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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

MARC SILVER, HEATHER PEFFER, and ALEXANDER HILL, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

BA SPORTS NUTRITION, LLC,

Defendant.

Case No. 3:20-cv-00633-SI

**CLASS ACTION**

**FIRST AMENDED CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

Plaintiffs Marc Silver, Heather Peffer, and Alexander Hill (together, "Plaintiffs"), individually and on behalf of all others similarly situated, bring this First Amended Class Action Complaint against Defendant BA Sports Nutrition, LLC ("Defendant" or "BA"), and on the basis of personal knowledge, information, and belief, and investigation of counsel, allege as follows:

## NATURE OF THE ACTION

1. Defendant BA manufacturers and sells BodyArmor Superdrink ("BodyArmor" or "product"). BA is the third largest seller of sports drinks throughout California and the United States, falling significantly behind first-place Gatorade, a PepsiCo product. In second place is Coca-Cola's Powerade—which company recently joined forces with BA by becoming a key investor in BodyArmor. In the last 52 weeks, BA retail sales have topped over $800 million and are expected to top $1 billion by the end of the year.[1]

2. In its effort to aggressively increase sales and displace Gatorade as industry leader,[2] BA violated California, New York, and Pennsylvania consumer protection laws, as well as nationwide unjust enrichment jurisprudence, through false and misleading, and unlawful, marketing and advertising of BodyArmor.

3. BA's on-label claims prominently represent that BodyArmor delivers "superior hydration" among sports drinks as well as clear health benefits, when such representations are misleading, if not strictly false.[3] BA labels also deceptively promote that BodyArmor contains healthful fruits when it does not, violating Food & Drug Administration ("FDA") labeling and flavor regulations in the process.

4. BA's non-label advertising claims, which Plaintiff Hill also saw, echo the deceptive on-label representations, reaffirming the message that BodyArmor, which charges a

[1] Thomas Barrabi, *BodyArmor heats up sports drink wars with new campaign, eyes Gatorade's top spot*, FOX BUSINESS (May 20, 2020), https://www.foxbusiness.com/markets/bodyarmor-campaign-2020-sales-gatorade.

[2] *See id*. (quoting BA founder Mike Repole on effort to unseat Gatorade as industry leader).

[3] *E.g.*, *Fisher v. Monster Beverage Corp.*, 656 F. App'x 819, 823 (9th Cir. 2016) ("Although the statements [including "hydrates like a sports drink"] upon which Townsend and Cross relied were not strictly false, it is plausible that they were misleading, which is all that California law requires").

considerable price premium, provides sports enthusiasts with superior hydration as compared to its competitors, in addition to benefitting their health.

5. Hydration is a term and product attribute with clear and material meaning to consumers—as well as to BA, PepsiCo, and all stakeholders in the sports drinks market.

6. Plaintiffs and other consumers perceive that the primary function of a sports drink is to hydrate them. More specifically, they believe in the need to replenish and/or retain fluids when exerting physically in order to avoid cramping and other adverse effects of dehydration, and conversely, to aid, extend and/or enhance their performance—and further, that superior means and levels of hydration are possible and better for them. Plaintiffs also, as California Attorney General Becerra has observed is commonplace, believed that sports drinks benefit them, regardless of the level or duration of their exertion.[4]

7. These perceptions are not only reasonable, but parallel industry activity and research.

8. To be sure, BA supports extensive research relating to hydration, as does PepsiCo, which has an institute devoted to the study of hydration—the Gatorade Sports Science Institute.[5]

9. BA's BodyArmor formula is based on this research.

10. As the Better Business Bureau's National Advertising Division ("NAD ") recently explained,

> BA's entire advertising campaign [] is premised on the basic idea that its products will provide some level of hydration. Hydration is not a subjective product characteristic – consumers understand that

[4] *See Attorney General Becerra Announces Settlement with Gatorade Over Allegedly Misleading, Anti-Water Statements*, CAL. DEPT. OF JUSTICE (Sept. 21, 2017), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-gatorade-over-allegedly-misleading; *see also* Compl., *People v. Gatorade Co.*, No. BC676734 (Cal. Super. Ct., L.A. Cty., Sept. 21, 2017), available at https://oag.ca.gov/system/files/attachments/press_releases/Gatorade%20Complaint.pdf (internal citations omitted).

[5] *See, e.g.*, *About GSSI*, GATORADE SPORTS SCIENCE INSTITUTE, https://www.gssiweb.org/en/about/about-gssi ("Founded in 1985, the Gatorade Sports Science Institute (GSSI) is committed to helping athletes optimize their health and performance through ***research and education in hydration*** and nutrition science.") (emphasis added) (last visited July 5, 2020); *Topics*, GATORADE SPORTS SCIENCE INSTITUTE, https://www.gssiweb.org/en/research/All (extensive list of research publications) (last visited July 5, 2020).

> sports drinks are intended to replenish electrolytes lost during vigorous physical activities. Indeed, BA admits that it's chosen formula and the inclusion of ingredients like coconut water and potassium is premised on their scientifically validated roles in aiding rehydration. It would be reasonable for consumers to believe the claim "better hydration" to be an objective claim about a product characteristic...."[6]

11. BA's marketing and advertising of BodyArmor is misleading and/or unlawful because it promotes non-truths about superior hydration and attendant benefits, and/or promotes claims riddled with material omissions and deceptions, and unlawful representations.

12. California, New York, and Pennsylvania consumer protection statutes and laws all prohibit deceptive and misleading statements, which includes claims that are not strictly false, in connection with the selling of a good—whether the statements are made through words or images or a combination thereof—as does nationwide unjust enrichment jurisprudence. California law also prohibits marketing that is in violation of federal regulations on flavor labeling. Sellers of goods must follow these laws.

## PARTIES

### A. Plaintiffs

13. Plaintiff Marc Silver is a resident of Santa Rosa, California.

14. During the relevant class period, and specifically between 2014 and 2018, Mr. Silver purchased BodyArmor from Walmart and other locations in Santa Rosa and Plumas Lake, California. Mostly, he purchased the Orange Mango, Grape, and Tropical Punch varieties.

15. Mr. Silver is a sports enthusiast.

16. Mr. Silver believes that a primary function of sports drinks is to hydrate.

17. Mr. Silver saw and believed BA's representations, on product labels and otherwise, that BodyArmor would provide superior hydration as compared to other sports drinks and would benefit his workout and health. He also believed that BodyArmor contained fruit ingredients given the names of the product, fruit imagery, and natural ingredient claims. Finally, Mr. Silver believed that BodyArmor was a lawfully marketed and sold product.

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[6] *BA Sports Nutrition LLC, BodyArmor Sports Drink,* Decision of the National Advertising Division, Better Business Bureau, No. 6215 (Oct. 23, 2018), at 8-9 (emphasis added).

18. Mr. Silver relied on BA's marketing and was misled thereby.

19. Mr. Silver purchased more of, or paid more for, BodyArmor than he would have had he known the truth about the product.

20. Mr. Silver was injured in fact and lost money as a result of BA's improper conduct.

21. If Mr. Silver knew that BA's marketing and sale was truthful and non-misleading, and lawful, he would purchase BodyArmor in the future. At present, however, he cannot purchase the product because he cannot be confident that the marketing of the products is, or will be, truthful and non-misleading and/or lawful.

