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8 *and the putative classes*

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

12 CHAYLA CLAY, ERICA
13 EHRlichman, LOGAN REICHERT,
14 and CHRIS ROMAN, individually and
15 on behalf of all others similarly situated,

15 Plaintiffs,

16 v.

17 CYTOSPORT, INC., a California
18 Corporation,

18 Defendant.

Case No: 3:15-cv-00165-L-AGS

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

1. **VIOLATION OF CAL. BUS. & PROF. CODE §§ 17500, et seq.;**
2. **VIOLATION OF CAL. CIV. CODE §§ 1750, et seq.;**
3. **VIOLATION OF CAL. BUS. & PROF. CODE §§ 17200, et seq.**
4. **VIOLATION OF FLA. STAT. §§ 501.201, et seq.;**
5. **VIOLATION OF M.C.L. §§ 445.901, et seq.;**
6. **BREACH OF EXPRESS WARRANTY; and**
7. **VIOLATION OF 15 U.S.C. §§ 2301, et seq.**

JURY TRIAL DEMANDED

1 (collectively the “Muscle Milk Powder Products”) as containing a “Precision Protein
2 Blend” - highlighting that these products include proteins from multiple sources and
3 amino acids, such as L-Glutamine, to boost athletic performance.

4 4. Furthermore, consumers are wary of the presence of perceived unhealthy
5 ingredients and often avoid protein powders that contain high levels of fats, oils and
6 unnecessary fillers. Accordingly, Defendant labels a subset of its Muscle Milk products
7 as “lean” to impress upon the public that its products contain less fat than its competitors:
8 Defendant’s Muscle Milk: Lean Muscle Protein Powder, Muscle Milk Light: Lean
9 Muscle Protein Powder, Muscle Milk Naturals: Nature’s Ultimate Lean Muscle Protein,
10 Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder, and Monster Milk:
11 Lean Muscle Protein Supplement (collectively the “Lean Muscle Milk Products”).

12 5. However, despite Cytosport’s labeling of the Muscle Milk RTD Products,
13 Muscle Milk Powder Products and the Lean Muscle Milk Products to the contrary,
14 Defendant’s products do not contain the ingredients and characteristics advertised.
15 Indeed, Cytosport’s Muscle Milk RTD Products do not contain the quantity of protein
16 that is advertised, and thus warranted, on each of the Product’s labels. But instead these
17 Products contain significantly less protein than what is claimed and displayed. Likewise,
18 Cytosport expressly advertises and labels, and therefore warrants, that the Muscle
19 Milk Powder Products’ proprietary “Precision Protein Blend” contains L-Glutamine, an
20 amino acid that aids in muscle recovery and is essential for the proper operation of the
21 immune system. Nevertheless, Cytosport’s Muscle Milk Powder Products do not
22 contain free-form L-Glutamine in *any* appreciable amount.

23 6. Cytosport also labels each of its Lean Muscle Milk Products as “lean” and
24 containing “Lean Lipids” - suggesting to reasonable consumers that these powders
25 contain less fat than other similar supplements on the market. This is demonstrably false.
26 Defendant’s Lean Muscle Milk Products contain no less fat than the majority of its
27 competitors. In fact, Defendant fortifies its Lean Muscle Milk Products with sunflower
28 and canola oils, considerable sources of fat. Therefore, Defendant has no basis to label

1 its Lean Muscle Milk Products as “lean.”

2 7. By marketing their Muscle Milk Powder Products as containing a “protein
3 blend” which includes L-Glutamine, but failing to actually include this amino acid
4 within the Products, and by misstating the actual protein content of the Muscle Milk
5 RTD Products, Defendant violates federal regulations designed to prevent deceptive
6 food labeling and breaches an express warranty created by its labeling. Additionally,
7 federal regulations also prevent Defendant’s misleading use of the term “lean” to
8 describe its products that are not. Defendant’s multiple and prominent
9 misrepresentations regarding its protein supplements form a pattern of unlawful and
10 unfair business practices that visits harms on the consuming public.

11 8. These actions violate a number of state consumer protections laws,
12 including the California Unfair Competition Law (“UCL”), the California False
13 Advertising Law (“FAL”), the California Consumer Legal Remedies Act (“CLRA”),
14 Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”) and Michigan’s
15 Consumer Protection Act (“MCPA”). These actions have injured Plaintiffs and
16 members of the Class, therefore Plaintiffs seek actual damages, restitution and/or
17 disgorgement, punitive and statutory damages, and any injunctive or equitable relief
18 deemed proper by the Court.

19 **II. JURISDICTION AND VENUE**

20 9. This Court has jurisdiction over the subject matter of this action pursuant
21 to the Class Action Fairness Act, 28 U.S.C. §§1332(d), 1446, and 1453(b). Plaintiffs
22 allege that they and the Class members are citizens of different states from Defendant,
23 and the cumulative amount in controversy for Plaintiffs and the Class exceeds \$5
24 million, exclusive of interest and costs.

25 10. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) because
26 many of the acts and transactions giving rise to the violations of law complained of
27 herein occurred in this District, and because Defendant:

28 (a) conducts business itself or through agent(s) in this District, by advertising,

1 marketing, distributing and/or manufacturing its products in this District; and/or

2 (b) is licensed or registered in this District; and/or

3 (c) otherwise has sufficient contacts within this District to justify Defendant
4 being fairly brought into Court in this District.

5 **III. PARTIES**

6 11. Plaintiff Chayla Clay (“Clay”) is, and at all times relevant hereto was, a
7 resident of California and a citizen of California. Plaintiff Clay has purchased several of
8 Defendant’s Muscle Milk products in the past four years, including Genuine Muscle
9 Milk: Protein Nutrition Shakes and Muscle Milk: Lean Muscle Protein Powder. Plaintiff
10 Clay most recently purchased Defendant’s Muscle Milk: Lean Muscle Protein Powder
11 at a GNC store located in San Diego, California on or about November 2013.

12 12. Plaintiff Logan Reichert (“Reichert”) is, and at all times relevant hereto
13 was a resident of Florida and a citizen of Florida. Plaintiff Reichert has purchased
14 several of Defendant’s Muscle Milk products, including Genuine Muscle Milk: Protein
15 Nutrition Shakes and Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder.
16 Plaintiff Reichert most recently purchased Defendant’s Muscle Milk Pro Series 50: Lean
17 Muscle Mega Protein Powder at a GNC store located in Pensacola, Florida on or about
18 January 2014.

19 13. Plaintiff Erica Ehrlichman (“Ehrlichman”) is, and at all times relevant
20 hereto was, a resident of Michigan and a citizen of Michigan. Plaintiff Ehrlichman has
21 purchased several of Defendant’s Muscle Milk products, including Muscle Milk Natural
22 Lean Protein Powder and Muscle Milk Protein Nutrition Shakes. Plaintiff Ehrlichman
23 most recently purchased Muscle Milk Natural Lean Protein Powder at the Better Health
24 Store located in Grosse Pointe Woods, Michigan on or about May 26, 2014, but has also
25 purchased Muscle Milk products at Kroger and Costco.

26 14. Plaintiff Chris Roman (“Roman”) is currently a resident of Nevada and a
27 citizen of Nevada. At other relevant times, he was a resident of California and a citizen
28 of California, and then a resident of Montana and a citizen of Montana. Plaintiff Roman

1 regularly purchased Muscle Milk Lean Muscle Protein Powder at Costco and GNC in
2 Eureka, California. In early 2016, Plaintiff Roman moved to Montana, where he
3 purchased Muscle Milk Lean Muscle Protein Powder at GNC in Havre, Montana. He
4 most recently purchased Muscle Milk Protein Nutrition Shakes at a 7-11 convenience
5 store in Las Vegas, Nevada, in or around September 2016.

6 15. Defendant Cytosport, Inc. is a California Corporation with its headquarters
7 in Benicia, California. Cytosport manufactures sports-oriented nutritional products.
8 Cytosport manufactures, markets, advertises, distributes and sells a line of Muscle Milk
9 and Cytosport branded protein powders and RTD products throughout the United States.
10 All of Cytosport's product labeling and advertising for its various Muscle Milk and
11 Cytosport brand products, sold and distributed nationwide, are and were created,
12 controlled and distributed by management located at Cytosport's Benicia, California
13 headquarters.

14 **IV. SUBSTANTIVE ALLEGATIONS**

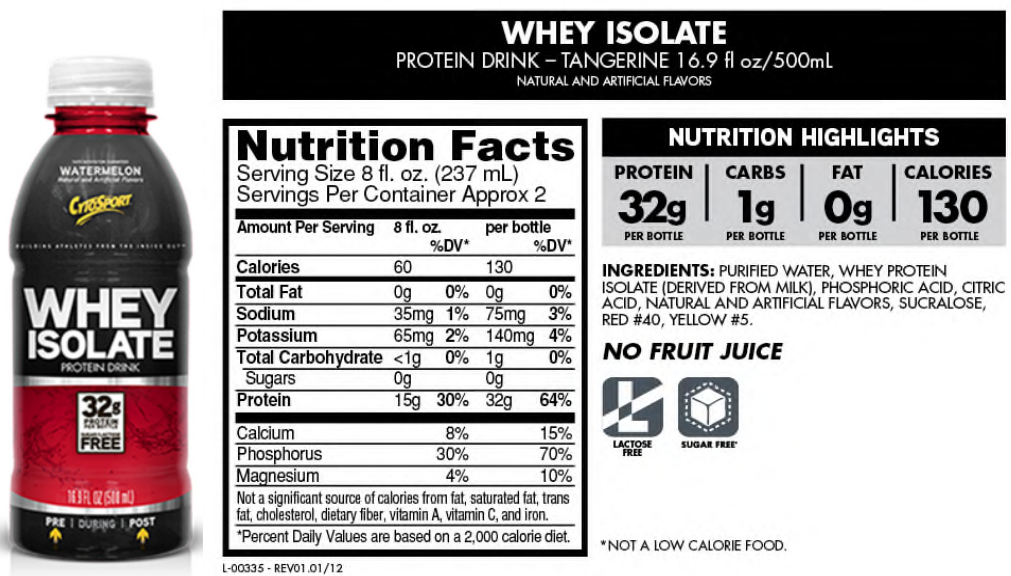
15 **A. Misrepresentations Regarding Defendant's RTD Products' Protein**
16 **Content**

17 16. It is axiomatic that the amount of reported protein contained within
18 Defendant's Muscle Milk RTD Products is material to any consumer seeking to
19 purchase a protein supplement. Accordingly, Defendant fortifies each Muscle Milk
20 RTD Product with Milk Protein Isolate as its primary, and most important, ingredient.
21 Milk Protein Isolate differs from raw milk because it is processed to include a higher
22 concentration of protein and removes much of the fats and carbohydrates traditionally
23 found in milk and other naturally occurring beverages. Thus, the type of concentrated
24 protein within the Muscle Milk RTD Product is particularly prized.

