IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
CASE NO.: **7:10-CV-102-D**

Antonio A. RODRIGUEZ, for himself and all others similarly situated, *Plaintiffs*	)	**MEMORANDUM SUPPORTING PLAINTIFF'S MOTION TO CERTIFY A CLASS**
v.	)	
Klee IRWIN, et al., *Defendants*	)	

Named Plaintiff Antonio A. Rodriguez moves to certify a Class of Plaintiffs as follows:

FACTS

Ludicrously unscientific and YouTube-lampooned as it may be, the Klee Irwin-Dr. James Chappell Dual Action Cleanse infomercial certainly is a box office smash for Defendants. By the Infomercial's own account, two million people had already bought this "one of a kind formula" of "powerful natural herbs" before the Infomercial began running in 2007, and even after a heavy discount for sales puffery, beyond doubt DAC's customers number in the hundreds of thousands. Named Plaintiff, like many millions of other Americans, saw the Infomercial and believed that this "delicate blend of 43 herbs" could relieve his constipation and give him a "wonderful feeling of being clean and new on the inside." At about 2:10 (**Exh. 1** is Plaintiff's transcript; **Exh. 2** is Defendants' posted "official" version) is one of Mr. Irwin's central claims:

> There's celebrities using it, politicians, doctors, but for as many people who have taken advantage of the life-changing benefits of my formula, there are still millions of people carrying around [2:21-2:38 title "Many Americans have between 5 and 22 pounds of compacted fecal matter stuck in their digestive system."] 15 or even 20 pounds of undigested toxic waste in their bodies that's weighing them down.

With a "NEW TV Discount Offer" of "low deep discount" and a "Deep Discount for 1st Time Buyers," not to mention a "special deep discount TV offer for first-time buyers only" on top of a

"Deep Discount & 2 FREE GIFTS," anybody would want to "call now to get your first-time buyer discount" and rid himself of enough "old rotten fecal matter" to fill a refrigerator drawer. "And that's still not all," continues the voiceover: "If you call now and cleanse with a friend or family member, you'll both receive 25% off today's already low deep discount for first-time buyers. There's no risk. If it doesn't work, you don't pay. So call now." **Exh. 1 at 5, 9, 11.**

Mr. Rodriguez did just that, and a few days later, the mail brought a small box of pill bottles. One product, Green Tea Natural Energy, a "$29.95 regular price," was truly "FREE" according to the invoice. Another, 12-in-One Men, was anything but. Normally $59.90, the "DEEP DISCOUNT" of $29.95 left only $29.95 for Mr. Rodriguez to pay for a month's supply of 12-in-One, although with $9.95 "Shipping & Handling" the price was really $39.90.

The star of the show, Dual Action Cleanse, was at least "dual," consisting of Colon Clear Formula and Total Body Purifier in separate bottles. Their regular price was $79.90 for two months, but "only" $59.90 after a "DEEP DISCOUNT" of $20.00. Though the package took eight days to arrive, $7.50 for "Rush & Priority" somehow found its way onto Mr. Rodriguez's credit card, as did yet another $9.95 "Shipping & Handling." After 20 separate mentions of "discount" in the Infomercial, $77.35 did not seem to "1st time buyer" Mr. Rodriguez to reflect any kind of "Deep Discount" much less a "LOW deep discount," especially considering the total package price of ***$117.25***, or ***more than TRIPLE the price*** of DAC ***and*** generic multivitamins in a store, such as Mr. Rodriguez's local Walmart, 15 minutes away in Elizabethtown.

In the box was a DAC brochure, which began with a letter from Klee Irwin himself. "Dear Friend: Feeling youthful, trim and energetic is just a few days away." Mr. Rodriguez being 80 years old at the time, "feeling youthful" seemed a challenging goal. But Mr. Irwin was sublimely confident of the etiology behind aging, bloating, and tiredness, which would be not

just "a low-fiber diet," but also "the world you and I live in now: polluted air, polluted water and food filled with artificial preservatives, hormones, pesticides, and other harmful chemicals." Under such assault from within and without, "your digestive system can easily become overwhelmed. Your colon can become sluggish, allowing toxic stool to build up and make you feel tired, bloated and old." It being impractical to "go live on a mountain somewhere to escape your toxic world," Mr. Irwin developed DAC "to give you an easy, at-home method of cleansing your body and restoring that pure, clean feeling you deserve. I hope you start using it immediately. Don't let another toxic day weigh you down. Yours for healthy cleansing, /s/ Klee Irwin, Creator of the Dual-Action Cleanse." **Exh. 7 at 3.**

Mere constipation, then, should have been no match for DAC's "powerful natural herbs," **Exh. 1 at 5, 9, 11,** wherefore Mr. Rodriguez took the whole bottles as directed. But to his dismay, Mr. Rodriguez soon discerned that however "Dual" it may have been, DAC resulted in, shall it be said, no "Action" in the bathroom, and consequently no "Cleanse." Mr. Rodriguez was compelled to visit a real physician, who correctly diagnosed his condition and prescribed effective medication that actually helped.

Two months later came another batch of DAC in the mail, and a charge of $64.85 effective 20 April 2009 on Mr. Rodriguez's Citibank card. Mr. Rodriguez does not remember asking for any kind of Auto-Ship program, but Irwin Naturals signed him up anyway. By now thoroughly disenchanted with DAC and outraged at the unauthorized charge, Mr. Rodriguez called at least three times to cancel, noting one call of 30 April 2009 on the cover of the 12-in-One brochure (**Exh. 9**), only to hear that he could not have a refund just for the asking, but must write a letter saying why DAC did not work. Mr. Rodriguez not being a native English speaker, this was a tall order for him.

