IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Lovelyn Gordon, individually and on behalf of all others similarly situated, Plaintiff, - against - Target Corporation, Defendant	7:20-cv-09589-KMK First Amended Class Action Complaint Jury Trial Demanded

Plaintiff alleges upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Target Corporation ("defendant") manufactures, markets and sells milk-based powder with iron ("infant formula") to non-infants, designated as Toddler Next Stage under its Up&Up brand ("Product").

I. Misleading Representations that Toddler Next Stage is Nutritionally Appropriate

2. The American Academy of Pediatrics (AAP) recommends "exclusive breastfeeding for the first 6 months of life with the addition of complementary foods and the continuation of breastfeeding until at least 12 months of age."[1]

3. Infant formula with added iron is the accepted alternative where breastfeeding is not an option. 21 C.F.R. § 106.3 (defining infant formula as "a food which purports to be or is represented for special dietary use for infants [0-12 months] by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.").

[1] *Id.*

4. The transition beyond the first twelve months is "critical for establishing healthy dietary preferences and preventing obesity in children."[2]

5. A global consensus of pediatric health organizations, including the American Academy of Pediatrics (AAP) Committee on Nutrition and the relevant Sub-Committee of the World Health Organization (WHO), advise that beyond twelve months, children's nutritional needs should be met with whole cow's milk, water and healthy whole foods as part of a balanced diet, and that "transition formula" "is not recommended."[3]

II. Defendant's Toddler Next Stage is Almost Identical to its Infant Formula Even Though it is Not Recommended for Dietary Needs of Target Group

6. Since 2003, rates of breastfeeding have increased significantly, resulting in a decrease in sales of infant formula.

7. To make up for declining sales of infant formulas, companies have introduced products marketed as "transition formulas," "follow-on formulas," "weaning formulas," "toddler milks," and "growing-up milks" ("GUMs") (collectively, "Transition Formulas") to children between twelve and thirty-six months old.[4]

8. U.S. Nielsen data shows advertising spending on transition formula quadrupled between 2003 and 2015, with sales increasing almost threefold.

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[2] Jennifer L. Harris, and Jennifer L. Pomeranz, "Infant formula and toddler milk marketing: opportunities to address harmful practices and improve young children's diets." Nutrition Reviews (2020).

[3] AAP Committee on Nutrition, 1988. Follow-on formulas follow-up or weaning formulas. Pediatrics 83, 1067 1989; World Health Organization, July 17, 2013. Information concerning the use and marketing of follow-up formula.

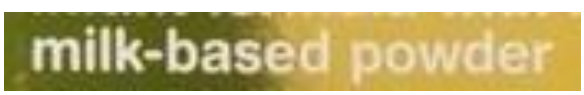
[4] Jennifer L. Pomeranz, Maria J. Romo Palafox, and Jennifer L. Harris. "Toddler drinks, formulas, and milks: Labeling practices and policy implications." Preventive medicine 109 (2018): 11-16 (citing American Academy of Pediatrics (AAP) Committee on Nutrition and World Health Organization (WHO) findings); Olga Khazan, The Ominous Rise of Toddler Milk, Baby-formula sales are slumping, so the companies that make it have turned to supplements for 3-year-olds, December 29, 2020.

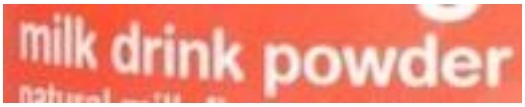
9. Companies like defendant capitalize on consumers' familiarity and acceptance of federally approved infant formula and continue selling it to them when their children are no longer infants, defined as zero to twelve months old.

10. Defendant's Infant Formula (top) is advertised and marketed in a way that is near-identical to its Toddler Next Stage (bottom), through a common labeling format, images, design, type size, fonts, call-outs and graphics.

11. New York State regulations, identical to those of the Food and Drug Administration ("FDA"), require companies to identify and describe a product in a way that distinguishes it from other products. See 1 NYCRR 259.1(a)(3) contained in Section 259.1 ("Packaging and labeling of food.") (incorporating 21 C.F.R. § 102.5(a) which requires food and beverages have a distinct "common or usual name").

12. The Infant Formula (left) and Toddler Next Stage (right) have identical statements of identity: "Milk Based Powder."





13. The identical statement of identity for the Transition Formula misleads consumers because it fails to tell them how it differs from the Infant Formula.

