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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,
AT KANSAS CITY

TONYA KELLY and BRIAN MARTENS, on behalf of themselves and all others similarly situated,	)	**Case No. 1316-CV11037**
	)	**Division No. 16**
Plaintiffs,	)	
v.	)	**TI**
POPCHIPS, INC.,	)	
Defendant.	)	**JURY TRIAL DEMANDED**

FIRST AMENDED CLASS ACTION PETITION

Plaintiffs Tonya Kelly ("Plaintiff Kelly") and Brian Martens ("Plaintiff Martens") (collectively, "Plaintiffs"), on behalf of themselves and on behalf of all others similarly situated, for their Class Action Petition against Defendant Popchips, Inc. ("Defendant"), states and alleges as follows:

Nature of the Action

1. This lawsuit asserts that Defendant Popchips, a national producer and marketer of chip snacks throughout the United States, has been falsely labeling and marketing its PopChips brand chip snacks ("Popchips") as an "all natural," "healthier" food product that contains "no preservatives" and "no artificial flavors or colors," among other representations, when Popchips are highly processed and contain numerous artificial and synthetic ingredients, excessive amounts of fat, and trivial amounts of essential nutrients such that Popchips are not "all natural" and are not a "healthier" food.

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2. Since January of 2007, Defendant has engaged in a comprehensive and uniform marketing campaign to misrepresent and misbrand Popchips as a healthy and natural product in order to exploit consumers' preference for food that is natural and healthy. Defendant's false and deceptive marketing practices allow it to differentiate Popchips from comparable brands and charge consumers a premium price for the product.

3. The artificial and synthetic ingredients contained in Defendant's Popchips include autolyzed yeast extract, citric acid, dextrose, disodium phosphate, lactic acid, malic acid, maltodextrin, sodium caseinate, sodium citrate, tartaric acid, torula yeast, xanthan gum, and yeast extract.

4. The ingredients "autolized yeast extract," "yeast extract," and "torula yeast" are synthetic additives that contain high quantities of free glutamate and MSG, neurological excitotoxins commonly known as "MSG." Defendant adds these ingredients to Popchips to create artificially savory flavors or umami taste sensations when eating Popchips.

5. Defendant knows that Popchips are not "all natural" or "healthier" and knows that the compounds and substances it adds to Popchips are in fact preservatives, fake flavors, ingredients derived from genetically modified organisms ("GMOs"), and sources of MSG. Defendant adds these ingredients to Popchips as part of a scientifically engineered formula to manipulate the flavor and aroma profile of Popchips, improve its texture, and extend its natural shelf life.

6. Despite Defendant's knowledge that Popchips are an unnatural and unhealthful snack that contains preservatives, GMOs, and fake flavors, Defendant chooses to market Popchips falsely and deceptively by uniformly misrepresenting and misbranding Popchips as an

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"all natural," "healthier" food product that contains "no fake colors or flavors," "no preservatives," and no MSG.

7. Defendant's false and deceptive marketing enables it to exploit consumers' willingness to pay a premium price for natural, healthy food products that contain no preservatives, no fake flavors, no GMOs, and no MSG. Defendant took advantage of consumers' preferences by charging a 220% price premium for its Popchips over comparable snack chip products.

8. Plaintiffs were injured as a direct and proximate result of Defendant's wrongful conduct in that they paid more for Popchips than they would have had Defendant openly and honestly marketed the product. Plaintiffs would not have purchased Defendant's Popchips for a premium price had they known the true nature of the product.

9. Plaintiffs are similarly situated to thousands of consumers throughout the United States who paid a premium price for Defendant's Popchips despite receiving a product that offers no additional benefits over other similar, less expensive food snack products offered by competitors.

10. Plaintiffs seek relief individually and on behalf of a nationwide class of consumers who purchased Popchips from January 2007 to the present (the "Class Period"). Plaintiffs assert claims for violation of state consumer protection statutes, breach of express warranty, breach of implied warranty, and unjust enrichment. Plaintiffs seek relief in the form of damages, pre-judgment and post-judgment interest, restitution, permanent injunctive and declaratory relief, reasonable attorneys' fees and litigation costs, and punitive damages in an

amount that is fair and reasonable, yet will serve to deter Defendant from similar conduct in the future.

The Parties

11. Plaintiff Tonya Kelly is a citizen of the State of Missouri and resides in Kansas City, Missouri. Plaintiff Kelly has purchased multiple varieties of Popchips for personal, family, or household purposes, including the Barbeque, Sea Salt & Vinegar, Thai Sweet Chili, and Chili Lime varieties, and has purchased Popchips in Missouri as recently as September of 2012. Plaintiff Kelly would not have purchased Popchips for a premium price had she known that, rather than an "all natural" product that is "healthier" and contains "no preservatives," "no artificial flavors or colors," as marketed by Defendant, she was purchasing an unnatural and unhealthful snack that contains preservatives and fake flavors.

12. Plaintiff Brian Martens is a citizen of the State of California and resides in Forestville, California. Plaintiff Martens has purchased multiple varieties of Popchips for personal, family, or household purposes, including the Barbeque and Thai Sweet Chili varieties, and has purchased Popchips in California as recently as August of 2012. Plaintiff Martens would not have purchased Popchips for a premium price had he known that, rather than an "all natural" product that is "healthier" and contains "no preservatives," "no artificial flavors or colors," as marketed by Defendant, he was purchasing an unnatural and unhealthful snack that contains preservatives and fake flavors.

13. Defendant Popchips, Inc. is a Delaware corporation with its principal place of business in San Francisco, California 94111. On information and belief, Defendant manufactures, packages, and distributes Popchips for sale in retail stores throughout the country.

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Defendant developed the marketing and sales strategy for Popchips, which it uniformly employs throughout the country, and is liable for the false and deceptive statements and omissions made therein.

Jurisdiction and Venue

14. This Court has personal jurisdiction over Defendant pursuant to Missouri Supreme Court Rule 54.06 and Mo. Rev. Stat. § 506.500 because a substantial portion of the wrongdoing alleged by Plaintiffs occurred in Missouri and Defendant purposefully availed itself to the benefits and protections of the State of Missouri by transacting business within Missouri.

