

ELECTRONICALLY FILED
 Superior Court of California,
 County of San Diego

08/25/2022 at 03:35:48 PM

Clerk of the Superior Court
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SUPERIOR COURT FOR THE STATE OF CA 37-2022-00034301-CU-FR-CTL

COUNTY OF SAN DIEGO

CAROL WALCOFF on behalf of herself and all
 others similarly situated,

Plaintiff,

v.

INNOFOODS USA, INC., COSTCO
 WHOLESALE CORPORATION,
 a Washington corporation and DOES 1 through
 20, inclusive,

Defendants.

CASE NO.:

CLASS ACTION COMPLAINT FOR:

1. FALSE AND MISLEADING
 ADVERTISING IN VIOLATION OF
 BUSINESS AND PROFESSIONS CODE
 §17200, *et seq.*
2. FALSE AND MISLEADING
 ADVERTISING IN VIOLATION OF
 BUSINESS AND PROFESSIONS CODE
 §17500, *et seq.*
3. VIOLATION OF CALIFORNIA CIVIL
 CODE § 1750. *et seq.*
4. UNJUST ENRICHMENT;
5. BREACH OF EXPRESS WARRANTY;
6. VIOLATION OF CONSUMER FRAUD
 LAWS;
7. NEGLIGENT MISREPRESENTATION

DEMAND FOR JURY TRIAL

1 Plaintiff Carol Walcoff ("Plaintiff") alleges the following based upon personal knowledge as
 2 to herself and her own acts, and upon information and belief and the investigation by Plaintiff's
 3 counsel, which included, among other things, a review of public documents, marketing materials, and
 4 announcements made by Innofoods Usa, Inc. ("Defendant" or "Innofoods") and Costco Wholesale
 5 Corporation, ("Costco") as to all other matters. Plaintiff believes that substantial additional evidentiary
 6 support exists for the allegations set forth herein and will be available after a reasonable opportunity
 7 for discovery.

8 NATURE OF THE ACTION

9 1. This action seeks to remedy the unfair, deceptive, and unlawful business practices of
 10 Innofoods with respect to the marketing, advertising, labeling, and sales of its Keto snack product line
 11 including Keto Coconut Cluster and Dark Chocolate Keto Nuggets (the "Products").

12 2. Innofoods recognizes consumers are increasingly health conscious.¹ Indeed, "keto"
 13 was the most Googled food-related term in 2020². Within the bars, cereals, baking mixes, cookies and
 14 snacks category, dollar sales for "keto" products have grown over 21% in the past year³. Yet at the
 15 same time that interest in keto expands, consumers also are increasingly choosing plant-based or vegan
 16 diets⁴. This can prevent keto dieters with a conundrum: How to eat a high-protein diet without tons of
 17 meat.

18 3. To capitalize on these market trends, Innofoods developed, marketed and distributed a
 19 purportedly "keto" snack product based on plant-based ingredients with packaging that highlights keto
 20 friendly ingredients such as almonds, pecans and pumpkin seeds.

21 4. As part of a scheme to make the Products more attractive to consumers, boost its sales,
 22 and ultimately increase its profits, Innofoods uses terms such as "keto-friendly" and "4 net carbs."

23
 24
 25 ¹ "We specialize in compiling concepts based on country or origin, marketing of healthy and trendy
 food products and we are specialists in the field of the organic glutenfree/lactosefree range and the
 vegan range." <https://www.innofoodcompany.com/?lang=en> (last viewed 8/15/2022).

26 ² [https://www.forbes.com/sites/meimeifox/2021/09/23/3-food-companies-targeting-the-growing-](https://www.forbes.com/sites/meimeifox/2021/09/23/3-food-companies-targeting-the-growing-keto-diet-market/?sh=616474cb6390)
 keto-diet-market/?sh=616474cb6390 (last viewed 8/15/2022)

27 ³ [https://www.forbes.com/sites/meimeifox/2021/09/23/3-food-companies-targeting-the-growing-](https://www.forbes.com/sites/meimeifox/2021/09/23/3-food-companies-targeting-the-growing-keto-diet-market/?sh=616474cb6390)
 keto-diet-market/?sh=616474cb6390 (last viewed 8/15/2022)

28 ⁴ [https://www.forbes.com/sites/meimeifox/2021/09/23/3-food-companies-targeting-the-growing-](https://www.forbes.com/sites/meimeifox/2021/09/23/3-food-companies-targeting-the-growing-keto-diet-market/?sh=616474cb6390)
 keto-diet-market/?sh=616474cb6390 (last viewed 8/15/2022.)



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4 6. However, Defendant's labeling, advertising, and marketing campaign is false and
5 misleading because: (1) the Products contain cane sugar; (2) the Products are high in net
6 carbohydrates.

7 7. When purchasing the Products, Plaintiff and reasonable consumers such as herself
8 relied on Defendant's misrepresentations that the products were "keto". Plaintiff would not have
9 purchased this product if she had known that Defendant's representations were false and misleading.
10 Plaintiff and the Classes paid a premium for the Products over comparable snacks that did not purport
11 to be "Keto". Plaintiff would not have purchased the Product had she known the truth. Plaintiff
12 suffered an injury by purchasing the Products at inflated prices. Plaintiff did not receive a keto
13 product; rather, she received a product that is sweetened with cane sugar.

14 8. Defendant's conduct of falsely marketing, advertising, labeling, and selling the Product
15 constitutes unfair, unlawful, and fraudulent conduct; is likely to deceive members of the public; and
16 is unethical, oppressive, unscrupulous, and/or substantially injurious to consumers, because, among
17 other things, it misrepresents the characteristics of goods and services. As such, Plaintiff seeks relief
18 in this action individually and as a class action on behalf of all purchasers in the United States of
19 Defendant's Products (the "Class"). Plaintiff also seeks relief in this action individually and as a class
20 action on behalf of a subclass of all purchasers in California of Defendant's Product (the "California
21 Class").

22 **JURISDICTION AND VENUE**

9. Both jurisdiction and venue are proper in this Court. Defendants conduct, or have conducted, a substantial amount of business activity in California. Defendants have sufficient minimum contacts in California or otherwise intentionally avail themselves of the California market through, without limitation, their advertisement, promotion, marketing, sales and/or distribution of the Product in the State of California and the County of San Diego and other business activities, so as to render the exercise of jurisdiction over the Defendants by the California courts consistent with

1 traditional notions of fair play and substantial justice.

