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14  
15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**  
18

19 KYM PARDINI and CARRIE WOOD, on  
behalf of themselves and all others similarly  
20 situated,

21 Plaintiffs,

22 v.

23 UNILEVER UNITED STATES, INC., a  
24 Delaware corporation,

25 Defendant.  
26

No. 3:13-cv-01675-SC

CLASS ACTION

**SECOND AMENDED CLASS  
ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

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1 Plaintiffs Kym Pardini and Carrie Wood bring this action on behalf of themselves and all  
2 others similarly situated against Unilever United States, Inc. (“Unilever”). Plaintiffs’ allegations  
3 against Defendant are based upon information and belief and upon investigation of Plaintiffs’  
4 counsel, except for allegations specifically pertaining to Plaintiffs, which are based upon Plaintiffs’  
5 personal knowledge.

6 **I. OVERVIEW**

7 1. This is a putative class action on behalf of a class of persons seeking redress for  
8 Defendant’s deceptive practices in its labeling and marketing of I Can’t Believe It’s Not Butter!  
9 Spray (“ICBINB”).

10 2. Consumers are increasingly health conscious and, as a result, many consumers are  
11 interested in fat-free and calorie-free food alternatives for themselves and their families.

12 3. Defendant’s ICBINB is deceptively labeled, marketed and sold to Plaintiffs and  
13 other consumers as having “0g fat” and “0 calories.”

14 4. In reality, Defendant’s ICBINB is neither “0 fat” nor “0 calories.” ICBINB contains  
15 1160 calories and 124 grams of fat per 12-ounce bottle.

16 5. Defendant’s claims regarding ICBINB are false and misleading because its product  
17 is falsely and unlawfully labeled “0g fat” and “0 calories.”

18 6. Defendant’s claims regarding ICBINB are false and misleading because its product  
19 labels include artificially small “serving sizes” that fail to account for the manner in which these  
20 products are customarily consumed.

21 7. Defendant’s claims regarding ICBINB are false and misleading because its labels do  
22 not disclose that ICBINB contains ingredients that are fats which, even in small quantities, add  
23 certain amounts of fat per serving.

24 8. As a result of its deceptive marketing and advertising, Defendant has generated  
25 substantial revenues from the sale of ICBINB.

**II. JURISDICTION**

1  
2 9. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)  
3 and (d) because the amount in controversy for the Class exceeds \$5,000,000, and Plaintiffs and  
4 other putative Class members are citizens of a different state than Defendant.

5 10. This Court has personal jurisdiction over Plaintiffs Kym Pardini and Carrie Wood  
6 because they submit to the Court’s jurisdiction. This Court has personal jurisdiction over the  
7 Defendant because it conducts substantial business in the District and thus has sufficient minimum  
8 contacts with this District and California.

9 11. Venue is proper in this Court because a substantial part of the events, omissions and  
10 acts giving rise to the claims herein occurred in this District. Defendant distributed, advertised and  
11 sold ICBINB, which is the subject of the present complaint, in this District.

12 12. Intradistrict Assignment: Venue is proper in the San Francisco or Oakland  
13 Divisions of this District because one of the plaintiffs resides in this District and Defendant  
14 conducts substantial business in this District.

**III. PARTIES**

15  
16 13. Plaintiff Kym Pardini is, and was at all relevant times, a citizen of California.  
17 Plaintiff purchased and consumed ICBINB in grocery stores in and around her home in Novato,  
18 California during the Class Period for personal, family, and household purposes. Plaintiff saw and  
19 read Unilever’s misrepresentations that ICBINB contains “0 g fat” and “0 calories” and relied on  
20 such misrepresentations in deciding to purchase ICBINB. Plaintiff Kym Pardini would not have  
21 purchased ICBINB had Unilever disclosed the true nature of its product on its packaging and/or  
22 would not have paid a premium for ICBINB.

23 14. Plaintiff Carrie Wood is, and was at all relevant times, a citizen of Missouri.  
24 Plaintiff purchased and consumed ICBINB in grocery stores in and around her home in Jackson  
25 County, Missouri during the Class Period for personal, family, and household purposes. Plaintiff  
26 saw and read Unilever’s misrepresentations that ICBINB contains “0 g fat” and “0 calories” and  
27 relied on such misrepresentations in deciding to purchase ICBINB. Plaintiff Carrie Wood would  
28

1 not have purchased ICBINB had Unilever disclosed the true nature of its product on its packaging  
2 and/or would not have paid a premium for ICBINB.

3 15. Defendant Unilever is a for-profit, Delaware corporation with its principal place of  
4 business in Englewood Cliffs, New Jersey. Defendant manufactures and markets brand name food  
5 products throughout the nation, including California.

#### 6 IV. FACTUAL ALLEGATIONS

7 16. Defendant is the third largest consumer goods company in the world. It markets and  
8 sells a line of margarine and vegetable oil spreads under the trademark name I Can't Believe It's  
9 Not Butter!

10 17. Today, I Can't Believe It's Not Butter! is the second largest margarine/spreads  
11 brand in the U.S. with annual retail sales in excess of \$300 million dollars.<sup>1</sup>

#### 12 A. Defendant Markets ICBINB as a Butter-Substitute

13 18. Unilever knows that society is concerned about obesity<sup>2</sup> and as a result consumers  
14 are looking for reduced fat and reduced calorie food choices.

15 19. To capitalize on these preferences, Unilever markets I Can't Believe It's Not Butter!  
16 as a healthier alternative to butter. While it has engaged various celebrities to market its product  
17 including "Fabio" and "Kim Catrall," Unilever consistently represents, "You can feel good about  
18 using I Can't Believe It's Not Butter! everyday."<sup>3</sup>

19 20. In marketing ICBINB as a butter-substitute, Unilever draws nutritional comparisons  
20 to butter. For instance, Unilever promotes, "Attention butter lovers: Do you crave the creamy  
21 flavor of butter with your favorite foods, but worry you have to compromise? I Can't Believe It's  
22 Not Butter!® Original tastes just as delicious as fresh butter"<sup>4</sup> and "Looking for more convenient  
23

24 <sup>1</sup> *I can't believe it's not Butter!*, <http://www.unileverusa.com/brands-in-action/detail/I-Can-t-Believe-It-s-Not-Butter--/295856/?WT.contenttype=view%20brands> (last visited August 7, 2013).

