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**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. **'23CV0047 AJB MDD**

v.)

CLASS ACTION COMPLAINT

BARE PERFORMANCE NUTRITION,)
 LLC, *a Texas limited liability company,*)

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 Bare Performance Nutrition, LLC ("BPN"), alleging that "Intra Flight Branch-Chained Amino Acids" powder ("the Products"), a 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 Products to commercial and individual consumers in this district, including Plaintiff; knowingly
 2 directing advertising and marketing materials concerning the Products into this district through
 3 wires and mails, both directly and through electronic and print publications that are directed to
 4 commercial and individual consumers in this district; and operating an e-commerce web site
 5 that offers the Products for sale to commercial and individual consumers in this district, as well
 6 as offering the Products for sale through third-party e-commerce websites, through both of
 7 which commercial and individual consumers residing in this district have purchased the
 8 Products.
 9

10 10. Defendant knowingly directs electronic activity and ships the Products into this
 11 district with the intent to engage in business interactions for profit, and it has in fact engaged in
 12 such interactions, including the sale of the Products to Plaintiff.
 13

14 11. Defendant also sells the Products to retailers and wholesalers in this district for
 15 the purpose of making the Products available for purchase by individual consumers in this
 16 district.
 17

18 12. Plaintiff's losses and those of other Class members were sustained in this district.

19 13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of
 20 the events or omissions giving rise to Plaintiff's claims occurred within this district.
 21

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

24 **FACTUAL ALLEGATIONS**

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

26 15. 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

16. 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

1 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-
2 natural” (66 percent). These were the three most attractive attributes in the consumer survey.
3 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
4 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

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

11
12 18. On or about July 29, 2022, Mr. Scheibe purchased Intra Flight Branch-Chained
13 Amino Acids powder, watermelon flavor, from Amazon.com (Order No. 114-4198103-
14 0826603).

15
16 19. Mr. Scheibe is a college student who has recently sought to lose weight and add
17 muscle mass, and to do so has begun to eat with intentionality and take dietary supplements. He
18 carefully reviews dietary supplement labels, including the Product’s label, to understand the
19 characteristics of the products he consumes, and he prefers to consume only products that
20 contain all-natural ingredients and flavorings.

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

22 20. Defendant BPN formulates, manufactures, and sells a dietary supplement called
23 Intra Flight Branch-Chained Amino Acids powder. These powders are marketed as supporting
24 improved workout recovery and muscle protein synthesis; hydration levels; and increased blood
25 flow and nutrient delivery.

21. These dietary supplements come in three different flavors: watermelon, blackberry lime, and lemonade. However, the Products differ only in flavoring; the base formulation for each flavor is the same, and they are offered for sale for an identical price.

22. The front label (or “principal display panel”) of all flavors of the Products state that the Products are “Naturally Flavored,” as shown in this example:



23. On the BPN website, images of these Products along with fruits reflecting their characterizing flavor, such as this example:



24. The BPN website also features testimonials from prominent athletes stating that BPN products are superior because they are “clean,” furthering advancing BPN’s claim to use only natural flavorings:

★★★★★

“I choose BPN because of how everything is thoroughly tested to ensure I’m getting products that are CLEAN.”

Russel Orhii, Pro Powerlifter



25. These natural flavoring claims are false. The Products are flavored using an artificial flavoring, DL malic acid, that is derived from petrochemicals. The DL malic acid is not used as a sweetener.

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

	Amount Per Serving	%DV*
Vitamin B6 (as Pyridoxine HCl)	3mg	180%
Sodium	180mg	8%
Instantized 2:1:1 BCAAs (as InstAminos®)	8g	**
L-Leucine, L-Isoleucine, L-Valine		**
L-Taurine	3g	**
L-Citrulline Malate 2:1	3g	**
L-Carnitine L-Tartrate	2g	**

**Daily Value not established.

Other Ingredients: Malic Acid, Silica, Sodium Bicarbonate, Trisodium Citrate, Citric Acid, Natural Flavor, Sucralose, Acesulfame Potassium.

27. 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

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

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

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

5 30. The quality and consumer acceptability of fruit flavors is based on their perceived
6 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
7 as watermelons, blackberries, lemons, and limes have their own natural ratio of sugars and acids.

8 31. The malic acid used in the Products is used to create, simulate, and/or reinforce
9 the fruit flavors stated on the labels.

