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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 MICHAEL GONZALES, individually and
on behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 NATURAL FACTORS NUTRITIONAL
15 PRODUCTS INC., a Washington
corporation,

16 Defendant.
17

Case No. 2:24-cv-02584-DSF-AS

**FIRST AMENDED CLASS ACTION
COMPLAINT**

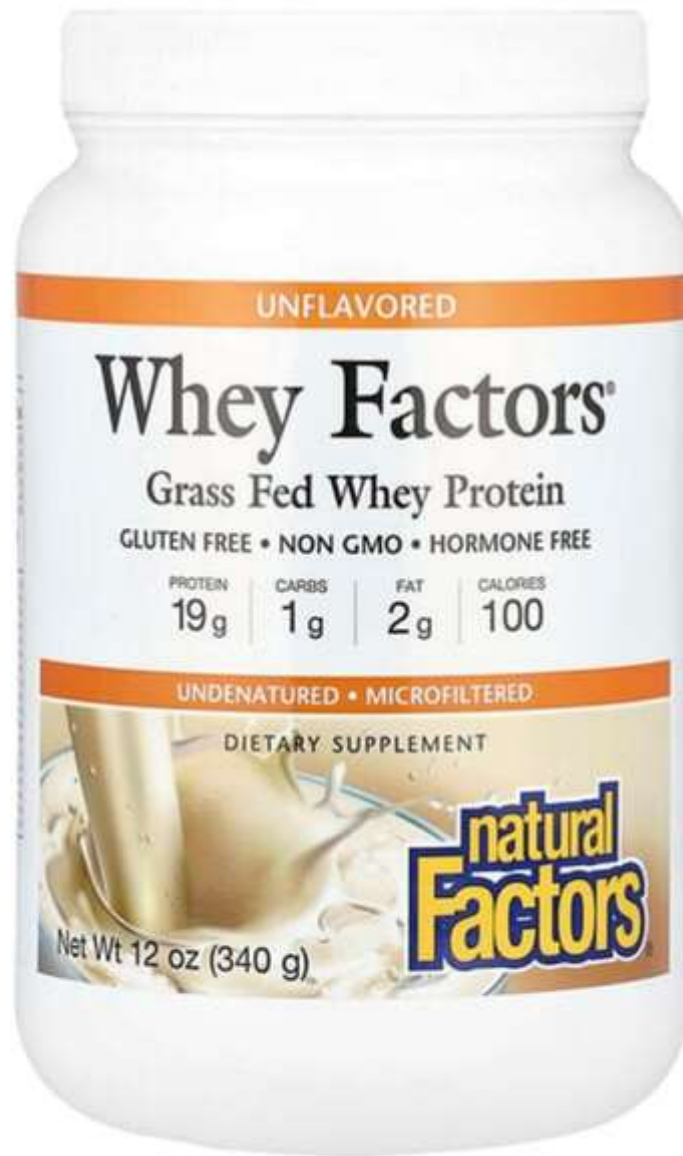
INTRODUCTION

1
2 1. Defendant manufactures and sells a popular nutritional supplement product
3 called “Natural Factors Whey Factors Grass Fed Whey Protein” (“the Product”). To
4 increase profits at the expense of consumers and fair competition, Defendant
5 deceptively sells the Product in oversized packaging that does not reasonably inform
6 consumers that they are buying significant amounts of air. In short, Defendant dupes
7 consumers into paying extra for empty space.

8 2. Federal and state courts have found that cases involving materially
9 identical claims are actionable and meritorious. *See, e.g., Coleman v. Mondelez Int’l*
10 *Inc.*, Case No. 2:20-cv-08100 (C.D. Cal. July 26, 2021); *Iglesias v. Ferrara Snack Co.*,
11 Case No. 3:17-cv-00849 (N.D. Cal. July 25, 2017); *Gordon v. Tootsie Roll Industries,*
12 *Inc.*, Case No. 2:17-cv-02664 (C.D. Cal. Oct. 4, 2017); *Escobar v. Just Born, Inc.*, Case
13 No. 2:17-cv-01826 (C.D. Cal. June 12, 2017); and *Thomas v. Nestle USA, Inc.*, Cal.
14 Sup. Case No. BC649863 (April 29, 2020).

