Case	3:23-cv-00215-GPC-BLM Document 1 Fi	led 02/06/23 PageID.1 Page 1 of 23
1 2 3 4 5 6 7	Charles C. Weller (SBN: 207034) legal@cweller.com CHARLES C. WELLER, APC 11412 Corley Court San Diego, California 92126 Tel: 858.414.7465 Fax: 858.300.5137 Attorney for Plaintiff Jacob Scheibe IN THE UNITED STA	TES DISTRICT COURT
8 9		ISTRICT OF CALIFORNIA
10	JACOB SCHEIBE, individually and on behalf of all those similarly situated,	)
11	Plaintiff,	) ) No.
12	v.	) CLASS ACTION COMPLAINT
13	1ST PHORM INTERNATIONAL, LLC, a	) JURY TRIAL DEMANDED
14 15	Missouri limited liability company,	) JUNT TRIAL DEMANDED
16	Defendant.	
17		)
18	Jacob Scheibe ("Plaintiff"), individuall	y and on behalf of all others similarly situated, by
19	and through undersigned counsel, hereby bring	s this action against 1st Phorm International, LLC
20	("1st Phorm"), alleging that "Ultra Performan	nce Hydration Sticks" ("the Products"), a dietary
21	supplement manufactured, packaged, labeled,	advertised, distributed, and sold by Defendant, is
22 23	misbranded and falsely advertised, and upon in	formation and belief and investigation of counsel
23 24	alleges as follows:	
25		PARTIES
26	1. Plaintiff Jacob Scheibe is and a	at all times relevant was a citizen of the state of
27	California, domiciled in San Diego, California	L.
28		
	CLASS ACTIO	-1- DN COMPLAINT

1 2. Defendant 1st Phorm International, LLC is a Missouri limited liability company 2 with its principal place of business and headquarters in Clayton, Missouri. On information and 3 belief, decisions relating to marketing, labelling, and formulation of the Products are made at 4 this corporate headquarters. All members of the limited liability company are citizens and 5 residents of the state of Missouri. 6 JURISDICTION AND VENUE 7 3. This Court has subject matter jurisdiction over this action pursuant to the Class 8 9 Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the 10 United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original 11 jurisdiction of the federal district courts over "any civil action in which the matter in controversy 12 exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class 13 action in which . . . any member of a class of plaintiffs is a citizen of a State different from any 14 defendant." 28 U.S.C. § 1332(d)(2)(A). 15 4. Plaintiff seeks to represent Class members who are citizens of states different from 16 17 the Defendant. 18 5. The matter in controversy in this case exceeds \$5,000,000 in the aggregate, 19 exclusive of interests and costs. 20

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

- 7. In the alternative, this Court has jurisdiction over this matter pursuant to 28 U.S.C.
  § 1332(a). The amount in controversy exceeds \$75,000 exclusive of interest and costs.
- 8. This Court has personal jurisdiction over Defendant because this action arises out
  of and relates to Defendant's contacts with this forum.

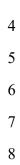
-2-CLASS ACTION COMPLAINT

27 28

1 9. Those contacts include but are not limited to sales of the Products directly to 2 commercial and individual consumers located in this district, including Plaintiff; shipping the 3 Products to commercial and individual consumers in this district, including Plaintiff; knowingly 4 directing advertising and marketing materials concerning the Products into this district through 5 wires and mails, both directly and through electronic and print publications that are directed to 6 commercial and individual consumers in this district; and operating an e-commerce web site 7 that offers the Products for sale to commercial and individual consumers in this district, as well 8 9 as offering the Products for sale through third-party e-commerce websites, through both of 10 which commercial and individual consumers residing in this district have purchased the 11 Products. 12 10. Defendant knowingly directs electronic activity and ships the Products into this 13 district with the intent to engage in business interactions for profit, and it has in fact engaged in 14 such interactions, including the sale of the Products to Plaintiff. 15 16 11. Defendant also sells the Products to retailers and wholesalers in this district for 17 the purpose of making the Products available for purchase by individual consumers in this 18 district. 19 12. Plaintiff's losses and those of other Class members were sustained in this district. 20 13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of 21 the events or omissions giving rise to Plaintiff's claims occurred within this district. 22 14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court 23 24 maintains personal jurisdiction over Defendant. 25 **FACTUAL ALLEGATIONS** 26 A. **Consumers Pay A Premium for "Clean Labels."** 27 15. Across the globe, consumers are increasingly attuned to claims that foods are "all-28 natural," minimally processed, or otherwise free of artificial flavors and preservatives. CLASS ACTION COMPLAINT

