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*Attorneys for Plaintiffs Kaelin Francisco,  
Eliza Reid, Kenneth J. Witham, and the  
Putative Plaintiff Class*

IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

KAELIN FRANCISCO, ELIZA REID,  
KENNETH J. WITHAM, individually  
and on behalf of all others similarly  
situated,

Plaintiff,

vs.

JUST BORN, INC., and DOES 1  
through 10, inclusive,

Defendants.

Case No.

**CLASS ACTION COMPLAINT**

1. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, *et. seq.*
2. VIOLATION OF CALIFORNIA FALSE ADVERTISING LAW, BUSINESS & PROFESSIONS CODE § 17500, *et. seq.*
3. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS & PROFESSIONS CODE § 17200, *et. seq.*

**DEMAND FOR JURY TRIAL**

1 Plaintiffs Kaelin Francisco, Eliza Reid, and Kenneth J. Witham, individually  
 2 and on behalf of all others similarly situated (“Plaintiffs”), bring this class action  
 3 complaint against Just Born, Inc. (“Defendant”), and allege as follows:

#### 4 SUMMARY OF THE ACTION

5 1. This is a class action lawsuit brought on behalf of all purchasers of Hot  
 6 Tamales® brand candy products (the “Product”) sold at retail outlets and movie  
 7 theaters throughout California and the United States. True and correct representations  
 8 of the Product’s front label is set forth below.



20 2. Defendant intentionally misleads and shortchanges consumers by falsely  
 21 and deceptively misrepresenting the amount of candy actually contained in each box  
 22 of Product. Defendant uniformly under-fills the opaque boxes by at least 55%. Every  
 23 box is filled only 45% full with candy product. The 55% balance is empty space, or  
 24 “slack fill,” nearly all of which serves no legitimate or lawful function.

#### 25 PARTIES

26 3. Plaintiffs are, and at all times relevant hereto were, citizens of California,  
 27 residing in the County of Los Angeles. Plaintiff Francisco purchased a Hot Tamales®  
 28 5 oz. box at a Ralph’s grocery store in Hawthorne, CA in early 2019. Plaintiff Reid

1 purchased a Hot Tamales® 5 oz. box at a Dollar Tree store in Lancaster, CA in early  
2 2019. Plaintiff Witham purchased a Hot Tamales® 5 oz. box at a Dollar Tree store in  
3 La Mirada, CA in early 2019. In making their purchases, Plaintiffs relied upon the  
4 opaque packaging, including the size of the box, as an indication for how much candy  
5 was contained in the box.

6 4. The Product's packaging was prepared and approved by Defendant and  
7 its agents and disseminated statewide and nationwide, as well as designed to  
8 encourage consumers to purchase the Product. If Plaintiffs had known that the box  
9 contained nonfunctional slack fill, they would not have purchased the Product, let  
10 alone paid for candy product they never received.

11 5. Just Born, Inc. is a corporation headquartered in Bethlehem,  
12 Pennsylvania. Just Born maintains its principal business office at 1300 Stefko Blvd.,  
13 Bethlehem, PA 18017. Just Born, directly and through its agents, has substantial  
14 contacts with and receives substantial benefits and income from and through the State  
15 of California. Just Born is the owner, manufacturer, and distributor of the Product,  
16 and is the company that created and/or authorized the false, misleading, and deceptive  
17 packaging for the Product.

#### 18 **JURISDICTION AND VENUE**

19 6. This Court has subject matter jurisdiction of this action pursuant to 28  
20 U.S.C. Section 1332 of the Class Action Fairness Act of 2005 because: (i) there are  
21 100 or more class members, (ii) there is an aggregate amount in controversy  
22 exceeding \$5,000,000, exclusive of interest and costs, and (iii) there is minimal  
23 diversity because at least one Plaintiff and Defendant are citizens of different states.  
24 This Court has supplemental jurisdiction over any state law claims pursuant to 28  
25 U.S.C. Section 1367.

26 7. Pursuant to 28 U.S.C. Section 1391, this Court is the proper venue for this  
27 action because a substantial part of the events, omissions, and acts giving rise to the  
28 claims herein occurred in this District: Plaintiffs are citizens of California who reside

1 in this District; Defendant made the challenged false representations to Plaintiffs in  
 2 this District; Plaintiffs purchased the Product in this District; and Plaintiffs used the  
 3 Product within this District. Moreover, Defendant receives substantial compensation  
 4 from sales in this District, and Defendant made numerous misrepresentations which  
 5 had a substantial effect in this District involving its label and packaging  
 6 representations.

7 8. Defendant is subject to personal jurisdiction in California based upon  
 8 sufficient minimum contacts which exist between Defendant and California.  
 9 Defendant is authorized to do and is doing business in California.

### 10 **FACTUAL ALLEGATIONS**

11 9. The average consumer spends only 13 seconds to make an in-store  
 12 purchasing decision.<sup>1</sup> That decision is heavily dependent on a product's packaging,  
 13 and particularly the package dimensions: "Most of our studies show that 75 to 80  
 14 percent of consumers don't even bother to look at any label information, no less the  
 15 net weight . . . . Faced with a large box and a smaller box, both with the same amount  
 16 of product inside . . . consumers are apt to choose the larger box because they think  
 17 it's a better value."<sup>2</sup>

18 10. Slack fill is the difference between the actual capacity of a container and  
 19 the volume of product contained therein.

