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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
12

13 JACOB SCHEIBE, *individually and on*)
14 *behalf of all those similarly situated,*)
15)
16 *Plaintiff,*)
17)
18 v.)
19)
20 PERFORMANCE ENHANCING)
21 SUPPLEMENTS, LLC, dba PEScience, a)
22 *Delaware limited liability company,*)
23)
24 *Defendant.*)

No. **'23CV0219 BEN DDL**

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

18 Jacob Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by
19 and through undersigned counsel, hereby brings this action against Performance Enhancing
20 Supplements LLC dba PEScience (“PEScience”), alleging that “Versalyte” (“the Products”), a
21 dietary supplement manufactured, packaged, labeled, advertised, distributed, and sold by
22 Defendant, is misbranded and falsely advertised, and upon information and belief and
23 investigation of counsel alleges as follows:
24

25 **PARTIES**

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.
28

1 2. Defendant Performance Enhancing Supplements, LLC dba PEScience is a
 2 Delaware limited liability company with its principal place of business and headquarters in
 3 Largo, Florida. On information and belief, decisions relating to marketing, labelling, and
 4 formulation of the Products are made at this corporate headquarters. All members of the limited
 5 liability company are citizens and residents of the state of Florida.
 6

7 **JURISDICTION AND VENUE**

8 3. This Court has subject matter jurisdiction over this action pursuant to the Class
 9 Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the
 10 United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original
 11 jurisdiction of the federal district courts over “any civil action in which the matter in controversy
 12 exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class
 13 action in which . . . any member of a class of plaintiffs is a citizen of a State different from any
 14 defendant.” 28 U.S.C. § 1332(d)(2)(A).
 15

16 4. Plaintiff seeks to represent Class members who are citizens of states different from
 17 the Defendant.

18 5. The matter in controversy in this case exceeds \$5,000,000 in the aggregate,
 19 exclusive of interests and costs.

20 6. In addition, “the number of members of all proposed plaintiff classes in the
 21 aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).
 22

23 7. In the alternative, this Court has jurisdiction over this matter pursuant to 28 U.S.C.
 24 § 1332(a). The amount in controversy exceeds \$75,000 exclusive of interest and costs.

25 8. This Court has personal jurisdiction over Defendant because this action arises out
 26 of and relates to Defendant’s contacts with this forum.
 27

28

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

12 10. Defendant knowingly directs electronic activity and ships the Products into this
13 district with the intent to engage in business interactions for profit, and it has in fact engaged in
14 such interactions, including the sale of the Products to Plaintiff.
15

16 11. Defendant also sells the Products to retailers and wholesalers in this district for
17 the purpose of making the Products available for purchase by individual consumers in this
18 district.
19

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

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

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

25 **FACTUAL ALLEGATIONS**

26 **A. Consumers Pay A Premium for “Clean Labels.”**

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

1 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
2 numbers of consumers were committed or casual adherents to so-called “clean label” food
3 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-
4 natural” (66 percent). These were the three most attractive attributes in the consumer survey.
5 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
6 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.
7

8 17. This consumer preference has led to an explosion in the category of “clean label”
9 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
10 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
11 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
12 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.
13

14 18. On or about October 23, 2022, Mr. Scheibe purchased PEScience’s Versalyte
15 powder, wild berry and citrus splash flavors, from Amazon.com (Order No. 111-3229685-
16 5081867) for \$43.08 inclusive of tax.

17 19. Mr. Scheibe is a student who has recently sought to lose weight and gain muscle.
18 He carefully reviews labels, including the Products’ labels, to ensure that he consumes only
19 natural ingredients and avoids artificial flavors and ingredients.
20

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

22 20. Defendant PEScience formulates, manufactures, and sells a dietary supplement
23 called “Versalyte.” These dietary supplement powders purport to provide energy to increase
24 hydration in order to make workouts more effective and efficient and to speed recovery.

