

1 LISA KOBIALKA (State Bar No. 191404)  
lkobialka@kramerlevin.com  
2 KRAMER LEVIN NAFTALIS & FRANKEL LLP  
990 Marsh Road  
Menlo Park, CA 94025  
3 Telephone: (650) 752-1700  
4 Facsimile: (650) 752-1800

5 HAROLD P. WEINBERGER (*admitted pro hac vice*)  
EILEEN M. PATT (*admitted pro hac vice*)  
hweinberger@kramerlevin.com  
6 epatt@kramerlevin.com  
KRAMER LEVIN NAFTALIS & FRANKEL LLP  
7 1177 Avenue of the Americas  
New York, NY 10036-2714  
8 Telephone: (212) 715-9132  
9 Facsimile: (212) 715-8132

10 Attorneys for Defendant  
11 NEUTROGENA CORPORATION

12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 JULIE FAGAN, MICHAEL FAGAN,  
MELISSA PENNELLATORE, AMY  
15 SAPEIKA and SHELLEY  
TRINCHERO, Individually and on  
16 Behalf of All Others Similarly  
17 Situated,

18  
19 Plaintiffs,

20 v.

21 NEUTROGENA CORPORATION,

22  
23 Defendant.

Case No.: EDCV 13-01316 SVW  
(OPx)

HON. STEPHEN V. WILSON

**DEFENDANT NEUTROGENA  
CORPORATION'S ANSWER  
AND AFFIRMATIVE  
DEFENSES TO THE FIRST  
AMENDED COMPLAINT**

Place: Courtroom 217/6 – 2<sup>nd</sup>  
Floor 312 N. Spring Street

Complaint Filed: July 29, 2013

1 Defendant Neutrogena Corporation (“Neutrogena” or  
2 “Defendant”), by its undersigned attorneys, hereby answers plaintiffs’ First  
3 Amended Class Action Complaint (“FAC”) dated September 13, 2013, as  
4 follows:

5 1. Denies the allegations in Paragraph 1, except admits that it sells and  
6 distributes the Products and that the packaging stated “100% naturally  
7 sourced sunscreen ingredients,” “naturally sourced sunscreen ingredients” or  
8 “100% naturally sourced sunscreens.” Neutrogena further admits that it  
9 manufactures some of the Products. Neutrogena refers to the packaging and  
10 labels for each of the Products for their true, correct, and complete contents.  
11 Defendant further admits that the FDA has not defined the term “natural” in  
12 the context of cosmetic products. Defendant refers to the letter written in  
13 connection with *Astiana v. Hain Celestial Group*, No. 12-cv-17596 (9<sup>th</sup> Cir.  
14 March 22, 2013) for its true, correct, and complete contents.

15 2. With respect to the allegations in paragraph 2, admits that plaintiffs  
16 seek to premise their claims on the 4 products alleged, except states that the  
17 pure & free® baby faces ultra gentle cream sunscreen Broad Spectrum SPF  
18 45+ product replaced the pure & free® baby faces ultra gentle sunblock SPF  
19 50+ product, and admits that both products contain identical ingredients.  
20 Neutrogena further admits that the phrase “naturally sourced sunscreen  
21 ingredients” on the front label of the 3oz and 5oz pure & free® baby  
22 sunscreen Broad Spectrum SPF 60+ product was changed at some point  
23 after June 2011 to read “100% naturally sourced sunscreen ingredients.”

24 3. Denies the allegations in paragraph 3, except admits that the Principal  
25 Display Panel (PDP) on the Products stated, “100% naturally sourced  
26 sunscreen ingredients,” “naturally-sourced sunscreen ingredients” or “100%  
27  
28

1 naturally sourced sunscreens.” Neutrogena specifically denies making any  
2 false or misleading statements.

3 4. The allegations in paragraph 4 consist of argument to which no  
4 response is required. To the extent any response is necessary, Neutrogena  
5 denies the allegations.

6 5. The allegations in paragraph 5 consist of argument to which no  
7 response is required. To the extent any response is necessary, Neutrogena  
8 denies the allegations. Neutrogena specifically denies making any false  
9 representations or advertising.

