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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SHERRIS MINOR as an individual, on behalf of
herself, the general public and those similarly
situated,

Plaintiff,

v.

BAKER MILLS, INC.; and KODIAK CAKES,
LLC,

Defendants.

CASE NO.

**CONSOLIDATED CLASS ACTION
COMPLAINT FOR VIOLATION OF
THE CALIFORNIA CONSUMERS
LEGAL REMEDIES ACT; FALSE AD-
VERTISING; FRAUD, DECEIT,
AND/OR MISREPRESENTATION;
UNFAIR BUSINESS PRACTICES;
AND UNJUST ENRICHMENT**

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. Plaintiff Sherris Minor by and through her counsel, brings this class action against
3 Defendants Baker Mills, Inc. and Kodiak Cakes, LLC, to seek redress for Defendants' deceptive
4 practices in labeling and marketing their Kodiak Cakes Flapjack and Waffle Mixes ("Kodiak
5 Cakes Mixes").

6 2. Consumers are increasingly health conscious and, as a result, many consumers
7 seek foods high in protein to support weight loss, exercise, and general fitness, among other
8 perceived health benefits of protein consumption.

9 3. To capitalize on this trend, Defendants prominently label their Kodiak Cakes
10 Mixes as containing 14g, 13g, 12g, 10g, or 8g of protein per serving depending on the flavor.
11 Consumers, in turn, reasonably expect that each serving will provide the actual amount of protein
12 that the label claims it will.

13 4. In truth, however, Defendants' Kodiak Cakes Mixes do not contain the amount of
14 protein that the labels claim. Based on amino acid content testing, Defendants' products contain
15 approximately 17% less protein than claimed, meaning, for example, rather than having 14 grams
16 of protein per serving, Defendants' product actually has only 11.5 grams.

17 5. Further, Defendants' products are also misbranded. Parallel state and federal
18 regulations require any product that makes a protein claim to include in the nutrition facts panel a
19 percentage of the daily value of the protein in the product based on its amino acid content and
20 digestibility score. Defendants' products prominently make protein content claims but fail to
21 provide the required percent daily value of protein.

22 6. Defendants' misrepresentations and misbranding caused Plaintiff and members of
23 the class to pay a price premium for the products.

PARTIES

24
25 7. Sherris Minor ("Plaintiff") is, and at all times alleged in this Class Action
26 Complaint was, an individual and a resident of Pleasant Hill, California (Contra Costa County);
27 Emoryville, California (Alameda County); or Oakland, California (Alameda, County).

28 8. Defendant Baker Mills, Inc. is a corporation existing under the laws of the State of

1 Utah, having its principal place of business in Utah.

2 9. Defendant Kodiak Cakes, LLC is a limited liability company existing under the
3 laws of the State of Delaware, having its principal place of business in Utah.

4 10. The Parties identified in paragraphs 8-9 of this Complaint are collectively referred
5 to hereafter as “Defendants.”

6 **JURISDICTION AND VENUE**

7 11. This Court has jurisdiction over the subject matter of this action pursuant to 28
8 U.S.C. § 1332(d)(2). The aggregate amount in controversy exceeds \$5,000,000, exclusive of
9 interest and costs; and Plaintiff and at least one Defendant are citizens of different states.

10 12. The injuries, damages and/or harm upon which this action is based, occurred or
11 arose out of activities engaged in by Defendants within, affecting, and emanating from, the State
12 of California. Defendants regularly conduct and/or solicit business in, engage in other persistent
13 courses of conduct in, and/or derive substantial revenue from products provided to persons in the
14 State of California. Defendants have engaged, and continue to engage, in substantial and
15 continuous business practices in the State of California.

16 13. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a
17 substantial part of the events or omissions giving rise to the claims occurred in the state of
18 California, including within this District.

19 14. In accordance with California Civil Code Section 1780(d), Plaintiff concurrently
20 files herewith a declaration establishing that, at various times throughout the class period, she
21 purchased Kodiak Cakes Mixes in Pleasant Hill, California; Emoryville, California; and Oakland,
22 California. (Plaintiff’s declaration is attached hereto as Exhibit A.)

23 15. Plaintiff accordingly alleges that jurisdiction and venue are proper in this Court.

24 **SUBSTANTIVE ALLEGATIONS**

25 16. Defendants manufacture, distribute, market, advertise, and sell flapjack and waffle
26 mixes in the United States under the brand name “Kodiak Cakes.” Defendants’ packaging for the
27 following varieties of Kodiak Cakes Mixes predominately, uniformly, and consistently state on
28 the principal display panel of the product labels that they contain “14g Protein” per serving:

- a. Strawberry Chocolate Chip
- b. Cinnamon Oat
- c. Buttermilk
- d. Dark Chocolate
- e. Peanut Butter
- f. Almond Poppy Seed
- g. Carb-Conscious Buttermilk
- h. Chocolate Chip

17. Defendants' packaging for the following varieties of Kodiak Cakes Mixes pre-dominately, uniformly, and consistently state on the principal display panel of the product labels that they contain "13g Protein" per serving:

- i. Frontier Oat

18. Defendants' packaging for the following varieties of Kodiak Cakes Mixes pre-dominately, uniformly, and consistently state on the principal display panel of the product labels that they contain "12g Protein" per serving:

- j. Plant Based Classic

19. Defendants' packaging for the following varieties of Kodiak Cakes Mixes pre-dominately, uniformly, and consistently state on the principal display panel of the product labels that they contain "10g Protein" per serving:

- k. Pumpkin Flax

20. Defendants' packaging for the following varieties of Kodiak Cakes Mixes pre-dominately, uniformly, and consistently state on the principal display panel of the product labels that they contain "8g Protein" per serving:

- l. Whole Wheat, Oat & Honey

21. The products referenced in Paragraphs 16-20 are referred to collectively herein as the "Kodiak Cake Mixes" or the "Products".