15. Venue is proper in this Court pursuant to Mo. Rev. Stat. § 508.010 because Plaintiff Kelly was first injured by the wrongful acts and conduct of Defendant in Jackson County, Missouri. Venue is also proper in this Court pursuant to Mo. Rev. Stat. § 407.025.1 because Plaintiff Kelly purchased Popchips in Jackson County, Missouri.

Factual Allegations

16. Defendant is the creator, manufacturer, distributor, marketer, and seller of Popchips.

17. On information and belief, Defendant produces its Popchips through a proprietary process in which potato or corn starch is hydraulically compressed under immense heat and pressure. The immediate release of heat and pressure causes the ingredients to fuse into a shaped product. Defendant thereafter coats the product with a formulated blend of seasonings, packages the product, and distributes it for sale at food retailers throughout the United States.

18. Defendant's Popchips are sold by retailers along with comparable products that are produced and made available for purchase by competitors.

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19. Because it is not feasible for a reasonable consumer to physically examine or test the contents and qualities of a food product prior to sale, consumers must rely on representations and product appearance to determine which food product to buy among comparable alternatives. Products that are entirely enclosed in packaging, such as Defendant's Popchips, require the consumer to rely entirely on representations about the product.

20. The ability of consumers to rely on food marketing to make accurate and informed decisions on which food products to buy is essential to consumer health and well-being and promotes food commerce.

21. Not surprisingly, consumers believe that limiting their intake of unnatural, processed foods is one of the most important components of healthy eating. The natural food industry realized $37 billion in sales for 2011 alone, representing a significant area of growth and profit for food manufacturers who produce all natural food products. Natural Foods Merchandiser, *NFM Market Overview 2012: Natural Stays on Perennial Path to Growth* (May 29, 2012), http://newhope360.com/nfm-market-overview/nfm-market-overview-2012-natural-stays-perennial-path-growth.

A. Defendant Markets Popchips as an All Natural and Healthier Product That Does Not Contain Artificial Colors or Preservatives

22. Since January of 2007, Defendant has engaged in a comprehensive and uniform marketing campaign to brand its Popchips as an all natural and healthy food product. Defendant's marketing campaign utilizes numerous mediums to reach consumers and influence their perceptions of Popchips, including the labeling and packaging for Popchips; an integrated

and rich-media website; social media such as Facebook and Twitter, and the use of celebrity sponsors and nutritionists.

23. As shown in Exhibit A and B, the labeling and packaging for Popchips contains numerous representations that Popchips are "all natural" and "healthier" and contain "no preservatives," "no fake colors," and "no fake flavors":

(a) "all natural";

(b) "no preservatives";

(c) "no artificial flavors or colors";

(d) "lately all this low-fat health talk has been taking the fun right out of snacking, not to mention the flavor. so we found a new way to put it back into an all natural chip like you've never tasted before.";

(e) "we season [Popchips] will the finest all-natural ingredients for a snack so tasty and crispy, you won't even notice it's (we hesitate to say) healthier."; and

(f) "nothing fake or phony. no fake colors, no fake flavors, no fluorescent orange fingertips, no wiping your greasy chip hand on your jeans. no, really."

24. The representations on Popchips' packaging are placed conspicuously on the package, are emphasized with contrasting ink, and are repeatedly stated. The word "natural" is stated four times on every package of Popchips.

25. The representations by Defendant on the labeling and packaging of Popchips are uniform among all flavors of Popchips and utilize the same placement, stylistic design, and grammatical emphasis on each package.

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26. Each package of Popchips encourages consumers to "pop over to popchips.com," where Defendant makes additional representations as to the "natural," "healthier," and preservative-free qualities of Popchips:

(a) "naturally delicious and healthier. that's *popchips*.";

(b) "thanks to the magic of popping, we found a way to pop all the flavor in, while keeping fake stuff and at least half the fat of regular flavored chips out.";

(c) "no artificial flavors or colors.";

(d) "we only use naturally delicious flavors.";

(e) "what's naturally delicious? for us, it's simple: no fake colors, no fake flavors, no preservatives and no fluorescent orange fingertips. no, really. we take the finest naturally delicious ingredients and leave out all the bad stuff, like hydrogenated oils and msg, that give snacking a bad name.";

(f) "what's all-natural? for us, it's simple: no fake colors, no fake flavors, no preservatives, and no fluorescent orange fingertips. no, really. we take the finest all-natural ingredients and leave out all the bad stuff, like hydrogenated oils and msg, that give snacking a bad name.";

(g) "do you use any preservatives, artificial flavors, colors or ingredients? nope. *popchips* have no preservatives, no fake flavors, and no fake colors. every last chip is totally natural.";

(h) "do *popchips* have msg or other flavor enhancers? no way. we only use all-natural flavors. because we promise our fellow snackers all-natural, and we mean it.";

(i) "popping is a way of making our naturally delicious chips.";

(j) "popping is how we turn our naturally delicious ingredients into our tastier and surprisingly healthier popped potato, tortilla and popped corn chips.";

(k) "**naturally delicious. nothing fake or phony.** our pledge: no fake colors, no fake flavors, no preservatives, no fluorescent orange fingertips, and no wiping your greasy chip hand on your jeans. no, really. we only use ingredients you can feel good about eating. and we leave out the bad stuff, like hydrogenated oils and msg, that give snacking a bad name. because *popchips* have no preservatives, make sure to get a good chip clip after opening the bag to keep our Popchips fresh. or better yet, just eat them all at once.";

(l) "[the founders] spent over a year, snacking, popping, and snacking some more, until they came up with *popchips*, [a] naturally delicious line of Popchips they loved to eat and did not have to hide."; and

(m) "*popchips* is a naturally delicious brand of popped snacks from *popchips*, inc."

