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

12 JACOB SCHEIBE, *individually and on*)
13 *behalf of all those similarly situated,*)
14)
15 *Plaintiff,*)
16)
17 v.)
18)
19 LIVWELL PRODUCTS, LLC dba Adapted)
20 *Nutrition, a Maryland limited liability*)
21 *company,*)
22)
23 *Defendant.*)

No. **'23CV0216 MMABLM**

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

24 _____
25
26 Jacob Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by
27 and through undersigned counsel, hereby brings this action against Livwell Products, LLC dba
28 Adapted Nutrition (“Adapted”), alleging that its Keto K1000 powders (“the Products”), dietary
supplements manufactured, packaged, labeled, advertised, distributed, and sold by Defendant,
are misbranded and falsely advertised, and upon information and belief and investigation of
counsel alleges as follows:

PARTIES

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

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

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

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14 18. On or about October 18, 2022, Scheibe purchased Adapted’s Keto K1000 powder,
15 watermelon, orange, lemonade, and raspberry lemon flavors, from Amazon.com (Order Nos.
16 111-8216063-4126610 and 111-1113087-0320237), for a total of \$141.63 inclusive of tax.

17 19. Mr. Scheibe is a college student who has recently sought to lose weight and add
18 muscle mass, and to do so has begun to reduce his carbohydrate intake, eat with intentionality,
19 and take dietary supplements. He carefully reviews dietary supplement labels, including the
20 Products’ label, to understand the characteristics of the products he consumes, and he prefers to
21 consume only products that contain all-natural ingredients and flavorings.

22
23 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

24 20. Defendant Adapted formulates, manufactures, and sells a dietary supplement
25 called Keto K1000 powder. These powders are marketed as supporting improved workout
26 recovery and muscle protein synthesis; hydration levels; and increased blood flow and energy.

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1 21. These dietary supplements come in five different flavors: lemonade, orange,
2 raspberry lemon, and watermelon. However, the Products differ only in flavoring; the base
3 formulation for each flavor is the same, and they are offered for sale for an identical price.

4 22. The front label (or “principal display panel”) of all flavors of the Products state
5 that the Products contain “Nothing Artificial” as shown in this photograph, which statement is
6 intended to convey to consumers that the Products contain no artificial ingredients including
7 flavoring ingredients:
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23 23. Since receiving Plaintiff’s demand letter, Adapted has changed the image of the
24 principal display panel on its Products to state that they contain “Clean Ingredients,” as shown
25 below. However, this statement is merely the functional equivalent of “Nothing Artificial” and
26 conveys the same information to consumers. In addition, on information and belief, Adapted
27 continues to ship Products to consumers with the old labelling that states “Nothing Artificial”:
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24. These labelling claims are false. The Products are flavored using an artificial flavoring, DL malic acid, that is derived from petrochemicals.

25. All flavors of the Products state, on the back label, that they contain “malic acid.”

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

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

28. Fruit flavors in a food are imparted by the interactions between sugars, acids, lipids, and various volatile compounds. The relative sweetness or tartness of a fruit flavor is

¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1 determined by the ratio between the sugars (mainly glucose and fructose) and acids, such as
2 citric and malic acid.

3 29. The quality and consumer acceptability of fruit flavors is based on their perceived
4 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
5 as lemons, raspberries, oranges, and watermelons have their own natural ratio of sugars and
6 acids.

7
8 30. The malic acid used in the Products is used to create, simulate, and/or reinforce
9 the fruit flavors stated on the labels.

10 31. Rather notably, Adapted also sells an unflavored version of the Products that does
11 not contain malic acid—which strongly suggests that the malic acid in the Products is used for
12 flavoring.

13 32. Defendant uses the petrochemical-derived DL malic acid in its Products to create,
14 simulate, or reinforce the fruit flavors but pretends otherwise, conflating natural and artificial
15 flavorings, misbranding the Products and deceiving consumers.

16 33. The ingredients on the Products’ label are declared in a way that is misleading and
17 contrary to law, because Defendant designates the ingredient by its generic name, “malic acid,”
18 instead of by its specific name, “DL malic acid.”
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21 **C. Requirements for Labelling**

22 34. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
23 (“FDCA”) require that a food’s label accurately describe the nature of the food product and its
24 characterizing flavors. 21 C.F.R. § 102.5(a).

