

1 **DEAN D. FLIPPO**
Monterey County District Attorney
2 **ANNE M. MICHAELS (SBN 136134)**
3 Managing Deputy District Attorney
4 **ROBERT J. LAUCLAN, JR. (SBN 118584)**
Deputy District Attorney
5 1200 Aguajito Road, Room 301
6 Monterey, California 93940
Telephone: (831) 647-7770 Facsimile: (831) 647-7762

FILED
MAY 26 2011

CONNIE MAZZEI
CLERK OF THE SUPERIOR COURT
M. OLIVEREZ, DEPUTY

7 **PRESTON DuFAUCHARD**
California Corporations Commissioner
8 **ALAN S. WEINGER**
9 Deputy Commissioner
10 **JOAN E. KERST (SBN 123351)**
Senior Corporations Counsel
11 Department of Corporations
12 One Sansome Street, Suite 600
San Francisco, CA 94104
13 Telephone: (415) 972-8547

CASE MANAGEMENT CONFERENCE
DATE: 9-30-11
TIME: 9:00 A.M.
PLACE: Courtroom 15, 2nd Floor
1200 Aguajito Rd., Monterey, CA 93940

14 Attorneys for Plaintiff, THE PEOPLE OF THE STATE OF CALIFORNIA

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **FOR THE COUNTY OF MONTEREY**

17
18 THE PEOPLE OF THE STATE OF
CALIFORNIA,

19 Plaintiff,

20 v.

21 TRU-LIGHT CORPORATION, a Nevada
22 corporation; DAVID WARREN BARTH, an
23 individual; MELLEN-THOMAS
24 BENEDICT, an individual; and DOES 1
through 100 inclusive,

25 Defendants.

DA CF NO.: CF03-0397
DA CASE NO.: COM ???
CIVIL CASE NO.: M112396

26
27 COMPLAINT FOR CIVIL PENALTIES
28 AND EQUITABLE RELIEF

//

//

1 **JURISDICTION AND VENUE**

2 1. DEAN D. FLIPPO, as District Attorney of the County of Monterey (the “District
3 Attorney”), acting to protect the public from unfair competition, including unlawful, unfair and
4 fraudulent business acts and practices; unfair, deceptive, untrue and misleading advertisements
5 and statements; and other prohibited acts, conduct and practices, brings this action in the public
6 interest in the name of the PEOPLE OF THE STATE OF CALIFORNIA (the “PEOPLE” or
7 “PLAINTIFF”). The authority of the District Attorney to bring this action is derived from
8 statutory law of the State of California, such as *California Business & Professions Code* §§
9 17200, 17203, 17204, 17206, 17500, 17535 and 17536; and, specifically, *California Business &*
10 *Professions Code* §§ 17204 and 17206(a). Under said statutes, the District Attorney seeks
11 remedies such as injunctive relief, civil penalties and restitution.

12 2. Acting to protect the public from unlawful and fraudulent securities transactions in
13 violation of the California Corporate Securities Law (*California Corporations Code* §§ 25000 et
14 seq.), PRESTON DuFAUCHARD, the California Corporations Commissioner, joins this action
15 pursuant to *California Corporations Code* § 25530 and *California Government Code* §§ 11180
16 et seq. in his capacity as head of the California Department of Corporations.

17 3. At all times mentioned herein, Defendants and each of them have transacted business
18 within the County of Monterey, other counties within the State of California, and other states
19 within the United States. The violations of law described herein are harmful to the rights and
20 interests of the general public as consumers. Said violations have occurred, and will continue to
21 occur, unless enjoined.

22 **LACK OF DIVERSITY JURISDICTION**

23 4. The claims in this case are based on and are directed at violations of California law. At
24 relevant times, DEFENDANTS were citizens and residents of California, were based and had
25 their primary place of business in California, and committed the acts complained of herein in
26 California. This case is not removable to federal court because it does not involve any federal
27 question and a state is not a citizen for purposes of diversity jurisdiction and therefore cannot be
28 sued in a diversity action. *Navarro Sav. Ass’n v. Lee* (1980) 446 U.S. 458, 460-61 [100 S.Ct.

1 1779, 64 L.Ed.2d 425]; *Moor v. Alameda County* (1973) 411 U.S. 693, 717 [93 S.Ct. 1875, 36
2 L.Ed.2d 596]; see also *California v. Steelcase, Inc.* (C.D. Cal. 1992) 792 F.Supp. 84, 86,
3 overruled on other grounds by *California v. Dynergy, Inc.* (9th Cir. 2004) 375 F.3d 831, 849 (“ . . .
4 for diversity purposes, a state is not a citizen of itself. Therefore, it cannot sue or be sued in a
5 diversity action.”)