25 17. Defendant labels and advertises all of its protein supplements, especially
26 its Muscle Milk RTD Products, in a manner that highlights the amount of added protein
27 contained within. Each Muscle Milk RTD Product lists its respective protein content on
28 each Product's front label, directly below the title of the Product, as well as on the back

1 nutritional label. Such representations constitute an express warranty regarding the
 2 Muscle Milk RTD Products’ protein content.

3 18. For example, the *Cytosport Whey Isolate Protein Drink*’s product label
 4 states plainly that it is fortified with 32 grams of protein on the front of the packaging
 5 and also indicates that there are 32 grams of protein per bottle (15 grams per serving) in
 6 the Nutrition Facts section¹:



WHEY ISOLATE
 PROTEIN DRINK – TANGERINE 16.9 fl oz/500mL
 NATURAL AND ARTIFICIAL FLAVORS

Nutrition Facts			
Serving Size 8 fl. oz. (237 mL)			
Servings Per Container Approx 2			
Amount Per Serving	8 fl. oz.	per bottle	
	%DV*	%DV*	
Calories	60	130	
Total Fat	0g 0%	0g 0%	
Sodium	35mg 1%	75mg 3%	
Potassium	65mg 2%	140mg 4%	
Total Carbohydrate	<1g 0%	1g 0%	
Sugars	0g	0g	
Protein	15g 30%	32g 64%	
Calcium	8%	15%	
Phosphorus	30%	70%	
Magnesium	4%	10%	

NUTRITION HIGHLIGHTS

PROTEIN	CARBS	FAT	CALORIES
32g	1g	0g	130
PER BOTTLE	PER BOTTLE	PER BOTTLE	PER BOTTLE

INGREDIENTS: PURIFIED WATER, WHEY PROTEIN ISOLATE (DERIVED FROM MILK), PHOSPHORIC ACID, CITRIC ACID, NATURAL AND ARTIFICIAL FLAVORS, SUCRALOSE, RED #40, YELLOW #5.

NO FRUIT JUICE

LACTOSE FREE **SUGAR FREE**

Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, vitamin A, vitamin C, and iron.
 *Percent Daily Values are based on a 2,000 calorie diet.

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*NOT A LOW CALORIE FOOD.

18 However, Defendant’s labeling is false. According to independent scientific testing of
 19 the *Cytosport Whey Isolate* product, conducted by Labdoor and others, the actual total
 20 per bottle contents of protein is approximately 27.3 grams as opposed to 32 grams
 21 of protein claimed by Defendant – a substantial difference. Labdoor, a company that
 22 specializes in providing consumers the necessary information needed to make informed
 23 purchasing decisions, grades protein supplements based on, *inter alia*, the accuracy of
 24 its labeling. Defendant’s labeling practices were so egregious, that Labdoor assigned
 25 Defendant’s Whey Isolate drink a “D” grade.

26 19. Similarly, the *Monster Milk: Protein Power Shake*’s product label states

27 _____
 28 ¹ All product images contained within this complaint were taken from Defendant’s website.

1 that the product fortified with 45 grams of protein on the front of the packaging and
 2 indicates that there are 45 grams of protein per bottle (and 18 grams per serving) in the
 3 Nutrition Facts section:



MONSTER MILK®
 PROTEIN POWER SHAKE – CHOCOLATE 20 fl oz/591 mL
 NATURALLY AND ARTIFICIALLY FLAVORED

Nutrition Facts			
Serving Size 8 fl. oz. (237 mL)			
Servings per Container 2.5			
Amount	Per Serving	Per Bottle	%DV*
Calories	120	310	
Calories from Fat	30	80	
Total Fat	3.5g	9g	14%
Saturated Fat	1.5g	4g	20%
Trans Fat	0g	0g	
Polyunsaturated Fat	0.5g	1g	
Monounsaturated Fat	1.5g	4g	
Cholesterol	10mg	25mg	8%
Sodium	190mg	480mg	20%
Potassium	620mg	1550mg	44%
Total Carbohydrate	5g	13g	4%
Dietary Fiber	2g	5g	20%
Sugars	<1g	1g	
Protein	18g	45g	90%
Calcium			20% 50%
Iron			2% 6%
Thiamin			40% 100%
Riboflavin			40% 100%

NUTRITION HIGHLIGHTS			
PROTEIN	CARBS	FAT	CALORIES
18g	5g	3.5g	120
PER 8 fl-oz SERVING	PER 8 fl-oz SERVING	PER 8 fl-oz SERVING	PER 8 fl-oz SERVING

INGREDIENTS: WATER, MILK PROTEIN ISOLATE, CALCIUM SODIUM CASEINATE, ALKALIZED COCOA POWDER, LESS THAN 1% OF: MALTODEXTRIN, SUNFLOWER OIL, SOLUBLE CORN FIBER, MEDIUM CHAIN TRIGLYCERIDES, NATURAL AND ARTIFICIAL FLAVORS, DIPOTASSIUM PHOSPHATE, WHEY PROTEIN CONCENTRATE, CELLULOSE GUM AND GEL, CANOLA OIL, CREATINE MONOHYDRATE, SOY LECITHIN, POTASSIUM CHLORIDE, SODIUM HEXAMETAPHOSPHATE, MAGNESIUM PHOSPHATE, L-LEUCINE, TRICALCIUM PHOSPHATE, ACESULFAME POTASSIUM, POTASSIUM CITRATE, L-ISOLEUCINE, L-VALINE, CARRAGEENAN, MONOSODIUM PHOSPHATE, SUCRALOSE, PYRIDOXINE HYDROCHLORIDE, RIBOFLAVIN, THIAMINE MONONITRATE, FOLIC ACID, CHROMIUM CHLORIDE, CYANOCOBALAMIN.

CONTAINS INGREDIENTS DERIVED FROM MILK AND SOY.

ADDED VITAMINS & MINERALS

GLUTEN FREE

LACTOSE FREE

15 Again, the above labeling proves false. Upon testing the *Monster Milk: Protein Power*
 16 *Shake's* protein content, the actual total per bottle contents of protein was shown to be
 17 between 36.9 and 41.55 grams as opposed to 45 grams of protein claimed by
 18 Defendant. Labdoor assigned this product a failing grade (“F”) due to these
 19 misrepresentations.

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20. The *Genuine Muscle Milk: Protein Nutrition Shake* (17 fl. oz.) label expressly states that it is fortified with 32 grams protein per bottle on the front of the packaging, and also indicates there are 32 grams of protein per bottle in the product’s Nutrition Facts section:



MUSCLE MILK®
 PROTEIN NUTRITION SHAKE – BANANA CRÈME 17 fl oz/500mL
 NATURALLY AND ARTIFICIALLY FLAVORED

Nutrition Facts
 Serving Size 8 fl-oz (237mL)
 Servings Per Container approx 2

Amount Per	8 fl oz	17 fl oz	
Calories	160	320	
Calories from Fat	70	140	
	% Daily Value*	% Daily Value*	
Total Fat	8g	16g	25%
Saturated Fat	2g	4g	20%
Trans Fat	0g	0g	
Polyunsaturated Fat	1.5g	2.5g	
Monounsaturated Fat	4.5g	9g	
Cholesterol	5mg	15mg	5%
Sodium	230mg	470mg	20%
Potassium	470mg	990mg	20%
Total Carbohydrate	6g	12g	4%
Dietary Fiber	0g	0g	4%
Sugars	2g	4g	
Protein	15g	32g	64%
Vitamin A	15%	35%	
Vitamin C	15%	35%	
Calcium	15%	35%	
Iron	15%	35%	
Vitamin D	15%	35%	
Vitamin E	15%	35%	
Thiamin	15%	35%	

NUTRITION HIGHLIGHTS

PROTEIN	CARBS	FAT	CALORIES
15g	6g	8g	160
PER 8 fl-oz SERVING	PER 8 fl-oz SERVING	PER 8 fl-oz SERVING	PER 8 fl-oz SERVING

INGREDIENTS: WATER, CALCIUM SODIUM CASEINATE, MILK PROTEIN ISOLATE, MALTODEXTRIN, SUNFLOWER OIL, CANOLA OIL, LESS THAN 1% OF: CRYSTALLINE FRUCTOSE, MEDIUM CHAIN TRIGLYCERIDES, DIPOTASSIUM PHOSPHATE, CELLULOSE GUM AND GEL, WHEY PROTEIN CONCENTRATE, MAGNESIUM PHOSPHATE, SOY LECITHIN, NATURAL AND ARTIFICIAL FLAVORS, POTASSIUM CHLORIDE, SODIUM HEXAMETAPOSPHATE, CARRAGEENAN, TRICALCIUM PHOSPHATE, ACESULFAME POTASSIUM, SALT, POTASSIUM CITRATE, ASCORBIC ACID, FERRIC PYROPHOSPHATE, SODIUM PHOSPHATE, DICALCIUM PHOSPHATE, SUCRALOSE, DL-ALPHA TOCOPHERYL ACETATE, D-CALCIUM PANTOTHENATE, NIACINAMIDE, ZINC OXIDE, COPPER GLUCONATE, VITAMIN A PALMITATE, YELLOW #5, PYRIDOXINE HYDROCHLORIDE, THIAMINE MONONITRATE, RIBOFLAVIN, CHROMIUM CHLORIDE, FOLIC ACID, BIOTIN, POTASSIUM IODIDE, CHOLECALCIFEROL, CYANOCOBALAMIN.

CONTAINS INGREDIENTS DERIVED FROM MILK AND SOY.
MUSCLE MILK PROVIDES NUTRIENTS FOUND IN NATURAL MILK THAT ARE IMPORTANT FOR BUILDING MUSCLES AND BONES.

However, this product also includes less protein than advertised and warranted. According to Labdoor testing of the *Genuine Muscle Milk: Protein Nutrition Shake* (17 fl. Oz.) product, the actual total per container protein contents is approximately 20.8 grams, far less than the 32 grams of protein claimed by Defendant. This Product also received a failing grade (“F”) from Labdoor.

21. Likewise, the 14 fl. Oz. container of Defendant’s *Genuine Muscle Milk: Protein Nutrition Shake* is also mislabeled. The *Genuine Muscle Milk* 14 fl. Oz. RTD product is reportedly fortified with 25 grams of protein per package, according to both its front label and Nutrition Facts. And like its larger cousin, the 14 fl. Oz. *Genuine Muscle Milk* RTD product contains less protein than reported. Based on independent testing, the actual protein content of Defendant’s *Genuine Muscle Milk* 14 fl. Oz. RTD product is approximately 22.15 grams per bottle.

