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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 SILVER WEINHOLTZ, *on behalf of all*)
13 *those similarly situated,*)
14)
15 *Plaintiff,*)
16 v.)
17)
18 EVLUTION NUTRITION LLC, *a Florida*)
19 *limited liability company,*)
20)
21 *Defendant.*)

No. '22CV1031 L MDD

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

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Silver Weinholtz (“Plaintiff”), individually and on behalf of all others similarly situated, by and through undersigned counsel, hereby brings this action against Evlution Nutrition LLC (“Defendant” or “Evlution”), alleging that certain products manufactured, packaged, labeled, advertised, distributed and sold by Defendant are misbranded and falsely advertised in California and otherwise violate California law, and upon information and belief and investigation of counsel alleges as follows:

PARTIES

1. Plaintiff Silver Weinholtz is and at all times relevant was a citizen of the state of California, domiciled in San Diego. On or about November 4, 2021, Weinholtz purchased

1 Evlution’s BCAA Energy powder, acai berry flavor, from third-party retailer Amazon.com
2 (Order #112-0774532-4952241).

3 2. Defendant Evlution Nutrition LLC is a Florida limited liability company with its
4 principal place of business in Coconut Creek, Florida. Evlution’s BCAA Energy powders come
5 in two relevant flavors (acai berry and lemon lime) (together, “the Products”) and purportedly
6 assist in workout recovery, provide energy, and support focus and memory.
7

8 **JURISDICTION AND VENUE**

9 3. This Court has subject matter jurisdiction over this action pursuant to the Class
10 Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the
11 United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original
12 jurisdiction of the federal district courts over “any civil action in which the matter in controversy
13 exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class
14 action in which . . . any member of a class of plaintiffs is a citizen of a State different from any
15 defendant.” 28 U.S.C. § 1332(d)(2)(A).
16

17 4. Plaintiff seeks to represent Class members who are citizens of states different from
18 the Defendant.

19 5. The matter in controversy in this case exceeds \$5,000,000 in the aggregate,
20 exclusive of interests and costs.
21

22 6. In addition, “the number of members of all proposed plaintiff classes in the
23 aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

24 7. In the alternative, the Court has jurisdiction pursuant to 28 U.S.C. § 1332(a). The
25 amount in controversy exceeds \$75,000 exclusive of interest, fees, and costs.

26 8. This Court has personal jurisdiction over Defendant because this action arises out
27 of and relates to Defendant’s contacts with this forum.
28

1 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
2 numbers of consumers were committed or casual adherents to so-called “clean label” food
3 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-
4 natural” (66 percent). These were the three most attractive attributes in the consumer survey.
5 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
6 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

8 17. This consumer preference has led to an explosion in the category of “clean label”
9 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
10 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
11 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
12 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

14 18. According to Nielsen, more than 40 percent of consumers rate the absence of
15 artificial flavors in their foods as important to them when deciding between competing products,
16 and more than 60 percent try to avoid artificial flavors at least some of the time.

17 19. Consumers also have a specific sense of the attributes of “natural” foods. Research
18 by Consumer Reports indicates that nearly 90 percent of consumers believe and expect that
19 foods described as “natural” should contain no artificial ingredients.

