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6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN JOSE DIVISION

10
11 PHYLLIS GUSTAVSON, individually and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 MARS, INC. and MARS CHOCOLATE
15 NORTH AMERICA, LLC,

16 Defendants.

Case No. 5:13-CV-4537

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

JURY TRIAL DEMANDED

17
18 Plaintiff, Phyllis Gustavson, through her undersigned attorneys, brings this her Complaint
19 against Defendants, Mars, Inc. and Mars Chocolate North America, Inc. (hereinafter “Mars” or
20 “Defendants”) as to her own acts upon actual knowledge, and as to all other matters upon
21 information and belief.

22 **DEFINITIONS**

23 1. “Class Period” is April 13, 2008 to the present.

24 2. “Purchased Products” are the five (5) chocolate candy products listed below
25 purchased by Plaintiff during the Class Period: (1) M&M Chocolate Candy, 1.69 oz., (2) Twix
26 Cookie Bar, 1.79 oz., (3) Dove Bar - Dark Chocolate, 3.3 oz., (4) Dove Bar - Milk Chocolate, 3.3
27 oz., and (5) Snickers Bar, 11.8 oz. Pictures of the Purchased Products are attached as exhibits
28 hereto and specific descriptions of the relevant label representations are included below.

1 3. “Substantially Similar Products” are the Defendants’ products listed below. Each
 2 of these products: (a) are chocolate candy products packaged the same way, if not identically, to
 3 the Purchased Products of the same type, only differing in flavor; (b) make the same label
 4 representations as described herein that were made on the Purchased Products, and (c) violate the
 5 same regulations of the Sherman Food & Drug Cosmetic Law, California Health & Safety Code §
 6 109875, *et seq.* (hereinafter “Sherman Law”) in the exact same manner as the Purchased Products
 7 as described herein.

8 3 Musketeers Bar
 9 Mars Bar
 10 Milky Way Bar
 11 Milky Way Bar – Caramel
 12 Milky Way Bar – Midnight
 13 Milky Way Bar – Unwrapped
 14 Snickers Bar – Almond
 15 Snickers Bar – Peanut Butter
 16 Snickers Bar – Dark Chocolate
 17 Twix Cookie Bar – Caramel **(PGPR)**
 18 Twix Cookie Bar – Peanut Butter
 19 M&M Chocolate Candy – Peanut
 20 M&M Chocolate Candy – Peanut Butter
 21 M&M Chocolate Candy – Pretzel
 22 M&M Chocolate Candy – Dark Mint
 23 M&M Chocolate Candy – Raspberry
 24 M&M Chocolate Candy – Dark Chocolate
 25 M&M Chocolate Candy – Dark Chocolate w/ Peanuts
 26 M&M Bar **(PGPR)**
 27 Dove Bar - Silky Smooth Milk Chocolate
 28 Dove Bar - Silky Smooth Almond Dark Chocolate **(F)**
 Dove Bar - Silky Smooth Almond Milk Chocolate
 Dove Bar - Silky Smooth Cookies and Crème **(PGPR)**
 Dove Bar - Silky Smooth Mint and Dark Chocolate Swirl **(PGPR)**
 Dove Bar - Silky Smooth White & Milk Chocolate Swirl **(PGPR)**
 Dove Bar - Silky Smooth Raspberry & Dark Chocolate Swirl **(PGPR)**
 Dove Bar - Silky Smooth Peanut Butter **(PGPR)**
 Dove Bar - Sugar Free Silky Smooth Peanut Butter Crème Chocolate **(PGPR)**
 Dove Bar - Sugar Free Silky Smooth Chocolate Crème Dark Chocolate **(PGPR)**
 Dove Bar - Sugar Free Silky Smooth Raspberry Crème Dark Chocolates **(PGPR)**
 Dove Bar - Dark Chocolate, Roasted Almond **(PGPR)**
 Dove Bar - Dark Chocolate, Raspberry & Dark Chocolate Swirl **(PGPR)**
 Dove Promise Bar - Silky Smooth Milk Chocolate
 Dove Promise Bar - Silky Smooth Dark Chocolate **(F)**
 Dove Promise Bar - Silky Smooth Almond Dark Chocolate **(F)**
 Dove Promise Bar - Silky Smooth Almond Milk Chocolate

1 Dove Promise Bar - Silky Smooth Cookies and Crème
2 Dove Promise Bar - Silky Smooth Mint and Dark Chocolate Swirl
3 Dove Promise Bar - Silky Smooth Peanut Butter Milk Chocolate
4 Dove Promise Bar - Silky Smooth Caramel
5 Dove Promise Bar - Silky Smooth Raspberry & Dark Chocolate Swirl
6 Dove Specialties - Roasted Almonds covered in Silky Smooth Milk Chocolate
7 Dove Specialties - Roasted Almonds covered in Silky Smooth Dark Chocolate (F)
8 Dove Specialties - Raisons and Peanuts covered in Silky Smooth Milk Chocolate

9 4. Upon information and belief, each of the forty-four (44) Substantially Similar
10 Products make one or more of the same label representations as the Purchased Products as
11 described herein. As described in more detail below, all the Substantially Similar Products have
12 an unlawful and misleading calorie related nutrient content claim. The Substantially Similar
13 Products marked with (F) contain an unlawful and misleading flavanol nutrient content claim and
14 the Substantially Similar Products marked with (PGPR) have an unlawful and misleading
15 common name label.

16 5. Plaintiff reserves the right to supplement the list of Substantially Similar Products
17 should evidence is adduced during discovery to show that other Mars products had labels which
18 violate the same provisions of the Sherman Law and have the same label representations as the
19 Purchased Products.

20 SUMMARY OF THE CASE

21 6. Plaintiff's case has two distinct facets. First, the "UCL unlawful" part. Plaintiff's
22 first cause of action is brought pursuant to the unlawful prong of California's Unfair Competition
23 Law, Cal. Bus. & Prof. Code § 17200 ("UCL"). Plaintiff alleges that Defendants package and
24 label the Purchased Products in violation of California's Sherman Law which adopts, incorporates
25 – and is identical – to the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("FDCA").
26 These violations (which do not require a finding that the labels are "misleading") render the
27 Purchased Products "misbranded" which is no small thing. Under California law, a food product
28 that is misbranded cannot legally be manufactured, advertised, distributed, held or sold.
Misbranded products cannot be legally sold, possessed, have no economic value, and are legally
worthless. Indeed, the sale of misbranded food is a criminal act in California and the FDA even
threatens food companies with seizure of misbranded products. This "misbranding" – standing

1 alone without any allegations of deception by Defendants or review of or reliance on the labels by
2 Plaintiff – give rise to Plaintiff’s first cause of action under the UCL. To state a claim under the
3 unlawful prong, Plaintiff need only allege that she would not have purchased the product had she
4 known it was unlawful, illegal and misbranded, because buying such a product would result in
5 owning and possessing a product that was illegal to own or possess.

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

13 8. Plaintiff did not know, and had no reason to know, that the Defendants’ Purchased
14 Products were misbranded under the Sherman Law and bore food labeling claims that failed to
15 meet the requirements to make those food labeling claims. Similarly, Plaintiff did not know, and
16 had no reason to know, that Defendants’ Purchased Products were false and misleading.

17 **BACKGROUND**

18 9. Identical California and federal laws require truthful, accurate information on the
19 labels of packaged foods. This case is about companies selling misbranded food to consumers.
20 The law, however, is clear: misbranded food cannot legally be sold, possessed, has no economic
21 value and is legally worthless. Purchasers of misbranded food are entitled to a refund of their
22 purchase price or other relief or compensation as determined by the Court. Plaintiff and members
23 of the class that purchased these products paid an unwarranted premium for these products.

24 10. Identical federal and California laws regulate the content of labels on packaged
25 food. The requirements of the federal Food Drug & Cosmetic Act (“FDCA”) were adopted by
26 the California legislature in the Sherman Law. Under FDCA section 403(a), food is
27 “misbranded” if “its labeling is false or misleading in any particular,” or if it does not contain
28 certain information on its label or in its labeling. 21 U.S.C. § 343(a).

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

9 12. If a manufacturer is going to make a claim on a food label or on its website, which
10 can be an extension of the label, the label must meet certain legal requirements that help
11 consumers make informed choices and ensure that they are not misled and that the labels are
12 truthful, accurate, and backed by scientific evidence. As described more fully below, Defendants
13 have sold products that are misbranded, illegal to possess and are worthless because (i) the labels
14 violate the Sherman Law and were sold by Defendants and (ii) Defendants made and continue to
15 make false, misleading and deceptive claims on the labels of their products.

16 13. Mars Chocolate North America, LLC is one of the leading producers of chocolate
17 candy and other types of confectionery. Mars, Inc. is the parent company of Mars Chocolate
18 North America, LLC. Defendants’ Purchased Products are sold to consumers through grocery and
19 other retail stores throughout California and throughout the U.S.

20 14. Defendants recognize that health claims drive sales, and actively promote the
21 health benefits of their products. Defendants have promoted the health and nutritional profiles of
22 their products by trying to highlight various purported attributes of their products such as to
23 highlight health and nutritional claims of a suspect nature. Defendants have run afoul of
24 California and federal regulations that prohibit companies from touting supposedly positive
25 nutritional aspects of their products while concealing or failing to disclose that those products
26 contain disqualifying nutrients at levels the state and federal regulators have concluded raise the
27 risk of a diet-related disease or health-related condition.

28 15. In recent years, responding to consumer demand for healthy foods has become a

1 central part of Defendants' business models and marketing strategies, even though Defendants'
2 Purchased Products are various forms of candy and confectionery that are not healthy or low-
3 calorie as a matter of law.

4 16. Defendants have realized that, based on the public's concern about health, obesity
5 and interest in lower calorie and natural foods, there is a financial benefit to be derived in selling
6 products claiming to be healthy. Accordingly, Defendants have labeled many of their candy and
7 confectionery products to emphasize these qualities even though such claims are in violation of
8 California and federal food labeling laws.

9 17. Defendants have pursued a strategy based on their assessment that nutritional
10 awareness and the desire for improved health and wellness will increasingly drive consumer
11 choice. Pursuant to this strategy, Defendants decided that they would renovate products for
12 nutrition and health considerations and would seek to inform consumers about available healthy
13 and nutritious options in using their products.

14 18. In pursuing such a strategy, Defendants (a) decided their success and profitability
15 was dependent on their ability to satisfy emerging consumer demand for healthy, nutritious and
16 lower calorie foods and (b) were prepared to make health and nutrition arguments on behalf of
17 "junk foods" like chocolate candy when in fact such claims were not true and, in fact, were
18 unlawful.

19 19. For example, according to Mars Incorporated, Mars is one of the world's leading
20 providers of food for people and pets and, as such, it has a:

21 responsibility to help our consumers and the pets they love lead healthy lives. We
22 are committed to making sure the products we offer, and the ingredients they
23 contain, can fit into a balanced diet - whether whole grain rice from UNCLE
24 BEN'S® or a delicious Mars chocolate bar. . . . Each of our business segments
25 focuses on three areas: information, renovation and innovation.¹

26 20. Defendants' key to achieving the goals of their health and nutrition strategy is to
27 convince consumers that they can use Defendants' chocolate candy as part of a healthy and
28 enjoyable diet. Recognizing that the success of this strategy was dependent on repositioning their

¹ <http://www.mars.com/global/about-mars/mars-pia/health-and-nutrition/health-and-nutrition-introduction.aspx>

1 chocolate candy as healthy, nutritious and lower calorie, Defendants made and are making false
2 and deceptive claims in violation of federal and state laws that govern the types of representations
3 that can be made on food labels.

4 21. Plaintiff brings this action under California law, which is identical to federal law,
5 for a number of Defendants' food labeling practices which are both (i) unlawful and (ii) deceptive
6 and misleading to consumers. These unlawful practices include:

- 7 A. Making unlawful nutrient content claims on the labels of food
8 products that are false and fail to meet the minimum nutritional
9 requirements legally required for the nutrient content claims being
10 made;
- 11 B. Making false calorie related nutrient content claims; and
- 12 C. Failing to utilize the common or usual names of ingredients on
13 their product labels.

14 **PARTIES**

15 22. Plaintiff, Phyllis Gustavson, is a resident of Campbell, California who purchased
16 more than \$25 worth of Defendants' Purchased Products in California during the Class Period.

17 23. Defendant Mars Chocolate North America, LLC is a Delaware LLC with its
18 headquarters in Hackettstown, New Jersey. Mars Chocolate North America, LLC is registered to
19 do business and does business in California.

20 24. Defendant Mars, Inc. is a Delaware corporation with its headquarters in McLean,
21 Virginia. Mars, Inc. is registered to do business and does business in California.

22 25. Defendants are leading producers of retail food products, including chocolate
23 candy and other confectionery. Defendants sell their Purchased Products to consumers through
24 grocery and other retail stores throughout California. They also promote their products throughout
25 California through their websites.

26 26. California law applies to all claims set forth in this Class Action Complaint
27 because Plaintiff lives in California and purchased the Purchased Products in California.
28 Accordingly, California has significant contacts and/or a significant aggregation of contacts with
the claims asserted by Plaintiff and all Class members.