27. The "ingredients" section of Defendant's webpage echoes the same representations made by Defendant on the labeling and packaging of Popchips:

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28. Defendant makes similar representations on Facebook, such as "we take the finest naturally delicious ingredients, add a little heat and pressure, and pop!"

29. Defendant also utilizes numerous celebrity endorsers to promote Popchips, including Katy Perry, Ashton Kutcher, Heidi Klum, Jillian Michaels, David Ortiz, and Sean Combs. Defendant utilizes these celebrity endorsers to promote the Popchips as a natural and healthy product that has no artificial or synthetic ingredients:

(a) Nothing fake about 'em. "I'm not into phonies. good thing there's nothing fake or phony in popchips. they only taste like they're bad for you." Katy Perry

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30. On information and belief, Defendant also seeks endorsements from nutritionists that Popchips is a natural and healthy food, many times offering monthly stipends and free Popchips in exchange for such endorsements.

31. The statements by Defendant representing and branding Popchips as an "all natural," "healthier" snack that is free of preservatives and fake flavors are uniform in all

material regards throughout its marketing channels, including its labeling and packaging of Popchips, its rich-media website, its use of social media, and its use of celebrity sponsors.

32. Plaintiffs and members of the Class were exposed uniformly to Defendant's comprehensive and long-term marketing campaign, which has had the effect of branding Popchips as an all natural, healthier snack in the minds of consumers.

B. Defendant's Popchips Are Not an All Natural Because They Are Highly Processed and Contain Artificial and Synthetic Ingredients

33. Contrary to Defendant's representations that Popchips are "all natural," and contain "no fake colors and flavors" and "no preservatives," Defendant's Popchips are not "all natural" because they are highly processed and contain numerous artificial and synthetic ingredients.

34. A reasonable consumer would expect and understand that the term "natural" on a product label and other advertisements would mean that the product comports with the ordinary meaning of the term as defined in the dictionary and federal regulations relating to food.

35. The term "natural" is defined by the Merriam-Webster dictionary as "existing or produced by nature: not artificial."

36. The U.S. Food and Drug Administration ("FDA") has issued an informal advisory opinion on the definition of "natural." The FDA states that the agency considers "'natural' as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." 56 F.R. 60421-01 (1991). Accordingly, the FDA "has not objected to the use of the

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term [natural] if the food does not contain added color, artificial flavors, or synthetic substances." FDA, *What Is the Meaning of "Natural" on the Label of Food*, http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.

37. The United States Department of Agriculture ("USDA") Food Safety and Inspection Service ("FSIS"), which governs certain food products such as meat and poultry, defines "natural" as meaning that "the product does not contain any artificial flavor or flavoring, coloring ingredient, or chemical preservative . . . or any other artificial or synthetic ingredient" and that the "product and its ingredients are not more than minimally processed. . . . [r]elatively severe processes, e.g., solvent extraction, acid hydrolysis, and chemical bleaching would clearly be considered more than minimal processing." USDA FSIS, *Food Standards and Labeling Policy Book*, www.fsis.usda.gov/OOPDE/larc/Policies/Labeling_Policy_Book_082005.pdf.

38. The FDA and the USDA both agree that a "natural" product should not contain any artificial or synthetic ingredients, artificial flavoring or coloring, or chemical preservatives.

39. There is no federal regulatory definition of an artificial ingredient, but the FDA does define an *artificial flavoring* as:

> The term artificial flavor or artificial flavoring means any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof.

21 C.F.R. § 501.22.

40. Furthermore, according to the USDA, an ingredient is synthetic if it is:

> A substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring

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> plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

7 C.F.R. § 205.2.

41. An ingredient that is not "artificial" because it is derived from a naturally occurring plant or animal source can nonetheless be "synthetic" if it is "formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources."

42. Defendant's Popchips include numerous ingredients that are unhealthy or are artificial or synthetic and, therefore, unnatural:

(a) **Autolyzed Yeast Extract** and **Yeast Extract** are highly processed yeast-based additives that are used as flavor enhancers to create artificially savory flavors or umami taste sensations in food products. *See* FDA, *Food Ingredients and Colors* (April 10, 2010), http://www.fda.gov/food/foodingredientspackaging/ucm094211. These additives contain high amounts of free glutamate or monosodium glutamate ("MSG"), a neurological excitotoxin linked to migraines, depression, fatigue, and cognitive degenerative disease. *See* FDA, *FAQ on Monosodium Glutamate (MSG)*, http://www.fda.gov/Food/FoodIngredientsPackaging/ucm328728. They are synthetically created through the chemical or thermal destruction of yeast cell walls and the subsequent formation of free amino acids through autolysis. The soluble components are extracted and the remaining substance is concentrated, pasteurized, and stored as a liquid or paste until mechanically added to food.

(b) **Citric Acid** is recognized by the FDA and other federal agencies as an unnatural substance when used as a food additive. *See* FDA Informal Warning Letter to the Hirzel Canning Company (August 29, 2001) ("the addition of calcium chloride and citric acid to these products preclude use of the term 'natural' to describe this product."); U.S. International Trade Commission, *Synthetic Organic Chemical Index*, USCTIC Pub. 2933, at 3-105 (Nov. 1995). Citric acid is added to foods as a synthetic preservative, flavorant, and acidity regulator. *Food Ingredients and Colors*, *supra*. It is commonly manufactured through solvent extraction or mycological fermentation of bacteria. 21 C.F.R. § 184.1033(a).

(c) **Dextrose** is a chemically derived sweetener and is a principal component of high fructose corn syrup. 21 C.F.R. §§ 184.1865-.1866. It is produced through chemical degradation of corn starch by complete hydrolysis with certain acids or enzymes, followed by commercial refinement and crystallization of the resulting hydrolysate. 21 C.F.R. 1857(a). It is thus a synthetic substance. Food products governed by the USDA must qualify natural claims if they contain dextrose. USDA *Food Standards and Labeling Policy Book*, *supra* ("the natural claim must be qualified to clearly and conspicuously identify the ingredient, e.g., all natural or all natural ingredients except dextrose[.]"). On information and belief, GMO corn is used as the source of the Dextrose. *See* USDA Economic Research Service, *Adoption of Genetically Engineered Crops in the U.S.: Recent Trends in*

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GE Adoption, http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx#.UhPVy5Lkv94.