2 10. Venue is proper in this Court because Defendant does business in San Diego County
3 and because the conduct alleged herein which gives rise to the claims asserted occurred within San
4 Diego County. Specifically, Plaintiff purchased the subject product at stores including Costco in
5 Carlsbad.

6 **PARTIES**

7 **Plaintiff**

8 11. Plaintiff is a citizen of California and an individual consumer. During the Class Period,
9 Plaintiff purchased the Products at Costco stores in Carlsbad, Burbank, and Los Angeles. In the last
10 two years, Plaintiff spent approximately three-hundred dollars (\$300) purchasing the Product for her
11 personal consumption.

12 12. Prior to purchasing the Products, Plaintiff read and relied upon false and misleading
13 statements that were prepared by and/or approved by Defendants and their agents and disseminated
14 through the Products' packaging. For each purchase, she understood that she was paying for a keto
15 snack and was deceived when she received a product that contained sugar and high carbohydrates.

16 13. Plaintiff suffered injury in fact and lost money and property as a result of the unfair,
17 deceptive, untrue, and misleading advertising described here. Had Plaintiff known of the defective
18 nature of the Products, she would not have purchased them.

19 14. If Plaintiff were to encounter product information and advertisements for Defendants'
20 Products, she could not rely on them. However, Plaintiff would be willing to purchase products from
21 Defendants in the future so long as Defendants produced a product that was actually "keto friendly".

22 **Defendants**

23 15. Defendant Innofoods is a Pennsylvania corporation. At all times relevant hereto,
24 Innofoods was in the business of distributing, marketing, promoting, and selling the Products
25 described herein throughout the United States and in this District. Thus, Innofoods purposely directed
26 its conduct toward this District and at all times relevant engaged in a continuous course of business in
27 this District by selling thousands of its washing machines and other consumer goods in this District
28 every year.

16. Defendant Costco is an American multinational corporation which operates a chain of membership-only big-box retail stores. Defendant is a Washington corporation and is authorized to do business in California.

17. Plaintiff is unaware of the true names or capacities of the Defendants sued herein under the fictitious names DOES 1 through 20 but will seek leave of this Court to amend the complaint and serve such fictitiously named Defendants once their names and capacities become known.

18. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and omissions alleged herein were performed by, or are attributable to Defendants, each acting as the agent, employee, alter ego, and/or joint venturer of, or working in concert with, each of the other co-Defendants and was acting within the course and scope of such agency, employment, joint venture, or concerted activity with legal authority to act on the others' behalf. The acts of any and all Defendants represent and were in accordance with Defendants' official policy.

19. At all relevant times, Defendants, and each of them, ratified each and every act or omission complained of herein. At all relevant times, Defendants, and each of them, aided and abetted the acts and omissions of each and all the other Defendants in proximately causing the damages herein alleged.

20. Plaintiff is informed and believes, and thereon alleges, that each of said Defendants are in some manner intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences, and transactions alleged herein.

GENERAL ALLEGATIONS

A. Keto Diets

21. In 2018, "What is keto?" was the number one searched health-related question, and the second in 2019.⁵

22. The Keto Diet was originally designed to help people who suffer from seizure disorders—not to help people lose weight. That's because both ketones and another chemical produced

⁵ <https://www.cnn.com/2019/12/12/health/health-questions-trending-google-2019-trnd/index.html>, (last viewed 8/24/2022)

1 by the diet, called beta hydroxybutyrate, may help minimize seizures⁶.

2 23. The Keto Diet essentially aims to force your body into ketosis and is high in fat,
3 moderate in protein, and low in carbs.

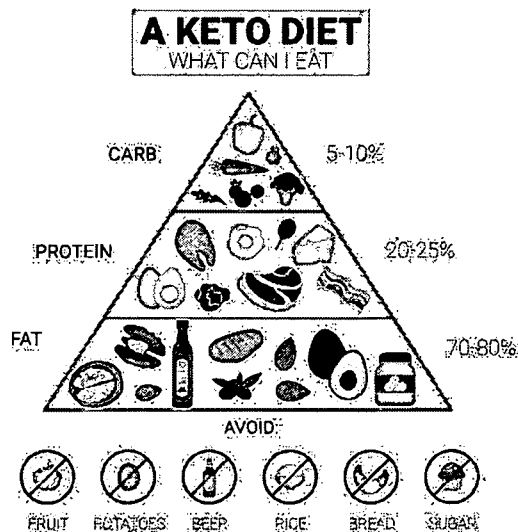
4 24. The Keto Diet aims to force your body into using a different type of fuel. Instead of
5 relying on sugar (glucose) that comes from carbohydrates (such as grains, legumes, vegetables, and
6 fruits), the Keto Diet relies on ketone bodies, a type of fuel that the liver produces from stored fat⁷.

7 25. When this happens, your body becomes incredibly efficient at burning fat for energy.
8 It also turns fat into ketones in the liver, which can supply energy for the brain.⁸

9 26. While everyone's body and needs are slightly different, that typically translates to:

- 10 • 60 to 75 percent of your calories from fat;
11 • 15 to 30 percent of your calories from protein;
12 • 5 percent or less of your calories from carbs

13 27. "When you are on the Keto Diet, you drastically cut your carbs to only 20 per day.
14 That's less than one apple!" said nutritionist Lisa Drayer⁹.



25 ⁶ <https://www.womenshealthmag.com/weight-loss/a19434332/what-is-the-keto-diet/> (last viewed 8/24/2022)

26 ⁷ <https://www.health.harvard.edu/staying-healthy/should-you-try-the-keto-diet> (last viewed 8/24/2022)

27 ⁸ <https://www.healthline.com/nutrition/ketogenic-diet-101#what-it-is>, (last viewed 8/24/2022)

28 ⁹ <https://www.cnn.com/2019/12/12/health/health-questions-trending-google-2019-trnd/index.html> (last viewed 8/24/2022)