25 <sup>2</sup> <http://www.unileverusa.com/brands/nutrition/diethealthandthefightagainstobesity/> (last  
26 accessed July 27, 2012).

27 <sup>3</sup> <http://www.unileverusa.com/brands/foodbrands/icantbelieveitsnotbutter/> (last accessed  
28 July 27, 2012)

<sup>4</sup> *I can't believe it's not Butter*, *supra* note 1.

ways to cook, and to manage calorie intake? Then look no further with I Can't Believe It's Not Butter! Spray.”<sup>5</sup>

21. In marketing ICBINB as a butter-substitute, Unilever touts ICBINB's unmistakable butter flavor. For instance, the bottle itself proclaims “America's Favorite Buttery Spray” and the name itself suggests that I Can't Believe It's Not Butter imparts comparable buttery taste.

22. In marketing ICBINB as a butter-substitute, Defendant emphasizes that ICBINB can replace butter in any application. For instance, the front label depicts ICBINB in a role traditionally reserved for butter – as a topping for corn on the cob and the label represents that (like butter) ICBINB can be used for “cooking” and “topping.” See Figures 1 and 2. Unilever even offers various tips and recipes for using ICBINB in place of butter on easy grilled vegetables, as topping for popcorn and as a spread for muffins and toasted bread.

**B. I Can't Believe It's Not Butter! Spray**

23. In 1994, Unilever launched I Can't Believe It's Not Butter! Spray, a butter-flavored, vegetable oil spread that is dispensed in pump-action squirt bottles.



Figure 1

<sup>5</sup> WayBack Machine, <http://web.archive.org/web/20051119205444/http://www.tasteyoulove.com/products.asp?section=products/spray> (last visited August 7, 2013).

24. Like other ICBINB products, ICBINB “Spray” is promoted as a substitute for butter and is used by consumers interchangeably with butter.

25. Unlike other ICBINB products, however, ICBINB “Spray” purports to be free of fat and calories. On the nutrition panel, ICBINB declares “Calories 0” and “Total Fat 0g” per serving. See Figure 2. Similarly, the front label states “0 Calories per serving” and “0g fat, (0g saturated fat), 0g Trans Fat per serving.” See Figure 1.



Figure 2

26. In reality, ICBINB contains 124 g fat and 1160 calories per 12-ounce bottle. Each “spray” delivers .8 calories and .08 grams of fat.



1           27. As described herein, Unilever’s 0-fat and 0-calories representations are false and  
2 misleading because:

- 3           a. ICBINB is not “0 fat” as a matter of fact or law;  
4           b. ICBINB is not “0 calories” as a matter of fact or law;  
5           c. ICBINB uses unlawfully small serving sizes that do not reflect customary  
6           usage; and  
7           d. ICBINB does not disclose that certain ingredients supply “trace amounts of  
8 fats” as required by law.

8 **C. Unilever Fails to Disclose the Amount of Fat and Calories in ICBINB as Required By**  
9 **the Food Drug and Cosmetic Act**

10           28. The Food Drug and Cosmetic Act (“FDCA”) regulates the proper labeling of food.  
11 21 U.S.C. §§ 301 *et seq.*

12           29. It also vests the Food and Drug Administration (“FDA”) with the authority to  
13 “protect the public health by ensuring that foods are safe, wholesome, sanitary, and properly  
14 labeled.” 21 U.S.C. § 393(b)(2)(A).

15           30. Pursuant to this authority, the FDA has promulgated a comprehensive set of  
16 regulations pertaining to labeling requirements. 21 C.F.R. §101.1 *et seq.* These regulations require  
17 a manufacturer to disclose the total number of calories and fat per serving on the labeling of a food  
18 product. 21 C.F.R. §101.9(c).

19           31. Defendant misled consumers by failing to comply with this regulatory scheme.  
20 Specifically, during the Class Period, Defendant violated FDA regulations by:

- 21           a. Declaring “Calories 0” in the nutrition panel in violation of 21 C.F.R.  
22 101.9(c)(1);  
23           b. Declaring “Total Fat 0g” per serving in the nutrition panel in violation of 21  
24 C.F.R. 101.9(c)(2);  
25           c. Declaring “0 Calories” on the front label in violation of 21 C.F.R. 101.60;  
26           d. Declaring “0g fat” on the front label in violation of 21 C.F.R. 101.62; and  
27           e. Omitting the asterisk required when making “0g fat” claims on the front  
28 label in violation of 21 C.F.R. 101.62(b)(ii).

1           **1. Defendant Failed to Adequately Disclose the Amount of Fat and Calories in**  
2           **ICBINB by Using Unlawful Serving Sizes**

3           32. 21 U.S.C. §343(q) governs the disclosure of nutrition information on a product  
4 label. It deems a food misbranded unless its label or labeling discloses the total number of calories  
5 per serving and the amount of fat per serving. *See also* 21 C.F.R. §101.9(c)(1-2)

6           33. The regulations define a “serving” as the amount of food “customarily consumed”  
7 per eating occasion, which must be “based on consumption data under actual conditions of use.”  
8 21 C.F.R. §101.9(b)(1).

9           34. The FDA has prescribed serving sizes for 131 product categories “to assure that  
10 nutrition labels on similar types of foods are consistent, so that consumers will be able to easily and  
11 readily make comparisons of nutrient content among products.” 55 F.R. 29517.

12           35. A manufacturer must use an authorized serving size or petition the FDA to establish  
13 a new product category by submitting evidence of customary usage. 21 C.F.R. §101.12(h).

14           36. The FDA has designated “Fats and Oils” as one product category. It comprises  
15 various subcategories including the default, “Butter, margarine, oil and shortening.” The required  
16 serving size for “Butter, margarine, oil and shortening” is one tablespoon. Manufacturers must use  
17 the defaulted serving size of one tablespoon for any “Fat and Oil” unless the product fits within a  
18 more specific subcategory.

