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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

Case No: 3:20-cv-00894-DMS-JLB

**THIRD AMENDED CLASS ACTION COMPLAINT
FOR VIOLATIONS OF:**

WARREN GROSS, DEBORAH
LEVIN, SHELBY COOPER, and
EDWARD BUCHANNAN on behalf
of themselves and all others similarly
situated,

Plaintiffs,

v.

VILORE FOODS COMPANY, INC.,
ARIZONA CANNING COMPANY,
LLC,

Defendants.

- 1. CONSUMERS LEGAL REMEDIES ACT,
CAL. CAL. CIV. CODE §§1750 *et seq.***
- 2. UNFAIR COMPETITION LAW, UNLAWFUL
PRONG
CAL. BUS. & PROF. CODE §§17200 *et seq.***
- 3. UNFAIR COMPETITION LAW, UNFAIR
PRONG
CAL. BUS. & PROF. CODE §§17200 *et seq.***
- 4. FALSE ADVERTISING LAW,
CAL. BUS. & PROF. CODE §§17500 *et seq.***
- 5. BREACH OF EXPRESS WARRANTY**
- 6. BREACH OF IMPLIED WARRANTY**
- 7. NEGLIGENT MISREPRESENTATION**

DEMAND FOR JURY TRIAL

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1 Warren Gross, Deborah Levin, Shelby Cooper, and Edward Buchannan
2 (“Plaintiffs”), on behalf of themselves and all others similarly situated, by and through
3 their undersigned counsel, hereby bring this action against Vilore Foods Company, Inc.,
4 (“Vilore”) and Arizona Canning Company, LLC (“ACC”) (collectively “Defendants”),
5 and upon information and belief and investigation of counsel, allege as follows:

6 **I. JURISDICTION AND VENUE**

7 1. Plaintiffs bring this action pursuant to the Class Action Fairness Act of 2005
8 (“CAFA”), 28 U.S.C. § 1332(d). At least one Defendant is a citizen of a state different
9 from that of a plaintiff, the putative class size is greater than 100 persons, and the amount
10 in controversy in the aggregate for the putative Class exceeds the sum or value of \$5
11 million exclusive of interest and costs. The amount in controversy, exclusive of interest,
12 costs, and attorneys' fees, exceeds the minimum jurisdictional amount for this Court and
13 minimal diversity exists. The Court has jurisdiction over this action pursuant to 28 U.S.
14 Code § 1332(d).

15 2. This Court has both general and specific personal jurisdiction over
16 Defendants.

17 3. The Court has personal jurisdiction over Defendants because during all times
18 relevant each company affirmatively established and maintained contacts with the State
19 of California and was registered to do business in California.

20 4. This Court further has specific personal jurisdiction arising from each
21 Defendants' decision to distribute and sell the Products in California.

22 5. Defendants have sufficient minimum contacts with this State and sufficiently
23 avail or availed themselves of the markets of this State through the promotion, sales, and
24 marketing of the Products within the State to render the exercise of jurisdiction by this
25 Court reasonable.

26 6. Venue is proper in this County because during the relevant period each
27 Defendant conducted business here and engaged in substantial transactions in this County,
28 and many of the transactions complained of herein occurred in this County including

specifically the transactions between Plaintiffs and Defendants and many of the transactions between Defendants and the Class.

II. NATURE OF THE ACTION

7. This is a consumer class action for violations of express and implied warranties, negligent misrepresentations, and consumer protection laws, with a California sub-class for violations of California consumer protection laws.

8. Defendants, during the proposed Class period, distributed, advertised, marketed, and sold a variety of Kern's juices and juice-based beverage products, including juice-based beverage products labeled "Guava Nectar", "Apricot Nectar", "Mango Nectar," and "Peach Nectar" (the "Products").

9. These Products, which are labeled and marketed under the brand name "Kern's" are all misbranded, falsely advertised, and unlawful to distribute in California and in the U.S.

10. The Kern's brand is owned in the United States by Grupo Jumex, S.A. de C.V. ("Jumex"), a Mexico corporate entity.

11. The Products are packaged in Mexico and imported to the United States.

12. Under U.S. law, every food product imported into the U.S. must identify on the product's package the full legal name and address of either the product manufacturer or the U.S. distributor for consumer contact and liability purposes.

13. Vilore, a Texas corporation, is currently identified on the Products' labels as the U.S. distributor and has been so for Products distributed beginning in 2018. Defendant Vilore is therefore liable for Products distributed from 2018 to the present.

