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6
7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9 Elena Nacarino, on behalf of herself and all
10 others similarly situated,

11 Plaintiff,

12 v.

13 KSF Acquisition Corporation, a corporation;
and DOES 1 through 10, inclusive,

14 Defendants.
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CASE NO.: 3:22-cv-04021

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 Plaintiff Elena Nacarino (“Plaintiff”), on behalf of herself and all others similarly situated,
2 brings this class action against Defendant KSF Acquisition Corporation (“Defendant” or “KSF”)
3 based on Defendant’s false and deceptive advertising and labeling of its SlimFast smoothie and
4 shake mix products. Plaintiff makes the following allegations based on the investigation of her
5 counsel, and on information and belief, except as to allegations pertaining to Plaintiff individually,
6 which are based on her personal knowledge.

7 **INTRODUCTION**

8 1. This case is predicated on a systemic course of false, misleading, and unlawful
9 conduct: Defendant has falsely and deceptively misrepresented the amount of protein in its
10 SlimFast smoothie and shake mix products (the “Products”).¹

11 2. The Products are one of the nation’s leading smoothie and shake mixes, and
12 Defendant is one of the nation’s leading manufacturers of these products. Consumers trust
13 Defendant to be transparent and sincere in its advertising, rather than deceitful and misleading.
14 Unfortunately for consumers, this is not Defendant’s practice with respect to its marketing and
15 advertising of the Products.

16 3. Specifically, on the front label of each of the Products, Defendant prominently
17 places a representation which promises a specific number of grams of protein (e.g., “20g HIGH
18 PROTEIN”) (hereinafter, the “Protein Representation”).² Consumers understand this message
19 simply: each serving of the Products’ smoothie/shake mix contains the number of grams of protein
20 promised on the front label.

21 4. However, unbeknownst to consumers, the shake mix contains far fewer grams of
22 protein than what is promised in the Protein Representation. Instead, the Products require *milk* to
23 be added in order to obtain the grams of protein advertised in the Protein Representation.

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26 ¹ The Products include the following: (1) SlimFast Original Meal Replacement Shake Mix; (2)
27 SlimFast Advanced Nutrition Smoothie Mix; (3) SlimFast Diabetic Weight Loss Meal Shake; and
28 (4) SlimFast Advanced Immunity Smoothie Mix.

² See Paragraph 16, *infra*, for an example of the Protein Representation.

PLAINTIFF

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2 11. Plaintiff is a citizen of the United States and the State of California and she
3 currently resides in San Francisco, California. In or around December 2021, Plaintiff purchased
4 the SlimFast Advanced Nutrition Smoothie Mix Vanilla Cream Product from a Safeway store in
5 San Francisco, California. In purchasing the Product, Plaintiff saw and relied on the “20g HIGH
6 PROTEIN” representation on the Product’s front label. Based on this representation, Plaintiff
7 believed that the smoothie mix itself contained 20 grams of protein per serving. Plaintiff’s
8 reasonable belief that the Product’s smoothie mix contained the number of grams promised in the
9 Protein Representation was an important factor in her decision to purchase the Product. Plaintiff
10 would not have purchased the Product, or she would have paid less for it (i.e., she would not have
11 paid a price premium), but for the aforementioned misrepresentation. Because did not receive the
12 number of grams of protein from the Product itself as promised, Plaintiff suffered injury in fact
13 and lost money as a result of Defendant’s misleading, false, unfair, and deceptive practices, as
14 described herein.

15 12. Despite Defendant’s misrepresentations, Plaintiff would purchase the Products, as
16 advertised, if they actually provided the grams of protein in the Products’ shake/smoothie mix as
17 stated on the front label. Although Plaintiff regularly shops at stores that carry the Products, absent
18 an injunction of Defendant’s deceptive advertising, she will be unable to rely with confidence on
19 Defendant’s advertising of the Products in the future. Furthermore, while Plaintiff currently
20 believes that the Protein Representation is inaccurate, she lacks personal knowledge as to
21 Defendant’s specific business practices, and thus, she will not be able determine whether the
22 Products truly will provide the stated protein from the mix itself. This leaves doubt in her mind as
23 to the possibility that at some point in the future the Products could be made in accordance with
24 the representations on the Products’ front label. This uncertainty, coupled with her desire to
25 purchase the Products, is an ongoing injury that can and would be rectified by an injunction
26 enjoining Defendant from making the alleged misleading representations. In addition, other Class
27 members will continue to purchase the Products, reasonably but incorrectly, believing that they
28 will receive the grams of protein from the Products as stated on the front label.

