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4	Tel: 858.414.7465 Fax: 858.300.5137								
5									
6	Attorney for Plaintiff Jacob Scheibe								
7									
8	IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA								
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10	JACOB SCHEIBE, individually and on behalf of all those similarly situated,))							
11	Plaintiff,) No. '23CV0217 TWR JLB							
12	v.	CLASS ACTION COMPLAINT							
13	MUSCLE FEAST, LLC, an Ohio limited)							
14	liability company,) JURY TRIAL DEMANDED)							
15	Defendant.))							
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18	Leach Cahaile ("Dlaintife") in dividually	and an habalf of all others similarly situated has							
19		and on behalf of all others similarly situated, by							
20	and through undersigned counsel, hereby brings	this action against Muscle Feast, LLC ("Muscle							
21	Feast"), alleging that "8-Hour Energy Pre-Workout" ("the Products"), a dietary supplemen								
22	manufactured, packaged, labeled, advertised, distributed, and sold by Defendant, is misbranded								
23	and falsely advertised, and upon information ar	nd belief and investigation of counsel alleges as							
24	follows:								
25	P	ARTIES							
26	1. Plaintiff Jacob Scheibe is and at	all times relevant was a citizen of the state of							
27	California, domiciled in San Diego, California.								
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2. Defendant Muscle Feast, LLC is an Ohio limited liability company with its principal place of business and headquarters in Nashport, Ohio. On information and belief, decisions relating to marketing, labelling, and formulation of the Products are made at this corporate headquarters. All members of the limited liability company are citizens and residents of the state of Ohio.

JURISDICTION AND VENUE

- 3. This Court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original jurisdiction of the federal district courts over "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A).
- 4. Plaintiff seeks to represent Class members who are citizens of states different from the Defendant.
- 5. The matter in controversy in this case exceeds \$5,000,000 in the aggregate, exclusive of interests and costs.
- 6. In addition, "the number of members of all proposed plaintiff classes in the aggregate" is greater than 100. See 28 U.S.C. § 1332(d)(5)(B).
- 7. In the alternative, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a). The amount in controversy exceeds \$75,000 exclusive of interest and costs.
- 8. This Court has personal jurisdiction over Defendant because this action arises out of and relates to Defendant's contacts with this forum.

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- 9. Those contacts include but are not limited to sales of the Products directly to commercial and individual consumers located in this district, including Plaintiff; shipping the Products to commercial and individual consumers in this district, including Plaintiff; knowingly directing advertising and marketing materials concerning the Products into this district through wires and mails, both directly and through electronic and print publications that are directed to commercial and individual consumers in this district; and operating an e-commerce web site that offers the Products for sale to commercial and individual consumers in this district, as well as offering the Products for sale through third-party e-commerce websites, through both of which commercial and individual consumers residing in this district have purchased the Products.
- 10. Defendant knowingly directs electronic activity and ships the Products into this district with the intent to engage in business interactions for profit, and it has in fact engaged in such interactions, including the sale of the Products to Plaintiff.
- Defendant also sells the Products to retailers and wholesalers in this district for the purpose of making the Products available for purchase by individual consumers in this district.
 - 12. Plaintiff's losses and those of other Class members were sustained in this district.
- 13. 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.
- 14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court maintains personal jurisdiction over Defendant.

FACTUAL ALLEGATIONS

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

15. Across the globe, consumers are increasingly attuned to claims that foods are "allnatural," minimally processed, or otherwise free of artificial flavors and preservatives.

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- 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 "Allnatural" (66 percent). These were the three most attractive attributes in the consumer survey. Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for "clean label" foods. See https://www.lek.com/insights/ei/next-generation-mindful-food-consumption.
- This consumer preference has led to an explosion in the category of "clean label" 17. foods and beverages. Leading analyst Allied Market Research estimated that the "natural foods and drinks" category would grow by an estimated compound annual growth rate of 13.7 percent from 2016 to 2023, reaching \$191 billion in annual sales by 2023. https://www.alliedmarketresearch.com/natural-food-and-drinks-market.
- 18. On or about October 23, 2022, Mr. Scheibe purchased Muscle Feast's 8-Hour Energy Pre-Workout powder, "All Natural Peach Mango" flavor, from Amazon.com (Order No. 111-2760641-6152240) for \$43.09 inclusive of tax.
- Mr. Scheibe is a student who has recently sought to lose weight and gain muscle. 19. He carefully reviews labels, including the Products' labels, to ensure that he consumes only natural ingredients and avoids artificial flavors and ingredients.

