

FILED
Superior Court of California
County of Los Angeles

MAR 16 2021

Sherri R. Carter, Executive Officer/Clerk of Court
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ORIGINAL

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11 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

12 COUNTY OF LOS ANGELES

13 SHANE WINKELBAUER, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 vs.

17 ANCIENT BRANDS, LLC, and DOES 1
18 through 10, inclusive,

19 Defendant.

Case No.

21STCV10258

CLASS ACTION COMPLAINT

1. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS AND PROFESSIONS CODE § 17200, *et seq.*
2. FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17500, *et seq.*
3. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, *et. seq.*
4. UNJUST ENRICHMENT
5. COMMON LAW FRAUD
6. INTENTIONAL MISREPRESENTATION
7. NEGLIGENT MISREPRESENTATION

DEMAND FOR JURY TRIAL

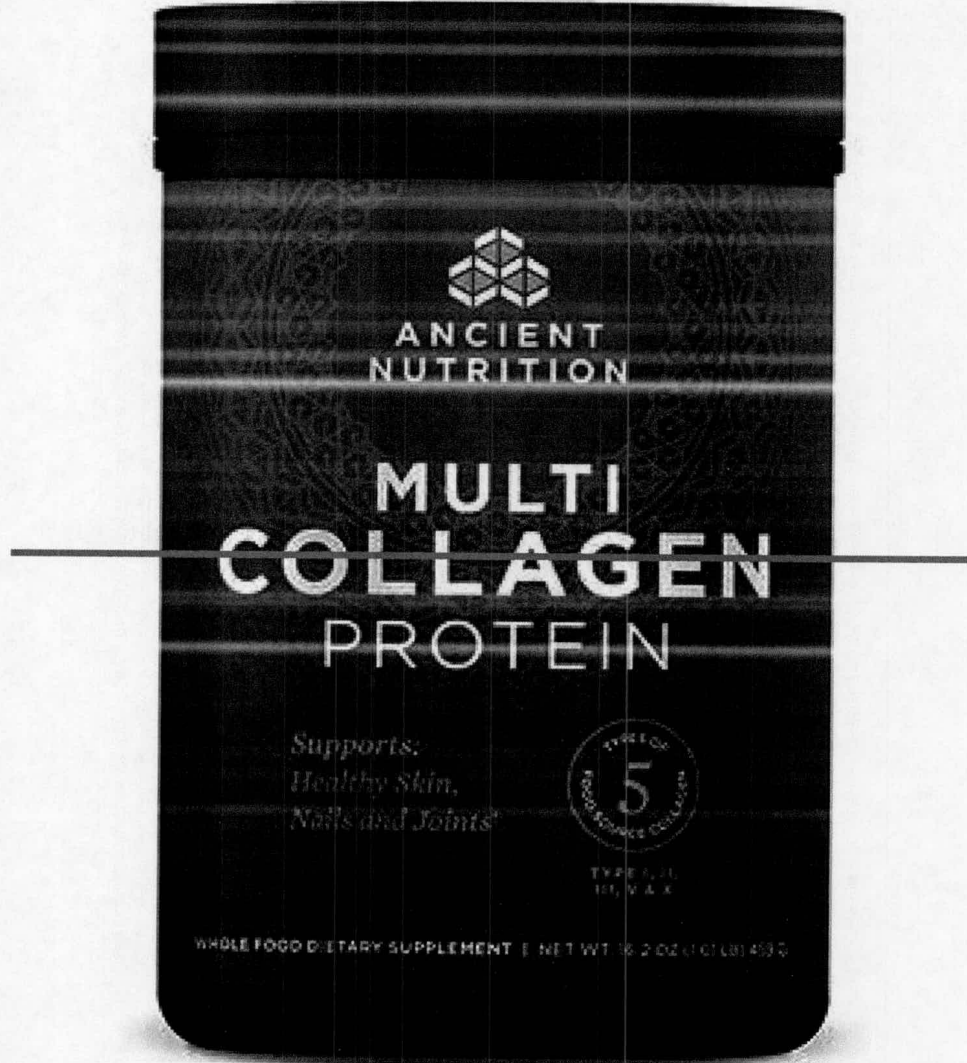
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INTRODUCTION

1. Defendant manufactures and sells an extremely popular line of protein powder products throughout the United States. To increase profits at the expense of consumers and fair competition, Defendant deceptively sells all Ancient Nutrition protein powders in opaque containers (the “Products”) in oversized packaging that does not reasonably inform consumers that they are more than half empty. Defendant’s “slack-fill” scam dupes unsuspecting consumers across America to pay premium prices for empty space. In one version of the Product, the opaque container measures to a vertical height of approximately 18.9 cm, while the product inside only measures to a vertical height of approximately 9.1 cm. Below is a true and correct image of one version of the Product, evidencing the deception. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space.



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2. While other similar lawsuits against Defendant’s competitors have all but curbed this unfair business practice, Defendant remains one of the last holdouts, ignoring the industry trend toward transparency in the hopes of obtaining an unfair competitive advantage in the marketplace. This class action aims to remedy Defendant’s unfair business practice by forcing it to follow the industry trend toward greater transparency and eliminating consumer deception.

3. Defendant markets the Products in a systematically misleading manner by representing them as adequately filled when, in fact, they contain an unlawful amount of empty space or “slack-fill.” Defendant underfills the Products for no lawful reason. The front of the Products’ packaging does not include any information that would reasonably apprise Plaintiff of the quantity of product relative to the size of the container, such as a fill line. Defendant does this to save money (by not filling the containers) and to deceive consumers into purchasing the Products over its competitors’ products. Defendant’s slack-fill scheme not only harms consumers, but it also harms its competitors who have implemented labeling changes designed to alert consumers to the true amount of product in each container. Accordingly, Defendant has violated the California Consumers Legal Remedies Act, particularly California Civil Code sections 1770(a)(2), 1770(a)(5), 1770(a)(7), 1770(a)(9). As such, Defendant has committed *per se* violations of Business & Professions Code section 17200, *et seq.*, Business & Professions Code section 17500, *et seq.*, and Civil Code section 1750, *et seq.*

4. Plaintiff and consumers have, accordingly, suffered injury in fact caused by the false, fraudulent, unfair, deceptive, unlawful, and misleading practices set forth herein, and seek injunctive relief, as well as, *inter alia*, compensatory damages, statutory damages, restitutionary damages, and attorneys’ fees.

