

## EXHIBIT 2

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18 *Alexander Hill, and the Proposed Class*

19 **UNITED STATES DISTRICT COURT**  
20 **NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

21 MARC SILVER, HEATHER PEFFER, and  
22 ALEXANDER HILL, individually and on  
behalf of all others similarly situated,

23 Plaintiffs,

24 vs.

25 BA SPORTS NUTRITION, LLC,

26 Defendant.

Case No. 3:20-cv-00633-SI

**CLASS ACTION**

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

**DEMAND FOR JURY TRIAL**

28

1 Plaintiffs Marc Silver, Heather Pepper, and Alexander Hill (together, “Plaintiffs”),  
2 individually and on behalf of all others similarly situated, bring this First Amended Class Action  
3 Complaint against Defendant BA Sports Nutrition, LLC (“Defendant” or “BA”), and on the basis  
4 of personal knowledge, information, and belief, and investigation of counsel, allege as follows:

5 **NATURE OF THE ACTION**

6 1. Defendant BA manufactures and sells BodyArmor Superdrink (“BodyArmor” or  
7 “product”). BA is the third largest seller of sports drinks throughout California and the United  
8 States, falling significantly behind first-place Gatorade, a PepsiCo product. In second place is  
9 Coca-Cola’s Powerade—which company recently joined forces with BA by becoming a key  
10 investor in BodyArmor. In the last 52 weeks, BA retail sales have topped over \$800 million and  
11 are expected to top \$1 billion by the end of the year.<sup>1</sup>

12 2. In its effort to aggressively increase sales and displace Gatorade as industry  
13 leader,<sup>2</sup> BA violated California, New York, and Pennsylvania consumer protection laws, as well  
14 as nationwide unjust enrichment jurisprudence, through false and misleading, and unlawful,  
15 marketing and advertising of BodyArmor.

16 3. BA’s on-label claims prominently represent that BodyArmor delivers “superior  
17 hydration” among sports drinks as well as clear health benefits, when such representations are  
18 misleading, if not strictly false.<sup>3</sup> BA labels also deceptively promote that BodyArmor contains  
19 healthful fruits when it does not, violating Food & Drug Administration (“FDA”) labeling and  
20 flavor regulations in the process.

21 4. BA’s non-label advertising claims, which Plaintiff Hill also saw, echo the  
22 deceptive on-label representations, reaffirming the message that BodyArmor, which charges a

23 \_\_\_\_\_  
24 <sup>1</sup> Thomas Barrabi, *BodyArmor heats up sports drink wars with new campaign, eyes Gatorade’s*  
*top spot*, FOX BUSINESS (May 20, 2020), [https://www.foxbusiness.com/markets/bodyarmor-](https://www.foxbusiness.com/markets/bodyarmor-campaign-2020-sales-gatorade)  
*campaign-2020-sales-gatorade*.

25 <sup>2</sup> *See id.* (quoting BA founder Mike Repole on effort to unseat Gatorade as industry leader).

26 <sup>3</sup> *E.g., Fisher v. Monster Beverage Corp.*, 656 F. App’x 819, 823 (9th Cir. 2016) (“Although the  
27 statements [including “hydrates like a sports drink”] upon which Townsend and Cross relied were  
28 not strictly false, it is plausible that they were misleading, which is all that California law  
requires”).

1 considerable price premium, provides sports enthusiasts with superior hydration as compared to  
2 its competitors, in addition to benefitting their health.

3 5. Hydration is a term and product attribute with clear and material meaning to  
4 consumers—as well as to BA, PepsiCo, and all stakeholders in the sports drinks market.

5 6. Plaintiffs and other consumers perceive that the primary function of a sports drink  
6 is to hydrate them. More specifically, they believe in the need to replenish and/or retain fluids  
7 when exerting physically in order to avoid cramping and other adverse effects of dehydration, and  
8 conversely, to aid, extend and/or enhance their performance—and further, that superior means and  
9 levels of hydration are possible and better for them. Plaintiffs also, as California Attorney General  
10 Becerra has observed is commonplace, believed that sports drinks benefit them, regardless of the  
11 level or duration of their exertion.<sup>4</sup>

12 7. These perceptions are not only reasonable, but parallel industry activity and  
13 research.

14 8. To be sure, BA supports extensive research relating to hydration, as does PepsiCo,  
15 which has an institute devoted to the study of hydration—the Gatorade Sports Science Institute.<sup>5</sup>

16 9. BA’s BodyArmor formula is based on this research.

17 10. As the Better Business Bureau’s National Advertising Division (“NAD”) recently  
18 explained,

19 BA’s entire advertising campaign [] is premised on the basic idea  
20 that its products will provide some level of hydration. Hydration is  
not a subjective product characteristic – consumers understand that

21  
22 <sup>4</sup> See *Attorney General Becerra Announces Settlement with Gatorade Over Allegedly Misleading, Anti-Water Statements*, CAL. DEPT. OF JUSTICE (Sept. 21, 2017), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-gatorade-over-allegedly-misleading>; see also Compl., *People v. Gatorade Co.*, No. BC676734 (Cal. Super. Ct., L.A. Cty., Sept. 21, 2017), available at [https://oag.ca.gov/system/files/attachments/press\\_releases/Gatorade%20Complaint.pdf](https://oag.ca.gov/system/files/attachments/press_releases/Gatorade%20Complaint.pdf) (internal citations omitted).

23  
24  
25 <sup>5</sup> See, e.g., *About GSSI*, GATORADE SPORTS SCIENCE INSTITUTE, <https://www.gssiweb.org/en/about/about-gssi> (“Founded in 1985, the Gatorade Sports Science Institute (GSSI) is committed to helping athletes optimize their health and performance through **research and education in hydration** and nutrition science.”) (emphasis added) (last visited July 5, 2020); *Topics*, GATORADE SPORTS SCIENCE INSTITUTE, <https://www.gssiweb.org/en/research/All> (extensive list of research publications) (last visited July 5, 2020).

1 sports drinks are intended to replenish electrolytes lost during  
2 vigorous physical activities. Indeed, BA admits that it’s chosen  
3 formula and the inclusion of ingredients like coconut water and  
4 potassium is premised on their scientifically validated roles in  
aiding rehydration. It would be reasonable for consumers to believe  
the claim “better hydration” to be an objective claim about a  
product characteristic....”<sup>6</sup>

5 11. BA’s marketing and advertising of BodyArmor is misleading and/or unlawful  
6 because it promotes non-truths about superior hydration and attendant benefits, and/or promotes  
7 claims riddled with material omissions and deceptions, and unlawful representations.

8 12. California, New York, and Pennsylvania consumer protection statutes and laws all  
9 prohibit deceptive and misleading statements, which includes claims that are not strictly false, in  
10 connection with the selling of a good—whether the statements are made through words or images  
11 or a combination thereof—as does nationwide unjust enrichment jurisprudence. California law  
12 also prohibits marketing that is in violation of federal regulations on flavor labeling. Sellers of  
13 goods must follow these laws.

## 14 PARTIES

### 15 **A. Plaintiffs**

16 13. Plaintiff Marc Silver is a resident of Santa Rosa, California.

17 14. During the relevant class period, and specifically between 2014 and 2018,  
18 Mr. Silver purchased BodyArmor from Walmart and other locations in Santa Rosa and Plumas  
19 Lake, California. Mostly, he purchased the Orange Mango, Grape, and Tropical Punch varieties.

20 15. Mr. Silver is a sports enthusiast.

21 16. Mr. Silver believes that a primary function of sports drinks is to hydrate.

22 17. Mr. Silver saw and believed BA’s representations, on product labels and otherwise,  
23 that BodyArmor would provide superior hydration as compared to other sports drinks and would  
24 benefit his workout and health. He also believed that BodyArmor contained fruit ingredients given  
25 the names of the product, fruit imagery, and natural ingredient claims. Finally, Mr. Silver believed  
26 that BodyArmor was a lawfully marketed and sold product.

27 <sup>6</sup> *BA Sports Nutrition LLC, BodyArmor Sports Drink*, Decision of the National Advertising  
28 Division, Better Business Bureau, No. 6215 (Oct. 23, 2018), at 8-9 (emphasis added).

