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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN FRANCISCO

ABRAHAM DRUCKER, on behalf of )  
himself and all others similarly )  
situated, )

Plaintiff, )

v. )

FERRERO USA, INC., )

Defendant. )

CASE NO.

**CCC-18-571845**

**CLASS ACTION COMPLAINT  
FOR:**

1) Violations of California's  
Consumers Legal Remedies Act,  
Civ. Code § 1750, *et seq.*

2) Violations of Unfair Competition  
Law, California Business &  
Professions Code § 17500, *et seq.*

3) Violations of Unfair Competition  
Law, California Business &  
Professions Code § 17200, *et seq.*

**DEMAND FOR JURY TRIAL**

**FILED**  
San Francisco County Superior Court  
DEC 45 2018  
CLERK OF THE COURT  
BY: *[Signature]*  
Deputy Clerk

**FILED**

## INTRODUCTION

1. Plaintiff Abraham Drucker (“Plaintiff”) brings this action on behalf of himself and on behalf of all others similarly situated against Defendant Ferrero USA, Inc. (“Ferrero,” the “Company” or “Defendant”) based on Defendant’s misleading business practices with respect to the packaging and sale of the Company’s Nutella & GO! Products (“Nutella & GO!” or the “Product”).

2. At all relevant times, and as depicted in the photographs below, Defendant has packaged and sold Nutella & GO! Products in opaque packaging that conceals from consumers the amount of product actually contained therein.

3. Specifically, the Company packages the Product in such a way as to make it appear that the Nutella portion of the Product fills half of the Product package, just as the breadsticks or pretzels portion fills the other half of the Product, as set forth in the images below:





4. Indeed, the Product's container mimics the design of a Nutella Jar, and reasonable consumers purchasing the Product believe that it is filled in the same manner as a traditional Nutella jar.



5. But in fact, and in stark contrast to the Product's outer packaging, the Nutella portion of the Product consists of approximately 50% Nutella *and 50% empty space*, as set forth in the image below:





6. The Products' packaging is *entirely* opaque, making it impossible for a reasonable consumer to see the quantity of Nutella provided in each Product.

7. Furthermore, a cardboard sleeve wholly encircles the four, twelve and twenty-four pack Products, making it *doubly* difficult to examine the Product sold in these quantities prior to purchase, as set forth in the image below.



8. In short, this packaging prevents the consumer from directly seeing or handling the Product and leads the reasonable consumer to believe that the package contains significantly more Nutella than it actually does.

9. This use of nonfunctional slack fill allows Defendant to lower its costs by duping customers into thinking they are getting a better bargain than they actually receive. As a result, Defendant has realized sizable profits.

10. Plaintiff and others have reasonably relied on Defendant's deceptive packaging in purchasing the Product at issue. If Plaintiff and other consumers had known the actual amount of Nutella contained in the Nutella & Go! Product, they would not have purchased the Product or would have paid less for the Product.

11. Therefore, Plaintiff and other consumers have suffered injury-in-fact as a result of Defendant's deceptive practices, including, but not limited to, out-of-pocket costs incurred in purchasing the overvalued Nutella & Go! Product.

**THE PARTIES**

***Plaintiff***

12. Plaintiff Abraham Drucker is an individual residing in San Francisco, California who, in or about October 2015, purchased Nutella & Go! Products, including the Product in the four-pack variety, from Safeway in San Francisco, California. Plaintiff purchased the Product for consumption by his children in reliance on Defendant's packaging, which made it appear that the Nutella portion of the Product fills half of the Product package, just as the breadstick or pretzel portion fills the other half of the Product. Consequently, he reasonably believed that he was purchasing the Product in the amount indicated by the size of the Nutella & Go! container; namely, that the Nutella portion of the Product filled half of the Product package, just as the breadstick or pretzel portion filled the other half of the Product.

13. Plaintiff thus reasonably believed that he was buying more Nutella than he actually received.

14. If Plaintiff had known at the time of purchase that the actual amount of Nutella in the Product was only half of what was represented by the packaging, he would not have purchased the Product or would have paid less for it. Plaintiff would purchase the product in the future if the labeling, packaging and pricing were no longer misleading and deceptive.