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	
5	natural" (66 percent). These were the three most attractive attributes in the consumer survey.
6	Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for "clean
7	label" foods. See https://www.lek.com/insights/ei/next-generation-mindful-food-consumption.
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	18. On or about October 18, 2022, Mr. Scheibe purchased 1st Phorm's Ultra
14	Performance Hydration sticks, mango, watermelon, and citrus flavors, from the company's
15	
16 17	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.
10	He carefully reviews labels, including the Products' labels, to ensure that he consumes only
20	natural ingredients and avoids artificial flavors and ingredients.
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	
	-4-
	CLASS ACTION COMPLAINT

1 addition, the front label uses depictions of fruits to reinforce the claim that the Products are 2 flavored using only natural sources: 3



9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

ist Phorms ryuration outside ficiently deliver to more effectively and efficiently deliver hydration to the bloodstream and muscles to help you perform your best during intense

Zero Calories

No Artificial Colors

Non GMO

Naturally Flavored

1

phorm

No Sugar

Gluten Free



phorm





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. <sup>1</sup>
11	25. This type of malic acid is manufactured in petrochemical plants from benzene or
12 13	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.
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 21	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.
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.
25	
26	
27	
28	<sup>1</sup> DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.
	-6- CLASS ACTION COMPLAINT

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

- 4 The ingredients on the Products' label are declared in a way that is misleading and 30. contrary to law, because Defendant designates the ingredient by its generic name, "malic acid," instead of by its specific name, "DL malic acid."
- 8

1

2

3

5

6

7

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

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

21

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 37. A food product's label also must include a statement of the "presence or absence 8

37. A food product's label also must include a statement of the "presence or absence
of any characterizing ingredient(s) or component(s)... when the presence or absence of such
ingredient(s) or component(s) in the food has a material bearing on price or consumer
acceptance ... and consumers may otherwise be misled about the presence or absence of the
ingredient(s) or component(s) in the food." 21 C.F.R. § 102.5.

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

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.

40. By changing the ratio between sugars and acids that is naturally found in fruits
such as oranges, lemons, mangoes, and strawberries, the DL malic acid used in the Products
reinforces, simulates, or creates the characterizing flavors, regardless of any other effect it may
have or purpose for which it was included.

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.

26

27

28

-8-CLASS ACTION COMPLAINT

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.

- 43. The Products have none of the required disclosures regarding the use of artificial flavors.
- 6 7

8

26

27

28

1

4

5

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

9 49. Labels are the chief means by which food product manufacturers convey critical 10 information to consumers, and consumers have been conditioned to rely on the accuracy of the 11 claims made on these labels. As the California Supreme Court stated in a case involving alleged 12 violations of the UCL and FAL, "Simply stated: labels matter. The marketing industry is based 13 on the premise that labels matter, that consumers will choose one product over another similar 14 product based on its label." Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 328 (2011). 15

16 50. Plaintiff reviewed the label on the Products prior to his purchase, and reviewed 17 the natural flavoring claims being made there and. Consumers such as Plaintiff who viewed the 18 Products' labels reasonably understood Defendant's "Naturally Flavored" statements, as well as 19 its failure to disclose the use of artificially derived malic acid, to mean that the Products contain 20 only natural flavorings. This representation was also false. 21

51. Consumers including Plaintiff reasonably relied on Defendant's statements such 22 that they would not have purchased the Products from Defendant if the truth about the Products 23 24 was known, or would have only been willing to pay a substantially reduced price for the Products 25 had they known that Defendant's representations were false and misleading.