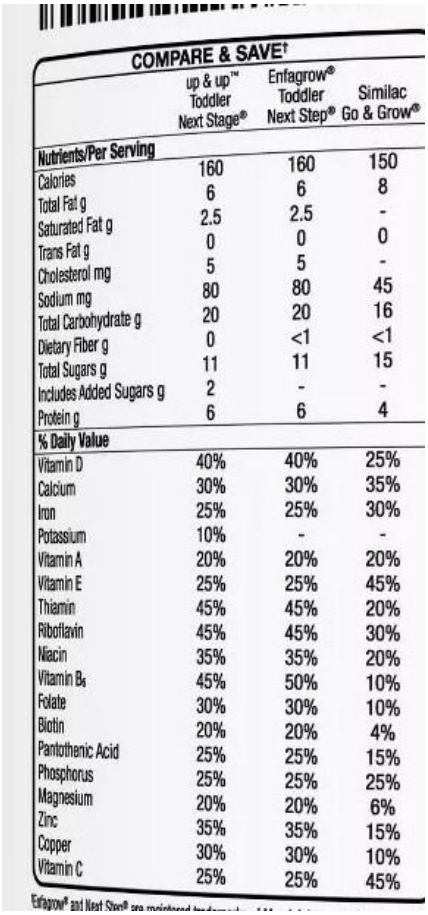
14. This gives caregivers the incorrect impression that the Transition Formula is nutritionally adequate for children over a year since their needs are different from infants.

15. The other similar representations further the incorrect impression that the Toddler Next Stage is what children should be fed in "next stage" beyond infancy.

Infant Formula	Toddler Next Stage ("Transition Formula")
0 – 12 Months	1+ Years
DHA and Dual Probiotics	DHA and iron to help support brain development,
Infant formula with iron	calcium and Vitamin D for strong bones
Triple Care	Neuro Support
Immunity; Brain; Development	Cognitive; Social; Motor; Language

16. The identical labeling elements further this impression and ride the coattails of the carefully regulated infant formula products to drive sales.

17. The Toddler Next Stage is misleading because it contains an Infant Formula Panel, even though it is not intended or recommended for infants.



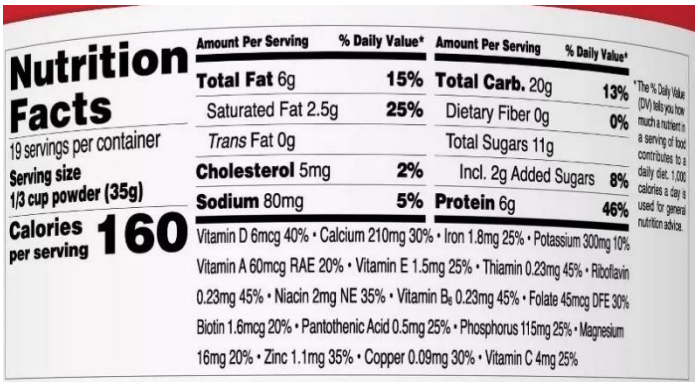
COMPARE & SAVE†

Nutrients/Per Serving	up & up™ Toddler Next Stage®	Enfagrow® Toddler Next Step®	Similac Go & Grow®
Calories	160	160	150
Total Fat g	6	6	8
Saturated Fat g	2.5	2.5	-
Trans Fat g	0	0	0
Cholesterol mg	5	5	-
Sodium mg	80	80	45
Total Carbohydrate g	20	20	16
Dietary Fiber g	0	<1	<1
Total Sugars g	11	11	15
Includes Added Sugars g	2	-	-
Protein g	6	6	4
% Daily Value			
Vitamin D	40%	40%	25%
Calcium	30%	30%	35%
Iron	25%	25%	30%
Potassium	10%	-	-
Vitamin A	20%	20%	20%
Vitamin E	25%	25%	45%
Thiamin	45%	45%	20%
Riboflavin	45%	45%	30%
Niacin	35%	35%	20%
Vitamin B_6	45%	50%	10%
Folate	30%	30%	10%
Biotin	20%	20%	4%
Pantothenic Acid	25%	25%	15%
Phosphorus	25%	25%	25%
Magnesium	20%	20%	6%
Zinc	35%	35%	15%
Copper	30%	30%	10%
Vitamin C	25%	25%	45%

†Enfagrow® and Next Step® are registered trademarks of [illegible]

18. Caregivers are familiar with the unique Infant Formula panel, a specific format only for the highly regulated infant formula.

