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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10

11 ANTHONY BUSO, individually and on  
behalf of all others similarly situated,

12 Plaintiff,

13 v.  
14

15 PENGUIN TRADING, INC., a New York  
corporation doing business as FRUIT  
BLISS; and DOES 1 through 10, inclusive,

16 Defendants.  
17

Case No. 2:17-cv-7025-DMG-KS

**CLASS ACTION**

**FIRST AMENDED COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMAND**

1 **INTRODUCTION**

2 1. The average consumer spends a mere 13 seconds making an in-store  
3 purchasing decision, or between 10 to 19 seconds for an online purchase.<sup>1</sup> That  
4 decision is heavily dependent on a product’s packaging, and particularly the package  
5 dimensions: “Most of our studies show that 75 to 80 percent of consumers don’t even  
6 bother to look at any label information, no less the net weight . . . . Faced with a large  
7 box and a smaller box, both with the same amount of product inside . . . consumers are  
8 apt to choose the larger box because they think it’s a better value.”<sup>2</sup> This lawsuit  
9 charges Defendant with intentionally packaging its Fruit Bliss Organic fruit products in  
10 opaque containers that contain approximately 50% empty space. Consumers, in  
11 reliance on the size of the containers, purchased the Fruit Bliss Organic fruit products,  
12 which they would not have purchased had they known that the containers were  
13 substantially empty.

14 2. Anthony Buso (“Plaintiff”), individually and on behalf of all others  
15 similarly situated, brings this Class Action Complaint for damages, injunctive relief,  
16 and any other available legal or equitable remedies, resulting from the unlawful and  
17 deceptive actions of Penguin Trading Inc. dba Fruit Bliss (“Defendant”) with respect to  
18 the packaging of its Fruit Bliss Organic fruit products. Plaintiff alleges as follows upon  
19 personal knowledge as to himself and his own acts and experiences, and, as to all other  
20 matters, upon information and belief, including investigation conducted by his  
21 attorneys.

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23  
24 <sup>1</sup> <http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-windowdown.html> (citing the Ehrenberg-Bass Institute of Marketing Science’s report “Shopping Takes Only Seconds...In-Store and Online”).

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26  
27 <sup>2</sup> <http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm> (quoting Brian Wansink, professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).



1 and sold the Fruit Bliss Organic fruit products at issue in this action in this judicial  
2 district, and it conducts business within this judicial district.

3 **PARTIES**

4 9. Plaintiff Anthony Buso is a citizen of the State of California and resides in  
5 Poway, California. Plaintiff purchased a Fruit Bliss Organic Deglet Nour Dates product  
6 for personal consumption during the last four years in San Diego, California. Plaintiff  
7 purchased the Product in reliance on Defendant's packaging in containers made, formed  
8 or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff  
9 known the truth about Defendant's misrepresentations, he would not have purchased  
10 the Fruit Bliss Organic Deglet Nour Dates product.

11 10. Plaintiff is informed and believes, and upon such information and belief  
12 alleges, that Defendant Penguin Trading Inc. is a New York corporation doing business  
13 as Fruit Bliss, with its principal place of business located in Brooklyn, New York.  
14 Plaintiff is informed and believes, and upon such information and belief alleges, that  
15 Defendant, at all times relevant, conducted business in the State of California and  
16 within the Southern District of California.

17 11. The true names and capacities of the Defendants sued herein as DOES 1  
18 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such  
19 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is  
20 legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of  
21 Court to amend this Complaint to reflect the true names and capacities of the DOE  
22 Defendants when such identities become known.

