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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Jose Luna, individually, and on behalf of
those similarly situated,

Plaintiff,

v.

Three Wishes Foods, Inc.,

Defendant.

CASE NO.
CLASS ACTION COMPLAINT
Demand for Jury Trial

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INTRODUCTION

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2 1. Plaintiff Jose Luna, by and through his counsel, brings this class action
3 against Defendant Three Wishes Food, Inc. (“Defendant”) to seek redress for its
4 unlawful and deceptive practices in labeling and marketing the THREE WISHES
5 cereal which make protein claims on the front and back of the product packaging -
6 including that the cereal contains 8 grams of protein, is high protein, and offers more
7 protein than the competition - while omitting a statement of the corrected amount of
8 protein from the Nutrition Facts Panel (“NFP”).

9 2. Consumers are increasingly health conscious and, as a result, many
10 consumers seek foods high in protein. To capitalize on this trend, Defendant markets
11 its Products¹ as being “high in protein” and offering “more protein” than competitors.

12 3. The Food and Drug Administration (“FDA”) prohibits “high” protein
13 claims unless the food product provides at least 20% of the daily recommended value
14 for protein. *See* 21 C.F.R. § 101.54(b) (requiring “20 percent or more of the RDI or the
15 DRV” for “high” claims).

16 4. Further, Defendant prominently labels its Products as being “high in
17 protein” and providing specific amounts of protein per serving depending on the
18 product, such as “8g PROTEIN” per serving on the front and back of its Cinnamon
19 flavored cereal. Consumers, in turn, reasonably expect that each product will actually
20 provide the amount of protein per serving claimed on the front of the product package
21 in a form the body can use.

22 5. The FDA prohibits such label claims about the amount of protein unless
23 manufacturers also provide additional information in the nutrition fact panel about
24 how much of the recommended daily value for protein that the product will actually
25 provide. 21 C.F.R. §§ 101.9(c)(7)(i), 101.13(b), (n). That is because the FDA recognizes
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27 ¹ At the time of this filing, the following THREE WISHES cereal products are
28 included in this definition: Cinnamon, Fruity, Frosted, Cocoa, Honey, and
Unsweetened. This definition is not exhaustive, and shall include all of Defendant’s
products that are similarly deceptively marketed.

1 that (1) when manufacturers tout an amount of protein on the front label, that
2 amount is likely to be material to purchasing decisions, even though reasonable
3 consumers may not know the total amount of protein they need to ingest on a daily
4 basis, and (2) not all proteins are the same in their ability to meet human nutritional
5 requirements, so a simple statement about the number of grams does not actually
6 inform consumers about how much usable protein they are receiving. Some proteins
7 are deficient in one or more of the nine amino acids essential to human protein
8 synthesis and/or are not fully digestible within the human gut. When a human body
9 uses up the least prevalent essential amino acid from a food product, protein
10 synthesis shuts down and all of the remaining amino acids from that protein source
11 degrade mostly into waste. Likewise, whatever portion of a protein source is not
12 digestible is similarly unavailable for protein synthesis. A protein's ability to support
13 human nutritional requirements is known as its "quality."

14 6. The FDA required method for measuring protein quality is called the
15 Protein Digestibility Corrected Amino Acid Score ("PDCAAS"). It combines a protein
16 source's amino acid profile and its percent digestibility into a discount factor ranging
17 from 0.0 to 1.0 that, when multiplied by the total protein quantity, shows how much
18 protein in a product is actually available to support human nutritional requirements.
19 The regulations term this the "corrected amount of protein per serving." 21 C.F.R. §
20 101.9(c)(7)(ii). For example, a PDCAAS of .5 means that only half of the protein in
21 that product is actually available to support human protein needs. If the product
22 contained 10 grams total protein per serving, the corrected amount of protein would
23 be only 5 grams per serving. As a result, protein products can vary widely in their
24 ability to support human protein needs—even between two comparator products with
25 the same total protein quantity.

26 7. Because consumers are generally unaware about the usability of various
27 proteins, and may even be unaware of the total amount of usable protein they should
28 ingest each day, the FDA prohibits manufacturers from advertising or promoting

1 their products with a protein claim unless they have satisfied two requirements.
 2 First, the manufacturer must calculate the “corrected amount of protein per serving”
 3 based on the quality of the product’s protein using the PDCAAS method. Second, the
 4 manufacturer must use the PDCAAS computation to provide “a statement of the
 5 corrected amount of protein per serving” in the nutrition facts panel (“NFP”)
 6 “expressed as” a percent daily value (“%DV”) and placed immediately adjacent to the
 7 statement of protein quantity. 21 C.F.R. § 101.9(c)(7)(i)-(iii). The %DV is the corrected
 8 amount of protein per serving divided by the daily reference value for protein of 50
 9 grams. *Id.* Using the same example of a product containing 10 grams total protein per
 10 serving with a PDCAAS of .5, the %DV is 10% (5g/50g). Had all of the protein in the
 11 product been useful in human nutrition, the %DV would be 20% (10g/50g). The FDA
 12 regulations that govern nutrient content claims are also clear that a manufacturer
 13 may not make any claims on the front or back packaging about the amount of protein
 14 in the product unless it complies with these two requirements. See 21 C.F.R. §
 15 101.13(b) (“A nutrient content claim[] may not be made on the label...unless the claim
 16 is made in accordance with this regulation [i.e., § 101.13]...” and (n) (“[n]utrition
 17 labeling in accordance with § 101.8...shall be provided for any food for which a
 18 nutrient content claim is made”); accord 58 Fed. Reg. 2302, 23310 (manufacturer can
 19 only make a “nutrient content claim...on the label or in labeling of a food, provided
 20 that the food bears nutrition labeling that complies with the requirements in
 21 proposed § 101.9.”).

22 8. The primary protein sources in Defendant’s Products are chickpeas and
 23 pea protein. The PDCAAS score is approximately .75² and .93,³ which means
 24 Defendant’s products will provide nutritionally less than the protein quantity
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26 ² Nosworthy, Matthew G et al. “Thermal processing methods differentially affect the
 27 protein quality of Chickpea (*Cicer arietinum*.)” *Food science & nutrition* vol. 8,6 2950-
 2958. 12 May. 2020, doi:10.1002/fsn3.1597.

28 ³FDA, *GRAS Notification for Roquette's Pea Protein Isolate*,
<https://www.fda.gov/media/134207/download#:~:text=Pea%20Protein%20Isolate%20is%20a,and%2093%25%20PDCAAS%20for%20adults.>

1 claimed. Nevertheless, Defendant failed to provide in the NFP a statement of the
2 corrected amount of protein per serving calculated according to the PDCAAS
3 methodology and expressed as a %DV. Accordingly, the protein claims on the
4 package, such as “8g PROTEIN” are unlawful in violation of parallel state and federal
5 laws because Defendant did not comply with the regulatory requirements for making
6 a protein claim. 21 C.F.R. § 101.9(c)(7)(i), 101.13(b), (n). The failure to include a
7 statement of the corrected amount of protein inside the NFP also rendered the NFP
8 itself unlawful. *Id.* § 101.9(c)(7)(i).

9 9. In addition to being unlawful under 21 CFR §§ 101.9 and 101.13,
10 Defendant’s prominent protein claims on the package while omitting the statement of
11 the corrected amount of protein per serving expressed as a %DV in the NFP, is also
12 likely to mislead reasonable consumers. Consumers reasonably expect that
13 Defendant’s products will actually provide nutritionally the full amount of protein per
14 serving claimed on the front and back of the package and stated in the protein
15 quantity section of the NFP, i.e., that the products contain high quality proteins. But
16 Defendant’s products do not do so and instead contain low quality proteins. Had
17 Defendant included a statement of the corrected amount of protein per serving in the
18 NFP, as it was required to do under the law, it would have revealed that the product
19 contains low quality proteins. That information was material to reasonable
20 consumers.

21 10. Defendant’s unlawful and deceptive conduct is not limited to the specific
22 protein representations and the failure to include the %DV.

23 11. Additionally, Defendant misrepresents that its Products are “high in
24 protein” despite failing to provide sufficient amounts of quality protein to make that
25 representation.

26 12. Defendant’s unlawful and misleading labeling caused Plaintiff and
27 members of the class to pay a price premium.
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PARTIES

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2 13. Plaintiff is a citizen of California, who purchased the Products during
3 the Class Period, as described herein. The advertising and labeling on the package of
4 the Products purchased by Plaintiff, including the protein representations, is typical
5 of the advertising and labeling of the Products purchased by members of the Class.

