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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**Ronald Patrick Kline and Yesina
Reyes Abreu, Individually And
On Behalf Of All Others Similarly
Situated,**

Plaintiffs,

v.

**Post Holdings,
Inc.,**

Defendant.

Case No.: '15CV2348 AJB RBB

CLASS ACTION

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

INTRODUCTION

1. The average consumer spends a mere 13 seconds making an in-store purchasing decision, or between 10 to 19 seconds for an online purchase.¹ That decision is heavily dependent on a product's packaging, and particularly the package dimensions: "Most of our studies show that 75 to 80 percent of consumers don't even bother to look at any label information, no less the net weight Faced with a large box and a smaller box, both with the same amount of product inside . . . consumers are apt to choose the larger box because they think it's a better value."² This lawsuit charges Defendant with intentionally packaging its DYMATIZE Protein Products, including its ISO-100, Elite Whey Protein, Elite Casein, Elite Fusion 7, Elite XT, Pursuit RX Recovery Blend, Elite Gourmet, and Pursuit RX Whey Protein (collectively, "Whey Products" or "Products") in large, opaque containers that contain more than 45% empty space. Consumers, in reliance on the size of the containers, paid a premium price for the Products, which they would not have purchased had they known that the containers were substantially empty.
2. Patrick Kline and Yesina Reyes Abreu (hereinafter "Plaintiffs"), individually and on behalf of all others similarly situated, bring this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the unlawful and deceptive actions of Post Holdings, Inc., doing business as Dymatize Nutrition ("Defendant" or "Dymatize"), with respect to the packaging of its Whey Products. Plaintiffs allege as follows upon personal knowledge as to themselves and their own

¹ <http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html> (citing the Ehrenberg-Bass Institute of Marketing Science's report "Shopping Takes Only Seconds...In-Store and Online").

² <http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm> (quoting Brian Wansink, professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).

1 acts and experiences, and, as to all other matters, upon information and belief,
2 including investigation conducted by their attorneys.

3 3. Dymatize sells supplement brands on a nationwide basis, including through
4 retailers such as GNC and the Vitamin Shoppe. Dymatize products are also
5 offered for sale online, including on websites such as gnc.com,
6 bodybuilding.com, amazon.com and vitaminshoppe.com. On the
7 vitaminshoppe.com website, a 3 pound container of Dymatize Nutrition
8 ISO-100 sells for \$61.99. A 5 pound container of Elite Whey sells for \$51.99,
9 and a 4 pound container of Elite XT sells for \$38.99.³

10 4. According to dymatize.com, “Dymatize Nutrition was founded in 1994 and
11 has grown into an industry leader, supplying the highest quality nutritional
12 supplements to millions of fitness enthusiasts and athletes around the world!
13 Dymatize is a world-renowned company spanning across 50+ countries.” In
14 addition, Dymatize claims that it offers “ELITE PROTEINS” that have “THE
15 HIGHEST LEVEL OF PURITY.”⁴

16 5. In addition, Dymatize states that its products are “backed by the Dymatize
17 Nutrition Sports Performance Institute (DNSPI). DNSPI has four main
18 departments: a forwardthinking Research and Development team (R&D), an
19 advisory board consisting of industry experts from around the world, a
20 worldclass university research team, and an elite selection of leading athletes
21 to test the efficiency of our products.”⁵

22 6. Plaintiffs purchased Dymatize Whey Products, and expected to receive full
23 containers of Product. The Whey Products are packaged in non-transparent
24 containers, as depicted below. Plaintiffs were surprised and disappointed

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26 ³ <http://www.vitaminshoppe.com/search?search=dymatize>. Accessed on October 9, 2015.

27 ⁴ <http://www.dymatize.com/proteins>. Accessed on October 9, 2015.

28 ⁵ <http://www.dymatize.com/whydymatize/verified-quality>. Accessed on October 9, 2015.

1 when they opened the Products to discover that the containers had more than
2 45% empty space, or slack-fill. Had Plaintiffs known about the slack-fill at
3 the time of purchase, they would not have bought Defendant's Products.

4 7. Defendant's conduct violates consumer protection and labeling laws.

5 **JURISDICTION AND VENUE**

6 8. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332,
7 because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in
8 which a member of the putative class is a citizen of a different state than
9 Defendant, and the amount in controversy exceeds the sum or value of
10 \$5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

11 9. The Court has jurisdiction over the state law claims because they form part of
12 the same case or controversy under Article III of the United States
13 Constitution.

14 10. The Court has personal jurisdiction over Defendant because its Whey
15 Products are advertised, marketed, distributed and sold through the State of
16 California; Defendant engaged in the wrongdoing alleged in this Complaint
17 throughout the United States, including in the State of California; Defendant
18 is authorized to do business in the State of California; and Defendant has
19 sufficient minimum contacts with the State of California, rendering the
20 exercise of jurisdiction by the Court permissible under traditional notions of
21 fair play and substantial justice. Moreover, Defendant is engaged in
22 substantial activity with the State of California.

23 11. Venue is proper in the United States District Court for the Southern District of
24 California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the
25 events giving rise to the claims occurred within this judicial district,
26 Defendant has marketed and sold the Products at issue in this action in this
27 judicial district, and it conducts business within this judicial district. In
28 addition, Plaintiff Kline resides in this judicial district.

