Case	3:23-cv-00839-BEN-JLB Document 1 F	iled 05/08/23 PageID.1 Page 1 of 22
1 2 3 4 5 6 7	Charles C. Weller (SBN: 207034) legal@cweller.com CHARLES C. WELLER, APC 11412 Corley Court San Diego, California 92126 Tel: 858.414.7465 Fax: 858.300.5137 Attorney for Plaintiff Paul Scheibe	
8 9		ATES DISTRICT COURT DISTRICT OF CALIFORNIA
10 11	PAUL SCHEIBE, individually and on behalf of all those similarly situated,	) )
12	Plaintiff,	; ) No
13	v.	) CLASS ACTION COMPLAINT
14	PERFECT KETO GROUP LLC, a Delaware limited liability company,	) JURY TRIAL DEMANDED
15	Defendant.	
16		)
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18	Paul Scheibe ("Plaintiff"), individual	ly and on behalf of all others similarly situated, by
19 20	and through undersigned counsel, hereby br	ings this action against Perfect Keto Group LLC
20	("Perfect Keto"), alleging that its BASE di	etary supplement, strawberry lemon flavor ("the
22	Product"), which is a dietary supplemen	t manufactured, packaged, labeled, advertised,
23	distributed, and sold by Defendant, is misbra	nded and falsely advertised, and upon information
24	and belief and investigation of counsel allege	es as follows:
25		PARTIES
26	1. Plaintiff Paul Scheibe is and a	at all times relevant was a citizen of the state of
27	California, domiciled in San Diego, Californi	ia.
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	CLASS ACT	-1- ION COMPLAINT

Defendant Perfect Keto Group LLC is a Delaware limited liability company with
 its principal place of business and headquarters in Austin, Texas. On information and belief,
 decisions relating to marketing, labelling, and formulation of the Products are made at this
 corporate headquarters.

#### JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this action pursuant to the Class
Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the
United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original
jurisdiction of the federal district courts over "any civil action in which the matter in controversy
exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class
action in which . . . any member of a class of plaintiffs is a citizen of a State different from any
defendant." 28 U.S.C. § 1332(d)(2)(A).

# 4. Plaintiff seeks to represent Class members who are citizens of states or countries different from the Defendant.

17 5. The matter in controversy in this case exceeds \$5,000,000 in the aggregate,
18 exclusive of interests and costs.

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  6. In addition, "the number of members of all proposed plaintiff classes in the aggregate" is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).
- In the alternative, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a). The amount in controversy exceeds \$75,000, exclusive of interest and costs.
- 8. This Court has personal jurisdiction over Defendant because this action arises out
  of and relates to Defendant's contacts with this forum.
- 9. Those contacts include but are not limited to sales of the Products directly to
  commercial and individual consumers located in this district, including Plaintiff; shipping the

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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 9 Products. 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.

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.

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12. Plaintiff's losses and those of other Class members were sustained in this district.
13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred within this district.

14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court
 maintains personal jurisdiction over Defendant.

