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

12 JESSE HELEMS, *on behalf of all those*)
13 *similarly situated,*)
14)
15 *Plaintiff,*)

No. **'22CV1120 GPC DEB**

16 v.)

CLASS ACTION COMPLAINT

17 HONEY BADGER LLC, *a Texas limited*)
18 *liability company,*)
19)
20 *Defendant.*)

JURY TRIAL DEMANDED

21 _____
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23 Jesse Helems (“Plaintiff”), individually and on behalf of all others similarly situated, by
24 and through undersigned counsel, hereby brings this action against Honey Badger LLC
25 (“Defendant” or “Honey Badger”), alleging that certain products manufactured, packaged,
26 labeled, advertised, distributed and sold by Defendant are misbranded and falsely advertised in
27 California and nationwide and otherwise violate Texas and California law, and upon information
28 and belief and investigation of counsel alleges as follows:

PARTIES

1. Plaintiff Jesse Helems is and at all times relevant was a citizen of the state of California, domiciled in San Diego. On or about March 4, 2022, Helems purchased Honey

1 Badger’s BCAA (Branch-Chained Amino Acid) powder, peach mango flavor, from third-party
2 retailer Amazon (Order #111-9748483-6392262).

3 2. Mr. Helems purchased and intended to use Honey Badger’s BCAA powder in
4 order to maintain the substantial weight loss he achieved in 2016, when he dropped 150 pounds
5 (out of 300) through cardio-based fitness and, especially, careful tracking to maintain a caloric
6 deficit every day. After losing an additional 15 pounds to get to 135, he decided to add lean mass
7 through strength training supported by controlled caloric intake, using pre- and post-workout
8 supplements such as Honey Badger’s BCAA powders.

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10 3. Mr. Helems’ long and arduous weight loss and fitness journey has been
11 accomplished in large part by researching supplements, carefully evaluating their label claims,
12 and carefully measuring his caloric intake. He relies on supplements’ label claims and consumes
13 foods, drinks, and supplements with intentionality.

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15 4. Defendant Honey Badger LLC (“Honey Badger” or “Defendant”) is a Texas
16 corporation with its principal place of business in Austin, Texas. Honey Badger’s BCAA
17 powders (“the Products”) purportedly assist in workout recovery, provide energy, and support
18 memory and cognitive health.

19 **JURISDICTION AND VENUE**

20 5. This Court has subject matter jurisdiction over this action pursuant to the Class
21 Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the
22 United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original
23 jurisdiction of the federal district courts over “any civil action in which the matter in controversy
24 exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class
25 action in which . . . any member of a class of plaintiffs is a citizen of a State different from any
26 defendant.” 28 U.S.C. § 1332(d)(2)(A).
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1 6. Plaintiff seeks to represent Class members who are citizens of states different from
2 the Defendant.

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

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

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

9 10. This Court has personal jurisdiction over Defendant because this action arises out
10 of and relates to Defendant’s contacts with this forum.

11 11. Those contacts include but are not limited to sales of the Products directly to
12 commercial and individual consumers located in this district, including Plaintiff; shipping the
13 Products to commercial and individual consumers in this district, including Plaintiff; knowingly
14 directing advertising and marketing materials concerning the Products into this district through
15 wires and mails, both directly and through electronic and print publications that are directed to
16 commercial and individual consumers in this district; and operating an e-commerce web site
17 that offers the Products for sale to commercial and individual consumers in this district, as well
18 as offering the Products for sale through third-party e-commerce websites, through both of
19 which commercial and individual consumers residing in this district have purchased the
20 Products.
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22 12. Defendant knowingly directs electronic activity and ships the Products into this
23 district with the intent to engage in business interactions for profit, and it has in fact engaged in
24 such interactions, including the sale of the Products to Plaintiff.
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1 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
2 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

3 21. According to Nielsen, more than 40 percent of consumers rate the absence of
4 artificial flavors in their foods as important to them when deciding between competing products,
5 and more than 60 percent try to avoid artificial flavors at least some of the time.

