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**KUNTZ, J.**

**REYES, M.J.**

FILED  
2015 JUN 26 11 11 AM  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

**CV 15**

**3741**

-----X  
MICHELLE HU,  
MICHELLE PEERY,  
JOHN DOE (ILLINOIS),  
JOHN DOE (MICHIGAN),  
JOHN DOE (NEW JERSEY),  
JOHN DOE (FLORIDA)  
and JOHN DOES 1-100, on behalf of  
themselves and others similarly situated,

Plaintiffs,

- against -

THE HERSHEY COMPANY,

Defendant.  
-----X

Case No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiffs MICHELLE HU, MICHELLE PEERY, JOHN DOE (ILLINOIS), JOHN DOE (MICHIGAN), JOHN DOE (NEW JERSEY), JOHN DOE (FLORIDA) and JOHN DOES 1-100, individually and on behalf of all other persons similarly situated, by their undersigned attorneys, as and for their Complaint against the Defendant, allege the following based upon personal knowledge as to themselves and their own action, and, as to all other matters, respectfully allege, upon information and belief, as follows (Plaintiffs believe that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery):

### **NATURE OF THE ACTION**

1. This is a consumer protection action arising out of deceptive and otherwise improper business practices that Defendant, THE HERSHEY COMPANY (hereinafter, “Hershey Company” or “Defendant”), engaged in with respect to the packaging of its Ice Breakers® Ice Cubes sugar-free gum products, which are packaged in plastic containers and regularly sold at pharmacies, convenience stores, grocery stores and supermarkets. The Products are sold as follows:

<b>PRODUCT</b>	<b>FLAVOR<sup>1</sup></b>
Ice Breakers® Ice Cubes (“Sugar-free gum Products”)	Peppermint
	Spearmint
	Arctic Grape
	Bubble Breeze
	Cool Lemon
	Wintergreen
	Raspberry Sorbet
	Strawberry Smoothie

(The Ice Breakers® Ice Cubes products, referred herein as the “Products.”)

2. Defendant manufactures, markets and sells the Products with non-functional slack-fill in violation of the Federal Food Drug & Cosmetic Act (“FDCA”) Section 403(d) (21 U.S.C. 343(d)), the Code of Federal Regulations Title 21 part 100, *et. seq.*, as well as state laws prohibiting misbranded food of the fifty states and the District of Columbia, which impose requirements identical to federal law.

3. Upon information and belief, Defendant sold and continues to sell the Products with non-functional slack-fill during the class period.

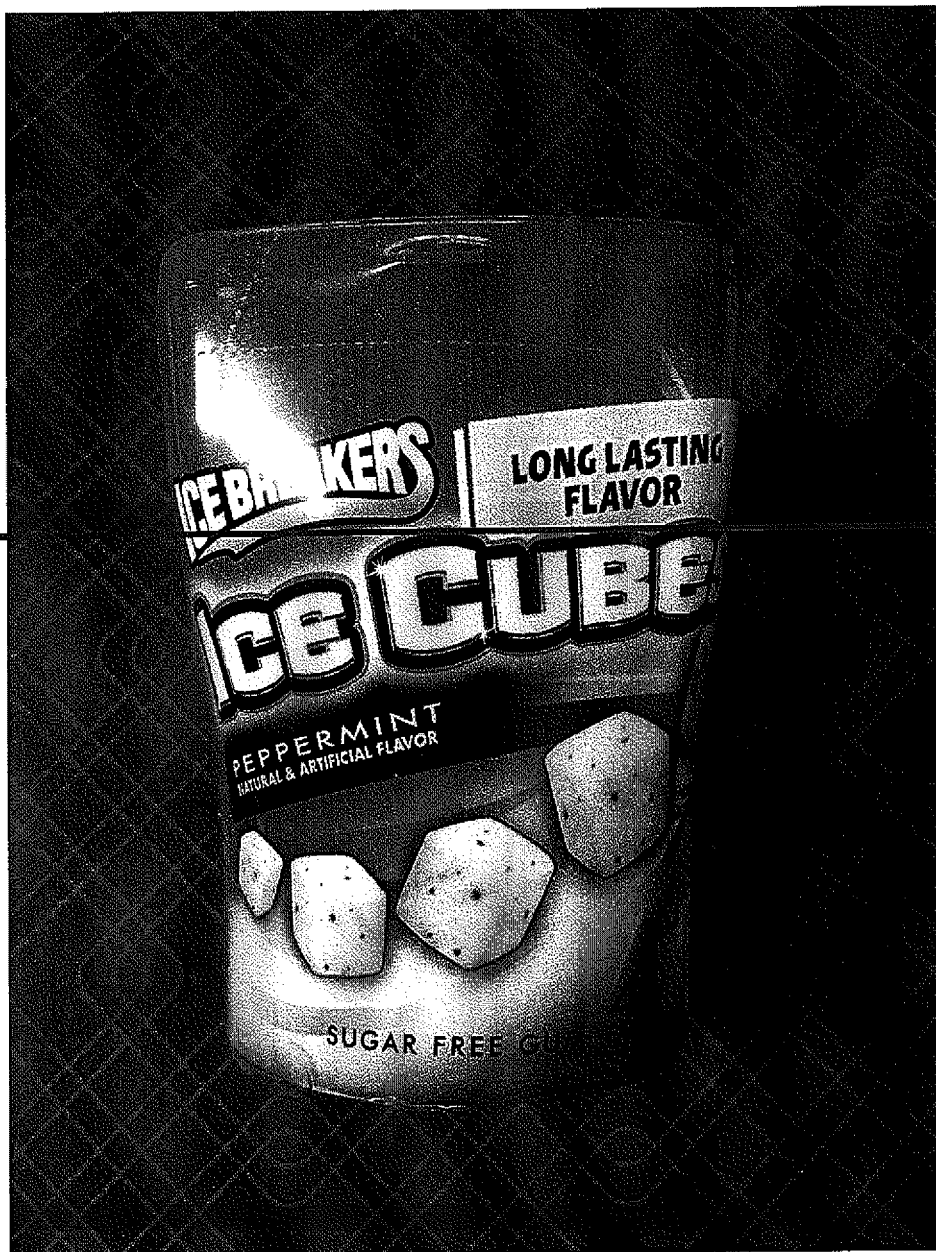
4. Images of the Products in various flavors are provided herein under **EXHIBIT A**. The non-transparent containers of the Products are invariably covered with brightly colored, non-

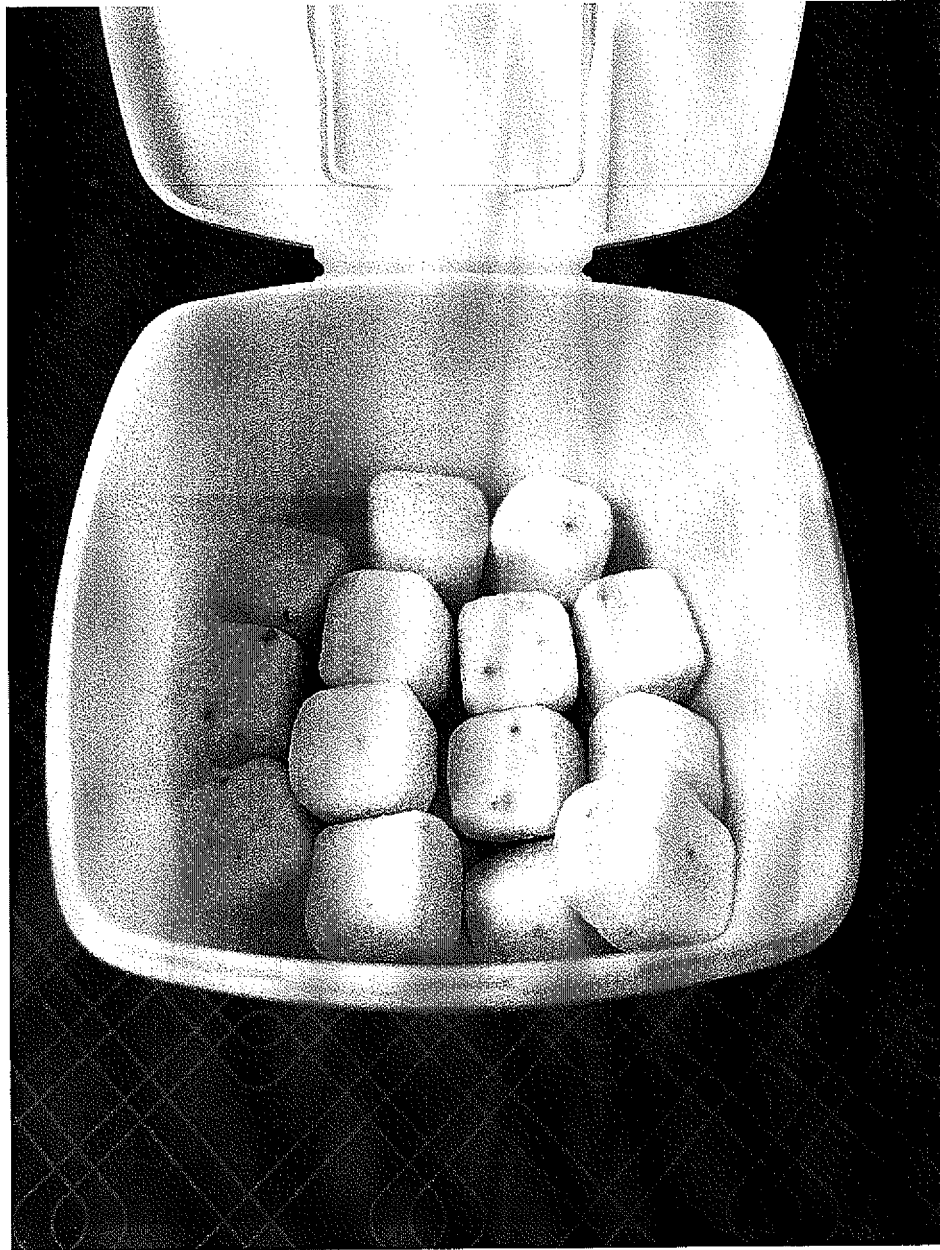
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<sup>1</sup> The flavors listed in the above table is only intended to be an incomprehensive list of all the flavors of the Products sold in all fifty states and the District of Columbia.

transparent wrappings so that Plaintiffs and Class members cannot see the non-functional slack-fill in the container. As shown below, the size of the containers in comparison to the volume of the Products contained therein makes it appear as Plaintiffs and Class members are buying more than what is actually being sold:







5. Plaintiffs and Class members viewed Defendant's misleading Product packaging, reasonably relied in substantial part on the representations and were thereby deceived in deciding to purchase the Products for a premium price.

6. Plaintiffs bring this proposed consumer class action on behalf of themselves and all other persons nationwide, who from the applicable limitations period up to and including the present (the "Class Period"), purchased for consumption and not for resale of the Products.

7. During the Class Period, Defendant manufactured, marketed and sold the Products throughout the United States. Defendant purposefully sold the Products in containers made, formed or filled as to be misleading and with non-functional slack-fill.

