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

12 PAUL SCHEIBE, *individually and on*)
13 *behalf of all those similarly situated,*)
14)
15 *Plaintiff,*)
16)
17)
18 v.)
19)
20 PERFECT KETO GROUP LLC, *a*)
21 *Delaware limited liability company,*)
22)
23 *Defendant.*)
24)

No. _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

25
26 Paul Scheibe (“Plaintiff”), individually and on behalf of all others similarly situated, by
27 and through undersigned counsel, hereby brings this action against Perfect Keto Group LLC
28 (“Perfect Keto”), alleging that its BASE dietary supplement, strawberry lemon flavor (“the
Product”), which is a dietary supplement manufactured, packaged, labeled, advertised,
distributed, and sold by Defendant, is misbranded and falsely advertised, and upon information
and belief and investigation of counsel alleges as follows:

PARTIES

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

1 Products to commercial and individual consumers in this district, including Plaintiff; knowingly
2 directing advertising and marketing materials concerning the Products into this district through
3 wires and mails, both directly and through electronic and print publications that are directed to
4 commercial and individual consumers in this district; and operating an e-commerce web site
5 that offers the Products for sale to commercial and individual consumers in this district, as well
6 as offering the Products for sale through third-party e-commerce websites, through both of
7 which commercial and individual consumers residing in this district have purchased the
8 Products.
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10 10. Defendant knowingly directs electronic activity and ships the Products into this
11 district with the intent to engage in business interactions for profit, and it has in fact engaged in
12 such interactions, including the sale of the Products to Plaintiff.
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14 11. Defendant also sells the Products to retailers and wholesalers in this district for
15 the purpose of making the Products available for purchase by individual consumers in this
16 district.
17

18 12. Plaintiff's losses and those of other Class members were sustained in this district.

19 13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of
20 the events or omissions giving rise to Plaintiff's claims occurred within this district.
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22 14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court
23 maintains personal jurisdiction over Defendant.

24 **FACTUAL ALLEGATIONS**

25 **A. Consumers Pay A Premium for "Clean Labels."**

26 15. Across the globe, consumers are increasingly attuned to claims that foods are "all-
27 natural," minimally processed, or otherwise free of artificial flavors and preservatives.

28 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
numbers of consumers were committed or casual adherents to so-called "clean label" food

1 attributes: “No artificial ingredients” (69 percent); “No preservatives” (67 percent); or “All-
2 natural” (66 percent). These were the three most attractive attributes in the consumer survey.
3 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
4 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

5
6 17. This consumer preference has led to an explosion in the category of “clean label”
7 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
8 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
9 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
10 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

11
12 18. On or about December 28, 2022, Mr. Scheibe purchased the Products from Perfect
13 Keto’s website (Order No. 85994705NN559011G).

14
15 19. Mr. Scheibe has recently sought to lose weight and gain muscle. He carefully
16 reviews labels, including the Products’ labels, to ensure that he consumes only natural
17 ingredients and avoids artificial flavors and ingredients.

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

19
20 20. Defendant Perfect Keto formulates, manufactures, and sells dietary
21 supplements—both beverages and powders—called BASE. These dietary supplements purport
22 to make workouts more effective and efficient and to speed muscle recovery and growth,
23 improve memory and cognition, and support immune response.

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25 21. The front label (or “principal display panel”) of the strawberry lemon flavor of the
26 Products prominently state they are “Flavored with Natural Flavors”:
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22. These claims are repeated on the website for the Products, which states that they are “Completely clean” and free of “junk” (see <https://shop.perfectketo.com/products/keto-drink-mix>):

- ✓ **Made to:** Help reach ketosis, maintain energy levels, curb appetite, hydrate, and minimize keto flu symptoms
- ✓ Sweetened with monk fruit for balanced sweetness
- ✓ Added electrolytes for optimal hydration
- ✓ Completely clean -- no artificial sweeteners or junk

1 23. These natural flavoring claims are false. The Products are flavored using an
2 artificial flavoring, DL malic acid, that is derived from petrochemicals.

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

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

9
10 26. This type of malic acid is manufactured in petrochemical plants from benzene or
11 butane—components of gasoline and lighter fluid, respectively—through a series of chemical
12 reactions, some of which involve highly toxic chemical precursors and byproducts.

13 27. Fruit flavors in a food are imparted by the interactions between sugars, acids,
14 lipids, and various volatile compounds. The sweetness or tartness of a fruit flavor is determined
15 by the ratio between the sugars (mainly glucose and fructose) and acids, such as citric and malic
16 acid.