1 18. Mr. Silver relied on BA's marketing and was misled thereby.

2 19. Mr. Silver purchased more of, or paid more for, BodyArmor than he would have  
3 had he known the truth about the product.

4 20. Mr. Silver was injured in fact and lost money as a result of BA's improper conduct.

5 21. If Mr. Silver knew that BA's marketing and sale was truthful and non-misleading,  
6 and lawful, he would purchase BodyArmor in the future. At present, however, he cannot purchase  
7 the product because he cannot be confident that the marketing of the products is, or will be,  
8 truthful and non-misleading and/or lawful.

9 22. Plaintiff Alexander Hill is a resident of Astoria, New York.

10 23. During the relevant class period, and specifically from 2013 on, Mr. Hill purchased  
11 BodyArmor from CVS on 86th and Second Avenue, and from Duane Reade by Walgreens stores  
12 at 17th and Third Avenue, and Ditmars Boulevard and 31st Street, and otherwise, in New York,  
13 New York. Mostly, he purchased the Strawberry Banana, Grape, and Fruit Punch varieties.

14 24. Mr. Hill is a sports enthusiast.

15 25. Mr. Hill believes that a primary function of sports drinks is to hydrate.

16 26. Mr. Hill believed BA's representations, on product labels and otherwise, that  
17 BodyArmor would provide superior hydration as compared to other sports drinks and would  
18 benefit his workout and health. He also believed that BodyArmor contained fruit ingredients given  
19 the names of the product, fruit imagery, and natural ingredient claims. Finally, Mr. Hill believed  
20 that BodyArmor was a lawfully marketed and sold product.

21 27. Mr. Hill relied on BA's marketing to such effects and was misled thereby.

22 28. Mr. Hill purchased more of, or paid more for, BA's BodyArmor than he would  
23 have had he known the truth about the product.

24 29. Mr. Hill was injured in fact and lost money as a result of Defendant's improper  
25 conduct.

26 30. If Mr. Hill knew that BA's marketing was truthful and non-misleading, and lawful,  
27 he would purchase BodyArmor in the future. At present, however, he cannot purchase the product  
28

1 because he cannot be confident that the marketing of the products is, and will be, truthful and non-  
2 misleading and/or lawful.

3 31. Ms. Pepper is a sports enthusiast.

4 32. Ms. Pepper believes that a primary function of sports drinks is to hydrate.

5 33. During the relevant class period, and specifically during 2018 and 2019, Ms. Pepper  
6 purchased BodyArmor from the Walmart and other locations in Coal Township, Pennsylvania.  
7 Mostly, she purchased the Blackout Berry, Watermelon Strawberry, and Fruit Punch varieties.

8 34. Ms. Pepper saw and believed BA's representations, on product labels and otherwise,  
9 that BodyArmor would provide superior hydration as compared to other sports drinks and would  
10 benefit her exertion and health. She also believed that BodyArmor contained fruit ingredients  
11 given the names of the product, fruit imagery, and natural ingredient claims. Finally, Ms. Pepper  
12 believed that BodyArmor was a lawfully marketed and sold product.

13 35. Ms. Pepper relied on BA's marketing about such effects and was misled thereby.

14 36. Ms. Pepper purchased more of, or paid more for, BA's BodyArmor than she would  
15 have had she known the truth about the product, or had she known that the product was unlawful.

16 37. Ms. Pepper was injured in fact and lost money as a result of Defendant's improper  
17 conduct.

18 38. If Ms. Pepper knew that BA's marketing was truthful and non-misleading, and  
19 lawful, she would purchase BodyArmor in the future. At present, however, she cannot purchase  
20 the product because she cannot be confident that the marketing of the products is, and will be,  
21 truthful and non-misleading and/or lawful.

22 **B. Defendant**

23 39. Defendant BA is a limited liability corporation organized and existing under the  
24 laws of the State of Delaware.

25 40. Defendant's principal place of business is 1720 Whitestone Expressway, Suite 501,  
26 New York, New York 11357.

27  
28





**DEFENDANT’S BUSINESS PRACTICES**

46. BA’s marketing and advertising of BodyArmor is false, misleading, and unlawful in at least four different ways.

**A. Deceptive On-Label Superior Hydration Claims**

**1. Primary Display Panel Claims**

47. First, BA deceptively markets that a particular attribute of BodyArmor is superior to other sports drinks, and implicitly, that such trait is objective and correlates with better workouts and/or improved physical exertion, when BA knows otherwise.

48. More specifically, BA markets that BodyArmor provides superior hydration compared to other sports drinks.

49. The superior hydration claims appear on BodyArmor’s label, including prominently on its two primary display panels (the front and “back” of BodyArmor bottles are identical), in conjunction with the body armor, or “BodyArmor,” nomenclature. *See* Images A, B.

Image A



Image B



1           50. As defined by Merriam Webster, “superior” means “excellent of its kind:  
2 BETTER.”<sup>7</sup> This is what Plaintiffs understood the term to mean too.

3           51. The capacity of sports drinks to hydrate is highly material to sports enthusiasts and  
4 those who physically exert (workers, lactating mothers, and more), including Plaintiffs, because of  
5 the belief that they need to replenish or retain fluids when exerting themselves in order to attain  
6 certain effects. These effects include avoidance of cramping, headaches, nausea, high body  
7 temperature, fatigue, and/or other conditions that similarly impair a workout.

8           52. In addition, replenishing or retaining fluids at an increased rate or capacity is seen  
9 as better in a sports drink—indeed hydration is viewed as their primary function and the better at  
10 it, the better the drink is perceived to be at having the desired effect of aiding, extending, or  
11 otherwise enhancing workouts.

12           53. The huge body of scientific research on hydration supports Plaintiffs’ perception,  
13 and the common consumer perception, of hydration as an objective and variable attribute.

14           54. For example, a google search of “hydration research sports” produces  
15 approximately **21,900** scholarly articles since 2016—many (albeit not all) of which are on topic.<sup>8</sup>  
16 The articles show the breadth of scientific interest in the study of hydration, including such varied  
17 sources and titles as FLUID BALANCE, HYDRATION, AND ATHLETIC PERFORMANCE,<sup>9</sup> *Impact of*

23 \_\_\_\_\_  
24 <sup>7</sup> *Superior*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/superior> (last  
visited July 5, 2020) (emphasis in original).

25 <sup>8</sup> *Hydration research sports*, GOOGLE SCHOLAR, [https://scholar.google.com/scholar?  
26 hl=en&as\\_sdt=0%2C9&as\\_ylo=2016&as\\_vis=1&q=hydration+research+athletics&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C9&as_ylo=2016&as_vis=1&q=hydration+research+athletics&btnG=) (last  
visited July 5, 2020).

27 <sup>9</sup> Flavia Meyer, et al., FLUID BALANCE, HYDRATION, AND ATHLETIC PERFORMANCE, CRC Press  
28 (Boca Raton 2016).

1 *Hydration on Collegiate Athletic Performance, Fatigue, and Recovery*,<sup>10</sup> and *An Overview of the*  
2 *Beneficial Effects of Hydration*.<sup>11</sup>

3 55. Similarly, a search for “beverages and hydration” in PubMed, a resource run by the  
4 National Institutes of Health for the search and retrieval of peer-reviewed biomedical and life  
5 science literature, produces 645 results.<sup>12</sup> This body of research too confirms the understanding of  
6 hydration as an important—and variable—attribute even among expert scientists. A *plethora* of  
7 titles there speak directly to this, including *A Randomized Trial to Assess the Potential of Different*  
8 *Beverages to Affect Hydration Status: Development of a Beverage Hydration Index*,<sup>13</sup> *Role of*  
9 *Functional Beverages on Sport Performance and Recovery*,<sup>14</sup> *Fluid Type Influences Acute*  
10 *Hydration and Muscle Performance Recovery in Human Subjects*,<sup>15</sup> and *Hydration for*  
11 *Recreational Sport and Physical Activity*.<sup>16</sup>

12 56. Consistent with hydration being an objective and variable trait, with known and  
13 identifiable physical effects, BA’s late brand ambassador and principal investor, 18-time All-Star  
14 basketball player Kobe Bryant, tweeted to his numerous followers that “players should be allowed  
15 to CHOOSE what sports drink *hydrates them best* and not FORCED to drink LEAGUE

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16  
17 <sup>10</sup> Lauren Woodard, *Impact Of Hydration On Collegiate Athletic Performance, Fatigue, And*  
18 *Recovery* (2017). Electronic Theses and Dissertations, 592, <https://egrove.olemiss.edu/etd/592/>  
(last visited July 5, 2020).

