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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LAZARO RODRIGUEZ,
JASON MENCER,
and VINCENT DOUGHERTY,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

CASE NO.:

v.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

NBTY, INC., UNITED STATES
NUTRITION, INC., and
HEALTHWATCHERS, INC.;

Defendants,

CLASS ACTION COMPLAINT

Plaintiffs, Lazaro Rodriguez, Jason Mencer and Vincent Dougherty, on behalf of themselves and all others similarly situated, by and through their undersigned attorneys, bring this Class Action Complaint against Defendants,

CLASS ACTION COMPLAINT

NBTY, Inc., United States Nutrition, Inc., and Healthwatchers, Inc., (hereinafter collectively referred to as “Defendants”), and for their Complaint allege, upon personal knowledge as to themselves, and upon information and belief and based upon the investigation to date of counsel, allege as follows:

INTRODUCTION

1. This is a class action on behalf of all persons and entities in the United States and the states of California, Florida and Pennsylvania who purchased the products Body Fortress Super Advanced Whey Protein¹ and Body Fortress Super Advanced Whey Isolate (the “Products”) from Defendants who misrepresent the amount of whey protein available in the Products.

2. The whey protein industry is a growing and extremely competitive business environment: “during the forecast period, [the market for] protein products is expected to grow by 62% to reach US\$7.8 billion in 2018.” <http://www.euromonitor.com/sports-nutrition-in-the-us/report>

3. However, the price of wholesale whey protein keeps increasing and is usually purchased for roughly \$15-\$18/kilo, making the profit margins on whey protein powder products very low.

¹ Super Advanced Whey Protein contains two types of whey protein; whey protein concentrate and whey protein isolate.

4. Defendants designed, manufactured, warranted, advertised and sold the Products throughout the United States, including in the states of California, Florida and Pennsylvania.

5. In an effort to reduce protein manufacturing costs, Defendants add cheaper free form amino acids and non-protein ingredients to increase the nitrogen content of the Products' protein powder. Nitrogen is the "tag" used by a common protein content test to determine the amount of protein in a product; but this is neither a direct measure of the actual protein content in a product nor a measure of the type of nitrogen containing compounds in a product.

6. This act is commonly referred to as "protein-spiking", "nitrogen-spiking" or "amino-spiking", and was evidenced recently in the 2007 pet food incident, which lead to domestic recalls of these products, and the 2008 Chinese milk powder scandal, when melamine, a nitrogen-rich chemical, was added to raw materials to fake high protein contents.

7. As a result of Defendants' practices, the consumer is left with a product that contains approximately 30% less whey protein than Defendant represented.

8. This practice has been condemned by the American Herbal Products Association (AHPA), an organization of dietary supplement manufacturers, which has issued a standard for manufacturers for measuring the True Protein content of their products which:

- a) Defines protein as “a chain of amino acids connected by peptide bonds” for labeling purposes;
- b) The use of calculations to include only proteins that are “chains of amino acids connected by peptide bonds; and
- c) To exclude any “non-protein nitrogen-containing substances” when counting total protein content.

www.ahpa.org/Default.aspx?tabid=441, April 1, 2014

9. Defendant NTBY, Inc. has been a member of AHPA since 1993.

10. Even one of the largest distributors in the United States of whey protein products, General Nutrition Centers, Inc. (“GNC”) has publicly criticized the kind of conduct engaged in by Defendants, essentially claiming it to be misleading to consumers. According to GNC, consumers cannot be sure that they are getting 100 percent protein in their products since companies don’t always show how they figure total grams of protein per serving.
www.gnclivewell.com/realprotein.

11. Despite the knowledge that “protein-spiking” is misleading to consumers, Defendants continue to advertise, distribute, label, manufacture and market the Products in a misleading and deceptive manner.

PARTIES

Named Plaintiffs

12. During the Class period, Lazaro Rodriguez and California Class Members purchased the Product Body Fortress Super Advanced Whey Protein through Walmart and various other retailers such as CVS, Walgreens, and numerous others. Plaintiff Rodriguez and Class Members suffered an injury in fact caused by the false, fraudulent, unfair, deceptive and misleading practices set forth in this Complaint. Lazaro Rodriguez is a resident of the County of Los Angeles, State of California, and the events set forth in the Complaint took place therein, who, on or about May 31, 2014, purchased the Product Body Fortress Super Advanced Whey Protein, with the UPC Code 074312296550, for his own use and not for resale from Walmart located at 8333 Van Nuys Blvd, Panorama City, CA 91402.