PARTIES

12. Plaintiff Ronald Patrick Kline (“Kline”) is a citizen of the State of California and resides in San Diego, California. Plaintiff Kline purchased a Whey Product for personal consumption during the last four years in San Diego, California. Plaintiff Kline purchased the Product in reliance on Defendant’s packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff Kline known the truth about Defendant’s misrepresentations, he would not have purchased the premium priced Product.
13. Plaintiff Yesina Reyes Abreu (“Abreu”) is a citizen of the State of New York and resides in Haverstraw, New York. Plaintiff Abreu purchased a Whey Product for personal consumption during the last four years in West Nyack, New York. Plaintiff Abreu purchased the Product in reliance on Defendant’s packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff Abreu known the truth about Defendant’s misrepresentations, she would not have purchased the premium priced Product.
14. Defendant Post Holdings, Inc. is headquartered in St. Louis, Missouri, and is the manufacturer and distributor of the Dymatize Nutrition brand and the parent of Dymatize Enterprises LLC. Dymatize Nutrition was acquired by Post in February of 2014.

FACTUAL ALLEGATIONS**Federal and State Laws Prohibit Non-functional Slack Full**

15. The Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §§ 301 *et seq.*, governs the sale of foods, drugs and cosmetics in the United States. The classification of a product as a food, drug, or cosmetic affects the regulations by which the manufacturer must abide. In general, a product is characterized according to its intended use, which may be established, among other ways,

by: (a) claims stated on the product’s labeling, in advertising, on the Internet, or in other promotional materials; (b) consumer perception established through the product’s reputation, for example by asking why the consumer is buying it and what the consumer expects it to do; or (c) the inclusion of ingredients well-known to have therapeutic use, for example fluoride in toothpaste. The Whey Products are characterized and understood by consumers to be a food.

16. Under the FDCA, the term “false” has its usual meaning of untruthful, while the term “misleading” is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire Product is misbranded. No other statement in the labeling cures a misleading statement. “Misleading” is judged in reference to “the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze.” *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

A. Misbranding of Foods

17. The Whey Product labels contain numerous ingredients found in or derived from food, including whey protein, cocoa powder, salt, and sucralose. Certain product labels describe the taste as “delicious” and state that consumers will “look forward to the next shake.”
18. According to mayoclinic.org, milk is made up of two types of proteins – casein and whey. “Whey proteins contain higher levels of essential amino acids. They are used in ice cream, bread, soup, baby formula, and other food products.”⁶ According to webMD.com, whey protein is “the protein

⁶ <http://www.mayoclinic.org/drugs-supplements/whey-protein/background/hrb-20060532>. Accessed on September 18, 2015.

1 contained in whey, the watery portion of milk that separates from the curds
2 when making cheese.”⁷

3 19. Under the Federal Food Drug and Cosmetic Act (“FDCA”), 21 U.S.C. §
4 343(d), a food shall be deemed to be misbranded if “(a) . . . (1) its labeling is
5 false or misleading in any particular”; or “(d) If its container is so made,
6 formed, or filled as to be misleading.”

7 20. Pursuant to 21 C.F.R. §100.100, a food is misbranded if “its container is so
8 made, formed or filled as to be misleading.” In addition, “(a) A container that
9 does not allow the consumer to fully view its contents shall be considered to
10 be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill
11 is the difference between the actual capacity of a container and the volume of
12 product contained therein. Nonfunctional slack-fill is the empty space in a
13 package that is filled to less than its capacity for reasons other than:

14 (1) Protection of the contents of the package;

15 (2) The requirements of the machines used for enclosing the contents in such
16 package;

17 (3) Unavoidable product settling during shipping and handling;

18 (4) The need for the package to perform a specific function (e.g., where
19 packaging plays a role in the preparation or consumption of a food), where
20 such function is inherent to the nature of the food and is clearly
21 communicated to consumers;

22 (5) The fact that the product consists of a food packaged in a reusable
23 container where the container is part of the presentation of the food and has
24 value which is both significant in proportion to the value of the product and
25 independent of its function to hold the food, e.g., a gift product consisting of
26 a food or foods combined with a container that is intended for further use

27
28 ⁷ <http://www.webmd.com/vitamins-supplements/ingredientmono-833-whey%20protein.aspx?activeingredientid=833&activeingredientname=whey%20protein>. Accessed on September 18, 2015.

1 after the food is consumed; or durable commemorative or promotional
 2 packages; or
 3 (6) Inability to increase level of fill or to further reduce the size of the
 4 package”

- 5 21. None of the above safe-harbor provisions applies to the Whey Products.
 6 Defendant intentionally incorporated non-functional slack-fill in its packaging
 7 of the Products in order to mislead consumers, including Plaintiffs and
 8 Members of the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398,
 9 405 (E.D.N.Y. 2010) (“Misleading consumers is not a valid reason to package
 10 a product with slack-fill. *See* 21 C.F.R. § 100.100(a)(1-6).”).
- 11 22. California and New York consumer protection and food labeling laws impose
 12 requirements which mirror the federal law. California Business & Professions
 13 Code states, “[n]o container shall be made, formed, or filled as to be
 14 misleading” and “[a] container that does not allow the consumer to fully view
 15 its contents shall be considered to be filled as to be misleading if it contains
 16 nonfunctional slack fill.” *See* Cal. Bus. & Prof. Code § 12606 (incorporating
 17 the safe harbor provisions of the CFR). *See also* Cal. Health and Safety Code
 18 § 110690 (“Any food is misbranded if its container is so made, formed, or
 19 filled as to be misleading.”); NY AGM. Law § 201 (“Food shall be deemed
 20 to be misbranded If its container is so made, formed, colored or filled as
 21 to be misleading.”).

