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*Interim Class Counsel*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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*Frito-Lay North America, Inc. "All Natural"* )  
*Litigation* )

CASE NO. 1:12-MD-02413-RRM-RLM

AMENDED CONSOLIDATED COMPLAINT

CLASS ACTION

JURY TRIAL DEMANDED

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## **PRELIMINARY STATEMENT**

This Amended Consolidated Complaint is brought against PepsiCo, Inc. (which has its headquarters in New York) and Frito-Lay North America, Inc. (collectively “Defendants”) by individual consumers residing in New York, California and Florida, alleging that Defendants deceptively and misleadingly marketed certain products as “all natural” when, in fact, those products contained unnatural, genetically-modified organisms. Plaintiffs bring this action on behalf of themselves and nationwide classes seeking declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) for violations of the Magnuson-Moss Warranty Act and the statutory and common law of the State of New York, and monetary damages pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) for violations of the Magnuson-Moss Warranty Act and the statutory and common law of the State of New York.

Alternatively, Plaintiffs bring this action on behalf of themselves and a multi-state class of residents of the states of New York, California and Florida seeking declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) for violations of the Magnuson-Moss Warranty Act and the statutory and common law of the State of New York, and a multi-state class of residents of the states of New York, California and Florida seeking monetary damages pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) for violations of the Magnuson-Moss Warranty Act and the statutory and common law of the State of New York.

Alternatively, Plaintiff Shake brings this action on behalf of himself and a class of New York residents seeking declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), and a class of New York residents seeking monetary damages pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), for violations of the statutory and common law of the State of New York; Plaintiffs Gengo and Zuro bring this action on behalf

of themselves and a class of California residents seeking declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), and a class of California residents seeking monetary damages pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), for violations of the statutory and common law of the State of California; and Plaintiff Lawson brings this action on behalf of herself and a class of Florida residents seeking declaratory and injunctive relief pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), and a class of Florida residents seeking monetary damages pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), for violations of the statutory and common law of the State of Florida.<sup>1</sup>

The allegations in this Amended Consolidated Complaint are based on the personal knowledge of each of the Plaintiffs as to themselves, and on information and belief as to all other matters.

## **I. NATURE OF THE ACTION**

1. Plaintiffs allege that from January 1, 2010 through the present (the “Class Period”), Defendants deceptively and misleadingly marketed certain products as “all natural” when, in fact, those products contained unnatural, genetically-modified organisms (“GMOs”).<sup>2</sup>

2. Representations that products are “all natural” are material to consumers, as Defendants have expressly acknowledged. As John Compton, CEO of PepsiCo Americas Foods,

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<sup>1</sup> As used herein, “Classes” refers to the nationwide, multi-state and statewide classes collectively.

<sup>2</sup> As used herein, “genetically-modified” refers to the use of molecular biology techniques, such as recombinant DNA techniques, to delete genes or to transfer genes for particular qualities from one species to another. In contrast to conventional breeding techniques, modern molecular biology techniques permit the insertion into an organism of genetic material from an unrelated species, as the DNA of a fish into a tomato. See Ed Wallis, *Fish Genes into Tomatoes: How the World Regulates Genetically Modified Foods*, 80 N.D. L. Rev. 421 (2004).

told an industry conference in 2010: “*We have talked extensively to consumers about this idea, and they come back and tell us the number one motivation for purchase is products that claim to be all natural.*” (Emphasis added.)

3. The deceptively and misleadingly marketed products include Tostitos Restaurant Style Tortilla Chips, Tostitos Bite Size Rounds Tortilla Chips, Tostitos Crispy Rounds Tortilla Chips, Tostitos Multigrain Tortilla Chips, Tostitos Scoops Tortilla Chips, Tostitos Multigrain Scoops Tortilla Chips, Tostitos Restaurant Style with a Hint of Lime Flavored Tortilla Chips, Tostitos Restaurant Style with a Hint of Jalapeno Flavored Tortilla Chips, Tostitos Restaurant Style with a Hint of Pepper Jack Flavored Tortilla Chips, Tostitos Artisan Recipes Fire-Roasted Chipotle Flavored Tortilla Chips, Tostitos Artisan Recipes Baked Three Cheese Queso Flavored Tortilla Chips, Tostitos Artisan Recipes Roasted Garlic and Black Bean Flavored Tortilla Chips, Tostitos Artisan Recipes Toasted Southwestern Spices Flavored Tortilla Chips (collectively referred to herein as “Tostitos”); SunChips Original Flavored Multigrain Snacks, SunChips Garden Salsa Flavored Multigrain Snacks, SunChips French Onion Flavored Multigrain Snacks, and SunChips Harvest Cheddar Flavored Multigrain Snacks, SunChips Jalapeno Jack Flavored Multigrain Snacks (collectively referred to herein as “SunChips”); and Fritos Bean Dip and Fritos Hot Bean Dip (collectively referred to as “Bean Dip”). Tostitos, SunChips and Bean Dip are collectively referred to herein as the “Products.”

4. Throughout the Class Period, Defendants have systematically marketed and advertised the Products as “all natural” on each package of Tostitos, SunChips and Bean Dip; on the Frito-Lay website; and in print and television advertisements such that any United States consumer who purchased, or today or in the future purchases the Products is exposed to Defendants’ “all natural” claim.

5. This claim is deceptive and misleading because the Products are not “all natural.” Specifically, the Products contain ingredients made from GMOs.

6. GMOs are organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally, allowing the organism to exhibit traits that would not appear in nature. “For example, by transferring specific genetic material from a bacterium to a plant, scientists can create plants that produce pesticidal proteins or other chemicals that the plant could not previously produce. Using this technology, scientists have modified corn, cotton, and potatoes to produce a pesticidal protein that is toxic when ingested by specific insect pests.” EPA’s Regulation of Biotechnology for Use in Pest Management, January 2012, *available at* [http://www.epa.gov/opbtpd1/biopesticides/reg\\_of\\_biotech/eparegofbiotech.htm](http://www.epa.gov/opbtpd1/biopesticides/reg_of_biotech/eparegofbiotech.htm).

7. Accordingly, Defendants mislead and deceive reasonable consumers, including the named Plaintiffs and the other members of the Classes, by portraying a product containing non-natural, genetically-modified ingredients as “all natural.”

8. Defendants’ conduct harms consumers by inducing them to purchase and consume the Products containing GMOs on the false premise that the products are “all natural,” and by inducing consumers to pay a premium price for the Products.

## **II. JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction over this consolidated action under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(a) and 1332(d) because, as to each proposed nationwide class (and each alternatively proposed class consisting of residents of New York, California and Florida), (1) there are over 100 members in the proposed class, (2) the amount in controversy exceeds \$5 million exclusive of interest and costs, and (3) at least one member of the proposed class (Julie Gengo, California; Valarie Zuro, California; Deborah

Lawson, Florida) is a resident of a state other than Defendants' states of citizenship (New York and Texas).

10. This Court also has subject matter jurisdiction under 28 U.S.C. § 1331 over Plaintiffs' Magnuson-Moss Warranty Act claim because it arises under federal law.

11. This Court has personal jurisdiction over PepsiCo, Inc. ("PepsiCo") because it is headquartered in Purchase, NY. Additionally, PepsiCo intentionally avails itself of the markets in New York; operates and manages facilities and warehouses in New York; advertises, markets and sells the Products as "all natural" in New York; and has sufficient contacts with this District such that it is fair and just for PepsiCo to adjudicate this dispute here.

12. This Court has personal jurisdiction over Frito-Lay North America, Inc. ("Frito-Lay") because a substantial portion of the wrongdoing alleged by Plaintiffs occurred in New York; Frito-Lay intentionally avails itself of the markets in New York; operates and manages facilities and warehouses in New York; advertises, markets and sells the Products as "all natural" in New York; and has sufficient contacts with this District such that it is fair and just for Frito-Lay to adjudicate this dispute here.

13. Venue is proper in this District because Defendants are subject to personal jurisdiction here, a substantial portion of Defendants' alleged wrongdoing occurred here, PepsiCo is located in New York, and many of the relevant documents and witnesses with knowledge of Defendants' alleged wrongdoing are believed to be located here.

14. Pursuant to a stipulation dated February 15, 2012, the Parties in *Gengo v. Frito-Lay North America, Inc.*, No.11-10322 SVW (FMOx), agreed that transfer to the Eastern District of New York, where the *Shake v. Frito-Lay North America, Inc. and PepsiCo, Inc.*, No.12-cv-00408-RRM, action was pending, would serve the convenience of the Parties and witnesses, and



the interests of justice as contemplated by 28 U.S.C. § 1404(a). The Honorable Steven V. Wilson of the United States District Court for the Central District of California, Western Division, found such transfer appropriate under 28 U.S.C. § 1404(a), and by order dated February 15, 2012, transferred the Gengo action to the Eastern District of New York.

15. Pursuant to a stipulation dated February 21, 2012, the Parties in Zuro v. Frito-Lay North America, Inc., No.11-cv-06672-JW, agreed that transfer to the Eastern District of New York, where the Shake v. Frito-Lay North America, Inc. and PepsiCo, Inc., No.12-cv-00408-RRM, action was pending, would serve the convenience of the Parties and witnesses, and the interests of justice as contemplated by 28 U.S.C. § 1404(a). The Honorable James Ware of the United States District Court for the Northern District of California, San Francisco Division, found such transfer appropriate under 28 U.S.C. § 1404(a), and by order dated February 22, 2012, transferred the Zuro action to the Eastern District of New York.

16. On March 16, 2012, this Court ordered the consolidation of the Shake, Gengo and Zuro actions under the caption shown above.