19. This is distinct from the Nutrition Facts, which also appears on the Product.



Nutrition Facts

19 servings per container

Serving size
1/3 cup powder (35g)

Calories per serving 160

Amount Per Serving	% Daily Value*	Amount Per Serving	% Daily Value*
Total Fat 6g	**15%**	**Total Carb.** 20g	**13%**
Saturated Fat 2.5g	**25%**	Dietary Fiber 0g	**0%**
Trans Fat 0g		Total Sugars 11g	
Cholesterol 5mg	**2%**	Incl. 2g Added Sugars	**8%**
Sodium 80mg	**5%**	**Protein** 6g	**46%**

Vitamin D 6mcg 40% • Calcium 210mg 30% • Iron 1.8mg 25% • Potassium 300mg 10% • Vitamin A 60mcg RAE 20% • Vitamin E 1.5mg 25% • Thiamin 0.23mg 45% • Riboflavin 0.23mg 45% • Niacin 2mg NE 35% • Vitamin B_6 0.23mg 45% • Folate 45mcg DFE 30% • Biotin 1.6mcg 20% • Pantothenic Acid 0.5mg 25% • Phosphorus 115mg 25% • Magnesium 16mg 20% • Zinc 1.1mg 35% • Copper 0.09mg 30% • Vitamin C 4mg 25%

*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 1,000 calories a day is used for general nutrition advice.

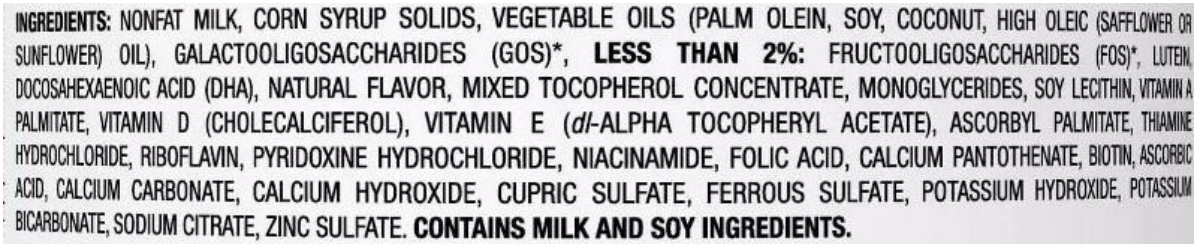
20. The use of the Infant Formula panel on a product not intended for infants is misleading because it gives caregivers the impression that the Product, like infant formula, is subject to heightened and specific FDA regulations.

21. In layman's terms, its addition makes the Product look more "serious" and quasi-clinical.

III. Toddler Next Stage is Nutritionally Inconsistent with Expert Advice

22. Child nutrition experts universally oppose consumption of added sugars by children between twelve and twenty-four months.

23. However, the Product contains two grams of added sugar, shown in the Nutrition Facts and ingredient list under the name "corn syrup solids."


INGREDIENTS: NONFAT MILK, CORN SYRUP SOLIDS, VEGETABLE OILS (PALM OLEIN, SOY, COCONUT, HIGH OLEIC (SAFFLOWER OR SUNFLOWER) OIL), GALACTOOLIGOSACCHARIDES (GOS)*, LESS THAN 2%: FRUCTOOLIGOSACCHARIDES (FOS)*, LUTEIN, DOCOSAHEXAENOIC ACID (DHA), NATURAL FLAVOR, MIXED TOCOPHEROL CONCENTRATE, MONOGLYCERIDES, SOY LECITHIN, VITAMIN A PALMITATE, VITAMIN D (CHOLECALCIFEROL), VITAMIN E (*dl*-ALPHA TOCOPHERYL ACETATE), ASCORBYL PALMITATE, THIAMINE HYDROCHLORIDE, RIBOFLAVIN, PYRIDOXINE HYDROCHLORIDE, NIACINAMIDE, FOLIC ACID, CALCIUM PANTOTHENATE, BIOTIN, ASCORBIC ACID, CALCIUM CARBONATE, CALCIUM HYDROXIDE, CUPRIC SULFATE, FERROUS SULFATE, POTASSIUM HYDROXIDE, POTASSIUM BICARBONATE, SODIUM CITRATE, ZINC SULFATE. **CONTAINS MILK AND SOY INGREDIENTS.**

