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**Filed**

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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

**CV 13 - 0492**

12 SUSAN LEONHART, individually and on  
13 behalf of all others similarly situated,

Case No.

**HRL**

**CLASS ACTION AND REPRESENTATIVE  
ACTION**

14 Plaintiff,  
15 v. *E-filing*

**COMPLAINT FOR DAMAGES,  
EQUITABLE AND INJUNCTIVE RELIEF**

16 NATURE'S PATH FOODS INC.,

**JURY TRIAL DEMANDED**

17 Defendant.

*ADR*

18  
19  
20 Plaintiff, through the undersigned attorneys, brings this lawsuit against Defendant Nature's  
21 Path Foods Inc. ("Nature's Path" or "Defendant") as to Plaintiff's own acts upon personal  
22 knowledge, and as to all other matters upon information and belief. To remedy the harm arising  
23 from Defendant's unlawful conduct, which has resulted in unjust profits, Plaintiff brings this action  
24 on behalf of a national class and a California subclass of consumers who, within the last four years,  
25 purchased Defendant's products 1) labeled with the ingredient "evaporated cane juice; 2) "labeled  
26 or advertised with an unapproved health or drug claim; 3) labeled or advertised with a low sodium  
27 claim despite containing levels of sodium exceeding the maximum level of 140 mgs specified in 21  
28

1 C.F.R. § 101.61; or 5) sold in packaging containing non-functional slack fill (referred to herein as  
2 “Misbranded Food Products”).

### 3 INTRODUCTION

4 1. Defendant Nature’s Path is one of the leading privately owned organic food  
5 companies in North America. The company sells, among other products, organic cereals, waffles,  
6 snack bars and breads in California, and throughout the United States as well as in many countries  
7 around the world. Nature’s Path is North America’s leading organic cereal company.

8 2. As part of its overall marketing strategy, Defendant recognizes that consumers desire  
9 to eat a healthier diet comprised of foods with no added sugar. Defendant similarly recognizes that  
10 consumers are willing to pay a premium for such healthy foods, and Defendant actively promotes  
11 the health benefits of its products. For example, Defendant’s website, [www.naturespath.com](http://www.naturespath.com),  
12 makes the following representations regarding ingredients in Defendant’s products:

- 13 • Amaranth is a highly nutritious and gluten free grain, and is unusual in that it offers  
14 a complete form of vegetable protein. It is also a great source of dietary fiber, folic  
15 acid, potassium, calcium and minerals such as iron, magnesium, phosphorus, copper  
16 and manganese. Amaranth is a good source of all essential amino acids, in particular  
17 lysine, and has a strengthening, toning effect on the body.
- 18 • The protein in buckwheat contains the eight essential amino acids and is also high in  
19 lysine. Buckwheat is also rich in many B vitamins as well as phosphorus,  
20 magnesium, iron, zinc, copper and manganese. It [sic] provides lots of protein as  
21 well as calcium, iron, manganese, potassium and zinc. A 1995 study from the Johns  
22 Hopkins Medical Institute showed that eating 30 grams of buckwheat daily can  
23 lower blood pressure. And because buckwheat grain is digested more slowly than  
24 other carbohydrates it can leave you feeling fuller longer and improve glucose  
25 tolerance among the carbohydrate sensitive.
- 26 • Kamut® Khorasan wheat is [sic] distant relative to modern wheat believed to have  
27 originated in the time of King Tut. It is a non-hybridized grain that has eight out of  
28 nine minerals, and contains up to 65% more amino acids. Kamut® Khorasan wheat  
is also higher in lipid and protein. The protein content is significantly higher and it  
also has a high amount of selenium, giving this grain strong antioxidant properties,  
which help protect the immune system.
- Millet is another gluten-free seed with high nutritional value. It is an excellent  
source of protein and is high in fibre [sic] and B vitamins. Millet is also particularly  
high in magnesium, giving the seed heart-protecting properties.
- People who enjoy a plant-based diet also benefit from lower LDL cholesterol levels,  
lower blood pressure, as well as lower rates of hypertension, type 2 diabetes, and  
some forms of cancer than non-vegetarians. In fact, vegetarian diets have even been  
associated with lower levels of obesity, reduced risk of cardiovascular disease and

1 lower total mortality.

2 • We offer over 80 products at a variety of sweetness levels. Please note that we also  
3 use organic sweeteners such as grape or pear juice, pomegranate juice, honey, barley  
4 malt, brown rice syrup, molasses and fruit juices. These sweeteners have unique  
5 flavor profiles and are sources from different plants and grains.

6 3. In the list of sweeteners mentioned above, the term “sugar” is not to be found. Most  
7 of the products which Nature’s Path currently markets list “evaporated cane juice” as an ingredient.  
8 Among the many products marketed under the Nature’s Path brand which have “evaporated cane  
9 juice in their ingredient lists are the following:

10 a. Cold Cereals: Crunchy Maple Sunrise, Crunch Vanilla Sunrise, Flax Plus Maple  
11 Pecan Crunch, Flax Plus Multibran Flakes, Flax Plus Pumpkin Raisin Crunch, Flax Plus Raisin  
12 Bran Flakes, Flax Plus Red Berry Crunch, Heritage Crunch, Flax Plus with Cinnamon, Chia Plus  
13 Chia Coconut Granola, Flax Plus Pumpkin Flax Granola, Flax Plus Vanilla Almond Crunch, Hemp  
14 Plus Granola, High Fiber Cinnamon Raisin Granola, Peanut Butter Granola, Pomegran Cherry  
15 Granola, Optimun Blueberry Cinnamon Flax, Optimum Slim Low Fat Vanilla, Crispy Rice,  
16 Heritage Flakes, Heritage O’s, Honey’d O’s, Mesa Sunrise, Mesa Sunrise with Raisins, Whole O’s;

17 b. Hot Cereals: Maple Nut Hot Oatmeal, Apple Cinnamon Hot Oatmeal, Flax Plus Hot  
18 Oatmeal, Optimum Power Blueberry Cinnamon Flax Hot Oatmeal, Variety Pack Hot Oatmeal,  
19 Multigrain Raisin Spice Hot Oatmeal, Optimum Cranberry Ginger Hot Oatmeal, Hemp Plus Hot  
20 Oatmeal;

21 c. Premium Granolas: Aloha Blend, Apple Crumble, Carrot Cake, Dark Chocolate &  
22 Red Berries;

23 d. EnviroKids: Amazon Frosted Flakes, Gorilla Munch Cereal, Koala Crisp, Leapin  
24 Lemurs, Panda Puffs, Cheetah Berry, Kaola Chocolate, Lemur Peanut Choco, Panda Peanut Butter,  
25 Penguin Fruity Burst;

26 e. Baking Mixes: Buttermilk Pancake mix, Flax Plus Multigrain Pancake mix,

27 f. Bars: Pumpkin-N-Spice Flax Plus Granola Bars, Macaroon Crunch Granola Bars,  
28 Apple Pie Crunch Chia Plus Granola Bars, Peanut Choco Crunch Ancient Grains Granola Bars,  
Honey Oat Crunch Flax Plus Granola Bars, Sunny Hemp Hemp Plus Granola Bars, EnviroKidz

1 peanut Choco Drizzle Crispy Rice Bars, EnviroKidz Chocolate Crispy Rice Bars, Lotta Apricotta  
2 Granola Bars, EnviroKidz Peanut Butter Crispy Rice Bars, EnviroKidz Berry Blast Crispy Rice  
3 Bars, Peanut Choco Granola Bars, Chococonut Granola Bars, Mmmapple PecanFlax Plus Granola  
4 Bars, EnviroKidz Fruity Burst Crispy Rice Bars, Peanut Buddy Granola Bars, Berry Strawberry  
5 Flax Plus Granola Bars;

6 g. Toaster Pastries: Frosted Mmmapple Brown Sugar Toaster Pastries, Unfrosted Bunch  
7 Blueberries Toaster Pastries, Frosted Cherry Pomegranate Toaster Pastries, Frosted Lotta  
8 Chocolotta Toaster Pastries, Frosted Berry Strawberry Toaster Pastries, Unfrosted Berry Strawberry  
9 Toaster Pastries, Frosted Granny's Apple Pie Toaster Pastries, Frosted Wildberry Acai Toaster  
10 Pastries, Unfrosted Granny's Apple Pie Toaster Pastries, Frosted Buncha Blueberries Toaster  
11 Pastries, Frosted Razzi Raspberry Toaster Pastries;

12 h. Waffles: Buckwheat Wildberry Frozen Waffles. Maple Cinnamon Frozen Waffles,  
13 Flax Plus Frozen Waffles, Ancient Grains Frozen Waffles, and Hemp Plus Frozen Waffles.

14 All of these products are misbranded for the reasons stated herein.

15 4. Although Defendant lists "evaporated cane juice" as an ingredient on the products  
16 indicated above, and on other products as well, the Food and Drug Administration ("FDA") has  
17 specifically warned companies not to use this term because it is 1)"false and misleading;" 2) in  
18 violation of a number of labeling regulations designed to ensure that manufacturers label their  
19 products with the common and usual names of the ingredients they use and accurately describe the  
20 ingredients they utilize; and 3) the ingredient in question is not a juice.

21 5. In referencing "evaporated cane juice" in its marketing materials, Defendant does  
22 not disclose the fact that "evaporated cane juice" is, in its ordinary and commonly understood term  
23 known as, "sugar," and/or "dried cane syrup." Instead, on its website in its Frequently Asked  
24 Questions, Defendant, in a section entitled "What is evaporated unrefined cane juice?" describes  
25 this ingredient without ever identifying it as sugar or dried cane syrup and gives the impression that  
26 it is something other than what it really is by stating:

27 Refined sugar is produced through the use of chemical purification  
28 and bleaching of sugar cane which removes the mineral component of  
the sugar and is very hard on the environment. Evaporated unrefined

1 cane juice eliminated the chemical purification steps of the process of  
2 turning cane juice into a crystalline substance, retaining its mineral  
3 content and creating less harmful byproducts to be released into the  
4 environment. It is composed mostly of sucrose and has the same  
5 sweetening properties as refined sugar.