6 **DEFENDANTS**

7 5. Upon information and belief, Defendant TRU-LIGHT CORPORATION (“TLC”) was
8 incorporated in the State of Nevada (entity number C13928-1995) on or about August 14, 1995,
9 and was thereafter an active corporation for some period of time. Upon information and belief,
10 on or about October 10, 1997, TLC made some filing with some public office in the State of
11 California (entity or filing number C2057945 or 02057945), and was qualified to do business in
12 California for some period of time. Upon information and belief, on or about December 11,
13 2008, TLC filed with some public office in the State of California a certificate of surrender
14 whereby it surrendered its right to engage in intrastate business within the State of California.
15 TLC had business offices located at 200 Clock Tower Place, Suite D-207, Carmel, California,
16 and later at 2 Harris Court, Suite B5, Monterey, California. The PEOPLE are informed and
17 further believe that the last known investment received by TLC was received on or about
18 September 30, 2006 in the amount of \$5,660 from the "Peter and Elizabeth Goldberg Family
19 Trust dated August 23, 1988."

20 6. Defendant DAVID WARREN BARTH ("BARTH") was, at relevant times complained of
21 herein, an officer (e.g., President and Chief Executive Officer ("CEO")), a director and an owner
22 of Defendant TLC. Upon information and belief, BARTH currently resides in Novato,
23 California.

24 7. Defendant MELLEN-THOMAS BENEDICT ("BENEDICT") was, at relevant times
25 complained of herein, an officer (e.g., Secretary, Treasurer and Chief Technology Officer), a
26 director, Chairman, and an owner of TLC. Upon information and belief, BENEDICT currently
27 resides in Aptos, California.

28 //

1 8. Defendants BENEDICT and BARTH as directors, officers and/or owners of Defendant
2 TLC at times pertinent to this Complaint, caused and/or engaged in the violations of law
3 hereinafter alleged.

4 9. Defendants DOES 1 through 100, are affiliates, agents, directors, employees, managers,
5 officers, and/or representatives of Defendant TLC who, at relevant times complained of herein,
6 caused and/or engaged in the violations of law hereinafter alleged.

7 10. The true names and capacities, whether individual, corporate, associate, or otherwise, of
8 the Defendants sued herein under the fictitious names of DOES 1 through 100, inclusive, are
9 unknown to PLAINTIFF, who, therefore, sues said Defendants by such fictitious names.
10 PLAINTIFF will amend this Complaint to show the true name of each Defendant when the same
11 has been ascertained. Each fictitiously named Defendant is responsible in some manner for the
12 violations herein alleged.

13 11. Whenever reference is made in this Complaint to any act of one or more Defendants,
14 such allegation shall be deemed to mean that such specified Defendant(s), as well as affiliates,
15 agents, directors, employees, managers, officers, and/or representatives thereof, committed or
16 authorized such act(s) while actively engaged in the control, direction or management of the
17 affairs of said Defendant(s) while acting within the course and scope of their duties.

18 12. Whenever reference is made in this Complaint to any act of more than one Defendant
19 (e.g., "Defendants"), such allegation shall be deemed to mean the act of each and every
20 Defendant named in this complaint, including, but not limited to those specified, if any, acting
21 both individually and also jointly with the other Defendant(s) included or specified.

22 13. Defendants, and each of them, knew that the other Defendants were engaging in or
23 planned to engage in the violations of law alleged in the First through Fourth Causes of Action in
24 this Complaint. Knowing that the other Defendants were engaging in such unlawful conduct,
25 each Defendant nevertheless facilitated and continued to facilitate the commission of those
26 unlawful acts. Each Defendant intended to encourage and facilitate the commission of the
27 unlawful acts, and did aid, encourage, facilitate, instigate, or promote the commission of
28 unlawful acts, and thereby, aided and abetted the other Defendants in unlawful conduct. The

1 unlawful acts alleged in the First through Fourth Causes of Action inclusive, were those acts
2 Defendants intended to and did facilitate or were the natural and reasonable consequences of the
3 acts Defendants intended to and did facilitate.

4 **GENERAL ALLEGATIONS**

5 14. DEFENDANTS, and each of them, have engaged in the businesses and practices of
6 obtaining funds, monies and property from other persons, and of advertising, creating,
7 delivering, distributing, giving away, manufacturing, packaging, promoting and selling to such
8 other persons, devices which displayed or emitted light, which DEFENDANTS claimed were
9 beneficial, curative, healing or therapeutic, including but not limited to devices sometimes
10 referred to in whole or in part as Bel Aura Beauty Mask, BPS, Mark VII — DDS, NewLife,
11 Odyssey, Odyssey Unit, Stargazer and/or TimeMachine.

12 15. To raise capital, DEFENDANTS, and each of them, offered and sold, and conspired with
13 and assisted others to offer and sell, in the State of California, in issuer transactions, securities
14 which were not qualified, nor exempt from or not subject to the requirement of qualification,
15 under the California Corporations Code, and for which the California Corporations
16 Commissioner had not issued any permit or other form of qualification. Securities were sold to
17 raise funds for TLC's expenses, including salaries for Defendants BARTH and BENEDICT.

18 16. In 1999 and thereafter, BARTH and BENEDICT met with potential investors and made
19 representations concerning investment of funds in connection with TLC.

20 17. Some documents given to investors stated that the funds raised from a round of financing
21 were to be used for TLC's "product design completion, testing and market introduction" and that
22 TLC anticipates "that the funds raised from the second round of financing would take TLC to the
23 initial public offering stage."