- 6 a. On multiple occasions within the past year, Plaintiff purchased the
7 Cinnamon and Cocoa flavors from Whole Foods stores in San Francisco
8 County, California on multiple occasions.
- 9 b. Plaintiff made each of his purchases after reading and relying on the
10 truthfulness of Defendant's labels that promised the Products provided a
11 specific number of grams of protein per serving. For example, he
12 purchased the Cinnamon and Cocoa flavors relying on the
13 representation of "8g PROTEIN" on the front and back labels. He also
14 relied on the representation that the Product was high in protein and
15 offered more protein than the competition. He believed the truth of each
16 representation, i.e., that the product was high in protein and would
17 actually provide the full amount of protein claimed on the labels in a
18 form human bodies could utilize. He relied on the Products to meet his
19 protein dietary needs. Had Defendant complied with the law and not
20 made the protein claims on the Products, he would not have been drawn
21 to the Products and would not have purchased them. At a minimum,
22 Plaintiff would have paid less for each Product.
- 23 c. Moreover, had Defendant adequately disclosed the corrected amount of
24 protein per serving for each Product expressed as a %DV, as FDA
25 regulations require, Plaintiff would not have purchased the Products or
26 would have, at minimum, paid less for them. Plaintiff regularly checks
27 the NFP before purchasing any product for the first time, including the
28 %DV column for protein when manufacturers provide it, and he uses

1 that information as a basis of comparison between similar products. He
2 looked at and read the NFP on the Product before purchasing it for the
3 first time. Manufacturers do not always disclose a %DV for protein, but
4 when they do, he prefers products that provide more of the recommend
5 daily amount of protein (i.e., the one with a higher %DV). When a
6 manufacturer does not provide a %DV for protein, he can only go off of
7 the stated grams of protein, and he assumes that all of those disclosed
8 grams are in a form his body can use as protein.

- 9 d. For example, with the Products, Plaintiff was looking for a product that
10 would provide 8 grams of useable, i.e., high quality, protein per serving.
11 Had Defendant disclosed that the product provided nutritionally only
12 deficient levels of protein, Plaintiff would have used that information as
13 a basis to compare similar products and would have preferred, instead,
14 to purchase a different product with a higher %DV. At a minimum he
15 would have paid less for Defendant's product. Without the statement of
16 the corrected amount of protein per serving in the form of a %DV, the
17 only information Plaintiff had about the Products was the 8 gram
18 protein quantity, and he did in fact believe he was receiving 8 grams of
19 high-quality protein when he purchased the Products.
- 20 e. Plaintiff continues to desire to purchase protein products, including
21 those marketed and sold by Defendant, and would like to purchase
22 products that provide 8 grams of protein per serving. If the Products
23 that currently make unlawful protein claims are reformulated to ensure
24 they provide, in a usable form, the grams of protein that are represented
25 on the labels, or their labels are changed to provide non-misleading
26 information, Plaintiff would likely purchase those Products again in the
27 future but will not do so until then. Plaintiff regularly visits stores
28 where the Products and other protein products are sold. Because

1 Plaintiff does not know the formula for Defendant's products, which can
2 change over time, and cannot test whether the Products provide the
3 amount of digestible protein that is represented on the label without
4 first purchasing the Product, Plaintiff will be unable to rely on
5 Defendant's labels when shopping for protein products in the future
6 absent an injunction that prohibits Defendant from mislabeling its
7 Products. Plaintiff would also be forced to retest and/or reanalyze each
8 Product that makes a protein claim but fails to include the %DV at each
9 time of purchase because such Products' ingredient list and labeling
10 would not reveal any changes in the amount of digestible protein, even if
11 such changes took place. In addition, at present Plaintiff cannot rely on
12 the accuracy of Defendant's labels for the entire line of Products, which
13 Plaintiff is also interested in purchasing with labeling that comports
14 with regulations. Should Defendant begin to market and sell a new line
15 of products, Plaintiff could also be at risk for buying another one of
16 Defendant's products in reliance on the same or similar
17 misrepresentation and omissions. And because of Defendant's unlawful
18 and misleading labels on its Products, Plaintiff cannot make informed
19 choices between protein products offered by Defendant and protein
20 products offered by other manufacturers, such as choices based on price
21 and relative nutritional content.

- 22 f. Plaintiff and members of the Class have been economically damaged by
23 their purchase of the Products because the advertising for the Products
24 was and is untrue and/or misleading under state law and the products
25 are misbranded; therefore, the Products are worth less than what
26 Plaintiff and members of the Class paid for them and/or Plaintiff and
27 members of the Class did not receive what they reasonably intended to
28 receive.

1 regarding the nature, quality, and/or ingredients of the Products, occurred within this
2 District and the Defendant conducts business in this District.

3 **DIVISIONAL ASSIGNMENT**

4 19. Pursuant to Civil Local Rule 3-2(c-d), a substantial part of the events
5 giving rise to the claims arose in San Francisco County, and this action should be
6 assigned to the San Francisco Division.

7 **FACTUAL ALLEGATIONS**

8 **A. Defendant Manufactures, Labels, and Advertises the Product**

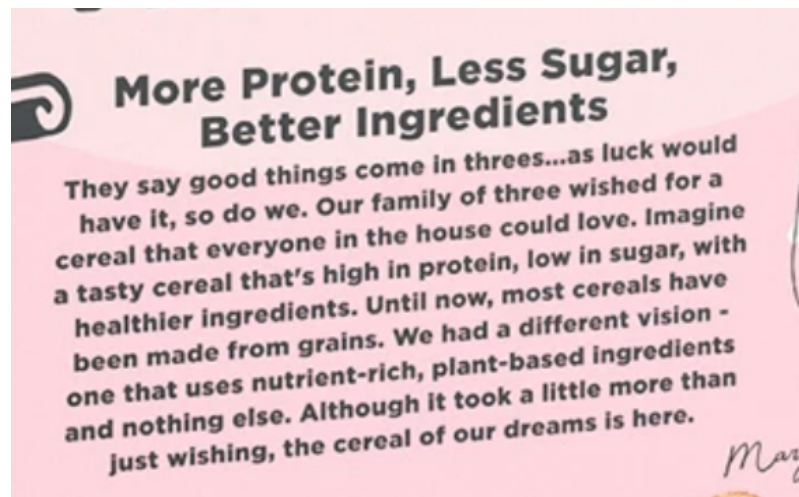
9 20. Defendant manufactures, distributes, markets, advertises, and sells a
10 variety of cereal products under the brand name “THREE WISHES.” These Products
11 have had packaging during the Class Period that predominately, uniformly, and
12 consistently states on the principal display panel of the product labels that they
13 contain and provide a certain amount of protein per serving.

14 21. The representations that the Products contain and provide a specific
15 amount of protein per serving were uniformly communicated to Plaintiff and every
16 other person who purchased any of the Products in California. The same or
17 substantially similar product label has appeared on each Product during the Class
18 Period in the general form of the following example:



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22. The back of the Product’s packaging includes claims that the Product is high in protein, offers 8 grams of protein, and more protein than competing products:



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2 23. The nutrition facts panel on the side of the Products uniformly and
3 consistently failed to provide any statement of the corrected amount of protein per
4 serving, expressed as a %DV, during the Class Period. The nutrition facts panels of
5 the Products have appeared consistently during the Class Period in the general form
6 of the following example (from the Cinnamon flavor):

Nutrition Facts	
7 Servings Per Container	
Serving Size	3/4 cup (35g)
Amount Per Serving	
Calories	120
<small>% Daily Value*</small>	
Total Fat 2g	3%
Saturated Fat 0g	0%
<i>Trans</i> Fat 0g	
Cholesterol 0mg	0%
Sodium 100mg	4%
Total Carbohydrate 18g	7%
Dietary Fiber 3g	11%
Total Sugars 3g	
Includes 3g Added Sugars	6%
Protein 8g	
Vitamin D 0mcg	0%
Calcium 150mg	10%
Iron 1.9mg	10%
Potassium 300mg	6%
<small>* The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.</small>	

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21 24. As described in detail below, Defendant's advertising and labeling of the
22 Products as containing and providing specific amounts of protein per serving is
23 unlawful, misleading, and intended to induce consumers to purchase the Products at
24 a premium price, while ultimately failing to meet consumer expectations. The
25 Products' label protein claims are unlawful because Defendant did not: (1) calculate
26 the "corrected amount of protein per serving" based on the quality of the product's
27 protein using the PDCAAS method; and (2) provide a statement of that corrected
28 amount of protein per serving in the NFP, expressed as a %DV. 21 C.F.R. §

1 101.9(c)(7)(i) & (iii). The unlawful protein claims induced consumers to purchase the
 2 Products at a premium price. Had Defendant complied with FDA regulations and not
 3 included a protein claim on the label of its Products, reasonable consumers would not
 4 have purchased them or would have paid less for the Products.

