





1           7.     In addition, “the number of members of all proposed plaintiff classes in the  
2 aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

3           8.     In the alternative, the Court has jurisdiction pursuant to 28 U.S.C. § 1332(a). The  
4 amount in controversy exceeds \$75,000 exclusive of interest, fees, and costs.

5           9.     This Court has personal jurisdiction over Defendant because this action arises out  
6 of and relates to Defendant’s contacts with this forum.

7  
8           10.    Those contacts include but are not limited to sales of the Products directly to  
9 commercial and individual consumers located in this district, including Plaintiff; shipping the  
10 Products to commercial and individual consumers in this district, including Plaintiff; knowingly  
11 directing advertising and marketing materials concerning the Products into this district through  
12 wires and mails, both directly and through electronic and print publications that are directed to  
13 commercial and individual consumers in this district; and operating an e-commerce web site  
14 that offers the Products for sale to commercial and individual consumers in this district, as well  
15 as offering the Products for sale through third-party e-commerce websites, through both of  
16 which commercial and individual consumers residing in this district have purchased the  
17 Products.  
18

19           11.    Defendant knowingly directs electronic activity and ships the Products into this  
20 district with the intent to engage in business interactions for profit, and it has in fact engaged in  
21 such interactions, including the sale of the Products to Plaintiff.  
22

23           12.    Defendant also sells the Products to retailers and wholesalers in this district for  
24 the purpose of making the Products available for purchase by individual consumers in this  
25 district.  
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27           13.    Plaintiff’s losses and those of other Class members were sustained in this district.  
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14. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred within this district.

15. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court maintains personal jurisdiction over defendant.

## FACTUAL ALLEGATIONS

### A. Deceptive Calories-Per-Serving Claims.

16. Under FDA regulations, the "Total Calories" in a dietary supplement such as the Products "shall be declared when they are present in a dietary supplement in quantitative amounts by weight that exceed the amount that can be declared as zero," *i.e.*, they exceed five calories per serving. 21 C.F.R. § 101.36(b)(ii)(1).

17. These regulations do not permit manufacturers of dietary supplements to omit stating calories per serving if the total calories per serving exceeds five calories.

18. FDA guidance clarifies this requirement. FDA provides a clear (high resolution) example of labeling calories for an amino acid-based supplement at <https://www.fda.gov/media/99158/download>. This FDA example, as pictured below, displays approximately 4 grams of total amino acids, which would approximate 16 Calories and is listed as 15 based on rounding rules:

Supplement Facts	
Serving Size 1 Tablet	
Servings Per Container 50	
Amount Per Tablet	
Calories	15
Isoleucine (as L-isoleucine hydrochloride)	450 mg*
Leucine (as L-leucine hydrochloride)	620 mg*
Lysine (as L-lysine hydrochloride)	500 mg*
Methionine (as L-methionine hydrochloride)	350 mg*
Cystine (as L-cystine hydrochloride)	200 mg*
Phenylalanine (as L-phenylalanine hydrochloride)	220 mg*
Tyrosine (as L-tyrosine hydrochloride)	900 mg*
Threonine (as L-threonine hydrochloride)	300 mg*
Valine (as L-valine hydrochloride)	650 mg*

\* Daily Value not established.

Other ingredients: Cellulose, lactose, and magnesium stearate.

1            19. In this example label, protein is not reported because there are no complete  
2 proteins. Nonetheless, the Total Calories attributable to individual amino acids are stated on the  
3 label.

4            20. FDA's guidance thus provides no safe harbor for supplement manufacturers to  
5 simply omit calories on the label of amino acid-based supplements if Total Calories exceed the  
6 amount that can be declared as zero, even if protein is not reported.