8. Defendant violated statutes enacted in each of the fifty states and the District of Columbia that are designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising. These statutes are:

- a. Alabama Deceptive Trade Practices Act, Ala. Statutes Ann. §§ 8-19-1, *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Ak. Code § 45.50.471, *et seq.*;
- c. Arizona Consumer Fraud Act, Arizona Revised Statutes, §§ 44-1521, *et seq.*;
- d. Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.*;
- e. California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.*;
- f. Colorado Consumer Protection Act, Colo. Rev. Stat. § 6 - 1-101, *et seq.*;
- g. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.*;
- h. Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et seq.*;
- i. District of Columbia Consumer Protection Procedures Act, D.C. Code § 28 3901, *et seq.*;
- j. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*;
- k. Georgia Fair Business Practices Act, § 10-1-390 *et seq.*;
- l. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statutes § 480 1, *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statutes § 481A-1, *et seq.*;
- m. Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.*;
- n. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*;
- o. Indiana Deceptive Consumer Sales Act, Indiana Code Ann. §§ 24-5-0.5-0.1, *et seq.*;
- p. Iowa Consumer Fraud Act, Iowa Code §§ 714.16, *et seq.*;
- q. Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et seq.*;
- r. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §§ 365.020, *et seq.*;
- s. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § § 51:1401, *et seq.*;
- t. Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et seq.*, and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et seq.*;
- u. Maryland Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq.*;
- v. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- w. Michigan Consumer Protection Act, § § 445.901, *et seq.*;
- x. Minnesota Prevention of Consumer Fraud Act, Minn. Stat §§ 325F.68, *et seq.*; and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43, *et seq.*;
- y. Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*;
- z. Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;
- aa. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code §30-14-101, *et seq.*;

- bb.* Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59 1601, *et seq.*, and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et seq.*;
- cc.* Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et seq.*;
- dd.* New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et seq.*;
- ee.* New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et seq.*;
- ff.* New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57 12 1, *et seq.*;
- gg.* New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §§ 349, *et seq.*;
- hh.* North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et seq.*;
- ii.* North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes §§ 75-1, *et seq.*;
- jj.* Ohio Deceptive Trade Practices Act, Ohio Rev. Code. Ann. §§ 4165.01. *et seq.*;
- kk.* Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.*;
- ll.* Oregon Unfair Trade Practices Act, Rev. Stat § 646.605, *et seq.*;
- mm.* Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. § § 201-1, *et seq.*;
- nn.* Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1, *et seq.*;
- oo.* South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.*;
- pp.* South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 1, *et seq.*;
- qq.* Tennessee Trade Practices Act, Tennessee Code Annotated §§ 47-25-101, *et seq.*;
- rr.* Texas Stat. Ann. §§ 17.41, *et seq.*, Texas Deceptive Trade Practices Act, *et seq.*;
- ss.* Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1, *et seq.*;
- tt.* Vermont Consumer Fraud Act, Vt. Stat. Ann. tit.9, § 2451, *et seq.*;
- uu.* Virginia Consumer Protection Act, Virginia Code Ann. §§59.1-196, *et seq.*;
- vv.* Washington Consumer Fraud Act, Wash. Rev. Code § 19.86.010, *et seq.*;
- ww.* West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-6-101, *et seq.*;
- xx.* Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100. 18, *et seq.*;
- yy.* Wyoming Consumer Protection Act, Wyoming Stat. Ann. §§40-12-101, *et seq.*

9. Defendant has deceived Plaintiffs and other consumers nationwide by mischaracterizing the volume of their Products. Defendant has been unjustly enriched as a result of their conduct. Through these unfair and deceptive practices, Defendant has collected millions of dollars from the sale of its Products that it would not have otherwise earned. Plaintiffs bring this action to stop Defendant's misleading practice.

10. Defendant's misbranding is intentional. Defendant has been unjustly enriched as a result of its conduct. Through these unfair and deceptive practices, Defendant has collected millions of dollars from the sale of its Products that it would not have otherwise earned.

11. Plaintiffs' claims are not barred by the doctrine of preemption because courts routinely recognize that state law causes of action are not preempted by the Nutritional Labeling and Education Act (codified as the FDCA, 21 U.S.C. 343 et seq.) if they "seek to impose requirements that are identical to those imposed by the FDCA." *Ackerman v. Coca-Cola Co.*, No. 09-0395, 2010 WL 2925955, at \*6 (E.D.N.Y. July 21, 2010) (citing *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 432 (2005)).

12. Plaintiffs' claims are not barred by the doctrine of primary jurisdiction. Courts routinely refuse to apply the doctrine of primary jurisdiction to consumer cases. The primary jurisdiction doctrine does not apply when "the issue at stake is legal in nature and lies within the traditional realm of judicial competence." *In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512, at \*8 (E.D.N.Y. Aug. 29, 2013) (citing *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 851 (2d Cir.1988)). The claims alleged herein are "far less about science than [they are] about whether a label is misleading ... and the reasonable-consumer inquiry upon which some of the claims in this case depends is one to which courts are eminently well suited, even well versed." *In re Frito-Lay N. Am.*, 2013 WL 4647512 at \*8.

### **JURISDICTION AND VENUE**

13. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a member of the putative class is a citizen of a different state than Defendant, and the amount in controversy exceeds the sum or value of \$5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

14. The Court has jurisdiction over the federal claims alleged herein pursuant to 28 U.S.C § 1331 because it arises under the laws of the United States.

15. The Court has jurisdiction over the state law claims because they form part of the same case or controversy under Article III of the United States Constitution.

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

17. The Court has personal jurisdiction over Defendant because its Products are advertised, marketed, distributed and sold throughout New York State; Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State; Defendant is authorized to do business in New York State; and Defendant has sufficient minimum contacts with New York and/or otherwise have intentionally availed themselves of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendant is engaged in substantial and not isolated activity within New York State.

18. Venue is proper in this district pursuant to 28 U.S.C § 1391(a) and (b), because a substantial part of the events giving rise to Plaintiff HU's claims occurred in this District, and Defendant is subject to personal jurisdiction in this District. Plaintiff HU purchased Defendant's Products in Kings County. Moreover, Defendant distributed, advertised and sold the Products, which are the subject of the present Complaint, in this District.

### **PARTIES**

#### ***Plaintiffs***

19. Plaintiff HU is, and at all relevant times hereto has been a citizen of the state of New York and resides in Kings County. Plaintiff HU has purchased the Ice Breakers® sugar-free gum Products for personal consumption within the State of New York. Plaintiff HU purchased the Products at convenience stores, supermarkets, and pharmacies located throughout Kings County, including but not limited to CVS. Specifically, within the twelve month period prior to the filing of this Complaint, Plaintiff HU purchased the Ice Breakers® sugar-free gum Product in

the Arctic Grape flavor at a CVS store in Kings County. Plaintiff HU purchased the Products for the premium price of \$4.69 (or more), and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

20. Plaintiff PEERY is, and at all relevant times hereto has been a citizen of the state of California and resides in San Bernardino, California. Plaintiff PEERY has purchased the Ice Breakers® sugar-free gum Products for personal consumption within the State of California. Plaintiff PEERY purchased the Products at convenience stores, supermarkets, and pharmacies located throughout San Bernardino County, including but not limited to CVS. Specifically, within the twelve month period prior to the filing of this Complaint, Plaintiff PEERY purchased the Ice Breakers® sugar-free gum Product in the Wintergreen flavor. Plaintiff PEERY purchased the Products at a premium price of \$4.59 (or more) and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

21. Plaintiff JOHN DOE (ILLINOIS) is, and at all relevant times hereto has been a citizen of the state of Illinois. Plaintiff JOHN DOE (ILLINOIS) has purchased the Products for personal consumption within the State of Illinois. Plaintiff JOHN DOE (ILLINOIS) purchased the Products at a premium price and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

22. Plaintiff JOHN DOE (NEW JERSEY) is, and at all relevant times hereto has been a citizen of the state of New Jersey. Plaintiff JOHN DOE (NEW JERSEY) has purchased the Products for personal consumption within the State of New Jersey. Plaintiff JOHN DOE (NEW JERSEY) purchased the Products at a premium price and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

23. Plaintiff JOHN DOE (MICHIGAN) is, and at all relevant times hereto has been a citizen of the state of Michigan. Plaintiff JOHN DOE (MICHIGAN) has purchased the Products for personal consumption within the State of Michigan. Plaintiff JOHN DOE (MICHIGAN) purchased the Products at a premium price and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

24. Plaintiff JOHN DOE (FLORIDA) is, and at all relevant times hereto has been a citizen of the state of Florida. Plaintiff JOHN DOE (FLORIDA) has purchased the Products for personal consumption within the State of Florida. Plaintiff JOHN DOE (FLORIDA) purchased the Products at a premium price and was financially injured as a result of Defendant's deceptive conduct as alleged herein.

25. Plaintiffs JOHN DOES 1-100 are, and at all times relevant hereto has been, citizens of the any of the fifty states and the District of Columbia. During the Class Period, Plaintiffs JOHN DOES 1-100 purchased Products for personal consumption within the United States. Plaintiffs purchased the Products at a premium price and were financially injured as a result of Defendant's deceptive conduct as alleged herein.

***Defendant***

26. Defendant THE HERSHEY COMPANY is a corporation organized under the laws of Delaware with its headquarters at The Hershey Company, 100 Crystal A Drive, Hershey, PA 17033 and an address for service of process at the Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. Defendant manufactured, packaged, distributed, advertised, marketed and sold the Misbranded Products to thousands of customers nationwide.

## **FACTUAL ALLEGATIONS**

### **Identical Federal and State Law Prohibit Misbranded Foods with Non-Functional Slack-**

#### **Fill**

27. Under the Federal Food Drug and Cosmetic Act (herein “FDCA”), Section 403(d) (codified as 21 U.S.C. § 343(d)), a food shall be deemed misbranded “[i]f its container is so made, formed, or filled as to be misleading.” Consumer protection laws of the fifty states and the District of Columbia correspond to the requirements of the FDCA, 21 U.S.C. §§ 343 *et seq.*

28. Defendant’s packaging and advertising of the Products also violate various state laws against misbranding which mirror federal law. New York and California state law broadly prohibit the misbranding of food in language identical to that found in regulations promulgated pursuant to the FDCA, 21 U.S.C. §§ 343 *et seq.*:

Pursuant to N.Y. AGM. LAW § 201, “[f]ood shall be deemed to be misbranded: 1. If its labeling is false or misleading in any particular... 4. If its container is so made, formed, colored or filled as to be misleading.”

Pursuant to California’s Sherman Food, Drug and Cosmetics Law, California Health and Safety Code § 110690, “Any food is misbranded if its container is so made, formed, or filled as to be misleading.”

29. Under the Rules of the City of New York, foods are deemed misbranded “in accordance with the Federal Food, Drug and Cosmetic Act (21 U.S.C. §343) or the New York State Agriculture and Markets Law (§ 201) under circumstances including, but not limited to, any of the following: (1) If its labeling is false or misleading in any particular. . . (4) If its container is so made, formed, colored or filled as to be misleading. . . .” *See* 24 R.C.N.Y. Health Code § 71.05(d).

30. Additionally, pursuant to 21 C.F.R. 100.100:

In accordance with section 403(d) of the act, a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.

(a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:

- (1) Protection of the contents of the package;
- (2) The requirements of the machines used for enclosing the contents in such package;
- (3) Unavoidable product settling during shipping and handling;
- (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
- (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
- (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other non-mandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

However, none of the above safe-harbor provisions applies to the Products. Defendant intentionally incorporated non-functional slack-fill in its packaging of the Products in order to mislead the consumers, including Plaintiffs and members of the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 405 (E.D.N.Y. 2010) (“Misleading consumers is not a valid reason to package a product with slack-fill. *See* 21 C.F.R. § 100.100(a)(1–6).”).

31. California’s Business & Professions Code § 12606.2 also provides that “No food containers shall be made, formed, or filled as to be misleading.” CA B&P Code 12606.2(b). Further, “[a] container that does not allow the consumer to fully view its contents shall be

considered to be filled as to be misleading if it contains nonfunctional slack fill.” CA B&P Code 12606.2(c).

**Defendant’s Products Contain Non-Functional Slack-Fill**

32. Defendant manufactures, packages, distributes, markets, and sells chewing gum products under the well-known household brand name Ice Breakers®. The Products are sold at most supermarket chains, convenience stores, pharmacies and other major retail outlets throughout the United States, including but not limited to Wal-Mart, Costco, CVS, Walgreens, Target and Amazon.com.

33. Defendant employed containing non-functional slack-fill to mislead customers into believing that they were receiving more Products than they actually were.

34. Non-functional slack-fill is the difference between the actual capacity of a container and the **volume** of product contained within. Plaintiffs were (and a consumer would reasonably be) misled about the volume of the product contained within the plastic container in comparison to the size of the Products’ packaging. The size of the container in relation to the actual volume of the cube-shaped chewing gum tablets contained therein was intended to mislead the consumer into believing the consumer was getting more of the Product than what was actually in the container.