> -9-CLASS ACTION COMPLAINT

	52. In the alternative, because of its deceptive and false labelling statements,
] ]	Defendant was enabled to charge a premium for the Products relative to key competitors'
ł	products, or relative to the average price charged in the marketplace.
	53. Consumers including Plaintiff especially rely on label claims made by food
	product manufacturers such as 1st Phorm, as they cannot confirm or disprove those claims
5	simply by viewing or even consuming the Products.
	54. Plaintiff suffered economic injury by Defendant's fraudulent and deceptive
	conduct as stated herein, and there is a causal nexus between Defendant's deceptive conduct and
	Plaintiff's injury.
	CLASS ACTION ALLEGATIONS
	55. Plaintiff brings this action individually and as representative of all those similarly
	situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers nationwide
	who purchased the Products within four years prior to the filing of this Complaint, as well as a
2	California Subclass of consumers in California who purchased the Products within four years
2	prior to the filing of this Complaint.
	56. Excluded from the Class and Subclass are Defendant and its affiliates, parents,
5	ubsidiaries, employees, officers, agents, and directors. Also excluded are any judicial officers
	presiding over this matter and the members of their immediate families and judicial staff.
	57. Plaintiff reserves the right to alter the Class definition, and to amend this
	Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable
	law.
	58. Certification of Plaintiff's claims for class-wide treatment is appropriate because
	Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
	-10-
	CLASS ACTION COMPLAINT

individual Class members would use to prove those elements in individual actions alleging the
 same claims.

3	59. Numerosity – Rule 23(a)(1): The size of the Class is so large that joinder of all
4	
5	Class members is impracticable. Plaintiff believes and avers there are thousands of Class
6	members geographically dispersed throughout the state.
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;
13	
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;
17	c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and
18	Class members;
19	d. the proper amount of damages and disgorgement or restitution;
20	e. the proper scope of injunctive relief; and
21	
22	
23	61. Defendant engaged in a common course of conduct in contravention of the laws
24	Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
25	of law, business practices, and injuries are involved. Individual questions, if any, pale by
26	comparison, in both quality and quantity, to the numerous common questions that predominate
27	
28	
	CLASS ACTION COMPLAINT

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. <b>Typicality – Rule 23(a)(3)</b> : Plaintiff's claims are typical of the claims of the Class
6 7	members because they are based on the same underlying facts, events, and circumstances
8	relating to Defendant's conduct.
9	64. Specifically, all Class members, including Plaintiff, were harmed in the same way
10	due to Defendant's uniform misconduct described herein; all Class members suffered similar
11	economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as
12	the Class members.
13 14	65. There are no defenses available to Defendant that are unique to the named
14	Plaintiff.
16	66. Adequacy of Representation – Rule 23(a)(4): Plaintiff is a fair and adequate
17	representative of the Class because Plaintiff's interests do not conflict with the Class members'
18	interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
19	against Defendant.
20	67. Furthermore, Plaintiff has selected competent counsel who are experienced in
21 22	class action and other complex litigation. Plaintiff and Plaintiff's counsel are committed to
22	prosecuting this action vigorously on behalf of the Class and have the resources to do so.
24	68. Superiority – Rule 23(b)(3): The class action mechanism is superior to other
25	available means for the fair and efficient adjudication of this controversy for at least the
26	following reasons
27	
28	-12-

1	a. the damages individual Class members suffered are small compared to the
2	burden and expense of individual prosecution of the complex and extensive
3	litigation needed to address Defendant's conduct such that it would be
4	virtually impossible for the Class members individually to redress the wrongs
5	
6	done to them. In fact, they would have little incentive to do so given the
7	amount of damage each member has suffered when weighed against the costs
8	and burdens of litigation;
9	b. the class procedure presents fewer management difficulties than individual
10	litigation and provides the benefits of single adjudication, economies of scale,
11	and supervision by a single Court;
12	c. the prosecution of separate actions by individual Class members would create
13	a risk of inconsistent or varying adjudications, which would establish
14	
15	incompatible standards of conduct for Defendant; and
16	d. the prosecution of separate actions by individual Class members would create
17	a risk of adjudications with respect to them that would be dispositive of the
18	interests of other Class members or would substantively impair or impede their
19	ability to protect their interests.
20	69. Unless the Class is certified, Defendant will retain monies received as a result of
21	its unlawful and deceptive conduct alleged herein.
22	
23	70. Unless a class-wide injunction is issued, Defendant will likely continue to
24	advertise, market, promote, and sell its Products in an unlawful and misleading manner, as
25	described throughout this Complaint, and members of the Class will continue to be misled,
26	harmed, and denied their rights under the law.
27	
28	-13-
	-13-

