

BURSOR & FISHER, P.A.

L. Timothy Fisher (State Bar No. 191626)
Annick M. Persinger (State Bar No. 272996)
Yeremey Krivoshey (State Bar No. 295032)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
 apersinger@bursor.com
 ykrivoshey@bursor.com

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ALISON REICHERT, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

DESIGNER PROTEIN, LLC, TRADER
JOE'S COMPANY,

Defendants.

Case No. '14CV2825 CAB DHB

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Alison Reichert (“Plaintiff”), individually and on behalf of herself
2 and all others similarly situated, by and through her attorneys, makes the following
3 allegations pursuant to the investigation of her counsel and based upon information
4 and belief, except as to allegations specifically pertaining to herself and her counsel,
5 which are based on personal knowledge.
6

7
8 **NATURE OF THE ACTION**

9 1. This is a class action lawsuit against Defendants Designer Protein, LLC
10 (“Designer”) and Trader Joe’s Company (“Trader Joe’s”) for misrepresenting
11 Designer Whey 100% Premium Whey Protein Powder (“Designer Whey Protein
12 Powder” or the “Product”) as: (i) being “100% Premium Whey Protein Powder,” (ii)
13 being “100% Premium Natural Whey Protein Powder,” and (iii) having “18 grams”
14 of 100% whey protein per serving (collectively, the “Misrepresentations”). In
15 reality, Designer Whey Protein Powder is “spiked” with additional and unnecessary
16 free-form amino acids, non-protein amino acids, and a litany of other non-whey
17 ingredients. As a result of Defendants’ practices, the Product (a) is not “100%
18 Premium Whey Protein Powder” and (b) actually contains significantly less whey
19 protein than represented.
20
21
22

23 2. The whey protein industry is a growing and highly competitive business
24 environment: “during the forecast period, [the market for] protein products is
25 expected to grow by 62% to reach US \$7.8 billion in 2018.”¹ However, the
26
27

28

¹ See <http://www.euromonitor.com/sports-nutrition-in-the-us/report>.

1 wholesale price of whey protein has continually increased in recent years and is
2 typically purchased for roughly \$15 to \$18 per kilogram, resulting in relatively low
3 profit margins for manufacturers.
4

5 3. In an effort to reduce its costs, Designer adds cheaper free-form amino
6 acids, non-protein amino acids, and other non-whey ingredients to Designer Whey
7 Protein Powder, including but not limited to taurine, L-glutamine, and L-leucine.
8 Thus, the Product is *not* “100% Premium Whey Protein Powder.”
9

10 4. Designer adds these ingredients to increase the nitrogen content of the
11 Product. Nitrogen is the “marker” used by a common test as a rough estimate of the
12 amount of protein in a product, but it is not a direct measurement of the actual
13 protein content. By adding nitrogen-rich ingredients, Designer’s products appear to
14 contain more protein than they actually do.
15
16

17 5. This act is commonly referred to as “protein-spiking,” “nitrogen-
18 spiking,” or “amino-spiking,” and was evidenced recently in 2007 when a wide
19 variety of pet foods were recalled due to adulteration with melamine, a compound
20 that contains 67% nitrogen by mass. In the wake of the scandal, *USA Today* reported
21 that, “A leading theory is that [melamine] was added to fake higher protein levels.”²
22 The issue arose again in 2008 when a variety of Chinese baby formulas were found
23 to be adulterated with melamine, which was similarly added to increase the apparent
24
25
26
27

28 ² See Melamine In Pet Food May Not Be Accidental,
http://usatoday30.usatoday.com/money/industries/2007-04-19-pet-food-usat_n.htm.

1 protein content in the affected products.³

2 6. In fact, the American Herbal Products Association (“AHPA”), an
3 organization of dietary supplement manufacturers, has condemned “protein-spiking”
4 and issued a standard for manufacturers for measuring protein which expressly
5 “exclude[s] any ‘non-protein nitrogen-containing substances’” when counting total
6 protein count.⁴
7

8
9 7. Additionally, General Nutrition Corporation (“GNC”), one of the
10 nation’s leading retailers of dietary supplements, has set up an informational website
11 called “Is Your Protein Scamming You?” in order to help educate consumers about
12 the deceptive labeling practices.⁵
13

14 8. Despite knowledge that “protein-spiking” is misleading to consumers,
15 Defendants continue to advertise, distribute, label, manufacture, and market Designer
16 Whey Protein Powder in a misleading and deceptive manner.
17

18 **THE PARTIES**

19 9. Plaintiff Alison Reichert is a citizen of New York who resides in East
20 Northport, New York. Plaintiff Reichert is a health-conscious consumer with an
21 active lifestyle. In or about August 2014, Plaintiff Reichert purchased a 12-ounce
22 container of Designer Whey 100% Premium Whey Protein Powder from a Trader
23 Joe’s retail store located at 5010 Jericho Turnpike, Commack, New York for
24
25

26 ³ See Protein Adulteration In China, http://en.wikipedia.org/wiki/Protein_adulteration_in_China
27 (“These adulterants can be used to inflate the apparent protein content of products, so that
inexpensive ingredients can pass for more expensive, concentrated proteins.”).

28 ⁴ See <http://www.ahpa.org/Default.aspx?tabid=441> (Apr. 1, 2014).

⁵ See <http://www.gnclivewell.com/realprotein/>.