20 11. Nonfunctional slack fill is the empty space in a package that is filled to  
 21 less than its capacity for reasons which are illegitimate or unlawful.

22 12. Defendant packages the Product in an opaque rectangular box with the  
 23 following dimensions: 6 inches tall by 3 inches wide by 1 inch deep.

24  
 25 <sup>1</sup> Randall Beard, *Make the Most of Your Brand's 20-Second Window*, NIELSEN (Jan.  
 26 13, 2015), [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html)  
 27 [your-brands-20-second-window.html](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html).

28 <sup>2</sup> Brigitte Honaker, *Chifles Plantain Chips Class Action Says Packages are Underfilled*, TOP CLASS ACTIONS (June 4, 2018), [https://topclassactions.com/lawsuit-](https://topclassactions.com/lawsuit-settlements/lawsuit-news/847805-chifles-plantain-chips-class-action-says-packages-underfilled/)  
[settlements/lawsuit-news/847805-chifles-plantain-chips-class-action-says-packages-](https://topclassactions.com/lawsuit-settlements/lawsuit-news/847805-chifles-plantain-chips-class-action-says-packages-underfilled/)  
[underfilled/](https://topclassactions.com/lawsuit-settlements/lawsuit-news/847805-chifles-plantain-chips-class-action-says-packages-underfilled/).

1           13.       The size of the box in and of itself is a representation by Defendant as to  
2 the amount of candy contained in the box. Plaintiffs and other consumers of the  
3 Product detrimentally and reasonably relied on this representation of quantity when  
4 they purchased the Product.

5           14.       Plaintiffs, like all reasonable consumers, prior to the point of sale, could  
6 not and did not reasonably understand or expect any of the net weight or serving  
7 disclosures to translate to a quantity of candy product meaningfully different from  
8 their expectation of a quantity of candy product commensurate with the size of the  
9 box.

10          15.       Plaintiff Francisco purchased a box of Hot Tamales® 5 oz. candy product  
11 during a visit to a Ralph's grocery store in Hawthorne, California in early 2019.  
12 Plaintiff Reid purchased a box of Hot Tamales® 5 oz. candy product during a visit to  
13 Dollar Tree in Lancaster, California in early 2019. Plaintiff Witham purchased a box  
14 of Hot Tamales® 5 oz. candy product during a visit to Dollar Tree in La Mirada,  
15 California in early 2019.

16          16.       Plaintiffs paid approximately \$1.00 to \$2.00 for the Product.

17          17.       Plaintiffs reasonably and detrimentally relied on the size of the box as a  
18 representation by Defendant of the quantity of candy product contained in the  
19 Product's containers.

20          18.       Only upon opening their respective candy boxes did Plaintiffs discover to  
21 their shock and disappointment that the Product's boxes were less than half-full,  
22 while over half of the boxes constituted slack fill, virtually all of which was  
23 nonfunctional.

24          19.       Prior to the point of sale, the Product's packaging does not allow for a  
25 visual or audial confirmation of the contents of the Product. The Product's opaque  
26 packaging prevents a consumer from observing the contents before opening. Even if  
27 a consumer were to "shake" the Product before opening, it is impossible for the  
28 reasonable consumer to discern the presence of any nonfunctional slack fill.



20. The other information that Defendant provides about quantity of candy product on the front label and back label of the Product does not enable a consumer to form any meaningful understanding about how to gauge the quantity of contents of the Product as compared to the size of the box itself.

21. The front label of the Product indicates a net weight of 5.0 ounces (141 grams). The nutritional panel on the back of the Product reports a serving size of 1.5 ounces and total of 3.5 servings per container. True and correct representations of the Product's front and back labels with annotations of other quantity disclosures are set forth below.



22. Disclosures of net weight and serving sizes in a measurement of ounces or grams does not allow the reasonable California or American consumer to make any meaningful conclusion about the quantity of candy product contained in the Product's boxes that would be different from the reasonable consumer's expectation that the quantity of candy product is commensurate with the size of the box.

23. Plaintiffs would not have purchased the Product had they known the Product contained slack fill which serves no functional or lawful purpose.

24. During Plaintiffs' investigations, Plaintiffs confirmed that Defendant uniformly under-fills the Product's boxes, rendering a whopping 55% of each box slack fill, nearly all of which serves no functional or lawful purpose. A true and correct representation of the inside of the Hot Tamales® box is pictured below.



25. The Product is made, formed, and filled as to be misleading. The Product therefore is misbranded.

26. The slack fill contained in the Product does not serve a legitimate or lawful purpose.

27. The slack fill contained in the Product does not protect the contents of the packages.

1        28. In fact, the greater the slack fill, the more room the contents have to  
2 bounce around during shipping and handling, and the more likely the contents are to  
3 break and sustain damage.