23 12. At all relevant times, each and every Defendant was acting as an agent  
24 and/or employee of each of the other Defendants and was acting within the course  
25 and/or scope of said agency and/or employment with the full knowledge and consent of  
26 each of the Defendants. Each of the acts and/or omissions complained of herein were  
27 alleged and made known to, and ratified by, each of the other Defendants (Penguin  
28

1 Trading Inc. dba Fruit Bliss and DOE Defendants will hereafter collectively be referred  
2 to as “Defendant”).

### 3 **FACTUAL ALLEGATIONS**

#### 4 **California Law Prohibits Non-functional Slack-Fill**

5 13. Many federal and state consumer protection and labeling laws prohibit  
6 deceptive packaging and labeling of products and commodities. In California, the Fair  
7 Packaging and Labeling Act (“CFPLA”) “is designed to protect purchasers of any  
8 commodity within its provisions against deception or misrepresentation. Packages and  
9 their labels should enable consumers to obtain accurate information as to the quantity of  
10 the contents and should facilitate value comparisons.” (California Business &  
11 Professions Code § 12601.)

12 14. In this context, the CFPLA provides: “No food containers shall be made,  
13 formed, or filled as to be misleading.” (California Business & Professions Code §  
14 12606.2(b).) “A container that does not allow the consumer to fully view its contents  
15 shall be considered to be filled as to be misleading if it contains nonfunctional slack  
16 fill.” (California Business & Professions Code § 12606.2(c).) Section 12606.2(c)  
17 defines “slack fill” as “the difference between the actual capacity of a container and the  
18 volume of product contained therein.” Similarly, section 12606.2(c) defines  
19 “nonfunctional slack fill” as “the empty space in a package that is filled to substantially  
20 less than its capacity for reasons other than any one or more of the following:

- 21 (1) Protection of the contents of the package.
- 22 (2) The requirements of machines used for enclosing the contents of the package.
- 23 (3) Unavoidable product settling during shipping and handling.
- 24 (4) The need for the package to perform a specific function, such as where packaging  
25 plays a role in the preparation or consumption of a food, if that function is inherent to  
26 the nature of the food and is clearly communicated to consumers.
- 27 (5) The fact that the product consists of a food packaged in a reusable container where  
28 the container is part of the presentation of the food and has value that is both significant

1 in proportion to the value of the product and independent of its function to hold the  
2 food, such as a gift product consisting of a food or foods combined with a container that  
3 is intended for further use after the food is consumed or durable commemorative or  
4 promotional packages.

5 (6) Inability to increase the level of fill or to further reduce the size of the package, such  
6 as where some minimum package size is necessary to accommodate required food  
7 labeling exclusive of any vignettes or other nonmandatory designs or label information,  
8 discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.”  
9 (California Business & Professions Code § 12606.2(c)(1)-(6).)

10 15. None of the above safe-harbor provisions applies to the Fruit Bliss Organic  
11 fruit products. Defendant intentionally incorporated non-functional slack-fill in its  
12 packaging of the Fruit Bliss Organic fruit products in order to mislead consumers,  
13 including Plaintiff and Members of the Class.

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

15 16. Defendant’s Fruit Bliss Organic fruit products are sold in non-transparent  
16 containers. The containers have significant slack-fill, as described below.

17 17. Nearly 80% of the interior of the Fruit Bliss Organic fruit product



1 containers, which concern the Fruit Bliss Organic Deglet Nour Dates product purchased  
2 by Plaintiff, is comprised of empty space, or non-functional slack fill.



13 18. Judging from the sizes of the container, a reasonable consumer would  
14 expect them to be substantially filled with product. Consumers are misled into believing  
15 that they are purchasing substantially more Fruit Bliss Organic fruit product than they  
16 receive.

17 19. There is no functional reason for including so much slack-fill in the Fruit  
18 Bliss Organic fruit products.

19 20. Plaintiff is informed and believes, and upon such information and belief  
20 alleges, that consumers have relied upon, and are continuing to rely upon, the size of  
21 the Fruit Bliss Organic fruit product containers as the basis for making purchasing  
22 decisions. Consumers believe that the Fruit Bliss Organic fruit product containers are  
23 substantially full because they cannot see the actual contents within the nontransparent  
24 container.

25 21. Plaintiff is informed and believes, and upon such information and belief  
26 alleges, that Defendant is selling and will continue to sell the Fruit Bliss Organic fruit  
27 products using these blatantly deceptive and misleading slack-filled containers.

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1 22. Defendant's packaging and advertising of the Fruit Bliss Organic fruit  
2 products violate the CFPLA, as set forth above.

