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6 UNITED STATES DISTRICT COURT  
7 NORTHERN DISTRICT OF CALIFORNIA  
8 SAN JOSE DIVISION

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

11 Plaintiff,

12 v.

13 NATURE’S PATH FOODS, INC.,

14 Defendant.

Case No. CV13-0492 (EJD)

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

**JURY TRIAL DEMANDED**

15  
16 Plaintiff, Susan Leonhart, (“Plaintiff”) through her undersigned attorneys, brings this  
17 lawsuit against Defendant Nature’s Path Foods, Inc., (collectively, “Nature’s Path” or “Defendant”)  
18 as to her own acts upon personal knowledge, and as to all other matters upon information and  
19 belief.  
20

21  
22 **I. DEFINITIONS**

23 1. “Class Period” is February 4, 2009 to the present.

24 2. “Purchased Products” are the Nature’s Path products listed below (2a-2b) that were  
25 purchased by Plaintiff during the Class Period:

26 a. EnviroKidz Panda Puffs cereal;

27 b. Heritage Flakes cereal;

1           3.       “Substantially Similar Products” are the Nature’s Path products listed in paragraph 4  
2 below. Each of these listed products: (i) make the same label representations, as described herein,  
3 as the Purchased Products, (ii) contain the same or most of the same ingredients as the Purchased  
4 Produces, and/or (iii) violate the same regulations of the Sherman Food Drug & Cosmetic Law,  
5 California Health & Safety Code § 109875, *et seq.* (the “Sherman Law”) as the Purchased Products,  
6 as described herein.

7           4.       “Misbranded Food Products” are the Purchased Products and the Substantially  
8 Similar Products identified herein.

9           5.       Upon information and belief, these Substantially Similar Products are the Nature’s  
10 Path products, sold during the Class Period. Below is a list of the Substantially Similar Products at  
11 issue in this case, the corresponding label violation, and the statute and/or regulation that was  
12 violated.

13       **ECJ** (in violation of 21 CFR 101.4(a)(1); 21 CFR 101.4(b)(20); 21 CFR 102.5; Cal. Health &  
14 Safety Code §110100; §110390; §110395; §110398; §110400; §110660; §110705; §110725(a);  
15 §110760; §110770; §110775)

16       **Cold Cereals:** Crunchy Maple Sunrise, Flax Plus Maple Pecan Crunch, Sunrise Crunchy  
17 Vanilla, Flax Plus Multibran Flakes, Flax Plus Pumpkin Raisin Crunch, Flax Plus Raisin Bran  
18 Flakes, Flax Plus Red Berry Crunch, Heritage Crunch, Flax Plus with Cinnamon, Chia Plus  
19 Chia Coconut Granola, Flax Plus Pumpkin Flax Granola, Flax Plus Vanilla Almond Crunch,  
20 Crispy Rice, Heritage Flakes, Hemp Plus Granola, High Fiber Cinnamon Raisin Granola,  
Peanut Butter Granola, Optimun Blueberry Cinnamon Flax, Optimum Slim Low Fat Vanilla,  
Heritage O’s, Honey’d O’s Corn Flakes, Mesa Sunrise, Mesa Sunrise with Raisins, Whole  
O’s;

21       **Hot Cereals:** Maple Nut Hot Oatmeal, Apple Cinnamon Hot Oatmeal, Flax Plus Hot  
22 Oatmeal, Optimum Power Blueberry Cinnamon Flax Hot Oatmeal, Variety Pack Hot  
23 Oatmeal, Multigrain Raisin Spice Hot Oatmeal, Optimum Cranberry Ginger Hot Oatmeal,  
Hemp Plus Hot Oatmeal;

24       **Premium Granolas:** Aloha Blend, Apple Crumble, Carrot Cake, Dark Chocolate & Red  
Berries;

25       **EnviroKidz:** Amazon Frosted Flakes, Gorilla Munch Cereal, Koala Crisp, Leapin Lemurs,  
26 Panda Puffs, Chocolate Crispy Rice Bars, Peanut Choco Drizzle, Panda Peanut Butter Crispy  
Rice Bars, Penguin Fruity Burst Rice Bars, Berry Blast Crisp Rice Bars;

27       **Baking Mixes:** Buttermilk Pancake mix, Flax Plus Multigrain Pancake mix;  
28

1 **Bars:** Pumpkin-N-Spice Flax Plus Granola Bars, Macaroon Crunch Granola Bars, Apple Pie  
2 Crunch Chia Plus Granola Bars, Peanut Choco Crunch Ancient Grains Granola Bars, Honey  
3 Oat Crunch Flax Plus Granola Bars, Sunny Hemp Hemp Plus Granola Bars, EnviroKidz  
4 peanut Choco Drizzle Crispy Rice Bars, EnviroKidz Chocolate Crispy Rice Bars, Lotta  
5 Apricotta Granola Bars, EnviroKidz Peanut Butter Crispy Rice Bars, Peanut Choco Granola  
6 Bars, EnviroKidz Berry Blast Crispy Rice Bars, Chococonut Granola Bars, Mmmapple Pecan  
7 Flax Plus Granola Bars, EnviroKidz Fruity Burst Crispy Rice Bars, Peanut Buddy Granola  
8 Bars, Berry Strawberry Flax Plus Granola Bars;

9 **Toaster Pastries:** Frosted Mmmapple Brown Sugar Toaster Pastries, Unfrosted Buncha  
10 Blueberries Toaster Pastries, Frosted Cherry Pomegranate Toaster Pastries, Frosted Lotta  
11 Chocolotta Toaster Pastries, Frosted Berry Strawberry Toaster Pastries, Unfrosted Berry  
12 Strawberry Toaster Pastries, Frosted Granny's Apple Pie Toaster Pastries, Frosted Wildberry  
13 Acai Toaster Pastries, Unfrosted Granny's Apple Pie Toaster Pastries, Frosted Buncha  
14 Blueberries Toaster Pastries, Frosted Razzi Raspberry Toaster Pastries;

15 **Waffles:** Buckwheat Wildberry Frozen Waffles, Maple Cinnamon Frozen Waffles, Flax Plus  
16 Frozen Waffles, Ancient Grains Frozen Waffles, and Hemp Plus Frozen Waffles.

17 **Undisclosed chemical preservative** (in violation of 21 CFR 101.22; Cal. Health & Safety Code

18 §110100; §110390; §110395; §110398; §110400; §110660; §110705; §110740; §110760; §110770;

19 §110775) (the following products contain citric acid unless otherwise noted). The following

20 products contain tocopherols or citric acid.

21 **Cold Cereals:** Crunchy Maple Sunrise, Flax Plus Maple Pecan Crunch, Sunrise Crunchy  
22 Vanilla, Flax Plus Multibran Flakes, Flax Plus Pumpkin Raisin Crunch, Flax Plus Raisin Bran  
23 Flakes, Flax Plus Red Berry Crunch, Heritage Crunch, Flax Plus with Cinnamon, Chia Plus  
24 Chia Coconut Granola, Flax Plus Pumpkin Flax Granola, Flax Plus Vanilla Almond Crunch,  
25 Pomegran Cherry Granola, Hemp Plus Granola, High Fiber Cinnamon Raisin Granola, Peanut  
26 Butter Granola, Optimun Blueberry Cinnamon Flax, Optimum Slim Low Fat Vanilla, Mesa  
27 Sunrise, Mesa Sunrise with Raisins,

28 **Premium Granolas:** Aloha Blend, Apple Crumble, Carrot Cake, Dark Chocolate & Red  
Berries;

**EnviroKidz:** Leapin Lemurs, Panda Puffs, Peanut Choco Drizzle,

**Baking Mixes:** Buttermilk Pancake mix, Flax Plus Multigrain Pancake mix,

**Bars:** Macaroon Crunch Granola Bars, Apple Pie Crunch Chia Plus Granola Bars, Peanut  
Choco Crunch Ancient Grains Granola Bars, Honey Oat Crunch Flax Plus Granola Bars,  
EnviroKidz peanut Choco Drizzle Crispy Rice Bars, Lotta Apricotta Granola Bars, Peanut  
Choco Granola Bars, Peanut Buddy Granola Bars, Berry Strawberry Flax Plus Granola Bars;

**Toaster Pastries:** Unfrosted Buncha Blueberries Toaster Pastries, Frosted Cherry  
Pomegranate Toaster Pastries, Frosted Berry Strawberry Toaster Pastries, Unfrosted Berry  
Strawberry Toaster Pastries, Frosted Granny's Apple Pie Toaster Pastries, Frosted Wildberry  
Acai Toaster Pastries, Unfrosted Granny's Apple Pie Toaster Pastries, Frosted Buncha  
Blueberries Toaster Pastries, Frosted Razzi Raspberry Toaster Pastries;

**Waffles:** Buckwheat Wildberry Frozen Waffles.

1 **Low sodium nutrient content claims** (in violation of 21 CFR 101.61; Cal. Health & Safety Code  
2 §110100; §110660; §110760

3 **Cold Cereals:** Crunchy Maple Sunrise, Crunch Vanilla Sunrise, Flax Plus Maple Pecan  
4 Crunch, Flax Plus with Cinnamon, Heritage Flakes, Heritage O's, Honey'd Corn Flakes,  
Mesa Sunrise, Whole O's;

5 **Hot Cereals:** Optimum Cranberry Ginger Hot Oatmeal,

6 **EnviroKids:** Amazon Frosted Flakes, Koala Crisp, Leapin Lemurs, Panda Puffs;

7 **Toaster Pastries:** Frosted Cherry Pomegranate Toaster Pastries.

8 **Slack-fill packaging** (in violation of 21 CFR 1.21; 21 CFR 100.100; Cal. Health & Safety Code §  
9 110100; §110760; §110660; Cal. Bus. & Prof. Code §12606)

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

15 **Hot Cereals:** Maple Nut Hot Oatmeal, Apple Cinnamon Hot Oatmeal, Flax Plus Hot  
16 Oatmeal, Optimum Power Blueberry Cinnamon Flax Hot Oatmeal, Variety Pack Hot  
17 Oatmeal, Multigrain Raisin Spice Hot Oatmeal, Optimum Cranberry Ginger Hot Oatmeal,  
Hemp Plus Hot Oatmeal;

18 **EnviroKids:** Amazon Frosted Flakes, Gorilla Munch Cereal, Koala Crisp, Leapin Lemurs,  
Panda Puffs.

19 **II. SUMMARY OF THE CASE**

20 6. Plaintiff's case has two facets. First, the "UCL unlawful" part. Plaintiff's first cause  
21 of action is brought pursuant to the unlawful prong of California's Unfair Competition Law, Cal.  
22 Bus. & Prof. Code § 17200 ("UCL"). Plaintiff alleges that Defendant packaged and labeled the  
23 Purchased Products in violation of California's Sherman Law which adopts, incorporates – and is  
24 identical – to the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("FDCA"). These  
25 violations (which do not require a finding that the labels are "misleading") render the Purchased  
26 Products "misbranded." Under California law, a food product that is misbranded cannot legally be  
27 manufactured, advertised, distributed, held or sold. Misbranded products cannot be legally sold,  
28

1 possessed, have no economic value, and are legally worthless. Indeed, the sale, purchase or  
2 possession of misbranded food is a criminal act in California and the FDA even threatens food  
3 companies with seizure of misbranded products. This “misbranding” – standing alone without any  
4 allegations of deception by Defendant or review of or reliance on the labels by Plaintiff – give rise  
5 to Plaintiff’s first cause of action under the UCL unlawful prong and is a strict liability claim.

6 7. Second, the “deceptive” part. Plaintiff alleges that the labels on the Purchased  
7 Products and Substantially Similar Products – aside from being unlawful under the Sherman Law –  
8 are also misleading, deceptive, unfair and fraudulent. Plaintiff describes these labels and how they  
9 are misleading. Plaintiff alleges that she reviewed the labels on the Purchased Products, reasonably  
10 relied in substantial part on the labels, and was thereby deceived, in deciding to purchase these  
11 products. Plaintiff would not have purchased a product that is illegal to own or possess. Plaintiff  
12 also would not have purchased the products noted above had she known the products contained  
13 added sugars, chemical preservatives, disqualifying levels of sodium, non-functional slack fill and  
14 made unapproved health or drug claims. Had Defendant informed Plaintiff of these facts there  
15 would have been no purchases. Plaintiff relied upon Defendant’s implied representation that its  
16 products were legal, the absence of any reference to added sugar on the product label, the absence  
17 of any indication on the label that the product contained chemical preservatives, disqualifying  
18 levels of sodium, unapproved health or drug claims and non-functioning slack fill in deciding to  
19 purchase the products noted above, and their reliance and subsequent injury arose from Defendant’s  
20 omission of these material facts.

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

### 25 **III. BACKGROUND**

26 9. The ingredient that Defendant lists as ECJ on the ingredient list of its product labels  
27 is “sucrose” as defined in 21 C.F.R. § 184.1854, and for the purposes of ingredient listing is  
28 properly listed simply as “sugar” under the applicable labeling regulations. There are no significant

1 nutritional differences between the variety of sucrose that Defendant labels as ECJ and what  
2 consumers know as ordinary refined white sugar.

