

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ANDREW LESHER, individually and on behalf of all others similarly situated,)	
)	
Plaintiff,)	Case No.
)	
v.)	
)	
PROGENEX HOLDINGS, LLC,)	JURY TRIAL DEMANDED
)	
Defendant.)	
)	

CLASS ACTION COMPLAINT

Plaintiff Andrew Lesher (“Plaintiff”), on behalf of himself and all others similarly situated, through his undersigned attorneys, states as follows for his Class Action Complaint against Defendant Progenex Holdings, LLC:

NATURE OF THIS ACTION

1. This is a consumer class action brought by Andrew Lesher on behalf of himself and all others similarly situated who purchased the dietary supplement Progenex More Muscle (the “Product”) from Defendant.

2. Defendant engaged in unfair and/or deceptive business practices by misrepresenting the nature and quality of the Product on the Product label, and were unjustly enriched.

PARTIES

3. Plaintiff Andrew Lesher is a resident of Illinois who purchased the Product for approximately \$75 in August of 2015 from a CrossFit retail store.

4. Defendant Progenex Holdings, LLC is a Wyoming Limited Liability Company with its principal place of business at 41 E 400 N #226, Logan, Utah 84321.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this controversy pursuant to 28 U.S.C. § 1332(d), because the matter in controversy exceeds the sum or value of \$5,000,000.00, exclusive of interest and costs, and because this is a class action in which a member of a class of plaintiffs is a citizen of a state different from the defendant.

6. Diversity jurisdiction exists because Plaintiff is a resident of Illinois and Defendant is a citizen of another state.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and (c) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District, and Defendant transacts business and/or has agents within this District.

GENERAL ALLEGATIONS

8. Sales of whey protein products are expected to grow to U.S. \$7.8 billion by 2018. However, due to the high level of competition in the market and the escalating price of wholesale whey protein, sellers' profit margins are slim.

9. In such a competitive business environment, Defendant makes an effort to differentiate the Product by including false claims regarding added ingredients to entice consumers to choose the Product over its competitors.

10. Defendant designed, manufactured, warranted, advertised and sold the Product throughout the United States, including the State of Illinois, and continues to do so.

Defendant's Misleading Labeling of Progenex More Muscle

11. Due to the highly competitive protein supplement industry, Defendant makes false claims about the Product to differentiate itself from competing protein products.

12. Defendant misled the Plaintiff and Class Members by stating that the Product contained comparatively more Branched Chain Amino Acids ("BCAAs") than regular whey protein isolate and that the Product was enriched with Growth Factors, which it is not.

Branched Chained Amino Acids

13. Defendant claims on the label of the Product, and through its marketing materials, including Defendant's website www.progenexusa.com, that the Product contains 20% more BCAAs than regular Whey Protein Isolate ("WPI"):

"PROGENEX More Muscle features a full 20 percent more BCAAs and leucine than regular whey protein isolate. The precise amount of BCAAs added to PROGENEX More Muscle were carefully calibrated, as the leucine content of whole proteins is directly related to how much protein your body will integrate into muscle. This synergistic combination cannot be replicated by simply adding extra leucine to a whey protein isolate or any other form of protein. When it comes to increasing energy, speeding recovery, stimulating muscle building and achieving your best body composition ever, PROGENEX More Muscle delivers MORE of everything you need!"¹

14. After scientific testing, the Product was shown to contain 7.218 grams of BCAAs per 31-gram protein serving. **Exhibit A.**

15. WPI is distributed by several suppliers globally, and is usually within certain levels of amino acid content levels.

16. For instance, Glanbia, one of the largest suppliers of WPI in the world, provides specification sheets of its proteins. Its WPI product contains 24.7 grams of BCAAs per 100 grams of protein. **Exhibit B.**

¹ <http://progenexusa.com/shop/more-muscle/> (last visited July 14, 2015).

17. Therefore, 31 grams of protein of one of the leading suppliers of WPI yields the consumer 7.657 grams of BCAAs. This amount is actually more BCAAs than the Product contains, making the statement “PROGENEX More Muscle features a full 20 percent more BCAAs and leucine than regular whey protein isolate” false and misleading.

18. Another example is Hilmar Ingredients, who is a supplier that sells Hilmar 9420 WPI. This WPI contains 21.8 grams of BCAAs per 100 grams of protein. **Exhibit C.**

19. Converting this to a 31-gram protein sample, Hilmar 9420 WPI contains 6.758 grams of BCAAs per 31 grams of protein. Although slightly less than the amount found in the Product, Defendant’s statement is still false and misleading because the Product only contains approximately 6.5% more BCAAs than this regular WPI.

