

**KAPLAN FOX & KILSHEIMER LLP**

Laurence D. King (CA Bar No. 206423)

*lking@kaplanfox.com*

Mario M. Choi (CA Bar No. 243409)

*mchoi@kaplanfox.com*

1999 Harrison Street, Suite 1560

Oakland, CA 94612

Telephone: (415) 772-4700

Facsimile: (415) 772-4707

**KAPLAN FOX & KILSHEIMER LLP**

Maia C. Kats (to be admitted *pro hac vice*)

*mkats@kaplanfox.com*

850 Third Avenue, 14<sup>th</sup> Floor

New York, NY 10022

Telephone: (202) 669-0658

Facsimile: (212) 687-7714

**REESE LLP**

Michael R. Reese (CA Bar No. 206773)

*mreese@reesellp.com*

100 West 93rd Street, 16th Floor

New York, NY 10025

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

**REESE LLP**

George V. Granade II (CA Bar No. 316050)

*ggranade@reesellp.com*

8484 Wilshire Boulevard, Suite 515

Los Angeles, CA 90211

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

*Counsel for Plaintiffs Marc Silver, Heather Peffer,  
Donovan Marshall, Alexander Hill, and the Proposed Class*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

MARC SILVER, HEATHER PEFFER,  
DONOVAN MARSHALL, ALEXANDER  
HILL, individually and on behalf of all others  
similarly situated,

Plaintiffs,

vs.

BA SPORTS NUTRITION, LLC,

Defendant.

Case No. 3:20-cv-0633

**CLASS ACTION**

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

1 Plaintiffs Marc Silver, Heather Pepper, Donovan Marshall, and Alexander Hill (together,  
2 “Plaintiffs”), individually and on behalf of all others similarly situated, bring this Class Action  
3 Complaint against BA Sports Nutrition, LLC (“Defendant” or “BA”), and on the basis of personal  
4 knowledge, information, and belief, and investigation of counsel, allege as follows:

5 **NATURE OF THE ACTION**

6 1. This is an action under the consumer protection laws of California, New York, and  
7 Pennsylvania against BA for unjust enrichment and false, deceptive, and unlawful marketing and  
8 sales of BA’s BodyArmor SuperDrink sports drinks (“BodyArmor”).

9 2. BA produces and sells BodyArmor, with flavors such as Banana Strawberry, Orange  
10 Mango, and Pineapple Coconut among others, online and through a network of retail stores.

11 3. BA markets that Americans need to attend to their hydration and that BodyArmor  
12 provides “SUPERIOR HYDRATION.”

13 4. BA also markets that BodyArmor hydration is “More Natural Better” hydration.

14 5. BA markets BodyArmor as having these “superior” and “better” hydration  
15 attributes in the context of other marketing—whether in-store displays, social media, or  
16 television—comparing it to water and/or competing sports drinks.

17 6. Beyond superior and better natural hydration claims, BA markets that BodyArmor  
18 is good for you because it is packed with essential vitamins and nutrients.

19 7. BA targets the general public, including children, parents of children, and adults  
20 who engage in recreational or no exercise—that is, non-endurance athletes—with its marketing  
21 claims.

22 8. BodyArmor does not provide “superior” or “better” hydration to Plaintiffs and  
23 other consumers than other beverages, nor are Plaintiffs or the general public hydration deficient  
24 and/or in need of its characteristics to replenish them from dehydration.

25 9. BodyArmor is not comprised of “natural” ingredients and/or more natural  
26 ingredients than water or other sports drinks.

27 10. BodyArmor on balance is not nutrient beneficial for the general public BA targets  
28 with its marketing, but is instead an unlawfully fortified junk food.

1           11.     Instead of providing the marketed qualities and characteristics, BodyArmor is a  
2     sugar-sweetened-beverage (“SSB”) that scientifically links to serious medical conditions,  
3     including obesity, type 2 diabetes, and cardiovascular disease, when regularly consumed.

4           12.     In essence, BodyArmor is a dressed-up soda masquerading as a health drink. A  
5     single 16-ounce serving of BodyArmor has 36 grams of sugar, which is the equivalent of nine  
6     teaspoons of sugar. The daily limit of added sugars recommended by the American Heart  
7     Association for women and children is only six teaspoons from all food sources in any given day,  
8     and nine for adult men.

9           13.     Plaintiffs would not have purchased BodyArmor, purchased as much of it, or paid  
10    as much for it, had they understood that consumption does not provide them with superior or  
11    better hydration, including as compared to water and/or other sports drinks.

12          14.     Plaintiffs would not have purchased BodyArmor, purchased as much of it, or paid  
13    as much for it, had they understood that consumption does not provide them with a drink  
14    comprised of natural ingredients and/or that was more, natural, better for them than other drinks.

15          15.     Plaintiffs would not have purchased BodyArmor, purchased as much of it, or paid  
16    as much for it, had they understood that consumption does not provide them with a nutritious  
17    beverage overall, and/or provided them with vitamins they did not require in the context of a junk  
18    food.

19          16.     Plaintiffs would not have purchased BodyArmor, purchased as much of it, or paid  
20    as much for it, had they understood that instead of superior or better hydration, and/or a natural,  
21    and/or overall nutritious, beverage, they were consuming a sugar-sweetened beverage that,  
22    according to the leading health authorities, scientific research links with disease and health  
23    epidemics when regularly consumed—thereby causing such health authorities to call for replacing  
24    such drinks with water and/or a reduction in consumption.

25          17.     Plaintiffs would not have purchased BodyArmor, for which they paid a price  
26    premium, had they understood that it is an unlawfully fortified junk food, and thus an unlawful  
27    product.  
28

18. Plaintiffs relied on BA's marketing when they purchased BodyArmor and were harmed thereby because they would not have made the purchases, or would have paid less for their purchases, or purchased fewer of them, had they known the truth about BodyArmor.

19. Plaintiffs would consider purchasing BodyArmor again if they knew that they could rely on the label and marketing as truthful when making purchases, including that the product they purchased matched the marketing claims and inferences made by BA, and/or was a lawfully marketed and sold product.

### **PARTIES**

#### **A. Plaintiffs**

20. Plaintiff Marc Silver is a resident of Santa Rosa, California.

21. During the relevant class period, and specifically between 2014 and 2018, Mr. Silver purchased BodyArmor from Walmart and other locations in Santa Rosa and Plumas Lake, California. Mostly, he purchased the Orange Mango, Grape, and Tropical Punch varieties.

22. Mr. Silver saw and believed BA's representations, including on product labels, in-store displays, and otherwise, that BodyArmor would provide needed nutrients and superior hydration to him as compared to other beverages, including water, and was beneficial to his overall well-being. He also believed the claims that it was more natural and better for him than other beverage options, and that BodyArmor was a lawfully marketed and sold product.

23. Mr. Silver was not an endurance athlete who exercised intensively during the relevant period, but understood from the marketing that BodyArmor was appropriate and optimal for him.

24. Mr. Silver relied on BA's marketing to such effects, and was misled thereby.

25. Mr. Silver purchased more of, or paid more for, BodyArmor than he would have had he known the truth about the product.

26. Mr. Silver was injured in fact and lost money as a result of Defendant's improper conduct.

27. If Mr. Silver knew that BA's marketing and sale was truthful and non-misleading, and lawful, he would purchase BodyArmor in the future. At present, however, he cannot purchase



1 the product because he cannot be confident that the marketing of the products is, and/or will be,  
2 truthful and non-misleading and/or lawful.

3 28. Plaintiff Heather Pepper is a resident of Paxinos, Pennsylvania.

4 29. During the relevant class period, and specifically during 2018 and 2019,  
5 Ms. Pepper purchased BodyArmor from the Walmart and other locations in in Coal Township,  
6 Pennsylvania. Mostly, she purchased the Blackout Berry, Watermelon Strawberry, and Fruit  
7 Punch varieties.

8 30. Ms. Pepper saw and believed BA's representations, including on product labels, in-  
9 store displays, via social influencers, and otherwise, that BodyArmor would provide needed  
10 nutrients and superior hydration to her as compared to other beverages, including water, and was  
11 beneficial to her overall well-being. She also believed the claims that BodyArmor was more  
12 natural and better for her than other options, and was a lawfully marketed and sold product.

13 31. In addition, Ms. Pepper believed that BodyArmor would enhance her production of  
14 breast milk during the period that she was breastfeeding because of its allegedly superior  
15 hydration abilities, and that its advertised nutrients would be a net benefit for her baby. Such  
16 alleged abilities were actively promoted online by BA's paid influencers, and reposted or  
17 otherwise re-promoted by BA itself.

