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16 **ATTORNEYS FOR PLAINTIFF**

17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

19 **SKYE ASTIANA on behalf of herself and all**
20 **others similarly situated,**

21 **Plaintiff,**

22 **v.**

23 **BEN & JERRY'S HOMEMADE, INC.,**

24 **Defendant.**

CASE NO.: 4:10-cv-04387-PJH

CLASS ACTION

AMENDED COMPLAINT FOR
DAMAGES, EQUITABLE,
DECLARATORY AND INJUNCTIVE
RELIEF

DEMAND FOR JURY TRIAL

1 Plaintiff, by her attorneys, brings this class action against Defendant Ben & Jerry's
2 Homemade, Inc. ("B&J" or "Defendant"), on her own behalf and on behalf of all others similarly
3 situated, and alleges as follows based upon information and belief and the investigation of her
4 counsel:

5 INTRODUCTION

6 1. This is a class action on behalf of a nationwide class and a California sub-class of
7 consumers who purchased Ben & Jerry's Homemade, Inc.'s "all natural" Ice Cream products which
8 contained alkalized cocoa processed with potassium carbonate, a man made, synthetic ingredient
9 beginning September 29, 2006 through the present ("Class Period"). Since at least 2006, B&J has
10 packaged, marketed and sold its Ice Cream products as being "all natural" despite the fact they
11 contain alkalized cocoa processed with a non-natural, man made, synthetic ingredient - potassium
12 carbonate.¹

13 2. Throughout the Class Period, B&J prominently displayed the moniker "all natural" on
14 the labels of its Ice Cream products, cultivating a wholesome, healthful and socially conscious image
15 in an effort to promote the sale of these products, even though its Ice Cream products were actually
16 not "all natural." While the "all natural" Ice Cream products labels did disclose they contain
17 processed alkalized cocoa, the labels did not disclose that the alkalized cocoa was processed with a
18 non-natural, man made, synthetic ingredient - potassium carbonate. This is a significant omission
19 since alkalized cocoa alternatively can be (and commonly is) processed with a natural ingredient
20 such as sodium carbonate. In light of the Ice Cream labels' "all natural" representation and the
21 availability of natural processing ingredients for alkalized cocoa, one would certainly not normally
22 expect the alkalized cocoa in B&J's Ice Cream products to be processed with a man made synthetic
23 ingredient. Indeed, as a result of this false and misleading labeling, B&J was able to sell these
24 supposedly "all natural" products to thousands of unsuspecting consumers in California and
25 throughout the United States and to profit handsomely from these transactions.

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27
28 ¹ As used throughout this Complaint, "Ice Cream" products includes B&J's "all natural" premium
Ice Creams, yogurts and sorbets identified in paragraph 20 of this Complaint.

1 Fudge Brownie Frozen Yogurt, B&J's All Natural Chocolate Fudge Brownie Ice Cream as well as
2 other of B&J's Ice Cream products² at the Whole Foods grocery store near her then residence in Mill
3 Valley California. Based on the "All Natural" representation on the B&J's Ice Cream labels, Ms.
4 Astiana believed the B&J Ice Cream she purchased was all natural and relied on this representation
5 in making the purchase. Upon information and belief, the B&J Ice Cream Ms. Astiana purchased
6 contained alkalized cocoa processed with potassium carbonate, a man made, synthetic ingredient.
7 While touting the product as "All Natural," the B&J Ice Cream labels Ms. Astiana relied on neither
8 disclosed that the alkalized cocoa used in the B&J Ice Cream was processed with potassium
9 carbonate, a man made, synthetic ingredient, nor otherwise disclosed that a man made, synthetic
10 ingredient was used in the B&J Ice Cream. Ms. Astiana not only purchased the B&J Ice Cream
11 products because the label said it was "All Natural," but she paid more money for the B&J Ice
12 Cream she purchased than she would have had to pay for other similar ice cream or frozen yogurt
13 products that were not all natural in that they contained man made, synthetic ingredients. Had Ms.
14 Astiana known the truth that the B&J Ice Cream was not all natural in that it contained alkalized
15 cocoa processed with potassium carbonate, a man made, synthetic ingredient, she would not have
16 purchased the B&J Ice Cream, but would have purchased another brand of ice cream or frozen
17 yogurt that was truly all natural or, if one was not available, would have purchased another non-
18 natural ice cream or frozen yogurt product that was less expensive than B&J Ice Cream. Ms.
19 Astiana did not receive the "All Natural" ice cream or frozen yogurt she bargained for when she
20 purchased the B&J All Natural Ice Cream products, and has lost money as a result in the form of
21 paying a premium for B&J Ice Cream because it was purportedly all natural instead of paying the
22 lesser amount for similar non-natural alternatives.

