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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DARYL DE KECZER individually and on behalf of all others similarly situated,

Plaintiff,

v.

TETLEY USA, INC.

Defendant.

Case No. 12-02409 EJD

SECOND AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR DAMAGES, EQUITABLE AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

Plaintiff, Daryl De Keczer, ("Plaintiff") through his undersigned attorneys, brings this lawsuit against Defendant Tetley USA, Inc. (hereinafter "Tetley" or "Defendant") as to his own acts upon personal knowledge, and as to all other matters upon information and belief.

DEFINITIONS

1. "Class Period" is May 11, 2008 to the present.

2. "Purchased Products" are the two (2) bagged tea products listed below purchased by Plaintiff during the Class Period. Pictures of the Purchased Products along with specific descriptions of the relevant label representations are included in ¶¶ 113-128 below.

a. British Blend Premium Black Tea, 80 bags, 7 oz.; and

b. Green Tea, 40 bags, 2.8 oz.

3. "Substantially Similar Products" are the products listed below. Each of these listed products: (i) are bagged tea products in identical packaging as the purchased products; (ii) contain green or black tea all of which comes from the same plant—camellia sinensis. The only difference in green and black tea is in the processing (drying of the tea leaves); (iii) all packages make the same label representations as described herein as the Purchased Products and (iv) violate the same regulations of the Sherman Food Drug & Cosmetic Law, California Health & Safety Code § 109875 *et seq.* (the "Sherman Law") as the Purchased Products:.

a. Green Tea Decaffeinated
b. Iced Tea Blend
c. Naturally Decaffeinated Iced Tea Blend
d. Decaffeinated British Blend
e. Classic Black Tea
f. Classic Black Tea Decaffeinated
g. Earl Grey

4. Upon information and belief, these Substantially Similar Products are all Defendant's green and black bagged tea products sold during the Class Period with unlawful antioxidant nutrient content claims and health claims on the packages and on Tetley's website. Plaintiff reserves the right to supplement this list if evidence is adduced during discovery to show that other green or black bagged tea products had labels which violate the same provisions of the Sherman Law and have the same label representations as the Purchased Products.

5. The class definition, listed in paragraph 151 is a combined list of the Purchased Products and Substantially Similar Products.

SUMMARY OF THE CASE

6. Plaintiff's case has two distinct facets. First, the "UCL unlawful" part. Plaintiff's first cause of action is brought pursuant to the unlawful prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 ("UCL"). Plaintiff alleges that Defendant package and label the Purchased Products in violation of California's Sherman Law which adopts, incorporates – and is identical – to the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("FDCA"). These violations (which do not require a finding that the labels are "misleading") render the

Purchased Products "misbranded" which is no small thing. Under California law, a food product that is misbranded cannot legally be manufactured, advertised, distributed, held or sold. Misbranded products cannot be legally sold, possessed, have no economic value, and are legally worthless. Indeed, the sale, purchase or possession of misbranded food is a criminal act in California and the FDA even threatens food companies with seizure of misbranded products. This "misbranding" – standing alone without any allegations of deception by Defendant or review of or reliance on the labels by Plaintiff – give rise to Plaintiff's first cause of action under the UCL. To state a claim under the unlawful prong, Plaintiff need only allege that he would not have purchased the product had he known it was misbranded because he would have a product that is illegal to own or possess.

7. Second, the "fraudulent" part. Plaintiff alleges that the illegal statements contained on the labels of the Purchased Products – aside from being unlawful under the Sherman Law – are also misleading, deceptive, unfair and fraudulent. Plaintiff describes these labels and how they are misleading. Plaintiff alleges that prior to purchase he reviewed the illegal statements on the labels on the Purchased Products, reasonably relied in substantial part on the labels, and was thereby deceived, in deciding to purchase these products. Had Plaintiff known the truth about the products he would not have purchased them.

8. Plaintiff did not know, and had no reason to know, that the Defendant's Purchased Products were misbranded under the Sherman Law and bore food labeling claims that failed to meet the requirements to make those food labeling claims. Similarly, Plaintiff did not know, and had no reason to know, that Defendant's Purchased Products were false and misleading.

BACKGROUND

9. Every day millions of Americans purchase and consume packaged foods. To protect these consumers, identical California and federal laws require truthful, accurate information on the labels of packaged foods. This case is about companies that flout those laws and sell misbranded food to unsuspecting consumers. The law, however, is clear: misbranded food cannot legally be manufactured, held, advertised, distributed or sold. Misbranded food is worthless as a matter of law, and purchasers of misbranded food are entitled to a refund of their

purchase price.

10. Defendant Tetley is a tea company based in New Jersey. It is a wholly owned subsidiary of Tata Global Beverages, Ltd., a conglomerate headquartered in Kolkata, West Bengal India. Tetley is the largest tea company by sales volume in the United Kingdom and Canada and a major seller of tea products in the United States and California.

11. Tata Global Beverages, Ltd., Tetley's parent, recognizes that health claims drive sales. It actively encourages its subsidiary Tetley to promote the alleged health benefits to consumers from using Tetley tea products. For example, in its 2009-2010 annual report, Tata Global stated:

> The global beverage market offers significant opportunities for growth. Markets for specialty tea, green tea, ready-to-drink beverages and fruit juices are growing far quicker than traditional black tea. These new areas give us opportunities to focus on the growing health and wellness segment with convenient products, delivered to consumers in a sustainable way.

http://www.tataglobalbeverages.com/Lists/Document%20Manager/Attachments/21/tata-tea-annual-report-2010.pdf.

12. On its own website, Tetley goes even further in promoting the health benefits of its tea products, specifically focusing on claimed nutrients in its tea known as antioxidants:

> Tea, like fruits and vegetables, is an excellent source of antioxidants. Antioxidants, in a nutshell (or a teacup, as the case may be), are compounds that prevent or delay oxidative damage to the body, cells and tissue brought on by free radicals. There are two basic categories of antioxidants: those that are produced naturally by your body, and those that are supplied by your diet—and that's where Tetley can help.
>
> All black, green, white and red (rooibos) teas contain powerful and natural antioxidants called flavonoids. Flavonoid antioxidant levels are generally higher in green and white teas, as they are taken from the early leaves and buds from the tea plant, *Camellia sinensis*, and undergo less processing than other teas.
>
> A growing body of evidence suggests that the antioxidants that occur naturally in tea can help your body in various ways, such as:
>
> . Neutralize free radicals that can cause cell damage linked to certain cancers
> . Inhibit the oxidation of LDL (bad cholesterol), helping you fight heart disease
> . Boost your immune system and help reduce infections by as much as 87%
> . A recent 2007 study conducted in the UK revealed that those who drank two

or more cups of green tea a day had a 65% lower risk of developing squamous cell carcinoma

. Studies have shown that black tea may protect lungs from damage caused by exposure to cigarette smoke and may also reduce the risk of stroke

. A study published in the February 2009 *Journal of Nutrition* suggests that green tea may reduce the risk of breast cancer if plentiful amounts of the beverage are consumed over many years

. Provide a boost to exercise-induced weight loss

http://www.tetleyusa.com/AboutTea_TeaAndHealth.php

13. Tetley utilizes improper antioxidant nutrient content, and health claims that have been expressly condemned by the FDA in numerous enforcement actions and warning letters. For example, Tetley makes unlawful antioxidant nutrient content and health claims directly on packages of its tea products. For example the Tetley Green Tea package purchased by the Plaintiff and shown below in paragraph 122 bears the statement on the front panel: " *Natural Source of Antioxidants*". The back panel of the Green Tea product purchased by Plaintiff states "*Tetley Tea: the smart choice for your healthy lifestyle: Like fruits and vegetables, tea is an excellent source of natural antioxidants which help boost the body's immune system. So, drink to your health with Tetley*." This same claim on the back of the package also appears on the British Blend Premium Black Tea purchased by Plaintiff as shown in paragraph 116 below.

14. Substantially similar unlawful antioxidant nutrient content and health claims are on each label of all Tetley's green and black bagged tea products.

15. If a manufacturer is going to make a claim on a food label, the label must meet certain legal requirements that help consumers make informed choices and ensure that they are not misled. As described more fully below, Defendant has made, and continues to make, false and deceptive claims in violation of California and federal laws that govern the types of representations that can be made on food labels. These laws recognize that reasonable consumers are likely to choose products claiming to have a health or nutritional benefit over otherwise similar food products that do not claim such benefits.

16. Under California law, which is identical to federal law, a number of the Defendant's food labeling practices are unlawful because they are deceptive and misleading to

consumers. These are:

A. Making unlawful nutrient content antioxidant claims on the labels of food products that fail to meet the general minimum nutritional requirements legally required for the nutrient content claims being made;

B. Making unlawful antioxidant claims on the labels of food products that fail to meet the specific minimum nutritional requirements legally required for the antioxidant claims being made;

C. Making unlawful and unapproved health claims about its products on the Tetley website that are prohibited by law.

17. These practices are not only illegal but they mislead consumers and deprive them of the information they require to make informed purchasing decisions.

18. California and federal laws have placed numerous requirements on food companies that are designed to ensure that the claims that companies make about their products to consumers are truthful, accurate and backed by acceptable forms of scientific proof. When companies such as Defendant make unlawful nutrient content, antioxidant, or health claims that are prohibited by California law, consumers such as Plaintiff are misled.

19. Identical California and federal laws regulate the content of labels on packaged food. The requirements of the FDCA were adopted by the California legislature in the Sherman Law. Under both the Sherman Law and FDCA section 403(a), food is "misbranded" if "its labeling is false or misleading in any particular," or if it does not contain certain information on its label or its labeling. 21 U.S.C. § 343(a).