15 3. The below pictures illustrate the deceptive nature of the packaging and the
16 substantial non-functional slack fill inside the package. In summary, actual product only
17 occupies approximately 64 percent of the exterior space represented by the Product’s
18 packaging container:





PARTIES

4. Plaintiff is a resident and citizen of California.

5. Defendant, Natural Factors Nutritional Products Inc., is a state of Washington corporation whose principal place of business is located in the state of Washington that sells nutritional supplement products directly via its website as well as through its distribution network to consumers nationwide, including in California. Defendant has substantial contacts with and receives substantial benefits and income from and through the State of California.

JURISDICTION AND VENUE

1 6. This Court has subject matter jurisdiction of this action pursuant to 28
2 U.S.C. § 1332(a)(1) because the amount in controversy exceeds the sum or value of
3 \$75,000, exclusive of interest and costs, and is between citizens of different states.

4 7. Defendant’s Notice of Removal states in relevant part, “The total cost to
5 Natural Factors to design and implement changes to the packaging, labeling, and filling
6 of the product, as requested by Plaintiff, and potential lost sales from product inventory
7 would exceed \$75,000.” (Notice of Removal ¶ 25 at 6:24-26; Doc. 1; Page ID #7.)

8 8. Plaintiff seeks an award of attorneys’ fees under California’s Consumers
9 Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 *et seq.* Cal. Civ. Code §
10 1780(e); *see Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998) (“We
11 hold that where an underlying statute authorizes an award of attorneys’ fees, ***either with***
12 ***mandatory or discretionary language***, such fees may be included in the amount in
13 controversy.”) (emphasis added).

14 9. Plaintiff’s lead counsel’s hourly billing rate dating back nearly a decade
15 ago was approved at \$750 per hour by the Court. *See Kissel v. Code 42 Software, Inc.*,
16 2018 WL 6113078, at *5 (C.D. Cal. Feb. 20, 2018) (Staton, J.) (finding as reasonable as
17 reasonable billing rate of Plaintiff’s lead counsel (who is counsel of record in the instant
18 action) of \$750 per hour based on time incurred dating back to 2015).

19 10. Punitive damages are also sought herein based upon Defendant’s deceptive
20 conduct, which indicates that Defendant is guilty of oppression, fraud, or malice.

21 11. This Court also has subject matter jurisdiction of this action pursuant to the
22 Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d)(2), because: (i) there
23 are 100 or more class members, (ii) there is an aggregate amount in controversy
24 exceeding \$5,000,000, exclusive of interest and costs, and (iii) there is at least minimal
25 diversity because at least one Plaintiff and Defendant are citizens of different states.

26 12. In *Mateski v. Just Born, Inc.*, No. CIVDS1926742 (Cal. Super. Ct. San
27 Bernardino Cty.), the California Superior Court issued an order granting final approval
28 of a class action settlement in an action alleging non-functional slack-fill in food

1 packaging in which the total monetary settlement was for a non-reversionary \$3.3
2 million total amount including \$983,161.07 in attorneys' fees and \$216,838.93 in
3 litigation expenses. *See Mateski v. Just Born, Inc.*, No. CIVDS1926742, slip op. at 6:2-
4 4 (Cal. Super. Ct. San Bernardino Cty. Dec. 15, 2020) (Cohn, J.); *Mateski v. Just Born,*
5 *Inc.*, No. CIVDS1926742, 2020 WL 12602319 (Cal. Super. Ct. San Bernardino Cty.
6 May 5, 2020) (Class Action Settlement Agt. 1.47).

