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

**MISHARI ALEISA, Individually
and On Behalf of All Others
Similarly Situated,**

Plaintiff,

v.

CONAGRA BRANDS, INC.,

Defendant.

Case No.:

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF:**

- 1) CONSUMER LEGAL
REMEDIES ACT, CAL. CIVIL
CODE §§ 1750, ET SEQ.;**
- 2) FALSE ADVERTISING LAW,
CAL. BUS. & PROF. §§ 17500, ET
SEQ.;**
- 3) UNFAIR COMPETITION LAW,
CAL. BUS. & PROF. §§ 17200, ET
SEQ.;**
- 4) NEGLIGENT
MISREPRESENTATION; AND**
- 5) INTENTIONAL
MISREPRESENTATION.**

[JURY TRIAL DEMANDED]

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INTRODUCTION

1. Plaintiff, MISHARI ALEISA (“Mr. Aleisa” or “Plaintiff”), brings this Class Action Complaint to challenge the deceptive advertising and business practices of defendant, CONAGRA BRANDS, INC. (“ConAgra” or “Defendant”) with regard to Defendant’s false and misleading promotion of its consumable cocoa products. Based on such false and misleading advertisements, Plaintiff and others similarly situated purchased Defendant’s mislabeled products.
2. Specifically, Plaintiff purchased Defendant’s “Swiss Miss Simply Cocoa Dark Chocolate Hot Cocoa Mix” (the “Product”), which is advertised as being “Simply Cocoa” and “Made with Real Cocoa”.
3. However, Defendant’s products consist of alkalized cocoa, which is a highly processed cocoa of substantially inferior quality compared to its all-natural counterpart.
4. Plaintiff alleges as follows upon personal knowledge as to Plaintiff’s own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by Plaintiff’s attorneys.
5. As stated by the California Supreme Court in *Kwikset v. Superior Court* 51 Cal. 4th 310, 328-29 (2011):

Simply stated: labels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities...

6. Defendant’s sale and advertising of deceptively labeled products constitutes violations of: (1) California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750, *et seq.*; (2) California’s False Advertising Law (“FAL”), Bus. & Prof. Code §§ 17500, *et seq.*; (3) California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.*; (5) negligent misrepresentation; and (6) intentional misrepresentation.

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1 7. This conduct caused Plaintiff and others similarly situated damages, and
2 requires restitution and injunctive relief to remedy and prevent further harm.

3 8. Unless otherwise indicated, the use of Defendant's name in this Complaint
4 includes all agents, employees, officers, members, directors, heirs, successors,
5 assigns, principals, trustees, sureties, subrogees, representatives and insurers of
6 the named Defendant.

7 **JURISDICTION AND VENUE**

8 9. This Court has jurisdiction over this matter pursuant to the Class Action
9 Fairness Act (CAFA) because the amount in controversy in this matter exceeds
10 \$5,000,000.00¹ as to all putative Class members, inclusive of attorneys' fees
11 and costs, and injunctive relief. *See* 28 U.S.C. § 1332(d).

12 10. This Court has diversity jurisdiction under 28 U.S.C. § 1332 because Plaintiff
13 is a resident and citizen of the State of California, and Defendant is a corporation
14 organized and existing under the laws of the State of Delaware, and
15 headquartered in the State of Illinois.

16 11. This Court has personal jurisdiction over Defendant because Defendant
17 conducts business in the County of San Francisco within the State of California.
18 Therefore, Defendant has sufficient minimum contacts with this state, and
19 otherwise purposely avails itself of the markets in this state through the
20 promotion, sale, and marketing of its products in this state, to render the exercise
21 of jurisdiction by this Court permissible under traditional notions of fair play
22 and substantial justice.

23 12. Venue is proper in the United States District Court for the Northern District of
24 California pursuant to 28 U.S.C. § 1391 for the following reasons: (i) Defendant

25
26 ¹ On information and belief, Defendant sells its products in brick and mortar stores
27 throughout California and on several different websites. Based upon the advertised
28 price of Defendant's Products and their statewide availability, Plaintiff is informed,
believes, and thereon alleges the class damages exceed the \$5,000,000 threshold as
set by 28 U.S.C. § 1332(d).

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1 sold its product to Plaintiff within this district; (ii) the alleged misleading
2 advertising that gave rise to Plaintiff’s claims occurred within this judicial
3 district; and, (iii) many of the acts and transactions giving rise to this action
4 occurred in this district because:

5 (a) Defendant is authorized to conduct business in this district;

6 (b) Defendant does substantial business within this district; and

7 (c) Defendant is subject to personal jurisdiction in this district

8 because it has availed itself of the laws and markets within this
9 district.

10 **PARTIES**

11 13. Plaintiff is a natural person residing in San Francisco, California.

12 14. Upon information and belief, Defendant is a corporation that is organized and
13 exists under the laws of the State of Delaware, with its principal place of
14 business in Chicago, Illinois.