20. Under the FDCA, the term "false" has its usual meaning of "untruthful," while the term "misleading" is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire food is misbranded, nor can any other statement in the labeling cure a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

21. On August 23, 2010, the FDA sent a warning letter to Unilever, one of Tetley's biggest competitors producing similar tea products, informing Unilever of its failure to comply with the requirements of the FDCA and its regulations for making almost identical unlawful claims on its tea product packages and on its website (the "FDA Warning Letter," attached hereto as Exhibit 1). The FDA Warning Letter stated, in pertinent part:

> **Unauthorized Nutrient Content Claims**
>
> Under section 403(r)(1)(A) of the Act [21 U.S.C. 343(r)(1)(A)], a claim that characterizes the level of a nutrient which is of the type required to be in the labeling of the food must be made in accordance with a regulation promulgated by the Secretary (and, by delegation, FDA) authorizing the use of such a claim. The use of a term, not defined by regulation, in food labeling to characterize the level of a nutrient misbrands a product under section 403(r)(1)(A) of the Act.
>
> Nutrient content claims using the term "antioxidant" must also comply with the requirements listed in 21 CFR 101.54(g). These requirements state, in part, that for a product to bear such a claim, an RDI must have been established for each of the nutrients that are the subject of the claim (21 CFR 101.54(g)(1)), and these nutrients must have recognized antioxidant activity (21 CFR 101.54(g)(2). The level of each nutrient that is the subject of the claim must also be sufficient to qualify for the claim under 21 CFR 101.54(b), (c), or (e) (21 CFR 101.54(g)(3)). For example, to bear the claim "high in antioxidant vitamin C," the product must contain 20 percent or more of the RDI for vitamin C under 21 CFR 101.54(b). Such a claim must also include the names of the nutrients that are the subject of the claim as part of the claim or, alternatively, the term "antioxidant" or "antioxidants" may be linked by a symbol (e.g., an asterisk) that refers to the same symbol that appears elsewhere on the same panel of the product label, followed by the name or names of the nutrients with recognized antioxidant activity (21 CFR 101.54(g)(4)). The use of a nutrient content claim that uses the term "antioxidant" but does not comply with the requirements of 21 CFR 101.54(g) misbrands a product under section 403(r)(2)(A)(i) of the Act.
>
> Your webpage entitled "Tea and Health" and subtitled "Tea Antioxidants" includes the statement, "LIPTON Tea is made from tea leaves rich in naturally protective antioxidants." The term "rich in" is defined in 21 CFR 101.54(b) and may be used to characterize the level of antioxidant nutrients (21 CFR 101.54(g)(3)). However, this claim does not comply with 21 CFR 101.54(g)(4) because it does not include the nutrients that are the subject of the claim or use a symbol to link the term "antioxidant" to those nutrients. Thus, this claim misbrands your product under section 403(r)(2)(A)(i) of the Act.
>
> This webpage also states "tea is a naturally rich source of antioxidants." The term "rich source" characterizes the level of antioxidant nutrients in the product and, therefore, this claim is a nutrient content claim (see section 403(r)(1) of the Act and 21 CFR 101.13(b)). Even if we determined that the term "rich source" could be considered a synonym for a term defined by regulation (e.g., "high" or "good source"), nutrient content claims that use the term "antioxidant" must meet the requirements of 21 CFR 101.54(g). The claim "tea is a naturally rich source of antioxidants" does not include the nutrients that are the subject of the claim or use a symbol to link the term "antioxidant" to those nutrients, as required by 21 CFR

> 101.54(g)(4). Thus, this claim misbrands your product under section 403(r)(2)(A)(i) of the Act. The product label back panel includes the statement "packed with protective FLAVONOID ANTIOXIDANTS." The term "packed with" characterizes the level of flavonoid antioxidants in the product; therefore, this claim is a nutrient content claim (see section 403(r)(1) of the Act and 21 CFR 101.13(b)). Even if we determined that the term "packed with" could be considered a synonym for a term defined by regulation, nutrient content claims that use the term "antioxidant" must meet the requirements of 21 CFR 101.54(g). The claim "packed with FLAVONOID ANTIOXIDANTS" does not comply with 21 CFR 101.54(g)1) because no RDI has been established for flavonoids. Thus, this unauthorized nutrient content claim causes your product to be misbranded under section 403(r)(2)(A)(i) of the Act.
>
> The above violations are not meant to be an all-inclusive list of deficiencies in your products or their labeling. It is your responsibility to ensure that all of your products are in compliance with the laws and regulations enforced by FDA. You should take prompt action to correct the violations. Failure to promptly correct these violations may result in regulatory actions without further notice, such as seizure and/or injunction.
>
> We note that your label contains a chart entitled "Flavonoid Content of selected beverages and foods." The chart appears to compare the amounts of antioxidants in your product with the amount of antioxidants in orange juice, broccoli, cranberry juice and coffee. However, the information provided may be misinterpreted by the consumer because although the chart is labeled, in part, "Flavonoid Content," the y-axis is labeled "AOX"; therefore, the consumer might believe that the chart is stating the total amount of antioxidants rather than specifically measuring the amount of flavonoids in the product.

http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm224509.htm

22. Tetley, which knew or should have known of the aforesaid warning letter continued to make the same unlawful antioxidant nutrient content claims on its labels and website.

23. Defendant has made, and continues to make, unlawful and misleading claims on food labels that are prohibited by California and federal law and which render these products misbranded. Under federal and California law, such products cannot legally be manufactured, advertised, distributed, held or sold. Defendant's violations of law include the illegal advertising, marketing, distribution, delivery and sale of these products to consumers in California and throughout the United States.

PARTIES

24. Plaintiff Daryl De Keczer is a resident of San Jose, California who purchased Tetley's green and black bagged tea food products in California during the four (4) years prior to

the filing of the original complaint in this cause (the "Class Period").

25. Defendant Tetley USA, Inc. is a Delaware corporation with its principle place of business in New Jersey. Tetley USA, Inc. is authorized to do business in California.

26. Defendant is leading producer of retail tea food products, including the Purchased Products. Defendant sells its food products to consumers through grocery and other retail stores as well as on its website throughout the United States and California.

JURISDICTION AND VENUE

27. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d) because this is a class action in which: (1) there are over 100 members in the proposed class; (2) members of the proposed class have a different citizenship from Defendant; and (3) the claims of the proposed class members exceed $5,000,000 in the aggregate.

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

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

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

FACTUAL ALLEGATIONS

A. Identical California and Federal Laws Regulate Food Labeling

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

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

33. In addition to its blanket adoption of federal labeling requirements, California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. For example, food products are misbranded under California Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars; are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110670 if their labeling fails to conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r) and regulations adopted thereto.

B. FDA Enforcement History

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

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

> FDA's research has found that with FOP labeling, people are less likely to check the Nutrition Facts label on the information panel of foods (usually, the back or side of the package). It is thus essential that both the criteria and symbols used in front-of-package and shelf-labeling systems be nutritionally sound, well-designed to help consumers make informed and healthy food choices, and not be false or misleading. The agency is currently analyzing FOP labels that appear to be misleading. The agency is also looking for symbols that either expressly or by implication are nutrient content claims. We are assessing the criteria established by food 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, a food that bears FOP or shelf labeling with a nutrient content claim that does not comply with the regulatory criteria for the claim as defined in Title 21 Code of Federal Regulations (CFR) 101.13 and Subpart D of Part 101 is misbranded. We will consider enforcement actions against clear violations of these established labeling requirements. . .
>
> … Accurate food labeling information can assist consumers in making healthy nutritional choices. FDA intends to monitor and evaluate the various FOP labeling systems and their effect on consumers' food choices and perceptions. FDA recommends that manufacturers and distributors of food products that include FOP labeling ensure that the label statements are consistent with FDA laws and regulations. FDA will proceed with enforcement action against products that bear FOP labeling that are explicit or implied nutrient content claims and that are not consistent with current nutrient content claim requirements. FDA will also proceed with enforcement action where such FOP labeling or labeling systems are used in a manner that is false or misleading.

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

37. Despite the issuance of the 2009 FOP Guidance, Defendant did not remove the unlawful and misleading food labeling claims from their products.

38. On March 3, 2010, the FDA issued an "Open Letter to Industry from [FDA Commissioner] Dr. Hamburg" (hereinafter, "Open Letter"). The Open Letter reiterated the FDA's 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 obesity among our citizens, particularly our children. With that in mind, I have made improving the scientific accuracy and usefulness of food labeling one of my priorities as Commissioner of Food and Drugs. The latest

> focus in this area, of course, is on information provided on the principal display panel of food packages and commonly referred to as "front-of-pack" labeling. The use of front-of-pack nutrition symbols and other claims has grown tremendously in recent years, and it is clear to me as a working mother that such information can be helpful to busy shoppers who are often pressed for time in making their food selections. ….
>
> As we move forward in those areas, I must note, however, that there is one area in which more progress is needed. As you will recall, we recently expressed concern, in a "Dear Industry" letter, about the number and variety of label claims that may not help consumers distinguish healthy food choices from less healthy ones and, indeed, may be false or misleading.
>
> At that time, we urged food manufacturers to examine their product labels in the context of 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. As a result, some manufacturers have revised their labels to bring them into line with the goals of the Nutrition Labeling and Education Act of 1990. Unfortunately, however, we continue to see products marketed with labeling that violates established labeling standards.
>
> To address these concerns, FDA is notifying a number of manufacturers that their labels are in violation of the law and subject to legal proceedings to remove misbranded products from the marketplace. While the warning letters that convey our regulatory intentions do not attempt to cover all products with violative labels, they do cover a range of concerns about how false or misleading labels can undermine the intention of Congress to provide consumers with labeling information that enables consumers to make informed and healthy food choices. For example: …
>
> - Products that claim to treat or mitigate disease are considered to be drugs and must meet the regulatory requirements for drugs, including the requirement to prove that the product is safe and effective for its intended use.
> - Misleading "healthy" claims continue to appear on foods that do not meet the long- and well-established definition for use of that term.
>
> . . . .
>
> These examples and others that are cited in our warning letters are not indicative of the labeling practices of the food industry as a whole. In my conversations with industry leaders, I sense a strong desire within the industry for a level playing field and a commitment to producing safe, healthy products. That reinforces my belief that FDA should provide as clear and consistent guidance as possible about food labeling claims and nutrition information in general, and specifically about how the growing use of front-of-pack calorie and nutrient information can best help 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-based front-of-pack regime that we can all use to help consumers choose healthier foods and healthier diets.

