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

<p>Sammer Zakhour and Aurelio Batista, Individually And On Behalf Of All Others Similarly Situated,</p> <p>Plaintiffs,</p> <p>v.</p> <p>Glanbia Performance Nutrition, Inc. d/b/a Optimum Nutrition, Inc.,</p> <p>Defendant.</p>	<p>Case No.: '15CV2513 AJB WVG</p> <p><u>CLASS ACTION</u></p> <p>COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF</p> <p>JURY TRIAL DEMANDED</p>
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INTRODUCTION

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- 2 1. The average consumer spends a mere 13 seconds making an in-store
- 3 purchasing decision, or between 10 to 19 seconds for an online purchase.¹
- 4 That decision is heavily dependent on a product's packaging, and particularly
- 5 the package dimensions: "Most of our studies show that 75 to 80 percent of
- 6 consumers don't even bother to look at any label information, no less the net
- 7 weight Faced with a large box and a smaller box, both with the same
- 8 amount of product inside . . . consumers are apt to choose the larger box
- 9 because they think it's a better value."² This lawsuit charges Defendant with
- 10 intentionally packaging its Whey products, including its: 100% Gold Standard
- 11 Whey; 100% Oats & Whey; Naturally Flavored 100% Whey Gold Standard;
- 12 Performance Whey; Performance Whey Isolate; Platinum Hydro Whey
- 13 Platinum Tri-Celle Casein; 100% Casein Protein; and Naturally Flavored
- 14 100% Casein (collectively, "Whey Products" or "Products") in large, opaque
- 15 containers that contain approximately 35% empty space. Consumers, in
- 16 reliance on the size of the containers, paid a premium price for the Products,
- 17 which they would not have purchased had they known that the containers
- 18 were substantially empty.
- 19 2. Sammer Zakhour and Aurelio Batista (hereinafter "Plaintiffs"), individually
- 20 and on behalf of all others similarly situated, bring this Class Action
- 21 Complaint for damages, injunctive relief, and any other available legal or
- 22 equitable remedies, resulting from the unlawful and deceptive actions of
- 23 Glanbia Performance Nutrition, Inc., doing business as Optimum Nutrition,

24 ¹ [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html)

25 [brands-20-second-window.html](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html) (citing the Ehrenberg-Bass Institute of Marketing

Science's report "Shopping Takes Only Seconds...In-Store and Online").

26 ²[http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm)

27 [product-packaging/overview/product-packaging-ov.htm](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm) (quoting Brian Wansink,

28 professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).

Inc. (“Defendant” or “Optimum Nutrition”) with respect to the packaging of its Whey Products. Plaintiffs allege as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

3. Optimum Nutrition sells Whey Products on a nationwide basis, in “close to 10,000 independent natural product and specialty retail stores, gyms, and fitness centers, and several major grocery chain and drug stores.”³ According to the optimumnutrition.com website, Optimum Nutrition whey products dominate the whey protein market: “Optimum Nutrition was established in 1986 to satisfy consumer demand for consistent quality in sports nutrition. The company is also known for innovation, being first to produce a casein protein powder, and first to offer an all-micellar casein formula. ON’s industry leadership can also be seen in the dominance of Gold Standard 100% Whey, universally recognized as the world’s best-selling whey protein.”⁴ Optimum Nutrition Whey Products can be purchased from bricks and mortar on online retailers, including amazon.com, the Vitamin Shoppe, and GNC. On the GNC website, a 2 pound container of 100% Whey Gold Standard sells for \$49.99 and a 5 pound container sells for \$99.99, with a discount for GNC members. A 3.5 pound container of Platinum Hydro Whey sells for \$109.99, with a discount for GNC members.⁵

4. Defendant claims to provide “first-rate sports nutrition supplements under the strictest quality control standards” It also states that customers are the company’s first priority: “We pride ourselves on customer loyalty and are

³ <http://www.optimumnutrition.com/about.php>. Accessed on October 26, 2015.

⁴ <http://www.optimumnutrition.com/about.php>. Accessed on October 26, 2015.

⁵ <http://www.gnc.com/family/index.jsp?categoryId=3703232&f=PAD%2FBrands%2FOptimum+Nutrition&fbc=1&lmdn=Brand&fbn=Brands%7COptimum+Nutrition>. Accessed on October 26, 2015.

1 pleased to report that nearly all of our first-time customers become devoted
2 patrons. You can be confident that from the moment a product is conceived to
3 the moment it leaves our facility we put only the best into Optimum Nutrition
4 so you only put the best into your body.”⁶

5 5. Plaintiffs purchased Defendant’s Whey Products, and expected to receive full
6 containers of Product. The Whey Products are packaged in non-transparent
7 containers, as depicted below. Plaintiffs were surprised and disappointed
8 when they opened the Products to discover that the containers had
9 approximately 35% empty space, or slack-fill. Had Plaintiffs known about
10 the slack-fill at the time of purchase, they would not have bought Defendant’s
11 Products.

