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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TAYLOR COSTA, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

RELIANCE VITAMIN CO. INC., a New Jersey Corporation,

Defendant.

Case No. 3:22-cv-04679-WHO

FIRST AMENDED CLASS ACTION COMPLAINT

1. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS AND PROFESSIONS CODE § 17200, *et seq*.
2. FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17500, *et seq*.
3. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, *et. seq.*
4. BREACH OF WARRANTY
5. FRAUDULENT INDUCEMENT – INTENTIONAL MISREPRESENTATION
6. NEGLIGENT MISREPRESENTATION
7. RESTITUTION/UNJUST ENRICHMENT

DEMAND FOR JURY TRIAL

Plaintiff Taylor Costa (**"Plaintiff"**), individually and on behalf of all others similarly situated, as more fully described herein (the **"Class"** and **"Class Members"**), brings this class action complaint against Defendant Reliance Vitamin Co., Inc. (**"Defendant"**), and alleges the following based upon investigation, information, and belief, unless otherwise expressly stated as based on personal knowledge.

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Clarkson Law Firm, P.C. | 22525 Pacific Coast Highway | Malibu, CA 90265

TABLE OF CONTENTS

Page No.

Clarkson Law Firm, P.C. | 22525 Pacific Coast Highway | Malibu, CA 90265

Clarkson Law Firm, P.C. | 22525 Pacific Coast Highway | Malibu, CA 90265

INTRODUCTION

1. **Synopsis**. To increase profits at the expense of consumers and fair competition, Defendant deceptively sells its powder supplements in opaque containers (the "Products") in oversized packaging that does not reasonably inform consumers that they are nearly half empty.

2. This empty space, known as "slack-fill," is at the center of a common scam employed in the market, and by Defendant here: attract consumers with large, oversized packaging to drive sales, while underfilling the product to save money.

3. Consumers are driven by visual cues when selecting products. Specifically, consumers choose larger containers because they associate the size of the products with more product and better value.

4. Slack-fill scams prey on these consumers and dupe them into paying a premium for empty space. Consumers receive less than they reasonably assume they will, based on the size of the package.

5. It also harms law-abiding companies who package their products in a manner congruent with the amount of product inside, as consumers are falsely led to believe they will get a better deal if they purchase a fraudster's larger package, only to find out later it is nearly half empty.

6. Below is a true and correct image of one version of the Product evidencing Defendant's deception: the opaque container measures to a vertical height of approximately 21.8 cm, while the product inside only measures to a vertical height of approximately 10.8 cm. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space:

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7. Due to its known propensity to deceive consumers and destroy fair competition, the use of empty space in product packaging is a practice that both the United States and California legislatures prohibit except in rare instances where the empty space can be deemed "functional" according to narrowly tailored criteria. *See* 21 C.F.R. § 100.100(a) and California Business and Professions Code § 12606.2. None of these statutory 'exceptions' apply to the Products, as discussed more fully *infra*. *See* ¶¶ 110-136.

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8. Instead, Defendant is utilizing empty space in its oversized, opaque packaging for the very reason it is prohibited: to trick consumers into believing its Products are a good deal, and a better deal than competitive products, based on size alone, and to save money by putting less product in each container than reasonable consumers expect to receive based on the package size. Ultimately, consumers pay premium prices for significantly empty containers.

9. Accordingly, Defendant has violated California Civil Code Sections 1750, *et seq*. (the "**CLRA**"), particularly California Civil Code Sections 1770(a)(2), 1770(a)(5), 1770(a)(7), and 1770(a)(9). As such, Defendant has committed *per se* violations of Business & Professions Code Section 17200, *et seq*. (the "**UCL**") and Business & Professions Code section 17500, *et seq*. (the "**FAL**").

10. Plaintiff and consumers have suffered injury in fact caused by the false, fraudulent, unfair, deceptive, unlawful, and misleading practices set forth herein, and seek injunctive relief, as well as, *inter alia*, compensatory damages, statutory damages, restitution, and attorneys' fees.

11. **Primary Dual Objectives.** Plaintiff brings this action individually and on behalf of those similarly situated to represent a Class of consumers who purchased the Products (defined *infra*). Plaintiff's primary objective in this litigation is to secure injunctive relief to stop Defendant's unlawful marketing of the Products as adequately filled. Plaintiff also seeks, on Plaintiff's individual behalf and on behalf of the Class, a monetary recovery of the premium consumers overpaid for the Products, as consistent with permissible law (including, for example, damages, restitution, and disgorgement).

12. **The Products**. Defendant's slack-fill scam extends to all flavors, sizes, and varieties of PlantFusion powder supplements sold in opaque containers (the **"Products"**) including, but not limited to:

a. Complete Protein – Vegan Protein Powder (Creamy Vanilla)

b. Complete Protein – Vegan Protein Powder (Rich Chocolate)

c. Complete Protein – Vegan Protein Powder (Red Velvet Cake)

d. Complete Protein – Vegan Protein Powder (Cookies and Cream)

e. Complete Protein – Vegan Protein Powder (Natural)

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f. Complete Lean – Vegan Protein Powder for Weight Loss (Creamy Vanilla)

g. Complete Lean – Vegan Protein Powder for Weight Loss (Chocolate Brownie)

h. Complete Meal – Vegan Meal Replacement Shake (Creamy Vanilla Bean)

i. Complete Meal – Vegan Meal Replacement Shake (Chocolate Caramel)

j. Inspire for Women – Vegan Protein Powder for Women (Creamy Vanilla Bean

k. Inspire for Women – Vegan Protein Powder for Women (Rich Chocolate)

l. Inspire for Women – Vegan Protein Powder for Women (Natural)

m. Elite Activated Peptide Protein – Vegan Sport Protein (Creamy Vanilla Bean)

n. Elite Activated Peptide Protein – Vegan Sport Protein (Rich Chocolate)

o. Complete Organic Protein – Organic Vegan Protein (Vanilla Chai)

p. Complete Organic Protein – Organic Vegan Protein (Rich Chocolate)

CALIFORNIA STATE AND FEDERAL COURTS FIND SLACK-FILL CASES MERITORIOUS AND APPROPRIATE FOR CLASS TREATMENT

13. Several state and federal courts have found that cases involving nearly identical claims are meritorious and appropriate for class treatment, including where, as here, powder-based protein products are sold in significantly empty containers. *See, e.g.*, *Winkelbauer v. Orgain Mgmt. et. al*, Case No. 20STCV44583 (L.A.S.C. May 20, 2021) (demurrer to claims involving slack-filled protein powder products overruled); *Barrett v. The Kroger Co.*, Case No. 21STCV14122 (L.A.S.C. October 8, 2021) (same); *Barrett v. Optimum Nutrition*, Case No. 2:21-cv-04398-DMG-SK (C.D. Cal. Jan. 12, 2022) (FRCP 12(b)(6) motion to dismiss slack-filled protein powder claims denied); *Padilla v. The Whitewave Foods Co., et. al.*, Case No. 2:18-cv-09327-JAK-JC (C.D. Cal. July 26, 2019) (FRCP 12(b)(6) motion to dismiss slack-filled supplement container claims denied); *Matic v. United States Nutrition, Inc.*, Case No. 2:18-cv-09592-PSG-AFM (C.D. Cal. Mar. 27, 2019) (FRCP 12(b)(6) (motion to dismiss slack-filled supplement container claims denied); *Merry, et al. v. International Coffee & Tea, LLC dba The Coffee Bean*, Case No. CIVDS1920749 (San Bernardino Superior Court Jan. 27, 2020) (demurrer to slack-filled powder container claims overruled); *Coleman v. Mondelez Int'l Inc.*, Case No. 2:20-cv-08100-FMO-AFM (C.D. Cal. July 26, 2021) (FRCP 12(b)(6) motion to dismiss slack-filled

Swedish Fish® candy box claims denied); *Iglesias v. Ferrara Candy Co.*, Case No. 3:17-cv-00849-VC (N.D. Cal. July 25, 2017) (FRCP 12(b)(6) motion to dismiss slack-filled Jujyfruits® and Lemonhead® candy box claims denied and nationwide settlement class certified) (cert. granted Oct. 31, 2018); *Tsuchiyama v. Taste of Nature, Inc*., Case No. BC651252 (L.A.S.C. Feb. 28, 2018) (motion for judgment on the pleadings involving slack-filled Cookie Dough Bites® candy box claims denied and nationwide settlement subsequently certified through Missouri court); *Gordon v. Tootsie Roll Industries, Inc*., Case No. 2:17-cv-02664-DSF-MRW (C.D. Cal. Oct. 4, 2017) (FRCP 12(b)(6) motions to dismiss slack-filled Junior Mints® and Sugar Babies® candy box claims denied); *Escobar v. Just Born, Inc.*, Case No. 2:17-cv-01826-BRO-PJW (C.D. Cal. June 12, 2017) (FRCP 12(b)(6) motion to dismiss slack-filled Mike N' Ike® and Hot Tamales® candy box claims denied, and California class action certified over opposition) (cert. granted June 19, 2019); *Thomas v. Nestle USA, Inc.*, Cal. Sup. Case No. BC649863 (April 29, 2020) (certifying as a class action, over opposition, slack-fill claims brought under California consumer protection laws).

PARTIES

14. **Plaintiff.** Plaintiff Taylor Costa is, and at all times relevant hereto was, a citizen of California residing in the county of San Francisco. Plaintiff made a one-time purchase of Defendant's Complete Protein – Vegan Protein Powder (Creamy Vanilla Bean) Product from a Whole Foods in San Francisco, California in November 2019. Plaintiff paid approximately $35.00 for the Product. In making her purchase, Plaintiff relied upon the opaque packaging, including the size of the container and product label, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers like Plaintiff to purchase the Products. Plaintiff understood the size of the container and product label to indicate that the amount of powder contained therein was commensurate with the size of the container, and she would not have purchased the Product, or would not have paid a price premium for the Product, had she known that the size of the container and product label were false and misleading. If the Product's packaging and labels were not misleading, then Plaintiff would purchase the Product in the future.

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15. **Defendant.** Defendant, Reliance Vitamin Co., Inc. is a New Jersey corporation. Defendant maintains its principal place of business at 3775 Park Ave #1, Edison, NJ 08820. Defendant, directly and through its agents, conducts business nationwide. Defendant has substantial contacts with and receives substantial benefits and income from and through the State of California. Defendant is the owner, manufacturer, and distributor of the Products, and is the company that created and/or authorized the false, misleading, and deceptive packaging for the Products.

16. In committing the wrongful acts alleged herein, Defendant planned and participated in and furthered a common scheme by means of false, misleading, deceptive, and fraudulent representations to induce members of the public to purchase the Products. Defendant participated in the making of such representations in that it did disseminate or cause to be disseminated said misrepresentations.

17. Defendant, upon becoming involved with the manufacture, advertising, and sale of the Products, knew or should have known that its advertising of the Products' packaging was false, deceptive, and misleading. Defendant affirmatively misrepresented the amount of powder contained in the Products' packaging in order to convince the public and consumers of the Products to purchase the Products, resulting in profits of millions of dollars or more to Defendant, all to the damage and detriment of the consuming public.

18. Defendant has created and still perpetuates a falsehood that Products' packaging contains an amount of powder commensurate with the size of the container, though they actually contain nonfunctional, unlawful slack-fill. As a result, Defendant's consistent and uniform advertising claims about the Products are false, misleading, and/or likely to deceive in violation of California and federal packaging and advertising laws.