35. The Ice Breakers® Products purchased by Plaintiffs are packaged in a wrapped, non-transparent plastic container with an actual capacity of approximately 60 pieces of gum. However, the Ice Breakers® Product contains merely 40 pieces of gum, or 67% of the container’s actual capacity. Thus, each plastic container of the Ice Breakers® Products has a non-functional slack-fill of approximately 33% of its actual capacity.

36. In addition to containing 33% non-functional slack-fill, the non-transparent containers used in the packaging of the Products are uniformly covered with non-transparent colorful plastic wrappings so that consumers cannot see the actual slack-filled space. The Products were designed by Defendant to give the impression that there is more content than actually packaged. *See EXHIBIT B* for similar competitor products without misleading packaging. In comparison to the Ice Breakers® Products, other chewing gum products packaged in similar containers have transparent lids to allow customers to easily determine how much chewing gum content they are actually receiving.

37. The size of the plastic containers in relation to the volume of the Products actually contained therein gives the false impression that the consumer is buying more than they are actually receiving.

38. Pictures of the Products and packaging are shown in **EXHIBIT A**. Because the entire plastic containers of the Products are covered by non-transparent plastic wrappings, consumers cannot see the non-functional slack-fill in the plastic containers. The pictures in **EXHIBIT A** show that the contents of the Products do not fill up the entirety of the plastic containers. In fact, each plastic container contains significant non-functional slack-fill in violation of federal and state laws.

39. Plaintiffs and the members of the Class relied on the sizes of the plastic containers to believe that the entire volume of the packaging of the Products would be filled to capacity, particularly since the slack-filled space was purposely concealed by Defendant. Plaintiffs and the members of the Class' reasonably relied on the expectation that Defendant's Products would not contain non-functional slack-fill.

**Plaintiffs Were Injured as a Result of Defendant's Misleading and Deceptive Conduct**

40. Defendant's Product packaging as alleged herein is deceptive and misleading and was designed to increase sales of the Products. Defendant's misrepresentations are part of its systematic Product packaging practice.

41. Plaintiffs and Class members paid the full price of the Products and received less of what Defendant represented they would be getting due to the non-functional slack-fill in the Products. In order for Plaintiffs and Class members to be made whole, Plaintiffs and Class members would have to receive enough of the sugar-free gum so that there is no non-functional slack-fill or have paid less for the Products. In the alternative, Plaintiffs and members of the Class are damaged by the percentage of non-functional slack-fill relative to the purchase price they paid.

42. There is no practical reason for the non-functional slack-fill used to package the Products other than to mislead consumers as to the actual volume of the Products being purchased by consumers.

43. In reliance on Defendant's deception, consumers – including Plaintiffs and members of the proposed Class – have purchased Products that contain non-functional slack-fill.

43. Under the FDCA, the term "false" has its usual meaning of "untruthful," while the term "misleading" is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire food is misbranded. No other statement in the labeling cures a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove

that anyone was actually misled. Consumer protection laws of the fifty states and the District of Columbia have substantially identical requirements as the FDCA.

44. Defendant's packaging and advertising of the Misbranded Products violate various state laws against misbranding. For example, New York State law broadly prohibits the misbranding of food in language identical to that found in regulations promulgated pursuant to the FDCA § 403, 21 U.S.C. 343. Under New York Agm. Law § 201, the law specifically provides that "[f]ood shall be deemed to be misbranded ... If its container is so made, formed, colored or filled as to be misleading." Similarly, California's Business & Professions Code § 12606.2 provides that "No food containers shall be made, formed, or filled as to be misleading." CA B&P Code 12606.2(b). Further, "[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill." CA B&P Code 12606.2(c).

45. Non-functional slack-fill is defined as the difference between the actual capacity of a container and the volume of product contained therein.

46. Defendant's Products are misbranded under state consumer protection laws and state food and drug laws because they misled Plaintiffs and Class members about the volume of the Products in comparison to the size of the Products' packaging. The size of the containers in relation to the actual amount of the Products contained therein gives the false impression that the consumer is buying more than they are actually receiving.

47. The types of misrepresentations made above would be considered by a reasonable consumer when deciding to purchase the Products. A reasonable person would attach importance to whether Defendant's Products are "misbranded," *i.e.*, not legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

48. Plaintiffs and Class members did not know, and had no reason to know, that the Products contained non-functional slack-fill.

49. Defendant's Product packaging was a material factor in Plaintiffs' and Class members' decisions to purchase the Products. In reliance on Defendant's Product packaging, Plaintiffs and Class members believed that they were getting more of the Products than was actually being sold. Had Plaintiffs and Class members known Defendant's Products contained non-functional slack-fill, they would not have bought the Products.

50. At the point of sale, Plaintiffs and Class members did not know, and had no reason to know, that the Products contained non-functional slack-fill as set forth herein, and would not have bought the Products had they known the truth about them.

51. Defendant's packaging with non-functional slack-fill is misleading and in violation of the FDCA and consumer protection laws of each of the fifty states and the District of Columbia, and the Products at issue are misbranded as a matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held or sold in the United States. Plaintiffs and Class members would not have bought the Products had they known they were misbranded and illegal to sell or possess.

52. As a result of Defendant's misrepresentations, Plaintiffs and thousands of others throughout the United States purchased the Products.

53. Plaintiffs and the Class (defined below) have been damaged by Defendant's deceptive and unfair conduct in that they purchased Products with non-functional slack-fill and paid prices they otherwise would not have paid.

**CLASS ACTION ALLEGATIONS**

***The Nationwide Class***

54. Plaintiffs brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class (the “Class”):

All persons or entities in the United States who made retail purchases of Products during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

***The New York Class***

55. Plaintiff HU seeks to represent a class consisting of the following subclass (the “New York Class”):

All New York residents who made retail purchases of Products during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

***The California Class***

56. Plaintiff PEERY seeks to represent a class consisting of the following subclass (the “California Class”):

All California residents who made retail purchases of Products during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

The proposed Classes exclude current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant’s legal representatives, heirs, successors, assigns, and any entity in which it has or has had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

57. Plaintiffs reserve the right to revise the Class definition based on facts learned in the course of litigating this matter.

58. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time

and can only be ascertained through the appropriate discovery, Plaintiffs believe that there are thousands of members in the proposed Class. Other members of the Class may be identified from records maintained by Defendant and may be notified of the pendency of this action by mail, or by advertisement, using the form of notice similar to that customarily used in class actions such as this.

59. 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 wrongful conduct.

60. Plaintiffs will fairly and adequately protect the interests of the members of the Class in that Plaintiffs have no interests antagonistic to those of the other members of the Class. Plaintiffs have retained experienced and competent counsel.

61. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages sustained by individual Class members may be relatively small, the expense and burden of individual litigation make it impracticable for the members of the Class to individually seek redress for the wrongful conduct alleged herein. If Class treatment of these claims were not available, Defendant would likely unfairly receive hundreds of thousands of dollars or more in improper charges.

62. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the common questions of law fact to the Class are:

- i. Whether Defendant labeled, packaged, marketed, advertised and/or sold Products to Plaintiffs and Class members, using false, misleading and/or deceptive packaging and labeling;
- ii. Whether Defendant's actions constitute violations of 21 U.S.C. § 343(d);

- iii. Whether Defendant omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising and/or sale of Products;
- iv. Whether Defendant's labeling, packaging, marketing, advertising and/or selling of Products constituted an unfair, unlawful or fraudulent practice;
- v. Whether the packaging of the Products during the relevant statutory period constituted unlawful non-functional slack-fill;
- vi. Whether, and to what extent, injunctive relief should be imposed on Defendant to prevent such conduct in the future;
- vii. Whether the members of the Class have sustained damages as a result of Defendant's wrongful conduct;
- viii. The appropriate measure of damages and/or other relief;
- ix. Whether Defendant has been unjustly enriched by its scheme of using false, misleading and/or deceptive labeling, packaging or misrepresentations, and;
- x. Whether Defendant should be enjoined from continuing their unlawful practices.

63. The class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class action.

64. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by any individual class member are too small to make it economically feasible for an individual class member to prosecute a separate action, and it is desirable for judicial efficiency to concentrate the litigation of the claims in this

forum. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action.

65. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

66. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Class predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

67. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interest of all members of the Class, although certain Class members are not parties to such actions.

68. Defendant's conduct is generally applicable to the Class as a whole and Plaintiffs seek, inter alia, equitable remedies with respect to the Class as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

**CAUSES OF ACTION**

**COUNT I**

**INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349  
(DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)**

69. Plaintiff HU realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

70. Plaintiff HU brings this claim individually and on behalf of the other members of the Class for an injunction for violations of New York's Deceptive Acts or Practices Law, General Business Law ("NY GBL") § 349.

71. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

72. Under the New York Gen. Bus. Code § 349, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law [§] 349 . . . claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

73. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Products in packaging resulting in non-functional slack-fill are unfair, deceptive and misleading and are in violation of the NY GBL § 349. Moreover, New York State law broadly prohibits the misbranding of foods in language identical to that found in regulations promulgated pursuant to the FDCA § 403, 29 U.S.C. 343(d). Under New York Agm. Law § 201, "[f]ood shall be deemed to be misbranded . . . If its container is so made, formed, colored or filled as to be misleading."

74. The foregoing deceptive acts and practices were directed at consumers.

75. Defendant should be enjoined from packaging its Products with non-functional slack-fill as described above pursuant to NY GBL § 349, New York Agm. Law § 201, and the FDCA, 21 U.S.C. § 343(d).

76. Plaintiff HU, on behalf of herself and all others similarly situated, respectfully demands a judgment enjoining Defendant's conduct, awarding costs of this proceeding and attorneys' fees, as provided by NY GBL, and such other relief as this Court deems just and proper.

## **COUNT II**

### **VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)**

77. Plaintiff HU realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

78. Plaintiff HU brings this claim individually and on behalf of the other members of the Class for violations of NY GBL § 349.

79. Any person who has been injured by reason of any violation of NY GBL § 349 may bring an action in her own name to enjoin such unlawful act or practice, an action to recover her actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

80. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misbranding its Products as seeming to contain more in the packaging than is actually included.

81. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Products in packages resulting in non-functional slack-fill are unfair, deceptive and misleading and are in violation of the NY GBL § 349, New York Agm. Law § 201 and the FDCA, 21 U.S.C. § 343(d) in that said Products are misbranded.

82. The foregoing deceptive acts and practices were directed at consumers.

83. Plaintiff HU and the other Class members suffered a loss as a result of Defendant's deceptive and unfair trade acts. Specifically, as a result of Defendant's deceptive and unfair acts and practices, Plaintiff HU and the other Class members suffered monetary losses associated with the purchase of Products, i.e., receiving less than the capacity of the packaging due to approximately 33% non-functional slack-fill in the Products. In order for Plaintiff HU and Class members to be made whole, they need to receive either the price premium paid for the Products or a refund of the purchase price of the Products equal to the percentage of non-functional slack-fill in the Products.

### **COUNT III**

#### **VIOLATIONS OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT, Cal. Civ. Code § 1750, *et seq.***

84. Plaintiff PEERY realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

85. Plaintiff PEERY brings this claim individually and on behalf of the other members of the California Class for Defendant's violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1761(d).

86. Plaintiff PEERY and California Class members are consumers who purchased the Products for personal, family or household purposes. Plaintiff PEERY and the California Class members are "consumers" as that term is defined by the CLRA in Cal. Civ. Code § 1761(d).

Plaintiff PEERY and the California Class members are not sophisticated experts with independent knowledge of corporate branding, labeling and packaging practices.

87. Products that Plaintiff PEERY and other California Class members purchased from Defendant were “goods” within the meaning of Cal. Civ. Code § 1761(a).

88. Defendant’s actions, representations, and conduct have violated, and continue to violate the CLRA, because they extend to transactions that intended to result, or which have resulted in, the sale of goods to consumers.