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### FACTUAL ALLEGATIONS

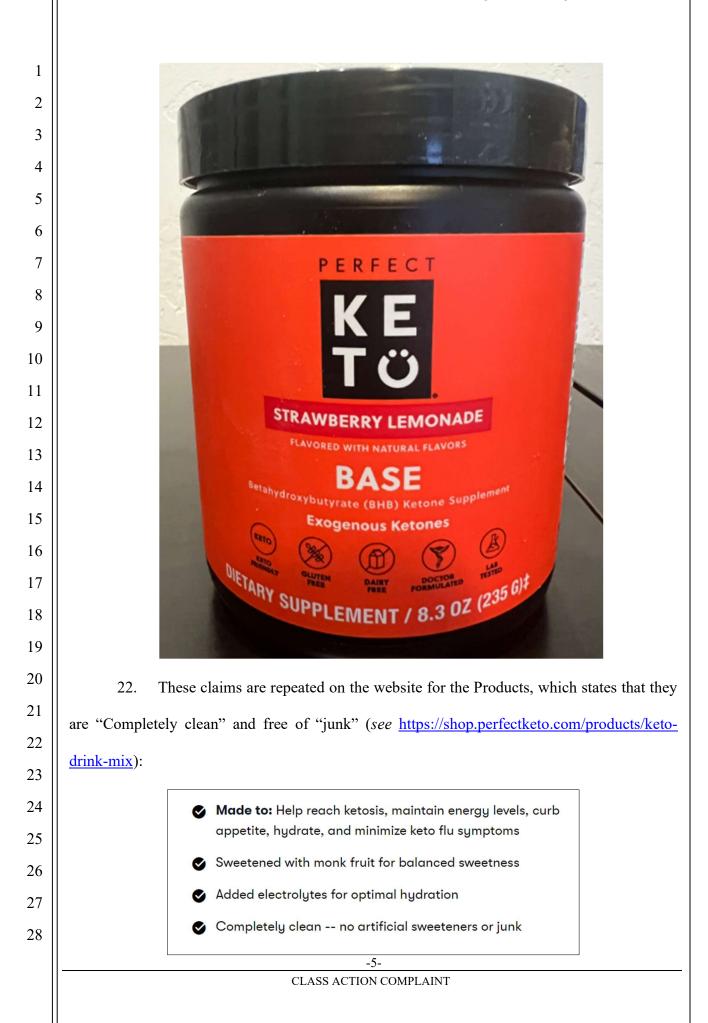
## A. Consumers Pay A Premium for "Clean Labels."

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

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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	17. This consumer preference has led to an explosion in the category of "clean label"
6 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	18. On or about December 28, 2022, Mr. Scheibe purchased the Products from Perfect
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13	Keto's website (Order No. 85994705NN559011G).
14	19. Mr. Scheibe has recently sought to lose weight and gain muscle. He carefully
15	reviews labels, including the Products' labels, to ensure that he consumes only natural
16	ingredients and avoids artificial flavors and ingredients.
17	<b>B.</b> Defendant's Use of Synthetic Flavorings and Deceptive Labels.
18 19	20. Defendant Perfect Keto formulates, manufactures, and sells dietary
20	supplements—both beverages and powders—called BASE. These dietary supplements purport
21	to make workouts more effective and efficient and to speed muscle recovery and growth,
22	improve memory and cognition, and support immune response.
23	21. The front label (or "principal display panel") of the strawberry lemon flavor of the
24	Products prominently state they are "Flavored with Natural Flavors":
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	-4- CLASS ACTION COMPLAINT



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 6	to formulate in large quantities and is almost never used in mass-produced food products.
7	Instead, testing by an independent third-party laboratory has confirmed that the malic acid that
8	Defendant uses in these Products is DL malic acid, a synthetic substance derived from
9	petrochemicals. <sup>1</sup>
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 16	by the ratio between the sugars (mainly glucose and fructose) and acids, such as citric and malic
17	acid.
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19	28. The quality and consumer acceptability of fruit flavors is based on their perceived
20	sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Fruits such
21	as raspberries have their own natural ratio of sugars and acids.
22	29. The DL malic acid used in the Products is used to create, simulate, and/or reinforce
23	the sweet and tart taste that consumers associate with the fruit flavors stated on the labels.
24	30. Defendant uses the petrochemical-derived DL malic acid in its Products to create
25	a sweet and tart flavor but pretends otherwise, conflating natural and artificial flavorings,
26	misbranding the Products and deceiving consumers.
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20	<sup>1</sup> DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid. -6-
	CLASS ACTION COMPLAINT

The ingredients on the Products' label are declared in a way that is misleading and 31. 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."

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# **Requirements for Labelling**

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

9 33. Artificial flavor is defined as "any substance, the function of which is to impart 10 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible 11 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy 12 products, or fermentation products thereof." 21 C.F.R § 101.22(a)(1).

34. Natural flavor is defined as "essential oil, oleoresin, essence or extractive, protein 14 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the 15 flavoring constituents" from fruits or vegetables, "whose significant function in food is flavoring 16 17 rather than nutritional." 21 C.F.R § 101.22(a)(3).

18 35. Any recognizable primary flavor identified directly or indirectly on the front label 19 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to 20 as a "characterizing flavor." 21 C.F.R. § 101.22. 21

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36. Here, the Products' labels state the characterizing flavors.

