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10 *Attorneys for Plaintiff*  
11 *and the Putative Classes*

12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 **Les Ferguson**, individually and on behalf  
15 of all others similarly situated,

16 Plaintiff,

17 v.

18 **CVS Pharmacy, Inc.**,

19 Defendant.

20 Case No: '18CV1529 JLS MDD

21 **CLASS ACTION COMPLAINT FOR:**

22 **1. Misleading and Untrue**  
23 **Advertising (Cal. Bus. & Prof. Code §§**  
24 **17500, et seq.);**

25 **2. Violation of the Consumer**  
26 **Legal Remedies Act (Cal. Civ. Code §§**  
27 **1750, et seq.);**

28 **3. Unfair Business Practices (Cal.**  
**Bus. & Prof. Code §§ 17200, et seq.)**

**4. Fraudulent Business Practices**  
**(Cal. Bus. & Prof. Code §§ 17200, et**  
**seq.)**

**5. Unlawful Business Practices**  
**(Cal. Bus. & Prof. Code §§ 17200, et**  
**seq.)**

**JURY TRIAL DEMANDED**

1 Les Ferguson (“Plaintiff”), on behalf of himself and others similarly situated  
2 (the “Class”), based on the investigation of counsel and his own individual  
3 knowledge as to Plaintiff’s own circumstances, hereby brings this Complaint  
4 against CVS Pharmacy, Inc. (“Defendant” or “CVS”), as follows:

5 **I. INTRODUCTION**

6 1. Plaintiff brings this proposed class action seeking damages and injunctive  
7 relief from Defendant CVS for its unlawful, unfair, and deceptive practices in the  
8 marketing and sale of Algal-900 DHA (the “Product” or “Algal-900 DHA”). CVS  
9 sells the Product on its website and in thousands of its retail stores nationwide.

10 2. CVS manufactures and sells Algal-900 DHA as a dietary supplement,  
11 promoting it—in bolded letters on its primary display panel and packaging—as  
12 “clinically shown to improve memory,” and as the only DHA form with clinical proof  
13 of efficacy, capable of reducing errors “50% or more” in an “episodic memory test.”

14 3. CVS’s submissions about Algal-900 DHA are false and misleading.  
15 Comprehensive, high-quality, clinical studies of adults’ cognitive performance have  
16 shown that omega-3 fatty acids, including DHA, work no better than a placebo. In a  
17 2014 report published in a top peer-reviewed clinical nutrition journal, researchers  
18 conducted an extensive meta-analysis of 34 randomized, controlled trials of omega-3  
19 fatty acids involving 12,999 subjects, and concluded that omega-3 fatty acids “do not  
20 improve cognitive performance in children, adults, or the elderly.” Moreover, a five-  
21 year NIH study of older adults, published in 2015, found that omega-3 fatty acid  
22 supplements “[do] not have a statistically significant effect on cognitive function.”  
23 The agency states that “substantive conclusions about the value of [omega-3 fatty  
24 acids] cannot be drawn.”

25 4. The sole study on which CVS relies for its submission that Algal-900  
26 DHA improves memory is a limited, short-term study conducted by in-house  
27 scientists of Martek Biosciences Corporation (“Martek”), a dietary supplements  
28

1 manufacturer. The Federal Trade Commission has concluded that this study does not  
2 support claims that DHA improves memory, and has prohibited Martek from making  
3 memory claims based on this study. Still, CVS relies exclusively on this study for its  
4 claims that Algal-900 DHA improves memory.

5 5. Plaintiff Les Ferguson purchased CVS's Algal-900 DHA, and found that  
6 it did not perform as advertised. He would not have purchased the Product had he  
7 been aware that it has no clinically proven effect on memory and cognitive  
8 performance in adults.

9 6. Plaintiff seeks an order enjoining CVS from continuing its false and  
10 misleading marketing practices with regard to Algal-900 DHA, and providing Plaintiff  
11 and the proposed Classes of purchasers (as defined below) with all compensation  
12 available under the law.