19           37. ICBINB’s label lists serving sizes for “topping” and “cooking spray” applications.  
20 ICBINB expresses both serving sizes by weight and in terms of the number of “sprays.” One  
21 “spray” does not, however, deliver a consistent amount of product and recently, Unilever changed  
22 its labels in an attempt to make the “spray” a standardized unit of measurement.

23           38. Regardless, both serving sizes are unlawful because they do not follow FDA  
24 mandated serving sizes.

25           **a. Serving Size 1 Gram for “Topping”**

26           39. The FDA requires that a serving size be based upon the product’s major intended  
27 use. 21 C.F.R. §101.12(a)(7).

1           40. Consumers primarily use ICBINB as a “topping” – a use that Defendant’s own label  
2 depicts and encourages. *See* Figure 2 (depicting ICBINB as a topping for corn on the cob).

3           41. As a topping, ICBINB lists a serving size of 5 sprays (1 g). *See* Figure 2.

4           42. One gram is not, however, a permissible serving size for any product in the “Fats  
5 and Oils” product category. *See* 21 C.F.R. §101.12, Table 2.

6           43. As the FDA has explained, “Manufacturers cannot deviate from the reference  
7 amount. . . . If the uniformity expected by Congress is to be maintained, the information on the  
8 need for revised or separate reference amounts must be evaluated by the FDA through the petition  
9 process that it has established. . . .” 58 F.R. 2273.

10          44. Defendant’s one gram serving size is, therefore, unlawful. It is also misleading  
11 because consumers use more than five sprays to achieve a buttery flavor.

12                   **b. Serving Size 0.25 Grams for “Cooking Spray”**

13          45. ICBINB lists a second serving size of one spray (0.2 g) for “Cooking Spray”  
14 applications. *See* Figure 2.

15          46. In so doing, Unilever wrongfully classifies ICBINB as a “spray type” with a  
16 required serving size of 0.25 grams. *See* 21 C.F.R. §101.12.

17          47. Defendant’s classification is unlawful because consumers like Ms. Pardini and Ms.  
18 Wood do not use one spray (0.2 g) and serving sizes must reflect customary usage.

19          48. Complaints about Defendant’s woefully inadequate serving sizes abound. For  
20 instance, a contributor to the website “That’s Fit” writes, “This issue makes me furious – so often  
21 products that are full of fat, and even trans fats, designate completely ridiculous serving sizes, then  
22 ‘round’ the fat down to zero. Often, they won’t even have on the label anywhere what the actual  
23 fat content is. So people think there’s no fat when there’s a ton.”<sup>6</sup> Another contributor writes  
24  
25  
26

27                   <sup>6</sup> Crabby McSlacker, Comment to *I Can’t Believe It’s Not Butter Spray Is Full of Fat – Buyer*  
28 *Beware, That’s Fit* (June 1, 2007), <http://www.thatsfit.com/2007/06/01/i-cant-believe-its-not-butter-spray-is-full-of-fat-buyer-be/>.

1 “Well that’s just stupid... ive never used ONE spray.”<sup>7</sup>

2 49. Many consumers like Ms. Pardini and Ms. Wood, in fact, report using far more than  
 3 one spray. Some even admit to pouring the product, thus avoiding the spray mechanism altogether.  
 4 For instance, a contributor to the website myfitnesspal.com writes, “A while back, I thought I had  
 5 discovered a gold mine! I can’t believe it’s not butter spray! For a butter substitute! 0 calories,  
 6 yada, yada. But after a bit, I began unscrewing the cap and pouring it on my potato, my oatmeal,  
 7 etc. Just now, I googled it to see if it’s bad for me (I was so sure it wasn’t, ha) and dang it, it is.”<sup>8</sup>

8 50. Unilever’s own website acknowledges that consumption exceeds one spray. For  
 9 instance, it promotes ten sprays for a single serving of Asparagus ‘N Parmesan Omelet. See  
 10 Figure 3.

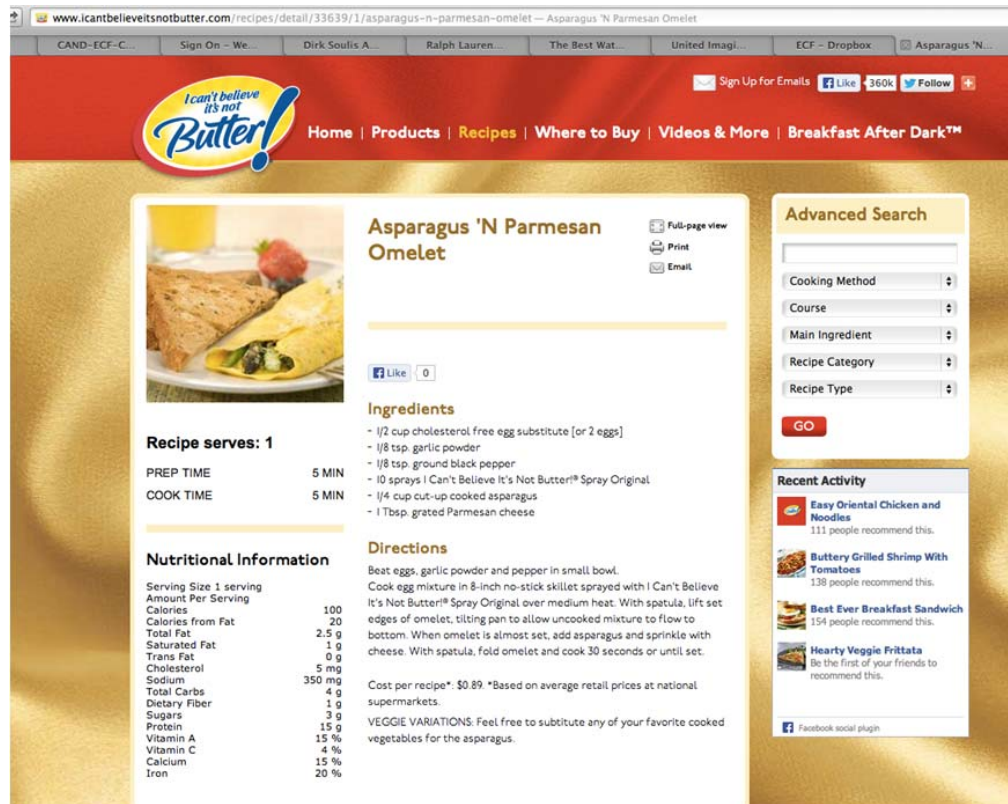


Figure 3

25 <sup>7</sup> Elizabethberg, Comment to *The Truth About “0” Calorie Parkay Butter Spray*, Calorie  
 26 Count (April 10, 2008), <http://caloriecount.about.com/forums/foods/truth-calorie-parkay-butter-spray>.

