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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JADE THOMAS, KETRINA GORDON, and CAREY HOFFMAN, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

NESTLE U.S.A., INC., and DOES 1 through 10, inclusive,

Defendants.

**CLASS ACTION**

Case No. BC649863

**THIRD AMENDED COMPLAINT**

1. VIOLATION OF CALIFORNIA, CIVIL CODE § 1750, *et seq.*
2. VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17500, *et seq.*
3. VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, *et. seq.*
4. COMMON LAW FRAUD
5. INTENTIONAL MISREPRESENTATION
6. NEGLIGENT MISREPRESENTATION

**JURY TRIAL DEMANDED**

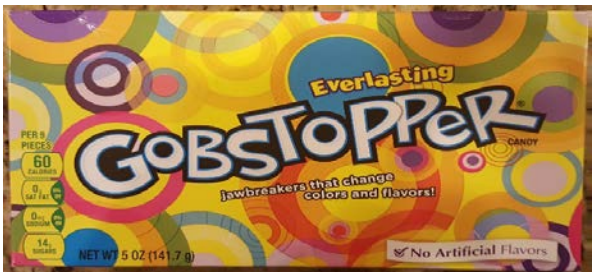
Plaintiffs Jade Thomas, Ketrina Gordon, and Carey Hoffman ("Plaintiffs"), individually and on behalf of all others similarly situated and by and through their counsel, bring this third amended class action complaint ("TAC") against Nestle U.S.A., Inc. ("Defendant") and Does 1 through 10, inclusive (collectively referred to herein as "Defendants") and allege upon personal knowledge as to their own actions, and upon information and belief as to counsel's investigation and all other matters, as follows:

## SUMMARY OF THE ACTION

1. This is a consumer protection and false advertising class action lawsuit brought on behalf of all purchasers of Raisinets®, Buncha Crunch®, Butterfinger Bites®, Tollhouse Semi-Sweet Chocolate Morsels®, Rainbow Nerds®, SweeTarts®, Spree®, Gobstopper®, and Sno-Caps® boxed candy products (each referred to individually as the "Product" and collectively as the "Products") sold at retail outlets and movie theaters throughout California. True and correct representations of the front of the Products' packaging are set forth in the images below.









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2. Defendant intentionally misleads and shortchanges consumers by falsely and deceptively misrepresenting the amount of candy actually contained in each opaque box of Product that conceals from consumers the amount of candies inside. The Products' packaging leads the reasonable consumer to believe he or she is purchasing a box full of candies. However, Defendant uniformly under-fills the opaque boxes by approximately 48%. Every box is filled approximately 52% full with candy product. The 48% balance is empty space, or "slack-fill," which serves no legitimate or lawful function.

3. Nonfunctional slack-fill, like the type employed by Defendant, allows Defendant to reduce its food product costs to the detriment of unwitting consumers, who are not receiving the full benefit of their bargain.

4. Plaintiffs and others have reasonably relied on Defendant's deceptive packaging in purchasing the Products, believing that the Products would be full of candies. Had Plaintiffs and other consumers known that the Products were not full of candies, they would not have purchased the Products or would have paid significantly less for the Products. Therefore, Plaintiffs and other consumers have suffered injury in fact as a result of Defendant's deceptive practices.

5. Plaintiffs bring this class action lawsuit individually and on behalf of all others similarly situated. Plaintiffs seek to represent a California Class and a California Consumer Subclass (defined *infra* in paragraphs 72-74) (together referred to as the "Classes").

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6. Plaintiffs seek damages, restitution, declaratory and injunctive relief, and all other remedies available under applicable law which this Court deems appropriate.

**PARTIES**

7. Plaintiff Jade Thomas ("Plaintiff Thomas") is, and at all times relevant hereto was, a citizen of California residing in the county of Alameda. Plaintiff purchased a Butterfinger Bites® 3.5 oz. box and a Buncha Crunch® 3.2 oz. box at United Artists Berkeley 7 in Berkeley, California in 2016. Plaintiff Thomas paid approximately $4.00 for each Product, and spent a total of $8.00 on both Products. In making her purchase, Plaintiff Thomas relied upon the opaque packaging, including the size of the box, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers to purchase the Product. If Plaintiff Thomas had known that the boxes contained nonfunctional slack-fill, she would not have purchased the Products, let alone paid for candy product she never received.

8. Plaintiff Ketrina Gordon ("Plaintiff Gordon") is, and at all times relevant hereto was, a citizen of California residing in the county of Los Angeles. Plaintiff purchased a Raisinets® 3.5 oz. box and a Buncha Crunch® 3.2 oz. box at Pacific Theatres in Los Angeles, California in 2016. Plaintiff Gordon paid approximately $4.00 for each Product, and spent a total of $8.00 on both Products. In making her purchase, Plaintiff Gordon relied upon the opaque packaging, including the size of the box, which was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers to purchase the Product. If Plaintiff Gordon had known that the boxes contained nonfunctional slack-fill, she would not have purchased the Products, let alone paid for candy product she never received.

9. Plaintiff Carey Hoffman ("Plaintiff Hoffman") is, and at all times relevant hereto was, a citizen of California. Plaintiff Hoffman currently resides in the county of Los Angeles. Plaintiff Hoffman purchased the Nestle Milk Chocolate Raisinets® 3.5 oz. and Nestle Dark Chocolate Raisinets® 3.5 oz. boxed candy from Ralphs in Los Angeles in 2016. Plaintiff Hoffman purchased the Products relying on the size and shape of the box packaging, believing that the box packaging would be full of Raisinets®. However, the Products Plaintiff Hoffman purchased contained approximately 48% empty space. Plaintiff Hoffman would not have purchased the Products or

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would have paid significantly less for them had she known that the package was only approximately 52% full of Raisinets®. Plaintiff Hoffman therefore suffered injury in fact and lost money as a result of Defendant's misleading, false, unfair and fraudulent practices, as described herein.

10. Nestle U.S.A., Inc. is a corporation headquartered in Glendale, California. Nestle maintains its principal business office at 800 North Brand Blvd., Glendale, CA, 91203. Nestle, directly and through its agents, parent company, related entities, and/or subsidiaries, has substantial contacts with and receives substantial benefits and income from and through the State of California. Nestle is the owner, producer, manufacturer, sales operator, and distributor of the Products, and is the company that created and/or authorized the false, misleading, and deceptive packaging, marketing, advertising and labeling for the Products.

11. The true names and capacities, whether individual, corporate, associate, or otherwise of certain manufacturers, distributors, and/or their alter egos sued herein as DOES 1 through 10 inclusive are presently unknown to Plaintiffs who therefore sues these individuals and/or entities by fictitious names. Plaintiffs will seek leave of this Court to amend the Complaint to show their true names and capacities when the same have been ascertained. Plaintiffs are informed and believe and based thereon allege that DOES 1 through 10 were authorized to do and did business in Los Angeles County. Plaintiffs are further informed and believe and based thereon allege that DOES 1 through 10 were and/or are, in some manner or way, responsible for and liable to Plaintiffs for the events, happenings, and damages hereinafter set forth below.

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## JURISDICTION AND VENUE

12. This Court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, Section 10, because this case is a cause not given by statute to other trial courts.