14. ACC, an Arizona corporation, was identified on the Products' labels as the U.S. distributor until December 31, 2017.¹ Defendant ACC is liable for Products that it distributed from May 13, 2016 to December 31, 2017.

¹ ACC officially ceased being the Products' U.S. distributor on December 31, 2017, but Products identifying ACC as the distributor and therefore the liable party likely continued to be sold in the U.S. during at least a substantial part of 2018.

15. The Products' labeling is false and misleading and violates and violated FDA regulations and state consumer protection laws.

16. The Products' labeling and advertising scheme is intended to conceal from consumers the fact that the Products contain artificial flavoring.

17. The Products are labeled as if they are flavored only with natural ingredients when the Products in fact contain an undisclosed artificial flavor in violation of state and federal law.

18. Both Defendants are liable under U.S. law for distributing the misbranded Products. Defendant ACC is liable for the Products it distributed from May 13, 2016 to December 31, 2017. Defendant Vilore is liable for the Products it distributed from 2018 to the present.

19. Plaintiffs, who were deceived by Defendants' unlawful conduct, purchased the Products in California, and were damaged thereby, bring this action on their own behalf and on behalf of California and other states' consumers to remedy Defendants' unlawful acts.

20. On behalf of the Class and sub-class as defined herein, Plaintiffs seek an order compelling Defendants to, *inter alia*: (1) cease transporting, distributing, advertising and selling the Products in violation of U.S. and California and other states' consumer protection law; (2) re-label or recall all existing deceptively packaged Products; (3) conduct a corrective advertising campaign to fully inform California and other states' consumers; (4) award Plaintiffs and other Class-members restitution, actual damages, and punitive damages; and (5) pay all costs of suit, expenses, and attorney fees.

III. PARTIES

21. Defendant Vilore Foods Company (“Vilore”) is a Texas Corporation with its principal place of business at 3838 Medical Drive, San Antonio, Texas.

22. Vilore is registered with the California Secretary of State to do business in California under entity number C1944592.

23. Vilore is the current designated U.S. distributor and liable entity for the

1 Products and has been since 2018.

2 24. Defendant Arizona Canning Company, LLC, (“ACC”) is a Delaware Limited
3 Liability Company with its principal place of business at 8755 South Rita Road, Tucson,
4 Arizona.

5 25. ACC was formerly registered with the California Secretary of State to do
6 business in California under entity number 200834810042. ACC canceled its California
7 LLC registration on January 3, 2018.

8 26. ACC was the former designated U.S. distributor and liable entity for the
9 Products distributed during the proposed Class period from May 13, 2016 to December
10 31, 2017.

11 27. During the respective periods when each Defendant was the identified
12 distributor and responsible party, each Defendant advertised, marketed, distributed, and
13 sold the Products in California and throughout the United States.

14 28. Allegations herein regarding each Defendant’s conduct pertain specifically
15 to the period during which that Defendant was legally responsible for the Products’
16 compliance with state and federal law.

17 29. Plaintiff Warren Gross (“Gross”) is a resident and citizen of Rancho
18 Cucamonga, California. Gross purchased the Products multiple times during the proposed
19 Class Period in San Diego County, California for personal and household consumption.

20 30. Plaintiff Deborah Levin (“Levin”) is a resident and citizen of Santa Monica,
21 California. Levin purchased the Products multiple times during the proposed Class Period
22 in California for personal and household consumption.

23 31. Plaintiff Shelby Cooper (“Cooper”) is a resident and citizen of Riverside,
24 California. Cooper purchased the Products multiple times during the proposed Class
25 Period in California for personal and household consumption.

26 32. Plaintiff Edward Buchannan (“Buchannan”) (collectively with Gross, Levin,
27 and Cooper, “Plaintiffs”) is a resident and citizen of Vacaville, California. Buchannan
28 purchased the Products multiple times during the proposed Class Period in California for

personal and household consumption.

IV. FACTUAL ALLEGATIONS

A. Defendants Did Not Disclose That the Products are Artificially Flavored.

33. The images below are true and accurate representations of the front labels of two of the Products distributed by Vilore during an interval of the proposed class period. Product labels reportedly changed at times during the class period but those changes are not material to the legal responsibilities described by the allegations herein.



34. As illustrated by the labels reproduced above, Defendant Vilore currently advertises and during the Class period advertised on the Products' front labels that the Products are characterized by fruit flavors like peach and guava.

35. The Kern's Peach Nectar product label, for example, shows a pictorial representation of ripe fresh peaches. The Kern's Guava Nectar product label shows a pictorial representation of ripe fresh guava.