JURISDICTION

19. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. Section 1332 of the Class Action Fairness Act of 2005 because: (i) there are 100 or more class members, (ii) there is an aggregate amount in controversy exceeding $5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least one Plaintiff and Defendant

are citizens of different states. The Court has supplemental jurisdiction over any state law claims pursuant to 28 U.S.C. Section 1367.

20. Defendant is subject to personal jurisdiction in California based upon sufficient minimum contacts which exist between Defendant and California. Defendant is authorized to do and is doing business in California.

VENUE

21. Pursuant to 28 U.S.C. Section 1391, this Court is the proper venue for this action because a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this District: Plaintiff is a citizen of California who resides in this District; Defendant made the challenged false representations to Plaintiff in this District; and Plaintiff purchased the Product in this District. Moreover, Defendant receives substantial compensation from sales in this District, actively advertises and sells the Products in this District, and made numerous misrepresentations through its advertising and labeling of Products, which had a substantial effect in this District.

FACTUAL BACKGROUND

A. Consumers Prefer Products with Larger Packages

22. Human beings are "predominantly visual" creatures.[1] Over 70% of a human's sensory receptors are located in their eyes, which allows people to interpret a visual scene in less than 1/10 of a second.[2] As a result, our environment caters to and prioritizes our desire to engage with visual content.[3]

23. One area that illustrates humans' visual nature, is the consumer decision-making process. Because the average consumer spends only 13 seconds deciding whether to make an in

[1] *Consumer Behavior and Visual Experiences*, MOXELS, https://www.moxels.com/post/consumer-behaviour-visual-experiences (last visited February 7, 2023).
[2] *Id.*
[3] *Id.*

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store purchase,[4] visual elements heavily influence purchase decisions.[5] Consumers are more likely to buy products that are noticeable and easy to see.[6]

24. Physical features of a product, such as size and shape, are critical to consumers' decision-making process.[7] Products with notable size and design features are more likely to be purchased.[8] Critically, physical features have an advantage over "design features with semantic content like text-elements[, which] are not suitable for getting consumer's first eye-contact in-store."[9]

25. Specifically, when it comes to packaging size, consumers tend to favor and purchase larger packages.[10] One study found that consumers are attracted to larger packages and containers because of the common perception that larger size correlates to greater value,[11] and the quantity of the good being purchased.[12]

26. Food marketing experts confirm that larger packaging dimensions make products more attractive to consumers and increase the likelihood that they will purchase a product. Consumers do not investigate or analyze all information available to them at the point of purchase; rather, "[p]eople assume the larger box is a better value."[13] According to Dr. Mark

[4] Randall Beard, *Make the Most of Your Brand's 20-Second Window*, NIELSEN, Jan. 13, 2015, https://www.nielsen.com/us/en/insights/article/2015/make-the-most-of-your-brands-20-second-windown./.
[5] *See* Moxels, *supra* note 1 ("Visual stimuli at a point of sale will influence consumers' intention to buy.")
[6] *Id.*
[7] J. Clement, et al., *Understanding consumers' in-store visual perception: The influence of package design features on visual attention*, JOURNAL OF RETAILING AND CONSUMER SERVICES, https://doi.org/10.1016/j.jretconser.2013.01.003 (Mar. 2013) ("Physical design features such as shape and contrast dominate the initial phase of searching.")
[8] *Id.*
[9] *Id.*
[10] P. Silayoi and M. Speece, *Packaging and purchase decisions: An exploratory study on the impact of involvement level and time pressure*, BRITISH FOOD JOURNAL, Vol. 106 No. 8, pp. 607-628. https://doi.org/10.1108/00070700410553602 (Aug. 1, 2004).
[11] *Id.*; *see also Package Downsizing Proves That Less Is Not More*, CONSUMER REPORTS https://www.consumerreports.org/cro/magazine/2015/09/packaging-downsizing-less-is-not-more/index.htm (Sep. 24, 2015).
[12] P. Raghubir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 J. MARKETING RESEARCH 313-326 (1999).
[13] *Package Downsizing Proves That Less Is Not More*, CONSUMER REPORTS https://www.consumerreports.org/cro/magazine/2015/09/packaging-downsizing-less-is-not-more/index.htm (Sep. 24, 2015).

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Lang, professor of food marketing at Saint Joseph's University, "[s]hoppers make decisions heuristically—based on shortcuts using inferences and incomplete data. We can't process everything."[14]

27. In one illustrative study by Valerie S. Folkes Professor Emeritus of Marketing at USC Marshall, a researcher disguised as a confused shopper in a grocery store asked others which of two different bottles of shampoo contained more. Of the 240 individuals asked, *only 2* tried to read the semantic text on the bottle labels for volume information. The remaining 238 participants all relied on their visual senses.

28. Folkes' study aligns with other research that humans "shop with their eyes" and that visual imagery and other 'depictions' dominate other modalities when consumers process packaging cues. This consumer behavior makes sense because it is based on human biology. As David Williams, Professor of Medical Optics at the University of Rochester has explained, "more than 50 percent of the cortex, the surface of the brain, is devoted to processing visual information."

B. The Products Are Deceptive to Reasonable Consumers

29. Marketers are fully aware of these well-known consumer behaviors and unfortunately, there is a long history of product manufacturers leveraging them to dupe consumers by employing deceptive packaging and labeling schemes, such as packaging their products in oversized containers that misrepresent the amount of product inside. This results in substantial empty space, otherwise known as "slack-fill." "Nonfunctional slack-fill" is empty space in a package that is filled to less than its capacity without lawful justification.

30. To address this predatory behavior and the misleading effect slack-filled containers have on consumers, both federal and California law explicitly prohibit nonfunctional slack-fill. *See* 21 C.F.R. § 100.100; Cal. Bus. & Prof. Code § 12606.2. These regulations, discussed in greater detail *infra*, were designed and implemented to protect consumers from fraudulent and deceptive slack-fill schemes exactly like the one Defendant employs here.

[14] *Id.*

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31. Rather than following the law, Defendant contravenes slack-fill regulations by underfilling its containers for no lawful reason. As a result, reasonable consumers believe they are purchasing a container full of protein powder when, in reality, what they actually receive is 50% less than what is represented by the size of the container.

32. The statutory framework regulating unlawful slack-fill reflects the legislature's awareness that packaging serves as a powerful advertising tool, and that a product's packaging communicates material information to consumers. More specifically, slack-fill legislation reflects an understanding that package size is interpreted by consumers to indicate quantity of contents.

33. In passing the Fair Packaging and Labeling Act ("FPLA"), Congress recognized the materiality of packaging size to consumers, and expressed concern regarding the propensity of oversized packaging to mislead consumers as to the quantity of product contained therein. 58 FR 64123, 64131.

34. The FDA has described product packaging as the "final salesman" between manufacturer and consumer, "communicating information about the quantity and quality of product in a container." 58 FR 64123, 64131. The FDA has also stated that "[c]onsumers develop expectations as to the amount of product they are purchasing based, at least in part, on the size of the container." 58 FR 64123, 64131.

35. In support of the FPLA, Congress aptly observed that product packaging must "apprise the consumer of [its] contents and [] enable the purchaser to make value comparisons among comparable products (H.R. 2076, 89th Cong., 2d sess., p. 7 (September 23, 1966))." 58 FR 64123, 64131.

36. Critically, Congress stated that "[p]ackages only partly filled create a false impression as to the quantity of food which they contain ***despite the declaration of quantity of contents on the label***." 58 FR 64123, 64131 (emphasis added).

37. Slack-filled containers explicitly impart inaccurate information about the amount of product contained inside. Consumers have no reason to question representations of amount communicated by the size of a product's packaging, so they reasonably do not seek out additional disclosures of amount on a label's text and if they do, they do not understand them to dispel the

visual deception created by oversized packaging. This is one reason why non-functional slack fill is prohibited altogether, rendering a package *per se* misleading.

38. Consumers' inability to rely on slack-filled containers prevents them from engaging in meaningful value comparisons based on price and quantity. Thus, Defendant's practice of packaging the Products in unlawfully oversized containers is just as deceptive as an explicitly false written statement of quantity on a product label.

39. Nonfunctional slack-fill renders the Products inherently deceptive, and the misleading first impression created by the oversized packaging is not overcome by semantic content like text-elements on a label. This is especially true where, as here, label statements of net weight, serving size in terms of an undefined "scoop," and servings per container, are not easily understood like a product "count" for a countable good might be, and also are not clear and conspicuous but instead scattered across several inconspicuous label locations and in small font.

40. Even if Plaintiff and other reasonable consumers of the Products had a reasonable opportunity to review, prior to the point of sale, other representations of amount, such as net weight or serving disclosures, they did not and would not have reasonably understood or expected such representations to translate to an amount of powder product meaningfully different from their expectation of an amount of powder commensurate with the size of the container.

41. For this reason, packaging, advertising, and selling products in oversized packaging that contains non-functional slack-fill is strictly prohibited, regardless of any textual disclosures of amount on the labeling. Under the slack-fill statutes, the nonfunctional slack-fill in the Products render them inherently deceptive and per se misleading.

42. **Reasonable Consumers Cannot Quantify the Products.** Unlike products that are traditional, countable goods, when purchasing the Products, reasonable consumers are not able to fully assess the amount of powder they are purchasing by translating net weight and serving disclosures into an expected quantity of powder.

43. The Products' labels do not expressly state the number of protein beverages that can be prepared from the powder contents of the container, nor do they provide any other meaningful metric from which a consumer could reasonably compute, at the point of purchase, the number of

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protein drinks they are receiving.

44. The "preparation instructions" on the side label direct consumers to add "1 scoop" to "10 to 12 oz." of water, with no indication of how much a "scoop" is, much less how many undefined "scoops" are in the Product.

45. *Nowhere* do the Products' labels state any purported "yield," such as "prepares 15 drinks."

46. To arrive at that "yield," a consumer would have to read the preparation instruction on the side label, turn the container around to view the rear-label supplement facts panel, read the portion of that panel that explains 1 "scoop" (30g) is a serving, and separately, that there are 15 "scoops" per container.

47. Thus, to determine the number and total volume of prepared protein beverages that can be made from the Products, a consumer must follow all of the following steps ***at the point of purchase***: (1) pick up the Product and review the label; (2) turn the container around to view the rear-label supplement facts panel; (3) separately locate the serving size (1 scoop) and servings per container (15 scoops) disclosures; (4) turn the product again to view the preparation instructions panel on the side of the label; (5) note that the instructions recommend mixing 1 scoop of powder in 10 to 12 ounces of water or other liquid; and (5) synthesize this information and conclude that the container yields approximately 15, 10 to 12 ounce beverages.

48. It is unreasonable to expect consumers to engage in such investigation and cognitive processing in the mere 13 seconds that they spend making an in-store purchasing decision, especially considering each of these disclosures is provided in barely legible fine print in inconspicuous label locations. Instead, consumers reasonably and justifiably rely on the size of the container to approximate the amount of powder contained inside.

49. The Products are not comparable to traditionally countable goods, such as cookies or candy, that disclose a piece count on the product label. Disclosures like "12 cookies" or "30 candies" are not ambiguous and require little cognitive processing by consumers. Reasonable consumers can easily conceptualize a "cookie," however, net weight and "scoops" of powder are metrics that communicate materially less—consumers do not know the size of a single scoop and

they do not know the quantity of powder that a gram equates to.