13. Plaintiffs have standing to bring this action pursuant to the California Consumers Legal Remedies Act, Civil Code Section 1750 *et seq.*; California False Advertising Law, Business & Professions Code Section 17500, *et seq.*; California Unfair Competition Law, Business & Professions Code Section 17200, *et seq.*; and the common law.

14. The Products include all products manufactured by Defendant which are substantially similar to Raisinets® 3.5 oz. boxes, Buncha Crunch® 3.2 oz. boxes, and Butterfinger Bites® 3.5 oz. boxes, including all candy products within the Tollhouse Semi-Sweet Chocolate Morsels®, Rainbow Nerds®, SweeTarts®, Spree®, Gobstopper®, and Sno-Caps® product lines packaged and sold in opaque boxes.

15. Out-of-state participants can be brought before this Court pursuant to the provisions of California Code of Civil Procedure section 395.5.

16. Defendant is subject to personal jurisdiction in California based upon sufficient minimum contacts which exist between it and California or otherwise did intentionally avail itself of the markets within California, through its sale of the Products to California consumers.

17. Venue is proper in this Court pursuant to California Code of Civil Procedure section 395, *et seq.* and California Civil Code section 1780(d) because Defendant conducts business in Los Angeles County, Defendant receives substantial compensation from sales in Los Angeles County, and Defendant made numerous misrepresentations which had a substantial effect in Los Angeles County, including, but not limited to, print media, and internet advertisements, and on the Products' packaging and labeling.

## FACTUAL ALLEGATIONS

### A. Background

18. At all relevant times, Defendant has manufactured, packaged, labeled, distributed, marketed, advertised, and sold the Products across California. The Products are sold at movie theatres, grocery chains, convenience stores, and other retail outlets including, but not limited to, Wal-Mart, CVS Pharmacy, Pavilions, Walgreens, Rite Aid Pharmacy, Ralphs, and Target.

19. Defendant packages each of the Products in an opaque rectangular box. The dimensions of Raisinets® 3.5 oz. boxes are: 6.25 inches tall by 3 inches wide by .5 inch deep. The dimensions of Buncha Crunch® 3.2 oz. boxes are: 6.25 inches tall by 3 inches wide by .75 inches deep. The dimensions of the Butterfinger Bites®3.5 oz. box is: 6 inches tall by 3 inches wide by 1 inch deep.

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**B. Slack-fill Law Background**

19. Pursuant to California's Business and Professions Code section 12606.2:

> (c) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following:
>
> (1) Protection of the contents of the package.
> (2) The requirements of the machines used for enclosing the contents in the package.
> (3) Unavoidable product settling during shipping and handling.
> (4) The need for the package to perform a specific function, such as where packaging plays a role in the preparation or consumption of a food, if that function is inherent to the nature of the food and is clearly communicated to consumers.
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value that is both significant in proportion to the value of the product and independent of its function to hold the food, such as a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed or durable commemorative or promotional packages.
> (6) Inability to increase the level of fill or to further reduce the size of the package, such as where some minimum package size is necessary to accommodate required food labeling exclusive of any vignettes or other nonmandatory designs or label information, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.

20. Furthermore, Congress has recognized that the law preventing misleading packaging is "intended to reach deceptive methods of filling…where the package is only partly filled and, *despite the declaration of quantity of contents on the label*, created the impression that it contains more food than it does." S. Rep. No. 493, 73d Cong., 2d sess. 9 (1934) (emphasis added).

21. In addition, the FDA, in promulgating an identical federal regulation, 21 C.F.R § 100.100, concluded that an accurate disclosure of a product's net weight on the product packaging does not exempt a manufacturer from complying with slack-fill regulations, finding that "the presence of an accurate net weight statement does not eliminate the misbranding…" Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64,123, 64,128 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100). Moreover, the FDA has emphasized that "[t]o rule that an accurate net weight statement protects against misleading fill would render the prohibition against misleading fill…

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redundant." *Id.* at 64,129.

**C. The Products Contain Non-functional Slack-fill**

22. Defendant's Products are misleading as they contain non-functional slack-fill within the meaning of California's Business and Professions Code Section 12606.2.

23. As depicted in paragraph 1, the Products are in opaque containers that have no holes or slits for consumers to even partially view the contents inside. Therefore, each of the Products do "not allow the consumer to fully view its contents." Cal Bus & Prof Code § 12606.2(c).

24. The Products' containers are "filled as to be misleading," because the Products' boxed packaging "contain[] nonfunctional slackfill:" a "difference between the actual capacity of a container and the volume of product contained therein." *Id*. In this case, the difference between the Products' maximum capacity and volume of actual candies inside is striking. Indeed, approximately 48% of Products' packaging volume is empty.

20. The size of the box in and of itself is a representation by Defendant as to the amount of candy product contained in the box. Plaintiffs and other consumers of the Products detrimentally and reasonably relied on this representation of quantity when they purchased the Products.

21. Plaintiff Thomas and Plaintiff Gordon and other consumers of the Products made their purchase decisions based upon a visual observation of the Products' packaging through the showcase window of a movie theater concession stand or retail outlet store shelf. Glass showcases are often used for the sale of the Products at most movie theatre concession counters throughout California as a security measure.

22. Plaintiff Thomas and Plaintiff Gordon and other consumers of the Products who purchased the Products at a movie theater displayed in the showcases did not have a reasonable opportunity to inspect the Products' packaging for other representations of quantity of candy product contained therein other than the size of the box itself or to view any other representations of quantity contained on the Products' packaging, e.g., net weight or serving disclosures.

23. Instead, they observed the Products from a distance through the showcase window and pointed them out to the concession counter employees. Plaintiffs then paid for the Products before they took physical possession of the Products.

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24. Once Plaintiffs took their seat in their respective movie theaters, Plaintiffs opened the top of each Products' box. Only then did they discover—to their disappointment—that both Products' boxes were only roughly half full, while the other half constituted nonfunctional slack-fill.

25. Prior to the point of sale, the Products' packaging did not allow for a visual or audial confirmation of the contents of the Products. The Products' opaque packaging prevents a consumer from observing the contents before opening. Even if a consumer were to "shake" the Products before opening, it is impossible for the consumer to discern the presence of any nonfunctional slack-fill.

26. Even if Plaintiffs and other consumers of the Products had a reasonable opportunity to review prior to the point of sale other representations of quantity like net weight or serving disclosures, such as Plaintiff Hoffman and other consumers who purchased the Products at a retail outlet, they did not and would not have reasonably understood or expected it to translate to a quantity of candy product meaningfully different from their expectation of a quantity of candy product commensurate with the size of the box.

27. Furthermore, Research indicates that 90% of consumers make a purchase after only visually examining the front of the packaging but without physically having the product in their hands, as in this case.[1]

28. Plaintiffs reasonably and detrimentally relied on the size of the box as a representation by Defendant of the quantity of candy product contained in the Products' containers.

29. The other information that Defendant provides about content quantity on the front label and back label of the Products does not enable the reasonable consumer to form any meaningful understanding about how to gauge the quantity of contents of the Products as compared to the size of the box itself.

[1] Clement, J., Visual influence on in-store buying decisions: an eye-track experiment on the visual influence of packaging design, 23 Journal of Marketing Management, 917−928 (2007).

