

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

M. BOUGHA

Plaintiff

- and -

**MAIDENFORM BRANDS, INC., MAIDENFORM, INC., WACOAL CANADA INC. AND
WACOAL AMERICA, INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: November 15, 2013

Issued by (S) Signature
Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

AND TO: Maidenform Brands, Inc.
485 US Highway 1 South Building F
Iselin, New Jersey 08830
USA

Tel: 732-621-2500
Fax: 302-636-5454

AND TO: Maidenform, Inc.
200 Madison Avenue
New York, New York 10173
USA

TO: Wacoal Canada Inc.
2400-1000 rue de la Gauchetière O
Montreal, Quebec
H3B 4W5

AND TO: Wacoal America, Inc.
One Wacoal Plaza
Lyndhurst, New Jersey 07071
USA

Tel: 201-933-8400
Fax: 201-933-8296

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Defendants’ Shapewear**” means shaping undergarments to alter the wearer’s body shape manufactured, marketed and/or sold by **Defendants**, which are made with **Shapewear Fabric** or **Novarel Slim Fabric**;
- (b) “**Defendants’ Shapewear Fabric**” or “**Novarel Slim Fabric**” means the fabric that is constructed with cosmetic substances; i.e. minerals and nutrients, that get absorbed by the skin and that **Defendants** deceptively allege will provide **Cosmetic Benefits**;
- (c) “**Class**” or “**Class Members**” means all residents in Canada who purchased **Shapewear** constructed with **Novarel Slim Fabric** and manufactured, marketed or sold by **Defendants**;
- (d) “*Courts of Justice Act*” means the Ontario Courts of Justice Act, RSO 1990, c. C-43, as amended;
- (e) “*Class Proceedings Act*” means the Class Proceedings Act, 1992, SO 1992, c. 6, as amended;
- (f) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Schedule A, as amended;

(g) “**Competition Act**” means the *Competition Act*, RSC 1985, c. C-34, as amended;

(h) “**Negligence Act**” means the *Negligence Act*, R.S.O. 1990, c. N-1, as amended;

(i) “**Sale of Goods Act**” means the *Sale of Goods Act*, R.S.O. 1990, c. S.1, as amended;

(j) “**Consumer Protection Legislation**” means:

(i) *Fair Trading Act*, RSA 2000, c. F-2, as amended;

(ii) *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, as amended;

(iii) *The Business Practices Act*, CCSM, c. B120, as amended;

(iv) *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, as amended, and *Trade Practices Act*, RSNL 1990, c. T-7, as amended;

(v) *Business Practices Act*, RSPEI 1988, c. B-7, as amended; and

(vi) *Consumer Protection Act*, SS 1996, c. C-30.1, as amended;

(k) “**Maidenform**” or the “**Maidenform Defendants**” means Maidenform Brands, Inc. and Maidenform, Inc.;

(l) “**Wacoal**” or the “**Wacoal Defendants**” means Wacoal Canada Inc. and Wacoal America, Inc.;

(m) “**Defendants**” means Maidenform Brands, Inc., Maidenform, Inc., Wacoal Canada Inc. and Wacoal America, Inc.;

(n) “**Plaintiff**” means M. Bougha;

(o) “**Representation**” means the **Defendants’** false, misleading or deceptive representations that their **Shapewear** (a) have performance characteristics, uses, benefits and/or qualities which they do not have, (b) are available for a reason that does not exist; and (c) their use of exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding their ability to provide significant **Cosmetic Benefits** as such use or failure deceives or tends to deceive; and

(p) “**Cosmetic Benefits**” means the **Defendants’** unsubstantiated claims that their **Shapewear** will:

- (i) Permanently cure cellulite;
- (ii) Destroy fat; and
- (iii) Cause weight loss.

CLAIM

2. The proposed Representative Plaintiff, M. Bougha, claims on her own behalf and on behalf of the members of the Class of persons as defined in defined in paragraph 4 below (the “Class”) as against Maidenform Brands, Inc., Maidenform, Inc., Wacoal Canada Inc. and Wacoal America, Inc. (collectively the “Defendants”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;

- (b) A declaration that the notice given by the Plaintiff on November 15, 2013, on her own behalf and on behalf of “person similarly situated”, is sufficient to give notice to the Defendants on behalf of all Class Members;
- (c) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation¹;
- (d) A declaration that the Representation was made in violation of s. 14 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation²;
- (e) A declaration that the Representation was made in violation of s. 15 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation³;
- (f) A declaration that the Representation was a false and misleading representation contrary to s. 52 of the *Competition Act*;
- (g) General damages in an amount to be determined in the aggregate for the Class Members to compensate them for the purchase price of Defendants’ Shapewear;

¹ Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s 7.2(3).

² Specifically, the *Fair Trading Act*, RSA 2000, c F-2, s. 6; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 4; *The Business Practices Act*, CCSM, c B120, s. 2; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 2; *Trade Practices Act*, RSNL 1990, c T-7, s. 5; *Business Practices Act*, RSPEI 1988, c B-7, s. 2; and *Consumer Protection Act*, SS 1996, c C-30.1, s. 5.