1 approximately \$11.99. Prior to purchasing Designer Whey Protein Powder, Plaintiff
2 Reichert reviewed the product's labeling and packaging. Specifically, she saw and
3 relied upon the representations that Designer Whey Protein Powder: (i) was "100%
4 Premium Whey Protein Powder" and (ii) had "18 grams" of 100% whey protein per
5 serving. In making her purchase, Plaintiff Reichert understood these representations
6 to be warranties that (a) Designer Whey is, in fact, "100% Premium Whey Protein
7 Powder" and that (b) it actually contains "18 grams" of 100% whey protein per
8 serving. In reliance on these representations and warranties, Plaintiff Reichert paid a
9 tangible increased cost for Designer Whey Protein Powder, which was worth less
10 than represented because the product is not "100% Premium Whey Protein Powder"
11 and does not actually contain "18 grams" of 100% whey protein per serving.
12 Accordingly, these representations and warranties were part of the basis of the
13 bargain, in that Plaintiff Reichert attributed value to these promises and would not
14 have purchased Designer Whey Protein Powder, or would have only paid for the
15 protein actually delivered by the Product, if she knew the truth about its protein
16 content and composition. Ultimately, Plaintiff Reichert used the Product as directed
17 but did not receive "100% Premium Whey Protein" or "18 grams" of 100% whey
18 protein per serving. Plaintiff Reichert also understood that in making the sale,
19 Trader Joe's was acting with the knowledge and approval of Designer and/or as the
20 agent of Designer. Plaintiff Reichert further understood that the purchase involved a
21 direct transaction between herself and Designer, because the purchase came with
22
23
24
25
26
27
28

1 Designer’s representation and warranty that the Product is “100% Premium Whey
2 Protein Powder” and contains “18 grams” of 100% whey protein per serving.

3
4 10. Defendant Designer Protein, LLC (“Designer”) is a Delaware limited
5 liability company with its principal place of business located at 5050 Avenida
6 Encinas, Suite 350, Carlsbad, California. Designer designed, manufactured,
7
8 promoted, marketed, distributed, and sold Designer Whey Protein Powder across the
9 United States, including to hundreds of thousands of consumers in New York.
10 Designer Whey Protein Powder purports to be “America’s #1 Protein Since 1993.”

11
12 11. Defendant Trader Joe’s Company (“Trader Joe’s”) is a California
13 corporation with its principal place of business located at 800 S Shamrock Avenue,
14 Monrovia, CA 91016. Trader Joe’s is a leading grocery retailer in the United States.
15 Trader Joe’s advertised, promoted, distributed, and sold Designer Whey Protein
16 Powder across the United States, including to hundreds of thousands of consumers in
17 New York.

18 19 20 **JURISDICTION AND VENUE**

21 12. This Court has subject matter jurisdiction over this civil action pursuant
22 to 28 U.S.C. § 1331 (federal question). This Court has supplemental jurisdiction
23 over state law claims pursuant to 28 U.S.C. § 1367.

24
25 13. This Court also has subject matter jurisdiction over this action pursuant
26 to 28 U.S.C. § 1332(d) because there are more than 100 class members and the
27 aggregate amount in controversy exceeds \$5,000,000, exclusive of interest, fees, and
28

1 costs, and at least one Class member is a citizen of a state different from Defendants.

2 14. This Court has personal jurisdiction over Defendants because
3
4 Defendants conduct substantial business within California, such that Defendants
5 have significant, continuous, and pervasive contacts with the State of California.
6 Additionally, both Defendants' principal places of business are in California, and
7
8 Defendant Trader Joe's is a California corporation.

9 15. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because
10 Defendants do substantial business in this District, substantial part of the events
11 giving rise to Plaintiff's claims took place within this judicial district, and Defendant
12 Designer's principal place of business is in this District.
13

14 **FACTUAL BACKGROUND**

15 **The Differences Between Whey Protein And Free Form Amino Acids**

16 16. Whey is a complete protein source, in that it contains all the essential
17 amino acids the human body needs to build protein-based compounds such as muscle
18 tissue, skin, fingernails, hair, and enzymes. One's daily protein needs depend on his
19 or her size, gender, and activity levels, although it likely amounts to somewhere
20 between 46 grams and 56 grams for most individuals. For athletes, daily protein
21 requirements are well over 100 grams, which is often difficult to obtain from eating
22 food alone. Whey protein powder is considered an especially valuable source of
23 protein because it is rich in branched-chain amino acids – leucine, isoleucine, and
24 valine – which are metabolized directly within the muscles as opposed to being
25
26
27
28

1 processed in the liver first.

2 17. According to the 2005 dietary reference intake (“DRI”) guidance from
3 the National Academy of Sciences, protein is comprised of long links of certain
4 types of amino acids. Stated otherwise, certain types of amino acids are the
5 “building blocks” of protein.
6

7
8 18. However, other types of amino acids, such as taurine (an ingredient in
9 Designer Whey Protein Powder), is not naturally found in whey protein and is not
10 processed by the body into protein. “Although most amino acids are needed to build
11 protein, taurine does not help to build muscle because it doesn’t link with other
12 amino acids or the building blocks of protein,” explains Roberta Anding, RD,
13 American Dietetic Association spokesperson and sports dietitian for the Houston
14 Texans football team.
15
16

17 19. Furthermore, although amino acids are the building blocks of protein,
18 they do not have the same beneficial effects of whole protein when they are free-
19 form (*i.e.*, not part of a complete protein). In fact, several studies have shown that
20 protein is absorbed more effectively than free-form amino acids in isolation.⁶
21

22
23 20. First, at least one study was conducted to determine whether the positive
24 effects of whey protein ingestion on the accrual of muscle protein are due solely to
25 its constituent amino acids, or whether the ingestion of complete proteins is more
26

27 ⁶ See, e.g., Mauro G. Di Pasquale, *Amino Acids and Proteins for the Athlete: The Anabolic Edge*
28 190 (2d ed. 2008).

1 beneficial. The study included a comparison of three trial groups. The first group
2 was provided intact whey protein, in the form of whey protein powder. The other
3 two groups were provided free-form amino acids in isolation. The researchers
4 concluded that ingestion of complete whey protein improves skeletal muscle protein
5 accrual through mechanisms that are beyond those attributed to free-form amino
6 acids in isolation.⁷

9 21. Second, another study found that “the lack of recovery after
10 immobilization-induced atrophy during ageing is due to an ‘anabolic resistance’ of
11 protein synthesis to amino acids during rehabilitation.” The study’s results
12 “highlight a novel approach to induce muscle mass recovery following atrophy in the
13 elderly by giving soluble milk protein or high protein diets.”⁸

16 22. Third, yet another study concluded that, “the bound form of an EAA
17 [essential amino acid] may be more efficiently utilized than when delivered in its
18 free-form [in isolation].”⁹

20 **Designer’s False And Misleading Labeling Of Designer Whey Protein Powder**

21 23. Designer features the ingredient sought by millions of American

23 ⁷ Christos S. Katsanos, *et al.*, *Whey Protein Ingestion In Elderly Results In Greater Muscle Protein*
24 *Accrual Than Ingestion Of Its Constituent Essential Amino Acid Content*, 28 *Nutr. Res.* 651
(Oct. 2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2612691>.