3 10. Although the nutrition facts panel on the Misbranded Food Products lists the total  
4 number of grams of all types of sugars, Defendant chose not to list the “sugar” (or “dried cane  
5 syrup”<sup>2</sup>) that it adds as an ingredient to its Misbranded Food Products in the ingredient list. Rather,  
6 Defendant uses the false and misleading term “evaporated cane juice” in place of sugar (or dried  
7 cane syrup) in order to disguise the fact that it is adding sugar to its products, and not just any type  
8 of sugar, but specifically sucrose.

9 11. The labeling of the Purchased Products and Substantially Similar Products is  
10 uniform in their use of ECJ as an ingredient and their omission of “sugar” or “dried cane syrup” as  
11 an added ingredient.

12 12. Defendant also unlawfully concealed the presence of chemical preservatives by  
13 failing to reveal the function of these ingredients on its food product labels as required by law. This  
14 was not only illegal and in violation of California Health & Safety Code §110740 and 21 C.F.R.  
15 §101.22 (adopted by California and incorporated by reference into California’s Sherman Law), it  
16 also deceived consumers like Plaintiff who were deprived of the information they required to make  
17 informed food purchasing decisions and avoid products containing ingredients like chemical  
18 preservatives they sought to avoid.

19 13. If a manufacturer makes a claim on a food label, the label must meet certain legal  
20 requirements that help consumers like Plaintiff make informed choices and ensure that they are not  
21 misled. Similarly, manufacturers have a duty to disclose on product labels the presence of certain  
22 ingredients like chemical preservatives and to refrain from making disqualified nutrient content  
23 claims and unapproved health or drug claims. As described more fully below, Defendant has made,  
24 and continues to make, unlawful as well as false and deceptive claims in violation of federal and  
25 California laws that govern the types of representations that can be made on food labels. Defendant

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26  
27 <sup>2</sup> In this Complaint Plaintiff refers to “dried cane syrup” as a possibly permissible alternative  
28 to “sugar” because the FDA has suggested that “dried cane syrup” might be an acceptable way  
to refer to the ingredient.

1 also failed and continues to fail to unlawfully and deceptively fail to disclose on it product labels  
2 the presence of certain ingredients like chemical preservatives as required by law. These laws  
3 recognize that reasonable consumers like Plaintiff are likely to choose products claiming to be  
4 natural or to have a health or nutritional benefit over otherwise similar food products that do not  
5 claim such properties or benefits or that disclose certain ingredients. More importantly, these laws  
6 recognize that the failure to disclose the presence of risk-increasing nutrients is deceptive because it  
7 conveys to consumers like Plaintiff the net impression that a food makes only positive contributions  
8 to a diet, or does not contain any nutrients at levels that raise the risk of diet-related disease or  
9 health-related condition. Similarly, the law recognizes that the absence of certain ingredients is  
10 important to certain consumers like Plaintiff and thus mandates the disclosure of such ingredients  
11 and their functions on product labels.

12 14. Defendant has made, and continues to make, misleading and unlawful claims on  
13 food labels of its Misbranded Food Products that are prohibited by federal and California law and  
14 which render these products misbranded. Defendant has failed, and continues to fail, to include  
15 disclosures about ingredients and their functions mandated on food labels of its Misbranded Food  
16 Products that are prohibited by federal and California law and Defendant's failure renders these  
17 products misbranded. Defendant's false and misleading labeling practices stem from its global  
18 marketing strategy. Thus, the violations, misrepresentations, and material omissions are similar  
19 across product labels and product lines.

20 15. Plaintiff and Consumers have paid a premium price for Misbranded Food Products  
21 that they have been misled into believing do not contain added sugar (*i.e.*, sucrose), chemical  
22 preservatives, or non-functional slack fill, do contain disqualifying levels of sodium, and made  
23 unapproved health or drug claims.

24 16. Plaintiff did not know, and had no reason to know, that Defendant's products were  
25 misbranded under the Sherman Law. Similarly, Plaintiff did not know, and had no reason to know,  
26 that Defendant's products were false and misleading and that material information mandated by law  
27 was omitted from Defendant's product labels by Defendant.

28

1           17.     In order to remedy the harm arising from Defendant’s illegal conduct, which has  
2 resulted in unjust profits, Plaintiff bring this action on behalf of a nationwide class of consumers  
3 who, within the Class Period, purchased Defendant’s Purchased Products and Substantially Similar  
4 Products (1) labeled with the ingredient “evaporated cane juice,” which is not the common or usual  
5 name of any sweetener, when such ingredient was not “juice” but was actually sugar (sucrose)  
6 and/or (2) failed to contain information and disclosures about the presence of chemical  
7 preservatives required by law on their labels and/or (3) labeled or advertised with a low sodium  
8 claim despite containing disqualifying levels of sodium in derogation of the law and/or (4) labeled  
9 or advertised with an unapproved health or drug claim and/or (5) sold in packaging containing non-  
10 functional slack fill.

11           18.     Identical California and federal laws require truthful, accurate information on the  
12 labels of packaged foods. This case is about companies selling misbranded food to consumers. The  
13 law, however, is clear: misbranded food cannot legally be sold, possessed, has no economic value  
14 and is legally worthless. Purchasers of misbranded food are entitled to a refund of their purchase  
15 price.

16           19.     Identical California and federal laws regulate the content of labels on packaged food.  
17 The requirements FDCA were adopted by the California Sherman Law. Under both the Sherman  
18 Law and FDCA section 403(a), food is “misbranded” if “its labeling is false or misleading in any  
19 particular,” or if it does not contain certain information on its label or its labeling. 21 U.S.C. §  
20 343(a).

21           20.     Under the FDCA, the term “false” has its usual meaning of “untruthful,” while the  
22 term “misleading” is a term of art. Misbranding reaches not only false claims, but also those claims  
23 that might be technically true, but still misleading. If any single representation in the labeling is  
24 misleading, the entire food is misbranded, nor can any other statement in the labeling cure a  
25 misleading statement.

26           21.     Under California law, a food product that is “misbranded” cannot legally be  
27 manufactured, advertised, distributed, held or sold. Misbranded products cannot be legally sold,  
28



1 possessed, have no economic value, and are legally worthless. Plaintiff and members of the Class  
2 who purchased these products paid an unwarranted premium for these products.

3 22. Nature's Path website, [www.naturespath.com](http://www.naturespath.com), is incorporated into the label for each  
4 Nature's Path product that bears that web address. All Purchased Products bear this website.  
5 According to the FDA and as a matter of law, the Nature's Path website and all linked websites  
6 constitute the labeling of any product bearing this web address.

7 23. Plaintiff brings this action under California law, which is identical to federal law, for  
8 a number of the Defendant's food labeling practices which are both (i) unlawful and (ii) deceptive  
9 and misleading to consumers. These include:

- 10 a. Products labeled with the ingredient "evaporated cane juice;"
- 11 b. Products labeled or advertised with an unapproved health or drug claim;
- 12 c. Products labeled or advertised with a low sodium claim despite containing  
13 levels of sodium exceeding the maximum level of 140 mgs specified in 21  
14 C.F.R. § 101.61;
- 15 d. Products that contain preservatives but whose labels claim they are "free" of  
16 preservatives and do not disclose those the preservatives on the label;
- 17 e. Products sold in packaging containing non-functional slack fill;

#### 17 **IV. PARTIES**

18 24. Plaintiff Susan Leonhart is a resident of Los Gatos, California who bought the  
19 Nature's Path Purchased Products listed above during the Class Period.

20 25. Defendant Nature's Path Foods, Inc. is a corporation which does business  
21 throughout California and the United States, with its principal place of business located at 2220  
22 Nature's Path Way, Blaine, Washington 98230. Nature's Path may be served with process of this  
23 Court by service on its California registered agent for service of process, J. Craig Williams, 3 Park  
24 Plaza, 17th Floor, Irvine, CA 92614.

25 26. Defendant is one of the leading privately owned organic food companies in North  
26 America. The company sells, among other products, organic cereals, waffles, snack bars and  
27 breads in California, and throughout the United States as well as in many countries around the  
28

1 world. Nature's Path is North America's leading organic cereal company. Defendant sells its food  
2 products to consumers through grocery and other retail stores throughout the United States.

3 27. California law applies to all claims set forth in this First Amended Complaint  
4 because Plaintiff lives in California and purchased the Purchased Products there. Also, the  
5 Defendant does business in California. All or most of the misconduct alleged herein was contrived  
6 in, implemented in, and/or has a shared nexus with California.

7 28. Accordingly, California has significant contacts and/or a significant aggregation of  
8 contacts with the claims asserted by Plaintiff and all Class members.

9 **V. JURISDICTION AND VENUE**

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

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

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

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

26 **VI. FACTUAL ALLEGATIONS**

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

28 33. Food manufacturers are required to comply with identical federal and state laws and

1 regulations that govern the labeling of food products. First and foremost among these is the FDCA  
2 and its labeling regulations, including those set forth in 21 C.F.R. § 101.

3 34. Pursuant to the Sherman Law, California has expressly adopted the federal labeling  
4 requirements as its own and indicated that “[a]ll food labeling regulations and any amendments to  
5 those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or  
6 after that date shall be the food regulations of this state.” California Health & Safety Code  
7 §110100.

8 35. In addition to its blanket adoption of federal labeling requirements, California has  
9 also enacted a number of laws and regulations that adopt and incorporate specific enumerated  
10 federal food laws and regulations. For example, food products are misbranded under California  
11 Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars;  
12 are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform  
13 to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted  
14 thereto; are misbranded under California Health & Safety Code § 110670 if their labeling fails to  
15 conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r)  
16 and regulations adopted thereto; are misbranded under California Health & Safety Code § 110705 if  
17 words, statements and other information required by the Sherman Law to appear on their labeling  
18 are either missing or not sufficiently conspicuous; are misbranded under California Health & Safety  
19 Code § 110735 if they are represented as having special dietary uses but fail to bear labeling that  
20 adequately informs consumers of their value for that use; and are misbranded under California  
21 Health & Safety Code § 110740 if they contain artificial flavoring, artificial coloring and chemical  
22 preservatives but fail to adequately disclose that fact on their labeling.

23 **B. FDA Enforcement History**

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

28 37. In October 2009, the FDA issued a *Guidance For Industry: Letter regarding Point*

1 *Of Purchase Food Labeling* to address its concerns about front of package labels (“2009 FOP  
2 Guidance”). The 2009 FOP Guidance advised the food industry:

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

12 It is important to note that nutrition-related FOP and shelf labeling, while currently  
13 voluntary, is subject to the provisions of the Federal Food, Drug, and Cosmetic Act  
14 that prohibit false or misleading claims and restrict nutrient content claims to those  
15 defined in FDA regulations. Therefore, FOP and shelf labeling that is used in a  
16 manner that is false or misleading misbrands the products it accompanies. Similarly,  
17 a food that bears FOP or shelf labeling with a nutrient content claim that does not  
18 comply with the regulatory criteria for the claim as defined in Title 21 Code of  
19 Federal Regulations (C.F.R.) 101.13 and Subpart D of Part 101 is misbranded. We  
20 will consider enforcement actions against clear violations of these established  
21 labeling requirements. . .

22 ... Accurate food labeling information can assist consumers in making healthy  
23 nutritional choices. FDA intends to monitor and evaluate the various FOP labeling  
24 systems and their effect on consumers' food choices and perceptions. FDA  
25 recommends that manufacturers and distributors of food products that include FOP  
26 labeling ensure that the label statements are consistent with FDA laws and  
27 regulations. FDA will proceed with enforcement action against products that bear  
28 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.

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

38. 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.”

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

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

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

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

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

24           As we move forward in those areas, I must note, however, that there is one area in  
25 which more progress is needed. As you will recall, we recently expressed concern,  
26 in a “Dear Industry” letter, about the number and variety of label claims that may not  
27 help consumers distinguish healthy food choices from less healthy ones and, indeed,  
28 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



1 [abelingNutrition/ucm181491.htm](http://abelingNutrition/ucm181491.htm).

2 46. In addition to its guidance to industry in general, the FDA has repeatedly sent  
3 warning letters to specific companies regarding specific violations such as the ones at issue in this  
4 case. The FDA's July 2012 Regulatory Procedures Manual indicates that a warning letter  
5 "communicates the agency's position on a matter" and that "[w]arning Letters are issued only for  
6 violations of regulatory significance." The FDA publicly posted these letters on its website with the  
7 expectation that food manufacturers would revise their product labels to correct any violations  
8 outlined in these warning letters.

9 47. In particular, the FDA has issued warning letters to at least a half-dozen companies  
10 for utilizing the unlawful term "evaporated cane juice."

