

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

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
	§	
<b>Plaintiff,</b>	§	
	§	
vs.	§	
	§	TRAVIS COUNTY, T E X A S
NATURE’S CANDY INC. d/b/a	§	
BENEFICIAL FOODS; MICHAEL	§	
DAVID ZYGMUNT; and TERESA	§	
ZYGMUNT,	§	
	§	
<b>Defendants.</b>	§	_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION, APPLICATION FOR TEMPORARY and  
PERMANENT INJUNCTION**

TO THE HONORABLE DISTRICT JUDGE:

COMES NOW, THE STATE OF TEXAS, acting by and through Attorney General Greg Abbott, complaining of NATURE’S CANDY, INC. d/b/a BENEFICIAL FOODS; MICHAEL DAVID ZYGMUNT; and TERESA ZYGMUNT (“Defendants”). For cause of action, Plaintiff respectfully shows the following:

**I. DISCOVERY PLAN**

**1.1** Under Texas Rule of Civil Procedure 190.3, discovery in this case is intended to be conducted as Level 2.

**II. AUTHORITY**

**2.1** This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the STATE OF TEXAS and in the public interest under the authority granted him by sections 431.060, 431.047, and 431.0585 of the

Texas Food, Drug and Cosmetic Act. See TEX. HEALTH & SAFETY CODE ANN. §§ 431.001-.415 (Vernon 2001 & Supp. 2008) (“TFDCA”).

**2.2** This action is also brought under the authority granted to the Attorney General by section 17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act. See TEX. BUS. & COM. CODE ANN. §§ 17.41 - .904 (Vernon 2002 & Supp. 2008) (“DTPA”). Defendants have engaged in false, misleading, or deceptive acts or practices in the course of trade and commerce as defined in, and declared unlawful by, DTPA sections 17.46(a) and (b).

### **III. DEFENDANTS**

**3.1** Defendant **NATURE’S CANDY, INC.** is a Texas corporation, doing business in this State as **BENEFICIAL FOODS**, located at 632 FM 2093, Fredericksburg, Texas 78624. Defendant may be served with process through its **Registered Agent: Michael David Zygmunt, Route 2, Box 217A, Fredericksburg, Texas 78624. SERVICE OF PROCESS IS HEREBY REQUESTED.**

**3.2** Defendant **MICHAEL DAVID ZYGMUNT** is president and director of **NATURE’S CANDY**. Defendant may be served at **Route 2, Box 217A, Fredericksburg, Texas 78624. SERVICE OF PROCESS IS HEREBY REQUESTED.**

**3.3** Defendant **TERESA ZYGMUNT** is secretary, treasurer and director of **NATURE’S CANDY**. Defendant may be served at **Route 2, Box 217A, Fredericksburg, Texas 78624. SERVICE OF PROCESS IS HEREBY REQUESTED.**

### **IV. VENUE**

**4.1** Under TFDCA sections 431.047(c) and 431.0585(d), venue of this action lies in Travis County, Texas.

**4.2** Under DTPA section 17.47(b), venue of this suit lies in Travis County, Texas.

## **V. PUBLIC INTEREST**

**5.1** Defendants have caused injury, loss and damage to the State of Texas and have caused adverse effects to legitimate business enterprises, lawfully conducting trade and commerce in this State. The State of Texas is of the opinion that these proceedings are in the public interest.

## **VI. ACTS OF AGENTS**

**6.1** Whenever in this Petition it is alleged that Defendants did any act, it is meant that:

A. Defendants performed or participated in the act; or

B. Defendants' officers, agents, or employees performed or participated in the act on behalf of, and under the authority of, one or more of the Defendants.

## **VII. TRADE AND COMMERCE**

**7.1** At all times described below, Defendants have engaged in conduct which constitutes "trade" and "commerce," as those terms are defined by DTPA section 17.45(6).

## **VIII. NOTICE BEFORE SUIT**

**8.1** On or about 6-9-06, 1-9-07, 6-12-07, 1-23-08, and 8-20-08, Defendants were notified of the alleged unlawful conduct described below.

## **IX. STATEMENT OF FACTS**

**9.1** Defendants market and sell Omega-3 Uplift nutritional bars as a way to cure, mitigate, treat, and/or prevent diseases, illnesses, and/or serious conditions, despite the fact that Defendants' marketing violates both federal and state food and drug laws, as well as the DTPA.

**9.2** Defendants’ products are regulated as food under TFDCA Chapter 431. Under the TFDCA, representations or claims that foods can cure, mitigate, treat, or prevent disease may not be legally made. Only drugs approved by the Federal Food and Drug Administration (“FDA”) may legally be claimed as having uses to cure, mitigate, treat, or prevent disease. The FDA has not approved any new drug applications for Defendants’ products. So, Defendants cannot legally market any of their products using claims that their products can cure, treat, mitigate, or prevent disease.