36. The labeled names, "Peach," and "Guava," for example, along with these

1 pictorial representations, under U.S. federal and state law including California law inform
 2 the consumer that the Products consist exclusively of and are flavored only with natural
 3 juices.

4 37. The images below taken from <http://kerns.com> as of 2017 are true and
 5 accurate representations of the front labels of two of the Products distributed by ACC
 6 during an interval of the proposed class period. Product labels reportedly changed at times
 7 during the class period, but those changes are not material to the legal responsibilities
 8 described by the allegations herein.



20 38. As illustrated by the labels reproduced above, Defendant ACC similarly
 21 advertised during the Class period on the Products' front labels that the Products were
 22 characterized by fruit flavors like mango and apricot.

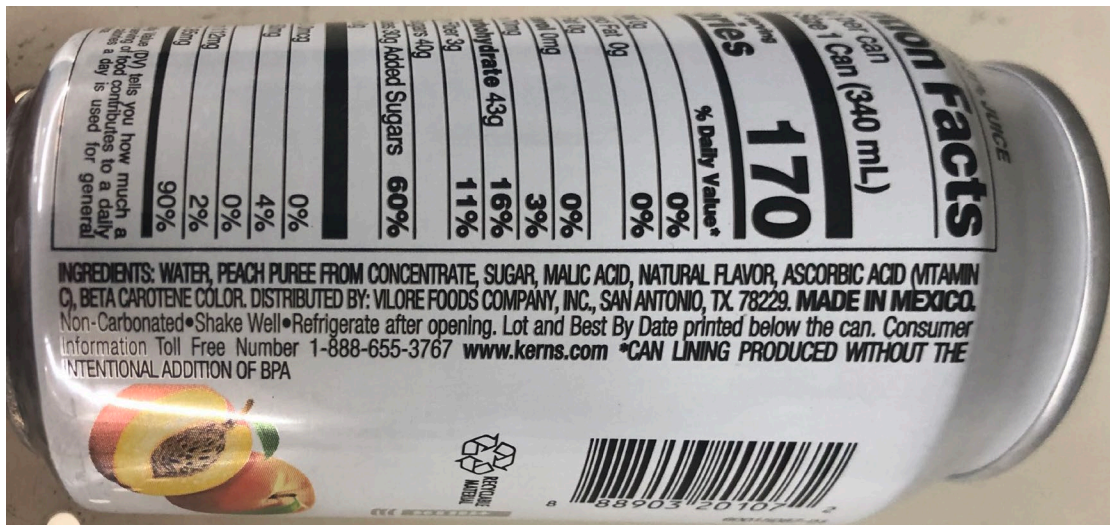
23 39. The Kern's Mango Nectar product label, for example, shows a pictorial
 24 representation of ripe fresh mangos. The Kern's Apricot Nectar product label shows a
 25 pictorial representation of ripe fresh apricot.

26 40. The labeled names, "Mango," and "Apricot," along with these pictorial
 27 representations, under U.S. federal and state law including California law inform the
 28 consumer that the Products consist exclusively of and are flavored only with natural juices.

41. Some of the Products' labels distributed by ACC also advertised, as shown above, that the Products were "100% Natural." The "100% Natural" claim, which was present on the retail can labels distributed by ACC in or around 2017, reportedly has since been removed.

42. All of the Products, however, contain a chemical identified as “malic acid.”

43. Below is a true and accurate representation of the rear-label of one of the Products distributed by Vilore during the Class Period showing “malic acid” on the ingredient list.



44. The ‘malic acid’ chemical in the Products is not naturally-occurring, but is instead manufactured in petrochemical plants from benzene or butane—components of gasoline and lighter fluid, respectively—through a series of chemical reactions, some of which involve highly toxic chemical precursors and byproducts.

45. The malic acid that is added to the Products is a synthetic chemical added to the Products to simulate and reinforce the Products' characterizing fruit flavors.

46. The manufacturer adds the industrial chemical dl-malic acid,² in the form of

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

1 a racemic mixture of d- and l- isomers, to flavor the Products and make them taste like
2 fresh fruit.

3 47. Both the natural and unnatural forms of malic acid confer a “tart, fruity”
4 flavor to food products.³

5 48. The manufacturer uses this artificial petrochemical, dl-malic acid, in its
6 Products but Defendants pretend otherwise, conflating the natural and the artificial
7 flavorings and deceiving consumers.

8 49. The Products’ labels therefore violate federal and California and other states’
9 laws in multiple regards.