7 13. In *Iglesias v. Ferrara Candy Co.*, No. 3:17-cv-00849-VC (N.D. Cal.), the
8 federal district court issued an order granting a motion for final approval of a class
9 action settlement in an action alleging non-functional slack-fill in food packaging in
10 which a \$2.5 million common fund was approved by the Court. (Doc. 93 at 8:1-2 in
11 No. 3:17-cv-00849-VC (N.D. Cal. Nov. 8, 2018) (Chhabria, J.); (Doc. 94 at 1:7-9 in
12 No. 3:17-cv-00849-VC (N.D. Cal. Nov. 8, 2018) (Chhabria, J.)) That court also
13 granted the plaintiff's motion for attorneys' fees in the sum of \$625,000 and
14 \$102,172.12 in litigation expenses. (Doc. 94 at 1:9-11, 1:18-21 in No. 3:17-cv-00849-
15 VC (N.D. Cal. Nov. 8, 2018) (Chhabria, J.)).

16 14. Pursuant to 28 U.S.C. § 1391, venue is proper because a substantial part of
17 the acts and events giving rise to the claims occurred in this District.

18 15. Defendant is subject to jurisdiction under California's "long-arm" statute
19 because the exercise of jurisdiction over Defendant is not "inconsistent with the
20 Constitution of this state or the United States."

21 **FACTUAL BACKGROUND**

22 16. The amount of product inside any product packaging is material to any
23 consumer seeking to purchase that product. The average consumer spends only 13
24 seconds deciding whether to make an in-store purchase;¹ this decision is heavily
25 dependent on a product's packaging, including the package dimensions. Research has
26 demonstrated that packages that seem larger are more likely to be purchased because

27 ¹ Randall Beard, *Make the Most of Your Brand's 20-Second Window*, NIELSEN, Jan.
28 13, 2015, <https://www.nielsen.com/insights/2015/make-the-most-of-your-brands-20-second-window/> (last visited Apr. 29, 2024).

1 consumers expect package size to accurately represent the quantity of the good being
2 purchased.²

3 17. Defendant chose a certain size package for its Product to convey to
4 consumers that they are receiving an amount of product commensurate with the size of
5 the package.

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

9 19. Defendant falsely represents the quantity of product in each of the
10 Product's opaque package. The size of each package leads reasonable consumers to
11 believe they are purchasing a package full of product when, in reality, consumers are
12 actually receiving significantly less than what is represented by the size of the package.

13 20. Even if consumers had a reasonable opportunity to review, prior to the
14 point of sale, other representations of quantity, such as net weight or serving
15 disclosures, they did not and would not have reasonably understood or expected such
16 representations to translate to a quantity product meaningfully different from the size of
17 the package.

18 21. Prior to the point of sale, the Product's packaging does not allow for
19 confirmation of the contents of the Product. The Product's opaque packaging prevents a
20 consumer from observing the contents before opening. Even if a reasonable consumer
21 were to "shake" or otherwise inspect the package before opening it, the reasonable
22 consumer would not be able to discern the presence of any nonfunctional slack-fill, let
23 alone the significant amount of nonfunctional slack-fill that is present in the package.
24 The Product's packaging is made with plastic material. It is impossible to detect the
25 presence of empty space near the top of the Product's container because of the plastic
26 material is inflexible near the top of the container.

27
28 ² P. Raghurir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 J. MARKETING RESEARCH 313-326 (1999).

1 22. The other information that Defendant provides about the quantity of
2 product on the front and back labels of the Product does not enable reasonable
3 consumers to form any meaningful understanding about how to gauge the quantity of
4 contents of the Product as compared to the size (*i.e.*, volume) of the package itself. For
5 instance, the front of the Product’s packaging does not have any labels that would
6 provide Plaintiff with any meaningful insight as to the amount of product to be
7 expected, such as a fill line. Plaintiff is informed and believes and thereon alleges that
8 at some point during the class period at issue herein, Defendant added a fill line
9 disclosure at the rear of the Product’s package labeling, but such disclosure is
10 inconspicuous to reasonable consumers based on the location of such disclosure, the
11 tiny font size, consumers would have to turn the Product sideways to read such
12 disclosure unlike the rest of the Product’s labels, and other reasons.