37. If a food product's characterizing flavor is not created exclusively by the named 23 flavor ingredient, the product's front label must state that the product's flavor was simulated or 24 25 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present 26 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. 8 9 Such statement must be in boldface print on the front display panel and of 39. 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. 13 41. By changing the ratio between sugars and acids that is naturally found in fruits, 14 the DL malic acid used in the Products reinforces, simulates, or creates the characterizing 15 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. 20 43. Because the Products contain artificial flavoring, California law requires the 21 Products to display both front- and back-label disclosures to inform consumers that the Products 22 are artificially flavored. 23 24 The Products have none of the required disclosures regarding the use of artificial 44. 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 -8-CLASS ACTION COMPLAINT

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

50. Plaintiff reviewed the labels on the Products prior to his purchase, and reviewed 8 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

51. Consumers including Plaintiff reasonably relied on Defendant's statements such 14 that they would not have purchased the Products from Defendant if the truth about the Products 15 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 52. In the alternative, because of its deceptive and false labelling statements, 19 Defendant was enabled to charge a premium for the Products relative to key competitors' products, or relative to the average price charged in the marketplace.

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53. Consumers including Plaintiff especially rely on label claims made by food 22 product manufacturers such as Perfect Keto, as they cannot confirm or disprove those claims 23 24 simply by viewing or even consuming the Products.

25 Plaintiff suffered economic injury by Defendant's fraudulent and deceptive 54. 26 conduct as stated herein, and there is a causal nexus between Defendant's deceptive conduct and 27 Plaintiff's injury. 28

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#### **CLASS ACTION ALLEGATIONS**

55. Plaintiff brings this action individually and as representative of all those similarly situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers in the United States who purchased the Products within four years prior to the filing of this Complaint, as well as a subclass of consumers in the State of California who purchased the Products within four years prior to the filing of this Complaint.

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.

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

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

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.

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

a. Whether the marketing, advertising, packaging, labeling, and other
 promotional materials for Defendant's Products is misleading and deceptive;

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	c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and
5	Class members;
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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
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16	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 20	63. <b>Typicality – Rule 23(a)(3)</b> : Plaintiff's claims are typical of the claims of the Class
20 21	members because they are based on the same underlying facts, events, and circumstances
21	relating to Defendant's conduct.
23	64. Specifically, all Class members, including Plaintiff, were harmed in the same way
24	due to Defendant's uniform misconduct described herein; all Class members suffered similar
25	economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as
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27	the Class members.
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	CLASS ACTION COMPLAINT

1 65. There are no defenses available to Defendant that are unique to the named 2 Plaintiff. 3 Adequacy of Representation – Rule 23(a)(4): Plaintiff is a fair and adequate 66. 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 67. Furthermore, Plaintiff has selected competent counsel who are experienced in 8 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 Superiority – Rule 23(b)(3): The class action mechanism is superior to other 68. 12 available means for the fair and efficient adjudication of this controversy for at least the 13 following reasons 14 the damages individual Class members suffered are small compared to the 15 a. 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 24 litigation and provides the benefits of single adjudication, economies of scale, 25 and supervision by a single Court; 26 27 28 -12-CLASS ACTION COMPLAINT

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	d. the prosecution of separate actions by individual Class members would create
5	a risk of adjudications with respect to them that would be dispositive of the
6 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	
12	70. Unless a class-wide injunction is issued, Defendant will likely continue to
13	advertise, market, promote, and sell its Products in an unlawful and misleading manner, as
14	described throughout this Complaint, and members of the Class will continue to be misled,
15	harmed, and denied their rights under the law. Plaintiff will be unable to rely on the Products'
16	advertising or labeling in the future, and so will not purchase the Products although he would
17	like to.
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 <i>et seq.</i> 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.
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	CLASS ACTION COMPLAINT

