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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

VALENTINO GREEN and JACOB POLONSKI,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

vs.

IOVATE HEALTH SCIENCES U.S.A. Inc., a  
Delaware Corporation,

Defendant.

Case No.

**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. UNJUST ENRICHMENT
5. COMMON LAW FRAUD
6. INTENTIONAL MISREPRESENTATION
7. NEGLIGENT MISREPRESENTATION

**DEMAND FOR JURY TRIAL**

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**INTRODUCTION**

1. Defendant manufactures and sells an extremely popular line of powder supplement products throughout the United States. To increase profits at the expense of consumers and fair competition, Defendant deceptively sells its supplements in oversized packaging that does not reasonably inform consumers that they are nearly half empty. Defendant’s slack-fill scam extends to all flavors, sizes, and varieties of Muscletech™ supplements sold in opaque containers (the “Products”). Defendant dupes unsuspecting consumers across America to pay premium prices for empty space. In one version of the Product, the opaque container measures to a vertical height of approximately 10 inches, while the product inside only measures to a vertical height of approximately 6 inches. Below is a true and correct image of Defendant’s 100% Whey Gold Double Rich Chocolate Protein Powder Product, evidencing the deception. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space.



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1                    **DEFENDANT’S SLACK-FILL SCHEME EXTENDS TO ITS OTHER PRODUCTS**

2                    2.            Defendant sells several varieties of protein powders and workout supplements.  
3                    Each of these Products contains an unlawful amount of slack-fill. In Defendant’s Nitro Tech  
4                    Whey Protein Product, the container measures to a vertical height of 8.25 inches and is filled to a  
5                    vertical height of 4.25 inches. Defendant underfills this Product by nearly 50%. Below is a true  
6                    and correct image of Defendant’s Nitro Tech Whey Protein Product, evidencing the deception.  
7                    The red line represents the actual fill line, below which is product, and above which is  
8                    nonfunctional empty space.



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1           3. In Defendant's VaporX5 Pre-workout Product, the container measures to a vertical  
2 height of 5.25 inches and is filled to a vertical height of 2.5 inches. Defendant underfills this  
3 Product by over 52%. Below is a true and correct image of Defendant's VaporX5 Pre-workout  
4 Product, evidencing the deception. The red line represents the actual fill line, below which is  
5 product, and above which is nonfunctional empty space.



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1           4. Defendant's Cell-Tech Product measures to a vertical height of 9 inches and is  
2 filled to a vertical height of 5.25 inches. Defendant underfills this Product by nearly 42%. Below  
3 is a true and correct image of Defendant's Cell-Tech Product, evidencing the deception. The red  
4 line represents the actual fill line, below which is product, and above which is nonfunctional  
5 empty space.



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1           5. Defendant's Amino Build Product measures to a vertical height of 6 inches and is  
2 filled to a vertical height of 3.25 inches. Defendant underfills this Product by over 45%. Below is  
3 a true and correct image of Defendant's Amino Build Product, evidencing the deception. The red  
4 line represents the actual fill line, below which is product, and above which is nonfunctional  
5 empty space.



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1           6. Defendant's Phase8 Protein Powder Product measures to a vertical height of 11  
2 inches and is filled to a vertical height of 6.25 inches. Defendant underfills this Product by over  
3 43%. Below is a true and correct image of Defendant's Phase8 Protein Powder Product,  
4 evidencing the deception. The red line represents the actual fill line, below which is product, and  
5 above which is nonfunctional empty space.

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1           7. All of the Products are substantially similar. The Products are of the same kind (i.e.,  
2 powder supplements); contain the same misrepresentations (i.e., oversized, opaque containers  
3 with nonfunctional slack-fill); cause the same type of injury (i.e., pecuniary harm from paying for  
4 and receiving less powder than reasonably expected); and are amenable to the same prospective  
5 remedies (i.e., reducing the packaging size, increasing the amount of powder, or modifying the  
6 existing packaging and/or labeling to bring the Products into statutory compliance).

7           8. Defendant markets the Products in a systematically misleading manner by  
8 representing them as adequately filled when, in fact, they contain an unlawful amount of empty  
9 space or “slack-fill.” Defendant underfills the Products for no lawful reason. The front of the  
10 Products’ packaging does not include any information that would reasonably apprise Plaintiffs of  
11 the quantity of product relative to the size of the container, such as a fill line.

12           9. Defendant underfills the Products to save money (by not filling the containers) and  
13 to deceive consumers into purchasing the Products over its competitors’ products. Defendant’s  
14 slack-fill scheme not only harms consumers, but it also harms its competitors who have  
15 implemented labeling changes designed to alert consumers to the true amount of product in each  
16 container.

17           10. Accordingly, Defendant has violated the California Consumers Legal Remedies  
18 Act, particularly California Civil Code sections 1770(a)(2), 1770(a)(5), 1770(a)(7), and  
19 1770(a)(9). As such, Defendant has committed *per se* violations of Business & Professions Code  
20 section 17200, *et seq.* and Business & Professions Code section 17500, *et seq.*

21           11. Plaintiffs and consumers have, accordingly, suffered injury in fact caused by the  
22 false, fraudulent, unfair, deceptive, unlawful, and misleading practices set forth herein, and seek  
23 injunctive relief, as well as, *inter alia*, compensatory damages, statutory damages, restitution, and  
24 attorneys’ fees.