CALIFORNIA STATE AND FEDERAL COURTS FIND SLACK-FILL CASES MERITORIOUS AND APPROPRIATE FOR CLASS TREATMENT

5. Several state and federal courts have found that cases involving nearly identical claims are meritorious and appropriate for class treatment. *See Padilla v. The Whitewave Foods Co., et. al.*, Case No. 2:18-cv-09327-JAK-JC (C.D. Cal.) (defendant’s FRCP 12(b)(6) motion to dismiss slack-filled supplement container claims denied); *Matic v. United States Nutrition, Inc.*,

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1 Case No. 2:18-cv-09592-PSG-AFM (C.D. Cal.) (defendant’s FRCP 12(b)(6) motion to dismiss
2 slack-filled supplement container claims denied); *Merry, et al. v. International Coffee & Tea, LLC*
3 *dba The Coffee Bean*, Case No. CIVDS1920749 (San Bernardino Superior Court) (defendant’s
4 demurrer to slack-filled powder filled container claims overruled); *Iglesias v. Ferrara Candy Co.*,
5 Case No. 3:17-cv-00849-VC (N.D. Cal.) (defendant’s FRCP 12(b)(6) motion to dismiss slack-
6 filled Jujufruits® and Lemonhead® candy box claims denied and nationwide settlement class
7 certified); *Tsuchiyama v. Taste of Nature, Inc.*, Case No. BC651252 (L.A.S.C.) (defendant’s
8 motion for judgment on the pleadings involving slack-filled Cookie Dough Bites® candy box
9 claims denied and nationwide settlement subsequently certified through Missouri court); *Gordon*
10 *v. Tootsie Roll Industries, Inc.*, Case No. 2:17-cv-02664-DSF-MRW (C.D. Cal.) (defendant’s
11 FRCP 12(b)(6) motion to dismiss slack-filled Junior Mints® and Sugar Babies® candy box claims
12 denied); *Escobar v. Just Born, Inc.*, Case No. 2:17-cv-01826-BRO-PJW (C.D. Cal.) (defendant’s
13 FRCP 12(b)(6) motion to dismiss slack-filled Mike N’ Ike® and Hot Tamales® candy box claims
14 denied and California class action certified); *Thomas v. Nestle USA, Inc.*, Cal. Sup. Case No.
15 BC649863 (April 29, 2020) (certifying as a class action slack-fill claims brought under California
16 consumer protection laws).

PARTIES

17
18 6. Plaintiff is, and at all times relevant hereto was, a citizen of California residing in
19 the county of Los Angeles. Plaintiff made a one-time purchase of Ancient Nutrition Multi
20 Collagen Protein powder at a Ralph’s store in Los Angeles, California in 2020. In making his
21 purchase, Plaintiff relied upon the opaque packaging, including the size of the container and
22 product label, which was prepared and approved by Defendant and its agents and disseminated
23 statewide and nationwide, as well as designed to encourage consumers like Plaintiff to purchase
24 the Products. Plaintiff understood the size of the container and product label to indicate that the
25 amount of protein powder contained therein was commensurate with the size of the container, and
26 he would not have purchased the Product, or would not have paid a price premium for the Product,
27 had he known that the size of the container and product label were false and misleading. If the
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1 Products' packaging and label were not misleading, then Plaintiff would purchase the Products in
2 the future.

3 7. Defendant, Ancient Brands, LLC is a corporation headquartered in Franklin,
4 Tennessee. Ancient Brands, LLC maintains its principal place of business at 2000 Mallory Lane,
5 Suite 130-307, Franklin, Tennessee 37067. Defendant, directly and through its agents, conducts
6 business nationwide. Defendant has substantial contacts with and receives substantial benefits and
7 income from and through the State of California. Defendant is the owner, manufacturer, and
8 distributor of the Products, and is the company that created and/or authorized the false,
9 misleading, and deceptive packaging for the Products.

10 8. The true names and capacities, whether individual, corporate, associate or otherwise
11 of certain manufacturers, distributors, and/or their alter egos sued herein as DOES 1 through 10
12 inclusive are presently unknown to Plaintiff, who therefore sue these Defendants by fictitious
13 names. Plaintiff will seek leave of this Court to amend the Complaint to show their true names
14 and capacities when the same have been ascertained. Plaintiff is informed and believes and based
15 thereon alleges that DOES 1 through 10 were authorized to do and did business in Los Angeles
16 County. Plaintiff is further informed and believes and based thereon alleges that DOES 1 through
17 10 were and/or are, in some manner or way, responsible for and liable to Plaintiff for the events,
18 happenings, and damages hereinafter set forth below.

19 9. Plaintiff is informed and believes and based thereon alleges that at all times relevant
20 herein each of the Defendants was the agent, servant, employee, subsidiary, affiliate, partner,
21 assignee, successor-in-interest, alter ego, or other representative of each of the remaining
22 Defendants and was acting in such capacity in doing the things herein complained of and alleged.

23 10. In committing the wrongful acts alleged herein, Defendants planned and
24 participated in and furthered a common scheme by means of false, misleading, deceptive, and
25 fraudulent representations to induce members of the public to purchase the Products. Defendants
26 participated in the making of such representations in that each did disseminate or cause to be
27 disseminated said misrepresentations.

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1 11. Defendants, upon becoming involved with the manufacture, distribution,
2 advertising, marketing, and sale of the Products, knew or should have known that the Products'
3 packaging were false, deceptive, misleading, unfair, unlawful, and fraudulent. Since the time
4 Defendants introduced the Products into the marketplace, Defendants have misrepresented the
5 amount of powder product contained in the product containers in order to convince consumers to
6 purchase and use the Product, resulting in profits of millions of dollars or more to Defendants, all
7 to the damage and detriment of the consuming public.

8 **JURISDICTION AND VENUE**

9 12. This Court has jurisdiction over all causes of action asserted herein pursuant to the
10 California Constitution, Article VI, section 10, because this case is a cause not given by statute to
11 other trial courts.

12 13. Plaintiff has standing to bring this action pursuant to Business & Professions Code
13 Section 17200, et seq.

14 14. Out-of-state participants can be brought before this Court pursuant to the provisions
15 of Code of Civil Procedure Section 395.5.

16 15. Defendant is subject to personal jurisdiction in California based upon sufficient
17 minimum contacts which exist between it and California.

18 16. Venue is proper in this Court because Defendant conducts business in Los Angeles
19 County, Defendant receives substantial compensation from sales in Los Angeles County, and
20 Defendant made numerous misrepresentations which had a substantial effect in Los Angeles
21 County, including, but not limited to, the Product's packaging and labeling. Moreover, Plaintiff
22 purchased the Product in Los Angeles County.