5 25. Defendant's failure to provide the required statement of the corrected
 6 amount of protein per serving, as well as Defendant's prominent protein claims made
 7 in the absence of any statement of the corrected amount of protein in the NFP, also
 8 deceived and misled reasonable consumers into believing that a serving of the
 9 Products will provide the grams of protein represented on the label, when that is not
 10 true. Had Defendant complied with the law, the statement of the corrected amount of
 11 protein would have revealed that the Products provide significantly less of the daily
 12 value of protein than high quality protein products with comparable protein
 13 quantities. The omission of this information allowed Defendant to charge a price
 14 premium. Had reasonable consumers been informed of the %DV for protein, as
 15 required by FDA regulations, they would not have purchased or would have paid less
 16 for the Products.

17 **B. Consumer Demand for Protein**

18 26. Consumers are focused on increasing the amount of protein in their
 19 diets. This increased demand indicates that consumers are willing to pay a premium
 20 for products labeled and marketed as high protein.⁴

21 27. Many American consumers are health conscious and seek wholesome,
 22 natural foods to keep a healthy diet, so they routinely rely upon nutrition information
 23 when selecting and purchasing food items. As noted by FDA Commissioner Margaret
 24 Hamburg during an October 2009 media briefing, "[s]tudies show that consumers
 25 trust and believe the nutrition facts information and that many consumers use it to
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27 ⁴ See Brooks, Robert & Simpson, S.J. & Raubenheimer, David. (2010). *The price of*
 28 *protein: Combining evolutionary and economic analysis to understand excessive*
energy consumption. Obesity Reviews : an official journal of the International
 Association for the Study of Obesity. 11. 887-94. 10.1111/j.1467-789X.2010.00733.x.

1 help them build a healthy diet.” Indeed, the FDA recommends relying on Nutrition
2 Facts Labels as the primary tool to monitor the consumption of protein.⁵

3 28. Protein is found throughout the body—in muscle, bone, skin, hair, and
4 virtually every other body part or tissue. The health benefits of protein are well
5 studied and wide ranging. Scientific studies have confirmed that protein can assist in
6 weight loss, reduce blood pressure, reduce cholesterol, and control for risk factors for
7 cardiovascular diseases. The National Academy of Medicine recommends that adults
8 get a minimum of .8 grams of protein for every kilogram of body weight per day, or
9 just over 7 grams for every 20 pounds of body weight.⁶ For a 140-pound person, that
10 means about 50 grams of protein each day. For a 200-pound person, that means about
11 70 grams of protein each day.

12 29. The health benefits of protein are just as important, if not more
13 important, for children. Children are in a relative state of constant growth and rely
14 on protein as the building block of muscle, bone, skin, hair, and virtually every other
15 body part or tissue. The National Academies of Science recommends the following
16 amounts of daily intake of protein based on age group: 1-3 years old: 13g of protein
17 per day; 4-8 years old: 19g of protein per day; 9-13 16 years old: 34g of protein per
18 day.⁷

19 30. Protein quantity by itself does not tell the full story of protein from a
20 human nutritional standpoint. A protein’s quality is also critical because humans
21 cannot fully digest or utilize some proteins. Proteins are not monolithic. They are
22 simply chains of amino acids, and different types of amino acids chained together in
23 different ways will make different types of proteins. Further, the makeup of the
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25 _____
26 ⁵ FDA Protein Fact Sheet,
<https://www.accessdata.fda.gov/scripts/InteractiveNutritionFactsLabel/factsheets/Protein.pdf>.

27 ⁶ National Academies of Medicine. Dietary Reference Intakes for Energy,
28 Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients).

⁷ *Id.*

1 protein changes the function of that protein in the body, and certain types of proteins
2 are more easily digested and used by humans than others.

3 31. All of a human's proteins are formed through the process of protein
4 synthesis within their own bodies. That is, although humans consume dietary
5 proteins, they digest those proteins, break them down into their constituent amino
6 acids, and then use those amino acids as building blocks to synthesize the human
7 proteins necessary for life, tissue repair, and other functions. Of the twenty total
8 amino acids, humans can produce only eleven of them on their own. Humans cannot
9 produce, under any circumstances, nine of the amino acids required for protein
10 synthesis. These nine amino acids are called the "essential amino acids" and they
11 must be supplied through the diet.

12 32. All nine essential amino acids are necessary for protein synthesis to take
13 place. Lacking even one essential amino acid will prevent protein synthesis from
14 occurring, and the rest of the proteins will degrade into waste. Accordingly, once the
15 body uses up the limiting essential amino acid from a protein source, the remainder
16 of that protein becomes useless to human protein synthesis and has little nutritional
17 value. As the FDA has explicitly recognized, "[b]ecause excess amino acids are not
18 stored in the body, humans need a constant supply of good quality dietary proteins to
19 support growth and development." 58 Fed. Reg. 2079 at 2101. High-quality proteins,
20 therefore, are those that contain all nine essential amino acids because they have a
21 greater effect on protein synthesis and are fully digestible. A dietary protein
22 containing all of the essential amino acids in the correct proportions is typically called
23 a "complete protein."

24 33. A protein source's digestibility also affects the amount of useable protein
25 a person receives from consuming it. Plant-based proteins like oats are approximately
26 80% digestible, meaning 20% of the protein from that source will simply pass through
27 the body without ever being absorbed at all.
28

1 34. As the FDA has stated in official guidance, “Accurate methods for
2 determining protein quality are necessary because different food protein sources are
3 not equivalent in their ability to support growth and body protein maintenance.” 56
4 Fed. Reg. 60366, § B. The Protein Digestibility Corrected Amino Acid Score
5 (“PDCAAS”), is the FDA mandated measure of protein quality, and it accounts for
6 both the amino acid profile and the digestibility of the protein. 21 C.F.R. §
7 101.9(c)(7)(ii).

8 35. The PDCAAS method requires the manufacturer to determine the
9 amount of essential amino acids that the food contains and then combine that with
10 the proteins’ digestibility into an overall discount factor (i.e., a “score” from 0.0-1.0)
11 that represents the actual amount of protein the food provides nutritionally when
12 multiplied by raw protein quantity. The regulations term this the “corrected amount
13 of protein per serving.” 21 C.F.R. § 101.9(c)(7)(i).

14 36. Defendant uses plant-based proteins in its products. Because of the
15 differences in benefits depending on the amino acid composition of a protein, the
16 source of protein is important. Although some plants can be high quality protein
17 sources, most plant-based proteins do not contain all nine essential amino acids and
18 are low quality to humans. Chickpea and pea proteins all have PDCAAS scores of
19 between .75. and .93, meaning approximately 7-25% of the protein from those sources
20 will be useless to humans nutritionally speaking.

21 37. Accordingly, Defendant’s use of low-quality proteins in the Products
22 means that they actually provide far less protein to humans than the Product labels
23 claim.

24 **C. Defendant Violates Identical Federal and State Regulations**

25 **a. Federal and State Regulations are Identical**

26 38. The FDA oversees the regulation and labeling of food pursuant to the
27 Federal Food, Drug and Cosmetic Act (“FDCA”).
28

39. California’s Sherman Food, Drug and Cosmetic Law, Cal. Heath & Saf. Code § 110765 et seq. (the “Sherman Law”), incorporates all food labeling regulations promulgated by the FDA under the FDCA. *See e.g.*, Cal. Heath & Saf. Code § 110100(a) (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.”), § 110380 and § 110505.

40. The federal laws and regulations discussed below are applicable nationwide to all sales of packaged food products. Additionally, none of the California laws sought to be enforced here imposes different requirements on the labeling of packaged food for sale in the United States.

41. To be clear, Plaintiff does not allege any claims pursuant to the FDCA and Sherman Law and relies on these regulations only to the extent they provide a predicate basis for liability under state and common law, as set forth herein.

b. Regulations Governing the Labeling of Food Products

42. 21 U.S.C. § 343 addresses misbranded food and states that a “food shall be deemed to be misbranded – (a) If (1) its labeling is false or misleading in any particular, or (2) in the case of a food to which section 350 of this title applies, its advertising is false or misleading in a material respect or its labeling is in violation of section 350(b)(2) of this title.” *See* 21 U.S.C. § 343(a).