22. Plaintiff Alexander Hill is a resident of Astoria, New York.

23. During the relevant class period, and specifically from 2013 on, Mr. Hill purchased BodyArmor from CVS on 86th and Second Avenue, and from Duane Reade by Walgreens stores at 17th and Third Avenue, and Ditmars Boulevard and 31st Street, and otherwise, in New York, New York. Mostly, he purchased the Strawberry Banana, Grape, and Fruit Punch varieties.

24. Mr. Hill is a sports enthusiast.

25. Mr. Hill believes that a primary function of sports drinks is to hydrate.

26. Mr. Hill believed BA's representations, on product labels and otherwise, that BodyArmor would provide superior hydration as compared to other sports drinks and would benefit his workout and health. He also believed that BodyArmor contained fruit ingredients given the names of the product, fruit imagery, and natural ingredient claims. Finally, Mr. Hill believed that BodyArmor was a lawfully marketed and sold product.

27. Mr. Hill relied on BA's marketing to such effects and was misled thereby.

28. Mr. Hill purchased more of, or paid more for, BA's BodyArmor than he would have had he known the truth about the product.

29. Mr. Hill was injured in fact and lost money as a result of Defendant's improper conduct.

30. If Mr. Hill knew that BA's marketing was truthful and non-misleading, and lawful, he would purchase BodyArmor in the future. At present, however, he cannot purchase the product

because he cannot be confident that the marketing of the products is, and will be, truthful and non-misleading and/or lawful.

31. Ms. Peffer is a sports enthusiast.

32. Ms. Peffer believes that a primary function of sports drinks is to hydrate.

33. During the relevant class period, and specifically during 2018 and 2019, Ms. Peffer purchased BodyArmor from the Walmart and other locations in Coal Township, Pennsylvania. Mostly, she purchased the Blackout Berry, Watermelon Strawberry, and Fruit Punch varieties.

34. Ms. Peffer saw and believed BA's representations, on product labels and otherwise, that BodyArmor would provide superior hydration as compared to other sports drinks and would benefit her exertion and health. She also believed that BodyArmor contained fruit ingredients given the names of the product, fruit imagery, and natural ingredient claims. Finally, Ms. Peffer believed that BodyArmor was a lawfully marketed and sold product.

35. Ms. Peffer relied on BA's marketing about such effects and was misled thereby.

36. Ms. Peffer purchased more of, or paid more for, BA's BodyArmor than she would have had she known the truth about the product, or had she known that the product was unlawful.

37. Ms. Peffer was injured in fact and lost money as a result of Defendant's improper conduct.

38. If Ms. Peffer knew that BA's marketing was truthful and non-misleading, and lawful, she would purchase BodyArmor in the future. At present, however, she cannot purchase the product because she cannot be confident that the marketing of the products is, and will be, truthful and non-misleading and/or lawful.

**B. Defendant**

39. Defendant BA is a limited liability corporation organized and existing under the laws of the State of Delaware.

40. Defendant's principal place of business is 1720 Whitestone Expressway, Suite 501, New York, New York 11357.

41. Defendant is the third largest sports drink company, after PepsiCo (Gatorade), and Coca-Cola (Powerade). Coca-Cola recently acquired an ownership interest in BA.

**JURISDICTION AND VENUE**

42. This Court has original subject matter jurisdiction over this proposed class action pursuant to the Class Action Fairness Act of 2005, which provides for the original jurisdiction of 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 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). Because Plaintiff Silver is a citizen of the State of California and Defendant is a citizen of the States of Delaware and New York, at least one member of the proposed Classes is a citizen of a state different from Defendant. Further, Plaintiffs allege the matter in controversy is well in excess of $5,000,000 in the aggregate, exclusive of interest and costs. Finally, Plaintiffs allege "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).

43. This Court has personal jurisdiction over Defendant for several reasons, including that Defendant has continuous and systematic contacts with California; and Plaintiffs' claims arise out of Defendant's conduct within California, in part because Plaintiff Silver purchased BodyArmor within California based on Defendant's dissemination of false and misleading information about the product.

44. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this District, including the purchase by Plaintiff Silver of BodyArmor based on BA's dissemination of false and misleading information about the product.

45. Pursuant to Civil Local Rule 3-2(c), an intra-district assignment to the San Francisco or Oakland Division is appropriate because a substantial part of the events or omissions which give rise to the claims asserted herein occurred in this Division, including that Plaintiff Silver made purchases of BodyArmor in Santa Rosa, respectively.

## DEFENDANT'S BUSINESS PRACTICES

46. BA's marketing and advertising of BodyArmor is false, misleading, and unlawful in at least four different ways.

### A. Deceptive On-Label Superior Hydration Claims

#### 1. Primary Display Panel Claims

47. First, BA deceptively markets that a particular attribute of BodyArmor is superior to other sports drinks, and implicitly, that such trait is objective and correlates with better workouts and/or improved physical exertion, when BA knows otherwise.

48. More specifically, BA markets that BodyArmor provides superior hydration compared to other sports drinks.

49. The superior hydration claims appear on BodyArmor's label, including prominently on its two primary display panels (the front and "back" of BodyArmor bottles are identical), in conjunction with the body armor, or "BodyArmor," nomenclature. *See* Images A, B.

Image A


Image B

50. As defined by Merriam Webster, "superior" means "excellent of its kind: BETTER."[7] This is what Plaintiffs understood the term to mean too.

51. The capacity of sports drinks to hydrate is highly material to sports enthusiasts and those who physically exert (workers, lactating mothers, and more), including Plaintiffs, because of the belief that they need to replenish or retain fluids when exerting themselves in order to attain certain effects. These effects include avoidance of cramping, headaches, nausea, high body temperature, fatigue, and/or other conditions that similarly impair a workout.

52. In addition, replenishing or retaining fluids at an increased rate or capacity is seen as better in a sports drink—indeed hydration is viewed as their primary function and the better at it, the better the drink is perceived to be at having the desired effect of aiding, extending, or otherwise enhancing workouts.

53. The huge body of scientific research on hydration supports Plaintiffs' perception, and the common consumer perception, of hydration as an objective and variable attribute.

54. For example, a google search of "hydration research sports" produces approximately ***21,900*** scholarly articles since 2016—many (albeit not all) of which are on topic.[8] The articles show the breadth of scientific interest in the study of hydration, including such varied sources and titles as FLUID BALANCE, HYDRATION, AND ATHLETIC PERFORMANCE,[9] *Impact of*

[7] *Superior*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/superior (last visited July 5, 2020) (emphasis in original).

[8] *Hydration research sports*, GOOGLE SCHOLAR, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C9&as_ylo=2016&as_vis=1&q=hydration+research+athletics&btnG= (last visited July 5, 2020).

[9] Flavia Meyer, et al., FLUID BALANCE, HYDRATION, AND ATHLETIC PERFORMANCE, CRC Press (Boca Raton 2016).

*Hydration on Collegiate Athletic Performance, Fatigue, and Recovery*,[10] and *An Overview of the Beneficial Effects of Hydration*.[11]

55. Similarly, a search for "beverages and hydration" in PubMed, a resource run by the National Institutes of Health for the search and retrieval of peer-reviewed biomedical and life science literature, produces 645 results.[12] This body of research too confirms the understanding of hydration as an important—and variable—attribute even among expert scientists. A *plethora* of titles there speak directly to this, including *A Randomized Trial to Assess the Potential of Different Beverages to Affect Hydration Status: Development of a Beverage Hydration Index*,[13] *Role of Functional Beverages on Sport Performance and Recovery*,[14] *Fluid Type Influences Acute Hydration and Muscle Performance Recovery in Human Subjects*,[15] and *Hydration for Recreational Sport and Physical Activity*.[16]

56. Consistent with hydration being an objective and variable trait, with known and identifiable physical effects, BA's late brand ambassador and principal investor, 18-time All-Star basketball player Kobe Bryant, tweeted to his numerous followers that "players should be allowed to CHOOSE what sports drink ***hydrates them best*** and not FORCED to drink LEAGUE

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[10] Lauren Woodard, *Impact Of Hydration On Collegiate Athletic Performance, Fatigue, And Recovery* (2017). Electronic Theses and Dissertations, 592, https://egrove.olemiss.edu/etd/592/ (last visited July 5, 2020).