³ Specifically, the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 8; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 8; *Trade Practices Act*, RSNL 1990, c T-7, s. 6; and *Business Practices Act*, RSPEI 1988, c B-7, s. 2.

- (h) Punitive, aggravated and exemplary damages in an amount that this Honourable Court deems appropriate;
- (i) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (j) In the alternative, an order for an accounting of revenues received by the Defendants resulting from the sale of their Shapewear as a result of the Representation to the Plaintiff and to the Class Members;
- (k) A declaration that any funds received by the Defendants through the sale of their Shapewear as a result of the Representation are held in trust for the benefit of the Plaintiff and Class Members;
- (l) Restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Shapewear to members of the Class on the basis of unjust enrichment;
- (m) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendants from the sale of their Shapewear to members of the Class on the basis of *quantum meruit*;
- (n) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;

- (o) A permanent injunction restraining the Defendants from continuing any actions taken by them in contravention of the Consumer Protection Legislation, the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act*;
- (p) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (q) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 2 (9) of the *Class Proceedings Act*;
- (r) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon pursuant to the *Excise Tax Act*, R.S.C. 1990. C. E-15; and
- (s) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in all the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, M. Bougha, is an individual residing in the City of Mississauga, in the Province of Ontario. Ms. Bougha purchased Shapewear manufactured, marketed and/or sold by Defendants and constructed with Novarel Slim Fabric. Plaintiff was deceived by Defendants' misrepresentations regarding the Novarel Slim technology and its ability to provide significant

Cosmetic Benefits. Plaintiff did not receive the benefit of the bargain and/or suffered out-of-pocket loss as a result of Defendants' misrepresentations and was damaged.

The Class

4. The Plaintiff seeks to represent the following class of which she is a member (the "Proposed Class"):

All residents in Canada who purchased Shapewear constructed with Novarel Slim Fabric and manufactured, marketed or sold by Defendants Wacoal or Maidenform.

The Defendants

A. Maidenform Defendants

5. The Defendant Maidenform Brands, Inc. ("Maidenform Brands") is Delaware Corporation with its principal place of business in Iselin, New Jersey.

6. The Defendant Maidenform, Inc. is an American corporation with its head office in New York, New York and it is the owner of the "Flexees" brand of Shapewear.

7. Maidenform describes itself as "a global intimate apparel company," which "design[s], source[s] and market[s] an extensive range of intimate apparel products, including bras, panties and shapewear." According to its Annual Report for the year ending December 31, 2012, Maidenform's sales of Shapewear comprised more than 33% of its sales for the last three (3) years.

B. Wacoal Defendants

8. The Defendant Wacoal Canada Inc. (“Wacoal Canada”) is a Canadian corporation with its head office in Quebec, Canada that is engaged in the sales of foundation garments, i.e. Shapewear and lingerie. It is a wholly-owned subsidiary of Wacoal America, Inc. (“Wacoal America”) that is carrying on business throughout Canada, including within the Province of Ontario.

9. The Defendant Wacoal America is an American corporation with its head office in Lyndhurst, New Jersey. It is the parent company of Wacoal Canada and is engaged in the sales of foundation garments, i.e. Shapewear and lingerie.

10. The Defendants are residents in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

11. The Defendants are jointly and severally liable for the acts and omissions of each other.

THE NATURE OF THE CLAIM

12. The Defendants are and, have been at all relevant times, engaged in the business of manufacturing, marketing and/or selling Shapewear, which has been defined as undergarments for women who want a flawless, bulge-free silhouette.

13. Defendants use Shapewear Fabric produced by Nurel, S.A. (“Nurel”) a Spanish company located in Zaragoza, Spain, claiming the fabric is constructed with minerals and nutrients (including, but not limited to: caffeine, vitamin E, ceramides and retinol) that are absorbed by the

skin and are alleged to provide significant Cosmetic Benefits, including to have the ability to permanently change a women's body shape and skin tone.

14. The Maidenform Defendants manufacture, market and sell Shapewear under the brand name Flexees and the Wacoal Defendants manufacture, market and sell Shapewear under the brand name iPant.

15. These class proceedings concern the false, misleading and/or deceptive Representations made by the Defendants concerning the alleged Cosmetic Benefits associated with their Shapewear that were manufactured, marketed and ultimately offered for sale to the public by the Defendants.

16. The Wacoal Defendants claim that that the Shapewear Fabric from Nurel is constructed "with embedded microcapsules containing caffeine to promote fat destruction, vitamin E to prevent the effects of aging; ceramides to restore and maintain the skin's smoothness; and retinol and aloe vera to moisturize and increase the firmness of the skin."

17. The United States Federal Trade Commission (the "FTC") calls such claims "about as credible as a note from the tooth fairy".

18. Yet Defendants make these misrepresentations in order to prey upon women's insecurities about their body images because Defendants know that the annual revenue of the U.S. weight-loss industry is \$20 billion, sales of shapewear in Canada were reported at \$22

million dollars for the year ending June 2012⁴, and U.S. sales of “nutrient-infused” textiles or “cosmeto-textiles” are estimated at more than \$600 million annually.