23 **FACTUAL BACKGROUND**

24 17. The amount of product inside any product packaging is material to any consumer
25 seeking to purchase that product. The average consumer spends only 13 seconds deciding
26 whether to make an in-store purchase;¹ this decision is heavily dependent on a product's

27 _____
28 ¹ Randall Beard, *Make the Most of Your Brand's 20-Second Window*, NIELSEN, Jan. 13, 2015,
<https://www.nielsen.com/us/en/insights/article/2015/make-the-most-of-your-brands-20-second-window/>.

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1 packaging, including the package dimensions. Research has demonstrated that packages that
2 seem larger are more likely to be purchased, because consumers expect package size to accurately
3 represent the quantity of the good being purchased.²

4 18. Accordingly, Defendant chose a certain size container for its Products to convey to
5 consumers that they are receiving a certain and substantial amount of protein powder product
6 commensurate with the size of the container. Such representations constitute an express warranty
7 regarding the Product’s content.

8 19. Slack-fill is the difference between the actual capacity of a container and the
9 volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that
10 is filled to less than its capacity for illegitimate or unlawful reasons.

11 20. Defendant falsely represents the quantity of product in each of the Products’ opaque
12 containers through its packaging. The size of each container leads the reasonable consumer to
13 believe he or she is purchasing a container full of protein powder product when, in reality, what
14 he or she actually receives is less than half of what is represented by the size of the container.

15 21. Even if Plaintiff and other reasonable consumers of the Products had a reasonable
16 opportunity to review, prior to the point of sale, other representations of quantity, such as net
17 weight or serving disclosures, they did not and would not have reasonably understood or expected
18 such representations to translate to a quantity of protein powder product meaningfully different
19 from their expectation of a quantity of powder product commensurate with the size of the
20 container.

21 22. Prior to the point of sale, the Products’ packaging does not allow for a visual or
22 audial confirmation of the contents of the Products. The Products’ opaque packaging prevents a
23 consumer from observing the contents before opening. Even if a reasonable consumer were to
24 “shake” the Products before opening the container, the reasonable consumer would not be able to
25 discern the presence of any nonfunctional slack-fill, let alone the 52% nonfunctional slack-fill
26 that is present in the Products.

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28 ² P. Raghubir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 J. MARKETING RESEARCH 313-326 (1999).

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1 23. The other information that Defendant provides about the quantity of protein powder
2 product on the front and back labels of the Products does not enable reasonable consumers to
3 form any meaningful understanding about how to gauge the quantity of contents of the Products
4 as compared to the size of each container itself. For instance, the front of the Products’ packaging
5 does not have any labels that would provide Plaintiff with any meaningful insight as to the
6 amount of protein powder to be expected, such as a fill line.

7 24. Disclosures of net weight and serving sizes in ounces, pounds, or grams do not
8 allow the reasonable consumer to make any meaningful conclusions about the quantity of protein
9 powder contained in the Products’ containers that would be different from the reasonable
10 consumer’s expectation that the quantity of protein powder product is commensurate with the size
11 of the container.

12 25. The net weight and serving size disclosures do not allow Plaintiff to make – and
13 Plaintiff did not make – any meaningful conclusions about the quantity of protein powder product
14 contained in the Products’ containers that was different than Plaintiff’s expectations that the
15 quantity of product would be commensurate with the size of the containers.

16 26. Plaintiff would not have purchased the Product had he known that the Product
17 contained slack-fill that serves no functional or lawful purpose.

18 **None of the Slack-Fill Statutory Exceptions Apply to the Products**

19 27. Pursuant to 21 C.F.R. § 100.100, “a food shall be deemed to be misbranded if its
20 container is so made, formed, or filled as to be misleading.” An opaque container “shall be
21 considered to be filled as to be misleading if it contains nonfunctional slack-fill.” *Id.*
22 Nonfunctional slack-fill is empty space within packaging that is filled to less than its capacity for
23 reasons other than provided for in the six enumerated slack fill exceptions.

24 **A. 21 C.F.R. 100.10(a)(1) – Protection of the Contents**

25 28. The slack-fill contained in the Products’ containers does not protect the contents of
26 the packages. In fact, because the product is a powder, there is no need to protect the product with
27 the slack-fill present.

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1 **B. 21 C.F.R. 100.100(a)(2) – Requirements of the Machines**

2 29. The machines used to package the Products would not be affected if there was more
3 powder product added. At most, a simple recalibration of the machines would be required. Upon
4 information and belief, adjusting these machines is rather simple.

5 30. Because the packages are only filled to 48% of their capacity, Defendant can
6 increase the Products’ fill level significantly without affecting how the containers are sealed, or it
7 can disclose the fill-level on the outside labeling to inform consumers of the amount of powder
8 product actually in the container, consistent with the law.

9 **C. 21 C.F.R. 100.100(a)(3) – Settling During Shipping and Handling**

10 31. The slack-fill present in the Products’ containers is not a result of the powder
11 product settling during shipping and handling. Given the Products’ density, shape, and
12 composition, any settling occurs immediately at the point of fill. No measurable product settling
13 occurs during subsequent shipping and handling.

14 32. Even if *some* product settling may occur, there is no reason why the Products’
15 containers are more than half empty, when competitor products – such as the Four Sigmatic
16 product below – which have similar product density, shape, and composition as Defendant’s
17 product, are filled nearly 90% full.

18 **D. 21 C.F.R. 100.100(a)(4) – Specific Function of Package**

19 33. The packages do not perform a specific function that necessitates the slack-fill. This
20 safe harbor would only apply if a specific function is “inherent to the nature of the food and is
21 clearly communicated to consumers.” The packages do not perform a function that is inherent to
22 the nature of the food. Defendant did not communicate a specific function to consumers, making
23 this provision inapplicable.

24 **E. 21 C.F.R. 100.100(a)(5) – Reusable Container**

25 34. The Products’ packaging is not reusable or of any significant value to the Products
26 independent of its function to hold the protein powder product. The Products’ containers are
27 intended to be discarded immediately after the powder product is used.

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F. 21 C.F.R. 100.100(a)(6) – Inability to Increase Fill or Decrease Container Size

35. The slack-fill present in the Products’ containers does not accommodate required labeling, discourage pilfering, facilitate handling, or prevent tampering.

36. Defendant can easily increase the quantity of protein powder product contained in each container (or, alternatively, decrease the size of the containers) by approximately 52% more volume.

37. Because none of the safe harbor provisions apply to the Products’ packaging, the packages contain nonfunctional slack-fill in violation of 21 C.F.R. 100.100 and are, therefore, filled as to be misleading. Plaintiff shall proffer expert testimony to establish these facts once this case reaches the merits more definitively.