6 [us.naturespath.com/faq-page#n185](http://us.naturespath.com/faq-page#n185) (webpage last visited January 18, 2013).

7 6. If a manufacturer is going to make a claim on a food label, the label must meet  
8 certain legal requirements that help consumers make informed choices and ensure that they are not  
9 misled. As described more fully below, Defendant has made, and continues to make, false and  
10 deceptive claims in violation of federal and California laws that govern the types of representations  
11 that can be made on food labels.

12 7. Identical federal and California laws regulate the content of labels on packaged food.  
13 The requirements of the federal Food Drug & Cosmetic Act (“FDCA”) were adopted by the  
14 California legislature in the Sherman Food Drug & Cosmetic Law, California Health & Safety  
15 Code § 109875, *et seq.* (the “Sherman Law”). Under FDCA section 403(a), food is “misbranded” if  
16 “its labeling is false or misleading in any particular,” or if it does not contain certain information on  
17 its label or its labeling. 21 U.S.C. § 343(a).

18 8. Under the FDCA, the term “false” has its usual meaning of “untruthful,” while the  
19 term “misleading” is a term of art. Misbranding reaches not only false claims, but also those claims  
20 that might be technically true, but still misleading. If any representation in the labeling is  
21 misleading, the entire food is misbranded, and no other statement in the labeling can cure a  
22 misleading statement. “Misleading” is judged in reference to “the ignorant, the unthinking and the  
23 credulous who, when making a purchase, do not stop to analyze.” *United States v. El-O-Pathic*  
24 *Pharmacy*, 192 F.2d 62, 75 (9<sup>th</sup> Cir. 1951). Under the FDCA, it is not necessary to prove that  
25 anyone was actually misled.

26 9. Defendant has made, and continues to make, false and deceptive claims on its  
27 Misbranded Food Products in violation of federal and California laws that govern the types of  
28 representations that can be made on food labels. In making unlawful “evaporated cane juice”  
claims on its Misbranded Food Products, Defendant has violated labeling regulations mandated by

1 federal and California law by listing sugar and/or sugar cane syrups as “evaporated cane juice.”

2 10. According to the FDA, the term “evaporated cane juice” is not the common or  
3 usual name of any type of sweetener, including sugar, sucrose, or dried cane syrup. Sugar or  
4 sucrose is defined by regulation in 21 C.F.R. §101.4(b)(20) and 21 C.F.R. §184.1854, as the  
5 common or usual name for material obtained from the crystallization from sugar cane or sugar beet  
6 juice that has been extracted by pressing or diffusion, then clarified and evaporated. Cane syrup is  
7 defined by regulation in 21 C.F.R. § 168.130. The common or usual name for the solid or dried  
8 form of cane syrup is “dried cane syrup.”

9 11. Sugar cane products exist in many different forms, ranging from raw sugars and  
10 syrups to refined sugar and molasses. These products are differentiated by their moisture, molasses,  
11 and sucrose content as well as by crystal size and any special treatments. Sugar cane products are  
12 required by regulation (21 C.F.R. §101.4) to be described by their common or usual names, sugar  
13 (21 C.F.R. 101.4(b)(20) and 21 C.F.R. §184.1854 or cane syrup (21 C.F.R. 168.1340). Other sugar  
14 cane products have common or usual names established by common usage such as molasses, raw  
15 sugar, brown sugar, turbinado sugar, muscovado sugar and demerara sugar.

16 12. The FDA has instructed that sweeteners derived from sugar cane syrup should not  
17 be listed in the ingredient declaration by names which suggest that the ingredients are juice, such as  
18 “evaporated cane juice.” The FDA considers such representation to be “false and misleading”  
19 under section 403(a)(1) of the FDCA (21 U.S.C. 343(a)(1)) because it fails to reveal the basic  
20 nature of the food and its characterizing properties (*i.e.*, that the ingredient is sugar or syrup) as  
21 required by 21 C.F.R § 102.5. Nevertheless, Defendant has made, and continues to make, false and  
22 deceptive claims on its Misbranded Food Products in violation of federal and California laws that  
23 govern the types of representations that can be made on food labels.

24 13. Defendant has made and continues to make unlawful drug and health claims on the  
25 labeling of its Misbranded Food Products that are prohibited by federal and California law and  
26 which render these products misbranded. These claims are unlawful and violate 21 C.F.R. §101.14  
27 because the claims have not been approved by the FDA or the Defendant’s products contain  
28 disqualifying nutrient levels.



1 U.S.C. § 1367, because they form part of the same case or controversy under Article III of the  
2 United States Constitution.

3 22. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28  
4 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is  
5 between citizens of different states.

6 23. The Court has personal jurisdiction over Defendant because a substantial portion of  
7 the wrongdoing alleged in this Complaint occurred in California, Defendant is authorized to do  
8 business in California, has sufficient minimum contacts with California, and otherwise intentionally  
9 avails itself of the markets in California through the promotion, marketing and sale of merchandise,  
10 sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of  
11 fair play and substantial justice.

12 24. Because a substantial part of the events or omissions giving rise to these claims  
13 occurred in this District and because the Court has personal jurisdiction over Defendant, venue is  
14 proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b).

15 **FACTUAL ALLEGATIONS**

16 **A. Identical California And Federal Laws Regulate Food Labeling**

17 25. Food manufacturers are required to comply with identical federal and state laws and  
18 regulations that govern the labeling of food products. First and foremost among these is the FDCA  
19 and its labeling regulations, including those set forth in 21 C.F.R. § 101.

20 26. Pursuant to the Sherman Law, California has expressly adopted the federal labeling  
21 requirements as its own and indicated that “[a]ll food labeling regulations and any amendments to  
22 those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or  
23 after that date shall be the food regulations of this state.” California Health & Safety Code  
24 §110100.

25 27. In addition to its blanket adoption of federal labeling requirements, California has  
26 also enacted a number of laws and regulations that adopt and incorporate specific enumerated  
27 federal food laws and regulations. For example, food products are misbranded under California  
28 Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars;



1 are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform  
2 to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted  
3 thereto; are misbranded under California Health & Safety Code § 110670 if their labeling fails to  
4 conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r)  
5 and regulations adopted thereto; are misbranded under California Health & Safety Code § 110705 if  
6 words, statements and other information required by the Sherman Law to appear on their labeling  
7 are either missing or not sufficiently conspicuous; are misbranded under California Health & Safety  
8 Code § 110735 if they are represented as having special dietary uses but fail to bear labeling that  
9 adequately informs consumers of their value for that use; and are misbranded under California  
10 Health & Safety Code § 110740 if they contain artificial flavoring, artificial coloring and chemical  
11 preservatives but fail to adequately disclose that fact on their labeling.

12 **B. FDA Enforcement History**

13 28. In recent years the FDA has become increasingly concerned that food manufacturers  
14 were disregarding food labeling regulations. To address this concern, the FDA elected to take steps  
15 to inform the food industry of its concerns and to place the industry on notice that food labeling  
16 compliance was an area of enforcement priority.

17 29. In October 2009, the FDA issued a *Guidance For Industry: Letter regarding Point*  
18 *Of Purchase Food Labeling* to address its concerns about front of package labels (“2009 FOP  
19 Guidance”). The 2009 FOP Guidance advised the food industry:

20 FDA’s research has found that with FOP labeling, people are less likely to check the  
21 Nutrition Facts label on the information panel of foods (usually, the back or side of  
22 the package). It is thus essential that both the criteria and symbols used in front-of-  
23 package and shelf-labeling systems be nutritionally sound, well-designed to help  
24 consumers make informed and healthy food choices, and not be false or misleading.  
25 The agency is currently analyzing FOP labels that appear to be misleading. The  
26 agency is also looking for symbols that either expressly or by implication are  
27 nutrient content claims. We are assessing the criteria established by food  
28 manufacturers for such symbols and comparing them to our regulatory criteria.

It is important to note that nutrition-related FOP and shelf labeling, while currently  
voluntary, is subject to the provisions of the Federal Food, Drug, and Cosmetic Act  
that prohibit false or misleading claims and restrict nutrient content claims to those  
defined in FDA regulations. Therefore, FOP and shelf labeling that is used in a  
manner that is false or misleading misbrands the products it accompanies. Similarly,

1 a food that bears FOP or shelf labeling with a nutrient content claim that does not  
2 comply with the regulatory criteria for the claim as defined in Title 21 Code of  
3 Federal Regulations (C.F.R.) 101.13 and Subpart D of Part 101 is misbranded. We  
4 will consider enforcement actions against clear violations of these established  
5 labeling requirements. . .

6 ... Accurate food labeling information can assist consumers in making healthy  
7 nutritional choices. FDA intends to monitor and evaluate the various FOP labeling  
8 systems and their effect on consumers' food choices and perceptions. FDA  
9 recommends that manufacturers and distributors of food products that include FOP  
10 labeling ensure that the label statements are consistent with FDA laws and  
11 regulations. FDA will proceed with enforcement action against products that bear  
12 FOP labeling that are explicit or implied nutrient content claims and that are not  
13 consistent with current nutrient content claim requirements. FDA will also proceed  
14 with enforcement action where such FOP labeling or labeling systems are used in a  
15 manner that is false or misleading.