13 23. Disclosures of net weight and serving sizes in ounces, pounds, or grams do
14 not allow the reasonable consumer to make any meaningful conclusions about the
15 quantity of product contained in the Product’s packages that would be different from a
16 consumer’s expectation that the quantity of product is commensurate with the size of
17 the package.

18 24. “[C]omparator products may provide evidence of non-functional slack-
19 fill...” *Daniel v. Mondelez Int’l, Inc.*, 287 F. Supp. 3d 177, 188 (E.D.N.Y. 2018).
20 Comparator products have significantly less empty space in similar containers. For
21 example, one comparator product sold at CVS/pharmacy retail stores under the PBfit
22 brand name and the “Peanut Butter Powder” product name (original flavor), which is
23 distributed by BetterBodyFoods, contains approximately 94 percent fill level with the
24 same type of twist-off lid as used in the Product. An image of the foregoing comparator
25 product advertised for sale on the grocery store website at:
26 [https://www.pavilions.com/shop/product-](https://www.pavilions.com/shop/product-details.960277858.html?productId=960277858&psrc=g&CMPID=ps_pav_soc_ecom_goo_20201026_71700000074898525_58700007109448358_92700063970950589&gad_)
27 [details.960277858.html?productId=960277858&psrc=g&CMPID=ps_pav_soc_ecom_g](https://www.pavilions.com/shop/product-details.960277858.html?productId=960277858&psrc=g&CMPID=ps_pav_soc_ecom_goo_20201026_71700000074898525_58700007109448358_92700063970950589&gad_)
28 [oo_20201026_71700000074898525_58700007109448358_92700063970950589&gad_](https://www.pavilions.com/shop/product-details.960277858.html?productId=960277858&psrc=g&CMPID=ps_pav_soc_ecom_goo_20201026_71700000074898525_58700007109448358_92700063970950589&gad_)

1 source=1&gclid=CjwKCAjwrcKxBhBMEiwAIVF8rKaj9Bep2OAMT8-
2 IWbJcBOYeejajGArsAR47K2QWpgLCqNrM-SYPXBoC2-
3 MQAvD_BwE&gclsrc=aw.ds (last visited Apr. 30, 2024) is as follows:
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24 25. In February 2024, Plaintiff purchased the Product (the net weight 12 ounces
25 version of the Product) for personal use from an online retailer known as Nutrition World
26 at: <https://nutritionw.com/>, in the amount of \$21.99 plus \$8.00 shipping and \$2.77 sales
27 tax for a total purchase price of \$32.76. In making the purchase, Plaintiff relied upon the
28 opaque packaging, including the size of the package and product label, that was

1 designed to encourage consumers like Plaintiff to purchase the Product. Plaintiff
2 understood the size of the package and product label to indicate that the amount of
3 product contained therein was commensurate with the size of the package, and would
4 not have purchased the Product, or would not have paid a price premium for the
5 Product, had Plaintiff known that the size of the package and product label were false
6 and misleading.

7 26. Plaintiff had dual motivations for purchasing the product. First, Plaintiff is
8 a consumer rights “tester” who creates public benefit by ensuring that companies
9 comply with their obligations under California law. Second, Plaintiff was genuinely
10 interested in consuming and enjoying the Product, and did so – with disappointment
11 that the package had significant amounts of empty space.

12 27. Plaintiff’s status as a dual motivation tester is both necessary and
13 appropriate. First, it is “necessary and desirable for committed individuals to bring
14 serial litigation” to enforce and advance consumer protection statutes. *See Langer v.*
15 *Kiser*, 57 F.4th 1085, 1097 (9th Cir. 2023). Second, nearly all consumers have dual
16 motives, as there are usually multiple reasons behind their purchasing decisions. *See*
17 *Cordes v. Boulder Brands USA, Inc.*, 2018 WL 6714323, at *3 (C.D. Cal. Oct. 17,
18 2018) (Gutierrez, J.).