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22. Defendant also misrepresents the protein contents of its *Muscle Milk Pro Series 40: Mega Protein Shakes*. For example, the *Muscle Milk Pro Series 40 Mega Protein Shake*'s (14 fl. Oz.) label states that the product is fortified with 40 of grams Protein on the front of the packaging and this representation is echoed on in the Product's Nutrition Facts section:



MUSCLE MILK® PRO SERIES 40
 MEGA PROTEIN SHAKE – CRUSHING COOKIES 'N CRÈME 14 fl oz/414mL
NATURALLY AND ARTIFICIALLY FLAVORED

Nutrition Facts		NUTRITION HIGHLIGHTS			
Serving Size 14 fl. oz. (414 mL) Servings Per Container 1		PROTEIN 40g	CARBS 8g	FAT 3g	CALORIES 220
Amount Per Serving					
Calories 220 <small>Calories from Fat 25</small>					
<small>% Daily Value*</small>					
Total Fat 3g	5%				
Saturated Fat 1g	5%				
<i>Trans</i> Fat 0g					
Polyunsaturated Fat 0.5g					
Monounsaturated Fat 1.5g					
Cholesterol 25mg	8%				
Sodium 370mg	15%				
Potassium 660mg	19%				
Total Carbohydrate 8g	3%				
Dietary Fiber 2g	8%				
Sugars 2g					
Protein 40g	80%				
Vitamin A 25%	Vitamin C 25%				
Calcium 50%	Iron 30%				
Vitamin D 25%	Vitamin E 25%				
Thiamin 25%	Riboflavin 25%				
Niacin 25%	Vitamin B6 25%				
Folate 25%	Vitamin B12 25%				
Biotin 25%	Pantothenic Acid 25%				
Phosphorus 70%	Iodine 25%				

INGREDIENTS: WATER, MILK PROTEIN ISOLATE, CALCIUM SODIUM CASEINATE, LESS THAN 1% OF: MALTODEXTRIN, INULIN, NATURAL AND ARTIFICIAL FLAVORS, CANOLA OIL, SUNFLOWER OIL, CELLULOSE GUM AND GEL, DIPOTASSIUM PHOSPHATE, WHEY PROTEIN CONCENTRATE, SOY LECITHIN, MAGNESIUM PHOSPHATE, POTASSIUM CHLORIDE, SODIUM HEXAMETAPHOSPHATE, DIMAGNESIUM PHOSPHATE, SODIUM PHOSPHATE, ACESULFAME POTASSIUM, POTASSIUM CITRATE, ASCORBIC ACID, CARRAGEENAN, FERRIC PYROPHOSPHATE, DICALCIUM PHOSPHATE, SUCRALOSE, TRICALCIUM PHOSPHATE, DL-ALPHA TOCOPHERYL ACETATE, D-CALCIUM PANTOTHENATE, NIACINAMIDE, ZINC OXIDE, COPPER GLUCONATE, VITAMIN A PALMITATE, PYRIDOXINE HYDROCHLORIDE, THIAMINE MONONITRATE, RIBOFLAVIN, CHROMIUM CHLORIDE, FOLIC ACID, BIOTIN, POTASSIUM IODIDE, CHOLECALCIFEROL, CYANOCOBALAMIN.

CONTAINS INGREDIENTS DERIVED FROM MILK AND SOY.
MUSCLE MILK PRO SERIES PROVIDES NUTRIENTS FOUND IN NATURAL MILK THAT ARE IMPORTANT FOR BUILDING MUSCLES AND BONES.



ADDED
VITAMINS
& MINERALS



GLUTEN
FREE

But testing of the *Muscle Milk Pro Series 40 Mega Protein Shakes* reveal that the actual total protein content per bottle was shown to be approximately 36.18 grams, short of the 40 grams of protein claimed on the Product's packaging.

23. Such misrepresentations regarding the contents and ingredients of Defendant's Muscle Milk RTD Products are unlawful under both state and federal law. The Federal Food, Drug, and Cosmetic Act ("FDCA"), passed by Congress in 1938, grants the Food and Drug Administration ("FDA") power to ensure "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2). In 1990, Congress amended the FDCA with the Nutrition Labeling and Education Act ("NLEA"), which sought to clarify and strengthen the FDA's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about

1 nutrients in foods. 21 U.S.C. §§ 343, *et seq.*

2 24. Defendant's deceptive statements violate 21 U.S.C. § 343(a)(1), which
3 deems food (including nutritional supplements) misbranded when the label contains a
4 statement that is "false or misleading in any particular." Federal regulations also dictate
5 the manner in which Defendant must label its product and the methods it must use to
6 determine the protein contents of its product. Defendant failed to ensure the accuracy of
7 its Muscle Milk RTD Products' labels in accordance with these federal regulations.

8 25. California prohibits the misbranding of food in a way that parallels the
9 FDCA through the "Sherman Law," HEALTH & SAF. CODE § 109875 *et seq.* The
10 Sherman Law explicitly incorporates by reference "[a]ll food labeling regulations and
11 any amendments to those regulations adopted pursuant to the FDCA," as the food
12 labeling regulations of CAL. HEALTH & SAF. CODE, § 110100, subd. (a). Accordingly,
13 the Sherman Law also provides that food is misbranded "if its labeling is false or
14 misleading in any particular." *Id.*

15 26. Defendant's deceptive statements also violate FLORIDA STATUTE §
16 500.11(1)(a) and MICHIGAN FOOD LAW ACT 92 of 2000 which also deem food (including
17 nutritional supplements) misbranded when the labels contains a statement that is "false
18 or misleading in any particular."

19 27. Defendant's representations regarding the protein contents of its Muscle
20 Milk RTD Products are material. Reasonable consumers of protein supplements base
21 their purchasing decisions on the advertised and warranted amount of protein contain
22 therein. Additionally, consumers reasonably rely of Defendant's label to accurately
23 determine the identity and amount of any dietary ingredients included within the
24 Defendant's products. Accordingly, Plaintiffs and Class Members, as reasonable
25 consumers, were materially misled by Defendant's representations regarding the true
26 nature of the Muscle Milk RTD Products' protein contents.

27 28. Further, such misrepresentations also breach Defendant's express warranty
28 that each Muscle Milk RTD Product contains protein in the amount listed on its label.

1 29. The difference between the Muscle Milk RTD Products promised and the
2 Products sold is significant and material. The amount of actual protein provided, and
3 the measure of protein per serving/container, has real impacts on the benefits provided
4 to consumers by the Products and the actual value of the Products. Persons requiring a
5 certain amount of protein supplementation, whether as part of fitness regimen or for
6 particular health needs, are left to ingest less protein than Defendant states will be
7 provided.

8 30. Because Plaintiffs and Class Members purchased a product that contains
9 less protein than advertised and warranted, Plaintiffs and Class Members have suffered
10 injury-in-fact. Misbranded food products cannot legally be manufactured, held,
11 advertised, distributed or sold. Thus, misbranded food has no economic value and is
12 worthless as a matter of law, and purchasers of misbranded food are entitled to a
13 restitution refund of the purchase price of the misbranded food. Additionally, had
14 Plaintiffs and Class Members known the true nature of the protein content of the Muscle
15 Milk RTD Products, they would not have purchased such Products, or would have only
16 paid for the protein actually delivered with the Products.

17 **B. Defendant Mislabels its Muscle Milk Powder Products**

18 31. In addition to mislabeling its products' protein contents, Defendant also
19 misrepresents the amount of L-Glutamine contained in the Muscle Milk Powder
20 Products.

21 ***1. L-Glutamine and its Function in the Human Body***

22 32. Amino acids are organic compounds chemically composed of amine (-
23 NH₂) and carboxylic acid (-COOH) groups, along with a side-chain specific to each
24 amino acid. The key elements found within all amino acids are carbon, hydrogen,
25 oxygen, and nitrogen, though other elements may be found in the side-chains of certain
26 amino acids. Based how these elements are structured will determine the amino acid
27 type.

28 33. Amino acids play an important role in the human body, where they are used

1 to synthesize proteins, aid in the function of the bodily systems, and provide a source of
2 energy. But not all amino acids are equally needed by the body or have the same
3 physiological benefits. Thus, there are certain amino acids that are more important than
4 others. For example, of the twenty-two standard amino acids, nine amino acids are called
5 "*essential*" for humans because they cannot be created from other compounds by the
6 body and must be taken in through an individual's diet. Six other amino acids are
7 considered "*conditionally essential*" meaning that the body may not be able to create
8 these amino acids in all circumstances.

9 34. When several amino acids are linked together by peptide bonds, they form
10 long chains called proteins. Although proteins consists entirely of amino acids, bonded
11 and unbonded amino acids are digested and absorbed differently by the human body.
12 Generally, unbonded amino acids are absorbed faster by the body than proteins. Thus,
13 a protein that contains particular amino acids is not utilized the same as ingesting
14 unbonded amino acids of the same type and quantity. This is the reason that Defendant,
15 and other supplement producers, fabricated both protein powders (such as the Muscle
16 Milk Powder Products) and amino acid dietary supplements which contain only
17 unbonded amino acids.² Indeed, unbonded amino acids supplements are often more
18 expensive, and for some consumers more sought-after, because while proteins can be
19 readily obtained from different foods, many unbonded amino acids are more difficult,
20 if not impossible, to obtain through a traditional diet and thus can only be acquired
21 through expensive processing.

22 35. L-glutamine (or glutamine) is one of the twenty-two amino acids found in
23 the human body and is considered a conditionally essential amino acid. L-glutamine is
24 found circulating in the blood, as well as stored in the skeletal muscles. Serving several
25 functions in the body, L-glutamine has been linked to protein and muscle synthesis. In
26 addition, L-glutamine, even in small amounts, has shown to increase the amount of

27 _____
28 ² See, e.g., Defendant's Muscle Milk Pro Series Amino: Amino Acid Dietary
Supplements. <http://www.muscle milk.com/products/bars1/pro-series-50-2/>

1 growth hormone levels by over 400%.³ L-glutamine also serves an important role in the
 2 immune system, and decreases in L-glutamine availability in the blood results in
 3 immunosuppression.⁴

4 36. L-glutamine supplementation is particularly important for athletes as
 5 strenuous physical exercise, as well as exhaustive training programs, tends to deplete
 6 the body's natural stores of L-glutamine due to lowered L-glutamine synthesis and
 7 enhanced uptake by liver and immune cells.⁵ Accordingly, without supplementation,
 8 many athletes can experience decreased immune system function during recovery
 9 periods, a time at which they are more vulnerable to disease. Increased L-glutamine
 10 availability during exercise is also associated with decreased muscle loss due to muscle
 11 catabolism and decreased inflammation - health benefits associated with optimal
 12 physical training.⁶ Accordingly, many consumers specifically seek out supplements
 13 fortified with L-glutamine when selecting a product to complement their workout
 14 regime.

