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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ALEX ANG and LYNN STREIT,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

v.

BIMBO BAKERIES USA, INC.

Defendant.

**C 13 1196**

Case No.

**CLASS ACTION AND REPRESENTATIVE  
ACTION**

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

**JURY TRIAL DEMANDED**

Plaintiffs, Alex Ang and Lynn Streit, through their undersigned attorneys, bring this lawsuit against Bimbo Bakeries USA, Inc. ("Defendant" or the "Company"), as to their own acts upon personal knowledge, and as to all other matters upon information and belief. In order to remedy the harm arising from Defendant's illegal conduct, which has resulted in unjust profits, Plaintiffs bring this action on behalf of a nationwide class of consumers who, within the last four years, purchased Defendant's bakery products 1) bearing a statement on the product label indicating that the product was a "Good Source" or an "Excellent Source" of a nutrient but which product did not meet the minimum nutrient level threshold requirement for making such "Good Source" or "Excellent Source" claim; 2) bearing a "fresh" claim but containing chemical

1 preservatives; 3) bearing a claim to be 100% whole wheat despite containing non-whole wheat  
 2 flour; 4) claiming to be bread or a roll or bun but containing a substance banned by regulation  
 3 from such products such as added coloring; 5) bearing an undisclosed paid endorsement; or 6)  
 4 falsely claiming to be baked fresh daily or delivered fresh daily. Collectively, such products are  
 5 referred to herein as "Misbranded Food Products."

## 6 INTRODUCTION

7 1. Defendant is the largest bakery company in the United States. Defendant owns  
 8 and distributes numerous leading bakery brands in the United States, including Arnold, Ball Park  
 9 Bimbo, Boboli, Brownberry, Earthgrains, Entenmann's Francisco, Freihofer's, Marinela, Mrs  
 10 Baird's, Oroweat, Sara Lee, Stroehmann, Thomas, Tia Rosa and others.

11 2. Defendant is aware of the desire of many of its consumers to eat a healthier diet.  
 12 Recognizing that health claims drive sales, Defendant, as part of its overall marketing strategy,  
 13 actively promotes the purported health benefits of its products on its product labels, in its  
 14 advertising and on its websites.

15 3. For example, Defendant makes the following representations regarding products  
 16 produced by its various bakery brands:

- 17 • The label of Defendant's Thomas's Plain Bagel Thins claims  
 18 that the bread is a "Excellent Source of Fiber" when it does not meet the  
 19 legal requirements for making such a claim;
- 20 • The label of Defendant's Thomas's Plain Bagel Thins bears an  
 21 unlawful paid American Heart Association endorsement that has been  
 22 determined by the FDA to be misleading to consumers when used in the  
 23 manner it is used by the Defendant;
- 24 • The label of Defendant's Sara Lee 100% Whole Wheat Bread  
 25 claims that the bread is an "Excellent Source of Whole Grain" when the  
 26 term "Excellent Source" when it does not meet the legal requirements  
 27 for making such a claim;
- 28 • The labels of Defendant's Sara Lee Soft & Smooth Whole Grain  
 White Bread and Sara Lee Classic 100% Whole Wheat Bread claim that  
 each bread is a "Good Source of Whole Grains" when those breads do  
 not meet the legal requirements for making such a claim;

1           • The label of Defendant's Boboli Whole Wheat Thin Pizza Crust  
2           claims that the crust is an "Excellent Source of Fiber" when it does not  
3           meet the legal requirements for making such a claim and also makes an  
          unpermitted claim that states "May Reduce The Risk of Heart Disease;"

4           • The label of Defendant's Entenmann's products indicate that the  
5           Entenmann's bakery goods are made fresh every day and delivered to  
6           stores daily, "so you always have fresh, quality baked goods to put on  
7           your table or take with you." However, Entenmann's products offered  
          for sale are not baked fresh daily nor are they delivered daily nor, rather  
8           the products have a long shelf life and contain preservatives that belie  
          any claim that they are "fresh;"

9           • The label of Defendant's Bimbo Original Toasted Bread  
10          represents that product to be bread but in fact due to the presence of  
11          banned artificial colors not allowed in bread, that product fails to satisfy  
          the standard of identity for bread and cannot therefore be represented as  
          bread.

12           4. Defendant's website, [www.bimbobakeriesusa.com](http://www.bimbobakeriesusa.com) and the linked websites of its  
13          various product brands are also largely dedicated to promoting the nutritional and health aspects  
14          of its bakery products. The websites have sections dedicated to "Nutrition" that tout Defendant's  
15          commitment to nutrition and health. Furthermore, many of Defendant's brands such as Thomas,  
16          Arnold, Oroweat, Sara Lee, Freihofer, Boboli and Bimbo include similar sections describing the  
17          purported health and nutrition benefits of their brands' food products. Defendant places the web  
18          addresses of its websites on its package labels, including the labels on Misbranded Food Products  
19          purchased by Plaintiffs.