***Defendant***

15. Defendant Ferrero first opened for business in New York City in 1969. Ferrero has sold several well-known products, including Nutella, Tic Tac mints, Ferrero Rocher chocolate and hazelnut praline, and other "quality confections." Ferrero maintains its principal place of business at 7 Sylvan Way, 4th Floor, Parsippany, New Jersey, 07054. Ferrero regularly conducts and transacts business in this County, as well as throughout the United States.

**JURISDICTION AND VENUE**

16. This Court has jurisdiction over this action pursuant to the California Constitution, Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those given by statutes to other courts. *See also* Cal. Civ. Proc. Code § 410.10.

17. Personal jurisdiction over Defendant is proper because Defendant has purposefully availed itself of the privilege of conducting business activities in California, including, but not limited to, marketing, distributing and selling the Product to Plaintiff and prospective Class members.

18. Venue as to Defendant is proper in this county, pursuant to California Code of Civil Procedure section 395.5. On information and belief, Defendant distributes, markets and sells the Product in this County and throughout California, and Defendant is within the jurisdiction of this Court for service of process purposes. The unlawful acts alleged herein have a direct effect on Plaintiff and those similarly situated within the State of California.

## **FACTUAL ALLEGATIONS**

19. At all relevant times, Defendant has distributed, marketed, advertised and sold the Product across California and the United States. Defendant sells the Product at major retail and online outlets, including Amazon, Wal-Mart, Target, Walgreens and many other outlets.

20. Pursuant to California Business and Professions Code section 12606(b), a “container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill.”

21. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Pursuant to California Business and Professions Code section 12606(b), nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of the following:

- a. Protecting the contents of the package;
- b. The requirements of the machines used for packaging the product;
- c. Unavoidable product settling during shipping and handling;
- d. The extra packaging is needed to accommodate necessary labeling information;
- e. The container has a value and use that is independent of the food it contains;

1 f. Some minimum package size is necessary to accommodate required food  
2 labeling, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices;

3 g. The product container bears a “reasonable relationship” to the actual  
4 amount of product contained;

5 h. The dimensions of the product are visible, or the actual size of the product  
6 is clearly depicted on the exterior packaging, with a notation that the product is “actual size”;

7 i. The presence of headspace is necessary to facilitate the mixing, adding,  
8 shaking, or dispensing of liquids or powders by consumers prior to use;

9 j. The exterior packaging contains a product delivery or dosing device, the  
10 existence of which is readily apparent from the packaging;

11 k. It is a kit designed to produce a particular result that is not dependent upon  
12 the quantity of the contents;

13 l. The exterior packaging is routinely displayed using tester units or  
14 demonstrations to consumers in retail stores, so that customers can see the actual, immediate  
15 container of the product being sold, or a depiction of the actual size prior to purchase;

16 m. Exterior packaging consists of holiday or gift packages and the purchaser  
17 can adequately determine the quantity and sizes of the immediate product container at the point  
18 of sale;

19 n. The exterior packaging is larger due to the inclusion of a free sample or  
20 gift, the presence of which is conspicuously disclosed; or

21 o. The packaging encloses computer hardware or software designed to serve  
22 a particular function which is clearly and conspicuously disclosed on the exterior packaging.

23 22. Defendant’s Nutella & Go! Product packaging fits squarely within the foregoing  
24 definition of non-functional slack fill under California law.

25 23. As depicted in the above photos at ¶¶ 3 and 7, Nutella & Go! is sold in an  
26 enclosed and opaque container that does not allow consumers to view the contents inside.  
27 Therefore, the packaging “does not allow the consumer to fully view its contents.” Cal. Bus. &  
28 Prof. Code § 12606(b).



1           24.     The Product's packaging is "filled as to be misleading" due to the amount of slack  
2 fill it employs. Indeed, the Company packages the Product in such a way as to make it appear  
3 that the Nutella portion of the Product fills half of the Product package, just as the breadsticks or  
4 pretzels portion fills the other half of the Product.