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30. Consumers often do not consult quantity indications on packages but use alternative methods, such as visual impressions of the package size, total package price, or previous purchase experience, to judge product quantity and to calculate product value.[2]

31. The front label of the Products indicates a net weight of 3.5 ounces (99.2 grams) or 3.2 ounces (90.7 grams). The nutrition panel on the back of Raisinets® reports a serving size of ¼ cup (45 grams) and total of 2 servings per container. The nutritional panel on the back of the Buncha Crunch® reports a serving size of 1/3 cup (37 grams) and total of 2.5 servings per container. The nutritional panel on the back of Butterfinger Bites® reports a serving size of 8 pieces (40 grams) and total of 2 servings per container. True and correct representations of the Products' front and back labels with annotations of other quantity disclosures are set forth below.







32. Disclosures of net weight and serving sizes in measurements of ounces, grams, candy pieces or cups do not allow the reasonable consumer to make any meaningful conclusions about the

[2] Gupta K, O. et al., *Package downsizing: is it ethical?* 21 AI & Society 239-250 (2007).

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quantity of candy product contained in the Products' boxes that would be different from the reasonable consumer's expectation that the quantity of candy product is commensurate with the size of the box.

33. Plaintiffs would not have purchased the Products had they known the Products contained slack-fill which serves no functional or lawful purpose.

34. During Plaintiffs' investigation, Plaintiffs confirmed that Defendant uniformly under-fills the Products' boxes, rendering a whopping 48% of each box slack-fill, nearly all of which serves no functional or lawful purpose. True and correct representations of the insides of each Product is pictured below in the following order: Buncha Crunch®, Raisinets®, and Butterfinger Bites®.

Buncha Crunch®

Raisinets®

Butterfinger Bites®

35. The Products are made, formed, and filled as to be misleading. The Products are therefore misbranded.

36. Furthermore, the slack-fill in the Products is non-functional as it does not fit into any

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of the safe-harbor provisions included in California's Business and Professions Code Section 12606.2:

(1) Pursuant to Cal Bus & Prof Code § 12606.2(c)(1), the slack-fill does not protect the contents inside the Products' packaging. For instance, the Raisinets candies are raisins coated with a hard chocolate finish. Therefore, the Raisinets candies are not susceptible to cracking, breaking, or crumbling like potato chips in a bag would be. The Raisinets candies are also not sticky due to the chocolate being coated with confectioner's glaze (lac-resin), which protects the candies and makes the candies smooth. Therefore, any concern for the safety of the contents inside the Products has been or should be alleviated by both the nature of the Raisinets candies. Any suggestion by Defendant that the Products' roomy box packaging protects the contents inside is inconsistent with Defendant's manufacturing and packaging practices for their other Raisinets products, which are packaged in tightly fitting, flimsy plastic bags. If anything, if more Raisinets candies, just as all the other Products described herein, were filled into the Products' packaging or the packaging size was reduced to the volume of the candies inside, the contents inside would be protected further, as the candies would be given less room to move around during transport. Accordingly, the use of smaller packaging or an increase in fill would offer the same, if not more, protection for the contents inside.

(2) Pursuant to Cal Bus & Prof Code § 12606.2(c)(2), no packaging or machine enclosure requirements would require that the Products be packaged with only approximately 52% candies. According to a statement released by Defendant, the empty space is to "avoid spillage and product loss during ***high speed filling.***"[3] (Emphasis added). It is certainly not "required" that Defendant fill its Products' packaging at such a high speed. Such practices increase profits for Defendant to the detriment of unsuspecting class members.

[3] http://www.today.com/video/candy-companies-are-under-filling-their-boxes-class-action-lawsuits-allege-882338371546 (last visited on March 10, 2017).

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(3) Pursuant to Cal Bus & Prof Code § 12606.2(c)(3), the slack-fill is not necessary to accommodate how candies "settle" inside the box. The Products consist of candies that are not pliable so as to be subject to settling or compressing in the Products' packaging over time.

(4) Pursuant to Cal Bus & Prof Code § 12606.2(c)(4), the Products' packaging does not "perform a specific function," such as playing a role in the preparation and consumption of the candies. The boxed packaging is simply used to hold the candies inside and display information about the Products.

(5) Pursuant to Cal Bus & Prof Code § 12606.2(c)(5), the Products are not packaged in a container that is meant to be reused or otherwise used after consumption of the candies inside. Once the consumer finishes the candies, the packaging is useless. Accordingly, the container does not have "value that is… independent of its function to hold the food." Cal Bus & Prof Code § 12606.2(c)(5). Moreover, as evidenced herein, even if Defendant has designed the packaging to allow consumers to reseal the packaging, the resealing mechanism can be implemented in the same manner regardless of the packaging size or the fill of the box.

(6) Pursuant to Cal Bus & Prof Code § 12606.2(c)(6), Defendant does have the ability to increase the level of fill or to reduce the size of the Products' packaging. (A) A significant number of additional candies can be added to the current Products without causing any protrusions or toppling over as shown, *supra*, in paragraph 34 where the box lids are open to reveal approximately 48% empty space. (B) The addition of candies would enhance the weight of the Products and prevent any tipping on shelves or stands. In the alternative, Defendant can reduce the size of the package as to hold the same amount of candies inside, without any non-functional slack-fill.

37. The Products are packaged in a box and sealed with heated glue. A true and correct representation of the heated glue is shown in the image below.

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38. The equipment used to seal the carton does not breach the inside of the Products' containers during the packaging process. The heated glue is applied to an exterior flap of the box, which is then sealed over the top by a second exterior flap.

39. Neither the heated glue application nor the sealing equipment require slack-fill during the manufacturing process. Even if there were no slack-fill present in the Products' boxes, the machines used for enclosing the contents in the package would work without disturbing the packaging process.

40. The slack-fill present in the Products' container is not a result of the candy product settling during shipping and handling. Given the Products' density, shape, and composition, any settling occurs immediately at the point of filling the box. No additional product settling occurs during subsequent shipping and handling.

41. Contrary to a powder product, for example, the contents of the Products are of a great enough density such that any slack-fill present at the point of sale was present at the time of filling the containers and packaging the contents.

42. The side of the Products' boxes bear a perforated tab .75 inches in length labeled "Press In Pull Up," "Press Top Here," or "Press to Open." True and correct representations are shown below.



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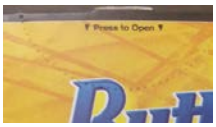



43. The perforated tabs apparently are intended to conveniently dispense the contents of the Products instead of having to unseal the glued flaps at the top. However, the size, placement, color, and (lack of) functionality of the perforated tab, *inter alia*, evidence Defendant knows or should know that the reasonable consumer does not actually use said perforated tabs to dispense the candy product. The true purpose behind Defendant's inclusion of the perforated tabs is to conceal the nonfunctional slack-fill contained in the Products.

44. The perforated tab of the Raisinets® box takes up approximately 1 inch of its 6.25-inch height, even though the actual opening of the tab is .75 inches long. The perforated tab of the Buncha Crunch® box takes up approximately 1.25 inches of its 6.25-inch height, even though the actual opening of the tab is .75 inches long.

45. The perforated tab of the Butterfingers Bites® box takes up approximately 2.5 inches of its 6.0-inch height, even though the actual opening of the tab is 1.75 inches long.

46. Defendant has no reason to place the perforated tab towards the middle of the Products' boxes, and take up an extra ¼ to ¾ inch of space. By indenting the side tab of each Product ¼ to ¾ of an inch, Defendant creates at least 4% to 12.5% of nonfunctional slack-fill.

