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10
 11 **UNITED STATES DISTRICT COURT**
 12 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
 13

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

16 Plaintiffs,

17 v.

18 CYTOSPORT, INC., a California
 19 Corporation,

20 Defendant.

Case No: '15CV0165 L DHB

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

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1 Chayla Clay, Erica Ehrlichman, and Logan Reichert (collectively “Plaintiffs”),
2 individually and on behalf of all others similarly situated, based on the investigation of
3 counsel and their own individual knowledge as to Plaintiffs’ own circumstances, hereby
4 complain against defendant Cytosport, Inc. (“Defendant” or “Cytosport”) as follows:

5 **I. INTRODUCTION**

6 1. Cytosport formulates, manufactures, advertises and sells the popular
7 “Muscle Milk” and Cytosport branded powdered and ready-to-drink (“RTD”) protein
8 supplements throughout the United States, including in California, Michigan, and
9 Florida. Cytosport principally markets its Muscle Milk and Cytosport branded products
10 as reasonably-priced protein supplements for elite athletes and those with more
11 moderate athletic and weight management goals. Cytosport’s marketing efforts target
12 all age groups and lifestyles, including people engaged in fitness, as part of a weight
13 loss program and protein supplementation for aging adults. However, Cytosport markets
14 its products in a systematically misleading manner, stating that its products have
15 ingredients, characteristics and benefits that they do not.

16 2. Because Defendant’s sales are driven by consumers seeking protein
17 supplementation, Cytosport prominently displays the total protein contents of its RTD
18 protein supplements (*Cytosport Whey Isolate Protein Drink, Monster Milk: Protein*
19 *Power Shake, Genuine Muscle Milk: Protein Nutrition Shake, and Muscle Milk Pro*
20 *Series 40: Mega Protein Shake* (collectively the “Muscle Milk RTD Products”)) on the
21 front and back of each product’s label.

22 3. Cytosport’s target market is not only interested in the amount of protein,
23 but also the type and quality of additional supplements included in each product.
24 Accordingly, Defendant markets and labels its *Muscle Milk: Lean Muscle Protein*
25 *Powder, Muscle Milk Light: Lean Muscle Protein Powder, Muscle Milk Naturals:*
26 *Nature’s Ultimate Lean Muscle Protein, Muscle Milk Gainer: High Protein Gainer*
27 *Powder Drink Mix, and Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder*
28 (collectively the “Muscle Milk Powder Products”) as containing a “Precision Protein

1 Blend” - highlighting that these products include proteins from multiple sources and
2 amino acids, such as L-Glutamine, to boost athletic performance.

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

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

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

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

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

18 II. JURISDICTION AND VENUE

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

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

27 (a) conducts business itself or through agent(s) in this District, by advertising,
28 marketing, distributing and/or manufacturing its products in this District; and/or

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

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

4 **III. PARTIES**

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

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

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

25 14. Defendant Cytosport, Inc. is a California Corporation with its headquarters
26 in Benicia, California. Cytosport manufactures sports-oriented nutritional products.
27 Cytosport manufactures, markets, advertises, distributes and sells a line of Muscle Milk
28 and Cytosport branded protein powders and RTD products throughout the United States.

1 All of Cytosport's product labeling and advertising for its various Muscle Milk and
2 Cytosport brand products, sold and distributed nationwide, are and were created,
3 controlled and distributed by management located at Cytosport's Benicia, California
4 headquarters.

5 **IV. SUBSTANTIVE ALLEGATIONS**

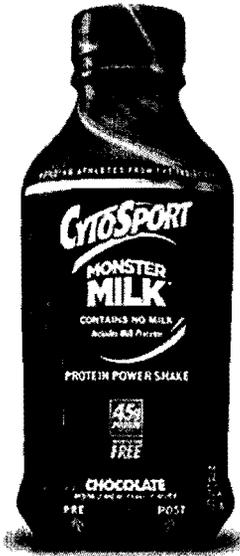
6 **A. Misrepresentations Regarding Defendant's RTD Products' Protein** 7 **Content**

8 15. It is axiomatic that the amount of reported protein contained within
9 Defendant's Muscle Milk RTD Products is material to any consumer seeking to
10 purchase a protein supplement. Accordingly, Defendant fortifies each Muscle Milk
11 RTD Product with Milk Protein Isolate as its primarily, and most important, ingredient.
12 Milk Protein Isolate differs from raw milk because it is processed to include a higher
13 concentration of protein and removes much of the fats and carbohydrates traditionally
14 found in milk and other naturally occurring beverages. Thus, the type of concentrated
15 protein within the Muscle Milk RTD Product is particularly prized.

16 16. Defendant labels and advertises all of its protein supplements, especially
17 its Muscle Milk RTD Products, in a manner that highlights the amount of added protein
18 contained within. Each Muscle Milk RTD Product lists its respective protein content on
19 each Product's front label, directly below the title of the Product, as well as on the back
20 nutritional label. Such representations constitute an express warranty regarding the
21 Muscle Milk RTD Products' protein content.

22 17. For example, the *Cytosport Whey Isolate Protein Drink*'s product label
23 states plainly that it fortified with 32 grams of protein on the front of the packaging and
24 also indicates that there are 32 grams of protein per bottle (15 grams per serving) in the
25 Nutrition Facts section¹:

26
27
28 ¹ All product images contained within this complaint were taken from Defendant's website.