20           5. Defendant actively promotes the false nutrient content claims and purported health  
21          benefits of its Misbranded Food Products, notwithstanding the fact that such promotion violates  
22          California and federal law.

23           6. If a manufacturer is going to make a claim on a food label, the label must meet  
24          certain legal requirements that help consumers make informed choices and ensure that they are  
25          not misled. These laws recognize that reasonable consumers are likely to choose products  
26          claiming to have a health or nutritional benefit over otherwise similar food products that do not  
27          claim such benefits. Under California law, which is identical to federal law, a number of the  
28          Defendant's food labeling practices are unlawful because they are deceptive and misleading to

1 consumers: These include:

2  
3 A. Making unlawful nutrient content claims on the labels of food  
4 products that fail to meet the minimum nutritional requirements that are  
legally required for the nutrient content claims that are being made;

5 B. Representing foods to be "fresh" when those products have  
6 undergone manufacturing processes and contain chemical preservatives  
that preclude any representations about freshness as a matter of law;

7 C. Making unlawful and unapproved health claims about their  
8 products that are prohibited by law;

9 D. Representing that products satisfy the standard of identity for  
10 bread, rolls or buns when they do not because of the inclusion of banned  
ingredients;

11 E. Representing that products are 100% whole wheat when they fail  
12 to meet the criteria for such a claim because of the inclusion of banned  
ingredients; and

13 F. Representing that foods are baked or delivered daily when they  
14 are not.

15 7. Identical California and federal laws regulate the content of labels on packaged  
16 food. The California legislature in the Sherman Food Drug & Cosmetic Law (the "Sherman  
17 Law"), California Health & Safety Code § 109875, *et seq.*, adopted the provisions of the federal  
18 Food Drug & Cosmetic Act ("FDCA"), 21 U. S. C. § 301 *et seq.* Under FDCA § 403(a), food is  
19 "misbranded" if "its labeling is false or misleading in any particular," or if it does not contain  
20 certain information on its label or its labeling. 21 U.S.C. § 343(a).

21 8. 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  
23 claims that might be technically true, but are still misleading. If any one representation in the  
24 labeling is misleading, the entire food is misbranded, and no other statement in the labeling can  
25 cure a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking  
26 and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-*  
27 *Pathic Pharmacy*, 192 F.2d 62, 75 (9<sup>th</sup> Cir. 1951). Under the FDCA, it is not necessary to prove  
28 that anyone was actually misled.

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(2) members of the proposed class have a different citizenship from Defendant; and (3) the claims of the proposed class members exceed \$5,000,000 in the aggregate.

17. The Court has jurisdiction over the federal claim alleged herein pursuant to 28 U.S.C. § 1331, because it arises under the laws of the United States.

18. The Court has jurisdiction over the California claims alleged herein pursuant to 28 U.S.C. § 1367, because they form part of the same case or controversy under Article III of the United States Constitution.

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

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

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

### **FACTUAL ALLEGATIONS**

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

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

23. Pursuant to the Sherman Law, California has expressly adopted the federal labeling requirements as its own and indicated that “[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993,

1 or adopted on or after that date shall be the food regulations of this state.” California Health &  
2 Safety Code § 110100.

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

19 **B. FDA Enforcement History**

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

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

27 FDA’s research has found that with FOP labeling, people are less  
28 likely to check the Nutrition Facts label on the information panel of  
foods (usually, the back or side of the package). It is thus essential

1 that both the criteria and symbols used in front-of-package and  
2 shelf-labeling systems be nutritionally sound, well-designed to help  
3 consumers make informed and healthy food choices, and not be  
4 false or misleading. The agency is currently analyzing FOP labels  
5 that appear to be misleading. The agency is also looking for  
6 symbols that either expressly or by implication are nutrient content  
claims. We are assessing the criteria established by food  
manufacturers for such symbols and comparing them to our  
regulatory criteria.

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

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

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

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

1           29. On March 3, 2010, the FDA issued an "Open Letter to Industry from [FDA  
2 Commissioner] Dr. Hamburg" (hereinafter, "Open Letter"). The Open Letter reiterated the FDA's  
3 concern regarding false and misleading labeling by food manufacturers. In pertinent part the letter  
4 stated:

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

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

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

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

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

7 . . . .

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

14 I will close with the hope that these warning letters will give food  
15 manufacturers further clarification about what is expected of them  
16 as they review their current labeling. I am confident that our past  
17 cooperative efforts on nutrition information and claims in food  
18 labeling will continue as we jointly develop a practical, science-  
based front-of-pack regime that we can all use to help consumers  
choose healthier foods and healthier diets.