19 <sup>11</sup> Douglas Kalman, *An Overview of the Beneficial Effects of Hydration*, in Sourya Datta and  
20 Debasis Bagchi, eds., *EXTREME AND RARE SPORTS: PERFORMANCE DEMANDS, DRIVERS,*  
*FUNCTIONAL FOODS, AND NUTRITION*, CRC Press (Boca Raton 2019), ch. 16.

21 <sup>12</sup> National Library Medicine, *Beverages and hydration*, NATIONAL CENTER FOR BIOTECHNOLOGY  
22 INFORMATION, <https://pubmed.ncbi.nlm.nih.gov/?term=beverages+and+hydration> (last visited  
23 July 5, 2020).

24 <sup>13</sup> Ronald J. Maughan, et al., *A randomized trial to assess the potential of different beverages to*  
25 *affect hydration status: development of a beverage hydration index*, 103 *AM. J. CLIN. NUTRITION*  
26 3, 717, 23 (2016).

27 <sup>14</sup> Stefania Orrù, et al., *Role of Functional Beverages on Sport Performance and Recovery*,  
28 10 *NUTRIENTS* 10, 1470 (Oct. 10, 2018).

<sup>15</sup> Preston R. Harris, et al., *Fluid type influences acute hydration and muscle performance*  
*recovery in human subjects*, 16 *J. INT’L SOC’Y OF SPORTS NUTRITION* 1, 15 (Apr. 4, 2019).

<sup>16</sup> Robert W. Kenefick and Samuel N. Cheuvront, *Hydration for recreational sport and physical*  
*activity*, 70 *NUTRITION REVIEWS Suppl. 2*, S137-42 (2012).

1 SPONSORS.... 2 much on the line *for cramping*. UPGRADE YOUR SPORTS DRINK.” See  
2 Image C (italics added).<sup>17</sup>

3  
4 Image C



17 57. So too, brand ambassador and investor Mike Trout, a Major League Baseball All-  
18 Star, who has explained that he was “cramp[ing] up a lot” before switching to BodyArmor and its  
19 superior hydration.<sup>18</sup>

20 58. BodyArmor not only creates but also then embraces this consumer perception, by  
21 way of example, retweeting a customer post that BodyArmor will help you keep *better* hydrated  
22 as recently as May 28, 2020.<sup>19</sup>

25 <sup>17</sup> Kobe Bryant (@Kobebryant), INSTAGRAM (June 6, 2014), <https://www.instagram.com/p/o6E3dKxNkl/?hl=en>.

26 <sup>18</sup> Barrabi, *supra* note 1.

27 <sup>19</sup> @BodyArmor, Twitter (May 28, 2020, 9:48 AM), <https://twitter.com/DrinkBODYARMOR/status/1266048697919561730>.

1 59. Plaintiffs relied on BA’s deceptive representations in deeming BodyArmor worthy  
2 of their purchase in the first instance, and/or worthy of its significant price premium.

3 **2. Additional Prominent and Misleading Labeling Claims**

4 60. In addition to the primary display panel claims, on the adjacent panel, BA tethers  
5 BodyArmor’s claimed superior hydration (and effects) to the drink’s unique combination of  
6 ingredients, including potassium rich electrolytes and antioxidants, in addition to its mix of  
7 vitamins and nutrients. Upon information and belief, this attribution appears on all BodyArmor  
8 labels throughout the class period. *See* Images D, E, and F.

9 Image D





Image E



Image F



61. Immediately adjacent to these statements are more that denigrate other sports drinks as inferior, including “*ditch your outdated sports drink,*” “*Upgrade your sports drink,*” and/or substantially similar disparagements and exhortations.

62. Mike Repole, BA’s founder, described the goal of such marketing: to message that BodyArmor is the “healthier, *modernized* alternative to Gatorade.”<sup>20,21</sup>

63. Plaintiffs got the message.

<sup>20</sup> Barrabi, *supra* note 1 (“BodyArmor founder Mike Repole told FOX Business that he wants to exceed Gatorade in overall sales by 2025”) (emphasis added); *see also id.* (“Gatorade, I can applaud them, because they’ve been around since 1965, and that deserves a lot of credit. Not too many companies or brands can be around for 55 years. But the problem is that they’ve never evolved.”).

<sup>21</sup> Mr. Repole also found VitaminWater, which advertising was the subject of litigation and eventually settlement in *Ackerman, et al. v. Coca Cola Company and Energy Brands Inc. (d/b/a Glaceau)*, No. 09-cv-0395 (E.D.N.Y.). *See Vitaminwater Settlement Approved by Court*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST (Apr. 8, 2016), <https://cspinet.org/news/vitaminwater-settlement-approved-court-20160408>.

1           64. Plaintiffs saw these and/or other substantially similar labeling claims and,  
2 individually and/or collectively, understood that BodyArmor provided superior hydration as  
3 compared to other sports drinks, including but not limited to Gatorade, and/or that such superior  
4 hydration would translate into correspondingly better workouts through the aforementioned  
5 physical effects.

6           65. In addition, Plaintiffs saw these and/or other substantially similar labeling claims,  
7 individually and/or collectively, and understood them to mean that BodyArmor’s capacity for  
8 superior hydration was objective and variable in degree and/or measure, and that BA conveyed as  
9 much to them intentionally and honestly, justifying the purchase and price premium.

10           66. BodyArmor, however, does not provide superior hydration, and attendant effects,  
11 as marketed expressly and/or by material omissions on its labels.

12           67. Plaintiffs were deceived by BA’s misleading claims into believing the contrary,  
13 even if BA’s claims were not strictly false.<sup>22</sup>

14           68. Had Plaintiffs understood the misleading nature of BA’s superior hydration claims,  
15 Plaintiffs would not have purchased BodyArmor, purchased as much of it, or paid as much for it  
16 as they did.

17       **B. Deceptive On-Label Claims of Health Benefits**

18           69. Second, Plaintiffs also understood BA’s labeling claims to imply that BodyArmor  
19 was good for their bodies and health overall.

20           70. California Attorney General Xavier Becerra has acknowledged the prevalence of  
21 this understanding, pleading elsewhere about a “misperception that sports drinks are beneficial []  
22 in connection with any amount of physical activity.”<sup>23</sup>

23           71. Plaintiffs’ perception that BodyArmor benefitted their health derived from the  
24 superior hydration claims, and/or from the prominent labeling of BodyArmor’s high vitamin and  
25 purported fruit contents. BodyArmor is artificially fortified with high levels of various vitamins,  
26

27 <sup>22</sup> See Fisher, *supra* note 3.

28 <sup>23</sup> CAL. DEPT. OF JUSTICE, *supra* note 4.

1 including up to 200% Reference Daily Intake of vitamins B3, B5, B6, B9, & B12 and 100% of  
2 vitamins A, C, and E.

3 72. Fortifying junk food runs afoul of Food & Drug Administration (“FDA”) policy.  
4 The FDA expressly opposes fortification of sugar foods precisely because the practice can  
5 “mislead” the public to consume unhealthy foods believing, given labeling claims, that they are  
6 healthful. 21 C.F.R. § 104.20(a).

7 73. Because of the prominent vitamin labeling and, separately and/or collectively,  
8 because of the superior hydration and fruit claims (*see infra* at ¶¶ 82-94), Plaintiffs believed that  
9 BodyArmor benefitted their health and well-being.

10 74. But BodyArmor is not beneficial to Plaintiffs’ bodies in the straightforward way  
11 that they understood when reviewing its labels and purchasing it.