16 [http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments  
17 /FoodLabelingNutrition/ucm187208.htm](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm187208.htm)

18 30. The 2009 FOP Guidance recommended that “manufacturers and distributors of food  
19 products that include FOP labeling ensure that the label statements are consistent with FDA law and  
20 regulations” and specifically advised the food industry that it would “proceed with enforcement  
21 action where such FOP labeling or labeling systems are used in a manner that is false or  
22 misleading.”

23 31. Defendant knew or should have known about the 2009 FOP guidance.

24 32. Despite the issuance of the 2009 FOP Guidance, Defendant did not remove the  
25 unlawful and misleading food labeling claims from its Misbranded Food Products.

26 33. On March 3, 2010, the FDA issued an “Open Letter to Industry from [FDA  
27 Commissioner] Dr. Hamburg” (hereinafter, “Open Letter”). The Open Letter reiterated the FDA’s  
28 concern regarding false and misleading labeling by food manufacturers. In pertinent part the letter  
stated:

In the early 1990s, the Food and Drug Administration (FDA) and the food industry worked together to create a uniform national system of nutrition labeling, which includes the now-iconic Nutrition Facts panel on most food packages. Our citizens appreciate that effort, and many use this nutrition information to make food choices. Today, ready access to reliable information about the calorie and nutrient content of food is even more important, given the prevalence of obesity and diet-related diseases in the United States. This need is highlighted by the announcement recently by the First Lady of a coordinated national campaign to reduce the incidence of

1 obesity among our citizens, particularly our children.

2 With that in mind, I have made improving the scientific accuracy and usefulness of  
3 food labeling one of my priorities as Commissioner of Food and Drugs. The latest  
4 focus in this area, of course, is on information provided on the principal display  
5 panel of food packages and commonly referred to as "front-of-pack" labeling. The  
6 use of front-of-pack nutrition symbols and other claims has grown tremendously in  
7 recent years, and it is clear to me as a working mother that such information can be  
8 helpful to busy shoppers who are often pressed for time in making their food  
9 selections....

10 As we move forward in those areas, I must note, however, that there is one area in  
11 which more progress is needed. As you will recall, we recently expressed concern,  
12 in a "Dear Industry" letter, about the number and variety of label claims that may not  
13 help consumers distinguish healthy food choices from less healthy ones and, indeed,  
14 may be false or misleading.

15 At that time, we urged food manufacturers to examine their product labels in the  
16 context of the provisions of the Federal Food, Drug, and Cosmetic Act that prohibit  
17 false or misleading claims and restrict nutrient content claims to those defined in  
18 FDA regulations. As a result, some manufacturers have revised their labels to bring  
19 them into line with the goals of the Nutrition Labeling and Education Act of 1990.  
20 Unfortunately, however, we continue to see products marketed with labeling that  
21 violates established labeling standards.

22 To address these concerns, FDA is notifying a number of manufacturers that their  
23 labels are in violation of the law and subject to legal proceedings to remove  
24 misbranded products from the marketplace. While the warning letters that convey  
25 our regulatory intentions do not attempt to cover all products with violative labels,  
26 they do cover a range of concerns about how false or misleading labels can  
27 undermine the intention of Congress to provide consumers with labeling information  
28 that enables consumers to make informed and healthy food choices.

. . . .

21 These examples and others that are cited in our warning letters are not indicative of  
22 the labeling practices of the food industry as a whole. In my conversations with  
23 industry leaders, I sense a strong desire within the industry for a level playing field  
24 and a commitment to producing safe, healthy products. That reinforces my belief  
25 that FDA should provide as clear and consistent guidance as possible about food  
26 labeling claims and nutrition information in general, and specifically about how the  
27 growing use of front-of-pack calorie and nutrient information can best help  
28 consumers construct healthy diets.

I will close with the hope that these warning letters will give food manufacturers  
further clarification about what is expected of them as they review their current  
labeling. I am confident that our past cooperative efforts on nutrition information  
and claims in food labeling will continue as we jointly develop a practical, science-

1 based front-of-pack regime that we can all use to help consumers choose healthier  
2 foods and healthier diets.

3 [http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm?utm\\_campaign=Google2&utm\\_sour](http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm?utm_campaign=Google2&utm_source=fdaSearch&utm_medium=website&utm_term=Open+Letter+to+Industry+from+Dr.+Hamburg&utm_content=1)  
4 [e=fdaSearch&utm\\_medium=website&utm\\_term=Open Letter to Industry from Dr.](http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm?utm_campaign=Google2&utm_source=fdaSearch&utm_medium=website&utm_term=Open+Letter+to+Industry+from+Dr.+Hamburg&utm_content=1)  
[Hamburg&utm\\_content=1](http://www.fda.gov/Food/LabelingNutrition/ucm202733.htm?utm_campaign=Google2&utm_source=fdaSearch&utm_medium=website&utm_term=Open+Letter+to+Industry+from+Dr.+Hamburg&utm_content=1)

5 34. Defendant continues to utilize unlawful food labeling claims despite the express  
6 guidance of the FDA in the Open Letter.

7 35. At the same time that it issued its Open Letter, the FDA issued a number of warning  
8 letters to companies whose products were misbranded as a result of their unlawful labels.

9 36. In its 2010 Open Letter to industry the FDA stated that the agency not only expected  
10 companies that received warning letters to correct their labeling practices but also anticipated that  
11 other companies would examine their food labels to ensure that they are in full compliance with  
12 food labeling requirements and make changes where necessary. Defendant did not change the  
13 labels on its Misbranded Food Products in response to these warning letters.

14 37. In addition to its general guidance about unlawful labeling practices, the FDA has  
15 issued specific guidance about the unlawful practices at issue here. In October of 2009, the FDA  
16 issued its *Guidance for Industry: Ingredients Declared as Evaporated Cane Juice*, which advised  
17 the industry that the term “evaporated cane juice” was unlawful.

18 <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodL>  
19 [abelingNutrition/ucm181491.htm](http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodL).

20 38. In addition to its guidance to industry in general, the FDA has repeatedly sent  
21 warning letters to specific companies regarding specific violations such as the ones at issue in this  
22 case. The FDA’s July 2012 Regulatory Procedures Manual indicates that a warning letter  
23 “communicates the agency’s position on a matter” and that “[w]arning Letters are issued only for  
24 violations of regulatory significance.” The FDA publicly posted these letters on its website with the  
25 expectation that food manufacturers would revise their product labels to correct any violations  
26 outlined in these warning letters.

27 39. In particular, the FDA has issued warning letters to at least a half-dozen companies  
28 for utilizing the unlawful term “evaporated cane juice.”

1           40. Defendant has continued to ignore the 2009 FOP Guidance which detailed the  
2 FDA's guidance on how to make food labeling claims as well as the 2009 Guidance on evaporated  
3 cane juice and the FDA warning letters on evaporated cane juice. As such, Defendant's  
4 Misbranded Food Products continue to run afoul of the 2009 FOP Guidance and the 2009 Guidance  
5 on evaporated cane juice and the FDA warning letters on evaporated cane juice as well as federal  
6 and California law.

7           41. Despite the numerous FDA warning letters and the 2009 Guidance on evaporated  
8 cane juice or the FDA evaporated cane juice warning letters and the 2010 Open Letter, Defendant  
9 has not removed the unlawful and misleading food labeling ingredient from Defendant's  
10 Misbranded Food Products.

11           42. Despite the FDA's numerous warnings to industry, Defendant has continued to sell  
12 products bearing unlawful food labeling claims without meeting the requirements to make such  
13 claims.

14           43. Even in the face of direct FDA regulation that "evaporated cane juice" is a "false and  
15 misleading" term, Defendant continues to use the term at the present time.

16           **C. Defendant's Unlawful and Misleading Evaporated Cane Juice Claims Cause**  
17           **Defendant's Food Products To Be Misbranded**

18           44. 21 C.F.R. §§ 101.3 and 102.5, which have been adopted by California, prohibit  
19 manufacturers from referring to foods by anything other than their common and usual names. 21  
20 C.F.R. § 101.4, which has been adopted by California, prohibits manufacturers from referring to  
21 ingredients by anything other than their common and usual names. Defendant has violated these  
22 provisions by failing to use the common or usual name for ingredients mandated by law. In  
23 particular, Defendant has used and continues to use the term "evaporated cane juice" on products  
24 in violation of numerous labeling regulations designed to protect consumers from misleading  
25 labeling practices. Defendant's practices also violate express FDA policies.

26           45. For example, Defendant violated the FDA's express policy with respect to the listing  
27 of certain ingredients such as sugar or dried cane syrup. As stated by the FDA, "FDA's current  
28

1 policy is that sweeteners derived from sugar cane syrup should not be declared as ‘evaporated cane  
2 juice’ because that term falsely suggests that the sweeteners are juice.”

3 46. The FDA “considers such representations to be false and misleading under section  
4 403(a)(1) of the Act (21 U.S.C. 343(a)(1) because they fail to reveal the basic nature of the food  
5 and its characterizing properties (*i.e.*, that the ingredients are sugars or syrups) as required by 21  
6 U.S.C. 102.5.”

7 47. In October of 2009, the FDA issued *Guidance for Industry: Ingredients Declared as*  
8 *Evaporated Cane Juice*, which that:

9 “...the term “evaporated cane juice” has started to appear as an ingredient on food  
10 labels, most commonly to declare the presence of sweeteners derived from sugar  
11 cane syrup. However, FDA’s current policy is that sweeteners derived from sugar  
12 cane syrup should not be declared as “evaporated cane juice” because that term  
13 falsely suggests that the sweeteners are juice...”

14 “Juice” is defined by 21 C.F.R. 120.1(a) as “the aqueous liquid expressed or  
15 extracted from one or more fruits or vegetables, purees of the edible portions of one  
16 or more fruits or vegetables, or any concentrates of such liquid or puree.” ...

