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11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

13 CHERYL FERNANDEZ, individually)  
14 and on behalf of all others )  
15 similarly situated, )

15 Plaintiffs, )

16 v. )

17 ATKINS NUTRITIONALS, INC., )  
18 and )  
19 DOES 1-10; )

20 Defendants. )  
21 \_\_\_\_\_ )

Case No. 3:17-CV-01628-GPC-WVG

**FIRST AMENDED**  
**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

22 Plaintiff Cheryl Fernandez, individually and on behalf of all other similarly  
23 situated individuals, by and through her counsel, brings this First Amended  
24

1 Complaint against Defendants Atkins Nutritionals, Inc., and Doe Defendants 1-10,  
2 for damages arising out of the purchase of Defendants’ purported diet products that  
3 claimed in “Net Carbs” representations that sugar alcohols have no impact on  
4 blood sugar. In support of her Complaint, Plaintiff respectfully submits and alleges  
5 the following:

6 **NATURE OF THE CASE**

7 1. This case concerns the labeling used by Atkins Nutritionals, Inc. when  
8 it touts its products as having low “Net Carbs” even though the products contain  
9 sugar alcohols.

10 2. When it calculates “Net Carbs” for labeling purposes, Atkins subtracts  
11 all carbohydrates associated with sugar alcohols from its calculation. Atkins’  
12 formula is based on its claim that sugar alcohols minimally impact blood sugar.  
13 This, however, is false, and even Atkins has characterized the term “Net Carbs” as  
14 “imprecise.”

15 3. Simply put, Atkins’ claim that sugar alcohols, particularly maltitol,  
16 minimally impact blood sugar and thus should not be included in a consumer’s  
17 carbohydrate count is wrong, meaning that the labeling and representations  
18 regarding Net Carbs also are wrong. Atkins affirmatively misrepresents and  
19 conceals these facts from consumers in violation of California law.

20 4. Plaintiff brings this suit on her own behalf, and on behalf of other  
21 affected purchasers in California, to obtain all remuneration available under the  
22 law.

1 **PARTIES**

2 5. Plaintiff Cheryl Fernandez is a resident of San Diego County,  
3 California.

4 6. Defendant Atkins is a Colorado corporation with headquarters located  
5 at 1050 17<sup>th</sup> Street, Ste. 1000, Denver, Colorado 80265-1001.

6 7. The true names and capacities, whether individual, corporate,  
7 associate, or otherwise, of Doe Defendants 1 through 10, inclusive, are unknown to  
8 Plaintiff at this time, and Plaintiff therefore sues these Defendants by such  
9 fictitious names. When Plaintiff ascertains the true names and capacities of these  
10 Defendants, Plaintiff will seek leave to amend this complaint accordingly. Plaintiff  
11 is informed and believes and thereon alleges that each defendant designated herein  
12 as a Doe is: (a) either a resident of California or does business in California of such  
13 nature and/or quantity as to render such defendant subject to jurisdiction in  
14 California in this case, and (b) responsible, in some actionable manner, for the  
15 events and happenings hereinafter referred to, and has proximately caused injuries  
16 and damages to Plaintiff, as hereinafter alleged.

17 **JURISDICTION AND VENUE**

18 8. The United States District Court for the Southern District of  
19 California has jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. §  
20 1332(d). The aggregated claims of the individual class members exceed the sum  
21 value of \$5,000,000, exclusive of interest and costs, and this is a class action in  
22 which more than two-thirds of the proposed plaintiff class are citizens of  
23 California, and Defendant Atkins is a citizen of Colorado.



1 use to replace conventional sugars were not approved for use in the Atkins Diet.  
2 Dr. Atkins wrote, “Sweeteners such as sorbitol, mannitol, and other hexitols [i.e.,  
3 sugar alcohols] are not allowed.” See Robert C. Atkins, M.D., *Dr. Atkins’ New*  
4 *Diet Revolution* (Rev.) at p. 100 (1999).

5 15. In 2002, Dr. Atkins revised this prohibition. He stated, “certain sugar  
6 alcohols such as maltitol do not affect blood sugar and are acceptable.” Robert C.  
7 Atkins, M.D., *Dr. Atkins’ New Diet Revolution* (3rd ed.) at p. 112 (2002).

8 16. What changed? Between 1999 and 2002, Atkins established a growing  
9 line of food products that included sugar alcohols.

10 **Atkins’ Specific Claims on “Net Carbs”**

11 17. Atkins’ website at [www.atkins.com](http://www.atkins.com) explains its definition of “Net  
12 Carbs” as “the total carbohydrate content of the food minus the fiber content and  
13 sugar alcohols.” It further claims, “The Net Carbs number reflects the grams of  
14 carbohydrate the significantly impact your blood sugar level and therefore are the  
15 only carbs you need to count when you do Atkins.”

16 18. Atkins claims its “Net Carb” calculation is based on “science.”

17 19. Atkins further claims:

18  
19 Net Carbs are the carbohydrates that significantly impact the blood-sugar  
20 level; they’re the only carbs that count when following Atkins. The good  
21 news is that the grams of carbohydrate in fiber, glycerine, and sugar alcohols  
22 don’t break down and convert to blood sugar and need not be counted by  
23  
24

1 people on the ANA. ... So Net Carbs represent the number of grams of total  
2 carbohydrate minus those that do not impact blood sugar.<sup>1</sup>

3 20. Atkins manufactures, distributes, markets, advertises, and sells  
4 products containing sugar alcohols as replacements for ordinary carbohydrates.