12 75. Instead, BodyArmor, as a sugar-sweetened beverage (“SSB”),<sup>24</sup> links to obesity  
13 and obesity-related diseases, including type 2 diabetes and cardiovascular disease—a link that is  
14 sufficiently documented as to be recognized by every or virtually every leading health authority.<sup>25</sup>

15 <sup>24</sup> “Sugar-sweetened beverage” refers to any carbonated or non-carbonated drink that is  
16 sweetened with sugar or high fructose corn syrup, or other caloric sweetener, including “soda  
17 drinks . . . sports drinks, tea and coffee drink, energy drinks, and any other beverages to which  
18 sugar . . . has been added.” *The CDC Guide to Strategies for Reducing the Consumption of Sugar-  
Sweetened Beverages* (Mar. 2010), at 4 (emphasis supplied), CENTERS FOR DISEASE CONTROL  
AND PREVENTION, <https://stacks.cdc.gov/view/cdc/51532>.

19 <sup>25</sup> Health authorities recognizing the link between SSB consumption and obesity and serious  
20 disease include, but are not limited to:

21 FDA: “strong and consistent evidence” shows an association between sugar drinks and excess  
22 body weight in children and adults. *Food Labeling: Revision of the Nutrition and Supplement  
Fact Labels*, 81 Fed. Reg. at 33,803 (May 27, 2016);

23 Centers for Disease Control and Prevention: “Frequently drinking sugar-sweetened beverages  
24 is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-  
25 alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis. Limiting the amount  
26 of SSB intake can help individuals maintain a healthy weight and have a healthy diet.” *Get the  
27 Facts: Sugar-Sweetened Beverages and Consumption*, CENTERS FOR DISEASE CONTROL AND  
28 PREVENTION, [https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-  
intake.html](https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html) (last visited July 5, 2020). *See also* Alyson B. Goodman, MD, MPH, et al., *Behaviors  
and Attitudes Associated With Low Drinking Water Intake Among US Adults, Food Attitudes and  
Behaviors Survey, 2007*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 11, 2013),  
[https://www.cdc.gov/pcd/issues/2013/12\\_0248.htm](https://www.cdc.gov/pcd/issues/2013/12_0248.htm) (“Adequate water intake has health benefits  
and is essential for preventing dehydration; dehydration is associated with adverse health effects  
(footnote continues on following page)



1 (footnote continued from previous page)

2 such as headache, urolithiasis, and impaired cognition. Health risks (e.g., dental caries, obesity)  
3 associated with intake of high levels of calorically sweetened beverages (e.g., regular soda, fruit  
4 drinks, *sports drinks*) decrease when plain drinking water is substituted for these beverages....  
The Dietary Guidelines [] encourages adults to drink water *as a healthful means of hydration*)  
(last visited June 16, 2020) (emphasis added; internal citations omitted);

5 World Health Organization: “reducing consumption of sugar-sweetened beverages would also  
6 reduce the risk of [] overweight and obesity.” *Reducing Consumption of Sugar-sweetened*  
7 *Beverages to Reduce the Risk of Childhood Overweight and Obesity*, WORLD HEALTH  
8 ORGANIZATION, [https://www.who.int/elena/titles/ssbs\\_childhood\\_obesity/en/](https://www.who.int/elena/titles/ssbs_childhood_obesity/en/) (last visited July 7,  
2020); see also *Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of*  
*Unhealthy Weight Gain in Adults*, WORLD HEALTH ORGANIZATION, [https://www.who.int/elena](https://www.who.int/elena/titles/ssbs_adult_weight/en/)  
[/titles/ssbs\\_adult\\_weight/en/](https://www.who.int/elena/titles/ssbs_adult_weight/en/) (last visited Jan. 8, 2020);

9 2015 U.S. Dietary Guidelines Advisory Committee: “Strong and consistent evidence shows  
10 that intake of added sugars from food and/or sugar sweetened beverages are associated with  
11 excess body weight in children and adults”; “[s]trong evidence shows that higher consumption of  
12 added sugars, especially sugar sweetened beverages, increases the risk of type 2 diabetes among  
13 adults and this relationship is not fully explained by body weight.” *Scientific Report of the 2015*  
*Dietary Guidelines Advisory Committee*, at 342-43, U.S. DEPT. OF HEALTH & HUMAN SERV. &  
U.S. DEPT. OF AGRIC. (2015), [https://health.gov/dietaryguidelines/2015-scientific-](https://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf)  
[report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf](https://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf) (last  
visited July 5, 2020);

14 American Medical Association (“AMA”): adopting policy supporting, among other strategies,  
15 “warning labels to educate consumers on the health harms of SSBs.” Sara Berg, *AMA Backs*  
*Comprehensive Approach Targeting Sugary Drinks*, AMERICAN MEDICAL ASSOCIATION (June 14,  
2017), [https://www.ama-assn.org/delivering-care/public-health/ama-backs-comprehensive-](https://www.ama-assn.org/delivering-care/public-health/ama-backs-comprehensive-approach-targeting-sugary-drinks)  
[approach-targeting-sugary-drinks](https://www.ama-assn.org/delivering-care/public-health/ama-backs-comprehensive-approach-targeting-sugary-drinks);

16 Institute of Medicine: “researchers have found strong associations between intake of sugar-  
17 sweetened beverages and weight gain”; “their link to obesity is stronger than that observed for  
18 any other food or beverage....” Committee on Accelerating Progress in Obesity Prevention, et al.,  
*ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION*,  
National Academies Press (US) (Wash. D.C., May 8, 2012), at ch. 6, p. 169, [https://www.ncbi.](https://www.ncbi.nlm.nih.gov/pubmed/24830053)  
[nlm.nih.gov/pubmed/24830053](https://www.ncbi.nlm.nih.gov/pubmed/24830053);

19 American Heart Association (“AHA”), “There is a robust body of evidence that SSB  
20 consumption is detrimental to health and has been associated with increased risk of CVD  
21 mortality, hypertension, liver lipogenesis, [type 2 diabetes], obesity, and kidney disease.” Linda  
22 Van Horn, et al., *Recommended Dietary Pattern to Achieve Adherence to the American Heart*  
*Association/American College of Cardiology (AHA/ACC) Guidelines: A Scientific Statement from*  
*the American Heart Association*, 134 *CIRCULATION* 22 (Oct. 27, 2016), [https://www.ahajournals.](https://www.ahajournals.org/doi/full/10.1161/cir.0000000000000462)  
[org/doi/full/10.1161/cir.0000000000000462](https://www.ahajournals.org/doi/full/10.1161/cir.0000000000000462);

23 American Public Health Association, “Consumption of [sugar] drinks is a significant  
24 contributor to the obesity epidemic and increases the risk of type 2 diabetes, heart disease, and  
25 dental decay.” *Taxes on Sugar-Sweetened Beverages*, AMERICAN PUBLIC HEALTH ASSOCIATION  
(Oct. 30, 2012), [https://www.apha.org/policies-and-advocacy/public-health-policy-](https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/13/59/taxes-on-sugar-sweetened-beverages)  
[statements/policy-database/2014/07/23/13/59/taxes-on-sugar-sweetened-beverages](https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/13/59/taxes-on-sugar-sweetened-beverages); and

26 American Diabetes Association, “Research has also shown that drinking sugary drinks is  
27 linked to type 2 diabetes. The American Diabetes Association recommends that people avoid  
28 drinking sugar-sweetened beverages and switch to water whenever possible to help prevent type 2  
diabetes.” *Myths about Diabetes*, AMERICAN DIABETES ASSOCIATION, [https://www.diabetes.org/](https://www.diabetes.org/diabetes-risk/prediabetes/myths-about-diabetes)  
[diabetes-risk/prediabetes/myths-about-diabetes](https://www.diabetes.org/diabetes-risk/prediabetes/myths-about-diabetes) (last visited July 5, 2020).

1           76.     Contrary to linking directly to good health and/or health and well-being benefits,  
2 BodyArmor consumption poses serious health risks to Plaintiffs—health risks that Plaintiffs did  
3 not understand existed given BA’s labeling claims and omissions (given the voluntary claims).