39. Notwithstanding the Open Letter, Defendant has continued to utilize unlawful food labeling claims despite the express guidance of the FDA in the Open Letter.

40. In addition to its guidance to industry, the FDA has sent warning letters to the industry, including many of Defendant's peer food manufacturers, for the same types of unlawful nutrient content claims described above.

41. In these letters dealing with unlawful nutrient content claims, the FDA indicated that, as a result of the same type of claims utilized by Defendant, products were in "violation of the Federal Food, Drug, and Cosmetic Act … and the applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR § 101)" and "misbranded within the meaning of section 403(r)(1)(A) because the product label bears a nutrient content claim but does not meet the requirements to make the claim." These warning letters were not isolated, as the FDA has issued other warning letters to other companies for the same type of food labeling claims at issue in this case.

42. The FDA stated that the agency not only expected companies that received warning letters to correct their labeling practices but also anticipated that other firms would examine their food labels to ensure that they are in full compliance with food labeling requirements and make changes where necessary. Defendant did not change the labels on its products in response to the warning letters sent to other companies.

43. Defendant also continued to ignore the FDA's Guidance for Industry, A Food Labeling Guide which details the FDA's guidance on how to make food labeling claims. Defendant continued to utilize unlawful claims on the labels of their products. As such, the Purchased Products, continue to run afoul of FDA guidance as well as identical federal and California law.

44. Despite the FDA's numerous warnings to industry, Defendant have continued to sell products bearing unlawful antioxidant food labeling claims without meeting the requirements to make them.

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45. Plaintiff did not know, and had no reason to know, that the Defendant's Purchased Products were misbranded and bore antioxidant food labeling claims despite failing to meet the requirements to make those antioxidant food labeling claims. Similarly, Plaintiff did not know, and had no reason to know, that the Defendant's Purchased Products were misbranded because their labeling was false and misleading.

OVERVIEW OF APPLICABLE SHERMAN LAW VIOLATIONS

A. Violations of the General Nutrient Content Claim Labeling Rules

46. The following Purchased Products have an unlawful and misleading "nutrient content" claim:

a. British Blend Premium Black Tea, 80 bags, 7 oz.; and

b. Green Tea, 40 bags, 2.8 oz.

47. Pursuant to Section 403 of the FDCA, a claim that characterizes the level of a nutrient in a food is a "nutrient content claim" that must be made in accordance with the regulations that authorize the use of such claims. 21 U.S.C. § 343(r)(1)(A). California expressly adopted the requirements of 21 U.S.C. § 343(r) in § 110670 of the Sherman Law.

48. Nutrient content claims are claims about specific nutrients contained in a product. They are typically made on food packaging in a font large enough to be read by the average consumer. Because consumers, including Plaintiff, rely upon these claims when making purchasing decisions, the regulations govern what claims can be made in order to prevent misleading claims.

49. Section 403(r)(1)(A) of the FDCA governs the use of expressed and implied nutrient content claims on labels of food products that are intended for sale for human consumption. 21 C.F.R. § 101.13.

50. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims, which California has expressly adopted. California Health & Safety Code § 110100.

51. An "expressed nutrient content claim" is defined as any direct statement about the level (or range) of a nutrient in the food (*e.g.*, "low sodium" or "contains 100 calories"). 21 C.F.R. § 101.13(b)(1).

52. An "implied nutrient content claim" is defined as any claim that: (i) describes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (*e.g.*, "high in oat bran"); or (ii) suggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (*e.g.*, "healthy, contains 3 grams (g) of fat"). 21 C.F.R. § 101.13(b)(2)(i-ii).

53. These regulations authorize use of a limited number of defined nutrient content claims. In addition to authorizing the use of only a limited set of defined nutrient content terms on food labels, these regulations authorize the use of only certain synonyms for these defined terms. If a nutrient content claim or its synonym is not included in the food labeling regulations it cannot be used on a label. Only those claims, or their synonyms, that are specifically defined in the regulations may be used. All other claims are prohibited. 21 C.F.R. § 101.13(b).

54. Only approved nutrient content claims will be permitted on the food label, and all other nutrient content claims will misbrand a food. It is thus clear which types of claims are prohibited and which types are permitted. Manufacturers are on notice that the use of an unapproved nutrient content claim is prohibited conduct. 58 F.R. 2302. In addition, 21 USC § 343(r)(2), whose requirements have been adopted by California, prohibits using unauthorized undefined terms and declares foods that do so to be misbranded.

55. Similarly, the regulations specify absolute and comparative levels at which foods qualify to make these claims for particular nutrients (*e.g.*, low fat . . . more vitamin C) and list synonyms that may be used in lieu of the defined terms. Certain implied nutrient content claims (*e.g.*, "healthy") also are defined. The daily values (DVs) for nutrients that the FDA has established for nutrition labeling purposes have application for nutrient content claims, as well. Claims are defined under current regulations for use with nutrients having established DVs; moreover, relative claims are defined in terms of a difference in the percent DV of a nutrient provided by one food as compared to another. *See e.g.*, 21 C.F.R. §§ 101.13 and 101.54.

56. In order to appeal to consumer preferences, Defendant have repeatedly made false and unlawful nutrient content claims about antioxidants that either fail to utilize one of the limited

defined terms or use one the defined terms improperly. These nutrient content claims are unlawful because they fail to comply with the nutrient content claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54, which are incorporated in California's Sherman Law. To the extent that the terms used by Defendant to describe antioxidant nutrients are deemed to be a synonym for a defined term like "contain" the claim would still be unlawful because either the terms are being used improperly or the nutrients at issue do not have established daily values and thus cannot serve as the basis for a term that has a minimum daily value threshold as the defined terms at issue here do.

57. Defendant's claims concerning unnamed antioxidants are false because Defendant's use of a defined term is in effect a claim that the products have met the minimum nutritional requirements for the use of the defined term when they have not.

58. For example, the antioxidant nutrient content claims that Defendant makes on the labels of the British Blend Premium Black Tea and Green Tea purchased by Plaintiff are false and unlawful because they use the defined terms "*natural source of antioxidants"* and/or "*excellent source of natural antioxidants*" improperly. Defendant uses these terms to describe antioxidants that fail to satisfy the minimum nutritional thresholds for these defined terms. "Source" is a synonym for "contains" and therefore requires a nutrient to be present at a level at least 10% of the Daily Value for that nutrient. Tetley's tea products, including those products purchased by Plaintiff, do not contain any such nutrient.

59. Defendant's misuse of defined terms is not limited the nutrient content claims on one or two products. Defendant's unlawful nutrient content claims are part of a widespread practice of misusing defined nutrient content claims to overstate the antioxidant nutrient content of all of their black and green bagged tea products.

60. Defendant falsely and unlawfully uses undefined terms such as "*excellent source*" and "*natural source*". By using such undefined terms Defendant is, in effect, falsely asserting that their products meet at least the lowest minimum threshold for any nutrient content claim which would be 10% of the daily value of the nutrient at issue. Such a threshold represents the lowest level that a nutrient can be present in a food before it becomes deceptive and misleading to

highlight its presence in a nutrient content claim. Thus, for example, it is deceptive and misleading for Defendant to claim that teas are a "source" of antioxidants or that such nutrients are "found" in tea. None of the nutrients in tea has a DV and thus it is unlawful to make nutrient content claims about them.

61. FDA enforcement actions targeting identical or similar claims to those made by Defendant have made clear the unlawfulness of such claims. For example, on March 24, 2011, the FDA sent Jonathan Sprouts, Inc. a warning letter where it specifically targeted a "source" type claim like the one used by Defendant. In that letter the FDA stated:

> Your Organic Clover Sprouts product label bears the claim "Phytoestrogen Source[.]" Your webpage entitled "Sprouts, The Miracle Food! - Rich in Vitamins, Minerals and Phytochemicals" bears the claim "Alfalfa sprouts are one of our finest food sources of . . . saponin." These claims are nutrient content claims subject to section 403(r)(1)(A) of the Act because they characterize the level of nutrients of a type required to be in nutrition labeling (phytoestrogen and saponin) in your products by use of the term "source." Under section 403(r)(2)(A) of the Act, nutrient content claims may be made only if the characterization of the level made in the claim uses terms which are defined by regulation. However, FDA has not defined the characterization "source" by regulation. Therefore, this characterization may not be used in nutrient content claims.

62. It is thus clear that a "source" claim is unlawful because the "FDA has not defined the characterization 'source' by regulation" and thus such a "characterization may not be used in nutrient content claims." Similarly, a claim that a nutrient is "found" in tea is improper because it is either an undefined characterization that a nutrient is found in a food at some undefined level or because it is a synonym for a defined term like "contains" as there is no difference in meaning between the statement "tea contains antioxidants" and the statement "antioxidants are found in tea." Both characterize the fact the tea contains antioxidants at some undefined level. The type of misrepresentations made above would be considered by a reasonable consumer like the Plaintiff when deciding to purchase the products.