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

Nutrition Facts
 Serving Size 8 fl. oz. (237 mL)
 Servings per Container 2.5

Amount	Per Serving	%DV*	Per Bottle	%DV*
Calories	120		310	
Calories from Fat	30		80	
Total Fat	3.5g	6%	9g	14%
Saturated Fat	1.5g	6%	4g	20%
Trans Fat	0g		0g	
Polyunsaturated Fat	0.5g		1g	
Monounsaturated Fat	1.5g		4g	
Cholesterol	10mg	3%	25mg	6%
Sodium	190mg	8%	480mg	20%
Potassium	620mg	18%	1550mg	44%
Total Carbohydrate	5g	2%	13g	4%
Dietary Fiber	2g	8%	5g	20%
Sugars	<1g		1g	
Protein	18g	36%	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

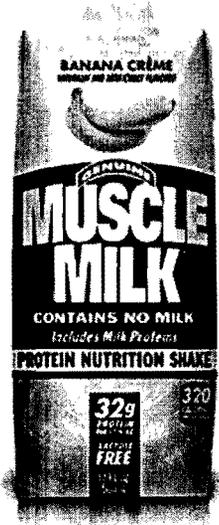
INGREDIENTS: WATER, MILK PROTEIN ISOLATE, CALCIUM SODIUM CASEINATE, ALKALIZED COCOA POWDER, LESS THAN 1% OF: MALTODEXTRIN, SUNFLOWER OIL, SOLUBLE CORN FIBER, MEDIUM CHAIN TRIGLYCERIDES, NATURAL AND ARTIFICIAL FLAVORS, DIPHOSPHATE, WHEY PROTEIN CONCENTRATE, CELLULOSE GUM AND GEL, CANOLA OIL, CREATINE MONOHYDRATE, SOY LECITHIN, POTASSIUM CHLORIDE, SODIUM HEXAMETAPOSPHATE, 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.



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

19. The *Genuine Muscle Milk: Protein Nutrition Shake* (17 fl. oz.) label expressly states that it fortified with 32 of 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. (237 mL)
 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	8%
Sodium	230mg	470mg	20%
Potassium	470mg	900mg	28%
Total Carbohydrate	6g	12g	4%
Dietary Fiber	0g	1g	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

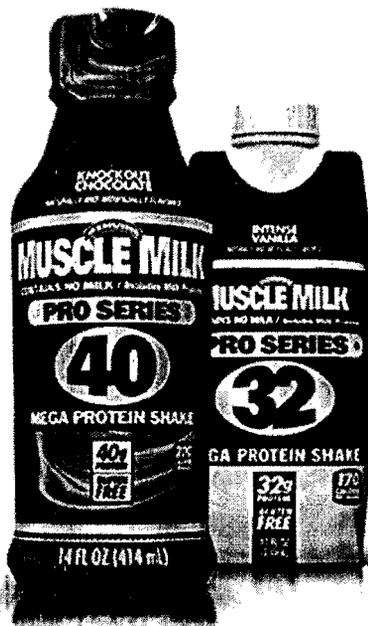
INGREDIENTS: WATER, CALCIUM SODIUM CASEINATE, MILK PROTEIN ISOLATE, MALTODEXTRIN, SUNFLOWER OIL, CANOLA OIL, LESS THAN 1% OF: CRYSTALLINE FRUCTOSE, MEDIUM CHAIN TRIGLYCERIDES, DIPHOSPHATE, CELLULOSE GUM AND GEL, WHEY PROTEIN CONCENTRATE, MAGNESIUM PHOSPHATE, SOY LECITHIN, NATURAL AND ARTIFICIAL FLAVORS, 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.

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

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

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



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

Nutrition Facts
 Serving Size 14 fl. oz. (414 mL)
 Servings Per Container 1

Amount Per Serving	
Calories 220	Calories from Fat 25
<small>% Daily Value*</small>	
Total Fat 3g	5%
Saturated Fat 1g	5%
Trans Fat 0g	
Polyunsaturated Fat 0.5g	
Monounsaturated Fat 1.5g	
Cholesterol 25mg	5%
Sodium 370mg	15%
Potassium 660mg	10%
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%

NUTRITION HIGHLIGHTS

PROTEIN	CARBS	FAT	CALORIES
40g	8g	3g	220

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, DIPOSSASSIUM PHOSPHATE, WHEY PROTEIN CONCENTRATE, SOY LECTHIN, 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.



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

4 22. Such misrepresentations regarding the contents and ingredients of
5 Defendant's Muscle Milk RTD Products are unlawful under both state and federal law.
6 The Federal Food, Drug, and Cosmetic Act ("FDCA"), passed by Congress in 1938,
7 grants the Food and Drug Administration ("FDA") power to ensure "foods are safe,
8 wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2). In 1990, Congress
9 amended the FDCA with the Nutrition Labeling and Education Act ("NLEA"), which
10 sought to clarify and strengthen the FDA's legal authority to require nutrition labeling
11 on foods, and to establish the circumstances under which claims may be made about
12 nutrients in foods. 21 U.S.C. §§ 343, *et seq.*

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

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

26 25. Defendant's deceptive statements also violate FLORIDA STATUTE §
27 500.11(1)(a) and MICHIGAN FOOD LAW ACT 92 of 2000 which also deem food (including
28 nutritional supplements) misbranded when the labels contains a statement that is "false

1 or misleading in any particular.”