(d) **Disodium Phosphate**, also known as disodium hydrogen phosphate, is a chemically generated sequestrant, a form of preservative that stabilizes the food, enhances texture of the product, and inhibits bacterial growth. 21 C.F.R. § 182.6290; *see also* Joint FAO/WHO Expert Committee on Food Additives, Disodium Hydrogen Phosphate, http://www.fao.org/ag/agn/jecfa-additives/specs/Monograph1/Additive-166.pdf. It is also used in industrial products such as in cleaning supplies, corrosion inhibitors, water softening agents, flame retardants, and waterproofing agents.

(e) **Lactic Acid** is a federally-listed synthetic substance. *Synthetic Organic Chemical Index*, *supra* at 3-104. Lactic acid is added to foods as a synthetic flavorant, acidity regulator, and preservative. 21 C.F.R. § 172.515(b); *see also Food Ingredients and Colors*, *supra*; E270, *Current EU Approved Additives and their E Numbers*, http://www.food.gov.uk/policy-advice/additivesbranch/enumberlist#anchor_3. Although lactic acid exists naturally in some foods, it must be synthetically formulated for use as a food additive through commercial fermentation of carbohydrates or by using acetaldehyde and hydrogen cyanide to form lactronitrile, which is then chemically degraded via hydrolysis to form lactic acid. 21 C.F.R. § 184.1061(a). Lactic acid is banned by the FDA for use in infant foods. *Id.* at § 184.1061(c)(2).

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(f) **Malic Acid** exists naturally in some foods, but is synthetically created for use as a food additive. 21 C.F.R. §§ 184.1069(a), 582.60. It is used as a flavor enhancer, acidity regulator, and preservative. *Id.*; *see also* E296, *Current EU Approved Additives and their E Numbers*, *supra*. Malic acid is commercially manufactured through the hydration of fumaric acid or maleic acid, both of which are designated by the federal government as hazardous substances. 40 C.F.R. § 116.4.

(g) **Maltodextrin** is a nonsweet saccharide polymer that is added to food as either a white powder or a concentrated solution to act as a thickening agent. 21 C.F.R. § 184.1444(a). It is commercially manufactured through the partial hydrolysis of corn starch, potato starch, or rice starch with certain acids and enzymes. *Id.* On information and belief, GMO corn is used as the source of the maltodextrin. *See Adoption of Genetically Engineered Crops in the U.S.*, *supra*.

(h) **Sodium Caseinate** is a highly processed substance. It is produced through the mechanical or chemical extraction of casein from milk and the addition of sodium hydroxide to dissolve the casein and stabilize the proteins for a longer shelf life. The resulting mixture is evaporated and leaves a tasteless, odorless, white powder that is added to food to act as an emulsifier and stabilizer. *See* Joint FAO/WHO Expert Committee on Food Additives, Sodium Caseinate, http://www.fao.org/ag/agn/jecfa-additives/specs/Monograph1/Additive-166.pdf.

(i) **Sodium Citrate** is a synthetic sequestrant, a form of preservative that inhibits bacterial growth. 21 C.F.R. §§ 205.605, 582.6751. It is synthesized by

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neutralizing citric acid – a synthetic substance already contained in Popchips – with sodium hydroxide or sodium carbonate. *Id.* at § 184.1751(a).

(j) **Tartaric Acid** is a federally recognized sequestrant. 21 U.S.C. § 582.6099. In addition to its preservative characteristics, it is added to food to act as a firming agent, flavor enhancer, humectant, and acidity regulator. *Id.* at § 184.1099. Although it exists naturally in some foods, tartaric acid is synthetically produced through the enzymatic reaction of cis-expoxisuccinate hydrolase within strains of immobilized *Rhodococcus ruber* bacteria.

(k) **Torula Yeast** is a food additive used to create artificially savory flavors or umami taste sensations in food products. As with autolyzed yeast extract, it contains high amounts of free glutamate or MSG, a neurological excitotoxin linked to migraines, depression, fatigue, and cognitive degenerative disease.

(l) **Xanthan Gum** is a synthetic additive derived from the bacterium *Xanthomonas campestris* through a pure-culture fermentation process. 21 C.F.R. § 172.695(a); 7 C.F.R. § 205.605. The additive is separated from the bacterial growth medium by the addition of isopropyl alcohol, or rubbing alcohol, after which it is dried and ground into a fine soluble powder. *Id.* A liquid medium is subsequently introduced to form a sticky gum substance that is used as a stabilizer, emulsifier, thickener, and suspending agent in food. *See Food Ingredients and Colors*, *supra*.

43. Because Defendant's Popchips contain numerous ingredients that are artificial or synthetic, Popchips cannot be considered natural under any reasonable definition of the term

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"natural," including the definitions provided by Merriam-Webster's dictionary, the FDA, the USDA, and even Defendant's own definition of "all-natural": "what's all-natural? for us, it's simple: no fake colors, no fake flavors, no preservatives, and no fluorescent orange fingertips. no, really."

44. Defendant's Popchips cannot be considered as having "no fake flavors" because they contain artificial or synthetic flavorants and flavors such autolyzed yeast extract, yeast extract, torula yeast, citric acid, dextrose, disodium phosphate, lactic acid, malic acid, sodium citrate, and tartaric acid, among other synthetic additives.

45. Defendant's Popchips cannot be considered as having "no preservatives" because they contain preservatives such as citric acid, disodium phosphate, lactic acid, malic acid, sodium citrate, and tartaric acid.

46. Defendant's Popchips cannot be considered free of MSG because they contain ingredients with high amounts of free glutamate and MSG such as autolyzed yeast extract, yeast extract, and torula yeast. According to informal FDA policy, the "FDA considers foods whose labels say 'No MSG' or 'No Added MSG' to be misleading if the food contains ingredients that are sources of free glutamates[.]" FDA Backgrounder, *Current & Useful Information from the Food & Drug Administration*, BG 95-16, August 31, 1995. Autolyzed yeast extract, yeast extract, and torula yeast are sources of free glutimates.

