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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiff,

v.

WRIGLEY SALES COMPANY, WM. WRIGLEY JR. COMPANY,

Defendants.

Case No. CV 12-01861 LHK

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

JURY TRIAL DEMANDED

Plaintiff, Phyllis Gustavson, through her undersigned attorneys, pursuant to the September 16, 2013 Order of this Court brings this her Second Amended Complaint against Defendants, Wrigley Sales Company and Wm. Wrigley Jr. Company (collectively "Wrigley" or "Defendants"), as to her own acts upon actual knowledge, and as to all other matters upon information and belief.

DEFINITIONS

1. "Class Period" is April 13, 2008 to the present.

2. "Purchased Products" are the five Wrigley products purchased by Plaintiff during the Class Period: (1) Eclipse sugar free gum, Winterfrost, 18 pcs; (2) Eclipse sugar free gum, Polar Ice, 12 pcs; (3) Orbit sugar free gum, Peppermint 14 pcs; (4) Orbit sugar free gum, Spearmint, 14 pcs; and (5) Lifesavers sugar free hard candy, 5 flavors, 2.75 oz. Pictures of the

Purchased Products are attached as exhibits 2-6 hereto and specific descriptions of the relevant label representations are included below in paragraphs 82-108.

3. "Substantially Similar Products" are Defendants' products listed below. Each of these products: (a) are gum, mints or candy products packaged the same way, if not identically, to the Purchased Products of the same type, only differing in flavor; (b) make the same label representation, i.e., "sugar free," as described herein that were made on the Purchased Products; and (c) violate the same regulations of the Sherman Food & Drug Cosmetic Law, California Health & Safety Code § 109875, *et seq.* ("Sherman Law") in the exact same manner as the Purchased Products.

Eclipse Gum in various sizes
- Spearmint
- Peppermint

Extra Gum in various sizes
- Polar Ice®
- Spearmint
- Peppermint
- Winterfresh®
- Classic Bubble
- Smooth Mint

Extra Dessert Delights® Gum
- Mint Chocolate Chip
- Root Beer Float
- Rainbow Sherbet
- Lemon Square
- Raspberry Vanilla Cupcake

Extra Fruit Sensations® Gum
- Sweet Watermelon

5 Sugar Free Gum in various sizes
- Rain®
- Cobalt®
- Flare®
- Solstice®
- React® 2.0 Fruit
- React® 2.0 Mint
- Prism®
- RPM® Fruit
- RPM® Mint

• Beta™
• 5® Focus™
• 5® Focus™

Orbit in various sizes
• Bubblemint™
• Wintermint®
• Cinnamint®
• Sweetmint
• Apple Remix
• Tropical Remix®
• Strawberry Remix®
• Peppermint DoublePak
• Spearmint DoublePak

Orbit White
• Bubblemint
• Peppermint
• Spearmint

Orbit for Kids
• Original Bubble Gum
• Strawberry Banana

Life Savers Hard Candy in various sizes
• Wild Cherry (sugar-free)
• Wint O Green (sugar-free)
• Pep O Mint (sugar-free)

4. Each of the Substantially Similar Products makes the same "sugar free" label claim as the Purchased Products as described herein. Each of the Substantially Similar Products have more than 40 calories per 50 grams. None of the labels of the Substantially Similar Products contain the FDA required disclosure "not a reduced calorie food," "not a low-calorie food," or "not for weight control."

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

6. "Class Products" are a combination of the Purchased Products and the Substantially Similar Products and is used in the class definition in paragraph 138.

SUMMARY OF THE CASE

7. Plaintiff's case has two distinct facets. First, the "UCL unlawful" part. Plaintiff's first cause of action is brought pursuant to the unlawful prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 ("UCL"). Plaintiff alleges that Defendants package and label the Purchased Products in violation of California's Sherman Law which adopts, incorporates – and is identical – to the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("FDCA"). These violations (which do not require a finding that the labels are "misleading") render the Purchased Products "misbranded" which is no small thing. Under California law, a food product that is misbranded cannot legally be manufactured, advertised, distributed, held or sold. Misbranded products cannot be legally sold, possessed, have no economic value, and are legally worthless. Indeed, the sale of misbranded food is a criminal act in California and the FDA even threatens food companies with seizure of misbranded products. This "misbranding" – standing alone without any allegations of deception by Defendants or review of or reliance on the labels by Plaintiff – give rise to Plaintiff's first cause of action under the UCL. To state a claim under the unlawful prong, Plaintiff need only allege that she would not have purchased the product had she known it was unlawful, illegal and misbranded, because buying such a product would result in owning and possessing a product that was illegal to own or possess.

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

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

BACKGROUND

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

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

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

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

14. Wrigley Sales Company and Wm. Wrigley Jr. Company are among the leading

producers of gum, mints and hard candies. Defendants' products are sold to consumers through grocery and other retail stores throughout California and throughout the U.S.

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

16. In recent years, responding to consumer demand for healthy, sugar free, low-calorie foods has become a central part of Defendants' business models and marketing strategies even though Defendants' Purchased Products fail to satisfy the regulatory requirements for sugar free claims.

17. Defendants have realized that, based on the public's concern about obesity and interest in low-calorie and dietetic foods, there is a financial benefit to be derived in selling products claiming to be "sugar free," "low-calorie" or "suitable for weight control." Accordingly, Defendants have labeled many of their candy and confectionery products such as their chewing gum, mints and hard candies as "sugar free" even though such claims are in violation of California and federal food labeling laws.

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

19. In pursuing such a strategy, Defendants (a) decided their success and profitability was dependent on their ability to satisfy emerging consumer demand for healthy, nutritious and

low-calorie foods and (b) were prepared to make health and nutrition arguments on behalf of "junk foods" gum, mints and hard candy when in fact such claims were not true and, in fact, were unlawful.

20. Wrigley itself states on its website:

> Health & Nutrition
>
> As part of a global food company, we are committed to addressing health and wellness issues and promoting healthy lifestyles. We're bringing this commitment to life through our product offerings — many of which are low-calorie and have functional benefits — and by the way we market our brands and engage with consumers.
>
> http://www.wrigley.com/global/static/2011-principles-in-action-showcase/index.html#people-2-
>
> Health & Nutrition:
>
> We provide a wide array of sugar-free gum products that offer snacking alternatives to high-calorie treats…
>
> http://www.wrigley.com/global/static/2011-principles-in-action-showcase/index.html#people-2-

21. Defendants' key to achieving the goals of their Health and Nutrition strategy is to convince consumers that they can use Defendants' chewing gum, mints and hard candy as part of a healthy and enjoyable diet. Recognizing that the success of this strategy was dependent on repositioning their gum, mints and hard candy as healthy, nutritious and low calorie, Defendants made and are making false and deceptive claims in violation of federal and state laws that govern the types of representations that can be made on food labels.

22. Plaintiff brings this action under California law, which is identical to federal law, for making (i) unlawful and/or (ii) misleading and deceptive "sugar free" claims.

PARTIES

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

24. Defendant Wrigley Sales Company is a Delaware corporation with its headquarters in Chicago, Illinois. Wrigley Sales Company is registered to do business and does business in

California.

25. Defendant Wm. Wrigley Jr. Company is a Delaware corporation with its headquarters in Chicago, Illinois. Wm. Wrigley Jr. Company is registered to do business and does business in California.

26. Defendants are leading producers of retail food products, including gum, mints, hard candy and other confectionery. Defendants sell their Purchased Products to consumers through grocery and other retail stores throughout California. They also promote their products throughout California through their websites.