43. Generally, a manufacturer is not required to include the DRV for protein. However, when a product’s label makes a nutrient content claim related to protein content, the manufacturer is required to include the DRV.⁸

44. To make a claim that a food is “high” in protein, the foods must meet a certain level of Reference Daily Intake (RDI) or Daily Reference Value (DRV). For

⁸ 21 C.F.R. § 101.9(c)(7) and *see Guidance for Industry: A Food Labeling Guide*, U.S. FOOD & DRUG ADMINISTRATION, <https://www.fda.gov/files/food/published/Food-Labeling-Guide-%28PDF%29.pdf> at N22 (“The percent of the DRV is required if a protein claim is made for the product or if the product is represented or purported to be for use by infants or children under 4 years of age.”) (last visited March 20, 2022).

1 example, 21 C.F.R. § 101.54 requires that the “food contains 20 percent or more of the
2 RDI or the DRV per reference amount customarily consumed.”

3
4 **c. The High Protein Claims Were Unlawful and Deceptive Because
the Products Are Not High in Protein.**

5 45. The Products contain less than the required 20% DRV to make “high
6 protein” claims.

7 46. Even if the proteins were nutritionally complete proteins, the Products
8 only contain 16% of the DRV for protein.

9 47. With the PDCAAS adjustment, this number is further diminished.

10 48. Defendant’s representation that the Products are high protein violates
11 both state and federal law.

12
13 **d. The Front and Back Label Protein Claims Were Unlawful Due to
14 the Omission of the %DV Inside the NFP as was the NFP Itself.**

15 49. A nutrient content claim is a claim that “expressly or implicitly
16 characterizes the level of a nutrient.” 21 C.F.R. § 101.13(b). “Express” nutrient
17 content claims include any statement outside the Nutrition Facts Panel, about the
18 level of a nutrient. 21 C.F.R. 101.13(b)(1). Moreover, stating information from the
19 nutrition facts panel (such as grams protein per serving) elsewhere on the package
20 necessarily constitutes a nutrient content claim. 21 C.F.R. § 101.13(c).

21 50. The FDA has always considered nutrient content claims to be “a
22 marketing activity,” the purpose of which is to advertise a specific product as a
23 “significant source” of the relevant nutrient. 56 Fed. Reg. 60366, 60372, 60375. The
24 FDA has long been suspicious of nutrient content claims and has repeatedly stated
25 that such claims can be misleading, so the rules that govern them are far more
26 restrictive. Indeed, “the general rule is that ‘nutrient content claims’ are not
27 permitted on food labels” and must instead satisfy all of the requirements of § 101.13
28 before being authorized to appear at all.

1 51. FDA regulations specifically condition the ability to make a nutrient
 2 content claim on compliance with the rules governing the NFP. Section 101.9(c)(7)(i),
 3 in particular, sets forth special rules for the NFP when manufacturers make a
 4 protein claim outside the NFP. It provides that “[a] statement of the corrected
 5 amount of protein per serving, as determined in paragraph (c)(7)(ii) of this section,
 6 calculated as a percentage of the RDI or DRV for protein, as appropriate, and
 7 expressed as a Percent of Daily Value . . . shall be given if a protein claim is made for
 8 the product . . .” 21 C.F.R. 101.9(c)(7)(i) (emphasis added). If a manufacturer does not
 9 want to perform PDCAAS and provide a statement of the corrected amount of protein
 10 per serving in the NFP, then it shall not make any protein claims.

11 52. The regulation governing nutrient content claims, section 101.13, also
 12 makes this plain. Section 101.13(n) provides that “[n]utrition labeling in accordance
 13 with § 101.9 . . . shall be provided for any food for which a nutrient content claim is
 14 made” and § 101.13(b) states “a nutrient content claim[] may not be made on the label
 15 . . . unless the claim is made in accordance with this regulation [i.e., § 101.13]” In
 16 other words, a manufacturer may not make any protein nutrient content claims on
 17 the labels of their products unless they have complied with the requirements for
 18 protein labeling in the nutrition facts panel pursuant to section 101.9(c)(7). Indeed,
 19 the FDA made clear when promulgating § 101.13(n) that it means that a
 20 manufacturer can only make “a nutrient content claim . . . on the label or in labeling
 21 of a food, provided that the food bears nutrition labeling that complies with the
 22 requirements in proposed § 101.9.” 58 Fed. Reg. 2302, 23310.

23 53. Further, FDA regulations require the %DV for protein to be calculated
 24 using PDCAAS, a method that accounts for both protein quantity and protein quality.
 25 21 C.F.R. § 101.9(c)(7)(i)-(iii); FDA Food Labeling Guide, p. 29, Question N.22.4 The
 26 first step is to calculate the “corrected amount of protein per serving” by multiplying
 27 protein quantity by the PDCAAS quality value, and then dividing that “corrected
 28

1 amount” by 50 grams (the “recommended daily value” for protein) to come up with the
2 %DV. *Id.*

3 54. The Products, currently or during the Class Period, all made protein
4 claims on the label but failed to provide a statement of the corrected amount of
5 protein per serving in the NFP calculated according to the PDCAAS method. The
6 protein claims on the Products are, therefore, unlawful, and were never permitted to
7 be on the labels in the first instance under §§ 101.9(c)(7)(i), 101.13(n), and 101.13(b).

8 55. Defendant’s failure to include a statement of the corrected amount of
9 protein per serving expressed as a %DV in the NFP also renders the NFP itself
10 unlawful under §§ 101.9(c)(7)(i)-(iii).

11 56. Defendant’s Products are, therefore, unlawful, misbranded, and violate
12 the Sherman Law, California Health & Safety Code § 110660, *et seq.* Defendant,
13 currently and during the Class Period, made protein content claims on the front and
14 back of its Product packages even though it uniformly failed to provide a statement of
15 the corrected amount of protein per serving in the NFP calculated according to the
16 PDCAAS method and expressed as a %DV as required by 21 C.F.R. § 101.9(c)(7)(i).
17 Defendant’s failure to comply with this requirement render these protein claims
18 unlawful per se and the product misbranded pursuant to § 101.13(n) and (b), as well
19 as under § 101.9(c)(7)(i) itself. Defendant’s NFPs are also unlawful and in violation of
20 § 101.9(c)(7)(i)-(iii).

21
22 **e. The Products’ Labeling Violates Federal and State Regulations**

23 57. Defendant’s marketing, advertising, and sale of the Products violates the
24 misbranding provisions of the Sherman Law (California Health & Safety Code §
25 110660, *et seq.*), including but not limited to:

- 26 i. Section 110665 (a food is misbranded if its labeling does not
27 conform with the requirements for nutrition labeling as set forth
28 in 21 U.S.C. Sec. 11 343(q));

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- 1 ii. Section 110705 (a food is misbranded if words, statements and
- 2 other information required by the Sherman Law to appear on food
- 3 labeling is either missing or not sufficiently conspicuous);
- 4 iii. Section 110760, which makes it unlawful for any person to
- 5 manufacture, sell, deliver, hold, or offer for sale any food that is
- 6 misbranded;
- 7 iv. Section 110765, which makes it unlawful for any person to
- 8 misbrand any food; and
- 9 v. Section 110770, which makes it unlawful for any person to receive
- 10 in commerce any food that is misbranded or to deliver or proffer
- 11 for delivery any such food.

12 58. Defendant's marketing, advertising, and sale of the Products also
13 violates the false advertising provisions of the Sherman Law (California Health &
14 Safety Code § 110390, *et. seq.*), including, but not limited to:

- 15 i. Section 110390, which makes it unlawful to disseminate false or
- 16 misleading food advertisements that include statements on
- 17 products and product packaging or labeling or any other medium
- 18 used to directly or indirectly induce the purchase of a food
- 19 product;
- 20 ii. Section 110395, which makes it unlawful to manufacture, sell,
- 21 deliver, hold or offer to sell any falsely or misleadingly advertised
- 22 food; and
- 23 iii. Sections 110398 and 110400, which make it unlawful to advertise
- 24 misbranded food or to deliver or proffer for delivery any food that
- 25 has been falsely or misleadingly advertised.

26 59. By failing to include on the Product labels the nutritional information
27 required by law, Defendant has violated the Act and the standards set by FDA
28 regulations, including but not limited to 21 C.F.R. § 101.9 (c)(7) and 21 C.F.R. §§

1 101.13(i)(3), (b), (n), which have been incorporated by reference into the Sherman
2 Law.