19. The market for slimming products is immense. For example, according to Statistics Canada, in 2012, 18.4% of Canadians aged 18 and older, roughly 4.7 million adults, reported height and weight that classified them as obese and 41.3% of men and 26.9% of women reported height and weight that classified them as overweight⁵.

20. In addition, according to the Heart and Stroke Foundation of Ontario, “Obesity and overweight have become one of the leading public health concerns in Canada” and “within the past 30 years, the prevalence of obesity doubled among those ages 40 to 69 and tripled among those 20 to 39”⁶.

21. The Defendants charge as much as fifty (50) percent more for the Shapewear made with Novarel Slim Fabric than for equivalent non-nutrient infused shapewear –despite the fact that the purported nutrients cannot provide the alleged Cosmetic Benefits of permanently curing cellulite, destroying fat, or causing weight loss.

22. As a result of Defendants’ misrepresentations about the Cosmetic Benefits of their Shapewear, Plaintiffs and the class have suffered out-of-pocket losses, did not receive the benefit of the bargain, and have been damaged.

A. Cellulite is a Non-Serious Medical Condition that Cannot be “Cured” through Topical Applications

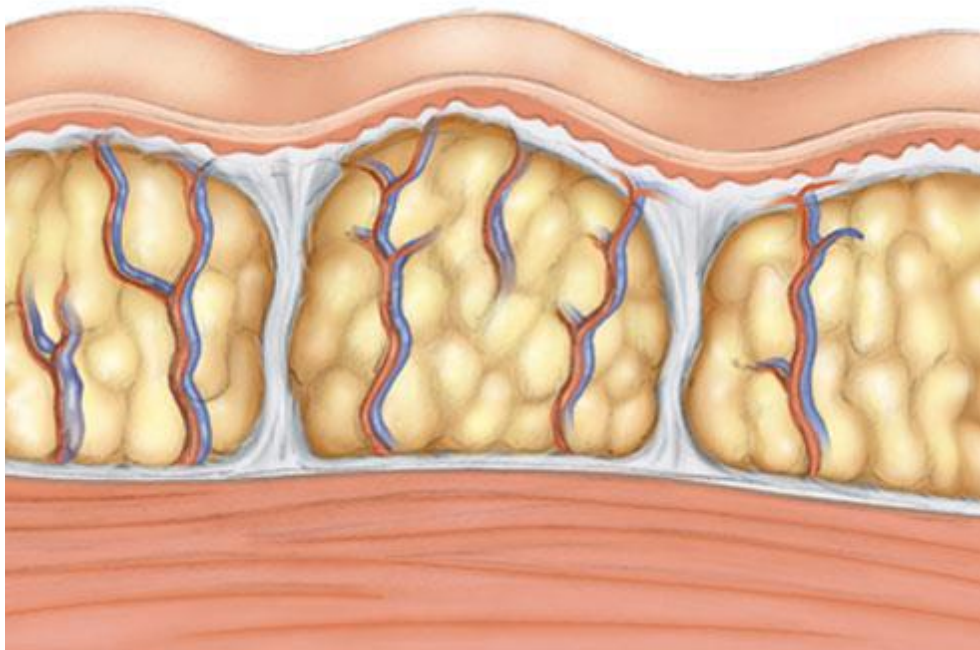
⁴ <https://www.npdgroup.ca/wps/portal/npd/ca/news/press-releases/shapewear-sales-slim-down-in-canada/>

⁵ <http://www.statcan.gc.ca/pub/82-625-x/2013001/article/11840-eng.htm>

⁶ <http://www.heartandstroke.on.ca/site/apps/nlnet/content2.aspx?c=pvI3IeNWJwE&b=3582275&ct=8136091>

23. The term “cellulite” is often used to refer to the appearance of dimpled skin on the thighs, buttocks and abdomen. Cellulite is most common in areas of fat deposits and is the result of the unevenness of fatty tissue beneath the skin surface.

24. Cellulite is caused by fibrous connective cords that tether the skin to the underlying muscle, with the fat lying between. As the fat cells accumulate, they push up against the skin, while the long, tough cords are pulling down. This creates an uneven surface or dimpling. A depiction of cellulite follows:



25. Cellulite is much more common in women than in men, and is thought to occur in 80-90% of post-adolescent females because fat is typically distributed in women in the thighs, hips and buttocks.

26. While cellulite is not a serious medical condition, cellulite can be unsightly and may cause embarrassment.

27. According to the Mayo Clinic, “[m]any devices, products and creams claim to treat cellulite. But there is little or no scientific evidence to support these claims. If you do find a cellulite treatment that improves your skin, the results aren't likely to last long term.”

28. The Mayo Clinic warns consumers that most treatments have not been proven effective in removing cellulite, including but not limited to:

- a) Vigorous massage. Some cellulite treatments are based on the concept that vigorous massage will increase blood flow, remove toxins and reduce excess fluid in cellulite-prone areas. One method in particular, Endermologie (also referred to as Lipomassage), uses a hand-held machine to knead the skin between rollers. You may notice a slight improvement to your skin after this treatment, but the results are typically short-lived.
- b) Mesotherapy. This procedure involves injecting a solution – which may contain a combination of aminophylline, hormones, enzymes, herbal extracts, vitamins and minerals - under the skin. This treatment can cause several unwanted effects, including infection, rashes, and bumpy or uneven skin contours.
- c) Cellulite creams. Creams that contain a variety of ingredients, such as vitamins, minerals, herbal extracts and antioxidants, are often marketed as the cure for cellulite. But no studies show that these creams offer any improvement. And in some cases, the ingredients in these products cause skin reactions or rashes.

