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

12 JACOB SCHEIBE, *individually and on*)
13 *behalf of all those similarly situated,*)
14)
15 *Plaintiff,*)
16)
17 v.)
18)
19 MUSCLE FEAST, LLC, *an Ohio limited*)
20 *liability company,*)
21)
22 *Defendant.*)
23)

No. **'23CV0217 TWR JLB**
CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

24 _____
25
26 Jacob Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by
27 and through undersigned counsel, hereby brings this action against Muscle Feast, LLC (“Muscle
28 Feast”), alleging that “8-Hour Energy Pre-Workout” (“the Products”), a dietary supplement
manufactured, packaged, labeled, advertised, distributed, and sold by Defendant, is misbranded
and falsely advertised, and upon information and belief and investigation of counsel alleges as
follows:

PARTIES

1. Plaintiff Jacob Scheibe is and at all times relevant was a citizen of the state of
California, domiciled in San Diego, California.

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>.

7
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>.

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14 18. On or about October 23, 2022, Mr. Scheibe purchased Muscle Feast’s 8-Hour
15 Energy Pre-Workout powder, “All Natural Peach Mango” flavor, from Amazon.com (Order No.
16 111-2760641-6152240) for \$43.09 inclusive of tax.

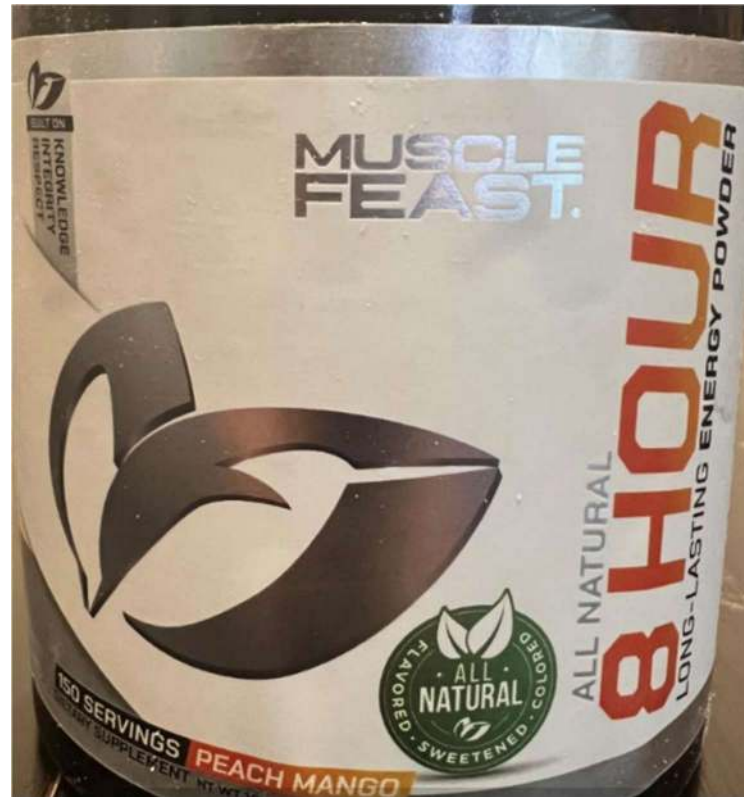
17 19. Mr. Scheibe is a student who has recently sought to lose weight and gain muscle.
18 He carefully reviews labels, including the Products’ labels, to ensure that he consumes only
19 natural ingredients and avoids artificial flavors and ingredients.
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21 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

22 20. Defendant Muscle Feast formulates, manufactures, and sells a dietary supplement
23 called “8-Hour Energy Pre-Workout.” These dietary supplement powders purport to provide
24 energy to make workouts more effective and efficient and to speed recovery.