Comparator Products Serve as Additional

Evidence of Nonfunctional Slack-Fill

38. Contrast Defendant’s packaging of the Products with a comparator product, such as Four Sigmatic Superfood Protein powder, which is manufactured and packaged in a similar opaque container. The Four Sigmatic container measures to a vertical height of approximately 19 cm. The container is filled with product to a height of approximately 17 cm. Therefore, this product is nearly 90% filled with a similar protein powder product. Below is a true and correct image of the comparator product. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space.

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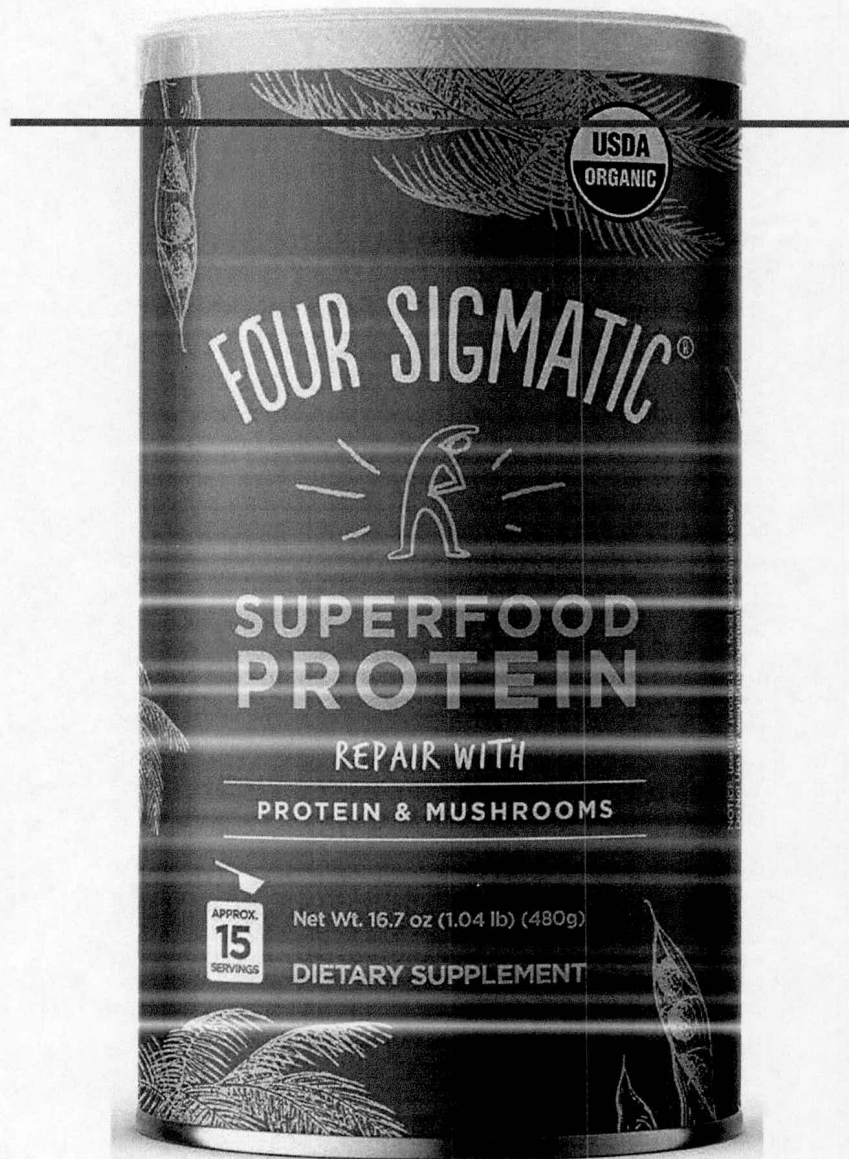
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39. The Four Sigmatic packaging provides additional evidence that the slack-fill present in the Products' packaging is nonfunctional.

40. The Four Sigmatic packaging provides additional evidence that the slack-fill in the Products is not necessary to protect and, in fact, does not protect, the contents of the Products; is not a requirement of the machines used for enclosing the contents of the Products; is not a result of unavoidable product settling during shipping and handling; is not needed to perform a specific function; and is not part of a legitimate reusable container.

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41. The Four Sigmatic packaging provides additional evidence that Defendant is able to increase the level of fill inside the Products’ containers.

42. The Four Sigmatic packaging provides additional evidence that Defendant has reasonable alternative designs available to it in its packaging of the Products.

43. Plaintiff did not expect that the Product would contain nonfunctional slack-fill, especially given that nonfunctional slack-fill, as opposed to functional slack-fill, is prohibited by federal law as well as California law.

44. The Products are made, formed, and filled so as to be misleading. The Products are, therefore, misbranded.

45. The slack-fill contained in the Products does not serve a legitimate or lawful purpose.

46. Defendant’s false, deceptive, and misleading label statements are unlawful under state and federal consumer protection and packaging laws.

47. Defendant intended for Plaintiff and the Class members to be misled.

48. Defendant’s misleading and deceptive practices proximately caused harm to Plaintiff and the Class.

CLASS ACTION ALLEGATIONS

49. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated. The Class which Plaintiff seeks to represent comprises:

“All persons who purchased the Products in the United States or, alternatively, the State of California, for personal use and not for resale during the time period of four years prior to the filing of the complaint through the present.”

Excluded from the Class are Defendant’s officers, directors, and employees, and any individual who received remuneration from Defendant in connection with that individual’s use or endorsement of the Products. Said definition may be further defined or amended by additional pleadings, evidentiary hearings, a class certification hearing, and orders of this Court.

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1 50. The Class is comprised of many thousands of persons. The Class is so numerous
2 that joinder of all members is impracticable and the disposition of their claims in a class action
3 will benefit the parties and the Court.