18 32. Ms. Pepper was not an endurance athlete who exercised intensively during the  
19 relevant period but understood from the marketing that BodyArmor was appropriate and optimal  
20 for her.

21 33. Ms. Pepper relied on BA's marketing about such effects, and was misled thereby.

22 34. Ms. Pepper purchased more of, or paid more for, BA's BodyArmor than she would  
23 have had she known the truth about the product, or had she known that the product was unlawful.

24 35. Ms. Pepper was injured in fact and lost money as a result of Defendant's improper  
25 conduct.

26 36. If Ms. Pepper knew that BA's marketing was truthful and non-misleading, and  
27 lawful, she would purchase BodyArmor in the future. At present, however, she cannot purchase  
28

1 the product because she cannot be confident that the marketing of the products is, and will be,  
2 truthful and non-misleading and/or lawful.

3 37. Plaintiff Donovan Marshall is a resident of San Francisco, California.

4 38. Between 2013-2019, Mr. Marshall purchased BodyArmor from Walgreens on  
5 Potrero Avenue, Target on Geary Boulevard, Costco and other locations in and around San  
6 Francisco, California. Mostly, he purchased the Strawberry Banana and Grape varieties.

7 39. Mr. Marshall believed BA's representations, including on product labels, in-store  
8 displays, social media, and television advertisements, including representations by celebrity brand  
9 ambassadors, that BodyArmor would provide needed nutrients and superior hydration to him as  
10 compared to other beverages, including water, and was beneficial to his overall well-being. He  
11 also believed that it was more natural and therefore better for him than other options, and a  
12 lawfully marketed and sold product.

13 40. Mr. Marshall was not an endurance athlete who exercised intensively during the  
14 relevant period but understood from the marketing that BodyArmor was appropriate and optimal  
15 for him.

16 41. Mr. Marshall relied on BA's marketing to such effects, and was misled thereby.

17 42. Mr. Marshall purchased more of, or paid more for, BA's BodyArmor than he  
18 would have had he known the truth about the product.

19 43. Mr. Marshall was injured in fact and lost money as a result of Defendant's  
20 improper conduct.

21 44. If Mr. Marshall knew that BA's marketing was truthful and non-misleading, and  
22 lawful, he would purchase BodyArmor in the future. At present, however, he cannot purchase the  
23 product because he cannot be confident that the marketing of the products is, and will be, truthful  
24 and non-misleading, or lawful.

25 45. Plaintiff Alexander Hill is a resident of Astoria, New York.

26 46. During the relevant class period, and specifically from 2013 on, Mr. Hill  
27 purchased BodyArmor from CVS on 86<sup>th</sup> and Second Avenue, Duane Reed stores at 17<sup>th</sup> and  
28

1 Third Avenue, and Ditmars Boulevard and 31<sup>st</sup> Street, and otherwise, in New York, New York.  
2 Mostly, he purchased the Fruit Punch, Strawberry Banana, and Grape varieties.

3 47. Mr. Hill believed BA's representations, including on product labels, in-store  
4 displays, social media, and television, and otherwise, that BodyArmor would provide needed  
5 nutrients and superior hydration to him as compared to other beverages, including Gatorade, and  
6 was beneficial to his overall well-being. He also believed that it was more natural and better for  
7 him than other options, and a lawfully marketed and sold product.

8 48. Mr. Hill was not an endurance athlete who exercised intensively during the  
9 relevant period but understood from the marketing that BodyArmor was appropriate and optimal  
10 for him.

11 49. Mr. Hill relied on BA's marketing to such effects, and was misled thereby.

12 50. Mr. Hill purchased more of, or paid more for, BA's BodyArmor than he would  
13 have had he known the truth about the product.

14 51. Mr. Hill was injured in fact and lost money as a result of Defendant's improper  
15 conduct.

16 52. If Mr. Hill knew that BA's marketing was truthful and non-misleading, and lawful,  
17 he would purchase BodyArmor in the future. At present, however, he cannot purchase the product  
18 because he cannot be confident that the marketing of the products is, and will be, truthful and  
19 non-misleading or lawful.

20 **B. Defendant**

21 53. Defendant BA is a limited liability corporation organized and existing under the  
22 laws of the State of Delaware.

23 54. Defendant's principal place of business is 1720 Whitestone Expressway,  
24 Suite 501, New York, New York 11357.

25 55. Defendant is the third largest sports drink company, after PepsiCo (Gatorade), and  
26 Coca-Cola (Powerade). Coca-Cola recently acquired an ownership interest in BA.

**JURISDICTION AND VENUE**

56. This Court has original subject-matter jurisdiction over this proposed class action pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, which provides for the original jurisdiction of federal district courts over “any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). Because Plaintiffs Silver and Marshall are citizens of the State of California and Defendant is a citizen of the States of Delaware and New York, at least one member of the proposed Class is a citizen of a state different from Defendant. Further, Plaintiffs allege the matter in controversy is well in excess of \$5,000,000 in the aggregate, exclusive of interest and costs. Finally, Plaintiffs allege “the number of members of all proposed plaintiff classes in the aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

57. This Court has personal jurisdiction over Defendant for several reasons, including that Defendant has continuous and systematic contacts with California; and Plaintiffs’ claims arise out of Defendant’s conduct within California, in part because Plaintiffs Silver and Marshall purchased BodyArmor within California based on Defendant’s dissemination of false and misleading information about the product.

58. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred within this District, including the purchase by Plaintiffs Silver and Marshall of BodyArmor based on BA’s dissemination of false and misleading information about the product.

59. Pursuant to Civil Local Rule 3-2(c), an intra-district assignment to the San Francisco or Oakland Division is appropriate because a substantial part of the events or omissions which give rise to the claims asserted herein occurred in this Division, including that Plaintiffs Silver and Marshall made purchases of BodyArmor in Santa Rosa and San Francisco, respectively.

**FACTUAL ALLEGATIONS**

60. BA deceptively markets that consumers need or would benefit from supplementing their hydration.

61. To that end, BA deceptively markets that BodyArmor is a “super drink” that delivers “superior” and “better” hydration to everyone.

62. BA deceptively markets that BodyArmor offers “More Natural Better” hydration.

63. The claims “SUPERIOR HYDRATION” and “SuperDrink” appear prominently on BodyArmor front of pack labels. *See* Image 1.

**Image 1**



64. BA also extends its claims of superior and better hydration across myriad other advertising platforms, including by way of compensated social media influencers, in-store promotions, television, and brand ambassadors, and when doing so, deceptively compares BodyArmor as the superior and better to alternate hydration sources including water and competing sports drinks. *See, e.g.,* Image 2.<sup>1</sup>

**Image 2**



AUTHOR ARCHIVE

**SARAH**

*Hey Ya'll! I'm Sarah, a clean-eating, adventure-seeking homeschool mom living in the desert of Palm Springs, CA. I aspire everyday to be a faithful follower, doting wife, nurturing mom and unforgettable human being. You'll find me camping, eating vegan food, taking pictures and watching Virginia Tech football. I may be a West Coast transplant, but I have an East Coast heart. <3*

BODYARMOR contains more electrolytes than the leading sports drink, coconut water, and vitamins with NO artificial flavors, colors, or sweeteners. It is also low in sodium and high in potassium – all-in-all, the perfect sports drink for all of us, especially growing kids.



<sup>1</sup> Sarah, *Kid-Friendly Sports Drink {BodyArmor}*, IN THE KNOW MOM (Sept. 29, 2014), <http://intheknowmom.net/kidfriendly-sports-drink-bodyarmor/>. *See also, e.g.,* Amy Blevins, *Body Armor – Rethink Your Sports Drink Review*, ENCOURAGING MOMS AT HOME, <https://encouragingmomsathome.com/body-armor-rethink-your-sports-drink-review/> (last viewed January 8, 2020); Samantha Jo, *BODYARMOR Sports Drinks*, BUFFALO MOMS (Aug. 22, 2016), <http://buffalomoms.com/bodyarmor-sports-drinks/>; Jen, *Superior Hydration for the Whole Family with BodyArmor*, PORTLAND MOMS BLOG (Sept. 11, 2016), <https://portland.citymomsblog.com/food-nutrition/bodyarmor-natural-sports-drink/>.



Top athletes are backing the brand, like Andrew Luck, Richard Sherman, Mike Trout and James Harden... not to mention Kobe Bryant, who is a major investor. If there is anyone who knows the importance of refueling sports drinks, it's these athletes at the top of their game!