INGREDIENTS: NONFAT MILK, CORN SYRUP SOLIDS, VEGETABLE OILS (PALM OLEIN, SOY, COCONUT, HIGH OLEIC (SAFFLOWER OR SUNFLOWER) OIL), GALACTOOLIGOSACCHARIDES (GOS)*, **LESS THAN 2%:** FRUCTOOLIGOSACCHARIDES (FOS)*, LUTEIN, DOCOSAHEXAENOIC ACID (DHA), NATURAL FLAVOR, MIXED TOCOPHEROL CONCENTRATE, MONOGLYCERIDES, SOY LECITHIN, VITAMIN A PALMITATE, VITAMIN D (CHOLECALCIFEROL), VITAMIN E (DL-ALPHA TOCOPHERYL ACETATE), ASCORBYL PALMITATE, THIAMINE HYDROCHLORIDE, RIBOFLAVIN, PYRIDOXINE HYDROCHLORIDE, NIACINAMIDE, FOLIC ACID, CALCIUM PANTOTHENATE, BIOTIN, ASCORBIC ACID, CALCIUM CARBONATE, CALCIUM HYDROXIDE, CUPRIC SULFATE, FERROUS SULFATE, POTASSIUM HYDROXIDE, POTASSIUM BICARBONATE, SODIUM CITRATE, ZINC SULFATE.

24. Even if caregivers scrutinize the packaging and discover the added sugars, they are not told that giving foods to children over twelve months with added sugars is contrary to their nutritional needs.[5]

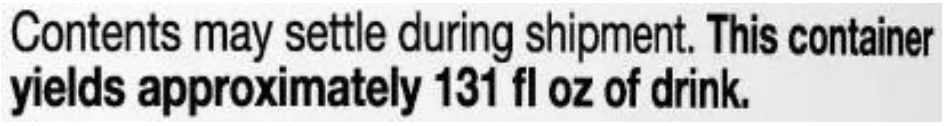
25. Beyond containing added sugars, the Product contains less protein, and more calories and carbohydrates (sugars) than whole cow's milk.

Nutritional Composition for 8 fl. oz.

Nutrient	Unit	Whole Cow's Milk	Toddler Next Stage
Energy	cal	149	160
Protein	g	7.69	8.0
Total Fat	g	7.98	8.0
Carbohydrate	g	12.8	26.66

26. According to defendant's website, the Product costs $14.69 for 680 g.[6]

27. Based on the label, the Product "yields approximately 131 fl oz of drink."



28. According to the Retail Milk Prices Report of the United States Department of Agriculture, whole milk in New York City costs $3.85 per gallon as of May 2020.[7]

[5] Maria J Romo-Palafox and JL Pomeranz et al., "Infant formula and toddler milk marketing and caregiver's provision to young children," Journal of Maternal and Child Nutrition, vol. 16,3 (2020): e12962. doi:10.1111/mcn.12962
[6] Target.com, Toddler Next Stage Formula Powder - 24oz - up & up.
[7] Agriculture Marketing Service, Retail Milk Prices Report, May 2020.

29. When the per ounce cost of whole milk is compared to Toddler Next Stage, the price difference is apparent.

Price	Cow's (whole)	Toddler Next Stage
Price ($/8 fl oz)	0.24	0.90
Price ($/gallon)	3.85	14.35

30. Toddler Next Stage is almost four times the cost of the recommended alternative and nutritionally superior choice of whole cow's milk.[8]

31. The similar labeling of the Infant Formula and Toddler Next Stage causes caregivers to make inaccurate and ill-advised nutritional purchasing decisions.

32. For instance, a study of caregivers' understanding of transition formula labeling concluded that 52% expected products like Toddler Next Stage, to "give toddlers nutrition that they wouldn't get from other sources."[9]

33. Public health research has shown that use of products such as Toddler Next Stage results in prolonged use of expensive, re-branded, infant formula instead of transitioning infants to cow's milk, water and other healthy foods.

34. Seventy percent of caregivers mistakenly believe that transition formulas like Toddler Next Stage is a suitable drink for children in this age range, despite expert opinions that they offer "no unique nutritional value beyond what could be achieved through a nutritionally adequate diet; furthermore, they contribute added sugars to diet."[10]

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[8] Consensus Statement, Healthy Beverage Consumption in Early Childhood: Recommendations from Key National Health and Nutrition Organizations, Robert Wood Johnson Foundation, Healthy Eating Research, Sept. 2019.
[9] Maria J Romo-Palafox and JL Pomeranz et al., Marketing claims on infant formula and toddler milk packages: What do caregivers think they mean? , UCONN Rudd Center for Food Policy & Obesity, September 2019.
[10] *Id.*

IV. Misleading Representations as to GMOs

35. In recent years, consumers have become significantly more aware of, and sensitive to, products that have been approved by independent third-parties, and buy those products based upon that independent verification of an attribute or quality they value.