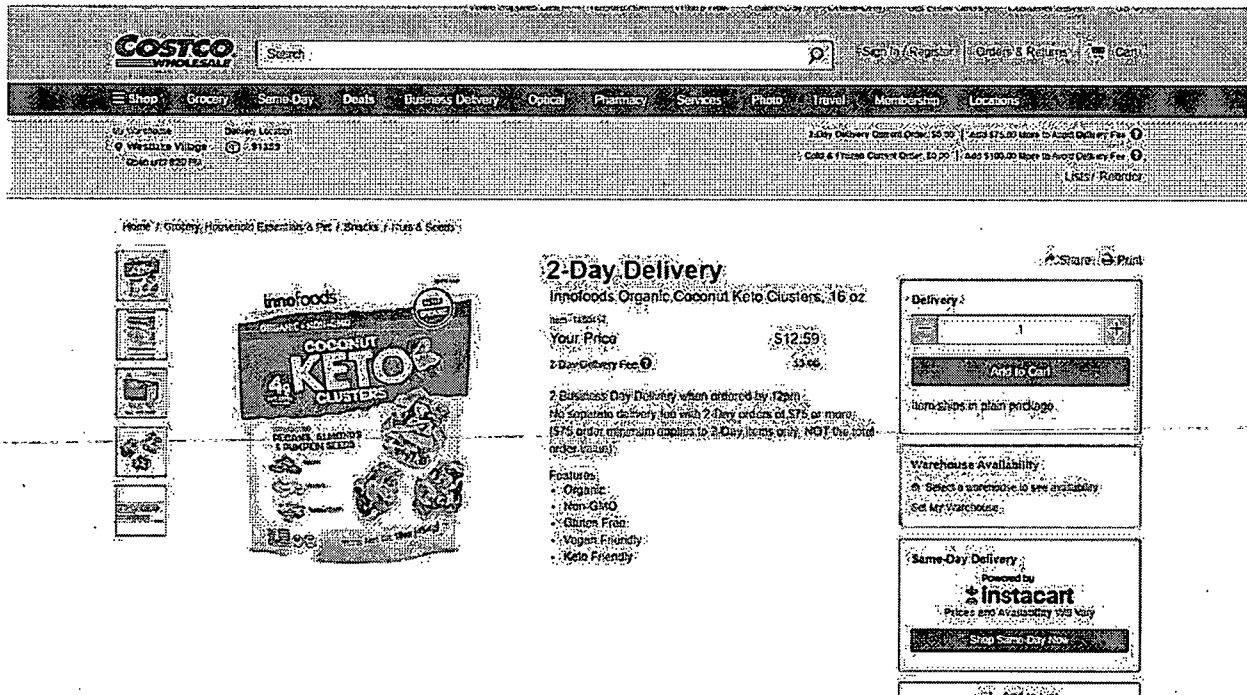
B. The Products are Marketed Deceptively

28. American consumers are health conscious and look for foods to keep a healthy diet and promote weight loss. Product package labels are vehicles that convey food quality and nutrition information to consumers that they can and do use to make purchasing decisions.

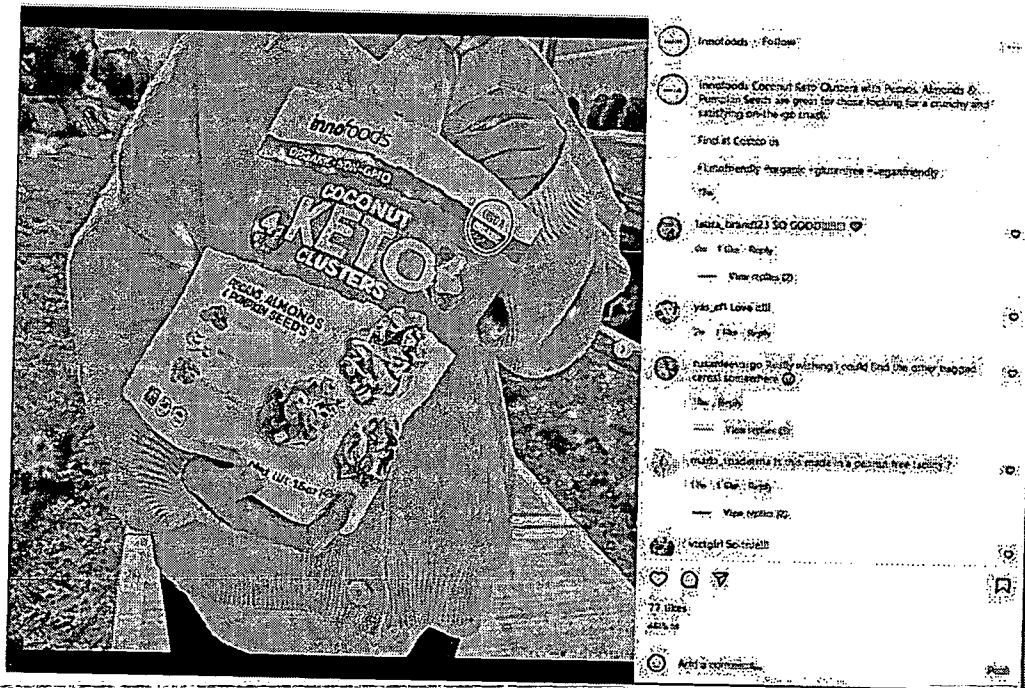
29. Defendants realize that consumers are increasingly aware of the relationship between health and diet and, thus, understand the importance and value of descriptors and labels that convey to consumers certain “buzzwords” when considering whether to buy foods.

30. Throughout the Class Period, Defendants engaged in, and Plaintiff and members of the Classes were exposed to, a long-term advertising campaign in which Defendants utilized various forms of media including, but not limited to, website, social media advertising, and print advertising on the Product’s label. Defendants have consistently made certain representations in its labeling, advertising, and marketing that are false and misleading. To accomplish this, Defendants use an integrated, nationwide messaging campaign to consistently convey the deceptive and misleading message that the Products are:

- “keto”;
- “keto-friendly”







28

32. Consumers lack the meaningful ability to test or independently ascertain the truthfulness of food and beverage labeling claims especially at the point of sale. Consumers would not know the true nature of the ingredients or the details of the manufacturing process merely by reading the ingredient label; their discovery requires investigation beyond the grocery store and knowledge of food chemistry as well as internal manufacturing habits beyond that of the average consumer. Thus, reasonable consumers must, and do, rely on food companies such as Defendants to honestly report the nature of a beverage's qualities and ingredients, and beverage companies such as Defendants intend and know that consumers rely upon food labeling statements in making their purchasing decisions. Such reliance by consumers is also eminently reasonable, since food companies are prohibited from making false or misleading statements on their products under federal law.

33. Defendants unscrupulously capitalize on consumers' heightened demand for natural products by deceptively labeling, advertising, and marketing the Products.

C. The Products Are Not Compatible with Ketogenic Diets

34. Innofoods Coconut Keto Clusters actually contain both cane sugar and brown rice syrup. According to calculations, this product is 14% sugar by weight and contains 1 teaspoons of added and natural sugar per serving¹⁰.