В. Defendant's Use of Synthetic Flavorings and Deceptive Labels.

- 20. Defendant Muscle Feast formulates, manufactures, and sells a dietary supplement called "8-Hour Energy Pre-Workout." These dietary supplement powders purport to provide energy to make workouts more effective and efficient and to speed recovery.
- The front label (or "principal display panel") of the Products prominently state 21. they are "All Natural" and "All Natural Flavored – Sweetened – Colored," with attention drawn to the claim through use of different colored fonts and graphic elements:

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22. Muscle Feast's Amazon storefront (the content of which the company controls) uses a description of the Products that further highlights that they are "All Natural" and have no "No Artificial Ingredients":

Muscle Feast 8 Hour Energy All Natural No Artificial Ingredients Keto-Friendly Sugar-Free Pre-Workout, Peach Mango, 300g Visit the Muscle Feast Store ★★★☆ ∨ 5 ratings \$3999 (\$39.99 / Count) Get \$50 off instantly: Pay \$0.00 \$39.99 upon approval for the Amazon Rewards Visa Card. No annual fee. Local Business ~ **Brand** Muscle Feast Item Form Powder Diet Type Vegan Flavor Peach Mango

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- 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 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
- 26. 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.
- 27. Fruit flavors in a food are imparted by the interactions between sugars, acids, 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 citric and malic acid.
- The quality and consumer acceptability of fruit flavors is based on their perceived 28. sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such as peaches and mangoes have their own natural ratio of sugars and acids.
- 29. The DL malic acid used in the Products is used to create, simulate, and/or reinforce the sweet and tart taste that consumers associate with the fruit flavors stated on the labels.
- 30. Defendant uses the petrochemical-derived DL malic acid in its Products to create a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings, misbranding the Products and deceiving consumers.

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

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

C. **Requirements for Labelling**

- Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act 32. ("FDCA") require that a food's label accurately describe the nature of the food product and its characterizing flavors. 21 C.F.R. § 102.5(a).
- Artificial flavor is defined as "any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof." 21 C.F.R § 101.22(a)(1).
- 34. Natural flavor is defined as "essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents" from fruits or vegetables, "whose significant function in food is flavoring rather than nutritional." 21 C.F.R § 101.22(a)(3).
- 35. Any recognizable primary flavor identified directly or indirectly on the front label of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to as a "characterizing flavor." 21 C.F.R. § 101.22.
- 36. Here, the Products' labels both state the characterizing flavors (peaches and mangoes) and reinforce the claim that this characterizing flavor is achieved by using only natural flavors through use of fonts and graphic elements.
- If a food product's characterizing flavor is not created exclusively by the named 37. flavor ingredient, the product's front label must state that the product's flavor was simulated or reinforced with either natural or artificial flavorings or both. If any artificial flavor is present

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which "simulates, resembles or reinforces" the characterizing flavor, the front label must prominently inform consumers that the product is "Artificially Flavored." 21 C.F.R. § 101.22(i)(2).

- A food product's label also must include a statement of the "presence or absence 38. of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such ingredient(s) or component(s) in the food has a material bearing on price or consumer acceptance . . . and consumers may otherwise be misled about the presence or absence of the ingredient(s) or component(s) in the food." 21 C.F.R. § 102.5.
- 39. Such statement must be in boldface print on the front display panel and of sufficient size for an average consumer to notice.
- 40. California's Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code § 109875, et seq., incorporates all food flavoring and additive regulations of the FDCA.
- 41. By changing the ratio between sugars and acids that is naturally found in fruits such as peaches and mangoes, the DL malic acid used in the Products reinforces, simulates, or creates the characterizing flavors, regardless of any other effect it may have or purpose for which it was included.
- 42. DL malic acid is not a "natural flavor" as this term is defined by federal and state regulations and is not derived from a fruit or vegetable or any other natural source. The Products therefore contain artificial flavorings.
- 43. Because the Products contain artificial flavoring, California law requires the Products to display both front- and back-label disclosures to inform consumers that the Products are artificially flavored.
- 44. The Products have none of the required disclosures regarding the use of artificial flavors.

