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Attorney for Plaintiff Jacob Scheibe

**IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JACOB SCHEIBE, *individually and on*)
behalf of all those similarly situated,)

Plaintiff,)

No. **'23CV0026 BTM BLM**

v.)

CLASS ACTION COMPLAINT

ALACER CORPORATION, *a California*)
corporation,)

JURY TRIAL DEMANDED

Defendant.)

 Jacob Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by and through undersigned counsel, hereby brings this action against Alacer Corporation (“Alacer”), alleging that “Emergen-C Daily Immune Support” (“the Products”), a powdered dietary supplement manufactured, packaged, labeled, advertised, distributed, and sold by Defendant, is misbranded and falsely advertised, and upon information and belief and investigation of counsel alleges as follows:

PARTIES

1. Plaintiff Jacob Scheibe is and at all times relevant was a citizen of the state of California, domiciled in San Diego, California.

1 wires and mails, both directly and through electronic and print publications that are directed to
2 commercial and individual consumers in this district; and operating an e-commerce web site
3 that offers the Products for sale to commercial and individual consumers in this district, as well
4 as offering the Products for sale through third-party e-commerce websites, through both of
5 which commercial and individual consumers residing in this district have purchased the
6 Products.
7

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

12 10. Defendant also sells the Products to retailers and wholesalers in this district for
13 the purpose of making the Products available for purchase by individual consumers in this
14 district.
15

16 11. Plaintiff's losses and those of other Class members were sustained in this district.
17

18 12. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of
19 the events or omissions giving rise to Plaintiff's claims occurred within this district.
20

21 13. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court
22 maintains personal jurisdiction over Defendant.
23

24 **FACTUAL ALLEGATIONS**

25 **A. Consumers Pay A Premium for "Clean Labels."**

26 14. Across the globe, consumers are increasingly attuned to claims that foods are "all-
27 natural," minimally processed, or otherwise free of artificial flavors and preservatives.
28

15. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
numbers of consumers were committed or casual adherents to so-called "clean label" food
attributes: "No artificial ingredients" (69 percent); "No preservatives" (67 percent); or "All-
natural" (66 percent). These were the three most attractive attributes in the consumer survey.

1 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
2 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

3 16. This consumer preference has led to an explosion in the category of “clean label”
4 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
5 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
6 from 2016 to 2023, reaching \$191 billion in annual sales by the end of 2023. See
7 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.
8

9 17. On or about August 15, 2022, Mr. Scheibe purchased a Emergen-C Daily Immune,
10 Super Orange flavor, from Amazon.com (Order No. 113-4661433-2091436).

11 18. Mr. Scheibe is a student who has recently sought to take better care of his health.
12 He carefully reviews labels, including the Products’ labels, to ensure that he consumes only
13 natural ingredients and avoids artificial flavors and ingredients.
14

15 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

16 19. Defendant Alacer formulates, manufactures, and sells a dietary supplement called
17 “Emergen-C Daily Immune Support.” These drink mix powders purport to contain 1,000 mg of
18 Vitamin C. They are marketed as providing immune system support, anti-oxidants, and other
19 nutrients that support health and wellness.

20 20. These dietary supplements come in eight different flavors: Super Orange,
21 Cranberry Pomegranate, Meyer Lemon, Pink Lemonade, Raspberry, Strawberry Kiwi,
22 Tangerine, and Tropical. However, the Products differ only in flavoring; the base formulation
23 for each flavor is the same, and they are offered for sale for an identical price.
24

25 21. The front label (or “principal display panel”) of all flavors of the Products
26 prominently state that they contain “Natural Flavors” and “Natural Fruit Flavors,” using bolded
27 type and graphical call-outs or insets to highlight these claims, as shown in this example:
28



22. All flavors of the Products use depictions of fruits on the front label, as shown above, to reinforce the natural flavoring claim that is being made.

23. These natural flavoring claims are false. The Products are flavored using an artificial flavoring, DL malic acid, that is derived from petrochemicals.

24. All flavors of the Products state, on the back label, that they contain “malic acid.”

25. While there is a naturally occurring form of malic acid, it is extremely expensive to formulate in the large quantities and is almost never used in mass-produced food products. Instead, testing by an independent third-party laboratory has confirmed that the malic acid that Defendant uses in these Products is DL malic acid, a synthetic substance derived from petrochemicals.¹

¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

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

4 27. Fruit flavors in a food are imparted by the interactions between sugars, acids,
5 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined
6 by the ratio between the sugars (mainly glucose and fructose) and acids, such as citric and malic
7 acid.

