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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

REBECCA RAUSCH, an individual, on
behalf of herself, the general public, and
those similarly situated,

Plaintiff,

v.

FLATOUT, INC.,

Defendant.

CASE NO.

**CLASS ACTION COMPLAINT FOR
VIOLATION OF THE CALIFORNIA
CONSUMERS LEGAL REMEDIES ACT;
FALSE ADVERTISING; FRAUD, DECEIT,
AND/OR MISREPRESENTATION;
UNFAIR BUSINESS PRACTICES; AND
UNJUST ENRICHMENT**

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. Plaintiff Rebecca Rausch, by and through her counsel, bring this class action
3 against Defendant Flatout, Inc. (“Defendant”) to seek redress for its unlawful and deceptive
4 practices in labeling and marketing its flatbread products.

5 2. Consumers are increasingly health conscious and, as a result, many consumers
6 seek foods high in protein. To capitalize on this trend, Defendant prominently labels its Flatout
7 brand flatbread products as providing specific amounts of protein per serving depending on the
8 product, such as “6g PROTEIN” per serving on the front label of its Flatout Light Italian Herb
9 Flatbread. Consumers, in turn, reasonably expect that each product will actually provide the
10 amount of protein per serving claimed on the front of the product package in a form the body can
11 use.

12 3. The Food and Drug Administration (“FDA”) prohibits such front label claims
13 about the amount of protein, unless manufacturers also provide additional information in the
14 nutrition fact panel about how much of the recommended daily value for protein that the product
15 will actually provide. 21 C.F.R. §§ 101.9(c)(7)(i), 101.13(b), (n). That is because the FDA
16 recognizes that (1) when manufacturers tout an amount of protein on the front label, that amount
17 is likely to be material to purchasing decisions, even though reasonable consumers may not know
18 the total amount of protein they need to ingest on a daily basis, and (2) not all proteins are the
19 same in their ability to meet human nutritional requirements, so a simple statement about the
20 number of grams does not actually inform consumers about how much usable protein they are
21 receiving. Some proteins are deficient in one or more of the nine amino acids essential to human
22 protein synthesis and/or are not fully digestible within the human gut. When a human body uses
23 up the least prevalent essential amino acid from a food product, protein synthesis shuts down and
24 all of the remaining amino acids from that protein source degrade mostly into waste. Likewise,
25 whatever portion of a protein source is not digestible is similarly unavailable for protein synthesis.
26 A protein’s ability to support human nutritional requirements is known as its “quality.”

27 4. The FDA required method for measuring protein quality is called the “Protein
28 Digestibility Corrected Amino Acid Score”—known by its acronym PDCAAS (pronounced Pee-

1 Dee-Kass). It combines a protein source’s amino acid profile and its percent digestibility into a
2 discount factor ranging from 0.0 to 1.0 that, when multiplied by the total protein quantity, shows
3 how much protein in a product is actually available to support human nutritional requirements.
4 The regulations term this the “corrected amount of protein per serving.” 21 C.F.R.
5 § 101.9(c)(7)(ii). For example, a PDCAAS of .5 means that only half of the protein in that product
6 is actually available to support human protein needs. If the product contained 10 grams total
7 protein per serving, the corrected amount of protein would be only 5 grams per serving. As a
8 result, protein products can vary widely in their ability to support human protein needs—even
9 between two comparator products with the same total protein quantity.

10 5. Because consumers are generally unaware about the usability of various proteins,
11 and may even be unaware of the total amount of usable protein they should ingest each day, the
12 FDA prohibits manufacturers from advertising or promoting their products with a protein claim
13 unless they have satisfied two requirements. First, the manufacturer must calculate the “corrected
14 amount of protein per serving” based on the quality of the product’s protein using the PDCAAS
15 method. Second, the manufacturer must use the PDCAAS computation to provide “a statement
16 of the corrected amount of protein per serving” in the nutrition facts panel (“NFP”) “expressed
17 as” a percent daily value (“%DV”) and placed immediately adjacent to the statement of protein
18 quantity. 21 C.F.R. § 101.9(c)(7)(i)-(iii). The %DV is the corrected amount of protein per serving
19 divided by the daily reference value for protein of 50 grams. *Id.* Using the same example of a
20 product containing 10 grams total protein per serving with a PDCAAS of .5, the %DV is 10%
21 (5g/50g). Had all of the protein in the product been useful in human nutrition, the %DV would be
22 20% (10g/50g). The FDA regulations that govern nutrient content claims are also clear that the
23 manufacturer may not make any front label claims about the amount of protein in the product
24 unless it complies with these two requirements. *See* 21 C.F.R. § 101.13(b) (“A nutrient content
25 claim[] may not be made on the label...unless the claim is made in accordance with this regulation
26 [i.e., § 101.13]...” and (n) (“[n]utrition labeling in accordance with § 101.8...shall be provided
27 for any food for which a nutrient content claim is made”); *accord* 58 Fed. Reg. 2302, 23310
28 (manufacturer can only make a ”nutrient content claim...on the label or in labeling of a food,

1 provided that the food bears nutrition labeling that complies with the requirements in proposed §
2 101.9.”).

3 6. The primary protein source in Defendant’s products is wheat protein. Wheat is a
4 low quality protein with a PDCAAS score of between 0.4 and 0.5, which means Defendant’s
5 products will provide nutritionally as little as *half* of their total protein quantity. Nevertheless,
6 Defendant failed to provide in the NFP a statement of the corrected amount of protein per serving
7 calculated according to the PDCAAS methodology and expressed as a %DV. Accordingly, the
8 protein claims on the front of the package, such as “6g PROTEIN” are unlawful in violation of
9 parallel state and federal laws because Defendant did not comply with the regulatory requirements
10 for making a protein claim. 21 C.F.R. § 101.9(c)(7)(i), 101.13(b), (n). The failure to include a
11 statement of the corrected amount of protein inside the NFP also rendered the NFP itself unlawful.
12 *Id.* § 101.9(c)(7)(i).

13 7. Where a product makes a protein claim, the NFP is required to contain a statement
14 of the corrected amount of protein per serving calculated according to the PDCAAS methodology
15 and expressed as a %DV. Accordingly, the protein claims on the front of the flatbread packages,
16 such as “6g PROTEIN,” are unlawful in violation of parallel state and federal laws because
17 Defendant did not comply with the regulatory requirements for making a protein claim.

18 8. In addition to being unlawful under 21 CFR §§ 101.9 and 101.13, Defendant’s
19 prominent protein claim on the front of the package, in the absence of any statement of the
20 corrected amount of protein per serving expressed as a %DV in the NFP, also is likely to mislead
21 reasonable consumers. Consumers reasonably expect that Defendant’s products will actually
22 provide nutritionally the full amount of protein per serving claimed on the front of the package
23 and stated in the protein quantity section of the NFP. But Defendant’s products do not do so on
24 account of their low protein quality. Had Defendant included a statement of the corrected amount
25 of protein per serving in the NFP, as it was required to do under the law, it would have revealed
26 that the product provides nutritionally as little as half of their total protein quantity. That
27 information was material to reasonable consumers.