27 <sup>8</sup> MaryBBrown, Comment to *I Can’t Believe It’s Not Butter-Spray*, MyFitnessPal (April 14,  
 28 2011), <http://www.myfitnesspal.com/topics/show/217304-i-can-t-believe-it-s-not-butter-spray-i-think-it-s-bad-fo>.

1           51. Defendant’s classification is also unlawful because ICBINB is a butter-substitute  
2 and by law, interchangeable products must use consistent serving sizes. 21 C.F.R. §101.12(d).

3           52. The FDA has explained, “the agency is proposing these standard serving sizes to  
4 assure that nutrition labels on similar types of foods are consistent, so that consumers will be able  
5 to easily and readily make comparisons of nutrient content among products. In addition, FDA  
6 expects that standard serving sizes will eliminate some of the problems that occur when  
7 manufacturers manipulate serving sizes to make a product appear, for example, lower in calories . .  
8 . than it would if a more objective serving size were used.” 55 F.R. 29517 (July 19, 1990).

9           53. “The agency believes that by grouping foods that have similar dietary usage into  
10 one category, a reasonable and appropriate serving size for all food within a category can be  
11 established . . . a consistent serving size for similar products enables consumers to compare the  
12 nutritional value of foods that are used interchangeably in the diet.” 56 F.R. 60394, 60397 (Nov.  
13 27, 1991).

14           54. As explained, ICBINB is promoted and used by consumers (including Ms. Pardini  
15 and Ms. Wood) as a butter substitute.

16           55. Its consumption is driven by taste, not the ability to lubricate.

17           56. Because consumers use ICBINB to achieve a comparable buttery flavor, it belongs  
18 in the same product category as butter itself with a required serving size of one tablespoon. *See* 21  
19 C.F.R. 101.12, Table 2.

20           57. Were it properly labeled with the serving sizes mandated by the FDA for a butter  
21 substitute, Unilever could not “round down” to claim “0g fat” per serving or “Calories 0” in the  
22 nutrition panel and “0 Calories per serving” and “0g fat” outside of the nutrition panel.<sup>9</sup> Instead the  
23 label would have read 60 calories and 6 grams of fat per tablespoon.<sup>10</sup>

24  
25  
26 <sup>9</sup> Notably, other products in the ICBINB line which are also used and promoted as butter  
27 substitutes using the same serving size as butter itself – one tablespoon.

28 <sup>10</sup> Because the “spray” delivers a variable amount of product, the per serving size is best  
expressed in a common household measurement, rather than the “spray.”

1           **2. Defendant Failed to Indicate that ICBINB Actually Contains Fat With an**  
2           **Asterisk as Required by the Food Drug and Cosmetic Act**

3           58. No matter the serving size, if a product claims to be free of fat it must include an  
4 asterisk referring to a statement below the list of ingredients, which states ‘adds a trivial amount of  
5 fat’ ‘adds a negligible amount of fat’ or ‘adds a dietary insignificant amount of fat.’” 21 C.F.R.  
6 § 101.62.

7           59. While Defendant listed “soybean oil” and “sweet cream buttermilk” in its ingredient  
8 list, these terms were not followed by an asterisk and any language disclosing the presence of fat.  
9 See Figure 2.

10          60. Defendant’s failure to disclose trace amounts of fat renders its product false and  
11 misleading.

12           **D. Defendant Was Aware that ICBINB Was Mislabeled Based on Consumer Complaints**  
13           **and FDA Warning Letters**

14          61. Defendant knew or should have known that its product was mislabeled and  
15 engendered confusion among consumers. The Internet is replete with complaints echoing that of  
16 the named Plaintiffs. For example, a contributor to the website “sparkpeople.com” writes, “I agree  
17 that most nutritional info can be misleading, but the butter spray takes the cake! Based on their  
18 logic, Doritos could advertise their chips as being 0 cal and 0 fat if they dropped the serving size  
19 down to half a chip. They should not legally be allowed to advertise a product with such a small  
20 serving size. Not to mention it’s next to impossible to measure. Nor is it a valid form of  
21 measurement. A more realistic approach would be to base the nutrition info on a tsp. of spray.”<sup>11</sup>

22          62. In March of 2004, the FDA issued a guidance letter to the food industry that  
23 indicated the FDA was concerned about the use of improper serving sizes. The letter stated:

24                   Dear Food Manufacturer:

25                   As you are aware, the Food and Drug Administration (FDA) is  
26                   involved in an initiative to give consumers helpful information that

27                   <sup>11</sup> Toozluc, Comment to *I Can’t Believe It’s Not Butter Spray Full of Fat!*, SparkPeople (July  
28                   8, 2013),  
<http://www.sparkpeople.com/myspark/messageboard.asp?imboard=1&imparent=31440612>.

1 will enable them to make more informed choices about their diets  
2 and lifestyle in an effort to reduce the incidence of overweight and  
3 obesity in the United States. A key component in providing nutrient  
4 information to consumers is the “Nutrition Facts” panel on food  
5 packages. In order for this nutrition information to be useful to  
6 consumers, it must be accurate and based on a meaningful amount of  
7 food. After the Nutrition Labeling and Education Act was enacted,  
8 thereby mandating nutrition labeling, FDA promulgated regulations  
9 that specify how serving size must be derived from an appropriate  
10 reference amount for the food commodity in question. . . . Therefore,  
11 we are taking this opportunity to remind the food industry about the  
12 rules for determining an appropriate serving size. Manufacturers  
13 must use the information provided in Title 21 of the Code of Federal  
14 Regulations (CFR) sections 101.9(b) and 101.12 to determine a  
15 specific serving size for their products. . . .<sup>12</sup>

16 FDA encourages the food industry to review their nutrition  
17 information and assure that the serving size declared is appropriate  
18 for the commodity in question. FDA also encourages manufacturers  
19 to refer to our guidance documents at [www.cfsan.fda.gov](http://www.cfsan.fda.gov) for  
20 additional information on serving sizes.