4 51. There is a well-defined community of interest in the questions of law and fact
5 involved affecting the parties to be represented in that the Class was exposed to the same
6 common and uniform false and misleading advertising and omissions. The questions of law and
7 fact common to the Class predominate over questions which may affect individual Class
8 members. Common questions of law and fact include, but are not limited to, the following:

- 9 a. The true nature and amount of product contained in each Products' packaging;
10 b. Whether the marketing, advertising, packaging, labeling, and other promotional
11 materials for the Products are deceptive;
12 c. Whether Defendant misrepresented the approval of the FDA, United States
13 Congress, and California Legislature that the Products' packaging complied with
14 federal and California slack-fill regulations and statutes;
15 d. Whether the Products contain nonfunctional slack-fill in violation of 21 C.F.R.
16 Section 100.100, *et seq.*;
17 e. Whether the Products contain nonfunctional slack-fill in violation of California
18 Business and Professions Code Section 12606.2, *et seq.*;
19 f. Whether Defendant's conduct is an unlawful business act or practice within the
20 meaning of Business and Professions Code section 17200, *et seq.*;
21 g. Whether Defendant's conduct is a fraudulent business act or practice within the
22 meaning of Business and Professions Code section 17200, *et seq.*;
23 h. Whether Defendant's conduct is an unfair business act or practice within the
24 meaning of Business and Professions Code section 17200, *et seq.*;
25 i. Whether Defendant's advertising is untrue or misleading within the meaning of
26 Business and Professions Code section 17500, *et seq.*;
27 j. Whether Defendant made false and misleading representations in its advertising and
28 labeling of the Product;

- 1 k. Whether Defendant knew or should have known that the representations were false;
- 2 l. Whether Plaintiff and the Class paid more money for the Products than they actually
- 3 received;
- 4 m. How much more money Plaintiff and the Class paid for the Products than they
- 5 actually received;
- 6 n. Whether Defendant committed common law fraud;
- 7 o. Whether Defendant was unjustly enriched at the expense of Plaintiff and the Class
- 8 members;
- 9 p. Whether Defendant intentionally misrepresented the amount of powder contained in
- 10 the Products' packaging; and
- 11 q. Whether Defendant negligently misrepresented the amount of powder contained in
- 12 the Products' packaging.

13 52. Plaintiff's claims are typical of the claims of the proposed Class, as the
14 representations and omissions made by Defendant are uniform and consistent and are contained
15 on packaging and labeling that was seen and relied on by Plaintiff and members of the Class.

16 53. Plaintiff will fairly and adequately represent and protect the interests of the proposed
17 Class. Plaintiff has retained competent and experienced counsel in class action and other complex
18 litigation. Plaintiff's Counsel prosecuted the largest slack-fill nationwide class action settlement in
19 2018. Plaintiff's Counsel also was the first law firm to successfully certify a slack-fill lawsuit
20 involving theater box candy confectioners (twice in 2019 and 2020, respectively).

21 54. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
22 Defendant's false, deceptive, and misleading representations. Plaintiff purchased the Product
23 because of the size of the container and the product label, which he believed to be indicative of the
24 amount of protein powder product contained therein as commensurate with the size of the
25 container. Plaintiff relied on Defendant's representations and would not have purchased the
26 Product if he had known that the packaging, labeling, and advertising as described herein was
27 false and misleading.

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1 62. Congress passed the Federal Food, Drug, and Cosmetic Act (“FDCA”), and in so
2 doing established the Federal Food and Drug Administration (“FDA”) to “promote the public
3 health” by ensuring that “foods are safe, wholesome, sanitary, and properly labeled.” 21 U.S.C.
4 §393.

5 63. The FDA has implemented regulations to achieve this objective. *See, e.g.*, 21 C.F.R.
6 § 101.1 *et seq.*

7 64. The legislature of California has incorporated 21 C.F.R. Section 100.100, which
8 prohibits nonfunctional slack-fill, into the State’s Business and Professions Code Section 12606.2
9 *et seq.*

10 65. The FDA enforces the FDCA and accompanying regulations; “[t]here is no private
11 right of action under the FDCA.” *Ivie v. Kraft Foods Global, Inc.*, 2013 U.S. Dist. LEXIS
12 25615,2013 WL 685372, at *1 (internal citations omitted).

13 66. In 1990, Congress passed an amendment to the FDCA, the Nutrition Labeling and
14 Education Act (“NLEA”), which imposed a number of requirements specifically governing food
15 nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343 *et seq.*

16 67. Plaintiff is not suing under the FDCA, but under California state law.

17 68. The California Sherman Food, Drug, and Cosmetic Act (“Sherman Law”), Cal.
18 Health & Safety Code Section 109875 *et seq.*, has adopted wholesale the food labeling
19 requirements of the FDCA and NLEA as the food regulations of California. Cal. Health & Safety
20 Code Section 110100.

21 69. The Sherman Law declares any food to be misbranded if it is false or misleading in
22 any particular, if the labeling does not conform with the requirements for nutrition labeling set
23 forth in certain provisions of the NLEA. Cal. Health & Safety Code Sections 110660, 110665,
24 110670.

25 70. The UCL prohibits “any unlawful, unfair... or fraudulent business act or practice.”
26 Cal. Bus & Prof. Code § 17200.

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A. “Unfair Prong”

71. Under California’s Unfair Competition Law, Cal. Bus. & Prof. Code Section 17200, *et seq.*, a challenged activity is “unfair” when “any injury it causes outweighs any benefits provided to consumers and the injury is one that the consumers themselves could not reasonably avoid.” *Camacho v. Auto Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

72. Defendant’s action of leaving 52% nonfunctional slack-fill in its Products does not confer any benefit to consumers.

73. Defendant’s action of leaving 52% nonfunctional slack-fill in its Products causes injuries to consumers, who do not receive a quantity of product commensurate with their reasonable expectations.

74. Defendant’s action of leaving 52% nonfunctional slack-fill in its Products causes injuries to consumers, who do not receive a level of protein commensurate with their reasonable expectations.

75. Defendant’s action of leaving 52% nonfunctional slack-fill in its Products causes injuries to consumers, who end up overpaying for the Products and receiving a quantity of protein powder less than what they expected to receive.

76. Consumers cannot avoid any of the injuries caused by the 52% nonfunctional slack-fill in Defendant’s Products.

77. Accordingly, the injuries caused by Defendant’s inclusion of 52% nonfunctional slack-fill in the Products outweigh any benefits.

78. Some courts conduct a balancing test to decide if a challenged activity amounts to unfair conduct under California Business and Professions Code Section 17200. They “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

79. Here, Defendant’s conduct of including 52% nonfunctional slack-fill in the Products’ packaging has no utility and financially harms purchasers. Thus, the utility of Defendant’s conduct is vastly outweighed by the gravity of harm.

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80. Some courts require that “unfairness must be tethered to some legislative declared policy or proof of some actual or threatened impact on competition.” *Lozano v. AT&T Wireless Servs. Inc.*, 504 F. 3d 718, 735 (9th Cir. 2007).

81. The California legislature maintains a declared policy of prohibiting nonfunctional slack-fill in consumer goods, as reflected in State’s Business and Professions Code Section 12606.2 and California Health and Safety Code Section 110100.

82. The 52% of nonfunctional slack-fill contained in the Products is tethered to a legislative policy declared in California according to Cal. Business and Professions Code Section 12606.2 and Cal. Health & Safety Code Section 110100.