22 **Defendant’s Products Contain Non Functional Slack-Fill**

- 23 23. Defendant’s Whey Products are sold in non-transparent containers that
 24 contain different net weights. Each of the containers has significant slack-fill,
 25 as described below.
- 26 24. The Dymatize Nutrition ISO 100 container depicted below is roughly 13
 27 inches tall. Up to and not including the space where the interior of the
 28 container narrows and above the indentation where the lid begins,

approximately 46% of the interior of the container is comprised of empty space, or non-functional slack fill. *See* PHOTOS A and B.

PHOTO A



PHOTO B



25. The Elite 100% Whey Protein container is approximately 10 inches tall. Up to and not including the space where the interior of the container narrows and above the indentation where the lid begins, approximately 50% of the interior of the container is comprised of empty space, or non-functional slack fill. *See* PHOTO C.

PHOTO C



26. Judging from the sizes of the containers, a reasonable consumer would expect them to be substantially filled with product. Consumers are misled into believing that they are purchasing substantially more Whey Product than they receive.

27. There is no functional reason for including more than 45% slack-fill in the Whey Products.

- 1 28. On information and belief, consumers have relied upon, and are continuing to
2 rely upon, the size of the Whey Product containers as the basis for making
3 purchasing decisions. Consumers believe that the Whey Products are
4 substantially full because they cannot see the actual contents within the non-
5 transparent container. *See Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d
6 398, 404 (E.D.N.Y. 2010) (finding that a half-filled supplement container
7 could constitute a “misleading representation” that resulted in the unjust
8 enrichment of the manufacturer even though the weight of the product and the
9 number of servings enclosed were clearly listed on the outer packaging).
- 10 29. On information and belief, Defendant is selling and will continue to sell the
11 Whey Products using these blatantly deceptive and misleading slack-filled
12 containers.
- 13 30. Defendant’s packaging and advertising of the Products violates various state
14 laws against misbranding, which contain requirements that mirror the FDCA,
15 as described herein.

16 **Plaintiffs Relied on Defendant’s Misleading and Deceptive Conduct and Were**
17 **Injured as a Result**

- 18 31. The types of misrepresentations made, as described herein, were considered
19 by Plaintiffs and Class Members (as would be considered by a reasonable
20 consumer) when deciding to purchase the Whey Products. Reasonable
21 consumers, including Plaintiffs and Class Members, attached importance to
22 whether Defendant’s Whey Products were misbranded, *i.e.*, not legally
23 salable, or capable of legal possession, and/or contain non-functional slack-
24 fill.
- 25 32. Plaintiffs and the Class Members did not know, and had no reason to know,
26 that the Whey Products contained non-functional slack-fill.
- 27 33. Defendant’s Product packaging was a material factor in Plaintiffs’ and the
28 Class Members’ decisions to purchase the Whey Products. Based on

1 Defendant's Product packaging, Plaintiffs and the Class Members believed
2 that they were getting more Product than was actually being sold. Had
3 Plaintiffs known Defendant's packaging was slack-filled, they would not have
4 bought the slack-filled Products.

5 34. Plaintiffs and the Class Members paid the full price of the Whey Products and
6 received less Product than they expected due to the non-functional slack-fill
7 in the Products.

8 35. There is no practical reason for the non-functional slack-fill used to package
9 the Whey Products other than to mislead consumers as to the actual volume of
10 the Products being purchased by consumers.

11 36. As a result of Defendant's misrepresentations, Plaintiffs and thousands of
12 others throughout the United States purchased the Products. Plaintiffs and the
13 Class (defined below) have been damaged by Defendant's deceptive and
14 unfair conduct.

15 **CLASS ACTION ALLEGATIONS**

16 37. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal
17 Rules of Civil Procedure on behalf of themselves and the following National
18 class and subclasses (collectively, the "Class" or "Classes"), defined as:

19 National Class: All persons in the United States who made retail
20 purchases of Dymatize Whey Products in containers made, formed or
21 filled as to be misleading and with non-functional slack-fill, during the
22 applicable limitations period, and/or such subclasses as the Court may
23 deem appropriate.

24 California Subclass: All California residents who made retail purchases
25 of Dymatize Whey Products in containers made, formed or filled as to be
26 misleading and with non-functional slack-fill, during the applicable
27 limitations period, and/or such subclasses as the Court may deem
28 appropriate.

1 New York Subclass: All New York residents who made retail purchases
2 of Dymatize Whey Products in containers made, formed or filled as to be
3 misleading and with non-functional slack-fill, during the applicable
4 limitations period, and/or such subclasses as the Court may deem
5 appropriate.