29. In 2004, the FTC launched “Operation Big Fat Lie”, a nation-wide law enforcement sweep against six companies making false weight-loss claims, as well as claims regarding cellulite cures, in national advertisements.

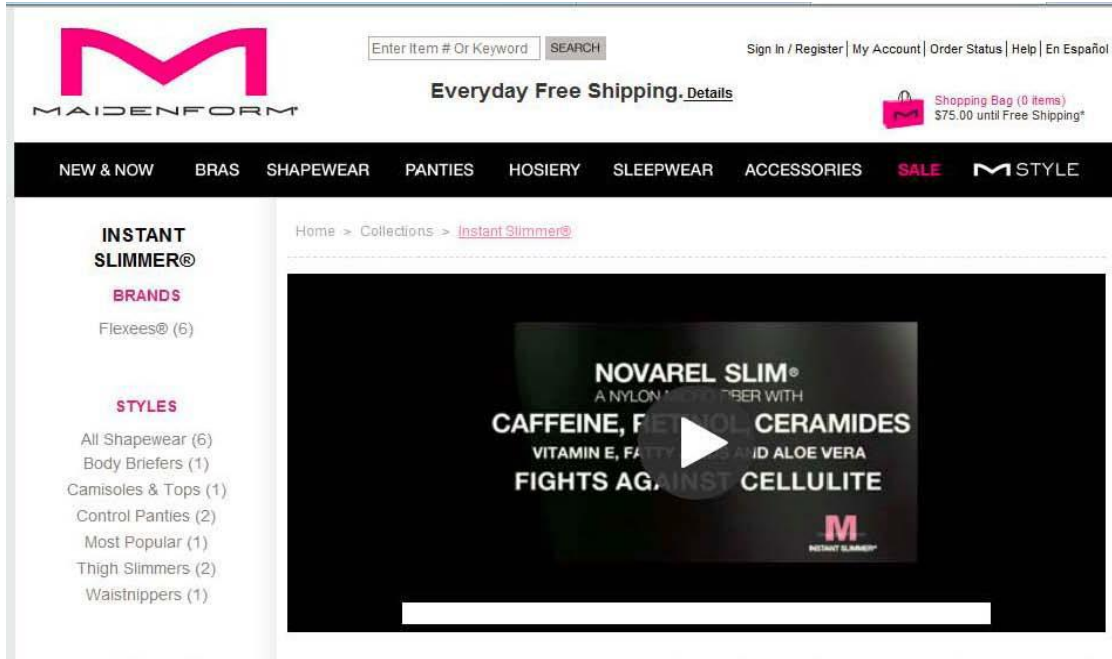
B. The Maidenform Defendants Misrepresent that their “Instant Slimmer” Shapewear “Fights Against Cellulite”

30. In or about March 2012, Maidenform launched its “Instant Slimmer” collection of Shapewear under its Flexees brand name. Maidenform markets its Instant Slimmer collection as being constructed with Novarel Slim “yarn technology” that provides “slimming benefits” and incorporates microcapsules containing caffeine, retinol, ceramides, and other active principles.

31. Maidenform’s website provides:

The screenshot shows the Maidenform website interface. At the top, there is a search bar with the text "Enter Item # Or Keyword" and a "SEARCH" button. To the right of the search bar are links for "Sign In / Register", "My Account", "Order Status", "Help", and "En Español". The Maidenform logo is on the left, and the text "Everyday Free Shipping. Details" is in the center. A shopping bag icon on the right shows "Shopping Bag (0 items)" and "\$75.00 until Free Shipping*". Below the navigation bar, there are categories: "NEW & NOW", "BRAS", "SHAPEWEAR", "PANTIES", "HOSIERY", "SLEEPWEAR", "ACCESSORIES", "SALE", and "M STYLE". The main content area shows search results for "novarel" (2 matches) and a link to "Flexees® Instant Slimmer® Collection Thigh Slimmer". A large image of a woman wearing black thigh-high shapewear is on the left. To the right, the product title is "FLEXEES® INSTANT SLIMMER® COLLECTION THIGH SLIMMER" with a price of "\$38.00" and a "Buy 1 Get 1 50% Off" offer. A "FREE SHIPPING" badge indicates "free standard US shipping when you spend *75 or more!". The product description states: "Reduce the appearance of cellulite with our Flexees® Instant Slimmer® Collection Thigh Slimmer!". A list of benefits includes: "Novarel Slim yarn technology provides slimming benefits by reducing the appearance of cellulite", "Smooths the skin", "Shapes the body for a more toned appearance", "Raw cut edges for the ultimate no-show look", "Soft, lightweight, silky fabrication caresses the skin", and "Medium Control". The fabric content is listed as "Body: 66% Nylon, 34% Elastane" and "Gusset Lining: 100% Cotton". The product is noted as "Imported". A note states: "Novarel Slim microfibre incorporates microcapsules containing caffeine, retinol, ceramides and other active principles." The style number is "Style: 1358". At the bottom, there is a "Size" dropdown menu set to "Select Size" with a "Sizing Guide" link, "Colors" (black and tan) with a price of "\$38.00", and a "Quantity" dropdown set to "1" with an "ADD TO BAG" button.