7            21. The Supplement Facts panel on Nutricost's EAA powder reports 5 calories per  
8 serving, as displayed below:  
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Supplement Facts		
Serving Size: 1 Scoop (15g) Servings Per Container: 60		
Amount Per Serving	% DV*	Amount Per Serving
Calories		
Total Carbohydrate	5	Taurine 2,000mg **
Thiamin (Vitamin B1)	1g <1%	Agmatine Sulfate 500mg **
(as thiamine mononitrate)	50mg 4,170%	L-Tyrosine 500mg **
Niacin		L-Theanine 300mg **
Vitamin B6 (as pyridoxine HCl)	25mg NE 160%	Caffeine Anhydrous 300mg **
Vitamin B12 (as methylcobalamin)	60mcg 3,530%	Theobromine 200mcg **
L-Citrulline Malate 2:1	200mcg 8,330%	Huperzine A 200mcg **
Beta-Alanine	6,000mg **	
	3,000mg **	

Other ingredients: Natural flavors, tartaric acid†, calcium silicate, silicon dioxide, citric acid, sucralose, fruit juice (for color).  
† Used as a flavor enhancer  
\*Percent Daily Values (DV) are based on a 2,000 calorie diet.  
\*\*Daily Value not established.

22            22. The Supplement Facts panel on Nutricost's Pre-Workout powder does not report  
23 any calories per serving, as displayed below:  
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27  
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Supplement Facts	
Serving Size: 1 Scoop (11g)	
Servings Per Container: 30	
Amount Per Serving	% DV
2:1:1 BCAA (Instantized)	6,000mg
L-Leucine	approx. 3,000mg
L-Isoleucine	approx. 1,500mg
L-Valine	approx. 1,500mg
L-Lysine HCl	800mg
L-Threonine	690mg
L-Phenylalanine	350mg
L-Histidine	100mg
L-Tryptophan	50mg
L-Methionine	10mg

\* Daily Value (DV) not established.

Other ingredients: Malic acid (flavor enhancer), citric acid, natural flavors, sucralose, silicon dioxide, acesulfame potassium, blue spirulina (for color).

23. FDA regulations permit the use of one of “Five Methods” of determining the caloric content of foods. *See* 21 C.F.R. § 101.9(c)(i)(1). A “safe-harbor” provision allows the “total number of calories” measured by any of the Five Methods to be as much as 20% greater than the calorie content listed on a label. *Id.* § 101.9(g)(5).

24. Among the methods by which a manufacturer may determine caloric content is using bomb calorimetry. *See* 21 C.F.R. § 101.9(c)(i)(1).

25. The Products were tested using bomb calorimetry conducted by an independent third-party nutritional analysis firm. That analysis revealed that:

- The EAA powder contains 5.12 kcal per gram—about 1,690 calories per container—or 56 calories per serving; and
- The Pre-Workout powder contains 3.74 kcal per gram—about 3,366 calories per container—or 56 calories per serving.



1           26. Consumers would reasonably expect—and Mr. Scheibe did expect—that a dietary  
2 supplement that reports 5 calories per serving contains only 5 calories per serving. Here, the  
3 explicit representation that the EAA powder contains only 5 calories per serving is false and  
4 deceptive.

5           27. Likewise, consumers would reasonably expect—and Mr. Scheibe did expect—  
6 that a dietary supplement that reports no calories per serving contains zero calories per serving.  
7 Here, the implied representation that the Pre-Workout powder contains zero calories per serving  
8 is false and deceptive.

9           28. Under any of the FDA’s relevant Five Methods, the Products are mislabelled.

10           29. Defendant’s labels deceive consumers, such as Plaintiff, by making deceptive  
11 representations regarding calorie content.  
12

13 **B. Defendant’s Use of Synthetic Flavorings.**

14           30. Like many consumers, Mr. Scheibe is increasingly attuned to, and relies on, claims  
15 that foods are “all-natural,” minimally processed, or are otherwise free of artificial ingredients.  
16

17           31. For example, a 2018 survey by L.E.K. Consulting found that overwhelming  
18 numbers of consumers were committed or casual adherents to so-called “clean label” food  
19 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-  
20 natural” (66 percent). These were the three most attractive attributes in the consumer survey.  
21 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean  
22 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.  
23

24           32. This consumer preference has led to an explosion in the category of “clean label”  
25 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods  
26 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent  
27  
28

from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

33. According to Nielsen, more than 40 percent of consumers rate the absence of artificial flavors in their foods as important to them when deciding between competing products, and more than 60 percent try to avoid artificial flavors at least some of the time.