3 **Plaintiff Relied on Defendant's Misleading and Deceptive Conduct and Was**  
4 **Injured as a Result**

5 23. The types of misrepresentations made, as described herein, were  
6 considered by Plaintiff and Class Members (as would be considered by a reasonable  
7 consumer) when deciding to purchase the Fruit Bliss Organic fruit products.  
8 Reasonable consumers, including Plaintiff and Class Members, attached importance to  
9 whether Defendant's Fruit Bliss Organic fruit products were misbranded, i.e., not  
10 legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

11 24. Plaintiff and the Class Members did not know, and had no reason to know,  
12 that the Fruit Bliss Organic fruit products contained non-functional slack-fill.

13 25. Defendant's product packaging was a material factor in Plaintiff's and the  
14 Class Members' decisions to purchase the Fruit Bliss Organic fruit products. Based on  
15 Defendant's product packaging, Plaintiff and the Class Members believed that they  
16 were getting more Fruit Bliss Organic fruit product than was actually being sold. Had  
17 Plaintiff known Defendant's packaging was slack-filled, he would not have bought the  
18 slack-filled Fruit Bliss Organic Deglet Nour Dates product.

19 26. Plaintiff and the Class Members paid the full price of the Fruit Bliss  
20 Organic fruit products and received less Fruit Bliss Organic fruit product than they  
21 expected due to the non-functional slack-fill in the Fruit Bliss Organic fruit products.

22 27. There is no practical reason for the non-functional slack-fill used to  
23 package the Fruit Bliss Organic fruit products other than to mislead consumers as to the  
24 actual volume of the Fruit Bliss Organic fruit products being purchased by consumers.

25 28. As a result of Defendant's misrepresentations, Plaintiff and thousands of  
26 others throughout California purchased the Products. Plaintiff and the Class (defined  
27 below) have been damaged by Defendant's deceptive and unfair conduct.

28 ///



**CLASS ACTION ALLEGATIONS**

1  
2 29. Plaintiff brings this action as a class action pursuant to Rule 23 of the  
3 Federal Rules of Civil Procedure on behalf of himself and the following class  
4 (collectively, the “Class” or “Classes”), defined as:

5 **All California residents who made retail purchases of Fruit Bliss Organic**  
6 **fruit products in with non-functional slack-fill, as defined by California**  
7 **Business & Professions Code § 12606.2, during the applicable limitations**  
8 **period up to and including final judgment in this action.**

9 30. The proposed Class excludes current and former officers and directors of  
10 Defendant, Members of the immediate families of the officers and directors of  
11 Defendant, Defendant’s legal representatives, heirs, successors, assigns, and any entity  
12 in which it has or has had a controlling interest, and the judicial officer to whom this  
13 lawsuit is assigned.

14 31. Plaintiff reserves the right to revise the Class definition based on facts  
15 learned in the course of litigating this matter.

16 32. The Fruit Bliss Organic fruit products sold by Defendant suffer from  
17 virtually the same misleading product bottling, labeling and nonfunctional slack-fill.

18 33. Numerosity: This action has been brought and may properly be maintained  
19 as a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the Federal  
20 Rules of Civil Procedure. While the exact number and identities of other Class  
21 Members are unknown to Plaintiff at this time, Plaintiff is informed and believes that  
22 there are hundreds of thousands of Members in the Class. Based on sales of the Fruit  
23 Bliss Organic fruit products it is estimated that the Class is composed of more than  
24 10,000 persons. Furthermore, even if subclasses need to be created for these consumers,  
25 it is estimated that each subclass would have thousands of Members. The Members of  
26 the Class are so numerous that joinder of all Members is impracticable and the  
27 disposition of their claims in a class action rather than in individual actions will benefit  
28 the parties and the courts.

1           34. Typicality: Plaintiff's claims are typical of the claims of the Members of  
2 the Class as all Members of the Class are similarly affected by Defendant's wrongful  
3 conduct, as detailed herein.