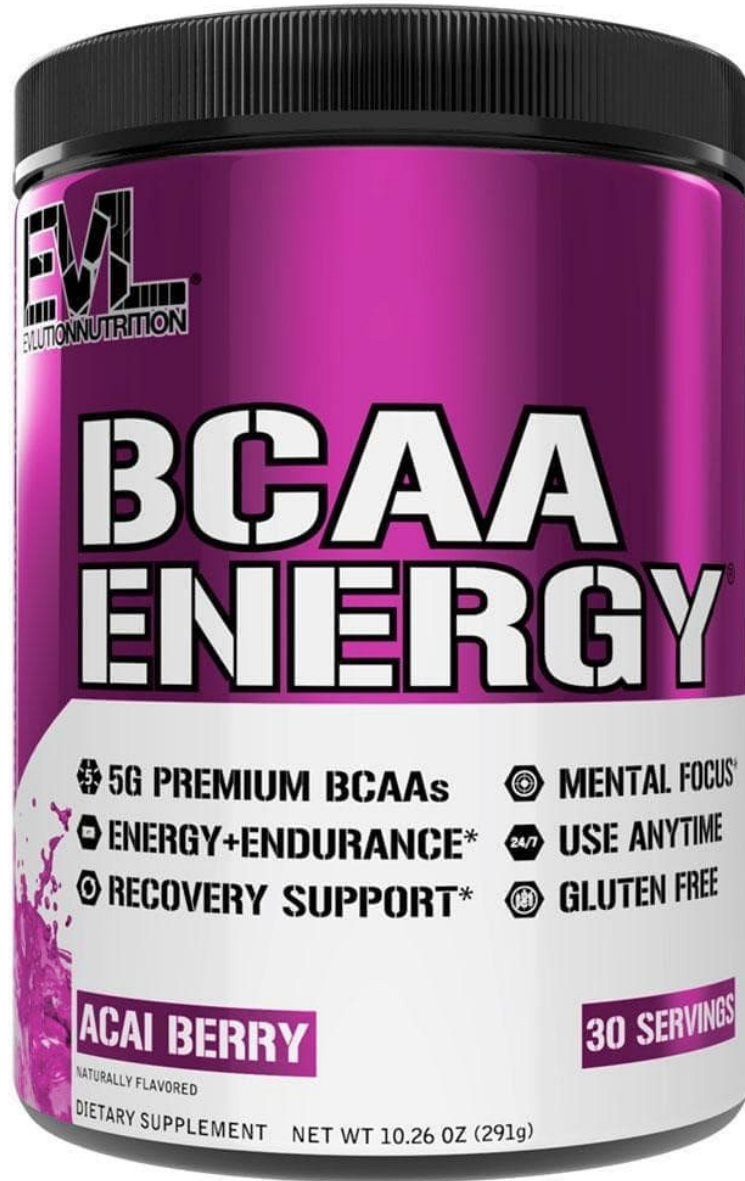
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21 **B. Defendant’s Use of Synthetic Flavorings.**

22 20. Defendant Evlution formulates, manufactures, and sells a number of pre-workout
23 dietary supplements that are meant to support recovery, among other health benefits. Among
24 those are Evlution’s BCAA Energy powders (acai berry and lemon lime flavors).

25 21. To appeal to consumers who seek out natural food products and are willing to pay
26 more for them, Defendant labels and advertises the Products as if they were exclusively naturally
27 flavored.

28

1 22. For example, the front label of the BCAA Energy product purchased by Weinholtz
2 states that the powder is “Naturally Flavored”:
3



23 23. The lemon lime flavor makes a similar flavoring claim. These claims are also
24 replicated on Evlution’s website. See [https://www.evlnutrition.com/products/bcaa-](https://www.evlnutrition.com/products/bcaa-energy?variant=541151461397)
25 [energy?variant=541151461397](https://www.evlnutrition.com/products/bcaa-energy?variant=541151461397) and [https://www.evlnutrition.com/products/bcaa-](https://www.evlnutrition.com/products/bcaa-energy?variant=30852815046)
26 [energy?variant=30852815046](https://www.evlnutrition.com/products/bcaa-energy?variant=30852815046) (last visited July 14, 2022).
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1 24. All of the back labels of the Products also state that they contain “Natural Flavors,”
2 with no other explicit flavoring statement made in the ingredients list:

L-Isoleucine	1,250mg	†
L-Valine	1,250mg	†
CarnoSyn® Beta-Alanine	500mg	†
L-Alanine	500mg	†
Taurine	500mg	†
Natural Energizers	110mg	†
Natural Caffeine (from Coffee Bean), Green Tea Extract (standardized for EGCG) (leaf)		
Percent Daily Values are based on a 2,000 calorie diet.		
† Daily value (DV) not established.		
Other Ingredients: Malic Acid, Citric Acid, Natural Flavor, Fruit and Vegetable Juice Powder (for color), Silica, Sucralose, Acesulfame Potassium		

13 25. These label claims are false. The Products are artificially flavored.