17 “As provided in 21 C.F.R. 101.4(a)(1), “Ingredients required to be declared on the  
18 label or labeling of a food . . . shall be listed by common or usual name . . . .” The  
19 common or usual name for an ingredient is the name established by common usage  
20 or by regulation (21 C.F.R. 102.5(d)). The common or usual name must accurately  
21 describe the basic nature of the food or its characterizing properties or ingredients,  
22 and may not be “confusingly similar to the name of any other food that is not  
23 reasonably encompassed within the same name” (21 C.F.R. 102.5(a))...

24 “Sugar cane products with common or usual names defined by regulation are sugar  
25 (21 C.F.R. 101.4(b)(20)) and cane sirup (alternatively spelled “syrup”) (21 C.F.R.  
26 168.130). Other sugar cane products have common or usual names established by  
27 common usage (e.g., molasses, raw sugar, brown sugar, turbinado sugar,  
28 muscovado sugar, and demerara sugar)...

“The intent of this draft guidance is to advise the regulated industry of FDA’s view  
that the term “evaporated cane juice” is not the common or usual name of any type  
of sweetener, including dried cane syrup. Because cane syrup has a standard of  
identity defined by regulation in 21 C.F.R. 168.130, the common or usual name for  
the solid or dried form of cane syrup is “dried cane syrup.”...

“Sweeteners derived from sugar cane syrup should not be listed in the ingredient  
declaration by names which suggest that the ingredients are juice, such as  
“evaporated cane juice.” FDA considers such representations to be false and  
misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they

1 fail to reveal the basic nature of the food and its characterizing properties (i.e., that  
2 the ingredients are sugars or syrups) as required by 21 C.F.R. 102.5. Furthermore,  
3 sweeteners derived from sugar cane syrup are not juice and should not be included  
4 in the percentage juice declaration on the labels of beverages that are represented to  
5 contain fruit or vegetable juice (see 21 C.F.R. 101.30).

6 48. Despite the issuance of the 2009 FDA Guidance, Defendant has not removed the  
7 unlawful and misleading food labeling ingredients from its Misbranded Food Products.

8 49. Defendant often lists ingredients with unlawful and misleading names. The  
9 Nutrition Facts label of the Misbranded Food Products list “evaporated cane juice” as an ingredient.  
10 According to the FDA, “‘evaporated cane juice’ is not the common or usual name of any type of  
11 sweetener, including dried cane syrup.” The FDA provides that “cane syrup has a standard of  
12 identity defined by regulation in 21 C.F.R. 168.130, the common or usual name for the solid or  
13 dried form of cane syrup is ‘dried cane syrup.’” Similarly, sugar or sucrose is defined by regulation  
14 in 21 C.F.R. §101.4(b)(20) and §184.1854, as the common or usual name for material obtained  
15 from the crystallization from sugar cane or sugar beet juice that has been extracted by pressing or  
16 diffusion, then clarified and evaporated.

17 50. Various FDA warning letters have made it clear that the use of the term “evaporated  
18 cane juice” is unlawful because the term does not represent the common or usual name of a food or  
19 ingredient. These warning letters indicate that foods bearing labels which contain the term  
20 “evaporated cane juice” are misbranded.

21 51. Such products mislead consumers into paying a premium price for inferior or  
22 undesirable ingredients or for products that contain ingredients not listed on the label.

23 52. Defendant’s false, unlawful and misleading ingredient listings render its products  
24 misbranded under federal and California law. Misbranded products cannot be legally sold, have no  
25 economic value, and are legally worthless. Plaintiff and the class paid a premium price for the  
26 Misbranded Food Products.

27 53. Defendant has also made these illegal claims on its websites and in advertising in  
28 violation of federal and California law.

1           **D.       Defendant Makes Unlawful Low Sodium Nutrient Content Claims**

2           54.       In order to appeal to consumer preferences, Defendant has repeatedly made false and  
3 unlawful “low sodium” nutrient content claims about the sodium levels in its products.

4           55.       These claims misrepresent and greatly understate the levels of sodium in their  
5 Misbranded Food Products. In doing so these claims violate 21 C.F.R. § 101.61 which has been  
6 adopted by the State of California.

7           56.       Defendant recognized that because of the significant health risks associated with  
8 sodium intake, consumers were increasingly seeking to avoid or limit sodium in their diets and thus  
9 were looking for low sodium food options.

10          57.       Rather than reformulate all of their food products so that they were at or below the  
11 “low” sodium benchmarks they knew consumers were seeking, the Defendant simply  
12 misrepresented a number of its sodium laden products and made false “low sodium”  
13 representations about these products and falsely depicted these products in their labeling,  
14 advertising and marketing materials and on their websites as being “low sodium” options when in  
15 fact they exceed the maximum levels of sodium that a “low sodium” product can possess.

16          58.       Pursuant to 21 C.F.R. § 101.61(b)(4) the term “low sodium” may be used on the  
17 labels or labeling of food if the food has a reference amount of less than 30 grams or less and  
18 contains 140 mgs or less sodium per reference amount customarily consumed and per 50 grams. By  
19 this definition many of the Defendant’s “low sodium” products are not in fact are not low sodium  
20 products.

21          59.       For example, the EviroKidz Panda Puffs cereal purchased by Plaintiff has a serving  
22 size of 30 grams and contains 130 mgs of sodium per serving size. On a 50 gram basis this equates  
23 to over 216 mgs of sodium, far more than the maximum 140 mgs cutoff for a legal low sodium  
24 claim. Notwithstanding this fact, Defendant misrepresents this product as being “low sodium” and  
25 thus understates the levels of sodium in the product.

26          60.       The low sodium claim on the EviroKidz Panda Puffs cereal purchased by Plaintiff is  
27 simply a false statement. By definition “low sodium” cereal could not contain more than 140 mgs of  
28 sodium per reference amount customarily consumed and per 50 grams.



1           61.       The EnviroKidz Panda Puffs cereal bought by the Plaintiff had more than 150% of  
2 the maximum level allowed for a low sodium claim.

3           62.       This false representation unlawfully overstated the healthiness of Defendant's  
4 products while understating their relative sodium levels.

5           63.       The Plaintiff bought Misbranded Food Products whose labeling and marketing  
6 materials falsely represented that the Misbranded Food Products had low relative sodium levels and  
7 thus represented a "low sodium" option. These products were falsely labeled and misbranded  
8 because contrary to the various false representations that they were a "low sodium" option, they  
9 contained disqualifying levels of sodium precluding such a representation. For example, the  
10 Defendant's EnviroKidz Panda Puffs cereal bought by Plaintiff was incapable of complying with the  
11 "low sodium" standard and in fact its sodium levels were far higher than allowed by law.

12           64.       A reasonable consumer would expect that when Defendant represents its products  
13 are a "low sodium" option claim the product will in fact be "low" in sodium and that Defendant  
14 was not using the term "low sodium" in a way that violates the law. A reasonable consumer would  
15 understand that if a Defendant compares its product with another product, that comparison will be  
16 truthful and accurate and not false and misleading.

17           65.       Consumers such as the Plaintiff are thus misled into purchasing Defendant's  
18 purportedly "low sodium" products that actually contain levels of sodium higher than the maximum  
19 upper limit for a "low sodium" product and that are not "low sodium" as falsely represented on  
20 their labeling and in their marketing materials. Defendant's products in this respect are misbranded  
21 under federal and California law.

22           66.       Plaintiff relied on Defendant's "low sodium" claims when making Plaintiff's  
23 purchase decisions over the last four years and were misled because they erroneously believed the  
24 express misrepresentations that the Defendant's products Plaintiff was purchasing were "low  
25 sodium" as represented. Purchasing "low sodium" products was important to Plaintiff in trying to  
26 buy "healthy" food products. Plaintiff would not have purchased these products had Plaintiff known  
27 that the Defendant's products' sodium claims were false.

28

1           67. For these reasons, Defendant's "low sodium" claims at issue in this Complaint are  
2 false and misleading and in violation of identical California and federal law and the products at issue  
3 are misbranded as a matter of law. In addition, the Defendant made other unlawful nutrient content  
4 claims such as those listed above in paragraph 2 by using defined nutrient content terms such as rich  
5 or high or undefined terms such as great source unlawfully in violation of 21 C.F.R. §§ 101.13 and  
6 101.54 to describe its products or ingredients. Therefore, Defendant's Misbranded Food Products  
7 are misbranded as a matter of California and federal law and cannot be sold or held and thus have no  
8 economic value and are legally worthless. Plaintiff and members of the Class who purchased these  
9 products paid an unwarranted premium for these products.

10           **E. Defendant Makes Unlawful Health Claims**

11           68. Defendant has violated identical California and federal law by making numerous  
12 unapproved health claims about Defendant's products. Defendant has also violated identical  
13 California and federal law by making numerous unapproved claims about the ability of Defendant's  
14 products and their ingredients to cure, mitigate, treat and prevent various diseases that render the  
15 products unapproved drugs under California and federal law. Moreover, in promoting the ability of  
16 its Misbranded Food Products to have an effect on certain diseases such as diabetes, Defendant has  
17 violated the advertising provisions of the Sherman law.

18           69. A health claim is a statement expressly or implicitly linking the consumption of a  
19 food substance (*e.g.*, ingredient, nutrient, or complete food) to risk of a disease such as diabetes or a  
20 health-related condition such as high-blood pressure. *See* 21 C.F.R. §101.14(a)(1), (a)(2), and  
21 (a)(5). Only health claims made in accordance with FDCA requirements, or authorized by FDA as  
22 qualified health claims, may be included in food labeling. Other express or implied statements that  
23 constitute health claims, but that do not meet statutory requirements, are prohibited in labeling  
24 foods.

