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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--- x	Case No. 1:17-cv-02402-NRB
SAMELINE ALCE and DESIRÉ NUGENT, *on behalf of themselves and others similarly situated*, :	
Plaintiffs, :	
:	**FIRST AMENDED CLASS ACTION COMPLAINT**
- against - :	
WISE FOODS, INC. :	JURY TRIAL DEMANDED
Defendant.	
--- x	

Plaintiffs SAMELINE ALCE and DESIRÉ NUGENT, 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 be uncovered 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, WISE FOODS, INC. (hereinafter "Wise" or

"Defendant"), engages in with respect to the packaging of their Wise® potato chip products (the "Products"). The Products are sold in non-transparent aluminum bags and marketed extensively throughout the United States. They are available at numerous retail and online outlets such as Walmart, Giant Food, and Amazon.com.

2. The Products are mass produced and sold in various standardized product lines, flavors, and quantities as follows:

Product Line	Product Flavor	Product Sizes
KETTLE COOKED	Jalapeño New York Deli Kettle Cooked Potato Chips	8.5 oz.
	Jalapeño Kettle Cooked	8.5 oz.
	Reduced Fat Sea Salt & Balsamic Vinegar Kettle Cooked	8.5 oz.
	Sea Salt & Balsamic Vinegar Kettle Cooked	8.5 oz.
	Reduced Fat Original Kettle Cooked Potato Chips	8.5 oz.
	Reduced Fat Barbecue Kettle Cooked	8.5 oz.
	Barbecue Kettle Cooked	8.5 oz.
	Original Kettle Cooked Potato Chips	8.5 oz.
POTATO CHIPS	Beef Barbacoa Tacos	8.5 oz.
	Unsalted	7 oz.
	Lightly Salted	7 oz.
	Salt & Vinegar	6.75 oz., 8.75 oz.
	Honey BBQ	6.75 oz., 8.75 oz.
	BBQ	6.75 oz., 8.75 oz.
	Onion & Garlic	6.75 oz., 8.75 oz.
	Golden Original	7 oz.
RIDGIES	Cheddar & Sour Cream	4.5 oz., 6.75 oz., 8.75 oz.
	Sour Cream & Onion	2.75 oz., 4.5 oz., 6.75 oz., 8.75 oz.
	Dill Pickle	8.75 oz.
	Barbecue	6.75 oz.
	All Natural	7 oz.

3. Images of the Products in various flavors are provided herein under **Exhibit A**.

4. Bags of Defendant's Products are only partly filled, misleading consumers about the quantity of chips they contain. Regardless of the different sizes of the plastic and aluminum bags, the Products are invariably packaged in non-transparent wrappings so that Plaintiffs and Class members cannot see the excessive air in the bag. The disproportionately large Product bags

therefore create the false impression that consumers receive a correspondingly large amount of chips when they purchase the Product.

5. Most of the empty space in each bag is empty air that does not serve any legitimate purpose, and only serves to mislead consumers, so the containers are objectively misleading and under-filled.

6. Defendant's packaging practice of including non-functional slack-fill in Product containers is false and misleading and violates consumer protection laws of New York. As a result, the Products, including Plaintiffs' purchased Products, are misbranded.

7. Defendant manufactures, markets and sells the Products with excessive air ("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 the laws prohibiting misbranded food of New York and the District of Columbia, which impose requirements identical to federal law.

8. The size of the plastic and aluminum chip bags in comparison to the volume of the Products contained therein makes it appear to Plaintiffs and Class members that they are buying more than what is actually being sold, thereby denying Plaintiffs and Class members the benefit of their bargain because they pay for full bags of chips (with only minimal air) but actually receive far fewer chips. In other words, consumers receive fewer chips than Defendant represents that they are getting, such that Plaintiffs and Class members pay more money for each quantity of chips than had been bargained for. Consequently, had Defendant not deceptively created the false impression that each Product bag contained far more chips than it actually does, Plaintiffs and Class members would have paid less money for the quantity of chips they actually received under the bargained-

for Product sale price. Instead, Defendant's deceptive practices directly caused Plaintiffs and Class members to pay a higher price for the Product than they would have paid otherwise.

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

10. "Slack-fill" is the technical term for air or filler material within a packaged product. Slack-fill that is necessary as part of the manufacturing process, is the result of contents settling during shipping, or that is necessary to protect the product is functional slack-fill and is not proscribed. Non-functional slack-fill is slack-fill that serves no legitimate purpose. "The [FDA] also finds that slack-fill in excess of that necessary to accomplish a particular function is nonfunctional slack-fill." 58 FR 64123, 64127.

11. When consumers purchase a package of Defendant's Products, they are getting less product than they bargained for. Consumer are effectively they are tricked into paying for air because the Products contain large amounts of non-functional slack-fill and only part of consumers' purchase price purchases chips in accordance with the represented and bargained for price-per-quantity of chips. The remainder of the purchase price garners consumers only empty air in the place of the chips that they had reasonably expected and bargained for.

12. For example, below is an image of a bag of Wise's® Golden Original Potato Chip Product containing 7 oz. of chips. When sold, the bag's resting dimensions are: approximately 12.5 inches in height, with about .5 inches at the top sealed shut, and 6.5 inches by width. The line indicates the approximate height of the potato chips inside, which occupy about one third of the total available space – only about 4 inches out of a total vertical capacity of approximately 12 inches in height, i.e. about 33% of the available space, leaving about 8 inches (67% of the available space) as slack-fill:

WISE
THE CLASSIC AMERICAN SNACK
golden
Original
POTATO CHIPS
$2.99
Shutterfly
APPROXIMATE
LINE OF FILL

13. Below is an image of how this bag appears once opened:

14. Below is an image of a bag of Wise's® Ridgies Sour Cream and Onion potato chip Product containing 6.75 oz. of chips. The bag's resting dimensions are: approximately 12.5 inches in height, with about .5 inches at the top sealed shut, and 6.5 inches by width. The line indicates the approximate height of the potato chips inside, which occupy about one third of the total available space – only about 4 inches out of a total vertical capacity of approximately 12 inches in height, i.e. about 33% of the available space, leaving about 8 inches (67% of the available space) as slack-fill:

CLASSIC · AMERICAN · SNACKS
WISE
SINCE 1921
Dare to Dip
Ridgies
SOUR CREAM & ONION
ARTIFICIALLY FLAVORED
RIDGED
POTATO CHIPS
APPROXIMATE
LINE OF FILL

15. Below is an image of how this bag appears once opened:

16. Some slack-fill serves a functional purpose or exists because manufacturing equipment does not completely fill a container and leaves some air. By comparing the bags of Defendant's Products to the bags of Defendant's other snack chip lines and the chips of its competitors, it is possible to establish that the Products contain non-functional slack-fill. Competitors' product bags that are smaller that Defendant's Product bags—yet contain the same amount of chips or more—show that it is possible to fit the same quantity of chips into a smaller bag. The surplus empty space in Defendant's Product bags over and above the space in comparison chip bags is certainly non-functional slack-fill. Likewise, when competitors fit more potato chips into the same size bag that Defendant uses, it proves that some of the empty space in Defendant's Product bags is in excess of that needed for potato chip manufacturing and shipping.

17. While some of Defendant's slack-fill may serve the functional purpose of minimizing the breakage of chips, Defendant's total slack-fill exceeds the amount necessary for this and some of the slack-fill is therefore nonfunctional slack-fill. This is proven by the fact that the slack-fill in Defendant's Products is significantly greater than the slack-fill in the packaging of Defendant's other potato chip products and those of its competitors. including Wise's® 9.25 oz. Original Dipsy Doodles, Ruffles® 6.25 oz. Oven Baked Original Chips, and Ruffles® 8.5 oz. Sour Cream and Onion Chips. *See* **Exhibit B**. The lines indicate the approximate height of the chips inside, which in all cases occupy far more than half of the total available space. Consequently, those bags have less than 50% slack-fill.

18. In fact, competitors use bags that are *simultaneously* smaller than Defendant's Product bags *and* contain more chips than them. This is compelling proof that Defendant's bags contain non-functional slack fill, i.e. that its Product bags are oversized relative to the quantity of chips they contain. Likewise, other snack chips manufactured by Defendant, such as Wise® Original Dipsy Doodles, has far less slack fill than the Products.

19. A bag of Wise® Original Dipsy Doodles contains 9.25 oz. of chips. The bag's resting dimensions are: approximately 10.5 inches in height, with about .5 inches at the top sealed shut, and 5.5 inches by width. The line indicates the approximate height of the potato chips inside, which occupy more than two thirds of the total available space –about 7.25 inches out of a total vertical capacity of approximately 10 inches in height, i.e. about 72.5% of the available space, leaving about 2.75 inches (27.5% of the available space) as slack-fill:

20. All 9.25 oz. bags of Wise® Original Dipsy Doodles chips have approximately the same amount of slack-fill, demonstrating that it is possible to consistently manufacture potato chip products with less than one third slack-fill.