25 ⁸ Hugues Magne, *et al.*, *Contrarily To Whey And High Protein Diets, Dietary Free Leucine*
26 *Supplementation Cannot Reverse The Lack Of Recovery Of Muscle Mass After Prolonged*
27 *Immobilization During Ageing*, 590 *J. of Physiology* 2035 (Apr. 2012), available at
<http://jp.physoc.org/content/590/8/2035.long>.

28 ⁹ Juha J. Hulmi, *et al.*, *Effect Of Protein/Essential Amino Acids And Resistance Training On*
Skeletal Muscle Hypertrophy: A Case For Whey Protein, 7 *Nutrition & Metabolism* 51 (2010),
available at <http://www.nutritionandmetabolism.com/content/7/1/51>.

1 consumers, “whey protein,” by prominently featuring it on the Products’ labeling.

2 The Product’s label plainly states: (i) “100% Premium Whey Protein Powder,” (ii)

3 “100% Premium Natural Whey Protein Powder,” and (iii) “18 Grams [Of] Protein,”

4 on the front label:





1
2
3
4
5
6
7
8
9
10
11
12
13
14
15 24. However, the Product’s “100% Premium Whey Protein” and “100%
16 Premium Natural Whey Protein” claims are false. In fact, Designer Whey Protein
17 Powder contains, for the purposes of “protein-spiking,” free-form amino acids,
18 including L-glutamine and L-leucine.

19
20 25. Even worse, Designer Whey Protein Powder includes the non-protein
21 amino acid taurine, which is not naturally found in whey protein and is not processed
22 by the body into protein.

23
24 26. Moreover, Designer Whey Protein Powder includes a litany of other
25 non-whey ingredients: L-phenylalanine, erythritol, soy lecithin, magnesium oxide,
26 citrus fiber, inulin, zinc gluconate, xanthan gum, sodium alginate, stevia leaf extract,
27
28

1 calcium pantothenate, pyridoxine, hydrochloride, thiam mononitrate, riboflavin,
2 annatto, mixed tocopherols, and vitamin D3:

3
4 **INGREDIENTS: DESIGNER WHEY® FULL SPECTRUM WHEY PEPTIDE BLEND (WHEY PROTEIN**
5 **CONCENTRATE, WHEY PROTEIN ISOLATE, L-GLUTAMINE, TAURINE, L-LEUCINE, L-PHENYLALANINE),**
6 **ERYTHRITOL, NATURAL VANILLA FLAVOR, WHEY MINERALS, SOY LECITHIN, MAGNESIUM OXIDE, CITRUS**
7 **FIBER, INULIN, ZINC GLUCONATE, XANTHAN GUM, SODIUM ALGINATE, SALT, STEVIA LEAF EXTRACT, CALCIUM**
8 **PANTOTHENATE, PYRIDOXINE HYDROCHLORIDE, THIAMIN MONONITRATE, RIBOFLAVIN, CINNAMON,**
9 **ANNATTO, MIXED TOCOPHEROLS (TO HELP PROTECT FLAVOR), VITAMIN D3 (CHOLECALCIFEROL).**

10 27. The presence of these “protein spiking” agents and other ingredients
11 necessarily means that Designer Whey Protein Powder is not “100% Premium Whey
12 Protein” or “100% Premium Natural Whey Protein.”

13 28. In fact, Designer recognizes the misleading nature of its labeling. On its
14 website’s FAQ section, Designer acknowledges that its product is not, in fact, “100%
15 Premium Whey Protein,” or “100% Premium Natural Whey Protein”:¹⁰

16 **Are Designer Whey products the same as regular 100% whey protein?**

17
18 While Designer Whey is derived from 100% whey protein, its formula is designed to produce more impressive
19 results. For instance, Designer Whey delivers a precise blend of three separate, partially pre-digested whey
20 proteins that make up our full spectrum whey peptide blend. Peptides have been proven in clinical science to be
21 the body’s preferred source of digestible nitrogen. Designer Whey also includes L-glutamine, B-vitamins, zinc, and
22 magnesium, which can help boost strength and speed recovery.

23 29. Of course, the average consumer does not have access to the website
24 prior to purchasing Designer Whey Protein Powder, and is thus left to judge the
25 Product based on its labeling alone.

26 30. Moreover, the presence of free-form amino acids, non-protein amino
27

28 ¹⁰ <http://designerwhey.com/about-us/faq>.

1 acids, and a litany of other non-whey ingredients necessarily means that Designer
 2 Whey Protein Powder does not contain “18 grams” of 100% whey protein per
 3 serving. Simply put, consumers are misled into believing that every gram of protein
 4 in the product is comprised solely of 100% whey protein.
 5

6 31. Furthermore, Designer Whey Protein Powder does not contain “18
 7 grams” of protein per serving due to the inclusion of ingredients added for the
 8 purpose of “protein spiking,” such as L-glutamine, L-leucine, and taurine.
 9

10 32. The Misrepresentations allow Defendants to command a substantial
 11 price premium over other Designer Whey protein products that do not contain the
 12 Misrepresentations:
 13

14 Store	15 Product	16 Servings Per Container	17 Price	18 Approximate Price Per Serving
19 Trader Joe’s	20 Designer Whey 100% Premium Whey Protein	21 12	\$11.99	\$0.99
22 Supplementwarehouse.com	23 Designer Whey Sustained Energy Protein	24 11	\$8.99	\$0.81

25 Defendant Trader Joe’s Liability

26 33. Defendant Trader Joe’s incorporates all of the Designer Whey Protein
 27 Powder’s label claims and product images described herein at its retail locations.
 28

34. On information and belief, Trader Joe’s employees review all labels and
 marketing materials of vendors, including Defendant Designer, and have the ability

1 to change false and misleading marketing materials, request different product
2 formulations, and ultimately reject products from being sold in its brick and mortar
3 retail stores.
4

5 35. On information and belief, Trader Joe's has the ability to obtain
6 certificates of analysis for review prior to approving a product for sale in its stores
7 and website.
8