5 21. Maltitol is the sugar alcohol of Atkins' choice. For example, it is (or  
6 has been)<sup>2</sup> a leading ingredient in the following Atkins' products: (a) Blueberry  
7 Greek Yogurt Bar; (b) Chocolate Peanut Butter Pretzel Bar; (c) Strawberry  
8 Almond Bar; (d) Cinnamon Bun Bar; (e) Chocolate Chip Granola Bar; (f)  
9 Chocolate Peanut Butter Bar; (g) Cookies n' Crème Bar; (h) Mudslide Bar; (i)  
10 Chocolate Chip Cookie Dough Bar; (j) Triple Chocolate Bar; (k) Caramel  
11 Chocolate Peanut Nougat Bar; (l) Caramel Double Chocolate Crunch Bar; (m)  
12 Cashew Trail Mix Bar; (n) Coconut Almond Delight Bar; (o) Dark Chocolate  
13 Almond Coconut Crunch Bar; (p) Caramel Chocolate Nut Roll; (q) Dark Chocolate  
14 Decadence Bar; (r) Chocolate Chip Crisp Bar; (s) Chocolate Hazelnut Bar; (t)  
15 Chocolate Oatmeal Fiber Bar; (u) Cranberry Almond Bar; (v) Chocolate Covered  
16 Almonds; (w) Chocolate Candies; (x) Chocolate Peanut Candies; (y) Caramel Nut  
17 Chew Bar; (z) Chocolate Caramel Mousse Bar; (aa) Chocolate Coconut Bar; (bb)  
18 Nutty Fudge Brownie; (cc) Peanut Butter Cups; and (dd) Peanut Caramel Cluster  
19 Bar.

20 \_\_\_\_\_  
21 <sup>1</sup> See <http://www.atkins.com/Science/Articles---Library/Carbohydrates/The-Blood-Sugar-Roller-Coaster--Excess-Carbs,-Exce.aspx>

22 <sup>2</sup> Defendants began removing maltitol from products after the commencement of litigation.  
23

1           22. The Atkins “Net Carb” formula subtracts all grams of sugar alcohol  
2 from carbohydrates. For example, its “Chocolate Candies” product claims to have  
3 “1g Net Carb.”



13  
14 ///

15 ///

16 ///

23. The ingredients panel for Atkins' Chocolate Candies reveals the following:

<b>Nutrition Facts</b>	
Serving Size 1 pack (28g)	
<b>Amount Per Serving</b>	
<b>Calories</b> 110	<b>Fat Cal.</b> 60
<b>% Daily Value*</b>	
<b>Total Fat</b> 7g	<b>11%</b>
Saturated Fat 4.5g	<b>23%</b>
Trans Fat 0g	
<b>Cholesterol</b> <5mg	<b>1%</b>
<b>Sodium</b> 5mg	<b>0%</b>
<b>Potassium</b> 60mg	<b>2%</b>
<b>Total Carbohydrate</b> 19g	<b>6%</b>
Dietary Fiber 4g	<b>16%</b>
Sugars 1g	
Sugar Alcohols 14g	
<b>Protein</b> 1g	<b>1%</b>
Vitamin A 0%	Vitamin C 0%
Calcium 2%	Iron 2%

INGREDIENTS: CHOCOLATE COATING (MALTITOL, COCOA BUTTER, INULIN, UNSWEETENED CHOCOLATE, WHOLE MILK POWDER, MILK FAT, COCOA POWDER (PROCESSED WITH ALKALI), SOY LECITHIN, VANILLA, NATURAL FLAVORS, SUCRALOSE), MALTITOL, LESS THAN 1% OF PURE VANILLA EXTRACT, CONFECTIONER'S GLAZE, CARNAUBA WAX, BEESWAX, TITANIUM DIOXIDE COLOR, YELLOW 5 LAKE, RED 40 LAKE, BLUE 1 LAKE, BLUE 2 LAKE, YELLOW 6 LAKE, YELLOW 6, GUM ARABIC. FR01  
**CONTAINS MILK AND SOY.**  
**THIS PRODUCT IS MANUFACTURED IN A FACILITY THAT USES PEANUTS, OTHER TREE NUTS AND WHEAT.**

★ Sugar Alcohols total includes 0g of glycerin.

24. Thus, Atkins starts with 19g of total carbs then subtracts 4g of Dietary Fiber and 14g of Sugar Alcohols to arrive at a Net Carbs claim of 1 gram. The ingredient list reveals "maltitol" is the most significant ingredient of the product.

25. By this calculation, Atkins assigns a carbohydrate value of zero to maltitol and any other sugar alcohols for this product.

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1           26. On the same product, Atkins also includes the following text box on  
2 the product's packaging:



11           27. An identical or substantially similar claim appears on the back of  
12 every Atkins' product identified in paragraph 21.

13           28. But, as described below, sugar alcohols do impact blood sugar more  
14 than a minimal amount, and Atkins' "Net Carb" count does *not* assist consumers  
15 with tracking carbohydrates that impact blood sugar because it omits sugar  
16 alcohols from its equation.

17           29. Further, this claim conflicts with the diet espoused by Dr. Atkins in  
18 his books. Indeed, Dr. Atkins stated that to arrive at net carbs, an individual should  
19 subtract only carbohydrates associated with fiber. He stated: "Basically, you can  
20 deduct the grams of fiber from the food's total carb count. I call the net number of  
21 grams, 'The carbs that count when you do Atkins.'" Robert C. Atkins, M.D., *Dr.*  
22 *Atkins' New Diet Revolution* (3rd ed.) at p. 68 (2002). He further elaborated, "And  
23

1 determining which carbs count is simple: Check the total fiber grams listed on the  
2 food label and subtract that number from the total grams of carbohydrate listed.”  
3 *Id.* at p. 69. Thus, even Dr. Atkins uses a different carbohydrate calculation than  
4 that used by Atkins in its labeling.

5 30. Atkins does not disclose the conflict between Dr. Atkins’ espoused  
6 method of calculating “Net Carbs” and the method used by the company.