6 22. Consumers also have a specific sense of the attributes of “natural” foods. Research
7 by Consumer Reports indicates that nearly 90 percent of consumers believe and expect that
8 foods described as “natural” should contain no artificial ingredients.
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10 **B. Defendant’s Use of Synthetic Flavorings.**

11 23. Defendant Honey Badger formulates, manufactures, and sells a number of plant-
12 based dietary supplements that are meant to support workout recovery, among other health
13 benefits. Among those are Honey Badger’s “BCAA” powders (pink lemonade, tropical punch,
14 peach mango, wild berry, blue raspberry, and lemon lime flavors).
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16 24. To appeal to consumers who seek out natural food products and are willing to pay
17 more for them, Defendant labels and advertises the Products as if they were exclusively naturally
18 flavored.

19 25. For example, the front label of the BCAA peach mango product purchased by
20 Helems states that the powder is “Naturally Flavored”:
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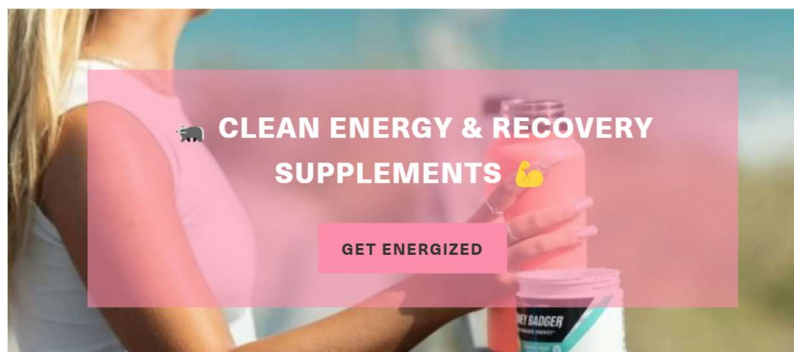
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26. Other flavors of the Products made similar claims regarding the use of natural flavors.

27. All of the back labels of the Products also state that they contain “Natural Flavors,” with no other explicit flavoring statement made in the ingredients list.

28. Attesting to the commercial value of “clean labels,” these Products are advertised as having “clean flavors” that are “unmatched for a refreshingly original taste.” Honey Badger advertises its Products as “Clean Energy” and promises “clean flavors and no artificial sweeteners or dyes”:



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OUR PROMISE

Made in the USA, straightforward, effective, and science-backed formulations with clean flavors and no artificial sweeteners or dyes.

OUR STORY

29. Using common slang, Honey Badger’s website also refers to its Products as “Authentic AF” to cement the association between the brand and clean, natural, and non-artificial ingredients including flavorings.

30. The references to “clean flavors,” as well as the explicit “naturally flavored” and “natural flavors” label claims, lead consumers to believe that only natural flavoring are used in the Products.

31. These label claims are false. The Products are artificially flavored.

32. Each of the Products contains an ingredient identified as “malic acid.” While there is a naturally occurring form of malic acid, it is extremely expensive to formulate in the large quantities and is almost never used in mass-produced food products. Instead, the malic acid that Defendant uses in these Products is DL malic acid, a synthetic petrochemical.²

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

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

1 34. Fruit flavors in a food are imparted by the interactions between sugars, acids,
2 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined
3 by the ratio between the sugars (mainly glucose and fructose) and acids, such as malic acid.

4 35. The quality and consumer acceptability of fruit flavors is based on their perceived
5 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
6 as peaches, mangoes, lemons, limes, and berries have their own natural ratio of sugars and acids.

7 36. The malic acid used in the Products is used to create, enhance, simulate, and/or
8 reinforce the sweet and tart taste that consumers associate with the characterizing fruit flavors,
9 such as peaches, mangoes, lemons, limes, and berries. As described below, it does so by
10 changing the ratio between acids and sugars in the Products.