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DEFENDANT

13. KSF Acquisition Corporation is a Delaware corporation that maintains its principal place of business and headquarters in Palm Beach Gardens, Florida. It markets and distributes the Products throughout California and the United States. The Products are sold in grocery stores such as Ralph’s, and online on websites such as Amazon.com.

FACTUAL ALLEGATIONS

14. Defendant owns SlimFast, one of the leading dietary shake and smoothie mix brands in the United States. Consumers trust Defendant to be honest and forthright in its advertising and marketing of its products, including the Products at issue here.

15. Despite this trust, Defendant has engaged in false and deceptive advertising in the marketing and sale of the Products.

16. For example, as demonstrated below, on the front label of each of the Products, Defendant prominently places a representation which promises a specific number of grams of protein (e.g., “20g HIGH PROTEIN”) (hereinafter, the “Protein Representation”).



17. Based on the foregoing example, a reasonable consumer would expect the smoothie mix to contain 20 grams of protein per serving. However, unbeknownst to consumers, the SlimFast Advanced Nutrition Smoothie Mix itself does not contain “20g HIGH PROTEIN” per serving, but instead, contains only *12g of protein per serving*. This means that the Product fails to provide 40% of the promised grams of protein per serving.

1 18. Defendant's other Products suffer from the same flaw. Most shockingly, SlimFast's
2 Original Product promises "10g PROTEIN", but the mix only contains 2g of protein per serving.
3 The Original Product fails to provide a considerable *80% of the promised grams of protein*.

4 19. The Advanced Immunity Product similarly promises "20g PROTEIN", but only
5 provides 12g of protein per serving. The Diabetic Weight Loss Products promise 10-11g of
6 protein, but provide only 2-3g of protein per serving.

7 20. Instead, to obtain the number of grams of protein represented on the Products' front
8 labeling, consumers must add milk to the Products. Nothing on the Products' front packaging
9 discloses to consumers that they must add milk to receive the amount of protein promised in the
10 Protein Representation.

11 21. As a result, Defendant's labeling of the Products is false and deceptive, and mislead
12 reasonable consumers.

13 22. Complaints by other purchasers of the Products show that this deception is not an
14 isolated incident experienced by Plaintiff. Below are a few of many complaints by consumers of
15 the Products regarding this precise issue:³



16 Jenny

17 ★★★★★ **Misleading and fraudulent information**

18 Reviewed in the United States on November 27, 2018

19 Style: Advanced Nutrition | Flavor Name: Vanilla Cream | Size: 12 Servings (Pack of 1) | **Verified Purchase**

20 This product does not contain the 20 grams of protein it claims. It only contains 12 grams of protein
21 per serving. In order to reach the 20 grams you have to mix it with 8 oz. of dairy milk. If you are lactose
22 intolerant or just avoid dairy this is not doable. All through the description of this product it claims that
23 the "powder " contains 20 grams of protein. False and misleading. When I complained to the company,
they said they were sorry and that I should return the product if I was unhappy. Great! So now I have to
pay the return shipping to send back a product I was duped into buying. Wow! Thanks for nothing!

24 355 people found this helpful

25 ³[https://www.amazon.com/SlimFast-Original-Replacement-Vitamins-
26 Chocolate/dp/B000DZT0N0/ref=cm_cr_arp_d_product_top?ie=UTF8#customerReviews](https://www.amazon.com/SlimFast-Original-Replacement-Vitamins-Chocolate/dp/B000DZT0N0/ref=cm_cr_arp_d_product_top?ie=UTF8#customerReviews)
[Original Product] and [https://www.amazon.com/SlimFast-Advanced-Nutrition-Vanilla-
27 Smoothie/dp/B0187HZC32/ref=sr_1_6?crd=1XVUQEA6HULL9&keywords=Slimfast%2Badva
nced&qid=1642984987&s=hpc&prefix=slimfast%2Badvance%2Chpc%2C121&sr=1-6&th=1](https://www.amazon.com/SlimFast-Advanced-Nutrition-Vanilla-Smoothie/dp/B0187HZC32/ref=sr_1_6?crd=1XVUQEA6HULL9&keywords=Slimfast%2Badvanced&qid=1642984987&s=hpc&prefix=slimfast%2Badvance%2Chpc%2C121&sr=1-6&th=1)
28 [Advanced Nutrition Product] (last visited July 6, 2022).