1	71. Ascertainability. To the extent ascertainability is required, the Class members are
2	readily ascertainable from Defendant's records and/or its agents' records of retail and online
3	sales, as well as through public notice.
4	72. Defendant has acted on grounds applicable to the Class as a whole, thereby
5 6	making appropriate final injunctive and declaratory relief concerning the Class as a whole.
7	COUNT 1
8	VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT ("MMPA") REV. STAT. MO. 407.020, et seq.
9	Nationwide Class
10	73. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
11	extent necessary, pleads this cause of action in the alternative.
12	74. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
13	a result of Defendant's actions as set forth herein.
14	75. The Products constitute "merchandise" as defined under § 407.010 of the Missouri
15	Revised Statutes.
16	76. As alleged herein, Defendant's business practices are a violation of the MMPA
17 18	because Defendant made material misrepresentations and deceptively failed to reveal facts that
19	are material in light of the flavoring representations that were made by Defendant on the labels
20	of its Products.
21	77. Plaintiff would not have purchased the Products if Defendant had not made the
22	representations concerning its product as set forth above and has been damaged in an amount to
23	be determined at trial, including an award of punitive damages due to Defendant's conduct as
24	described herein.
25	
26	78. Defendant's conduct as described above and incorporated herein was outrageous
27	due to Defendant's evil motive or reckless indifference to the rights of the consumers who
28	
	-14-
	CLASS ACTION COMPLAINT

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 6	whichever is greater under Mo. Rev. Stat. § 510.265.
7	COUNT 2
8	VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 et seq. — "UNFAIR" CONDUCT
9	California Subclass
10	80. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
11	extent necessary, pleads this cause of action in the alternative.
12	81. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
13	a result of Defendant's actions as set forth herein.
14	82. Defendant's actions as alleged in this Complaint constitute "unfair" conduct
15	within the meaning of California Business and Professions Code Section 17200, et seq.
16 17	83. Defendant's business practices, as alleged herein, are "unfair" because it fails to
17	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.
25 26	86. Defendant publicly disseminated untrue or misleading representations regarding
20	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.
	-15-
	CLASS ACTION COMPLAINT

1	87. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
2	of this court enjoining Defendant from continuing to engage in "unfair" business practices and
3	any other act prohibited by law, including those acts set forth in this Complaint, and further seek
4	all other relief allowable under Business and Professions Code Section 17200, et seq.
5	COUNT 3
6	VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 <i>et seq.</i> — "FRAUDULENT" CONDUCT
7	California Subclass
8 9	88. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
10	extent necessary, plead this cause of action in the alternative.
11	89. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
12	a result of Defendant's actions as set forth above.
13	90. Defendant's actions as alleged in this Complaint constitute "fraudulent" conduct
14	within the meaning of California Business and Professions Code Section 17200 et seq.
15	91. Defendant's business practices, as alleged herein, are "fraudulent" because it fails
16	to disclose accurately the synthetic flavoring used in the Products.
17	92. As a result of this "fraudulent" conduct, Plaintiff expended money and engaged in
18	activities it would not otherwise have spent or conducted.
19	
20	93. Defendant's wrongful business practices alleged herein constituted, and continue
21	to constitute, a continuing course of unfair competition since it continues to market and sell its
22	products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
23	oppressive, unscrupulous and/or substantially injurious to its customers.
24	94. Defendant publicly disseminated untrue or misleading representations regarding
25	the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
26	should have known, were untrue or misleading.
27	should have known, were undue of misicading.
28	
	-16- CLASS ACTION COMPLAINT