10 50. During the respective period when each defendant was legally responsible,
11 Defendant Vilore failed and Defendant ACC failed to properly disclose this artificial
12 flavor on the Products’ “principle display panel” or “panels” of the label, violating federal,
13 California, and other states’ laws in multiple ways. *See, e.g.*, 21 C.F.R. § 101.22(i); Cal.
14 Health & Saf. Code § 109875, *et seq.*, (Sherman Law), incorporating 21 C.F.R. § 101.22.

15 51. Numerous other states have similar consumer protection laws to California’s.
16 The Products violate both the federal FDCA and these state laws in multiple ways.

17 52. Because each Product contains additional flavoring ingredients that simulate
18 and reinforce the Products’ characterizing flavors, the Products’ front labels are required
19 by law to disclose those additional flavors rather than misleadingly suggest that the
20 Products are flavored only by the labeled natural juices. *See, e.g.*, Cal. Health & Saf. Code
21 §109875 *et seq.*

22 53. Even more deceptive, however, is the fact that the Products contain an
23 artificial flavoring ingredient and yet, at all times during the proposed Class Period,
24 omitted every legally-required disclosure from the Products’ labels.

25 54. Because they contain artificial flavor, both federal and state law require the
26 Products to display both front- and back-label disclosures to inform consumers that they

27 _____
28 ³ <https://thechemco.com/chemical/malic-acid/>; visited 04/12/17.

1 are artificially flavored. *See, e.g.*, 21 CFR § 101.22.

2 55. None of the Products' labels have such a disclosure.

3 56. Omitting this disclosure from the Products' front and rear labels conceals this
4 fact from consumers. *See, e.g.*, Cal. Health & Saf. Code § 109875, *et seq.*, (Sherman Law),
5 incorporating 21 C.F.R. § 101.22.

6 57. Further, the labels of some of the Products distributed by ACC during the
7 proposed class period, in fact, falsely claimed the Products were "100% Natural". Under
8 federal and state law, the synthetic ingredient dl-malic acid is not "natural".

9 58. California law, incorporating and identically mirroring U.S. Food, Drug, and
10 Cosmetic Act regulations by reference, requires that a food's label accurately describe the
11 nature of the food product and its characterizing flavors.

12 59. Under FDA regulations, a recognizable primary flavor identified on the front
13 label of a food product is referred to as a "characterizing flavor". 21 CFR § 101.22.

14 60. FDA regulations and California law establish that if "the label, labeling, or
15 advertising of a food makes any direct or indirect representations with respect to the
16 primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other
17 means" then "such flavor shall be considered the characterizing flavor". 21 C.F.R. §
18 101.22(i).

19 61. The Products' front labels identify and identified the Products as, for
20 example, "Guava," "Apricot," "Mango," and "Peach."

21 62. Under the Code of Federal Regulations, guava, apricot, mango, and peach
22 are considered the characterizing flavors of these Products. *See* 21 C.F.R. 101.22(i).

23 63. If a product's characterizing flavor is not created exclusively by the
24 characterizing flavor ingredient, the product's front label must state that the product's
25 flavor was simulated or reinforced with either or both of natural or artificial flavorings. If
26 any artificial flavor is present which "simulates, resembles or reinforces" the
27 characterizing flavor, the food must be prominently labeled as "Artificially Flavored." 21
28 C.F.R. § 101.22(i)(3), (4).

1 64. A food product's label also must include a statement of the "presence or
2 absence of any characterizing ingredient(s) or component(s) . . . when the presence or
3 absence of such ingredient(s) or component(s) in the food has a material bearing on price
4 or consumer acceptance . . . and consumers may otherwise be misled about the presence
5 or absence of the ingredient(s) or component(s) in the food." 21 C.F.R. § 102.5(c).

6 65. Such statements must be in easily-readable print on the front display panel
7 and of sufficient size for an average consumer to notice. *Id.*

8 66. The Products contain and contained the artificial flavor dl-malic acid, which
9 simulates and reinforces the characterizing flavors of the Products.

10 67. The Products' labels fail to provide an "artificially flavored" disclosure on
11 the "principal display panel or panels of the label" as required by federal and state law.
12 *See* 21 C.F.R. 101.22(i)(2); 21 C.F.R. 101.22(i)(3); Cal. Health & Saf. Code § 109875, *et*
13 *seq.*, (Sherman Law), incorporating 21 C.F.R. § 101.22.

14 68. The Products are therefore falsely advertised throughout the United States
15 and in California, and otherwise violate state consumer protection laws.