June 2009 brought another box of DAC in the mail and another unauthorized charge to Mr. Rodriguez's Citibank card, this time "only" $59.85. The same thing happened again in August 2009, though the price was down to $54.85. But any "low deep discount" amount was far too much for Mr. Rodriguez, who lost at least $296.80 total, $114.70 of which occurred after he had called at least three times and asked to be taken off Defendants' "Auto-Ship" program, if indeed he ever really asked for Auto-Ship (the alleged recording of his initial call is still not available to him) because DAC simply did not work. Small wonder, because DAC, far from a "delicate blend" of "powerful natural herbs that gently cleanse" all those horrid "toxins" and "the 5 to 22 pounds of undigested red meat" alleged to be clogging the average American lower GI tract, is a useless, worthless, and downright dangerous product of ancient quackery that Defendants have to sell by fraud and pay for by theft, because if Defendants told anything like the truth about DAC, nobody in his right mind would want to ingest it if he were paid to, much less pay for it himself, let alone volunteer to have Defendants suck money from his credit card to no purpose for months on end.

DAC Cannot Possibly Work As Advertised

"Many Americans have between 5 and 22 pounds of compacted fecal matter stuck in their digestive system." **Exh. 1 at 8.** This title appears twice on screen in the Infomercial, accompanied by Mr. Irwin and Dr. Chappell's smoothly earnest assurances that DAC "flushes away as much as 10 to 30 pounds of old rotten fecal matter." **Exh. 2 at 6.** The blatant falseness of this crackpot idea cannot be overstated. There simply is no such thing as a lump of rotten meat lying in anyone's GI tract. If it were, that would constitute abdominal blockage, a medical emergency that a real physician would treat with anything but DAC. Surely Dr. Chappell, somewhere in his quasi-medical education, has run across the concept of colonoscopy, which

would instantly show any debris stuck to the colon, or seen autopsy photos of dissected colons with all that rotting meat spilling out, if there were any. But there are no such images anywhere, so Defendants have to come up with a photo of a purported bowel-clogging object in shades of black and bold green, and claim this is what all that gunk really looks like. (It seems not to have crossed Defendants' minds that rotting red meat is not black and bold green.) Moreover, 22 pounds of meat is the size of a Thanksgiving turkey. Cramming all that into the average human abdomen would result in "an unsightly bulge" all right, along with quite some "tiredness" and "sluggish" feeling. Thus, DAC's entire premise is a brazen falsehood, and Defendants know it. This is the oldest trick in the very old book of fraud: invent a nonexistent problem and terrify the public into paying through the nose for an alleged solution.

The names of DAC's two components, Colon Clear Formula and Total Body Purifier, are reminiscent of what Soviet citizens used to say about the Party newspaper *Pravda* (Truth) and the official government daily *Izvestia* (News)—no truth in one, no news in the other. The very name of Colon Clear Formula (CCF) is, as already seen, purely fraudulent because colons need no "clearing" except for occasional constipation that an OTC laxative will handle admirably. To hear Klee Irwin and James Chappell talk, CCF is not a laxative and does not create laxative dependency; it just "clears" your colon with "powerful natural herbs," and the Infomercial never hints at any possible side effects. But the very first ingredient of CCF, other than calcium, is cascara sagrada bark (*Rhamnus purshiana*), a harsh stimulant laxative that, even though it is "natural," has numerous and serious side effects, enough that there is no logical reason to self-medicate with cascara sagrada when so many other options are available.

Foremost among cascara sagrada's side effects is laxative dependency, one of the conditions that CCF is supposed to *prevent*, but can happen if use of cascara sagrada continues

beyond a week—and CCF's instructions are to take it daily, or two or three times daily, for a month straight. Cascara sagrada overuse can have other disagreeable results such as electrolyte imbalance, loose stools, bloody diarrhea, abdominal pain, cramps, and vomiting. These are especially likely if the bark has not been aged for at least an entire year after harvesting, and in the complete absence of inspection and testing that the "alternative health" lobby has ensured, no one has any way of knowing the quality and condition of ingredients in "natural" products. The medical literature reports at least three cases, two in America and one in Denmark, of cascara sagrada causing cholestatic hepatitis (inflammation and blockage of bile ducts in the liver), resulting in the Danish physician recommending that cascara sagrada be utterly banned from sale. After asking for but not receiving evidence of safety and effectiveness, the FDA disallowed cascara sagrada's use in over-the-counter laxative drug products as of 05 November 2002.

Even though CCF is not supposed to be a laxative, it contains the following materials known to have laxative properties, at least if taken in sufficient quantity:

Psyllium seed (*Plantago ovata, Plantago isphagula*)
Apple pectin and apple powder (*Malus domestica*)
Gum karaya (*Sterculia urens*)
Guar gum (*Cyamopsis tetragonoloba*)

Though the other component of DAC, Total Body Purifier (TBP), is not supposed to be a laxative either, it, too, contains substances with laxative properties:

Rhubarb root (*Rheum palmatum*)
Cape aloe gel (*Aloe ferox*)
Safflower oil seed (*Carthamus tinctorius*)
Yellow dock root (*Rumex crispus*)

Despite all the laxativity (if that is a word) in DAC, at about 15:00 of the Infomercial (5:11-5:18 of Part 2), this title appears: "While not a laxative, Dual Action Cleanse has similar benefits and effects of a laxative." Simultaneously, Mr. Irwin is saying: "Well, laxatives weaken your ability

to keep things moving. They can make you dependent on them." Defendants, however, cannot admit that **Dual Action Cleanse IS a laxative**, because then DAC might be considered a drug, which means FDA testing, and Defendants know that it would never pass, and would sicken many test subjects, if not kill a few by perforating or blocking their intestines.

Perhaps to cover all bases, DAC includes diuretic substances too:

Alfalfa leaf (*Medicago sativa*)
Burdock (*Arctium lappa, Arctium minus*)
Horsetail herb (*Equisetum arvense*)

An interesting CCF ingredient is slippery elm bark (*Ulmus rubra Muhl., Ulmus fulva Muhl.*), which can be made into porridge that is supposed to soothe the digestive tract, but what "cleansing" effect this may have is not apparent, and anyway there cannot possibly be enough slippery elm bark in a whole armload of CCF to make porridge. The remaining ingredients in CCF and TBP are either ordinary cooking herbs and spices:

Fennel seed (*Foeniculum vulgare dulce*)
Ginger root (*Zingiber officinale*)
Garlic extract (*Allium sativum*)
Lemon peel (*Citrus limon*)
Peppermint leaf (*Mentha piperita*)
Fenugreek seed (*Trigonella foenum-graecum*)

or food items in microscopic amounts:

Watercress (*Nasturtium officinale*)
Barley rice (fiber) (*Hordeum vulgare*)
Beet (root) (*Beta vulgaris*)
Turnip (*Brassica rapa*)
Oat bran (seed kernel) (many species of the genus *Avena*)
Dandelion root (*Taraxacum officinale*)
Green tea extract (*Camellia sinensis*)
Red clover (*Trifolium pretense*)
Cranberry extract (*Vaccinium macrocarpon*)
Chickweed herb (*Stellaria media*)
Irish moss (*Chondrus crispus*)

or substances picked seemingly at random, few with any known medical use at all, some with potentially serious side effects, and none with any "purification" or "detoxification" value:

Acacia gum (*Acacia senegal*)
Red raspberry leaf (*Rubus idaeus*)
Lactobacillus acidophilus
Yarrow flower (*Achillea millefolium*)
Siberian eleuthero (*Eleutherococcus senticosus*)
Hawthorn berries (*Crataegus oxyacantha*)
Horsetail herb (*Equisetum arvense*)
Turmeric (*Curcuma longa*)
Licorice root (*Glycyrrhiza glabra*)
Marshmallow root (*Althaea oficinalis*)
Mullein leaf (*Verbascum thapsus*)
Tropical almond fruit (*Terminalia catappa*)
Lecithin
Papaya leaf (*Carica papaya*)
Milk thistle herb (*Silybum marianu*)
Black cohosh root (*Cimicifuga racemosa*)
Club moss (*Huperzia serrata*)
Plantain herb (*Plantago major*)

or plants that, far from "cleansing" or "purifying," are positively toxic:

Pau d'arco (*Tabebuia avellanedae*, *T. heptaphylla*, *T. impetiginosa*)
Blue green algae (cyanobacteria, aka pond scum)
Skullcap herb (*Scutellaria lateriflora* (American), *S. baicalensis* (Chinese))

Obviously, DAC is hazardous to your health and should be thoroughly illegal. Unbelievably, it is available in retail stores across the fruited plain, and by phone and online, because the improvident Dietary Supplement and Health Education Act (DSHEA) of 1994, 21 U.S.C. § 321(ff), leaves a loophole for virtually any purported folk remedy, however unproven or dangerous it may be, to be labeled a "dietary supplement" and sold and regulated as a "food," so long as it is "an herb or other botanical." Thus, the ghastly mash-up known as Dual Action Cleanse, which does nothing of the sort and generally makes people worse, is freely available online, by phone, and in neighborhood stores, because its label bears the magic words: "This

statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease." 21 U.S.C. § 343(r)(6)(C).

But it is. Defendants have already diagnosed every Infomercial viewer with the disease of "colon toxicity" or "impacted decaying red meat" or other unscientific nonsense dredged up from the 19th century. "Colon health" advocates, who seem never to have any significant scientific education or any meaningful health credentials but always stand ready to sell "natural cures" to the trusting public at decidedly unnatural prices, blame virtually all health problems on "poisons" or "toxins" in the intestine without ever specifying which substances are supposed to be poisonous or toxic. Tragically, the sad state of science education in America for the last generation has robbed the nation of critical thinking skills and left people ready to believe anything that seems to provide a quick, cheap, easy, comfortable, "natural" fix to whatever ails them. Defendants understand this all too well, and they are far from the only ones.

On 16 August 2010, the Federal Trade Commission announced *FTC v. Central Coast Nutraceuticals, Inc.*, case number 1:10cv4931 in U.S. District Court for the Northern District of Illinois. The products in question are acai berry supplements, falsely claimed to cause rapid weight loss, and Colotox "colon cleanser." **Exhs. 17-22** are from oncology expert Denis R. Miller, MD, whose cv shows decades of research on "complementary medicine" as well as conventional treatment of cancer. He has few kind words for CCN's wares.

> Most text books define constipation as 'infrequent bowel movements, typically <3 times per week, difficulty during defecations, or the sensation of incomplete bowel evacuation.' … In my review of a variety of colon cleansing products currently on the market, I found that most of the purveyors of colon cleansing products offer a new, self-serving definition of constipation: … 'Ideally, you should have a bowel movement after every meal. Any less than two or three bowel movements a day, and you're probably constipated.' … If this new definition of constipation were accepted, virtually every American would now be classified as 'constipated' and thus would be a candidate for a proprietary colon cleanser.

Exh. 17 at 13. This is extremely similar to Defendants' claims. Dr. Miller listed the properties of Colotox/Colopure's ingredient herbs, and opined that whoever mixed it up most have thought "that if one laxative is good, six are even better." ***Id.* at 22.** Colotox/Colopure's ingredient list is in **Exh. 22**, and another expert, Robert Kushner, MD examined "AcaiPure," whose ingredient list, **Exh. 25 at 13-14**, is identical to Colotox/Colopure, and declared that

> there is no credible medical evidence that these ingredients, or the combination of these ingredients, would be effective in causing any weight loss, other than perhaps some minimal weight loss due to the laxative effect of many of the above listed ingredients. Any weight loss due to the use of laxatives, which work to facilitate bowel movements, would be the loss of water weight from the passage of stool and such weight loss would not be significant or permanent.

Exh. 24 at 6. Cascara sagrada, the *seventh* laxative in Colopure/Colotox/AcaiPure, "is the most potent of them all as its primary pharmacologic role is to increase intestinal motility and contractions, effectively producing bowel evacuation." **Exh. 18 at 2.** "Reported adverse reactions from cascara sagrada include vomiting, abdominal cramps, diarrhea, hypokalemia, and rarely, cholestatic hepatitis." ***Id.*** Though Defendants do not sell DAC as a cancer cure, it would have the same side effects as Colopure, such as "loss of bowel function, with exacerbation of constipation, bowel obstruction, and even death." ***Id.* at 4.** Buckthorn and goldenseal are the only ingredients in AcaiPure/Colotox/Colopure not also in DAC.

Even though it cannot possibly work, very many people either experience no harm from DAC or actually like it, attributing whatever health or "energy" improvement they experience to the product they just paid for. It could well be that they become laxative dependent due to the laxatives in the "not a laxative" product that "has similar benefits and effects of a laxative." Whatever their reasons, DAC attracts far more than enough happy one-time customers to make Mr. Irwin a multimillionaire for life. But this is not enough, not nearly, for Mr. Irwin.