11 48. Defendant has continued to ignore the 2009 FOP Guidance which detailed the  
12 FDA's guidance on how to make food labeling claims as well as the 2009 Guidance on evaporated  
13 cane juice and the FDA warning letters on evaporated cane juice. As such, Defendant's  
14 Misbranded Food Products continue to run afoul of the 2009 FOP Guidance and the 2009 Guidance  
15 on evaporated cane juice and the FDA warning letters on evaporated cane juice as well as federal  
16 and California law.

17 49. Despite the numerous FDA warning letters and the 2009 Guidance on evaporated  
18 cane juice or the FDA evaporated cane juice warning letters and the 2010 Open Letter, Defendant  
19 has not removed the unlawful and misleading food labeling ingredient from Defendant's  
20 Misbranded Food Products.

21 50. Despite the FDA's numerous warnings to industry, Defendant has continued to sell  
22 products bearing unlawful food labeling claims without meeting the requirements to make such  
23 claims.

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

26 **C. Defendant's Unlawful and Misleading "Evaporated Cane Juice" Claims Cause**  
27 **Defendant's Food Products To Be Misbranded**

1           52.     21 C.F.R. §§ 101.3 and 102.5, which have been adopted by California, prohibit  
2 manufacturers from referring to foods by anything other than their common and usual names. 21  
3 C.F.R. § 101.4, which has been adopted by California, prohibits manufacturers from referring to  
4 ingredients by anything other than their common and usual names. Defendant has violated these  
5 provisions by failing to use the common or usual name for ingredients mandated by law. In  
6 particular, Defendant has used and continues to use the term “evaporated cane juice” on products  
7 in violation of numerous labeling regulations designed to protect consumers from misleading  
8 labeling practices. Defendant’s practices also violate express FDA policies.

9           53.     For example, Defendant violated the FDA’s express policy with respect to the listing  
10 of certain ingredients such as sugar or dried cane syrup. As stated by the FDA, “FDA’s current  
11 policy is that sweeteners derived from sugar cane syrup should not be declared as ‘evaporated cane  
12 juice’ because that term falsely suggests that the sweeteners are juice.”

13           54.     The FDA “considers such representations to be false and misleading under section  
14 403(a)(1) of the Act (21 U.S.C. 343(a)(1) because they fail to reveal the basic nature of the food  
15 and its characterizing properties (*i.e.*, that the ingredients are sugars or syrups) as required by 21  
16 U.S.C. 102.5.”

17           55.     In October of 2009, the FDA issued *Guidance for Industry: Ingredients Declared as*  
18 *Evaporated Cane Juice*, which that:

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

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

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



1 reasonably encompassed within the same name” (21 C.F.R. 102.5(a))...

2 “Sugar cane products with common or usual names defined by regulation are sugar  
3 (21 C.F.R. 101.4(b)(20)) and cane sirup (alternatively spelled “syrup”) (21 C.F.R.  
4 168.130). Other sugar cane products have common or usual names established by  
5 common usage (e.g., molasses, raw sugar, brown sugar, turbinado sugar,  
6 muscovado sugar, and demerara sugar)...

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

12 “Sweeteners derived from sugar cane syrup should not be listed in the ingredient  
13 declaration by names which suggest that the ingredients are juice, such as  
14 “evaporated cane juice.” FDA considers such representations to be false and  
15 misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they  
16 fail to reveal the basic nature of the food and its characterizing properties (i.e., that  
17 the ingredients are sugars or syrups) as required by 21 C.F.R. 102.5. Furthermore,  
18 sweeteners derived from sugar cane syrup are not juice and should not be included  
19 in the percentage juice declaration on the labels of beverages that are represented to  
20 contain fruit or vegetable juice (see 21 C.F.R. 101.30).

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

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

58. Various FDA warning letters have made it clear that the use of the term “evaporated  
cane juice” is unlawful because the term does not represent the common or usual name of a food or

1 ingredient. These warning letters indicate that foods bearing labels which contain the term  
2 “evaporated cane juice” are misbranded.

3 59. Such products mislead consumers into paying a premium price for inferior or  
4 undesirable ingredients or for products that contain ingredients not listed on the label.

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

9 61. Defendant has also made these illegal claims on its websites and in advertising in  
10 violation of federal and California law.

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

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

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

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

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

26 66. Pursuant to 21 C.F.R. § 101.61(b)(4) the term “low sodium” may be used on the  
27  
28

1 labels or labeling of food if the food has a reference amount of less than 30 grams or less and  
2 contains 140 mgs or less sodium per reference amount customarily consumed and per 50 grams. By  
3 this definition many of the Defendant's "low sodium" products are not, in fact, low sodium products.

4 67. For example, the EnviroKidz Panda Puffs cereal purchased by Plaintiff has a serving  
5 size of 30 grams and contains 130 mgs of sodium per serving size. On a 50 gram basis this equates  
6 to over 216 mgs of sodium, far more than the maximum 140 mgs cutoff for a legal low sodium  
7 claim. Notwithstanding this fact, Defendant misrepresents this product as being "low sodium" and  
8 thus understates the levels of sodium in the product.

9 68. The low sodium claim on the EnviroKidz Panda Puffs cereal purchased by Plaintiff is  
10 simply a false statement. By definition "low sodium" cereal could not contain more than 140 mgs of  
11 sodium per reference amount customarily consumed and per 50 grams.

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

14 70. This false representation unlawfully overstated the healthiness of Defendant's  
15 products while understating their relative sodium levels.

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

23 72. A reasonable consumer would expect that when Defendant represents its products  
24 as a "low sodium" option, the product will in fact be "low" in sodium and that Defendant was not  
25 using the term "low sodium" in a way that violates the law. A reasonable consumer would  
26 understand that if a Defendant compares its product with another product, that comparison will be  
27 truthful and accurate and not false and misleading.

28 73. Consumers such as the Plaintiff are thus misled into purchasing Defendant's

1 purportedly “low sodium” products that actually contain levels of sodium higher than the maximum  
2 upper limit for a “low sodium” product and that are not “low sodium” as falsely represented on  
3 their labeling and in their marketing materials. Defendant’s products in this respect are misbranded  
4 under federal and California law.

5 74. Plaintiff relied on Defendant’s “low sodium” claims when making Plaintiff’s  
6 purchase decisions over the last four years and were misled because they erroneously believed the  
7 express misrepresentations that the Defendant’s products Plaintiff was purchasing were “low  
8 sodium” as represented. Purchasing “low sodium” products was important to Plaintiff in trying to  
9 buy “healthy” food products. Plaintiff would not have purchased these products had Plaintiff known  
10 that the Defendant’s products’ sodium claims were false.

11 75. For these reasons, Defendant’s “low sodium” claims at issue in this Complaint are  
12 false and misleading and in violation of identical California and federal law and the products at issue  
13 are misbranded as a matter of law. In addition, the Defendant made other unlawful nutrient content  
14 claims by using defined nutrient content terms such as “rich” or “high” or undefined terms such as  
15 “great source” unlawfully in violation of 21 C.F.R. §§ 101.13 and 101.54 to describe its products or  
16 ingredients. Therefore, Defendant’s Misbranded Food Products are misbranded as a matter of  
17 California and federal law and cannot be sold or held and thus have no economic value and are  
18 legally worthless. Plaintiff and members of the Class who purchased these products paid an  
19 unwarranted premium for these products.

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

21 76. Defendant has violated identical California and federal law by making numerous  
22 unapproved health claims about Defendant’s products. Defendant has also violated identical  
23 California and federal law by making numerous unapproved claims about the ability of Defendant’s  
24 products and their ingredients to cure, mitigate, treat and prevent various diseases that render the  
25 products unapproved drugs under California and federal law. Moreover, in promoting the ability of  
26 its Misbranded Food Products to have an effect on certain diseases such as diabetes, Defendant has  
27 violated the advertising provisions of the Sherman law.

28

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

8           78.     21 C.F.R. § 101.14, which has been expressly adopted by California, provides when  
9 and how a manufacturer may make a health claim about its product. A “Health Claim” means any  
10 claim made on the label or in labeling of a food, including a dietary supplement, that expressly or  
11 by implication, including “third party” references, written statements (*e.g.*, a brand name including  
12 a term such as “heart”), symbols (*e.g.*, a heart symbol), or vignettes, characterizes the relationship  
13 of any substance to a disease or health-related condition. Implied health claims include those  
14 statements, symbols, vignettes, or other forms of communication that suggest, within the context in  
15 which they are presented, that a relationship exists between the presence or level of a substance in  
16 the food and a disease or health-related condition (*see* 21 CFR § 101.14(a)(1)).

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

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

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

27                   Qualifies as both low fat and low saturated fat;  
28                   Contains 480 mg or less of sodium per reference  
                    amount and per labeled serving, and per 50 g (as

1 prepared for typically rehydrated foods) if the  
2 food has a reference amount of 30 g or 2 tbsps or  
less;

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

6 Except for raw fruits and vegetables, certain  
7 frozen or canned fruits and vegetables, and  
8 enriched cereal-grain products that conform to a  
9 standard of identity, provides at least 10% of the  
daily value (DV) of vitamin A, vitamin C,  
10 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.

11 21 C.F.R. § 101.65(d)(2).

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

14 83. Defendant has violated the provisions of § 21 C.F.R. §101.14, 21 U.S.C. §  
15 321(g)(1)(D) and 21 U.S.C. § 352(f)(1) by including certain claims on their product labeling.

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

21 85. The therapeutic claims on Defendant's labeling establish that Defendant's products  
22 are drugs because they are intended for use in the cure, mitigation, treatment, or prevention of  
23 disease. Defendant's products are not generally recognized as safe and effective for the above  
24 referenced uses and, therefore, the products would be "new drug[s]" under section 201(p) of the Act  
25 [21 U.S.C. § 321(p)]. New drugs may not be legally marketed in the U.S. without prior approval  
26 from the FDA as described in section 505(a) of the Act [21 U.S.C. § 355(a)]. FDA approves a new  
27 drug on the basis of scientific data submitted by a drug sponsor to demonstrate that the drug is safe  
28 and effective. Defendant also violated California Health & Safety Code § 110403 which prohibits

1 the advertisement of products that are represented to have any effect on enumerated conditions,  
2 disorders and diseases unless the materials have federal approval.

3 86. Plaintiff saw such health related claims and relied on Defendant's health claims  
4 which influenced Plaintiff's decision to purchase Defendant's products. Plaintiff would not have  
5 bought the products had Plaintiff known Defendant's claims were unapproved and that the products  
6 were thus misbranded.

7 87. Plaintiff and members of the Class was misled into the belief that such claims were  
8 legal and had passed regulatory muster and were supported by science capable of securing  
9 regulatory acceptance. Because this was not the case, Plaintiff and members of the Class have been  
10 deceived.

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

15 89. Plaintiff and members of the Class have been misled by Defendant's unlawful  
16 labeling practices and actions into purchasing products they would not have otherwise purchased  
17 had they known the truth about these products. Plaintiff and members of the Class who purchased  
18 these products paid an unwarranted premium for these products.

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

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

25 91. Marketing research showed that consumers, including Plaintiff, are increasingly  
26 interested in all natural foods that did not contain chemical preservatives or artificial flavors. In  
27 fact, consumer surveys had established that 1) 80% of the general population thought the fact that  
28 a product contained no preservatives or artificial ingredients was a product attribute that was

1 very/somewhat important when purchasing a food product; 2) 81% of the general population  
2 thought the fact that a product was natural was very/somewhat important when purchasing a food  
3 product; and 3) 76% of the general population thought the fact that a product contained no  
4 artificial flavors was very/somewhat important when purchasing a food product. Moreover, the  
5 percentage of consumers indicating that such product attributes were important to their  
6 purchasing decisions was increasing annually.

7 92. Of particular concern to the food manufacturers like Defendant was the fact that  
8 certain key segments of their consumer base placed even greater importance on these product  
9 attributes than the general population. For example, 19% of the U.S. general population classified  
10 as Lifestyles Of Health And Sustainability (“LOHAS”) consumers since the Consumer surveys  
11 had established that 1) 95% of LOHAS consumers thought the fact that a product contained no  
12 artificial ingredients was a product attribute that was very/somewhat important when purchasing a  
13 food product and that 92% of LOHAS consumers thought the fact that a product contained no  
14 artificial flavors was very/somewhat important when purchasing a food product.

15 93. In addition to LOHAS consumers, food manufacturers also had to take into account  
16 other segments of the market such as Naturalites who comprised about 19% of the U.S. general  
17 population and were avid users of natural products and whose preferences for natural products  
18 lacking artificial ingredients and artificial flavors was almost as strong as LOHAS consumers.  
19 Consumer surveys had established that 1) 90% of Naturalites consumers thought the fact that a  
20 product contained no artificial ingredients was a product attribute that was very/somewhat  
21 important when purchasing a food product and that 87% of Naturalites consumers thought the fact  
22 that a product contained no artificial flavors was very/somewhat important when purchasing a  
23 food product.

