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individually and on behalf of a class
11 of similarly situated individuals

12 (Additional counsel on signature page)

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 TOMAS JOHNSON, individually and
on behalf of a class of similarly situated
16 individuals,

17 Plaintiff,

18 v.

19 EN-R-G FOODS, LLC, a Colorado
limited liability company, doing
20 business as Honey Stinger; EN-R-G
HOLDINGS, INC., a Colorado
21 corporation; and DOES 1 through 5,

22 Defendants.

) Case No.

) **CLASS ACTION COMPLAINT**
) **FOR:**

-) **1. Fraudulent Inducement;**
-) **2. Cal. Comm. Code § 2313;**
-) **3. Cal. Civil Code §1750;**
-) **4. Cal. Bus. & Profs. Code**
-) **§17500;**
-) **5. Cal. Bus. & Profs. Code**
-) **§17200;**
-) **6. Unjust Enrichment.**

) **DEMAND FOR JURY TRIAL**

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1 Plaintiff Tomas Johnson (“Plaintiff”) bring this action on his own behalf and
2 on behalf of the Class and subclass he seeks to represent, based upon his own
3 personal knowledge as to himself and his own acts and upon information and belief
4 and the investigation of his counsel as to all other matters, and allege as follows:

5 **NATURE OF THE CASE**

6 1. Defendants mislabel, misbrand, and falsely advertise Honey Stinger
7 Gluten Free Organic Maple Waffles (the “Product”) as containing maple syrup when
8 maple syrup is not an ingredient in the Product.

9 2. Defendants’ conduct breaches their express warranties with consumers,
10 constitutes false advertising, violates the California Consumer Legal Remedies Act,
11 the California False Advertising Law, the California Unfair Competition Law, the
12 California Sherman Food, Drug, and Cosmetic Law, the Federal Food, Drug, and
13 Cosmetic Act, the federal Food, Drug and Cosmetic Act, 28 U.S.C. § 343 (“FDCA”),
14 various federal regulations, and constitutes fraudulent inducement and unjust
15 enrichment.

16 3. Plaintiff brings this action on behalf of himself and on behalf of a class
17 and subclass of purchasers to stop Defendants from mislabeling their organic maple
18 waffles as containing maple when maple syrup is not an ingredient in the Product. In
19 addition, Plaintiff, on behalf of himself and the proposed classes, seeks damages,
20 restitution and other equitable, injunctive, declaratory, and monetary relief as set forth
21 below.

22 **PARTIES**

23 4. Plaintiff Tomas Johnson (“Plaintiff”) is a resident of Los Angeles
24 County, California. He purchased Honey Stinger Gluten Free Organic Maple Waffles
25 in retail stores located in Orange County, California.

26 5. Defendant EN-R-G FOODS, LLC is a Colorado limited liability
27 company and does business under the fictitious business name “Honey Stinger”.
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1 EN-R-G FOODS, LLC has its principal place of business in Steamboat Springs,
2 Colorado and maintains a registered agent for service of process at 735 Oak Street,
3 Steamboat Springs, Colorado 80487.

4 6. Defendant EN-R-G HOLDINGS, INC. is a Colorado corporation, has its
5 principal place of business in Steamboat Springs, Colorado, and maintains a
6 registered agent for service of process at 735 Oak Street, Steamboat Springs,
7 Colorado 80487. Based on information and belief, EN-R-G HOLDINGS, INC. is a
8 member of, controls, and/or has an ownership interest in EN-R-G FOODS, LLC and
9 is responsible for the conduct of EN-R-G FOODS, LLC alleged in this complaint.

10 7. Plaintiff is currently ignorant of the true names and capacities, whether
11 individual, corporate, associate, or otherwise, of the Defendants sued herein under the
12 fictitious names Does 1 through 5, inclusive, and therefore, sues such Defendants by
13 such fictitious names. Plaintiff will seek leave to amend this complaint to allege the
14 true names and capacities of said fictitiously named Defendants when their true
15 names and capacities have been ascertained. Plaintiff is informed and believes and
16 based thereon alleges that each of the fictitiously named Doe Defendants is legally
17 responsible in some manner for the events and occurrences alleged herein, and for the
18 damages suffered by Plaintiff and the classes.

19 8. Plaintiff is informed and believes and based thereon alleges that all
20 defendants, including the fictitious Doe Defendants, were at all relevant times acting
21 as actual agents, conspirators, ostensible agents, partners and/or joint venturers and
22 employees of all other defendants, and that all acts alleged herein occurred within the
23 course and scope of said agency, employment, partnership, and joint venture,
24 conspiracy or enterprise, and with the express and/or implied permission, knowledge,
25 consent, authorization and ratification of their co-Defendants; however, each of these
26 allegations are deemed “alternative” theories whenever not doing so would result in a
27 contradiction with the other allegations.