## 13 **II. JURISDICTION AND VENUE**

14 7. This Court has jurisdiction over this action under the Class Action  
15 Fairness Act, 28 U.S.C. § 1332(d). The total amount in controversy exceeds  
16 \$5,000,000, exclusive of interests and costs, the number of members of the proposed  
17 Class is 100 or more, and at least one member of the Class is a citizen of a state  
18 different from the defendant.

19 8. Venue is proper in this District under 28 U.S.C. § 1391, because a  
20 substantial part of the events and misrepresentations giving rise to the claims occurred  
21 in this District, Plaintiff Ferguson resides in this District, and Plaintiff Ferguson  
22 purchased CVS's Algal-900 DHA in this District.

## 23 **III. PARTIES**

24 9. Plaintiff Les Ferguson is a resident of San Diego County, California.  
25 During the Class Period (defined below), Plaintiff purchased Algal-900 DHA for  
26 personal use from a CVS retail location in San Diego, California.

1           10. Defendant CVS Pharmacy, Inc. is a corporation organized and existing  
2 under the laws of the State of Delaware, with its principal place of business at One  
3 CVS Drive, Woonsocket, Rhode Island. CVS is a public company engaged in the  
4 retail sale of prescription drugs, supplements, and general merchandise. It has  
5 approximately 9,800 retail locations in the United States. CVS also sells products  
6 online at www.cvs.com.

7           11. Defendant, directly and through its agents, sells Algal-900 DHA  
8 throughout the United States, including in the state of California. Defendant is the  
9 registered marketer, retailer, and distributor of Algal-900 DHA, and created and  
10 disseminated the false and misleading labels for the Product.

11 **IV. FACTUAL BACKGROUND**

12 **A. Omega-3 Fatty Acids**

13           12. Omega-3 fatty acids are long-chain, polyunsaturated fatty acids (PUFA).  
14 There are three main omega-3 fatty acids: alpha-linolenic acid (ALA),  
15 eicosapentaenoic acid (EPA), and docosahexaenoic acid (DHA). ALA is found  
16 mainly in plant oils such as flaxseed, soybean, and canola oils. While, DHA and EPA  
17 are found in fish and other seafood.

18           13. Generally, Omega-3 fatty acids are not able to be produced by the body.  
19 ALA is an essential fatty acid, meaning that the human body cannot make it, so  
20 individuals must get ALA from the foods and beverages you consume. The human  
21 body can convert some ALA into EPA and then to DHA, but only in very small  
22 amounts. Therefore, getting EPA and DHA from foods (and dietary supplements) is  
23 the only practical way to increase levels of these omega-3 fatty acids in your body.

24           14. Nevertheless, Omega-3 fatty acids are contained in substantial amounts  
25 in a variety of foods, including fish, vegetables, vegetable oils, and nuts. Accordingly,  
26 supplementation of Omega-3 fatty acids is often not required. For example, the  
27 National Institutes of Health (“NIH”), Office of Dietary Supplements) notes that  
28