65. Indeed, basketball giant James Harden and others aggressively and prolifically market BodyArmor as the “More Natural Better Hydration” drink. *See, e.g.*, Images 3-4.<sup>2</sup>

Image 3



Image 4



<sup>2</sup> @BodyArmor, TWITTER (May 14, 2018, 4:12 PM), <https://twitter.com/DrinkBODYARMOR/status/996166287616368641> (unknown location); Tiffane V., <https://houston.citymomsblog.com/want-to-meet-james-harden/> (July 30, 2015) (advertising free month's supply of “natural” BodyArmor and camp opportunity for winning kids in grades 1-12).

66. In conjunction with its “superior hydration” claims, BA’s “more natural better” and “more natural better hydration” claims, alone and/or with its comparator claims, are almost ubiquitous on social media, labels, on-line, television, and in-store displays. *See, e.g.*, Images 3-11.<sup>3</sup>

Image 5



Image 6



<sup>3</sup> *Id.*; see also Samantha Jo, <http://buffalomoms.com/bodyarmor-sports-drinks/>; @BodyArmor, TWITTER (Apr. 13, 2018, 5:45 PM), <https://twitter.com/DrinkBODYARMOR/status/984955833627889665> (Sam’s Club); @BodyArmor, TWITTER (Jan. 29, 2018, 8:47 PM), <https://twitter.com/DrinkBODYARMOR/status/958018822702817282> (Kroger); @BodyArmor, TWITTER (May 6, 2018, 4:40 PM), <https://twitter.com/DrinkBODYARMOR/status/993265300438175745> (unknown location); BODYARMOR, <https://www.drinkbodyarmor.com/products/> (last visited Jan. 8, 2020) (product flavors).



Image 7

THREE THINGS ABOUT BODYARMOR:

First, let me start off by saying that BODYARMOR is made of natural ingredients, which is really important to me especially because our kids are so little still. I cringe when our daughter asks for “Gator” (Gatorade) at the store, simply because I know it is full of so many sugars and unhealthy preservatives. BODYARMOR is made of mainly coconut water, which makes it not only taste light and refreshing, but also makes it a healthier alternative! The drinks are gluten free, caffeine free, and Certified Kosher.

Image 8



Image 9





Image 10



Image 11



67. BA's claims are deceptive and misleading because BodyArmor does not provide superior or better hydration to its targeted consumers, including Plaintiffs, than do other drinks as a general matter and/or because of their purported "more natural better" ingredients.

68. As BA admitted before the administrative tribunal of the Council of the Better Business Bureaus—the National Advertising Division ("NAD")—there is no scientific

1 substantiation for its “superior” or “better” hydration claims, or its claims that BodyArmor is  
2 “more natural better,” and there is no way to substantiate such claims.

3 69. According to BA itself, hydration is a “subjective concept” for which “there is no  
4 universal formula that provides a baseline for “good” hydration, much less “better” (or “worse”)  
5 hydration,” and that consumers understand this to be the case regardless of its marketing claims.  
6 *BA Sports Nutrition LLC, BodyArmor Sports Drink*, Decision of the NAD, Case No. 6215, at 8-9  
7 (Nov. 23, 2018) (citing and rejecting BA’s arguments in support of its contention that such  
8 marketing is not misleading and recommending discontinuance of claims).<sup>4</sup>

9 70. BA thus employs marketing claims of “superior” and “better” hydration—which  
10 convey to consumers an objective claim—despite knowing that its claims are unsubstantiated and  
11 scientifically indefensible.

12 71. Similarly, BA’s claims that BodyArmor is “natural,” “more natural better,” and  
13 “more natural better hydration” are deceptive because BodyArmor is not comprised of natural  
14 ingredients and/or there is no substantiation that it hydrates better than other drinks either  
15 generally or because it has “more natural” ingredients. As set forth by the NAD when it  
16 recommended that BA cease such advertising, among BodyArmor’s many unnatural ingredients  
17 are: Dipotassium Phosphate (Electrolyte); Ascorbic Acid (Vitamin C); Magnesium Oxide  
18 (Electrolyte); Calcium D-Pantothenate (Vitamin B5); Niacinamide (Vitamin B3); Alpha-  
19 Tocopheryl Acetate (Vitamin E); Zinc Oxide (Electrolyte); Pyridoxine Hydrochloride (Vitamin  
20 B6); Vitamin A Palmitate (Vitamin A); Folic Acid (Vitamin B9); and Cyanocobalamin (Vitamin  
21 B12). *See* NAD Decision at 8.

22 72. Instead of sports drinks, the Centers for Disease Control (“CDC”) has declared that  
23 water is the “healthier choice” for purposes of hydration.<sup>5</sup>

24  
25  
26 <sup>4</sup> *See also, e.g.,* Carl Heneghen, *Forty Years of Sports Performance Research and Little Insight*  
27 *Gained*, BMJ (Sept. 11, 2012), <https://www.bmj.com/content/345/bmj.e6085> (cataloging the  
methodological flaws of industry-sponsored research on sports drinks).

28 <sup>5</sup> *Getting the Facts: Drinking Water and Intake*, CDC (last updated Aug. 9, 2016),  
<https://www.cdc.gov/nutrition/data-statistics/plain-water-the-healthier-choice.html>.

73. The CDC's recommendation focuses on the amount of sugar in SSBs, including BodyArmor,<sup>6</sup> and the established link between SSB consumption and obesity, type 2 diabetes, and cardiovascular disease—coupled with the fact that water more than adequately hydrates Americans (with the *possible* exception of the most active endurance athletes).<sup>7</sup>

74. Sugar is the second ingredient in BodyArmor—after water. *See* Image 12.<sup>8</sup>

**Image 12**



**INGREDIENTS**

Filtered Water, Pure Cane Sugar, Coconut Water Concentrate, Citric Acid, Dipotassium Phosphate (Electrolyte), Vegetable Juice Concentrate (Color), Ascorbic Acid (Vitamin C), Gum Arabic, Magnesium Oxide (Electrolyte), Natural Strawberry Banana Flavor with Other Natural Flavors, Calcium D-Pantothenate (Vitamin B5), Niacinamide (Vitamin B3), alpha-Tocopheryl Acetate (Vitamin E), Ester Gum, Zinc Oxide (Electrolyte), Pyridoxine Hydrochloride (Vitamin B6), Vitamin A Palmitate (Vitamin A), Folic Acid (Vitamin B9), beta-apo-8' Carotenal (Color), Cyanocobalamin (Vitamin B12).

75. A single 16-ounce bottle of BodyArmor has *36 grams*, or approximately *nine teaspoons of sugar*, and a single 28-ounce bottle has *63 grams*, or approximately *15 teaspoons of sugar*.

76. The American Heart Association (“AHA”) recommends that adult women and children consume no more than six teaspoons of added sugar a day, and that adult men consume no more than nine teaspoons.<sup>9</sup> *A single small-size serving of BodyArmor exceeds those limits for*

<sup>6</sup> “Sugar-sweetened beverage” refers to any carbonated or non-carbonated drink that is sweetened with sugar or high fructose corn syrup, or other caloric sweetener, including soda, fruit drinks, teas, coffees, *sports drinks*, and energy drinks. *The CDC Guide to Strategies for Reducing the Consumption of Sugar-Sweetened Beverages* (Mar. 2010), at 4, <https://stacks.cdc.gov/view/cdc/51532>.

<sup>7</sup> Even with respect to hard-core athletes, for whom the sports drink industry developed electrolyte-infused beverages, the benefits of sports drinks are scientifically unclear and hotly debated. Scientists are increasingly concerned that hyponatremia, caused by excess fluids and over-dilution of sodium levels from sports drinks, poses more of a threat than dehydration even to true endurance athletes, including marathoners. *See, e.g.,* Christie Ashwanden, *You Don’t Need Sports Drinks to Stay Hydrated*, FIVETHIRTYEIGHT (Feb. 4, 2019), <https://fivethirtyeight.com/features/you-dont-need-sports-drinks-to-stay-hydrated/>.

<sup>8</sup> *Nutrition Facts & Ingredients, Strawberry Banana, BODYARMOR*, <https://www.drinkbodyarmor.com/product/strawberry-banana/> (last visited Jan. 8, 2020).

<sup>9</sup> *Added Sugars*, AHA (Apr. 17, 2018), <https://www.heart.org/en/healthy-living/healthy-eating/eat-smart/sugar/added-sugars>.



women and children, even without considering other sources of sugar in the diet, and reaches the recommended limit for men. *A large size exceeds the recommended limits on added sugar for men, women, and children.*

77. In addition to the CDC and AHA, virtually every leading health authority warns of the link between SSB consumption and obesity, type-2 diabetes, and cardio-vascular disease, and recommends *reducing* their consumption because of the health risks—especially as seven out of every ten adults in the United States are now overweight or obese (71.6%),<sup>10</sup> and approximately 110 million Americans overall are diabetic or pre-diabetic.<sup>1112</sup>

<sup>10</sup> *Obesity and Overweight*, CDC (June 13, 2016), <https://www.cdc.gov/nchs/fastats/obesity-overweight.htm>. <https://www.cdc.gov/chronicdisease/resources/publications/aag/diabetes.htm>.