7 **Sugar Alcohols Retain Significant Energy Value**

8 31. Contrary to Atkins’ claims, the authoritative scientific research on  
9 sugar alcohols, particularly maltitol, shows that they continue to have a significant  
10 impact on blood sugar levels.

11 32. The Diabetes Teaching Center at the University of California, San  
12 Francisco puts it best, “[D]on’t be fooled – sugar alcohols are still a form of  
13 carbohydrate, and they still affect your blood sugar levels, if not as dramatically.”<sup>3</sup>

14 33. Similarly, Dr. Regina Castro of the Mayo Clinic warns consumers  
15 should “be cautious with sugar alcohols” because they “can increase your blood  
16 sugar level.”<sup>4</sup>

17 34. Upon information and belief, no independent scientist, doctor, or  
18 researcher agrees with Atkins’ assertion that maltitol and other sugar alcohols have

19 \_\_\_\_\_  
20 <sup>3</sup> See <http://dtc.ucsf.edu/living-with-diabetes/diet-and-nutrition/understanding-carbohydrates/counting-carbohydrates/learning-to-read-labels/counting-sugar-alcohols/>.

21 <sup>4</sup> See <http://www.mayoclinic.org/diseases-conditions/diabetes/expert-answers/artificial-sweeteners/faq-20058038>.  
22

1 a net energy value of zero. Atkins conceals this fact from consumers, and does not  
2 disclose this fact in its labeling or representations to consumers.

3 35. In the study “Sugar Alcohols and Diabetes: A Review,”<sup>5</sup> Dr. Thomas  
4 Wolever explained:

5 Some people may believe that products sweetened with sugar alcohols allow  
6 for more variety in food choices, and, hence, increased quality of life for  
7 people with diabetes. However, there is *no evidence* that sugar alcohol-  
8 sweetened products have any benefit on long-term glycemic control in  
9 people with diabetes.

9 ...

10 The rationale behind the use of sugar-alcohol sweetened products for weight  
11 management is that they reduce both the energy and sugar contents of  
12 confectionary. However, the reduction in energy content is not large[.] ...  
13 Most sugar alcohols have an energy content 1.0 to 2.0 kcal/g less than  
14 sucrose or other carbohydrates, and since tolerance for sugar alcohol intake  
is limited, their impact on overall energy balance is likely to be, at most,  
approximately 20 to 40 kcal/day.

15 Thomas Wolever, M.D. Ph.D., “Sugar Alcohol and Diabetes: A Review,”  
Canadian Journal of Diabetes 2002; 26(4): 356-362.

16 36. Ordinary carbs have an energy value of approximately four calories  
17 per gram.

18 37. Maltitol has an energy value of approximately three calories per gram,  
19 25 percent less than the energy value of an ordinary carb.<sup>6</sup>

20 \_\_\_\_\_  
21 <sup>5</sup> See <http://archive.diabetes.ca/files/SugarAlcohols--Wolever--CJDDecember2002.pdf>.

22 <sup>6</sup> See <http://www.inspection.gc.ca/food/labelling/food-labelling-for-industry/nutrition-labelling/elements-within-the-nutrition-facts-table/eng/1389206763218/1389206811747?chap=1>.

1 38. Dr. Wolever found that 50 to 75 percent of maltitol is absorbed into  
2 the body.

3 39. By multiplying the energy value by the percent of the sugar alcohol  
4 absorbed by the body, one can arrive at the carb value of a sugar alcohol relative to  
5 an ordinary carbohydrate. Thus, total carbohydrate energy consumed per gram of  
6 maltitol is actually between 38 to 56 percent of the carbohydrate value of table  
7 sugar or ordinary carbohydrates.

8 40. Thus, according to this scientifically-accurate calculation, the true  
9 “Net Carbs” in Atkins’ “Chocolate Candies” product would be between 6.32 and  
10 8.84 grams instead of the 1 gram claimed by Atkins. Accordingly, just as one  
11 example, the “Chocolate Candies” product has a “Net Carb” value of between 632  
12 to 884 percent times as high as that claimed by Atkins.

13 41. According to the Diabetes Teaching Center at the University of  
14 California, San Francisco, “When counting carbohydrates for products made with  
15 sugar alcohols, [one should] subtract half of the grams of sugar alcohol listed on  
16 the food label from the total grams of carbohydrate.”<sup>7</sup>

17 42. Thus, experts agree: carbohydrates derived from sugar alcohols (1)  
18 impact blood sugar, and (2) should be included in a carbohydrate count for  
19 products.

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21 <sup>7</sup> See [http://www.diabetes.org/food-and-fitness/food/what-can-i-eat/understanding-](http://www.diabetes.org/food-and-fitness/food/what-can-i-eat/understanding-carbohydrates/sugar-alcohols.html)  
22 [carbohydrates/sugar-alcohols.html](http://www.diabetes.org/food-and-fitness/food/what-can-i-eat/understanding-carbohydrates/sugar-alcohols.html).

1           43. But Atkins conceals the fact that sugar alcohols impact blood sugar  
2 from consumers and affirmatively misrepresents the opposite – that sugar alcohols  
3 have only a “minimal” impact on blood sugar.

4   **The Term “Net Carbs” is Misleading**

5           44. The FDA has not regulated the phrase “Net Carb” but has  
6 affirmatively stated that it “ha[s] concerns that [the] term may be misleading to  
7 consumers.”<sup>8</sup>

8           45. The FDA admonished a different company for failing to include  
9 maltitol in its carbohydrate count on its label. In a June 20, 2001, letter concerning  
10 the product Carbolite, the FDA stated:

11                   The product is further misbranded because the label bears the  
12 claim “Zero Carbohydrate” and the statement “Maltitol . . . has  
13 been omitted from the total carbohydrate content . . .” Maltitol  
14 is a carbohydrate and must be included in the value declared for  
“Total Carbohydrate” . . .