13. During the Class period, Jason Mencer and Florida Class Members purchased the Product Body Fortress Super Advanced Whey Protein through Walmart and various other retailers such as CVS, Walgreens, and numerous others. Plaintiff Mencer and Class Members suffered an injury in fact caused by the false, fraudulent, unfair, deceptive and misleading practices set forth in this Complaint. Jason Mencer is a resident of the County of Polk, State of Florida, and the events set forth in the Complaint took place therein, who, on or about June 21, 2014, purchased the Product Body Fortress Super Advanced Whey Protein for

approximately \$16.98, with the UPC Code 074312443152, for his own use and not for resale. Plaintiff Mencer made regular purchases of Defendants' product, approximately one container every two to three weeks for the past several years, from two Walmart locations in Polk County, FL. These two Walmart's are located at 355 Cypress Gardens Blvd, Winter Haven, FL 33880 and 5600 State Road 544, Winter Haven, FL 33880.

14. During the Class period, Vincent Dougherty and Pennsylvania Class Members purchased the Product Body Fortress Super Advanced Whey Protein through Walmart and various other retailers such as CVS, Walgreens, and numerous others. Plaintiff Dougherty and Class Members suffered an injury in fact caused by the false, fraudulent, unfair, deceptive and misleading practices set forth in this Complaint. Vincent Dougherty is a resident of the County of Clearfield, State of Pennsylvania, and the events set forth in the Complaint took place therein, who, on or about May 27, 2014, purchased the Product Body Fortress Super Advanced Whey Protein, with the UPC Code 074312443152, for his own use and not for resale from Walmart located at 20 Industrial Dr., Dubois, PA 15801, for approximately \$15.98.

Defendants

15. NBTY, Inc. is licensed in the State of Delaware, with a principal place of business address at 2100 Smithtown Avenue, Ronkonkoma, NY 11779. Under information and belief NBTY, Inc. has controlling interest in United States Nutrition, Inc. and Healthwatchers, Inc.

16. Defendant NBTY (“NBTY”) is the parent company of Defendants, United States Nutrition, Inc. and Healthwatchers, Inc.

17. Unites States Nutrition, Inc. is licensed in the State of Delaware, with a principal place of business address at 90 Orville Drive, Bohemia, NY 11716, and upon information and belief is a subsidiary of Defendant NBTY, Inc.

18. Healthwatchers, Inc. is licensed in the State of Delaware, with a principal place of business address at 90 Orville Drive, Bohemia, NY 11716, and upon information and belief is a subsidiary of Defendant NBTY, Inc.

JURISDICTION AND VENUE

19. This Court has jurisdiction over the subject matter of this action pursuant to the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiffs are citizens of California and Defendants are incorporated in Delaware and otherwise maintain their principal places of business in New York), (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of

interests and costs, and (iii) there are 100 or more members of the proposed Plaintiffs class².

20. Defendants conduct substantial business in California, including the sale and distribution of the Products in California, and have sufficient contacts with California or otherwise intentionally availed itself of the laws and markets of California, so as to sustain this Court's jurisdiction over Defendants.

21. Venue is proper in this district pursuant to 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to this claim occurred in this District, a substantial part of the property that is the subject of this action is situated in this District, and Defendants are subject to personal jurisdiction in this District.

22. As a result of Defendants' manufacturing, marketing, distributing, promoting, and selling the Products to purchasers throughout California, either directly or indirectly through third parties or related entities, Defendants have benefitted from the laws of California and profited from California commerce.

23. Defendants conducted systematic and continuous business activities in and throughout the State of California by selling and distributing the Products

² Defendants' Products are sold through numerous different online and brick/mortar retailers, including but not limited to; Walmart, Walgreens, CVS, Kmart, and Bodybuilding.com. There are likely hundreds of thousands of class members composing the proposed classes with tens of millions of dollars spent on the Products due to the far reaching distribution channels and high consumer demand for whey protein products.

throughout the State of California, and otherwise intentionally availed themselves of markets in the State of California through the promotion and marketing of their business, including the sale of the Products at issue in this litigation.

STATEMENT OF FACTS

The Differences Between Whey Protein & Free Form Amino Acids

24. Whey is a complete protein source, which means it contains all the essential amino acids your body needs to build protein-based compounds such as muscle tissue, skin, fingernails, hair and enzymes. Daily protein need depends on your size, gender and activity levels, although it likely amounts to somewhere between 46 grams and 56 grams. For elite athletes, daily protein requirements are well over 100 grams, which is often difficult to get just from eating food. Of course, persons may need to supplement their protein intake for reasons of ill-health as well.

25. Whey protein powder is especially rich in branched-chain amino acids -- such as leucine, isoleucine and valine -- which are metabolized directly within your muscles as opposed to being processed in your liver first.

26. The 2005 dietary reference intake (DRI) guidance clearly defines protein as macromolecules with links of amino acids, and does not mention amino acids or creatine. Although amino acids are the building blocks of protein, they do

not have the same beneficial effects of whole protein. Part of the reason for this has to do with protein digestion and absorption.