22. The representation that the Products contain "14g protein," "13g protein," "12g protein," "10g protein," and "8g protein" per serving respectively, was uniformly communicated

to Plaintiff and every other person who purchased any of the Products in California. The same or substantially similar product label has appeared on each respective product during the entirety of the Class Period in the general form of the following example:



23. The nutrition facts panel on the side of the product likewise repeats the protein content claims, although it fails to provide any referenced percent the daily value of its protein content as state and federal regulations require. The side panel of the product has appeared consistently throughout the Class Period in the general form of the following example:



24. As described in detail below, Defendants' advertising and labeling of the Products as containing "14g protein," "13g protein," "12g protein," "10g protein," and "8g protein" per serving respectively, is false, misleading, and intended to induce consumers to purchase the Kodiak Cakes Mixes at a premium price, while ultimately failing to meet consumer expectations. These representations deceive and mislead reasonable consumers into believing that a serving of the Product will contain the grams of protein as represented on the label, when in fact, protein content testing reveals that a serving contains approximately 17% fewer grams of protein than claimed.

Consumer Demand for Protein

25. Many American consumers are health conscious and seek wholesome, natural foods to keep a healthy diet, so they routinely rely upon nutrition information when selecting and purchasing food items. This is especially true in the community of athletes, registered dietitians, and coaches, to which Defendants market. As noted by FDA Commissioner Margaret Hamburg during an October 2009 media briefing, “[s]tudies show that consumers trust and believe the nutrition facts information and that many consumers use it to help them build a healthy diet.” Indeed, the FDA recommends relying on Nutrition Facts Labels as the primary tool to monitor the consumption of protein.¹

26. Protein is found throughout the body—in muscle, bone, skin, hair, and virtually every other body part or tissue. The National Academy of Medicine recommends that adults get a minimum of .8 grams of protein for every kilogram of body weight per day, or just over 7 grams for every 20 pounds of body weight.² For a 140-pound person, that means about 50 grams of protein each day. For a 200-pound person, that means about 70 grams of protein each day.

27. Athletes and fitness enthusiasts typically consume much higher amounts of protein each day; typically between 1 to 1.5 grams of protein for every pound of body weight.

28. The health benefits of protein are just as important, if not more important, for children. Children are in a relative state of constant growth and rely on protein as the building block of muscle, bone, skin, hair, and virtually every other body part or tissue. The National Academies of Science recommends the following amounts of daily intake of protein based on age group: 1-3 years old: 13 g of protein per day; 4-8 years old: 19 g of protein per day; 9-13 years old: 34 g of protein per day.³

29. Athletes, dieticians, and coaches are particularly concerned about incorporating protein into their diets both pre and post workout. Protein is the building block of muscles. There-

¹ FDA Protein Fact Sheet,

<https://www.accessdata.fda.gov/scripts/InteractiveNutritionFactsLabel/factsheets/Protein.pdf>

² National Academies of Medicine. *Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients)*.

³ *Id.*

1 fore, consumers trying to gain muscle seek to ensure their protein intake is sufficiently high to
2 promote muscle growth and prevent muscle loss. Many studies report that consuming protein af-
3 ter exercise can aid recovery by reducing muscle damage and improving muscle performance.

4 30. The health benefits of protein are well studied and wide ranging. Scientific studies
5 have confirmed that protein can assist in weight loss, reduce blood pressure, reduce cholesterol,
6 and control for risk factors for cardiovascular diseases.

7 31. Proteins are not a monolithic substance, but instead come in many varieties. Pro-
8 teins are essentially chains of different amino acids, and different types of amino acids chained
9 together in different ways will make different types of proteins. Further, the makeup of the pro-
10 tein that is ingested changes the function of the protein in the body, and certain types of proteins
11 are more easily digested by humans than others.

12 32. Typically, a “complete protein” is a protein that contains all nine essential amino
13 acids. An essential amino acid is one that the human body cannot produce on its own and must be
14 obtained through diet. Essential amino acids may be measured by the Protein Digestibility Cor-
15 rected Amino Acid Score (“PDCAAS”), which FDA regulations rely on for the calculation of
16 Daily Reference Values (“DRV”). 21 C.F.R. § 101.9(c)(7)(ii); FDA Food Labeling Guide, p.29,
17 Question N. 22.

18 33. The PDCAAS method requires the manufacturer to determine the amount of es-
19 sential amino acids that the food contains and then multiply that number by humans’ ability to
20 digest the amino acid profile.

21 34. Because of the differences in benefits depending on the amino acid composition of
22 a protein, the source of protein is important. Whey protein is animal-based and contains all nine
23 essential amino acids. Plant protein contains higher levels of antioxidants, but rarely contains all
24 nine essential amino acids.

25 35. Defendants use both whey protein and plant-based proteins in their products. De-
26 fendants claim “We use a variety of protein sources in our products to help you meet your indi-
27 vidual requirements. Whole grain oats and wheat both have protein in them naturally. Our
28

primary source of added protein is whey protein, wheat protein, and milk protein. Other secondary sources come from egg and pea proteins.”

Federal and State Regulations Governing Food Labeling

36. The Food and Drug Administration regulates nutrition content labeling. According to these regulations, “[a] statement of the corrected amount of protein per serving, as determined in paragraph (c)(7)(ii) of this section, calculated as a percentage of the RDI or DRV for protein, as appropriate, and expressed as a Percent of Daily Value . . . *shall be given if a protein claim is made for the product . . .*” 21 C.F.R. 101.9(c)(7)(i) (emphasis added).

37. Although FDA guidance provides that a declaration of the DRV for protein is “not mandatory” in typical circumstances, that same guidance is equally clear that “[t]he percent of the DRV is required if a protein claim is made for the product.”⁴

38. Further, FDA regulations require the DRV to be calculated using amino acid analysis, more specifically the Protein Digestibility Corrected Amino Acid Score (“PDCAAS”). 21 C.F.R. § 101.9(c)(7)(ii); FDA Food Labeling Guide, p. 29, Question N.22. The PDCAAS method does not calculate protein content by nitrogen combustion, which is otherwise permitted under 21 C.F.R. § 101.9(c)(7) for products that do not make protein content claims.⁵

39. Accordingly, when a product makes a protein content claim, FDA regulations require manufacturers to calculate the amount of amino acids that the food contains and then multiply that amount by humans’ ability to digest the amino acid profile to come up with a percent daily value.