10 6. With respect to the allegations in paragraph 6, admits that plaintiffs  
11 seek to premise jurisdiction under 28 U.S.C. §1332(d), but denies  
12 knowledge or information sufficient to form a beliefs as to whether “a  
13 substantial number of the members of the proposed class are citizens of a  
14 state different from that of Defendant,” and denies that plaintiffs have stated  
15 a claim against Neutrogena.

16 7. With respect to the allegations in paragraph 7, admits that venue is  
17 proper.

18 8. Denies knowledge or information sufficient to form a belief as to the  
19 truth of the allegations in paragraph 8.

20 9. Denies knowledge or information sufficient to form a belief as to the  
21 truth of the allegations in paragraph 9.

22 10. Denies knowledge or information sufficient to form a belief as to the  
23 truth of the allegations in paragraph 10.

24 11. Denies knowledge or information sufficient to form a belief as to the  
25 truth of the allegations in paragraph 11.

1 12. Denies knowledge or information sufficient to form a belief as to the  
2 truth of the allegations in paragraph 12.

3 13. With respect to the allegations in paragraph 13, admits that  
4 Neutrogena is headquartered where alleged and that it distributes, markets,  
5 and sells the Products throughout the United States. Neutrogena further  
6 admits that some of the labeling, manufacturing and advertising of the some  
7 of the Products occurs in California, but denies that Neutrogena's conduct  
8 gives rise to any claims.

9 14. Denies knowledge or information sufficient to form a belief as to the  
10 truth of the allegations in paragraph 14.

11 15. Denies the allegations in paragraph 15, except admits that Neutrogena  
12 markets skin care, hair care and cosmetic products, and that it manufactures  
13 some sunscreen application products in the Pure & Free® line. Defendant  
14 refers to the Neutrogena website for its true, correct and complete contents,  
15 and denies that it is misleading in any respect.

16 16. Denies the allegations in paragraph 16 of the Amended Complaint,  
17 except admits that the PDP of each product stated, "100% naturally sourced  
18 sunscreen ingredients," "100% naturally sourced sunscreens" or "naturally  
19 sourced sunscreen ingredients." Neutrogena refers to the full packaging of  
20 the Products for its true, correct and complete contents.

21 17. Denies the allegations in paragraph 17.

22 18. Denies the allegations in paragraph 18.

23 19. Denies the allegations in paragraph 19, except refers to the packaging  
24 of the Products which lists their true, correct and complete contents.  
25 Neutrogena specifically denies that any of the Products contain "irritating  
26 chemicals."  
27

1 20. Denies the allegations in paragraph 20, except refers to the packaging  
2 of the Products which lists their true correct and complete contents.

3 21. Denies the allegations in paragraph 21 and refers to Neutrogena's  
4 website for its true, correct and complete contents, except admits that three  
5 of the four Products are marketed for babies. Neutrogena specifically denies  
6 making any false or misleading representations.

7 22. Denies the allegations in paragraph 22, except refers to the packaging  
8 of the Products which lists their true correct and complete contents.  
9 Neutrogena specifically denies that any of the ingredients in the Products are  
10 harmful in the manners alleged or in any respect whatsoever.

11 23. Denies the allegations in paragraph 23, except admits that Defendant  
12 is headquartered in Los Angeles, California, that some of the employees who  
13 are responsible for marketing Neutrogena brand products are located there,  
14 and that some of the marketing materials concerning the Products were  
15 developed there. Defendant further admits that it receives revenues from the  
16 sale of the Products to its customers.

17 24. Denies the allegations in paragraph 24.

18 25. The allegations in paragraph 25 state a legal conclusion to which no  
19 response is required. To the extent any response is necessary, Neutrogena  
20 denies the allegations. Neutrogena specifically denies that this action can  
21 properly proceed as a class action.

22 26. The allegations in paragraph 26 state a legal conclusion to which no  
23 response is required. To the extent any response is necessary, Neutrogena  
24 denies the allegations. Neutrogena specifically denies that this action can  
25 properly proceed as a class action.