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

JURISDICTION AND VENUE

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

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

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

31. The Court has personal jurisdiction over Defendants because a substantial portion of the wrongdoing alleged in this Second Amended Complaint occurred in California, Defendants are authorized to do business in California, have sufficient minimum contacts with California, and otherwise intentionally avail themselves of the markets in California through the promotion,

marketing and sale of merchandise, sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

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

FACTUAL ALLEGATIONS

A. Identical California And Federal Laws Regulate Food Labeling

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

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

35. In addition to its blanket adoption of federal labeling requirements, California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. For example, food products are misbranded under California Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars; are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110670 if their labeling fails to conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110705 if words, statements and other information required by the Sherman Law to appear on their labeling are either missing or not sufficiently conspicuous; and are misbranded under California Health & Safety Code § 110735 if they are represented as having

special dietary uses but fail to bear labeling that adequately informs consumers of their value for that use.

B. FDA Enforcement History

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

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

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

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 nutrient content of food is even more important, given the prevalence of obesity and diet-related diseases in the United States. This need is highlighted by the announcement recently by the First Lady of a coordinated national campaign to reduce the incidence of obesity among our citizens, particularly our children.
>
> With that in mind, I have made improving the scientific accuracy and usefulness of food labeling one of my priorities as Commissioner of Food and Drugs. The latest focus in this area, of course, is on information provided on the principal display panel of food packages and commonly referred to as "front-of-pack" labeling. The use of front-of-pack nutrition symbols and other claims has grown tremendously in recent years, and it is clear to me as a working mother that such information can be helpful to busy shoppers who are often pressed for time in making their food selections . . . .
>
> As we move forward in those areas, I must note, however, that there is one area in which more progress is needed. As you will recall, we recently expressed concern, in a "Dear Industry" letter, about the number and variety of label claims that may not help consumers distinguish healthy food choices from less healthy ones and, indeed, may be false or misleading.
>
> At that time, we urged food manufacturers to examine their product labels in the context of the provisions of the Federal Food, Drug, and Cosmetic Act that prohibit false or misleading claims and restrict nutrient content claims to those defined in FDA regulations. As a result, some manufacturers have revised their labels to bring them into line with the goals of the Nutrition Labeling and Education Act of 1990. Unfortunately, however, we continue to see products marketed with labeling that violates established labeling standards.
>
> To address these concerns, FDA is notifying a number of manufacturers that their

> labels are in violation of the law and subject to legal proceedings to remove misbranded products from the marketplace. While the warning letters that convey our regulatory intentions do not attempt to cover all products with violative labels, they do cover a range of concerns about how false or misleading labels can undermine the intention of Congress to provide consumers with labeling information that enables consumers to make informed and healthy food choices . . For example:
>
> - 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.
>
> - Misleading "healthy" claims continue to appear on foods that do not meet the long- and well-established definition for use of that term.
>
> - Juice products that mislead consumers into believing they consist entirely of a single juice are still on the market. Despite numerous admonitions from FDA over the years, we continue to see juice blends being inaccurately labeled as single-juice products.
>
> These examples and others that are cited in our warning letters are not indicative of the labeling practices of the food industry as a whole. In my conversations with industry leaders, I sense a strong desire within the industry for a level playing field and a commitment to producing safe, healthy products. That reinforces my belief that FDA should provide as clear and consistent guidance as possible about food labeling claims and nutrition information in general, and specifically about how the growing use of front-of-pack calorie and nutrient information can best help consumers construct healthy diets.
>
> I will close with the hope that these warning letters will give food manufacturers further clarification about what is expected of them as they review their current labeling. I am confident that our past cooperative efforts on nutrition information and claims in food labeling will continue as we jointly develop a practical, science-based front-of-pack regime that we can all use to help consumers choose healthier foods and healthier diets.

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

42. In addition to its guidance to industry, the FDA has sent warning letters to the

industry, including many of Defendants' peer food manufacturers, for the same types of unlawful nutrient content claims described above.

43. In these letters dealing with unlawful nutrient content claims, the FDA indicated that, as a result of the same type of claims utilized by Defendants, products were in "violation of the Federal Food, Drug, and Cosmetic Act … and the applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 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 examine their food labels to ensure that they are in full compliance with food labeling requirements and make changes where necessary. Defendants did not change the labels on their Purchased Products despite that Defendants knew or should have known of these warning letters to other companies for the same type of violations that Defendants commit with their labels on the products subject to this litigation.

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

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

47. Plaintiff did not know, and had no reason to know, that Defendants' Purchased

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

OVERVIEW OF APPLICABLE SHERMAN LAW VIOLATIONS

48. Under California law, which is identical to federal law, Defendants' make unlawful and deceptive "sugar free" nutrient content claims.

A. California and Federal Law Regulate Unlawful Nutrient Content Claims

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

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

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

52. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims, which California has expressly adopted in California Health & Safety Code § 110100. Among other requirements, 21 C.F.R. § 101.13 requires that manufacturers include certain disclosures when a nutrient claim is made and, at the same time, the product contains certain levels of unhealthy ingredients, such as fat and sodium. It also sets forth the manner in which that disclosure must be made, as follows:

> (4)(i) The disclosure statement "See nutrition information for ___ content" shall be in easily legible boldface print or type, in distinct contrast to other printed or

> graphic matter, and in a size no less than that required by §101.105(i) for the net quantity of contents statement, except where the size of the claim is less than two times the required size of the net quantity of contents statement, in which case the disclosure statement shall be no less than one-half the size of the claim but no smaller than one-sixteenth of an inch, unless the package complies with §101.2(c)(2), in which case the disclosure statement may be in type of not less than one thirty-second of an inch.
>
> (ii) The disclosure statement shall be immediately adjacent to the nutrient content claim and may have no intervening material other than, if applicable, other information in the statement of identity or any other information that is required to be presented with the claim under this section (e.g., see paragraph (j)(2) of this section) or under a regulation in subpart D of this part (e.g., see §§101.54 and 101.62). If the nutrient content claim appears on more than one panel of the label, the disclosure statement shall be adjacent to the claim on each panel except for the panel that bears the nutrition information where it may be omitted.

53. 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).

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

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

56. Only approved nutrient content claims will be permitted on the food label, and all other nutrient content claims will misbrand a food. It is thus clear which types of claims are prohibited and which are permitted. Manufacturers are on notice that the use of an unapproved

nutrient content claim is prohibited conduct. 58 FR 2302. In addition, 21 U.S.C. § 343(r)(2) prohibits using unauthorized undefined terms and declares foods that do so to be misbranded.

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

B. Defendants Violate California Law By Making Unlawful "Sugar Free" Nutrient Claims.

58. All of the Purchased Products contain an unlawful "sugar free" nutrient content claim on their labels.

59. Federal and California regulations regulate sugar free claims as a particular type of nutrient content claim. Specifically, 21 C.F.R. § 101.60 contains special requirements for nutrient claims that use the term "sugar free." Pursuant to the Sherman Law, California has expressly adopted the federal labeling requirements of 21 C.F.R. § 101.60 as its own. California Health & Safety Code § 110100.