6 38. The proposed Classes exclude current and former officers and directors of
7 Defendant, Members of the immediate families of the officers and directors of
8 Defendant, Defendant's legal representatives, heirs, successors, assigns, and
9 any entity in which it has or has had a controlling interest, and the judicial
10 officer to whom this lawsuit is assigned.

11 39. Plaintiffs reserve the right to revise the Class definitions based on facts
12 learned in the course of litigating this matter.

13 40. Numerosity: This action has been brought and may properly be maintained as
14 a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the
15 Federal Rules of Civil Procedure. While the exact number and identities of
16 other Class Members are unknown to Plaintiffs at this time, Plaintiffs are
17 informed and believe that there are hundreds of thousands of Members in the
18 Class. Based on sales of the Products, it is estimated that the Class is
19 composed of more than 10,000 persons. Furthermore, even if subclasses need
20 to be created for these consumers, it is estimated that each subclass would
21 have thousands of Members. The Members of the Class are so numerous that
22 joinder of all Members is impracticable and the disposition of their claims in a
23 class action rather than in individual actions will benefit the parties and the
24 courts.

25 41. Typicality: Plaintiffs' claims are typical of the claims of the Members of the
26 Class as all Members of the Class are similarly affected by Defendant's
27 wrongful conduct, as detailed herein.

28 //

42. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Members of the Class in that they have no interests antagonistic to those of the other Members of the Class. Plaintiffs have retained experienced and competent counsel.

43. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages sustained by individual Class Members may be relatively small, the expense and burden of individual litigation makes it impracticable for the Members of the Class to individually seek redress for the wrongful conduct alleged herein. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action. If Class treatment of these claims were not available, Defendant would likely unfairly receive thousands of dollars or more in improper revenue.

44. Common Questions Predominate: Common questions of law and fact exist as to all Members of the Class and predominate over any questions solely affecting individual Members of the Class. Among the common questions of law and fact applicable to the Class are:

- i. Whether Defendant labeled, packaged, marketed, advertised and/or sold Whey Products to Plaintiffs, and those similarly situated, using false, misleading and/or deceptive packaging and labeling;
- ii. Whether Defendant's actions constitute violations of 21 U.S.C. 100.100, *et. seq.*;
- iii. Whether Defendant's actions constitute violations of state consumer protection laws;

- iv. Whether Defendant omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising and/or sale of its Whey Products;
 - v. Whether Defendant's labeling, packaging, marketing, advertising and/or selling of Whey Products constituted an unfair, unlawful or fraudulent practice;
 - vi. Whether Defendant's packaging of the Whey Products constituted nonfunctional slack-fill;
 - vii. Whether, and to what extent, injunctive relief should be imposed on Defendant to prevent such conduct in the future;
 - viii. Whether the Members of the Class have sustained damages as a result of Defendant's wrongful conduct;
 - ix. The appropriate measure of damages and/or other relief; and
 - x. Whether Defendant should be enjoined from continuing its unlawful practices.
45. The class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class action.
46. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.
47. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Class predominate over any questions affecting only

individual Members; and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

48. The prosecution of separate actions by Members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interest of all Members of the Class, although certain Class Members are not parties to such actions.

49. Defendant's conduct is generally applicable to the Class as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

CAUSES OF ACTION

COUNT I

VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT, Cal. Civ. Code § 1750, *et seq.*

50. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

51. Plaintiffs bring this claim individually and on behalf of the Class for Defendant's violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code 1761(d).

52. Plaintiffs and the Class Members are consumers who purchased the Products for personal, family or household purposes. Plaintiffs and the Class Members are "consumers" as that term is defined by the CLRA in Cal. Civ. Code 1761(d). Plaintiffs and the Class Members are not sophisticated experts with independent knowledge of corporate branding, labeling and packaging practices.

53. The Products that Plaintiffs and other Class Members purchased from Defendant were "goods" within the meaning of Cal. Civ. Code 1761(a).

54. Defendant's actions, representations, and conduct have violated, and continue to violate the CLRA, because they extend to transactions that intended to result, or which have resulted in, the sale of goods to consumers.

55. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and which contain non-functional slack-fill, and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

56. California's Consumers Legal Remedies Act, Cal. Civ. Code 1770(a)(5), prohibits "Misrepresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have." By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5) of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents that the Products have quantities they do not have.

57. Cal. Civ. Code 1770(a)(9) further prohibits "[a]dvertising goods or services with intent not to sell them as advertised." By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(9), because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it advertises goods as containing more product than they in fact contain.

58. Plaintiffs and the Class Members are not sophisticated experts about corporate branding, labeling and packaging practices. Plaintiffs and the Class acted reasonably when they purchased the Products based on their belief that Defendant's representations were true and lawful.

59. Plaintiffs and the Class suffered injuries caused by Defendant because (a) they would not have purchased the Products on the same terms absent Defendant's

1 illegal and misleading conduct as set forth herein; (b) they paid a price
2 premium for the Products due to Defendant's misrepresentations and
3 deceptive packaging in containers made, formed or filled as to be misleading
4 and containing non-functional slack-fill; and (c) the Products did not have the
5 quantities as promised.