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- 45. Plaintiff reserves the right to amend this Complaint to add further products that contain similar label misrepresentations as testing continues.
- 49. Labels are the chief means by which food product manufacturers convey critical information to consumers, and consumers have been conditioned to rely on the accuracy of the claims made on these labels. As the California Supreme Court stated in a case involving alleged violations of the UCL and FAL, "Simply stated: labels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label." Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 328 (2011).
- 50. Plaintiff reviewed the label on the Products prior to his purchase, and reviewed the natural flavoring claims being made there and on the company's Amazon storefront. Consumers such as Plaintiff who viewed the Products' labels reasonably understood Defendant's "All Natural" and "All Natural Flavored" statements, as well as its failure to disclose the use of artificially derived malic acid, to mean that the Products contain only natural flavorings. This representation was also false.
- 51. Consumers including Plaintiff reasonably relied on Defendant's statements such that they would not have purchased the Products from Defendant if the truth about the Products was known, or would have only been willing to pay a substantially reduced price for the Products had they known that Defendant's representations were false and misleading.
- 52. In the alternative, because of its deceptive and false labelling statements, Defendant was enabled to charge a premium for the Products relative to key competitors' products, or relative to the average price charged in the marketplace.
- 53. Consumers including Plaintiff especially rely on label claims made by food product manufacturers such as Muscle Feast, as they cannot confirm or disprove those claims simply by viewing or even consuming the Products.

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

CLASS ACTION ALLEGATIONS

- 55. Plaintiff brings this action individually and as representative of all those similarly situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers nationwide who purchased the Products within four years prior to the filing of this Complaint, as well as a subclass of California consumers who purchased the Products within four years prior to the filing of this Complaint.
- 56. Excluded from the Class and Subclass are Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors. Also excluded are any judicial officers presiding over this matter and the members of their immediate families and judicial staff.
- Plaintiff reserves the right to alter the Class and Subclass definitions, and to amend 57. this Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable law.
- 58. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as individual Class members would use to prove those elements in individual actions alleging the same claims.
- 59. Numerosity – Rule 23(a)(1): The size of the Class is so large that joinder of all Class members is impracticable. Plaintiff believes and avers there are thousands of Class members geographically dispersed throughout the nation.
- 60. Existence and Predominance of Common Questions of Law and Fact – Rule 23(a)(2), (b)(3): There are questions of law and fact common to the Class. These questions

predominate over any questions that affect only individual Class members. Common legal and factual questions and issues include but are not limited to:

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

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- 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.
- 67. Furthermore, Plaintiff has selected competent counsel who are experienced in class action and other complex litigation. Plaintiff and Plaintiff's counsel are committed to prosecuting this action vigorously on behalf of the Class and have the resources to do so.
- Superiority Rule 23(b)(3): The class action mechanism is superior to other available means for the fair and efficient adjudication of this controversy for at least the following reasons
 - a. the damages individual Class members suffered are small compared to the burden and expense of individual prosecution of the complex and extensive litigation needed to address Defendant's conduct such that it would be virtually impossible for the Class members individually to redress the wrongs done to them. In fact, they would have little incentive to do so given the amount of damage each member has suffered when weighed against the costs and burdens of litigation;

- b. the class procedure presents fewer management difficulties than individual litigation and provides the benefits of single adjudication, economies of scale, and supervision by a single Court;
- c. the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for Defendant; and
- d. the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would be dispositive of the interests of other Class members or would substantively impair or impede their ability to protect their interests.
- 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.

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COUNT 1 VIOLATION OF OHIO CONSUMER SALES PRACTICES ACT ("OCSPA"), OHIO REV. CODE § 1345.01 et seq.

Nationwide Class

73. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the

- 74. Plaintiff purchased dietary supplements from Defendant for personal, family, or household purposes.
- Plaintiff's purchase of the Products was a "consumer transaction" within the 75. meaning of OCSPA.
 - 76. Defendant is a "supplier" within the meaning of OCSPA.

extent necessary, pleads this cause of action in the alternative.

- 77. Defendant is required by federal regulations to specifically perform certain actions, i.e., state the source of its flavoring accurately, in order to avoid committing an unfair and deceptive act.
- 78. Defendant's acts and practices, as alleged in this complaint, violate the OCSPA because they were an unfair or deceptive act or practice in connection with a consumer transaction—namely, the sale of mislabelled and/or deceptively labelled dietary supplements as set forth herein. This conduct was intended to result and did result in the sale of these goods to consumers. This conduct includes but is not limited to:
 - a. Representing that the Products have sponsorship, approval, performance characteristics, accessories, uses, or benefits that they do not have;
 - b. Representing that the Products were of a particular standard, quality, grade, style, prescription, or model when they were actually of another;
 - c. Advertising goods or services with intent not to sell them as advertised; and
 - d. Engaging in other fraudulent or deceptive conduct creating a likelihood of confusion or misunderstanding.

