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Attorneys for Plaintiffs and the Proposed Classes

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

HOWARD CLARK, TODD HALL, ANGELA
PIRRONE, individually, on behalf of all others
similarly situated, and the general public,

Plaintiffs,

v.

THE HERSHEY COMPANY, a Delaware
corporation,

Defendant.

Case No: 3:18-cv-06113-WHA

SECOND AMENDED COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiffs Howard Clark, Todd Hall, and Angela Pirrone (“Plaintiffs”), on behalf of
2 themselves and all others similarly situated, by and through their undersigned counsel, hereby
3 bring this Action against Defendant The Hershey Company (“Defendant”), alleging that certain
4 Brookside Dark Chocolate products manufactured, packaged, labeled, advertised, distributed and sold
5 by Defendant as containing “No Artificial Flavors” are misbranded and falsely advertised and
6 otherwise violate consumer protection laws, and upon information and belief and investigation of
7 counsel alleges as follows:

8 **JURISDICTION AND VENUE**

9 1. This Court has original jurisdiction over this action under the Class Action Fairness Act
10 of 2005 (“CAFA”), 28 U.S.C. § 1332(d). The Defendant is a citizen of a state different from that of
11 the Plaintiffs, the putative class size is greater than 100 persons, and the amount in controversy in the
12 aggregate for the putative Class exceeds the sum or value of \$5 million exclusive of interest and costs.

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

15 3. The Court has personal jurisdiction over Defendant because its Brookside Dark
16 Chocolate Products are advertised, marketed, distributed and sold throughout the State of California;
17 Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States,
18 including in the State of California; Defendant is authorized to do business in the State of California;
19 and Defendant has sufficient minimum contacts with the State of California, rendering the exercise of
20 jurisdiction by the Court permissible under traditional notions of fair play and substantial justice.
21 Moreover, Defendant is engaged in substantial activity with the State of California.

22 4. Venue is proper in the United States District Court for the Northern District of
23 California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the
24 claims occurred within this judicial district, Defendant has marketed and sold the Brookside Dark
25 Chocolate Products at issue in this action in this judicial district, and it conducts business within this
26 judicial district. Plaintiff Howard Clark also purchased the Brookside Products within this District.

NATURE OF THE ACTION

5. This is a consumer class action for violations of warranty, negligent and intentional misrepresentations/omissions and consumer protection laws, with a proposed Nationwide Class, a California Class, and a New York Class.

6. Defendant manufactures, distributes, advertises, markets and sells a variety of purportedly natural fruit flavored products known as the Brookside Dark Chocolate products, including, without limitation, Brookside Dark Chocolate Acai & Blueberry Flavors, Brookside Dark Chocolate Goji & Raspberry Flavors, Brookside Dark Chocolate Vineyard Inspired Chardonnay Grape & Peach, Brookside Dark Chocolate Crunchy Clusters Berry Medley Flavors, Brookside Dark Chocolate Pomegranate Flavor, and Brookside Dark Chocolate Vineyard Inspired Merlot Grape & Black Currant Flavors (collectively, the “Products”). Each of the Products are labeled as containing “No Artificial Flavors.” However, each of the Products contain an artificial flavoring ingredient called d-l malic acid.

7. The labeling of the Products is false and misleading and the Products thus are misbranded under California and New York consumer protection laws. Specifically, the Products are labeled as if they are flavored only with natural ingredients when they in fact contain an undisclosed artificial flavor, d-l-malic acid, in violation of state and federal law.

8. Defendant’s packaging, labeling, and advertising scheme is intended to give consumers the impression that they are buying a premium, all-natural product with only natural flavoring ingredients instead of a product that contains artificial chemicals and is artificially flavored.

9. Plaintiffs, who were deceived by Defendant’s unlawful conduct and purchased the Brookside Dark Chocolate Product in California and New York, bring this action on their own behalf and on behalf of United States, California, and New York consumers to remedy Defendant’s unlawful actions.

10. On behalf of the Classes as defined herein, Plaintiffs seek an Order compelling Defendant to, among other things: (1) cease packaging, distributing, advertising and selling the Products in violation of U.S. FDA regulations and California consumer protection laws and state common laws; (2) re-label or recall all existing deceptively packaged Products; (3) conduct a

corrective advertising campaign to inform consumers fully; (4) award Plaintiffs and other Class members restitution, actual damages, and punitive damages; and (5) pay all costs of suit, expenses, and attorneys' fees.

PARTIES

11. Plaintiff Howard Clark is a citizen of the State of California and resides in San Francisco, California.

12. Plaintiff Clark purchased the Brookside Dark Chocolate – Acai & Blueberry Flavors product for personal consumption in 2018 in the Northern District of California.

13. Plaintiff Todd Hall is a citizen of the State of California and resides in Rancho Cucamonga, California.

14. Plaintiff Hall has purchased Brookside Dark Chocolate Products for personal consumption several times since 2014.

15. Plaintiff Angela Pirrone is a citizen of the State of New York and resides in Long Island, New York.

16. Plaintiff Pirrone has purchased Brookside Dark Chocolate Products for personal consumption several times since 2012.

17. Plaintiffs are informed and believe, and upon such information and belief allege, that Defendant The Hershey Company is a Delaware corporation with its principal place of business located in Hershey, Pennsylvania. Plaintiffs are informed and believe, and upon such information and belief allege, that Defendant, at all times relevant, conducted business in the State of California and within the Northern District of California. The Hershey Company is registered with the California Secretary of State under entity number C0171995.

FACTUAL BACKGROUND

A. Hershey Implicitly Warrants to Consumers that its Brookside Dark Chocolates are Natural.

18. The Hershey Company sells small ball-shaped dark chocolates with a fruit flavored center called "Brookside Dark Chocolate."

19. Hershey boasts of its exclusively created exotic flavored combinations: “Intriguingly delicious combinations. Açai. Pomegranate. Goji. These aren’t your everyday fruit flavors. Who would dare wrap them in a delicious ball of dark chocolate? We would. And we did.”¹ “We’re always experimenting with flavors until we uncover the most interesting and delicious dark chocolate and fruit flavor combinations. The result, tart is zingy, dark is sweet, and chocolate is ballsy!”²

20. True and correct photographs of the Brookside Dark Chocolate Acai & Blueberries Flavors Product with the “No Artificial Flavors” labeling statements on the front and back of the packaging are shown below:



¹ https://www.brooksidechocolate.com/en_us/home.html

² https://www.brooksidechocolate.com/en_us/thats-ballsy.html



21. True and correct photographs of the Brookside Dark Chocolate Goji and Raspberry Flavors Product with the “No Artificial Flavors” labeling statements on the front and back of the packaging are shown below:



22. True and correct photographs of the Brookside Dark Chocolate Pomegranate Flavor Product with the “No Artificial Flavors” labeling statements on the front and back of the packaging are shown below:



23. True and correct photographs of the Brookside Dark Chocolate Crunchy Clusters Berry Medley Flavors Product with the “No Artificial Flavors” labeling statements on the front and back of the packaging are shown below:



24. Although some versions of the Brookside Dark Chocolate Product packaging state “No Artificial Flavors” on both the front and back of the packaging as shown in the images above, other versions of the Brookside Dark Chocolate Product packaging state “No Artificial Flavors” prominently on the back of the product packaging as shown in the true and correct photographs below:



“No Artificial
Flavors”



“No
Artificial
Flavors”

25. Each of the Brookside Products at issue in this litigation are substantially similar because each Product represents that it is made with “No Artificial Flavors” on the labeling of the Product and each of the Products at issue are made with an artificial flavoring ingredient called d-l malic acid.