### **III. PARTIES**

#### **A. Plaintiffs**

17. Plaintiff Chris Shake is a consumer residing in Brooklyn, New York. Shake purchased Tostitos, SunChips and Bean Dip for his personal consumption approximately once per month in 2011 at Key Foods, Associated Supermarkets, and various convenience stores located in Brooklyn. During that period all of those products contained the representations on their packages and in related advertising that they were “all natural.” Shake was exposed to Defendants’ claims that the Products were “all natural” through Defendants’ product packaging, to which he was exposed approximately once per month in stores and more frequently in his home. Shake believed Defendants’ representations that the Tostitos, SunChips and Bean Dip he

purchased were “all natural.” He relied on those representations in making his purchase decisions and would not have purchased the products had he known they were not all natural because they contained GMOs. Shake paid for “all natural” products, but he received products that were not all natural; specifically, he received products made from corn that was genetically manipulated in a laboratory to exhibit traits that corn does not possess in nature. The products Shake received were worth less than the products for which he paid. Shake was injured in fact and lost money as a result of Defendants’ improper conduct.

18. Plaintiff Julie Gengo is a consumer residing in Richmond, California. From approximately 2010 until September 2011, Gengo purchased Tostitos and SunChips approximately once per month for her own and her family’s consumption. Specifically, Gengo purchased Tostitos Multigrain Tortilla Chips, Tostitos Scoops Tortilla Chips, Tostitos Artisan Recipes Fire-Roasted Chipotle Tortilla Chips, SunChips Original flavored Multigrain Snacks, SunChips French Onion Flavored Multigrain Snacks, and SunChips Harvest Cheddar Flavored Multigrain Snacks. During that period all of those products contained the representations on their packages and in related advertising that they were “all natural.” Gengo became aware of Defendants’ “all natural” representations through Defendants’ print media advertising and product packaging, to which she was exposed approximately once per week in stores and more frequently in her home. Gengo believed Defendants’ representations that the Tostitos and SunChips she purchased were “all natural.” She relied on those representations in making her purchase decisions and would not have purchased the products had she known they were not “all natural” because they contained GMOs. Gengo paid for “all natural” products, but she received products that were not all natural; specifically, she received products made from corn that was genetically manipulated in a laboratory to exhibit traits that corn does not possess in nature. The

products Gengo received were worth less than the products for which she paid. Gengo was injured in fact and lost money as a result of Defendants' improper conduct.

19. Plaintiff Valarie Zuro is a consumer residing in San Francisco, California. From 2010 until December 2011, Zuro purchased Tostitos and SunChips approximately once per month for her own consumption. Specifically, Zuro purchased Tostitos Restaurant Style Tortilla Chips, Tostitos Crispy Rounds Tortilla Chips, Tostitos Multigrain Tortilla Chips, Tostitos Scoops Tortilla Chips, Tostitos Restaurant Style with a Hint of Lime Tortilla Chips, Tostitos Artisan Recipes Fire-Roasted Chipotle Tortilla Chips, SunChips Original flavored Multigrain Snacks, SunChips Garden Salsa Flavored Multigrain Snacks, Sun Chips French Onion Flavored Multigrain Snacks, and SunChips Harvest Cheddar Flavored Multigrain Snacks. During that period, all of those products contained the representations on their packages and in related advertising that they were "all natural." Zuro became aware of these representations through Defendants' print media advertising and product packaging, to which she was exposed approximately once per week. Zuro believed Defendants' representations that the Tostitos and SunChips she purchased were "all natural." She relied on those representations in making her purchase decisions and would not have purchased the products had she known they were not "all natural" because they contained GMOs. Zuro paid for "all natural" products, but she received products that were not all natural; specifically, she received products made from corn that was genetically manipulated in a laboratory to exhibit traits that corn does not possess in nature. The products Zuro received were worth less than the products for which she paid. Zuro was injured in fact and lost money as a result of Defendants' improper conduct.

20. Plaintiff Deborah Lawson is a consumer residing in Perry, Florida. Lawson purchased SunChips approximately once per week for her own and her family's consumption

beginning in the first half of 2010 for a period of about six months. Specifically, Lawson purchased SunChips Original Flavored Multigrain Snacks, SunChips French Onion Flavored Multigrain Snacks, and SunChips Harvest Cheddar Flavored Multigrain Snacks at the Walmart Supercenters in Tallahassee, FL and Perry, FL. During that period, all of those products contained the representations on their packages and in related advertising that they were “all natural”. Lawson became aware of Defendant’s “all natural” representations through Defendant’s product packaging, to which she was exposed approximately once per week at Walmart and on an ongoing basis in her home. Lawson believed Defendant’s representations that the SunChips she purchased were “all natural”. She relied on those representations in making her purchase decisions and would not have purchased the Products had she known they were not “all natural” because they contained GMOs. Lawson paid for “all natural” products, but she received products that were not all natural; specifically, she received products made from corn that was genetically manipulated in a laboratory to exhibit traits that corn does not possess in nature. The products Lawson received were worth less than the products for which she paid. Lawson was injured in fact and lost money as a result of Defendant’s improper conduct.

21. Plaintiffs were damaged, in an amount to be determined at trial, as a result of Defendants’ misrepresentations of the Products as “all natural.” Plaintiffs paid for products they believed to be “all natural,” but did not receive products that were “all natural.” The products Plaintiffs received were worth less than the products for which they paid. Further, Plaintiffs paid a premium price for the Products over the costs of competitive products not bearing an “all natural” label.

**B. Defendants**

22. Defendant PepsiCo, Inc., is a Delaware Corporation with headquarters in Purchase, NY. PepsiCo is the parent company of Frito-Lay, which it holds as a wholly-owned subsidiary. PepsiCo markets, advertises and distributes the Products.

23. PepsiCo is a world leader in convenient snacks, foods, and beverages, with net revenues of over \$60 billion and over 285,000 employees. PepsiCo owns some of the world's most popular brands, including Pepsi-Cola, Mountain Dew, Diet Pepsi, Lay's, Doritos, Tropicana, Gatorade, and Quaker. Its brands are available worldwide through numerous distribution channels including stores, restaurants, food service facilities and vending operations. See PepsiCo's Corporate Profile, *available at* <http://www.pepsico.com/Investors/Corporate-Profile.html>, and PepsiCo's Annual Report on Form 10-K, filed Feb. 27, 2012, *available at* <http://www.sec.gov/Archives/edgar/data/77476/000119312512081822/d269581d10k.htm>.

PepsiCo operates and manages facilities and warehouses in New York.

24. Defendant Frito-Lay, a Delaware corporation with headquarters in Plano, TX, is a wholly-owned subsidiary of PepsiCo. Frito-Lay manufactures, markets, advertises, distributes, and sells the Products.

25. Frito-Lay claims that its products are in 93% percent of American households and that its brands account for 59% of the U.S. snack chip industry. *See* Frito-Lay job posting at [http://miamidade.jobing.com/jobfair\\_company.asp?i=32798](http://miamidade.jobing.com/jobfair_company.asp?i=32798). Frito-Lay's net revenues were \$13.3 billion, \$12.6 billion and \$12.4 billion in 2011, 2010 and 2009, respectively. *See* PepsiCo's Annual Report on Form 10-K, filed Feb. 27, 2012, *available at* <http://www.sec.gov/Archives/edgar/data/77476/000119312512081822/d269581d10k.htm>. Frito-Lay's operating profit was \$3.6 billion, \$3.3 billion and \$3.1 billion in 2011, 2010 and 2009, respectively. Frito-Lay has more than 38,000 employees. *See* PepsiCo's Annual Report on Form

10-K, filed Feb. 27, 2012, available at <http://www.sec.gov/Archives/edgar/data/77476/000119312512081822/d269581d10k.htm>. Frito-Lay owns or leases approximately 40 food manufacturing and processing plants and approximately 1,720 warehouses, distribution centers and offices in the U.S.

26. The Frito-Lay website lists 26 locations in the same zip code as this courthouse at which consumers can purchase “all natural” Tostitos. According to current public listings on YellowPages.com, Frito-Lay has 22 physical locations in New York state, including four within this District (in Brooklyn, Queens, East Islip and Riverhead, NY). *See* <http://www.yellowpages.com/ny/frito-lay>.

**C. Both PepsiCo and Frito-Lay Actively Engage in the Advertising and Marketing of the Products as “All Natural” and Profit Therefrom.**

27. The marketing, advertising and distribution functions of PepsiCo and Frito-Lay are substantially intertwined. More specifically, Defendant PepsiCo actively coordinates its marketing and advertising activities with Defendant Frito-Lay to promote the Products as “all natural,” and benefits therefrom.

28. In September 2011, PepsiCo announced the formation of an integrated marketing campaign titled: “Power of One – Americas Council”, to bring together its top food and beverage leaders to “leverage the combined scale of the company's complementary snack and beverage businesses across North, South and Central America.” *See* <http://www.pepsico.com/PressRelease/PepsiCo-Announces-Formation-of-Power-of-One---Americas-Council-and-Creation-of-G09202011.html> (last visited July 3, 2012).

29. PepsiCo also announced the creation of the “Global Snacks Group,” designed to “drive breakthrough innovation across [PepsiCo’s] leading portfolio of global snack food brands,” including Frito-Lay. The Global Snacks Group focuses on “developing a coordinated

approach to [PepsiCo's] global brand portfolio, creating and delivering breakthrough snacks innovation and promoting best practice-sharing around the world." *See* <http://www.pepsico.com/PressRelease/PepsiCo-Announces-Formation-of-Power-of-One---Americas-Council-and-Creation-of-G09202011.html> (last visited July 3, 2012).

30. Both integrated marketing initiatives are led by John Compton, CEO of PepsiCo Americas Foods, who described the initiatives as "critical components of [PepsiCo's] long-term strategy to strengthen and extend [PepsiCo's] global leadership position in snacks and leverage the power of [PepsiCo's] combined food and beverage businesses." PepsiCo described the level of integration between itself and its snack businesses, including Frito-Lay, that is required under the "Power of One" marketing strategy:

The Power of One – Americas Council will ensure full coordination across the food and beverage operating systems, while also unlocking opportunities to create value across the business – from sales, marketing and distribution to back-office operations. The new group will also focus on creating opportunities in complementary food and beverage products in ways that are attractive to retailers and consumers.

Tom Greco, President of Frito-Lay North America is on the Power of One – Americas Council along with Compton, Al Carey (CEO of PepsiCo Americas Beverages) and other senior PepsiCo executives. *See* <http://www.pepsico.com/PressRelease/PepsiCo-Announces-Formation-of-Power-of-One---Americas-Council-and-Creation-of-G09202011.html> (last visited July 3, 2012).