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1 9. All Defendants, including Does 1 through 5, are collectively referred to
2 as “Defendants” or “Honey Stinger.”

3 10. Whenever this complaint refers to any act of Defendants, the allegations
4 shall be deemed to mean the act of those defendants named in the particular cause of
5 action, and each of them, acting individually, jointly and severally, unless otherwise
6 alleged.

7 **JURISDICTION & VENUE**

8 11. This Court has original jurisdiction over this action pursuant to 28
9 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of
10 a state different from Defendants, (b) the amount in controversy exceeds \$5,000,000,
11 exclusive of interest and costs, and (c) none of the exceptions under that subsection
12 apply to this action.

13 12. This Court has personal jurisdiction over Defendants because they
14 conduct operations and/or sales in California and the acts alleged herein originated in
15 this District.

16 13. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a
17 substantial part of the events giving rise to the claims occurred in this District and
18 because Plaintiff Johnson resides in this District.

19 **COMMON ALLEGATIONS OF FACT**

20 **Consumer Preferences and Expectations Regarding** 21 **Products Containing Maple Syrup**

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23 14. Maple syrup is a premium ingredient that companies add to sweeten
24 food products. Maple syrup is preferred over other sweeteners for a variety of
25 reasons including taste, quality, health benefits, origin, among others.

26 15. Maple syrup contains an abundant amount of naturally occurring
27 minerals such as calcium, manganese, potassium and magnesium. It is also a source
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1 of beneficial antioxidants that have been shown to help prevent cancer, support the
2 immune system, lower blood pressure and slow the effects of aging. See
3 <http://vermontmaple.org> (last visited August 14, 2016).

4 16. Maple syrup is believed to have a higher nutritional value than all other
5 common sweeteners. See <http://vermontmaple.org> (last visited August 14, 2016).

6 17. Defendants claim to use maple syrup in Honey Stinger Gluten Free
7 Organic Maple Waffles. The Product prominently displays the words “organic
8 maple” on its packaging along with images of an iconic maple leaf and maple syrup
9 splashed on a waffle.

10 18. Consumers reasonably rely on the name of the Product along with these
11 images and statements to indicate that the Product contains maple syrup.

12 19. Food products that are represented as containing maple syrup command
13 a premium in the marketplace. In addition, companies increase sales when they
14 represent that a Product contains maple syrup.

15 **Honey Stinger Mislabels Gluten Free Organic Maple Waffles**
16 **as Containing Maple Syrup**

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18 20. Defendants manufacture, promote, distribute, and sell Honey Stinger
19 Gluten Free Organic Maple Waffles. The Product is sold online directly from
20 Defendants as well as in various retail stores across the nation, such as sporting goods
21 and health food stores.

22 21. On the front packaging of all of the Products, Honey Stinger places a
23 prominent image of a maple leaf and maple syrup splashed on the waffle. Further,
24 the words “Organic Maple Waffle” appear prominently, in large type, on the Product
25 label.

26 22. The front packaging of the Product is the same as, or substantially
27 similar to the image depicted below.
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23. Despite this representation, the Product does not contain any maple syrup, and is therefore misbranded under state and federal laws.

24. In making their purchasing decisions, consumers, including Plaintiff and Class Members, reasonably rely on the labeling (such as the name of the Product, images of maple syrup or a maple leaf, and the declaration of “organic maple” on the front packaging) to inform them of whether the Products contain maple syrup.

25. The presence of maple syrup, a premium ingredient, in the Product has a material bearing on consumers’ (including Plaintiff and Class Members’) purchasing decisions.

26. According to the Vermont Maple Sugar Makers’ Association and over ten other maple industry groups, these business practices injure consumers and maple

1 syrup manufacturers:

2 This unchecked misbranding has an adverse impact on
3 manufacturers of products containing real maple syrup, as it
4 allows cheaper products not containing premium
5 ingredients to compete with those actually containing maple
6 syrup. Further, it deceives consumers into believing they are
7 purchasing a premium product when, in fact, they have a
8 product of substantially lower quality.