63. These very same types of violations at issue here over nutrient content claims for food products were condemned in the FDA warning letter to Unilever referred to above and attached as Exhibit 1, in which, the FDA stated:

> The product label back panel includes the statement "packed with protective FLAVONOID ANTIOXIDANTS." The term "packed with" characterizes the level of flavonoid antioxidants in the product; therefore, this claim is a nutrient

> content claim (see section 403(r)(1) of the Act and 21 CFR 101.13(b)). Even if we determined that the term "packed with" could be considered a synonym for a term defined by regulation, nutrient content claims that use the term "antioxidant" must meet the requirements of 21 CFR 101.54(g). The claim "packed with FLAVONOID ANTIOXIDANTS" does not comply with 21 CFR 101.54(g)1) because no RDI has been established for flavonoids.

64. Just as the FDA found Unilever's use of the phrase "packed with flavonoid antioxidants" to be in violation of law for the particular tea products focused on by the FDA, Tetley's use on its website and package labels of terms such as "*excellent source"* and "*natural source of antioxidants*" is in violation of law. Such violations cause these products to be misbranded under section 403(r)(2)(A)(i) of the Act.

65. The nutrient content claim regulations discussed above are intended to ensure that consumers are not misled as to the actual or relative levels of nutrients in food products.

66. For these reasons, Defendant's use of terms such as "*excellent source"* or "*source of"* are false and misleading and in violation of 21 C.F.R. §§ 101.13 and 101.54 and identical California law, and the products at issue are misbranded as a matter of law. Defendant has violated these referenced regulations. Therefore, Defendant's products are misbranded as a matter of California and federal law and cannot be sold or held and thus are legally worthless.

67. Defendant's claims in this respect are false and misleading and are in this respect misbranded under identical California and federal laws. Misbranded products cannot be legally sold and are legally worthless. Plaintiff and members of the Class who purchased such products paid an unwarranted premium for these products.

B. Violations of Specific Antioxidant Nutrient Content Claim Labeling Rules

68. The following Purchased Products have an unlawful and misleading "antioxidant nutrient content" claim:

a. British Blend Premium Black Tea, 80 bags, 7 oz.; and

b. Green Tea, 40 bags, 2.8 oz.

69. Defendant violates identical California and federal antioxidant labeling regulations.

70. Both California and federal regulations regulate antioxidant claims as a particular type of nutrient content claim. Specifically, 21 C.F.R. § 101.54(g), which has been adopted by California, contains special requirements for nutrient claims that use the term "antioxidant:"

(1) the name of the antioxidant must be disclosed;

(2) there must be an established RDI for that antioxidant, and if not, no "antioxidant" claim can be made about it;

(3) the label claim must include the specific name of the nutrient that is an antioxidant and cannot simply say "antioxidants" (*e.g.*, "high in antioxidant vitamins C and E"), *see* 21 C.F.R. § 101.54(g)(4);

(4) the nutrient that is the subject of the antioxidant claim must also have recognized antioxidant activity, *i.e.*, there must be scientific evidence that after it is eaten and absorbed from the gastrointestinal tract, the substance participates in physiological, biochemical or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions, *see* 21 C.F.R. § 101.54(g)(2);

(5) the antioxidant nutrient must meet the requirements for nutrient content claims in 21 C.F.R. § 101.54(b), (c), or (e) for "High" claims, "Good Source" claims, and "More" claims, respectively. For example, to use a "High" claim, the food would have to contain 20% or more of the Daily Reference Value ("DRV") or RDI per serving. For a "Good Source" claim, the food would have to contain between 10-19% of the DRV or RDI per serving, *see* 21 C.F.R. § 101.54(g)(3); and

(6) the antioxidant nutrient claim must also comply with general nutrient content claim requirements such as those contained in 21 C.F.R. § 101.13(h) that prescribe the circumstances in which a nutrient content claim can be made on the label of products high in fat, saturated fat, cholesterol or sodium.

71. Defendant has labels that violate federal and California law: (1) because the antioxidants are not named, (2) because there are no RDIs for the unnamed antioxidants being touted (3) because no antioxidants are capable of qualifying for a "good source" or "excellent source" claim and (4) because Defendant lacks adequate scientific evidence that the claimed antioxidant nutrients participate in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions after they are eaten and absorbed from the gastrointestinal tract.

72. The FDA has issued at least 7 warning letters addressing similar unlawful antioxidant nutrient content claims. Defendant knew or should have known of these FDA warning letters.

73. Ignoring the legal requirements regarding antioxidant claims, Defendant has made multiple unlawful antioxidant claims about its products.

74. Not only do Defendant's antioxidant nutrient content claims regarding the benefits of unnamed antioxidants, flavonoids and other nutrients violate FDA rules and regulations as previously interpreted by FDA in the above mentioned warning letters and in its publications, they directly contradict the consensus of medical and scientific authority. For example, one of Tetley largest competitor's own current scientific research has concluded after researching antioxidant properties that:

> despite more than 50 studies convincingly showing that flavonoids possess potent antioxidant activity *in vitro,* the ability of flavonoids to act as an antioxidant *in vivo* [in humans], has not been demonstrated….
>
> No evidence has been provided to establish that having antioxidant activity/content and/or antioxidant properties is a beneficial physiological effect.

Rycroft, Jane, "The Antioxidant Hypothesis Needs to be Updated," Vol. 1, *Tea Quarterly Tea Science Overview,* Lipton Tea Institute of Tea Research (Jan. 2011), pp. 2-3.

75. In fact, the USDA recently removed the USDA ORAC Database for Selected Foods from its website "due to mounting evidence that the values indicating antioxidant capacity have no relevance to the effects of specific bioactive compounds, including polyphenols on human health." It was this database that the Defendant premised a number of their labeling claims including the comparison of the antioxidant and/or flavonoid content of tea to fruits and vegetables referenced on its labels. According to the USDA:

> ORAC values are routinely misused by food and dietary supplement manufacturing companies to promote their products and by consumers to guide their food and dietary supplement choices….
>
> There is no evidence that the beneficial effects of polyphenol-rich foods can be attributed to the antioxidant properties of these foods. The data for antioxidant capacity of foods generated by in vitro (test-tube) methods cannot be extrapolated to in vivo (human) effects and the clinical trials to test benefits of dietary antioxidants have produced mixed results. We know now that antioxidant molecules in food have a wide range of functions, many of which are unrelated to the ability to absorb free radicals.

For these reasons the ORAC table, previously available on this web site has been withdrawn.

76. Scientific evidence and consensus establishes the improper nature of the Defendant's antioxidant claims as they cannot satisfy the legal and regulatory requirement that

the nutrient that is the subject of the antioxidant claim must have recognized antioxidant activity, *i.e.*, there must be scientific evidence that after it is eaten and absorbed from the gastrointestinal tract, the substance participates in physiological, biochemical or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions, *see* 21 C.F.R. § 101.54(g)(2).

77. In addition to the FDA Warning Letter to Unilever discussed above (Exhibit 1), the FDA has issued warning letters addressing similar unlawful antioxidant nutrient content claims. *See e.g.*, FDA warning letter dated August 30, 2010 to Dr. Pepper Snapple Group regarding its misbranded Canada Dry Sparkling Green Tea Ginger Ale product because green tea and green tea flavonoids "are not nutrients with recognized antioxidant activity"; FDA warning letter dated February 22, 2010 to Redco Foods, Inc. regarding its misbranded Salada Naturally Decaffeinated Green Tea product because "there are no RDIs for (the antioxidants) grapeskins, rooibos (red tea) and anthocyanins"; FDA warning letter dated February 22, 2010 to Fleminger Inc. regarding its misbranded Tea For Health products because the admonition "[d]rink high antioxidant green tea" . . . "does not include the nutrients that are the subject of the claim or use a symbol to link the term antioxidant to those nutrients".

78. Defendant was or should have been aware of these FDA warning letters.

79. The antioxidant regulations discussed above are intended to ensure that consumers are not misled as to the actual or relative levels of antioxidants in food products.

80. For these reasons, Defendant's antioxidant claims at issue in this Second Amended Complaint are false and misleading and in violation of 21 C.F.R. §§ 101.13 and 101.54 and identical California law, and Defendant's British Blend Premium Blend Black Tea and Green Tea are misbranded as a matter of law. Because these products are misbranded as a matter of California and federal law they cannot be sold or held and thus are legally worthless.

81. Defendant's claims in this respect are false and misleading and the products are in this respect misbranded under identical California and federal laws, Misbranded products cannot be legally sold and are legally worthless. Plaintiff and members of the Class who purchased these products paid an unwarranted premium for these products.

C. Violations of Health Claim Labeling Rules on Tetley's Labels and Website

82. The following Purchased Products are misbranded because the labels of these products refer the consumer to Tetley's website for additional information and because Tetley offers products for sale on its website http://www.tetleyusa.com :

a. British Blend Premium Black Tea, 80 bags, 7 oz.; and

b. Green Tea, 40 bags, 2.8 oz.

Any unlawful health claim made on Tetley's website is attributed to the product label. Under federal and California law (21 U.S.C. § 321(m)) these claims/representations are incorporated into the labels as if the physical product label itself contained the language found on Defendant's website. The label reference to a website becoming part of the label was pointed out by FDA in warning letters to other tea companies, including Unilever for its Lipton Tea products as shown in Exhibit 1 attached hereto and made a part hereof by reference, in which FDA stated: "A link to your website... appears on ... product label... We have determined that your websites... are labeling within the meaning of 201(m) of the act...." Therefore, the Purchased Products are misbranded.

