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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MOLLY BROWN, PARSA MILLER, and
LAUREN MORGAN as individuals, on behalf of themselves, the general public and those similarly situated,

Plaintiffs,

v.

NATURE’S PATH FOODS, INC.,

Defendant.

CASE NO. 4:21-cv-05132-HSG

SECOND AMENDED CLASS ACTION COMPLAINT FOR VIOLATION OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT; FALSE ADVERTISING; FRAUD, DECEIT, AND/OR MISREPRESENTATION; UNFAIR BUSINESS PRACTICES; AND UNJUST ENRICHMENT

JURY TRIAL DEMANDED

INTRODUCTION

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2 1. Plaintiffs Molly Brown, Parsa Miller, and Lauren Morgan, by and through their
3 counsel, bring this class action against Defendant Nature’s Path Foods, Inc. to seek redress for
4 Defendant’s unlawful and deceptive practices in labeling and marketing its Nature’s Path
5 products.

6 2. Consumers are increasingly health conscious and, as a result, many consumers
7 seek foods high in protein. To capitalize on this trend, Defendant prominently labels its Nature’s
8 Path products as providing specific amounts of protein per serving depending on the product,
9 such as “**10g PROTEIN**” on the front label of its Hemp Hearts Granola.

10 3. However, the Food and Drug Administration (“FDA”) prohibits such front label
11 claims about the amount of protein, unless manufactures also provide additional information in
12 the nutrition fact panel about how much of the recommended daily value for protein that the
13 product will actually provide. 21 C.F.R. §§ 101.9(c)(7)(i), 101.13(b), (n). That is because the
14 FDA recognizes that (1) when manufacturers tout an amount of protein on the front label, that
15 amount is likely to be material to purchasing decisions, even though reasonable consumers may
16 not know the total amount of protein they need to ingest on a daily basis, and (2) not all proteins
17 are the same in their ability to meet human nutritional requirements, so a simple statement about
18 the number of grams does not actually inform consumers about how much usable protein they are
19 receiving. Some proteins are deficient in one or more of the nine amino acids essential to human
20 protein synthesis and/or are not fully digestible within the human gut. When a human body uses
21 up the least prevalent essential amino acid from a food product, protein synthesis shuts down and
22 all of the remaining amino acids from that protein source degrade mostly into waste. Likewise,
23 whatever portion of a protein source is not digestible is similarly unavailable for protein
24 synthesis. A protein’s ability to support human nutritional requirements is known as its “quality.”

25 4. The FDA required method for measuring protein quality is called the “Protein
26 Digestibility Corrected Amino Acid Score”—known by its acronym PDCAAS (pronounced Pee-
27 Dee-Kass). It combines a protein source’s amino acid profile and its percent digestibility into a
28 discount factor ranging from 0.0 to 1.0 that, when multiplied by the total protein quantity, shows

1 how much protein in a product is actually available to support human nutritional requirements.
2 The regulations term this the “corrected amount of protein per serving.” 21 C.F.R.
3 § 101.9(c)(7)(ii). For example, a PDCAAS of .5 means that only half of the protein in that
4 product is actually available to support human protein needs. If the product contained 10 grams
5 total protein per serving, the corrected amount of protein would be only 5 grams per serving. As a
6 result, protein products can vary widely in their ability to support human protein needs—even
7 between two comparator products with the same total protein quantity.

8 5. Because consumers are generally unaware about the usability of various proteins,
9 and may even be unaware of the total amount of usable protein they should ingest each day, the
10 FDA prohibits manufacturers from advertising or promoting their products with a protein claim
11 unless they have satisfied two requirements. First, the manufacturer must calculate the “corrected
12 amount of protein per serving” based on the quality of the product’s protein using the PDCAAS
13 method. Second, the manufacturer must use the PDCAAS computation to provide “a statement of
14 the corrected amount of protein per serving” in the nutrition facts panel (“NFP”) “expressed as” a
15 percent daily value (“%DV”) and placed immediately adjacent to the statement of protein
16 quantity. 21 C.F.R. § 101.9(c)(7)(i)-(iii). The %DV is the corrected amount of protein per serving
17 divided by the daily reference value for protein of 50 grams. *Id.* Using the same example of a
18 product containing 10 grams total protein per serving with a PDCAAS of .5, the %DV is 10%
19 (5g/50g). Had all of the protein in the product been useful in human nutrition, the %DV would be
20 20% (10g/50g). The FDA regulations that govern nutrient content claims are also clear that the
21 manufacturer may not make any front label claims about the amount of protein in the product
22 unless it complies with these two requirements. *See* 21 C.F.R. § 101.13(b) (“a nutrient content
23 claim[] may not be made on the label...unless the claim is made in accordance with this
24 regulation [i.e., § 101.13]...” and (n) (“[n]utrition labeling in accordance with § 101.9...shall be
25 provided for any food for which a nutrient content claim is made”); *accord* 58 Fed. Reg. 2302,
26 23310 (manufacturer can only make “a nutrient content claim . . . on the label or in labeling of a
27 food, provided that the food bears nutrition labeling that complies with the requirements in
28 proposed § 101.9.”)

1 6. The primary protein source in Defendant’s products are oats. Oats are a low quality
2 protein with a PDCAAS score of between 0.5 and 0.6, which means Defendant’s products will
3 provide nutritionally as little as *half* of their total protein quantity. Nevertheless, Defendant failed
4 to provide in the NFP a statement of the corrected amount of protein per serving calculated
5 according to the PDCAAS methodology and expressed as a %DV. Accordingly, the protein claims
6 on the front of the package, such as “**10g Protein**” are unlawful in violation of parallel state and
7 federal laws because Defendant did not comply with the regulatory requirements for making a
8 protein claim. 21 C.F.R. § 101.9(c)(7)(i), 101.13(b), (n). The failure to include a statement of the
9 corrected amount of protein inside the NFP also rendered the NFP itself unlawful. *Id.* §
10 101.9(c)(7)(i).

11 7. In addition to being unlawful under 21 CFR §§ 101.9 and 101.13, Defendant’s
12 prominent protein claim on the front of the package, in the absence of any statement of the
13 corrected amount of protein per serving expressed as a %DV in the NFP, also is likely to mislead
14 reasonable consumers. Consumers reasonably expect that Defendant’s products will actually
15 provide nutritionally the full amount of protein per serving claimed on the front of the product
16 package and stated in the protein quantity section of the NFP. But Defendant’s products do not do
17 so on account of their low protein quality. Had Defendant included a statement of the corrected
18 amount of protein per serving in the NFP, as it was required to do under the law, it would have
19 revealed that the product provides nutritionally as little as half of their total protein quantity. That
20 information was material to reasonable consumers.

21 8. Defendant compounds its unlawful and deceptive conduct because its prominent
22 “10g PROTEIN” on the front label is computed not only based on the uncorrected amount of
23 protein from low-value oats, but also only *if the cereal is eaten with milk*. Although Defendants
24 include a small, barely legible notation on the front label of the Hemp Hearts Granola that reads
25 “per serving with milk,”¹ and they state in the Nutrition Facts panel for the Hemp Hearts Granola
26 that there are 10 grams of protein in the product with milk and 6 grams protein without milk, they
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28 ¹ Not all of Defendant’s Products include, on the front label, an amount of protein that is inclusive of milk. Most of Defendant’s Products, in fact, do not.

1 fail to include a corrected amount of protein as a %DV for either of those computations. A person
2 who consumes the product without milk receives only approximately 3 grams of usable protein,
3 or 30% of the amount represented on the front panel.

4 **PARTIES**

5 9. Molly Brown is, and at all times alleged in this Class Action Complaint was, an
6 individual and a resident of Novato, California.

7 10. Parsa Miller is, and at all times alleged in this Class Action Complaint was, an
8 individual and a resident of Loomis, California.

9 11. Lauren Morgan is, and at all times alleged in this Class Action Complaint was, an
10 individual and a resident of Huntington Beach, California.

11 12. Molly Brown, Parsa Miller, and Lauren Morgan are collectively referred to
12 hereafter as “Plaintiffs.”

13 13. Defendant Nature’s Path Foods, Inc. (“Defendant”) is a corporation existing under
14 the laws of Canada with its principal place of business in Richmond, British Columbia, Canada,
15 and is registered to do business in California.

16 **JURISDICTION AND VENUE**

17 14. This Court has jurisdiction over the subject matter of this action pursuant to 28
18 U.S.C. § 1332(d)(2). The aggregate amount in controversy exceeds \$5,000,000, exclusive of
19 interest and costs; and Plaintiffs and Defendant are citizens of different states.

20 15. The injuries, damages and/or harm upon which this action is based, occurred or
21 arose out of activities engaged in by Defendant within, affecting, and emanating from, the State
22 of California. Defendant regularly conducts and/or solicits business in, engages in other persistent
23 courses of conduct in, and/or derives substantial revenue from products provided to persons in the
24 State of California. Defendant has engaged, and continues to engage, in substantial and
25 continuous business practices in the State of California.

26 16. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a
27 substantial part of the events or omissions giving rise to the claims occurred in the state of
28 California, including within this District.