**9.3** Despite the lack of FDA approval for Defendants’ products, Defendants employ their illegal and deceptive marketing for monetary gain. To further sales, Defendants make disease claims, directly or indirectly, on their websites and on written materials such as product labels and boxes. Defendants market their nutritional bars on their websites, [www.beneficialfoods.com](http://www.beneficialfoods.com) and [www.naturescandystore.com](http://www.naturescandystore.com). They include a quote on the first page of one website, “[l]et food be your medicine and medicine be your food.” Defendants make the following additional claims on their websites:

**A.** “We are developing all natural food products that nutritionally address specific health issues.”

**B.** “The Low Carb Omega-3 Uplift Bar is specifically formulated to help you nutritionally gain and maintain proper brain health. It can nutritionally help to prevent and combat depression.”

**C.** “Like the Original Omega-3 Uplift Bar, it also has the same proportions of nuts and seeds containing the essential brain nutrient Tryptophan, necessary for the brain to produce serotonin, an important neuro-transmitter. It also contains Folic Acid and Vitamin B-12

in the same proportions as the Original. Folic Acid has been shown not only to be an important nutritive factor for proper brain health, but also in helping to prevent Alzheimer's disease. Vitamin B-12 has also proven to be a small but essential component of a healthy brain. These essential nutrients can work together in a synergistic way.”

**D.** “The Omega-3 Uplift Bar has been specifically developed to provide your body with the raw materials necessary to gain and maintain proper brain health. . . . Brain nutrition is a factor in depression. Please consider: 1 in 16 Americans suffers with depression, and anti-depressant sales are up 800% since 1990. A diet high in Omega-3 decreases the risk of depression. Omega-3 is found in flax seeds, walnuts, and almonds. The Omega-3 Uplift Bar has all three!!! Low Serotonin levels are linked to depression and the brain needs the raw material Tryptophan to make Serotonin. Tryptophan is found in pumpkin seeds, sesame seed, and almonds. The Omega-3 Uplift Bar has all three!! Insufficient levels of Folic Acid can cause depression and Vitamin B-12 deficiency symptoms include frequent forgetfulness and depression. The Uplift bar is fortified with Folic Acid and Vitamin B-12!”

See Exhibit A (attached hereto and incorporated as if set out in full).

**9.4** Defendants also make health claims on the labels of the nutrition bars, such as the Omega -3 nutritional bar labels, providing:

- A.** “Nutrition for the brain.”
- B.** “This bar is endorsed by Neil Nedley, M.D.”
- C.** “OMEGA -3”
- D.** “*Uplift* <sup>vegan</sup>”
- E.** “Feed Your Brain”

F. “The brain is the control center for the entire body and proper brain nutrition is essential for maintaining a sense of well-being. Please notice the abundance of power packed seeds in this bar. Seeds are the beginning of life and contain powerful nutrients for the brain.”

G. “Beneficial Foods has developed this bar to provide your body with the 4 essential brain nutrients identified by science: Omega-3, Tryptophan, (as found naturally in nuts and seeds), Folic Acid, and Vitamin B-12 . . . .” See Exhibit B (attached hereto and incorporated as if set out in full).

9.5 The Omega -3 Low Carb Alternative nutritional bar labels also make illegal claims. See Exhibit C (attached hereto and incorporated as if set out in full).

9.6 Defendants make the following representations through testimonials located on one of their websites:

A. “[T]hey are the best nutritional bars I have ever eaten! Not only that but I have noticed a change in how I feel!”

B. “My husband, son and I have been saved from many a mood disaster when on the road and delayed away from food . . . by your Uplift Bar!”

C. “What I was most pleased about, however, was the taste and physical and/or emotional effects that carry me through my workday until the evening meal!”

See Exhibit A (attached hereto and incorporated as if set out in full).

## **X. REGULATION BY TEXAS DEPARTMENT OF STATE HEALTH SERVICES**

10.1 Since 1993, Defendant NATURE’S CANDY, INC. has been licensed as a food manufacturer by the Texas Department of State Health Services (“TDSHS”)(or its predecessor entity, the Texas Department of Health) and began manufacturing and selling the Omega-3

Uplift bars under the assumed name “Beneficial Foods.” In 2007, Defendant was subsequently licensed by the TDSHS to manufacture food under the name “Beneficial Foods.”