[11] Douglas Kalman, *An Overview of the Beneficial Effects of Hydration*, in Sourya Datta and Debasis Bagchi, eds., EXTREME AND RARE SPORTS: PERFORMANCE DEMANDS, DRIVERS, FUNCTIONAL FOODS, AND NUTRITION, CRC Press (Boca Raton 2019), ch. 16.

[12] National Library Medicine, *Beverages and hydration*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, https://pubmed.ncbi.nlm.nih.gov/?term=beverages+and+hydration (last visited July 5, 2020).

[13] Ronald J. Maughan, et al., *A randomized trial to assess the potential of different beverages to affect hydration status: development of a beverage hydration index*, 103 AM. J. CLIN. NUTRITION 3, 717, 23 (2016).

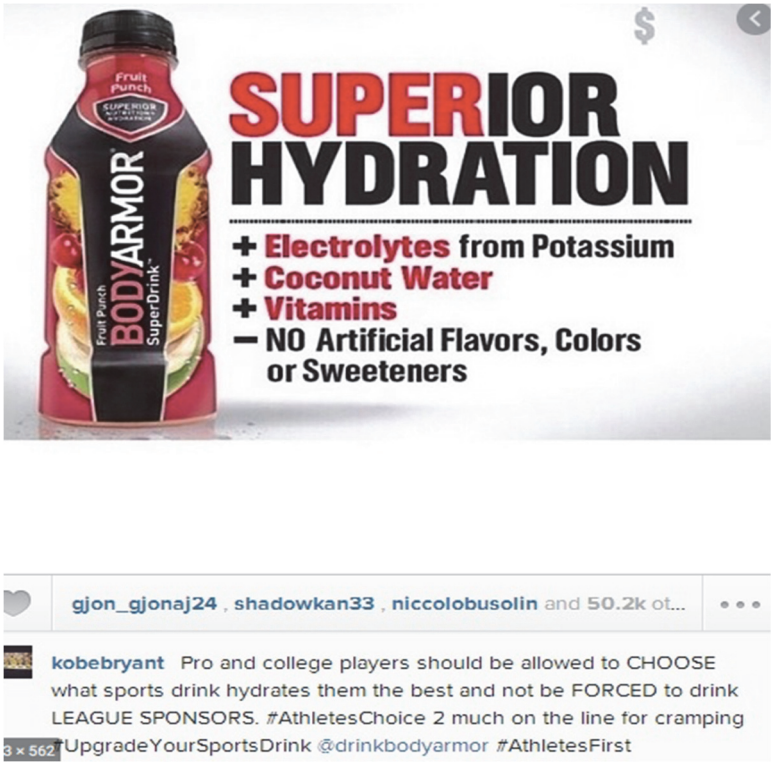
[14] Stefania Orrù, et al., *Role of Functional Beverages on Sport Performance and Recovery*, 10 NUTRIENTS 10, 1470 (Oct. 10, 2018).

[15] Preston R. Harris, et al., *Fluid type influences acute hydration and muscle performance recovery in human subjects*, 16 J. INT'L SOC'Y OF SPORTS NUTRITION 1, 15 (Apr. 4, 2019).

[16] Robert W. Kenefick and Samuel N. Cheuvront, *Hydration for recreational sport and physical activity*, 70 NUTRITION REVIEWS Suppl. 2, S137-42 (2012).

SPONSORS…. 2 much on the line ***for cramping***. UPGRADE YOUR SPORTS DRINK." *See* Image C (italics added).[17]

Image C




57. So too, brand ambassador and investor Mike Trout, a Major League Baseball All-Star, who has explained that he was "cramp[ing] up a lot" before switching to BodyArmor and its superior hydration.[18]

58. BodyArmor not only creates but also then embraces this consumer perception, by way of example, retweeting a customer post that BodyArmor will help you keep *better* hydrated as recently as May 28, 2020.[19]

[17] Kobe Bryant (@Kobebryant), INSTAGRAM (June 6, 2014), https://www.instagram.com/p/o6E3dKxNkl/?hl=en.

[18] Barrabi, *supra* note 1.

[19] @BodyArmor, Twitter (May 28, 2020, 9:48 AM), https://twitter.com/DrinkBODYARMOR/status/1266048697919561730.

59. Plaintiffs relied on BA's deceptive representations in deeming BodyArmor worthy of their purchase in the first instance, and/or worthy of its significant price premium.

**2. Additional Prominent and Misleading Labeling Claims**

60. In addition to the primary display panel claims, on the adjacent panel, BA tethers BodyArmor's claimed superior hydration (and effects) to the drink's unique combination of ingredients, including potassium rich electrolytes and antioxidants, in addition to its mix of vitamins and nutrients. Upon information and belief, this attribution appears on all BodyArmor labels throughout the class period. *See* Images D, E, and F.

Image D

Image E



Image F


61. Immediately adjacent to these statements are more that denigrate other sports drinks as inferior, including "*ditch* your *outdated* sports drink," "*Upgrade* your sports drink," and/or substantially similar disparagements and exhortations.

62. Mike Repole, BA's founder, described the goal of such marketing: to message that BodyArmor is the "healthier, *modernized* alternative to Gatorade."[20,21]

63. Plaintiffs got the message.

[20] Barrabi, *supra* note 1 ("BodyArmor founder Mike Repole told FOX Business that he wants to exceed Gatorade in overall sales by 2025") (emphasis added); *see also id.* ("Gatorade, I can applaud them, because they've been around since 1965, and that deserves a lot of credit. Not too many companies or brands can be around for 55 years. But the problem is that they've never evolved.").

[21] Mr. Repole also found VitaminWater, which advertising was the subject of litigation and eventually settlement in *Ackerman, et al. v. Coca Cola Company and Energy Brands Inc. (d/b/a Glaceau)*, No. 09-cv-0395 (E.D.N.Y.). *See Vitaminwater Settlement Approved by Court*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST (Apr. 8, 2016), https://cspinet.org/news/vitaminwater-settlement-approved-court-20160408.

64. Plaintiffs saw these and/or other substantially similar labeling claims and, individually and/or collectively, understood that BodyArmor provided superior hydration as compared to other sports drinks, including but not limited to Gatorade, and/or that such superior hydration would translate into correspondingly better workouts through the aforementioned physical effects.

65. In addition, Plaintiffs saw these and/or other substantially similar labeling claims, individually and/or collectively, and understood them to mean that BodyArmor's capacity for superior hydration was objective and variable in degree and/or measure, and that BA conveyed as much to them intentionally and honestly, justifying the purchase and price premium.

66. BodyArmor, however, does not provide superior hydration, and attendant effects, as marketed expressly and/or by material omissions on its labels.

67. Plaintiffs were deceived by BA's misleading claims into believing the contrary, even if BA's claims were not strictly false.[22]

68. Had Plaintiffs understood the misleading nature of BA's superior hydration claims, Plaintiffs would not have purchased BodyArmor, purchased as much of it, or paid as much for it as they did.