4        29. If, on the other hand, the amount of candy product contained in each box  
5 were commensurate with the size of the box as consumers expect, then the candy  
6 product would have less room to move around during shipping and handling, and  
7 would be less likely to sustain damage.

8        30. As such, the slack fill present in the Product makes the candy product  
9 more susceptible to damage, and in fact causes the candy product to often sustain  
10 damage.

11       31. The Product is packaged in a box and sealed with heated glue. A true and  
12 correct representation of the heated glue is shown in the image below.



20       32. The equipment used to seal the carton does not breach the inside of the  
21 Product's container during the packaging process. The heated glue is applied to an  
22 exterior flap of the box, which is then sealed over the top by a second exterior flap.

23       33. Neither the heated glue application nor the sealing equipment requires  
24 slack fill during the manufacturing process. Even if there were no slack fill present in  
25 the Product's boxes, the machines used for enclosing the contents in the package  
26 would work without disturbing the packaging process.

27       34. The slack fill present in the Product's container is not a result of the candy  
28 product settling during shipping and handling. Given the Product's density, shape,



1 and composition, any settling occurs immediately at the point of filling the box. No  
2 additional product settling occurs during subsequent shipping and handling.

3 35. The Product does not use packaging that is part of a reusable container  
4 with any significant value to the Product independent of its function to hold the candy  
5 product.

6 36. For example, the Product's container is not a commemorative item.

7 37. The Product's container is a box intended to be discarded into the  
8 recycling bin immediately after the contents have been completely consumed.

9 38. Defendant can easily increase the quantity of candy product contained in  
10 each Product container or, alternatively, decrease the size of the containers or change  
11 the label in a way that eliminates the deception such as, for example, adding a fill  
12 line, transparent window, or actual size depiction accompanied by the words actual  
13 size.

14 39. Contrast Defendant's packaging of the Product with a comparator product  
15 like "Boston Baked Beans" ("BBB"), a candy product manufactured by Ferrara  
16 Candy Company and similarly sold at movie theaters located throughout California  
17 and the United States. A true and correct representation of the front of the BBB  
18 product is shown in the image below.



1        40.        BBB is sold in identical packaging to that of the Product, i.e., opaque  
2 boxes of identical size, shape, volume, and material.

3        41.        BBB is packaged using nearly identical fill and heated glue enclosing  
4 machines to those of the Product.

5        42.        BBB is a coated candy of nearly identical size, shape, and density of that  
6 of the Product.

7        43.        However, contrary to the Product, BBB has insubstantial slack fill. A true  
8 and correct representation is pictured in the image below.



21        44.        BBB's packaging provides additional evidence that the slack fill present  
22 in the Product is nonfunctional.

23        45.        BBB's packaging provides additional evidence that the slack fill present  
24 in the Product is not necessary to protect (and in fact does not protect) the contents  
25 of the Product.

26        46.        BBB's packaging provides additional evidence that the slack fill present  
27 in the Product is not a requirement of the machines used for enclosing the contents of  
28 the Product.

1 47. BBB's packaging provides additional evidence that the slack fill present  
2 in the Product is not a result of unavoidable product settling during shipping and  
3 handling.

4 48. BBB's packaging provides additional evidence that the slack fill present  
5 in the Product is not needed to perform a specific function.

6 49. BBB's packaging provides additional evidence that the slack fill present  
7 in the Product is not part of a legitimate reusable container.

8 50. BBB's packaging provides additional evidence that Defendant is able to  
9 increase the level of fill.

10 51. BBB's packaging provides additional evidence that Defendant has  
11 reasonable alternative designs available to package its Product.

12 52. Plaintiffs did not expect that the Product would contain nonfunctional  
13 slack fill, especially given that nonfunctional slack fill, as opposed to functional slack  
14 fill, is prohibited by California law and federal law.

15 53. Defendant's conduct threatens California consumers by using  
16 intentionally deceptive and misleading slack filled containers. Defendant's conduct  
17 also threatens other companies, large and small, who play by the rules. Defendant's  
18 conduct stifles competition and has a negative impact on the marketplace, and reduces  
19 consumer choice.

20 54. There is no practical reason for the nonfunctional slack fill present in the  
21 Product other than to mislead consumers as to the actual volume of the Product being  
22 purchased by consumers while simultaneously providing Defendant with a financial  
23 windfall as a result of money saved from lower supply costs and money earned from  
24 consumers who pay for product they never receive.

25 55. Plaintiffs make the allegations herein upon personal knowledge as to  
26 themselves and their own acts and experiences, and as to all other matters, upon  
27 information and belief, including investigation conducted by their attorneys.

28 ///

## **CLASS ALLEGATIONS**

56. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated. Plaintiffs seek to represent a Class consisting of “All persons who purchased the Product in United States for personal use and not for resale during the time period February 3, 2013, through the present. Excluded from the Class are Defendant’s officers, directors, and employees, and any individual who received remuneration from Defendant in connection with that individual’s use or endorsement of the Product.”