9 36. Each of these representations, warranties, and guarantees are false and
10 misleading. Designer Whey Protein Powder is not "100% Premium Whey Protein,"
11 does not contain "18 grams" of 100% whey protein per serving, and is spiked with
12 free-form amino acids, non-protein amino acids, and a litany of other non-whey
13 ingredients
14

15 **Defendants' Conduct Harmed Plaintiff And Class Members**

16
17 37. Plaintiff and members of the Class and New York Subclass were in fact
18 misled by Defendants' Misrepresentations regarding the true nature of Designer
19 Whey Protein Powder.
20

21 38. The difference between Designer Whey Protein Powder as promised
22 and the Product as sold is significant. First, the Product does not contain "100%
23 Premium Whey Protein" as represented. Second, the amount of actual protein
24 provided, and the measure of protein per serving, has real impacts on the benefits
25 provided to consumers, and the actual value of the Product itself.
26
27

28 39. As aforementioned, whey protein is superior to free-form amino acids

1 as a protein source. Consumers, therefore, are getting an inferior product in
2 comparison to what they bargained for because the product is not “100% Premium
3 Whey Protein,” but instead contains free-form amino acids, non-protein amino acids,
4 and other non-whey ingredients.
5

6 40. Furthermore, consumers are left with a product that contains less protein
7 than represented, due to the presence of “protein-spiking” ingredients.
8

9 41. Plaintiff and members of the Class and New York Subclass would not
10 have purchased Designer Whey Protein Powder, or would have only paid for the
11 whey protein actually delivered by Designer Whey Protein Powder, if they had
12 known the truth regarding the Product.
13

14 **CLASS ACTION ALLEGATIONS**

15
16 42. Plaintiff seeks to represent a class defined as all persons in the United
17 States who purchased Designer Whey Protein Powder (the “Class”) and a subclass of
18 Class members who purchased Designer Whey Protein Powder in New York (the
19 “New York Subclass”). Excluded from the Class and New York Subclass is any
20 entity in which Defendants have a controlling interest, and officers or directors of
21 Defendants.
22

23
24 43. Members of the Class and New York Subclass are so numerous that
25 their individual joinder herein is impracticable. On information and belief, members
26 of the Class and New York Subclass number in the millions. The precise number of
27 Class members and their identities are unknown to Plaintiff at this time but may be
28

1 determined through discovery. Class members may be notified of the pendency of
2 this action by mail and/or publication through the distribution records of Defendants
3 and third party retailers and vendors.
4

5 44. Common questions of law and fact exist as to all Class members and
6 predominate over questions affecting only individual Class members. Common legal
7 and factual questions include, but are not limited to, whether Defendants' labeling,
8 marketing, advertising, and promotion of Designer Whey Protein Powder was false
9 and misleading.
10

11
12 45. The claims of the named Plaintiff are typical of the claims of the Class
13 in that the named Plaintiff was exposed to Defendants' false and misleading labeling,
14 marketing, advertising, and promotion, purchased Designer Whey Protein Powder,
15 and suffered a loss as a result of that purchase.
16

17 46. Plaintiff is an adequate representative of the Class and New York
18 Subclass because her interests do not conflict with the interests of the Class members
19 she seeks to represent, she has retained competent counsel experienced in
20 prosecuting class actions, and she intends to prosecute this action vigorously. The
21 interests of Class members will be fairly and adequately protected by Plaintiff and
22 her counsel.
23
24

25 47. The class mechanism is superior to other available means for the fair
26 and efficient adjudication of the claims of Class and New York Subclass members.
27 Each individual Class member may lack the resources to undergo the burden and
28

1 expense of individual prosecution of the complex and extensive litigation necessary
2 to establish Defendants' liability. Individualized litigation increases the delay and
3 expense to all parties and multiplies the burden on the judicial system presented by
4 the complex legal and factual issues of this case. Individualized litigation also
5 presents a potential for inconsistent or contradictory judgments. In contrast, the class
6 action device presents far fewer management difficulties and provides the benefits of
7 single adjudication, economy of scale, and comprehensive supervision by a single
8 court on the issue of Defendants' liability. Class treatment of the liability issues will
9 ensure that all claims and claimants are before this Court for consistent adjudication
10 of the liability issues.
11
12
13

14
15
16 **COUNT I**
17 **(Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*)**

18 48. Plaintiff repeats the allegations contained in the foregoing paragraphs as
19 if fully set forth herein.

20 49. Plaintiff brings this claim individually and on behalf of members of the
21 Class and New York Subclass against all Defendants.

22 50. Designer Whey Protein Powder is a consumer product as defined in 15
23 U.S.C. § 2301(1).
24

25 51. Plaintiff and Class members are consumers as defined in 15 U.S.C. §
26 2301(3).
27
28

1 52. Defendants are suppliers and warrantors as defined in 15 U.S.C. §§
2 2301(4) and (5).

3
4 53. In connection with the sale of Designer Whey Protein Powder,
5 Defendants issued written warranties as defined in 15 U.S.C. § 2301(6), by making
6 express warranties that Designer Whey Protein Powder: (i) is “100% Premium
7 Whey Protein Powder,” (ii) is “100% Premium Natural Whey Protein Powder,” and
8 (iii) contains “18 grams” of 100% whey protein per serving. Thus, a reasonable
9 consumer would expect that Designer Whey Protein Powder is, in fact, 100% whey
10 protein and does, in fact, contain 18 grams of protein from 100% whey protein.

11
12
13 54. Designer promises Designer Whey Protein Powder will conform to the
14 express warranties over a specified period of time – until the “enjoy by” date, printed
15 on every container.

16
17 55. However, Designer Whey Protein Powder does not conform to the
18 express warranties because the Product is not, in fact, 100% whey protein, and does
19 not, in fact, contain 18 grams of protein from 100% whey protein.