21. Below is an image of how this bag appears once opened:

22. A bag of Ruffles® Oven Baked Original contains 6.25 oz. of chips. The bag's resting dimensions are: approximately 11 inches in height, with about .5 inches at the top sealed shut, and 6 inches by width. The line indicates the approximate height of the potato chips inside, which occupy almost two thirds of the total available space –about 6.5 inches out of a total vertical capacity of approximately 10.5 inches in height, i.e. about 61% of the available space, leaving about 4 inches (38% of the available space) as slack-fill:

23. All 6.25 oz. bags of Ruffles® Oven Baked Original chips have approximately the same amount of slack-fill, demonstrating that it is possible to consistently manufacture potato chip products with less than 40% slack-fill.

24. Below is an image of how this bag appears once opened:

25. A bag of Ruffles® Sour Cream and Onion contains 8.5 oz. of chips. The bag's resting dimensions are: approximately 12 inches in height, with about .5 inches at the top sealed shut, and 6.5 inches by width. The line indicates the approximate height of the potato chips inside, which occupy more than two thirds of the total available space –about 8 inches out of a total vertical capacity of approximately 11.5 inches in height, i.e. about 70% of the available space, leaving about 3.5 inches (30% of the available space) as slack-fill:

26. All 8.5 oz. bags of Ruffles® Sour Cream & Onion Potato Chips have approximately the same amount of slack-fill, demonstrating that it is possible to consistently manufacture potato chip products with 30% slack-fill.

27. Below is an image of how this bag appears once opened:

28. The individual Ruffles® chips are comparable in size, shape, and weight to the Wise® chips. Each chip is thin, weighs approximately two grams, and is circular or ovoid with a diameter of about 1.5 inches; *see* **Exhibit C**.

29. The Ruffles® bag is half an inch *shorter* than Defendant's 7 oz. and 6.75 oz. Product bags, but the chips inside weigh more and reach twice as high. Measurements and comparisons for the other Product sizes are in **Exhibits B** and **C**.

30. The Wise® Original Dipsy Doodles bag is two inches *shorter* than Defendant's 7 oz. and 6.75 oz. Product bags, but the chips inside weigh more and reach almost twice as high. Measurements and comparisons for the other Product sizes are in **Exhibits B** and **C**.

31. Each Product bag is almost identical to every other bag selling that same weight and flavor with regards to precise bag size, chip weight, and internal fill. All 2.75 oz., 4.5 oz., 6.75 oz., 7 oz., 8.5 oz., and 8.75 oz. potato chip Product bags are standardized to have the same quantity of chips as other Product bags of that size and to be more than half full of air. Plaintiffs' Product bags were typical bags that, as Plaintiffs recollect, were less than half full of chips. Class members' Product bags were sized and filled to the common standard.

32. A plaintiff who is sold less than what was promised by a product label has a right to recover the amount by which she overpaid. *See Lazaroff v. Paraco Gas Corp*., 2011 NY Slip Op 52541(U), ¶ 6, 38 Misc. 3d 1217(A), 1217A, 967 N.Y.S.2d 867, 867 (Sup. Ct.) ("Plaintiff alleges that, had she understood the true amount of the product, she would not have purchased it, and that she and the purported members of the class paid a higher price per gallon/pound of propane and failed to receive what was promised and/or the benefit of her bargain, i.e., a full 20 pound cylinder and the amount of propane she was promised. Thus, plaintiff has properly alleged injury") (quotations and citations omitted).

33. The Products are misbranded regardless of any disclosures about contents settling and regardless of whether or not weight is labeled accurately. Under Federal regulations, "label statements cannot correct nonfunctional or misleading fill." Misleading Containers; Nonfunctional Slack-Fill, 58 Fed. Reg. 64123-01, 64129 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100).

34. As the FDA explains in the Federal Register:

> Consumers develop expectations as to the amount of product they are purchasing based, at least in part, on the size of the container. The congressional report that accompanied the FPLA stated: "Packages have replaced the salesman. Therefore, it is urgently required that the information set forth on these packages be sufficiently adequate to apprise the consumer of their contents and to enable the purchaser to make value comparisons among comparable products" (H.R. 2076, 89th Cong., 2d sess., p. 7 (September 23, 1966)). Thus, packaging becomes the "final salesman" between the manufacturer and the consumer, communicating information about the quantity and quality of product in a container. Further, Congress stated (S. Rept. 361, supra at 9) that "Packages only partly filled create a false impression as to the quantity of food which they contain despite the declaration of quantity of contents on the label."

58 Fed. Reg. 64123-01, 64131 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100) (emphasis added).

35. Courts have noted the incorporation of FDA regulations into New York law in evaluating claims brought under NY GBL § 349. *See Ackerman v. Coca-Cola Co*., No. CV-09-0395 (JG) (RML), 2010 U.S. Dist. LEXIS 73156, at *13 (E.D.N.Y. July 21, 2010) ("New York's

Agriculture and Marketing law similarly provides in relevant part that food shall be deemed misbranded '[i]f its labeling is false or misleading in any particular,' and incorporates the FDCA's labeling provisions.").

36. Plaintiffs and Class members viewed Defendant's misleading Product packaging, and reasonably relied in substantial part on the Product packaging's implicit representations of quantity and volume when purchasing the Products. Plaintiffs and Class members all bargained to receive a full container of chips. The Product containers were not full and their packaging misrepresented the quantity of chips contained therein, so consumers did not receive all that they had bargained for.

37. Plaintiffs bring this proposed consumer class action on behalf of themselves and all other in New York and District of Columbia purchasers who, from the applicable limitations period up to and including the present (the "Class Period"), purchased the Products for consumption and not for resale.

38. During the Class Period, Defendant manufactured, marketed and sold the Products throughout New York and the District of Columbia. Defendant purposefully sold the Products with non-functional slack-fill as part of a systematic practice.

39. Defendant violated statutes enacted in New York and the District of Columbia that are designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising.

40. Defendant has deceived Plaintiffs and other consumers throughout New York and the District of Columbia by misrepresenting the volume of their Products, inducing Plaintiffs and Class members to reasonably rely on Defendant's misrepresentations and purchase Products that did not contain the represented quantity of chips. 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 their Products that they would not have otherwise earned. Plaintiffs bring this action to stop Defendant's deceptive practice.

41. Plaintiffs expressly do not seek to contest or enforce any state law that has requirements beyond those established by federal laws or regulations.

JURISDICTION AND VENUE

42. 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).

43. 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.

44. 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 in New York State; Defendant is authorized to do business in New York State. Defendant has sufficient minimum contacts with New York and has intentionally availed itself 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.

45. 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 ALCE's claims occurred in this District, and Defendant is subject to personal jurisdiction in this District. Plaintiff ALCE purchased Defendant's

Products in Nassau County. Moreover, Defendant distributed, advertised and sold the Products, which are the subject of the present Complaint, in this District.

PARTIES

Plaintiffs

46. Plaintiff ALCE is, and at all relevant times hereto has been, a citizen of the state of New York and resides in Bronx County. On August 23, 2016, Plaintiff ALCE purchased the 7 oz. Wise® Golden Original Potato Chips Product for personal consumption at Merrick Farms, a grocery store located in Nassau County, New York. Plaintiff ALCE purchased the Product for the price of $1.94, and was financially injured as a result of Defendant's deceptive conduct as alleged herein because he did not receive the quantity that he paid for. Plaintiff ALCE paid to receive a functionally full bag of chips (i.e., a bag without non-functional slack-fill), but the bag Plaintiff ALCE received was less than half full of chips and contained significant non-functional slack-fill.

47. As the result of Defendant's deceptive conduct as alleged herein, Plaintiff ALCE was injured when he paid full price for the Product but did not receive a full bag, i.e. a bag without non-functional slack-fill that only contained chips and functional slack-fill. He paid $1.94 for the Product on the reasonable assumption that the bag was filled to functional capacity. Defendant promised Plaintiff ALCE a functionally full bag of chips for $1.94, but it only delivered a partially full bag, depriving him of the benefit of her bargain. Accordingly, he was injured in the amount of the percentage of the purchase price equal to the percentage of shortfall in the Product.

48. Defendant's competitor Ruffles® manufactures similar standardized mass-produced chips, packaging them with about 30% slack-fill. *See* **Exhibit B**, pp. 6–8. Ruffles'® slack-fill may be partially non-functional, but the Ruffles® bag demonstrates that **<u>at most</u>** a bag of chips contains 30% functional slack-fill. Plaintiff ALCE paid $1.94 for a 7-oz. bag, and his bag was a typical bag that was about 33% full of chips, with slack-fill of about 67%. **At least** 37% of

Plaintiff ALCE's bag (67%-30%) was non-functional slack-fill, because empty space in excess of the amount in the Ruffles® bag is demonstrably not necessary as part of the potato chip manufacturing and packaging process. **At least** 70% of Plaintiff ALCE's bag should have contained chips, but only 33% of the bag volume was filled with chips.

