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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEW JERSEY**  
**(NEWARK DIVISION)**

**CLIFFORD KAFKA, an individual,** }  
**on behalf of himself and all others** }  
**similarly situated,** }  
 }  
**Plaintiffs,** }  
 }  
**vs.** }  
 }  
**IOVATE HEALTH SCIENCES, INC., a** }  
**Canadian corporation; IOVATE HEALTH** }  
**SCIENCES USA, INC.; and MUSCLETECH** }  
**RESEARCH AND DEVELOPMENT, INC.,** }  
 }  
**Defendants.** }

**Case No.:** \_\_\_\_\_  
**Jury Trial Requested**

**CLASS ACTION COMPLAINT**

**COMES NOW** Plaintiff, Clifford Kafka, individually and on behalf of all others similarly situated (the "Class"), by his attorneys, and hereby files his Class Action Complaint against Iovate Health Sciences, Inc., a Canadian Corporation, Iovate Health Sciences, USA, Inc. and MuscleTech Research and Development, Inc. (hereinafter collectively referred to as "Defendants").

**INTRODUCTION**

1. On May 1, 2009, the Food and Drug Administration (FDA) issued a warning that

consumers should “immediately stop using Hydroxycut products by Iovate Health Sciences, Inc., of Oakville, Ontario and distributed by Iovate Health Sciences USA, Inc. of Blasdell, N.Y. Some Hydroxycut products are associated with a number of serious liver injuries. Iovate has agreed to recall Hydroxycut products from the market.”

2. The FDA went on to report that it had received “...23 reports of serious health problems ranging from jaundice and elevated liver enzymes, an indicator of potential liver injury, to liver damage requiring liver transplant. One death due to liver failure has been reported to the FDA.”

3. Hydroxycut products are dietary supplements marketed for weight loss, fat burners, and energy enhancers that bear the Iovate or MuscleTech brand name.

4. Typically, the recalled Hydroxycut products contain pretentious verbiage extolling their alleged attributes, such as that referenced with the “Hydroxycut Dietary Supplement” (60 rapid release caplets): **INCREASE ENERGY, BURN CALORIES, CONTROL APPETITE, CLINICALLY PROVEN INGREDIENTS.** This particular product likewise boasts that it is “America’s number one selling weight-loss supplement.”

5. On a website operated by the Defendants, the following representations concerning Hydroxycut were made: “Plain and simple, Hydroxycut was created to help you reach your weight-loss goals. This medical doctor-formulated supplement contains ingredients that are of the highest quality and have been combined to make it one of the most effective weight-loss supplements available on the market today. Hydroxycut is comprised of a blend of research-proven key ingredients that can help you lose up to 4.5 times the weight than diet and exercise alone. On top of that, this top selling weight-loss supplement increases your energy and helps control your appetite, too. With Hydroxycut in your diet and exercise plan, you’ll be well

on your way to achieving your weight-loss goals in no time!”  
(<http://www.hydroxycut.com/products/hydroxycut/index.shtml> -accessed March 19, 2009.)

6. For several years, the FDA has been monitoring the safety of the Hydroxycut products, which were manufactured and marketed by Defendants. Prior to 2004, Hydroxycut contained ephedra, but this ingredient was allegedly removed from the Hydroxycut products in 2004. Even after the alleged removal of ephedra, liver damage and other associated injuries from the products continued to be reported to the FDA.

7. After reviewing the data and serious adverse events which were reported to the FDA, the FDA Health Hazard Evaluation Board concluded “... the ingestion of the dietary supplement, Hydroxycut, presents a severe, potentially life-threatening hazard to some users. Although Hydroxycut-induced hepatotoxicity has been reversible in most patients that have come to the attention of CFSAN (Center for Food Safety and Applied Nutrition), in certain instances acute liver failure has resulted that has required liver transplantation to ensure survival and death occurred in one instance prior to transplantation.”

8. The Hydroxycut products which were recalled due to the threat of serious liver injury, or other injuries, as noted by the FDA, include the following products, which had the Iovate or MuscleTech brand name:

- Hydroxycut Regular Rapid Release Caplets
- Hydroxycut Caffeine-Free Rapid Release Caplets
- Hydroxycut Hardcore Liquid Caplets
- Hydroxycut Max Liquid Caplets
- Hydroxycut Regular Drink Packets
- Hydroxycut Caffeine-Free Drink Packets
- Hydroxycut Hardcore Drink Packets (Ignition Stix)
- Hydroxycut Max Drink Packets
- Hydroxycut Liquid Shots
- Hydroxycut Hardcore RDSs (Ready-to-Drink)
- Hydroxycut Max Aqua Shed

Hydroxycut 24  
Hydroxycut Carb Control  
Hydroxycut Natural

9. Defendants have promoted, marketed and sold the recalled Hydroxycut products to consumers in New Jersey, as well as others throughout the United States, since, at least, 2002. The Plaintiff, a resident citizen of New Jersey, purchased one or more of the recalled Hydroxycut products.