JURISDICTION, VENUE AND EQUITABLE TOLLING

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

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

9 29. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to
10 28 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is
11 between citizens of different states.

12 30. The Court has personal jurisdiction over Defendants because a substantial portion
13 of the wrongdoing alleged in this Class Action Complaint occurred in California, Defendants are
14 authorized to do business in California, have sufficient minimum contacts with California, and
15 otherwise intentionally avail themselves of the markets in California through the promotion,
16 marketing and sale of merchandise, sufficient to render the exercise of jurisdiction by this Court
17 permissible under traditional notions of fair play and substantial justice.

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

21 32. Plaintiff originally filed this case against Defendants on April 13, 2012. All claims
22 alleged herein have been tolled due to the original filing and the claims in this case relate back to
23 the filing of the original complaint on April 13, 2012.

FACTUAL ALLEGATIONS

A. Identical California and Federal Laws Regulate Food Labeling

24
25
26 33. Food manufacturers are required to comply with federal and state laws and
27 regulations that govern the labeling of food products. First and foremost among these is the
28 FDCA and its labeling regulations, including those set forth in 21 C.F.R. § 101.

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

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

19 **B. FDA Enforcement History**

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

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

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

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

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

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

28 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. Despite the issuance of the 2009 FOP Guidance, Defendants did not remove the
unlawful and misleading food labeling claims from their Purchased Products.

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

In the early 1990s, the Food and Drug Administration (FDA) and the food
industry worked together to create a uniform national system of nutrition labeling,
which includes the now-iconic Nutrition Facts panel on most food packages. Our
citizens appreciate that effort, and many use this nutrition information to make
food choices. Today, ready access to reliable information about the calorie and

1 nutrient content of food is even more important, given the prevalence of obesity
2 and diet-related diseases in the United States. This need is highlighted by the
3 announcement recently by the First Lady of a coordinated national campaign to
4 reduce the incidence of obesity among our citizens, particularly our children.

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

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

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

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

- Nutrient content claims that FDA has authorized for use on foods for adults are not permitted on foods for children under two. Such claims are highly inappropriate when they appear on food for infants and toddlers because it is well known that the nutritional needs of the very young are different than those of adults.
- Claims that a product is free of trans fats, which imply that the product is a better choice than products without the claim, can be misleading when a product is high in saturated fat, and especially so when the claim is not accompanied by the required statement referring consumers to the more complete information on the Nutrition Facts panel.
- Products that claim to treat or mitigate disease are considered to be drugs and must meet the regulatory requirements for drugs, including the requirement to prove that the product is safe and effective for its intended use.

- 1 • Misleading “healthy” claims continue to appear on foods that do not meet
2 the long- and well-established definition for use of that term.
- 3 • Juice products that mislead consumers into believing they consist entirely
4 of a single juice are still on the market. Despite numerous admonitions
5 from FDA over the years, we continue to see juice blends being
6 inaccurately labeled as single-juice products.

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

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

21 41. Notwithstanding the Open Letter, Defendants have continued to utilize unlawful
22 food labeling claims despite the express guidance of the FDA in the Open Letter.

23 42. In addition to its guidance to industry, the FDA has sent warning letters to the
24 industry, including many of Defendants’ peer food manufacturers, for the same types of unlawful
25 nutrient content claims described above.

26 43. In these letters dealing with unlawful nutrient content claims, the FDA indicated
27 that, as a result of the same type of claims utilized by the Defendants, products were in “violation
28 of the Federal Food, Drug, and Cosmetic Act ... and the applicable regulations in Title 21, Code
of Federal Regulations, Part 101 (21 C.F.R. § 101)” and “misbranded within the meaning of
section 403(r)(1)(A) because the product label bears a nutrient content claim but does not meet
the requirements to make the claim.” These warning letters were not isolated as the FDA has
issued numerous warning letters to other companies for the same type of food labeling claims at
issue in this case; the same being released as public records discoverable and downloadable from
the Internet.

44. The FDA stated that the agency not only expected companies that received
warning letters to correct their labeling practices but also anticipated that other firms would

1 examine their food labels to ensure that they are in full compliance with food labeling
2 requirements and make changes where necessary. Defendants did not change the labels on their
3 Purchased Products despite that Defendants knew or should have known of these warning letters
4 to other companies for the same type of violations that Defendants commit with their labels on
5 the products subject to this litigation.

6 45. Defendants have turned a blind eye to the FDA's Guidance for Industry, A Food
7 Labeling Guide, which details the FDA's guidance on how to make food labeling claims.
8 Defendants continue to utilize unlawful claims on the labels of its Purchased Products. Despite
9 all of the available warnings and detailed instructions, Defendants' Purchased Products continue
10 to run afoul of FDA guidance as well as federal and California law.

11 46. Despite the FDA's numerous warnings to industry, Defendants have continued to
12 sell products bearing unlawful food labeling claims without meeting the requirements to make
13 them.

14 47. Plaintiff did not know, and had no reason to know, that Defendants' Purchased
15 Products were misbranded and bore unlawful food labeling claims that failed to meet the
16 requirements to make such claims. Similarly, Plaintiff did not, and had no reason to know, that
17 Defendants' Purchased Products were misbranded because the package labeling on the products
18 purchased by Plaintiff were misleading and false.

19 **OVERVIEW OF APPLICABLE SHERMAN LAW VIOLATIONS**

20 **A. California and Federal Law Regulate Unlawful Nutrient Content Claims**

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

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

1 misleading claims.

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

5 51. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims,
6 which California has expressly adopted in California Health & Safety Code § 110100. Among
7 other requirements, 21 C.F.R. § 101.13 requires that manufacturers include certain disclosures
8 when a nutrient claim is made and, at the same time, the product contains certain levels of
9 unhealthy ingredients, such as fat and sodium. It also sets forth the manner in which that
10 disclosure must be made, as follows:

11 (4)(i) The disclosure statement “See nutrition information for ___ content” shall
12 be in easily legible boldface print or type, in distinct contrast to other printed or
13 graphic matter, and in a size no less than that required by §101.105(i) for the net
14 quantity of contents statement, except where the size of the claim is less than two
15 times the required size of the net quantity of contents statement, in which case the
16 disclosure statement shall be no less than one-half the size of the claim but no
17 smaller than one-sixteenth of an inch, unless the package complies with
18 §101.2(c)(2), in which case the disclosure statement may be in type of not less
19 than one thirty-second of an inch.

20 (ii) The disclosure statement shall be immediately adjacent to the nutrient content
21 claim and may have no intervening material other than, if applicable, other
22 information in the statement of identity or any other information that is required
23 to be presented with the claim under this section (e.g., see paragraph (j)(2) of this
24 section) or under a regulation in subpart D of this part (e.g., see §§101.54 and
25 101.62). If the nutrient content claim appears on more than one panel of the label,
26 the disclosure statement shall be adjacent to the claim on each panel except for the
27 panel that bears the nutrition information where it may be omitted.

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

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

1 C.F.R. § 101.13(b)(2)(i-ii).

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

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

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

22 **B. The Defendants Make Unlawful and Misleading Flavanol Nutrient Content**
23 **Claims**

24 57. The following Purchased Products have unlawful flavanol nutrient content claims
25 on the packages: Dove Bar – Dark Chocolate, 3.3 oz.

26 58. In order to appeal to consumer preferences, Defendants have repeatedly made false
27 and unlawful nutrient content claims for flavanols that fail to utilize one of the limited defined
28 terms. These nutrient content claims are unlawful because they fail to comply with the nutrient

1 content claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54, which have been
2 incorporated in California’s Sherman Law. To the extent that the terms used by the Defendants to
3 describe nutrients like flavanols are deemed to be a synonym for a defined term like “contain” the
4 claim would still be unlawful because, as these flavanols do not have established daily values,
5 they cannot serve as the basis for a term that has a minimum daily value threshold as the defined
6 terms at issue here do.

7 59. Defendants’ claims concerning unnamed flavanol nutrients are false are unlawful
8 because they fail to comply with the nutrient content claim provisions in violation of 21 C.F.R. §§
9 101.13 and 101.54, which have been incorporated in California’s Sherman Law. They are false
10 because Defendants’ use of a defined term is in effect a claim met the minimum nutritional
11 requirements for the use of that term when they have not.

12 60. Claims that products like Defendants Dove Bar - Dark Chocolate, 3.3 oz. are “*a*
13 *natural source of cocoa flavanols*” are unlawful. They are also false because the terms have
14 defined minimum nutritional thresholds so that, for example, a claim that a product “contains” a
15 nutrient is a claim that the product has at least 10% of the daily value of that nutrient.

16 61. By using defined terms improperly, Defendants were, in effect, falsely asserting
17 that the products met the minimum nutritional thresholds for the claims in question which its
18 products failed to qualify for. By using undefined terms such as “source” and “found” Defendants
19 were, in effect, falsely asserting that its products met at least the lowest minimum threshold for
20 any nutrient content claim which would have been 10% of the daily value of the nutrient at issue.
21 Such a threshold represents the lowest level that a nutrient can be present in a food before it
22 becomes deceptive and misleading to highlight its presence in a nutrient content claim.

23 62. FDA enforcement actions targeting identical or similar claims to those made by
24 Defendants have made clear the unlawfulness of such claims. For example, on March 24, 2011,
25 the FDA sent Jonathan Sprouts, Inc. a warning letter where it specifically targeted a “source” type
26 claim like the one used on the Defendants’ chocolate products. In that letter the FDA stated:

27 Your Organic Clover Sprouts product label bears the claim “Phytoestrogen
28 Source [.]” Your webpage entitled “Sprouts, The Miracle Food! - Rich in
Vitamins, Minerals and Phytochemicals” bears the claim “Alfalfa sprouts are one

1 of our finest food sources of . . . saponin.” These claims are nutrient content
2 claims subject to section 403(r)(1)(A) of the Act because they characterize the
3 level of nutrients of a type required to be in nutrition labeling (phytoestrogen and
4 saponin) in your products by use of the term “source.” Under section 403(r)(2)(A)
5 of the Act, nutrient content claims may be made only if the characterization of the
6 level made in the claim uses terms which are defined by regulation. However,
7 FDA has not defined the characterization “source” by regulation. Therefore, this
8 characterization may not be used in nutrient content claims.

9 63. It is thus clear that a “source” claim like the one utilized on the label Defendants’
10 Dove Bar - Dark Chocolate, 3.3 oz. is unlawful because the “FDA has not defined the
11 characterization ‘source’ by regulation” and thus such a “characterization may not be used in
12 nutrient content claims.” Such a claim characterizes the fact the cocoa or chocolate contain
13 unnamed flavanols at some undefined level. This type of claims is false because it falsely implies
14 that the levels of nutrients in the food are capable of satisfying the minimum nutritional threshold
15 established by regulation.

16 64. Similarly, a claim that a nutrient is “found” in cocoa or chocolate is improper
17 because it is either an undefined characterization that a nutrient is found in a food at some
18 undefined level or because it is a synonym for a defined term like “contains” as there is no
19 difference in meaning between the statement “chocolate contains flavanols” and the statement
20 “flavanols are found in chocolate.” Both characterize the fact the chocolate contains flavanols at
21 some undefined level. The types of misrepresentations made above would be considered by a
22 reasonable consumer like the Plaintiff when deciding to purchase the products.

23 65. Claims that certain of Defendants’ chocolate products are a source of “*cocoa*
24 *flavanols*” or that the Defendants COOAPRO process “*helps retain much of the naturally*
25 *occurring cocoa flavanols*” (as stated on the labels of Dove Bar – Dark Chocolate) are unlawful
26 and false because flavanols do not have an RDI and therefore these Defendants’ chocolate
27 products do not meet the minimum nutrient level threshold to make such a claim which is 10
28 percent or more of the RDI or the DRV per reference amount customarily consumed.

66. Claims that certain of Defendants’ chocolate products contain or are made with an
ingredient that is known to contain a particular nutrient, or is prepared in a way that affects the
content of a particular nutrient in the food, can only be made if it is a “good source” of the

1 nutrient that is associated with the ingredient or type of preparation. Thus, Defendants'
2 statements on chocolate products that the products are a "source" of "flavanols" trigger a "good
3 source" (10 percent or more of the RDI or the DRV per reference amount customarily consumed)
4 which Defendants cannot demonstrate for flavanols. Similarly, Defendants' label claim that its
5 cocoa products are a "[n]atural source of cocoa flavanols" trigger a "good source" requirement
6 (10 percent or more of the RDI or the DRV per reference amount customarily consumed) for
7 "flavanols" which cannot be established since there is no RDA or DRV for flavanols.

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

10 68. Plaintiff relied on Defendants' nutrient content claims when making her purchase
11 decisions and was misled because she erroneously believed the implicit misrepresentation that the
12 Dove Bar - Dark Chocolate, 3.3 oz. she was purchasing met the minimum nutritional threshold to
13 make such claims. Plaintiff would not have purchased this product had she known that this
14 product did not in fact satisfy such minimum nutritional requirements with regard to flavanols
15 and consequently that the product was not as healthy as Defendants advertised.