1 17. In accordance with California Civil Code Section 1780(d), Plaintiff Molly Brown
2 concurrently files herewith a declaration establishing that, at various times throughout the class
3 period, she purchased Nature’s Path Hemp Hearts Granola, Gorilla Munch Cereal (23 oz),
4 Pumpkin Seed + Flax Granola in grocery stores in Novato, Petaluma and San Rafael, California.
5 (Plaintiff Molly Brown’s declaration is attached hereto as Exhibit A.)

6 18. Plaintiffs accordingly allege that jurisdiction and venue are proper in this Court.

7 **SUBSTANTIVE ALLEGATIONS**

8 19. Defendant manufactures, distributes, markets, advertises, and sells a variety of
9 breakfast and snack products in the United States under the brand name “Nature’s Path.” Many of
10 these products have packaging that predominately, uniformly, and consistently states on the prin-
11 cipal display panel of the product labels that they contain and provide a certain amount of protein
12 per serving. Plaintiffs have attached, as Exhibit B, a non-exhaustive list of the Nature’s Path prod-
13 ucts that make protein claims on the front of the product packages. The products listed in Exhibit
14 B, and any other Nature’s Path brand product that claims a specific amount of protein on the front
15 of its label, will hereinafter be referred to as the “Products.”

16 20. The representation that the Products contain and provide a specific amount of pro-
17 tein per serving was uniformly communicated to Plaintiffs and every other person who purchased
18 any of the Products in California and the United States. The same or substantially similar product
19 label has appeared on each Product during the entirety of the Class Period in the general form of
20 the following example:

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21. The nutrition facts panel on the side of the Products uniformly and consistently failed to provide any statement of the corrected amount of protein per serving, expressed as a %DV, throughout the Class Period. The nutrition facts panel of the Products has appeared consistently throughout the Class Period in the general form of the following example (from the Hemp Hearts Granola):

Nutrition Facts			
About 6 servings per container			
Serving size 3/4 cup cereal (55g)			
	Per 3/4 cup cereal		Per 3/4 cup cereal with 1/2 cup skim milk
Calories	260		300
	%DV*		%DV*
Total Fat	10g 13%		10g 13%
Saturated Fat	1.5g 8%		1.5g 8%
Trans Fat	0g		0g
Polyunsaturated Fat	6g		6g
Monounsaturated Fat	2.5g		2.5g
Cholesterol	0mg 0%		0mg 0%
Sodium	45mg 2%		95mg 4%
Total Carb.	36g 13%		42g 15%
Dietary Fiber	5g 18%		5g 18%
Total Sugars	10g		16g
Incl. Added Sugars	9g 18%		9g 18%
Protein	6g		10g
Vitamin D	0mcg 0%		2mcg 8%
Calcium	26mg 2%		175mg 15%
Iron	2mg 10%		2mg 10%
Potassium	178mg 4%		369mg 8%

* The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.

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22. As described in detail below, Defendant’s front label protein claims, which advertise the Products as containing and providing specific amounts of protein per serving, are unlawful because Defendant did not: (1) calculate the “corrected amount of protein per serving” based on the quality of the product’s protein using the PDCAAS method; and (2) provide a statement of that corrected amount of protein per serving in the NFP, expressed as %DV. 21 C.F.R. § 101.9(c)(7)(i) & (iii). Defendant’s failure to comply with § 101.9 also makes the front label claims unlawful under §§ 101.13(n) and (b). The unlawful front label protein claims induced consumers to purchase the Products at a premium price. Had Defendant not included a protein claim on the front label of its Products, as required by FDA regulations, reasonable consumers would not have purchased or would have paid less for the Products.

23. Defendant’s failure to provide the required statement of the corrected amount of protein per serving, as well as Defendant’s prominent front label protein claims made in the absence of any statement of the corrected amount of protein in the NFP, also deceived and misled reasonable consumers into believing that a serving of the Products will provide the grams of protein represented on the label, when that is not true. Had Defendant complied with the law, the statement of the corrected amount of protein would have revealed the Products provide

1 significantly less protein than claimed because Defendant uses low quality proteins in its prod-
2 ucts, such as oats. The absence of this information also allowed Defendant to charge a price pre-
3 mium. Had reasonable consumers been informed of the true amount of protein that the products
4 provided through a statement of the corrected amount of protein per serving, as required by FDA
5 regulations, they would not have purchased or would have paid less for the Products.

6 **Consumer Demand for Protein**

7 24. Many American consumers are health conscious and seek wholesome, natural
8 foods to keep a healthy diet, so they routinely rely upon nutrition information when selecting and
9 purchasing food items. This is especially true in the community of athletes, registered dietitians,
10 and coaches, to which Defendant markets. As noted by FDA Commissioner Margaret Hamburg
11 during an October 2009 media briefing, “[s]tudies show that consumers trust and believe the nu-
12 trition facts information and that many consumers use it to help them build a healthy diet.” In-
13 deed, the FDA recommends relying on Nutrition Facts Labels as the primary tool to monitor the
14 consumption of protein.²

15 25. Protein is found throughout the body—in muscle, bone, skin, hair, and virtually
16 every other body part or tissue. The health benefits of protein are well studied and wide ranging.
17 Scientific studies have confirmed that protein can assist in weight loss, reduce blood pressure, re-
18 duce cholesterol, and control for risk factors for cardiovascular diseases. The National Academy
19 of Medicine recommends that adults get a minimum of .8 grams of protein for every kilogram of
20 body weight per day, or just over 7 grams for every 20 pounds of body weight.³ For a 140-pound
21 person, that means about 50 grams of protein each day. For a 200-pound person, that means about
22 70 grams of protein each day.

23 26. Athletes and fitness enthusiasts typically consume much higher amounts of protein
24 each day; typically between 1 to 1.5 grams of protein for every pound of body weight.

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27 ² FDA Protein Fact Sheet, <https://www.accessdata.fda.gov/scripts/InteractiveNutritionFactsLabel/factsheets/Protein.pdf>

28 ³ National Academies of Medicine. *Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients)*.

1 27. The health benefits of protein are just as important, if not more important, for chil-
2 dren. Children are in a relative state of constant growth and rely on protein as the building block
3 of muscle, bone, skin, hair, and virtually every other body part or tissue. The National Academies
4 of Science recommends the following amounts of daily intake of protein based on age group: 1-3
5 years old: 13 g of protein per day; 4-8 years old: 19 g of protein per day; 9-13 years old: 34 g of
6 protein per day.⁴

7 28. Protein *quantity* by itself does tell the full story of protein from a human nutri-
8 tional standpoint. A protein's *quality* is also critical because humans cannot fully digest or utilize
9 some proteins. Proteins are not monolithic. They are simply chains of amino acids, and different
10 types of amino acids chained together in different ways will make different types of proteins. Fur-
11 ther, the makeup of the protein changes the function of that protein in the body, and certain types
12 of proteins are more easily digested and used by humans than others.

13 29. All of a human's proteins are formed through the process of protein synthesis
14 within their own bodies. That is, although humans consume dietary proteins, they digest those
15 proteins, break them down into their constituent amino acids, and then use those amino acids as
16 building blocks to synthesize the human proteins necessary for life, tissue repair, and other func-
17 tions. Of the twenty total amino acids, humans can produce only eleven of them on their own.
18 Humans cannot produce, under any circumstances, nine of the amino acids required for protein
19 synthesis. These nine amino acids are called the "essential amino acids" and they must be sup-
20 plied through the diet.

21 30. All nine essential amino acids are necessary for protein synthesis to take place.
22 Lacking even one essential amino acid will prevent protein synthesis from occurring, and the rest
23 of the proteins will degrade into waste. Accordingly, once the body uses up the limiting essential
24 amino acid from a protein source, the remainder of that protein becomes useless to human protein
25 synthesis and has little nutritional value. As the FDA has explicitly recognized, "[b]ecause excess
26 amino acids are not stored in the body, humans need a constant supply of good quality dietary
27 proteins to support growth and development." 58 Fed. Reg. 2079 at 2101. High-quality proteins,
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⁴ *Id.*

1 therefore, are those that contain all nine essential amino acids because they have a greater effect
2 on protein synthesis and are fully digestible. A dietary protein containing all of the essential
3 amino acids in the correct proportions is typically called a “complete protein.”

4 31. A protein source’s digestibility also affects the amount of useable protein a person
5 receives from consuming it. Many plant-based proteins are only 85% digestible, meaning 15% of
6 the protein from that source will simply pass through the body without ever being absorbed at all.

7 32. As the FDA has stated in official guidance, “Accurate methods for determining
8 protein quality are necessary because different food protein sources are not equivalent in their
9 ability to support growth and body protein maintenance.” 56 Fed. Reg. 60366, § B. The Protein
10 Digestibility Corrected Amino Acid Score (“PDCAAS”), is the FDA mandated measure of pro-
11 tein quality, and it accounts for both the amino acid profile and the digestibility of the protein. 21
12 C.F.R. § 101.9(c)(7)(ii).