27. There have been several studies that have shown that protein is absorbed more rapidly than amino acids.³

28. A study was conducted to determine whether the effects of whey protein ingestion on muscle protein accrual are due solely to its constituent essential amino acid content. The study was a comparison of three trial groups. The first provided 15g of intact whey protein (whey protein powder). The other 2 trials provided either the individual essential amino acids (7g) or the individual non-essential amino acids (8g) found in whey. The researchers determined that whey protein ingestion improves skeletal muscle protein accrual through mechanisms that are beyond those attributed to its essential amino acid content.⁴

29. Another study found that “the lack of recovery after immobilization-induced atrophy during ageing is due to an ‘anabolic resistance’ of protein synthesis to amino acids during rehabilitation.” The study’s results “highlight a

³ Di Pasquale MG. *Amino Acids and Proteins for the Athlete: The Anabolic Edge*, Second Edition. Boca Raton, FL: CRC Press; 2008:190.

⁴ Katsanos C, *et al.* Whey protein ingestion in elderly results in greater muscle protein accrual than ingestion of its constituent essential amino acid content. *Nutr. Res.* Oct. 2008; 28(10):651-658.

novel approach to induce muscle mass recovery following atrophy in the elderly by giving soluble milk protein or high protein diets.”⁵

30. Further, in a review study the authors concluded that, “the bound form of an EAA [essential amino acid] may be more efficiently utilized than when delivered in its free-form.”⁶

Body Fortress’ Misleading Labeling of Super Advanced Whey Protein & Super Advanced Whey Isolate

31. Defendants feature the name of the ingredient sought by millions of American consumers, “whey protein” or “whey isolate”, by predominantly featuring it in the name of the Products, “Body Fortress Super Advanced Whey Protein” and “Body Fortress Super Advanced Whey Isolate” on the containers. *See Exhibits A and D.*

32. Defendants product, “Body Fortress Super Advanced Whey Protein” is labeled as providing 30 grams of protein per serving:

⁵ Magne H, *et al.* Contrarily to whey and high protein diets, dietary free leucine supplementation cannot reverse the lack of recovery of muscle mass after prolonged immobilization during ageing. *J. Physiol.* Apr 15, 2012; 590(Pt 8): 2035-2049.

⁶ Terada T, Inui K. Peptide transporters: structure, function, regulation and application for drug delivery. *Curr Drug Metab.* 2004;5:85-94.

Supplement Facts

Amount Per Serving	%Daily Value	
	1 Scoop (42 g) about 21	2 Scoops (84 g) about 11
Calories	170	340
Calories from Fat	25	45
Total Fat	2.5 g	4%†
Saturated Fat	1.5 g	8%†
Cholesterol	70 mg	23%†
Total Carbohydrate	7 g	2%†
Dietary Fiber	<1 g	4%†
Sugars	2 g	††
Protein	30 g	60%†
Calcium	72 mg	7%
Iron	0.5 mg	3%
Phosphorus	74 mg	7%
Magnesium	23 mg	6%
Zinc	0.09 mg	1%
Copper	0.05 mg	3%
Sodium	100 mg	4%
Potassium	210 mg	6%

†Percent Daily Values are based on a 2,000 calorie diet.
††Daily Value not established.


Ingredients: Super Whey Protein Blend (Whey Protein Concentrate, Whey Protein Isolates), Super Recovery Blend (Glycine, Creatine Monohydrate, Taurine, Threonine, L-Glutamine, Leucine, Valine, Isoleucine), Maltodextrin, Cocoa (processed with alkali), Natural and Artificial Flavors, Soy Lecithin, Cellulose Gum, Acesulfame Potassium, Sucralose.
Contains milk and soy ingredients.
Gluten Free

Typical Amino Acid Profile (milligrams per 42 g scoop***)			
Essential Amino Acids	Nonessential Amino Acids		
Histidine	334 mg	Alanine	803 mg
Isoleucine	1,133 mg	Arginine	469 mg
Leucine	1,974 mg	Aspartic Acid	2,078 mg
Lysine	1,616 mg	Cysteine	422 mg
Methionine	422 mg	Glutamic Acid	3,104 mg
Phenylalanine	623 mg	Glycine	4,357 mg
Threonine	2,222 mg	Proline	1,116 mg
Tryptophan**	320 mg	Serine	915 mg
Valine	1,093 mg	Tyrosine	564 mg

**L-Tryptophan is naturally occurring, not added.
***approximate values




YOUR BODY - YOUR FORTRESS.®



For more information on other Body Fortress® products or for complete training and nutrition programs, visit www.bodyfortress.com.

Carefully Manufactured by
Healthwatchers (DE), Inc.
Bohemia, NY 11716 U.S.A.
1-800-215-5980



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Directions: For adults, add one (1) scoop (42 g) to 6-8 ounces of water or your favorite beverage daily. Serious athletes and bodybuilders (over 125 pounds) should consume 1-2 scoops immediately after exercise.

BLENDER – SIMPLE
Cover and blend for 20-30 seconds. ^^

SHAKER – SIMPLER
Cover and shake for 25-30 seconds.

GLASS & SPOON – SIMPLEST
Stir for 20-30 seconds or until completely blended.

^^For Mass Gaining: add higher calorie foods such as peanut butter, 1-2% milk, and fruit juices.
For Dieters: add lower calorie foods such as skim milk or just use water.

