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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JOHN NAHRA, individually and on  
behalf of all others similarly situated,

Plaintiff,

vs.

AXE AND SLEDGE SUPPLEMENTS  
INC., a Pennsylvania Corporation,

Defendant.

Case No.

**CLASS ACTION COMPLAINT**

1. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS AND PROFESSIONS CODE § 17200, *et seq.*
2. FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17500, *et seq.*
3. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, *et. seq.*
4. BREACH OF WARRANTY
5. COMMON LAW FRAUD
6. INTENTIONAL MISREPRESENTATION
7. RESTITUTION/UNJUST ENRICHMENT

**DEMAND FOR JURY TRIAL**

Plaintiff John Nahra (“**Plaintiff**”), individually and on behalf of all others similarly situated, as more fully described herein (the “**Class**” and “**Class Members**”), brings this class action complaint against Defendant Axe And Sledge Supplements Inc. (“**Defendant**”), and alleges the following based upon investigation, information, and belief, unless otherwise expressly stated as based on personal knowledge.

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6. Due to its known propensity to deceive consumers and destroy fair competition, the use of empty space in product packaging is a practice that both the United States and California legislatures prohibit except in rare instances where the empty space can be deemed “functional” according to narrowly tailored criteria. *See* 21 C.F.R. 100.100(a). None of these statutory ‘exceptions’ apply to the Products, as discussed more fully *infra*. *See* ¶¶ 32-43.

7. Instead, Defendant is utilizing empty space in its oversized, opaque packaging for the very reason it is prohibited: to trick consumers into believing its Products are a good deal, and a better deal than competitive products, based on size alone, and to save money by putting less product in each container than reasonable

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1 consumers expect to receive based on the package size. Ultimately, consumers pay  
2 premium prices for significantly empty containers.

3 8. Accordingly, Defendant has violated California Civil Code sections  
4 1750, *et seq.* (the “CLRA”), particularly California Civil Code sections 1770(a)(2),  
5 1770(a)(5), 1770(a)(7), and 1770(a)(9). As such, Defendant has committed *per se*  
6 violations of Business & Professions Code section 17200, *et seq.* (the “UCL”) and  
7 Business & Professions Code section 17500, *et seq.* (the “FAL”).

8 9. Plaintiff and consumers have suffered injury in fact caused by the false,  
9 fraudulent, unfair, deceptive, unlawful, and misleading practices set forth herein,  
10 and seek injunctive relief, as well as, *inter alia*, compensatory damages, statutory  
11 damages, restitution, and attorneys’ fees.

12 10. **Primary Dual Objectives.** Plaintiff brings this action individually and  
13 on behalf of those similarly situated to represent a National Class and a California  
14 Subclass of consumers who purchased the Products (defined *infra*). Plaintiff’s  
15 primary objective in this litigation is to secure injunctive relief to stop Defendant’s  
16 unlawful marketing of the Products as adequately filled. Plaintiff also seeks, on  
17 Plaintiff’s individual behalf and on behalf of the Class, a monetary recovery of the  
18 premium consumers overpaid for the Products, as consistent with permissible law  
19 (including, for example, damages, restitution, and disgorgement).

20 **CALIFORNIA STATE AND FEDERAL COURTS FIND SLACK-FILL**  
21 **CASES MERITORIOUS AND APPROPRIATE FOR CLASS TREATMENT**

22 11. Several state and federal courts have found that cases involving nearly  
23 identical claims are meritorious and appropriate for class treatment, including  
24 where, as here, powder-based protein products are sold in significantly empty  
25 containers. *See, e.g., Winkelbauer v. Orgain Mgmt. et. al*, Case No. 20STCV44583  
26 (L.A.S.C. May 20, 2021) (demurrer to claims involving slack-filled protein powder  
27 products overruled); *Barrett v. The Kroger Co.*, Case No. 21STCV14122 (L.A.S.C.  
28 October 8, 2021) (same); *Barrett v. Optimum Nutrition*, Case No. 2:21-cv-04398-

1 DMG-SK (C.D. Cal. Jan. 12, 2022) (FRCP 12(b)(6) motion to dismiss slack-filled  
2 protein powder claims denied); *Padilla v. The Whitewave Foods Co., et al.*, Case  
3 No. 2:18-cv-09327-JAK-JC (C.D. Cal. July 26, 2019) (FRCP 12(b)(6) motion to  
4 dismiss slack-filled supplement container claims denied); *Matic v. United States*  
5 *Nutrition, Inc.*, Case No. 2:18-cv-09592-PSG-AFM (C.D. Cal. Mar. 27, 2019)  
6 (FRCP 12(b)(6) (motion to dismiss slack-filled supplement container claims  
7 denied); *Merry, et al. v. International Coffee & Tea, LLC dba The Coffee Bean*,  
8 Case No. CIVDS1920749 (San Bernardino Superior Court Jan. 27, 2020) (demurrer  
9 to slack-filled powder container claims overruled); *Coleman v. Mondelez Int'l Inc.*,  
10 Case No. 2:20-cv-08100-FMO-AFM (C.D. Cal. July 26, 2021) (FRCP 12(b)(6)  
11 motion to dismiss slack-filled Swedish Fish® candy box claims denied); *Iglesias v.*  
12 *Ferrara Candy Co.*, Case No. 3:17-cv-00849-VC (N.D. Cal. July 25, 2017) (FRCP  
13 12(b)(6) motion to dismiss slack-filled Jujufruits® and Lemonhead® candy box  
14 claims denied and nationwide settlement class certified) (cert. granted Oct. 31,  
15 2018); *Tsuchiyama v. Taste of Nature, Inc.*, Case No. BC651252 (L.A.S.C. Feb. 28,  
16 2018) (motion for judgment on the pleadings involving slack-filled Cookie Dough  
17 Bites® candy box claims denied and nationwide settlement subsequently certified  
18 through Missouri court); *Gordon v. Tootsie Roll Industries, Inc.*, Case No. 2:17-cv-  
19 02664-DSF-MRW (C.D. Cal. Oct. 4, 2017) (FRCP 12(b)(6) motions to dismiss  
20 slack-filled Junior Mints® and Sugar Babies® candy box claims denied); *Escobar*  
21 *v. Just Born, Inc.*, Case No. 2:17-cv-01826-BRO-PJW (C.D. Cal. June 12, 2017)  
22 (FRCP 12(b)(6) motion to dismiss slack-filled Mike N' Ike® and Hot Tamales®  
23 candy box claims denied, and California class action certified over opposition) (cert.  
24 granted June 19, 2019); *Thomas v. Nestle USA, Inc.*, Cal. Sup. Case No. BC649863  
25 (April 29, 2020) (certifying as a class action, over opposition, slack-fill claims  
26 brought under California consumer protection laws).

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**PARTIES**

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12. **Plaintiff.** Plaintiff John Nahra currently resides in Maryland. Plaintiff was, at all times relevant hereto, a citizen of California residing in the county of Los Angeles. Plaintiff made a one-time purchase of Defendant’s Dippin’ Dots Banana Split Farm Fed Protein Product from a Vitamin Shoppe in Los Angeles, California in early 2022. Plaintiff paid approximately \$52.99 for the Product. In making his purchase, Plaintiff relied upon the opaque packaging, including the size of the container, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers like Plaintiff to purchase the Products. Plaintiff understood the size of the container to indicate the amount of powder contained in it was commensurate with the size of the container. He would not have purchased the Product, or would not have paid a premium for the Product, had he known that the Product was significantly underfilled. Plaintiff wishes to purchase the Product again in the future if the amount of powder inside were congruent with the size of the package.

13. **Defendant.** Defendant, Axe And Sledge Supplements Inc., is a Pennsylvania corporation headquartered in Pittsburgh, Pennsylvania. Defendant maintains its principal place of business at 1909 New Texas Road Pittsburgh, PA 15239. Defendant, directly and through its agents, conducts business nationwide. Defendant has substantial contacts with and receives substantial benefits and income from and through the State of California. Defendant is the owner, manufacturer, and distributor of the Products, and is the company that created and/or authorized the false, misleading, and deceptive packaging for the Products.

14. In committing the wrongful acts alleged herein, Defendant planned and participated in and furthered a common scheme by means of false, misleading, deceptive, and fraudulent representations to induce members of the public to purchase the Products. Defendant participated in the making of such representations in that it did disseminate or cause to be disseminated said misrepresentations.





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1 hereto, was a citizen of California residing in Los Angeles County; Defendant made  
2 the misrepresentation to Plaintiff in Los Angeles County; Plaintiff purchased the  
3 Product in Los Angeles County; and Plaintiff consumed the Product within Los  
4 Angeles County. Moreover, Defendant receives substantial compensation from  
5 sales in Los Angeles County, and Defendant made numerous misrepresentations in  
6 its packaging and advertising that had a substantial effect in Los Angeles County.