89. Defendant violated federal and California law because the Products contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

90. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5) of the CLRA, because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents that the Products have quantities which they do not have.

91. Cal. Civ. Code § 1770(a)(9) further prohibits “[a]dvertising goods or services with intent not to sell them as advertised.” By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(9), because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it advertises goods with the intent not to sell the goods as advertised.

92. Plaintiff PEERY and the California Class members are not sophisticated experts about the corporate branding, labeling and packaging practices. Plaintiff PEERY and the California Class acted reasonably when they purchased the Products based on their belief that Defendant's representations were true and lawful.

93. Plaintiff PEERY and the California Class suffered injuries caused by Defendant because (a) they would not have purchased the Products on the same terms absent Defendant's illegal and misleading conduct as set forth herein; (b) they paid a price premium for the Products due to Defendant's misrepresentations and deceptive packaging with non-functional slack-fill; and (c) the Products did not have the quantities as promised.

94. On or about April 29, 2015, prior to filing this action, a CLRA notice letter was served on Defendant which complies in all respects with California Civil Code § 1782(a). Plaintiff PEERY sent THE HERSHEY COMPANY, on behalf of herself and the proposed Class, a letter via certified mail, return receipt requested, advising Defendant that they are in violation of the CLRA and demanding that they cease and desist from such violations and make full restitution by refunding the monies received therefrom. A true and correct copy of Plaintiff PEERY's letter is attached hereto as **EXHIBIT C**.

95. Wherefore, Plaintiff PEERY seeks damages, restitution, and injunctive relief for these violations of the CLRA.

#### **COUNT IV**

#### **VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW, California Business & Professions Code §§ 17200, et seq.**

96. Plaintiff PEERY realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

97. Plaintiff PEERY brings this claim individually and on behalf of the members of the proposed California Class for Defendant's violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq.

98. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising ...."

99. Defendant violated federal and California law because the Products contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

100. Defendant's business practices, described herein, violated the "unlawful" prong of the UCL by violating Section 403(r) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 343(d), California Health & Safety Code § 110690, the CLRA, and other applicable law as described herein.

101. Defendant's business practices, described herein, violated the "unfair" prong of the UCL in that their conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits. Defendant's advertising is of no benefit to consumers, and its failure to comply with the FDCA and parallel California labeling requirements and deceptive advertising concerning the quantity of the Products offends the public policy advanced by the FDCA to ensure that "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2)(A).

102. Defendant violated the "fraudulent" prong of the UCL by misleading Plaintiff PEERY and the California Class to believe that the Products contained more contents than they

actually do and that such packaging and labeling practices were lawful, true and not intended to deceive or mislead the consumers.

103. Plaintiff PEERY and the California Class members are not sophisticated experts about the corporate branding, labeling, and packaging practices of the Products. Plaintiff PEERY and the California Class acted reasonably when they purchased the Products based on their belief that Defendant's representations were true and lawful.

104. Plaintiff PEERY and the California Class lost money or property as a result of Defendant's UCL violations because (a) they would not have purchased the Products on the same terms absent Defendant's illegal conduct as set forth herein, or if the true facts were known concerning Defendant's representations; (b) they paid a price premium for the Products due to Defendant's misrepresentations; and (c) the Products did not have the quantities as promised.

#### **COUNT V**

##### **VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW, California Business & Professions Code §§ 17500, et seq.**

105. Plaintiff PEERY realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

106. Plaintiff PEERY brings this claim individually and on behalf of the members of the proposed California Class for Defendant's violations of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*

107. Under the FAL, the State of California makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, ... in any advertising device ... or in any other manner or means whatever, including over the Internet, any statement, concerning ... personal property or services, professional or otherwise, or 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.”

108. Defendant engaged in a scheme of offering misbranded Products for sale to Plaintiff PEERY and the California Class members by way of packaging the Products with non-functional slack-fill. Such practice misrepresented the content and quantity of the misbranded Products. Defendant’s advertisements and inducements were made in California and come within the definition of advertising as contained in Bus. & Prof. Code § 17500, et seq. in that the product packaging was intended as inducements to purchase Defendant’s Products. Defendant knew that these statements were unauthorized, inaccurate, and misleading.

109. Defendant violated federal and California law because the Products contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

110. Defendant violated § 17500, et seq. by misleading Plaintiff PEERY and the California Class to believe that the packaging with non-functional slack-fill made about the Products were true as described herein.

111. Defendant knew or should have known, through the exercise of reasonable care that the Products were and continue to be misbranded, and that their representations about the quantity of the Products were untrue and misleading.

112. Plaintiff PEERY and the California Class lost money or property as a result of Defendant’s FAL violations because (a) they would not have purchased the Products on the same terms absent Defendant’s illegal conduct as set forth herein, or if the true facts were known concerning Defendant’s representations; (b) they paid a price premium for the Products due to

Defendant's misrepresentations; and (c) the Products did not have the characteristics, benefits, or quantities as promised.

## **COUNT VI**

### **VIOLATION OF ILLINOIS' CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS § 505, et seq.**

113. Plaintiff JOHN DOE (ILLINOIS) realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

114. Plaintiff JOHN DOE (ILLINOIS) brings this claim individually and on behalf of the other members of the Illinois Class for violations of Illinois's Consumer Fraud and Deceptive Business Practice Act, ("ICFA"), 815 ILC § 505, et seq.

115. Plaintiff JOHN DOE (ILLINOIS) and Illinois Class members are consumers who purchased the Products for personal, family or household purposes. Plaintiff JOHN DOE (ILLINOIS) and the Illinois Class members are "consumers" as that term is defined by the ICFA, 815 ILC § 505/1(e) as they purchased the Products for personal consumption or of a member of their household and not for resale.

116. Products that Plaintiff JOHN DOE (ILLINOIS) and other Illinois Class members purchased from Defendant were "merchandise" within the meaning of the ICFA, 815 ILC § 505/1(b).

117. Under Illinois law, 815 ILC § 505/2, "[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." By

engaging in the conduct set forth herein, Defendant violated and continues to violate § 505/2 of the ICFA, because Defendant's conduct constitutes unfair methods of competition and unfair or deceptive acts or practices, in that it misrepresents that the Products have quantities which they do not have.

118. Defendant's packaging with non-functional slack-fill constitute a deceptive act or practice under the ICFA because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

119. Defendant intended that Plaintiff JOHN DOE (ILLINOIS) and other members of the Illinois Class rely on their deceptive act or practice.

120. Defendant's deceptive act or practice occurred in the course of trade or commerce. "The terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property...." 815 ILC § 505/1(f). Defendant's deceptive act or practice occurred in the advertising, offering for sale, sale, or distribution of the Products.

121. Plaintiff JOHN DOE (ILLINOIS) and the Illinois Class suffered actual damage proximately caused by Defendant because (a) they would not have purchased the Products on the same terms absent Defendant's illegal and misleading conduct as set forth herein, or if the true facts were known concerning Defendant's representations; (b) they paid a price premium for the Products due to Defendant's misrepresentations and deceptive packaging with non-functional slack-fill; and (c) the Products did not have the characteristics, benefits, or quantities as promised.

122. Wherefore, Plaintiff JOHN DOE (ILLINOIS) seeks damages, restitution, and injunctive relief for these violations of the ICFA.

**COUNT VII**

**VIOLATION OF FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT,  
Fla. Stat. Ann. § 501.201, et seq.**

123. Plaintiff JOHN DOE (FLORIDA) realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

124. Plaintiff JOHN DOE (FLORIDA) brings this claim individually and on behalf of the Florida Class for Defendant's violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, et seq.

125. Section 501.204(1) of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") makes "unfair or deceptive acts or practices in the conduct or any trade or commerce" in Florida unlawful.

126. Throughout the Class Period, by advertising, marketing, distributing, and/or selling the Products with the packaging with non-functional slack-fill, to Plaintiff JOHN DOE (FLORIDA) and other Florida Class members, Defendant violated the FDUTPA by engaging in false advertising concerning the content and quantity of the Products.

127. Defendant has made and continue to make deceptive, false and misleading statements concerning the quantities of its Products, namely manufacturing, selling, marketing, packaging and advertising the Products with false and misleading statements concerning its quantities, as alleged herein. Defendant violated federal and Florida law because the Products contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

128. Plaintiff JOHN DOE (FLORIDA) and other Florida Class members seek to enjoin such unlawful acts and practices as described above. Each of the Florida Class members will be

irreparably harmed unless the unlawful actions of Defendant are enjoined in that they will continue to be unable to rely on the Defendant's packaging with non-functional slack-fill.

129. Had Plaintiff JOHN DOE (FLORIDA) and the Florida Class members known the misleading and/or deceptive nature of Defendant's claims, they would not have purchased the Products.

130. Plaintiff JOHN DOE (FLORIDA) and the Florida Class members were injured in fact and lost money as a result of Defendant's conduct of improperly packaging the Products with non-functional slack-fill. Plaintiff JOHN DOE (FLORIDA) and the Florida Class members paid for Defendant's premium priced Products, but received Products that were worth less than the Products for which they paid.

131. Plaintiff JOHN DOE (FLORIDA) and the Florida Class seek declaratory relief, enjoining Defendant from continuing to disseminate their false and misleading statements, actual damages plus attorney's fees and court costs, and other relief allowable under the FDUTPA.

### **COUNT VIII**

#### **VIOLATION OF MICHIGAN'S CONSUMER PROTECTION ACT, MCL §§ 445.901. *et seq.***

132. Plaintiff JOHN DOE (MICHIGAN) realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

133. Plaintiff JOHN DOE (MICHIGAN) brings this claim individually and on behalf of the Michigan Class for Defendant's violations under the Michigan Consumer Protection Act, MCL §§ 445.901. *et seq.* (the "MCPA").

134. Defendant's actions constitute unlawful, unfair, deceptive and fraudulent actions/practices as defined by the MCPA, MCL §445.901, *et seq.*, as they occurred in the course of trade or commerce.

135. As part of its fraudulent marketing practices Defendant engaged in a pattern and practice of knowingly and intentionally making numerous false representations and omissions of material facts, with the intent to deceive and fraudulently induce reliance by Plaintiff JOHN DOE (MICHIGAN) and the members of the Michigan Class. These false representations and omissions were uniform and identical in nature as they all represent that the Products contain more contents than they actually do.

136. Defendant has made and continue to make deceptive, false and misleading statements concerning the quantities of its Products, namely manufacturing, selling, marketing, packaging and advertising the Products with false and misleading statements concerning its quantities, as alleged herein. Defendant violated federal and Michigan law because the Products contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

137. Had Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class known the misleading and/or deceptive nature of Defendant's claims, they would not have purchased the Products. Defendant's acts, practices and omissions, therefore, were material to Plaintiffs' decision to purchase the Products at a premium price, and were justifiably relied upon by Plaintiffs.

138. The unfair and deceptive trade acts and practices have directly, foreseeably and proximately caused damage to Plaintiff JOHN DOE (MICHIGAN) and other members of the Michigan Class.

139. The Defendant's practices, in addition, are unfair and deceptive because they have caused Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class substantial harm, which is

not outweighed by any countervailing benefits to consumers or competition, and is not an injury consumers themselves could have reasonably avoided.

140. The Defendant's acts and practices have misled and deceived the general public in the past, and will continue to mislead and deceive the general public into the future, by, among other things, causing them to purchase Products with false and misleading statements concerning its content and quantity at a premium price.

141. Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class are entitled to preliminary and permanent injunctive relief ordering the Defendant to immediately cease these unfair business practices, as well as disgorgement and restitution to Plaintiff JOHN DOE (Michigan) and the Michigan Class of all revenue associated with their unfair practices, or such revenues as the Court may find equitable and just.