28

1 9. Additionally, Defendant’s protein claim is also misleading because it is stated in
2 the form of a quantitative amount appearing alone, without any information about protein quality.
3 FDA regulations prohibit a manufacturer from stating “the amount or percentage of a nutrient”
4 on the front label if it is “false or misleading in any respect.” 21 C.F.R. § 101.13(i)(3). The
5 primary protein source in Defendant’s products is wheat. Wheat is a low quality protein with a
6 PDCAAS score that ranges between 0.4 and 0.5. Accordingly, although Defendant advertises its
7 flatbreads, for example, with a “6g PROTEIN” claim, it actually provides, in a form that humans
8 can use, as little as 2 grams of protein, i.e., less than half the protein consumers reasonable expect
9 to receive based on the label. This is misleading.

10 10. Defendant’s unlawful and misleading protein claims caused Plaintiff and members
11 of the class to pay a price premium for the products.

12 **PARTIES**

13 11. Plaintiff Rebecca Rausch is, and at all times alleged in this Class Action Complaint
14 was, an individual and a resident of Pleasant Hill, California. Plaintiff Rausch makes her
15 permanent home in California and intends to remain in California.

16 12. Defendant Flat Out, Inc. is a corporation existing under the laws of Delaware, with
17 its principal place of business in Westerville, Ohio.

18 **JURISDICTION AND VENUE**

19 13. This Court has jurisdiction over the subject matter of this action pursuant to 28
20 U.S.C. § 1332(d)(2). The aggregate amount in controversy exceeds \$5,000,000, exclusive of
21 interest and costs; and Plaintiff and Defendant are citizens of different states.

22 14. The injuries, damages and/or harm upon which this action is based, occurred or
23 arose out of activities engaged in by Defendant within, affecting, and emanating from, the State
24 of California. Defendant regularly conducts and/or solicits business in, engages in other persistent
25 courses of conduct in, and/or derives substantial revenue from products provided to persons in
26 the State of California. Defendant has engaged, and continues to engage, in substantial and
27 continuous business practices in the State of California.
28

1 15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a
2 substantial part of the events or omissions giving rise to the claims occurred in the state of
3 California, including within this District.

4 16. In accordance with California Civil Code Section 1780(d), Ms. Rausch
5 concurrently files herewith a declaration establishing that, at various times throughout the class
6 period, she purchased Flatout flatbreads in both Italian Herb and Multigrain flavors. (Ms.
7 Rausch’s declaration is attached hereto as Exhibit A.)

8 17. Plaintiff accordingly alleges that jurisdiction and venue are proper in this Court.

9 **SUBSTANTIVE ALLEGATIONS**

10 18. Defendant manufactures, distributes, markets, advertises, and sells a variety of
11 consumer food products under the brand name “Flatout.” Some of these products, including its
12 flatbreads and pizza crusts, have packaging that predominately, uniformly, and consistently states
13 on the principal display panel of the product labels that they contain and provide a certain amount
14 of protein per serving. Plaintiff has attached, as Exhibit B, a non-exhaustive list of the Flatout
15 products that make protein claims on the front of the product packages. The products listed in
16 Exhibit B, and any other Flatout brand product that claims a specific amount of protein on the
17 front of its label, will hereinafter be referred to as the “Products.”

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

1
2 20. The nutrition facts panel on the back of the Products uniformly and consistently
3 failed to provide any statement of the corrected amount of protein per serving, expressed as
4 a %DV, throughout the Class Period. The nutrition facts panel of the Products has appeared
5 consistently throughout the Class Period in the general form of the following example (from the
6 Light Original Flatbread):





21. As described in detail below, Defendant’s advertising and labeling of the Products as containing and providing specific amounts of protein per serving is unlawful, misleading, and intended to induce consumers to purchase the Products at a premium price, while ultimately failing to meet consumer expectations. The Products’ front label protein claims are unlawful because Defendant did not: (1) calculate the “corrected amount of protein per serving” based on the quality of the product’s protein using the PDCAAS method; and (2) provide a statement of

1 that corrected amount of protein per serving in the NFP, expressed as %DV. 21 C.F.R. §
2 101.9(c)(7)(i) & (iii). Defendant's failure to comply with § 101.9 also makes the front label claims
3 unlawful under §§ 101.13(n) and (b). The unlawful front label protein claims induced consumers
4 to purchase the Products at a premium price. Had Defendant complied with FDA regulations and
5 not included a protein claim on the front label of its Products, reasonable consumers would not
6 have purchased or would have paid less for the Products. The front label protein claims are also
7 false and misleading because they deceive reasonable consumers into believing that a serving of
8 the Products will provide the grams of protein as represented on the label, when in fact, correcting
9 for the Products' poor protein quality through PDCAAS, the amount provided will be
10 approximately half or less because Defendant uses proteins of low biological value to humans in
11 its products, such as wheat-derived proteins.

12 22. Defendant's failure to provide the required statement of the corrected amount of
13 protein per serving, as well as Defendant's prominent front label protein claims made in the
14 absence of any statement of the corrected amount of protein in the NFP, also deceived and misled
15 reasonable consumers into believing that a serving of the Products will provide the grams of
16 protein represented on the label, when that is not true. Had Defendant complied with the law, the
17 statement of the corrected amount of protein would have revealed the Products provide
18 significantly less protein than claimed because Defendant uses low quality protein in its products,
19 such as wheat. The absence of this information also allowed Defendant to charge a price premium.
20 Had reasonable consumers been informed of the true amount of protein that the products provided
21 through a statement of the corrected amount of protein per serving, as required by FDA
22 regulations, they would not have purchased or would have paid less for the Products.

23 **Consumer Demand for Protein**

24 23. Many American consumers are health conscious and seek wholesome, natural
25 foods to keep a healthy diet, so they routinely rely upon nutrition information when selecting and
26 purchasing food items. This is especially true in the community of athletes, registered dietitians,
27 and coaches, to which Defendant markets. As noted by FDA Commissioner Margaret Hamburg
28 during an October 2009 media briefing, "[s]tudies show that consumers trust and believe the

1 nutrition facts information and that many consumers use it to help them build a healthy diet.”
2 Indeed, the FDA recommends relying on Nutrition Facts Labels as the primary tool to monitor
3 the consumption of protein.¹

4 24. Protein is found throughout the body—in muscle, bone, skin, hair, and virtually
5 every other body part or tissue. The health benefits of protein are well studied and wide ranging.
6 Scientific studies have confirmed that protein can assist in weight loss, reduce blood pressure,
7 reduce cholesterol, and control for risk factors for cardiovascular diseases. The National Academy
8 of Medicine recommends that adults get a minimum of .8 grams of protein for every kilogram of
9 body weight per day, or just over 7 grams for every 20 pounds of body weight.² For a 140-pound
10 person, that means about 50 grams of protein each day. For a 200-pound person, that means about
11 70 grams of protein each day.