Please note: Crystalline Taurine will appear as small crystals within the powder.

Body Fortress® Super Advanced Whey Protein is aspartame free.

WARNING: Not intended for use by pregnant or nursing women. If you are taking any medications or have any medical condition, consult your doctor before use. Avoid this product if you have kidney disease. Discontinue use and consult your doctor if any adverse reactions occur. Not intended for use by persons under the age of 18.

KEEP OUT OF THE REACH OF CHILDREN. STORE AT ROOM TEMPERATURE, TIGHTLY CLOSED AND AVOID EXCESSIVE HEAT. FOR YOUR PROTECTION, DO NOT USE IF SEAL UNDER CAP IS BROKEN OR MISSING.

*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

33. However, Defendants’ claimed total protein count of 30 grams of protein per serving, in Super Advanced Whey Protein, is not just whey protein but also includes, for the purposes of “protein-spiking”: several free form amino acids, including Glycine, Threonine, L-Glutamine, Leucine, Valine, and Isoleucine; the non-protein amino acid Taurine; and the non-amino acid compound Creatine Monohydrate.

34. Once these “protein spiking” agents are removed from the formula of analysis, and the “bound” amino acid count is determined, the true content of whey protein in the Products can be determined.

35. After scientific testing of the product Super Advanced Whey Protein, the actual total content per serving of whey protein is actually around 21.5 grams (as calculated from the total bonded amino acids) as opposed to 30 grams of protein claims by Defendants for their “Whey Protein” products. See Exhibit G.

36. Defendants product, “Body Fortress Super Advanced Whey Isolate” is labeled as providing 30 grams of protein per serving:

Supplement Facts

Serving Size 1 Scoop (34 g) 2 Scoops (68 g)
 Servings Per Container about 26 about 13

Amount Per Serving	%Daily Value		%Daily Value	
Calories	130		260	
Calories from Fat	5		10	
Total Fat	0.5 g	1%†	1 g	2%†
Saturated Fat	<0.5 g	1%†	0.5 g	2%†
Cholesterol	15 mg	5%	30 mg	9%
Total Carbohydrate	1 g	<1%†	2 g	1%†
Dietary Fiber	<1 g	1%†	<1 g	2%†
Sugars	<1 g	††	1 g	††
Protein	30 g	60%†	60 g	120%†
Calcium	57 mg	6%	115 mg	11%
Phosphorus	46 mg	5%	93 mg	9%
Magnesium	12 mg	3%	25 mg	6%
Sodium	95 mg	4%	190 mg	8%
Potassium	70 mg	2%	140 mg	4%

†Percent Daily Values are based on a 2,000 calorie diet.
 ††Daily Value not established.

Ingredients: Whey Protein Isolate, Super Recovery Blend (Glycine, Taurine, L- Threonine, L-Glutamine, L-Arginine, L-Alanine, L-Lysine Hydrochloride, L-Leucine, L-Isoleucine, L-Valine), Natural and Artificial Flavors, Cellulose Gum, Xanthan Gum, Acesulfame Potassium, Sucralose, Carrageenan.

Contains milk and wheat ingredients.

Typical Amino Acid Profile (milligrams per 34 g scoop****)

Essential Amino Acids	Nonessential Amino Acids
Histidine 317 mg	Alanine 962 mg
Isoleucine 1,294 mg	Arginine 407 mg
Leucine 2,136 mg	Aspartic Acid 2,141 mg
Lysine 1,867 mg	Cysteine 474 mg
Methionine 419 mg	Glutamic Acid 3,491 mg
Phenylalanine 588 mg	Glycine 5,825 mg
Threonine 3,308 mg	Proline 1,393 mg
Tryptophan*** 360 mg	Serine 872 mg
Valine 1,141 mg	Tyrosine 547 mg

***L-Tryptophan is naturally occurring, not added.
 ****approximate values

37. However, Defendants' total protein count of 30 grams of protein per serving, in Super Advanced Whey Isolate, is not just whey protein (whey isolate) but also includes, for the purposes of "protein-spiking": the free form amino acids Glycine, L-Threonine, L-Glutamine, L-Arginine, L-Alanine, L-Lysine Hydrochloride, L-Leucine, L-Isoleucine, and L-Valine; and the non-protein amino acid Taurine.

38. The FDCA actually speaks to the misleading nature of predominantly using the name of an ingredient in the labeling of a product under 21 C.F.R. § 101.18(b), which states:

The labeling of a food which contains two or more ingredients may be misleading by reason (among other reasons) of the designation of such food in such labeling by a name which includes or suggests the name of one or more but not all such ingredients, even though the names of all such ingredients are stated elsewhere in the labeling.

39. The Defendants mislead consumers by repeatedly referencing whey protein, including in the name of the Products, but never disclaiming the limited amount of whey protein that the Products actually deliver or making clear that the Products' protein content is only fractionally whey protein.