7 **FACTUAL ALLEGATIONS**

8 **A. The Size of the Products’ Packaging Matters to Consumers**

9 20. The amount of product inside any product packaging is material to any  
10 consumer seeking to purchase that product. The average consumer spends only 13  
11 seconds deciding whether to make an in-store purchase;<sup>1</sup> this decision is heavily  
12 dependent on a product’s packaging, including the package dimensions. Research  
13 has demonstrated that packages that seem larger are more likely to be purchased,  
14 because consumers expect package size to accurately represent the quantity of the  
15 good being purchased.<sup>2</sup>

16 21. Accordingly, Defendant concocted its deceptive slack fill scam to  
17 leverage this known consumer behavior, by choosing an oversized container for its  
18 Products to convey to consumers that they are receiving a certain and substantial  
19 amount of powder product commensurate with the size of the container. Such  
20 representations constitute an express warranty regarding the Products’ content.

21 **B. The Products Are Deceptive to Reasonable Consumers**

22 22. Slack-fill is the difference between the actual capacity of a container  
23 and the volume of product contained therein. Nonfunctional slack-fill is the empty  
24 space in a package that is filled to less than its capacity for illegitimate or unlawful  
25 reasons.

26 \_\_\_\_\_  
27 <sup>1</sup> Randall Beard, *Make the Most of Your Brand’s 20-Second Window*, NIELSEN, Jan.  
13, 2015, <https://www.nielsen.com/us/en/insights/article/2015/make-the-most-of-your-brands-20-second-window/>.

28 <sup>2</sup> P. Raghubir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 J. MARKETING RESEARCH 313-326 (1999).

1           23. Defendant falsely represents the quantity of product in each of the  
2 Products' opaque containers through its packaging. The size of each container leads  
3 the reasonable consumer to believe he or she is purchasing a container full of  
4 powder product when, in reality, what he or she actually receives is about 43% less  
5 than what is represented by the size of the container. Almost half the container is  
6 empty.

7           24. Even if Plaintiff and other reasonable consumers of the Products had a  
8 reasonable opportunity to review, prior to the point of sale, other representations of  
9 quantity, such as net weight or serving disclosures, they did not and would not have  
10 reasonably understood or expected such representations to translate to a quantity of  
11 powder product meaningfully different from their expectation of an amount of  
12 powder commensurate with the size of the container.

13           25. Unlike products that are traditional, countable goods, reasonable  
14 consumers are not able to fully assess the quantity of powder they are purchasing  
15 by doing computations based on net weight and serving disclosures and translating  
16 that information into an expected quantity of powder.

17           26. Instead, reasonable consumers rely on the size of the Products'  
18 containers, which provide a much more salient and efficient means of assessing the  
19 amount of powder they are purchasing.

20           27. Disclosures of net weight and serving sizes in ounces or grams do not  
21 allow the reasonable consumer to make any meaningful conclusions about the  
22 quantity of powder contained in the Products' containers that would be different  
23 from the reasonable consumer's expectation that the quantity of powder is  
24 commensurate with the size of the container.

25           28. The other information that Defendant provides about the quantity of  
26 powder on the front and back labels of the Products do not enable reasonable  
27 consumers to form any meaningful understanding about how to gauge the quantity  
28 of contents of the Products as compared to the size of the container itself. For

1 instance, the front of the Products’ packaging does not have any label that would  
2 provide Plaintiff with any meaningful insight as to the amount of powder to be  
3 expected, such as a fill line or other graphic depicting the fill level.

4 29. Prior to the point of sale, the Products’ packaging does not allow for a  
5 visual or audial confirmation of the contents of the Products. The Products’ opaque  
6 packaging prevents a consumer from observing the contents before opening. Even  
7 if a reasonable consumer were to “shake” the Products before opening the  
8 container, the reasonable consumer would not be able to discern the presence of any  
9 nonfunctional slack-fill, let alone the significant amount of nonfunctional slack-fill  
10 that is present in the Products.

11 30. Plaintiff would not have purchased the Product had he known that the  
12 Product contained slack-fill that serves no functional or lawful purpose.

13 31. Defendant intended for Plaintiff and the Class members to be misled.  
14 Defendant’s misleading and deceptive practices proximately caused harm to  
15 Plaintiff and the Class, as well as Defendant’s lawfully acting competitors.

### 16 **C. None of the Slack-Fill Statutory Exceptions Apply to the Products**

17 32. Pursuant to 21 C.F.R. § 100.100, “a food shall be deemed to be  
18 misbranded if its container is so made, formed, or filled as to be misleading.” An  
19 opaque container “shall be considered to be filled as to be misleading if it contains  
20 nonfunctional slack-fill.” *Id.* Nonfunctional slack-fill is empty space within  
21 packaging that is filled to less than its capacity for reasons other than provided for in  
22 the enumerated slack-fill exceptions.

#### 23 **1. 21 C.F.R. 100.100(a)(1) – Protection of the Contents**

24 33. The slack-fill in the Products’ containers does not protect the contents of  
25 the packages. In fact, because the product is a powder, rather than an inherently  
26 fragile good, there is no need to protect the product with the slack-fill present.

27 34. If the amount of powder in each container was commensurate with the  
28 size of the container, as reasonable consumers expect, then the powder would have

1 less room to move around during shipping and handling and would be less likely to  
2 sustain damage.

3 **2. 21 C.F.R. 100.100(a)(2) – Requirements of the Machines**

4 35. The machines used to package the Products would not be affected if  
5 there was more powder product added. At most, a simple recalibration of the  
6 machines would be required. Upon information and belief, adjusting these machines  
7 is rather simple.

8 36. Because the packages are filled to about half of their capacity,  
9 Defendant can increase the Products' fill level significantly without affecting how  
10 the containers are sealed. Alternatively, Defendant can decrease the container size to  
11 match the amount of powder, or it can disclose clearly and conspicuously the fill-  
12 level on the outside labeling to inform consumers of the amount of powder product  
13 actually in the container.

14 **3. 21 C.F.R. 100.100(a)(3) – Settling During Shipping and Handling**

15 37. The slack-fill present in the Products' containers is not a result of the  
16 powder product settling during shipping and handling. Given the Products' density,  
17 shape, and composition, any settling occurs immediately at the point of fill. No  
18 measurable product settling occurs during subsequent shipping and handling.

19 38. Even if *some* product settling may occur, there is no lawful reason the  
20 Products' containers are nearly half empty, when competitor products—such as the  
21 SuperiorSource product below—which have similar product density, shape, and  
22 composition as Defendant's product, are filled nearly 90% full.

23 **4. 21 C.F.R. 100.100(a)(4) – Specific Function of Package**

24 39. The packages do not perform a specific function that necessitates the  
25 slack-fill. This safe harbor would only apply if a specific function were “inherent to  
26 the nature of the food and clearly communicated to consumers.” The packages do  
27 not perform a function that is inherent to the nature of the food. Powder products  
28 can be held in many other kinds of containers, such as bags. The drinks made from

1 the powder are also not prepared inside the container. Defendant did not otherwise  
2 communicate a specific function to consumers, further making this provision  
3 inapplicable.

4 **5. 21 C.F.R. 100.100(a)(5) – Reusable Container**

5 40. The Products' packaging is not reusable or of any significant value to  
6 the Products independent of its function to hold the powder product. The Products'  
7 plastic containers are intended to be discarded immediately after the powder product  
8 is used.

9 **6. 21 C.F.R. 100.100(a)(6) – Inability to Increase Fill or Decrease**  
10 **Container Size**

11 41. The slack-fill present in the Products' containers does not accommodate  
12 required labeling, discourage pilfering, facilitate handling, or prevent tampering.

13 42. Defendant can easily increase the quantity of powder in each container  
14 (or, alternatively, decrease the size of the containers) by approximately 43% more  
15 volume.

16 43. Because none of the statutory exceptions apply to the Products'  
17 packaging, the packages contain nonfunctional slack-fill in violation of 21 C.F.R.  
18 100.100 and are, therefore, filled as to be misleading. Plaintiff shall proffer expert  
19 testimony to establish these facts once this case reaches the merits more definitively.

20 **D. Comparator Products Serve as Additional Evidence of Nonfunctional**  
21 **Slack-Fill**

22 44. Contrast the Products' packaging with a comparator product, such as  
23 SuperiorSource Keto Collagen, which is also packaged in an opaque container. The  
24 SuperiorSource container measures to a vertical height of approximately 7 inches.  
25 The container is filled with product to a height of approximately 6.3 inches.  
26 Therefore, this product is approximately 90% filled with a similar powder product.  
27 Below is a true and correct image of the comparator product. The red line represents  
28 the actual fill line, below which is product, and above which is nonfunctional empty

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space:



45. The SuperiorSource packaging provides additional evidence that the slack-fill present in the Products’ packaging is nonfunctional.