23 6. Defendant Ben & Jerry's Homemade, Inc. was founded in 1977 in Vermont and
24 currently maintains its headquarters at 30 Community Drive, South Burlington, VT 05403-6828.
25 From its inception, to the present day, B&J claims to produce a wide variety of super premium Ice
26 Cream, Ice Cream novelties, low fat Ice Cream, low fat frozen yogurt and sorbet, using Vermont
27 _____

28 ² The other ice cream products include Cherry Garcia, Chocolate, Chocolate Chip Cookie Dough, Chocolate Fudge Brownie, Chubby Hubby, Chunky Monkey and New York Super Fudge Chunk.

1 dairy products and high quality, all natural ingredients. Ben & Jerry's products are distributed
2 nationwide in supermarkets, grocery stores, convenience stores, franchise Ben & Jerry's scoop
3 shops, restaurants and other venues. In 2000, B&J was acquired by Unilever, one of the world's
4 largest consumer products companies in a deal estimated at \$326 million.

5 **JURISDICTION AND VENUE**

6 7. Jurisdiction of this Court is proper under 28 U.S.C. §1332, as complete diversity
7 between the parties exists. Representative Plaintiff Skye Astiana, now an Oregon resident, was a
8 California resident during her purchases of Defendant's products at issue in this litigation from
9 September 29, 2006 through September, 2007. Defendant's principle place of business is Vermont
10 and it is a wholly owned subsidiary of Unilever plc, a foreign corporation.

11 8. Upon information and belief, the amount in controversy exceeds \$5,000,000 for
12 Representative Plaintiff, Class members and Sub-Class members collectively, exclusive of interest
13 and costs, by virtue of the combined purchase prices paid by Plaintiff, the Class and the Sub-Class,
14 and the profit reaped by Defendant from its transactions with Plaintiff, the Class and the Sub-Class,
15 as a direct and proximate result of the wrongful conduct alleged herein, and by virtue of the
16 injunctive and equitable relief sought.

17 9. Venue is proper within this judicial district pursuant to 28 U.S.C. § 1391(b) and (c).
18 Defendant maintains offices and has agents, transacts business or is found within this judicial
19 district. Moreover, a substantial portion of the underlying transactions and events complained of
20 herein occurred and affected persons and entities are in this judicial district, and Defendant has
21 received substantial compensation from such transactions and business activity in this judicial
22 district, including as the result of purchases of Defendant's Ice Cream products from retail locations
23 herein. Finally, Defendant inhabits and/or may be found in this judicial district, and the interstate
24 trade and commerce described herein is and has been carried out in part within this judicial district.

25 **BACKGROUND**

26 10. The cocoa bean is a seed that grows on trees native to South America. The fermented
27 and dried cocoa seed is the basic ingredient in chocolate. Chocolate is a name given to products that
28

1 are derived from cocoa which are then mixed with some sort of fat (*e.g.* cocoa butter, oil) and finely
2 powdered sugar to produce a solid edible product.

3 11. To make chocolate, the beans are processed, roasted, cracked and shelled. The
4 resulting pieces called nibs are further processed into a chocolate liquor, butter or powder. The
5 cocoa powder is typically used in the flavoring of Ice Creams.

6 12. Unsweetened baking cocoa powder is typically rendered in one of two forms: a
7 unalkalized cocoa or a version known as Dutch-process/alkalized cocoa. Both are made by
8 pulverizing partially defatted chocolate liquor and removing nearly all the cocoa butter. Unalkalized
9 cocoa is light in color and somewhat acidic with a strong chocolate flavor. Dutch-process cocoa is
10 processed with alkali to neutralize its acidity. Dutch cocoa is slightly milder in taste, with a deeper
11 and warmer color than unalkalized cocoa. Dutch-process cocoa is frequently used when the product
12 calls for the blending of cacao with liquids. Dutch processing destroys most of the flavonols present
13 in unalkalized cocoa -- the water-soluble plant pigments that are believed to give dark chocolate
14 health benefits in the form of antioxidant, anti-inflammatory and antiviral properties.

15 **ALKALIZED COCOA PROCESSED WITH POTASSIUM CARBONATE IS UNNATURAL**

16 13. Although the FDA does not directly regulate the term “natural,” the FDA has
17 established a policy defining the outer boundaries of the use of that term by clarifying that a product
18 is not natural if it contains color, artificial flavors, or synthetic substances.