34. Consumers also have a specific sense of the attributes of “natural” foods. Research by Consumer Reports indicates that nearly 90 percent of consumers believe and expect that foods described as “natural” should contain no artificial ingredients.

35. To appeal to consumers who seek out natural food products and are willing to pay more for them, Defendant labels and advertises the Products as if they are exclusively naturally flavored.

36. For example, the front label of the EAA product purchased by Scheibe uses depictions of raspberries and states that it is “Naturally Flavored with Other Natural Flavors”:



37. This label claims are false. The Products are artificially flavored.



1           38. The Product contains an ingredient identified as “malic acid”:



3           39. While there is a naturally occurring form of malic acid, it is extremely expensive  
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12 to formulate in large quantities and is almost never used in mass-produced food products. Instead, the malic acid that Defendant uses in these Products is “DL malic acid,” a synthetic petrochemical.<sup>1</sup>

13           40. This type of malic acid is manufactured in petrochemical plants from benzene or  
14  
15 butane—components of gasoline and lighter fluid, respectively—through a series of chemical reactions, some of which involve highly toxic chemical precursors and byproducts.

16           41. Fruit flavors in a food are imparted by the interactions between sugars, acids,  
17  
18 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined by the ratio between the sugars (mainly glucose and fructose) and acids, such as malic acid.

19           42. The quality and consumer acceptability of fruit flavors is based on their perceived  
20  
21 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such as lemons, limes, and acai berries have their own natural ratio of sugars and acids.

22           43. The DL malic acid used in the Products is used to create, enhance, simulate, and/or  
23  
24 reinforce the sweet and tart taste that consumers associate with the characterizing fruit flavors, such as lemons, limes, and acai berries. It does so by changing the ratio between acids and sugars  
25  
26 in the Products.  
27

28  
<sup>1</sup> DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1           44. Defendant uses the artificial petrochemically derived DL malic acid in its Products  
2 to create this sweet and tart flavor but pretends otherwise, conflating natural and artificial  
3 flavorings, misbranding the Products and deceiving consumers.

4           45. The ingredients on the Products' label are declared in a way that is misleading and  
5 contrary to law, because Defendant designates the ingredient by its generic name, "malic acid,"  
6 instead of by its specific name, "DL malic acid."  
7

8           46. Testing conducted by independent third-party laboratories has confirmed the use  
9 of DL malic acid in the Products.

#### 10 **C. Requirements for Labelling—Flavoring**

11           47. California's Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §  
12 109875, *et seq.*, incorporates all food flavoring and additive regulations of the Federal Food,  
13 Drug, and Cosmetic Act ("FDCA"). The regulations require that a food's label accurately  
14 describe the nature of the food product and its characterizing flavors. 21 C.F.R. § 102.5(a).  
15

16           48. Artificial flavor is defined as "any substance, the function of which is to impart  
17 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible  
18 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy  
19 products, or fermentation products thereof." 21 C.F.R. § 101.22(a)(1).  
20

21           49. Natural flavor is defined as "essential oil, oleoresin, essence or extractive, protein  
22 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the  
23 flavoring constituents" from fruits or vegetables, "whose significant function in food is flavoring  
24 rather than nutritional." 21 C.F.R. § 101.22(a)(3).

25           50. Any recognizable primary flavor identified directly or indirectly on the front label  
26 of a food Product, whether by word, vignette, depiction of a fruit, or other means is referred to  
27 as a "characterizing flavor." 21 C.F.R. § 101.22.  
28

1           51. Here, the Products' labels state the characterizing flavors and also use depictions  
2 of fruits to identify the characterizing flavor.

3           52. If a food product's characterizing flavor is not created exclusively by the named  
4 flavor ingredient, the product's front label must state that the product's flavor was simulated or  
5 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present  
6 that "simulates, resembles or reinforces" the characterizing flavor, the front label must  
7 prominently inform consumers that the product is "Artificially Flavored." 21 C.F.R. §  
8 101.22(i)(2).  
9

10           53. A food product's label also must include a statement of the "presence or absence  
11 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such  
12 ingredient(s) or component(s) in the food has a material bearing on price or consumer  
13 acceptance . . . and consumers may otherwise be misled about the presence or absence of the  
14 ingredient(s) or component(s) in the food." 21 C.F.R. § 102.5.  
15

16           54. Such statement must be in boldface print on the front display panel and of  
17 sufficient size for an average consumer to notice.