49. Instead of receiving functionally full containers with the approximately 70% or greater volume of chips that he had reasonably expected,[1] what ALCE actually received was a product only about 33% full. Therefore, Plaintiff ALCE ultimately obtained only 47% of what he bargained for.[2] Correspondingly, ALCE was cheated out of the remaining 53% of the purchase price. The sum of approximately $1.02 ($1.94 * 53%) from Plaintiff ALCE's purchase price was deceptively taken and wrongfully retained by Defendant. Put another way, ALCE paid 113% too much for the chips he actually received (i.e., consumers paid more than twice what they had bargained to pay per quantity of chips).[3] Plaintiff ALCE paid $1.94 for a full bag of chips, but Defendant under-filled his bag by more than half, depriving him of the benefit of his bargain.

50. Should Plaintiff ALCE encounter the Products in the future, he could not rely on the truthfulness of the packaging, absent corrective changes to the packaging. However, Plaintiff ALCE would still be willing to repurchase the type of Product he purchased in its current formulation as long as he is not compelled to pay for empty space within the container when buying the Product. He is ready to make such a purchase immediately, provided only that the price paid correspond to the chips within the container. However, Plaintiff ALCE has neither perfect

[1] Competitor Ruffles'® product bag contains only 30% slack-fill in its 8.5 oz. bag of potato chips, demonstrating that at most 30% of the slack in Defendant's Products could be functional slack-fill, and the rest of the slack in Defendant's Products is certainly non-functional slack-fill.

[2] $\frac{\textbf{33\% Actual Fill}}{\textbf{70\% Expected Fill}}$ = Approximately **47%** of the expected fill was in the Product bag.

[3] $\frac{\textbf{53\% of Purchase Price Buying Only Air and Wrongfully Taken}}{\textbf{47\% of Purchase Price Actually Spent on Chips as Bargained For}}$ = Approximately **113%**

knowledge nor permanent memory of exactly how much unnecessary air is in each and every Product size and flavor, particularly those sizes and flavors other than the one that he purchased. For Defendant's product lines that he is aware of, Plaintiff ALCE does not remember completely or precisely which of them have little or no non-functional slack-fill, nor does he remember exactly how much non-functional slack-fill they have. *See e.g.* **Exhibit B**, pp. 3–5, depicting Defendant's Dipsy Doodles snack chip bags with only about 27.5% slack-fill, most of which is functional slack-fill. Additionally, Defendant produces many products regarding which Plaintiff ALCE simply does not know (and may never know) whether they contain non-functional slack-fill. Plaintiff NUGENT plans to purchase Defendant's products in the future, and is in imminent danger of purchasing a Product with non-functional slack-fill.

51. Plaintiff NUGENT is, and at all relevant times hereto has been a citizen of the District of Colombia and resides in the District of Colombia. On August 19, 2016, Plaintiff NUGENT purchased the 6.75 oz. Wise® Honey BBQ Potato Chips Product from a Giant grocery store in the District of Colombia. Plaintiff NUGENT purchased the Product for the price of $2.00, and was financially injured as a result of Defendant's deceptive conduct as alleged herein because she did not receive the quantity that she paid for. Plaintiff NUGENT paid to receive a functionally full bag of chips (i.e., a bag without non-functional slack-fill), but the bag Plaintiff NUGENT received was less than half full of chips and contained significant non-functional slack-fill.

52. As the result of Defendant's deceptive conduct as alleged herein, Plaintiff NUGENT was injured when she paid full price for the Product but did not receive a full bag, i.e. a bag without non-functional slack-fill that only contained chips and functional slack-fill. She paid $2.00 for the Product on the reasonable assumption that the bag was filled to functional capacity. Defendant promised Plaintiff NUGENT a functionally full bag of chips for $2.00, but it only

delivered a partially full bag, depriving her of the benefit of her bargain. Accordingly, she was injured in the amount of the percentage of the purchase price equal to the percentage of shortfall in the Product.

53. Defendant's competitor Ruffles® manufactures similar standardized mass-produced chips, packaging them with about 30% slack-fill. *See* **Exhibit B**, pp. 6–8. Ruffles'® slack-fill may be partially non-functional, but the Ruffles® bag demonstrates that **at most** a bag of chips contains 30% functional slack-fill. Plaintiff NUGENT paid $2.00 for a 7-oz. bag, and her bag was a typical bag that was about 33% full of chips, with slack-fill of about 67%. **At least** 37% of Plaintiff NUGENT's bag (67%-30%) was non-functional slack-fill, because empty space in excess of the amount in the Ruffles® bag is demonstrably not necessary as part of the potato chip manufacturing and packaging process. **At least** 70% of Plaintiff NUGENT's bag should have contained chips, but only 33% of the bag volume was filled with chips.

54. Instead of receiving functionally full containers with the approximately 70% or greater volume of chips that they had reasonably expected, what Plaintiff NUGENT actually received was a product only about 33% full. Therefore, NUGENT ultimately obtained only 47% of what she bargained for. Correspondingly, NUGENT was cheated out of the remaining 53% of the purchase price. The sum of approximately $1.06 ($2.00 * 53%) from Plaintiff NUGENT's purchase price was deceptively taken and wrongfully retained by Defendant. Put another way, NUGENT paid 113% too much for the chips she actually received (i.e., consumers paid more than twice what they had bargained to pay per quantity of chips). Plaintiff paid $2.00 for a full bag of chips, but Defendant under-filled her bag by more than half, depriving her of the benefit of her bargain.

55. Should Plaintiff NUGENT encounter the Products in the future, she could not rely on the truthfulness of the packaging, absent corrective changes to the packaging. However, Plaintiff NUGENT would still be willing to repurchase the type of Product she purchased in its current formulation as long as she is not compelled to pay for empty space within the container when buying the Product. She is ready to make such a purchase immediately, provided only that the price paid correspond to the chips within the container. However, Plaintiff NUGENT has neither perfect knowledge nor permanent memory of exactly how much unnecessary air is in each and every Product size and flavor, particularly those sizes and flavors other than the one that she purchased. For Defendant's product lines that she is aware of, Plaintiff NUGENT does not remember completely or precisely which of them have little or no non-functional slack-fill, nor does she remember exactly how much non-functional slack-fill they have. *See e.g.* **Exhibit B**, pp. 3–5, depicting Defendant's Dipsy Doodles snack chip bags with only about 27.5% slack-fill, most of which is functional slack-fill. Additionally, Defendant produces many products regarding which Plaintiff NUGENT simply does not know (and may never know) whether they contain non-functional slack-fill. Plaintiff NUGENT plans to purchase Defendant's products in the future, and is in imminent danger of purchasing a Product with non-functional slack-fill.

Defendant

56. Defendant WISE FOODS, INC. is a corporation organized under the laws of Pennsylvania with its headquarters at 228 Rasely St., Berwick, PA 18603.

57. Defendant manufactures, markets, advertises and sells its extensive "Wise®" line of snack products throughout the United States, including the Products purchased by Plaintiffs and the Class. Defendant manufactured, packaged, distributed, advertised, marketed and sold the misbranded Products to millions of customers nationwide, including in New York, and

Washington D.C. The Products are available at numerous retail and online outlets such as Walmart, Giant Food, and Amazon.com.

58. The labeling, packaging, and advertising for the Products, relied upon by Plaintiffs, were prepared and/or approved by Defendant and its agents, and were disseminated by Defendant and its agents through advertising containing the misrepresentations alleged herein. Such labeling, packaging and advertising were designed to encourage consumers to purchase the Products and reasonably misled the reasonable consumer, i.e. Plaintiffs and the Class, into purchasing the Products. Defendant owned, marketed and distributed the Products, and created and/or authorized the unlawful, fraudulent, unfair, misleading and/or deceptive labeling, packaging and advertising for the Products.

FACTUAL ALLEGATIONS

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

59. Under § 403(d) of the FDCA (21 U.S.C. § 343(d)), a food shall be deemed to be misbranded "[i]f its container is so made, formed, or filled as to be misleading."

60. The FDA has implemented § 403(d) through 21 C.F.R. § 100.100, which states:

> 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).

61. Food labeling law and regulations of New York and the District of Columbia impose requirements which mirror federal law.

62. New York Agm. Law § 201 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." Moreover, Part 259.1 of Title 1 of the New York Codes, Rules and Regulations (1 NYCRR § 259.1), incorporates by reference the regulatory requirements for food labeling under the FDCA:

> "For the purpose of the enforcement of article 17 of the Agriculture and Markets Law, and except where in conflict with the statutes of this State or with rules and regulations promulgated by the commissioner, the commissioner hereby adopts the current regulations as they appear in title 21 of the *Code of Federal Regulations* (revised as of April 1, 2013) … in the area of food packaging and labeling as follows: … (2) Part 100 of title 21 of the *Code of Federal Regulations* [21 C.F.R. 100 et seq.], containing Federal definitions and standards for food packaging and labeling *General* at pages 5-10…."

1 NYCRR § 259.1(a)(2).

63. Courts have noted the incorporation of FDA regulations into New York law in evaluating claims brought under NY GBL § 349. *See Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG) (RML), 2010 U.S. Dist. LEXIS 73156, at *13 (E.D.N.Y. July 21, 2010) ("New York's Agriculture and Marketing law similarly provides in relevant part that food shall be deemed

misbranded '[i]f its labeling is false or misleading in any particular,' and incorporates the FDCA's labeling provisions").

