

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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GARY NULL & ASSOCIATES, INC.,

Plaintiff,

Case No.: 10601070

Amended Complaint

.. against ..

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TRIARCO INDUSTRIES, INC.

Defendant.
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Plaintiffs, GARY NULL & ASSOCIATES, INC., by their undersigned counsel

LESLIE E. FOURTON, ESQ., alleges as, and for their Complaint against Defendant, Triarco Industries, Inc., respectfully alleges as follows:

INTRODUCTION

1. This tortious action arises out of the manufacturing defect of a dietary food supplement product, *Gary Null's Ultimate Power Meal*, thereby mixed, and manufactured by Triarco Industries, Inc. *Gary Null's Ultimate Power Meal*, is a dietary food supplement product created by Gary Null & Associates, Inc., which is a company that provides premium dietary & nutritional supplement to their consumers, along with books, vitamins and pedagogical materials by Dr. Gary Null. Triarco Industries, Inc., is a leading supplier of premium natural ingredients for the health, and nutritional industries that improperly mixed, inadequately tested, carelessly manufactured, and participated in the distribution of the placement of an inferior adulterated product into the marketplace, namely *Gary Null's Ultimate Power Meal*. And due to the Defendant's careless neglect not performing adequate safety testing on the aforementioned, caused significant damages and suffering, (both economic and non-economic), to Gary Null & Associates, Inc.; in addition, their consumers suffer from severe traumatic medical damages because, as previously stated, the defendant mixed 1,000,000 IU (instead of 1,000 IU) of Vitamin D (Cholecalciferol) into the Product, and did not perform the necessary scientific assay analysis in order to determine the aforementioned, thereby causing severe negative economic

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consequences, and medical damages to humans, respectively. Here, as previously stated, the Defendant's careless neglect also caused severe pecuniary damage(s) to Gary Null & Associates, Inc., as they suffer from a blemished reputation due to the aforementioned, and a significant loss of business economically such as, but not limited to, the sale of their products, thereof.

2. In addition, the manufacturing defects of *Gary Null's Ultimate Power Meal* created by Triarco caused substantial and irreparable damages. More specifically, since 2009, the Plaintiffs' consumers were purchasing, and utilizing *Gary Null's Ultimate Power Meal*, whereby they suffered severe negative medical conditions due to an overwhelming abundance of Vitamin D, that they placed in their personal systems, unknowingly. Indeed, upon discovering the aforementioned information, Plaintiffs notified Defendants. In addition, it should be noted that this disparaging information, regarding the status of Plaintiff's Product, *Gary Null's Ultimate Power Meal*, negatively affected Plaintiffs' standing in the alternative healthcare community, which has threatened to destroy Plaintiffs' reputation, and has adversely affected the economic health of the employees of Gary Null & Associates, Inc.

PARTIES

3. Plaintiffs GARY NULL & ASSOCIATES, INC., (hereinafter, "GNA") is a domestic corporation with offices located at 2307 Broadway, 2nd Floor, New York, N.Y. 10024.

4. Defendant TRIARCO INDUSTRIES INC., (hereinafter, "Triarco"), has Corporate Headquarters that are located in Wayne, New Jersey, with Manufacturing Facilities in Paterson, New Jersey and Green Pond, South Carolina. Triarco is organized under the laws of the State of New Jersey, where it was initially based. Respectfully, Triarco Industries, Inc., claims on the Internet, <http://www.triarco.com>, that they are, "celebrating over 30 years as a leading supplier of premium natural ingredients for the health and nutritional industries. Dedicated to excellence in both product and service, Triarco is ISO 9001:2008 certified by the National Science Foundation (NSF) and Underwriter Laboratories (UL). Triarco maintains two state-of-the-art manufacturing facilities with pharmaceutical-grade testing capabilities, and quality control. With access to the finest raw-source ingredients available

world-wide, Triarco offers unsurpassed natural nutrition." Finally, Triarco maintains that, "through our meticulous laboratory testing and extensive range of production capabilities, including specialized granulation and agglomeration, Triarco Captures what is best about nature and delivers an inimitable product."