13 33. The PDCAAS method requires the manufacturer to determine the amount of es-
14 sential amino acids that the food contains and then combine that with the proteins’ digestibility
15 into an overall discount factor (i.e., a “score” from 0.0-1.0) that represents the actual amount of
16 protein the food provides nutritionally when multiplied by raw protein quantity. The regulations
17 term this the “corrected amount of protein per serving.” 21 C.F.R. § 101.9(c)(7)(i).

18 34. Defendant uses plant-based proteins in its products. Because of the differences in
19 benefits depending on the amino acid composition of a protein, the source of protein is important.
20 Whey protein is animal-based and contains all nine essential amino acids. It has a high biological
21 value and is fully digestible by humans. Thus, whey protein has a PDCAAS of 1.0. Plant proteins
22 rarely contain all nine essential amino acids. Further, plant proteins such as wheat and oat pro-
23 teins, which Defendant uses in its Products according to the ingredient lists, are of low quality to
24 humans. Both types of proteins typically have a PDCAAS of around .5, meaning only 50% of the
25 protein from those sources will be useable by humans as protein.

26 35. Accordingly, Defendant’s use of low quality proteins, even in combination with
27 some higher quality proteins, means that they actually provide far less protein to humans than the
28 Product labels claim.

Federal and State Regulations Governing Food Labeling

36. Identical federal and California laws regulate the content of labels on packaged food. The requirements of the federal Food, Drug & Cosmetic Act (“FDCA”), and its labeling regulations, including those set forth in 21 C.F.R. §§ 101, 102, were adopted by the California legislature in the Sherman Food Drug & Cosmetic Law (the “Sherman Law”). California Health & Safety Code § 110100 (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.”). The federal laws and regulations discussed below are applicable nationwide to all sales of packaged food products. Additionally, none of the California laws sought to be enforced here imposes different requirements on the labeling of packaged food for sale in the United States.

37. According to FDA regulations, “[a] statement of the corrected amount of protein per serving, as determined in paragraph (c)(7)(ii) of this section, calculated as a percentage of the RDI or DRV for protein, as appropriate, and expressed as a Percent of Daily Value . . . *shall* be given if a protein claim is made for the product . . .” 21 C.F.R. 101.9(c)(7)(i) (emphasis added). If a manufacturer does not want to perform PDCAAS and provide a statement of the corrected amount of protein per serving in the NFP, then it shall not make any protein claims.

38. The regulation governing nutrient content claims, section 101.13, also makes this plain. Section 101.13(n) provides that “[n]utrition labeling in accordance with § 101.9 . . . shall be provided for any food for which a nutrient content claim is made” and § 101.13(b) states “a nutrient content claim[] may not be made on the label . . . unless the claim is made in accordance with this regulation [i.e., § 101.13] . . .” In other words, a manufacturer may not make any protein nutrient content claims on the front labels of their products unless they have complied with the requirements for protein labeling in the nutrition facts panel pursuant to section 101.9(c)(7). Indeed, the FDA made clear when promulgating § 101.13(n) that it means that a manufacturer can only make “a nutrient content claim . . . on the label or in labeling of a food, provided that the food bears nutrition labeling that complies with the requirements in proposed § 101.9.” 58 Fed. Reg. 2302, 23310.

1 39. Further, FDA regulations require the %DV for protein to be calculated using
2 PDCAAS, a method that accounts for both protein quantity and protein quality. 21 C.F.R. §
3 101.9(c)(7)(i)-(iii); FDA Food Labeling Guide, p. 29, Question N.22.⁵ The first step is to calcu-
4 late the “corrected amount of protein per serving” by multiplying protein quantity by the
5 PDCAAS quality value, and then dividing that “corrected amount” by 50 grams (the “recom-
6 mended daily value” for protein) to come up with the %DV. *Id.*

7 40. Defendant’s Products all make protein claims on the front label, but fail, uniformly
8 to provide a statement of the corrected amount of protein per serving in the NFP calculated ac-
9 cording to the PDCAAS method. The protein claims on the front are, therefore, unlawful, and
10 were never permitted to be on the labels in the first instance under §§ 101.9(c)(7)(i), 101.13(n),
11 and 101.13(b).

12 41. Defendant’s failure to include a statement of the corrected amount of protein per
13 serving expressed as a %DV in the NFP also renders the NFP itself unlawful under
14 §§ 101.9(c)(7)(i)-(iii).

15 42. Defendant’s use of a front-label protein claim, while failing to include the required
16 statement of the corrected amount of protein per serving in the NFP calculated using the
17 PDCAAS method and expressed as a %DV, is also misleading. By failing to provide it, Defend-
18 ant misled consumers into believing that the Products provide a higher amount of protein than
19 they really do. It also enabled Defendant to conceal the fact that its Products consist of low qual-
20 ity proteins that simply do not provide all of the protein that quantity alone represents. Indeed,
21 when promulgating 21 C.F.R. § 101.9(c)(7), the FDA explained in published guidance that “In-
22 formation on protein quantity alone can be misleading on foods that are of low protein quality.” It
23 also explained that it was prohibiting manufacturers from making any protein claims at all *unless*
24 the manufacturer provides a statement of the corrected amount of protein per serving in the NFP
25 based on PDCAAS because “nutrition labeling must allow consumers to readily identify foods
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27 ⁵ Guidance for Industry: A Food Labeling Guide (“FDA Food Labeling Guide”) p. 29, Question
28 N22, U.S. Food & Drug Administration, <https://www.fda.gov/media/81606/download> (last ac-
cessed February 18, 2020).

1 with particularly low quality protein to prevent them from being misled by information on only
2 the amount of protein present.” 58 Fed. Reg. 2079 at 2101-2.

3 43. Similarly, 21 C.F.R. § 101.13(i)(3) prohibits manufacturers from making a claim
4 on the front of a product’s package about the “amount or percentage of a nutrient,” such as pro-
5 tein, if the statement is “false or misleading in any respect.” If it is, then “it may not be made on
6 the label.” 21 C.F.R. § 101.13(b). This is true even if the same amount appears in the nutrition
7 facts panel. 21 C.F.R. § 101.13(c). Since the omission of the %DV from the nutrition facts panel
8 rendered the front label protein claim misleading, the protein claim was not permitted to be on the
9 front label.

10 44. Under the FDCA, the term false has its usual meaning of “untruthful,” while the
11 term misleading is a term of art that covers labels that are technically true, but are likely to de-
12 ceive consumers.

13 45. FDA regulations also allow for a separate “as prepared” column in the Nutrition
14 Facts panel for food “commonly combined with other ingredients” but the “type and quantity of
15 the other ingredients to be added to the product” and “the specific method of cooking or other
16 preparation” must be “specified prominently on the label.” 21 C.F.R. § 101.9(h)(4). Should a
17 manufacturer opt to include an “as prepared” column in the Nutrition Facts panel, it must also in-
18 clude the %DV in both the “as prepared” and “as purchased” columns. 21 C.F.R. § 101.9(e)(3).

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Defendant's Marketing and Labeling of its Products Violates State and Federal Food Labeling Laws

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2 46. Defendant's Products are unlawful, misbranded, and violate the Sherman Law,
3 California Health & Safety Code § 110660, *et seq.* Defendant makes protein content claims on the
4 front of its Product packages even though it uniformly fails to provide a statement of the cor-
5 rected amount of protein per serving in the NFP calculated according to the PDCAAS method and
6 expressed as a %DV (for both the "as prepared" and "as purchased" columns) as required by 21
7 C.F.R. § 101.9(c)(7)(i). Defendant's failure to comply with this requirement render its front label
8 protein claim unlawful per se and the product misbranded pursuant to § 101.13(n) and (b), as well
9 as under § 101.9(c)(7)(i) itself. Defendant's omission of the %DV from the NFP despite the fact
10 that it makes front label protein claims is also unlawful and in violation of § 101.9(c)(7)(i)-(iii).

11 47. Defendant's standalone, front label protein quantity claim is also misleading, and
12 therefore prohibited by sections 101.13(i)(3), (b), and (n) due to Defendant's failure to include a
13 statement of the corrected amount of protein per serving in the NFP calculated using the
14 PDCAAS method and expressed as a %DV. Consumers have a "limited knowledge and under-
15 standing of the amount of [protein] that [is] recommended for daily consumption," let alone an
16 understanding of the science behind protein quality and how different types of proteins are used
17 and absorbed in the body. 56 Fed. Reg. 60421. The FDA requires a statement of the corrected
18 amount of protein per serving in the NFP precisely to ensure that "consumers are not misled by
19 information on only the amount of protein present" in a product with low quality protein. 58 Fed.
20 Reg. 2079 at 2101-2. Defendant's failure to provide it rendered the label misleading.