16 69. The distribution of misbranded products in interstate commerce violates
17 federal law, 21 U.S.C. § 331, and corresponding state consumer protection laws.

18 70. Under these regulations, Defendants, before distributing the Products in U.S.
19 commerce, were required to place prominently on the Products' front labels a notice
20 sufficient to allow consumers to understand that the Products contained added flavoring
21 ingredients and artificial flavorings.

22 71. Defendants failed to do so, deceiving consumers and violating federal and
23 state law.

24 72. Defendants intentionally omitted the legally-required "artificially flavored"
25 disclosure from consumers because consumers prefer naturally-flavored food and
26 beverage products over products with artificial flavors, and will pay more for natural
27 products.

28 73. Plaintiffs were therefore unaware that the Products contained artificial

1 flavoring when they purchased them.

2 74. When purchasing the Products, Plaintiffs were seeking a product of particular
3 qualities that were flavored only with the natural ingredients claimed on the label and
4 which did not contain artificial flavoring.

5 75. Plaintiffs are not alone in these purchasing preferences. As reported in Forbes
6 Magazine, 88% of consumers polled indicated they would pay more for foods perceived as
7 natural or healthy. “All demographics [of consumers]—from Generation Z to Baby
8 Boomers—say they would pay more” for such products, specifically including foods with
9 no artificial flavors.⁴

10 76. John Compton, the CEO of a competing beverage manufacturer, announced
11 to investors that, “We have talked extensively to consumers . . . and they come back and
12 tell us the number one motivation for purchase is products that claim to be all natural.”

13 77. Defendants label and advertise the Products to reflect these consumer
14 preferences – not by making the Products only with natural ingredients, but instead by
15 omitting the legally-required disclosures informing consumers that the Products contain
16 artificial flavors.

17 78. California’s Health & Safety Code specifically states that “Any food is
18 misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical
19 preservative, unless its labeling states that fact.” Cal. Health & Saf. Code § 110740.

20 79. California law required both Defendants to include sufficient notice on the
21 Products’ labels to alert consumers that the Products are artificially flavored.

22 80. Defendants failed to do so.

23 81. Accordingly, the Products were misbranded and illegal to distribute or sell in
24 California. Cal. Health & Saf. Code § 110740; § 110760; § 110765.

25
26
27 ⁴ “Consumers Want Healthy Foods--And Will Pay More For Them”; Forbes Magazine,
28 February 15, 2015. <https://www.forbes.com/sites/nancygagliardi/2015/02/18/consumers-want-healthy-foods-and-will-pay-more-for-them/#4b8a6b4b75c5>; visited April 7, 2017.

1 82. Because the Products violated California law, they were misbranded when
2 offered for sale.

3 83. Plaintiffs lost money as a result of Defendants' conduct because they
4 purchased Products that contained undisclosed artificial flavors and were illegal to sell.

5 **B. Defendants' Competitors Label Their Products Lawfully.**

6 84. Defendants not only deceived consumers but also gained an unfair
7 commercial advantage in the marketplace by marketing and distributing misbranded
8 products.

9 85. Manufacturers and distributors of competing beverage products label their
10 products lawfully.

11 86. Meadow Gold, Value Time, and Tang, for example, accurately label their
12 artificially flavored fruit juice beverages as "Artificially Flavored."

13 87. Other competing manufacturers, offering products whose labels suggest just
14 as Defendants do that their products are naturally flavored, truly are flavored only with
15 natural ingredients.

16 88. Defendants, however, conceal the use of artificial flavoring, deceiving
17 consumers, illegally cutting costs and increasing profits, and competing unfairly and
18 unlawfully in the marketplace, hurting their competitors as well as consumers.

19 89. Defendants' conduct injures competing manufacturers and distributors that
20 do not engage in the same illegal behavior. These manufacturers and distributors compete
21 for market share and limited shelf space, as well as for consumers' buying preferences and
22 dollars.

23 90. Defendants' competitors do so lawfully. Defendants do not.

24 **C. Plaintiffs' Purchases of the Products**

25 91. Plaintiff Gross purchased an assortment pack of the Products in California
26 during the Class Period defined herein.

27 92. Plaintiff Gross purchased the Products in 2018 and 2019, and most recently
28 purchased an assortment pack of the Products in August 2019 at a Costco store at 650

1 Gateway Center Drive, San Diego, CA 92102.

2 93. Plaintiff Levin purchased the Kern's Peach Nectar and Kern's Apricot Nectar
3 Products, in addition to various other flavors, in California during the Class Period as
4 defined herein.