20
21 56. By reason of Defendants’ breach of express warranty, Defendants
22 violated the statutory rights due to Plaintiff and Class members pursuant to the
23 MMWA, thereby damaging Plaintiff and Class members. *See* 15 U.S.C. §§ 2301, *et*
24 *seq.*

25
26 57. Plaintiff and members of the Class were injured as a direct and
27 proximate result of Defendants’ breach because (a) they would not have purchased
28

1 Designer Whey Protein Powder if they had known that the product does not contain
2 100% whey protein, and does not contain 18 grams of 100% whey protein; (b) they
3 paid a price premium for Designer Whey Protein Powder based on Defendants'
4 express warranties; and (c) Designer Whey Protein Powder did not have the
5 characteristics, uses, or benefits as promised, namely that the product contains
6 "100% Premium Whey Protein," "100% Premium Natural Whey Protein," and/or
7 "18 grams" of 100% whey protein.
8
9

10 58. Pursuant to 15 U.S.C. § 2310(d)(1), Plaintiff and the Class are entitled
11 to recover the damages caused to them by Defendants' breach of written and implied
12 warranty, which either constitute the full purchase price of Designer Whey Protein
13 Powder or the difference in value between Designer Whey Protein Powder as
14 warranted and the products as sold. In addition, pursuant to 15 U.S.C. § 2310(d)(2),
15 Plaintiff and the Class are entitled to recover a sum equal to the aggregate amount of
16 costs and expenses (including attorneys' fees based on actual time expended)
17 determined by the Court to have been reasonably incurred by Plaintiff and the Class
18 in connection with the commencement and prosecution of this action.
19
20
21

22 59. On November 13, 2014, prior to filing this action, a pre-suit notice letter
23 was served on Defendants which complies in all respects with the MMWA. Plaintiff
24 sent Defendants a letter advising them that they are in violation of the MMWA and
25 demanded that they cease and desist from such violations and make full restitution
26 by refunding the monies received therefrom. A true and correct copy of Plaintiff's
27
28

1 letter is attached hereto as Exhibit A.

2
3 **COUNT II**
4 **(Breach of Express Warranty)**

5 60. Plaintiff repeats the allegations contained in the foregoing paragraphs as
6 if fully set forth herein.

7 61. Plaintiff brings this claim individually and on behalf of members of the
8 Class and New York Subclass against all Defendants.

9 62. In connection with the sale of Designer Whey Protein Powder,
10 Defendants issued written warranties. Defendants, as the designers, manufacturers,
11 marketers, distributors, and/or sellers expressly warranted that Designer Whey
12 Protein Powder was fit for its intended purpose by making the express warranties:
13 that Designer Whey Protein Powder (i) is “100% Premium Whey Protein,” (ii) is
14 “100% Premium Natural Whey Protein,” and (iii) contains “18 grams” of 100%
15 whey protein.
16
17
18

19 63. Defendants’ express warranties, and their affirmations of fact and
20 promises made to Plaintiff and the Class regarding Designer Whey Protein Powder,
21 became part of the basis of the bargain between Defendants and Plaintiff and the
22 Class, thereby creating an express warranty that Designer Whey Protein Powder
23 would conform to those affirmations of fact, representations, promises, and
24 descriptions.
25
26

27 64. Designer Whey Protein Powder does not, in fact, contain “100%
28

1 Premium Whey Protein,” nor does it contain “18 grams” of 100% whey protein.
2 Instead, the Product contains free-form amino acids, including L-glutamine and L-
3 leucine, non-protein amino acids, including taurine, and other non-whey ingredients.
4

5 65. Plaintiff and members of the Class were injured as a direct and
6 proximate result of Defendants’ breach because (a) they would not have purchased
7 Designer Whey Protein Powder if they had known that the product does not contain
8 100% whey protein and does not contain 18 grams of 100% whey protein; (b) they
9 paid a price premium for Designer Whey Protein Powder based on Defendants’
10 express warranties; and (c) Designer Whey Protein Powder did not have the
11 characteristics, uses, or benefits as promised, namely that the product contains
12 “100% Premium Whey Protein,” “100% Premium Natural Whey Protein,” and/or
13 “18 grams” of 100% whey protein. As a result, Plaintiff and members of the Class
14 have been damaged either in the full amount of the purchase price of Designer Whey
15 Protein Powder or in the difference in value between Designer Whey Protein Powder
16 as warranted and the product as actually sold.
17
18
19
20

21 66. On November 13, 2014, prior to filing this action, a pre-suit notice letter
22 was served on Defendants which complies in all respects with U.C.C. §§ 2-313, 2-
23 607. Plaintiff sent Defendants a letter advising them that they breached an express
24 warranty and demanded that they cease and desist from such breaches and make full
25 restitution by refunding the monies received therefrom. A true and correct copy of
26 Plaintiff’s letter is attached hereto as Exhibit A.
27
28

COUNT III
(Breach Of The Implied Warranty Of Merchantability)

1
2
3 67. Plaintiff repeats the allegations contained in the paragraphs above as if
4 fully set forth herein.
5

6 68. Plaintiff brings this claim individually and on behalf of the members of
7 the Class and New York Subclass against all Defendants.
8

9 69. Defendants are and were at all relevant times “merchants” within the
10 meaning of the Uniform Commercial Code (“UCC”). Defendants manufactured,
11 distributed, and marketed Designer Whey Protein Powder, which is a “good” within
12 the meaning of the UCC. Consequently, Defendants impliedly warranted that
13 Designer Whey Protein Powder was merchantable, including that it could pass
14 without objection in the trade under the contract description, that it was fit for the
15 ordinary purposes for which such goods are used, that it was of fair average quality
16 within the description, that it was adequately labeled, and that it would conform to
17 the promises or affirmations of fact made on its label. However, each of these
18 implied warranties were false with respect to the goods of the kind sold to Plaintiff
19 and members of the Class and New York Subclass.
20
21

22 70. In reliance upon Defendants’ skill and judgment and the implied
23 warranties above, Plaintiff and Class members purchased Designer Whey Protein
24 Powder.
25
26

27 71. Designer Whey Protein Powder was not altered by Plaintiff or members
28

1 of the Class.