31. The following press release, dated December 28, 2010, appears on the PepsiCo website:

**Frito-Lay Launches Products Made With All Natural Ingredients**

December 28, 2010 – Approximately Fifty Percent of the Product Portfolio to be Made With All Natural Ingredients

PLANO, Texas - PepsiCo's Frito-Lay North America division today said that approximately 50 percent of its product portfolio will be made with all natural ingredients, including three of its biggest brands, Lay's® potato chips, Tostitos® tortilla chips and SunChips® multigrain snacks. The products made with all natural ingredients do not have any artificial or synthetic ingredients, and they do not contain any artificial flavors or artificial preservatives, or ingredients such as monosodium glutamate (MSG), yet still have the great taste consumers expect from Frito-Lay.

More than six dozen varieties of Frito-Lay products will be made with all natural ingredients including all the flavors of Lay's® potato chips, Tostitos® tortilla chips, SunChips® multigrain snacks, Baked! snacks, and Rold Gold® pretzels by the end of 2011.

***“As the snack food category leader, we have insights that show consumers are seeking a wider range of products made with all natural ingredients.*** At Frito-Lay North America we want to provide our customers with a broad portfolio of snack options that taste great and are made with real food ingredients,” said Ann Mukherjee, senior vice president and chief marketing officer, Frito-Lay. “Many of the unflavored snacks in our portfolio are already made with all natural ingredients, and we’ve focused on expanding our portfolio of products with all natural ingredients to include more of consumers’ favorite flavored products.”

Frito-Lay's seasoning professionals and chefs at the Frito-Lay Flavor Kitchen™ turn culinary inspiration into great tasting snacks like Lay's regionally-inspired flavors, such as Tangy Carolina BBQ and Garden Tomato & Basil. The Frito-Lay seasoning professionals created the new seasonings for the products made with all natural ingredients.

New products made with all natural ingredients are now becoming available at retailers nationwide with more products launching throughout 2011. The reformulated products will be easily identifiable in stores with a stamp on package that calls out that the product is made with all natural ingredients, with no MSG, artificial preservatives or artificial flavors.

To support the transformation, Frito-Lay is undertaking the largest integrated marketing campaign in the history of the company. The portfolio-focused, 360 degree marketing campaign launches January 1 [2011] during the Tostitos Fiesta Bowl and includes a significant focus on digital and social mediums to connect with consumers.



Highlights of the campaign include:

- Television Advertising:** National campaign launching January 1st during the Tostitos Fiesta Bowl and appearing on a range of network and cable channels will focus on the real employees behind the products made with natural ingredients, from the purchasing agents who buy ingredients, to culinary center chefs who inspire new products to quality experts that ensure products meet Frito-Lay's high standards.
- Print Advertising:** National campaign highlighting the real food ingredients and culinary-based innovation process that are used to make Frito-Lay's products, appearing in a variety of national print outlets. The print campaign will include Quick Response (QR) codes that leverage scan technology to unlock additional content, including recipes and culinary webisodes.
- In-Store Promotions:** In-store communications including redesigned packaging, partnering with top-tier retailers and media for cooperative advertising.

Frito-Lay is making an investment in emerging technology and marketing practices to support the program; embracing digital media in a way they never have before and utilizing the scale of mass media to drive digital and social engagement. And in 2011, Frito-Lay will use advertising and marketing to drive consumers to Facebook. Most of the advertisements - and for the first time ever, packaging - will list branded Facebook pages. Frito-Lay will claim the broadest portfolio of consumer products that include a Facebook URL on packaging to date.

Throughout the campaign, Frito-Lay is highlighting our 'seed to shelf' story, which shows the care and pride that goes into every step to make our products, from the real ingredients that we use, to the real culinary arts and quality employee experts," said Mukherjee. "We are pulling back the curtain and inviting consumers to learn how our products are created, from our kitchen into theirs.

<http://www.fritolay.com/about-us/press-release-20101228.html> (last visited July 3, 2012)

(emphasis added).

32. John Compton, CEO of PepsiCo Americas Foods, made the following comments at an industry conference in 2010, further revealing the degree to which the businesses of PepsiCo and Frito-Lay are intertwined:

Let me first start with this decision to the Frito-Lay [move] to all natural. Consumers have consistently told us they are looking for more whole grains, and more all natural snacks. And they are voting with their wallets. If you look at the total food and beverage growth in the United States, it's growing around 2% to 3%. And the all-natural segment is growing almost 3 times faster than the total.

\* \* \*

Now, you may ask, what does it mean to be all natural? Well, it means just that -- no artificial colors, no preservatives, no artificial flavors, ***and made with all-natural ingredients.***

\* \* \*

[W]e command somewhere between 50 and 60 feet of space [in supermarket snack food aisles]. At least half of that space now will be blocked in an all-natural look and feel. And, due to our DSD system, ***we will take that all-natural look to every piece of that permanent equipment that you see around the stores, and all of our temporary displays will showcase and romance the all-natural look.***

\* \* \*

***We have talked extensively to consumers about this idea, and they come back and tell us the number one motivation for purchase is products that claim to be all natural.*** And the purchase intent went up for heavy users, medium users, and importantly, light users who tend to come and go from the category.

<http://www.pepsico.com/Download/PEP-Transcript-2010-11-17.pdf> (emphasis added).

33. In 2009, 2010 and 2011, PepsiCo's annual shareholder meeting was held at Frito-Lay headquarters in Plano, TX.

34. According to PepsiCo's 2011 Annual Report, Thomas R. Greco is both Executive Vice President of PepsiCo and President of Frito-Lay North America.

35. Frito-Lay shares marketing, accounting, warehousing and other business functions with the Quaker Oats, Tropicana and Gatorade divisions of PepsiCo.

#### IV. FACTUAL ALLEGATIONS

##### A. Defendants Advertise and Market Tostitos, SunChips and Bean Dip as “All Natural”

36. Throughout the Class Period, Defendants systematically marketed and advertised the Products as “all natural” in product packaging, print advertisements (e.g., coupons or magazine advertisements), both visually and audibly in television commercials, and on the Frito-Lay and SunChips websites (<http://www.fritolay.com/tostitos/index.html>, <http://www.fritolay.com/our-snacks/fritos-bean-dip.html> and <http://www.sunchips.com/>).

37. Defendants stamp every bag of Tostitos and SunChips, and every can of Bean Dip, with a large, bulls-eye like pattern with the phrase “all natural” in bold, prominent font on the front of the package as illustrated in the representative images of Tostitos, SunChips and Bean Dip packaging reproduced below:

## The Frito-Lay “All Natural” Stamp



## Packaging for All Natural SunChips Original Multigrain Snacks



**Ingredients:** Whole Corn, Sunflower and/or Canola Oil, Whole Wheat, Whole Oat Flour, Rice Flour, Sugar, Corn Bran, Salt, Natural Flavor, and Maltodextrin (Made From Corn).

**CONTAINS A WHEAT INGREDIENT.**

No Preservatives.

### Nutrition Facts

Serving Size	1 package
Servings Per Container	1
Amount Per Serving	
Calories	140
Calories from Fat	50
	%Daily Value*
Total Fat 6g	10%
Saturated Fat 1g	5%
Trans Fat 0g	
Polyunsaturated Fat 1g	
Monounsaturated Fat 3.5g	
Cholesterol 0mg	0%
Sodium 120mg	5%
Total Carbohydrate 19g	6%
Dietary Fiber 3g	10%
Sugars 2g	
Protein 2g	
Vitamin A	0%
Vitamin C	0%
Calcium	0%
Iron	2%
Vitamin E	6%
Thiamin	2%
Niacin	2%
Vitamin B6	2%
Phosphorus	4%
Magnesium	4%
Zinc	2%
*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.	
	Calories: 2,000 2,500
Total Fat	Less than 65g 80g
Sat Fat	Less than 20g 25g
Cholesterol	Less than 300mg 300mg
Sodium	Less than 2,400mg 2,400mg
Total Carbohydrate	300g 375g
Dietary Fiber	25g 30g
Calories per gram:	
Fat 9	Carbohydrate 4 Protein 4



## Packaging for "All Natural" Garden Salsa SunChips Multigrain Snacks



**Ingredients:** Whole Corn, Sunflower and/or Canola Oil, Whole Wheat, Whole Oat Flour, Rice Flour, Sugar, Corn Bran, Tomato Powder, Salt, Natural Flavors, Maltodextrin (Made From Corn), Cheddar Cheese (Milk, Cheese Cultures, Salt, Enzymes), Dextrose, Buttermilk, Onion Powder, Whey, Yeast Extract, Romano Cheese (Part-Skim Cow's Milk, Cheese Cultures, Salt, Enzymes), Whey Protein Concentrate, Corn Oil, Spices (Including Jalapeno Pepper), Citric Acid, Paprika Extracts, and Lactic Acid.

**CONTAINS WHEAT AND MILK INGREDIENTS.**

Servings Per Container 1	
Amount Per Serving	
Calories	
	140
Calories from Fat	
	60
%Daily Value*	
Total Fat 6g	9%
Saturated Fat 1g	5%
Trans Fat 0g	
Polyunsaturated Fat 1g	
Monounsaturated Fat 3.5g	
Cholesterol 0mg	0%
Sodium 140mg	6%
Potassium 70mg	2%
Total Carbohydrate 19g	6%
Dietary Fiber 3g	10%
Sugars 2g	
Protein 2g	
Vitamin A	0%
Vitamin C	0%
Calcium	0%
Iron	2%
Vitamin E	6%
Thiamin	2%
Riboflavin	2%
Niacin	2%
Vitamin B6	4%
Phosphorus	6%
Magnesium	4%
Zinc	2%

\*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

Calories:		2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:			
Fat 9	Carbohydrate 4	Protein 4	

## Packaging for "All Natural" Harvest Cheddar SunChips Multigrain Snacks



**INGREDIENTS:** Whole Corn, Sunflower Oil, Whole Wheat, Whole Oat Flour, Rice Flour, Sugar, Corn Bran, Maltodextrin (Made From Corn), Salt, Cheddar Cheese (Milk, Cheese Cultures, Salt, Enzymes), Natural Flavors, Whey, Whey Protein Concentrate, Onion Powder, Romano Cheese (Cow's Milk, Cheese Cultures, Salt, Enzymes), Buttermilk, Yeast Extract, Citric Acid, Paprika Extracts, Lactic Acid, Garlic Powder, Parmesan Cheese (Milk, Cheese Cultures, Salt, Enzymes), and Skim Milk.