6 60. On or about October 15, 2015, prior to filing this action, Plaintiff Kline sent a
7 CLRA notice letter to Defendant which complies with California Civil Code
8 1782(a). Plaintiff Kline sent Post Holdings, Inc., individually and on behalf
9 of the proposed Class, a letter via Certified Mail, advising Defendant that it is
10 in violation of the CLRA and demanding that it cease and desist from such
11 violations and make full restitution by refunding the monies received
12 therefrom. A true and correct copy of the letter is attached hereto as
13 EXHIBIT 1.

14 61. Wherefore, Plaintiffs seek injunctive relief for these violations of the CLRA.

15
16 **COUNT II**
17 **VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW,**
California Business & Professions Code § 17200, et seq.

18 62. Plaintiffs reallege and incorporate herein by reference the allegations
19 contained in all preceding paragraphs, and further allege as follows:

20 63. Plaintiffs bring this claim individually and on behalf of the Members of the
21 Class for Defendant's violations of California's Unfair Competition Law, Cal.
22 Bus. & Prof. Code §§ 17200, et seq.

23 64. The UCL provides, in pertinent part: "Unfair competition shall mean and
24 include unlawful, unfair or fraudulent business practices and unfair,
25 deceptive, untrue or misleading advertising..."

26 65. Defendant violated federal and California law because the Products are
27 packaged in containers made, formed or filled as to be misleading and that
28

1 contain non-functional slack-fill and because they are intentionally packaged
2 to prevent the consumer from being able to fully see their contents.

3 ***A. “Unlawful” Prong***

4 66. Defendant’s business practices, described herein, violated the “unlawful”
5 prong of the UCL by violating Section 352 of the Federal Food, Drug, and
6 Cosmetic Act, 21 U.S.C. 301, the CLRA, Cal. Bus. & Prof. Code § 12606,
7 California Health & Safety Code § 110690, and other applicable law as
8 described herein.

9 67. Defendant violated section 12606 of the Business and Professions Code, in
10 that Defendant packaged its Products in non-conforming type containers.
11 Said non-conforming packages contained extra space by volume in the
12 interior of the container. The extra space provided no benefit to the contents
13 of the packaging and misled consumers. In addition, Defendant packaged its
14 Products in containers made, formed, or filled as to be misleading to a
15 potential customer as to the actual size and filling of the package with
16 Defendant’s Products.

17 ***B. “Unfair” Prong***

18 68. Defendant’s business practices, described herein, violated the “unfair” prong
19 of the UCL in that its conduct is substantially injurious to consumers, offends
20 public policy, and is immoral, unethical, oppressive, and unscrupulous, as the
21 gravity of the conduct outweighs any alleged benefits. Defendant’s
22 advertising is of no benefit to consumers.

23 ***C. “Fraudulent” Prong***

24 69. Defendant violated the “fraudulent” prong of the UCL by misleading
25 Plaintiffs and the Class to believe that the Products contained more content
26 than they actually contain and that such packaging and labeling practices were
27 lawful, true and not intended to deceive or mislead consumers.
28

70. Plaintiffs and the Class Members are not sophisticated experts about the corporate branding, labeling, and packaging practices of the Products. Plaintiffs and the Class acted reasonably when they purchased the Products based on their belief that Defendant's representations were true and lawful.

71. Plaintiffs and the Class lost money or property as a result of Defendant's UCL violations because (a) they would not have purchased the Products on the same terms absent Defendant's illegal conduct as set forth herein, or if the true facts were known concerning Defendant's representations; (b) they paid a price premium for the Products due to Defendant's misrepresentations; and (c) the Products did not have the quantities as represented.

72. The conduct of Defendant as set forth above demonstrates the necessity for granting injunctive relief restraining such and similar acts of unfair competition pursuant to California Business and Professions Code. Unless enjoined and restrained by order of the court, Defendant will retain the ability to, and may engage in, said acts of unfair competition, and misleading advertising. As a result, Plaintiffs and the Class are entitled to injunctive and monetary relief.

COUNT III
VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW,
California Business & Professions Code § 17500, *et seq.*

73. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

74. Plaintiffs bring this claim individually and on behalf of the Members of the Class for Defendant's violations of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*

75. Under the FAL, the State of California makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state . . . in any advertising device . . . or in any other manner or means

1 whatever, including over the Internet, any statement, concerning . . . personal
2 property or services, professional or otherwise, or performance or disposition
3 thereof, which is untrue or misleading and which is known, or which by the
4 exercise of reasonable care should be known, to be untrue or misleading.”

5 76. Defendant engaged in a scheme of offering misbranded Products for sale to
6 Plaintiffs and the Class Members by way of packaging the Products in
7 containers made, formed or filled as to be misleading and which contain non-
8 functional slack-fill. Such practice misrepresented the content and quantity of
9 the misbranded Products. Defendant’s advertisements were made in
10 California and come within the definition of advertising as contained in Bus.
11 & Prof Code §§ 17500, *et seq.* in that the product packaging was intended as
12 inducements to purchase Defendant’s Products. Defendant knew its conduct
13 was unauthorized, inaccurate, and misleading.

14 77. Defendant violated federal and California law because the Products are
15 packaged in containers made, formed or filled as to be misleading and which
16 contain non-functional slack-fill and because they are intentionally packaged
17 to prevent the consumer from being able to fully see their contents.