<sup>11</sup> *New CDC Report: More than 100 million Americans have diabetes or prediabetes*, CDC (July 18, 2017), <https://www.cdc.gov/media/releases/2017/p0718-diabetes-report.html>.

<sup>12</sup> Among the health authorities recognizing the link between SSB consumption and obesity and disease are:

Food & Drug Administration (“FDA”): “strong and consistent evidence” shows an association between sugar drinks and excess body weight in children and adults. 81 Fed. Reg. at 33,803;

CDC: “Frequently drinking sugar-sweetened beverages is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis. Limiting the amount of SSB intake can help individuals maintain a healthy weight and have a healthy diet.” *Get the Facts: Sugar-Sweetened Beverages and Consumption*, CDC (last reviewed Feb. 7, 2017), <https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html>. *See also Beverage Consumption Among High School Students—United States, 2010*, CDC MORBIDITY AND MORTALITY WEEKLY REPORT (June 17, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6023a2.htm> (sugar drinks are “contributing to the prevalence of obesity among adolescents in the United States”);

World Health Organization (“WHO”): “Current evidence suggests that increasing consumption of sugar-sweetened beverages is associated with overweight and obesity in children. Therefore, reducing consumption of sugar-sweetened beverages would also reduce the risk of childhood overweight and obesity.” *Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Childhood Overweight and Obesity*, WHO, [https://www.who.int/elena/titles/ssbs\\_childhood\\_obesity/en/](https://www.who.int/elena/titles/ssbs_childhood_obesity/en/) (last visited Jan. 8, 2020); *Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Unhealthy Weight Gain in Adults*, WHO, [https://www.who.int/elena/titles/ssbs\\_adult\\_weight/en/](https://www.who.int/elena/titles/ssbs_adult_weight/en/) (last visited Jan. 8, 2020);

2015 U.S. Dietary Guidelines Advisory Council: “Strong and consistent evidence shows that intake of added sugars from food and/or sugar sweetened beverages are associated with excess body weight in children and adults”; “[s]trong evidence shows that higher consumption of added sugars, especially sugar sweetened beverages, increases the risk of type 2 diabetes among adults and this relationship is not fully explained by body weight.” *Scientific Report of the 2015 Dietary Guidelines Advisory Committee*, at pt. D, ch. 6, p. 20, U.S. DEP’T OF AGRIC. & U.S. DEP’T OF HEALTH & HUMAN SERV. (2015), available at <https://health.gov/dietaryguidelines/2015->

78. Despite this, BA persists in targeting the general public, including children and their parents, and non-endurance athletes, with its deceptive “health halo” marketing claims when BodyArmor is effectively camouflaged junk food for them.

79. Social media too is rife with BA’s deceptive claims, such as BodyArmor having a “benefit over water by providing a small amount of carbohydrate to the working muscles which gives kids a constant amount of fuel and helps to delay fatigue,” or that “pure cane sugar is the preferred fuel for our brains and bodies.” *See* Image 13.<sup>13</sup>

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scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf (last visited Jan. 8, 2020).

American Medical Association (“AMA”): adopting policy supporting, among other strategies, “warning labels to educate consumers on the health harms of SSBs,” and “work[ing] with ‘local school districts to promote healthy beverage choices for students.” Sara Berg, *AMA Backs Comprehensive Approach Targeting Sugary Drinks*, AMA (June 14, 2017), <https://www.ama-assn.org/delivering-care/public-health/ama-backs-comprehensive-approach-targeting-sugary-drinks>;

Institute of Medicine (“IOM”): “researchers have found strong associations between intake of sugar-sweetened beverages and weight gain”; “their link to obesity is stronger than that observed for any other food or beverage . . . .” *Accelerating Progress in Obesity Prevention: Solving the Weight of the Nation*, at ch. 6, p. 169, IOM (May 2012), available at <https://www.ncbi.nlm.nih.gov/pubmed/24830053>;

AHA, “There is a robust body of evidence that SSB consumption is detrimental to health and has been associated with increased risk of CVD mortality, hypertension, liver lipogenesis, [type 2 diabetes], obesity, and kidney disease.” Linda Van Horn, et al., *Recommended Dietary Pattern to Achieve Adherence to the American Heart Association/American College of Cardiology (AHA/ACC) Guidelines: A Scientific Statement from the American Heart Association*, 134 CIRCULATION 22 (Oct. 27, 2016), available at <https://www.ahajournals.org/doi/full/10.1161/cir.0000000000000462>. “Therefore, it is recommended that children and adolescents limit their intake of SSBs to 1 or fewer 8-oz beverages *per week* (Class I; Level of Evidence A).” Miriam B. Vos, et al., *Added Sugars and Cardiovascular Disease Risk in Children: A Scientific Statement from the American Heart Association*, 135 CIRCULATION 19 (Aug. 22, 2016) (emphasis added), available at <https://ahajournals.org/doi/full/10.1161/CIR.0000000000000439>;

American Public Health Association (“APHA”), “Consumption of [sugar] drinks is a significant contributor to the obesity epidemic and increases the risk of type 2 diabetes, heart disease, and dental decay.” *Taxes on Sugar-Sweetened Beverages*, APHA (Oct. 30, 2012), available at <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/13/59/taxes-on-sugar-sweetened-beverages>; and

American Diabetes Association (“ADA”), “Research has also shown that drinking sugary drinks is linked to type 2 diabetes. The American Diabetes Association recommends that people avoid drinking sugar-sweetened beverages and switch to water whenever possible to help prevent type 2 diabetes.” *Myths about Diabetes*, ADA available at <https://www.diabetes.org/diabetes-risk/prediabetes/myths-about-diabetes> (last visited Jan. 9, 2020).

<sup>13</sup> *Why do we use pure cane sugar?*, BA (May 10, 2018), <https://www.drinkbodyarmor.com/faq/why-do-we-use-pure-cane-sugar/>.

Image 13



80. BA even promotes BodyArmor, through compensated social influencers and re-posts of bloggers and influencers, as helpful to nursing mothers of newborns. Because of its purported “superior hydration,” mothers who drink it are claimed to produce more breast milk. Omitted from mention is the tsunami of sugar that both baby and mother ingest, especially at two to three bottles a day, and that plain water is healthy, has no sugar, and hydrates excellently. *See* Images 14-16.

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Image 14

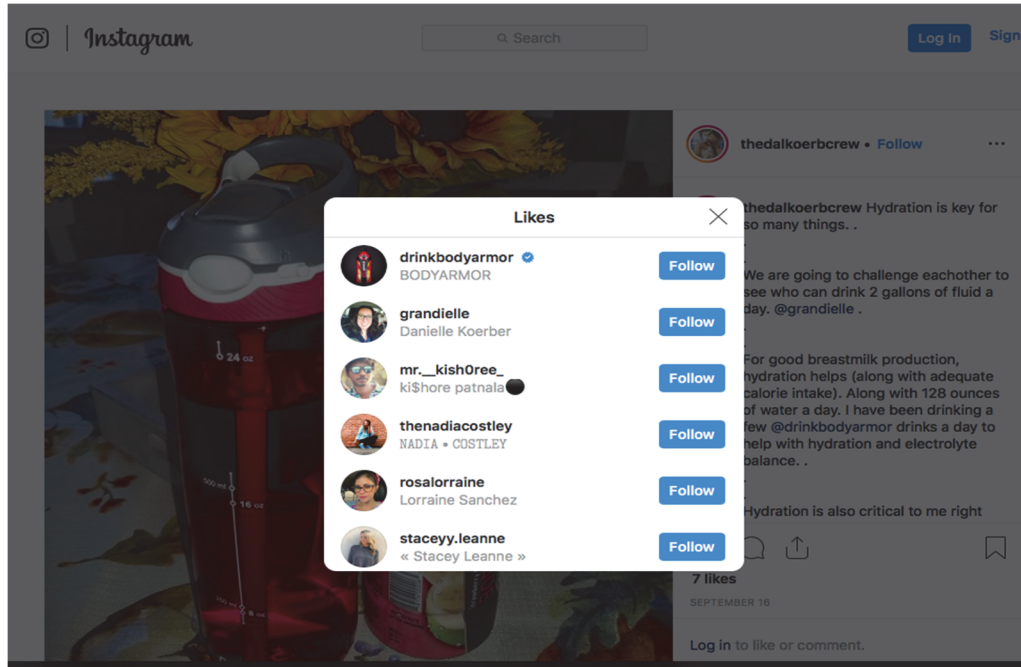


Image 15



Image 16



81. Indeed, BA's promotes BodyArmor as superior, better, and beneficial hydration for myriad activities and lifestyles that fall far short of high exertion levels that some industry scientists contend justify consuming such ingredients. BodyArmor is widely promoted for the playground, school lunch bag, bit of play in the creek, toddler soccer games, among other non-endurance activities. *See, e.g.,* Images 17-19.