47. The perforated tab of each Product's box is the same color as the packaging of the Product. Therefore, it is hidden and difficult to see in broad daylight. Undoubtedly, a reasonable consumer cannot see the side tab while watching a movie in a dark theater.

48. The size of the tabs relative to the size of the candies makes it cumbersome to dispense the candy product through the perforated tabs. Further, a consumer who elects to depress the perforated tab which folds inside the box is faced with the cumbersome task of dispensing the candy product past the internalized depressed tab. Opening the glued seals located at the end of the box and bending the flaps outward allows the candy product to be dispensed without obstruction.

49. Reasonable consumers instinctually open the Products by undoing the Products' glued seal. Neither one of the Products' glued seals direct the consumer to a perforated side tab. Before

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consumers break the glue seal of the Products to open the packaging, they do not encounter any instructions about dispensing the contents from the side of the package. True and correct representations of the top and bottom glued seals are shown below.


50. Defendant can reasonably foresee that consumers open the Products by undoing one of the glued seals of the packaging. Thus, Defendant knows that any perforated side tab it places on the Products' packaging must have conspicuous colors and marking. The fact that Defendant blends the side tabs into the Products' packaging, instead of designing it to stand out or take up the least amount of space necessary, demonstrates that Defendant does not genuinely intend for the perforated tab to be used, and that the reasonable consumer does not actually use them.

51. The perforated side tab on the Products' packaging does not perform any specific function that is inherent to the nature of the contents. Nor is it clearly communicated to consumers. A reasonable consumer can easily dispense the Products from the top of their packaging, without any side tab. Therefore, the Products' packaging does not require any functional slack-fill to accommodate a perforated side tab.

52. Defendant has reasonable alternative designs available to package its Products. It can package the Products in boxes without any perforated side tab, as Defendant has done in the past.

53. The Products do not use packaging that is part of a reusable container with any significant value to the Products independent of its function to hold the candy product.

54. For example, the Products' containers are not commemorative items.

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55. The Products' containers are boxes intended to be discarded into the recycling bin immediately after the contents have been completely consumed.

56. Defendant can easily increase the quantity of candy product contained in each Product container (or, alternatively, decrease the size of the containers) by 48%.

57. The "Nutrition Facts" panel on the back of each box states "Servings Per Container about 2 or 2.5." By arithmetic, each serving would be the equivalent of the following: 100% expected total fill, divided by 2 or 2.5 servings, yielding a value of 40% to 50% of volume per serving. Given the Products can accommodate an additional 48% of candy product, consumers are being shortchanged roughly at least 1 serving per box.

**D. The Products' Packaging is Misleading to Reasonable Consumers**

60. Defendant's Products' packaging is misleading to reasonable consumers, including Plaintiffs and the class members, and only serves the profit maximizing interests of Defendant.

61. Defendant knows, knew or should have known how the Products are filled and packaged because it and its agents manufacture, fill, and packaged the Products.

62. Additionally, Defendant knows, knew or should have known that Plaintiffs and other consumers did and would rely on the size and style of their packaging in purchasing the Products, and would reasonably believe that the Products' packaging is full of candies:

a. According to Congress, "[c]onsumers develop expectations as to the amount of product they are purchasing based, at least in part, on the *size of the container*." Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64,123, 64,131 (emphasis added). Moreover, because "[p]ackages have replaced the salesman," "packaging becomes the 'final salesman' between the manufacturer and the consumer, communicating information about the quantity and quality of product in a container." *Id.*

b. Furthermore, according to a peer reviewed journal article, an average consumer spends approximately 12 seconds purchasing a product in-store and approximately 19

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seconds purchasing a product online.[4] Furthermore, according to peer reviewed journal article analyzing the effects container size and shape on consumer perception, "[p]ackages that appear larger will be more likely to be purchased."[5]

c. Moreover, research has consistently demonstrated that consumers rarely read details beyond the final price of the product and, often, not even that.[6] Consumers often do not consult quantity indications on packages but use alternative methods (e.g., visual impressions of the package size, total package price, or previous purchase experience) to judge product quantity and to calculate product value.[7]

63. Plaintiffs did not expect that the Products would contain nonfunctional slack-fill, especially given that nonfunctional slack-fill, as opposed to functional slack-fill, is prohibited by California law and federal law.

64. In reasonable reliance on the size and style of the packaging, and believing that the Products would be full of candies, Plaintiffs and members of the Classes purchased the Products.

65. Plaintiffs and members of the Classes do not know, did not know, and have no reason to know, that the Products actually contained a significant amount of empty space, lacking candies, because the containers are opaque with no view of the contents inside, at the time of purchase. A reasonable consumer cannot accurately determine the fill of the Products by shaking or squeezing packaging, and is certainly not expected to do so prior to purchasing the Products:

a. Research indicates that 90% of consumers make a purchase after only visually examining the front of the packaging but without physically having the product in their hands.[8]

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[4] C.J. Gobb & W.D. Hoyer, Direct observation of search behavior in the purchase of two nondurable products, Psychology & Marketing 2: 161–179 (1985).

[5] Priya Raghubir & Aradhna Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 Journal of Marketing Research, No. 3, 313-326 (1999).

[6] Peter R Dickson & Alan G. Sawyer, *Point of Purchase Behavior and Price Perceptions of Supermarket Shoppers*, Marketing Science Institute Report No. 86-102. Cambridge, MA: Marketing Science Institute (1986).

[7] Omprakesh K. Gupta et al., *Package downsizing: is it ethical?* 21 AI & Society, No. 3, 239-250 (2007).

[8] Jesper Clement, Visual influence on in-store buying decisions: an eye-track experiment on the visual influence of packaging design, 23 Journal of Marketing Management, 917−928 (2007).

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Los Angeles, CA 90069

66. Because the Products do not contain the amount of candies reasonably expected by Plaintiffs and consumers, Defendant's uniform practice of filling and packaging the Products in the foregoing manner was and continues to be misleading and deceptive, and cheats consumers.

67. Each consumer has been exposed to the same or substantially similar deceptive practice as each of the Products (1) contain the same misleading size and style of packaging, and (2) contain approximately 48% non-functional slack-fill.

68. Plaintiffs and other consumers have paid an unlawful premium for the Products. More specifically, they paid for candies they expected but never received. Plaintiffs and other consumers would have paid significantly less for the Products had they known that the Products were filled with only approximately 52% candies. In the alternative, Plaintiffs and other consumers would not have purchased the Products at all had they known that the Products were filled with only approximately 52% candies. Therefore, Plaintiffs and other consumers purchasing the Products suffered injury in fact and lost money as a result of Defendant's false, unfair, and fraudulent practices, as described herein.

69. Defendant's conduct threatens California consumers by using intentionally deceptive and misleading slack-filled containers. Defendant's conduct also threatens other companies, large and small, who "play by the rules." Defendant's conduct stifles competition and has a negative impact on the marketplace, and reduces consumer choice.

70. As a result of its misleading business practice, and the harm caused to Plaintiffs and other consumers, Defendant should be enjoined from inadequately filling its packaging of the Products. Furthermore, Defendant should be required to pay for all damages caused to misled consumers, including Plaintiff.

71. Despite being misled by Defendant, Plaintiffs would likely purchase the Products in the future if the Products were full of candies.