26. Hershey is promising purely natural Products with its Brookside Product line that purport to contain “No Artificial Flavors” for the following reasons:

- (1) First, and most significantly, the Products are not named after the famous Hershey name. Instead, Hershey calculatedly named the Product line “Brookside.” “Brookside” means the land bordering on a brook.³ Hershey is well aware that the name “Brookside” elicits feelings, thoughts, and associations related to nature and has advertised its Product line accordingly with that in mind. Nature-related name association and beautiful scenic imagery in Hershey’s advertising is conveying to consumers that the Products are natural.
- (2) Second, the Products feature a tree logo at the top of the packaging. Again, Hershey wants consumers to think nature/natural.
- (3) Third, the Products feature beautifully photographed and captivating pictures of leaves and fruits, including but not limited to, tempting and delectable pomegranates, blueberries, grapes, raspberries, and peaches that appear handpicked from a garden.
- (4) Fourth, the Products use premium packaging to convey to the consumer that the Products are of gourmet quality, and artfully color code the packages in relation to the fruits pictured on the labels. For example, the “Dark Chocolate Blueberry” Product packaging is blue, the “Dark Chocolate Pomegranate” Product is red, and the “Dark Chocolate Vineyard Inspired Peach” is orange.
- (5) Fifth, the “Vineyard Inspired” Products feature beautifully photographed chunks of raw dark chocolate and mouthwatering fruit in a clear glass that intends to communicate pure and unadulterated ingredients.

27. Indeed, Hershey’s thought, time, diligence, creativity, and money spent in branding, and marketing its Products is evident. Hershey cleverly and purposefully offers consumers a palpable

³ <https://www.merriam-webster.com/dictionary/brookside>

promise of naturalness as well as premium quality through its nature-related word association, imagery, photography, packaging, and advertising. Based on the foregoing, Hershey conveys to consumers that its Brookside Products are pure, natural, and contain “No Artificial Flavors.”

B. Hershey Warrants That its Brookside Products Contain “No Artificial Flavors.”

28. Hershey’s Brookside Product line bears the notation “No Artificial Flavors” on the labeling of the Products. Defendant’s labeling and advertising scheme is deliberately intended to give consumers the impression that the Products are composed only of natural flavors.

29. Defendant painstakingly and intentionally designed its Products’ labels to deceive consumers into believing that there are no artificial ingredients, including artificial flavoring agents or artificial chemicals contained in the Products, but this is false.

30. The Products contain a synthetic chemical flavoring compound identified as “malic acid.” For example, the Brookside Dark Chocolate – Acai & Blueberry Flavors Product’s back label states that the ingredients include: “Dark Chocolate, Sugar, Chocolate...**Malic Acid**, Tapioca Dextrin, Canola Oil, Acai Puree Concentrate, Sodium Bicarbonate, Ascorbic Acid, Sodium Citrate, Citric Acid (To Maintain Freshness), Resinous Glaze.” (Emphasis added).

31. This “malic acid” is an inexpensive synthetic chemical used in processed food products to make the taste like tangy fresh fruits – like blueberries, lemons, mangos, or cherries, and in the Products Plaintiffs purchased, like the Acai, Blueberry, Pomegranate, and Raspberry flavors.⁴

32. Under these circumstances, the labels of the Products violate California, New York, and federal statutes and state common law in multiple respects.

33. First, because each of the Products contains additional flavoring ingredients that simulate and reinforce the characterizing flavor, the front label is required by law to disclose those additional flavors rather than misleadingly suggest that the product is flavored only by natural fruit juices. (California Health & Safety Code § 109875 *et seq.*, (Sherman Law), incorporating 21 C.F.R. § 101.22.)⁵

⁴<http://www.bartek.ca/pdfs/BulletinsMalic/Improving%20the%20Flavor%20of%20Fruit%20Products%20with%20Acidulants.pdf>.

⁵California’s Sherman Food, Drug and Cosmetic Act, California Health & Safety Code § 109875 *et seq.*, incorporates into California law all regulations enacted pursuant to the U.S. Food Drug and

34. Second, the Products' ingredient lists violate federal and state law because they identify, misleadingly, the malic acid flavoring only as the general "malic acid" instead of using the specific, non-generic name of the ingredient. (*See* 21 C.F.R. § 101.4(a)(1).)

35. Even more deceptive, however, is the fact that the Products, rather than being flavored only with natural juices and flavors as the labels suggest, contain an undisclosed artificial flavor made from petrochemicals. Defendant conceals this from consumers.

36. There is a different, naturally-occurring form of malic acid found in some fruits and vegetables. Defendant does not use this type of malic acid; it instead adds a synthetic industrial chemical called d-l malic acid,⁶ in the form of a racemic mixture of d- and l-isomers, to flavor the Products and make them taste like fresh fruit. On August 27, 2018, Plaintiffs' counsel had the Brookside Dark Chocolate Acai & Blueberries Flavors Product tested for the presence of artificial d-l malic acid by a reputable food laboratory. This testing confirms that the Product tested positive for the presence of artificial d-l malic acid. During discovery, Defendant also admitted that each of the Brookside Products at issue "contain d-l malic acid" in response to Plaintiffs' First Set of Requests for Admission.

37. This type of "malic acid" is not naturally-occurring but is in fact manufactured in petrochemical plants from benzene or butane – components of gasoline and lighter fluid, respectively – through a series of chemical reactions, some of which involve highly toxic chemical precursors and byproducts.

38. Both the natural and unnatural forms of malic acid are considered "GRAS" (generally recognized as safe) for use as flavorings in foods marketed to adults⁷; the d-malic acid form, however,

Cosmetic Act. An act or omission that would violate an FDCA regulation necessarily violates California's Sherman Law. (Health & Safety Code, § 110100.) Regulatory citations in the text are to California's Sherman Law and reference the corresponding federal regulation for convenience.

⁶ D-malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

⁷ The d-l form of malic acid, the one used by Defendant, is forbidden for use in baby foods out of health concerns if consumed by infants.

1 has never been extensively studied for its health effects in human beings. Both forms confer a “tart,
2 fruity” flavor to food products.⁸

3 39. Defendant uses this artificial petrochemical, d-1 malic acid, in its Products but pretends
4 otherwise, conflating the natural and artificial flavorings and deceiving consumers.

5 40. Because they contain artificial flavor, both federal and state law require the Products to
6 display both front- and back-label disclosures to inform consumer that they are artificially flavored.
7 (21 C.F.R. § 101.22.)

