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

12 JACOB SCHEIBE, *on behalf of all those*) No. **'22CV1765 BEN MSB**
13 *similarly situated,*)
14) **CLASS ACTION COMPLAINT**
15 *Plaintiff,*) **JURY TRIAL DEMANDED**
16 v.)
17)
18 ESUPPLEMENTS, LLC dba Nutricost, *a*)
19 *Utah limited liability company,*)
20)
21 *Defendant.*)

22 _____
23 Jacob Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by
24 and through undersigned counsel, hereby brings this action against eSupplements, LLC dba
25 Nutricost (“Defendant” or “Nutricost”), alleging that certain products manufactured, packaged,
26 labeled, advertised, distributed and sold by Defendant are misbranded and falsely advertised in
27 California and otherwise violate California law, and upon information and belief and
28 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. On or about July 28, 2022, Scheibe purchased Nutricost’s

1 EAA (blue raspberry flavor) and Pre-Workout (grape flavor) powders (“the Products”) from
2 third-party retailer Amazon.com (Order Nos. 114-9257336-4449848 and 114-1333444-
3 3793004).

4 2. Mr. Scheibe is a student who has recently sought to lose weight and add muscle
5 mass, and to do so has begun to eat with intentionality and take dietary supplements. He carefully
6 reviews labels, including the Products’ labels, to track calories in order to maintain progress
7 toward his weight loss goals.

8 3. Defendant eSupplements, LLC dba Nutricost is a Utah limited liability company
9 with its principal place of business in Vineyard, Utah. Nutricost’s Products are dietary
10 supplements that contain an amino acid blend that purportedly support endurance during
11 workouts and aid in muscle repair when taken after workouts. They are used to increase muscle
12 mass and lose weight associated with fat.

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15 **JURISDICTION AND VENUE**

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

23 5. Plaintiff seeks to represent Class members who are citizens of states different from
24 the Defendant.

25 6. The matter in controversy in this case exceeds \$5,000,000 in the aggregate,
26 exclusive of interests and costs.
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1 7. In addition, “the number of members of all proposed plaintiff classes in the
2 aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

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

5 9. This Court has personal jurisdiction over Defendant because this action arises out
6 of and relates to Defendant’s contacts with this forum.

7 10. Those contacts include but are not limited to sales of the Products directly to
8 commercial and individual consumers located in this district, including Plaintiff; shipping the
9 Products to commercial and individual consumers in this district, including Plaintiff; knowingly
10 directing advertising and marketing materials concerning the Products into this district through
11 wires and mails, both directly and through electronic and print publications that are directed to
12 commercial and individual consumers in this district; and operating an e-commerce web site
13 that offers the Products for sale to commercial and individual consumers in this district, as well
14 as offering the Products for sale through third-party e-commerce websites, through both of
15 which commercial and individual consumers residing in this district have purchased the
16 Products.

17 11. Defendant knowingly directs electronic activity and ships the Products into this
18 district with the intent to engage in business interactions for profit, and it has in fact engaged in
19 such interactions, including the sale of the Products to Plaintiff.

20 12. Defendant also sells the Products to retailers and wholesalers in this district for
21 the purpose of making the Products available for purchase by individual consumers in this
22 district.

23 13. Plaintiff’s losses and those of other Class members were sustained in this district.
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1 14. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of
2 the events or omissions giving rise to Plaintiff’s claims occurred within this district.

3 15. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court
4 maintains personal jurisdiction over defendant.
5

6 **FACTUAL ALLEGATIONS**

7 **A. Deceptive Calories-Per-Serving Claims.**

8 16. Under FDA regulations, the “Total Calories” in a dietary supplement such as the
9 Products “shall be declared when they are present in a dietary supplement in quantitative
10 amounts by weight that exceed the amount that can be declared as zero,” *i.e.*, they exceed five
11 calories per serving. 21 C.F.R. § 101.36(b)(ii)(1).