25 35. Artificial flavor is defined as “any substance, the function of which is to impart
26 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
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1 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
2 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

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

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8 37. Any recognizable primary flavor identified directly or indirectly on the front label
9 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
10 as a “characterizing flavor.” 21 C.F.R. § 101.22.

11 38. Here, the Products’ labels both state the characterizing flavors (lemons,
12 raspberries, oranges, and watermelons) and reinforce the statement of the characterizing flavor
13 by depictions of fruits on the Products’ websites.

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15 39. If a food product’s characterizing flavor is not created exclusively by the named
16 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
17 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present
18 which “simulates, resembles or reinforces” the characterizing flavor, the front label must
19 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
20 101.22(i)(2).

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22 40. A food product’s label also must include a statement of the “presence or absence
23 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
24 ingredient(s) or component(s) in the food has a material bearing on price or consumer
25 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
26 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.

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

3 42. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
4 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

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

9 44. DL malic acid is not a “natural flavor” as this term is defined by federal and state
10 regulations and is not derived from a fruit or vegetable or any other natural source. The Products
11 therefore contain artificial flavorings.
12

13 45. Because the Products contain artificial flavoring, California law requires the
14 Products to display both front- and back-label disclosures to inform consumers that the Products
15 are artificially flavored.
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17 46. The Products have none of the required disclosures regarding the use of artificial
18 flavors.

19 47. Plaintiff reserves the right to amend this Complaint to add further products that
20 contain similar label misrepresentations as testing continues.
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22 49. Labels are the chief means by which food product manufacturers convey critical
23 information to consumers, and consumers have been conditioned to rely on the accuracy of the
24 claims made on these labels. As the California Supreme Court stated in a case involving alleged
25 violations of the UCL and FAL, “Simply stated: labels matter. The marketing industry is based
26 on the premise that labels matter, that consumers will choose one product over another similar
27 product based on its label.” *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).
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1 56. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,
2 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over
3 this matter and the members of their immediate families and judicial staff.

4 57. Plaintiff reserves the right to alter the Class definition, and to amend this
5 Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable
6 law.

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8 58. Certification of Plaintiff’s claims for class-wide treatment is appropriate because
9 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
10 individual Class members would use to prove those elements in individual actions alleging the
11 same claims.

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

15
16 60. **Existence and Predominance of Common Questions of Law and Fact – Rule**
17 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
18 predominate over any questions that affect only individual Class members. Common legal and
19 factual questions and issues include but are not limited to:

- 20
21 a. Whether the marketing, advertising, packaging, labeling, and other
22 promotional materials for Defendant’s Products is misleading and deceptive;
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24 b. Whether a reasonable consumer would understand Defendant’s “Nothing
25 Artificial” claim to indicate that the Products contained only natural
26 flavorings, and reasonably relied upon that representation;
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28 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and
Class members;

- 1 d. the proper amount of damages and disgorgement or restitution;
- 2 e. the proper scope of injunctive relief; and
- 3 f. the proper amount of attorneys' fees.

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

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

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

17 64. Specifically, all Class members, including Plaintiff, were harmed in the same way
18 due to Defendant's uniform misconduct described herein; all Class members suffered similar
19 economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as
20 the Class members.

21
22 65. There are no defenses available to Defendant that are unique to the named
23 Plaintiff.

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

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

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

- 7
- 8 a. the damages individual Class members suffered are small compared to the
9 burden and expense of individual prosecution of the complex and extensive
10 litigation needed to address Defendant's conduct such that it would be
11 virtually impossible for the Class members individually to redress the wrongs
12 done to them. In fact, they would have little incentive to do so given the
13 amount of damage each member has suffered when weighed against the costs
14 and burdens of litigation;
 - 15 b. the class procedure presents fewer management difficulties than individual
16 litigation and provides the benefits of single adjudication, economies of scale,
17 and supervision by a single Court;
 - 18 c. the prosecution of separate actions by individual Class members would create
19 a risk of inconsistent or varying adjudications, which would establish
20 incompatible standards of conduct for Defendant; and
 - 21 d. the prosecution of separate actions by individual Class members would create
22 a risk of adjudications with respect to them that would be dispositive of the
23 interests of other Class members or would substantively impair or impede their
24 ability to protect their interests.
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1 any other act prohibited by law, including those acts set forth in this Complaint, and further seek
2 all other relief allowable under Business and Professions Code Section 17200, *et seq.*