10 32. Defendant uses the petrochemical-derived DL malic acid in its Products to create,
11 simulate, or reinforce the fruit flavors but pretends otherwise, conflating natural and artificial
12 flavorings, misbranding the Products and deceiving consumers.

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

16 **C. Requirements for Labelling**

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

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

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

5
6 37. Any recognizable primary flavor identified directly or indirectly on the front label
7 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
8 as a “characterizing flavor.” 21 C.F.R. § 101.22.

9 38. Here, the Products’ labels both state the characterizing flavors (watermelons,
10 blackberries, lemons, and limes) and reinforce the statement of the characterizing flavor by
11 depictions of fruits on the Products’ websites.

12
13 39. If a food product’s characterizing flavor is not created exclusively by the named
14 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
15 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
16 which “simulates, resembles or reinforces” the characterizing flavor, the front label must
17 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
18 101.22(i)(2).

19 40. A food product’s label also must include a statement of the “presence or absence
20 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
21 ingredient(s) or component(s) in the food has a material bearing on price or consumer
22 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
23 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.

24
25 41. Such statement must be in boldface print on the front display panel and of
26 sufficient size for an average consumer to notice.

1 42. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
2 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

3 43. By changing the ratio between sugars and acids that is naturally found in fruits
4 such as watermelons, blackberries, lemons, and limes, the DL malic acid used in the Products
5 reinforces, simulates, or creates the characterizing flavors, regardless of any other effect it may
6 have or purpose for which it was included.

7
8 44. DL malic acid is not a “natural flavor” as this term is defined by federal and state
9 regulations and is not derived from a fruit or vegetable or any other natural source. The Products
10 therefore contain artificial flavorings.

11 45. Because the Products contain artificial flavoring, California law requires the
12 Products to display both front- and back-label disclosures to inform consumers that the Products
13 are artificially flavored.

14
15 46. The Products have none of the required disclosures regarding the use of artificial
16 flavors.

17 47. Plaintiff reserves the right to amend this Complaint to add further products that
18 contain similar label misrepresentations as testing continues.

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

25
26 50. Plaintiff reviewed the label on the Products prior to his purchase as well as the
27 company’s website, and reviewed the natural flavoring claims being made there. Consumers
28

1 such as Plaintiff who viewed the Products' labels and the company's website reasonably
2 understood Defendant's "Naturally Flavored" statements, as well as its failure to disclose the
3 use of artificially derived malic acid, to mean that the Products contain only natural flavorings.
4 This representation was also false.

5
6 51. Consumers including Plaintiff reasonably relied on Defendant's statements such
7 that they would not have purchased the Products from Defendant if the truth about the Products
8 was known, or would have only been willing to pay a substantially reduced price for the Products
9 had they known that Defendant's representations were false and misleading.

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

13
14 53. Consumers including Plaintiff especially rely on label claims made by food
15 product manufacturers such as BPN, as they cannot confirm or disprove those claims simply by
16 viewing or even consuming the Products.

17 54. Plaintiff suffered economic injury by Defendant's fraudulent and deceptive
18 conduct as stated herein, and there is a causal nexus between Defendant's deceptive conduct and
19 Plaintiff's injury.

20
21 **CLASS ACTION ALLEGATIONS**

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

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

4 57. Plaintiff reserves the right to alter the Class definition, and to amend this
5 Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable
6 law.

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

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

14 60. **Existence and Predominance of Common Questions of Law and Fact – Rule**
15 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
16 predominate over any questions that affect only individual Class members. Common legal and
17 factual questions and issues include but are not limited to:

- 18 a. Whether the marketing, advertising, packaging, labeling, and other
19 promotional materials for Defendant's Products is misleading and deceptive;
20 b. Whether a reasonable consumer would understand Defendant's "Natural
21 Flavors" claims to indicate that the Products contained only natural flavorings,
22 and reasonably relied upon those representations;
23 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and
24 Class members;
25
26
27
28

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

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

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

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

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

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

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

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

COUNT 1
VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT
TEX. BUS. & COM. CODE § 17.01 *et seq.*
Nationwide Class

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

49. Plaintiff has satisfied all prerequisites to suit.

50. Plaintiff is a consumer, as defined under the Deceptive Trade Practices Act, and relied upon the false, misleading, or deceptive acts or practices by Defendant, as set forth above, to his detriment.