64. The requirements of 21 C.F.R. § 100.100 have also been incorporated by reference into the District of Columbia Consumer Protection Procedures Act, which prohibits "sell[ing] consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law." (emphasis added) D.C. Code § 28–3904(x).

Defendant's Products Contain Slack-Fill

65. Slack-fill is the difference between the actual capacity of a container and the volume of product contained within it.

66. Defendant's Products all contain significant slack-fill. The measurements are in **Exhibit B**, and they show the following levels of slack-fill:

a. Wise's® 7 oz. Bag: Approximately 67% Slack-Fill; *see* **Exhibit B**, pp. 1–8;

b. Wise's® 6.75 oz. Bag: Approximately 67% Slack-Fill; *see* **Exhibit B**, pp. 9–12;

c. Wise's® 2.75 oz. Bag: Approximately 75% Slack-Fill: *see* **Exhibit B**, pp. 13–16;

d. Wise's® 4.5 oz. Bag: Approximately 62.5% Slack-Fill; *see* **Exhibit B**, pp. 17–19;

e. Wise's® 8.5 oz. Bag: Approximately 58% Slack-Fill; *see* **Exhibit B**, pp. 20–22;

f. Wise's® 8.75 oz. Bag: Approximately 72% Slack-Fill; *see* **Exhibit B**, pp. 23–25.

67. This is in contrast to competitor Ruffles'® potato chip bags, which contain only about one third slack fill. The slack in the Ruffles® bag may or may not all be functional slack, but slack in a potato chip bag in excess of 30% is certainly non-functional, as the 8.5 oz. Ruffles® Sour Cream and Onion bag demonstrates. Defendant misleads consumers into purchasing its Products because consumers believe that they are purchasing a bag containing only chips and

functional slack-fill, but consumers who purchased the Products received far fewer chips than they bargained for, as the Product bags have significant amounts of volume occupied by non-functional slack-fill instead of potato chips.

68. It is also in contrast to Defendant's own Dipsy Doodles snack chip bags, which are almost three quarters filled with chips, with only about 27.5% slack-fill, *see* **Exhibit B**, pp. 3–5.

Defendant's Slack-Fill is Non-Functional

69. The FDA has defined non-functional slack-fill as any slack-fill in excess of that required to achieve the functional purposes listed in 21 C.F.R. § 100.100(a):

> FDA advises that the exceptions to the definition of "nonfunctional slack-fill" in § 100.100(a) apply to that portion of the slack-fill within a container that is necessary for, or results from, a specific function or practice, e.g., the need to protect a product. Slack-fill in excess of that necessary to accomplish a particular function is nonfunctional slack-fill. Thus, the exceptions in § 100.100(a) provide only for that amount of slack-fill that is necessary to accomplish a specific function. FDA advises that these exceptions do not exempt broad categories of food, such as gift products and convenience foods, from the requirements of section 403(d) of the act. For example, § 100.100(a)(2) recognizes that some slack-fill may be necessary to accommodate requirements of the machines used to enclose a product in its container and is therefore functional slack-fill. However, § 100.100(a)(2) does not exempt all levels of slack-fill in all mechanically packaged products from the definition of nonfunctional slack-fill.

58 FR 64123, 64126 (emphasis added).

70. Thus, the possibility that some portion of the slack-fill in Defendant's Products may be justified as functional based on the exemptions in §100.100(a) does not justify slack-fill that is in excess of that required to serve a legitimate purpose—protecting contents, accommodating the machines that enclose the contents, accommodating settling, etc. Defendant's slack fill serves no purpose other than to mislead consumers about the quantity of food they are actually purchasing. *See 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).").

71. That Defendant's Products contain slack-fill in excess of what is permitted under § 100.100 is proven by the fact that other lines and brands of snack chips contain significantly less slack-fill. The similarly sized bags of Defendant's competitors contain significantly less slack-fill, and thus more chips by volume, notwithstanding factors like the need to protect package contents or accommodate machines and settling. This is documented in **Exhibit B** and summarized here below:

a. Wise's® 7 oz. Bag (12.5 inches tall, 12 inches vertical capacity): 67% slack-fill **versus** Ruffles® 8.5 oz. Sour Cream and Onion Chips Bag (12 inches tall, 11.5 inches vertical capacity): 30% slack-fill; *see* **Exhibit B**, pp. 1-8.

b. Wise's® 6.75 oz. Bag (12.5 inches tall, 12 inches vertical capacity): 67% slack-fill **versus** Ruffles® 8.5 oz. Sour Cream and Onion Chips Bag (12 inches tall, 11.5 inches vertical capacity): 30% slack-fill; *see* **Exhibit B**, pp. 9-12.

c. Wise's® 2.75 oz. Bag (10.5 inches tall, 10 inches vertical capacity): 75% slack-fill **versus** Ruffles® 6.25 oz. Oven Baked Original potato chips bag (11 inches tall, 10.5 inches vertical capacity): 38% slack-fill; *see* **Exhibit B**, pp. 13-16.

d. Wise's® 4.5 oz. Bag (10.5 inches tall, 10 inches vertical capacity): 62.5% slack-fill **versus** Ruffles® 6.25 oz. Oven Baked Original potato chips bag (11 inches tall, 10.5 inches vertical capacity): 38% slack-fill; *see* **Exhibit B**, pp. 17-19.

e. Wise's® 8.5 oz. Bag (12.5 inches tall, 12 inches vertical capacity): 58% slack-fill **versus** Ruffles® 8.5 oz. Sour Cream and Onion Chips Bag (12 inches tall, 11.5 inches vertical capacity): 30% slack-fill; *see* **Exhibit B**, pp. 20-22.

f. Wise's® 8.75 oz. Bag (14 inches tall, 13.5 inches vertical capacity): 72% slack-fill **versus** Ruffles® 8.5 oz. Sour Cream and Onion Chips Bag (12 inches tall, 11.5 inches vertical capacity): 30% slack-fill; *see* **Exhibit B**, pp. 23-25.

72. The slack-fill in Wise's® Products varies between different sized bags. But it is in every case greater than the slack-fill in the similarly sized bags of its competitor Ruffles. Whereas the latter limits their slack-fill to approximately 30% or so, Defendant's Products significantly exceed this threshold. The comparison is between the same kind of product in the same kind of packaging that is enclosed in the same way by the same kind of technology. And yet Wise's® competitor Ruffles® manage to package their chips in a way that leaves consumers with a more accurate sense of how much food they are actually purchasing. Thus, whatever real constraints might justify 30% slack-fill in the competitor chips cannot explain the excess slack-fill in Defendant's Products.

73. This pattern is unambiguously demonstrated by the contrast between the 2.75 oz. and 4.5 oz. bags of Wise® Ridgies potato chips. As shown below, the bags are packaged into identically sized bags, yet 2.75 oz. bag contains far fewer chips than the 4.5 oz. bag. No manufacturing or other constraints limit Defendant from filling its 2.75 oz. bag more fully or from using a smaller bag to package 2.75 oz. of chips. Defendant's 4.5 oz. bag – which itself contains non-functional slack-fill – shows that more chips can fit comfortably within a smaller bag.

Defendant's Non-Functional Slack-Fill is Deceptive and Misleading

74. The real explanation lies in Defendant's desire to mislead consumers about how much product they are actually purchasing and thus increase sales and profits. Defendant uses non-functional slack-fill to mislead consumers into believing that they are receiving more chips than they are actually receiving. The packaging of the Products is uniformly made out of non-transparent wrappings so that consumers cannot see the slack-fill therein, thus giving Plaintiffs and the Class the false impression that there are more chips inside than there actually is.

75. Even if Defendant's net weight disclosures are accurate, such does not eliminate this basic deception. The FDA has confirmed this in unequivocal terms:

> FDA disagrees with the comments that stated that net weight statements protect against misleading fill. FDA finds that the presence of an accurate net weight

> statement does not eliminate the misbranding that occurs when a container is made, formed, or filled so as to be misleading.

58 FR 64123, 64128 (emphasis added).

> Section 403(e) of the act requires packaged food to bear a label containing an accurate statement of the quantity of contents. This requirement is separate and in addition to section 403(d) of the act. To rule that an accurate net weight statement protects against misleading fill would render the prohibition against misleading fill in section 403(d) of the act redundant. In fact, Congress stated (S. Rept. No. 493, 73d Cong., 2d sess. 9 (1934)) in arriving at section 403(d) of the act that that section is "intended to reach deceptive methods of filling where the package is only partly filled and, despite the declaration of quantity of contents on the label, creates the impression that it contains more food than it does." Thus, Congress clearly intended that failure to comply with either section would render a food to be misbranded.

58 FR 64123, 64128-64129 (emphasis added).

76. Independently from the text on the Product labels and regardless of its accuracy or inaccuracy, the size of the Product packaging makes a representation about the quantity of its contents. For Defendant's Products, this representation is false.