25 21. The front label (or “principal display panel”) of the Products prominently state
26 they are “All Natural” and “All Natural Flavored – Sweetened – Colored,” with attention drawn
27 to the claim through use of different colored fonts and graphic elements:
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22. Muscle Feast’s Amazon storefront (the content of which the company controls) uses a description of the Products that further highlights that they are “All Natural” and have no “No Artificial Ingredients”:

Muscle Feast 8 Hour Energy All Natural No Artificial Ingredients Keto-Friendly Sugar-Free Pre-Workout, Peach Mango, 300g

[Visit the Muscle Feast Store](#)

★★★★☆ 5 ratings

\$39⁹⁹ (\$39.99 / Count)

Get \$50 off instantly: Pay \$0.00 ~~\$39.99~~ upon approval for the Amazon Rewards Visa Card. No annual fee.

Local Business ~

Brand	Muscle Feast
Item Form	Powder
Diet Type	Vegan
Flavor	Peach Mango

1 23. These natural flavoring claims are false. The Products are flavored using an
2 artificial flavoring, DL malic acid, that is derived from petrochemicals.

3 24. All flavors of the Products state, on the back label, that they contain “malic acid.”

4 25. While there is a naturally occurring form of malic acid, it is extremely expensive
5 to formulate in large quantities and is almost never used in mass-produced food products.
6 Instead, testing by an independent third-party laboratory has confirmed that the malic acid that
7 Defendant uses in these Products is DL malic acid, a synthetic substance derived from
8 petrochemicals.¹

9
10 26. This type of malic acid is manufactured in petrochemical plants from benzene or
11 butane—components of gasoline and lighter fluid, respectively—through a series of chemical
12 reactions, some of which involve highly toxic chemical precursors and byproducts.

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14 27. Fruit flavors in a food are imparted by the interactions between sugars, acids,
15 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined
16 by the ratio between the sugars (mainly glucose and fructose) and acids, such as citric and malic
17 acid.

18 28. The quality and consumer acceptability of fruit flavors is based on their perceived
19 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
20 as peaches and mangoes have their own natural ratio of sugars and acids.

21 29. The DL malic acid used in the Products is used to create, simulate, and/or reinforce
22 the sweet and tart taste that consumers associate with the fruit flavors stated on the labels.

23 30. Defendant uses the petrochemical-derived DL malic acid in its Products to create
24 a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings,
25 misbranding the Products and deceiving consumers.
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¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1 31. The ingredients on the Products’ label are declared in a way that is misleading and
2 contrary to law, because Defendant designates the ingredient by its generic name, “malic acid,”
3 instead of by its specific name, “DL malic acid.”

4 **C. Requirements for Labelling**

5 32. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
6 (“FDCA”) require that a food’s label accurately describe the nature of the food product and its
7 characterizing flavors. 21 C.F.R. § 102.5(a).

8 33. Artificial flavor is defined as “any substance, the function of which is to impart
9 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
10 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
11 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

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

16 35. Any recognizable primary flavor identified directly or indirectly on the front label
17 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
18 as a “characterizing flavor.” 21 C.F.R. § 101.22.

19 36. Here, the Products’ labels both state the characterizing flavors (peaches and
20 mangoes) and reinforce the claim that this characterizing flavor is achieved by using only natural
21 flavors through use of fonts and graphic elements.

22 37. If a food product’s characterizing flavor is not created exclusively by the named
23 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
24 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
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1 which “simulates, resembles or reinforces” the characterizing flavor, the front label must
2 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
3 101.22(i)(2).

4 38. A food product’s label also must include a statement of the “presence or absence
5 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
6 ingredient(s) or component(s) in the food has a material bearing on price or consumer
7 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
8 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.

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10 39. Such statement must be in boldface print on the front display panel and of
11 sufficient size for an average consumer to notice.

12 40. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
13 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

14
15 41. By changing the ratio between sugars and acids that is naturally found in fruits
16 such as peaches and mangoes, the DL malic acid used in the Products reinforces, simulates, or
17 creates the characterizing flavors, regardless of any other effect it may have or purpose for which
18 it was included.