5           25.     But in reality, the Nutella portion of the Product consists of approximately 50%  
6 Nutella and 50% *empty space*. The Product's packaging is entirely opaque, making it impossible  
7 for a reasonable consumer to see the quantity of Nutella provided in each Product. Furthermore,  
8 a cardboard sleeve wholly encircles the four, twelve and twenty-four pack Products, making it  
9 doubly difficult to examine the Product sold in these quantities prior to purchase.

10          26.     As set out in California Business and Professions Code section 12606(b), non-  
11 functional slack fill is defined as "the empty space in a package that is filled to substantially less  
12 than its capacity" and which does not fall under any of the safe harbor provisions.

13          27.     The amount of product that a consumer receives when purchasing the Product fills  
14 approximately 50% of the Nutella portion of the container it is packaged in, as set forth in the  
15 photo at ¶ 5.

16          28.     Furthermore, the packaging does not fit within any of the safe harbor provisions  
17 listed in California Business and Professions Code section 12606(b):

18               a.     Pursuant to section 12606(b)(1), the slack fill does not protect the contents  
19 of the packaging, as the product is not fragile or breakable;

20               b.     Pursuant to section 12606(b)(2), there is no reason that machines used for  
21 enclosing the contents of the package could not fill the void with Nutella;

22               c.     Pursuant to section 12606(b)(3), the slack fill is not necessary to  
23 accommodate product settling, as Nutella is not the sort of product that "settles";

24               d.     Pursuant to section 12606(b)(4), the container does not need to be larger to  
25 accommodate necessary labeling information;

26               e.     Pursuant to section 12606(b)(5), the container is not decorative or  
27 representational, and does not have a value that is both significant in proportion to its value and  
28 independent of its function to hold the product;



1 f. Pursuant to section 12606(b)(6), the packaging is not needed to prevent  
2 theft or accommodate required labeling or tamper-resistant devices;

3 g. Pursuant to section 12606(b)(7), the container does not bear a reasonable  
4 relationship to the actual amount of product contained inside, and the amount of the product  
5 therein is not visible to the consumer at the point of sale;

6 h. Pursuant to section 12606(b)(8), neither the dimensions of the immediate  
7 product container nor the product are visible through the exterior packaging, and the size of the  
8 immediate product container is not clearly and conspicuously depicted on the exterior packaging;

9 i. Pursuant to section 12606(b)(9), the slack fill is not necessary to facilitate  
10 mixing, shaking, or dispensing of the product;

11 j. Pursuant to section 12606(b)(10), the outer container is not a delivery or  
12 dosing device for the product;

13 k. Pursuant to section 12606(b)(11), the outer container is not a kit or system  
14 designed to produce a result not dependent on the quantity of the contents;

15 l. Pursuant to section 12606(b)(12), the product is not routinely displayed  
16 outside of its packaging such that consumers can see the actual, immediate container of the  
17 product being sold prior to purchase;

18 m. Pursuant to section 12606(b)(13), the exterior packaging is not a holiday  
19 or gift packaging;

20 n. Pursuant to section 12606(b)(14), the packaging does not contain a free  
21 sample or gift which necessitates larger packaging; and

22 o. Pursuant to section 12606(b)(15), the packaging does not contain  
23 computer hardware or software.

24 29. Defendant's packaging is misleading to reasonable consumers, including Plaintiff  
25 and Class members, and serves only to maximize Defendant's profits.

26 30. Defendant knows, or should know, that consumers, like Plaintiff and other Class  
27 members, reasonably rely on the size and style of the packaging in purchasing the Product, and  
28 would reasonably believe that the packaging contains much more Nutella than it actually does.

1           31. In reasonable reliance on the size and style of the packaging, Plaintiff and Class  
2 members purchased the Product.

3           32. Plaintiff and Class members do not know, did not know, and have no reason to  
4 know, that the Nutella & Go! Product packaging contains a significant amount of empty space at  
5 the time of purchase because the containers are opaque with no view of the contents inside.