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Lynette Molina

★★★★★ **Do not waste your money**

Reviewed in the United States on September 29, 2019

Style: Advanced Nutrition | Flavor Name: Vanilla Cream | Size: 12 Servings (Pack of 2) | **Verified Purchase**

It contains a deceiving wrapper making you think that the protein grams you will get are from the shake powder, but in reality they are counting the milk's protein on the grams advertised. I cant drink milk so it was such a waste of money. Any other protein brand indicates the protein grams in yhe from of the label for the powder only, then will have a chat with or without milk on the nutritional facts.



Zakira

★★★★★ **This product only has 2g protein as compared to the advertised 10g!!**

Reviewed in the United States on June 9, 2020

Flavor Name: Rich Chocolate Royale | Size: 34 Servings (Pack of 1) | **Verified Purchase**

It advertises 10g protein If you look on the Nutritional Facts it's only 2g protein and only 10g if you mix it with non fat milk! False advertising. What if you mix it with water or something other than milk? They shouldn't put that on the front of the can if that's not accurate. I decided to go with Pure Protein powder that I found on amazon. Around the same price, 25g of protein and only 4g of sugar compared to the 11g with this product. Also around the same calories. Way better for your body.



Christine A Berger

★★★★★ **CONTAINS **TWO** GRAMS OF PROTEIN**

Reviewed in the United States on September 13, 2018

Flavor Name: Rich Chocolate Royale | Size: 34 Servings (Pack of 1) | **Verified Purchase**

The product arrived and I was furious to see it contains only 2 grams of protein. I feel the marketing is blatantly misleading in repeatedly stating 10 grams of protein. The other 8 is from milk you have to add yourself; it's also strongly implied this product is ready-to-drink with water like the familiar cans. I looked at my husband's hot cocoa mix and it's literally the same amount of protein and calories; 2 grams protein and 100 calories. And at least the cocoa I could drink mixed with water! I am seeking a refund. This is not a nutritional product and I don't feel it would add any health or wellness benefits over just drinking a glass of plain milk.

1 23. The belief that the Products themselves will actually contain the amount of protein
2 promised in the Protein Representation is even more reasonable given that other smoothie and
3 shake mix manufacturers correctly advertise on their products' front labels the amount of protein
4 that consumers will receive based on the *products alone*, irrespective of whether the consumer
5 adds milk or any other ingredient.

6 24. As demonstrated below, one of the nation's leading nutrient supplement
7 companies, Nestle's Garden of Life, correctly advertises the grams of protein consumers receive
8 *solely* from the content of its Garden of Life Fit High Protein For Weight Loss dietary shake
9 product.⁴ The product's front label advertises "28 grams" of protein, and this is precisely what
10 consumers receive from the product's contents alone.

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26 ⁴ [https://www.amazon.com/Garden-Life-Organic-Meal-
Replacement/dp/B01NA7VLNL/ref=sr_1_16?crid=1XIVG45GIOYG2&keywords=Protein%2Bsh
ake%2Bmix&qid=1649130728&rdc=1&srefix=protein%2Bshake%2Bmi%2Caps%2C154&sr=8
-16&th=1](https://www.amazon.com/Garden-Life-Organic-Meal-
Replacement/dp/B01NA7VLNL/ref=sr_1_16?crid=1XIVG45GIOYG2&keywords=Protein%2Bsh
ake%2Bmix&qid=1649130728&rdc=1&srefix=protein%2Bshake%2Bmi%2Caps%2C154&sr=8
-16&th=1) (last visited July 8, 2022).

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Supplement Facts

Serving Size 1 Level Scoop (About 46.5g)
Servings Per Container 20

	Amount Per Serving	% Daily Value
Calories	180	
Total Fat	3 g	4% ¹
Saturated Fat	0.5 g	3% ¹
<i>Trans</i> Fat	0 g	
Polyunsaturated Fat	1 g	
Monounsaturated Fat	1 g	
Sodium	280 mg	12%
Total Carbohydrate	11 g	4% ¹
Dietary Fiber	4 g	14% ¹
Soluble Fiber	2 g	
Insoluble Fiber	2 g	
Total Sugars	<1 g	+
Includes 0g Added Sugars		0% ¹
Protein	28 g	38%¹
Vitamin D	25 mcg (1,000 IU)	125%
Calcium (naturally occurring)	150 mg	12%
Iron (naturally occurring)	3 mg	17%
Potassium (naturally occurring)	90 mg	2%
Vitamin A	280 mcg	31%
Vitamin C (naturally occurring)	1.2 mg	1%
Vitamin E (from Sunflower Oil)	15 mg	100%
Vitamin K	130 mcg	108%
Magnesium (naturally occurring)	27 mg	6%
Chromium (from Brown Rice Chelate)	35 mcg	100%

25. Another of the nation's leading nutrient supplement companies, Nature's Bounty, correctly advertises its Complete Protein & Vitamin Shake Mix⁵ in the same manner.