46. The SuperiorSource packaging provides additional evidence that the slack-fill in the Products is not necessary to protect and, in fact, does not protect, the contents of the Products; is not a requirement of the machines used for enclosing the contents of the Products; is not a result of unavoidable product settling during shipping and handling; is not needed to perform a specific function; and is not part of a legitimate reusable container.

47. The SuperiorSource packaging provides additional evidence that Defendant is able to increase the level of fill inside the Products’ containers.

48. The SuperiorSource packaging provides additional evidence that Defendant has reasonable alternative designs available to it in its packaging of the Products.

///

1           49. Plaintiff did not expect that the Product would contain nonfunctional  
2 slack-fill, especially given that nonfunctional slack-fill, as opposed to functional  
3 slack-fill, is prohibited by federal law as well as California law.

4           50. The slack-fill contained in the Products does not serve a legitimate or  
5 lawful purpose.

6           51. The Products are made, formed, and filled so as to be misleading. The  
7 Products are, therefore, misbranded.

### 8 **E. Defendant’s Conduct Harms Consumers and Threatens Fair Competition**

9           **52. Reasonable Consumer’s Perception.** Defendant’s practice of selling  
10 the Products in oversized, misleading packaging is a pervasive scheme which leads  
11 reasonable consumers, like Plaintiff, into believing that the Products conform to the  
12 Defendant’s misrepresentation—meaning, consumers are led to believe that they are  
13 purchasing a quantity of product commensurate with the size of the container they  
14 select.

15           **53. Reliance.** During the course of its false, misleading, and deceptive  
16 advertising scheme, Defendant has sold tens of thousands of units, if not more,  
17 based on Defendant’s misrepresentations. Plaintiff and the Class relied on the size  
18 of the containers as a proxy for the amount of powder contained therein and, had  
19 they known the Products were nearly half-empty, they would not have purchased  
20 the Products or would have paid significantly less for them. Therefore, Plaintiff and  
21 the class suffered injury in fact and lost money as a result of Defendant’s  
22 misrepresentations.

23           **54. Fair Competition.** Defendant’s conduct threatens consumers by using  
24 deceptive and misleading packaging to convince them to purchase the Products for a  
25 premium. Defendant’s conduct also threatens other companies, large and small, who  
26 “play by the rules,” by giving Defendant a competitive advantage in the  
27 marketplace. Defendant benefits from increased sales by representing to consumers  
28 that the Products’ containers are adequately filled, while simultaneously cutting



1 costs by underfilling the containers by approximately 43%. Defendant's conduct  
2 therefore stifles competition, has a negative impact on the marketplace, and reduces  
3 consumer choice.

4 **55. No Legitimate Business Reason.** There is no legitimate reason for  
5 Defendant's false and misleading representations as to the quantity of powder the  
6 Products contain, other than to mislead consumers as to the actual quantity of  
7 powder contained therein and obtain a competitive advantage over competitors.  
8 Based on Defendant's misrepresentations, consumers purchase the Products over  
9 Defendant's competitors, incorrectly believing they are adequately filled, thus  
10 providing Defendant with a financial windfall.

11 **F. The Products are Substantially Similar**

12 **56. The Products.** Defendant's slack-fill scam extends to all flavors, sizes,  
13 and varieties of Axe And Sledge Powder Products sold in opaque containers. The  
14 Products include, without limitation, Axe And Sledge Farm Fed Grass Fed Whey  
15 Protein Isolate (Banana Split Ice Cream), Axe And Sledge Farm Fed Grass Fed  
16 Whey Protein Isolate (Strawberry Ice Cream), Axe And Sledge Farm Fed Grass  
17 Fed Whey Protein Isolate (Glazed Donut), Axe And Sledge Farm Fed Grass Fed  
18 Whey Protein Isolate (Vanilla Milkshake), Axe And Sledge Farm Fed Grass Fed  
19 Whey Protein Isolate (Chocolate Milkshake), Axe And Sledge Farm Fed Grass Fed  
20 Whey Protein Isolate (Salted Caramel), Axe And Sledge Home Made Meal  
21 Replacement with Real Whole Foods (Chocolate Brownie), Axe And Sledge Home  
22 Made Meal Replacement with Real Whole Foods (Peanut Butter Cookie), Axe And  
23 Sledge Home Made Meal Replacement with Real Whole Foods (Sweet Potato Pie),  
24 Axe And Sledge Home Made Meal Replacement with Real Whole Foods  
25 (Blueberry Muffin), and Axe And Sledge Home Made Meal Replacement with Real  
26 Whole Foods (Lemon Cream Pie).

27 **57.** As described herein, Plaintiff purchased the Farm Fed Grass Fed Whey  
28 Protein Isolate Banana Split Ice Cream Product (the "Purchased Product"). The

1 additional Products (collectively, the “Unpurchased Products”) are substantially  
2 similar to the Purchased Product.

3 a. **Defendant.** All Products are manufactured, sold, marketed, advertised,  
4 and packaged by Defendant.

5 b. **Brand.** All Products are sold under the same brand name: Axe And  
6 Sledge Supplements.

7 c. **Purpose.** All Products are powder beverage mixes intended for human  
8 consumption.

9 d. **Ingredients.** All Products are made from largely the same ingredients  
10 or types of ingredients, predominantly whey protein isolate as well as  
11 natural and artificial flavors, processed in the same or similar manner,  
12 and manufactured into the finished Products in the same or similar  
13 manner. *See Exhibit 2 [Ingredient Disclosures].*

14 e. **Marketing Demographics.** All Products are marketed directly to  
15 consumers for personal consumption. In particular, the Products are  
16 manufactured and marketed as workout supplements for use in  
17 conjunction with an exercise routine.

18 f. **Packaging.** All Products are packaged in the same opaque, oversized,  
19 and under-filled containers intended to mislead consumers to believe  
20 the products are adequately filled and contain a quantity of powder  
21 commensurate with the size of the container.

22 g. **Misleading Effect.** The misleading effect of the Products’ packaging  
23 on consumers is the same for all Products—consumers over-pay for the  
24 Products believing that they are purchasing Products that are adequately  
25 filled when, in reality, the Products contain approximately 43%  
26 nonfunctional slack-fill.

27 ///

28 ///

**NO ADEQUATE REMEDY AT LAW**

1  
2 58. Plaintiff and members of the Class are entitled to equitable relief, as no  
3 adequate remedy at law exists.

4 a. **Broader Statutes of Limitations.** The statutes of limitations for the  
5 causes of action pled herein vary. The limitations period is four years  
6 for claims brought under the UCL, which is one year longer than the  
7 statutes of limitations under the FAL and CLRA. In addition, the  
8 statutes of limitations vary for certain states' laws for breach of  
9 warranty and unjust enrichment/restitution, between approximately 2  
10 and 6 years. Thus, California Subclass members who purchased the  
11 Products more than 3 years prior to the filing of the complaint will be  
12 barred from recovery if equitable relief were not permitted under the  
13 UCL. Similarly, Nationwide Class members who purchased the  
14 Products prior to the furthest reach-back under the statute of  
15 limitations for breach of warranty, will be barred from recovery if  
16 equitable relief were not permitted for restitution/unjust enrichment.

17 b. **Broader Scope of Conduct.** In addition, the scope of actionable  
18 misconduct under the unfair prong of the UCL is broader than the  
19 other causes of action asserted herein. It includes, for example,  
20 Defendant's overall unfair marketing scheme to promote and brand  
21 the Products as adequately filled, across a multitude of media  
22 platforms, including the Products' labels and packaging, over a long  
23 period of time, in order to gain an unfair advantage over competitor  
24 products and to take advantage of consumers' desire for products that  
25 are adequately filled. Plaintiff and California Subclass members may  
26 be entitled to restitution under the UCL, while not entitled to  
27 damages under other causes of action asserted herein (e.g., the FAL  
28 requires actual or constructive knowledge of the falsity; the CLRA is

1 limited to certain types of plaintiffs (an individual who seeks or  
2 acquires, by purchase or lease, any goods or services for personal,  
3 family, or household purposes) and other statutorily enumerated  
4 conduct). Similarly, unjust enrichment/restitution is broader than  
5 breach of warranty. For example, in some states, breach of warranty  
6 may require privity of contract or pre-lawsuit notice, which are not  
7 typically required to establish unjust enrichment/restitution. Thus,  
8 Plaintiff and Class members may be entitled to recover under unjust  
9 enrichment/restitution, while not entitled to damages under breach of  
10 warranty, because they purchased the products from third-party  
11 retailers or did not provide adequate notice of a breach prior to the  
12 commencement of this action.