83. Defendant’s packaging of the Products, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unfair conduct.

84. Defendant knew or should have known of its unfair conduct.

85. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute an unfair business practice within the meaning of California Business and Professions Code Section 17200.

86. There existed reasonably available alternatives to further Defendant’s legitimate business interests, other than the conduct described herein. Defendant could have used packaging appropriate for the amount of protein powder product contained within the Products.

87. All of the conduct alleged herein occurs and continues to occur in Defendant’s business. Defendant’s wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

88. Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant’s unfair conduct. Plaintiff paid an unwarranted premium for this product. Specifically, Plaintiff paid for 52% of protein powder product he never received. Plaintiff would not have purchased the Product if he had known that the Product’s packaging contained nonfunctional slack-fill.

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B. “Fraudulent” Prong

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2 89. California Business and Professions Code Section 17200, et seq., considers conduct
3 fraudulent and prohibits said conduct if it is likely to deceive members of the public. *Bank of the*
4 *West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

5 90. Defendant’s conduct of packaging the Products with 52% nonfunctional slack-fill is
6 likely to deceive members of the public.

7 91. Defendant’s packaging of the Products, as alleged in the preceding paragraphs, is
8 false, deceptive, misleading, and unreasonable, and constitutes fraudulent conduct.

9 92. Defendant knew or should have known of its fraudulent conduct.

10 93. As alleged in the preceding paragraphs, the misrepresentations by Defendant
11 detailed above constitute a fraudulent business practice in violation of California Business &
12 Professions Code Section 17200.

13 94. Defendant had reasonably available alternatives to further its legitimate business
14 interests, other than the conduct described herein. Defendant could have used packaging
15 appropriate for the proportion of Products contained therein.

16 95. All of the conduct alleged herein occurs and continues to occur in Defendant’s
17 business. Defendant’s wrongful conduct is part of a pattern or generalized course of conduct
18 repeated on thousands of occasions daily.

19 96. Plaintiff and the Class have suffered injury in fact and have lost money as a result
20 of Defendant’s fraudulent conduct. Plaintiff paid an unwarranted premium for the Product.
21 Specifically, Plaintiff paid for 52% of protein powder product he never received. Plaintiff would
22 not have purchased the Product if he had known that the packaging contained nonfunctional
23 slack-fill.

C. “Unlawful” Prong

24
25 97. California Business and Professions Code Section 17200, et seq., identifies
26 violations of other laws as “unlawful practices that the unfair competition law makes
27 independently actionable.” *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D.
28 Cal. 2008).

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1 98. Defendant’s packaging of the Products, as alleged in the preceding paragraphs,
2 violates California Civil Code Section 1750, *et. seq.*, California Business and Professions Code
3 Section 17500, *et. seq.*, Cal. Business and Professions Code Section 12606.2 *et. seq.*, and 21
4 C.F.R Section 100.100.

5 99. Defendant’s packaging of the Products, as alleged in the preceding paragraphs, is
6 false, deceptive, misleading, and unreasonable, and constitutes unlawful conduct.

7 100. Defendant knew or should have known of its unlawful conduct.

8 101. As alleged in the preceding paragraphs, the misrepresentations by Defendant
9 detailed above constitute an unlawful business practice within the meaning of California Business
10 and Professions Code Section 17200.

11 102. There were reasonably available alternatives to further Defendant’s legitimate
12 business interests, other than the conduct alleged herein. Defendant could have either used
13 packaging appropriate for the amount of protein powder product contained therein or indicated
14 how much powder the Products contained with a clear and conspicuous fill line.

15 103. All of the conduct alleged herein occurred and continues to occur in Defendant’s
16 business. Defendant’s unlawful conduct is part of a pattern or generalized course of conduct
17 repeated on thousands of occasions daily.

18 104. Plaintiff and the Class have suffered injury in fact and have lost money as a result
19 of Defendant’s unlawful conduct. Plaintiff paid an unwarranted premium for this product.
20 Specifically, Plaintiff paid for 52% of protein powder product he never received. Plaintiff would
21 not have purchased the Product if he had known that the packaging contained nonfunctional
22 slack-fill.

23 105. As a result of the business acts and practices described above, Plaintiff and
24 members of the Class, pursuant to § 17203, are entitled to an order enjoining such future
25 wrongful conduct on the part of Defendant and such other orders and judgments that may be
26 necessary to disgorge Defendant’s ill-gotten gains and to restore to any person in interest any
27 money paid for the Products as a result of the wrongful conduct of Defendant.

28

1 a. Plaintiff and members of the Class are entitled to equitable relief as no adequate
2 remedy at law exists.

3 (1) The applicable limitations period is four years for claims brought under the
4 UCL, which is one year longer than the applicable statute of limitations under the
5 FAL and CLRA. Thus, class members who purchased the Products between 3 and 4
6 years prior to the filing of the complaint will be barred from the Class if equitable
7 relief were not granted under the UCL.

8 (2) The scope of actionable misconduct under the unfair prong of the UCL is
9 broader than the other causes of action asserted herein to include, for example, the
10 overall unfair marketing scheme of underfilling the Products' packaging. Thus,
11 Plaintiff and class members may be entitled to restitution under the UCL, while not
12 entitled to damages under other causes of action asserted herein (e.g., the FAL
13 requires actual or constructive knowledge of the falsity; the CLRA is limited to
14 certain types of plaintiffs (an individual who seeks or acquires, by purchase or
15 lease, any goods or services for personal, family, or household purposes) and other
16 statutorily enumerated conduct).

17 (3) Injunctive relief is appropriate on behalf of Plaintiff and members of the Class
18 because Defendant continues to deceptively underfill the Products' packaging.
19 Injunctive relief is necessary to prevent Defendant from continuing to engage in this
20 unfair, fraudulent, and/or unlawful conduct described herein and to prevent future
21 harm—none of which can be achieved through available legal remedies. Further,
22 injunctive relief, in the form of packaging or label modifications, is necessary to
23 dispel public misperception about the Products that has resulted from years of
24 Defendant's unlawful marketing efforts. Such modifications could include, but are
25 not limited to, shrinking the packaging, adding more powder product to the
26 packaging, or adding a fill line on the front label. Such relief is not available
27 through a legal remedy, as monetary damages may be awarded to remedy past harm
28 (i.e., purchasers who have been misled), while injunctive relief is necessary to

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remedy future harm (i.e., prevent future purchasers from being misled), under the current circumstances where the dollar amount of future damages is not reasonably ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the damages caused by Defendant’s future harm (e.g., the dollar amount that Plaintiff and Class members will pay for the underfilled Products), rendering injunctive relief a necessary remedy.