15           *See* Food and Drug Administration Warning Letter ONPLDS 20-01 (June 20,  
16 2001).

17           46. Though the FDA does not formally regulate use of the phrase “Net  
18 Carb,” its Canadian counterpart has found that the phrase is “not acceptable due to  
19  
20

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21  
22           <sup>8</sup>       *See*  
<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2014/ucm407036.htm>.

1 lack of scientific consensus on ... definition and [its] potential to mislead  
2 consumers.”<sup>9</sup>

3 47. In another study, Dr. Wolever articulated the same concerns. He  
4 wrote, “Food labels of products containing sugar alcohols can be confusing.”  
5 Thomas Wolever, M.D. Ph.D., “Sugar Alcohol and Diabetes: A Review,”  
6 Canadian Journal of Diabetes 2002; 26(4): 356-362 at 360 (2002). He elaborated  
7 that “individuals who use product labels to count carbohydrates could potentially  
8 overestimate the amount of insulin to use for a carbohydrate load. Complicating  
9 this issue is a lack of consistent labelling, both nationally and internationally, for  
10 products containing sugar alcohols.” *Id.* at 361.

11 48. In 2004, Dr. Wolever told the New York Times, “It’s a big  
12 misconception to say maltitol does not raise blood sugar.” Instead, he explained,  
13 “Sugar alcohols have come on the market quite aggressively and it’s very  
14 confusing. The science is not good.”<sup>10</sup>

15 49. In 2004, Atkins appeared to agree with the consensus that food labels  
16 concerning sugar alcohols were misleading. The company announced in 2004 that  
17 it would discontinue using the term “Net Carbs” on its food labels because the term  
18 is “imprecise.” Sarah Ellison, *Atkins Labels Will Drop Term ‘Net Carbs’*, THE  
19

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20 <sup>9</sup> See <http://www.inspection.gc.ca/food/labelling/food-labelling-for-industry/nutrition-labelling/carbohydrate-claims/eng/1409844949900/1409845010355>.

21 <sup>10</sup> See Burros, Marian, “New ‘Low-Carb’ Foods Aren’t All-You-Can-Eat, N.Y. Times, Apr.  
22 14, 2004, available at  
<http://www.nytimes.com/learning/students/pop/20040415snaphursday.html>.

1 WALL STREET JOURNAL, Oct. 6, 2004 (available at  
2 <http://www.wsj.com/articles/SB109700319191636814>). According to the article:

3 As low-carb products have proliferated, the food industry has  
4 faced increasing skepticism about their nutrient content and  
5 labeling. For example, many companies, including Atkins at  
6 one time, calculate a products “net carbs” by subtracting grams  
7 of fiber and sugar alcohols from the total carbohydrate grams.  
8 That calculation allows food makers to cook up starchy, sweet  
9 products like brownies, pastries and candy, and call them “low  
10 carb.” **But one thing the calculation doesn’t take into  
11 account is that sugar alcohols raise blood-sugar levels, just  
12 as “net carbs” do.**

13 *Id.* (emphasis added).

14 50. Nonetheless, despite acknowledging that the term “Net Carbs” is  
15 “imprecise” and that sugar alcohols impact blood sugar levels, Atkins continues to  
16 use the term in its labeling and advise consumers that sugar alcohols have a  
17 “minimal” impact on blood sugar levels – a conclusion that it publicly rejected in  
18 2004.

19 51. Additionally, Atkins uses the phrase “Only Xg Net Carbs” in its  
20 labeling on products identified in paragraph 21. Atkins’ use of the term “Only”  
21 implies a claim concerning the nutrients of Atkins’ products, and improperly  
22 suggests that nutrients (i.e., “net carbs”) are absent or present in a certain amount.  
23 Because the FDA has not defined what constitutes an acceptable level to bear the  
24 label “Only” in the context of net carbs, Atkins’ labels bearing that term are  
misbranded.

### **Atkins Conceals Material Facts and Its Representations Are False**

25 52. Atkins’ “Net Carb” claims are false, misleading, and likely to deceive  
26 consumers, such as Plaintiff and members of the Class, in that Atkins’ products

1 have multiple times the level of carbohydrates that impact blood sugar as labeled  
2 by Atkins' Net Carb claim because sugar alcohol continues to have an effect on  
3 blood sugar and calories in direct contradiction to Atkins' claims.

4 53. Over the course of the last several years and up until just a few  
5 months ago, Plaintiff has purchased at the Wal-Mart and/or Target stores near her  
6 home the following Atkins products that have a "Net Carbs" designation but still  
7 include sugar alcohols: Chocolate Coconut Bar; Peanut Butter Cups; Dark  
8 Chocolate Almond Coconut Crunch Bar; Chocolate Peanut Candies; Caramel  
9 Double Chocolate Crunch Bar; and Dark Chocolate Decadence Bar. All of these  
10 products contain sugar alcohols (including maltitol), and the Net Carbs on each  
11 product wrongfully omit sugar alcohols from their calculation.

12 54. The products that Plaintiff purchased contained the "Counting Carbs"  
13 box on the packaging identified in paragraph 26, *supra*. Thus, the products that  
14 Plaintiff purchased represented that sugar alcohols have only a "minimal" impact  
15 on consumers' blood sugar and that sugar alcohols are not a carbohydrate that  
16 "impact blood sugar." In this respect, the representations on the Atkins' products  
17 purchased by Plaintiff were fraudulent, misleading, and they concealed material  
18 facts (i.e., that sugar alcohols impact blood sugar).

19 55. Moreover, the products that Plaintiff purchased contained the "Only  
20 Xg Net Carbs" representation, which impliedly suggested that the products  
21 contained net carbs were absent or present in a certain amount. This representation  
22 constitutes a misbranding of the products that Plaintiff purchased.