12 6. Defendant’s conduct violates consumer protection and labeling laws.

13 **JURISDICTION AND VENUE**

14 7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332,
15 because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in
16 which a member of the putative class is a citizen of a different state than
17 Defendant, and the amount in controversy exceeds the sum or value of
18 \$5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

19 8. The Court has jurisdiction over the state law claims because they form part of
20 the same case or controversy under Article III of the United States
21 Constitution.

22 9. The Court has personal jurisdiction over Defendant because its Whey
23 Products are advertised, marketed, distributed and sold through the State of
24 California; Defendant engaged in the wrongdoing alleged in this Complaint
25 throughout the United States, including in the State of California; Defendant
26 is authorized to do business in the State of California; and Defendant has
27 sufficient minimum contacts with the State of California, rendering the

28 ⁶ <http://www.optimumnutrition.com/about.php>. Accessed on October 26, 2015.

exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendant is engaged in substantial activity with the State of California.

10. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred within this judicial district, Defendant has marketed and sold the Products at issue in this action in this judicial district, and it conducts business within this judicial district. In addition, Plaintiff Zakhour resides in this judicial district.

PARTIES

11. Plaintiff Sammer Zakhour (“Zakhour”) is a citizen of the State of California and resides in San Diego, California. Plaintiff Zakhour purchased a Whey Product for personal consumption during the last four years in San Diego, California. Plaintiff Zakhour purchased the Product in reliance on Defendant’s packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff Zakhour known the truth about Defendant’s misrepresentations, he would not have purchased the premium priced Product.
12. Plaintiff Aurelio Batista (“Batista”) is a citizen of the State of New York and resides in Haverstraw, New York. Plaintiff Batista purchased a Whey Product for personal consumption during the last four years in West Nyack, New York. Plaintiff Batista purchased the Product in reliance on Defendant’s packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff Batista known the truth about Defendant’s misrepresentations, he would not have purchased the premium priced Product.
13. On information and belief, Defendant Optimum Nutrition, Inc. is based in Illinois.

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FACTUAL ALLEGATIONS**Federal and State Laws Prohibit Non-functional Slack Full**

14. The Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §§ 301 *et seq.*, governs the sale of foods, drugs and cosmetics in the United States. The classification of a product as a food, drug, or cosmetic affects the regulations by which the manufacturer must abide. In general, a product is characterized according to its intended use, which may be established, among other ways, by: (a) claims stated on the product’s labeling, in advertising, on the Internet, or in other promotional materials; (b) consumer perception established through the product’s reputation, for example by asking why the consumer is buying it and what the consumer expects it to do; or (c) the inclusion of ingredients well-known to have therapeutic use, for example fluoride in toothpaste. The Whey Products are characterized and understood by consumers to be a food.

15. Under the FDCA, the term “false” has its usual meaning of untruthful, while the term “misleading” is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire Product is misbranded. No other statement in the labeling cures a misleading statement. “Misleading” is judged in reference to “the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze.” *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

A. Misbranding of Foods

16. The Whey Product labels contain numerous ingredients found in or derived from food, including whey protein and cocoa powder. Certain Product labels contain instructions on how to create drinks from the Products, and state that, by adding fruit, peanut butter, coconut and other ingredients, the consumer

can create an “even more delicious shake.” In addition, certain labels provide suggestions on how to use the Products in food, such as yogurt, or baked goods.

17. According to mayoclinic.org, milk is made up of two types of proteins – casein and whey. “Whey proteins contain higher levels of essential amino acids. They are used in ice cream, bread, soup, baby formula, and other food products.”⁷ According to webMD.com, whey protein is “the protein contained in whey, the watery portion of milk that separates from the curds when making cheese.”⁸

18. Under the Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. § 343(d), a food shall be deemed to be misbranded if “(a) . . . (1) its labeling is false or misleading in any particular”; or “(d) If its container is so made, formed, or filled as to be misleading.”

19. Pursuant to 21 C.F.R. §100.100, a food is misbranded if “its container is so made, formed or filled as to be misleading.” In addition, “(a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:

- (1) Protection of the contents of the package;
- (2) The requirements of the machines used for enclosing the contents in such package;
- (3) Unavoidable product settling during shipping and handling;

⁷ <http://www.mayoclinic.org/drugs-supplements/whey-protein/background/hrb-20060532>. Accessed on September 18, 2015.

⁸ <http://www.webmd.com/vitamins-supplements/ingredientmono-833-whey%20protein.aspx?activeingredientid=833&activeingredientname=whey%20protein>. Accessed on September 18, 2015.