2 72. Designer Whey Protein Powder was defective when it left the exclusive
3 control of Defendants.
4

5 73. Defendants knew Designer Whey Protein Powder would be purchased
6 and consumed by Plaintiff and members of the Class without additional testing.
7 Designer Whey Protein Powder was not of fair average quality within its description,
8 was not adequately labeled, and does not conform to the promises or affirmations of
9 fact made on its label.
10

11 74. More specifically, Defendants breached their implied warranty of
12 merchantability to Plaintiff and the Class because Designer Whey Protein Powder
13 would not pass without objection in the trade because it does not conform to the
14 promises or affirmation of fact made on its label.
15

16 75. As a direct and proximate cause of Defendants' breach of the implied
17 warranty, Plaintiff and Class members were injured because (a) they would not have
18 purchased Designer Whey Protein Powder if they had known that the product does
19 not contain 100% whey protein and does not contain 18 grams of 100% whey
20 protein; (b) they paid a price premium for Designer Whey Protein Powder based on
21 Defendants' implied warranties; and (c) Designer Whey Protein Powder did not have
22 the characteristics, uses, or benefits as promised, namely that the product contains
23 "100% Premium Whey Protein," "100% Premium Natural Whey Protein," and/or
24 "18 grams" of 100% whey protein. As a result, Plaintiff and members of the Class
25
26
27
28

1 have been damaged either in the full amount of the purchase price of Designer Whey
2 Protein Powder or in the difference in value between Designer Whey Protein Powder
3 as warranted and the product as actually sold.
4

5 76. On November 13, 2014, prior to filing this action, a pre-suit notice letter
6 was served on Defendants which complies in all respects with U.C.C. §§ 2-314, 2-
7 607. Plaintiff sent Defendants a letter advising them that they breached an implied
8 warranty and demanded that they cease and desist from such breaches and make full
9 restitution by refunding the monies received therefrom. A true and correct copy of
10 Plaintiff's letter is attached hereto as Exhibit A.
11

12
13 **COUNT IV**
14 **(Unjust Enrichment/Common Law Restitution)**

15 77. Plaintiff repeats the allegations contained in the paragraphs above as if
16 fully set forth herein.
17

18 78. Plaintiff brings this claim individually and on behalf of the members of
19 the Class and New York Subclass against all Defendants.
20

21 79. Plaintiff and members of the Class conferred benefits on Defendants by
22 purchasing Designer Whey Protein Powder.
23

24 80. Defendants have been unjustly enriched in retaining the revenues
25 derived from Plaintiff's and Class members' purchases of Designer Whey Protein
26 Powder. Retention of those monies under these circumstances is unjust and
27 inequitable because of Defendants' Misrepresentations about Designer Whey Protein
28

1 Powder, which caused injuries to Plaintiff and members of the Class because they
2 would not have purchased Designer Whey Protein Powder if the true facts had been
3 known.
4

5 81. Because Defendants' retention of the non-gratuitous benefits conferred
6 on them by Plaintiff and members of the Class is unjust and inequitable, Defendants
7 must pay restitution to Plaintiff and members of the Class for their unjust
8 enrichment, as ordered by the Court.
9

10 **COUNT V**
11 **(Deceptive Acts Or Practices, New York General Business Law § 349)**

12 82. Plaintiff repeats the allegations in the foregoing paragraphs as if fully
13 set forth herein.
14

15 83. Plaintiff brings this claim individually and on behalf of the members of
16 the New York Subclass against all Defendants.
17

18 84. By the acts and conduct alleged herein, Defendants committed unfair or
19 deceptive acts and practices by making the Misrepresentations.
20

21 85. The foregoing deceptive acts and practices were directed at consumers.

22 86. The foregoing deceptive acts and practices are misleading in a material
23 way because they fundamentally misrepresent the characteristics, ingredients, and
24 benefits of Designer Whey Protein Powder to induce consumers to purchase same.
25

26 87. Plaintiff and members of the New York Subclass were injured because
27 (a) they would not have purchased Designer Whey Protein Powder if they had
28

1 known that the product does not contain 100% whey protein and does not contain 18
2 grams of 100% whey protein; (b) they paid a price premium for Designer Whey
3 Protein Powder based on Defendants' express and implied warranties; and (c)
4 Designer Whey Protein Powder did not have the characteristics, uses, or benefits as
5 promised, namely that the product contains "100% Premium Whey Protein," "100%
6 Premium Natural Whey Protein," and/or "18 grams" of 100% whey protein. As a
7 result, Plaintiff and members of the New York Subclass have been damaged either in
8 the full amount of the purchase price of Designer Whey Protein Powder or in the
9 difference in value between Designer Whey Protein Powder as warranted and the
10 product as actually sold.
11
12
13

14 88. On behalf of herself and other members of the New York Subclass,
15 Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover
16 her actual damages or fifty dollars, whichever is greater, three times actual damages,
17 and reasonable attorneys' fees.
18
19

20 **COUNT VI**
21 **(False Advertising, New York General Business Law § 350)**

22 89. Plaintiff repeats the allegations in the foregoing paragraphs as if fully
23 set forth herein.

24 90. Plaintiff brings this claim individually and on behalf of the members of
25 the New York Subclass against all Defendants.
26

27 91. Based on the foregoing, Defendants have engaged in consumer-oriented
28

1 conduct that is deceptive or misleading in a material way which constitutes false
2 advertising in violation of Section 350 of the New York GBL.

3
4 92. Defendants' false, misleading, and deceptive statements and
5 representations of fact, including but not limited to the Misrepresentations, were and
6 are directed to consumers.

7
8 93. Defendants' false, misleading, and deceptive statements and
9 representations of fact, including but not limited to the Misrepresentations, were and
10 are likely to mislead a reasonable consumer acting reasonably under the
11 circumstances.

12
13 94. Defendants' false, misleading, and deceptive statements and
14 representations of fact, including but not limited to the Misrepresentations, have
15 resulted in consumer injury or harm to the public interest.