23 56. Plaintiff believed the false representations about "Net Carbs" that she  
24 saw on the product packaging, and she relied on those representations in deciding  
to purchase Defendants' products. Plaintiff would not have purchased the products  
if she had known that sugar alcohols impact blood sugar and the Atkins products



1 identified herein instead had “Net Carbs,” i.e. “carbs that impact blood sugar,”  
2 which were up to significantly higher than the amount claimed by Atkins.

3 57. Furthermore, ordinary and reasonable consumers would not purchase  
4 Atkins products containing the “Net Carbs” designation if they knew the facts and  
5 information that Atkins misrepresented to and concealed from consumers.

6 58. Plaintiff and members of the Class have been economically damaged  
7 by their purchase of Atkins’ products, in that they spent money on products that  
8 they would not have purchased if they had known of the true facts and information  
9 that Atkins concealed and misled consumers about. Atkins charges a premium for  
10 its products and specifically markets them in a premium location of its retailers;  
11 thus, Plaintiff and members of the Class paid more than they normally would have  
12 for comparable products. In this respect, Plaintiff and members of the Class have  
13 overpaid for Atkins products containing the “Net Carbs” calculation.

### 12 CLASS ACTION ALLEGATIONS

13 59. Under Rule 23 of the Federal Rules of Civil Procedure, Plaintiff  
14 brings this action on behalf of herself and the following proposed Class:

15 Consumers who purchased in the State of California Atkins’ products  
16 that contained sugar alcohols and were sold in packaging that (1)  
17 represented that sugar alcohols do not impact blood sugar and omitted  
18 that sugar alcohols impact blood sugar, and/or (2) represented the  
19 product contained “Only” a certain number of net carbs.

20 60. Excluded from the proposed Class are Defendants, any affiliate,  
21 parent, employee or subsidiary of Defendants; any entity in which Defendants have  
22 a controlling interest; any officer, director, or employee of Defendants; any  
23 successor or assign of Defendants; anyone employed by counsel for Plaintiff in this  
24

1 action; and any Judge to whom this case is assigned, as well as his or her  
2 immediate family.

3 61. This action has been brought and may be properly maintained as a  
4 class action under Federal Rule of Civil Procedure 23.

5 62. **Numerosity of the Class – Rule 23(a)(1)**. Class members are so  
6 numerous that their individual joinder is impracticable. While the exact number of  
7 class members is unknown to Plaintiff at the present time and can only be  
8 ascertained through appropriate discovery, Plaintiff believes that there are  
9 thousands of class members located throughout California. These members are  
10 readily ascertainable, such as through sales receipts.

11 63. **Existence and Predominance of Common Questions of Law and**  
12 **Fact – Rule 23(a)(2), 23(b)(3)**. Common questions of law and fact exist as to all  
13 members of the Class and predominate over questions affecting only individual  
14 Class members. These common legal and factual questions, each of which may  
15 also be certified under Rule 23(c)(4), include the following:

- 16 a. Whether Atkins misrepresented / concealed the sugar alcohol content  
17 on the label of its products identified with the “Net Carbs” designation;
- 18 b. Whether Atkins misrepresented the impact sugar alcohols have on  
19 blood sugar, and/or wrongfully omitted that sugar alcohols impact  
20 blood sugar;
- 21 c. Whether Atkins misbranded its products when it stated they have  
22 “Only” a certain amount of net carbs;
- 23

- d. Whether Atkins’ violated federal law by using a term that is not defined by the FDA in a “nutrient content” claim that it makes on the packaging for its products;
- e. Whether Atkins was aware of its deception and/or omissions;
- f. Whether Atkins’ deception is material;
- g. Whether Atkins concealed or omitted the true nature of its product;
- h. Whether Atkins profited from its misconduct;
- i. Whether Atkins’ conduct harmed Plaintiff and the Class;
- j. Whether Atkins has engaged in unlawful, unfair, or fraudulent business practices in violation of California law;
- k. Whether Plaintiffs and the other Class members are entitled to equitable relief, including declaratory relief, restitution, and/or rescission.

64. **Typicality – Rule 23(a)(3)**. Plaintiff’s claims are typical of the claims of the Class because, among other things, Plaintiff purchased Atkins products bearing the “Net Carbs” label that contained sugar alcohols, including products that contain the misrepresentations and omissions alleged herein.

65. **Adequacy of Representation – Rule 23(a)(4)**. Plaintiff will fairly and adequately protect the interests of Class members. Plaintiff has retained counsel competent and experienced in complex class action litigation, and Plaintiff will prosecute this action vigorously. Plaintiff has no interests adverse or antagonistic to those of the Class.



**FIRST CAUSE OF ACTION**

**Violation of California Business and Professions Code §§ 17200 *et seq.*  
(Plaintiff, individually and on behalf of the Class)**

68. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

69. Plaintiff asserts this cause of action on behalf of herself and the proposed Class against Defendants under the California Business and Professions Code §§ 17200 *et seq.*

70. California law prohibits unfair competition, which is defined as “any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...” Cal. Bus. & Prof. Code § 17200; *see also* 17203. Defendants have violated and continue to violate this Unfair Competition Law (“UCL”).

71. The National Labeling and Education Act (NLEA) permits nutrient content claims on food product packaging that “characterize[] the level of any nutrient which is of type required by paragraph (q)(1) or (q)(2) to be in the label or labeling of the food” but “only if the characterization of the level made in the claim uses terms which are defined in the regulations of the Secretary.” 21 U.S.C. § 343(r)(1)(A) and (r)(2)(A)(i).<sup>11</sup>

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<sup>11</sup> Plaintiff maintains the position from her original complaint that Atkins’ Net Carb claims detailing the total number of “Net Carbs” in each product is not a “nutrient content claim” under federal law because “Net Carbs” is not a nutrient. However, Plaintiff recognizes the court’s order herein and thus, now pleads in the alternative that, if such claims on the front of the package are “nutrient content claims,” then they fail to comply with the regulations of the Secretary as required by the NLEA.