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

18 26. Protein *quantity* by itself does not tell the full story of protein from a human
19 nutritional standpoint. A protein’s *quality* is also critical because humans cannot fully digest or
20 utilize some proteins. Proteins are not monolithic. They are simply chains of amino acids, and
21 different types of amino acids chained together in different ways will make different types of
22 proteins. Further, the makeup of the protein changes the function of that protein in the body, and
23 certain types of proteins are more easily digested and used by humans than others.

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25
26 ¹ FDA Protein Fact Sheet,

27 <https://www.accessdata.fda.gov/scripts/InteractiveNutritionFactsLabel/factsheets/Protein.pdf>

28 ² National Academies of Medicine. *Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients)*.

³ *Id.*

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

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

19 29. A protein source’s digestibility also affects the amount of useable protein a person
20 receives from consuming it. Many plant-based proteins like wheat are only 85% digestible,
21 meaning 15% of the protein from that source will simply pass through the body without ever
22 being absorbed at all.

23 30. As the FDA has stated in official guidance, “Accurate methods for determining
24 protein quality are necessary because different food protein sources are not equivalent in their
25 ability to support growth and body protein maintenance.” 56 Fed. Reg. 60366, § B. The Protein
26 Digestibility Corrected Amino Acid Score (“PDCAAS”), is the FDA mandated measure of
27 protein quality, and it accounts for both the amino acid profile and the digestibility of the protein.
28 21 C.F.R. § 101.9(c)(7)(ii).

1 31. The PDCAAS method requires the manufacturer to determine the amount of
2 essential amino acids that the food contains and then combine that with the proteins' digestibility
3 into an overall discount factor (i.e., a "score" from 0.0-1.0) that represents the actual amount of
4 protein the food provides nutritionally when multiplied by raw protein quantity. The regulations
5 term this the "corrected amount of protein per serving." 21 C.F.R. § 101.9(c)(7)(i).

6 32. Defendant uses plant-based proteins in its products. Because of the differences in
7 benefits depending on the amino acid composition of a protein, the source of protein is important.
8 protein does not contain all nine essential amino acids and is low quality to humans. Wheat
9 proteins typically have a PDCAAS of between .4 and .5, meaning only 40-50% of the protein
10 from those sources will be useable by humans as protein.

11 33. Accordingly, Defendant's use of low quality proteins means that they actually
12 provide far less protein to humans than the Product labels claim.

13 **Federal and State Regulations Governing Food Labeling**

14 34. Identical federal and California laws regulate the content of labels on packaged
15 food. The requirements of the federal Food, Drug & Cosmetic Act ("FDCA"), and its labeling
16 regulations, including those set forth in 21 C.F.R. §§ 101, 102, were adopted by the California
17 legislature in the Sherman Food Drug & Cosmetic Law (the "Sherman Law"). California Health
18 & Safety Code § 110100 ("All food labeling regulations and any amendments to those regulations
19 adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date
20 shall be the food labeling regulations of this state."). The federal laws and regulations discussed
21 below are applicable nationwide to all sales of packaged food products. Additionally, none of the
22 California laws sought to be enforced here imposes different requirements on the labeling of
23 packaged food for sale in the United States.

24 35. According to FDA regulations, "[a] statement of the corrected amount of protein
25 per serving, as determined in paragraph (c)(7)(ii) of this section, calculated as a percentage of the
26 RDI or DRV for protein, as appropriate, and expressed as a Percent of Daily Value . . . *shall* be
27 given if a protein claim is made for the product . . ." 21 C.F.R. 101.9(c)(7)(i) (emphasis added).
28 If a manufacturer does not want to perform PDCAAS and provide a statement of the corrected

1 amount of protein per serving in the NFP, then it shall not make any protein claims.

2 36. The regulation governing nutrient content claims, section 101.13, also makes this
 3 plain. Section 101.13(n) provides that “[n]utrition labeling in accordance with § 101.9 . . . shall
 4 be provided for any food for which a nutrient content claim is made” and § 101.13(b) states “a
 5 nutrient content claim[] may not be made on the label . . . unless the claim is made in accordance
 6 with this regulation [i.e., § 101.13] . . .” In other words, a manufacturer may not make any protein
 7 nutrient content claims on the front labels of their products unless they have complied with the
 8 requirements for protein labeling in the nutrition facts panel pursuant to section 101.9(c)(7).
 9 Indeed, the FDA made clear when promulgating § 101.13(n) that it means that a manufacturer
 10 can only make “a nutrient content claim . . . on the label or in labeling of a food, provided that the
 11 food bears nutrition labeling that complies with the requirements in proposed § 01.9.” 58 Fed.
 12 Reg. 2302, 23310.

13 37. Further, FDA regulations require the %DV for protein to be calculated using
 14 PDCAAS, a method that accounts for both protein quantity and protein quality. 21 C.F.R. §
 15 101.9(c)(7)(i)-(iii); FDA Food Labeling Guide, p. 29, Question N.22.⁴ The first step is to calculate
 16 the “corrected amount of protein per serving” by multiplying protein quantity by the PDCAAS
 17 quality value, and then dividing that “corrected amount” by 50 grams (the “recommended daily
 18 value” for protein) to come up with the %DV. *Id.*

19 38. The Products all make protein claims on the front label, but fail, uniformly to
 20 provide a statement of the corrected amount of protein per serving in the NFP calculated according
 21 to the PDCAAS method. The protein claims on the front are, therefore, unlawful, and were never
 22 permitted to be on the labels in the first instance under §§ 101.9(c)(7)(i), 101.13(n), and 101.13(b).

23 39. Defendant’s failure to include a statement of the corrected amount of protein per
 24 serving expressed as a %DV in the NFP also renders the NFP itself unlawful under §§

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 26
 27 ⁴ Guidance for Industry: A Food Labeling Guide (“FDA Food Labeling Guide”) p. 29, Question
 28 N22, U.S. Food & Drug Administration, <https://www.fda.gov/media/81606/download> (last
 accessed February 18, 2020).

1 101.9(c)(7)(i)-(iii).

2 40. Defendant's use of a front-label protein claim, while failing to include the required
3 statement of the corrected amount of protein per serving in the NFP calculated using the PDCAAS
4 method and expressed as a %DV, is also misleading. By failing to provide it, Defendant misled
5 consumers into believing that the Products provide a higher amount of protein than they really do.
6 It also enabled Defendant to conceal the fact that its Products consist of low quality proteins
7 derived from wheat that simply do not provide all of the protein that quantity alone represents.
8 Indeed, when promulgating 21 C.F.R. § 101.9(c)(7), the FDA explained in published guidance
9 that "Information on protein quantity alone can be misleading on foods that are of low protein
10 quality." It also explained that it was prohibiting manufacturers from making any protein claims
11 at all *unless* the manufacturer provides a statement of the corrected amount of protein per serving
12 in the NFP based on PDCAAS because "nutrition labeling must allow consumers to readily
13 identify foods with particularly low quality protein to prevent them from being misled by
14 information on only the amount of protein present." 58 Fed. Reg. 2079 at 2101-2.