83. Tetley's website generically described its products by category: sometimes just tea ("Tea, like fruits and vegetables, is an excellent source of antioxidants"); sometimes black tea ("Studies have shown that black tea may protect lungs from damage caused by exposure to cigarette smoke and may also reduce the risk of stroke"); and sometimes green tea ("A recent 2007 study conducted in the UK revealed that those who drank two or more cups of green tea a day had a 65% lower risk of developing squamous cell carcinoma".

http://www.tetleyusa.com/AboutTea_TeaAndHealth.php

84. A health claim is a statement expressly or implicitly linking the consumption of a food substance (*e.g.*, ingredient, nutrient, or complete food) to risk of a disease (*e.g.*, cardiovascular disease) or a health-related condition (*e.g.*, hypertension). *See* 21 C.F.R. §101.14(a)(1), (a)(2), and (a)(5). Only health claims made in accordance with FDCA requirements, or authorized by FDA as qualified health claims, may be included in food labeling.

Other express or implied statements that constitute health claims, but that do not meet statutory requirements, are prohibited in labeling foods.

85. 21 C.F.R. § 101.14, which has been expressly adopted by California, provides when and how a manufacturer may make a health claim about its product. A "Health Claim" means any claim made on the label or in labeling of a food, including a dietary supplement, that expressly or by implication, including "third party" references, written statements (e.g., a brand name including a term such as "heart"), symbols (e.g., a heart symbol), or vignettes, characterizes the relationship of any substance to a disease or health-related condition. Implied health claims include those statements, symbols, vignettes, or other forms of communication that suggest, within the context in which they are presented, that a relationship exists between the presence or level of a substance in the food and a disease or health-related condition (*see* 21 C.F.R. § 101.14(a)(1)).

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

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

88. The use of the term "healthy" is not a health claim but rather an implied nutrient content claim about general nutrition that is defined by FDA regulation. 21 C.F.R. § 101.65, which has been adopted by California, sets certain minimum nutritional requirements for making an implied nutrient content claim that a product is healthy. For example, for unspecified foods the food must supply at least 10 percent of the RDI of one or more specified nutrients. Defendant has misrepresented the healthiness of their products while failing to meet the regulatory requirements for making such claims. In general, the term may be used in labeling an individual food product that:

> Qualifies as both low fat and low saturated fat;
>
> Contains 480 mg or less of sodium per reference amount and per labeled serving, and per 50 g (as prepared for typically rehydrated foods) if the food has a reference amount of 30 g or 2 tbsps or less;
>
> Does not exceed the disclosure level for cholesterol (*e.g.*, for most individual food products, 60 mg or less per reference amount and per labeled serving size); *and*
>
> Except for raw fruits and vegetables, certain frozen or canned fruits and vegetables, and enriched cereal-grain products that conform to a standard of identity, provides at least 10% of the 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.
>
> 21 C.F.R. § 101.65(d)(2).

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

90. Tetley has violated the provisions of § 21 C.F.R. §101.14, 21 C.F.R. §101.65, 21 U.S.C. § 321(g)(1)(D) and 21 U.S.C. § 352(f)(1) by including certain claims on its product labels and website. As indicated in paragraph 12 and 83 above Tetley's claims that its tea products can prevent illnesses and diseases such lung damage from smoking, strokes and cancer are unlawful.

91. The therapeutic claims on its labels and website establish that the product is a drug because it is intended for use in the cure, mitigation, treatment, or prevention of disease. Tetley's products are not generally recognized as safe and effective for the above referenced uses and, therefore, the products would be "new drug[s]" under section 201(p) of the Act [21 U.S.C. § 321(p)]. New drugs may not be legally marketed in the U.S. without prior approval from the FDA as described in section 505(a) of the Act [21 U.S.C. § 355(a)]. FDA approves a new drug on the basis of scientific data submitted by a drug sponsor to demonstrate that the drug is safe and effective.

92. As stated above in paragraph 21 the FDA conducted a review of the packaging of the tea products of one of Defendant's biggest competitors, Unilever, and found these same types of claims to be "in violation of the Federal Food, Drug, and Cosmetic Act … and the applicable

regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR 101)." FDA found the product to be misbranded stating:

> Your Lipton Green Tea 100% Natural Naturally Decaffeinated product is offered for conditions that are not amenable to self-diagnosis and treatment by individuals who are not medical practitioners; therefore, adequate directions for use cannot be written so that a layperson can use this drug safely for its intended purposes. Thus, your Lipton Green Tea 100% Natural Naturally Decaffeinated product is misbranded under section 502(f)(1) of the Act in that the labeling for this drug fails to bear adequate directions for use [21 U.S.C. § 352(f)(1)].

See **Exhibit 1**.

93. Such health claims are in violation of 21 U.S.C. § 352(f)(1) and therefore the products are misbranded.

94. Not only do Tetley's website health claims regarding the benefits of tea "antioxidants" or "flavonoids" violate FDA rules and regulations, they directly contradict the scientific research of the tea industry, including the research of Tetley's competitor, Unilever, whose scientists concluded: "[T]he evidence today does not support a direct relationship between tea consumption and a physiological AOX [antioxidant] benefit." This conclusion was reported by Dr. Jane Rycroft, Director of Lipton Tea Institute of Tea, in an article published in January, 2011 and cited previously in paragraph 74.

95. This is further confirmed by the USDA which recently removed the USDA ORAC Database for Selected Foods from its website "due to mounting evidence that the values indicating antioxidant capacity have no relevance to the effects of specific bioactive compounds, including polyphenols on human health." Nonetheless, Tetley continues to tout the benefits of tea "antioxidants" or "flavonoids" on its product labels and on its website.

96. Additional evidence of Tetley's knowledge that its antioxidant health claims were improper and misleading is provided by the November 25, 2009 Adjudication of the British Advertising Standards Authority ("ASA"). There, the ASA found that Tetley's print and TV advertisements stating that Tetley products were: "rich in antioxidants that can keep your heart healthy" were misleading. In so holding, ASA stated:

> Because the evidence we had seen was not directly relevant to the implied claim that green tea, or the antioxidants in it, had general health benefits, we considered it was not sufficient substantiation for that claim. We concluded that the ad was

> misleading.
>
> On this point, the ad breached CAP (Broadcast) TV Advertising Standards Code rules 5.1.1 (Misleading advertising), 5.2.1 (Evidence), 5.2.2 (Implications), 8.3.1(a) (Accuracy in food advertising)
>
> The ad must not be broadcast again in its current form. We told Tetley not to imply that a product had greater health benefits than it did if they did not hold substantiation for the implied claims….

Adjudication of the ASA Counsil, Tetley GB, Ltd., November 25, 2009 http://www.asa.org.uk/ASA-action/Adjudications/2009/11/Tetley-GB-Ltd/TF_ADJ_47670.aspx

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

98. Defendant's health related claims are unlawful and the products are in this respect misbranded under identical California and federal laws. Misbranded products cannot be legally sold and thus are legally worthless.

DEFENDANT'S CONDUCT IS UNLAWFUL

99. Plaintiff's case is brought alternatively pursuant to the unlawful prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 ("UCL") and the California Legal Remedies Act, Cal. Civ. Code § 1750, et seq. Plaintiff alleges that Defendant packaged and labeled the Purchased Products and Class Products in violation of California's Sherman Law which adopts, incorporates, and is, in all relevant aspects, identical to the federal Food Drug & Cosmetics Act, 21 U.S.C. § 301 et. seq. ("FDCA"). Purchased Products and Class Products with the identical labeling violations are "misbranded."

100. Tetley's act of selling an illegally misbranded product violates Sherman Law § 110760 which makes it unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded. The sale of a misbranded product results in an independent violation of the unlawful prong of the UCL that is separate from any labeling violation.

101. Pursuant to Sherman Law § 11825, the sale of such a misbranded product constitutes a criminal act punishable by up to twelve months in jail. As a result, the injury to the

Class arises from the Defendant illegally selling a product it misbranded, the sale of which is a criminal act. Plaintiff and the Class have been unlawfully deprived of money because the Defendant sold them a worthless, illegal product that could not be legally sold or possessed. Due to the law's prohibition of possession of such a product, consumers have been unwittingly placed, solely and directly by Tetley's conduct, in a legal position that no reasonable consumer would choose. Consumers have thus been directly injured by the Defendant's illegal act of unlawfully selling them an illegal product. Such unlawful conduct by Defendant Tetley is actionable under California law irrespective of any reliance by consumers such as Plaintiff.

102. Under California law, a food product that is misbranded cannot be legally manufactured, advertised, distributed, possessed or sold. These products are illegal to possess, have no economic value and are legally worthless. Indeed, the sale or possession of misbranded food is a criminal act in California. When Plaintiff and the Class purchased an illegally misbranded product there is causation and injury even absent reliance on the misrepresentation that misbranded the product.

THE UCL's UNLAWFUL PRONG DOES NOT REQUIRE CONSUMER RELIANCE ON AN UNLAWFUL LABEL

103. The unlawful sale of misbranded food products that are illegal to sell or possess– standing alone without any allegations of deception by Defendant other than the implicit misrepresentation that its products are legal to sell or possess, or any review of or reliance on the particular labeling claims by Plaintiff – gives rise to Plaintiff's cause of action under the UCL and the CLRA. In short, Defendant's injury causing unlawful conduct is the only necessary element needed for UCL liability. All Plaintiff needs to show is that he bought an unlawful product that he would not have otherwise purchased absent the Defendant's failure to disclose the material fact that the product was unlawful to sell or possess. Therefore, Plaintiff's claim does not sound in fraud; instead, it alleges strict liability pursuant to the above cited provisions of federal law and Sherman Law.