6           33. For example, numerous consumers reviewing the Product on Amazon.com  
7 observed that the packaging was misleading:

8           a. “Great Idea, But Oh Nutella How Dashed My Happiness!!!, October 3,  
9 2015. I should give this one star for its addictive nature, but alas, Nutella, how I love thee.  
10 However, it only gets 3 stars for *being deceitfully skimpy* with the Nutella! When you open the  
11 package, you see two compartments, one for the cookie sticks the other holding the Nutella.  
12 Seeing the cookie stick as merely a means to scoop the luscious silky chocolate, I of course  
13 mounded a heaping pile onto the stick thinking I had chocolate love all the way down to the  
14 bottom of the container. You can only imagine the immense disappointment when I discovered  
15 *the chocolate compartment only goes down half way!!!* My heart sank and I was stranded with  
16 a pile of cookie sticks and no more chocolatey goodness. Oh Nutella, how could you be so  
17 cruel?”<sup>1</sup> (Emphasis added).

18           b. “Delicious, but a lot of packaging waste, June 21, 2015. I bought these for  
19 snacks for our group meetings at work. People really love them! The container shape doesn’t  
20 really make sense – I know it’s supposed to look like a nutella jar, but it would be easier to get  
21 all the nutella if it were a shallower/wider shape. That being said, *the nutella pocket is not as*  
22 *deep as it looks — it only goes down halfway!* Since nutella is shelf stable, it would be much  
23 more economical to just get a normal jar of nutella and some plain cookies to spread it on for our  
24 group – these aren’t really made for sharing and it’s kind of *a lot of packaging waste*. But it’s

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27 <sup>1</sup> Customer Review, AMAZON.COM, [https://www.amazon.com/gp/customer-](https://www.amazon.com/gp/customer-reviews/R185QJA2RHCED9/ref=cm_cr_ar_p_d_rvw_ttl?ie=UTF8&ASIN=B004RREF5S)  
28 [reviews/R185QJA2RHCED9/ref=cm\\_cr\\_ar\\_p\\_d\\_rvw\\_ttl?ie=UTF8&ASIN=B004RREF5S](https://www.amazon.com/gp/customer-reviews/R185QJA2RHCED9/ref=cm_cr_ar_p_d_rvw_ttl?ie=UTF8&ASIN=B004RREF5S) (last  
visited November 27, 2018).

1 definitely our most popular snack option, and I'm sure anyone would be happy to have this on a  
2 car ride or in their lunches."<sup>2</sup> (Emphasis added).

3 c. "Only half full, April 1, 2017. Taste great but I feel like *Nutella shorts*  
4 *you on the actual Nutella. It's only half full.*"<sup>3</sup> (Emphasis added).

5 d. "Wonderful taste in a convenient package. February 17, 2015. Slightly  
6 salty pretzel sticks go great with Nutella. The taste is amazing, but very sweet. You will want to  
7 pair this with a drink. The serving size is just right, but I didn't pace myself and ran out of  
8 Nutella before I used all of the pretzel sticks. *The package is slightly deceiving. The depth of*  
9 *the Nutella chamber is only about half the depth of the pretzel chamber*, but this allows you to  
10 'double dip' after biting off some of the pretzel without having to stick your fingers into the  
11 Nutella chamber."<sup>4</sup> (Emphasis added).

12 34. Indeed, as set forth above, reasonable consumers know that the Product is  
13 designed to "look like a nutella jar" and reasonable consumers know that Defendant's other  
14 product, Nutella sold separately in a jar, is filled *completely* to the bottom of the relevant  
15 container, as set forth in the image below:



23 <sup>2</sup> Customer Review, AMAZON.COM, [https://www.amazon.com/gp/customer-](https://www.amazon.com/gp/customer-reviews/RN20TRSYL4CZ/ref=cm_cr_getr_d_rvw_ttl?ie=UTF8&ASIN=B004RREF5S)  
24 [reviews/RN20TRSYL4CZ/ref=cm\\_cr\\_getr\\_d\\_rvw\\_ttl?ie=UTF8&ASIN=B004RREF5S](https://www.amazon.com/gp/customer-reviews/RN20TRSYL4CZ/ref=cm_cr_getr_d_rvw_ttl?ie=UTF8&ASIN=B004RREF5S) (last  
visited November 27, 2018).