60. 21 C.F.R. § 101.60(c)(1) provides that:

> Sugar content claims—(1) Use of terms such as "sugar free," "free of sugar," "no sugar," "zero sugar," "without sugar," "sugarless," "trivial source of sugar," "negligible source of sugar," or "dietary insignificant source of sugar." Consumers may reasonably be expected to regard terms that represent that the food contains no sugars or sweeteners e.g., "sugar free," or "no sugar," as indicating a product which is low in calories or significantly reduced in calories. Consequently, except as provided in paragraph (c)(2) of this section, a food may not be labeled with such terms unless: (i) The food contains less than 0.5 g of sugars, as defined in § 101.9(c)(6)(ii), per reference amount customarily consumed and per labeled serving or, in the case of a meal product or main dish product, less than 0.5 g of sugars per labeled serving; and (ii) The food contains no ingredient that is a sugar or that is generally understood by consumers to contain sugars unless the listing of the ingredient in the ingredient statement is followed by an asterisk that refers to the statement below the list of ingredients, which states "adds a trivial amount of sugar," "adds a negligible amount of

> sugar," or "adds a dietary insignificant amount of sugar;" and (iii)(A) It is labeled "low-calorie" or "reduced calorie" or bears a relative claim of special dietary usefulness labeled in compliance with paragraphs (b)(2), (b)(3), (b)(4), or (b)(5) of this section, or, if a dietary supplement, it meets the definition in paragraph (b)(2) of this section for ''low calorie'' but is prohibited by §§101.13(b)(5) and101.60(a)(4) from bearing the claim or (B) Such term is immediately accompanied, each time it is used, by either the statement "not a reduced calorie food," "not a low-calorie food," or "not for weight control."

61. 21 C.F.R. § 101.60(b)(2) provides that:

> The terms "low-calorie," "few calories," "contains a small amount of calories," "low source of calories," or "low in calories" may be used on the label or in labeling of foods, except meal products as defined in § 101.13(l) and main dish products as defined in § 101.13(m), provided that: (i)(A) The food has a reference amount customarily consumed greater than 30 grams (g) or greater than 2 tablespoons and does not provide more than 40 calories per reference amount customarily consumed; or (B) The food has a reference amount customarily consumed of 30 g or less or 2 tablespoons or less and does not provide more than 40 calories per reference amount customarily consumed and, except for sugar substitutes, per 50 g ….(ii) If a food meets these conditions without the benefit of special processing, alteration, formulation, or reformulation to vary the caloric content, it is labeled to clearly refer to all foods of its type and not merely to the particular brand to which the label attaches (e.g., "celery, a low-calorie food").

62. None of Defendants' Purchased Products are low-calorie or suitable for weight control as they all contain more than the 40 calories per 50 grams which is the maximum amount allowed under 21 C.F.R. § 101.60(b)(2). Moreover, they are not capable of satisfying the requirements for a claim of dietary usefulness that would allow Defendants to avoid having to place a disclaimer next to the term sugar free each time it appeared on the label.

63. Defendants have failed to include on any of their Purchased Products a "conspicuous" statement of dietary usefulness explaining the basis for the sugar free claim that also precludes the use of such a claim. Similarly, Defendants have also failed indicate on any of their Purchased Product labels the fact that its products are sweetened with nutritive and non-nutritive sweeteners or to detail the percentage of the product that nonnutritive components comprise as required by regulation.

64. Defendants thus place a prominent sugar free claim on the principal display panel of their Purchased Products. This is what is visible to consumers. Defendants hide their purported statement of dietary usefulness on the back of the

package where it is invisible to the consumer as it is either underneath or in back of the panel consumers' view. This is contrary to the rules for statements of dietary usefulness as well as other labeling provisions. The whole point of the labeling rules is to provide useful information to consumers not hide it away from them.

65. Rather than clearly disclose that their products have calories, Defendants have resorted to false statements to conceal this fact. For example, on its website Wrigley states that "[s]everal types of artificial sweeteners are used in Wrigley's sugar-free products and as flavor enhancers in some other brands." Wrigley lists maltitol, sorbitol and xylitol as part of this group and then false states: [t]hese artificial sweeteners deliver long-lasting noncaloric taste." This is false as maltitol, sorbitol and xylitol are all nutritive, caloric sweeteners.

66. Building on such deception, Defendants have repeatedly represented through their advertising campaigns that their sugar free products sweetened with these sweeteners are low-calorie. For example, Defendants have distributed a publication entitled "Benefits of Chewing" that falsely represents that its sugar free gums are "a very low-calorie option." It further states: "the FDA has allowed the claim "Low-calorie [sugar free chewing gum] may be useful in weight control." Defendants' insertion of the bracketed phrase "sugar free chewing gum" to the actual words of the FDA is misleading and false because the FDA only approved such a claim for low-calorie products, which Defendants' sugar free gum is not. Similarly, Defendants have joined together as prominent members of the board of directors of the International Chewing Gum Association to ensure that entity promotes the purported health benefits of chewing gum including the dissemination of the false claim that chewing gum "provides [a] low-calorie snack."

67. This false as Defendants Purchased Products provide more than 40 calories per 50 grams. Yet the label on each of these products contains a statement "sugar free" without the FDA required disclosure "not a reduced calorie food," "not a low-

calorie food," or "not for weight control." Their calories level are as follows:

Eclipse sugar free gum, Winterfrost, 18 pcs	(83.3 calories)
Eclipse sugar free gum, Polar Ice, 12 pcs	(83.3 calories)
Orbit sugar free gum, peppermint 14 pcs	(131.5 calories)
Orbit sugar free gum, spearmint, 14 pcs	(131.5 calories)
Lifesavers sugar free hard candy, 5 flavors	(100 calories)

68. Defendants' Substantially Similar Products each have more than 80 calories per 50 grams as well. Yet the label on each of these products contains a statement "sugar free" without the FDA required disclosure "not a reduced calorie food," "not a low-calorie food," or "not for weight control."

69. Notwithstanding the fact that 21 C.F.R. § 101.60(c)(1) bars the use of the terms "sugar free" on foods that are not low-calorie unless they bear an express warning immediately adjacent to each use of the terms that discloses that the food is "not a reduced calorie food," or "not a low-calorie food," or "not for weight control," Defendants have touted their non low-calorie products as sugar free and chosen to omit the mandated disclosure statement.

70. In doing so Defendants have ignored the language of 21 C.F.R. § 101.60(c)(1) that states that:

> Consumers may reasonably be expected to regard terms that represent that the food contains no sugars or sweeteners e.g., "sugar free," or "no sugar," as ***indicating a product which is low in calories or significantly reduced in calories.*** (emphasis added)

71. Because consumers may reasonably be expected to regard terms that represent that the food contains no sugars or sweeteners (e.g., "sugar free") as indicating a product which is low in calories or significantly reduced in calories, consumers are misled when foods that are not low-calorie as a matter of law are falsely represented to be low-calorie through the unlawful use of terms like "sugar free" that they are not allowed to bear due to their high calorific levels and absence of mandated disclosure statements.

72. The labeling for Defendants' products violate California law and federal law. For these reasons, Defendants' sugar free claims at issue in this Second Amended Complaint are misleading and in violation of 21 C.F.R. § 101.60 and California law, and

the products at issue are misbranded as a matter of law. Misbranded products cannot be legally sold and are legally worthless.