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

12. Several state and federal courts have found that cases involving nearly identical claims are meritorious and appropriate for class treatment. *See, e.g., Winkelbauer v. Orgain Mgmt. et. al.*, Case No. 20STCV44583 (L.A.S.C. May 20, 2021) (defendant’s demurrer to claims involving slack-filled protein powder products overruled); *Barrett v. Optimum Nutrition*, Case No. 2:21-cv-04398-DMG-SK (C.D. Cal. Jan. 12, 2022) (defendant’s 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) (defendant’s 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) (defendant’s 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) (defendant’s 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) (defendant’s 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) (defendant’s FRCP 12(b)(6) motion to dismiss slack-filled Jujufruits® 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) (defendant’s 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) (defendant’s 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) (defendant’s 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

1 as a class action, over opposition, slack-fill claims brought under California consumer protection  
2 laws).

3 **PARTIES**

4 13. Plaintiff Valentino Green is, and at all times relevant hereto was, a citizen of  
5 California residing in the county of Alameda. Plaintiff made a one-time purchase of Defendant's  
6 Nitro-Tech 100% Whey Gold Protein Powder Product at a GNC store in San Leandro, California  
7 in August 2019. Plaintiff paid approximately \$50.00 for the Product. In making his purchase,  
8 Plaintiff relied upon the opaque packaging, including the size of the container and product label,  
9 which was prepared and approved by Defendant and its agents and disseminated statewide and  
10 nationwide, as well as designed to encourage consumers like Plaintiff to purchase the Products.  
11 Plaintiff understood the size of the container and product label to indicate that the amount of  
12 protein powder contained therein was commensurate with the size of the container, and he would  
13 not have purchased the Product, or would not have paid a price premium for the Product, had he  
14 known that the size of the container and product label were false and misleading. If the Product's  
15 packaging and labels were not misleading, then Plaintiff would purchase the Product in the future.

16 14. Plaintiff Jacob Polonski is, and at all times relevant hereto was, a citizen of  
17 California residing in the county of San Mateo. Plaintiff made a one-time purchase of Defendant's  
18 Nitro-Tech Whey Protein Powder Product at a GNC store in San Bruno, California in February  
19 2020. Plaintiff paid approximately \$50.00 for the Product. In making his purchase, Plaintiff relied  
20 upon the opaque packaging, including the size of the container and product label, which was  
21 prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as  
22 well as designed to encourage consumers like Plaintiff to purchase the Products. Plaintiff  
23 understood the size of the container and product label to indicate the amount of protein powder  
24 contained therein was commensurate with the size of the container, and he would not have  
25 purchased the Product, or would not have paid a price premium for the Product, had he known that  
26 the size of the container and product label were false and misleading. If the Product's packaging  
27 and labels were not misleading, then Plaintiff would purchase the Product in the future.

1           15. Defendant, Iovate Health Sciences U.S.A. Inc. is a Delaware corporation. Defendant  
2 maintains its principal place of business at 1105 North Market Street, Suite 1330, Wilmington, DE  
3 19801. Defendant, directly and through its agents, conducts business nationwide. Defendant has  
4 substantial contacts with and receives substantial benefits and income from and through the State  
5 of California. Defendant is the owner, manufacturer, and distributor of the Products, and is the  
6 company that created and/or authorized the false, misleading, and deceptive packaging for the  
7 Products.

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

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

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

### **JURISDICTION AND VENUE**

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26           19. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C.  
27 Section 1332 of the Class Action Fairness Act of 2005 because: (i) there are 100 or more class  
28 members, (ii) there is an aggregate amount in controversy exceeding \$5,000,000, exclusive of

1 interest and costs, and (iii) there is minimal diversity because at least one Plaintiff and Defendant  
 2 are citizens of different states. The Court has supplemental jurisdiction over any state law claims  
 3 pursuant to 28 U.S.C. Section 1367.

4 20. Pursuant to 28 U.S.C. Section 1391, this Court is the proper venue for this action  
 5 because a substantial part of the events, omissions, and acts giving rise to the claims herein  
 6 occurred in this District: Plaintiffs are citizens of California who reside in this District; Defendant  
 7 made the challenged false representations to Plaintiffs in this District; and Plaintiffs purchased the  
 8 Products in this District. Moreover, Defendant receives substantial compensation from sales in  
 9 this District, actively advertises and sells the Products in this District, and made numerous  
 10 misrepresentations through its advertising and labeling of Products, which had a substantial effect  
 11 in this District.

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

### 15 **FACTUAL BACKGROUND**

16 22. The amount of product inside any product packaging is material to any consumer  
 17 seeking to purchase that product. The average consumer spends only 13 seconds deciding  
 18 whether to make an in-store purchase;<sup>1</sup> this decision is heavily dependent on a product's  
 19 packaging, including the package dimensions. Research has demonstrated that packages that  
 20 seem larger are more likely to be purchased because consumers expect package size to accurately  
 21 represent the quantity of the good being purchased.<sup>2</sup>

22 23. Accordingly, Defendant chose a certain size container for its Products to convey to  
 23 consumers that they are receiving a certain and substantial amount of powder product  
 24 commensurate with the size of the container. Such representations constitute an express warranty  
 25 regarding the Products' content.

26 \_\_\_\_\_  
 27 <sup>1</sup> 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-](https://www.nielsen.com/us/en/insights/article/2015/make-the-most-of-your-brands-20-second-window/)  
[window/](https://www.nielsen.com/us/en/insights/article/2015/make-the-most-of-your-brands-20-second-window/).

28 <sup>2</sup> P. Raghurir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 J. MARKETING RESEARCH 313-326 (1999).

1           24. Slack-fill is the difference between the actual capacity of a container and the  
2 volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that  
3 is filled to less than its capacity for illegitimate or unlawful reasons.