11 37. Defendant uses the artificial petrochemically derived DL malic acid in its Products
12 to create this sweet and tart flavor but pretends otherwise, conflating natural and artificial
13 flavorings, misbranding the Products and deceiving consumers.

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

17 39. Even if the malic acid used in the Products is not DL malic acid but is instead L
18 malic acid, it is still not a "natural" flavoring. Almost all l-malic acid used in mass produced
19 food products uses a substrate that is derived from petroleum products. For this reason, for
20 example, organic food producers and advocates have sought to have L malic acid to be struck
21 from the list of additives that can be used in foods labelled "organic."
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25 **C. Requirements for Labelling—Flavoring**

26 40. California's Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
27 109875, *et seq.*, incorporates all food flavoring and additive regulations of the Federal Food,
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1 Drug, and Cosmetic Act (“FDCA”). The regulations require that a food’s label accurately
2 describe the nature of the food product and its characterizing flavors. 21 C.F.R. § 102.5(a).

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

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

11 43. Any recognizable primary flavor identified directly or indirectly on the front label
12 of a food Product, whether by word, vignette, depiction of a fruit, or other means is referred to
13 as a “characterizing flavor.” 21 C.F.R. § 101.22.

14 44. Here, the Products’ labels state the characterizing flavors (peaches, mangoes,
15 lemons, limes, berries, and the like).

16 45. If a food product’s characterizing flavor is not created exclusively by the named
17 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
18 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
19 that “simulates, resembles or reinforces” the characterizing flavor, the front label must
20 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
21 101.22(i)(2).

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

3 47. Such statement must be in boldface print on the front display panel and of
4 sufficient size for an average consumer to notice.

5 48. By changing the ratio between sugars and acids that is naturally found in fruits
6 such as peaches, mangoes, lemons, limes, and berries, the DL malic acid used in the Product
7 reinforces, stimulates, or enhances the characterizing flavors, regardless of any other effect it
8 may have or purpose for which it was included.

9 49. DL malic acid is not a “natural flavor” as this term is defined by federal and state
10 regulations and is not derived from a fruit or vegetable or any other natural source. Rather, it is
11 derived from petroleum products. The Products therefore contain artificial flavorings.

12 50. Because the Products contain artificial flavoring, California law requires the
13 Products to display both front- and back-label disclosures to inform consumers that the Products
14 are artificially flavored.

15 51. The Products have none of the required disclosures regarding the use of artificial
16 flavors.

17 52. Since first being contacted by Plaintiff’s counsel regarding these claims, Honey
18 Badger has altered its labels to state that the Products are “Flavored With Other Natural
19 Flavors.” However, this change does not satisfy the FDA’s labelling requirements and the
20 Products remain misbranded.

21 **D. Honey Badger’s Zero-Calorie Claims and FDA’s Five Methods**

22 53. On its website, Honey Badger claims that the Products contain zero calories. In
23 fact, this claim is made in connection with purported “Third Party Lab Test Results” confirming
24 the company’s various claims about the Products:

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54. Honey Badger’s website also juxtaposes a zero-calorie claim with a depiction of the Product’s Supplements Facts labelling, which is the place that most consumers go to find the caloric content of a supplement (both this image and the above are at <https://drinkhoneybadger.com/products/vegan-bcaa>, last visited July 25, 2022):

Supplement Facts		
Serving Size 1 Scoop (8.2g)		
Servings Per Container 30		
Amount Per Serving	%DV**	
Magnesium (as Magnesium Citrate)	13 mg	3%
Chloride (as Pink Himalayan Salt)	70 mg	3%
Sodium (as Pink Himalayan Salt)	47 mg	2%
Potassium (as Potassium Citrate)	43 mg	1%
Amino Acid Blend:	5,000 mg	†
L-Glutamine (2,500 mg), L-Leucine (800 mg), L-Threonine (524.5 mg), L-Isoleucine (400 mg), L-Valine (400 mg), L-Phenylalanine (210 mg), L-Lysine Hydrochloride (150 mg), L-Histidine (15 mg), L-Methionine (0.25 mg), L-Tryptophan (0.25 mg)		
**Percent Daily Values are based on a 2,000 calorie diet.		
† Daily Value not established.		
Other Ingredients: Citric Acid, Natural Flavors, Stevia Leaf Extract, Silicon Dioxide, Spirulina Extract (For Color).		