17
18 28. The quality and consumer acceptability of fruit flavors is based on their perceived
19 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
20 as raspberries have their own natural ratio of sugars and acids.

21 29. The DL malic acid used in the Products is used to create, simulate, and/or reinforce
22 the sweet and tart taste that consumers associate with the fruit flavors stated on the labels.

23 30. Defendant uses the petrochemical-derived DL malic acid in its Products to create
24 a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings,
25 misbranding the Products and deceiving consumers.
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¹ DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1 31. The ingredients on the Products’ label are declared in a way that is misleading and
2 contrary to law, because Defendant designates the ingredient by its generic name, “malic acid,”
3 instead of by its specific name, “DL malic acid.”

4 **C. Requirements for Labelling**

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

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

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

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

19 36. Here, the Products’ labels state the characterizing flavors.

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

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

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

11 40. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §
12 109875, *et seq.*, incorporates all food flavoring and additive regulations of the FDCA.

14 41. By changing the ratio between sugars and acids that is naturally found in fruits,
15 the DL malic acid used in the Products reinforces, simulates, or creates the characterizing
16 flavors, regardless of any other effect it may have or purpose for which it was included.

17 42. DL malic acid is not a “natural flavor” as this term is defined by federal and state
18 regulations and is not derived from a fruit or vegetable or any other natural source. The Products
19 therefore contain artificial flavorings.

21 43. Because the Products contain artificial flavoring, California law requires the
22 Products to display both front- and back-label disclosures to inform consumers that the Products
23 are artificially flavored.

24 44. The Products have none of the required disclosures regarding the use of artificial
25 flavors.

26 45. Plaintiff reserves the right to amend this Complaint to add further products that
27 contain similar label misrepresentations as testing continues.
28

1 49. Labels are the chief means by which food product manufacturers convey critical
2 information to consumers, and consumers have been conditioned to rely on the accuracy of the
3 claims made on these labels. As the California Supreme Court stated in a case involving alleged
4 violations of the UCL and FAL, “Simply stated: labels matter. The marketing industry is based
5 on the premise that labels matter, that consumers will choose one product over another similar
6 product based on its label.” *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).
7

8 50. Plaintiff reviewed the labels on the Products prior to his purchase, and reviewed
9 the natural flavoring claims being made on those labels. Consumers such as Plaintiff who viewed
10 the Products’ labels reasonably understood Defendant’s “Flavored with Natural Flavors”
11 statements, as well as its failure to disclose the use of artificially derived malic acid, to mean
12 that the Products contain only natural flavorings. This representation was also false.
13

14 51. Consumers including Plaintiff reasonably relied on Defendant’s statements such
15 that they would not have purchased the Products from Defendant if the truth about the Products
16 was known, or would have only been willing to pay a substantially reduced price for the Products
17 had they known that Defendant’s representations were false and misleading.
18

19 52. In the alternative, because of its deceptive and false labelling statements,
20 Defendant was enabled to charge a premium for the Products relative to key competitors’
21 products, or relative to the average price charged in the marketplace.
22

23 53. Consumers including Plaintiff especially rely on label claims made by food
24 product manufacturers such as Perfect Keto, as they cannot confirm or disprove those claims
25 simply by viewing or even consuming the Products.
26

27 54. Plaintiff suffered economic injury by Defendant’s fraudulent and deceptive
28 conduct as stated herein, and there is a causal nexus between Defendant’s deceptive conduct and
Plaintiff’s injury.

1 **CLASS ACTION ALLEGATIONS**

2 55. Plaintiff brings this action individually and as representative of all those similarly
3 situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers in the United
4 States who purchased the Products within four years prior to the filing of this Complaint, as well
5 as a subclass of consumers in the State of California who purchased the Products within four
6 years prior to the filing of this Complaint.
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8 56. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,
9 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over
10 this matter and the members of their immediate families and judicial staff.

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

13 58. Certification of Plaintiff's claims for class-wide treatment is appropriate because
14 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
15 individual Class members would use to prove those elements in individual actions alleging the
16 same claims.
17

18 59. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all
19 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
20 members geographically dispersed throughout the United States.
21

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

- 26 a. Whether the marketing, advertising, packaging, labeling, and other
27 promotional materials for Defendant's Products is misleading and deceptive;
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- 1 b. Whether a reasonable consumer would understand Defendant’s natural
- 2 flavorings claims to indicate that the Products contained only natural
- 3 flavorings, and reasonably relied upon those representations;
- 4
- 5 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and
- 6 Class members;
- 7 d. the proper amount of damages and disgorgement or restitution;
- 8 e. the proper scope of injunctive relief; and
- 9 f. the proper amount of attorneys’ fees.