47. Ingredients that may not be artificial, such as autolyzed yeast extract, yeast extract, and torula yeast, because they are derived through fermentation of plant or animal sources, are nonetheless synthetic because they are fermented through unnatural processes or are

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highly refined after fermentation to concentrate the substance and enhance its longevity and functionality.

48. Ingredients that contain GMOs are not "all natural" because GMOs are "organisms in which the genetic material (DNA) has been altered in a way that *does not occur naturally*. The technology is often called 'modern biotechnology' or 'gene technology', sometimes also 'recombinant DNA technology' or 'genetic engineering'. It allows selected individual genes to be transferred from one organism to another, also between non-related species. Such methods are used to create [genetically modified ("GM")] plants – which are then used to grow GM food crops." World Health Organization, *20 Questions on Genetically Modified (GM) Foods*, http://www.who.int/foodsafety/publications/biotech/en/20questions_en.pdf (emphasis added).

49. Defendant knew or should have known that Popchips contain and, at all times relevant hereto, contained artificial or synthetic ingredients, including preservatives, fake flavors, and GMOs such that it knew or should have known that its Popchips are not an "all natural" product and are not free of preservatives and fake flavors.

50. Rather than openly and honestly marketing Popchips, Defendant deliberately chose to market Popchips falsely and deceptively by uniformly misrepresenting and misbranding Popchips as an "all natural," "healthier" food product that contains "no fake colors or flavors," "no preservatives," and no MSG.

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C. Defendant's Popchips Are Not "Healthier" Because They Contain Excessive Amounts of Fat and Contain Trivial Amounts of Nutrients

51. Contrary to Defendant's representations that Popchips are "healthier," Popchips are not a "healthier" food because they contain excessive amounts of fat and have trivial amounts of essential nutrients.

52. The use of the term "healthier" to describe a food product is governed by FDA regulations. Under 21 C.F.R. § 101.65(d), a food company "may use the term 'healthy' or related terms (e.g., 'health,' 'healthful,' 'healthfully,' 'healthfulness,' 'healthier,' 'healthiest,' 'healthily' and 'healthiness') as an implied nutrient content claim on the label or in labeling of a food" only if, among other requirements, "[t]he food meets the following conditions for fat, saturated fat, cholesterol, and other nutrients[.]" 21 C.F.R. § 101.65(d)(2)(i).

53. A food meets the required conditions for "fat" if it qualities as "low fat" pursuant to § 101.62(b)(2). *See* 21 C.F.R. § 101.65(d)(2)(i). Section 101.62(b)(2) provides that a product is "low fat" if the "food has a reference amount customarily consumed of 30 g or less or 2 tablespoons or less and contains 3 g or less of fat per reference amount customarily consumed and per 50 g of food." § 101.62(b)(2)(i)(B).

54. A food meets the required conditions for nutrient content if it contains "[a]t least 10 percent of the [Reference Daily Intake ("RDI")] or [Daily Reference Value ("DRV")] per [Reference Amount Customarily Consumed] of one or more of vitamin A, vitamin C, calcium, iron, protein or fiber." 21 C.F.R. § 101.65(d)(2)(i).

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55. Defendant's Popchips have a reference amount customarily consumed ("RA") of 30 grams. *See* 21 C.F.R. § 101.12(b).

56. Defendant's labeling of Popchips as "healthier" violates 21 C.F.R. § 101.62(b)(2) because Popchips contain more than three grams of fat per RA, contain more than three grams of fat per 50 grams of the food, and have insufficient amounts of vitamin A, vitamin C, calcium, iron, protein or fiber per RDI or DRV. As shown in Exhibit A and B, each flavor of Popchips contains 4 grams of fat per identified serving size of 28 grams. Furthermore, each flavor of Popchips contains a nearly identical nutritional profile of: 0% RDI of vitamin A; 0% RDI of vitamin C; 2% RDI of calcium, 2% RDI of iron, 4% DRV of protein, and 4-8% DRV of fiber.

57. Pursuant to FDA regulations, Popchips lack sufficient nutritive characteristics to qualify as "healthier" and, therefore, are misbranded. *See* 21 C.R.F. § 101.62(b)(2).

58. Rather than openly and honestly marketing Popchips, Defendant deliberately chose to market Popchips falsely and deceptively by uniformly misrepresenting and misbranding Popchips as a "healthier" food.

D. Consumers Reasonably Relied on Defendant's False Representations and Deceptive Marketing Practices in Purchasing Popchips for a Premium Price

59. Defendant chose to market its Popchips falsely and deceptively because it knew that consumers will pay more for an all-natural and healthier product that contains no preservatives, fake flavors, GMOs, or MSG than they would for a similar product that is unnatural, has preservatives, uses fake flavors, contains GMOs, and is not healthful.

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60. As a result of Defendant's conduct in branding Popchips in a false and deceptive manner, Popchips are inextricably associated in the minds of consumers with all-natural and healthier foods.

61. Consumers reasonably believe a product that is natural, healthier, and free of preservatives and fake flavors is a superior, high-quality product that justifies a premium price.

62. Defendant exploited consumers' willingness to pay a premium price for high-quality food products by charging a considerably higher price for Popchips than comparable brands.

63. The retail price Defendant provides for Popchips is, on average, 220% greater than comparable brands of snack chip products:

Brand	Price	Ounces	Price/Ounce
Popchips™	$2.99	3.0	$1.0
Quaker® Popped Chips	$2.00	3.0	67¢
Lay's® Kettle Cooked Potato Chips	$3.49	8.5	41¢
Lay's® Kettle Cooked Reduced Fat Potato Chips	$3.49	8.5	41¢
Lay's® Baked! Potato Crisps	$3.99	9.0	44¢
Sun Chips® Multigrain Snacks	$3.99	10.5	38¢
Sun Chips® 6 Grain Medley Chips	$3.99	9.0	44¢
Kettle Brand® Potato Chips	$3.49	9.0	39¢

64. A rational consumer would not pay a 220% price premium for a product that offers no perceivable benefit compared to other similar and readily-available products. To the contrary, Plaintiffs and members of the Class chose to pay a 220% price premium because they reasonably believed they were purchasing an all natural and healthier snack that is free of preservatives, fake flavors, and MSG.