73. In September 2007, the FDA issued a guidance letter to the food industry that indicated the FDA was concerned about unlawful sugar free type claims "that fail to bear the required disclaimer statement when these foods are not 'low' or 'reduced in' calories or fail to bear the required disclaimer statement in the location or with the conspicuousness required by regulation." The letter stated:

> Dear Manufacturer:
>
> The Food and Drug Administration (FDA) is concerned about the number of products we have seen that contain claims regarding the absence of sugar, such as, "sugar free" but that fail to bear the required disclaimer statement when these foods are not "low" or "reduced in" calories or fail to bear the required disclaimer statement in the location or with the conspicuousness required by regulation. As part of our continuing effort to reduce the incidence of obesity in the United States, FDA wants to ensure that consumers are provided with the label information they need to make informed choices for maintaining a healthy diet. We are highlighting accurate claims about the absence of sugar as a regulatory priority. The agency intends to take appropriate action against products that we encounter that bear a claim about the absence of sugar (e.g., sugar free) but that fail to meet each of the requirements of the regulation that defines "sugar free." We intend to pay particular attention to those foods that are required to bear a disclaimer statement under the regulation that defines "sugar free," but that fail to do so or otherwise fail to comply with the regulation, 21 C.F.R. 101.60(c). Therefore, we are taking this opportunity to remind food manufacturers and distributors of conventional food products that the definition of "sugar free" includes several requirements.
>
> Under the authority of the Nutrition Labeling and Education Act of 1990, FDA issued regulations for the nutrient content claim "sugar free" 58 Federal Register (FR) 2302 at 2415. "Sugar free" is defined in Title 21 of the Code of Federal Regulations 101.60(c) …
>
> FDA has historically taken the position that consumers may associate claims regarding the absence of sugar with weight control and with foods that are low-calorie or that have been altered to reduce calories significantly. Therefore, the definition for "sugar free" includes the requirement that any food that is not low or reduced in calorie disclose that fact. Without such information some consumers might think the food was offered for weight control. See 56 FR 60421 at 60435. Consequently, the definition for "sugar free" includes the requirement that the food be labeled with the claim "low-calorie" or "reduced calorie" or bear a relative claim of special dietary usefulness labeled in compliance with 21 C.F.R. 101.60(b)(2), (b)(3), (b)(4), or (b)(5) or such claim is immediately accompanied, each time it is used, by one of the following disclaimer statements: "not a reduced calorie food," "not a low-calorie food," or "not for weight control" (see 21 C.F.R. 101.60(c)(1)(iii)). The disclaimer statement, when required, must accompany the claim each time it is used. In addition, the disclaimer statement is subject to the

> requirements of 21 C.F.R. 101.2(c) and must appear prominently and conspicuously but in no case may the letters be less than one-sixteenth inch in height.
>
> FDA encourages food manufacturers and distributors to review their labels and ensure that any food that bears a claim regarding the absence of sugar meet each of the requirements for that claim including the placement and conspicuousness of the disclaimer statement in 21 C.F.R. 101.60(c)(1)(iii) when required. FDA will take appropriate action, consistent with our priorities and resources, when we find problems with the use of nutrient content claims regarding the absence of sugar in foods.

74. Defendants ignored this FDA guidance and engaged in the exact labeling practices the FDA sought to eliminate.

75. In addition to the industry guidance which Defendants ignored, the FDA has repeatedly taken enforcement action and issued warning letters against several other companies addressing the type of misleading sugar free nutrient content claims described above.

76. The enforcement actions and warning letters were hardly isolated, as the FDA has taken action against several other companies finding that the products were misbranded within the meaning of section 403 because the products' labels bore "sugar free" claims but did not meet the requirements to make such a claim.

77. Defendants ignored the FDA's repeated enforcement actions and issuance of warning letters and continued to use unlawful sugar free claims on their product labels and in their advertising and marketing materials when they were prohibited from doing so.

78. All doubt as to Defendants' deliberate and willful disregard for the law as to the labeling of its products is removed by the 2005 letter of Defendants to FDA requesting that FDA change the law regarding "sugar free" claims on gum products which are high in calories. A copy of this letter is attached as Exhibit 1 and a made a part hereof by reference. In the letter Defendants stated (emphasis added):

> Sugar-free chewing gum is generally formulated with intense sweeteners such as aspartame, sucralose, and acesulfame-K, and also sugar alcohols, such as sorbitol, xylitol, and isomalt. A single three-gram piece of sugar-free stick chewing gum is the Reference Amount Customarily Consumed (RACC) and contains

> approximately 5 calories. However***, sugar-free chewing gum does not qualify as "low-calorie" according to the criteria established in 21 C.F.R. 101.60(b)(2), and hence must either be labeled with the disclaimer "not a low-calorie food" or it must bear a relative claim of special dietary usefulness, as set forth in §101.60(c) governing sugar content claims.*** This creates a strange and confusing situation to the consumer.
>
> ***Sugar-free chewing gum cannot be labeled as low-calorie, however, because it contains more than 40 calories per 50 grams.*** (See criteria for low-calorie claims, 21 C.F.R. 101.60(b)(2)) We recognize the reasoning behind application of the calories-per- 50-gram criteria. FDA would like to ensure that calorie-dense foods having small RACCs, such as sugar, butter and salad dressings, not be labeled as "low-calorie." This is sensible as a means of discouraging foreseeable over-consumption of these foods (emphasis added).[1]

79. FDA did not change the law as requested by Defendants. Thereafter, instead of abiding by the law, Defendants decided to disregard the law and continue to make "sugar free" claims without the required disclosure.

80. Plaintiff saw and relied on Defendants' unlawful sugar free nutrient content claims and based her purchasing decisions, in substantial part, on such claims. Had Plaintiff been aware that Defendants sugar free representations were unlawful, i.e., rendered the Purchased Product misbranded, and misleading, i.e., not low in calories, she would not have purchased Defendants' products.

81. Plaintiff did not know, and had no reason to know, that Defendants' products were misbranded, and bore false "sugar free" nutrient claims despite failing to meet the requirements to make those nutrient claims. Plaintiff was equally unaware that Defendants' Purchased Products contained calories at levels that required a disclaimer or disclosure. Plaintiff and members of the Class who purchased the Purchased Products paid an unwarranted premium for these products. Because of Defendants' labeling violations these products were misbranded and could not be legally held or sold. They were worthless.

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

82. Plaintiff purchased the Purchased Products in California during the Class Period

[1] Letter to FDA from Carol Knight, Ph.D. Sr. Director, Scientific and Regulatory Affairs, Wm. Wrigley Jr. Company, 2005.

and read and relied in substantial part on the "sugar free" nutrient content claims made on the labels of these products in making her purchasing decisions.

83. The "sugar free" claim on of the label of each Purchased Product (i) violates the Sherman Law and is therefore misbranded and may not be sold or purchased and (ii) is misleading and deceptive.

A. Eclipse Sugar Free Gum, Winterfrost, 18 pcs

84. Plaintiff purchased Wrigley's Eclipse Sugar Free Gum, Winterfrost, 18 pcs in the Class Period. The label (front and back) of the package purchased by Plaintiff is attached as Exhibit 2.

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

"SUGARFREE GUM"

86. This product is unlawful, misleading, misbranded and violates the Sherman Law (through incorporation of 21 C.F.R. § 101.60(c)) because the label uses the phrase "sugar free" despite containing more than 40 calories per 50g serving and does not have the required disclosure that the product is not low-calorie and bear an express warning immediately adjacent to the sugar free claim that discloses that the food is "not a reduced calorie food," or "not a low-calorie food," or "not for weight control."

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

88. Plaintiff was misled by Defendants' unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had she known the truth about this product, *i.e.*, not low in calories, significantly reduced in calories, or suitable for weight control. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled

by these label representations in the same way(s) as Plaintiff.