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

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

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

22 64. Specifically, all Class members, including Plaintiff, were harmed in the same way
23 due to Defendant’s uniform misconduct described herein; all Class members suffered similar
24 economic injury due to Defendant’s misrepresentations; and Plaintiff seeks the same relief as
25 the Class members.
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1 65. There are no defenses available to Defendant that are unique to the named
2 Plaintiff.

3 66. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate
4 representative of the Class because Plaintiff’s interests do not conflict with the Class members’
5 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
6 against Defendant.
7

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

11 68. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other
12 available means for the fair and efficient adjudication of this controversy for at least the
13 following reasons
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15 a. the damages individual Class members suffered are small compared to the
16 burden and expense of individual prosecution of the complex and extensive
17 litigation needed to address Defendant’s conduct such that it would be
18 virtually impossible for the Class members individually to redress the wrongs
19 done to them. In fact, they would have little incentive to do so given the
20 amount of damage each member has suffered when weighed against the costs
21 and burdens of litigation;

22 b. the class procedure presents fewer management difficulties than individual
23 litigation and provides the benefits of single adjudication, economies of scale,
24 and supervision by a single Court;
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- 1 c. the prosecution of separate actions by individual Class members would create
- 2 a risk of inconsistent or varying adjudications, which would establish
- 3 incompatible standards of conduct for Defendant; and
- 4
- 5 d. the prosecution of separate actions by individual Class members would create
- 6 a risk of adjudications with respect to them that would be dispositive of the
- 7 interests of other Class members or would substantively impair or impede their
- 8 ability to protect their interests.

9 69. Unless the Class is certified, Defendant will retain monies received as a result of
10 its unlawful and deceptive conduct alleged herein.

11 70. Unless a class-wide injunction is issued, Defendant will likely continue to
12 advertise, market, promote, and sell its Products in an unlawful and misleading manner, as
13 described throughout this Complaint, and members of the Class will continue to be misled,
14 harmed, and denied their rights under the law. Plaintiff will be unable to rely on the Products’
15 advertising or labeling in the future, and so will not purchase the Products although he would
16 like to.
17

18 71. **Ascertainability.** To the extent ascertainability is required, the Class members are
19 readily ascertainable from Defendant’s records and/or its agents’ records of retail and online
20 sales, as well as through public notice.
21

22 72. Defendant has acted on grounds applicable to the Class as a whole, thereby
23 making appropriate final injunctive and declaratory relief concerning the Class as a whole.

24 **COUNT 1**
25 **VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT (“TDTPA”)**
26 **TEX. BUS. & COM. CODE § 17.01 *et seq.***
Nationwide Class

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

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

- 3 a. Defendant’s acts and practices constitute misrepresentations that its Products have
4 characteristics, benefits, or uses which they do not have;
5
6 b. Defendant misrepresented that its Products are of a particular standard, quality,
7 and/or grade, when they are of another;
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9 c. Defendant’s acts and practices constitute the advertisement of goods, without the
10 intent to sell them as advertised;
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12 d. Defendant’s acts and practices fail to represent that transactions involving its
13 Products involve actions that are prohibited by law, particularly the use of
14 misleading nutritional labelling; and
15
16 e. Defendant’s acts and practices constitute representations that its Products have
17 been supplied in accordance with previous representations when they were not.

18 110. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
19 entitling them to injunctive relief, disgorgement, and restitution.

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

25 112. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
26 to recover actual damages sustained as a result of Defendant’s violations of the CLRA. Such
27 damages include, without limitation, monetary losses and actual, punitive, and consequential
28 damages, in an amount to be proven at trial.

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- a. Certifying the Class;
- b. Declaring that Defendant violated the TDTPA, CLRA, UCL, and FAL;
- c. Awarding actual and other damages as permitted by law, and/or ordering an accounting by Defendant for any and all profits derived by Defendant from the unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein;
- d. Ordering an awarding of injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein, and ordering Defendant to engage in a corrective advertising campaign;
- e. Ordering Defendant to pay attorneys’ fees and litigation costs to Plaintiff;
- f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.

/s/ Charles C. Weller
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May 8, 2023

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Perfect Keto BASE Dietary Supplement Is Misbranded, Class Action Says](#)