40. Identical federal and California laws regulate the content of labels on packaged food and require truthful, accurate information on the labels of packaged foods. The requirements of the federal Food, Drug & Cosmetic Act (“FDCA”), and its labeling regulations, including those set forth in 21 C.F.R. §§ 101, 102, were adopted by the California legislature in the

⁴ Guidance for Industry: A Food Labeling Guide (“FDA Food Labeling Guide”) p. 29, Question N22, U.S. Food & Drug Administration, <https://www.fda.gov/media/81606/download> (last accessed February 18, 2020).

⁵ Specifically, the regulation states that the grams of protein figure in the nutrition fact box “may be calculated on the basis of the factor of 6.25 times the nitrogen content of the food.”

Sherman Food Drug & Cosmetic Law (the “Sherman Law”). California Health & Safety Code § 110100 (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.”). The federal laws and regulations discussed below are applicable nationwide to all sales of packaged food products. Additionally, no state imposes different requirements on the labeling of packaged food for sale in the United States.

41. Under the FDCA, the term false has its usual meaning of “untruthful,” while the term misleading is a term of art that covers labels that are technically true, but are likely to deceive consumers. Under the FDCA, if any single representation on the labeling is false or misleading, the entire food is misbranded, and no other statement in the labeling can cure a misleading statement.

42. Further in addition to its blanket adoption of federal labeling requirements, California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. See California Health & Safety Code § 110660 (misbranded if label is false and misleading); and California Health & Safety Code § 110705 (misbranded if words, statements and other information required by the Sherman Law are either missing or not sufficiently conspicuous).

43. Under California law, a food product that is “misbranded” cannot legally be manufactured, advertised, distributed, sold, or possessed. Misbranded products have no economic value and are legally worthless.

44. Representing that the Kodiak Cakes Mixes contain “14g protein,” “13g protein,” “12g protein,” “10g protein,” and “8g protein” per serving respectively, is a statement of fact, and use of these phrases on the labels of packaged food is limited by the aforementioned misbranding laws and regulations.

Defendants’ Marketing and Labeling of their Kodiak Cakes Mixes Violates State and Federal Food Labeling Laws

45. Defendants’ Products are unlawful, misbranded, and violate the Sherman Law, California Health & Safety Code § 110660, et seq., because the Products’ labels state that each serving of Kodiak Cakes Mix contains “14g protein,” “13g protein,” “12g protein,” “10g protein,”

1 and “8g protein” per serving respectively, when, in fact, amino acid content testing reveals that
 2 the Products contains approximately 17% fewer grams of protein than claimed.

3 46. Further, Defendants make protein content claims on the front of their packages and
 4 yet have left the Percent Daily Value column of its nutrition facts for protein completely blank.
 5 Because Defendants made a protein content claim, they were statutorily obligated to calculate the
 6 protein content of their products via the amino analysis described above and to provide a percent
 7 daily value figure using the PDCAAS method described above. Defendants have failed to do so,
 8 and their Products are accordingly misbranded.

9 47. Defendants’ marketing, advertising, and sale of the Products violates the false ad-
 10 vertising provisions of the Sherman Law (California Health & Safety Code § 110390, *et. Seq.*),
 11 including but not limited to:

- 12 a. Section 110390, which makes it unlawful to disseminate false or misleading food
 13 advertisements that include statements on products and product packaging or
 14 labeling or any other medium used to directly or indirectly induce the purchase of
 15 a food product;
- 16 b. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or
 17 offer to sell any falsely or misleadingly advertised food; and
- 18 c. Sections 110398 and 110400, which make it unlawful to advertise misbranded
 19 food or to deliver or proffer for delivery any food that has been falsely or
 20 misleadingly advertised.

21 48. Defendants’ marketing, advertising, and sale of the Products violates the
 22 misbranding provisions of the Sherman Law (California Health & Safety Code § 110660, *et.*
 23 *seq.*), including but not limited to:

- 24 d. Section 110665 (a food is misbranded if its labeling does not conform with the
 25 requirements for nutrition labeling as set forth in 21 U.S.C. Sec. 343(q));
- 26 e. Section 110705 (a food is misbranded if words, statements and other information
 27 required by the Sherman Law to appear food labeling is either missing or not
 28 sufficiently conspicuous);

- f. Section 110760, which makes it unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded;
- g. Section 110765, which makes it unlawful for any person to misbrand any food; and
- h. Section 110770, which makes it unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food.

49. Defendants have violated 21 U.S.C. § 343(a), and the standards set by FDA regulations, including but not limited to 21 C.F.R. § 101.9 (c)(7), which have been incorporated by reference in the Sherman Law, by failing to include on their product labels the nutritional information required by law.

50. A reasonable consumer would expect that the Products contain what Defendants identify them to contain on the product labels and that the labels would not be contrary to the policies or regulations of the State of California and/or the FDA. For example, a reasonable consumer would expect that when Defendants label their Products as containing “14g Protein” per serving, the Products would contain 14 grams of protein per serving. However, based on amino acid content testing conducted by Plaintiff’s counsel, Defendants’ Products contain approximately 17% less protein per serving than claimed.

51. Consumers lack the meaningful ability to test or independently ascertain the truthfulness of Defendants’ food labeling claims, especially at the point of sale. Consumers would not know the true protein content of the Products merely by looking elsewhere on the product package. Its discovery requires investigation well beyond the grocery store aisle and knowledge of food chemistry beyond that of the average consumer. An average consumer does not have the specialized knowledge necessary to ascertain that a serving of a Kodiak Cakes Mix does not contain the number of grams that is represented on the label, and instead contains 17% fewer grams. That, combined with Defendants’ active concealment in representing that the Products contain “14g protein,” “13g protein,” “12g protein,” “10g protein,” and “8g protein” per serving respectively, and not disclosing otherwise anywhere on the label much less by listing the Protein DRV as it is required to do, gave the average reasonable consumer no reason to suspect that Defen-

dants' representations on the packages were not true, and therefore consumers had no reason to investigate where the Products actually do contain "14g protein," "13g protein," "12g protein," "10g protein," and "8g protein" per serving respectively. Thus, reasonable consumers relied on Defendants' representations regarding the nature of the Products.