(4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;

(5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or

(6) Inability to increase level of fill or to further reduce the size of the package”

20. None of the above safe-harbor provisions applies to the Whey Products. Defendant intentionally incorporated non-functional slack-fill in its packaging of the Products in order to mislead consumers, including Plaintiffs and Members of the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 405 (E.D.N.Y. 2010) (“Misleading consumers is not a valid reason to package a product with slack-fill. *See* 21 C.F.R. § 100.100(a)(1-6).”).

21. California and New York consumer protection and food labeling laws impose requirements which mirror the federal law. California Business & Professions Code states, “[n]o container shall be made, formed, or filled as to be misleading” and “[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill.” *See* Cal. Bus. & Prof. Code § 12606 (incorporating the safe harbor provisions of the CFR). *See also* Cal. Health and Safety Code § 110690 (“Any food is misbranded if its container is so made, formed, or filled as to be misleading.”); NY AGM. Law § 201 (“Food shall be deemed

to be misbranded If its container is so made, formed, colored or filled as to be misleading.”).

Defendant’s Products Contain Non Functional Slack-Fill

22. Defendant’s Whey Products are sold in non-transparent containers that contain different net weights. Each of the containers has significant slack-fill, as described below.

23. The 100% Whey Gold Standard container, for example, is roughly 10 inches tall. Up to and not including the space where the interior of the container narrows and above the indentation where the lid begins, approximately 35% of the interior of the container is comprised of empty space, or non-functional slack fill. *See* PHOTOS A and B.

PHOTO A



PHOTO B



24. Judging from the sizes of the containers, a reasonable consumer would expect them to be substantially filled with product. Consumers are misled into believing that they are purchasing substantially more Whey Product than they receive.
25. There is no functional reason for including approximately 35% slack-fill in the Whey Products.
26. On information and belief, consumers have relied upon, and are continuing to rely upon, the size of the Whey Product containers as the basis for making purchasing decisions. Consumers believe that the Whey Products are substantially full because they cannot see the actual contents within the non-transparent container. *See Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 404 (E.D.N.Y. 2010) (finding that a half-filled supplement container could constitute a “misleading representation” that resulted in the unjust

enrichment of the manufacturer even though the weight of the product and the number of servings enclosed were clearly listed on the outer packaging).

27. On information and belief, Defendant is selling and will continue to sell the Whey Products using these blatantly deceptive and misleading slack-filled containers.

28. Defendant's packaging and advertising of the Products violates various state laws against misbranding, which contain requirements that mirror the FDCA, as described herein.

Plaintiffs Relied on Defendant's Misleading and Deceptive Conduct and Were Injured as a Result

29. The types of misrepresentations made, as described herein, were considered by Plaintiffs and Class Members (as would be considered by a reasonable consumer) when deciding to purchase the Whey Products. Reasonable consumers, including Plaintiffs and Class Members, attached importance to whether Defendant's Whey Products were misbranded, *i.e.*, not legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

30. Plaintiffs and the Class Members did not know, and had no reason to know, that the Whey Products contained non-functional slack-fill.

31. Defendant's Product packaging was a material factor in Plaintiffs' and the Class Members' decisions to purchase the Whey Products. Based on Defendant's Product packaging, Plaintiffs and the Class Members believed that they were getting more Product than was actually being sold. Had Plaintiffs known Defendant's packaging was slack-filled, they would not have bought the slack-filled Products.

32. Plaintiffs and the Class Members paid the full price of the Whey Products and received less Product than they expected due to the non-functional slack-fill in the Products.

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33. There is no practical reason for the non-functional slack-fill used to package the Whey Products other than to mislead consumers as to the actual volume of the Products being purchased by consumers.

34. As a result of Defendant's misrepresentations, Plaintiffs and thousands of others throughout the United States purchased the Products. Plaintiffs and the Class (defined below) have been damaged by Defendant's deceptive and unfair conduct.

CLASS ACTION ALLEGATIONS

35. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following National class and subclasses (collectively, the "Class" or "Classes"), defined as:

National Class: All persons in the United States who made retail purchases of Optimum Nutrition Whey Products in containers made, formed or filled as to be misleading and with non-functional slack-fill, during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

California Subclass: All California residents who made retail purchases of Optimum Nutrition Whey Products in containers made, formed or filled as to be misleading and with non-functional slack-fill, during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

New York Subclass: All New York residents who made retail purchases of Optimum Nutrition Whey Products in containers made, formed or filled as to be misleading and with non-functional slack-fill, during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

36. The proposed Classes exclude current and former officers and directors of Defendant, Members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, assigns, and

any entity in which it has or has had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

37. Plaintiffs reserve the right to revise the Class definitions based on facts learned in the course of litigating this matter.