8 41. These Products have neither front-label nor back-label “Artificially Flavored”
9 disclosures. Defendant intentionally designed these Product labels without the required disclosure of
10 “Artificial Flavoring” on the front or back of the label for the purpose of deceiving consumers into
11 believing that there are no artificial ingredients, artificial flavoring agents or artificial chemicals
12 contained in the Products. It is currently unknown whether the Products are also contaminated with
13 precursor chemicals used in the manufacture of d-1 malic acid.

14 42. California law, incorporating and identically mirroring U.S. Food, Drug and Cosmetic
15 Act regulations by reference, requires that a food’s label accurately describe the nature of the food
16 product and its characterizing flavors. (21 C.F.R. § 102.5(a).)

17 43. Under FDA regulations, a recognizable primary flavor identified on the front label of a
18 food product is referred to as a “characterizing flavor.” (21 C.F.R. § 101.22.)

19 44. FDA regulations and California law establish that if “the label, labeling, or advertising
20 of a food makes any direct or indirect representations with respect to the primary recognizable flavors
21 by word, vignette, e.g., description of a fruit, or other means” then “such flavor shall be considered the
22 characterizing flavor.” (California’s Sherman Law, incorporating 21 C.F.R. § 101.22(i).)

23 45. “Acai & Blueberry Flavors” and other fruits are named and labeled as, and are primary
24 recognizable flavors identified on, the Products’ front labels. These are characterizing flavors under
25 California and federal regulations.

26 46. If a product’s characterizing flavor is not created exclusively by the characterizing
27 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or

28 ⁸ <https://thechemco.com/chemical/malic-acid/> (last visited April 30, 2018).

reinforced with either or both of natural or artificial flavorings. If any artificial flavor is present which “simulates, resembles or reinforces” the characterizing flavor, the food must be prominently labeled as “Artificially Flavored.” (California’s Sherman Law, incorporating 21 C.F.R. § 101.22(i)(3), (4).) A food product’s label also must include a statement of the “presence or absence of any characterizing ingredient(s) or component(s) ... when the presence or absence of such ingredient(s) or component(s) in the food has a material bearing on price or consumer acceptance ... and consumers may otherwise be misled about the presence or absence of the ingredient(s) or component(s) in the food.” (California’s Sherman Law, incorporating 21 C.F.R. § 102.5(c).) Such statements must be in boldface print on the front display panel and of sufficient size for an average consumer to notice. (*Id.*)

47. The synthetic d-l malic acid in the Products simulates, resembles, and reinforces the characterizing fruit flavors for the Products. Under these regulations, Defendant was required to place prominently on the Products’ front labels a notice sufficient to allow California consumers to understand that the Products contained artificial flavorings.

48. Defendant failed to do so, deceiving consumers and violating California law, federal law, and corresponding state common laws.

49. Accordingly, Plaintiffs and the Class were unaware that the Products contained artificial flavoring when they purchased them and were deceived.

C. Hershey Unfairly Capitalizes and Exploits Market Share by Targeting Natural and Premium-Product Seeking Consumers.

50. Hershey understands that it is targeting a different audience with its Brookside Dark Chocolate Products. Hershey also understands that there has been a shift in consumer choice and that consumers more than ever are actively seeking out Products with natural ingredients.

51. With that understanding, Hershey knew Plaintiffs and Class Members were seeking out products that were natural and which did not contain artificial flavoring, and Hershey took advantage of that.

52. Hershey’s intent is most telling by its deliberate choice to leave its renowned name off its Products’ packaging and choosing to name the Products by a completely different nature-related moniker (“Brookside”).

53. Defendant is taking away informed consumer choice by deceiving consumers and claiming that its Products are natural when this is false.

54. Hershey's choice packaging touting real ingredients and elite branding allows it to enjoy a price premium of at least \$3.79 per bag.

55. In Forbes Magazine, 88% of consumers polled recently indicated they would pay more for foods perceived as natural or healthy. "All demographics [of consumers] – from Generation Z to Baby Boomers – say they would pay more" for such products, specifically including foods with no artificial flavors.⁹ Forty-one percent (41%) of consumers rated the absence of artificial flavors in food products as "Very Important," and eighty percent (80%) of North American consumers are willing to pay a premium for foods with no artificial ingredients.¹⁰

56. John Compton, the CEO of a beverage manufacturer, spoke to investors at the Morgan Stanley Consumer & Retail Conference, stating: "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 natural."

57. Hershey is well-aware of the consumer shift in consumers actively seeking out natural products and is tapping into that market share with its Brookside Product line and deliberately packaging its Products with a "No Artificial Flavors" notation.

58. Defendant's labeling and advertising reflect consumer preferences – not by making the Products solely with natural ingredients, but instead by concealing the fact that the Products are artificially flavored.

59. California's Health & Safety Code states that "[a]ny food is misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless its labelling states that fact." (California Health & Safety Code, § 110740.)

⁹ *Consumers Want Healthy Foods - And Will Pay More For Them*"; Forbes Magazine, February 15, 2015. <https://www.forbes.com/sites/nancygagliardi/2015/02/18/consumers-want-healthy-foods-and-will-pay-more-for-them/#4b8a6b4b75c5>; (last visited March 22, 2018).

¹⁰ The Nielsen Company, Global Health and Wellness Survey, "Healthy Eating Habits Around the World," 2015; <https://www.nielsen.com/content/dam/nielsen-global/eu/nielseninsights/pdfs/Nielsen%20Global%20Health%20and%20Wellness%20Report%20-%20January%202015.pdf>; (last visited March 22, 2018)

60. California law requires Defendant to include sufficient notice on the Products' labels to alert California consumers that the Products are artificially flavored. Defendant failed to do so. Accordingly, Defendant's Products were misbranded and illegal to distribute or sell in California. (California Health & Safety Code, §§ 110740, 110760, 110765.)

61. Because the Products violated Federal, California, and New York law, they were misbranded when offered for sale in the United States.

62. Plaintiffs and the Class lost money as a result of Defendant's conduct because they purchased Products that contained undisclosed artificial flavors and were illegal to sell.

D. Plaintiffs' Purchases Of the Brookside Dark Chocolate Products.

63. Plaintiff Howard Clark purchased the Brookside Dark Chocolate Acai & Blueberry Flavors Product in California during the Class Period defined herein. Specifically, between approximately April and July 2018, Plaintiff Clark purchased at least two packages of the Brookside Dark Chocolate – Acai & Blueberry Flavors Product with the "No Artificial Flavors" labeling statement in the Northern District of California. Plaintiff Clark paid approximately \$3.50 to \$4.00 for the Products that he purchased.

64. Plaintiff Clark's most recent purchase of the Brookside Dark Chocolate Acai & Blueberry Flavors Product with the "No Artificial Flavors" labeling statement was in approximately July 2018 at Safeway located on 1335 Webster Street, San Francisco, CA 94115.

65. When purchasing the Brookside Dark Chocolate Acai & Blueberry Flavors Product, Plaintiff Clark read and relied on the "No Artificial Flavors" labeling statement. Plaintiff Clark would not have purchased the Product, or would have paid less for the Product, had he known at the time of purchase that the Product actually contains an artificial flavoring ingredient.