4           25. Defendant falsely represents the quantity of product in each of the Products’ opaque  
5 containers through its packaging. The size of each container leads the reasonable consumer to  
6 believe he or she is purchasing a container full of powder product when, in reality, what he or she  
7 actually receives is significantly less than what is represented by the size of the container.

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

13           27. Prior to the point of sale, the Products’ packaging does not allow for a visual or  
14 audial confirmation of the contents of the Products. The Products’ opaque packaging prevents a  
15 consumer from observing the contents before opening. Even if a reasonable consumer were to  
16 “shake” the Products before opening the container, the reasonable consumer would not be able to  
17 discern the presence of any nonfunctional slack-fill, let alone the significant amount of  
18 nonfunctional slack-fill that is present in the Products.

19           28. The other information that Defendant provides about the quantity of powder on the  
20 front and back labels of the Products does not enable reasonable consumers to form any  
21 meaningful understanding about how to gauge the quantity of contents of the Products as  
22 compared to the size of the container itself. For instance, the front of the Products’ packaging  
23 does not have any labels that would provide Plaintiffs with any meaningful insight as to the  
24 amount of powder to be expected, such as a fill line.

25           29. Disclosures of net weight and serving sizes in ounces, pounds, or grams do not  
26 allow the reasonable consumer to make any meaningful conclusions about the quantity of powder  
27 contained in the Products’ containers that would be different from their expectation that the  
28 quantity of powder is commensurate with the size of the container.

1           30. Plaintiffs would not have purchased the Product had they known that the Product  
2 contained slack-fill that serves no functional or lawful purpose.

3                           **None of the Slack-Fill Statutory Exceptions Apply to the Products**

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

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

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

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

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

17           34. Because the packages are filled to less than half of their capacity, Defendant can  
18 increase the Products’ fill level significantly without affecting how the containers are sealed, or it  
19 can disclose the fill-level on the outside labeling to inform consumers of the amount of powder  
20 product actually in the container, consistent with the law.

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

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

26           36. Even if *some* product settling may occur, there is no reason why the Products’  
27 containers are nearly half empty, when competitor products – such as the SuperiorSource product  
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1 below – which have similar product density, shape, and composition as Defendant’s product, are  
2 filled nearly 90% full.

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

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

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

10 38. The Products’ packaging is not reusable or of any significant value to the Products  
11 independent of its function to hold the powder product. The Products’ containers are intended to  
12 be discarded immediately after the powder product is used.

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

14 39. The slack-fill present in the Products’ containers does not accommodate required  
15 labeling, discourage pilfering, facilitate handling, or prevent tampering.

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

18 41. Because none of the safe harbor provisions apply to the Products’ packaging, the  
19 packages contain nonfunctional slack-fill in violation of 21 C.F.R. 100.100 and are, therefore,  
20 filled as to be misleading. Plaintiffs shall proffer expert testimony to establish these facts once this  
21 case reaches the merits more definitively.

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**Comparator Products Serve as Additional Evidence of Nonfunctional Slack-Fill**

42. Contrast the Products' packaging with a comparator product, such as SuperiorSource Keto Collagen, which is also packaged in an opaque container. 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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1 43. The SuperiorSource packaging provides additional evidence that the slack-fill  
2 present in the Products' packaging is nonfunctional.

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

8 45. The SuperiorSource packaging provides additional evidence that Defendant is able  
9 to increase the level of fill inside the Products' containers.

10 46. The SuperiorSource packaging provides additional evidence that Defendant has  
11 reasonable alternative designs available to it in its packaging of the Products.

12 47. Plaintiffs did not expect that the Product would contain nonfunctional slack-fill,  
13 especially given that nonfunctional slack-fill, as opposed to functional slack-fill, is prohibited by  
14 federal law and California law.

15 48. The Products are made, formed, and filled so as to be misleading. The Products are,  
16 therefore, misbranded.

17 49. Defendant's false, deceptive, and misleading label statements are unlawful under  
18 state and federal consumer protection and packaging laws.

19 50. Defendant's misleading and deceptive practices proximately caused harm to  
20 Plaintiffs and the Class.

21 **CLASS ACTION ALLEGATIONS**

22 51. Plaintiffs bring this action on their own behalf and on behalf of all other persons  
23 similarly situated. The Class which Plaintiffs seek to represent comprises:

24 "All persons who purchased the Products in the United States or, alternatively,  
25 the State of California, for personal use and not for resale during the time period  
of four years prior to the filing of the complaint through the present."

26 Excluded from the Class are Defendant's officers, directors, and employees, and any individual  
27 who received remuneration from Defendant in connection with that individual's use or  
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1 endorsement of the Products. Said definition may be further defined or amended by additional  
2 pleadings, evidentiary hearings, a class certification hearing, and orders of this Court.

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

6 53. Common questions of law and fact exist as to all Class members and predominate  
7 over questions affecting only individual Class members. Common questions of law and fact  
8 include, but are not limited to, the following:

- 9 a. The true nature and amount of product contained in each Products' packaging;
- 10 b. Whether the marketing, advertising, packaging, labeling, and other promotional  
11 materials for the Products are deceptive;
- 12 c. Whether Defendant misrepresented the approval of the FDA, United States  
13 Congress, and California Legislature that the Products' packaging complied with  
14 federal and California slack-fill regulations and statutes;
- 15 d. Whether the Products contain nonfunctional slack-fill in violation of 21 C.F.R.  
16 Section 100.100, *et seq.*;
- 17 e. Whether Defendant's conduct is an unlawful business act or practice within the  
18 meaning of Business and Professions Code section 17200, *et seq.*;
- 19 f. Whether Defendant's conduct is a fraudulent business act or practice within the  
20 meaning of Business and Professions Code section 17200, *et seq.*;
- 21 g. Whether Defendant's conduct is an unfair business act or practice within the  
22 meaning of Business and Professions Code section 17200, *et seq.*;
- 23 h. Whether Defendant's advertising is untrue or misleading within the meaning of  
24 Business and Professions Code section 17500, *et seq.*;
- 25 i. Whether Defendant made false and misleading representations in its advertising and  
26 labeling of the Products;
- 27 j. Whether Defendant knew or should have known that the misrepresentations were  
28 false;