3 60. The aforementioned Sherman Law provisions stem from California's
4 traditional, historic police power to regulate food labels, which long predates the
5 FDCA. *See Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894) ("If there be any
6 subject over which it would seem the states ought to have plenary control, and the
7 power to legislate in respect to which . . . it is the protection of the people against
8 fraud and deception in the sale of food products"); *see also Brown v. Van's Int'l Foods,*
9 *Inc.*, No. 3:22-cv-00001-WHO, 2022 WL 1471454, at *7 (N.D. Cal. May 10, 2022)
10 ("[s]tates have traditionally possessed the power to protect their citizens from fraud
11 and deception in the sale of food, and therefore there is a strong presumption against
12 federal preemption in the area of marketing food"), quoting *Clancy v. Bromley Tea*
13 *Co.*, 308 F.R.D. 564, 573 (N.D. Cal. 2013).

14 61. Moreover, while the Sherman Law directly incorporates the FDA food
15 labeling regulations in Section 110665, Plaintiff base his claims on other Sherman
16 Law provisions that independently prohibit the dissemination of "false or misleading
17 food advertisements" (which include food labels) and the misbranding of food,
18 including Sections 110705, 110760, 110765, 110390, 11039, 110398. These provisions,
19 in particular, would exist even if the FDCA did not.

20
21 **f. The Omission of the %DV Was Misleading Under Traditional**
22 **State Law Prohibitions Against Fraudulent and Deceptive**
23 **Advertising.**

24 62. In addition to violating the aforementioned statutes, Defendant has
25 violated the traditional common law duty not to commit fraud and mislead consumers
26 about the characteristics and qualities of its Products, as well as traditional state law
27 prohibitions on false and misleading advertising that long predate the FDCA or
28 Sherman Law.

1 63. Defendant's use of protein nutrient content claims, while failing to
2 include the required statement of the corrected amount of protein per serving in the
3 NFP calculated using the PDCAAS method and expressed as a %DV, is misleading.
4 Reasonable consumers are unaware of the nutritional value of various protein sources
5 and upon seeing a front-label or back-label quantitative protein claim reasonably
6 believe that all of the advertised protein will be nutritionally available—i.e., that the
7 product contains high quality proteins. Had Defendant complied with the law, the
8 statement of the corrected amount of protein expressed as a %DV would have
9 revealed that the Products provide significantly less of the daily value of protein than
10 high quality protein products with comparable protein quantities. Had reasonable
11 consumers been informed of the %DV for protein, as required by FDA regulations,
12 they would not have purchased or would have paid less for the Products.

13 64. Consumers lack the meaningful ability to test or independently
14 ascertain the truthfulness of Defendant's food labeling claims, especially at the point
15 of sale. They would not know the quality of protein in the Products or how much of
16 the daily recommended value of protein they provide merely by looking elsewhere on
17 the product package given Defendant's omissions. Its discovery requires investigation
18 well beyond the grocery store aisle and knowledge of food chemistry beyond that of
19 the average consumer. An average consumer does not have the specialized knowledge
20 necessary to ascertain the nutritional value of the protein in the Products. The
21 average reasonable consumer had no reason to suspect that Defendant's
22 representations and omissions on the packages were misleading.

23 65. Defendant intends and knows that consumers will and do rely upon food
24 labeling statements in making their purchasing decisions. Label claims and other
25 forms of advertising and marketing drive product sales, particularly if placed
26 prominently on the front of product packaging, as Defendant has done with its
27 protein claims.
28

1 66. Defendant's duty not to mislead consumers about the quality or
2 nutritional value of the protein in its products does not stem from either the FDCA or
3 California's Sherman Law. Instead, that duty stems from traditional California
4 prohibitions on misleading and deceptive advertising (including prohibitions on
5 fraudulent omissions) that long predate the FDCA or Sherman Law, including the
6 UCL's fraud prong, the CLRA, the FAL, and the common law tort of fraud.

7
8 **g. Defendant Misleadingly Markets the Products to Increase
9 Profits and Gain a Competitive Edge**

10 67. In making unlawful, false, misleading, and deceptive representations,
11 Defendant distinguishes the Products from its competitors' products. Defendant knew
12 and intended that consumers would purchase, and pay a premium for, products
13 labeled with protein claims and that failed to reveal they provide less of the daily
14 value of protein than comparable products with high quality proteins. By using this
15 branding and marketing strategy, Defendant is stating that the Products are superior
16 to, better than, and more nutritious and healthful than other products that do not
17 make protein claims, or that do not make protein claims based on poorly- disclosed
18 added ingredients, or that properly provide the required statement of the corrected
19 amount of protein in the product as determined by the PDCAAS method and express
20 as a %DV and otherwise do not mislead consumers about the quality or nutritional
21 value of the protein in its products.

22 **h. Defendant Intends to Continue to Market the Products with
23 Protein Claims**

24 68. Because consumers pay a price premium for products that make protein
25 claims, and also pay a premium for products that provide more protein, by labeling its
26 Products with protein claims and/or omitting the required statement of the corrected
27 amount of protein per serving, Defendant is able to both increase its sales and retain
28 more profits.

69. Defendant engaged in the practices complained of herein to further its private interests of: (i) increasing sales of the Products while decreasing the sales of competitors that do not misrepresent the number of grams of protein contained in its products, and/or (ii) commanding a higher price for its Products because consumers will pay more for the Products due to consumers' demand for products with protein claims.

70. The market for protein products is continuing to grow and expand, and because Defendant knows consumers rely on representations about the number of grams of protein in food products, Defendant has an incentive to continue to make such unlawful and misleading representations. In addition, other trends suggest that Defendant has no incentive to change its labeling practices.

71. For example, one market analysis revealed that between 2013-2017, product launches with a protein claim grew 31%.⁹

72. To capitalize on the growing market, Defendant continues to launch new product lines and flavors to diversify its portfolio to maintain its competitive edge. Moreover, Defendant has continued to replicate its misrepresentations on new products. It is therefore likely that Defendant will continue to unlawfully and/or misleadingly advertise the Products and perpetuate the misrepresentations regarding the protein in the Products.

C. Plaintiff and Consumers Purchased the Products to Their Detriment

73. Plaintiff and the Class Members reasonably relied to their detriment on Defendant's misleading representations and omissions.

74. Defendant's false, misleading, and deceptive misrepresentations and omissions are likely to continue to deceive and mislead reasonable consumers and the

⁹ Gil Hyslop, *10 Key Snack Trends to Watch*, BAKERYANDSNACKS.COM (Sep. 28, 2021), <https://www.bakeryandsnacks.com/Article/2018/11/26/10-key-snack-trends-to-watch>.

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1 general public, as they have already deceived and misled the Plaintiff and the Class
2 Members.

3 75. In making the false, misleading, and deceptive representations and
4 omissions described herein, Defendant knew and intended that consumers would pay
5 a premium for Products labeled high protein over comparable products not so labeled.

6 76. As an immediate, direct, and proximate result of Defendant's false,
7 misleading, and deceptive representations and omissions, Defendant injured the
8 Plaintiff and the Class Members in that they:

- 9 a. Paid a sum of money for Products that were not what Defendant
10 represented;
- 11 b. Paid a premium price for Products that were not what Defendant
12 represented;
- 13 c. Were deprived of the benefit of the bargain because the Products they
14 purchased were different from what Defendant warranted; and
- 15 d. Were deprived of the benefit of the bargain because the Products they
16 purchased had less value than what Defendant represented.

17 77. Had Defendant not made the false, misleading, and deceptive
18 representations and omissions, Plaintiff and the Class Members would not have been
19 willing to pay the same amount for the Products they purchased, and, consequently,
20 Plaintiff and the Class Members would not have been willing to purchase the
21 Products.

22 78. Plaintiff and the Class Members paid for Products that were represented
23 to have certain levels of protein but received Products that were deficient. The
24 products Plaintiff and the Class Members received were worth less than the Products
25 for which they paid.

26 79. Based on Defendant's misleading and deceptive representations,
27 Defendant was able to, and did, charge a premium price for the Products over the cost
28

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1 of competitive products that do not misrepresent the protein levels and are compliant
2 with the law.

3 80. Plaintiff and the Class Members all paid money for the Products.
4 However, Plaintiff and the Class Members did not obtain the full value of the
5 advertised Products due to Defendant's misrepresentations and omissions. Plaintiff
6 and the Class Members purchased, purchased more of, and/or paid more for, the
7 Products than they would have had they known the truth about the Products.
8 Consequently, Plaintiff and the Class Members have suffered injury in fact and lost
9 money as a result of Defendant's wrongful conduct.