19 28. To be clear, Plaintiff would not have purchased the Product had Plaintiff
20 known that the Product contained slack-fill that serves no functional or lawful purpose,
21 and would have consumed the entirety of the contents if the package was filled to
22 Plaintiff’s expectations.

23 29. Plaintiff intends to purchase the Product in the future but cannot
24 reasonably do so without an injunctive relief order from the Court ensuring Defendant’s
25 packaging, labeling, and filling of the Product is accurate and lawful, at which point
26 Plaintiff will reasonably be able to rely upon Defendant’s representations about the
27 Product.

28

1 30. The injuries of Plaintiff and the Class cannot be wholly remedied by
2 monetary relief and such remedies at law are inadequate. While monetary damages
3 would compensate Plaintiff for past harm, monetary damages alone would be
4 insufficient to remedy the ongoing harm experienced by Plaintiff and other consumers
5 from Defendant’s conduct. Monetary damages would not guarantee that Plaintiff or
6 other consumers would avoid being misled by the deceptive practice of filling of
7 Defendant’s containers in the future with non-functional empty space. Plaintiff and
8 other future purchasers will continue to be misled. Because retrospective monetary
9 damages will not prevent the future harm only remediable by an injunction ordering
10 Defendant to stop filling its containers in a misleading manner, injunctive relief is being
11 sought herein.

12 **None of the Slack-Fill Statutory Exceptions Apply to the Product**

13 31. Under California’s Sherman Food, Drug, and Cosmetic Law (“Sherman
14 Law”), Cal. Health & Safety Code § 109875 *et seq.*, “Any food is misbranded if its
15 container is so made, formed, or *filled* as to be misleading.” *Id.* § 110690 (emphasis
16 added). Similarly, California’s Fair Packaging and Labeling Act (“CFPLA”), Cal. Bus.
17 and Prof. Code § 12601 *et seq.*, provides, “No food containers shall be made, formed, or
18 *filled* as to be misleading.” (Cal. Bus. & Prof. Code § 12606.2(b) (emphasis added).)

19 32. “A container that does not allow the consumer to fully view its contents
20 shall be considered to be filled as to be misleading if it contains nonfunctional slack
21 fill.” *Id.* § 12606.2(c). “Slack fill is the difference between the actual capacity of a
22 container and the volume of product contained therein.” *Id.* “Nonfunctional slack fill is
23 the empty space in a package that is filled to substantially less than its capacity for
24 reasons other than any one or more of [enumerated exceptions].” *Id.*

25 **A. Cal. Bus. & Prof. Code § 12606.2(c)(1) – Protection of the Contents**

26 33. The empty space in the Product’s container does not protect the contents of
27 the Product, which is protein powder.
28

1 **B. Cal. Bus. & Prof. Code § 12606.2(c)(2) – Requirements of the**
2 **Machines**

3 34. The machines used for enclosing the contents of the package would not be
4 affected if there was more fill of the Product added. At most, a simple recalibration of
5 the machines would be required. Plaintiff is informed and believes and thereon alleges
6 that adjusting these machines would be rather simple.

7 35. Defendant can increase the Product’s fill level significantly without
8 affecting how the packages are sealed, or it can disclose the fill-level on the outside
9 labeling in a clear and conspicuous manner to inform consumers of the amount of
10 product actually in the package.

11 36. In other words, the machines used for enclosing the contents of the
12 package have the capacity to add more content to the containers used to enclose the
13 contents of the Product.

14 **C. Cal. Bus. & Prof. Code § 12606.2(c)(3) – Unavoidable Product Settling**
15 **During Shipping and Handling**

16 37. The slack-fill present in the Product’s packages is not a result of
17 unavoidable product settling during shipping and handling. Given the Product’s
18 composition as a powder, any settling occurs immediately at the point of fill. No
19 measurable product settling occurs during subsequent shipping and handling.