50. Even if a consumer concluded that the Products yield 15 protein drinks, under California and federal slack fill laws, these disclosures do not dispel the misleading impression created by the inherently deceptive oversized package. As discussed in greater detail *infra*, the slack-fill statutes do not create an exception for misleading packaging with otherwise accurate statements of quantity, including yield disclosures. FDA guidance is clear: "label statements do not dispel the misleading aspect of nonfunctional slack-fill." 58 FR 64123, 64131.

51. Further, even if a consumer does synthesize the disparate disclosures scattered around the Product's label to arrive at "15 drinks," that yield is itself based upon weights and measures (scoops, grams, and ounces) that, like net weight, do not provide the consumer with any meaningful indication of the volume of powder contained within the Product's packaging.

52. Critically, even if a drink "yield" were obvious from the label, and consumers understood it to mean the Product would be half-empty (they do not), the number of drinks that can be prepared from the Product fails to account for the countless different ways that consumers use protein powder. Defendant itself includes over 35 different recipes for its various Products on its website, including, e.g., lemon bars, cakes, pies, muffins, brownies, and even spinach dip.[15] For a consumer buying the Products to make spinach dip or brownies, or any number of other known uses for protein powder, the number of "drinks" does nothing to inform them how much powder is in the container. Because net weight, number of "scoops," and number of drinks do not provide meaningful metrics for estimating the volume of raw powder contained in the Products, reasonable consumers using the Products in food preparation also necessarily rely on the size of the container as a proxy for the amount of powder contained therein.

53. Protein powder products are also inherently customizable, and thus will be consumed differently per individual, even those who are using it to make drinks. Individuals of different weights, ages, body types, and genders have different protein needs and, thus, may not consume the same "one scoop" serving. Even flavor preference can account for a consumer using

[15] *The PlantFusion Life – Recipes*, https://plantfusion.com/blogs/the-plantfusion-life-recipes (last visited Feb. 7, 2023).

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the Products in a manner differently than recommended by the serving disclosure.

54. Because the number of drinks is insufficient to quantify the total amount of product in the container, reasonable consumers instead rely on the size of the Products' containers. Product container size provides a much more salient and efficient means of assessing the amount of powder they are purchasing.

55. Further, none of the information necessary to quantify the number of drinks that could be derived from the Products appears on the ***front*** label. All of the disparate amount disclosures are stated in small print, in inconspicuous locations on the side or back-labels. Generally, reasonable consumers do not view the back label prior to purchasing a product, and if they do, the review is cursory.

56. Thus, reasonable consumers in an average overall 13-second purchase decision are unlikely even to see various amount disclosures, much less synthesize them to arrive at an estimated number of drinks.

57. Instead, consumers rely on the size of the container as a proxy for the amount of powder they will receive, especially where, as here, there is not one way (like in a drink) to consume the Product.

58. Because Defendant's Product container is up to twice the size of competitive products of similar net weight, consumers pick Defendant's Product because they assume, reasonably, the larger container will have more powder inside and, thus, is a better value. Consumer research by product design and marketing consultancy Therefore Design indicates that this decision— to choose one brand over another—happens in only 3-7 seconds.

59. When consumers do look to the back label, they do so for a specific, and often *health-related* purpose, not to find information about the amount of product inside, which they instead reasonably eyeball based on the size of the package. For example, one study found that 40% of consumers who do turn to the back label do so because they are specifically looking for the number of calories contained in the product.[16]

[16] *When grocery shopping, what information on nutrition facts labels, if any, do you look at most often?* Statistia, (May 2021) https://www.statista.com/statistics/1287656/nutrition-facts-label-information-consumers-look-at-the-most-us/

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60. Moreover, when consumers do consult back labels, they often do not read them in their entirety. One study found that 52.5% of consumers admit that they do not look at the ingredient list, the aspect of the packaging that contains some of the most important information about the product.[17]

61. Critically, even when consumers do read the back label, they frequently do not understand what they are reading: "57.7% consumers 'don't understand' the food labels, whereas 39.7% 'partially understand' the food labels information."[18] Because of the confusion caused by back labels, consumers prefer short front-label claims to back-label explanations.[19]

62. Defendant easily could have put a Product "yield" or number of servings on the front label, as competitors do. For example, the Optimum Nutrition Gold Standard Protein Powder front label states "24 Servings:"

[17] Goyal R, Deshmukh N. *Food label reading: Read before you eat*. J Educ Health Promot. 2018 Apr 3;7:56. doi: 10.4103/jehp.jehp_35_17. PMID: 29693037; PMCID: PMC5903167.

[18] *Id.*

[19] *See e.g.*, Grunert K.G., Wills J.M. *A review of European research on consumer response to nutrition information on food labels. J. Public Health.* 2007;15:385–399. doi: 10.1007/s10389-007-0101-9; Wansink B., Sonka S.T., Hasler C.M. *Front-label health claims: When less is more*. *Food Policy.* 2004;29:659–667. doi: 10.1016/j.foodpol.2004.10.004.

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63. Instead, Defendant includes on the front label only "net weight" which courts have concluded is not a meaningful measurement for a product like protein powder, sufficient to overcome the visual deception caused by an oversized container like Defendant's that is sold half empty.

64. **Net Weight Does Not Cure Deception.** The Products' labels state the "product is sold by weight, not volume." But this does not dispel deception. Reasonable consumers do not understand what this phrase conveys because they are not aware of how the Products' weight correlates to volume or package size. Thus, reasonable consumers assume that the weight disclosed on the Products' labels represents an amount of powder consistent with the size of the container. For this reason, many products that are sold by weight include additional clarifying language, such as "the size of this container does not necessarily depict the actual amount of product within" or "the amount of product in this box may differ from the amount contained in similar-sized boxes." With no such clarifying language on Defendant's Product, reasonable consumers are not aware that the weight of the Products may translate to a quantity that is notably less than what is represented by the size of the packaging.

65. Even if consumers did understand the phrase "product is sold by weight, not volume" (they do not), it does not alert consumers that the packaging is half empty. At most, this statement may prompt a purchaser to look for the net weight disclosure on the front label—however, consumers lack the necessary expertise to translate net weight into an expected amount of powder.

66. The net weight disclosure does not enable reasonable consumers to gauge the quantity of powder compared to the size of the container itself. Reasonable consumers are not sufficiently versed in weights and measures to read the net weight listed on the Product's label and, with no other visual reference, translate that net weight into an expected quantity of protein powder. Instead, reasonable consumers examine the size of the container to judge how much powder it contains and are duped into buying a Product that is half empty and lacks reasonable congruence to the size of the container.

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67. The fact that the Products' packaging indicates that a purchaser would receive 450 grams or 15.87 ounces of protein powder does not indicate to a reasonable consumer that the Products' container is not full and that, instead, half of the container is empty. Reasonable consumers interpret the net weight as indicating an amount equivalent to the size of the container.

68. Moreover, the FDA has stated "the presence of an accurate net weight statement does not eliminate the misbranding that occurs when a container is made, formed, or filled so as to be misleading." 58 FR 64123, 64128.

69. Federal law requires more than a mere statement of net weight to cure the deception created by underfilled packaging. Section 343(e) (formerly, section 403(e)) of the Food, Drug, and Cosmetic Act ("FDCA") "requires packaged food to bear a label containing an accurate statement of the quantity of contents" and, according to the FDA, "[t]his requirement is ***separate and in addition to***" the requirements imposed by section 343(d) (formerly, section 403(d)) of the act. 58 FR 64123 (emphasis added).

70. Thus, the FDA found that an accurate net weight statement alone is insufficient to cure misleading fill, because such a ruling "would render the prohibition against misleading fill in section [343(d)] of the act redundant." 58 FR 64123.

71. Congress expressly intended that section 343(d) of the act "'reach deceptive methods of filling where the package is only partly filled and, ***despite the declaration of quantity of contents on the label, creates the impression that it contains more food than it does***.'" 58 FR 64123, 64128-64129 (emphasis added).

72. Because the net weight declaration does not provide consumers with meaningful information about the quantity of powder inside the Products, it fails to counter the misleading impression created by the oversized packaging.

73. **Settling May Occur.** At the very bottom of the Products' rear labels, buried below the preparation instructions, the labels also state "settling may occur during shipping." Again, this does not dispel deception. First, consumers do not understand what this means. "Settling" in this context is a manufacturing and product packaging industry term. Most consumers do not work in manufacturing or product packaging and, therefore, do not know what "settling" is. Second, even

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if they do know what "settling" means in this context, reasonable consumers may think that this statement means, at most, that there will be a small percentage of empty space in the packaging as a result of settling. Reasonable consumers certainly do not expect "settling may occur during shipping" to mean that the Products will be half empty, especially when other powder products sold by Defendant's competitors are adequately filled.

74. Regardless of whether consumers understand the statement "settling may occur during shipping" to mean the Products may be half-empty (they do not), Defendant is not permitted to unlawfully underfill their packaging. Doing so is inherently misleading, and there is no exception or safe harbor for such a statement.

75. Moreover, all the statements related to quantity appearing on the Products' labels are not prominent, clear, or conspicuous. Even if consumers examined the labels closely, statements of net weight, serving size, "scoops" and servings per container are likely to go unnoticed. These statements appear in small text, and they are hidden in discreet locations on the label where consumers are not likely to look. Thus, for this additional reason these disclosures do not effectively dispel the misleading impression created by the substantially oversized container.

76. Visual misrepresentations are not effectively countered by semantic elements like text, which is why industry standard, followed by Defendant's competitors, is to at least have a "fill line" on the container visually reflecting the volume of powder contained inside. Without it, consumers have no reasonable way to gauge the amount of powder inside without first buying the container and opening it to see.

77. Plaintiff would not have purchased the Product had she known that the Product contained far less powder than was commensurate with the size of its packaging.

78. Defendant intended for Plaintiff and the Class members to be misled. Defendant's misleading and deceptive practices proximately caused harm to Plaintiff and the Class, as well as Defendant's lawfully acting competitors.

79. **Reasonable Alternatives Available to Dispel Deception.** At all times relevant hereto, Defendant had reasonable alternatives available to dispel the deception created by its

oversized packaging, including but not limited to visual representations of quantity, such as a fill line.

80. "Fill lines" exist as one method to visually depict the amount of product inside a package, and they are used because semantic elements like text are ineffective at countering the visual deception caused by an oversized container, in Defendant's case, half-empty. "Fill lines" are standard in the protein powder industry, among many other product lines. They are regularly approved as proper "injunctive relief" in slack-fill cases.

81. More specifically, fill lines are clear visual markers on the outside of a package that show where the product inside measures to vis-a-vis the package size and dispel deception that results from oversized packaging. While numeric weights and measures often confuse consumers for the reasons identified *supra*, fill lines are one way to better communicate to consumers how much product they will actually receive.

82. While Defendant's competitors have implemented these visual representations of amount on their labels and packaging, Defendant has ignored this industry trend towards transparency, electing instead to continue misleading consumers as to the amount of powder contained in the Products to obtain an unfair competitive advantage in the marketplace.

83. Below is a true and correct image of one comparator product, illustrating how Defendant's competitors use a fill line to dispel misperceptions created by opaque, oversized packaging. The Vega Plant-Based Premium sport protein product has a conspicuous fill line on the label, marked with bright red capital letters that unambiguously spell out "FILL LINE," which communicates to consumers where the powder product measures in relation to the size of its packaging:

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84. The Vega product also features bold, conspicuous text on the front label which states, in all capital letters, "SEE SIDE PANEL FOR FILL LINE."

