discussing Body Shaper is attached as Exhibit C):

- A. “Body Shaper with Collagen CLA & Aloe Vera. A *natural product* that does not stimulate, starve, or trick the body into weight loss. This breakthrough formula feeds the body with a *collagen protein* supplement . . . This *previously unrecognized nutrient* has been shown to help . . .
  - Reduce body fat
  - Promote & protect lean muscle tissue
  - Improve the body’s use of nutrients
  - Perform as a powerful antioxidant”
- B. “I don't have the luxury of hours at a gym or exercise to slim down. After a month on the *Body Shaper* program, I don't have to. I've lost two dress sizes, sleep more soundly, and wake up rejuvenated & ready to seize the day!’  
Kim Vernie - Miami, FL”
- C. “Too busy for good health & nutrition? We have the solution . . . Body Shaper!”

29. Defendants also have aired thirty-second and sixty-second television advertisements on television stations. The television advertisements contain, *inter alia*, the following statements and representations in “testimonials”:

- A. “The most sensible way to do it - and still be able to eat what you want to eat. . . . You eat what you want to eat and still lose weight. . . . My favorite thing about it? . . . That I can eat what I want to eat and that I don’t have to exercise that much and it works while I’m sleeping. . . . [I’ve lost] 25 pounds.”
- B. “I eat all I want . . . whatever I want. . . . I’m 32 pounds lighter.”
- C. “It’s like a dream come true - it’s a miracle! . . .Where else can you eat all the foods that you love and still lose weight? . . . [I’ve lost] 41 pounds.”

The quoted testimonials appear in a 60-second television advertisement, produced by Defendant Siskind in October of 2000. Prominently superimposed over the videotaped endorsers is a “dancing” graphic representation of a bottle of Evening Formula.

## **X. VIOLATIONS OF THE DECEPTIVE TRADE PRACTICES ACT**

30. Based on the conduct alleged in the preceding paragraphs, Defendants have engaged in the manufacture and distribution of dietary supplements and food products and in the course and conduct of trade and commerce have directly and indirectly engaged in false, misleading, or deceptive acts and practices declared unlawful by §17.46(a) and (b) of the DTPA, including but not limited to the following:

- A. Defendants engaged in false, misleading, or deceptive acts or practices in the manufacture and distribution of dietary supplements and food products in violation of DTPA §17.46(a);
- B. Defendants engaged in false, misleading, or deceptive acts or practices within the meaning of §17.46(b) of the DTPA because:
  - i. They have represented that their goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not in violation of §17.46(b)(5) of the DTPA; and
  - ii. They failed to disclose information concerning goods or services which was known at the time of the transaction and failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered into had the information been disclosed in violation of §17.46(b)(24) of the DTPA.

## **XI. UNLAWFUL ACTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT**

### **A. Unsubstantiated Efficacy Representations**

31. Defendants, through their advertising and promotional materials, have represented

or caused to be represented, expressly or by implication, the following statements without possessing and relying upon a reasonable basis that substantiated those representations at the time the representations were made, as declared to be unlawful by §17.46(a) and (b) of the DTPA:

- A. Evening Formula will cause users to lose substantial weight without reducing calorie intake and/or increasing exercise;
- B. Evening Formula will cause users to lose substantial weight even if users eat substantial amounts of food high in fat and calories;
- C. Evening Formula will cause consumers to burn a substantial amount of body fat and build a substantial amount of lean muscle mass without reducing calorie intake and/or increasing exercise;
- D. Evening Formula, taken at bedtime and a minimum of three hours after last food consumption, will cause users to lose significantly more weight than they would lose simply by fasting for at least three hours before going to bed;
- E. Evening Formula will cause substantial weight loss; and
- F. Evening Formula will cause substantial long-term or permanent weight loss.

**B. False Representations Regarding Scientific and Clinical Studies**

32. Defendants, through their advertising and promotional materials, have represented, expressly or by implication, that Evening Formula is clinically proven to cause users (a) to lose substantial weight; (b) to burn a substantial amount of body fat; and (c) to build a substantial amount of lean muscle mass, without reducing calorie intake and/or increasing exercise.