20. Further, Hilmar Ingredients also offers for sale Hilmar 9010 Instantized WPI, which contains 21.3 grams of BCAAs per 100 grams of protein. **Exhibit D.**

21. Converting this to a 31-gram protein sample, Hilmar 9010 Instantized WPI contains 6.603 grams of BCAAs per 31 grams of protein. Although slightly less than the amount found in the Product, Defendant’s statement is still false and misleading because the Product only contains approximately 8.5% more BCAAs than this regular WPI.

22. Under information and belief, Defendant uses Glanbia Thermax 690 as its protein source for the Product. Looking at the specifications sheet of the Thermax 690 WPI, the product contains roughly 6.5 grams of BCAA per 31 grams of protein. Again, this is far from the 20% difference in BCAA content. **Exhibit E.**

Growth Factors

23. Defendant also falsely claims on the label of the Product, and through its marketing materials, including Defendant's website www.progenexusa.com, that the Product is enhanced with growth factors:

“PROGENEX More Muscle is specifically formulated for fast and maximum uptake. The key to PROGENEX More Muscle is that it contains the highest quality whey protein isolate available that has been hydrolyzed through a proprietary enzymatic process and enriched with whey growth factors.”²

24. Growth factors are hypothetically supposed to be found in WPI, but the manufacturing of this ingredient most likely strip these factors from the finished product.

25. However, Defendant claims that the Product is “enhanced” with additional growth factors, thus creating superior results compared to other WPI products.

26. Again, looking at the Glanbia Thermax 690 WPI powder, there is no indication that the WPI is “enhanced” with any type of growth factor. **Exhibit E.**

27. Also, after scientific testing, the Product was shown not to contain any growth factors at all. **Exhibit F.**

28. The difference between the product Defendant expressly and/or implicitly purports to deliver, and the Product actually delivered, is significant. The amount of added compounds provided by the Product directly affects its value to reasonable consumers. Because of Defendant's practices, such consumers are misled and deceived into paying an inflated price for Defendant's Product.

29. Pursuant to 21 U.S.C. § 321(f), the Product is a “food” regulated by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (“FDCA”), and the FDCA regulations.

² <http://progenexusa.com/shop/more-muscle/> (last visited July 14, 2015).

30. Defendant's false and misleading label statements violate 21 U.S.C. § 343(a) and the so-called "little FDCA" statutes adopted by many states,³ which deem food misbranded when "its labeling is false or misleading in any particular."

31. Further, federal statutes and regulations require that all ingredients added to a food product for their functional effect to be listed in descending order of predominance. *See* 21 U.S.C. § 343(i); 21 C.F.R. §§ 101.2, 101.4, 101.100(a)(3)(ii)(c). Failure to list an ingredient, or listing ingredients which are not contained in a product, shall render a food misbranded and therefore its sale will be deemed unlawful. 21 U.S.C. §§ 343(a), 331(a).

32. Illinois has expressly adopted the federal food labeling requirements as its own: "[A] federal regulation automatically adopted pursuant to this Act takes effect in this State on the date it becomes effective as a Federal regulation." 410 ILCS 620/21. Thus, a violation of federal food labeling laws is an independent violation of Illinois law and actionable as such.

33. Pursuant to 410 ILCS 620/11, which mirrors 21 U.S.C. § 343(a), "[a] food is misbranded - (a) If its labeling is false or misleading in any particular."

34. The Illinois Consumer Fraud Act ("ICFA") also protects Defendant's consumers, and provides:

§ 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 ILCS 505/2.

³ *See, e.g.*, 410 ILCS 620/11.

35. Defendant's false, deceptive and misleading label statements are unlawful under several states' Consumer Fraud Acts.

36. The introduction of misbranded food into interstate commerce is prohibited under the FDCA and all state parallel statutes cited in this Class Action Complaint.

37. Defendant intended for Plaintiff and the Class members to be misled.

38. Defendant's misleading and deceptive practices proximately caused harm to the Plaintiff and the Classes.

CLASS ACTION ALLEGATIONS

39. Plaintiff brings this action individually and as representative of all those similarly situated, pursuant to Federal Rule of Civil Procedure 23 on behalf of the below-defined Classes:

National Class: All persons in the United States that purchased the Product.

Consumer Fraud Multi-State Class: All persons in the States of California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington that purchased the Product.⁴

Illinois Subclass: All persons in the State of Illinois that purchased the Product.