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

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

24 32. In these letters the FDA indicated that, as a result of the same type of claims  
25 utilized by Defendant, products were in "violation of the Federal Food, Drug, and Cosmetic Act  
26 ... and the applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR §  
27 101)" and "misbranded within the meaning of section 403(r)(1)(A) because the product label  
28 bears a nutrient content claim but does not meet the requirements to make the claim."

1           33. The warning letters were hardly isolated as the FDA has issued other warning  
2 letters to other companies for the same type of food labeling claims at issue in this case.

3           34. The FDA stated that the agency not only expected companies that received  
4 warning letters to correct their labeling practices but also anticipated that other firms would  
5 examine their food labels to ensure that they are in full compliance with food labeling  
6 requirements and make changes where necessary. Defendant did not change the labels on its  
7 Misbranded Food Products in response to these warning letters.

8           35. Defendant also ignored the 2009 FOP Guidance which detailed the FDA's  
9 guidance on how to make food labeling claims, and continued to utilize unlawful claims on the  
10 labels of their Misbranded Food Products. As such, the Defendant's Misbranded Food Products  
11 continue to run afoul of 2009 FOP Guidance as well as federal and California law.

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

14           37. Plaintiffs did not know, and had no reason to know, that the Defendant's  
15 Misbranded Food Products were misbranded and bore food labeling claims despite failing to meet  
16 the requirements to make those food labeling claims.

17           **C. Defendant's Food Products are Misbranded**

18           **i. Defendant Makes Unlawful Nutrient Content Claims**

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

23           39. Nutrient content claims are claims about specific nutrients contained in a product.  
24 They are typically made on the front of packaging in a font large enough to be read by the  
25 average consumer. Because these claims are relied upon by consumers when making purchasing  
26 decisions, the regulations govern what claims can be made in order to prevent misleading claims.

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

4           41. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims,  
5 which California has expressly adopted. California Health & Safety Code § 110100.

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

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

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

21           45. Only approved nutrient content claims will be permitted on the food label, and all  
22 other nutrient content claims will misbrand a food. It should thus be clear which type of claims  
23 are prohibited and which are permitted. Manufacturers are on notice that the use of an  
24 unapproved nutrient content claim is prohibited conduct. 58 FR 2302. In addition, 21 U.S.C. §  
25 343(r)(2) prohibits using unauthorized undefined terms and declares foods that do so to be  
26 misbranded.

27           46. In order to appeal to consumer preferences, Defendant has repeatedly made  
28 unlawful nutrient content claims that its products are a “good source” of nutrients such as fiber,

1 calcium, protein, and iron. These false nutrient content claims are unlawful because they fail to  
2 comply with the nutrient content claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54,  
3 which have been incorporated in California's Sherman Law.

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

12 48. Defendant has repeatedly made unlawful nutrient content claims about fiber,  
13 calcium and other nutrients that fail to utilize one of the limited defined terms appropriately.  
14 These nutrient content claims are unlawful because they fail to comply with the nutrient content  
15 claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54, which have been incorporated in  
16 California's Sherman Law. They are false because the terms have defined minimum nutritional  
17 thresholds so that, for example, a claim that a product contains a nutrient is a claim that the  
18 product has at least 10% of the daily value of that nutrient. By using defined terms improperly,  
19 Defendant has, in effect, falsely asserted that the products met the minimum nutritional thresholds  
20 for the claims in question when they do not. By using undefined terms, Defendant has, in effect,  
21 falsely asserted that its products meet at least the lowest minimum threshold for any nutrient  
22 content claim which is 10% of the daily value of the nutrient at issue. Such a threshold represents  
23 the lowest level that a nutrient can be present in a food before it becomes deceptive and  
24 misleading to highlight its presence in a nutrient content claim.

25 49. For example, the Defendant utilized a label for Thomas' Plain Made With Whole  
26 Grain Mini Bagels that stated, in relevant part, that the product was "A Good Source of Protein,  
27 Iron, Thiamin, and Folic Acid" despite the fact that that the product does not meet the minimum  
28 nutrient level threshold to make such a claim which is 10 percent or more of the RDI (Reference

1 Daily Intake or Recommended Daily Intake) or the DRV (Daily Reference Value) per reference  
 2 amount customarily consumed. *See* 21 C.F.R. § 101.54(c).

3 50. Defendant has unlawfully labeled a number of its food products as being a “good  
 4 source” or an “excellent source” of Whole Grain, fiber, calcium or other nutrients when they do  
 5 not meet the minimum nutrient level threshold to make such claims.