9 27. See Feb. 15, 2016 Letter from Vermont Maple Sugar Makers'
10 Association to the Food and Drug Administration available at
11 <https://consumermediallc.files.wordpress.com/2016/02/fdamaple.pdf> (last visited
12 August 14, 2016); see also, March 10, 2016 letter from various members of Congress
13 to Food and Drug Administration Commissioner available at
14 https://www.leahy.senate.gov/imo/media/doc/FINAL_Letter_FDA_Maple%20Labeling_3.10.16.pdf (last visited August 14, 2016).

15 28. Accordingly, Plaintiff and members of the Class have been harmed
16 because they were induced to purchase and/or pay a price premium for the Product
17 based on Defendants' untrue and misleading statements.

18 **Plaintiff's Individual Allegations**

19 29. In or around February, May, and September 2015, Plaintiff Tomas
20 Johnson purchased Honey Stinger Gluten Free Organic Maple Waffles at REI stores
21 in various places, including Huntington Beach, in Orange County, California.

22 30. Plaintiff viewed and relied upon the name of the Product "organic maple
23 waffle" and an image of an iconic maple leaf and maple syrup splashed on a waffle
24 prominently displayed on the front packaging of the Product. These images and
25 statements were the same as or substantially similar to the representations depicted in
26 paragraph 22 above.

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1 31. Because he was purchasing a Product that was represented to contain
2 maple syrup, he reasonably believed that it, in fact, contained maple syrup.

3 32. Plaintiff relied on these representations when forming his purchasing
4 decisions and was deceived into making a purchase based on these representations.

5 33. Had Plaintiff known the truth, he would not have purchased the Product
6 as offered for sale, or would not have paid as much. As a result, Plaintiff was
7 harmed.

8 34. In addition to monetary damages, Plaintiff seeks injunctive relief to stop
9 Defendants from mislabeling the Product and to inform consumers that the Product
10 do not contain any maple syrup.

11 **CLASS ACTION ALLEGATIONS**

12 35. Plaintiff Johnson brings this action pursuant to Federal Rule of Civil
13 Procedure 23(b)(2) and Rule 23(b)(3) on behalf of himself and a class defined as
14 follows:

15 **Nationwide Class:** All individuals in the United States
16 who, during the period from four years prior to the filing of
17 this Complaint through the date of class certification
purchased Honey Stinger Gluten Free Organic Maple
Waffles.

18 36. Plaintiff Johnson also brings this action pursuant to Federal Rule of Civil
19 Procedure 23(b)(2) and 23(b)(3) on behalf of himself and a subclass defined as
20 follows:

21 **California Subclass:** All individuals who, during the period
22 from four years prior to the filing of this Complaint through
23 the date of class certification purchased Honey Stinger
Gluten Free Organic Maple Waffles in California.

24 37. Excluded from the Class and Subclass are Defendants, any entity in
25 which any Defendant has a controlling interest or which has a controlling interest in
26 any Defendant, and Defendants' agents, legal representatives, predecessors,
27 successors, assigns, and employees. Also excluded from the Class and Subclass are
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1 the judge and staff to whom this case is assigned, and any member of the judge's
2 immediate family.

3 38. Plaintiff reserves the right to revise the definition of the Class and/or
4 subclass, based on facts learned during discovery.

5 39. The exact number of persons in the Class and Subclass as herein
6 identified and described, is unknown but is estimated to number in the thousands. The
7 Class and Subclass are so numerous that joinder of individual members herein is
8 impracticable.

9 40. Plaintiff will fairly and adequately represent and protect the interests of
10 the other members of the Class and Subclass. Plaintiff has retained counsel with
11 substantial experience in prosecuting complex litigation and class actions. Plaintiff
12 and his counsel are committed to vigorously prosecuting this action on behalf of the
13 members of the Class and Subclass, and have the financial resources to do so.
14 Neither Plaintiff nor his counsel have any interest adverse to those of the other
15 members of the Class or Subclass.

16 41. Absent a class action, most members of the Class and Subclass would
17 find the cost of litigating their claims to be prohibitive, and will have no effective
18 remedy. The class treatment of common questions of law and fact is also superior to
19 multiple individual actions or piecemeal litigation in that it conserves the resources of
20 the Court and the litigants, and promotes consistency and efficiency of adjudication.

21 42. Defendants have acted and failed to act on grounds generally applicable
22 to all members of the Class and Subclass in falsely advertising and mislabeling the
23 Product as containing maple syrup, requiring the Court's imposition of uniform relief
24 to ensure compatible standards of conduct toward members of the Class and
25 Subclass.

26 43. The factual and legal basis of Defendants' liability to Plaintiff and to the
27 other members of the Class and Subclass are the same, resulting in injury to the
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1 Plaintiff and to all of the other members of the Class and Subclass as a result of the
2 Defendants' conduct of falsely advertising and mislabeling the Product as containing
3 maple syrup. Plaintiff and members of the Class and Subclass have suffered harm
4 and damages as a result of Defendants' unlawful and wrongful conduct.