106. Pursuant to Civil Code § 3287(a), Plaintiff and the Class are further entitled to pre-judgment interest as a direct and proximate result of Defendant’s unfair and fraudulent business conduct. The amount on which interest is to be calculated is a sum certain and capable of calculation, and Plaintiff and the Class are entitled to interest in an amount according to proof.

COUNT TWO

FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS & PROFESSIONS CODE § 17500, et seq.

107. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and incorporates the same as if set forth herein at length.

108. Plaintiff brings this claim individually and on behalf of the Class.

109. California’s False Advertising Law, California Business and Professions Code Section 17500, et seq., makes it “unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, in any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”

110. Defendant knowingly manipulated the physical dimensions of the Products’ containers, or stated another way, under-filled the amount of protein powder product in Products, by including 52% nonfunctional slack-fill as a means to mislead the public about the amount of protein powder product contained in each package.

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1 111. Defendant controlled the packaging of the Products. It knew or should have known,
2 through the exercise of reasonable care, that its representations about the quantity of protein
3 powder product contained in the Products were untrue and misleading.

4 112. Defendant's action of packaging the Products with 52% nonfunctional slack-fill
5 instead of including more protein powder content in the container, or decreasing the size of the
6 container, is likely to deceive the general public.

7 113. Defendant's actions were false and misleading, such that the general public is and
8 was likely to be deceived, in violation of Section 17500.

9 114. As a direct and proximate result of Defendant's conduct alleged herein in violation
10 of the FAL, Plaintiff and members of the Class, pursuant to § 17535, are entitled to an order of
11 this Court enjoining such future wrongful conduct on the part of Defendant, and requiring
12 Defendant to disclose the true nature of its misrepresentations.

13 a. Plaintiff and members of the Class are entitled to equitable relief as no adequate
14 remedy at law exists.

15 (1) The scope of permissible plaintiffs under the FAL is broader than the CLRA to
16 include, for example, individuals or entities who purchased the Products for
17 non-personal, non-family, and non-household purposes. Thus, Plaintiff and
18 class members may be entitled to restitution under the FAL, while not entitled
19 to damages under the CLRA.

20 (2) Injunctive relief is appropriate on behalf of Plaintiff and members of the Class
21 because Defendant continues to deceptively underfill the Products' packaging.
22 Injunctive relief is necessary to prevent Defendant from continuing to engage in
23 the unlawful conduct described herein and to prevent future harm—none of
24 which can be achieved through available legal remedies. Further, injunctive
25 relief, in the form of packaging or label modifications, is necessary to dispel
26 public misperception about the Products that has resulted from years of
27 Defendant's unfair, fraudulent, and unlawful marketing efforts. Such
28 modifications would include, but are not limited to, shrinking the packaging,

1 adding more powder product to the packaging, or adding a fill line the front
2 label. Such relief is also not available through a legal remedy as monetary
3 damages may be awarded to remedy past harm (i.e., purchasers who have been
4 misled), while injunctive relief is necessary to remedy future harm (i.e., prevent
5 future purchasers from being misled), under the current circumstances where
6 the dollar amount of future damages is not reasonably ascertainable at this time.
7 Plaintiff is, currently, unable to accurately quantify the damages caused by
8 Defendant's future harm (e.g., the dollar amount that Plaintiff and Class
9 members overpay pay for the underfilled Products), rendering injunctive relief a
10 necessary remedy.

11 115. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
12 Defendant's false representations. Plaintiff purchased the Products in reliance upon the claims by
13 Defendant that the Products were of the quantity represented by Defendant's packaging and
14 advertising. Plaintiff would not have purchased the Products if he had known that the packaging
15 and labeling as alleged herein were false.

16 116. Plaintiff and members of the Class also request an order requiring Defendant to
17 disgorge its ill-gotten gains and/or award full restitution of all monies wrongfully acquired by
18 Defendant by means of such acts of false advertising, plus interests and attorneys' fees.

19 **COUNT THREE**

20 **VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT,**

21 **CALIFORNIA CIVIL CODE § 1750, et seq.**

22 **(By Plaintiff against Defendant)**

23 117. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs
24 and incorporates the same as if set forth herein at length.

25 118. The CLRA prohibits certain "unfair methods of competition and unfair or deceptive
26 acts or practices" in connection with a sale of goods.

27 119. The practices described herein, specifically Defendant's packaging, advertising, and
28 sale of the Products, were intended to result and did result in the sale of the Products to the

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1 consuming public and violated and continue to violate sections 1770(a)(2), 1770(a)(5),
2 1770(a)(7), 1770(a)(9) of the CLRA by (1) misrepresenting the approval of the Products as
3 compliant with 21 C.F.R Section 100.100, California Business and Professions Code Section
4 12606.2, and the Sherman Law; (2) representing the Products have characteristics and quantities
5 that they do not have; (3) advertising and packaging the Products with intent not to sell them as
6 advertised and packaged; and (4) representing that the Products have been supplied in accordance
7 with a previous representation as to the quantity of protein powder product contained within each
8 container, when it has not.

9 120. Defendant fraudulently deceived Plaintiff and the Class by representing that the
10 Products' packaging, which includes 52% nonfunctional slack-fill, actually conforms to federal
11 and California slack-fill regulations and statutes including the Sherman Law, California Business
12 and Professions Code Section 12606.2, and 21 C.F.R. 100.100.

13 121. Defendant packaged the Products in containers that contain 52% nonfunctional
14 slack-fill and made material misrepresentations to fraudulently deceive Plaintiff and the Class.

15 122. Defendant fraudulently deceived Plaintiff and the Class by misrepresenting the
16 Products as having characteristics and quantities which they do not have, e.g., that the Products
17 are adequately filled when they are not. In doing so, Defendant intentionally misrepresented and
18 concealed material facts from Plaintiff and the Class. Said misrepresentations and concealment
19 were done with the intention of deceiving Plaintiff and the Class and depriving them of their legal
20 rights and money.

21 123. Defendant fraudulently deceived Plaintiff and the Class by packaging and
22 advertising the Products with intent not to sell them as advertised and by intentionally under-
23 filling the Products' containers and replacing protein powder product with nonfunctional slack-
24 fill. In doing so, Defendant intentionally misrepresented and concealed material facts from
25 Plaintiff and the Class. Said misrepresentations and concealment were done with the intention of
26 deceiving Plaintiff and the Class and depriving them of their legal rights and money.