16
17 95. Plaintiff and members of the New York Subclass have been injured
18 because (a) they would not have purchased Designer Whey Protein Powder if they
19 had known that the product does not contain 100% whey protein and does not
20 contain 18 grams of 100% whey protein; (b) they paid a price premium for Designer
21 Whey Protein Powder based on Defendants' express and implied warranties; and (c)
22 Designer Whey Protein Powder did not have the characteristics, uses, or benefits as
23 promised, namely that the product contains "100% Premium Whey Protein," "100%
24 Premium Natural Whey Protein," and/or "18 grams" of 100% whey protein. As a
25 result, Plaintiff and members of the New York Subclass have been damaged either in
26
27
28

1 the full amount of the purchase price of Designer Whey Protein Powder or in the
2 difference in value between Designer Whey Protein Powder as warranted and the
3 product as actually sold.
4

5 96. As a result of Defendants' false, misleading, and deceptive statements
6 and representations of fact, including but not limited to the Misrepresentations,
7 Plaintiff has suffered and will continue to suffer economic injury.
8

9 97. Plaintiff and members of the New York Subclass suffered an
10 ascertainable loss caused by Defendants' Misrepresentations because they paid more
11 for Designer Whey Protein Powder than they would have had they known the truth
12 about the product.
13

14 98. On behalf of herself and other members of the New York Subclass,
15 Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover
16 her actual damages or five hundred dollars, whichever is greater, three times actual
17 damages, and reasonable attorneys' fees.
18

19
20 **COUNT VII**
21 **(Violation of California's Unfair Competition Law ("UCL"),**
22 **California Business & Professions Code §§ 17200, et seq.)**

23 99. Plaintiff repeats the allegations in the foregoing paragraphs as if fully
24 set forth herein.

25 100. Plaintiff brings this claim individually and on behalf of members of the
26 Class and New York Subclass against all Defendants.
27

28 101. Defendants are subject to California's Unfair Competition Law, Cal.

1 Bus. & Prof. Code §§ 17200, *et seq.* The UCL provides, in pertinent part: “Unfair
2 competition shall mean and include unlawful, unfair or fraudulent business practices
3 and unfair, deceptive, untrue or misleading advertising”
4

5 102. Defendants’ Misrepresentations and other conduct, described herein,
6 violated the “unlawful” prong of the UCL by violating GBL §§ 349 & 350 as
7 described herein, and by violating U.C.C. § 2-607.
8

9 103. Defendants’ Misrepresentations and other conduct, described herein,
10 violated the “unfair” prong of the UCL in that their conduct is substantially injurious
11 to consumers, offends public policy, and is immoral, unethical, oppressive, and
12 unscrupulous, as the gravity of the conduct outweighs any alleged benefits.
13

14 104. Defendants violated the “fraudulent” prong of the UCL by making the
15 Misrepresentations about Designer Whey Protein Powder, as described herein.
16

17 105. Defendants’ conduct took place in California because Defendants’
18 designed, marketed, and sold Designer Whey Protein Powder to hundreds of
19 thousands of consumers in California.
20

21 106. Plaintiff and the Class and New York Subclass lost money or property
22 as a result of Defendants’ UCL violations because (a) they would not have purchased
23 Designer Whey Protein Powder if they had known that the product does not contain
24 100% whey protein and does not contain 18 grams of 100% whey protein; (b) they
25 paid a price premium for Designer Whey Protein Powder based on Defendants’
26 express and implied warranties; and (c) Designer Whey Protein Powder did not have
27
28

1 the characteristics, uses, or benefits as promised, namely that the product contains
2 “100% Premium Whey Protein,” “100% Premium Natural Whey Protein,” and/or
3 “18 grams” of 100% whey protein.
4

5 **COUNT VIII**
6 **(Negligent Misrepresentation)**

7 107. Plaintiff repeats the allegations in the foregoing paragraphs as if fully
8 set forth herein.

9 108. Plaintiff brings this claim individually and on behalf of the members of
10 the Class and New York Subclass against all Defendants.
11

12 109. As discussed above, Defendants represented that Designer Whey
13 Protein Powder: (i) is “100% Premium Whey Protein,” (ii) is “100% Premium
14 Natural Whey Protein,” and (iii) contains “18 grams” of 100% whey protein, but
15 failed to disclose that the product contains free-form amino acids, including L-
16 glutamine and L-leucine, non-protein amino acids, including taurine, and other non-
17 whey ingredients. Thus, the Product is not “100% Premium Whey Protein,” is not
18 “100% Premium Natural Whey Protein,” and does not contain “18 grams” of 100%
19 whey protein. Defendants had a duty to disclose this information.
20
21
22

23 110. At the time Defendants made these representations, Defendants knew or
24 should have known that these representations were false or made them without
25 knowledge of their truth or veracity.
26

27 111. At an absolute minimum, Defendants negligently misrepresented and/or
28

1 negligently omitted material facts about Designer Whey Protein Powder.

2 112. The negligent misrepresentations and omissions made by Defendants,
3 upon which Plaintiff and Class members reasonably and justifiably relied, were
4 intended to induce and actually induced Plaintiff and Class members to purchase
5 Designer Whey Protein Powder.
6

7
8 113. Plaintiff and Class members would not have purchased Designer Whey
9 Protein Powder if the true facts had been known.

10 114. The negligent actions of Defendants caused damage to Plaintiff and
11 Class members, who are entitled to damages and other legal and equitable relief as a
12 result.
13

14 **COUNT IX**
15 **(Fraud)**

16 115. Plaintiff repeats the allegations in the foregoing paragraphs as if fully
17 set forth herein.
18

19 116. Plaintiff brings this claim individually and on behalf of the members of
20 the Class and New York Subclass against all Defendants.
21

22 117. As discussed above, Defendants made false and misleading
23 representations, including the Misrepresentations, and failed to disclose that the
24 Designer Whey Protein Powder contains free-form amino acids, including L-
25 glutamine and L-leucine, non-protein amino acids, including taurine, and other non-
26 whey ingredients. Thus, the Product is not “100% Premium Whey Protein,” is not
27
28

1 “100% Premium Natural Whey Protein,” and does not contain “18 grams” of 100%
2 whey protein. Defendants had a duty to disclose this information.

3
4 118. The false and misleading representations and omissions were made with
5 knowledge of their falsehood.

6
7 119. The false and misleading representations and omissions were made by
8 Defendants, upon which Plaintiff and members of the Class and Subclass reasonably
9 and justifiably relied, and were intended to induce and actually induced Plaintiff and
10 Class members to purchase Designer Whey Protein Powder.

11
12 120. The fraudulent actions of Defendants caused damage to Plaintiff and
13 members of the Class and Subclass, who are entitled to damages and other legal and
14 equitable relief as a result.