57. Plaintiffs seek to represent a Subclass consisting of “All persons who purchased the Product in the State of California for personal use and not for resale during the time period February 3, 2013, through the present. Excluded from the Class are Defendant’s officers, directors, and employees, and any individual who received remuneration from Defendant in connection with that individual’s use or endorsement of the Product.”

58. The Classes are so numerous that their individual joinder herein is impracticable. On information and belief, the Classes number in the millions throughout the United States and California. The Classes are sufficiently numerous because millions of units of Product have been sold in California during the time period February 3, 2013, through the present (the “Class Period”).

59. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact common to the Class predominate over questions which may affect individual Class members. Common questions of law and fact include, but are not limited to, the following:

a. Whether Defendant’s conduct constitutes an unfair method of competition, or unfair or deceptive act or practice, in violation of Civil Code Section 1750, *et seq.*;

///



1           b. Whether Defendant misrepresented the approval of the FDA,  
2 United States Congress, and California Legislature that the Product's packaging  
3 complied with federal and California slack fill regulations and statutes in violation of  
4 Civil Code Section 1750, *et seq.*;

5           c. Whether Defendant used deceptive representations in connection  
6 with the sale of the Product in violation of Civil Code Section 1750, *et seq.*;

7           d. Whether Defendant represented the Product has characteristics or  
8 quantities that they do not have in violation of Civil Code Section 1750, *et seq.*;

9           e. Whether Defendant advertised the Product with intent not to sell  
10 them as advertised in violation of Civil Code Section 1750, *et seq.*;

11           f. Whether Defendant represented that the Product has been supplied  
12 in accordance with a previous representation of quantity of candy product contained  
13 therein by way of its packaging when it has not, in violation of Civil Code Section  
14 1750, *et seq.*;

15           g. Whether Defendant's packaging is untrue or misleading in  
16 violation of Business and Professions Code Section 17500, *et seq.*;

17           h. Whether Defendant knew or by the exercise of reasonable care  
18 should have known its packaging was and is untrue or misleading in violation of  
19 Business and Professions Code Section 17500, *et seq.*;

20           i. Whether Defendant's conduct is an unfair business practice within  
21 the meaning of Business and Professions Code Section 17200, *et seq.*;

22           j. Whether Defendant's conduct is a fraudulent business practice  
23 within the meaning of Business and Professions Code Section 17200, *et seq.*;

24           k. Whether Defendant's conduct is an unlawful business practice  
25 within the meaning of Business and Professions Code Section 17200, *et seq.*;

26           l. Whether Defendant's packaging is false or misleading and  
27 therefore misbranded in violation of California Health and Safety Code sections  
28 110660, 110665, or 110670;

1 m. Whether the Product contains nonfunctional slack fill in violation  
2 of 21 C.F.R. 100.100, *et seq.*;

3 n. Whether Plaintiffs and the Classes paid more money for the  
4 Product than they actually received; and

5 o. How much more money Plaintiffs and the Classes paid for the  
6 Product than they actually received.

7 60. Plaintiffs' claims are typical of the claims of the Classes, and Plaintiffs  
8 will fairly and adequately represent and protect the interests of the Classes. Plaintiffs  
9 have retained competent and experienced counsel in class action and other complex  
10 litigation.

11 61. Plaintiffs and the Classes have suffered injury in fact and have lost money  
12 as a result of Defendant's false representations. Plaintiffs purchased the Product  
13 under the false belief that the Product contained an amount of candy product  
14 commensurate with the size of the box. Plaintiffs relied on Defendant's packaging  
15 and would not have purchased the Product if they had known that the Product  
16 contained nonfunctional slack fill.

17 62. A class action is superior to other available methods for fair and efficient  
18 adjudication of this controversy. The expense and burden of individual litigation  
19 would make it impracticable or impossible for the Classes to prosecute their claims  
20 individually.

21 63. The trial and litigation of Plaintiffs' claims are manageable. Individual  
22 litigation of the legal and factual issues raised by Defendant's conduct would increase  
23 delay and expense to all parties and the court system. The class action device presents  
24 far fewer management difficulties and provides the benefits of a single, uniform  
25 adjudication, economies of scale, and comprehensive supervision by a single court.

26 64. Defendant has acted on grounds generally applicable to the entirety of the  
27 Classes, thereby making final injunctive relief and/or corresponding declaratory relief  
28 appropriate with respect to the Classes as a whole. The prosecution of separate

actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendant.

65. Absent a class action, Defendant will likely retain the benefits of its wrongdoing. Because of the small size of the individual Class members' claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein. Absent a representative action, the Classes will continue to suffer losses and Defendant will be allowed to continue these violations of law and to retain the proceeds of their ill-gotten gains.

### **COUNT ONE**

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

66. Plaintiffs repeat and re-allege all allegations of the previous paragraphs, and incorporate the same as if set forth herein at length.

67. Plaintiffs bring this cause of action pursuant to Civil Code Section 1750, *et seq.*, the Consumers Legal Remedies Act ("CLRA"), on their own behalf and on behalf of all other persons similarly situated. Plaintiffs seek to represent a Class consisting of "All persons who purchased the Product in United States for personal use and not for resale during the time period February 3, 2013, through the present. Excluded from the Class are Defendant's officers, directors, and employees, and any individual who received remuneration from Defendant in connection with that individual's use or endorsement of the Product."