FACTS

5. TRIARCO INDUSTRIES, INC., (hereinafter, "Triarco"), has Corporate Headquarters that are located in Wayne, New Jersey, with Manufacturing Facilities in Paterson, New Jersey and Green Pond, South Carolina. On or about December 15, 2009. In addition, six consumers were hospitalized with severe kidney damage(s), and they threatened that they would never buy any product of the Plaintiffs' ever again. Here, once Plaintiffs began to receive complaints of consumers that were in various hospitals with kidney damage(s) with elevated levels of Vitamin D, (and Calcium), the Plaintiffs immediately notified Archon Vitamin Corporation ("Archon", e.g. an affiliated corporation of the defendant, Triarco). Plaintiffs then immediately had to contact each one of their consumers, and attempt to help them as best he could by explaining what had happened regarding the improperly mixed Vitamin D, within *Ultimate Power Meal*, because up to that point in time, they were still not aware of the problem that the defendants had caused due to their improper mixing of the aforementioned product.

6. Plaintiffs, in fact, notified Archon Vitamin Corporation ("Archon," e.g. the affiliated corporation of the defendant, Triarco), of the problem, and it took several days before Archon was able to determine that the problem was in fact the improper levels of Vitamin D. The Vitamin D was supplied by Triarco to Archon Vitamin Corporation; but, when asked how 1,000,000 units of Vitamin D got placed into a single serving, no one had a credible answer. In fact, according to the label the amount of Vitamin D per serving should have been 1000 IU; but, as previously stated, was 1,000,000 IU. In addition, when Archon Vitamin Corporation informed Plaintiffs that it was Triarco that had supplied the Vitamin D, they were entirely surprised as Plaintiffs did not know of Triarco's existence up to that point in time. In fact, only when Plaintiffs asked to speak with the director of Triarco did they learn of this

discrepancy. Here, during this period of time Archon Vitamin Corporation, and Triarco performed their recall and notified the FDA. Archon Vitamin Corporation, and Gary Null & Associates, Inc., made every effort to locate every product; but, still there was not an acceptable answer as to how an error of this magnitude could have ever occurred, on three separate occasions. Upon examining Triarco's website, one of the features stated was that Triarco's quality assurance for customers was of performing proper laboratory assays so as to always perform proper adequate safety testing for all of their materials, and products, and to also provide a detailed analysis of their products for safety. But, to Plaintiffs' disappointment what Triarco was advertising versus what they actually provided was diametrically opposed. In fact, Defendant had three separate occasions to perform adequate safety tests of the product to determine whether what they were shipping to Archon Vitamin Corporation was indeed a 1,000 unit per serving of Vitamin D, and had they done that even once, this disaster would probably not have occurred.

7. Here, the only fortunate moment for the Plaintiffs was the fact that *Gary Null's Ultimate Power Meal* was not used for a very long period of time by thousands of people because some of GNA's products are literally used by tens of thousands of people. In fact, at no time, did GNA ever receive a written or personal apology from the owners of Triarco (or the scientists) who made the specific mixing mistake from the company. Plaintiffs were astonished to find out that the person that they usually communicate with at Archon Vitamin Corporation regarding any issue pertaining to GNA, namely President Christopher Rohde, is the son of the President of Triarco, namely Rodger Rohde.

8. In addition, Defendant created a product ingredient with full knowledge that it had not been adequately tested, and assayed for potency. This was a new product with a major promotional effort, and according to Triarco's own website they prided themselves in performing comprehensive scientific assays. Therefore, to bring a new product to market, which contained multiple ingredients without performing proper assays, showed a complete disregard for the ultimate safety to the consumers of that product. GNA is concerned that Mr. Rohde's father owned Triarco, and that Defendant should have