104. Under California law, which is identical to federal law, the sale of Defendant's products listed above are unlawful, because they are misbranded in violation of the Sherman Law.

105. Tetley's unlawful, identical ingredient lists render these products misbranded under California law.

106. In addition to the violations of law listed above, the Defendant has violated a number of additional California laws.

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

108. Defendant violated California Health & Safety Code § 110765 which makes it unlawful for any person to misbrand any food.

109. Defendant violated California Health & Safety Code § 110770 which makes it unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for deliver any such food.

110. Defendant's act of selling a misbranded product violates Sherman Law § 110760 (unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded). The sale of a misbranded product results in an independent violation of the unlawful prong that is separate from the labeling violations listed above. When Plaintiff purchased Defendant's misbranded products there was causation and injury even absent reliance on the misrepresentation/omission that misbranded the product. This injury arises from the unlawful sale of an illegal product that is a crime to sell and a crime to possess. Plaintiff was deprived of money in an illegal sale and given a worthless illegal product in return. In addition, due to the law's prohibition of possession of such a product, consumers have been unwittingly placed by the Defendant's conduct in a legal position that no reasonable consumer would agree to be placed.

111. Thus, in this case, where Defendant unlawfully sold products containing the unlawful nutrient content claim there is: 1) a violation of specific labeling regulations as set out hereinbefore and 2) a violation of the UCL unlawful prong due to the Defendant's sale of an illegal product that is unlawful to possess.

112. The Plaintiff would not have bought the misbranded food products if the Defendant had disclosed the material fact that the misbranded food products were illegal to sell

and possess. The Plaintiff was injured by the Defendant's unlawful act of selling an illegal product that was illegal to sell or possess.

THE PURCHASED PRODUCTS ARE MISBRANDED UNDER THE SHERMAN LAW AND ARE MISLEADING AND DECEPTIVE

113. Plaintiff purchased the Purchased Products in California during the Class Period and read and relied in substantial part on the antioxidant nutrient content claims and health claims made on the labels of these products in making his purchasing decisions.

114. Each Purchased Product has a label that violates the Sherman Law and is therefore misbranded and may not be sold or purchased.

115. Each Purchased Product has a label that is false, misleading and deceptive. Plaintiff would not have bought these products had he known the truth about the products and that the claimed health benefits were false.

116. The labels of the Purchased Products are copied below:

a. <u>British Blend Premium Black Tea, 80 tea bags, 7 oz.</u>

117. The following unlawful and misleading language appears on the back panel of this product:

"Tetley Tea: the smart choice for you healthy lifestyle"

"Like fruits and vegetables, tea is an excellent source of natural antioxidants, which help boost the body's immune system. So drink to your health with Tetley"

118. Plaintiff read and reasonably relied on these label representations in the preceding paragraph and based and justified the decision to purchase the product, in substantial part, on these label representations. Also, Plaintiff reasonably relied and believed that this product was not misbranded under the Sherman Law and was therefore legal to buy and possess and would not have purchased it had he known it was misbranded.

119. Plaintiff was misled by Defendant's unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had he known the truth about this product, *i.e.*, that it did not contain an antioxidant nutrient with beneficial and healthy qualities. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food

alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled by these label representations in the same way(s) as Plaintiff.

120. This product is unlawful, misbranded, violates the Sherman Law (through incorporation of 21 C.F.R. § 101.13 and § 101.54(g)), and is misleading and deceptive because in the label uses the sentence: "*Like fruits and vegetables, tea* is *an excellent source of antioxidants which help boost the body's immune system*". This misbrands the product because: (1) the antioxidants are not named, (2) because there are no RDIs for the unnamed antioxidants being touted (3) no antioxidants in tea are capable of qualifying for a "good source" or "high source" claim (which "excellent source" claim must do), and (4) Defendant lacks adequate scientific evidence that the claimed antioxidant nutrients participate in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions after they are eaten and absorbed from the gastrointestinal tract.

121. FDA warning letters, including the Unilever letter (Exhibit 1,) gave Defendant notice of these violations. Defendant did not change this label despite these warning letters.

b. <u>Green Tea, 40 tea bags, 2.8 oz.</u>

122. Plaintiff purchased Tetley Green Tea in the Class Period. The label of the package purchased by Plaintiff is as follows:

123. The following unlawful and misleading language appears on the front panel of the package:

"Natural source of Antioxidants"

124. The same unlawful and misleading language as is on the labels of the black tea appears on the back panel of the package of green tea:

"Tetley Tea: the smart choice for you healthy lifestyle"

"Like fruits and vegetables, tea is an excellent source of natural antioxidants, which help boost the body's immune system. So drink to your health with Tetley"

125. Plaintiff read and reasonably relied on the label representation in the preceding paragraphs and based and justified the decision to purchase the product, in substantial part, on these label representations. Also, Plaintiff reasonably relied and believed that this product was not misbranded under the Sherman Law and was therefore legal to buy and possess and would not have purchased it had he known it was misbranded.

126. Plaintiff was misled by Defendant's unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had he known the truth about this product, *i.e.*, that it did not meet the minimum nutritional threshold to make such claims. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled by these label representations in the same way(s) as Plaintiff.

127. This product is unlawful, misbranded, violates the Sherman Law (through incorporation of 21 C.F.R. § 101.13 and § 101.54(g)), and is misleading and deceptive because it unlawfully uses the phrase on the front of the package "*Natural source of Antioxidants*" and the sentence on the back of the package "*Like fruits and vegetables, tea* is *an excellent source of antioxidants which help boost the body's immune system"*. This misbrands the product because: (1) the antioxidants are not named, (2) because there are no RDIs for the unnamed antioxidants being touted (3) no antioxidants in tea are capable of qualifying for a "good source" or "high source" claim (which "natural source" and/or "excellent source" claim must do), and (4) Defendant lacks adequate scientific evidence that the claimed antioxidant nutrients participate in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions after they are eaten and absorbed from the gastrointestinal tract.

128. FDA warning letters including the Unilever letter (Exhibit 1) gave Defendant notice of these violations. Defendant did not change this label despite these warning letters.

DEFENDANT HAS VIOLATED CALIFORNIA LAW BY MANUFACTURING, ADVERTISING, DISTRIBUTING AND SELLING PURCHASED PRODUCTS

129. Defendant has manufactured, advertised, distributed and sold products that are misbranded under California law. Misbranded products cannot be legally manufactured, advertised, distributed, sold or held and are legally worthless as a matter of law.

130. 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.

131. Defendant has violated California Health & Safety Code § 110395 which makes it unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food.

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

133. Defendant has violated California Health & Safety Code § 110403 which prohibits the advertisement of products that are represented to have any effect on enumerated conditions, disorders and diseases.

134. Defendant has violated California Health & Safety Code § 110660 because their labeling is false and misleading in one or more ways.

135. Defendant's Purchased Products are misbranded under California Health & Safety Code § 110665 because their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and the regulations adopted thereto.

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

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

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

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

140. Defendant has violated the standard set by 21 C.F.R. § 101.22, which has been incorporated by reference in the Sherman Law, by failing to include on their product labels the nutritional information required by law.

141. Defendant has violated the standards set by 21 CFR §§ 101.13, 101.14, and 101.54 which have been adopted and incorporated by reference in the Sherman Law, by including unauthorized antioxidant and nutrient content claims on their products.

142. Defendant have violated the standards set by 21 CFR §§ 101.14, and 101.65, which have been adopted by reference in the Sherman Law, by including unauthorized health and healthy claims on their products.

PLAINTIFF AND THE PURCHASED PRODUCTS

143. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy diet. Plaintiff read and reasonably relied on the labels as described herein when buying the Purchased Products. Plaintiff relied on Defendant's labeling and based and justified the decision to purchase Defendant's products, in substantial part, on these labels.

144. At point of sale, Plaintiff did not know, and had no reason to know, that the Purchased Products did not contain the beneficial nutrients represented on the labels and in fact were unlawful and misbranded as set forth herein, and would not have bought the products had he known the truth about them, *i.e.*, that the products were illegal to purchase and possess.

145. After Plaintiff learned that Defendant's Purchased Products were falsely labeled, Plaintiff stopped purchasing them.

146. As a result of Defendant unlawful misrepresentations, Plaintiff and thousands of others in California and throughout the United States purchased the Purchased Products and the Substantially Similar Products at issue.

147. Defendant's labeling as alleged herein is false and misleading and was designed to increase sales of the products at issue. Defendant's misrepresentations are part of its systematic labeling practice and a reasonable person would attach importance to Defendant's misrepresentations in determining whether to purchase the products at issue.

148. A reasonable person would also attach importance to whether Defendant's products were "misbranded," *i.e.*, legally salable, and capable of legal possession, and to Defendant's representations about these issues in determining whether to purchase the products at issue. Plaintiff would not have purchased Defendant's products had he known they were not capable of being legally sold or held.

149. Plaintiff's purchases of the Purchased Products damaged Plaintiff because misbranded products cannot be legally sold, possessed, have no economic value, and are legally worthless. In addition, Plaintiff had cheaper alternatives available and paid an unwarranted premium for the Purchased Products.