5 44. There are many questions of law and fact common to the claims of
6 Plaintiff and the other members of the Class and the Subclass, and those questions
7 predominate over any questions that may affect individual members of the Class and
8 Subclass. Common questions for the Class include but are not limited to the
9 following:

- 10 (a) Whether the name of the Product and use of images of maple
11 syrup and a maple leaf constituted an express warranty that the
12 Product contained maple syrup;
- 13 (b) Whether Defendants breached their express warranties with
14 Plaintiff and class members;
- 15 (c) Whether Defendants' labeling is unlawful, unfair, deceptive, or
16 misleading to reasonable consumers under the UCL;
- 17 (d) Whether Defendants' conduct violates the Cal. Bus. & Profs.
18 Code §17200 *et seq.*, Cal. Civil Code §1750 *et seq.*, and Cal. Bus.
19 & Profs. Code § 17500 *et seq.*;
- 20 (e) Whether the Product contains maple syrup;
- 21 (f) Whether a reasonable consumer would expect that products
22 labeled with images of maple syrup and a maple leaf and
23 including "Organic Maple" in the name of the product would in
24 fact contain maple syrup as an ingredient;
- 25 (g) Whether, as a result of Defendants' conduct, Plaintiff and the
26 Class and Subclass are entitled to equitable relief and/or other
27 relief, and, if so, the nature of such relief; and
- 28 (h) The method of calculation and extent of damages for Plaintiff and
members of the Class and Subclass.

FIRST CLAIM FOR RELIEF
Fraudulent Inducement
(On behalf of Plaintiff and the Nationwide Class)

26 45. Plaintiff repeats and re-alleges the allegations of the preceding
27 paragraphs as if fully set forth herein.

1 46. As described with particularity above, Defendants have used and
2 continue to use, marketing tactics they know or reasonably should know are false and
3 misleading.

4 47. To induce Plaintiff and the Nationwide Class into purchasing the
5 Product, Defendants affirmatively represented that the Product contains maple.

6 48. Defendants' affirmative representations were, in fact, false. In particular,
7 the Product does not contain maple.

8 49. The representations made by Defendants were material terms in their
9 transactions with Plaintiff and the Nationwide Class because these representations
10 directly affected Plaintiff's and Class members' purchasing decisions.

11 50. Defendants, as the manufacturers and designers of the Product and their
12 packaging, knew or should have known, with the exercise of reasonable care, that the
13 Product they were offering to consumers does not contain any maple syrup and that
14 consumers would be misled into believing that the Product contained that ingredient.

15 51. Defendants knew or should have known that a number of maple syrup
16 industry groups or associations have jointly complained about this issue as negatively
17 affecting consumers' ability to make informed decisions and causing unfair
18 competition.

19 52. Therefore, Defendants intentionally designed their public
20 representations to mislead consumers about the ingredients and quality of the
21 Product.

22 53. Defendants made these representations with the intent to induce Plaintiff
23 and the Nationwide Class to rely upon them by purchasing the Product.

24 54. Plaintiff and the Nationwide Class were misled by these representations.

25 55. As a result of Defendants' misrepresentations, Plaintiff and Class were
26 deceived into purchasing the Product.

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1 56. As a result of their reasonable reliance on Defendants’
2 misrepresentations, Plaintiff and the Nationwide Class have suffered actual monetary
3 damages in the form of the prices paid for the Product and/or the price premium paid
4 for the Product.

5 **SECOND CLAIM FOR RELIEF**
6 **Violation of the California Commercial Code § 2313,**
7 **Breach of Express Warranty**
8 **(On behalf of Plaintiff and the California Subclass)**

9 57. Plaintiff repeats and re-alleges the allegations of the preceding
10 paragraphs as if fully set forth herein.

11 58. Defendants produced, advertised, marketed, distributed, and sold the
12 Product with the affirmation of fact, promise, and description on the packaging that it
13 contained maple syrup.

14 59. Plaintiff and members of the California Subclass relied on these
15 affirmations of fact, promises, and descriptions in that they were part of the basis of
16 the bargain under which Plaintiff and members of the California Subclass purchased
17 the Product.

18 60. Defendants breached these express warranties by producing, distributing,
19 and marketing the Product to Plaintiff and the California Subclass that did not
20 conform to the affirmations of fact, promises, and/or descriptions made on the
21 packaging (that the Product contained maple syrup).