**CONTAINS WHEAT AND MILK INGREDIENTS.**

## Nutrition Facts

Serving Size 1 oz. (28g/About 15 chips)

### Amount Per Serving

**Calories** 140 **Calories from Fat** 60

### % Daily Value\*

**Total Fat** 6g **10%**

Saturated Fat 1g **4%**

Trans Fat 0g

Polyunsaturated Fat 1.5g

Monounsaturated Fat 3.5g

**Cholesterol** 0mg **0%**

**Sodium** 200mg **8%**

**Potassium** 70mg **2%**

**Total Carbohydrate** 19g **6%**

Dietary Fiber 3g **10%**

Sugars 2g

**Protein** 2g

Vitamin A 0% • Vitamin C 0%

Calcium 0% • Iron 2%

Vitamin E 6% • Thiamin 2%

Riboflavin 2% • Niacin 2%

Vitamin B6 4% • Phosphorus 6%

Magnesium 4% • Zinc 2%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

Calories:	2,000	2,500
Total Fat	Less than 65g	80g
Sat Fat	Less than 20g	25g
Cholesterol	Less than 300mg	300mg
Sodium	Less than 2,400mg	2,400mg
Potassium	3,500mg	3,500mg
Total Carbohydrate	300g	375g
Dietary Fiber	25g	30g

Calories per gram:

Fat 9 • Carbohydrate 4 • Protein 4

## Packaging for "All Natural" Tostitos Restaurant Style Tortilla Chips



**INGREDIENTS:** Whole White Corn, Vegetable Oil (Corn, Canola and/or Sunflower Oil), and Salt. No Preservatives.

<b>Nutrition Facts</b>	
Serving Size 1 oz (28g/About 7 chips)	
Amount Per Serving	
<b>Calories</b> 140	Calories from Fat 60
% Daily Value*	
<b>Total Fat</b> 7g	<b>10%</b>
Saturated Fat 1g	<b>5%</b>
Trans Fat 0g	
<b>Cholesterol</b> 0mg	<b>0%</b>
<b>Sodium</b> 115mg	<b>5%</b>
<b>Total Carbohydrate</b> 19g	<b>6%</b>
Dietary Fiber 1g	<b>5%</b>
Sugars 0g	
Protein 2g	
Vitamin A 0%	Vitamin C 0%
Calcium 2%	Iron 2%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:  
Fat 9 • Carbohydrate 4 • Protein 4

## Packaging for "All Natural" Tostitos Bite Size Rounds Tortilla Chips



**INGREDIENTS:** Whole White Corn, Vegetable Oil (Corn, Soybean, Canola and/or Sunflower Oil), and Salt. No Preservatives.

<b>Nutrition Facts</b>	
Serving Size 1 oz (28g/About 24 chips)	
Amount Per Serving	
<b>Calories</b> 140	Calories from Fat 70
% Daily Value*	
<b>Total Fat</b> 7g	<b>11%</b>
Saturated Fat 1g	<b>5%</b>
Trans Fat 0g	
Polyunsaturated Fat 3g	
Monounsaturated Fat 2g	
<b>Cholesterol</b> 0mg	<b>0%</b>
<b>Sodium</b> 110mg	<b>5%</b>
<b>Total Carbohydrate</b> 18g	<b>6%</b>
Dietary Fiber 2g	<b>7%</b>
Sugars 0g	
Protein 2g	
Vitamin A 0%	Vitamin C 0%
Calcium 2%	Iron 2%
Vitamin E 4%	Thiamin 2%
Niacin 2%	Vitamin B6 4%
Phosphorus 4%	Magnesium 4%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:  
Fat 9 • Carbohydrate 4 • Protein 4



## Packaging for "All Natural" Tostitos Crispy Rounds Tortilla Chips



**INGREDIENTS:** Whole White Corn, Vegetable Oil (Corn, Soybean, Canola and/or Sunflower Oil), and Salt.  
No Preservatives.

**Nutrition Facts**

Serving Size 1 oz (28g/About 13 chips)

**Amount Per Serving****Calories** 140 **Calories from Fat** 70**% Daily Value\*****Total Fat** 7g **11%**Saturated Fat 1g **6%**

Trans Fat 0g

Polyunsaturated Fat 3g

Monounsaturated Fat 2g

**Cholesterol** 0mg **0%****Sodium** 120mg **5%****Total Carbohydrate** 18g **6%**Dietary Fiber 2g **7%**

Sugars 0g

**Protein** 2g

Vitamin A 0% • Vitamin C 0%

Calcium 4% • Iron 2%

Vitamin E 4% • Niacin 2%

Vitamin B6 4% • Phosphorus 6%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

## Packaging for "All Natural" Tostitos Scoops Tortilla Chips



**INGREDIENTS:** Whole White Corn, Vegetable Oil (Corn, Canola and/or Sunflower Oil), and Salt.  
No Preservatives.

No Preservatives.

**Nutrition Facts**

Serving Size 1 oz (28g/About 13 chips)

**Amount Per Serving****Calories** 140 **Calories from Fat** 60**% Daily Value\*****Total Fat** 7g **11%**Saturated Fat 1g **5%**

Trans Fat 0g

**Cholesterol** 0mg **0%****Sodium** 120mg **5%****Total Carbohydrate** 19g **6%**Dietary Fiber 2g **7%**

Sugars 0g

**Protein** 2g

Vitamin A 0% • Vitamin C 0%

Calcium 2% • Iron 0%

Vitamin E 4% • Thiamin 2%

Riboflavin 2% • Vitamin B6 4%

Phosphorus 6% • Magnesium 4%

Zinc 2%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

## Packaging for "All Natural" Tostitos Hint of Lime Tortilla Chips



**INGREDIENTS:** Whole White Corn, Vegetable Oil (Corn, Canola and/or Sunflower Oil), Maltodextrin (Made From Corn), Salt, Sugar, Natural Flavors (Including Natural Lime Flavor), Dextrose, Sour Cream (Cultured Cream, Skim Milk), Corn Bran, Whey, Spice, and Yeast Extract.

**CONTAINS MILK INGREDIENTS.**

No Preservatives.

### Nutrition Facts

Serving Size 1 oz (28g/About 6 chips)

**Amount Per Serving**

**Calories 150**      **Calories from Fat 70**

**% Daily Value\***

**Total Fat 7g**      **11%**

Saturated Fat 1g      **5%**

Trans Fat 0g

**Cholesterol 0mg**      **0%**

**Sodium 125mg**      **5%**

**Total Carbohydrate 18g**      **6%**

Dietary Fiber 1g      **5%**

Sugars less than 1g

**Protein 2g**

Vitamin A 0%      •      Vitamin C 0%

Calcium 2%      •      Iron 2%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:  
Fat 9      •      Carbohydrate 4      •      Protein 4

## Packaging for "All Natural" Tostitos Multigrain Tortilla Chips



**INGREDIENTS:** Whole Corn, Vegetable Oil (Corn, Soybean, Canola, and/or Sunflower Oil), Corn Starch, Whole Buckwheat Flour, Whole Oat Flour, Sugar, Toasted Corn Germ, Whole Wheat Flour, and Salt.

**CONTAINS WHEAT INGREDIENTS.**

### Nutrition Facts

Serving Size 1 oz (28g/About 8 chips)

**Amount Per Serving**

**Calories 150**      **Calories from Fat 70**

**% Daily Value\***

**Total Fat 7g**      **11%**

Saturated Fat 1g      **5%**

Trans Fat 0g

Polyunsaturated Fat 3g

Monounsaturated Fat 2g

**Cholesterol 0mg**      **0%**

**Sodium 110mg**      **5%**

**Total Carbohydrate 19g**      **6%**

Dietary Fiber 2g      **7%**

Sugars less than 1g

**Protein 2g**

Vitamin A 0%      •      Vitamin C 0%

Calcium 2%      •      Iron 2%

Thiamin 2%      •      Vitamin B6 2%

Phosphorus 4%      •      Magnesium 4%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:  
Fat 9      •      Carbohydrate 4      •      Protein 4



### Packaging for “All Natural” Fritos Bean Dip



### Packaging for “All Natural” Fritos Hot Bean Dip



38. The large “all natural” stamp is featured prominently on the front of the chips bags, less than one-inch to the left of, and level with, the product’s brand-name. Similarly, the “all natural” claim is featured prominently on the front of each can of Bean Dip, less than one-inch to the left of, and level with, the product’s brand-name. This prime placement of the “all natural” stamp on the Tostitos and SunChips bags and Bean Dip cans reinforces the significance to consumers of Defendants’ “all natural” claim. Defendants have explained that the location of the stamp on the Tostitos and SunChips bags enables consumers to “easily identify” its “all natural” products. <http://www.fritolay.com/your-health/naturally-delicious.html> (last visited July 3, 2012).

39. Defendants proclaim on the Frito-Lay website that Tostitos start with “3 simple ingredients” – 100% pure white corn, “naturally healthier” oils, and a dash of salt. ***“With just three natural ingredients, Tostitos Tortilla Chips are a subtle reminder that the best things in life are surprisingly simple.”*** <http://www.fritolay.com/tostitos/index.html#/products> (last visited July 3, 2012) (emphasis added). In reality, each “all natural” Tostitos product is not so “surprisingly simple” because at least one of these three “natural ingredients” – corn – has been proven to contain GMOs.

40. In addition to the representations appearing on the Products’ packaging and advertising, there is a page called “Naturally Delicious” on Defendant Frito-Lay’s website under the “Your Health” tab, explaining what the “all natural” stamp means and listing Defendants’ products that feature these representations. The webpage states, in pertinent part:

We’re proud to make so many of the Frito-Lay snacks you love with all natural ingredients.