**10.2** Defendants’ regulatory history demonstrates that they are aware that it is illegal to make any claims that the nutrition bars can cure, treat, mitigate, or prevent diseases. In fact, Defendants have been repeatedly notified by the TDSHS that their conduct contravenes both state and federal law. Despite these warnings, Defendants have continued to engage in the illegal conduct.

**10.3** Six times in the last two and a half years (4-7-06, 11-20-06, 4-10-07, 1-16-08, 1-23-08, and 8-20-08), the TDSHS inspected Defendants’ facility manufacturing the Omega-3 Uplift bar. After each inspection, the TDSHS notified Defendants of their violations, including the illegality of the health claims being made for the nutritional bars, yet Defendants failed to correct these violations. Ultimately, the TDSHS detained the misbranded items found at Defendants’ facility and instructed that these misbranded items could not be moved or sold without violating the law. See Exhibit D (attached hereto and incorporated as is set out in full).

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

**11.1** Plaintiff incorporates the preceding paragraphs, as if set forth in full.

### **DRUG CLAIMS:**

**11.2** By representing their products as curing, mitigating, treating, or preventing disease, Defendants’ products are considered “drugs” under TFDCa section 431.002(14). “Drugs” not generally recognized as safe and effective for their intended use are “new drugs” under TFDCa section 431.002(25). New drugs must be approved by the FDA before they may be marketed. The FDA has not approved any new drug applications for Defendants’ products.

**11.3** A drug is deemed to be misbranded unless its labeling bears adequate directions for use, or the drug has been exempted from those requirements by regulations adopted by the Secretary of the United States Department of Health and Human Services. See TFDCA § 431.112(c)(1). Defendants’ products are misbranded under the TFDCA.

**11.4** Defendants advertise and sell “drugs” that fail to bear adequate directions for their intended uses because adequate directions for use by a layperson cannot be written for an unapproved drug under the terms of TFDCA section 431.112(e)(1). See also 21 C.F.R. § 201.5. By selling, delivering, offering for sale, holding for sale, or giving away any new drug without an FDA-approved new drug application, Defendants have violated TFDCA sections 431.114(a)(1) and 431.021(e).

**11.5** TFDCA section 431.021(a) and (b) prohibits introducing or delivering any misbranded drug into commerce, or causing such introduction or delivery. Defendants have violated this statute.

**11.6** Defendants’ representations concerning their products constitute “advertising.” See TFDCA § 431.002(1). Advertising unapproved “new drugs” is misleading and false, violating TFDCA section 431.182.

**FOOD CLAIMS:**

**11.7** In the alternative, Defendants’ products are foods within the meaning of TFDCA section 431.002(16). As foods, Defendants’ labels fail to comply with TFDCA sections 431.082(a), 431.082(t), 431.082(u), and 21 C.F.R. section 101.9(c)(2)(ii)(required nutritional information).

SPECIFIC VIOLATIONS:

**11.8** Defendants have violated the following specific provisions of the TFDCA:

**A.** Introducing or causing the introduction into commerce a misbranded drug, violating TFDCA section 431.021(a);

**B.** Introducing or causing the introduction into commerce a misbranded food, violating TFDCA section 431.021(a);

**C.** Misbranding any drug in commerce, violating TFDCA section 431.021(b);

**D.** Misbranding any food in commerce, violating TFDCA section 431.021(b);

**E.** Distributing or causing the distribution into commerce of a consumer commodity with a non-conforming label, violating TFDCA section 431.021(d);

**F.** Introducing or causing the introduction into commerce of an unapproved new drug, violating TFDCA section 431.021(e);

**G.** Falsely advertising drugs, violating TFDCA section 431.021(f);

**H.** Falsely advertising foods, violating TFDCA section 431.021(f);

**I.** Manufacturing misbranded drugs, violating TFDCA section 431.021(h); and

**J.** Manufacturing misbranded food, violating TFDCA section 431.021(h).

**XII. VIOLATIONS OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT**

**12.1** Plaintiff hereby incorporates the preceding paragraphs as if set forth in full.

**12.2** Defendants have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful by DTPA section 17.46(a). Defendants have violated the following additional provisions of the DTPA:

A. Causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods (DTPA section 17.46(b)(2));

B. Causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another (DTPA section 17.46(b)(3));

C. Representing that goods have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have (DTPA section 17.46(b)(5));

D. Representing that goods are of a particular standard, quality or grade, if they are of another (DTPA section 17.46(b)(7));

E. Advertising goods with intent not to sell them as advertised (DTPA section 17.46(b)(9)); and

F. Failing to disclose information concerning goods which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed (DTPA section 17.46(b)(24)).

### **XIII. INJURY TO CONSUMERS**

**13.1** By means of the foregoing unlawful acts and practices, Defendants have acquired money or other property from identifiable persons to whom such money or property should be restored, or who in the alternative are entitled to an award of damages.