### **COUNT IX**

#### **VIOLATION OF NEW JERSEY'S CONSUMER FRAUD ACT, N.J.S.A.56:8-1, *et seq.***

142. Plaintiff JOHN DOE (NEW JERSEY) realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

143. Plaintiff JOHN DOE (NEW JERSEY) bring this claim individually and on behalf of the other members of the New Jersey Class for violations of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*

144. At all relevant times, Defendant was and is a "person," as defined by N.J.S.A. 56:8-1(d).

145. At all relevant times, Defendant's Products constituted "merchandise," as defined by N.J.S.A. 56:8-1(c).

146. At all relevant times, Defendant's manufacturing, branding, labeling, packaging, sales and/or distribution of the Products at issue met the definition of "advertisement" set forth by N.J.S.A. 56:8-1(a).

147. At all relevant times, Defendant's manufacturing, branding, labeling, packaging, sales and/or distribution of the Products at issue met the definition of "sale" set forth by N.J.S.A. 56:8-1(e).

148. N.J.S.A. 56:8-2 provides that "[t]he act, use or employment by any person of any unconscionable practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission, ...is declared to be an unlawful practice..."

149. Defendant has made and continue to make deceptive, false and misleading statements concerning the quantities of its Products, namely manufacturing, selling, marketing, packaging and advertising the Products with false and misleading statements concerning its quantities, as alleged herein. Defendant violated federal and New Jersey law because the Products contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

150. As described in detail above, Defendant uniformly misrepresented to Plaintiff JOHN DOE (NEW JERSEY) and each member of the New Jersey Class the Products' quantity by means of their branding, labeling and packaging.

151. Defendant has therefore engaged in practices which are unconscionable, deceptive and fraudulent and which are based on false pretenses, false promises, misrepresentations, and the knowing concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission in their manufacturing, branding, labeling,

packaging, selling and distribution of the Products. Defendant has therefore violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq.

152. As a direct and proximate result of Defendant's improper conduct, Plaintiff JOHN DOE (NEW JERSEY) and other members of the New Jersey Class have suffered damages and ascertainable losses of moneys and/or property, by paying more for the Products than they would have, and/or by purchasing the Products which they would not have purchased, if the quantity of the Products had not been misrepresented, in amounts to be determined at trial.

## **COUNT XI**

### **NEGLIGENT MISREPRESENTATION (All States and the District of Columbia)**

153. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

154. Defendant, directly or through its agents and employees, made false representations, concealment and nondisclosures to Plaintiffs and members of the Class. Defendant, through its deceptive packaging of the Products, makes uniform representations regarding the Products.

155. Defendant, as the manufacturers, packagers, labelers and initial sellers of the Products purchased by the Plaintiffs, had a duty to disclose the true nature of the Products and not sell the Products with non-functional slack-fill. Defendant had exclusive knowledge of material facts not known or reasonably accessible to the Plaintiffs; Defendant actively concealed material facts from the Plaintiffs and Defendant made partial representations that are misleading because some other material fact has not been disclosed. Defendant's failure to disclose the information it had a duty to disclose constitutes material misrepresentations and materially

misleading omissions which misled the Plaintiffs who relied on Defendant in this regard to disclose all material facts accurately and truthfully and fully.

156. Plaintiffs and members of the Class reasonably relied on Defendant's representation that their Product contains more product than actually packaged.

157. In making the representations of fact to Plaintiffs and members of the Class described herein, Defendant has failed to fulfill their duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendant's negligence and carelessness.

158. Defendant, in making the misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true. Defendant made and intended the misrepresentations to induce the reliance of Plaintiffs and members of the Class.

159. Plaintiffs and members of the Class would have acted differently had they not been misled – i.e. they would not have paid money for the Products in the first place.

160. Defendant has a duty to correct the misinformation they disseminated through the deceptive packaging of the Products. By not informing Plaintiffs and members of the Class, Defendant breached their duty. Defendant also profited financially as a result of this breach.

161. Plaintiffs and members of the Class relied upon these false representations and nondisclosures by Defendant when purchasing the Products, upon which reliance was justified and reasonably foreseeable.

162. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs and members of the Class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for Products, and any interest

that would have been accrued on all those monies, all in an amount to be determined according to proof at time of trial.

163. Defendant acted with intent to defraud, or with reckless or negligent disregard of the rights of Plaintiffs and members of the Class.

164. Plaintiffs and members of the Class are entitled to damages, including punitive damages.

## **COUNT XII**

### **COMMON LAW FRAUD (All States and the District of Columbia)**

165. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

166. Defendant intentionally made materially false and misleading representations regarding the size of the Products.

167. Plaintiffs and members of the Class were induced by, and relied on, Defendant's false and misleading packaging, representations and omissions and did not know at the time that they were purchasing the Products that they were purchasing Products that contained unlawful non-functional slack-fill.

168. Defendant knew or should have known of its false and misleading labeling, packaging and misrepresentations and omissions. Defendant nevertheless continued to promote and encourage customers to purchase the Products in a misleading and deceptive manner. Had Defendant adequately disclosed the true size of the Products, Plaintiffs and Class members would not have purchased the Products.

169. Plaintiffs and members of the Class have been injured as a result of Defendant's fraudulent conduct.

170. Defendant is liable to Plaintiffs and members of the Class for damages sustained as a result of Defendant's fraud. In order for Plaintiffs and Class members to be made whole, they need to receive either the price premium paid for the Products or a refund of the purchase price of the Products equal to the percentage of non-functional slack-fill in the Products.

## **COUNT XII**

### **UNJUST ENRICHMENT (All States and the District of Columbia)**

171. Plaintiffs reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

172. As a result of Defendant's deceptive, fraudulent and misleading labeling, packaging, advertising, marketing and sales of Products, Defendant were enriched, at the expense of and members of the Class, through the payment of the purchase price for Defendant's Products.

173. Plaintiffs and members of the Class conferred a benefit on Defendant through purchasing the Products, and Defendant has knowledge of this benefit and has voluntarily accepted and retained the benefits conferred on it.

174. Defendant will be unjustly enriched if it is allowed to retain such funds, and each Class member is entitled to an amount equal to the amount they enriched Defendant and for which Defendant has been unjustly enriched.

175. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that they received from Plaintiffs, and all others similarly situated, in light of the fact that the volume of the Products purchased by Plaintiffs and the Class, was not what Defendant purported it to be by its labeling and packaging. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiffs,

and all others similarly situated, for selling its Products in packaging resulting in non-functional slack-fill. In order for Plaintiffs and Class members to be made whole, they need to receive either the price premium paid for the Products or a refund of the purchase price of the Products equal to the percentage of non-functional slack-fill in the Products.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, prays for relief and judgment against Defendant as follows:

(A) For an Order certifying the nationwide Class and under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representatives of the Class and Plaintiffs' attorneys as Class Counsel to represent members of the Class;

(B) For an Order declaring the Defendant's conduct violates the statutes referenced herein;

(C) For an Order finding in favor of Plaintiffs and members of the Class;

(D) For compensatory and punitive damages in amounts to be determined by the Court and/or jury;

(E) For prejudgment interest on all amounts awarded;

(F) For an Order of restitution and all other forms of equitable monetary relief;

(G) For injunctive relief to repackage the Products without non-functional slack-fill as pleaded or as the Court may deem proper;

(H) For an Order awarding Plaintiffs and members of the Class their reasonable attorneys' fees and expenses and costs of suit; and

(I) For such other and further relief as the Court deems just and proper.

**DEMAND FOR TRIAL BY JURY**

Plaintiffs, individually and on behalf of all others similarly situated, hereby demands a jury trial on all claims so triable.

Dated: June 24, 2015

Respectfully submitted,

**LEE LITIGATION GROUP, PLLC**

C.K. Lee (CL 4086)

30 East 39<sup>th</sup> Street, Second Floor

New York, NY 10016

Tel.: 212-465-1188

Fax: 212-465-1181

*Attorneys for Plaintiffs and the Class*



By: C.K. Lee, Esq.

# EXHIBIT A

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## Ice Breakers® Ice Cubes Chewing Gum (Peppermint)



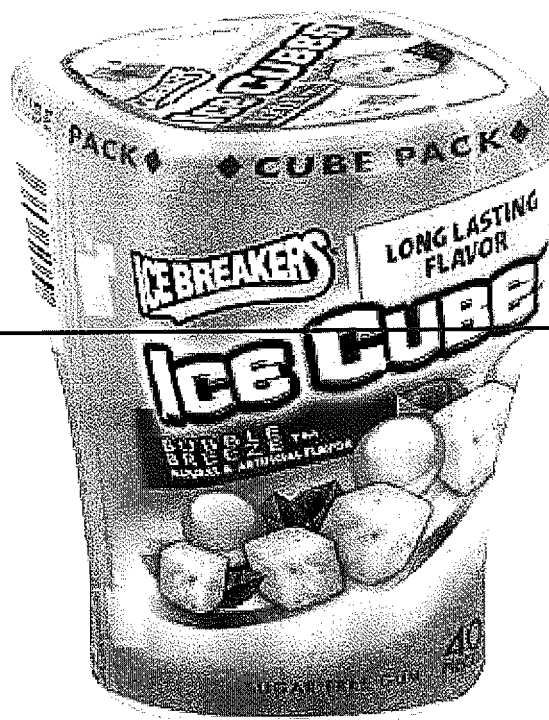
## Ice Breakers® Ice Cubes Chewing Gum (Spearmint)



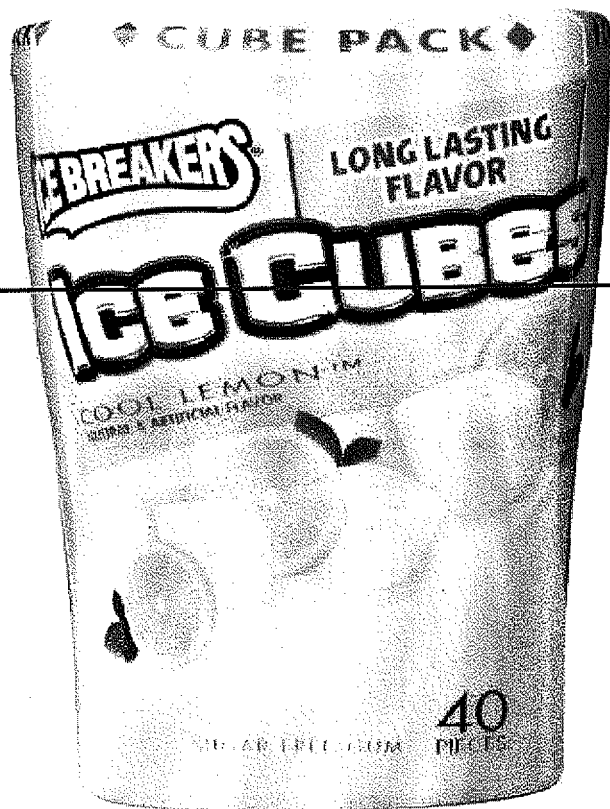
## Ice Breakers® Ice Cubes Chewing Gum (Arctic Grape)