Dissatisfied with the fantastic riches bestowed upon him already, Mr. Irwin makes sure that whether or not customers ask for the Auto-Ship program (there is absolutely no reason to do so, since DAC is available nationwide in retail stores at less than half the "factory direct" price), their credit or debit cards get charged or debited anyway, typically three or four more times, as happened to Mr. Rodriguez. It is easy to find hundreds of complaints about this practice, dating back to at least 2006. Also are frequent mentions that attempted return of the product is futile, even within the 30-day trial period. As Mr. Rodriguez experienced, Defendants' personnel or third party call centers have at their disposal any number of creative excuses to do anything other than what is right—give the money back, all of it, now.

One call center, Defendant Telezone, LLC, employed dozens of people to sell Mr. Irwin's products. Phone reps there were under heavy pressure to bring home the bacon, by any means necessary. Most especially, phone reps would get in extremely serious trouble if they dared allow a customer to cancel his Auto-Ship program, unless the customer could be convinced to buy something even more expensive in its place. $50 "gift certificates" came with $16.95 a month "service charges." Particular targets were senior citizens, prized because they have far higher incidence of constipation and because they often did not fully understand what Defendants were illegally doing to them, and furthermore were far less likely to be technically literate enough to do their own online research and determine that Defendants were up to no good. Telezone closed its 5340 Alla Road location in Los Angeles on 05 August 2009, in violation of plant closing law according to a few former employees (who, by the way, Mr. Irwin sought to convert to "independent contractors" so he would save even more money on payroll taxes, even though the people in question worked regular shifts at the company's office using company equipment and very definitely were required to follow orders and not do things

according to their independent judgment), and does not currently specify a service address of its registered agent, according to California Secretary of State corporate records.

Another call center is or was at 121 Mill Street, Auburn ME, variously owned by or known as PowerTel Marketing Group, Inc., PowerTel Marketing Group, LLC, FD&H Enterprises, LLC, and AdvanceTel Direct, LLC, and now seems to be run by Great Falls Marketing, LLC (which Plaintiffs will not name as a defendant because its liability is far from clear). Advertised in the brochure that came with Mr. Rodriguez's order was Glucotrin, another "natural" product of Mr. Irwin, this time aimed at the "ONE OUT OF EVERY TWO PEOPLE" (allcaps in original) with "rising blood-sugar levels." According to its homepage, Glucotrin is supposed to have "been carefully assembled by the Blood Sugar Institute." People who want to "[m]inimize blood-sugar spikes" and "[o]vercome early signs of Pre-Diabetes" and call the "Blood Sugar Institute" are actually talking to ordinary salespeople at 121 Mill Street or other call centers. That Mr. Irwin, who has no real medical or pharmacological training, would concoct a wholly fictional medical-sounding entity to convince people to accept his "Deep Discount Offer" of $59.95 plus $4.95 shipping and handling for a product falsely claiming to treat "pre-diabetes" and therefore diabetes, a complex disease that can blind, disfigure, and kill its victims, is by itself proof beyond a reasonable doubt that Mr. Irwin is nothing but a callous fraudster who has grown obscenely rich by badly harming the public.

He is far from the only one, though. Defendants were and are on notice that similar racketeering operations are thoroughly illegal, by the contemporaneous and well-publicized prosecution of Steven Warshak, now sitting in prison for 25 years with scant hope of successful appeal, and other key personnel, including his mother and his lawyer, of Berkeley Premium Nutraceuticals, purveyors of the "natural male enhancement" supplement Enzyte, for the same

pattern of lawbreaking as here: useless or harmful products, false claims of a medically impossible result in a memorable TV and online campaign (i.e., the ubiquitous "Smiling Bob," who was always surrounded by envious admirers, ribald double entendres, a jaunty whistled jingle, "and a very happy missus at home"), steady streams of unwanted merchandise from a surprise "continuity" program, unauthorized credit and debit card charges, elusive customer service reps, nonsensical conditions for refunds, and almost never any money back. *See United States v. Warshak*, 562 F.Supp.2d 986 (S.D.Oh. 2008). An excellent summary of this affair appeared in a recent episode of CNBC's *American Greed* series.

Just this month, as mentioned, the FTC landed hard on Central Coast Nutraceuticals, Inc. (CCN), a major marketer of fraudulent "colon cleanse" products, obtaining a TRO, appointment of receiver, and asset freeze. Like Defendants here, the acai berry fraudsters would not be content with mere millionaire status, but chose to commit access device fraud all day every day, raking in at least $30 million for 2009 by charging people for "free" trials and refusing to refund money even after compliance with Simon Says rules. Just like Defendants' Auto-Ship surprise, CCN volunteered nearly all its customers for the "Lifestyle Program" (for some reason, CCN personnel were under strict orders never to call it "Auto-Ship") that automatically charged credit and debit cards for unwanted merchandise, and those who dared cancel their cards soon got dunning letters with threats to vandalize their credit reports, so many of them paid anyway.

Most appalling about the foregoing is that Mr. Irwin was in the "natural health" industry before Mr. Warshak started and long before anybody had heard of acai berries, and is still hard at it long after Mr. Warshak's forced retirement. Instead of taking warning from Mr. Warshak's fate, Defendants seemed to have looked at his business model and adopted it as their own, only on an even larger scale. But to date, for reasons utterly beyond Plaintiffs' comprehension,

neither any attorney general nor the FDA nor the FTC has pounced on Defendants to shut them down, confiscate their assets, and reimburse their victims. Doubtless, the acai scammers' doom will make no impression on Defendants. Plaintiffs, then, will see what they can do themselves.

POINTS AND AUTHORITIES

Merits of the Causes of Action

"Class certification is only proper when a determinative critical issue overshadows all other issues." *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990). The "determinative critical issue" is that Defendants used identifiable enterprises to commit a pattern of interstate mail, wire, bank, and access device fraud in furtherance of their "colon cleanse" swindle, then transported, received, and laundered the proceeds to interfere with Plaintiffs' recovery; therefore, Plaintiffs are entitled to relief under several different theories that hang on these central facts.