1           72. The regulations of the Secretary regarding “characterization” apply to  
2 any “claim that expressly or implicitly characterizes the level of a nutrient of the  
3 type required to be made on the label or labeling of foods[.]” and requires that such  
4 claims be “made in accordance with 21 C.F.R. section 101.13.” See 21 C.F.R.  
5 section 101.13(b).

6           73. Per the Secretary’s regulations, an “express[] nutrient content claim”  
7 is “any direct statement about the level (or range) of a nutrient in the food[.]” 21  
8 C.F.R. section 101.13(b)(1)

9           74. An “implied nutrient content claim” is any claim that “describes the  
10 food or an ingredient therein in a manner that suggests that a nutrient is absent or  
11 present in a certain amount” or (b) “suggests that the food, because of its nutrient  
12 content claim, may be useful in maintaining healthy dietary practices and is made  
13 in association with an explicit claim or statement about a nutrient[.]” 21 C.F.R.  
14 section 101.13(b)(2).

15           75. The NLEA also prohibits nutrient content claims that are “false or  
16 misleading in any respect.” 21 C.F.R. § 101.13(i)(3).

17           76. Atkins defines “Net Carbs” on its packaging as “carbs that impact  
18 blood sugar.”

19           77. As used on Atkins’ packaging, the term “Net Carbs” characterizes the  
20 level of, in Atkins’ own words, “carbs that impact blood sugar.”

21           78. As used on Atkins’ packaging, the word “net” is an adjective.  
22  
23  
24



- 1 d. Misbranding its products with the qualifier “Only” before “Net Carbs”  
2 on its packaging that improperly suggests that a nutrient is absent or  
3 present in a certain amount.
- 4 e. Making a “nutrient content claim” on every package through the use  
5 of the term “Net Carbs,” when neither the phrase as a whole nor the  
6 word “net” is defined by FDA regulations; and
- 7 f. Marketing, advertising, and selling products using the “Atkins” name  
8 without disclosing and omitting that the products are inconsistent with  
9 the philosophy of the diet and company’s eponymous founder.

10 85. Atkins’ conduct was misleading and deceptive, and unlawful because  
11 it violated the California Business & Professions Code §§ 17500 *et seq.*;  
12 California’s Sherman Food, Drug, and Cosmetics Act, Cal. Health & Safety Code  
13 § 109875 *et seq.*; the Consumer Legal Remedies Act, codified at California Civil  
14 Code § 1750 *et seq.*; and other applicable state and federal laws and regulations.

15 86. The acts, omissions, and practices alleged herein also constitute unfair  
16 business acts and practices in that Atkins’ conduct is immoral, unscrupulous, and  
17 offends public policy by seeking to profit from deceiving consumers.

18 87. As a direct result of Atkins’ unlawful, unfair or fraudulent business  
19 acts and/or practices, Plaintiff and members of the Class suffered injury in fact and  
20 lost money or property.

21 88. Accordingly, Plaintiff, on behalf of herself and the Class, seeks  
22 damages and restitution against Atkins, and other relief as specifically prayed for  
23 herein.



**SECOND CAUSE OF ACTION**

**Violation of California Business and Professions Code §§ 17500 *et seq.*  
(Plaintiff, individually and on behalf of the Class)**

89. Plaintiff incorporates by reference and re-alleges all paragraphs previously alleged herein.

90. Plaintiff asserts this cause of action on behalf of herself and the Class against Defendants under the California Business and Professions Code §§ 17500 *et seq.*

91. Throughout the class period, Atkins engaged in unlawful and/or fraudulent conduct under California Business & Professions Code §§ 17500 *et seq.* by engaging in the sale of misrepresented “Net Carbs” products identified herein and publicly disseminating various advertisements that Atkins knew or reasonably should have known were untrue and misleading. Atkins committed such violations of the False Advertising Law with actual knowledge or knowledge fairly implied on basis of objective circumstances.

92. Atkins’ advertisements, representations, and labeling were designed to, and did, result in the purchase of “Net Carbs” products, and Atkins profited from the sale of its product to unwary consumers.

93. Plaintiff and the Class suffered injury in fact and lost money as a direct result of Atkins’ misconduct.

94. Accordingly, Plaintiff, on behalf of herself and the Class, seeks relief against Atkins in the form of an order declaring Atkins’ conduct in violation California and federal law, and other relief as specifically prayed for herein.

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**THIRD CAUSE OF ACTION**  
**Breach of Express Warranty – Violation of**  
**California Commercial Code § 2313**  
**(Plaintiff, individually and on behalf of the Class)**

1  
2  
3 95. Plaintiff incorporates by reference and re-alleges all paragraphs  
4 previously alleged herein.

5 96. Plaintiff asserts this cause of action on behalf of herself and the  
6 proposed Class against Defendants under Cal. Com. Code § 2313.

7 97. Under Cal. Com. Code § 2313, an express warranty is created by an  
8 affirmation of fact or promise made by the seller to the buyer which relates to the  
9 goods and becomes part of the basis of the bargain. Additionally, a description of  
10 the goods which is made part of the basis of the bargain also creates an express  
11 warranty.

12 98. Atkins made an affirmation of fact or promise relating to its goods  
13 pursuant to Cal. Com. Code § 2313 when it represented on the label of its products  
14 that they contained a limited number of “Net Carbs,” i.e. “carbs that impact blood  
15 sugar.

16 99. The written affirmations of fact at issue here are the Net Carb  
17 statements and calculations made on Defendants’ products, which include but are  
18 not limited to:

- 19 a. “Atkins Net Carb Count assists you in tracking carbs that impact  
20 blood sugar. Fiber and sugar alcohols should be subtracted from the  
21 total carbs since they minimally impact blood sugar.”  
22



1           105. As a direct result of Atkins’ breach of express warranty, Plaintiff and  
2 the Class have been damaged in that they spent more than they otherwise would  
3 have for the product.