12 17. These regulations do not permit manufacturers of dietary supplements to omit
13 stating calories per serving if the total calories per serving exceeds five calories.
14

15 18. FDA guidance clarifies this requirement. FDA provides a clear (high resolution)
16 example of labeling calories for an amino acid-based supplement
17 at <https://www.fda.gov/media/99158/download>. This FDA example, as pictured below, displays
18 approximately 4 grams of total amino acids, which would approximate 16 Calories and is listed
19 as 15 based on rounding rules:
20

Supplement Facts	
Serving Size 1 Tablet	
Servings Per Container 50	
Amount Per Tablet	
Calories	15
Isoleucine (as L-isoleucine hydrochloride)	450 mg*
Leucine (as L-leucine hydrochloride)	620 mg*
Lysine (as L-lysine hydrochloride)	500 mg*
Methionine (as L-methionine hydrochloride)	350 mg*
Cystine (as L-cystine hydrochloride)	200 mg*
Phenylalanine (as L-phenylalanine hydrochloride)	220 mg*
Tyrosine (as L-tyrosine hydrochloride)	900 mg*
Threonine (as L-threonine hydrochloride)	300 mg*
Valine (as L-valine hydrochloride)	650 mg*

* Daily Value not established.

Other ingredients: Cellulose, lactose, and magnesium stearate.

1 19. In this example label, protein is not reported because there are no complete
2 proteins. Nonetheless, the Total Calories attributable to individual amino acids are stated on the
3 label.

4 20. FDA's guidance thus provides no safe harbor for supplement manufacturers to
5 simply omit calories on the label of amino acid-based supplements if Total Calories exceed the
6 amount that can be declared as zero, even if protein is not reported.

7 21. The Supplement Facts panel on Nutricost's EAA powder reports 5 calories per
8 serving, as displayed below:

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Amount Per Serving		% DV*	Amount Per Serving	% DV**
Calories				
Total Carbohydrate	5		Taurine	2,000mg
Thiamin (Vitamin B1)	1g	<1%	Agmatine Sulfate	500mg
(as thiamine mononitrate)	50mg	4,170%	L-Tyrosine	300mg
Niacin			L-Theanine	300mg
Vitamin B6 (as pyridoxine HCl)	25mg NE	160%	Caffeine Anhydrous	200mg
Vitamin B12 (as methylcobalamin)	60mg	3,530%	Theobromine	200mcg
L-Citrulline Malate 2:1	200mcg	8,330%	Huperzine A	
Beta-Alanine	6,000mg	**		
	3,000mg	**		

*Percent Daily Values (DV) are based on a 2,000 calorie diet.
**Daily Value not established.

Other ingredients: Natural flavors, tartaric acid†, calcium silicate, silicon dioxide, citric acid, sucralose, fruit juice (for color).

23 22. The Supplement Facts panel on Nutricost's Pre-Workout powder does not report
24 any calories per serving, as displayed below:

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Amount Per Serving	% DV
2:1:1 BCAA (Instantized)	6,000mg
L-Leucine	approx. 3,000mg
L-Isoleucine	approx. 1,500mg
L-Valine	approx. 1,500mg
L-Lysine HCl	800mg
L-Threonine	690mg
L-Phenylalanine	350mg
L-Histidine	100mg
L-Tryptophan	50mg
L-Methionine	10mg

* Daily Value (DV) not established.
Other ingredients: Malic acid (flavor enhancer), citric acid, natural flavors, sucralose, silicon dioxide, acesulfame potassium, blue spirulina (for color).

14 23. FDA regulations permit the use of one of “Five Methods” of determining the
15 caloric content of foods. *See* 21 C.F.R. § 101.9(c)(i)(1). A “safe-harbor” provision allows the
16 “total number of calories” measured by any of the Five Methods to be as much as 20% greater
17 than the calorie content listed on a label. *Id.* § 101.9(g)(5).

18 24. Among the methods by which a manufacturer may determine caloric content is
19 using bomb calorimetry. *See* 21 C.F.R. § 101.9(c)(i)(1).

20 25. The Products were tested using bomb calorimetry conducted by an independent
21 third-party nutritional analysis firm. That analysis revealed that:

- 22
- 23 • The EAA powder contains 5.12 kcal per gram—about 1,690 calories per
24 container—or 56 calories per serving; and
 - 25 • The Pre-Workout powder contains 3.74 kcal per gram—about 3,366 calories per
26 container—or 56 calories per serving.
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1 26. Consumers would reasonably expect—and Mr. Scheibe did expect—that a dietary
2 supplement that reports 5 calories per serving contains only 5 calories per serving. Here, the
3 explicit representation that the EAA powder contains only 5 calories per serving is false and
4 deceptive.