18 78. Defendant violated 17500, *et seq.* by misleading Plaintiffs and the Class to
19 believe that the Product packaging contains more Whey Product than it in fact
20 contains, as described herein.

21 79. Defendant knew or should have known, through the exercise of reasonable
22 care that the Products were and continue to be misbranded, and that its
23 representations about the quantities of the Products were untrue and
24 misleading.

25 80. Plaintiffs and the Class Members lost money or property as a result of
26 Defendant’s FAL violations because (a) they would not have purchased the
27 Products on the same terms absent Defendant’s illegal conduct as set forth
28 herein, or if the true facts were known concerning Defendant’s

1 representations; (b) they paid a price premium for the Products due to
2 Defendant's misrepresentations; and (c) the Products did not have the benefits,
3 or quantities as promised, and as a result the class is entitled to monetary and
4 injunctive relief.

5
6 **COUNT IV**
7 **VIOLATION OF NEW YORK DECEPTIVE TRADE PRACTICES ACT**
8 **NEW YORK GENERAL BUSINESS LAW § 349**

8 81. Plaintiffs reallege and incorporate herein by reference the allegations
9 contained in all preceding paragraphs, and further allege as follows:

10 82. Plaintiffs bring this claim individually and on behalf of the Members of the
11 Class for Defendant's violations of New York's Deceptive Acts or Practices
12 Law, NY GBL § 349.

13 83. NY GBL § 349 states that "deceptive acts or practices in the conduct of any
14 business, trade or commerce or in the furnishing of any service in this state
15 are ... unlawful."

16 84. It is not necessary to prove justifiable reliance under NY GBL § 349. *See*
17 *Koch v. Acker, Merrall & Condit. Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div.
18 2012) ("To the extent that the Appellate Division order imposed a reliance
19 requirement on General Business law 349 . . . claims, it was error. Justifiable
20 reliance by the plaintiff is not an element of the statutory claim.") (internal
21 citations omitted).

22 85. Defendant engaged in deceptive acts and practices by offering misbranded
23 Products for sale in trade or commerce to Plaintiffs and the Class Members by
24 way of packaging the Products in containers made, formed or filled as to be
25 misleading and which contain non-functional slack-fill. Such practices were
26 in violation of NY GBL § 349 and 21 C.F.R. 100.100.

27 86. Defendant violated federal and New York law because the Products are
28 packaged in containers made, formed or filled as to be misleading and which

1 contain non-functional slack-fill and because they are intentionally packaged
2 to prevent consumers from being able to fully see their contents.

3 87. The foregoing deceptive acts and practices were directed at consumers.

4 88. Plaintiffs and the Class Members lost money or property as a result of
5 Defendant's violations of NY GBL § 349 because (a) they would not have
6 purchased the Products on the same terms absent Defendant's illegal conduct
7 as set forth herein, or if the true facts were known concerning Defendant's
8 representations; (b) they paid a price premium for the Products due to
9 Defendant's misrepresentations; and (c) the Products did not have the benefits,
10 or quantities as promised, and as a result the class is entitled to monetary and
11 injunctive relief.

12
13 **COUNT V**
14 **NEGLIGENT MISREPRESENTATION**

15 89. Plaintiffs repeat and realleges each and every allegation contained above as if
16 fully set forth herein, and further allege as follows:

17 90. Defendant, directly or through its agents and employees, made false
18 representations, concealments and non disclosures to Plaintiffs and Members
19 of the Class.

20 91. Defendant as the manufacturer, packager, labeler and initial seller of the
21 Products purchased by Plaintiffs and Class Members had a duty to disclose
22 the true quantity of the Products and to refrain from selling them in containers
23 made, formed or filled as to be misleading and which contain non-functional
24 slack-fill. Defendant had exclusive knowledge of material facts not known or
25 reasonably accessible to Plaintiffs and Class Members; Defendant actively
26 concealed material facts from Plaintiffs and Class Members and Defendant
27 made partial representations that are misleading because some other material
28 fact has not been disclosed. Defendant's failure to disclose the information it
had a duty to disclose constitutes material misrepresentations and materially

1 misleading omissions which misled Plaintiffs and Class Members, who relied
2 on Defendant in this regard to disclose all material facts accurately, truthfully
3 and fully.

4 92. Plaintiffs and Members of the Class reasonably relied on Defendant's
5 representation that the Products contain more Whey Product than actually
6 packaged.

7 93. In making the representations of fact to Plaintiffs and Members of the Class
8 described herein, Defendant has failed to fulfill its duties to disclose the
9 material facts set forth above. The direct and proximate cause of this failure
10 to disclose was Defendant's negligence and carelessness.

11 94. Defendant, in making the misrepresentations and omissions, and in engaging
12 in the acts alleged above, knew or reasonably should have known that the
13 representations were not true. Defendant made and intended the
14 misrepresentations to induce the reliance of Plaintiffs and Members of the
15 Class.

16 95. As the manufacturer of its Products, Defendant is in the unique position of
17 being able to provide accurate information about those Products. Therefore
18 there is a special and privity-like relationship between Defendant and
19 Plaintiffs and other consumers.