8 28. The quality and consumer acceptability of fruit flavors is based on their perceived
9 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
10 as oranges, lemons, raspberries, and other fruits have their own natural ratio of sugars and acids.

11 29. The malic acid used in the Products is used to create, simulate, and/or reinforce
12 the sweet and tart taste that consumers associate with the characterizing fruit flavors stated on
13 the labels.

14 30. Defendant uses the petrochemical-derived DL malic acid in its Products to create
15 a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings,
16 misbranding the Products and deceiving consumers.

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

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21
22
23 **C. Requirements for Labelling**

24 32. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
25 ("FDCA") require that a food's label accurately describe the nature of the food product and its
26 characterizing flavors. 21 C.F.R. § 102.5(a).

1 33. Artificial flavor is defined as “any substance, the function of which is to impart
2 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
3 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
4 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

5
6 34. Natural flavor is defined as “essential oil, oleoresin, essence or extractive, protein
7 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the
8 flavoring constituents” from fruits or vegetables, “whose significant function in food is flavoring
9 rather than nutritional.” 21 C.F.R § 101.22(a)(3).

10 35. Any recognizable primary flavor identified directly or indirectly on the front label
11 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
12 as a “characterizing flavor.” 21 C.F.R. § 101.22.

13
14 36. Here, the Products’ labels both state the characterizing flavors (oranges, lemons,
15 raspberries, cranberries, and others) and reinforce the explicit statement of the characterizing
16 flavor by depictions of fruits.

17 37. If a food product’s characterizing flavor is not created exclusively by the named
18 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
19 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
20 which “simulates, resembles or reinforces” the characterizing flavor, the front label must
21 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
22 101.22(i)(2).

23
24 38. A food product’s label also must include a statement of the “presence or absence
25 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
26 ingredient(s) or component(s) in the food has a material bearing on price or consumer
27
28

1 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
2 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.

3 39. Such statement must be in boldface print on the front display panel and of
4 sufficient size for an average consumer to notice.

5 40. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
6 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

7 41. By changing the ratio between sugars and acids that is naturally found in fruits
8 such as oranges, lemons, raspberries, cranberries, and others, the DL malic acid used in the
9 Products reinforces, simulates, or creates the characterizing flavors, regardless of any other
10 effect it may have or purpose for which it was included.

11 42. DL malic acid is not a “natural flavor” as this term is defined by federal and state
12 regulations and is not derived from a fruit or vegetable or any other natural source. The Products
13 therefore contain artificial flavorings.

14 43. Because the Products contain artificial flavoring, federal and California law
15 require the Products to display both front- and back-label disclosures to inform consumers that
16 the Products are artificially flavored.

17 44. The Products have none of the required disclosures regarding the use of artificial
18 flavors.

19 45. Plaintiff reserves the right to amend this Complaint to add further products that
20 contain similar label misrepresentations as testing continues.

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

3 50. Plaintiff reviewed the label on the Products prior to his purchase, and reviewed
4 the natural flavoring claims being made there. Consumers such as Plaintiff who viewed the
5 Products’ labels reasonably understood Defendant’s “Natural Flavors” statements, as well as its
6 failure to disclose the use of artificially derived malic acid, to mean that the Products contain
7 only natural flavorings. This representation was also false.

9 51. Consumers including Plaintiff reasonably relied on Defendant’s statements such
10 that they would not have purchased the Products from Defendant if the truth about the Products
11 was known, or would have only been willing to pay a substantially reduced price for the Products
12 had they known that Defendant’s representations were false and misleading.

14 52. In the alternative, because of its deceptive and false labelling statements,
15 Defendant was enabled to charge a premium for the Products relative to key competitors’
16 products, or relative to the average price charged in the marketplace.

17 53. Consumers including Plaintiff especially rely on label claims made by food
18 product manufacturers such as Alacer, as they cannot confirm or disprove those claims simply
19 by viewing or even consuming the Products.

21 54. Plaintiff suffered economic injury by Defendant’s fraudulent and deceptive
22 conduct as stated herein, and there is a causal nexus between Defendant’s deceptive conduct and
23 Plaintiff’s injury.