25 21. The front label (or “principal display panel”) of the Products prominently state
26 they are “Naturally Flavored,” with attention drawn to the claim through graphic elements. In
27 addition, the front label uses depictions of fruits such as lemons, and oranges as well as
28

1 strawberries, raspberries, and blackberries to reinforce the claim that the Products are flavored
2 using only natural sources:



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

1 23. All flavors of the Products state, on the back label, that they contain “malic acid.”
2 The back labels also state that the Products contain “Natural Flavors.”

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

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

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

17 27. The quality and consumer acceptability of fruit flavors is based on their perceived
18 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
19 as oranges, lemons, pineapples, strawberries, raspberries, and blackberries have their own
20 natural ratio of sugars and acids.

22 28. The DL malic acid used in the Products is used to create, simulate, and/or reinforce
23 the sweet and tart taste that consumers associate with the fruit flavors stated on the labels.

24 29. Defendant uses the petrochemical-derived DL malic acid in its Products to create
25 a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings,
26 misbranding the Products and deceiving consumers.

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

1 30. The ingredients on the Products’ label are declared in a way that is misleading and
2 contrary to law, because Defendant designates the ingredient by its generic name, “malic acid,”
3 instead of by its specific name, “DL malic acid.”
4

5 **C. Requirements for Labelling**

6 31. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
7 (“FDCA”) require that a food’s label accurately describe the nature of the food product and its
8 characterizing flavors. 21 C.F.R. § 102.5(a).

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

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

17 34. Any recognizable primary flavor identified directly or indirectly on the front label
18 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
19 as a “characterizing flavor.” 21 C.F.R. § 101.22.
20

21 35. Here, the Products’ labels both state the characterizing flavors and reinforce the
22 claim that this characterizing flavor is achieved by using only natural flavors through use of
23 depictions of fruits.
24

25 36. If a food product’s characterizing flavor is not created exclusively by the named
26 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
27 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
28

1 which “simulates, resembles or reinforces” the characterizing flavor, the front label must
2 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
3 101.22(i)(2).

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

9 38. Such statement must be in boldface print on the front display panel and of
10 sufficient size for an average consumer to notice.

11 39. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
12 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

13 40. By changing the ratio between sugars and acids that is naturally found in berries
14 and citrus fruits, the DL malic acid used in the Products reinforces, simulates, or creates the
15 characterizing flavors, regardless of any other effect it may have or purpose for which it was
16 included.

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

20 42. Because the Products contain artificial flavoring, California law requires the
21 Products to display both front- and back-label disclosures to inform consumers that the Products
22 are artificially flavored.

23 43. The Products have none of the required disclosures regarding the use of artificial
24 flavors.

1 44. Plaintiff reserves the right to amend this Complaint to add further products that
2 contain similar label misrepresentations as testing continues.

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

9 50. Plaintiff reviewed the label on the Products prior to his purchase, and reviewed
10 the natural flavoring claims being made there and. Consumers such as Plaintiff who viewed the
11 Products’ labels reasonably understood Defendant’s “Naturally Flavored” statements, as well as
12 its failure to disclose the use of artificially derived malic acid, to mean that the Products contain
13 only natural flavorings. This representation was also false.

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

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

21 53. Consumers including Plaintiff especially rely on label claims made by food
22 product manufacturers such as PEScience, as they cannot confirm or disprove those claims
23 simply by viewing or even consuming the Products.

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- 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 “Naturally 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.

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

1 economic injury due to Defendant’s misrepresentations; and Plaintiff seeks the same relief as
2 the Class members.

3 65. There are no defenses available to Defendant that are unique to the named
4 Plaintiff.
5

6 66. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate
7 representative of the Class because Plaintiff’s interests do not conflict with the Class members’
8 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
9 against Defendant.