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- 79. As a direct and proximate result of Defendant's conduct, Plaintiff has been harmed and has suffered ascertainable loss, in that he purchased products that he otherwise would not have had he been told the truth regarding the Products' flavoring. Meanwhile, Defendant has generated more revenue than it otherwise would have, unjustly enriching itself. Defendant's violations also affect the public interest.
- 80. Plaintiff is entitled to damages (including treble, punitive, or special damages), equitable relief, reasonable attorney's fees and costs, declaratory relief, and a permanent injunction enjoining Defendant from its unlawful, fraudulent, and deceitful activity.

COUNT 2 VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 et seq. — "UNFAIR" CONDUCT California Subclass

- 81. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.
- 82. 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.
- 83. Defendant's actions as alleged in this Complaint constitute "unfair" conduct within the meaning of California Business and Professions Code Section 17200, et seq.
- 84. Defendant's business practices, as alleged herein, are "unfair" because it fails to disclose accurately the synthetic flavoring used in the Products.
- 85. As a result of this "unfair" conduct, Plaintiff expended money and engaged in activities it would not otherwise have spent or conducted.
- 86. 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.

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8	87.	Defendant publicly disseminated untrue or misleading representations regarding
the flavo	oring	label claims of its Products, which it knew, or in the exercise of reasonable care
should h	nave k	nown, were untrue or misleading.

88. Pursuant to Business and Professions Code Section 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 Section 17200, et seq.

COUNT 3 VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 et seq. — "FRAUDULENT" CONDUCT California Subclass

- 89. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.
- Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as 90. a result of Defendant's actions as set forth above.
- 91. Defendant's actions as alleged in this Complaint constitute "fraudulent" conduct within the meaning of California Business and Professions Code Section 17200 et seq.
- 92. Defendant's business practices, as alleged herein, are "fraudulent" because it fails to disclose accurately the synthetic flavoring used in the Products.
- 93. As a result of this "fraudulent" conduct, Plaintiff expended money and engaged in activities it would not otherwise have spent or conducted.
- 94. 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.

95.	Defendant publicly disseminated untrue or misleading representations regarding
the flavori	ng label claims of its Products, which it knew, or in the exercise of reasonable care
should hav	ve known, were untrue or misleading.

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

COUNT 4 VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 et seg. — "UNLAWFUL" CONDUCT California Subclass

- 97. Plaintiff reallege the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.
- 98. 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.
- 99. Defendant's actions as alleged in this Complaint constitute "unlawful" conduct within the meaning of California Business and Professions Code Section 17200, et seq.
- 100. Defendant's business practices, as alleged herein, are "unlawful" because it fails disclose accurately the synthetic flavoring used in the Products.
- 101. As a result of this "unlawful" conduct, Plaintiff expended money and engaged in activities he would not otherwise have spent or conducted.
- 102. Defendant's 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.

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- 103. 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.
- 104. 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

- 105. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.
- 106. 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.
- 107. Defendant engaged in advertising and marketing to the public and offered for sale advertising services on a nationwide basis, including in California.
- 108. Defendant engaged in the advertising and marketing alleged herein with the intent to directly or indirectly induce the sale of the Products to consumers.
- 109. Defendant's advertisements and marketing representations regarding the characteristics of the Products were false, misleading, and deceptive as set forth above.
- 110. 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.
- 111. 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:
 - 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;
 - 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

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By reason of the foregoing, Plaintiff and the Class have been irreparably harmed, entitling them to injunctive relief, disgorgement, and restitution. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the

e. Defendant's acts and practices constitute representations that its Products have

been supplied in accordance with previous representations when they were not.

- 53. 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.
- 54. 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.
- 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 7 UNJUST ENRICHMENT **Nationwide Class**

- 56. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.
- Defendant, through its marketing and labeling of the Products, misrepresented and 57. deceived consumers regarding the flavoring in the Products.
- 58. Defendant did so for the purpose of enriching itself and it in fact enriched itself by doing so.