Image 17



Image 18



Image 19



82. BA’s competitors do not market similarly with respect to their “superior” and “better” hydration claims and/or target consumers so broadly. Instead, BA’s competitors have modified their advertising to be more transparent and less deceptive about who, if anyone, might benefit from sports drink consumption and how their product compares to other beverages.

83. For instance, BA’s leading competitor, PepsiCo, now advises that Gatorade is for serious endurance athletes only and that other consumers should instead drink its low-sugar beverages.<sup>14</sup>

84. For example, in its published “Open Letter to Athletes and Consumers,” PepsiCo explains that “Gatorade wasn’t developed for just any purpose,” but for “the special goal of helping serious athletes.” More, it explains, “the ingredients in our products—including carbohydrates in the form of sugar, are functional for athletes. The sugar in Gatorade is there for physical, athletic use. *For less intense workouts, we have lower- / no-sugar solutions like G2 and Propel. But when you’re working out for **multiple hours in the hot sun, in full pads doing two-a-***

<sup>14</sup> See generally *FAQs*. GATORADE, <https://contact.pepsico.com/gatorade/faqs;itemsPerPage=100> (last visited Jan. 9, 2020).

1 *days, or just starting mile #7 of your training run*, you know how important carbohydrates  
 2 are....” See Image 20 (emphasis added).

3  
 4 **Image 20**



23 85. Further camouflaging BodyArmor's true character and effects, BA unlawfully  
 24 fortifies BodyArmor with various nutrients and then aggressively promotes their alleged health  
 25 benefits.

26 86. For example, BA markets that BodyArmor is: "PACKED WITH VITAMIN E" . . .  
 27 "which helps limit the damage of muscles and soreness through exercise and increases energy";  
 28 "PACKED WITH VITAMIN A" . . . "which helps protect your vision and your immune



system!"; "PACKED WITH VITAMIN C" which "is an antioxidant that is critical for immunity and helps lower blood pressure"; and "PACKED WITH VITAMIN B," which "boosts metabolism and breaks down protein and carbohydrates for energy during exercise." See Images 21-25.<sup>15</sup>

Image 21



Image 22



Image 23



Image 24



<sup>15</sup> Blevins, Body Amor – Rethink Your Sports Drink Review.

## Image 25

My family was asked to review a case of **BODYARMOR — the new sports drink**. Frankly, I'm in love. The ingredients are so good for you. Coconut water. Vitamins. All the good things, and nothing artificial. From a mom's perspective it doesn't get any better than that. Of the four boys who tried BODYARMOR — three were also enamored. We like it. And I especially like that it's a healthy choice.



87. Independent of deception, such marketing and fortification is unlawful because the U.S. Food and Drug Administration (“FDA”) prohibits fortification of junk food, including sugar drinks, with nutrients when there is a “relative” claim for the product, such as “superior” or “better” hydration, or “health” claim, such as “lowers blood pressure.” 21 C.F.R. § 101.54(e)(1), § 101.65(d)(2).

88. The rationale for the FDA’s prohibition on fortification of junk foods is precisely to prevent what BA does here: the deceptive promotion of foods as healthy that do not have a net nutritional benefit, or which are otherwise problematic nutritionally, simply by infusing them with some vitamin or vitamins—let alone with vitamins for which the vast majority of Americans have no deficiency.

89. Because BodyArmor is illegally fortified, the drink violates FDA regulations, and is therefore misbranded and unlawful. *See* Cal. Health & Safety Code § 110100(a) (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act ... shall be the food labeling regulations of this state.”).

### **ECONOMIC INJURY**

90. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the superior, better, and natural hydration claims in addition to the overall health attributes and benefits marketed by BA.

91. Plaintiffs saw and relied on BA's misleading advertising of BodyArmor.

92. Plaintiffs believed that BodyArmor had the aforementioned qualities and benefits advertised, and that the beverage was lawful.

93. As a result, Plaintiffs received beverages that lacked the net nutritional and/or hydration benefits that they reasonably believed the products had, and which were not superior nutritionally or in hydration terms to less expensive options.

94. Plaintiffs lost money and thereby suffer injury as they would not have purchased BodyArmor, purchased as much BodyArmor, and/or paid as much for the drink absent these misrepresentations.

95. Plaintiffs altered their position to their detriment and suffered damages in an amount equal to the amounts they paid for the BodyArmor they purchased.

96. Plaintiffs would purchase BodyArmor again in the future should it have the natural, nutritional, superior and/or better hydration benefits advertised, and should it be lawful.

97. By engaging in false and misleading marketing, BA reaped, and continues to reap, increased sales and profits.

98. BA knows that the qualities it markets are material to a consumer's decision to purchase BodyArmor.

99. BA deliberately cultivates these misperceptions through its marketing of BodyArmor. Indeed, BA relies and capitalizes on consumer misconceptions about BodyArmor.

### **CLASS ACTION ALLEGATIONS**

100. Pursuant to Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, Plaintiffs bring this action individually and on behalf of four proposed classes defined as follows:

**The California Class.** All persons residing in the State of California who purchased one or more BodyArmor sports drinks during the applicable limitations period.

1       **The New York Class.** All persons residing in the State of New York who  
 2       purchased one or more BodyArmor sports drinks during the applicable limitations  
 3       period.

4       **The Pennsylvania Class.** All persons residing in the State of Pennsylvania who  
 5       purchased one or more BodyArmor sports drinks during the applicable limitations  
 6       period.

7       **The Nationwide Class.** All persons residing in the United States who purchased  
 8       one or more BodyArmor sports drinks during the applicable limitations period.

9       101. Collectively, the California Class, New York Class, Pennsylvania Class, and  
 10       Nationwide Class are referred to as the “Class.”

11       102. Excluded from the Class are: (a) Defendants; (b) Defendants’ board members,  
 12       executive-level officers, and attorneys, and immediate family members of any of the foregoing  
 13       persons; (c) governmental entities; (d) the Court, the Court’s immediate family, and Court staff;  
 14       and (e) any person that timely and properly excludes himself or herself from the Class in  
 15       accordance with Court-approved procedures.

16       103. Certification of Plaintiffs’ claims for class-wide treatment is appropriate because  
 17       Plaintiffs can prove the elements of the claims on a class-wide basis using the same evidence as  
 18       individual Class members would use to prove the elements in individual actions alleging the same  
 19       claims.

20       104. **Numerosity.** The Class consists of many thousands of persons throughout the  
 21       states of California, New York, and Pennsylvania. The Class is so numerous that joinder of all  
 22       members is impracticable, and the disposition of each of the Class’s claims in a class action will  
 23       benefit the parties and the Court.

24       105. **Commonality and Predominance.** Common questions of law and fact  
 25       predominate over any questions affecting only individual Class members. These common  
 26       questions have the capacity to generate common answers that will drive resolution of this action.  
 27       These common questions include whether:

- 28       a. BA is responsible for the conduct alleged herein;
- b. BA’s conduct constitutes the violations of law alleged herein;

1 c. BA acted willfully, recklessly, negligently, or with gross negligence in  
2 committing the violations of law alleged herein;

3 d. Plaintiffs and the Class members are entitled to injunctive relief; and

4 e. Plaintiffs and the Class members are entitled to restitution and damages.

5 106. Because they were subject to the same deceptive and unlawful marketing and sales  
6 practices, and because they purchased BodyArmor, all Class members were subject to the same  
7 wrongful conduct.

8 107. Absent BA's material deceptions, misstatements, and omissions, Plaintiffs and the  
9 other Class members would not have purchased BodyArmor.

10 108. **Typicality.** Plaintiffs' claims are typical of the claims of the Class because  
11 Plaintiffs and the Class members all purchased BodyArmor and were injured thereby. The claims  
12 of Plaintiffs and the Class members are based on the same legal theories and arise from the same  
13 false and misleading conduct.

14 109. **Adequacy of Representation.** Plaintiffs are adequate representatives of the Class  
15 because their interests do not conflict with those of the Class members. Each Class member seeks  
16 damages reflecting a similar and discrete purchase, or similar and discrete purchases, that each  
17 Class member made. Plaintiffs have retained competent and experienced class action counsel who  
18 intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately  
19 protect the Class members' interests.