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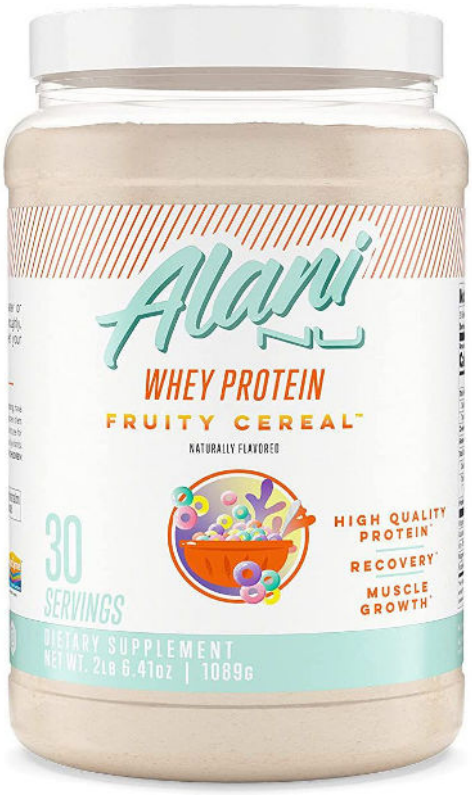
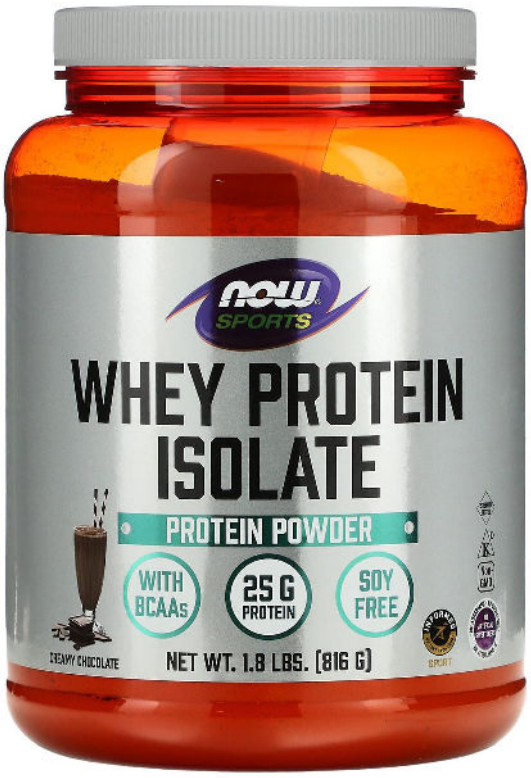
85. The packaging of the Vega Plant-Based protein product demonstrates one of the various ways manufacturers of powder products attempt to correct misperceptions created by oversized packaging: by using clear and conspicuous fill lines to communicate powder quantity.

86. Some of Defendant's competitors also have adopted transparent or translucent containers as a means to dispel deception, as it allows the consumer to view the contents of the packaging and immediately discern the quantity of powder they will receive. Thus, the consumer is made aware of any discrepancy between the size of the packaging and the quantity of powder at the point of purchase.

87. Below are true and correct images of two of Defendant's competitor products. The Alani Nu Whey Protein product is packaged in a fully transparent container that allows consumers to view the contents of the container at the point of purchase. Similarly, the Now Sports Whey Protein Isolate product is packaged in an orange-tinted, translucent container that allows purchasers to fully view its contents and fill level.





88. Notably, both the Alani Nu and Now Sports products are also packaged in containers that are an appropriate size for the quantity of powder product contained therein. They

are full of powder—whereas Defendant's containers are sold half-empty, and because consumers cannot see inside, and there is no fill line, they do not know that.

89. Conversely, the Products' opaque packaging prevents a consumer from observing the contents before opening. Even if a reasonable consumer were to "shake" the Products before opening the container, the reasonable consumer would not be able to discern the presence of any nonfunctional slack-fill, let alone the significant amount of nonfunctional slack-fill that is present in the Products.

90. Other competitors elect to package their protein powders in pliable bags which, unlike Defendant's rigid plastic containers, allow consumers to feel and physically manipulate the powder product within, and thereby discern the level of fill before purchasing and opening the product.

91. Despite Defendant's awareness of these reasonable visual alternatives, it has failed to avail itself of any available measures to dispel deception. Instead, Defendant continues to manufacture, package, and sell the Products in oversized, opaque containers to increase demand and sales without incurring the higher costs associated with adequately filling the containers.

92. Defendant could easily implement a fill line, or any number of other visual indicators of fill level, in an effort to dispel the false impression created by the Products' underfilled, oversized packaging. Defendant could also sell its Products in containers sized to reflect the amount of powder inside, as their competitors do. But Defendant chooses not to do so to continue benefiting from consumer confusion and to maintain the competitive advantage it has obtained as a result of its fraudulent slack-fill scheme.

C. Defendant's Conduct Harms Consumers and Threatens Fair Competition.

93. **Reasonable Consumer's Perception.** Defendant's practice of selling the Products in oversized, misleading packaging leads reasonable consumers, like Plaintiff, into believing that the Products conform to Defendant's fraudulent misrepresentation—meaning, consumers are led to believe that they are purchasing a quantity of product commensurate with the size of the container they select.

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94. **Actual Evidence of Deception in the Market.** Evidence in the market illustrates the deception, and shows that consumers are, in fact, mislead by Defendant's fraudulent misrepresentations. Consumers have expressed frustration and confusion after purchasing the Products, only to discover that the packaging contains nearly half empty space.

95. Some consumers have taken to social media to express their dissatisfaction with the fill level of the Products, and to inform Defendant that they were deceived by Defendant's oversized packaging. One Twitter user posted images of his half-filled Product and asked, "Why use such a large container if you won't even fill it half way."

96. Another consumer asked Defendant if the Product she purchased was "on sale because it's half full or are they all like this?"

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97. After purchasing one of the Products and discovering that it was half empty, another confused consumer simply asked Defendant "Why?!"

98. While some consumers expressed confusion upon viewing the Products' contents and realizing the deception, others expressed exasperation. One twitter user wrote "I just opened this jar of protein. [][] I'm missing half the jar?? Looks like I've been using it for 3 weeks already! Smh ['shaking my head']"

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99. Sharing images showing the substantial amount of empty space in the Products, another aggrieved consumer wrote: "Stuff isn't half bad @PlantFusion, but where's the rest of the quantity I purchased? That's barely half!"

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100. These consumer reactions serve as actual evidence of deception in the market, illustrating the misleading effect of Defendant's underfilled, oversized packaging and the failure of Defendant's textual disclosures (net weight and servings) to cure the resulting deception. Consumers rely on the size of the Products' packaging in deciding to purchase the Products, and they reasonably believe the Products contain a quantity of protein powder commensurate with the size of the packaging.

101. Consumers are confused and frustrated when they open the Products and discover that they received half the amount of protein powder they had bargained for.

102. Despite Defendant's knowledge of the deception, they have failed to implement reasonably available alternatives that would correct the misleading impression created by the oversized packaging.

103. Like Defendant's competitors who compete honestly in the marketplace, Defendant could have implemented a fill line, transparent or translucent packaging, or pliable packaging. Alternatively, Defendant could have adequately filled the containers to conform to consumers' reasonable expectations, or it could have packaged the Products in smaller containers that accurately represent the quantity of powder contained therein. Indeed, there are competitive protein powders on the market of similar net weight that are sold in containers that are half the size of Defendant's.

104. Despite its knowledge of the deception, Defendant failed to avail itself of any of the several alternatives available to dispel the misleading impression created by the oversized packaging. As a result, Defendant continues to benefit from increased sales at a higher price point by misrepresenting the amount of protein powder in the Products.

105. Defendant's fraudulent conduct harms consumers who pay a premium for protein powder that they never receive and provides Defendant with an unfair competitive advantage over competitors that have implemented measures, such as fill lines, in an effort to avoid misleading consumers.

106. **Fair Competition.** Defendant's conduct threatens California consumers by using deceptive and misleading packaging to convince them to purchase the Products for a premium.

Defendant's conduct threatens other companies, large and small, who "play by the rules" by giving Defendant a competitive advantage in the marketplace. Defendant benefits from increased sales by representing to consumers that the Products' containers are adequately filled, while simultaneously cutting costs by underfilling the containers. Defendant's conduct, therefore, stifles competition, has a negative impact on the marketplace, and reduces consumer choice.

107. **Reliance.** During the course of its false, misleading, and deceptive advertising scheme, Defendant has sold thousands of units, if not far more, based on Defendant's misrepresentations. Plaintiff and the Class relied on the size of the containers as a proxy for the amount of powder contained therein and, therefore, suffered injury in fact and lost money as a result of Defendant's false representations.

108. **No Legitimate Business Reason.** There is no legitimate reason for Defendant's false and misleading representations as to the quantity of powder the Products contain, other than to mislead consumers as to the actual quantity of powder contained therein and obtain a competitive advantage over competitors. Based on Defendant's misrepresentations, consumers purchase the Products over Defendant's competitors, incorrectly believing they are adequately filled, thus providing Defendant with a financial windfall.

D. None of the Slack-Fill Statutory Exceptions Apply to the Products

109. **Federal Statutory Exceptions.** Pursuant to 21 C.F.R. § 100.100, "a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading." An opaque container "shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill." *Id.* Nonfunctional slack-fill is empty space within packaging that is filled to less than its capacity for reasons other than provided for in the enumerated slack-fill exceptions.

1. 21 C.F.R. 100.10(a)(1) – Protection of the Contents

110. The slack-fill in the Products' containers does not protect the contents of the packages. In fact, because the product is a powder, there is no need to protect the product with the slack-fill present.

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2. 21 C.F.R. 100.100(a)(2) – Requirements of the Machines

111. The machines used to package the Products would not be affected if there was more powder product added. At most, a simple recalibration of the machines would be required. Upon information and belief, adjusting these machines is rather simple.

112. Because the packages are filled to less than half of their capacity, Defendant can increase the Products' fill level significantly without affecting how the containers are sealed, or it can at least disclose the fill-level on the outside labeling.

3. 21 C.F.R. 100.100(a)(3) – Settling During Shipping and Handling

113. The slack-fill present in the Products' containers is not a result of the powder product settling during shipping and handling. Given the Products' density, shape, and composition, any settling occurs immediately at the point of fill. No measurable product settling occurs during subsequent shipping and handling.

114. Even if *some* product settling may occur, there is no legitimate reason why the Products' containers are nearly half empty, when competitor products—such as the SuperiorSource and Four Sigmatic products below—which have similar product density, shape, and composition as Defendant's product, are filled nearly 90% full. Moreover, the Alani Nu and Now Sports products referenced *supra* (¶¶ 88-89) are also sold full of powder, further evidencing Defendant's fraud cannot be excused based on "settling."

4. 21 C.F.R. 100.100(a)(4) – Specific Function of Package

115. The packages do not perform a specific function that necessitates the slack-fill. This safe harbor would only apply if a specific function were "inherent to the nature of the food and [] clearly communicated to consumers." The packages do not perform a function that is inherent to the nature of the food. Defendant did not communicate a specific function to consumers, making this provision inapplicable.

5. 21 C.F.R. 100.100(a)(5) – Reusable Container

116. The Products' packaging is not reusable or of any significant value to the Products independent of its function to hold the powder product. The Products' plastic containers are intended to be discarded immediately after the powder product is used.