⁵ https://www.amazon.com/Natures-Bounty-Complete-Collagen-Chocolate/dp/B08YS3TWTT/ref=sr_1_6?crd=1XIVG45GIOYG2&keywords=Protein+shake+mi

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[x&qid=1649130728&sprefix=protein+shake+mi%2Caps%2C154&sr=8-6](https://www.naturesbounty.com/products/complete-protein-vitamin-shake-mix-decadent-chocolate-capsules) (last visited July 8, 2022).

DIRECTIONS: Mix two (2) scoops (33 g) with 8 oz of water. To increase the protein content to more than 20 grams per serving and enjoy a creamy texture, mix with 8 oz of skim milk. Shake can also be enjoyed by mixing with you favorite vegetarian milk alternative. Best served ice cold.

Supplement Facts		
Serving Size 2 Scoops (33 g) Servings Per Container about 13		
Amount Per Serving		%Daily Value
Calories	110	
Total Fat	3 g	4%**
Saturated Fat	1 g	5%**
Cholesterol	25 mg	8%
Total Carbohydrate	11 g	4%**
Dietary Fiber	6 g	21%**
Total Sugars	2 g	***
Includes 2g Added Sugars		4%**
Protein	15 g	30%**
Vitamin C (as Ascorbic Acid)	60 mg	67%
Vitamin D (as D2 Ergocalciferol)	20 mcg (800 IU)	100%
Thiamin (Vitamin B-1) (as Thiamin Hydrochloride)	1.5 mg	125%
Riboflavin (Vitamin B-2)	1.7 mg	131%
Niacin (as Niacinamide)	20 mg	125%
Vitamin B-6 (as Pyridoxine Hydrochloride)	2 mg	118%
Folate	666 mcg DFE (400 mcg Folic Acid)	167%
Vitamin B-12 (as Cyanocobalamin)	6 mcg	250%
Biotin (as d-Biotin)	300 mcg	1,000%
Pantothenic Acid (as d-Calcium Pantothenate)	10 mg	200%
Calcium	230 mg	18%
Iron	3 mg	17%
Phosphorus	230 mg	18%
Magnesium	50 mg	12%
Sodium	100 mg	4%
Potassium	380 mg	8%
Digestive Enzyme Blend Bromelain (from Pineapple), Papain (from Papaya fruit)	11 mg	***
Flaxseed which typically contains: Alpha-Linolenic Acid (Omega-3) Other Fatty Acids	888 mg 218 mg	*** ***
Collagen	3 g	***

**Percent Daily Values are based on a 2,000 calorie diet.
***Daily Value not established.

26. Thus, consumers are accustomed to seeing dietary shake mix products' front labels advertise the grams of protein based on the protein contained in the products *alone*.

1 27. The amount of protein contained in the Products is a material factor to Plaintiff and
2 other reasonable consumers as the Products serve as nutritional shakes and meal replacements and
3 protein is an essential nutrient for the human body.

4 28. Defendant's decision to highlight the purported protein in the Products through the
5 conspicuous Protein Representation, in addition to the purchasing decisions and beliefs from
6 consumers such as Plaintiff and the reviews depicted above, further demonstrate the materiality of
7 the Protein Representation.

8 29. As the entity ultimately responsible for the manufacturing and advertising of the
9 Products, Defendant is responsible for the accuracy of the information conveyed about the
10 Products, including the representations on the front packaging.

11 30. Defendant knew or should have known that the Products' advertising is deceptive,
12 and that reasonable consumers would believe the Products contain the number of grams of protein
13 per serving promised on the Products' front label. For example, Defendant should have been
14 aware of the aforementioned complaints from its consumers regarding this precise issue.

15 31. Through the use of misleading representations, Defendant commands a price that
16 Plaintiff and the Classes would not have paid had they been fully informed. Had Plaintiff been
17 aware that the Product was falsely labeled, she would have purchased a different product or paid
18 significantly less for it. Alternatively, had Plaintiff been aware that the Product was falsely labeled
19 she would not have purchased the Product at all.

20 32. By the use of misleading representations, Defendant created increased market
21 demand for the Products and increased its market share relative to what its demand and share
22 would have been had it marketed the Products truthfully.