21 63. Defendant ignored these consumer complaints and the FDA’s guidance and  
22 continued to use its deceptive and misleading product labels.

23 **E. Plaintiffs Relied on ICBINB’s Label in Deciding to Purchase ICBINB**

24 64. Plaintiffs were reasonably diligent consumers looking for products that were fat-free  
25 and calorie-free alternatives to butter.

26 65. While shopping in grocery stores in and around her home in Novato, California  
27 Plaintiff Pardini encountered ICBINB in the refrigerated section of grocery stores. She noted that  
28 the product appeared next to butter and margarine – products for which ICBINB was promoted as a  
fat-free and calorie-free alternative.

66. Plaintiff Pardini saw and read representations on the front label that ICBINB is “0 g  
fat” and “0 calories.” Plaintiff also noted that the front label depicted and promoted ICBINB as a  
butter-flavored topping for foods.

67. Before deciding to purchase ICBINB, Plaintiff Pardini also inspected the nutritional  
panel. On the back label, she saw and read representations that ICBINB contains “Calories 0,” and

---

<sup>12</sup> Letter to Food Manufacturers about Accurate Serving Size Declaration on Food Products, March 12, 2004, available at: <http://www.fda.gov/Food/LabelingNutrition/FoodLabelingGuidanceRegulatoryInformation/InspectionCompliance/WarningOtherLetters/ucm110234.htm> (last accessed July 20, 2012).

1 “Total Fat 0g.” She noted that these statements were consistent with ICBINB’s “0 g fat” and “0  
2 calories” claims on the front label. Notably, Plaintiff did not see any disclosure or other indication  
3 on the nutritional panel that ICBINB actually contains fats and calories.

4 68. Plaintiff Kym Pardini relied on these representations in deciding to purchase  
5 ICBINB. She simply had no reason to doubt that ICBINB was actually free of fat and calories.

6 69. Similarly, while shopping in grocery stores in and around her home in Blue Springs,  
7 Missouri, Plaintiff Wood encountered ICBINB in the refrigerated section of grocery stores. She  
8 noted that the product appeared next to butter and margarine – products for which ICBINB was  
9 promoted as a fat-free and calorie-free alternative.

10 70. Plaintiff Wood saw and read representations on the front label that ICBINB is “0 g  
11 fat” and “0 calories.”

12 71. Before deciding to purchase ICBINB, Plaintiff Wood inspected the nutritional  
13 panel. On the back label, she saw and read representations that ICBINB contains “Calories 0,” and  
14 “Total Fat 0g.” She noted that these statements were consistent with ICBINB’s “0 g fat” and “0  
15 calories” claims on the front label. Notably, Plaintiff did not see any disclosure or other indication  
16 on the nutritional panel that ICBINB actually contains fats and calories.

17 72. Plaintiff Wood relied on these representations in deciding to purchase ICBINB. She  
18 simply had no reason to doubt that ICBINB was actually free of fat and calories.

19 **F. Plaintiffs Could Not Have Discovered, in the Exercise of Reasonable Diligence that**  
20 **Defendant’s Product Labels Were Misleading**

21 73. Plaintiffs were reasonably diligent consumers looking for products that were fat-free  
22 and calorie-free alternatives to butter. Nevertheless, Plaintiffs did not discover that Unilever’s  
23 labeling was false, deceptive, or misleading until July 2012 and April 2013.

24 74. Plaintiffs were unaware that ICBINB contains 124 grams of fat and 1160 calories  
25 per 12-ounce bottle and did not quality as “0 g fat” or “0 calories” based on amounts customarily  
26 consumed. Plaintiff was also unaware that ICBINB contained added ingredients that supplied  
27 certain amounts of fat per serving.



1           75. Plaintiffs are not nutritionists, food experts, or food scientists; Plaintiffs are lay  
2 consumers who did not possess Defendant’s specialized knowledge or food testing capabilities  
3 which would have otherwise enabled them to see through Defendant’s deceptive marketing and  
4 advertising.

5           76. Plaintiffs, in the exercise of reasonable diligence, could not have discovered  
6 Defendant’s practices earlier because, like nearly all consumers, Plaintiffs do not have food testing  
7 capabilities whereby they could have uncovered the true nutritional content of ICBINB.

8 **G. Defendant’s Misrepresentations Cause Plaintiffs and the Class Ascertainable Damages**  
9 **and Injury**

10           77. Plaintiffs purchased ICBINB believing it contained “0 fat” and “0 calories” based  
11 on Unilever’s deceptive advertising and misrepresentations.

12           78. ICBINB costs more than similar products without misleading advertisements and  
13 misrepresentations, and would have cost less absent the false and misleading statements.

14           79. Plaintiffs and members of the Class paid more for ICBINB than they otherwise  
15 would have had they not been misled by the false and misleading advertisements and  
16 misrepresentations complained of herein. Plaintiffs and members of the Class would not have  
17 purchased ICBINB at the prices they did, or would not have purchased ICBINB at all, absent  
18 Defendant’s false and misleading misrepresentations.

19           80. For these reasons, ICBINB was worth less than what Plaintiffs and members of the  
20 Class paid for it.

21           81. Plaintiffs and members of the Class were induced to and did purchase ICBINB  
22 instead of competing products based on the false statements and misrepresentations described  
23 herein.

24           82. Instead of receiving products that have the advantages inherent in being “0 fat” and  
25 “0 calories,” Plaintiffs and members of the Class received products that were a significant source of  
26 fat and calories.