15 15. Defendant manufactures and/or distributes various products, including edible
16 consumer packaged goods. Defendant conducts extensive business through
17 Internet sales and enjoys wide retail distribution at numerous stores within the
18 United States, including California.

19 **NATURE OF THE CASE**

20 16. At all times relevant, Defendant made and continues to make affirmative
21 misrepresentations regarding its cocoa products, which it manufactures,
22 markets, and sells in physical stores and online through its own website and
23 other retailers, including Amazon.com.

24 17. Defendant advertised, marketed, packaged, and sold its cocoa products to
25 Plaintiff and other consumers similarly situated in California with the false
26 representation that its cocoa products contained the simplest form of real cocoa.

27 18. A good majority of Defendants’ hot chocolate products state that each product
28 is “Made with Real Cocoa”.

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- 1 19. Similarly, Defendant labels each of these products as being “Simply Cocoa” and
 2 being made with “Five Simple Ingredients.”
 3 20. An exemplar of the Product’s label is below:



- 18 21. Defendant makes such representations because modern day consumers place a
 19 high value on pure ingredients.²
 20 22. Approximately two-thirds of consumers “noted that health, nutrition and
 21 making better choices are factors in their purchasing decisions on indulgent
 22 items or desserts,” and “half of shoppers look for ‘real’ ingredients.”³

23 ² According to a trade publication, “[M]ore consumers are looking for authenticity and
 24 ‘real’ ingredients in their foods, including sweet ingredients like real sugar” and cocoa. The
 25 International Dairy-Deli-Bakery Association collected survey data showing that a growing
 26 “number of Americans continue to avoid products made with processed or artificial
 27 ingredients.” Beth Day, Indulgence driving innovation in baked foods, November 3, 2016
 FoodBusinessNews.net, <https://www.foodbusinessnews.net/articles/7110-indulgence-driving-innovation-in-baked-foods>.

28 ³ See also, Progressive Grocer, Bakery Connects Emotionally With Consumers, Drives
 Grocery Sales, April 8, 2019, <https://progressivegrocer.com/bakery-connects->

- 1 23. Defendant’s claims regarding the simplicity of its chocolate are false and
2 misleading because Defendant’s products are comprised of Alkalized Cocoa.
- 3 24. The alkalization process begins with transforming cocoa beans into cocoa
4 powder. Cocoa powder results from crushing the edible portions of the cocoa
5 bean – “nibs” – into a fine paste, releasing and melting the nibs’ fat content
6 (cocoa butter).
- 7 25. The combination of crushed, ground nibs and cocoa butter produces chocolate
8 liquor.
- 9 26. The chocolate liquor is pressed between hydraulic plates to form hard-cocoa
10 “press cakes” and the excess cocoa butter is removed.
- 11 27. The cocoa cakes are grated into fine powders.
- 12 28. The types of powders produced are based on the amount of cocoa butter, or fat,
13 remaining in the powder: high or “breakfast cocoa” (22% +), medium or
14 “cocoa” (10-12%) and lowfat cocoa (less than 10%).
- 15 29. The cocoa powder can be further treated through alkalization (“Dutch-process”
16 or alkalized) or used in its non-alkalized state.
- 17 30. The alkalization process is executed by soaking the cocoa in an alkali solution
18 consisting of a mixture of either ammonium; potassium; or sodium bicarbonate,
19 carbonate, or hydroxide; or magnesium carbonate or oxide.
- 20 31. The use and presence of alkalis reduces the acidity of cocoa powder, giving it a
21 noticeably darker hue associated with the Products but detracting from the “real
22 cocoa” taste.
- 23 32. In addition to altering the flavor of the cocoa, the alkalization process also
24 eviscerates the healthy properties that exist in all-natural cocoa. Specifically,
25 alkalization has been shown to substantially decrease the levels of healthy
26 polyphenols and flavonoids.⁴

27 [emotionally-consumers-drives-grocery-sales.](#)

28 ⁴ Mark J. Payne et al., *Impact of Fermentation, Drying, Roasting, and Dutch Processing*
Case # 6 of 25 *Aleisa v. ConAgra Brands*

1 33. These healthy aspects of natural cocoa are known for antioxidant activities that
 2 can improved cardiovascular health, reduced oxidative effects of LDL
 3 cholesterol, and reduced blood pressure and many other potential
 4 improvements.

5 34. The alkalization of the cocoa radically alters the composition of the cocoa
 6 ingredient, such that it is drastically different from simple, real cocoa.

7 35. Defendant's conduct as alleged herein violates several parallel California laws,
 8 as more fully set forth herein.

9 **FACTUAL ALLEGATIONS**

10 36. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
 11 this Complaint as though fully stated herein.

12 37. On or about August 9, 2019, Plaintiff purchased Defendant's "Swiss Miss
 13 Simply Cocoa Dark Chocolate Hot Cocoa Mix" for \$5.60 from the online
 14 retailer Amazon.com.