4           35. Adequacy: Plaintiff will fairly and adequately protect the interests of the  
5 Members of the Class in that he has no interests antagonistic to those of the other  
6 Members of the Class. Plaintiff has retained experienced and competent counsel.

7           36. Superiority: A class action is superior to other available methods for the  
8 fair and efficient adjudication of this controversy. Since the damages sustained by  
9 individual Class Members may be relatively small, the expense and burden of  
10 individual litigation makes it impracticable for the Members of the Class to individually  
11 seek redress for the wrongful conduct alleged herein. Furthermore, the adjudication of  
12 this controversy through a class action will avoid the potentially inconsistent and  
13 conflicting adjudications of the claims asserted herein. There will be no difficulty in the  
14 management of this action as a class action. If Class treatment of these claims were not  
15 available, Defendant would likely unfairly receive thousands of dollars or more in  
16 improper revenue.

17           37. Common Questions Predominate: Common questions of law and fact exist  
18 as to all Members of the Class and predominate over any questions solely affecting  
19 individual Members of the Class. Among the common questions of law and fact  
20 applicable to the Class are:

21           i. Whether Defendant labeled, packaged, marketed, advertised and/or  
22 sold Fruit Bliss Organic fruit products to Plaintiff, and those similarly situated,  
23 using false, misleading and/or deceptive packaging and labeling;

24           ii. Whether Defendant's actions constitute violations of the CFPLA,  
25 California Business & Professions Code § 12606.2;

26           iii. Whether Defendant omitted and/or misrepresented material facts in  
27 connection with the labeling, packaging, marketing, advertising and/or sale of its  
28 Fruit Bliss Organic fruit products;

1           iv. Whether Defendant's labeling, packaging, marketing, advertising  
2 and/or selling of Fruit Bliss Organic fruit products constituted an unfair, unlawful  
3 or fraudulent practice;

4           v. Whether Defendant's packaging of the Fruit Bliss Organic fruit  
5 products constituted nonfunctional slack-fill;

6           vi. Whether, and to what extent, injunctive relief should be imposed on  
7 Defendant to prevent such conduct in the future;

8           vii. Whether the Members of the Class have sustained damages as a  
9 result of Defendant's wrongful conduct;

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

11           ix. Whether Defendant should be enjoined from continuing its unlawful  
12 practices.

13           38. The class is readily definable, and prosecution of this action as a Class  
14 action will reduce the possibility of repetitious litigation. Plaintiff knows of no  
15 difficulty which will be encountered in the management of this litigation which would  
16 preclude his maintenance of this matter as a Class action.

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

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

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

3 42. Defendant's conduct is generally applicable to the Class as a whole and  
4 Plaintiff seeks, inter alia, equitable remedies with respect to the Class as a whole. As  
5 such, Defendant's systematic policies and practices make declaratory relief with respect  
6 to the Class as a whole appropriate.

7 **CAUSES OF ACTION**

8 **FIRST CAUSE OF ACTION**

9 **VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT,**

10 **Cal. Civ. Code § 1750, et seq.**

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

13 44. Plaintiff brings this claim individually and on behalf of the Class for  
14 Defendant's violations of California's Consumer Legal Remedies Act ("CLRA"), Cal.  
15 Civ. Code 1761(d).

16 45. Plaintiff and the Class Members are consumers who purchased the Fruit  
17 Bliss Organic fruit products for personal, family or household purposes. Plaintiff and  
18 the Class Members are "consumers" as that term is defined by the CLRA in Cal. Civ.  
19 Code § 1761(d). Plaintiff and the Class Members are not sophisticated experts with  
20 independent knowledge of corporate branding, labeling and packaging practices.

21 46. The Fruit Bliss Organic fruit products that Plaintiff and other Class  
22 Members purchased from Defendant were "goods" within the meaning of Cal. Civ.  
23 Code § 1761(a).

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

27 48. Defendant violated California law because the Fruit Bliss Organic fruit  
28 products are packaged in containers made, formed or filled as to be misleading and

1 which contain non-functional slack-fill, and because they are intentionally packaged to  
2 prevent the consumer from being able to fully see their contents.