66. Plaintiff Clark did not discover that the Brookside Dark Chocolate Products actually contain an artificial flavoring ingredient called d-l malic acid until approximately September of 2018 when he was first informed of the results of the testing for d-l malic acid contained in the Product that was performed by a reputable food laboratory.

67. Plaintiff Todd Hall is a resident of Rancho Cucamonga, California and has been purchasing Brookside Dark Chocolate Products since approximately 2014. The specific flavors that

1 Plaintiff Hall purchased were the Brookside Dark Chocolate Pomegranate Flavors Product with the
2 “No Artificial Flavors” labeling statement, the Brookside Dark Chocolate Acai & Blueberries
3 Flavored Product with the “No Artificial Flavors” labeling statement, and the Brookside Dark
4 Chocolate Goji & Raspberry Flavored Product with the “No Artificial Flavors” labeling statement.
5 Plaintiff Hall purchased the Brookside Dark Chocolate Products mentioned above on approximately a
6 monthly basis from around 2014 until approximately June of 2018. Plaintiff Hall purchased the
7 Products from Albertson’s, Target, and CVS stores located near his home in Rancho Cucamonga,
8 California. Plaintiff Hall paid approximately \$3.50 to \$4.00 for the Products that he purchased.

9 68. Plaintiff Hall’s most recent purchase of a Brookside Dark Chocolate Product was the
10 Brookside Dark Chocolate Pomegranate Flavors Product with the “No Artificial Flavors” labeling
11 statement, which he purchased in approximately June of 2018 at a CVS store located on 120 E.
12 Bonita Avenue, San Dimas, CA 91773.

13 69. When purchasing the Brookside Dark Chocolate Products, Plaintiff Hall read and relied
14 on the “No Artificial Flavors” labeling statement. Plaintiff Hall would not have purchased the
15 Products, or would have paid less for the Products, had he known at the time of purchase that the
16 Products actually contain an artificial flavoring ingredient.

17 70. Plaintiff Hall did not discover that the Brookside Dark Chocolate Products actually
18 contain the artificial flavoring ingredient called d-l malic acid until approximately November 14, 2018
19 when he was first informed of the results of the testing for d-l malic acid contained in the Product that
20 was performed by a reputable food laboratory.

21 71. Plaintiff Angela Pirrone is a resident of Long Island, New York and has been
22 purchasing various flavored Brookside Products since 2012. Plaintiff Pirrone began purchasing the
23 Brookside Dark Chocolate Products with the “No Artificial Flavors” labeling statements in the State
24 of New York beginning in approximately March of 2014. The specific flavors of the Products that
25 Plaintiff Pirrone purchased are the Brookside Dark Chocolate Acai & Blueberry Flavors and the
26 Brookside Dark Chocolate Pomegranate Flavors. Plaintiff Pirrone purchased the Products in New
27 York beginning in approximately March of 2014 until approximately August of 2018 from CVS and
28

1 Stop & Shop stores. Plaintiff Pirrone paid approximately \$3.50 to \$4.00 for her purchases of the
2 Products.

3 72. Plaintiff Pirrone's most recent purchase of a Brookside Dark Chocolate Product with
4 the "No Artificial Flavors" labeling statement was in August 2018 at CVS store located on 3496 Long
5 Beach Road, Oceanside, New York, 11572.

6 73. When purchasing the Brookside Dark Chocolate Products, Plaintiff Pirrone read and
7 relied on the "No Artificial Flavors" labeling statement. Plaintiff Pirrone would not have purchased
8 the Products, or would have paid less for the Products, had she known at the time of purchase that the
9 Products actually contain an artificial flavoring ingredient.

10 74. Plaintiff Pirrone did not discover that the Brookside Dark Chocolate Products actually
11 contain the artificial flavoring ingredient called d-l malic acid until approximately November 14, 2018
12 when she was first informed of the results of the testing for d-l malic acid contained in the Product that
13 was performed by a reputable food laboratory.

14 75. Plaintiffs were deceived by and relied upon the Brookside Dark Chocolate Products'
15 deceptive labeling, and specifically the omission of the legally-required notice that it contained
16 artificial flavorings. Plaintiffs purchased the Products believing them to be naturally flavored, based
17 on the Products' deceptive labeling stating that the Products contain "No Artificial Flavors."

18 76. Plaintiffs, as a reasonable consumers, are not required to subject consumer food
19 products to laboratory analysis, to scrutinize the back of the label to discover that the product's front
20 label is false and misleading, or to search the label for information that federal regulations require be
21 displayed prominently on the front – and, in fact, under state law is entitled to rely on statements that
22 Defendant deliberately places on the Brookside Dark Chocolate Products' labelling. Defendant, but
23 not Plaintiffs, knew or should have known that this labelling was in violation of federal regulations
24 and state law.

25 77. Because Plaintiffs reasonably assumed that the Products would be free of artificial
26 flavoring based on the Products' "No Artificial Flavors" labeling statement, when they were not, they
27 did not receive the benefit of their purchase. Instead of receiving the benefit of Products free of
28 artificial flavoring, Plaintiffs received Products that were unlawfully labelled to deceive the consumers

1 into believing that the Products are exclusively naturally flavored and contain no artificial flavoring, in
2 violation of federal and state labelling regulations.

3 78. Plaintiffs would not have purchased the Products, or would have paid less for the
4 Products, in the absence of Defendant's misrepresentations and omissions. Had Defendant not
5 violated federal and state laws, Plaintiffs would not have been injured.

6 79. The Products were worth less than what Plaintiffs paid for them and Class members
7 would not have paid as much as they have for the Products absent Defendant's false and misleading
8 statements and omissions.

9 80. Plaintiffs and the Class therefore lost money as a result of Defendant's unlawful
10 behavior. Plaintiffs and the Class altered their position to their detriment and suffered loss in an
11 amount equal to the amounts they paid for the Products or, alternatively, the price premium that they
12 paid for the Products.

13 81. Plaintiffs intend to, seek to, and will purchase the Brookside Dark Chocolate Products
14 again when they can do so with the assurance that the Brookside Dark Chocolate Products' labels,
15 which indicate that the Products are naturally flavored and contain "No Artificial Flavors", is lawful
16 and consistent with the Brookside Dark Chocolate Products' ingredients.

17 **CLASS ACTION ALLEGATIONS**

18 82. Plaintiffs bring this action on behalf of themselves and all others similarly situated
19 pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3).