10 **CLASS DEFINITIONS AND ALLEGATIONS**

11 81. Plaintiff brings this action as a class action pursuant to Federal Rule of
12 Civil Procedure 23 on behalf of himself, on behalf of all others similarly situated, and
13 as a member of the classes defined as follows (collectively, the "Class" or "Classes"):

- 14 1. All citizens of California who, within the relevant statute of
15 limitation periods, purchased Defendant's Products ("California
16 Class");
- 17 2. All citizens of the United States who, within the relevant statute
18 of limitations periods, purchased Defendant's Products
19 ("Nationwide Class").

20 82. Excluded from the Class are Defendant, its parents, subsidiaries,
21 affiliates, officers, and directors, those who purchased the Products for resale, all
22 persons who make a timely election to be excluded from the Class, the judge to whom
23 the case is assigned and any immediate family members thereof, and those who
24 assert claims for personal injury.

25 83. The members of the Class are so numerous that joinder of all Class
26 Members is impracticable. Defendant has sold, at a minimum, tens of thousands of
27 units of the Products to Class Members.
28

1 84. There is a well-defined community of interest in the questions of law and
2 fact involved in this case. Questions of law and fact common to the members of the
3 putative classes that predominate over questions that may affect individual Class
4 Members include, but are not limited to the following:

- 5 a. What is the PDCAAS for the protein in the Products;
- 6 b. Whether the marketing, advertising, packaging, labeling, and other
7 promotional materials for the Products are unlawful and/or misleading;
- 8 c. Whether Defendant's actions violate Federal and California laws
9 invoked herein;
- 10 d. Whether labeling the Products with a protein claim causes the Products
11 to command a price premium in the market;
- 12 e. Whether Defendant's failure to provide a statement of the corrected
13 amount of protein per serving in the Products sold to the Classes was
14 likely to deceive reasonable consumers;
- 15 f. Whether representations regarding the number of grams of protein in
16 the Products are material to a reasonable consumer;
- 17 g. Whether Defendant engaged in the behavior knowingly, recklessly, or
18 negligently;
- 19 h. The amount of profits and revenues Defendant earned as a result of the
20 conduct;
- 21 i. Whether Class members are entitled to restitution, injunctive and other
22 equitable relief and, if so, what is the nature (and amount) of such relief;
23 and
- 24 j. Whether Class members are entitled to payment of actual, incidental,
25 consequential, exemplary and/or statutory damages plus interest
26 thereon, and if so, what is the nature of such relief.

27 85. Plaintiff's claims are typical of those of other Class Members because
28 Plaintiff, like all members of the classes, purchased Defendant's Products bearing the

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1 high protein representations and Plaintiff sustained damages from Defendant's
2 wrongful conduct.

3 86. Plaintiff will fairly and adequately protect the interests of the classes
4 and has retained counsel that is experienced in litigating complex class actions.
5 Plaintiff has no interests which conflict with those of the classes.

6 87. A class action is superior to any other available means for the fair and
7 efficient adjudication of this controversy, and no unusual difficulties are likely to be
8 encountered in the management of this class action. The damages or other financial
9 detriment suffered by Plaintiff and the other Class Members are relatively small
10 compared to the burden and expense that would be required to individually litigate
11 their claims against Defendant, making it impracticable for Class Members to
12 individually seek redress for Defendant's wrongful conduct. Even if Class Members
13 could afford individual litigation, the court system could not. Individualized litigation
14 creates a potential for inconsistent or contradictory judgments, and increases the
15 delay and expense to all parties and the court system. By contrast, the class action
16 device presents far fewer management difficulties, and provides the benefits of single
17 adjudication, economies of scale, and comprehensive supervision by a single court.

18 88. The prerequisites to maintaining a class action for equitable relief are
19 met as Defendant has acted or refused to act on grounds generally applicable to the
20 classes, thereby making appropriate equitable relief with respect to the classes as a
21 whole.

22 89. The prosecution of separate actions by members of the classes would
23 create a risk of establishing inconsistent rulings and/or incompatible standards of
24 conduct for Defendant. For example, one court might enjoin Defendant from
25 performing the challenged acts, whereas another might not. Additionally, individual
26 actions could be dispositive of the interests of the classes even where certain Class
27 Members are not parties to such actions.
28

FIRST CLAIM FOR RELIEF

Violations of the Unfair Competition Law (“UCL”),

Cal. Bus. & Prof. Code §§ 17200 *et seq.*

90. Plaintiff repeats and realleges each and every factual allegation contained in the foregoing paragraphs as if fully set forth herein.

91. Plaintiff brings this claim individually and on behalf of the members of the proposed California Class against the Defendant.

92. Within four (4) years preceding the filing of this lawsuit, and at all times mentioned herein, Defendant has engaged, and continue to engage, in unlawful, unfair, and fraudulent trade practices in California by engaging in the unlawful, unfair, and fraudulent business practices outlined in this complaint.

93. In particular, Defendant has engaged, and continues to engage, in unlawful practices by, without limitation, violating the following state and federal laws: (i) the CLRA as described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman Law (Article 3), including without limitation, California Health & Safety Code §§ 110390, 110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705, 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and branding of food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to 21 C.F.R. § 101.9 (c)(7), which are incorporated into the Sherman Law (California Health & Safety Code §§ 110100(a), 110380, and 110505).

94. In particular, Defendant has engaged, and continues to engage, in unfair and fraudulent practices by, without limitation, the following: (i) unlawfully making a protein claim on the package without complying with the regulatory requirements for making a protein claim set forth in 21 C.F.R. § 101.9(c)(7)(i)-(iii) and incorporated by reference by California’s Sherman law; (ii) failing to provide a statement of the corrected amount of protein per serving in the NFP, calculated according to the

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1 PDCAAS method and expressed as a %DV, as required by FDA regulations; and (iii)
2 misleading reasonable consumers regarding the quality of protein in its products and
3 its contribution to consumers’ daily protein needs by omitting the %DV for protein.

4 95. Defendant’s conduct constitutes an unfair business act and practice
5 pursuant to California Business & Professions Code §§ 17200, *et seq.* (the “UCL”). The
6 UCL provides, in pertinent part: “Unfair competition shall mean and include
7 unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or
8 misleading advertising”

9 96. Defendant’s knowing conduct, as alleged herein, constitutes an “unfair”
10 and/or “fraudulent” business practice, as set forth in California Business &
11 Professions Code §§ 17200-17208.

12 97. Defendant’s conduct was and continues to be unfair and fraudulent
13 because, directly or through its agents and employees, Defendant made materially
14 false representations and omissions.

15 98. As described herein, Defendant made representations that the Products
16 are high in protein when the Products are not high in protein.

17 99. Defendant is aware that the representations and omissions they have
18 made about the Products were and continue to be false and misleading.

19 100. Defendant had an improper motive—to derive financial gain at the
20 expense of accuracy or truthfulness—in its practices related to the labeling and
21 advertising of the Products.

22 101. There were reasonable alternatives available to Defendant to further its
23 legitimate business interests, other than the conduct described herein.

24 102. Defendant’s misrepresentations of material facts, as set forth herein,
25 also constitute an “unlawful” practice because they violate California Civil Code §§
26 1572, 1573, 1709, 1710, 1711, and 1770 and the laws and regulations cited herein, as
27 well as the common law.
28

1 103. Defendant's conduct in making the representations and omissions
2 described herein constitutes a knowing failure to adopt policies in accordance with
3 and adherence to applicable laws, as set forth herein, all of which are binding upon
4 and burdensome to their competitors. This conduct creates an unfair competitive
5 advantage for Defendant, thereby constituting an unfair business practice under
6 California Business & Professions Code §§ 17200-17208.

7 104. In addition, Defendant's conduct was, and continues to be, unfair in that
8 its injury to countless purchasers of the Products is substantial, and is not
9 outweighed by any countervailing benefits to consumers or to competitors.

10 105. Moreover, Plaintiff and members of the California Class could not have
11 reasonably avoided such injury. Defendant's material misrepresentations and
12 omissions regarding the Products were likely to deceive, and Defendant knew or
13 should have known that its misrepresentations and omissions were untrue and
14 misleading. Plaintiff purchased the Products in reliance on the representations made
15 by Defendant, including that the Products' labeling was accurate as alleged herein,
16 and without knowledge of Defendant's misrepresentations and omissions.