**B. Deceptive On-Label Claims of Health Benefits**

69. Second, Plaintiffs also understood BA's labeling claims to imply that BodyArmor was good for their bodies and health overall.

70. California Attorney General Xavier Becerra has acknowledged the prevalence of this understanding, pleading elsewhere about a "misperception that sports drinks are beneficial [] in connection with any amount of physical activity."[23]

71. Plaintiffs' perception that BodyArmor benefitted their health derived from the superior hydration claims, and/or from the prominent labeling of BodyArmor's high vitamin and purported fruit contents. BodyArmor is artificially fortified with high levels of various vitamins,

[22] *See* Fisher, *supra* note 3.

[23] CAL. DEPT. OF JUSTICE, *supra* note 4.

including up to 200% Reference Daily Intake of vitamins B3, B5, B6, B9, & B12 and 100% of vitamins A, C, and E.

72. Fortifying junk food runs afoul of Food & Drug Administration ("FDA") policy. The FDA expressly opposes fortification of sugar foods precisely because the practice can "*mislead*" the public to consume unhealthy foods believing, given labeling claims, that they are healthful. 21 C.F.R. § 104.20(a).

73. Because of the prominent vitamin labeling and, separately and/or collectively, because of the superior hydration and fruit claims (*see infra* at ¶¶ 82-94), Plaintiffs believed that BodyArmor benefitted their health and well-being.

74. But BodyArmor is not beneficial to Plaintiffs' bodies in the straightforward way that they understood when reviewing its labels and purchasing it.

75. Instead, BodyArmor, as a sugar-sweetened beverage ("SSB"),[24] links to obesity and obesity-related diseases, including type 2 diabetes and cardiovascular disease—a link that is sufficiently documented as to be recognized by every or virtually every leading health authority.[25]

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[24] "Sugar-sweetened beverage" refers to any carbonated or non-carbonated drink that is sweetened with sugar or high fructose corn syrup, or other caloric sweetener, including "soda drinks . . . *sports drinks*, tea and coffee drink, energy drinks, and any other beverages to which sugar . . . has been added." *The CDC Guide to Strategies for Reducing the Consumption of Sugar-Sweetened Beverages* (Mar. 2010), at 4 (emphasis supplied), CENTERS FOR DISEASE CONTROL AND PREVENTION, https://stacks.cdc.gov/view/cdc/51532.

[25] Health authorities recognizing the link between SSB consumption and obesity and serious disease include, but are not limited to:

FDA: "strong and consistent evidence" shows an association between sugar drinks and excess body weight in children and adults. *Food Labeling: Revision of the Nutrition and Supplement Fact Labels*, 81 Fed. Reg. at 33,803 (May 27, 2016);

Centers for Disease Control and Prevention: "Frequently drinking sugar-sweetened beverages is associated with weight gain/obesity, type 2 diabetes, heart disease, kidney diseases, non-alcoholic liver disease, tooth decay and cavities, and gout, a type of arthritis. Limiting the amount of SSB intake can help individuals maintain a healthy weight and have a healthy diet." *Get the Facts: Sugar-Sweetened Beverages and Consumption*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html(last visited July 5, 2020). *See also* Alyson B. Goodman, MD, MPH, et al., *Behaviors and Attitudes Associated With Low Drinking Water Intake Among US Adults, Food Attitudes and Behaviors Survey, 2007*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 11, 2013), https://www.cdc.gov/pcd/issues/2013/12_0248.htm ("Adequate water intake has health benefits and is essential for preventing dehydration; dehydration is associated with adverse health effects

(*footnote continues on following page*)

*(footnote continued from previous page)*
such as headache, urolithiasis, and impaired cognition. Health risks (e.g., dental caries, obesity) associated with intake of high levels of calorically sweetened beverages (e.g., regular soda, fruit drinks, *sports drinks*) decrease when plain drinking water is substituted for these beverages…. The Dietary Guidelines [] encourages adults to drink water *as a healthful means of hydration*") (last visited June 16, 2020) (emphasis added; internal citations omitted);

World Health Organization: "reducing consumption of sugar-sweetened beverages would also reduce the risk of [] overweight and obesity." *Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Childhood Overweight and Obesity*, WORLD HEALTH ORGANIZATION, https://www.who.int/elena/titles/ssbs_childhood_obesity/en/ (last visited July 7, 2020); *see also Reducing Consumption of Sugar-sweetened Beverages to Reduce the Risk of Unhealthy Weight Gain in Adults*, WORLD HEALTH ORGANIZATION, https://www.who.int/elena/titles/ssbs_adult_weight/en/ (last visited Jan. 8, 2020);

2015 U.S. Dietary Guidelines Advisory Committee: "Strong and consistent evidence shows that intake of added sugars from food and/or sugar sweetened beverages are associated with excess body weight in children and adults"; "[s]trong evidence shows that higher consumption of added sugars, especially sugar sweetened beverages, increases the risk of type 2 diabetes among adults and this relationship is not fully explained by body weight." *Scientific Report of the 2015 Dietary Guidelines Advisory Committee*, at 342-43, U.S. DEPT. OF HEALTH & HUMAN SERV. & U.S. DEPT. OF AGRIC. (2015), https://health.gov/dietaryguidelines/2015-scientific-report/PDFs/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf (last visited July 5, 2020);

American Medical Association ("AMA"): adopting policy supporting, among other strategies, "warning labels to educate consumers on the health harms of SSBs." Sara Berg, *AMA Backs Comprehensive Approach Targeting Sugary Drinks*, AMERICAN MEDICAL ASSOCIATION (June 14, 2017), https://www.ama-assn.org/delivering-care/public-health/ama-backs-comprehensive-approach-targeting-sugary-drinks;

Institute of Medicine: "researchers have found strong associations between intake of sugar-sweetened beverages and weight gain"; "their link to obesity is stronger than that observed for any other food or beverage…." Committee on Accelerating Progress in Obesity Prevention, et al., ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION, National Academies Press (US) (Wash. D.C., May 8, 2012), at ch. 6, p. 169, https://www.ncbi.nlm.nih.gov/pubmed/24830053;

American Heart Association ("AHA"), "There is a robust body of evidence that SSB consumption is detrimental to health and has been associated with increased risk of CVD mortality, hypertension, liver lipogenesis, [type 2 diabetes], obesity, and kidney disease." Linda Van Horn, et al., *Recommended Dietary Pattern to Achieve Adherence to the American Heart Association/American College of Cardiology (AHA/ACC) Guidelines: A Scientific Statement from the American Heart Association*, 134 CIRCULATION 22 (Oct. 27, 2016), https://www.ahajournals.org/doi/full/10.1161/cir.0000000000000462;

American Public Health Association, "Consumption of [sugar] drinks is a significant contributor to the obesity epidemic and increases the risk of type 2 diabetes, heart disease, and dental decay." *Taxes on Sugar-Sweetened Beverages*, AMERICAN PUBLIC HEALTH ASSOCIATION (Oct. 30, 2012), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/23/13/59/taxes-on-sugar-sweetened-beverages; and

American Diabetes Association, "Research has also shown that drinking sugary drinks is linked to type 2 diabetes. The American Diabetes Association recommends that people avoid drinking sugar-sweetened beverages and switch to water whenever possible to help prevent type 2 diabetes." *Myths about Diabetes*, AMERICAN DIABETES ASSOCIATION, https://www.diabetes.org/diabetes-risk/prediabetes/myths-about-diabetes (last visited July 5, 2020).