	59.	Consumers	conferred	a	benefit	on	Defendant	by	purchasing	the	Produ	ıcts,
includi	ing an	effective pre	emium abo	ve	their tru	e va	lue. Defend	lant	appreciated,	acce	epted,	and
retaine	d the b	enefit to the	detriment of	of o	consume	rs.						

- 60. Defendant continues to possess monies paid by consumers to which Defendant is not entitled.
- 61. Under the circumstances it would be inequitable for Defendant to retain the benefit conferred upon it and Defendant's retention of the benefit violates fundamental principles of justice, equity, and good conscience.
- 62. Plaintiff seeks disgorgement of Defendant's ill-gotten gains and restitution of Defendant's wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed appropriate by the Court, and such other relief as the Court deems just and proper to remedy Defendant's unjust enrichment.
- 63. 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.

COUNT 8 **BREACH OF EXPRESS WARRANTY Nationwide Class**

- 64. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.
- 65. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products contain only "Natural Flavors" and "Natural Fruit Flavors." Defendant intentionally highlights this language by using bolded fonts and setting these statements out graphically in insets and callouts.

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27 28 Flavors" and "Natural Fruit Flavors." 67. 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

creates an express warranty to support the representation that the Products contain only "Natural

The front labeling with the representations of fruits is also misleading and further

Products would conform to those affirmations of fact, representations, promises, and

between Defendant and Plaintiff and the Class, which creates an express warranty that the

descriptions.

66.

68. The Products do not conform to the express warranty that the Products were "All Natural" and contain only "All Natural Flavored," because they are flavored by and contain ingredients that are unnatural and synthetic, i.e., DL malic acid.

69. 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 OCSPA, 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;

CLASS ACTION COMPLAINT

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Case

JS 44 (Rev. 04/2) Gase 3:23-cv-00217-TWR-JL Procument in Silver 106/23 Page 1 of 2

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.)