20 **D. Cal. Bus. & Prof. Code § 12606.2(c)(4) – Specific Function of Package**

21 38. The package of the Product does not perform a specific function that
22 necessitates the slack-fill “such as where packaging plays a role in the preparation or
23 consumption of a food....” (Cal. Bus. & Prof. Code § 12606.2(c)(4).) The packages of
24 the Product do not perform a specific function inherent to the nature of the food that
25 necessitates the slack-fill. Defendant has failed to clearly communicate to consumers
26 via the Product’s packaging or otherwise the need for the package to perform any
27 specific function.

28 **E. Cal. Bus. & Prof. Code § 12606.2(c)(5) – Reusable Package**

 39. The Product’s package is not reusable or of any significant value to the

1 Product independent of its function to hold the Product. The package is intended to be
2 discarded immediately after the Product is consumed.

3 40. The Product package is not a durable commemorative package. The
4 Product's package is not a promotional package.

5 **E. Cal. Bus. & Prof. Code § 12606.2(c)(6) – Inability to Increase Fill or**
6 **Further Reduce Package Size**

7 41. The size of the container is not at some minimum package size necessary
8 to accommodate required food labeling exclusive of any nonmandatory designs or label
9 information, discourage pilfering, facilitate handling, or accommodate tamper-resistant
10 devices.

11 42. Defendant can easily increase the quantity of the Product in each package
12 (or, alternatively, decrease the size of the packages) significantly.

13 43. There is no need to use a larger than required container to provide adequate
14 space for the legible presentation of mandatory and necessary labeling information.
15 Indeed, the upper portion of the Product's container contains no label at all.

16 **F. Cal. Bus. & Prof. Code § 12606.2(c)(7)(A) – Visibility of Product's**
17 **Dimensions Through Exterior Packaging**

18 44. The Product's dimensions are not visible through the exterior packaging.

19 **G. Cal. Bus. & Prof. Code § 12606.2(c)(7)(B) – Depiction of Actual Size of**
20 **the Product**

21 45. The actual size of the Product is not clearly and conspicuously depicted on
22 any side of the exterior packaging, excluding the bottom, accompanied by a clear and
23 conspicuous disclosure that the depiction is the "actual size" of the Product.

24 **H. Cal. Bus. & Prof. Code § 12606.2(c)(7)(C) – Fill Line**

25 46. A line or a graphic that represents the Product and a statement
26 communicating that the line or a graphic represents the Product such as "Fill Line" are
27 not clearly and conspicuously depicted on exterior packaging of the Product.

28 47. As mentioned above, Plaintiff is informed and believes and thereon alleges

1 that at some point during the class period at issue herein, Defendant added a fill line
2 disclosure at the rear of the Product's package labeling, but such disclosure is
3 inconspicuous to reasonable consumers because of the location of such disclosure, the
4 tiny font size, the fact that consumers would have to turn the Product sideways to read
5 such disclosure unlike the rest of the statements on the Product's labels, and other
6 reasons.

7 **I. Cal. Bus. & Prof. Code § 12606.2(c)(8) – Mode of Commerce**

8 48. Paragraph (8) of subdivision (c) of section 12606.2 of the California
9 Business and Professions Code is inconsistent with any of the safe harbors set forth in
10 21 C.F.R. § 100.100(a). Thus, this provision is not consistent with the requirements
11 imposed by Section 403(d) of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21
12 U.S.C. § 343(d)), or any regulation promulgated pursuant thereto. Thus, this provision
13 is not operative because it is not identical to the federal requirements. (*See* Cal. Bus. &
14 Prof. Code § 12606.2(f)); *Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103, 1155
15 (S.D. Cal. 2021) (finding that California's "mode of commerce" safe harbor at Cal. Bus.
16 & Prof. Code § 12606.2(c)(8) was "not operative" because it was inconsistent with both
17 the FDCA and 21 C.F.R. § 100.100); *Reyes v. Just Born, Inc.*, - F. Supp. 3d -, 2024 WL
18 1748629, at *5 (C.D. Cal. Apr. 8, 2024) (Vera, J.) ("the actual size exemption in the
19 CLRA is not identical to the federal requirements and is therefore not operative")
20 (citing *Stewart*, 537 F. Supp. 3d at 1154-56).