18           55. By changing the ratio between sugars and acids that is naturally found in fruits  
19 such as raspberries, the DL malic acid used in the Product reinforces, stimulates, or enhances  
20 the characterizing flavors, regardless of any other effect it may have or purpose for which it was  
21 included.  
22

23           56. DL malic acid is not a "natural flavor" as this term is defined by federal and state  
24 regulations and is not derived from a fruit or vegetable or any other natural source. Rather, it is  
25 derived from petroleum products. The Products therefore contain artificial flavorings.  
26  
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1           57. Because the Products contain artificial flavoring, California law requires the  
2 Products to display both front- and back-label disclosures to inform consumers that the Products  
3 are artificially flavored.

4           58. The Products have none of the required disclosures regarding the use of artificial  
5 flavors.

6           59. While the Products come in different flavors, each flavor is substantially similar  
7 to every other flavor in terms of the Product's formulation and amino acid blend. In addition,  
8 each flavor of the Products makes the same misrepresentation regarding calories per serving.  
9

10          60. Plaintiff reserves the right to amend this Complaint to add further products that  
11 contain similar label misrepresentations as testing continues.

12          61. Labels are the chief means by which food product manufacturers convey critical  
13 information to consumers, and consumers have been conditioned to rely on the accuracy of the  
14 claims made on these labels. As the California Supreme Court stated in a case involving alleged  
15 violations of the UCL and FAL, "Simply stated: labels matter. The marketing industry is based  
16 on the premise that labels matter, that consumers will choose one product over another similar  
17 product based on its label." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).  
18

19          62. Given the Defendant's labels, consumers including Plaintiff would reasonably  
20 understand Defendant's statements to mean that the Products had 5 calories per serving as  
21 represented or zero calories per serving as implied. These representations were false.  
22

23          63. Consumers including Plaintiff viewed and reasonably relied on Defendant's  
24 statements on the Products' labels, as described herein, and would not have purchased the  
25 Products from Defendant if the truth about the Products were known, or would have only been  
26 willing to pay a substantially reduced price for the Products had they known that Defendant's  
27 representations were false and misleading.  
28



1           71.   **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all  
 2   Class members is impracticable. Plaintiff believes and avers there are thousands of Class  
 3   members geographically dispersed throughout the State.

4           72.   **Existence and Predominance of Common Questions of Law and Fact – Rule**  
 5   **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions  
 6   predominate over any questions that affect only individual Class members. Common legal and  
 7   factual questions and issues include but are not limited to:

- 9           a.   Whether the marketing, advertising, packaging, labeling, and other promotional  
 10           materials for the Products is misleading and deceptive;
- 11           b.   Whether a reasonable consumer would understand Defendant’s flavoring claims  
 12           to mean that the Products contained only natural flavors, or the calories-per-  
 13           serving claims to mean that the Products had 5 or zero calories per serving, and  
 14           reasonably relied upon those representations;
- 15           c.   Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class  
 16           members;
- 17           d.   the proper amount of damages and disgorgement or restitution;
- 18           e.   the proper scope of injunctive relief; and
- 19           f.   the proper amount of attorneys’ fees.

20           73.   Defendant engaged in a common course of conduct in contravention of the laws  
 21   Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations  
 22   of law, business practices, and injuries are involved. Individual questions, if any, pale by  
 23   comparison, in both quality and quantity, to the numerous common questions that predominate  
 24   this action. The common questions will yield common answers that will substantially advance  
 25   the resolution of the case.

1           74. In short, these common questions of fact and law predominate over questions that  
2 affect only individual Class members.

3           75. **Typicality – Rule 23(a)(3):** Plaintiff's claims are typical of the claims of the Class  
4 members because they are based on the same underlying facts, events, and circumstances  
5 relating to Defendant's conduct.  
6

7           76. Specifically, all Class members, including Plaintiff, were harmed in the same way  
8 due to Defendant's uniform misconduct described herein; all Class members suffered similar  
9 economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as  
10 the Class members.