2 26. Defendant’s representations regarding the protein contents of its Muscle
3 Milk RTD Products are material. Reasonable consumers of protein supplements base
4 their purchasing decisions on the advertised and warranted amount of protein contain
5 therein. Additionally, consumers reasonably rely of Defendant’s label to accurately
6 determine the identity and amount of any dietary ingredients included within the
7 Defendant’s products. Accordingly, Plaintiffs and Class Members, as reasonable
8 consumers, were materially misled by Defendant’s representations regarding the true
9 nature of the Muscle Milk RTD Products’ protein contents.

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

12 28. The difference between the Muscle Milk RTD Products promised and the
13 Products sold is significant and material. The amount of actual protein provided, and
14 the measure of protein per serving/container, has real impacts on the benefits provided
15 to consumers by the Products and the actual value of the Products. Persons requiring a
16 certain amount of protein supplementation, whether as part of fitness regimen or for
17 particular health needs, are left to ingest less protein than Defendant states will be
18 provided.

19 29. Because Plaintiffs and Class Members purchased a product that contains
20 less protein than advertised and warranted, Plaintiffs and Class Members have suffered
21 injury-in-fact. Misbranded food products cannot legally be manufactured, held,
22 advertised, distributed or sold. Thus, misbranded food has no economic value and is
23 worthless as a matter of law, and purchasers of misbranded food are entitled to a
24 restitution refund of the purchase price of the misbranded food. Additionally, had
25 Plaintiffs and Class Members known the true nature of the protein content of the Muscle
26 Milk RTD Products, they would not have purchased such Products, or would have only
27 paid for the protein actually delivered with the Products.

28 ///

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

2 30. In addition to mislabeling its products' protein contents, Defendant also
3 misrepresents the amount of L-Glutamine contained in the Muscle Milk Powder
4 Products.

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

6 31. Amino acids are organic compounds chemically composed of amine (-
7 NH₂) and carboxylic acid (-COOH) groups, along with a side-chain specific to each
8 amino acid. The key elements found within all amino acids are carbon, hydrogen,
9 oxygen, and nitrogen, though other elements may be found in the side-chains of certain
10 amino acids. Based how these elements are structured will determine the amino acid
11 type.

12 32. Amino acids play an important role in the human body, where they are used
13 to synthesize proteins, aid in the function of the bodily systems, and provide a source of
14 energy. But not all amino acids are equally needed by the body or have the same
15 physiological benefits. Thus, there are certain amino acids that are more important than
16 others. For example, of the twenty-two standard amino acids, nine amino acids are called
17 "*essential*" for humans because they cannot be created from other compounds by the
18 body and must be taken in through an individual's diet. Six other amino acids are
19 considered "*conditionally essential*" meaning that the body may not be able to create
20 these amino acids in all circumstances.

21 33. When several amino acids are linked together by peptide bonds, they form
22 long chains called proteins. Although proteins consists entirely of amino acids, bonded
23 and unbonded amino acids are digested and absorbed differently by the human body.
24 Generally, unbonded amino acids are absorbed faster by the body than proteins. Thus,
25 a protein that contains particular amino acids is not utilized the same as ingesting
26 unbonded amino acids of the same type and quantity. This is the reason that Defendant,
27 and other supplement producers, fabricated both protein powders (such as the Muscle
28 Milk Powder Products) and amino acid dietary supplements which contain only

1 unbonded amino acids.² Indeed, unbonded amino acids supplements are often more
2 expensive, and for some consumers more sought-after, because while proteins can be
3 readily obtained from different foods, many unbonded amino acids are more difficult,
4 if not impossible, to obtain through a traditional diet and thus can only be acquired
5 through expensive processing.

6 34. L-glutamine (or glutamine) is one of the twenty-two amino acids found in
7 the human body and is considered a conditionally essential amino acid. L-glutamine is
8 found circulating in the blood, as well as stored in the skeletal muscles. Serving several
9 functions in the body, L-glutamine has been linked to protein and muscle synthesis. In
10 addition, L-glutamine, even in small amounts, has shown to increase the amount of
11 growth hormone levels by over 400%.³ L-glutamine also serves an important role in the
12 immune system, and decreases in L-glutamine availability in the blood results in
13 immunosuppression.⁴

14 35. L-glutamine supplementation is particularly important for athletes as
15 strenuous physical exercise, as well as exhaustive training programs, tends to deplete
16 the body's natural stores of L-glutamine due to lowered L-glutamine synthesis and
17 enhanced uptake by liver and immune cells.⁵ Accordingly, without supplementation,
18 many athletes can experience decreased immune system function during recovery
19 periods, a time at which they are more vulnerable to disease. Increased L-glutamine
20 availability during exercise is also associated with decreased muscle loss due to muscle
21 catabolism and decreased inflammation - health benefits associated with optimal
22

23 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/](http://www.muscle milk.com/products/bars1/pro-series-50-2/)

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

26 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>)

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

1 physical training.⁶ Accordingly, many consumers specifically seek out supplements
2 fortified with L-glutamine when selecting a product to complement their workout
3 regime.