24 **CLASS ACTION ALLEGATIONS**

25 55. Plaintiff brings this action individually and as representative of all those similarly
26 situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers nationwide
27 who purchased the Products within four years prior to the filing of this Complaint, as well as a
28

1 subclass of California consumers who purchased the Products within four years prior to the
2 filing of this Complaint.

3 56. Excluded from the Class and Subclass are Defendant and its affiliates, parents,
4 subsidiaries, employees, officers, agents, and directors. Also excluded are any judicial officers
5 presiding over this matter and the members of their immediate families and judicial staff.
6

7 57. Plaintiff reserves the right to alter the Class and Subclass definitions, and to amend
8 this Complaint to add additional Subclasses, as necessary to the full extent permitted by
9 applicable law.

10 58. Certification of Plaintiff's claims for class-wide treatment is appropriate because
11 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
12 individual Class members would use to prove those elements in individual actions alleging the
13 same claims.
14

15 59. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all
16 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
17 members geographically dispersed throughout the nation.

18 60. **Existence and Predominance of Common Questions of Law and Fact – Rule**
19 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
20 predominate over any questions that affect only individual Class members. Common legal and
21 factual questions and issues include but are not limited to:
22

- 23 a. Whether the marketing, advertising, packaging, labeling, and other
24 promotional materials for Defendant's Products is misleading and deceptive;
- 25 b. Whether a reasonable consumer would understand Defendant's "Natural
26 Flavors" claims to indicate that the Products contained only natural flavorings,
27 and reasonably relied upon those representations;
28

- c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class members;
- d. the proper amount of damages and disgorgement or restitution;
- e. the proper scope of injunctive relief; and
- f. the proper amount of attorneys' fees.

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

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

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

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

65. There are no defenses available to Defendant that are unique to the named Plaintiff.

66. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate representative of the Class because Plaintiff's interests do not conflict with the Class members'

1 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
2 against Defendant.

3 67. Furthermore, Plaintiff has selected competent counsel who are experienced in
4 class action and other complex litigation. Plaintiff and Plaintiff's counsel are committed to
5 prosecuting this action vigorously on behalf of the Class and have the resources to do so.
6

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

- 10 a. the damages individual Class members suffered are small compared to the
11 burden and expense of individual prosecution of the complex and extensive
12 litigation needed to address Defendant's conduct such that it would be
13 virtually impossible for the Class members individually to redress the wrongs
14 done to them. In fact, they would have little incentive to do so given the
15 amount of damage each member has suffered when weighed against the costs
16 and burdens of litigation;
17
18 b. the class procedure presents fewer management difficulties than individual
19 litigation and provides the benefits of single adjudication, economies of scale,
20 and supervision by a single Court;
21
22 c. the prosecution of separate actions by individual Class members would create
23 a risk of inconsistent or varying adjudications, which would establish
24 incompatible standards of conduct for Defendant; and
25
26 d. the prosecution of separate actions by individual Class members would create
27 a risk of adjudications with respect to them that would be dispositive of the
28

1 interests of other Class members or would substantively impair or impede their
2 ability to protect their interests.

3 69. Unless the Class is certified, Defendant will retain monies received as a result of
4 its unlawful and deceptive conduct alleged herein.

5 70. Unless a class-wide injunction is issued, Defendant will likely continue to
6 advertise, market, promote, and sell its Products in an unlawful and misleading manner, as
7 described throughout this Complaint, and members of the Class will continue to be misled,
8 harmed, and denied their rights under the law.

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

12 72. Defendant has acted on grounds applicable to the Class as a whole, thereby
13 making appropriate final injunctive and declaratory relief concerning the Class as a whole.

14
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16 **COUNT 1**
17 **VIOLATION OF PENNSYLVANIA UNFAIR TRADE PRACTICES AND**
18 **CONSUMER PROTECTION LAW, 73 P.S. § 201-1 *et seq.***
19 **Nationwide Class**

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

22 74. Plaintiff purchased dietary supplements from Defendant for personal, family, or
23 household purposes within the meaning of 73 P.S. § 201-9.2.