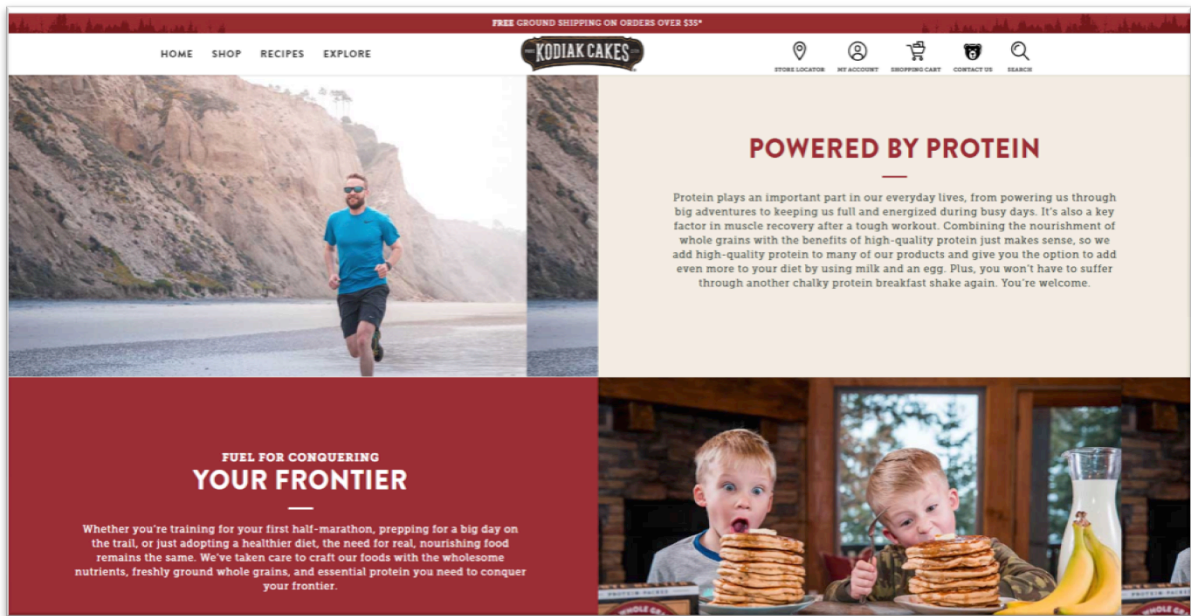
52. Defendants intend and know that consumers will and do rely upon food labeling statements in making their purchasing decisions. Label claims and other forms of advertising and marketing drive product sales, particularly if placed prominently on the front of product packaging, as Defendants have done with the claim that their Kodiak Cakes Mixes contain "14g protein," "13g protein," "12g protein," "10g protein," and "8g protein" per serving respectively.

Defendants' Website and Other Marketing Confirms That Defendants Intend to Deceive Consumers

53. Defendants' own advertising and marketing materials show that Defendants intended to deceive consumers into believing the false and deceptive packaging of the Products.

54. For example, Defendants' website located at <https://www.kodiakcakes.com> ("Defendants' website") claims that its Kodiak Cakes Mixes are "Protein Packed." Defendants' website encourages consumers to buy their Products, which they describe as "giv[ing] you the fuel to sustain you all day long."

55. The "Our Mission" page of Defendants' website explains that their Products contain protein because protein "plays an important part in our everyday lives, from powering us through big adventures to keeping us full and energized during busy days," and is "a key factor in muscle recovery after a tough workout." It goes on to boast "Combining the nourishment of whole grains with the benefits of high-quality protein just makes sense, so we add high-quality protein to many of our products and give you the option to add even more to your diet by using milk and an egg. Plus, you won't have to suffer through another chalky protein breakfast shake again. You're welcome." A screenshot of Defendants' "Our Mission" page appears below:



56. Defendants' website encourages consumers to use their Products in baking anything from Fish and Chips to Strawberry Chocolate Chip Cupcakes to Cake Batter Blondies ("[Y]ou don't have to feel too guilty about having two, or three!"), claiming "The goodness doesn't stop at breakfast. Check out these versatile, delicious recipes that can transform your favorite Kodiak Cakes mix into something completely unexpected." By promoting the use of its Products in baking foods, Defendants intend to lead consumers to believe that the foods that otherwise lack nutritional value can now be a source of healthy nutrients.

57. In short, Defendants' advertising and marketing campaign confirms that Defendants intend that consumers be effectively deceived by Defendants' misrepresentations on the Products' labels. More specifically, Defendants intend that consumers who read the Products' labels believe that the Products contain the number of grams of protein listed on the front of the label.

Defendants Misleadingly Market Their Kodiak Cakes Mixes to Increase Profits and Gain a Competitive Edge

58. Defendants' website explains their perceived competitive advantage, stating: "Whether you're training for your first half-marathon, prepping for a big day on the trail, or just adopting a healthier diet, the need for real, nourishing food remains the same. We've taken care to

1 craft our foods with the wholesome nutrients, freshly ground whole grains, and essential protein
2 you need to conquer your frontier.”

3 59. In making false, misleading, and deceptive representations, Defendants distinguish
4 their Kodiak Cakes Mixes from competitors’ products. Defendants knew and intended that con-
5 sumers would purchase, and pay a premium for, protein products labeled as having more protein
6 than the Products actually contain over comparable protein sources that do not contain misleading
7 representations on the product labels. For example, Defendants’ website states, “[r]esearch . . .
8 shows that consuming whey protein in combination with carbohydrates post-workout is an excel-
9 lent way to stimulate muscle growth, recovery, and reduce muscle soreness. For this reason,
10 Kodiak Cakes are a perfect pre or post-workout breakfast option for athletes. Our Kodiak Cakes
11 cups are a great on-the-go breakfast or snack athletes can throw in their gym bag before playing
12 in a game or tournament.” By using this branding and marketing strategy, Defendants are stating
13 that its protein products are superior to, better than, and more nutritious and healthful than other
14 forms of protein products that do not misrepresent the number of grams of protein on their labels.