20 83. **The Nationwide Class is defined as follows:**

21 All U.S. citizens who made retail purchases of one of the following Brookside Dark
22 Chocolate Products labeled as containing "No Artificial Flavors" in their respective
23 state of citizenship on or after October 4, 2014 and until the Class is certified, for
24 personal use and not for resale, excluding Defendant and Defendant's officers,
25 directors, employees, agents and affiliates, and the Court and its staff:

- 26 • Brookside Dark Chocolate Acai & Blueberry Flavors;
- 27 • Brookside Dark Chocolate Goji & Raspberry Flavors;
- 28 • Brookside Dark Chocolate Vineyard Inspired Chardonnay Grape & Peach;

- Brookside Dark Chocolate Crunchy Clusters Berry Medley Flavors;
- Brookside Dark Chocolate Pomegranate Flavor, and;
- Brookside Dark Chocolate Vineyard Inspired Merlot Grape & Black Currant Flavors

84. **The California Class is defined as follows:**

All California citizens who made retail purchases of one of the following Brookside Dark Chocolate Products in California on or after October 4, 2018 and until the Class is certified, for personal use and not for resale, excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, and the Court and its staff:

- Brookside Dark Chocolate Acai & Blueberry Flavors;
- Brookside Dark Chocolate Goji & Raspberry Flavors;
- Brookside Dark Chocolate Vineyard Inspired Chardonnay Grape & Peach;
- Brookside Dark Chocolate Crunchy Clusters Berry Medley Flavors;
- Brookside Dark Chocolate Pomegranate Flavor, and;
- Brookside Dark Chocolate Vineyard Inspired Merlot Grape & Black Currant Flavors

85. **The New York Class is defined as follows:**

All New York citizens who made retail purchases of one of the following Brookside Dark Chocolate Products in New York on or after November 21, 2015 and until the Class is certified, for personal use and not resale, excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, and the Court and its staff:

- Brookside Dark Chocolate Acai & Blueberry Flavors;
- Brookside Dark Chocolate Goji & Raspberry Flavors;
- Brookside Dark Chocolate Vineyard Inspired Chardonnay Grape & Peach;
- Brookside Dark Chocolate Crunchy Clusters Berry Medley Flavors;
- Brookside Dark Chocolate Pomegranate Flavor, and;
- Brookside Dark Chocolate Vineyard Inspired Merlot Grape & Black Currant Flavors

1
2 86. During the Class Period, the Products unlawfully contained the undisclosed artificial
3 flavors d-malic acid or d-l malic acid and were otherwise improperly labeled. Defendant failed to label
4 the Products as required by federal and state law.

5 87. During the Class Period, Class members purchased the misbranded Products, paying a
6 price premium for those Products compared to similar products lawfully labeled.

7 88. The proposed Classes meet all criteria for a class action, including numerosity,
8 commonality, typicality, predominance, superiority, and adequacy of representation.

9 89. This action has been brought and may properly be maintained as a class action against
10 Defendant. While the exact number and identities of other Class Members are unknown to Plaintiffs at
11 this time, Plaintiffs are informed and believe that there are hundreds of thousands of Members in the
12 Class. The Members of the Class are so numerous that joinder of all Members is impracticable and the
13 disposition of their claims in a class action rather than in individual actions will benefit the parties and
14 the courts.

15 90. The proposed Classes satisfy typicality. Plaintiffs' claims are typical of and are not
16 antagonistic to the claims of other Class members. Plaintiffs and the Class members all purchased the
17 Products, were deceived by the false and deceptive labeling, and lost money as a result, purchasing
18 Products that were illegal to sell in California.

19 91. The proposed Classes satisfy superiority. A class action is superior to any other means
20 for adjudication of the Class members' claims because each Class member's claim is modest, based on
21 the Products' retail purchase prices which are generally under \$5.00 per unit. It would be impractical
22 for individual Class members to bring individual lawsuits to vindicate their claims.

23 92. Because Defendant's misrepresentations were made on the label of the Products, all
24 Class members including Plaintiffs were exposed to and continue to be exposed to the omissions and
25 affirmative misrepresentations. If this action is not brought as a class action, Defendant can continue
26 to deceive consumers and violate California law with impunity.

27 93. The proposed Class representatives satisfy adequacy of representation. Plaintiffs are
28 adequate representatives of the Class as they seek relief for the Class, their interests do not conflict

1 with the interests of the Class members, and they have no interests antagonistic to those of other Class
2 members. Plaintiffs have retained counsel competent in the prosecution of consumer fraud and class
3 action litigation.

4 94. The proposed Classes satisfy commonality and predominance. There is a well-defined
5 community of interest in questions of law and fact common to the Class, and these predominate over
6 any individual questions affecting individual Class members in this action.

7 95. Questions of law and fact common to Plaintiffs and the Class include:

8 a. Whether Defendant failed to disclose the presence of the artificial flavoring ingredient d-l
9 malic acid in the Product;

10 b. Whether Defendant's labeling omissions and representations constituted false advertising
11 under California law;

12 c. Whether Defendant's conduct constituted a violation of California's Unfair Competition
13 Law;

14 d. Whether Defendant's conduct constituted a violation of California's Consumer Legal
15 Remedies Act;

16 e. Whether Defendant's label statements claiming solely natural flavorings was an affirmative
17 representation of the Product's composition and conveyed an express warranty;

18 f. Whether Defendant's conduct constitutes a breach of implied warranties under California's
19 Commercial Code;

20 g. Whether the statute of limitations should be tolled on behalf of the Class;

21 h. Whether the Class is entitled to restitution, rescission, actual damages, punitive damages,
22 attorney fees and costs of suit, and injunctive relief; and

23 i. Whether members of the Class are entitled to any such further relief as the Court deems
24 appropriate.

25 96. Plaintiffs will fairly and adequately protect the interests of the Class, have no interests
26 that are incompatible with the interests of the Class, and have retained counsel competent and
27 experienced in class litigation.

1 97. Defendant has acted on grounds applicable to the entire Class, making final injunctive
2 relief or declaratory relief appropriate for the Class as a whole.

3 98. Class treatment is therefore appropriate under Federal Rule of Civil Procedure 23.

4 99. Class damages will be adduced at trial through expert testimony and other competent
5 evidence.

6 100. California and New York law holds that the price-premium consumers paid for the
7 falsely-advertised Products, as a percentage of the Products' retail prices, is a proper measure of Class
8 damages.

9 101. Food-industry consumer research is consistent and readily supports such estimates of
10 that price-premium, as consumers quantitatively report that they seek out, value, and are willing to pay
11 a premium for food products with no artificial flavors.

12 102. On information and belief, based on publicly-available information, Plaintiffs allege
13 that the total amount in controversy exclusive of fees, costs, and interest, based on the estimated price
14 premium and Product revenues for sales to the Class in California during the proposed Class Period,
15 exceeds \$5 million.

16 **CAUSES OF ACTION**

17 **FIRST CAUSE OF ACTION**

18 **FRAUD BY OMISSION**

19 **CAL. CIV. CODE §§ 1709-1710**

20 **and the common law of all states**

21 **(on behalf of the Nationwide Class, the California Class, and the New York Class)**

22 103. Plaintiffs re-allege and incorporate by reference the allegations made elsewhere in the
23 Complaint as is set forth in full herein.

24 104. Plaintiffs bring this claim for fraud by omission pursuant to California Civil Code §§
25 1709-1710, *et seq.* and the common law of all states. The elements of fraud are substantially similar
26 from state to state, thus making nationwide class certification appropriate.