55. Honey Badger makes similar claims at third-party websites where the Products are sold, such as on Amazon.com (see <https://www.amazon.com/Honey-Badger-Vegan-Keto-BCAA/dp/B07SR7335N/>, last visited July 25, 2022):

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- Zero Calories, Zero Sugar, Zero Carbs = Zero Crash: Made with natural stevia leaf extract and noncaloric ingredients meaning it's non-habit forming and won't make you crash mid-workout or post-workout.

56. Regulations of the U.S. Food and Drug Agency (“FDA”) permit the use of any of “Five Methods” of determining the caloric content of foods. *See* 21 C.F.R. § 101.9(c)(i)(1). As a “Third Group” nutrient, or one associated with health concerns, the actual calories per serving of the Product cannot 20 percent of the label claim. *Id.* § 101.9(g)(5).

57. The FDA provides a clear example of labeling calories for an amino acid-based supplement at <https://www.fda.gov/media/99158/download>. This FDA example, as pictured below, displays approximately 4 grams of total amino acids, which would approximate 16 calories and is listed as 15 based on pertinent rounding rules:

Supplement Facts	
Serving Size 1 Tablet	
Servings Per Container 50	
Amount Per Tablet	
Calories	15
Isoleucine (as L-isoleucine hydrochloride)	450 mg*
Leucine (as L-leucine hydrochloride)	620 mg*
Lysine (as L-lysine hydrochloride)	500 mg*
Methionine (as L-methionine hydrochloride)	350 mg*
Cystine (as L-cystine hydrochloride)	200 mg*
Phenylalanine (as L-phenylalanine hydrochloride)	220 mg*
Tyrosine (as L-tyrosine hydrochloride)	900 mg*
Threonine (as L-threonine hydrochloride)	300 mg*
Valine (as L-valine hydrochloride)	650 mg*
*Daily Value not established.	

Other ingredients: Cellulose, lactose, and magnesium stearate.

58. Honey Badger lists the “Amino Acid Blend” in the Product as approximately 5 grams per serving as displayed below:

Supplement Facts		
Serving Size 1 Scoop (8.2g)		
Servings Per Container 30		
	Amount Per Serving	%DV**
Magnesium (as Magnesium Citrate)	13 mg	3%
Chloride (as Pink Himalayan Salt)	70 mg	3%
Sodium (as Pink Himalayan Salt)	47 mg	2%
Potassium (as Potassium Citrate)	43 mg	1%
Amino Acid Blend:	5,000 mg	†
L-Glutamine (2,500 mg), L-Leucine (800 mg), L-Threonine (524.5 mg), L-Isoleucine (400 mg), L-Valine (400 mg), L-Phenylalanine (210 mg), L-Lysine Hydrochloride (150 mg), L-Histidine (15 mg), L-Methionine (0.25 mg), L-Tryptophan (0.25 mg)		
**Percent Daily Values are based on a 2,000 calorie diet. † Daily Value not established.		

59. Based on the FDA guidance and consistent with the example provided, the amino acid blend in the Product alone constitutes approximately 25-30 calories per serving. This 25-30 calorie per serving estimate does not include the calories provided by other ingredients.

60. This analysis is consistent with bomb calorimetry analysis that was conducted by an independent laboratory at the direction of Plaintiff's counsel. Bomb calorimetry is one of the FDA-approved "Five Methods."

61. That analysis revealed that the Product contains 2,040 kcal per pound, or about 1,100 calories in the entire 30-serving container. These results establish that the Product contains about 36 calories per serving.