### **PARTIES**

10. Plaintiff, Clifford Kafka, is a resident of New Jersey, and has purchased some of the recalled Hydroxycut products in the past. Specifically, Plaintiff has purchased Hydroxycut Rapid Release Caplets within two (2) years of the filing of this Complaint. Plaintiff brings this action on behalf of himself as an individual consumer and on behalf of all other similarly situated persons.

11. Defendant, Iovate Health Sciences, Inc. is a Canadian corporation with its headquarters in Oakville, Ontario, Canada.

12. Defendant Iovate Health Sciences USA, Inc. is, upon information and belief, a wholly owned subsidiary of Iovate Health Sciences, Inc., and has its principal place of business in Blasdell, New York.

13. Defendant MuscleTech Research and Development, Inc. is likewise a Canadian corporation, with its principal place of business in Mississauga, Ontario, Canada. Upon information and belief, Iovate owns MuscleTech.

14. At all times relevant hereto, Defendants manufactured, promoted, marketed, sold, compounded, tested, and otherwise commercially produced the Hydroxycut products for human

consumption. These Hydroxycut products were promoted, marketed and advertised throughout the United States, including the State of New Jersey and this federal judicial district. Moreover, the recalled Hydroxycut products were sold to consumers throughout the United States, including the State of New Jersey and this federal judicial district.

15. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, the employees of all Defendants, its subsidiaries, affiliates, and other related entities, as well as the employees of the subsidiaries, affiliates and other related entities, were the agents, servants and employees of Defendants, and at all times herein mentioned, each was acting within the purpose and scope of said agency and employment. Whenever reference in this Complaint is made to any act or transaction of Defendants, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents and/or representatives of the Defendants committed, knew of, performed, authorized, ratified and/or directed such act or transaction on behalf of the Defendants while actively engaged in the scope of their duties.

#### **VENUE AND JURISDICTION**

16. This Court has jurisdiction over the subject matter presented by this Complaint because it is a class action arising under the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005), codified in pertinent part at 28 U.S.C. §1332(d), which explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the Class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs. Plaintiff alleges that the total claims of individual Class members in this action are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. §1332(d)(2), (5). Plaintiff is a citizen of New Jersey, whereas, as set forth above,

Defendants are citizens of Canada and the State of New York. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A). Furthermore, Plaintiff alleges that more than two-thirds of all of the members of the proposed Class in the aggregate are citizens of a state other than New Jersey, where this action is originally being filed, and that the total number of members of the proposed Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

### **FACTUAL ALLEGATIONS**

17. All allegations in this Complaint are based on information and belief and/or are likely to have evidentiary support after reasonable opportunity for further investigation and discovery. Plaintiff repeats, re-alleges and reincorporates by reference the paragraphs above.

18. Defendants have promoted, advertised, marketed and sold the Hydroxycut products in New Jersey, including this federal judicial district, and elsewhere in the United States.

19. As stated previously in this complaint, on May 1, 2009, the FDA warned consumers to immediately stop taking the recalled Hydroxycut products because they posed a serious risk of liver injuries, as well as other risks, including, but not limited to: jaundice, elevated liver enzymes, seizures, cardiovascular disorders and rhabdomyolysis.

20. The products, which were widely distributed and massively marketed throughout the United States, including this federal judicial district, contained numerous representations concerning the uses and benefits of the products which included, but were not limited to, the following:

(a) That the products were of the highest quality and were one of the most effective weight loss supplements available on the market;

(b) That the products contained a blend of research-proven key ingredients that could help consumers lose weight;

©) That the products would increase energy and control appetite;

(d) That the products contained clinically proven ingredients;

(e) That the products would burn calories.

21. Contrary to the marketing and promotional campaign disseminated by the Defendants, and contrary to the boastful language on the labels of the Hydroxycut products, such products were not a healthy alternative for consumers seeking to lose weight, burn calories, or tone muscles.

22. Instead, the Hydroxycut products were unsafe and unfit for human consumption, in that they caused serious liver injury, as well as other dangerous side effects, which were neither contained on the product packages or included in the advertising and promotional materials Defendants created to persuade consumers to purchase the products throughout the United States, and also within this Federal judicial district.

23. The advertising, marketing and promotion of the Hydroxycut products by Defendants was deceptive and misleading, in that it concealed the risks of liver injury which Defendants knew or should have know.

24. Additionally, representations were made on the packages of the products as to their attributes and benefits which were likewise false and misleading.