27           83. Plaintiffs and members of the Class lost money as a result of Unilever’s deception in  
28 that they did not receive what they paid for.

1 84. Plaintiffs and members of the Class altered their position to their detriment and  
2 suffered damages in an amount equal to the amount they paid for ICBINB.

3 **V. CLASS ACTION ALLEGATIONS**

4 85. Plaintiffs seek certification of a Class defined as follows:

5 All persons nationwide who purchased I Can't Believe It's Not  
6 Butter! Spray ("The Class"). Excluded from the Class are  
7 Defendant; the officers, directors or employees of Defendant; any  
8 entity in which Defendant has a controlling interest; and any affiliate,  
9 legal representative, heir or assign of Defendant; also excluded are  
10 any federal, state or local governmental entities, any judicial officer  
11 presiding over this action and the members of his/her immediate  
12 family and judicial staff, any juror assigned to this action and those  
13 claiming that they have suffered any personal injury as a result of  
14 consuming Defendant's misbranded products.

15 86. Plaintiffs seek certification of a Subclass defined as:

16 All persons in the State of California who purchased I Can't Believe  
17 It's Not Butter! Spray. Excluded from the Subclass are Defendant;  
18 the officers, directors or employees of Defendant; any entity in which  
19 Defendant has a controlling interest; and any affiliate, legal  
20 representative, heir or assign of Defendant; also excluded are any  
21 federal, state or local governmental entities, any judicial officer  
22 presiding over this action and the members of his/her immediate  
23 family and judicial staff, any juror assigned to this action and those  
24 claiming that they have suffered any personal injury as a result of  
25 consuming Defendant's misbranded products.

26 87. Plaintiffs seek certification of a Subclass defined as:

27 All persons in the State of Missouri who purchased I Can't Believe  
28 It's Not Butter! Spray. Excluded from the Subclass are Defendant;  
the officers, directors or employees of Defendant; any entity in which  
Defendant has a controlling interest; and any affiliate, legal  
representative, heir or assign of Defendant; also excluded are any  
federal, state or local governmental entities, any judicial officer  
presiding over this action and the members of his/her immediate  
family and judicial staff, any juror assigned to this action and those  
claiming that they have suffered any personal injury as a result of  
consuming Defendant's misbranded products.

88. Plaintiffs do not know the exact number of Class and Subclass members at the  
present time. However, due to the nature of the trade and commerce involved, there are many  
thousands of Class members, such that joinder of all Class members is impracticable.

1           89.     The Class is readily ascertainable through Defendant’s business records and notice  
2 can be provided by publication and through techniques similar to those customarily used in other  
3 consumer fraud cases and complex class actions.

4           90.     There are questions of law and fact common to the Class and Subclass. Defendant’s  
5 advertising, marketing, labeling and promotional practices were supplied uniformly to all members  
6 of the Class who were similarly affected by having purchased ICBINB for their intended and  
7 foreseeable purpose as a “0 fat” and “0 calorie” topping.

8           91.     Plaintiffs assert claims that are typical of the Class and Subclass. Plaintiffs and all  
9 Class members have been subjected to the same wrongful conduct because they have all purchased  
10 ICBINB which was mislabeled “0 fat” and “0 calories.” Like other members of the class, Plaintiffs  
11 overpaid for ICBINB and/or purchased a product that they otherwise would not have.

12           92.     Plaintiffs will fairly and adequately represent and protect the interests of the Class  
13 and Subclass. Plaintiffs are represented by counsel competent and experienced in both consumer  
14 protection and class action litigation.

15           93.     Class certification is appropriate because Defendant has acted on grounds that apply  
16 generally to the Class, so that final injunctive relief or corresponding declaratory relief is  
17 appropriate respecting the Class as a whole.

18           94.     Class certification is appropriate because common questions of law and fact  
19 substantially predominate over any questions that may affect only individual members of the Class  
20 and Subclass, including, *inter alia*, the following:

- 21                   a.     Whether Defendant misrepresented or omitted material facts in connection  
22                             with the promotion, marketing, advertising, packaging, labeling and sale of  
                                  ICBINB;
- 23                   b.     Whether Defendant represented that ICBINB has characteristics, benefits,  
24                             uses or qualities that it does not have;
- 25                   c.     Whether Defendant’s nondisclosures and misrepresentations would be  
26                             material to a reasonable consumer;
- 27                   d.     Whether the nondisclosures and misrepresentations were likely to deceive a  
28                             reasonable consumer in violation of the consumer protection statutes of New  
                                  Jersey, California and/or Missouri;

- e. Whether the nondisclosures and misrepresentations were likely to deceive a reasonable consumer in violation of the consumer protection statutes of New Jersey, California and/or Missouri;
- f. Whether Unilever breached an express warranty made to Plaintiffs and the Class;
- g. Whether Unilever intentionally misrepresented that ICBINB is “0 fat” and “0 calories”;
- h. Whether Defendant’s unlawful, unfair and/or deceptive practices harmed Plaintiffs and the members of the Class;
- i. Whether Plaintiffs and the members of the Class are entitled to damages, restitution, and/or equitable or injunctive relief.

95. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all the individual Class and Subclass members is impracticable. Furthermore, because the restitution and damages suffered, and continue to be suffered, by each individual Class member may be relatively small, the expense and burden of individual litigation would make it very difficult or impossible for individual Class members to redress the wrongs done to each of them individually and the burden imposed on the judicial system would be enormous.

96. The prosecution of separate actions by the individual Class and Subclass members would create a risk of inconsistent or varying adjudications with respect to individual Class members, which would establish incompatible standards of conduct for Defendant. In contrast, the conduct of this action as a class action presents far fewer management difficulties, conserves judicial resources and the parties’ resources, and protects the rights of each Class member.

**VI. CAUSES OF ACTION**

**FIRST CAUSE OF ACTION**

**FRAUD BY CONCEALMENT**

97. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

98. Plaintiffs bring this claim individually and on behalf of the nationwide Class, or in the alternative, on behalf of a class of California residents.

99. As set forth above, Unilever concealed material facts concerning the nutritional content of ICBINB. Unilever had a duty to make these disclosures based on its superior

1 knowledge regarding the composition of its product, as well as its affirmative misrepresentations to  
2 the contrary.