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

⁴ The States in the Consumer Fraud Multi-State Class are limited to those States with similar consumer fraud laws under the facts of this case: California (Cal. Bus. & Prof. Code §17200, *et seq.*); Florida (Fla. Stat. §501.201, *et seq.*); Illinois (815 Ill. Comp. Stat. 502/1, *et seq.*); (Massachusetts (Mass. Gen. Laws Ch. 93A, *et seq.*); Michigan (Mich. Comp. Laws §445.901, *et seq.*); Minnesota (Minn. Stat. §325F.67, *et seq.*); Missouri (Mo. Rev. Stat. 010, *et seq.*); New Jersey (N.J. Stat. §56:8-1, *et seq.*); New York (N.Y. Gen. Bus. Law §349, *et seq.*); and Washington (Wash. Rev. Code §19.86.010, *et seq.*).

40. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

41. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** The members of the Classes are so numerous that their individual joinder herein is impracticable. On information and belief, Class members number in the thousands to millions. The precise number of Class members and their addresses are presently unknown to Plaintiff, but may be ascertained from Defendant's books and records. Class members may be notified of the pendency of this action by mail, email, Internet postings, and/or publication.

42. **Commonality and Predominance – Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3).** Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Such common questions of law or fact include:

- a. The true nature of the ingredients in the Product;
- b. Whether the marketing, advertising, packaging, labeling, and other promotional materials for the Product are deceptive;
- c. Whether Defendant's actions violate the State consumer fraud statutes invoked below;
- d. Whether Defendant was Unjustly Enriched at the expense of Plaintiff and Class Members; and
- e. Whether Defendant violated an Express Warranty to Plaintiff and Class Members.

43. Defendant engaged in a common course of conduct giving rise to the legal rights sought to be enforced by Plaintiff, on behalf of himself and the other Class members. Similar or

identical statutory and common law violations, business practices, and injuries are involved. Individual questions, if any, pale by comparison, in both quality and quantity, to the numerous common questions that dominate this action.

44. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiff's claims are typical of the claims of the other members of the Classes because, among other things, all Class members were comparably injured through Defendant's uniform misconduct described above. Further, there are no defenses available to Defendant that are unique to Plaintiff.

45. **Adequacy of Representation – Federal Rule of Civil Procedure 23(a)(4).** Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the other Class members he seeks to represent, he has retained counsel competent and experienced in complex class action litigation, and Plaintiff will prosecute this action vigorously. Accordingly, Plaintiff and his counsel will fairly and adequately protect the Classes' interests.

46. **Insufficiency of Separate Actions – Federal Rule of Civil Procedure 23(b)(1).** Absent a representative class action, members of the Classes would continue to suffer the harm described herein, for which they would have no remedy. Even if separate actions could be brought by individual consumers, the resulting multiplicity of lawsuits would cause undue hardship and expense for both the Court and the litigants, as well as create a risk of inconsistent rulings and adjudications that might be dispositive of the interests of similarly situated purchasers, substantially impeding their ability to protect their interests, while establishing incompatible standards of conduct for Defendant. The proposed Classes thus satisfy the requirements of Fed. R. Civ. P. 23(b)(1).

47. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).** Defendant has acted or refused to act on grounds generally applicable to Plaintiff and the other

members of the Classes, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the members of the Classes as a whole.

48. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other members of the Classes are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendant, so it would be impracticable for Class members to individually seek redress for Defendant's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CAUSES OF ACTION

COUNT I

Violation of State Consumer Fraud Acts (On Behalf of the Multi-State Class)

49. Plaintiff incorporates each preceding paragraph as if fully set forth herein.

50. The Consumer Fraud Acts of the States in the Consumer Fraud Multi-State Class⁵ prohibit the use of unfair or deceptive business practices in the conduct of trade or commerce.

⁵ California (Cal. Bus. & Prof. Code §17200, *et seq.*); Florida (Fla. Stat. §501.201, *et seq.*); Illinois (815 Ill. Comp. Stat. 502/1, *et seq.*); (Massachusetts (Mass. Gen. Laws Ch. 93A, *et seq.*); Michigan (Mich. Comp. Laws §445.901, *et seq.*); Minnesota (Minn. Stat. §325F.67, *et seq.*); Missouri (Mo. Rev. Stat. 010, *et seq.*); New Jersey (N.J. Stat. §56:8-1, *et seq.*); New York (N.Y. Gen. Bus. Law §349, *et seq.*); and Washington (Wash. Rev. Code §19.86.010, *et seq.*).

