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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
12

13 JACOB SCHEIBE, *individually and on*)
14 *behalf of all those similarly situated,*)
15)
16 *Plaintiff,*)

No. _____

v.)

CLASS ACTION COMPLAINT

17 1ST PHORM INTERNATIONAL, LLC, *a*)
18 *Missouri limited liability company,*)
19)
20 *Defendant.*)

JURY TRIAL DEMANDED

21 _____
22
23 Jacob Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by
24 and through undersigned counsel, hereby brings this action against 1st Phorm International, LLC
25 (“1st Phorm”), alleging that “Ultra Performance Hydration Sticks” (“the Products”), a dietary
26 supplement manufactured, packaged, labeled, advertised, distributed, and sold by Defendant, is
27 misbranded and falsely advertised, and upon information and belief and investigation of counsel
28 alleges as follows:

PARTIES

1. Plaintiff Jacob Scheibe is and at all times relevant was a citizen of the state of
California, domiciled in San Diego, California.

1 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
2 numbers of consumers were committed or casual adherents to so-called “clean label” food
3 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-
4 natural” (66 percent). These were the three most attractive attributes in the consumer survey.
5 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
6 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

7
8 17. This consumer preference has led to an explosion in the category of “clean label”
9 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
10 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
11 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
12 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

13
14 18. On or about October 18, 2022, Mr. Scheibe purchased 1st Phorm’s Ultra
15 Performance Hydration sticks, mango, watermelon, and citrus flavors, from the company’s
16 website (Order No. 1P-121383770499) for \$113.10 inclusive of tax.

17 19. Mr. Scheibe is a student who has recently sought to lose weight and gain muscle.
18 He carefully reviews labels, including the Products’ labels, to ensure that he consumes only
19 natural ingredients and avoids artificial flavors and ingredients.

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21 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

22 20. Defendant 1st Phorm formulates, manufactures, and sells a dietary supplement
23 called “Ultra Performance Hydration Sticks.” These dietary supplement powders purport to
24 increase hydration in order to make workouts more effective and efficient and to speed muscle
25 recovery and growth.

26 21. The front label (or “principal display panel”) of the Products prominently state
27 they are “Naturally Flavored,” with attention drawn to the claim through graphic elements. In
28

1 addition, the front label uses depictions of fruits to reinforce the claim that the Products are
2 flavored using only natural sources:



1 22. These natural flavoring claims are false. The Products are flavored using an
2 artificial flavoring, DL malic acid, that is derived from petrochemicals.

3 23. All flavors of the Products state, on the back label, that they contain “malic acid.”
4 The back labels also state that the Products contain “Natural Flavors.”
5

6 24. While there is a naturally occurring form of malic acid, it is extremely expensive
7 to formulate in large quantities and is almost never used in mass-produced food products.
8 Instead, testing by an independent third-party laboratory has confirmed that the malic acid that
9 Defendant uses in these Products is DL malic acid, a synthetic substance derived from
10 petrochemicals.¹

11 25. This type of malic acid is manufactured in petrochemical plants from benzene or
12 butane—components of gasoline and lighter fluid, respectively—through a series of chemical
13 reactions, some of which involve highly toxic chemical precursors and byproducts.
14

15 26. Fruit flavors in a food are imparted by the interactions between sugars, acids,
16 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined
17 by the ratio between the sugars (mainly glucose and fructose) and acids, such as citric and malic
18 acid.

19 27. The quality and consumer acceptability of fruit flavors is based on their perceived
20 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
21 as oranges, lemons, mangoes, and strawberries have their own natural ratio of sugars and acids.
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23 28. The DL malic acid used in the Products is used to create, simulate, and/or reinforce
24 the sweet and tart taste that consumers associate with the fruit flavors stated on the labels.
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¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1 29. Defendant uses the petrochemical-derived DL malic acid in its Products to create
2 a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings,
3 misbranding the Products and deceiving consumers.

4 30. The ingredients on the Products' label are declared in a way that is misleading and
5 contrary to law, because Defendant designates the ingredient by its generic name, "malic acid,"
6 instead of by its specific name, "DL malic acid."
7

8 **C. Requirements for Labelling**

9 31. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
10 ("FDCA") require that a food's label accurately describe the nature of the food product and its
11 characterizing flavors. 21 C.F.R. § 102.5(a).

12 32. Artificial flavor is defined as "any substance, the function of which is to impart
13 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
14 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
15 products, or fermentation products thereof." 21 C.F.R § 101.22(a)(1).
16

17 33. Natural flavor is defined as "essential oil, oleoresin, essence or extractive, protein
18 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the
19 flavoring constituents" from fruits or vegetables, "whose significant function in food is flavoring
20 rather than nutritional." 21 C.F.R § 101.22(a)(3).
21

22 34. Any recognizable primary flavor identified directly or indirectly on the front label
23 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
24 as a "characterizing flavor." 21 C.F.R. § 101.22.