4                                   **FOURTH CAUSE OF ACTION**  
5                                   **Breach of Implied Warranty of Merchantability**  
6                                   **Violation of Cal. Com. Code § 2314**  
7                                   **(Plaintiff, individually and on behalf of the Class)**

8           106. Plaintiff, on behalf of herself and the proposed Class, repeats and re-  
9 alleges all paragraphs previously alleged and incorporates those allegations into  
10 this cause of action as though fully set forth herein.

11           107. Defendants are, and at all relevant times were, in the business of  
12 manufacturing and selling food products to consumers such as Plaintiff and  
13 members of the proposed Class.

14           108. As part of this business enterprise, Defendants manufactured, tested,  
15 advertised, promoted, packaged, marketed, sold, and/or distributed Atkins brand  
16 products with packaging that contained “Net Carbs” representations that falsely  
17 claimed, “Atkins Net Carb Count assists you in tracking carbs that impact blood  
18 sugar. Fiber and sugar alcohols should be subtracted from the total carbs since they  
19 minimally impact blood sugar.”

20           109. Based on this Atkins’ explanation, Atkins’ Net Carb total on each  
21 product represents what it claims to be the “carbs that impact blood sugar.” But  
22 sugar alcohols do impact blood sugar.

23           110. For example, the Chocolate Peanut Candies product purchased by  
24 Plaintiff claims to have only 1 gram “Net Carbs” – or, as Atkins claims, only 1

1 carb that impacts a consumer’s blood sugar. However, the Chocolate Peanut  
2 Candies have 15 grams of sugar alcohols, which, as described above, do impact  
3 blood sugar.

4 111. At the time Defendants manufactured, tested, advertised, promoted,  
5 packaged, marketed, sold, and/or distributed Atkins brand products with packaging  
6 that contained “Net Carbs” representations that falsely underrepresented the  
7 number of carbohydrates that impact blood sugar, Defendants knew that the  
8 products would be ingested, and impliedly warranted that the products were of  
9 merchantable quality and fit for their ordinary purpose.

10 112. In connection with their sale of the products described above,  
11 Defendants gave a written warranty as defined in section 2301(6). The particulars  
12 of this express warranty are set forth in Plaintiff’s Third Cause of Action above  
13 and incorporated by reference here. The written affirmations of fact at issue here  
14 are the Net Carbs statements and calculations made on Defendants’ products,  
15 which include but are not limited to:

- 16 a. “Atkins Net Carb Count assists you in tracking carbs that impact  
17 blood sugar. Fiber and sugar alcohols should be subtracted from the  
18 total carbs since they minimally impact blood sugar.”  
19  
20 b. A “Net Carb” total placed on the front of the box that, combined with  
21 the definition on the back, asserts that each product has a certain level  
22 of “carbs that impact blood sugar” which, for each product, was  
23

1 substantially less than the actual number of carbs in each product that  
2 impact blood sugar.

- 3 c. An “Only Xg Net Carbs” representation that improperly suggests that  
4 a nutrient is absent or present in a certain amount.

5 113. The written affirmations of fact on Defendants’ products related to the  
6 nature of the material in the products in that they specifically stated the claimed  
7 number of carbohydrate materials in each product that “impact blood sugar.”  
8

9 114. These written affirmations of fact were promises that the food product  
10 would meet a specific level of performance when consumed by Plaintiff, i.e. that  
11 only a certain limited number of carbohydrates in each product would impact  
12 Plaintiff’s blood sugar levels.

13 115. Contrary to Defendants’ written affirmations of fact relating to the  
14 nature of the product and promises that its food products only had a certain limited  
15 number of grams of carbohydrates that impacted Plaintiff’s blood sugar, in fact, the  
16 product contained significantly more carbs that impact blood sugar than claimed by  
17 Defendants.

18 116. By impacting Plaintiff’s blood sugar more than warranted,  
19 Defendants’ products failed to meet the specific level of performance promised by  
20 Defendants.

21 117. Plaintiff and members of the proposed Class purchased these products  
22 that were manufactured and marketed by Atkins and sold by intermediary retail  
23

1 outlets, including Target and Wal-Mart. Plaintiff and members of the proposed  
2 Class purchased these products based on the mistaken belief, engendered by  
3 Defendants' concealments and misrepresentations, that the products contained  
4 fewer weight-affecting and blood-sugar-level affecting carbohydrates than they  
5 actually contained. Defendants' representations and warranties in this regard were  
6 false, misleading, and inaccurate, in that the products were not of merchantable  
7 quality because the products were defective, would not pass without objection in  
8 the trade, were not fit for ordinary purposes, did not conform to the promises on  
9 the labeling, and were potentially harmful and undesirable to consumers of  
10 products who sought to consumer foodstuffs that did not elevate their blood sugar  
11 and did not cause weight gain.

12 118. Defendants breached the implied warranty of merchantability because  
13 the products that Defendants manufactured, packaged, and marketed, could not and  
14 did not deliver on the advertised and labeled claims with respect to the "Net Carbs"  
15 representations made by Defendants.

16 119. Defendants' products that were purchased by Plaintiff and members  
17 of the proposed Class, did not have even the most basic degree of fitness for  
18 ordinary use as a diet food, in that at the time of Defendants' marketing and sale of  
19 the products, and at the time of Plaintiff's and the class members' purchase of the  
20 products, the products contained carbohydrates that impact blood sugar in greater  
21 numbers than the packaging suggested. Purchasers of Atkins brand food products,  
22 including Plaintiff and members of the proposed Class, specifically purchased and  
23 purchase Atkins products because Dr. Atkins has long promoted the consumption

1 of low-carb foods with minimal carbs that impact blood sugar as a healthful diet  
2 and a method of managing weight. The fact that the products contained a much  
3 greater number of carbohydrates that impact blood sugar than claimed in  
4 Defendants’ “Net Carbs” representations rendered the products not reasonably  
5 suitable for their ordinary uses.