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

5 36. Defendant markets its Muscle Milk Powder Products as containing a
6 "protein blend" for athletes. To support these claims, Defendant states in its marketing
7 material that it has developed and fabricated "a unique mix of complete multi-source
8 proteins" known as their "Precision Protein Blend" with "calcium sodium caseinate,
9 milk protein isolate, whey protein isolate, whey protein hydrolysate, whey protein
10 concentrate, lactoferrin, **L-glutamine** and taurine, which provide amino acids... to help
11 you recover from exercise and build muscle." (Emphasis added). Defendant directs that
12 its products should be used as a dietary supplement, *i.e.*, that they should be added to
13 liquids (such as water, milk or smoothies) or other foods (such as pancakes, bars, and
14 other snacks) to supplement normal dietary intake and state its products are excellent
15 for "individuals looking to build size and gain muscle mass."

16 37. Similarly, each of the Muscle Milk Powder Products' labels states that they
17 contain a "protein blend" that includes "CALCIUM SODIUM CASEINATE, MILK
18 PROTEIN ISOLATE, WHEY PROTEIN ISOLATE, WHEY PROTEIN
19 HYDROLYSATE, WHEY PROTEIN CONCENTRATE, LACTOFERRIN, **L-**
20 **GLUTAMINE** AND TAURINE." (Emphasis added).

21 38. By listing L-glutamine in the products' nutritional panels, separate from
22 the Muscle Milk Powder Products' primary protein sources (*e.g.*, calcium sodium
23 caseinate, milk protein isolate, whey protein isolate, whey protein hydrolysate, whey
24 protein concentrate, and lactoferrin), Defendant asserts that each Muscle Milk Powder
25 Product is fortified with unbonded L-glutamine amino acids. However, despite
26 advertising, labeling and warranting that its Muscle Milk Powder Products include free-

27 _____
28 ⁶ See *id.*; [http://etd.lsu.edu/docs/available/etd-06162005142747/unrestricted/
Piattoly_thesis.pdf](http://etd.lsu.edu/docs/available/etd-06162005142747/unrestricted/Piattoly_thesis.pdf)

1 form L-glutamine, these Products do not contain *any* unbonded L-glutamine amino
2 acids. Simply put, Defendant's consumers are not getting the ingredients listed on each
3 Product's label, for which they have paid a premium.

4 39. Undeniably listing an ingredient, such as L-glutamine, in a product's
5 mandated nutritional labeling and then failing to include said ingredient is unlawful
6 under federal and state law. Federal statutes and regulations require that all ingredients
7 added to a food product for their functional effect to be listed in descending order of
8 predominance. *See* 21 U.S.C. § 343(i); 21 C.F.R. §§ 101.2, 101.4, 101.100(a)(3)(ii)(c).
9 Failure to list an ingredient, or listing ingredients which are not contained in a product,
10 shall render a food misbranded and therefore its sale will be deemed unlawful. 21 U.S.C.
11 §§ 343(a), 331(a). The above laws, and all regulations enacted pursuant thereto, are
12 incorporated into California, Florida and Michigan law. CAL. HEALTH & SAF. CODE §
13 110100, FLORIDA STATUTE § 500.11(1)(a) and MICHIGAN FOOD LAW Act 92 of 2000.
14 Thus, a violation of federal food labeling laws is an independent violation of California,
15 Florida and Michigan law and actionable as such.

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

24 41. Furthermore, Cytosport's Muscle Milk Powder Products are a dietary
25 supplement under 21 U.S.C. § 321(ff). Had Cytosport elected to classify its Muscle Milk
26 Powder Products as a dietary supplement, as it arguably should have, Defendant would
27 have had to separately list the identity of each unbonded amino acids and their amounts
28 within the nutrition label, instead of being allowed to include them with the ingredient

1 list under “protein blend.” 21 C.F.R. § 101.4. This would have put customers on better
2 notice that free form L-glutamine is not present in the Muscle Milk Powder Products in
3 any significantly appreciable amounts. However, Defendant instead labeled its Muscle
4 Milk Powder Products as a food, and included L-glutamine as part of their “protein
5 blend,” to obfuscate its unfair and illegal labeling business practices.⁷

6 42. By specifically listing that L-glutamine as a separate ingredient contained
7 in its Muscle Milk Powder Products, Cytosport warrants that unbonded L-glutamine
8 would be present in Muscle Milk Powder Products in an appreciable amount (or at least
9 in an amount that is greater than the ingredients listed below it on the Products’ label).
10 Defendant breached this express warranty by selling a product that did not, in fact,
11 contain *any* measurable amount of unbonded L-glutamine.

12 43. Again, the difference between the Product promised and the Product sold
13 is significant. The L-glutamine fortification has a real impact on the benefits provided
14 to consumers by the Products and the actual value of the Products themselves - otherwise
15 L-glutamine would not have been advertised as an integral part of Defendant’s
16 “Precision Protein Blend” on the Products’ label.