25 <sup>3</sup> Customer Review, AMAZON.COM, [https://www.amazon.com/gp/customer-](https://www.amazon.com/gp/customer-reviews/R2K8XFO9KVYMJN/ref=cm_cr_getr_d_rvw_ttl?ie=UTF8&ASIN=B004RREF5S)  
26 [reviews/R2K8XFO9KVYMJN/ref=cm\\_cr\\_getr\\_d\\_rvw\\_ttl?ie=UTF8&ASIN=B004RREF5S](https://www.amazon.com/gp/customer-reviews/R2K8XFO9KVYMJN/ref=cm_cr_getr_d_rvw_ttl?ie=UTF8&ASIN=B004RREF5S) (last  
visited November 27, 2018).

27 <sup>4</sup> Customer Review, AMAZON.COM, [https://www.amazon.com/gp/customer-](https://www.amazon.com/gp/customer-reviews/R3ERNI6H7O18WN/ref=cm_cr_getr_d_rvw_ttl?ie=UTF8&ASIN=B00V54EA74)  
28 [reviews/R3ERNI6H7O18WN/ref=cm\\_cr\\_getr\\_d\\_rvw\\_ttl?ie=UTF8&ASIN=B00V54EA74](https://www.amazon.com/gp/customer-reviews/R3ERNI6H7O18WN/ref=cm_cr_getr_d_rvw_ttl?ie=UTF8&ASIN=B00V54EA74) (last  
visited November 27, 2018).

1           35. A reasonable consumer cannot accurately determine the fill of the Product by  
2 shaking or squeezing the packaging, and is certainly not expected to do so prior to purchasing the  
3 Product.

4           36. Indeed, the Product label does not independently disclose the weight of the  
5 Nutella portion of the Product.

6           37. To this day, Defendant continues to sell the Product in deceptive packaging,  
7 without disclosing the true nature of the contents therein. Because the packaging does not  
8 contain the amount of product reasonably expected by Plaintiff and Class members, Defendant's  
9 uniform practice of filling and packaging the Product in the foregoing manner was and continues  
10 to be misleading and deceptive and cheats consumers.

11           38. Each consumer has been exposed to the same or substantially similar deceptive  
12 practice, with the same misleading size and style of packaging, containing approximately 50%  
13 non-functional slack fill in the Nutella half of the Product.

14           39. Plaintiff and other consumers have paid an unlawful premium for the Product. If  
15 Plaintiff and Class members knew how little product they were getting, Plaintiff and Class  
16 members would not have purchased the Product or would have paid less for it.

17           40. Therefore, Plaintiff and other consumers purchasing the Product suffered injury in  
18 fact and lost money as a result of Defendant's false, unfair, and fraudulent practices, as described  
19 herein.

20           41. As a result of their reliance on Defendant's representations, consumers have  
21 suffered an ascertainable loss of money, including, but not limited to, out-of-pocket costs  
22 incurred in purchasing the Product, which Plaintiff and other consumers have paid an unlawful  
23 premium for. Specifically, they have paid for an amount of product that they expected but never  
24 received.

25           42. Plaintiff and other consumers would have paid significantly less for the Product  
26 had they known that the package only contained 50% of the Nutella portion of the product that it  
27 had the capacity to hold.  
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1           51. Plaintiff reserves the right to amend the Class and Sub-Class definitions if  
2 discovery and further investigation reveal that the Class and/or Sub-Classes should be expanded  
3 or otherwise modified. There is a well-defined community of interest in the litigation and the  
4 Classes are readily ascertainable.

5           52. The Classes for whose benefit this action is brought are so numerous and  
6 geographically dispersed that joinder of all members is impractical.

7           53. Plaintiff is unable to state the exact numbers of members of the Classes without  
8 discovery of Defendant's records but, on information and belief, allege that the members of the  
9 Classes number in the millions.

10          54. Plaintiff is typical of the members of the Classes in that his claims are based on  
11 the exact same facts and legal theories as the claims of all other Class members.