33. In truth and in fact, Evening Formula is not clinically proven to cause users (a) to lose substantial weight; (b) to burn a substantial amount of body fat; and (c) to build a substantial amount of lean muscle mass, without reducing calorie intake and/or increasing exercise. Therefore, the making of the representations constitutes a deceptive practice, and the making of false advertisements, in violation of §17.46(a) and (b) of the DTPA.

## **XII. VIOLATIONS OF THE TEXAS FOOD, DRUG AND COSMETIC ACT**

34. Based on the conduct alleged above, Defendants have engaged in the manufacture and distribution of dietary supplements and food products and misbranded foods as follows:

- A. Foods held, stored, transported, packed and/or repacked by Defendant are deemed misbranded within the meaning of §431.082(a) of the TFDCA because the labeling is false or misleading and fails to conform with the regulations promulgated under the authority of the TFDCA in § 431.181.

## **XII. PROHIBITED ACTS UNDER THE TEXAS FOOD DRUG AND COSMETIC ACT**

35. Defendants have committed or caused to be committed the following acts prohibited and declared to be unlawful by § 431.021 of the TFDCA:

- A. Introducing into commerce food that is misbranded, in violation of § 431.021(a) of the TFDCA;
- B. Delivering for introduction into commerce food that is misbranded, in violation of § 431.021(a) of the TFDCA;
- C. The misbranding of any food in commerce, in violation of §431.021(b) of the TFDCA;
- D. The distribution in commerce of a consumer commodity, if such commodity is contained in a package, or if there is affixed to that commodity a label that does not conform to the provisions of the TFDCA in violation of §431.021(d) of the TFDCA;
- E. The dissemination of any false advertisement in violation of §431.021(f) of the TFDCA; and
- F. The manufacture within this state of food that is adulterated or misbranded, in violation of § 431.021(h) of the TFDCA.

## **XIII. RESTITUTION**

36. By means of the foregoing unlawful acts and practices, Defendants have acquired the money or other property of identifiable persons to whom such money or property should be restored,

or who in the alternative are entitled to an award of damages.

#### **XIV. APPLICATION FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION**

37. The STATE OF TEXAS alleges that Defendants are in violation of the laws of the STATE OF TEXAS, and unless immediately restrained by the Honorable Court, that Defendants' continued manufacture and distribution of dietary supplements and food products threatens immediate and irreparable injury to consumers and the general public. The ATTORNEY GENERAL requests a Temporary Injunction and Permanent Injunction as indicated in subsequent paragraphs.

#### **XV. PRESERVATION OF COMPANY RECORDS**

38. The State also asks that the records of Defendants should be conserved and preserved during the pendency of these legal proceedings. Unless the injunctive relief is granted, said records of Defendants may be dissipated, lost, altered, removed, or materially injured. The interests of the STATE OF TEXAS require a Temporary Injunction and Permanent Injunction in light of the harmful activities of Defendants.

#### **XVI. PUBLIC AND CONSUMER INJURY**

39. Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of Defendants' unlawful acts or practices. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief from this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

40. Further, by reason of the institution and continued operation of the acts and practices described herein above, Defendants have violated and will continue to violate the laws as alleged above. Defendants, unless restrained by this Honorable Court, will continue violating the laws of the STATE OF TEXAS and injury, loss, and damage will result to the STATE OF TEXAS and to the general public.

#### **XVII. THIS COURT'S POWER TO GRANT RELIEF**

41. Section 17.47(b), (c) and (d) of the DTPA, empowers this Court to grant injunctive relief, civil penalties, and such other relief as the Court may deem appropriate to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice.

42. Sections 431.047 and 431.0585 of the TFDCa empower this Court to grant injunctive relief, civil penalties, and reasonable expenses and attorneys' fees.