21 48. Defendant also violated 21 C.F.R. § 101.9(h)(4) because it failed to *prominently*
22 display "the type and quantity of the other ingredients to be added to the product by the user and
23 the specific method of cooking and other preparation" on the front the label. For instance, the
24 Hemp Hearts Granola states "10g PROTEIN" on the front of the package and below, in very
25 small, barely legible font, states that it is "per serving with milk" and below that, in even smaller
26 font, states "prepared with a ½ cup of skim milk." This language is not prominently featured on
27 the label and, therefore, violates 21 C.F.R. § 101.9(h)(4). Nor did Defendant provide a statement
28

1 of the corrected amount of protein per serving for the product with and without milk, expressed as
2 a %DV, as required by 21 C.F.R. § 101.9(e)(3).

3 49. Defendant's marketing, advertising, and sale of the Products violates the
4 misbranding provisions of the Sherman Law (California Health & Safety Code § 110660, *et.*
5 *seq.*), including but not limited to:

- 6 a. Section 110665 (a food is misbranded if its labeling does not conform with the
7 requirements for nutrition labeling as set forth in 21 U.S.C. Sec. 343(q));
- 8 b. Section 110705 (a food is misbranded if words, statements and other information
9 required by the Sherman Law to appear food labeling is either missing or not
10 sufficiently conspicuous);
- 11 c. Section 110760, which makes it unlawful for any person to manufacture, sell,
12 deliver, hold, or offer for sale any food that is misbranded;
- 13 d. Section 110765, which makes it unlawful for any person to misbrand any food;
14 and
- 15 e. Section 110770, which makes it unlawful for any person to receive in commerce
16 any food that is misbranded or to deliver or proffer for delivery any such food.

17 50. Defendant's marketing, advertising, and sale of the Products also violates the false
18 advertising provisions of the Sherman Law (California Health & Safety Code § 110390, *et. seq.*),
19 including but not limited to:

- 20 f. Section 110390, which makes it unlawful to disseminate false or misleading food
21 advertisements that include statements on products and product packaging or
22 labeling or any other medium used to directly or indirectly induce the purchase of
23 a food product;
- 24 g. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or
25 offer to sell any falsely or misleadingly advertised food; and
- 26 h. Sections 110398 and 110400, which make it unlawful to advertise misbranded
27 food or to deliver or proffer for delivery any food that has been falsely or
28 misleadingly advertised.

1 51. Defendant has violated 21 U.S.C. § 343(a), and the standards set by FDA
2 regulations, including but not limited to 21 C.F.R. § 101.9 (c)(7), 21 C.F.R. § 101.13(i)(3), (b),
3 (n), 21 C.F.R. § 101.9 (h)(4), and 21 C.F.R. 101.9(e)(3), which have been incorporated by
4 reference in the Sherman Law, by failing to include and/or prominently display on the Product
5 labels the nutritional information required by law.

6 52. A reasonable consumer would expect that the Products provide what Defendant
7 identifies them to provide on the product labels and that the labels would not be contrary to the
8 policies or regulations of the State of California and/or the FDA. For example, a reasonable
9 consumer would expect that when Defendant labels its Products as containing “10g PROTEIN”
10 per serving, the Products would provide 10 grams of protein per serving in a form their bodies
11 could use. Because Defendant did not conduct PDCAAS and provide a statement of the corrected
12 amount of protein per serving, expressed as a %DV, consumers have no idea that the Products
13 provide significantly less protein.

14 53. Consumers lack the meaningful ability to test or independently ascertain the truth-
15 fulness of Defendant’s food labeling claims, especially at the point of sale. Reasonable consum-
16 ers, when they look at the front label of the Products, believe the Products provide the amount of
17 protein represented on the front label. Because Defendant does not include any information as to
18 the quality of the protein anywhere on the packaging, even though it was legally required to do so
19 via the statement of corrected amount of protein expressed as a %DV, consumers do not have any
20 reason to think otherwise. Reasonable consumers do not walk around with the PDCAAS values
21 for various protein sources in their heads. They would not know the true amount of protein the
22 Products provide nutritionally merely by looking elsewhere on the product package. Its discovery
23 requires investigation well beyond the grocery store aisle and knowledge of food chemistry be-
24 yond that of the average consumer. An average consumer does not have the specialized
25 knowledge necessary to ascertain that a serving of a Product does not provide the number of
26 grams of protein that is represented on the label. An average consumer also lacks the specialized
27 knowledge necessary to determine the PDCAAS for the Products. The average reasonable con-
28 sumer had no reason to suspect that Defendant’s representations on the packages were

1 misleading. Therefore, consumers had no reason to investigate whether the Products actually do
2 provide the amount of protein per serving that the labels claim they do and reasonably relied on
3 Defendant's representations regarding the nature of the Products.

4 54. Defendant intends and knows that consumers will and do rely upon food labeling
5 statements in making their purchasing decisions. Label claims and other forms of advertising and
6 marketing drive product sales, particularly if placed prominently on the front of product packag-
7 ing, as Defendant has done with the claims on the Products that they contain and provide specific
8 amounts of protein per serving.

9 **Defendant Misleadingly Markets Its Products to Increase Profits and Gain a Competitive**
10 **Edge**

11 55. In making unlawful, false, misleading, and deceptive representations, Defendant
12 distinguishes its Products from its competitors' products. Defendant knew and intended that con-
13 sumers would purchase, and pay a premium for, products labeled with a protein claim. By using
14 this branding and marketing strategy, Defendant is stating that its Products are superior to, better
15 than, and more nutritious and healthful than other products that do not make protein claims, or
16 that do not make protein claims based on poorly-disclosed added ingredients, or that properly pro-
17 vide the required statement of the corrected amount of protein in the product as determined by the
18 PDCAAS method and express as a %DV and otherwise do not mislead consumers about the
19 amount of protein their products actually provide.

20 **Defendant Intends to Continue to Market its Products as Containing More Protein than the**
21 **Products Actually Contain**

22 56. Because consumers pay a price premium for products that make protein claims,
23 and also pay a premium for products that provide more protein, by labeling its Products with pro-
24 tein claims and/or omitting the required statement of the corrected amount of protein per serving
25 than they actually provide, Defendant is able to both increase its sales and retain more profits.

26 57. Defendant engaged in the practices complained of herein to further its private in-
27 terests of: (i) increasing sales of its Products while decreasing the sales of competitors that do not
28 misrepresent the number of grams of protein contained in its products, and/or (ii) commanding a

1 higher price for its Products because consumers will pay more for these Products due to consum-
2 ers' demand for products with protein claims and/or more protein.

3 58. The market for protein products is continuing to grow and expand, and because
4 Defendant knows consumers rely on representations about the number of grams of protein in food
5 products, Defendant has an incentive to continue to make such unlawful and misleading represen-
6 tations. In addition, other trends suggest that Defendant has no incentive to change its labeling
7 practices.

8 59. For example, one market analysis revealed that between 2013-2017, product
9 launches with a protein claim grew 31%.⁶

10 60. To capitalize on the growing market, Defendant continues to launch new product
11 lines and flavors to diversify its portfolio to maintain its competitive edge. Moreover, Defendant
12 has continued to replicate its misrepresentations on new product lines. It is therefore likely that
13 Defendant will continue to unlawfully and/or misleadingly advertise its Products and perpetuate
14 the misrepresentations regarding the protein in its Products.

15 **PLAINTIFFS' EXPERIENCES**

16 **Plaintiff Molly Brown**

17 61. Plaintiff Molly Brown has purchased Nature's Path Hemp Hearts Granola, Pump-
18 kin Seed + Flax Granola, and Gorilla Munch Cereal (23 oz) from various Whole Foods and
19 Sprouts stores throughout the Bay Area, including Novato, Petaluma and San Rafael, California,
20 on multiple occasions during the last four years.

21 62. Ms. Brown made each of her purchases after reading and relying on the truthful-
22 ness of Defendant's front labels that promised the Products provided a specific number of grams
23 of protein per serving. For example, she purchased the Hemp Hearts Granola after reading and
24 relying on the representation of "10g PROTEIN" per serving on the front of the product package.
25 She believed the truth of each representation, i.e., that the product would actually provide her the
26 specific amount of protein claimed on the front labels in a form her body could utilize. Had
27

28 ⁶ https://www.bakeryandsnacks.com/Article/2018/11/26/10-key-snack-trends-to-watch?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright

1 Defendant complied with the law, and not made the protein claims on the front of its packages in
2 these circumstances, she would not have been drawn to the Products and would not have pur-
3 chased them. At a minimum she would have paid less for each Product. The lack of prominence
4 of the “as prepared” disclaimer on the front of the package also caused Plaintiff to pay a price
5 premium for the Products on which it appears. She did not see the disclaimer on the front of the
6 package saying that the product provided 10 grams of protein only if consumed with milk, and
7 believed the product itself was providing the full amount of advertised protein.

8 63. Moreover, had Defendant adequately disclosed the corrected amount of protein per
9 serving for each Product expressed as a %DV, as FDA regulations require, Plaintiff would not
10 have purchased the products or would have, at minimum, paid less for them. Plaintiff regularly
11 checks the NFP before purchasing any product for the first time and uses that as a basis of com-
12 parison between similar products. She looked at and read the NFP on the Hemp Hearts Granola
13 before purchasing it for the first time. She is a vegan, which means that protein is very important
14 to her and she examines the %DV column for protein when manufacturers provide that infor-
15 mation, although not all always do. When manufacturers provide that information, she will al-
16 ways choose the product that provides more of the recommended daily value of protein (i.e., has a
17 higher %DV for protein) because, as a vegan, she needs to make sure she meets all of her daily
18 recommended protein needs, which can be difficult to do. When a manufacturer does not provide
19 a %DV for protein, she can only go off of the stated grams of protein, and she assumes that all of
20 those disclosed grams are in a form her body can use as protein.