25 35. Here, the Products' labels both state the characterizing flavors and reinforce the
26 claim that this characterizing flavor is achieved by using only natural flavors through use of
27 depictions of fruits.
28

1 36. If a food product’s characterizing flavor is not created exclusively by the named
2 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
3 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
4 which “simulates, resembles or reinforces” the characterizing flavor, the front label must
5 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
6 101.22(i)(2).
7

8 37. A food product’s label also must include a statement of the “presence or absence
9 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
10 ingredient(s) or component(s) in the food has a material bearing on price or consumer
11 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
12 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.
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14 38. Such statement must be in boldface print on the front display panel and of
15 sufficient size for an average consumer to notice.

16 39. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
17 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

18 40. By changing the ratio between sugars and acids that is naturally found in fruits
19 such as oranges, lemons, mangoes, and strawberries, the DL malic acid used in the Products
20 reinforces, simulates, or creates the characterizing flavors, regardless of any other effect it may
21 have or purpose for which it was included.
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23 41. DL malic acid is not a “natural flavor” as this term is defined by federal and state
24 regulations and is not derived from a fruit or vegetable or any other natural source. The Products
25 therefore contain artificial flavorings.
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1 42. Because the Products contain artificial flavoring, California law requires the
2 Products to display both front- and back-label disclosures to inform consumers that the Products
3 are artificially flavored.

4 43. The Products have none of the required disclosures regarding the use of artificial
5 flavors.

6 44. Plaintiff reserves the right to amend this Complaint to add further products that
7 contain similar label misrepresentations as testing continues.

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

14 50. Plaintiff reviewed the label on the Products prior to his purchase, and reviewed
15 the natural flavoring claims being made there and. Consumers such as Plaintiff who viewed the
16 Products’ labels reasonably understood Defendant’s “Naturally Flavored” statements, as well as
17 its failure to disclose the use of artificially derived malic acid, to mean that the Products contain
18 only natural flavorings. This representation was also false.

19 51. Consumers including Plaintiff reasonably relied on Defendant’s statements such
20 that they would not have purchased the Products from Defendant if the truth about the Products
21 was known, or would have only been willing to pay a substantially reduced price for the Products
22 had they known that Defendant’s representations were false and misleading.
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1 individual Class members would use to prove those elements in individual actions alleging the
2 same claims.

3 59. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all
4 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
5 members geographically dispersed throughout the state.
6

7 60. **Existence and Predominance of Common Questions of Law and Fact – Rule**
8 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
9 predominate over any questions that affect only individual Class members. Common legal and
10 factual questions and issues include but are not limited to:

- 11 a. Whether the marketing, advertising, packaging, labeling, and other
12 promotional materials for Defendant’s Products is misleading and deceptive;
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14 b. Whether a reasonable consumer would understand Defendant’s “Naturally
15 Flavored” claims to indicate that the Products contained only natural
16 flavorings, and reasonably relied upon those representations;
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18 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and
19 Class members;
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21 d. the proper amount of damages and disgorgement or restitution;
22 e. the proper scope of injunctive relief; and
23 f. the proper amount of attorneys’ fees.

24 61. Defendant engaged in a common course of conduct in contravention of the laws
25 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
26 of law, business practices, and injuries are involved. Individual questions, if any, pale by
27 comparison, in both quality and quantity, to the numerous common questions that predominate
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1 this action. The common questions will yield common answers that will substantially advance
2 the resolution of the case.

3 62. In short, these common questions of fact and law predominate over questions that
4 affect only individual Class members.

5 63. **Typicality – Rule 23(a)(3):** Plaintiff’s claims are typical of the claims of the Class
6 members because they are based on the same underlying facts, events, and circumstances
7 relating to Defendant’s conduct.

8 64. Specifically, all Class members, including Plaintiff, were harmed in the same way
9 due to Defendant’s uniform misconduct described herein; all Class members suffered similar
10 economic injury due to Defendant’s misrepresentations; and Plaintiff seeks the same relief as
11 the Class members.

12 65. There are no defenses available to Defendant that are unique to the named
13 Plaintiff.

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

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

21 68. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other
22 available means for the fair and efficient adjudication of this controversy for at least the
23 following reasons

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- a. the damages individual Class members suffered are small compared to the burden and expense of individual prosecution of the complex and extensive litigation needed to address Defendant’s conduct such that it would be virtually impossible for the Class members individually to redress the wrongs done to them. In fact, they would have little incentive to do so given the amount of damage each member has suffered when weighed against the costs and burdens of litigation;
- b. the class procedure presents fewer management difficulties than individual litigation and provides the benefits of single adjudication, economies of scale, and supervision by a single Court;
- c. the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for Defendant; and
- d. the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would be dispositive of the interests of other Class members or would substantively impair or impede their ability to protect their interests.

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

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

1 purchased the Products, entitling Plaintiff and putative class members to an award of punitive
2 damages under Mo. Rev. Stat §§ 407.025 and 510.265.