13 c. **Broader Scope of Relief.** The UCL provides for only restitutionary  
14 and injunctive relief, whereas the CLRA also provides for monetary  
15 damages. In many cases, liability under the two statutes will involve  
16 the same facts and elements. But here, Plaintiff predicates his UCL  
17 unlawful claim on a specific statutory provision, 21 C.F.R. 100.100,  
18 which prohibits nonfunctional slack-fill. Plaintiff may be able to  
19 prove the more straightforward factual elements in 21 C.F.R.  
20 100.100, and thus prevail under the UCL, while still being unable to  
21 convince a jury of the more subjective claim that members of the  
22 public are likely to be deceived, and therefore fail with respect to his  
23 CLRA claim for damages. *See, e.g., Ostrovskaya v. St. John Knits,*  
24 *Inc.*, 2022 U.S. Dist. LEXIS 100861, at \*11-12 (C.D. Cal. Mar. 31,  
25 2022).

26 d. **Injunctive Relief to Cease Misconduct and Dispel Misperception.**  
27 Injunctive relief is appropriate on behalf of Plaintiff and members of  
28 the Class because reasonable consumers expect the Products'

1 containers to hold an amount of product commensurate with their  
2 size, but Defendant fills their opaque containers with far less product  
3 than a reasonable consumer would expect. Injunctive relief is  
4 necessary to prevent Defendant from continuing to engage in the  
5 unfair, fraudulent, and/or unlawful conduct described herein and to  
6 prevent future harm—none of which can be achieved through  
7 available legal remedies (such as monetary damages to compensate  
8 past harm). Further, injunctive relief, in the form of affirmative  
9 disclosures, is necessary to dispel the public misperception about the  
10 Products that has resulted from years of Defendant’s unfair,  
11 fraudulent, and unlawful marketing efforts. Such disclosures would  
12 include, but are not limited to, publicly disseminated statements that  
13 the Products are not adequately filled and providing accurate  
14 information about the Products’ true nature; and/or requiring  
15 prominent qualifications and/or disclaimers on the Products’ front  
16 labels concerning the Products’ true nature. An injunction requiring  
17 affirmative disclosures to dispel the public’s misperception, and  
18 prevent the ongoing deception and repeat purchases based thereon, is  
19 also not available through a legal remedy (such as monetary  
20 damages). In addition, Plaintiff is *currently* unable to accurately  
21 quantify the damages caused by Defendant’s future harm, because  
22 discovery and Plaintiff’s investigation have not yet completed,  
23 rendering injunctive relief all the more necessary. For example,  
24 because the court has not yet certified any class, the following  
25 remains unknown: the scope of the class, the identities of its  
26 members, their respective purchasing practices, prices of past/future  
27 Product sales, and quantities of past/future Product sales.  
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- e. **Public Injunction.** Further, because a “public injunction” is available under the UCL, damages will not adequately “benefit the general public” in a manner equivalent to an injunction.
- f. **California vs. Non-California Class Claims.** Violation of the UCL, FAL, and CLRA are claims asserted on behalf of Plaintiff and the California Subclass against Defendant, while the common law causes of action are asserted on behalf of Plaintiff and the Nationwide Class. Dismissal of farther-reaching remedies, such as restitution, would bar recovery for non-California members of the Class. In other words, legal remedies available or adequate under the California-specific causes of action (such as the CLRA) have no impact on this Court’s jurisdiction to award equitable relief under the remaining causes of action asserted on behalf of non-California putative class members.
- g. **Procedural Posture—Incomplete Discovery & Pre-Certification.** Lastly, this is an initial pleading in this action and discovery has not yet commenced and/or is at its initial stages. No class has been certified yet. No expert discovery has commenced and/or completed. The completion of fact/non-expert and expert discovery, as well as the certification of this case as a class action, are necessary to finalize and determine the adequacy and availability of all remedies, including legal and equitable, for Plaintiff’s individual claims and any certified class. Plaintiff therefore reserves his right to amend this complaint and/or assert additional facts that demonstrate this Court’s jurisdiction to order equitable remedies where no adequate legal remedies are available for either Plaintiff and/or any certified class. Such proof, to the extent necessary, will be presented prior to the trial of any equitable claims for relief and/or the entry of an order granting equitable relief.

**CLASS ACTION ALLEGATIONS**

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2       **59. Class Definition.** Plaintiff brings this action as a class action pursuant to  
3 Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of himself and all  
4 others similarly situated, and as members of the Classes defined as follows:

5       All residents of the United States who, within the applicable statute of  
6 limitations periods, purchased the Products for purposes other than resale  
7 (“**Nationwide Class**”); and

8       All residents of California who, within four years prior to the filing of this  
9 Complaint, purchased the Products for purposes other than resale (“**California**  
10 **Subclass**”).

11 (“**Nationwide Class**” and “**California Subclass**,” collectively, “**Class**”).

12       **60. Class Definition Exclusions.** Excluded from the Class are: (i)  
13 Defendant, its assigns, successors, employees, and legal representatives; (ii) any  
14 entities in which Defendant has controlling interests; (iii) federal, state, and/or local  
15 governments, including, but not limited to, their departments, agencies, divisions,  
16 bureaus, boards, sections, groups, counsels, and/or subdivisions; and (iv) any  
17 judicial officer presiding over this matter and person within the third degree of  
18 consanguinity to such judicial officer.

19       **61. Reservation of Rights to Amend the Class Definition.** Plaintiff  
20 reserves the right to amend or otherwise alter the class definition presented to the  
21 Court at the appropriate time in response to facts learned through discovery, legal  
22 arguments advanced by Defendant, or otherwise.

23       **62. Numerosity.** Members of the Class are so numerous that joinder of all  
24 members is impracticable. Upon information and belief, the Nationwide Class  
25 consists of tens of thousands of purchasers (if not more) dispersed throughout the  
26 United States, and the California Subclass likewise consists of thousands of  
27 purchasers (if not more) dispersed throughout the State of California. Accordingly,  
28 it would be impracticable to join all members of the Class before the Court.

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63. **Common Questions Predominate.** There are numerous and substantial questions of law or fact common to all members of the Class that predominate over any individual issues. Common questions of law and fact include, but are not limited to, the following:

- a. The true nature and amount of product contained in each Product’s packaging;
- b. Whether the packaging, labeling, and other promotional materials for the Products are deceptive;
- c. Whether Defendant misrepresented the approval of the FDA, United States Congress, and California Legislature that the Products’ packaging complied with federal and California slack-fill regulations and statutes;
- d. Whether the Products contain nonfunctional slack-fill in violation of 21 C.F.R. Section 100.100, *et seq.*;
- e. Whether Defendant’s conduct is an unlawful business act or practice within the meaning of Business and Professions Code section 17200, *et seq.*;
- f. Whether Defendant’s conduct is a fraudulent business act or practice within the meaning of Business and Professions Code section 17200, *et seq.*;
- g. Whether Defendant’s conduct is an unfair business act or practice within the meaning of Business and Professions Code section 17200, *et seq.*;
- h. Whether Defendant’s advertising is untrue or misleading within the meaning of Business and Professions Code section 17500, *et seq.*;
- i. Whether Defendant made false and misleading representations in its advertising and labeling of the Products;
- j. Whether Defendant knew or should have known that the representations were false;



- 1 k. Whether Plaintiff and the Class paid more money for the Products than
- 2 they actually received;
- 3 l. How much more money Plaintiff and the Class paid for the Products
- 4 than they actually received;
- 5 m. Whether Defendant’s conduct constitutes common law fraud;
- 6 n. Whether Plaintiff and the Class are entitled to injunctive relief; and
- 7 o. Whether Defendant was unjustly enriched at the expense of Plaintiff and
- 8 the Class;

9 64. **Typicality.** Plaintiff’s claims are typical of the claims of the Class  
10 Members they seek to represent because Plaintiff, like the Class Members,  
11 purchased Defendant’s misleading and deceptive Products. Defendant’s unlawful,  
12 unfair and/or fraudulent actions concern the same business practices described  
13 herein irrespective of where they occurred or were experienced. Plaintiff and the  
14 Class sustained similar injuries arising out of Defendant’s conduct. Plaintiff’s and  
15 Class Members’ claims arise from the same practices and course of conduct and are  
16 based on the same legal theories.

17 65. **Adequacy.** Plaintiff is an adequate representative of the Class he seeks  
18 to represent because his interests do not conflict with the interests of the Class he  
19 seeks to represent. Plaintiff will fairly and adequately protect Class Members’  
20 interests and has retained counsel experienced and competent in the prosecution of  
21 complex class actions, including complex questions that arise in consumer  
22 protection litigation. For example, Plaintiff’s Counsel was the first law firm to  
23 successfully certify over opposition a slack-fill lawsuit (twice in 2019 and 2020,  
24 respectively).