15 41. Similarly, 21 C.F.R. § 101.13(i)(3) prohibits manufacturers from making a claim
16 on the front of a product's package about the "amount or percentage of a nutrient," such as protein,
17 if the statement is "false or misleading in any respect." If it is, then "it may not be made on the
18 label." 21 C.F.R. § 101.13(b). This is true even if the same amount appears in the nutrition facts
19 panel. 21 C.F.R. § 101.13(c). Since the omission of the %DV from the nutrition facts panel
20 rendered the front label protein claim misleading, the protein claim was not permitted to be on
21 the front label.

22 42. Under the FDCA, the term false has its usual meaning of "untruthful," while the
23 term misleading is a term of art that covers labels that are technically true, but are likely to deceive
24 consumers.

25 43. The FDA explained in promulgating section 101.13(i) that the regulation was
26 necessary "since many consumers have a limited knowledge and understanding of the amounts
27 of nutrients that are recommended for daily consumption," which means that "a statement
28 declaring that the product contained a specified amount of a nutrient could be misleading. By its

1 very presence, such a statement could give consumers who were unfamiliar with the dietary
2 recommendations the false impression that the product would assist them in maintaining healthy
3 dietary practices relative to the amount of the nutrient consumed when it, in fact, would not.” 56
4 Fed. Reg. 60421. The rules are different for amounts in the NFP and nutrient content claims
5 because a voluntary nutrient declaration on the front panel “is viewed by the agency as an effort
6 to market the food as a significant source of nutrients.” 56 Fed. Reg. 60366.

7 44. In addition to regulating the NFP, the FDA has promulgated a separate set of
8 regulations that govern nutrient content claims on the front of a package. 21 C.F.R. § 101.13. A
9 nutrient content claim is a claim that “expressly or implicitly characterizes the level of a nutrient.”
10 21 C.F.R. § 101.13(b). “Express” nutrient content claims include any statement outside the
11 Nutrition Facts Panel, about the level of a nutrient. 21 C.F.R. 101.13(b)(1); 21 C.F.R. § 101.13(c).
12 Stating information from the nutrition facts panel (such as grams protein per serving) elsewhere
13 on the package necessarily constitutes a nutrient content claim. 21 C.F.R. § 101.13(c). A
14 manufacturer cannot make a nutrient content claim in the form of a “statement about the amount
15 or percentage of a nutrient” if the statement is “false or misleading in any respect.” 21 C.F.R.
16 101.13(i)(3).

17 45. While a required statement *inside* of the NFP escapes regulations reserved for
18 nutrient content claims (21 C.F.R. § 101.13(c)), the identical statement *outside* of the NFP is still
19 considered a nutrient content claim and is therefore subject to 21 C.F.R. § 101.13(i)(3). 21 C.F.R.
20 § 101.13(c). Indeed, the Ninth Circuit has specifically held that “a requirement to state certain
21 facts in the nutrition label is not a license to make that statement elsewhere on the product.” *Reid v.*
22 *Johnson & Johnson*, 780 F.3d 952, 960 (9th Cir. 2015). Thus, Defendant’s quantitative protein
23 claims on the front label are subject to analysis as a nutrient content claim and cannot be false or
24 misleading in any manner.

25 46. Defendant’s protein representations on the front package are misleading because
26 they broadly tout protein quantity *alone* while ignoring that the poor quality proteins in the
27 Products will provide far less useable protein than claimed. The claim on the front is therefore
28 separately misleading and should never have appeared on the package.

Defendant’s Marketing and Labeling of the Products Violates State and Federal Food Labeling Laws

47. Defendant’s Products are unlawful, misbranded, and violate the Sherman Law, California Health & Safety Code § 110660, *et seq.* Defendant makes protein content claims on the front of its Product packages even though it uniformly fails to provide a statement of the corrected amount of protein per serving in the NFP calculated according to the PDCAAS method and expressed as a %DV as required by 21 C.F.R. § 101.9(c)(7)(i). Defendant’s failure to comply with this requirement render its front label protein claim unlawful per se and the product misbranded pursuant to § 101.13(n) and (b), as well as under § 101.9(c)(7)(i) itself. Defendant’s omission of the %DV from the NFP despite the fact that it makes front label protein claims is also unlawful and in violation of § 101.9(c)(7)(i)-(iii).

48. Defendant’s standalone, front label protein quantity claim is also misleading, and therefore prohibited by sections 101.13(i)(3), (b), and (n) due to Defendant’s failure to include a statement of the corrected amount of protein per serving in the NFP calculated using the PDCAAS method and expressed as a %DV. Consumers have a “limited knowledge and understanding of the amount of [protein] that [is] recommended for daily consumption,” let alone an understanding of the science behind protein quality and how different types of proteins are used and absorbed in the body. 56 Fed. Reg. 60421. The FDA requires a statement of the corrected amount of protein per serving in the NFP precisely to ensure that “consumers are not misled by information on only the amount of protein present” in a product with low quality protein. 58 Fed. Reg. 2079 at 2101-2. Defendant’s failure to provide it rendered the label misleading. Further, the front label is also misleading because it states that it provides a specific amount of protein per serving—such as “6g PROTEIN” for the Italian Herb Flatbread—when, in fact, after adjusting the protein content based on PDCAAS, the Products will provide approximately half that much protein.

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

- 1 a. Section 110665 (a food is misbranded if its labeling does not conform with
- 2 the requirements for nutrition labeling as set forth in 21 U.S.C. Sec.
- 3 343(q));
- 4 b. Section 110705 (a food is misbranded if words, statements and other
- 5 information required by the Sherman Law to appear food labeling is either
- 6 missing or not sufficiently conspicuous);
- 7 c. Section 110760, which makes it unlawful for any person to manufacture,
- 8 sell, deliver, hold, or offer for sale any food that is misbranded;
- 9 d. Section 110765, which makes it unlawful for any person to misbrand any
- 10 food; and
- 11 e. Section 110770, which makes it unlawful for any person to receive in
- 12 commerce any food that is misbranded or to deliver or proffer for delivery
- 13 any such food.

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

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

26 51. Defendant has violated 21 U.S.C. § 343(a), and the standards set by FDA
 27 regulations, including but not limited to 21 C.F.R. § 101.9 (c)(7), 21 C.F.R. § 101.13(i)(3), (b),
 28 (n), 21 C.F.R. § 101.9(h)(d), and 21 C.F.R. 101.9(e)(3) which have been incorporated by reference

1 in the Sherman Law, by failing to include on the Product labels the nutritional information
2 required by law.

3 52. A reasonable consumer would expect that the Products provide what Defendant
4 identifies them to provide on the product labels and that the labels would not be contrary to the
5 policies or regulations of the State of California and/or the FDA. For example, a reasonable
6 consumer would expect that when Defendant labels its Products as containing “6g PROTEIN”
7 per serving, as Defendant claimed on the Italian Herb Flatbread, the Product would provide 6
8 grams of protein per serving in a form their bodies could use. Because Defendant did not conduct
9 PDCAAS and provide a statement of the corrected amount of protein per serving, expressed as a
10 %DV, consumers have no idea that the Products provide significantly less protein.