24 75. The Pennsylvania Unfair Trade Practices and Consumer Protection Law
25 ("PUTPCPL") prohibits engaging in fraudulent or deceptive conduct (i) representing that goods
26 have characteristics, benefits, or qualities that they do not have; (ii) representing that goods or
27 services are of a particular standard, quality, or grade, if they are of another; (iii) advertising
28 goods or services with intent not to sell them as advertised; and (iv) engaging in any other

1 fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding.
2 73 P.S. § 201-2(4).

3 76. Defendant's acts and practices, as alleged in this complaint, violate the
4 Pennsylvania Unfair Trade Practices and Consumer Protection Law by engaging in unfair
5 methods of competition and unfair and deceptive acts and practices in connection with
6 transactions—namely, the sale of mislabelled and/or deceptively labelled dietary supplements
7 as set forth herein. This conduct was intended to result and did result in the sale of these goods
8 to consumers. Specifically, Defendant:
9

- 10 a. Represented that dietary supplements had characteristics that they did not have;
11 b. Represented that dietary supplements were of a particular standard, quality, or
12 grade when they were actually of another;
13 c. Advertised goods or services with intent not to sell them as advertised; and
14 d. Engaged in other fraudulent or deceptive conduct creating a likelihood of
15 confusion or misunderstanding.
16

17 77. Defendant's conduct was also deceptive and unfair in that it violated the
18 prohibition against false or misleading labelling and marketing in Pennsylvania's Food Safety
19 Act, 3 Pa. C.S.A. § 5721, *et seq.*
20

21 78. As a direct and proximate result of Defendant's conduct, Plaintiff has been harmed
22 and has suffered ascertainable loss, in that he purchased products that he otherwise would not
23 have had he been told the truth regarding the Products' flavoring. Meanwhile, Defendant has
24 generated more revenue than it otherwise would have, unjustly enriching itself. Defendant's
25 violations also affect the public interest.
26
27
28

1 79. Plaintiff is entitled to damages (including treble, punitive, or special damages),
 2 equitable relief, reasonable attorney's fees and costs, declaratory relief, and a permanent
 3 injunction enjoining Defendant from its unlawful, fraudulent, and deceitful activity.
 4

5 **COUNT 2**
 6 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
 7 **SECTION 17200 *et seq.* — “UNFAIR” CONDUCT**
 8 **California Subclass**

9 80. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
 10 extent necessary, pleads this cause of action in the alternative.
 11

12 81. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
 13 a result of Defendant's actions as set forth herein.
 14

15 82. Defendant's actions as alleged in this Complaint constitute “unfair” conduct
 16 within the meaning of California Business and Professions Code Section 17200, *et seq.*
 17

18 83. Defendant's business practices, as alleged herein, are “unfair” because it fails to
 19 disclose the use of synthetic flavoring in the Products and makes affirmative misrepresentations
 20 regarding that flavoring, as set forth herein.
 21

22 84. As a result of this “unfair” conduct, Plaintiff expended money and engaged in
 23 activities it would not otherwise have spent or conducted.
 24

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

 86. Defendant publicly disseminated untrue or misleading representations regarding
 the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
 should have known, were untrue or misleading.

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

5
 6 **COUNT 3**
 7 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
 8 **SECTION 17200 *et seq.* — “FRAUDULENT” CONDUCT**
 9 **California Subclass**

10 88. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
 11 extent necessary, plead this cause of action in the alternative.

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

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

16 91. Defendant’s business practices, as alleged herein, are “fraudulent” because it fails
 17 to disclose the use of synthetic flavoring in the Products and makes affirmative
 18 misrepresentations regarding that flavoring, as set forth herein.

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

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

25 94. Defendant publicly disseminated untrue or misleading representations regarding
 26 the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
 27 should have known, were untrue or misleading.
 28

102. Defendant publicly disseminated untrue or misleading representations regarding the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care should have known, were untrue or misleading.

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

COUNT 5
VIOLATION OF CALIFORNIA BUSINESS &
PROFESSIONS CODE SECTION 17500 *et seq.*
California Subclass

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

105. 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.

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

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

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

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

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

COUNT 6
VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,
CAL. CIV. CODE § 1750 *ET SEQ.*
California Subclass

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

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

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

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

50. As alleged herein, Defendant’s business practices are a violation of the CLRA because Defendant deceptively failed to reveal facts that are material in light of the flavoring representations that were made by Defendant on the labels of its Products.