3 100. Unilever actively concealed material facts, in whole or in part, with the intent to  
4 induce Plaintiffs and members of the Class to purchase ICBINB.

5 101. Plaintiffs and the Class were unaware of these omitted material facts and would not  
6 have acted as they did if they had known of the concealed facts.

7 102. As a result of the concealment of the facts, Plaintiffs and the Class sustained  
8 damage in an amount to be determined at trial.

9 **SECOND CAUSE OF ACTION**

10 **BREACH OF EXPRESS WARRANTY**

11 103. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

12 104. Plaintiffs bring this claim individually and on behalf of the nationwide Class, or in  
13 the alternative, on behalf of a class of California residents.

14 105. Defendant expressly warranted in its marketing, advertising and promotion of  
15 ICBINB that ICBINB is “0 fat” and “0 calories.”

16 106. Plaintiffs and members of the Class purchased ICBINB based on these express  
17 warranties.

18 107. ICBINB is not, however, “0 fat” or “0 calories” as expressly warranted.

19 108. Plaintiffs and Class members were injured as a direct and proximate result of  
20 Defendant’s breach because: (1) they purchased ICBINB and/or at a premium based on  
21 Defendant’s misleading product labels and (2) ICBINB did not have the composition, attributes,  
22 characteristics, nutritional content or value as promised.

23 **THIRD CAUSE OF ACTION**

24 **INTENTIONAL MISREPRESENTATION**

25 109. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

26 110. Plaintiffs bring this claim individually and on behalf of the nationwide Class, or in  
27 the alternative, on behalf of a class of California residents.

28

1 111. Defendant materially and intentionally mislabeled ICBINB's nutritional values as  
2 alleged herein.

3 112. Defendant's misrepresentations about the fat and calorie content of ICBINB were  
4 intended to influence the purchasing decisions of Plaintiffs and members of the Class who  
5 justifiably relied upon the accuracy of Defendant's labels.

6 113. Defendant's misrepresentations caused Plaintiffs and the Class to purchase a  
7 product that they would not have otherwise purchased and/or at a price that they would not have  
8 otherwise paid.

9 **FOURTH CAUSE OF ACTION**

10 **VIOLATIONS OF NEW JERSEY'S CONSUMER FRAUD ACT**

11 114. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

12 115. Plaintiffs bring this claim individually and on behalf of the nationwide Class.

13 116. New Jersey's consumer fraud statute applies to a class of purchasers of ICBINB,  
14 both within and outside of New Jersey, who have been harmed as a result of Defendant's conduct.

15 117. New Jersey's contacts with this dispute are both extensive and weighty. Defendant's  
16 scheme was devised, implemented and directed from Defendant's offices in New Jersey.

17 Moreover, New Jersey has a substantial interest in preventing fraudulent practices within the State  
18 which may have an effect both in New Jersey and throughout the rest of the country.

19 118. The New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1, *et seq.*, makes unfair  
20 methods of competition and unfair or deceptive acts or practices in the conduct of any trade or  
21 commerce, unlawful. The act provides: "The act, use or employment by any person of any  
22 unconscionable commercial practice, deception, fraud, false pretense, false promise,  
23 misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with  
24 intent that others rely upon such concealment, suppression or omission, in connection with the sale  
25 or advertisement of any merchandise or real estate, or with the subsequent performance of such  
26 person as aforesaid, whether or not any person has in fact been misled, deceived or damaged  
27 thereby, is declared to be an unlawful practice . . ." N.J.S.A. § 56:8-2.

28

1 119. Defendant violated this section in that: (a) Defendant's conduct in violation of  
2 FDCA and accompanying FDA regulations constitutes a *per se* violation of the act; (b) Defendant's  
3 practices are unconscionable in that they are unethical, immoral, oppressive and harmful, and  
4 depart from the standard of good faith, honesty in fact and fair dealing established under the act;  
5 and (c) Defendant's conduct was deceptive, fraudulent, concealing numerous material facts and  
6 misrepresenting others all with the result of causing Plaintiffs and the Class to suffer ascertainable  
7 losses of money or property.

8 120. Defendant's conduct described herein constitutes the employment of false pretense,  
9 false promise, misrepresentation, misleading statement or deceptive practice upon Plaintiffs and the  
10 Class within the meaning of the act.

11 121. Plaintiffs and the Class suffered ascertainable losses as a result of Defendant's  
12 unlawful conduct.

13  
14 122. Plaintiffs and the Class are entitled to three times their ascertainable losses pursuant  
15 to N.J.S.A. §§ 56:8-19. In addition, Defendant's conduct is subject to an award of attorney's fees  
16 and costs and any other appropriate legal or equitable relief as provided under N.J.S.A. 56:8-19.

17 123. Plaintiffs and the Class seek court-ordered relief of an equitable nature against  
18 Defendant, including, but not limited to, orders declaring Defendant's practices as alleged to be  
19 unlawful, unfair, unconscionable and/or deceptive, and enjoining Defendant from undertaking any  
20 further unlawful, unfair, unconscionable and/or deceptive acts or omissions.

21 124. Plaintiffs and the Class seek disgorgement and restitution of all monies paid to  
22 Defendant for as a result of Defendant's unlawful acts, plus interest on damages at the legal rate,  
23 and/or three times the amount of their economic damages.

24 **FIFTH CAUSE OF ACTION**

25 **VIOLATIONS OF THE CONSUMER LEGAL REMEDIES ACT**  
26 **(CAL. CIV. CODE § 1750, *et seq.*)**

27 125. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

28 126. Plaintiffs bring this claim individually and on behalf of the California Subclass.

1           127. Defendant is a “person” under Cal. Civ. Code § 1761(c).

2           128. Plaintiffs are “consumer,” as defined by Cal. Civ. Code § 1761(d), who purchased  
3 ICBINB sold by Defendant.