25           70. 21 C.F.R. § 101.14, which has been expressly adopted by California, provides when  
26 and how a manufacturer may make a health claim about its product. A "Health Claim" means any  
27 claim made on the label or in labeling of a food, including a dietary supplement, that expressly or  
28 by implication, including "third party" references, written statements (*e.g.*, a brand name including

1 a term such as “heart”), symbols (*e.g.*, a heart symbol), or vignettes, characterizes the relationship  
 2 of any substance to a disease or health-related condition. Implied health claims include those  
 3 statements, symbols, vignettes, or other forms of communication that suggest, within the context in  
 4 which they are presented, that a relationship exists between the presence or level of a substance in  
 5 the food and a disease or health-related condition (*see* 21 CFR § 101.14(a)(1)).

6 71. Further, health claims are limited to claims about disease risk reduction, and cannot  
 7 be claims about the diagnosis, cure, mitigation, or treatment of disease. An example of an  
 8 authorized health claim is: “Three grams of soluble fiber from oatmeal daily in a diet low in  
 9 saturated fat and cholesterol may reduce the risk of heart disease. This cereal has 2 grams per  
 10 serving.”

11 72. A claim that a substance may be used in the diagnosis, cure, mitigation, treatment, or  
 12 prevention of a disease is a drug claim and may not be made for a food. 21 U.S.C. § 321(g)(1)(D).

13 73. The use of the term “healthy” is not a health claim but rather an implied nutrient  
 14 content claim about general nutrition that is defined by FDA regulation. In general, the term may be  
 15 used in labeling an individual food product that:

16 Qualifies as both low fat and low saturated fat;  
 17 Contains 480 mg or less of sodium per reference  
 18 amount and per labeled serving, and per 50 g (as  
 19 prepared for typically rehydrated foods) if the  
 food has a reference amount of 30 g or 2 tbsps or  
 less;

20 Does not exceed the disclosure level for  
 21 cholesterol (*e.g.*, for most individual food  
 products, 60 mg or less per reference amount and  
 per labeled serving size); *and*

22 Except for raw fruits and vegetables, certain  
 23 frozen or canned fruits and vegetables, and  
 24 enriched cereal-grain products that conform to a  
 25 standard of identity, provides at least 10% of the  
 26 daily value (DV) of vitamin A, vitamin C,  
 calcium, iron, protein, *or* fiber per reference  
 amount. Where eligibility is based on a nutrient  
 that has been added to the food, such fortification  
 must comply with FDA’s fortification policy.

27 21 C.F.R. § 101.65(d)(2).  
 28

1           74.     The FDA's regulation on the use of the term healthy also encompasses other,  
2 derivative uses of the term health (*e.g.*, healthful, healthier) in food labeling. 21 C.F.R. § 101.65(d).

3           75.     Defendant has violated the provisions of § 21 C.F.R. §101.14, 21 U.S.C. §  
4 321(g)(1)(D) and 21 U.S.C. § 352(f)(1) by including certain claims on their product labeling.

5           76.     Defendant makes unlawful health related claims. For example, Defendant claims  
6 that the ingredients in its cereals, such as those bought by the Plaintiff, protect the immune system,  
7 have "heart protecting properties," lower blood pressure rates, lower rates of hypertension, lower  
8 cholesterol levels, prevent type 2 diabetes, lower levels of obesity, reduce the risk of cardiovascular  
9 disease and lower mortality.

10          77.     The therapeutic claims on Defendant's labeling establish that Defendant's products  
11 are drugs because they are intended for use in the cure, mitigation, treatment, or prevention of  
12 disease. Defendant's products are not generally recognized as safe and effective for the above  
13 referenced uses and, therefore, the products would be "new drug[s]" under section 201(p) of the Act  
14 [21 U.S.C. § 321(p)]. New drugs may not be legally marketed in the U.S. without prior approval  
15 from the FDA as described in section 505(a) of the Act [21 U.S.C. § 355(a)]. FDA approves a new  
16 drug on the basis of scientific data submitted by a drug sponsor to demonstrate that the drug is safe  
17 and effective. Defendant also violated California Health & Safety Code § 110403 which prohibits  
18 the advertisement of products that are represented to have any effect on enumerated conditions,  
19 disorders and diseases unless the materials have federal approval.

20          78.     Plaintiff saw such health related claims and relied on Defendant's health claims  
21 which influenced Plaintiff's decision to purchase Defendant's products. Plaintiff would not have  
22 bought the products had Plaintiff known Defendant's claims were unapproved and that the products  
23 were thus misbranded.

24          79.     Plaintiff and members of the Class was misled into the belief that such claims were  
25 legal and had passed regulatory muster and were supported by science capable of securing  
26 regulatory acceptance. Because this was not the case, Plaintiff and members of the Class have been  
27 deceived.

28

1 80. Defendant's materials and advertisements not only violate regulations adopted by  
2 California, such as 21 C.F.R. § 101.14, they also violate California Health & Safety Code § 110403  
3 which prohibits the advertisement of products that are represented to have any effect on  
4 enumerated conditions, disorders and diseases unless the materials have federal approval.

5 81. Plaintiff and members of the Class have been misled by Defendant's unlawful  
6 labeling practices and actions into purchasing products they would not have otherwise purchased  
7 had they known the truth about these products. Plaintiff and members of the Class who purchased  
8 these products paid an unwarranted premium for these products.

9 82. Defendant's health related claims are false and misleading and the products are in  
10 this respect misbranded under identical California and federal laws. Misbranded products cannot be  
11 legally sold and thus have no economic value and are legally worthless.

12 **F. Defendant Violates California Law By Making Unlawful And False Claims**  
13 **That Its Misbranded Food Products Are "Free" of Preservatives And By**  
14 **Failing To Disclose On Its Misbranded Food Products' Labels The Presence Of**  
15 **Preservatives In Those Products As Required By California Law**

16 83. Despite the fact that its Misbranded Food Products contained chemical preservatives,  
17 Defendant falsely stated on the labeling of its Misbranded Food Products that they were free of  
18 preservatives. This statement was demonstrably false and misled consumers such as the Plaintiff  
19 who relied on the statements.

20 84. For example, Defendant's EnviroKids cereal bought by Plaintiff bore such a false  
21 labeling statement. In fact, this product contained the chemical preservatives tocopherols which are  
22 listed as chemical preservatives in 21 C.F.R. § 182.3890 and which meet the definition of chemical  
23 preservatives incorporated into California and federal law in (21 C.F.R. § 101.22. Such  
24 preservatives are an unnatural additive.

25 85. Given the presence of this chemical preservative, representing such a product as  
26 preservative free is both false and misleading and renders the product misbranded.

27 86. Moreover, even if Defendant had not included a false representation that its  
28 Misbranded Food Products were free of preservatives on its product labeling, these products would

1 have still been misbranded as a matter of law because of Defendant's failure to disclose the  
2 presence of such ingredients as mandated by identical California and federal law.

3 87. "Under California law "food is misbranded if it bears or contains any artificial  
4 flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact (California  
5 Health & Safety Code § 110740). California's law is identical to federal law on this point.

6 88. Pursuant to 21 C.F.R. § 101.22 which has been adopted by California, "[a] statement  
7 of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on  
8 its container or wrapper, or on any two or all three of these, as may be necessary to render such  
9 statement likely to be read by the ordinary person under customary conditions of purchase and use  
10 of such food." 21 C.F.R. § 101.22 defines a chemical preservative as "any chemical that, when  
11 added to food, tends to prevent or retard deterioration thereof, but does not include common salt,  
12 sugars, vinegars, spices, or oils extracted from spices, substances added to food by direct exposure  
13 thereof to wood smoke, or chemicals applied for their insecticidal or herbicidal properties."

14 89. Defendant's Misbranded Food Products were misbranded because they contained  
15 chemical preservatives like tocopherols but failed to disclose that fact. Moreover, Defendant false  
16 misrepresented the function of this chemical by labeling it natural vitamin e thus misrepresenting its  
17 use as vitamin fortification when it was merely a preservative present at a nutritional insignificant  
18 amount.

19 90. For example, while Defendant's EnviroKidz cereal bought by Plaintiff, contains  
20 tocopherols which is used in that product as a type of chemical preservative designed to retard  
21 rancidity, the products' label fails to disclose the fact that the tocopherols are being used as a  
22 preservative in those products by including a parenthetical such as (preservative) or (to retard  
23 spoilage) after the term tocopherols in the ingredient statement. Because Defendant unlawfully fails  
24 to indicate these ingredients are being used as chemical preservatives and misrepresents them as a  
25 fortifying vitamin, a reasonable consumer would have no reason to doubt the preservative free  
26 claim.

27 91. A reasonable consumer would expect that when Defendant made a representation on  
28 its products' labels that such products were "free" of preservatives that such a representation was

1 true, A reasonable consumer would also expect that when Defendant lists its products' ingredients  
2 that it would make all disclosures required by law such as the disclosure of chemical preservatives  
3 and coloring mandated by identical California and federal law.

4 92. Plaintiff saw Defendant's label representations that its products were "free" of  
5 preservatives and relied on them in the reasonable expectation that such a representation was true.  
6 Plaintiff based her purchasing decisions in part on the belief that these products did not contain  
7 chemical preservatives or artificial ingredients.

8 93. Plaintiff did not know, and had no reason to know, that Defendant's Misbranded  
9 Food Products contained undisclosed chemical preservatives because 1) Defendant falsely  
10 represented on its label that the products were "free" of preservatives and 2) failed to disclose those  
11 chemical preservatives as required by California and federal law.

12 94. Consumers are thus misled into purchasing Defendant's products with false and  
13 misleading labeling statements and ingredient descriptions, which do not describe the basic nature  
14 of the ingredients, as required by California Health & Safety Code § 110740 and 21 C.F.R. §§  
15 101.22 which has been adopted as law by California.