24 18. BARTH and BENEDICT provided investors with one or more subscription agreements
25 (e.g., in 2000) stating that "The undersigned has received and read carefully the Corporation's
26 Business Plan, dated January, 2000 (the 'Memorandum') . . . THE SHARES HAVE BEEN
27 ISSUED PURSUANT TO EXEMPTIONS FROM REGISTRATION PROVISIONS OF THE
28 [FEDERAL] AND STATE SECURITIES LAWS."

1 19. BARTH and BENEDICT provided investors one or more business plans or business
2 summaries (e.g., in 1999 and 2000) containing statements such as TLC “has developed a new
3 paradigm in anti-aging and regeneration technology that can slow down the aging process to a
4 crawl and reverse many of its negative effects . . . other tests have clearly demonstrated the
5 ability of the Company’s technology to ‘super-boost’ the body’s immune system . . . For the first
6 time in history, Tru-Light technology provides an easy to use, non invasive method to keep the
7 immune system ahead of the aging curve. The technology is based on the Company’s
8 breakthroughs in the field of phototherapy and involves the direct photonic stimulation of certain
9 areas and organs of a user’s body.”

10 20. BARTH and BENEDICT offered and sold securities in the form of shares of TLC
11 common and preferred stock to California investors. Investors provided in excess of \$1,000,000
12 to BARTH and BENEDICT in exchange for shares of TLC.

13 21. Shares of stock are defined as "securities" under the California Corporations Code.
14 TLC's stock was offered and sold in California in issuer transactions.

15 22. The California Department of Corporations ("DOC") has never issued a permit, license
16 or other form of approval or qualification authorizing TLC, BARTH or BENEDICT to offer and
17 sell common or preferred stock of TLC in the State of California. Additionally, the United States
18 Securities and Exchange Commission ("SEC") has never issued a permit, license or other form
19 of approval or registration authorizing TLC, BARTH or BENEDICT to offer and sell common or
20 preferred stock of TLC. There is no record of TLC, BARTH or BENEDICT filing any notice of
21 exemption with either the DOC or the SEC.

22 23. The offer and sale of shares of TLC stock to California residents are not subject to
23 exemption from qualification under the California Corporate Securities Law. The sale of such
24 securities are subject to qualification under said law and such securities are being or have been
25 offered for sale without first being so qualified or exempted.

26 24. The “Sherman Food, Drug, and Cosmetic Law,” *California Health & Safety Code* §§
27 109875 – 111835 (the “California Act”), applies to a “device,” *California Health & Safety Code*
28 § 109920, which is defined in part as any instrument, apparatus, implement, machine,

1 contrivance or other similar or related article, including any component, part, or accessory, that is
2 intended for use in the cure, mitigation, treatment, or prevention of disease in humans, or is
3 intended to affect any function of the body of humans and that does not achieve any of its
4 principal intended purposes through chemical action within or on the body of humans and that is
5 not dependent upon being metabolized for the achievement of any of its principal intended
6 purposes, *California Health & Safety Code* § 109220.

7 25. Section 201(h) of the “Federal Food, Drug and Cosmetic Act” (the “Federal Act,”
8 defined at *California Health and Safety Code* § 109930), 21 U. S. C. § 321(h), contains the same
9 definition of a “device.”

10 26. Under the Federal Act, a device introduced into interstate commerce after the enactment
11 of the 1976 Medical Device Amendments is automatically classified as a Class III device, as
12 described in 21 U. S. C. § 360c(f)(1). A device which is classified as a Class III device is
13 required to have an approved application for premarket approval in accordance with 21 U. S. C.
14 § 360e, or an exemption from such approval under 21 U. S. C. § 360j(g), unless the Food and
15 Drug Administration (“FDA”) reclassifies the device as a Class II or Class I device, or the
16 sponsor submits a premarket notification to the FDA, and obtains an FDA decision that the
17 device is substantially equivalent to a legally marketed device.

18 27. Similarly, the California Act provides that no person may sell, deliver, or give away any
19 new device (defined at *California Health & Safety Code* § 109975) unless (a) a premarket
20 approval application has been approved, and that approval has not been withdrawn, terminated or
21 suspended under Section 515 of the Federal Act (21 U. S. C. § 360e); or (b) the State Department
22 of Health Services (*California Health and Safety Code* § 109910) has approved a new device
23 application for that new device and that approval has not been withdrawn, terminated or
24 suspended. *California Health and Safety Code* § 111550.

25 28. The California Act generally makes it unlawful for any person to advertise any device
26 represented to have any effect in diseases, disorders, or conditions of the immune system, unless
27 the device is approved or cleared for marketing for that specific curative or therapeutic effect
28 through means such as a new device application approved pursuant to Section 111550 of the

1 California Act, a device premarket approval application approved under Section 515 of the
2 Federal Act (21 U. S. C. § 360e), or a determination of substantial equivalence for a device
3 pursuant to Section 513(f)(1) of the Federal Act (21 U. S. C. § 360c(i)). *California Health and*
4 *Safety Code* §§ 110403, 110405.