19 <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm094536.htm> and

20 <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>. Specifically, the FDA states:

21 “the agency will maintain its policy (Ref. 32) regarding the use of ‘natural,’ as meaning that nothing
22 artificial or synthetic (including all color additives regardless of source) has been included in, or has
23 been added to, a food that would not normally be expected to be in the food.” 58 Fed. Reg. 2302,
24 2407 (Jan. 6, 2003).

25 14. Cocoa can be unalkalized or alkalinized as specified in this Complaint. A Dutching or
26 alkalization takes place during the processing of cocoa beans. During this process an alkali, usually
27
28

1 potassium carbonate or sodium carbonate³, suspended in water is used to neutralize acids and alter
2 the pH level of the beans. It darkens the cocoa, makes it milder in flavor and increases its
3 dispersability.

4 15. The FDA requires that “when any optional alkali ingredient” is used, “the name of
5 the food shall be accompanied by the statement ‘Processed with alkali’, or ‘Processed with -----’,
6 the blank being filled in with the common or usual name of the specific alkali ingredient used in the
7 food.” 21 C.F.R. 163.112(c)(1).

8 16. Ben & Jerry’s Ice Cream products containing alkalized cocoa are processed with
9 potassium carbonate. Potassium carbonate is a recognized synthetic substance. 7 C.F.R.
10 §205.605(b). However, the other commonly used alkali in making alkalized cocoa – sodium
11 carbonate – is a recognized nonsynthetic, natural substance. 7 C.F.R. §205.605(a). Unfortunately,
12 as explained in the next section of this Complaint, B&J’s Ice Cream products never disclosed that
13 the alkalized cocoa it used was processed with potassium carbonate a recognized synthetic
14 substance, despite the “All Natural” representation on its Ice Cream product labels.

15 **BEN & JERRY’S USE OF ALKALIZED COCOA**

16 17. American consumers are health conscious and look for wholesome, natural foods to
17 keep a healthy diet so they frequently take nutrition information into consideration in selecting and
18 purchasing food items. Product package labels, including nutrition labels, are vehicles that convey
19 nutrition information to consumers which they can and do use to make purchasing decisions. As
20 noted by Food and Drug Administration Commissioner Margaret Hamburg during an October 2009
21

22
23 ³ Besides the commonly used potassium carbonate and sodium carbonate, there are other less
24 commonly used alkali substances approved for use in processing cocoa not listed herein that are
25 identified at 21 C.F.R. 163.112(b)(1). Significantly, sodium carbonate and sodium bicarbonate
26 appear to be the only “safe and suitable” nonsynthetic alkali substances approved for use in
27 alkalizing cocoa. *Id.* Compare 7 C.F.R. §205.605. To the extent B&J may claim some of its Ice
28 Cream products may have to some degree used alkalized cocoa processed with one or more of these
less commonly used alkali substances, it is believed and therefore averred by Plaintiff that the B&J
Ice Cream products did not contain alkalized cocoa processed with one of the nonsynthetic alkali
substances, and instead contained alkalized cocoa processed with one of the synthetic alkali
substances.

1 media briefing, “[s]tudies show that consumers trust and believe the nutrition facts information and
2 that many consumers use it to help them build a healthy diet.”

3 18. The prevalence of claims about nutritional content on food packaging in the United
4 States has increased in recent years as manufacturers have sought to provide consumers with
5 nutrition information and thereby influence their purchasing decisions. The results of the FDA’s
6 most recent Food Label and Package Survey found that approximately 4.8 percent of food products
7 sold in the United States had either a health claim or a qualified health claim on the food package,
8 and that more than half (53.2%) of the food products reviewed had nutrient content claims on the
9 packaging.

10 19. The alkalized cocoa in Ben & Jerry’s Ice Cream products labeled as “All Natural”
11 was processed with potassium carbonate, a recognized synthetic substance. Ben & Jerry’s Ice
12 Cream products could have used alkalized cocoa processed with the other commonly used alkalizing
13 agent - sodium carbonate, a recognized nonsynthetic, natural substance, but they did not. While
14 Ben & Jerry’s “All Natural” Ice Cream labels did disclose that they contain alkalized cocoa, those
15 labels did not disclose that the alkalized cocoa was processed with potassium carbonate, a
16 recognized synthetic substance. This omission is significant and material given its “All Natural”
17 representation on the Ice Cream products labels. Indeed, based on the “All Natural” representation,
18 one would normally expect the alkalized cocoa contained in the Ice Cream products to be processed
19 with the commonly used nonsynthetic, natural alternative – sodium carbonate.