1 27. The allegations in paragraph 27 state a legal conclusion to which no  
2 response is required. To the extent any response is necessary, Neutrogena  
3 denies the allegations. Neutrogena specifically denies that this action can  
4 properly proceed as a class action.

5 28. The allegations in paragraph 28 state a legal conclusion to which no  
6 response is required. To the extent any response is necessary, Neutrogena  
7 denies the allegations. Neutrogena specifically denies that this action can  
8 properly proceed as a class action.

9 29. The allegations in paragraph 29 state a legal conclusion to which no  
10 response is required. To the extent any response is necessary, Neutrogena  
11 denies the allegations. Neutrogena specifically denies that this action can  
12 properly proceed as a class action.

13 30. The allegations in paragraph 30 state legal conclusions to which no  
14 response is required. To the extent any response is necessary, Neutrogena  
15 denies the allegations. Neutrogena specifically denies that this action can  
16 properly proceed as a class action.

17 31. The allegations in paragraph 31 state legal conclusions to which no  
18 response is required. To the extent any response is necessary, Neutrogena  
19 denies the allegations. Neutrogena specifically denies that this action can  
20 properly proceed as a class action.

21 32. The allegations in paragraph 32 state a legal conclusion to which no  
22 response is required. To the extent any response is necessary, Neutrogena  
23 denies the allegations. Neutrogena specifically denies that this action can  
24 properly proceed as a class action.

25 33. The allegations in paragraph 33 state legal conclusions to which no  
26 response is required. To the extent any response is necessary, Neutrogena  
27

1 denies the allegations. Neutrogena specifically denies that this action can  
2 properly proceed as a class action.

3 **As to Count I**

4 34. Neutrogena incorporates its answers to the foregoing paragraphs  
5 herein.

6 35. The allegations in paragraph 35 state a legal conclusion to which no  
7 response is required. To the extent any response is necessary, Neutrogena  
8 denies the allegations. Neutrogena refers to the statute referenced therein for  
9 its true correct and complete terms.

10 36. The allegations in paragraph 36 state a legal conclusion to which no  
11 response is required. To the extent any response is necessary, Neutrogena  
12 denies the allegations. Neutrogena refers to the statute referenced therein for  
13 its true correct and complete terms.

14 37. Denies the allegations in paragraph 37. Neutrogena specifically  
15 denies engaging in any "conduct that is likely to deceive members of the  
16 public."

17 38. Denies the allegations in paragraph 38. Neutrogena specifically  
18 denies "engag[ing] in fraudulent business acts and practices which constitute  
19 unfair competition[.]"

20 39. The allegations in paragraph 39 state a legal conclusion to which no  
21 response is required. To the extent any response is necessary, Neutrogena  
22 denies the allegations. Neutrogena refers to the statute referenced therein for  
23 its true correct and complete terms.

24 40. Denies the allegations in paragraph 40.

25 41. Denies the allegations in paragraph 41. Neutrogena specifically  
26 denies making any false or misleading statement.  
27

1 42. Denies the allegations in paragraph 42.

2 43. The allegations in paragraph 43 state a legal conclusion to which no  
3 response is required. To the extent any response is necessary, Neutrogena  
4 denies the allegations. Neutrogena refers to the statute referenced therein for  
5 its true correct and complete terms.

6 44. Denies the allegations in paragraph 44. Neutrogena specifically  
7 denies that it “engaged in unfair business practices.”

8 45. Denies the allegations in paragraph 45.

9 46. Denies the allegations in paragraph 46.

10 47. Denies the allegations in paragraph 47.

11 48. Denies the allegations in paragraph 48.

12 49. Denies the allegations in paragraph 49.

13 50. The allegations in paragraph 50 state a legal conclusion to which no  
14 response is required. To the extent any response is necessary, Neutrogena  
15 denies the allegations. Neutrogena refers to the statute referenced therein for  
16 its true, correct and complete terms.

17 51. Denies the allegations in paragraph 51.

18 **As to Count II**

19 52. Neutrogena incorporates its answers to the foregoing paragraphs  
20 herein.