76. Contrary to linking directly to good health and/or health and well-being benefits, BodyArmor consumption poses serious health risks to Plaintiffs—health risks that Plaintiffs did not understand existed given BA's labeling claims and omissions (given the voluntary claims).

77. Indeed, a single 16-ounce bottle of BodyArmor has 36 grams, or approximately nine teaspoons of sugar, and a single 28-ounce bottle has 63 grams, or approximately 15 teaspoons of sugar.

78. Again, as California Attorney General Becerra has explained,

> Sports drinks often have a high sugar content. For example, one 32-ounce bottle of a sports drink could have as much as 56 grams of sugar, which is ***more than double*** the 25 grams of added sugar that any child or teenager aged 2 to 18 should consume in an entire day, according to the American Heart Association. Despite this, consumers commonly misperceive sports drinks to be beneficial for children in connection with any amount of sports activity. The American Academy of Pediatrics has made clear that children "rarely need sports drinks" and that "water, not sports drinks, should be the principal source of hydration for children and adolescents."[26]

79. These same principles and ad-derived misperceptions apply to Plaintiffs and other consumers. The AHA's recommended limit for added sugar in adult women is six teaspoons per day, and nine teaspoons a day for adult men. At 15 teaspoons, a single 32-ounce bottle has more than double the maximum daily amount recommended for women, and almost double the maximum recommended for men. And at 9 teaspoons of added sugar, a single small 16-ounce bottle, without any additional added sugar in the diet, exceeds the maximum recommended for adult women (and children) and hits the upper limit for men.

80. Plaintiffs did not understand BodyArmor's link with disease and/or adverse health outcomes given its vitamin, superior hydration, better sports drink, and fruit labeling claims, collectively and individually. Nor did they understand how grams of added sugar correspond to teaspoons—a familiar and meaningful measure to them—even had they consulted the comparatively small print nutrition facts panel elsewhere on the label, which often Plaintiffs (like all consumers) do not consult. Nor were they aware of the AHA recommendations.

[26] CAL. DEPT. OF JUSTICE, *supra* note 4 (emphasis added).

81. Had Plaintiffs understood that instead of delivering health benefits, or benefitting them in a straightforward manner, through superior hydration and/or high levels of vitamins and/or fruits, leading health authorities have concluded that drinking sugary sports drinks (including BodyArmor) link with obesity, type 2 diabetes, and cardiovascular disease, they would not have purchased it, purchased as much of it, and/or paid as much for it as they did.

**C. Deceptive On-Label Fruit Claims & Related Violation of FDA Flavor Regulations**

82. BodyArmor sports drinks are named and labeled according to various fruit combinations, including "Mixed Berry," "Orange Mango," "Grape," "Watermelon Strawberry," "Strawberry Banana," "Berry Lemonade," "Fruit Punch," and "Tropical Punch."

83. The two primary display labels of the various BodyArmor drinks conspicuously denote each fruit-based name—twice, for a total of four times—and also depict the corresponding fruits in prominent front and side label vignettes. *See* Images G, H, and I; s*ee also* Images A, B.

Image G


Image H


Image I


84. The other side label prominently markets that the flavors are "natural." *See* Images D, E, and F *supra*.

85. Given the naming of the drinks, the images of named fruits on the drinks, and/or the natural ingredients claim, all deceptively blazoned across BodyArmor labels, Plaintiffs

believed that BodyArmor drinks contained significant amounts of such fruits—or in the jargon of the FDA, amounts sufficient to qualify such fruits as characterizing ingredients.

86. Plaintiffs have a favorable view of fruits, believing that natural fruits and fruit juices benefit their health.

87. Plaintiffs believed also that the vitamins in BodyArmor derived from the labeled fruits instead of entirely or virtually so from artificial fortification, and that such natural derivation was better for them.

88. According to the fine print on the back labels (far smaller comparatively than the voluntary fruit statements and images), however, BodyArmor, does not contain a characterizing amount—*if any*—of named and/or pictured fruits.

89. Instead of fruits, upon information and belief, BodyArmor contains unnamed ingredients that function as inauthentic flavors simulating the taste of the named and imaged fruits.

90. FDA regulations require that each time an ingredient is named, pictured, and/or otherwise referenced on the label in such a way as to indicate that the food contains it, and/or contains it in an amount sufficient to independently characterize the food, but in reality does not, every reference to the ingredient on the label must *immediately* be followed with the word "flavored." 21 C.F.R. § 101.22(i)(1)(i) (also specifying font size).

91. The word "flavored" never follows the naming or images of fruits on BodyArmor labels, rendering the labeling of all BodyArmor drinks in violation of FDA regulations and unlawful under California law.

92. Plaintiffs would not have purchased BodyArmor had they understood that the drinks contained very little, *if any*, of the labeled fruits as ingredients, and/or that the level of the labeled fruits were not present in sufficient amounts to flavor the drinks (*i.e.*, sufficient to qualify as characterizing ingredients), purchased as much of them, and/or paid as much for them.

93. Plaintiffs would not have purchased BodyArmor had they understood that BodyArmor is not flavored naturally by the fruits imaged, and/or that those fruits do not supply their vitamin content, purchased as much of them, and/or paid as much for them.

94. More, Plaintiffs would not have purchased BodyArmor had they understood that the drinks were unlawfully labeled and misbranded in violation of 21 C.F.R. § 101.22 and California law.

**D. Non-Label Deceptive Advertising Claims (Plaintiff Hill)**

95. BA repeats the same deceptive superior hydration and health benefits messages beyond its labels.

96. BA's advertising campaign floods the sports drink marketplace and reinforces its labeling claims (and vice versa) by way of highly conspicuous in-store displays, billboards, television ads, and through Twitter and other social media. *See, e.g.*, Images J, K, L, M, and N.

Image J

Image K


Image L


Image M


Image N


97. These campaigns saturated the sports drink community with messaging about BodyArmor's purported superior hydration qualities and, by corollary, the alleged inferiority of Gatorade, which advertising was seen by Plaintiff Hill.

98. For example, through point-of-purchase displays, on Twitter, YouTube, television, and other media, BA promoted BodyArmor's hydration superiority and denigrated Gatorade by analogizing its consumption to using a carrier pigeon instead of a cell phone, an antique typewriter instead of a laptop, and/or wearing colonial era clothing instead of modern athletic wear. *See, e.g.*, Images O (repeating BodyArmor's superior hydration claims and comparing Gatorade to using an old typewriter); P (repeating BodyArmor's superior hydration claims and comparing Gatorade to wearing colonial era clothing); Q (repeating BodyArmor's superior hydration claims and comparing drinking Gatorade to using a Carrier Pigeon).

Image O


Image P

Image Q


99. Plaintiff Hill saw such advertising claims and, individually and/or collectively, understood that BodyArmor was superior at hydrating as compared to other sports drinks, including but not limited to Gatorade, and/or that such superior hydration would translate into correspondingly better workouts and related physical effects.

100. Plaintiff saw these and/or other substantially similar labeling claims, individually and/or collectively, and understood them to mean that capacity for superior hydration was objective and variable and that BodyArmor was superior, justifying its purchase and price premium.

101. BodyArmor, however, does not provide the superior hydration, and attendant effects, as marketed on its labels.

102. Plaintiffs were deceived by BA's misleading advertising claims, collectively with the labeling claims and independently as well, into believing the contrary, even if BA's claims were not strictly false.