68. Plaintiffs seek to represent a Subclass consisting of "All persons who purchased the Product in the State of California for personal use and not for resale during the time period February 3, 2013, through the present. Excluded from the Classes are Defendant's officers, directors, and employees, and any individual who received remuneration from Defendant in connection with that individual's use or endorsement of the Product."

1       69. The Classes consist of millions of persons, the joinder of whom is  
2 impracticable.

3       70. There are questions of law and fact common to the Classes, which  
4 questions are substantially similar and predominate over questions affecting the  
5 individual Class members, including but not limited to those questions listed in  
6 Paragraph 54, above.

7       71. The CLRA prohibits certain “unfair methods of competition and unfair or  
8 deceptive acts or practices” in connection with a sale of goods.

9       72. The practices described herein, specifically Defendant’s packaging,  
10 advertising, and sale of the Product, were intended to result in the sale of the Product  
11 to the consuming public and violated and continue to violate the CLRA by (1)  
12 misrepresenting the approval of the Product as compliant with 21 C.F.R §100.100  
13 and the Sherman Law; (2) using deceptive representations in connection with the  
14 Products; (3) representing the Product has characteristics and quantities that it does  
15 not have; (4) advertising and packaging the Product with intent not to sell it as  
16 advertised and packaged; and (5) representing that the Product has been supplied in  
17 accordance with a previous representation as to the quantity of candy product  
18 contained within each box, when it has not.

19       73. Defendant fraudulently deceived Plaintiffs and the Classes by  
20 representing that the Product’s packaging which includes substantial nonfunctional  
21 slack fill actually conforms with federal and California slack fill regulations and  
22 statutes including the Sherman Law and 21 C.F.R. 100.100.

23       74. Defendant packaged the Product in boxes which contain substantial  
24 nonfunctional slack fill by making material misrepresentations to fraudulently  
25 deceive Plaintiffs and the Classes.

26       75. Defendant fraudulently deceived Plaintiffs and the Classes by  
27 misrepresenting the Product as having characteristics and quantities which it does not  
28 have, e.g., that the Product is free of nonfunctional slack fill when it is not. In doing



1 so, Defendant intentionally misrepresented and concealed material facts from  
2 Plaintiffs and the Classes. Said misrepresentations and concealment were done with  
3 the intention of deceiving Plaintiffs and the Classes and depriving them of their legal  
4 rights and money.

5 76. Defendant fraudulently deceived Plaintiffs and the Classes by packaging  
6 and advertising the Product with intent not to sell it as advertised, by intentionally  
7 under-filling the Product's containers and instead replacing candy product with  
8 nonfunctional slack fill. In doing so, Defendant intentionally misrepresented and  
9 concealed material facts from Plaintiffs and the Classes. Said misrepresentations and  
10 concealment were done with the intention of deceiving Plaintiffs and the Classes and  
11 depriving them of their legal rights and money.

12 77. Defendant fraudulently deceived Plaintiffs and the Classes by  
13 representing that the Product was supplied in accordance with an accurate  
14 representation as the quantity of candy product contained therein when it was not.  
15 Defendant presented the physical dimensions of the Product's packaging to Plaintiffs  
16 and the Classes before the point of purchase and gave Plaintiffs and the Classes a  
17 reasonable expectation that the quantity of candy product contained therein was  
18 commensurate with the size of packaging. In doing so, Defendant intentionally  
19 misrepresented and concealed material facts from Plaintiffs and the Classes. Said  
20 misrepresentations and concealment were done with the intention of deceiving  
21 Plaintiffs and the Classes and depriving them of their legal rights and money.

22 78. Defendant knew or should have known, through the exercise of  
23 reasonable care, that the Product's packaging was misleading.

24 79. Defendant's actions as described herein were done with conscious  
25 disregard of Plaintiffs' rights, and Defendant was wanton and malicious in its  
26 concealment of the same.

27 80. Defendant's Product packaging was a material factor in Plaintiffs' and the  
28 Classes' decisions to purchase the Product. Based on Defendant's Product packaging,

1 Plaintiffs and the Classes reasonably believed that they were getting more candy  
 2 product than they actually received. Had they known the truth of the matter, Plaintiffs  
 3 and the Classes would not have purchased the Product.

4 81. Plaintiffs and the Classes have suffered injury in fact and have lost money  
 5 as a result of Defendant's unfair, unlawful, and fraudulent conduct. Specifically,  
 6 Plaintiffs paid for candy product they never received. Plaintiffs and the Classes would  
 7 not have purchased the Product had they known the box contained nonfunctional  
 8 slack fill.

9 82. Defendant's false and misleading packaging should be enjoined due to  
 10 the false, misleading, and/or deceptive nature of Defendant's packaging. In addition,  
 11 Defendant should be compelled to provide restitution and damages to consumers who  
 12 paid for candy product they never received due to Defendant's representation that it  
 13 contained substantially more (and a commensurate amount of) candy product for a  
 14 box of its size.