24 94. These consumer preferences posed a significant threat to the Defendant’s core food  
25 business because its Misbranded Food Products, including their EnviroKids cereal product  
26 purchased by Plaintiff contained chemical preservatives and artificial flavors.

27 95. Despite the fact that its Misbranded Food Products contained chemical preservatives,  
28 Defendant falsely stated on the labeling of its Misbranded Food Products that they were free of



1 preservatives. This statement was demonstrably false and misled consumers such as the Plaintiff  
2 who relied on the statements.

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

8 97. The FDA considers tocopherols and citric acid to be a chemical preservative. The  
9 FDA has repeatedly sent warning letters to companies informing them that their products are  
10 misbranded because they fail to disclose the function of chemical preservatives including those at  
11 issue here. See e.g.

12 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2004/ucm146627.htm>;

13 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2012/ucm319489.htm>);

14 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2011/ucm264369.htm>;

15 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2012/ucm323184.htm>;

16 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2011/ucm274535.htm>

17 (potassium sorbate);

18 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2011/ucm278285.htm>;

19 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2010/ucm228663.htm> (citr  
20 ic acid);

21 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2005/ucm075432.htm>;

22 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2006/ucm075850.htm>;

23 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2002/ucm145155.htm>;

24 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2012/ucm314769.htm>;

25 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2002/ucm144800.htm>;

26 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2011/ucm280161.htm>;

27 <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2011/ucm268285.htm>;

28

1           98.     While the chemicals may be different in name, they are not different in function or  
2 effect and the failure to adequately disclose them results in identical violations of law.

3           99.     Tocopherols and citric acid are chemical preservatives. 21 C.F.R. § 101.22(a)(5)  
4 provides that, “The term *chemical preservative* means any chemical that, when added to food, tends  
5 to prevent or retard deterioration thereof, but does not include common salt, sugars, vinegars,  
6 spices, or oils extracted from spices, substances added to food by direct exposure thereof to wood  
7 smoke, or chemicals applied for their insecticidal or herbicidal properties.”

8           100.    Tocopherols and citric acid are not a type of common salt, sugar, vinegar, spice, or  
9 oil extracted from spices, nor are they a substance added to food by direct exposure thereof to wood  
10 smoke, or chemicals applied for their insecticidal or herbicidal properties. As used by Defendant in  
11 its products these chemicals prevent or retard deterioration of the products. Therefore, tocopherols  
12 are a “chemical preservative,” in Defendant’s products as defined in 21 C.F.R. § 101.22(a)(5).

13           101.    Defendant appears to place great importance on concealing the fact that its products  
14 contain chemical preservatives. It places false and untruthful statements on its website saying its  
15 products do not contain chemical preservatives. It places false untruthful statements on certain  
16 products indicating that they lack preservatives.

17           102.    The falsity of Defendant’s statements and labeling claims would be revealed if  
18 Defendant complied with the law and disclosed the presence and function of the chemical  
19 preservatives it adds as ingredients to its products like the EnviroKids cereal purchased by Plaintiff.

20           103.    Rather than comply with the law, Defendant has violated the numerous statutory  
21 provisions that require that the presence and function of chemical preservatives to be disclosed on  
22 product labels.

23           104.    Given the presence of these chemical preservatives, representing such a product as  
24 preservative free is both false and misleading and renders the product misbranded.

25           105.    Moreover, even if Defendant does not included a false representation that its  
26 Misbranded Food Products were free of preservatives on its product labeling, these products would  
27 have still been misbranded as a matter of law because of Defendant’s failure to disclose the  
28 presence of such ingredients as mandated by identical California and federal law.

1           106. “Under California law” food is misbranded if it bears or contains any artificial  
2           flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact (California  
3           Health & Safety Code § 110740). California’s law is identical to federal law on this point.

4           107. Defendant has violated 21 C.F.R. § 101.22, 21 U.S.C. § 343(a), and 21 U.S.C. §  
5           343(k), all of which are adopted by and incorporated into the Sherman Law. A statement of  
6           artificial flavoring, artificial coloring, or chemical preservative shall be placed on the food or on its  
7           container or wrapper, or on any two or all three of these, as may be necessary to render such  
8           statement likely to be read by the ordinary person under customary conditions of purchase and use  
9           of such food.

10           108. Pursuant to 21 C.F.R. § 101.22(c): A statement of artificial flavoring, artificial  
11           coloring, or chemical preservative shall be placed on the food or on its container or wrapper, or on  
12           any two or all three of these, as may be necessary to render such statement likely to be read by the  
13           ordinary person under customary conditions of purchase and use of such food.

14           109. Pursuant to 21 C.F.R. § 101.22(j): A food to which a chemical preservative(s) is  
15           added shall, except when exempt pursuant to 101.100 bear a label declaration stating both the  
16           common or usual name of the ingredient(s) and a separate description of its function, e.g.,  
17           "preservative", "to retard spoilage", "a mold inhibitor", "to help protect flavor" or "to promote color  
18           retention".

19           110. Defendant’s Misbranded Food Products were misbranded because they contained  
20           chemical preservatives like tocopherols but failed to disclose that fact. Moreover, Defendant falsely  
21           misrepresented the function of this chemical by labeling it natural vitamin E thus misrepresenting  
22           its use as vitamin fortification when it was merely a preservative present at a nutritionally  
23           insignificant amount.

24           111. For example, while Defendant’s EnviroKidz cereal bought by Plaintiff, contains  
25           tocopherols which is used in that product as a type of chemical preservative designed to retard  
26           rancidity, the products’ label fails to disclose the fact that the tocopherols are being used as a  
27           preservative in those products by including a parenthetical such as (preservative) or (to retard  
28           spoilage) after the term tocopherols in the ingredient statement. Because Defendant unlawfully fails

1 to indicate these ingredients are being used as chemical preservatives and misrepresents them as a  
2 fortifying vitamin, a reasonable consumer would have no reason to doubt the preservative free  
3 claim.

4 112. A reasonable consumer would expect that when Defendant made a representation on  
5 its products' labels that such products were "free" of preservatives that such a representation was  
6 true. A reasonable consumer would also expect that when Defendant lists its products' ingredients  
7 that it would make all disclosures required by law such as the disclosure of chemical preservatives  
8 and coloring mandated by identical California and federal law.

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

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

17 115. Consumers are thus misled into purchasing Defendant's products with false and  
18 misleading labeling statements and ingredient descriptions, which do not describe the basic nature  
19 of the ingredients, as required by California Health & Safety Code § 110740 and 21 C.F.R. §§  
20 101.22 which has been adopted as law by California.

21 116. Had Plaintiff been aware that the Misbranded Food Products she purchased  
22 contained chemical preservatives she would not have purchased the products. Plaintiff had other  
23 alternatives that lacked such ingredients and Plaintiff also had cheaper alternatives.

24 117. Because of their false label representations and omissions about chemical  
25 preservatives Defendant's Misbranded Food Products are in this respect misbranded under identical  
26 federal and California law, including California Health & Safety Code § 110740. Misbranded  
27 products cannot be legally sold and have no economic value and are legally worthless. Plaintiff and  
28

1 members of the Class who purchased these products paid an unwarranted premium for these  
2 products.

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

5 118. Pursuant to C.F.R. 100.100 which has been adopted by California:

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

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

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

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

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

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

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

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

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

120. Defendant lacked any lawful justification for doing so.

1 121. Plaintiff and members of the Class relied on and were deceived by Defendants'  
2 misleading slack filled packaging.

3 122. Plaintiff purchased slack filled packages of Defendants' Heritage Flakes and  
4 EnviroKidz Panda Puffs cereal.

5 123. Plaintiff did not know, and had no reason to know, that Defendants' Misbranded  
6 Food Products were slack filled and misbranded. Had Plaintiff known Defendants' packaging was  
7 slack filled they would not have bought the slack filled products. Plaintiff and members of the Class  
8 who purchased the Misbranded Food Products paid an unwarranted premium for these products.  
9 Because of Defendants' slack fill packaging violations these products were misbranded and could  
10 not be legally held or sold. They were worthless. It was also unlawful to sell such misbranded  
11 products and the Plaintiff would not have bought these products had they known they were  
12 misbranded and illegal to sell or possess

13 **H. Plaintiff Was Injured As A Result Of Defendant's Unlawful Conduct.**

14 124. Defendant's act of selling these Misbranded Food Products violates Sherman Law §  
15 110760 (unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is  
16 misbranded). The sale of a misbranded product results in an independent violation of the unlawful  
17 prong that is separate from the labeling violations listed above. When Plaintiff purchased  
18 Defendant's Misbranded Food Products there was causation and injury even absent reliance on the  
19 misrepresentation/omission that misbranded the product. This injury arises from the unlawful sale  
20 of an illegal product that is crime to sell and crime to possess. Plaintiff were deprived of money in  
21 an illegal sale and given a worthless illegal product in return. In addition, due to the law's  
22 prohibition of possession of such a product, consumers have been unwittingly placed by  
23 Defendant's conduct in a legal position that no reasonable consumer would agree to be placed.

24 125. Thus, in this case, where Defendant unlawfully sold products labeled with the  
25 unlawful term ECJ, which failed to disclose the presence and function of chemical preservatives,  
26 contained disqualifying levels of sodium and non-functional slack fill and made unapproved health  
27 or drug claims there is 1) a violation of specific labeling regulations and 2) an independent violation  
28 of the unlawful prong due to the Defendant's sale of an illegal product that is unlawful to possess.

1 Plaintiff would not have bought the misbranded food products had she known or had Defendant  
2 disclosed the material fact that the misbranded food products were illegal to sell and possess.  
3 Plaintiff was injured by the Defendant's unlawful act of selling her an illegal product that was  
4 illegal to sell or possess.

5         126. These Misbranded Food Products are illegal to sell or possess pursuant to Sherman  
6 Law § 110825, which provide that any Sherman Law violation (*e.g.*, the sale of a product whose  
7 label fails to use the common and usual ingredient name as required by law) constitutes a strict  
8 liability criminal offense punishable by a fine of up to \$1000 and up to twelve month in jail. Such  
9 fines and punishments on the same level of what a person might face if found to be in possession of  
10 a controlled substance. Moreover, Sherman Law § 110825 is strict liability crime. As a result, the  
11 injury to Plaintiff and the Class arises from the Defendant illegally selling a product it misbranded,  
12 the sale of which is a criminal act. Plaintiff and the Class has been unlawfully deprived of money in  
13 an illegal transaction that occurred because the Defendant sold them a worthless, illegal product  
14 that could not be legally sold or possessed. Due to the law's prohibition of possession of such a  
15 product, consumers have been unwittingly placed, solely and directly by Defendant's conduct, in a  
16 legal position that no reasonable consumer would choose. Consumers have thus been directly  
17 injured by the Defendant's illegal act of unlawfully selling them an illegal product. This harm goes  
18 beyond mere economic injury.

19         127. Offering food products for sale through ordinary commercial channels carries with it  
20 an implied representation that the products can legally be bought and sold, and Plaintiff reasonably  
21 believed that the Purchased Products were legal to buy and sell and would not have purchased them  
22 had she known otherwise.

23         128. Moreover, Defendant as the manufacturer, packager, labeler and initial seller of the  
24 food products purchased by the Plaintiff had a duty to disclose the true nature of the ingredients in  
25 the products and not to conceal the presence of sugar, chemical preservatives, disqualifying levels  
26 of sodium, non-functional slack fill or to make unapproved health or drug claims. Defendant had  
27 exclusive knowledge of material facts not known or reasonably accessible to the Plaintiff;  
28 Defendant actively concealed material facts from the Plaintiff; and Defendant made partial

1 representations that are misleading because some other material fact has not been disclosed.  
2 Defendant's failure to disclose the information it had a duty to disclose constitutes material  
3 misrepresentations and materially misleading omissions which mislead the Plaintiff who relied on  
4 Defendant in this regard to disclose all material facts accurately and truthfully and fully.

5 129. The unlawful sale of Misbranded Food Products that are illegal to sell or possess—  
6 standing alone without any allegations of deception by Defendant other than the implicit  
7 misrepresentation that its products are legal to sell or possess, or any review of or reliance on the  
8 particular labeling claims by Plaintiff – gives rise to Plaintiff's cause of action under the “unlawful”  
9 prong of the UCL and the CLRA. In short, Defendant's injury causing unlawful conduct is the only  
10 necessary element needed for UCL liability under the unlawful prong. All Plaintiff needs to show is  
11 that she bought an unlawful product that she would not have otherwise purchased had she been  
12 aware of the material fact that the product was unlawful to sell or possess. Therefore, this claim  
13 does not sound in fraud; instead, it alleges strict liability pursuant to the above cited provisions of  
14 the federal law and Sherman Law.

15 130. At point of sale, Plaintiff did not know, and had no reason to know, that the  
16 Purchased Products were unlawful and misbranded as set forth herein, and would not have bought  
17 the product had she known the truth about it, *i.e.*, that the product was illegal to purchase and  
18 possess, or that it contained added sugar, chemical preservatives, disqualifying levels of sodium,  
19 non-functional slack fill and made unapproved health or drug claims.