20 20. According to a complaint filed with the FDA in 2010 by the Center for Science in the
21 Public Interest (“CSPI”), and as confirmed by Ben & Jerry’s Ice Cream labels, cocoa processed with
22 alkali is used as an ingredient in 36 of Ben & Jerry’s Ice Cream flavors which otherwise claim to be
23 “all natural.” Those Ice Cream flavors are:

24 **a. Ben & Jerry's "All-Natural" Flavors - Ice Cream**
25 Banana Split
26 Boston Cream Pie
27 Brownie Batter
28 Cake Batter
Cheesecake Brownie
Cherry Garcia
Chocolate
Chocolate Chip Cookie Dough

1 Chocolate Fudge Brownie
Chocolate Macadamia
2 Chubby Hubby
3 Chunky Monkey
Dublin Mudslide
4 Fossil Fuel
Half Baked
5 Imagine Whirled Peace
Karamel Sutra
6 Milk & Cookies
7 Mint Chocolate Chunk
Mint Chocolate Cookie
8 Mud Pie
Neapolitan Dynamite
9 New York Super Fudge Chunk
Oatmeal Cookie Chunk
10 Peanut Butter Cup
Phish Food
11 S'mores
12 Triple Caramel Chunk
Turtle Soup
13 Vanilla Caramel Fudge

14 **b. Ben & Jerry's "All Natural" Frozen Yogurts (Froyos)**

15 Froyo Cherry Garcia
16 Froyo Chocolate Fudge Brownie
Froyo Half-Baked

17 **c. Ben & Jerry's "All Natural" Popsicles**

18 Cherry Garcia
19 Fudgy Brownies
Half Baked

20 21. The CSPI warned as early as 2002 that B&J had been misbranding their products as
21 "all natural" when in truth they were not.

22 "Ben & Jerry's enjoys a carefully-cultivated public image as an eco-friendly, worker-friendly
23 brand—the kind of company whose label claims should be truthful," CSPI executive director
24 Michael F. Jacobson said. "So it's sad that Ben & Jerry's is trying to pass off products laden
25 with these factory-spun ingredients as 'natural,' when there's little natural about them. These
26 ingredients are man-made and simply don't occur in nature."

27 22. According to the Ben & Jerry's corporate website, their product mission is to "make
28 distribute and sell the finest quality "all natural" Ice Cream and euphoric concoctions with a
continued commitment to incorporating wholesome, "natural" ingredients and incorporating

1 business practices that respect the earth and the environment.” (emphasis added).

2 [http://www.benjerry.com/activism/mission statement](http://www.benjerry.com/activism/mission_statement).

3 23. The labeling of products as “all natural” carry implicit health benefits important to
4 consumers – benefits that consumers are often willing to pay a premium over comparable products
5 that are not “all natural.” Over the past 30 years B&J has cultivated and reinforced a corporate
6 image that has catered to this “all natural” theme and have boldly emblazed this moniker on each
7 and every one of its Ice Cream products labels, despite the fact it uses alkalized cocoa processed
8 with a unnatural, synthetic ingredient – potassium carbonate.

9 24. B&J’s has used the “all natural” label to shape its brand and sell its product. Yet, the
10 existence of alkalized cocoa processed with potassium carbonate a man made, synthetic ingredient in
11 its Ice Creams renders the use of the label “all natural,” false and misleading. In manufacturing its
12 Ice Cream products, Defendant had a choice between using natural or unnatural alkali processed
13 cocoa. It chose the later, but nonetheless labeled its Ice Cream products as “all natural.” As a matter
14 of its self characterized socially conscious corporate morality, and as matter of law, B&J must now
15 reconcile its labeling with the true content of its products.

16 **CLASS ACTION ALLEGATIONS**

17 25. Plaintiff brings this action on behalf of herself and on behalf of all other members of
18 the Class (“Class”), defined as all persons who, on or after September 29, 2006, purchased in the
19 United States B&J’s Ice Cream products that were labeled “all natural” but contained alkalized
20 cocoa processed with a synthetic ingredient. Plaintiff brings this Class pursuant to Federal Rule of
21 Civil Procedure 23(a), and (b)(1), 23(b)(2) and 23(b)(3).