12          55. There are questions of law and fact common to the Classes which predominate  
13 over any questions affecting only individual members. The common questions of law and fact  
14 affecting the rights of all members of the Classes include the following:

- 15           a. Whether the Product's packaging contains non-functional slack fill;
- 16           b. Whether Defendant's conduct was unlawful, unfair, and/or deceptive;
- 17           c. Whether Defendant's conduct violates federal and/or state consumer  
18 protection laws;
- 19           d. Whether Plaintiff and other Class members are entitled to equitable relief,  
20 including, without limitation, a preliminary and/or permanent injunction;
- 21           e. Whether Plaintiff and other Class members are entitled to damages;
- 22           f. Whether Defendant knew or reasonably should have known of the  
23 deceptive representations and omissions relating to the Product packaging; and
- 24           g. Whether Defendant is obligated to inform Class members of their right to  
25 seek reimbursement for having paid for the Product in reliance on Defendant's  
26 misrepresentations.

27          56. Each of these common questions of law and fact is identical for each and every  
28 member of the Classes.

59. The prosecution of separate actions by individual members of the Classes would create a risk of inconsistent adjudications and would cause needless expenditure of judicial resources, and as such, prosecution on a class basis is superior to other methods of adjudication.

**Violation of California's Consumers Legal Remedies Act,  
California Civil Code § 1750, *et seq.***

61. Plaintiff brings this cause of action on behalf of himself and on behalf of the members of the CLRA Sub-Class.

63. Plaintiff and CLRA Sub-Class members are “consumers” within the meaning of California Civil Code section 1761(d) because they bought the Product for personal, family, or household purposes.

65. Therefore, Defendant violates section 1770(a)(5) of the Consumers Legal Remedies Act (“CLRA”).

1           66. California Civil Code section 1770(a)(9) prohibits “[a]dvertising goods or  
2 services with intent not to sell them as advertised.” By deceitfully packaging the Product in a  
3 container with significantly greater volume than the product contained therein, and then  
4 intentionally selling the Product in a manner that does not meet consumer expectations as to the  
5 quantity of Nutella contained in the packaging, Defendant has violated section 1770(a)(9) of the  
6 CLRA.

7           67. At all relevant times, Defendant knew or reasonably should have known that the  
8 Product’s packaging contained a significant amount of nonfunctional slack fill, and that Plaintiff  
9 and other members of the CLRA Sub-Class would reasonably and justifiably rely on the size and  
10 style of the package in purchasing the Product.

11           68. Plaintiff and members of the CLRA Sub-Class have reasonably and justifiably  
12 relied on Defendant’s misleading and fraudulent conduct when purchasing the Product.  
13 Moreover, Defendant’s fraudulent and misleading conduct is material in that a reasonable  
14 consumer would have considered the amount of product contained in the packaging to be  
15 important in deciding whether to purchase the Product or pay less. Therefore, reliance on such  
16 conduct as a material reason for the decision to purchase the Product may be presumed or  
17 inferred for Plaintiff and members of the CLRA Sub-Class.

18           69. Plaintiff and members of the CLRA Sub-Class have suffered and continue to  
19 suffer injuries caused by Defendant, because they would not have purchased the Product, or  
20 would have paid significantly less for the Product, had they known that Defendant’s conduct was  
21 misleading and fraudulent.

22           70. As a direct and proximate result of Defendant’s unfair methods of competition  
23 and/or unfair and deceptive practices, Plaintiff and the CLRA Sub-Class have suffered and will  
24 continue to suffer actual damages.

25           71. Under California Civil Code section 1780(a), Plaintiff and members of the CLRA  
26 Sub-Class seek damages, restitution, declaratory and injunctive relief, and all other remedies the  
27 Court deems appropriate for Defendant’s violations of the CLRA. Plaintiff seeks to enjoin  
28 Defendant from use of deceptive non-functional slack fill in its products.



72. Plaintiff provided Defendant with notice of its violations of the CLRA pursuant to California Civil Code section 1782(a) on April 3, 2018.

73. Defendant failed to provide appropriate relief for its violations of the CLRA within 30 days. Therefore, Plaintiff now seeks monetary and compensatory damages, in addition to injunctive and equitable relief.

74. Pursuant to California Civil Code section 1780(d), attached hereto is the affidavit showing that this action has been commenced in the proper forum.

**COUNT II**

**Violation of California Business & Professions Code § 17500, *et seq.***

75. Plaintiff re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

76. Plaintiff brings this cause of action on behalf of himself and on behalf of the Nationwide Class, or in the alternative, on behalf of the California Sub-Class.