21 64. For example, with the Hemp Hearts Granola product, Plaintiff was looking for a
22 product that would provide her 10 grams of useable protein per serving. Had she seen that the
23 product provided only 10% (or less) of the daily value for protein, i.e., only approximately 5
24 grams or less corrected amount of protein per serving, she would not have purchased the product
25 or, at a minimum would have paid less for it. Plaintiff would also have used the information as a
26 basis to compare similar products and would have chosen instead to purchase one with a higher
27 %DV. Without the statement of the corrected amount of protein per serving in the form of a
28 %DV, the only information plaintiff had about the Products was the 10 gram protein quantity

1 claim, and she believed she was receiving the full amount of that quantity in a form her body
2 could use. Because the Products did not provide any statement of the corrected amount of protein
3 per serving, she did not have any reason to believe that the Products provided less protein than the
4 amount represented in the NFP and on the front of the label. Nor did she have any reason to
5 know the Products consisted of anything other than high quality proteins, and did in fact believe
6 she was receiving 10 grams of high quality protein.

7 65. Ms. Brown continues to desire to purchase protein products, including those mar-
8 keted and sold by Defendant. If the Products were reformulated to provide in a usable form the
9 grams of protein that are represented on the labels, Ms. Brown would likely purchase them again
10 in the future. Ms. Brown regularly visits stores where Defendant's Products and other protein
11 products are sold. Because Ms. Brown does not know the formula for Defendant's products and
12 cannot test whether or not the Products provide the amount of protein that is represented on the
13 label, Ms. Brown will be unable to rely on Defendant's labels when shopping for protein products
14 in the future absent an injunction that prohibits Defendant from labeling its products with the in-
15 correct number of grams of protein that each serving contains. Should Defendant begin to market
16 and sell a new line of products, Ms. Brown could be at risk for buying another one of Defendant's
17 products in reliance on the same or similar misrepresentation.

18 **Plaintiff Parsa Miller**

19 66. Plaintiff Parsa Miller has purchased Nature's Path Hemp Hearts Granola, Gorilla
20 Munch Cereal (23 oz), Love Crunch Cereal (Chocolate & Peanut Butter), Heritage Flakes Cereal,
21 Flax Plus Multibran Flakes Cereal, Flax Plus Maple Pecan Crunch Cereal, Flax Plus Pumpkin
22 Raisin Crunch Cereal, Flax Plus Red Berry Crunch Cereal, Coconut Chia Granola, Pumpkin +
23 Flax Seed Granola, Apple Cinnamon Oatmeal, Blueberry Cinnamon Flax Oatmeal, Old
24 Fashioned Oats, Flax Plus Waffles, Maple Cinnamon Waffles, and Ancient Grains Waffles from
25 various grocery stores, including Safeway stores, throughout the Loomis, California area during
26 the last four years.

27 67. Mr. Miller made each of his purchases after reading and relying on the truthfulness
28 of Defendant's front labels that promised the Products provided a specific number of grams of

1 protein per serving. For example, he purchased the Hemp Hearts Granola after reading and
2 relying on the representation of “10g PROTEIN” per serving on the front of the product package.
3 He believed the truth of each representation, i.e., that the product would actually provide him the
4 specific amount of protein claimed on the front labels in a form his body could utilize. Had
5 Defendant complied with the law, and not made the protein claims on the front of its packages in
6 these circumstances, he would not have been drawn to the Products and would not have
7 purchased them. At a minimum he would have paid less for each Product. The lack of
8 prominence of the “as prepared” disclaimer on the front of the package also caused Plaintiff to
9 pay a price premium for the Products on which it appears. His family always uses non-dairy milk,
10 like almond milk, so he does not count on seeing any fine print disclaimer to counteract the large
11 print protein representation and believed the product itself was providing the full 10 grams of
12 advertised protein.

13 68. Moreover, had Defendant adequately disclosed the corrected amount of protein per
14 serving for each Product expressed as a %DV, as FDA regulations require, Plaintiff would not
15 have purchased the products or would have, at minimum, paid less for them. He looked at and
16 read the NFP on the Hemp Hearts Granola before purchasing it for the first time. Plaintiff
17 regularly checks the NFP before purchasing any product for the first time, including the %DV
18 column for protein when manufacturers provide it, and he uses that information as a basis of
19 comparison between similar products. Manufacturers do not always disclose a %DV for protein,
20 but when they do, he always selects the product that provides more of the recommend daily
21 amount of protein (i.e., the one with a higher %DV). When a manufacturer does not provide a
22 %DV for protein, he can only go off of the stated grams of protein, and he assumes that all of
23 those disclosed grams are in a form his body can use as protein.

24 69. For example, with the Hemp Hearts Granola product, Plaintiff was looking for a
25 product that would provide him 10 grams of useable protein per serving. Had he seen that the
26 product provided only 10% (or less) of the daily value for protein, i.e., only approximately 5
27 grams or less corrected amount of protein per serving, he would not have purchased the product
28 or, at a minimum would have paid less for it. Plaintiff would also have used the information as a

1 basis to compare similar products and would have chosen instead to purchase one with a higher
2 %DV. Without the statement of the corrected amount of protein per serving in the form of a
3 %DV, the only information plaintiff had about the Products was the 10g protein quantity, and he
4 believed he was receiving the full amount of that quantity in a form his body could use. Because
5 the Products did not provide any statement of the corrected amount of protein per serving, he did
6 not have any reason to believe that the Products provided less protein than the amount represented
7 in the NFP and on the front of the label. Nor did he have any reason to know the Products
8 consisted of anything other than high quality proteins, and did in fact believe he was receiving 10
9 grams of high quality protein.

10 70. Mr. Miller continues to desire to purchase protein products, including those
11 marketed and sold by Defendant. If the Products were reformulated to provide the grams of
12 protein that are represented on the labels, Mr. Miller would likely purchase them again in the
13 future. Mr. Miller regularly visits stores where Defendant's Products and other protein products
14 are sold. Because Mr. Miller does not know the formula for Defendant's products and cannot test
15 whether or not the Products provide the amount of protein that is represented on the label, Mr.
16 Miller will be unable to rely on Defendant's labels when shopping for protein products in the
17 future absent an injunction that prohibits Defendant from labeling its products with the incorrect
18 number of grams of protein that each serving contains. Should Defendant begin to market and sell
19 a new line of products, Mr. Miller could be at risk for buying another one of Defendant's products
20 in reliance on the same or similar misrepresentation.

21 **Plaintiff Lauren Morgan**

22 71. Plaintiff Lauren Morgan has purchased Nature's Path Hemp Hearts Granola,
23 Apple Cinnamon Oatmeal, and Pumpkin + Flax Seed Granola from Walmart and/or Target retail
24 stores throughout the Huntington Beach, California area during the last three years.

25 72. Ms. Morgan made each of her purchases after reading and relying on the
26 truthfulness of Defendant's front labels that promised the Products provided a specific number of
27 grams of protein per serving. For example, she purchased the Hemp Hearts Granola after reading
28 and relying on the representation of "10g PROTEIN" per serving on the front of the product

1 package. She believed the truth of each representation, i.e., that the product would actually
2 provide her the specific amount of protein claimed on the front labels in a form her body could
3 utilize. Had Defendant complied with the law, and not made the protein claims on the front of its
4 packages in these circumstances, she would not have been drawn to the Products and would not
5 have purchased them. At a minimum she would have paid less for each Product. The lack of
6 prominence of the “as prepared” disclaimer on the front of the package also caused Plaintiff to
7 pay a price premium for the Products on which it appears. The disclaimer was so small and failed
8 to stand out such that she believed she was receiving the full amount of protein advertised in large
9 print on the front label from the product by itself.

10 73. Moreover, had Defendant adequately disclosed the corrected amount of protein per
11 serving for each Product, as FDA regulations require, Plaintiff would not have purchased the
12 products or would have, at minimum, paid less for them. She looked at and read the NFP on the
13 Hemp Hearts Granola before purchasing it for the first time. Plaintiff regularly checks the NFP
14 before purchasing any product for the first time and uses that as a basis of comparison between
15 similar products. This includes examining the %DV column for protein when manufacturers
16 provide that information, although not all always do. When manufacturers provide that
17 information, she will always choose the product that provides more of the recommended daily
18 value of protein (i.e., has a higher %DV for protein). When a manufacturer does not provide a
19 %DV for protein, she can only go off of the stated grams of protein, and she assumes that all of
20 those disclosed grams are in a form her body can use as protein.