32. Maidenform posted a video on its website purporting to show that the Novarel Slim Fabric “fights against cellulite.” A screenshot follows:



33. Similarly, Maidenform represents on its Shapewear hangtags that Flexees “[r]educes the appearance of cellulite with: ceramides, caffeine [and] retinol”.

34. Maidenform charges as much as 62 percent more for its Instant Slimmer Shapewear than for the same shapewear without the claimed Cosmetic Benefits. Yet Maidenform’s Instant Slimmer Shapewear cannot and does not reduce or fight against cellulite nor promote fat destruction. At best, consumers who purchase Maidenform’s Instant Slimmer Shapewear receive the same body shapewear that Maidenform sells made without Novarel Slim technology.

C. Wacoal Misrepresents That its “Anti-Cellulite iPant” Will Promote Fat Destruction


35. On January 26, 2011, Wacoal debuted its Shapewear called the iPant, claiming that the iPant “works with your body to visually reduce the appearance of cellulite from your waist, hips and thighs as you move. The first in America to utilize Novarel Slim® technology in shapewear,

Wacoal's iPant will help you redefine your silhouette and reshape your lower body in 28 days with lasting results.” Wacoal advertises its iPant as anti-cellulite:




36. Wacoal represents that its iPant “is constructed of Novarel Slim® nylon microfibers with embedded microcapsules containing caffeine to promote fat destruction; vitamin E to prevent the effects of aging; ceramides to restore and maintain the skin’s smoothness; and retinol and aloe vera to moisturize and increase the firmness of the skin.” An example from its website provides:



HOME / SHAPEWEAR / NEW ARRIVALS / IPANT ANTI CELLULITE LONG LEG SHAPER



iPant Anti-Cellulite Long Leg Shaper
Available in S-2X!

809171  4.7 [Write a Review](#)

Wacoal's iPant with LYCRA® beauty fabric, shapes and sculpts as it releases ingredients into your skin while you move throughout the day. See below details for more information on this amazing new product!

Color  





Size [View Sizing Chart](#)

Qty **\$60.00**

[ADD TO BAG](#)

[Email to a Friend](#) | [Add to wish list](#) | [Print Page](#)

[VIEW OUR DIGITAL CATALOG >](#)

 Facebook  Tweet  Pinterest 

DETAILS **FABRIC CONTENT** **CARE** **REVIEWS**

Wacoal's iPant offers superior comfort and smoothing along with amazing cosmetic benefits.

The iPant is constructed of Novarel Slim® nylon microfibers with embedded microcapsules containing **caffeine** to promote fat destruction; **vitamin E** to prevent the effects of aging; **ceramides** to restore and maintain the skin's smoothness; and **retinol** and **aloe vera** to moisturize and increase the firmness of the skin.

The iPant with LYCRA® beauty fabric shapes and sculpts as it releases ingredients into your skin while you move throughout the day.

37. Wacoal advertises to consumers on its website as well as on the hangtags attached to its Shapewear “to wear the iPant 8 hours a day, 7 days a week for 28 days,” stating “Novarel Slim® test results show most women reported improved appearance, a reduction in thigh measurement and that their clothes felt less tight.” Wacoal also claims that the “active ingredients are still present after 100 washes”.

38. In addition, Wacoal claims that its Shapewear provides “amazing cosmetic benefits”, that wearing the garment will result in a “[p]ermanent anti-cellulite effect” and that “[c]linical and sensorial tests performed after 28 days of garment use by an independent laboratory” indicate:

- 76% Slimming efficiency;
- 72% Feel lighter; and;
- 63% State reduction of “orange peel” aspect.

39. Wacoal preys upon the insecurities of consumers by referring to its iPant product in its marketing as “HOPE ON A HANGER”.

40. Wacoal charges as much as fifty (50) percent more for the iPant than for the same shapewear without the claimed Cosmetic Benefits. Yet Wacoal’s iPant does not actually reduce thigh measurement or promote fat destruction as Wacoal claims. At best, consumers who purchase Wacoal’s iPants receive the same body shapewear that Wacoal sells made without Novarel Slim technology.

D. Defendants’ Conduct Injured Plaintiff and the Class Members

41. Based on Defendants’ misleading and deceptive sales scheme, Defendants were able to charge a premium for their Shapewear constructed of Novarel Slim Fabric over the costs of the same style shapewear made from non-cosmetic infused fabric.

42. Plaintiff and the Class Members that she seeks to represent suffered economic damages by purchasing Defendants’ products, did not receive the benefit of the bargain, suffered out-of-pocket loss, and are therefore entitled to claim a full refund for their purchases.