10 67. Furthermore, Plaintiff has selected competent counsel who are experienced in
11 class action and other complex litigation. Plaintiff and Plaintiff’s counsel are committed to
12 prosecuting this action vigorously on behalf of the Class and have the resources to do so.
13

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

- 17 a. the damages individual Class members suffered are small compared to the
18 burden and expense of individual prosecution of the complex and extensive
19 litigation needed to address Defendant’s conduct such that it would be
20 virtually impossible for the Class members individually to redress the wrongs
21 done to them. In fact, they would have little incentive to do so given the
22 amount of damage each member has suffered when weighed against the costs
23 and burdens of litigation;
24
- 25 b. the class procedure presents fewer management difficulties than individual
26 litigation and provides the benefits of single adjudication, economies of scale,
27 and supervision by a single Court;
28

- 1 c. the prosecution of separate actions by individual Class members would create
- 2 a risk of inconsistent or varying adjudications, which would establish
- 3 incompatible standards of conduct for Defendant; and
- 4
- 5 d. the prosecution of separate actions by individual Class members would create
- 6 a risk of adjudications with respect to them that would be dispositive of the
- 7 interests of other Class members or would substantively impair or impede their
- 8 ability to protect their interests.

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

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

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

18 72. Defendant has acted on grounds applicable to the Class as a whole, thereby
19 making appropriate final injunctive and declaratory relief concerning the Class as a whole.
20

21
22 **COUNT 1**
23 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
24 **SECTION 17200 *et seq.* — “UNFAIR” CONDUCT**

25 73. 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 74. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
28 a result of Defendant’s actions as set forth herein.

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

3 76. Defendant’s business practices, as alleged herein, are “unfair” because it fails to
4 disclose accurately the synthetic flavoring used in the Products.
5

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

8 78. Defendant’s wrongful business practices alleged herein constituted, and continue
9 to constitute, a continuing course of unfair competition since it continues to market and sell its
10 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
11 oppressive, unscrupulous and/or substantially injurious to its customers.
12

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

16 80. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
17 of this court enjoining Defendant from continuing to engage in “unfair” business practices and
18 any other act prohibited by law, including those acts set forth in this Complaint, and further seek
19 all other relief allowable under Business and Professions Code Section 17200, *et seq.*
20

21 **COUNT 2**
22 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
23 **SECTION 17200 *et seq.* — “FRAUDULENT” CONDUCT**

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

26 82. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
27 a result of Defendant’s actions as set forth above.
28

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

3 84. Defendant’s business practices, as alleged herein, are “fraudulent” because it fails
4 to disclose accurately the synthetic flavoring used in the Products.
5

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

8 86. Defendant’s wrongful business practices alleged herein constituted, and continue
9 to constitute, a continuing course of unfair competition since it continues to market and sell its
10 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
11 oppressive, unscrupulous and/or substantially injurious to its customers.
12

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

16 88. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an
17 order of this Court enjoining Defendant from continuing to engage in “fraudulent” business
18 practices and any other act prohibited by law, including those acts set forth in this Complaint,
19 and further seeks all other relief allowable under Business and Professions Code Section 17200,
20 *et seq.*
21

22 **COUNT 3**
23 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
24 **SECTION 17200 *et seq.* — “UNLAWFUL” CONDUCT**

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

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

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

3 92. Defendant’s business practices, as alleged herein, are “unlawful” because it fails
4 disclose accurately the synthetic flavoring used in the Products.
5

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

8 94. Defendant’s business practices alleged herein constituted, and continue to
9 constitute, a continuing course of unfair competition since it continues to market and sell its
10 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
11 oppressive, unscrupulous and/or substantially injurious to its customers.
12

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

16 96. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
17 of this court enjoining Defendant from continuing to engage in “unlawful” business practices
18 and any other act prohibited by law, including those acts set forth in this Complaint, and further
19 seeks all other relief allowable under Business and Professions Code Section 17200, *et seq.*
20

21 **COUNT 4**
22 **VIOLATION OF CALIFORNIA BUSINESS &**
23 **PROFESSIONS CODE SECTION 17500 *et seq.***

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

26 98. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
27 a result of Defendant’s actions as set forth above.
28

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

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

5 101. Defendant’s advertisements and marketing representations regarding the
6 characteristics of the Products were false, misleading, and deceptive as set forth above.