77. While consumers may have come to expect significant slack-fill in potato chips and other snack products, this too does not eliminate Defendant's deception. The FDA has stated that "although consumers may become used to the presence of nonfunctional slack-fill in a particular product or product line, the recurrence of slack-fill over an extended period of time does not legitimize such slack-fill if it is nonfunctional." 58 FR 64123, 64131

Plaintiffs and the Class Reasonably Relied on the Size of the Products' Packaging as an Indicator of How Much Food They Were Purchasing

78. 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. Defendant only partly fulfilled its bargain with Plaintiffs and Class members, as Plaintiffs and Class members bargained to receive a functionally full container but instead received a container with non-functional slack-fill.

79. Defendant's Product packaging was a material factor in Plaintiffs' and Class members' decisions to purchase the Products because reasonable consumers attach importance to the quantity of food they believe they are purchasing.

80. Plaintiffs and the Class reasonably relied on the size of the Products' packaging to infer how much food they were purchasing and reasonably believed that the bags were filled as closely to capacity as functionally possible (i.e., were functionally full). The FDA has explained why such reliance is reasonable:

> Consumers develop expectations as to the amount of product they are purchasing based, at least in part, on the size of the container. The congressional report that accompanied the FPLA stated: "Packages have replaced the salesman. Therefore, it is urgently required that the information set forth on these packages be sufficiently adequate to apprise the consumer of their contents and to enable the purchaser to make value comparisons among comparable products" (H.R. 2076, 89th Cong., 2d sess., p. 7 (September 23, 1966)). Thus, packaging becomes the "final salesman" between the manufacturer and the consumer, communicating information about the quantity and quality of product in a container. Further, Congress stated (S. Rept. 361, supra at 9) that "Packages only partly filled create a false impression as to the quantity of food which they contain despite the declaration of quantity of contents on the label."

58 FR 64123, 64131 (emphasis added).

81. Congress recognized that the size of a package is in and of itself a kind of sales pitch, even if not made with words or numbers. Thus, consumers can reasonably rely on packaging size as a representation of quantity regardless of whatever is printed on the label. And manufacturers can be held responsible for non-functional slack-fill regardless of whatever else they say.

82. Defendant might argue that Plaintiffs and the Class should not have relied on the packaging's size to infer its contents because they could have manipulated the packaging in order to acquire a sense of the slack-fill therein (i.e., shaking the package to hear the chips rustling or

poking it to feel the air). But the FDA has stated that such manipulation cannot be reasonably expected of consumers:

> FDA advises that the entire container does not need to be transparent to allow consumers to fully view its contents, i.e., a transparent lid may be sufficient depending on the conformation of the package. On the other hand, FDA finds that devices, such as a window at the bottom of a package, that require consumers to manipulate the package, e.g., turning it upside down and shaking it to redistribute the contents, do not allow consumers to fully view the contents of a container. FDA finds that such devices do not adequately ensure that consumers will not be misled as to the amount of product in a package. Therefore, such foods remain subject to the requirements in § 100.100(a) that slack-fill in the container be functional slack-fill.

58 FR 64123, 64128 (emphasis added).

The FDA was here contemplating a scenario in which manipulating a package might permit an accurate visual estimate of its contents. This is clearly impossible in the case of Defendant's wholly non-transparent packaging, which can only provide audial or tactile clues as to the Products' slack-fill. But the same basic principle applies: the possibility that manipulating a package might yield additional insight into its contents does not exculpate non-functional slack-fill (just as accurate net weight disclosures do not). The possibility of manipulating the package to discover the truth about it does not mitigate the false statement conveyed by the disproportionately large size of the product packaging. Likewise, the existence of true label statements regarding weight and quantity (if any) do not diminish Defendant's wrongdoing in using a false and misleading packaging size.

Plaintiffs and the Class Were Injured as a Result of Defendant's Deceptive Conduct

83. Plaintiffs and Class members were injured as the result of Defendant's deceptive conduct because they paid money for less Product than Defendant represented they would be receiving, i.e., each quantity of chips costs more than Plaintiffs and Class members had bargained for. Consequently, had Defendant not deceptively created the false impression that each Product bag contained far more chips than it actually does, Plaintiffs and Class members would have paid

less money for the quantity of chips they actually received under the bargained-for Product sale price. Instead, Defendant's deceptive practices directly caused Plaintiffs and Class members to pay a higher price for the Product than they would have paid otherwise. In order for Plaintiffs and Class members to be made whole, they must be compensated in an amount consisting in the proportion of the purchase price equal to the percentage of non-functional slack-fill in the Products, which is equivalent to the amount of product Plaintiffs and the Class paid for that Defendant did not-deliver, i.e. the percentage of shortfall in the container. *See Lazaroff v. Paraco Gas Corp.*, 2011 NY Slip Op 52541(U), ¶ 6, 38 Misc. 3d 1217(A), 1217A, 967 N.Y.S.2d 867, 867 (Sup. Ct.) ("Plaintiff alleges that, had she understood the true amount of the product, she would not have purchased it, and that she and the purported members of the class paid a higher price per gallon/pound of propane and failed to receive what was promised and/or the benefit of her bargain, i.e., a full 20 pound cylinder and the amount of propane she was promised…Thus, plaintiff has properly alleged injury. Accordingly, the court finds that the plaintiff has stated a claim for a violation of GBL § 349."); *Kacocha v. Nestle Purina Petcare Co.*, No. 15-CV-5489 (KMK), 2016 U.S. Dist. LEXIS 107097, at *51-52 (S.D.N.Y. Aug. 11, 2016) ("Indeed, in her Complaint, Plaintiff seeks monetary damages on the grounds that she 'would not have paid the premium price she paid' to buy the Products had she 'known the truth.'… Case law makes clear that this is sufficient at the motion-to-dismiss phase for a § 349 claim to survive.").

Defendant is Liable for its Deceptive Conduct

84. Defendant's conduct caused injury to Plaintiffs and the Class regardless of whether Defendant ultimately received from middlemen all, some, or none of the higher price that Plaintiffs and the Class paid as a result of Defendant's false and misleading conduct. Similarly, Defendant's conduct caused this injury regardless of whether or not Defendant reduced its expenses by using a

smaller quantity of chips in each Product bag. Defendant caused injury to Plaintiffs and the Class, regardless of whether it (or any party) profited thereby.

85. Defendant's false representations of quantity led reasonable consumers to believe that they were getting a better value for the Products than they were actually receiving. Instead, Plaintiffs and the Class paid a higher price per quantity of chips than they had bargained for, and so they paid a higher total price than they would otherwise have paid for each Product they purchased. The false representations of the Product bags caused Plaintiffs and the Class to pay higher prices, regardless of whether the Products passed into possession of middlemen before being ultimately sold to Plaintiffs and the Class. Defendant's false representations of quantity were universally present as an underlying factor in each retail purchase of the Products, and its universal falsity pervades each purchase.

86. Accordingly, Defendant cannot escape its liability by invoking a "lack of privity" defense. Privity would only be applicable to claims for breach of implied warranties. and courts routinely find manufacturers can be liable under despite not having privity with consumers. *See e.g. Ebin v. Kangadis Food Inc.*, 2013 U.S. Dist. LEXIS 174174, at *12-16 (S.D.N.Y. Dec. 9, 2013), (dismissing plaintiffs' implied warranty claim for lack of privity and denying defendant's motion to dismiss plaintiffs' NY GBL § 349 claim where plaintiffs claimed that defendant's food labels were false and misleading).

87. New York Courts have long recognized that justice requires that consumers have legal remedies against false advertising by a mass-producing food manufacturer, particularly one that targets the general public with advertisements:

> Today, however, the significant warranty, the one which effectively induces the purchase, is frequently that given by the manufacturer through mass advertising and

> labeling to ultimate business users or to consumers with whom he has no direct contractual relationship.
>
> The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompany the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.
>
> The policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentations outweighs allegiance to an old and out-moded technical rule of law which, if observed, might be productive of great injustice. The manufacturer places his product upon the market and, by advertising and labeling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.

Randy Knitwear, Inc. v. Am. Cyanamid Co., 11 N.Y.2d 5, 12-13, 226 N.Y.S.2d 363, 367-68, 181 N.E.2d 399, 402-03 (1962) (*superseded by statute as state in Ebin v. Kangadis Food Inc.*, 2013 U.S. Dist. LEXIS 174174, at *17 (S.D.N.Y. Dec. 9, 2013)).

88. The facts in those New York cases that require privity as an element of an implied warranty claim are distinguishable from Defendant’s conduct in question here because those cases involve a separation between a manufacturer’s representations and consumers. Defendant’s false and misleading representations were seen by Plaintiffs and every Class member. It is certainly fair to hold Defendant responsible for the higher prices that its conduct induced:

> The issue is whether New York will permit [an implied warranty claim] … Where the product, although not itself unduly dangerous, does not function properly,

> resulting in economic loss other than physical damage to persons or property **(and where the product is not sold under the manufacturer's trade name or label, or under a warranty, by advertisements or otherwise, that may fairly be said to run from the manufacturer to the ultimate user or purchaser)**.

Schiavone Constr. Co. v. Elgood Mayo Corp., 81 A.D.2d 221, 228, 439 N.Y.S.2d 933, 937 (App. Div. 1981) (Silverman, J., dissenting), *rev'd* 56 NY2d 667 *for reasons stated in dissenting opinion of Silverman, J.* (emphasis added).