65. Consumers' willingness to pay a 220% price premium for Popchips over comparable, readily available brands is a direct and proximate result of Defendant's conduct in falsely and deceptively branding its Popchips as an "all natural" and "healthier" food product that contains "no fake colors or flavors," "no preservatives," and no MSG.

66. Plaintiffs and members of the Class reasonably relied on Defendant's false representations and deceptive marketing that Popchips are an "all natural" and "healthier" food product that contains "no fake colors or flavors" and "no preservatives" when they purchased Defendant's Popchips for a premium price. Defendant's false and deceptive marketing was material to Plaintiffs' decisions to purchase Popchips for a premium price.

67. It is unreasonable to expect consumers to disregard Defendant's misrepresentations and deceptive labeling, which specifically professes the nature of Popchips' ingredients, on the ground that the nutrition label lists such ingredients. A reasonable consumer would not know the manner in which the ingredients are manufactured and would not know the role such ingredients have in artificially flavoring, preserving, texturizing, and stabilizing Popchips by reading information on the nutrition label.

68. Had Plaintiffs and members of the Class known the true nature of Defendant's Popchips, they would not have purchased Defendant's Popchips for a premium price.

E. Defendant Profited Greatly at the Expense of Plaintiffs and Members of the Class

69. Defendant profited greatly from the sale of its falsely marketed and deceptively branded Popchips. According to the market research company SymphonyIRI Group,

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Defendant's projected revenue for 2012 was approximately $100 million, reflecting an almost 40% increase in growth from the prior year.

70. Much of Defendant's financial success is directly attributable to the price premium it extracted from Plaintiffs and members of the Class by way of its wrongful conduct in falsely and deceptively marketing and misbranding Popchips as an "all natural," "healthier" food product that is free of preservatives, fake flavors, GMOs, and MSG.

71. As a direct and proximate result of Defendant's false representations and deceptive marketing, Plaintiffs and members of the Class were injured in that they paid more for Popchips than they would have had Defendant openly and honestly marketed Popchips.

72. Plaintiffs seek, individually and on behalf of the members of the Class, relief in the form of damages, pre-judgment and post-judgment interest, restitution, permanent injunctive and declaratory relief, reasonable attorneys' fees and litigation costs, and punitive damages in an amount that is fair and reasonable, yet will serve to deter Defendant from similar conduct in the future.

Class Action Allegations

73. Plaintiffs bring this class action pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure on behalf of a nationwide class of consumers (the "Class"), defined as:

> All purchasers of Popchips, Inc.'s "Popchips" brand snacks in the United States from January 2007 to the present. Excluded from the Class are Defendant; subsidiaries and affiliates of Defendant; directors and officers of Defendant and members of their immediate families; federal, state, and local governmental entities; any judicial officers presiding over this action and their immediate family and judicial staff; any juror assigned to this action; and all consumers, if any, who have received a full refund from Defendant for their purchase of the Popchips based on the claims alleged herein.

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74. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, thousands of individuals purchased Popchips in the United States.

75. Common questions of law and fact exist as to all Class members. Common legal and factual questions include, but are not limited to:

(a) whether Defendant's Popchips failed to conform to the representations, advertisements, and other marketing published and presented to Plaintiffs and members of the Class;

(b) whether Defendant's marketing and labeling of Popchips was false, misleading, deceptive, or unfair;

(c) whether Defendant failed to disclose material facts to the Plaintiffs and members of the Class regarding Popchips;

(d) whether Defendant concealed from Plaintiffs and members of the Class that Popchips did not conform to its stated representations;

(d) whether Defendant had a duty to disclose material facts to Plaintiffs and members of the Class regarding Popchips;

(e) whether Defendant knew of the true nature of Popchips and the ingredients therein;

(f) whether Defendant was unjustly enriched by its conduct;

(g) whether Defendant breached an express or implied warranty made to Plaintiffs and members of the Class;

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(h) whether Defendant's aforementioned conduct violated and continues to violate applicable law;

(i) whether Plaintiffs and members of the Class are entitled to restitution, monetary relief, injunctive relief, or punitive damages, and the amount and nature of such relief; and

(j) whether Plaintiffs and members of the Class are entitled to an award of reasonable attorneys' fees, pre-judgment and post-judgment interest, and costs of suit.

76. Plaintiffs' claims are typical of the claims of the members of the Class, as all members of the Class are similarly affected by Defendant's unlawful conduct. Plaintiffs have no interests that are antagonistic to the interests of the other members of the Class. Plaintiffs and all members of the Class have sustained economic injury arising out of the unlawful conduct for which Defendant is liable.

77. Plaintiffs are fair and adequate representatives of the Class because their interests do not conflict with the interests of the Class members whom they seek to represent, they have retained counsel competent and experienced in such matters, and they intend to prosecute this action vigorously on behalf of absent members of the Class. Plaintiffs and their counsel will fairly and adequately protect the interests of members of the Class.

78. Defendant has acted or refused to act on grounds generally applicable to all members of the Class. Defendant has consistently and uniformly misrepresented the nature of Popchips to Plaintiffs and members of the Class throughout the Class Period. Accordingly, final

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injunctive relief or corresponding declaratory relief is appropriate with respect to the Class as a whole.

79. Common questions of law and fact predominate over questions affecting only individual members of the Class. The class mechanism is also superior to any other available means for the fair and efficient adjudication of the claims asserted by Plaintiffs and members of the Class. Individualized proceedings would result in increased delay and expense for all parties, would create an unnecessary burden on the judicial system, and would frustrate the claims of many individual class members who would be unable to incur individually the burden and expense necessary to establish liability against Defendant.

80. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Count I

Violation of the Missouri Merchandising Practices Act

81. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

82. Plaintiffs bring this claim individually and on behalf of the Class under the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010 *et seq.*

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83. Throughout the Class Period, Defendant represented and continues to represent that Popchips are "all natural," "healthier," and non-GMO and contain "no preservatives" and "no fake colors or flavors," when Popchips are in fact highly unnatural, are not healthful, and contain preservatives, fake flavors, GMOs, and MSG.

84. Defendant's falsities, misrepresentations, concealment, and failure to disclose the true nature of Popchips constitutes a "deception, fraud . . . false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact," in violation of the MMPA. *See* Mo. Rev. Stat. § 407.020.

85. Defendant's conduct constitutes an "unfair practice" under the MMPA because it: (a) is unethical, oppressive or unscrupulous; (b) causes substantial injury to consumers; (c) violates Defendant's duty of good faith by soliciting consumers in a dishonest manner without observing reasonable commercial standards of fair dealing; and (d) is unconscionable. *See* 15 C.S.R. § 60-8.

86. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs and members of the Class suffered an ascertainable loss by paying more for Popchips than they would have had Defendant not engaged in a deception, fraud, false promise, misrepresentation, and unfair practice and had not concealed, suppressed, or omitted material facts concerning the product despite having a duty to disclose such information.

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Count II

Violation of the California Consumer Legal Remedies Act

87. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

88. Plaintiffs bring this claim individually and on behalf of the Class under the California Consumer Legal Remedies Act ("CLRA"), California Civil Code ("Cal. Civ. Code") § 1750 *et seq.*

89. Throughout the Class Period, Defendant represented and continues to represent that Popchips are "all natural," "healthier," and "non-GMO" and contain "no preservatives" and "no fake colors or flavors," when Popchips are in fact highly unnatural, are not healthful, and contain preservatives, fake flavors, GMOs, and MSG.

90. Defendant violated Cal. Civ. Code § 1770(a)(5), which prohibits Defendant from "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have." Defendant continues to violate this provision by continuing to misrepresent the characteristics, ingredients, and benefits of Popchips.

91. Defendant also violated Cal. Civ. Code § 1770(a)(7), which prohibits Defendant from "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." Defendant continues to violate this provision by continuing to misrepresent the standard, quality, and general nature of Popchips.

92. Defendant also violated Cal. Civ. Code § 1770(a)(9), which prohibits Defendant from "[a]dvertising goods or services with intent not to sell them as advertised." Defendant continues to violate this provision by continuing to falsely and deceptively advertise Popchips.

93. Plaintiffs and members of the Class have been and continue to be harmed by Defendant's conduct because they would not have paid the premium price for Popchips had they known that Popchips are an unnatural and unhealthful snack that contains preservatives, fake flavors, GMOs, and MSG.

94. Plaintiffs seek, both individually and on behalf of members of the Class, preliminary and permanent injunctive relief against Defendant to enjoin it from continuing to engage in its wrongful conduct.

95. Prior to filing this Class Action Petition, Plaintiff Martens sent a letter to Defendant through certified mail, return receipt requested, notifying Defendant of its violations of the CLRA and demanding that it correct, repair, replace, or otherwise rectify the goods alleged to be in violation of the CLRA. A copy of the CLRA notice letter is attached as Exhibit C. As indicated in the CLRA notice letter, Plaintiffs will amend the Class Action Petition to include a request for monetary damages under the CLRA if Defendant fails to provide the relief requested within 30 days of its receipt of the letter.

96. Due to Defendant's failure to provide the relief requested in the CLRA notice letter within 30 days of its receipt of the letter, Plaintiffs seek monetary damages for the claim under the CLRA.

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Count III

Violation of California's Unfair Competition Law

97. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

98. Plaintiffs bring this claim individually and on behalf of the members of the Class under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*

99. Throughout the Class Period, Defendant engaged and continues to engage in "unfair competition" in violation of the UCL because Defendant's false and deceptive marketing, as previously identified, constitutes "unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising." *See* Cal. Bus. & Prof. Code § 17200. Defendant's false and deceptive marketing of Popchips is immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers.

100. Plaintiffs and members of the Class have suffered injury in fact and have lost money or property as a result of Defendant's unfair competition because they would not have paid the premium price for Popchips had they known that, contrary to Defendant's false and deceptive marketing, Popchips are highly unnatural, are not healthful, and contain preservatives, fake flavors, GMOs, and MSG.

101. There is no justification for Defendant's conduct, which caused and continues to cause substantial injury to consumers and competition and otherwise provides no utility or benefit. Plaintiffs and members of the Class could not have reasonably avoided the injury they

suffered because they could not reasonably determine the precise nature of Popchips from information on the packaging.

102. Plaintiffs seek, both individually and on behalf of members of the Class, injunctive relief against Defendant, restitution of all monies improperly paid to Defendant as a result of its deceptive practices, including interest thereon, and payment of attorneys' fees and costs as provided by law.

Count IV

Violation of California's False Advertising Law

103. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

104. Plaintiffs bring this claim individually and on behalf of the members of the Class under California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*

105. Under California's FAL, it is "unlawful for any person, firm, corporation, or association . . . to make or disseminate or cause to be made or disseminated before the public in this state . . . any statement, concerning . . . personal property or . . . concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *See* Cal. Bus. & Prof. Code § 17500.

106. Throughout the Class Period, Defendant violated and continues to violate California's FAL by falsely and misleadingly marketing and selling Popchips as an "all natural" "healthier," and "non-GMO" food that contains "no preservatives" and "no fake colors or

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flavors" when Popchips are in fact highly unnatural, are not healthful, and contain preservatives, fake flavors, GMOs, and MSG.

107. As the creator of the manufacturing process and formula used to make Popchips, Defendant knew or should have known through the exercise of reasonable care that its marketing of Popchips was and continues to be untrue and misleading. Popchips' marketing is "untrue" because, through its very design, it is likely to deceive reasonable consumers.