51. All of the above-described acts, omissions, and failures of Defendant are cause of an actual and proximate cause of Plaintiff's damages.

52. Because Defendant's actions and conduct as set forth herein were committed knowingly and intentionally, Plaintiff is entitled to recover, in addition to all damages described herein, mental anguish damages and additional penalty damages, in an amount not to exceed

1 three times such actual damages, for Defendant having knowingly committed its conduct.
 2 Additionally, Plaintiff is ultimately entitled to recover damages in an amount not to exceed three
 3 times the amount of mental anguish and actual damages due to Defendant having intentionally
 4 committed such conduct.

5 73. As a result of Defendant's unconscionable, misleading, and deceptive actions and
 6 conduct as set forth herein, Plaintiff has been forced to retain the legal services of the
 7 undersigned attorney to protect and pursue these claims on his behalf. Accordingly, Plaintiff
 8 also seeks to recover his costs and reasonable and necessary attorneys' fees as permitted under
 9 Section 17.50(d) of the Texas Business & Commerce Code, as well as any other such damages
 10 to which Plaintiff may show himself to be justly entitled at law and in equity.
 11

12
 13 **COUNT 2**
 14 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
 15 **SECTION 17200 *et seq.* — "UNFAIR" CONDUCT**
 16 **California Subclass**

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

19 75. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
 20 a result of Defendant's actions as set forth herein.

21 76. Defendant's actions as alleged in this Complaint constitute "unfair" conduct
 22 within the meaning of California Business and Professions Code Section 17200, *et seq.*

23 77. Defendant's business practices, as alleged herein, are "unfair" because it fails to
 24 disclose accurately the artificial flavoring used in the Products.

25 78. As a result of this "unfair" conduct, Plaintiff expended money and engaged in
 26 activities it would not otherwise have spent or conducted.

27 79. Defendant's wrongful business practices alleged herein constituted, and continue
 28 to constitute, a continuing course of unfair competition since it continues to market and sell its

1 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
 2 oppressive, unscrupulous and/or substantially injurious to its customers.

3 80. Defendant publicly disseminated untrue or misleading representations regarding
 4 the flavoring of its Products, which it knew, or in the exercise of reasonable care should have
 5 known, were untrue or misleading.
 6

7 81. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
 8 of this court enjoining Defendant from continuing to engage in “unfair” business practices and
 9 any other act prohibited by law, including those acts set forth in this Complaint, and further seek
 10 all other relief allowable under Business and Professions Code Section 17200, *et seq.*
 11

12 **COUNT 3**
 13 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
 14 **SECTION 17200 *et seq.* — “FRAUDULENT” CONDUCT**
 15 **California Subclass**

16 82. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
 17 extent necessary, plead this cause of action in the alternative.
 18

19 83. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
 20 a result of Defendant’s actions as set forth above.
 21

22 84. Defendant’s actions as alleged in this Complaint constitute “fraudulent” conduct
 23 within the meaning of California Business and Professions Code Section 17200 *et seq.*
 24

25 85. Defendant’s business practices, as alleged herein, are “fraudulent” because it fails
 26 to disclose accurately the artificial flavoring used in the Products.
 27

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

87. 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

1 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
 2 oppressive, unscrupulous and/or substantially injurious to its customers.

3 88. Defendant publicly disseminated untrue or misleading representations regarding
 4 the flavoring of its Products, which it knew, or in the exercise of reasonable care should have
 5 known, were untrue or misleading.
 6

7 89. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an
 8 order of this Court enjoining Defendant from continuing to engage in “fraudulent” business
 9 practices and any other act prohibited by law, including those acts set forth in this Complaint,
 10 and further seeks all other relief allowable under Business and Professions Code Section 17200,
 11 *et seq.*
 12

13 **COUNT 4**
 14 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
 15 **SECTION 17200 *et seq.* — “UNLAWFUL” CONDUCT**
 16 **California Subclass**

17 90. Plaintiff reallege the preceding paragraphs as if fully set forth herein and, to the
 18 extent necessary, pleads this cause of action in the alternative.

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

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

23 93. Defendant’s business practices, as alleged herein, are “unlawful” because it fails
 24 to disclose accurately the synthetic flavoring used in the Products.

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

27 95. Defendant’s business practices alleged herein constituted, and continue to
 28 constitute, a continuing course of unfair competition since it continues to market and sell its

1 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
 2 oppressive, unscrupulous and/or substantially injurious to its customers.