6 51. Several of Defendant’s food products such as its Sara Lee 100% Whole Wheat  
 7 Bread, Sara Lee Soft & Smooth Whole Grain White Bread and Sara Lee Classic 100% Whole  
 8 Wheat Bread claim on their labels that the products are a “Good Source of Whole Grain” or an  
 9 “Excellent Source of Whole Grain.” Although food manufacturers are permitted under the law to  
 10 make factual statements about whole grains on their food labels such as “10 grams of whole  
 11 grains,” the FDA has specifically ruled that they are only allowed to do so “provided that the  
 12 statements are not false or misleading under section 403(a) of the Act and do not imply a  
 13 particular level of the ingredient, i.e., ‘high’ or ‘excellent source.’” Thus, Defendant’s labeling of  
 14 its food products as a “Good Source of Whole Grains” or an “Excellent Source of Whole Grain”  
 15 is specifically prohibited and specifically deemed to be false and misleading by the FDA.

16 52. The nutrient content claims regulations discussed above are intended to ensure that  
 17 consumers are not misled as to the actual or relative levels of nutrients in food products.  
 18 Defendant has violated these referenced regulations. Therefore, Defendant’s Misbranded Food  
 19 Products are misbranded as a matter of California and federal law and cannot be sold or held  
 20 because they are legally worthless.

21 **D. Defendant Violated The Laws Regulating The Labeling Of Food Products**  
 22 **And Misled Consumers By Selling Them Misbranded Food Products Bearing**  
 23 **A Paid Endorsement Without Disclosing The Material Fact That The**  
 24 **Defendant Paid To Receive The Endorsement.**

25 53. In order to protect consumers from being misled, the laws regulating the labeling  
 26 of food require that companies disclose any instance where they have paid to receive an  
 27 endorsement that is placed on a product label. According to the FDA:

28 “[t]he agency recognizes that endorsements made for compensation by private  
 organizations or individuals may be misleading to consumers. The agency is advising that  
 when such endorsements are made, a statement should be included in close proximity to

1 the claim, informing consumers that the organization or individual was compensated for  
2 the endorsement. Failure to divulge this information on a label that bears a paid  
3 endorsement would cause the product to be misbranded under sections 403(a) and 201(n)  
4 of the act for failure to reveal a fact that is material.”

5 54. The failure to disclose that an endorsement was actually a paid endorsement also  
6 violates 21 CFR §1.21 which states that it is misleading and misbrands a product to fail to reveal  
7 a material fact on the label of a food product. The FDA has issued at least one warning letter for  
8 such an unlawful and misleading practice.

9 55. In direct violation of the labeling laws and the FDA directive, Defendant paid to  
10 receive certain endorsements and then placed those labels without disclosing that they were in  
11 fact paid endorsements on its products, including products such as the Thomas' Plain Bagel Thins  
12 product bore a “heart-check mark” from the American Heart Association. This mark was intended  
13 and did convey to the Plaintiffs that an independent third party had independently certified the  
14 healthiness and heart healthiness of the product in question. Plaintiffs were unaware of the fact  
15 that this heart-check mark was obtained only after the Defendant paid for its placement. The  
16 Plaintiffs relied on this mark and influenced the Plaintiffs’ purchase decision. Had the Defendant  
17 disclosed that the endorsement was a paid one, Plaintiffs would not have viewed the certification  
18 as independent and would not have viewed the product as being more healthy and beneficial than  
19 other alternatives. Had the Plaintiffs known that the product was misbranded because of the  
20 failure to reveal such a material fact and that the product been labeled in accordance with the law,  
21 Plaintiffs would not have purchased the product. Defendant’s concealment of the material fact  
22 that the endorsement was a paid one misled Plaintiffs.

23 56. The Plaintiffs’ reliance was reasonable and a reasonable consumer would have  
24 been misled by the Defendant’s actions. This is confirmed by the promotional materials that are  
25 provided to companies interested in participating in the heart-check program. The materials  
26 confirm that controlled studies have shown that the mark increases sales by influencing  
27 consumers that an “independent” group has certified the healthiness and heart healthiness of the  
28 products bearing the mark. According to these materials:

Shoppers want clear, simple purchase guidance from a trusted source. The American Heart Association heart-check mark increases product sales because seeing the mark on a package assures shoppers they are making a smart choice.

These materials also emphasize the benefits to a food company of placing the mark on their product and how such a mark will be perceived and used by consumers. According to the heart-check marketing materials:

Why certify?