4           77.     Indeed, a single 16-ounce bottle of BodyArmor has 36 grams, or approximately  
5 nine teaspoons of sugar, and a single 28-ounce bottle has 63 grams, or approximately 15  
6 teaspoons of sugar.

7           78.     Again, as California Attorney General Becerra has explained,

8                     Sports drinks often have a high sugar content. For example, one  
9                     32-ounce bottle of a sports drink could have as much as 56 grams  
10                    of sugar, which is *more than double* the 25 grams of added sugar  
11                    that any child or teenager aged 2 to 18 should consume in an entire  
12                    day, according to the American Heart Association. Despite this,  
13                    consumers commonly misperceive sports drinks to be beneficial  
14                    for children in connection with any amount of sports activity. The  
15                    American Academy of Pediatrics has made clear that children  
16                    “rarely need sports drinks” and that “water, not sports drinks,  
17                    should be the principal source of hydration for children and  
18                    adolescents.”<sup>26</sup>

19           79.     These same principles and ad-derived misperceptions apply to Plaintiffs and other  
20 consumers. The AHA’s recommended limit for added sugar in adult women is six teaspoons per  
21 day, and nine teaspoons a day for adult men. At 15 teaspoons, a single 32-ounce bottle has more  
22 than double the maximum daily amount recommended for women, and almost double the  
23 maximum recommended for men. And at 9 teaspoons of added sugar, a single small 16-ounce  
24 bottle, without any additional added sugar in the diet, exceeds the maximum recommended for  
25 adult women (and children) and hits the upper limit for men.

26           80.     Plaintiffs did not understand BodyArmor’s link with disease and/or adverse health  
27 outcomes given its vitamin, superior hydration, better sports drink, and fruit labeling claims,  
28 collectively and individually. Nor did they understand how grams of added sugar correspond to  
teaspoons—a familiar and meaningful measure to them—even had they consulted the  
comparatively small print nutrition facts panel elsewhere on the label, which often Plaintiffs (like  
all consumers) do not consult. Nor were they aware of the AHA recommendations.

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<sup>26</sup> CAL. DEPT. OF JUSTICE, *supra* note 4 (emphasis added).

1 81. Had Plaintiffs understood that instead of delivering health benefits, or benefitting  
2 them in a straightforward manner, through superior hydration and/or high levels of vitamins  
3 and/or fruits, leading health authorities have concluded that drinking sugary sports drinks  
4 (including BodyArmor) link with obesity, type 2 diabetes, and cardiovascular disease, they would  
5 not have purchased it, purchased as much of it, and/or paid as much for it as they did.

6 **C. Deceptive On-Label Fruit Claims & Related Violation of FDA Flavor Regulations**

7 82. BodyArmor sports drinks are named and labeled according to various fruit  
8 combinations, including “Mixed Berry,” “Orange Mango,” “Grape,” “Watermelon Strawberry,”  
9 “Strawberry Banana,” “Berry Lemonade,” “Fruit Punch,” and “Tropical Punch.”

10 83. The two primary display labels of the various BodyArmor drinks conspicuously  
11 denote each fruit-based name—twice, for a total of four times—and also depict the corresponding  
12 fruits in prominent front and side label vignettes. *See* Images G, H, and I; *see also* Images A, B.

13 Image G



14 Image H



15 Image I



16 84. The other side label prominently markets that the flavors are “natural.” *See*  
17 Images D, E, and F *supra*.

18 85. Given the naming of the drinks, the images of named fruits on the drinks, and/or  
19 the natural ingredients claim, all deceptively blazoned across BodyArmor labels, Plaintiffs  
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1 believed that BodyArmor drinks contained significant amounts of such fruits—or in the jargon of  
2 the FDA, amounts sufficient to qualify such fruits as characterizing ingredients.

3 86. Plaintiffs have a favorable view of fruits, believing that natural fruits and fruit  
4 juices benefit their health.

5 87. Plaintiffs believed also that the vitamins in BodyArmor derived from the labeled  
6 fruits instead of entirely or virtually so from artificial fortification, and that such natural derivation  
7 was better for them.

8 88. According to the fine print on the back labels (far smaller comparatively than the  
9 voluntary fruit statements and images), however, BodyArmor, does not contain a characterizing  
10 amount—if *any*—of named and/or pictured fruits.

11 89. Instead of fruits, upon information and belief, BodyArmor contains unnamed  
12 ingredients that function as inauthentic flavors simulating the taste of the named and imaged  
13 fruits.

14 90. FDA regulations require that each time an ingredient is named, pictured, and/or  
15 otherwise referenced on the label in such a way as to indicate that the food contains it, and/or  
16 contains it in an amount sufficient to independently characterize the food, but in reality does not,  
17 every reference to the ingredient on the label must *immediately* be followed with the word  
18 “flavored.” 21 C.F.R. § 101.22(i)(1)(i) (also specifying font size).

19 91. The word “flavored” never follows the naming or images of fruits on BodyArmor  
20 labels, rendering the labeling of all BodyArmor drinks in violation of FDA regulations and  
21 unlawful under California law.

22 92. Plaintiffs would not have purchased BodyArmor had they understood that the  
23 drinks contained very little, *if any*, of the labeled fruits as ingredients, and/or that the level of the  
24 labeled fruits were not present in sufficient amounts to flavor the drinks (*i.e.*, sufficient to qualify  
25 as characterizing ingredients), purchased as much of them, and/or paid as much for them.  
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1 93. Plaintiffs would not have purchased BodyArmor had they understood that  
2 BodyArmor is not flavored naturally by the fruits imaged, and/or that those fruits do not supply  
3 their vitamin content, purchased as much of them, and/or paid as much for them.

4 94. More, Plaintiffs would not have purchased BodyArmor had they understood that  
5 the drinks were unlawfully labeled and misbranded in violation of 21 C.F.R. § 101.22 and  
6 California law.

7 **D. Non-Label Deceptive Advertising Claims (Plaintiff Hill)**

8 95. BA repeats the same deceptive superior hydration and health benefits messages  
9 beyond its labels.

10 96. BA’s advertising campaign floods the sports drink marketplace and reinforces its  
11 labeling claims (and vice versa) by way of highly conspicuous in-store displays, billboards,  
12 television ads, and through Twitter and other social media. *See, e.g.*, Images J, K, L, M, and N.

13 Image J



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Image K



Image L



Image M



Image N



97. These campaigns saturated the sports drink community with messaging about BodyArmor’s purported superior hydration qualities and, by corollary, the alleged inferiority of Gatorade, which advertising was seen by Plaintiff Hill.

1 98. For example, through point-of-purchase displays, on Twitter, YouTube, television,  
2 and other media, BA promoted BodyArmor’s hydration superiority and denigrated Gatorade by  
3 analogizing its consumption to using a carrier pigeon instead of a cell phone, an antique typewriter  
4 instead of a laptop, and/or wearing colonial era clothing instead of modern athletic wear. *See, e.g.*,  
5 Images O (repeating BodyArmor’s superior hydration claims and comparing Gatorade to using an  
6 old typewriter); P (repeating BodyArmor’s superior hydration claims and comparing Gatorade to  
7 wearing colonial era clothing); Q (repeating BodyArmor’s superior hydration claims and  
8 comparing drinking Gatorade to using a Carrier Pigeon).

9 Image O



17 James Harden: "Thanks Gatorade, we'll take it from here."

18 Image P



27 BODYARMOR Sports Drink | James Harden "Thanks..."



Image Q



14           99. Plaintiff Hill saw such advertising claims and, individually and/or collectively,  
15 understood that BodyArmor was superior at hydrating as compared to other sports drinks,  
16 including but not limited to Gatorade, and/or that such superior hydration would translate into  
17 correspondingly better workouts and related physical effects.

18           100. Plaintiff saw these and/or other substantially similar labeling claims, individually  
19 and/or collectively, and understood them to mean that capacity for superior hydration was  
20 objective and variable and that BodyArmor was superior, justifying its purchase and price  
21 premium.