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

3 **C. Misrepresentations Regarding Defendant's Lean Muscle Milk**
4 **Products' Fat Content**

5 45. Recent trends in dieting and weight loss often emphasize increasing one's
6 protein intake in relation to fats and carbohydrates. Additionally, many health
7 conscience consumers actively seek out low-fat food products and dietary supplements
8 for other reasons (for example, individuals with a predisposition for heart disease and
9 those with high blood pressure often avoid foods high in fats). As a result, Defendant
10 markets a number of its Muscle Milk branded powders as "lean." Each of the Lean
11 Muscle Milk Products specifically includes a variation of the term "lean muscle protein"
12 in their names (or in the case of Defendant's Monster Milk, labeled as a "New Leaner
13 Formula") and are labeled as containing "Lean Lipids," a term purportedly trademarked
14 by Defendant.

15 46. However, pursuant to Section 403 of the FDCA, a claim that characterizes
16 the level of a nutrient in a food is a "nutrient content claim" that must be made in
17 accordance with the regulations that authorize the use of such claims. 21 U.S.C. §
18 343(r)(1)(A). Food nutrient content claims include the labeling which implies or
19 suggests that a food contains less fat and cholesterol than other similar products of the
20 same type. California, Florida and Michigan have each expressly adopted the
21 requirements of 21 U.S.C. § 343(r) into their own state statutory regimes.

22 47. Federal regulations specifically prohibit the use of the word "lean" unless
23 Defendant uses such term in accordance with its definition as set out in 21 C.F.R. §
24 101.62(e). *See* 21 C.F.R. § 101.62(a). Use of the term "lean" in a way that does not with
25 comply with 21 C.F.R. § 101.62(e) "shall be deemed to be misbrand[ing] under sections
26 201(n), 403(a), and 403(r) of the Federal Food, Drug, and Cosmetic Act." 21 C.F.R. §
27 101.62(a), (f). Defendant's use of the word "lean" in the names of each Lean Muscle
28 Milk Product does not meet the definitional requirements of 21 C.F.R. § 101.62(e) and

1 thus is a *per se* violation of the Food, Drug, and Cosmetic Act and independently
2 actionable under parallel state consumer protection laws.

3 48. Defendant's use of the word "lean" to describe its Lean Muscle Milk
4 Products is particularly misleading because these Products do not contain any less fat
5 than similar "*non-lean*" protein powders on the market. Almost all of Defendant's
6 competitors produce protein powders with the same, if not lower, fat and cholesterol
7 levels. This is because most protein supplements use protein isolates and concentrates
8 that specifically remove the vast majority of fats and carbohydrates from the Product's
9 protein sources. Accordingly, the Lean Muscle Milk Products are not lean because they
10 do not contain any less fat than other traditional protein powders.

11 49. Defendant's other marketing practices regarding the Lean Muscle Milk
12 Products are equally misleading. Defendant's use of the term "Lean Lipids" is
13 particularly troubling because lipid is the scientific name for a class of molecules that
14 include fats, and thus is often used synonymously describe fat molecules. Therefore, the
15 term "Lean Lipids" is oxymoronic, because a lipid (*i.e.*, a fat) by definition can never
16 be "lean." Each of the Lean Muscle Milk Products' labeling states that these Products
17 contain a "Lean Lipid" blend. However, the "Lean Lipid" blend is primarily comprised
18 of three ingredients - sunflower oil, medium chain triglycerides, canola oil - which are
19 significant sources of fat.⁸

20 50. Marketing and labeling Defendant's Lean Muscle Milk Products as
21 containing the equivalent of "lean fats" is considerably misleading and does not comply
22 with the relevant federal regulations. Indeed, by fortifying its protein powders with a
23 "Lean Lipid" blend consisting of sunflower oil, medium chain triglycerides, canola oil,
24 Defendant cannot possibly claim that its Lean Muscle Milk Products are lean.

25 51. There is no basis in law or fact for Defendant to label and brand its Lean

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 Muscle Milk Products as lean under the circumstances. As such, Defendant has and
 2 continues to misbrand its Lean Muscle Milk Products in a misleading and deceptive
 3 manner that has the capacity to confuse reasonable consumers regarding the fat content
 4 of its Products. Had Plaintiffs and members of the Class known the true nature of the
 5 Lean Muscle Milk Products' fat contents, they would not have purchased Defendant's
 6 protein powders or alternatively paid significantly less for them.

7 **V. CLASS ACTION ALLEGATIONS**

8 52. Plaintiffs bring this action as a class action pursuant to Federal Rule of
 9 Civil Procedure 23 for the following Class of persons:

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

- 12 1. the Muscle Milk RTD Products: Cytosport Whey Isolate Protein
 13 Drink; Monster Milk: Protein Power Shake; Genuine Muscle Milk:
 Protein Nutrition Shake; and Muscle Milk Pro Series 40: Mega
 Protein Shake;
- 14 2. the Muscle Milk Powder Products: Muscle Milk: Lean Muscle
 15 Protein Powder; Muscle Milk Light: Lean Muscle Protein Powder;
 16 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
- 17 3. the Lean Muscle Milk Products: Defendant's Muscle Milk: Lean
 18 Muscle Protein Powder; Muscle Milk Light: Lean Muscle Protein
 19 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.