21 **J. The Operative Slack-Fill Safe Harbor Provisions Do Not Apply Here.**

22 49. Because none of the safe harbor provisions in the CFPLA that are
23 operative because they are consistent with the FDCA apply to the Product's container or
24 packaging, the container contains nonfunctional slack-fill in violation of section 110690
25 of the California Health and Safety Code and section 12606.2 of the California Business
26 and Professions Code, and are, therefore, misleading as a matter of law.

27 50. Defendant's false, deceptive, and misleading filling of the Product
28 containers is unlawful under state consumer protection and packaging laws.

1 51. Defendant’s misleading and deceptive practices proximately caused harm
2 to Plaintiff by causing Plaintiff to spend more money than Plaintiff would have
3 otherwise spent had Plaintiff known the extent of the Product’s non-functional slack-
4 fill.

5 **CLASS ACTION ALLEGATIONS**

6 52. Plaintiff brings this action individually and on behalf of all others similarly
7 situated (the “Class”) defined as follows:

8 **All persons within the state of California who purchased the**
9 **Product from a retailer within the statute of limitations period**
10 **and whose rights were violated as described above.**

11 53. NUMEROSITY: Plaintiff does not know the number of Class members but
12 believes the number to be in the tens of thousands, at minimum. The exact identities of
13 Class members may be ascertained by the records maintained by Defendant or
14 California retailers.

15 54. COMMONALITY: Common questions of fact and law exist as to all Class
16 members, and predominate over any questions affecting only individual members of the
17 Class. Such common legal and factual questions, which do not vary between Class
18 members, and which may be determined without reference to the individual
19 circumstances of any Class member, include but are not limited to the following:

- 20 a. Whether Defendant engaged in the wrongful conduct described above;
21 b. Whether Plaintiff and Class members are entitled to actual damages in the
22 form of a price premium to be calculated on a classwide basis; and
23 c. Whether Class members are entitled to injunctive relief.

24 55. TYPICALITY: As a person located in California who purchased the
25 Product from a retailer, who was misled by the size of the Product’s container, Plaintiff
26 is asserting claims that are typical of the Class.

27 56. ADEQUACY: Plaintiff will fairly and adequately protect the interests of
28 the members of the Class. Plaintiff has retained attorneys experienced in class action

1 litigation. All individuals with interests that are actually or potentially adverse to or in
2 conflict with the Class or whose inclusion would otherwise be improper are excluded.

3 57. SUPERIORITY: A class action is superior to other available methods of
4 adjudication because individual litigation of the claims of all Class members is
5 impracticable and inefficient. Even if every Class member could afford individual
6 litigation, the court system could not. It would be unduly burdensome to the courts in
7 which individual litigation of numerous cases would proceed.

8 **CAUSES OF ACTION**

9 **FIRST CAUSE OF ACTION**

10 **COMMON LAW FRAUD**

11 58. Plaintiff incorporates by reference the foregoing paragraphs as if set forth
12 hereinafter.

13 59. The elements of cause of action for California common law fraud are (a)
14 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge
15 of falsity (or “scienter”); (c) intent to induce reliance; (d) justifiable reliance; and (e)
16 resulting damage. *See Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996).

17 60. Each element of the cause of action for fraud is present here, as shown by
18 the following “Who, What, When, Where, and Why” summary:

- 19 a. **Who**: The false or misleading representations were made by the Defendant
20 and the individuals employed by Defendant who make packaging and
21 labeling decisions.
- 22 b. **What**: The false or misleading representation was the filling of the Product
23 in an oversized container, which implied to the reasonable consumer that
24 the container had more protein powder than it actually contained.
- 25 c. **When**: The false or misleading representation has been made continuously
26 through the statute of limitations period, as it is made each time a package
27 is sold – including when Plaintiff purchased the product in February 2024.
- 28

1 d. **Where:** The false or misleading representation was made on Defendant’s
2 website, marketing materials, and the packaging of the Product sold either
3 online at commercial websites or at retail stores in California, if any.