22 26. Plaintiff also brings this action on behalf of herself and on behalf of all other
23 members of the Sub-Class (“Sub-Class”), defined as all persons who, on or after September 29,
24 2006, purchased in the State of California B&J’ Ice Cream products that were labeled “all natural”
25 but contained alkalized cocoa processed with a synthetic ingredient. Plaintiff brings this Sub-Class
26 pursuant to Federal Rule of Civil Procedure 23(a), and (b)(1), 23(b)(2) and 23(b)(3).

27 27. Excluded from the Class and Sub-Class are: (i) all persons who purchased a B&J Ice
28 Cream products for resale; (ii) Defendant and its employees, principals, affiliated entities, legal

1 representatives, successors and assigns; (iii) any person who files a valid, timely request for
2 exclusion; and (iv) the judges to whom this action is assigned and any members of their immediate
3 families.

4 28. Upon information and belief, there are thousands of Class members who are
5 geographically dispersed throughout the United States and Sub-Class members who are
6 geographically dispersed throughout the State of California. Therefore, individual joinder of all
7 members of the Class or Sub-Class would be impracticable.

8 29. Common questions of law or fact exist as to all members of the Class and Sub-Class.
9 These questions predominate over the questions affecting only individual class members. These
10 common legal or factual questions include:

- 11 a. whether B&J's labels its Ice Cream products as "all natural;"
- 12 b. whether the alkalized cocoa used in B&J' Ice Cream products is
13 processed with a synthetic ingredient;
- 14 c. whether B&J's "all natural" labeling of its Ice Cream products is
15 likely to deceive class or sub-class members or the general
16 public;
- 17 d. whether B&J's representations are unlawful;
- 18 e. the appropriate measure of resitutionary disgorgement and/or
19 restitution.

20 30. Plaintiff's claims are typical of the claims of the Class and Sub-Class, in that Plaintiff
21 was a consumer who purchased B&J's "all natural" Ice Cream products in the United States and in
22 California that contained alkalized cocoa processed with a synthetic ingredient during the Class
23 Period. Plaintiff, therefore, is no different in any relevant respect from any other Class or Sub-Class
24 member, and the relief sought is common to the Class and Sub-Class.

25 31. Plaintiff is an adequate representative of the Class and Sub-Class because her
26 interests do not conflict with the interests of the Class and Sub-Class members she seeks to
27 represent, and she has retained counsel competent and experienced in conducting complex class
28 action litigation. Plaintiff and her counsel will adequately protect the interests of the Class and Sub-
Class.

1 32. A class action is superior to other available means for the fair and efficient
2 adjudication of this dispute. The damages suffered by each individual class member likely will be
3 relatively small, especially given the relatively small cost of the Ice Cream products at issue and the
4 burden and expense of individual prosecution of the complex litigation necessitated by B&J's
5 conduct. Thus, it would be virtually impossible for the Class and Sub-Class members individually to
6 effectively redress the wrongs done to them. Moreover, even if the Class and Sub-Class members
7 could afford individual actions, it would still not be preferable to class-wide litigation.
8 Individualized actions present the potential for inconsistent or contradictory judgments. By contrast,
9 a class action presents far fewer management difficulties and provides the benefits of single
10 adjudication, economies of scale, and comprehensive supervision by a single court.

11 33. In the alternative, the Class and Sub-Class may be certified because B&J has acted or
12 refused to act on grounds generally applicable to the Class and Sub-Class, thereby making
13 appropriate preliminary and final equitable relief with respect to the Class and Sub-Class.

14 **FIRST CAUSE OF ACTION**
15 **(Common Law Fraud)**

16 34. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates
17 them as if they were fully written herein. This Count is brought on behalf of Plaintiff and the Class
18 and the Sub-Class.

19 35. Defendant's product labels for its Ice Cream uniformly misrepresented during the
20 Class Period that its Ice Cream products were "all natural," when in fact they contain alkalized cocoa
21 powder processed with potassium carbonate, a man made, synthetic ingredient. While Defendant's
22 labels did uniformly disclose during the Class Period that its "all natural" Ice Cream contained
23 alkalized cocoa powder, it uniformly did not disclose during the Class Period that the alkalized
24 cocoa powder it used contained the man made synthetic potassium carbonate. Thus, the disclosure
25 on its labels that the Ice Cream contained alkalized cocoa power constitutes an affirmative act of
26 concealment and non-disclosure since cocoa power may be (and commonly is) alkalized with natural
27 ingredients such as sodium carbonate, and the information about whether Defendant's cocoa powder
28 was alkalized with the man-made, synthetic potassium carbonate was known only by Defendant.