## Ice Breakers® Ice Cubes Chewing Gum (Bubble Breeze)



## Ice Breakers® Ice Cubes Chewing Gum (Cool Lemon)



## Ice Breakers® Ice Cubes Chewing Gum (Wintergreen)



## Ice Breakers® Ice Cubes Chewing Gum (Raspberry Sorbet)

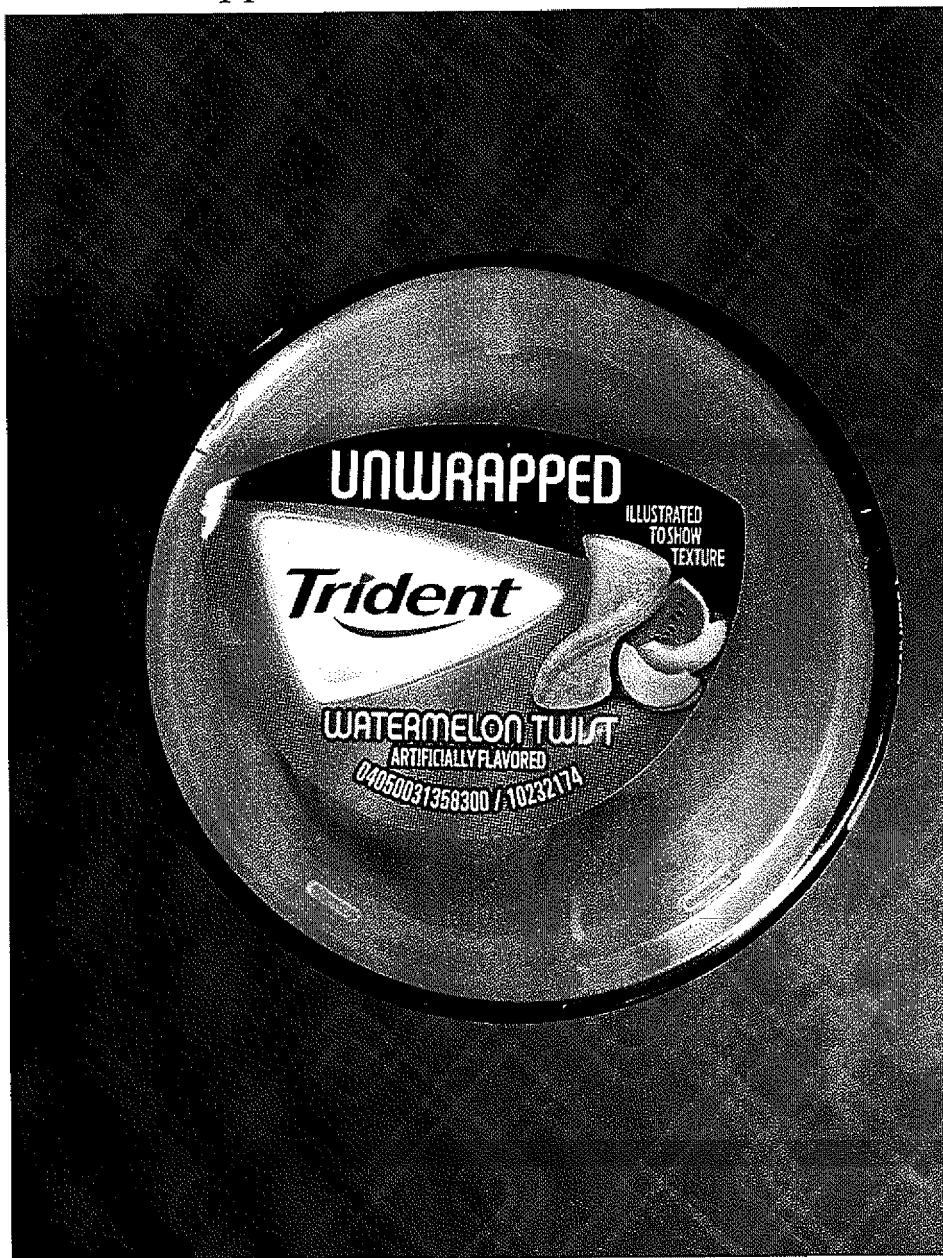


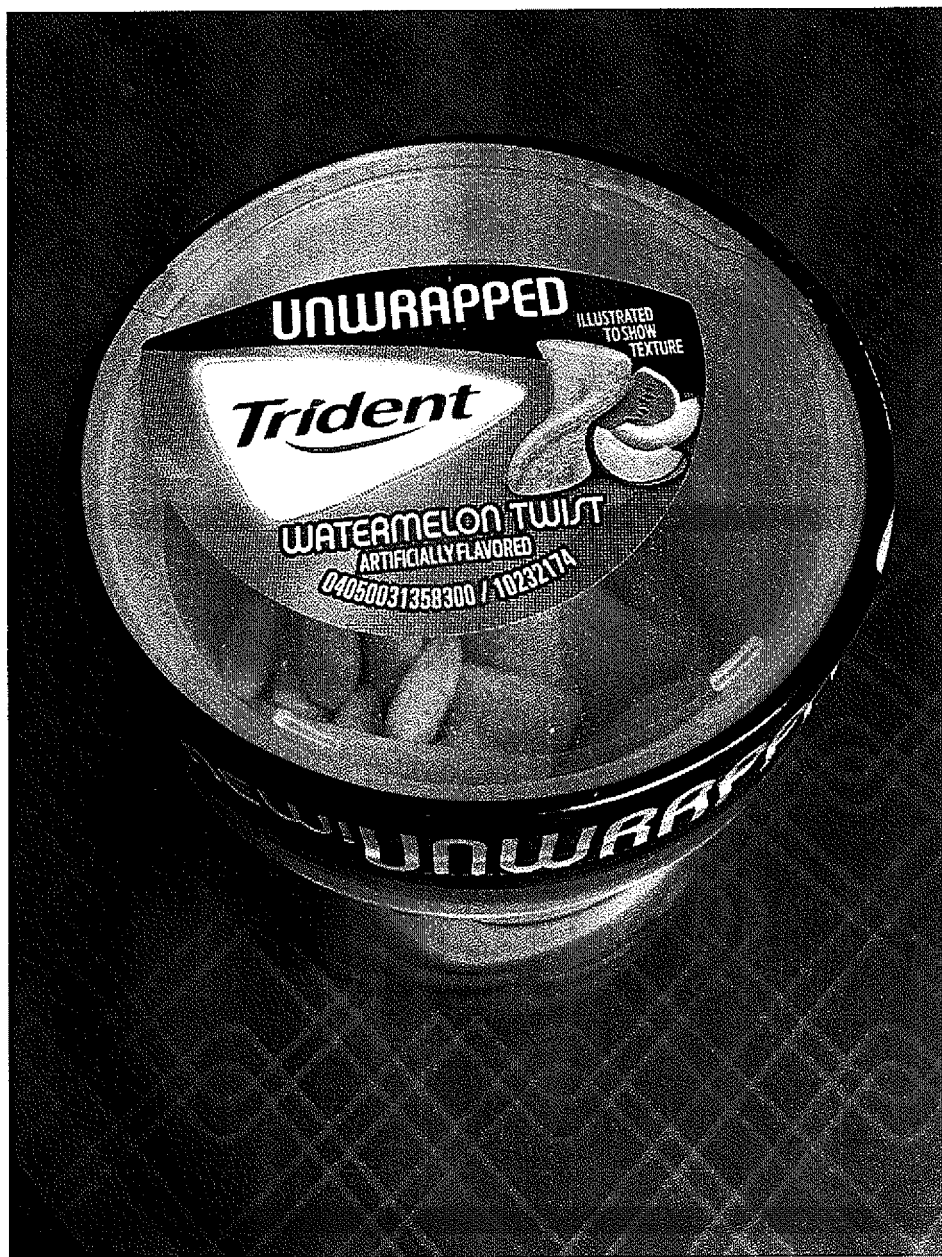
## Ice Breakers® Ice Cubes Chewing Gum (Strawberry Smoothie)