- 1 74. Plaintiff has satisfied all prerequisites to suit. 2 Plaintiff is a consumer, as defined under the TDTPA, and relied upon the false, 75. 3 misleading, or deceptive acts or practices by Defendant, as set forth above, to his detriment. 4 76. All of the above-described acts, omissions, and failures of Defendant are cause of 5 an actual and proximate cause of Plaintiff's damages. 6 Because Defendant's actions and conduct as set forth herein were committed 77. 7 knowingly and intentionally, Plaintiff is entitled to recover, in addition to all damages described 8 9 herein, mental anguish damages and additional penalty damages, in an amount not to exceed 10 three times such actual damages, for Defendant having knowingly committed its conduct. 11 Additionally, Plaintiff is ultimately entitled to recover damages in an amount not to exceed three 12 times the amount of mental anguish and actual damages due to Defendant having intentionally 13 committed such conduct. 14 78. As a result of Defendant's unconscionable, misleading, and deceptive actions and 15 16 conduct as set forth herein, Plaintiff has been forced to retain the legal services of the 17 undersigned attorney to protect and pursue these claims on his behalf. Accordingly, Plaintiff 18 also seeks to recover his costs and reasonable and necessary attorneys' fees as permitted under 19 Section 17.50(d) of the Texas Business & Commerce Code, as well as any other such damages 20 to which Plaintiff may show himself to be justly entitled at law and in equity. 21 COUNT 2 22 **VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE** SECTION 17200 et seq. — "UNFAIR" CONDUCT 23 **California Subclass** 24 79. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the 25 extent necessary, pleads this cause of action in the alternative. 26 80. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as 27
- 28 || a result of Defendant's actions as set forth herein.

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1	81. Defendant's actions as alleged in this Complaint constitute "unfair" conduct
2	within the meaning of California Business and Professions Code Section 17200, et seq.
3	82. Defendant's business practices, as alleged herein, are "unfair" because it fails to
4	disclose accurately the synthetic flavoring used in the Products.
5 6	83. As a result of this "unfair" conduct, Plaintiff expended money and engaged in
7	activities it would not otherwise have spent or conducted.
8	84. Defendant's wrongful business practices alleged herein constituted, and continue
9	to constitute, a continuing course of unfair competition since it continues to market and sell its
10	products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
11	oppressive, unscrupulous and/or substantially injurious to its customers.
12	85. Defendant publicly disseminated untrue or misleading representations regarding
13 14	the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
14	should have known, were untrue or misleading.
16	86. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
17	of this court enjoining Defendant from continuing to engage in "unfair" business practices and
18	any other act prohibited by law, including those acts set forth in this Complaint, and further seek
19	all other relief allowable under Business and Professions Code Section 17200, et seq.
20	COUNT 3
21 22	VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 <i>et seq.</i> — "FRAUDULENT" CONDUCT California Subclass
23	87. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
24	extent necessary, plead this cause of action in the alternative.
25 26	88. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
27	a result of Defendant's actions as set forth above.
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	-15- CLASS ACTION COMPLAINT

1	89. Defendant's actions as alleged in this Complaint constitute "fraudulent" conduct
2	within the meaning of California Business and Professions Code Section 17200 et seq.
3	90. Defendant's business practices, as alleged herein, are "fraudulent" because it fails
4	to disclose accurately the synthetic flavoring used in the Products.
5 6	91. As a result of this "fraudulent" conduct, Plaintiff expended money and engaged in
7	activities it would not otherwise have spent or conducted.
8	92. Defendant's wrongful business practices alleged herein constituted, and continue
9	to constitute, a continuing course of unfair competition since it continues to market and sell its
10	products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
11	oppressive, unscrupulous and/or substantially injurious to its customers.
12	93. Defendant publicly disseminated untrue or misleading representations regarding
13	the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
14	should have known, were untrue or misleading.
15	should have known, were undree of misleading.
16	94. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an
17	order of this Court enjoining Defendant from continuing to engage in "fraudulent" business
18	practices and any other act prohibited by law, including those acts set forth in this Complaint,
19 20	and further seeks all other relief allowable under Business and Professions Code Section 17200,
20	et seq.
22	COUNT 4
23	VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 17200 et seq. — "UNLAWFUL" CONDUCT
24	California Subclass
25	95. Plaintiff reallege the preceding paragraphs as if fully set forth herein and, to the
26	extent necessary, pleads this cause of action in the alternative.
27	96. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
28	a result of Defendant's actions as set forth above.
	-16- CLASS ACTION COMPLAINT