20 131. Misbranded products cannot be legally sold, possessed, have no economic value, and  
21 are legally worthless. Plaintiff and the Class have been damaged by Defendant's illegal conduct in  
22 that they purchased misbranded and worthless products that were illegal to sell or possess. Plaintiff  
23 was injured by the loss of the purchase price in an illegal transaction, the illegality of which  
24 Plaintiff was unaware. Defendant misled Plaintiff to believe that the Misbranded Food Products  
25 were legal to purchase and possess, lacked added sugar, and lacked any chemical preservative,  
26 disqualifying levels of sodium, non-functional slack fill and made approved health or drug claims.  
27 Had Plaintiff known that the Defendant's products were misbranded, , *i.e.*, illegal to purchase and  
28 possess, contained added sugar, and/or contained chemical preservatives and/or contained



1 disqualifying levels of sodium and/or contained non-functional slack fill and/or made unapproved  
2 health or drug claims, she would not have bought Defendant's products.

3 132. In addition, Plaintiff was injured because she was unwittingly placed in legal  
4 jeopardy due to the possession of Defendant's illegal and misbranded products, which as noted  
5 above carries a potential fine and jail time. No reasonable consumer would buy a product that was  
6 illegal to sell or possess. No reasonable consumer would buy a food product whose mere possession  
7 could result in a prison term of one year and a four-figure fine.

8 133. A reasonable person would also attach importance to whether Defendant's products  
9 are "misbranded," *i.e.*, not legally salable, or capable of legal possession, contained added sugar,  
10 and/or contained chemical preservatives and/or contained disqualifying levels of sodium and/or  
11 contained non-functional slack fill and/or made unapproved health or drug claims. Reasonable  
12 consumers would be, and were, misled in the same manner as Plaintiff in that a reasonable  
13 consumer would not knowingly purchase a product that is illegal to buy or sell.

14 134. In this case, Plaintiff read the labels of the products she purchased looking for added  
15 sugar, chemical preservatives, health or drug claims, nutrient content claims and at the size of the  
16 packaging. If the product label had indicated it contained any one of those ingredients or did not  
17 make any of those claims, Plaintiff would not have purchased the product. But because the product  
18 label did not indicate it contained added sugar, chemical preservatives, disqualifying levels of  
19 sodium, non-functional slack fill and/or made unapproved health or drug claims, Plaintiff was  
20 duped into purchasing the product. As a result of Defendant's unlawful use of the term ECJ, its  
21 unlawful concealment and failure to disclose the presence and function of chemical preservatives,  
22 disqualifying levels of sodium, non-functional slack fill and its use of unapproved health and drug  
23 claims Plaintiff and the Class members purchased the Misbranded Food Products at issue. Plaintiff  
24 and the Class members have been proximately harmed, and Defendant has been unjustly enriched,  
25 by Defendant's unlawful scheme.

26 **I. Defendant Has Violated California Law**

27 135. Defendant has violated California Health & Safety Code § 110390, which makes it  
28 unlawful to disseminate false or misleading food advertisements that include statements on

1 products and product packaging or labeling or any other medium used to directly or indirectly  
2 induce the purchase of a food product.

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

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

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

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

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

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

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

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

26 144. Defendant has violated the standards set by 21 C.F.R. §§ 101.4 and 102.5 which has  
27 been incorporated by reference in the Sherman Law, by failing to include on its product labels the  
28 common and usual names of ingredients contained in its food products. Additionally, Defendant has

1 violated the standard set by 21 C.F.R. § 101.14 by making unlawful health claims about its products  
2 such as those referenced in paragraphs 2 and 78 above. Defendant also violated the standard set by  
3 21 C.F.R. §§ 101.13 and 101.61 by making unlawful low sodium claims about its products and 21  
4 C.F.R. §§ 101.13 and 101.54 by utilizing unlawful nutrient content claims.

5  
6 **J. Defendant's Use Of ECJ As An Ingredient On Its Labels Is Fraudulent, Deceptive, And Misleading Because It Fails To Identify "Added Sugar."**

7 145. Plaintiff is a health conscious consumer who wished to avoid added sugar (the  
8 sucrose variety in particular, but other added sugars as well) in the products she purchased.  
9 However, when she scanned the ingredient lists of the Purchased Products, Plaintiff did not  
10 understand the term ECJ or "granulated sugar cane juice" was added sugar. This is hardly  
11 surprising since 1) the FDA considers the term to be false and misleading *because* it fails to reveal  
12 that the ingredient is a sugar or a syrup; 2) juice is considered to be a healthy food that is not the  
13 equivalent of added sugar, 3) it is not generally known to the consuming public that there is no  
14 significant nutritional difference between ECJ and ordinary white sugar; 4) ECJ is not typically  
15 among the added sugars; and 5) consumer studies confirm that most purchase decisions are made in  
16 a fraction of a second and thus the potential for a false and misleading term to mislead is  
17 significant. Moreover, the Nutrition Facts listing of total sugars does not allow a consumer, or  
18 Plaintiff, to determine if a product has any added sugars. Consumers are only able to determine the  
19 presence of added sugars by reading a products ingredient list. Companies like Defendant that  
20 mislabel their sugars in the ingredient list with false and misleading terms frustrate this capability  
21 by hiding the added sugar. In addition, the inclusion of words such as "juice" or "cane" into the  
22 false and misleading term evaporated cane juice do not mitigate the false and misleading nature of  
23 the term and in fact in the case of a word like "juice" actually makes it misleading in the eyes of the  
24 FDA since it is an added sugar and not a juice. In contrast, the failure to utilize words like "sugar"  
25 (or "syrup") to describe the ingredient identified by Defendant as evaporated cane juice is false and  
26 misleading because it conceals the fact that the ingredient is in fact an added sugar, namely an  
27 added sugar (or syrup) sweetener.

28 146. Plaintiff's desire to avoid added sugars was reasonable. Added sugar is a known

1 health risk that consumers are advised to avoid by the United States government, scientific and  
2 educational institutions, and food related companies such as grocery store chains and food  
3 manufacturers. All of these entities know and publish: 1) there is a distinction between added  
4 sugars and naturally occurring sugars; 2) added sugars have no beneficial nutritional value,  
5 contribute only empty calories and have recognized health risks 3) consumers should either  
6 eliminate or greatly limit their consumption of added sugars and foods containing added sugars; 4)  
7 it is the ingredient list and not the nutrition facts panel of a food's label that informs consumers of  
8 the presence of added sugars; and 5) consumers need to be careful to avoid added sugar that is  
9 disguised by another name.

10 147. The 2010 Dietary Guidelines promulgated by U.S. Department of Health and Human  
11 Services and the U.S. Department of Agriculture make clear that 1) there is a distinction between  
12 "added sugars" and naturally occurring sugars; 2) consumers should either eliminate or greatly limit  
13 their consumption of added sugars and foods containing added sugars; 3) it is the ingredient list and  
14 not the nutrition facts portion of a food's label that informs consumers of the presence of "added  
15 sugars." <http://www.health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf>.

16 148. Other federal government agencies adopt a similar approach to added sugars. For  
17 instance, the National Institute of Health 1) confirms the health risks posed by added sugar, 2)  
18 indicates the need to read the ingredient list to find added sugars and 3) utilizes a list that fails to  
19 include the false and misleading term evaporated cane juice.

20 <http://www.nia.nih.gov/health/publication/whats-your-plate/solid-fats-added-sugars>.

21 149. The United States government's approach to added sugars is echoed by other  
22 scientific, educational and medical entities like the American Heart Association ("AHA")  
23 ([http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Sugars-](http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Sugars-101_UCM_306024_Article.jsp)  
24 [101\\_UCM\\_306024\\_Article.jsp](http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Sugars-101_UCM_306024_Article.jsp)), the Harvard School of Public Health  
25 (<http://www.hsph.harvard.edu/nutritionsource/cereal-sugar-content>), and the Mayo Clinic  
26 (<http://www.mayoclinic.com/health/added-sugar/my00845>).

27 150. Even food related companies such as grocery store chains and food manufacturers  
28 have adopted a similar approach with respect to added sugars. See <http://www.shoprite.com/for->

1 [your-family/dietitians-corner/archives/sugar-by-any-other-name-is-still-sugar/](http://your-family/dietitians-corner/archives/sugar-by-any-other-name-is-still-sugar/);  
2 <http://www.publix.com/wellness/greenwise/products/ProductDetail.do?id=1930.>;  
3 <http://www.atkins.com/Science/Articles---Library/Sugar/Finding-Added-Sugars.aspx>.

4 151. Defendant's food has significant added sugar. Moreover, for many consumers the  
5 AHA actually recommends even lower daily limits of added sugar. For individuals with an 1800  
6 daily calorie requirement the AHA recommends a daily limit of 20 grams of added sugar. For  
7 individuals with a 1600 daily calorie requirement the AHA recommends a daily limit of 12 grams  
8 of added sugar. <http://circ.ahajournals.org/content/120/11/1011.full.pdf>.

9 152. Disclosure of the total number of grams of sugar in the Nutrition Panel of a foods  
10 label does not render the use of ECJ in the ingredients list non-misleading. First, the total sugars  
11 disclosure does not disclose the presence of added sugars as opposed to sugars occurring naturally  
12 in other ingredients. Second, the disclosure of the total sugars does not disclose the nature of the  
13 added sugars. Not all sugars are created equal. Some, like honey for instance, may be perceived by  
14 reasonable consumers as relatively innocuous or even nutritionally beneficial. Others, like high  
15 fructose corn syrup, have acquired a negative reputation, and many reasonable consumers seek to  
16 avoid them. Sucrose – the one that consumers know simply as “sugar” on food ingredient lists – is  
17 decidedly in the latter category, especially among the health-conscious consumers (like Plaintiff)  
18 that Defendant targets. Thus, regardless of any total sugars disclosure, the use of the term ECJ on  
19 the ingredient list is doubly misleading because it conceals both the presence of added sugar in  
20 general, *and* the nature of the sugar added.

21 153. Defendant's use of the word “cane” was not sufficient to advise Plaintiff that  
22 “evaporated cane juice” was sugar. The term “cane” is not exclusively a reference to sugar or sugar  
23 cane. Many other types of cane exist and are used in foods, for example, bamboo cane and sorghum  
24 cane, both which produce juice. *See e.g.* 21 C.F.R. § 168.160 (“sorghum cane”). Corn is a form of  
25 cane. There are over 1000 species just of bamboo and over 10,000 members of the family of plants  
26 that includes corn and sugar cane. Most common berries such as blackberries, raspberries, blue  
27 berries and goji berries grow on canes and are referred to as “cane berries.” Of course, Defendant  
28 utilized the term “cane” with the term “juice,” a defined, regulated term not commonly associated

1 with sugar or added sugar.

2 154. Moreover, even to the extent the word “cane” might be construed to necessarily or  
3 obviously referring to sugar cane, the use of the term ECJ is misleading because it implies that the  
4 product is just dehydrated cane squeezings, which it is not. That would be another product, known  
5 as “panela,” which is prepared by evaporating the “juice” of the sugar cane plant without stripping  
6 away the nutrients in the refining process as is done with the ingredient Defendant lists as ECJ. The  
7 sugar cane product utilized as an ingredient by Defendant is far removed from natural sugar cane or  
8 unrefined sugar cane juice. Natural sugar cane is described by sources as healthy and nutritious,  
9 containing vitamins, minerals, enzymes, fibers, and phytonutrients that help the body digest  
10 naturally occurring sugars, such as lactose, glucose and fructose. It also is reported to contain  
11 vitamins A, C, B1, B2, B6, niacin, and pantothenic acid, which work synergistically with the  
12 minerals to nourish the body. Sugar cane also reportedly contains a unique mix of antioxidant  
13 polyphenols. The polyphenols, vitamins, and minerals present in sugar cane are claimed to help  
14 slow down the absorption of the sugars and prevent the sharp rise in blood sugar levels associated  
15 with refined sugar. Similarly, raw sugar cane juice has been described by some as a “wonder food”  
16 that has many beneficial properties. The ECJ in the Defendant’s Misbranded Food Products  
17 contains none of these health benefits because during processing the nutrients have been pressed,  
18 boiled and strained out.

19 155. Thus, evaporated cane juice is neither “juice” nor only subject to “evaporation” – a  
20 process that absent pressing, boiling, and separation would leave the sugar crystals with their  
21 nutrients still intact. From a nutritional standpoint, evaporated cane juice is not significantly  
22 different than refined white sugar. Refined sugar and evaporated cane juice both have 111 calories  
23 per ounce and they are both about 99% sucrose (*i.e.*, empty calories).