### **CLASS ALLEGATIONS**

25. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

26. Plaintiff brings this action on behalf of the following Class pursuant to FRCP 23:

(a) A class of all consumers in the United States who purchased the recalled Hydroxycut products from 2002 to May 1, 2009;

(b) A subclass of all citizens of New Jersey who purchased the recalled Hydroxycut products in New Jersey from 2002 to May 1, 2009.

27. Defendants' practices were applied uniformly to all members of the Class, so that the questions of law and fact are common to all members of the Class. All putative Class members were and are similarly affected by having purchased the products, and the relief sought herein is for the benefit of Plaintiff and members of the proposed Class. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class is so numerous that joinder of all members would be impractical.

28. Based on the sales of the products and the popularity of the products, it is apparent that the number of absent Class members would be at least in the many thousands, thereby making joinder impossible.

29. Questions of law and fact common to the Class exist that predominate over questions affecting only individual members, including the following:

(a) Whether Defendants' conduct as set forth herein constitutes the act, use or employment of an unconscionable commercial practice, deceptive, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in violation of New Jersey Consumer Fraud Act;

(b) Whether Defendants negligently misrepresented the benefits of taking the products;

©.) Whether Defendants intentionally misrepresented the benefits of taking the

products;

- (d) Whether the labels on the products were misleading;
- (e) Whether the warnings on the product labels were adequate;
- (f) Whether Defendants were unjustly enriched by the conduct challenged herein;
- (g) Whether Defendants' conduct as set forth above injured consumers, and if so, the

extent of the injury; and

- (h) Whether Plaintiff and the Class are entitled to damages and attorneys' fees.

30. The claims asserted by Plaintiff in this action are typical of the claims of the members of the Class as the claims arise from the same course of conduct by Defendants, and the relief sought is common.

31. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class. Plaintiff has retained counsel competent and experienced in both consumer protection and class action litigation.

32. Certification of this Class action is appropriate under FRCP 23(b) because the questions of law or fact common to the respective Class members predominate over questions of law or fact affecting only individual members.

33. This predominance makes class litigation superior to any other method available for the fair and efficient adjudication of these claims. Absent a class action, it would be highly unlikely that the representative Plaintiff or any other Class member would be able to protect their own interests because the cost of litigation through individual lawsuits might exceed expected recovery. Certification is also appropriate because Defendants acted or refused to act on grounds generally applicable to the Class. Further, given the large number of consumers, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent

and conflicting adjudications, an outcome that further supports the benefit of bringing this as a class action.

34. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the courts that such individual actions would engender. The benefits of proceeding as a class action, including providing a method for obtaining redress for claims that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to the management of this class action.

35. In the aggregate, Plaintiff contends that the claims of the individual Class members exceed the sum of \$5,000,000.00, exclusive of interest and costs.

### **COUNT ONE**

(Violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq.)

36. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

37. At all relevant times, Defendants were and are “persons,” as defined by N.J.S.A. 56:8-1(d).

38. At all relevant times, the Hydroxycut products constituted “merchandise,” as defined by N.J.S.A. 56:8-1©).

39. At all relevant times, Defendants’ manufacturing, marketing, advertising, sales and/or distribution of the products at issue met the definition of “advertisement” set forth by N.J.S.A. 56:8-1(a).

40. At all relevant times, Defendants’ manufacturing, marketing, advertising, sales

and/or distribution of the products at issue met the definition of “advertisement” set forth by N.J.S.A. 56:8-1(e).

41. N.J.S.A. 56:8-2 provides that “[t]he act, use or employment by any person of any unconscionable practice, deception, fraud, false pretense, false promise, misrepresentation or the knowing, concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission,...is declared to be an unlawful practice...

42. Defendants uniformly represented to Plaintiff and each Class member by means of its advertising, marketing, sales and other promotional materials the following:

- (a) That the products contained ingredients which were of the highest quality;
- (b) That the ingredients in Hydroxycut were research proven to be safe;
- ©.) That the all-natural ingredients in Hydroxycut rendered it safe for human consumption;
- (d) That the Hydroxycut products were being sold to Plaintiff and the class in a lawful manner.

43. Defendants have therefore engaged in practices which are unconscionable, deceptive and fraudulent and which are based on false pretenses, false promises, misrepresentations, and the knowing concealment, suppression or omission in their manufacturing, advertising, marketing, selling and distribution of the products. Defendants have therefore violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*

44. As a direct and proximate result of Defendants’ improper conduct, Plaintiff and the other members of the Class have suffered damages and ascertainable losses of moneys and/or property, by paying money for the products that were marketed, promoted and sold in a deceptive and misleading manner.