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- 1 k. Whether Plaintiffs and the Class paid more money for the Products than they
- 2 actually received;
- 3 l. How much more money Plaintiffs and the Class paid for the Products than they
- 4 actually received;
- 5 m. Whether Defendant’s conduct alleged herein is fraudulent;
- 6 n. Whether Defendant was unjustly enriched at the expense of Plaintiffs and the Class
- 7 members;
- 8 o. Whether Defendant intentionally misrepresented the amount of powder contained in
- 9 the Products’ packaging; and
- 10 p. Whether Defendant negligently misrepresented the amount of powder contained in
- 11 the Products’ packaging.

12 54. Plaintiffs’ claims are typical of the claims of the proposed Class, as the

13 representations and omissions made by Defendant are uniform and consistent and are contained

14 on packaging and labeling that was seen and relied on by Plaintiffs and members of the Class.

15 55. Plaintiffs will fairly and adequately represent and protect the interests of the

16 proposed Class. Plaintiffs have retained competent and experienced counsel in class action and

17 other complex litigation. Plaintiffs’ Counsel prosecuted the largest slack-fill nationwide class

18 action settlement in 2021. Plaintiffs’ Counsel also was the first law firm to successfully certify a

19 slack-fill lawsuit involving theater box candy confectioners (twice in 2019 and 2020,

20 respectively).

21 56. Plaintiffs and the Class have suffered injury in fact and have lost money as a result

22 of Defendant’s false, deceptive, and misleading representations. Plaintiffs purchased the Products

23 because of the size of the containers and the product labels, which they believed to be indicative of

24 the amount of protein powder product contained therein as commensurate with the size of the

25 container. Plaintiffs relied on Defendant’s representations and would not have purchased the

26 Products if they had known that the packaging, labeling, and advertising as described herein was

27 false and misleading.

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1            57.    The Class is identifiable and readily ascertainable. Notice can be provided to such  
2 purchasers using techniques and a form of notice similar to those customarily used in class  
3 actions and by Internet publication, radio, newspapers, and magazines.

4            58.    A class action is superior to other available methods for fair and efficient  
5 adjudication of this controversy. The expense and burden of individual litigation would make it  
6 impracticable or impossible for the Class to prosecute their claims individually. The trial and the  
7 litigation of Plaintiffs’ claims are manageable. Individual litigation of the legal and factual issues  
8 raised by Defendant’s conduct would increase delay and expense to all parties and the court  
9 system. The class action device presents far fewer management difficulties and provides the  
10 benefits of a single, uniform adjudication, economies of scale, and comprehensive supervision by  
11 a single court.

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

17            60.    Absent a class action, Defendant will likely retain the benefits of its wrongdoing.  
18 Because of the small size of the individual Class members’ claims, few, if any, Class members  
19 could afford to seek legal redress for the wrongs complained of herein. Absent a representative  
20 action, the Class members will continue to suffer losses and Defendant will be allowed to  
21 continue these violations of law and to retain the proceeds of its ill-gotten gains.

22    **COUNT ONE**

23                                    **VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW**

24    **BUSINESS & PROFESSIONS CODE § 17200, et seq.**

25            61.    Plaintiffs repeat and re-allege the allegations set forth in the preceding paragraphs  
26 and incorporate the same as if set forth herein at length.

27            62.    Plaintiffs bring this claim individually and on behalf of the Class.

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1           63. Congress passed the Federal Food, Drug, and Cosmetic Act (“FDCA”), and in so  
2 doing established the Federal Food and Drug Administration (“FDA”) to “promote the public  
3 health” by ensuring that “foods are safe, wholesome, sanitary, and properly labeled.” 21 U.S.C.  
4 §393.

5           64. The FDA has implemented regulations to achieve this objective. *See, e.g.*, 21 C.F.R.  
6 § 101.1 *et seq.*

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

10           66. The FDA enforces the FDCA and accompanying regulations; “[t]here is no private  
11 right of action under the FDCA.” *Ivie v. Kraft Foods Global, Inc.*, 2013 U.S. Dist. LEXIS  
12 25615,2013 WL 685372, at \*1 (internal citations omitted).

13           67. In 1990, Congress passed an amendment to the FDCA, the Nutrition Labeling and  
14 Education Act (“NLEA”), which imposed a number of requirements specifically governing food  
15 nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343 *et seq.*

16           68. Plaintiffs are not suing under the FDCA, but under California state law.

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

21           70. The Sherman Law declares any food to be misbranded if it is false or misleading in  
22 any particular or if the labeling does not conform with the requirements for nutrition labeling set  
23 forth in certain provisions of the NLEA. Cal. Health & Safety Code Sections 110660, 110665,  
24 110670.

25           71. The UCL prohibits “any unlawful, unfair... or fraudulent business act or practice.”  
26 Cal. Bus & Prof. Code § 17200.

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**A. “Unfair Prong”**

72. 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).

73. Defendant’s actions alleged herein do not confer any benefit to consumers.

74. Defendant’s actions alleged herein cause injuries to consumers, who do not receive a quantity of product commensurate with their reasonable expectations.