B. Eclipse sugar free gum, Polar Ice, 12 pcs

89. Plaintiff purchased Wrigley's Eclipse Sugar Free Gum, Polar Ice 18 pcs in the Class Period. The label (front and back) of the package purchased by Plaintiff is attached as Exhibit 3.

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

"SUGARFREE GUM"

91. This product is unlawful, misleading, misbranded and violates the Sherman Law (through incorporation of 21 C.F.R. § 101.60(c)) because the label uses the phrase "sugar free" despite containing more than 40 calories per 50g serving and does not have the required disclosure that the product is not low-calorie and bear an express warning immediately adjacent to the sugar free claim that discloses that the food is "not a reduced calorie food," or "not a low-calorie food," or "not for weight control."

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

93. Plaintiff was misled by Defendants' unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had she known the truth about this product, *i.e.*, not low in calories, significantly reduced in calories, or suitable for weight control. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled by these label representations in the same way(s) as Plaintiff.

C. Orbit sugar free gum, peppermint, 14 pcs

94. Plaintiff purchased Wrigley's Orbit Sugar Free Gum, Peppermint, 14 pcs in the Class Period. The label (front and back) of the package purchased by Plaintiff is attached as

Exhibit 4.

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

"SUGARFREE GUM"

96. This product is unlawful, misleading, misbranded and violates the Sherman Law (through incorporation of 21 C.F.R. § 101.60(c)) because the label uses the phrase "sugar free" despite containing more than 40 calories per 50g serving and does not have the required disclosure that the product is not low-calorie and bear an express warning immediately adjacent to the sugar free claim that discloses that the food is "not a reduced calorie food," or "not a low-calorie food," or "not for weight control."

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

98. Plaintiff was misled by Defendants' unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had she known the truth about this product, *i.e.*, not low in calories, significantly reduced in calories, or suitable for weight control. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled by these label representations in the same way(s) as Plaintiff.

D. <u>Orbit sugar free gum, spearmint, 14 pcs</u>

99. Plaintiff purchased Wrigley's Orbit Sugar Free Gum, Spearmint, 14 pcs in the Class Period. The label (front and back) of the package purchased by Plaintiff is attached as Exhibit 5.

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

"SUGARFREE GUM"

101. This product is unlawful, misleading, misbranded and violates the Sherman Law

(through incorporation of 21 C.F.R. § 101.60(c)) because the label uses the phrase "sugar free" despite containing more than 40 calories per 50g serving and does not have the required disclosure that the product is not low-calorie and bear an express warning immediately adjacent to the sugar free claim that discloses that the food is "not a reduced calorie food," or "not a low-calorie food," or "not for weight control."

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

103. Plaintiff was misled by Defendants' unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had she known the truth about this product, *i.e.*, not low in calories, significantly reduced in calories, or suitable for weight control. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled by these label representations in the same way(s) as Plaintiff.

E. <u>Lifesavers sugar free hard candy, 5 flavors, 2.75 oz</u>

104. Plaintiff purchased Wrigley's Lifesavers sugar free hard candy, 5 flavors, 2.75 oz. in the Class Period. The label (front and back) of the package purchased by Plaintiff is attached as Exhibit 6.

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

"SUGAR FREE"

106. This product is unlawful, misleading, misbranded and violates the Sherman Law (through incorporation of 21 C.F.R. § 101.60(c)) because the label uses the phrase "sugar free" despite containing more than 40 calories per 50g serving and does not have the required disclosure that the product is not low-calorie and bear an express warning immediately adjacent to the sugar free claim that discloses that the food is "not a reduced calorie food," or "not a low-

calorie food," or "not for weight control."

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

108. Plaintiff was misled by Defendants' unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had she known the truth about this product, *i.e.*, not low in calories, significantly reduced in calories, or suitable for weight control. In addition, Plaintiff paid on unwarranted premium for this product. Plaintiff had other food alternatives and Plaintiff also had cheaper alternatives. Reasonable consumers would be misled by these label representations in the same way(s) as Plaintiff.

DEFENDANTS HAVE VIOLATED CALIFORNIA LAW BY MANUFACTURING, ADVERTISING DISTRIBUTING AND SELLING THE PURCHASED PRODUCTS

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

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

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

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

113. Defendants have violated California Health & Safety Code § 110660 because their

labeling is false and misleading in at least one way.

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

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

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

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

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

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

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

121. Defendants have violated and continue to violate the standards set by 21 C.F.R. §§ 101.13, and 101.60, which have been adopted by reference in the Sherman Law, by including unauthorized nutrient content and sugar free claims on their Purchased Products.

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

123. By selling products that bear unauthorized and unlawful sugar free claims and are not low calorie but fail to properly disclose that fact, Defendants have violated and continue to violate federal laws and regulations prohibiting the misbranding of food products including those in 21 U.S.C. § 343, which have been adopted by reference in the Sherman Law.

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

125. Defendants violated California law by utilizing unlawful sugar-related claims (*e.g.*, false/unlawful no sugar added claims) to make their products appear healthier than they in fact were.

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

> (a) it bears a false or misleading label …
>
> (f) its label fails to conspicuously depict any word, statement, or other information required to appear on the label or labeling and be prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and

use; …

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

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

PLAINTIFF PURCHASED DEFENDANTS' PURCHASED PRODUCTS

128. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy diet.

129. Plaintiff purchased Defendants' Purchased Products at issue in this Second Amended Complaint since 2008 and throughout the Class Period.

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

131. Plaintiff read the "sugar free" nutrient content claim on the labels of the Purchased Products, where applicable, before purchasing them. Defendants' failure to disclose the presence of risk-increasing nutrients and calories and their utilization of false and improper labeling claims was deceptive because it falsely conveyed to the Plaintiff the net impression that the particular Purchased Product she bought made only positive contribution to a diet, and did not contain any nutrients or calories at levels that raised the risk of diet-related disease or health related condition. Defendants' utilization of unlawful and unauthorized nutrient content claims also misled the Plaintiff with respect to the nature of the products she was purchasing.

132. Plaintiff relied on Defendants' package labeling, "sugar free" claims and based and justified the decision to purchase Defendants' Purchased Products, in substantial part, on Defendants' package labeling. Plaintiff would have foregone purchasing Defendants' products and bought other products readily available at a lower price.

133. At point of sale, Plaintiff did not know, and had no reason to know, that Defendants' Purchased Products were misbranded as set forth herein, and would not have bought

the products had she known the truth about them.

134. As a result of Defendants' misrepresentations, Plaintiff and thousands of others in California and the United States purchased the Purchased Products at issue.

135. Defendants' labeling, advertising and marketing as alleged herein is false and misleading and designed to increase sales of the products at issue.

136. A reasonable consumer would attach importance to Defendants' "sugar free" representations in determining whether to purchase the products at issue.

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

CLASS ACTION ALLEGATIONS

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

> All persons in California who purchased any of Wrigley's Class Products since April 13, 2008.

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

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

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

142. Common Questions Predominate: This action involves common questions of law

and fact applicable to each Class member that predominate over questions that affect only individual Class members. Thus, proof of a common set of facts will establish the right of each Class member to recover. Questions of law and fact common to each Class member include, for example:

a. Whether Defendants engaged in unlawful and misleading business practices by failing to properly package and label their Class Products sold to consumers;

b. Whether the Class Products at issue were misbranded or unlawfully packaged and labeled as a matter of law;

c. Whether Defendants made unlawful and misleading sugar free claims with respect to their Class Products sold to consumers;

d. Whether Defendants used unlawful and misleading nutritional or ingredient information;

e. Whether Defendants violated California Bus. & Prof. Code § 17200, California Bus. & Prof. Code § 17500, and the Sherman Law;

f. Whether Plaintiff and the Class is entitled to equitable and/or injunctive relief; and

g. Whether Defendants' unlawful, unfair and/or deceptive practices harmed Plaintiff and the Class.