1 Defendant had a duty to disclose this material information in light of its representation on its labels
2 that its Ice Cream was “all natural.”

3 36. Defendant’s “all natural” statements and representations and its affirmative
4 concealments and omissions described herein were material in that there was a substantial likelihood
5 that a reasonable prospective purchaser of its Ice Cream would have considered them important
6 when deciding whether or not to purchase the Ice Cream.

7 37. Defendant knew or recklessly disregarded that its Ice Cream was not “all natural,”
8 and uniformly misrepresented its Ice Cream as “all natural” and affirmatively concealed and omitted
9 the truth with the intent and purpose of inducing consumers (*i.e.*, Plaintiff and the Class and Sub-
10 Class) to purchase its Ice Cream products.

11 38. Defendant failed to disclose, misrepresented and/or concealed the foregoing material
12 facts from Plaintiff and the Class and Sub-Class knowing that these facts may have justifiably
13 induced them to refrain from purchasing Defendant’s Ice Cream and instead purchase another
14 manufacturer’s ice cream, frozen yogurt or sorbet that was actually all natural, or to purchase a less
15 expensive non-natural substitute ice cream, frozen yogurt or sorbet product.

16 39. As set forth in paragraph 5 of this Complaint, Plaintiff relied on Defendant’s “all
17 natural” representations on its Ice Cream labels as a material basis for her decisions to purchase
18 Defendant’s Ice Cream. Moreover, based on the very materiality of Defendant’s misrepresentations,
19 concealments and omissions uniformly made on or omitted from its Ice Cream product labels, Class
20 and Sub-Class members’ reliance on those misrepresentations, concealments and omissions as a
21 material basis for their decision to purchase Defendant’s Ice Cream may be presumed or inferred for
22 all Class and Sub-Class members.

23 40. Defendant carried out the scheme set forth in this Complaint willfully, wantonly and
24 with reckless disregard for the interests of Plaintiff and the Class and the Sub-Class.

25 41. By reason of the foregoing, Plaintiff and members of the Class and Sub-Class have
26 been injured by purchasing Ice Cream represented to be “all natural” which was not, and/or by
27 paying a premium for that supposedly “all natural” Ice Cream over less expensive non-natural
28 alternatives. Plaintiff, the Class and Sub-Class are therefore entitled to recover damages, punitive

1 damages, equitable relief such as restitution and disgorgement of profits, and declaratory and
2 injunctive relief.

3
4 **SECOND CAUSE OF ACTION**
5 **(“Unlawful” Business Practices in Violation of**
6 **The Unfair Competition Law (“UCL”), Bus. & Prof. Code 17200, et seq.)**

7 42. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates
8 them as if they were fully written herein. This Count is brought on behalf of Plaintiff and the Sub-
9 Class.

10 43. The UCL defines unfair business competition to include any “unlawful, unfair or
11 fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading” advertising. Cal.
12 Bus. Prof. Code 17200.

13 44. A business act or practice is “unlawful” if it violates any established state or federal
14 law.

15 45. California’s Sherman Food, Drug, and Cosmetic Law (“Sherman Law”), Article 6,
16 Section 110660 provides that: “Any food is misbranded if its labeling is false or misleading in any
17 particular.”

18 46. B&J’s has violated, and continues to violate the Sherman Law, Article 6, Section
19 110660 and hence has also violated and continues to violate the “unlawful” prong of the UCL
20 through its use of the term “all natural” on the labels of its Ice Cream products that contained
21 alkalized cocoa processed with a unnatural, synthetic ingredient. This identical conduct also violates
22 the FDA Policy concerning what is “natural” as set forth in paragraph 12 and throughout this
23 Complaint. This identical conduct also serves as the sole factual basis of each cause of action
24 brought by this Complaint, and Plaintiff does not seek to enforce any of the state law claims raised
25 herein to impose any standard of conduct that exceeds that which would violate the FDA Policy
26 concerning what is “natural.”

1 47. By committing the acts and practices alleged above, B&J has engaged, and continues
2 to be engaged, in unlawful business practices within the meaning of California Business and
3 Professions Code 17200 *et seq.*

4 48. Through its unlawful acts and practices, B&J has obtained, and continues to unfairly
5 obtain, money from members of the Sub-Class. As such, Plaintiff requests that this Court cause B&J
6 to restore this money to Plaintiff and all Sub-Class members, to disgorge the profits B&J made on
7 these transactions, and to enjoin B&J from continuing to violate the Unfair Competition Law or
8 violating it in the same fashion in the future as discussed herein. Otherwise, the Sub-Class may be
9 irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

10
11 **THIRD CAUSE OF ACTION**
12 **(“Unfair” Business Practices in Violation of**
13 **The Unfair Competition Law (“UCL”), Bus. & Prof. Code 17200, et seq.)**

14 49. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates
15 them as if they were fully written herein. This Count is brought on behalf of Plaintiff and the Sub-
16 Class.