75. Defendant’s actions alleged herein cause injuries to consumers, who do not receive a level of powder commensurate with their reasonable expectations.

76. Defendant’s actions alleged herein cause injuries to consumers, who end up overpaying for the Products and receiving a quantity of powder less than what they expected to receive.

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

78. Accordingly, the injuries caused by Defendant’s conduct alleged herein outweigh any benefits.

79. 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).

80. 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.

81. 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 Wireless Servs. Inc.*, 504 F. 3d 718, 735 (9th Cir. 2007).

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1 82. The California legislature maintains a declared policy of prohibiting nonfunctional  
2 slack-fill in consumer goods, as reflected in California Business and Professions Code Section  
3 12606.2 and California Health and Safety Code Section 110100.

4 83. The significant nonfunctional slack-fill contained in the Products is tethered to a  
5 legislative policy declared in California according to Cal. Business and Professions Code Section  
6 12606.2 and Cal. Health & Safety Code Section 110100.

7 84. Defendant's packaging of the Products, as alleged herein, is false, deceptive,  
8 misleading, and unreasonable, and constitutes unfair conduct.

9 85. Defendant knew or should have known of its unfair conduct.

10 86. As alleged in the preceding paragraphs, the misrepresentations by Defendant  
11 detailed above constitute an unfair business practice within the meaning of California Business  
12 and Professions Code Section 17200.

13 87. There existed reasonably available alternatives to further Defendant's legitimate  
14 business interests, other than the conduct described herein. Defendant could have used packaging  
15 appropriate for the amount of powder product contained within the Products.

16 88. All of the conduct alleged herein occurs and continues to occur in Defendant's  
17 business. Defendant's unfair conduct is part of a pattern or generalized course of conduct  
18 repeated on thousands of occasions daily.

19 89. Plaintiffs and the Class have suffered injury in fact and have lost money as a result  
20 of Defendant's unfair conduct. Plaintiffs paid an unwarranted premium for this product.  
21 Specifically, Plaintiffs paid for powder product they never received. Plaintiffs would not have  
22 purchased the Products if they had known that the Products' packaging contained nonfunctional  
23 slack-fill.

24 **B. "Fraudulent" Prong**

25 90. California Business and Professions Code Section 17200, et seq., considers conduct  
26 fraudulent and prohibits said conduct if it is likely to deceive members of the public. *Bank of the*  
27 *West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

28 91. Defendant's conduct alleged herein is likely to deceive members of the public.





1           102. As alleged herein, the misrepresentations by Defendant detailed above constitute an  
2 unlawful business practice within the meaning of California Business and Professions Code  
3 Section 17200.

4           103. There were reasonably available alternatives to further Defendant's legitimate  
5 business interests, other than the conduct described herein. Defendant could have either used  
6 packaging appropriate for the amount of powder product contained therein or indicated how  
7 much powder the Products contained with a clear and conspicuous fill line.

8           104. All of the conduct alleged herein occurred and continues to occur in Defendant's  
9 business. Defendant's unlawful conduct is part of a pattern or generalized course of conduct  
10 repeated on thousands of occasions daily.

11           105. Plaintiffs and the Class have suffered injury in fact and have lost money as a result  
12 of Defendant's unlawful conduct. Plaintiffs paid an unwarranted premium for this product.  
13 Specifically, Plaintiffs paid for powder product they never received. Plaintiffs would not have  
14 purchased the Product if they had known that the packaging contained nonfunctional slack-fill.

15           106. As a result of the conduct described herein, Plaintiffs and members of the Class,  
16 pursuant to § 17203, are entitled to an order enjoining such future wrongful conduct on the part of  
17 Defendant and such other orders and judgments that may be necessary to disgorge Defendant's  
18 ill-gotten gains and to restore to any person in interest any money paid for the Products as a result  
19 of the wrongful conduct of Defendant.

20           a. Plaintiffs and members of the Class are entitled to equitable relief as no adequate  
21 remedy at law exists.

22           (1) The applicable limitations period is four years for claims brought under the UCL,  
23 which is one year longer than the applicable statute of limitations under the FAL and  
24 CLRA. Thus, class members who purchased the Products between 3 and 4 years  
25 prior to the filing of the complaint will be barred from the Class if equitable relief  
26 were not granted under the UCL.

27           (2) The scope of actionable misconduct under the unfair prong of the UCL is  
28 broader than the other causes of action asserted herein to include, for example, the

1 overall unfair marketing scheme of underfilling the Products' packaging. Thus,  
2 Plaintiffs and class members may be entitled to restitution under the UCL, while not  
3 entitled to damages under other causes of action asserted herein (e.g., the FAL  
4 requires actual or constructive knowledge of the falsity; the CLRA is limited to  
5 certain types of plaintiffs (an individual who seeks or acquires, by purchase or lease,  
6 any goods or services for personal, family, or household purposes) and certain  
7 statutorily enumerated conduct).