38. Numerosity: This action has been brought and may properly be maintained as a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the Federal Rules of Civil Procedure. While the exact number and identities of other Class Members are unknown to Plaintiffs at this time, Plaintiffs are informed and believe that there are hundreds of thousands of Members in the Class. Based on sales of the Products, it is estimated that the Class is composed of more than 10,000 persons. Furthermore, even if subclasses need to be created for these consumers, it is estimated that each subclass would have thousands of Members. The Members of the Class are so numerous that joinder of all Members is impracticable and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the courts.

39. Typicality: Plaintiffs' claims are typical of the claims of the Members of the Class as all Members of the Class are similarly affected by Defendant's wrongful conduct, as detailed herein.

40. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Members of the Class in that they have no interests antagonistic to those of the other Members of the Class. Plaintiffs have retained experienced and competent counsel.

41. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages sustained by individual Class Members may be relatively small, the expense and burden of individual litigation makes it impracticable for the Members of the Class to individually seek redress for the wrongful conduct alleged herein. Furthermore, the adjudication of this controversy through a class action will

1 avoid the potentially inconsistent and conflicting adjudications of the claims
2 asserted herein. There will be no difficulty in the management of this action
3 as a class action. If Class treatment of these claims were not available,
4 Defendant would likely unfairly receive thousands of dollars or more in
5 improper revenue.

6 42. Common Questions Predominate: Common questions of law and fact exist as
7 to all Members of the Class and predominate over any questions solely
8 affecting individual Members of the Class. Among the common questions of
9 law and fact applicable to the Class are:

- 10 i. Whether Defendant labeled, packaged, marketed, advertised and/or sold
11 Whey Products to Plaintiffs, and those similarly situated, using false,
12 misleading and/or deceptive packaging and labeling;
- 13 ii. Whether Defendant's actions constitute violations of 21 U.S.C. 100.100,
14 *et. seq.*;
- 15 iii. Whether Defendant's actions constitute violations of state consumer
16 protection laws;
- 17 iv. Whether Defendant omitted and/or misrepresented material facts in
18 connection with the labeling, packaging, marketing, advertising and/or
19 sale of its Whey Products;
- 20 v. Whether Defendant's labeling, packaging, marketing, advertising and/or
21 selling of Whey Products constituted an unfair, unlawful or fraudulent
22 practice;
- 23 vi. Whether Defendant's packaging of the Whey Products constituted
24 nonfunctional slack-fill;
- 25 vii. Whether, and to what extent, injunctive relief should be imposed on
26 Defendant to prevent such conduct in the future;
- 27 viii. Whether the Members of the Class have sustained damages as a result of
28 Defendant's wrongful conduct;
- ix. The appropriate measure of damages and/or other relief; and

x. Whether Defendant should be enjoined from continuing its unlawful practices.

43. The class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class action.

44. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

45. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Class predominate over any questions affecting only individual Members; and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

46. The prosecution of separate actions by Members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interest of all Members of the Class, although certain Class Members are not parties to such actions.

47. Defendant's conduct is generally applicable to the Class as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

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CAUSES OF ACTION**COUNT I****VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT,
Cal. Civ. Code § 1750, *et seq.***

48. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

49. Plaintiffs bring this claim individually and on behalf of the Class for Defendant's violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code 1761(d).

50. Plaintiffs and the Class Members are consumers who purchased the Products for personal, family or household purposes. Plaintiffs and the Class Members are "consumers" as that term is defined by the CLRA in Cal. Civ. Code 1761(d). Plaintiffs and the Class Members are not sophisticated experts with independent knowledge of corporate branding, labeling and packaging practices.

51. The Products that Plaintiffs and other Class Members purchased from Defendant were "goods" within the meaning of Cal. Civ. Code 1761(a).

52. Defendant's actions, representations, and conduct have violated, and continue to violate the CLRA, because they extend to transactions that intended to result, or which have resulted in, the sale of goods to consumers.

53. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and which contain non-functional slack-fill, and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

54. California's Consumers Legal Remedies Act, Cal. Civ. Code 1770(a)(5), prohibits "Misrepresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have." By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5)

1 of the CLRA, because Defendant's conduct constitutes unfair methods of
2 competition and unfair or fraudulent acts or practices, in that it misrepresents
3 that the Products have quantities they do not have.

4 55. Cal. Civ. Code 1770(a)(9) further prohibits "[a]dvertising goods or services
5 with intent not to sell them as advertised." By engaging in the conduct set
6 forth herein, Defendant violated and continues to violate Section 1770(a)(9),
7 because Defendant's conduct constitutes unfair methods of competition and
8 unfair or fraudulent acts or practices, in that it advertises goods as containing
9 more product than they in fact contain.

10 56. Plaintiffs and the Class Members are not sophisticated experts about corporate
11 branding, labeling and packaging practices. Plaintiffs and the Class acted
12 reasonably when they purchased the Products based on their belief that
13 Defendant's representations were true and lawful.