22           101. BodyArmor, however, does not provide the superior hydration, and attendant  
23 effects, as marketed on its labels.

24           102. Plaintiffs were deceived by BA’s misleading advertising claims, collectively with  
25 the labeling claims and independently as well, into believing the contrary, even if BA’s claims  
26 were not strictly false.

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**ECONOMIC INJURY**

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103. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the superior hydration claims marketed by BA.

104. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the health benefits marketed by BA.

105. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the fruit claims marketed on its labels.

106. When purchasing BodyArmor, Plaintiffs sought products that were lawful.

107. Plaintiffs saw and relied on BA’s misleading labeling of BodyArmor.

108. Plaintiff Hill saw and, in addition to and/or independent of the labeling claims, relied on BA’s misleading advertising of BodyArmor.

109. Plaintiffs believed that BodyArmor had the aforementioned qualities and benefits marketed.

110. Plaintiffs believed that BodyArmor was lawfully marketed and sold.

111. In reliance on the claims, Plaintiffs paid a price premium for BA.

112. As a result of their reliance, Plaintiffs received beverages that lacked the superior hydration benefits (and/or commensurate workout and physical benefits) that they reasonably believed the products had.

113. As a result of their reliance, Plaintiffs received beverages that lacked the health benefits that they reasonably believed the products had.

114. As a result of their reliance, Plaintiffs received beverages that lacked the fruit ingredients that they reasonably believed the products had.

115. Plaintiffs received beverages that were unlawfully marketed and sold.

116. Plaintiffs lost money and thereby suffered injury as they would not have purchased BodyArmor, purchased as much BodyArmor, and/or paid as much for the drink absent these misrepresentations and unlawful acts.

1 117. Plaintiffs altered their position to their detriment and suffered damages in an  
2 amount equal to the amounts they paid for the BodyArmor they purchased, and/or in additional  
3 amounts attributable to the deceptions.

4 118. Plaintiffs would purchase BodyArmor again in the future should they be able to  
5 rely on its marketing as truthful and non-deceptive, and lawful.

6 119. By engaging in false and misleading marketing, and unlawful labeling, BA reaped,  
7 and continues to reap, increased sales of BodyArmor and profits.

8 120. BA knows that the qualities it markets are material to a consumer’s decision to  
9 purchase BodyArmor and/or to pay a significant price premium for it.

10 121. Indeed, BA deliberately cultivates, and capitalizes on, the foregoing deceptions.

11 **CLASS ACTION ALLEGATIONS**

12 122. Pursuant to Rules 23(a), (b)(2), and (b)(3) of the FEDERAL RULES OF CIVIL  
13 PROCEDURE (“Rule”), Plaintiffs bring this action individually and on behalf of four proposed  
14 classes defined as follows:

15 **The Nationwide Class.** All persons residing in the United States  
16 who purchased one or more BodyArmor sports drinks during the  
applicable limitations period.

17 **The California Subclass.** All persons residing in the State of  
18 California who purchased one or more BodyArmor sports drinks  
during the applicable limitations period.

19 **The New York Subclass.** All persons residing in the State of New  
20 York who purchased one or more BodyArmor sports drinks during  
the applicable limitations period.

21 **The Pennsylvania Subclass.** All persons residing in the State of  
22 Pennsylvania who purchased one or more BodyArmor sports  
drinks during the applicable limitations period.

23 123. The Nationwide Class, and the California Subclass, New York Subclass, and  
24 Pennsylvania Subclass, are collectively referred to as the “Class.”

25 124. Excluded from the Class are: (a) Defendants; (b) Defendants’ board members,  
26 executive-level officers, and attorneys, and immediate family members of any of the foregoing  
27 persons; (c) governmental entities; (d) the Court, the Court’s immediate family, and Court staff;  
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1 and (e) any person that timely and properly excludes himself or herself from the Class in  
2 accordance with Court-approved procedures.

3 125. Certification of Plaintiffs' claims for class-wide treatment is appropriate because  
4 Plaintiffs can prove the elements of the claims on a class-wide basis using the same evidence as  
5 individual Class members would use to prove the elements in individual actions alleging the same  
6 claims.

7 126. **Numerosity.** The Class consists of many thousands of persons throughout the  
8 states of California, New York, and Pennsylvania. The Class is so numerous that joinder of all  
9 members is impracticable, and the disposition of each of the Class's claims in a class action will  
10 benefit the parties and the Court.

11 127. **Commonality and Predominance.** Common questions of law and fact  
12 predominate over any questions affecting only individual Class members. These common  
13 questions have the capacity to generate common answers that will drive resolution of this action.  
14 These common questions include whether:

- 15 a. BA is responsible for the conduct alleged herein;
- 16 b. BA's conduct constitutes the violations of law alleged herein;
- 17 c. BA acted willfully, recklessly, negligently, or with gross negligence in  
18 committing the violations of law alleged herein;
- 19 d. Plaintiffs and the Class members are entitled to injunctive relief; and
- 20 e. Plaintiffs and the Class members are entitled to restitution and damages.

21 128. Because they were subject to the same deceptive and unlawful labeling and  
22 advertising practices, and because they purchased BodyArmor, all Class members were subject to  
23 the same wrongful conduct.

24 129. Absent BA's material deceptions, misstatements, and omissions, Plaintiffs and the  
25 other Class members would not have purchased BodyArmor, purchased as much BodyArmor as  
26 they did, and/or paid as much for it.

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1           130.   **Typicality.** Plaintiffs’ claims are typical of the claims of the Class because  
2 Plaintiffs and the Class members all purchased BodyArmor and were injured thereby. The claims  
3 of Plaintiffs and the Class members are based on the same legal theories and arise from the same  
4 false and misleading conduct.

5           131.   **Adequacy of Representation.** Plaintiffs are adequate representatives of the Class  
6 because their interests do not conflict with those of the Class members. Each Class member seeks  
7 damages reflecting a similar and discrete purchase, or similar and discrete purchases, that each  
8 Class member made. Plaintiffs have retained competent and experienced class action counsel who  
9 intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately  
10 protect the Class members’ interests.

11           132.   **Injunctive or Declaratory Relief.** The requirements for maintaining a class action  
12 pursuant to Rule 23(b)(2) are met, as Defendants have acted or refused to act on grounds generally  
13 applicable to the Class, thereby making appropriate final injunctive relief or corresponding  
14 declaratory relief with respect to the Class as a whole.

15           133.   **Superiority.** A class action is superior to other available methods for the fair and  
16 efficient adjudication of this controversy because joinder of all Class members is impracticable.  
17 The amount at stake for each Class member, while significant, is such that individual litigation  
18 would be inefficient and cost prohibitive. Additionally, adjudication of this controversy as a class  
19 action will avoid the possibility of inconsistent and potentially conflicting adjudication of the  
20 claims asserted herein. Plaintiffs anticipate no difficulty in the management of this action as a  
21 class action.

22           134.   **Notice to the Class.** Plaintiffs and their counsel anticipate that notice to the  
23 proposed Class will be effectuated through recognized, Court-approved notice dissemination  
24 methods, which may include United States mail, electronic mail, Internet postings, and/or  
25 published notice.

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**CLAIMS FOR RELIEF**

**FIRST CLAIM**  
**Violation of California’s Unfair Competition Law,**  
**CAL. BUS. & PROF. CODE §§ 17200, *et seq.***  
**Unlawful Conduct Prong**  
**(By Plaintiff Silver on Behalf of the California Subclass)**

135. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

136. Plaintiff Silver brings this claim on behalf of the California Subclass for violation of the “unlawful” prong of California’s Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200, *et seq.* (the “UCL”).

137. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” CAL. BUS. & PROF. CODE § 17200.