15 83. By letter dated August 23, 2016, Plaintiffs advised Defendant of its false  
 16 and misleading claims pursuant to California Civil Code Section 1782(a).

## 17 COUNT TWO

### 18 **Violation of California False Advertising Law,** 19 **Business & Professions Code § 17500, *et seq.***

20 84. Plaintiffs repeat and re-allege the allegations set forth in the preceding  
 21 paragraphs, and incorporate the same as if set forth herein at length.

22 85. Plaintiffs bring this cause of action pursuant to Business and Professions  
 23 Code Section 17500, *et seq.*, on their own behalf and on behalf of all other persons  
 24 similarly situated. Plaintiffs seek to represent a Class consisting of "All persons who  
 25 purchased the Product in United States for personal use and not for resale during the  
 26 time period February 3, 2013, through the present. Excluded from the Class are  
 27 Defendant's officers, directors, and employees, and any individual who received  
 28

1 remuneration from Defendant in connection with that individual's use or  
2 endorsement of the Product."

3 86. Plaintiffs seek to represent a Subclass consisting of "All persons who  
4 purchased the Product in the State of California for personal use and not for resale  
5 during the time period February 3, 2013, through the present. Excluded from the  
6 Subclass are Defendant's officers, directors, and employees, and any individual who  
7 received remuneration from Defendant in connection with that individual's use or  
8 endorsement of the Product."

9 87. California's False Advertising Law, California Business and Professions  
10 Code Section 17500, *et seq.*, makes it "unlawful for any person to make or  
11 disseminate or cause to be made or disseminated before the public in this state, in any  
12 advertising device or in any other manner or means whatever, including over the  
13 Internet, any statement, concerning personal property or services, professional or  
14 otherwise, or performance or disposition thereof, which is untrue or misleading and  
15 which is known, or which by the exercise of reasonable care should be known, to be  
16 untrue or misleading."

17 88. Defendant knowingly manipulated the physical dimensions of the  
18 Product's boxes, or stated another way, under-filled the amount of candy product in  
19 each of the Product, by including substantial nonfunctional slack fill as a means to  
20 mislead the public about the amount of candy product contained in each package.

21 89. Defendant controlled the packaging of the Product. They knew or should  
22 have known, through the exercise of reasonable care that its representations about the  
23 quantity of candy product contained in the Product were untrue and misleading.

24 90. The general public bases its purchasing decisions on the dimensions of a  
25 product's packaging. Consumers generally do not look at any label information, such  
26 as net weight or serving disclosures. Instead, the general public chooses a larger box  
27 because it leads them to believe they are receiving a better value.  
28

91. Defendant's packaging with substantial nonfunctional slack fill instead of including more candy product or smaller boxes or modified labels that disclose the quantity of candy (e.g., a fill line, transparent window, or actual size depiction accompanied by the term actual size) is likely to deceive the general public.

92. Defendant's actions in violation of Section 17500 were false and misleading such that the general public is and was likely to be deceived.

93. Pursuant to Business and Professions Code Section 17535, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of under-filling the Product's containers. Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs and the Classes restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations in an amount to be determined at trial.

94. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's false representations. Plaintiffs and the Classes purchased the Product in reliance upon the claims by Defendant that the Product was of the quantity represented by Defendant's packaging and advertising. Plaintiffs and the Classes would not have purchased the Product if they had known that the claims and advertising as described herein were false.

### **COUNT THREE**

#### **Violation of California Unfair Competition Law,**

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

95. Plaintiffs repeat and re-allege the allegations set forth above, and incorporate the same as if set forth herein at length.

96. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section 17200, *et seq.*, on their own behalf and on behalf of all other persons similarly situated. Plaintiffs seek to represent a Class consisting of "All persons who



1 purchased the Product in United States for personal use and not for resale during the  
 2 time period February 3, 2013, through the present. Excluded from the Class are  
 3 Defendant's officers, directors, and employees, and any individual who received  
 4 remuneration from Defendant in connection with that individual's use or  
 5 endorsement of the Product."

6 97. In the alternative, Plaintiffs seek to represent a Subclass consisting of "All  
 7 persons who purchased the Product in the State of California for personal use and not  
 8 for resale during the time period February 3, 2013, through the present. Excluded  
 9 from the Subclass are Defendant's officers, directors, and employees, and any  
 10 individual who received remuneration from Defendant in connection with that  
 11 individual's use or endorsement of the Product."

12 98. Congress passed the Federal Food, Drug, and Cosmetic Act ("FDCA"),  
 13 and in so doing established the Federal Food and Drug Administration ("FDA") to  
 14 "promote the public health" by ensuring that "foods are safe, wholesome, sanitary,  
 15 and properly labeled." 21 U.S.C. § 393.

16 99. The FDA has implemented regulations to achieve this objective. *See*,  
 17 *e.g.*, 21 C.F.R. § 101.1 *et seq.*

18 100. The FDA enforces the FDCA and accompanying regulations; "[t]here is  
 19 no private right of action under the FDCA." *Ivie v. Kraft Foods Global, Inc.*, 2013  
 20 U.S. Dist. LEXIS 25615, 2013 WL 685372, at \*1 (internal citations omitted).