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

- 22 1. the Muscle Milk RTD Products: Cytosport Whey Isolate Protein
 23 Drink; Monster Milk: Protein Power Shake; Genuine Muscle Milk:
 Protein Nutrition Shake; and Muscle Milk Pro Series 40: Mega
 Protein Shake;
- 24 2. the Muscle Milk Powder Products: Muscle Milk: Lean Muscle
 25 Protein Powder; Muscle Milk Light: Lean Muscle Protein Powder;
 26 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
- 27 3. the Lean Muscle Milk Products: Defendant's Muscle Milk: Lean
 28 Muscle Protein Powder; Muscle Milk Light: Lean Muscle Protein
 Powder; Muscle Milk Naturals: Nature's Ultimate Lean Muscle

1 Protein; Muscle Milk Pro Series 50: Lean Muscle Mega Protein
2 Powder; and Monster Milk: Lean Muscle Protein Supplement.

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

- 5 1. the Muscle Milk RTD Products: Cytosport Whey Isolate Protein
6 Drink; Monster Milk: Protein Power Shake; Genuine Muscle Milk:
7 Protein Nutrition Shake; and Muscle Milk Pro Series 40: Mega
8 Protein Shake;
- 9 2. the Muscle Milk Powder Products: Muscle Milk: Lean Muscle
10 Protein Powder; Muscle Milk Light: Lean Muscle Protein Powder;
11 Muscle Milk Naturals: Nature's Ultimate Lean Muscle Protein;
12 Muscle Milk Gainer: High Protein Gainer Powder Drink Mix; and
13 Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder; and
- 14 3. the Lean Muscle Milk Products: Defendant's Muscle Milk: Lean
15 Muscle Protein Powder; Muscle Milk Light: Lean Muscle Protein
16 Powder; Muscle Milk Naturals: Nature's Ultimate Lean Muscle
17 Protein; Muscle Milk Pro Series 50: Lean Muscle Mega Protein
18 Powder; and Monster Milk: Lean Muscle Protein Supplement.

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

- 21 1. the Muscle Milk RTD Products: Cytosport Whey Isolate Protein
22 Drink; Monster Milk: Protein Power Shake; Genuine Muscle Milk:
23 Protein Nutrition Shake; and Muscle Milk Pro Series 40: Mega
24 Protein Shake;
- 25 2. the Muscle Milk Powder Products: Muscle Milk: Lean Muscle
26 Protein Powder; Muscle Milk Light: Lean Muscle Protein Powder;
27 Muscle Milk Naturals: Nature's Ultimate Lean Muscle Protein;
28 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: 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.

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

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

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

7 55. Plaintiffs' claims are typical of the claims of the other members of the
8 Class. All members of the Class have been and/or continue to be similarly affected by
9 Defendant's wrongful conduct as complained of herein, in violation of federal and state
10 law. Plaintiffs are unaware of any interests that conflict with or are antagonistic to the
11 interests of the Class.

12 56. Plaintiffs will fairly and adequately protect the Class members' interests
13 and have retained counsel competent and experienced in consumer class action lawsuits
14 and complex litigation. Plaintiffs and their counsel have the necessary financial
15 resources to adequately and vigorously litigate this class action, and Plaintiffs are aware
16 of their duties and responsibilities to the Class.

17 57. Defendant has acted with respect to the Class in a manner generally
18 applicable to each Class member. Common questions of law and fact exist as to all Class
19 members and predominate over any questions wholly affecting individual Class
20 members. There is a well-defined community of interest in the questions of law and fact
21 involved in the action, which affect all Class members. Among the questions of law and
22 fact common to the Class are, *inter alia*:

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

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

28 (c) Whether Defendant's Lean Muscle Milk Products are misbranded for

1 including the term “lean” in each of the Products’ names;

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

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

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

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

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

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

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

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

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

26 (iii) Whether Defendant’s sale of its Muscle Milk and Cytosport products
27 constitutes an “unfair” business practice because consumer injury outweighs any
28 countervailing benefits to consumers or competition, and because such injury

1 could not be reasonably avoided by consumers; and

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

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

9 (h) Whether Defendant’s mischaracterization of the protein, L-glutamine, and
10 fat contents in its Muscle Milk and Cytosport products constitutes violations of M.C.L.
11 § 445.903(1)(a), (c), (e), (s), and (cc);

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

14 (j) Whether Plaintiff and the Class should be awarded attorneys’ fees and the
15 costs of suit.

16 58. A class action is superior to all other available methods for the fair and
17 efficient adjudication of this controversy since joinder of all members is impracticable.
18 Furthermore, as the damages suffered by individual Class members may be relatively
19 small, the expense and burden of individual litigation make it virtually impossible for
20 Class members to individually redress the wrongs done to them. There will be no
21 difficulty in managing this action as a class action.

22 59. Defendant has acted on grounds generally applicable to the entire Class
23 with respect to the matters complained of herein, thereby making appropriate the relief
24 sought herein with respect to the Class as a whole.

25 **FIRST COUNT**

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

28 60. Plaintiffs hereby incorporate by reference the allegations contained in the

1 preceding paragraphs of this Complaint.

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

6 62. These materials, advertisements and other inducements misrepresented
7 and/or omitted the true contents and benefits of Defendant's Muscle Milk and Cytosport
8 products as alleged herein. Said materials, advertisements and other inducements were
9 controlled and emanated from Defendant's headquarters, located the State of California.
10 Such advertisements and inducements appear on the labels of Defendant's Muscle Milk
11 and Cytosport products that are produced at Defendant's manufacturing facility in
12 Benicia, California and appear on Muscle Milk's and Cytosport's website which is
13 maintained and controlled from Defendant's Benicia, California headquarters.