15
16 **PRAYER FOR RELIEF**

17 121. WHEREFORE, Plaintiff, individually and on behalf of all others
18 similarly situated, seeks a judgment against Defendants, as follows:

- 19
20 a. For an order certifying the nationwide Class and the New
21 York Subclass under Rule 23 of the Federal Rules of Civil
22 Procedure and naming Plaintiff as representative of the
23 Class and New York Subclass and Plaintiff’s attorneys as
24 Class Counsel to represent the Class and New York
25 Subclass;
26 b. For an order declaring that Defendants’ conduct violates
27 the statutes referenced herein;
28 c. For an order finding in favor of Plaintiff, the nationwide
Class, and the New York Subclass on all counts asserted
herein;
d. For compensatory, statutory, and punitive damages in
amounts to be determined by the Court and/or jury;

- e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable monetary relief;
- g. For injunctive relief as pleaded or as the Court may deem proper; and
- h. For an order awarding Plaintiff and the Class and New York Subclass their reasonable attorneys' fees and expenses and costs of suit.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury on all causes of action and issues so triable.

Dated: November 26, 2014

BURSOR & FISHER, P.A.

By: /s/ L. Timothy Fisher
L. Timothy Fisher

L. Timothy Fisher (State Bar No. 191626)
Annick M. Persinger (State Bar No. 272996)
Yeremey Krivoshey (State Bar No. 295032)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
 apersinger@bursor.com
 ykrivoshey@bursor.com

Attorneys for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Alison Reichert, individually and on behalf of all others similarly situated,

(b) County of Residence of First Listed Plaintiff Suffolk County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

L. Timothy Fisher, Bursor & Fisher, P.A. 1990 North California Boulevard, Suite 940, Walnut Creek, CA 94596 Tel: 925-300-4455

DEFENDANTS

Designer Protein, LLC, Trader Joe's Company,

County of Residence of First Listed Defendant San Diego County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'14CV2825 CAB DHB

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 1332(d) Brief description of cause: Mislabeled Protein Powder

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 5,000,000.01 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 11/26/2014 SIGNATURE OF ATTORNEY OF RECORD s/ L. Timothy Fisher

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

EXHIBIT A



BURSOR & FISHER
P.A.

888 SEVENTH AVENUE
NEW YORK, NY 10019
www.bursor.com

NEAL J. DECKANT
Tel: 646.837.7150
Fax: 212.989.9163
ndeckant@bursor.com

November 13, 2014

Via Certified Mail – Return Receipt Requested

Designer Protein, LLC
5050 Avenida Encinas, Suite 350
Carlsbad, CA 92008

Designer Protein, LLC
P.O. Box 2469
Carlsbad, CA 92018

Trader Joe's Company
800 S Shamrock Avenue
Monrovia, CA 91016

*Re: Demand Letter Pursuant to California Civil Code § 1782;
Violation of Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.;
Violation of U.C.C. §§ 2-313, 2-314; and all other applicable laws*

To Whom It May Concern:

This letter serves as a notice and demand for corrective action by Designer Protein, LLC (“Designer”) and Trader Joe’s Company (“Trader Joe’s”), arising from breaches of warranty under the Magnuson-Moss Warranty Act on behalf of our client, Alison Reichert, and a class of all similarly situated purchasers of Designer Whey 100% Premium Natural Whey Protein Powder (“Designer Whey Protein”). This letter also serves as notice and demand for corrective action arising from violations of numerous provisions of California law, including the Consumers Legal Remedies Act, Civil Code § 1770, including but not limited to subsections (a)(5), (7), and (9). This letter also serves as notice pursuant to U.C.C. § 2-607(3)(a) concerning the breaches of express and implied warranties described herein.

You have participated in the manufacture, marketing, and sale of Designer Whey Protein. Designer Whey Protein has been, and continues to be, marketed and sold as: (i) being “100% Premium Natural Whey Protein Powder,” and (ii) containing “19 grams” of 100% whey protein per serving (collectively, the “Misrepresentations”). In fact, Designer Whey Protein is not “100% Premium Natural Whey Protein,” and does not contain “19 grams” of 100% whey protein per serving, because Designer Whey Protein contains free form amino acids and non-whey ingredients. These amino acids include, but are not limited to, taurine, L-glutamine, and L-leucine. Accordingly, these representations, made on Designer Whey Protein’s labeling, are false and misleading.

Ms. Reichert purchased Designer Whey Protein at a Trader Joe's location in New York in reliance on the Misrepresentations. Designer expressly warranted that Designer Whey Protein's protein content is 100% from whey, and that the product contains only 100% whey protein. Designer breached these express warranties because Designer Whey Protein is not 100% whey protein, but includes amino acids and other non-whey ingredients. *See* U.C.C. § 2-313.

Designer's conduct is also a deceptive business practice under New York General Business Law Section 349, and constitutes false advertising under New York General Business Law Section 350.

Ms. Reichert is acting on behalf of a class defined as all persons in the United States who purchased Designer Whey Protein, and a subclass of class members who purchased Designer Whey Protein in the State of New York.

To cure these defects, we demand that you (1) cease and desist from further sales of mislabeled Designer Whey Protein; (2) issue an immediate recall of mislabeled Designer Whey Protein; and (3) make full restitution to all purchasers of Designer Whey Protein.

We further demand that you preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to, the following:

1. All documents concerning the design, development, supply, production, extraction, and/or testing of Designer Whey Protein;
2. All documents concerning the advertisement, marketing, or sale of Designer Whey Protein;
3. All documents concerning communications with any retailer involved in the marketing or sale of Designer Whey Protein;
4. All documents concerning communications with purchasers of Designer Whey Protein;
5. All documents concerning protein content testing;
6. All documents concerning communications with federal or state regulators; and
7. All documents concerning the total revenue derived from sales of Designer Whey Protein in the United States, New York, and California.

If you contend that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents promptly.

We are willing to negotiate to attempt to resolve the demands asserted in this letter. If you wish to enter into such discussions, please contact me immediately. If I do not hear from you promptly, I will conclude that you are not interested in resolving this dispute short of litigation.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Neal Deckant", with a long, sweeping flourish extending to the right.

Neal J. Deckant