15 38. Defendant manufactures, markets, and sells the Product online through retailers,
 16 which it advertises on the Product's label as containing five simple ingredients,
 17 as being "Simply Cocoa" and as being "Made with Real Cocoa".

18 39. At the time Plaintiff purchased Defendant's Product, Plaintiff believed and
 19 relied upon the representations made on Defendant's Product's label and
 20 packaging concerning the quality of the cocoa, and reasonably believed the
 21 product would contain cocoa in its purest and simplest form.

22
 23 *on Epicatechin and Catechin Content of Cacao Beans and Cocoa Ingredients*, J. AGRIC.
 24 FOOD CHEM. 58, 10518–10527 (2010) (determining that alkalization decreased the
 25 flavonoids which create the health benefits by 98% and 80%); Kenneth B. Miller et al.,
 26 *Impact of Alkalization of the Antioxidant and Flavanol Content of Commercial Cocoa*
 27 *Powders*, J. AGRIC. FOOD CHEM. 56, 8527–8533 (2008) ("compared to natural cocoa
 28 powder, alkali treatment or Dutching does substantially reduce the level of flavanols in
 occur.")

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1 40. Defendant's Product's label, packaging, and advertising materials are prepared
2 and/or approved by Defendant and/or its agents.

3 41. Plaintiff further relied upon Defendant's representations viewable on
4 Amazon.com.

5 42. As detailed above, Defendant's Product lacks the flavor and healthy properties
6 of unprocessed cocoa. Thus, the Product is substantially inferior from the
7 quality advertised.

8 43. Defendant knew, or in the exercise of reasonable care, should have known that
9 its Product's label and advertising materials were misleading or false.

10 44. As a consequence of Defendant's unfair and deceptive advertising and
11 manufacturing practices, Plaintiff and other consumers similarly situated
12 purchased and overpaid for Defendant's Product under the false impression that
13 the Product contained real cocoa.

14 45. Plaintiff and other consumers similarly situated in California purchased and
15 overpaid for Defendant's Product under the false impression that the Product
16 contained unprocessed cocoa, when in fact the Product contained alkalized
17 cocoa instead of real, unprocessed cocoa.

18 46. If Plaintiff had been aware that the Product did not contain simple, unprocessed
19 cocoa, Plaintiff would have paid less for it, or would have purchased a different
20 product. In other words, Plaintiff would not have purchased Defendant's
21 Product but for the representations on the Product's label and related
22 advertising.

23 47. Plaintiff also seeks to represent substantially similar products that are subject to
24 the causes of action brought in this complaint. These products include, but are
25 not limited to, ConAgra's Swiss Miss Milk Chocolate Flavor Hot Cocoa Mix,
26 38.27 Ounce Canister; Swiss Miss Swiss Miss Milk Chocolate Hot Cocoa Mix
27 Packets - 50 Count Envelopes; Swiss Miss Hot Cocoa Mix, Milk Chocolate, No
28 Sugar Added, 60-Count Envelopes; Swiss Miss Sensible Sweets No Sugar

1 Added Hot Cocoa Mix, 13.8 Ounce Canister; Swiss Miss Cocoa Milk Chocolate
2 Canister, 45.68 Ounce Canister; Swiss Miss Milk Chocolate Flavor Hot Cocoa
3 Mix, (8) 1.38 Ounce Envelopes; Swiss Miss Milk Chocolate Flavor Reduced
4 Calorie Hot Cocoa Mix, Keto Friendly, (8) 0.39 Ounce Envelopes; Swiss Miss
5 Marshmallow Hot Cocoa Mix, (30) 1.38 Ounce Envelopes; Swiss Miss
6 Marshmallow Hot Cocoa Mix, 37.18 Ounce Canister; Swiss Miss Milk
7 Chocolate Hot Cocoa Mix Canister 76.5 Ounce Canister; Swiss Miss Variety
8 Pack Hot Cocoa Mix, 8 Count 11.04 oz 12-Pack; Swiss Miss Indulgent
9 Collection Caramel Delight.

10 48. Plaintiff and others similarly situated were exposed to and relied upon the same
11 material misrepresentations made on Defendant's Product label and website,
12 where Defendant sold, and currently sells, its Product to consumers throughout
13 the State of California.

14 49. As a result of Defendant's false and misleading statements and failure to
15 disclose (or adequately disclose), Plaintiff and others similarly situated
16 consumers purchased thousands, if not tens or hundreds of thousands, of units
17 of Defendant's Product, and have suffered, and continue to suffer, injury in fact
18 through the loss of money and/or property.

19 50. Even if Defendant's actions were in compliance with the FDCA, Plaintiff's
20 claim does not seek to challenge the Product's labeling in areas where the FDA
21 has promulgated regulations. Plaintiff's claim is, instead, predicated on the fact
22 that the labeling and associated advertising is misleading and deceptive. Indeed,
23 compliance with the minimum requirements is necessary, but it is not sufficient
24 to determine whether a product's label is false and misleading, and simply does
25 not provide a shield from liability. *See e.g., Wyeth v. Levine*, 129 S. Ct 1187,
26 1202 (2009).