14 57. Plaintiffs and the Class suffered injuries caused by Defendant because (a) they
15 would not have purchased the Products on the same terms absent Defendant's
16 illegal and misleading conduct as set forth herein; (b) they paid a price
17 premium for the Products due to Defendant's misrepresentations and
18 deceptive packaging in containers made, formed or filled as to be misleading
19 and containing non-functional slack-fill; and (c) the Products did not have the
20 quantities as promised.

21 58. On or about October 30, 2015, prior to filing this action, Plaintiff Zakhour
22 sent a CLRA notice letter to Defendant which complies with California Civil
23 Code 1782(a). Plaintiff Zakhour sent individually and on behalf of the
24 proposed Class, a letter via Certified Mail to Glanbia Performance Nutrition,
25 Inc., d/b/a Optimum Nutrition, Inc., advising Defendant that it is in violation
26 of the CLRA and demanding that it cease and desist from such violations and
27 make full restitution by refunding the monies received therefrom. A true and
28 correct copy of the letter is attached hereto as EXHIBIT 1.

59. Wherefore, Plaintiffs seek injunctive relief for these violations of the CLRA.

COUNT II**VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW,
California Business & Professions Code § 17200, *et seq.***

60. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

61. Plaintiffs bring this claim individually and on behalf of the Members of the Class for Defendant’s violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*

62. The UCL provides, in pertinent part: “Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising...”

63. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and that contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

A. “Unlawful” Prong

64. Defendant’s business practices, described herein, violated the “unlawful” prong of the UCL by violating Section 352 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301, the CLRA, Cal. Bus. & Prof. Code § 12606, California Health & Safety Code § 110690, and other applicable law as described herein.

65. Defendant violated section 12606 of the Business and Professions Code, in that Defendant packaged its Products in non-conforming type containers. Said non-conforming packages contained extra space by volume in the interior of the container. The extra space provided no benefit to the contents of the packaging and misled consumers. In addition, Defendant packaged its Products in containers made, formed, or filled as to be misleading to a potential customer as to the actual size and filling of the package with Defendant’s Products.

B. “Unfair” Prong

66. Defendant’s business practices, described herein, violated the “unfair” prong of the UCL in that its conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits. Defendant’s advertising is of no benefit to consumers.

C. “Fraudulent” Prong

67. Defendant violated the “fraudulent” prong of the UCL by misleading Plaintiffs and the Class to believe that the Products contained more content than they actually contain and that such packaging and labeling practices were lawful, true and not intended to deceive or mislead consumers.

68. Plaintiffs and the Class Members are not sophisticated experts about the corporate branding, labeling, and packaging practices of the Products. Plaintiffs and the Class acted reasonably when they purchased the Products based on their belief that Defendant’s representations were true and lawful.

69. Plaintiffs and the Class lost money or property as a result of Defendant’s UCL violations because (a) they would not have purchased the Products on the same terms absent Defendant’s illegal conduct as set forth herein, or if the true facts were known concerning Defendant’s representations; (b) they paid a price premium for the Products due to Defendant’s misrepresentations; and (c) the Products did not have the quantities as represented.

70. The conduct of Defendant as set forth above demonstrates the necessity for granting injunctive relief restraining such and similar acts of unfair competition pursuant to California Business and Professions Code. Unless enjoined and restrained by order of the court, Defendant will retain the ability to, and may engage in, said acts of unfair competition, and misleading advertising. As a result, Plaintiffs and the Class are entitled to injunctive and monetary relief.

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COUNT III**VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW,
California Business & Professions Code § 17500, *et seq.***

71. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:
72. Plaintiffs bring this claim individually and on behalf of the Members of the Class for Defendant's violations of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*
73. Under the FAL, the State of California makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state . . . in any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement, concerning . . . personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."
74. Defendant engaged in a scheme of offering misbranded Products for sale to Plaintiffs and the Class Members by way of packaging the Products in containers made, formed or filled as to be misleading and which contain non-functional slack-fill. Such practice misrepresented the content and quantity of the misbranded Products. Defendant's advertisements were made in California and come within the definition of advertising as contained in Bus. & Prof Code §§ 17500, *et seq.* in that the product packaging was intended as inducements to purchase Defendant's Products. Defendant knew its conduct was unauthorized, inaccurate, and misleading.
75. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and which contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

- 1 76. Defendant violated 17500, *et seq.* by misleading Plaintiffs and the Class to
2 believe that the Product packaging contains more Whey Product than it in fact
3 contains, as described herein.
- 4 77. Defendant knew or should have known, through the exercise of reasonable
5 care that the Products were and continue to be misbranded, and that its
6 representations about the quantities of the Products were untrue and
7 misleading.
- 8 78. Plaintiffs and the Class Members lost money or property as a result of
9 Defendant's FAL violations because (a) they would not have purchased the
10 Products on the same terms absent Defendant's illegal conduct as set forth
11 herein, or if the true facts were known concerning Defendant's
12 representations; (b) they paid a price premium for the Products due to
13 Defendant's misrepresentations; and (c) the Products did not have the benefits,
14 or quantities as promised, and as a result the class is entitled to monetary and
15 injunctive relief.