22 61. Defendants have been on notice of their breach of these express
23 warranties as they manufactured the Product and designed the labeling. Further, they
24 knew or should have known that a number of groups in the maple syrup industry have
25 jointly complained about this issue as negatively affecting consumers and the
26 industry alike.

27 62. As a proximate result of Defendants’ breach of their express warranty,
28 Plaintiff and members of the California Subclass sustained damages, including but

1 not limited to the purchase price of the Product and/or the premium paid for the
2 Product.

3 63. Plaintiff, on behalf of himself and the California Subclass, is entitled to
4 damages and other legal and equitable relief including, a right of reimbursement, as
5 well as costs, expenses and attorneys' fees.

6 64. Plaintiff brings this action as a private attorney general, and to vindicate
7 and enforce an important right affecting the public interest. Plaintiff and the
8 California Subclass are therefore entitled to an award of attorneys' fees under Code
9 of Civil Procedure section 1021.5 for bringing this action.

10 **THIRD CLAIM FOR RELIEF**
11 **Violations of the Consumers Legal Remedies Act,**
12 **California Civil Code § 1750, et seq.**
(On behalf of Plaintiff and the California Subclass)

13 65. Plaintiff repeats and re-alleges the allegations of the preceding
14 paragraphs as if fully set forth herein.

15 66. The California Consumer Legal Remedies Act, Section 1750 of the
16 California Civil Code, protects consumers against fraud, unlawful practices, and
17 unconscionable commercial practices in connection with the sale of any merchandise.

18 67. Plaintiff and members of the California Subclass are "consumers" as
19 defined by Section 1761(d) of California Code because they sought or acquired the
20 Product for personal, family, or household purposes.

21 68. The Product is a "good" within the meaning of Section 1761(a) of the
22 California Civil Code as it is a tangible chattels bought for personal, family, or
23 household purposes.

24 69. Defendants manufactured, licensed, distributed, marketed, and sold the
25 Product as containing maple when, in fact, it does not. Such conduct constitutes a
26 violation of the California Consumer Legal Remedies Act as specified below.

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1 70. Defendants' conduct violated and continues to violate the Consumer
2 Legal Remedies Act by engaging in the following practices proscribed by section
3 1770(a), subsections (2), (5), (7), and (9) of the California Civil Code, respectively, in
4 transactions with Plaintiff and members of the California Subclass, which were
5 intended to result in, and did result in, the sale of the Product in that Defendants:
6 misrepresented the source, sponsorship, approval, or certification of goods or
7 services; misrepresented that goods or services have sponsorship, approval,
8 characteristics, ingredients, uses, benefits, or qualities which they do not have;
9 represented that goods or services are of a particular standard, quality, or grade if they
10 are of another; and advertised goods or services with intent not to sell them as
11 advertised.

12 71. Plaintiff and other members of the California Subclass reasonably relied
13 upon and were deceived by Defendants' representations that the Product contains
14 maple syrup.

15 72. Pursuant to section 1782(d) of the California Civil Code, Plaintiff, on
16 behalf of himself and the California Subclass, seeks a Court order enjoining
17 Defendants from such future conduct and any other such orders that may be
18 necessary to rectify the fraudulent, unlawful, unconscionable commercial practices,
19 and fraudulent business practices of Defendants, including requiring Defendants to
20 cease mislabeling of the Product as containing maple syrup.

21 **FOURTH CLAIM FOR RELIEF**
22 **Violations of California Business and**
23 **Professions Code, § 17500, et seq.,**
24 **(On behalf of Plaintiff and the California Subclass)**

25 73. Plaintiff repeats and re-alleges the allegations of the preceding
26 paragraphs as if fully set forth herein.

1 74. Business and Professions Code Section 17500 prohibits the
2 dissemination of statements that are untrue, misleading, and which are known, or
3 which by the exercise of reasonable care should be known, to be untrue or
4 misleading.

5 75. Defendants' acts and practices violated Business and Professions Code
6 Section 17500, *et seq.* Defendants disseminated untrue and misleading statements to
7 Plaintiff and members of the California Subclass by mislabeling the Product as
8 containing maple syrup.

9 76. Defendants' statements were untrue and misleading in material respects
10 because Plaintiff and the California Subclass would not have purchased the Product,
11 or would have paid less for the Product had they known that the Product did not
12 contain any maple syrup.

13 77. Defendants' use of statements and imagery on the Product's packaging
14 and name had the capacity, likelihood and tendency to deceive and confuse
15 consumers (including Plaintiff and California Subclass members) into believing that
16 the Product contained maple syrup.