11           77. There are no defenses available to Defendant that are unique to the named  
12 Plaintiff.  
13

14           78. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate  
15 representative of the Class because Plaintiff's interests do not conflict with the Class members'  
16 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress  
17 against Defendant.

18           79. Furthermore, Plaintiff has selected competent counsel who are experienced in  
19 class actions and other complex litigation. Plaintiff and Plaintiff's counsel are committed to  
20 prosecuting this action vigorously on behalf of the Class and have the resources to do so.  
21

22           80. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other  
23 available means for the fair and efficient adjudication of this controversy for at least the  
24 following reasons:

- 25           a. the damages individual Class members suffered are small compared to the burden  
26 and expense of individual prosecution of the complex and extensive litigation  
27 needed to address Defendant's conduct such that it would be virtually impossible  
28



1 for the Class members individually to redress the wrongs done to them. In fact,  
2 they would have little incentive to do so given the amount of damage each member  
3 has suffered when weighed against the costs and burdens of litigation;

4 b. the class procedure presents fewer management difficulties than individual  
5 litigation and provides the benefits of single adjudication, economies of scale, and  
6 supervision by a single court;

7 c. the prosecution of separate actions by individual Class members would create a  
8 risk of inconsistent or varying adjudications, which would establish incompatible  
9 standards of conduct for Defendant; and

10 d. the prosecution of separate actions by individual Class members would create a  
11 risk of adjudications with respect to them that would be dispositive of the interests  
12 of other Class members or would substantively impair or impede their ability to  
13 protect their interests.

14  
15  
16 81. Unless the Class is certified, Defendant will retain monies received as a result of  
17 its unlawful and deceptive conduct alleged herein.

18 82. Unless a class-wide injunction is issued, Defendant will likely continue to  
19 advertise, market, promote, and sell the Products in an unlawful and misleading manner, as  
20 described throughout this Complaint, and members of the Class will continue to be misled,  
21 harmed, and denied their rights under the law.

22 83. **Ascertainability.** To the extent ascertainability is required, the Class members are  
23 readily ascertainable from Defendant's records and/or its agents' records of retail and online  
24 sales, as well as through public notice.

25 84. Defendant has acted on grounds applicable to the Class as a whole, thereby  
26 making appropriate final injunctive and declaratory relief concerning the Class as a whole.  
27  
28

**COUNT 1**  
**VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION**  
**17200 *ET SEQ.* — “UNFAIR” CONDUCT**

85. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

86. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as a result of Defendant’s actions as set forth herein.

87. Defendant’s actions as alleged in this Complaint constitute “unfair” conduct within the meaning of California Business and Professions Code § 17200, *et seq.*

88. Defendant’s business practices, as alleged herein, are “unfair” because it fails to disclose accurately the synthetic flavoring used in the Products and accurately state the caloric content of the Products.

89. As a result of this “unfair” conduct, Plaintiff expended money and engaged in activities he would not otherwise have spent or conducted.

90. Defendant’s wrongful business practices alleged herein constituted, and continue to constitute, a continuing course of unfair competition since it continues to market and sell its products in a manner that offends public policy and/or in a fashion that is immoral, unethical, oppressive, unscrupulous and/or substantially injurious to its customers.

91. Defendant publicly disseminated untrue or misleading representations regarding the calories per serving of its Products, which it knew, or in the exercise of reasonable care should have known, were untrue or misleading.

92. Pursuant to Business and Professions Code § 17203, Plaintiff seeks an order of this court enjoining Defendant from continuing to engage in “unfair” business practices and any other act prohibited by law, including those acts set forth in this Complaint, and further seek all other relief allowable under Business and Professions Code § 17200, *et seq.*

**COUNT 2**  
**VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**  
**SECTION 17200 *ET SEQ.* — “FRAUDULENT” CONDUCT**

93. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

94. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as a result of Defendant’s actions as set forth above.

95. Defendant’s actions as alleged in this Complaint constitute “fraudulent” conduct within the meaning of California Business and Professions Code § 17200 *et seq.*

96. Defendant’s business practices, as alleged herein, are “fraudulent” because it fails to disclose accurately the synthetic flavoring used in the Products and accurately state the caloric content of the Products.