14 63. Defendant's advertisements and other inducements come within the
15 definition of advertising as contained in CAL. BUS. PROF. CODE §§ 17500, *et seq.*, in that
16 such promotional materials were intended as inducements to purchase Defendant's
17 Muscle Milk and Cytosport products and are statements disseminated by Defendant,
18 who is located in California, to Plaintiffs and other members of the Class and the
19 California Sub-Class.

20 64. Defendant knew, or in the exercise of reasonable care should have known,
21 that the statements regarding its Muscle Milk and Cytosport products' protein and L-
22 glutamine content were false, misleading and/or deceptive. Defendant equally, knew, or
23 in the exercise of reasonable care should have known, that branding its Lean Muscle
24 Milk Products as lean was a violation of 21 C.F.R. § 101.62 and thus was false,
25 misleading and/or deceptive.

26 65. Consumers, including Plaintiffs and members of the Class and the
27 California Sub-Class, necessarily and reasonably relied on Defendant's statements
28 regarding the contents of its products. Consumers, including Plaintiffs and members of

1 the Class and the California Sub-Class, were among the intended targets of such
2 representations.

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

9 67. Plaintiffs and Class and the California Sub-Class members were harmed
10 and suffered injury as a result of Defendant's violations of the CAL. BUS. PROF. CODE
11 §§ 17500, *et seq.* Defendant has been unjustly enriched at the expense of Plaintiffs and
12 the members of the Class and the California Sub-Class.

13 68. Accordingly, Plaintiff and members of the Class and the California Sub-
14 Class seek injunctive relief prohibiting Defendant from continuing these wrongful
15 practices, and such other equitable relief, including full restitution of all improper
16 revenues and ill-gotten profits derived from Defendant's wrongful conduct to the fullest
17 extent permitted by law. Misbranded food products cannot legally be manufactured,
18 held, advertised, distributed or sold. Thus, misbranded food has no economic value and
19 is worthless as a matter of law, and purchasers of misbranded food are entitled to a
20 restitution refund of the purchase price of the misbranded food.

21 SECOND COUNT

22 **Violation of CAL. CIV. CODE §§ 1750, *et seq.*-** 23 **Misrepresentation of a Product's standard, quality,** 24 **sponsorship, approval, and/or certification** **(On Behalf of the California Subclass)**

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

27 70. Defendant's Muscle Milk and Cytosport products are a "good" as defined
28 by California Civil Code §1761(a).

1 71. Defendant is a "person" as defined by California Civil Code §1761(c).

2 72. Plaintiff Clay and California Sub-Class members are "consumers" within
3 the meaning of California Civil Code §1761(d) because they purchased their Muscle
4 Milk and Cytosport products for personal, family or household use.

5 73. The sale of Defendant's Muscle Milk and Cytosport products to Plaintiff
6 Clay and California Sub-Class members is "transaction" as defined by California Civil
7 Code §1761(e).

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

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

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

22 77. As a result of Defendant's conduct, Plaintiff Clay and California Sub-Class
23 members were harmed and suffered actual damages as a result of Defendant's unfair
24 competition and deceptive acts and practices. Had Defendant disclosed the true nature
25 and/or not falsely represented its Muscle Milk and Cytosport products' protein, L-
26 glutamine and fat content, Plaintiff Clay and the California Sub-Class would not have
27 been misled into purchasing Defendant's Muscle Milk and Cytosport products, or,
28 alternatively, pay significantly less for them.

1 78. Additionally, misbranded food products cannot legally be manufactured,
2 held, advertised, distributed or sold. Thus, misbranded food has no economic value and
3 is worthless as a matter of law, and purchasers of misbranded food are entitled to a
4 refund of the purchase price of the misbrand food.

5 79. Plaintiff Clay, on behalf of herself and all other similarly situated
6 California consumers, and as appropriate, on behalf of the general public of the state of
7 California, seeks injunctive relief prohibiting Defendant continuing these unlawful
8 practices pursuant to California Civil Code § 1782(a)(2).

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

12 81. If Defendant's fail to respond to Plaintiff's CLRA notice within 30 days,
13 Plaintiff Clay may amend this Complaint to seek all available damages under the CLRA
14 for all violations complained of herein, including, but not limited to, statutory damages,
15 punitive damages, attorney's fees and cost and any other relief that the Court deems
16 proper.

17 **THIRD COUNT**

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

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

23 83. The Sherman Law, HEALTH & SAF. CODE §§ 109875 *et seq.*, broadly
24 prohibits the misbranding of any food products. The Sherman Law provides that food is
25 misbranded "if its labeling is false or misleading in any particular." HEALTH & SAF.
26 CODE § 110660.

27 84. Defendant is a person within the meaning of HEALTH & SAF. CODE §
28 109995.

1 85. Additionally, California has adopted as its own, and as the Sherman Law
2 expressly incorporates, “[a]ll food labeling regulations and any amendments to those
3 regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted
4 on or after that date” as “the food labeling regulations of this state.” Federal statutes
5 and regulations, including, but not limited to, 21 U.S.C. §§ 321, 343 and 21 C.F.R. §§
6 101.4, 101.64, prohibit the mislabeling and misbranding of food products.