14 26. Each of the Products contains an ingredient identified as “malic acid.” While there
15 is a naturally occurring form of malic acid, it is extremely expensive to formulate in large
16 quantities and is almost never used in mass-produced food products. Instead, the malic acid that
17 Defendant uses in these Products is “DL malic acid,” a synthetic petrochemical.¹

18 27. This type of malic acid is manufactured in petrochemical plants from benzene or
19 butane—components of gasoline and lighter fluid, respectively—through a series of chemical
20 reactions, some of which involve highly toxic chemical precursors and byproducts.

21 28. Fruit flavors in a food are imparted by the interactions between sugars, acids,
22 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined
23 by the ratio between the sugars (mainly glucose and fructose) and acids, such as malic acid.
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28 ¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1 29. The quality and consumer acceptability of fruit flavors is based on their perceived
2 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
3 as lemons, limes, and acai berries have their own natural ratio of sugars and acids.

4 30. The DL malic acid used in the Products is used to create, enhance, simulate, and/or
5 reinforce the sweet and tart taste that consumers associate with the characterizing fruit flavors,
6 such as lemons, limes, and acai berries. It does so by changing the ratio between acids and sugars
7 in the Products.
8

9 31. Defendant uses the artificial petrochemically derived DL malic acid in its Products
10 to create this sweet and tart flavor but pretends otherwise, conflating natural and artificial
11 flavorings, misbranding the Products and deceiving consumers.
12

13 32. The ingredients on the Products' label are declared in a way that is misleading and
14 contrary to law, because Defendant designates the ingredient by its generic name, "malic acid,"
15 instead of by its specific name, "DL malic acid."

16 33. Even if the malic acid used in the Products is not DL malic acid but is instead "L
17 malic acid," it is still not a "natural" flavoring. Almost all L malic acid used in mass produced
18 food products uses a substrate that is derived from petroleum products. For this reason, for
19 example, organic food producers and advocates have sought to have L malic acid to be struck
20 from the list of additives that can be used in foods labelled "organic" or "natural."
21

22 **C. Requirements for Labelling**

23 34. California's Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
24 109875, *et seq.*, incorporates all food flavoring and additive regulations of the Federal Food,
25 Drug, and Cosmetic Act ("FDCA"). The regulations require that a food's label accurately
26 describe the nature of the food product and its characterizing flavors. 21 C.F.R. § 102.5(a).
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1 35. Artificial flavor is defined as “any substance, the function of which is to impart
2 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
3 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
4 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

5 36. Natural flavor is defined as “essential oil, oleoresin, essence or extractive, protein
6 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the
7 flavoring constituents” from fruits or vegetables, “whose significant function in food is flavoring
8 rather than nutritional.” 21 C.F.R § 101.22(a)(3).

9 37. Any recognizable primary flavor identified directly or indirectly on the front label
10 of a food Product, whether by word, vignette, depiction of a fruit, or other means is referred to
11 as a “characterizing flavor.” 21 C.F.R. § 101.22.
12

13 38. Here, the Products’ labels state the characterizing flavors (lemons, limes, and acai
14 berries).
15

16 39. If a food product’s characterizing flavor is not created exclusively by the named
17 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
18 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
19 that “simulates, resembles or reinforces” the characterizing flavor, the front label must
20 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
21 101.22(i)(2).
22

23 40. A food product’s label also must include a statement of the “presence or absence
24 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
25 ingredient(s) or component(s) in the food has a material bearing on price or consumer
26 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
27 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.
28

1 41. Such statement must be in boldface print on the front display panel and of
2 sufficient size for an average consumer to notice.

3 42. By changing the ratio between sugars and acids that is naturally found in fruits
4 such as lemons, limes, and acai berries, the DL malic acid used in the Product reinforces,
5 stimulates, or enhances the characterizing flavors, regardless of any other effect it may have or
6 purpose for which it was included.