Ingredients: (Organic*) Coconut*, Pumpkin seeds*, Pecans*, Almonds*, Cane sugar*, Brown rice syrup*, Coconut butter*, Erythritol*, Flax seeds*, Sea salt, Agave fiber*, Natural flavor*

Contains: Coconuts, Pecans, Almonds
Packed in a facility that uses tree nuts.

Made in Canada with imported ingredients

*Trademark of the National Foundation for Celiac Awareness
Used under license

STORE IN A COOL DRY PLACE TO MAINTAIN FRESHNESS

¹⁰<https://www.ewg.org/foodscores/products/677210091366>

InnofoodsCoconutKetoClustersWithOrganicPecansAlmondsPumpkinSeedsPecansAlmondsPumpkinSeeds/ (last viewed 8/24/2022)

1 35. Likewise, the Innofoods Dark Chocolate Keto Nuggets- Coconut Seeds Pumpkin
2 Seeds, Quinoa, & Sunflower Seeds also contains cane sugar.

3 **TOLLING OF THE STATUTE OF LIMITATIONS,**
4 **FRAUDULENT CONCEALMENT, EQUITABLE TOLLING,**
5 **AND CONTINUING VIOLATIONS**

6 36. Plaintiff did not discover, and could not have discovered through the exercise of
7 reasonable diligence, the existence of the claims sued upon herein until immediately prior to
8 commencing this civil action.

9 37. Any applicable statutes of limitation have been tolled by Defendants' affirmative acts
10 of fraudulent concealment and continuing misrepresentations, as the facts alleged above reveal.

11 38. Because of the self-concealing nature of Defendants' actions and their affirmative acts
12 of concealment, Plaintiff and the Classes assert the tolling of any applicable statutes of limitations
13 affecting the claims raised herein.

14 39. Defendants continue to engage in the deceptive practice, and consequently, unwary
15 consumers are injured on a daily basis by Defendants' unlawful conduct. Therefore, Plaintiff and the
16 Classes submit that each instance that Defendants engaged in the conduct complained of herein and
17 each instance that a member of any Class purchased the Products constitutes part of a continuing
18 violation and operates to toll the statutes of limitation in this action.

19 40. Defendants are estopped from relying on any statute of limitations defense because of
20 their unfair or deceptive conduct.

21 41. Defendants' conduct was and is, by its nature, self-concealing. Still, Defendants,
22 through a series of affirmative acts or omissions, suppressed the dissemination of truthful information
23 regarding their illegal conduct, and actively have foreclosed Plaintiff and the Classes from learning of
24 their illegal, unfair, and/or deceptive acts.

25 42. By reason of the foregoing, the claims of Plaintiff and the Classes are timely under any
26 applicable statute of limitations, pursuant to the discovery rule, the equitable tolling doctrine, and
27 fraudulent concealment.
28

CLASS ACTION ALLEGATIONS

43. Plaintiff brings this action individually and on behalf of all other persons similarly situated. The Classes that Plaintiff seeks to represent comprise:

California Class

All persons in California who purchased the Products for personal or household use, and not for resale or distribution purposes at any time between August 25, 2018 until the date of judgment in this action. Specifically excluded from this Class are Defendants; the officers, directors, or employees of Defendants; any entity in which Defendants have a controlling interest; and any affiliate, legal representative, heir, or assign of Defendants (California Class). Also excluded are those who assert claims for personal injury as well as any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action (the "California Class").

National Class

All persons in the United States who purchased the Products for personal or household use, and not for resale or distribution purposes from August 25, 2018, until the date of judgment in this action for personal or household use, and not for resale or distribution purposes. Specifically excluded from this Class are Defendants; the officers, directors, or employees of Defendants; any entity in which Defendants have a controlling interest; and any affiliate, legal representative, heir, or assign of Defendants ("National Class"). Also excluded are those who assert claims for personal injury as well as any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

Consumer Protection Class

All persons who reside in states in the United States with similar consumer protection laws, breach of express warranty laws and breach of implied warranty law, who purchased the Products from August 25, 2018, until the date of judgment in this action, for personal or household use, and not for resale or distribution purposes ("Consumer Protection Class"). Specifically excluded from this Class are Defendants; the officers, directors, or employees of Defendants; any entity in which Defendants has a controlling interest; and any affiliate, legal representative, heir, or assign of Defendants. Also excluded are those who assert claims for personal injury as well as any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

44. Plaintiff reserves the right to redefine the Classes and to add additional subclasses as appropriate based on further investigation, discovery, and specific theories of liability.

45. The Classes are sufficiently numerous, as each includes thousands of persons who have

1 purchased the Product. Thus, joinder of such persons in a single action or bringing all members of the
2 Classes before the Court is impracticable for purposes of California Civil Code Section 382. The
3 question is one of a general or common interest of many persons and it is impractical to bring them
4 all before the Court. The disposition of the claims of the members of the Classes in this class action
5 will substantially benefit both the parties and the Court.

6 46. There are questions of law and fact common to each Class for purposes of California
7 Civil Code Section 382, including whether Defendants' labels and packaging include uniform
8 misrepresentations and omissions that misled Plaintiff and the other members of the Classes to believe
9 the Products were "keto" and/or "keto-friendly". The members of each Class were and are similarly
10 affected by having purchased the Product for its intended and foreseeable purpose as promoted,
11 marketed, advertised, packaged, and labeled by Defendants as set forth in detail herein, and the relief
12 sought herein is for the benefit of Plaintiff and other members of the Classes. Thus, there is a well-
13 defined community of interest in the questions of law and fact involved in this action and affecting
14 the parties.

15 47. Plaintiff asserts claims that are typical of the claims of each respective Class for
16 purposes of California Civil Code Section 382. Plaintiff and all members of each respective Class
17 have been subjected to the same wrongful conduct because they have purchased that Product, which
18 is not natural as represented. Plaintiff paid a premium for the Product, on the belief it was "keto",
19 over similar alternatives that did not make such representations. Plaintiff and the members of each
20 Class have thus all overpaid for the Product.

21 48. Plaintiff will fairly and adequately represent and protect the interests of the other
22 members of each respective Class for purposes of California Civil Code Section 382. Plaintiff has no
23 interests antagonistic to those of other members of each respective Class. Plaintiff is committed to
24 the vigorous prosecution of this action and has retained counsel experienced in litigation of this nature
25 to represent her. Plaintiff anticipates no difficulty in the management of this litigation as a class action.