89. The abovementioned factors would justify a finding of an implied warranty running from Defendant to consumers, and so they certainly establish Plaintiffs' standing to bring this class action lawsuit under consumer protection statutes.

CLASS ACTION ALLEGATIONS

90. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following two Classes:

The New York Class

91. Plaintiff ALCE seeks to represent the following class:

> All persons who made retail purchases of Products during the applicable limitations period in New York, and/or such subclasses as the Court may deem appropriate; (the "New York Class").

The District of Columbia Class

92. Plaintiff NUGENT seeks to represent the following class:

> All persons who made retail purchases of Products during the applicable limitations period in the District of Columbia, and/or such subclasses as the Court may deem appropriate; (the "D.C. Class").

93. 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 they have or have had a controlling interest, and the judicial officer to whom this lawsuit is assigned

94. The members of the Classes 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 Classes. Other members of the Classes 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.

95. Plaintiffs' claims are typical of the claims of the members of the Classes as all members of the Classes are similarly affected by Defendant's wrongful conduct.

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

97. 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 Classes to individually seek redress for the wrongful conduct alleged herein.

98. Common questions of law and fact exist as to all members of the Classes and predominate over any questions solely affecting individual members of the Classes. Among the questions of law and fact common to the Classes 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 Classes have sustained damages as a result of Defendant's wrongful conduct;

viii. Whether Defendant purposely chose non-transparent plastic and aluminum Product bags so that Plaintiffs and Class members would not be able to see the amount of slack-fill contained in the Products;

ix. The appropriate measure of damages and/or other relief;

x. Whether Defendant has been unjustly enriched through its scheme of using false, misleading and/or deceptive labeling, packaging or misrepresentations, and;

xi. Whether Defendant should be enjoined from continuing its unlawful practices.

99. The membership of the Classes 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 that would preclude its maintenance as a class action.

100. 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 prevent 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.

101. 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 Classes, thereby making appropriate final injunctive or equitable relief with respect to the Classes as a whole.

102. 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 Classes 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.

103. 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 Classes, although certain Class members are not parties to such actions.

104. Defendant's conduct is generally applicable to the Classes as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Classes as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Classes 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) (Brought on Behalf of the New York Class)

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

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

107. 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." 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.

108. Moreover, New York State law broadly prohibits misbranding of foods just as federal law prohibits it. New York prohibits Defendant's misleading packaging in language identical to that found in regulations promulgated pursuant to the FDCA § 403 (21 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."

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

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

111. Plaintiff ALCE is at risk of several types of future injury, each of which justifies the imposition of an injunction. First, Defendant has misleadingly manufactured many different sizes of Products with non-functional slack-fill, and so Plaintiff ALCE may be deceived into purchasing a slack-filled Wise® Product again (whether the exact same size and flavor as before or not), causing the same type of economic injury as enumerated in the complaint. Plaintiff ALCE is willing to purchase all of Defendant's products in their current formulation, and so is in imminent risk of being deceived into purchasing a Product with misleading packaging and consequently less chips than he had bargained for.

112. Second, Plaintiff ALCE is no longer able to rely on Defendant's representations, regardless of whether the representations are true or false. Plaintiff ALCE knows that the Products have been packaged with grossly excessive slack fill, whereas in contrast Wise's® 9.25 oz. Original Dipsy Doodles have been packaged with minimal slack-fill, so she cannot rely on defendant's representations absent an injunction.

113. Third, Plaintiff ALCE may in the future hesitate to purchase Defendant's products, even if it ceases its unlawful labeling practices and begins packaging its Products without slack-fill. If the Products are no longer sold with non-functional slack-fill, then Plaintiff ALCE could then not take advantage of those products because she has been misled into believing that the products have non-functional slack-fill:

> [S]ome courts have focused on the particular nature of the injury at issue to find standing. They have found at least two injuries sufficient to establish standing where the plaintiff is aware of the misrepresentation: absent an injunction, the plaintiff-consumer will 1) no longer be able to confidently rely on the defendant's representations (*see Ries*, 287 F.R.D. at 533), and 2) refrain from purchasing products in the future even if they in fact conform to her expectations (*see Lilly v. Jamba Juice Company*, No. 13-cv-02998-JST, 2015 U.S. Dist. LEXIS 34498, 2015 WL 1248027, at *3-5 (N.D. Cal. March 18, 2015). When a consumer discovers that a representation about a product is false, she doesn't know that another, later representation by the same manufacturer is also false. She just doesn't know

> whether or not it's true. A material representation injures the consumer not only when it is untrue, but also when it is unclear whether or not is true.

Duran v. Hampton Creek, No. 3:15-cv-05497-LB, 2016 U.S. Dist. LEXIS 41650 (N.D. Cal. Mar. 28, 2016).

114. The Court should follow the lead of California Federal Courts and recognize that a plaintiff may be injured after she learns of a manufacturer's deception, even though she is unlikely to fall victim to the exactly the same scheme again in exactly the same manner. To hold otherwise would immunize manufacturers and render injunctive relief impossible in consumer fraud class action lawsuits – if learning of a deception removed a Plaintiff's standing to seek an injunction, then wrongdoers could violate the law with impunity, defeating the purpose of consumer protection statutes.

115. Under NY GBL § 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)).

116. Plaintiff ALCE, 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 § 349, and such other relief as this Court deems just and proper.

COUNT II

DAMAGES FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT) (Brought on Behalf of the New York Class)

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

118. Plaintiff ALCE brings this claim individually and on behalf of the other members of the New York Class for violations of NY GBL § 349.

119. 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 acts or practices, 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.

120. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misbranding their Products so that they appear to contain more in the packaging than is actually included.

121. 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.

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

123. Plaintiff ALCE and the other New York Class members suffered a loss as a result of Defendant's deceptive and unfair trade practices. Specifically, as a result of Defendant's deceptive and unfair acts and practices, Plaintiff ALCE and the other New York Class members suffered monetary losses from the purchase of Products, i.e., receiving less than the capacity of the packaging due to (at minimum) approximately 12% to 45% non-functional slack-fill in the Products. In order for Plaintiff ALCE and New York Class members to be made whole, they must

receive a refund of the purchase price of the Products equal to the percentage of shortfall in the Products.

COUNT III

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW §§ 350 AND 350-a(1)
(FALSE ADVERTISING)
(Brought on Behalf of the New York Class)

124. This claim is brought on behalf of Plaintiff ALCE and members of the New York Class against Defendant.

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

126. Defendant has been and/or is engaged in the "conduct of…business, trade or commerce" within the meaning of N.Y. Gen. Bus. Law § 350.

127. New York Gen. Bus. Law § 350 makes unlawful "[f]alse advertising in the conduct of any business, trade or commerce." False advertising means "advertising, including labeling, of a commodity … if such advertising is misleading in a material respect," taking into account "the extent to which the advertising fails to reveal facts material in light of … representations [made] with respect to the commodity …" N.Y. Gen. Bus. Law § 350-a(1).

128. Pursuant to the FDCA as implemented through 21 C.F.R. § 100.100, package size is an affirmative representation of quantity. Thus, the non-functional slack-fill in Defendant's Products constituted false advertising as to the quantity of chips contained therein. Defendant caused this false advertising to be made and disseminated throughout New York. Defendant's false advertising was known, or through the exercise of reasonable care should have been known, by Defendant to be untrue and misleading to consumers and the New York Class.

129. Defendant's affirmative misrepresentations were material and substantially uniform in content, presentation, and impact upon consumers at large. Consumers purchasing the Products were, and continue to be, exposed to Defendant's material misrepresentations.

130. Defendant has violated N.Y. Gen. Bus. Law § 350 because its misrepresentations and/or omissions regarding the Products, as set forth above, were material and likely to deceive a reasonable consumer.

131. Plaintiff ALCE and members of the New York Class have suffered an injury, including the loss of money or property, as a result of Defendant's false and misleading advertising. In purchasing the Products, Plaintiff ALCE and members of the New York Class relied on the misrepresentations regarding the quantity of the Products that was actually food rather than non-functional slack-fill. Those representations were false and/or misleading because the Products contain substantial hidden non-functional slack-fill. In order for Plaintiff ALCE and New York Class members to be made whole, they must receive a refund of the purchase price of the Products equal to the percentage of shortfall in the Products.

132. Pursuant to N.Y. Gen. Bus. Law § 350-e, Plaintiff ALCE and members of the New York Class seek monetary damages (including actual, minimum, punitive, treble, and/or statutory damages), injunctive relief, restitution and disgorgement of all monies obtained by means of Defendant's unlawful conduct, interest, and attorneys' fees and costs.

COUNT IV

VIOLATIONS OF THE DISTRICT OF COLUMBIA CONSUMER PROTECTION PROCEDUES ACT
D.C. Code § 28-3901 et seq.
(Brought on Behalf of the D.C. Class)

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

134. Plaintiff NUGENT brings this claim individually and on behalf of the other members of the D.C. Class for Defendant's violations of the District of Columbia's Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901, *et seq*.