25 66. **Superiority and Substantial Benefit.** A class action is superior to other  
26 methods for the fair and efficient adjudication of this controversy, since individual  
27 joinder of all members of the Class is impracticable and no other group method of  
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1 adjudication of all claims asserted herein is more efficient and manageable for at  
2 least the following reasons:

- 3 a. The claims presented in this case predominate over any questions of  
4 law or fact, if any exist at all, affecting any individual member of the  
5 Class;
- 6 b. Absent a Class, the members of the Class will continue to suffer  
7 damage and Defendant's unlawful conduct will continue without  
8 remedy while Defendant profits from and enjoys its ill-gotten gains;
- 9 c. Given the size of individual Class Members' claims, few, if any,  
10 Class Members could afford to or would seek legal redress  
11 individually for the wrongs Defendant committed against them, and  
12 absent Class Members have no substantial interest in individually  
13 controlling the prosecution of individual actions;
- 14 d. When the liability of Defendant has been adjudicated, claims of all  
15 members of the Class can be administered efficiently and/or  
16 determined uniformly by the Court; and
- 17 e. This action presents no difficulty that would impede its management  
18 by the Court as a class action, which is the best available means by  
19 which Plaintiff and Class Members can seek redress for the harm  
20 caused to them by Defendant.

21 67. **Inconsistent Rulings.** Because Plaintiff seeks relief for all members of  
22 the Class, the prosecution of separate actions by individual members would create a  
23 risk of inconsistent or varying adjudications with respect to individual members of  
24 the Class, which would establish incompatible standards of conduct for Defendant.

25 68. **Injunctive/Equitable Relief.** The prerequisites to maintaining a class  
26 action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met,  
27 as Defendant has acted or refused to act on grounds generally applicable to the  
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1 Class, thereby making appropriate final injunctive or equitable relief with respect to  
2 the Class as a whole.

3 69. **Manageability.** Plaintiff and Plaintiff’s counsel are unaware of any  
4 difficulties that are likely to be encountered in the management of this action that  
5 would preclude its maintenance as a class action.

6 **COUNT ONE**

7 **Violation of California Unfair Competition Law**

8 **California Business & Professions Code § 17200, *et seq.***

9 ***(On Behalf of the California Subclass)***

10 70. **Incorporation by Reference.** Plaintiff repeats and realleges the  
11 allegations set forth in the preceding paragraphs and incorporates the same as if set  
12 forth herein at length.

13 71. **California Subclass.** Plaintiff brings this cause of action pursuant to  
14 Business and Professions Code Section 17200, *et seq.*, individually and on behalf of  
15 the California Subclass.

16 72. **FDCA.** Congress passed the Federal Food, Drug, and Cosmetic Act  
17 (“FDCA”), and in so doing established the Federal Food and Drug Administration  
18 (“FDA”) to “promote the public health” by ensuring that “foods are safe,  
19 wholesome, sanitary, and properly labeled.” 21 U.S.C. §393.

20 73. The FDA has implemented regulations to achieve this objective. *See,*  
21 *e.g.,* 21 C.F.R. § 101.1 *et seq.*

22 74. The legislature of California has incorporated 21 C.F.R. Section  
23 100.100, which prohibits nonfunctional slack-fill, into the State’s Business and  
24 Professions Code Section 12606.2 *et seq.*

25 75. The FDA enforces the FDCA and accompanying regulations; “[t]here is  
26 no private right of action under the FDCA.” *Ivie v. Kraft Foods Global, Inc.*, 2013  
27 U.S. Dist. LEXIS 25615, 2013 WL 685372, at \*1 (internal citations omitted).

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1           76. In 1990, Congress passed an amendment to the FDCA, the Nutrition  
2 Labeling and Education Act (“NLEA”), which imposed a number of requirements  
3 specifically governing food nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343  
4 *et. seq.*

5           77. Plaintiff is not suing under the FDCA, but under California state law.

6           78. **Sherman Law.** The California Sherman Food, Drug, and Cosmetic Act  
7 (“Sherman Law”), Cal. Health & Safety Code Section 109875 *et seq.*, has adopted  
8 wholesale the food labeling requirements of the FDCA and NLEA as the food  
9 regulations of California. Cal. Health & Safety Code Section 110100.

10           79. The Sherman Law declares any food to be misbranded if it is false or  
11 misleading in any particular, or if the labeling does not conform with the  
12 requirements for nutrition labeling set forth in certain provisions of the NLEA. Cal.  
13 Health & Safety Code Sections 110660, 110665, 110670.

14           80. **The UCL.** California Business & Professions Code, Sections 17200, *et*  
15 *seq.* (the “UCL”) prohibits unfair competition and provides, in pertinent part, that  
16 “unfair competition shall mean and include unlawful, unfair or fraudulent business  
17 practices and unfair, deceptive, untrue or misleading advertising.”

#### 18   A. “Unfair” Prong

19           81. **Unfair Standard.** Under California’s Unfair Competition Law, Cal.  
20 Bus. & Prof. Code Section 17200, *et seq.*, a challenged activity is “unfair” when  
21 “any injury it causes outweighs any benefits provided to consumers and the injury  
22 is one that the consumers themselves could not reasonably avoid.” *Camacho v.*  
23 *Auto Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

24           82. **Injury.** Defendant’s action of leaving 43% nonfunctional slack-fill in  
25 its Products does not confer any benefit to consumers.

26           83. Defendant’s action of leaving 43% nonfunctional slack-fill in its  
27 Products causes injuries to consumers, who do not receive a quantity of product  
28 commensurate with their reasonable expectations.

1           84. Defendant’s action of leaving 43% nonfunctional slack-fill in its  
2 Products causes injuries to consumers, who do not receive a level of protein or  
3 other nutrients consistent with Defendant’s representations and commensurate with  
4 their reasonable expectations.

5           85. Defendant’s action of leaving 43% nonfunctional slack-fill in its  
6 Products causes injuries to consumers, who end up overpaying for the Products and  
7 receiving a quantity of protein powder less than what they expected to receive.

8           86. Consumers cannot avoid any of the injuries caused by the 43%  
9 nonfunctional slack-fill in Defendant’s Products.

10           87. Accordingly, the injuries caused by Defendant’s inclusion of 43%  
11 nonfunctional slack-fill in the Products outweigh any benefits.

12           88. **Balancing Test.** Some courts conduct a balancing test to decide if a  
13 challenged activity amounts to unfair conduct under California Business and  
14 Professions Code Section 17200. They “weigh the utility of the defendant’s conduct  
15 against the gravity of the harm to the alleged victim.” *Davis v. HSBC Bank Nevada,*  
16 *N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

17           89. **No Utility.** Here, Defendant’s conduct of including 43% nonfunctional  
18 slack-fill in the Products’ packaging has no utility and financially harms purchasers.  
19 Thus, the utility of Defendant’s conduct is vastly outweighed by the gravity of  
20 harm.

21           90. **Legislative Declared Policy.** Some courts require that “unfairness must  
22 be tethered to some legislative declared policy or proof of some actual or threatened  
23 impact on competition.” *Lozano v. AT&T Wireless Servs. Inc.*, 504 F. 3d 718, 735  
24 (9th Cir. 2007).

25           91. The California legislature maintains a declared policy of prohibiting  
26 nonfunctional slack-fill in consumer goods, as reflected in California Business and  
27 Professions Code Section 12606.2 and California Health and Safety Code Section  
28 110100.

1           92. The approximately 43% nonfunctional slack-fill contained in the  
2 Products is tethered to a legislative policy declared in California according to Cal.  
3 Business and Professions Code Section 12606.2 and Cal. Health & Safety Code  
4 Section 110100.

5           93. **Unfair Conduct.** Defendant's packaging of the Products, as alleged  
6 herein, is false, deceptive, misleading, and unreasonable, and constitutes unfair  
7 conduct.

8           94. Defendant knew or should have known of its unfair conduct.

9           95. As alleged herein, the misrepresentations by Defendant detailed above  
10 constitute an unfair business practice within the meaning of California Business and  
11 Professions Code Section 17200.

12           96. **Reasonably Available Alternatives.** There existed reasonably  
13 available alternatives to further Defendant's legitimate business interests, other than  
14 the conduct described herein. Defendant could have used packaging appropriate for  
15 the amount of powder product contained within the Products. Defendant also could  
16 have included a clear and conspicuous visual representation of fill level on the  
17 Products' front label to reasonably apprise consumers of the quantity of product  
18 contained therein.

19           97. **Ongoing Business Practice.** All of the conduct alleged herein occurs  
20 and continues to occur in Defendant's business. Defendant's unfair conduct is part  
21 of a pattern or generalized course of conduct repeated on thousands of occasions  
22 daily.