**ECONOMIC INJURY**

103. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the superior hydration claims marketed by BA.

104. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the health benefits marketed by BA.

105. When purchasing BodyArmor, Plaintiffs sought products that were consistent with the fruit claims marketed on its labels.

106. When purchasing BodyArmor, Plaintiffs sought products that were lawful.

107. Plaintiffs saw and relied on BA's misleading labeling of BodyArmor.

108. Plaintiff Hill saw and, in addition to and/or independent of the labeling claims, relied on BA's misleading advertising of BodyArmor.

109. Plaintiffs believed that BodyArmor had the aforementioned qualities and benefits marketed.

110. Plaintiffs believed that BodyArmor was lawfully marketed and sold.

111. In reliance on the claims, Plaintiffs paid a price premium for BA.

112. As a result of their reliance, Plaintiffs received beverages that lacked the superior hydration benefits (and/or commensurate workout and physical benefits) that they reasonably believed the products had.

113. As a result of their reliance, Plaintiffs received beverages that lacked the health benefits that they reasonably believed the products had.

114. As a result of their reliance, Plaintiffs received beverages that lacked the fruit ingredients that they reasonably believed the products had.

115. Plaintiffs received beverages that were unlawfully marketed and sold.

116. Plaintiffs lost money and thereby suffered injury as they would not have purchased BodyArmor, purchased as much BodyArmor, and/or paid as much for the drink absent these misrepresentations and unlawful acts.

117. Plaintiffs altered their position to their detriment and suffered damages in an amount equal to the amounts they paid for the BodyArmor they purchased, and/or in additional amounts attributable to the deceptions.

118. Plaintiffs would purchase BodyArmor again in the future should they be able to rely on its marketing as truthful and non-deceptive, and lawful.

119. By engaging in false and misleading marketing, and unlawful labeling, BA reaped, and continues to reap, increased sales of BodyArmor and profits.

120. BA knows that the qualities it markets are material to a consumer's decision to purchase BodyArmor and/or to pay a significant price premium for it.

121. Indeed, BA deliberately cultivates, and capitalizes on, the foregoing deceptions.

## CLASS ACTION ALLEGATIONS

122. Pursuant to Rules 23(a), (b)(2), and (b)(3) of the FEDERAL RULES OF CIVIL PROCEDURE ("Rule"), Plaintiffs bring this action individually and on behalf of four proposed classes defined as follows:

> **The Nationwide Class**. All persons residing in the United States who purchased one or more BodyArmor sports drinks during the applicable limitations period.
>
> **The California Subclass**. All persons residing in the State of California who purchased one or more BodyArmor sports drinks during the applicable limitations period.
>
> **The New York Subclass**. All persons residing in the State of New York who purchased one or more BodyArmor sports drinks during the applicable limitations period.
>
> **The Pennsylvania Subclass**. All persons residing in the State of Pennsylvania who purchased one or more BodyArmor sports drinks during the applicable limitations period.

123. The Nationwide Class, and the California Subclass, New York Subclass, and Pennsylvania Subclass, are collectively referred to as the "Class."

124. Excluded from the Class are: (a) Defendants; (b) Defendants' board members, executive-level officers, and attorneys, and immediate family members of any of the foregoing persons; (c) governmental entities; (d) the Court, the Court's immediate family, and Court staff;

and (e) any person that timely and properly excludes himself or herself from the Class in accordance with Court-approved procedures.

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

126. **Numerosity**. The Class consists of many thousands of persons throughout the states of California, New York, and Pennsylvania. The Class is so numerous that joinder of all members is impracticable, and the disposition of each of the Class's claims in a class action will benefit the parties and the Court.

127. **Commonality and Predominance**. Common questions of law and fact predominate over any questions affecting only individual Class members. These common questions have the capacity to generate common answers that will drive resolution of this action. These common questions include whether:

a. BA is responsible for the conduct alleged herein;

b. BA's conduct constitutes the violations of law alleged herein;

c. BA acted willfully, recklessly, negligently, or with gross negligence in committing the violations of law alleged herein;

d. Plaintiffs and the Class members are entitled to injunctive relief; and

e. Plaintiffs and the Class members are entitled to restitution and damages.

128. Because they were subject to the same deceptive and unlawful labeling and advertising practices, and because they purchased BodyArmor, all Class members were subject to the same wrongful conduct.

129. Absent BA's material deceptions, misstatements, and omissions, Plaintiffs and the other Class members would not have purchased BodyArmor, purchased as much BodyArmor as they did, and/or paid as much for it.

130. **Typicality**. Plaintiffs' claims are typical of the claims of the Class because Plaintiffs and the Class members all purchased BodyArmor and were injured thereby. The claims of Plaintiffs and the Class members are based on the same legal theories and arise from the same false and misleading conduct.

131. **Adequacy of Representation**. Plaintiffs are adequate representatives of the Class because their interests do not conflict with those of the Class members. Each Class member seeks damages reflecting a similar and discrete purchase, or similar and discrete purchases, that each Class member made. Plaintiffs have retained competent and experienced class action counsel who intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the Class members' interests.

132. **Injunctive or Declaratory Relief**. The requirements for maintaining a class action pursuant to Rule 23(b)(2) are met, as Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

133. **Superiority**. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all Class members is impracticable. The amount at stake for each Class member, while significant, is such that individual litigation would be inefficient and cost prohibitive. Additionally, adjudication of this controversy as a class action will avoid the possibility of inconsistent and potentially conflicting adjudication of the claims asserted herein. Plaintiffs anticipate no difficulty in the management of this action as a class action.

134. **Notice to the Class**. Plaintiffs and their counsel anticipate that notice to the proposed Class will be effectuated through recognized, Court-approved notice dissemination methods, which may include United States mail, electronic mail, Internet postings, and/or published notice.

## CLAIMS FOR RELIEF

### FIRST CLAIM
**Violation of California's Unfair Competition Law,**
**CAL. BUS. & PROF. CODE §§ 17200, *et seq.***
**Unlawful Conduct Prong**
**(By Plaintiff Silver on Behalf of the California Subclass)**

135. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

136. Plaintiff Silver brings this claim on behalf of the California Subclass for violation of the "unlawful" prong of California's Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200, *et seq.* (the "UCL").

137. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." CAL. BUS. & PROF. CODE § 17200.

138. Defendant's acts, omissions, misrepresentations, practices, and/or non-disclosures concerning BodyArmor, as alleged herein, constitute "unlawful" business acts and practices in that they violate the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301, *et seq.* (the "FFDCA"), and its implementing regulations, including, at least, the following sections:

a. 21 U.S.C. § 343(a), which deems food misbranded when its labeling contains a statement that is "false or misleading in any particular," with "misleading" defined to "take[] into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material";

b. 21 U.S.C. § 321(n), which states the nature of a false and misleading advertisement;

c. 21 C.F.R. § 101.18(b), which prohibits true statements about ingredients that are misleading in light of the presence of other ingredients;

d. 21 C.F.R. § 102.5(c), which prohibits the naming of foods so as to create an erroneous impression about the presence or absence of ingredient(s) or component(s) therein;

e. 21 C.F.R. § 101.22(i), which requires that labeling of flavors to prevent an erroneous impression about the presence of absence of characterizing ingredients; and

f. 21 U.S.C. §§ 331, 333, which prohibits the introduction of misbranded foods into interstate commerce.