26 49. Class certification is appropriate under California Civil Code Section 382 because
27 Defendants have acted on grounds that apply generally to each Class, so that final injunctive relief or
28 corresponding declaratory relief is appropriate respecting each Class as a whole. Defendants utilize

1 an integrated, nationwide messaging campaign that includes uniform misrepresentations that misled
2 Plaintiff and the other members of each Class.

3 50. Class certification is appropriate under California Civil Code Section 382 because
4 common questions of law and fact substantially predominate over any questions that may affect only
5 individual members of each Class. Among these common questions of law and fact are:

- 6 a. whether Defendants misrepresented or omitted material facts in connection with the
7 promotion, marketing, advertising, packaging, labeling, and sale of the Product;
- 8 b. whether Defendants' labeling of the Product is likely to deceive the members of each
9 Class;
- 10 c. whether Defendants' conduct is unethical, oppressive, unscrupulous, and/or
11 substantially injurious to consumers;
- 12 d. whether Defendants represented that the Product has characteristics, benefits, uses, or
13 qualities that it does not have;
- 14 e. whether Defendants' acts and practices in connection with the promotion, marketing,
15 advertising, packaging, labeling, distribution, and sale of the Product violated the laws
16 alleged herein;
- 17 f. whether Plaintiff and members of the Classes are entitled to injunctive and other
18 equitable relief; and
- 19 g. whether Defendants were unjustly enriched by their conduct.

20 51. Defendants engaged in a common course of conduct giving rise to the legal rights
21 sought to be enforced by the members of each respective Class. Similar or identical statutory and
22 common law violations and deceptive business practices are involved. Individual questions, if any,
23 pale by comparison to the numerous common questions that predominate.

24 52. The injuries sustained by Plaintiff and the members of each Class flow, in each
25 instance, from a common nucleus of operative facts – Defendants' misconduct.

26 53. Plaintiff and the members of each Class have been damaged by Defendants'
27 misconduct. The members of each Class have paid for a product that would not have been purchased
28

1 in the absence of Defendants' deceptive scheme, or, alternatively, would have been purchased at a
2 lesser price.

3 54. Proceeding as a class action provides substantial benefits to both the parties and the
4 Court because this is the most efficient method for the fair and efficient adjudication of the
5 controversy. Members of each Class have suffered and will suffer irreparable harm and damages as a
6 result of Defendants' wrongful conduct. Because of the nature of the individual claims of the members
7 of each Class, few, if any, could or would otherwise afford to seek legal redress against Defendants
8 for the wrongs complained of herein, and a representative class action is therefore the appropriate,
9 superior method of proceeding and essential to the interests of justice insofar as the resolution of
10 claims of the members of each Class is concerned. Absent a representative class action, members of
11 each Class would continue to suffer losses for which they would have no remedy, and Defendants
12 would unjustly retain the proceeds of its ill-gotten gains. Even if separate actions could be brought
13 by individual members of each Class, the resulting multiplicity of lawsuits would cause undue
14 hardship, burden, and expense for the Court and the litigants, as well as create a risk of inconsistent
15 rulings, which might be dispositive of the interests of the other members of each Class who are not
16 parties to the adjudications and/or may substantially impede their ability to protect their interests.

17 **FIRST CAUSE OF ACTION**

18 **FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS &** 19 **PROFESSIONS CODE § 17200, *et seq.***

20 **(By Plaintiff and California Class against all Defendants and Does 1-10)**

21 55. Plaintiff repeats and realleges the allegations set forth above, and incorporates the same
22 as if set forth herein at length.

23 56. This cause of action is brought pursuant to *Business and Professions Code* § 17200, *et*
24 *seq.*

25 57. In the advertising of the Product, Defendants makes false and misleading statements.
26 Specifically, as set forth above, Defendants represent that the Products are "keto" and/or "keto
27 friendly".
28

1 58. In fact, the Products are not keto or “keto-friendly” because they are high in net
2 carbohydrates, and contain high glycemic sweeteners such as sugar and brown rice syrup.

3 59. Defendants are aware that the claims that they make about the Products are false,
4 misleading and unsubstantiated.

5 60. As alleged in the preceding paragraphs, the misrepresentations and omissions by
6 Defendants of the material facts detailed above constitute an unfair and fraudulent business practice
7 within the meaning of California *Business & Professions Code* § 17200.

8 61. In addition, Defendants’ use of various forms of advertising media to advertise, call
9 attention to or give publicity to the sale of goods or merchandise which are not as represented in any
10 manner constitute unfair competition, unfair, deceptive, untrue or misleading advertising, and an
11 unlawful business practice within the meaning of California *Business & Professions Code* §§ 17531
12 and 17200, which advertisements have deceived and are likely to deceive the consuming public, in
13 violation of California *Business & Professions Code* § 17500.

14 62. There were reasonably available alternatives to further Defendants’ legitimate business
15 interests, other than the conduct described herein.

16 63. All of the conduct alleged herein occurs and continues to occur in Defendants’
17 business. Defendants’ wrongful conduct is part of a pattern or generalized course of conduct repeated
18 on hundreds of occasions daily.

19 64. Pursuant to California *Business & Professions Code* §§ 17203 and 17535, Plaintiff and
20 the members of the Classes seek an order of this Court enjoining Defendants from continuing to
21 engage, use, or employ their practice of advertising the sale and use of the Products. Likewise,
22 Plaintiff and the members of the Classes seek an order requiring Defendants to disclose such
23 misrepresentations, and additionally request an order awarding Plaintiff restitution of the money
24 wrongfully acquired by Defendants by means of responsibility attached to Defendants’ failure to
25 disclose the existence and significance of said misrepresentations.

26 ///

27 ///

28 ///

SECOND CAUSE OF ACTION

**FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS &
PROFESSIONS CODE § 17500, *et seq.***

(By Plaintiff and California Class against all Defendants and Does 1-10)

65. Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs, and incorporates the same as if set forth herein at length.

66. This cause of action is brought pursuant to California *Business and Professions Code* § 17500, *et seq.* (known as California's False Advertising Law or "FAL").

67. The FAL prohibits the dissemination of any advertisement which is untrue or misleading, and which is known, or which by exercise of reasonable care should be known, to be untrue or misleading. Cal. Bus. & Prof. Code §17500.

68. In its advertising of the Products, Defendants make false and misleading statements. Specifically, as set forth above, Defendant; advertise, represent, and warranty that the Products are "keto" and/or "keto-friendly".