11 53. Consumers lack the meaningful ability to test or independently ascertain the
12 truthfulness of Defendant’s food labeling claims, especially at the point of sale. Reasonable
13 consumers, when they look at the front label of the Products, believe the Products provide the
14 amount of protein represented on the front label. Because Defendant does not include any
15 information as to the quality of the protein anywhere on the packaging, even though it was legally
16 required to do so via the statement of corrected amount of protein expressed as a %DV, consumers
17 do not have any reason to think otherwise. Reasonable consumers do not walk around with the
18 PDCAAS values for various protein sources in their heads. They would not know the true amount
19 of protein the Products provide nutritionally merely by looking elsewhere on the product package.
20 Its discovery requires investigation well beyond the grocery store aisle and knowledge of food
21 chemistry beyond that of the average consumer. An average consumer does not have the
22 specialized knowledge necessary to ascertain that a serving of a Product does not provide the
23 number of grams of protein that is represented on the label. An average consumer also lacks the
24 specialized knowledge necessary to determine the PDCAAS for the Products. The average
25 reasonable consumer had no reason to suspect that Defendant’s representations on the packages
26 were misleading. Therefore, consumers had no reason to investigate whether the Products actually
27 do provide the amount of protein per serving that the labels claim they do and reasonably relied
28 on Defendant’s representations regarding the nature of the Products.

1 54. Defendant intends and knows that consumers will and do rely upon food labeling
2 statements in making their purchasing decisions. Label claims and other forms of advertising and
3 marketing drive product sales, particularly if placed prominently on the front of product
4 packaging, as Defendant has done with the claims on the Products that they contain and provide
5 specific amounts of protein per serving.

6 **Defendant Misleadingly Markets the Products to Increase Profits and Gain a Competitive**
7 **Edge**

8 55. In making unlawful, false, misleading, and deceptive representations, Defendant
9 distinguishes the Products from its competitors' products. Defendant knew and intended that
10 consumers would purchase, and pay a premium for, products labeled with a protein claim. By
11 using this branding and marketing strategy, Defendant is stating that the Products are superior to,
12 better than, and more nutritious and healthful than other products that do not make protein claims,
13 or that do not make protein claims based on poorly-disclosed added ingredients, or that properly
14 provide the required statement of the corrected amount of protein in the product as determined by
15 the PDCAAS method and express as a %DV and otherwise do not mislead consumers about the
16 amount of protein their products actually provide.

17 **Defendant Intends to Continue to Market the Products as Containing More Protein than**
18 **the Products Actually Contain**

19 56. Because consumers pay a price premium for products that make protein claims,
20 and also pay a premium for products that provide more protein, by labeling its Products with
21 protein claims and/or omitting the required statement of the corrected amount of protein per
22 serving than they actually provide, Defendant is able to both increase its sales and retain more
23 profits.

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

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

6 59. For example, one market analysis revealed that between 2013-2017, product
7 launches with a protein claim grew 31%.⁵

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

13 **PLAINTIFF’S EXPERIENCES**

14 61. On multiple occasions in the last four years, Plaintiff purchased the Flatout
15 flatbreads in both Italian Herb and Multigrain flavors from a Walmart retail store in Pinole,
16 California.

17 62. Plaintiff made each of her purchases after reading and relying on the truthfulness
18 of Defendant’s front labels that promised the Products provided a specific number of grams of
19 protein per serving. For example, she purchased the Flatout Italian Herb flatbreads relying on the
20 representation of “6g PROTEIN” on the front of the product package. She believed the truth of
21 each representation, i.e., that the product would actually provide her the specific amount of protein
22 claimed on the front labels in a form her body could utilize. Had Defendant complied with the
23 law, and not made the protein claims on the front of its packages in these circumstances, she
24 would not have been drawn to the Products and would not have purchased them. At a minimum,
25 Plaintiff would have paid less for each Product.

26 _____

27
28 ⁵ https://www.bakeryandsnacks.com/Article/2018/11/26/10-key-snack-trends-to-watch?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright

1 63. Moreover, had Defendant adequately disclosed the corrected amount of protein
2 per serving for each Product expressed as a %DV, as FDA regulations require, Plaintiff would
3 not have purchased the products or would have, at minimum, paid less for them. Plaintiff regularly
4 checks the NFP before purchasing any product for the first time, including the %DV column for
5 protein when manufacturers provide it, and she uses that information as a basis of comparison
6 between similar products. She looked at and read the NFP on the Flatout Italian Herb Flatbread
7 before purchasing it for the first time. Manufacturers do not always disclose a %DV for protein,
8 but when they do, she selects the product that provides more of the recommend daily amount of
9 protein (i.e., the one with a higher %DV). When a manufacturer does not provide a %DV for
10 protein, she can only go off of the stated grams of protein, and she assumes that all of those
11 disclosed grams are in a form her body can use as protein.

12 64. For example, with the Flatout Italian Herb flatbread, Plaintiff was looking for a
13 product that would provide her with 6 grams of useable protein per serving. Had she seen that the
14 product provided only 6% (or less) of the daily value for protein, i.e., only approximately 2-3
15 grams or less corrected amount of protein per serving, she would not have purchased the product
16 or, at a minimum, she would have paid less for it. Plaintiff would also have used the information
17 as a basis to compare similar products and would have chosen instead to purchase one with a
18 higher %DV. Without the statement of the corrected amount of protein per serving in the form of
19 a %DV, the only information Plaintiff had about the Products was the 6g protein quantity, and
20 she believed she was receiving the full amount of that quantity in a form her body could use.
21 Because the Products did not provide any statement of the corrected amount of protein per
22 serving, Plaintiff did not have any reason to believe that the Products provided less protein than
23 the amount represented on the front of the label. Plaintiff did in fact believe she was receiving 6
24 grams of high quality protein when she purchased the flatbread product.

25 65. Plaintiff continues to desire to purchase protein products, including those marketed
26 and sold by Defendant, and would like to purchase products that provide, for example, 6 grams
27 of protein per serving. If the Products were reformulated to provide in a usable form the grams of
28 protein that are represented on the labels, or the labels were reformulated to provide non-

1 **The Class:** All persons in the State of California who purchased the Products
2 between July 15, 2018 and the present.

3 68. This action has been brought and may properly be maintained as a class action
4 against Defendant because there is a well-defined community of interest in the litigation and the
5 proposed class is easily ascertainable.

6 69. Numerosity: Plaintiff does not know the exact size the Class, but she estimates that
7 it is composed of more than 100 persons. The persons in the Class are so numerous that the joinder
8 of all such persons is impracticable and the disposition of their claims in a class action rather than
9 in individual actions will benefit the parties and the courts.