23           98. **Causation/Damages.** Plaintiff and the California Subclass have  
24 suffered injury in fact and have lost money as a result of Defendant's unfair  
25 conduct. Plaintiff paid an unwarranted premium for this product. Specifically,  
26 Plaintiff paid for powder product they never received. Plaintiff would not have  
27 purchased, or would have paid substantially less for, the Products if they had  
28 known that the Products' packaging contained nonfunctional slack-fill.

**B. “Fraudulent” Prong**

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99. **Fraud Standard.** California Business and Professions Code Section 17200, et seq., considers conduct fraudulent and prohibits said conduct if it is likely to deceive members of the public. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

100. **Fraudulent Business Practice.** Defendant’s conduct of packaging the Products with 43% nonfunctional slack-fill is likely to deceive members of the public.

101. Defendant’s packaging of the Products, as alleged herein, is false, deceptive, misleading, and unreasonable, and constitutes fraudulent conduct.

102. Defendant knew or should have known of their fraudulent conduct.

103. As alleged herein, the misrepresentations by Defendant constitute a fraudulent business practice in violation of California Business & Professions Code Section 17200.

104. **Reasonable and Detrimental Reliance.** Plaintiff and the California Subclass reasonably and detrimentally relied on Defendant’s false and misleading representations to their detriment in that they purchased the Products.

105. **Reasonably Available Alternatives.** Defendant had reasonably available alternatives to further its legitimate business interests, other than the conduct described herein. Defendant could have either used packaging appropriate for the amount of powder product contained therein or indicated how much powder the Products contained with a clear and conspicuous fill line or other visual representation of fill level.

106. **Ongoing Business Practice.** All of the conduct alleged herein occurs and continues to occur in Defendant’s business. Defendant’s fraudulent conduct is part of a pattern or generalized course of conduct.

107. **Causation/Damages.** Plaintiff and the California Subclass have suffered injury in fact and have lost money as a result of Defendant’s fraudulent

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1 conduct. Plaintiff paid an unwarranted premium for the Product. Specifically,  
2 Plaintiff paid for 43% of powder product he never received. Plaintiff would not have  
3 purchased the Products if he had known that the packaging contained nonfunctional  
4 slack-fill. Accordingly, Plaintiff seeks damages, restitution, and/or disgorgement of  
5 ill-gotten gains pursuant to the UCL.

### 6 C. “Unlawful” Prong

7 108. **Unlawful Standard.** California Business and Professions Code Section  
8 17200, *et seq.*, identifies violations of other laws as “unlawful practices that the  
9 unfair competition law makes independently actionable.” *Velazquez v. GMAC*  
10 *Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

11 109. **Violations of CLRA and FAL and Slack-Fill Statute.** Defendant’s  
12 packaging of the Products, as alleged herein, violates the CLRA, the FAL, and 21  
13 C.F.R. Section 100.100.

14 110. **Additional Violations.** Defendant’s conduct in making the false  
15 representations described herein constitutes a knowing failure to adopt policies in  
16 accordance with and/or adherence to applicable laws, as set forth herein, all of  
17 which are binding upon and burdensome to their competitors. This conduct  
18 engenders an unfair competitive advantage for Defendant, thereby constituting an  
19 unfair, fraudulent and/or unlawful business practice under California Business &  
20 Professions Code Sections 17200-17208. Additionally, Defendant’s  
21 misrepresentations of material facts, as set forth herein, violate California Civil  
22 Code Sections 1572, 1573, 1709, 1710, 1711, and 1770, as well as the common  
23 law.

24 111. **Unlawful Conduct.** Defendant’s packaging of the Products, as alleged  
25 herein, is false, deceptive, misleading, and unreasonable, and constitutes unlawful  
26 conduct.

27 112. Defendant knows or should know of its unlawful conduct.  
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1           **113. Reasonably Available Alternatives.** Defendant had reasonably  
2 available alternatives to further its legitimate business interests, other than the  
3 fraudulent conduct described herein. Defendant could have either used packaging  
4 appropriate for the amount of powder product contained therein or indicated how  
5 much powder the Products contained with a clear and conspicuous fill line or other  
6 visual representation of fill level.

7           **114. Ongoing Business Practice.** All of the conduct alleged herein occurred  
8 and continues to occur in Defendant's business. Defendant's unlawful conduct is  
9 part of a pattern or generalized course of conduct repeated on thousands of  
10 occasions daily.

11           **115. Injury in Fact.** Plaintiff and the California Subclass have suffered  
12 injury in fact and have lost money as a result of Defendant's unlawful conduct.  
13 Plaintiff and the California Subclass paid an unwarranted premium for this Product.  
14 Specifically, Plaintiff paid for 43% of powder product he never received. Plaintiff  
15 would not have purchased the Product if he had known that the packaging  
16 contained nonfunctional slack-fill.

17           **116. Causation/Damages.** Plaintiff seeks damages, restitution and/or  
18 disgorgement of ill-gotten gains pursuant to the UCL. Plaintiff and members of the  
19 California Subclass, pursuant to § 17203, are entitled to an order enjoining such  
20 future wrongful conduct on the part of Defendant and such other orders and  
21 judgments that may be necessary to disgorge Defendant's ill-gotten gains and to  
22 restore to any person in interest any money paid for the Products as a result of the  
23 wrongful conduct of Defendant.

24           **117. Prejudgment Interest.** Pursuant to Civil Code § 3287(a), Plaintiff and  
25 the California Subclass are further entitled to prejudgment interest as a direct and  
26 proximate result of Defendant's unfair, fraudulent, and unlawful business conduct.  
27 The amount on which interest is to be calculated is a sum certain and capable of  
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1 calculation, and Plaintiff and the Class are entitled to interest in an amount  
2 according to proof.

3 **COUNT TWO**

4 **False and Misleading Advertising in Violation of**  
5 **California Business and Professions Code § 17500, *et seq.***

6 ***(On Behalf of the California Subclass)***

7 **118. Incorporation by Reference.** Plaintiff repeats and realleges the  
8 allegations set forth in the preceding paragraphs and incorporates the same as if set  
9 forth herein at length.

10 **119. California Subclass.** Plaintiff brings this claim individually and on  
11 behalf of the California Subclass who purchased the Products within the applicable  
12 statute of limitations.

13 **120. FAL Standard.** California’s False Advertising Law, California  
14 Business and Professions Code Section 17500, *et seq.*, makes it “unlawful for any  
15 person to make or disseminate or cause to be made or disseminated before the  
16 public in this state, in any advertising device or in any other manner or means  
17 whatever, including over the Internet, any statement, concerning personal property  
18 or services, professional or otherwise, or performance or disposition thereof, which  
19 is untrue or misleading and which is known, or which by the exercise of reasonable  
20 care should be known, to be untrue or misleading.”

21 **121. The Deceptive Misrepresentation.** Defendant’s action of packaging  
22 the Products with 43% nonfunctional slack-fill instead of including more powder  
23 content in the container, or decreasing the size of the container, is likely to deceive  
24 the general public.

25 **122.** Defendant’s actions were false and misleading, such that the general  
26 public is and was likely to be deceived, in violation of Section 17500.

27 **123. Knowledge.** Defendant knowingly manipulated the physical  
28 dimensions of the Products’ containers, or stated another way, under-filled the

1 amount of powder product in the Products, by including approximately 43% slack-  
2 fill as a means to mislead the public about the amount of powder product contained  
3 in each package.

4 124. Defendant controlled the packaging of the Products. It knew or should  
5 have known, through the exercise of reasonable care, that its representations about  
6 the quantity of powder product contained in the Products were untrue and  
7 misleading.

8 125. **Causation/Damages.** Plaintiff and the California Subclass have  
9 suffered injury in fact and have lost money as a result of Defendant’s false  
10 representations. Plaintiff purchased the Products in reliance upon Defendant’s  
11 claims that the Products were of the quantity represented by Defendant’s packaging  
12 and advertising. Plaintiff would not have purchased the Products if she had known  
13 that the packaging as alleged herein were false.

14 126. As a direct and proximate result of Defendant’s misconduct in violation  
15 of the FAL, Plaintiff and members of the California Subclass, pursuant to § 17535,  
16 are entitled to an order of this Court enjoining such future wrongful conduct on the  
17 part of Defendant, and requiring Defendant to disclose the true nature of its  
18 misrepresentations.

19 127. Plaintiff and the California Subclass were harmed in the amount of the  
20 purchase price they paid for the Products. Further, Plaintiff and members of the  
21 California Subclass have suffered and continue to suffer economic losses and other  
22 damages including, but not limited to, the amounts paid for the Products, and any  
23 interest that would have accrued on those monies, in an amount to be proven at trial.  
24 Accordingly, Plaintiff seeks a monetary award for violation of the FAL in damages,  
25 restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff and the  
26 California Subclass for said monies, as well as injunctive relief to enjoin  
27 Defendant’s misconduct to prevent ongoing and future harm that will result.