16 **COUNT IV**

17 **VIOLATION OF NEW YORK DECEPTIVE TRADE PRACTICES ACT**

18 **NEW YORK GENERAL BUSINESS LAW § 349**

- 19 79. Plaintiffs reallege and incorporate herein by reference the allegations
20 contained in all preceding paragraphs, and further allege as follows:
- 21 80. Plaintiffs bring this claim individually and on behalf of the Members of the
22 Class for Defendant's violations of New York's Deceptive Acts or Practices
23 Law, NY GBL § 349.
- 24 81. NY GBL § 349 states that "deceptive acts or practices in the conduct of any
25 business, trade or commerce or in the furnishing of any service in this state
26 are ... unlawful."
- 27 82. It is not necessary to prove justifiable reliance under NY GBL § 349. *See*
28 *Koch v. Acker, Merrall & Condit. Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div.
2012) ("To the extent that the Appellate Division order imposed a reliance
requirement on General Business law 349 . . . claims, it was error. Justifiable
reliance by the plaintiff is not an element of the statutory claim.") (internal
citations omitted).

83. Defendant engaged in deceptive acts and practices by offering misbranded Products for sale in trade or commerce to Plaintiffs and the Class Members by way of packaging the Products in containers made, formed or filled as to be misleading and which contain non-functional slack-fill. Such practices were in violation of NY GBL § 349 and 21 C.F.R. 100.100.

84. Defendant violated federal and New York law because the Products are packaged in containers made, formed or filled as to be misleading and which contain non-functional slack-fill and because they are intentionally packaged to prevent consumers from being able to fully see their contents.

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

86. Plaintiffs and the Class Members lost money or property as a result of Defendant's violations of NY GBL § 349 because (a) they would not have purchased the Products on the same terms absent Defendant's illegal conduct as set forth herein, or if the true facts were known concerning Defendant's representations; (b) they paid a price premium for the Products due to Defendant's misrepresentations; and (c) the Products did not have the benefits, or quantities as promised, and as a result the class is entitled to monetary and injunctive relief.

COUNT V

NEGLIGENT MISREPRESENTATION

87. Plaintiffs repeat and realleges each and every allegation contained above as if fully set forth herein, and further allege as follows:

88. Defendant, directly or through its agents and employees, made false representations, concealments and non disclosures to Plaintiffs and Members of the Class.

89. Defendant as the manufacturer, packager, labeler and initial seller of the Products purchased by Plaintiffs and Class Members had a duty to disclose the true quantity of the Products and to refrain from selling them in containers made, formed or filled as to be misleading and which contain non-functional

1 slack-fill. Defendant had exclusive knowledge of material facts not known or
2 reasonably accessible to Plaintiffs and Class Members; Defendant actively
3 concealed material facts from Plaintiffs and Class Members and Defendant
4 made partial representations that are misleading because some other material
5 fact has not been disclosed. Defendant's failure to disclose the information it
6 had a duty to disclose constitutes material misrepresentations and materially
7 misleading omissions which misled Plaintiffs and Class Members, who relied
8 on Defendant in this regard to disclose all material facts accurately, truthfully
9 and fully.

10 90. Plaintiffs and Members of the Class reasonably relied on Defendant's
11 representation that the Products contain more Whey Product than actually
12 packaged.

13 91. In making the representations of fact to Plaintiffs and Members of the Class
14 described herein, Defendant has failed to fulfill its duties to disclose the
15 material facts set forth above. The direct and proximate cause of this failure
16 to disclose was Defendant's negligence and carelessness.

17 92. Defendant, in making the misrepresentations and omissions, and in engaging
18 in the acts alleged above, knew or reasonably should have known that the
19 representations were not true. Defendant made and intended the
20 misrepresentations to induce the reliance of Plaintiffs and Members of the
21 Class.

22 93. As the manufacturer of its Products, Defendant is in the unique position of
23 being able to provide accurate information about those Products. Therefore
24 there is a special and privity-like relationship between Defendant and
25 Plaintiffs and other consumers.

26 94. Defendant has a duty to correct the misinformation it disseminated through its
27 advertising of the Products. By not informing Plaintiffs and Members of the
28 Class, Defendant breached its duty. Defendant also gained financially from
and as a result of this breach.

- 1 95. By and through such deceit, misrepresentations and/or omissions, Defendant
2 intended to induce Plaintiffs and Members of the Class to alter their position
3 to their detriment. Plaintiffs and Members of the Class relied upon these false
4 representations when purchasing Whey Products in over-sized containers,
5 which reliance was justified and reasonably foreseeable.
- 6 96. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs
7 and Members of the Class have suffered and continue to suffer economic
8 losses and other general and specific damages, including but not limited to the
9 amounts paid for Whey Products, and any interest that would have been
10 accrued on those monies, all in an amount to be determined according to
11 proof at time of trial.
- 12 97. Defendant acted with intent to defraud, or with reckless or negligent disregard
13 of the rights of Plaintiffs and Members of the Class.
- 14 98. Plaintiffs and Members of the Class are entitled to relief in an amount to be
15 proven at trial, and injunctive relief.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs pray for relief and judgment as follows:

- 18 (A) For an Order certifying the Class pursuant to Federal Rule of Civil Procedure
19 23, appointing Plaintiffs as class representatives, and designating Plaintiffs'
20 counsel as counsel for the Class;
- 21 (B) For an Order certifying the California Subclass, appointing Plaintiff Zakhour
22 representative of the California Subclass, and designating his counsel as
23 counsel for the California Subclass;
- 24 (C) For an Order certifying the New York Subclass, appointing Plaintiff Batista
25 representative of the New York Subclass, and designating his counsel as
26 counsel for the New York Subclass;
- 27 (D) For an Order declaring that Defendant's conduct violated the CLRA, Cal. Civ.
28 Code § 1750, *et seq.*, and awarding (i) injunctive relief, (ii) costs of suit, and
(iii) reasonable attorneys' fees;

- (E) For an Order declaring that Defendant's conduct violated California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, and California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*, and awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post judgment interest, (iv) exemplary and/or punitive damages pursuant to Cal. Civ. Code § 3294, (v) costs of suit, and (iv) reasonable attorneys' fees pursuant to, *inter alia*, Cal. Code of Civ. Proc § 1021.5;
- (F) For an Order declaring that Defendant's conduct violated New York Gen Bus Law § 349, and awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post judgment interest, and (iv) reasonable attorneys' fees;
- (G) For an Order finding that Defendant made Negligent Misrepresentations, and awarding special, general, and compensatory damages to Plaintiffs and the Class;
- (H) For compensatory damages in amounts to be determined by the Court and/or jury;
- (I) For prejudgment interest on all amounts awarded;
- (J) For an order of restitution and all other forms of equitable monetary relief, as pleaded;
- (K) For injunctive relief as pleaded or as the Court may deem proper;
- (L) For an Order awarding Plaintiffs and the Class their reasonable attorneys' fees and expenses and costs of suit as pleaded; and
- (M) For such other and further relief as the Court deems just and proper.

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DEMAND FOR TRIAL BY JURY

Plaintiffs, individually and on behalf of all others similarly situated, hereby demand a jury trial on all claims so triable.

Dated: November 4, 2015

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: /s/ Abbas Kazerounian
Abbas Kazerounian
ATTORNEY FOR PLAINTIFFS

GOTTLIEB & ASSOCIATES

Jeffrey M. Gottlieb, Esq. (JG-7905)

Dana L. Gottlieb, Esq. (DG-6151)

Pro hac vice to be filed

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Suite PHR

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NYJG@aol.com

danalgottlieb@aol.com

Telephone: (212) 228-9795

Facsimile: (212) 982-6284

KAZEROUNI LAW GROUP, APC
Costa Mesa, California

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

Sammer Zakhour and Aurelio Batista, 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)

Abbas Kazerounian, Esq. (SBN: 249203)
Kazerouni Law Group, APC
245 Fischer Avenue, Suite D1, Costa Mesa, CA 92626 (800) 400-6808

DEFENDANTS

Glanbia Performance Nutrition, Inc. dba Optimum Nutrition, Inc.

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)

'15CV2513 AJB WVG

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

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

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

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" 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 checked="" 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 checked="" 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 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 <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	CIVIL RIGHTS <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 PRISONER PETITIONS 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):
28 U.S.C. § 1332

Brief description of cause:

Violations of Cal. Consumer Legal Remedies Act; Cal. Unfair Competition Law; Cal. False Advertising Law

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
5,000,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

11/04/2015

SIGNATURE OF ATTORNEY OF RECORD

s/Abbas Kazerounian, Esq.

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

Print

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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.

PLAINTIFFS' EXHIBIT A

Plaintiff's CLRA Letter to Glanbia Performance Nutrition,
Inc d/b/a Optimum Nutrition, Inc. Dated 10/30/2015

In The Case Of

Sammer Zakhour and Aurelio Batista, et al

v.

Glanbia Performance Nutrition, Inc d/b/a Optimum Nutrition, Inc.

KAZEROUNI LAW GROUP, APC

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Facsimile: (800) 520-5523

Consumer Attorneys

www.kazlg.com

October 30, 2015

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Ryan McBride, Esq. – Managing Associate (AZ)

Masih Kazeroouni, Esq. – Of Counsel (CA)
Joshua Swigart, Esq. – Of Counsel (CA, DC)
Robert Hyde, Esq. – Of Counsel (CA, MN)
Andrei Armas, Esq. – Of Counsel (CA)
Naomi Spector, Esq. – Of Counsel (CA)

SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Glanbia Performance Nutrition, Inc.
d/b/a Optimum Nutrition, Inc.
c/o Corporate Creations Network IN (Registered Agent)
350 S Northwest Highway 300
Park Ridge, IL 60068

RE: Demand Letter Pursuant to California Civil Code § 1782

Dear Sir or Madam:

This letter serves as notice and demand for corrective action by Glanbia Performance Nutrition, Inc., doing business as Optimum Nutrition, Inc. (“Optimum”) pursuant to the Consumers Legal Remedies Act, California Civil Code § 1782 (“CLRA”). This letter is sent on behalf of our client, Sammer Zakhour,¹ a purchaser of Optimum Whey Products in the State of California, and all other persons similarly situated. We hereby demand that you take immediate corrective action within thirty (30) days as further described below.

Optimum’s Protein Products, including its: 100% Gold Standard Whey; 100% Oats & Whey; Naturally Flavored 100% Whey Gold Standard; Performance Whey; Performance Whey Isolate; Platinum Hydro Whey Platinum Tri-Cell Casein; 100% Casein Protein; and Naturally Flavored 100% Casein (collectively, “Whey Products” or “Products”) are packaged in large, opaque containers that contain significant empty space, or “slack fill.” Consumers, in reliance on the size of the containers, paid a premium price for the Products, which they would not have purchased had they known about the significant slack fill. Among other things, the Optimum Products are misbranded under federal and state law. Optimum intentionally packed its Products in non-transparent containers with non-functional slack-fill in order to mislead consumers.

¹ This firm represents Mr. Zakhour. Please refrain from contacting Mr. Zakhour directly. Please direct any and all communications to this office.

Demand Letter Pursuant to California Civil Code § 1782

Glanbia Performance Nutrition, Inc.

CALIFORNIA – NEVADA – TEXAS – ARIZONA

KAZEROUNI LAW GROUP, APC

245 Fischer Ave
Suite D1
Costa Mesa, CA 92626

Telephone: (800) 400-6808
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Naomi Spector, Esq. – Of Counsel (CA)

The above-described representations are false and misleading and constitute unlawful, unfair, or fraudulent acts or practices and unfair methods of competition in violation of the CLRA, including but not limited to §§ 1770(a)(5) and (9). The representations also violate California's Unfair Competition Law and False Advertising Law, California Business & Professions Code §§ 17200, *et seq.*, and 17500, *et seq.* Optimum has and continues to mislead consumers into believing that the Whey Product Containers are full, when in fact they contain substantial slack-fill. These misrepresentations allow Optimum to increase its sales, charge a premium price for its product, and capture market share from its competitors.

If our client had known about the slack-fill contained in Optimum's Whey Product, he would not have purchased the Product. Our client is a citizen of the State of California and is a consumer as defined in California Civil Code § 1761(d) because he purchased an Optimum Whey Product for personal, family, or household purposes. Our client relied on the size of the Optimum Whey Product container in purchasing that Product. As a result, our client suffered loss of money.

We hereby demand on behalf of our client and all other similarly situated that Optimum immediately: (1) cease and desist from continued sale of all Optimum Whey Products containing slack-fill; (2) initiate corrective action; and (3) offer to refund the purchase price of all misrepresented Optimum Whey Products purchased by our client, plus reimbursement for interest. Please comply with this demand within thirty (30) days from receipt of this letter. Additionally, this letter serves as notice to Optimum of its duty to preserve and retain all documents, tangible items, and electronically stored information that is potentially relevant to this matter.

Demand Letter Pursuant to California Civil Code § 1782

Glanbia Performance Nutrition, Inc.

CALIFORNIA – NEVADA – TEXAS – ARIZONA

KAZEROUNI LAW GROUP, APC

245 Fischer Ave
Suite D1
Costa Mesa, CA 92626

Telephone: (800) 400-6808
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Andrei Armas, Esq. – Of Counsel (CA)
Naomi Spector, Esq. – Of Counsel (CA)

If Optimum wishes to enter into discussions to resolve the demands asserted in this letter, please contact me immediately. Your cooperation in this matter would be greatly appreciated.

Yours truly,

/s/ Abbas Kazerounian

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cc: Joshua B. Swigart, Esq.

Demand Letter Pursuant to California Civil Code § 1782

Glanbia Performance Nutrition, Inc.

CALIFORNIA – NEVADA – TEXAS – ARIZONA