23 33. Plaintiff and members of the Classes were exposed to and justifiably relied upon
24 the same material misrepresentations (i.e., the Protein Representation) throughout the class period.
25 Specifically, each of the Products contain a Protein Representation, and each of the Products do
26 not contain the amount of protein promised in the Protein Representation. As such, this case fits
27 squarely within the parameters for class certification.

28

1 **CLASS ACTION ALLEGATIONS**

2 34. Plaintiff brings this class action pursuant to Fed. R. Civ. P 23 and all other
3 applicable laws and rules, individually, and on behalf of all members of the following Classes:

4 **California Class**

5 All residents of California who purchased the Products within the applicable statute of
6 limitation (“California Class”).

7 **California Consumer Subclass**

8 All residents of California who purchased the Product for personal, family, or household
9 purposes, within the applicable statute of limitations period (“California Consumer
10 Subclass”) (together with the California Class, the “Classes”).

11 35. Excluded from the Classes are the following individuals and/or entities: Defendant
12 and its parents, subsidiaries, affiliates, officers and directors, current or former employees, and any
13 entity in which Defendant has a controlling interest; all individuals who make a timely election to
14 be excluded from this proceeding using the correct protocol for opting out; and all judges assigned
15 to hear any aspect of this litigation, as well as their immediate family members.

16 36. Plaintiff reserves the right to modify or amend the definition of the proposed
17 Classes and/or add subclasses before the Court determines whether class certification is
18 appropriate.

19 37. Plaintiff is a member of all the Classes.

20 38. **Numerosity:** Members of each Class are so numerous and geographically
21 dispersed that individual joinder of all Class members is impracticable. The precise number of
22 Class members is unknown to Plaintiff but is likely to be ascertained by the Defendant’s records
23 or through sales data. At a minimum, there likely are tens of thousands of Class members.

24 39. **Commonality:** There are questions of law and fact common to the proposed
25 class(es). Common questions of law and fact include, without limitations:

- 26 a. whether Defendant’s course of conduct alleged herein violates the statutes and
27 other laws that are pled in this Complaint;

- 1 b. whether reasonable consumers would rely upon Defendant’s representations
2 about the Product and reasonably believe the Product’s Protein Representation;
3 c. whether Defendant knew or should have known its representations were false or
4 misleading;
5 d. whether Defendant was unjustly enriched by retaining monies from the sale of
6 the Products;
7 e. whether certification of each Class is appropriate under Rule 23;
8 f. whether Plaintiff and the members of each Class are entitled to declaratory,
9 equitable, or injunctive relief, and/or other relief, and the scope of such relief;
10 and
11 g. the amount and nature of the relief to be awarded to the Plaintiff and the Class,
12 including whether Plaintiff and the Class are entitled to punitive damages.
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15 40. **Typicality**: Plaintiff’s claims are typical of the other Class members because
16 Plaintiff, as well as Class members, purchased the Products. Plaintiff and the members of the
17 Classes relied on the representations made by the Defendant about the Products prior to
18 purchasing the Product. Plaintiff and the members of each Class paid for Defendant’s Products
19 and would not have purchased them (or would have paid substantially less for them) had they
20 known that the Defendant’s representations were untrue.
21

22 41. **Adequacy**: Plaintiff will fairly and adequately protect the interests of the proposed
23 Classes as her interests do not conflict with the interests of the members of the proposed Classes
24 she seeks to represent, and she has retained counsel competent and experienced in class action
25 litigation. Thus, the interests of the members of the Classes will be fairly and adequately protected
26 by Plaintiff and her counsel.
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1 42. **Predominance:** Pursuant to Rule 23(b)(3), the common issues of law and fact
2 identified in this Complaint predominate over any other questions affecting only individual
3 members of the Classes. Class issues fully predominate over any individual issue because no
4 inquiry into individual conduct is necessary; all that is required is a narrow focus on Defendant's
5 misconduct detailed at length in this Complaint.
6

7 43. **Superiority:** A class action is superior to all other available methods for the fair
8 and efficient adjudication of this litigation because individual litigation of each claim is
9 impractical. It would be unduly burdensome to have individual litigation of hundreds of thousands
10 of individual claims in separate lawsuits, every one of which would present the issues presented in
11 the Complaint/lawsuit. Further, because of the damages suffered by any individual Class member
12 may be relatively modest in relation to the cost of litigation, the expense and burden of individual
13 litigation make it difficult, if not impossible. Furthermore, many of the Class members may be
14 unaware that claims exist against the Defendant.
15