97. As a result of this “fraudulent” conduct, Plaintiff expended money and engaged in activities he would not otherwise have spent or conducted.

98. Defendant’s wrongful business practices alleged herein constituted, and continue to constitute, a continuing course of unfair competition since it continues to market and sell its products in a manner that offends public policy and/or in a fashion that is immoral, unethical, oppressive, unscrupulous and/or substantially injurious to its customers.

99. Defendant publicly disseminated untrue or misleading representations regarding the calories per serving of its Products, which it knew, or in the exercise of reasonable care should have known, were untrue or misleading.

100. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order of this Court enjoining Defendant from continuing to engage in “fraudulent” business practices and any other act prohibited by law, including those acts set forth in this Complaint,

1 and further seeks all other relief allowable under Business and Professions Code Section 17200,  
2 *et seq.*

3  
4 **COUNT 3**  
5 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**  
6 **SECTION 17200 *ET SEQ.* — “UNLAWFUL” CONDUCT**

7 101. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the  
8 extent necessary, pleads this cause of action in the alternative.

9 102. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as  
10 a result of Defendant’s actions as set forth above.

11 103. Defendant’s actions as alleged in this Complaint constitute “unlawful” conduct  
12 within the meaning of California Business and Professions Code Section 17200, *et seq.*

13 104. Defendant’s business practices, as alleged herein, are “unlawful” because it fails  
14 to disclose accurately the synthetic flavoring used in the Products and accurately state the caloric  
15 content of the Products.

16 105. As a result of this “unlawful” conduct, Plaintiff expended money and engaged in  
17 activities it would not otherwise have spent or conducted.

18 106. Defendant’s business practices alleged herein constituted, and continue to  
19 constitute, a continuing course of unfair competition since it continues to market and sell its  
20 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,  
21 oppressive, unscrupulous and/or substantially injurious to its customers.

22 107. Defendant publicly disseminated untrue or misleading representations regarding  
23 the calories per serving in its Products, which it knew, or in the exercise of reasonable care  
24 should have known, were untrue or misleading.

25 108. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order  
26 of this court enjoining Defendant from continuing to engage in “unlawful” business practices  
27  
28

1 and any other act prohibited by law, including those acts set forth in this Complaint, and further  
2 seeks all other relief allowable under Business and Professions Code Section 17200, *et seq.*

3  
4 **COUNT 4**  
5 **VIOLATION OF CALIFORNIA BUSINESS &**  
6 **PROFESSIONS CODE SECTION 17500 *ET SEQ.***

7 109. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the  
8 extent necessary, pleads this cause of action in the alternative.

9 110. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as  
10 a result of Defendant's actions as set forth above.

11 111. Defendant engaged in advertising and marketing to the public and offered for sale  
12 advertising services on a nationwide basis, including in California.

13 112. Defendant engaged in the advertising and marketing alleged herein with the intent  
14 to directly or indirectly induce the sale of the Products to consumers.

15 113. Defendant's advertisements and marketing representations regarding the  
16 characteristics of the Products were false, misleading, and deceptive as set forth above.

17 114. At the time it made and disseminated the statements alleged herein, Defendant  
18 knew or should have known that the statements were untrue or misleading, and acted in violation  
19 of Business and Professions Code Section 17500, *et seq.*

20 115. Plaintiff seeks injunctive relief and all other relief allowable under Business and  
21 Professions Code Section 17500, *et seq.*

22  
23 **COUNT 5**  
24 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**  
25 **CAL. CIV. CODE § 1750 *ET SEQ.***

26 116. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the  
27 extent necessary, pleads this cause of action in the alternative.  
28

1           117. Plaintiff is a “consumer” within the meaning of the Consumer Legal Remedies  
2 Act (“CLRA”), Cal. Civ. Code § 1761(d).

3           118. The sale of Defendant’s Products to Plaintiff and Class members was a  
4 “transaction” within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

5           119. The Products purchased by Plaintiff and Class members are “goods” within the  
6 meaning of the CLRA, Cal. Civ. Code § 1761(a).