28 ///

**COUNT THREE**

**Violation of California Consumers Legal Remedies Act,**

**California Civil Code § 1750, *et seq.***

***(On Behalf of the California Subclass)***

128. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporates the same as if set forth herein at length.

129. **California Subclass.** Plaintiff brings this claim individually and on behalf of the California Subclass who purchased the Products within the applicable statute of limitations.

130. **CLRA Standard.** The CLRA provides in California Civil Code Section 1750 that “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful.” (Civ. Code, § 1750.)

131. **Goods/Services.** The Products are “goods,” as defined by the CLRA in California Civil Code Section 1761(a).

132. **Defendant.** Defendant is a “person,” as defined by the CLRA in California Civil Code Section 1761(c).

133. **Consumers.** Plaintiff and members of the California Subclass are “consumers,” as defined by the CLRA in California Civil Code Section 1761(d).

134. **Transactions.** The purchase of the Products by Plaintiff and members of the California Subclass are “transactions” as defined by the CLRA under California Civil Code Section 1761(e).

135. **Violations of the CLRA.** The practices alleged herein, specifically Defendant’s packaging, advertising, and sale of the Products, were intended to result, and did result in the sale of the Products to the consuming public and

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1 violated and continue to violate sections 1770(a)(2), 1770(a)(5), 1770(a)(7), and  
2 1770(a)(9) of the CLRA:

- 3 a. Section 1770(a)(2), by misrepresenting the approval of the Products as
- 4 compliant with 21 C.F.R. Section 100.100 and the Sherman Law;
- 5 b. 1770(a)(5), by representing the Products have characteristics and
- 6 quantities that they do not have;
- 7 c. 1770(a)(7), advertising and packaging the Products with intent not to
- 8 sell them as advertised and packaged; and,
- 9 d. 1770(a)(9) by representing that the Products have been supplied in
- 10 accordance with a previous representation as to the quantity of powder
- 11 contained within each container, when they have not.

12 136. Defendant fraudulently, maliciously, and wantonly deceived Plaintiff  
13 and the California Subclass by representing that the Products' packaging, which  
14 includes 43% nonfunctional slack-fill, actually conforms to federal and California  
15 slack-fill regulations and statutes including the Sherman Law, California Business  
16 and Professions Code Section 12606.2, and 21 C.F.R. 100.100.

17 137. Defendant packaged the Products in containers that contain  
18 approximately 43% nonfunctional slack-fill and made material misrepresentations  
19 to fraudulently deceive Plaintiff and the California Subclass.

20 138. Defendant fraudulently, maliciously, and wantonly deceived Plaintiff  
21 and the California Subclass by misrepresenting the Products as having  
22 characteristics and quantities which they do not have, e.g., that the Products are free  
23 of nonfunctional slack-fill when they are not. In doing so, Defendant intentionally  
24 misrepresented and concealed material facts from Plaintiff and the California  
25 Subclass. Said misrepresentations and concealment were done with the intention of  
26 deceiving Plaintiff and the California Subclass and depriving them of their legal  
27 rights and money.

28 ///

1           139. Defendant fraudulently, maliciously, and wantonly deceived Plaintiff  
2 and the California Subclass by packaging and advertising the Products with intent  
3 not to sell them as advertised and by intentionally under-filling the Products'  
4 containers and replacing powder product with nonfunctional slack-fill. In doing so,  
5 Defendant intentionally misrepresented and concealed material facts from Plaintiff  
6 and the California Subclass. Said misrepresentations and concealment were done  
7 with the intention of deceiving Plaintiff and the California Subclass and depriving  
8 them of their legal rights and money.

9           140. Defendant fraudulently, maliciously, and wantonly deceived Plaintiff  
10 and the California Subclass by representing that the Products were supplied in  
11 accordance with an accurate representation as to the quantity of powder product  
12 contained therein when they were not. Defendant presented the physical dimensions  
13 of the Products' packaging to Plaintiff and the California Subclass before the point  
14 of purchase and gave Plaintiff and the California Subclass a reasonable expectation  
15 that the quantity of product contained therein would be commensurate with the size  
16 of the packaging. In doing so, Defendant intentionally misrepresented and  
17 concealed material facts from Plaintiff and the California Subclass. Said  
18 misrepresentations and concealment were done with the intention of deceiving  
19 Plaintiff and the California Subclass and depriving them of their legal rights and  
20 money.

21           141. **Knowledge.** Defendant knew or should have known, through the  
22 exercise of reasonable care, that the Products' packaging was misleading.

23           142. Defendant's actions as alleged herein were done with conscious  
24 disregard of Plaintiff's rights, and Defendant was wanton and malicious in its  
25 concealment of the same.

26           143. **Causation/Reliance/Materiality.** Defendant's packaging of the  
27 Products was a material factor in Plaintiff's and the California Subclass's decisions  
28 to purchase the Products. Based on Defendant's packaging of the Products, Plaintiff

1 and the California Subclass reasonably believed that they were getting more  
2 product than they received. Had they known the truth of the matter, Plaintiff and the  
3 California Subclass would not have purchased, or would have paid substantially  
4 less for, the Products.

5       144. **Injury in Fact.** Plaintiff and the California Subclass have suffered  
6 injury in fact and have lost money as a result of Defendant's unfair, unlawful, and  
7 fraudulent conduct. Specifically, Plaintiff paid for powder product he never  
8 received. Plaintiff would not have purchased, or would have paid substantially less  
9 for, the Products had they known the container contained nonfunctional slack-fill.

10       145. **Causation/Damages.** As a direct and proximate result of Defendant's  
11 misconduct in violation of the CLRA, Plaintiff and members of the California  
12 Subclass were harmed in the amount of the purchase price they paid for the  
13 Products. Further, Plaintiff and members of the California Subclass have suffered  
14 and continue to suffer economic losses and other damages including, but not limited  
15 to, the amounts paid for the Products, and any interest that would have accrued on  
16 those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a  
17 monetary award for violation of this Act in the form of damages, restitution, and/or  
18 disgorgement of ill-gotten gains to compensate Plaintiff and the California Subclass  
19 for said monies.

20       146. Plaintiff also respectfully requests that the court enjoin Defendant from  
21 continuing to employ the unlawful methods, acts, and practices alleged herein  
22 pursuant to § 1780(a)(2).

23       147. **Section 1782(d)—Prelitigation Demand/Notice.** Pursuant to  
24 California Civil Code, Section 1782, more than thirty days prior to the filing of this  
25 complaint, Plaintiff's counsel, acting on behalf of Plaintiff and all members of the  
26 California Subclass, mailed a demand letter dated July 12, 2022, via U.S. certified  
27 mail, return receipt requested, addressed to Defendant Axe And Sledge  
28 Supplements Inc. at its headquarters and principal place of business (1909 New

1 Texas Road Pittsburgh, PA 15239) and its registered agent for service of process  
2 (2652 Norma Drive, Lower Burrell, PA 15068).

3 **COUNT FOUR**

4 **Breach of Warranty**

5 *(On Behalf of the Nationwide Class & California Subclass)*

6 148. **Incorporation by Reference.** Plaintiff repeats and realleges the  
7 allegations set forth in the preceding paragraphs and incorporates the same as if set  
8 forth herein at length.

9 149. **Nationwide Class & California Subclass.** Plaintiff brings this claim  
10 individually and on behalf of the Nationwide Class and California Subclass against  
11 Defendant.

12 150. **Express Warranty.** By packaging and selling the Products, Defendant  
13 made promises and affirmations of fact regarding the Products' packaging and fill  
14 level, as alleged herein. The Products' packaging constitutes an express warranty  
15 that the Products contain an amount of powder commensurate with the size of the  
16 container. This became part of the basis of the bargain between Plaintiff and  
17 members of the Class and Defendant.

18 151. **Implied Warranty of Merchantability.** By packaging and selling the  
19 Products, Defendant, a merchant of goods, made promises and affirmations of fact  
20 that the Products are merchantable and conform to the promises or affirmations of  
21 fact made through the Products' packaging, as alleged herein. The Products'  
22 packaging, combined with the implied warranty of merchantability, creates  
23 warranties that became part of the basis of the bargain between Plaintiff and  
24 members of the Class and Defendant—namely, that the Products are adequately  
25 filled.

26 152. **Breach of Warranty.** Contrary to Defendant's warranties, the Products  
27 do not contain an amount of powder commensurate with the size of the container;  
28



1 rather, they contain approximately 43% nonfunctional slack-fill and, therefore,  
2 Defendant breached its warranty as to the Products and their qualities.