15 **Defendants Intend to Continue to Market their Products as Containing More Protein than**
16 **the Products Actually Contain**

17 60. Because consumers pay a price premium for protein supplement products that con-
18 tain more protein, by labeling their Products as containing more grams of protein per serving than
19 they actually contain, Defendants are able to both increase their sales and retain more profits.

20 61. Defendants engaged in the practices complained of herein to further their private
21 interests of: (i) increasing sales of their Products while decreasing the sales of competitors that do
22 not misrepresent the number of grams of protein contained in their products, and/or (ii) com-
23 manding a higher price for their Products because consumers will pay more for these Kodiak
24 Cakes Mixes due to consumers’ demand for products containing more protein.

25 62. The market for protein products is continuing to grow and expand, and because
26 Defendant knows consumers rely on representations about the number of grams of protein in their
27 Products, Defendants have an incentive to continue to make such false representations. In addi-
28 tion, other trends suggest that Defendants have no incentive to change their labeling practices.

63. For example, one market analysis revealed that between 2013-2017, product launches with a protein claim grew 31%.⁶

64. To capitalize on the growing market, since 2014, Defendants have expanded their product line from Kodiak Cakes Mixes, to frozen waffles, baking mixes, oatmeal, granola, and snacks and have continued to replicate their misrepresentations on the new product lines. Defendants' co-founder has stated regarding the company's focus on protein, "One success factor is sticking to your position. It was taking a long time to get Kodiak Cakes to where we wanted, and we did wonder if should do a white flour pancake mix. I formulated a really good white flour mix, but the best thing we ever did was not launch it. We're all about the whole grain and protein."⁷ Defendants continue to launch new product lines and flavors to diversify their portfolio to maintain their competitive edge, making it likely that Defendants will continue to misleadingly advertise their Products and perpetuate the misrepresentations regarding the number of grams of protein in its Products.

PLAINTIFF'S EXPERIENCE

65. Plaintiff has purchased at least ten of Defendants' Kodiak Cakes Mixes from various Sprouts Farmers Market, Target, and Safeway stores throughout the East Bay in Northern California over the past year. She typically purchased the Buttermilk flavor.

66. Plaintiff made each of her purchases after reading and relying on the truthfulness of Defendants' product label that promised the Products contained "14g Protein" per serving of the Buttermilk flavor. She was attracted to the Products because, when given a choice, she prefers to buy quick and easy breakfast items that support her active physical fitness levels and high protein diet. But on each of the Products she purchased, Defendants misrepresented the protein contents of the Products as containing 17% more grams of protein than they actually contain.

⁶ https://www.bakeryandsnacks.com/Article/2018/11/26/10-key-snack-trends-to-watch?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright

⁷ Stephen Daniells, *Kodiak Cakes' CEO: "We're Growing 80% Year-on-Year and Approaching \$100 Million,"* FOOD NAVIGATOR USA, Jan. 24, 2018, <https://www.foodnavigator-usa.com/Article/2018/01/24/Kodiak-Cakes-CEO-We-re-growing-80-year-on-year-and-approaching-100-million>.

1 67. At the time of each of her purchases of the Products, Plaintiff did not know that the
2 Products did not contain the amount of protein represented on the label. As a result of Defen-
3 dants' misrepresentations and omissions, the Products have no, or, at a minimum, a much lower
4 value to Plaintiff.

5 68. Plaintiff not only purchased the Products because its label said that it contained
6 "14g Protein" per serving, but she also paid more money for the Products than she would have
7 paid for other or a similar protein product that was not mislabeled regarding the number of grams
8 of protein it contained.

9 69. Had Defendants not misrepresented (by omission and commission) the true nature
10 of the Products, Plaintiff would not have purchased them or, at a very minimum, she would have
11 paid less for the Products.

12 70. Plaintiff continues to desire to purchase protein products, including those marketed
13 and sold by Defendants. If Defendants' Products were reformulated to contain the grams of pro-
14 tein that are represented on the labels, Plaintiff would likely purchase Defendants' Products again
15 in the future. Plaintiff regularly visits stores where Defendants' Products and other protein prod-
16 ucts are sold. Because Plaintiff does not know the formula for Defendants' products and cannot
17 test whether or not the Products contain the amount of protein that is represented on the label,
18 Plaintiff will be unable to rely on Defendants' labels when shopping for protein products in the
19 future absent an injunction that prohibits Defendants from labeling their products with the incor-
20 rect number of grams of protein that each serving contains. Should Defendants begin to market
21 and sell a new line of products, Plaintiff could be at risk for buying another one of Defendants'
22 products in reliance on the same or similar misrepresentation.

23 71. Plaintiff and members of the Class have been economically damaged by their
24 purchase of the Products because the advertising for the Products was and is untrue and/or
25 misleading under California law and the products are misbranded; therefore, the Products are
26 worth less than what Plaintiffs and members of the Class paid for them and/or Plaintiffs and
27 members of the Class did not receive what they reasonably intended to receive.
28

CLASS ALLEGATIONS

72. Plaintiff brings this class action lawsuit on behalf of herself and proposed classes of similarly situated persons, pursuant to Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure. Plaintiff seeks to represent the following groups of similarly situated persons, defined as follows:

All persons in the State of California who purchased the Products between April 9, 2016 and the present.

73. This action has been brought and may properly be maintained as a class action against Defendants because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.

74. Numerosity: Plaintiff does not know the exact size the Class, but she estimates that it is composed of more than 100 persons. The persons in the Class are so numerous that the joinder of all such persons is impracticable and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the courts.