7
8 43. D-l malic acid is not a “natural flavor” as this term is defined by federal and state
9 regulations and is not derived from a fruit or vegetable or any other natural source. Rather, it is
10 derived from petroleum products. The Products therefore contain artificial flavorings.

11 44. Because the Products contain artificial flavoring, California law requires the
12 Products to display both front- and back-label disclosures to inform consumers that the Products
13 are artificially flavored.

14
15 45. The Products have none of the required disclosures regarding the use of artificial
16 flavors.

17 **D. All Flavors of the Deceptively Labeled Products are Substantially Similar.**

18 46. The Products are offered in two relevant flavors. However, each flavor of the
19 Products are substantially similar to each other.

20 47. These Products are made with a base formulation that includes trisodium citrate,
21 silica, and acesulfame potassium, as well as an identical amino acid blend.

22 48. These Products purport to contain only “natural” flavors, *i.e.*, be free of artificial
23 flavors and preservatives.

24
25 49. These Products are also offered for sale on the Defendant’s website for the same
26 price: \$27.99 for a 30-serving container.

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1 50. The Products also use similar labels, and the labels present the natural flavoring
2 claim in a similar manner.

3 51. Because of these similarities, the resolution of the asserted claims will be identical
4 as between the purchased and unpurchased Products.
5

6 52. Because both the products and alleged misrepresentations are substantially
7 similar, Plaintiff's claims related to the Products that he purchased are typical of the claims
8 available to all purchasers of the Products. As such, Plaintiff is an adequate class representative
9 for a class of purchasers of all of the Products, regardless whether Plaintiff purchased every
10 flavor of the Products.

11 53. Plaintiff reserves the right to amend this Complaint to add further products that
12 contain similar label misrepresentations as testing continues.
13

14 54. Labels are the chief means by which food product manufacturers convey critical
15 information to consumers, and consumers have been conditioned to rely on the accuracy of the
16 claims made on these labels. As the California Supreme Court stated in a case involving alleged
17 violations of the UCL and FAL, "Simply stated: labels matter. The marketing industry is based
18 on the premise that labels matter, that consumers will choose one product over another similar
19 product based on its label." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).
20

21 55. Given the Defendant's labels, consumers including Plaintiff would reasonably
22 understand Defendant's statements to mean that each Products contained only natural flavorings
23 as advertised and represented. These statements were false.

24 56. Consumers including Plaintiff would reasonably rely on Defendant's statements
25 such that they would not have purchased the Products from Defendant if the truth about the
26 Products' flavoring were known, or would have only been willing to pay a substantially reduced
27

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1 price for the Products had they known that Defendant’s representations were false and
2 misleading.

3 57. In the alternative, because of its deceptive and false labelling statements,
4 Defendant was enabled to charge a premium for the Products relative to key competitors'
5 products, or relative to the average price charged in the marketplace
6

7 58. Consumers including Plaintiff especially rely on the “Naturally Flavored” label
8 claims made by food product manufacturers such as Evlution, as they cannot confirm or disprove
9 those claims simply by viewing or even consuming the Product.

10 59. Plaintiff suffered economic injury by Defendant’s fraudulent and deceptive
11 conduct as stated herein, and there is a causal nexus between Defendant’s deceptive conduct and
12 Plaintiff’s injury.
13

14 **CLASS ACTION ALLEGATIONS**

15 60. Plaintiff brings this action individually and as representative of all those similarly
16 situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all persons with the State
17 of California who purchased the Products within four years prior to the filing of this Complaint.

18 61. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,
19 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over
20 this matter and the members of their immediate families and judicial staff.
21

22 62. Plaintiff reserves the right to alter the Class definition, and to amend this
23 Complaint to add Subclasses, as necessary to the full extent permitted by applicable law.

24 63. Certification of Plaintiff’s claims for class-wide treatment is appropriate because
25 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
26 individual Class members would use to prove those elements in individual actions alleging the
27 same claims.
28

1 64. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all
2 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
3 members geographically dispersed throughout the State.