21 74. For example, with the Hemp Hearts Granola product, Plaintiff was looking for a
22 product that would provide her 10 grams of useable protein per serving.. Had she seen that the
23 product provided only 10% (or less) of the daily value for protein, i.e., only approximately 5
24 grams or less corrected amount of protein per serving, she would not have purchased the product
25 or, at a minimum would have paid less for it. Plaintiff would also have used the information as a
26 basis to compare similar products and would have chosen instead to purchase one with a higher
27 %DV. Without the statement of the corrected amount of protein per serving in the form of a
28 %DV, the only information plaintiff had about the Products was the 10 gram protein quantity, and

1 she believed she was receiving the full amount of that quantity in a form her body could use.
2 Because the Products did not provide any statement of the corrected amount of protein per
3 serving, she did not have any reason to believe that the Products provided less protein than the
4 amount represented in the NFP and on the front of the label. Nor did she have any reason to
5 know the Products consisted of anything other than high quality proteins, and did in fact believe
6 she was receiving 10 grams of high quality protein

7 75. Ms. Morgan continues to desire to purchase protein products, including those
8 marketed and sold by Defendant. If the Products were reformulated to provide the grams of
9 protein that are represented on the labels, Ms. Morgan would likely purchase them again in the
10 future. Ms. Morgan regularly visits stores where Defendant's Products and other protein products
11 are sold. Because Ms. Morgan does not know the formula for Defendant's products and cannot
12 test whether or not the Products provide the amount of protein that is represented on the label,
13 Ms. Morgan will be unable to rely on Defendant's labels when shopping for protein products in
14 the future absent an injunction that prohibits Defendant from labeling its products with the
15 incorrect number of grams of protein that each serving contains. Should Defendant begin to
16 market and sell a new line of products, Ms. Morgan could be at risk for buying another one of
17 Defendant's products in reliance on the same or similar misrepresentation.

18 76. Plaintiffs and members of the Class have been economically damaged by their
19 purchase of the Products because the advertising for the Products was and is unlawful and/or
20 misleading under California law and the products are misbranded; therefore, the Products are
21 worth less than what Plaintiffs and members of the Class paid for them and/or Plaintiffs and
22 members of the Class did not receive what they reasonably intended to receive.

23 CLASS ALLEGATIONS

24 77. Plaintiffs bring this class action lawsuit on behalf of themselves and proposed
25 classes of similarly situated persons, pursuant to Rule 23(b)(2) and (b)(3) of the Federal Rules of
26 Civil Procedure. Plaintiffs seek to represent the following groups of similarly situated persons,
27 defined as follows:

28 **The Class:** All persons in the State of California who purchased the Products between

1 July 2, 2017 and the present.

2 **The Subclass:** All Class Members who purchased Products that make protein claims on
3 the front of the package based on “as prepared” nutrition information.

4 78. This action has been brought and may properly be maintained as a class action
5 against Defendant because there is a well-defined community of interest in the litigation and the
6 proposed class is easily ascertainable.

7 79. Numerosity: Plaintiffs do not know the exact size the Class and Subclass, but they
8 estimate that it is composed of more than 100 persons. The persons in the Class and Subclass are
9 so numerous that the joinder of all such persons is impracticable and the disposition of their
10 claims in a class action rather than in individual actions will benefit the parties and the courts.

11 80. Common Questions Predominate: This action involves common questions of law
12 and fact to the potential classes because each class member’s claim derives from the deceptive,
13 unlawful and/or unfair statements and omissions that led consumers to believe that the Products
14 contained the amount of protein as represented on the Product labels. The common questions of
15 law and fact predominate over individual questions, as proof of a common or single set of facts
16 will establish the right of each member of the Class and Subclass to recover. The questions of law
17 and fact common to the Class and Subclass are:

- 18 a. What is the PDCAAS for the protein in the Products;
- 19 b. Whether the marketing, advertising, packaging, labeling, and other promotional
20 materials for the Products are unlawful and/or misleading;
- 21 c. Whether Defendant’s actions violate Federal and California laws invoked herein;
- 22 d. Whether labeling the Products with a protein claim causes the Products to
23 command a price premium in the market;
- 24 e. Whether Defendant’s failure to provide a statement of the corrected amount of
25 protein per serving in the Products sold to the Class and Subclass members was
26 likely to deceive reasonable consumers;
- 27 f. Whether Defendant engaged in the behavior knowingly, recklessly, or negligently;
- 28 g. The amount of profits and revenues Defendant earned as a result of the conduct;
- h. Whether Class and Subclass members are entitled to restitution, injunctive and

1 other equitable relief and, if so, what is the nature (and amount) of such relief; and

- 2 i. Whether Class and Subclass members are entitled to payment of actual, incidental,
3 consequential, exemplary and/or statutory damages plus interest thereon, and if so,
4 what is the nature of such relief.

5 81. Typicality: Plaintiffs' claims are typical of the claims of the other members of the
6 Class and Subclass because, among other things, all such claims arise out of the same wrongful
7 course of conduct engaged in by Defendant in violation of law as complained of herein. Further,
8 the damages of each member of the Class and Subclass were caused directly by Defendant's
9 wrongful conduct in violation of the law as alleged herein.

10 82. Adequacy of Representation: Plaintiffs will fairly and adequately protect the
11 interests of all Class and Subclass members because it is in their best interests to prosecute the
12 claims alleged herein to obtain full compensation due to them for the unfair and illegal conduct of
13 which they complain. Plaintiffs also have no interests that are in conflict with, or antagonistic to,
14 the interests of Class and Subclass members. Plaintiffs have retained highly competent and
15 experienced class action attorneys to represent their interests and that of the Class and Subclass.
16 By prevailing on their own claims, Plaintiffs will establish Defendant's liability to all Class and
17 Subclass members. Plaintiffs and their counsel have the necessary financial resources to
18 adequately and vigorously litigate this class action, and Plaintiffs and counsel are aware of their
19 fiduciary responsibilities to the Class and Subclass members and are determined to diligently
20 discharge those duties by vigorously seeking the maximum possible recovery for Class and
21 Subclass members.

22 83. Superiority: There is no plain, speedy, or adequate remedy other than by
23 maintenance of this class action. The prosecution of individual remedies by members of the
24 classes will tend to establish inconsistent standards of conduct for Defendant and result in the
25 impairment of Class and Subclass members' rights and the disposition of their interests through
26 actions to which they were not parties. Class action treatment will permit a large number of
27 similarly situated persons to prosecute their common claims in a single forum simultaneously,
28 efficiently, and without the unnecessary duplication of effort and expense that numerous

1 individual actions would engender. Furthermore, as the damages suffered by each individual
2 member of the classes may be relatively small, the expenses and burden of individual litigation
3 would make it difficult or impossible for individual members of the classes to redress the wrongs
4 done to them, while an important public interest will be served by addressing the matter as a class
5 action.

6 84. Plaintiffs are unaware of any difficulties that are likely to be encountered in the
7 management of this action that would preclude its maintenance as a class action.

8 **CAUSES OF ACTION**

9 Plaintiffs do not plead, and hereby disclaim, causes of action under the FDCA and
10 regulations promulgated thereunder by the FDA. Plaintiffs rely on the FDCA and FDA
11 regulations only to the extent such laws and regulations have been separately enacted as state law
12 or regulation or provide a predicate basis of liability under the state and common laws cited in the
13 following causes of action.

14 **PLAINTIFFS' FIRST CAUSE OF ACTION**

15 **(Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code §
1750, *et seq.*)**

16 **On Behalf of Plaintiffs, the Class, and the Subclass**

17 85. Plaintiffs reallege and incorporate the paragraphs of this Class Action Complaint
18 as if set forth herein.

19 86. Defendant's actions, representations and conduct have violated, and continue to
20 violate the CLRA, because they extend to transactions that are intended to result, or which have
21 resulted, in the sale or lease of goods or services to consumers.

22 87. Plaintiffs and other Class and Subclass members are "consumers" as that term is
23 defined by the CLRA in California Civil Code § 1761(d).

24 88. The Products that Plaintiffs (and other similarly situated Class and Subclass
25 members) purchased from Defendant were "goods" within the meaning of California Civil Code
26 § 1761(a).

27 89. Defendant's acts and practices, set forth in this Class Action Complaint, led
28 customers to falsely believe that the Products provided nutritionally the amount of protein
claimed on the product package. By engaging in the actions, representations and conduct set forth

1 in this Class Action Complaint, Defendant has violated, and continue to violate, § 1770(a)(2), §
2 1770(a)(5), § 1770(a)(7), § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California
3 Civil Code §1770(a)(2), Defendant's acts and practices constitute improper representations
4 regarding the source, sponsorship, approval, or certification of the goods they sold. In violation of
5 California Civil Code §1770(a)(5), Defendant's acts and practices constitute improper
6 representations that the goods it sells have sponsorship, approval, characteristics, ingredients,
7 uses, benefits, or quantities, which they do not have. In violation of California Civil Code
8 §1770(a)(7), Defendant's acts and practices constitute improper representations that the goods it
9 sells are of a particular standard, quality, or grade, when they are of another. In violation of
10 California Civil Code §1770(a)(8), Defendant has disparaged the goods, services, or business of
11 another by false or misleading representation of fact. In violation of California Civil Code
12 §1770(a)(9), Defendant has advertised goods or services with intent not to sell them as advertised.
13 Finally, regarding California Civil Code §1770(a)(8), Defendant deceptively markets and
14 advertises that, unlike other protein product manufacturers, it sells Products that provide more
15 grams of protein than the Products actually do. Further, Defendant had a duty to disclose the
16 corrected amount of protein per serving in the NFP as calculated by the PDCAAS method, which
17 Defendant failed to do. 21 C.F.R. § 101.9(c)(7)(i)-(iii).