5 29. DEFENDANTS concluded that provisions of the California Act and the Federal Act
6 applied to them and their devices, as they communicated with the FDA and the California State
7 Department of Health Services, and submitted to the FDA one premarket notification, K031513,
8 for a device referred to in whole or part as the Odyssey. That submission was deleted on
9 October 25, 2004, due to failure to respond to an April 9, 2004 FDA request for additional
10 information. The State of California embargoed devices of DEFENDANTS before May 2, 2003.

11 30. DEFENDANTS made representations concerning one or more of their devices,
12 indicating that the Defendants considered them to be “new devices” under the California Act and
13 the Federal Act.

14 31. For example, in 1999 and continuing thereafter, BARTH and BENEDICT represented
15 that TLC to be “an early stage technology company” that “has developed a new paradigm in anti-
16 aging and regeneration technology that can slow down the aging process to a crawl and reverse
17 many of its negative effects.” BARTH and BENEDICT represented that TLC’s technology
18 could “super-boost the body’s immune system. This includes activation of white blood cells,
19 clearing the blood plasma of parasites, increased oxygenation as well as the stimulation of the
20 liver and kidney detoxification function.” In 1999 and continuing thereafter, BARTH and
21 BENEDICT used the following phrases to describe TLC and/or devices of Defendants: TLC
22 “has developed a breakthrough”; the technology is based on TLC’s “breakthroughs in the field of
23 phototherapy and involves the direct photonic stimulation of certain areas and organ’s of a user’s
24 body”; TLC “has developed a new paradigm . . .”; “For the first time in history, Tru-Light
25 technology provides an easy to use, noninvasive method to keep the immune system ahead of the
26 aging curve”; TLC’s “breakthrough involves . . .”; TLC “feels that its technology offers a
27 revolutionary way . . .”; and TLC “devices are based on the newly developed super-bright light
28 emitting diodes, which is an offshoot of laser diode technology.”

1 32. DEFENDANTS made and disseminated or caused to be made and disseminated claims
2 for one or more of their devices, through advertisements in a variety of media, including but not
3 limited to, brochures, newsletters, testimonials, stock holder updates, stock purchase
4 prospectuses, and videos, that were disseminated directly within Monterey County, the State of
5 California, and to other states in the United States. DEFENDANTS shipped one or more of their
6 devices directly to the general public in Monterey County, the State of California, and to other
7 states in the United States.

8 33. DEFENDANTS made and disseminated and caused to be made and disseminated claims
9 for one or more of their devices, expressly, such as statements made by the directors, employees
10 and officers of TLC to potential investors and actual investors; by the use of visual images; and
11 by blood testing, i.e., taking blood samples of potential investors and having them view their
12 blood under a microscope before and after use of some device of the DEFENDANTS.

13 34. DEFENDANTS prepared and distributed promotional materials to prospective investors.
14 The claims set forth in the promotional materials include, but are not limited to, claims that one
15 or more of their devices, are “State of the Art Anti-Aging Technology” and “the Holy Grail of
16 anti-aging.” One promotional material states in part:

17 “Recapture the Vitality of Your Youth.

18 What if someone discovered a new paradigm in

19 health maintenance technology that quickly slows the aging process and
20 reverses many of its negative effects, regardless of age, lifestyle or diet?

21 What if it was easy? What if it was proven, safe and effective? Wouldn’t

22 you want to extend and enjoy the best years of your life?”

23 35. Other promotional pieces state that “Tru-Light’s phototherapy is a safe, non-invasive
24 way to keep ahead of the aging curve” and “Tru-Light’s proprietary modulated phototherapy
25 systems stimulate systemic full-body regeneration.”

26 //

27 //

28 //

1 36. DEFENDANTS claimed that “On-going scientific and medical studies of Tru-Light
2 users have shown without any other lifestyle changes, regular Tru-Light treatments stimulate the
3 body’s regenerative abilities resulting in: Reduction in Biological Age Markers . . . Increased
4 Growth Hormone Levels . . . Reduction of Stress . . . Increased Energy Production . . .
5 Improved blood flow . . . Improved antioxidant status, thus combating free radical damage . . .
6 Increased Collagen Production”

7 37. DEFENDANTS claimed that “Hospitals now use phototherapy to treat skin ailments,
8 reduce muscle pain and inflammation, speed up wound healing & treat certain kinds of cancer,”
9 thus implying and suggesting that DEFENDANTS’ devices may be used for similar purposes
10 including the treatment of certain kinds of cancers.

11 38. DEFENDANTS advertised that “[b]y reversing age related decline in endocrine
12 function, this has the effect of making Tru-Light modulated Phototherapy recipients feel
13 ‘younger and smarter.’”

14 39. DEFENDANTS claimed that, “The great majority of subjects, tested under controlled
15 conditions had significant improvements (average increase 148%) in GROWTH HORMONE
16 levels after a 30-day course of Tru-Light modulated photo-stimulation.”

17 40. DEFENDANTS failed to inquire of potential investors or users of their device(s)
18 whether the investors or users suffered from any specific health conditions prior to use, and to
19 give any warnings or disclosures of possible side effects.