108. Plaintiffs and members of the Class would not have paid the premium price for Popchips had they known that, contrary to Defendant's false and misleading marketing, Popchips are a unnatural and unhealthful snack that contains preservatives, GMOs, MSG, and fake flavors.

Count V

Breach of Express Warranty

109. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

110. Plaintiffs bring this claim individually and on behalf of the members of the Class for the violation of express warranty laws.

111. As the creator, manufacturer, marketer, distributor, and seller of Popchips, Defendant expressly warranted that Popchips were "all natural," "healthier," "non-GMO," free of MSG, contained "no preservatives," and contained "no fake colors or flavors" when it sold Popchips to Plaintiffs and members of the Class.

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112. Defendant expressly pledged as to the absence of fake flavors, preservatives, and unnatural substances: "naturally delicious. nothing fake or phony. our pledge: no fake colors, no fake flavors, no preservatives, no fluorescent orange fingertips, and no wiping your greasy chip hand on your jeans. no, really." Defendant also expressly warranted that Popchips are all natural, do not contain MSG, and do not contain flavor enhancers: "do *popchips* have msg or other flavor enhancers? no way. we use all-natural flavors. because we promise our fellow snackers all-natural, and we mean it."

113. At all relevant times, Defendant's Popchips failed to conform to their express warranties, which were a material factor inducing Plaintiffs and members of the Class to purchase Popchips, because the Popchips purchased by them were a unnatural and unhealthful snack that contains preservatives and fake flavors.

114. On information and belief, Defendant has actual knowledge of the failure of Popchips to conform to its express warranties since January of 2007. Plaintiffs have otherwise satisfied all conditions precedent to enforcing their breach of express warranty claims against Defendant.

115. Plaintiffs and members of the Class were injured as a direct and proximate result of Defendant's breach of express warranties because they paid a premium price as a result of Defendant's express warranty that they otherwise would not have paid.

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Count VI

Breach of Implied Warranty of Merchantability

116. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

117. Plaintiffs bring this claim individually and on behalf of the members of the Class for the violation of implied warranty of merchantability laws.

118. At all relevant times, Defendant represented that Popchips were "all natural," "healthier," "non-GMO," and contained "no preservatives," "no fake colors or flavors," and no MSG, impliedly warranting that Popchips would conform to these promises or affirmations of fact, among other implied warranties as to merchantability.

119. Defendant's Popchips were not merchantible at the time of sale, therefore breaching the implied warranty of merchantability, because the Popchips purchased by Plaintiffs and members of the Class were in fact highly unnatural, are not healthful, and contain preservatives, fake flavors, GMOs, and MSG.

120. Plaintiffs and members of the Class were injured as a direct and proximate result of Defendant's breach of implied warranty of merchantability because they paid a premium price as a result of Defendant's implied warranty that they otherwise would not have paid.

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Count VII

Restitution under the Theory of Unjust Enrichment

121. Plaintiffs incorporate by reference the allegations in all paragraphs of this Class Action Petition as though fully set forth in this paragraph.

122. Plaintiffs bring this claim individually and on behalf of the members of the Class.

123. Although states differ in how they identify claims for restitution or unjust enrichment, each state requires the same elements and implicate the same well-established public policy. A plaintiff can obtain restitution if he or she shows that: (a) the defendant received a benefit from the plaintiff; and (b) it would be unjust to allow the defendant to retain the benefit. These elements promote the same fundamental policy: a person should not be permitted unjustly to enrich him or herself at the expense of another.

124. Defendant received a monetary benefit at the expense of Plaintiffs and members of the Class when Plaintiffs and members of the Class purchased Popchips for a premium price.

125. Defendant's enrichment is unjust and inequitable under the circumstances because it was obtained through its wrongful conduct in falsely and deceptively marketing Popchips as "all natural," "healthier," and "non-GMO" product that was free of preservatives, fake flavors, and MSG and, on that basis, charging a premium price to Plaintiffs and members of the Class when they purchased Popchips.

126. Because Defendant was unjustly enriched at the expense of Plaintiffs and members of the Class, Defendant must pay restitution to Plaintiffs and members of the Class in the amount of its unjust enrichment.

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Prayer for Relief

WHEREFORE, Plaintiffs, individually and on behalf of members of the Class, pray for and requests relief against Defendant Popchips, Inc. in the form of:

A. An order certifying the Class, appointing Plaintiffs as Class Representatives, and appointing Plaintiffs' counsel as Class Counsel;

B. An order finding in favor of Plaintiffs and members of the Class on all counts asserted in this Class Action Petition;

C. An order permanently enjoining Defendant from continuing to engage in its wrongful conduct, including, but not limited to:

1. Prohibiting Defendant from deceptively labeling and marketing Popchips as an "all natural," "healthier," and "non-GMO" food product that contains no preservatives, fake flavors, or MSG;

2. Prohibiting Defendant from selling Popchips that are deceptively labeled and marketed;

3. Requiring Defendant to immediately recall all Popchips that are deceptively labeled and marketed;

4. Requiring Defendant to truthfully represent its Popchips in all future labeling and marketing of the product; and

5. Any other equitable relief as this Court deems just and proper;

D. A judgment awarding Plaintiffs and members of the Class restitution and all other forms of equitable monetary relief, including equitable accounting, disgorgement, constructive trust, and punitive damages;

E. A judgment awarding Plaintiffs and members of the Class damages as determined by the Court or jury, including compensatory damages, treble damages, and

punitive damages in an amount that is fair and reasonable, yet will serve to deter Defendant from similar conduct in the future;

F. A judgment awarding pre-judgment and post-judgment interest on all monetary sums awarded;

G. An order awarding reasonable attorneys' fees, expenses, and costs of suit; and

H. An order or judgment awarding any such other and further relief as this Court deems just and proper.

Demand for Jury Trial

Plaintiffs hereby demand a trial by jury on all claims or issues so triable.

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Respectfully submitted,

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