16 95. Had Plaintiff been aware that the Misbranded Food Products she purchased  
17 contained chemical preservatives she would not have purchased the products. Plaintiff had other  
18 alternatives that lacked such ingredients and Plaintiff also had cheaper alternatives.

19 96. Because of their false label representations and omissions about chemical  
20 preservatives Defendant's Misbranded Food Products are in this respect misbranded under identical  
21 federal and California law, including California Health & Safety Code § 110740. Misbranded  
22 products cannot be legally sold and have no economic value and are legally worthless. Plaintiff and  
23 members of the Class who purchased these products paid an unwarranted premium for these  
24 products.

25 **G. Defendant Has Violated California Law By Using Misleading Containers**  
26 **That Are Slack Filled With Nonfunctional Slack Fill**

27 97. Pursuant to C.F.R. 100.100 which has been adopted by California:  
28

1 In accordance with section 403(d) of the act, a food shall be deemed to be misbranded if  
2 its container is so made, formed, or filled as to be misleading.

3 (a) A container that does not allow the consumer to fully view its contents shall be  
4 considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-  
5 fill is the difference between the actual capacity of a container and the volume of  
6 product contained therein. Nonfunctional slack-fill is the empty space in a package that  
7 is filled to less than its capacity for reasons other than:

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

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

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

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

14 (5) The fact that the product consists of a food packaged in a reusable container where  
15 the container is part of the presentation of the food and has value which is both  
16 significant in proportion to the value of the product and independent of its function to  
17 hold the food, e.g., a gift product consisting of a food or foods combined with a  
18 container that is intended for further use after the food is consumed; or durable  
19 commemorative or promotional packages; or

20 (6) Inability to increase level of fill or to further reduce the size of the package (e.g.,  
21 where some minimum package size is necessary to accommodate required food labeling  
22 (excluding any vignettes or other non-mandatory designs or label information),  
23 discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

24 98. Defendant has routinely employed slack filled packaging containing non-functional  
25 slack fill to mislead consumers into believing they were receiving more than they actually were.

26 These include the boxes of

27 99. Defendant lacked any lawful justification for doing so.

28 **H. Defendant Has Violated California Law**

100. Defendant has violated California Health & Safety Code § 110390, which makes it  
unlawful to disseminate false or misleading food advertisements that include statements on  
products and product packaging or labeling or any other medium used to directly or indirectly  
induce the purchase of a food product.

101. Defendant has violated California Health & Safety Code § 110395, which makes it



1 unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food.

2 102. Defendant has violated California Health & Safety Code §§ 110398 and 110400,  
3 which make it unlawful to advertise misbranded food or to deliver or proffer for delivery any food  
4 that has been falsely advertised.

5 103. Defendant has violated California Health & Safety Code § 110660 because its  
6 product labeling is false and misleading in one or more ways.

7 104. Defendant's Misbranded Food Products are misbranded under California Health &  
8 Safety Code § 110670 because their labeling fails to conform with the requirements for nutrient  
9 content and health claims set forth in 21 U.S.C. § 343(r) and the regulations adopted thereto.

10 105. Defendant has violated California Health & Safety Code § 110760, which makes it  
11 unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is  
12 misbranded.

13 106. Defendant's Misbranded Food Products are misbranded under California Health &  
14 Safety Code § 110755 because the products are purported to be or are represented for special  
15 dietary uses, and their labels fail to bear such information concerning their vitamin, mineral, and  
16 other dietary properties as the Secretary determines to be, and by regulations prescribes as,  
17 necessary in order fully to inform purchasers as to its value for such uses.

18 107. Defendant has violated California Health & Safety Code § 110765, which makes it  
19 unlawful for any person to misbrand any food.

20 108. Defendant has violated California Health & Safety Code § 110770, which makes it  
21 unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer  
22 for delivery any such food.

23 109. Defendant has violated the standards set by 21 C.F.R. §§ 101.4 and 102.5 which has  
24 been incorporated by reference in the Sherman Law, by failing to include on its product labels the  
25 common and usual names of ingredients contained in its food products. Additionally, Defendant has  
26 violated the standard set by 21 C.F.R. § 101.14 by making unlawful health claims about its products  
27 such as those referenced in paragraphs 2 and 78 above. Defendant also violated the standard set by  
28 21 C.F.R. §§ 101.13 and 101.61 by making unlawful low sodium claims about its products and 21

1 C.F.R. §§ 101.13 and 101.54 by utilizing unlawful nutrient content claims.

2 **I. Plaintiff Purchased Defendant's Misbranded Food Products**

3 110. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy  
4 diet.

5 111. During the Class Period, Plaintiff purchased a number of Defendant's Misbranded  
6 Food Products including, but not limited to Heritage Flakes and EnviroKidz Panda Puffs cereal.

7 112. Plaintiff would not have purchased Defendant's Misbranded Food Products had  
8 Plaintiff known that the Misbranded Food Products contained sugar or dried cane syrup. Plaintiff  
9 read and reasonably relied upon the labels on Defendant's Misbranded Food Products, including the  
10 ingredient "evaporated cane juice" on the back panels, before purchasing Defendant's products.  
11 Plaintiff also read and reasonably relied upon Defendant's unlawful and deceptive  
12 misrepresentations on Defendant's website before purchasing Defendant's products, including its  
13 unlawful health claims described in Paragraphs 2 and 77 above. Defendant's web address is printed  
14 on its package labels, and by law Defendant's website misrepresentations are incorporated in its  
15 labels.

16 113. Plaintiff relied on Defendant's package labeling including the side panel ingredients  
17 list referencing "evaporated cane juice," and the nutrient content claims and based and justified the  
18 decision to purchase Defendant's products in substantial part on Defendant's package labeling,  
19 including the labeling claiming that Defendant's product contained as an ingredient "evaporated  
20 cane juice" and that the Defendant's products possessed certain nutritional and health benefits  
21 detailed above including in Paragraph 2 and 77.

22 114. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
23 products were misbranded as set forth herein, and would not have bought the products had Plaintiff  
24 known the truth about them.

25 115. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
26 "evaporated cane juice" ingredient name was unlawful and unauthorized as set forth herein. Had  
27 Plaintiff known this information, Plaintiff would not have bought the products.

28 116. Plaintiff did not know and had no reason to know that Defendant's Misbranded Food

1 Products were misbranded and bore false food labeling claims despite failing to meet the  
2 requirements to make those food labeling claim including the health claims, low sodium claims and  
3 other nutritional content claims. Had Plaintiff known this information, Plaintiff would not have  
4 bought the products.

5 117. In reliance on Defendant's "evaporated cane juice" ingredient name and other  
6 product claims detailed above, Plaintiff and thousands of others in California and throughout the  
7 United States purchased the Misbranded Food Products at issue.

8 118. Defendant's labeling, advertising and marketing as alleged herein are false and  
9 misleading and were designed to increase sales of the products at issue. Defendant's  
10 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a  
11 reasonable person would attach importance to Defendant's misrepresentations in determining  
12 whether to purchase the products at issue.

13 119. A reasonable person would also attach importance to whether Defendant's products  
14 were legally salable, and capable of legal possession, and to Defendant's representations about  
15 these issues in determining whether to purchase the products at issue. Plaintiff would not have  
16 purchased Defendant's Misbranded Food Products had Plaintiff known they were not capable of  
17 being legally sold or held.

18 120. Plaintiff and members of the Class relied on and were deceived by Defendant's  
19 misleading slack filled packaging.

20 121. Plaintiff purchased slack filled packages of Defendant's products including  
21 Defendant's Heritage Flakes and EnviroKidz Panda Puffs cereal containing nonfunctional slack fill.

22 122. Plaintiff did not know, and had no reason to know, that Defendant's Misbranded  
23 Food Products were slack filled with nonfunctional slack fill and misbranded. Plaintiff and  
24 members of the Class who purchased the Misbranded Food Products paid an unwarranted premium  
25 for these products. Because of Defendant's slack fill packaging violations these products were  
26 misbranded and could not be legally held or sold. They were legally and economically worthless.

27 123. As a result of Defendant's unlawful use of the term "evaporated cane juice, its use of  
28 unlawful health claims, it use of unlawful low sodium and other nutrient content claims and its

1 unlawful slack filling of its packaging with nonfunctional slack fill, Plaintiff and the Class members  
2 purchased the Misbranded Food Products at issue. Plaintiff and the Class members have been  
3 proximately harmed, and Defendant has been unjustly enriched, by Defendant's deceptive and  
4 unlawful scheme.

5 **CLASS ACTION ALLEGATIONS**

6 124. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure  
7 23(b)(2) and 23(b)(3) on behalf of the following class:

8 All persons in the United States, and alternatively, a sub-class of all persons in  
9 California who, within the last four years, purchased Defendant's products  
10 1) labeled with the ingredient evaporated cane juice; 2) labeled or advertised with  
11 an unapproved health or drug claim; 3) labeled or advertised with a low sodium  
12 claim despite containing levels of sodium exceeding the maximum level of 140 mgs  
specified in 21 C.F.R. § 101.61; or 5) sold in packaging containing non-functional  
slack fill (the "Class").

13 125. The following persons are expressly excluded from the Class:  
14 (1) Defendant and its subsidiaries and affiliates; (2) all persons who make a timely election  
15 to be excluded from the proposed Class; (3) governmental entities; and (4) the Court to  
16 which this case is assigned and its staff.

17 126. This action can be maintained as a class action because there is a well-defined  
18 community of interest in the litigation and the proposed Class is easily ascertainable.

19 127. Numerosity: Based upon Defendant's publicly available sales data with respect to  
20 the misbranded products at issue, it is estimated that the Class numbers in the thousands, and that  
21 joinder of all Class members is impracticable.