27 124. Defendant fraudulently deceived Plaintiff and the Class by representing that the
28 Products were supplied in accordance with an accurate representation as to the quantity of protein

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1 powder product contained therein when it was not. Defendant presented the physical dimensions
2 of the Products' packaging to Plaintiff and the Class before the point of purchase and gave
3 Plaintiff and the Class a reasonable expectation that the quantity of product contained therein
4 would be commensurate with the size of packaging. In doing so, Defendant intentionally
5 misrepresented and concealed material facts from Plaintiff and the Class. Said misrepresentations
6 and concealment were done with the intention of deceiving Plaintiff and the Class and depriving
7 them of their legal rights and money.

8 125. Defendant knew or should have known, through the exercise of reasonable care,
9 that the Products' packaging was misleading.

10 126. Defendant's actions as described herein were done with conscious disregard of
11 Plaintiff's rights, and Defendant was wanton and malicious in its concealment of the same.

12 127. Defendant's packaging of the Products was a material factor in Plaintiff's and the
13 Class's decisions to purchase the Products. Based on Defendant's packaging of the Products,
14 Plaintiff and the Class reasonably believed that they were getting more product than they actually
15 received. Had they known the truth of the matter, Plaintiff and the Class would not have
16 purchased the Products.

17 128. Plaintiff and the Class have suffered injury in fact and have lost money as a result
18 of Defendant's unfair, unlawful, and fraudulent conduct. Specifically, Plaintiff paid for protein
19 powder product he never received. Plaintiff would not have purchased the Product had he known
20 the container contained nonfunctional slack-fill.

21 129. Plaintiff respectfully requests that the Court enjoin Defendant from continuing to
22 employ the unlawful methods, acts, and practices alleged herein pursuant to § 1780(a)(2). In
23 addition, Defendant should be compelled to provide restitution and damages to consumers who
24 paid for Products that are not what they expected to receive due to Defendant's
25 misrepresentations.

26 a. Plaintiff and members of the Class are entitled to equitable relief as no adequate
27 remedy at law exists.

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(1) Injunctive relief is appropriate on behalf of Plaintiff and members of the Class because Defendant continues to deceptively underfill the Products’ packaging. Injunctive relief is necessary to prevent Defendant from continuing to engage in the unlawful conduct described herein and to prevent future harm – none of which can be achieved through available legal remedies. Further, injunctive relief, in the form of packaging or label modifications, is necessary to dispel public misperception about the Products that has resulted from years of Defendant’s unfair, fraudulent, and unlawful marketing efforts. Such modifications would include, but are not limited to, shrinking the packaging, adding more powder product to the packaging, or adding a fill line on the front label. Such relief is also not available through a legal remedy as monetary damages may be awarded to remedy past harm (i.e., purchasers who have been misled), while injunctive relief is necessary to remedy future harm (i.e., prevent future purchasers from being misled), under the current circumstances where the dollar amount of future damages is not reasonably ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the damages caused by Defendant’s future harm (e.g., the dollar amount that Plaintiff and Class members overpay for the underfilled Products), rendering injunctive relief a necessary remedy.

130. By letter dated June 10, 2020, Plaintiff advised Defendant of its false and misleading claims pursuant to California Civil Code Section 1782(a).

COUNT FOUR

Restitution Based on Quasi-Contract/Unjust Enrichment

131. Plaintiff repeats and realleges the allegations set forth above and incorporates the same as if set forth herein at length.

132. Plaintiff brings this cause of action individually and on behalf of the members of the Class against Defendant.

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1 protein powder product than required and instead contain a substantial amount of nonfunctional
2 and unlawful slack-fill. Defendant has misrepresented the quantity of protein powder product
3 contained in the Products.

4 143. Defendant's misrepresentations are and were material (i.e., the type of
5 misrepresentations to which a reasonable person would attach importance and would be induced
6 to act thereon in making his or her purchase decision), because they relate to the quantity of
7 protein powder product contained in the Products.

8 144. Defendant knew of, or showed reckless disregard for, the fact that the Products
9 contained a substantial amount of nonfunctional slack-fill.

10 145. Defendant intended for Plaintiff and the Class to rely on these representations, as
11 evidenced by Defendant's intentional manufacturing of packaging that is substantially larger than
12 necessary to hold the volume of the contents contained therein.

13 146. Plaintiff and the Class have reasonably and detrimentally relied on Defendant's
14 misrepresentations when purchasing the Products and, had they known the truth, they would not
15 have purchased the Products or would have paid significantly less for the Products.

16 147. Therefore, as a direct and proximate result of Defendant's fraud, Plaintiff and
17 members of the Class have suffered injury in fact.

18 **COUNT SIX**

19 **Intentional Misrepresentation**

20 148. Plaintiff repeats and realleges all of the allegations contained above and
21 incorporates the same as if set forth herein at length.

22 149. Plaintiff brings this cause of action individually and on behalf of all members of the
23 Class against Defendant.

24 150. Defendant has filled and packaged the Products in a manner indicating that the
25 Products are adequately filled with protein powder product. However, the Products contain 52%
26 less protein powder product than required and instead contain a substantial amount of
27 nonfunctional slack-fill. Defendant misrepresented the quantity of protein powder product
28 contained within the Products' packaging.

1 159. Defendant’s misrepresentations regarding the Products are material to a reasonable
2 consumer, as they relate to the quantity of product received by the consumer. A reasonable
3 consumer would attach importance to such representations and would be induced to act thereon in
4 making his or her purchase decision.

5 160. At all relevant times when such misrepresentations were made, Defendant knew or
6 should have known that the Products were not adequately filled with protein powder but instead
7 contained a substantial amount of nonfunctional slack-fill.

8 161. Defendant intended for Plaintiff and the Class to rely on the size and style of the
9 Products’ packaging, as evidenced by Defendant’s packaging that is significantly larger than is
10 necessary to contain the volume of the protein powder product therein.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays
13 for judgment and relief on all Causes of Action as follows:

- 14 A. An order enjoining Defendant from continuing to label and/or package the
- 15 Products as challenged herein;
- 16 B. Damages against Defendant in an amount to be determined at trial, together
- 17 with pre- and post- judgement interest at the maximum rate allowable by
- 18 law on any amounts awarded;
- 19 C. Restitution and/or disgorgement in an amount to be determined at trial;
- 20 D. Reasonable attorneys’ fees and costs; and
- 21 E. Granting such other and further as may be just and proper.

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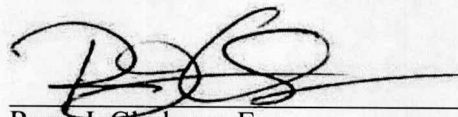
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JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all triable issues.

DATED: March 16, 2021

CLARKSON LAW FIRM, P.C.



Ryan J. Clarkson, Esq.
Zach Chrzan, Esq.

Attorneys for Plaintiff

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