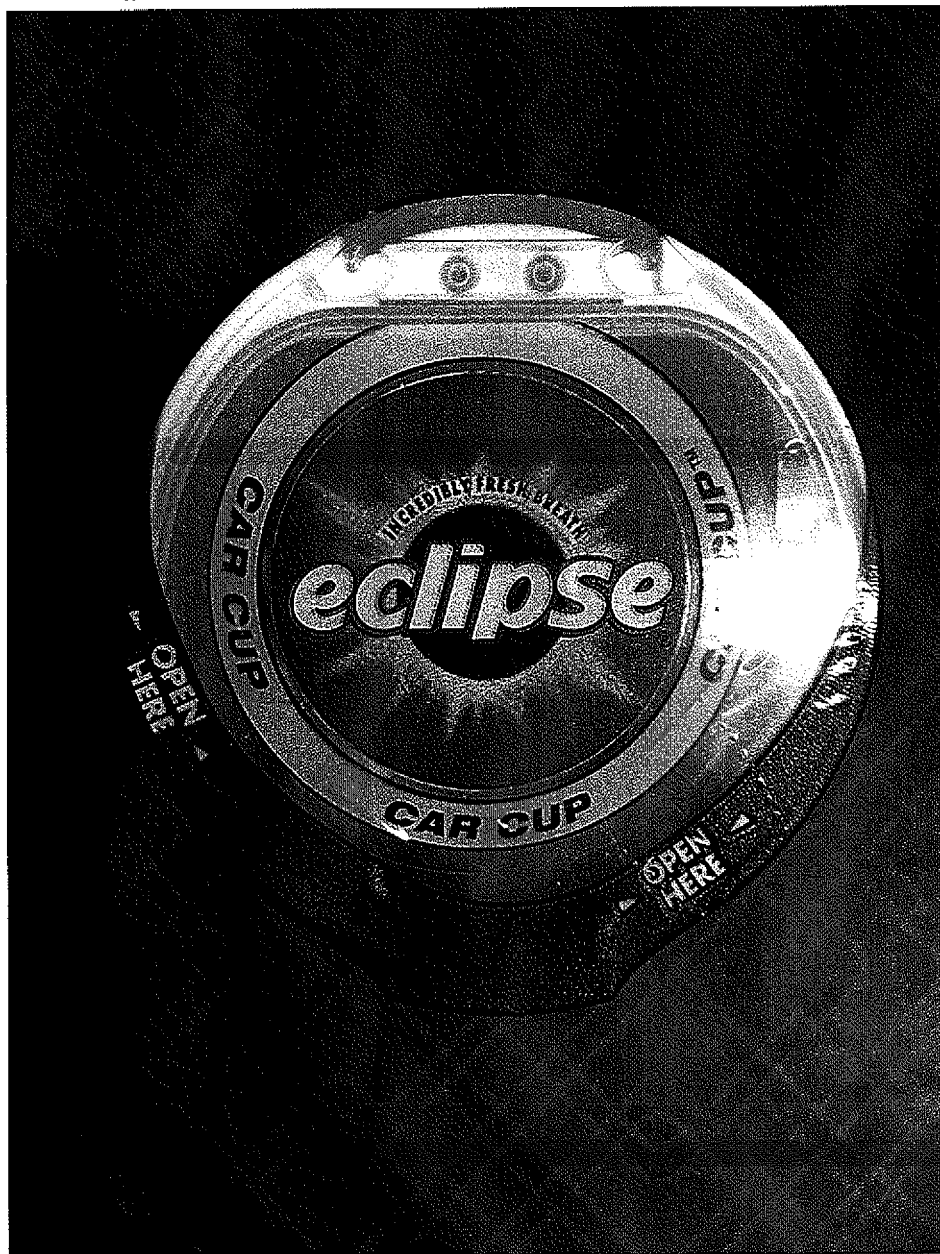
# **EXHIBIT B**

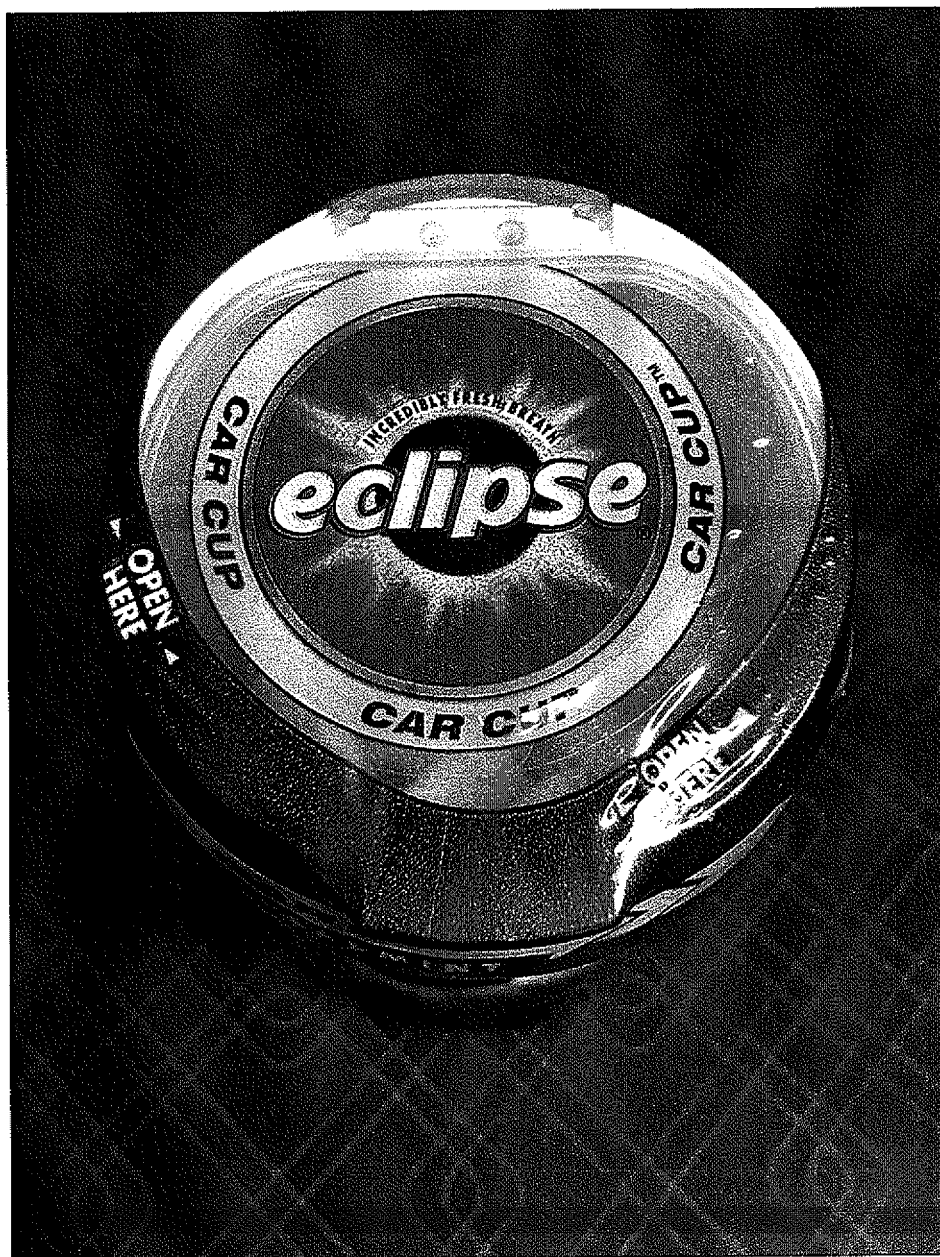
## Trident Unwrapped – Watermelon Twist Chewing Gum



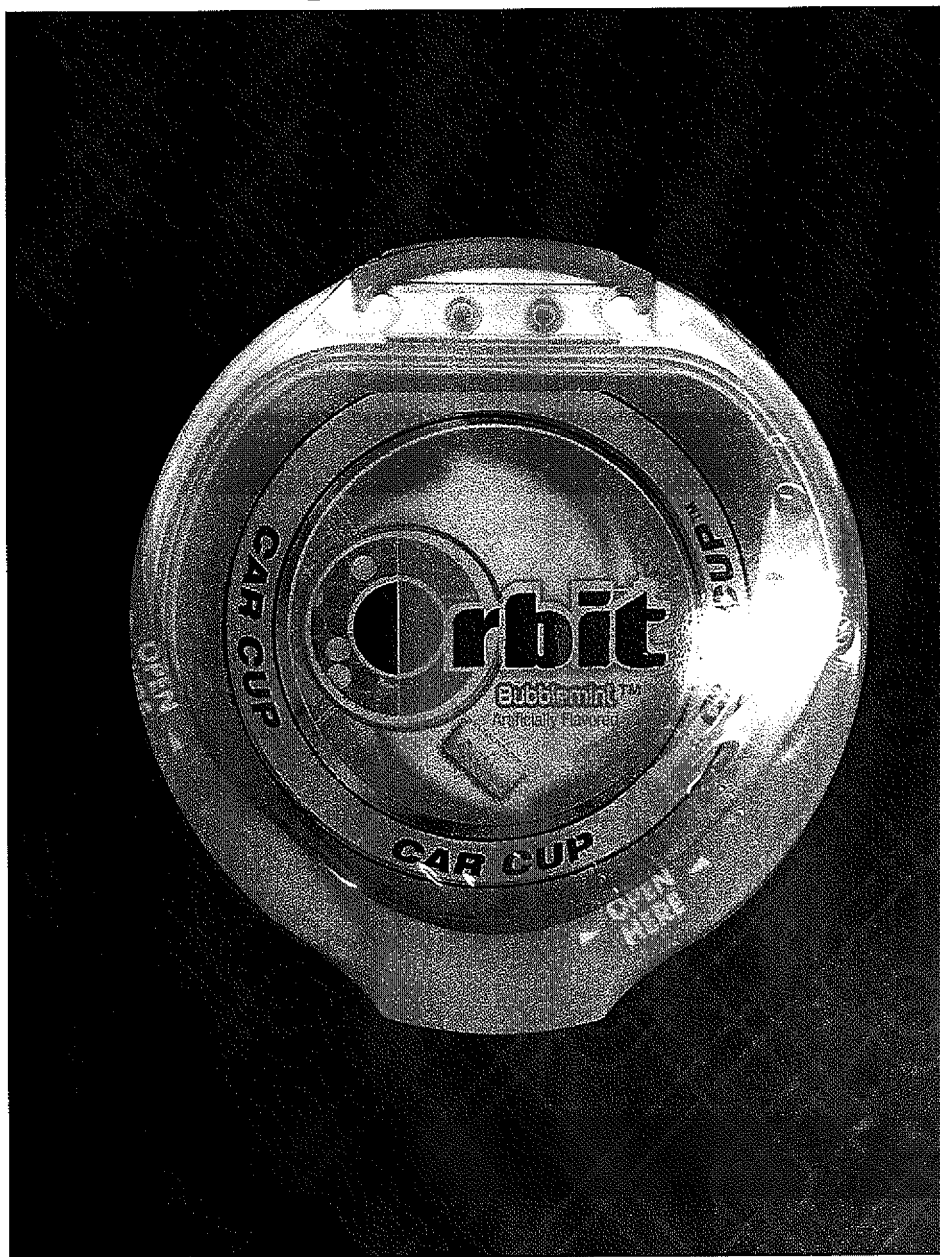


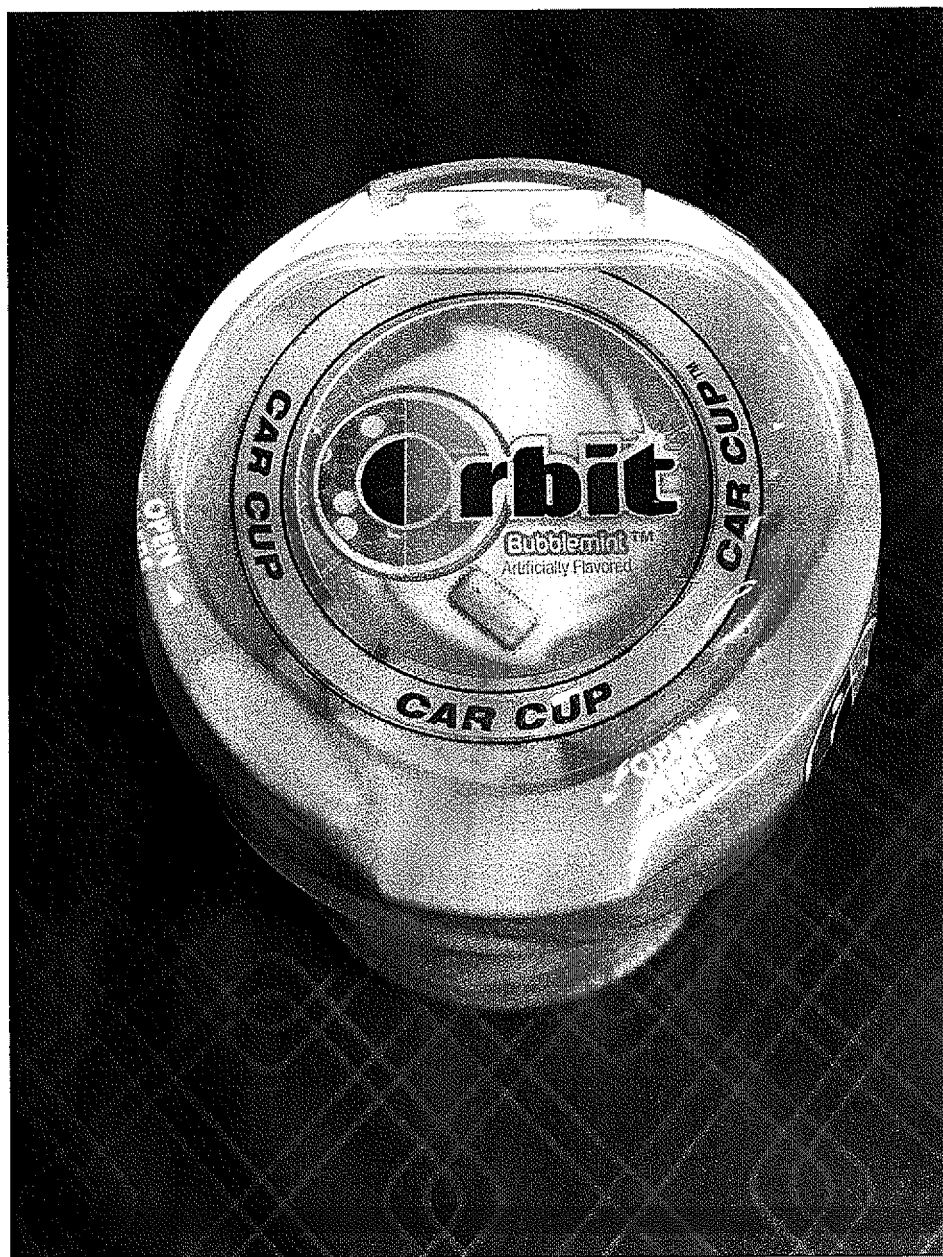
## Eclipse Cap Cup Chewing Gum - Spearmint