69. In fact, the Products are not "keto" or "keto-friendly" because they contain sugar and other high glycemic sweeteners such as and are high in carbohydrates.

70. As alleged in the preceding paragraphs, the misrepresentations by Defendants of the material facts detailed above constitute an unfair and fraudulent business practice within the meaning of California *Business & Professions Code* § 17500.

71. In addition, Defendants' use of various forms of advertising media to advertise, call attention to or give publicity to the sale of goods or merchandise which are not as represented in any manner constitutes unfair competition, unfair, deceptive, untrue or misleading advertising, and an unlawful business practice within the meaning of California *Business & Professions Code* §§ 17531 and 17200, which advertisements have deceived and are likely to deceive the consuming public, in violation of California *Business & Professions Code* § 17500.

72. Pursuant to California *Business & Professions Code* §§ 17203 and 17535, Plaintiff and the members of the Classes seek an order of this Court enjoining Defendants from continuing to engage, use, or employ their practice of advertising the sale and use of the Products. Likewise, Plaintiff and the members of the Classes seek an order requiring Defendants to disclose such

1 misrepresentations, and additionally request an order awarding Plaintiff restitution of the money
2 wrongfully acquired by Defendants by means of responsibility attached to Defendants' failure to
3 disclose the existence and significance of said misrepresentations.

4 **THIRD CAUSE OF ACTION**

5 **VIOLATION OF CALIFORNIA CIVIL CODE § 1750, *et seq.***

6 **(By Plaintiff and California Class against all Defendants and Does 1-10)**

7 73. Plaintiff repeats and realleges all the allegations of the previous paragraphs, and
8 incorporates the same as if set forth herein at length.

9 74. This cause of action is brought pursuant to California *Civil Code* § 1750, *et seq.*, the
10 Consumers Legal Remedies Act.

11 75. Plaintiff, as well as each member of the Consumer Class, constitutes a "consumer" within
12 the meaning of California *Civil Code* § 1761(d).

13 76. Defendants' sales of the Products constitute "transactions" within the meaning of
14 California *Civil Code* § 1761(e).

15 77. The Products purchased by Plaintiff and the Consumer Class constitute "goods" under
16 California *Civil Code* § 1761(a).

17 78. The Consumer Class consists of thousands of persons, the joinder of whom is
18 impracticable.

19 79. There are questions of law and fact common to the classes, which questions are
20 substantially similar and predominate over questions affecting the individual members, including but
21 not limited to:

- 22 a. whether Defendants represented that the Products have characteristics, ingredients,
23 benefits, uses or quantities which it does not have;
- 24 b. Whether Defendants advertised the Products with the intent not to sell them as advertised
- 25 c. The existence, extent and significance of the major misrepresentations, concealments and
26 omissions regarding the purported characteristics of Products violate the Act; and
- 27 d. Whether Defendants knew of the existence of these misrepresentations, concealments
28 and omissions.

1 80. The policies, acts, and practices heretofore described were intended to result in the sale
2 of the Products to the consuming public and violated and continue to violate: (1) Section 1770(a)(5)
3 of the Act which prohibits, *inter alia*, “[r]epresenting that goods or services have sponsorship,
4 approval, characteristics, ingredients, uses, benefits, or quantities which they do not have;” and (2)
5 Section 1770(a)(9), which prohibits, “[a]dvertising goods or services with intent not to sell them as
6 advertised.”

7 81. Defendants fraudulently deceived Plaintiff and the Classes by representing that the
8 Products have certain characteristics, benefits, uses and qualities which it does not have. In doing so,
9 Defendants intentionally misrepresented and concealed material facts from Plaintiff and the Classes,
10 specifically and not limited to the defects in the Products which caused rusting and premature failure.
11 Said misrepresentations and concealment were done with the intention of deceiving Plaintiff and the
12 Classes and depriving them of their legal rights and money.

13 82. Defendants’ actions as described hereinabove were done with conscious disregard of
14 Plaintiff’s rights and Defendants were wanton and malicious in their concealment of the same.

15 83. Pursuant to § 1780(a) of the Act, Plaintiff seeks injunctive relief in the form of an order
16 enjoining the above-described wrongful acts and practices of Defendants including, but not limited to,
17 an order enjoining Defendants from distributing such false advertising and misrepresentations.
18 Plaintiff shall be irreparably harmed if such an order is not granted.

19 84. Pursuant to Civil Code §1782, Plaintiff gave Defendants notice by letter dated August
20 25, 2022, by certified mail, of the particular violations of Civil Code § 1770. The Notice requested
21 that Defendants rectify the problems associated with the actions alleged in this Complaint, and give
22 notice to all affected consumers of its intent to so act.

23 85. Plaintiff reserves the right to amend this Complaint to include a request for damages
24 under the CLRA after complying with California *Civil Code* 1782(a) within thirty (30) days after the
25 exhaustion of filing requirements.

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FOURTH CAUSE OF ACTION

UNJUST ENRICHMENT

(By Plaintiff, California Class and National Class

Against all Defendants and Does 1-10)

86. Plaintiff repeats and reallege the allegations set forth in the preceding paragraphs, and incorporates the same as if set forth herein at length.

87. Plaintiff brings this claim individually, as well as on behalf of members of the Nationwide Class and California Class pursuant California law. Although there are numerous permutations of the elements of the unjust enrichment cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the Defendants was unjustly enriched. At the core of each state's law are two fundamental elements – the defendant received a benefit from the Plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the Plaintiff. The focus of the inquiry is the same in each state. Since there is no material conflict relating to the elements of unjust enrichment between the different jurisdictions from which class members will be drawn, California law applies to the claims of the Class.

88. In the alternative, Plaintiff brings this claim individually as well as on behalf of the California Class.

89. At all times relevant hereto, Defendants deceptively labeled, marketed, advertised, and sold the Products to Plaintiff and the Classes.

90. Plaintiff and members of the Classes conferred upon Defendants non-gratuitous payments for the Products that they would not have due to Defendants' deceptive labeling, advertising, and marketing. Defendants accepted or retained the non-gratuitous benefits conferred by Plaintiff and members of the Classes, with full knowledge and awareness that, as a result of Defendants' deception, Plaintiff and members of the Class were not receiving a product of the quality, nature, fitness, or value that had been represented by Defendants and reasonable consumers would have expected.

91. Defendants have been unjustly enriched in retaining the revenues derived from purchases of the Products by Plaintiff and members of the Classes, which retention under these circumstances is unjust and inequitable because the machines are prone to premature failure.