24 **K. Plaintiff Was Injured As A Result Of Defendant’s Misleading Conduct**

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

1           157. Plaintiff did not know that the ingredient listed as ECJ was in fact sucrose and  
2 essentially the nutritional equivalent of ordinary white sugar, and Plaintiff relied on the Defendant’s  
3 explicit ECJ representations and the absence of added “sugar” on the ingredient list. Plaintiff  
4 would not have bought the Purchased Products had she known that the ingredient declared as “ECJ”  
5 was really added sugar (*i.e.*, added sucrose). As a result of such reliance, Plaintiff thought that  
6 Defendant’s Misbranded Food Products were preferable to other similar products lacking such  
7 statements, or accurately listing added “sugar” as an ingredient.

8           158. Reasonable consumers would be, and were, misled in the same manner as Plaintiff in  
9 that a reasonable consumer would not recognize that the ingredient listed as ECJ is really what is  
10 more commonly known as added “sugar.”

11           159. As a result of Defendant’s unlawful misrepresentations, Plaintiff and thousands of  
12 others in California and throughout the United States purchased the Purchased Products and the  
13 Class Products at issue.

14           160. Defendant’s use of the term ECJ misleads consumers into paying a premium price  
15 for inferior or undesirable ingredients or for products that contain ingredients not listed on the label,  
16 and Plaintiff and the class paid an unwarranted premium price for the Misbranded Food Products, at  
17 least in part because of the misleading manner in which concealed the presence of added sugar (*i.e.*,  
18 added sucrose) as an ingredient in the products.

19           161. As a result of Defendant’s deceptive use of the term ECJ, Plaintiff and the Class  
20 members purchased the Misbranded Food Products at issue. Plaintiff and the Class members have  
21 been proximately harmed, and Defendant has been unjustly enriched, by Defendant’s deceptive  
22 scheme.

23           162. Likewise, consistent with her desire eat healthy and natural foods, Plaintiff read the  
24 product labels looking for the presence of chemical preservatives. Plaintiff did not know that the  
25 products she purchased contained the chemical preservatives noted above. She relied on the lack of  
26 any indication on the product label that it contained chemical preservatives and/or artificial flavors  
27 in deciding to purchase Defendant’s product. Plaintiff would not have bought the Purchased  
28 Products had she known that the product contained chemical preservatives. As a result of such

1 reliance, Plaintiff thought that Defendant's Misbranded Food Products were preferable to other  
2 similar products that indicated on its label that chemical preservatives and/or artificial flavors were  
3 included as an ingredient.

4 163. Reasonable consumers would be, and were, misled in the same manner as Plaintiff in  
5 that a reasonable consumer would attach importance to the presence of chemical preservatives in a  
6 product in choosing whether to purchase that product. The reasonable consumer, like Plaintiff,  
7 would read the product labels looking for the presence of chemical preservatives. They would rely  
8 on the lack of any indication on the product label that it contained chemical preservatives in  
9 deciding to purchase Defendant's product. Like Plaintiff, the reasonable consumer would not have  
10 bought Defendant's Products had they known that the product contained chemical preservatives.  
11 As a result of such reliance, like Plaintiff, the reasonable consumer would believe that Defendant's  
12 Misbranded Food Products were preferable to other similar products that indicated on its label that  
13 chemical preservatives were included as an ingredient.

14 164. As a result of Defendant's unlawful misrepresentations, Plaintiff and thousands of  
15 others in California and throughout the United States purchased the Purchased Products and the  
16 Misbranded Products at issue.

17 165. Defendant's failure to disclose the presence of the chemical preservatives noted  
18 above mislead consumers into paying a premium price for inferior or undesirable ingredients or for  
19 products that contain ingredients not listed on the label, and Plaintiff and the class paid an  
20 unwarranted premium price for the Misbranded Food Products, at least in part because of the  
21 misleading manner in which concealed the presence of chemical preservatives as an ingredient in  
22 the products.

23 166. As a result of Defendant's deceptive labeling, i.e., hiding the presence of chemical  
24 preservatives in its products noted above, Plaintiff and the Class members purchased the  
25 Misbranded Food Products at issue. Plaintiff and the Class members have been proximately  
26 harmed, and Defendant has been unjustly enriched, by Defendant's deceptive scheme.

27 167. Further, consistent with her desire eat healthy and natural foods, Plaintiff read the  
28 product labels looking for nutrition content and health and/or drug claims. Plaintiff did not know



1 that the products she purchased did not conform with the nutrition content and health and/or drug  
2 claims noted above. She relied on the on the product label which claimed nutrition content and  
3 health and/or drug claims in deciding to purchase Defendant's product. Plaintiff would not have  
4 bought the Purchased Products had she known that the product did not conform with the nutrition  
5 content and health and/or drug claims noted above. As a result of such reliance, Plaintiff thought  
6 that Defendant's Misbranded Food Products were preferable to other similar products that did not  
7 indicated on its label the nutrition content and health and/or drug claims noted above.

8 168. Reasonable consumers would be, and were, misled in the same manner as Plaintiff in  
9 that a reasonable consumer would attach importance to the nutrition content and health and/or drug  
10 claims on a product in choosing whether to purchase that product. The reasonable consumer, like  
11 Plaintiff, would read the product labels looking for the nutrition content and health and/or drug  
12 claims. They would rely on the presence of any nutrition content and health and/or drug claims on  
13 the product label in deciding to purchase Defendant's product. Like Plaintiff, the reasonable  
14 consumer would not have bought Defendant's Products had they known that the product did not  
15 conform with the nutrition content and health and/or drug claims noted above. As a result of such  
16 reliance, like Plaintiff, the reasonable consumer would believe that Defendant's Misbranded Food  
17 Products were preferable to other similar products that did not indicate on its label the nutrition  
18 content and health and/or drug claims noted above.

19 169. As a result of Defendant's unlawful misrepresentations, Plaintiff and thousands of  
20 others in California and throughout the United States purchased the Purchased Products and the  
21 Misbranded Products at issue.

22 170. Defendant's false label stating the nutrition content and health and/or drug claims  
23 noted above mislead consumers into paying a premium price for inferior or undesirable ingredients  
24 or for products that did not conform with the claims listed on the label, and Plaintiff and the class  
25 paid an unwarranted premium price for the Misbranded Food Products, at least in part because of  
26 the misleading manner in which concealed the nonconformity with the nutrition content and health  
27 and/or drug claims noted above on the label of the products.

28 171. As a result of Defendant's deceptive labeling, i.e., products bearing labels not

1 conforming with the nutrition content and health and/or drug claims noted above, Plaintiff and the  
2 Class members purchased the Misbranded Food Products at issue. Plaintiff and the Class members  
3 have been proximately harmed, and Defendant has been unjustly enriched, by Defendant's  
4 deceptive scheme.

5 **L. Plaintiff Purchased Defendant's Misbranded Food Products**

6 172. As noted above, Plaintiff care about the nutritional content of food they buy and seek  
7 to maintain a healthy diet. Plaintiff read and reasonably relied on the ingredient lists on the labels  
8 of the Purchased Products before purchasing them as described herein. Plaintiff relied on  
9 Defendant's labeling as described herein and based and justified the decision to purchase  
10 Defendant's products, in substantial part, on the label.

11 173. As it related to products that listed ECJ as an ingredient, Plaintiff seeks to avoid  
12 and/or minimize added sugar in the food that they purchase. So, at the time of purchase, she read  
13 the labels of the Purchased Products to determine whether the Purchased Products contained added  
14 sugar by reading the ingredient list. In this case, when she read the ingredient list of the Purchased  
15 Products to determine if sugar had been added as an ingredient, "sugar" was not listed thus she was  
16 led to believe that the Purchased Products did not contain added sugar as an ingredient. She did not  
17 know that the ingredient "evaporated cane juice" was, in reality, added sugar at the time she made  
18 her purchase. Had she known "evaporated cane juice" was essentially the same thing as added  
19 sugar, she would not have purchased the Purchased Products. At the time she purchased the  
20 Purchased Products, because of the fact it used the term "juice," it sounded like something healthy.

21 174. Based on the Purchased Product labels, Plaintiff believed Defendant's products that  
22 she purchased did not contain added sugar as an ingredient. Likewise, at point of sale, Plaintiff did  
23 not know, and had no reason to know, that Defendant's ECJ claims were unlawful and unauthorized  
24 as set forth herein. Had Plaintiff known the Purchased Products contained added sugar (or syrup),  
25 she would not have purchased the Products. As a result, Plaintiff suffered injury-in-fact and lost  
26 money.

27 175. Plaintiff Susan Leonhart purchased Defendant's Misbranded Food Products,  
28 including but not limited to Heritage Flakes and EnviroKidz Panda Puffs cereal with the listed

1 ingredient “evaporated cane juice” or “organic evaporated cane juice” on occasions during the  
2 Class Period.

3 176. Plaintiff read the labels on Defendant’s Misbranded Food Products, including the  
4 ingredient ECJ on the back panel, before purchasing them. Plaintiff has disclosed in her initial  
5 disclosures and attached to their response to Defendant’s motion to dismiss true and correct copies  
6 of Heritage Flakes labels to Defendant.

7 177. Plaintiff would not have purchased Defendant’s Misbranded Food Products had  
8 Plaintiff known that the Misbranded Food Products contained added sugar or dried cane syrup, or  
9 that the products were illegal to sell or possess. Plaintiff read the labels on Defendant’s Misbranded  
10 Food Products, including the Ingredient, “evaporated cane juice” on the labels before purchasing  
11 them.

12 178. Plaintiff relied on Defendant’s package labeling including the ingredient,  
13 “evaporated cane juice” and justified their decision to purchase Defendant’s products in substantial  
14 part on Defendant’s package labeling including the ingredient, “evaporated cane juice.”

15 179. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant’s  
16 products were misbranded as set forth herein, and would not have bought the products had she  
17 known the truth about them, and that they were illegal to sell or possess.

18 180. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant’s  
19 misuse of “evaporated cane juice” were unlawful and unauthorized as set forth herein, and would  
20 not have bought the products had she known the truth about them.

21 181. As a result of Defendant’s unlawful “evaporated cane juice” claim, Plaintiff and  
22 thousands of others in California and throughout the United States purchased the Misbranded Food  
23 Products at issue.

24 182. Defendant’s labeling, advertising and marketing as alleged herein are false and  
25 misleading and were designed to increase sales of the products at issue. Defendant’s  
26 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a  
27 reasonable person would attach importance to Defendant’s misrepresentations in determining  
28 whether to purchase the products at issue.

1           183. A reasonable person would also attach importance to whether Defendant's products  
2 were legally salable, and capable of legal possession, and to Defendant's representations about  
3 these issues in determining whether to purchase the products at issue. Plaintiff would not have  
4 purchased Defendant's Misbranded Food Products had she known they were not capable of being  
5 legally sold or held.

6           184. As a result of Defendant's unlawful use of the unlawful term ECJ, Plaintiff and the  
7 Class members purchased the Misbranded Food Products at issue. Plaintiff and the Class members  
8 have been proximately harmed, and Defendant has been unjustly enriched, by Defendant's  
9 deceptive and unlawful scheme.

10           185. As it related to products that failed to disclose the presence of a chemical  
11 preservative as an ingredient, Plaintiff seeks to avoid and/or minimize chemical preservatives in the  
12 food that she purchases. So, at the time of purchase, she read the labels of the Purchased Products  
13 to determine whether the Purchased Products contained chemical preservatives by reading the  
14 ingredient list. In this case, when she read the ingredient list of the Purchased Products to  
15 determine if chemical preservatives had been added as an ingredient, none were listed thus she were  
16 led to believe that the Purchased Products did not contain chemical preservatives as an ingredient.  
17 She did not know that the ingredients citric acid and tocopherols in the Purchased Products were  
18 chemical preservatives at the time she made her purchase. Had she known the ingredients citric  
19 acid and tocopherols in the Purchased Products were chemical preservatives, she would not have  
20 purchased the Purchased Products.

21           186. Based on the Purchased Product labels, Plaintiff believed Defendant's products that  
22 she purchased did not contain chemical preservatives and/or artificial flavors as an ingredient.  
23 Likewise, at point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
24 failure to disclose the presence of chemical preservatives rendered the Purchased Products unlawful  
25 and unauthorized as set forth herein. Had Plaintiff known the Purchased Products contained  
26 chemical preservatives, she would not have purchased the Products. As a result, Plaintiff suffered  
27 injury-in-fact and lost money.

28           187. Plaintiff Susan Leonhart purchased Defendant's Misbranded Food Products Heritage

1 Flakes and EnviroKidz Panda Puffs cereal during the Class Period.

2 188. Plaintiff read the labels on Defendant's Misbranded Food Products, including the  
3 ingredient list on the back panel, before purchasing them. Plaintiff have disclosed in their initial  
4 disclosures and attached to their response to Defendant's motion to dismiss true and correct copies  
5 of Heritage Flakes labels to Defendant.

6 189. Plaintiff would not have purchased Defendant's Misbranded Food Products had  
7 Plaintiff known that the Misbranded Food Products contained chemical preservatives, or that the  
8 products were illegal to sell or possess. Plaintiff read the labels on Defendant's Misbranded Food  
9 Products on the labels before purchasing them.