19 42. DL malic acid is not a “natural flavor” as this term is defined by federal and state
20 regulations and is not derived from a fruit or vegetable or any other natural source. The Products
21 therefore contain artificial flavorings.

22
23 43. Because the Products contain artificial flavoring, California law requires the
24 Products to display both front- and back-label disclosures to inform consumers that the Products
25 are artificially flavored.

26 44. The Products have none of the required disclosures regarding the use of artificial
27 flavors.

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1 45. Plaintiff reserves the right to amend this Complaint to add further products that
2 contain similar label misrepresentations as testing continues.

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

9 50. Plaintiff reviewed the label on the Products prior to his purchase, and reviewed
10 the natural flavoring claims being made there and on the company’s Amazon storefront.
11 Consumers such as Plaintiff who viewed the Products’ labels reasonably understood
12 Defendant’s “All Natural” and “All Natural Flavored” statements, as well as its failure to
13 disclose the use of artificially derived malic acid, to mean that the Products contain only natural
14 flavorings. This representation was also false.

15 51. Consumers including Plaintiff reasonably relied on Defendant’s statements such
16 that they would not have purchased the Products from Defendant if the truth about the Products
17 was known, or would have only been willing to pay a substantially reduced price for the Products
18 had they known that Defendant’s representations were false and misleading.

19 52. In the alternative, because of its deceptive and false labelling statements,
20 Defendant was enabled to charge a premium for the Products relative to key competitors’
21 products, or relative to the average price charged in the marketplace.

22 53. Consumers including Plaintiff especially rely on label claims made by food
23 product manufacturers such as Muscle Feast, as they cannot confirm or disprove those claims
24 simply by viewing or even consuming the Products.
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1 predominate over any questions that affect only individual Class members. Common legal and
2 factual questions and issues include but are not limited to:

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

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19 61. Defendant engaged in a common course of conduct in contravention of the laws
20 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
21 of law, business practices, and injuries are involved. Individual questions, if any, pale by
22 comparison, in both quality and quantity, to the numerous common questions that predominate
23 this action. The common questions will yield common answers that will substantially advance
24 the resolution of the case.

25 62. In short, these common questions of fact and law predominate over questions that
26 affect only individual Class members.

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

1 64. Specifically, all Class members, including Plaintiff, were harmed in the same way
2 due to Defendant’s uniform misconduct described herein; all Class members suffered similar
3 economic injury due to Defendant’s misrepresentations; and Plaintiff seeks the same relief as
4 the Class members.

5 65. There are no defenses available to Defendant that are unique to the named
6 Plaintiff.

7 66. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate
8 representative of the Class because Plaintiff’s interests do not conflict with the Class members’
9 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
10 against Defendant.
11

12 67. Furthermore, Plaintiff has selected competent counsel who are experienced in
13 class action and other complex litigation. Plaintiff and Plaintiff’s counsel are committed to
14 prosecuting this action vigorously on behalf of the Class and have the resources to do so.
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16 68. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other
17 available means for the fair and efficient adjudication of this controversy for at least the
18 following reasons

- 19 a. the damages individual Class members suffered are small compared to the
20 burden and expense of individual prosecution of the complex and extensive
21 litigation needed to address Defendant’s conduct such that it would be
22 virtually impossible for the Class members individually to redress the wrongs
23 done to them. In fact, they would have little incentive to do so given the
24 amount of damage each member has suffered when weighed against the costs
25 and burdens of litigation;
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- b. the class procedure presents fewer management difficulties than individual litigation and provides the benefits of single adjudication, economies of scale, and supervision by a single Court;
- c. the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for Defendant; and
- d. the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would be dispositive of the interests of other Class members or would substantively impair or impede their ability to protect their interests.