36. Consumers have become significantly more aware of, and sensitive to, genetically modified organisms ("GMOs") in their food.

37. This is especially important when providing nutrition to small children.

38. Many consumers try to avoid GMOs for reasons including negative health and environmental impact.

39. To meet consumer demand for non-GMO products, an industry of independent, third-party validation companies has developed.

40. These independent organizations review a product's ingredients and assure consumers they do not contain GMOs nor come from animals who have consumed GMO feed.

41. Obtaining this approval allows companies to obtain a competitive advantage and to sell more products at higher prices.

42. Recognizing the value of independent certification, the Federal Trade Commission ("FTC") has warned companies to be careful in making representations about independent certification. *See* 16 C.F.R. § 260.1.

43. The FTC guidelines against deceptive marketing regarding "Certifications and Seals of Approval" state:

> It is deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.
>
> 16 C.F.R. § 260.6(a) (emphasis added).

44. Seals are distinguishable to consumers because they are written in a typeface and font wholly different from the surrounding text.

45. In violation of the FTC's warnings, defendant represents the Product as verified by an independent third-party with respect to GMOs, through the front panel "seal" of "non-GMO – ingredients not genetically engineered."

46. In developing their "non-GMO" seal, defendant intentionally mimicked the content and message of the foremost independent verification organization – the Non-GMO Project.

47. The Non-GMO Project, headquartered in Bellingham, Washington, is a not-for-profit organization founded in 2007 that bases its work upon "rigorous scientific foundation and world-class technical support."[11]

48. Through the Non-GMO Project's work with the Global ID Group, these entities are "the world leaders in non-GMO testing, certification, and consulting."

[11] History, Non-GMO Project.

49. The Non-GMO Project's Product Verification Program is widely recognized with more than 3,000 verified brands, over 43,000 products and more than $19.2 billion in annual sales.

50. The Non-GMO Product Verification Program verifies that products are not derived from GMO crops and that milk and meat are not derived from animals fed GMO crops.

51. Unfortunately for consumers, the "non-GMO" seal is false and misleading.

52. The truth is that the "non-GMO" seal is not a designation bestowed by a non-profit, or even a neutral third-party, but instead is the work of defendant.

53. Looking to profit off consumer desire for independently validated products, Defendant created a deceptive non-GMO seal that mimics the Non-GMO Project seal and fails to tell consumers the whole truth about GMOs in the Product.

54. Defendant's seal tells a "half-truth": while the Product may not be *made with* genetically engineered ingredients, GMOs were used only one level back in the food production process.

55. For example, the Product contains dairy ingredients including milk and lactose, that come from cows fed GMO grains.

56. Therefore, the ingredients in the Product are derived from GMOs even though the Product may not be made directly with GMO ingredients.

57. This violates the standard of the Non-GMO Project, which prohibits its seal of on dairy-based products that could be from animals fed GMO feed.[12]

58. Defendant avoids the Non-GMO Project's feed standard by using their own, self-created non-GMO seal, misleading consumers.

[12] Animal-Derived Ingredients, Non-GMO Project.

59. Defendant relies on consumer familiarity and trust of the seal of the Non-GMO Project and does not expect them to realize there is a difference.

60. As a result of this deceptive seal, consumers paid a premium to purchase a non-GMO Product even though it contained ingredients which were produced with GMOs.

V. Conclusion

61. Reasonable consumers must and do rely on defendant to honestly describe the components and features of the Product.

62. Defendant misrepresented the Product through affirmative statements, half-truths, and omissions.

63. Defendant sold more of the Product and at a higher prices than it would have in absence of this misconduct, resulting in additional profits at the expense of consumers.

64. Had Plaintiff and proposed class members known the truth, they would not have bought the Product or would have paid less for it.

65. Plaintiff paid more for the Product based on the representations than she would have otherwise paid.

66. As a result of the false and misleading representations, the Product is sold at a premium price, approximately no less than no less than $14.69 for 680 g, excluding tax, higher than similar products represented in a non-misleading way, and higher than it would be sold for absent the misleading representations and omissions.

Jurisdiction and Venue

67. Jurisdiction is proper pursuant to Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d)(2).

68. Plaintiff Lovelyn Gordon is a citizen of New York.

69. Defendant Target Corporation is a Minnesota corporation with a principal place of business in Minneapolis, Hennepin County, Minnesota.