4           129. Cal. Civ. Code § 1770(a)(5) prohibits “[r]epresenting that goods or services have  
5 sponsorship, approval, characteristic, ingredients, uses, benefits, or quantities which they do not  
6 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she  
7 does not have.” Defendant violated this provision by misrepresenting that ICBINB is “0 fat” and  
8 “0 calories.”

9           130. Cal. Civ. Code § 1770(a)(7) prohibits “[r]epresenting that goods or services are of a  
10 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of  
11 another.” Defendant violated this provision by misrepresenting that ICBINB is “0 fat” and “0  
12 calories.”

13           131. Cal. Civ. Code § 1770(a)(9) prohibits “[r]epresenting goods or services with intent  
14 not to sell them as advertised.” Defendant violated this provision by misrepresenting that ICBINB  
15 is “0 fat” and “0 calories.”

16           132. Plaintiffs and the Subclass suffered lost money or property as a result of these  
17 violations because: (a) they would not have purchased ICBINB on the same terms if the true facts  
18 concerning this product had been known; (b) they paid a premium due to the false representations  
19 about the products; and (c) ICBINB is not “0 fat” or “0 calories.”

20           133. As a result of these violations, Defendant has caused and continues to cause actual  
21 damage to Plaintiffs and members of the Subclass and, if not stopped, will continue to harm them.

22           134. On April 12, 2013, Plaintiff Pardini commenced an action for injunctive relief under  
23 the CLRA. In accordance with Cal. Civil Code § 1780(a), Plaintiffs and members of the Subclass  
24 sought and continue to seek injunctive and equitable relief for Defendant’s violations of the CLRA.  
25 In addition, having mailed appropriate notice and demand in accordance with Cal. Civil Code  
26 § 1782(a) & (d), Plaintiffs hereby amend this Complaint to include a request for damages. In  
27 particular, pursuant to and in accordance with §1782, Plaintiff sent written notice to Defendant via  
28 certified mail, received by Defendant on May 13, 2013, addressing the alleged violations under



1 CLRA §1770 as detailed in the Complaint (based on the marketing, labeling, and sale of ICBINB  
 2 as 0 fat and 0 calorie), demanding that Defendant reimburse Plaintiff and class members for the  
 3 violations of §1770 alleged in the Complaint, and demanding that Defendant notify class members  
 4 of the lawsuit. Within 30 days of receiving Plaintiff’s notice, Defendant failed to make  
 5 reimbursements or other remedies requested by Plaintiff, and Defendant failed to agree to give the  
 6 requested remedies within a reasonable time. Furthermore, Defendant failed to identify similarly-  
 7 situated consumers who purchased ICBINB; Defendant failed to notify such consumers that upon  
 8 their request Defendant shall make the appropriate reimbursement or other remedy; Defendant did  
 9 not give the reimbursements or notice requested on behalf of such consumers, and Defendant did  
 10 not offer to do so in a reasonable time. Further, Defendant did not cease from engaging in the  
 11 alleged CLRA violations, and Defendant did not agree to do so in a reasonable time. On or about  
 12 June 5, 2013, Unilever’s counsel responded to Plaintiff’s CLRA letter pursuant to §1782 by  
 13 indicating that the requested reimbursement would not be made. Accordingly, Plaintiffs now  
 14 amend their complaint to include a request for damages under the CLRA, and Plaintiffs seek all  
 15 relief authorized under Civil Code § 1780, including attorneys’ fees and costs, as requested more  
 16 fully in the Prayer for Relief.

17 135. Plaintiff Pardini includes an affidavit with this Complaint that shows venue in this  
 18 District is proper, to the extent such an affidavit is required by Cal. Civil Code § 1780(d) in federal  
 19 court.

## 20 **SIXTH CAUSE OF ACTION**

### 21 **VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW** 22 **(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**

23 136. Plaintiffs reallege and incorporate by reference all paragraphs alleged herein.

24 137. Plaintiffs bring this claim individually and on behalf of the California Subclass.

25 138. California Business and Professions Code § 17200 prohibits any “unlawful, unfair,  
 26 or fraudulent business act or practice.” Unilever has engaged in unlawful, fraudulent, and unfair  
 27 business acts and practices in violation of the UCL.  
 28





1 E. Award Plaintiffs, the Class, and Subclass restitution of all monies paid to Defendant  
2 as a result of unlawful, deceptive, and unfair business practices;

3 F. Award Plaintiffs, the Class, and Subclass members exemplary damages in such  
4 amount as proven at trial;

5 G. Award Plaintiffs and the Class and Subclass members reasonable attorneys' fees,  
6 costs, and pre- and post-judgment interest; and

7 H. Award Plaintiffs and the Class and Subclass members such other further and  
8 different relief as the nature of the case may require or as may be determined to be just, equitable,  
9 and proper by this Court.

10  
11 **VIII. JURY TRIAL DEMAND**

12 Plaintiffs, by counsel, request a trial by jury on their legal claims, as set forth herein.

13  
14 DATED: September 20, 2013

HAGENS BERMAN SOBOL SHAPIRO LLP

15  
16 By \_\_\_\_\_ /s/ Lee Gordon \_\_\_\_\_

17  
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*Attorneys for Plaintiffs and the Proposed Class*

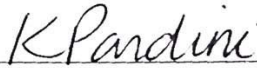
**DECLARATION RE CLRA VENUE**

I, Kym Pardini, do hereby declare and state as follows:

1. I am a party plaintiff in *Kym Pardini on behalf of herself and all others similarly situated v. Unilever United States, Inc. a Delaware corporation*. Pursuant to CAL. CIV. CODE § 1780(d), I make this declaration in support of the Class Action Complaint and the claim therein for relief under CAL. CIV. CODE § 1780(a). I have personal knowledge of the facts stated herein and, if necessary, could competently testify thereto.

2. This action for relief under CAL. CIV. CODE § 1780(a) has been commenced in a county that is a proper place for trial of this action because Unilever does business throughout the State of California.

This declaration is signed under penalty of perjury under the laws of the State of California this 8th day of August, 2013.

  
\_\_\_\_\_

Kym Pardini

**CERTIFICATE OF SERVICE**

I hereby certify that on September 19, 2013, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

/s/ Lee M. Gordon  
LEE M. GORDON

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