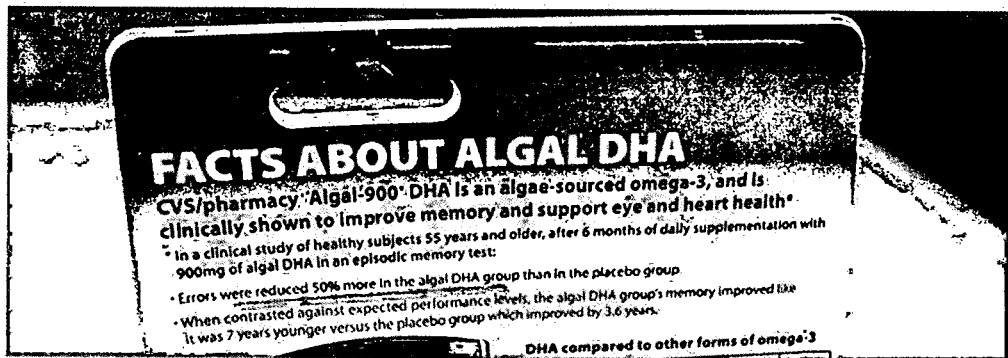
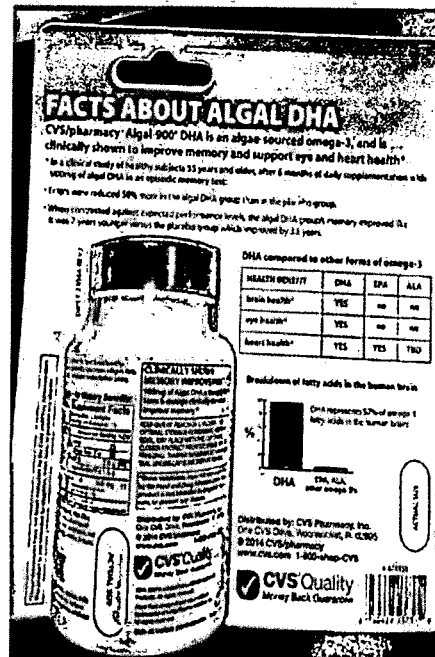
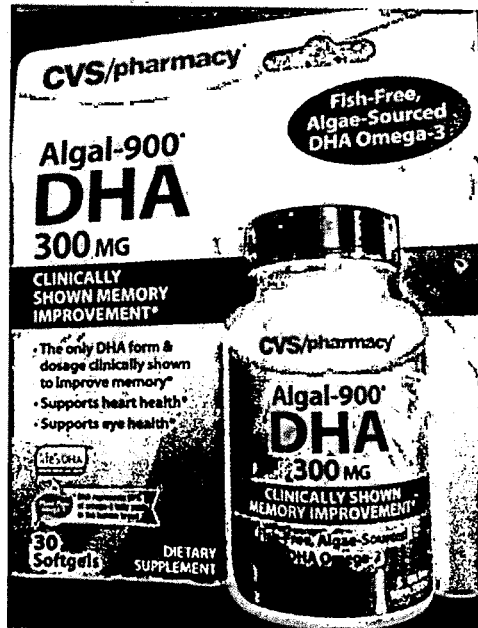
1 children (depending on age and gender) only require between .5 grams and 1.6 grams  
2 of ALA per day and adults need between 1.1 grams and 1.6 grams per day. Thus,  
3 NIH states that individual can get adequate amounts of omega-3s by eating a variety  
4 of foods and that Omega-3 deficiency is very rare in the United States.

5 15. It should also be noted, that recommended amounts of EPA and DHA  
6 have not been established and the U.S. Food and Drug Administration (“FDA”)  
7 recommends consuming no more than 3 g/day of EPA and DHA combined, including  
8 up to 2 g/day from dietary supplements as it may cause health problems.

9 **B. CVS’s Algal-900 DHA Labeling**

10 16. CVS manufactures and markets its Algal-900 DHA dietary supplements.  
11 As per the supplement’s instructions, CVS recommends that individuals take 900 mg  
12 of DHA per day. This is a relatively large amount as most individuals only need  
13 between 500 mg to 1.6 grams per day.

14 17. CVS’s Algal-900 DHA is not inexpensive, it is often sold for more than  
15 thirty dollars for a 30 day supply. CVS commands this price by aggressively  
16 marketing its Algal-900 DHA as a treatment for memory improvement and brain  
17 health. On the front and back of the package, CVS claims that Algal-900 DHA offers  
18 “CLINICALLY SHOWN MEMORY IMPROVEMENT.” On the front of the package  
19 CVS advertises that Algal-900 DHA is “[t]he only DHA form & dosage clinically  
20 shown to improve memory” and makes similar claims on the back of the package and  
21 the bottle:  
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18. CVS repeats this message on the back of the label and adds more specific statements:

**CVS/pharmacy Algal-900\* DHA is an algae-sourced omega-3, and is clinically shown to improve memory and support eye and heart health\***

**\* In a clinical study of healthy subjects 55 years and older, after 6 months of daily supplementation with 900mg of algal DHA in an episodic memory test:**

**• Errors were reduced 50% more in the algal DHA group than in the placebo group.**

- When contrasted against expected performance levels, the algal DHA's group memory improved like it was 7 years younger versus the placebo group which improved by 3.6 years.