92. Retaining the non-gratuitous benefits conferred upon Defendants by Plaintiff and members of the Classes under these circumstances made Defendants' retention of the non-gratuitous benefits unjust and inequitable. Thus, Defendants must pay restitution to Plaintiff and members of the Classes for their unjust enrichment, as ordered by the Court.

FIFTH CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

**(By Plaintiff, on behalf of herself, the California Class and
Consumer Protection Class Against all Defendants and Does 1-10)**

93. Plaintiff repeats and reallege the allegations set forth in the preceding paragraphs, and incorporates the same as if set forth herein at length.

94. Plaintiff brings this Count individually under the laws of the state of California where she purchased the Product and on behalf of the California Class and Consumer Protection Class (in states having similar laws regarding express warranties).

95. Defendants' representations, as described herein, are affirmations by Defendants that the Products are "keto" and "keto-friendly".

96. Defendants' representations regarding the Products are made to Plaintiff and the other members of the Classes at the point of purchase and are part of the description of the goods. Those promises constituted express warranties and became part of the basis of the bargain, between Defendants on the one hand, and Plaintiff and the Classes on the other.

97. In addition, or in the alternative, Defendants made each of their above-described representations to induce Plaintiff and the Classes to rely on such representations, and they each did so rely on Defendants' representations as a material factor in their decisions to purchase the Products. Plaintiff and other members of the Classes would not have purchased the Products but for these representations and warranties.

98. The Products did not, in fact, meet the representations Defendants made about Products, as described herein, because the Products are not keto or "keto-friendly".

99. Defendants breached their express warranties by supplying the Products in a condition that does not satisfy warranty obligations.

1 100. At all times relevant to this action, Defendants made false representations in breach of
2 the express warranties and in violation of state express warranty laws, including:

- 3 a. Alaska St. §45.02.313;
- 4 b. Ariz. Rev. Stat. Ann. §47-2313;
- 5 c. Ark. Code Ann. §4-2-313;
- 6 d. Cal. Com. Code §2313;
- 7 e. Colo. Rev. Stat. §4-2-313;
- 8 f. Conn. Gen. Stat. Ann. §42a-2-313;
- 9 g. D.C. Code §28:2-313;
- 10 h. Fla. Stat. §672.313;
- 11 i. Haw. Rev. Stat. §490:2-313;
- 12 j. 810 Ill. Comp. Stat. 5/2-313;
- 13 k. Ind. Code §26-1-2-313;
- 14 l. Kan. Stat. Ann. §84-2-313;
- 15 m. La. Civ. Code. Ann. art. 2520;
- 16 n. Maine Rev. Stat. Ann. 11 §2-313;
- 17 o. Mass. Gen. Laws Ann. 106 §2-313;
- 18 p. Minn. Stat. Ann. §336.2-313;
- 19 q. Miss. Code Ann. §75-2-313;
- 20 r. Mo. Rev. Stat. §400.2-313;
- 21 s. Mont. Code Ann. §30-2-313;
- 22 t. Neb. Rev. Stat. §2-313;
- 23 u. Nev. Rev. Stat. §104.2313;
- 24 v. N.H. Rev. Stat. Ann. §382-A:2-313;
- 25 w. N.J. Stat. Ann. §12A:2-313;
- 26 x. N.M. Stat. Ann. §55-2-313;
- 27 y. N.Y. U.C.C. Law §2-313;
- 28 z. N.C. Gen. Stat. Ann. §25-2-313;

- 1 aa. Okla. Stat. Ann. tit. 12A, §2-313;
- 2 bb. Or. Rev. Stat. §72.3130;
- 3 cc. Pa. Stat. Ann. tit. 13, §2313;
- 4 dd. R.I. Gen. Laws §6A-2-313;
- 5 ee. S.C. Code Ann. §36-2-313;
- 6 ff. S.D. Codified Laws. §57A-2-313;
- 7 gg. Tenn. Code Ann. §47-2-313;
- 8 hh. Tex. Bus. & Com. Code Ann. §2.313;
- 9 ii. Utah Code Ann. §70A-2-313;
- 10 jj. Vt. Stat. Ann. tit. 9A§2-313;
- 11 kk. Wash. Rev. Code §62A.2-313;
- 12 ll. W. Va. Code §46-2-313;
- 13 mm. Wyo. Stat. Ann. §34.1-2-313;

14 101. The above statutes do not require privity of contract in order to recover for breach of
15 express warranty.

16 102. Plaintiff has complied with the warranty terms, including usage instructions. Plaintiff
17 has made a demand upon Defendants to perform under the warranty terms, but Defendants have failed
18 to comply with those terms.

19 103. As a direct and proximate result of the breach of express warranties, Plaintiff has
20 suffered damages, injury in fact, and ascertainable loss in an amount to be determined at trial,
21 including repair and replacement costs and damages to other property.

22 104. Wherefore, Plaintiff and the Classes demand judgment against Defendants for
23 compensatory damages, plus interest, costs, and such additional relief as the Court may deem
24 appropriate or to which Plaintiff and the Classes may be entitled.

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SIXTH CAUSE OF ACTION

VIOLATIONS OF CONSUMER FRAUD LAWS

**(By Plaintiff, on Behalf of Herself, the California Class, and Consumer Protection Class
against all Defendants and Does 1-100)**

105. Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs, and incorporates the same as if set forth herein at length.

106. Plaintiff brings this Count individually under the laws of the state where she purchased the Product and on behalf of all other persons who purchased the Products in states having similar laws regarding consumer fraud and deceptive trade practices.

107. Plaintiff and each of the other members of the Classes are consumers, purchasers, or other persons entitled to the protection of the consumer protection laws of the state in which they purchased the Products.

108. The consumer protection laws of the State in which Plaintiff and the other members of the Classes purchased the Products declare that unfair or deceptive acts or practices, in the conduct of trade or commerce, are unlawful.