17 78. Defendants, as the manufacturers and designers of the Product and the
18 packaging, knew or should have known, with the exercise of reasonable care, that it
19 does not contain any maple syrup and that consumers would be misled into believing
20 that maple syrup was an ingredient in the Product. Therefore, Defendants knew or
21 should have known that their statements were untrue and misleading.

22 79. Plaintiff and members of the California Subclass were induced to
23 purchase and/or pay a price premium for the Product based on Defendants' untrue
24 and misleading statements.

25 80. Plaintiff and members of the California Subclass were aware of, and
26 reasonably relied on Defendants' untrue and misleading statements.

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1 81. Defendants disseminated untrue and misleading statements about the
2 ingredients and quality of the Product with the intent not to sell it as advertised.

3 82. Pursuant to section 17535 of the California Business and Professions
4 Code, Plaintiff, on behalf of himself and the California Subclass seeks restitution and
5 a Court order enjoining Defendants from such future conduct and any other such
6 orders as may be necessary to rectify Defendants' mislabeling and false advertising,
7 including requiring Defendants to cease misrepresenting that the Product contains
8 maple syrup.

9 83. Plaintiff brings this action as a private attorney general, and to vindicate
10 and enforce an important right affecting the public interest. Plaintiff and the
11 California Subclass are therefore entitled to an award of attorneys' fees under Code
12 of Civil Procedure section 1021.5 for bringing this action.

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14 **FIFTH CLAIM FOR RELIEF**
15 **Violations of California Business & Professions Code,**
16 **Section 17200, *et seq.*, Unlawful, Unfair and**
17 **Fraudulent Business Acts and Practices**
18 **(On behalf of Plaintiff and the California Subclass)**

19 84. Plaintiff repeats and re-alleges the allegations of the preceding
20 paragraphs as if fully set forth herein.

21 85. Defendants' acts and practices as detailed herein constitute acts of unfair
22 competition. Defendants have engaged in unlawful, unfair or fraudulent business acts
23 and/or practices within the meaning of California Business & Professions Code,
24 section 17200, *et seq.* Defendants need only violate one of the three prongs of the
25 statute to be held strictly liable.

26 86. Defendants have engaged in "unlawful" business acts and practices by
27 manufacturing, promoting, and distributing the Product as containing maple syrup,
28 when, in fact, maple syrup is not an ingredient in the Product. Defendants' business
acts and practices violate the California Business and Professions Code, section

1 17500, *et seq.* and the California Consumer Legal Remedies Act, California Civil
2 Code, Section 1750, *et seq.*, as alleged herein.

3 87. Defendants’ acts and practices are further “unlawful” because they
4 violate the Federal Food, Drug, and Cosmetic Act (“FDCA”). The FDCA provides
5 that a food product is misbranded if: “its labeling is false or misleading in any
6 particular;” or “if it is an imitation of another food, unless its label bears, in type of
7 uniform size and prominence, the word ‘imitation’ and immediately thereafter, the
8 name of the food imitated.” 21 U.S.C. § 343(a) and (c).

9 88. Defendants’ acts and practices are further “unlawful” because they
10 violate multiple FDA regulations.

11 89. Defendants’ acts and practices violate 21 CFR § 102.5, which governs
12 “characterizing properties or ingredients.” 21 CFR § 102.5 requires that (a) “[t]he
13 common or usual name of a food . . . accurately identify or describe, in as simple and
14 direct terms as possible, the basic nature of the food or its characterizing properties or
15 ingredients;” (b) “the common or usual name of a food shall include the percentage(s)
16 of any characterizing ingredient(s) or component(s) when the proportion of such
17 ingredient(s) or component(s) in the food has a material bearing on price or consumer
18 acceptance or when the labeling or the appearance of the food may otherwise create
19 an erroneous impression that such ingredient(s) or component(s) is present in an
20 amount greater than is actually the case”; and (c) “[t]he common or usual name of a
21 food shall include a statement of the presence or absence of any characterizing
22 ingredient(s) or component(s) . . . when the presence or absence of such ingredient(s)
23 or component(s) in the food has a material bearing on price or consumer acceptance
24 or when the labeling or the appearance of the food may otherwise create an erroneous
25 impression that such ingredient(s) or component(s) is present when it is not.”

26 90. Defendants declare “maple” on their packaging as a characterizing
27 ingredient even where maple syrup (as defined in 21 CFR § 168.140(a)) is not
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1 actually present in the Product. Maple is a substance derived from the heat treatment
2 of sap from the maple tree. None of the ingredients in the Product qualify as maple
3 syrup under this definition.

