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Matthew Gates and Carlos Solis

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

**Matthew Gates and Carlos Solis,
Individually And On Behalf Of
All Others Similarly Situated,**

Plaintiffs,

v.

**NBTY, Inc. and United States
Nutrition, Inc.,**

Defendants.

Case No.: '16CV2090 AJB WVG

CLASS ACTION

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

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INTRODUCTION

1. The average consumer spends a mere 13 seconds making an in-store purchasing decision, or between 10 to 19 seconds for an online purchase.¹ That decision is heavily dependent on a product's packaging, and particularly the package dimensions: "Most of our studies show that 75 to 80 percent of consumers don't even bother to look at any label information, no less the net weight Faced with a large box and a smaller box, both with the same amount of product inside . . . consumers are apt to choose the larger box because they think it's a better value."² This lawsuit charges defendants NBTY, Inc. ("NBTY") and United States Nutrition, Inc., ("USN") (collectively referred to as "Defendants") with intentionally packaging its protein products, including its (1) Body Fortress products (i.e., Body Fortress - Super Advanced Whey Protein, Body Fortress - Super Advanced 100% Protein Isolate, Body Fortress - Super Advanced Mass Gainer, and Body Fortress Energy Protein) ("Body Fortress Products") and (2) Pure Protein products (i.e., Pure Protein - 100% Whey Protein, Pure Protein - Daily Fit Powder, Pure Protein - Natural Whey, Pure Protein - Plus, and Pure Protein - Body Shaping Formula) ("Pure Protein Products") (collectively the Body Fortress Products and Pure Protein Products are referred to as the "Products") in large, opaque containers that contain more than 37% empty space. 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 that the containers were substantially empty.

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").

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).

2. Matthew Gates and Carlos Solis (hereinafter “Plaintiffs”), individually and on behalf of all others similarly situated, bring this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the unlawful and deceptive actions of Defendants, with respect to the packaging of its 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. Defendants sell nutritional supplements on a nationwide basis, including under the Pure Protein and Body Fortress brands. Defendants’ products are offered for sale in retail stores, such as Costco, BJ’s, Kroger, Rite Aid, Target and Safeway. Defendants’ Products are also sold online, including on websites such as amazon.com. On amazon.com, a 2-pound container of Pure Protein - Whey Protein sells for approximately \$28.52.³ Similarly, a 2-pound container of Body Fortress - Super Advanced Whey Protein sells for approximately \$17.94.⁴

4. According to naturesbounty.com, “Health-conscious people have trusted Nature’s Bounty® products for decades. Our dedication to quality, consistency, and scientific research has resulted in vitamins and nutritional supplements of unrivaled excellence. By combining the latest breakthroughs in nutritional science with the finest ingredients, we’re proud to provide you with supplements of unsurpassed quality and value.”⁵

5. Plaintiffs purchased Defendants’ Products, and expected to receive full containers of product. The Products are packaged in non-transparent containers, as

³ <http://www.amazon.com/Pure-Protein-Vanilla-Cream-Pound/dp/B003V5PUZQ>. Accessed on December 22, 2015.

⁴ http://www.amazon.com/s/ref=nb_sb_ss_i_1_14?url=search-alias%3Dhpc&field-keywords=body+fortress+whey+protein&sprefix=body+fortress+whey+protein%2Chpc%2C192. Accessed on December 22, 2015.

⁵ <https://www.naturesbounty.com/about-us/>. Accessed on December 22, 2015.

1 depicted below. Plaintiffs were surprised and disappointed when they opened the
2 Products to discover that the containers had more than 37% empty space, or slack-
3 fill. Had Plaintiffs known about the slack-fill, they would not have bought
4 Defendants' Products.

5 6. Defendants' conduct violates consumer protection and labeling laws.

6 JURISDICTION AND VENUE

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

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

14 9. The Court has personal jurisdiction over Defendants because their Products
15 are advertised, marketed, distributed and sold through the State of California;
16 Defendants engaged in the wrongdoing alleged in this Complaint throughout the
17 United States, including in the State of California; Defendants are authorized to do
18 business in the State of California; and Defendants have sufficient minimum
19 contacts with the State of California, rendering the exercise of jurisdiction by the
20 Court permissible under traditional notions of fair play and substantial justice.
21 Moreover, Defendants are engaged in substantial activity with the State of
22 California.