135. The purpose of the CPPA is to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices," to "promote, through effective enforcement, fair business practices throughout the community," and to "educate consumers to demand high standards and seek proper redress of grievances. D.C. Code §§ 28-3901(b)(1)-(3). The CPPA's provisions are to be "construed and applied liberally to promote its purpose." D.C. Code § 3901(c).

136. Plaintiff NUGENT and the D.C. Class members are consumers who purchased the Products for personal, family or household purposes. Plaintiff NUGENT and the D.C. Class members are "consumers" as that term is defined in D.C. Code § 28-3901(a)(2).

137. Products that Plaintiff NUGENT and other D.C. Class members purchased from Defendant were "goods" within the meaning of D.C. Code § 28-3901(a)(7).

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

139. Defendant violated federal and District of Columbia 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.

140. The District of Columbia's CPPA, D.C. Code § 28-3904(a) prohibits as an unlawful trade practice "represent[ing] that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not

have." By engaging in the conduct set forth herein, Defendant violated and continues to violate the CPPA, because the purpose and effect of its oversized bags is to misrepresent the quantity of chips that Plaintiff and other consumers are purchasing.

141. D.C. Code § 28-3904(e) further prohibits "misrepresent[ing] as to a material fact which has a tendency to mislead" as an unlawful trade practice. By engaging in the conduct set forth herein, Defendant violated and continues to violate the CPPA. The size of its potato chip bags was a material consideration in Plaintiff's and other consumers' decision to purchase Defendant's Products and misled Plaintiff and the D.C. Class about the quantity of chips contained therein.

142. D.C. Code § 28-3904(h) also prohibits as an unlawful trade practice "advertis[ing] or offer[ing] goods or services without the intent to sell them or without the intent to sell them as advertised or offered." By engaging in the conduct set forth herein, Defendant violated and continues to violate the CPPA, because the size of Defendant's potato chip bag advertises a larger quantity of chips than Defendant is actually selling.

143. Additionally, D.C. Code § 28–3904(x) prohibits "sell[ing] consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law." Thus, any violation of 21 C.F.R. § 100.100 is also a violation of the DCCA.

144. Courts in the District of Columbia interpret the D.C. Code as establishing "[t]he policy of protecting the public from injury, physical or pecuniary, resulting from misrepresentation … which dictates that the manufacturer should be held responsible to the consumer public for representations made for the purpose of promoting the sale of the product." Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 923 (D.C. 1962).

145. The violations set forth above are violations "whether or not any consumer is in fact misled, deceived, or damaged thereby." D.C. Code § 28-3904

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

147. Plaintiff NUGENT and the D.C. 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; and (b) the Products did not have the quantities as promised.

148. Pursuant to D.C. Code § 28-3905(k)(1)(A), Plaintiff is entitled to recover the greater of treble damages or $1,500 per violation from Defendant.

149. Pursuant to D.C. Code § 28-3905(k)(1)(B), Plaintiff is entitled to recover reasonable attorney's fees from Defendant.

150. Pursuant to D.C. Code § 28-3905(k)(1)(C), Plaintiff is entitled to recover punitive damages from Defendant.

151. Pursuant to D.C. § 28-3905(k)(1)(D), Plaintiff is entitled to seek an injunction against Defendant's continuing use of non-functional slack-fill to deceive and mislead consumers.

152. Pursuant to D.C. Code § 28-3905(k)(1)(F), Plaintiff is entitled to any other relief which the Court deems proper.

153. Wherefore, Plaintiff NUGENT seeks the greater of treble damages or $1500 per violation, punitive damages, injunctive relief, and any other relief that the Court deems proper for the violations of the CPPA set forth above.

COUNT V

UNJUST ENRICHMENT
(Brought on Behalf of the New York and D.C. Classes

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

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

156. 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.

157. Defendant will be unjustly enriched if 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.

158. The focus of an unjust enrichment claim is whether the defendant was unjustly enriched. At the core of New York law are three fundamental elements – the defendant received a benefit from the plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the plaintiff. "To prevail on a claim for unjust enrichment in New York, a plaintiff must establish 1) that the defendant benefitted; 2) at the plaintiff's expense; and 3) that equity and good conscience require restitution. The benefit to the defendant is not limited to monies, and can be either a direct or an indirect benefit." *State Farm Mut. Auto. Ins. Co. v. Grafman*, 655 F. Supp. 2d 212, 222 (E.D.N.Y. 2009) (internal quotations and citations omitted).

159. Under the circumstances, it would violate equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiffs and others similarly situated, given that the volume of the Products purchased by Plaintiffs and the Class was not what Defendant represented it as being through the Products' packaging. It would be unjust and inequitable for Defendant to retain the benefit of selling its Products in packaging containing non-functional slack-fill without restitution to Plaintiffs and others similarly situated because Plaintiffs and the Class did not receive the full benefit of their bargain. In order for Plaintiffs and Class members to be made whole, they must receive a refund equivalent to the proportion of the purchase price of the Products equal to the percentage of non-functional slack-fill in them.

160. In New York, unjust enrichment serves as a mechanism to reimburse defrauded consumers even when a product was purchased indirectly through a third party and there is no direct connection between the parties. *See Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 404 (E.D.N.Y. 2010), (denying motion to dismiss unjust enrichment claim where plaintiff was not in privity with defendant); *see also Famular v. Whirlpool Corp.*, No. 16 CV 944 (VB), 2017 U.S. Dist. LEXIS 8265 (S.D.N.Y. Jan. 19, 2017) ("New York law does not require plaintiff to have conferred a direct benefit on defendant to state a claim for unjust enrichment. Rather, the law requires only that the plaintiff's relationship with a defendant not be too attenuated.") (internal quotations and citations omitted).

PRAYER FOR RELIEF

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

(A) For an Order certifying the New York and D.C. Classes under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representatives of their respective Classes and Plaintiffs' attorneys as Class Counsel to represent members of both Classes;

(B) For an Order declaring that 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 ordering Defendant to repackage the Products without non-functional slack-fill;

(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 demand a jury trial on all claims so triable.

Dated: June 27, 2017

Respectfully submitted,

/s/ C.K. Lee
By: C.K. Lee, Esq.

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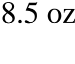
EXHIBIT A

Product Line	Product Flavor	Product Sizes
KETTLE COOKED	Jalapeño New York Deli Kettle Cooked Potato Chips	8.5 oz.
	Jalapeño Kettle Cooked	8.5 oz.

	Reduced Fat Sea Salt & Balsamic Vinegar Kettle Cooked	8.5 oz.
	Sea Salt & Balsamic Vinegar Kettle Cooked	8.5 oz.

	Reduced Fat Original Kettle Cooked Potato Chips 	8.5 oz. 
	Reduced Fat Barbecue Kettle Cooked 	8.5 oz.

	Barbecue Kettle Cooked	8.5 oz.
	Original Kettle Cooked Potato Chips	8.5 oz.

POTATO CHIPS	Beef Barbacoa Tacos	8.5 oz.
	Unsalted	7 oz.

	Lightly Salted	7 oz.
	Salt & Vinegar	6.75 oz., 8.75 oz.

	Honey BBQ	6.75 oz., 8.75 oz.
	BBQ	6.75 oz., 8.75 oz.

	Onion & Garlic	6.75 oz., 8.75 oz.
	Golden Original	7 oz.

RIDGIES	Cheddar & Sour Cream	4.5 oz., 6.75 oz., 8.75 oz.
	Sour Cream & Onion	2.75 oz., 4.5 oz., 6.75 oz., 8.75 oz.

	Dill Pickle	8.75 oz.
	Barbecue	6.75 oz.

	All Natural 	7 oz.

EXHIBIT B

Wise® Golden Original Potato Chips – 7 oz.

Immediately below is an image of a bag of Wise® Golden Original Potato Chips containing 7 oz. of chips. The bag's capacity is 12 vertical inches (out of a height of 12.5 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6.5 inches by width when it is filled with chips. The line indicates the approximate height of the potato chips inside, which occupy about one third of the total available space – only 4 inches out of a total capacity of 12 vertical inches, about 33% of the available space, leaving 67% slack-fill:

Below is an image of how the 7 oz. Wise® Golden Original Potato Chip bag appears once opened:

Below is a 9.25 oz. bag of Wise® Dipsy Doodles snack chips. The bag's capacity is 10 vertical inches (out of a height of 10.5 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 5.5 inches by width when it is filled with chips. It contains about 7.25 inches of product in a bag with 10 inches of available space, about 72.5%, leaving only 27.5% slack-fill:

Below is an image of how the 8.25 oz. bag of Wise® Dipsy Doodles appears once opened:

The Dipsy Doodles bag is two inches *shorter* than the Golden Original Potato Chips bag, but the chips inside reach 3.25 inches higher.

Below is an 8.5 oz. bag of a competitor's product, Ruffles® Sour Cream & Onion potato chips. The bag's capacity is 11.5 vertical inches (out of a height of 12 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6.5 inches by width when it is filled with chips. It contains about 8 inches of product in a bag with 11.5 inches of available space, about 70%, leaving only 30% slack-fill:

Below is an image of how the 8.5 oz. Ruffles® Sour Cream & Onion Potato Chips bag appears once opened:

The Ruffles® bag is half an inch *shorter* than the Wise bag, but the chips inside reach 4 inches higher.