27 105. Defendant actively concealed material facts, in whole or in part, with the intent to
28 induce Plaintiffs and members of the Class to purchase the Products. Specifically, Defendant actively

1 concealed the truth about the Products by not disclosing the existence of artificial flavoring ingredients
2 on the front label of the Products as is required by California and federal law.

3 106. Plaintiffs and the Class was unaware of these omitted material facts and would not have
4 purchased the Products, or would have paid less for the Products, if they had known of the concealed
5 facts.

6 107. Plaintiffs and the Class suffered injuries that were proximately caused by Defendant's
7 active concealments and omissions of material facts.

8 108. Defendant's fraudulent concealments and omissions were a substantial factor in
9 causing the harm suffered by Plaintiffs and the Class members as they would not have purchased the
10 products at all if all material facts were properly disclosed.

11 **SECOND CAUSE OF ACTION**

12 **NEGLIGENT MISREPRESENTATION**

13 **CAL. CIV. CODE §§ 1709-1710**

14 **and the common law of all states**

15 **(on behalf of the Nationwide Class, the California Class, and the New York Class)**

16 109. Plaintiffs re-allege and incorporate by reference the allegations made elsewhere in the
17 Complaint as if set forth in full herein.

18 110. Plaintiffs bring this claim for negligent misrepresentation pursuant to California Civil
19 Code §§ 1709-1710, *et seq.* and the common law of all states. The elements of negligent
20 misrepresentation are substantially similar from state to state, thus making nationwide class
21 certification appropriate.

22 111. Defendant had a duty to disclose to Plaintiffs and the Class members the existence of
23 artificial flavoring ingredients on the front labels of the Products pursuant to California and federal
24 law. Defendant was in a superior position than Plaintiffs and the Class members such that reliance by
25 Plaintiffs and the Class members was justified. Defendant possessed the skills and expertise to know
26 the type of information that would influence a consumer's purchasing decision.

112. During the applicable Class period, Defendant negligently or carelessly misrepresented, omitted, and concealed from consumers material facts regarding the products, including the existence of artificial flavoring ingredients.

113. Defendant was careless in ascertaining the truth of their representations in that it knew or should have known that Plaintiffs and the Class members would not have realized the true existence of artificial flavoring ingredients in the Products.

114. Plaintiffs and the Class members were unaware of the falsity of Defendant's misrepresentations and omissions and, as a result, justifiably relied on them when making the decision to purchase the Products.

115. Plaintiffs and the Class members would not have purchased the Products, or would have paid less for the Products, if the true facts had been known.

THIRD CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT,

Cal. Civ. Code § 1750, *et seq.*

(on behalf of the California Class)

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

117. The California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CLRA") prohibits any unfair, deceptive and unlawful practices, and unconscionable commercial practices in connection with the sale of any goods or services to consumers.

118. Plaintiffs and the Class are "consumers" as defined by Cal. Civ. Code § 1761(d). The Products are a "good" as defined by Cal. Civ. Code § 1761.

119. Defendant's failure to label the Products in compliance with federal and state labeling regulations, was an unfair, deceptive, unlawful, and unconscionable commercial practice.

120 Defendant's conduct violates the CLRA, including but not limited to, the following provisions:

§ 1770(a)(5): representing that goods have characteristics, uses, or benefits which they do not have.

§ 1770(a)(7): representing that goods are of a particular standard, quality, or grade if they are of another.

§ 1770(a)(9): advertising goods with intent not to sell them as advertised.

§ 1770(a)(16): representing the subject of a transaction has been supplied in accordance with a previous representation when it has not.

121. As a result of Defendant's violations, Plaintiffs and the Class suffered ascertainable losses in the form of the price premiums they paid for the deceptively labeled and marketed Products, which they would not have paid had these Products been labeled truthfully, and in the form of the reduced value of the Products purchased compared to the Products as labeled and advertised.

122. On or about September 13, 2018, prior to filing this action, Plaintiff Clark sent a CLRA notice letter to Defendant which complies with California Civil Code § 1782(a). Plaintiff sent Defendant, individually and on behalf of the proposed Class, a letter via Certified Mail, advising Defendant that it is in violation of the CLRA and demanding that it cease and desist from such violations and make full restitution by refunding the monies received therefrom. Plaintiff Pirrone and Plaintiff Hall also sent a CLRA letter on November 14, 2018. Attached hereto as Exhibits 1 and 2 are copies of Plaintiffs' CLRA letters.

123. Wherefore, Plaintiffs seeks damages, restitution, attorneys' fees and costs, and injunctive relief for Defendant's violations of the CLRA.

FOURTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW, (UNLAWFUL PRONG)

Cal. Business & Professions Code § 17200, *et seq.*

(on behalf of the California Class)

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

125. Section 17200 of the California Business & Professions Code ("Unfair Competition Law" or "UCL") prohibits any "unlawful," "unfair" and "fraudulent" business practice. Section 17200 specifically prohibits any "unlawful . . . business act or practice."

126. The UCL borrows violations of other laws and statutes and considers those violations also to constitute violations of California law.

127. Defendant's practices as described herein were at all times during the Class Period and continue to be unlawful under, *inter alia*, FDA regulations and California's Sherman Law.

128. Among other violations, Defendant's conduct in unlawfully packaging and distributing the Products in commerce in California violated U.S. FDA packaging and labelling regulations.

129. The Products' labels fail to disclose that they contain synthetic artificial flavoring in violation of 21 C.F.R. § 101.22 and California's Sherman Law.

130. The Products contain d-l-malic acid. The d-l-malic acid is a flavoring material that creates, simulates, and reinforces the Products' characterizing fruit flavors.

131. The d-l-malic acid in the Products is not derived from a natural material as defined in 21 C.F.R. § 101.22 and is therefore by law artificial flavors.

132. Defendant fails to inform consumers of the presence of the artificial flavor in the Products, on either the front or back-label as required by law.

133. Defendant's practices are therefore unlawful as defined in Section 17200 of the California Business & Professions Code.

FIFTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW (UNFAIR PRONG)

Cal. Business & Professions Code § 17200, *et seq.*

(on behalf of the California Class)

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

135. Section 17200 of the California Business & Professions Code ("Unfair Competition Law" or "UCL") prohibits any "unfair . . . business act or practice." Defendant's practices violate the Unfair Competition Law "unfair" prong as well.

136. Defendant's practices as described herein are "unfair" within the meaning of the California Unfair Competition Law because the conduct is unethical and injurious to California

1 residents and the utility of the conduct to Defendant does not outweigh the gravity of the harm to
2 consumers.

3 137. While Defendant's decision to label the Products deceptively and in violation of
4 California law may have some utility to Defendant in that it allows Defendant to sell the Products to
5 consumers who otherwise would not purchase an artificially-flavored food product at the retail price
6 or at all if it were labelled correctly, and to realize higher profit margins that if they formulated or
7 labelled the Products lawfully, this utility is small and far outweighed by the gravity of the harm
8 Defendant inflicts upon California consumers.

9 138. Defendant's conduct also injures competing food product manufacturers, distributors,
10 and sellers that do not engage in the same unlawful, unfair, and unethical behavior.