21 101. In 1990, Congress passed an amendment to the FDCA, the Nutrition  
 22 Labeling and Education Act ("NLEA"), which imposed a number of requirements  
 23 specifically governing food nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343 *et*  
 24 *seq.*

25 102. Plaintiffs are not suing under the FDCA, but under California state law.

26 103. The California Sherman Food, Drug, and Cosmetic Act ("Sherman  
 27 Law"), Cal. Health & Safety Code § 109875 *et seq.*, has adopted wholesale the food  
 28 labeling requirements of the FDCA and NLEA as the food regulations of

1 California. Cal. Health & Safety Code § 110100.

2 104. The Sherman Law declares any food to be misbranded if it is false or  
3 misleading in any particular, if the labeling does not conform to the requirements for  
4 nutrition labeling set forth in certain provisions of the NLEA. Cal. Health & Safety  
5 Code §§ 110660, 110665, 110670.

6 105. The UCL prohibits “any unlawful, unfair... or fraudulent business act or  
7 practice.” Cal. Bus & Prof. Code § 17200.

8 **A. “Unfair” Prong**

9 106. Under California’s False Advertising Law, Cal. Bus. & Prof. Code  
10 Section 17200, *et seq.*, a challenged activity is “unfair” when “any injury it causes  
11 outweighs any benefits provided to consumers and the injury is one that the  
12 consumers themselves could not reasonably avoid.” *Camacho v. Auto Club of*  
13 *Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

14 107. Defendant’s action of leaving substantial nonfunctional slack fill in its  
15 Product does not confer any benefit to consumers.

16 108. Defendant’s action of leaving substantial nonfunctional slack fill in its  
17 Product causes injuries to consumers because they do not receive a quantity of candy  
18 commensurate with their reasonable expectation.

19 109. Defendant’s action of leaving substantial nonfunctional slack fill in its  
20 Product causes injuries to consumers because they do not receive a level of hunger  
21 satiety commensurate with their reasonable expectation.

22 110. Defendant’s action of leaving substantial nonfunctional slack fill in its  
23 Product causes injuries to consumers because they end up overpaying for the Product  
24 and receiving a quantity of candy less than what they expected to receive.

25 111. Consumers cannot avoid any of the injuries caused by the substantial  
26 nonfunctional slack fill in Defendant’s Product.

27 112. Accordingly, the injuries caused by Defendant’s activity of including  
28 substantial nonfunctional slack fill in the Product outweighs any benefits.

1 113. Some courts conduct a balancing test to decide if a challenged activity  
2 amounts to unfair conduct under California Business and Professions Code Section  
3 17200. They “weigh the utility of the defendant’s conduct against the gravity of the  
4 harm to the alleged victim.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169  
5 (9th Cir. 2012).

6 114. Here, Defendant’s conduct of including substantial nonfunctional slack  
7 fill in the Product’s packaging has no utility and financially harms purchasers. Thus  
8 the utility of Defendant’s conduct is vastly outweighed by the gravity of harm.

9 115. Some courts require that “unfairness must be tethered to some legislative  
10 declared policy or proof of some actual or threatened impact on competition.” *Lozano*  
11 *v. AT&T Wireless Servs. Inc.*, 504 F. 3d 718, 735 (9th Cir. 2007).

12 116. The California legislature maintains a declared policy of prohibiting  
13 nonfunctional slack fill in consumer goods, as reflected in California Health and  
14 Safety Code Section 110100.

15 117. The substantial nonfunctional slack fill contained in the Product is  
16 tethered to a legislative policy declared in California according to Cal. Health &  
17 Safety Code § 110100.

18 118. Defendant’s packaging of the Product, as alleged in the preceding  
19 paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unfair  
20 conduct.

21 119. Defendant knew or should have known of its unfair conduct.

22 120. As alleged in the preceding paragraphs, the misrepresentations by  
23 Defendant detailed above constitute an unfair business practice within the meaning  
24 of California Business and Professions Code Section 17200.

25 121. There were reasonably available alternatives to further Defendant’s  
26 legitimate business interests, other than the conduct described herein. Defendant  
27 could have used packaging appropriate for the amount of candy product contained  
28 within the Product.

122. All of the conduct alleged herein occurs and continues to occur in Defendant's business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

123. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ its practice of under-filling the Product's boxes. Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose such misrepresentations, and additionally request an order awarding Plaintiffs restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant's failure to disclose the existence and significance of said misrepresentations in an amount to be determined at trial.

124. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant's unfair conduct. Plaintiffs and the Classes paid an unwarranted premium for this product. Specifically, Plaintiffs and the Classes paid for substantial empty space instead of candy product they never received. Plaintiffs would not have purchased the Product if they had known that the Product's packaging contained nonfunctional slack fill.

### **B. "Fraudulent" Prong**

125. California Business and Professions Code Section 17200, *et seq.*, considers conduct fraudulent and prohibits said conduct if it is likely to deceive members of the public. *Bank of Wes v. Superior Court*, 2 Cal. 4th 1254, 553 (1992).