## CLASS ALLEGATIONS

72. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated that may be properly maintained under California Civil Code § 1781 and other applicable laws. Plaintiffs seek to represent a Class consisting of "All persons who purchased the

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Los Angeles, CA 90069

Products in in the State of California during the time period February 9, 2013, through the present ("California Class").

73. Plaintiffs also seek to represent a subclass defined as all California residents, who within the relevant statute of limitations periods, purchased the Products for personal, family, or household purposes ("California Consumer Subclass").

74. Excluded from the Classes are: Defendant, Defendant's officers, directors, employees, members of their immediate families and their legal representatives, heirs, successors or assigns, any individual who received remuneration from Defendant in connection with that individual's use or endorsement of the Product, and any entity which Defendant has or had a controlling interest. Any judge and/or magistrate judge to whom this action is assigned and any members of such judges' staffs and immediate families are also excluded from the Classes. Further excluded from the Classes are persons or entities that purchased the Products for the sole purpose of resale.

75. Plaintiffs hereby reserve the right to amend or modify the class definitions with greater specificity or division after having had an opportunity to conduct discovery.

76. Plaintiffs are all members of both Classes.

77. Numerosity: Members of the Classes are so numerous that their individual joinder herein is impracticable. On information and belief, the class members number in the hundreds of thousands or more throughout California. The Classes are sufficiently numerous because hundreds of thousands of units or more of the Products have been sold in California during the time period February 9, 2013, through the present (the "Class Period"). The Products are available for sale at movie theatres, grocery chains, convenience stores, and other retail outlets including, but not limited to, Wal-Mart, CVS Pharmacy, Pavilions, Walgreens, Rite Aid Pharmacy, Ralphs, and Target.

78. Common Questions Predominate: There is a well-defined community of interest in the questions of law and fact involved affecting the Plaintiffs and Classes. The questions of law and fact common to the Classes predominate over questions which may affect individual class members. Common questions of law and fact include, but are not limited to, the following:

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

a. Whether Defendant's conduct constitutes an unfair method of competition, or unfair or deceptive act or practice, in violation of Civil Code Section 1750, *et seq*.;

b. Whether Defendant misrepresented the approval of the FDA, United States Congress, and California Legislature that the Products' packaging complied with federal and California slack-fill regulations and statutes in violation of Civil Code Section 1750, *et seq*.;

c. Whether Defendant used deceptive representations in connection with the sale of the Products in violation of Civil Code Section 1750, *et seq*.;

d. Whether Defendant represented the Products have characteristics or quantities that they do not have in violation of Civil Code Section 1750, *et seq*.;

e. Whether Defendant advertised the Products with intent not to sell them as advertised in violation of Civil Code Section 1750, *et seq*.;

f. Whether Defendant represented that the Products have been supplied in accordance with a previous representation of quantity of candy product contained therein by way of its packaging when it has not, in violation of Civil Code Section 1750, *et seq*.;

g. Whether Defendant's packaging is untrue or misleading in violation of Business and Professions Code Section 17500, *et seq*.;

h. Whether Defendant knew or by the exercise of reasonable care should have known its packaging was and is untrue or misleading in violation of Business and Professions Code Section 17500, *et seq*.;

i. Whether Defendant's conduct is an unfair business practice within the meaning of Business and Professions Code Section 17200, *et seq*.;

j. Whether Defendant's conduct is a fraudulent business practice within the meaning of Business and Professions Code Section 17200, *et seq*.;

k. Whether Defendant's conduct is an unlawful business practice within the meaning of Business and Professions Code Section 17200, *et seq*.;

l. Whether Defendant's packaging is false or misleading and therefore misbranded in violation of California Health and Safety Code sections 110660, 110665, or 110670;

CLARKSON LAW FIRM, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

m. Whether the Products' packaging contains nonfunctional slack-fill in violation of 21 C.F.R. 100.100, *et seq.*;

n. Whether the Products' packaging contains nonfunctional slack-fill in violation of California Business and Professions Code Section 12606.2, *et seq.*;

o. Whether Plaintiffs and the Classes paid more money for the Products than they actually received; and

p. How much money Plaintiffs and the Classes paid for the Products than they actually received.

79. Typicality: Plaintiffs' claims are typical of the claims of the Classes they seek to represent in that Plaintiffs and members of the Classes were exposed to Defendant's misleading packaging, purchased the Products relying on the misleading packaging, and suffered losses as a result of such purchases.

80. Adequacy: Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Plaintiffs are adequate representatives of the Classes because their interests do not conflict with the interests of the members of the Classes they seek to represent. Plaintiffs each intend to prosecute this action vigorously. Plaintiffs have retained competent and experienced counsel in class action and other complex litigation. The interests of the class members will be fairly and adequately protected by Plaintiffs and their counsel.

81. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's false representations. Plaintiffs purchased the Products under the false belief that the Products contained an amount of candy product commensurate with the size of each box. Plaintiffs relied on Defendant's packaging and would not have purchased the Products if they had known that the Products contained nonfunctional slack-fill.

82. Superiority: A class action is superior to other available methods for fair and efficient adjudication of this controversy. The size of each claim is too small to pursue individually and each individual class member will lack the resources to undergo the expense and burden of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability.

CLARKSON LAW FIRM, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

83. The trial and litigation of Plaintiffs' claims are manageable. Individual litigation of the legal and factual issues raised by Defendant's conduct would increase delay and expense to all parties and the court system. The class action device presents far fewer management difficulties and provides the benefits of a single, uniform adjudication, economies of scale, and comprehensive supervision by a single court. The class action mechanism is designed to remedy harms like this one, which is too small in value, although not insignificant, to file individual lawsuits for.

84. Defendant has acted or refused to act on grounds generally applicable to the class members, thereby making final injunctive relief and/or corresponding declaratory relief appropriate with respect to the Classes as a whole. The prosecution of separate actions by individual class members would create the risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for Defendant.

85. Absent a class action, Defendant will likely retain the benefits of its wrongdoing, and will be allowed to continue these violations of law and to retain the proceeds of their ill-gotten gains.

86. Questions of law and fact common to the class members predominate over any questions that affect only individual members, and because the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy.

## FIRST CAUSE OF ACTION

**Violation of California Consumers Legal Remedies Act, California Civil Code § 1750, *et seq*. (*for the California Consumer Subclass*)**

87. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

88. Plaintiffs bring this cause of action pursuant to Civil Code Section 1750, *et seq*., the Consumers Legal Remedies Act ("CLRA"), on their own behalf and on behalf of all other persons similarly situated of the proposed California Consumer Subclass against Defendant.

89. The Class consists of hundreds of thousands of persons, the joinder of whom is impracticable.

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Los Angeles, CA 90069

90. There are questions of law and fact common to the California Consumer Subclass, which questions are substantially similar and predominate over questions affecting the individual class members, including but not limited to those questions listed in Paragraph 78, above.

91. The Products are "goods" within the meaning of Cal. Civ. Code § 1761(a), and the purchases of such products by Plaintiffs and members of the California Consumer Subclass constitute "transactions" within the meaning of Cal. Civ. Code § 1761(e).