- Align with America's nutritional leader. The American Heart Association is one of the nation's most recognized brands. Because we are the authority on heart health, consumers seek our guidance on nutrition and heart-healthy living. Certification from the American Heart Association is especially meaningful to consumers because it signifies the independent voice of a trusted health organization.
- Attract health-conscious consumers. Eighty-three percent of consumers are aware of the heart-check mark. Sixty-six percent of primary grocery shoppers say the heart-check mark has a strong/moderate influence on their choices when shopping.
- Boost your product's visibility. Our award-winning integrated promotions feature in-store advertising, hang tag and messaging, media placements, and more. Our marketing campaigns build awareness of the heart-check mark and drive consumers to certified products.
- Join an exceptional roster of certified products. Your company name and product receive recognition on heartcheckmark.org, our award-winning Web site, and our convenient online grocery list builder.
- Make a valuable addition to your marketing mix. Many of the food industry's top brands have certified products for one reason: It works. Our last client satisfaction survey found that 90 percent of respondents plan to renew certification. Another 90 percent said they have a favorable opinion of the program. This speaks volumes to the ROI for certification.
- Gain added credibility. More than half of shoppers prefer food ratings from a third-party health organization, such as the American Heart Association's heart-check mark. The rise of new food icons has created confusion, but ultimately consumers rely on the independent symbol they have come to know and trust.

Connect your product with consumers' health priorities — certify your product today!

57. By failing to reveal that the supposedly independent certifying group was merely a paid shill, Defendant misled the Plaintiffs, who reasonably relied on such claims. The

Defendant's actions were unlawful and misbranded the products bearing such a paid endorsement without disclosing the fact that the Defendant had bought the endorsement. Misbranded products cannot be legally sold or held and have no economic value and are worthless as a matter of law.

**E. Defendant's Violated The Laws Regulating The Making Of "Fresh" Claims**

58. 21 C.F.R. § 101.95 regulates the use of "fresh" claims. It precludes the use of terms such as "fresh" or "fresh taste" on products where the use of such terms "on the label or in labeling of a food in a manner ... suggests or implies that the food is unprocessed." Such terms are reserved for instances where "the food is in its raw state and has not been frozen or subjected to any form of thermal processing or any other form of preservation."

59. In direct violation of this provision the Defendants have falsely indicated that a number of its Entenmann's products such as the Soft'ees bought by the Plaintiffs are "fresh" despite the fact that have been chemically preserved and do not qualify for any exemption such as being freshly baked.

60. Even in the absence of any regulatory provision restricting the use of the term fresh, the Defendant's use of the term fresh would still be unlawful. Seeking to mislead consumers into the erroneous belief that its products are freshly baked like a bakery's Defendant has falsely claimed on its Entenmann's labels that a number of its Entenmann's products such as the Soft'ees bought by the Plaintiffs are "baked fresh daily" or in the alternative "fresh baked daily" and that Entenmann's "bakes fresh and delivers to stores daily." Such representations are false as the chemically preserved products are not baked fresh daily nor are they delivered daily and in fact they sit on stores for weeks at a time until they reach their extended sell by date.

61. Defendant compounds its deception by placing the signature of long-dead William Entenmann on its label as if this person was certifying the truthfulness of this false statement. In doing so, Defendant not only seeks to mislead about the freshness of its products but also to falsely convey that these are the product of a family type bakery and not an industrial bakery conglomerate.

62. Defendant misled the Plaintiffs, who reasonably relied on such claims. The Defendant's actions were unlawful and misbranded the products bearing such claims. Misbranded products cannot be legally sold or held and have no economic value and are worthless as a matter of law.

**F. Defendant Has Violated Labeling Laws Regulating The Labeling Of Whole Wheat, Whole Grain And Bread, Rolls And Buns**

63. Various regulations preclude the use of terms such as Whole Wheat, Whole Grain and Bread, Rolls and Buns when the include certain banned ingredients like unlawful flour varieties and caramel color utilized by Defendant in its products. Thus, the varieties of 100% Whole Wheat Bread purchased by the Plaintiffs was unlawfully labeled because they included soy flour which precludes the use of the term 100% whole wheat. Similarly, the Bimbo Original Toasted Bread purchased by Plaintiffs was improperly labeled as Bread when it contained the banned artificial colors Red 40 and Yellow 5 which violate the standard of identity for bread and preclude the use of that term.

64. Defendant misled the Plaintiffs, who reasonably relied on such representations. The Defendant's actions were unlawful and misbranded the products bearing such representations. Misbranded products cannot be legally sold or held and have no economic value and are worthless as a matter of law.

**G. Defendant Has Violated California Law**

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

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

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

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

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

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

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

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

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

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

75. Defendant has violated the standards set by 21 CFR §§ 101.13, 101.54, and 101.65 which have been adopted by reference in the Sherman Law, by including unauthorized nutrient content claims on their products.