43. Section 402.006(c) of the TEX. GOV'T. CODE ANN. (Vernon 1990) empowers this court with the authority to grant Plaintiff the costs of Court, reasonable attorney fees and such other relief to which Plaintiff may be justly entitled.

#### **XVIII. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff THE STATE OF TEXAS prays that this Court as authorized by §17.47 of the DTPA and §§431.047 and 431.0585 of the TFDCa, and pursuant to its own equitable powers:

- A. Cite Defendants according to law to appear and answer herein;
- B. Temporarily enjoin Defendants from violating §17.46(a) and (b) of the DTPA after due notice and hearing;

- C. Temporarily enjoin Defendants from violating §431.021 of the TFDCA after due notice and hearing;
- D. Permanently enjoin Defendants, individually, and by their officers, agents, servants, employees, subsidiaries and any person acting in concert or participation with Defendants, upon final hearing, from violating §17.46(a) and (b) of the DTPA and from engaging in the following practices in the pursuit and conduct of trade or commerce within the STATE OF TEXAS as follows:
- (1) misrepresenting that Evening Formula will cause users to lose substantial weight without reducing calorie intake and/or increasing exercise;
  - (2) misrepresenting that Evening Formula will cause users to lose substantial weight even if users eat substantial amounts of food high in fat and calories;
  - (3) misrepresenting that Evening Formula will cause consumers to burn a substantial amount of body fat and build a substantial amount of lean muscle mass without reducing calorie intake and/or increasing exercise;
  - (4) misrepresenting that Evening Formula, taken at bedtime and a minimum of three hours after last food consumption, will cause users to lose significantly more weight than they would lose simply by fasting for at least three hours before going to bed;
  - (5) misrepresenting that Evening Formula will cause substantial weight loss;
  - (6) misrepresenting that Evening Formula will cause substantial long-term or permanent weight loss;
  - (7) misrepresenting, expressly or by implication, that Evening Formula is clinically proven to cause users (a) to lose substantial weight;
  - (8) misrepresenting, expressly or by implication, that Evening Formula is clinically proven to cause users to burn a substantial amount of body fat; and
  - (9) misrepresenting, expressly or by implication, that Evening Formula is clinically proven to cause users to build a substantial amount of lean muscle mass, without reducing calorie intake and/or increasing exercise.
- E. Permanently enjoin Defendants, individually, and by their officers, agents, servants, employees, subsidiaries and any person acting in concert or participation with Defendants, upon final hearing, from violating §431.021 of the TFDCA and from engaging in the following practices in the pursuit and conduct of trade or commerce within the STATE OF TEXAS as follows:

- (1) Introducing into commerce food that is misbranded, in violation of § 431.021(a) of the TFDCA;
  - (2) Delivering for introduction into commerce food that is misbranded, in violation of § 431.021(a) of the TFDCA;
  - (3) Misbranding any food in commerce, in violation of §431.021(b) of the TFDCA;
  - (4) Disseminating any false advertisement in violation of §431.021(f) of the TFDCA; and
  - (5) Manufacturing within this state food that is adulterated or misbranded, in violation of § 431.021(h) of the TFDCA.
- F. Award Plaintiff the STATE OF TEXAS civil penalties in the amount of \$2,000.00 per violation of the DTPA, not to exceed a total of \$10,000.00, as provided in §17.47(c) of the DTPA;
- G. Award Plaintiff the STATE OF TEXAS civil penalties in the amount of \$25,000.00 per day per violation of §431.021 of the TFDCA;
- H. Order each and every Defendant, jointly and severally, to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or, in the alternative, award judgment for damages to compensate for such losses;
- I. Order each and every Defendant, jointly and severally, to disgorge all monies taken from identifiable individuals through deceptive practices, including all ill-gotten gains and benefits or profits resulting from its violations of the DTPA;
- J. Award Plaintiff reasonable attorney fees and costs as provided in §431.047(d) of the TFDCA and § 402.006(c) OF THE TEX. GOV'T. CODE ANN.; and
- K. Grant such other and additional equitable relief as the Court may deem just and proper.

Respectfully submitted,

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