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1 51. This action seeks, among other things, equitable and injunctive relief, restitution
2 of all amounts illegally obtained, and disgorgement of any and all ill-gotten
3 gains as a result of the misconduct alleged herein.

4 **CLASS ACTION ALLEGATIONS**

5 52. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
6 this Complaint as though fully stated herein.

7 53. Plaintiff brings this action individually and on behalf of all others similarly
8 situated against Defendant, pursuant to the Federal Rules of Civil Procedure
9 23(a) and (b)(3) and/or (b)(2).

10 54. Subject to additional information obtained through further investigation and/or
11 discovery, the proposed class (the “Class”) consists of:

12 All persons within California who purchased the Product, or any
13 substantially similar products, from Defendant, within the four
14 years prior to the filing of this Complaint.

15 55. Excluded from the Class is Defendant and any of its officers, directors, and
16 employees, or anyone who purchased Defendant’s Product for the purpose of
17 resale. Plaintiff reserves the right to modify or amend the Class definition before
18 the Court determines whether certification is appropriate.

19 56. The “Class Period” means four years prior to the filing of the Complaint in this
20 action.

21 57. **Ascertainability.** The members of the Class are readily ascertainable from
22 Defendant’s records and/or Defendant’s agent’s records of retail and online
23 sales, as well as through public notice.

24 58. **Numerosity.** The members of the Class are so numerous that their individual
25 joinder is impracticable. Plaintiff alleges that the putative Class consists of
26 hundreds, if not thousands of members due to the size of Defendant and the
27 availability of its products in a variety of commercial grocery stores.
28

1 **59. Existence and Predominance of Common Questions of Law and Fact.**

2 Common questions of law and fact exist as to all members of the Class and
3 predominate over any questions affecting only individual Class members. All
4 members of the Class have been subject to the same conduct and their claims
5 are based on the same standardized marketing, advertisements and promotions.
6 The common legal and factual questions include, but are not limited to, the
7 following:

- 8 a. Whether the Product as manufactured contains alkalized cocoa;
- 9 b. Whether alkalized cocoa is of inferior quality compared to real,
10 simple, and unprocessed cocoa;
- 11 c. Whether Defendant's claims and representations, as alleged herein,
12 are untrue, misleading, and/or reasonably likely to deceive the
13 average consumer;
- 14 d. Whether Defendant's conduct violates California Civil Code §§ 1750,
15 *et seq.*;
- 16 e. Whether Defendant's advertising is false, untrue, or misleading
17 within the meaning of California Business & Professions Code §§
18 17500, *et seq.*;
- 19 f. Whether Defendant's conduct is an unfair, fraudulent, or unlawful act
20 or practice within the meaning of California Business & Professions
21 Code §§ 17200, *et seq.*;
- 22 g. Whether Defendant's advertising is unfair, deceptive, untrue or
23 misleading within the meaning of California Business & Professions
24 Code §§ 17200, *et seq.*;
- 25 h. Whether Defendant acted negligently or intentionally in making the
26 misrepresentations contained on the Product's label and Defendant's
27 website;
- 28

- 1 i. Whether Defendant, through its conduct, received money that, in
 2 equity and good conscience, belongs to Plaintiff and members of the
 3 Class;
 4 j. Whether Plaintiff and the putative Class members are entitled to
 5 equitable relief, including but not limited to restitution and/or
 6 disgorgement of ill-gotten gains; and
 7 k. Whether Plaintiff and the putative Class members are entitled to
 8 injunctive relief as sought herein.

9 60. **Typicality.** Plaintiff's claims are typical of the claims of the members of the
 10 Class in that Plaintiff is a member of the Class that Plaintiff seeks to represent.
 11 Similar to members of the putative Class, Plaintiff purchased the Product after
 12 exposure to the same material misrepresentations and/or omissions appearing
 13 on the Product's label. Plaintiff also received a Product that does not contain
 14 real, simple cocoa, but instead contained highly processed alkalized cocoa.
 15 Plaintiff is advancing the same claims and legal theories on behalf of himself
 16 and all absent members of the Class. Defendant has no defenses unique to the
 17 Plaintiff.

18 61. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the
 19 interests of the members of the putative Class. Plaintiff has retained counsel
 20 experienced in consumer protection law, including class actions, and
 21 specifically, false and deceptive advertising. Plaintiff has no adverse or
 22 antagonistic interest to those in the Class and will fairly and adequately protect
 23 the interests of the Class. Plaintiff's attorneys are aware of no interests adverse
 24 or antagonistic to those of Plaintiff and proposed Class.