21 53. The allegations in paragraph 53 state a legal conclusion to which no  
22 response is required. To the extent any response is necessary, Neutrogena  
23 denies the allegations. Neutrogena refers to the statute referenced therein for  
24 its true, correct and complete terms.

25 54. The allegations in paragraph 54 state a legal conclusion to which no  
26 response is required. To the extent any response is necessary, Neutrogena  
27



1 denies the allegations. Neutrogena refers to the statute referenced therein for  
2 its true, correct and complete terms.

3 55. Denies the allegations in paragraph 55.

4 56. Denies the allegations in paragraph 56.

5 57. Denies the allegations in paragraph 57.

6 58. Denies the allegations in paragraph 58, except admits that Neutrogena  
7 received and sent the correspondence alleged. Neutrogena refers to that  
8 correspondence for its true, correct and complete contents.

9 59. Denies the allegations in paragraph 59, except admits that plaintiffs  
10 seek damages.

11 60. Denies the allegations in paragraph 60.

12 **As to Count III**

13 61. Neutrogena incorporates its answers to the foregoing paragraphs  
14 herein.

15 62. Denies the allegations in paragraph 62.

16 63. Denies the allegations in paragraph 63.

17 64. Denies the allegations in paragraph 64.

18 **As to Count IV**

19 65. Neutrogena incorporates its answers to the foregoing paragraphs  
20 herein.

21 66. Denies the allegations in paragraph 66.

22 67. Denies the allegations in paragraph 67.

23 68. Denies the allegations in paragraph 68.

24 **As to Count V**

25 69. Neutrogena incorporates its answers to the foregoing paragraphs  
26 herein.

1 70. The allegations in paragraph 70 state a legal conclusion to which no  
2 response is required. To the extent any response is necessary, Neutrogena  
3 denies the allegations. Neutrogena refers to the statute referenced therein for  
4 its true, correct and complete terms.

5 71. The allegations in paragraph 71 state a legal conclusion to which no  
6 response is required. To the extent any response is necessary, Neutrogena  
7 denies the allegations. Neutrogena refers to the statute referenced therein for  
8 its true, correct and complete terms.

9 72. Denies the allegations in paragraph 72. Neutrogena specifically  
10 denies making any misrepresentations.

11 73. Denies the allegations in paragraph 73. Neutrogena specifically denies  
12 making any misleading representations or misrepresentations.

13 74. Denies the allegations in paragraph 74.

14 **As to Count VI**

15 75. Neutrogena incorporates its answers to the foregoing paragraphs  
16 herein.

17 76. The allegations in the second paragraph numbered 2 state legal  
18 conclusions to which no response is required. To the extent any response is  
19 necessary, Neutrogena denies the allegations. Neutrogena specifically  
20 denies that this action can properly proceed as a class action.

21 77. The allegations in the second paragraph numbered 3 state legal  
22 conclusions to which no response is required. To the extent any response is  
23 necessary, Neutrogena denies the allegations.

24 78. Denies the allegations in the second paragraph numbered 4, except  
25 admits that Neutrogena received and sent the correspondence alleged.  
26  
27

1 Neutrogena refers to that correspondence for its true, correct and complete  
2 contents.

3 79. Denies the allegations in the second paragraph numbered 5.  
4 Neutrogena specifically denies “engag[ing] in unfair methods of competition  
5 and unfair and deceptive acts and practices.”

6 80. Denies the allegations in the second paragraph numbered 6.

7 81. With respect to the allegations in the second paragraph numbered 7,  
8 denies that plaintiffs are entitled to any of the relief sought.

9 **Affirmative Defenses**

10 Neutrogena sets forth below its affirmative defenses. By setting forth  
11 these affirmative defenses, Neutrogena does not assume the burden of  
12 proving any fact, issue, or element of a cause of action where such burden  
13 properly belongs to the plaintiffs or the class members. Neutrogena reserves  
14 the right to raise additional affirmative defenses as may be established  
15 during discovery and by the evidence in this case.