109. Forty states and the District of Columbia have enacted statutes designed to protect consumers against unfair, deceptive, fraudulent, and unconscionable trade and business practices and false advertising and that allow consumers to bring private and/or class actions. These statutes are found at:

- a. Alabama Deceptive Trade Practices Act, Ala. Code §8-19-1 *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Code §45.50.471 *et seq.*;
- c. Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101 *et seq.*;
- d. California Consumer Legal Remedies Act, Cal. Civ. Code §1750 *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.*;
- e. Colorado Consumer Protection Act, Colo. Rev. Stat. §6-1-101 *et seq.*;
- f. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a *et seq.*;
- g. Delaware Deceptive Trade Practices Act, Del. Code tit. 6§2511 *et seq.*;

- 1 h. District of Columbia Consumer Protection Procedures Act, D.C. Code §28 3901 *et*
- 2 *seq.*;
- 3 i. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. §501.201 *et seq.*;
- 4 j. Georgia Fair Business Practices Act, Ga. Code Ann. §10-1-390 *et seq.*;
- 5 k. California Unfair and Deceptive Practices Act, California Revised Statues §480-1 *et*
- 6 *seq.*, and California Uniform Deceptive Trade Practices Act, Haw. Rev. Stat. §481A-1
- 7 *et seq.*;
- 8 l. Idaho Consumer Protection Act, Idaho Code Ann. §48-601 *et seq.*;
- 9 m. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat.
- 10 Ann. 505/1 *et seq.*;
- 11 n. Kansas Consumer Protection Act, Kan. Stat. Ann §50 626 *et seq.*;
- 12 o. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §367.110 *et seq.*, and the
- 13 Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §365.020 *et seq.*;
- 14 p. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann.
- 15 §51:1401 *et seq.*;
- 16 q. Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5 §205A *et seq.*, and Maine
- 17 Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. tit. 10, §1211 *et seq.*,
- 18 r. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- 19 s. Michigan Consumer Protection Act, Mich. Comp. Laws §445.901 *et seq.*;
- 20 t. Minnesota Prevention of Consumer Fraud Act, Minn. Stat. Ann. §325F.68 *et seq.*, and
- 21 Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. §325D.43 *et seq.*;
- 22 u. Mississippi Consumer Protection Act, Miss. Code Ann. §§75-24-1 *et seq.*;
- 23 v. Missouri Merchandising Practices Act, Mo. Rev. Stat. §407.010 *et seq.*;
- 24 w. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann. §30-
- 25 14-101 *et seq.*;
- 26 x. Nebraska Consumer Protection Act, Neb. Rev. Stat. §59-1601 *et seq.*, and the Nebraska
- 27 Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §87-301 *et seq.*;
- 28 y. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §598.0903 *et seq.*;

- z. New Hampshire Consumer Protection Act, N.H. Rev. Stat. §358-A:1 *et seq.*;
- aa. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §56:8 1 *et seq.*;
- bb. New Mexico Unfair Practices Act, N.M. Stat. Ann. §57 12 1 *et seq.*;
- cc. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §349 *et seq.*;
- dd. North Dakota Consumer Fraud Act, N.D. Cent. Code §51 15 01 *et seq.*;
- ee. Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §1345.02 and 1345.03; Ohio Admin. Code §109:4-3-02, 109:4-3-03, and 109:4-3-10;
- ff. Oklahoma Consumer Protection Act, Okla. Stat. tit. 15 §751 *et seq.*;
- gg. Oregon Unfair Trade Practices Act, Ore. Rev. Stat §646.608(e) & (g);
- hh. Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws §6-13.1-1 *et seq.*;
- ii. South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-10 *et seq.*;
- jj. South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§37 24 1 *et seq.*;
- kk. Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101 *et seq.*;
- ll. Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §2451 *et seq.*;
- mm. Washington Consumer Fraud Act, Wash. Rev. Code §19.86.010 *et seq.*;
- nn. West Virginia Consumer Credit and Protection Act, West Virginia Code §46A-6-101 *et seq.*; and
- oo. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18 *et seq.*

110. The Products constitute a product to which these consumer protection laws apply.

111. In the conduct of trade or commerce regarding its production, marketing, and sale of the Products, Defendants engaged in one or more unfair or deceptive acts or practices including, but not limited to, uniformly representing to Plaintiff and each member of the Classes that the Products were "keto" and/or "keto-friendly."

112. Defendants' representations and omissions were false, untrue, misleading, deceptive, and/or likely to deceive.

1 113. Defendant Costco knew, or should have known, that its representations and omissions
2 were false, untrue, misleading, deceptive, and/or likely to deceive.

3 114. Defendant Innofoods knew, or should have known, that its representations and
4 omissions were false, untrue, misleading, deceptive, and/or likely to deceive.

5 115. Defendant Costco used or employed such deceptive and unlawful acts or practices with
6 the intent that Plaintiff and members of the Classes rely thereon.

7 116. Defendant Innofoods used or employed such deceptive and unlawful acts or practices
8 with the intent that Plaintiff and members of the Classes rely thereon.

9 117. Plaintiff and the other members of the Classes did so rely.

10 118. Plaintiff and the other members of the Classes purchased the Products produced by
11 Defendants which misrepresented the characteristics and nature of The Products.

12 119. Plaintiff and the other members of the Classes would not have purchased the Products
13 but for Defendants' deceptive and unlawful acts.

14 120. As a result of Defendants' conduct, Plaintiff and the other members of the Classes
15 sustained damages in amounts to be proven at trial.

16 121. Defendants' conduct showed complete indifference to, or conscious disregard for, the
17 rights and safety of others such that an award of punitive and/or statutory damages is appropriate under
18 the consumer protection laws of those states that permit such damages to be sought and recovered.

19 **SEVENTH CAUSE OF ACTION**

20 **NEGLIGENT MISREPRESENTATION**

21 **(By Plaintiff, on Behalf of Herself, and the California Class**

22 **against all Defendants and Does 1-10)**

23 122. Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs, and
24 incorporates the same as if set forth herein at length.

25 123. In making representations of fact to Plaintiff and the California Class members about
26 the Products, Defendants failed to fulfill their duty to disclose the material facts alleged above. Such
27 failure to disclose on the part of Defendants amounts to negligent misrepresentation.
28

Cause of Action);

H. That the Court order Defendants to disgorge all monies wrongfully obtained and all revenues and profits derived by Defendants as a result of its acts or practices as alleged in this

Complaint;

I. That the Court award damages to Plaintiff and the Classes;

J. The common fund doctrine, and/or any other appropriate legal theory; and

K. that the Court grant such other and further relief as may be just and proper.

DATED: August 25, 2022

BRADLEY/GROMBACHER, LLP

By: /s/ Kiley L. Grombacher
Marcus J. Bradley, Esq.
Kiley Lynn Grombacher, Esq.
Attorneys for Plaintiff

JURY DEMAND

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

DATED: August 25, 2022

BRADLEY/GROMBACHER, LLP

By: /s/ Kiley L. Grombacher
Marcus J. Bradley, Esq.
Kiley Lynn Grombacher, Esq.
Attorneys for Plaintiff