10 190. Plaintiff relied on Defendant's package labeling and based and the absence of any  
11 disclosed artificial flavors justified her decision to purchase Defendant's products in substantial part  
12 on Defendant's package labeling including the absence of any disclosed chemical preservatives.

13 191. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
14 products were misbranded as set forth herein, and would not have bought the products had she  
15 known the truth about them, and that they were illegal to sell or possess.

16 192. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
17 failure to disclose the presence and function of chemical preservatives were unlawful and  
18 unauthorized as set forth herein, and would not have bought the products had she known the truth  
19 about them.

20 193. As a result of Defendant's failure to disclose the presence and function of chemical  
21 preservatives, Plaintiff and thousands of others in California and throughout the United States  
22 purchased the Misbranded Food Products at issue.

23 194. Defendant's labeling, advertising and marketing as alleged herein are false and  
24 misleading and were designed to increase sales of the products at issue. Defendant's  
25 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a  
26 reasonable person would attach importance to Defendant's misrepresentations in determining  
27 whether to purchase the products at issue.

28 195. A reasonable person would also attach importance to whether Defendant's products

1 were legally salable, and capable of legal possession, and to Defendant's representations about  
2 these issues in determining whether to purchase the products at issue. Plaintiff would not have  
3 purchased Defendant's Misbranded Food Products had they known they were not capable of being  
4 legally sold or held.

5 196. As a result of Defendant's unlawful failure to disclose the presence of chemical  
6 preservatives on the product label, Plaintiff and the Class members purchased the Misbranded Food  
7 Products at issue. Plaintiff and the Class members have been proximately harmed, and Defendant  
8 has been unjustly enriched, by Defendant's deceptive and unlawful scheme.

9 197. Regarding products bearing labels stating false nutrition content claims and  
10 unapproved health and/or drug claims, Plaintiff seeks out food that is low in sodium and/or those  
11 foods that affirmatively state their nutritional value. So, at the time of purchase, she read the labels  
12 of the Purchased Products to determine whether the Purchased Products were low in sodium and/or  
13 those foods that affirmatively stated their nutritional value by reading the ingredient list and the  
14 label. In this case, when she read the ingredient list of the Purchased Products to determine if they  
15 were low in sodium and/or those foods that affirmatively stated their nutritional value, they were  
16 stated to be so, thus she was led to believe that the Purchased Products were low in sodium and  
17 were a product that conformed with the approved health and/or drug claim as stated on the label.  
18 She did not know that the sodium levels were disqualifying or that the stated health and/or drug  
19 claims were unapproved in the Purchased Products at the time she made her purchase. Had she  
20 known the sodium levels were disqualifying or that the stated health and/or drug claims were  
21 unapproved in the Purchased Products, she would not have purchased the Purchased Products.

22 198. Based on the Purchased Product labels, Plaintiff believed Defendant's products that  
23 she purchased were low in sodium and possessed an approved health and/or drug claim. Likewise,  
24 at point of sale, Plaintiff did not know, and had no reason to know, that Defendant's failure to  
25 disclose that the disqualifying sodium levels or that the unapproved stated health and/or drug claims  
26 rendered the Purchased Products unlawful and unauthorized as set forth herein. Had Plaintiff  
27 known that the sodium levels were disqualifying or that the stated health and/or drug claims were  
28 unapproved, she would not have purchased the Products. As a result, Plaintiff suffered injury-in-

1 fact and lost money.

2 199. Plaintiff Susan Leonhart purchased Defendant's Misbranded Food Products Heritage  
3 Flakes and EnviroKidz Panda Puffs cereal during the Class Period.

4 200. Plaintiff read the labels on Defendant's Misbranded Food Products, including the  
5 ingredient list on the back panel, before purchasing them. Plaintiff have disclosed in their initial  
6 disclosures and attached to their response to Defendant's motion to dismiss true and correct copies  
7 of Heritage Flakes labels to Defendant.

8 201. Plaintiff would not have purchased Defendant's Misbranded Food Products had  
9 Plaintiff known that the Misbranded Food Products contained sodium levels that were disqualifying  
10 or that the stated health and/or drug claims was unapproved, or that the products were illegal to sell  
11 or possess. Plaintiff read the labels on Defendant's Misbranded Food Products on the labels before  
12 purchasing them.

13 202. Plaintiff relied on Defendant's package labeling and based on the representations  
14 therein justified her decision to purchase Defendant's products in substantial part on Defendant's  
15 package labeling including the low sodium claim and the health and/or drug claim.

16 203. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
17 products were misbranded as set forth herein, and would not have bought the products had she  
18 known the truth about them, and that they were illegal to sell or possess.

19 204. At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's  
20 failure to disclose that the sodium levels that were disqualifying or that the stated health and/or drug  
21 claims was unapproved was unlawful and unauthorized as set forth herein, and would not have  
22 bought the products had she known the truth about them.

23 205. As a result of Defendant's labels stating false nutrition content claims and  
24 unapproved health and/or drug claims, Plaintiff and thousands of others in California and  
25 throughout the United States purchased the Misbranded Food Products at issue.

26 206. Defendant's labeling, advertising and marketing as alleged herein are false and  
27 misleading and were designed to increase sales of the products at issue. Defendant's  
28 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a

1 reasonable person would attach importance to Defendant's misrepresentations in determining  
2 whether to purchase the products at issue.

3 207. A reasonable person would also attach importance to whether Defendant's products  
4 were legally salable, and capable of legal possession, and to Defendant's representations about  
5 these issues in determining whether to purchase the products at issue. Plaintiff would not have  
6 purchased Defendant's Misbranded Food Products had they known they were not capable of being  
7 legally sold or held.

8 208. As a result of Defendant's unlawful product labels stating false nutrition content  
9 claims and unapproved health and/or drug claims, Plaintiff and the Class members purchased the  
10 Misbranded Food Products at issue. Plaintiff and the Class members have been proximately  
11 harmed, and Defendant has been unjustly enriched, by Defendant's deceptive and unlawful scheme.

12 **CLASS ACTION ALLEGATIONS**

13 209. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure  
14 23(b)(2) and 23(b)(3) on behalf of the following class:

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

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

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

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



1           213. Common Questions Predominate: This action involves common questions of law  
2 and fact applicable to each Class member that predominate over questions that affect only  
3 individual Class members. Thus, proof of a common set of facts will establish the right of each  
4 Class member to recover. Questions of law and fact common to each Class member include, just  
5 for example:

- 6           a. Whether Defendant engaged in unlawful, unfair or deceptive  
7 business practices by failing to properly package and label its  
8 Misbranded Food Products sold to consumers;
- 9           b. Whether the food products at issue were misbranded as a matter of  
10 law;
- 11           c. Whether Defendant made unlawful and misleading “evaporated cane  
12 juice” or health or low sodium claims with respect to food products  
13 sold to consumers;
- 14           d. Whether Defendant utilized nonfunctional slack fill packaging or  
15 failed to properly list or describe the ingredients in its products;
- 16           e. Whether Defendant violated California Bus. & Prof. Code § 17200,  
17 *et seq.*, California Bus. & Prof. Code § 17500, *et seq.*, the  
18 Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq.*,  
19 California Civ. Code § 1790, *et seq.*, 15 U.S.C. § 2301, *et seq.*, and  
20 the Sherman Law;
- 21           f. Whether Plaintiff and the Class are entitled to equitable and/or  
22 injunctive relief;
- 23           g. Whether Defendant’s unlawful, unfair and/or deceptive practices  
24 harmed Plaintiff and the Class; and
- 25           h. Whether Defendant was unjustly enriched by its deceptive practices.

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

1 arise from the same practices and course of conduct that give rise to the claims of the Class  
2 members and are based on the same legal theories.

3         215. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.  
4 Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to  
5 the interests of the Class members. Plaintiff has retained highly competent and experienced class  
6 action attorneys to represent her interests and those of the members of the Class. Plaintiff and  
7 Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this  
8 class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class  
9 members and will diligently discharge those duties by vigorously seeking the maximum possible  
10 recovery for the Class.

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

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



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

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

5 230. As a result of Defendant's conduct, Plaintiff and the Class, pursuant to Business and  
6 Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and  
7 such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains  
8 and restore any money paid for Defendant's Misbranded Food Products by Plaintiff and the Class.

9  
10 **SECOND CAUSE OF ACTION**  
**Business and Professions Code § 17200 *et seq.***  
**Unfair Business Acts and Practices**

11  
12 213. Plaintiff incorporates by reference each allegation set forth above.

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

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

16 235. Plaintiff and members of the Class suffered a substantial injury by virtue of buying  
17 Defendant's Misbranded Food Products that they would not have purchased absent Defendant's  
18 illegal conduct.

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

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

25 238. Plaintiff and the Class who purchased Defendant's Misbranded Food Products had  
26 no way of reasonably knowing that the products were misbranded and were not properly marketed,  
27 advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of  
28 them suffered.

1           239. The consequences of Defendant's conduct as set forth herein outweigh any  
2 justification, motive or reason therefor. Defendant's conduct is and continues to be unlawful,  
3 illegal, immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious to  
4 Plaintiff and the Class.

5           240. Pursuant to Business and Professions Code § 17203, as a result of Defendant's  
6 conduct, Plaintiff and the Class, are entitled to an order enjoining such future conduct by  
7 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's  
8 ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by Plaintiff  
9 and the Class.

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

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

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

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

18           244. Defendant's misleading marketing, advertising, packaging and labeling of the  
19 Misbranded Food Products and misrepresentations that the products were salable, capable of  
20 possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff  
21 and members of the Class were deceived. Defendant has engaged in fraudulent business acts and  
22 practices.

23           245. Defendant's fraud and deception caused Plaintiff and the Class to purchase  
24 Defendant's Misbranded Food Products that they would otherwise not have purchased had they  
25 known the true nature of those products.

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

          247. As a result of Defendant's conduct as set forth herein, Plaintiff and the Class,

1 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future  
2 conduct by Defendant, and such other orders and judgments which may be necessary to disgorge  
3 Defendant's ill-gotten gains and restore any money paid for Defendant's Misbranded Food  
4 Products by Plaintiff and the Class.

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

8 248. Plaintiff incorporates by reference each allegation set forth above.

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

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

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

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

253. Defendant's conduct in disseminating misleading and deceptive statements in

1 California and nationwide to Plaintiff and the Class was and is likely to deceive reasonable  
2 consumers by obfuscating the true composition and nature of Defendant's Misbranded Food  
3 Products in violation of the "misleading prong" of California Business and Professions Code  
4 §17500 *et seq.*

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

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

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

17 257. Plaintiff incorporates by reference each allegation set forth above.

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

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

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

1 Class. Defendant knew, or in the exercise of reasonable care should have known, that these  
2 statements were untrue.

3 261. In furtherance of its plan and scheme, Defendant prepared and distributed in  
4 California and nationwide via product packaging and labeling, and other promotional materials,  
5 statements that falsely advertise the composition of Defendant's Misbranded Food Products, and  
6 falsely misrepresented the nature of those products. Plaintiff and the Class were the intended  
7 targets of such representations and would reasonably be deceived by Defendant's materials.

8 262. Defendant's conduct in disseminating untrue advertising throughout California  
9 deceived Plaintiff and members of the Class by obfuscating the contents, nature and quality of  
10 Defendant's Misbranded Food Products in violation of the "untrue prong" of California Business  
11 and Professions Code § 17500.

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

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

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

23 265. Plaintiff incorporates by reference each allegation set forth above.

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

28



1           267. At the time of any amendment seeking damages under the CLRA, Plaintiff will  
2 demonstrate that the violations of the CLRA by Defendant were willful, oppressive and fraudulent,  
3 thus supporting an award of punitive damages.

4           268. Consequently, Plaintiff and the Class will be entitled to actual and punitive damages  
5 against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code §  
6 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-described acts  
7 and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and  
8 attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal.  
9 Civ. Code § 1780.

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

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

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

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

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

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

27           275. By engaging in the conduct set forth herein, Defendant violated and continues to  
28 violate Section 1770(a)(9) of the CLRA, because Defendant's conduct constitutes unfair methods of

1 competition and unfair or fraudulent acts or practices in that they advertise goods with the intent not  
2 to sell the goods as advertised.

3 276. By engaging in the conduct set forth herein, Defendant violated and continues to  
4 violate Section 1770(a)(16) of the CLRA, because Defendant's conduct constitutes unfair methods  
5 of competition and unfair or fraudulent acts or practices in that they represent that a subject of a  
6 transaction has been supplied in accordance with a previous representation when it has not.

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

11 **SEVENTH CAUSE OF ACTION**  
12 **Restitution Based on Unjust Enrichment/Quasi-Contract**

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

14 279. As a result of Defendant's fraudulent and misleading labeling, advertising,  
15 marketing and sales of Defendant's Misbranded Food Products, Defendant was enriched at the  
16 expense of Plaintiff and the Class.