1	95. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an
2	order of this Court enjoining Defendant from continuing to engage in "fraudulent" business
3	practices and any other act prohibited by law, including those acts set forth in this Complaint,
4	and further seeks all other relief allowable under Business and Professions Code Section 17200,
5	et seq.
6	COUNT 4
7	<b>VIOLATION OF CALIFORNIA BUSINESS &amp; PROFESSIONS CODE</b>
8	SECTION 17200 <i>et seq.</i> — "UNLAWFUL" CONDUCT California Subclass
9	96. Plaintiff reallege the preceding paragraphs as if fully set forth herein and, to the
10	extent necessary, pleads this cause of action in the alternative.
11	
12	97. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
13	a result of Defendant's actions as set forth above.
14	98. Defendant's actions as alleged in this Complaint constitute "unlawful" conduct
15	within the meaning of California Business and Professions Code Section 17200, et seq.
16	99. Defendant's business practices, as alleged herein, are "unlawful" because it fails
17 18	disclose accurately the synthetic flavoring used in the Products.
19	100. As a result of this "unlawful" conduct, Plaintiff expended money and engaged in
20	activities he would not otherwise have spent or conducted.
21	101. Defendant's business practices alleged herein constituted, and continue to
22	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.
25 26	102. Defendant publicly disseminated untrue or misleading representations regarding
20	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.
20	-17-
	CLASS ACTION COMPLAINT

1	103. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
2	of this court enjoining Defendant from continuing to engage in "unlawful" business practices
3	and any other act prohibited by law, including those acts set forth in this Complaint, and further
4	seeks all other relief allowable under Business and Professions Code Section 17200, et seq.
5 6	COUNT 5
7	VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17500 <i>et seq</i> .
	California Subclass
8 9	104. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
10	extent necessary, pleads this cause of action in the alternative.
11	105. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
12	a result of Defendant's actions as set forth above.
13	106. Defendant engaged in advertising and marketing to the public and offered for sale
14	advertising services on a nationwide basis, including in California.
15	107. Defendant engaged in the advertising and marketing alleged herein with the intent
16	to directly or indirectly induce the sale of the Products to consumers.
17	
18	108. Defendant's advertisements and marketing representations regarding the
19	characteristics of the Products were false, misleading, and deceptive as set forth above.
20	109. At the time it made and disseminated the statements alleged herein, Defendant
21	knew or should have known that the statements were untrue or misleading, and acted in violation
22	of Business and Professions Code Section 17500, et seq.
23	110. Plaintiff seeks injunctive relief and all other relief allowable under Business and
24	Professions Code Section 17500, et seq.
25	Thessions code Section 17500, et seq.
26	
27	
28	
	-18-
	CLASS ACTION COMPLAINT

2:23-cv-00215-GPC-BLM Document 1 Filed 02/06/23 PageID.19 Page 19 of 23
COUNT 6 VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT, CAL. CIV. CODE § 1750 <i>ET SEQ</i> . California Subclass
45. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
extent necessary, pleads this cause of action in the alternative.
46. Plaintiff is a "consumer" within the meaning of the Consumer Legal Remedies
Act ("CLRA"), Cal. Civ. Code § 1761(d).
47. The sale of Defendant's Products to Plaintiff and Class members was a
"transaction" within the meaning of the CLRA, Cal. Civ. Code § 1761(e).
48. The Products purchased by Plaintiff and Class members are "goods" within the
meaning of the CLRA, Cal. Civ. Code § 1761(a).
49. As alleged herein, Defendant's business practices are a violation of the CLRA
because Defendant deceptively failed to reveal facts that are material in light of the flavoring
representations that were made by Defendant on the labels of its Products.
50. Defendant's ongoing failure to provide material facts about its Products on its
labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:
a. Defendant's acts and practices constitute misrepresentations that its Products have
characteristics, benefits, or uses which they do not have;
b. Defendant misrepresented that its Products are of a particular standard, quality,
and/or grade, when they are of another;
c. Defendant's acts and practices constitute the advertisement of goods, without the
intent to sell them as advertised;
d. Defendant's acts and practices fail to represent that transactions involving its
Products involve actions that are prohibited by law, particularly the use of
misleading nutritional labelling; and
-19- CLASS ACTION COMPLAINT

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 7	particular violations of the CLRA described herein and demanded Defendant rectify the actions
8	described above by providing complete monetary relief, agreeing to be bound by their legal
9	obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
10	notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
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	
15	damages, in an amount to be proven at trial.
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 20	COUNT 7 UNJUST ENRICHMENT
	National Class
21 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.
28	
	-20-
	CLASS ACTION COMPLAINT