20 110. **Injunctive or Declaratory Relief.** The requirements for maintaining a class action  
21 pursuant to Rule 23(b)(2) are met, as Defendants have acted or refused to act on grounds  
22 generally applicable to the Class, thereby making appropriate final injunctive relief or  
23 corresponding declaratory relief with respect to the Class as a whole.

24 111. **Superiority.** A class action is superior to other available methods for the fair and  
25 efficient adjudication of this controversy because joinder of all Class members is impracticable.  
26 The amount at stake for each Class member, while significant, is such that individual litigation  
27 would be inefficient and cost-prohibitive. Additionally, adjudication of this controversy as a class  
28 action will avoid the possibility of inconsistent and potentially conflicting adjudication of the



1 claims asserted herein. Plaintiffs anticipate no difficulty in the management of this action as a  
2 class action.

3 112. **Notice to the Class.** Plaintiffs and their counsel anticipate that notice to the  
4 proposed Class will be effectuated through recognized, Court-approved notice dissemination  
5 methods, which may include United States mail, electronic mail, Internet postings, and/or  
6 published notice.

## 7 **CLAIMS FOR RELIEF**

### 8 **FIRST CLAIM**

#### 9 **Violation of California's Unfair Competition Law, 10 CAL. BUS. & PROF. CODE § 17200, *et seq.* 11 **Unlawful Conduct Prong (By Plaintiffs Silver and Marshall, on Behalf of the California Class)****

12 113. Plaintiffs Silver and Marshall repeat each and every allegation contained in the  
13 paragraphs above and incorporates such allegations by reference herein.

14 114. Plaintiffs Silver and Marshall bring this claim on behalf of the California Class for  
15 violation of the “unlawful” prong of California’s Unfair Competition Law, CAL. BUS. & PROF.  
16 CODE § 17200 *et seq.* (the “UCL”).

17 115. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.”  
18 CAL. BUS. & PROF. CODE § 17200.

19 116. Defendants’ acts, omissions, misrepresentations, practices, non-disclosures, and  
20 illegal fortification of junk food, concerning BodyArmor, as alleged herein, constitute “unlawful”  
21 business acts and practices in that they violate the Federal Food, Drug, and Cosmetic Act,  
22 21 U.S.C. § 301 *et seq.* (the “FFDCA”), and its implementing regulations, including, at least, the  
23 following sections:

24 a. 21 U.S.C. § 343(a), which deems food misbranded when its labeling  
25 contains a statement that is “false or misleading in any particular,” with “misleading” defined to  
26 “take[] into account (among other things) not only representations made or suggested by  
27 statement, word, design, device, or any combination thereof, but also the extent to which the  
28 labeling or advertising fails to reveal facts material;”

- b. 21 U.S.C. § 321(n), which states the nature of a false and misleading advertisement;
- c. 21 C.F.R. § 101.18(b), which prohibits true statements about ingredients that are misleading in light of the presence of other ingredients;
- d. 21 C.F.R. § 102.5(c), which prohibits the naming of foods so as to create an erroneous impression about the presence or absence of ingredient(s) or component(s) therein;
- e. 21 C.F.R. § 101.54(e)(1), which prohibits fortification of junk food in conjunction with “relative” labeling claims;
- f. 21 C.F.R. § 101.65(d)(2), which prohibits fortification of junk food in conjunction with health-based labeling claims; and
- g. 21 U.S.C. §§ 331, 333, which prohibits the introduction of misbranded foods into interstate commerce.

117. BA’s conduct is further “unlawful” because it violates California’s False Advertising Law, CAL. BUS. & PROF. CODE § 17500 *et seq.* (the “FAL”), and California’s Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.* (the “CLRA”), as discussed in the claims below.

118. BA’s conduct also violates California’s Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAFETY CODE § 109875 *et seq.* (the “Sherman Law”), including, at least, the following sections:

- a. Section 110100 (adopting all FDA regulations as state regulations);
- b. Section 110290 (“In determining whether the labeling or advertisement of a food . . . is misleading, all representations made or suggested by statement, word, design, device, sound, or any combination of these, shall be taken into account. The extent that the labeling or advertising fails to reveal facts concerning the food . . . or consequences of customary use of the food . . . shall also be considered.”);
- c. Section 110390 (“It is unlawful for any person to disseminate any false advertisement of any food. . . . An advertisement is false if it is false or misleading in any particular.”);

1           d.       Section 110395 (“It is unlawful for any person to manufacture, sell,  
2 deliver, hold, or offer for sale any food . . . that is falsely advertised.”);

3           e.       Section 110398 (“It is unlawful for any person to advertise any food, drug,  
4 device, or cosmetic that is adulterated or misbranded.”);

5           f.       Section 110400 (“It is unlawful for any person to receive in commerce any  
6 food . . . that is falsely advertised or to deliver or proffer for delivery any such food . . . .”); and

7           g.       Section 110660 (“Any food is misbranded if its labeling is false or  
8 misleading in any particular.”).

9           119.   Each of the challenged advertising statements made, and actions taken, by BA  
10 violates the FFDCA, CLRA, FAL, and Sherman Law, and, consequently, violates the “unlawful”  
11 prong of the UCL.

12           120.   BA leveraged its deception to induce Plaintiffs Silver and Marshall and the  
13 members of the California Class to purchase products that were of lesser value and quality than  
14 advertised.

15           121.   BA’s deceptive marketing and labeling caused Plaintiffs Silver and Marshall and  
16 the members of the California Class to suffer injury in fact and to lose money or property, as it  
17 denied them the benefit of the bargain. Had Plaintiffs Silver and Marshall and the members of the  
18 California Class been aware of BA’s false and misleading marketing and labeling tactics, and  
19 unlawful fortification, they would not have purchased BodyArmor, purchased as much  
20 BodyArmor, or paid as much for BodyArmor.

21           122.   In accordance with California Business and Professions Code section 17203,  
22 Plaintiffs Silver and Marshall seek an order enjoining BA from continuing to conduct business  
23 through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective  
24 advertising campaign.

25           123.   Plaintiffs Silver and Marshall also seek an order for the disgorgement and  
26 restitution of all monies from the sale of BodyArmor that BA unjustly acquired through acts of  
27 unlawful, unfair, and/or fraudulent competition.

28           124.   Therefore, Plaintiffs Silver and Marshall pray for relief as set forth below.

**SECOND CLAIM**

**Violation of California's Unfair Competition Law,  
CAL. BUS. & PROF. CODE § 17200, *et seq.*  
Unfair and Fraudulent Conduct Prongs  
(By Plaintiffs Silver and Marshall, on Behalf of the California Class)**

125. Plaintiffs Silver and Marshall repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

126. Plaintiffs Silver and Marshall bring this claim on behalf of the California Class for violation of the “unfair” and “fraudulent” prongs of the UCL.

127. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” CAL. BUS. & PROF. CODE § 17200.

128. Defendants’ false and misleading marketing of BodyArmor, as alleged herein, constitute “unfair” business acts and practices because such conduct is immoral, unscrupulous, and offends public policy. Further, the gravity of BA’s conduct outweighs any conceivable benefit of such conduct.

129. The acts, omissions, misrepresentations, practices, and non-disclosures of BA, as alleged herein, constitute “fraudulent” business acts and practices, because BA’s conduct is false and misleading to Plaintiffs Silver and Marshall and the members of the California Class.

130. BA’s marketing and labeling of BodyArmor is likely to deceive reasonable consumers about their true ingredient and nutritional profile.

131. BA either knew or reasonably should have known that the claims in the marketing, advertising, and labeling of BodyArmor were likely to deceive reasonable consumers.

132. In accordance with California Business & Professions Code section 17203, Plaintiffs Silver and Marshall seek an order enjoining BA from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

133. Plaintiffs Silver and Marshall also seek an order for the disgorgement and restitution of all monies from the sale of BodyArmor that were unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

134. Therefore, Plaintiffs Silver and Marshall pray for relief as set forth below.

**THIRD CLAIM**

**Violation of California's False Advertising Law,  
CAL. BUS. & PROF. CODE § 17500, *et seq.*  
(By Plaintiffs Silver and Marshall, on Behalf of the California Class)**

135. Plaintiffs Silver and Marshall repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

136. Plaintiffs Silver and Marshall bring this claim on behalf of the California Class for violation of the FAL.

137. The FAL prohibits making any false or misleading advertising claim. CAL. BUS. & PROF. CODE § 17500.

138. As alleged herein, BA, in its marketing and labeling of BodyArmor, makes “false [and] misleading advertising claim[s],” as it deceives consumers about the drink’s true characteristics and benefits.