3 153. **Causation/Remedies.** As a direct and proximate result of Defendant’s  
4 breach of warranty, Plaintiff and members of the Class were harmed in the amount  
5 of the purchase price they paid for the Products. Further, Plaintiff and members of  
6 the Class have suffered and continue to suffer economic losses and other damages  
7 including, but not limited to, the amounts paid for the Products, and any interest that  
8 would have accrued on those monies, in an amount to be proven at trial.  
9 Accordingly, Plaintiff seeks a monetary award for breach of warranty in the form of  
10 damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff  
11 and the Class for said monies, as well as injunctive relief to enjoin Defendant’s  
12 misconduct to prevent ongoing and future harm that will result.

13 **COUNT FIVE**

14 **Common Law Fraud**

15 *(On Behalf of the Nationwide Class & California Subclass)*

16 154. **Incorporation by Reference.** Plaintiff repeats and realleges the  
17 allegations set forth in the preceding paragraphs and incorporates the same as if set  
18 forth herein at length.

19 155. **Nationwide Class & California Subclass.** Plaintiff brings this cause of  
20 action individually and on behalf of the Nationwide Class and California Subclass  
21 against Defendant.

22 156. **Fraud.** Defendant has willfully, falsely, and knowingly filled and  
23 packaged the Products in a manner indicating that the Products are filled with an  
24 amount of powder product commensurate with the size of the container. However,  
25 the Products contain significantly less powder product than advertised and instead  
26 contain approximately 43% nonfunctional slack-fill.

27 157. **Materiality.** Defendant’s misrepresentations are and were material (i.e.,  
28 the type of misrepresentations to which a reasonable person would attach

1 importance and would be induced to act thereon in making his or her purchase  
2 decision), because they relate to the quantity of powder product contained in the  
3 Products.

4 158. **Knowledge.** Defendant knew of, or showed reckless disregard for, the  
5 fact that the Products contained a substantial amount of nonfunctional slack-fill.

6 159. **Intentional.** Defendant intended for Plaintiff and the Class to rely on  
7 these representations, as evidenced by Defendant's intentional use of packaging that  
8 is substantially larger than necessary to hold the volume of powder product  
9 contained therein.

10 160. **Reliance.** Plaintiff and the Class have reasonably and detrimentally  
11 relied on Defendant's misrepresentations when purchasing the Products and, had  
12 they known the truth, they would not have purchased the Products or would have  
13 paid significantly less for the Products.

14 161. **Causation.** Therefore, as a direct and proximate result of Defendant's  
15 fraud, Plaintiff and members of the Class have suffered injury in fact.

## 16 COUNT SIX

### 17 **Intentional Misrepresentation**

18 *(On Behalf of the Nationwide Class & California Subclass)*

19 162. **Incorporation by Reference.** Plaintiff repeats and realleges the  
20 allegations set forth in the preceding paragraphs and incorporates the same as if set  
21 forth herein at length.

22 163. **Nationwide Class & California Subclass.** Plaintiff brings this cause of  
23 action individually and on behalf of all members of the Nationwide Class and  
24 California Subclass against Defendant.

25 164. **Misrepresentation.** Defendant has filled and packaged the Products in a  
26 manner indicating that the Products are filled with an amount of powder product  
27 commensurate with the size of the container. However, the Products contain  
28 significantly less powder product than advertised and instead contain approximately

1 43% nonfunctional slack-fill. Defendant misrepresents the quantity of powder  
2 product contained within the Products' packaging.

3 165. **Materiality.** Defendant's misrepresentations regarding the Products are  
4 material to a reasonable consumer, as they relate to the quantity of product received  
5 by consumers. A reasonable consumer would attach importance to such  
6 representations and would be induced to act thereon in making his or her purchase  
7 decision.

8 166. **Knowledge.** At all relevant times when such misrepresentations were  
9 made, Defendant knew or should have known that the representations were false  
10 and misleading.

11 167. **Intentional.** Defendant intended for Plaintiff and the Class to rely on  
12 the size and style of the Products' packaging, as evidenced by Defendant's  
13 intentional manufacturing, marketing, and selling of packaging that is substantially  
14 larger than necessary to hold the volume of powder product contained therein.

15 168. **Reliance.** Plaintiff and the Class reasonably and justifiably relied on  
16 Defendant's intentional misrepresentations when purchasing the Products, and had  
17 they known the truth, they would not have purchased the Products or would have  
18 purchased them at significantly lower prices.

19 169. **Causation.** As a direct and proximate result of Defendant's intentional  
20 misrepresentations, Plaintiff and the Class have suffered injury in fact.

## 21 **COUNT SEVEN**

### 22 **Restitution Based on Quasi-Contract/Unjust Enrichment** 23 ***(On Behalf of the Nationwide Class & California Subclass)***

24 170. **Incorporation by Reference.** Plaintiff repeats and realleges the  
25 allegations set forth in the preceding paragraphs and incorporates the same as if set  
26 forth herein at length.

27 171. **Nationwide Class & California Subclass.** Plaintiff brings this claim  
28 individually and on behalf of the Nationwide Class and California Subclass against

1 Defendant.

2 172. **Defendant’s Unjust Receipt Through Deception.** By means of  
3 Defendant’s wrongful conduct alleged herein, Defendant knowingly sold the  
4 Products to Plaintiff and members of the Class in a manner that was unfair,  
5 unconscionable, and oppressive.

6 173. Defendant knowingly received and retained wrongful benefits and funds  
7 from Plaintiff and members of the Class. In so doing, Defendant acted with  
8 conscious disregard for the rights of Plaintiff and members of the Class.

9 174. Defendant’s knowing acceptance and retention of the benefit is  
10 inequitable and unjust because the benefit was obtained by Defendant’s fraudulent,  
11 misleading, and deceptive representations and omissions.

12 175. **Plaintiff/Class Conferred a Benefit.** By purchasing the Products,  
13 Plaintiff and members of the Class conferred a benefit on Defendant in the form of  
14 the purchase price of the Products.

15 176. **Defendant’s Knowledge of Conferred Benefit.** Defendant had  
16 knowledge of such benefit and Defendant appreciated the benefit because, were  
17 consumers not to purchase the Products, Defendant would not generate revenue  
18 from the sales of the Products.

19 177. **Unjust Enrichment.** Under the common law doctrine of unjust  
20 enrichment, it is inequitable for Defendant to be permitted to retain the benefits they  
21 received, without justification, from selling the Products to Plaintiff and members of  
22 the Class in an unfair, unconscionable, and oppressive manner. Defendant’s  
23 retention of such funds under such circumstances constitutes unjust enrichment.

24 178. As a result of Defendant’s wrongful conduct as alleged herein,  
25 Defendant has been unjustly enriched at the expense of, and to the detriment of,  
26 Plaintiff and members of the Class.

27 179. Defendant’s unjust enrichment is traceable to, and resulted directly and  
28 proximately from, the conduct alleged herein.

1 180. The financial benefits derived by Defendant rightfully belong to  
2 Plaintiff and members of the Class. Defendant should be compelled to return in a  
3 common fund for the benefit of Plaintiff and members of the Class all wrongful or  
4 inequitable proceeds received by Defendant.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff, individually and on behalf of all others similarly  
7 situated, prays for judgment and relief on all causes of action as follows:

- 8 A. **Certification:** For an order certifying this action as a class action,  
9 appointing Plaintiff as the Class Representative, and appointing  
10 Plaintiff's Counsel as Class Counsel;
- 11 B. **Declaratory Relief:** For an order declaring that Defendant's  
12 conduct violates the statutes and laws referenced herein;
- 13 C. **Injunction:** For an order requiring Defendant to immediately  
14 cease and desist from selling the Products in violation of law;  
15 enjoining Defendant from continuing to market, advertise,  
16 distribute, and sell the Products in the unlawful manner described  
17 herein; requiring Defendant to engage in an affirmative  
18 advertising campaign to dispel the public misperception of the  
19 Products resulting from Defendant's unlawful conduct; and  
20 requiring all further and just corrective action, consistent with  
21 permissible law and pursuant to only those causes of action so  
22 permitted;
- 23 D. **Damages/Restitution/Disgorgement:** For an order awarding  
24 monetary compensation in the form of damages, restitution,  
25 and/or disgorgement to Plaintiff and the Class, consistent with  
26 permissible law and pursuant to only those causes of action so  
27 permitted;
- 28 E. **Attorneys' Fees & Costs:** For an order awarding attorneys' fees  
and costs, consistent with permissible law and pursuant to only  
those causes of action so permitted;
- F. **Pre/Post-Judgment Interest:** For an order awarding pre-  
judgment and post-judgment interest, consistent with permissible  
law and pursuant to only those causes of action so permitted; and

G. **All Just & Proper Relief:** For such other and further relief as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Plaintiff demands a jury trial on all triable issues.

DATED: October 28, 2022

**CLARKSON LAW FIRM, P.C.**

/s/ Zachary T. Chrzan  
Ryan J. Clarkson, Esq.  
Zachary T. Chrzan, Esq.

Attorneys for Plaintiff

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