43. The Defendants know or understand that the promotion and advertising of their Shapewear, in part, targets consumers and customers in Canada.

44. The Defendants placed their Shapewear into the stream of commerce in Canada, including within the Province of Ontario, and elsewhere with the intention and expectation that consumers, such as the Plaintiff and Class Members, would purchase the product based on their Representation.

45. The Defendants knew or ought to have known that purchasers of their Shapewear would not be reasonably able to protect their interests, that such purchasers would be unable to receive a substantial benefit from the Shapewear and that consumers would be relying on the Defendants' Representation to their detriment.

46. The Representation was made for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants. The Representation was made knowingly or recklessly. The Representation was made to the public. The Representation was false or misleading in a material respect, namely as to the Cosmetic Benefits of the Defendants' Shapewear.

47. The Class Members have suffered and will suffer injuries, losses or damages as a result of the Defendants' conduct.

48. Canadian consumers were never compensated for damages incurred as a result of purchasing the Defendants' Shapewear in reliance upon the Representation.

THE REPRESENTATIVE PLAINTIFF

49. In 2013, the Plaintiff purchased two (2) Shapewear products constructed with Novarel Slim Fabric; Flexees by Maidenform for approximately \$52.00 plus taxes and iPant by Wacoal for approximately \$75.00 from The Bay in Toronto, Ontario.

50. The Plaintiff purchased the Shapewear based on the Defendants' marketing and after having read the product's labelling and hangtags. Specifically, she believed that the Shapewear would cause her to permanently cure her cellulite, destroy fat and cause weight loss.

51. The Plaintiff did not experience the Cosmetic Benefits as represented by the Defendants.

52. The Plaintiff discovered, while researching online, that a class action has been instituted in the United States due to this issue.

53. The Plaintiff has suffered damages as a result of purchasing the Shapewear, including the costs of purchasing these expensive Shapewear products, including sales taxes.

CAUSES OF ACTION

A. Breach of Contract – Defence to Formation

54. The Plaintiff and Class Members submit that the contract of sale is voidable by at their election due to misrepresentation or fraud in the inducement.

55. Upon purchasing the Defendants' Shapewear, the Plaintiff and Class Members entered into an express contract of sale with the Defendants such that in exchange for money (or a

money equivalent) the Defendants would provide the Shapewear based on the purported associated Cosmetic Benefits.

56. This contract of sale was based on a fraudulent material misrepresentation or a non-fraudulent material misrepresentation on the part of the Defendants such that the Plaintiff and Class Members were induced into purchasing the Shapewear in justifiable reliance upon the Defendants' misrepresentations regarding the Cosmetic Benefits associated with Shapewear constructed with Novarel Slim Fabric.

57. As such, the contract of sale is wholly voidable by the Plaintiff and Class Members who are entitled to compensatory damages in the amount of the money that was expended to purchase the Shapewear.

B. Breach of Warranty

58. The Defendants are "merchants" in the business of selling lingerie, undergarments and shapewear to foreseeable consumers such as Plaintiffs and the members of the Class, including, but not limited to Shapewear of the kind sold to Plaintiffs and the members of the Class in this Claim.

59. Plaintiffs and the members of the Class purchased Defendants' Shapewear constructed with Novarel Slim fabric.

60. The Defendants expressly warranted that the Shapewear constructed with Novarel Slim fabric fights cellulite, destroys fat and causes weight loss thus, this express representation becomes a basis of the bargain, implicating the Defendants' joint and several liability for breach.

61. The Shapewear does not conform to these express representations because they do not fight cellulite, destroy fat or cause weight loss. Thus, Defendants breached their express warranties.

62. As a direct and proximate result of the breach of said warranties, Plaintiffs and the Class members suffered and/or will continue to be harmed and suffer economic loss.

63. Plaintiffs and the Class members did rely on the express warranties of the Defendants herein.

64. The Defendants knew or should have known that, in fact, said Representation and warranties were false, misleading and untrue.

65. As a direct and proximate result of the foregoing acts and/or omissions, Plaintiffs and the Class members have suffered damages entitling them to compensatory damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

66. Further, and or in the alternative, the Defendants breached their implied warranties of fitness for a particular purpose, i.e. the Cosmetic Benefits and or committed intentional misrepresentations of material fact which induced the Plaintiff and Class Members to purchase the Shapewear in reliance.

67. Class Members were unable to receive a substantial benefit from the Shapewear to their detriment.

C. Tort of Negligence

68. The Defendants had a positive legal duty to use reasonable care to perform its legal obligations to the Plaintiff and Class Members;

69. The Defendants were aware that its customers (including Plaintiff and the Class) relied on it to provide truthful and accurate information about its products, including their Shapewear.

70. It was certainly reasonably foreseeable that if the Defendants were negligent in their duty to provide accurate information about their Shapewear, that customers would sustain injury and damages.

71. By its acts described herein, the Defendants failed to take reasonable care to ensure that their Representations were accurate and to ensure that their Shapewear products would perform as advertised.

72. This breach was a direct and proximate result of the Defendants' failure to use reasonable care in its marketing and advertising campaign.

73. By reason of the foregoing, Plaintiff and each member of the Class are entitled to recover damages and other relief from Defendants.