1	97. Defendant's actions as alleged in this Complaint constitute "unlawful" conduct
2	within the meaning of California Business and Professions Code Section 17200, et seq.
3	98. Defendant's business practices, as alleged herein, are "unlawful" because it fails
4	disclose accurately the synthetic flavoring used in the Products.
5	99. As a result of this "unlawful" conduct, Plaintiff expended money and engaged in
6 7	activities he would not otherwise have spent or conducted.
8	100. Defendant's business practices alleged herein constituted, and continue to
9	constitute, a continuing course of unfair competition since it continues to market and sell its
10	products in a manner that offends public policy and/or in a fashion that is immoral, unethical,
11	
12	oppressive, unscrupulous and/or substantially injurious to its customers.
13	101. Defendant publicly disseminated untrue or misleading representations regarding
14	the flavoring label claims of its Products, which it knew, or in the exercise of reasonable care
15	should have known, were untrue or misleading.
16	102. Pursuant to Business and Professions Code Section 17203, Plaintiff seeks an order
17	of this court enjoining Defendant from continuing to engage in "unlawful" business practices
18	and any other act prohibited by law, including those acts set forth in this Complaint, and further
19	seeks all other relief allowable under Business and Professions Code Section 17200, et seq.
20	COUNT 5
21	<b>VIOLATION OF CALIFORNIA BUSINESS &amp;</b>
22	PROFESSIONS CODE SECTION 17500 <i>et seq.</i> California Subclass
23	103. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
24	extent necessary, pleads this cause of action in the alternative.
25	
26	104. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
27	a result of Defendant's actions as set forth above.
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	CLASS ACTION COMPLAINT

1	105. Defendant engaged in advertising and marketing to the public and offered for sale	
2	advertising services on a nationwide basis, including in California.	
3	106. Defendant engaged in the advertising and marketing alleged herein with the intent	
4	to directly or indirectly induce the sale of the Products to consumers.	
5	107. Defendant's advertisements and marketing representations regarding the	
6	characteristics of the Products were false, misleading, and deceptive as set forth above.	
7	108. At the time it made and disseminated the statements alleged herein, Defendant	
8		
9	knew or should have known that the statements were untrue or misleading, and acted in violation	
10	of Business and Professions Code Section 17500, et seq.	
11 12	109. Plaintiff seeks injunctive relief and all other relief allowable under Business and	
12	Professions Code Section 17500, et seq.	
14	COUNT 6	
15	VIOLATION OF THE CALIFORNIA CONSUMER LEGAL REMEDIES ACT, CIVIL CODE § 1750 <i>et seq</i> .	
16	California Subclass	
17	110. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the	
18	extent necessary, pleads this cause of action in the alternative.	
19	111. Plaintiff is a "consumer" within the meaning of the Consumer Legal Remedies	
20	Act ("CLRA"), Cal. Civ. Code § 1761(d).	
21	106. The sale of Defendant's Products to Plaintiff and Class members was a	
22	"transaction" within the meaning of the CLRA, Cal. Civ. Code § 1761(e).	
23	107. The Products purchased by Plaintiff and Class members are "goods" within the	
24	meaning of the CLRA, Cal. Civ. Code § 1761(a).	
25	108. As alleged herein, Defendant's business practices are a violation of the CLRA	
26	because Defendant deceptively failed to reveal facts that are material in light of the flavoring	
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28	representations that were made by Defendant on the labels of its Products. -18-	
	CLASS ACTION COMPLAINT	

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	b. Defendant misrepresented that its Products are of a particular standard, quality,
6	and/or grade, when they are of another;
7 8	c. Defendant's acts and practices constitute the advertisement of goods, without the
9	intent to sell them as advertised;
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11	d. Defendant's acts and practices fail to represent that transactions involving its
12	Products involve actions that are prohibited by law, particularly the use of
13	misleading nutritional labelling; and
14	e. Defendant's acts and practices constitute representations that its Products have
15	been supplied in accordance with previous representations when they were not.
16	110. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
17	entitling them to injunctive relief, disgorgement, and restitution.
18	111. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
19	particular violations of the CLRA described herein and demanded Defendant rectify the actions
20	described above by providing complete monetary relief, agreeing to be bound by their legal
21 22	obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
22	notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
23	112. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
25	to recover actual damages sustained as a result of Defendant's violations of the CLRA. Such
26	
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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	CLASS ACTION COMPLAINT