3 49. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5),  
4 prohibits “Misrepresenting that goods or services have sponsorship, approval,  
5 characteristics, ingredients, uses, benefits, or quantities which they do not have or that a  
6 person has a sponsorship, approval, status, affiliation, or connection which he or she  
7 does not have.” By engaging in the conduct set forth herein, Defendant violated and  
8 continues to violate Section 1770(a)(5) of the CLRA, because Defendant’s conduct  
9 constitutes unfair methods of competition and unfair or fraudulent acts or practices, in  
10 that it misrepresents that the Fruit Bliss Organic fruit products have quantities they do  
11 not have.

12 50. Cal. Civ. Code § 1770(a)(9) further prohibits “[a]dvertising goods or  
13 services with intent not to sell them as advertised.” By engaging in the conduct set  
14 forth herein, Defendant violated and continues to violate Section 1770(a)(9), because  
15 Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent  
16 acts or practices, in that it advertises goods as containing more product than they in fact  
17 contain.

18 51. Plaintiff and the Class Members are not sophisticated experts about  
19 corporate branding, labeling and packaging practices. Plaintiff and the Class acted  
20 reasonably when they purchased the Fruit Bliss Organic fruit products based on their  
21 belief that Defendant’s representations were true and lawful.

22 52. Given the materiality of Defendant’s misrepresentations, Plaintiff and the  
23 Class Members are entitled to a presumption of reliance.

24 53. Plaintiff and the Class suffered injuries caused by Defendant because (a)  
25 they would not have purchased the Fruit Bliss Organic fruit products on the same terms  
26 absent Defendant’s illegal and misleading conduct as set forth herein; (b) they  
27 purchased the Fruit Bliss Organic fruit products due to Defendant’s misrepresentations  
28 and deceptive packaging in containers made, formed or filled as to be misleading and

1 containing non-functional slack-fill; and (c) the Fruit Bliss Organic fruit products did  
2 not have the quantities as promised.

3 54. On or about July 27, 2017, prior to filing this action, Plaintiff sent a CLRA  
4 notice letter to Defendant which complies with California Civil Code 1782(a). Plaintiff  
5 sent Fruit Bliss, individually and on behalf of the proposed Class, a letter via Certified  
6 Mail, advising Defendant that it is in violation of the CLRA and demanding that it  
7 cease and desist from such violations and make full restitution by refunding the monies  
8 received therefrom. A true and correct copy of the letter is attached hereto as Exhibit 1.

9 55. Wherefore, Plaintiff seeks injunctive relief for these violations of the  
10 CLRA.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff prays for relief and judgment against Defendant as  
13 follows:

14 (A) For an Order certifying the Class pursuant to Federal Rule of Civil  
15 Procedure 23, appointing Plaintiff as class representatives, and designating  
16 Plaintiff's counsel as counsel for the Class;

17 (B) For an Order declaring that Defendant's conduct violated the CLRA,  
18 Cal. Civ. Code § 1750, et seq.;

19 (C) For injunctive relief as pleaded or as the Court may deem proper;

20 (D) For an order of restitution and all other forms of equitable monetary  
21 relief, as pleaded;

22 (E) For compensatory damages in amounts to be determined by the Court  
23 and/or jury;

24 (F) For punitive damages;

25 (G) For prejudgment interest on all amounts awarded;

26 (H) For an Order awarding Plaintiff and the Class their reasonable  
27 attorneys' fees and expenses and costs of suit as pleaded pursuant to, *inter alia*,  
28 Cal. Civ. Code § 1780(e) and Cal. Civ. Proc. Code § 1021.5; and

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

2 Date: October 1, 2017

Respectfully submitted,

3 PACIFIC TRIAL ATTORNEYS  
4 A Professional Corporation

5 By: /s/Scott J. Ferrell

6 Scott J. Ferrell  
7 Attorneys for Plaintiff

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**DEMAND FOR TRIAL BY JURY**

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

Date: October 1, 2017

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS  
A Professional Corporation

By: /s/Scott J. Ferrell  
Scott J. Ferrell  
Attorneys for Plaintiff