3 79. Plaintiff and the putative class members are entitled to an award of punitive
4 damages in the amount that is five (5) times their actual damages or \$500,000 per violation,
5 whichever is greater under Mo. Rev. Stat. § 510.265.
6

7 **COUNT 2**
8 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
9 **SECTION 17200 *et seq.* — “UNFAIR” CONDUCT**
10 **California Subclass**

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

13 81. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
14 a result of Defendant’s actions as set forth herein.

15 82. Defendant’s actions as alleged in this Complaint constitute “unfair” conduct
16 within the meaning of California Business and Professions Code Section 17200, *et seq.*

17 83. Defendant’s business practices, as alleged herein, are “unfair” because it fails to
18 disclose accurately the synthetic flavoring used in the Products.

19 84. As a result of this “unfair” conduct, Plaintiff expended money and engaged in
20 activities it would not otherwise have spent or conducted.

21 85. Defendant’s wrongful business practices alleged herein constituted, and continue
22 to constitute, a continuing course of unfair competition since it continues to market and sell its
23 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
24 oppressive, unscrupulous and/or substantially injurious to its customers.
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26 86. Defendant publicly disseminated untrue or misleading representations regarding
27 the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
28 should have known, were untrue or misleading.

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103. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order of this court enjoining Defendant from continuing to engage in “unlawful” business practices and any other act prohibited by law, including those acts set forth in this Complaint, and further seeks all other relief allowable under Business and Professions Code Section 17200, *et seq.*

COUNT 5
VIOLATION OF CALIFORNIA BUSINESS &
PROFESSIONS CODE SECTION 17500 *et seq.*
California Subclass

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

105. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as a result of Defendant’s actions as set forth above.

106. Defendant engaged in advertising and marketing to the public and offered for sale advertising services on a nationwide basis, including in California.

107. Defendant engaged in the advertising and marketing alleged herein with the intent to directly or indirectly induce the sale of the Products to consumers.

108. Defendant’s advertisements and marketing representations regarding the characteristics of the Products were false, misleading, and deceptive as set forth above.

109. At the time it made and disseminated the statements alleged herein, Defendant knew or should have known that the statements were untrue or misleading, and acted in violation of Business and Professions Code Section 17500, *et seq.*

110. Plaintiff seeks injunctive relief and all other relief allowable under Business and Professions Code Section 17500, *et seq.*

1 **COUNT 6**
2 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**
3 **CAL. CIV. CODE § 1750 *ET SEQ.***
4 **California Subclass**

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

7 46. Plaintiff is a “consumer” within the meaning of the Consumer Legal Remedies
8 Act (“CLRA”), Cal. Civ. Code § 1761(d).

9 47. The sale of Defendant’s Products to Plaintiff and Class members was a
10 “transaction” within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

11 48. The Products purchased by Plaintiff and Class members are “goods” within the
12 meaning of the CLRA, Cal. Civ. Code § 1761(a).

13 49. As alleged herein, Defendant’s business practices are a violation of the CLRA
14 because Defendant deceptively failed to reveal facts that are material in light of the flavoring
15 representations that were made by Defendant on the labels of its Products.

16 50. Defendant’s ongoing failure to provide material facts about its Products on its
17 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:

- 18
- 19 a. Defendant’s acts and practices constitute misrepresentations that its Products have
20 characteristics, benefits, or uses which they do not have;
 - 21 b. Defendant misrepresented that its Products are of a particular standard, quality,
22 and/or grade, when they are of another;
 - 23 c. Defendant’s acts and practices constitute the advertisement of goods, without the
24 intent to sell them as advertised;
 - 25 d. Defendant’s acts and practices fail to represent that transactions involving its
26 Products involve actions that are prohibited by law, particularly the use of
27 misleading nutritional labelling; and
28

1 e. Defendant’s acts and practices constitute representations that its Products have
2 been supplied in accordance with previous representations when they were not.

3 51. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
4 entitling them to injunctive relief, disgorgement, and restitution.

5 52. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
6 particular violations of the CLRA described herein and demanded Defendant rectify the actions
7 described above by providing complete monetary relief, agreeing to be bound by their legal
8 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
9 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
10

11 53. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
12 to recover actual damages sustained as a result of Defendant’s violations of the CLRA. Such
13 damages include, without limitation, monetary losses and actual, punitive, and consequential
14 damages, in an amount to be proven at trial.
15

16 54. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin
17 publication of misleading and deceptive nutritional labels on Defendant’s Products and to
18 recover reasonable attorneys’ fees and costs.

19 **COUNT 7**
20 **UNJUST ENRICHMENT**
21 **National Class**

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

24 56. Defendant, through its marketing and labeling of the Products, misrepresented and
25 deceived consumers regarding the flavoring in the Products.

26 57. Defendant did so for the purpose of enriching itself and it in fact enriched itself
27 by doing so.
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- e. Ordering Defendant to pay attorneys’ fees and litigation costs to Plaintiff;
- f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.

/s/ Charles C. Weller
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