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6. 21 C.F.R. 100.100(a)(6) – Inability to Increase Fill or Decrease Container Size

117. The slack-fill present in the Products' containers does not accommodate required labeling, discourage pilfering, facilitate handling, or prevent tampering.

118. Defendant can easily increase the quantity of powder in each container (or, alternatively, decrease the size of the containers) significantly.

119. Notably, 21 C.F.R. § 100.100 does not carve out a statutory exception for accurate label disclosures. Where none of the statutory exceptions apply, the non-functional slack fill is rendered *per se* misleading.

120. **California Statutory Exceptions.** The sale of products containing nonfunctional slack-fill is independently proscribed under California law.

121. The language of California's slack-fill statute largely mirrors the federal statute detailed *supra*. Pursuant to California Business and Professions Code Section 12606.2, "No food containers shall be made, formed, or filled as to be misleading." *Id.* Any opaque container "shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill." *Id.* Nonfunctional slack fill is defined as "the empty space in a package that is filled to substantially less than its capacity" for reasons other than the exceptions. *Id.*

122. California law incorporates all of the safe harbor 'exceptions' to otherwise unlawful empty space enumerated in 21 C.F.R. 100.100, as well as four additional exceptions that do not appear in the federal statute. None of them provide harbor for Defendant as explained below.

7. Cal. Bus. & Prof. Code § 12606.2(c)(7)(A) – Dimensions Visible Through Packaging

123. The actual dimensions of the Products are not visible through the exterior packaging. The containers that hold the Products are opaque, and they do not allow consumers to view the powder inside at all. While competitors of Defendant sell in clear containers to avoid consumer deception, Defendant does not.

8. Cal. Bus. & Prof. Code § 12606.2(c)(7)(B) – "Actual Size" Disclosure

124. The Products' packaging and labels do not include an accurate depiction of the Products accompanied by a disclosure indicating that the depiction is the "actual size" of the

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Products.

125. The legislative history of the statute shows that this exception was intended to apply to packages "containing a discrete number of products (such as in the case of snack bars)." 2017 Legis. Bill Hist. CA A.B. 2632.

126. The Products are protein powders and thus are not divisible into discrete countable units like cookies, candies, or snack bars, so the "actual size" of the Products cannot be accurately depicted anywhere on the packaging or labeling, nor is it.

9. Cal. Bus. & Prof. Code § 12606.2(c)(7)(c) – Visual Representation of Fill (Fill Line)

127. The Products labels and packaging do not include *any* visual representation of fill or quantity, much less a clear and conspicuous fill line or graphic representing fill level as is required to qualify under this exception.

128. To the extent that the Product settles, the exterior packaging, label, and container do not include any representation of the minimum amount of powder product contained therein or the minimum fill level after settling.

129. The legislative history reveals that this exception was aimed at products that settle and that the legislature intended for fill lines to serve as the mechanism for curing deception created by otherwise nonfunctional slack-fill. 2017 Legis. Bill Hist. CA A.B. 2632.

130. The legislative history also makes clear that the legislature expressly intended to establish clear and conspicuous fill lines as the appropriate mechanism to cure deception created by oversized packaging for powder products. 2017 Legis. Bill Hist. CA A.B. 2632.

131. Defendant has failed to bring the Products into compliance with California law by implementing clear and conspicuous fill lines or any other comparable visual indication of fill to dispel deception.

10. Cal. Bus. & Prof. Code § 12606.2(c)(8) – Mode of Commerce Precludes Viewing and Handling by Consumer

132. The Products are sold at retailers throughout the United States and California. Thus, the mode of commerce does not preclude consumers from viewing and handling the physical

container prior to purchase.

133. Before purchasing the Products, consumers can view the exterior packaging, and they may pick up and physically manipulate the container.

134. Cal. Bus. & Prof. Code § 12606.2, like 21 C.F.R. § 100.100, does not provide any statutory exception for accurate label disclosures. Because the Products do not qualify for any of the statutory safe harbors under either statute, the Products are *per se* misleading. Textual statements of amount do not insulate Defendant from liability or dispel the consumer deception attributable to the oversized packaging.

135. Plaintiff shall proffer expert testimony to establish these facts once this case reaches the merits stage.

E. Comparator Products Serve as Additional Evidence of Nonfunctional Slack-Fill

136. **Comparator Products with Substantial Fill.** Deception is further evident when one contrasts the Products' packaging with comparator products, which are also packaged in opaque containers. One example is SuperiorSource Keto Collagen. The SuperiorSource container measures to a vertical height of approximately 7 inches. The container is filled with product to a height of approximately 6.3 inches. Therefore, this product is approximately 90% filled with a similar powder product. Below is a true and correct image of the comparator product. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space:

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137. Contrast the Products' packaging with yet another comparator product, Four Sigmatic's Superfood Protein Powder, which is also packaged in an opaque container. The Four Sigmatic container measures to a vertical height of approximately 19 cm. The container is filled with product to a height of approximately 17 cm. Therefore, this product is approximately 90% filled with a similar powder product. Below is a true and correct image of the comparator product. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space:

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138. The SuperiorSource and Four Sigmatic packaging provide additional evidence that the slack-fill present in the Products' packaging is nonfunctional.

139. The SuperiorSource and Four Sigmatic packaging provides additional evidence that the slack-fill in the Products is not necessary to protect and, in fact, does not protect, the contents of the Products; is not a requirement of the machines used for enclosing the contents of the Products; is not a result of unavoidable product settling during shipping and handling; is not needed to perform a specific function; and is not part of a legitimate reusable container.

140. The SuperiorSource and Four Sigmatic packaging provides additional evidence that Defendant is able to increase the level of fill inside the Products' containers.

The SuperiorSource and Four Sigmatic packaging provides additional evidence that Defendant has reasonable alternative designs available to it in its packaging of the Products.

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F. The Products are all Substantially Similar

141. **The Products**. Defendant's slack-fill scam extends to all flavors, sizes, and varieties of Plant Fusion Powder Products sold in opaque containers. The Products include, without limitation, Complete Protein – Vegan Protein Powder (Creamy Vanilla), Complete Protein – Vegan Protein Powder (Rich Chocolate), Complete Protein – Vegan Protein Powder (Red Velvet Cake), Complete Protein – Vegan Protein Powder (Cookies and Cream), Complete Protein – Vegan Protein Powder (Natural), Complete Lean – Vegan Protein Powder for Weight Loss (Creamy Vanilla), Complete Lean – Vegan Protein Powder for Weight Loss (Chocolate Brownie), Complete Meal – Vegan Meal Replacement Shake (Creamy Vanilla Bean), Complete Meal – Vegan Meal Replacement Shake (Chocolate Caramel), Inspire for Women – Vegan Protein Powder for Women (Creamy Vanilla Bean), Inspire for Women – Vegan Protein Powder for Women (Rich Chocolate), Inspire for Women – Vegan Protein Powder for Women (Natural), Elite Activated Peptide Protein – Vegan Sport Protein (Creamy Vanilla Bean), Elite Activated Peptide Protein – Vegan Sport Protein (Rich Chocolate), Complete Organic Protein – Organic Vegan Protein (Vanilla Chai), Complete Organic Protein – Organic Vegan Protein (Rich Chocolate).

142. As described herein, Plaintiff purchased the Complete Protein – Vegan Protein Powder (Creamy Vanilla Bean) Product (the "Purchased Product"). The additional Products (collectively, the "Unpurchased Products") are substantially similar to the Purchased Product.

a. **Defendant.** All Products are manufactured, sold, marketed, advertised, and packaged by Defendant.

b. **Brand.** All Products are sold under the same brand name: Plant Fusion.

c. **Purpose.** All Products are plant-based protein powder supplement mixes intended for human consumption.

d. **Ingredients.** All Products are made from largely the same ingredients or types of ingredients, predominantly plant-based protein as well as natural and artificial flavors, processed in the same or similar manner, and manufactured into the finished Products in the same or similar manner.

e. **Marketing Demographics.** All Products are marketed directly to consumers for personal consumption. In particular, the Products are manufactured and marketed as plant-based workout supplements for use in conjunction with an exercise routine.

f. **Packaging.** All Products are packaged in the same opaque, oversized, and under-filled containers intended to mislead consumers to believe the products are adequately filled and contain a quantity of powder commensurate with the size of the container. All Products are uniformly packaged with approximately 50% nonfunctional slack-fill and share the same label disclosures that are insufficient to overcome the deception caused by selling the Products in oversized packaging half empty, as described in this Complaint.

g. **Misleading Effect.** The misleading effect of the Products' packaging on consumers is the same for all Products—consumers over-pay for the Products believing that they are purchasing Products that are adequately filled when, in reality, the Products contain approximately 50% nonfunctional slack-fill.

NO ADEQUATE REMEDY AT LAW

143. Plaintiff and members of the Class are entitled to equitable relief, as no adequate remedy at law exists.

a. **Broader Statutes of Limitations.** The statutes of limitations for the causes of action pled herein vary. The limitations period is four years for claims brought under the UCL, which is one year longer than the statutes of limitations under the FAL and CLRA. Thus, Class members who purchased the Products more than 3 years prior to the filing of the complaint will be barred from recovery if equitable relief were not permitted under the UCL.

b. **Broader Scope of Conduct.** In addition, the scope of actionable misconduct under the unfair prong of the UCL is broader than the other causes of action asserted herein. It includes, for example, Defendant's overall unfair marketing scheme to promote and brand the Products with the Challenged Representation, across a multitude of media platforms, including the Products' labels and

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packaging, over a long period of time, in order to gain an unfair advantage over competitor products and to take advantage of consumers' desire for products that comport with the Challenged Representation. The UCL also creates a cause of action for violations of law (such as statutory or regulatory requirements and court orders related to similar representations and omissions made on the type of products at issue). Thus, Plaintiff and Class members may be entitled to restitution under the UCL, while not entitled to damages under other causes of action asserted herein (e.g., the FAL requires actual or constructive knowledge of the falsity; the CLRA is limited to certain types of plaintiffs (an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes) and other statutorily enumerated conduct). Similarly, unjust enrichment/restitution is broader than breach of warranty. For example, to state a cause of action for unjust enrichment/restitution, a plaintiff need not prove that the defendant engaged in any specific activity, just that it was unjustly enriched at the plaintiff's expense.

c. **Broader Scope of Relief.** The UCL provides for only restitutionary and injunctive relief, whereas the CLRA also provides for monetary damages. In many cases, liability under the two statutes will involve the same facts and elements. But here, Plaintiff predicates her UCL unlawful claim on a specific statutory provision, 21 C.F.R. 100.100, which prohibits nonfunctional slack-fill. Plaintiff may be able to prove the more straightforward factual elements in 21 C.F.R. 100.100, and thus prevail under the UCL, while still being unable to convince a jury of the more subjective claim that members of the public are likely to be deceived, and therefore fail with respect to her CLRA claim for damages.

d. **Injunctive Relief to Cease Misconduct and Dispel Misperception.** Injunctive relief is appropriate on behalf of Plaintiff and members of the Class because reasonable consumers expect the Products' containers to hold an amount of