16 69. For these reasons, Defendants' nutrient content claims at issue in this Class Action
17 Complaint are false and misleading and in violation of 21 C.F.R. § 101.13 and California law, and
18 the products at issue are misbranded as a matter of law. Defendants have violated these
19 referenced regulations. Therefore, Defendants' Dove Bar - Dark Chocolate, 3.3 oz. and the
20 products listed herein that are substantially similar are misbranded as a matter of federal and
21 California law and cannot be sold or held because they are legally worthless.

22 70. Plaintiff was thus misled by the Defendants' unlawful labeling practices and
23 actions into purchasing products she would not have otherwise purchased had she known the truth
24 about those products.

25 71. Defendants' claims in this respect are false and misleading and the products are in
26 this respect misbranded under identical federal and California laws, misbranded products cannot
27 be legally sold and are legally worthless. Plaintiff and members of the Class who purchased these
28 products paid an unwarranted premium for these products.

1 **C. Defendants Make Unlawful and Misleading Calorie Related Nutrient Content**
2 **Claims**

3 72. All five of the Purchased Products have an unlawful calorie related nutrient
4 content claim on their labels which was reviewed and relied upon by Plaintiff. Similarly, all the
5 Substantially Similar Products also have an unlawful calorie related nutrient content claim on the
6 labels of the products.

7 73. To appeal to consumer preferences, Defendants have repeatedly made unlawful
8 calorie nutrient content claims on the packages of both the Purchased Products and Substantially
9 Similar Products as described above. These claims are unlawful because they are false and
10 misleading and fail to conform to the mandated requirements for nutrient content claims.

11 74. In addition, the Defendants make these claims on products containing
12 disqualifying nutrient levels that preclude the making of even truthful and accurate nutrient
13 claims without the required disclaimer or warning.

14 75. In particular, Defendants have placed an unlawful calorie related nutrition content
15 claim on the front of the packages of these products. This calorie nutrient content claim purports
16 to utilize the form of one of the four “Basic Icons” from the Nutrition Keys (Facts Up Front)
17 voluntary labeling program developed by the Grocery Manufacturers Association (“GMA”) and
18 Food Marketing Institute (“FMI”). However, as detailed below, the icon used by Defendants does
19 not comply with (1) California and federal labeling requirements; (2) guidance from the FDA
20 about the proper use of the four “Basic Icons” from the Nutrition Keys (Facts Up Front) voluntary
21 labeling program; or (3) the provisions of the Nutrition Keys (Facts Up Front) voluntary labeling
22 program.

23 76. The Nutrition Keys (Facts Up Front) voluntary labeling program developed by the
24 GMA and FMI utilizes four “Basic Icons” that are designed to be presented together (along with
25 several possible optional icons) to give consumers a clear picture of the nutritional value of a
26 serving of the particular foods in question. The Nutrition Keys (Facts Up Front) voluntary
27 labeling program is designed so that shoppers can quickly compare the relative nutritional value
28 of food items that are all using the same yardsticks to determine nutritional value.

1 77. Any utility of the four “Basic Icons” from the Nutrition Keys (Facts Up Front)
2 voluntary labeling program evaporates when a food manufacturer fails to follow the same rules as
3 everyone else in the program and games the system making its products appear healthier and
4 preferable to competing products when in fact they are not. The four “Basic Icons” from the
5 Nutrition Keys (Facts Up Front) voluntary labeling program are designed so that consumers can
6 make quick purchasing decision without studying packaging and thus it is particularly
7 inappropriate and misleading for a manufacturer to use tricks to take advantage of consumers who
8 seek to avail themselves of the information that the Nutrition Keys (Facts Up Front) voluntary
9 labeling program is supposed to supply.

10 78. Defendants failed to adhere to the guidelines of the Nutrition Keys (Facts Up
11 Front) voluntary labeling program by utilizing smaller reference sizes for their icons than the
12 serving size mandated by the FDA that the guidelines required. This understated the calories (and
13 any other referenced nutrients) in Defendants’ products listed herein. In addition, while the
14 Nutrition Keys (Facts Up Front) voluntary labeling program made clear that there was no DV for
15 calories or sugars and thus none should be used in the Basic Icons, Defendants utilized an
16 unauthorized DV for calories that would overstate calorific requirements for much of the
17 population including women and children and other consumers with lower calorific
18 requirements.² This is made clear by the nutritional calculator included supplied by the Nutrition
19 Keys (Facts Up Front) voluntary labeling program. It is also confirmed by FDA materials that
20 calculate caloric requirements.

21 79. At the request of the GMA and the FMI the FDA provided guidance about the
22 Nutrition Keys (Facts Up Front) voluntary labeling program and the icons that it utilized. In its
23 guidance the FDA rejected the view that the icons were not nutrient content claims and expressly
24 stated that the:

25 FDA views the Nutrition Keys Basic Icons (calories, saturated fat, sodium and
26 total sugar content) and Optional Icons as nutrient content claims subject to all the
27 requirements of the FDCA and the Agency’s regulations.

28 ² See <http://www.gmaonline.org/news-events/newsroom/food-and-beverage-industry-launches-nutrition-keys-front-of-pack-nutrition-/>

1 *Id.* As such, when a manufacturer utilizes such icons on the product labels of products containing
2 a disqualifying nutrient level, it must comply with the requirements of 21 C.F.R. § 101.13(h) and
3 include a disclosure statement designed to inform consumers that the product contains a nutrient
4 at level the FDA believes poses a risk of a diet related disease or health condition. Such
5 disclosure is designed to prohibit manufacturers from falsely implying their products are
6 healthier than they actually are by only highlighting positive attributes while concealing negative
7 aspects.

8 80. The FDA made clear that:

9 standardized, non-selective presentation of the four Basic Icons on a company's
10 product line would alleviate some of FDA's concern regarding the potential for
11 product labeling to mislead consumers by presenting only "good news" about
12 nutrient content on the front of the package, which is the concern that the
13 regulations governing nutrient content claims were intended to address. We also
14 recognize that the standardized, non-selective presentation of the four Basic Icons
15 on a company's entire product line, if widely adopted by the food industry in a
16 uniform manner, may contribute to FDA's public health goals by fostering
17 awareness of the nutrient content of foods in the marketplace and assisting
18 consumers in making quick, informed, and healthy food choices.

19 *Id.* Notwithstanding this position, Defendants resorted to selective non-standard presentation of
20 "good news" about nutrient content on the front of the package, which is the concern that the
21 regulations governing nutrient content claims were intended to address. Moreover, Defendants
22 did not utilize the four Basic Icons but rather a bastardized version of the calorie icon (that used
23 smaller reference sizes than the required serving size and an unauthorized DV for calories) that
24 hindered awareness of the nutrient content of foods in the marketplace and interfered with
25 consumers being able to make quick, informed, and healthy food choices. In doing so
26 Defendants failed to follow the FDA's guidance that while it would not enforce the regulations
27 quoted above and require the disclosure of disqualifying nutrient if ALL FOUR of the nutrients
28 covered by the Basic Icons were presented together on the front of the package, it would
continue to require such disclosures if less than all four were repeated on the front. In doing so
the FDA stated:

As of the date of this letter, FDA intends to exercise enforcement discretion as
outlined in the numbered points above with respect to firms that participate in and
comply with the terms of the Nutrition Keys program, including use of the four
Basic Icons on virtually all eligible products. We believe that this will facilitate

1 participation in a positive effort to provide consumers more ready access to
2 information about the nutrient content of packaged foods, without compromising
3 consumer protection. A key consideration in our decision is that the disclosure
4 statement referring consumers to the Nutrition Facts panel of the food label will
5 continue to be required on products that bear Optional Icons and that exceed the
6 disclosure trigger levels of total fat, saturated fat, cholesterol, or sodium
7 established in 21 C.F.R. 101.13(h). In addition, all other nutrient content claims
8 used on the food label or in other labeling will be expected to comply with the
9 relevant regulations on the use of such claims.

10 *Id.* The FDA made clear however that when a manufacturer like Defendants acts improperly the
11 “FDA does not intend to exercise enforcement discretion with respect to companies that misuse
12 the Nutrition Keys labeling system in a manner that misleads consumers or otherwise violates the
13 FDCA.” *Id.*

14 81. As stated above, the nutrient content claims are unlawful because among other
15 reasons, they have failed to include disclosure statements for nutrient content claims required by
16 law that are designed to inform consumers of the inherently unhealthy nature of those products in
17 violation of 21 C.F.R. § 101.13(h), which has been incorporated in California’s Sherman Law.

18 82. 21 C.F.R. § 101.13 (h)(l) provides that:

19 If a food ... contains more than 13.0 g of fat, 4.0 g of saturated fat, 60 milligrams
20 (mg) of cholesterol, or 480 mg of sodium per reference amount customarily
21 consumed, per labeled serving, or, for a food with a reference amount customarily
22 consumed of 30 g or less ... per 50 g ... then that food must bear a statement
23 disclosing that the nutrient exceeding the specified level is present in the food as
24 follows: “See nutrition information for content” with the blank filled in with the
25 identity of the nutrient exceeding the specified level, e.g., “See nutrition
26 information for fat content.”

27 83. It should be noted that the disclosure required by 21 C.F.R. § 101.13 (h) that is at
28 issue in this case is completely separate and different from the disclaimer discussed in 21 C.F.R. §
101.13 (i). The disclosure required by 21 C.F.R. § 101.13 (h) is designed to ensure consumers are
given completely nutritional information and that manufacturers do not tout positive nutritional
aspects while concealing negative aspects like disqualifying nutrient levels. In contrast, the
disclaimer described in 21 C.F.R. § 101.13(i) is designed to ensure that there is adequate
disclosure when claims implicitly characterize the level of the nutrient in the food but are not
consistent with such a definition. 21 C.F.R. § 101.13(h) mandates the disclosure of other
disqualifying nutrients while 21 C.F.R. § 101.13(i) mandates that particular nutrient claims that

1 implicitly characterize levels of nutrients either be consistent with regulatory definitions for those
2 nutrients or disclose that fact. There are entirely separate provisions with entirely different
3 requirements.

4 84. Defendants repeatedly violated 21 C.F.R. § 101.13(h). Defendants' Purchased
5 Products' packaging prominently makes claims about the products percentage of the Daily Value
6 for calories despite disqualifying levels of total fat and saturated that exceed the disclosure
7 threshold stated in 21 C.F.R. § 101.13(h).³ For example, the principal display panel of
8 Defendants' M&M Chocolate Candy packages unlawfully makes such a nutrient content claim
9 despite containing more than 4 grams of saturated fat per serving size. This level of saturated fat
10 bars the making of a nutrient content claim without a disclosure statement.

11 85. Pursuant to 21 C.F.R. § 101.13(h), Defendants are prohibited from making the
12 unqualified nutrient claims of on its food products if its products contain disqualifying levels of
13 fat, saturated fat, cholesterol, or sodium, unless the product also displays a disclosure statement
14 that informs consumers of the product's fat, saturated fat and sodium levels.

15 86. The FDA made clear in its regulations that (a) repeating on the front of a package
16 the levels of any of the four (4) nutrients required in the nutritional information box on the back
17 of the package is a nutrient content claim; and (b) such nutrient content claims must comply with
18 all requirements of such claims, including disclaimers for high levels of saturated fat, fat or
19 sodium or other disqualifying nutrients.

20 87. These regulations are intended to ensure that consumers are not misled to believe
21 that a product that claims, for instance, to have certain nutritional benefits, but actually has other
22 unhealthy fat, saturated fat, cholesterol or sodium levels, is a healthy choice.

23
24
25 ³ For a food, except a meal product as defined in §101.13(l) or a main dish product as defined in
26 §101.13(m), these levels are more than 13.0 g of fat, 4.0 g of saturated fat, 60 mg of cholesterol, or 480 mg
27 of sodium per reference amount customarily consumed, per labeled serving, or, for a food with a reference
28 amount customarily consumed of 30 g or less or 2 tablespoons or less, per 50 g. If a food is a meal
product as defined in §101.13(l), these levels are more than 26 g of fat, 8.0 g of saturated fat, 120 mg of
cholesterol, or 960 mg of sodium per labeled serving. If a food is a main dish product as defined in
§101.13(m), these levels are more than 19.5 g of fat, 6.0 g of saturated fat, 90 mg of cholesterol, or 720 mg
of sodium per labeled serving.

1 88. Nevertheless, Defendants' labels on its Purchased Products make calorie related
2 nutrient content claims without such a disclosure even though these products contain fat,
3 saturated fat, cholesterol, or sodium in excess of the levels that the FDA has concluded increases
4 the risk of a diet-related disease or health related condition.

5 89. For example, the (i) Dove Bar - Dark Chocolate Dove bar had disqualifying
6 amounts of fat and saturated fat, (ii) the M&M Chocolate Candy and Twix Cookie Bar had
7 disqualifying amounts of saturated fat, yet all bore the calorie related nutrient content claim
8 without the mandated disclosure. Moreover, Defendants compound this problem by often making
9 their front of package nutrient claims not based on the actual serving size but rather on a per piece
10 or bar or pack basis that represents only a fraction of the levels present in the actual serving size.
11 This is misleading to consumers like Plaintiff. This was true on all Purchased Products.

12 90. Based on the fat and saturated fat content of Defendants' Purchased Products,
13 pursuant to federal and California law, Defendants must include a warning statement adjacent to
14 any calorie or other nutrient claim that informs consumers of the high levels of fat, saturated fat,
15 cholesterol or sodium.