62. Honey Badger's zero-calorie representations are thus in direct violation of FDA guidance for labeling calories when present at levels at or above 5 calories per serving and at 5 calorie intervals up to 50 calories. *See* 21 C.F.R. § 101.9(c). The FDA requires manufacturers to declare "total calories" in the Supplement Facts panel "when they are present in measurable amounts," defined as "an amount that exceeds the amount that can be declared as 'zero'" pursuant 21 C.F.R. § 101.9(c). *See* <https://www.fda.gov/food/dietary-supplements-guidance-documents-regulatory-information/dietary-supplement-labeling-guide-chapter-iv-nutrition-labeling#4-6>.

1 63. Moreover, in accordance with 21 C.F.R. § 101.60(a)(4), dietary supplements may
2 only make zero-calorie claims when there are less than 5 calories per labeled serving. Honey
3 Badger’s Products do not meet this requirement.

4 64. Under any of the FDA’s relevant Five Methods, the Product is mislabelled, even
5 after subtracting grams of protein to account for indigestibility.

6 65. Defendant’s advertising deceives consumers, such as Plaintiff, by making the
7 same deceptive representations regarding calorie content.

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9 **E. All Flavors of the Deceptively Labeled Products are Substantially Similar.**

10 66. The Products are offered in multiple flavors. However, each flavor of the Products
11 is substantially similar to other flavors.

12 67. All of these Products are made with a base formulation that includes magnesium,
13 sodium, and potassium, as well as monk fruit extract and stevia leaf extract.

14 68. All of these Products purport to contain only “natural” flavors, *i.e.*, be free of
15 artificial flavors and preservatives.

16 69. These Products are also offered for sale on the Defendant’s website for the same
17 price: \$29.95 for a 30-serving container of BCAA powder.

18 70. The Products also use similar labels, and the deceptive claims are presented in a
19 similar manner.

20 71. Because of these similarities, the resolution of the asserted claims will be identical
21 as between the purchased and unpurchased Products.

22 72. Because both the products and alleged misrepresentations are substantially
23 similar, Plaintiff’s claims related to the Products that he purchased are typical of the claims
24 available to all purchasers of the Products. As such, Plaintiff is an adequate class representative
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1 for a class of purchasers of all of the Products, regardless of whether Plaintiff purchased every
2 flavor of the Products.

3 73. Plaintiff reserves the right to amend this Complaint to add further products that
4 contain similar label misrepresentations as testing continues.

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

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

16 76. Consumers including Plaintiff especially rely on the “Natural Flavors” or “zero
17 calorie” claims made by food product manufacturers such as Honey Badger, as they cannot
18 confirm or disprove those claims simply by viewing or even consuming the Product.

19 77. Plaintiff suffered economic injury by Defendant’s fraudulent and deceptive
20 conduct as stated herein, and there is a causal nexus between Defendant’s deceptive conduct and
21 Plaintiff’s injury.

22 **CLASS ACTION ALLEGATIONS**

23 78. Plaintiff brings this action individually and as representative of all those similarly
24 situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all persons within the United

1 States who purchased the Products within four years prior to the filing of this Complaint, as well
2 as a California subclass, consisting of all persons within the state of California who purchased
3 the Products within four years prior to the filing of this Complaint.

4 79. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,
5 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over
6 this matter and the members of their immediate families and judicial staff.

7 80. Plaintiff reserves the right to alter the Class definition, and to amend this
8 Complaint to add Subclasses, as necessary to the full extent permitted by applicable law.

9 81. Certification of Plaintiff's claims for class-wide treatment is appropriate because
10 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
11 individual Class members would use to prove those elements in individual actions alleging the
12 same claims.

13 82. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all
14 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
15 members geographically dispersed throughout the nation.

16 83. **Existence and Predominance of Common Questions of Law and Fact – Rule**
17 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
18 predominate over any questions that affect only individual Class members. Common legal and
19 factual questions and issues include but are not limited to:

- 20 a. Whether the marketing, advertising, packaging, labeling, and other promotional
21 materials for the Products is misleading and deceptive;
- 22 b. Whether a reasonable consumer would understand Defendant's "natural flavors"
23 and "zero calories" claims to indicate that the Products contained only natural
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- 1 flavorings and were free of calories, and reasonably relied upon those
2 representations;
- 3 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class
4 members;
- 5 d. the proper amount of damages and disgorgement or restitution;
- 6 e. the proper scope of injunctive relief; and
- 7 f. the proper amount of attorneys' fees.