75. Common Questions Predominate: This action involves common questions of law and fact to the potential classes because each class member's claim derives from the deceptive, unlawful and/or unfair statements and omissions that led consumers to believe that the Products contained the amount of protein as represented on the Product labels. The common questions of law and fact predominate over individual questions, as proof of a common or single set of facts will establish the right of each member of the Class to recover. The questions of law and fact common to the Class are:

- a. The true nature of the protein content in the Products;
- b. Whether the marketing, advertising, packaging, labeling, and other promotional materials for the Product are deceptive and/or unlawful because of misrepresentations;
- c. Whether Defendants' actions violate Federal and California laws invoked herein;
- d. Whether labeling the Products as containing more grams of protein than they actually contain causes the Products to command a price premium in the market as

- 1 compared with similar products that do not make such misrepresentations;
- 2 e. Whether Defendants' advertising and marketing regarding the Products sold to the
- 3 class members was likely to deceive reasonable consumers;
- 4 f. Whether representations regarding the number of grams of protein in the Products
- 5 are material to a reasonable consumer;
- 6 g. Whether Defendants engaged in the behavior knowingly, recklessly, or
- 7 negligently;
- 8 h. The amount of profits and revenues earned by Defendants as a result of the
- 9 conduct;
- 10 i. Whether class members are entitled to restitution, injunctive and other equitable
- 11 relief and, if so, what is the nature (and amount) of such relief; and
- 12 j. Whether class members are entitled to payment of actual, incidental,
- 13 consequential, exemplary and/or statutory damages plus interest thereon, and if so,
- 14 what is the nature of such relief.

15 76. Typicality: Plaintiff's claims are typical of the claims of the other members of the

16 Class because, among other things, all such claims arise out of the same wrongful course of

17 conduct engaged in by Defendant in violation of law as complained of herein. Further, the

18 damages of each member of the Class were caused directly by Defendants' wrongful conduct in

19 violation of the law as alleged herein.

20 77. Adequacy of Representation: Plaintiff will fairly and adequately protect the

21 interests of all class members because it is in their best interests to prosecute the claims alleged

22 herein to obtain full compensation due to them for the unfair and illegal conduct of which they

23 complain. Plaintiff also has no interests that are in conflict with, or antagonistic to, the interests of

24 class members. Plaintiff has retained highly competent and experienced class action attorneys to

25 represent her interests and that of the class. By prevailing on her own claims, Plaintiff will

26 establish Defendants' liability to all class members. Plaintiff and her counsel have the necessary

27 financial resources to adequately and vigorously litigate this class action, and Plaintiff and

28 counsel are aware of their fiduciary responsibilities to the class members and are determined to

1 diligently discharge those duties by vigorously seeking the maximum possible recovery for class
2 members.

3 78. Superiority: There is no plain, speedy, or adequate remedy other than by
4 maintenance of this class action. The prosecution of individual remedies by members of the
5 classes will tend to establish inconsistent standards of conduct for Defendant and result in the
6 impairment of class members' rights and the disposition of their interests through actions to
7 which they were not parties. Class action treatment will permit a large number of similarly
8 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,
9 and without the unnecessary duplication of effort and expense that numerous individual actions
10 would engender. Furthermore, as the damages suffered by each individual member of the classes
11 may be relatively small, the expenses and burden of individual litigation would make it difficult
12 or impossible for individual members of the class to redress the wrongs done to them, while an
13 important public interest will be served by addressing the matter as a class action.
14

15 79. Plaintiff is unaware of any difficulties that are likely to be encountered in the
16 management of this action that would preclude its maintenance as a class action.
17

18 **CAUSES OF ACTION**

19 Plaintiff does not plead, and hereby disclaims, causes of action under the FDCA and
20 regulations promulgated thereunder by the FDA. Plaintiff relies on the FDCA and FDA
21 regulations only to the extent such laws and regulations have been separately enacted as state law
22 or regulation or provide a predicate basis of liability under the state and common laws cited in the
23 following causes of action.
24

25 **PLAINTIFF'S FIRST CAUSE OF ACTION**

26 **(Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code §**
27 **1750, *et seq.*)**

28 **On Behalf of Plaintiff and the Class**

80. Plaintiff realleges and incorporates the paragraphs of this Class Action Complaint

1 as if set forth herein.

2 81. Defendants' actions, representations and conduct have violated, and continue to
3 violate the CLRA, because they extend to transactions that are intended to result, or which have
4 resulted, in the sale or lease of goods or services to consumers.

5 82. Plaintiff and other class members are "consumers" as that term is defined by the
6 CLRA in California Civil Code § 1761(d).

7 83. The Products that Plaintiff (and other similarly situated class members) purchased
8 from Defendant were "goods" within the meaning of California Civil Code § 1761(a).

9 84. Defendants' acts and practices, set forth in this Class Action Complaint, led
10 customers to falsely believe that the Products contained the amount of protein claimed on the
11 product package. By engaging in the actions, representations and conduct set forth in this Class
12 Action Complaint, Defendants have violated, and continue to violate, § 1770(a)(2), § 1770(a)(5),
13 § 1770(a)(7), § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California Civil Code
14 §1770(a)(2), Defendants' acts and practices constitute improper representations regarding the
15 source, sponsorship, approval, or certification of the goods they sold. In violation of California
16 Civil Code §1770(a)(5), Defendants' acts and practices constitute improper representations that
17 the goods they sell have sponsorship, approval, characteristics, ingredients, uses, benefits, or
18 quantities, which they do not have. In violation of California Civil Code §1770(a)(7), Defendants'
19 acts and practices constitute improper representations that the goods it sells are of a particular
20 standard, quality, or grade, when they are of another. In violation of California Civil Code
21 §1770(a)(8), Defendant has disparaged the goods, services, or business of another by false or
22 misleading representation of fact. In violation of California Civil Code §1770(a)(9), Defendant
23 has advertised goods or services with intent not to sell them as advertised. Finally, regarding
24 California Civil Code §1770(a)(8), Defendants falsely or deceptively market and advertise that,
25 unlike other protein product manufacturers, they sell Products that contain more grams of protein
26 than the Products actually contain. Further, Defendant failed to list the DRV of protein, as it was
27 required to do.

28 85. Plaintiff requests that this Court enjoin Defendants from continuing to employ the

1 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
 2 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the
 3 future, Plaintiff and the other members of the Class will continue to suffer harm.