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

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

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

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

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

fairly and efficiently adjudicating the controversy.

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

FIRST CAUSE OF ACTION

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

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

150. Defendants' conduct constitutes unlawful business acts and practices.

151. Defendants sold Purchased Products nationwide and in California.

152. Defendants are corporations and, therefore are "persons" within the meaning of the Sherman Law.

153. 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).

154. 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.*

155. 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.

156. 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.

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

158. 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 Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Purchased Products by Plaintiff and the Class.

SECOND CAUSE OF ACTION

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

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

160. Defendants' conduct as set forth herein constitutes unfair business acts and practices.

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

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

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

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

the Class.

165. 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 Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Purchased Products by Plaintiff and the Class.

THIRD CAUSE OF ACTION

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

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

167. Defendants' conduct as set forth herein constitutes fraudulent business practices under California Business and Professions Code sections § 17200, *et seq.*

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

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

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

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

172. As a result of Defendants' conduct as set forth herein, Plaintiff and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future

conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Purchased Products by Plaintiff and the Class.

FOURTH CAUSE OF ACTION

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

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

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

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

176. 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.

177. 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.

178. 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 Defendants' Purchased Products in violation of the "misleading prong" of California Business and Professions Code § 17500, *et seq*.

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

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

FIFTH CAUSE OF ACTION

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

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

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

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

184. Defendants engaged in a scheme of offering Defendants' Purchased Products for sale to Plaintiff and the Class by way of product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendants' Purchased Products. Defendants' advertisements and inducements were made in California and come within the definition of advertising as contained in Business and Professions Code §17500, *et seq*. in that the product packaging and labeling, and promotional materials were intended as inducements to purchase Defendants' Purchased Products, and are statements disseminated by Defendants to Plaintiff and the Class. Defendants knew, or in the exercise of

reasonable care should have known, that these statements were untrue.

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

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

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

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

SIXTH CAUSE OF ACTION

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

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

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

191. Plaintiff and the Class are entitled to actual and punitive damages against Defendants for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiff and the Class are entitled to an order enjoining the above-described acts and practices,

providing restitution to Plaintiff and the Class, ordering payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

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

193. Defendants sold Purchased Products in California during the Class Period.

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

195. Defendants' Purchased Products were and are "goods" within the meaning of Cal. Civ. Code §1761(a).

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

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

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

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

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

201. Pursuant to Section 1782(a) of the CLRA, on May 18, 2012, Plaintiff's counsel served Wrigley with notice of Wrigley's violations of the CLRA. As authorized by Wrigley's counsel, Plaintiff's counsel served Wrigley by certified mail, return receipt requested. Wrigley has not responded.

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

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

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

JURY DEMAND

Plaintiff hereby demands a trial by jury of her claims.

PRAYER FOR RELIEF

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

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

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

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

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

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

F. For an order awarding punitive damages;

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

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

Dated: October 1, 2013

Respectfully submitted,

/s/ Ben F. Pierce Gore

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Fax: (662) 513-0072
colemanlawfirmpa@bellsouth.net

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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

s/Pierce Gore
Ben F. Pierce Gore

Wm. Jr. Company
WRIGLEY BUILDING • 410 N. MICHIGAN AVENUE
CHICAGO, ILLINOIS 60611 • TEL:(312)644-2121

BY ELECTRONIC MAIL

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, Maryland 20852

Re: Docket No. 2004N-0463; Food Labeling, Prominence of Calories

Dear Sir or Madam:

We are writing with the following comments responsive to the Agency's Advance Notice of Proposed Rulemaking (ANPRM) referenced above. The Wm. Wrigley Jr. Company appreciates this opportunity to make its views known.

Chewing gum is a unique type of food in several respects. It is chewed for an extended period of time but not swallowed. The amount likely to be enjoyed each day by a typical consumer of sugar-free chewing gum delivers fewer than 10 calories. Consumers chew gum for its flavor, for its chewing enjoyment, and for other benefits its provides. The actual amount of energy (calories) attributable to a single piece of chewing gum may vary depending on the length of time the gum is chewed and the extent to which all carbohydrates are chewed out of the gum.

Sugar-free chewing gum is among the best available snack choices for consumers interested in reducing their caloric intake, which may help reduce or maintain body weight when coupled with daily exercise. This is because chewing gum is a low-calorie alternative to other forms of snacking and can help satisfy an urge to snack for an extended period of time. Sugar-free chewing gum is recognized by the American Dietetic Association and the American Diabetic Association as a "free food" which can be eaten whenever desired in weight management and diabetic diets.[1] Health professionals and wellness/fitness groups often recommend chewing gum to control nibbling while cooking or to avoid tempting situations for snacking on high calorie foods.[2]

FDA's current labeling regulations, however, inhibit the ability of chewing gum manufacturers to convey this information to consumers. Specifically, sugar-free chewing

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[1] Exchange Lists for Weight Management, 2003 edition. Exchange lists for (diabetic) meal planning, 2003 edition.

[2] Shield, J. Weight Watchers Magazine, Nov/Dec 2004. Lakeshore Athletic Clubs. Weekly email to members, June 2, 2005.

EXHIBIT 1

gum is generally not eligible for a "low calorie" claim, and, in fact, sugar-free chewing gum must be labeled either with the disclaimer "not a low-calorie food" or a relative claim of special dietary usefulness, as required in the regulations. As FDA examines calorie declarations generally, the Wm. Wrigley Jr. Company urges the agency to consider changes in the nutrient content claim regulations that would allow for helpful and truthful label statements regarding the calorie content of sugar-free chewing gum.

Sugar-free chewing gum is generally formulated with intense sweeteners such as aspartame, sucralose, and acesulfame-K, and also sugar alcohols, such as sorbitol, xylitol, and isomalt. A single three-gram piece of sugar-free stick chewing gum is the Reference Amount Customarily Consumed (RACC) and contains approximately 5 calories. However, sugar-free chewing gum does not qualify as "low calorie" according to the criteria established in 21 C.F.R. 101.60(b)(2), and hence must either be labeled with the disclaimer "not a low calorie food" or it must bear a relative claim of special dietary usefulness, as set forth in §101.60(c) governing sugar content claims. This creates a strange and confusing situation to the consumer.

We respectfully submit that the consumer is not served by this information and is, in fact, misled by it. Survey data consistently demonstrate that among consumers who chew gum, the overall population mean consumption is less than two sticks per day. In the 13-17 year age group (who are the heaviest consumers of chewing gum), mean consumption is less than three sticks per day. This would contribute approximately 15 calories to an individual's diet per day, which amounts to less than one percent of a 2000-calorie daily value. This should qualify as "low calorie" by any reasonable definition.

Sugar-free chewing gum cannot be labeled as low-calorie, however, because it contains more than 40 calories per 50 grams. (See criteria for low-calorie claims, 21 C.F.R. 101.60(b)(2)) We recognize the reasoning behind application of the calories-per-50-gram criteria. FDA would like to ensure that calorie-dense foods having small RACCs, such as sugar, butter and salad dressings, not be labeled as "low calorie." This is sensible as a means of discouraging foreseeable over-consumption of these foods.