3 96. Defendant publicly disseminated untrue or misleading representations regarding
 4 the flavoring of its Products, which it knew, or in the exercise of reasonable care should have
 5 known, were untrue or misleading.
 6

7 97. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
 8 of this court enjoining Defendant from continuing to engage in “unlawful” business practices
 9 and any other act prohibited by law, including those acts set forth in this Complaint, and further
 10 seeks all other relief allowable under Business and Professions Code Section 17200, *et seq.*
 11

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

16 98. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
 17 extent necessary, pleads this cause of action in the alternative.
 18

19 99. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
 20 a result of Defendant’s actions as set forth above.
 21

22 100. Defendant engaged in advertising and marketing to the public and offered for sale
 23 advertising services on a nationwide basis, including in California.
 24

25 101. Defendant engaged in the advertising and marketing alleged herein with the intent
 26 to directly or indirectly induce the sale of the Products to consumers.
 27

28 102. Defendant’s advertisements and marketing representations regarding the flavoring
 of the Products were false, misleading, and deceptive as set forth above.

103. 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.*

1 d. Defendant's acts and practices fail to represent that transactions involving its
2 Products involve actions that are prohibited by law, particularly the use of
3 misleading nutritional labelling; and

4 e. Defendant's acts and practices constitute representations that its Products have
5 been supplied in accordance with previous representations when they were not.
6

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

9 60. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
10 particular violations of the CLRA described herein and demanded Defendant rectify the actions
11 described above by providing complete monetary relief, agreeing to be bound by their legal
12 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
13 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
14

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

19 62. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin
20 publication of misleading and deceptive nutritional labels on Defendant's Products and to
21 recover reasonable attorneys' fees and costs.
22

23 **COUNT 7**
24 **UNJUST ENRICHMENT**
25 **Nationwide Class**

26 63. 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 64. Defendant, through its marketing and labeling of the Products, misrepresented and
2 deceived consumers regarding the flavoring in the Products.

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

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

8 67. Defendant continues to possess monies paid by consumers to which Defendant is
9 not entitled.

10 68. Under the circumstances it would be inequitable for Defendant to retain the benefit
11 conferred upon it and Defendant's retention of the benefit violates fundamental principles of
12 justice, equity, and good conscience.

13 69. Plaintiff seeks disgorgement of Defendant's ill-gotten gains and restitution of
14 Defendant's wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed
15 appropriate by the Court, and such other relief as the Court deems just and proper to remedy
16 Defendant's unjust enrichment.

17 70. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
18 a result of Defendant's actions as set forth above.

19
20
21
22 **COUNT 8**
23 **BREACH OF EXPRESS WARRANTY**
24 **Nationwide Class**

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

27 72. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
28 expressly warranted that the Products were "Naturally Flavored."

73. Defendant's express warranties, and its affirmations of fact and promises made to Plaintiff and the Class and regarding the Products, became part of the basis of the bargain between Defendant and Plaintiff and the Class, which creates an express warranty that the Products would conform to those affirmations of fact, representations, promises, and descriptions.

74. The Products do not conform to the express warranty that the Products contain were "Naturally Flavored," because they contain ingredients that are unnatural and synthetic, *i.e.*, DL malic acid.

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

PRAYER FOR RELIEF

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

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

- 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 ON ANY COUNTS SO TRIABLE.

Respectfully submitted,

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

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

January 11, 2023

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 all others
similarlv situated

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

(c) Attorneys (Firm Name, Address, and Telephone Number)
Charles C. Weller, Charles C. Weller APC, 11412 Corley
Ct., San Diego CA 92126, 858.414.7465

DEFENDANTS

Bare Performance Nutrition, LLC

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

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

Attorneys (If Known)

'23CV0047 AJB MDD

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)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input checked="" type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<div><div>PERSONAL INJURY</div><div><input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice</div></div> <div><div>PERSONAL INJURY</div><div><input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</div></div> <div><div>PERSONAL PROPERTY</div><div><input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability</div></div>	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <div>LABOR</div> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <div>IMMIGRATION</div> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <div>INTELLECTUAL PROPERTY RIGHTS</div> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <div>SOCIAL SECURITY</div> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <div>FEDERAL TAX SUITS</div> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

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 fraud action for misbranded dietary supplements

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
1/11/2023

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.