5 94. Plaintiff Levin purchased the Products multiple times at several locations in
6 California since 2014, including but not limited to at a Gelson's Market at 2627 Lincoln
7 Boulevard, Santa Monica, California and a 99 Cents Only store at 201 Lincoln Boulevard,
8 Venice California. Plaintiff Levin's most recent purchase was in August 2018 at Ralph's
9 located on 4311 Lincoln Blvd, Marina Del Rey, CA 90292.

10 95. Plaintiff Cooper purchased the Kern's Peach Nectar, Kern's Apricot Nectar,
11 Kern's Guava Nectar, and Kern's Mango Nectar Products in California during the Class
12 Period as defined herein.

13 96. Plaintiff Cooper purchased the Products multiple times at several locations
14 in California since approximately 2012 and continuing until approximately June of 2020,
15 including Sam's Club and Food 4 Less stores located in Riverside, California.

16 97. Plaintiff Buchannan purchased the Kern's Peach Nectar, Kern's Mango
17 Nectar, and Kern's Guava Nectar, in addition to various other flavors, in California during
18 the Class Period as defined herein.

19 98. Plaintiff Buchannan purchased the Products multiple times at several
20 locations in California since approximately 1999 and continuing until approximately June
21 of 2020, including Walmart, Raley's, and Lucky's stores located in Vacaville, California.

22 99. The Products were purchased at the marked retail prices, recently \$0.79 per
23 11.5 ounce single-serving can, or from time to time at higher or lower prices.

24 100. Plaintiff Levin first discovered Defendants' unlawful acts described herein
25 in September of 2018, when she learned the Products' characterizing flavors were
26 deceptively created or reinforced using artificial flavoring.

27 101. Plaintiff Gross first discovered Defendants' unlawful acts described herein
28 in March of 2020, when he learned the Products' characterizing flavors were deceptively

1 created or reinforced using artificial flavoring.

2 102. Plaintiff Cooper first discovered Defendants' unlawful acts described herein
3 in July of 2020, when she learned the Products' characterizing flavors were deceptively
4 created or reinforced using artificial flavoring.

5 103. Plaintiff Buchannan first discovered Defendants' unlawful acts described
6 herein in July of 2020, when he learned the Products' characterizing flavors were
7 deceptively created or reinforced using artificial flavoring.

8 104. Plaintiffs relied upon and were deceived by the Products' deceptive labeling,
9 and specifically the omission of the legally required notice that it contained artificial
10 flavorings. Plaintiffs purchased the Products believing they were naturally flavored, based
11 on the Products' deceptive labeling and failure to disclose that they were artificially
12 flavored.

13 105. Plaintiffs, as reasonable consumers, are not required to subject consumer
14 food products to laboratory analysis, to scrutinize the back of the label to discover that the
15 product's front label is false and misleading, or to search the label for information that
16 federal regulations require be displayed prominently on the front – and, in fact, under state
17 law are entitled to rely on statements that Defendants place on or omit from the Products'
18 labeling. Defendants, but not Plaintiffs, knew or should have known that this labeling was
19 in violation of federal regulations and state law.

20 106. Because Plaintiffs reasonably assumed the Products to be free of artificial
21 flavoring, based on the Products' labels, when they were not, they did not receive the
22 benefit of their purchases. Instead of receiving the benefit of products free of artificial
23 flavoring, they received Products that were unlawfully labeled so as to deceive the
24 consumer into believing that they are exclusively naturally flavored and contain no
25 artificial flavoring, in violation of federal and state labeling regulations.

26 107. Plaintiffs would not have purchased the Products or would not have paid as
27 much as they had for the Products absent Defendants' misrepresentations and omissions.
28 Had Defendants not violated the law, Plaintiffs would not have been injured.

1 108. The Products were worth less than what Plaintiffs paid for them and class
2 members would not have paid as much as they have for the Products absent Defendants'
3 false and misleading statements and omissions.

4 109. Plaintiffs lost money as a result of Defendants' unlawful behavior. Plaintiffs
5 altered their position to their detriment and suffered loss in an amount equal to the amount
6 they paid for the Products.

7 110. Plaintiffs intend to, seek to, and will purchase the Products again when they
8 can do so with the assurance that the Products' labels, which indicate that the Products are
9 naturally flavored, are lawful and consistent with the Products' ingredients.