20 96. Defendant has a duty to correct the misinformation it disseminated through its
21 advertising of the Products. By not informing Plaintiffs and Members of the
22 Class, Defendant breached its duty. Defendant also gained financially from
23 and as a result of this breach.

24 97. By and through such deceit, misrepresentations and/or omissions, Defendant
25 intended to induce Plaintiffs and Members of the Class to alter their position
26 to their detriment. Plaintiffs and Members of the Class relied upon these false
27 representations when purchasing Whey Products in over-sized containers,
28 which reliance was justified and reasonably foreseeable.

- 1 98. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs
2 and Members of the Class have suffered and continue to suffer economic
3 losses and other general and specific damages, including but not limited to the
4 amounts paid for Whey Products, and any interest that would have been
5 accrued on those monies, all in an amount to be determined according to
6 proof at time of trial.
- 7 99. Defendant acted with intent to defraud, or with reckless or negligent disregard
8 of the rights of Plaintiffs and Members of the Class.
- 9 100. Plaintiffs and Members of the Class are entitled to relief in an amount to be
10 proven at trial, and injunctive relief.

11
12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs pray for relief and judgment as follows:

- 14 (A) For an Order certifying the Class pursuant to Federal Rule of Civil Procedure
15 23, appointing Plaintiffs as class representatives, and designating Plaintiffs'
16 counsel as counsel for the Class;
- 17 (B) For an Order certifying the California Subclass, appointing Plaintiff Kline
18 representative of the California Subclass, and designating his counsel as
19 counsel for the California Subclass;
- 20 (C) For an Order certifying the New York Subclass, appointing Plaintiff Abreu
21 representative of the New York Subclass, and designating her counsel as
22 counsel for the New York Subclass;
- 23 (D) For an Order declaring that Defendant's conduct violated the CLRA, Cal.
24 Civ. Code § 1750, *et seq.*, and awarding (i) injunctive relief, (ii) costs of suit,
25 and (iii) reasonable attorneys' fees;
- 26 (E) For an Order declaring that Defendant's conduct violated California's Unfair
27 Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, and California's
28 False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.*, and

- 1 awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post
2 judgment interest; (iv) exemplary and/or punitive damages pursuant to Cal.
3 Civ. Code § 3294, (v) costs of suit, and (iv) reasonable attorneys' fees
4 pursuant to, *inter alia*, Cal. Code of Civ. Proc § 1021.5;
- 5 (F) For an Order declaring that Defendant's conduct violated New York Gen Bus
6 Law § 349, and awarding (i) injunctive relief, (ii) actual damages, (iii)
7 prejudgment and post judgment interest, and (iv) reasonable attorneys' fees;
- 8 (G) For an Order finding that Defendant made Negligent Misrepresentations, and
9 awarding special, general, and compensatory damages to Plaintiffs and the
10 Class;
- 11 (H) For compensatory damages in amounts to be determined by the Court and/or
12 jury;
- 13 (I) For prejudgment interest on all amounts awarded;
- 14 (J) For an order of restitution and all other forms of equitable monetary relief, as
15 pleaded;
- 16 (K) For injunctive relief as pleaded or as the Court may deem proper;
- 17 (L) For an Order awarding Plaintiffs and the Class their reasonable attorneys'
18 fees and expenses and costs of suit as pleaded; and
- 19 (M) For such other and further relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

20 Plaintiffs, individually and on behalf of all others similarly situated, hereby
21 demand a jury trial on all claims so triable.

22 Dated: October 16, 2015

23 Respectfully submitted,

24 **KAZEROUNI LAW GROUP, APC**

25 By: /s/ Abbas Kazerounian
26 Abbas Kazerounian
27 ATTORNEY FOR PLAINTIFFS
28

GOTTLIEB & ASSOCIATES

Jeffrey M. Gottlieb, Esq. (JG-7905)

Dana L. Gottlieb, Esq. (DG-6151)

Pro hac vice to be filed

150 East 18th Street

Suite PHR

New York, NY 10003

NYJG@aol.com

danalgottlieb@aol.com

Telephone: (212) 228-9795

Facsimile: (212) 982-6284

CIVIL COVER SHEET

15CV2348 AJB RBB

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Ronald Patrick Kline and Yesina Reyes Abreu, Individually And On Behalf Of All Others Similarly Situated,

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Abbas Kazerounian, Esq. (SBN: 249203)

Kazerouni Law Group, APC

245 Fischer Avenue, Suite D1, Costa Mesa, CA 92626 (800) 400-6808

DEFENDANTS

Post Holdings, Inc.

County of Residence of First Listed Defendant _____

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 740 Railway Labor Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Employee Retirement Income Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 375 False Claims Act ☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☒ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education PRISONER PETITIONS Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 1332

Brief description of cause:

Violations of Cal. Civ. Code § 1750, et seq; Cal. Bus. & Prof. Code §§ 17200, et seq, and §§17500, et seq,

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

5,000,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND:

☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

10/16/2015

SIGNATURE OF ATTORNEY OF RECORD

s/Abbas Kazerounian

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

PLAINTIFFS' EXHIBIT A

Plaintiff CLRA Letter to Post Holdings, Inc. Dated
10/15/2015

In The Case Of

Ronald Patrick Kline and Yesina Reyes Abreu, et al

v.

Post Holdings, Inc.