138. Defendant’s acts, omissions, misrepresentations, practices, and/or non-disclosures concerning BodyArmor, as alleged herein, constitute “unlawful” business acts and practices in that they violate the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, *et seq.* (the “FFDCA”), and its implementing regulations, including, at least, the following sections:

- a. 21 U.S.C. § 343(a), which deems food misbranded when its labeling contains a statement that is “false or misleading in any particular,” with “misleading” defined to “take[] into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material”;
- b. 21 U.S.C. § 321(n), which states the nature of a false and misleading advertisement;
- c. 21 C.F.R. § 101.18(b), which prohibits true statements about ingredients that are misleading in light of the presence of other ingredients;

- 1           d.     21 C.F.R. § 102.5(c), which prohibits the naming of foods so as to create an
- 2                     erroneous impression about the presence or absence of ingredient(s) or
- 3                     component(s) therein;
- 4           e.     21 C.F.R. § 101.22(i), which requires that labeling of flavors to prevent an
- 5                     erroneous impression about the presence of absence of characterizing
- 6                     ingredients; and
- 7           f.     21 U.S.C. §§ 331, 333, which prohibits the introduction of misbranded
- 8                     foods into interstate commerce.

9           139.    BA’s conduct is further “unlawful” because it violates California’s False  
10    Advertising Law, CAL. BUS. & PROF. CODE §§ 17500, *et seq.* (the “FAL”), and California’s  
11    Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750, *et seq.* (the “CLRA”), as discussed in  
12    the claims below.

13           140.    BA’s conduct also violates California’s Sherman Food, Drug, and Cosmetic Law,  
14    CAL. HEALTH & SAFETY CODE §§ 109875, *et seq.* (the “Sherman Law”), including, at least, the  
15    following sections:

- 16           a.     Section 110100 (adopting all FDA regulations as state regulations);
- 17           b.     Section 110290 (“In determining whether the labeling or advertisement of a
- 18                     food . . . is misleading, all representations made or suggested by statement,
- 19                     word, design, device, sound, or any combination of these, shall be taken
- 20                     into account. The extent that the labeling or advertising fails to reveal facts
- 21                     concerning the food . . . or consequences of customary use of the food . . .
- 22                     shall also be considered.”);
- 23           c.     Section 110390 (“It is unlawful for any person to disseminate any false
- 24                     advertisement of any food.... An advertisement is false if it is false or
- 25                     misleading in any particular.”);
- 26           d.     Section 110395 (“It is unlawful for any person to manufacture, sell, deliver,
- 27                     hold, or offer for sale any food . . . that is falsely advertised.”);
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- 1 e. Section 110398 (“It is unlawful for any person to advertise any food, drug,  
2 device, or cosmetic that is adulterated or misbranded.”);
- 3 f. Section 110400 (“It is unlawful for any person to receive in commerce any  
4 food . . . that is falsely advertised or to deliver or proffer for delivery any  
5 such food....”); and
- 6 g. Section 110660 (“Any food is misbranded if its labeling is false or  
7 misleading in any particular.”).

8 141. Each of the challenged advertising statements made, and actions taken, by BA  
9 violates the FFDCA, CLRA, FAL, and Sherman Law, and, consequently, violates the “unlawful”  
10 prong of the UCL.

11 142. BA leveraged its deception to induce Plaintiff Silver and the members of the  
12 California Subclass to purchase products that were of lesser value and quality than advertised.

13 143. BA’s deceptive marketing and labeling caused Plaintiff and the members of the  
14 California Subclass to suffer injury in fact and to lose money or property, as it denied them the  
15 benefit of the bargain. Had Plaintiff Silver and the members of the California Subclass been aware  
16 of BA’s false and misleading marketing and unlawful labeling, they would not have purchased  
17 BodyArmor, purchased as much BodyArmor, or paid as much for BodyArmor.

18 144. Plaintiff Silver seeks an order enjoining BA from continuing to conduct business  
19 through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective  
20 advertising campaign. CAL. BUS. AND PROF. CODE § 17203.

21 145. Plaintiff Silver also seeks an order for the disgorgement and restitution of all  
22 monies from the sale of BodyArmor that BA unjustly acquired through acts of unlawful, unfair,  
23 and/or fraudulent competition.

24 146. Therefore, Plaintiff Silver prays for relief as set forth below.

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**THIRD CLAIM**  
**Violation of California’s False Advertising Law,**  
**CAL. BUS. & PROF. CODE §§ 17500, *et seq.***  
**(By Plaintiff Silver, on Behalf of the California Subclass)**

157. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

158. Plaintiff Silver brings this claim on behalf of the California Subclass for violation of the FAL.

159. The FAL prohibits making any false or misleading advertising claim. CAL. BUS. & PROF. CODE § 17500.

160. As alleged herein, BA, in its advertising and/or labeling of BodyArmor, makes “false [and] misleading advertising claim[s],” as it deceives consumers about the drink’s true qualities, characteristics and/or benefits.

161. In reliance on these false and misleading claims, Plaintiff Silver and the members of the California Class purchased BodyArmor believing that it conveyed the qualities, characteristics, and/or benefits claimed.

162. BA knew or should have known that the advertising and/or labeling of BodyArmor was likely to deceive consumers.

163. As a result, Plaintiff Silver and the California Class members seek injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which BA was unjustly enriched.

164. Therefore, Plaintiff Silver prays for relief as set forth below.

**FOURTH CLAIM**  
**Violation of California’s Consumers Legal Remedies Act,**  
**CAL. CIV. CODE §§ 1750, *et seq.***  
**(By Plaintiff Silver, on Behalf of the California Subclass)**

165. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

1           166. Plaintiff Silver brings this claim on behalf of the California Subclass for violation  
2 of the CLRA.

3           167. The CLRA adopts a statutory scheme prohibiting various deceptive practices in  
4 connection with the conduct of a business providing goods, property, or services primarily for  
5 personal, family, or household purposes.

6           168. BA’s policies, acts, and practices were designed to, and did, result in the purchase  
7 and use of BodyArmor primarily for personal, family, or household purposes, and violated and  
8 continue to violate the following sections of the CLRA:

- 9           a. Section 1770(a)(5), which prohibits representing that goods have a  
10           particular composition or contents that they do not have;
- 11           b. Section 1770(a)(5), which also prohibits representing that goods have  
12           characteristics, uses, or benefits that they do not have;
- 13           c. Section 1770(a)(7), which prohibits representing that goods are of a  
14           particular standard, quality, or grade if they are of another;
- 15           d. Section 1770(a)(9), which prohibits advertising goods with intent not to sell  
16           them as advertised; and
- 17           e. Section 1770(a)(16), which prohibits representing that the subject of a  
18           transaction has been supplied in accordance with a previous representation  
19           when it has not.

20           169. As a result, in accordance with CIVIL CODE § 1780(a)(2), Plaintiff Silver and the  
21 members of the California Subclass have suffered irreparable harm and seek injunctive relief in  
22 the form of an order:

- 23           a. Enjoining BA from continuing to engage in the deceptive practices  
24           described above;
  - 25           b. Requiring BA to provide public notice of the true nature and characteristics  
26           of BodyArmor; and
  - 27           c. Enjoining BA from such deceptive business practices in the future.
- 28

1 170. Defendant willfully and knowingly violated the CLRA.

2 171. Plaintiff provided notice to BA of its violation of the CLRA on or about  
3 January 28, 2020, pursuant to CIVIL CODE § 1782(b). BA failed to respond to Plaintiff’s demand  
4 and fully satisfy the requirements therein to bring its conduct into compliance with the law and  
5 provide Plaintiff and the California Subclass the relief requested under the CLRA.

6 172. Pursuant to CIVIL CODE § 1780(a), Plaintiff and members of the California  
7 Subclass seek compensatory damages, punitive damages, restitution, disgorgement of profits, and  
8 an order enjoining BA from deceptively marketing BodyArmor.

9 173. Therefore, Plaintiff Silver prays for relief as set forth below.

10 **FIFTH CLAIM**  
11 **Violation of New York’s Consumer Protection from**  
12 **Deceptive Acts and Practices Law,**  
13 **N.Y. GEN. BUS. LAW §§ 349, *et seq.***  
14 **(By Plaintiff Hill, on Behalf of the New York Subclass)**

15 174. Plaintiff Hill repeats each and every allegation contained in the paragraphs above  
16 and incorporates such allegations by reference herein.