15 2. *Misrepresentations Regarding Defendant's "Protein Blend"*

16 37. Defendant markets its Muscle Milk Powder Products as containing a
 17 "protein blend" for athletes. To support these claims, Defendant states in its marketing
 18 material that it has developed and fabricated "a unique mix of complete multi-source
 19 proteins" known as their "Precision Protein Blend" with "calcium sodium caseinate,
 20 milk protein isolate, whey protein isolate, whey protein hydrolysate, whey protein
 21 concentrate, lactoferrin, L-glutamine and taurine, which provide amino acids... to help
 22

23 ³ See Welbourne TC, *Increased plasma bicarbonate and growth hormone after an*
 24 *oral glutamine load*, 61(5) Am J Clin Nutr. 1058-61 (1995)
 (<http://www.ncbi.nlm.nih.gov/pubmed/7733028>)

25 ⁴ See Calder PC, Yaqoob P., *Glutamine and the immune system*, 17(3) Amino
 Acids 227-41 (1999) (<http://www.ncbi.nlm.nih.gov/pubmed/10582122>)

26 ⁵ See Agostini F, Biolo G., *Effect of physical activity on glutamine metabolism*,
 27 13(1) Curr Opin Clin Nutr Metab Care. 58-64 (2010) (<http://www.ncbi.nlm.nih.gov/pubmed/19841583>)

28 ⁶ See *id.*; http://etd.lsu.edu/docs/available/etd-06162005142747/unrestricted/Piattoly_thesis.pdf

1 you recover from exercise and build muscle.” (Emphasis added). Defendant directs that
2 its products should be used as a dietary supplement, *i.e.*, that they should be added to
3 liquids (such as water, milk or smoothies) or other foods (such as pancakes, bars, and
4 other snacks) to supplement normal dietary intake and state its products are excellent
5 for “individuals looking to build size and gain muscle mass.”

6 38. Similarly, each of the Muscle Milk Powder Products’ labels states that they
7 contain a “protein blend” that includes “CALCIUM SODIUM CASEINATE, MILK
8 PROTEIN ISOLATE, WHEY PROTEIN ISOLATE, WHEY PROTEIN
9 HYDROLYSATE, WHEY PROTEIN CONCENTRATE, LACTOFERRIN, **L-**
10 **GLUTAMINE** AND TAURINE.” (Emphasis added).

11 39. By listing L-glutamine in the products’ nutritional panels, separate from
12 the Muscle Milk Powder Products’ primary protein sources (*e.g.*, calcium sodium
13 caseinate, milk protein isolate, whey protein isolate, whey protein hydrolysate, whey
14 protein concentrate, and lactoferrin), Defendant asserts that each Muscle Milk Powder
15 Product is fortified with unbonded L-glutamine amino acids. However, despite
16 advertising, labeling and warranting that its Muscle Milk Powder Products include free-
17 form L-glutamine, these Products do not contain *any* unbonded L-glutamine amino
18 acids. Simply put, Defendant’s consumers are not getting the ingredients listed on each
19 Product’s label, for which they have paid a premium.

20 40. Undeniably listing an ingredient, such as L-glutamine, in a product’s
21 mandated nutritional labeling and then failing to include said ingredient is unlawful
22 under federal and state law. Federal statutes and regulations require that all ingredients
23 added to a food product for their functional effect to be listed in descending order of
24 predominance. *See* 21 U.S.C. § 343(i); 21 C.F.R. §§ 101.2, 101.4, 101.100(a)(3)(ii)(c).
25 Failure to list an ingredient, or listing ingredients which are not contained in a product,
26 shall render a food misbranded and therefore its sale will be deemed unlawful. 21 U.S.C.
27 §§ 343(a), 331(a). The above laws, and all regulations enacted pursuant thereto, are
28 incorporated into California, Florida and Michigan law. CAL. HEALTH & SAF. CODE §

1 110100, FLORIDA STATUTE § 500.11(1)(a) and MICHIGAN FOOD LAW Act 92 of 2000.
2 Thus, a violation of federal food labeling laws is an independent violation of California,
3 Florida and Michigan law and actionable as such.

4 41. In violation of 21 U.S.C. §§ 343(a), Defendant misleads consumers by
5 including an ingredient in each Muscle Milk Powder Product's nutritional labels which
6 is not actually included in the products themselves. L-glutamine fortification is
7 important for athletes, particularly those who engage in intense physical exercise
8 routines or exhaustive long-term fitness programs for the reasons stated above. Thus,
9 Defendant's representations that its Muscle Milk Powder Products contain unbonded L-
10 glutamine, when they in fact do not, are misleading and injurious to reasonable
11 consumers.

12 42. Furthermore, Cytosport's Muscle Milk Powder Products are a dietary
13 supplement under 21 U.S.C. § 321(ff). Had Cytosport elected to classify its Muscle Milk
14 Powder Products as a dietary supplement, as it arguably should have, Defendant would
15 have had to separately list the identity of each unbonded amino acids and their amounts
16 within the nutrition label, instead of being allowed to include them with the ingredient
17 list under "protein blend." 21 C.F.R. § 101.4. This would have put customers on better
18 notice that free form L-glutamine is not present in the Muscle Milk Powder Products in
19 any significantly appreciable amounts. However, Defendant instead labeled its Muscle
20 Milk Powder Products as a food, and included L-glutamine as part of their "protein
21 blend," to obfuscate its unfair and illegal labeling business practices.⁷

22 43. By specifically listing that L-glutamine as a separate ingredient contained
23 in its Muscle Milk Powder Products, Cytosport warrants that unbonded L-glutamine
24 would be present in Muscle Milk Powder Products in an appreciable amount (or at least
25 in an amount that is greater than the ingredients listed below it on the Products' label).

26
27 ⁷ For example, Defendant's Muscle Milk Pro Series Amino: Amino Acid Dietary
28 Supplement's label specifically lists the amount of each amino acid with the product.
<http://www.muscle milk.com/products/bars1/pro-series-50-2/>

1 Defendant breached this express warranty by selling a product that did not, in fact,
2 contain *any* measurable amount of unbonded L-glutamine.

3 44. Again, the difference between the Product promised and the Product sold
4 is significant. The L-glutamine fortification has a real impact on the benefits provided
5 to consumers by the Products and the actual value of the Products themselves - otherwise
6 L-glutamine would not have been advertised as an integral part of Defendant's
7 "Precision Protein Blend" on the Products' label.

8 45. Persons requiring a certain amount of L-glutamine supplementation,
9 whether as part of a fitness regimen or for other health-related reasons, are left to ingest
10 less L-glutamine than Defendant's Muscle Milk Powder Products state they will
11 provide. By purchasing Defendant's product, consumers are getting no more L-
12 glutamine than they would otherwise receive by consuming a similar protein supplement
13 that is not represented as being fortified with free-form L-glutamine. Thus, Plaintiffs
14 and members of the Class suffer actual injuries, as L-glutamine supplements
15 independently sell for significant amounts. Had Plaintiffs and members of the Class
16 known the true nature of the Muscle Milk Powder Products L-glutamine content, they
17 would not have purchased Defendant's protein powders or alternatively paid
18 significantly less for them.

19 **C. Misrepresentations Regarding Defendant's Lean Muscle Milk**
20 **Products' Fat Content**

21 46. Recent trends in dieting and weight loss often emphasize increasing one's
22 protein intake in relation to fats and carbohydrates. Additionally, many health
23 conscience consumers actively seek out low-fat food products and dietary supplements
24 for other reasons (for example, individuals with a predisposition for heart disease and
25 those with high blood pressure often avoid foods high in fats). As a result, Defendant
26 markets a number of its Muscle Milk branded powders as "**lean**." Each of the Lean
27 Muscle Milk Products specifically includes a variation of the term "**lean** muscle protein"
28 in their names (or in the case of Defendant's Monster Milk, labeled as a "New Leaner

1 Formula”) and are labeled as containing “Lean Lipids,” a term purportedly trademarked
2 by Defendant.

3 47. However, pursuant to Section 403 of the FDCA, a claim that characterizes
4 the level of a nutrient in a food is a “nutrient content claim” that must be made in
5 accordance with the regulations that authorize the use of such claims. 21 U.S.C. §
6 343(r)(1)(A). Food nutrient content claims include the labeling which implies or
7 suggests that a food contains less fat and cholesterol than other similar products of the
8 same type. California, Florida and Michigan have each expressly adopted the
9 requirements of 21 U.S.C. § 343(r) into their own state statutory regimes.

10 48. Federal regulations specifically prohibit the use of the word “lean” unless
11 Defendant uses such term in accordance with its definition as set out in 21 C.F.R. §
12 101.62(e). *See* 21 C.F.R. § 101.62(a). Use of the term “lean” in a way that does not with
13 comply with 21 C.F.R. § 101.62(e) “shall be deemed to be misbrand[ing] under sections
14 201(n), 403(a), and 403(r) of the Federal Food, Drug, and Cosmetic Act.” 21 C.F.R. §
15 101.62(a), (f). Defendant’s use of the word “lean” in the names of each Lean Muscle
16 Milk Product does not meet the definitional requirements of 21 C.F.R. § 101.62(e) and
17 thus is a *per se* violation of the Food, Drug, and Cosmetic Act and independently
18 actionable under parallel state consumer protection laws.

19 49. Defendant’s use of the word “lean” to describe its Lean Muscle Milk
20 Products is particularly misleading because these Products do not contain any less fat
21 than similar “*non-lean*” protein powders on the market. Almost all of Defendant’s
22 competitors produce protein powders with the same, if not lower, fat and cholesterol
23 levels. This is because most protein supplements use protein isolates and concentrates
24 that specifically remove the vast majority of fats and carbohydrates from the Product’s
25 protein sources. Accordingly, the Lean Muscle Milk Products are not lean because they
26 do not contain any less fat than other traditional protein powders.