3
4 **COUNT 3**
5 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
6 **SECTION 17200 *et seq.* — “FRAUDULENT” CONDUCT**
7 **(California Subclass)**

8 58. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
9 extent necessary, plead this cause of action in the alternative.

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

12 60. Defendant’s actions as alleged in this Complaint constitute “fraudulent” conduct
13 within the meaning of California Business and Professions Code Section 17200 *et seq.*

14 61. Defendant’s business practices, as alleged herein, are “fraudulent” because it
15 misrepresents the nature of the flavoring used in the Products and fails to disclose accurately the
16 artificial flavoring used in the Products.

17 62. As a result of this “fraudulent” conduct, Plaintiff expended money and engaged in
18 activities it would not otherwise have spent or conducted.

19 63. Defendant’s wrongful business practices alleged herein constituted, and continue
20 to constitute, a continuing course of unfair competition since it continues to market and sell its
21 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
22 oppressive, unscrupulous and/or substantially injurious to its customers.

23 64. Defendant publicly disseminated untrue or misleading representations regarding
24 the flavoring of its Products, which it knew, or in the exercise of reasonable care should have
25 known, were untrue or misleading.

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

4
5 **COUNT 4**
6 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE**
7 **SECTION 17200 *et seq.* — “UNLAWFUL” CONDUCT**
8 **(California Subclass)**

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

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

13 68. Defendant’s actions as alleged in this Complaint constitute “unlawful” conduct
14 within the meaning of California Business and Professions Code Section 17200, *et seq.*

15 69. Defendant’s business practices, as alleged herein, are “unlawful” because it
16 misrepresents the nature of the flavoring used in the Products and fails to disclose accurately the
17 artificial flavoring used in the Products.

18 70. As a result of this “unlawful” conduct, Plaintiff expended money and engaged in
19 activities he would not otherwise have spent or conducted.

20 71. Defendant’s business practices alleged herein constituted, and continue to
21 constitute, a continuing course of unfair competition since it continues to market and sell its
22 products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
23 oppressive, unscrupulous and/or substantially injurious to its customers.

24 72. Defendant publicly disseminated untrue or misleading representations regarding
25 the flavoring of its Products, which it knew, or in the exercise of reasonable care should have
26 known, were untrue or misleading.
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1 **COUNT 6**
2 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**
3 **CAL. CIV. CODE § 1750 *et seq.***
4 **(California Subclass)**

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

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

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

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

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

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

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

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

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

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

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

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

19 **COUNT 7**
20 **UNJUST ENRICHMENT**
21 **(Nationwide Class)**

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

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

26 60. Defendant did so for the purpose of enriching itself and it in fact enriched itself
27 by doing so.
28

1 Products would conform to those affirmations of fact, representations, promises, and
2 descriptions.

3 69. The Products do not conform to the express warranty that the Products contain
4 “Nothing Artificial,” because they contain ingredients that are unnatural and synthetic, *i.e.*, DL
5 malic acid.

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

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff respectfully request the Court grant the following relief against
14 Defendant:
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- 16 a. Certifying the Class;
- 17 b. Declaring that Defendant violated the MCPA, CLRA, UCL, and FAL;
- 18 c. Awarding actual and other damages as permitted by law, and/or ordering an
19 accounting by Defendant for any and all profits derived by Defendant from the
20 unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein;
- 21 d. Ordering an awarding of injunctive relief as permitted by law or equity, including
22 enjoining Defendant from continuing the unlawful practices as set forth herein, and
23 ordering Defendant to engage in a corrective advertising campaign;
- 24 e. Ordering Defendant to pay reasonable attorneys’ fees and litigation costs to Plaintiff;
- 25 f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts
26 awarded; and
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g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.

Respectfully submitted,

/s/ Charles C. Weller
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