\* \* \*

Natural FAQs

Q: What does it mean when a product is made with all natural ingredients?

A: All Frito-Lay snack chips made with natural ingredients start with all-natural corn or potatoes and healthier oils.

\* \* \*

Q: Which Frito-Lay products are now made with natural ingredients?

A: Our original potato chips and tortilla chips have actually always been all natural; they are made with just three simple ingredients—potatoes or corn, oil and salt. Now many of your favorite flavored products are made with natural ingredients, too, such as LAY'S® Potato Chips, TOSTITOS® Tortilla Chips and SUNCHIPS® Multigrain Snacks. For a full list of Frito-Lay natural products, please see the list below.

<http://www.fritolay.com/your-health/naturally-delicious.html> (last visited July 3, 2012)

(emphasis added).

41. By consistently and systematically marketing and advertising the Products as “all natural” on the Products’ packaging and otherwise throughout the Class Period and throughout the U.S., Defendants ensured that all consumers purchasing the Products would be, and all consumers purchasing the Products were, exposed to Defendants’ misrepresentation that the Products are “all natural.”

#### **B. GMOs Are Not Natural**

42. GMOs are not natural. They are, of course, not “all natural.” As more fully alleged below, “unnatural” is a defining characteristic of genetically modified foods.

43. As of January 2010, Monsanto was the world’s dominant producer of genetically modified seeds; 80% of the U.S. corn crop is grown with seeds containing Monsanto’s technology. See Robert Langreth and Bruce Herper, *The Planet Versus Monsanto*, Forbes, Jan. 18, 2010, <http://www.forbes.com/forbes/2010/0118/americas-best-company-10-gmos-dupont-planet-versus-monsanto.html>. Monsanto defines GMOs as “Plants or animals that *have had their genetic makeup altered to exhibit traits that are not naturally theirs*. In general, genes are

taken (copied) from one organism that shows a desired trait and transferred into the genetic code of another organism.” Monsanto Glossary, <http://www.monsanto.com/newsviews/Pages/glossary.aspx#g> (last visited July 3, 2012) (emphasis added).

44. Romer Labs, a company that provides diagnostic solutions to the agricultural industry, defines GMOs as “[a]griculturally important plants [that] are often genetically modified by the insertion of DNA material from outside the organism into the plant’s DNA sequence, allowing the plant to *express novel traits that normally would not appear in nature*, such as herbicide or insect resistance. Seed harvested from genetically modified plants will also contain these modifications.” Romer Labs, <http://www.romerlabs.com/en/knowledge/gmo/> (last visited July 3, 2012) (emphasis added).

45. That GMOs are not natural is further evidenced by the explanations of health and environmental organizations, such as The World Health Organization, which defines GMOs as “organisms in which the genetic material (DNA) *has been altered in a way that does not occur naturally*.” World Health Organization, *20 Questions on Genetically Modified (GM) Foods* at [http://www.who.int/foodsafety/publications/biotech/en/20questions\\_en.pdf](http://www.who.int/foodsafety/publications/biotech/en/20questions_en.pdf) (last visited July 3, 2012).

46. The Environmental Protection Agency has distinguished conventional breeding of plants from genetic engineering using modern scientific techniques.

What is the difference between plant-incorporated protectants produced through genetic engineering and those produced through conventional breeding?

Conventional breeding is a method in which genes for pesticidal traits are introduced into a plant through natural methods, such as cross-pollination. For a plant-incorporated pesticide, one would breed a plant that produces a pesticide with a sexually compatible plant that does not possess this property but possesses other properties of interest to the breeder, e.g., sweeter fruit. Then, out of the offspring, the breeder would choose the offspring plant that produces the

pesticide, and therefore expresses the desired pesticidal trait, as well as producing sweeter fruit.

Genetically engineered plant-incorporated protectants are created through a process that utilizes several different modern scientific techniques to introduce a specific pesticide-producing gene into a plant's DNA genetic material. For example, a desired gene that produces a desired pesticide[] (e.g., the insecticidal protein Bt from the bacterium, *Bacillus thuringiensis*) can be isolated from another organism, such as a bacterium, and then inserted into a plant. The desired gene becomes part of the plant's DNA. The plant then expresses the incorporated gene and produces the pesticidal protein as it would one of its own components.

United States Environmental Protection Agency, Prevention, Pesticides and Toxic Substances, *Questions & Answers Biotechnology: Final Plant-Pesticide/Plant Incorporated Protectants (PIPs) Rules* (July 19, 2001), at <http://www.epa.gov/scipoly/biotech/pubs/qanda.pdf>.

47. Genetic engineering is not just an extension of conventional breeding. In fact, it differs profoundly. "As a general rule, conventional breeding develops new plant varieties by the process of selection, and seeks to achieve expression of genetic material which is already present within a species.... Conventional breeding employs processes that occur in nature, such as sexual and asexual reproduction....Genetic engineering works primarily through insertion of genetic material, although gene insertion must also be followed up by selection. This insertion process does not occur in nature...." Michael K. Hansen, *Genetic Engineering Is Not An Extension Of Conventional Plant Breeding; How genetic engineering differs from conventional breeding, hybridization, wide crosses and horizontal gene transfer*, available at <http://www.consumersunion.org/food/boxerwc200.htm>.

48. As indicated by the definitions and descriptions above, which come from a wide array of industry, government and health organizations, GMOs are not "all natural." GMOs are "created" artificially in a laboratory through genetic engineering. Thus, by claiming the Products are "all natural," Defendants deceive and mislead reasonable consumers.

**C. Tostitos, SunChips and Bean Dip Are Made From GMOs**

49. The Products contain GMOs.

50. Tests conducted by an independent laboratory on samples of Defendants' "all natural" Tostitos and SunChips confirmed the presence of GMOs.

**D. Defendants Deceptively Market the Products as "All Natural" to Induce Consumers to Purchase the Products**

51. A representation that a product is "all natural" is material to a reasonable consumer.

52. Defendants are well-aware that claims of food being "all natural" are material to consumers. Defendants market and advertise the Products as "all natural" to increase sales of the Products.

53. Nearly seven in ten consumers surveyed by researcher Mintel said they were "very" or "somewhat" interested in natural products. Bruce Horovitz, *Frito-Lay Turns to Nature's Path*, USA TODAY, Dec. 28, 2010 (available at [http://www.usatoday.com/printedition/news/20101228/fritonatural28\\_st.art.htm](http://www.usatoday.com/printedition/news/20101228/fritonatural28_st.art.htm)).

54. In surveys by Brand Keys consultancy, "natural ingredients" ranks second only to "taste" in influencing consumer purchasing behavior. Horovitz, *Frito-Lay Turns to Nature's Path*, USA TODAY, Dec. 28, 2010.

55. John Compton, CEO of PepsiCo Americas Foods, acknowledged the importance of "all natural" labels to consumers:

Let me first start with this decision to the Frito-Lay [move] to all natural. Consumers have consistently told us they are looking for more whole grains, and more all natural snacks. And they are voting with their wallets. If you look at the total food and beverage growth in the United States, it's growing around 2% to 3%. And the all-natural segment is growing almost 3 times faster than the total."

\* \* \*

“We have talked extensively to consumers about this idea, and they come back and tell us the number one motivation for purchase is products that claim to be all natural. And the purchase intent went up for heavy users, medium users, and importantly, light users who tend to come and go from the category.

<http://www.pepsico.com/Download/PEP-Transcript-2010-11-17.pdf> (emphasis added).

56. According to Frito-Lay’s Chief Marketing Officer Ann Mukherjee, as quoted in USA Today: “‘Consumers tell us they’re looking for better choices in their snacking options....’ At the top of the list, she says, are snacks made with natural ingredients.” Horovitz, *Frito-Lay Turns to Nature’s Path*, USA Today, Dec. 28, 2010.

57. Such materiality is evidenced by Defendants marketing the Products as “all natural” throughout the Class Period in nearly every media format, and on the front of all bags of Tostitos and SunChips and the front of all cans of Bean Dip.

58. Defendants acknowledge on their website:

Q: Why do we offer products made with all natural ingredients?

A: We know people are increasingly looking for snacks made with natural ingredients. At Frito-Lay, we are proud to offer a wide range of snack options that taste great and meet everyone’s needs.

<http://www.fritolay.com/your-health/naturally-delicious.html> (last visited July 3, 2012) (emphasis added).

59. Defendants have repeatedly acknowledged that “consumers are seeking a wider range of products made with all natural ingredients.” Defendants have made their “all natural” products “easily identifiable in stores with a stamp on package that calls out that the product is made with all natural ingredients.” Frito-Lay Foods, News Release, *Frito-Lay Unveils Flavor Kitchen on Times Square Billboard to Showcase How Real Ingredients and Recipes Inspire*

*Snacks Made With All Natural Ingredients*, Apr. 11, 2011 (available at <http://www.fritolay.com/about-us/press-release-20110411.html>).

60. To support the transformation to “all natural” products, Defendants undertook “the largest integrated marketing campaign in the history of the company.” See Frito-Lay Press Release, Dec. 28, 2010 (available at <http://www.fritolay.com/about-us/press-release-20101228.html>).

61. According to Consumers Union, “Eighty-six percent of consumers expect a ‘natural’ label to mean processed foods do not contain any artificial ingredients.” Notice of the Federal Trade Commission, *Comments of Consumers Union on Proposed Guides for Use of Environmental Marketing Claims*, 16 CFR § 260, Dec. 10, 2010 (available at <http://www.ftc.gov/os/comments/greenguiderevisions/00289-57072.pdf>).

#### **E. Plaintiffs Were Damaged**

62. Plaintiffs were injured in fact as a result of Defendants’ misleading and deceptive misrepresentations.

63. Plaintiffs purchased the Products because Plaintiffs believed Defendants’ representations that the Products were made of “all natural” ingredients. Plaintiffs would not have purchased the Products had they known the Products were not “all natural” because they contained GMOs.