4 86. Plaintiff provided Defendants with notice and demand that Defendants correct,
 5 repair, replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices
 6 complained of herein. Despite receiving the aforementioned notice and demand, Defendants
 7 failed to do so in that, among other things, it failed to identify similarly situated customers, notify
 8 them of their right to correction, repair, replacement or other remedy, and/or to provide that
 9 remedy. Accordingly, Plaintiff seeks, pursuant to California Civil Code § 1780(a)(3), on behalf of
 10 herself and those similarly situated class members, compensatory damages, punitive damages and
 11 restitution of any ill-gotten gains due to Defendants' acts and practices.

12 87. Plaintiffs also requests that this Court award their costs and reasonable attorneys'
 13 fees pursuant to California Civil Code § 1780(d).

14 **PLAINTIFF'S SECOND CAUSE OF ACTION**
 15 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**
 16 **On Behalf of Plaintiff and the Class**

17 88. Plaintiff realleges and incorporates by reference the paragraphs of this Class
 18 Action Complaint as if set forth herein.

19 89. Beginning at an exact date unknown to Plaintiff, but within three (3) years
 20 preceding the filing of the Class Action Complaint, Defendants made untrue, false, deceptive
 21 and/or misleading statements in connection with the advertising and marketing of the Products.

22 90. Defendants made representations and statements (by omission and commission)
 23 that led reasonable customers to believe that the Products that they were purchasing contained
 24 more grams of protein per serving than the Products actually contained. Further, Defendants
 25 failed to list the DRV of protein, as it was required to do.

26 91. Plaintiff and those similarly situated relied to their detriment on Defendants' false,
 27 misleading and deceptive advertising and marketing practices, including each of the
 28 misrepresentations and omissions set forth above. Had Plaintiff and those similarly situated been
 adequately informed and not intentionally deceived by Defendants, she would have acted

1 differently by, without limitation, refraining from purchasing Defendants' Products or paying less
2 for them.

3 92. Defendants' acts and omissions are likely to deceive the general public.

4 93. Defendants engaged in these false, misleading and deceptive advertising and
5 marketing practices to increase their profits. Accordingly, Defendants have engaged in false
6 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and
7 Professions Code.

8 94. The aforementioned practices, which Defendants used, and continue to use, to
9 their significant financial gain, also constitute unlawful competition and provide an unlawful
10 advantage over Defendants' competitors as well as injury to the general public.

11 95. As a direct and proximate result of such actions, Plaintiff and the other class
12 members have suffered, and continue to suffer, injury in fact and have lost money and/or property
13 as a result of such false, deceptive and misleading advertising in an amount which will be proven
14 at trial, but which is in excess of the jurisdictional minimum of this Court.

15 96. Plaintiff seeks, on behalf of herself and those similarly situated, full restitution of
16 monies, as necessary and according to proof, to restore any and all monies acquired by
17 Defendants from Plaintiff, the general public, or those similarly situated by means of the false,
18 misleading and deceptive advertising and marketing practices complained of herein, plus interest
19 thereon.

20 97. Plaintiff seeks, on behalf of herself and those similarly situated, a declaration that
21 the above-described practices constitute false, misleading and deceptive advertising.

22 98. Plaintiff seeks, on behalf of herself and those similarly situated, an injunction to
23 prohibit Defendants from continuing to engage in the false, misleading and deceptive advertising
24 and marketing practices complained of herein. Such misconduct by Defendants, unless and until
25 enjoined and restrained by order of this Court, will continue to cause injury in fact to the general
26 public and the loss of money and property in that Defendants will continue to violate the laws of
27 California, unless specifically ordered to comply with the same. This expectation of future
28 violations will require current and future consumers to repeatedly and continuously seek legal

1 redress in order to recover monies paid to Defendants to which they are not entitled. Plaintiff,
 2 those similarly situated and/or other consumers nationwide have no other adequate remedy at law
 3 to ensure future compliance with the California Business and Professions Code alleged to have
 4 been violated herein.

5 **PLAINTIFF'S THIRD CAUSE OF ACTION**
 6 **(Common Law Fraud, Deceit and/or Misrepresentation)**
 7 **On Behalf of Plaintiff and the Class**

8 99. Plaintiff realleges and incorporates by reference the paragraphs of this Class
 9 Action Complaint as if set forth herein.

10 100. Defendants have fraudulently and deceptively informed Plaintiff that the Products
 11 contain more grams of protein than they actually contain. Further, Defendants failed to list the
 12 DRV of protein, as it was required to do.

13 101. These misrepresentations and omissions were known exclusively to, and actively
 14 concealed by, Defendants, not reasonably known to Plaintiff, and material at the time they were
 15 made. Defendants knew the composition of the Products, and knew that the Products did not
 16 contain the amount of protein represented on the label. Defendants' misrepresentations and
 17 omissions concerned material facts that were essential to the analysis undertaken by Plaintiff as to
 18 whether to purchase Defendants' Products. In misleading Plaintiff and not so informing Plaintiff,
 19 Defendants breached their duty to her. Defendants also gained financially from, and as a result of,
 20 their breach.

21 102. Plaintiff and those similarly situated relied to their detriment on Defendants'
 22 misrepresentations and fraudulent omissions. Had Plaintiff and those similarly situated been
 23 adequately informed and not intentionally deceived by Defendants, they would have acted
 24 differently by, without limitation: (i) declining to purchase the Products, (ii) purchasing less of
 25 them, or (iii) paying less for the Products.

26 103. By and through such fraud, deceit, misrepresentations and/or omissions,
 27 Defendants intended to induce Plaintiff and those similarly situated to alter their position to their
 28 detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiff and those
 similarly situated to, without limitation, purchase the Products.

104. Plaintiff and those similarly situated justifiably and reasonably relied on Defendants' misrepresentations and omissions, and, accordingly, were damaged by Defendants.

105. As a direct and proximate result of Defendants' misrepresentations and/or omissions, Plaintiff and those similarly situated have suffered damages, including, without limitation, the amount they paid for the Products.

106. Defendants' conduct as described herein was wilful and malicious and was designed to maximize Defendants' profits even though Defendant knew that it would cause loss and harm to Plaintiff and those similarly situated.