Racketeer Influenced and Corrupt Organizations Act

This is the big hammer, meant to make people pay in full for the damage they do if they choose to use one or more of their enterprises to commit a pattern of crime. The elements of an 18 U.S.C § 1962(c) violation are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity…. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima v. Imrex*, 473 U.S. 479, 496 (1985). Taking these elements in turn:

"***(1) conduct***": "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993). Mr. Irwin is *the* "upper management" at Irwin Naturals and Ultimate Nutraceuticals, and is DAC's public persona, sometimes together with his sidekick Dr. Chappell, in all its advertising and product packaging. Mr. Stevens, as VP

for legal affairs, is undeniably "upper management" of Irwin Naturals.

"***(2) of an enterprise***": "[T]he 'enterprise' in [18 U.S.C. § 1962](c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity. … [I]t need only be an association in fact." *National Organization for Women v. Scheidler*, 510 U.S. 249, 259 (1994). Irwin Naturals and Ultimate Nutraceuticals, LLC are formal legal entities and easily meet this element. "[18 U.S.C. § 1962(c)] applies when a corporate employee unlawfully conducts the affairs of a corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001).

"***(3) through a pattern***": "[R]elatedness of racketeering elements is not enough to satisfy [18 U.S.C.] § 1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (emphasis in original); *see also GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 549 (4th Cir. 2001). "[T]he threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J., Inc.*, 492 U.S. at 242. Fraud and money laundering are Mr. Irwin's regular, and virtually only, business. No end to any of this is in sight, unless law enforcement is quietly planning to administer the Warshak treatment. Plaintiffs fervently hope so.

"***(4) of racketeering activity.***": Mr. Irwin makes most of his living, if not virtually all of it, from fraud. By devising his Auto-Ship program and foisting it on thousands of customers from at least 2006 onward whether they wanted it or not, he is perhaps the nation's grandest practitioner of access device fraud, *see* 18 U.S.C. § 1029(a)(2) and (5), and "knowingly

execute[d], or attempt[ed] to execute, a scheme or artifice to defraud a financial institution." 18 U.S.C. § 1344(1). He uses the Postal Service and interstate wires to sell and ship worthless and harmful products. "Mail fraud and wire fraud are forms of 'racketeering activity' for purposes of RICO. [18 U.S.C.] § 1961(1)(B)." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 454 (2006). The "scheme or artifice," not the fraud itself, is the crime. *See Neder v. United States*, 527 U.S. 1, 25 (1999). Mail fraud, 18 U.S.C. § 1341, consists not only of mailings designed to waft away victims' money, but also use of the mails "to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Lane*, 474 U.S. 438, 451-52 (1986). At least twice, and probably over 100,000 times, Mr. Irwin accepted the proceeds of his businesses' specified unlawful activity, which promoted the carrying on of still further unlawful activity. Without a doubt the total amount has been over $10,000, if not $60,000,000 or more. Mr. Irwin thus violated 18 U.S.C. §§ 1956, 1957, 2314, and 2315.

Mr. Stevens may wax indignant at being a Defendant here, relying on corporate bar folklore that holds lawyers immune from liability for anything they do so long as it is on behalf of a client, and that lawyers may accept fraudulently obtained money so long as it wears the fig leaf of a legal fee. This last is only a defense to transaction money laundering, and only if, per 18 U.S.C. § 1957(f)(1), it is for criminal defense work "necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." No such exception is in §§ 1956, 2314, or 2315. Mr. Stevens' attention is directed to *Warshak*, 562 F.Supp.2d at 998, outlining Warshak lawyer Paul Kellogg's knowledge of the "continuity program" (read "Auto-Ship") and the unlawful nature of the proceeds which he was using his legal skills to hide from the Federal Trade Commission. Mr. Kellogg is now appealing his conviction and sentence.

And, standing to sue by virtue of having been ***"injured in his business or property by the conduct constituting the violation."*** Mr. Rodriguez most certainly has been. "KLEE IRWIN HLTH PROG-V 800-9744054" sucked $296.80 from his Citibank card in five separate transactions on four different days spread over six months of 2009, at least three of which Mr. Rodriguez did not intend or authorize, and none of which resulted in any value to him. These transactions, and Mr. Irwin's subsequent transmission, reception, and laundering of the proceeds, violated 18 U.S.C. §§ 1029, 1341, 1343, 1344, 1956, 1957, 2314, and 2315, all of them § 1961(1) predicates, and NCGS § 14-100, a North Carolina RICO predicate.

Mr. Irwin and his lawyer Mr. Stevens are thus well RICO'd up, which brings the discussion around to Dr. Chappell and 18 U.S.C. § 1962(d), which forbade him "to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *Beck v. Prupis*, 529 U.S. 494, 507 (2000) holds "that a person may not bring suit under § 1964(c) predicated on a violation of § 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." But as seen just *supra*, Mr. Rodriguez's injuries were *entirely* the result of racketeering acts. One of them was the count of wire fraud that Mr. Irwin and Dr. Chappell committed by making the Infomercial. Chock full of knowing falsehoods, it was what induced Mr. Rodriguez to lay out money for DAC, as Mr. Irwin and Dr. Chappell intended. Conspiracy is more than mere parallelism, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but here, Mr. Irwin and Dr. Chappell did not just happen to stumble upon the same TV studio at the same time and spontaneously start talking about toxins and undigested red meat and universally bad colon health these days, then out of the blue have it occur to them that Dual Action Cleanse can fix everything, and at a "Low Deep Discount" too. No, they agreed beforehand to make the Infomercial and rehearsed their lines thoroughly, knowing and hoping

that many, many people would see it and give up money for a useless, dangerous product.