139. In reliance on these false and misleading advertising claims, Plaintiffs Silver and Marshall and the members of the California Class purchased BodyArmor believing that it conveyed net nutritional benefits and superior hydration, as promoted by BA’s marketing.

140. BA knew or should have known that the marketing and labeling of BodyArmor was likely to deceive consumers.

141. As a result, Plaintiffs Silver and Marshall and the California Class members seek injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which BA was unjustly enriched.

142. Therefore, Plaintiffs Silver and Marshall pray for relief as set forth below.

**FOURTH CLAIM**

**Violation of California's Consumers Legal Remedies Act,  
CAL. CIV. CODE § 1750, *et seq.*  
(By Plaintiffs Silver and Marshall, on Behalf of the California Class)  
(Injunctive Relief Only)**

143. Plaintiffs Silver and Marshall repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

1           144. Plaintiffs Silver and Marshall bring this claim on behalf of the California Class for  
2 violation of the CLRA, seeking injunctive relief only.

3           145. The CLRA adopts a statutory scheme prohibiting various deceptive practices in  
4 connection with the conduct of a business providing goods, property, or services primarily for  
5 personal, family, or household purposes.

6           146. BA's policies, acts, and practices were designed to, and did, result in the purchase  
7 and use of BodyArmor primarily for personal, family, or household purposes, and violated and  
8 continue to violate the following sections of the CLRA:

9               a. Section 1770(a)(5), which prohibits representing that goods have a  
10 particular composition or contents that they do not have;

11              b. Section 1770(a)(5), which also prohibits representing that goods have  
12 characteristics, uses, or benefits that they do not have;

13              c. Section 1770(a)(7), which prohibits representing that goods are of a  
14 particular standard, quality, or grade if they are of another;

15              d. Section 1770(a)(9), which prohibits advertising goods with intent not to  
16 sell them as advertised; and

17              e. Section 1770(a)(16), which prohibits representing that the subject of a  
18 transaction has been supplied in accordance with a previous representation when it has not.

19           147. As a result, in accordance with California Civil Code section 1780(a)(2), Plaintiffs  
20 Silver and Marshall and the members of the California Class have suffered irreparable harm and  
21 seek injunctive relief in the form of an order:

22               a. Enjoining BA from continuing to engage in the deceptive practices  
23 described above;

24               b. Requiring BA to provide public notice of the true nature of BodyArmor;  
25 and

26               c. Enjoining BA from such deceptive business practices in the future.

27           148. Pursuant to section 1782 of the CLRA, Plaintiffs Silver and Marshall hereby notify  
28 BA in writing of its particular violations of section 1770 of the CLRA and are demanding, among

1 other actions, that BA cease marketing BodyArmor as set forth in detail above and correct, repair,  
 2 replace, or otherwise rectify BodyArmor is in violation of section 1770. If BA fails to respond to  
 3 Plaintiffs' demand within 30 days of this notice, pursuant to section 1782 of the CLRA, Plaintiffs  
 4 will amend this Class Action Complaint to request, in addition to the above relief, statutory  
 5 damages, actual damages, punitive damages, interest, and attorneys' fees.

6 149. Therefore, Plaintiffs Silver and Marshall pray for relief as set forth below.

### 7 **FIFTH CLAIM**

#### 8 **Violation of New York's Consumer Protection from** 9 **Deceptive Acts and Practices Law,** 10 **N.Y. GEN. BUS. LAW § 349, *et seq.*** **(By Plaintiff Hill, on Behalf of the New York Class)**

11 150. Plaintiff Hill repeats each and every allegation contained in the paragraphs above  
 12 and incorporates such allegations by reference herein.

13 151. Plaintiff Hill brings this claim on behalf of the New York Class for violation of  
 14 section 349 of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y.  
 15 GEN. BUS. LAW § 349 *et seq.*

16 152. Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business,  
 17 trade or commerce or in the furnishing of any service in [the State of New York]." N.Y. GEN.  
 18 BUS. LAW § 349(a).

19 153. BA's labeling and marketing of BodyArmor, as alleged herein, constitute  
 20 "deceptive" acts and practices, as such conduct misled Plaintiff Hill and the New York Class.

21 154. Subsection (h) of section 349 grants private plaintiffs a right of action for violation  
 22 of New York's Consumer Protection from Deceptive Acts and Practices Law, as follows:

23 In addition to the right of action granted to the attorney general pursuant to this  
 24 section, any person who has been injured by reason of any violation of this section  
 25 may bring an action in his own name to enjoin such unlawful act or practice, an  
 26 action to recover his actual damages or fifty dollars, whichever is greater, or both  
 27 such actions. The court may, in its discretion, increase the award of damages to an  
 28 amount not to exceed three times the actual damages up to one thousand dollars, if  
 the court finds the defendant willfully or knowingly violated this section. The  
 court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. GEN. BUS. LAW § 349(h).

155. In accordance with subsection (h) of section 349, Plaintiff Hill seeks an order enjoining BA from continuing the unlawful deceptive acts and practices set out above. Absent a Court order enjoining the unlawful deceptive acts and practices, and as evidenced by its lack of response to the BBB's NAD recommendations, BA will continue its false and misleading marketing campaign and, in doing so, irreparably harm each of the New York Class members.

156. As a consequence of BA's deceptive acts and practices, Plaintiff Hill and other members of the New York Class suffered an ascertainable loss of monies. By reason of the foregoing, Plaintiff Hill and other members of the New York Subclass also seek actual damages or statutory damages of \$50 per violation, whichever is greater, as well as punitive damages. N.Y. GEN. BUS. LAW § 349(h).

157. Therefore, Plaintiff Hill prays for relief as set forth below.

#### **SIXTH CLAIM**

#### **Violation of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW § 350, *et seq.* (By Plaintiff Hill, on Behalf of the New York Class)**

158. Plaintiff Hill repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

159. Plaintiff Hill brings this claim on behalf of the New York Class for violation of section 350 of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW § 350.

160. Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in [the State of New York]." N.Y. GEN. BUS. LAW § 350.

161. New York General Business Law section 350-a defines "false advertising" as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect." N.Y. GEN. BUS. LAW § 350-a.1. The section also provides that advertising can be false by omission, as it further defines "false advertising" to include "advertising [that] fails to reveal facts material in the



light of such representations with respect to the commodity . . . to which the advertising relates.”

*Id.*

162. BA’s labeling, marketing, and advertising of BodyArmor, as alleged herein, are “misleading in a material respect” and, thus, constitute “false advertising,” as they falsely represent BodyArmor as being beneficial nutritionally and providing necessary and/or superior hydration.

163. Plaintiff Hill seeks an order enjoining BA from continuing this false advertising. Absent enjoining this false advertising, BA will continue to mislead Plaintiff Hill and the other members of the New York Subclass and, in doing so, irreparably harm each of the New York Class members.

164. As a direct and proximate result of BA’s violation of New York General Business Law section 350, Plaintiff Hill and the other members of the New York Class have also suffered an ascertainable loss of monies.

165. By reason of the foregoing, Plaintiff Hill and other members of the New York Subclass also seek actual damages or statutory damages of \$500 per violation, whichever is greater, as well as punitive damages. N.Y. GEN. BUS. LAW § 350-e.

166. Therefore, Plaintiff Hill prays for relief as set forth below.

### **SEVENTH CLAIM**

#### **Violation of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.***

#### **(By Plaintiff Pepper on Behalf of the Pennsylvania Class)**

167. Plaintiff Pepper repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

168. Plaintiff Pepper brings this claim on behalf of the Pennsylvania Class for violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 *et seq.*

169. BA is a “person,” as meant by 73 P.S. § 201-2(2).

170. Plaintiff Pepper and Pennsylvania Class members purchased goods and services in “trade” and “commerce,” as meant by 73 P.S. § 201-2(3), primarily for personal, family, and/or household purposes.

171. BA engaged in unfair methods of competition and unfair or deceptive acts or practices in the conduct of its trade and commerce in violation of 73 P.S. § 201-3, including the following:

a. Representing that its goods and services have characteristics, uses, benefits, ingredients, and qualities that they do not have (73 P.S. § 201-2(4)(v));

b. Representing that its goods and services are of a particular standard or quality if they are of another (73 P.S. § 201-2(4)(vii)); and

c. Advertising goods or services with intent not to sell them as advertised (73 P.S. § 201-2(4)(ix)).

172. BA's labeling, marketing, and advertising of BodyArmor, as alleged herein, are "misleading in a material respect" and, thus, constitute "false advertising," as they falsely represent BodyArmor as being beneficial nutritionally and providing necessary and/or superior hydration.