In the case of chewing gum, however, the calorie content of 50 grams is not at all relevant to foreseeable consumption patterns. At approximately three grams per stick, a consumer would need to chew 17 sticks of chewing gum in one day, or approximately one stick for every waking hour, to chew 50 grams. As noted previously, the estimated mean consumption among teens, the heaviest users of chewing gum, is less than three sticks a day.

Under these circumstances, it is confusing and misleading to consumers that sugar-free chewing gum must be labeled "not a low calorie food." It is also contrary to the First Amendment to the United States Constitution that FDA's labeling regulations (1) prohibit a truthful and non-misleading low-calorie claim on sugar-free chewing gum, and (2) go so far as to compel the use of the "not a low calorie food" disclaimer in some cases.

For these reasons, we ask FDA to consider amending the criteria for a low-calorie claim in §101.60 so that the calories-per-50-grams criterion is not applied to sugar-free chewing gum.

We would also like to take this opportunity to comment on other matters discussed in the ANPRM. Wrigley does not support the inclusion of a mandatory calorie content declaration on the principal display panel of packaged foods. Consumers should be able to refer to the familiar nutrition facts panel for all mandatory nutrition information. The best way to make the calorie declaration more prominent in the nutrition facts panel would be to have it provided in bold type. Wrigley does not support a larger type size for the calorie declaration or any other information in the nutrition facts panel because label space on many products, including chewing gum, is limited.

Along these lines, Wrigley agrees that the calories from fat declaration is not particularly useful to consumers and occupies valuable label space. As emphasized in the 2005 Dietary Guidelines, "when it comes to weight control, calories count – not the proportions of carbohydrate, fat, and protein in the diet." Wrigley also does not support the inclusion of a percent daily value for calories. As emphasized in the 2005 Dietary Guidelines and in USDA's new MyPyramid, one size does not fit all. There is not a single daily value for calories. Consumers should be encouraged to consider their own individual energy requirements, and valuable label space should not be devoted to a misleading statement in this regard.

Once again, the Wm. Wrigley Jr. Company appreciates this opportunity to make its views known. We would be pleased to answer any questions or contribute additional information or suggestions at any time.

Respectfully submitted,

Carol Knight

Carol Knight, Ph.D.
Sr. Director, Scientific and Regulatory Affairs

Wm. WRIGLEY Jr. Company
Global Innovation Center
1132 W. Blackhawk Street
Chicago, IL 60622

Exhibit 2


WINTERFROST®
INCREDIBLY FRESH BREATH
WRIGLEY'S
eclipse
NOW 50% MORE!
18 PIECES
SUGARFREE GUM

Exhibit 3


INCREDIBLY FRESH BREATH
WRIGLEY'S
eclipse
12 PIECES
SUGARFREE GUM
POLAR ICE®
eclipse

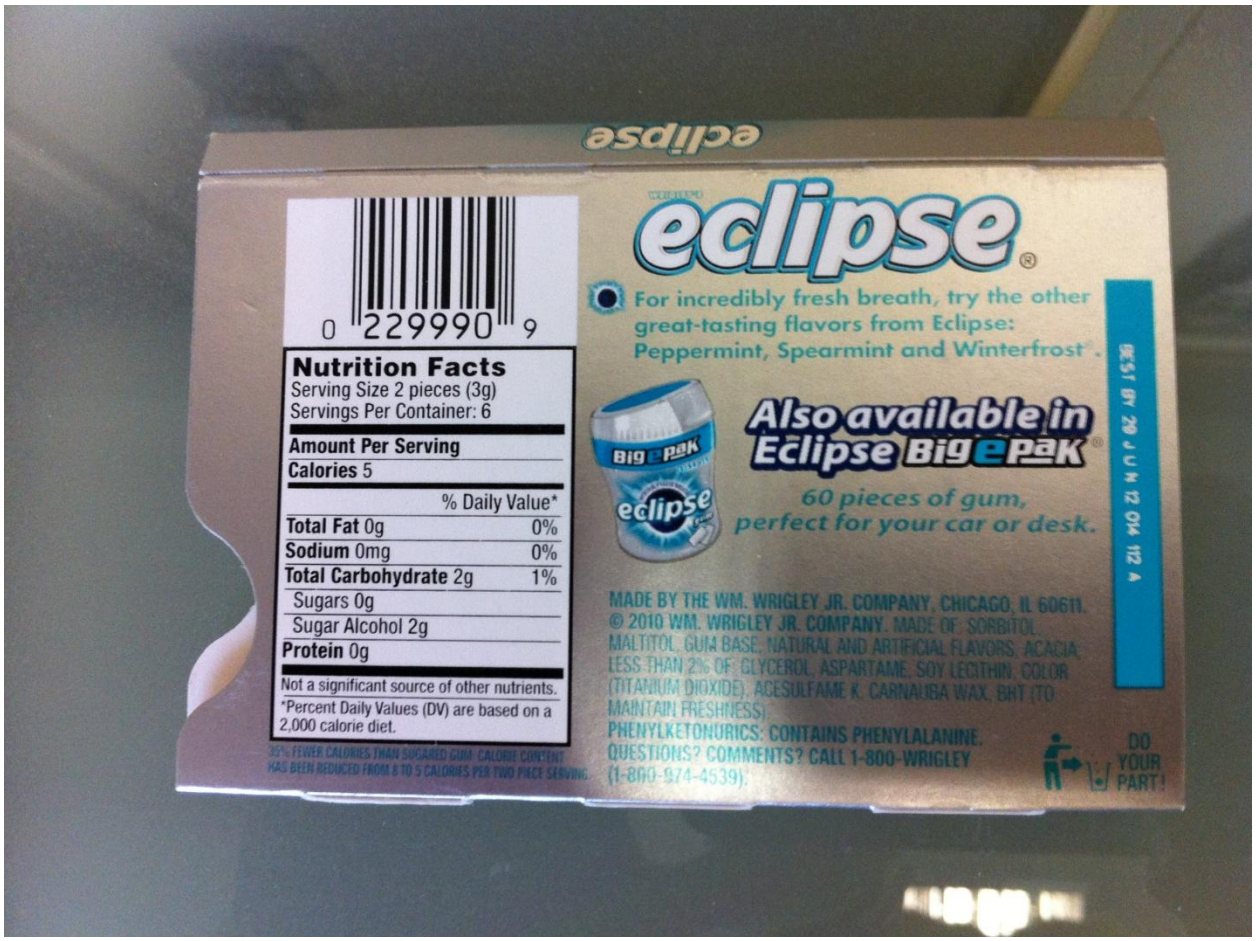
eclipse
eclipse
0 22990 9
Nutrition Facts
Serving Size 2 pieces (3g)
Servings Per Container: 6
Amount Per Serving
Calories 5
% Daily Value*
Total Fat 0g 0%
Sodium 0mg 0%
Total Carbohydrate 2g 1%
Sugars 0g
Sugar Alcohol 2g
Protein 0g
Not a significant source of other nutrients.
*Percent Daily Values (DV) are based on a 2,000 calorie diet.
35% FEWER CALORIES THAN SUGARED GUM. CALORIE CONTENT HAS BEEN REDUCED FROM 8 TO 5 CALORIES PER TWO PIECE SERVING.
For incredibly fresh breath, try the other great-tasting flavors from Eclipse: Peppermint, Spearmint and Winterfrost®.
Also available in Eclipse Big ePaK®
60 pieces of gum, perfect for your car or desk.
MADE BY THE WM. WRIGLEY JR. COMPANY, CHICAGO, IL 60611.
© 2010 WM. WRIGLEY JR. COMPANY. MADE OF: SORBITOL, MALTITOL, GUM BASE, NATURAL AND ARTIFICIAL FLAVORS, ACACIA, LESS THAN 2% OF: GLYCEROL, ASPARTAME, SOY LECITHIN, COLOR (TITANIUM DIOXIDE), ACESULFAME K, CARNAUBA WAX, BHT (TO MAINTAIN FRESHNESS).
PHENYLKETONURICS: CONTAINS PHENYLALANINE.
QUESTIONS? COMMENTS? CALL 1-800-WRIGLEY (1-800-974-4539).
DO YOUR PART!
BEST BY 29 JUN 12 014 112 A