17 175. Plaintiff Hill brings this claim on behalf of the New York Subclass for violation of  
18 section 349 of New York’s Consumer Protection from Deceptive Acts and Practices Law, N.Y.  
19 GEN. BUS. LAW §§ 349, *et seq.*

20 176. Section 349 prohibits “[d]eceptive acts or practices in the conduct of any business,  
21 trade or commerce or in the furnishing of any service in [the State of New York].” N.Y. GEN.  
22 BUS. LAW § 349(a).

23 177. BA’s labeling and/or advertising of BodyArmor, as alleged herein, constitute  
24 “deceptive” acts and practices, as such conduct misled Plaintiff Hill and the New York Subclass.

25 178. Section 349(h) grants private plaintiffs a right of action for violation of New  
26 York’s Consumer Protection from Deceptive Acts and Practices Law, as follows:

27 In addition to the right of action granted to the attorney general  
28 pursuant to this section, any person who has been injured by reason  
of any violation of this section may bring an action in his own  
name to enjoin such unlawful act or practice, an action to recover  
his actual damages or fifty dollars, whichever is greater, or both  
such actions. The court may, in its discretion, increase the award of

1 damages to an amount not to exceed three times the actual  
2 damages up to one thousand dollars, if the court finds the  
3 defendant willfully or knowingly violated this section. The court  
4 may award reasonable attorney’s fees to a prevailing plaintiff.

5 N.Y. GEN. BUS. LAW § 349(h).

6 179. In accordance with Section 349(h), Plaintiff Hill seeks an order enjoining BA from  
7 continuing the unlawful deceptive acts and practices set out above. Absent a Court order enjoining  
8 the unlawful deceptive acts and practices, BA will continue its false and misleading advertising  
9 and/or labeling campaigns and, in doing so, irreparably harm each of the New York Subclass  
10 members.

11 180. As a consequence of BA’s deceptive acts and practices, Plaintiff Hill and other  
12 members of the New York Subclass suffered an ascertainable loss of monies. By reason of the  
13 foregoing, Plaintiff Hill and other members of the New York Subclass also seek actual damages or  
14 statutory damages of \$50 per violation, whichever is greater, as well as punitive damages for BA’s  
15 knowing and willful deceptions. N.Y. GEN. BUS. LAW § 349(h).

16 181. Therefore, Plaintiff Hill prays for relief as set forth below.

17 **SIXTH CLAIM**  
18 **Violation of New York’s Consumer Protection from**  
19 **Deceptive Acts and Practices Law,**  
20 **N.Y. GEN. BUS. LAW §§ 350, *et seq.***  
21 **(By Plaintiff Hill, on Behalf of the New York Subclass)**

22 182. Plaintiff Hill repeats each and every allegation contained in the paragraphs above  
23 and incorporates such allegations by reference herein.

24 183. Plaintiff Hill brings this claim on behalf of the New York Subclass for violation of  
25 section 350 of New York’s Consumer Protection from Deceptive Acts and Practices Law, N.Y.  
26 GEN. BUS. LAW §§ 350, *et seq.*

27 184. Section 350 prohibits “[f]alse advertising in the conduct of any business, trade or  
28 commerce or in the furnishing of any service in [the State of New York].” N.Y. GEN. BUS.  
LAW § 350.

1 185. Section 350-a defines “false advertising” as “advertising, including labeling, of a  
2 commodity, or of the kind, character, terms or conditions of any employment opportunity if such  
3 advertising is misleading in a material respect.” N.Y. GEN. BUS. LAW § 350-a.1. The section also  
4 provides that advertising can be false by omission, as it further defines “false advertising” to  
5 include “advertising [that] fails to reveal facts material in the light of such representations with  
6 respect to the commodity . . . to which the advertising relates.” *Id.*

7 186. BA’s labeling, marketing, and advertising of BodyArmor, as alleged herein, are  
8 “misleading in a material respect” and, thus, constitute “false advertising,” as they represent  
9 BodyArmor as having qualities, characteristics, and/or benefits that it does not have.

10 187. Plaintiff Hill seeks an order enjoining BA from continuing this false marketing and  
11 advertising. Absent enjoining this false advertising, BA will continue to mislead Plaintiff Hill and  
12 the other members of the New York Subclass and, in doing so, irreparably harm each of the New  
13 York Subclass members.

14 188. As a direct and proximate result of BA’s violation of GENERAL BUSINESS LAW  
15 section 350, Plaintiff Hill and the other members of the New York Subclass have also suffered an  
16 ascertainable loss of monies.

17 189. By reason of the foregoing, Plaintiff Hill and other members of the New York  
18 Subclass also seek actual damages or statutory damages of \$500 per violation, whichever is  
19 greater, as well as punitive damages. N.Y. GEN. BUS. LAW § 350-e.

20 190. Therefore, Plaintiff Hill prays for relief as set forth below.

21  
22 **SEVENTH CLAIM**  
23 **Violation of Pennsylvania’s Unfair Trade Practices and**  
24 **Consumer Protection Law,**  
25 **73 P.S. §§ 201-1, et seq.**  
26 **(By Plaintiff Peffer on Behalf of the Pennsylvania Subclass)**

27  
28 191. Plaintiff Peffer repeats each and every allegation contained in the paragraphs above  
and incorporates such allegations by reference herein.

1           192. Plaintiff Pepper brings this claim on behalf of the Pennsylvania Subclass for  
2 violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-  
3 1, *et seq.*

4           193. BA is a “person,” as meant by 73 P.S. § 201-2(2).

5           194. Plaintiff Pepper and Pennsylvania Subclass members purchased goods and services  
6 in “trade” and “commerce,” as meant by 73 P.S. § 201-2(3), primarily for personal, family, and/or  
7 household purposes.

8           195. BA engaged in unfair methods of competition and unfair or deceptive acts or  
9 practices in the conduct of its trade and commerce in violation of 73 P.S. § 201-3, including the  
10 following:

- 11           a. Representing that its goods and services have characteristics, uses, benefits,  
12 ingredients, and qualities that they do not have, 73 P.S. § 201-2(4)(v);
- 13           b. Representing that its goods and services are of a particular standard or  
14 quality if they are of another, 73 P.S. § 201-2(4)(vii); and
- 15           c. Advertising goods or services with intent not to sell them as advertised,  
16 73 P.S. § 201-2(4)(ix).

17           196. BA’s labeling, marketing, and advertising of BodyArmor, as alleged herein, are  
18 “misleading in a material respect” and, thus, constitute “false advertising.”

19           197. BA’s representations and omissions were material because they were likely to  
20 deceive reasonable consumers.

21           198. BA intended to mislead Plaintiff Pepper and Pennsylvania Subclass members and  
22 induce them to rely on its misrepresentations and omissions.

23           199. BA acted intentionally, knowingly, and maliciously to violate Pennsylvania’s  
24 Unfair Trade Practices and Consumer Protection Law, and recklessly disregarded Plaintiff Pepper  
25 and Pennsylvania Subclass members’ rights. BA’s knowledge of BodyArmor put it on notice that  
26 BodyArmor was not as it advertised.

27  
28



**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of the members of each Class, respectfully request the Court to enter an Order:

A. Certifying the proposed Classes under Rules 23(a), (b)(2), and (b)(3), as set forth above;

B. Declaring that Defendant is financially responsible for notifying the Class members of the pendency of this suit;

C. Declaring that Defendant has committed the violations of law alleged herein;

D. Providing for any and all injunctive relief the Court deems appropriate;

E. Awarding statutory damages in the maximum amount for which the law provides;

F. Awarding monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount that the Court or jury will determine, in accordance with applicable law;

G. Providing for any and all equitable monetary relief the Court deems appropriate;

H. Awarding punitive or exemplary damages in accordance with proof and in an amount consistent with applicable precedent;

I. Awarding Plaintiffs their reasonable costs and expenses of suit, including attorneys' fees;

J. Awarding pre- and post-judgment interest to the extent the law allows; and

K. For such further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38, Plaintiffs hereby demand a trial by jury on all claims so triable.

Respectfully submitted,

DATED: July 7, 2020

**KAPLAN FOX & KILSHEIMER LLP**

By: /s/ Laurence D. King  
Laurence D. King



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