25 62. **Superiority.** A class action is superior to all other available means for the fair
 26 and efficient adjudication of this controversy. Individualized litigation would
 27 create the danger of inconsistent and/or contradictory judgments arising from
 28 the same set of facts. Individualized litigation would also increase the delay and

1 expense to all parties and the court system. The damages or other financial
2 detriment suffered by individual Class members may be relatively small
3 compared to the burden and expense that would be entailed by individual
4 litigation of the claims against the Defendant. The injury suffered by each
5 individual member of the proposed class is relatively small in comparison to the
6 burden and expense of individual prosecution of the complex and extensive
7 litigation necessitated by Defendant's conduct. It would be virtually impossible
8 for members of the proposed Class to individually redress effectively the
9 wrongs to them. Even if the members of the proposed Class could afford such
10 litigation, the court system could not. Individualized litigation of the complex
11 legal and factual issues of such a case increases the delay and expense to all
12 parties, including the court. By contrast, the class action device presents far
13 fewer management difficulties, and provides the benefits of single adjudication,
14 economy of scale, and comprehensive supervision by a single court. Therefore,
15 a class action is maintainable pursuant to the Federal Rules of Civil Procedure
16 23(a) and (b)(3) and/or (b)(2).

17 63. Unless the Class is certified, Defendant will retain monies received as a result
18 of Defendant's unlawful and deceptive conduct alleged herein. Unless a class-
19 wide injunction is issued, Defendant will also likely continue to, or allow its
20 resellers to, advertise, market, promote, and sell the Class Product in an
21 unlawful and misleading manner, and members of the Class will continue to be
22 misled, harmed, and denied their rights under California law.

23 64. Further, Defendant has acted or refused to act on grounds that are generally
24 applicable to the class so that declaratory and injunctive relief is appropriate to
25 the Class as a whole, making class certification appropriate pursuant to Fed. R.
26 Civ. P. 23(b)(2).

**FIRST CAUSE OF ACTION FOR
VIOLATIONS OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT
CAL. CIV. CODE §§ 1750, ET SEQ.**

65. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

66. California Civil Code Section 1750, *et seq.*, entitled the Consumers Legal Remedies Act (hereinafter “CLRA”), provides a list of “unfair or deceptive” practices in a “transaction” relating to the sale of “goods” or “services” to a “consumer.” The Legislature’s intent in promulgating the CLRA is expressed in Civil Code Section 1760, which provides, *inter alia*, that its terms are to be:

Construed liberally and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

67. Defendant’s Product constitutes a “good” as defined pursuant to Civil Code Section 1761(a).

68. Plaintiff and the putative Class members are each a “consumer” as defined pursuant to Civil Code Section 1761(d).

69. Plaintiff and each of the putative Class members’ purchase of Defendant’s Product constitutes a “transaction” as defined pursuant to Civil Code Section 1761(e).

70. Civil Code Section 1770(a)(2), (5), (7) and (9) provide that:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(2) [m]isrepresenting the source, sponsorship, approval, or certification of goods or services;

(5) [r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have . . . ;

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1 (7) [r]epresenting that goods or services are of a particular
2 standard, quality, or grade . . . if they are of another; [and]

3 (9) [a]dvertising goods or services with intent not to sell
4 them as advertised.

5 71. Defendant violated Civil Code Section 1770(a)(2), (5), (7) and (9) by marketing
6 and representing that its Product contained simple, real cocoa, when in fact the
7 Product contained highly processed alkalized cocoa. Such cocoa is of inferior
8 quality as it does not contain the healthy properties typically associated with
9 unprocessed cocoa.

10 72. On information and belief, Defendant's violations of the CLRA, as set forth
11 herein, were done with awareness of the fact that the conduct alleged was
12 wrongful and was motivated solely by Defendant's self-interest, monetary gain,
13 and increased profit. Plaintiff further alleges that Defendant committed these
14 acts knowing the harm that would result to Plaintiff. Defendant engaged in such
15 unfair and deceptive conduct notwithstanding such knowledge.

16 73. Plaintiff suffered an "injury in fact" because Plaintiff's money was taken by
17 Defendant as a result of Defendant's false representations set forth on
18 Defendant's actual Product label.

19 74. As a direct and proximate result of Defendant's violations of the CLRA,
20 Plaintiff and members of the putative Class are entitled to a declaration that
21 Defendant violated the Consumer Legal Remedies Act.

22 75. As of the filing of this Complaint, Defendant has not complied with Plaintiff's
23 demand letter pursuant to California Civil Code § 1782, which was served on
24 Defendant on or about September 11, 2019, by certified U.S. mail.

25 76. Attached hereto as Exhibit A is the affidavit of Plaintiff pursuant to Cal. Civ.
26 Code § 1780(d).

27 77. Plaintiff and the putative Class are also entitled to, and seek, injunctive relief
28 prohibiting such conduct in the future and to recover money damages.

1 have purchased the Product, would have paid less for the Product, or would have
 2 purchased a different product from another manufacturer.