27 50. Defendant’s other marketing practices regarding the Lean Muscle Milk
28 Products are equally misleading. Defendant’s use of the term “Lean Lipids” is

1 particularly troubling because lipid is the scientific name for a class of molecules that
 2 include fats, and thus is often used synonymously describe fat molecules. Therefore, the
 3 term “Lean Lipids” is oxymoronic, because a lipid (*i.e.*, a fat) by definition can never
 4 be “lean.” Each of the Lean Muscle Milk Products’ labeling states that these Products
 5 contain a “Lean Lipid” blend. However, the “Lean Lipid” blend is primarily comprised
 6 of three ingredients - sunflower oil, medium chain triglycerides, canola oil - which are
 7 significant sources of fat.⁸

8 51. Marketing and labeling Defendant’s Lean Muscle Milk Products as
 9 containing the equivalent of “lean fats” is considerably misleading and does not comply
 10 with the relevant federal regulations. Indeed, by fortifying its protein powders with a
 11 “Lean Lipid” blend consisting of sunflower oil, medium chain triglycerides, canola oil,
 12 Defendant cannot possibly claim that its Lean Muscle Milk Products are lean.

13 52. There is no basis in law or fact for Defendant to label and brand its Lean
 14 Muscle Milk Products as lean under the circumstances. As such, Defendant has and
 15 continues to misbrand its Lean Muscle Milk Products in a misleading and deceptive
 16 manner that has the capacity to confuse reasonable consumers regarding the fat content
 17 of its Products. Had Plaintiffs and members of the Class known the true nature of the
 18 Lean Muscle Milk Products’ fat contents, they would not have purchased Defendant’s
 19 protein powders or alternatively paid significantly less for them.

20 V. CLASS ACTION ALLEGATIONS

21 53. Plaintiffs bring this action as a class action pursuant to Federal Rule of
 22 Civil Procedure 23 for the following Class of persons:

23 **Nationwide Class:** All persons in the United States who, within four
 24 (4) years of the filing of this Complaint, purchased:

25 1. the Muscle Milk RTD Products: Cytosport Whey
 Isolate Protein Drink; Monster Milk: Protein Power Shake;

26 _____
 27 ⁸ Some of the Lean Muscle Milk Products labeling sold during the class period
 28 included L-carnitine, an amino acid, in their “Lean Lipid Blend.” Again, fortifying the
 “Lean Lipid Blend” with L-carnitine does nothing to reduce the fat content in
 Defendant’s “Lipid Blend” or the Lean Muscle Milk Products as a whole.

1 Genuine Muscle Milk: Protein Nutrition Shake; and Muscle Milk
Pro Series 40: Mega Protein Shake;

2 2. the Muscle Milk Powder Products: Muscle Milk:
3 Lean Muscle Protein Powder; Muscle Milk Light: Lean Muscle
4 Protein Powder; Muscle Milk Naturals: Nature’s Ultimate Lean
5 Muscle Protein; Muscle Milk Gainer: High Protein Gainer
6 Powder Drink Mix; and Muscle Milk Pro Series 50: Lean Muscle
7 Mega Protein Powder; and

8 3. the Lean Muscle Milk Products: Defendant’s
9 Muscle Milk: Lean Muscle Protein Powder; Muscle Milk Light:
10 Lean Muscle Protein Powder; Muscle Milk Naturals: Nature’s
11 Ultimate Lean Muscle Protein; Muscle Milk Pro Series 50: Lean
12 Muscle Mega Protein Powder; and Monster Milk: Lean Muscle
13 Protein Supplement.

14 **California Sub-Class:** All persons residing in California who, within
15 four (4) years of the filing of this Complaint, purchased:

16 1. the Muscle Milk RTD Products: Cytosport Whey
17 Isolate Protein Drink; Monster Milk: Protein Power Shake;
18 Genuine Muscle Milk: Protein Nutrition Shake; and Muscle Milk
19 Pro Series 40: Mega Protein Shake;

20 2. the Muscle Milk Powder Products: Muscle Milk:
21 Lean Muscle Protein Powder; Muscle Milk Light: Lean Muscle
22 Protein Powder; Muscle Milk Naturals: Nature’s Ultimate Lean
23 Muscle Protein; Muscle Milk Gainer: High Protein Gainer
24 Powder Drink Mix; and Muscle Milk Pro Series 50: Lean Muscle
25 Mega Protein Powder; and

26 3. the Lean Muscle Milk Products: Defendant’s
27 Muscle Milk: Lean Muscle Protein Powder; Muscle Milk Light:
28 Lean Muscle Protein Powder; Muscle Milk Naturals: Nature’s
Ultimate Lean Muscle Protein; Muscle Milk Pro Series 50: Lean
Muscle Mega Protein Powder; and Monster Milk: Lean Muscle
Protein Supplement.

Florida Sub-Class: All persons residing in Florida who, within four
(4) years of the filing of this Complaint, purchased:

1. the Muscle Milk RTD Products: Cytosport Whey
Isolate Protein Drink; Monster Milk: Protein Power Shake;
Genuine Muscle Milk: Protein Nutrition Shake; and Muscle Milk
Pro Series 40: Mega Protein Shake;

2. the Muscle Milk Powder Products: Muscle Milk:
Lean Muscle Protein Powder; Muscle Milk Light: Lean Muscle
Protein Powder; Muscle Milk Naturals: Nature’s Ultimate Lean
Muscle Protein; Muscle Milk Gainer: High Protein Gainer
Powder Drink Mix; and Muscle Milk Pro Series 50: Lean Muscle
Mega Protein Powder; and

3. the Lean Muscle Milk Products: Defendant’s
Muscle Milk: Lean Muscle Protein Powder; Muscle Milk Light:

1 Lean Muscle Protein Powder; Muscle Milk Naturals: Nature's
2 Ultimate Lean Muscle Protein; Muscle Milk Pro Series 50: Lean
Muscle Mega Protein Powder; and Monster Milk: Lean Muscle
Protein Supplement.

3 **Michigan Sub-Class:** All individuals residing in Michigan who,
4 within six (6) years of the filing of this Complaint, purchased:

5 1. the Muscle Milk RTD Products: Cytosport Whey
6 Isolate Protein Drink; Monster Milk: Protein Power Shake;
7 Genuine Muscle Milk: Protein Nutrition Shake; and Muscle Milk
Pro Series 40: Mega Protein Shake;

8 2. the Muscle Milk Powder Products: Muscle Milk:
9 Lean Muscle Protein Powder; Muscle Milk Light: Lean Muscle
10 Protein Powder; Muscle Milk Naturals: Nature's Ultimate Lean
Muscle Protein; Muscle Milk Gainer: High Protein Gainer
Powder Drink Mix; and Muscle Milk Pro Series 50: Lean Muscle
Mega Protein Powder; and

11 3. the Lean Muscle Milk Products: Defendant's
12 Muscle Milk: Lean Muscle Protein Powder; Muscle Milk Light:
13 Lean Muscle Protein Powder; Muscle Milk Naturals: Nature's
Ultimate Lean Muscle Protein; Muscle Milk Pro Series 50: Lean
Muscle Mega Protein Powder; and Monster Milk: Lean Muscle
Protein Supplement.

14 Excluded from the Class are all legal entities, Defendant herein and any person, firm,
15 trust, corporation, or other entity related to or affiliated with Defendant, as well as any
16 judge, justice or judicial officer presiding over this matter and members of their
17 immediate families and judicial staff.

18 54. Plaintiffs reserve the right to amend the Class definition if further
19 investigation and discovery indicates that the Class definition should be narrowed,
20 expanded, or otherwise modified.

21 55. While the exact number of Class members is unknown to Plaintiffs at this
22 time, and will be ascertained through appropriate discovery, Plaintiffs are informed and
23 believe that there are tens of thousands of members in the proposed Class. The number
24 of individuals who comprise the Class are is so numerous that joinder of all such persons
25 is impracticable and the disposition of their claims in a class action, rather than in
26 individual actions, will benefit both the parties and the courts.

27 56. Plaintiffs' claims are typical of the claims of the other members of the
28 Class. All members of the Class have been and/or continue to be similarly affected by

1 Defendant's wrongful conduct as complained of herein, in violation of federal and state
2 law. Plaintiffs are unaware of any interests that conflict with or are antagonistic to the
3 interests of the Class.

4 57. Plaintiffs will fairly and adequately protect the Class members' interests
5 and have retained counsel competent and experienced in consumer class action lawsuits
6 and complex litigation. Plaintiffs and their counsel have the necessary financial
7 resources to adequately and vigorously litigate this class action, and Plaintiffs are aware
8 of their duties and responsibilities to the Class.

9 58. Defendant has acted with respect to the Class in a manner generally
10 applicable to each Class member. Common questions of law and fact exist as to all Class
11 members and predominate over any questions wholly affecting individual Class
12 members. There is a well-defined community of interest in the questions of law and fact
13 involved in the action, which affect all Class members. Among the questions of law and
14 fact common to the Class are, *inter alia*:

15 (a) Whether Defendant labels, markets and otherwise advertises its Muscle
16 Milk RTD Products in a deceptive, false, or misleading manner by misstating the
17 Products' protein content;

18 (b) Whether Defendant's Muscle Milk Powder Products contain any amount
19 of unbonded L-glutamine that would warrant its disclosure on the Products' label;

20 (c) Whether Defendant's Lean Muscle Milk Products are misbranded for
21 including the term "lean" in each of the Products' names;

22 (d) Whether Defendant's sale of their Muscle Milk and Cytosport products
23 constitutes unfair methods of competition and unfair or deceptive acts or practices in
24 violation of, *inter alia*, CAL. BUS. & PROF. CODE §§ 1770 *et seq.*, including:

25 (i) Whether Defendant misrepresents the source, sponsorship, approval,
26 or certification of their Muscle Milk and Cytosport products;

27 (ii) Whether Defendant misrepresents that its Muscle Milk and
28 Cytosport products have benefits which they do not have;

1 (iii) Whether Defendant represents that its Muscle Milk and Cytosport
2 products are of a particular standard or quality if it is of another; and

3 (iv) Whether Defendant advertises its Muscle Milk and Cytosport
4 products with intent not to sell them as advertised;

5 (e) Whether Defendant’s sale of their Muscle Milk and Cytosport products
6 constitutes misleading and deceptive advertising under, *inter alia*, CAL. BUS. & PROF.
7 CODE § 17500.