8 (3) Injunctive relief is appropriate on behalf of Plaintiffs and members of the Class  
9 because Defendant continues to deceptively underfill the Products' packaging.  
10 Injunctive relief is necessary to prevent Defendant from continuing to engage in this  
11 unfair, fraudulent, and/or unlawful conduct described herein and to prevent future  
12 harm—none of which can be achieved through available legal remedies. Further,  
13 injunctive relief, in the form of packaging or label modifications, is necessary to  
14 dispel public misperception about the Products that has resulted from years of  
15 Defendant's unlawful marketing efforts. Such modifications could include, but are  
16 not limited to, shrinking the packaging, adding more powder product to the  
17 packaging, or adding a fill line on the front label. Such relief is not available through  
18 a legal remedy, as monetary damages may be awarded to remedy past harm (i.e.,  
19 purchasers who have been misled), while injunctive relief is necessary to remedy  
20 future harm (i.e., prevent future purchasers from being misled), under the current  
21 circumstances where the dollar amount of future damages is not reasonably  
22 ascertainable at this time. Plaintiffs are, currently, unable to accurately quantify the  
23 damages caused by Defendant's future harm (e.g., the dollar amount that Plaintiffs  
24 and Class members will pay for the underfilled Products), rendering injunctive relief  
25 a necessary remedy.

26 107. Pursuant to Civil Code § 3287(a), Plaintiffs and the Class are further entitled to  
27 prejudgment interest as a direct and proximate result of Defendant's unfair, fraudulent, and  
28 unlawful business conduct. The amount on which interest is to be calculated is a sum certain and

1 capable of calculation, and Plaintiffs and the Class are entitled to interest in an amount according  
2 to proof.

3 **COUNT TWO**

4 **FALSE AND MISLEADING ADVERTISING IN VIOLATION OF**  
5 **BUSINESS & PROFESSIONS CODE § 17500, *et seq.***

6 108. Plaintiffs repeat and re-allege the allegations set forth in the preceding paragraphs  
7 and incorporate the same as if set forth herein at length.

8 109. Plaintiffs bring this claim individually and on behalf of the Class.

9 110. California’s False Advertising Law, California Business and Professions Code  
10 Section 17500, *et seq.*, makes it “unlawful for any person to make or disseminate or cause to be  
11 made or disseminated before the public in this state, in any advertising device or in any other  
12 manner or means whatever, including over the Internet, any statement, concerning personal  
13 property or services, professional or otherwise, or performance or disposition thereof, which is  
14 untrue or misleading and which is known, or which by the exercise of reasonable care should  
15 be known, to be untrue or misleading.”

16 111. Defendant knowingly manipulated the physical dimensions of the Products’  
17 containers, or stated another way, under-filled the amount of powder product in the Products, as a  
18 means to mislead the public about the amount of powder product contained in each package.

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

22 113. Defendant’s action of packaging the Products with nonfunctional slack-fill, instead  
23 of including more powder in the container or decreasing the size of the container, is likely to  
24 deceive the general public.

25 114. Defendant’s actions were false and misleading, such that the general public is and  
26 was likely to be deceived, in violation of Section 17500.

27 115. As a direct and proximate result of Defendant’s conduct alleged herein in violation  
28 of the FAL, Plaintiffs and members of the Class, pursuant to Section 17535, are entitled to an

1 order of this Court enjoining such future wrongful conduct on the part of Defendant and requiring  
2 Defendant to disclose the true nature of its misrepresentations.

3 a. Plaintiffs and members of the Class are entitled to equitable relief as no adequate  
4 remedy at law exists.

5 (1) The scope of permissible plaintiffs under the FAL is broader than the CLRA to  
6 include, for example, individuals or entities who purchased the Products for non-  
7 personal, non-family, and non-household purposes. Thus, Plaintiffs and class  
8 members may be entitled to restitution under the FAL, while not entitled to  
9 damages under the CLRA.

10 (2) Injunctive relief is appropriate on behalf of Plaintiffs and members of the Class  
11 because Defendant continues to deceptively underfill the Products' packaging.  
12 Injunctive relief is necessary to prevent Defendant from continuing to engage in  
13 the unlawful conduct described herein and to prevent future harm—none of  
14 which can be achieved through available legal remedies. Further, injunctive  
15 relief, in the form of packaging or label modifications, is necessary to dispel  
16 public misperception about the Products that has resulted from years of  
17 Defendant's unfair, fraudulent, and unlawful marketing efforts. Such  
18 modifications would include, but are not limited to, shrinking the packaging,  
19 adding more powder product to the packaging, or adding a fill line the front  
20 label. Such relief is also not available through a legal remedy as monetary  
21 damages may be awarded to remedy past harm (i.e., purchasers who have been  
22 misled), while injunctive relief is necessary to remedy future harm (i.e., prevent  
23 future purchasers from being misled), under the current circumstances where the  
24 dollar amount of future damages is not reasonably ascertainable at this time.  
25 Plaintiffs are, currently, unable to accurately quantify the damages caused by  
26 Defendant's future harm (e.g., the dollar amount that Plaintiffs and Class  
27 members overpay for the underfilled Products), rendering injunctive relief a  
28 necessary remedy.

1 116. Plaintiffs and the Class have suffered injury in fact and have lost money as a result  
2 of Defendant’s false representations. Plaintiffs purchased the Products in reliance upon the claims  
3 by Defendant that the Products were of the quantity represented by Defendant’s packaging and  
4 advertising. Plaintiffs would not have purchased the Products if they had known that the  
5 packaging and labeling as alleged herein were false.

6 117. Plaintiffs and members of the Class also request an order requiring Defendant to  
7 disgorge its ill-gotten gains and/or award full restitution of all monies wrongfully acquired by  
8 Defendant by means of such acts of false advertising, plus interests and attorneys’ fees.

9 **COUNT THREE**

10 **VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT,**  
11 **CALIFORNIA CIVIL CODE § 1750, *et seq.***

12 118. Plaintiffs repeat and re-allege the allegations set forth in the preceding paragraphs  
13 and incorporate the same as if set forth herein at length.

14 119. The CLRA prohibits certain “unfair methods of competition and unfair or deceptive  
15 acts or practices” in connection with a sale of goods.