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

- a. Defendant’s acts and practices constitute misrepresentations that its Products have characteristics, benefits, or uses which they do not have;
- b. Defendant misrepresented that its Products are of a particular standard, quality, and/or grade, when they are of another;
- c. Defendant’s acts and practices constitute the advertisement of goods, without the intent to sell them as advertised;
- d. Defendant’s acts and practices fail to represent that transactions involving its Products involve actions that are prohibited by law, particularly the use of misleading nutritional labelling; and

1 e. Defendant's acts and practices constitute representations that its Products have
2 been supplied in accordance with previous representations when they were not.

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

5 53. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
6 particular violations of the CLRA described herein and demanded Defendant rectify the actions
7 described above by providing complete monetary relief, agreeing to be bound by their legal
8 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
9 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
10

11 54. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
12 to recover actual damages sustained as a result of Defendant's violations of the CLRA. Such
13 damages include, without limitation, monetary losses and actual, punitive, and consequential
14 damages, in an amount to be proven at trial.
15

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

19 **COUNT 7**
20 **UNJUST ENRICHMENT**
21 **Nationwide Class**

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

24 57. Defendant, through its marketing and labeling of the Products, misrepresented and
25 deceived consumers regarding the flavoring in the Products.

26 58. Defendant did so for the purpose of enriching itself and it in fact enriched itself
27 by doing so.
28

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

4 60. Defendant continues to possess monies paid by consumers to which Defendant is
5 not entitled.

6 61. Under the circumstances it would be inequitable for Defendant to retain the benefit
7 conferred upon it and Defendant's retention of the benefit violates fundamental principles of
8 justice, equity, and good conscience.

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

13 63. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
14 a result of Defendant's actions as set forth above.

15
16
17 **COUNT 8**
18 **BREACH OF EXPRESS WARRANTY**
19 **Nationwide Class**

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

22 65. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
23 expressly warranted that the Products contain only "Natural Flavors" and "Natural Fruit
24 Flavors." Defendant intentionally highlights this language by using bolded fonts and setting
25 these statements out graphically in insets and callouts.

1 66. The front labeling with the representations of fruits is also misleading and further
2 creates an express warranty to support the representation that the Products contain only “Natural
3 Flavors” and “Natural Fruit Flavors.”

4 67. Defendant’s express warranties, and its affirmations of fact and promises made to
5 Plaintiff and the Class and regarding the Products, became part of the basis of the bargain
6 between Defendant and Plaintiff and the Class, which creates an express warranty that the
7 Products would conform to those affirmations of fact, representations, promises, and
8 descriptions.
9

10 68. The Products do not conform to the express warranty that the Products contain
11 only “Natural Flavors” and “Natural Fruit Flavors,” because they contain ingredients that are
12 unnatural and synthetic, *i.e.*, DL malic acid.
13

14 69. As a direct and proximate cause of Defendant’s breach of express warranty,
15 Plaintiff and Class members have been injured and harmed because: (a) they would not have
16 purchased the Products on the same terms if they knew the truth about the Products’ unnatural
17 ingredients; (b) they paid a price premium based on Defendant’s express warranties; and (c) the
18 Products do not have the characteristics, uses, or benefits that were promised.
19

20 PRAYER FOR RELIEF

21 WHEREFORE, Plaintiff respectfully request the Court grant the following relief against
22 Defendant:

- 23 a. Certifying the Class;
- 24 b. Declaring that Defendant violated the PUTPCPL, CLRA, UCL, and FAL;
- 25 c. Awarding actual and other damages as permitted by law, and/or ordering an
26 accounting by Defendant for any and all profits derived by Defendant from the
27 unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein;
28

- 1 d. Ordering an awarding of injunctive relief as permitted by law or equity, including
2 enjoining Defendant from continuing the unlawful practices as set forth herein, and
3 ordering Defendant to engage in a corrective advertising campaign;
4
5 e. Ordering Defendant to pay attorneys' fees and litigation costs;
6
7 f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts
8 awarded; and
9
10 g. Such other relief as the Court may deem just and proper.

11 TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.

12 /s/ Charles C. Weller
13 Charles C. Weller (Cal. SBN: 207034)
14 Attorney for Plaintiff

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20 January 6, 2023
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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.