Exhibit 4


LIMITED EDITION
WRIGLEY'S
Orbit
peppermint
artificially flavored
HELP CLEAN UP YOUR WORLD
BY ENTERING CODE ON PACK • SEE DETAILS ON SIDE
14 pieces
sugarfree gum

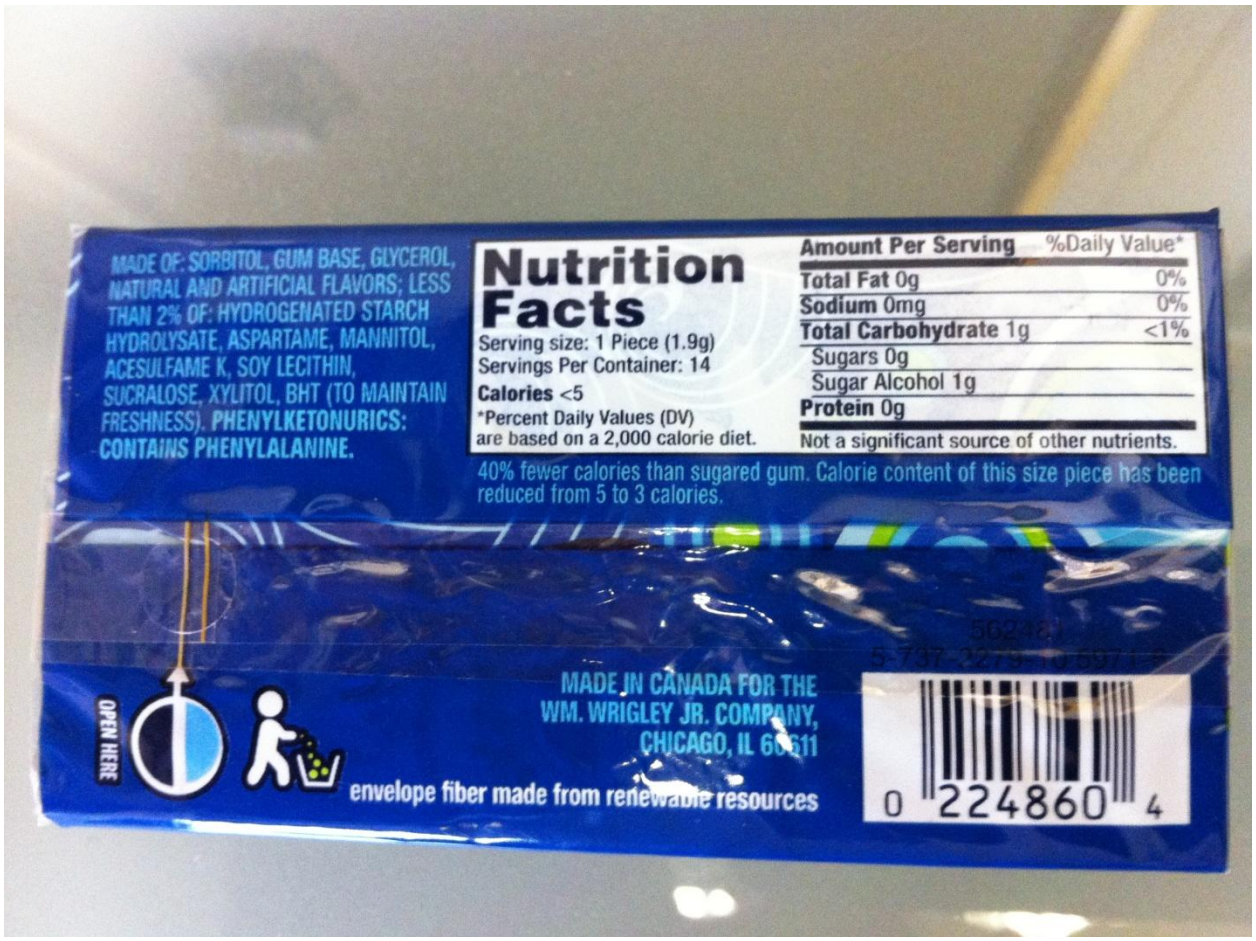
MADE OF: SORBITOL, GUM BASE, GLYCEROL, NATURAL AND ARTIFICIAL FLAVORS; LESS THAN 2% OF: HYDROGENATED STARCH HYDROLYSATE, ASPARTAME, MANNITOL, ACESULFAME K, SOY LECITHIN, SUCRALOSE, XYLITOL, BHT (TO MAINTAIN FRESHNESS). PHENYLKETONURICS: CONTAINS PHENYLALANINE.
Nutrition Facts
Serving size: 1 Piece (1.9g)
Servings Per Container: 14
Calories <5
*Percent Daily Values (DV) are based on a 2,000 calorie diet.
Amount Per Serving %Daily Value*
Total Fat 0g 0%
Sodium 0mg 0%
Total Carbohydrate 1g <1%
Sugars 0g
Sugar Alcohol 1g
Protein 0g
Not a significant source of other nutrients.
40% fewer calories than sugared gum. Calorie content of this size piece has been reduced from 5 to 3 calories.
OPEN HERE
MADE IN CANADA FOR THE WM. WRIGLEY JR. COMPANY, CHICAGO, IL
envelope fiber made from renewable resources
0 224860 4

Exhibit 5


orbit
spearmint
artificially flavored
14
pieces
sugarfree gum
THOUSANDS of chances to
WIN ALL SPRING!
Nutrition
Facts
Amount Per Serving
Total Fat 0g
Sodium 0mg
Total Carbohydrate 1g
Sugars 0g
Sugar Alcohol 1g
Protein 0g
0 224840

Exhibit 6


NEW LOOK!
SAME GREAT TASTE
SUGAR FREE
LIFESAVERS
HARD CANDY
5 FLAVORS
CHERRY
RASPBERRY
WATERMELON
ORANGE
PINEAPPLE
CALORIES 30
2%DV
PER SERVING
INDIVIDUALLY WRAPPED


SUGAR FREE
LIFESAVERS
HARD CANDY
5 FLAVORS
Perfect when your tongue can't make up its mind.
More flavors.
More fun for your mouth.™
BEST BY:09NOV12003A7
Nutrition Facts
Serving Size: 4 Pieces (15g)
Servings Per Container about 5
Amount Per Serving
Calories 30
% Daily Value*
Total Fat 0g 0%
Sodium 0mg 0%
Total Carbohydrate 14g 4%
Sugars 0g
Sugar Alcohol 14g
Protein 0g
DO YOUR PART!
PROOF OF PURCHASE
LIFE SAVERS® 5 FLAVORS
2.75 OZ (78g) BAG