92. The practices described herein, specifically Defendant's packaging, advertising, and sale of the Products, were intended to result in the sale of the Product to the consuming public and violated and continue to violate the CLRA by (1) misrepresenting the approval of the Products as compliant with 21 C.F.R §100.100, California Business and Professions Code Section 12606.2, and the Sherman Law; (2) using deceptive representations in connection with the Products; (3) representing the Products have characteristics and quantities that they do not have; (4) advertising and packaging the Products with intent not to sell them as advertised and packaged; and (5) representing that the Products have been supplied in accordance with a previous representation as to the quantity of candy product contained within each box, when it has not. *See* CLRA § 1770(a)(5), (a)(9).

93. Defendant fraudulently deceived Plaintiffs and the California Consumer Subclass by representing that the Products' packaging which includes 48% nonfunctional slack-fill actually conforms with federal and California slack-fill regulations and statutes including the Sherman Law, California Business and Professions Code Section 12606.2, and 21 C.F.R. 100.100.

94. Pursuant to 21 C.F.R. Section 100.100 and California Business and Professions Code Section 12606.2: "A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill."

95. Defendant knowingly packaged the Products in boxes which contain 48% nonfunctional slack-fill by making material misrepresentations to fraudulently deceive Plaintiffs and the California Consumer Subclass, or Defendant reasonably should have known that the Products were not full of candies and contained a significant amount of nonfunctional slack-fill, and that Plaintiffs and the California Consumer Subclass would reasonably and justifiably rely on

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the size and style of the Products' packaging in purchasing the Products.

96. Defendant fraudulently deceived Plaintiffs and the California Consumer Subclass by misrepresenting the Products as having characteristics and quantities which they do not have, e.g., that the Products are free of nonfunctional slack-fill when they are not. In doing so, Defendant intentionally or reasonably should have known it misrepresented and concealed material facts from Plaintiffs and the California Consumer Subclass. Said misrepresentations and concealment deceived Plaintiffs and the California Consumer Subclass and deprived them of their legal rights and money.

97. Defendant fraudulently deceived Plaintiffs and the California Consumer Subclass by packaging and advertising the Products with intent not to sell them as advertised, by intentionally or reasonably should have known it was under-filling the Products' containers and instead replaced candy product with nonfunctional slack-fill. In doing so, Defendant misrepresented and concealed material facts from Plaintiffs and the California Consumer Subclass. Said misrepresentations and concealment deceived Plaintiffs and the California Consumer Subclass and deprived them of their legal rights and money.

98. Defendant fraudulently deceived Plaintiffs and the California Consumer Subclass by representing that the Products' packaging was supplied in accordance with an accurate representation as the quantity of candy product contained therein when they were not. Defendant presented the physical dimensions of the Products' packaging to Plaintiffs and the California Consumer Subclass before the point of purchase and gave Plaintiffs and the California Consumer Subclass a reasonable expectation that the quantity of candy product contained therein was commensurate with the size of packaging. In doing so, Defendant misrepresented and concealed material facts from Plaintiffs and the California Consumer Subclass. Said misrepresentations and concealment deceived Plaintiffs and the California Consumer Subclass and deprived them of their legal rights and money.

99. Defendant knew or should have known, through the exercise of reasonable care, that the Products' packaging was misleading.

100. Defendant's actions as described herein were done with disregard of Plaintiffs' and

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Los Angeles, CA 90069

the California Consumer Subclass's rights, and Defendant was wanton and malicious in its concealment of the same.

101. Defendant's Product packaging was a material factor in Plaintiffs' and the California Consumer Subclass's decisions to purchase the Products. Based on Defendant's Product packaging, Plaintiffs and the California Consumer Subclass reasonably relied on Defendant's misleading packaging and fraudulent conduct believing that they were getting more candy product than they actually received. Had they known the truth of the matter, Plaintiffs and the California Consumer Subclass would not have purchased the Products or would have paid significantly less for the Products had they known that Defendant's conduct was misleading and fraudulent.

102. Plaintiffs and the California Consumer Subclass have suffered injury in fact and have lost money as a result of Defendant's unfair, unlawful and fraudulent conduct. Specifically, Plaintiffs and the California Consumer Subclass paid for candy product they never received. Plaintiffs and the California Consumer Subclass would not have purchased the Products had they known the boxes contained nonfunctional slack-fill or would have paid significantly less for the Products.

103. Under Cal. Civ. Code section 1780(a), Defendant's false and misleading packaging should be enjoined due to the false and misleading, and/or deceptive nature of Defendant's packaging. In addition, Defendant should be compelled to provide declaratory relief, restitution, damages, and all other remedies the Court deems appropriate for Defendant's violations of the CLRA to consumers who paid for candy product they never received due to Defendant's representation that it contained a commensurate amount of candy product for a box of its size.

104. By a letter dated September 12, 2016, Plaintiff Gordon advised Defendant of its false and misleading claims pursuant to Cal. Civ. Code section 1782(a).

105. By a letter dated November 23, 2016, Plaintiff Hafer advised Defendant of its false and misleading claims pursuant to Cal. Civ. Code section 1782(a).

106. On August 11, 2017, the Parties stipulated to substitute Plaintiff Hafer in this matter with Plaintiff Hoffman pursuant to Cal. Rule of Court 3.770(a)-(c) and CCP 473(a)(1).

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Los Angeles, CA 90069

107. Because Defendant failed to fully rectify or remedy the damages caused after waiting more than the statutorily required 30 days after it received the notice and demand letters, Plaintiffs timely filed their class action complaints, and are properly filing this TAC on behalf of themselves individually and all members of the California Consumer Subclass.

**SECOND CAUSE OF ACTION**
**Violation of California False Advertising Law,**
**Business and Professions Code § 17500, *et seq.***
**(*for the Classes*)**

108. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

109. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section 17500, *et seq*., on their own behalf and on behalf of the members of the proposed California Class and California Consumer Subclass against Defendant.

110. California's False Advertising Law, California Business and Professions Code Section 17500, *et seq*., 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 whatever, including over the Internet, any statement, concerning personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

111. Defendant manipulated the physical dimensions of the Products' boxes, or stated another way, under-filled the amount of candy product in each of the Products, by including 48% nonfunctional slack-fill as a means to mislead the public about the amount of candy product contained in each package, and did so knowingly or reasonably should have known.

112. Defendant controlled the packaging of the Products. It knew or should have known, through the exercise of reasonable care that its representations about the quantity of candy product contained in the Products were untrue and misleading.

113. The general public bases its purchasing decisions on the dimensions of a product's packaging. Consumers generally do not look at any label information, such as net weight or serving

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Los Angeles, CA 90069

disclosures. Instead, the general public chooses a larger box because it leads them to believe they are receiving a better value.

114. Defendant's conduct of packaging the Products with 48% nonfunctional slack-fill instead of including more candy product or smaller boxes deceives the general public.

115. Defendant's actions in violation of Section 17500 were false and misleading such that the general public is and was likely to be deceived.

116. Pursuant to Business and Professions Code Sections 17535, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of under-filling the Products' containers. Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiff and the Classes restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations in an amount to be determined at trial.

117. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's false representations. Plaintiffs purchased the Products in reliance upon the claims by Defendant that the Products were of the quantity represented by Defendant's packaging and advertising. Plaintiffs would not have purchased the Products if they had known that the claims and advertising as described herein were false.

