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

<p>Matthew Gates and John Martinez, Individually And On Behalf Of All Others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>MusclePharm Corporation,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No.: <u>'15CV2870 BAS DHB</u></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

- 1
- 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 Protein Products, including its ARNOLD
- 11 SCHWARZENEGGER SERIES IRON WHEY, MusclePharm Combat
- 12 Protein Powder, MusclePharm Combat Powder, MusclePharm Combat Black
- 13 Weight Gainer, and MusclePharm FitMiss DELIGHT, (collectively, “Whey
- 14 Products” or “Products”) in large, opaque containers that contain more than
- 15 45% empty space. Consumers, in reliance on the size of the containers, paid a
- 16 premium price for the Products, which they would not have purchased had
- 17 they known that the containers were substantially empty.
- 18 2. Matthew Gates and John Martinez (hereinafter “Plaintiffs”), individually and
- 19 on behalf of all others similarly situated, bring this Class Action Complaint
- 20 for damages, injunctive relief, and any other available legal or equitable
- 21 remedies, resulting from the unlawful and deceptive actions of MusclePharm
- 22 Corporation (“Defendant” or “MusclePharm”), with respect to the packaging
- 23 of its Whey Products. Plaintiffs allege as follows upon personal knowledge

24 ¹ <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”).

25 ²<http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm> (quoting Brian Wansink, professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).

1 as to themselves and their own acts and experiences, and, as to all other
2 matters, upon information and belief, including investigation conducted by
3 their attorneys.

4 3. MusclePharm sells nutritional supplements on a nationwide basis, including
5 in more than 110 countries and 35,000 retail outlets across the world.³
6 Defendant's products are also offered for sale online, including on websites
7 such as gnc.com, bodybuilding.com, amazon.com, and vitaminshoppe.com.
8 On gnc.com, a 4 pound container of MusclePharm Combat Powder sells for
9 \$79.99, with a discount for GNC members. A 5 pound container of
10 MusclePharm Arnold Schwarzenegger Series ARNOLD IRON MASS sells
11 for \$79.99, with a discount for GNC members.⁴

12 4. According to musclepharmcorp.com, the company was founded by a former
13 member of the Indianapolis Colts because of his frustration with the
14 supplements he was taking: "They were not helping my performance as
15 promised in advertisements – in fact, they were hindering my performance,
16 and even caused injuries on the football field. After my strength coach
17 advised me to stop taking over-marketed supplements that over-promised and
18 under-delivered, I found my mission in life. This is why I started
19 MusclePharm®."⁵

20 5. Specifically, the website states that the "the sports nutrition industry is
21 virtually unregulated and wrought with companies that prey on young
22 athletes' ignorance. They over-hype and under-deliver on label claims and
23 effectiveness." To combat this ill, MusclePharm "has invested millions of
24 dollars and amassed a team of the world's most respected scientists,

25 ³ <http://topics.nytimes.com/top/news/business/companies/tone-in-twenty/index.html>.
26 Accessed on December 7, 2015.

27 ⁴ [http://www.gnc.com/family/index.jsp?categoryId=3703232&f=PAD%2FBrands
28 %2FMusclePharm&fbc=1&lmdn=Brand&fbn=Brands%7CMusclePharm](http://www.gnc.com/family/index.jsp?categoryId=3703232&f=PAD%2FBrands%2FMusclePharm&fbc=1&lmdn=Brand&fbn=Brands%7CMusclePharm). Accessed on
December 7, 2015.

⁵ <http://musclepharmcorp.com/about/>. Accessed on December 7, 2015.

1 physicians, researchers, trainers and athletes. Our quest is to create a superior
2 line of sports nutrition products that are safe, free of banned substances, and
3 formulated, tested and certified under the most stringent conditions in the
4 marketplace today.”⁶

5 6. In addition, the MusclePharm website states: “No one offers better quality
6 and goes above and beyond for its customers... no one!’ Ask any experienced
7 athlete what they think about MusclePharm® products and you’ll get the
8 same answer again and again, ‘Nothing works like MusclePharm® and its
9 safe! When you take a MusclePharm® product, you really know you’re
10 taking something!’ All it takes is trying them once for consumers to see and
11 feel what everyone is talking about—these products are for real. Best of all,
12 they are made by real doctors! ⁷

13 7. Plaintiffs purchased MusclePharm Whey Products, and expected to receive
14 full containers of Product. The Whey Products are packaged in non-
15 transparent containers, as depicted below. Plaintiffs were surprised and
16 disappointed when they opened the Products to discover that the containers
17 had more than 45% empty space, or slack-fill. Had Plaintiffs known about
18 the slack-fill at the time of purchase, they would not have bought Defendant’s
19 Products.

20 8. Defendant’s conduct violates consumer protection and labeling laws.

21 JURISDICTION AND VENUE

22 9. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332,
23 because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in
24 which a member of the putative class is a citizen of a different state than
25 Defendant, and the amount in controversy exceeds the sum or value of
26 \$5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

27 ⁶ *Id.*

28 ⁷<http://musclepharmcorp.com/about/our-mission/>. Accessed on December 7, 2015.

1 10. The Court has jurisdiction over the state law claims because they form part of
2 the same case or controversy under Article III of the United States
3 Constitution.

4 11. The Court has personal jurisdiction over Defendant because its Whey
5 Products are advertised, marketed, distributed and sold through the State of
6 California; Defendant engaged in the wrongdoing alleged in this Complaint
7 throughout the United States, including in the State of California; Defendant
8 is authorized to do business in the State of California; and Defendant has
9 sufficient minimum contacts with the State of California, rendering the
10 exercise of jurisdiction by the Court permissible under traditional notions of
11 fair play and substantial justice. Moreover, Defendant is engaged in
12 substantial activity with the State of California.

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

19 **PARTIES**

20 13. Plaintiff Matthew Gates (“Gates”) is a citizen of the State of California and
21 resides in San Diego, California. Plaintiff Gates purchased a Whey Product
22 for personal consumption during the last four years in San Diego, California.
23 Plaintiff Gates purchased the Product in reliance on Defendant’s packaging in
24 containers made, formed or filled as to be misleading and containing non-
25 functional slack-fill. Had Plaintiff Gates known the truth about Defendant’s
26 misrepresentations, he would not have purchased the premium priced Product.

27 14. Plaintiff John Martinez (“Martinez”) is a citizen of the State of New York and
28 resides in West Haverstraw, New York. Plaintiff Martinez purchased a Whey
Product for personal consumption during the last four years in West Nyack,

1 New York. Plaintiff Martinez purchased the Product in reliance on
 2 Defendant's packaging in containers made, formed or filled as to be
 3 misleading and containing non-functional slack-fill. Had Plaintiff Martinez
 4 known the truth about Defendant's misrepresentations, he would not have
 5 purchased the premium priced Product.

- 6 15. Defendant MusclePharm is headquartered in Denver, Colorado, and is the
 7 manufacturer and distributor of the MusclePharm and Arnold
 8 Schwarzenegger brands.

9 **FACTUAL ALLEGATIONS**

10 **Federal and State Laws Prohibit Non-functional Slack Full**

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

- 22 17. Under the FDCA, the term "false" has its usual meaning of untruthful, while
 23 the term "misleading" is a term of art. Misbranding reaches not only false
 24 claims, but also those claims that might be technically true, but still
 25 misleading. If any one representation in the labeling is misleading, the entire
 26 Product is misbranded. No other statement in the labeling cures a misleading
 27 statement. "Misleading" is judged in reference to "the ignorant, the
 28 unthinking and the credulous who, when making a purchase, do not stop to

1 analyze.” *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir.
2 1951). Under the FDCA, it is not necessary to prove that anyone was actually
3 misled.

4 **A. Misbranding of Foods**

5 18. The Whey Product labels contain numerous ingredients found in or derived
6 from food, including whey protein, cocoa powder, and eggs. Certain product
7 labels also describe how to make drinks and milkshakes from the powders.

8 19. According to mayoclinic.org, milk is made up of two types of proteins –
9 casein and whey. “Whey proteins contain higher levels of essential amino
10 acids. They are used in ice cream, bread, soup, baby formula, and other food
11 products.”⁸ According to webMD.com, whey protein is “the protein
12 contained in whey, the watery portion of milk that separates from the curds
13 when making cheese.”⁹

14 20. Under the Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §
15 343(d), a food shall be deemed to be misbranded if “(a) . . . (1) its labeling is
16 false or misleading in any particular”; or “(d) If its container is so made,
17 formed, or filled as to be misleading.”

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

(1) Protection of the contents of the package;

25 _____
26 ⁸ [http://www.mayoclinic.org/drugs-supplements/whey-protein/background/
hrb-20060532](http://www.mayoclinic.org/drugs-supplements/whey-protein/background/hrb-20060532). Accessed on September 18, 2015.

27 ⁹ [http://www.webmd.com/vitamins-supplements/ingredientmono-833-whey
28 %20protein.aspx?activeingredientid=833&activeingredientname=whey%20protein](http://www.webmd.com/vitamins-supplements/ingredientmono-833-whey%20protein.aspx?activeingredientid=833&activeingredientname=whey%20protein).
Accessed on September 18, 2015.

1 (2) The requirements of the machines used for enclosing the contents in such
2 package;

3 (3) Unavoidable product settling during shipping and handling;

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

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

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

- 17 22. None of the above safe-harbor provisions applies to the Whey Products.
18 Defendant intentionally incorporated non-functional slack-fill in its packaging
19 of the Products in order to mislead consumers, including Plaintiffs and
20 Members of the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398,
21 405 (E.D.N.Y. 2010) (“Misleading consumers is not a valid reason to package
22 a product with slack-fill. *See* 21 C.F.R. § 100.100(a)(1-6).”).
- 23 23. California and New York consumer protection and food labeling laws impose
24 requirements which mirror the federal law. California Business & Professions
25 Code states, “[n]o container shall be made, formed, or filled as to be
26 misleading” and “[a] container that does not allow the consumer to fully view
27 its contents shall be considered to be filled as to be misleading if it contains
28 nonfunctional slack fill.” *See* Cal. Bus. & Prof. Code § 12606 (incorporating
the safe harbor provisions of the CFR). *See also* Cal. Health and Safety Code

1 § 110690 (“Any food is misbranded if its container is so made, formed, or
2 filled as to be misleading.”); NY AGM. Law § 201 (“Food shall be deemed
3 to be misbranded If its container is so made, formed, colored or filled as
4 to be misleading.”).

5 **Defendant’s Products Contain Non Functional Slack-Fill**

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

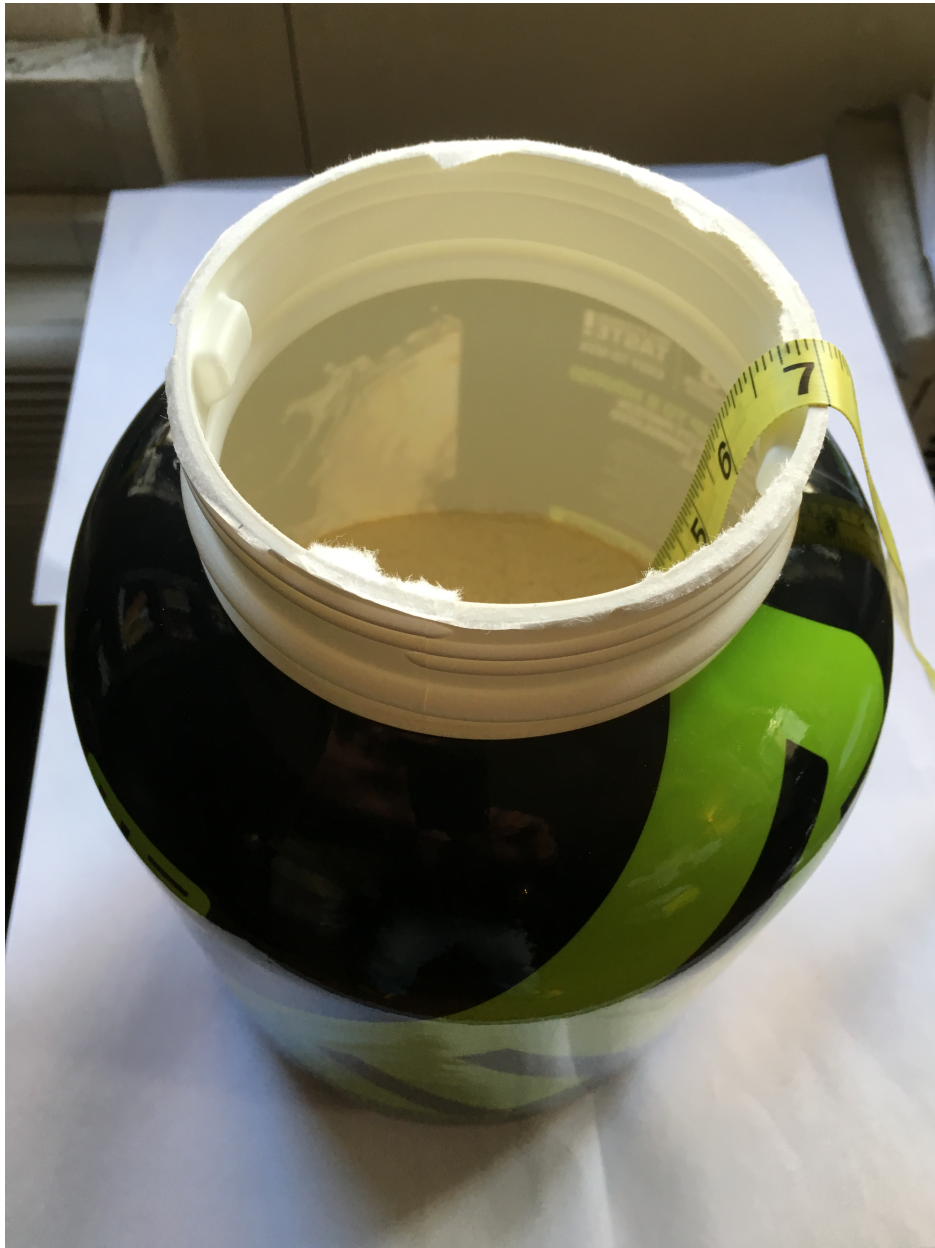
9 25. The Arnold Schwarzenegger Iron Whey container depicted below is roughly
10 10 inches tall. Up to and not including the space where the interior of the
11 container narrows and above the indentation where the lid begins,
12 approximately 45% of the interior of the container is comprised of empty
13 space, or non-functional slack fill. *See* PHOTO A.

14 PHOTO A



1 26. The Combat Protein Powder container depicted below is roughly 12 inches
2 tall. Up to and not including the space where the interior of the container
3 narrows and above the indentation where the lid begins, approximately 46%
4 of the interior of the container is comprised of empty space, or non-functional
5 slack fill. See PHOTO B.

6 PHOTO B



26
27 27. Judging from the sizes of the containers, a reasonable consumer would expect
28 them to be substantially filled with product. Consumers are misled into

1 believing that they are purchasing substantially more Whey Product than they
2 receive.

3 28. There is no functional reason for including more than 45% slack-fill in the
4 Whey Products.

5 29. On information and belief, consumers have relied upon, and are continuing to
6 rely upon, the size of the Whey Product containers as the basis for making
7 purchasing decisions. Consumers believe that the Whey Products are
8 substantially full because they cannot see the actual contents within the non-
9 transparent container. *See Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d
10 398, 404 (E.D.N.Y. 2010) (finding that a half-filled supplement container
11 could constitute a “misleading representation” that resulted in the unjust
12 enrichment of the manufacturer even though the weight of the product and the
13 number of servings enclosed were clearly listed on the outer packaging).

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

17 31. Defendant’s packaging and advertising of the Products violates various state
18 laws against misbranding, which contain requirements that mirror the FDCA,
19 as described herein.

20 **Plaintiffs Relied on Defendant’s Misleading and Deceptive Conduct and**
21 **Were Injured as a Result**

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

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

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

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

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

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

19 CLASS ACTION ALLEGATIONS

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

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

28 California Subclass: All California residents who made retail
purchases of MusclePharm Whey Products in containers made,

1 formed or filled as to be misleading and with non-functional slack-fill,
2 during the applicable limitations period, and/or such subclasses as the
3 Court may deem appropriate.

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

9 39. The proposed Classes exclude current and former officers and directors of
10 Defendant, Members of the immediate families of the officers and directors of
11 Defendant, Defendant's legal representatives, heirs, successors, assigns, and
12 any entity in which it has or has had a controlling interest, and the judicial
13 officer to whom this lawsuit is assigned.

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

16 41. Numerosity: This action has been brought and may properly be maintained as
17 a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the
18 Federal Rules of Civil Procedure. While the exact number and identities of
19 other Class Members are unknown to Plaintiffs at this time, Plaintiffs are
20 informed and believe that there are hundreds of thousands of Members in the
21 Class. Based on sales of the Products, it is estimated that the Class is
22 composed of more than 10,000 persons. Furthermore, even if subclasses need
23 to be created for these consumers, it is estimated that each subclass would
24 have thousands of Members. The Members of the Class are so numerous that
25 joinder of all Members is impracticable and the disposition of their claims in a
26 class action rather than in individual actions will benefit the parties and the
27 courts.
28

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

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

8 44. Superiority: A class action is superior to other available methods for the fair
9 and efficient adjudication of this controversy. Since the damages sustained by
10 individual Class Members may be relatively small, the expense and burden of
11 individual litigation makes it impracticable for the Members of the Class to
12 individually seek redress for the wrongful conduct alleged herein.
13 Furthermore, the adjudication of this controversy through a class action will
14 avoid the potentially inconsistent and conflicting adjudications of the claims
15 asserted herein. There will be no difficulty in the management of this action
16 as a class action. If Class treatment of these claims were not available,
17 Defendant would likely unfairly receive thousands of dollars or more in
18 improper revenue.

19 45. Common Questions Predominate: Common questions of law and fact exist as
20 to all Members of the Class and predominate over any questions solely
21 affecting individual Members of the Class. Among the common questions of
22 law and fact applicable to the Class are:

23 i. Whether Defendant labeled, packaged, marketed, advertised and/or
24 sold Whey Products to Plaintiffs, and those similarly situated, using false,
25 misleading and/or deceptive packaging and labeling;

26 ii. Whether Defendant's actions constitute violations of 21 U.S.C.
27 100.100, *et. seq.*;

28 iii. Whether Defendant's actions constitute violations of state consumer
protection laws;

1 iv. Whether Defendant omitted and/or misrepresented material facts in
2 connection with the labeling, packaging, marketing, advertising and/or sale
3 of its Whey Products;

4 v. Whether Defendant's labeling, packaging, marketing, advertising and/
5 or selling of Whey Products constituted an unfair, unlawful or fraudulent
6 practice;

7 vi. Whether Defendant's packaging of the Whey Products constituted
8 nonfunctional slack-fill;

9 vii. Whether, and to what extent, injunctive relief should be imposed on
10 Defendant to prevent such conduct in the future;

11 viii. Whether the Members of the Class have sustained damages as a result
12 of Defendant's wrongful conduct;

13 ix. The appropriate measure of damages and/or other relief; and

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

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

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

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

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

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

10 **CAUSES OF ACTION**

11 **COUNT I**

12 **VIOLATION OF CALIFORNIA’S CONSUMER LEGAL REMEDIES ACT,**
13 **Cal. Civ. Code § 1750, *et seq.***

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

16 52. Plaintiffs bring this claim individually and on behalf of the Class for
17 Defendant’s violations of California’s Consumer Legal Remedies Act
18 (“CLRA”), Cal. Civ. Code 1761(d).

19 53. Plaintiffs and the Class Members are consumers who purchased the Products
20 for personal, family or household purposes. Plaintiffs and the Class Members
21 are “consumers” as that term is defined by the CLRA in Cal. Civ. Code
22 1761(d). Plaintiffs and the Class Members are not sophisticated experts with
23 independent knowledge of corporate branding, labeling and packaging
24 practices.

25 54. The Products that Plaintiffs and other Class Members purchased from
26 Defendant were “goods” within the meaning of Cal. Civ. Code 1761(a).

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

//

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

5 57. California’s Consumers Legal Remedies Act, Cal. Civ. Code 1770(a)(5),
6 prohibits “Misrepresenting that goods or services have sponsorship, approval,
7 characteristics, ingredients, uses, benefits, or quantities which they do not
8 have or that a person has a sponsorship, approval, status, affiliation, or
9 connection which he or she does not have.” By engaging in the conduct set
10 forth herein, Defendant violated and continues to violate Section 1770(a)(5)
11 of the CLRA, because Defendant’s conduct constitutes unfair methods of
12 competition and unfair or fraudulent acts or practices, in that it misrepresents
13 that the Products have quantities they do not have.

14 58. Cal. Civ. Code 1770(a)(9) further prohibits “[a]dvertising goods or services
15 with intent not to sell them as advertised.” By engaging in the conduct set
16 forth herein, Defendant violated and continues to violate Section 1770(a)(9),
17 because Defendant’s conduct constitutes unfair methods of competition and
18 unfair or fraudulent acts or practices, in that it advertises goods as containing
19 more product than they in fact contain.

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

24 60. Plaintiffs and the Class suffered injuries caused by Defendant because (a) they
25 would not have purchased the Products on the same terms absent Defendant’s
26 illegal and misleading conduct as set forth herein; (b) they paid a price
27 premium for the Products due to Defendant’s misrepresentations and
28 deceptive packaging in containers made, formed or filled as to be misleading

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1 and containing non-functional slack-fill; and (c) the Products did not have the
2 quantities as promised.

3 61. On or about December 15, 2015, prior to filing this action, Plaintiff Gates sent
4 a CLRA notice letter to Defendant which complies with California Civil Code
5 1782(a). Plaintiff Gates sent MusclePharm., individually and on behalf of the
6 proposed Class, a letter via Certified Mail, advising Defendant that it is in
7 violation of the CLRA and demanding that it cease and desist from such
8 violations and make full restitution by refunding the monies received
9 therefrom. A true and correct copy of the letter is attached hereto as
10 EXHIBIT 1.

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

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

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

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

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

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

27 //

28 //

1 **A. “Unlawful” Prong**

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

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

15 **B. “Unfair” Prong**

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

21 **C. “Fraudulent” Prong**

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

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

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

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

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

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

19 75. Plaintiffs bring this claim individually and on behalf of the Members of the
20 Class for Defendant's violations of California's False Advertising Law
21 ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*

22 76. Under the FAL, the State of California makes it "unlawful for any person to
23 make or disseminate or cause to be made or disseminated before the public in
24 this state in any advertising device . . . or in any other manner or means
25 whatever, including over the Internet, any statement, concerning . . . personal
26 property or services, professional or otherwise, or performance or disposition
27 thereof, which is untrue or misleading and which is known, or which by the
28 exercise of reasonable care should be known, to be untrue or misleading."

77. Defendant engaged in a scheme of offering misbranded Products for sale to
Plaintiffs and the Class Members by way of packaging the Products in

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Costa Mesa, California

1 containers made, formed or filled as to be misleading and which contain non-
2 functional slack-fill. Such practice misrepresented the content and quantity of
3 the misbranded Products. Defendant's advertisements were made in
4 California and come within the definition of advertising as contained in Bus.
5 & Prof Code §§ 17500, *et seq.* in that the product packaging was intended as
6 inducements to purchase Defendant's Products. Defendant knew its conduct
7 was unauthorized, inaccurate, and misleading.

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

12 79. Defendant violated 17500, *et seq.* by misleading Plaintiffs and the Class to
13 believe that the Product packaging contains more Whey Product than it in fact
14 contains, as described herein.

15 80. Defendant knew or should have known, through the exercise of reasonable
16 care that the Products were and continue to be misbranded, and that its
17 representations about the quantities of the Products were untrue and
18 misleading.

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

27 //

28 //

COUNT IV
VIOLATION OF NEW YORK DECEPTIVE TRADE PRACTICES ACT
NEW YORK GENERAL BUSINESS LAW § 349

1
2
3 82. Plaintiffs reallege and incorporate herein by reference the allegations
4 contained in all preceding paragraphs, and further allege as follows:

5 83. Plaintiffs bring this claim individually and on behalf of the Members of the
6 Class for Defendant’s violations of New York’s Deceptive Acts or Practices
7 Law, NY GBL § 349.

8 84. NY GBL § 349 states that “deceptive acts or practices in the conduct of any
9 business, trade or commerce or in the furnishing of any service in this state
10 are ... unlawful.”

11 85. Any person who has been injured by reason of a violation of NY GBL § 349
12 may bring an action to enjoin such unlawful act or practice, an action to
13 recover actual damages or fifty dollars, whichever is greater, or both. The
14 court may, in its discretion, increase the award to an amount not to exceed
15 three times the actual damage, up to one thousand dollars, if the conduct was
16 willful or knowing.

17 86. It is not necessary to prove justifiable reliance under NY GBL § 349. *See*
18 *Koch v. Acker, Merrall & Condit. Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div.
19 2012) (“To the extent that the Appellate Division order imposed a reliance
20 requirement on General Business law 349 . . . claims, it was error. Justifiable
21 reliance by the plaintiff is not an element of the statutory claim.”) (internal
22 citations omitted).

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

28 88. Defendant violated federal and New York law because the Products are
packaged in containers made, formed or filled as to be misleading and which

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Costa Mesa, California

1 contain non-functional slack-fill and because they are intentionally packaged
2 to prevent consumers from being able to fully see their contents.

3 89. The foregoing deceptive acts and practices were directed at consumers.

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

12 **COUNT V**
13 **NEGLIGENT MISREPRESENTATION**

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

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

19 93. Defendant as the manufacturer, packager, labeler and initial seller of the
20 Products purchased by Plaintiffs and Class Members had a duty to disclose
21 the true quantity of the Products and to refrain from selling them in containers
22 made, formed or filled as to be misleading and which contain non-functional
23 slack-fill. Defendant had exclusive knowledge of material facts not known or
24 reasonably accessible to Plaintiffs and Class Members; Defendant actively
25 concealed material facts from Plaintiffs and Class Members and Defendant
26 made partial representations that are misleading because some other material
27 fact has not been disclosed. Defendant's failure to disclose the information it
28 had a duty to disclose constitutes material misrepresentations and materially
misleading omissions which misled Plaintiffs and Class Members, who relied

1 on Defendant in this regard to disclose all material facts accurately, truthfully
2 and fully.

3 94. Plaintiffs and Members of the Class reasonably relied on Defendant's
4 representation that the Products contain more Whey Product than actually
5 packaged.

6 95. In making the representations of fact to Plaintiffs and Members of the Class
7 described herein, Defendant has failed to fulfill its duties to disclose the
8 material facts set forth above. The direct and proximate cause of this failure
9 to disclose was Defendant's negligence and carelessness.

10 96. Defendant, in making the misrepresentations and omissions, and in engaging
11 in the acts alleged above, knew or reasonably should have known that the
12 representations were not true. Defendant made and intended the
13 misrepresentations to induce the reliance of Plaintiffs and Members of the
14 Class.

15 97. As the manufacturer of its Products, Defendant is in the unique position of
16 being able to provide accurate information about those Products. Therefore
17 there is a special and privity-like relationship between Defendant and
18 Plaintiffs and other consumers.

19 98. Defendant has a duty to correct the misinformation it disseminated through its
20 advertising of the Products. By not informing Plaintiffs and Members of the
21 Class, Defendant breached its duty. Defendant also gained financially from
22 and as a result of this breach.

23 99. By and through such deceit, misrepresentations and/or omissions, Defendant
24 intended to induce Plaintiffs and Members of the Class to alter their position
25 to their detriment. Plaintiffs and Members of the Class relied upon these false
26 representations when purchasing Whey Products in over-sized containers,
27 which reliance was justified and reasonably foreseeable.

28 100. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs
and Members of the Class have suffered and continue to suffer economic

1 losses and other general and specific damages, including but not limited to the
2 amounts paid for Whey Products, and any interest that would have been
3 accrued on those monies, all in an amount to be determined according to
4 proof at time of trial.

5 101. Defendant acted with intent to defraud, or with reckless or negligent disregard
6 of the rights of Plaintiffs and Members of the Class.

7 102. Plaintiffs and Members of the Class are entitled to relief in an amount to be
8 proven at trial, and injunctive relief.

9 **PRAYER FOR RELIEF**

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

- 11 (A) For an Order certifying the Class pursuant to Federal Rule of Civil Procedure
12 23, appointing Plaintiffs as class representatives, and designating Plaintiffs'
13 counsel as counsel for the Class;
- 14 (B) For an Order certifying the California Subclass, appointing Plaintiff Gates
15 representative of the California Subclass, and designating his counsel as
16 counsel for the California Subclass;
- 17 (C) For an Order certifying the New York Subclass, appointing Plaintiff Martinez
18 representative of the New York Subclass, and designating his counsel as
19 counsel for the New York Subclass;
- 20 (D) For an Order declaring that Defendant's conduct violated the CLRA, Cal.
21 Civ. Code § 1750, *et seq.*, and awarding (i) injunctive relief, (ii) costs of suit,
22 and (iii) reasonable attorneys' fees;
- 23 (E) For an Order declaring that Defendant's conduct violated California's Unfair
24 Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, and California's
25 False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*, and
26 awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post
27 judgment interest; (iv) exemplary and/or punitive damages pursuant to Cal.
28 Civ. Code § 3294, (v) costs of suit, and (iv) reasonable attorneys' fees
pursuant to, *inter alia*, Cal. Code of Civ. Proc § 1021.5;

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- 1 (F) For an Order declaring that Defendant's conduct violated New York Gen Bus
2 Law § 349, and awarding (i) injunctive relief, (ii) actual damages, (iii)
3 prejudgment and post judgment interest, and (iv) reasonable attorneys' fees;
4 (G) For an Order finding that Defendant made Negligent Misrepresentations, and
5 awarding special, general, and compensatory damages to Plaintiffs and the
6 Class;
7 (H) For compensatory damages in amounts to be determined by the Court and/or
8 jury;
9 (I) For prejudgment interest on all amounts awarded;
10 (J) For an order of restitution and all other forms of equitable monetary relief, as
11 pleaded;
12 (K) For injunctive relief as pleaded or as the Court may deem proper;
13 (L) For an Order awarding Plaintiffs and the Class their reasonable attorneys'
14 fees and expenses and costs of suit as pleaded; and
15 (M) For such other and further relief as the Court deems just and proper.

16 **DEMAND FOR TRIAL BY JURY**

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

19 Dated: December 18, 2015

Respectfully submitted,

20 **KAZEROUNI LAW GROUP, APC**

21 By: /s/ Abbas Kazerounian

22 Abbas Kazerounian

23 ATTORNEY FOR PLAINTIFFS

KAZEROUNI LAW GROUP, APC
Costa Mesa, California

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ADDITIONAL COUNSEL FOR PLAINTIFFS:

GOTTLIEB & ASSOCIATES

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

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

Pro hac vice to be filed

150 East 18th Street

Suite PHR

New York, NY 10003

NYJG@aol.com

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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

Matthew Gates and John Martinez, 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

MusclePharm Corporation

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)

'15CV2870 BAS DHB

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

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

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

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

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

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

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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332

Brief description of cause: Violations of Cal. Civ. Code § 1750 et seq; Violations of Cal Bus. & Prof. Code §§17200 et seq;

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 12/18/2015 SIGNATURE OF ATTORNEY OF RECORD s/Abbas Kazerounian, Esq.

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.

PLAINTIFF'S EXHIBIT A

CLRA Letter to MusclePharm Corporation Dated
December 15, 2015

In The Case Of

Matthew Gates and John Martinez, et al

v.

MusclePharm Corporation

KAZEROUNI LAW GROUP, APC

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Suite D1
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Consumer Attorneys

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December 15, 2015

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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

MusclePharm Corporation
c/o Vcorp Services CA, Inc. (Registered Agent)
5670 Wilshire Blvd, Ste. 1530
Los Angeles, CA 90036

RE: Demand Letter Pursuant to California Civil Code § 1782

Dear Sir or Madam:

This letter serves as notice and demand for corrective action by Muscle Corporation (“MusclePharm”) pursuant to the Consumers Legal Remedies Act, California Civil Code § 1782 (“CLRA”). This letter is sent on behalf of our client, Matthew Gates,¹ a purchaser of MusclePharm 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.

MusclePharm’s Protein Products, including its: ARNOLD SCHWARZENEGGER SERIES IRON WHEY, MusclePharm Combat Protein Powder, MusclePharm Combat Powder, MusclePharm Combat Black Weight Gainer, and MusclePharm FitMiss DELIGHT, (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 MusclePharm Products are misbranded under federal and state law. MusclePharm intentionally packed its Products in non-transparent containers with non-functional slack-fill in order to mislead consumers.

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

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

Demand Letter Pursuant to California Civil Code § 1782

MusclePharm Corporation

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Matthew Kennedy, Esq. – Managing Associate (TX)
Ryan McBride, Esq. – Managing Associate (AZ)

Masih Kazerouni, 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)

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.* MusclePharm 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 MusclePharm to increase its sales, charge a premium price for its products, and capture market share from its competitors.

If our client had known about the slack-fill contained in MusclePharm'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 a MusclePharm Whey Product for personal, family, or household purposes. Our client relied on the size of the MusclePharm 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 MusclePharm immediately: (1) cease and desist from continued sale of all MusclePharm Whey Products containing slack-fill; (2) initiate corrective action; and (3) offer to refund the purchase price of all misrepresented MusclePharm 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 MusclePharm of its duty to preserve and retain all documents, tangible items, and electronically stored information that is potentially relevant to this matter.

If MusclePharm 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

Abbas Kazerounian, Esq.
Direct Line: 800-400-6808 Ext: 2
Email: ak@kazlg.com

cc: Joshua B. Swigart, Esq.

Demand Letter Pursuant to California Civil Code § 1782
MusclePharm Corporation

CALIFORNIA – NEVADA – TEXAS – ARIZONA