173. BA's representations and omissions were material because they were likely to deceive reasonable consumers.

174. BA intended to mislead Plaintiff Pepper and Pennsylvania Class members and induce them to rely on its misrepresentations and omissions.

175. BA acted intentionally, knowingly, and maliciously to violate Pennsylvania Unfair Trade Practices and Consumer Protection Law, and recklessly disregarded Plaintiff Pepper and Pennsylvania Class members' rights. BA's knowledge of BodyArmor put it on notice that BodyArmor was not as it advertised.

176. As a direct and proximate result of BA's unfair methods of competition and unfair or deceptive acts or practices and Plaintiff Pepper's and Pennsylvania Class members' reliance on them, Plaintiff Pepper and Pennsylvania Class members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing BodyArmor.

177. Therefore, Plaintiff Pepper prays for relief as set forth below.

**EIGHTH CLAIM FOR RELIEF**

**Unjust Enrichment / Quasi-Contract  
(By Plaintiffs Silver, Marshall, Pepper, and Hill, on Behalf of the Nationwide Class)**

178. Plaintiffs incorporate by reference each allegation set forth above

179. As a result of BA's unlawful and misleading labeling, marketing, and sale of BodyArmor, BA was enriched at the expense of Plaintiffs.

180. BA sold BodyArmor drinks to Plaintiffs that were either not capable of being sold legally and that were worthless, or were not worth the amounts that Plaintiffs paid for them.

181. Plaintiffs paid a premium price for BodyArmor, which is more expensive than water and more expensive than its competitors, Gatorade and Powerade.

182. It is against equity and good conscience to permit BA to retain the ill-gotten benefits received from Plaintiffs and the Nationwide Class members given that the BodyArmor was not what BA purported it to be.

183. It would be unjust and inequitable for BA to retain the benefit, warranting restitutionary disgorgement to Plaintiffs and the Nationwide Class members of all monies paid for BodyArmor, and/or all monies paid for which Plaintiffs and the Nationwide Class members did not receive benefit.

184. As a direct and proximate result of BA's actions, Plaintiffs and the Nationwide Class members have suffered damages in an amount to be proven at trial.

185. Therefore, Plaintiffs pray for relief as set forth below.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of the members of each Class, respectfully request the Court to enter an Order:

A. Certifying the proposed Classes under Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3), as set forth above;

B. Declaring that Defendant is financially responsible for notifying the Class members of the pendency of this suit;

C. Declaring that Defendant has committed the violations of law alleged herein;

1 D. Providing for any and all injunctive relief the Court deems appropriate;

2 E. Awarding statutory damages in the maximum amount for which the law provides;

3 F. Awarding monetary damages, including but not limited to any compensatory,  
4 incidental, or consequential damages in an amount that the Court or jury will determine, in  
5 accordance with applicable law;

6 G. Providing for any and all equitable monetary relief the Court deems appropriate;

7 H. Awarding punitive or exemplary damages in accordance with proof and in an  
8 amount consistent with applicable precedent;

9 I. Awarding Plaintiffs their reasonable costs and expenses of suit, including  
10 attorneys' fees;

11 J. Awarding pre- and post-judgment interest to the extent the law allows; and

12 K. For such further relief as this Court may deem just and proper.

13 **DEMAND FOR JURY TRIAL**

14 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a  
15 trial by jury on all claims so triable.

16 Respectfully submitted,

17 DATED: January 28, 2020

18 **KAPLAN FOX & KILSHEIMER LLP**

19 By: /s/ Laurence D. King  
Laurence D. King

20 Laurence D. King (CA Bar No. 206423)  
lking@kaplanfox.com  
21 Mario M. Choi (CA Bar No. 243409)  
mchoi@kaplanfox.com  
22 1999 Harrison Street, Suite 1560  
Oakland, CA 94612  
23 Telephone: (415) 772-4700  
Facsimile: (415) 772-4707

24 **KAPLAN FOX & KILSHEIMER LLP**  
25 Maia C. Kats (*to be admitted pro hac vice*)  
mkats@kaplanfox.com  
26 850 Third Avenue, 14<sup>th</sup> Floor  
New York, NY 10022  
27 Telephone: (202) 669-0658  
Facsimile: (212) 687-7714  
28

**REESE LLP**

Michael R. Reese (CA Bar No. 206773)

*mreese@reesellp.com*

100 West 93rd Street, 16th Floor

New York, NY 10025

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

**REESE LLP**

George V. Granade II (CA Bar No. 316050)

*ggranade@reesellp.com*

8484 Wilshire Boulevard, Suite 515

Los Angeles, CA 90211

Telephone: (212) 643-0500

Facsimile: (212) 643-0500

*Counsel for Plaintiffs Marc Silver, Heather Peffer,  
Donovan Marshall, Alexander Hill, and the Proposed  
Class*

CIVIL COVER SHEET

The JS-CAND 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 in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

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

2 U.S. Government Defendant

3 Federal Question  
(U.S. Government Not a Party)

4 Diversity  
(Indicate Citizenship of Parties in Item III)

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

	PTF	DEF		PTF	DEF
Citizen of This State	1	1	Incorporated or Principal Place of Business In This State	4	4
Citizen of Another State	2	2	Incorporated and Principal Place of Business In Another State	5	5
Citizen or Subject of a Foreign Country	3	3	Foreign Nation	6	6

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
110 Insurance	PERSONAL INJURY	625 Drug Related Seizure of Property 21 USC § 881	422 Appeal 28 USC § 158	375 False Claims Act
120 Marine	310 Airplane	690 Other	423 Withdrawal 28 USC § 157	376 Qui Tam (31 USC § 3729(a))
130 Miller Act	315 Airplane Product Liability	LABOR	PROPERTY RIGHTS	400 State Reapportionment
140 Negotiable Instrument	320 Assault, Libel & Slander	710 Fair Labor Standards Act	820 Copyrights	410 Antitrust
150 Recovery of Overpayment Of Veteran's Benefits	330 Federal Employers' Liability	720 Labor/Management Relations	830 Patent	430 Banks and Banking
151 Medicare Act	340 Marine	740 Railway Labor Act	835 Patent—Abbreviated New Drug Application	450 Commerce
152 Recovery of Defaulted Student Loans (Excludes Veterans)	345 Marine Product Liability	751 Family and Medical Leave Act	840 Trademark	460 Deportation
153 Recovery of Overpayment of Veteran's Benefits	350 Motor Vehicle	790 Other Labor Litigation	SOCIAL SECURITY	470 Racketeer Influenced & Corrupt Organizations
160 Stockholders' Suits	355 Motor Vehicle Product Liability	791 Employee Retirement Income Security Act	861 HIA (1395ff)	480 Consumer Credit
190 Other Contract	360 Other Personal Injury	IMMIGRATION	862 Black Lung (923)	490 Cable/Sat TV
195 Contract Product Liability	362 Personal Injury -Medical Malpractice	462 Naturalization Application	863 DIWC/DIWW (405(g))	850 Securities/Commodities/Exchange
196 Franchise	CIVIL RIGHTS	465 Other Immigration Actions	864 SSID Title XVI	890 Other Statutory Actions
REAL PROPERTY	PRISONER PETITIONS		865 RSI (405(g))	891 Agricultural Acts
210 Land Condemnation	HABEAS CORPUS		FEDERAL TAX SUITS	893 Environmental Matters
220 Foreclosure	440 Other Civil Rights		870 Taxes (U.S. Plaintiff or Defendant)	895 Freedom of Information Act
230 Rent Lease & Ejectment	441 Voting		871 IRS—Third Party 26 USC § 7609	896 Arbitration
240 Torts to Land	442 Employment			899 Administrative Procedure Act/Review or Appeal of Agency Decision
245 Tort Product Liability	443 Housing/Accommodations			950 Constitutionality of State Statutes
290 All Other Real Property	445 Amer. w/Disabilities—Employment			
	446 Amer. w/Disabilities—Other			
	448 Education			
	OTHER			
	540 Mandamus & Other			
	550 Civil Rights			
	555 Prison Condition			
	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—Transfer

8 Multidistrict Litigation—Direct File

VI. CAUSE OF ACTION

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

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.

DEMAND \$

CHECK YES only if demanded in complaint:  
JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only)

SAN FRANCISCO/OAKLAND

SAN JOSE

EUREKA-MCKINLEYVILLE



## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

**Authority For Civil Cover Sheet.** The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
  - b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
  - c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
  - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
  - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
  - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
  - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
  - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
  - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
  - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
  - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
  - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket.
- Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.