16 91. No such disclosure statement currently exists on Defendants' Purchased Products.
17 Therefore, they are misbranded as a matter of federal and California law and cannot be sold
18 because they are legally worthless.

19 92. In the FDA Guidance to Industry the FDA states (emphasis added):

20 **Are nutrition designations permitted on food package labels?**

21 **Answer: FDA considers information that is required or permitted in the**
22 **Nutrition Facts label that is on the front label or elsewhere on the package**
23 **outside the Nutrition Facts label to be a Nutrient Content Claim (NCC). In**
24 **such cases, the package label must comply with the regulations for nutrient**
25 **content claims. See the NCC section and Appendices A and B of this document**
26 **for more information. 21 C.F.R. 101.13(c).⁴**

27 93. In addition to its guidance to industry, the FDA has sent warning letters to the
28 industry, including many of Defendants' peer food manufacturers, for the same types of unlawful

27 ⁴ Guidance to Industry, A food labeling Guide, Nutrition Labeling, October, 2009,
28 <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm064894.htm>

1 nutrient content claims described above. In these letters the FDA indicated that as a result of the
2 same types of claims utilized by Defendants, products were in “violation of the Federal Food,
3 Drug, and Cosmetic Act ... and the applicable regulations in Title 21, Code of Federal
4 Regulations, Part 101 (21 C.F.R. 101)” and “misbranded within the meaning of section 403
5 because the product label bears a nutrient content claim but does not meet the requirements to
6 make the claim.”

7 94. The warning letters were not isolated, as the FDA has issued a number of other
8 warning letters to other companies for the same type of unlawful nutrient content claims at issue
9 in this case.

10 95. Despite the FDA’s numerous warnings to industry, Defendants have continued to
11 sell its Purchased Products bearing unlawful calorie related nutrient content claims without
12 meeting the requirements to make them. These claims also failed to adhere to the guidelines
13 established by the FDA, the GMA and the FMI for Nutrition Keys (Facts Up Front) voluntary
14 labeling program.

15 96. Plaintiff saw and relied on Defendants’ false calorie related daily value nutrient
16 content claims and based her purchasing decisions in part on such claims. Had Plaintiff been
17 aware that Defendants’ calorie related daily value nutrient content claims were false she would
18 not have purchased Defendants’ products.

19 97. Plaintiff did not know, and had no reason to know, that Defendant’s Purchased
20 Products were misbranded, and bore nutrient claims despite failing to meet the requirements to
21 make those nutrient claims. Plaintiff was equally unaware that Defendant’s Purchased Products
22 contained one or more nutrients like total fat or saturated fat at levels in the food that, according
23 to the FDA, “may increase the risk of disease or health related condition that is diet related.”
24 Plaintiff was equally unaware that Defendants DV claim for calories was not authorized by the
25 FDA or the GMA or the FMI and was not compliant with the guidelines established by the FDA,
26 the GMA and the FMI for Nutrition Keys (Facts Up Front) voluntary labeling program. Plaintiff
27 was also unaware that Defendants were utilizing an icon for calories that improperly understated
28 calories compared to competing products.

1 98. Had Plaintiff known these facts, Plaintiff would not have purchased the Purchased
2 Products. Plaintiff and members of the Class who purchased the Purchased Products paid an
3 unwarranted premium for these products.

4 99. Defendants' unlawful statements on products of front of package calorie nutrient
5 content claims result in two separate and independent unlawful violations, bringing into effect
6 four separate law violations: one a specific labeling violation and one a violation for the sale of a
7 misbranded product.

8 100. When a manufacturer such as Defendants make an unlawful calorie nutrient
9 content claim it violates 21 C.F.R. § 101.13 (and Sherman Law § 110100), Sherman Law §
10 110670 and Sherman Law § 110705. Thus, it violates the unlawful prong. Such products are
11 misbranded under Sherman Law § 110660, Sherman Law § 110670 and Sherman Law § 110705.
12 Defendants' act of selling a misbranded product violates Sherman Law § 110760.

13 101. The sale of a misbranded product results in an independent violation of the
14 unlawful prong that is separate from the labeling violation. The only necessary element of that
15 claim is Defendants' unlawful label, and injury arises from the unlawful sale of an illegal product
16 that is unlawful to sell and unlawful to possess. Although, in this case Plaintiff did rely on the
17 calorie related nutrient content claim, no reliance by the consumer is necessary beyond reliance
18 on the legality of the product. Plaintiff has been deprived of money in an illegal sale and given a
19 worthless illegal product in return. In addition, due to the law's prohibition of possession of such
20 a product, Plaintiff has been unwittingly placed by Defendants' conduct in a legal position that no
21 reasonable consumer would agree to be placed.

22 102. 21 C.F.R. § 101.13 (h)(l) provides that:

23 If a food ... contains more than 13.0 g of fat, 4.0 g of saturated fat, 60 milligrams
24 (mg) of cholesterol, or 480 mg of sodium per reference amount customarily
25 consumed, per labeled serving, or, for a food with a reference amount customarily
26 consumed of 30 g or less ... per 50 g ... then that food must bear a statement
27 disclosing that the nutrient exceeding the specified level is present in the food as
28 follows: "See nutrition information for ___ content" with the blank filled in with the
identity of the nutrient exceeding the specified level, e.g., "See nutrition
information for fat content."

1 103. 21 C.F.R. § 1.21 establishes that failure to disclose material facts is a violation of
2 the disclosure rules and is *per se* “misleading.” The fat which Defendants failed to disclose is
3 material.

4 104. Defendants repeatedly violated these provisions when they prominently stated
5 front of package calorie nutrient content claims claim on their labels of the Purchased Products
6 without the mandatory disclosure statement.

7 105. This Court has found this exact kind of label representation to be misleading.

8 106. “A disqualifying level of, say, saturated fat is four grams per ‘reference amount
9 customarily consumed.’” 21 C.F.R. § 101.13(h)(1); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp.
10 2d 1111 (N.D. Cal. 2010). If this level is exceeded, a food purveyor is prohibited from making an
11 unqualified claim touting the health benefits of another nutrient in the food. *Id.* This is because
12 the Agency has reasoned that the beneficent claim, standing alone, would be misleading.” *Id.*

13 107. This Court has already held that an improper nutrient claim such as Defendants’
14 calorie claim even if accurate, may be unlawful and misleading. *Wilson v. Frito-Lay North*
15 *America, Inc.*, 2013 WL 1320468 (N.D. April 1, 2013)(Plaintiffs sufficiently alleged claim that
16 the “0 Grams Trans Fat” statement on bags of potato chips was deceptive because, accompanied
17 by a disclosure of at least one of the ingredients that 21 C.F.R. § 101.13(h)(1) requires to be
18 disclosed, they and other reasonable consumers would think that the statements on the labels
19 make accurate claims about the labeled products’ nutritional content when, in fact, they do not;
20 nutrient claim such as; “0 grams Trans Fat,” even if accurate, may be unlawful and misleading).

21 108. In *Chacanaca*, Judge Seeborg explained:

22 The federal regulatory statute provides for this precise scenario: that is, it
23 categorizes as misleading and therefore prohibited even true nutrient content
24 claims if the presence of another “disqualifying” nutrient exceeds and amount
25 established by regulation. The Agency has by regulation imposed “disqualifying”
26 levels for only four nutrients: total fat, saturated fat, cholesterol, and sodium.
27 21C.F.R. §§ 101.13(h)(1), 101.14(a)(4). It is important to note how disqualifying
28 claims work. A disqualifying level of say, saturated fat is four grams per
“reference amount customarily consumed.” 21C.F.R. § 101.13 (h)(1). If this level
is exceeded, a food purveyor is prohibited from making an unqualified claim
touting the health benefits of another nutrient in the food. This is because the
Agency has reasoned that the beneficent claim, standing alone, would be
misleading.

1 *Chacanaca*, 752 F. Supp. 2d at 1122 (emphasis in original).

2 109. Despite the FDA's numerous warnings to industry, Defendants continued to sell its
3 Purchased Products bearing improper front of package calorie nutrient content claims without
4 meeting the requirements to make these claims.

5 110. Due to Defendants misbranding of their Purchased Products, Plaintiff lost money
6 by purchasing unlawful products.

7 111. Thus, in this case, where Defendants unlawfully sold products containing an
8 calorie related nutrient content statement and omitting the mandatory disclosure statement there
9 is (1) a violation of specific labeling regulations; (2) a plaintiff who relied on that labeling
10 statement; (3) a violation of both the unlawful and misleading prongs due to Plaintiff's reliance;
11 and (4) an independent violation of the unlawful prong due to Defendants' sale of an illegal
12 product that is unlawful to possess.

13 112. As to their misleading claim, Plaintiff alleges pursuant to Federal Rule of Civil
14 Procedure 9(b) as follows:

15 113. Plaintiff did not know, and had no reason to know, that Defendants' Purchased
16 Products were misbranded, by the front of package calorie nutrient content claims despite failing
17 to meet the requirements to make those nutrient claims. Plaintiff read and relied upon Defendants'
18 front of package front of package calorie nutrient content claims statement, and Plaintiff was thus
19 deceived. Plaintiff was further unaware that Defendants' food products contained saturated fat
20 and total fat at levels in the food that, according to the FDA, "may increase the risk of disease or
21 health related condition that is diet related." Because of Defendants' unlawful and misleading
22 front of package calorie nutrient content claims and omitted disclosure statement, Plaintiff was
23 misled to believe that the product was better for her diet by containing no appreciable levels of
24 deleterious nutrients present at actionable levels by the FDA. Plaintiff was misled to believe the
25 products did not contain saturated fat, fat, cholesterol, sodium, and other negative food attributes
26 at levels that may increase the risk of disease or health related conditions. Defendants' front of
27 package calorie nutrient content claims label claim and omitted disclosure statement led Plaintiff
28

1 to believe that Defendants' food products were a better and healthier choice than other competing
2 snack products.

3 114. Defendants' conduct misled Plaintiff because, with Defendants failing to disclose
4 the high saturated fat and other deleterious attributes of its food, Plaintiff was misled into
5 believing Defendants' product to be a healthier choice. Plaintiff is conscious of the healthiness of
6 the products they purchase, and Defendants' unlawful statements and omitted mandatory
7 disclosures deprived Plaintiff of her ability to take into account those foods' contributions, or not,
8 to Plaintiff's total dietary composition. Defendants' concealed the deleterious attributes of their
9 food, and Plaintiff was misled and deceived, both by Defendants' statements of the healthy
10 attribute (front of package calorie nutrient content claims) and failure to disclose the deleterious
11 food attributes (fat content over 13g). The health conscious Plaintiff was misled by Defendants'
12 unlawfully prominent display of the ostensible good traits of its product, and unlawful failure to
13 disclose the bad.

14 115. Plaintiff reasonably relied on this label representation when making her purchase
15 decision and were misled by the front of package calorie nutrient content claims representation at
16 issue here. Plaintiff would not have purchased Defendants food products had she known the
17 truth about these products, *i.e.* that the products failed to make better contributions to Plaintiff's
18 diet and that the products contain one or more nutrients like saturated fat at levels in the food that
19 increased the risk of disease and/or dietary health related conditions. Plaintiff had other food
20 alternatives that satisfied such standards and Plaintiff also had cheaper alternatives. Reasonable
21 consumers would have been misled in the same identical manner as Plaintiff.

22 116. Defendants' unlawful failure to use the mandatory disclosure is actionable.
23 Plaintiff was unlawfully misled to believe that the products were low in saturated fat, by the front
24 of package calorie nutrient content claims statement, and, as a result, they purchased these
25 products. Plaintiff was misled and deceived through the very means and methods the FDA sought
26 to regulate.

27 117. Plaintiff and the Class would not have purchased Defendants' Purchased Products
28 had they not been misled by Defendants' unlawful calorie related claim and been properly

1 informed by Defendants' of the deleterious attributes of those products, and had they otherwise
2 not have been improperly misled and deceived as stated herein.

3 118. In addition to concealing the disqualifying nutrient levels present in their products,
4 Defendants have engaged in other unlawful and misleading labeling practices.

5 119. In particular, Defendants have utilized a front of package calorie related nutrient
6 claim that indicates that the products in question supply a certain percentage of the Daily Value
7 ("DV") of calories. The Purchased Products all bore such a claim oftentimes in a "logo" listing
8 the calories by smaller piece or packages as opposed to by the larger FDA mandated serving size,
9 This claim is false because just like for sugars and trans fat there is no established DV for calories
10 and food manufacturers are precluded from making such claims unless a DV actually exists. In
11 fact, the exact amount of caloric intake that is appropriate is individualized and on average
12 women such as Plaintiff require less calories per day than men do to either lose or maintain their
13 weight. So that the DV used by Defendants likely understates the actual percentage for
14 individuals like Plaintiff. It is also misleading because, even if it could be given, it is given on a
15 quantity of the product less than the FDA mandated serving size thus understating the true
16 amount of calories. For example, the front panel of the package of the Snickers Bar purchased by
17 Plaintiff states "80 Calories per piece" and bears a "logo" or "box" stating "Calories 80, 4% DV,
18 per piece." This information is repeated on the back of the package in a brightly colored box that
19 also has the "per piece" amount of total fat, saturated fat, sugars and sodium. As is indicated in
20 the Nutrition Facts the FDA mandated serving size is two (2) pieces, so even if the calorie claim
21 on the front were lawful it would understate the nutrients by 50%. Moreover, the claim is
22 unlawful because the claim on the front of the package does not include the required disclosure of
23 high levels of fat and other unhealthy nutrients.