10 70. Common Questions Predominate: This action involves common questions of law
11 and fact to the potential Class because each class member’s claim derives from the deceptive,
12 unlawful and/or unfair statements and omissions that led consumers to believe that the Products
13 contained the amount of protein as represented on the Product labels. The common questions of
14 law and fact predominate over individual questions, as proof of a common or single set of facts
15 will establish the right of each member of the Class to recover. The questions of law and fact
16 common to the Class are:

- 17 a. What is the PDCAAS for the protein in the Products;
- 18 b. Whether the marketing, advertising, packaging, labeling, and other
19 promotional materials for the Products are unlawful and/or misleading;
- 20 c. Whether Defendant’s actions violate Federal and California laws invoked
21 herein;
- 22 d. Whether labeling the Products with a protein claim causes the Products to
23 command a price premium in the market;
- 24 e. Whether Defendant’s failure to provide a statement of the corrected
25 amount of protein per serving in the Products sold to the Class and Subclass
26 members was likely to deceive reasonable consumers;
- 27 f. Whether representations regarding the number of grams of protein in the
28 Products are material to a reasonable consumer;

- 1 g. Whether Defendant engaged in the behavior knowingly, recklessly, or
- 2 negligently;
- 3 h. The amount of profits and revenues Defendant earned as a result of the
- 4 conduct;
- 5 i. Whether Class members are entitled to restitution, injunctive and other
- 6 equitable relief and, if so, what is the nature (and amount) of such relief;
- 7 and
- 8 j. Whether Class members are entitled to payment of actual, incidental,
- 9 consequential, exemplary and/or statutory damages plus interest thereon,
- 10 and if so, what is the nature of such relief.

11 71. Typicality: Plaintiff's claims are typical of the claims of the other members of the
12 Class because, among other things, all such claims arise out of the same wrongful course of
13 conduct engaged in by Defendant in violation of law as complained of herein. Further, the
14 damages of each member of the Class were caused directly by Defendant's wrongful conduct in
15 violation of the law as alleged herein.

16 72. Adequacy of Representation: Plaintiff will fairly and adequately protect the
17 interests of all Class members because it is in their best interests to prosecute the claims alleged
18 herein to obtain full compensation due to them for the unfair and illegal conduct of which they
19 complain. Plaintiff also has no interests that are in conflict with, or antagonistic to, the interests
20 of Class members. Plaintiff has retained highly competent and experienced class action attorneys
21 to represent her interests and that of the Class. By prevailing on her own claims, Plaintiff will
22 establish Defendant's liability to all Class members. Plaintiff and her counsel have the necessary
23 financial resources to adequately and vigorously litigate this class action, and Plaintiff and counsel
24 are aware of their fiduciary responsibilities to the Class members and are determined to diligently
25 discharge those duties by vigorously seeking the maximum possible recovery for Class members.

26 73. Superiority: There is no plain, speedy, or adequate remedy other than by
27 maintenance of this class action. The prosecution of individual remedies by members of the class
28 will tend to establish inconsistent standards of conduct for Defendant and result in the impairment

1 of Class members' rights and the disposition of their interests through actions to which they were
2 not parties. Class action treatment will permit a large number of similarly situated persons to
3 prosecute their common claims in a single forum simultaneously, efficiently, and without the
4 unnecessary duplication of effort and expense that numerous individual actions would engender.
5 Furthermore, as the damages suffered by each individual member of the class may be relatively
6 small, the expenses and burden of individual litigation would make it difficult or impossible for
7 individual members of the class to redress the wrongs done to them, while an important public
8 interest will be served by addressing the matter as a class action.

9 74. Plaintiff is unaware of any difficulties that are likely to be encountered in the
10 management of this action that would preclude its maintenance as a class action.

11 **CAUSES OF ACTION**

12 Plaintiff does not plead, and hereby disclaims, causes of action under the FDCA and
13 regulations promulgated thereunder by the FDA. Plaintiff relies on the FDCA and FDA
14 regulations only to the extent such laws and regulations have been separately enacted as state law
15 or regulation or provide a predicate basis of liability under the state and common laws cited in the
16 following causes of action.

17 **PLAINTIFF'S FIRST CAUSE OF ACTION**

18 **(Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code §
19 1750, *et seq.*)
20 **On Behalf of Plaintiff and the Class****

21 75. Plaintiff realleges and incorporates the paragraphs of this Class Action Complaint
22 as if set forth herein.

23 76. Defendant's actions, representations and conduct have violated, and continue to
24 violate the CLRA, because they extend to transactions that are intended to result, or which have
25 resulted, in the sale or lease of goods or services to consumers.

26 77. Plaintiff and other class members are "consumers" as that term is defined by the
27 CLRA in California Civil Code § 1761(d).

28 78. The Products that Plaintiff (and other similarly situated class members) purchased
from Defendant were "goods" within the meaning of California Civil Code § 1761(a).

1 79. Defendant's acts and practices, set forth in this Class Action Complaint, led
2 customers to falsely believe that the Products provided nutritionally the amount of protein claimed
3 on the product package. By engaging in the actions, representations and conduct set forth in this
4 Class Action Complaint, Defendant has violated, and continues to violate, § 1770(a)(2), §
5 1770(a)(5), § 1770(a)(7), § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California
6 Civil Code §1770(a)(2), Defendant's acts and practices constitute improper representations
7 regarding the source, sponsorship, approval, or certification of the goods they sold. In violation
8 of California Civil Code §1770(a)(5), Defendant's acts and practices constitute improper
9 representations that the goods it sells have sponsorship, approval, characteristics, ingredients,
10 uses, benefits, or quantities, which they do not have. In violation of California Civil Code
11 §1770(a)(7), Defendant's acts and practices constitute improper representations that the goods it
12 sells are of a particular standard, quality, or grade, when they are of another. In violation of
13 California Civil Code §1770(a)(8), Defendant deceptively markets and advertises that, unlike
14 other protein product manufacturers, it sells Products that provide more grams of protein than the
15 Products actually do. In violation of California Civil Code §1770(a)(9), Defendant has advertised
16 goods or services with intent not to sell them as advertised. Finally, Defendant had a duty to
17 disclose the corrected amount of protein per serving in the NFP as calculated by the PDCAAS
18 method, which Defendant failed to do. 21 C.F.R. § 101.9(c)(7)(i)-(iii).

19 80. Plaintiff requests that this Court enjoin Defendant from continuing to employ the
20 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
21 § 1780(a)(2). If Defendant is not restrained from engaging in these types of practices in the future,
22 Plaintiff and the other members of the Class will continue to suffer harm. Plaintiff and those
23 similarly situated have no adequate remedy at law to stop Defendant's continuing practices.

24 81. Plaintiff provided Defendant with notice and a demand to Defendant correct,
25 repair, replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices
26 complained of herein. Despite receiving the aforementioned notice and demand, Defendant failed
27 to do so in that, among other things, it failed to identify similarly situated customers, notify them
28 of their right to correction, repair, replacement or other remedy, and/or to provide that remedy.

1 Accordingly, Plaintiff seeks, pursuant to California Civil Code § 1780(a)(3), on behalf of
2 themselves and those similarly situated class members, compensatory damages, punitive damages
3 and restitution of any ill-gotten gains due to Defendant’s acts and practices.