4 e. **Why:** Defendant made the false or misleading representation to induce
5 consumers to purchase the Product, to cause them to pay more for the
6 Product, and to take market share and profits from its competitors.

7 61. **Knowledge:** Defendant knows that the Product’s packaging has significant
8 quantities of nonfunctional slack-fill or empty space, knows that consumers are
9 influenced by the size and volume of the Product container to purchase the Product,
10 knows that consumers believe that it is full, and knows that it is deceiving consumers.

11 62. **Intent to defraud:** Defendant intends for consumers to purchase the
12 Product under the mistaken belief that the package is full so that Defendant can capture
13 sales it would not have otherwise received and can increase profits.

14 63. **Justifiable reliance:** Plaintiff’s reliance on the size of the package was
15 reasonable, as consumers reasonably expect that a package will be filled commensurate
16 with its size.

17 64. **Resulting damage:** Plaintiff was damaged by paying more for the Product
18 than Plaintiff would have paid and receiving less Product than Plaintiff expected to
19 receive. To be clear, Plaintiff changed position in reliance upon the fraud (by
20 purchasing the Product) and was damaged by that change of position (by receiving less
21 than Plaintiff paid for and reasonably expected to receive).

22 **SECOND CAUSE OF ACTION**

23 **VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT**

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

25 65. Plaintiff incorporates by reference the foregoing paragraphs as if set forth
26 hereinafter.

27 66. The CLRA prohibits certain “unfair methods of competition and unfair or
28 deceptive acts or practices” in connection with the sale of goods.

1 67. The practices described herein, specifically Defendant's packaging,
2 advertising, and sale of the Product, were intended to result and did result in the sale of
3 the Product to the consuming public and violated and continue to violate sections
4 1770(a)(5) and 1770(a)(9) of the CLRA by: (1) representing the Product has
5 characteristics or quantities that it does not have; and (2) advertising and packaging the
6 Product with intent not to sell it as advertised and packaged.

7 68. Defendant deceived Plaintiff by filling the Product's packaging, which
8 includes significant nonfunctional slack-fill, in a misleading manner contrary to
9 California slack-fill statutes including the Sherman Law and the CFPLA.

10 69. Defendant packaged the Product in packages that contain significant
11 nonfunctional slack-fill and made material misrepresentations to deceive Plaintiff and
12 all consumers.

13 70. Defendant deceived Plaintiff by misrepresenting the Product as having
14 characteristics and quantities that it does not have, e.g., that the Product is free of
15 nonfunctional slack-fill when it is not. In doing so, Defendant intentionally
16 misrepresented and concealed material facts from Plaintiff. Said misrepresentations and
17 concealment were done with the intention of deceiving Plaintiff and depriving Plaintiff
18 of rights and money.

19 71. Defendant knew that the Product's packaging was misleading and
20 deceptive.

21 72. Defendant's packaging of the Product was a material factor in Plaintiff's
22 decisions to purchase the Product. Based on Defendant's packaging of the Product,
23 Plaintiff reasonably believed that Plaintiff would receive more product than actually
24 received. Had Plaintiff known the truth of the matter, Plaintiff would have not have
25 purchased the Product.

26 73. Plaintiff has suffered injury in fact and has lost money as a result of
27 Defendant's deceptive, unfair, and unlawful conduct. Specifically, Plaintiff paid for
28 Product never received.

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- A. An order enjoining Defendant from continuing to package and/or label the Product as challenged herein;
- B. Actual, statutory, and punitive damages;
- C. Attorneys’ fees and costs; and
- D. All other relief at law or in equity that may be just and proper.

Dated: May 10, 2024

PACIFIC TRIAL ATTORNEYS, APC

By: /s/Scott J. Ferrell
Scott. J. Ferrell
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2024, I electronically filed the foregoing **FIRST AMENDED CLASS ACTION COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Scott J. Ferrell
Scott J. Ferrell

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