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

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

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

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

1 **COUNT 1**
2 **VIOLATION OF OHIO CONSUMER SALES PRACTICES ACT (“OCSPA”),**
3 **OHIO REV. CODE § 1345.01 *et seq.***
4 **Nationwide Class**

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

7 74. Plaintiff purchased dietary supplements from Defendant for personal, family, or
8 household purposes.

9 75. Plaintiff’s purchase of the Products was a “consumer transaction” within the
10 meaning of OCSPA.

11 76. Defendant is a “supplier” within the meaning of OCSPA.

12 77. Defendant is required by federal regulations to specifically perform certain
13 actions, *i.e.*, state the source of its flavoring accurately, in order to avoid committing an unfair
14 and deceptive act.

15 78. Defendant’s acts and practices, as alleged in this complaint, violate the OCSPA
16 because they were an unfair or deceptive act or practice in connection with a consumer
17 transaction—namely, the sale of mislabelled and/or deceptively labelled dietary supplements as
18 set forth herein. This conduct was intended to result and did result in the sale of these goods to
19 consumers. This conduct includes but is not limited to:

- 20
- 21 a. Representing that the Products have sponsorship, approval, performance
22 characteristics, accessories, uses, or benefits that they do not have;
 - 23 b. Representing that the Products were of a particular standard, quality, grade, style,
24 prescription, or model when they were actually of another;
 - 25 c. Advertising goods or services with intent not to sell them as advertised; and
 - 26 d. Engaging in other fraudulent or deceptive conduct creating a likelihood of
27 confusion or misunderstanding.
- 28

1 **COUNT 6**
2 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**
3 **CAL. CIV. CODE § 1750 *ET SEQ.***
4 **California Subclass**

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

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

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

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

13 50. As alleged herein, Defendant’s business practices are a violation of the CLRA
14 because Defendant deceptively failed to reveal facts that are material in light of the flavoring
15 representations that were made by Defendant on the labels of its Products.

16 51. Defendant’s ongoing failure to provide material facts about its Products on its
17 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:

- 18
- 19 a. Defendant’s acts and practices constitute misrepresentations that its Products have
20 characteristics, benefits, or uses which they do not have;
 - 21 b. Defendant misrepresented that its Products are of a particular standard, quality,
22 and/or grade, when they are of another;
 - 23 c. Defendant’s acts and practices constitute the advertisement of goods, without the
24 intent to sell them as advertised;
 - 25 d. Defendant’s acts and practices fail to represent that transactions involving its
26 Products involve actions that are prohibited by law, particularly the use of
27 misleading nutritional labelling; and
28

1 e. Defendant's acts and practices constitute representations that its Products have
2 been supplied in accordance with previous representations when they were not.

3 52. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
4 entitling them to injunctive relief, disgorgement, and restitution.

5 53. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
6 particular violations of the CLRA described herein and demanded Defendant rectify the actions
7 described above by providing complete monetary relief, agreeing to be bound by their legal
8 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
9 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
10

11 54. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
12 to recover actual damages sustained as a result of Defendant's violations of the CLRA. Such
13 damages include, without limitation, monetary losses and actual, punitive, and consequential
14 damages, in an amount to be proven at trial.

15 55. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin
16 publication of misleading and deceptive nutritional labels on Defendant's Products and to
17 recover reasonable attorneys' fees and costs.
18

19 **COUNT 7**
20 **UNJUST ENRICHMENT**
21 **Nationwide Class**

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

24 57. Defendant, through its marketing and labeling of the Products, misrepresented and
25 deceived consumers regarding the flavoring in the Products.

26 58. Defendant did so for the purpose of enriching itself and it in fact enriched itself
27 by doing so.
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- d. Ordering an awarding of injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein, and ordering Defendant to engage in a corrective advertising campaign;
- e. Ordering Defendant to pay attorneys' fees and litigation costs to Plaintiff;
- 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 ON ANY COUNTS SO TRIABLE.

/s/ Charles C. Weller
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