6 120. Plaintiff and the members of the proposed Class relied on the implied  
7 warranty of merchantability in their selection, purchase, and consumption of these  
8 diet products. Plaintiff and the members of the proposed Class reasonably relied on  
9 the skill and judgment of Defendants, as manufacturers and marketers of diet  
10 products, to select, produce, and sell to consumers only those diet products that  
11 were of merchantable quality because they were suitable for the purpose that  
12 consumers reasonably use diet products for—that is, for human consumption of  
13 food that will not or will only minimally elevate their blood sugar and/or cause  
14 weight gain.

15 121. Defendants placed their diet products into the stream of commerce  
16 with higher carbohydrate content than represented, despite the fact that these  
17 products were expected to, and did, reach users, consumers, and other persons  
18 coming into contact with these products, without substantial change in the  
19 condition that they were packaged, marketed, and sold.

20 122. Neither Plaintiff nor any member of the proposed Class was required  
21 to provide pre-suit notice to Defendants of their claim for breach of the implied  
22 warranty of merchantability because Defendants were remote manufacturers with  
23 whom the purchaser did not deal. Plaintiff and members of the proposed Class are



1 consumers who purchase food products from retailers rather than directly from  
2 manufacturers, and Plaintiff and members of the proposed Class purchased  
3 Defendants' products from retailers.

4 123. Additionally, neither Plaintiff nor any member of the proposed Class  
5 is required to establish privity of contract with Defendants because Plaintiff and  
6 each member of the proposed Class is an intended third-party beneficiary of  
7 contracts between Defendants and the retailers from whom Plaintiff and the  
8 proposed Class members purchased Defendants' manufactured products, and  
9 specifically were intended third-party beneficiaries of Defendants' implied  
10 warranties and agreements. Defendants' warranty agreements were designed for  
11 and intended to benefit Plaintiff and the proposed Class.

12 124. Privity also is not required because Defendants' products were  
13 foodstuffs. Considerations of public policy demand that the utmost care and  
14 caution be exacted from the manufacturer of articles of food, in order to protect  
15 consumers from injuries resulting from the ingestion of products that  
16 manufacturers warrant are suitable for human consumption.

17 125. As a direct and proximate result of Defendants' breach of implied  
18 warranties, Plaintiff and the members of the proposed Class suffered and/or will  
19 continued to be harmed and suffer economic loss, in that Plaintiff and the members  
20 of the proposed Class spent money purchasing Defendants' products that they  
21 could not reasonably nor safely use for the intended purpose of consuming food  
22 that did not elevate their blood sugar levels or foster weight gain. The failure of  
23 Defendants' products to have their expected and advertised qualities, of being

1 suitable for consumption as a diet food, was a substantial factor in causing Plaintiff  
2 and the members of the proposed Class to suffer economic loss.

3 126. As a direct and proximate result of the foregoing acts and/or  
4 omissions, Plaintiff and the members of the proposed Class have suffered damages  
5 and are entitled to compensatory damages, costs, and reasonable attorneys' fees.

6 **REQUEST FOR RELIEF**

7 WHEREFORE, Plaintiff, on behalf of herself and the Class, requests  
8 judgment and relief as follows:

9 1. For an order certifying the proposed Class, and appointing Plaintiff  
10 and her counsel of record to represent the proposed Class;

11 2. For an order declaring that Atkins has violated California Business  
12 and Professions Code §§ 17200 *et seq.*;

13 3. For an order declaring that Atkins has violated California Business  
14 and Professions Code §§ 17500 *et seq.*;

15 4. For an order declaring that Atkins has breached an express warranty  
16 pursuant to California Commercial Code § 2313;

17 5. For an order declaring that Atkins breached the implied warranty of  
18 merchantability;

19 6. For an order awarding Plaintiff and Class members damages and  
20 statutory damages in an amount to be proven at trial, including punitive damages,  
21 together with pre-trial and post-trial interest thereon;

22 7. For an order awarding Plaintiff and Class members restitution,  
23 disgorgement, or other equitable relief as the Court deems proper;

1 8. For an order awarding Plaintiff and the Class reasonable attorneys’  
2 fees and costs of suit, including expert witness fees; and

3 9. For an order awarding such other and further relief as this Court  
4 deems just and proper.

5 **JURY DEMAND**

6 Plaintiff, on behalf of herself and all similarly situated persons, demands a  
7 trial by jury on all issues that are triable to a jury.

8  
9 Dated: January 31, 2018

Respectfully submitted,

10 /s/ Deborah Rosenthal

11 Deborah Rosenthal Cal. Bar No. 184241

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24 *Counsel for Plaintiff and the Class*

1 **PROOF OF SERVICE**

2  
3 I, Deborah Rosenthal, declare that I am over the age of eighteen (18) and not  
4 a party to the entitled action. I am an attorney at the law firm of SIMMONS  
5 HANLEY CONROY, and my office is located at 455 Market Street, Suite 2220,  
6 San Francisco, California 94105.

7 On January 24, 2018, I caused to be filed the following: **FIRST**  
8 **AMENDED CLASS ACTION COMPLAING** with the Clerk of the Court of the  
9 United States District Court for the Southern District of for the Southern District of  
10 California, using the official Electronic Document Filing System which served  
11 copies on all interested parties registered for electronic filing.

12  
13 I declare under penalty of perjury that the foregoing is true and correct.

14  
15 */s/ Deborah Rosenthal*

16 ***Counsel for Plaintiff and Class Members***