7           120. As alleged herein, Defendant’s business practices are a violation of the CLRA  
8 because Defendant deceptively failed to reveal facts that are material in light of the flavoring  
9 and calories per serving representations that were made by Defendant on the labels of its  
10 Products.  
11

12           121. Defendant’s ongoing failure to provide material facts about its Products on its  
13 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:  
14

- 15           a. Defendant’s acts and practices constitute misrepresentations that its Products have  
16 characteristics, benefits, or uses which they do not have;
- 17           b. Defendant misrepresented that its Products are of a particular standard, quality,  
18 and/or grade, when they are of another;
- 19           c. Defendant’s acts and practices constitute the advertisement of goods, without the  
20 intent to sell them as advertised;
- 21           d. Defendant’s acts and practices fail to represent that transactions involving its  
22 Products involve actions that are prohibited by law, particularly the use of  
23 misleading nutritional labelling; and  
24
- 25           e. Defendant’s acts and practices constitute representations that its Products have  
26 been supplied in accordance with previous representations when they were not.  
27  
28

122. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed, entitling them to injunctive relief, disgorgement, and restitution.

123. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the particular violations of the CLRA described herein and demanded Defendant rectify the actions described above by providing complete monetary relief, agreeing to be bound by their legal obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.

124. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled to recover actual damages sustained as a result of Defendant's violations of the CLRA. Such damages include, without limitation, monetary losses and actual, punitive, and consequential damages, in an amount to be proven at trial.

125. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin publication of misleading and deceptive nutritional labels on Defendant's Products and to recover reasonable attorneys' fees and costs.

### COUNT 6 UNJUST ENRICHMENT

126. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

127. Defendant, through its marketing and labeling of the Products, misrepresented and deceived consumers regarding the calories per serving in the Products.

128. Defendant did so for the purpose of enriching itself and it in fact enriched itself by doing so.

129. Consumers conferred a benefit on Defendant by purchasing the Products, including an effective premium above their true value. Defendant appreciated, accepted, and retained the benefit to the detriment of consumers.



1           130. Defendant continues to possess monies paid by consumers to which Defendant is  
2 not entitled.

3           131. Under the circumstances it would be inequitable for Defendant to retain the benefit  
4 conferred upon it and Defendant's retention of the benefit violates fundamental principles of  
5 justice, equity, and good conscience.

6           132. Plaintiff seeks disgorgement of Defendant's ill-gotten gains and restitution of  
7 Defendant's wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed  
8 appropriate by the Court, and such other relief as the Court deems just and proper to remedy  
9 Defendant's unjust enrichment.

10           133. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as  
11 a result of Defendant's actions as set forth above.

12  
13  
14                                   **PRAYER FOR RELIEF**

15           134. WHEREFORE, Plaintiff respectfully request the Court grant the following relief  
16 against Defendant:

- 17           a. Certifying the Class;
- 18           b. Declaring that Defendant violated the CLRA, UCL, and FAL;
- 19           c. Awarding actual and other damages as permitted by law, and/or ordering an  
20 accounting by Defendant for any and all profits derived by Defendant from the  
21 unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein;
- 22           d. Ordering an awarding of injunctive relief as permitted by law or equity, including  
23 enjoining Defendant from continuing the unlawful practices as set forth herein, and  
24 ordering Defendant to engage in a corrective advertising campaign;
- 25  
26  
27  
28

- 1 e. Ordering Defendant to pay attorneys' fees and litigation costs to Plaintiff pursuant to  
2 California Code of Civil Procedure section 1021.5 and the common-law private-  
3 attorney-general doctrine;  
4  
5 f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts  
6 awarded; and  
7  
8 g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED.