40. Defendants use the term "whey protein" in a way that is interchangeable with the term "protein", so the consumer is misled to believe that every gram of protein in the Products are comprised solely of whey protein.

41. For the Product Super Advanced Whey Protein, under the “Supplement Facts” section of the label, referenced above, under “Other Ingredients”, the Defendants list Whey Protein Concentrate and Whey Protein Isolate in their “Super Whey Protein Blend”.

42. In contrast, Defendants disclose the “protein-spiking” agents in a separate category they call the “Super Recovery Blend” which makes no reference to the word “protein”.

43. For the Product Super Advanced Whey Isolate, Defendants do the same thing under the “Supplement Facts” section of the label. Under “Other Ingredients”, the Defendants first list the ingredient Whey Protein Isolate, and then disclose the “protein spiking” ingredients under the category “Super Recovery Blend” which makes no mention of protein.

44. A reasonable consumer, looking at the name of the Products, and reading the “Supplement Facts”, is misled into thinking that the 30 grams of protein per serving claimed by Defendants for the Whey Protein Products are derived exclusively from the “Super Whey Protein Blend” or “Whey Protein Isolate”.

45. Moreover, Defendants make further deceptive references to whey protein on the actual label of the product Super Advanced Whey Protein:

- a) “60g PREMIUM PROTEIN”⁷;
- b) “**PREMIUM WHEY PROTEIN**”;
- c) “Body Fortress Super Advanced **Whey Protein** delivers a **powerful blend of premium proteins** athletes need to support lean muscle mass and maximize their training.”;
- d) “Body Fortress Super Advanced **Whey Protein** features a **Super Recovery Blend to further enhance the benefits of our premium Whey Protein Blend.**”;
- e) “**Whey** is the preferred **protein source** in sports and bodybuilding nutrition because it contains superior quality **Branched Chain Amino Acids — made up of Leucine, Isoleucine and Valine —** which are important for the maintenance of muscle tissue.”; and
- f) “Contains naturally occurring **Branched Chain Amino Acids** from **protein.**”⁸

See Exhibits A-C.

⁷ 60 grams of protein per two (2) servings.

⁸ Defendants say “protein” in this statement to mean complete protein which contains Branched Chain Amino Acids (“BCAAs”). Defendants do not differentiate between Whey Protein and the other non-protein sources they use towards their protein count. Creatine Monohydrate, Glycine and Taurine do not contain BCAAs.

46. Defendants make further deceptive references to whey protein on the actual label of the product Super Advanced Whey Isolate:

- a) “60g ULTRA PURE PROTEIN”;
- b) “Over 9 grams of **BCAAs from Protein**”⁹;
- c) “Super Advanced **Whey Isolate** contains protein that is processed using microfiltration to ensure an isolated whey that contains minimal lactose & fat. **These isolation processes separate the valuable protein** from non-protein materials yielding a **highly-purified whey isolate.**”;
- d) “State-of-the-art manufacturing processes are used to retain the active **Whey Protein** Peptides & Microfractions — some other **whey isolate** processing methods remove Glycomacropeptides, which are an **important protein component.**”;
- e) “Enhanced with additional free-form amino acids to work synergistically with **Whey Isolate's** high concentration of aminos.”;
- f) “2 scoops contain over 9 grams of the following **Branched Chain Amino Acids from protein**”; and

⁹ Defendants say “protein” in this statement to mean complete protein which contains Branched Chain Amino Acids (“BCAAs”). Free form amino acids do not contain BCAAs.

g) “**Whey protein** has been relied upon for years by athletes, bodybuilders and anyone looking to get into their best shape. Super Advanced **Whey Isolate** provides all of the benefits **Whey** is known for and more by carefully removing more of the fat and lactose that you don't need.”

See Exhibits E-F.

47. Defendants also include a graph on the labels of the Products which explain the benefits of whey protein, exclusively, furthering the false impression that whey protein is the sole source of protein within the Products. *See Exhibits B and E.*

48. All of these misleading label claims, along with the Products' names, “Super Whey Protein Blend” and “Whey Protein Isolate”, taken together, misled reasonable consumers that the protein content of the Products were derived solely from whey protein.

49. Nowhere on the label does it state, or even imply, that the protein content contains any, let alone substantial amounts of free form and non-protein amino acids.

50. Plaintiffs and Class Members were in fact misled by Defendants' representations regarding the true nature of the protein content and value.

51. The difference between the Products promised and the Products sold is significant. The amount of actual protein provided, and the measure of protein

per serving, has real impacts on the benefits provided to consumers by the Products, and the actual value of the Products themselves.

52. Persons requiring a certain amount of protein supplementation, whether as part of a fitness regimen or for real health needs, are left to ingest less protein than Defendants state will be provided.

53. Defendants' misleading claims contained herein are in violation of 21 C.F.R. § 101.18(b), making the Product misbranded.

54. Defendants' deceptive statements violate 21 U.S.C. § 343(a)(1), which deems food (including nutritional supplements) misbranded when the label contains a statement that is "false or misleading in any particular".