performed a scientific assay analysis prior to giving the ingredients to Archon Vitamin Corporation, and they failed to do so on three separate occasions. Additionally, Triarco should have known that two nutritional ingredient Vitamin D3, and Selenium could prove extremely dangerous causing severe adverse effects if consumed in high doses. Here, it is axiomatic that proper manufacturing standards would dictate to check the actual potency of these ingredients in all circumstances, and for any customer, in order to abide by industry standards, and to abide by Triarco's assertions on their website, namely that, "Triarco maintains two state-of-the-art manufacturing facilities with pharmaceutical-grade testing capabilities and quality control." In addition, Triarco maintains that, "through our meticulous laboratory testing and extensive range of production capabilities, including specialized granulation and agglomeration, Triarco Captures what is best about nature and delivers an inimitable product." Clearly, the aforementioned was not performed. Therefore, negligence (or wrongdoing) led to these serious consequences. Repeatedly, GNA asked why the defendant did not assay *Gary Null's Ultimate Power Meal*, as promised, and Plaintiffs never received a satisfactory answer. When asked to speak directly with the scientist who was responsible for formulating Vitamin D (Cholecalciferol) for this particular product, Plaintiffs were told that it was impossible to speak with him.

AS AND FOR A FIRST CAUSE OF ACTION
(Strict Products Liability)

9. Plaintiffs hereby adopt and incorporate by reference the allegations contained in paragraphs 1 through 8 of this Complaint as if fully set forth herein.

10. Plaintiff is a domestic corporation with a principal place of business at 2307 Broadway, City of New York, County of New York, New York.

11. This Court has jurisdiction over this action with respect to the Defendant pursuant to New York CPLR 302 because Defendant transacts business within the state, and committed a tortious act without the state causing injury to a person or property within the state.

12. At all relevant times, defendant improperly mixed, inadequately tested, carelessly

manufactured, and participated in the distribution of the placement of an inferior adulterated product into the marketplace, namely *Gary Null's Ultimate Power Meal*.

13. On or about December 15, 2009, Plaintiff's were severely injured, economically, due to *Gary Null's Ultimate Power Meal* that was improperly mixed, manufactured, inadequately tested, and distributed by the Defendant. Here, the Defendant improperly mixed the product because they admittedly used an incorrect amount of Vitamin D (Cholecalciferol)(e.g. 1,000,000 IU instead of what was stated on the label, namely 1,000 IU), which did not afford the necessary, and proper protection of such product with that what was required to adequately protect both Plaintiffs, and their consumers with proper adequate safety testing, so as to perform the necessary scientific assays adequately, and to properly protect consumers from accidentally taking *Gary Null's Ultimate Power Meal* with 1,000,000 IU of Vitamin D.

14. Upon information and belief, prior to December 15, 2009, the Defendant manufactured (or participated in the manufacture of parts thereof), of *Gary Null's Ultimate Power Meal*.

15. Upon information and belief, *Gary Null's Ultimate Power Meal* was improperly mixed, inadequately tested, manufactured, and placed on the market by the Defendant, (or by way of the Defendant's participation in manufacturing the product).

16. The Defendant was doing business for the purpose of mixing, testing, manufacturing, Constructing, and selling premium natural ingredients for health, and nutritional products such as *Gary Null's Ultimate Power Meal*.

17. Plaintiffs suffered injury to their business, and professional reputations within their community, and within the alternative healthcare community.

18. The product was in a defective condition when it left the control of the Defendant, and was expected to, and did reach the hands of consumers, and users without substantial change in the condition in which it was sold.

19. The Plaintiffs were unaware of any defect in *Gary Null's Ultimate Power Meal*.

20. Upon information and belief, at all relevant times, *Gary Null's Ultimate Power Meal* was being used for the purpose, and in the manner for which it was normally intended.

AS AND FOR A SECOND CAUSE OF ACTION
(Negligence)

21. Plaintiff fully repeats paragraphs 1 through 20 as if fully set forth herein.

22. Upon information and belief, Defendant is known as a leading supplier of premium natural ingredients for the health and nutritional industries. Dedicated to excellence in both product and service, Triarco is ISO 9001:2008 certified by the National Science Foundation (NSF) and Underwriter Laboratories (UL).

23. During all relevant times, Defendant was in the business of, among other things, mixing, manufacturing, testing, and distributing premium natural ingredients for the health, and nutritional industries; in addition, as previously stated, defendant improperly mixed, inadequately tested, carelessly manufactured, and participated in the distribution of the placement of an inferior adulterated product into the marketplace, namely *Gary Null's Ultimate Power Meal*.