5 27. Likewise, consumers would reasonably expect—and Mr. Scheibe did expect—
6 that a dietary supplement that reports no calories per serving contains zero calories per serving.
7 Here, the implied representation that the Pre-Workout powder contains zero calories per serving
8 is false and deceptive.

9 28. Under any of the FDA’s relevant Five Methods, the Products are mislabelled.

10 29. Defendant’s labels deceive consumers, such as Plaintiff, by making deceptive
11 representations regarding calorie content.
12

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

15 30. Like many consumers, Mr. Scheibe is increasingly attuned to, and relies on, claims
16 that foods are “all-natural,” minimally processed, or are otherwise free of artificial ingredients.

17 31. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
18 numbers of consumers were committed or casual adherents to so-called “clean label” food
19 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-
20 natural” (66 percent). These were the three most attractive attributes in the consumer survey.
21 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
22 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.
23

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

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

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

9 35. To appeal to consumers who seek out natural food products and are willing to pay
10 more for them, Defendant labels and advertises the Products as if they are exclusively naturally
11 flavored.
12

13 36. For example, the front label of the EAA product purchased by Scheibe uses
14 depictions of raspberries and states that it is “Naturally Flavored with Other Natural Flavors”:
15



28 37. This label claims are false. The Products are artificially flavored.

1 38. The Product contains an ingredient identified as “malic acid”:



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8 39. While there is a naturally occurring form of malic acid, it is extremely expensive
9 to formulate in large quantities and is almost never used in mass-produced food products.
10 Instead, the malic acid that Defendant uses in these Products is “DL malic acid,” a synthetic
11 petrochemical.¹

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

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

20
21 42. The quality and consumer acceptability of fruit flavors is based on their perceived
22 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
23 as lemons, limes, and acai berries have their own natural ratio of sugars and acids.

24
25 43. The DL malic acid used in the Products is used to create, enhance, simulate, and/or
26 reinforce the sweet and tart taste that consumers associate with the characterizing fruit flavors,
27 such as lemons, limes, and acai berries. It does so by changing the ratio between acids and sugars
28 in the Products.

¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1 44. Defendant uses the artificial petrochemically derived DL malic acid in its Products
2 to create this sweet and tart flavor but pretends otherwise, conflating natural and artificial
3 flavorings, misbranding the Products and deceiving consumers.

4 45. The ingredients on the Products’ label are declared in a way that is misleading and
5 contrary to law, because Defendant designates the ingredient by its generic name, “malic acid,”
6 instead of by its specific name, “DL malic acid.”
7

8 46. Testing conducted by independent third-party laboratories has confirmed the use
9 of DL malic acid in the Products.

10 **C. Requirements for Labelling—Flavoring**

11 47. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
12 109875, *et seq.*, incorporates all food flavoring and additive regulations of the Federal Food,
13 Drug, and Cosmetic Act (“FDCA”). The regulations require that a food’s label accurately
14 describe the nature of the food product and its characterizing flavors. 21 C.F.R. § 102.5(a).
15

16 48. Artificial flavor is defined as “any substance, the function of which is to impart
17 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
18 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
19 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).
20

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

25 50. Any recognizable primary flavor identified directly or indirectly on the front label
26 of a food Product, whether by word, vignette, depiction of a fruit, or other means is referred to
27 as a “characterizing flavor.” 21 C.F.R. § 101.22.
28

1 51. Here, the Products’ labels state the characterizing flavors and also use depictions
2 of fruits to identify the characterizing flavor.

3 52. If a food product’s characterizing flavor is not created exclusively by the named
4 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
5 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
6 that “simulates, resembles or reinforces” the characterizing flavor, the front label must
7 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
8 101.22(i)(2).
9

10 53. A food product’s label also must include a statement of the “presence or absence
11 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
12 ingredient(s) or component(s) in the food has a material bearing on price or consumer
13 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
14 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.
15

16 54. Such statement must be in boldface print on the front display panel and of
17 sufficient size for an average consumer to notice.

18 55. By changing the ratio between sugars and acids that is naturally found in fruits
19 such as raspberries, the DL malic acid used in the Product reinforces, stimulates, or enhances
20 the characterizing flavors, regardless of any other effect it may have or purpose for which it was
21 included.
22

23 56. DL malic acid is not a “natural flavor” as this term is defined by federal and state
24 regulations and is not derived from a fruit or vegetable or any other natural source. Rather, it is
25 derived from petroleum products. The Products therefore contain artificial flavorings.
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1 57. Because the Products contain artificial flavoring, California law requires the
2 Products to display both front- and back-label disclosures to inform consumers that the Products
3 are artificially flavored.