1	58. Consumers conferred a benefit on Defendant by purchasing the Products,
2	including an effective premium above their true value. Defendant appreciated, accepted, and
3	
4	retained the benefit to the detriment of consumers.
5	59. Defendant continues to possess monies paid by consumers to which Defendant is
6	not entitled.
7	60. Under the circumstances it would be inequitable for Defendant to retain the benefit
8	conferred upon it and Defendant's retention of the benefit violates fundamental principles of
9	justice, equity, and good conscience.
10	61. Plaintiff seeks disgorgement of Defendant's ill-gotten gains and restitution of
11	Defendant's wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed
12	appropriate by the Court, and such other relief as the Court deems just and proper to remedy
13	Defendant's unjust enrichment.
14	
15	62. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
16	a result of Defendant's actions as set forth above.
17 18	COUNT 8 BREACH OF EXPRESS WARRANTY
19	National Class
20	63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
20 21	
20 21 22	63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
21	63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.
21 22	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,</li> </ul>
21 22 23	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products are "Naturally Flavored."</li> </ul>
<ul><li>21</li><li>22</li><li>23</li><li>24</li></ul>	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products are "Naturally Flavored."</li> <li>65. The front labeling with the representations of fruits is also misleading and further creates an express warranty to support the representation that the Products are "Naturally</li> </ul>
<ul> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> </ul>	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products are "Naturally Flavored."</li> <li>65. The front labeling with the representations of fruits is also misleading and further</li> </ul>
<ul> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> </ul>	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products are "Naturally Flavored."</li> <li>65. The front labeling with the representations of fruits is also misleading and further creates an express warranty to support the representation that the Products are "Naturally</li> </ul>
<ul> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> </ul>	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products are "Naturally Flavored."</li> <li>65. The front labeling with the representations of fruits is also misleading and further creates an express warranty to support the representation that the Products are "Naturally Flavored."</li> </ul>
<ul> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> <li>26</li> <li>27</li> </ul>	<ul> <li>63. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.</li> <li>64. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that the Products are "Naturally Flavored."</li> <li>65. The front labeling with the representations of fruits is also misleading and further creates an express warranty to support the representation that the Products are "Naturally Flavored."</li> </ul>

66. Defendant's express warranties, and its affirmations of fact and promises made to Plaintiff and the Class and regarding the Products, became part of the basis of the bargain between Defendant and Plaintiff and the Class, which creates an express warranty that the Products would conform to those affirmations of fact, representations, promises, and descriptions.

67. The Products do not conform to the express warranty that the Products were "Naturally Flavored," because they are flavored by and contain ingredients that are unnatural and synthetic, *i.e.*, DL malic acid.

10 68. As a direct and proximate cause of Defendant's breach of express warranty, 11 Plaintiff and Class members have been injured and harmed because: (a) they would not have 12 purchased the Products on the same terms if they knew the truth about the Products' unnatural 13 ingredients; (b) they paid a price premium based on Defendant's express warranties; and (c) the 14 Products do not have the characteristics, uses, or benefits that were promised. 15

## **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff respectfully request the Court grant the following relief against 18 Defendant:

a. Certifying the Class;

b. Declaring that Defendant violated the MMPA, CLRA, UCL, and FAL;

c. Awarding actual and other damages as permitted by law, and/or ordering an accounting by Defendant for any and all profits derived by Defendant from the unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein; 24 25 d. Ordering an awarding of injunctive relief as permitted by law or equity, including

- enjoining Defendant from continuing the unlawful practices as set forth herein, and ordering Defendant to engage in a corrective advertising campaign;
- 28

26

27

1

2

3

4

5

6

7

8

9

16

19

20

21

22

23

## Case 3:23-cv-00215-GPC-BLM Document 1 Filed 02/06/23 PageID.23 Page 23 of 23

1	e. Ordering Defendant to pay attorneys' fees and litigation costs to Plaintiff;
2	f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts
3	awarded; and
4	g. Such other relief as the Court may deem just and proper.
5	
6	TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.
7 8	<u>/s/ Charles C. Weller</u> Charles C. Weller (Cal. SBN: 207034) Attorney for Plaintiff
9	CHARLES C. WELLER, APC
10	11412 Corley Court San Diego, California 92126 Tel: 858.414.7465
11	Tel: 858.414.7465 Fax: 858.300.5137
12	February 6, 2023
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	22
	-23- CLASS ACTION COMPLAINT

## **ClassAction.org**

This complaint is part of ClassAction.org's searchable <u>class action lawsuit database</u>