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product commensurate with their size, but Defendant fills its opaque containers with far less product than a reasonable consumer would expect. Injunctive relief is necessary to prevent Defendant from continuing to engage in the unfair, fraudulent, and/or unlawful conduct described herein and to prevent future harm—none of which can be achieved through available legal remedies (such as monetary damages to compensate past harm). Further, injunctive relief, in the form of affirmative disclosures is necessary to dispel the public misperception about the Products that has resulted from years of Defendant's unfair, fraudulent, and unlawful marketing efforts. Such disclosures would include, but are not limited to, publicly disseminated statements that the Products are not adequately filled and providing accurate information about the Products' true nature; and/or requiring prominent qualifications and/or disclaimers on the Products' front labels concerning the Products' true nature. An injunction requiring affirmative disclosures to dispel the public's misperception, and prevent the ongoing deception and repeat purchases based thereon, is also not available through a legal remedy (such as monetary damages). In addition, Plaintiff is *currently* unable to accurately quantify the damages caused by Defendant's future harm, because discovery and Plaintiff's investigation have not yet completed, rendering injunctive relief all the more necessary. For example, because the court has not yet certified any class, the following remains unknown: the scope of the class, the identities of its members, their respective purchasing practices, prices of past/future Product sales, and quantities of past/future Product sales.

e. **Public Injunction.** Further, because a "public injunction" is available under the UCL, damages will not adequately "benefit the general public" in a manner equivalent to an injunction.

f. **Procedural Posture—Incomplete Discovery & Pre-Certification.** Lastly, this is an initial pleading in this action and discovery has not yet commenced and/or is at its initial stages. No class has been certified yet. No expert discovery has

commenced and/or completed. The completion of fact/non-expert and expert discovery, as well as the certification of this case as a class action, are necessary to finalize and determine the adequacy and availability of all remedies, including legal and equitable, for Plaintiff's individual claims and any certified class. Plaintiff therefore reserves her right to amend this complaint and/or assert additional facts that demonstrate this Court's jurisdiction to order equitable remedies where no adequate legal remedies are available for either Plaintiff and/or any certified class. Such proof, to the extent necessary, will be presented prior to the trial of any equitable claims for relief and/or the entry of an order granting equitable relief.

CLASS ACTION ALLEGATIONS

144. **Class Definition.** Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of herself and all others similarly situated, and as members of the Class defined as follows:

> All residents of California who, within four years prior to the filing of this Complaint, purchased the Products for purposes other than resale ("**Class**").

145. **Class Definition Exclusions.** Excluded from the Class are: (i) Defendant, its assigns, successors, and legal representatives; (ii) any entities in which Defendant has controlling interests; (iii) federal, state, and/or local governments, including, but not limited to, their departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions; and (iv) any judicial officer presiding over this matter and person within the third degree of consanguinity to such judicial officer.

146. **Reservation of Rights to Amend the Class Definition.** Plaintiff reserves the right to amend or otherwise alter the class definition presented to the Court at the appropriate time in response to facts learned through discovery, legal arguments advanced by Defendant, or otherwise.

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147. **Numerosity.** The Class is comprised of many thousands of persons. The Class is so numerous that joinder of all members is impracticable and the disposition of their claims in a class action will benefit the parties and the Court.

148. **Common Questions Predominate.** Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common questions of law and fact include, but are not limited to, the following:

a. The true nature and amount of product contained in each Products' packaging;

b. Whether the marketing, advertising, packaging, labeling, and other promotional materials for the Products are deceptive;

c. Whether Defendant misrepresented the approval of the FDA, United States Congress, and California Legislature that the Products' packaging complied with federal and California slack-fill regulations and statutes;

d. Whether the Products contain nonfunctional slack-fill in violation of 21 C.F.R. Section 100.100, *et seq.*;

e. Whether Defendant's conduct is an unlawful business act or practice within the meaning of Business and Professions Code section 17200, *et seq.*;

f. Whether Defendant's conduct is a fraudulent business act or practice within the meaning of Business and Professions Code section 17200, *et seq.*;

g. Whether Defendant's conduct is an unfair business act or practice within the meaning of Business and Professions Code section 17200, *et seq.*;

h. Whether Defendant's advertising is untrue or misleading within the meaning of Business and Professions Code section 17500, *et seq.*;

i. Whether Defendant made false and misleading representations in its advertising and labeling of the Products;

j. Whether Defendant knew or should have known that the misrepresentations were false;

k. Whether Plaintiff and the Class paid more money for the Products than they actually received;

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l. How much more money Plaintiff and the Class paid for the Products than they actually received;

m. Whether Defendant's conduct alleged herein is fraudulent;

n. Whether Plaintiff and the Class are entitled to injunctive relief;

o. Whether Defendant intentionally misrepresented the amount of powder contained in the Products' packaging; and

p. Whether Defendant was unjustly enriched at the expense of Plaintiff and the Class.

149. **Typicality.** Plaintiff's claims are typical of the claims of the proposed Class, as the representations and omissions made by Defendant are uniform and consistent and are contained on packaging and labeling that was seen and relied on by Plaintiff and members of the Class.

150. **Adequacy.** Plaintiff will fairly and adequately represent and protect the interests of the proposed Class. Plaintiff has retained competent and experienced counsel in class action and other complex litigation. Plaintiff's Counsel prosecuted the largest slack-fill nationwide class action settlement in 2021. Plaintiff's Counsel also was the first law firm to successfully certify a slack-fill lawsuit involving theater box candy confectioners (twice in 2019 and 2020, respectively).

151. **Superiority and Substantial Benefit.** A class action is superior to other methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable and no other group method of adjudication of all claims asserted herein is more efficient and manageable for at least the following reasons:

a. The claims presented in this case predominate over any questions of law or fact, if any exist at all, affecting any individual member of the Class;

b. Absent a Class, the members of the Class will continue to suffer damage and Defendant's unlawful conduct will continue without remedy while Defendant profits from and enjoy its ill-gotten gains;

c. Given the size of individual Class Members' claims, few, if any, Class Members could afford to or would seek legal redress individually for the wrongs Defendant committed against them, and absent Class Members have no

substantial interest in individually controlling the prosecution of individual actions;

d. When the liability of Defendant has been adjudicated, claims of all members of the Class can be administered efficiently and/or determined uniformly by the Court; and

e. This action presents no difficulty that would impede its management by the Court as a class action, which is the best available means by which Plaintiff and Class Members can seek redress for the harm caused to them by Defendant.

152. **Inconsistent Rulings.** Defendant has acted on grounds generally applicable to the entire Class, thereby making final injunctive relief and/or corresponding declaratory relief appropriate with respect to the Class as a whole. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant.

153. **Injunctive/Equitable Relief.** The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

154. **Injury in Fact.** Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant's false, deceptive, and misleading representations. Plaintiff purchased the Products because of the size of the containers and the product labels, which they believed to be indicative of the amount of powder contained therein as commensurate with the size of the container. Plaintiff relied on Defendant's representations and would not have purchased the Products if they had known that the packaging, labeling, and advertising as described herein was false and misleading.

155. **Inadequacy Absent a Class Action:** Absent a class action, Defendant will likely retain the benefits of its wrongdoing. Because of the small size of the individual Class members' claims, few, if any, Class members could afford to seek legal redress for the wrongs complained

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of herein. Absent a representative action, the Class members will continue to suffer losses and Defendant will be allowed to continue these violations of law and to retain the proceeds of its ill-gotten gains.

156. **Manageability.** Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

COUNT ONE

Violation of California Unfair Competition Law

California Business & Professions Code § 17200, *et seq*.

157. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporate the same as if set forth herein at length.

158. **Class Allegations.** Plaintiff brings this cause of action pursuant to Business and Professions Code Section 17200, *et seq*., on his own behalf and a Class who purchased the Products within the applicable statute of limitations.

159. **FDCA.** Congress passed the Federal Food, Drug, and Cosmetic Act ("FDCA"), and in so doing established the Federal Food and Drug Administration ("FDA") to "promote the public health" by ensuring that "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. §393.

160. The FDA has implemented regulations to achieve this objective. *See, e.g.*, 21 C.F.R. § 101.1 *et seq.*

161. The legislature of California has incorporated 21 C.F.R. Section 100.100, which prohibits nonfunctional slack-fill, into the State's Business and Professions Code Section 12606.2 *et seq.*

162. The FDA enforces the FDCA and accompanying regulations; "[t]here is no private right of action under the FDCA." *Ivie v. Kraft Foods Global, Inc.,* 2013 U.S. Dist. LEXIS 25615,2013 WL 685372, at *1 (internal citations omitted).

163. In 1990, Congress passed an amendment to the FDCA, the Nutrition Labeling and Education Act ("NLEA"), which imposed a number of requirements specifically governing food

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nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343 *et. seq.*

164. Plaintiff is not suing under the FDCA, but under California state law.

165. **Sherman Law.** The California Sherman Food, Drug, and Cosmetic Act ("Sherman Law"), Cal. Health & Safety Code Section 109875 *et seq.*, has adopted wholesale the food labeling requirements of the FDCA and NLEA as the food regulations of California. Cal. Health & Safety Code Section 110100.

166. The Sherman Law declares any food to be misbranded if it is false or misleading in any particular or if the labeling does not conform with the requirements for nutrition labeling set forth in certain provisions of the NLEA. Cal. Health & Safety Code Sections 110660, 110665, 110670.

167. **The UCL.** California Business & Professions Code, Sections 17200, *et seq.* (the **"UCL"**) prohibits unfair competition and provides, in pertinent part, that "unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising."

168. **False Advertising Claims.** Defendant in its packaging of the Products makes false and misleading representations regarding the quantity of the Products, particularly representing the Products as having a greater quantity than they actually contain. Such packaging appears on each of the Products herein, and are sold at retailers in the State of California and across the nation, as well as on Defendant's official website.

169. **Deliberately False and Misleading.** Defendant does not have any reasonable basis for the Products to contain nonfunctional slack-fill. Defendant knew and knows that the Products contain nonfunctional slack-fill, yet Defendant intentionally packages the Products in opaque containers and fills them with less powder than a reasonable consumer would expect in order to deceive reasonable consumers into believing that Products are filled with powder commensurate with the size of their container.

170. **False Advertising Claims Cause Purchase of Products.** Defendant's labeling and advertising of the Products led to, and continues to lead to, reasonable consumers, including Plaintiff, to purchase the Products.

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171. **Injury in Fact.** Plaintiff and the Class have suffered injury in fact and have lost money or property as a result of and in reliance upon Defendant's False Advertising Claims—namely Plaintiff and the Class lost the premium they paid for Products that do not contain a quantity of product they would expect given their container.

172. **No Reasonably Available Alternatives/Legitimate Business Interests.** Defendant failed to avail themselves of reasonably available, lawful alternatives to further their legitimate business interests.

173. **Business Practice.** All of the conduct alleged herein occurred and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern, practice and/or generalized course of conduct, which will continue on a daily basis until Defendant voluntarily alters its conduct or Defendant is otherwise ordered to do so.

174. **Injunction.** Pursuant to Business and Professions Code Sections 17203 and 17535, Plaintiff and the members of the Class seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practice of packaging and advertisement of the sale and use of the Products as alleged herein. Likewise, Plaintiff and the members of the Class seek an order requiring Defendant to disclose such misrepresentations, and to preclude Defendant's failure to disclose the existence and significance of said misrepresentations.

175. **Causation/Damages.** As a direct and proximate result of Defendant's misconduct in violation of the UCL, Plaintiff and members of the Class were harmed in when they paid a premium for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the premium paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for violation of the UCL in damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff and the Class for said monies, as well as injunctive relief to enjoin Defendant's misconduct to prevent ongoing and future harm that will result.