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

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

26  
27 **EIGHTH CAUSE OF ACTION**  
28 **Breach of Implied Warranty of Merchantability**

282. Plaintiff incorporates by reference each allegation set forth above. Implied in the

1 purchase of the Purchased and Misbranded Products by Plaintiff and the Class is the warranty that  
2 the products are legal and can be lawfully possessed and resold.

3 283. Defendant knowingly and intentionally misbranded these products.

4 284. Defendant knew or should have known that those products were illegal to sell or  
5 possess.

6 285. When Defendant sold those products they impliedly warranted that the products  
7 were legal and could be lawfully possessed and resold.

8 286. Plaintiff would not have knowingly purchased products that were illegal to possess,  
9 and are unsellable, which potentially exposed Plaintiff to criminal prosecution.

10 287. No reasonable consumer would knowingly purchase products that are illegal to  
11 possess, and are unsellable, which potentially expose that consumer to criminal prosecution.

12 288. The Purchased and Misbranded products were unfit for the ordinary purpose for  
13 which Plaintiff and the Class purchased them.

14 289. The Purchased and Misbranded products were all misbranded, thus, contraband and  
15 illegal to sell or possess, and therefore not merchantable as a matter of law.

16 290. In fact, these products were economically worthless.

17 291. As a result, Plaintiff and the Class were injured through their purchase of an  
18 unsuitable, useless, illegal, and unsellable product. Plaintiff purchased these products believing  
19 them to be a legal form of food, but due to the products' misbranding these products are unfit for  
20 sale, possession, or consumption by the State of California and the federal government.

21 292. The Purchased and Misbranded products were unfit for the specific purpose that  
22 Plaintiff and the Class purchased them. Plaintiff and the Class purchased these products believing  
23 them to be natural products free of chemical preservatives, artificial flavors, or added sugars  
24 because that is the type of health and natural products that Plaintiff and the Class desired. But these  
25 products were unfit for that particular purpose because they contained undisclosed chemical  
26 preservatives, artificial flavors, or added sugars.

27 293. By reason of the foregoing, Plaintiff and the Class were damaged in the amount they  
28 paid for the products.

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**NINTH CAUSE OF ACTION**  
**Common Count Of Money Had And Received -**  
**Recovery In Assumpsit of Funds Paid For Misbranded Products That Are**  
**Illegal To Sell**

294. Plaintiff repeats and realleges each of the above allegations as if fully set forth herein.

295. By definition, a contract is an agreement to do or not to do a certain thing. The sale and purchase of food items is a type of contract. The sale of misbranded food products is a type of illegal contract specifically prohibited by law.

296. The sale of a misbranded food product is an illegal act in California and nationwide. Such a sale is expressly prohibited by California and federal law and the laws of other states.

297. Pursuant to California Civ. Code § 3523 it is a codified legal maxim that “for every wrong there is a remedy.” The unlawful sale of misbranded food products that are illegal to sell or possess as a matter of express statutory law pursuant to Sherman Law § 110760 – 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 right to recover for the damages suffered as a result of the illegal sale.

298. The sale of a misbranded product violates the public policy of California and the other forty-nine states.

299. The sale of a misbranded product in California constitutes an illegal contract and is void under the laws of California. Such illegal transactions are void under common law and the laws of the other states as well.

300. Plaintiff and the Class seek damages and restitution under the common law and numerous statutory provisions enacted by California including but not limited to California Civ. Code §§ 1427, 1428, 1549, 1619, 1621, 1667, 1668, 1712, 3281-82, 3294, 3300, 3333, 3345, 3360, 3366-68, 3523, and 3539. These statutory provisions and the common law establish the right of Plaintiff and the Class to 1) a remedy for Defendant’s illegal acts, 2) various types of damages and restitution. Moreover, while Plaintiff and the Class suffered significant injury and damage to be

1 proved at trial, even if that were not the case, then pursuant to California Civ. Code § 3360, the law  
2 would still allow Plaintiff and the Class to recover, inter alia, nominal damages due to the  
3 Defendant's illegal conduct.

4 301. Plaintiff and members of the Class were unaware that the Misbranded Food Products  
5 purchased by Plaintiff and members of the Class were misbranded and thus illegal to sell or  
6 possess. Plaintiff and members of the Class thus lacked the factual information to indicate to  
7 Plaintiff and members of the Class that the sale of Misbranded Food Products in California or any  
8 other state constituted an illegal act.

9 302. Plaintiff and members of the Class were justifiably ignorant of facts of which the  
10 Defendant was not ignorant.

11 303. Plaintiff and members of the Class were not acquainted with the statutory  
12 regulations relating to the Defendant's food business and were justified in presuming special  
13 knowledge by the Defendant of such regulations.

14 304. Plaintiff and the members of the Class were thus not in pari delicto with the  
15 Defendant who had superior knowledge of facts of which the Plaintiff and members of the Class  
16 were unaware. Plaintiff and the Class were justifiably ignorant of facts of which the Defendant was  
17 not ignorant, Plaintiff and the Class were not acquainted with the statutory regulations relating to  
18 the Defendant's particular business and Plaintiff and the Class were justified in presuming special  
19 knowledge by the Defendant of such regulations.

20 305. Plaintiff and the members of the Class are thus entitled to recover the funds they  
21 expended to purchase the Defendant's Misbranded Food Products.

22 306. Defendant received and has possession of money that it obtained from the illegal  
23 sale of misbranded food products to the Plaintiff and the Class in transactions that were unlawful,  
24 expressly prohibited by statute and void. The money held by Defendant is the property of Plaintiff  
25 and the Class. Defendant is obliged in equity and good conscience to restore it to Plaintiff and the  
26 Class.

27 **TENTH CAUSE OF ACTION**  
28 **Declaratory Judgment That Defendant Violated Federal And State Laws Regarding**  
**Mislabeled And Misbranded Food Products**

1           307. Plaintiff repeats and realleges each of the above allegations as if fully set forth  
2 herein.

3           308. The sale of a misbranded food product is an illegal act in California and nationwide.  
4 Such a sale is expressly prohibited by Federal and California law as well as the laws of the other  
5 states.

6           309. The sale of a misbranded product violates the public policy of California and the  
7 other 49 states.

8           310. The sale of a misbranded product in California constitutes an illegal contract and is  
9 void under Federal law and the laws of California and the other states.

10           311. Plaintiff and other members of the Class who purchased Defendant's Misbranded  
11 Food Products in California and nationwide further seek to enjoin such unlawful deceptive and  
12 unconscionable trade practices as described above. Each of the Class members who purchased  
13 Defendant's Misbranded Food Products in California and nationwide will be irreparably harmed  
14 unless the unlawful actions of the Defendant are enjoined in that Defendant will continue to falsely  
15 and misleadingly and unlawfully conceal the chemical preservatives contained in its Misbranded  
16 Food Products and to illegally manufacture, distribute and sell this illegally labeled, misbranded  
17 product in violation of the food and drug laws that prohibit such actions. Plaintiff and other  
18 members of the Class who purchased Defendant's Misbranded Food Products in California and  
19 nationwide therefore seek to enjoin the manufacture, distribution or sale of any of Defendant's  
20 Misbranded Food Products in California and further request an order granting them injunctive relief  
21 ordering appropriate corrective advertising and appropriate disclosures on the labeling in  
22 advertising, marketing and promotion of Defendant's Misbranded Food Products in California and  
23 nationwide.

24           312. A case or controversy exists among Plaintiff, the Class and Defendant as to  
25 applicability of the federal and state laws as to Defendant.

26           313. As a direct and proximate result of Defendant's conduct, Plaintiff and the Class have  
27 suffered and will continue to suffer damages.

28           314. Pursuant to 28 USCS § 2201, 28 USCS § 2202, F.R.C.P. 57, and California Code of

1 Civ. Proc. § 1060, Plaintiff, on behalf of Plaintiff and the Class, request a declaration of rights and  
2 duties with respect to Defendant, and an Order enjoining Defendant from continuing to market,  
3 advertise, distribute, and sell Misbranded Food Products in the unlawful manner described herein;  
4 and ordering Defendant to engage in corrective action.

5 315. Absent such injunctive relief Defendant will continue to illegally manufacture,  
6 distribute and sell mislabeled and misbranded food products to the detriment of consumers in the  
7 state of California and nationwide.

8  
9 **ELEVENTH CAUSE OF ACTION**  
**Breach Of Express Warranty**

10 316. Plaintiff repeats and realleges each of the above allegations as if fully set forth  
11 herein.

12 317. Defendant's affirmations of fact and/or promises relating to their Misbranded Food  
13 Products created express written warranties that the products would conform to Defendant's  
14 affirmations of fact and/or promises.

15 318. Alternatively, Defendant's descriptions of their Misbranded Food Products became  
16 part of the bases of the bargains, creating express written warranties that the products purchased by  
17 Plaintiff and the other Class members would conform to Defendant's descriptions and  
18 specifications.

19 319. In fact, the Misbranded Food Products purchased by Plaintiff did not so conform.

20 320. Defendant provided written warranties that its Misbranded Food Products were  
21 labeled in compliance with state and federal law and were not misbranded under state and federal  
22 law. Defendant breached these express written warranties. The Plaintiff and the Class were Third  
23 party beneficiaries of the Defendant's warranties. Defendant breached these express written  
24 warranties.

25 321. As a result of the foregoing, Plaintiff and the other Class members have suffered  
26 damages, in that the value of the products they purchased was less than warranted by Defendant.

27 322. Plaintiff asserts this cause of action for violations of the laws of state and federal law  
28 pertaining to express warranties.

1           323. Defendant engaged in a scheme of offering Misbranded Food Products for sale to  
2 Plaintiff and members of the Class by way of, inter alia, product packaging and labeling, and other  
3 promotional materials.

4           324. In furtherance of its plan and scheme, Defendant prepared and distributed within  
5 California and nationwide via product packaging and labeling, and other promotional materials,  
6 statements that misleadingly and deceptively represented the composition and nature of Misbranded  
7 Food Products.

8           325. Plaintiff and the Class were the intended targets of such representations.

9           326. Plaintiff and the Class reasonably relied on Defendant's representations.

10           327. Plaintiff and the Class were injured as a result of Defendant's breach of their express  
11 warranties about Misbranded Food Products.

12  
13                                   **TWELFTH CAUSE OF ACTION**  
  **Negligent Misrepresentation**

14           328. Plaintiff repeats and realleges each of the above allegations as if fully set forth  
15 herein.

16           329. In making representations of fact to Plaintiff and the other Class members about  
17 their Misbranded Food Products, Defendant failed to fulfill their duties to disclose the material facts  
18 alleged above. Such failure to disclose on the part of Defendant amounts to negligent  
19 misrepresentation.

20           330. Plaintiff and the other Class members, as a direct and proximate cause of  
21 Defendant's negligent misrepresentations, reasonably relied upon such misrepresentations to their  
22 detriment. By reason thereof, Plaintiff and the other Class members have suffered damages in an  
23 amount to be proved at trial.

24                                   **THIRTEENTH CAUSE OF ACTION**  
  **Negligence**

25           331. Plaintiff repeats and realleges each of the above allegations as if fully set forth  
26 herein.

27           332. In making representations of fact to Plaintiff and the other Class members about  
28 their Misbranded Food Products, Defendant failed to lawfully label or advertise their Misbranded



1 Food Products and violated their duties to disclose the material facts alleged above. Such conduct  
2 on the part of Defendant amounts to negligence.

3 333. Plaintiff and the other Class members, as a direct and proximate cause of  
4 Defendant's negligence, reasonably relied upon such representations to their detriment. By reason  
5 thereof, Plaintiff and the other Class members have suffered damages.

6 334. As described above, Defendant's actions violated a number of express statutory  
7 provisions designed to protect Plaintiff and the Class. Defendant's illegal actions constitute  
8 negligence per se. Moreover, the statutory food labeling and misbranding provisions violated by  
9 Defendant are strict liability provisions.

10 335. As alleged above, Plaintiff and the Class were injured by Defendant's statutory  
11 violations and are entitled to recover an amount to be determined at trial due to the injuries and loss  
12 they suffered as a result of Defendant's negligence.

13 **JURY DEMAND**

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

15 **PRAYER FOR RELIEF**

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

- 18 A. For an order certifying this case as a class action and appointing Plaintiff and  
19 Plaintiff's counsel to represent the Class;
- 20 B. For an order awarding, as appropriate, damages, restitution or disgorgement to  
21 Plaintiff and the Class;
- 22 C. For an order requiring Defendant to immediately cease and desist from selling  
23 Misbranded Food Products in violation of law; enjoining Defendant from continuing to market,  
24 advertise, distribute, and sell these products in the unlawful manner described herein; and ordering  
25 Defendant to engage in corrective action;
- 26 D. For all equitable remedies available pursuant to Cal. Civ. Code § 1780;
- 27 E. For an order awarding attorneys' fees and costs;
- 28 F. For an order awarding punitive damages;

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- 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: May 23, 2014

Respectfully submitted,

s/Colin H. Dunn

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