SUBSTANTIALLY SIMILAR PRODUCT CLAIMS

150. The products listed in paragraph 3 and below have the same label representations and Sherman Law violations as the Purchased Products as described herein:

A. Substantially Similar Green Bagged Tea Products with identical packaging and the following identical label claims as the purchased green tea product:

"Natural Source of Antioxidants" (front panel of packages of all green bagged tea products)

"Tetley Tea: the smart choice for you healthy lifestyle"
"Like fruits and vegetables, tea is an excellent source of natural antioxidants, which help boost the body's immune system. So drink to your health with Tetley" (back panel of packages of all green tea products)

1. Green Tea Decaffeinated

B. Substantially Similar Black Bagged Tea Products with identical packaging and the following identical label claims as the purchased black tea product:

"Tetley Tea: the smart choice for you healthy lifestyle"
"Like fruits and vegetables, tea is an excellent source of natural antioxidants, which help boost the body's immune system. So drink to your health with Tetley" (back panel of packages of all black tea products)

1. Iced Tea Blend
2. Naturally Decaffeinated Iced Tea Blend
3. Decaffeinated British Blend
4. Classic Black Tea
5. Classic Black Tea Decaffeinated
6. Earl Grey

CLASS ACTION ALLEGATIONS

151. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure 23(b)(2) and 23(b)(3) on behalf of the following class: All persons in California who since May 11, 2008, purchased one of the following Tetley bagged tea products with antioxidant and health claims on the labels and website:

a. Green Tea
b. Green Tea Decaffeinated
c. British Blend Premium Black Tea
d. Iced Tea Blend
e. Naturally Decaffeinated Iced Tea Blend
f. Decaffeinated British Blend
g. Classic Black Tea
h. Classic Black Tea Decaffeinated
i. Earl Grey

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

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

154. Membership in the Class is so numerous as to make it impractical to bring all Class members before the Court. The exact number of Class members is unknown, but Plaintiff reasonably estimates and believes that there are thousands of persons in the Class.

155. There are questions of law and fact common to the Class which predominate over any questions which may affect only individual members of the Class, including but not limited to the following:

(a) Whether Defendant engaged in unfair or deceptive business practices by failing to properly package and label products sold to consumers;

(b) Whether the food products at issue were misbranded or unlawfully packaged and labeled under the Sherman Law;

(c) Whether Defendant made unlawful and misleading antioxidant nutrient content and health claims with respect to its food products sold to consumers;

(d) 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;

(e) Whether Plaintiff and the Class are entitled to equitable and/or injunctive relief; and

(f) Whether Defendant's unlawful, unfair and/or deceptive practices harmed Plaintiff and the Class.

156. Plaintiff is a member of the Class he seeks to represent. Plaintiff's claims are typical of the Class members' claims. Plaintiff will fairly and adequately protect the interests of the Class in that Plaintiff's claims are typical and representative of the Class.

157. There are no unique defenses which may be asserted against Plaintiff individually, as distinguished from the Class. The claims of Plaintiff are the same as those of the Class.

158. There exist no conflicts of interest as between Plaintiff and the other Class members. Plaintiff has retained counsel that is competent and experienced in complex class action litigation. Plaintiff and counsel will fairly and adequately represent and protect the interests of the Class.

159. Plaintiff and Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this class action. Plaintiff is aware of the fiduciary responsibilities to the Class and agrees to diligently discharge those duties.

160. The questions of law and/or fact common to the members of the Class predominate over questions that may affect only individual members. The common nucleus of operative fact herein centers on Defendant's conduct.

161. This class action is superior to any other method for the fair and efficient adjudication of this dispute. The damages suffered by many members of the Class are small in relation to the expense and burden of individual litigation and, therefore, it is highly impractical for individual Class members to attempt to vindicate their interests individually. There will be no extraordinary difficulty in the management of this Class action.

162. The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds

generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

163. Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be 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

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

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

166. Under California law, unlawful injury causing conduct, such as Defendant's unlawful sale of an illegal product, is the only element necessary for the UCL claim. No reliance is necessary. Plaintiffs' claims are based on California law identical to the federal law.

167. Defendant sold the Purchased Products in California and throughout the United States during the Class Period which were misbranded.

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

169. 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.

170. 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.

171. 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.*

172. Defendant sold Plaintiff and the Class products that were not capable of being sold or held legally, and which were legally worthless. Plaintiff and the Class paid a premium price for these products.

173. 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 other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and to restore to any Class Member any money paid.

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

175. 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 such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid by Plaintiff and the Class.

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

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

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

178. Defendant sold the Purchased Products in California and throughout the United States during the Class Period which were misbranded.

179. Plaintiff and members of the Class suffered a substantial injury by virtue of buying Defendant's misbranded products that they would not have purchased absent Defendant's illegal conduct.

180. Defendant's deceptive packaging and labeling of their products as described herein and its sale of unsalable misbranded products that were illegal to possess was of no benefit to consumers, and the harm to consumers and competition is substantial.

181. Defendant sold Plaintiff and the Class products that were not capable of being legally sold or held and that were legally worthless. Plaintiff and the Class paid a premium price for these products.

182. Plaintiff and the Class who purchased Defendant's products had no way of reasonably knowing that the products were misbranded and were not properly marketed,

advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of them suffered.

183. The consequences of Defendant's conduct as set forth herein outweigh any justification, motive or reason therefore. Defendant's conduct is and continues to be immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious to Plaintiff and the Class.

184. 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 such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid by Plaintiff and the Class.

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

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

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

187. Defendant's conduct in mislabeling and misbranding originated from and was approved at Defendant's headquarters in California and elsewhere in the U.S.

188. Defendant sold Purchased Products in California and throughout the United States during the Class Period which were misbranded.

189. Defendant's misleading packaging and labeling of its products and their misrepresentations that the products were salable, capable of legal possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff and members of the Class were deceived. Defendant has engaged in fraudulent business acts and practices.

190. Defendant's fraud and deception caused Plaintiff and the Class to purchase Defendant's Purchased Products that they would otherwise not have purchased had they known the true nature of those products.

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191. Defendant sold Plaintiff and the Class Purchased Products that were not capable of being sold or held legally and that were legally worthless. In addition, Plaintiff and the Class paid a premium price for the products.

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

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

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

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

195. Defendant's conduct in mislabeling and misbranding its food products originated from and was approved at Defendant's headquarters in California and elsewhere in the U.S.

196. Defendant sold products in California and throughout the United States during the Class Period which were misbranded.

197. Defendant engaged in a scheme of offering Defendant's products for sale to Plaintiff and members of the Class by way of, *inter alia*, product packaging and labeling. These materials misrepresented and/or omitted the true contents and nature of Defendant's 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 were intended as inducements to purchase Defendant's 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.

198. In furtherance of their plan and scheme, Defendant prepared and distributed within California and nationwide via product packaging and labeling, the statements misleading and

deceptive representations as described herein. Plaintiff and the Class necessarily and reasonably relied on Defendant's materials, and were the intended targets of such representations.

199. 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 products in violation of the "misleading prong" of California Business and Professions Code § 17500 *et seq.*

200. As a result of Defendant's violations of the "misleading prong" of California Business and Professions Code § 17500 *et seq.*, Defendant have been unjustly enriched at the expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held and are legally worthless and Plaintiff and the Class paid a premium price for these products.

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

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

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

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

204. Defendant's conduct in mislabeling and misbranding its food products originated from and was approved at Defendant's headquarters in California and elsewhere in the U.S.

205. Defendant sold products in California and throughout the United States during the Class Period.

206. Defendant engaged in a scheme of offering Defendant's products for sale to Plaintiff and the Class by way of product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendant's products. Defendant's advertisements and inducements were made in 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 the product packaging and labeling, and promotional materials were intended as inducements to purchase Defendant's products, and are statements disseminated by Defendant to Plaintiff and the Class. Defendant knew, or in the exercise of reasonable care should have known, that these statements were untrue.

207. In furtherance of their plan and scheme, Defendant prepared and distributed in California and nationwide via product packaging and labeling, and other promotional materials, statements that falsely advertise the composition of Defendant's products, and falsely misrepresented the nature of those products. Plaintiff and the Class were the intended targets of such representations and would reasonably be deceived by Defendant's materials.

208. Defendant's conduct in disseminating untrue advertising throughout California deceived Plaintiff and members of the Class by obfuscating the contents, nature and quality of Defendant's products in violation of the "untrue prong" of California Business and Professions Code § 17500.

209. As a result of Defendant's violations of the "untrue prong" of California Business and Professions Code § 17500 *et seq.*, Defendant have been unjustly enriched at the expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held and are legally worthless and Plaintiff and the Class paid a premium price for these products.

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

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

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

212. This cause of action is brought pursuant to the CLRA. Defendant's violations of the CLRA were and are willful, oppressive and fraudulent, thus supporting an award of punitive damages.

213. Plaintiff and the Class are entitled to actual and punitive damages against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiff and the Class are entitled to an order enjoining the above-described acts and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

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

215. Defendant sold products in California during the Class Period.

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

217. Defendant's products were and are "goods" within the meaning of Cal. Civ. Code §1761(a).

218. By engaging in the conduct set forth herein, Defendant violated and continue to violate Section 1770(a)(5), of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular ingredients, characteristics, uses, benefits and quantities of the goods.

219. By engaging in the conduct set forth herein, Defendant violated and continue to violate Section 1770(a)(7) of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular standard, quality or grade of the goods.

220. By engaging in the conduct set forth herein, Defendant violated and continue to violate Section 1770(a)(9) of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it advertises goods with the intent not to sell the goods as advertised.

221. By engaging in the conduct set forth herein, Defendant have violated and continue to violate Section 1770(a)(16) of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it represents that a

subject of a transaction has been supplied in accordance with a previous representation when they have not.

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

223. Pursuant to Section 1782(a) of the CLRA, on June 1, 2012, Plaintiff's counsel served Defendant with notice of Defendant's violations of the CLRA. As authorized by Defendant's counsel, Plaintiff's counsel served Defendant by certified mail, return receipt requested. Defendant did not respond.