3 87. This false and misleading advertising of the Product by Defendant presents a
 4 continuing threat to consumers, as such conduct is ongoing to this day.

5 88. As a direct and proximate result of the aforementioned acts and omissions by
 6 Defendant, Defendant received and continues to hold monies rightfully
 7 belonging to Plaintiff and the putative Class members, who were led to purchase
 8 Defendant's Product during the Class Period.

9
 10 **THIRD CAUSE OF ACTION FOR**
 11 **VIOLATIONS OF CALIFORNIA'S UNFAIR COMPETITION LAW ("UCL")**
BUS. & PROF. CODE §§ 17200, ET SEQ.

12 89. Plaintiff re-alleges and incorporates by reference all of the above paragraphs of
 13 this Complaint as though fully stated herein.

14 90. Plaintiff and Defendant are each a "person" as defined by California Business
 15 & Professions Code § 17201. California Business & Professions Code § 17204
 16 authorizes a private right of action on both an individual and representative
 17 basis.

18 91. "Unfair competition" is defined by Business and Professions Code § 17200 as
 19 encompassing several types of business "wrongs," including: (1) an "unlawful"
 20 business act or practice, (2) an "unfair" business act or practice, (3) a
 21 "fraudulent" business act or practice, and (4) "unfair, deceptive, untrue or
 22 misleading advertising." The definitions in § 17200 are drafted in the
 23 disjunctive, meaning that each of these "wrongs" operates independently from
 24 the others.

25 92. By and through Defendant's conduct alleged in further detail above and herein,
 26 Defendant engaged in conduct which constitutes unlawful, unfair, and/or
 27 fraudulent business practices, and unfair, deceptive, untrue or misleading
 28 advertising, as prohibited by California's UCL.

A. “UNLAWFUL” PRONG

1
2 93. Beginning at a date currently unknown and continuing to the time of the filing
3 of this Complaint, Defendant has committed acts of unfair competition,
4 including those described above, by engaging in a pattern of “unlawful”
5 business practices, within the meaning of Bus. & Prof. Code §§ 17200 *et seq.*,
6 by marketing, manufacturing, and distributing Defendant’s Product in violation
7 of California’s Consumers Legal Remedies Act, Civil Code § 1759, *et seq.* and
8 California’s False Advertising Law, Business & Professions Code §§ 17500, *et*
9 *seq.*, as alleged herein.

10 94. Defendant further violated California’s Health & Safety Code § 110660, which
11 states that “any food is misbranded if its labeling is false or misleading in any
12 particular.” Section 110660 is a part of California's Sherman Food, Drug and
13 Cosmetic law, California Health & Safety Code § 109875 (the “Sherman law”).

14 95. Claims under state law based on the deceptive labeling of a food product is
15 expressly permitted when the statute to be enforced imposes legal obligations
16 identical to that of the Federal Food, Drug, and Cosmetic Act (“FDCA”),
17 including FDA regulations concerning naming and labeling food products. *See*
18 *e.g., In re Farm Raised Salmon Cases*, 22 Cal. 4th 1077, 1094-95 (2008).
19 Plaintiff’s claim that Defendant violated the FAL by labeling its Product in a
20 false or misleading way imposes legal obligations identical to 21 U.S.C. §
21 343(a) of the FDCA, which states that, “a food shall be deemed to be
22 misbranded . . . [i]f (1) its labeling is false or misleading in any particular[.]”
23 Further, section 343(a) of the FDCA is not subject to the express preemption
24 provision set forth in 21 U.S.C. § 343-1 of the FDCA.

25 96. Defendant violated the above-referenced statutes by falsely representing that its
26 Product is comprised of real, simple unprocessed cocoa, when in fact the
27 product contained highly processed cocoa.
28

1 97. By advertising, promoting, manufacturing, and selling its Product in violation
 2 of those California laws, Defendant engaged in a pattern of “unlawful” business
 3 practices within the meaning of California’s UCL.

4 **B. “UNFAIR” PRONG**

5 98. Beginning at a date currently unknown and continuing to the time of the filing
 6 of this Complaint, Defendant has committed acts of unfair competition as
 7 prohibited by Bus. & Prof. Code §§ 17200, *et seq.*

8 99. Had Plaintiff and the putative class members been informed that Defendant’s
 9 Product did not in fact contain real, simple cocoa as advertised, they would not
 10 have purchased the Product, would have paid less for it, or would have
 11 purchased a different product. In other words, Defendant earned the business of
 12 Plaintiff and the putative Class members by using deceptive advertising, which
 13 placed competitors at a disadvantage. Furthermore, Plaintiff and the putative
 14 Class members were harmed in that they paid a price premium for the Product.