24 120. The inclusion of a DV for calories on the label of Defendants Purchased Products
25 is completely false and misleading for the following reason. According to the 2010 U.S. dietary
26 guidelines only a small amount of calories should be derived from fats or sugars even if a
27 midrange 2000 calorie diet is used as the reference point. The guidelines actually list 5 lower
28 caloric diets as reference points (1000, 1200, 1400, 1600 and 1800 calorie diets) recognizing as

1 the FDA and USDA both do that different people have different caloric requirements and thus
2 there is no single DV for calories. Moreover, the dietary guidelines recommend eliminating
3 sources of added sugar such as candy from the diet entirely. According to these guidelines, “the
4 maximum limit” of calories in a midrange 2000 calorie diet that should be derived from fats and
5 added sugars is 258. Defendants’ Purchased Products contain between 142 and 212 calories from
6 fats and added sugars (using stated calories from fat and 4 calories for each stated gram of sugar.
7 This represents between 55% and 82.2% of the maximum caloric limit that should comprise a
8 2000 calorie diet. Thus, Defendants fabricated DV for calories grossly overstates the amount of
9 calories from a 2000 calorie diet that should come from candy such as Defendants.’ This is true
10 for each of Defendants’ Purchased Products and the Substantially Similar Products.

11 121. Thus, Defendants’ M&M Chocolate Candy, 1.69 oz. (80 calories from fat, 31 g
12 sugars) has 204 calories from fat and sugars and provides 79.1% of the maximum daily caloric
13 limit and not the 12% DV fabricated by Defendants; Defendants’ Twix Cookie Bar, 1.79 oz. (110
14 calories from fat, 24 g sugars) has 206 calories from fat and sugars and provides 79.8% of the
15 maximum daily caloric limit and not the 13% DV fabricated by Defendants; Defendants’ Dove
16 Bar - Dark Chocolate Dove Bar, 3.3 oz. (120 calories from fat, 19 g sugars) has 196 calories
17 from fat and sugars and provides 76% of the maximum daily caloric limit and not the 11% DV
18 fabricated by Defendants; Defendants’ Dove Bar - Milk Chocolate, 3.3 oz. (120 calories from fat,
19 23 g sugars) has 212 calories from fat and sugars and provides 82.2% of the maximum daily
20 caloric limit and not the 12% DV fabricated by Defendants; and Defendants’ Snickers Bar, 11.8
21 oz. (70 calories from fat, 9 g sugars) has 142 calories from fat and sugars and provides 55% of
22 the maximum daily caloric limit and not the 4% DV per piece or 8% per serving fabricated by
23 Defendants.

24 122. By placing a fabricated DV for calories that grossly misrepresented and
25 overstated the maximum amount of calories that should come, Defendants misrepresented the
26 healthiness of their candy and made them seem like more a part of a healthy diet than they
27 actually were. Even if a person was to depend on just the amounts of fat and saturated fat that the
28 FDA uses to calculate the daily recommended value percentages for fat and saturated fat to

1 calculate a DV for calories (the FDA has no daily recommended value for sugar or calories),
2 Defendants' fabricated DV for calories would still overstate the amount of calories that should be
3 derived from a product such as Defendants' candy as on each purchased product the percentages
4 for each of these two components both far exceed the percentage represented to be the DV for
5 calories in some cases by more than 3 times the percentage stated as the purported DV for
6 calories.

7 123. Thus, Defendants' M&M Chocolate Candy, 1.69 oz. (fabricated 12% DV calories;
8 has 14% of the recommended fat and 30% of the recommended saturated fat); Defendants' Twix
9 Cookie Bar, 1.79 oz. (fabricated 13% DV calories; has 18% of the recommended fat and 35% of
10 the recommended saturated fat); Defendants' Dove Bar - Dark Chocolate, 3.3 oz. (fabricated 11%
11 DV calories; has 22% of the recommended fat and 40% of the recommended saturated fat);
12 Defendants' Dove Bar - Milk Chocolate, 3.3 oz. (fabricated 12% DV calories; has 20% of the
13 recommended fat and 40% of the recommended saturated fat); and Defendants' Snickers Bar,
14 11.8 oz. (fabricated 4% DV calories per piece and 8% per serving; has 12% of the recommended
15 fat and 15% of the recommended saturated fat) all overstate the actual amount of calories these
16 products should be allowed to contribute to a person's diet even if a midrange 2000 calorie diet is
17 utilized as the reference point. Defendants' fabricated DV for calories overstates the relative
18 portion of a 2000 calorie diet that should come from Defendants' candy and makes it falsely
19 appear that pursuant to official guidelines Defendants' candy can feature in a larger portion of a
20 person's diet than it actually should according to government guidelines. Defendants' fabricated
21 DV for calories was misleading to consumer like the Plaintiff who relied on Defendants'
22 fabricated DV for calories. Moreover, any reasonable consumer would have been misled by
23 Defendants' fabricated DV for calories.

24 124. The FDA has repeatedly issued warning letters to companies who made such
25 unauthorized DV claims.

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D. Defendants Violate California Law By Failing To Label Their Product Ingredients By Their Common Names

125. The following Purchased Products unlawfully fail to label ingredients by their common name: Twix Cookie Bar, 1.79 oz.

126. In violation of identical California and federal law, Defendants misrepresented the ingredients in its chocolate products. The Defendants did this by failing to list these ingredients in the ingredient statements by their common and usual name.

127. Under California law “[a]ny food fabricated from two or more ingredients is misbranded unless it bears a label clearly stating the common or usual name of each ingredient” (California Health & Safety Code § 110725). California’s law is identical to federal law on this point.

128. Moreover, California has expressly adopted the federal regulations as its own. Thus California has adopted the requirements of 21 C.F.R. § 101.4 which mandate that the ingredient names listed on product labels be the common or usual name of those ingredients.

129. In its guidance for industry and warning letters to manufacturers, the FDA has repeatedly stated its policy of restricting the ingredient names listed on product labels to their common or usual name, as provided in 21 C.F.R. § 101.4(a)(1).

130. An ingredient’s common or usual name is the name established by common usage or regulation, as provided in 21 C.F.R. § 102.5(d) which has been adopted by the State of California.

131. The common or usual name must accurately describe the basic nature of the food or its characterizing properties or ingredients, as provided in 21 C.F.R. § 102.5(a).

132. The purpose of these laws and regulations is to ensure that consumers are provided with accurate information about products and their ingredients so they can make informed purchasing decisions. Consumers can avoid chemicals and ingredients they wish to avoid in particular products and can select products that contain the ingredients consumers’ desire.

133. Absent such disclosures and labeling practices, consumers cannot, except by luck or happenstance, avoid chemicals like the ones at issue here.

1 134. Ignoring California law and its incorporated federal regulations and guidance,
2 Defendants mislabeled its Twix Cookie Bar and its Substantially Similar Products so that
3 consumers were deprived of accurate information and, in fact, the Plaintiff and the members of
4 the class were misled by the Defendants' concealment of a chemical they wished to avoid in their
5 food.

6 135. Defendants failed to list the ingredient polyglycerol polyricinoleic acid by its
7 common or usual name in some of the Defendants' chocolate products like Twix Cookie Bar.
8 Instead, Defendants listed it by a non-common or usual name PGPR. Moreover, when they list it
9 they do not describe its function. Polyglycerol polyricinoleic acid is used to reduce the amount of
10 high cost cocoa butter that is used in the chocolate. This form of economic adulteration saves the
11 Defendants considerable amounts of money. Hiding the presence of the polyglycerol
12 polyricinoleic acid allows them to pass off their chocolate products as higher value items. As the
13 Defendants themselves note consumers should try and search out products that contain 100%
14 cocoa butter. Defendants make this harder to do by their deceptive labeling practices.

15 136. In listing PGPR as an ingredient, and failing to list the actual ingredient
16 polyglycerol polyricinoleic acid by its common and usual name, Defendants not only misled the
17 Plaintiff and the Class by concealing the presence of this chemical in Defendants' Twix Cookie
18 Bar, Defendants also violated California Health & Safety Code § 110725 and the federal
19 regulations (21 C.F.R. §§ 101.4 and 102.5) that have been adopted as law by the State of
20 California. Specifically, Defendants have failed to disclose the presence of the polyglycerol
21 polyricinoleic acid by its common or usual name, as required by California Health & Safety Code
22 § 110725 and 21 C.F.R. §§ 101.4 and 102.5. They also have failed to reveal its function.

23 137. A reasonable consumer would expect that when a manufacturer lists the
24 ingredients on its products, the product's ingredients are given their common or usual name as
25 required by law.

26 138. Plaintiff did not know, and had no reason to know, that Defendants' Twix Cookie
27 Bar was misbranded because they failed to list an ingredient by the ingredient's common or usual
28

1 name, despite identical California and federal regulations requiring that that the chemicals be
2 listed as ingredients by their common and usual names.

3 139. Plaintiff and reasonable consumers are thus misled into purchasing Defendants'
4 products with false and misleading ingredient names, which do not describe the basic nature of
5 the food or its characterizing properties or ingredients, as provided in California Health & Safety
6 Code § 110725 and 21 C.F.R. §§ 101.4 and 102.5(a) both of which have been adopted as law by
7 California.

8 140. Plaintiff who relied on the Defendants' labeling and ingredient lists was misled
9 by the Defendants' failure to use the common or usual name of the ingredient polyglycerol
10 polyricinoleic acid and Defendants' utilization of a misleading ingredient name, which does not
11 describe the basic nature of the food or its characterizing properties or ingredients

12 141. Had Plaintiff been aware that the Defendants' Twix Cookie Bar she purchased
13 contained polyglycerol polyricinoleic acid she would not have purchased the products or
14 knowingly used them as food. Plaintiff had other alternatives that lacked such ingredients and
15 Plaintiff also had cheaper alternatives.

16 142. Defendants' claims in this respect are false and misleading and the products are in
17 this respect misbranded under identical federal and California law, including California Health &
18 Safety Code § 110725. Misbranded products cannot be legally sold and are legally worthless.
19 Plaintiff and members of the Class who purchased these products paid an unwarranted premium
20 for these products.

21 **THE PURCHASED PRODUCTS ARE MISBRANDED UNDER THE SHERMAN LAW**
22 **AND ARE MISLEADING AND DECEPTIVE**

23 143. Plaintiff purchased the Purchased Products in California during the Class Period
24 and read and relied in substantial part on the claims on the labels of the products, including the
25 nutrient content claims and other misleading and unlawful information thereon as specified above
26 in making her purchasing decisions.

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

1 145. Each Purchased Product has a label that is false, misleading and deceptive.

2 **A. M&M Chocolate Candy, 1.69 oz**

3 146. Plaintiff purchased Mars M&M Chocolate Candy, 1.69 oz in the Class Period. The
4 label (front and back) of the package purchased by Plaintiff is attached as **Exhibit A**.

5 147. The following unlawful and misleading language appears on the front label:

6 **“Calories 230” / “12% DV” (front and back)**

7 148. This product is unlawful, misleading, misbranded and violates the Sherman Law
8 (through incorporation of 21 C.F.R. § 101.60(c) because the label touts 230 calories when there is
9 no DV or RDI for calories and despite the fact the product is high in fat it does not have the
10 required disclosure adjacent to the nutrient claim that informs consumers of the high levels of fat,
11 saturated fat, cholesterol or sodium. It is also misleading because it understates the amount of
12 calories which should be derived from fats or sugars. The product is also unlawful, misleading
13 and misbranded for violations of other provisions of California and Federal law as set out below.

14 149. Plaintiff read and reasonably relied on the label representation as set out above and
15 based and justified the decision to purchase the product, in substantial part, on the label
16 representation. Also, Plaintiff reasonably relied and believed that this product was not
17 misbranded under the Sherman Law and was therefore legal to buy and possess and would not
18 have purchased it had she known it was misbranded and illegal to buy or possess.

19 150. Plaintiff was misled by Defendants’ unlawful and misleading label on this product.
20 Plaintiff would not have otherwise purchased this product had she known the truth about this
21 product, *i.e.*, not as healthy as labeled and contains high levels of fat and/or saturated fat. In
22 addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food
23 alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled
24 by these label representations in the same way(s) as Plaintiff.

25 **B. Twix Chocolate Candy, 1.79 oz**

26 151. Plaintiff purchased Twix Chocolate Candy, 1.79 oz. in the Class Period. The label
27 (front and back) of the package purchased by Plaintiff is attached as **Exhibit B**.
28

1 152. The following unlawful and misleading language appears on the front label:
2 “Calories 250” / “13% DV”

3 153. The following unlawful and misleading language appears on the back label:
4 “PGPR” (as an ingredient)
5 “Calories 250” / “13% DV”

6 154. This product is unlawful, misleading, misbranded and violates the Sherman Law
7 (through incorporation of 21 C.F.R. § 101.60(c) because (i) the label touts 250 calories when
8 there is no DV or RDI for calories and despite the fact the product is high in fat it does not have
9 the required disclosure adjacent to the nutrient claim that informs consumers of the high levels of
10 fat, saturated fat, cholesterol or sodium and (ii) the label conceals the use of polyglycerol
11 polyricinoleic acid. It is also misleading because it understates the amount of calories which
12 should be derived from fats or sugars. The product is also unlawful, misleading and misbranded
13 for violations of other provisions of California and Federal law as set out below.