224. Defendant failed to provide appropriate relief for its violations of the CLRA within 30 days of its receipt of the CLRA demand notice. Accordingly, pursuant to Sections 1780 and 1782(b) of the CLRA, Plaintiff is entitled to recover actual damages, punitive damages, attorneys' fees and costs, and any other relief the Court deems proper.

225. Consequently, Plaintiff and the Class are entitled to actual and punitive damages against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-described acts and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

PRAYER FOR RELIEF

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

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

B. For an order awarding, as appropriate, damages in excess of five million dollars ($5,000,000), restitution or disgorgement to Plaintiff and the Class for all causes of action;

C. For an order requiring Defendant to immediately cease and desist from selling their products in the class definition above in violation of law; enjoining Defendant from continuing to market, advertise, distribute, and sell these products in the unlawful manner described herein; and ordering Defendant to engage in corrective action;

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

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

F. For an order awarding punitive damages;

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

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

Dated: September 3, 2013

Respectfully submitted,

/s/ *Pierce Gore*

Ben F. Pierce Gore (SBN 128515)
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Attorneys for Plaintiff

Exhibit 1

Unilever United States, Inc. 8/23/10

Department of Health and Human Services

Public Health Service
Food and Drug Administration
College Park, MD 20740

August 23,2010

WARNING LETTER

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Michael B. Polk
President of Unilever Americas
Unilever, Inc.
700 Sylvan Avenue
Englewood, NJ 07632-3113

Re: CFSAN-OC-10-24

Dear Mr. Polk:

The Food and Drug Administration (FDA) has reviewed the label for your "Lipton Green Tea 100% Natural Naturally Decaffeinated" product and reviewed your labeling for this product on your websites, www.lipton.com[1] and www.liptont.com[2] in August 2010. Based on our review, we have concluded that this product is in violation of the Federal Food, Drug, and Cosmetic Act (the Act). You can find the Act and regulations on FDA's website at www.fda.gov[3].

A link to .your website, www.lipton.com[4]. appears on your "Lipton Green Tea 100% Natural Naturally Decaffeinated" product label. This website directs U.S. visitors to another website, www.liptont.com[5]. We have determined that your websites, www.lipton.com[6] and www.liptont.com[7]. are labeling within the meaning of section 201(m) of the Act for your "Lipton Green Tea 100% Natural Naturally Decaffeinated" product.

Unapproved New Drug

Your website, www.liptont.com[8]. also promotes your Lipton Green Tea 100% Natural Naturally Decaffeinated product for conditions that cause it to be a drug under section 201(g)(1)(B) of the Act [21 U.S.C. § 321(g)(1)(B)].

For example, your webpage entitled "Tea and Health," subtitled "Heart Health Research" and further subtitled "Cholesterol Research" bears the following claim: "[F]our recent studies in people at risk for coronary disease have shown a significant cholesterol lowering effect from tea or tea flavonoids ... One of these studies, on post-menopausal women, found that total cholesterol was lowered by 8% after drinking 8 cups of green tea daily for 12 weeks ...."

The therapeutic claims on your website establish that the product is a drug because it is intended for use in the cure, mitigation, treatment, or prevention of disease. Your Lipton Green Tea 100% Natural Naturally Decaffeinated product is not generally recognized as safe and effective for the above referenced uses and,

Exhibit 1

therefore, the product is a "new drug" under section 201(p) of the Act [21 U.S.C. § 321(p)]. New drugs may not be legally marketed in the U.S. without prior approval from FDA as described in section 505(a) of the Act [21 U.S.C.
§ 355(a)]. FDA approves a new drug on the basis of scientific data submitted by a drug sponsor to demonstrate that the drug is safe and effective.

Your Lipton Green Tea 100% Natural Naturally Decaffeinated product is offered for conditions that are not amenable to self-diagnosis and treatment by individuals who are not medical practitioners; therefore, adequate directions for use cannot be written so that a layperson can use this drug safely for its intended purposes. Thus, your Lipton Green Tea 100% Natural Naturally Decaffeinated product is misbranded under section 502(f)(1) of the Act in that the labeling for this drug fails to bear adequate directions for use [21 U.S.C. § 352(f)(1)] .

Unauthorized Nutrient Content Claims

Under section 403(r)(1)(A) of the Act [21 U.S.C. 343(r)(1)(A)], a claim that characterizes the level of a nutrient which is of the type required to be in the labeling of the food must be made in accordance with a regulation promulgated by the Secretary (and, by delegation, FDA) authorizing the use of such a claim. The use of a term, not defined by regulation, in food labeling to characterize the level of a nutrient misbrands a product under section 403(r)(1)(A) of the Act.

Nutrient content claims using the term "antioxidant" must also comply with the requirements listed in 21 CFR 101.54(g). These requirements state, in part, that for a product to bear such a claim, an RDI must have been established for each of the nutrients that are the subject of the claim (21 CFR 101.54(g)(1)), and these nutrients must have recognized antioxidant activity (21 CFR 101.54(g)(2). The level of each nutrient that is the subject of the claim must also be sufficient to qualify for the claim under 21 CFR 101.54(b), (c), or (e) (21 CFR 101.54(g)(3)). For example, to bear the claim "high in antioxidant vitamin C," the product must contain 20 percent or more of the RDI for vitamin C under 21 CFR 101.54(b). Such a claim must also include the names of the nutrients that are the subject of the claim as part of the claim or, alternatively, the term "antioxidant" or "antioxidants" may be linked by a symbol (e.g., an asterisk) that refers to the same symbol that appears elsewhere on the same panel of the product label, followed by the name or names of the nutrients with recognized antioxidant activity (21 CFR 101.54(g)(4)). The use of a nutrient content claim that uses the term "antioxidant" but does not comply with the requirements of 21 CFR 101.54(g) misbrands a product under section 403(r)(2)(A)(i) of the Act.

Your webpage entitled "Tea and Health" and subtitled "Tea Antioxidants" includes the statement, "LIPTON Tea is made from tea leaves rich in naturally protective antioxidants." The term "rich in" is defined in 21 CFR 101.54(b) and may be used to characterize the level of antioxidant nutrients (21 CFR 101.54(g)(3)). However, this claim does not comply with 21 CFR 101.54(g)(4) because it does not include the nutrients that are the subject of the claim or use a symbol to link the term "antioxidant" to those nutrients. Thus, this claim misbrands your product under section 403(r)(2)(A)(i) of the Act.

This webpage also states that "tea is a naturally rich source of antioxidants." The term "rich source" characterizes the level of antioxidant nutrients in the product and, therefore, this claim is a nutrient content claim (see section 403(r)(1) of the Act and 21 CFR 101.13(b)). Even if we determined that the term "rich source" could be considered a synonym for a term defined by regulation (e.g., "high" or "good source"), nutrient content claims that use the term "antioxidant" must meet the requirements of 21 CFR 101.54(g). The claim "tea is a naturally rich source of antioxidants" does not include the nutrients that are the subject of the claim or use a symbol to link the term "antioxidant" to those nutrients, as required by 21 CFR 101.54(g)(4). Thus, this claim misbrands your product under section 403(r)(2)(A)(i) of the Act.

The product label back panel includes the statement "packed with protective FLAVONOID ANTIOXIDANTS." The term "packed with" characterizes the level of flavonoid antioxidants in the product; therefore, this claim is a nutrient content claim (see section 403(r)(1) of the Act and 21 CFR 101.13(b)). Even if we determined that the term "packed with" could be considered a synonym for a term defined by regulation, nutrient content claims that use the term "antioxidant" must meet the requirements of 21 CFR 101.54(g). The claim "packed with FLAVONOID ANTIOXIDANTS" does not comply with 21 CFR 101.54(g)1) because no RDI has been established for flavonoids. Thus, this unauthorized nutrient content claim causes your product to be misbranded under section 403(r)(2)(A)(i) of the Act.

The above violations are not meant to be an all-inclusive list of deficiencies in your products or their labeling. It is your responsibility to ensure that all of your products are in compliance with the laws and regulations enforced by FDA. You should take prompt action to correct the violations. Failure to promptly correct these violations may result in regulatory actions without further notice, such as seizure and/or injunction.

We note that your label contains a chart entitled "Flavonoid Content of selected beverages and foods." The chart

appears to compare the amounts of antioxidants in your product with the amount of antioxidants in orange juice broccoli, cranberry juice and coffee. However, the information provided may be misinterpreted by the consumer because although the chart is labeled, in part, "Flavonoid Content," the y-axis is labeled "AOX"; therefore, the consumer might believe that the chart is stating the total amount of antioxidants rather than specifically measuring the amount of flavonoids in the product.

You should take prompt action to correct these violations. Please respond to this letter within 15 days from receipt with the actions you plan to take in response to this letter, including an explanation of each step being taken to correct the current violations and prevent similar violations. Include any documentation necessary to show that correction has been achieved. If you cannot complete corrective action within fifteen working days, state the reason for the delay and the time within which you will complete the correction.

You should direct your written reply to Latasha A. Robinson, Food and Drug Administration, Center for Food Safety and Applied Nutrition, 5100 Paint Branch Parkway, Office of Compliance (HFS-608), Division of Enforcement, College Park, Maryland 20740-3835.

Sincerely,

/s/

Jennifer A. Thomas
Acting Director
Office of Compliance
Center for Food Safety
and Applied Nutrition

cc: FDA New Jersey District

Close Out Letter

- Unilever United States, Inc. - Close Out Letter 5/10/11[9]

Page Last Updated: 08/09/2011
Note: If you need help accessing information in different file formats, see Instructions for Downloading Viewers and Players.

Links on this page:

1. http://www.lipton.com/
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9. /ICECI/EnforcementActions/WarningLetters/2010/ucm267398.htm