4 91. Maple syrup is a premium ingredient which has a material bearing on the
5 price and/or consumer acceptance of food products that contain such ingredients,
6 which is why they are frequently an ingredient named in the title of foods or
7 displayed on its packaging. Thus, if a product name includes “maple,” or its
8 packaging emphasizes the presence of maple (e.g., through images of maple syrup or
9 a maple leaf), but the Product does not actually contain any maple syrup, it is
10 unlawfully misbranded under the FDA’s regulations.

11 92. Defendants’ Product is an imitation product because it is a substitute for
12 and resembles organic maple waffles, *i.e.*, the food that has real maple as an
13 ingredient. Defendants’ labels do not bear the word “imitation”, as required by law.

14 93. Defendants’ acts and practices also violate 21 CFR § 101.3, which
15 governs identity labeling of food in packaged forms and provides that a “food that is
16 a substitute for and resembles another food shall not be deemed to be an imitation
17 provided it meets each of the following requirements (i) [i]t is not nutritionally
18 inferior to the food for which it substitutes and which it resembles (ii) [i]ts label bears
19 a common or usual name that complies with the provisions of 102.5 of this chapter
20 and that is not false or misleading or in the absence of an common or usual name, an
21 appropriately descriptive term that is not false or misleading.” Defendants’ organic
22 maple waffles do not satisfy each of these conditions.

23 94. Defendants’ conduct further violates: (1) The California Sherman Food,
24 Drug, and Cosmetic Law (“Sherman Law”), Cal. Health & Safety Code § 110660,
25 which deems food products “misbranded” if their labeling is “false or misleading in
26 any particular; (2) Health & Safety Code § 110100, which adopts all FDA food
27 labeling regulations as state regulations; (3) Health & Safety Code § 110395, which

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1 makes it “unlawful for any person to manufacture, sell, deliver, hold, or offer for sale
2 any food, drug, device, or cosmetic that is falsely advertised;” (4) Health & Safety
3 Code § 110660, which deems that “any food is misbranded if its labeling is false or
4 misleading in any particular” and (5) Health & Safety Code § 110685, which deems
5 that “any food is misbranded if it is offered for sale under the name of another food,
6 or if it is an imitation of another food for which a definition and standard of identity
7 has been established by regulation and its label does not bear, in type of uniform size
8 and prominence the word “imitation,” and immediately following, the name of the
9 food imitated.”

10 95. All of the challenged advertisements and statements made by Defendants
11 thus constitute violations of the Sherman Law and the FDCA, and as such, violate the
12 “unlawful” prong of the UCL.

13 96. Plaintiff reserves the right to identify additional provisions of the law
14 violated by Defendants as further investigation and discovery warrants.

15 97. Defendants’ failure to comply with the above statutes and regulations
16 constitutes an unlawful business act or practice.

17 98. Section 17200 of the California Business & Professional Code also
18 prohibits any “unfair business act or practice.” As described above, Defendants have
19 engaged in “unfair” business acts or practices in that they falsely labeled the Product
20 as containing maple syrup,

21 99. The gravity of the harm to Plaintiff and the California Subclass
22 outweighs any arguable utility of Defendants’ conduct. Plaintiff Johnson’s injury is
23 substantial, is not outweighed by any countervailing benefit to consumers or
24 competition, and is not one that consumers could have reasonably avoided.

25 100. Defendants’ conduct offends California public policy tethered to the
26 California Consumer Legal Remedies Act, the California Business and Professions
27 Code section 17500, the California Sherman Law, and the FDCA, which are intended
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1 to preserve fair competition, to protect consumers from market distortions, and to
2 allow consumers to make informed choices in their purchasing of food products.

3 101. Defendants' actions are immoral, unethical, and/or unscrupulous, and
4 offend established public policy, and have injured Plaintiff and other members of the
5 California Subclass.

6 102. Section 17200 also prohibits any "fraudulent business act or practice."
7 Defendants' conduct constituted "fraudulent" business acts or practices in that their
8 conduct had a tendency and likelihood to deceive persons to whom such conduct was
9 and is targeted by labeling the Product as containing maple, when, in fact, it does not
10 contain maple.

11 103. Plaintiff and members of the California Subclass were deceived by
12 Defendants' representations as to whether the Product contained maple syrup.

13 104. Plaintiff and members of the California Subclass reasonably relied on
14 Defendants' representations. As the California Supreme Court has explained,
15 "Simply stated: labels matter. The marketing industry is based on the premise that
16 labels matter, that consumers will choose one product over another similar product
17 based on its label and various tangible and intangible qualities they may come to
18 associate with a particular source." *Kwikset Corp. v. Superior Court* (2011) 51
19 Cal.4th 310, 328.