14 155. Plaintiff read and reasonably relied on the label representations as set out above
15 and based and justified the decision to purchase the product, in substantial part, on the label
16 representations. Also, Plaintiff reasonably relied and believed that this product was not
17 misbranded under the Sherman Law and was therefore legal to buy and possess and would not
18 have purchased it had she known it was misbranded and illegal to buy or possess.

19 156. Plaintiff was misled by Defendants’ unlawful and misleading label on this product.
20 Plaintiff would not have otherwise purchased this product had she known the truth about this
21 product, *i.e.*, not as healthy as labeled and contains high levels of fat and/or saturated fat and
22 actually contained polyglycerol polyricinoleic acid. In addition, Plaintiff paid on unwarranted
23 premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper
24 alternatives. Reasonable consumers would be misled by these label representations in the same
25 way(s) as Plaintiff.

26 **C. Dove Bar - Dark Chocolate, 3.3 oz.**

27 157. Plaintiff purchased Mars Dark Chocolate Dove Bar in the Class Period. The label
28 (front and back) of the package purchased by Plaintiff is attached as **Exhibit C**.

1 158. The following unlawful and misleading language appears on the front label:
2 **“Calories 220” / “11% DV”**

3 159. The following unlawful and misleading language appears on the back label:

4 **“Calories 220” / “11% DV”**

5 **“naturally occurring cocoa flavanols”**

6 **“a natural source of cocoa flavanols”**

7 160. This product is unlawful, misleading, misbranded and violates the Sherman Law
8 (through incorporation of 21 C.F.R. § 101.60(c) because (i) the label touts 220 calories when
9 there is no DV or RDI for calories and despite the fact the product is high in fat it does not have
10 the required disclosure adjacent to the nutrient claim that informs consumers of the high levels of
11 fat, saturated fat, cholesterol or sodium and (ii) the back label of the product is also unlawful,
12 misleading and misbranded for violations the nutrient content rules regarding antioxidants.
13 Flavanols do not have an RDI. It is also misleading because it understates the amount of calories
14 which should be derived from fats or sugars. The product is also unlawful, misleading and
15 misbranded for violations of other provisions of California and Federal law as set out below.

16 161. Plaintiff read and reasonably relied on the label representations as set out above
17 and based and justified the decision to purchase the product, in substantial part, on the label
18 representations. Also, Plaintiff reasonably relied and believed that this product was not
19 misbranded under the Sherman Law and was therefore legal to buy and possess and would not
20 have purchased it had she known it was misbranded and illegal to buy or possess.

21 162. Plaintiff was misled by Defendants’ unlawful and misleading label on this product.
22 Plaintiff would not have otherwise purchased this product had she known the truth about this
23 product, *i.e.*, not as healthy as labeled and contains high levels of fat and/or saturated fat and In
24 addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food
25 alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled
26 by these label representations in the same way(s) as Plaintiff.

27 **D. Dove Bar - Milk Chocolate, 3.3 oz**

28 163. Plaintiff purchased Mars Chocolate Dove Bar in the Class Period. The label (front

1 and back) of the package purchased by Plaintiff is attached as **Exhibit D**.

2 164. The following unlawful and misleading language appears on the front label:

3 **“Calories 230” / “12% DV”**

4 165. This product is unlawful, misleading, misbranded and violates the Sherman Law
5 (through incorporation of 21 C.F.R. § 101.60(c) because the label touts 230 calories when there is
6 no DV or RDI for calories and despite the fact the product is high in fat it does not have the
7 required disclosure adjacent to the nutrient claim that informs consumers of the high levels of fat,
8 saturated fat, cholesterol or sodium. It is also misleading because it understates the amount of
9 calories which should be derived from fats or sugars. The product is also unlawful, misleading
10 and misbranded for violations of other provisions of California and Federal law as set out below.

11 166. Plaintiff read and reasonably relied on the label representation as set out above and
12 based and justified the decision to purchase the product, in substantial part, on the label
13 representation. Also, Plaintiff reasonably relied and believed that this product was not
14 misbranded under the Sherman Law and was therefore legal to buy and possess and would not
15 have purchased it had she known it was misbranded and illegal to buy or possess.

16 167. Plaintiff was misled by Defendants’ unlawful and misleading label on this product.
17 Plaintiff would not have otherwise purchased this product had she known the truth about this
18 product, *i.e.*, not as healthy as labeled and contains high levels of fat and/or saturated fat. In
19 addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food
20 alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled
21 by these label representations in the same way(s) as Plaintiff.

22 **E. Snickers Bar - 11.8 oz.**

23 168. Plaintiff purchased Snickers Bar, 11.8 oz in the Class Period. The label (front and
24 back) of the package purchased by Plaintiff is attached as **Exhibit E**.

25 169. The following unlawful and misleading language appears on the front label:

26 **“Calories 230” / “12% DV”**

27 170. This product is unlawful, misleading, misbranded and violates the Sherman Law
28 (through incorporation of 21 C.F.R. § 101.60(c) because the label touts 230 calories when there is

1 no DV or RDI for calories and despite the fact the product is high in fat it does not have the
2 required disclosure adjacent to the nutrient claim that informs consumers of the high levels of fat,
3 saturated fat, cholesterol or sodium. It is also misleading because it understates the amount of
4 calories which should be derived from fats or sugars. The product is also unlawful, misleading
5 and misbranded for violations of other provisions of California and Federal law as set out below.

6 171. Plaintiff read and reasonably relied on the label representation as set out above and
7 based and justified the decision to purchase the product, in substantial part, on the label
8 representation. Also, Plaintiff reasonably relied and believed that this product was not
9 misbranded under the Sherman Law and was therefore legal to buy and possess and would not
10 have purchased it had she known it was misbranded and illegal to buy or possess.

11 172. Plaintiff was misled by Defendants' unlawful and misleading label on this product.
12 Plaintiff would not have otherwise purchased this product had she known the truth about this
13 product, *i.e.*, not as healthy as labeled and contains high levels of fat and/or saturated fat. In
14 addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food
15 alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled
16 by these label representations in the same way(s) as Plaintiff.

17 **DEFENDANTS HAVE VIOLATED CALIFORNIA LAW BY MANUFACTURING,**
18 **ADVERTISING DISTRIBUTING AND SELLING MISBRANDED FOOD PRODUCTS**

19 173. Defendants have manufactured, advertised, distributed and sold products that are
20 misbranded under California law. Misbranded products cannot be legally manufactured,
21 advertised, distributed, sold or held and are legally worthless as a matter of law.

22 174. Defendants have violated California Health & Safety Code §§ 109885 and 110390
23 which make it unlawful to disseminate false or misleading food advertisements that include
24 statements on products and product packaging or labeling or any other medium used to directly or
25 indirectly induce the purchase of a food product.

26 175. Defendants have violated California Health & Safety Code § 110395 which makes
27 it unlawful to manufacture, sell, deliver, hold or offer to sell any misbranded food.
28

1 176. Defendants have violated California Health & Safety Code § 110398 which makes
2 it unlawful to deliver or proffer for delivery any food that has been falsely advertised.

3 177. Defendants have violated California Health & Safety Code § 110660 because their
4 labeling is false and misleading in one or more ways.

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

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

11 180. Defendants' Purchased Products are misbranded under California Health & Safety
12 Code § 110705 because words, statements and other information required by the Sherman Law to
13 appear on their labeling either are missing or not sufficiently conspicuous.

14 181. Defendants have violated California Health & Safety Code § 110760 which makes
15 it unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is
16 misbranded.

17 182. Defendants have violated California Health & Safety Code § 110765 which makes
18 it unlawful for any person to misbrand any food.

19 183. Defendants have violated California Health & Safety Code § 110770 which makes
20 it unlawful for any person to receive in commerce any food that is misbranded or to deliver or
21 proffer for delivery any such food.

22 184. Defendants have violated the standard set by 21 C.F.R. § 101.2, 101.3, 101.4;
23 101.9, 101.12, 101.22, 102.5, and 105.66 all of which have been incorporated by reference in the
24 Sherman Law, by failing to include on their product labels the nutritional information required by
25 law.

26 185. Defendants have violated and continue to violate the standards set by 21 C.F.R. §§
27 101.13, 101.54, 101.60 and 105.66, which have been adopted by reference in the Sherman Law,
28 by including unauthorized nutrient content claims on their products.

1 186. Defendants have violated and continue to violate the standard set by 21 C.F.R. §
2 101.18 which have been adopted by reference in the Sherman Law, by misrepresenting their non-
3 low-calorie food products as low-calorie alternatives to other food products.

4 187. Defendants have violated and continue to violate the standard set by 21 C.F.R. §
5 101.60 which have been adopted by reference in the Sherman Law, by representing either
6 expressly or implicitly that their products are low-calorie and or lack sugar when they fail to meet
7 the requirements for making such claims.

8 188. Defendants have manufactured, distributed, advertised, marketed and sold
9 products misbranded in violation of the standards contained in 21 U.S.C. § 343(r), which has been
10 incorporated in the Sherman Law, and continue to do so. Pursuant to 21 U.S.C. § 343(r), food is
11 misbranded if, as here, it bears a nutrient content claim despite failing to meet the requirements
12 for making that claim. *See* California Health and Safety Code § 110670.

13 189. In addition to their violation of sections (q) and (r) of 21 U.S.C. § 343, Defendants
14 have manufactured, distributed, advertised, marketed and sold products misbranded in violation
15 of the standard set by sections a, f, and j of 21 U.S.C. § 343 which has been adopted by reference
16 in the Sherman Law, and continue to do so. Pursuant to 21 U.S.C. § 343 food shall be deemed to
17 be misbranded if, as in the instant case:

18 (a) it bears a false or misleading label ...

19 (f) its label fails to conspicuously depict any word, statement, or other
20 information required to appear on the label or labeling and be prominently placed
21 thereon with such conspicuousness (as compared with other words, statements,
22 designs, or devices, in the labeling) and in such terms as to render it likely to be
23 read and understood by the ordinary individual under customary conditions of
24 purchase and use; ...

25 (j) it purports to be or is represented for special dietary uses, and its label fails to
26 bear such information concerning its vitamin, mineral, and other dietary
27 properties as the Secretary determines to be, and by regulations prescribes as,
28 necessary in order fully to inform purchasers as to its value for such uses.

29 190. Each of the federal requirements has been expressly adopted by the State of
30 California and thus each of Defendants' violations of these federal standards constitutes an
31 independent violation of state law.

PLAINTIFF PURCHASED DEFENDANTS' PURCHASED PRODUCTS

1
2 191. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy
3 diet.

4 192. Plaintiff purchased Defendants' Purchased Products at issue in this Class Action
5 Complaint since 2008 and throughout the Class Period.

6 193. During the Class Period, Plaintiff spent more than twenty-five dollars (\$25.00) on
7 Defendants' Purchased Products.

8 194. Plaintiff read the labels on Defendants' products, including nutrient content claims
9 and other unlawful and misleading information described above on the labels before purchasing
10 them. Defendants' failure to disclose the presence of risk-increasing nutrients and calories and
11 their utilization of false and improper labeling claims was deceptive because it falsely conveyed
12 to the Plaintiff the net impression that the Purchased Products she bought made better
13 contributions to a diet than other non-misbranded similar products, and did not contain any
14 nutrients or calories at levels that raised the risk of diet-related disease or health related condition.
15 Defendants' utilization of unlawful and unauthorized nutrient content claims also misled the
16 Plaintiff with respect to the nature of the products she was purchasing.

17 195. Plaintiff relied on Defendants' package labeling nutrient content claims and other
18 unlawful and misleading information on the labels and based and justified the decision to
19 purchase Defendants' products in substantial part on Defendants' package labeling. Plaintiff
20 would have foregone purchasing Defendants' products and bought other products readily
21 available at a lower price.

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

25 197. As a result of Defendants' misrepresentations, Plaintiff and thousands of others in
26 California and the United States purchased the products at issue.

27 198. Defendants' labeling, advertising and marketing as alleged herein are false and
28 misleading and designed to increase sales of the products at issue. Defendants' misrepresentations

1 are part of an extensive labeling, advertising and marketing campaign, and a reasonable person
2 would attach importance to Defendants' representations in determining whether to purchase the
3 products at issue.

4 199. A reasonable person would also attach importance to whether Defendants'
5 Purchased Products were legally salable, and capable of legal possession, and to Defendants'
6 representations about these issues in determining whether to purchase the products at issue.
7 Plaintiff would not have purchased Defendants' Purchased Products had she known they were not
8 capable of being legally sold or held and did not possess the characteristics or nutritional
9 attributes they were falsely represented to have by the Defendants.