77. California Business and Professions Code section 17500 prohibits unfair, deceptive, untrue, and misleading advertising in connection with the disposal of personal property (among other things), including, without limitation, false statements as to the use, worth, benefits, or characteristics of the property.

78. Defendant has represented and continues to represent to the public, including Plaintiff and Class members, through its deceptive packaging, that more Nutella is contained therein than actually is. Defendant's representation is misleading because the packing only contains 50% of the amount of Nutella in that portion of the Product compared to what the packaging could potentially hold. Defendant made such untrue or misleading advertisements with the intent to dispose of said merchandise.

79. Defendant knew, or in the exercise of reasonable care should have known, that these representations were misleading and deceptive, and that such representations continue to be misleading.

80. As a result of their reliance on Defendant's misrepresentations, Class members suffered an ascertainable loss of money, property, and/or value of the product.

81. As a direct and proximate result of Defendant's unfair and deceptive practices, Plaintiff and the Class have suffered and will continue to suffer actual damages.

82. Defendant has been unjustly enriched and should be required to make restitution to Plaintiff and the Class. Pursuant to section 17535 of the California Business and Professions Code, Plaintiff and Class Members are entitled to an order of this Court enjoining such future conduct on the part of Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore to any person in interest any money paid for the Product as a result of the wrongful conduct of Defendant.

### **COUNT III**

#### **Violation of California Business & Professions Code § 17200, *et seq.***

83. Plaintiff re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

84. Plaintiff brings this cause of action on behalf of himself and on behalf of the Nationwide Class, or in the alternative, on behalf of himself and on behalf of the California Sub-Class.

85. As a result of their reliance on Defendant's misrepresentations and omissions, Class members suffered an ascertainable loss of money, property, and/or value of the Product.

86. The Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"), prohibits acts of "unfair competition," including any "unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising."

87. Under the UCL, a business act or practice is "unlawful" if it violates any established state or federal law.

88. Defendant's false and misleading advertising of the Product therefore was and continues to be "unlawful" because it violates California Business and Professions Code section 12606(b), because it contains unlawful non-functional slack fill as detailed herein.

89. Furthermore, Defendant's acts, conduct and practices also constituted violations of the CLRA, and violations of California's False Advertising Law.

90. By its conduct, Defendant has engaged in unfair competition and unlawful, unfair, and fraudulent business practices.

91. Defendant's unfair or deceptive acts or practices occurred repeatedly in Defendant's trade or business, and were capable of deceiving a substantial portion of the purchasing public.

92. As a direct and proximate result of Defendant's unfair and deceptive practices, Plaintiff and the Class have suffered and will continue to suffer actual damages. Defendant has been unjustly enriched and should be required to make restitution to Plaintiff and the Class pursuant to sections 17203 and 17204 of the California Business and Professions Code.

### REQUESTS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

a. An order certifying the proposed Class and Sub-Classes, designating Plaintiff as named representative of the Classes, and designating the undersigned as Class Counsel;

b. An order enjoining Defendant from further deceptive advertising, sales, and other business practices with respect to the Product's packaging;

c. A declaration requiring Defendant to comply with the various provisions of California's False Advertising Law and the CLRA alleged herein and to make all the required representations;

d. An award to Plaintiff and the Classes for compensatory, exemplary, and statutory damages, including interest, in an amount to be proven at trial;

e. A declaration that Defendant must disgorge, for the benefit of the Classes, all or part of the ill-gotten profits it received from the sale of the Product, or make full restitution to Plaintiff and members of the Classes;

f. An award of attorneys' fees and costs, as allowed by law;

g. An award of attorneys' fees and costs pursuant to California Code of Civil Procedure section 1021.5;


- 1 h. An award of pre-judgment and post-judgment interest, as provided by law;  
2 i. Leave to amend the Complaint to conform to the evidence produced at  
3 trial; and  
4 j. Such other relief as may be appropriate under the circumstances.

5 **DEMAND FOR TRIAL BY JURY**

6 Plaintiff hereby demands a trial by jury.

7 DATED: December 4, 2018

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