4 82. Plaintiff also requests that this Court award her costs and reasonable attorneys’
5 fees pursuant to California Civil Code § 1780(d).

6 **PLAINTIFF’S SECOND CAUSE OF ACTION**
7 **(False Advertising, Business and Professions Code § 17500, *et seq.* (“FAL”))**
8 **On Behalf of Plaintiff and the Class**

9 83. Plaintiff realleges and incorporates by reference the paragraphs of this Class
10 Action Complaint as if set forth herein.

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

14 85. Defendant made representations and statements (by omission and commission)
15 that led reasonable customers to believe that the Products that they were purchasing contained
16 more grams of protein per serving than the Products actually provided. Further, Defendant had a
17 duty to disclose the corrected amount of protein per serving in the NFP, as calculated according
18 to the PDCAAS method, which Defendant failed to do.

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

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

26 88. Defendant engaged in these false, misleading and deceptive advertising and
27 marketing practices to increase its profits. Accordingly, Defendant has engaged in false
28 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and
Professions Code.

1 89. The aforementioned practices, which Defendant used, and continues to use, to its
2 significant financial gain, also constitute unlawful competition and provide an unlawful
3 advantage over Defendant’s competitors as well as injury to the general public.

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

8 91. Plaintiff seeks, on behalf of herself and those similarly situated, full restitution of
9 monies, as necessary and according to proof, to restore any and all monies acquired by Defendant
10 from Plaintiff, the general public, or those similarly situated by means of the false, misleading
11 and deceptive advertising and marketing practices complained of herein, plus interest thereon.
12 Pursuant to Federal Rule of Civil Procedure 8(e)(2), Plaintiff makes the following allegations in
13 this paragraph only hypothetically and as an alternative to any contrary allegations in her other
14 causes of action, in the event that such causes of action will not succeed. Plaintiff and the Class
15 may be unable to obtain monetary, declaratory and/or injunctive relief directly under other causes
16 of action and will lack an adequate remedy at law, if the Court requires them to show classwide
17 reliance and materiality beyond the objective reasonable consumer standard applied under the
18 FAL, because Plaintiff may not be able to establish each Class member’s individualized
19 understanding of Defendant’s misleading representations as described in this Complaint, but the
20 FAL does not require individualize proof of deception or injury by absent Class members. *See,*
21 *e.g., Ries v. Ariz. Bevs. USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) (“restitutionary relief
22 under the UCL and FAL ‘is available without individualized proof of deception, reliance, and
23 injury.’”). In addition, Plaintiff and the Class may be unable to obtain such relief under other
24 causes of action and will lack an adequate remedy at law, if Plaintiff is unable to demonstrate the
25 requisite *mens rea* (intent, reckless, and/or negligence), because the FAL imposes no such *mens*
26 *rea* requirement and liability exists even if Defendant acted in good faith.

27 92. Plaintiff seeks, on behalf of herself and those similarly situated, a declaration that
28 the above-described practices constitute false, misleading and deceptive advertising.

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

12 **PLAINTIFF'S THIRD CAUSE OF ACTION**
13 **(Common Law Fraud, Deceit and/or Misrepresentation)**
14 **On Behalf of Plaintiff and the Class**

15 94. Plaintiff realleges and incorporates by reference the paragraphs of this Class
16 Action Complaint as if set forth herein.

17 95. Defendant has fraudulently and deceptively informed Plaintiff that the Products
18 provide more grams of protein than they actually provide in a form useful to the human body.
19 Defendant failed to provide a statement of the corrected amount of protein per serving in the NFP,
20 calculated according to the PDCAAS method, on all the Products, as it was required to do.

21 96. These misrepresentations and omissions were known exclusively to, and actively
22 concealed by, Defendant, not reasonably known to Plaintiff, and material at the time they were
23 made. Defendant knew or should have known the composition of the Products, and knew or
24 should have known that the Products did not contain or provide the amount of protein represented
25 on the label. Defendant's misrepresentations and omissions concerned material facts that were
26 essential to the analysis undertaken by Plaintiff as to whether to purchase Defendant's Products.
27 In misleading Plaintiff and not so informing Plaintiff, Defendant breached its duty to them.
28 Defendant also gained financially from, and as a result of, its breach.

1 97. Plaintiff and those similarly situated relied to their detriment on Defendant's
2 misrepresentations and fraudulent omissions. Had Plaintiff and those similarly situated been
3 adequately informed and not intentionally deceived by Defendant, they would have acted
4 differently by, without limitation: (i) declining to purchase the Products, (ii) purchasing less of
5 them, or (iii) paying less for the Products.

6 98. By and through such fraud, deceit, misrepresentations and/or omissions,
7 Defendant intended to induce Plaintiff and those similarly situated to alter their position to their
8 detriment. Specifically, Defendant fraudulently and deceptively induced Plaintiff and those
9 similarly situated to, without limitation, purchase the Products.

10 99. Plaintiff and those similarly situated justifiably and reasonably relied on
11 Defendant's misrepresentations and omissions, and, accordingly, were damaged by Defendant.

12 100. As a direct and proximate result of Defendant's misrepresentations and/or
13 omissions, Plaintiff and those similarly situated have suffered damages, including, without
14 limitation, the amount they paid for the Products.

15 101. Defendant's conduct as described herein was wilful and malicious and was
16 designed to maximize Defendant's profits even though Defendant knew that it would cause loss
17 and harm to Plaintiff and those similarly situated.

18 **PLAINTIFF'S FOURTH CAUSE OF ACTION**
19 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions**
20 **Code § 17200, et seq.)**
21 **On Behalf of Plaintiff and the Class**

22 102. Plaintiff realleges and incorporates by reference the paragraphs of this Class
23 Action Complaint as if set forth herein.

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

28 104. 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

1 described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman
2 Law (Article 3), including without limitation, California Health & Safety Code §§ 110390,
3 110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article
4 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705,
5 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and branding of
6 food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to 21 C.F.R.
7 21 C.F.R. § 101.9 (c)(7), which are incorporated into the Sherman Law (California Health &
8 Safety Code §§ 110100(a), 110380, and 110505).

9 105. In particular, Defendant has engaged, and continues to engage, in unfair and
10 fraudulent practices by, without limitation, the following: (i) unlawfully making a protein claim
11 on the front of the package without complying with the regulatory requirements for making a
12 protein claim set forth in 21 C.F.R. § 101.9(c)(7)(i)-(iii) and incorporated by reference by
13 California's Sherman law; (ii) failing to provide a statement of the corrected amount of protein
14 per serving in the NFP, calculated according to the PDCAAS method and expressed as a %DV,
15 as required by FDA regulations; and (iii) misleading reasonable consumers regarding the amount
16 of protein the Products provide nutritionally in a form that humans can use.

17 106. Plaintiff and those similarly situated relied to their detriment on Defendant's
18 unlawful, unfair, and fraudulent business practices. Had Plaintiff and those similarly situated been
19 adequately informed and not deceived by Defendant, they would have acted differently by,
20 without limitation: (i) declining to purchase the Products, (ii) purchasing less of the Products, or
21 (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 its
24 profits. Accordingly, Defendant has engaged in unlawful trade practices, as defined and
25 prohibited by section 17200, *et seq.* of the California Business and Professions Code.