16 **First Affirmative Defense**

17 (Failure to State a Claim)

18 82. The FAC fails to state a claim upon which relief may be granted

19 **Second Affirmative Defense**

20 (Lack of Standing)

21 83. Plaintiffs lack standing to assert the claims herein, in whole or in part,  
22 or to act as Class Representatives.

23 **Third Affirmative Defense**

24 (Laches)

25 84. Plaintiffs and the putative classes are barred, in whole or in part, from  
26 recovery by the doctrine of laches.

1 Fourth Affirmative Defense

2 (Statutes of Limitations)

3 85. The claims of plaintiffs and the putative classes are barred, in whole  
4 or in part, by the applicable statutes of limitations.

5 Fifth Affirmative Defense

6 (First Amendment)

7 86. The claims of plaintiffs and the putative class are barred, in whole or  
8 in part, by the First Amendment of the United States Constitution, and  
9 similar provisions in the Constitution of the State of California, which  
10 protect, among other things, Neutrogena's right to promote and advertise its  
11 products.

12 Sixth Affirmative Defense

13 (Safe Harbor)

14 87. The FAC is barred, in whole or in part, because Neutrogena's  
15 business practices are not unfair, unlawful or likely to mislead because its  
16 conduct falls within a safe harbor created by law.

17 Seventh Affirmative Defense

18 (Good Faith/Reasonable Belief as to Accuracy and Validity)

19 88. The FAC is barred, in whole or in part, because any representations or  
20 statements alleged to have been made by Neutrogena were true and accurate  
21 at the time made and/or otherwise were made in good faith and with a  
22 reasonable belief as to their validity and accuracy and with reasonable belief  
23 that all of Neutrogena's conduct was lawful.

24 Eighth Affirmative Defense

25 (Due Process)

1 89. The FAC, and the certification of the proposed classes, are barred, in  
2 whole or in part, by the Due Process Clauses of the Constitutions of the  
3 United States and the State of California, and by the Due Process Clauses of  
4 any other state Constitutions the Court may deem applicable.

5 Ninth Affirmative Defense

6 (Preemption/Primary Jurisdiction)

7 90. The FAC is barred, in whole or in part, by the doctrines of federal  
8 preemption or primary jurisdiction.

9 Tenth Affirmative Defense

10 (Punitive Damages)

11 91. Plaintiffs and the putative classes are barred from recovering punitive  
12 damages against Neutrogena because any imposition of punitive damages  
13 under the facts and circumstances of this case would violate the rights of  
14 Neutrogena under the United States Constitution, the Constitution of the  
15 State of California, and the applicable laws of California including, but not  
16 limited to, Section 3294 of the California Civil Code.

17  
18 *(continued on next page)*  
19  
20  
21  
22  
23  
24  
25  
26  
27

1 WHEREFORE, Neutrogena prays that plaintiffs take nothing by the way of  
2 their FAC, their requests to certify the classes be denied, and the Court enter  
3 judgment in favor of Neutrogena as follows:

- 4 1. For Neutrogena's reasonable attorney's fees;
- 5 2. For Neutrogena's reasonable costs and expenses incurred in defending  
6 against the allegations contained in the FAC and in this action; and
- 7 3. For such other and further relief as the Court deems just and proper.

8  
9 Dated: January 22, 2014

KRAMER LEVIN NAFTALIS  
& FRANKEL LLP

11 By: /s/Harold P. Weinberger  
12 Harold P. Weinberger

13 Harold P. Weinberger  
14 (*admitted pro hac vice*)  
15 Eileen M. Patt  
16 (*admitted pro hac vice*)  
17 hweinberger@kramerlevin.com  
18 Kramer Levin Naftalis & Frankel LLP  
19 1177 Avenue of the Americas  
20 New York, NY 10036  
21 Telephone: (212) 715-9216  
22 Facsimile: (212) 715-8132

23 Lisa Kobialka (State Bar No. 191404)  
24 lkobialka@kramerlevin.com  
25 Kramer Levin Naftalis & Frankel LLP  
26 990 Marsh Road  
27 Menlo Park, CA 94025  
Telephone: (650) 752-1700  
Facsimile: (650) 752-1800

Attorneys for Defendant  
Neutrogena Corporation KL3 2957158.4