4 65. **Existence and Predominance of Common Questions of Law and Fact – Rule**
5 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
6 predominate over any questions that affect only individual Class members. Common legal and
7 factual questions and issues include but are not limited to:

- 8
- 9 a. Whether the marketing, advertising, packaging, labeling, and other promotional
10 materials for the Products is misleading and deceptive;
 - 11 b. Whether a reasonable consumer would understand Defendant’s “natural flavors”
12 claims to indicate that the Products contained only natural flavorings, and
13 reasonably relied upon those representations;
 - 14 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class
15 members;
 - 16 d. the proper amount of damages and disgorgement or restitution;
 - 17 e. the proper scope of injunctive relief; and
 - 18 f. the proper amount of attorneys’ fees.
- 19

20 66. Defendant engaged in a common course of conduct in contravention of the laws
21 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
22 of law, business practices, and injuries are involved. Individual questions, if any, pale by
23 comparison, in both quality and quantity, to the numerous common questions that predominate
24 this action. The common questions will yield common answers that will substantially advance
25 the resolution of the case.
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1 67. In short, these common questions of fact and law predominate over questions that
2 affect only individual Class members.

3 68. **Typicality – Rule 23(a)(3):** Plaintiff’s claims are typical of the claims of the Class
4 members because they are based on the same underlying facts, events, and circumstances
5 relating to Defendant’s conduct.

6 69. Specifically, all Class members, including Plaintiff, were harmed in the same way
7 due to Defendant’s uniform misconduct described herein; all Class members suffered similar
8 economic injury due to Defendant’s misrepresentations; and Plaintiff seeks the same relief as
9 the Class members.
10

11 70. There are no defenses available to Defendant that are unique to the named
12 Plaintiff.

13 71. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate
14 representative of the Class because Plaintiff’s interests do not conflict with the Class members’
15 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
16 against Defendant.
17

18 72. Furthermore, Plaintiff has selected competent counsel who are experienced in
19 class actions and other complex litigation. Plaintiff and Plaintiff’s counsel are committed to
20 prosecuting this action vigorously on behalf of the Class and have the resources to do so.
21

22 73. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other
23 available means for the fair and efficient adjudication of this controversy for at least the
24 following reasons:

- 25 a. the damages individual Class members suffered are small compared to the burden
26 and expense of individual prosecution of the complex and extensive litigation
27 needed to address Defendant’s conduct such that it would be virtually impossible
28

- 1 for the Class members individually to redress the wrongs done to them. In fact,
2 they would have little incentive to do so given the amount of damage each member
3 has suffered when weighed against the costs and burdens of litigation;
4
5 b. the class procedure presents fewer management difficulties than individual
6 litigation and provides the benefits of single adjudication, economies of scale, and
7 supervision by a single court;
8
9 c. the prosecution of separate actions by individual Class members would create a
10 risk of inconsistent or varying adjudications, which would establish incompatible
11 standards of conduct for Defendant; and
12
13 d. the prosecution of separate actions by individual Class members would create a
14 risk of adjudications with respect to them that would be dispositive of the interests
15 of other Class members or would substantively impair or impede their ability to
16 protect their interests.

17 74. Unless the Class is certified, Defendant will retain monies received as a result of
18 its unlawful and deceptive conduct alleged herein.

19 75. Unless a class-wide injunction is issued, Defendant will likely continue to
20 advertise, market, promote, and sell the Products in an unlawful and misleading manner, as
21 described throughout this Complaint, and members of the Class will continue to be misled,
22 harmed, and denied their rights under the law.

23 76. **Ascertainability.** To the extent ascertainability is required, the Class members are
24 readily ascertainable from Defendant's records and/or its agents' records of retail and online
25 sales, as well as through public notice.

26 77. Defendant has acted on grounds applicable to the Class as a whole, thereby
27 making appropriate final injunctive and declaratory relief concerning the Class as a whole.
28

1 **COUNT 1**
2 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION**
3 **17200 ET SEQ. — “UNFAIR” CONDUCT**

4 78. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
5 extent necessary, pleads this cause of action in the alternative.