118. Plaintiffs are informed and believe, and based thereon allege that at all times relevant herein each of these individuals and/or entities was the agent, servant, employee, subsidiary, affiliate, partner, assignee, successor-in-interest, alter ego, or other representative of each of the remaining Defendants and was acting in such capacity in doing the things herein complained of and alleged.

119. In committing the wrongful acts alleged herein, Defendant planned and participated in and furthered a common scheme by means of false, misleading, deceptive, and fraudulent representations to induce members of the public to purchase the Products. Defendant participated in the making of such representations in that it did disseminate or cause to be disseminated said misrepresentations.

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Los Angeles, CA 90069

120. Defendant, upon becoming involved with the manufacture, advertising, and sale of the Products, knew or should have known that the Products were being under-filled, and thus the packaging of the Products was misleading. Defendant affirmatively misrepresented the quantity of the Products' contents in order to convince the public and the Products' consumer to purchase and use the Products, resulting in profits of millions of dollars or more to Defendant, all to the damage and detriment of the consuming public.

121. Plaintiffs request that this Court cause Defendant to restore this money to Plaintiffs and members of the Classes, to disgorge the profits Defendant made on these transactions, and to enjoin Defendant from violating the FAL or violating it in the same fashion in the future as discussed herein. Otherwise, Plaintiffs and members of the Classes may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

## THIRD CAUSE OF ACTION

**Violations of California Unfair Competition Law**
**Business and Professions Code§ 17200, *et seq.***
**(*for the Classes*)**

122. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

123. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section 17200, *et seq*., on their own behalf and on behalf of the members of the proposed California Class and California Consumer Subclass against Defendant.

124. Congress passed the Federal Food, Drug, and Cosmetic Act ("FDCA"), and in so doing established the Federal Food and Drug Administration ("FDA") to "promote the public health" by ensuring that "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393.

125. The FDA has implemented regulations to achieve this objective. *See, e.g*., 21 C.F.R. § 101.1 *et seq*.

126. The legislature of California has incorporated 21 C.F.R. Section 100.100, which prohibits nonfunctional slack-fill, into California's Business and Professions Code Section 12606.2, *et seq.*

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Los Angeles, CA 90069

127. The FDA enforces the FDCA and accompanying regulations; "[t]here is no private right of action under the FDCA." *Ivie v. Kraft Foods Global, Inc*., 2013 U.S. Dist. LEXIS 25615, 2013 WL 685372, at *1 (internal citations omitted).

128. In 1990, Congress passed an amendment to the FDCA, the Nutrition Labeling and Education Act ("NLEA"), which imposed a number of requirements specifically governing food nutritional content labeling. *See, e.g., 21 U.S.C. § 343 et. seq*.

129. Plaintiffs are not suing under the FDCA, but under California state law.

130. The California Sherman Food, Drug, and Cosmetic Act ("Sherman Law"), Cal. Health & Safety Code § 109875 *et seq*., has adopted wholesale the food labeling requirements of the FDCA and NLEA as the food regulations of California. Cal. Health & Safety Code § 110100.

131. The Sherman Law declares any food to be misbranded if it is false or misleading in any particular, if the labeling does not conform with the requirements for nutrition labeling set forth in certain provisions of the NLEA. Cal. Health & Safety Code §§ 110660, 110665, 110670.

132. The UCL prohibits and provides, in pertinent part, that "unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising…." Cal. Bus & Prof. Code § 17200.

**A. "Unfair" Prong**

133. Under California's False Advertising Law, Cal. Bus. & Prof. Code Section 17200, *et seq*., a challenged activity is "unfair" when "any injury it causes outweighs any benefits provided to consumers and the injury is one that the consumers themselves could not reasonably avoid." *Camacho v. Auto Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

134. Defendant's action of leaving 48% nonfunctional slack-fill in its Products does not confer any benefit to consumers.

135. Defendant's action of leaving 48% nonfunctional slack-fill in its Products causes injuries to consumers because they do not receive a quantity of candy commensurate with their reasonable expectation.

136. Defendant's action of leaving 48% nonfunctional slack-fill in its Products causes injuries to consumers because they do not receive a level of hunger satiety commensurate with their

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

reasonable expectation.

137. Defendant's action of leaving 48% nonfunctional slack-fill in its Products causes injuries to consumers because they end up overpaying for the Products and receiving a quantity of candy less than what they expected to receive.

138. Consumers cannot avoid any of the injuries caused by the 48% nonfunctional slack-fill in Defendant's Products.

139. Accordingly, the injuries caused by Defendant's activity of including 48% nonfunctional slack-fill in the Products outweighs any benefits.

140. Some courts conduct a balancing test to decide if a challenged activity amounts to unfair conduct under California Business and Professions Code Section 17200. They "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Davis v. HSBC Bank Nevada, N.A.,* 691 F.3d 1152, 1169 (9th Cir. 2012).

141. Here, Defendant's conduct of including 48% nonfunctional slack-fill in the Products' packaging has no utility and financially harms purchasers. Thus, the utility of Defendant's conduct is vastly outweighed by the gravity of harm.

142. Some courts require that "unfairness must be tethered to some legislative declared policy or proof of some actual or threatened impact on competition." *Lozano v. AT&T Wireless Servs. Inc.,* 504 F. 3d 718, 735 (9th Cir. 2007).

143. The California legislature maintains a declared policy of prohibiting nonfunctional slack-fill in consumer goods, as reflected in California's Business and Professions Code Section 12606.2 and California Health and Safety Code Section 110100.

144. The 48% of nonfunctional slack-fill contained in the Products is tethered to a legislative policy declared in California according to California Business and Professions Code Section 12606.2 and California Health & Safety Code Section 110100.

145. Defendant's packaging of the Products, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unfair conduct.

146. Defendants knew or should have known of its unfair conduct.

147. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed

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Los Angeles, CA 90069

above constitute an unfair business practice within the meaning of California Business and Professions Code Section 17200.

148. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein. Defendant could have used packaging appropriate for the amount of candy product contained within the Products.

149. All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct repeated on approximately thousands of occasions daily.

150. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practice of under-filling the Products' boxes. Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs and the class members restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations in an amount to be determined at trial.

151. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's unfair conduct. Plaintiffs paid an unwarranted premium for these products. Specifically, Plaintiffs paid for 48% of candy product they never received. Plaintiffs would not have purchased the Products if they had known that the Products' packaging contained nonfunctional slack-fill or would have paid significantly less for the Products.

**B. "Fraudulent" Prong**

152. California Business and Professions Code Section 17200, *et seq.*, considers conduct fraudulent and therefore prohibits said conduct if it is likely to deceive members of the public. *Bank of W v. Superior Court*, 2 Cal. 4th 1254, 553 (1992). Also, a business practice is "fraudulent" if it actually deceives members of the consuming public. *See* UCL.

153. Members of the public base their purchasing decisions on the dimensions of a product's packaging. They generally do not view label information or net weight and serving

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

disclosures. Members of the public choose a larger box because they automatically assume it has better value.

154. Defendant's conduct of packaging the Products with 48% nonfunctional slack-fill is likely to deceive members of the public.

155. Defendant's packaging of the Products, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes fraudulent conduct.

156. Defendant knew or should have known of its fraudulent conduct.

157. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute a fraudulent business practice in violation of California Business & Professions Code Section 17200.

158. There were reasonably available alternatives to further Defendant's legitimate business interests other than the conduct described herein. Defendant could have used packaging appropriate for the amount of Products contained therein.