22 128. Common Questions Predominate: This action involves common questions of law  
23 and fact applicable to each Class member that predominate over questions that affect only  
24 individual Class members. Thus, proof of a common set of facts will establish the right of each  
25 Class member to recover. Questions of law and fact common to each Class member include, just  
26 for example:

- 27 a. Whether Defendant engaged in unlawful, unfair or deceptive  
28 business practices by failing to properly package and label its  
Misbranded Food Products sold to consumers;

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- b. Whether the food products at issue were misbranded as a matter of law;
- c. Whether Defendant made unlawful and misleading “evaporated cane juice” or health or low sodium claims with respect to food products sold to consumers;
- d. Whether Defendant utilized nonfunctional slack fill packaging or failed to properly list or describe the ingredients in its products;
- e. Whether Defendant violated California Bus. & Prof. Code § 17200, *et seq.*, California Bus. & Prof. Code § 17500, *et seq.*, the Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq.*, California Civ. Code § 1790, *et seq.*, 15 U.S.C. § 2301, *et seq.*, and the Sherman Law;
- f. Whether Plaintiff and the Class are entitled to equitable and/or injunctive relief;
- g. Whether Defendant’s unlawful, unfair and/or deceptive practices harmed Plaintiff and the Class; and
- h. Whether Defendant was unjustly enriched by its deceptive practices.

129. Typicality: Plaintiff’s claims are typical of the claims of the Class because Plaintiff bought Defendant’s Misbranded Food Products during the Class Period. Defendant’s unlawful, unfair and/or fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. Plaintiff and the Class sustained similar injuries arising out of Defendant’s conduct in violation of California law. The injuries of each member of the Class were caused directly by Defendant’s wrongful conduct. In addition, the factual underpinning of Defendant’s misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiff’s claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

130. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class. Neither Plaintiff nor Plaintiff’s counsel have any interests that conflict with or are antagonistic to the interests of the Class members. Plaintiff has retained highly competent and experienced class action attorneys to represent her interests and those of the members of the Class. Plaintiff and

1 Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this  
2 class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class  
3 members and will diligently discharge those duties by vigorously seeking the maximum possible  
4 recovery for the Class.

5 131. Superiority: There is no plain, speedy or adequate remedy other than by  
6 maintenance of this class action. The prosecution of individual remedies by members of the Class  
7 will tend to establish inconsistent standards of conduct for Defendant and result in the impairment  
8 of Class members' rights and the disposition of their interests through actions to which they were  
9 not parties. Class action treatment will permit a large number of similarly situated persons to  
10 prosecute their common claims in a single forum simultaneously, efficiently, and without the  
11 unnecessary duplication of effort and expense that numerous individual actions would engender.  
12 Further, as the damages suffered by individual members of the Class may be relatively small, the  
13 expense and burden of individual litigation would make it difficult or impossible for individual  
14 members of the Class to redress the wrongs done to them, while an important public interest will be  
15 served by addressing the matter as a class action. Class treatment of common questions of law and  
16 fact would also be superior to multiple individual actions or piecemeal litigation in that class  
17 treatment will conserve the resources of the Court and the litigants, and will promote consistency  
18 and efficiency of adjudication.

19 132. The prerequisites to maintaining a class action for injunctive or equitable relief  
20 pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds  
21 generally applicable to the Class, thereby making appropriate final injunctive or equitable relief  
22 with respect to the Class as a whole.

23 133. The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3)  
24 are met as questions of law or fact common to class members predominate over any questions  
25 affecting only individual members, and a class action is superior to other available methods for  
26 fairly and efficiently adjudicating the controversy.

27 134. Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be  
28 encountered in the management of this action that would preclude its maintenance as a class action.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION  
Business and Professions Code § 17200 *et seq.*  
Unlawful Business Acts and Practices**

135. Plaintiff incorporates by reference each allegation set forth above.

136. Defendant's conduct constitutes unlawful business acts and practices.

137. Defendant sold Misbranded Food Products in California and throughout the United States during the Class Period.

138. Defendant is a corporation and, therefore, a "person" within the meaning of the Sherman Law.

139. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of Defendant's violations of the advertising provisions of Article 3 of the Sherman Law and the misbranded food provisions of Article 6 of the Sherman Law.

140. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of Defendant's violations of § 17500 *et seq.*, which forbids untrue and misleading advertising.

141. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of Defendant's violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*

142. Defendant sold Plaintiff and the Class Misbranded Food Products that were not capable of being sold or held legally and which had no economic value and were legally worthless. Plaintiff and the Class paid a premium for the Misbranded Food Products.

143. As a result of Defendant's illegal business practices, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct and such or orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and to restore to any class member any money paid for the Misbranded Food Products.

144. Defendant's unlawful business acts present a threat and reasonable continued likelihood of injury to Plaintiff and the Class.

145. As a result of Defendant's conduct, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and

1 such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains  
2 and restore any money paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

3 **SECOND CAUSE OF ACTION**  
4 **Business and Professions Code § 17200 *et seq.***  
5 **Unfair Business Acts and Practices**

6 146. Plaintiff incorporates by reference each allegation set forth above.

7 147. Defendant's conduct as set forth herein constitutes unfair business acts and practices.

8 148. Defendant sold Misbranded Food Products in California and throughout the United  
9 States during the Class Period.

10 149. Plaintiff and members of the Class suffered a substantial injury by virtue of buying  
11 Defendant's Misbranded Food Products that they would not have purchased absent Defendant's  
12 illegal conduct.

13 150. Defendant's deceptive marketing, advertising, packaging and labeling of  
14 Misbranded Food Products and sale of unsalable misbranded products that were illegal to possess  
15 was of no benefit to Plaintiff and members of the Class, and the harm to consumers is substantial.

16 151. Defendant sold Plaintiff and the Class Misbranded Food Products that were not  
17 capable of being legally sold or held and that had no economic value and were legally worthless.  
18 Plaintiff and the Class paid a premium price for the Misbranded Food Products.

19 152. Plaintiff and the Class who purchased Defendant's Misbranded Food Products had  
20 no way of reasonably knowing that the products were misbranded and were not properly marketed,  
21 advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of  
22 them suffered.

23 153. The consequences of Defendant's conduct as set forth herein outweigh any  
24 justification, motive or reason therefor. Defendant's conduct is and continues to be unlawful,  
25 illegal, immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious to  
26 Plaintiff and the Class.

27 154. Pursuant to Business and Professions Code § 17203, as a result of Defendant's  
28 conduct, Plaintiff and the Class, are entitled to an order enjoining such future conduct by



1 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's  
2 ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by Plaintiff  
3 and the Class.

4 **THIRD CAUSE OF ACTION**  
5 **Business and Professions Code § 17200 *et seq.***  
6 **Fraudulent Business Acts and Practices**

7 155. Plaintiff incorporates by reference each allegation set forth above.

8 156. Defendant's conduct as set forth herein constitutes fraudulent business practices  
9 under California Business and Professions Code sections § 17200 *et seq.*

10 157. Defendant sold Misbranded Food Products in California and throughout the United  
11 States during the Class Period.

12 158. Defendant's misleading marketing, advertising, packaging and labeling of the  
13 Misbranded Food Products and misrepresentations that the products were salable, capable of  
14 possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff  
15 and members of the Class were deceived. Defendant has engaged in fraudulent business acts and  
16 practices.

17 159. Defendant's fraud and deception caused Plaintiff and the Class to purchase  
18 Defendant's Misbranded Food Products that they would otherwise not have purchased had they  
19 known the true nature of those products.

20 160. Defendant sold Plaintiff and the Class Misbranded Food Products that were not  
21 capable of being sold or held legally and that had no economic value and were legally worthless.  
22 Plaintiff and the Class paid a premium price for the Misbranded Food Products.

23 161. As a result of Defendant's conduct as set forth herein, Plaintiff and the Class,  
24 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future  
25 conduct by Defendant, and such other orders and judgments which may be necessary to disgorge  
26 Defendant's ill-gotten gains and restore any money paid for Defendant's Misbranded Food  
27 Products by Plaintiff and the Class.

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**FOURTH CAUSE OF ACTION**  
**Business and Professions Code § 17500 *et seq.***  
**Misleading and Deceptive Advertising**

162. Plaintiff incorporates by reference each allegation set forth above.

163. Plaintiff asserts this cause of action for violations of California Business and Professions Code § 17500 *et seq.* for misleading and deceptive advertising against Defendant.

164. Defendant sold Misbranded Food Products in California and throughout the United States during the Class Period.

165. Defendant engaged in a scheme of offering Misbranded Food Products for sale to Plaintiff and members of the Class by way of, *inter alia*, product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendant's Misbranded Food Products. Defendant's advertisements and inducements were made within California and throughout the United States and come within the definition of advertising as contained in Business and Professions Code §17500 *et seq.* in that such product packaging and labeling, and promotional materials were intended as inducements to purchase Defendant's Misbranded Food Products and are statements disseminated by Defendant to Plaintiff and the Class that were intended to reach members of the Class. Defendant knew, or in the exercise of reasonable care should have known, that these statements were misleading and deceptive as set forth herein.

166. In furtherance of its plan and scheme, Defendant prepared and distributed within California and nationwide via product packaging and labeling, and other promotional materials, statements that misleadingly and deceptively represented the composition and the nature of Defendant's Misbranded Food Products. Plaintiff and the Class necessarily and reasonably relied on Defendant's materials, and were the intended targets of such representations.

167. Defendant's conduct in disseminating misleading and deceptive statements in California and nationwide to Plaintiff and the Class was and is likely to deceive reasonable consumers by obfuscating the true composition and nature of Defendant's Misbranded Food Products in violation of the "misleading prong" of California Business and Professions Code §17500 *et seq.*

1 168. As a result of Defendant's violations of the "misleading prong" of California  
2 Business and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the  
3 expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held, have no  
4 economic value and are legally worthless. Plaintiff and the Class paid a premium price for the  
5 Misbranded Food Products.