16 44. **Declaratory and Injunctive Relief:** Pursuant to Rule 23(b)(2), declaratory and
17 injunctive relief is appropriate in this matter. Defendant has acted or refused to act on grounds
18 generally applicable to Plaintiff and the other Class members, thereby making appropriate final
19 injunctive relief and declaratory relief, as described below, with respect to the Class members as a
20 whole. Unless a class-wide injunction is issued, Defendant will continue to advertise, market,
21 promote, and sell the Products in an unlawful and misleading manner, as described throughout this
22 Complaint, and members of the Classes will continue to be misled, harmed, and denied their rights
23 under the law.
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FIRST CLAIM FOR RELIEF
Violation of California’s Consumers Legal Remedies Act
California Civil Code § 1750, *et seq.*
(For the California Consumer Subclass)

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4 45. Plaintiff repeats the allegations contained in paragraphs 1-44 above as if fully set
5 forth herein.

6 46. Plaintiff brings this claim individually and on behalf of the members of the
7 proposed California Consumer Subclass against Defendant pursuant to California’s Consumers
8 Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.*

9 47. The Products are “goods” within the meaning of Cal. Civ. Code § 1761(a), and the
10 purchases of the Products by Plaintiff and members of the California Consumer Subclass
11 constitute “transactions” within the meaning of Cal. Civ. Code § 1761(e).

12 48. Cal. Civ. Code § 1770(a)(5) prohibits “[r]epresenting that goods or services have
13 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
14 have...” By promising a specific number of grams of protein in the Products’ Protein
15 Representation on the Products’ front labeling, Defendant has represented and continues to
16 represent that the Products have characteristics (i.e., provide a certain number of grams of protein)
17 that they do not have. Therefore, Defendant has violated section 1770(a)(5) of the CLRA.

18 49. Cal. Civ. Code § 1770(a)(7) prohibits “[r]epresenting that goods or services are of
19 a particular standard, quality, or grade, or that goods are of a particular style or model, if they are
20 of another.” By promising a specific number of grams of protein in the Products’ Protein
21 Representation on the Products’ front labeling, Defendant has represented and continues to
22 represent that the Products are of a particular standard (i.e., provide a certain number of grams of
23 protein) that they do not meet. Therefore, Defendant has violated section 1770(a)(7) of the CLRA.

24 50. Cal. Civ. Code § 1770(a)(9) prohibits “[a]dvertising goods or services with intent
25 not to sell them as advertised.” By promising a specific number of grams of protein in the
26 Products’ Protein Representation on the Products’ front labeling, Defendant has advertised the
27 Products with characteristics it intended not to provide to consumers. As such, Defendant has
28 violated section 1770(a)(9) of the CLRA.

1 57. The FAL makes it “unlawful for any person to make or disseminate or cause to be
2 made or disseminated before the public . . . in any advertising device . . . or in any other manner or
3 means whatever, including over the Internet, any statement, concerning . . . personal property or
4 services professional or otherwise, or performance or disposition thereof, which is untrue or
5 misleading and which is known, or which by the exercise of reasonable care should be known, to
6 be untrue or misleading.” Cal. Bus. & Prof. Code § 17500.

7 58. Defendant has represented and continues to represent to the public, including
8 Plaintiff and members of the proposed California Class, through its deceptive packaging, that the
9 Products provide more protein than they actually contain. Because Defendant has disseminated
10 misleading information regarding the Products, and Defendant knows, knew, or should have
11 known through the exercise of reasonable care that the representations were and continue to be
12 misleading, Defendant has violated the FAL.

13 59. As a result of Defendant’s false advertising, Defendant has and continues to
14 unlawfully obtain money from Plaintiff and members of the California Class. Plaintiff therefore
15 requests that the Court cause Defendant to restore this fraudulently obtained money to them and
16 members of the proposed California Class, to disgorge the profits Defendant made on these
17 transactions, and to enjoin Defendant from violating the FAL or violating it in the same fashion in
18 the future as discussed herein. Otherwise, Plaintiff and members of the proposed California Class
19 may be irreparably harmed and/or denied an effective and complete remedy.

20 **THIRD CLAIM FOR RELIEF**
21 **Violation of California’s Unfair Competition Law (“UCL”),**
22 **California Business & Professions Code § 17200, *et seq.***
 (For the California Class)

23 60. Plaintiff repeats the allegations contained in paragraphs 1-44 above as if fully set
24 forth herein.