19. Charts and tables on the back of the package imply that the Product is an essential supplement for proper brain functioning, and superior to other omega-3 products. The packaging reads that "DHA represents 97% of omega-3 fatty acids in the human brain!"

### C. CVS's Claims About Algal-900 DHA Are False and Misleading

20. CVS's Algal-900 DHA claims are false and misleading because they rely on a small, limited study that has been discredited. Rather, an overwhelming body of research finds no clinical effect of DHA on memory. CVS's claims also violate federal disclaimer regulations, rendering the Product misbranded, false, and misleading.

#### 1. The FTC Has Concluded that the One Study Relied on by CVS for Its Algal-900 DHA Claims Does Not Support Such Claims

21. The sole study on which CVS relies in support of its Algal-900 DHA claims is titled "Beneficial effects of docosahexaenoic acid on cognition in age-related cognitive decline" by Karin Yurko-Mauro et al., also known as the "MIDAS Study."<sup>1</sup> This study purports to show that DHA supplements improve learning and memory function in subjects with age-related cognitive decline.

22. The Federal Trade Commission (FTC), however, has already concluded that the MIDAS study does "not reveal any improvement in working memory" and that "clinical-proof claims [based on the study] are false and misleading."<sup>2</sup> The FTC also noted that the study's principal investigator and author was an employee of Martek, which funded the study for the purpose of promoting its own DHA product,

<sup>1</sup> The full citation for the article is: Karin Yurko-Mauro, Beneficial Effects of Docosahexaenoic Acid on Cognition in Age-Related Cognitive Decline, 6 *Alzheimer's & Dementia* 456 (2010).

<sup>2</sup> FTC, *Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill: In the Matter of i-Health, Inc. and Martek Biosciences Corp.* (June 6, 2014), available at <https://goo.gl/BdKT70> (viewed Jan. 29, 2016).

1 “BrainStrong Adult.” The FTC entered a consent decree with Martek, banning it from  
2 basing memory claims on the MIDAS study. In announcing the action, the FTC  
3 stated:

4 Results [from test subjects performing episodic memory  
5 tasks] . . . did not yield a pattern of statistically and clinically  
6 significant improvement in the DHA group relative to the  
7 placebo group. Whether analyzed separately or as a  
8 composite, the effect size of any statistically significant,  
9 between-group difference was trivial, and no evidence  
10 showed that any such difference correlated with  
improvement in everyday episodic memory tasks outside the  
laboratory, such as the ability to remember the location of  
one’s sunglasses or why one entered a room.<sup>3</sup>

11 23. In the subsequent consent decree and accompanying FTC order, the FTC  
12 enjoined Martek and its partner company, i-Health, from making any memory  
13 improvement and cognitive decline claims, absent “competent and reliable scientific  
14 evidence” that held up “in light of the entire body of relevant and reliable scientific  
15 evidence, to substantiate that the representation is true.”<sup>4</sup> The FTC also enjoined  
16 Martek and i-Health from misrepresenting the results of the MIDAS study, including  
17 through the use of the phrases “clinically shown” or “clinically proven.” Martek  
18 quickly took “BrainStrong Adult” off the market after entry of the Consent Decree.  
19 Martek no longer promotes any DHA products as improving memory in adults.

20 24. Despite these findings, CVS makes the same false and misleading claims  
21 about the cognitive health benefits of its DHA supplement, and relies on the very  
22 same MIDAS study that the FTC has unequivocally rejected as a basis for such  
23 claims.

26 <sup>3</sup> *i-Health, Inc. & Martek Biosciences Corp.*, No. C-4486, available at  
27 <https://goo.gl/ERTkEP> (viewed Jan. 29, 2016).

28 <sup>4</sup> *i-Health, Inc. & Martek Biosciences Corp.*, No. C-4486 (F.T.C. Aug. 21, 2014),  
available at <https://goo.gl/ERTkEP> (viewed Jan. 29, 2016).