PLAINTIFF'S FOURTH CAUSE OF ACTION
(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions Code § 17200, *et seq.*)
On Behalf of Plaintiff and the Class

107. Plaintiff realleges and incorporates by reference the paragraphs of this Class Action Complaint as if set forth herein.

108. Within four (4) years preceding the filing of this lawsuit, and at all times mentioned herein, Defendants have engaged, and continue to engage, in unlawful, unfair, and fraudulent trade practices in California by engaging in the unlawful, unfair, and fraudulent business practices outlined in this complaint.

109. In particular, Defendants have engaged, and continue to engage, in unlawful practices by, without limitation, violating the following state and federal laws: (i) the CLRA as described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman Law (Article 3), including without limitation, California Health & Safety Code §§ 110390, 110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705, 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and branding of food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to 21 C.F.R. 21 C.F.R. § 101.9 (c)(7), which are incorporated into the Sherman Law (California Health & Safety Code §§ 110100(a), 110380, and 110505).

110. In particular, Defendants have engaged, and continue to engage, in unfair and

1 fraudulent practices by, without limitation, the following: (i) misrepresenting that the Products
2 contain more grams of protein than they actually contain; and (ii) failing to list the Protein DRV
3 as required by FDA regulations.

4 111. Plaintiff and those similarly situated relied to their detriment on Defendants'
5 unlawful, unfair, and fraudulent business practices. Had Plaintiff and those similarly situated been
6 adequately informed and not deceived by Defendants, they would have acted differently by,
7 without limitation: (i) declining to purchase the Products, (ii) purchasing less of the Products, or
8 (iii) paying less for the Products.

9 112. Defendants' acts and omissions are likely to deceive the general public.

10 113. Defendants engaged in these deceptive and unlawful practices to increase their
11 profits. Accordingly, Defendants have engaged in unlawful trade practices, as defined and
12 prohibited by section 17200, *et seq.* of the California Business and Professions Code.

13 114. The aforementioned practices, which Defendants have used to their significant
14 financial gain, also constitute unlawful competition and provide an unlawful advantage over
15 Defendants' competitors as well as injury to the general public.

16 115. As a direct and proximate result of such actions, Plaintiff and the other class
17 members, have suffered and continue to suffer injury in fact and have lost money and/or property
18 as a result of such deceptive and/or unlawful trade practices and unfair competition in an amount
19 which will be proven at trial, but which is in excess of the jurisdictional minimum of this Court.
20 Among other things, Plaintiff and the class members lost the amount they paid for the Products.

21 116. As a direct and proximate result of such actions, Defendants have enjoyed, and
22 continue to enjoy, significant financial gain in an amount which will be proven at trial, but which
23 is in excess of the jurisdictional minimum of this Court.

24 117. Plaintiff seeks, on behalf of themselves and those similarly situated, full restitution
25 of monies, as necessary and according to proof, to restore any and all monies acquired by
26 Defendants from Plaintiff, the general public, or those similarly situated by means of the
27 deceptive and/or unlawful trade practices complained of herein, plus interest thereon.

28 118. Plaintiff seeks, on behalf of those similarly situated, a declaration that the above-

1 described trade practices are fraudulent, unfair, and/or unlawful.

2 119. Plaintiff seeks, on behalf of those similarly situated, an injunction to prohibit
 3 Defendants from continuing to engage in the deceptive and/or unlawful trade practices
 4 complained of herein. Such misconduct by Defendants, unless and until enjoined and restrained
 5 by order of this Court, will continue to cause injury in fact to the general public and the loss of
 6 money and property in that Defendants will continue to violate the laws of California, unless
 7 specifically ordered to comply with the same. This expectation of future violations will require
 8 current and future consumers to repeatedly and continuously seek legal redress in order to recover
 9 monies paid to Defendants to which they were not entitled. Plaintiff, those similarly situated
 10 and/or other consumers nationwide have no other adequate remedy at law to ensure future
 11 compliance with the California Business and Professions Code alleged to have been violated
 12 herein.
 13

14
 15 **PLAINTIFF'S FIFTH CAUSE OF ACTION**
 16 **(Unjust Enrichment)**
 17 **On Behalf of Plaintiff and the Class**

18 120. Plaintiff realleges and incorporates by reference all paragraphs alleged herein

19 121. Plaintiff and members of the Class members conferred a benefit on the Defendants
 20 by purchasing the Products

21 122. Defendants have been unjustly enriched in retaining the revenues from Plaintiff's
 22 and Class Members' purchases of the Products, which retention is unjust and inequitable, because
 23 Defendants falsely represented that the Products contained specific amounts of protein per
 24 serving, when, in fact, the Products contained approximately 17% less protein than represented.
 25 This harmed Plaintiff and members of the class because they paid a price premium as a result.

26 123. Because Defendants' retention of the non-gratuitous benefit conferred on it by
 27 Plaintiff and Class members is unjust and inequitable, Defendants must pay restitution to Plaintiff
 28 and the Class members for its unjust enrichment, as ordered by the Court.

124. Plaintiff, therefore, seeks an order requiring Defendants to make restitution to her

1 and other members of the Class

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff, on behalf of herself and those similarly situated,
4 respectfully request that the Court enter judgement against Defendants as follows:

- 5 A. Certification of the proposed Class, including appointment of Plaintiff's counsel as
6 class counsel;
- 7 B. An order temporarily and permanently enjoining Defendants from continuing the
8 unlawful, deceptive, fraudulent, and unfair business practices alleged in this Com-
9 plaint;
- 10 C. An award of compensatory damages in an amount to be determined at trial;
- 11 D. An award of statutory damages in an amount to be determined at trial;
- 12 E. An award of punitive damages in an amount to be determined at trial;
- 13 F. An award of treble damages;
- 14 G. An award of restitution in an amount to be determined at trial;
- 15 H. An order requiring Defendants to pay both pre- and post-judgment interest on any
16 amounts awarded;
- 17 I. For reasonable attorney's fees and the costs of suit incurred; and
- 18 J. For such further relief as this Court may deem just and proper.

19 **JURY TRIAL DEMANDED**

20 Plaintiff hereby demands a trial by jury.

21 Dated: April 28, 2020

GUTRIDE SAFIER LLP

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