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

PARTIES

11. Plaintiff Matthew Gates (“Gates”) is a citizen of the State of California and resides in San Diego, California. Sometime in November 2015, Plaintiff Gates purchased a Pure Protein - 100% Whey Powder product and Body Fortress - Super Advanced Whey Protein on amazon.com. Plaintiff Gates purchased the products in reliance on Defendants’ packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff Gates known the truth about Defendants’ misrepresentations, he would not have purchased the premium priced Products.

12. Plaintiff Carlos Solis (“Solis”) is a citizen of the State of New York and resides in West Haverstraw, New York. Sometime in October 2015, Plaintiff Solis purchased Defendants’ Pure Protein - Daily Fit Powder and Body Fortress Super Advanced Whey Protein from local shops in Stony Point, New York.⁶ Plaintiff Solis purchased the products in reliance on Defendants’ packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff Solis known the truth about Defendants’ misrepresentations, he would not have purchased the premium priced Products.

13. Defendants NBTY and USN are incorporated in the state of Delaware. NBTY is the parent company of USN, which manufactures and/or distributes the Body Fortress and Pure Protein brands.

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

⁶ Specifically, Solis purchased Defendants’ Pure Protein - Daily Fit Powder from a local Walgreens and Body Fortress - Super Advanced Whey Protein from Pathmark, also a local store.

1 which the manufacturer must abide. In general, a product is characterized
2 according to its intended use, which may be established, among other ways, by: (a)
3 claims stated on the product's labeling, in advertising, on the Internet, or in other
4 promotional materials; (b) consumer perception established through the product's
5 reputation, for example by asking why the consumer is buying it and what the
6 consumer expects it to do; or (c) the inclusion of ingredients well-known to have
7 therapeutic use, for example fluoride in toothpaste. The Products are characterized
8 and understood by consumers to be a food.

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

18 **A. Misbranding of Foods**

19 16. The Product labels contain numerous ingredients found in or derived from
20 food, including whey protein, cocoa powder, and eggs. Certain product labels also
21 describe how to make drinks and milkshakes from the powders.

22 17. According to mayoclinic.org, milk is made up of two types of proteins –
23 casein and whey. "Whey proteins contain higher levels of essential amino acids.
24 They are used in ice cream, bread, soup, baby formula, and other food products."⁷
25 According to webMD.com, whey protein is "the protein contained in whey, the
26

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

1 watery portion of milk that separates from the curds when making cheese.”⁸

2 18. Under the Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §
3 343(d), a food shall be deemed to be misbranded if “(a) . . . (1) its labeling is false
4 or misleading in any particular”; or “(d) If its container is so made, formed, or
5 filled as to be misleading.”

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

- 13 (1) Protection of the contents of the package;
- 14 (2) The requirements of the machines used for enclosing the contents in such
- 15 package;
- 16 (3) Unavoidable product settling during shipping and handling;
- 17 (4) The need for the package to perform a specific function (e.g., where
- 18 packaging plays a role in the preparation or consumption of a food), where
- 19 such function is inherent to the nature of the food and is clearly
- 20 communicated to consumers;
- 21 (5) The fact that the product consists of a food packaged in a reusable
- 22 container where the container is part of the presentation of the food and has
- 23 value which is both significant in proportion to the value of the product and
- 24 independent of its function to hold the food, e.g., a gift product consisting of
- 25 a food or foods combined with a container that is intended for further use
- 26

27 ⁸ [http://www.webmd.com/vitamins-supplements/ingredientmono-833-](http://www.webmd.com/vitamins-supplements/ingredientmono-833-whey%20protein.aspx?activeingredientid=833&activeingredientname=whey%20protein)
28 [whey%20protein.aspx?activeingredientid=833&activeingredientname=whey%20p](http://www.webmd.com/vitamins-supplements/ingredientmono-833-whey%20protein.aspx?activeingredientid=833&activeingredientname=whey%20protein)
rotein. Accessed on September 18, 2015.

1 after the food is consumed; or durable commemorative or promotional
2 packages; or
3 (6) Inability to increase level of fill or to further reduce the size of the
4 package”

5 20. None of the above safe-harbor provisions applies to the Products.
6 Defendants intentionally incorporated non-functional slack-fill in its packaging of
7 the Products in order to mislead consumers, including Plaintiffs and Members of
8 the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 405 (E.D.N.Y.
9 2010) (“Misleading consumers is not a valid reason to package a product with
10 slack-fill. *See* 21 C.F.R. § 100.100(a)(1-6).”).

11 21. California and New York consumer protection and food labeling laws
12 impose requirements that mirror the federal law. California Business &
13 Professions Code states, “[n]o container shall be made, formed, or filled as to be
14 misleading” and “[a] container that does not allow the consumer to fully view its
15 contents shall be considered to be filled as to be misleading if it contains
16 nonfunctional slack fill.” *See* Cal. Bus. & Prof. Code § 12606 (incorporating the
17 safe harbor provisions of the CFR). *See also* Cal. Health and Safety Code §
18 110690 (“Any food is misbranded if its container is so made, formed, or filled as to
19 be misleading.”); NY AGM. Law § 201 (“Food shall be deemed to be misbranded .
20 . . . If its container is so made, formed, colored or filled as to be misleading.”).

21 **Defendants’ Products Contain Non Functional Slack-Fill**

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

25 23. Defendants’ Pure Protein -100% Whey Protein container depicted below is
26 roughly 8 inches tall. Up to and not including the space where the interior of the
27 container narrows and above the indentation where the lid begins, approximately
28 37% of the interior of the container is comprised of empty space, or non-functional

1 slack fill. *See* PHOTO A.

2 PHOTO A



20 24. Defendants' Body Fortress - Super Advanced Whey Protein container,
21 purchased by both Plaintiffs and depicted below, is roughly 8 inches tall. Up to
22 and not including the space where the interior of the container narrows and above
23 the indentation where the lid begins, approximately 37% of the interior of the
24 container is comprised of empty space, or non-functional slack fill. *See* PHOTO
25 B.

26 //

27 //

28 //

PHOTO B



25. 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.

26. There is no functional reason for including more than 37% slack-fill in the Products.

27. On information and belief, consumers have relied upon, and are continuing to rely upon, the size of the Products' containers as the basis for making purchasing decisions. Consumers believe that the Products are substantially full because they cannot see the actual contents within the non-transparent container.

1 *See Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 404 (E.D.N.Y. 2010)
2 (finding that a half-filled supplement container could constitute a “misleading
3 representation” that resulted in the unjust enrichment of the manufacturer even
4 though the weight of the product and the number of servings enclosed were clearly
5 listed on the outer packaging).

6 28. On information and belief, Defendants are selling and will continue to sell
7 the Products using these blatantly deceptive and misleading slack-filled containers.

8 29. Defendants’ packaging and advertising of the Products violates various state
9 laws against misbranding, which contain requirements that mirror the FDCA, as
10 described herein.

11 **Plaintiffs Relied on Defendants’ Misleading and Deceptive Conduct and Were**
12 **Injured as a Result**

13 32. The types of misrepresentations made, as described herein, were considered
14 by Plaintiffs and Class Members (as would be considered by a reasonable
15 consumer) when deciding to purchase the Products. Reasonable consumers,
16 including Plaintiffs and Class Members, attached importance to whether
17 Defendants’ Products were misbranded, *i.e.*, not legally salable, or capable of legal
18 possession, and/or contain non-functional slack-fill.

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

21 34. Defendants’ Product packaging was a material factor in Plaintiffs’ and the
22 Class Members’ decisions to purchase the Products. Based on Defendants’
23 Product packaging, Plaintiffs and the Class Members believed that they were
24 getting more Product than was actually being sold. Had Plaintiffs known
25 Defendants’ packaging was slack-filled, they would not have bought the slack-
26 filled Products.

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

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

7 37. As a result of Defendants' misrepresentations, Plaintiffs and thousands of
8 others throughout the United States purchased the Products. Plaintiffs and the
9 Class (defined below) have been damaged by Defendants' deceptive and unfair
10 conduct.

11 CLASS ACTION ALLEGATIONS

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

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

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

25 New York Subclass: All New York residents who made retail purchases
26 of Defendants' Products in containers made, formed or filled as to be
27 misleading and with non-functional slack-fill, during the applicable
28

1 limitations period, and/or such subclasses as the Court may deem
2 appropriate.

3 39. The proposed Classes exclude current and former officers and directors of
4 Defendants, Members of the immediate families of the officers and directors of
5 Defendants, Defendants' legal representatives, heirs, successors, assigns, and any
6 entity in which it has or has had a controlling interest, and the judicial officer to
7 whom this lawsuit is assigned.

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

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

21 42. Typicality: Plaintiffs' claims are typical of the claims of the Members of the
22 Class as all Members of the Class are similarly affected by Defendants' wrongful
23 conduct, as detailed herein.

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

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

11 45. Common Questions Predominate: Common questions of law and fact exist
12 as to all Members of the Class and predominate over any questions solely affecting
13 individual Members of the Class. Among the common questions of law and fact
14 applicable to the Class are:

- 15 i. Whether Defendants labeled, packaged, marketed, advertised and/or
16 sold Products to Plaintiffs, and those similarly situated, using false,
17 misleading and/or deceptive packaging and labeling;
- 18 ii. Whether Defendants' actions constitute violations of 21 U.S.C.
19 100.100, *et. seq.*;
- 20 iii. Whether Defendants' actions constitute violations of state consumer
21 protection laws;
- 22 iv. Whether Defendants omitted and/or misrepresented material facts in
23 connection with the labeling, packaging, marketing, advertising and/or sale
24 of its Products;
- 25 v. Whether Defendants' labeling, packaging, marketing, advertising
26 and/or selling of Products constituted an unfair, unlawful or fraudulent
27 practice;
- 28

- 1 vi. Whether Defendants' packaging of the Products constituted
2 nonfunctional slack-fill;
- 3 vii. Whether, and to what extent, injunctive relief should be imposed on
4 Defendants to prevent such conduct in the future;
- 5 viii. Whether the Members of the Class have sustained damages as a result
6 of Defendants' wrongful conduct;
- 7 ix. The appropriate measure of damages and/or other relief; and
- 8 x. Whether Defendants should be enjoined from continuing its unlawful
9 practices.

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

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

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

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

50. Defendants' 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, Defendants' systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

CAUSES OF ACTION

COUNT I

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

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

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

53. 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.

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

55. Defendants' 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.

56. Defendants 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.

57. California's Consumers Legal Remedies Act, Cal. Civ. Code 1770(a)(5), prohibits "Misrepresenting that goods or services have sponsorship, approval,

1 characteristics, ingredients, uses, benefits, or quantities which they do not have or
2 that a person has a sponsorship, approval, status, affiliation, or connection which
3 he or she does not have.” By engaging in the conduct set forth herein, Defendants
4 violated and continues to violate Section 1770(a)(5) of the CLRA, because
5 Defendants’ conduct constitutes unfair methods of competition and unfair or
6 fraudulent acts or practices, in that it misrepresents that the Products have
7 quantities they do not have.

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

14 59. Plaintiffs and the Class Members are not sophisticated experts about
15 corporate branding, labeling and packaging practices. Plaintiffs and the Class
16 acted reasonably when they purchased the Products based on their belief that
17 Defendants’ representations were true and lawful.

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

24 61. On or about December 21, 2015, prior to filing this action, Plaintiff Gates
25 sent a CLRA notice letter to Defendants, which complies with California Civil
26 Code 1782(a). Plaintiff Gates sent Defendants, individually and on behalf of the
27 proposed Class, a letter via Certified Mail, advising Defendants that it is in
28

violation of the CLRA and demanding that it cease and desist from such violations and make full restitution by refunding the monies received therefrom.

62. 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.*

63. Plaintiffs re-llege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

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

65. 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..."

66. Defendants 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

67. Defendants' 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.

68. Defendants violated section 12606 of the Business and Professions Code, in that Defendants packaged their 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

1 and misled consumers. In addition, Defendants packaged their Products in
2 containers made, formed, or filled as to be misleading to a potential customer as to
3 the actual size and filling of the package with Defendants' Products.

4 **B. "Unfair" Prong**

5 69. Defendants' business practices, described herein, violated the "unfair" prong
6 of the UCL in that its conduct is substantially injurious to consumers, offends
7 public policy, and is immoral, unethical, oppressive, and unscrupulous, as the
8 gravity of the conduct outweighs any alleged benefits. Defendants' advertising is
9 of no benefit to consumers.

10 **C. "Fraudulent" Prong**

11 70. Defendants violated the "fraudulent" prong of the UCL by misleading
12 Plaintiffs and the Class to believe that the Products contained more content than
13 they actually contain and that such packaging and labeling practices were lawful,
14 true and not intended to deceive or mislead consumers.

15 71. Plaintiffs and the Class Members are not sophisticated experts about the
16 corporate branding, labeling, and packaging practices of the Products. Plaintiffs
17 and the Class acted reasonably when they purchased the Products based on their
18 belief that Defendants' representations were true and lawful.

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

25 73. The conduct of Defendants as set forth above demonstrates the necessity for
26 granting injunctive relief restraining such and similar acts of unfair competition
27 pursuant to California Business and Professions Code. Unless enjoined and
28 restrained by order of the court, Defendants 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.

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

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

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

76. 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."

77. Defendants 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. Defendants' 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 Defendants' Products. Defendants knew their conduct was unauthorized, inaccurate, and misleading.

78. Defendants violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and which

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

3 79. Defendants violated 17500, *et seq.* by misleading Plaintiffs and the Class to
4 believe that the Product packaging contains more whey product than it in fact
5 contains, as described herein.

6 80. Defendants knew or should have known, through the exercise of reasonable
7 care that the Products were and continue to be misbranded, and that its
8 representations about the quantities of the Products were untrue and misleading.

9 81. Plaintiffs and the Class Members lost money or property as a result of
10 Defendants' FAL violations because (a) they would not have purchased the
11 Products on the same terms absent Defendants' illegal conduct as set forth herein,
12 or if the true facts were known concerning Defendants' representations; (b) they
13 paid a price premium for the Products due to Defendants' misrepresentations; and
14 (c) the Products did not have the benefits, or quantities as promised, and as a result
15 the class is entitled to monetary and injunctive relief.

16 **COUNT IV**
17 **VIOLATION OF NEW YORK DECEPTIVE TRADE PRACTICES ACT**
18 **NEW YORK GENERAL BUSINESS LAW § 349**

19 82. Plaintiffs re-allege and incorporate herein by reference the allegations
20 contained in all preceding paragraphs, and further allege as follows:

21 83. Plaintiffs bring this claim individually and on behalf of the Members of the
22 Class for Defendants' violations of New York's Deceptive Acts or Practices Law,
23 NY GBL § 349.

24 84. 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 are ...
26 unlawful."

27 85. Any person who has been injured by reason of a violation of NY GBL § 349
28 may bring an action to enjoin such unlawful act or practice, an action to recover

1 actual damages or fifty dollars, whichever is greater, or both. The court may, in its
2 discretion, increase the award to an amount not to exceed three times the actual
3 damage, up to one thousand dollars, if the conduct was willful or knowing.

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

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

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

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

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

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COUNT V
NEGLIGENT MISREPRESENTATION

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

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

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

94. Plaintiffs and Members of the Class reasonably relied on Defendants' representation that the Products contain more whey product than actually packaged.

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

96. Defendants, in making the misrepresentations and omissions, and in engaging in the acts alleged above, knew or reasonably should have known that the

1 representations were not true. Defendants made and intended the
2 misrepresentations to induce the reliance of Plaintiffs and Members of the Class.

3 97. As the manufacturer of its Products, Defendants are in the unique position of
4 being able to provide accurate information about those Products. Therefore there
5 is a special and privity-like relationship between Defendants and Plaintiffs and
6 other consumers.

7 98. Defendants have a duty to correct the misinformation it disseminated
8 through its advertising of the Products. By not informing Plaintiffs and Members
9 of the Class, Defendants breached its duty. Defendants also gained financially
10 from and as a result of this breach.

11 99. By and through such deceit, misrepresentations and/or omissions,
12 Defendants intended to induce Plaintiffs and Members of the Class to alter their
13 position to their detriment. Plaintiffs and Members of the Class relied upon these
14 false representations when purchasing Products in over-sized containers, which
15 reliance was justified and reasonably foreseeable.

16 100. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs
17 and Members of the Class have suffered and continue to suffer economic losses
18 and other general and specific damages, including but not limited to the amounts
19 paid for Products, and any interest that would have been accrued on those monies,
20 all in an amount to be determined according to proof at time of trial.

21 101. Defendants acted with intent to defraud, or with reckless or negligent
22 disregard of the rights of Plaintiffs and Members of the Class.

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

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

- (A) For an Order certifying the Class pursuant to Federal Rule of Civil Procedure 23, appointing Plaintiffs as class representatives, and designating Plaintiffs' counsel as counsel for the Class;
- (B) For an Order certifying the California Subclass, appointing Plaintiff Gates representative of the California Subclass, and designating his counsel as counsel for the California Subclass;
- (C) For an Order certifying the New York Subclass, appointing Plaintiff Martinez representative of the New York Subclass, and designating his counsel as counsel for the New York Subclass;
- (D) For an Order declaring that Defendants' conduct violated the CLRA, Cal. Civ. Code § 1750, *et seq.*, and awarding (i) injunctive relief, (ii) costs of suit, and (iii) reasonable attorneys' fees;
- (E) For an Order declaring that Defendants' 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 Defendants' conduct violated New York Gen Bus Law § 349, and awarding (i) injunctive relief, (ii) actual damages and/or statutory damages (i.e., \$50 per GBL 349), whichever is greater or both plus treble actual damages not to exceed \$1,000, (iii) prejudgment and post judgment interest, and (iv) reasonable attorneys' fees;

- 1 (G) For an Order finding that Defendants made Negligent Misrepresentations,
 2 and awarding special, general, and compensatory damages to Plaintiffs and
 3 the Class;
 4 (H) For compensatory damages in amounts to be determined by the Court and/or
 5 jury;
 6 (I) For prejudgment interest on all amounts awarded;
 7 (J) For an order of restitution and all other forms of equitable monetary relief,
 8 as pleaded;
 9 (K) For injunctive relief as pleaded or as the Court may deem proper;
 10 (L) For an Order awarding Plaintiffs and the Class their reasonable attorneys'
 11 fees and expenses and costs of suit as pleaded; and
 12 (M) For such other and further relief as the Court deems just and proper.

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KAZEROUNI LAW GROUP, APC
245 FISCHER AVENUE, SUITE D1
COSTA MESA, CA 92626

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: August 18, 2015

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: /s/ Andrei Armas
Abbas Kazerounian
Andrei Armas
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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New York, NY 10003

NYJG@aol.com

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Facsimile: (212) 982-6284

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 Carlos Solis, 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); Andrei Armas (SBN 299703)
Kazerouni Law Group, APC
245 Fischer Avenue, Suite D1, Costa Mesa, CA 92626 (800) 400-6808

DEFENDANTS

NBTY, Inc. and United States Nutrition, Inc. **'16CV2090 AJB WVG**

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)

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

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

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

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input 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 type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <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. Civ. Code § 1750 et seq; Violations of Cal Bus. & Prof. Code §§17200 et seq and 17500 et seq

VII. REQUESTED IN COMPLAINT:

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

DEMAND \$
5000000.00

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE 8/18/2016 SIGNATURE OF ATTORNEY OF RECORD
s/ Andrei Armas

FOR OFFICE USE ONLY

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

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[Additional Attorneys on Signature Page]

Attorneys for Plaintiffs,

Matthew Gates and Carlos Solis

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

**Matthew Gates and Carlos Solis,
Individually And On Behalf Of
All Others Similarly Situated,**

Plaintiffs,

v.

**NBTY, Inc. and United States
Nutrition, Inc.,**

Defendants.

Case No.: '16CV2090 AJB WVG

**PLAINTIFFS' AFFIDAVIT OF
VENUE PURSUANT TO
CALIFORNIA CIVIL CODE
SECTION 1780(d)**

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I, Andrei Armas, declare as follows:

1. I am counsel of record for the plaintiffs in this action and make this declaration to the best of my knowledge, information and belief of the facts stated herein.

3. At all times herein, defendants NBTY, Inc. and United States Nutrition, Inc., are headquartered in the City of Bohemia, State of New York and are incorporated in the State of Delaware.

4. The transaction that forms the basis of this action or a substantial portion thereof occurred in the County of San Diego, State of California.

5. Plaintiffs' Complaint filed in this matter contains a cause of action for violation of the Consumers Legal Remedies Act as against defendant.

Per the foregoing assertions, this cause of action has been properly commenced in the proper county or judicial district for trial.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was signed on the August 18, 2016, at Oakland, California.

Dated: August 18, 2016

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: /s/ ANDREI ARMAS
ANDREI ARMAS, ESQ.
ATTORNEYS FOR PLAINTIFF

GOTTLIEB & ASSOCIATES

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

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

Pro hac vice to be filed

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