16 120. The practices described herein, specifically Defendant’s packaging, advertising, and  
17 sale of the Products, were intended to result and did result in the sale of the Products to the  
18 consuming public and violated and continue to violate sections 1770(a)(2), 1770(a)(5),  
19 1770(a)(7), and 1770(a)(9) of the CLRA by: (1) misrepresenting the approval of the Products as  
20 compliant with 21 C.F.R Section 100.100 and the Sherman Law; (2) representing the Products  
21 have characteristics and quantities that they do not have; (3) advertising and packaging the  
22 Products with intent not to sell them as advertised and packaged; and (4) representing that the  
23 Products have been supplied in accordance with a previous representation as to the quantity of  
24 powder contained within each container, when they have not.

25 121. Defendant fraudulently deceive, and continues to deceive, Plaintiffs and the Class  
26 by representing that the Products’ packaging, which includes significant nonfunctional slack-fill,  
27 actually conforms to federal and California slack-fill regulations and statutes including the  
28 Sherman Law and 21 C.F.R. 100.100.

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1           122. Defendant packaged the Products in containers that contain significant  
2 nonfunctional slack-fill and made material misrepresentations to fraudulently deceive Plaintiffs  
3 and the Class.

4           123. Defendant fraudulently deceived Plaintiffs and the Class by misrepresenting the  
5 Products as having characteristics and quantities which they do not have, e.g., that the Products  
6 are free of nonfunctional slack-fill when they are not. In doing so, Defendant intentionally  
7 misrepresented and concealed material facts from Plaintiffs and the Class. Said  
8 misrepresentations and concealment were done with the intention of deceiving Plaintiffs and the  
9 Class and depriving them of their legal rights and money.

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

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

25           126. Defendant knew or should have known, through the exercise of reasonable care,  
26 that the Products' packaging was misleading.

27           127. Defendant's actions as described herein were done with conscious disregard of  
28 Plaintiffs' rights, and Defendant was wanton and malicious in its concealment of the same.

1           128. Defendant’s packaging of the Products was a material factor in Plaintiffs’ and the  
2 Class’s decisions to purchase the Products. Based on Defendant’s packaging of the Products,  
3 Plaintiffs and the Class reasonably believed that they were getting more product than they  
4 actually received. Had they known the truth of the matter, Plaintiffs and the Class would not have  
5 purchased the Products.

6           129. Plaintiffs and the Class have suffered injury in fact and have lost money as a result  
7 of Defendant’s unfair, unlawful, and fraudulent conduct. Specifically, Plaintiffs paid for powder  
8 product they never received. Plaintiffs would not have purchased the Products had they known  
9 the container contained nonfunctional slack-fill.

10           130. Plaintiffs respectfully request that the Court enjoin Defendant from continuing to  
11 employ the unlawful methods, acts, and practices alleged herein pursuant to § 1780(a)(2). In  
12 addition, Defendant should be compelled to provide restitution and damages to consumers who  
13 paid for Products that are not what they expected to receive due to Defendant’s  
14 misrepresentations.

15           a. Plaintiffs and members of the Class are entitled to equitable relief as no adequate  
16 remedy at law exists.

17           (1) Injunctive relief is appropriate on behalf of Plaintiffs and members of the Class  
18 because Defendant continues to deceptively underfill the Products’ packaging.  
19 Injunctive relief is necessary to prevent Defendant from continuing to engage in the  
20 unlawful conduct described herein and to prevent future harm – none of which can  
21 be achieved through available legal remedies. Further, injunctive relief, in the form  
22 of packaging or label modifications, is necessary to dispel public misperception  
23 about the Products that has resulted from years of Defendant’s unfair, fraudulent,  
24 and unlawful marketing efforts. Such modifications would include, but are not  
25 limited to, shrinking the packaging, adding more powder product to the packaging,  
26 or adding a fill line on the front label. Such relief is also not available through a  
27 legal remedy as monetary damages may be awarded to remedy past harm (i.e.,  
28 purchasers who have been misled), while injunctive relief is necessary to remedy

1 future harm (i.e., prevent future purchasers from being misled), under the current  
2 circumstances where the dollar amount of future damages is not reasonably  
3 ascertainable at this time. Plaintiffs are, currently, unable to accurately quantify the  
4 damages caused by Defendant's future harm (e.g., the dollar amount that Plaintiffs  
5 and Class members overpay for the underfilled Products), rendering injunctive relief  
6 a necessary remedy.

7 **COUNT FOUR**

8 **Restitution Based on Quasi-Contract/Unjust Enrichment**

9 131. Plaintiffs repeat and reallege the allegations set forth above and incorporate the  
10 same as if set forth herein at length.

11 132. Plaintiffs bring this cause of action individually and on behalf of all members of the  
12 Class against Defendant.

13 133. By means of Defendant's wrongful conduct alleged herein, Defendant knowingly  
14 sold the Products to Plaintiffs and the Class in a manner that was unfair, unconscionable, and  
15 oppressive.

16 134. Defendant knowingly received and retained wrongful benefits and funds from  
17 Plaintiffs and members of the Class. In so doing, Defendant acted with conscious disregard for  
18 the rights of Plaintiffs and the Class.

19 135. As a result of Defendant's wrongful conduct as alleged herein, Defendant has been  
20 unjustly enriched at the expense of, and to the detriment of, Plaintiffs and members of the Class.

21 136. Defendant's unjust enrichment is traceable to, and resulted directly and proximately  
22 from, the conduct alleged herein.