25 61. Plaintiff brings this claim individually and on behalf of the members of the
26 proposed California Class against Defendant pursuant to California Business & Professions Code
27 § 17200 (“UCL”).
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1 62. The UCL, Cal. Bus. & Prof Code § 17200, provides, in pertinent part, that “unfair
2 competition shall mean and include unlawful, unfair or fraudulent business practices and unfair,
3 deceptive, untrue or misleading advertising”

4 63. Under the UCL, a business act or practice is “unlawful” if it violates any
5 established state or federal law. Defendant’s false and misleading advertising of the Products was
6 and continues to be “unlawful” because it violates the CLRA, the FAL, and other applicable laws
7 as described herein. As a result of Defendant’s unlawful business acts and practices, Defendant
8 has unlawfully obtained money from Plaintiff and members of the proposed California Class.

9 64. Under the UCL, a business act or practice is “unfair” if its conduct is substantially
10 injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and
11 unscrupulous, as the benefits for committing such acts or practices are outweighed by the gravity
12 of the harm to the alleged victims. Defendant’s conduct was and continues to be of no benefit to
13 purchasers of the Products, as it is misleading, unfair, unlawful, and is injurious to consumers who
14 rely on the packaging. Deceiving consumers into believing they will receive the grams of protein
15 promised on the front packaging of the Products, but providing fewer grams of protein than
16 advertised, is of no benefit to consumers. Therefore, Defendant’s conduct was and continues to be
17 “unfair.” As a result of Defendant’s unfair business acts and practices, Defendant has and
18 continues to unfairly obtain money from Plaintiff and members of the proposed California Class.

19 65. Under the UCL, a business act or practice is “fraudulent” if it actually deceives or
20 is likely to deceive members of the consuming public. Defendant’s conduct here was and
21 continues to be fraudulent because it has the effect of deceiving consumers into believing they will
22 receive more protein than what is promised on the front packaging of the Products. Because
23 Defendant misled Plaintiff and members of the California Class, Defendant’s conduct was
24 “fraudulent.” As a result of Defendant’s fraudulent business acts and practices, Defendant has and
25 continues to fraudulently obtain money from Plaintiff and members of the California Class.

26 66. Plaintiff requests that the Court cause Defendant to restore this unlawfully,
27 unfairly, and fraudulently obtained money to them, and members of the proposed California Class,
28 to disgorge the profits Defendant made on these transactions, and to enjoin Defendant from

1 violating the UCL or violating it in the same fashion in the future as discussed herein. Otherwise,
2 Plaintiff and members of the proposed California Class may be irreparably harmed and/or denied
3 an effective and complete remedy.

4 **FOURTH CLAIM FOR RELIEF**
5 **Breach of Express Warranty**
6 **Cal. Com. Code § 2313**
7 ***(For the California Class)***

8 67. Plaintiff repeats the allegations contained in paragraphs 1-44 above as if fully set
9 forth herein.

10 68. Plaintiff brings this claim individually and on behalf of the members of the
11 California Class against Defendant for breach of express warranty under Cal. Com. Code § 2313.

12 69. California’s express warranty statutes provide that “(a) Any affirmation of fact or
13 promise made by the seller to the buyer which relates to the goods and becomes part of the basis
14 of the bargain creates an express warranty that the goods shall conform to the affirmation or
15 promise,” and “(b) Any description of the goods which is made part of the basis of the bargain
16 creates an express warranty that the goods shall conform to the description.” Cal. Com. Code §
17 2313.

18 70. Defendant has expressly warranted on the Products’ front packaging that the
19 Products contain a specific number of grams of protein as stated on the Products’ Protein
20 Representation (e.g., “20g HIGH PROTEIN). However, as alleged herein, these express
21 representations are false and misleading. The Products contain far fewer grams of protein than
22 explicitly represented on the Products’ Protein Representation.

23 71. The Protein Representations on the Products’ front labels are: (a) an affirmation of
24 fact or promise made by Defendant to consumers that the Products contain the specific number of
25 grams of protein promised on the Protein Representation; (b) became part of the basis of the
26 bargain to purchase the Products when Plaintiff and other consumers relied on the representations;
27 and (c) created an express warranty that the Products would conform to the affirmations of fact or
28 promises. In the alternative, the representations about the Products are descriptions of goods which
were made as part of the basis of the bargain to purchase the Products, and which created an
express warranty that the Products would conform to the product descriptions.

1 of merchantability is implied in every contract for sale of the Products to California consumers.