126. Members of the public base their purchasing decisions on the dimensions of a product's packaging. They generally do not view label information or net weight and serving disclosures. Members of the public choose a larger box because they automatically assume it has better value.

127. Defendant's conduct of packaging the Product with substantial nonfunctional slack fill is likely to deceive members of the public.

128. Defendant's packaging of the Product, as alleged in the preceding

1 paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes  
2 fraudulent conduct.

3 129. Defendant knew or should have known of its fraudulent conduct.

4 130. As alleged in the preceding paragraphs, the misrepresentations by  
5 Defendant detailed above constitute a fraudulent business practice in violation of  
6 California Business & Professions Code Section 17200.

7 131. There were reasonably available alternatives to further Defendant's  
8 legitimate business interests other than the conduct described herein. Defendant could  
9 have used packaging appropriate for the amount of Product contained therein.

10 132. All of the conduct alleged herein occurs and continues to occur in  
11 Defendant's business. Defendant's wrongful conduct is part of a pattern or  
12 generalized course of conduct repeated on thousands of occasions daily.

13 133. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and  
14 the Classes seek an order of this Court enjoining Defendant from continuing to  
15 engage, use, or employ their practice of under-filling the Product's containers.  
16 Likewise, Plaintiffs and the Classes seek an order requiring Defendant to disclose  
17 such misrepresentations, and additionally request an order awarding Plaintiffs  
18 restitution of the money wrongfully acquired by Defendant by means of  
19 responsibility attached to Defendant's failure to disclose the existence and  
20 significance of said misrepresentations in an amount to be determined at trial.

21 134. Plaintiffs and the Classes have suffered injury in fact and have lost money  
22 as a result of Defendant's fraudulent conduct. Plaintiffs paid an unwarranted premium  
23 for this Product. Specifically, Plaintiffs and the Classes paid for substantial empty  
24 space instead of candy product they never received. Plaintiffs and the Classes would  
25 not have purchased the Product if they had known that the boxes contained substantial  
26 nonfunctional slack fill.

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28 ///



### C. “Unlawful” Prong

135. California Business and Professions Code Section 17200, *et seq.*, identifies violations of other laws as “unlawful practices that the unfair competition law makes independently actionable.” *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

136. Defendant’s packaging of the Product, as alleged in the preceding paragraphs, violates California Civil Code Section 1750, *et. seq.*, California Business and Professions Code Section 17500, *et. seq.*, California’s Sherman Law, the FDCA, and 21 C.F.R §100.100.

137. Defendant’s packaging of the Product, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unlawful conduct.

138. Defendant knew or should have known of its unlawful conduct.

139. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute an unlawful business practice within the meaning of California Business and Professions Code Section 17200.

140. There were reasonably available alternatives to further Defendant’s legitimate business interests, other than the conduct described herein. Defendant could have used packaging appropriate for the amount of candy product contained therein or made label changes that eliminate the deception such as, by way of example and without limitation, adding a fill line, transparent window, or actual size depiction accompanied by the phrase “actual size.”

141. All of the conduct alleged herein occurred and continues to occur in Defendant’s business. Defendant’s wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

142. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of under-filling the Product’s boxes. Likewise,

1 Plaintiffs and the Classes seek an order requiring Defendant to disclose such  
 2 misrepresentations, and additionally request an order awarding Plaintiffs restitution  
 3 of the money wrongfully acquired by Defendant by means of responsibility attached  
 4 to Defendant's failure to disclose the existence and significance of said  
 5 misrepresentations in an amount to be determined at trial.

6 143. Plaintiffs and the Classes have suffered injury in fact and have lost  
 7 money as a result of Defendant's unlawful conduct. Plaintiffs paid an unwarranted  
 8 premium for this Product. Specifically, Plaintiffs and the Classes paid for  
 9 substantial empty space instead of candy product they never received. Plaintiffs and  
 10 the Classes would not have purchased the Product if they had known that the  
 11 Product contained nonfunctional slack fill.

### 12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs, on behalf of themselves and on behalf of the Classes  
 14 defined herein, pray for judgment and relief on all Causes of Action as follows:

15 A. For an order enjoining Defendant from continuing to engage in the  
 16 unlawful conduct and practices described herein, such as by filling the box, shrinking  
 17 the box, or changing the Product's labels to eliminate the consumer deception such  
 18 as, for example, adding a fill line, transparent window, or actual size depiction  
 19 accompanied by the phrase "actual size";

20 B. For an order certifying the Class, appointing Plaintiffs as class  
 21 representatives, and designating Plaintiffs' counsel as counsel for the Class;

22 D. Restitution in an amount to be determined at trial;

23 E. Punitive damages;

24 G. Reasonable attorney fees and costs; and

25 H. Granting such other and further relief as may be just and proper.

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**JURY TRIAL DEMANDED**

Plaintiffs demand a jury trial on all triable issues.

DATED: June 25, 2019

**CLARKSON LAW FIRM, P.C.**

/s/ Ryan J. Clarkson

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