139. BA's conduct is further "unlawful" because it violates California's False Advertising Law, CAL. BUS. & PROF. CODE §§ 17500, *et seq.* (the "FAL"), and California's Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750, *et seq.* (the "CLRA"), as discussed in the claims below.

140. BA's conduct also violates California's Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAFETY CODE §§ 109875, *et seq.* (the "Sherman Law"), including, at least, the following sections:

a. Section 110100 (adopting all FDA regulations as state regulations);

b. Section 110290 ("In determining whether the labeling or advertisement of a food . . . is misleading, all representations made or suggested by statement, word, design, device, sound, or any combination of these, shall be taken into account. The extent that the labeling or advertising fails to reveal facts concerning the food . . . or consequences of customary use of the food . . . shall also be considered.");

c. Section 110390 ("It is unlawful for any person to disseminate any false advertisement of any food…. An advertisement is false if it is false or misleading in any particular.");

d. Section 110395 ("It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food . . . that is falsely advertised.");

e. Section 110398 ("It is unlawful for any person to advertise any food, drug, device, or cosmetic that is adulterated or misbranded.");

f. Section 110400 ("It is unlawful for any person to receive in commerce any food . . . that is falsely advertised or to deliver or proffer for delivery any such food…."); and

g. Section 110660 ("Any food is misbranded if its labeling is false or misleading in any particular.").

141. Each of the challenged advertising statements made, and actions taken, by BA violates the FFDCA, CLRA, FAL, and Sherman Law, and, consequently, violates the "unlawful" prong of the UCL.

142. BA leveraged its deception to induce Plaintiff Silver and the members of the California Subclass to purchase products that were of lesser value and quality than advertised.

143. BA's deceptive marketing and labeling caused Plaintiff and the members of the California Subclass to suffer injury in fact and to lose money or property, as it denied them the benefit of the bargain. Had Plaintiff Silver and the members of the California Subclass been aware of BA's false and misleading marketing and unlawful labeling, they would not have purchased BodyArmor, purchased as much BodyArmor, or paid as much for BodyArmor.

144. Plaintiff Silver seeks an order enjoining BA from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign. CAL. BUS. AND PROF. CODE § 17203.

145. Plaintiff Silver also seeks an order for the disgorgement and restitution of all monies from the sale of BodyArmor that BA unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

146. Therefore, Plaintiff Silver prays for relief as set forth below.

**SECOND CLAIM**
**Violation of California's Unfair Competition Law,**
**CAL. BUS. & PROF. CODE §§ 17200, *et seq.***
**Unfair and Fraudulent Conduct Prongs**
**(By Plaintiff Silver on Behalf of the California Subclass)**

147. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

148. Plaintiff Silver brings this claim on behalf of the California Subclass for violation of the "unfair" and "fraudulent" prongs of the UCL.

149. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." CAL. BUS. & PROF. CODE § 17200.

150. Defendant's false and misleading marketing and/or advertising of BodyArmor, as alleged herein, constitute "unfair" business acts and practices because such conduct is immoral, unscrupulous, and offends public policy. Further, the gravity of BA's conduct outweighs any conceivable benefit of such conduct.

151. The acts, omissions, misrepresentations, practices, and non-disclosures of BA, as alleged herein, constitute "fraudulent" business acts and practices, because BA's conduct is false and misleading to Plaintiff Silver and the members of the California Subclass.

152. BA's marketing and/or advertising of BodyArmor is likely to deceive reasonable consumers about their true qualities and characteristics.

153. BA either knew or reasonably should have known that the claims in the marketing, advertising, and labeling of BodyArmor were likely to deceive reasonable consumers.

154. Plaintiff Silver seeks an order enjoining BA from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign. CAL. BUS. & PROF. CODE § 17203.

155. Plaintiff Silver also seeks an order for the disgorgement and restitution of all monies from the sale of BodyArmor that were unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

156. Therefore, Plaintiff Silver prays for relief as set forth below.

**THIRD CLAIM**
**Violation of California's False Advertising Law,**
**CAL. BUS. & PROF. CODE §§ 17500, *et seq.***
**(By Plaintiff Silver, on Behalf of the California Subclass)**

157. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

158. Plaintiff Silver brings this claim on behalf of the California Subclass for violation of the FAL.

159. The FAL prohibits making any false or misleading advertising claim. CAL. BUS. & PROF. CODE § 17500.

160. As alleged herein, BA, in its advertising and/or labeling of BodyArmor, makes "false [and] misleading advertising claim[s]," as it deceives consumers about the drink's true qualities, characteristics and/or benefits.

161. In reliance on these false and misleading claims, Plaintiff Silver and the members of the California Class purchased BodyArmor believing that it conveyed the qualities, characteristics, and/or benefits claimed.

162. BA knew or should have known that the advertising and/or labeling of BodyArmor was likely to deceive consumers.

163. As a result, Plaintiff Silver and the California Class members seek injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which BA was unjustly enriched.

164. Therefore, Plaintiff Silver prays for relief as set forth below.

**FOURTH CLAIM**
**Violation of California's Consumers Legal Remedies Act,**
**CAL. CIV. CODE §§ 1750, *et seq.***
**(By Plaintiff Silver, on Behalf of the California Subclass)**

165. Plaintiff Silver repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

166. Plaintiff Silver brings this claim on behalf of the California Subclass for violation of the CLRA.

167. The CLRA adopts a statutory scheme prohibiting various deceptive practices in connection with the conduct of a business providing goods, property, or services primarily for personal, family, or household purposes.

168. BA's policies, acts, and practices were designed to, and did, result in the purchase and use of BodyArmor primarily for personal, family, or household purposes, and violated and continue to violate the following sections of the CLRA:

a. Section 1770(a)(5), which prohibits representing that goods have a particular composition or contents that they do not have;

b. Section 1770(a)(5), which also prohibits representing that goods have characteristics, uses, or benefits that they do not have;

c. Section 1770(a)(7), which prohibits representing that goods are of a particular standard, quality, or grade if they are of another;

d. Section 1770(a)(9), which prohibits advertising goods with intent not to sell them as advertised; and

e. Section 1770(a)(16), which prohibits representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

169. As a result, in accordance with CIVIL CODE § 1780(a)(2), Plaintiff Silver and the members of the California Subclass have suffered irreparable harm and seek injunctive relief in the form of an order:

a. Enjoining BA from continuing to engage in the deceptive practices described above;

b. Requiring BA to provide public notice of the true nature and characteristics of BodyArmor; and

c. Enjoining BA from such deceptive business practices in the future.

170. Defendant willfully and knowingly violated the CLRA.

171. Plaintiff provided notice to BA of its violation of the CLRA on or about January 28, 2020, pursuant to CIVIL CODE § 1782(b). BA failed to respond to Plaintiff's demand and fully satisfy the requirements therein to bring its conduct into compliance with the law and provide Plaintiff and the California Subclass the relief requested under the CLRA.

172. Pursuant to CIVIL CODE § 1780(a), Plaintiff and members of the California Subclass seek compensatory damages, punitive damages, restitution, disgorgement of profits, and an order enjoining BA from deceptively marketing BodyArmor.

173. Therefore, Plaintiff Silver prays for relief as set forth below.

**FIFTH CLAIM**
**Violation of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW §§ 349, *et seq.***
**(By Plaintiff Hill, on Behalf of the New York Subclass)**

174. Plaintiff Hill repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

175. Plaintiff Hill brings this claim on behalf of the New York Subclass for violation of section 349 of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW §§ 349, *et seq.*

176. Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [the State of New York]." N.Y. GEN. BUS. LAW § 349(a).