20 41. DEFENDANTS referenced a “Tru-Light Scientific and Medical Team” and a “Scientific
21 Advisory Board” as if such team and board existed and played a key or significant role relating
22 to DEFENDANTS’ devices.

23 42. DEFENDANTS falsely advertised and published names of persons as part of a
24 developmental team, though some such persons were not involved in developing TLC device(s),
25 and they had not agreed to endorse them.

26 43. DEFENDANTS failed to comply with and violated securities laws, the California Act,
27 the Federal Act, and other laws as alleged herein.

28

1 44. Claims, representations and statements regarding devices such as those noted in
2 paragraphs 14 through 43 above, were not approved by federal or state authorities.

3 **FIRST CAUSE OF ACTION:**

4 **UNQUALIFIED OFFERS AND SALES OF SECURITIES IN VIOLATION OF**
5 **CALIFORNIA CORPORATIONS CODE SECTION 25110**

6 **Against All Defendants**

7 45. PLAINTIFF incorporates and re-alleges by reference all preceding paragraphs of this
8 Complaint as though fully set forth in this cause of action.

9 46. Under *California Corporations Code* § 25110, it is unlawful for any person to offer or
10 sell in this state any security in an issuer transaction unless such sale has been qualified under
11 *California Corporations Code* §§ 25111, 25112, or 25113, or unless such security is exempted or
12 not subject to qualification under Chapter 1, commencing with *California Corporations Code* §
13 25100.

14 47. Commencing at least as early as 1997, DEFENDANTS offered and sold, or conspired
15 with other co-defendants, or directly or indirectly controlled other co-defendants by knowingly
16 inducing, or by knowingly providing substantial assistance to other co-defendants, to offer and
17 sell securities in issuer transactions in the State of California.

18 48. The investments offered and sold by DEFENDANTS are “securities” within the meaning
19 of *California Corporations Code* § 25019 and case law thereunder. The securities included, but
20 are not limited to, shares of common and preferred stock, convertible debentures, promissory
21 notes and investment contracts.

22 49. The sales referred to herein constitute “issuer transactions” within the meaning of
23 *California Corporations Code* §§ 25010 and 25011.

24 50. DEFENDANTS “offered and sold” the securities referred to herein, “within the state” of
25 California within the meaning of *California Corporations Code* §§ 25008 and 25017.

26 51. The California Corporations Commissioner has not issued a permit or other form of
27 qualification authorizing DEFENDANTS to offer and sell securities referred to herein in the
28 State of California.

1 52. The offer and sale of securities referred to herein are not exempt from the requirement of
2 qualification under *California Corporations Code* § 25110.

3 **SECOND CAUSE OF ACTION:**
4 **MISREPRESENTATIONS OR OMISSIONS OF MATERIAL FACTS IN VIOLATION**
5 **OF CALIFORNIA CORPORATIONS CODE SECTION 25401**

6 **Against All Defendants**

7 53. PLAINTIFF incorporates and re-alleges by reference all preceding paragraphs of this
8 Complaint as though fully set forth in this cause of action.

9 54. *California Corporations Code* § 25401 provides as follows: “It is unlawful for any
10 person to offer or sell a security in this state or buy or offer to buy a security in this state by
11 means of any written or oral communication which includes an untrue statement of a material
12 fact or omits to state a material fact necessary in order to make the statements made, in the light
13 of circumstances under which they were made, not misleading.”

14 55. In offering and selling securities referred to herein, DEFENDANTS made, or conspired
15 with other co-defendants, or directly or indirectly controlled other co-defendants by knowingly
16 inducing, or by knowingly providing substantial assistance to other co-defendants, to make,
17 untrue statements and/or misrepresentations of material facts to some or all prospective or
18 existing investors. The misrepresentations include, but are not limited to, the following:

- 19 a. Shares were issued pursuant to exemptions from registration provisions of federal and
20 state securities laws.
21 b. Named professional persons in the medical field had advised Defendants regarding
22 some device, or had evaluated or tested same.

23 56. In offering and selling the securities referred to herein, DEFENDANTS made, or
24 conspired amongst themselves, and with other co-defendants, or directly or indirectly controlled
25 other co-defendants by knowingly inducing, or by knowingly providing substantial assistance to
26 other co-defendants, to omit informing investors about material facts including, but not limited
27 to, the following:

28 //

- 1 a. Sales of shares of TLC stock were not exempt from registration nor were they
2 registered;
- 3 b. No DEFENDANT ever obtained any approval, exemption or determination of
4 substantial equivalence under the California Act or the Federal Act as required;
- 5 c. DEFENDANTS' devices were either "new devices" under the California Act and the
6 Federal Act (and thus compliance with applicable provisions of those laws was
7 required); or they were not (and thus the devices were subject to greater competition
8 than were "new devices"). DEFENDANTS failed to disclose material facts such as
9 noncompliance with various laws and/or competition from other devices;
- 10 d. Some implications, representations and suggestions of the DEFENDANTS, including
11 but not limited to alleged benefits of their particular devices in slowing or reversing
12 aging or its negative effects, in boosting immunity, and in treating cancer, had not
13 been confirmed, substantiated or validated by any independent medical study relating
14 to the relevant, particular device(s) of the DEFENDANTS;
- 15 e. Under certain circumstances, it is unlawful for any person to advertise any device
16 represented to have any effect on cancer (*Cal. Health & Safety Code* § 110403 (e)), or
17 on diseases, disorders, or conditions of the immune system (*Cal. Health & Safety*
18 *Code* § 110403 (a)), which prohibition would restrict DEFENDANTS' advertising
19 and thus decrease the marketability of their devices;
- 20 f. BARTH previously had several unsuccessful business ventures and was a defendant
21 in litigation;
- 22 g. BARTH or his previous company, BTI, were the subject of judgments, tax liens, or
23 bankruptcy;
- 24 h. Investors would not receive TLC's financial statements and reports or any accounting
25 of the use of their funds after they invested;
- 26 i. Names of professional persons in the medical field were being used, without their
27 consent or knowledge, in documents of DEFENDANTS given to investors;
- 28

1 j. DEFENDANTS failed to inquire, investigate or research specific health conditions of
2 persons before they used DEFENDANTS' devices, and to give any disclosure or
3 warning of possible side effects, thus exposing TLC investors and their investments
4 to potential liability;

5 k. DEFENDANTS were expending and exhausting investor funds without generating
6 significant cash flow separate and apart from proceeds of the sale of TLC stock to
7 investors.

8 57. The misstatements and omissions referred to herein were "material facts" within the
9 meaning of *California Corporations Code* § 25401.

10 58. The misrepresentations and omissions of DEFENDANTS were "in connection with" the
11 offer and sale of securities.

12 59. DEFENDANTS' misrepresentations and omissions of material fact took place "within
13 the state" of California within the meaning of *California Corporations Code* § 25008.

14 60. DEFENDANTS made untrue statements and/or omitted to disclose statements of
15 material facts in connection with the offer and sale of securities in violation of *California*
16 *Corporations Code* § 25401.

17 61. Unless enjoined by this Court, DEFENDANTS and each of them, will continue to
18 violate *California Corporations Code* § 25401.

19 **THIRD CAUSE OF ACTION:**

20 **DISSEMINATION OF UNTRUE AND MISLEADING STATEMENTS**

21 **IN VIOLATION OF**

22 **CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17500**

23 **Against All Defendants**

24 62. PLAINTIFF incorporates and re-alleges by reference all preceding paragraphs of this
25 Complaint as though fully set forth in this cause of action.

26 63. Beginning at an exact date unknown to PLAINTIFF, DEFENDANTS, with intent
27 directly or indirectly to dispose of real or personal property and to perform services, professional
28 or otherwise, or anything of any nature whatsoever, and to induce the public to enter into any

1 obligation relating thereto, made and disseminated and caused to be made and disseminated
2 before the public in the State of California, and made and disseminated and caused to be made or
3 disseminated from the State of California before the public in states other than the State of
4 California, in publication, advertising and proclamation, and in other manner or means,
5 statements concerning that real and personal property and those services, professional or
6 otherwise, and concerning circumstances and matters of fact connected with the proposed
7 performance or disposition thereof, which were untrue and misleading, and which were known,
8 or which by the exercise of reasonable care should be known, to be untrue and misleading; and
9 so DEFENDANTS made and disseminated and caused to be so made and disseminated such
10 statements as part of a plan or scheme with the intent not to sell that personal property and those
11 services, professional or otherwise, so advertised at the price stated therein, and as so advertised.
12 These statements include, but are not limited to, statements such as those set forth in paragraphs
13 14 through 43, above.

14 64. Pursuant to *California Business & Professions Code* §§ 17535 and 17536, PLAINTIFF
15 is entitled to injunctive relief and civil penalties as hereinafter set forth.

16 **FOURTH CAUSE OF ACTION:**
17 **UNFAIR COMPETITION**
18 **IN VIOLATION OF**
19 **CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200**
20 **Against All Defendants**

21 65. PLAINTIFF incorporates and re-alleges by reference all preceding paragraphs of this
22 Complaint as though fully set forth in this cause of action.

23 66. *California Business & Professions Code* § 17200 states, in pertinent part: “unfair
24 competition shall mean and include any unlawful, unfair, or fraudulent business act or practice
25 and unfair, deceptive, untrue or misleading advertisement and any act prohibited by Chapter 1
26 (commencing with § 17500) of Part 3 of Division 7 of the Business & Professions Code.”
27 Beginning at an exact date that is unknown to PLAINTIFF, DEFENDANTS engaged in a course
28

1 of conduct constituting acts of unfair competition, as defined by *California Business &*
2 *Professions Code* § 17200, including but not limited to the following:

- 3 a. With intent directly or indirectly to dispose of real or personal property or to perform
4 services, professional or otherwise, or anything of any nature whatsoever or to induce
5 the public to enter into any obligation relating thereto, or making or disseminating
6 before the public, in any publication, advertisement, proclamation, or in any other
7 manner or means whatever, including over the Internet, any untrue or misleading
8 statement relating to the disposition of any property or the performance of any
9 service, in violation of *California Business & Professions Code* § 17500;
- 10 b. Committing actual fraud in violation of *California Civil Code* § 1572;
- 11 c. Committing constructive fraud in violation of *California Civil Code* § 1573;
- 12 d. Committing deceit in violation of *California Civil Code* § 1710;
- 13 e. Committing unlawful methods of competition, and unfair and deceptive acts, such as
14 representing that services have characteristics which they do not have; and
15 representing that a transaction confers and involves rights which it does not have or
16 involve, or which are prohibited by law, in violation of *California Civil Code* § 1770;
- 17 f. Offering or selling unqualified, non-exempt securities in violation of *California*
18 *Corporations Code* § 25110;
- 19 g. Making untrue or misleading statements or omitting material facts necessary to avoid
20 misleading investors in violation of *California Corporations Code* § 25401;
- 21 h. Selling, delivering, and giving away new devices, in violation of *California Health &*
22 *Safety Code* § 111550;
- 23 i. Advertising devices, in violation of *California Health & Safety Code* § 110405;
- 24 j. Manufacturing, selling, delivering, holding or offering for sale misbranded devices, in
25 violation of *California Health & Safety Code* § 111440;
- 26 k. Misbranding a device, in violation of *California Health & Safety Code* § 111445;
- 27 l. Receiving in commerce, or delivering or proffering for delivery any misbranded
28 device, in violation of *California Health & Safety Code* § 111450;

1 m. Making false and deceptive claims as more fully set forth in paragraphs 14 through
2 43, above;

3 n. Stealing and theft of personal property in violation of *California Penal Code* §§ 484,
4 486, 487, 488, 489 and 490;

5 o. Defrauding any other person of money, labor or property by any false or fraudulent
6 representation or pretense in violation of *California Penal Code* § 532.

7 67. DEFENDANTS, and each of them, are subject to civil penalties, pursuant to *California*
8 *Business & Professions Code* § 17206, and to injunctive relief, pursuant to *California Business*
9 *& Professions Code* §§ 17203 – 17204.

10 68. A statute of limitations tolling agreement was executed by and between the parties herein
11 to protect and preserve the PLAINTIFF’S right to bring this action. That tolling agreement or
12 waiver was executed in May and June 2004, is stated to be effective May 1, 2004 and to pertain
13 to a period of time beginning on June 3, 2003, was entered into pursuant to *California Code of*
14 *Civil Procedure* § 360.5, and has never been terminated by notice. Any action brought in the
15 name of the People of the State of California by the Commissioner to enforce any liability
16 created under the *California Corporations Code* §§ 25110, 25401, and 25535(a) must be brought
17 before the expiration of four years after the act or transaction constituting the violation. Any
18 action to enforce any cause of action pursuant to *California Business & Professions Code* §
19 17200 is to be commenced within four years after the cause of action accrued. See *California*
20 *Business & Professions Code* § 17208; and *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117,
21 1130 (C.D. Cal. 2010). Any action pursuant to *California Business & Professions Code* § 17500
22 is subject to a three-year statute of limitations. See *Yumul v. Smart Balance, Inc.*, 733 F. Supp.
23 2d 1117, 1130 (C.D. Cal. 2010), citing *County of Fresno v. Lehman*, 229 Cal. App. 3d 340, 346,
24 280 Cal. Rptr. 310 (1991); and *California Civil Code* § 338(a) (providing a default three-year
25 statute of limitations for actions created by statute). Under the plain language of *California Code*
26 *of Civil Procedure* § 360.5, “a written waiver executed prior to the running of the applicable
27 statute of limitations shall be effective for a period of four years from the commencement of the
28 running of the statute of limitations. For a written waiver executed after the statute of limitations

1 has run, the four years runs from the date of signing of the waiver.” *California First Bank v.*
2 *Braden*, 264 Cal. Rptr. 820, 216 Cal. App. 3d 672, 676 (1989).

3 **PRAYER**

4 WHEREFORE, PLAINTIFF prays as follows:

5 1. For a Judgment of Permanent Injunction enjoining all DEFENDANTS, and such DOES
6 as may subsequently be named, and their officers, directors, successors in interest, agents,
7 employees, powers of attorney, and all persons acting in concert or participating with them, from
8 directly or indirectly violating:

9 a. *California Corporations Code* § 25110 by offering to sell, selling, arranging for the
10 sale, issuing, engaging in the business of selling, negotiating for the sale of, or
11 otherwise in any way dealing or participating in the offer or sale of, any security of
12 any kind, including but not limited to the securities described in this Complaint,
13 unless such security or transaction is qualified or exempted or not subject to
14 qualification; and

15 b. *California Corporations Code* § 25401 by offering to sell or selling any security of
16 any kind, including but not limited to, the securities described in this Complaint, by
17 means of any written or oral communication, which contains any untrue statements of
18 any material fact or fails to state any material fact necessary in order to make the
19 statements made not misleading, including but not limited to the misrepresentations
20 and omissions alleged in this Complaint.