Then they did it again, with a 30-minute infomercial for 12-in-One multivitamins, transcribed in **Exh. 26**, which claims that "store-bought" multis are obsolete and in fact are leading to "malnourishment" and obesity, but 12-in-One (even though neither Mr. Irwin nor Dr. Chappell have any serious training in nutrition) will not only supply 117 nutrients but will also cure depression, improve memory and concentration, and (what else) cause real weight loss, all within two days and at the customary alleged "NEW TV Discount Offer" price. As with the DAC Infomercial, the chief aim of the 12-in-One infomercial is to snag credit card numbers and commit plenty more access device fraud. Regardless of whether he still gets royalties (Plaintiffs' understanding is that he does not, having accepted a one-time appearance fee), Dr. Chappell was instrumental to Mr. Irwin's astronomically profitable DAC business and to any success of 12-in-One, and is responsible per 18 U.S.C. § 1962(c) and (d) for all the damage done, as are Mr. Irwin and Mr. Stevens. It is perfectly possible to be acquitted of § 1962(c) and convicted of § 1962(d). *See Salinas v. United States*, 522 U.S. 52 (1997).

NCRICO, applicable to the estimated 6,000 or more North Carolinians to have lost money to Defendants, and Nevada RICO, applicable to the whole class because Defendants used Nevada entities to damage all of them, are similar enough to (actually less difficult to plead than) federal RICO that they need no extensive separate treatment until later motion practice.

Unfair and Deceptive Trade Practices

This is far simpler than RICO. "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have," Cal. Civ. Code § 1770(a)(5), is illegal, and triggers § 1770:

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).

(2) An order enjoining the methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief that the court deems proper.

As abundantly seen, Dr. Chappell does not have the status of either ND or board certified chiropractor, Mr. Irwin has no status at all other than salesman, and DAC is the epitome of a good that does not have the uses and benefits that Defendants represent it to have.

The elements of an unfair trade claim per NCGS § 75-1.1 are "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). "The determination of whether an act is unfair or deceptive is a question of law for the court." *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C.App. 228, 230, 314 S.E.2d 582, 584 (1984). *Dalton v. Camp*, 353 N.C 647, 657, 548 S.E.2d 704, 711 (2001), further requires "egregious or aggravating circumstances." If Defendants' acts and practices are not unfair, deceptive, egregious, and aggravating, then nothing can be.

The foregoing should do to show that huge numbers of people have the same valid statutory claims for a vast amount of money and attorney fees from Defendants. Plaintiffs' counts for common law conversion, negligence, fraud, and breach of contract, and joint and several liability for all damages on theories of conspiracy, respondeat superior, and veil-piercing are just as meritorious, but the opportunity to advance them in detail will come later.

Equitable Relief

Plaintiffs will address these causes in more detail in forthcoming motions for preliminary injunctions, asset freezes, and appointment of operating receivers *pendente lite*.

Rule 23, Piece by Piece

The simplest way to show the appropriateness of class certification is to list Rule 23's factors in sequence, and the evidence and arguments supporting each. Fed.R.Civ.P. 23(a) begins: **"*One or more members of a class may sue or be sued as representative parties on behalf of all members only if ...***

"(a)(1) *the class is so numerous that joinder of all members is impractical.*" A class of 94 is numerous. *See Brown v. Nucor Corp.*, 576 F.3d 149, 152 (4th Cir. 2009). The Second Circuit and other authorities presume numerosity at 40 class members. *See*, *e.g.*, *Consol. Rail Corp. v. Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). "As few as forty class members can render joinder impractical, especially when the members are 'widely scattered and their holdings are generally too small to warrant undertaking individual actions.' *Murray v. E*Trade Fin. Corp.*, 240 F.R.D. 392, 396 (N.D. Ill. 2006). Courts rely on common sense to determine whether an estimate of class size is reasonable and meets the numerosity requirement." *Randolph v. Crown Asset Mgmt*, 254 F.R.D. 513, 517 (N.D. Ill. 2008). The Infomercial claims two million customers—*before* the Infomercial aired—of either DAC or a similar product, Ultimate Cleanse. The nation's biggest retailers sell DAC in stores and online for as little as $22.88 per two-bottle set. Mr. Rodriguez ordered by phone and lost $296.80, a lot of money to him. These are common sense proof of a numerous class, "widely scattered" and with "small holdings."

"(a)(2) *there are questions of law or fact common to the class.*" As the Amended Complaint shows, Named Plaintiff and the Class were victims of most or all of the following sections of 18 U.S.C.: § 1029 access device fraud, § 1341 mail fraud, § 1343 wire fraud, § 1344

bank fraud, § 1956 promotion and concealment money laundering and conspiracy, § 1957 transactions in proceeds of specified unlawful activity, § 2314 transportation of property taken by fraud, and § 2315 receipt of property taken by fraud, and Defendants committed them so often and so continuously, with no end in sight to this day, that Defendants' offenses amount to a pattern of racketeering activities in violation of § 1962(a), (c), and (d), entitling each Class Member to § 1964(c) money damages. Defendants violated California consumer protection law and Nevada RICO as to every Class Member. Defendants converted every Class Member's property to their own use and breached their contract with every Class Member. Defendants have unjustly enriched themselves with every Class Member's money and are constructive trustees of the same, entitling every Class Member to equitable relief from every Defendant. All Defendants negligently harmed the Class by failing to use reasonable care in the selection, training, supervision, and retention of their underlings. Furthermore, Rule 23 only governs procedure and does not change substantive rights, and applies to state statutory claims even if the statute that creates them expressly forbids class treatment. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, __ U.S. __, __, 130 S.Ct. 1431, 1443 (2010).

"(a)(3) *the claims or defenses of the representative parties are typical of the claims or defenses of the class.*" Named Plaintiff has suffered both injuries that Defendants inflicted on the rest of the Class, that is, paying money for a deceptively advertised and ineffective product, followed by unauthorized charges for unordered merchandise. He is entitled to relief under all causes of action in the Amended Complaint.

"(a)(4) ***and the representative parties will fairly and adequately protect the interests of the class.*****"** "The Supreme Court 'has repeatedly held [that] a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). Named Plaintiff Antonio Rodriguez is an extraordinarily suitable representative. While he is not a native English speaker and is unused to dealing with legal matters, he understands the basic nature of the laws that entitle him and the Class to relief. He is honorably retired after a lifetime of productive work, and should not have to endure this sort of fraud and theft, but instead of being content to seek just a triple refund for himself, has volunteered for the public service of bringing justice to hundreds of thousands of other Americans. Needless to say, he should receive a ***substantial*** incentive award for his actions above and beyond his immediate self-interest, as a wholesome example of what other good citizens may expect if they answer a similar call to duty.