10 **V. CLASS ACTION ALLEGATIONS**

11 111. Plaintiffs bring this action on behalf of themselves and all others similarly
12 situated (the "Class" and "sub-class") as a proposed class action pursuant to the Class
13 Action Fairness Act of 2005, 28 U.S.C. § 1332(d), with a nationwide class and California
14 sub-class.

15 112. The Class is defined as follows:

16 All U.S. citizens who purchased one or more of the Products in the United
17 States on or after May 13, 2016, excluding Defendants and Defendants'
18 officers, directors, employees, agents, and affiliates, and the Court and its
19 staff.

20 113. The California sub-class is defined as follows:

21 All California citizens who purchased one or more of the Products in
22 California on or after May 13, 2016, excluding Defendants and Defendants'
23 officers, directors, employees, agents, and affiliates, and the Court and its
24 staff.

25 114. During the Class Period, the Products unlawfully contained the undisclosed
26 artificial flavors d-malic acid or dl-malic acid and were otherwise improperly labeled as
27 alleged herein. Defendants failed to label the Products as required by state and federal law.

28 115. The proposed Class and sub-class meet all criteria for a class action, including

1 numerosity, typicality, superiority, and adequacy of representation.

2 116. The proposed Class and sub-class satisfy numerosity. The Products are
3 offered for sale at over two thousand supermarkets in California alone; the Class numbers
4 at minimum in the hundreds of thousands. Individual joinder of the class members in this
5 action is impractical. Addressing the class members' claims through this class action will
6 benefit Class members, the parties, and the courts.

7 117. The proposed Class and sub-class satisfy typicality. Plaintiffs' claims are
8 typical of and are not antagonistic to the claims of other Class members. Plaintiffs and the
9 class members all purchased the Products, were deceived by the false and deceptive
10 labeling, and lost money as a result, purchasing products that were illegal to sell in
11 California and the United States.

12 118. The proposed Class and sub-class satisfy superiority. A class action is
13 superior to any other means for adjudication of the Class members' claims because each
14 class member's claim is modest, based on the Products' retail purchase price which is
15 generally under \$5.00. It would be impractical for individual class members to bring
16 individual lawsuits to vindicate their claims.

17 119. Because Defendants' misrepresentations were made on the label of the
18 Products themselves, all Class members including Plaintiffs were exposed to and continue
19 to be exposed to the omissions and affirmative misrepresentations. If this action is not
20 brought as a class action, Defendants can continue to deceive consumers and violate
21 California and other states' laws with impunity.

22 120. The proposed Class representatives satisfy adequacy of representation. Each
23 Plaintiff is an adequate representative of the Class as each seeks relief for the Class, their
24 interests do not conflict with the interests of the Class members, and each has no interest
25 antagonistic to those of other class members. Plaintiffs have retained counsel who are
26 competent in the prosecution of consumer fraud and class action litigation.

27 121. There is a well-defined community of interest in questions of law and fact
28 common to the Class, and these predominate over any individual questions affecting

1 individual Class members in this action.

2 122. Questions of law and fact common to Plaintiffs and the Class include:

- 3 a. Whether Defendants failed to disclose the presence of the
- 4 artificial flavoring ingredient dl-malic acid in the Product;
- 5 b. Whether the Products' label statement, "100% Natural" was a
- 6 false or misleading statement of fact;
- 7 c. Whether Defendants' labeling representations and omissions
- 8 constituted false advertising under California or other state law;
- 9 d. Whether Defendants' conduct constituted a violation of
- 10 California's Unfair Competition Law;
- 11 e. Whether Defendants' conduct constituted a violation of
- 12 California's Consumer Legal Remedies Act;
- 13 f. Whether Defendants' conduct constituted a violation of other
- 14 states' corresponding consumer protection laws;
- 15 g. Whether Defendants' label statements were affirmative
- 16 representations of the Products' composition and conveyed an
- 17 express warranty;
- 18 h. Whether Defendants' conduct constitutes a breach of implied
- 19 warranties pursuant to California's Commercial Code and other
- 20 states' statutory or common-law warranty law;
- 21 i. Whether the Class is entitled to restitution, rescission, actual
- 22 damages, punitive damages, attorney fees and costs of suit, and
- 23 injunctive relief; and
- 24 j. Whether members of the Class are entitled to any such further
- 25 relief as the Court deems appropriate.

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

124. Defendants have acted on grounds applicable to the entire Class, making final injunctive relief or declaratory relief appropriate for the Class as a whole.