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

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

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13
14 **COUNT 5**
15 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**
16 **CAL. CIV. CODE § 1750 ET SEQ.**

17 45. 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 46. Plaintiff is a “consumer” within the meaning of the Consumer Legal Remedies
20 Act (“CLRA”), Cal. Civ. Code § 1761(d).

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

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

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

28

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

- 3 a. Defendant’s acts and practices constitute misrepresentations that its Products have
4 characteristics, benefits, or uses which they do not have;
5
6 b. Defendant misrepresented that its Products are of a particular standard, quality,
7 and/or grade, when they are of another;
8
9 c. Defendant’s acts and practices constitute the advertisement of goods, without the
10 intent to sell them as advertised;
11
12 d. Defendant’s acts and practices fail to represent that transactions involving its
13 Products involve actions that are prohibited by law, particularly the use of
14 misleading nutritional labelling; and
15
16 e. Defendant’s acts and practices constitute representations that its Products have
17 been supplied in accordance with previous representations when they were not.

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

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

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

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

4
5 **COUNT 6**
6 **UNJUST ENRICHMENT**

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

9 56. Defendant, through its marketing and labeling of the Products, misrepresented and
10 deceived consumers regarding the flavoring in the Products.

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

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

16 59. Defendant continues to possess monies paid by consumers to which Defendant is
17 not entitled.

18 60. Under the circumstances it would be inequitable for Defendant to retain the benefit
19 conferred upon it and Defendant’s retention of the benefit violates fundamental principles of
20 justice, equity, and good conscience.

21 61. Plaintiff seeks disgorgement of Defendant’s ill-gotten gains and restitution of
22 Defendant’s wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed
23 appropriate by the Court, and such other relief as the Court deems just and proper to remedy
24 Defendant’s unjust enrichment.

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

**COUNT 7
BREACH OF EXPRESS WARRANTY**

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2
3 63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
4 extent necessary, pleads this cause of action in the alternative.

5 64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
6 expressly warranted that the Products are “Naturally Flavored.”

7 65. The front labeling with the representations of fruits is also misleading and further
8 creates an express warranty to support the representation that the Products are “Naturally
9 Flavored.”

10 66. Defendant’s express warranties, and its affirmations of fact and promises made to
11 Plaintiff and the Class and regarding the Products, became part of the basis of the bargain
12 between Defendant and Plaintiff and the Class, which creates an express warranty that the
13 Products would conform to those affirmations of fact, representations, promises, and
14 descriptions.

15 67. The Products do not conform to the express warranty that the Products were
16 “Naturally Flavored,” because they are flavored by and contain ingredients that are unnatural
17 and synthetic, *i.e.*, DL malic acid.

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

PRAYER FOR RELIEF

25
26 WHEREFORE, Plaintiff respectfully request the Court grant the following relief against
27 Defendant:
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- a. Certifying the Class;
- b. Declaring that Defendant violated the 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;
- e. Ordering Defendant to pay attorneys’ fees and litigation costs to Plaintiff;
- f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.

/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

February 6, 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 those similarly situated
(b) County of Residence of First Listed Plaintiff San Diego, CA
(c) Attorneys (Firm Name, Address, and Telephone Number)
Charles C. Weller, CHARLES WELLER APC, 11412 Corley Ct., San Diego CA 92126, (858) 414-7465

DEFENDANTS
Performance Enhancing Supplements, LLC dba PEScience
County of Residence of First Listed Defendant Largo, FL
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)
'23CV0219 BEN DDL

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
Citizen of This State [X] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [X] 3
PTF DEF
Incorporated or Principal Place of Business In This State [] 4 [] 4
Incorporated and Principal Place of Business In Another State [] 5 [X] 5
Foreign Nation [] 6 [] 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)
[X] 1 Original Proceeding
[] 2 Removed from State Court
[] 3 Remanded from Appellate Court
[] 4 Reinstated or Reopened
[] 5 Transferred from Another District (specify)
[] 6 Multidistrict Litigation - Transfer
[] 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. section 1332
Brief description of cause:
Consumer protection claim for misbranded dietary supplements

VII. REQUESTED IN COMPLAINT:
[X] 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: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE 2/6/2023 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.