55. California prohibits the misbranding of food in a way which parallels the FDCA through the "Sherman Law", Health & Saf. Code § 109875 et seq. The Sherman Law provides that food is misbranded "if its labeling is false or misleading in any particular." *Id.*

56. The Sherman Law explicitly incorporates by reference "[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the FDCA," as the food labeling regulations of California. Cal. Health & Saf. Code, § 110100, subd. (a).

57. Plaintiffs and Class Members would have purchased another whey protein product, if any at all, or would have only paid for the whey protein actually

delivered with the Products, if they would have not been deceived by the misleading labeling of the Products by Defendants.

CLASS ACTION ALLEGATIONS

58. Plaintiffs bring this class action pursuant to Federal Rule of Civil Procedure 23, and case law thereunder on behalf of themselves and all others similarly situated, with the Class and Subclasses defined as follows:

NATIONAL CLASS:

All persons in the United States that purchased the Products at any time during the four years before the date of the filing of this Class Action Complaint to the present.

CALIFORNIA SUBCLASS:

All persons in the State of California that purchased the Products at any time during the four years before the date of the filing of this Class Action Complaint to the present.

FLORIDA SUBCLASS:

All persons in the State of Florida that purchased the Products at any time during the four years before the date of the filing of this Class Action Complaint to the present.

PENNSYLVANIA SUBCLASS:

All persons in the State of Pennsylvania that purchased the Products at any time during the four years before the date of the filing of this Class Action Complaint to the present.

59. Plaintiffs reserve the right to amend the class definitions following further investigation and discovery.

60. Excluded from the Classes are Defendants, any entity in which Defendants have a controlling interest or that have a controlling interest in Defendants, and Defendants' legal representatives, assignees, and successors. Also excluded are the judge to who this case is assigned and any member of the judge's immediate family.

61. Numerosity. The Classes are so numerous that joinder of all members is impracticable. On information and belief, the Classes have more than 10,000 members. Moreover, the disposition of the claims of the Classes in a single action will provide substantial benefits to all parties and the Court.

62. Commonality. There are numerous questions of law and fact common to Plaintiff and members of the Class. These common questions of law and fact include, but are not limited to, the following:

a. Whether the marketing, advertising, packaging, labeling, and other promotional materials for the Products are deceptive;

b. Whether Defendants' actions violate California's law against unfair and deceptive acts or practices, Business and Professions Code §17200, *et seq.*;

c. Whether Defendants' actions violate California's law against false advertising, Business and Professions Code §17500, *et seq.*

d. Whether Defendants' actions violate California's Consumer Legal Protection Act, Civil Code §1750, *et seq.*

e. Whether Defendants' actions violate Florida's Deceptive and Unfair Trade Practices Act (Florida Statutes §§501.201 et seq.)

f. Whether Defendants were unjustly enriched at the expense of the Class Members.

63. Typicality. Plaintiffs' claims are typical of the claims of the Classes. Plaintiffs' claims, like the claims of the Classes, arise out of the same common course of conduct by Defendants and are based on the same legal and remedial theories.

64. Adequacy. Plaintiffs will fairly and adequately protect the interests of the Classes. Plaintiffs have retained competent and capable attorneys with significant experience and complex and class action litigation, including consumer class actions. Plaintiffs and their counsel are committed to prosecuting this action vigorously on behalf of the Classes and have the financial resources to do so. Neither Plaintiffs nor their counsel have interests that are contrary to or that conflict with those of the proposed Classes.

65. Predominance. Defendants have engaged in a common course of conduct toward Plaintiffs and members of the Classes. The common issues arising from this conduct that affect Plaintiff and members of the Classes predominate over any individual issues. Adjudication of these common issues in a single action has important and desirable advantages of judicial economy.

66. Superiority. A class action is the superior method for the fair and efficient adjudication of this controversy. Classwide relief is essential to compel Defendants to keep such adulterated and misbranded products out of the market and to compensate those who have been misled into purchase of the Products. The interest of individual members of the Classes in individually controlling the prosecution of separate claims against Defendants are small because the damages in an individual action are small. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because Defendants acted or failed to act on grounds generally applicable to the Classes. Class treatment is superior to multiple individual suits or piecemeal litigation because it conserves judicial resources, promotes consistency and efficiency of adjudication, provides a forum for small claimants, and deters illegal activities. There will be no significant difficulty in the management of this case as a class action.

67. Injunctive and Declaratory Relief Appropriate. Defendants have acted on grounds generally applicable to the Classes, thereby making final injunctive relief and corresponding declaratory relief with respect to the Classes appropriate on a class wide basis.