8 (f) Whether Defendant’s sale of its Muscle Milk and Cytosport products
9 constitutes “unlawful,” “unfair,” or “fraudulent” business acts or practices under, *inter*
10 *alia*, CAL. BUS. & PROF. CODE §§ 17200 *et seq.*, including:

11 (i) Whether Defendant’s sale of its Muscle Milk and Cytosport products
12 constitutes “unlawful” or “unfair” business practices by violating the public
13 policies set out in CAL. BUS. & PROF. CODE §§ 1770 *et seq.*, CAL. BUS. & PROF.
14 CODE §§ 17500 and other California and federal statutes and regulations;

15 (ii) Whether Defendant’s sale of its Muscle Milk and Cytosport
16 products is immoral, unethical, oppressive, unscrupulous or substantially
17 injurious to consumers;

18 (iii) Whether Defendant’s sale of its Muscle Milk and Cytosport products
19 constitutes an “unfair” business practice because consumer injury outweighs any
20 countervailing benefits to consumers or competition, and because such injury
21 could not be reasonably avoided by consumers; and

22 (iv) Whether Defendant’s mischaracterization of the protein, L-
23 glutamine, and fat contents in its Muscle Milk and Cytosport products constitutes
24 a “fraudulent” business practice because members of the public are likely to be
25 deceived;

26 (g) Whether Defendant’s mischaracterization of the protein, L-glutamine, and
27 fat contents in its Muscle Milk and Cytosport products constitutes unlawful, unfair and
28 fraudulent acts under FLA. STAT. § 501.203.

1 (h) Whether Defendant's mischaracterization of the protein, L-glutamine, and
2 fat contents in its Muscle Milk and Cytosport products constitutes violations of M.C.L.
3 § 445.903(1)(a), (c), (e), (s), and (cc);

4 (i) The nature and extent of damages, restitution, equitable remedies, and
5 declaratory and injunctive relief to which Plaintiffs and the Class are entitled; and

6 (j) Whether Plaintiff and the Class should be awarded attorneys' fees and the
7 costs of suit.

8 59. A class action is superior to all other available methods for the fair and
9 efficient adjudication of this controversy since joinder of all members is impracticable.
10 Furthermore, as the damages suffered by individual Class members may be relatively
11 small, the expense and burden of individual litigation make it virtually impossible for
12 Class members to individually redress the wrongs done to them. There will be no
13 difficulty in managing this action as a class action.

14 60. Defendant has acted on grounds generally applicable to the entire Class
15 with respect to the matters complained of herein, thereby making appropriate the relief
16 sought herein with respect to the Class as a whole.

17 **FIRST COUNT**

18 **Violation of CAL. BUS. & PROF. CODE §§ 17500, *et seq.* -**
19 **Untrue, Misleading and Deceptive Advertising**
20 **(On Behalf of the Nationwide Class and the California Sub-class)**

21 61. Plaintiffs hereby incorporate by reference the allegations contained in the
22 preceding paragraphs of this Complaint.

23 62. At all material times, Defendant engaged in a scheme of offering its Muscle
24 Milk and Cytosport products for sale to Plaintiffs, and other members of the Class and
25 the California Sub-Class by way of, *inter alia*, commercial marketing, and advertising,
26 internet content, product packaging and labelling, and other promotional materials.

27 63. These materials, advertisements and other inducements misrepresented
28 and/or omitted the true contents and benefits of Defendant's Muscle Milk and Cytosport
products as alleged herein. Said materials, advertisements and other inducements were

1 controlled and emanated from Defendant's headquarters, located the State of California.
2 Such advertisements and inducements appear on the labels of Defendant's Muscle Milk
3 and Cytosport products that are produced at Defendant's manufacturing facility in
4 Benicia, California and appear on Muscle Milk's and Cytosport's website which is
5 maintained and controlled from Defendant's Benicia, California headquarters.

6 64. Defendant's advertisements and other inducements come within the
7 definition of advertising as contained in CAL. BUS. PROF. CODE §§ 17500, *et seq.*, in that
8 such promotional materials were intended as inducements to purchase Defendant's
9 Muscle Milk and Cytosport products and are statements disseminated by Defendant,
10 who is located in California, to Plaintiffs and other members of the Class and the
11 California Sub-Class.

12 65. Defendant knew, or in the exercise of reasonable care should have known,
13 that the statements regarding its Muscle Milk and Cytosport products' protein and L-
14 glutamine content were false, misleading and/or deceptive. Defendant equally, knew, or
15 in the exercise of reasonable care should have known, that branding its Lean Muscle
16 Milk Products as lean was a violation of 21 C.F.R. § 101.62 and thus was false,
17 misleading and/or deceptive.

18 66. Consumers, including Plaintiffs and members of the Class and the
19 California Sub-Class, necessarily and reasonably relied on Defendant's statements
20 regarding the contents of its products. Consumers, including Plaintiffs and members of
21 the Class and the California Sub-Class, were among the intended targets of such
22 representations.

23 67. The above acts of Defendant, in disseminating said misleading and
24 deceptive statements throughout the State of California and nationwide to consumers,
25 including Plaintiffs and members of the Class and the California Sub-Class, were and
26 are likely to deceive reasonable consumers by obfuscating the true nature and amount
27 of the ingredients in Defendant's Muscle Milk and Cytosport products, and thus were
28 violations of CAL. BUS. PROF. CODE §§ 17500, *et seq.*

1 75. By labeling their Muscle Milk RTD Products as containing a specific
2 amount of protein when in fact these Products contained less than the advertised amount
3 of protein, Defendant violated California Civil Code §§ 1770(a)(2), (5), (7) and (9), as
4 it misrepresented the standard, quality, sponsorship, approval, and/or certification of its
5 Muscle Milk and Cytosport products.

6 76. By labeling their Muscle Milk Powder Products as containing a “protein
7 blend” which included L-glutamine when in fact these Products did not, Defendant
8 violated California Civil Code §§ 1770(a)(2), (5), (7) and (9), as it misrepresented the
9 standard, quality, sponsorship, approval, and/or certification of its Muscle Milk and
10 Cytosport products.

11 77. Defendant violated California Civil Code §§ 1770(a)(2), (5), (7) and (9) by
12 misbranding its Lean Muscle Milk Products as lean in violation of 21 C.F.R. § 101.62
13 and its California equivalent - regulations which are aimed at preventing false and
14 misleading labelling practices.

15 78. As a result of Defendant's conduct, Plaintiffs Clay and Roman and
16 California Sub-Class members were harmed and suffered actual damages as a result of
17 Defendant’s unfair competition and deceptive acts and practices. Had Defendant
18 disclosed the true nature and/or not falsely represented its Muscle Milk and Cytosport
19 products’ protein, L-glutamine and fat content, Plaintiffs Clay and Roman and the
20 California Sub-Class would not have been misled into purchasing Defendant’s Muscle
21 Milk and Cytosport products, or, alternatively, would have paid significantly less for
22 them.

23 79. Additionally, misbranded food products cannot legally be manufactured,
24 held, advertised, distributed or sold. Thus, misbranded food has no economic value and
25 is worthless as a matter of law, and purchasers of misbranded food are entitled to a
26 refund of the purchase price of the misbrand food.

27 80. Plaintiffs Clay and Roman, on behalf of themselves individually and all
28 other similarly situated California consumers, and as appropriate, on behalf of the

1 general public of the state of California, seek injunctive relief prohibiting Defendant
2 continuing these unlawful practices pursuant to California Civil Code § 1782(a)(2).

3 81. Plaintiff Clay provided Defendant with notice of its alleged violations of
4 the CLRA pursuant to California Civil Code § 1782(a) *via* certified mail, demanding
5 that Defendant correct such violations.

6 82. Defendant failed to respond to Plaintiff's CLRA notice within 30 days.
7 Thus, this Complaint seeks all available damages under the CLRA for all violations
8 complained of herein, including, but not limited to, statutory damages, punitive
9 damages, attorney's fees and costs and any other relief that the Court deems proper.

10 **THIRD COUNT**

11 **Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.* -**
12 **Unlawful Business Acts and Practices**
13 **(On Behalf of the Nationwide Class and the California Sub-Class)**

14 83. Plaintiffs hereby incorporate by reference the allegations contained in the
15 preceding paragraphs of this Complaint.

16 84. The Sherman Law, HEALTH & SAF. CODE §§ 109875 *et seq.*, broadly
17 prohibits the misbranding of any food products. The Sherman Law provides that food is
18 misbranded "if its labeling is false or misleading in any particular." HEALTH & SAF.
19 CODE § 110660.

20 85. Defendant is a person within the meaning of HEALTH & SAF. CODE §
21 109995.

22 86. Additionally, California has adopted as its own, and as the Sherman Law
23 expressly incorporates, "[a]ll food labeling regulations and any amendments to those
24 regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted
25 on or after that date" as "the food labeling regulations of this state." Federal statutes
26 and regulations, including, but not limited to, 21 U.S.C. §§ 321, 343 and 21 C.F.R. §§
27 101.4, 101.64, prohibit the mislabeling and misbranding of food products.

28 87. Federal statutes and regulations prohibit misleading consumers by

1 misrepresenting a product’s nutritional ingredients and including an ingredient on each
2 Muscle Milk and Cytosport product’s nutritional labels that is not actually included in
3 the products themselves.

4 88. Additionally, the word “lean” to may not be used to describe a food product
5 or dietary supplement unless it complies with definitional requirements of 21 C.F.R. §
6 101.62(e). If a food product is described as lean, and does not comply with 21 C.F.R. §
7 101.62(e), the food is considered misbranded. 21 C.F.R. § 101.62(f).

8 89. The California Civil Code § 1770(a)(2), (5), (7) and (9) also prohibits
9 mislabeling food misrepresenting the standard, quality, sponsorship, approval, and/or
10 certification of food products, as noted in above.

11 90. The business practices alleged above are unlawful under Business and
12 Professional Code §§ 17500, *et seq.*, California Civil Code §§ 1770(a)(2), (5), (7) and
13 (9) and the Sherman Law, each of which forbids the untrue, fraudulent, deceptive, and/or
14 misleading marketing, advertisement, packaging and labelling of food products and
15 dietary supplements.

16 91. As a result of Defendant’s above unlawful, unfair and fraudulent acts and
17 practices, Plaintiffs, on behalf of themselves and all others similarly situated, and as
18 appropriate, on behalf of the general public, seeks injunctive relief prohibiting
19 Defendant from continuing these wrongful practices, and such other equitable relief,
20 including full restitution of all improper revenues and ill-gotten profits derived from
21 Defendant’s wrongful conduct to the fullest extent permitted by law. Misbranded food
22 products cannot legally be manufactured, held, advertised, distributed or sold. Thus,
23 misbranded food has no economic value and is worthless as a matter of law, and
24 purchasers of misbranded food are entitled to a restitution refund of the purchase price
25 of the misbranded food.