24. Defendant should have known that the product was dangerous, and capable of causing severe injuries.

25. The Defendant negligently mixed, tested, manufactured and distributed *Gary Null's Ultimate Power Meal*. In addition, Triarco failed to warn anyone of the inherent danger of the product (e.g. *Ultimate Power Meal*) with the improper amount of Vitamin D (e.g. 1,000,000 IU instead of 1,000 IU), and failed to perform adequate safety testing of the product (e.g. scientific assays), thereof.

26. On or about December 15, 2009, Plaintiff's were severely injured, economically and non-economically, due to *Gary Null's Ultimate Power Meal* that was improperly mixed, inadequately tested, carelessly manufactured, and distributed by the Defendant. Here, as previously stated, the Defendant improperly mixed the product because they admittedly used an incorrect amount of Vitamin D (Cholecalciferol)(e.g. 1,000,000 IU instead of what was stated on the label, namely 1,000 IU), which did not afford the necessary, and proper protection of such product with that what was required to adequately

protect both Plaintiffs, and their consumers with proper adequate safety testing so as to perform the necessary scientific assays adequately, and to properly protect consumers from accidentally using Gary Null's *Ultimate Power Meal* with 1,000,000 IU instead of 1,000 IU of Vitamin D.

27. Plaintiffs suffer and will continue to suffer severe economic duress due to, but not limited to, loss of general business, and lack of sales of products for GNA's business.

28. By reason of the above, Plaintiff's future well-being regarding the earning capacity, and ability to perform (and accomplish) normal activities such as, but not limited to, sales of products have been adversely affected.

29. Plaintiffs have been, and may continue to be required to expend substantial sums of money for appropriate business related matters such as, but not limited to, replacement of the product and expenses for employees, thereof.

30. Defendant, its agents, servants and/or employees, were negligent in the mixing, inspection, testing, and manufacture of *Gary Null's Ultimate Power Meal*.

31. The injuries described above were caused solely by the negligence of the Defendant. Plaintiffs in no way contributed to their injuries.

32. As a result of the Defendant's negligence, the Plaintiffs were severely injured.

AS AND FOR A THIRD CAUSE OF ACTION
(Breach of Express Warranties)

33. Plaintiff repeats paragraphs 1 through 32.

34. The Defendant, in mixing, testing, manufacturing, and participating in the placing on the market of a product known as *Gary Null's Ultimate Power Meal*, impliedly warranted to Plaintiffs, as a foreseeable user, that the product was reasonably safe, and wholesome and fit for the purpose for which it was intended, and that it was of merchantable quality.

35. *Gary Null's Ultimate Power Meal* had not been properly mixed, as previously stated, and adequately tested before it was placed on the market, and the Defendant's representations with respect to its safety for use on human beings was false.

36. The Plaintiffs relied upon the skill, and judgment of the Defendant, when, in fact, the product, *Gary Null's Ultimate Power Meal*, was not safe, and wholesome, and fit for the purpose for which it was allegedly manufactured, and was not of merchantable quality, in that the use of the product caused the Plaintiff to sustain the above stated pecuniary damages (e.g. economic and physical), thereof.

**AS AND FOR A FOURTH CAUSE OF ACTION
(Breach of Implied Warranties)**

37. The Plaintiff repeats paragraphs 1 through 36.

38. In connection with the sale of *Gary Null's Ultimate Power Meal* to Gary Null, Gary Null & Associates, Inc., and their consumers, the Defendant warranted that *Gary Null's Ultimate Power Meal* was fit for human use and was merchantable.

39. The Plaintiffs used *Gary Null's Ultimate Power Meal* in reliance on the Defendant's Warranty as the product was represented to them in sample form.

40. The Defendant's warranty was false in that Triarco improperly mixed, inadequately tested, carelessly manufactured, and participated in the distribution of the placement of an inferior adulterated product into the marketplace, namely *Gary Null's Ultimate Power Meal*. Finally, this Product was not fit for human use, and could have possibly caused death; therefore, this product was not merchantable.