17 106. Plaintiff and those similarly situated relied to their detriment on
18 Defendant's unlawful, unfair, and fraudulent business practices. Had Plaintiff and
19 those similarly situated been adequately informed and not deceived by Defendant,
20 they would have acted differently by, without limitation: (i) declining to purchase the
21 Products, (ii) purchasing less of the Products, or (iii) paying less for the Products.

22 107. Defendant's acts and omissions are likely to deceive the general public.

23 108. Defendant engaged in these deceptive and unlawful practices to increase
24 its profits. Accordingly, Defendant has engaged in unlawful and fraudulent trade
25 practices, as defined and prohibited by section 17200, *et seq.* of the California
26 Business and Professions Code.

27 109. The aforementioned practices, which Defendant has used to its
28 significant financial gain, also constitute unlawful competition and provide an

1 unlawful advantage over Defendant’s competitors as well as injury to the general
2 public.

3 110. As a direct and proximate result of such actions, Plaintiff and the other
4 Class members have suffered and continue to suffer injury in fact and have lost
5 money and/or property as a result of such deceptive and/or unlawful trade practices
6 and unfair competition in an amount which will be proven at trial, but which is in
7 excess of the jurisdictional minimum of this Court. Among other things, Plaintiff and
8 the Class members lost the amount they paid for the Products.

9 111. As a direct and proximate result of such actions, Defendant has enjoyed,
10 and continues to enjoy, significant financial gain in an amount which will be proven
11 at trial, but which is in excess of the jurisdictional minimum of this Court.

12 112. Plaintiff seeks, on behalf of himself and those similarly situated,
13 equitable relief, including the restitution for the premium and/or full price that they
14 or others paid to Defendant as a result of Defendant’s conduct. Plaintiff and the Class
15 lack an adequate remedy at law to obtain such relief with respect to their
16 “unlawfulness” claims in this UCL cause of action because the California Sherman
17 Law does not provide a direct cause of action, so Plaintiff and the Class must allege
18 those violations as predicate acts under the UCL to obtain relief.

19 113. Plaintiff also seeks equitable relief, including restitution, with respect to
20 his UCL “fraudulent” prong claims. Pursuant to Federal Rule of Civil Procedure
21 8(e)(2), Plaintiff makes the following allegations in this paragraph only hypothetically
22 and as an alternative to any contrary allegations in their other causes of action, in
23 the event that such causes of action do not succeed. Plaintiff and the Class may be
24 unable to obtain monetary, declaratory and/or injunctive relief directly under other
25 causes of action and will lack an adequate remedy of law, if the Court requires them
26 to show class-wide reliance and materiality beyond the objective reasonable consumer
27 standard applied under the UCL, because Plaintiff may not be able to establish each
28 Class Member’s individualized understanding of Defendant’s misleading

1 representations as described in this Complaint, but the UCL does not require
2 individualized proof of deception or injury by absent class members. *See, e.g., Stearns*
3 *v Ticketmaster*, 655 F.3d 1013, 1020, 1023-25 (distinguishing, for purposes of CLRA
4 claim, among class members for whom website representations may have been
5 materially deficient, but requiring certification of UCL claim for entire class). In
6 addition, Plaintiff and the Class may be unable to obtain such relief under other
7 causes of action and will lack an adequate remedy at law, if Plaintiff is unable to
8 demonstrate the requisite *mens rea* (intent, reckless, and/or negligence), because the
9 UCL imposes no such *mens rea* requirement and liability exists even if Defendant
10 acted in good faith.

11 114. Plaintiff seeks, on behalf of those similarly situated, a declaration that
12 the above-described trade practices are fraudulent, unfair, and/or unlawful.

13 115. Plaintiff seeks, on behalf of those similarly situated, an injunction to
14 prohibit Defendant from continuing to engage in the deceptive and/or unlawful trade
15 practices complained of herein. Such misconduct by Defendant, unless and until
16 enjoined and restrained by order of this Court, will continue to cause injury in fact to
17 the general public and the loss of money and property in that Defendant will continue
18 to violate the laws of California, unless specifically ordered to comply with the same.
19 This expectation of future violations will require current and future consumers to
20 repeatedly and continuously seek legal redress in order to recover monies paid to
21 Defendant to which they were not entitled. Plaintiff and those similarly situated have
22 no other adequate remedy at law to ensure future compliance with the California
23 Business and Professions Code alleged to have been violated herein.

SECOND CLAIM FOR RELIEF

Violations of the False Advertising Law (“FAL”),

Cal. Bus. & Prof. Code §§ 17500 *et seq.*

116. Plaintiff repeats and realleges each and every factual allegation contained in the foregoing paragraphs as if fully set forth herein.

117. Plaintiff brings this claim individually and on behalf of the members of the proposed California Class against the Defendant.

118. Beginning at an exact date unknown to Plaintiff, but within four (4) years preceding the filing of the Class Action Complaint, Defendant made untrue, false, deceptive and/or misleading statements in connection with the advertising and marketing of the Products.

119. Defendant made representations and statements (by omission and commission) that led reasonable customers to believe that the Products that they were purchasing contained high quality proteins that provided nutritionally more grams of protein per serving than the Products actually provided, and that the Products were appropriate for meeting protein dietary needs. Defendant had a duty to disclose the corrected amount of protein per serving in the NFP, as calculated according to the PDCAAS method, which Defendant failed to do.

120. Plaintiff and those similarly situated relied to their detriment on Defendant’s false, misleading and deceptive advertising and marketing practices, including each of the misrepresentations and omissions set forth above. Had Plaintiff and those similarly situated been adequately informed and not intentionally deceived by Defendant, they would have acted differently by, without limitation, refraining from purchasing Defendant’s Products or paying less for them.

121. Defendant’s acts and omissions are likely to deceive the general public.

122. Defendant engaged in these false, misleading and deceptive advertising and marketing practices to increase its profits. Accordingly, Defendant has engaged

1 in false advertising, as defined and prohibited by section 17500, *et seq.* of the
2 California Business and Professions Code.

3 123. The aforementioned practices, which Defendant used, and continues to
4 use, to its significant financial gain, also constitute unlawful competition and provide
5 an unlawful advantage over Defendant's competitors as well as injury to the general
6 public.

7 124. As a direct and proximate result of such actions, Plaintiff and the other
8 members have suffered, and continue to suffer, injury in fact and have lost money
9 and/or property as a result of such false, deceptive and misleading advertising in an
10 amount which will be proven at trial, but which is in excess of the jurisdictional
11 minimum of this Court.

12 125. Plaintiff seeks, on behalf of himself and those similarly situated, full
13 restitution of monies, as necessary and according to proof, to restore any and all
14 monies acquired by Defendant from Plaintiff, the general public, or those similarly
15 situated by means of the false, misleading and deceptive advertising and marketing
16 practices complained of herein, plus 16interest thereon. Pursuant to Federal Rule of
17 Civil Procedure 8(e)(2), Plaintiff makes the following allegations in this paragraph
18 only hypothetically and as an alternative to any contrary allegations in his other
19 causes of action, in the event that such causes of action will not succeed. Plaintiff and
20 the Class may be unable to obtain monetary, declaratory and/or injunctive relief
21 directly under other causes of action and will lack an adequate remedy at law, if the
22 Court requires them to show class-wide reliance and materiality beyond the objective
23 reasonable consumer standard applied under the FAL, because Plaintiff may not be
24 able to establish each Class member's individualized understanding of Defendant's
25 misleading representations as described in this Complaint, but the FAL does not
26 require individualize proof of deception or injury by absent Class members. *See, e.g.,*
27 *Ries v. Ariz. Bevs. USA LLC*, 26 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("restitutionary
28 relief under the UCL and FAL 'is available without individualized proof of deception,

1 reliance, and injury.”). In addition, Plaintiff and the Class may be unable to obtain
 2 such relief under other causes of action and will lack an adequate remedy at law, if
 3 Plaintiff is unable to demonstrate the requisite *mens rea* (intent, reckless, and/or
 4 negligence), because the FAL imposes no such *mens rea* requirement and liability
 5 exists even if Defendant acted in good faith.

6 126. Plaintiff seeks, on behalf of himself and those similarly situated, a
 7 declaration that the above-described practices constitute false, misleading and
 8 deceptive advertising.