17 50. The UCL defines unfair business competition to include any “unlawful, unfair or
18 fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading” advertising. Cal.
19 Bus. Prof. Code 17200.

20 51. A business act or practice is “unfair” under the Unfair Competition Law if the
21 reasons, justifications and motives of the alleged wrongdoer are outweighed by the gravity of the
22 harm to the alleged victims.

23 52. B&J has and continues to violate the “unfair” prong of the UCL through its
24 misleading description of its products as all natural when indeed a main ingredient is not natural
25 being processed with a synthetic substance. The gravity of the harm to members of the Sub-Class
26 resulting from such unfair acts and practices outweighs any conceivable reasons, justifications
27 and/or motives of B&J for engaging in such deceptive acts and practices. By committing the acts
28 and practices alleged above, B&J has engaged, and continues to be engaged, in unfair business
practices within the meaning of California Business and Professions Code 17200 *et seq.*

1 53. Through its unfair acts and practices, B&J has obtained, and continues to unfairly
2 obtain, money from members of the Sub-Class. As such, Plaintiff requests that this Court cause B&J
3 to restore this money to Plaintiff and all Sub-Class members, to disgorge the profits B & J has made
4 on its Ice Cream products, and to enjoin B&J from continuing to violate the Unfair Competition Law
5 or violating it in the same fashion in the future as discussed herein. Otherwise, the Sub-Class may
6 be irreparably harmed and/or denied an effective and complete remedy if such an order is not
7 granted.

8 **FOURTH CAUSE OF ACTION**
9 **(“Fraudulent” Business Practices in Violation of**
10 **The Unfair Competition Law (“UCL”), Bus. & Prof. Code 17200, et seq.)**

11 54. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates
12 them as if they were fully written herein. This Count is brought on behalf of Plaintiff and the Sub-
13 Class.

14 55. The UCL defines unfair business competition to include any “unlawful, unfair or
15 fraudulent” act or practice, as well as any “unfair, deceptive, untrue or misleading” advertising. Cal.
16 Bus. & Prof. Code §17200.

17 56. A business act or practice is “fraudulent” under the Unfair Competition Law if it
18 actually deceives or is likely to deceive members of the consuming public.

19 57. B&J’s acts and practices of mislabeling their products as all natural despite the fact
20 they contained alkalized cocoa processed with non-natural, a synthetic substance has the effect of
21 misleading consumers into believing the product something it is not.

22 58. As a result of the conduct described above, B&J has been, and will continue to be,
23 unjustly enriched at the expense of Plaintiff and members of the proposed Sub-Class. Specifically,
24 B&J has been unjustly enriched by the profits it has obtained from Plaintiff and the Sub-Class from
25 the purchases of Ice Cream products made by them.

26 59. Through its unfair acts and practices, B&J has improperly obtained, and continues to
27 improperly obtain, money from members of the Sub-Class. As such, Plaintiff requests that this
28 Court cause B&J to restore this money to Plaintiff and all Sub-Class members, to disgorge the

1 profits B & J has made on its Ice Cream products, and to enjoin B&J from continuing to violate the
2 Unfair Competition Law or violating it in the same fashion in the future as discussed herein.
3 Otherwise, the Sub-Class may be irreparably harmed and/or denied an effective and complete
4 remedy if such an order is not granted.

5
6 **FIFTH CAUSE OF ACTION**
7 **(False Advertising in Violation of**
8 **California Business & Professions Code 17500, et seq.)**

9 60. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates
10 them as if they were fully written herein.

11 61. This cause of action is brought by Plaintiff on behalf of herself, the Sub-Class
12 members, and the general public of the State of California.

13 62. Defendant uses advertising on its packaging to sell its Ice Cream products. Defendant
14 is disseminating advertising concerning its goods which by its very nature is deceptive, untrue, or
15 misleading within the meaning of California Business & Professions Code 17500, *et seq.* because
16 those advertising statements contained on its product labels are misleading and likely to deceive, and
17 continue to deceive, members of the putative class and the general public as described throughout
18 this Complaint.