8 84. Defendant engaged in a common course of conduct in contravention of the laws
9 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
10 of law, business practices, and injuries are involved. Individual questions, if any, pale by
11 comparison, in both quality and quantity, to the numerous common questions that predominate
12 this action. The common questions will yield common answers that will substantially advance
13 the resolution of the case.

14 85. In short, these common questions of fact and law predominate over questions that
15 affect only individual Class members.

16 86. **Typicality – Rule 23(a)(3):** Plaintiff's claims are typical of the claims of the Class
17 members because they are based on the same underlying facts, events, and circumstances
18 relating to Defendant's conduct.

19 87. Specifically, all Class members, including Plaintiff, were harmed in the same way
20 due to Defendant's uniform misconduct described herein; all Class members suffered similar
21 economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as
22 the Class members.

23 88. There are no defenses available to Defendant that are unique to the named
24 Plaintiff.

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

5 90. Furthermore, Plaintiff has selected competent counsel who are experienced in
6 class action and other complex litigation. Plaintiff and Plaintiff’s counsel are committed to
7 prosecuting this action vigorously on behalf of the Class and have the resources to do so.

8 91. **Superiority – Rule 23(b)(3)**: The class action mechanism is superior to other
9 available means for the fair and efficient adjudication of this controversy for at least the
10 following reasons:
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- 12 a. the damages individual Class members suffered are small compared to the burden
13 and expense of individual prosecution of the complex and extensive litigation
14 needed to address Defendant’s conduct such that it would be virtually impossible
15 for the Class members individually to redress the wrongs done to them. In fact,
16 they would have little incentive to do so given the amount of damage each member
17 has suffered when weighed against the costs and burdens of litigation;
- 18 b. the class procedure presents fewer management difficulties than individual
19 litigation and provides the benefits of single adjudication, economies of scale, and
20 supervision by a single court;
- 21 c. the prosecution of separate actions by individual Class members would create a
22 risk of inconsistent or varying adjudications, which would establish incompatible
23 standards of conduct for Defendant; and
- 24 d. the prosecution of separate actions by individual Class members would create a
25 risk of adjudications with respect to them that would be dispositive of the interests
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1 of other Class members or would substantively impair or impede their ability to
2 protect their interests.

3 92. Unless the Class is certified, Defendant will retain monies received as a result of
4 its unlawful and deceptive conduct alleged herein.

5 93. Unless a class-wide injunction is issued, Defendant will likely continue to
6 advertise, market, promote, and sell the Products in an unlawful and misleading manner, as
7 described throughout this Complaint, and members of the Class will continue to be misled,
8 harmed, and denied their rights under the law.

9 94. **Ascertainability.** To the extent ascertainability is required, the Class members are
10 readily ascertainable from Defendant's records and/or its agents' records of retail and online
11 sales, as well as through public notice.

12 95. Defendant has acted on grounds applicable to the Class as a whole, thereby
13 making appropriate final injunctive and declaratory relief concerning the Class as a whole.

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16 **COUNT 1**
17 **VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT**
18 **TEX. BUS. & COM. CODE § 17.01 *et seq.***
19 **Nationwide Class**

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

22 97. Plaintiff has satisfied all prerequisites to suit.

23 98. Plaintiff is a consumer, as defined under the Deceptive Trade Practices Act, and
24 relied upon the false, misleading, or deceptive acts or practices by Defendant, as set forth above,
25 to his detriment.

26 99. All of the above-described acts, omissions, and failures of Defendant are cause of
27 an actual and proximate cause of Plaintiff's damages.

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g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED.

/s/ Charles C. Weller
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