51. Defendant intended that Plaintiff and each of the other members of the Consumer Fraud Multi-State Class would rely upon their deceptive conduct, and a reasonable person would in fact be misled by this deceptive conduct.

52. As a result of the Defendant's use or employment of unfair or deceptive acts or business practices, Plaintiff and each of the other members of the Consumer Fraud Multi-State Class have sustained damages in an amount to be proven at trial.

53. In addition, Defendant's conduct showed malice, motive, and the reckless disregard of the truth such that an award of punitive damages is appropriate.

COUNT II

Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (In the alternative to Count I and On Behalf of the Illinois Subclass)

54. Plaintiff incorporates each preceding paragraph as if fully set forth herein.

55. The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.*, prohibits the use of unfair or deceptive business practices in the conduct of trade or commerce. The ICFA is to be liberally construed to effectuate its purpose.

56. Defendant intended that Plaintiff and each of the other members of the Class would rely upon their deceptive conduct, and a reasonable person would in fact be misled by this deceptive conduct.

57. As a result of the Defendant's use or employment of unfair or deceptive acts or business practices, Plaintiff and each of the other members of the Illinois Subclass have sustained damages in an amount to be proven at trial.

58. In addition, Defendant's conduct showed malice, motive, and the reckless disregard of the truth such that an award of punitive damages is appropriate.

COUNT III
Unjust Enrichment
(On Behalf of the Illinois and National Classes)

59. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

60. Plaintiff and Class Members conferred benefits on Defendant by purchasing the Product.

61. Defendant received a substantial benefit in the form of payments from Plaintiff and members of the Classes for purchasing the Product.

62. Plaintiff and members of the Classes would not have purchased the Product if they had been aware of its misleading labeling, and the true nature and quality of the Product.

63. Defendant's retention of its benefit without providing the product Plaintiff and members of the Classes reasonably expected to receive would be unjust and inequitable.

64. Because Defendant's retention of the non-gratuitous benefits conferred on them by Plaintiff and Class Members is unjust and inequitable, Defendant must pay restitution to the Plaintiff and the Class Members for their unjust enrichment, as ordered by the Court.

COUNT IV
Breach of Express Warranty
(On Behalf of the Illinois and National Classes)

65. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

66. Plaintiff, and each member of the Classes formed a contract with Defendant at the time Plaintiff and the other Class members purchased the Products. The terms of the contract include the promises and affirmations of fact made by Defendant on the Product's packaging and through marketing and advertising, as described above. This labeling, marketing and advertising constitute express warranties and became part of the basis of bargain, and are part of the standardized contract between Plaintiff and the members of the Classes and Defendant.

67. Defendant purports through its advertising and packaging to create express warranties that the Product contained certain ingredients and provided certain benefits, which it did not.

68. All conditions precedent to Defendant's liability under this contract were performed by Plaintiff and the Classes when they purchased the Product.

69. Defendant breached express warranties about the Product and its qualities because Defendant's statements about the Product were false and the Product does not conform to Defendant's affirmations and promises described above. Plaintiff and the Class Members would not have purchased the Product had they known the true nature of the Product's ingredients and what the Product did and did not contain.

70. As a result of Defendant's breach of warranty, Plaintiff and Class Members have been damaged in the amount of the purchase price of the Product and any consequential damages resulting from the purchases.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all claims in this complaint so triable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other members of the Classes proposed in this Complaint, respectfully requests that the Court enter judgment as follows:

- A. Declaring that this action is a proper class action, certifying the Class as requested herein, designating Plaintiff as Class Representative and appointing the undersigned counsel as Class Counsel for the Classes;
- B. Ordering Defendant to pay actual damages to Plaintiff and the other members of the Classes;
- C. Ordering Defendant to pay punitive damages, as allowable by law, to Plaintiff and the other members of the Classes;

- D. Ordering Defendant to pay statutory damages, as provided by the applicable state consumer protection statutes invoked above, to Plaintiff and the other members of the Classes;
- E. Ordering Defendant to pay attorneys' fees and litigation costs to Plaintiff and the other members of the Classes;
- F. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded;
- G. Leave to amend this Complaint to conform to the evidence presented at trial; and
- H. Ordering such other and further relief as may be just and proper.

Dated: September 4, 2015

Respectfully submitted,

ANDREW LESHER, individually and on behalf of
all others similarly situated

/s/ Joseph J. Siprut

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