4 58. The Products have none of the required disclosures regarding the use of artificial
5 flavors.

6 59. While the Products come in different flavors, each flavor is substantially similar
7 to every other flavor in terms of the Product’s formulation and amino acid blend. In addition,
8 each flavor of the Products makes the same misrepresentation regarding calories per serving.

9 60. Plaintiff reserves the right to amend this Complaint to add further products that
10 contain similar label misrepresentations as testing continues.

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

17 62. Given the Defendant’s labels, consumers including Plaintiff would reasonably
18 understand Defendant’s statements to mean that the Products had 5 calories per serving as
19 represented or zero calories per serving as implied. These representations were false.

20 63. Consumers including Plaintiff viewed and reasonably relied on Defendant’s
21 statements on the Products’ labels, as described herein, and would not have purchased the
22 Products from Defendant if the truth about the Products were known, or would have only been
23 willing to pay a substantially reduced price for the Products had they known that Defendant’s
24 representations were false and misleading.

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

4 65. Consumers including Plaintiff especially rely on calories-per-serving and
5 flavoring label claims made by food product manufacturers such as Nutricost, as they cannot
6 confirm or disprove those claims simply by viewing or even consuming the Product.
7

8 66. Plaintiff suffered economic injury by Defendant's fraudulent and deceptive
9 conduct as stated herein, and there is a causal nexus between Defendant's deceptive conduct and
10 Plaintiff's injury.

11 **CLASS ACTION ALLEGATIONS**

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

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

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

21 70. Certification of Plaintiff's claims for class-wide treatment is appropriate because
22 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
23 individual Class members would use to prove those elements in individual actions alleging the
24 same claims.
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1 71. **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 72. **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 flavoring claims
12 to mean that the Products contained only natural flavors, or the calories-per-
13 serving claims to mean that the Products had 5 or zero calories per serving, and
14 reasonably relied upon those representations;
 - 15 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class
16 members;
 - 17 d. the proper amount of damages and disgorgement or restitution;
 - 18 e. the proper scope of injunctive relief; and
 - 19 f. the proper amount of attorneys’ fees.
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22 73. Defendant engaged in a common course of conduct in contravention of the laws
23 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
24 of law, business practices, and injuries are involved. Individual questions, if any, pale by
25 comparison, in both quality and quantity, to the numerous common questions that predominate
26 this action. The common questions will yield common answers that will substantially advance
27 the resolution of the case.

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1 74. In short, these common questions of fact and law predominate over questions that
2 affect only individual Class members.

3 75. **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 76. 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 77. There are no defenses available to Defendant that are unique to the named
11 Plaintiff.

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

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

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

- 22 a. the damages individual Class members suffered are small compared to the burden
23 and expense of individual prosecution of the complex and extensive litigation
24 needed to address Defendant’s conduct such that it would be virtually impossible
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- 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 81. Unless the Class is certified, Defendant will retain monies received as a result of
18 its unlawful and deceptive conduct alleged herein.

19 82. 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 83. **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 84. 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 85. 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 86. 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 87. 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 88. Defendant’s business practices, as alleged herein, are “unfair” because it fails to
11 disclose accurately the synthetic flavoring used in the Products and accurately state the caloric
12 content of the Products.

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

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

19 91. Defendant publicly disseminated untrue or misleading representations regarding
20 the calories per serving of its Products, which it knew, or in the exercise of reasonable care
21 should have known, were untrue or misleading.

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

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3 93. 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 94. 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 95. 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 96. Defendant’s business practices, as alleged herein, are “fraudulent” because it fails
11 to disclose accurately the synthetic flavoring used in the Products and accurately state the caloric
12 content of the Products.

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

15
16 98. Defendant’s wrongful business practices alleged herein constituted, and continue
17 to 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 99. Defendant publicly disseminated untrue or misleading representations regarding
21 the calories per serving of its Products, which it knew, or in the exercise of reasonable care
22 should have known, were untrue or misleading.