26 109. The aforementioned practices, which Defendant has used to its significant
27 financial gain, also constitute unlawful competition and provide an unlawful advantage over
28 Defendant's competitors as well as injury to the general public.

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

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

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

15 113. Plaintiff also seeks equitable relief, including restitution, with respect to her UCL
16 “fraudulent” prong claims. Pursuant to Federal Rule of Civil Procedure 8(e)(2), Plaintiff makes
17 the following allegations in this paragraph only hypothetically and as an alternative to any
18 contrary allegations in their other causes of action, in the event that such causes of action do not
19 succeed. Plaintiff and the Class may be unable to obtain monetary, declaratory and/or injunctive
20 relief directly under other causes of action and will lack an adequate remedy of law, if the Court
21 requires them to show classwide reliance and materiality beyond the objective reasonable
22 consumer standard applied under the UCL, because Plaintiff may not be able to establish each
23 Class member’s individualized understanding of Defendant’s misleading representations as
24 described in this Complaint, but the UCL does not require individualized proof of deception or
25 injury by absent class members. *See, e.g., Stearns v Ticketmaster*, 655 F.3d 1013, 1020, 1023-25
26 (distinguishing, for purposes of CLRA claim, among class members for whom website
27 representations may have been materially deficient, but requiring certification of UCL claim for
28 entire class). In addition, Plaintiff and the Class may be unable to obtain such relief under other

1 causes of action and will lack an adequate remedy at law, if Plaintiff is unable to demonstrate the
2 requisite *mens rea* (intent, reckless, and/or negligence), because the UCL imposes no such *mens*
3 *rea* requirement and liability exists even if Defendant acted in good faith.

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

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

16 **PLAINTIFF’S FIFTH CAUSE OF ACTION**
17 **(Unjust Enrichment)**
18 **On Behalf of Plaintiff and the Class**

19 116. Plaintiff realleges and incorporate by reference the paragraphs of this Class Action
20 Complaint as if set forth herein.

21 117. Plaintiff and members of the Class conferred a benefit on the Defendant by
22 purchasing the Products.

23 118. Defendant has been unjustly enriched in retaining the revenues from Plaintiff’s
24 and Class members’ purchases of the Products, which retention is unjust and inequitable, because
25 Defendant falsely represented that the Products contained specific amounts of protein per serving,
26 while failing to disclose that the Products actually provided less protein than represented. This
27 harmed Plaintiff and Class members because they paid a price premium as a result.

28 119. Because Defendant’s retention of the non-gratuitous benefit conferred on it by
Plaintiff and Class members is unjust and inequitable, Defendant must pay restitution to Plaintiff

1 and the Class members for its unjust enrichment, as ordered by the Court. Plaintiff and those
2 similarly situated have no adequate remedy at law to obtain this restitution.

3 120. Plaintiff, therefore, seeks an order requiring Defendant to make restitution to them
4 and other members of the Class.

5 **PRAYER FOR RELIEF**

6 **WHEREFORE**, Plaintiff, on behalf of herself and those similarly situated, respectfully
7 request that the Court enter judgement against Defendant as follows:

8 A. Certification of the proposed Class, including appointment of Plaintiff's counsel
9 as class counsel;

10 B. An order temporarily and permanently enjoining Defendant from continuing the
11 unlawful, deceptive, fraudulent, and unfair business practices alleged in this Complaint;

12 C. An award of compensatory damages in an amount to be determined at trial, except
13 for those causes of action where compensatory damages are not legally available;

14 D. An award of statutory damages in an amount to be determined at trial, except for
15 those causes of action where statutory damages are not legally available;

16 E. An award of punitive damages in an amount to be determined at trial, except for
17 those causes of action where punitive damages are not legally available;

18 F. An award of treble damages, except for those causes of action where treble
19 damages are not legally available;

20 G. An award of restitution in an amount to be determined at trial;

21 H. An order requiring Defendant to pay both pre- and post-judgment interest on any
22 amounts awarded;

23 I. For reasonable attorneys' fees and the costs of suit incurred; and

24 J. For such further relief as this Court may deem just and proper.

25 **JURY TRIAL DEMANDED**

26 Plaintiff hereby demands a trial by jury.
27
28

Dated: July 15, 2022

GUTRIDE SAFIER LLP

/s/Seth A. Safier/s/
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Attorneys for Plaintiff

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EXHIBIT A

I, Rebecca Rausch, declare:

1. I am a Plaintiff in this action. If called upon to testify, I could and would competently testify to the matters contained herein based upon my personal knowledge.

1. I submit this Declaration pursuant to California Code of Civil Procedure section 2215.5 and California Civil Code section 1780(d).

2. As set forth in my complaint, I purchased Flatout Flatbread in both the Italian Herb and Multigrain flavors on one or more occasions during the last four years in California.

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

Executed on ^{7/13/2022} in Pleasant Hill, California.

DocuSigned by:
Rebecca Rausch
50A3888970AB448...
Rebecca Rausch

EXHIBIT B

Product Type	Variety	Protein Content Claim
Wraps	Flatout Light Original Flatbread	6g (No DV)
	Flatout Multigrain with Flax Flatbread	5g (No DV)
	Flatout Light Italian Herb Flatbread	6g (No DV)
	Flatout Light Spinach Flatbread	6g (No DV)
	Flatout Protein Up Classic White Flatbread	10g (No DV)
CarbDown	Flatout CarbDown Olive Oil & Sea Salt Flatbread	4g (No DV)
	Flatout CarbDown Spinach Flatbread	4g (No DV)
Foldit	Flatout Foldit 5 Grain Flax Flatbread	6g (No DV)
	Flatout Foldit Traditional White Flatbread	5g (No DV)
	Flatout Foldit Rosemary & Olive Oil Flatbread	5g (No DV)
	Flatout Foldit Sweet Hawaiian Flatbread	5g (No DV)
	Flatout Foldit Everything Flatbread	5g (No DV)
Pizza Crusts	Flatout Rustic White Artisan Thin Pizza Crusts	5g (No DV)

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

REBECCA RAUSCH

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

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

Seth Safier, SBN 197427, Gutride Safier LLP, 100 Pine

DEFENDANTS

FLATOUT, INC.

County of Residence of First Listed Defendant Franklin, OH (IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)

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

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

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

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status. Includes options like 'Citizen of This State', 'Citizen of Another State', 'Citizen or Subject of a Foreign Country', 'Incorporated or Principal Place of Business In This State', etc.

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

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Each category lists specific legal codes and descriptions.

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

- 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 USC s 1332

Brief description of cause: Violation of consumer protection statutes; fraud

VII. REQUESTED IN COMPLAINT:

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

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

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

JUDGE DOCKET NUMBER

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

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 07/15/2022

SIGNATURE OF ATTORNEY OF RECORD

s/Seth Safier/s/