10 **CLASS ACTION ALLEGATIONS**

11 200. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure
12 23(b)(2) and 23(b)(3) on behalf of the following Class:

13 All persons in California who purchased a food product manufactured or
14 distributed by Defendants that (1) bears a flavanol claim on its label; or (2) a
15 percentage daily value claim for calories on its label; or (3) lists PGPR as an
ingredient on its label since April 11, 2008.

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

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

22 203. Numerosity: Based upon Defendants' publicly available sales data with respect to
23 the misbranded products at issue, it is estimated that the Class number in the thousands, and that
24 joinder of all Class members is impracticable.

25 204. Common Questions Predominate: This action involves common questions of law
26 and fact applicable to each Class member that predominate over questions that affect only
27 individual Class members. Thus, proof of a common set of facts will establish the right of each
28

1 Class member to recover. Questions of law and fact common to each Class member include, for
2 example:

- 3 a. Whether Defendants engaged in unlawful and misleading business
4 practices by failing to properly package and label their Purchased
5 Products sold to consumers;
- 6 b. Whether the food products at issue were misbranded or unlawfully
7 packaged and labeled as a matter of law;
- 8 c. Whether Defendants made unlawful and misleading nutrient
9 content flavanol claims with respect to their food products sold to
10 consumers;
- 11 d. Whether Defendants violated California Bus. & Prof. Code §
12 17200, California Bus. & Prof. Code § 17500, and the Sherman
13 Law;
- 14 e. Whether Plaintiff and the Class is entitled to equitable and/or
15 injunctive relief;
- 16 f. Whether Defendants' unlawful, unfair and/or deceptive practices
17 harmed Plaintiff and the Class.

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

28 206. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.
Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to
the interests of the Class members. Plaintiff has retained highly competent and experienced class
action attorneys to represent their interests and those of the members of the Class. Plaintiff and
Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate

1 this class action, and Plaintiff and her counsel are aware of their fiduciary responsibilities to the
2 Class members and will diligently discharge those duties by vigorously seeking the maximum
3 possible recovery for the Class.

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

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

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

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

FIRST CAUSE OF ACTION

**Business and Professions Code § 17200, et seq.
Unlawful Business Acts and Practices**

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

212. Defendants’ conduct constitutes unlawful business acts and practices.

213. Defendants sold Purchased Products nationwide and in California.

214. Defendants are corporations and, therefore are “persons” within the meaning of the Sherman Law.

215. Defendants’ business practices are unlawful under § 17200, et seq. by virtue of Defendants’ violations of the advertising provisions of the Sherman Law (Article 3) and the misbranded food provisions of the Sherman Law (Article 6).

216. Defendants’ business practices are unlawful under § 17200, et seq. by virtue of Defendants’ violations of § 17500, et seq., which forbids untrue and misleading advertising. Defendants’ business practices are unlawful under § 17200, et seq. by virtue of Defendants’ violations of § the Consumer Legal Remedies Act, Cal Civ. Code § 17500, et seq.

217. Defendants sold Plaintiff and the Class Purchased Products that were not capable of being sold legally and which were legally worthless. Plaintiff and the Class paid a premium price for the Purchased Products.

218. As a result of Defendants’ illegal business practices, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct and such other orders and judgments which may be necessary to disgorge Defendants’ ill-gotten gains and to restore to any Class Member any money paid for the Purchased Products.

219. Defendants’ unlawful business acts present a threat and reasonable continued likelihood of deception to Plaintiff and the Class.

220. As a result of Defendants’ conduct, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and such other orders and judgments which may be necessary to disgorge Defendants’

1 ill-gotten gains and restore any money paid for Defendants' Purchased Products by Plaintiff and
2 the Class.

3 **SECOND CAUSE OF ACTION**

4 **Business and Professions Code § 17200, et seq.**
5 **Unfair Business Acts and Practices**

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

7 222. Defendants' conduct as set forth herein constitutes unfair business acts and
8 practices.

9 223. Defendants sold Purchased Products nationwide and in California during the Class
10 Period.

11 224. Defendants' deceptive marketing, advertising, packaging and labeling of their
12 Purchased Products was of no benefit to consumers, and the harm and injury to consumers and
13 competition is substantial. Plaintiff and members of the Class suffered a substantial injury by
14 virtue of buying Defendants' Purchased Products that they would not have purchased absent the
15 Defendants' illegal conduct as set forth herein.

16 225. Defendants' sold Plaintiff and the Class Purchased Products that were not capable
17 of being legally sold and that were legally worthless. Plaintiff and the Class paid a premium price
18 for the Purchased Products. Plaintiff and the Class who purchased Defendants' Purchased
19 Products had no way of reasonably knowing that the products were misbranded and were not
20 properly marketed, advertised, packaged and labeled, and thus could not have reasonably avoided
21 the injury each of them suffered.

22 226. The consequences of Defendants' conduct as set forth herein outweighs any
23 justification, motive or reason therefor. Defendants' conduct is and continues to be immoral,
24 unethical, unscrupulous, contrary to public policy, and is substantially injurious to Plaintiff and
25 the Class.

26 227. As a result of Defendants' conduct, Plaintiff and the Class, pursuant to Business
27 and Professions Code § 17203, are entitled to an order enjoining such future conduct by
28 Defendant, and such other orders and judgments which may be necessary to disgorge Defendants'

1 ill-gotten gains and restore any money paid for Defendants’ Purchased Products by Plaintiff and
2 the Class.

3 **THIRD CAUSE OF ACTION**

4 **Business and Professions Code § 17200, et seq.**
5 **Fraudulent Business Acts and Practices**

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

7 229. Defendants’ conduct as set forth herein constitutes fraudulent business practices
8 under California Business and Professions Code sections § 17200, et seq.

9 230. Defendants sold Purchased Products nationwide and in California during the Class
10 Period.

11 231. Defendants’ misleading marketing, advertising, packaging and labeling of the
12 Purchased Products and its misrepresentations that the products at issue were salable, capable of
13 legal possession and not misbranded were likely to deceive reasonable consumers, and in fact,
14 Plaintiff and members of the Class were deceived. Defendants have engaged in fraudulent
15 business acts and practices.

16 232. Defendants’ fraud and deception caused Plaintiff and the Class to purchase
17 Defendants’ Purchased Products that they would otherwise not have purchased had they known
18 the true nature of those products.

19 233. Defendants sold Plaintiff and the Class Purchased Products that were not capable
20 of being sold or held legally and that were legally worthless. Plaintiff and the Class paid a
21 premium price for the Purchased Products.

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

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FOURTH CAUSE OF ACTION

Business and Professions Code § 17500, *et seq.*
Misleading and Deceptive Advertising

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

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

237. Defendants sold Purchased Products nationwide and in California during the Class Period.

238. Defendants engaged in a scheme of offering Defendants' Purchased 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 Defendants' Purchased Products. Defendants' advertisements and inducements were made within California 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 Defendants' Purchased Products and are statements disseminated by Defendants to Plaintiff and the Class that were intended to reach members of the Class. Defendants knew, or in the exercise of reasonable care should have known, that these statements were misleading and deceptive as set forth herein.

239. In furtherance of their plan and scheme, Defendants prepared and distributed within California and nationwide via product packaging and labeling, and other promotional materials, statements that misleadingly and deceptively represented the ingredients contained in and the nature of Defendants' Purchased Products. Plaintiff and the Class necessarily and reasonably relied on Defendants' materials, and were the intended targets of such representations.

240. Defendants' conduct in disseminating misleading and deceptive statements in California and nationwide to Plaintiff and the Class was and is likely to deceive reasonable consumers by obfuscating the true ingredients and nature of the Defendants' Purchased Products in violation of the "misleading prong" of California Business and Professions Code § 17500, *et seq.*

1 and falsely misrepresented the nature of those products. Plaintiff and the Class were the intended
2 targets of such representations and would reasonably be deceived by Defendants' materials.

3 248. Defendants' conduct in disseminating untrue advertising throughout California and
4 nationwide deceived Plaintiff and members of the Class by obfuscating the contents, nature and
5 quality of the Defendants' Purchased Products in violation of the "untrue prong" of California
6 Business and Professions Code § 17500.

7 249. As a result of Defendants' violations of the "untrue prong" of California Business
8 and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of
9 Plaintiff and the Class. Misbranded products cannot be legally sold and are legally worthless.
10 Plaintiff and the Class paid a premium price for the Purchased Products.

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

15 SIXTH CAUSE OF ACTION

16 Consumers Legal Remedies Act, Cal. Civ. Code §1750, et seq.

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

18 252. This cause of action is brought pursuant to the CLRA. Defendants' violations of
19 the CLRA were and are willful, oppressive and fraudulent, thus supporting an award of punitive
20 damages.

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

26 254. Defendants' actions, representations and conduct have violated, and continue to
27 violate the CLRA, because they extend to transactions that are intended to result, or which have
28 resulted, in the sale of goods or services to consumers.

1 255. Defendants sold Purchased Products in California during the Class Period.

2 256. Plaintiff and members of the Class are “consumers” as that term is defined by the
3 CLRA in Cal. Civ. Code §1761(d).

4 257. Defendants’ Purchased Products were and are “goods” within the meaning of Cal.
5 Civ. Code §1761(a).

6 258. By engaging in the conduct set forth herein, Defendants violated and continue to
7 violate Section 1770(a)(5), of the CLRA, because Defendants’ conduct constitutes unfair methods
8 of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular
9 ingredients, characteristics, uses, benefits and quantities of the goods.

10 259. By engaging in the conduct set forth herein, Defendants violated and continue to
11 violate Section 1770(a)(7) of the CLRA, because Defendants’ conduct constitutes unfair methods
12 of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular
13 standard, quality or grade of the goods.

14 260. By engaging in the conduct set forth herein, Defendants violated and continue to
15 violate Section 1770(a)(9) of the CLRA, because Defendants’ conduct constitutes unfair methods
16 of competition and unfair or fraudulent acts or practices, in that it advertises goods with the intent
17 not to sell the goods as advertised.

18 261. By engaging in the conduct set forth herein, Defendants have violated and
19 continue to violate Section 1770(a)(16) of the CLRA, because Defendants’ conduct constitutes
20 unfair methods of competition and unfair or fraudulent acts or practices, in that it represents that a
21 subject of a transaction has been supplied in accordance with a previous representation when they
22 have not.

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

27 263. Pursuant to Section 1782(a) of the CLRA, on May 18, 2012, Plaintiff’s counsel
28 served Defendants with notice of Defendants’ violations of the CLRA. As authorized by Mars’

1 counsel, Plaintiff’s counsel served Mars by certified mail, return receipt requested. Mars has not
2 responded.

3 264. Mars has failed to provide appropriate relief for its violations of the CLRA within
4 30 days of its receipt of the CLRA demand notice. Accordingly, pursuant to Sections 1780 and
5 1782(b) of the CLRA, Plaintiff is entitled to recover actual damages, punitive damages, attorneys’
6 fees and costs, and any other relief the Court deems proper.

7 265. Plaintiff makes certain claims in the Class Action Complaint that were not
8 included in the original Complaint filed on April 13, 2012, and were not included in Plaintiff’s
9 CLRA demand notice.

10 266. Plaintiff will demonstrate that the violations of the CLRA by Defendants were
11 willful, oppressive and fraudulent, thus supporting an award of actual and punitive damages.

12 267. Consequently, Plaintiff and the Class are entitled to actual and punitive damages
13 against Defendants for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code §
14 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-described acts
15 and practices, providing restitution to Plaintiff and the Class, ordering payment of costs and
16 attorneys’ fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal.
17 Civ. Code § 1780.

18 **JURY DEMAND**

19 Plaintiff hereby demands a trial by jury of her claims.

20 **PRAYER FOR RELIEF**

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

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

25 B. For an order awarding, as appropriate, damages, restitution or disgorgement to
26 Plaintiff and the Class for all causes of action;

27 C. For an order requiring Defendants to immediately cease and desist from selling
28 their Purchased Products in violation of law; enjoining Defendants from continuing to market,

1 advertise, distribute, and sell these products in the unlawful manner described herein; and
2 ordering Defendants to engage in corrective action;

- 3 D. For all remedies available pursuant to Cal. Civ. Code § 1780;
4 E. For an order awarding attorneys' fees and costs;
5 F. For an order awarding punitive damages;
6 G. For an order awarding pre-and post-judgment interest; and
7 H. For an order providing such further relief as this Court deems proper.

8 Dated: October 1, 2013

Respectfully submitted,

9
10 /s/ Ben F. Pierce Gore

Ben F. Pierce Gore (SBN 128515)
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San Jose, CA 95126
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Oxford, MS 38655
Telephone: (662) 236-0047
Fax: (662) 513-0072
colemanlawfirm@bellsouth.net

18 *Attorneys for Plaintiff*

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that a true and correct copy of the forgoing was filed and served
21 via the Court's ECF filing system this 1st day of October, 2013 on all counsel of record.