2 81. By advertising the Products with the Protein Representations on the Products' front
3 label, Defendant made an implied promise on the container that the Products contain the specific
4 number of grams of protein. The Products, however, have not "conformed to the promises...made
5 on the container or label" because the Products contain far fewer grams of protein as promised on
6 the Products' front label. Plaintiff, as well as other California consumers, did not receive the goods
7 as impliedly warranted by Defendant to be merchantable. Therefore, the Products are not
8 merchantable under California law and Defendant has breached its implied warranty of
9 merchantability in regard to the Products.

10 82. If Plaintiff and members of the California Class had known that the Products'
11 Protein Representations were false and misleading, they would not have been willing to pay the
12 premium price associated with them. Therefore, as a direct and/or indirect result of Defendant's
13 breach, Plaintiff and members of the California Class have suffered injury and deserve to recover
14 all damages afforded under the law.

15 **SIXTH CLAIM FOR RELIEF**
16 **Quasi Contract/Unjust Enrichment/Restitution**
17 ***(for the Classes)***

18 83. Plaintiff repeats the allegations contained in paragraphs 1-44 above as if fully set
19 forth herein.

20 84. Plaintiff brings this claim individually and on behalf of the members of the
21 proposed California Class against Defendant for unjust enrichment.

22 85. As alleged herein, Defendant has intentionally and recklessly made misleading
23 representations to Plaintiff and members of the California Class to induce them to purchase the
24 Products. Plaintiff and members of the California Class have reasonably relied on the misleading
25 representations and have not received all of the benefits (i.e., grams of protein) promised by
26 Defendant through the Products' Protein Representations. Plaintiff and members of the proposed
27 California Class have therefore been induced by Defendant's misleading and deceptive
28 representations about the Products, and paid more money to Defendant for the Products than they
otherwise would and/or should have paid.

1 enrichment that Defendant obtained from Plaintiff and the proposed California Class as a result of
2 its unlawful, unfair and fraudulent business practices described herein;

3 E. An award of all economic, monetary, actual, consequential, and compensatory
4 damages caused by Defendant's conduct;

5 F. An award of nominal, punitive, and statutory damages;

6 H. An award to Plaintiff and her counsel of reasonable expenses and attorneys' fees;

7 I. An award to Plaintiff and the proposed California Class of pre and post-judgment
8 interest, to the extent allowable; and

9 J. For such further relief that the Court may deem just and proper.

10 **DEMAND FOR JURY TRIAL**

11 Plaintiff, on behalf of herself and the proposed Classes, hereby demands a jury trial with
12 respect to all issues triable of right by jury.

13
14
15 DATED: July 8, 2022

CUSTODIO & DUBEY, LLP

16 By: /s/ Robert Abiri

17
18 Robert Abiri (SBN 238681)
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24
25
26
27
28 *Attorney for Plaintiff and the
Putative Classes*

EXHIBIT "A"

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DECLARATION OF ELENA NACARINO

I, Elena Nacarino, hereby declare:

1. I am a Plaintiff in the action entitled *Nacarino v. KSF Acquisition Corporation*. I am a competent adult over eighteen years of age and I have personal knowledge of the facts set forth herein. If called as a witness, I could and would testify competently thereto.

2. I currently reside in the City of San Francisco located in the County of San Francisco.

3. In or around December 2021, I purchased the SlimFast Advanced Nutrition Smoothie Mix product in San Francisco, CA.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on 07/08/2022 at San Francisco, California.



Elena Nacarino

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Elena Nacarino, on behalf of herself and all other similarly situated

(b) County of Residence of First Listed Plaintiff San Francisco County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Robert Abiri, Esq. Custodio & Dubey LLP, 445 S. Figueroa Street, Suite 2520, Los Angeles, CA 90071, 213-593-9095

DEFENDANTS

KSF Acquisition, a corporation; and DOES 1 through 10, inclusive

County of Residence of First Listed Defendant Palm Beach County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

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

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- X 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation-Transfer 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332

Brief description of cause:

Violation of CA Statutes, Breach of Warranty, Unjust Enrichment, Common Law Fraud

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.

DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: X Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only)

X SAN FRANCISCO/OAKLAND

SAN JOSE

EUREKA-MCKINLEYVILLE

DATE 07/08/2022

SIGNATURE OF ATTORNEY OF RECORD

/s/ Robert Abiri

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”

Date and Attorney Signature. Date and sign the civil cover sheet.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Actions Claim Protein Content Is Overstated on SlimFast Smoothie, Shake Mix Labels](#)