9 127. Plaintiff seeks, on behalf of himself and those similarly situated, an
 10 injunction to prohibit Defendant from continuing to engage in the false, misleading
 11 and deceptive advertising and marketing practices complained of herein. Such
 12 misconduct by Defendant, unless and until enjoined and restrained by order of this
 13 Court, will continue to cause injury in fact to the general public and the loss of money
 14 and property in that Defendant will continue to violate the laws of California, unless
 15 specifically ordered to comply with the same. This expectation of future violations will
 16 require current and future consumers to repeatedly and continuously seek legal
 17 redress in order to recover monies paid to Defendant to which it is not entitled.
 18 Plaintiff, those similarly situated, and/or other consumers nationwide have no other
 19 adequate remedy at law to ensure future compliance with the California Business
 20 and Professions Code alleged to have been violated herein.

21 22 **THIRD CLAIM FOR RELIEF**

23 **Violations of the Consumer Legal Remedies Act (“CLRA”),**

24 **Cal. Civ. Code §§ 1750 *et seq.***

25 128. Plaintiff repeats and realleges each and every factual allegation
 26 contained in the foregoing paragraphs as if fully set forth herein.

27 129. Plaintiff brings this claim individually and on behalf of the members of
 28 the proposed California Class against the Defendant.

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1 130. At all times relevant hereto, Plaintiff and members of the California
2 Class were “consumer[s],” as defined in Civil Code section 1761(d).

3 131. At all times relevant hereto, Defendant constituted a “person,” as
4 defined in Civil Code section 1761(c).

5 132. At all times relevant hereto, the Products manufactured, marketed,
6 advertised, and sold by Defendant constituted “goods,” as defined in Civil Code
7 section 1761(a).

8 133. The purchases of the Products by Plaintiff and members of the
9 California Class are “transactions” within the meaning of Civil Code section 1761(e).

10 134. Defendant’s acts, practices, and omissions, set forth in this Complaint,
11 led customers to falsely believe that the Products contained high quality proteins that
12 provided nutritionally the full amount of protein advertised on the product package.
13 By engaging in the actions, representations and conduct set forth in this Complaint,
14 Defendant has violated, and continues to violate, § 1770(a)(2), § 1770(a)(5), §
15 1770(a)(7), § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California Civil
16 Code §1770(a)(2), Defendant’s acts and practices constitute improper representations
17 regarding the source, sponsorship, approval, or certification of the goods they sold. In
18 violation of California Civil Code §1770(a)(5), Defendant’s acts and practices
19 constitute improper representations that the goods it sells have sponsorship,
20 approval, characteristics, ingredients, uses, benefits, or quantities, which they do not
21 have. In violation of California Civil Code § 1770(a)(7), Defendant’s acts, practices,
22 and omissions constitute improper representations that the goods it sells are of a
23 particular standard, quality, or grade, when they are of another. In violation of
24 California Civil Code §1770(a)(8),

25 135. Defendant deceptively markets and advertises that, unlike other protein
26 product manufacturers, it sells Products that provide nutritionally more grams of
27 protein than the Products actually do. In violation of California Civil Code
28

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1 §1770(a)(9), Defendant has advertised goods or services with intent not to sell them
2 as advertised.

3
4 136. Pursuant to the provisions of Cal. Civ. Code § 1782(a), Plaintiff provided
5 notice to Defendant of its alleged violations of the CLRA, demanding that Defendant
6 correct such violations, and providing it with the opportunity to correct its business
7 practices. Notice was sent via certified mail, return receipt requested on February 2,
8 2023. As of the date of filing this complaint, Defendant has not responded.
9 Accordingly, if after 30 days no satisfactory response to resolve this litigation on a
10 class-wide basis has been received, Plaintiff will seek leave to amend this request to
11 seek restitution and actual damages as provided by the CLRA.
12

13 137. Pursuant to California Civil Code § 1780, Plaintiff seeks injunctive
14 relief, reasonable attorneys' fees and costs, and any other relief that the Court deems
15 proper.
16

17 138. Defendant knew or should have known that its Products did not contain
18 the claimed characteristics because Defendant manufactured, marketed and sold its
19 Products without those characteristics that it claimed. Defendant knew or should
20 have known that its representations about its products as described herein violated
21 consumer protection laws, and that these statements would be relied upon by
22 Plaintiff and members of the California Class.

23 139. Defendant's actions as described herein were done with conscious
24 disregard of Plaintiff's and California Class Members' rights and was wanton and
25 malicious.

26 140. Defendant's wrongful business practices constituted, and constitute, a
27 continuing course of conduct in violation of the CLRA since Defendant is still
28 representing that its Products have characteristics which they do not have.

FOURTH CLAIM FOR RELIEF

Unjust Enrichment

1
2
3 141. Plaintiff repeats and realleges each and every allegation contained in
4 the foregoing paragraphs as if fully set forth herein.

5 142. Plaintiff brings this claim individually and on behalf of the members of
6 the proposed Classes against the Defendant.

7 143. At all times relevant hereto, Defendant deceptively marketed,
8 advertised, and sold merchandise to Plaintiff and the Classes.

9
10 144. Plaintiff and members of the Classes conferred upon Defendant
11 nongratuitous payments for the Products that they would not have if not for
12 Defendant's deceptive advertising and marketing. Defendant accepted or retained the
13 nongratuitous benefits conferred by Plaintiff and members of the Classes, with full
14 knowledge and awareness that, as a result of Defendant's deception, Plaintiff and
15 members of the Classes were not receiving a product of the quality, nature, fitness, or
16 value that had been represented by Defendant and reasonable consumers would have
17 expected.
18

19 145. Defendant has been unjustly enriched in retaining the revenues derived
20 from Plaintiff's and Class Members' purchases of the Products. Retention of those
21 monies under these circumstances is unjust and inequitable because of Defendant's
22 misrepresentations about the Products, which caused injuries to Plaintiff and Class
23 Members because they would not have purchased the Products if the true facts had
24 been known.
25

26
27 146. Because Defendant's retention of the non-gratuitous benefits conferred
28 on it by Plaintiff and members of the Classes is unjust and inequitable, Defendant

1 must pay restitution to Plaintiff and members of the Classes for its unjust
2 enrichment, as ordered by the Court.

3 **RELIEF DEMANDED**

4 **WHEREFORE**, Plaintiff, individually and on behalf of all others similarly
5 situated, seeks judgment against Defendant, as follows:

- 6 a. Certification of the proposed Classes, including
7 appointment of Plaintiff's counsel as class counsel;
8 b. An order temporarily and permanently enjoining
9 Defendant from continuing the unlawful, deceptive,
10 fraudulent, and unfair business practices alleged in
11 this Complaint;
12 c. An award of compensatory damages in an amount to
13 be determined at trial, except for those causes of
14 action where compensatory damages are not legally
15 available;
16 d. An award of statutory damages in an amount to be
17 determined at trial, except for those causes of action
18 where statutory damages are not legally available;
19 e. An award of punitive damages in an amount to be
20 determined at trial, except for those causes of action
21 where punitive damages are not legally available;
22 f. An award of treble damages, except for those causes
23 of action where treble damages are not legally
24 available;
25 g. An award of restitution in an amount to be
26 determined at trial;
27 h. An order requiring Defendant to pay both pre- and
28 post-judgment interest on any amounts awarded;

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- i. For reasonable attorneys’ fees and the costs of suit incurred; and
- j. For such further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all causes of action and issues so triable.

Dated: February 2, 2023

Respectfully submitted,

By: /s/ J. Ryan Gustafson _____
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**pro hac vice to be sought*

Counsel for Plaintiff and the 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

Jose Luna, individually, and on behalf of those similarly situated,

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

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

GOOD | GUSTAFSON | AUMAIS LLP SHENAQ PC The Keeton Firm LLC
2330 Westwood Boulevard, Suite 103 3500 Lenox Road, Ste. 1500 100 S Commons, Ste. 102
Los Angeles, California 90064 Atlanta GA 30326 Pittsburgh, PA 15212
Telephone: (310) 274-4663 Telephone: (888) 909-9993 Telephone: (888) 412-4291

DEFENDANTS

Three Wishes Foods, Inc.

County of Residence of First Listed Defendant New York (NY) (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

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

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant X 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)

Table with columns PTF and DEF for Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

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

Large table with categories: CONTRACT, REAL PROPERTY, PERSONAL INJURY, CIVIL RIGHTS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

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

- X 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): 28 U.S.C. Section 1332(d)(2) (Diversity Jurisdiction)

Brief description of cause:

Consumer Fraud - Deceptive, Misleading, and Fraudulent Marketing of Food Products

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ 5,000,001.00

CHECK YES only if demanded in complaint: JURY DEMAND: X 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) X SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE February 2, 2023

SIGNATURE OF ATTORNEY OF RECORD

/s/ J. Ryan Gustafson

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.