CAUSATION

74. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendants are the direct and proximate cause of the Plaintiff's and Class Members' injuries.

75. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

Compensatory Damages (Economic Losses)

76. By reason of the acts, omissions and breaches of legal obligations of the Defendants, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include the purchase price of the Shapewear.

Punitive, Exemplary and Aggravated Damages

77. The Defendants have taken a cavalier and arbitrary attitude to its legal and moral duties to the Class Members.

78. In addition, it should be noted since the Defendants are parts of a highly-revered, multi-billion dollar corporation, it is imperative to avoid any perception of evading the law without impunity. Should the Defendants only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to other businesses to deceive their customers as well. Punitive, aggravated and exemplary damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

79. At all material times, the conduct of the Defendants as set forth was malicious, deliberate and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner.

STATUTORY REMEDIES

80. The Defendants are in breach of the *Sale of Goods Act*, the *Consumer Protection Act* and the *Competition Act* and/or other similar/equivalent legislation.

81. The Plaintiff pleads and relies upon consumer protection and trade legislation and common law, as it exists in this jurisdiction and the equivalent/similar legislation and common law in other Canadian provinces and territories. The Class Members have suffered injury, economic loss and damages caused by or materially-contributed to by the Defendants' inappropriate and unfair business practices, which includes the Defendants being in breach of applicable Consumer Protection laws.

A. Breach of the *Sale of Goods Act*

82. At all times relevant to this action, the Plaintiff and Class Members were "buyer[s]" within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

83. At all times relevant to this action, the Defendants were "seller[s]" within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

84. The transactions by which the Plaintiff and Class Members purchased their “goods” from the Defendants were “sale[s]” within the meaning of those terms as defined in s.1 of the *Sale of Goods Act*.

85. The Defendants were aware that the consumers purchased the Shapewear for the particular purpose of the alleged Cosmetic Benefits based on their marketing and advertising and there is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose.

86. The Defendants committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed and/or advertised, as per s.15 of Part I of the *Sale of Goods Act*, the Defendants are liable. The Class is entitled to maintain an action for breach of warranty under ss. 51 & 55 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act*

87. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

88. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

89. The transactions by which the Plaintiff and Class Members purchased their Shapewear from the Defendants were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

90. The Defendants have engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Shapewear has performance characteristics, uses, benefits and/or qualities, which they do not have;
- (b) Representing that the Shapewear products are available for a reason that does not exist; i.e. Cosmetic Benefits; and
- (c) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding their ability to provide significant Cosmetic Benefits as such use or failure deceives or tends to deceive.

91. The Representation was and is unconscionable because *inter alia* the Defendants know or ought to know that the consumer is unable to receive a substantial benefit from the subject-matter of the representation.

92. The Plaintiff states that the Representation was false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Plaintiff and the Class to purchase the Shapewear as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

93. The Plaintiff and the Class Members relied on the Representation.

94. The reliance upon the Representation by the Plaintiff and Class Members is established by his or her purchase and/or use of the Shapewear. Had the Plaintiff and Class Members known that the Representation was false and misleading they would not have purchased and/or used the Shapewear.

C. Breach of the *Competition Act*

95. At all times relevant to this action, the Defendants' manufacturing, marketing and selling business was a "business" and the Shapewear was a "product" within the meaning of that term as defined in s.2 of the *Competition Act*.

96. The Defendants' acts are in breach of s. 52 of Part VI of the *Competition Act*, were and are unlawful and render the Defendants jointly and severally liable to pay damages and costs of investigation pursuant to s. 36 of the *Competition Act*.

97. The Defendants knowingly or recklessly made the Representation to the public and in so doing breached s.52 of the *Competition Act* because the Representation:

- (a) Was made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendants;
- (b) Was made to the public;
- (c) Was false and misleading in a material respect; and

- (d) Stated performance characteristics, uses, benefits and/or qualities of the Shapewear that were false and not based on adequate and proper testing and represented that the Shapewear products are available for a reason that does not exist, i.e. Cosmetic Benefits.

98. The Plaintiff and Class Members relied upon the Representation by buying and/or using the Shapewear and suffered damages and loss.

99. Pursuant to s. 36 of the *Competition Act*, the Defendants are liable to pay the damages which resulted from the breach of s. 52.

100. Pursuant to s. 36 of the *Competition Act*, the Plaintiff and Class Members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

101. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

WAIVER OF TORT, UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

102. The Plaintiff pleads and relies on the doctrine of waiver of tort and states that the Defendants' conduct, including the alleged breaches of any of the *Sale of Goods Act*, the *Consumer Protection Act*, or the *Competition Act* constitutes wrongful conduct which can be waived in favour of an election to receive restitutionary or other equitable remedies.

103. The Plaintiff reserves the right to elect at the Trial of the Common Issues to waive the legal wrong and to have damages assessed in an amount equal to the gross revenues earned by the Defendants or the net income received by the Defendants or a percent of the sale of the Shapewear as a result of the Defendants' false Representation which resulted in revenues and profit for the Defendants.