6 79. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
7 a result of Defendant’s actions as set forth herein.

8 80. Defendant’s actions as alleged in this Complaint constitute “unfair” conduct
9 within the meaning of California Business and Professions Code § 17200, *et seq.*

10 81. Defendant’s business practices, as alleged herein, are “unfair” because it fails to
11 disclose accurately the synthetic flavoring used in the Products.

12 82. As a result of this “unfair” conduct, Plaintiff expended money and engaged in
13 activities he would not otherwise have spent or conducted.

14 83. Defendant’s wrongful business practices alleged herein constituted, and continue
15 to constitute, a continuing course of unfair competition since it continues to market and sell its
16 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
17 oppressive, unscrupulous and/or substantially injurious to its customers.

18 84. Defendant publicly disseminated untrue or misleading representations regarding
19 the flavoring of its Products, which it knew, or in the exercise of reasonable care should have
20 known, were untrue or misleading.

21 85. Pursuant to Business and Professions Code § 17203, Plaintiff seeks an order of
22 this court enjoining Defendant from continuing to engage in “unfair” business practices and any
23 other act prohibited by law, including those acts set forth in this Complaint, and further seek all
24 other relief allowable under Business and Professions Code § 17200, *et seq.*
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1 **COUNT 2**
2 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
3 **SECTION 17200 *ET SEQ.* — “FRAUDULENT” CONDUCT**

4 86. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
5 extent necessary, pleads this cause of action in the alternative.

6 87. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
7 a result of Defendant’s actions as set forth above.

8 88. Defendant’s actions as alleged in this Complaint constitute “fraudulent” conduct
9 within the meaning of California Business and Professions Code § 17200 *et seq.*

10 89. Defendant’s business practices, as alleged herein, are “fraudulent” because it fails
11 to disclose accurately that the Products contained artificial flavorings.

12 90. As a result of this “fraudulent” conduct, Plaintiff expended money and engaged in
13 activities he would not otherwise have spent or conducted.

14 91. Defendant’s wrongful business practices alleged herein constituted, and continue
15 to constitute, a continuing course of unfair competition since it continues to market and sell its
16 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
17 oppressive, unscrupulous and/or substantially injurious to its customers.

18 92. Defendant publicly disseminated untrue or misleading representations regarding
19 the flavoring claims of its Products, which it knew, or in the exercise of reasonable care should
20 have known, were untrue or misleading.

21 93. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an
22 order of this Court enjoining Defendant from continuing to engage in “fraudulent” business
23 practices and any other act prohibited by law, including those acts set forth in this Complaint,
24 and further seeks all other relief allowable under Business and Professions Code Section 17200,
25 *et seq.*
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COUNT 3
VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE
SECTION 17200 *ET SEQ.* — “UNLAWFUL” CONDUCT

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3 94. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
4 extent necessary, pleads this cause of action in the alternative.

5 95. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
6 a result of Defendant’s actions as set forth above.

7
8 96. Defendant’s actions as alleged in this Complaint constitute “unlawful” conduct
9 within the meaning of California Business and Professions Code Section 17200, *et seq.*

10 97. Defendant’s business practices, as alleged herein, are “unlawful” because it fails
11 to disclose accurately the use of synthetic flavoring in its Products, in contravention of binding
12 legal requirements governing the accuracy of nutritional labelling.

13
14 98. As a result of this “unlawful” conduct, Plaintiff expended money and engaged in
15 activities it would not otherwise have spent or conducted.

16 99. Defendant’s business practices alleged herein constituted, and continue to
17 constitute, a continuing course of unfair competition since it continues to market and sell its
18 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
19 oppressive, unscrupulous and/or substantially injurious to its customers.

20 100. Defendant publicly disseminated untrue or misleading representations regarding
21 “natural flavors” in its Products, which it knew, or in the exercise of reasonable care should have
22 known, were untrue or misleading.