177. BA's labeling and/or advertising of BodyArmor, as alleged herein, constitute "deceptive" acts and practices, as such conduct misled Plaintiff Hill and the New York Subclass.

178. Section 349(h) grants private plaintiffs a right of action for violation of New York's Consumer Protection from Deceptive Acts and Practices Law, as follows:

> In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of

> damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. GEN. BUS. LAW § 349(h).

179. In accordance with Section 349(h), Plaintiff Hill seeks an order enjoining BA from continuing the unlawful deceptive acts and practices set out above. Absent a Court order enjoining the unlawful deceptive acts and practices, BA will continue its false and misleading advertising and/or labeling campaigns and, in doing so, irreparably harm each of the New York Subclass members.

180. As a consequence of BA's deceptive acts and practices, Plaintiff Hill and other members of the New York Subclass suffered an ascertainable loss of monies. By reason of the foregoing, Plaintiff Hill and other members of the New York Subclass also seek actual damages or statutory damages of $50 per violation, whichever is greater, as well as punitive damages for BA's knowing and willful deceptions. N.Y. GEN. BUS. LAW § 349(h).

181. Therefore, Plaintiff Hill prays for relief as set forth below.

**SIXTH CLAIM**
**Violation of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW §§ 350, *et seq.***
**(By Plaintiff Hill, on Behalf of the New York Subclass)**

182. Plaintiff Hill repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

183. Plaintiff Hill brings this claim on behalf of the New York Subclass for violation of section 350 of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW §§ 350, *et seq.*

184. Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in [the State of New York]." N.Y. GEN. BUS. LAW § 350.

185. Section 350-a defines "false advertising" as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect." N.Y. GEN. BUS. LAW § 350-a.1. The section also provides that advertising can be false by omission, as it further defines "false advertising" to include "advertising [that] fails to reveal facts material in the light of such representations with respect to the commodity . . . to which the advertising relates." *Id.*

186. BA's labeling, marketing, and advertising of BodyArmor, as alleged herein, are "misleading in a material respect" and, thus, constitute "false advertising," as they represent BodyArmor as having qualities, characteristics, and/or benefits that it does not have.

187. Plaintiff Hill seeks an order enjoining BA from continuing this false marketing and advertising. Absent enjoining this false advertising, BA will continue to mislead Plaintiff Hill and the other members of the New York Subclass and, in doing so, irreparably harm each of the New York Subclass members.

188. As a direct and proximate result of BA's violation of GENERAL BUSINESS LAW section 350, Plaintiff Hill and the other members of the New York Subclass have also suffered an ascertainable loss of monies.

189. By reason of the foregoing, Plaintiff Hill and other members of the New York Subclass also seek actual damages or statutory damages of $500 per violation, whichever is greater, as well as punitive damages. N.Y. GEN. BUS. LAW § 350-e.

190. Therefore, Plaintiff Hill prays for relief as set forth below.

**SEVENTH CLAIM**
**Violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.***
**(By Plaintiff Peffer on Behalf of the Pennsylvania Subclass)**

191. Plaintiff Peffer repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

192. Plaintiff Peffer brings this claim on behalf of the Pennsylvania Subclass for violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq*.

193. BA is a "person," as meant by 73 P.S. § 201-2(2).

194. Plaintiff Peffer and Pennsylvania Subclass members purchased goods and services in "trade" and "commerce," as meant by 73 P.S. § 201-2(3), primarily for personal, family, and/or household purposes.

195. BA engaged in unfair methods of competition and unfair or deceptive acts or practices in the conduct of its trade and commerce in violation of 73 P.S. § 201-3, including the following:

a. Representing that its goods and services have characteristics, uses, benefits, ingredients, and qualities that they do not have, 73 P.S. § 201-2(4)(v);

b. Representing that its goods and services are of a particular standard or quality if they are of another, 73 P.S. § 201-2(4)(vii); and

c. Advertising goods or services with intent not to sell them as advertised, 73 P.S. § 201-2(4)(ix).

196. BA's labeling, marketing, and advertising of BodyArmor, as alleged herein, are "misleading in a material respect" and, thus, constitute "false advertising."

197. BA's representations and omissions were material because they were likely to deceive reasonable consumers.

198. BA intended to mislead Plaintiff Peffer and Pennsylvania Subclass members and induce them to rely on its misrepresentations and omissions.

199. BA acted intentionally, knowingly, and maliciously to violate Pennsylvania's Unfair Trade Practices and Consumer Protection Law, and recklessly disregarded Plaintiff Peffer and Pennsylvania Subclass members' rights. BA's knowledge of BodyArmor put it on notice that BodyArmor was not as it advertised.

200. As a direct and proximate result of BA's unfair methods of competition and unfair or deceptive acts or practices and Plaintiff Peffer's and Pennsylvania Subclass members' reliance on them, Plaintiff Peffer and Pennsylvania Subclass members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing BodyArmor.

201. Therefore, Plaintiff Peffer prays for relief as set forth below.

**EIGHTH CLAIM FOR RELIEF**
**Unjust Enrichment / Quasi-Contract**
**(By Plaintiffs Silver, Peffer, and Hill on Behalf of the Nationwide Class)**

202. Plaintiffs incorporate by reference each allegation set forth above

203. As a result of BA's unlawful and misleading labeling, advertising, and/or sale of BodyArmor, BA was enriched at the expense of Plaintiffs.

204. BA sold BodyArmor drinks to Plaintiffs that were either not capable of being sold legally and that were worthless or were not worth the amounts that Plaintiffs paid for them.

205. Plaintiffs paid a premium price for BodyArmor, which is more expensive than its competitors sports drinks, including Gatorade.

206. It is against equity and good conscience to permit BA to retain the ill-gotten benefits received from Plaintiffs and the Nationwide Class members given that the BodyArmor was not what BA purported it to be.

207. It would be unjust and inequitable for BA to retain the benefit, warranting restitutionary disgorgement to Plaintiffs and the Nationwide Class members of all monies paid for BodyArmor, and/or all monies paid for which Plaintiffs and the Nationwide Class members did not receive benefit.

208. As a direct and proximate result of BA's actions, Plaintiffs and the Nationwide Class members have suffered damages in an amount to be proven at trial.

209. Therefore, Plaintiffs pray for relief as set forth below.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the members of each Class, respectfully request the Court to enter an Order:

A. Certifying the proposed Classes under Rules 23(a), (b)(2), and (b)(3), as set forth above;

B. Declaring that Defendant is financially responsible for notifying the Class members of the pendency of this suit;

C. Declaring that Defendant has committed the violations of law alleged herein;

D. Providing for any and all injunctive relief the Court deems appropriate;

E. Awarding statutory damages in the maximum amount for which the law provides;

F. Awarding monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount that the Court or jury will determine, in accordance with applicable law;

G. Providing for any and all equitable monetary relief the Court deems appropriate;

H. Awarding punitive or exemplary damages in accordance with proof and in an amount consistent with applicable precedent;

I. Awarding Plaintiffs their reasonable costs and expenses of suit, including attorneys' fees;

J. Awarding pre- and post-judgment interest to the extent the law allows; and

K. For such further relief as this Court may deem just and proper.

## DEMAND FOR JURY TRIAL

Pursuant to Rule 38, Plaintiffs hereby demand a trial by jury on all claims so triable.

Respectfully submitted,

DATED: July 7, 2020

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By: /s/ *Laurence D. King*
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