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A. "Unfair Prong"

176. **Unfair Standard.** Under California's Unfair Competition Law, Cal. Bus. & Prof. Code Section 17200, *et seq.*, a challenged activity is "unfair" when "any injury it causes outweighs any benefits provided to consumers and the injury is one that the consumers themselves could not reasonably avoid." *Camacho v. Auto Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

177. **Injury.** Defendant's actions alleged herein do not confer any benefit to consumers. Defendant's actions alleged herein cause injuries to consumers, who do not receive a quantity of product commensurate with their reasonable expectations.

178. Consumers cannot avoid any of the injuries caused by Defendant's actions as alleged herein.

179. Accordingly, the injuries caused by Defendant's conduct alleged herein outweigh any benefits.

180. **Balancing Test.** Some courts conduct a balancing test to decide if a challenged activity amounts to unfair conduct under California Business and Professions Code Section 17200. They "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

181. **No Utility.** Here, Defendant's challenged conduct of has no utility and financially harms purchasers. Thus, the utility of Defendant's conduct is vastly outweighed by the gravity of harm.

182. **Legislative Declared Policy.** Some courts require that "unfairness must be tethered to some legislative declared policy or proof of some actual or threatened impact on competition." *Lozano v. AT&T WirelessServs. Inc*., 504 F. 3d 718, 735 (9th Cir. 2007).

183. The California legislature maintains a declared policy of prohibiting nonfunctional slack-fill in consumer goods, as reflected in California Business and Professions Code Section 12606.2 and California Health and Safety Code Section 110100.

184. Defendant's packaging of the Products in oversized containers for the amount of product therein is in direct opposition and thereby tethered to the legislative declared policy

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evinced by California Business and Professions Code Section 12606.2 and California Health and Safety Code Section 110100.

185. **Unfair Conduct.** Defendant's packaging of the Products, as alleged herein, is false, deceptive, misleading, and unreasonable, and constitutes unfair conduct. Defendant knew or should have known of its unfair conduct. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute an unfair business practice within the meaning of California Business and Professions Code Section 17200.

186. **Reasonably Available Alternatives.** There existed reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein. Defendant could have used packaging appropriate for the amount of powder product contained within the Products.

187. **Defendant's Wrongful Conduct.** All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's unfair conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

188. **Injunction.** Pursuant to Business and Professions Code Sections 17203, Plaintiff and the Class seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practices of packaging the Products to conform with the Challenged Representation.

189. **Causation/Damages.** Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant's unfair conduct. Plaintiff paid an unwarranted premium for this product. Specifically, Plaintiff paid for powder product they never received. Plaintiff would not have purchased, or would have paid substantially less for, the Products if they had known that the Products' packaging contained nonfunctional slack-fill.

B. "Fraudulent" Prong

190. **Fraud Standard.** The UCL considers conduct fraudulent (and prohibits said conduct) if it is likely to deceive members of the public. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

191. **Fraudulent & Material Challenged Representation.** Defendant used the Challenged Representation with the intent to sell the Products to consumers, including Plaintiff

and the Class. The Challenged Representation is false and Defendant knows or should know of its falsity. The Challenged Representation is likely to deceive consumers into purchasing the Products because it is material to the average, ordinary, and reasonable consumer.

192. **Fraudulent Business Practice.** As alleged herein, the misrepresentations by Defendant constitute a fraudulent business practice in violation of California Business & Professions Code Section 17200.

193. **Reasonable and Detrimental Reliance.** Plaintiff and the Class reasonably and detrimentally relied on the material and false Challenged Representation to their detriment in that they purchased the Products.

194. **Reasonably Available Alternatives.** Defendant had reasonably available alternatives to further its legitimate business interests, other than the conduct described herein. Defendant could have either used packaging appropriate for the amount of powder product contained therein or indicated how much powder the Products contained with a clear and conspicuous fill line.

195. **Business Practice.** All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct.

196. **Injunction.** Pursuant to Business and Professions Code Sections 17203, Plaintiff and the Class seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practice of packaging the Products to conform with the Challenged Representation.

197. **Causation/Damages.** Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant's fraudulent conduct. Plaintiff paid an unwarranted premium for the Products. Specifically, Plaintiff paid for powder product they never received. Plaintiff would not have purchased the Products if they had known that the packaging contained nonfunctional slack-fill. Accordingly, Plaintiff seeks damages, restitution, and/or disgorgement of ill-gotten gains pursuant to the UCL.

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C. Unlawful Prong

198. **Unlawful Standard.** California Business and Professions Code Section 17200, *et seq.*, identifies violations of other laws as "unlawful practices that the unfair competition law makes independently actionable." *Velazquez v. GMAC Mortg. Corp.,* 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

199. **Violations of CLRA and FAL.** Defendant's packaging of the Products, as alleged herein, violates California Civil Code Sections 1750, *et seq.* (the "**CLRA**"), California Business and Professions Code Sections 17500, *et seq.* (the "**FAL**"), and 21 C.F.R Section 100.100 as set forth below in the Sections regarding those causes of action.

200. **Additional Violations.** Defendant's conduct in making the false representations described herein constitutes a knowing failure to adopt policies in accordance with and/or adherence to applicable laws, as set forth herein, all of which are binding upon and burdensome to their competitors. This conduct engenders an unfair competitive advantage for Defendant, thereby constituting an unfair, fraudulent and/or unlawful business practice under California Business & Professions Code Sections 17200-17208. Additionally, Defendant's misrepresentations of material facts, as set forth herein, violate California Civil Code Sections 1572, 1573, 1709, 1710, 1711, and 1770, as well as the common law.

201. **Unlawful Conduct.** Defendant's packaging and slack-filling, as alleged herein, is false, deceptive, misleading, and unreasonable, and constitutes unlawful conduct. Defendant knows or should know of its unlawful conduct.

202. **Reasonably Available Alternatives.** Defendant had reasonably available alternatives to further its legitimate business interests, other than the fraudulent conduct described herein. Defendant could have either used packaging appropriate for the amount of powder product contained therein or indicated how much powder the Products contained with a clear and conspicuous fill line.

203. **Business Practice.** All of the conduct alleged herein occurred and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

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204. **Causation/Damages** Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant's unlawful conduct. Plaintiff and the Class paid an unwarranted premium for this Product. Specifically, Plaintiff paid for powder product they never received. Plaintiff would not have purchased the Products if they had known that the packaging contained nonfunctional slack-fill. Accordingly, Plaintiff seeks damages, restitution and/or disgorgement of ill-gotten gains pursuant to the UCL. Plaintiff and members of the Class, pursuant to § 17203, are entitled to an order enjoining such future wrongful conduct on the part of Defendant and such other orders and judgments that may be necessary to disgorge Defendant's ill-gotten gains and to restore to any person in interest any money paid for the Products as a result of the wrongful conduct of Defendant.

205. **Prejudgment Interest.** Pursuant to Civil Code § 3287(a), Plaintiff and the Class are further entitled to prejudgment interest as a direct and proximate result of Defendant's unfair, fraudulent, and unlawful business conduct. The amount on which interest is to be calculated is a sum certain and capable of calculation, and Plaintiff and the Class are entitled to interest in an amount according to proof.

206. **Injury in Fact.** Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant's unlawful conduct. Plaintiff paid an unwarranted premium for this product. Specifically, Plaintiff paid for powder product they never received. Plaintiff would not have purchased, or would have paid substantially less for, the Product if they had known that the packaging contained nonfunctional slack-fill.

COUNT TWO

False and Misleading Advertising in Violation of California Business and Professions Code § 17500, *et seq*.

207. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporate the same as if set forth herein at length.

208. **Class Allegations.** Plaintiff brings this claim individually and on behalf of the Class who purchased the Products within the applicable statute of limitations.

209. **FAL Standard.** California's False Advertising Law, California Business and Professions Code Section 17500, *et seq.*, makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, in any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should beknown, to be untrue or misleading."

210. **False & Material Challenged Representations Disseminated to Public.** Defendant violated Section 17500 when it advertised and marketed the Products through the unfair, deceptive, untrue, and misleading Challenged Representation disseminated to the public through the Products' packaging. These representations are false because the Products do not conform to them. The representations are material because they are likely to mislead a reasonable consumer into purchasing the Products.

211. **Knowledge.** Defendant knowingly manipulated the physical dimensions of the Products' containers, or stated another way, under-filled the amount of powder product in the Products, as a means to mislead the public about the amount of powder product contained in each package.

212. Defendant controlled the packaging of the Products. It knew or should have known, through the exercise of reasonable care, that its representations about the quantity of powder product contained in the Products were untrue and misleading.

213. **Causation/Damages.** As a direct and proximate result of Defendant's misconduct in violation of the FAL, Plaintiff and members of the Class were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for violation of the FAL in damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff and the Class for said monies, as well as injunctive relief to enjoin Defendant's misconduct to prevent

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ongoing and future harm that will result.

COUNT THREE

Violation of California Consumers Legal Remedies Act,

California Civil Code § 1750, *et seq*.

214. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporate the same as if set forth herein at length.

215. **Class Allegations.** Plaintiff brings this claim individually and on behalf of the Class who purchased the Products within the applicable statute of limitations.

216. **CLRA Standard.** The CLRA provides in California Civil Code Section 1750 that "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful." (Civ. Code, § 1750.)

217. **Goods/Services.** The Products are "goods," as defined by the CLRA in California Civil Code Section 1761(a).

218. **Defendant.** Defendant is a "person," as defined by the CLRA in California Civil Code Section 1761(c).

219. **Consumers.** Plaintiff and members of the Class are "consumers," as defined by the CLRA in California Civil Code Section1761(d).

220. **Transactions.** The purchase of the Products by Plaintiff and members of the Class are "transactions" as defined by the CLRA under California Civil Code Section 1761(e).

221. **Violations of the CLRA** The practices described herein, specifically Defendant's packaging, advertising, and sale of the Products, were intended to result and did result in the sale of the Products to the consuming public and violated and continue to violate CLRA:

b. Section 1770(a)(2), by misrepresenting the approval of the Products as compliant with 21 C.F.R. Section 100.100 and the Sherman Law;

c. 1770(a)(5), by representing the Products have characteristics and quantities that they do not have;

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d. 1770(a)(7), advertising and packaging the Products with intent not to sell them as advertised and packaged; and,

e. 1770(a)(9) by representing that the Products have been supplied in accordance with a previous representation as to the quantity of powder contained within each container, when they have not.

222. **Malicious.** Defendant fraudulently, maliciously, and wantonly deceived Plaintiff and the Class by misrepresenting the Products as having characteristics and quantities which they do not have, e.g., that the Products are free of nonfunctional slack-fill when they are not. In doing so, Defendant intentionally misrepresented and concealed material facts from Plaintiff and the Class. Said misrepresentations and concealment were done with the intention of deceiving Plaintiff and the Class and depriving them of their legal rights and money.

223. Defendant fraudulently, maliciously, and wantonly deceived Plaintiff and the Class by packaging and advertising the Products with intent not to sell them as advertised and by intentionally under-filling the Products' containers and replacing powder product with nonfunctional slack-fill. In doing so, Defendant intentionally misrepresented and concealed material facts from Plaintiff and the Class. Said misrepresentations and concealment were done with the intention of deceiving Plaintiff and the Class and depriving them of their legal rights and money.