18 90. Plaintiffs request that this Court enjoin Defendant from continuing to employ the
19 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
20 § 1780(a)(2). If Defendant is not restrained from engaging in these types of practices in the
21 future, Plaintiffs and the other members of the Class and Subclass will continue to suffer harm.
22 Plaintiffs and those similarly situated have no adequate remedy at law to stop Defendant's
23 continuing practices.

24 91. Plaintiffs provided Defendant with notice and demand that Defendant correct,
25 repair, replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices
26 complained of herein. Despite receiving the aforementioned notice and demand, Defendant failed
27 to do so in that, among other things, it failed to identify similarly situated customers, notify them
28 of their right to correction, repair, replacement or other remedy, and/or to provide that remedy.

1 Accordingly, Plaintiffs seek, pursuant to California Civil Code § 1780(a)(3), on behalf of
2 themselves and those similarly situated Class and Subclass members, compensatory damages,
3 punitive damages and restitution of any ill-gotten gains due to Defendant's acts and practices.

4 92. Plaintiffs also request that this Court award their costs and reasonable attorneys'
5 fees pursuant to California Civil Code § 1780(d).

6 **PLAINTIFFS' SECOND CAUSE OF ACTION**
7 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**
8 **On Behalf of Plaintiffs, the Class, and the Subclass**

9 93. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
10 Complaint as if set forth herein.

11 94. Beginning at an exact date unknown to Plaintiffs, but within three (3) years
12 preceding the filing of the Class Action Complaint, Defendant made untrue, false, deceptive
13 and/or misleading statements in connection with the advertising and marketing of the Products.

14 95. Defendant made representations and statements (by omission and commission)
15 that led reasonable customers to believe that the Products that they were purchasing contained
16 more grams of protein per serving than the Products actually provided. Further, Defendant had a
17 duty to disclose the corrected amount of protein per serving in the NFP, as calculated according to
18 the PDCAAS method, which Defendant failed to do.

19 96. Plaintiffs and those similarly situated relied to their detriment on Defendant's
20 false, misleading and deceptive advertising and marketing practices, including each of the
21 misrepresentations and omissions set forth above. Had Plaintiffs and those similarly situated been
22 adequately informed and not intentionally deceived by Defendant, they would have acted
23 differently by, without limitation, refraining from purchasing Defendant's Products or paying less
24 for them.

25 97. Defendant's acts and omissions are likely to deceive the general public.

26 98. Defendant engaged in these false, misleading and deceptive advertising and
27 marketing practices to increase its profits. Accordingly, Defendant has engaged in false
28 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and
Professions Code.

1 99. The aforementioned practices, which Defendant used, and continues to use, to its
2 significant financial gain, also constitute unlawful competition and provide an unlawful
3 advantage over Defendant’s competitors as well as injury to the general public.

4 100. As a direct and proximate result of such actions, Plaintiffs and the other Class and
5 Subclass members have suffered, and continue to suffer, injury in fact and have lost money and/or
6 property as a result of such false, deceptive and misleading advertising in an amount which will
7 be proven at trial, but which is in excess of the jurisdictional minimum of this Court.

8 101. Plaintiffs seek, on behalf of themselves and those similarly situated, full restitution
9 of monies, as necessary and according to proof, to restore any and all monies acquired by
10 Defendant from Plaintiffs, the general public, or those similarly situated by means of the false,
11 misleading and deceptive advertising and marketing practices complained of herein, plus interest
12 thereon. Pursuant to Federal Rule of Civil Procedure 8(e)(2), Plaintiffs make the following
13 allegations in this paragraph only hypothetically and as an alternative to any contrary allegations
14 in their other causes of action, in the event that such causes of action will not succeed. Plaintiffs,
15 the Class, and the Subclass may be unable to obtain monetary, declaratory and/or injunctive relief
16 directly under other causes of action and will lack an adequate remedy at law, if the Court
17 requires them to show classwide reliance and materiality beyond the objective reasonable
18 consumer standard applied under the FAL, because Plaintiffs may not be able to establish each
19 Class member’s and/or Subclass member’s individualized understanding of Defendant’s
20 misleading representations as described in this Complaint, but the FAL does not require
21 individualize proof of deception or injury by absent Subclass members. *See, e.g., Ries v. Ariz.*
22 *Bevs. USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) (“restitutionary relief under the UCL and
23 FAL ‘is available without individualized proof of deception, reliance, and injury.’”). In addition,
24 Plaintiffs, the Class and the Subclass may be unable to obtain such relief under other causes of
25 action and will lack an adequate remedy at law, if Plaintiff is unable to demonstrate the requisite
26 *mens rea* (intent, reckless, and/or negligence), because the FAL imposes no such *mens rea*
27 requirement and liability exists even if Defendant acted in good faith.

28 102. Plaintiffs seek, on behalf of themselves and those similarly situated, a declaration

1 that the above-described practices constitute false, misleading and deceptive advertising.

2 103. Plaintiffs seek, on behalf of themselves and those similarly situated, an injunction
3 to prohibit Defendant from continuing to engage in the false, misleading and deceptive
4 advertising and marketing practices complained of herein. Such misconduct by Defendant, unless
5 and until enjoined and restrained by order of this Court, will continue to cause injury in fact to the
6 general public and the loss of money and property in that Defendant will continue to violate the
7 laws of California, unless specifically ordered to comply with the same. This expectation of
8 future violations will require current and future consumers to repeatedly and continuously seek
9 legal redress in order to recover monies paid to Defendant to which it is not entitled. Plaintiff,
10 those similarly situated and/or other consumers nationwide have no other adequate remedy at law
11 to ensure future compliance with the California Business and Professions Code alleged to have
12 been violated herein.

13 **PLAINTIFFS' THIRD CAUSE OF ACTION**
14 **(Common Law Fraud, Deceit and/or Misrepresentation)**
15 **On Behalf of Plaintiffs, the Class, and the Subclass**

16 104. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
17 Complaint as if set forth herein.

18 105. Defendant has fraudulently and deceptively informed Plaintiffs that the Products
19 provide more grams of protein than they actually provide in a form useful to the human body.
20 Defendant failed to provide a statement of the corrected amount of protein per serving in the NFP,
21 calculated according to the PDCAAS method, on all its Products, as it was required to do. Also,
22 as to some of the Products, Defendant failed to display “the type and quantity of the other
23 ingredients to be added to the product by the user and the specific method of cooking and other
24 preparation” prominently on the front the label, as it was required to do.

25 106. These misrepresentations and omissions were known exclusively to, and actively
26 concealed by, Defendant, not reasonably known to Plaintiff, and material at the time they were
27 made. Defendant knew or should have known the composition of the Products, and knew or
28 should have known that the Products did not contain or provide the amount of protein represented
on the label. Defendant’s misrepresentations and omissions concerned material facts that were

1 essential to the analysis undertaken by Plaintiffs as to whether to purchase Defendant's Products.
2 In misleading Plaintiffs and not so informing Plaintiffs, Defendant breached its duty to them.
3 Defendant also gained financially from, and as a result of, its breach.

4 107. Plaintiffs and those similarly situated relied to their detriment on Defendant's
5 misrepresentations and fraudulent omissions. Had Plaintiffs and those similarly situated been
6 adequately informed and not intentionally deceived by Defendant, they would have acted
7 differently by, without limitation: (i) declining to purchase the Products, (ii) purchasing less of
8 them, or (iii) paying less for the Products.

9 108. By and through such fraud, deceit, misrepresentations and/or omissions, Defendant
10 intended to induce Plaintiffs and those similarly situated to alter their position to their detriment.
11 Specifically, Defendant fraudulently and deceptively induced Plaintiffs and those similarly
12 situated to, without limitation, purchase the Products.

13 109. Plaintiffs and those similarly situated justifiably and reasonably relied on
14 Defendant's misrepresentations and omissions, and, accordingly, were damaged by Defendant.

15 110. As a direct and proximate result of Defendant's misrepresentations and/or
16 omissions, Plaintiffs and those similarly situated have suffered damages, including, without
17 limitation, the amount they paid for the Products.

18 111. Defendant's conduct as described herein was wilful and malicious and was
19 designed to maximize Defendant's profits even though Defendant knew that it would cause loss
20 and harm to Plaintiffs and those similarly situated.

21 **PLAINTIFFS' FOURTH CAUSE OF ACTION**
22 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions**
23 **Code § 17200, et seq.)**
24 **On Behalf of Plaintiffs, the Class, and the Subclass**

25 112. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
26 Complaint as if set forth herein.