15 **C. “FRAUDULENT” PRONG**

16 100. Beginning at a date currently unknown and continuing to the time of the filing
 17 of this Complaint, Defendant engaged in acts of unfair competition, including
 18 those described above and herein, in violation of Bus. & Prof. Code §§ 17200,
 19 *et seq.*, by engaging in a pattern of “fraudulent” business practices within the
 20 meaning of Bus. & Prof. Code §§ 17200, *et seq.*, by falsely advertising its
 21 Product as containing real, simple unprocessed cocoa, when, in fact, the Product
 22 contained highly processed and non-simple cocoa.

23 101. Plaintiff reserves the right to allege further conduct that constitutes other
 24 fraudulent business acts or practices. Such conduct is ongoing and continues to
 25 this date.

26 **D. “UNFAIR, DECEPTIVE, UNTRUE OR MISLEADING ADVERTISING” PRONG**

27 102. Defendant’s advertising is unfair, deceptive, untrue, and/or misleading within
 28 the meaning of Bus. & Prof. Code §§ 17200, *et seq.*, in that consumers are led

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1 to believe that Defendant’s Product contains a simple and real cocoa, when, in
2 fact, the Product highly processed cocoa that is of inferior quality to
3 unprocessed cocoa.

4 103. Plaintiff and other such reasonable consumers are likely to be, and were,
5 deceived and misled by Defendant’s advertising of its Product, as alleged above.

6 104. As a direct and proximate result of Defendant’s unlawful, unfair, and fraudulent
7 conduct described herein, Defendant received and continues to receive an unfair
8 competitive advantage and unearned commercial benefits at the expense of its
9 competitors and the public, who unwittingly provided money to Defendant
10 based on Defendant’s misleading representations.

11 105. Plaintiff and the putative Class members suffered an injury in fact because
12 Plaintiff’s money was taken by Defendant as a result of Defendant’s false
13 representations as set forth on the Product label and Amazon.com.

14 106. Such acts and omissions by Defendant are unlawful and/or unfair and/or
15 fraudulent, and constitute multiple violations of California’s UCL. Plaintiff
16 reserves the right to identify additional violations by Defendant as may be
17 established through discovery.

18 107. In prosecuting this action for the enforcement of important rights affecting the
19 public interest, Plaintiff seeks the recovery of attorneys’ fees, which reward is
20 available to a prevailing plaintiff in a class action such as this.

21 **FOURTH CAUSE OF ACTION**
22 **NEGLIGENT MISREPRESENTATION**

23 108. Plaintiff repeats, re-alleges, and incorporates by reference the above allegations
24 as if fully stated herein.

25 109. Beginning at a date currently unknown and continuing to the time of the filing
26 of this Complaint, Defendant represented to Plaintiff and others similarly
27 situated, through product packaging and advertising materials, that Defendant’s
28 Product contains real, simple, and unprocessed cocoa.

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1 110. Defendant made these representations knowing, or having reason to know, that
2 its Product contained highly processed cocoa.

3 111. Defendant acted with the intent to induce the public, including Plaintiff and
4 putative Class members, to purchase Defendant's Product.

5 112. Plaintiff and the putative Class members saw, believed, and relied upon
6 Defendant's representations in making the decision to purchase Defendant's
7 Product.

8 113. At all times relevant, Defendant knew or should have known that such
9 representations were untrue, and Defendant had no reasonable basis for
10 believing the representations to be true.

11 114. As a proximate result of Defendant's negligent misrepresentations, Plaintiff and
12 other consumers similarly situated were induced to purchase, purchase more of,
13 or pay more for Defendant's Product due to the unlawful acts of Defendant, in
14 an amount to be determined at trial, during the Class Period.

15
16 **FIFTH CAUSE OF ACTION**
17 **INTENTIONAL MISREPRESENTATION**

18 115. Plaintiff repeats, re-alleges, and incorporates herein by reference the above
19 allegations as if fully stated herein.

20 116. Beginning at a date currently unknown and continuing to the time of the filing
21 of this Complaint, Defendant intentionally represented to Plaintiff and others
22 similarly situated, through product packaging and advertising materials, that
23 Defendant's Product contained a higher quality of cocoa than it did.

24 117. Defendant acted intentionally by willfully and purposefully printing "Made with
25 Real Cocoa"; "Simply Cocoa"; and "Five simple ingredients" on the Product's
26 label.

1 118. Because the Product contains highly processed alkalized chocolate, the cocoa is
2 of lesser value. Therefore, the cocoa that is not the same quality as Defendant
3 advertises.

4 119. Defendant knew or had reason to know such representations were false, and
5 continued to label its Product in a false or misleading way.

6 120. Defendant further knew that retailers were advertising its Product as containing
7 a certain quality of cocoa, because Defendant designed, manufactured, and
8 affixed the product labeling to its Products before supplying the Product to the
9 retailers.

10 121. Plaintiff and the putative Class members saw, believed, and relied upon
11 Defendant's representations in making the decision to purchase Defendant's
12 Product.

13 122. As a proximate result of Defendant's intentional misrepresentations, Plaintiff
14 and the putative Class members were damaged in an amount to be determined
15 at trial.