64. Plaintiffs paid for “all natural” products but received products that were not all natural. The products Plaintiffs received were worth less than the products for which they paid.

65. Based on Defendants’ misleading and deceptive misrepresentations, Defendants were able to and did charge a premium price for the Products over the costs of competitive products not bearing an “all natural” label.



66. Tostitos cost approximately \$2.98 per 9 oz. serving size (or 33.1 cents per ounce) and SunChips cost \$3.28 per 10.5 ounce bag (or 31.2 cents per ounce), while rival brands that did not contain the false and misleading “all natural” representations – such as Doritos, also produced by Defendants – cost only \$2.58 per 11.5 ounces (or 22.4 cents per ounce). Likewise, Fritos' Bean Dip cost approximately \$2.99 per 9 ounces (or 33 cents per ounce) while rival brands that did not contain the false and misleading "all natural" representations - such as Zapp's Bean Dip - cost only \$2.39 per 9 ounces (or 26 cents per ounce).

67. Plaintiffs paid these premium prices because Plaintiffs believed Defendants' representations that the Products were made of “all natural” ingredients. Plaintiffs would not have purchased the Products had they known the Products were not “all natural” because they contained GMOs.

## **V. CLASS ACTION ALLEGATIONS**

68. Plaintiffs bring this action on behalf of themselves and as a class action, pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of a nationwide class (the “Nationwide (b)(2) Class”), defined as:

All persons in the United States who have purchased Tostitos Restaurant Style Tortilla Chips, Tostitos Bite Size Rounds Tortilla Chips, Tostitos Crispy Rounds Tortilla Chips, Tostitos Multigrain Tortilla Chips, Tostitos Scoops Tortilla Chips, Tostitos Multigrain Scoops Tortilla Chips, Tostitos Restaurant Style with a Hint of Lime Flavored Tortilla Chips, Tostitos Restaurant Style with a Hint of Jalapeno Flavored Tortilla Chips, Tostitos Restaurant Style with a Hint of Pepper Jack Flavored Tortilla Chips, Tostitos Artisan Recipes Fire-Roasted Chipotle Flavored Tortilla Chips, Tostitos Artisan Recipes Baked Three Cheese Queso Flavored

Tortilla Chips, Tostitos Artisan Recipes Roasted Garlic and Black Bean Flavored Tortilla Chips, Tostitos Artisan Recipes Toasted Southwestern Spices Flavored Tortilla Chips, SunChips Original Flavored Multigrain Snacks, SunChips Garden Salsa Flavored Multigrain Snacks, SunChips French Onion Flavored Multigrain Snacks, and SunChips Harvest Cheddar Flavored Multigrain Snacks, SunChips Jalapeno Jack Flavored Multigrain Snacks , Fritos Bean Dip and/or Fritos Hot Bean Dip during the Class Period.

69. In addition, Plaintiffs bring this action on behalf of themselves and as a class action, pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of a nationwide class (the “Nationwide (b)(3) Class”), defined as being coextensive with the Nationwide (b)(2) Class.<sup>3</sup>

70. Alternatively, Plaintiffs bring this action on behalf of a multi-state class of New York, California and Florida residents who purchased any of the above-listed products during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) (the “NY-CA-FL (b)(2) Class”); and, on behalf of a multi-state class of New York, California and Florida residents who purchased any of the above-listed products during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) (the “NY-CA-FL (b)(3) Class”) (collectively, the “NY-CA-FL Classes”).

71. Alternatively, Plaintiff Shake brings this action on behalf of a class of persons who purchased any of the above-listed products in New York during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) (the “New York (b)(2) Class”); and, on behalf of a class of New York residents who purchased any of the above-listed products during

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<sup>3</sup> The Nationwide (b)(2) Class and the Nationwide (b)(3) Class are hereinafter collectively referred to as the “Nationwide Classes.”

the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) (the “New York (b)(3) Class”) (collectively, the “New York Classes”).

72. Alternatively, Plaintiffs Gengo and Zuro bring this action on behalf of a class of California residents who purchased any of the above-listed products during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) (the “California (b)(2) Class”); and, on behalf of a class of California residents who purchased any of the above-listed products during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) (the “California (b)(3) Class”) (collectively, the “California Classes”).

73. Alternatively, Plaintiff Lawson brings this action on behalf of a class of Florida residents who purchased any of the above-listed products during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2) (the “Florida (b)(2) Class”); and, on behalf of a class of Florida residents who purchased any of the above-listed products during the Class Period, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) (the “Florida (b)(3) Class”) (collectively, the “Florida Classes”).

74. Excluded from the Classes are Defendants, their subsidiaries, affiliates and employees; all persons who make a timely election to be excluded from the Classes; governmental entities; and the judges to whom this case is assigned and any immediate family members thereof.

75. Certification of Plaintiffs’ claims for class-wide treatment is appropriate because Plaintiffs can prove the elements of their claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

**A. Numerosity—Federal Rule of Civil Procedure 23(a)(1)**

76. The members of each of the Classes are so numerous that individual joinder of all class members is impracticable. The precise number of members of the Classes is unknown to

Plaintiffs, but it is clear that the number greatly exceeds the number that would make joinder practicable, particularly given Defendants' comprehensive nationwide distribution and sales network. Members of the Classes may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

**B. Commonality and Predominance—Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3)**

77. This action involves common questions of law or fact, which predominate over any questions affecting individual members of the Classes. All members of the Classes were exposed to Defendants' deceptive and misleading advertising and marketing claim that the Products are "all natural" because that claim was on the front of every bag of Tostitos and SunChips and the front of every can of Bean Dip. Furthermore, common questions of law or fact include:

- (a) whether Defendants engaged in the conduct as alleged herein;
- (b) whether Defendants' practices violate applicable law;
- (c) whether Plaintiffs and the other members of the Classes are entitled to actual, statutory, or other forms of damages, and other monetary relief; and
- (d) whether Plaintiffs and the other members of the Classes are entitled to equitable relief, including but not limited to injunctive relief and restitution.

78. Defendants engaged in a common course of conduct in contravention of the laws sought to be enforced by Plaintiffs individually and on behalf of the other members of the Classes. Similar or identical statutory and common law violations, business practices, and injuries are involved. Individual questions, if any, pale by comparison, in both quality and

quantity, to the numerous common questions that dominate this action. Moreover, the common questions will yield common answers.

**C. Typicality—Federal Rule of Civil Procedure 23(a)(3)**

79. Plaintiffs' claims are typical of the claims of the other members of the Classes because, among other things, all members of the Classes were comparably injured through the uniform misconduct described above, were subject to Defendants' false, deceptive, misleading, and unfair advertising and marketing practices and representations, including the false claim that the Products are "all natural." Further, there are no defenses available to Defendants that are unique to Plaintiffs.

**D. Adequacy of Representation—Federal Rule of Civil Procedure 23(a)(4)**

80. Plaintiffs are adequate representatives of the members of the Classes because their interests do not conflict with the interests of the other members of the Classes they seek to represent; they have retained counsel competent and experienced in complex class action litigation; and Plaintiffs will prosecute this action vigorously. The Classes' interests will be fairly and adequately protected by Plaintiffs and their counsel. Co-lead Counsels Milberg LLP and Reese Richman LLP have long been leaders in the representation of consumers in a wide variety of actions nationwide where they have sought to protect consumers from fraudulent and deceptive practices. See <http://www.milberg.com/consumerlitigation/> and <http://www.reeserichman.com/cases/consumer-fraud.html>.

**E. Declaratory and Injunctive Relief—Federal Rule of Civil Procedure 23(b)(2)**

81. Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and the other members of the Classes, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the members of the Classes as a whole.

**F. Superiority—Federal Rule of Civil Procedure 23(b)(3)**

82. A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiffs and the other members of the Classes are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendants, so it would be impracticable for members of the Classes to individually seek redress for Defendants' wrongful conduct. Even if the members of the Classes could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Given the similar nature of the members of the Classes' claims and the absence of material or dispositive differences in the statutes and common laws upon which the claims are based when such claims are grouped as proposed above and below, the nationwide classes or, alternatively, the NY-CA-FL Classes or the separate New York, California and Florida Classes will be easily managed by the Court and the parties.

**VI. CLAIMS FOR RELIEF**

**COUNT I**

**Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq.  
(Brought on Behalf of the Nationwide Classes)**

83. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

84. Plaintiffs bring this claim individually and on behalf of the other members of the Nationwide Classes.

85. The Magnuson-Moss Warranty Act provides a federal remedy for consumers who have been damaged by the failure of a supplier or warrantor to comply with any obligation under a written warranty or implied warranty, or other various obligations established under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq.

86. Tostitos, SunChips and Bean Dip are consumer products within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

87. Plaintiffs and the other Class members are “consumers” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).

88. Frito-Lay and PepsiCo are each a “supplier” and “warrantor” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4) and (5).

89. Frito-Lay’s and PepsiCo’s written statements that the Products are “all natural,” as alleged herein, are statements made in connection with the sale of the Products that relate to the nature of the Products and affirm and promise that the Products are defect free, i.e., not incorporating unnatural ingredients, but rather incorporating only natural ingredients, and as such are “written warranties” within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6)(A).

90. As alleged herein, Frito-Lay and PepsiCo have breached this written warranty by selling consumers Tostitos, SunChips and Bean Dip that are not “all natural” as warranted and thus do not conform to Frito-Lay’s and PepsiCo’s written warranty, violating the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq., and causing Plaintiffs and the other members of the Classes injury and damage in an amount to be proven at trial.

**COUNT II**

**Violation of New York General Business Law § 349 (Deceptive Acts and Practices)  
(Brought on Behalf of the Nationwide Classes, NY-CA-FL Classes, and New York Classes)**

91. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

92. Plaintiffs bring this claim individually and on behalf of the other members of the Nationwide Classes, NY-CA-FL Classes and New York Classes.

93. New York General Business Law § 349 (“GBL § 349”) prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York].”

94. As fully alleged above, throughout the Class Period, by advertising, marketing, distributing, and/or selling the Products with claims that they were “all natural” to Plaintiffs and other Class members, Defendants engaged in, and continue to engage in, deceptive acts and practices because the Products are in fact made from GMOs that are not natural.