purpose of initiating the civil di	OCKEL SHEEL. (SEE INSTRUC	TIONS ON NEXT PAGE OF							
I. (a) PLAINTIFFS			DEFENDANTS						
Jacob Scheibe,	individually and on b	ehalf of those	Muscle Feast, LLC						
similarly situated	· ·								
(b) County of Residence of		an Diego, CA	County of Residence of First Listed Defendant Nashport, Ohio						
` '	XCEPT IN U.S. PLAINTIFF CA			(IN U.S. PLAINTIFF CASES C					
			NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF						
			THE TRACT	Γ OF LAND INVOLVED.					
(c) Attorneys (Firm Name, .	Address, and Telephone Number	r)	Attorneys (If Known)	'23CV0217	TWD II D				
Charles C Well	er, CHARLES WELL	FR APC 11412		23640217	IVVKJLD				
	Diego CA 92126, (8	•							
Coney Ct., San	Diego CA 92 126, (6	36) 414-7463							
II. BASIS OF JURISD	ICTION (Place an "X" in	One Box Only)	I. CITIZENSHIP OF P	RINCIPAL PARTIES	(Place an "X" in One Box for Plaintiff				
			(For Diversity Cases Only)		and One Box for Defendant)				
U.S. Government Plaintiff	3 Federal Question	Not a Bautul		TF DEF 1 Incorporated or Pi	rincipal Place				
riamun	(U.S. Government l	voi a Fariy)	Citizen of This State	I Incorporated or Proof Business In T					
_	_			_	<u>_</u>				
2 U.S. Government	× 4 Diversity	: (p : : t m)	Citizen of Another State	2 Incorporated and I of Business In A					
Defendant	(Indicate Citizensni	ip of Parties in Item III)		of Business in A	Another State				
				3 Foreign Nation	□ 6 □ 6				
			Foreign Country						
IV. NATURE OF SUIT	Γ (Place an "X" in One Box On	ly)		Click here for: Nature of S	Suit Code Descriptions.				
CONTRACT	ТО	RTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES				
110 Insurance	PERSONAL INJURY	PERSONAL INJURY	625 Drug Related Seizure	422 Appeal 28 USC 158	375 False Claims Act				
120 Marine 130 Miller Act	310 Airplane 315 Airplane Product	265 Personal Injury - Product Liability	of Property 21 USC 881	423 Withdrawal 28 USC 157	376 Qui Tam (31 USC 3729(a))				
140 Negotiable Instrument	Liability	367 Health Care/	O50 Other	INTELLECTUAL	400 State Reapportionment				
150 Recovery of Overpayment	320 Assault, Libel &	Pharmaceutical		PROPERTY RIGHTS	410 Antitrust				
& Enforcement of Judgment		Personal Injury		820 Copyrights	430 Banks and Banking				
151 Medicare Act 152 Recovery of Defaulted	330 Federal Employers' Liability	Product Liability 368 Asbestos Personal		830 Patent	450 Commerce 460 Deportation				
Student Loans	340 Marine	Injury Product		835 Patent - Abbreviated New Drug Application	470 Racketeer Influenced and				
(Excludes Veterans)	345 Marine Product	Liability		840 Trademark	Corrupt Organizations				
153 Recovery of Overpayment	Liability	PERSONAL PROPERTY		880 Defend Trade Secrets	480 Consumer Credit				
of Veteran's Benefits 160 Stockholders' Suits	350 Motor Vehicle 355 Motor Vehicle	370 Other Fraud 371 Truth in Lending	710 Fair Labor Standards Act	Act of 2016	(15 USC 1681 or 1692) 485 Telephone Consumer				
190 Other Contract	Product Liability	380 Other Personal	720 Labor/Management	SOCIAL SECURITY	Protection Act				
× 195 Contract Product Liability	360 Other Personal	Property Damage	Relations	861 HIA (1395ff)	490 Cable/Sat TV				
196 Franchise	Injury	385 Property Damage	740 Railway Labor Act	862 Black Lung (923)	850 Securities/Commodities/				
	362 Personal Injury -	Product Liability	751 Family and Medical	863 DIWC/DIWW (405(g))	<u> </u>				
REAL PROPERTY	Medical Malpractice CIVIL RIGHTS	PRISONER PETITIONS	Leave Act 790 Other Labor Litigation	864 SSID Title XVI 865 RSI (405(g))	890 Other Statutory Actions 891 Agricultural Acts				
210 Land Condemnation	440 Other Civil Rights	Habeas Corpus:	791 Employee Retirement	603 K3I (403(g))	893 Environmental Matters				
220 Foreclosure	441 Voting	463 Alien Detainee	Income Security Act	FEDERAL TAX SUITS	895 Freedom of Information				
230 Rent Lease & Ejectment	442 Employment	510 Motions to Vacate		870 Taxes (U.S. Plaintiff	Act				
240 Torts to Land	443 Housing/	Sentence		or Defendant)	896 Arbitration				
245 Tort Product Liability 290 All Other Real Property	Accommodations 445 Amer. w/Disabilities -	530 General 535 Death Penalty	IMMIGRATION	871 IRS—Third Party 26 USC 7609	899 Administrative Procedure Act/Review or Appeal of				
250 7th Other Real Property	Employment	Other:	462 Naturalization Application		Agency Decision				
	446 Amer. w/Disabilities -	540 Mandamus & Other	465 Other Immigration		950 Constitutionality of				
	Other 448 Education	550 Civil Rights 555 Prison Condition	Actions		State Statutes				
	446 Education	560 Civil Detainee -							
		Conditions of							
		Confinement							
V. ORIGIN (Place an "X" i									
				erred from 6 Multidistr					
Proceeding Sta	ite Court	Appellate Court —	Reopened Anothe	er District Litigation	Litigation - Direct File				
	Cita tha II S Civil Sto	tuta undar which you are t	iling (Do not cite jurisdictional sta	//	Brieet i ne				
	28 LLS C section 1332		imig (Do noi cue jurisuiciionui sia	nuies uniess uiversuy).					
VI. CAUSE OF ACTION	Brief description of ca								
		laim for misbranded dietary	supplements						
VII. REQUESTED IN		IS A CLASS ACTION	DEMAND \$	CHECK YES only	if demanded in complaint:				
COMPLAINT:	UNDER RULE 2		\$5,000,000	JURY DEMAND:					
		•	**;***********************************	JUNI DEMINIO					
VIII. RELATED CASI	E(S) (See instructions):								
IF ANY	(See timi actions).	JUDGE		DOCKET NUMBER					
DATE		SIGNATURE OF ATTO	RNEY OF RECORD						

/s/ Charles C. Weller

APPLYING IFP

JUDGE ____

MAG. JUDGE

2/6/2023

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT ___

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)".

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.

II.

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.