"(b) ***A class action may be maintained if Rule 23(a) is satisfied and if:***

"(2) ***the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.*****"** Plaintiffs are entitled to equitable relief including imposition of a constructive trust and consequent order for the constructive trustees (Defendants) to turn over every Class Member's property, to wit, credit or debit card access information, and any money that Defendants still have. As with any other equitable remedy, a constructive trustee

is subject to contempt of court if he chooses to disobey a turnover order. Plaintiffs are also entitled to preliminary injunctions or asset freezes to protect the res until final judgment.

"(3) ***or, the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.*****"** This is apparent already, but to be thorough—

"***The matters pertinent to these findings include:***

"(A) ***the class members' interests in individually controlling the prosecution or defense of separate actions.*****"** All Class Members are welcome to opt out and run their own cases with the assistance of independent counsel even after class certification. However, the amounts involved are small, and it would not at all be a good use of court resources to hear thousands, or hundreds of thousands, of individual cases that would end in the monotonously same result—Defendants liable for triple damages and attorney fees, the latter far exceeding the former.

"(B) ***the extent and nature of any litigation concerning the controversy already begun by or against class members.*****"** Astonishingly, the instant action seems to be the only one ever to have been filed against any Defendant in any United States court. A few individual lawsuits are pending in state courts here and there, including one in Arizona by a man who almost died after a product similar to DAC perforated his intestine. The lack of action despite the huge numbers of persons harmed is almost certainly due to the small amounts involved and the reluctance of lawyers to take such tiny cases, coupled with Defendants' crafty strategy of satisfying complaints that come through BBB in order to maintain an undeserved A rating (**Exh. 16**).

"(C) ***the desirability or undesirability of concentrating the litigation of the claims in the particular forum.*****"** RICO nationwide service of process is sufficient by itself to confer personal

jurisdiction and lay proper venue here. Named Plaintiff lives here, as does Counsel. Defendants' activities have so saturated the nation that except perhaps for the Central District of California, where Defendants live but where law enforcement has let Defendants go on and commit crimes for many years without interference, no District is more suitable than any other.

"(D) ***and the likely difficulties in managing a class action.*****"** One difficulty is the sheer size of the Class, at least 200,000. Appointment of receivers would be a big help. Defendants have records of how much each Class Member paid, at least for the last four years (RICO and NCUDTPA statute of limitation). Another is finding enough money to cover triple damages, even for only the last four years. However, only a small fraction of Class Members send in claim forms in the typical class action, so that might be a self-resolving problem.

"... **(g)** ***Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court must consider:***

"(A)(i) ***the work counsel has done in identifying or investigating potential claims in the action.*****"** Counsel has done all of the legal research and writing himself, and all of the factual research, including personally transcribing Defendants' Infomercial and personally looking up every single ingredient on Defendants' product labels. If on no other principle than quantum meruit as restated in the story of The Little Red Hen, Counsel deserves to stay.

"(A)(ii) ***counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action.*****"** Though Counsel has not run a class action after certification, nobody else is even trying to help out these innocent victims, and as the saying goes, "sometimes there's justice; other times there's just us." Counsel has handled cases of similar or greater complexity to this one for some time on behalf of many individuals. Three putative class actions, *Manuel v. Gembala*, 7:10cv4-FL, *Caraballo v. Bagbeh*, 7:10cv122-H, and

(counting the last two as one) *Southwood v. The Credit Card Solution*, 7:09cv81-F and *Taylor v. Bettis*, 7:09cv183-F, are examples of the kind of work that Counsel is now dedicating himself to. However, none of those classes seems to be larger than 2,200, and the instant case is far, far too big for one lawyer to handle. Counsel will need help to run it, and is in contact with a larger and more experienced firm to take on partial responsibility. Should Counsel not be able to find help himself, this Court's official request for applications to the Bar of this Court would be most welcome. Asset freezes and appointment of receivers would also be a huge help, which motions will be filed as early as is practicable.

"(A)(iii) ***counsel's knowledge of the applicable law.*****"** This Court may judge that for itself from the pleadings and papers so far, together with those in the aforementioned putative class actions that Counsel is also running.

"(A)(iv) ***and the resources that counsel will commit to representing the class.*****"** Again, a class size of 200,000-plus indicates that many more resources will be necessary than are at the command of a solo practitioner. Counsel will dedicate all he has, but will need help.

"(B) ***[The court] may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.*****"** The only one that springs to mind at this time is that distressingly few plaintiffs' lawyers are willing to take similar public interest cases and fill in the vast gap in consumer protection left by state AGs, on grounds that such matters are too complicated, too time-consuming, and above all, unprofitable because of the years-long wait to get paid, or to not get paid at all. This Court's enforcement of prompt deadlines and a fair fee award in the instant case would begin to win some hearts and minds in the plaintiffs' bar.

"(C) ***[The court] may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable***

***costs.*"** This Court is welcome to do so at any time. As to fees and costs, the statutory causes of action shift all of those to Defendants. Named Plaintiff agreed that Counsel would advance reasonable costs and that any recovery would go first to reimbursement of costs, followed by a one-third contingent fee on the balance of the recovery. In a common fund case, a percentage of the recovery is entirely proper and usual. The Fourth Circuit seems not to have set a definitive test for reasonableness of class counsel fees, but many districts in this Circuit have imported the seven factors of *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 733 (3d Cir. 2001):

"(1) the size of the fund created and the number of persons benefitted": The size of the fund remains to be seen, but is likely to range from millions (early reasonable settlement with discount for the uncertainties of litigation) to hundreds of millions (unreasonable resistance to the inevitable, resulting in judgment for full statutory damages). The number of persons benefitted will be no less than 200,000, or at least as many of them as will get around to sending in claim forms. That is a very low-end conservative estimate of how many customers have wasted money on DAC or lost money to Defendants' fraudulent charges.

"(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel": This, too, remains to be seen, but Defendants' conduct—bluntly, stealing truckloads of money simply because they can—has so infuriated so many people that almost to a person, Class Members are likely to be ecstatic that *some*body is doing something and are unlikely to object to a healthy fee.