11 139. Moreover, Defendant's practices also violate public policy expressed by specific
12 constitutional, statutory or regulatory provisions, including the Sherman Law, the False Advertising
13 Law, and the FDA regulations cited herein.

14 140. Plaintiffs Clark's and Hall's and Class members' purchases of the Products all took
15 place in California.

16 141. Defendant labeled the Products in violation of federal regulations and California law
17 requiring truth in labelling.

18 142. Defendant consciously failed to disclose material facts to Plaintiffs and the Class in
19 Defendant's advertising and marketing of the Products.

20 143. Defendant's conduct is unconscionable because, among other reasons, it violates 21
21 C.F.R. § 101.22(c), which requires all foods containing artificial flavoring to include:

22 A statement of artificial flavoring ... [which] shall be placed on the food or on its
23 container or wrapper, or on any two or all three of these, as may be necessary to render
24 such a statement likely to be read by the ordinary person under customary conditions of
25 purchase and use of such food.

26 144. Defendant's conduct is "unconscionable" because it violates, among other things, 21
27 C.F.R. § 101.22(c), which requires all food products for which artificial flavoring provides a
28 characterizing flavor to disclose this fact prominently on the product's front label.

145. Defendant intended that Plaintiffs and the Class rely on Defendant's acts of omission so that Plaintiffs and other Class members would purchase the Products.

146. Had Defendant disclosed all material information regarding the Products in its advertising and marketing, Plaintiffs and the Class would not have purchased the Products or would have paid less for those Products.

147. Plaintiffs and the Class suffered injury in fact and lost money or property as a result of Defendant's deceptive advertising. They were denied the benefit of the bargain when they decided to purchase the Products based on Defendant's violation of the applicable laws and regulations, or to purchase the Products in favor of competitors' products, which are less expensive, contain no artificial flavoring, or are lawfully labelled.

148. Plaintiffs suffered an ascertainable loss of money. The acts, omissions and practices of Defendant detailed herein proximately caused Plaintiffs and other members of the Class to suffer an ascertainable loss in the form of, among other things, monies spent to purchase the Products they otherwise would not have, and they are entitled to recover such damages, together with appropriate penalties, including restitution, damages, attorneys' fees and costs of suit.

149. Section 17200 also prohibits any "unfair, deceptive, untrue or misleading advertising." For the reasons set forth above, Defendant engaged in unfair, deceptive, untrue and misleading advertising in violation of California Business & Professions Code § 17200.

150. Pursuant to California Business & Professions Code § 17203, Plaintiffs seek an order requiring Defendant immediately to cease such acts of unlawful, unfair and fraudulent business practices and requiring Defendant to return the full amount of money improperly collected to those who purchased the Products.

SIXTH CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW

Cal. Business & Professions Code § 17500, *et seq.*

(on behalf of the California Class)

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

152. Plaintiffs bring this fourth cause of action on behalf of the Class against Defendant for violation of California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* ("FAL").

153. Defendant made and distributed, in California and in interstate commerce, the Products that unlawfully fail to disclose artificial flavoring on its packaging as required by federal food labelling regulations.

154. The Products' labelling and advertising in California falsely describe them as if they were only naturally flavored.

155. Under California False Advertising Law, Business & Professions Code § 17500 *et seq.*, "It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property ... to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device ... any statement concerning that real or personal property ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. ..." (Cal. Bus. & Prof. Code § 17500.)

156. Defendant's labelling and advertising statements, communicating to consumers that the Products contain natural flavors and concealing the fact that it contained a synthetic artificial flavor, were untrue and misleading, and Defendant at a minimum by exercise of reasonable care should have known that those actions were false or misleading. Defendant's conduct violated California's False Advertising Law.

SEVENTH CAUSE OF ACTION

BREACH OF EXPRESS WARRANTIES

CAL. COMM. CODE § 2313

(on behalf of the California Class and all states with substantially similar laws)

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

158. The Products labels' warrant that the products have "no artificial flavors." The Products' front labels also misleadingly advertise by operation of law that the products are flavored only with the listed fruits.

159. These promises became part of the basis of the bargain between the parties and thus constituted an express warranty, which Defendant breached; the Products are artificially flavored.

160. Defendant sold the goods to Plaintiffs and other consumers who bought the goods from Defendant.

161. As a result, Plaintiffs and other consumers did not receive goods as warranted by Defendant.

162. Within a reasonable amount of time after Plaintiffs discovered that the Products contained synthetic ingredients, Plaintiffs notified Defendant of such breach.

163. As a proximate result of this breach, Plaintiffs and other consumers have been damaged in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION

BREACH OF IMPLIED WARRANTIES

CAL. COMM. CODE § 2314

(on behalf of the California Class and all states with substantially similar laws)

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

165 Defendant's label representations also created implied warranties that the Products were suitable for a particular purpose, specifically as a naturally flavored food product. Defendant breached this warranty as well.

166. The Products' front label misleadingly implies that they are flavored with the natural ingredients comprising the characterizing flavors. As alleged in detail above, at the time of purchase Defendant has reason to know that Plaintiffs, as well as members of the Class, intended to use the Products as a naturally flavored food product. This became part of the basis of the bargain between the parties.

1 167. As alleged in detail above, at the time of purchase Defendant had reason to know that
2 Plaintiffs, as well as all members of the Class, intended to use the Products as naturally-flavored food
3 products.

4 168. This became part of the basis of the bargain between the parties.

5 169. Based on the implied warranty, Defendant sold the goods to Plaintiffs and other Class
6 members who bought the goods from Defendant.

7 170. At the time of purchase, Defendant knew or had reason to know that Plaintiffs and the
8 Class members were relying on Defendant's skill and judgment to select or furnish a product that was
9 suitable for this particular purpose, and Plaintiffs justifiably relied on Defendant's skill and judgment.

10 171. The Products were not suitable for this purpose.

11 172. Plaintiffs purchased the Products believing they had the qualities Plaintiffs sought,
12 based on the deceptive advertising and labelling, but the Products were actually unsatisfactory to
13 Plaintiffs for the reasons described herein.

14 173. The Products were not merchantable in California, as they were not of the same quality
15 as other products in the natural food category generally acceptable in the trade.

16 174. The Products would not pass without objection in the trade when packaged with their
17 existing label, because the Products were misbranded and illegal to sell in California. (Cal.
18 Commercial Code, §2314(2)(a).)

19 175. The Products also were not acceptable commercially and breached their implied
20 warranty because they were not adequately packaged and labelled as required. (Cal. Commercial
21 Code, §2314(2)(e).)

22 176. The Products also were not acceptable commercially and breached their implied
23 warranty because they did not conform to the promises or affirmations of fact made on the container or
24 label. (Cal. Commercial Code, §2314(2)(f), and other grounds set forth in Commercial Code, §2314.)

25 177. By offering the Products for sale and distributing those products in California,
26 Defendant also warranted that the Products were not misbranded and were legal to purchase in
27 California. Because the Products were misbranded in several respects and were therefore illegal to sell
28 or offer for sale in California, Defendant breached this warranty as well.