21 2. For a Judgment of Permanent Injunction enjoining all DEFENDANTS, and such DOES
22 as may subsequently be named, and their officers, directors, successors in interest, agents,
23 employees, powers of attorney, and all persons acting in concert or participating with them, from
24 directly or indirectly violating:

25 a. the “Sherman Food, Drug, and Cosmetic Law,” *California Health & Safety Code* §§
26 109875 – 111835;

27 b. the “Food, Drug, and Cosmetic Act,” 21 U. S. C. § 301 et seq.;

28 c. any and all provisions of law referenced in any cause of action herein stated;

1 d. *California Business & Professions Code* §§ 17500 and 17200.

2 3. For a Judgment of Permanent Injunction enjoining all Defendants, and such DOES as
3 may subsequently be named, and their officers, directors, successors in interest, agents,
4 employees, powers of attorney, and all persons acting in concert or participating with them, from
5 directly or indirectly:

6 a. Altering, concealing, destroying, discarding, obliterating, removing, shredding,
7 transferring, or otherwise disposing of, in any manner, any books, brochures,
8 computer files, computer printouts, computer programs, manuals, or any other
9 writings or documents of any kind as defined under *California Evidence Code* § 250
10 relating to the transactions and course of conduct as alleged in any complaint in this
11 action;

12 b. Altering, assigning, converting, conveying, disbursing, dissipating, encumbering,
13 exhausting, foreclosing, hypothecating, pledging, selling, transferring, using, utilizing
14 or otherwise disposing of any real or personal property or other assets in the
15 Defendants' possession or under their control, which property was derived from the
16 direct or indirect sale and issuance of securities as alleged in this Complaint, without
17 leave of Court.

18 4. For a Judgment requiring DEFENDANTS and each of them and such DOES as may
19 subsequently be named, individually, jointly and severally, to rescind each and all of the
20 unlawful transactions alleged in this Complaint, as shall be determined by this Court to have
21 occurred, and further requiring DEFENDANTS to pay full restitution to each person determined
22 to have been subjected to DEFENDANTS' acts or practices which constitute violations of the
23 *California Corporations Code*, with the total amount of funds being at least such amount to be
24 determined, less the amount of any repayment of principal, or any other amount according to
25 proof. In addition, to pay either the contracted rate of interest or the legal rate of interest on the
26 amounts invested by the clients from the dates of their investments to the date of judgment
27 herein.

1 5. For a Judgment requiring all DEFENDANTS and each of them and such DOES as may
2 subsequently be named, individually, jointly and severally, to disgorge according to proof, all
3 funds from all known investors, all benefits received, including but not limited to, salaries,
4 commissions, fees and profits, derived directly or indirectly from the acts or practices which
5 constitute violations of the *California Corporations Code*.

6 6. For a Judgment requiring DEFENDANTS and each of them and such DOES as may
7 subsequently be named to pay the Department of Corporations as a civil penalty for each act in
8 violation of the Corporate Securities Law of 1968, as authorized by *California Corporations*
9 *Code* § 25535 as follows:

- 10 a. As to the First Cause of Action, for at least \$25,000 for each violation, for at least 100
11 violations of *California Corporations Code* § 25110, or such other amount according
12 to proof;
- 13 b. As to the Second Cause of Action, for at least \$25,000 for each violation, for at least
14 100 violations of *California Corporations Code* § 25401, or such other amount
15 according to proof.

16 7. For a Judgment of Permanent Injunction, pursuant to *California Business & Professions*
17 *Code* §§ 17203, 17204 and 17535, restraining and enjoining DEFENDANTS and such DOES as
18 subsequently may be named from disseminating any deceptive statements, or engaging in or
19 performing, directly or indirectly, any acts of unfair competition as set forth in paragraph 55,
20 above.

21 8. For a Judgment that DEFENDANTS and DOES as subsequently may be named shall pay
22 a civil penalty of up to \$2,500 for each act of unfair competition, pursuant to *California Business*
23 *& Professions Code* § 17206.

24 9. For a Judgment that DEFENDANTS and DOES as subsequently may be named shall pay
25 a civil penalty of up to \$2,500 for each deceptive statement, pursuant to *California Business &*
26 *Professions Code* § 17536.

27 //

28 //

1 10. For a Judgment that DEFENDANTS and DOES as subsequently may be named shall
2 pay an amount of restitution for each victim of DEFENDANTS' deceptive statements and acts of
3 unfair competition.

4 11. For this Court to retain jurisdiction of this action in order to implement and carry out the
5 terms of all orders and decrees that may be entered herein or to entertain any suitable application
6 or motion by Plaintiff for additional relief within the jurisdiction of this Court.

7 12. For costs of suit.

8 13. For such other and further relief as the Court may deem just and proper.

9 Dated: May 26, 2011

Respectfully submitted,

10 DEAN D. FLIPPO,
11 Monterey County District Attorney

12
13 By: _____

14 ANNIE M. MICHAELS
15 Managing Deputy District Attorney

16 ROBERT J. LAUHLAN, JR.
17 Deputy District Attorney

18 PRESTON DuFAUCHARD
19 California Corporations Commissioner

20 By: _____

21 JOAN E. KERST
22 Senior Corporations Counsel

23 Attorneys for Plaintiff, THE PEOPLE
24 OF THE STATE OF CALIFORNIA