45. New Jersey has numerous contacts with the conduct alleged herein and a strong interest in applying the New Jersey Consumer Fraud Act to that conduct. Defendants are found, do business and/or transact business within this district. Defendants maintain agents in this district and are licensed to do, have done, and continue to do business in the state of New Jersey. Defendants' improper conduct set forth herein occurred in this district or was conceived of and executed from this district in whole or in part. In addition, Defendants directly advertised, marketed and sold the products to consumers in this district.

46. As such, New Jersey's contacts to this litigation make it a desirable forum for this litigation and New Jersey's interest in applying the New Jersey Consumer Fraud Act in this litigation outweighs any interests other states or their laws may have.

## **COUNT TWO**

(Negligent Misrepresentation)

47. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

48. Defendants represented to Plaintiff and each Class Member by means of its advertising, marketing and other promotional materials, and the product labeling and packaging that the products:

- (a) That the products contained ingredients which were of the highest quality;
- (b) That the ingredients in Hydroxycut were research proven to be safe;
- ©.) That the all-natural ingredients in Hydroxycut rendered it safe for human consumption;
- (d) That the Hydroxycut products were being sold to Plaintiff and the class in a lawful manner.

49. Defendants' representations were untrue as set forth above.

50. Defendants made the representations herein alleged with the intention of inducing Plaintiff and the public to purchase the products.

51. Plaintiff and Class members saw, believed, and relied on Defendants' representations and, in reliance on them, purchased the products. Said reliance was reasonable, given Defendants' generally good reputation among consumers. Plaintiff and the Class were without the ability to determine the truth of these statements on their own.

52. At the time Defendants made the misrepresentations herein alleged, they had no reasonable grounds for believing the representations to be true, because they knew that the products were being sold in a deceptive and misleading manner.

53. As a proximate result of the foregoing negligent misrepresentations by Defendants, Plaintiff and Class members were induced to spend an amount to be determined at trial on the products. Accordingly, and as a proximate result of Defendants' misrepresentations as set forth herein, Plaintiff and Class members lost the money they paid for the products in an amount to be determined at trial.

### **COUNT THREE**

(Intentional Misrepresentation)

54. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

55. Defendants' representations were untrue as set forth above.

56. Defendants made the representations herein alleged with the intention of inducing Plaintiff and the public to purchase the products.

57. Plaintiff and Class members saw, believed, and relied on Defendants' representations and, in reliance on them, purchased the products. Said reliance was reasonable, given Defendants reputation with marketing weight loss and dietary supplement products.

58. At the time Defendants made the representations herein alleged, Defendants knew the representations were false, because they knew the products had serious side effects which were being concealed from consumers, and otherwise knew that the benefits of the products were false and misleading.

59. Defendants made the misrepresentations with the intention of depriving Plaintiff and Class members of property or otherwise causing injury, and are guilty of fraud.

60. As a proximate result of the foregoing intentional misrepresentations by Defendants, Plaintiff and Class members were induced to spend an amount to be determined at trial on the products. Plaintiff and Class members lost the money they paid for the products in an amount to be determined at trial. Had Plaintiff and the Class members known the true facts about the products, they would not have purchased them.

#### **COUNT FOUR**

(Unjust Enrichment)

61. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

62. Defendants have benefitted from their unlawful acts by receiving excessive revenue derived from the sales of the products which were marketed and sold in a deceptive manner.

63. Plaintiff and other members of the Class are entitled to the establishment of a constructive trust consisting of the benefit conferred upon Defendants in the form of their excessive revenue derived from the sales of the products which Plaintiff and other Class members may make claims on a *pro rata* basis for restitution.

#### **NOTICE TO ATTORNEY GENERAL**

64. A copy of this Complaint will be mailed to the Attorney General of the State of

New Jersey within 10 days of filing pursuant to MN.J.S.A. 56:8-20.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff and the Class pray that the Court enter Judgment for them and against Defendants as follows:

1. Certifying the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying Plaintiff as the representative of the Class, and designating Plaintiff's counsel as counsel of the Class;

2. Declaring Defendants' acts and practices, as described herein, constitute unconscionable and deceptive commercial practices that are unlawful under the New Jersey Consumer Fraud Act;

3. Awarding Plaintiff and the Class refunds, damages, treble damages, attorneys' fees and other costs; and

4. Granting any such other and further legal or equitable relief as this Court deems appropriate.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all claims so triable as a matter of right.

Dated: May 8, 2009.

/s/ Roger W. Orlando  
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**CERTIFICATION PURSUANT TO LOCAL RULE 11.2**

Plaintiff, by his attorneys, hereby certifies that to the best of his knowledge the matter in controversy is not the subject of any other action pending in any court, nor is it the subject of any pending arbitration or administrative proceeding. Plaintiffs are not aware of any other party who should be joined in this action.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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