**H. Plaintiffs Purchased Defendant's Misbranded Food Products**

76. Plaintiffs care about the nutritional content of food and seek to maintain a healthy diet.

1           77. During the Class Period, Plaintiffs purchased Defendant's Misbranded Food  
2 Products, including, but not limited to, Defendant's Sara Lee Classic 100% Whole Wheat Bread,  
3 Sara Lee 100% Whole Wheat Bread, Sara Lee Soft & Smooth Whole Grain White Bread,  
4 Thomas's Plain Bagel Thins, Thomas Mini Bagels, and Entenmann's Soft'ees.

5           78. Plaintiffs read the "good source" and "excellent source" label claims, the  
6 representations of freshness and daily delivery, the heart check-endorsement, the descriptions of  
7 the products as bread, rolls or buns, and the 100% whole wheat claims on the labels on  
8 Defendant's Misbranded Food Products before purchasing them.

9           79. Plaintiffs relied on Defendant's package labeling including the "good source" and  
10 "excellent source" of nutrients label claims, the representations of freshness and daily delivery,  
11 the heart check-endorsement, the descriptions of the products as bread, rolls or buns, and the  
12 100% whole wheat claim and based and justified the decision to purchase Defendant's products  
13 in substantial part on Defendant's package labeling.

14           80. At point of sale, Plaintiffs did not know, and had no reason to know, that  
15 Defendant's products were misbranded as set forth herein, and would not have bought the  
16 products had they known the truth about them.

17           81. At point of sale, Plaintiffs did not know, and had no reason to know, that  
18 Defendant's label claims were unlawful and unauthorized as set forth herein, and would not have  
19 bought the products had they known the truth about them.

20           82. As a result of Defendant's unlawful label claims, Plaintiffs and thousands of others  
21 in California and throughout the United States purchased the Misbranded Food Products at issue.

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

27           84. A reasonable person would also attach importance to whether Defendant's  
28 products were legally salable, and capable of legal possession, and to Defendant's representations

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

#### 4 CLASS ACTION ALLEGATIONS

5 85. Plaintiffs bring this action as a class action pursuant to Federal Rule of Procedure  
 6 23(b)(2) and 23(b)(3) on behalf of the following class:

7 All persons in the United States who, within the last four years, purchased  
 8 Defendant's bakery products 1) bearing a statement on the product label indicating  
 9 that the product was a "Good Source" or an "Excellent Source" of a nutrient but  
 10 which product did not meet the minimum nutrient level threshold requirement for  
 11 making such "Good Source" or "Excellent Source" claim; 2) bearing a "fresh"  
 12 claim but containing chemical preservatives; 3) bearing a claim to be 100% whole  
 13 wheat despite containing non-whole wheat flour; 4) claiming to be bread or a roll  
 or bun but containing a substance banned by statute from such products such as  
 added coloring; 5) bearing an undisclosed paid endorsement; or 6) falsely  
 claiming to be baked fresh daily or delivered fresh daily. (the "Class").

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

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

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

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

- 28 a. Whether Defendant engaged in unlawful, unfair or deceptive  
 business practices by failing to properly package and label their

Misbranded Food Products sold to consumers;

- b. Whether the food products at issue were misbranded as a matter of law;
- c. Whether Defendant made unlawful and misleading "Good Source" and "Excellent Source" and "fresh" claims with respect to their food products sold to consumers;
- d. Whether Defendant made unlawful and misleading 100% whole wheat claims with respect to their food products sold to consumers;
- e. Whether Defendant made unlawful and misleading bread, rolls, and buns claims with respect to their food products sold to consumers;
- f. Whether Defendant violated California Bus. & Prof. Code § 17200, *et seq.*, California Bus. & Prof. Code § 17500, *et seq.*, the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, California Civ. Code § 1790, *et seq.*, 15 U.S.C. § 2301, *et seq.*, and the Sherman Law;
- g. Whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief;
- h. Whether Defendant's unlawful, unfair and/or deceptive practices harmed Plaintiffs and the Class; and
- i. Whether Defendant was unjustly enriched by its deceptive practices.

90. Typicality: Plaintiffs' claims are typical of the claims of the Class because Plaintiffs bought Defendant's Misbranded Food Products during the Class Period. Defendant's unlawful, unfair and/or fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. Plaintiffs 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. Plaintiffs' claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

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

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

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

27           94.    The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3)  
28   are met as questions of law or fact common to class members predominate over any questions

1 affecting only individual members, and a class action is superior to other available methods for  
2 fairly and efficiently adjudicating the controversy.

3 95. Plaintiffs and Plaintiffs' counsel are unaware of any difficulties that are likely to  
4 be encountered in the management of this action that would preclude its maintenance as a class  
5 action.