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FOURTH COUNT

**Violation of CAL. BUS. & PROF. CODE §§ 17200, et seq. -
Unfair Business Acts and Practices
(On Behalf of the Nationwide Class and the California Sub-class)**

92. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

93. Plaintiffs and other members of the Class and the and the California Sub-Class who purchased Defendant’s Muscle Milk and Cytosport products suffered a substantial injury by virtue of buying a product that misrepresented and/or omitted the true contents and benefits of its protein, L-glutamine, and fat contents. Had Plaintiffs and members of the Class and the and the California Sub-Class known that Defendant’s materials, advertisement and other inducements misrepresented and/or omitted the true contents and benefits of its Muscle Milk and Cytosport products, they would not have purchased said products.

94. Defendant’s actions alleged herein violate the laws and public policies of California and the federal government, as set out preceding paragraphs of this Complaint.

95. There is no benefit to consumers or competition by allowing Defendant to deceptively market, advertise, package and label its Muscle Milk and Cytosport products.

96. Plaintiffs and Class and the and the California Sub-Class members who purchased Defendant’s Muscle Milk and Cytosport products had no way of reasonably knowing that these products were deceptively marketed, advertised, packaged and labeled. Thus, Class and the California Sub-Class members could not have reasonably avoided the injury they suffered.

97. The gravity of the harm suffered by Plaintiffs and Class and the and the California Sub-Class members who purchased Defendant’s Muscle Milk and Cytosport products outweighs any legitimate justification, motive or reason for marketing, advertising, packaging and labeling the Muscle Milk and Cytosport products in a

1 deceptive and misleading manner. Accordingly, Defendant's actions are immoral,
 2 unethical, unscrupulous and offend the established public policies as set out in federal
 3 regulations and is substantially injurious to Plaintiffs Clay and Roman and members of
 4 the Class and the and the California Sub-Class.

5 98. The above acts of Defendant, in disseminating said misleading and
 6 deceptive statements throughout the State of California and nation-wide to consumers,
 7 including Plaintiffs and members of the Class and the and the California Sub-Class,
 8 were and are likely to deceive reasonable consumers by obfuscating the true nature and
 9 amount of the ingredients in Defendant's Muscle Milk and Cytosport products, and thus
 10 were violations of CAL. BUS. PROF. CODE §§ 17500, *et seq.*

11 99. As a result of Defendant's above unlawful, unfair and fraudulent acts and
 12 practices, Plaintiffs, on behalf of themselves and all others similarly situated, and as
 13 appropriate, on behalf of the general public, seek injunctive relief prohibiting Defendant
 14 from continuing these wrongful practices, and such other equitable relief, including full
 15 restitution of all improper revenues and ill-gotten profits derived from Defendant's
 16 wrongful conduct to the fullest extent permitted by law. Misbranded food products
 17 cannot legally be manufactured, held, advertised, distributed or sold. Thus misbranded
 18 food has no economic value and is worthless as a matter of law, and purchasers of
 19 misbranded food are entitled to a restitution refund of the purchase price of the misbrand
 20 food.

FIFTH COUNT

Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.* - Fraudulent Business Acts and Practices (On Behalf of the Nationwide Class and the California Sub-class)

24 100. Plaintiffs hereby incorporate by reference the allegations contained in the
 25 preceding paragraphs of this Complaint.

26 101. Such acts of Defendant as described above constitute a fraudulent business
 27 practice under Cal. Bus. & Prof. Code §§ 17200, *et seq.*

28 102. As more fully described above, Defendant mislabels the protein content in

1 the Muscle Milk RTD Products. Defendant also misleadingly markets, advertises,
2 packages, and labels its Muscle Milk Powder Products as containing a “protein blend,”
3 which contains L-glutamine when in fact it does not. Defendant violated 21 C.F.R. §
4 101.62 by misbranding its Lean Muscle Milk Products as lean when it had no legal basis
5 for doing so. Defendant’s misleading marketing, advertising, packaging, and labeling
6 are likely to, and do, deceive reasonable consumers. Indeed, Plaintiffs were deceived
7 about the nutritional benefits of Defendant’s Muscle Milk and Cytosport products, as
8 Defendant’s marketing, advertising, packaging, and labeling of its Muscle Milk and
9 Cytosport products misrepresents and/or omits the true nature of the Products’
10 nutritional contents and benefits. Said acts are fraudulent business practice and acts.

11 103. Defendant’s misleading and deceptive practices caused Plaintiffs to
12 purchase Defendant’s Muscle Milk and Cytosport products and/or pay more than they
13 would have otherwise had they know the true nature of the contents of the Muscle Milk
14 and Cytosport products.

15 104. As a result of Defendant’s above unlawful, unfair and fraudulent acts and
16 practices, Plaintiffs, on behalf of themselves and all others similarly situated, and as
17 appropriate, on behalf of the general public, seeks injunctive relief prohibiting
18 Defendant from continuing these wrongful practices, and such other equitable relief,
19 including full restitution of all improper revenues and ill-gotten profits derived from
20 Defendant’s wrongful conduct to the fullest extent permitted by law. Misbranded food
21 products cannot legally be manufactured, held, advertised, distributed or sold. Thus,
22 misbranded food has no economic value and is worthless as a matter of law, and
23 purchasers of misbranded food are entitled to a restitution refund of the purchase price
24 of the misbrand food.

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SIXTH COUNT

**Violation of FLA. STAT. §§ 501.201, *et seq.* -
Deceptive and Unfair Trade Practices
(On Behalf of the Florida Sub-Class)**

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4 105. Plaintiffs hereby incorporate by reference the allegations contained in the
5 preceding paragraphs of this Complaint.

6 106. Plaintiff Reichert is a consumer as defined by FLORIDA STATUTE § 501.203.

7 107. Defendant’s Muscle Milk and Cytosport products are goods within the
8 meaning of FLORIDA STATUTE §§ 501.201, *et seq.*

9 108. Defendant engaged in trade or commerce, as defined by FLA. STAT. §
10 501.203, by advertising, soliciting, providing, offering, or distributing its Muscle Milk
11 and Cytosport products with the State of Florida.

12 109. FLORIDA STATUTE § 500.11(1)(a) deem food (including nutritional
13 supplements) misbranded when the labels contains a statement that is “false or
14 misleading in any particular” and adopts the federal labeling requirements as Florida law.

15 110. Federal/state statutes and regulations prohibit misleads consumers by
16 including an ingredient in each Muscle Milk and Cytosport product’s nutritional labels
17 which is not actually included in the products themselves or overstating the amount of
18 certain nutritional ingredients.

19 111. Additionally, the word “lean” to may not be used to describe a food product
20 or dietary supplement unless it complies with definitional requirements of 21 C.F.R. §
21 101.62(e). If a food product is described as lean, and does not comply with 21 C.F.R. §
22 101.62(e), the food is considered misbranded. 21 C.F.R. § 101.62(f).

23 112. Plaintiff Reichert and other members of the Florida Sub-Class who
24 purchased Defendant’s Muscle Milk and Cytosport products suffered substantial injury
25 by virtue of buying a product that misrepresented and/or omitted the true nature of its
26 protein, L-glutamine, and fat content. Had Plaintiff Reichert and other reasonable
27 consumers known that Defendant’s materials, advertisements and other inducements
28 misrepresented and/or omitted the true contents and benefits of its Muscle Milk and

1 Cytosport products, they would not have purchased said Products.

2 113. There is no benefit to consumers or competition by allowing Defendant to
3 deceptively market, advertise, package and label its Muscle Milk and Cytosport
4 products.

5 114. Plaintiff Reichert and Florida Sub-Class members who purchased
6 Defendant's Muscle Milk and Cytosport products had no way of reasonably knowing
7 that these Products were deceptively marketed, advertised, packaged and labeled. Thus,
8 Florida Sub-Class members could not have reasonably avoided the injury they suffered.

9 115. The gravity of the harm suffered by Plaintiff Reichert and Florida Sub-
10 Class members who purchased Defendant's Muscle Milk and Cytosport products
11 outweighs any legitimate justification, motive or reason for marketing, advertising,
12 packaging and labeling the Muscle Milk and Cytosport products in a deceptive and
13 misleading manner. Accordingly, Defendant's actions are immoral, unethical,
14 unscrupulous and offend the established public policy as set out in federal regulations
15 and is substantially injurious to Plaintiff Reichert and members of the Florida Sub-Class.

16 116. The above acts of Defendant, in disseminating said misleading and
17 deceptive statements throughout the State of Florida to consumers, including Plaintiff
18 Reichert and members of the Florida Sub-Class, were and are likely to deceive
19 reasonable consumers by obfuscating the true nature and amount of the ingredients in
20 Defendant's Muscle Milk and Cytosport products, and thus were violations of FLA.
21 STAT. §§ 501.201, *et seq.*

22 117. These misleading and deceptive practices caused Plaintiff Reichert to
23 purchase Defendant's Muscle Milk and Cytosport products and/or pay more than they
24 would have otherwise had they known the true nature of the contents of Defendant's
25 Muscle Milk and Cytosport products. Additionally, had Reichert known the true nature
26 of the contents of Defendant's Muscle Milk and Cytosport products, they would had not
27 purchased these Products.

28 118. As a result of Defendant's above unlawful, unfair and fraudulent acts and

1 practices, Plaintiff Reichert, on behalf of himself and all others similarly situated, and
2 as appropriate, on behalf of the general public of the State of Florida, seeks injunctive
3 relief prohibiting Defendant from continuing these wrongful practices, and such other
4 equitable relief, including full restitution and disgorgement of all improper revenues and
5 ill-gotten profits derived from Defendant’s wrongful conduct to the fullest extent
6 permitted by law.

7 **SEVENTH COUNT**

8 **Violation of M.C.L. §§ 445.901, *et seq.* -**
9 **Deceptive and Unfair Trade Practices**
10 **(On Behalf of the Michigan Sub-Class)**

11 119. Plaintiffs hereby incorporate by reference the allegations contained in the
12 preceding paragraphs of this Complaint.

13 120. Plaintiff Ehrlichman and Defendant are persons as defined by M.C.L. §
14 445.902(d).

15 121. Defendant engaged in trade or commerce, as defined by M.C.L. §
16 445.902(g), by advertising, soliciting, providing, offering, or distributing its Muscle
17 Milk and Cytosport products with the State of Michigan.

18 122. MICHIGAN FOOD LAW ACT 92 of 2000 deem food (including nutritional
19 supplements) misbranded when the labels contains a statement that is “false or
20 misleading in any particular” and adopts the federal labeling requirements as Michigan
21 law.

22 123. Federal/state statutes and regulations prohibit misleading consumers by
23 including an ingredient in each Muscle Milk and Cytosport product’s nutritional labels
24 that is not actually included in the products themselves or overstating the amount of
25 certain nutritional ingredients.

26 124. Additionally, the word “lean” may not be used to describe a food product
27 or dietary supplement unless it complies with definitional requirements of 21 C.F.R. §
28 101.62(e). If a food product is described as lean, and does not comply with 21 C.F.R. §

1 101.62(e), the food is considered misbranded. 21 C.F.R. § 101.62(f).