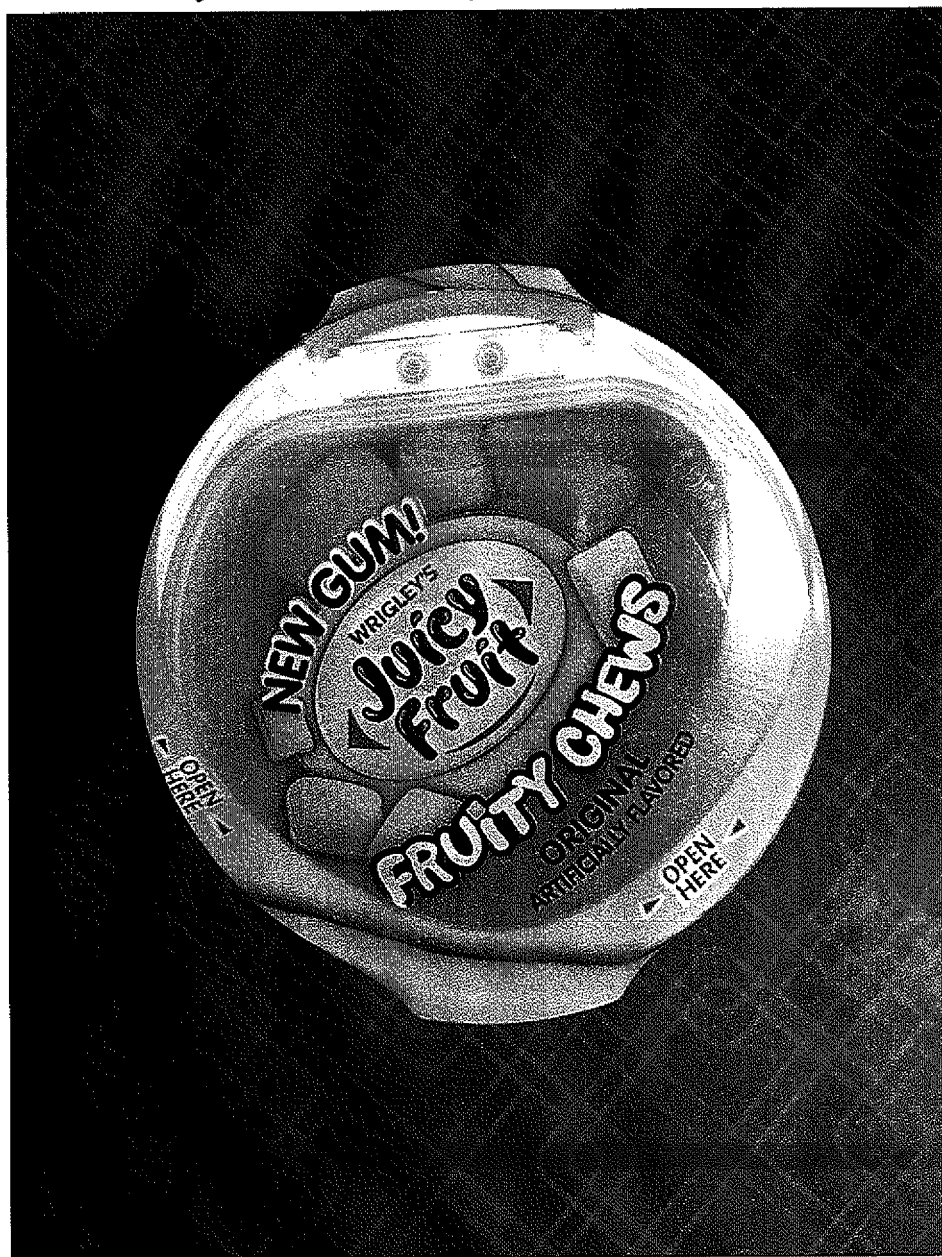


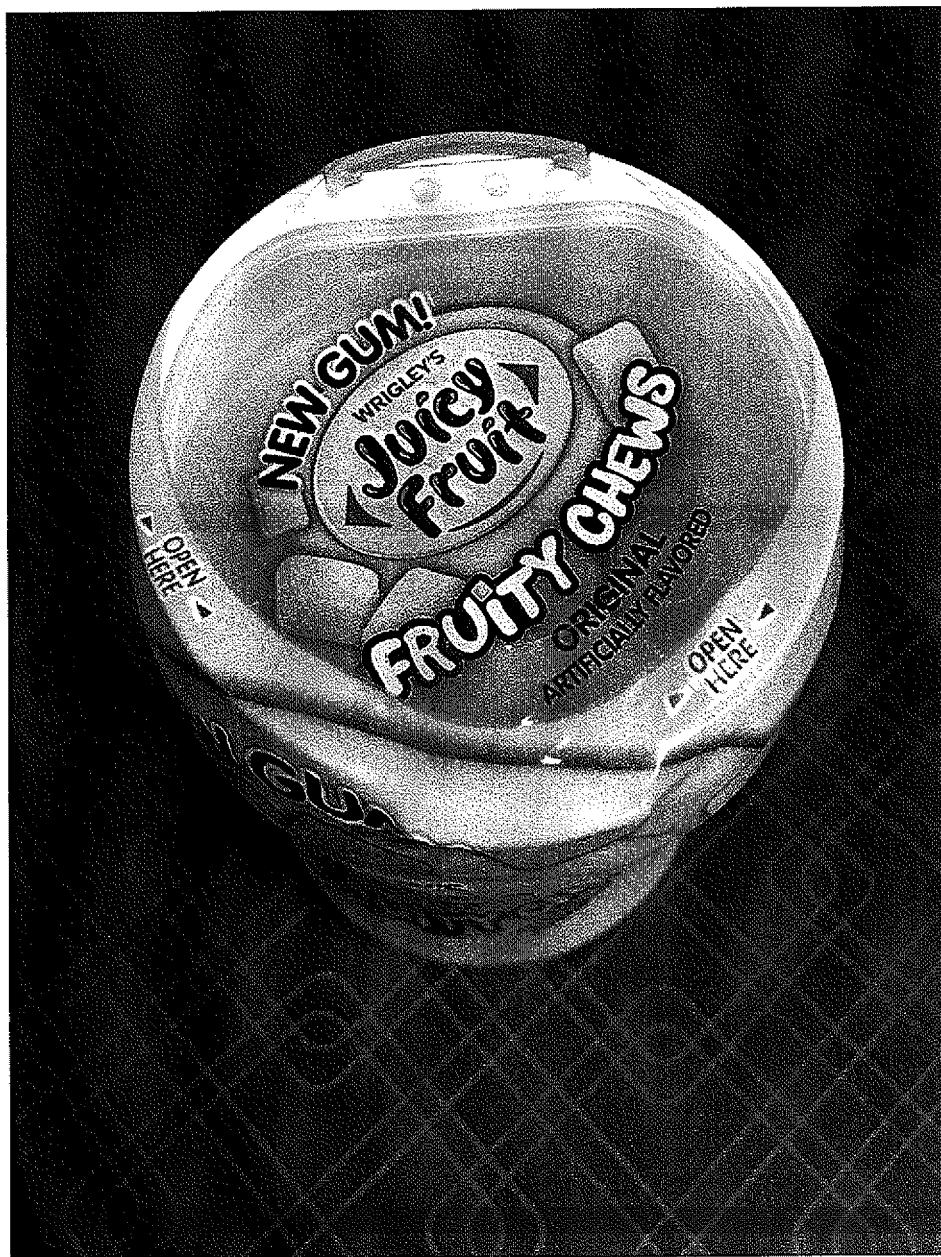
## Orbit Car Cup Chewing Gum - Bubblemint





## Juicy Fruit – Fruity Chews - Original





# EXHIBIT C

## LEE LITIGATION GROUP, PLLC

30 EAST 39<sup>TH</sup> STREET, SECOND FLOOR

NEW YORK, NY 10016

TEL: 212-465-1180

FAX: 212-465-1181

INFO@LEELITIGATION.COM

WRITER'S DIRECT: 212-465-1188  
cklee@leelitigation.com

April 29, 2015

**VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Legal Department  
The Hershey Company  
100 Crystal A Drive  
Hershey, PA 17033

Re: Demand Letter re: Ice Breakers® Ice Cubes (Peppermint)  
Ice Breakers® Ice Cubes (Spearmint)  
Ice Breakers® Ice Cubes (Arctic Grape)  
Ice Breakers® Ice Cubes (Bubble Breeze)  
Ice Breakers® Ice Cubes (Cool Lemon)  
Ice Breakers® Ice Cubes (Wintergreen)  
Ice Breakers® Ice Cubes (Raspberry Sorbet)  
Ice Breakers® Ice Cubes (Strawberry Smoothie)  
(together, the “Products”)

To Whom It May Concern:

This demand letter serves as a notice and demand for corrective action on behalf of my client, Michelle Peery and all other persons similarly situated, arising from violations of numerous provisions of California law including the Consumers Legal Remedies Act, Civil Code § 1770, including but not limited to subsections (a)(5) and (9) and violations of consumer protection laws of each of the fifty states and the District of Columbia. This demand letter serves as notice pursuant to state laws concerning your deceptive and misleading Product packaging.

You have participated in the manufacture, marketing and sale of the Ice Breakers® Ice Cubes chewing gum Products. The Products are packaged in containers made, formed or filled as to be misleading, contain non-functional slack fill and violate the Federal Food Drug & Cosmetic Act (“FDCA”) Section 403 (21 U.S.C. 343) and consumer protection laws of each of the fifty states and the District of Columbia. As a result, consumers are misled as to the volume of the Products.

Ms. Michelle Peery, a resident of California, purchased the Ice Breakers® Ice Cubes Products in the Wintergreen flavor in reliance on the packaging and is acting on behalf of a class defined as all persons in each of the fifty states and the District of Columbia who purchased the Products (hereafter, the “Class”).

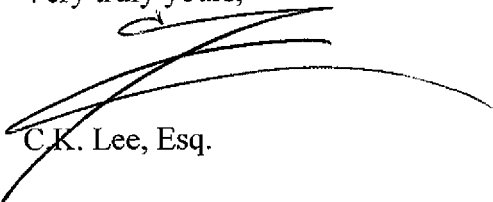
To cure the defects described above, we demand that you (i) cease and desist from continuing to package the Products with non-functional slack fill; (ii) issue an immediate recall on any Products with non-functional slack fill; and (iii) make full restitution to all purchasers throughout the United States of all purchase money obtained from sales thereof.

We further demand that you preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to the following:

- (i) All documents concerning the manufacture, labeling and packaging process for the Products;
- (ii) All communications with the U.S. Food and Drug Administration concerning the product development, labeling, packaging, marketing and sales of the Products;
- (iii) All documents concerning the advertisement, marketing, or sale of the Products; and
- (iv) All communications with customers concerning complaints or comments concerning the Products.

We are willing to negotiate to attempt to resolve the demands asserted in this letter. If you wish to enter into such discussions, please contact me immediately. If I do not hear from you promptly, I will conclude that you are not interested in resolving this dispute short of litigation. If you contend that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents promptly.

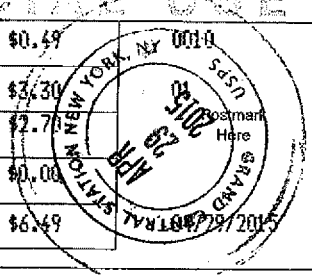
Very truly yours,



C.K. Lee, Esq.

7014 2870 0000 2949 7963

U.S. Postal Service	
CERTIFIED MAIL® RECEIPT	
Domestic Mail Only	
For delivery information, visit our website at <a href="http://www.usps.com">www.usps.com</a> ®	
HERSHEY PA 17033	
Postage	\$ 01.49
Certified Fee	\$3.30
Return Receipt Fee (Endorsement Required)	\$2.70
Restricted Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$ 6.49
Sent To Legal Department, The Hershey Company Street & Apt. No. or PO Box No. 100 Crystal A Drive City, State, ZIP+4 Hershey, PA 17033	
PS Form 3800, July 2014 See Reverse for instructions	



JS 44 (Rev. 1/2013)

## CIVIL COVER SHEET

The Civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of insulating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

Michelle Hu, Michelle Peery, John Doe (Illinois), John Doe (Michigan), John Doe (New Jersey), John Doe (Florida) and John Does 1-100

## DEFENDANTS

The Hershey Company

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

County of Residence of First Listed Defendant **Dauphin**  
(IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number)

C.K. Lee, Esq., Lee Litigation Group, PLLC  
30 East 39th Street, Second Floor, New York, NY 10018  
Tel.: (212) 465-1188

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |  |  |                                |   |
|--|--|--------------------------------|---|
| <input checked="" type="checkbox"/> 1 Citizen of This State        | <input type="checkbox"/> 1 Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 PTF | <input type="checkbox"/> 4 DEF            |
| <input type="checkbox"/> 2 Citizen of Another State                | <input type="checkbox"/> 2 Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 PTF | <input checked="" type="checkbox"/> 5 DEF |
| <input type="checkbox"/> 3 Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 Foreign Nation  | <input type="checkbox"/> 6 PTF | <input type="checkbox"/> 6 DEF            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act (Excludes Veterans) <input type="checkbox"/> 152 Recovery of Defaulted Student Loans <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from Another District (specify)  
☐ 6 Multidistrict Litigation

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
**28 U.S.C. 1332(d); New York General Business Law Section 349**  
 Brief description of cause:  
**Deceptive and Unfair Trade Practices**

## VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S)

IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

4653089869

15-3741

### CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, C.K. Lee, counsel for Plaintiffs, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- ☒ monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- ☒ the complaint seeks injunctive relief,
- ☐ the matter is otherwise ineligible for the following reason

### DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

### RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that "A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

### NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
  - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? No
  - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? \_\_\_\_\_

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

### BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

☒ Yes

☐ No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐ Yes

(If yes, please explain)

☒ No

I certify the accuracy of all information provided above.

Signature: \_\_\_\_\_