178. As a result of this breach, Plaintiffs and other consumers did not receive goods as impliedly warranted by Defendant.

179. Within a reasonable amount of time after Plaintiffs discovered that the Products contained synthetic flavoring ingredients, Plaintiffs notified Defendant of such breach.

180. As a proximate result of this breach of warranty, Plaintiffs and other consumers have been damaged in an amount to be determined at trial.

181. As a result, Plaintiffs and the Class, and the general public, are entitled to injunctive and equitable relief, restitution, and an order for the disgorgement of funds by which Defendant was unjustly enriched.

NINTH CAUSE OF ACTION

CLAIM FOR UNFAIR TRADE PRACTICES

N.Y. BUS. LAW § 349

(on behalf of the New York Class)

182. Plaintiff and Class Members re-allege and incorporate by reference each and every allegation set forth above, and further allege as follows:

183. Plaintiff Angela Pirrone brings this Count individually and on behalf of members of the New York Class.

184. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by making the Misrepresentations.

185. The foregoing deceptive acts and practices were directed at consumers, including Plaintiff and members of the New York Sub-Class.

186. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics and qualities of Brookside Products to induce consumers to purchase the Products.

187. Plaintiff and the New York Class Members were injured.

TENTH CAUSE OF ACTION

CLAIM FOR FALSE ADVERTISING

N.Y. BUS. LAW § 350

(on behalf of the New York Class)

1 188. Plaintiff and the Class Members re-allege and incorporate by reference each and every
2 allegation set forth above, and further allege as follows:

3 189. Plaintiff Angela Pirrone brings the Count individually and on behalf of members of the
4 Nationwide Class and New York Sub-Class against Defendants.

5 190. Based on the foregoing, Defendant has engaged in consumer-oriented conduct that is
6 deceptive or misleading in a material way which constitutes false advertising in violation of Section
7 350 of the New York General Business Law.

8 191. Defendant's false, misleading, and deceptive statements and representations of fact,
9 including, but not limited to, the Misrepresentations, were and are directed to consumers, including
10 Plaintiff and members of the Classes.

11 192. Defendant's false, misleading, and deceptive statements and representations of fact,
12 including, but not limited to, the Misrepresentations, were and are likely to mislead a reasonable
13 consumer acting reasonably under the circumstances.

14 193. Defendant's false, misleading, and deceptive statements and representations of fact,
15 including, but not limited to, the Misrepresentations, have resulted in consumer injury or harm to the
16 public interest.

17 194. As a result of Defendant's false, misleading, and deceptive statements and
18 representations of fact, including, but not limited to, the Misrepresentations, Plaintiff and Class
19 Members have suffered and continue to suffer economic injury.

20 195. Plaintiff and the New York Sub-Class suffered an ascertainable loss caused by
21 Defendant's Misrepresentations because they paid for Products, which they would not have purchased,
22 or would not have paid as much for the Products, had they known the truth about the Products.

23 196. Plaintiff, on behalf of herself and other members of the New York Sub- Class, seeks to
24 enjoin the unlawful acts and practices described herein, to recover actual damages or \$500.00,
25 whichever is greater, three times actual damages, and reasonable attorneys' fees and costs.

26 **ELEVENTH CAUSE OF ACTION**

27 **CLAIM FOR BREACH OF EXPRESS WARRANTY**

28 **N.Y. U.C.C. § 2-313**

(on behalf of the New York Class and all states with substantially similar laws)

197. Plaintiff and the Class Members re-allege and incorporate by reference each and every allegation set forth above, and further allege as follows:

198. Plaintiff brings this Count individually and on behalf of the members of the New York Classes against the Hershey Defendant.

199. Defendant, as a manufacturer, marketer, distributor and/or seller, expressly warranted that Brookside Products were fit for their intended purpose of making the Express Warranties.

200. In fact, Brookside Products are not fit for such purposes because each of the Express Warranties is false and misleading.

201. Defendant breached the warranty implied in the contract for the sale of Brookside Products in that the Products could not pass without objection in the trade under the contract description, the goods were not of fair or average quality within the description, the goods were unfit for their intended and ordinary purpose for which the Products are used.

TWELVETH CAUSE OF ACTION

CLAIM FOR BREACH OF IMPLIED WARRANTY

N.Y. U.C.C. § 2-314

(on behalf of the New York Class and all states with substantially similar laws)

202. Plaintiff and the Class Members re-allege and incorporate by reference each and every allegation set forth above, and further allege as follows:

203. Plaintiff brings this Count individually and on behalf of the members of the Nationwide Class and New York Subclass against the Hershey Defendant.

204. Defendant is and was at all relevant times, merchants under N.Y. U.C.C. § 2- 314. Defendant, as the designer, manufacturer, marketer, distributor and/or seller, impliedly warranted that Brookside Products were fit for their intended purpose in that that the Products did not have artificial ingredients and/or artificial flavoring. Defendant did so with the intent to induce Plaintiff and the New York Class Members to purchase Brookside Products.

205. Defendant breached the warranty implied in the contract for the sale of Brookside Products in that the Products could not pass without objection in the trade under the contract description, the goods were not of fair or average quality within the description, the goods were unfit

1 for their intended and ordinary purpose for which the Products are used.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiffs, on behalf of themselves, all others similarly situated, and the
4 general public, pray for judgment against Defendant as follows:

5 (A) An order confirming that this action is properly maintainable as a class action as
6 defined above;

7 (B) An order appointing Plaintiffs as class representatives and The Law Office of
8 Ronald A. Marron and Pacific Trial Attorneys as counsel for the Class;

9 (C) An order requiring Defendant to bear the cost of Class notice;

10 (D) An order declaring that the conduct complained of herein violates the CLRA;

11 (E) An order declaring that the conduct complained of herein violates the UCL;

12 (F) An order declaring that the conduct complained of herein violates the FAL;

13 (G) An order declaring that the conduct complained of herein breached express
14 warranties, implied warranties, or both;

15 (H) An order requiring Defendant to disgorge any benefits received from Plaintiff and
16 any unjust enrichment realized as a result of the improper and misleading labeling advertising,
17 and marketing of the Products;

18 (I) An order requiring Defendant to pay restitution and damages to Plaintiff and Class
19 members so that they may be restored any money which was acquired by means of any unfair,
20 deceptive, unconscionable or negligent acts;

21 (J) An award of punitive damages in an amount to be proven at trial;

22 (K) An order for damages and statutory damages;

23 (L) An order enjoining Defendant's deceptive and unfair practices;

24 (M) An order requiring Defendant to conduct corrective advertising;

25 (N) An award of pre-judgment and post-judgment interest;

26 (O) An award of attorney fees and costs; and

27 (P) Such other and further relief as this Court may deem just, equitable, or proper.
28

JURY DEMAND

Plaintiffs demand a trial by jury on all claims for damages. Plaintiffs do not seek a jury trial for claims sounding in equity.

DATED: April 4, 2019

Respectfully Submitted,

/s/ Ronald A. Marron
Ronald A. Marron

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