20 105. Plaintiff and members of the California Subclass have suffered injuries
21 as a direct and proximate result of the unlawful, unfair, and fraudulent business
22 practices of Defendants in that they purchased a product that they would not have
23 purchased, or they would have paid less for, had they known that the Product did not
24 contain any maple syrup.

25 106. Pursuant to section 17203 of the California Business and Professions
26 Code, Plaintiff, on his own behalf and on behalf of the California Subclass, seeks
27 restitution and a Court order enjoining Defendants from such future conduct and any
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1 other such orders that may be necessary to rectify the unlawful, unfair, and fraudulent
2 business practices of Defendants, including requiring Defendants to cease mislabeling
3 the Product as containing maple syrup.

4 107. Plaintiff brings this action as a private attorney general, and to vindicate
5 and enforce an important right affecting the public interest. Plaintiff and the
6 California Subclass are therefore entitled to an award of attorneys' fees under Code
7 of Civil Procedure section 1021.5 for bringing this action.

8
9 **SIXTH CLAIM FOR RELIEF**
10 **Unjust Enrichment**
11 **(Brought by Plaintiff and the Nationwide Class)**

12 108. Plaintiff repeats and re-alleges the allegations of the preceding
13 paragraphs as if fully set forth herein.

14 109. Plaintiff and the Nationwide Class members conferred a benefit upon
15 Defendants, in the form of the excess prices they paid for the Product over and above
16 the actual value of the Product.

17 110. Defendants had an appreciation or knowledge of the benefit conferred,
18 as demonstrated by the fact that the Product offers no benefits not available from
19 other comparable products unaccompanied by maple claims and/or comparable
20 products in the marketplace that bear similar claims and actually contain maple.

21 111. Defendants' acceptance or retention of these benefits is inequitable
22 under the circumstances as outlined above.

23 112. Plaintiff, on behalf of himself and the Nationwide Class, seeks
24 restitution or, in the alternative, imposition of a constructive trust on the funds
25 inequitably received and retained.

26 WHEREFORE, Plaintiff, prays for the following relief:

- 27 a. An order certifying the Class and Subclass defined above;

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- 1 b. An award of damages, including actual damages, statutory damages
- 2 where applicable;
- 3 c. An injunction requiring Defendants to cease misrepresenting that Honey
- 4 Stinger Gluten Free Organic Maple Waffles contain maple syrup and
- 5 requiring Defendants to retrieve existing false and misleading
- 6 advertising materials, publish corrective advertising, and provide notice
- 7 to consumers who already purchased the Product;
- 8 d. For any and all other relief available under the various statutory and
- 9 common law causes of action asserted herein;
- 10 e. An award of reasonable attorneys' fees and costs;
- 11 f. For pre-judgment interest on the sums owing; and
- 12 g. For such other and further relief as the Court deems just and proper.

13
14 Dated: August 19, 2016

Respectfully submitted,

15
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*Attorneys for Plaintiff Tomas Johnson,
individually and on behalf of a class of
similarly situated individuals*

JURY DEMAND

113. Plaintiff demands a trial by jury of all causes of action and matters so triable.

Dated: August 19, 2016

Respectfully submitted,

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DECLARATION OF DAVID C. PARISI

I, David C. Parisi, hereby declare on oath as follows:

1. I am an attorney licensed to practice law in the state of California. I am over the age of 18 years and I have personal knowledge of the matters attested to herein. If called upon to testify, I would and could competently do so.

2. I make this declaration pursuant to California Civil Code section 1780(d) on behalf of my client, Plaintiff Tomas Johnson, on behalf of himself and all others similarly situated.

3. Defendant EN-R-G FOODS, LLC doing business as Honey Stinger is a Colorado corporation and has its principal place of business in Steamboat Springs, Colorado. It maintains a registered agent for service of process at 735 Oak Street, Steamboat Springs, Colorado 80487 and is doing business in the state of California.

4. Defendant EN-R-G HOLDINGS, INC. is a Colorado corporation and has its principal place of business in Steamboat Springs, Colorado. It maintains a registered agent for service of process at 735 Oak Street, Steamboat Springs, Colorado 80487 and is doing business in the state of California.

5. The transaction or a substantial portion of the transaction identified in the Complaint occurred in Los Angeles County, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 19th day of August 2016 at Venice, California.

 /s/David C. Parisi
David C. Parisi