1	113. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin
2	publication of misleading and deceptive nutritional labels on Defendant's Products and to
3	recover reasonable attorneys' fees and costs.
4	COUNT 7
5	UNJUST ENRICHMENT Nationwide Class
6 7	114. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
8	extent necessary, pleads this cause of action in the alternative.
9	115. Defendant, through its marketing and labeling of the Products, misrepresented and
10	deceived consumers regarding the flavoring in the Products.
11	116. Defendant did so for the purpose of enriching itself and it in fact enriched itself
12	
13	by doing so.
14	117. Consumers conferred a benefit on Defendant by purchasing the Products,
15	including an effective premium above their true value. Defendant appreciated, accepted, and
16	retained the benefit to the detriment of consumers.
17	118. Defendant continues to possess monies paid by consumers to which Defendant is
18	not entitled.
19 20	119. Under the circumstances it would be inequitable for Defendant to retain the benefit
20 21	conferred upon it and Defendant's retention of the benefit violates fundamental principles of
21	justice, equity, and good conscience.
23	120. Plaintiff seeks disgorgement of Defendant's ill-gotten gains and restitution of
24	Defendant's wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed
25	appropriate by the Court, and such other relief as the Court deems just and proper to remedy
26	Defendant's unjust enrichment.
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	CLASS ACTION COMPLAINT

1	121. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
2	a result of Defendant's actions as set forth above.
3	COUNT 8
4	BREACH OF EXPRESS WARRANTY Nationwide Class
5 6	122. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
7	extent necessary, pleads this cause of action in the alternative.
8	123. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
9	expressly warranted that the Products were "Flavored with Natural Flavors."
10	124. Defendant's express warranties, and its affirmations of fact and promises made to
11	Plaintiff and the Class and regarding the Products, became part of the basis of the bargain
12	between Defendant and Plaintiff and the Class, which creates an express warranty that the
13	Products would conform to those affirmations of fact, representations, promises, and
14	descriptions.
15 16	125. The Products do not conform to the express warranty that the Products were
17	"Flavored with Natural Flavors," because they are flavored by and contain ingredients that are
18	
19	unnatural and synthetic, <i>i.e.</i> , DL malic acid.
20	126. As a direct and proximate cause of Defendant's breach of express warranty,
21	Plaintiff and Class members have been injured and harmed because: (a) they would not have
22	purchased the Products on the same terms if they knew the truth about the Products' unnatural
23	ingredients; (b) they paid a price premium based on Defendant's express warranties; and (c) the
24	Products do not have the characteristics, uses, or benefits that were promised.
25	PRAYER FOR RELIEF
26	WHEREFORE, Plaintiff respectfully request the Court grant the following relief against
27	Defendant:
28	
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1	a. Certifying the Class;
2	b. Declaring that Defendant violated the TDTPA, CLRA, UCL, and FAL;
3	c. Awarding actual and other damages as permitted by law, and/or ordering an
4	accounting by Defendant for any and all profits derived by Defendant from the
5	unlawful, unfair, and/or fraudulent conduct and/or business practices alleged herein;
6 7	d. Ordering an awarding of injunctive relief as permitted by law or equity, including
8	enjoining Defendant from continuing the unlawful practices as set forth herein, and
9	ordering Defendant to engage in a corrective advertising campaign;
10	e. Ordering Defendant to pay attorneys' fees and litigation costs to Plaintiff;
11	f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts
12	awarded; and
13	g. Such other relief as the Court may deem just and proper.
14	TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.
15 16	/s/ Charles C. Weller
17	Charles C. Weller (Cal. SBN: 207034)         Attorney for Plaintiff
18	CHARLES C. WELLER, APC 11412 Corley Court
19	San Diego, California 92126 Tel: 858.414.7465
20	Fax: 858.300.5137
21	May 8, 2023
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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: <u>Perfect Keto BASE Dietary Supplement Is</u> <u>Misbranded, Class Action Says</u>