41. Consequently, the Plaintiffs have been substantially damaged.

**AS AND FOR A FIFTH CAUSE OF ACTION
(Implied Warranty in Contract of Sale)**

42. The Plaintiffs repeat paragraphs 1 through 41.

43. Defendant *Triarco* is a leading supplier of premium natural ingredients for the health and nutritional industries that provides meticulous laboratory testing, and an extensive range of production capabilities, including the aforementioned for the Plaintiffs' product known as *Gary Null's Ultimate Power Meal*.

44. Defendant *Triarco* is in the business of supplying premium natural ingredients for the health

and nutritional industries, among other things, as previously stated, providing laboratory testing and an extensive range of production capabilities. Defendant improperly mixed, inadequately tested, and participated in the improper manufacture, and distribution of a product known as *Gary Null's Ultimate Power Meal* for sale through Archon Vitamin Corporation to GNA, and consumers, as well.

45. GNA is the intended beneficiary of a contract (i) a valid and binding contract (e.g. express or implied), between Archon Vitamin Corporation, and Triarco (ii) the contract was intended for the Plaintiffs' benefit, and (iii) the benefit to GNA is sufficiently immediate, rather than incidental.

46. *Gary Null's Ultimate Power Meal* was sold to Plaintiff by Archon Vitamin Corp. by sample, and Archon Vitamin Corporation at the time of making the agreement, warranted that the Product would correspond with the sample in quality, and would be equal to the sample in all respects.

47. At all relevant times, Plaintiffs utilized the services of the Defendant whereby the Plaintiffs were injured, as previously stated, on or about December 15, 2009, economically, due to *Gary Null's Ultimate Power Meal*, which was improperly mixed, inadequately tested, carelessly manufactured, and distributed into the marketplace as an inferior adulterated product. Here, as previously stated, the defendant improperly mixed the product with the incorrect amount of Vitamin D (Cholecalciferol)(e.g. 1,000,000 IU instead of 1,000 IU), which did not afford the necessary, and proper protection of such product with that what was required to adequately protect both Plaintiffs, and their consumers with proper safety testing so as to perform the necessary scientific assays adequately in order to protect people from accidentally taking *Gary Null's Ultimate Power Meal* with the improper amount of 1,000,000 IU of Vitamin D.

48. Plaintiffs' injuries were caused solely by Defendant's negligent and improper mixing, inadequate testing, and improper manufacture of *Gary Null's Ultimate Power Meal*, and breach of warranty of fitness, and through no fault of Plaintiffs.

49. By reasons of the improper mixing, inadequate safety testing (e.g. scientific assay analysis),

negligence, and breach of warranty, Plaintiffs suffered (and continue to suffer), from injury to their business, and Plaintiffs believe these injuries will continue for the foreseeable future.

50. As a result of Defendant's actions, Plaintiffs have become irritable, suffered great mental anguish, anxiety, loss of sleep, and other psychological injuries.

51. In addition, Plaintiffs have been deprived of income and earnings, and will likely sustain further loss from earnings in the future.

52. At the time of mixing, testing, manufacture and distribution, Defendant warranted and represented that the Product was merchantable and safe for the purpose for which it was intended. *Gary Null's Ultimate Power Meal* was defective, unsafe and unfit for ordinary use.

53. The Product in question was defective, and as a result, as previously stated, defendants are strictly liable to plaintiff.

54. Accordingly, as a result of the foregoing causes of action, Plaintiffs are entitled to monetary damages, including, but not limited to, those for harm to Plaintiffs and their reputation(s). The Plaintiffs have suffered, and will continue to suffer, damages as a direct result of Defendant's actions in the sum of \$10,000,000.00.

REQUEST FOR RELIEF

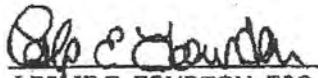
WHEREFORE, Plaintiff(s) respectfully request judgment from this Honorable Court:

- A. Awarding Plaintiffs' monetary damages, plus interest, under Plaintiffs' cause of action for the above in the amount of \$10,000,000.00; and
- B. On each of the above Causes of Action, award the named Plaintiff with costs and disbursements and attorney's fees; and
- C. Awarding such other and further relief as this Court deems just and proper.

Dated this 10th day of May, 2010.

GARY NULL & GARY NULL & ASSOCIATES, INC.

By:


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