7 86. Federal statutes and regulations prohibit misleading consumers by
8 misrepresenting a product’s nutritional ingredients and including an ingredient on each
9 Muscle Milk and Cytosport product’s nutritional labels that is not actually included in
10 the products themselves.

11 87. Additionally, the word “lean” to may not be used to describe a food product
12 or dietary supplement unless it complies with definitional requirements of 21 C.F.R. §
13 101.62(e). If a food product is described as lean, and does not comply with 21 C.F.R. §
14 101.62(e), the food is considered misbranded. 21 C.F.R. § 101.62(f).

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

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

23 90. As a result of Defendant’s above unlawful, unfair and fraudulent acts and
24 practices, Plaintiffs, on behalf of themselves and all others similarly situated, and as
25 appropriate, on behalf of the general public, seeks injunctive relief prohibiting
26 Defendant from continuing these wrongful practices, and such other equitable relief,
27 including full restitution of all improper revenues and ill-gotten profits derived from
28 Defendant’s wrongful conduct to the fullest extent permitted by law. Misbranded food

1 products cannot legally be manufactured, held, advertised, distributed or sold. Thus,
2 misbranded food has no economic value and is worthless as a matter of law, and
3 purchasers of misbranded food are entitled to a restitution refund of the purchase price
4 of the misbranded food.

5 **FOURTH COUNT**

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

9 91. Plaintiffs hereby incorporate by reference the allegations contained in the
10 preceding paragraphs of this Complaint.

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

19 93. Defendant's actions alleged herein violate the laws and public policies of
20 California and the federal government, as set out preceding paragraphs of this
21 Complaint.

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

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

1 96. The gravity of the harm suffered by Plaintiffs and Class and the and the
 2 California Sub-Class members who purchased Defendant's Muscle Milk and Cytosport
 3 products outweighs any legitimate justification, motive or reason for marketing,
 4 advertising, packaging and labeling the Muscle Milk and Cytosport products in a
 5 deceptive and misleading manner. Accordingly, Defendant's actions are immoral,
 6 unethical, unscrupulous and offend the established public policies as set out in federal
 7 regulations and is substantially injurious to Plaintiff Clay and members of the Class and
 8 the and the California Sub-Class.

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

15 98. 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, seek injunctive relief prohibiting Defendant
 18 from continuing these wrongful practices, and such other equitable relief, including full
 19 restitution of all improper revenues and ill-gotten profits derived from Defendant's
 20 wrongful conduct to the fullest extent permitted by law. Misbranded food products
 21 cannot legally be manufactured, held, advertised, distributed or sold. Thus misbranded
 22 food has no economic value and is worthless as a matter of law, and purchasers of
 23 misbranded food are entitled to a restitution refund of the purchase price of the misbrand
 24 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)

28 99. Plaintiffs hereby incorporate by reference the allegations contained in the

1 preceding paragraphs of this Complaint.

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

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

15 102. Defendant’s misleading and deceptive practices caused Plaintiffs to
16 purchase Defendant’s Muscle Milk and Cytosport products and/or pay more than they
17 would have otherwise had they know the true nature of the contents of the Muscle Milk
18 and Cytosport products.

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

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

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

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

9 107. 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.

12 108. 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.

15 109. 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.

19 110. 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).

23 111. 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.

2 112. 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.

5 113. 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.

9 114. 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.

16 115. 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.*

22 116. 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.

28 117. 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**
(On Behalf of the Michigan Sub-Class)

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

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

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

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

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

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

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

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

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

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

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

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EIGHTH COUNT

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

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

6 130. Plaintiffs and each member of the Class formed a contract with Defendant
7 at the time Plaintiff and the other members of the Class purchased one or more of the
8 Muscle Milk RTD Products and/or Muscle Milk Powder Products. The terms of that
9 contract include the promises and affirmations of fact made by Defendant on the
10 packaging of the Muscle Milk Powder Products regarding the Products' "Protein Blend"
11 and on the packaging of the Muscle Milk RTD Products regarding the Products' protein
12 content.

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

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

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

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

28 ///

NINTH COUNT

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

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

136. 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.

137. 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).

138. 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.

139. 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.

140. 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).

141. 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).

142. 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.

10 143. 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.

15 144. 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.

22 145. 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).

26 VI. PRAYER FOR RELIEF

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

28 A. For an order declaring that this action is properly maintained as a class

1 action and appointing Plaintiffs as representatives for the Class, and appointing
2 Plaintiffs' counsel as Class counsel;

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

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

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

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

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

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

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

15 **VII. JURY TRIAL DEMAND**

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

18 Respectfully submitted,

19 FINKELSTEIN & KRINSK LLP

20
21 Dated: January 23, 2015

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Attorneys for Plaintiffs and the Putative Classes

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

'15CV0165L DHB

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
 CHAYLA CLAY, ERICA EHRlichMAN, and LOGAN REICHERT,
 individually and on behalf of all others similarly situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Finkelstein & Krinsk LLP, 501 W. Broadway, Suite 1250, San Diego, CA
 92101 (619) 238-1333

DEFENDANTS
 CYTOSPORT, INC., a California Corporation

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

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

Attorneys (If Known)

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

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

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)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

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 (specify) 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):
15 U.S.C. §§ 2301, et seq.

Brief description of cause:
Warranty action and various state causes of action.

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 01/23/2015 SIGNATURE OF ATTORNEY OF RECORD:

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.