23
24 101. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
25 of this court enjoining Defendant from continuing to engage in “unlawful” business practices
26 and any other act prohibited by law, including those acts set forth in this Complaint, and further
27 seeks all other relief allowable under Business and Professions Code Section 17200, *et seq.*
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COUNT 4
VIOLATION OF CALIFORNIA BUSINESS &
PROFESSIONS CODE SECTION 17500 *ET SEQ.*

102. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

103. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as a result of Defendant’s actions as set forth above.

104. Defendant engaged in advertising and marketing to the public and offered for sale advertising services on a nationwide basis, including in California.

105. Defendant engaged in the advertising and marketing alleged herein with the intent to directly or indirectly induce the sale of the Products to consumers.

106. Defendant’s advertisements and marketing representations regarding the characteristics of the Products were false, misleading, and deceptive as set forth above.

107. At the time it made and disseminated the statements alleged herein, Defendant knew or should have known that the statements were untrue or misleading, and acted in violation of Business and Professions Code Section 17500, *et seq.*

108. Plaintiff seeks injunctive relief and all other relief allowable under Business and Professions Code Section 17500, *et seq.*

COUNT 5
VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,
CAL. CIV. CODE § 1750 *ET SEQ.*

109. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

110. Plaintiff is a “consumer” within the meaning of the Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1761(d).

1 111. The sale of Defendant’s Products to Plaintiff and Class members was a
2 “transaction” within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

3 112. The Products purchased by Plaintiff and Class members are “goods” within the
4 meaning of the CLRA, Cal. Civ. Code § 1761(a).

5 113. As alleged herein, Defendant’s business practices are a violation of the CLRA
6 because Defendant deceptively failed to reveal facts that are material in light of the “natural
7 flavors” representations that were made by Defendant on the labels and associated website and
8 marketing materials of its Products.

9 114. Defendant’s ongoing failure to provide material facts about its Products on its
10 labels and associated advertising material violates the following subsections of Cal. Civ. Code
11 § 1770(a) in these respects:
12

- 13 a. Defendant’s acts and practices constitute misrepresentations that its Products have
14 characteristics, benefits, or uses which they do not have;
15 b. Defendant misrepresented that its Products are of a particular standard, quality,
16 and/or grade, when they are of another;
17 c. Defendant’s acts and practices constitute the advertisement of goods, without the
18 intent to sell them as advertised;
19 d. Defendant’s acts and practices fail to represent that transactions involving its
20 Products involve actions that are prohibited by law, particularly the use of
21 misleading nutritional labelling; and
22 e. Defendant’s acts and practices constitute representations that its Products have
23 been supplied in accordance with previous representations when they were not.
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25 115. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
26 entitling them to injunctive relief, disgorgement, and restitution.
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1 116. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
2 particular violations of the CLRA described herein and demanded Defendant rectify the actions
3 described above by providing complete monetary relief, agreeing to be bound by their legal
4 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
5 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
6

7 117. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
8 to recover actual damages sustained as a result of Defendant’s violations of the CLRA. Such
9 damages include, without limitation, monetary losses and actual, punitive, and consequential
10 damages, in an amount to be proven at trial.

11 118. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin
12 publication of misleading and deceptive nutritional labels on Defendant’s Products and to
13 recover reasonable attorneys’ fees and costs.
14

15 **COUNT 6**
16 **UNJUST ENRICHMENT**

17 119. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
18 extent necessary, pleads this cause of action in the alternative.

19 120. Defendant, through its marketing and labeling of the Products, misrepresented and
20 deceived consumers regarding the character of the flavoring in the Products.

21 121. Defendant did so for the purpose of enriching itself and it in fact enriched itself
22 by doing so.

23 122. Consumers conferred a benefit on Defendant by purchasing the Products,
24 including an effective premium above their true value. Defendant appreciated, accepted, and
25 retained the benefit to the detriment of consumers.
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27 123. Defendant continues to possess monies paid by consumers to which Defendant is
28 not entitled.

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f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and

g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED.

/s/ Charles C. Weller
Charles C. Weller (Cal. SBN: 207034)
Attorney for Plaintiff

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July 14, 2022