104. Further, the Defendants have been unjustly enriched as a result of the revenues generated from the sale of the Shapewear and as such, *inter alia*, that:

- (a) The Defendants have obtained an enrichment through revenues and profits from the sale of the Shapewear;
- (b) The Plaintiff and other Class Members have suffered a corresponding deprivation including the price of the Shapewear; and
- (c) The benefit obtained by the Defendants and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendants resulted from the Defendants' wrongful acts, there is and can be no juridical reason justifying the Defendants' retaining any portion of such money paid.

105. Further, or in the alternative, the Defendants are constituted as constructive trustees in favour of the Class Members for all of the monies received because, among other reasons:

- (a) The Defendants were unjustly enriched by receipt of the monies paid for the Shapewear;

- (b) The Class Members suffered a corresponding deprivation by purchasing the Shapewear;
- (c) The monies were acquired in such circumstances that the Defendants may not in good conscience retain them;
- (d) Equity, justice and good conscience require the imposition of a constructive trust;
- (e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- (f) There are no factors that would render the imposition of a constructive trust unjust.

106. Further, or in the alternative, the Plaintiff claim an accounting and disgorgement of the benefits which accrued to the Defendants.

COMMON ISSUES

107. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of law and fact include:

- (a) Did the Defendants advertise, represent or hold themselves out as producing or manufacturing Shapewear that would provide significant Health Benefits?

- (b) Did the Defendants engage in unfair, false, misleading, and/or deceptive acts or practices in their manufacturing, marketing or sale of Shapewear?
- (c) Did the Defendants impliedly warrant these products for fitness for a particular purpose?
- (d) Are the Defendants in breach of contract or is there a valid defence to enforcement whereby the Plaintiff and Class Members may elect to void the contract?
- (e) Did the Defendants' breach of contract proximately cause loss or injury and damages?
- (f) Did the Defendants breach their express or implied warranties as to the existence of Cosmetic Benefits?
- (g) Do the Defendants owe the Class members a duty to use reasonable care?
- (h) Did the Defendants act negligently in failing to use reasonable care to perform its legal obligations?
- (i) Did the Defendants intend that the Shapewear be purchased by the Plaintiff, Class Members and/or others?

- (j) Did the Defendants intend or foresee that the Plaintiff or other Class Members would purchase the Shapewear based on the Representation regarding the Cosmetic Benefits?
- (k) Did the Defendants' negligence proximately cause loss or injury and damages?
- (l) Did the Defendants' acts or practices breach the *Consumer Protection Act*, the *Competition Act* and/or other similar/equivalent legislation?
- (m) Were the Defendants unjustly enriched?
- (n) Have Class Members been damaged by the Defendants' conduct and, if so, what is the proper measure of such damages?
- (o) Are the Defendants liable to the Class Members for reimbursement of the purchase price of the Shapewear as a result of their misconduct and unfair business practices?
- (p) Should an injunctive remedy be ordered to prohibit the Defendants from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- (q) Are the Defendants responsible to pay compensatory and/or punitive damages to class members and in what amount?

EFFICACY OF CLASS PROCEEDINGS

108. The members of the proposed Class potentially number in the hundreds of thousands if not millions. Because of this, joinder into one action is impractical and unmanageable.

Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable.

109. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, and the small amount being claimed by each person, many people will hesitate to institute an individual action against the Defendant. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendant would increase delay and expense to all parties and to the court system.

110. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgements on questions of fact and law that are similar or related to all members of the class.

111. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice.

112. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to her counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel are qualified to prosecute complex class actions.

LEGISLATION

113. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the *Negligence Act*, the *Sale of Goods Act*, the *Competition Act* and other Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

114. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) The Defendants engage in business with residents of Ontario;
- (b) The Defendants derive substantial revenue from carrying on business in Ontario;
and
- (c) The damages of Class Members were sustained in Ontario.

115. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

DEFENDANTS' JOINT AND SEVERAL LIABILITY

116. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to herself and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;
- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to manufacture, market and sell the Shapewear;
- (d) Each Defendant owed a duty of care to the other and to each Class Member by virtue of the common business plan to manufacture, market and sell the Shapewear; and
- (e) The Defendants intended that their businesses be run as one global business organization.

117. The Plaintiff and the other Class Members are entitled to legal and equitable relief against the Defendants, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate.

118. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

SERVICE OUTSIDE ONTARIO

119. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), (h) and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));
- (d) In respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (e) The claim is authorized by statute, the *Sale of Goods Act*, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (f) Against a person carrying on business in Ontario (rule 17. 02(p)).

Date: November 15, 2013

**CONSUMER LAW GROUP
PROFESSIONAL CORPORATION**

340 Albert Street
Suite 1300
Ottawa, Ontario
K1R 7Y6

Jeff Orenstein
LSUC# 59631G
Email: jorenstein@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff

M. BOUGHA
Plaintiff

MAIDENFORM BRANDS, INC. et *alli*
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

**CONSUMER LAW GROUP
PROFESSIONAL CORPORATION**

340 Albert Street
Suite 1300
Ottawa, Ontario
K1R 7Y6

Jeff Orenstein
LSUC# 59631G
Email: jorenstein@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff