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Melanie Kelley

8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 MELANIE KELLEY, individually, and on  
behalf of other members of the general  
12 public similarly situated,

13 Plaintiff,

14 v.

15 WWF OPERATING COMPANY, a  
Delaware corporation, dba WHITEWAVE  
16 SERVICES, INC.,

17 Defendant.  
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Case No.:

**CLASS ACTION COMPLAINT FOR:**

- (1) Violations of California's Consumers Legal Remedies Act
- (2) Violation of Unfair Competition Law, California Business & Professions Code § 17200 *et seq.*
- (3) Violation of False Advertising Law, California Business & Professions Code § 17500

**DEMAND FOR JURY TRIAL**

**INTRODUCTION**

1  
2 1. Plaintiff Melanie Kelley (“Plaintiff”) brings this action for herself and on  
3 behalf of all persons in the United States who, at any time since four years prior to the filing  
4 of this complaint, purchased any Silk Almondmilk beverage (“Silk Almond Beverages”)<sup>1</sup>  
5 manufactured, marketed, distributed, and sold by WWF Operating Company, dba WhiteWave  
6 Services, Inc. (“WhiteWave” or “Defendant”).

7 2. This case arises out of the false, misleading, and deceptive marketing practices  
8 of Defendant’s Silk Almondmilk products. Defendant has deceptively informed and led its  
9 customers to believe that they were purchasing, for a premium price, a dairy milk alternative  
10 that is nutritionally equivalent, and even superior, to dairy milk, as defined by the U.S. Food  
11 & Drug Administration (the “FDA”)<sup>2</sup>. However, as discussed in detail below, Defendant’s  
12 Silk Almond Beverages significantly lack many of the essential nutrients and vitamins  
13 provided in dairy milk, which Defendant fails to disclose to and actively conceals from  
14 consumers.

15 3. Consumer demand for non-dairy milks (“milk substitutes”) has exponentially  
16 increased over the past decade. In fact, almond-based milk substitutes, including the Silk  
17 Almond Beverages, experienced a 40% increase in sales between 2013 and 2014 alone, while  
18 dairy milk sales have steadily declined.<sup>3</sup> By calling its Silk Almond Beverages “milk”, a term  
19 historically used to define cow’s milk, Defendant has capitalized on reasonable consumers’

20  
21 <sup>1</sup> On information and belief, the Almond Beverages include, without limitation, the  
22 following: Silk Vanilla Almondmilk, Silk Original Almondmilk, Silk Organic Original  
23 Almondmilk, Silk Dark Chocolate Almondmilk, Silk Unsweetened Vanilla Almondmilk, Silk  
24 Unsweetened Almondmilk, Silk Light Vanilla Almondmilk, Silk Light Original Almondmilk.

25 <sup>2</sup> “Milk is the lacteal secretion, practically free from colostrum, obtained by the  
26 complete milking of one or more healthy cows. Milk that is in final package form for beverage  
27 use shall have been pasteurized or ultrapasteurized, and shall contain not less than 8 1/4  
28 percent milk solids not fat and not less than 3 1/4 percent milkfat. Milk may have been  
adjusted by separating part of the milkfat therefrom, or by adding thereto cream, concentrated  
milk, dry whole milk, skim milk, concentrated skim milk, or nonfat dry milk. Milk may be  
homogenized.” See 21 CFR § 131.110.

<sup>3</sup> <http://www.sacbee.com/news/local/health-and-medicine/article31689980.html>.

1 understanding of the well-known health benefits and essential nutrients<sup>4</sup> that dairy milk  
2 provides without actually providing those health benefits and essential nutrients. Moreover,  
3 Defendant's entire marketing strategy portrays its Silk Almond Beverages as nutritionally  
4 superior to dairy milk. For example, Defendant's official website<sup>5</sup> advertises its Silk Almond  
5 Beverages with the following claims:

- 6 • Try delicious soymilk, almondmilk or cashewmilk **instead of your usual dairy milk**  
7 in cereal, or pack a tempting Dairy-Free Yogurt Alternative for lunch. It could be the  
8 start of a deliciously smart new habit.
- 9 • Silk Unsweetened Vanilla Almondmilk: **45% DV of calcium vs. 30% DV in skim**  
10 **dairy milk**. USDA National Nutrient Database for Standard Reference, Release 26.  
11 Data consistent with typical skim dairy milk.
- 12 • With a mildly nutty taste and a calorie count that isn't nutty at all, **our almondmilk is**  
13 **perfectly poised to become your cereal's new best friend. Plus it can be a smart**  
14 **swap for milk in recipes or shakes. Every delicious glass has absolutely no**  
15 **cholesterol and no saturated fat**. That's what we call the power of plant-based  
16 nutrition!

17 4. Defendant even provides a "Compare to Dairy" link on each Silk Almond  
18 Beverages' webpage that attempts to highlight the health advantages of its products as  
19 compared to fat-free dairy milk yet fails to highlight nearly all of the essential vitamins and  
20 nutrients provided in fat-free dairy milk that are significantly reduced or nonexistent in the  
21 Silk Almond Beverages (Figure 1). Reasonable consumers are thus misled to believe that *but*  
22 *for* the nutritional advantages specified by Defendant, the Silk Almond Beverages are  
23

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24 <sup>4</sup> "Dairy foods are excellent sources of nutrients of public health concern, including  
25 Vitamin D, calcium, and potassium. Consumption of dairy foods provides numerous health  
26 benefits including lower risk of diabetes, metabolic syndrome, cardiovascular disease and  
27 obesity. [...] on average across the calorie levels, dairy foods contribute about 67 percent of  
28 calcium, 64 percent of Vitamin D, and 17 percent of magnesium."

<sup>5</sup> <https://silk.com/>. (emphasis added).

1 nutritionally equal to dairy milk.

2 Figure 1:



5. Specifically, on information and belief, Defendant fails to disclose to consumers that its Almond Beverages lack the following essential vitamins and nutrients, as defined by the FDA, available in measurable amounts in fat-free dairy milk:

ESSENTIAL VITAMIN/NUTRIENT	SKIM DAIRY MILK (serving size 1 cup) <sup>6</sup>	SILK ORIGINAL ALMONDMILK (serving size 1 cup)
PROTEIN	9.7g (20% DRV <sup>7</sup> )	1g (2% DRV)
MAGNESIUM	39mg (9.3% RDI <sup>8</sup> )	(4% RDI)

<sup>6</sup> All Nutrients Milk, nonfat, fluid, protein fortified, with added vitamin A and vitamin D, USDA National Nutrient Database for Standard Reference, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

<sup>7</sup> Daily Reference Value, See National Nutrient Database for U.S. Dept. of Agriculture, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

1	PHOSPHORUS	276mg (22% RDI)	26mg (2% RDI)*
2	POTASSIUM	448mg (9.5% DRV)	35mg (<1% DRV)
3	ZINC	1.11mg (10% RDI)	0.18mg (1% RDI)*
4	VITAMIN C	2.7mg (3% RDI)	0mg (0% RDI)
5	RIBOFLAVIN	.477mg (37% RDI)	(4% RDI)
6	PANTOTHENIC ACID	.925mg (18.5% RDI)	.079mg (1% RDI)*
7	VITAMIN B6	.123mg (7.2% RDI)	.039mg (2% RDI)*
8	FOLATE	15ug (3.8% RDI)	3ug (<1% RDI)*
9	VITAMIN A	150ug (16.6% RDI)	(10% RDI)

10 \*Nutritional values not provided on Defendant's Almond Beverage labels. *See All Nutrients,*  
 11 *Beverages, almond milk, unsweetened,* USDA National Nutrient Database for Standard  
 12 Reference, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

13 6. Further, Defendant fails to label its Silk Almond Beverages as "imitation milk",  
 14 as required by the FDA, which requires products to be labeled "imitation" if there is *any*  
 15 reduction in the content of essential nutrients present in a measurable amount in the  
 16 standardized food for which the product is substituting. Thus, Silk Almond Beverages must  
 17 be labeled "imitation milk" because they are, in fact, nutritionally inferior to dairy milk due to  
 18 their reduction in the content of essential nutrients present in a measurable amount in dairy  
 19 milk, as identified above and throughout this complaint.

20 7. Moreover, because Defendant utilizes the common or usual name of a food (i.e.  
 21 "milk") but fails to reveal the basic nature and characterizing ingredients of the Silk Almond  
 22 Beverages, in accordance with 21 C.F.R. § 102.5(b), Defendant must label its Almond  
 23 Beverages as "imitation milk", as required by 21 C.F.R. § 101.3(e).

24 8. On information and belief, the amount of essential vitamins and nutrients

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26 <sup>8</sup> Reference Daily Intake, *See National Nutrient Database for U.S. Dept. of*  
 27 *Agriculture, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.*

1 provided by dairy milk has a material bearing on price and consumer acceptance of products  
2 attempting to substitute dairy milk. WhiteWave has labeled its products to highlight its low  
3 calorie and fat content as compared to fat-free dairy milk and has been successful in capturing  
4 the market share previously attributed to dairy milk due to its omissions regarding the actual  
5 nutritional comparison of essential nutrients. By deceiving consumers about the nature,  
6 quality, and/or ingredients of its products, WhiteWave is able to command a premium price,  
7 increasing consumers' willingness to pay and reduce the market share of competing products,  
8 thereby increasing its own sales and profits.

9       9. Reasonable consumers must, and do, rely on WhiteWave's overall marketing,  
10 including, without limitation, product advertisements, labels, displays, and packaging, in  
11 determining whether to purchase its Silk Almond Beverages. As such, reasonable consumers  
12 remain unaware that they are not receiving the same levels of essential vitamins and nutrients  
13 provided in dairy milk when purchasing Defendant's Silk Almond Beverages to substitute  
14 dairy milk.

15       10. Defendant's deceptive labeling poses a serious health concern to consumers. In  
16 fact, the 2015 Dietary Guidelines Advisory Committee Report found that in cases where  
17 people do not consume dairy, the levels of calcium, magnesium, iron, vitamin A and  
18 riboflavin drop below the recommended intake, and intake levels of potassium, vitamin D and  
19 choline also drop substantially.<sup>9</sup> While Defendant could fortify its Silk Almond Beverages to  
20 contain comparable quantities of the essential vitamins and nutrients contained in dairy milk,  
21 it chooses not to do so. Even so, absorption of these vitamins and nutrients is less efficient  
22 from plant beverages such as the Silk Almond Beverages.

23       11. On information and belief, every Silk Almond Beverage at issue in this  
24 complaint has the same nutritional content and contains the same deceptive misrepresentations

25 \_\_\_\_\_  
26 <sup>9</sup> Scientific Report of the 2015 Dietary Guidelines Advisory Committee, Part D.  
27 Chapter 1, Advisory Report to the Secretary of Health and Human Services and the Secretary  
28 of Agriculture, February 2015, available at <https://health.gov/dietaryguidelines/2015-scientific-report/pdfs/scientific-report-of-the-2015-dietary-guidelines-advisory-committee.pdf>.

1 employed by WhiteWave.

2 12. If Plaintiff and Class Members knew that the Silk Almond Beverages were  
3 nutritionally inferior and lacked the same level of essential vitamins and nutrients as dairy  
4 milk, Plaintiff and Class Members would not have purchased the Silk Almond Beverages or  
5 would have paid less for them.

6 13. On information and belief, WhiteWave knew about and concealed the  
7 nutritional inferiority of its Silk Almond Beverage products from Plaintiff and Class  
8 Members, prior to the time of sale and thereafter.

9 14. By employing the labeling and marketing tactics illustrated above, WhiteWave  
10 intends for consumers to rely on its representations regarding the calorie and fat content of its  
11 Silk Almond Beverages rather than the actual values of essential vitamins and nutrients as  
12 compared to dairy milk, and hundreds of thousands of reasonable consumers did in fact so  
13 rely. Because WhiteWave will not notify Class Members that the Silk Almond Beverages are  
14 in fact nutritionally inferior to dairy milk, Plaintiff and Class Members (as well as members of  
15 the general public) remain subject to WhiteWave's deceptive advertising.

16 15. As a result of their reliance on Defendant's omissions and mischaracterizations,  
17 consumers have suffered an ascertainable loss of money, including, but not limited to, out of  
18 pocket costs incurred in purchasing over-valued Silk Almond Beverages. Further, as a result  
19 of its deceptive marketing and unfair competition with other similar manufacturers and  
20 brands, WhiteWave realized sizable profits.

21 16. The Silk Almond Beverages are misbranded under Sections 403(a), (c), (f), and  
22 (g) of the Food Drug & Cosmetic Act (the "FDCA"), 21 U.S.C. §§ 343(a), (c), (f), and (g).  
23 Further, the Sherman Food, Drug, and Cosmetic Law (the "Sherman Law"), Cal. Health &  
24 Safety Code §§ 109875-111915, expressly incorporates the food labeling requirements set  
25 forth in the FDCA, and provides that any food is misbranded if its labeling is false or  
26 misleading or does not conform to FDCA requirements. See Cal. Health & Safety Code §§  
27 110100(a), 110660-110805.

28 17. Thus, the Almond Beverages cannot be legally manufactured, advertised,

1 distributed, or sold in the United States as they are currently labeled. *See* 21 U.S.C. § 331. In  
2 order to comply with federal and state labeling requirements, Defendant must:

- 3 a. Revise its Almond Beverages' labels to state, in type of uniform size  
4 and prominence, the word "imitation" and, immediately thereafter, milk;  
5 or  
6 b. Revise its Almond Beverages' labels to state the percentages of  
7 characterizing ingredients or information concerning the presence or  
8 absence of the ingredients as part of the common or usual name of milk;  
9 or  
10 c. Fortify its Almond Beverages with vitamins and nutrients in an amount  
11 equal to or greater than the amount of essential vitamins and nutrients  
12 present in dairy milk in measurable amounts; or  
13 d. Cease utilizing the common or usual name "milk" in the statement of  
14 identity of its Almond Beverages.

15 **PARTIES**

16 **PLAINTIFF MELANIE KELLEY**

17 18. Plaintiff Melanie Kelley is a California citizen who resides in Fresno,  
18 California. During the class period alleged herein, and most recently in or around December  
19 2016, Plaintiff purchased Defendant's Silk Almond Beverages, specifically the Silk  
20 Unsweetened Vanilla Almondmilk, from Save Mart in Fresno County.

21 19. Plaintiff purchased Defendant's Silk Almond Beverages in reliance on  
22 WhiteWave's marketing of the products including the claims and product information on the  
23 packaging and labeling, specifically claims comparing the Silk Almond Beverages' nutritional  
24 contents to dairy milk. Among other marketing sources, Plaintiff saw a television commercial  
25 for the Silk Almond Beverages that caused her to believe that the Silk Almond Beverages  
26 were healthier than dairy milk.

27 20. In deciding to purchase the Silk Almond Beverages, Plaintiff saw, relied upon,  
28 and reasonably believed that the Almond Beverages were nutritionally superior to dairy milk



1 and contained comparable amounts of the essential vitamins and nutrients contained in dairy  
2 milk and contained higher amounts of protein and vitamin D than dairy milk. Purchasing a  
3 nutritionally superior alternative to dairy milk was, and is, important to Plaintiff. In fact,  
4 Defendant's representations and omissions regarding the nutritional contents of the Almond  
5 Beverages were material to Plaintiff in her decision to purchase Silk Almond Beverages.

6 21. If Plaintiff had known at the time of purchase that these products were  
7 nutritionally inferior to dairy milk, she would have paid less for them and would have  
8 considered an alternative dairy milk substitute with nutrients similar to dairy milk.

9 **DEFENDANT**

10 22. Defendant WWF Operating Company is a corporation organized and in  
11 existence under the laws of the State of Delaware and is registered to do business in the State  
12 of California. WWF Operating Company's corporate headquarters and principal place of  
13 business are located at are located at 1225 Seventeenth Street, Suite 1000, Denver, Colorado  
14 80202. WWF Operating Company tests, produces, manufactures, markets, distributes, and  
15 sells Silk Almondmilk products nationwide and in California.

16 23. At all relevant times, Defendant was and is engaged in the business of testing,  
17 producing, manufacturing, marketing, distributing, and selling Silk Almondmilk products in  
18 Fresno County and throughout the United States of America.

19 **JURISDICTION**

20 24. This is a class action.

21 25. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C.  
22 § 1331 because this action arises under the Constitution or laws of the United States and the  
23 Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) and (6), in that, as to each Class defined  
24 herein:

- 25 a. the matter in controversy exceeds \$5,000,000.00, exclusive of interest  
26 and costs;
- 27 b. this is a class action involving 100 or more class members; and
- 28 c. this is a class action in which at least one member of the Plaintiff class

1 is a citizen of a State different from at least one Defendant.

2 26. The Court has personal jurisdiction over Defendant, which have at least  
3 minimum contacts with the State of California because they have conducted business there  
4 and have availed themselves of California's markets through the advertising, manufacturing,  
5 distribution, and sales of its Silk Almond Beverages.

6 **VENUE**

7 27. WWF Operating Company, through its advertising, manufacturing, distribution,  
8 and sales of its Silk Almond Beverages, has established sufficient contacts in this district such  
9 that personal jurisdiction is appropriate. Defendant is deemed to reside in this district  
10 pursuant to 28 U.S.C. § 1391(a).

11 28. Further, Defendant has conducted business here and has availed itself of  
12 California's markets through its advertising, manufacturing, distribution, and sales of its Silk  
13 Almond Beverages. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

14 29. Additionally, Plaintiff Melanie Kelley's Declaration, as required under  
15 California Civil Code section 1780(d), but not pursuant to *Erie* and federal procedural rules,  
16 reflects that a substantial part of the events or omissions giving rise to the claims alleged  
17 herein occurred, or a substantial part of property that is the subject of this action, is situated in  
18 Fresno County, California. It is attached as **Exhibit 1**.

19 **FACTUAL ALLEGATIONS**

20 30. Consumer demand for non-dairy milks ("milk substitutes") has exponentially  
21 increased over the past decade. In fact, almond-based milk substitutes, including Defendant's  
22 Silk Almond Beverages, experienced a 40% increase in sales between 2013 and 2014 alone,  
23 while dairy milk sales have steadily declined. By calling its Almond Beverages "milk", a  
24 term historically used and understood to define cow's milk, Defendant has capitalized on  
25 reasonable consumers' understanding of the well-known health benefits and essential nutrients  
26 that dairy milk provides without actually providing those health benefits and essential  
27 nutrients. Moreover, Defendant's entire marketing strategy portrays its Silk Almond  
28 Beverages as nutritionally superior to dairy milk.

1           31.     The Silk Almond Beverages are misbranded under Sections 403(a), (c), (f), and  
2 (g) of the Food Drug & Cosmetic Act (the “FDCA”), 21 U.S.C. §§ 343(a), (c), (f), and (g).  
3 Further, the Sherman Food, Drug, and Cosmetic Law (the “Sherman Law”), Cal. Health &  
4 Safety Code §§ 109875-111915, expressly incorporates the food labeling requirements set  
5 forth in the FDCA, and provides that any food is misbranded if its labeling is false or  
6 misleading or does not conform to FDCA requirements. *See* Cal. Health & Safety Code §§  
7 110100(a), 110660-110805.

8           32.     Thus, the Silk Almond Beverages cannot be legally manufactured, advertised,  
9 distributed, or sold in the United States as they are currently labeled. *See* 21 U.S.C. § 331.

10           33.     Further, it is a violation of the Sherman Law to advertise any misbranded food,  
11 § 110398; to manufacture, sell deliver, hold, or offer for sale any food that is misbranded, §  
12 110760; to misbrand any food, § 110765; or to receive in commerce any food that is  
13 misbranded or deliver or proffer it for delivery, § 110770.

14     **The Almond Beverages Are Nutritionally Inferior to Dairy Milk**

15           34.     Foods must be labeled “imitation”, and are deemed misbranded when they are  
16 not, if the food is intended to substitute for and resemble another food but is nutritionally  
17 inferior to that food.<sup>10</sup> A food is nutritionally inferior when there is “any reduction in the  
18 content of an essential nutrient that is present in a measurable amount.”<sup>11</sup> In clarifying this  
19 requirement, the FDA has stated “...a new food that resembles a traditional food and is a  
20 substitute for the traditional food must be labeled as an imitation if the new food contains less  
21 protein or a lesser amount of any essential vitamin or mineral.”<sup>12</sup>

22           <sup>10</sup> *See* 21 C.F.R. 101.3(e).

23           <sup>11</sup> *See* 21 C.F.R. § 101.3(e)(4)(ii), “For the purpose of this section, a measurable  
24 amount of an essential nutrient in a food shall be considered to be 2 percent or more of the  
25 Daily Reference Value (DRV) of protein listed under §101.9(c)(7)(iii) and of potassium listed  
26 under §101.9(c)(9) per reference amount customarily consumed and 2 percent or more of the  
27 Reference Daily Intake (RDI) of any vitamin or mineral listed under §101.9(c)(8)(iv) per  
reference amount customarily consumed, except that selenium, molybdenum, chromium, and  
chloride need not be considered.”

28           <sup>12</sup> *Guidance for Industry: A Food Labeling Guide*, available at

35. On information and belief, Defendant fails to disclose to consumers that its Silk Almond Beverages lack the following essential vitamins and nutrients, as defined by the FDA, available in measurable amounts in fat-free dairy milk:

<b>ESSENTIAL VITAMIN/NUTRIENT</b>	<b>SKIM DAIRY MILK (serving size 1 cup)<sup>13</sup></b>	<b>SILK ORIGINAL ALMONDMILK (serving size 1 cup)</b>
PROTEIN	9.7g (20% DRV <sup>14</sup> )	1g (2% DRV)
MAGNESIUM	39mg (9.3% RDI <sup>15</sup> )	(4% RDI)
PHOSPHORUS	276mg (22% RDI)	26mg (2% RDI)*
POTASSIUM	448mg (9.5% DRV)	35mg (<1% DRV)
ZINC	1.11mg (10% RDI)	0.18mg (1% RDI)*
VITAMIN C	2.7mg (3% RDI)	0mg (0% RDI)
RIBOFLAVIN	.477mg (37% RDI)	(4% RDI)
PANTOTHENIC ACID	.925mg (18.5% RDI)	.079mg (1% RDI)*
VITAMIN B6	.123mg (7.2% RDI)	.039mg (2% RDI)*
FOLATE	15ug (3.8% RDI)	3ug (<1% RDI)*
VITAMIN A	150ug (16.6% RDI)	(10% RDI)

\*Nutritional values not provided on Defendant's Almond Beverage labels. *See All Nutrients, Beverages, almond milk, unsweetened*, USDA National Nutrient Database for Standard Reference, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

[/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm#toc](https://www.fda.gov/food/guidance-regulation/guidance-documents/regulatory-information/labeling-nutrition/ucm2006828.htm#toc) (January 2013).

<sup>13</sup> *All Nutrients Milk, nonfat, fluid, protein fortified, with added vitamin A and vitamin D*, USDA National Nutrient Database for Standard Reference, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

<sup>14</sup> Daily Reference Value, *See National Nutrient Database for U.S. Dept. of Agriculture*, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

<sup>15</sup> Reference Daily Intake, *See National Nutrient Database for U.S. Dept. of Agriculture*, Release 28 (May 2016), available at <https://ndb.nal.usda.gov/ndb/>.

1  
2 36. Further, Defendant fails to label its Silk Almond Beverages as “imitation milk”,  
3 as required by the FDA, which requires products to be labeled “imitation” if there is any  
4 reduction in the content of essential nutrients present in a measurable amount in the  
5 standardized food for which the product is substituting. Thus, Silk Almond Beverages must  
6 be labeled “imitation milk” because they are, in fact, nutritionally inferior to dairy milk due to  
7 their reduction in the content of essential nutrients present in a measurable amount in dairy  
8 milk, as identified above and throughout this complaint.

9 37. Moreover, because Defendant utilizes the common or usual name of a food (i.e.  
10 “milk”) but fails to reveal the basic nature and characterizing ingredients of the Silk Almond  
11 Beverages, in accordance with 21 C.F.R. § 102.5(b), Defendant must label its Almond  
12 Beverages as “imitation milk”, as required by 21 C.F.R. § 101.3(e).

13 38. Because WhiteWave will not notify Class Members that the Silk Almond  
14 Beverages are in fact nutritionally inferior to dairy milk or label its Silk Almond Beverages as  
15 “imitation milk”, Plaintiff and Class Members (as well as members of the general public)  
16 remain subject to WhiteWave’s deceptive advertising and misrepresentations.

17 **Defendant Fails to Include All Required Statement of Identity Disclosures Under The**  
18 **“Common or Usual Name” Principle For Its Silk Almond Beverages**

19 39. When a product utilizes the “common or usual name of a food”, it must  
20 include:

21 **“the percentage(s) of any characterizing ingredient(s) or component(s)**  
22 **when the proportion of such ingredient(s) or component(s) in the food has**  
23 **a material bearing on price or consumer acceptance or when the labeling**  
24 **or the appearance of the food may otherwise create an erroneous**  
25 **impression that such ingredient(s) or component(s) is present in an**  
26 **amount greater than is actually the case.”<sup>16</sup>**

27 40. Here, by calling its Silk Almond Beverages “milk”, a term defined by the FDA  
28 specifically in reference to cow’s milk, Defendant has capitalized on reasonable consumers’

<sup>16</sup> 21 C.F.R. § 102.5(b). (emphasis added).

1 understanding of the well-known health benefits and essential nutrients that dairy milk  
2 provides without actually providing those health benefits and essential nutrients. Moreover,  
3 Defendant's entire marketing strategy portrays its Silk Almond Beverages as nutritionally  
4 superior to dairy milk.

5 41. Further, the FDA relaxed its statement of identity standards in the early 1990s  
6 due to concerns regarding lack of innovation in food development and attention to healthier  
7 alternatives to standardized foods. At that time, a manufacturer could not use the name of a  
8 standardized food unless the substitute food contained the "characterizing ingredient" of the  
9 food. In allowing for the "common or usual name" standard, the FDA and the FTC  
10 specifically addressed concerns over consumer deception. In doing so, the agencies heavily  
11 relied on the existence of false advertising and consumer protection laws to address consumer  
12 deception in situations where manufacturers attempt to abuse the standard and provide  
13 nutritionally inferior products while commanding a premium price. The relaxed standard of  
14 identity requirements was intended to promote healthier alternatives to standardized food by  
15 providing more nutritional value, not less, as is the case with the Silk Almond Beverages.

16 42. By employing the labeling and marketing tactics illustrated above, WhiteWave  
17 intends for consumers to rely on its representations regarding the calorie and fat content of its  
18 Silk Almond Beverages rather than the actual values of essential vitamins and nutrients and  
19 the characterizing ingredients as compared to dairy milk, and hundreds of thousands of  
20 reasonable consumers did in fact so rely. Because WhiteWave will not notify Class Members  
21 that the Silk Almond Beverages are nutritionally inferior to dairy milk, Plaintiff and Class  
22 Members (as well as members of the general public) remain subject to WhiteWave's  
23 deceptive advertising. Further, because WhiteWave will not notify Class Members of the  
24 percentage of the characterizing ingredients of its Silk Almond Beverages in comparison to  
25 common "milk" or list its Silk Almond Beverages as "imitation milk", Plaintiff and Class  
26 Members remain subject to WhiteWave's deceptive and unlawful advertising.

27 43. If Plaintiff and Class Members knew that the Silk Almond Beverages were  
28 nutritionally inferior and lacked the same level of essential vitamins and nutrients as dairy

1 milk, Plaintiff and Class Members would not have purchased the Silk Almond Beverages or  
2 would have paid less for them.

3 44. WhiteWave knows, or should reasonably know, that consumers purchase its  
4 products to substitute for common dairy milk and knows that consumers will pay a premium  
5 for these products or would not purchase these products at all unless they contained equal or  
6 greater amounts of essential vitamins and nutrients provided in dairy milk.

7 45. As a result of their reliance on Defendant's representations, consumers have  
8 suffered an ascertainable loss of money, including, but not limited to, out of pocket costs  
9 incurred in purchasing over-valued Silk Almond Beverages. Further, as a result of its  
10 deceptive marketing and unfair competition with other similar manufacturers and brands,  
11 WhiteWave realized sizable profits.

12 46. As the intended, direct, and proximate result of WhiteWave's false, misleading,  
13 and deceptive representations and omissions, WhiteWave has been unjustly enriched through  
14 more sales of Silk Almond Beverages and higher profits at the expense of Plaintiff and the  
15 Class members.

### 16 **CLASS ALLEGATIONS**

17 47. Plaintiff brings this lawsuit as a class action on behalf of herself and all others  
18 similarly situated as members of the proposed Class pursuant to Federal Rules of  
19 Civil Procedure 23(a), 23(b)(2), 23(b)(3), and 23(c)(4). This action satisfies the numerosity,  
20 commonality, typicality, adequacy, predominance, and superiority requirements of those  
21 provisions.

22 48. The Class and Sub Class(es) are defined as:

23 **Nationwide Class**: All individuals in the United States who purchased any  
24 Silk Almondmilk product since four years prior to the filing of this complaint  
(the "Nationwide Class" or "Class").

25 **California Sub-Class**: All members of the Nationwide Class who reside in the  
26 State of California (the "California Sub-Class").

27 **CLRA Sub-Class**: All members of the California Sub-Class who are  
28 "consumers" within the meaning of California Civil Code § 1761(d) (the  
"CLRA Sub-Class").

1           49. Excluded from the Class and Sub-Classes are: (1) Defendant, any entity or  
2 division in which Defendant has a controlling interest, and their legal representatives, officers,  
3 directors, assigns, and successors; (2) the Judge to whom this case is assigned and the Judge's  
4 staff; (3) any Judge sitting in the presiding state and/or federal court system who may hear an  
5 appeal of any judgment entered; and (4) those persons who have suffered personal injuries as  
6 a result of the facts alleged herein. Plaintiff reserves the right to amend the Class and Sub-  
7 Class definitions if discovery and further investigation reveal that the Class and Sub-Class  
8 should be expanded or otherwise modified.

9           50. Numerosity: Although the exact number of Class Members is uncertain and  
10 can only be ascertained through appropriate discovery, the number is great enough such that  
11 joinder is impracticable. The disposition of the claims of these Class Members in a single  
12 action will provide substantial benefits to all parties and to the Court. The Class Members are  
13 readily identifiable from information and records in Defendant's possession, custody, or  
14 control.

15           51. Typicality: Plaintiff's claims are typical of the claims of the Class in that  
16 Plaintiff, like all Class Members, purchased Silk Almondmilk products and were subjected to  
17 the same deceptive advertising practices by Defendant since four years prior to the filing of  
18 this complaint. The representative Plaintiff, like all Class Members, has been damaged by  
19 Defendant's misconduct in that they incurred expenses due to their reliance on Defendant's  
20 deceptive representations and omissions regarding its Silk Almond Beverages, as described  
21 throughout this complaint. Furthermore, the factual bases of Defendant's misconduct are  
22 common to all Class Members and represent a common thread resulting in injury to all Class  
23 Members.

24           52. Commonality: There are numerous questions of law and fact common to  
25 Plaintiff and the Class that predominate over any question affecting only individual Class  
26 Members. These common legal and factual issues include the following:

- 27           a. Whether WhiteWave misrepresented and/or failed to disclose material  
28 facts concerning the Silk Almond Beverages;



- 1           b.     Whether the Silk Almond Beverages are misbranded under federal and
- 2                     state laws;
- 3           c.     Whether the Silk Almond Beverages are nutritionally inferior to dairy
- 4                     milk;
- 5           d.     Whether WhiteWave's conduct was unfair and/or deceptive;
- 6           e.     Whether WhiteWave has a duty to disclose the true nature of its Silk
- 7                     Almond Beverages' ingredients;
- 8           f.     Whether Plaintiff and other Class Members are entitled to equitable
- 9                     relief, including but not limited to a preliminary and/or permanent
- 10                    injunction;
- 11           g.     Whether Plaintiff and other Class Members are entitled to damages;
- 12           h.     Whether Defendant knew or reasonably should have known of its
- 13                     deceptive representations and omissions relating to its Silk Almond
- 14                     Beverages' ingredients; and
- 15           i.     Whether Defendant is obligated to inform Class Members of their right
- 16                     to seek reimbursement for having paid for Silk Almond Beverages in
- 17                     reliance on Defendant's misrepresentations.

18           53.     Adequate Representation: Plaintiff will fairly and adequately protect the  
19 interests of the Class Members. Plaintiff has retained attorneys experienced in the prosecution  
20 of class actions, including consumer and product defect class actions, and Plaintiff intends to  
21 prosecute this action vigorously.

22           54.     Predominance and Superiority: Plaintiff and Class Members have all suffered  
23 and will continue to suffer harm and damages as a result of Defendant's unlawful and  
24 wrongful conduct. A class action is superior to other available methods for the fair and  
25 efficient adjudication of the controversy. Absent a class action, most Class Members would  
26 likely find the cost of litigating their claims prohibitively high and would therefore have no  
27 effective remedy at law. Because of the relatively small size of the individual Class  
28 Members' claims, it is likely that only a few Class Members could afford to seek legal redress

1 for Defendant's misconduct. Absent a class action, Class Members will continue to incur  
2 damages, and Defendant's misconduct will continue without remedy. Class treatment of  
3 common questions of law and fact would also be a superior method to multiple individual  
4 actions or piecemeal litigation in that class treatment will conserve the resources of the courts  
5 and the litigants, and will promote consistency and efficiency of adjudication.

6 **FIRST CAUSE OF ACTION**

7 **(Violation of California's Consumers Legal Remedies Act, California Civil Code § 1750,**  
8 ***et seq.*)**

9 55. Plaintiff re-alleges and incorporates by reference each and every allegation  
10 contained in the preceding paragraphs of this Complaint as though fully set forth herein.

11 56. Plaintiff brings this cause of action on behalf of herself and on behalf of the  
12 members of the CLRA Sub-Class.

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

14 58. Plaintiff and CLRA Sub-Class Members are "consumers" within the meaning  
15 of California Civil Code § 1761(d) because they bought the Almond Beverages for personal,  
16 family, or household purposes.

17 59. By failing to disclose and concealing the true and actual nature of the Silk  
18 Almond Beverages from Plaintiff and prospective Class Members, Defendant violated  
19 California Civil Code § 1770(a), as it represented that the Silk Almond Beverages had  
20 characteristics and benefits that they do not have, represented that the Silk Almond Beverages  
21 were of a particular standard, quality, or grade when they were of another, and advertised the  
22 Silk Almond Beverages with the intent not to sell them as advertised. *See* Cal. Civ. Code §§  
23 1770(a)(5)(7) & (9).

24 60. Defendant's unfair and deceptive acts or practices occurred repeatedly in  
25 Defendant's trade or business and were capable of deceiving a substantial portion of the  
26 purchasing public.

27 61. Defendant knew the Silk Almond Beverages did not possess the characteristics  
28 and benefits as represented and were not of the particular standard, quality or grade as

1 represented.

2 62. As a result of their reliance on Defendant's representations and omissions,  
3 Class Members suffered an ascertainable loss of money, property, and/or value of their  
4 Almond Beverages.

5 63. Defendant was under a duty to Plaintiff and Class Members to disclose the true  
6 and actual nature of the Silk Almond Beverages' ingredients because:

- 7 a. Defendant was in a superior position to know the true state of facts  
8 about the ingredients in the Almond Beverages;
- 9 b. Plaintiff and Class Members could not reasonably have been expected to  
10 learn or discover the true nature of the ingredients in the Almond  
11 Beverages at the time of purchase and thereafter; and
- 12 c. Defendant knew that Plaintiff and Class Members could not reasonably  
13 have been expected to learn of or discover the true nature of the Almond  
14 Beverages' ingredients.

15 64. In failing to disclose and misrepresenting the true nature and contents of the  
16 Silk Almond Beverages, Defendant knowingly and intentionally concealed material facts and  
17 breached its duty not to do so.

18 65. The facts Defendant concealed from or misrepresented to Plaintiff and Class  
19 Members are material in that a reasonable consumer would have considered them to be  
20 important in deciding whether to purchase the Silk Almond Beverages or pay less. If Plaintiff  
21 and Class Members had known that the Silk Almond Beverages were nutritionally inferior, or  
22 contained less essential vitamins and nutrients, as dairy milk, they would not have purchased  
23 the Silk Almond Beverages or would have paid less for them.

24 66. Plaintiff and Class Members are reasonable consumers who expect  
25 manufacturers, like WhiteWave, to provide accurate and truthful representations regarding the  
26 nutritional quantities and dietary benefits contained in their products, especially as compared  
27 to those present in dairy milk, which Defendant's Silk Almond Beverages attempt to replace.  
28 Further, reasonable consumers, like Plaintiff, rely on the representations made by

1 manufacturers regarding products' ingredients in determining whether to purchase the  
2 particular products and consider that information important to their purchase decision.

3 67. As a direct and proximate result of Defendant's unfair methods of competition  
4 and/or unfair and deceptive practices, Plaintiff and the Class have suffered and will continue  
5 to suffer actual damages.

6 68. Plaintiff and the Class are entitled to equitable relief.

7 69. Plaintiff provided Defendant with notice of its violations of the CLRA pursuant  
8 to California Civil Code § 1782(a). If Defendant fails to provide appropriate relief for its  
9 violations of the CLRA within 30 days, Plaintiff will seek monetary, compensatory, and  
10 punitive damages, in addition to injunctive and equitable relief.

### 11 **SECOND CAUSE OF ACTION**

#### 12 **(Violation of California Business & Professions Code § 17500 *et seq.*)**

13 70. Plaintiff incorporates by reference the allegations contained in each and every  
14 paragraph of this Complaint.

15 71. Plaintiff brings this cause of action on behalf of herself and on behalf of the  
16 Nationwide Class, or in the alternative, on behalf of the California Sub-Class.

17 72. California Business & Professions Code § 17500 prohibits unfair, deceptive,  
18 untrue, and misleading advertising in connection with the disposal of personal property  
19 (among other things), including, without limitation, false statements as to the use, worth,  
20 benefits, or characteristics of the property.

21 73. Defendant has committed acts of untrue and misleading advertising by  
22 engaging in false representations as to the essential vitamins and nutrients contained in its Silk  
23 Almond Beverages. In addition, Defendant made such untrue or misleading advertisements  
24 with the intent to dispose of said merchandise.

25 74. WhiteWave knew, or in the exercise of reasonable care should have known,  
26 that these representations were misleading and deceptive.

27 75. Defendant's misleading representations and omissions regarding its Silk  
28 Almond Beverages was, and continues to be, likely to deceive members of the public.



1 Further, reasonable consumers, like Plaintiff, rely on the representations made by  
2 manufacturers regarding products' ingredients in determining whether to purchase the  
3 particular products and consider that information important to their purchase decision.

4 84. In failing to disclose and actively misrepresenting the actual nutritional  
5 composition of the Silk Almond Beverages in relation to dairy milk, Defendant has knowingly  
6 and intentionally concealed material facts and breached its duty not to do so.

7 85. Defendant was under a duty to Plaintiff and Class Members to disclose the  
8 actual nutritional composition of the Silk Almond Beverages in relation to dairy milk, and  
9 other omitted or misrepresented facts alleged herein, because:

- 10 a) Defendant was in a superior position to know the true nutritional composition  
11 of the Almond Beverages as compared to dairy milk;
- 12 b) Defendant made partial representations about nutritional composition of the  
13 Almond Beverages without revealing the material information needed to  
14 determine whether to purchase; and
- 15 c) Defendant actively concealed the true nutritional composition of the Almond  
16 Beverages from Plaintiff and the Class.

17 86. The facts Defendant concealed from or misrepresented to Plaintiff and Class  
18 Members are material in that a reasonable consumer would have considered them to be  
19 important in deciding whether to purchase the Silk Almond Beverages or pay less. If Plaintiff  
20 and Class Members had known that the Silk Almond Beverages were nutritionally inferior, or  
21 contained less essential vitamins and nutrients, as dairy milk, they would not have purchased  
22 the SilkAlmond Beverages or would have paid less for them.

23 87. Defendant's conduct was and is likely to deceive consumers.

24 88. Defendant's acts, conduct and practices were unlawful, in that they constituted:

- 25 a. Violations of California's Consumers Legal Remedies Act;
- 26 b. Violations of California's False Advertising Law;
- 27 c. Violations of California's Sherman Law; and
- 28 d. Violations of the Federal Food Drug & Cosmetic Act;

1 89. By its conduct, Defendant has engaged in unfair competition and unlawful,  
2 unfair, and fraudulent business practices.

3 90. Defendant’s unfair or deceptive acts or practices occurred repeatedly in  
4 Defendant’s trade or business, and were capable of deceiving a substantial portion of the  
5 purchasing public.

6 91. As a direct and proximate result of Defendant’s unfair and deceptive practices,  
7 Plaintiff and the Class have suffered and will continue to suffer actual damages.

8 92. Defendant has been unjustly enriched and should be required to make  
9 restitution to Plaintiff and the Class pursuant to §§ 17203 and 17204 of the Business &  
10 Professions Code.

11 **PRAYER FOR RELIEF**

12 93. Plaintiff, on behalf of herself, and all others similarly situated, requests the  
13 Court to enter judgment against Defendant, as follows:

- 14 a. An order certifying the proposed Class and Sub-Classes, designating  
15 Plaintiff as named representative of the Class, and designating the  
16 undersigned as Class Counsel;
- 17 b. An order enjoining Defendant from further deceptive advertising, sales,  
18 and other business practices with respect to its representations regarding  
19 the Silk Almond Beverages;
- 20 c. An injunction:
- 21 i. Ordering Defendant to revise its Silk Almond Beverages’  
22 labels to state, in type of uniform size and prominence, the  
23 word “imitation” and, immediately thereafter, milk; or
- 24 ii. Ordering Defendant to revise its Silk Almond Beverages’  
25 labels to state the percentages of characterizing ingredients or  
26 information concerning the presence or absence of the  
27 ingredients as part of the common or usual name of milk; or
- 28 iii. Ordering Defendant to fortify its Silk Almond Beverages with

1 vitamins and nutrients in an amount equal to or greater than the  
2 amount of essential vitamins and nutrients present in dairy  
3 milk in measurable amounts; or

4 iv. Ordering Defendant to cease utilizing the common or usual  
5 name “milk” in the statement of identity of its Silk Almond  
6 Beverages.

7 d. A declaration requiring Defendant to comply with the various  
8 provisions of the Federal Food Drug & Cosmetic Act, California’s  
9 Sherman Law, California’s False Advertising Law and CLRA alleged  
10 herein and to make all the required representations;

11 e. An award to Plaintiff and the Class for compensatory, exemplary, and  
12 statutory damages, including interest, in an amount to be proven at trial;

13 f. A declaration that Defendant must disgorge, for the benefit of the Class,  
14 all or part of the ill-gotten profits it received from the sale of its Silk  
15 Almond Beverages, or make full restitution to Plaintiff and Class  
16 Members;

17 g. An award of attorneys’ fees and costs, as allowed by law;

18 h. An award of attorneys’ fees and costs pursuant to California Code of  
19 Civil Procedure § 1021.5;

20 i. An award of pre-judgment and post-judgment interest, as provided by  
21 law;

22 j. Leave to amend the Complaint to conform to the evidence produced at  
23 trial; and

24 k. Such other relief as may be appropriate under the circumstances.

25 **DEMAND FOR JURY TRIAL**

26 94. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by  
27 jury of any and all issues in this action so triable.

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Dated: January 24, 2017

Respectfully submitted,

Capstone Law APC

By: /s/ Lee A. Cirsch

Lee A. Cirsch  
Robert K. Friedl  
Trisha K. Monesi

Attorneys for Plaintiff Melanie Kelley

# EXHIBIT 1

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Melanie Kelley

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MELANIE KELLEY, individually, and on  
behalf of other members of the general  
public similarly situated,

Plaintiffs,

v.

WWF OPERATING COMPANY, a  
Delaware corporation, dba WHITEWAVE  
SERVICES, INC.,

Defendant.

Case No.:

**DECLARATION OF MELANIE KELLEY  
IN SUPPORT OF VENUE FOR CLASS  
ACTION COMPLAINT PURSUANT TO  
CIVIL CODE SECTION 1780(d)**

**DECLARATION OF MELANIE KELLEY**

I, MELANIE KELLEY, declare under penalty of perjury as follows:

1. I make this declaration based upon my personal knowledge except as to those matters stated herein that are based upon information and belief, and as to those matters I believe them to be true. I am over the age of eighteen, a citizen of the State of California, and a Plaintiff in this action.

2. Pursuant to California Civil Code section 1780(d), this Declaration is submitted in support of Plaintiff’s Selection of Venue for the Trial of Plaintiff’s Cause of Action alleging violation of California’s Consumers Legal Remedies Act.

3. I reside in Fresno, California, which is in the County of Fresno.

4. I purchased Silk Unsweetened Almondmilk and Silk Unsweetened Coconutmilk, which are some of the products at issue in this action, most recently from Save Mart, which is located in the County of Fresno.

5. I am informed and believe that Defendant WWF Operating Company (“Defendant”) is a Delaware corporation organized and existing under the laws of the State of Delaware, and registered to conduct business in California. Defendant WWF Operating Company’s Corporate Headquarters are located at 1225 Seventeenth Street, Suite 1000, Denver, Colorado 80202.

6. On information and belief, Defendant produces, manufactures, markets, distributes, and/or sells the Silk brand almond- and coconut-based beverages at issue in Plaintiff’s Complaint, filed concurrently herewith, in Fresno County and throughout the United States of America.

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7. The transactions described above form the basis of this action, or a substantial portion thereof, and occurred in the County of Fresno. On information and belief, Defendant conducts business in Fresno County, California, including, but not limited to, marketing, distributing, and/or selling its products to Class Members. Accordingly, Fresno County is a proper place for trial of this action.

8. I declare under penalty of perjury under the laws of California and the United States of America that the foregoing is true and correct.

Executed January \_\_\_\_, 2017 in Fresno, California.

\_\_\_\_\_  
Melanie Kelley