23
24 100. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an
25 order of this Court enjoining Defendant from continuing to engage in “fraudulent” business
26 practices and any other act prohibited by law, including those acts set forth in this Complaint,
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1 and further seeks all other relief allowable under Business and Professions Code Section 17200,
2 *et seq.*

3 **COUNT 3**
4 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
5 **SECTION 17200 *ET SEQ.* — “UNLAWFUL” CONDUCT**

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

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

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

12 104. Defendant’s business practices, as alleged herein, are “unlawful” because it fails
13 to disclose accurately the synthetic flavoring used in the Products and accurately state the caloric
14 content of the Products.
15

16 105. As a result of this “unlawful” conduct, Plaintiff expended money and engaged in
17 activities it would not otherwise have spent or conducted.

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

22 107. Defendant publicly disseminated untrue or misleading representations regarding
23 the calories per serving in its Products, which it knew, or in the exercise of reasonable care
24 should have known, were untrue or misleading.
25

26 108. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
27 of this court enjoining Defendant from continuing to engage in “unlawful” business practices
28

1 and any other act prohibited by law, including those acts set forth in this Complaint, and further
2 seeks all other relief allowable under Business and Professions Code Section 17200, *et seq.*

3
4 **COUNT 4**
5 **VIOLATION OF CALIFORNIA BUSINESS &**
6 **PROFESSIONS CODE SECTION 17500 *ET SEQ.***

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

9 110. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
10 a result of Defendant's actions as set forth above.

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

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

15 113. Defendant's advertisements and marketing representations regarding the
16 characteristics of the Products were false, misleading, and deceptive as set forth above.

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

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

22
23 **COUNT 5**
24 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**
25 **CAL. CIV. CODE § 1750 *ET SEQ.***

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

28

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

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

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

7 120. As alleged herein, Defendant’s business practices are a violation of the CLRA
8 because Defendant deceptively failed to reveal facts that are material in light of the flavoring
9 and calories per serving representations that were made by Defendant on the labels of its
10 Products.
11

12 121. Defendant’s ongoing failure to provide material facts about its Products on its
13 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:
14

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

1 122. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
2 entitling them to injunctive relief, disgorgement, and restitution.

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

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

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

17 **COUNT 6**
18 **UNJUST ENRICHMENT**

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

21 127. Defendant, through its marketing and labeling of the Products, misrepresented and
22 deceived consumers regarding the calories per serving in the Products.

23 128. Defendant did so for the purpose of enriching itself and it in fact enriched itself
24 by doing so.
25

26 129. Consumers conferred a benefit on Defendant by purchasing the Products,
27 including an effective premium above their true value. Defendant appreciated, accepted, and
28 retained the benefit to the detriment of consumers.

1 130. Defendant continues to possess monies paid by consumers to which Defendant is
2 not entitled.

3 131. Under the circumstances it would be inequitable for Defendant to retain the benefit
4 conferred upon it and Defendant’s retention of the benefit violates fundamental principles of
5 justice, equity, and good conscience.
6

7 132. Plaintiff seeks disgorgement of Defendant’s ill-gotten gains and restitution of
8 Defendant’s wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed
9 appropriate by the Court, and such other relief as the Court deems just and proper to remedy
10 Defendant’s unjust enrichment.

11 133. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
12 a result of Defendant’s actions as set forth above.
13

14 **PRAYER FOR RELIEF**

15 134. WHEREFORE, Plaintiff respectfully request the Court grant the following relief
16 against Defendant:

- 17 a. Certifying the Class;
- 18 b. Declaring that Defendant violated the CLRA, UCL, and FAL;
- 19 c. Awarding actual and other damages as permitted by law, and/or ordering an
20 accounting by Defendant for any and all profits derived by Defendant from the
21 unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein;
- 22 d. Ordering an awarding of injunctive relief as permitted by law or equity, including
23 enjoining Defendant from continuing the unlawful practices as set forth herein, and
24 ordering Defendant to engage in a corrective advertising campaign;
25
26
27
28

- 1 e. Ordering Defendant to pay attorneys' fees and litigation costs to Plaintiff pursuant to
2 California Code of Civil Procedure section 1021.5 and the common-law private-
3 attorney-general doctrine;
4
5 f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts
6 awarded; and
7
8 g. Such other relief as the Court may deem just and proper.

8 TRIAL BY JURY IS DEMANDED.

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

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November 10, 2022