70. Diversity exists because plaintiff Lovelyn Gordon and defendant are citizens of different states.

71. Upon information and belief, sales of the Product and any available statutory and other monetary damages, exceed $5 million during the applicable statutes of limitations, exclusive of interest and costs.

72. Venue is proper because a substantial part of the events or omissions giving rise to the claim occurred here – the purchase of plaintiff and her experiences identified here.

Parties

73. Plaintiff Lovelyn Gordon is a citizen of Yonkers, Westchester County, New York.

74. Defendant Target Corporation is a Minnesota corporation with a principal place of business in Minneapolis, Minnesota, Hennepin County

75. Defendant operates approximately 1,900 Target stores in all fifty states.

76. Target sells products from groceries to consumer electronics.

77. Target's private label, or store brands, are known for their high quality, equivalent to their branded counterparts.

78. The Up&Up brand is used for consumer health products, such as the Toddler Next Stage.

79. Plaintiff purchased the Product on at least one occasion within the statutes of limitations for each cause of action, during May 2020, at defendant's store at 500 E Sandford Blvd, Mt Vernon, NY 10550.

80. Plaintiff bought the Product because she expected it would be nutritionally adequate

for children over one year old for whom she is or was a caregiver.

81. The Product was worth less than what Plaintiff and consumers paid and she would not have paid as much absent Defendant's false and misleading representations and omissions.

82. Plaintiff paid more for the Product than she would have paid otherwise.

83. Plaintiff intends to, seeks to, and will purchase the Product again when she can do so with the assurance that Product's representations about its components and ingredients are consistent with its representations.

Class Allegations

84. The class will consist of all purchasers of the Product who reside in New York during the applicable statutes of limitations.

85. Plaintiff seeks class-wide injunctive relief based on Rule 23(b) in addition to a monetary relief class.

86. Common questions of law or fact predominate and include whether defendant's representations were and are misleading and if plaintiff and class members are entitled to damages.

87. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair and deceptive representations and actions.

88. Plaintiff is an adequate representative because her interests do not conflict with other members.

89. No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

90. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

91. Plaintiff's counsel is competent and experienced in complex class action litigation

and intends to protect class members' interests adequately and fairly.

92. Plaintiff seeks class-wide injunctive relief because the practices continue.

New York General Business Law ("GBL") §§ 349 & 350

(Consumer Protection Statute)

93. Plaintiff incorporates by reference all preceding paragraphs.

94. Plaintiff and class members desired to purchase a product which was nutritionally adequate for children older than one year..

95. Defendant's false and deceptive representations and omissions are material in that they are likely to influence consumer purchasing decisions.

96. Defendant misrepresented the Product through statements, omissions, ambiguities, half-truths and/or actions.

97. Plaintiff relied on the representations.

98. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Breaches of Express Warranty,
Implied Warranty of Merchantability and
Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq*.

99. The Product was manufactured, labeled and sold by defendant and expressly and impliedly warranted to plaintiff and class members that it was nutritionally adequate for children older than one year..

100. Defendant had a duty to disclose and/or provide non-deceptive descriptions and marketing of the Product.

101. This duty is based on Defendant's outsized role in the market for this type of Product.

102. Plaintiff provided or will provide notice to defendant, its agents, representatives, retailers and their employees.

103. Defendant received notice and should have been aware of these issues due to complaints by regulators, competitors, and consumers, to its main offices since the Product has been sold.

104. The Product did not conform to its affirmations of fact and promises due to defendant's actions and were not merchantable because they were not fit to pass in the trade as advertised.

105. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Negligent Misrepresentation

106. Defendant had a duty to truthfully represent the Product, which it breached.

107. This duty is based on defendant's position, holding itself out as having special knowledge and experience in this area.

108. The representations took advantage of consumers' cognitive shortcuts made at the point-of-sale and their trust in defendant.

109. Plaintiff reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, their purchases of the Product.

110. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Fraud

111. Defendant misrepresented and/or omitted the attributes and qualities of the Product.

112. Defendant's fraudulent intent is evinced by its knowledge of the relevant regulations, as its misleading representations are careful to avoid glaringly prohibited statements but are still misleading.

Unjust Enrichment

113. Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct the challenged practices to comply with the law;
3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, and restitution and disgorgement for members of the class pursuant to the applicable laws;
4. Awarding monetary damages, statutory damages pursuant to any statutory claims and interest pursuant to the common law and other statutory claims;
5. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
6. Other and further relief as the Court deems just and proper.

Dated: May 4, 2021

Respectfully submitted,

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