Wise® Ridgies Sour Cream and Onion Potato Chips – 6.75 oz.

Immediately below is an image of a bag of Wise® Ridgies Sour Cream and Onion potato chips containing 6.75 oz. of chips. The bag's capacity is 12 vertical inches (out of a height of 12.5 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6.5 inches by width when it is filled with chips. The line indicates the approximate height of the potato chips inside, which occupy about one third of the total available space – only 4 inches out of a total capacity of 12 vertical inches, about 33% of the available space, leaving 67% slack-fill:

Below is an image of how the 6.75 oz. Wise® Ridgies Sour Cream and Onion potato chip bag appears once opened:

The Dipsy Doodles bag is two inches *shorter* than the Golden Original Potato Chips bag, but the chips inside reach 3.25 inches higher.

The Ruffles® bag is half an inch *shorter* than the Wise bag, but the chips inside reach 4 inches higher.

Wise® Ridgies Sour Cream and Onion Potato Chips – 2.75 oz.

Immediately below is a comparison of a 2.75 oz. bag of Wise® Ridgies Sour Cream and Onion potato chips and a 9.25 oz. bag of Wise® Dipsy Doodles. The Wise® Ridgies bag's capacity is 10 vertical inches (out of a height of 10.5 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6.25 inches by width when it is filled with chips. The line indicates the approximate height of the potato chips inside, which occupy about one quarter of the total available space – only 2.5 inches out of a total capacity of 10 vertical inches, about 25% of the available space, leaving 75% slack-fill. The Dipsy Doodles bag is two inches *shorter* than the Ridgies Sour Cream and Onion potato chip bag, but the chips inside reach 3.25 inches higher.

Below is a 6.25 oz. bag of a competitor's product, Ruffles® Oven Baked Original potato chips. The bag's capacity is 10.5 vertical inches (out of a height of 11 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6 inches by width when it is filled with chips. It contains about 6.5 inches of product in a bag with 10.5 inches of available space, about 62%, leaving only 38% slack-fill. The Ruffles® bag is half an inch *shorter* than the Wise bag, but the chips inside reach 4 inches higher.

Below is an image of how the 2.75 oz. Wise® Ridgies Sour Cream and Onion potato chip bag appears once opened:

Below is an image of how the 6.25 oz. bag of Ruffles® Oven Baked Original potato chips appears once opened:

Wise® Ridgies Sour Cream and Onion Potato Chips – 4.5 oz.

Immediately below is a comparison of a 4.5 oz. bag of Wise® Ridgies Sour Cream and Onion potato chips and a 9.25 oz. bag of Wise® Dipsy Doodles. The Wise® Ridgies bag's capacity is 10 vertical inches (out of a height of 10.5 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6.25 inches by width when it is filled with chips. The line indicates the approximate height of the potato chips inside, which occupy about one third of the total available space – only 3.75 inches out of a total capacity of 10 vertical inches, about 37.5% of the available space, leaving 62.5% slack-fill. The Dipsy Doodles bag is the same height as the Ridgies Sour Cream and Onion potato chip bag, but the chips inside reach 3.5 inches higher.

The Ruffles® bag is only half an inch taller than the Wise bag, but the chips inside reach 2.75 inches higher.

Below is an image of how the 4.5 oz. Wise® Ridgies Sour Cream and Onion potato chip bag appears once opened:

Wise® Sea Salt & Balsamic Vinegar Kettle Potato Chips – 8.5 oz.

Immediately below is a comparison of an 8.5 oz. bag of Wise® Sea Salt & Balsamic Vinegar Kettle potato chips and a 9.25 oz. bag of Wise® Dipsy Doodles. The bag's capacity is 12 vertical inches (out of a height of 12.5 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 6.5 inches by width when it is filled with chips. The line indicates the approximate height of the potato chips inside, which occupy less than half of the total available space – only 5 inches out of a total capacity of 12 vertical inches, about 42% of the available space, leaving 58% slack-fill. The Dipsy Doodles bag is two inches *shorter* than the Sea Salt & Balsamic Vinegar Kettle potato chip bag, but the chips inside reach 2.25 inches higher.

The 8.5 oz. bag of Ruffles® Sour Cream & Onion Potato Chips is half an inch *shorter* than the Wise® bag, but the chips inside reach three inches higher.

Below is an image of how the 8.5 oz. Wise® Sea Salt & Balsamic Vinegar Kettle potato chip bag appears once opened:

Wise® Salt & Vinegar Potato Chips – 8.75 oz.

Immediately below is a comparison of an 8.75 oz. bag of Wise® Salt & Vinegar potato chips and an 8.5 oz. bag of Ruffles® Sour Cream & Onion Potato Chips. The Wise® bag's capacity is 13.5 vertical inches (out of a height of 14 inches, minus half an inch of packaging at the top used to seal the bag shut) and about 7.75 inches by width when it is filled with chips. The line indicates the approximate height of the potato chips inside, which occupy about one quarter of the total available space – only 3.75 inches out of a total capacity of 1.5 vertical inches, about 28% of the available space, leaving 72% slack-fill. The Ruffles® bag is two inches *shorter* than the Wise bag, but the chips inside reach 4.25 inches higher.

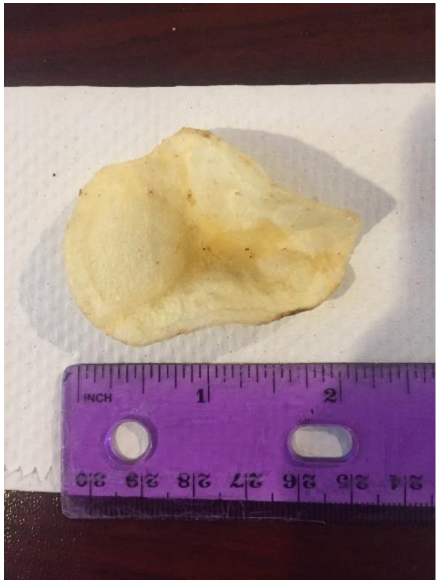
The Dipsy Doodles bag is 3.5 inches *shorter* than the Salt & Vinegar potato chip bag, but the chips inside reach 4.5 inches higher.

Below is an image of how the 8.75 oz. Wise® Salt & Vinegar potato chip bag appears once opened:

EXHIBIT C

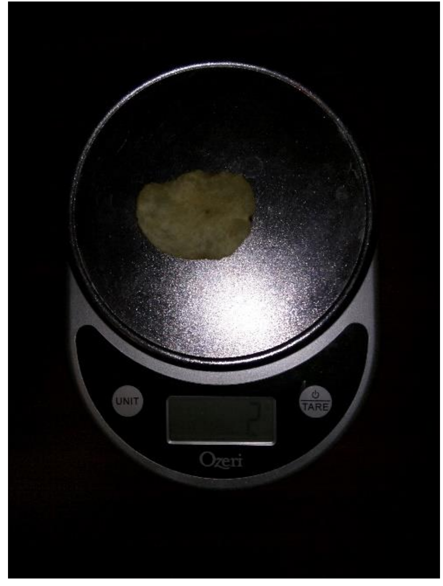
The potato chips across brands, lines, flavors, and bag sizes share essentially all same physical properties. Wise's® chips are all directly comparable with competitor Ruffles'® chips:

Wise® Golden Original Potato Chips – 7 oz.

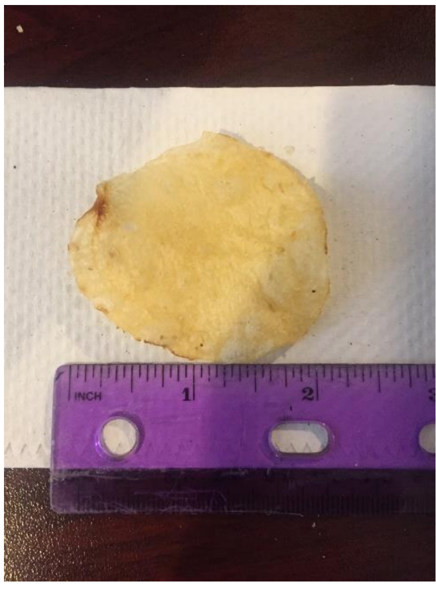


Wise® Ridgies Sour Cream and Onion Potato Chips –2.75 oz., 4.5 oz., and 6.75 oz.

Wise® Sea Salt & Balsamic Vinegar Kettle Potato Chips – 8.5 oz.



Wise® Salt & Vinegar Potato Chips – 8.75 oz.



Ruffles® Sour Cream & Onion Potato Chips – 8.5 oz.

Ruffles® Oven Baked Original Potato Chips – 8.5 oz.

Wise® Dipsy Doodles are snack chips that are substantially similar to potato chips. Each individual Dipsy Doodles chip is heavier, but is also larger and occupies more volume:

Wise® Dipsy Doodles – 9.25 oz.