"(3) the skill and efficiency of the attorneys involved": Skill may be best judged from Counsel's filings here and in other cases pending in this Court. Though efficiency will be an elusive goal in what promises to be a massive, messy, and contentious affair, one ordinary Named Plaintiff armed with one lawyer has already brought considerable attention (readers are

invited to try search terms such as "ultimate nutraceuticals" to see how many sites have picked up on the instant case) to a cold, cruel, calculated, and premeditated multimillion-dollar nationwide fraudulent conspiracy that otherwise had no end in sight. For this alone, a substantial fee award seems more than fair, and would attract more consumer lawyers to do likewise.

"(4) the complexity and duration of the litigation": The instinctive wrongness of Defendants' actions is apparent to anyone, but putting Plaintiffs' individual losses into words that will meet the elements of effective causes of action, including the notoriously picky RICO statute, against well-defended Defendants, is rather involved. Duration of the litigation is guaranteed to be years, unless Defendants elect to settle somewhat short of total ruin.

"(5) the risk of nonpayment": Defendants have done at least $20 million of harm to the Class, and probably far, far more. Statutory triple damages will range from $60 million to the best part of a billion dollars. Collection of the full amount, especially if it proves to be toward the upper end of the range, could be a fiscal impossibility, and collecting any significant sum at all from Defendants will require the appointment of receivers well versed in asset recovery. Defendants blithely misrepresented their useless and harmful products, and then stole money hand over fist from their customers, dragooning into crime many hundreds of telemarketers just trying to make a living. Scofflaws of this sort may be counted on to resist execution fiercely, and Plaintiffs will require all the force of the law to collect anything whatsoever. Early realistic settlement might brighten the picture significantly, but Plaintiffs fear that even this clearly reasonable step may happen only after a receiver's or bankruptcy trustee's intervention. Regardless of how the case ultimately comes to an end, the likelihood of full repayment is slim, and whatever money does come in will have been dearly earned.

"(6) the amount of time devoted to the case by plaintiffs' counsel": As in *In re Abrams &*

Abrams, P.A., 605 F.3d 238 (4th Cir. 2010), Counsel does nearly all of his cases on a contingent fee basis (he seems to have an unhappy knack for attracting clients who have already lost all their money to the people who need suing), and it is difficult to keep time records with any kind of accurate attribution to each case, since so many of Counsel's cases involve complex and overlapping RICO legal research. In the instant case, the work has barely begun. But a fair estimate is that at a minimum, Counsel has devoted at least 200 hours to the instant case so far, often in the dead of night and on weekends and holidays to the exclusion of more entertaining and refreshing activities. The sheer size of the putative Class, and the greater-than-average amount of discovery in store for all, makes it impossible to know how much time will be necessary and proper to a just and speedy resolution. Counsel does not see why lawyers should be incentivized to pad hours or do anything other than spend the right amount of time necessary to obtain as much justice as is available, unlike class counsel in the next point.

"and (7) the awards in similar cases." Cases approving or disapproving various percentage fees are abundant. *Farinella v. PayPal, Inc.*, 611 F.Supp.2d 250, 272-73 (E.D.N.Y. 2009), collects cases allowing as much as 30% of $15.175 million and 33% of $4.375 million, or as little as 10% of $1.2 million and 15% of $2.075 million. In *Farinella* itself, the district court was less than ecstatic with the behavior of both sides.

> Public policy should encourage meritorious suits and discourage frivolous ones. The Court is troubled by the public policy ramifications of awarding substantial fees in cases of questionable merit such as this one. ... This order brings to a close a case of questionable merit that nonetheless consumed thousands of hours the attorneys' and the Court's time. Instead of going to those merits, the parties managed to wrangle on the periphery for some five years. After all of that time, it remains an open question who the beneficiaries of the action are and whether it was worthwhile.

611 F.Supp.2d at 273, 274. The parties agreed to a 28% fee, which the court considered to be "at the high end of the spectrum." *Id.* at 272. The court also noted that lead class counsel had been

a lawyer for only five years and had never run a class action before, committing rookie mistakes "such as filing an amended complaint in state court after the case had been removed[.]" *Id.* Even so, the court only knocked off eight percentage points for unrelated, unnecessary, or already paid-for work, and approved a 20% fee totaling $700,000 for Class Counsel's 3,930.85 hours. *See id.* at 273.

Here, Counsel is advancing the case with all deliberate speed. It is very clear who benefits—more than 200,000 consumers. All eventual class counsel should receive a fair percentage, but since the size of the common fund could be anywhere from a few million to hundreds of millions of dollars, it is premature to set an exact fraction yet.

"(g)(2) ***When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.*****"** Removal of Counsel from the case would be unfair to him and damaging to the Class, so this pertains to co-counsel applicants.

"(g)(3) ***The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.*****"** Counsel is the only one here at the moment, but others should be appointed as soon as suitable candidates can be found.

"(g)(4) ***Class counsel must fairly and adequately represent the interests of the class.*****"** Adequacy has been shown, so long as this Court appoints suitable assistance, and Counsel has no reason to be unfair to the interests of the Class.

WHEREFORE Plaintiffs request this Court to certify a Class of Plaintiffs consisting of all persons in the United States who purchased Dual Action Cleanse or with whose credit or debit cards or other access devices Defendants obtained money without authorization, and to

appoint the undersigned as Class Counsel together with associate counsel adequate to help manage a very large class, and to order paid from any common fund the costs of the action, a substantial incentive award to Named Plaintiff, and a reasonable fee to all Class Counsel.

Submitted this **25 August 2010** by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **25 August 2010** I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notice of such filing to

Pressly Millen, Esq.
Womble Carlyle
150 Fayetteville Street Suite 2100
Raleigh NC 27601
Counsel for Defendants Klee Irwin, Irwin Naturals, Ultimate Nutraceuticals

And that a hardcopy of the foregoing will be served along with the summons and Amended Complaint upon all other Defendants, and that per published judicial references, hardcopy will be dispatched no later than **25 August 2010** to the Clerk's office and opposing counsel.

Submitted this **25 August 2010** by:

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