CAUSES OF ACTION

COUNT I

Violation of the Consumer Legal Remedies Act

Cal. Civ. Code §1750, *et. seq.*

(On Behalf of California Class Members Represented by Lazaro Rodriguez)

68. Plaintiffs incorporate each preceding paragraph as if fully set forth herein.

69. Plaintiff and each member of the Class is a “Consumer” as that term is defined by Cal. Civ. Code § 1761(d).

70. The Products are a “Good” as that term is defined by Cal. Civ. Code § 1761(a).

71. Defendants are “Persons” as defined by Cal. Civ. Code § 1761(c).

72. The transaction(s) involved here are “Transaction(s)” as defined by Cal. Civ. Code § 1761(e).

73. Plaintiff and members of the Class are Consumers who purchased the Product for personal use within the applicable statute of limitations period.

74. Plaintiff has standing to pursue this cause of action because Plaintiff has suffered injury-in-fact and has lost money or property as a result of Defendants’ actions as set forth here.

75. Plaintiff and Class members purchased the Product in reliance on Defendants’ labeling claims.

76. Defendants have used deceptive representations with respect to the Products in violation of Cal. Civ. Code §1770(a)(4).

77. Defendants have misrepresented the sponsorship, approval, characteristics, or ingredients of the Products in violation of Cal. Civ. Code §1770(a)(5).

78. Defendants have misrepresented the standard, quality, or grade of the Products in violation of Cal. Civ. Code §1770(a)(7).

79. Defendants knew or should have known that their representations of fact are material and likely to mislead consumers.

80. Defendants' practices, acts, and course of conduct in marketing and selling the Products are likely to mislead a reasonable consumer acting reasonably under the circumstances to his or her detriment. Like Plaintiff, members of the Class would not have purchased the Products had they known the true source of protein in the Products.

81. Plaintiff and members of the Class have been directly and proximately damaged by Defendants' actions.

82. In conjunction with filing this Complaint, Plaintiff's Counsel mailed to Defendants, by certified mail, return receipt requested, the written notice required by Civil Code §1782(a). Should Defendants fail to respond within thirty days, Plaintiff will amend to seek damages under the Consumer Legal Remedies Act.

83. Defendants have engaged in, and continue to engage in, business practices in violation of the Consumer Legal Remedies Act, Civ. Code §1750, et seq. by continuing to make false and misleading representations on their labeling of the Products.

84. These business practices are misleading and/or likely to mislead Consumers and should be enjoined.

COUNT II

Violation of False Advertising Law Cal. Bus. & Prof. Code § 17500, et seq.

(On Behalf of California Class Members Represented by Lazaro Rodriguez)

85. Plaintiffs incorporate each preceding paragraph as if fully set forth herein.

86. Plaintiff and the Class have standing to pursue a cause of action for false advertising under Bus. & Prof. Code §17500, et seq. because Plaintiff and members of the Class have suffered an injury-in-fact and lost money as a result of Defendants' actions as set forth herein.

87. Defendants advertised, marketed, and otherwise disseminated misleading information to the public through advertising mediums including the Internet statements regarding the Products.

88. Defendants continue to disseminate such statements.

89. Defendants' statements are misleading.

90. Defendants know that these statements are misleading, or could have discovered their misleading nature with the exercise of reasonable care.

91. Defendants' misleading statements were part of a scheme or plan to sell the Products to the public the true source of the protein published on their product labels and marketing material.

92. Plaintiff and Class members relied on Defendants' marketing, labeling, and other product literature.

93. Defendants' actions violate Cal. Bus. & Prof. Code § 17500, et seq.

94. As a direct and proximate result of Defendants' actions, as set forth herein, Defendants have received ill-gotten gains and/or profits, including but not limited to money from Plaintiff and Class members who paid for the Products. Therefore, Defendants have been unjustly enriched.

95. Plaintiff and Class members seek injunctive relief, restitution, and disgorgement of Defendants' ill-gotten gains as provided for by Cal. Bus. & Prof. Code §17535.

96. Plaintiff and Class members seek injunctive relief to compel Defendants from continuing to engage in these wrongful practices in the future. No other adequate remedy at law exists. If an injunction is not ordered, Plaintiff and Class members will suffer irreparable harm and/or injury.

COUNT III

Violation of the Unfair Competition Act

Cal. Bus. & Prof. Code § 17200, *et seq.*

(On Behalf of California Class Members Represented by Lazaro Rodriguez)

97. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

98. Plaintiff and the Class have standing to pursue a cause of action for false advertising under Bus & Prof. Code §17200, *et seq.* because Plaintiff and members of the Class have suffered an injury-in-fact and lost money as a result of Defendants' actions as set forth herein.

99. Defendants' actions as described herein constitute unfair competition within the meaning of Bus. & Prof. Code §17200, in that Defendants have engaged in unlawful, unfair, or fraudulent business practices by violating the federal FDCA, the federal DSHEA, California's Sherman Food Drug & Cosmetic Act, and California's Consumer Legal Remedies Act.