95. Plaintiffs and other Class members seek to enjoin such unlawful, deceptive acts and practices as described above. Each of the Class members will be irreparably harmed unless the unlawful, deceptive actions of Defendants are enjoined in that Defendants will continue to falsely and misleadingly advertise the “all natural” nature of the Products.

96. Plaintiffs believed Defendants’ representations that the Products they purchased were “all natural.” Plaintiffs would not have purchased the Products had they known the Products were not “all natural” because they contained GMOs.

97. Plaintiffs were injured in fact and lost money as a result of Defendants’ conduct of improperly describing the Products as “all natural.” Plaintiffs paid for “all natural” products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.



98. Plaintiffs and Class members seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-gotten revenues and/or profits, injunctive relief, enjoining Defendants from continuing to disseminate their false and misleading statements, and other relief allowable under GBL § 349.

### **COUNT III**

#### **Violation of New York General Business Law § 350 (False Advertising) (Brought on Behalf of the Nationwide Classes, NY-CA-FL Classes, and New York Classes)**

99. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

100. Plaintiffs bring this claim individually and on behalf of the other members of the Nationwide Classes, NY-CA-FL Classes and New York Classes.

101. New York General Business Law § 350 (“GBL § 350”) makes “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service” in New York unlawful. GBL § 350 defines “false advertising,” in relevant part, as “advertising, including labeling, of a commodity...if such advertising is misleading in a material respect.”

102. Throughout the Class Period, by advertising, marketing, distributing, and/or selling the Products with claims that they were “all natural” to Plaintiffs and other Class members, Defendants violated GBL § 350 by engaging in, and they continue to violate GBL § 350 by continuing to engage in, false advertising concerning the composition of the Products that are made from GMOs, which are not natural.

103. Plaintiffs and other Class members seek to enjoin such unlawful acts and practices as described above. Each of the Class members will be irreparably harmed unless the unlawful actions of Defendants are enjoined in that Plaintiffs will continue to be unable to rely on Defendants’ representations that the Products are “all natural.” .

104. Plaintiffs believed Defendants' representations that the Products were "all natural." Plaintiffs would not have purchased the Products had they known the Products contained GMOs.

105. Plaintiffs were injured in fact and lost money as a result of Defendants' conduct of improperly describing the Products as "all natural." Plaintiffs paid for "all natural" products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.

106. Plaintiffs and Class Members seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-gotten revenues and/or profits, injunctive relief, enjoining Defendants from continuing to disseminate their false and misleading statements, and other relief allowable under New York General Business Law § 350.

#### **COUNT IV**

##### **Violation of California Business & Professions Code §§ 17500 et seq. (Brought on behalf of California Classes)**

107. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

108. Plaintiffs bring this claim individually and on behalf of the California Classes.

109. Throughout the Class Period, Defendants engaged in a public advertising and marketing campaign representing that the Products are "all natural."

110. The Products are in fact made from ingredients containing GMOs that are not natural. Defendants' advertisements and marketing representations are, therefore, misleading, untrue, and likely to deceive the public.

111. Defendants engaged in their advertising and marketing campaign with intent to directly induce customers to purchase the Products based on false claims.

112. In making and disseminating the statements alleged herein, Defendants knew or should have known that the statements were untrue or misleading.

113. Plaintiffs believed Defendants' representations that the Products were "all natural." Plaintiffs would not have purchased the Products had they known the Products contained GMOs.

114. Plaintiffs were injured in fact and lost money as a result of Defendants' conduct of improperly describing the Products as "all natural." Plaintiffs paid for "all natural" products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.

115. Plaintiffs and members of the California Classes seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-gotten revenues and/or profits, injunctive relief enjoining Defendants from continuing to disseminate their untrue and misleading statements, and other relief allowable under California Business & Professions Code Section 17535.

#### **COUNT V**

#### **Violation of California Business & Professions Code §§ 17200 et seq (Brought on behalf of California Classes).**

116. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

117. Plaintiffs bring this claim individually and on behalf of the California Classes.

118. The circumstances giving rise to Plaintiffs' allegations include Defendants' corporate policies regarding the sale and marketing of the Products.

119. By engaging in the acts and practices described above, Defendants committed one or more acts of "unfair competition" within the meaning of Business & Professions Code

§ 17200. “Unfair competition” is defined to include any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [Business & Professions Code §§ 17500 et seq.].”

120. Defendants committed “unlawful” business acts or practices by, among other things, violating California Business & Professions Code § 17500.

121. Defendants committed “unfair” business acts or practices by, among other things:

- (a) engaging in conduct where the utility of such conduct, if any, is outweighed by the gravity of the consequences to Plaintiffs and members of the California Classes;
- (b) engaging in conduct that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to Plaintiffs and members of the California Classes; and
- (c) engaging in conduct that undermines or violates the spirit or intent of the consumer protection laws alleged in this Complaint.

122. Defendants committed unlawful, unfair and/or fraudulent business acts or practices by, among other things, engaging in conduct Defendants knew or should have known was likely to and did deceive the public, including Plaintiffs and other members of the California Classes.

123. As detailed above, Defendants’ unlawful, unfair, and/or fraudulent practices include making false and/or misleading representations that the Products were “all natural.” Plaintiffs believed Defendants’ representations that the Products were “all natural.” Plaintiffs would not have purchased the Products, but for Defendants’ misleading statements about the product being “all natural.” Plaintiffs were injured in fact and lost money as a result of Defendants’ conduct of improperly describing the Products as “all natural.” Plaintiffs paid for

“all natural” products, but did not receive products that were “all natural.” Plaintiffs received products that contained ingredients that were genetically engineered in a laboratory, and which had their genetic codes artificially altered to exhibit un-natural qualities.

124. Plaintiffs and members of the California Classes seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-gotten revenues and/or profits, injunctive relief, and other relief allowable under California Business & Professions Code Section 17203, including, but not limited to, enjoining Defendants from continuing to engage in their unfair, unlawful and/or fraudulent conduct as alleged.

### **COUNT VI**

#### **Violation of the California Consumers Legal Remedies Act – Cal. Civ. Code §§ 1750 et seq. (Brought on behalf of California Classes)**

125. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

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

127. This cause of action is brought pursuant to the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq. (the “CLRA”). This cause of action seeks monetary damages and injunctive relief pursuant to California Civil Code § 1782.

128. A demand letter was sent to Defendants prior to the filing of this Complaint. A copy of Plaintiffs’ notice and demand letter sent to Defendants is attached hereto as Exhibit A. Defendants did not correct the misrepresentations identified in the demand letter.

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

130. Plaintiffs and all members of the California Classes are “consumers” as that term is defined by the CLRA in California Civil Code § 1761(d).

131. Defendants sold the Products, which are “goods” within the meaning of California Civil Code § 1761(a), to Plaintiffs and other members of the California Classes.

132. By engaging in the actions, misrepresentations, and misconduct set forth in this Class Action Complaint, Defendants violated, and continue to violate, Civil Code § 1770(a)(5) by misrepresenting that the Products are “all natural” and have particular qualities that they do not have, namely, that they are “all natural” when they are not.

133. By engaging in the actions, misrepresentations, and misconduct set forth in this Complaint, Defendants violated, and continue to violate, Civil Code § 1770(a)(9), by advertising the Products with intent to sell the Products not as they were advertised.

134. By engaging in the actions, misrepresentations, and misconduct set forth in this Complaint, Defendants violated, and continue to violate, § 1770(a)(16) by misrepresenting that a subject of a transaction has been supplied in accordance with a previous representation when it has not.

135. Defendants violated the CLRA by representing through its advertisements the Products as described above when they knew, or should have known, that the representations and advertisements were unsubstantiated, false, and misleading.

136. Plaintiffs believed Defendants’ representations that the Products were “all natural.” Plaintiffs would not have purchased the Products, but for Defendants’ misleading statements about the products being “all natural.” Plaintiffs were injured in fact and lost money as a result of Defendants’ conduct of improperly describing the Products as “all natural.” Plaintiffs paid for an “all natural” product but did not receive a product that was “all natural.”



Plaintiffs received products that contained ingredients that were genetically engineered in a laboratory, and which had their genetic codes artificially altered to exhibit un-natural qualities.

137. Plaintiffs request that this Court enjoin Defendants from continuing to employ the unlawful methods, acts, and practices alleged herein pursuant to California Civil Code § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the future, Plaintiffs and the members of the California Classes will be harmed in that they will continue to be unable to rely on Defendants' representations that the Products are "all natural."

### **COUNT VII**

#### **Violation of the Florida Deceptive And Unfair Trade Practices Act § 501.201 et seq. (Brought on behalf of Florida Classes)**

138. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

139. Plaintiffs bring this claim individually and on behalf of the Florida Classes.

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

141. Throughout the Class Period, by advertising, marketing, distributing, and/or selling the Products with claims that they were "all natural" to Plaintiffs and other Class members, Defendants violated the FDUTPA by engaging in, and they continue to violate the FDUTPA by continuing to engage in, false advertising concerning the composition of the Products that are made from GMOs, which are not natural.

142. Plaintiffs and other Class members seek to enjoin such unlawful acts and practices as described above. Each of the Class members will be irreparably harmed unless the unlawful

actions of Defendants are enjoined in that they will continue to be unable to rely on the Defendants' representations that the Products are "all natural."

143. Had Plaintiffs known the Products were not "all natural" because they contained GMOs, they would not have purchased the Products.

144. Plaintiffs were injured in fact and lost money as a result of Defendants' conduct of improperly describing the Products as "all natural." Plaintiffs paid for "all natural" products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.

145. Plaintiffs and Class Members seek declaratory relief, enjoining Defendants from continuing to disseminate their false and misleading statements, actual damages plus attorney's fees and court costs, and other relief allowable under the FDUTPA.

### **COUNT VIII**

#### **Breach of Express Warranty Under New York Law (Brought on Behalf of the Nationwide Classes, NY-CA-FL Classes and New York Classes)**

146. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

147. Plaintiffs bring this claim individually and on behalf of the other members of the Nationwide Classes, NY-CA-FL Classes and New York Classes.