KAZEROUNI LAW GROUP, APC

245 Fischer Ave
Suite D1
Costa Mesa, CA 92626

Telephone: (800) 400-6808
Facsimile: (800) 520-5523

Consumer Attorneys

www.kazlg.com

October 15, 2015

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Mohammad Kazerooni, Esq. – Partner (CA)
Assal Assassi, Esq. – Partner (CA)
Matthew Loker, Esq. – Managing Associate (CA)
Jason Ibey, Esq. – Associate (CA)
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Mona Amini, Esq. – Associate (CA)
Danny Horen, Esq. – Managing Associate (NV)
Matthew Kennedy, Esq. – Managing Associate (TX)
Ryan McBride, Esq. – Managing Associate (AZ)

Masih Kazerooni, Esq. – Of Counsel (CA)
Joshua Swigart, Esq. – Of Counsel (CA, DC)
Robert Hyde, Esq. – Of Counsel (CA, MN)
Andrei Armas, Esq. – Of Counsel (CA)
Naomi Spector, Esq. – Of Counsel (CA)

SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Post Holdings, Inc., doing business in California as Post Foods
c/o Corporate Creations Network Inc. (Agent for service)
1430 Truxtun Avenue, 5th Floor
Bakersfield, CA 93301

RE: Demand Letter Pursuant to California Civil Code § 1782

Dear Sir or Madam:

This letter serves as notice and demand for corrective action by Post Holdings, Inc., doing business as Dymatize Nutrition (“Dymatize”), pursuant to the Consumers Legal Remedies Act, California Civil Code § 1782 (“CLRA”). This letter is sent on behalf of our client, Ronald Patrick Kline,¹ a purchaser of Dymatize Whey Products in the state of California, and all other persons similarly situated. We hereby demand that you take immediate corrective action within thirty (30) days as further described below.

Dymatize’s Protein Products, including its ISO-100, Elite Whey Protein, Elite Casein, Elite Fusion 7, Elite XT, Pursuit RX Recovery Blend, Elite Gourmet, and Pursuit RX Whey Protein (collectively, “Whey Products” or “Products”) are packaged in large, opaque containers that contain significant empty space, or “slack fill.” Consumers, in reliance on the size of the containers, paid a premium price for the Products, which they would not have purchased had they known about the significant slack fill. Among other things, the Dymatize Products are misbranded under federal and state law. Dymatize intentionally packed its Products in non-transparent containers with non-functional slack-fill in order to mislead consumers.

The above-described representations are false and misleading and constitute unlawful, unfair, or fraudulent acts or practices and unfair methods of competition in violation of the CLRA, including but not limited to §§ 1770(a)(5) and (9). The representations also

¹ This firm represents Mr. Kline. Please refrain from contacting Mr. Kline directly. Please direct any and all communications to this office.

Demand Letter Pursuant to California Civil Code § 1782
Post Holdings, Inc.

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Costa Mesa, CA 92626

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Naomi Spector, Esq. – Of Counsel (CA)

violate California's Unfair Competition Law and False Advertising Law, California Business & Professions Code §§ 17200, *et seq.*, and 17500, *et seq.* Dymatize has and continues to mislead consumers into believing that the Whey Product Containers are full, when in fact they contain substantial slack-fill. These misrepresentations allow Dymatize to increase its sales, charge a premium price for its product, and capture market share from its competitors.

If our client had known about the slack-fill contained in Dymatize's Whey Product, he would not have purchased the Product. Our client is a citizen of the State of California and is a consumer as defined in California Civil Code § 1761(d) because he purchased Dymatize Whey Product for personal, family, or household purposes. Our client relied on the size of the Dymatize Whey Product container in purchasing that Product. As a result, our client suffered loss of money.

We hereby demand on behalf of our client and all other similarly situated that Dymatize immediately: (1) cease and desist from continued sale of all Dymatize Whey Products containing slack-fill; (2) initiate corrective action; and (3) offer to refund the purchase price of all misrepresented Dymatize Whey Products purchased by our client, plus reimbursement for interest. Please comply with this demand within thirty (30) days from receipt of this letter. Additionally, this letter also serves as notice to Dymatize of its duty to preserve and retain all documents, tangible items, and electronically stored information that is potentially relevant to this matter.

Demand Letter Pursuant to California Civil Code § 1782
Post Holdings, Inc.

CALIFORNIA – NEVADA – TEXAS – ARIZONA

KAZEROUNI LAW GROUP, APC

245 Fischer Ave
Suite D1
Costa Mesa, CA 92626

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Robert Hyde, Esq. – Of Counsel (CA, MN)
Andrei Armas, Esq. – Of Counsel (CA)
Naomi Spector, Esq. – Of Counsel (CA)

If Post Holdings, Inc. wishes to enter into discussions to resolve the demands asserted in this letter, please contact me immediately. Your cooperation in this matter would be greatly appreciated.

Yours truly,

/s/ Abbas Kazerounian

Abbas Kazerounian, Esq.
Direct Line: 800-400-6808 Ext: 2
Email: ak@kazlg.com

cc: Joshua B. Swigart, Esq.

Demand Letter Pursuant to California Civil Code § 1782
Post Holdings, Inc.

CALIFORNIA – NEVADA – TEXAS – ARIZONA