100. Defendants' actions as described herein constitute unfair competition within the meaning of Bus. & Prof. Code §17200, on the additional grounds that Defendants have failed to properly label the Product in accordance with 21 C.F.R. 101, *et seq.*

101. Defendants' actions also constitute unfair competition within the meaning of Bus. & Prof. Code §17200, in that Defendants have made unfair,

deceptive, untrue or misleading statements in advertising mediums, including the Internet, in violation of Bus. & Prof. Code §17500.

102. Defendants' actions have caused economic injury to Plaintiff and Class members. Plaintiff and Class members would not have purchased the Products had they known the true source of the protein content.

103. Pursuant to Bus. & Prof. Code §17203, Plaintiff and Class members seek an injunction enjoining Defendants from continuing to market, advertise, and sell the Products without first complying with federal and state law and to prevent Defendants from continuing to engage in unfair competition or any other act prohibited by law.

104. Plaintiff and Class members also seek an order requiring Defendants to make full restitution and disgorgement of their ill-gotten gains of all money wrongfully obtained from Plaintiff and Class members as permitted by Bus. & Prof. Code §17203.

COUNT IV

**Violation of the Florida Deceptive and Unfair Trade Practices Act
(Florida Statutes §§501.201 et seq.)**

(On Behalf of Florida Class Members Represented by Jason Mencer)

105. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

106. This action is brought to secure redress for the unlawful, deceptive and unfair trade practices perpetrated by Defendants on behalf of Plaintiff and the Class members.

107. Plaintiff and all Class Members are “consumers” and the transactions at issue in this complaint constitute “trade or commerce” as defined by Florida Statutes § 501.203 (7) and (8) respectively.

108. Florida Statutes § 502.201, et seq. was enacted to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive or unfair acts or practices in the conduct of any trade or commerce.

109. Defendants’ actions, as alleged herein, constitute affirmative acts or representations including: unconscionable commercial practices; deception; fraud; false pretense; false promise; and/or misrepresentation, and therefore are unlawful under the FDUTPA.

110. When a FDUPTA claim is based on an affirmative act or representation, neither intent to deceive by Defendants nor actual reliance by Plaintiff or the Class need be shown.

111. Defendants' actions, as alleged herein, constitute knowing omissions and therefore are unlawful under the FDUTPA.

112. Plaintiff and the Class reasonably and justifiably relied on Defendants' deceptive, unfair, fraudulent, misrepresentations, as alleged herein. Plaintiff and members of the proposed Class and the public were certain to be deceived because Defendants knowingly failed to disclose the source, affiliation, origin, characteristics, ingredients, standards and quality of the Products. Defendants' business practices in its advertising, marketing, packaging, labeling and sales of the Products as unique and superior products justifying substantially higher prices over alternative whey protein dietary supplements, is an unconscionable, unfair, and deceptive act or practice in violation of the FDUPTA.

113. As a direct and proximate cause of Defendants' unlawful acts and omissions, Plaintiff and the Class have suffered an ascertainable loss of money or property, real or personal, in that they would not have purchased the Products but for Defendants' material omissions and affirmative acts or representations in connection with the marketing, advertising, and sale of the Products.

114. Plaintiff and the Class Members are entitled to compensatory damages, equitable and declaratory relief, costs, and reasonable attorney's fees.

COUNT V

Unjust Enrichment

(On Behalf of the National Class and All Subclasses Represented by All Named Plaintiffs)

115. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

116. Plaintiff and Class Members conferred benefits on Defendants by purchasing the Products.

117. Defendants have been unjustly enriched in retaining the revenues derived from Plaintiff's and Class Members' purchase of the Products. Retention of those monies under these circumstances is unjust and inequitable because Defendants' labeling of the Products was misleading to consumers, which caused injuries to Plaintiff and Class Members because they would have not purchased the Products if the true facts would have been known.

118. Because Defendants' retention of the non-gratuitous benefits conferred on them by Plaintiff and Class Members is unjust and inequitable, Defendants must pay restitution to Plaintiff and the Class Members for their unjust enrichment, as ordered by the Court.

RELIEF REQUESTED

Plaintiffs request for the following relief:

- A. Certification of the National Class;
- B. Certification of the proposed California Subclass;

- C. Certification of the proposed Florida Subclass;
- D. Certification of the proposed Pennsylvania Subclass;
- D. Appointment of Plaintiffs as class representatives;
- E. Appointment of the undersigned counsel as counsel for the Classes;
- F. A declaration that Defendants' actions complained of herein violate the State of California and Florida consumer protection statutes.
- G. A declaration that Defendants were Unjustly Enriched.
- H. An order enjoining Defendants from engaging in the unlawful conduct set forth herein;
- I. An award to Plaintiffs and the Classes of restitution and disgorgement as requested by Plaintiffs' second and third causes of action;
- J. An award to Plaintiffs and the Classes of attorneys' fees and costs, as allowed by law and/or equity;
- K. Leave to amend this Complaint to conform to the evidence presented at trial; and
- L. Orders granting such other and further relief as the Court deems necessary, just, and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury for all issues so triable.

DATED: July 1, 2014

By: /s/ Jonathan Shub
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