148. The Plaintiffs and other members of the Classes formed a contract with Defendants at the time they purchased the Products. The terms of that contract include the promises and affirmations of fact Defendants make on the Products' packaging and through marketing and advertising, including Defendants' promise that the Products are "all natural," as described above. This marketing and advertising constitute express warranties and became part

of the basis of the bargain, and are part of the standardized contract between each of the Plaintiffs and other members of the Classes, and Defendants.

149. In addition or in the alternative to the formation of an express contract, Defendants made each of their above-described representations to induce the Plaintiffs and other members of the Classes to rely on such representations, and they each did so rely (and should be presumed to have relied) on Defendants' "all natural" representations as a material factor in their decision(s) to purchase the Products.

150. All conditions precedent to Defendants' liability under this contract have been performed by the Plaintiffs and other members of the Classes when they purchased the Products for their ordinary purposes.

151. At all times relevant to this action, Defendants have breached their express warranties about the Products because the Products are not "all natural" because they contained GMOs or plants that are not 100 percent natural, in violation of N.Y.U.C.C. § 2-313.

152. As a result of Defendants' breaches of their express warranties, the Plaintiffs and other members of the Nationwide and New York Classes were damaged in the amount of the purchase price they paid for the Products, in an aggregate amount to be proven at trial.

### **COUNT IX**

#### **Breach of Express Warranty Under California Law (Brought on Behalf of the California Classes)**

153. Plaintiffs incorporate the above allegations in in paragraphs 1-82 by reference as though fully set forth herein.

154. Plaintiffs bring this claim individually and on behalf of the other members of the California Classes.

155. The Plaintiffs and other members of the Classes formed a contract with Defendants at the time they purchased the Products. The terms of that contract include the promises and affirmations of fact Defendants make on the Products' packaging and through marketing and advertising, including Defendants' promise that the Products are "all natural," as described above. This marketing and advertising constitute express warranties and became part of the basis of the bargain, and are part of the standardized contract between each of the Plaintiffs and other members of the Classes, and Defendants.

156. In addition or in the alternative to the formation of an express contract, Defendants made each of their above-described representations to induce the Plaintiffs and other members of the Classes to rely on such representations, and they each did so rely (and should be presumed to have relied) on Defendants' "all natural" representations as a material factor in their decision(s) to purchase the Products.

157. All conditions precedent to Defendants' liability under this contract have been performed by the Plaintiffs and other members of the Classes when they purchased the Products for their ordinary purposes.

158. At all times relevant to this action, Defendants have breached their express warranties about the Products because the Products are not "all natural" because they contained GMOs or plants that are not 100 percent natural, in violation of California Commercial Code § 2313.

159. As a result of Defendants' breaches of their express warranties, the Plaintiffs and other members of the California Classes were damaged in the amount of the purchase price they paid for the Products, in an aggregate amount to be proven at trial.

**COUNT X**

**Breach of Express Warranty Under Florida Law  
(Brought on Behalf of the Florida Classes)**

160. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

161. Plaintiffs bring this claim individually and on behalf of the other members of the Florida Classes.

162. The Plaintiffs and other members of the Classes formed a contract with Defendants at the time they purchased the Products. The terms of that contract include the promises and affirmations of fact Defendants make on the Products' packaging and through marketing and advertising, including Defendants' promise that the Products are "all natural," as described above. This marketing and advertising constitute express warranties and became part of the basis of the bargain, and are part of the standardized contract between each of the Plaintiffs and other members of the Classes, and Defendants.

163. In addition or in the alternative to the formation of an express contract, Defendants made each of their above-described representations to induce the Plaintiffs and other members of the Classes to rely on such representations, and they each did so rely (and should be presumed to have relied) on Defendants' "all natural" representations as a material factor in their decision(s) to purchase the Products.

164. All conditions precedent to Defendants' liability under this contract have been performed by the Plaintiffs and other members of the Classes when they purchased the Products for their ordinary purposes.

165. At all times relevant to this action, Defendants have breached their express warranties about the Products because the Products are not "all natural" because they contained

GMOs or plants that are not 100 percent natural, in violation of Section 672.313(1)(a), Florida Statutes (1987).

166. As a result of Defendants' breaches of their express warranties, the Plaintiffs and other members of the Florida Classes were damaged in the amount of the purchase price they paid for the Products, in an aggregate amount to be proven at trial.

### **COUNT XI**

#### **Intentional Misrepresentation Under New York Law (Brought on Behalf of the Nationwide Classes, NY-CA-FL Classes and New York Classes)**

167. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

168. Plaintiffs bring this claim individually and on behalf of the other members of the Nationwide Classes, NY-CA-FL Classes and New York Classes.

169. Throughout the Class Period, Defendants have intentionally misrepresented a material fact about the Products by advertising, marketing, distributing, and/or selling the Products to Plaintiffs and other Class members with claims that they are "all natural."

170. At the time Defendants made the misrepresentations herein alleged, Defendants knew the products were not "all natural" because they contained GMOs.

171. Defendants misrepresented the Products as "all natural" with the purpose of inducing Plaintiffs reliance and inducing Plaintiffs to purchase the Products.

172. Plaintiffs reasonably relied on Defendants' representations that the Products were "all natural," and, in reasonable reliance thereon, purchased the Products.

173. Plaintiffs were ignorant as to the falsity of Defendants' "all natural" misrepresentations and would not have purchased the Products had they known the products were not "all natural" because they contained GMOs.



174. Plaintiffs were injured in fact and lost money as a result of Defendants' conduct of improperly describing the Products as "all natural." Plaintiffs paid for "all natural" products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.

**COUNT XII**  
**Intentional Misrepresentation Under California Law**  
**(Brought on Behalf of the California Classes)**

175. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

176. Plaintiffs bring this claim individually and on behalf of the other members of the California Classes.

177. Throughout the Class Period, Defendants have intentionally misrepresented a material fact about the Products by advertising, marketing, distributing, and/or selling the Products to Plaintiffs and other Class members with claims that they are "all natural."

178. At the time Defendants made the misrepresentations herein alleged, Defendants knew the products were not "all natural" because they contained GMOs.

179. Defendants misrepresented the Products as "all natural" with the purpose of inducing Plaintiffs reliance and inducing Plaintiffs to purchase the Products.

180. Plaintiffs reasonably relied on Defendants' representations that the Products were "all natural," and, in reasonable reliance thereon, purchased the Products.

181. Plaintiffs were ignorant as to the falsity of Defendants' "all natural" misrepresentations and would not have purchased the Products had they known the products were not "all natural" because they contained GMOs.

182. Plaintiffs were injured in fact and lost money as a result of Defendants' conduct of improperly describing the Products as "all natural." Plaintiffs paid for "all natural" products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.

### **COUNT XIII**

#### **Intentional Misrepresentation Under Florida Law (Brought on Behalf of the Florida Classes)**

183. Plaintiffs incorporate the above allegations in paragraphs 1-82 by reference as though fully set forth herein.

184. Plaintiffs bring this claim individually and on behalf of the other members of the Florida Classes.

185. Throughout the Class Period, Defendants have intentionally misrepresented a material fact about the Products by advertising, marketing, distributing, and/or selling the Products to Plaintiffs and other Class members with claims that they are "all natural."

186. At the time Defendants made the misrepresentations herein alleged, Defendants knew the products were not "all natural" because they contained GMOs.

187. Defendants misrepresented the Products as "all natural" with the purpose of inducing Plaintiffs reliance and inducing Plaintiffs to purchase the Products.

188. Plaintiffs reasonably relied on Defendants' representations that the Products were "all natural," and, in reasonable reliance thereon, purchased the Products.

189. Plaintiffs were ignorant as to the falsity of Defendants' "all natural" misrepresentations and would not have purchased the Products had they known the products were not "all natural" because they contained GMOs.

190. Plaintiffs were injured in fact and lost money as a result of Defendants' conduct of improperly describing the Products as "all natural." Plaintiffs paid for "all natural" products, but did not receive such products. The products Plaintiffs received were worth less than the products for which they paid.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf other members of the Classes described in this Consolidated Complaint, respectfully request that:

A. the Court certify Nationwide Classes pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), and adjudge Plaintiffs and their counsel to be adequate representatives thereof;

B. alternatively, the Court certify the NY-CA-FL Classes pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), and adjudge Plaintiffs and their counsel to be adequate representatives thereof;

C. alternatively, the Court certify the separate New York, California and Florida Classes pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), and adjudge Plaintiffs and their counsel to be adequate representatives thereof;

D. the Court enter an Order requiring Defendants to pay to Plaintiffs and other members of the Classes economic, monetary, consequential, compensatory or statutory damages, whichever is greater; and, if Defendants' conduct is proved willful, awarding Plaintiffs and the other members of the Classes exemplary damages to the extent provided by law;

E. the Court enter an Order awarding restitution and disgorgement of all monies Defendants acquired by means of any act or practice declared by this Court to be wrongful, or any other appropriate remedy in equity, to Plaintiffs and the other members of the Classes;

F. the Court enter an Order awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Defendants from continuing the unlawful practices set forth above; directing Defendants to cease their deceptive and misleading marketing campaign in which it describes Tostitos, SunChips and Bean Dip as “all natural”; and directing Defendants to disgorge all monies Defendants acquired by means of any act or practice declared by this Court to be wrongful;

G. the Court enter an Order awarding Plaintiffs, individually and on behalf of the other members of the Classes, their expenses and costs of suit, including reasonable attorneys’ fees and reimbursement of reasonable expenses, to the extent provided by law;

H. the Court enter an Order awarding to Plaintiffs individually and on behalf of the other members of the Classes pre- and post-judgment interest, to the extent allowable; and

I. for such other and further relief as may be just and proper.

### **JURY DEMAND**

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury of all claims in this Consolidated Complaint so triable.

DATED: December 3, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notifications of such filing to the email addresses indicated on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing via the U.S. Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

Dated: December 3, 2013

  
David Scalfani



## Mailing Information for a Case 1:12-md-02413-RRM-RLM

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## Manual Notice List

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