6 169. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are  
7 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
8 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money  
9 paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

10 **FIFTH CAUSE OF ACTION**  
11 **Business and Professions Code § 17500 *et seq.***  
12 **Untrue Advertising**

13 170. Plaintiff incorporates by reference each allegation set forth above.

14 171. Plaintiff asserts this cause of action against Defendant for violations of California  
15 Business and Professions Code § 17500 *et seq.* regarding untrue advertising.

16 172. Defendant sold Misbranded Food Products in California and throughout the United  
17 States during the Class Period.

18 173. Defendant engaged in a scheme of offering Defendant's Misbranded Food Products  
19 for sale to Plaintiff and the Class by way of product packaging and labeling, and other promotional  
20 materials. These materials misrepresented and/or omitted the true contents and nature of  
21 Defendant's Misbranded Food Products. Defendant's advertisements and inducements were made  
22 in California and throughout the United States and come within the definition of advertising as  
23 contained in Business and Professions Code § 17500 *et seq.* in that the product packaging and  
24 labeling, and promotional materials were intended as inducements to purchase Defendant's  
25 Misbranded Food Products, and are statements disseminated by Defendant to Plaintiff and the  
26 Class. Defendant knew, or in the exercise of reasonable care should have known, that these  
27 statements were untrue.

28 174. In furtherance of its plan and scheme, Defendant prepared and distributed in  
California and nationwide via product packaging and labeling, and other promotional materials,

1 statements that falsely advertise the composition of Defendant's Misbranded Food Products, and  
2 falsely misrepresented the nature of those products. Plaintiff and the Class were the intended  
3 targets of such representations and would reasonably be deceived by Defendant's materials.

4 175. Defendant's conduct in disseminating untrue advertising throughout California  
5 deceived Plaintiff and members of the Class by obfuscating the contents, nature and quality of  
6 Defendant's Misbranded Food Products in violation of the "untrue prong" of California Business  
7 and Professions Code § 17500.

8 176. As a result of Defendant's violations of the "untrue prong" of California Business  
9 and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the expense of  
10 Plaintiff and the Class. Misbranded products cannot be legally sold or held, have no economic  
11 value, and are legally worthless. Plaintiff and the Class paid a premium price for the Misbranded  
12 Food Products.

13 177. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are  
14 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
15 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money  
16 paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

17 **SIXTH CAUSE OF ACTION**  
18 **Consumers Legal Remedies Act, Cal. Civ. Code §1750 *et seq.***

19 178. Plaintiff incorporates by reference each allegation set forth above.

20 179. This cause of action is brought pursuant to the CLRA. Plaintiff does not currently  
21 seek monetary damages for this cause of action and this cause of action is limited solely to  
22 injunctive relief. Plaintiff intends to amend this Complaint to seek damages in accordance with the  
23 CLRA after providing Defendant with notice pursuant to Cal. Civ. Code § 1782.

24 180. At the time of any amendment seeking damages under the CLRA, Plaintiff will  
25 demonstrate that the violations of the CLRA by Defendant were willful, oppressive and fraudulent,  
26 thus supporting an award of punitive damages.

27 181. Consequently, Plaintiff and the Class will be entitled to actual and punitive damages  
28 against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code §

1 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-described acts  
2 and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and  
3 attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal.  
4 Civ. Code § 1780.

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

8 183. Defendant sold Misbranded Food Products in California and throughout the United  
9 States during the Class Period.

10 184. Plaintiff and members of the Class are "consumers" as that term is defined by the  
11 CLRA in Cal. Civ. Code §1761(d).

12 185. Defendant's Misbranded Food Products were and are "goods" within the meaning of  
13 Cal. Civ. Code §1761(a).

14 186. By engaging in the conduct set forth herein, Defendant violated and continues to  
15 violate Section 1770(a)(5) of the CLRA because Defendant's conduct constitutes unfair methods of  
16 competition and unfair or fraudulent acts or practices in that they misrepresent the particular  
17 ingredients, characteristics, uses, benefits and quantities of the goods.

18 187. By engaging in the conduct set forth herein, Defendant violated and continues to  
19 violate Section 1770(a)(7) of the CLRA, because Defendant's conduct constitutes unfair methods of  
20 competition and unfair or fraudulent acts or practices in that they misrepresent the particular  
21 standard, quality or grade of the goods.

22 188. By engaging in the conduct set forth herein, Defendant violated and continues to  
23 violate Section 1770(a)(9) of the CLRA, because Defendant's conduct constitutes unfair methods of  
24 competition and unfair or fraudulent acts or practices in that they advertise goods with the intent not  
25 to sell the goods as advertised.

26 189. By engaging in the conduct set forth herein, Defendant violated and continues to  
27 violate Section 1770(a)(16) of the CLRA, because Defendant's conduct constitutes unfair methods  
28

1 of competition and unfair or fraudulent acts or practices in that they represent that a subject of a  
2 transaction has been supplied in accordance with a previous representation when it has not.

3 190. Plaintiff requests that the Court enjoin Defendant from continuing to employ the  
4 unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2). If  
5 Defendant is not restrained from engaging in these practices in the future, Plaintiff and the Class  
6 will continue to suffer harm.

7 **SEVENTH CAUSE OF ACTION**  
8 **Restitution Based on Unjust Enrichment/Quasi-Contract**

9 191. Plaintiff incorporates by reference each allegation set forth above.

10 192. As a result of Defendant's fraudulent and misleading labeling, advertising,  
11 marketing and sales of Defendant's Misbranded Food Products, Defendant was enriched at the  
12 expense of Plaintiff and the Class.

13 193. Defendant sold Misbranded Food Products to Plaintiff and the Class that were not  
14 capable of being sold or held legally and which had no economic value and were legally worthless.  
15 It would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits  
16 it received from Plaintiff and the Class, in light of the fact that the products were not what  
17 Defendant purported them to be. Thus, it would be unjust and inequitable for Defendant to retain  
18 the benefit without restitution to Plaintiff and the Class of all monies paid to Defendant for the  
19 products at issue.

20 194. As a direct and proximate result of Defendant's actions, Plaintiff and the Class have  
21 suffered damages in an amount to be proven at trial.

22 **JURY DEMAND**

23 Plaintiff hereby demands a trial by jury of all claims.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, and on  
26 behalf of the general public, prays for judgment against Defendant as follows:

27 A. For an order certifying this case as a class action and appointing Plaintiff and  
28 Plaintiff's counsel to represent the Class;

1 B. For an order awarding, as appropriate, damages, restitution or disgorgement to  
2 Plaintiff and the Class for all causes of action other than the CLRA, as Plaintiff does not seek  
3 monetary relief under the CLRA, but intends to amend this Complaint to seek such relief;

4 C. For an order requiring Defendant to immediately cease and desist from selling  
5 Misbranded Food Products in violation of law; enjoining Defendant from continuing to market,  
6 advertise, distribute, and sell these products in the unlawful manner described herein; and ordering  
7 Defendant to engage in corrective action;

8 D. For all equitable remedies available pursuant to Cal. Civ. Code § 1780;

9 E. For an order awarding attorneys' fees and costs;

10 F. For an order awarding punitive damages;

11 G. For an order awarding pre-and post-judgment interest; and

12 H. For an order providing such further relief as this Court deems proper.

13  
14 Dated: February 4, 2013

Respectfully submitted,

15  
16 *Ben F. Pierce Gore*

17 Ben F. Pierce Gore (SBN 128515)  
18 PRATT & ASSOCIATES  
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21 Telephone: (408) 429-6506  
22 Fax: (408) 369-0752  
23 pgore@prattattorneys.com

24  
25 *Attorneys for Plaintiff*  
26  
27  
28

# CIVIL COVER SHEET

JS 44 CAND (Rev. 12/11)

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

### I. (a) PLAINTIFFS

SUSAN LEONHART, individually and on behalf of all others similarly situated

### DEFENDANTS

NATURE'S PATH FOODS INC.

(b) County of Residence of First Listed Plaintiff Santa Clara  
*(EXCEPT IN U.S. PLAINTIFF CASES)*

County of Residence of First Listed Defendant \_\_\_\_\_  
*(IN U.S. PLAINTIFF CASES ONLY)*

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

Attorneys (If Known)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Pierce Gore, Pratt & Associates  
1871 The Alameda, Suite 425  
San Jose, CA 95126  
(408) 429-6506

# CV 13 - 0492

# HRL

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

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

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

- (For Diversity Cases Only)*
- |   |   |                                |   |                                |                                       |
|---|---|--------------------------------|---|--------------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> PTF 1 | <input type="checkbox"/> DEF 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> PTF 4 | <input type="checkbox"/> DEF 4        |
| Citizen of Another State                | <input type="checkbox"/> 2                | <input type="checkbox"/> 2     | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5     | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3                | <input type="checkbox"/> 3     | Foreign Nation  | <input type="checkbox"/> 6     | <input type="checkbox"/> 6            |

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input checked="" type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input checked="" type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		<input type="checkbox"/> 897 Agricultural Acts	

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

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

### VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. § 1332

Brief description of cause:

Class action/package food misbranding/Sherman Law

VII. REQUESTED IN COMPLAINT:  CHECK IF THIS IS A CLASS ACTION DEMAND \$ UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

### VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

### IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)

(Place an "X" in One Box Only)

- SAN FRANCISCO/OAKLAND
- SAN JOSE
- EUREKA

DATE February 4, 2013

SIGNATURE OF ATTORNEY OF RECORD

PIERCE GORE *Pierce Gore* NDC-JS44