159. All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

160. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of under-filling the Products' containers. Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations in an amount to be determined at trial.

161. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's unlawful, unfair, and fraudulent conduct. Plaintiffs paid an unwarranted premium for these products. Specifically, Plaintiffs paid for 48% of candy product they never received. Plaintiffs would not have purchased the Products or would have paid significantly less for the Products if they had known that the boxes contained nonfunctional slack-fill.

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9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

### C. "Unlawful" Prong

162. California Business and Professions Code Section 17200, *et seq.*, identifies violations of any state or federal law as "unlawful practices that the unfair competition law makes independently actionable." *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

163. Defendant's packaging of the Products, as alleged in the preceding paragraphs, violates California Civil Code Section 1750, *et. seq.*, California Business and Professions Code Section 17500, *et. seq.*, California's Sherman Law, California Business and Professions Code Section 12606.2, *et seq.*, the FDCA, and 21 C.F.R section 100.100.

164. Defendant's packaging of the Products, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unlawful conduct.

165. Defendant knew or should have known of its unlawful conduct.

166. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute an unlawful business practice within the meaning of California Business and Professions Code section 17200.

167. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein. Defendant could have used packaging appropriate for the amount of candy product contained therein.

168. All of the conduct alleged herein occurred and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

169. Pursuant to Business and Professions Code section 17203, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of under-filling the Products' boxes. Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations in an amount to be determined at trial.

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170. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's unlawful conduct. Plaintiffs paid an unwarranted premium for these products. Specifically, Plaintiffs paid for 48% candy product they never received. Plaintiffs would not have purchased the Products or would have paid significantly less for the Products if they had known that the Products contained nonfunctional slack-fill.

**FOURTH CAUSE OF ACTION**
**Common Law Fraud**
***(for the Classes)***

171. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

172. Plaintiffs bring this cause of action individually and on behalf of the members of the Classes against Defendant.

173. Defendant has willfully, falsely, and knowingly filled and packaged the Products in a manner indicating that the Products are full of candies. However, the Products contain only approximately 52% candies and instead contain significant amounts of non-functional slack-fill. Therefore, Defendant has made misrepresentations as to the Products.

174. Defendant's misrepresentations are and were material (i.e., the type of misrepresentations to which a reasonable person would attach importance and would be induced to act thereon in making purchase decisions), because they relate to the quantity of Products the consumer is receiving.

175. Defendant knew or recklessly disregarded the fact that the Products contained a significant amount of non-functional slack-fill.

176. Defendant intended and intends that Plaintiffs and other consumers rely on these representations, as evidenced by Defendant intentionally manufacturing packaging that is significantly larger than the volume of the contents inside.

177. Plaintiffs and members of the Classes have reasonably and justifiably relied on Defendant's misrepresentations when purchasing the Products and had the correct facts been known, would not have purchased the Products or would not have purchased them at the prices at which they were offered.

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Los Angeles, CA 90069

178. Therefore, as a direct and proximate result of Defendant's fraud, Plaintiffs and members of the Classes have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

**FIFTH CAUSE OF ACTION**
**Intentional Misrepresentation**
**(*for the Classes*)**

179. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

180. Plaintiffs bring this cause of action individually and on behalf of the members of the Classes against Defendant.

181. Defendant has filled and packaged the Products in a manner indicating that the Products are full of candies. However, the Products contain only approximately 52% candies and instead contain a significant amount of non-functional slack-fill. Therefore, Defendant has made misrepresentations as to the Products.

182. Defendant's misrepresentations regarding the Products are material to a reasonable consumer because they relate to the quantity of product received by consumers. A reasonable consumer would attach importance to such representations and would be induced to act thereon in making purchase decisions.

183. At all relevant times when such misrepresentations were made, Defendant knew that the representations were misleading, or has acted recklessly in making the representations, without regard to the truth.

184. Defendant intended and intends that Plaintiffs and other consumers rely on the size and style of the Products' packaging, as evidenced by Defendant's intentionally manufacturing, marketing, and selling packaging that is significantly larger than the volume of the contents inside.

185. Plaintiffs and members of the Classes have reasonably and justifiably relied on Defendant's intentional misrepresentations when purchasing the Products, and had the correct facts been known, would not have purchased the Products or would not have purchased them at the prices at which they were offered.

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186. Therefore, as a direct and proximate result of Defendant's intentional misrepresentations, Plaintiffs and members of the Classes have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

## SIXTH CAUSE OF ACTION
## Negligent Misrepresentation
## (*for the Classes*)

187. Plaintiffs repeat and reallege all the allegations contained in the preceding paragraphs and incorporate the same as if set forth herein at length.

188. Plaintiffs bring this cause of action individually and on behalf of the members of the Classes against Defendant.

189. Defendant has filled and packaged the Products in a manner indicating that the Products are full of candies. However, the Products contain only approximately 52% candies and instead contain a significant amount of non-functional slack-fill. Therefore, Defendant has made misrepresentations as to the Products.

190. Defendant's misrepresentations regarding the Products are material to a reasonable consumer because they relate to the quantity of product received by the consumer. A reasonable consumer would attach importance to such representations and would be induced to act thereon in making purchase decisions.

191. At all relevant times when such misrepresentations were made, Defendant knew or has been negligent in not knowing that that the Products are not full of candies and instead contain a significant amount of non-functional slack-fill. Defendant has no reasonable grounds for believing its misrepresentation is not false and misleading.

192. Defendant intended and intends that Plaintiffs and other consumers rely on the size and style of the Products' packaging, as evidenced by Defendant's packaging that is significantly larger than the volume of the contents inside.

193. Plaintiffs and members of the Classes have reasonably and justifiably relied on Defendant's negligent misrepresentations when purchasing the Products, and had the correct facts been known, would not have purchased the Products or would not have purchased them at the prices

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Los Angeles, CA 90069

at which they were offered.

194. Therefore, as a direct and proximate result of Defendant's negligent misrepresentations, Plaintiffs and members of the Classes have suffered economic losses and other general and specific damages, including but not limited to the amounts paid for the Products, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and on behalf of the Classes defined herein, pray for judgment and relief on all causes of action as follows:

A. For an order certifying the Classes, appointing Plaintiffs as class representatives, and designating Plaintiffs' counsel as counsel for the Classes;

B. For all forms of relief set forth above;

C. For an order declaring that Defendant's conduct violates the statutes and laws referenced herein;

D. For an order finding in favor of Plaintiffs and the Classes on all causes of action asserted herein;

E. For an order awarding all damages, including punitive damages and damages under the California Consumers Legal Remedies Act against Defendant in an amount to be determined by this Court and/or jury at trial, together with pre- and post-judgment interest at the maximum rate allowable by law on any amounts awarded;

F. Restitution and/or disgorgement in an amount to be determined at trial and all other forms of equitable monetary relief;

G. An order enjoining Defendant from continuing to engage in the unlawful conduct and practice described herein or as this Court may deem proper;

H. Awarding Plaintiff and the Classes their reasonable attorneys' fees and costs of suit, including as provided by statute such as under California Code of Civil Procedure section 1021.5; and

I. Granting such other and further relief as this Court may deem just and proper.

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**JURY TRIAL DEMANDED**

Plaintiffs reiterate their jury demand on all triable issues.

DATED: August 17, 2017

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