224. Defendant fraudulently, maliciously, and wantonly deceived Plaintiff and the Class by representing that the Products were supplied in accordance with an accurate representation as to the quantity of powder product contained therein when they were not. Defendant presented the physical dimensions of the Products' packaging to Plaintiff and the Class before the point of purchase and gave Plaintiff and the Class a reasonable expectation that the quantity of product contained therein would be commensurate with the size of the packaging. In doing so, Defendant intentionally misrepresented and concealed material facts from Plaintiff and the Class. Said misrepresentations and concealment were done with the intention of deceiving Plaintiff and the Class and depriving them of their legal rights and money.

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225. **Knowledge.** Defendant knew or should have known, through the exercise of reasonable care, that the Products' packaging was misleading. Defendant's actions as described herein were done with conscious disregard of Plaintiff's rights, and Defendant was wanton and malicious in its concealment of the same.

226. **Causation/Reliance/Materiality.** Defendant's packaging of the Products was a material factor in Plaintiff's and the Class's decisions to purchase the Products. Based on Defendant's packaging of the Products, Plaintiff and the Class reasonably believed that they were getting more product than they actually received. Had they known the truth of the matter, Plaintiff and the Class would not have purchased, or would have paid substantially less for, the Products.

227. **Section 1782(d)—Prelitigation Demand/Notice.** Pursuant to California Civil Code, Section 1782, more than thirty days prior to the filing of this complaint, on or about May 27, 2020 Plaintiff's counsel, acting on behalf of Plaintiff and all members of the Class, mailed a demand letter, via U.S. certified mail, return receipt requested, addressed to Defendant Iovate Health Sciences U.S.A., Inc. at its headquarters and principal place of business (1105 North Market Street Ste. 1330, Wilmington, DE 19801) and its registered agent for service of process (CT Corporation System at 818 W Seventh Street, Ste. 930, Los Angeles, CA 90017).

228. **Injury in Fact.** Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendant's unfair, unlawful, and fraudulent conduct. Specifically, Plaintiff paid for powder product they never received. Plaintiff would not have purchased, or would have paid substantially less for, the Products had they known the container contained nonfunctional slack-fill.

229. **Causation/Damages.** As a direct and proximate result of Defendant's misconduct in violation of the CLRA, Plaintiff and members of the Class were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for violation of this Act in the form of damages, restitution, disgorgement of ill-gotten gains to compensate Plaintiff

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and the Class for said monies.

230. **Punitive Damages**. Defendant's unfair, fraudulent, and unlawful conduct described herein constitutes malicious, oppressive, and/or fraudulent conduct warranting an award of punitive damages as permitted by law. Defendant's misconduct is malicious as Defendant acted with the intent to cause Plaintiff and consumers to pay for Products that were not, in fact, receiving. Defendant willfully and knowingly disregarded the rights of Plaintiff and consumers as Defendant were, at all times, aware of the probable dangerous consequences of their conduct and deliberately failed to avoid misleading consumers, including Plaintiff. Defendant's misconduct is oppressive as, at all relevant times, said conduct was so vile, base, and/or contemptible that reasonable people would look down upon it and/or otherwise would despise such corporate misconduct. Said misconduct subjected Plaintiff and consumers to cruel and unjust hardship in knowing disregard of their rights. Defendant's misconduct is fraudulent as Defendant, at all relevant times, intentionally misrepresented and/or concealed material facts with the intent to deceive Plaintiff and consumers. The wrongful conduct constituting malice, oppression, and/or fraud was committed, authorized, adopted, approved, and/or ratified by officers, directors, and/or managing agents of Defendant. Accordingly, Plaintiff seeks an award of punitive damages against Defendant.

COUNT FOUR

Breach of Warranty Under California Law

231. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporate the same as if set forth herein at length.

232. **Class Allegations.** Plaintiff brings this claim individually and on behalf of the Class who purchased the Products within the applicable statute of limitations.

233. **Express Warranty.** Through packaging and selling the Products at issue, Defendant made promises and affirmations of fact on the Products' packaging, and through its marketing and advertising, as described herein. This packaging constitutes an express warranty and because the size of the Products boxes operates as a description of the goods—specifically, a description of the amount of product the package contained therein—and contributed to Plaintiff's decision to

ultimately purchase the Product. Although the Products' labels feature various serving size and net weight measurements, this information is insufficient to allow reasonable consumers to quantify the products, and thus does not contribute to a consumers purchase decision, as alleged herein. Ultimately, the package size constitutes the most meaningful description of the amount of powder in the Products and serves as part of the basis of the bargain between Plaintiff and members of the Class and Defendant.

234. **Implied Warranty of Merchantability.** By advertising and selling the Products at issue, Defendant, a merchant of goods, made promises and affirmations of fact that the Products are merchantable and conform to the promises or affirmations of fact made on the Products' packaging and labeling, and through its marketing and advertising, as described herein. This labeling and advertising, combined with the implied warranty of merchantability, constitute warranties that became part of the basis of the bargain between Plaintiff and members of the Class and Defendant—that the Products, among other things, conform to the Challenged Representations.

235. **Breach of Warranty.** Contrary to Defendant's warranties, the Products do not conform to the Challenged Representation and, therefore, Defendant breached its warranties about the Products and their qualities.

236. **Causation/Remedies.** As a direct and proximate result of Defendant's breach of warranty, Plaintiff and members of the Class were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for breach of warranty in the form of damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff and the Class for said monies, as well as injunctive relief to enjoin Defendant's misconduct to prevent ongoing and future harm that will result.

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COUNT FIVE

Fraudulent Inducement - Intentional Misrepresentation Under California Law

237. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporate the same as if set forth herein at length.

238. **Class Allegations.** Plaintiff brings this cause of action individually and on behalf of all members of the Class against Defendant.

239. **Misrepresentation.** Defendant has filled and packaged the Products in a manner indicating that the Products are adequately filled with powder. However, the Products contain significantly less powder product than advertised and instead contain a substantial amount of nonfunctional slack-fill. Defendant misrepresents the quantity of powder product contained within the Products' packaging.

240. **Knowledge.** At all relevant times when such misrepresentations were made, Defendant knew or should have known that the representations were misleading, and that knowledge that the Products were half empty was withheld from consumers.

241. **Materiality.** Defendant's misrepresentations regarding the Products are material to a reasonable consumer, as they relate to the quantity of product received by consumers. A reasonable consumer would attach importance to such representations and would be induced to act thereon in making his or her purchase decision. Defendant knew that their misrepresentations regarding the product were material, and that a reasonable consumer would rely on Defendants' representations in making purchasing decision.

242. **Plaintiff's Knowledge.** Plaintiff and class members did not know-nor could they have known through reasonable diligence-that the Products contain a substantial amount of nonfunctional slack-fill.

243. **Intentional.** Defendant intended to induce—and did, indeed, induce—Plaintiff and Class members to purchase the Products by misrepresenting that the Products contain a quantity of powder commensurate with the size of the packaging, despite the fact that the products contain a substantial amount of nonfunctional slack-fill. Defendant intended for Plaintiff and the Class to rely on the size and style of the Products' packaging, as evidenced by Defendant's intentional

manufacturing, marketing, and selling of packaging that is significantly larger than is necessary to contain the volume of the contents within them.

244. **Reasonable Reliance.** Plaintiff and the Class reasonably and justifiably relied on Defendant's intentional misrepresentations when purchasing the Products, and had they known the truth, they would not have purchased the Products or would have purchased them at significantly lower prices as alleged herein.

245. **Causation.** As a direct and proximate result of Defendant's intentional misrepresentations, Plaintiff and the Class have suffered injury in fact.

COUNT SIX

Negligent Misrepresentation Under California Law

246. **Incorporation by Reference.** Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs and incorporate the same as if set forth herein at length.

247. **Class Allegations.** Plaintiff brings this cause of action individually and on behalf of all members of the Class against Defendant.

248. **Duty.** Defendant had a duty to Plaintiff and the Class to exercise reasonable and ordinary care in the development, testing, manufacture, marketing, distribution, and sale of the Products.

249. **Breach.** Defendant breached its duty to Plaintiff and the Class by marketing and selling the Products to Plaintiff and the Class with unlawful, nonfunctional slack-fill and deceiving reasonable consumers.

250. **Defendant's Misrepresentation.** By packaging the Products as alleged herein, Defendant misrepresented that the Products are adequately and lawfully filled.

251. **No Reasonable Grounds.** Defendant knew or should have known that the Products contain unlawful, nonfunctional slack-fill.

252. **Material Misrepresentation.** Defendant also knew, or should have known, that the size of the Products' containers were material and that a reasonable consumer would rely on Defendant's misrepresentations in making purchasing decisions. The Products' value is tied to the amount of powder contained therein.

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253. **Plaintiff's Knowledge.** Plaintiff and Class Members did not know—nor could they have known through reasonable diligence—that the Products contained unlawful, nonfunctional slack-fill.

254. **Reasonable Reliance.** In making their purchasing decisions, Plaintiff and Class Members reasonably relied on Defendant's false, deceptive, and misleading packaging.

255. **Intentional Inducement.** Defendant affirmatively misrepresented the amount of powder contained in the Products' packaging to induce Plaintiff and Class Members to purchase the Products. Plaintiff and Class Members were induced to purchase the Products based on this misrepresentation.

256. **Causation/Remedies.** As a direct and proximate result of Defendant's negligent misrepresentation, Plaintiff and members of the Class were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for negligent misrepresentation in the form of damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff and the Class for said monies, as well as injunctive relief, including without limitation, public injunctive relief, to enjoin Defendant's misconduct to prevent ongoing and future harm that will result.

COUNT SEVEN

Unjust Enrichment/Restitution Under California Law

257. **Incorporation by Reference.** Plaintiff re-alleges and incorporates by reference all allegations contained in this complaint, as though fully set forth herein.

258. **Class Allegations.** Plaintiff brings this claim individually and on behalf of the Class who purchased the Products within the applicable statute of limitations.

259. **Plaintiff/Class Conferred a Benefit.** By purchasing the Products, Plaintiff and members of the Class conferred a benefit on Defendant in the form of the purchase price of the Products.

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260. **Defendant's Knowledge of Conferred Benefit.** Defendant had knowledge of such benefit and Defendant appreciated the benefit because, were consumers not to purchase the Products, Defendant would not generate revenue from the sales of the Products.

261. **Defendant's Unjust Receipt Through Deception.** Defendant's knowing acceptance and retention of the benefit is inequitable and unjust because the benefit was obtained by Defendant's fraudulent, misleading, and deceptive representations and omissions.

262. **Causation/Damages.** As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and members of the Class were harmed in the amount of the purchase price they paid for the Products. Further, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other damages including, but not limited to, the amounts paid for the Products, and any interest that would have accrued on those monies, in an amount to be proven at trial. Accordingly, Plaintiff seeks a monetary award for unjust enrichment in damages, restitution, and/or disgorgement of ill-gotten gains to compensate Plaintiff and the Class for said monies, as well as injunctive relief to enjoin Defendant's misconduct to prevent ongoing and future harm that will result.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, pray for judgment and relief on all causes of action as follows:

A. An order enjoining Defendant from continuing to package and/or label the Products as challenged herein;

B. Damages against Defendant in an amount to be determined at trial, together with pre- and post- judgement interest at the maximum rate allowable by law on any amounts awarded;

C. Restitution and/or disgorgement in an amount to be determined at trial;

D. Reasonable attorneys' fees and costs; and

E. Granting such other and further relief as may be just and proper.

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JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all triable issues.

DATED: February 16, 2023

CLARKSON LAW FIRM, P.C.

/s/ Zachary T. Chrzan
Ryan J. Clarkson, Esq.
Zachary T. Chrzan, Esq.

Attorneys for Plaintiff

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