2 125. By labeling their products as containing a “protein blend” which included
3 L-glutamine in its Muscle Milk Powder Products, when in fact these Products did not,
4 Defendant violated M.C.L. § 445.903(1)(a), (c), (e), (s), and (cc), as it misrepresented
5 the standard, quality, sponsorship, approval, and/or certification of its Muscle Milk
6 Powder Products. Similarly, Defendant violated M.C.L. § 445.903(1)(a), (c), (e), (s),
7 and (cc) by overstating the amount of protein in their Muscle Milk RTD Products.

8 126. Defendant violated M.C.L. § 445.903(1)(a), (c), (e), (s), and (cc) by
9 misbranding its Lean Muscle Milk Products as lean in violation of 21 C.F.R. § 101.62.

10 127. As a result of Defendant's conduct, Plaintiff Ehrlichman and Michigan
11 Sub-Class members were harmed and suffered actual damages as a result of Defendant’s
12 unfair, unconscionable, or deceptive methods, acts, or practices. Had Defendant
13 disclosed the true nature of the contents of its “protein blend,” and/or not falsely
14 represented its Muscle Milk and Cytosport products’ protein and fat content, Plaintiff
15 Ehrlichman would not have been misled into purchasing Defendant’s Muscle Milk and
16 Cytosport products, or, alternatively, paid significantly less for them.

17 128. Plaintiff Ehrlichman, on behalf of herself and all other similarly situated
18 Michigan consumers, and as appropriate, on behalf of the general public of the State of
19 Michigan, seeks damages, as well as declarative and injunctive relief prohibiting
20 Defendant from continuing these unlawful practices pursuant to M.C.L. § 445.911.

21 129. As a result of Defendant’s above unfair, unconscionable, or deceptive
22 methods, acts, or practices, Plaintiff Ehrlichman, on behalf of herself and all others
23 similarly situated, and as appropriate, on behalf of the general public of the State of
24 Michigan, seeks an award of the actual damages caused by Defendant’s unfair,
25 unconscionable, or deceptive methods, acts, or practices and any other relief the Court
26 deems appropriate.

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EIGHTH COUNT

**Breach of Express Warranty
(On Behalf of the Nationwide Class)**

130. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

131. Plaintiffs and each member of the Class formed a contract with Defendant at the time Plaintiff and the other members of the Class purchased one or more of the Muscle Milk RTD Products and/or Muscle Milk Powder Products. The terms of that contract include the promises and affirmations of fact made by Defendant on the packaging of the Muscle Milk Powder Products regarding the Products’ “Protein Blend” and on the packaging of the Muscle Milk RTD Products regarding the Products’ protein content.

132. The Muscle Milk and Cytosport products’ packaging constitute express warranties, became part of the basis of the bargain, and are part of a standardized contract between Plaintiffs and the members of the Nationwide Class on the one hand, and Defendant on the other.

133. All conditions precedent to Defendant's liability under this contract have been performed by Plaintiffs and the Class.

134. Defendant breached the terms of this contract, including the express warranties, with Plaintiffs and the Class by not providing the products that could provide the benefits promised, *i.e.* that the Products contains a “Protein Blend” which included L-glutamine and providing Products that include the warranted amount of protein, as alleged above.

135. As a result of Defendant's breach of its contract, Plaintiffs and the Class have been damaged in the amount of the different purchase price of any and all of the Muscle Milk RTD Products and Muscle Milk Powder Products they purchased and the price of a product which provides the benefits and contents as warranted.

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NINTH COUNT

**Violation of 15 U.S.C. §§ 2301 *et seq.* -
Breach of Written Warranty
(On Behalf of the Nationwide Class)**

136. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint.

137. This claim is brought by Plaintiffs on behalf of themselves and the nationwide Class solely for breach of federal law. This claim is not based on any violation of state law.

138. The Magnuson–Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, creates a private federal cause of action for breach of a “written warranty” as defined by the Act. 15 U.S.C. § 2301(6) and § 2310(d)(1).

139. The Muscle Milk Powder Products and Muscle Milk RTD Products are “consumer products” as that term is defined by 15 U.S.C. § 2301(1), as they constitute tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes.

140. Plaintiffs and members of the Class are “consumers” as defined by 15 U.S.C. § 2301(3), since they are buyers of Muscle Milk Powder Products and Muscle Milk RTD Products for purposes other than resale.

141. Defendant is an entity engaged in the business of making and selling dietary supplements available, either directly or indirectly, to consumers such as Plaintiffs and the Class. As such, Defendant is a “supplier” as defined in 15 U.S.C. § 2301(4).

142. Through its labeling, Defendant gave and offered a written warranty to consumers relating to the nature and quantity of L-glutamine contains within the Muscle Milk Powder Products and the protein contents of the Muscle Milk RTD Products. As a result, Defendant is a “warrantor” within the meaning of 15 U.S.C. § 2301(5).

143. Defendant provided a “written warranty” within the meaning of 15 U.S.C. 2301(6) for the Muscle Milk Powder Products by labeling its products as containing L-

1 glutamine and labeling its Muscle Milk RTD Products as containing a specific amount
2 of protein. These affirmations of fact regarding the nature and quantity of the
3 ingredients in the Muscle Milk RTD Products and Muscle Milk Powder Products
4 constituted, and were intended to convey to purchasers, a written promise that the
5 ingredients in the products were free of a particular type of defect (*i.e.*, the Muscle Milk
6 and Cytosport products would include a particular ingredient in a certain amount). As
7 such, these written promises and affirmations were part of the basis of Plaintiffs' and
8 the Class' bargain with Defendant in purchasing the Muscle Milk RTD Products and
9 Muscle Milk Powder Products.

10 144. Defendant breached the written warranty by failing to provide and supply
11 the Muscle Milk and Cytosport products as promised. Specifically, the Muscle Milk
12 Powder Products did not contain any unbonded L-glutamine and the Muscle Milk
13 Powder Products did not contain the amount of protein warranted, and thus were
14 defective.

15 145. Plaintiffs and members of the Class were injured by Defendant's failure to
16 comply with its obligations under the written warranty since Plaintiffs and members of
17 the Class paid for products that did not have the promised ingredients of a particular
18 quality and amount, did not receive the defect-free protein supplement that was
19 promised to them and that they bargained for, and paid a premium for the Muscle Milk
20 RTD Products and Muscle Milk Powder Products when they could have instead
21 purchased other less expensive alternative protein supplements.

22 146. Plaintiffs and the Class therefore for this claim seek and are entitled to
23 recover "damages and other legal and equitable relief" and "costs and expenses
24 (including attorneys' fees based upon actual time expended)" as provided in 15 U.S.C.
25 § 2310(d).

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VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Class pray for relief and judgment as follows:

A. For an order declaring that this action is properly maintained as a class action and appointing Plaintiffs as representatives for the Class, and appointing Plaintiffs' counsel as Class counsel;

B. That Defendant bear the costs of any notice sent to the Class;

C. For an order awarding Plaintiffs and the members of the Class actual damages, restitution and/or disgorgement;

D. For an order enjoining Defendant from continuing to engage in the unlawful and unfair business acts and practices as alleged herein;

E. For restitution of the funds that unjustly enriched Defendant at the expense of the Plaintiffs and Class Members.

F. For an order awarding Plaintiffs and the members of the Class pre- and post-judgment interest;

G. For an order awarding attorneys' fees and costs of suit, including expert's witnesses fees as permitted by law; and

H. Such other and further relief as this Court may deem just and proper.

VII. JURY TRIAL DEMAND

Plaintiffs demand a trial by jury for all of the claims asserted in this Complaint so triable.

Respectfully submitted,

FINKELSTEIN & KRINSK LLP

Dated: March 15,2015

By: /s/ Trenton R. Kashima
Trenton R. Kashima

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6 Attorneys for Plaintiffs
 7 and the Putative Classes

8
 9 UNITED STATES DISTRICT COURT
 10 SOUTHERN DISTRICT OF CALIFORNIA

11
 12 CHAYLA CLAY, ERICA
 EHRlichMAN, and LOGAN
 13 REICHERT, individually and on behalf
 of all others similarly situated,
 14
 Plaintiffs,
 15 v.
 16 CYTOSPORT, INC., a California
 corporation,
 17
 18
 19 Defendant.

Case No: 3:15-cv-00165

PROOF OF SERVICE

Trial Date: _ None Set
 Action Filed: January 23, 2015

20 I, the undersigned, declare that I am over the age of eighteen (18) years and
 21 not a party to the within action. I am employed in the County of San Diego, State of
 22 California. My business address is 550 W. C Street, Suite 1760, San Diego,
 23 California 92101.

24 I served the following document(s) on March 15, 2017:

- 25 **FIRST AMENDED CLASS ACTION COMPLAINT FOR:**
 26 **1. VIOLATION OF CAL. BUS. & PROF. CODE §§ 17500, et seq.;**
 27 **2. VIOLATION OF CAL. CIV. CODE §§ 1750, et seq.;**
 28 **3. VIOLATION OF CAL. BUS. & PROF. CODE §§ 17200, et seq.**
4. VIOLATION OF FLA. STAT. §§ 501.201, et seq.;
5. VIOLATION OF M.C.L. §§ 445.901, et seq.;
6. BREACH OF EXPRESS WARRANTY; and

1 **7. VIOLATION OF 15 U.S.C. §§ 2301, et seq.**

2 On the person(s) listed below:

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23 By the following means:

24 **VIA U.S. MAIL:** I enclosed the documents in a sealed envelope or package
25 addressed to the person(s) at the address(es) listed above. I placed the
26 envelope for collection and mailing, following our ordinary business practices.
27 I am readily familiar with this business's practice for collecting and processing
28 correspondence for mailing. On the same day that correspondence is place for
collection and mailing, it is deposited in the ordinary course of business with
the United States Postal Service, in a sealed envelope with postage fully
prepaid.

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VIA OVERNIGHT DELIVERY: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address listed above. I placed the envelope or package for collection and overnight delivery to an office or a regularly utilized drop box of the overnight delivery carrier.

VIA ELECTRONIC TRANSMISSION: Based on a court order or agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above.
(PROPOSED ORDER ONLY)

XX VIA NOTICE OF ELECTRONIC FILING (ECF): Electronic Services via the Court's CM/ECF system pursuant to CivLR 5.4(c).

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct and that I am employed in the office, at whose direction the within service was made.

Executed: March 15, 2017, at San Diego, California.

/s/ Trenton R. Kashima
Trenton R. Kashima