27 113. Within four (4) years preceding the filing of this lawsuit, and at all times
28 mentioned herein, Defendant has engaged, and continue to engage, in unlawful, unfair, and
fraudulent trade practices in California by engaging in the unlawful, unfair, and fraudulent

1 business practices outlined in this complaint.

2 114. In particular, Defendant has engaged, and continue to engage, in unlawful
3 practices by, without limitation, violating the following state and federal laws: (i) the CLRA as
4 described herein; (ii) the FAL as described herein; (iii) the misbranded food provisions of the
5 Sherman Law (Article 6), including without limitation, California Health & Safety Code §§
6 110660, 110665, 110705, 110760, 110765, and 110770; (iv) the advertising provisions of the
7 Sherman Law (Article 3), including without limitation, California Health & Safety Code §§
8 110390, 110395, 110398 and 110400; and (v) and federal laws regulating the advertising and
9 branding of food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to
10 21 C.F.R. § 101.13(i)(3), (b) and (c); 21 C.F.R. § 101.9 (c)(7), 101.9(h)(4), and 101.9(e)(3),
11 which are incorporated into the Sherman Law (California Health & Safety Code §§ 110100(a),
12 110380, and 110505).

13 115. In particular, Defendant has engaged, and continues to engage, in unfair and
14 fraudulent practices by, without limitation, the following: (i) unlawfully making a protein claim
15 on the front of the package without complying with the regulatory requirements for making a
16 protein claim set forth in 21 C.F.R. § 101.9(c)(7)(i)-(iii) and incorporated by reference by
17 California's Sherman law; (ii) failing to provide a statement of the corrected amount of protein
18 per serving in the NFP, calculated according to the PDCAAS method and expressed as a %DV, as
19 required by FDA regulations; (iii) failing to prominently display the type and quantity of the
20 ingredients to be added to the product by the user and the specific method of cooking on the front
21 the label; and (iv) misleading reasonable consumers regarding the amount of protein the Products
22 provide nutritionally in a form that humans can use.

23 116. Plaintiffs and those similarly situated relied to their detriment on Defendant's
24 unlawful, unfair, and fraudulent business practices. Had Plaintiffs and those similarly situated
25 been adequately informed and not deceived by Defendant, they would have acted differently by,
26 without limitation: (i) declining to purchase the Products, (ii) purchasing less of the Products, or
27 (iii) paying less for the Products.

28 117. Defendant's acts and omissions are likely to deceive the general public.

1 118. Defendant engaged in these deceptive and unlawful practices to increase its
2 profits. Accordingly, Defendant has engaged in unlawful trade practices, as defined and
3 prohibited by section 17200, *et seq.* of the California Business and Professions Code.

4 119. The aforementioned practices, which Defendant has used to its significant
5 financial gain, also constitute unlawful competition and provide an unlawful advantage over
6 Defendant's competitors as well as injury to the general public.

7 120. As a direct and proximate result of such actions, Plaintiffs and the other Class and
8 Subclass members, have suffered and continue to suffer injury in fact and have lost money and/or
9 property as a result of such deceptive and/or unlawful trade practices and unfair competition in an
10 amount which will be proven at trial, but which is in excess of the jurisdictional minimum of this
11 Court. Among other things, Plaintiffs, Class members, and the Subclass members lost the amount
12 they paid for the Products.

13 121. As a direct and proximate result of such actions, Defendant has enjoyed, and
14 continues to enjoy, significant financial gain in an amount which will be proven at trial, but which
15 is in excess of the jurisdictional minimum of this Court.

16 122. Plaintiffs seek, on behalf of themselves and those similarly situated, equitable
17 relief, including the restitution for the premium and/or full price that they or others paid to
18 Defendants as a result of Defendants' conduct. Plaintiffs, the Class and the Subclass lack an
19 adequate remedy at law to obtain such relief with respect to their "unlawfulness" claims in this
20 UCL cause of action because the California Sherman Law does not provide a direct cause of
21 action, so Plaintiffs and the Class, and the Subclass must allege those violations as predicate acts
22 under the UCL to obtain relief.

23 123. Plaintiffs also seek equitable relief, including restitution, with respect to their UCL
24 "fraudulent" prong claims. Pursuant to Federal Rule of Civil Procedure 8(e)(2), Plaintiffs make
25 the following allegations in this paragraph only hypothetically and as an alternative to any contrary
26 allegations in their other causes of action, in the event that such causes of action do not succeed.
27 Plaintiffs, the Class and the Subclass may be unable to obtain monetary, declaratory and/or
28 injunctive relief directly under other causes of action and will lack an adequate remedy of law, if

1 the Court requires them to show classwide reliance and materiality beyond the objective
2 reasonable consumer standard applied under the UCL, because Plaintiffs may not be able to
3 establish each Class member's and/or Subclass member's individualized understanding of
4 Defendants' misleading representations as described in this Complaint, but the UCL does not
5 require individualized proof of deception or injury by absent class members. *See, e.g., Stearns v*
6 *Ticketmaster*, 655 F.3d 1013, 1020, 1023-25 (distinguishing, for purposes of CLRA claim, among
7 class members for whom website representations may have been materially deficient, but requiring
8 certification of UCL claim for entire class). In addition, Plaintiffs, the Class and the Subclass may
9 be unable to obtain such relief under other causes of action and will lack an adequate remedy at
10 law, if Plaintiff is unable to demonstrate the requisite *mens rea* (intent, reckless, and/or
11 negligence), because the UCL imposes no such *mens rea* requirement and liability exists even if
12 Defendants acted in good faith.

13 124. Plaintiffs seek, on behalf of those similarly situated, a declaration that the above-
14 described trade practices are fraudulent, unfair, and/or unlawful.

15 125. Plaintiffs seek, on behalf of those similarly situated, an injunction to prohibit
16 Defendant from continuing to engage in the deceptive and/or unlawful trade practices complained
17 of herein. Such misconduct by Defendant, unless and until enjoined and restrained by order of
18 this Court, will continue to cause injury in fact to the general public and the loss of money and
19 property in that Defendant will continue to violate the laws of California, unless specifically
20 ordered to comply with the same. This expectation of future violations will require current and
21 future consumers to repeatedly and continuously seek legal redress in order to recover monies
22 paid to Defendant to which they were not entitled. Plaintiffs, those similarly situated and/or other
23 consumers nationwide have no other adequate remedy at law to ensure future compliance with the
24 California Business and Professions Code alleged to have been violated herein.

25 **PLAINTIFFS' FIFTH CAUSE OF ACTION**

26 **(Unjust Enrichment)**

27 **On Behalf of Plaintiffs, the Class, and the Subclass**

28 126. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action

1 Complaint as if set forth herein.

2 127. Plaintiffs and members of the Class and the Subclass conferred a benefit on the
3 Defendant by purchasing the Products.

4 128. Defendant has been unjustly enriched in retaining the revenues from Plaintiffs' and
5 Class and Subclass members' purchases of the Products, which retention is unjust and
6 inequitable, because Defendant falsely represented that the Products contained specific amounts
7 of protein per serving, while failing to disclose that the Products actually provided less protein
8 than represented. This harmed Plaintiff, Class members, and Subclass members because they paid
9 a price premium as a result.

10 129. Because Defendant's retention of the non-gratuitous benefit conferred on it by
11 Plaintiffs and Class and Subclass members is unjust and inequitable, Defendant must pay
12 restitution to Plaintiffs and the Class and Subclass members for its unjust enrichment, as ordered
13 by the Court. Plaintiffs and those similarly situated have no adequate remedy at law to obtain this
14 restitution.

15 130. Plaintiffs, therefore, seeks an order requiring Defendant to make restitution to
16 them and other members of the Class and Subclass.

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, Plaintiffs, on behalf of themselves and those similarly situated,
19 respectfully request that the Court enter judgement against Defendant as follows:

- 20 A. Certification of the proposed Class and Subclass, including appointment of
21 Plaintiffs' counsel as class counsel;
- 22 B. An order temporarily and permanently enjoining Defendant from continuing the
23 unlawful, deceptive, fraudulent, and unfair business practices alleged in this Com-
24 plaint;
- 25 C. An award of compensatory damages in an amount to be determined at trial, except
26 for those causes of action where compensatory damages are not legally available;
- 27 D. An award of statutory damages in an amount to be determined at trial, except for
28 those causes of action where statutory damages are not legally available;

1 E. An award of punitive damages in an amount to be determined at trial, except for
2 those causes of action where punitive damages are not legally available;

3 F. An award of treble damages, except for those causes of action where treble
4 damages are not legally available;

5 G. An award of restitution in an amount to be determined at trial;

6 H. An order requiring Defendant to pay both pre- and post-judgment interest on any
7 amounts awarded;

8 I. For reasonable attorneys' fees and the costs of suit incurred; and

9 J. For such further relief as this Court may deem just and proper.

10 **JURY TRIAL DEMANDED**

11 Plaintiffs hereby demand a trial by jury.

12 Dated: August 18, 2022

13 **GUTRIDE SAFIER LLP**

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