22 s/Pierce Gore

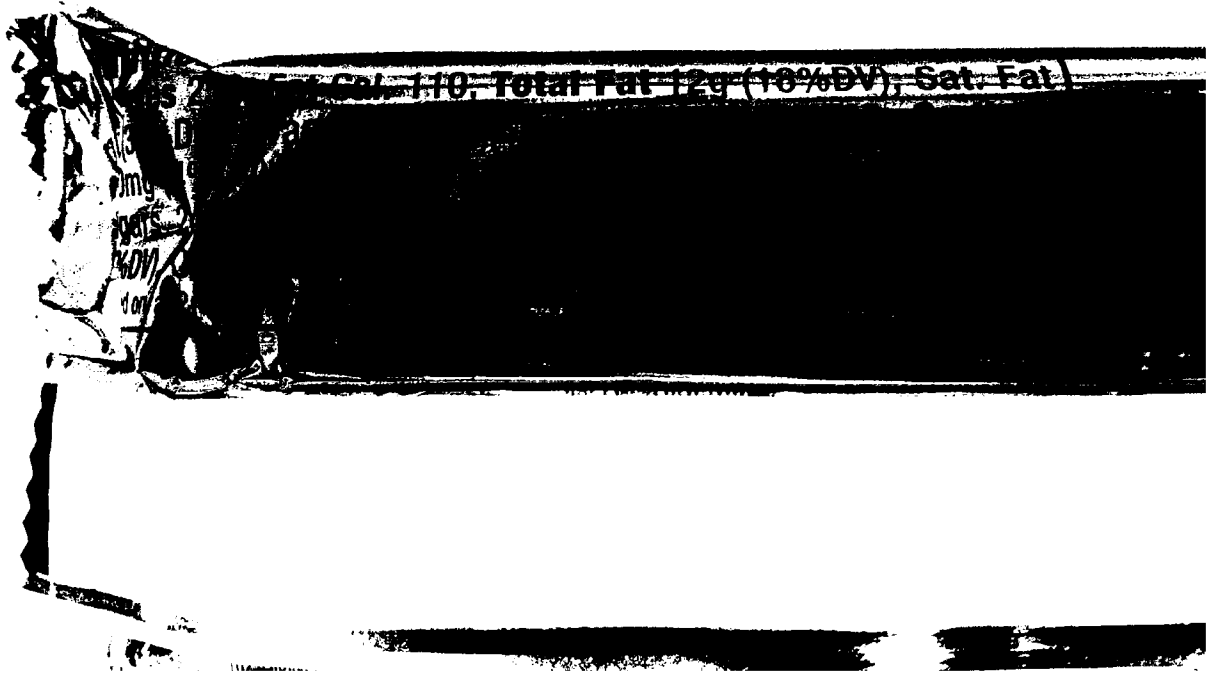
Ben F. Pierce Gore

Exhibit A



Exhibit B





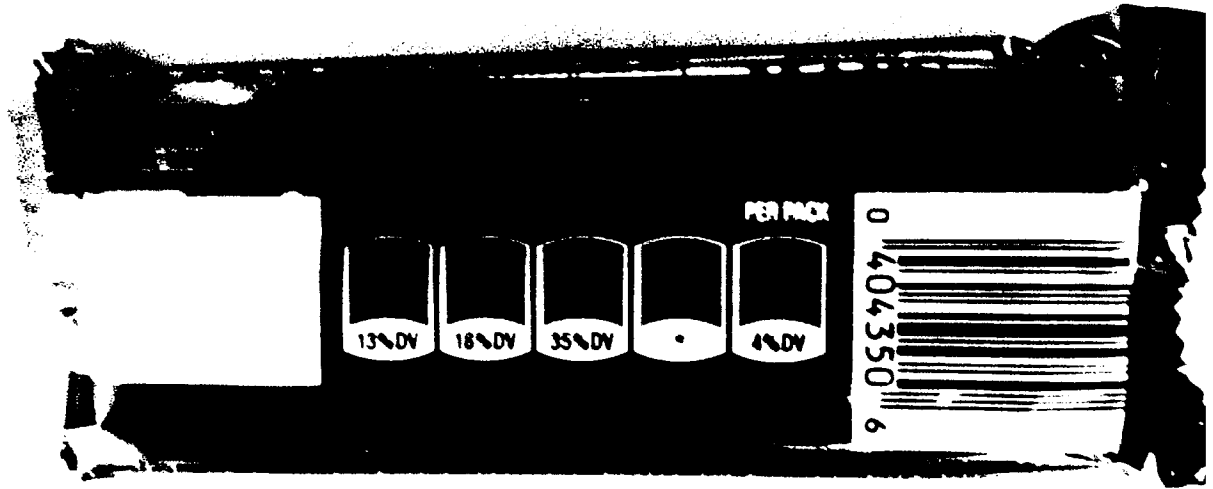


Exhibit C






What's Inside... PER SERVING (ABOUT 2 SERVINGS PER PACK)


| | | | | |
|----------------------------------|-----------------------------------|--------------------------------|---------------------------|-------------------------------|
| CALORIES 220 11% DV | TOTAL FAT 14g 22% DV | SAT FAT 8g 40% DV | SUGARS 19g • | SODIUM 0mg 0% DV |
|----------------------------------|-----------------------------------|--------------------------------|---------------------------|-------------------------------|

GDA's ARE BASED ON A 2,000 CALORIE DIET
To learn more visit www.marshealthyliving.com
*No DV defined



CERTIFIED COCOA

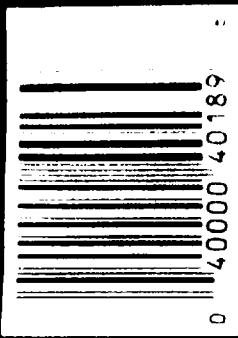
DOVE Pure Silk Cream
DOVE Cream



www.dove.com

We value your questions
or comments.
Call 1-800-851-0704
or visit us at
www.dovechocolate.com
Please save the unused
product and wrapper.

1229042 MP 6



Nutrition Facts Serv size 9 pieces (42g).
Servings Per Container about 2, Calories 220,
Fat Cal. 120, Total Fat 14g (22% DV), Sat. Fat
8g (40% DV), Trans Fat 0g, Cholest. 5mg
(2% DV), Sodium 0mg (0% DV), Total Carb. 25g
(8% DV), Dietary Fiber 3g (12% DV), Sugars
19g, Protein 2g, Vitamin A (0% DV), Vitamin C
(0% DV), Calcium (0% DV), Iron (6% DV). Percent
Daily Values (DV) are based on a 2,000 calorie diet.

SEMI-SWEET CHOCOLATE, SUGAR, COCOA BEANS, COCOA BUTTER,
PROCESSED WITH ALKALI, LECITHIN, VANILLA FLAVOR, MIBKAL 50,
LECITHIN NATURAL AND ARTIFICIAL FLAVORS (U)



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Hackettstown, NJ 07940-1503 USA

| | | | | |
|------|--------|--------|-----|-------|
| 220 | 14g | 8g | 19g | 0mg |
| % DV | 22% DV | 40% DV | * | 0% DV |

GDA's ARE BASED ON A 2,000 CALORIE DIET
To learn more visit www.marshealthyiving.com
*No DV defined



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traceable
from the
farms into
our factory.

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is made with the finest
quality cocoa to deliver a
silky smooth chocolate
experience that lingers long
after it melts away.

Your moment. Your Dove.™



www.cocoapro.com

Our special patented and proprietary
COCOAPRO® process helps retain much
of the naturally occurring cocoa flavanols.



What's Inside... PER SERVING (ABOUT 2 SERVINGS PER POUCH)

| CALORIES | TOTAL FAT | SAT. FAT | SUGARS | SODIUM |
|----------|-----------|----------|--------|--------|
| 220 | 14g | 8g | 19g | 0mg |
| 44% DV | 22% DV | 40% DV | * | 0% DV |

GDA's ARE BASED ON A 2,000 CALORIE DIET
To learn more visit www.marshealthyliving.com
*No DV defined



CERTIFIED COCOA

DOVE Pure Silk Chocolate
DOVE CHOCOLATE



www.dove.com

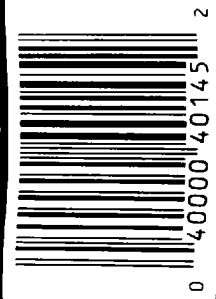
Exhibit D



We value your questions or comments. Call 1-800-551-0704 or visit us at www.dovechocolate.com. Please save the unused product and wrapper.

1226049 MP 3

212 AG
ELZ03



Nutrition Facts Serv Size: 9 pieces (42g), Servings Per Container: about 2, **Calories 230**, Fat Cal. 120, **Total Fat 13g (20% DV)**, Sat. Fat 8g (40% DV), Trans Fat 0g, Cholest. 10mg (3% DV), **Sodium 25mg (1% DV)**, **Total Carb. 25g (8% DV)**, Dietary Fiber 1g (4% DV), Sugars 23g, **Protein 3g**, Vitamin A (2% DV), Vitamin C (0% DV), Calcium (6% DV), Iron (2% DV). Percent Daily Values (DV) are based on a 2,000 calorie diet.

MILK CHOCOLATE (SUGAR, COCOA BUTTER, CHOCOLATE, SKIM MILK, MILKFAT, LACTOSE, CHOCOLATE PROCESSED WITH ALKALI, SOY LECITHIN, NATURAL AND ARTIFICIAL FLAVORS). (U)D



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| | | | | |
|---|----------------------|---------------------|-----------------|----------------------|
| 230 12% DV | 13g 20% DV | 8g 40% DV | 23g * | 25mg 1% DV |
| GDA'S ARE BASED ON A 2,000 CALORIE DIET To learn more visit www.marshelthyiving.com *No DV defined | | | | |

with the finest quality cacao to deliver a silky smooth chocolate experience that lingers long after it melts away.

Your moment. Your Dove.™



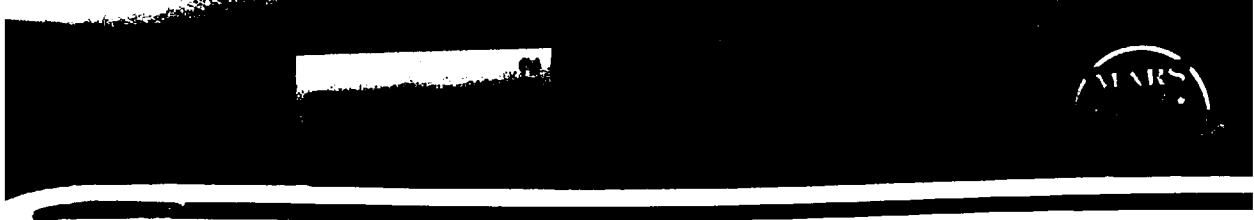


Exhibit E





FUN SIZE

PERCENT DAILY VALUES

| | | | |
|---------------------------------|----------------------------------|------------------------------|--------------------------------|
| TOTAL FAT 4g 8% DV | SAT. FAT 1.5g 3% DV | SUGARS 0g 0% DV | SODIUM 40mg 2% DV |
|---------------------------------|----------------------------------|------------------------------|--------------------------------|

| Amount/Serving | DV** | Amount/Serving | DV** |
|------------------|------|------------------------|------|
| Total Fat 8g | 12% | Total Carbohydrate 21g | 7% |
| Saturated Fat 3g | 15% | Dietary Fiber 1g | 4% |
| Trans Fat 0g | | Sugars 17g | |
| Cholesterol 5mg | 2% | Protein 3g | |
| Sodium 85mg | 4% | | |

*Contains less than 2% of the Daily Value of these nutrients.
 **Percent Daily Values (DV) are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

| | Calories: 2,000 | 2,500 |
|--------------------|-------------------|---------|
| Total Fat | Less than 65g | 80g |
| Sat. Fat | Less than 20g | 25g |
| Cholesterol | Less than 300mg | 300mg |
| Sodium | Less than 2,400mg | 2,400mg |
| Total Carbohydrate | 300g | 375g |
| Dietary Fiber | 25g | 30g |

CHOCOLATE, SKIM MILK, LACTOSE, MILKFAT, SOY LECITHIN, ARTIFICIAL FLAVOR, SKIM MILK, PARTIALLY HYDROGENATED SOYBEAN OIL, LACTOSE, SALT, EGG WHITES, ALMONDS.

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JS 44 (Rev 12/12) cand rev (1/15/13)

CIVIL COVER SHEET

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
 PHYLLIS GUSTAVSON, individually and on behalf of all others similarly situated,

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

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Ben F. Pierce Gore, Pratt & Associates, 1871 The Alameda, Suite 425,
 San Jose, CA 95126 (408) 369-0800

DEFENDANTS
 MARS, INC, and MARS CHOCOLATE NORTH AMERICA, LLC

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) _____

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)

(For Diversity Cases Only)

| | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input 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 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 | PERSONAL INJURY <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 | PERSONAL INJURY <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 PERSONAL PROPERTY <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 | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROBATE RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark |
| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS | LABOR | SOCIAL SECURITY |
| <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 | <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 | Habeas Corpus: <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 Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | <input type="checkbox"/> 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 | <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)) |
| | | | IMMIGRATION | FEDERAL TAX SUITS |
| | | | <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 870 Taxes (U S Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 |

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(d)

Brief description of cause:
Class action/food labeling 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 Lucy H. Koh DOCKET NUMBER 5:12-CV-01861 LHK

DATE 10/01/2013 SIGNATURE OF ATTORNEY OF RECORD
/Ben F. Pierce Gore

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2) (Place an "X" in One Box Only)

SAN FRANCISCO/OAKLAND SAN JOSE EUREKA