19 63. In making and disseminating the statements alleged herein, Defendant knew or should
20 have known that the statements were untrue or misleading, and acted in violation of California
21 Business & Professions Code 17500, *et seq.*

22 64. The misrepresentations and non-disclosures by Defendant of the material facts
23 detailed above constitute false and misleading advertising and therefore constitute a violation of,
24 California Business & Professions Code 17500, *et seq.*

25 65. Through its deceptive acts and practices, Defendant has improperly and illegally
26 obtained money from Plaintiff and members of the putative Sub-Class. As such, Plaintiff requests
27 that this Court cause Defendant to restore this money to Plaintiff and members of the putative Sub-
28 Class, and to enjoin Defendant from continuing to violate California Business & Professions Code

1 §17500, *et seq.* or violating it in the same fashion in the future as discussed above. Otherwise,
2 Plaintiff and those similarly situated will continue to be harmed by Defendant's false and/or
3 misleading advertising.

4 66. Pursuant to California Business & Professions Code 17535, Plaintiff seeks an order of
5 this Court ordering Defendant to fully disclose the true nature of its misrepresentations. Plaintiff
6 additionally requests an order requiring Defendant to disgorge its ill-gotten gains and/or award full
7 restitution of all monies wrongfully acquired by Defendant by means of such acts of false
8 advertising, plus interest and attorneys fees so as to restore any and all monies which were acquired
9 and obtained by means of such untrue and misleading advertising, misrepresentations and omissions,
10 and which ill-gotten gains are still retained by Defendant. Plaintiff and the putative Sub-Class may
11 be irreparably harmed and/or denied an effective and complete remedy if such an order is not
12 granted.

13 67. Plaintiff and the putative Sub-Class are therefore entitled to the relief described
14 below.

15 **SIXTH CAUSE OF ACTION**
16 **(Restitution Based On Quasi-Contract/Unjust Enrichment)**

17 68. Plaintiff hereby incorporates by reference each and every allegation contained in the
18 preceding paragraphs of this Complaint as if fully rewritten herein. Plaintiff pleads this Count in the
19 alternative. This Count is brought on behalf of Plaintiff, the Class, and the Sub-Class.

20 69. B&J's conduct in enticing Plaintiff, the Class and the Sub-Class to purchase its Ice
21 Cream products through its false and misleading packaging as described throughout this Complaint
22 is unlawful because the statements contained on its product labels are untrue. B&J took monies
23 from Plaintiff, Class and Sub-Class members for a product promised to be "all natural," even though
24 the product it sold is not natural as specified throughout this Complaint. B&J has been unjustly
25 enriched at the expense of Plaintiff, Class and Sub-Class members as result of its unlawful conduct
26 alleged herein, thereby creating a quasi-contractual obligation on B&J to restore these ill-gotten
27 gains to Plaintiff, the Class and the Sub-Class.
28

1 70. As a direct and proximate result of B&J's unjust enrichment, Plaintiff, the Class and
2 the Sub-Class members are entitled to restitution or restitutionary disgorgement in an amount to be
3 proved at trial.

4 **PRAYER**

5 WHEREFORE, Plaintiff, on behalf of herself and on behalf of the other members of the
6 Class and Sub-Class, request award and relief as follows:

7 A. An order certifying that this action is properly brought and may be maintained as a
8 class action, that Plaintiff be appointed Class and Sub-Class Representative and Plaintiff's counsel
9 be appointed Class and Sub-Class Counsel.

10 B. Restitution in such amount that Plaintiff and all Class and Sub-Class members paid to
11 purchase Ice Cream products, or the profits B&J obtained from those transactions.

12 C. Compensatory damages;

13 D. Punitive damages;

14 E. A declaration and order enjoining B&J from advertising its products misleadingly, in
15 violation of California's Sherman Food, Drug and Cosmetic Law and other applicable laws and
16 regulations as specified in this Complaint.

17 F. An order awarding Plaintiff her costs of suit, including reasonable attorneys' fees and
18 pre and post-judgment interest.

19 G. An order requiring an accounting for, and imposition of a constructive trust upon, all
20 monies received by B&J as a result of the unfair, misleading, fraudulent and unlawful conduct
21 alleged herein.

22 H. Such other and further relief as may be deemed necessary or appropriate.
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DEMAND FOR JURY TRIAL

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Plaintiff hereby demands a trial by jury on all causes of action and/or issues so triable.

Dated: December 8, 2010

By: s/Joseph N. Kravec, Jr.
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