23 137. Under the common law doctrine of unjust enrichment, it is inequitable for  
24 Defendant to be permitted to retain the benefits it received, without justification, from selling the  
25 Products to Plaintiffs and members of the Class in an unfair, unconscionable, and oppressive  
26 manner. Defendant's retention of such funds under such circumstances constitutes unjust  
27 enrichment.

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1           138. The financial benefits derived by Defendant rightfully belong to Plaintiffs and  
2 members of the Class. Defendant should be compelled to return in a common fund for the benefit  
3 of Plaintiffs and members of the Class all wrongful or inequitable proceeds received by  
4 Defendant.

5           139. Plaintiffs and members of the Class have no adequate remedy at law.

6   **COUNT FIVE**

7   **Common Law Fraud**

8           140. Plaintiffs repeat and reallege all of the allegations contained in the preceding  
9 paragraphs and incorporate the same as if set forth herein at length.

10           141. Plaintiffs bring this cause of action individually and on behalf of the Class against  
11 Defendant.

12           142. Defendant has willfully, falsely, and knowingly filled and packaged the Products in  
13 a manner indicating that the Products are sufficiently filled with an amount of powder product  
14 commensurate with the size of the container. However, the Products contain significantly less  
15 powder product than advertised and instead contain a substantial amount of nonfunctional and  
16 unlawful slack-fill. Defendant has misrepresented the quantity of powder product contained in the  
17 Products.

18           143. Defendant's misrepresentations are and were material (i.e., the type of  
19 misrepresentations to which a reasonable person would attach importance and would be induced  
20 to act thereon in making his or her purchase decision), because they relate to the quantity of  
21 powder product contained in the Products.

22           144. Defendant knew of, or showed reckless disregard for, the fact that the Products  
23 contained a substantial amount of nonfunctional slack-fill.

24           145. Defendant intended for Plaintiffs and the Class to rely on these representations, as  
25 evidenced by Defendant's intentional manufacturing of packaging that is substantially larger than  
26 necessary to hold the volume of the contents contained therein.

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1 146. Plaintiffs and the Class have reasonably and detrimentally relied on Defendant’s  
2 misrepresentations when purchasing the Products and, had they known the truth, they would not  
3 have purchased the Products or would have paid significantly less for the Products.

4 147. Therefore, as a direct and proximate result of Defendant’s fraud, Plaintiffs and  
5 members of the Class have suffered injury in fact.

6 **COUNT SIX**

7 **Intentional Misrepresentation**

8 148. Plaintiffs repeat and reallege all of the allegations contained above and incorporate  
9 the same as if set forth herein at length.

10 149. Plaintiffs bring this cause of action individually and on behalf of all members of the  
11 Class against Defendant.

12 150. Defendant has filled and packaged the Products in a manner indicating that the  
13 Products are adequately filled with powder. However, the Products contain significantly less  
14 powder product than advertised and instead contain a substantial amount of nonfunctional slack-  
15 fill. Defendant misrepresents the quantity of powder product contained within the Products’  
16 packaging.

17 151. Defendant’s misrepresentations regarding the Products are material to a reasonable  
18 consumer, as they relate to the quantity of product received by consumers. A reasonable consumer  
19 would attach importance to such representations and would be induced to act thereon in making  
20 his or her purchase decision.

21 152. At all relevant times when such misrepresentations were made, Defendant knew or  
22 should have known that the representations were misleading.

23 153. Defendant intended for Plaintiffs and the Class to rely on the size and style of the  
24 Products’ packaging, as evidenced by Defendant’s intentional manufacturing, marketing, and  
25 selling of packaging that is significantly larger than is necessary to contain the volume of the  
26 contents within them.

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1 154. Plaintiffs and the Class reasonably and justifiably relied on Defendant’s intentional  
2 misrepresentations when purchasing the Products, and had they known the truth, they would not  
3 have purchased the Products or would have purchased them at significantly lower prices.

4 155. As a direct and proximate result of Defendant’s intentional misrepresentations,  
5 Plaintiffs and the Class have suffered injury in fact.

6 **COUNT SEVEN**

7 **Negligent Misrepresentation**

8 156. Plaintiffs repeat and reallege all of the allegations contained above and incorporate  
9 the same as if set forth herein at length.

10 157. Plaintiffs bring this cause of action individually and on behalf of the Class against  
11 Defendant.

12 158. Defendant has filled and packaged the Products in a manner indicating that the  
13 Products are adequately filled with powder product. However, the Products contain significantly  
14 less powder product than advertised and instead contain a substantial amount of nonfunctional  
15 slack-fill. Defendant misrepresents the quantity of powder product contained within the Products’  
16 packaging.

17 159. Defendant’s misrepresentations regarding the Products are material to a reasonable  
18 consumer, as they relate to the quantity of product received by the consumer. A reasonable  
19 consumer would attach importance to such representations and would be induced to act thereon in  
20 making his or her purchase decision.

21 160. At all relevant times when such misrepresentations were made, Defendant knew or  
22 should have known that the Products were not adequately filled with powder but instead contained  
23 a substantial amount of nonfunctional slack-fill.

24 161. Defendant intended for Plaintiffs and the Class to rely on the size and style of the  
25 Products’ packaging, as evidenced by Defendant’s packaging that is significantly larger than is  
26 necessary to contain the volume of the powder product therein.

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, 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 as may be just and proper.

**JURY TRIAL DEMANDED**

Plaintiffs demand a jury trial on all triable issues.

DATED: April 28, 2022

**CLARKSON LAW FIRM, P.C.**

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

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# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [MuscleTech Supplement Containers Sold 'Nearly Half Empty,' Class Action Says](#)

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