### 6 **CAUSES OF ACTION**

#### 7 **FIRST CAUSE OF ACTION** 8 **Business and Professions Code § 17200 *et seq.*** 9 **Unlawful Business Acts and Practices**

10 96. Plaintiffs incorporate by reference each allegation set forth above.

11 97. Defendant's conduct constitutes unlawful business acts and practices.

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

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

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

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

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

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

26 104. As a result of Defendant's illegal business practices, Plaintiffs and the Class,  
27 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future  
28 conduct and such other orders and judgments which may be necessary to disgorge Defendant's

1 ill-gotten gains and to restore to any class member any money paid for the Misbranded Food  
2 Products.

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

5 106. As a result of Defendant's conduct, Plaintiffs and the Class, pursuant to Business  
6 and Professions Code § 17203, 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  
9 Plaintiffs and the Class.

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

13 107. Plaintiffs incorporate by reference each allegation set forth above.

14 108. Defendant's conduct as set forth herein constitutes unfair business acts and  
15 practices.

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

18 110. Plaintiffs and members of the Class suffered a substantial injury by virtue of  
19 buying Defendant's Misbranded Food Products that they would not have purchased absent  
20 Defendant's illegal conduct.

21 111. Defendant's deceptive marketing, advertising, packaging and labeling of  
22 Misbranded Food Products and sale of unsalable misbranded products that were illegal to possess  
23 was of no benefit to Plaintiffs and members of the Class, and the harm to consumers is  
24 substantial.

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

28 113. Plaintiffs and the Class who purchased Defendant's Misbranded Food Products

1 had no way of reasonably knowing that the products were misbranded and were not properly  
 2 marketed, advertised, packaged and labeled, and thus could not have reasonably avoided the  
 3 injury each of them suffered.

4 114. The consequences of Defendant's conduct as set forth herein outweigh any  
 5 justification, motive or reason therefor. Defendant's conduct is and continues to be unlawful,  
 6 illegal, immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious  
 7 to Plaintiffs and the Class.

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

13  
 14 **THIRD CAUSE OF ACTION**  
**Business and Professions Code § 17200 *et seq.***  
 15 **Fraudulent Business Acts and Practices**

16 116. Plaintiffs incorporate by reference each allegation set forth above.

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

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

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

26 120. Defendant's fraud and deception caused Plaintiffs and the Class to purchase  
 27 Defendant's Misbranded Food Products that they would otherwise not have purchased had they  
 28 known the true nature of those products.

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

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

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

123. Plaintiffs incorporate by reference each allegation set forth above.

124. Plaintiffs assert this cause of action for violations of California Business and Professions Code § 17500 *et seq.* for misleading and deceptive advertising against Defendant.

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

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

127. In furtherance of its plan and scheme, Defendant prepared and distributed within

1 California and nationwide via product packaging and labeling, and other promotional materials,  
2 statements that misleadingly and deceptively represented the composition and the nature of  
3 Defendant's Misbranded Food Products. Plaintiffs and the Class necessarily and reasonably  
4 relied on Defendant's materials, and were the intended targets of such representations.

5 128. Defendant's conduct in disseminating misleading and deceptive statements in  
6 California and nationwide to Plaintiffs and the Class was and is likely to deceive reasonable  
7 consumers by obfuscating the true composition and nature of Defendant's Misbranded Food  
8 Products in violation of the "misleading prong" of California Business and Professions Code  
9 §17500 *et seq.*

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

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

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

22 131. Plaintiffs incorporate by reference each allegation set forth above.

23 132. Plaintiffs assert this cause of action against Defendant for violations of California  
24 Business and Professions Code § 17500 *et seq.* regarding untrue advertising.

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

27 134. Defendant engaged in a scheme of offering Defendant's Misbranded Food  
28 Products for sale to Plaintiffs and the Class by way of product packaging and labeling, and other

1 promotional materials. These materials misrepresented and/or omitted the true contents and  
2 nature of Defendant's Misbranded Food Products. Defendant's advertisements and inducements  
3 were made in California and throughout the United States and come within the definition of  
4 advertising as contained in Business and Professions Code §17500 *et seq.* in that the product  
5 packaging and labeling, and promotional materials were intended as inducements to purchase  
6 Defendant's Misbranded Food Products, and are statements disseminated by Defendant to  
7 Plaintiffs and the Class. Defendant knew, or in the exercise of reasonable care should have  
8 known, that these statements were untrue.

9 135. In furtherance of its plan and scheme, Defendant prepared and distributed in  
10 California and nationwide via product packaging and labeling, and other promotional materials,  
11 statements that falsely advertise the composition of Defendant's Misbranded Food Products, and  
12 falsely misrepresented the nature of those products. Plaintiffs and the Class were the intended  
13 targets of such representations and would reasonably be deceived by Defendant's materials.