16 123. Plaintiff alleges the "who, what, when, where, and how" of the alleged
17 deception by Defendant as follows:

- 18 i. The "who" is Defendant;
 - 19 ii. The "what" is the representation that Defendant's Product, and
20 substantially similar products, had real and simple cocoa;
 - 21 iii. The "when" is the date Plaintiff purchased the Product, and the Class
22 Period of four years prior to the filing of this Complaint;
 - 23 iv. The "where" is in Defendant's product labeling, advertisements, and
24 online marketing; and
 - 25 v. The "how" is the allegation that Defendant did not disclose that its
26 Product is does not contain "simple" cocoa, but instead highly
27 processed alkalized cocoa.
- 28

1 124. By engaging in the acts described above, Defendant is guilty of malice,
2 oppression, and fraud, and Plaintiff and the putative Class are therefore entitled
3 to recover exemplary or punitive damages.

4 **PRAYER FOR RELIEF**

5 **WHEREFORE**, Plaintiff respectfully requests the Court grant Plaintiff and
6 the putative Class members the following relief against Defendant:

- 7 • that this action be certified as a Class Action;
- 8 • that Plaintiff be appointed as the Class Representative;
- 9 • that Plaintiff's attorneys be appointed as Class Counsel;
- 10 • that Defendant's wrongful conduct be adjudged and decreed to violate the
11 consumer protection statutes raised herein;
- 12 • an order requiring imposition of a constructive trust and and/or
13 disgorgement of Defendant's ill-gotten gains and to pay restitution to
14 Plaintiff and all members of the Class and to restore to the plaintiff and
15 members of the class all funds acquired by means of any act or practice
16 declared by this court to be an unlawful, fraudulent or unfair business act
17 or practice, in violation of laws, statutes or regulations, or constituting
18 unfair competition;
- 19 • distribution of any monies recovered on behalf of members of the Class via
20 fluid recovery or *cy pres* recovery were necessary and as applicable, to
21 prevent Defendant from retaining the benefits of their wrongful conduct;
- 22 • that Plaintiff and each of the other members of the Class recover the
23 amounts by which Defendant has been unjustly enriched;
- 24 • a temporary, preliminary and/or permanent order for injunctive relief
25 requiring Defendant to: (i) discontinue its false and/or misleading
26 statement/s; and (ii) undertake an immediate public information campaign
27 to inform members of the proposed class as to their prior practices;
- 28

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- 1 • that Defendant be enjoined from continuing the wrongful conduct alleged
- 2 herein and be required to comply with all applicable laws;
- 3 • Pre-judgment interests from the date of filing of this suit;
- 4 • that Plaintiff and each member of the putative Class recover their costs of
- 5 suit; and
- 6 • Any other relief the Court may deem just and proper.

7
8 **FIRST CAUSE OF ACTION FOR**
9 **VIOLATIONS OF CALIFORNIA’S CONSUMER LEGAL REMEDIES ACT**
10 **CAL. BUS. & PROF. CODE §§ 1750, ET SEQ.**

- 11 • Actual damages, injunctive relief, restitution, and punitive damages
- 12 pursuant to Cal. Civ. Code § 1780(a); and
- 13 • an award of costs and attorney’s fees pursuant to Cal. Civ. Code §
- 14 1780(d).

15 **SECOND CAUSE OF ACTION FOR**
16 **VIOLATIONS OF CALIFORNIA’S FALSE ADVERTISING LAW**
17 **CAL. BUS. & PROF. CODE §§ 17500, ET SEQ.**

- 18 • Restitution and injunctive relief pursuant to Bus. & Prof. Code § 17203;
- 19 and
- 20 • recovery of reasonably attorney’s fees pursuant to, *inter alia*, California
- 21 Code of Civil Procedure § 1021.5.

22 **THIRD CAUSE OF ACTION FOR**
23 **VIOLATIONS OF CALIFORNIA’S UNFAIR COMPETITION LAW**
24 **CAL. BUS. & PROF. CODE §§ 17200, ET SEQ.**

- 25 • Restitution and injunctive relief pursuant to Bus. & Prof. Code § 17535;
- 26 and
- 27 • recovery of reasonable attorneys’ fees pursuant to, *inter alia*, California
- 28 Code of Civil Procedure § 1021.5.

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**FOURTH CAUSE OF ACTION FOR
NEGLIGENT MISREPRESENTATION**

- A judgment against Defendant for general and compensatory damages in an amount to be determined at trial; and

**FIFTH CAUSE OF ACTION FOR
INTENTIONAL MISREPRESENTATION**

- A judgment against Defendant for general and compensatory damages in an amount to be determined at trial;
- punitive damages pursuant to Cal. Civ. Code § 3294; and
- that Plaintiff and the members of the Class be granted any other relief the Court may deem just and proper.

TRIAL BY JURY

125. Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to and demands a trial by jury.

Dated: November 14, 2019

Respectfully submitted,

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