9 /s/ Charles C. Weller  
10 Charles C. Weller (Cal. SBN: 207034)  
Attorney for Plaintiff

11 CHARLES C. WELLER, APC  
12 11412 Corley Court  
13 San Diego, California 92126  
Tel: 858.414.7465  
Fax: 858.300.5137

14 November 10, 2022  
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CIVIL COVER SHEET

The JS 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 by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Jacob Scheibe, individually and on behalf of others  
siminalrlv situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Charles C. Weller, CHARLES C. WELLER APC, 11412  
Corley Ct., Sand Diego, CA, Tel: 858.414.7465

DEFENDANTS

eSupplements, LLC dba Nutricost

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

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

Attorneys (If Known) '22CV1765 BEN MSB

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

☐ 1 U.S. Government Plaintiff

☐ 2 U.S. Government Defendant

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

☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

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

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

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

CONTRACT

☐ 110 Insurance  
☐ 120 Marine  
☐ 130 Miller Act  
☐ 140 Negotiable Instrument  
☐ 150 Recovery of Overpayment & Enforcement of Judgment  
☐ 151 Medicare Act  
☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)  
☐ 153 Recovery of Overpayment of Veteran's Benefits  
☐ 160 Stockholders' Suits  
☐ 190 Other Contract  
☒ 195 Contract Product Liability  
☐ 196 Franchise

TORTS

PERSONAL INJURY

☐ 310 Airplane  
☐ 315 Airplane Product Liability  
☐ 320 Assault, Libel & Slander  
☐ 330 Federal Employers' Liability  
☐ 340 Marine  
☐ 345 Marine Product Liability  
☐ 350 Motor Vehicle  
☐ 355 Motor Vehicle Product Liability  
☐ 360 Other Personal Injury  
☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY

☐ 365 Personal Injury - Product Liability  
☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability  
☐ 368 Asbestos Personal Injury Product Liability  

PERSONAL PROPERTY

☐ 370 Other Fraud  
☐ 371 Truth in Lending  
☐ 380 Other Personal Property Damage  
☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY

☐ 625 Drug Related Seizure of Property 21 USC 881  
☐ 690 Other  

LABOR

☐ 710 Fair Labor Standards Act  
☐ 720 Labor/Management Relations  
☐ 740 Railway Labor Act  
☐ 751 Family and Medical Leave Act  
☐ 790 Other Labor Litigation  
☐ 791 Employee Retirement Income Security Act  

IMMIGRATION

☐ 462 Naturalization Application  
☐ 465 Other Immigration Actions

BANKRUPTCY

☐ 422 Appeal 28 USC 158  
☐ 423 Withdrawal 28 USC 157  

INTELLECTUAL PROPERTY RIGHTS

☐ 820 Copyrights  
☐ 830 Patent  
☐ 835 Patent - Abbreviated New Drug Application  
☐ 840 Trademark  
☐ 880 Defend Trade Secrets Act of 2016  

SOCIAL SECURITY

☐ 861 HIA (1395ff)  
☐ 862 Black Lung (923)  
☐ 863 DIWC/DIWW (405(g))  
☐ 864 SSID Title XVI  
☐ 865 RSI (405(g))  

FEDERAL TAX SUITS

☐ 870 Taxes (U.S. Plaintiff or Defendant)  
☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES

☐ 375 False Claims Act  
☐ 376 Qui Tam (31 USC 3729(a))  
☐ 400 State Reapportionment  
☐ 410 Antitrust  
☐ 430 Banks and Banking  
☐ 450 Commerce  
☐ 460 Deportation  
☐ 470 Racketeer Influenced and Corrupt Organizations  
☐ 480 Consumer Credit (15 USC 1681 or 1692)  
☐ 485 Telephone Consumer Protection Act  
☐ 490 Cable/Sat TV  
☐ 850 Securities/Commodities/Exchange  
☐ 890 Other Statutory Actions  
☐ 891 Agricultural Acts  
☐ 893 Environmental Matters  
☐ 895 Freedom of Information Act  
☐ 896 Arbitration  
☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision  
☐ 950 Constitutionality of State Statutes

Click here for: [Nature of Suit Code 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 U.S.C. Section 1332

Brief description of cause:  
Consumer protection action for mislabelled and misbranded food products

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$  
5,000,000

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

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE  
11/10/2022

SIGNATURE OF ATTORNEY OF RECORD  
/s/ Charles C. Weller

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

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

- I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.  
(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)  
(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. **Origin.** Place an "X" in one of the seven boxes.  
Original Proceedings. (1) Cases which originate in the United States district courts.  
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.  
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.  
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.  
**PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.