### **XIV. NO FEDERAL CLAIMS**

**14.1** No claims are hereby asserted under any Federal statutes or under the U.S. Constitution, and Plaintiff is not seeking any relief under Federal law.

## **XV. CONDITIONS PRECEDENT**

**15.1** All conditions precedent to Plaintiff's right to recover and Defendants' liability have occurred or have been waived.

## **XVI. PRAYER**

**16.1** Because Defendants have engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the law as alleged in this Petition. Unless enjoined by this Honorable Court, Defendant will continue to violate the laws of the State of Texas.

**16.2 WHEREFORE, PREMISES CONSIDERED,** Plaintiff prays that Defendants be cited according to law to appear and answer herein; and upon notice and hearing a Temporary and Permanent Injunction be issued, restraining and enjoining Defendants, Defendants' officers, agents, employees, attorneys, and any other persons in active concert or participation with Defendants from engaging in the following conduct:

**A.** Selling, marketing, promoting, distributing, and/or advertising any foods or drugs by representing, expressly or by implication, that the product can cure, treat, mitigate, or prevent any disease or illness;

**B.** Causing confusion or misunderstanding as to the sponsorship or approval of Defendants products by the FDA or the TDSHS;

**C.** Causing confusion or misunderstanding as to certification of Defendants' products by the FDA or the TDSHS;

**D.** Representing that Defendants' products have health characteristics, uses or benefits which they do not have;

**E.** Representing that Defendants' products are of a particular standard or quality, when they are not;

**F.** Introducing or causing the introduction of a new drug into commerce that has not been approved by the FDA;

**G.** Misbranding, introducing, or causing the introduction of a misbranded drug or food into commerce;

**H.** Falsely advertising a drug or food;

**I.** Manufacturing a drug or food that is misbranded; or

**J.** Distributing or causing the distribution into commerce of a product with a label not conforming to law.

**16.3** Plaintiff further prays that Defendants be cited according to law to appear and answer herein; and upon notice and hearing a Temporary and Permanent Injunction be issued, compelling Defendants, Defendants' officers, agents, employees, attorneys, and any other persons in active concert or participation with Defendants to do the following:

**A.** Remove all claims and testimonials that Beneficial Foods nutritional bars can cure, treat, mitigate, or prevent any disease from all of Defendants' websites, promotional materials, and advertisements;

**B.** Disclose that Defendants' nutritional bars are not approved by FDA to cure, treat, mitigate, or prevent disease; and

**C.** Disclose that FDA has not determined that Defendants' nutritional bars are safe and effective to cure, treat, mitigate, or prevent disease and that such claims are illegal to make for nutritional bars.

**16.4** Plaintiff further prays that upon final hearing this Court order Defendants to pay civil penalties in favor of the STATE OF TEXAS in the amount of \$25,000.00 per day for each violation of TFDCA section 431.021.

**16.5** Plaintiff further prays that upon final hearing this Court order Defendants to pay civil penalties in favor of the STATE OF TEXAS in the amount of up to \$20,000.00 per violation of the DTPA.

**16.6** Plaintiff further prays that upon final hearing this Court order Defendants to destroy all products that were manufactured, adulterated, or misbranded. See TFDCA §§ 431.021, 431.051.

**16.7** Plaintiff further prays that upon final hearing this Court order that Defendants restore all money or other property taken from persons by means of unlawful acts or practices or, in the alternative, award judgment for damages to compensate for such losses.

**16.8** Plaintiff further prays that upon final hearing this Court order Defendants to pay to the STATE OF TEXAS attorney fees and costs of court. See TEX. GOVT. CODE § 402.006(c) (Vernon 2005 & Supp. 2008).

**16.9** Plaintiff further prays that upon final hearing this Court order Defendants to pay Plaintiff's and the TDSHS's reasonable expenses incurred in obtaining injunctive relief, including investigative costs, court costs, reasonable attorneys' fees, witness fees, and deposition expenses. See TFDCA § 431.047(d).

**16.10** Plaintiff further prays that upon final hearing this Court grant all other relief, at law or in equity, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

JEFF L. ROSE  
Deputy First Assistant Attorney General

PAUL D. CARMONA  
Assistant Attorney General  
Chief, Consumer Protection and Public Health Division

---

GLORIA SALINAS  
Assistant Attorney General  
Consumer Protection and Public Health Division  
State Bar No. 17534300  
300 W. 15<sup>th</sup> Street  
Austin, Texas 78701  
(512) 463-2070  
(512) 473-8301 (FACSIMILE)

**Attorneys for the State of Texas**