14 136. Defendant's conduct in disseminating untrue advertising throughout California  
15 deceived Plaintiffs and members of the Class by obfuscating the contents, nature and quality of  
16 Defendant's Misbranded Food Products in violation of the "untrue prong" of California Business  
17 and Professions Code § 17500.

18 137. As a result of Defendant's violations of the "untrue prong" of California Business  
19 and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the expense of  
20 Plaintiffs and the Class. Misbranded products cannot be legally sold or held, have no economic  
21 value, and are legally worthless. Plaintiffs and the Class paid a premium price for the  
22 Misbranded Food Products.

23 138. Plaintiffs and the Class, pursuant to Business and Professions Code § 17535, are  
24 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
25 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any  
26 money paid for Defendant's Misbranded Food Products by Plaintiffs and the Class.

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

139. Plaintiffs incorporate by reference each allegation set forth above.

140. This cause of action is brought pursuant to the CLRA. Plaintiffs do not currently seek monetary damages for this cause of action and this cause of action is limited solely to injunctive relief. Plaintiffs intend to amend this Complaint to seek damages in accordance with the CLRA after providing Defendant with notice pursuant to Cal. Civ. Code § 1782.

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

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

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

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

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

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

147. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5) of the CLRA because Defendant's conduct constitutes unfair methods

1 of competition and unfair or fraudulent acts or practices in that they misrepresent the particular  
 2 ingredients, characteristics, uses, benefits and quantities of the goods.

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

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

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

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

20  
 21 **SEVENTH CAUSE OF ACTION**  
 22 **Restitution Based on Unjust Enrichment/Quasi-Contract**

23 152. Plaintiffs incorporate by reference each allegation set forth above.

24 153. As a result of Defendant's fraudulent and misleading labeling, advertising,  
 25 marketing and sales of Defendant's Misbranded Food Products, Defendant was enriched at the  
 26 expense of Plaintiffs and the Class.

27 154. Defendant sold Misbranded Food Products to Plaintiffs and the Class that were not  
 28 capable of being sold or held legally and which had no economic value and were legally

1 worthless. It would be against equity and good conscience to permit Defendant to retain the ill-  
 2 gotten benefits it received from Plaintiffs and the Class, in light of the fact that the products were  
 3 not what Defendant purported them to be. Thus, it would be unjust and inequitable for Defendant  
 4 to retain the benefit without restitution to Plaintiffs and the Class of all monies paid to Defendant  
 5 for the products at issue.

6 155. As a direct and proximate result of Defendant's actions, Plaintiffs and the Class  
 7 have suffered damages in an amount to be proven at trial.

### 8 **JURY DEMAND**

9 Plaintiffs hereby demand a trial by jury of all claims.

### 10 **PRAYER FOR RELIEF**

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

13 A. For an order certifying this case as a class action and appointing Plaintiffs and  
 14 Plaintiffs' counsel to represent the Class;

15 B. For an order awarding, as appropriate, damages, restitution or disgorgement to  
 16 Plaintiffs and the Class for all causes of action other than the CLRA, as Plaintiffs do not seek  
 17 monetary relief under the CLRA, but intend to amend this Complaint to seek such relief;

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

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

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

24 F. For an order awarding punitive damages;

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

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

1 Dated: March 15, 2013

Respectfully submitted,

*Pierce Gore*

Ben F. Pierce Gore (SBN 128515)

PRATT & ASSOCIATES

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Attorneys for Plaintiffs

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

**I. (a) PLAINTIFFS**

ALEX ANG and LYNN STREIT, individually and on behalf of all others  
similarly situated

(b) County of Residence of First Listed Plaintiff SAN FRANCISCO  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Pierce Gore, Pratt & Associates  
1871 The Alameda, Suite 425  
San Jose, CA 95126  
(408) 429-6506

**DEFENDANTS**

BIMBO BAKERIES USA, INC.

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

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

Attorneys (If Known)

DMR

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

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

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

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

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

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education <b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

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

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

**VI. CAUSE OF ACTION**

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

Brief description of cause:  
Class Action/Packaged food misbranding/Sherman Law violations

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$**

CHECK YES only if demanded in complaint:

**JURY DEMAND:** ☒ Yes ☐ No

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

(See instructions):

JUDGE

DOCKET NUMBER

**IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)**

(Place an "X" in One Box Only)

(X) SAN FRANCISCO/OAKLAND

() SAN JOSE

() EUREKA

DATE March 15, 2013

SIGNATURE OF ATTORNEY OF RECORD Pierce Gore

Pierce Gore