125. Class treatment is therefore appropriate. Plaintiffs will, if notice is required, confer with Defendants and seek to present the Court with a stipulation and proposed order on the details of a class notice plan.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violations of the Consumers Legal Remedies Act ("CLRA")

Cal. Civ. Code §§ 1750, *et seq.*

(on behalf of the California Class)

126. Plaintiffs reallege and incorporate by reference the allegations made elsewhere in the Complaint as if set forth in full herein.

127. Plaintiffs' CLRA claim is based on purchases made by California Class members from May 13, 2017 to the present.

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

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

130. Defendants' failure to label the Products in accord with federal and state labeling regulations, omitting the required information that the Products contain artificial flavoring, was an unfair, deceptive, unlawful and unconscionable commercial practice.

131. Defendants' conduct violates the Consumer Legal Remedies Act.

132. As a result of Defendants' violations, Plaintiffs and the Class suffered ascertainable losses in the form of the price premiums they paid for the unlawfully labeled and marketed Products, which they would not have paid had the Products been labeled in accordance with federal and California law, and in the form of the reduced value of the Products purchased compared to the Products as labeled and advertised.

1 133. On or about October 15, 2020, Plaintiffs sent a notice letter to Defendants
 2 which complies with California Civil Code § 1782(a). Plaintiffs sent Defendants,
 3 individually and on behalf of the proposed Class, a letter via Certified Mail, demanding
 4 that Defendants rectify the actions described above by providing monetary relief, agreeing
 5 to be bound by their legal obligations, and giving notice to all affected customers of their
 6 intent to do so. A copy of Plaintiffs' October 15, 2020 CLRA letter is attached hereto as
 7 **Exhibit 1**.

8 134. More than thirty days have passed since Plaintiffs sent Defendants their
 9 CLRA letter and Defendants have failed to take the corrective action described in
 10 Plaintiffs' letter. Wherefore, Plaintiffs seek damages, restitution, injunctive relief, and
 11 attorneys' fees and costs for Defendants' violations of the CLRA.

12 **SECOND CAUSE OF ACTION**

13 **Violations of the Unfair Competition Law ("UCL"), Unlawful Prong**

14 **Cal. Bus. & Prof. Code §§ 17200, *et seq.***

15 **(on behalf of the California Class)**

16 135. Plaintiffs reallege and incorporate by reference each and every allegation
 17 contained elsewhere in this Complaint, as if fully set forth herein.

18 136. Plaintiffs' UCL claim is based on purchases made by California Class
 19 members from May 13, 2016 to the present.

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

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

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

140. Among other violations, Defendants' conduct in unlawfully distributing the Products in commerce in California violated U.S. FDA packaging and labeling regulations.

141. The Products' front labels fail to disclose that they contain synthetic artificial flavoring in violation of 21 CFR § 101.22 and California's Sherman Law and are therefore misbranded.

142. The Products contain dl-malic acid.

143. The dl-malic acid is an artificial flavoring material, and is included in the Products to create, simulate, and reinforce the Products' characterizing fruit flavors.

144. The dl-malic acid in the Products is not derived from any natural material as defined in 21 CFR § 101.22 and is therefore by law an artificial flavor.

145. Defendants failed to inform consumers of the presence of the artificial flavor in the Products, on either the front or back-label as required by law, and distributed the Products in interstate commerce and in California.

146. Defendants' practices are therefore unlawful as defined in Section 17200, *et seq.* of the California Civil Code.

THIRD CAUSE OF ACTION

Violations of the Unfair Competition Law ("UCL"), Unfair Prong

Cal. Bus. & Prof. Code §§ 17200, *et seq.*

(on behalf of the California Class)

147. Plaintiffs reallege and incorporate by reference each and every allegation contained elsewhere in this Complaint as if fully set forth herein.

148. Plaintiffs' UCL claim is based on purchases made by California Class members from May 13, 2016 to the present.

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

150. The Defendants' practices as described herein are "unfair" within the

1 meaning of the California Unfair Competition Law because the conduct is unethical and
2 injurious to California residents and the utility of the conduct to Defendants does not
3 outweigh the gravity of the harm to consumers.

4 151. While Defendants' decision to distribute the misbranded Products in
5 violation of federal and state law may have some utility to Defendants in that it allowed
6 Defendants to sell the Products to consumers who otherwise would not purchase an
7 artificially-flavored food product at the retail price or at all if it were labeled correctly, and
8 to realize higher profit margins than if the Products were formulated or labeled lawfully,
9 this utility is small and far outweighed by the gravity of the harm Defendants inflicted
10 upon California consumers.

11 152. Defendants' conduct also injures competing food product manufacturers,
12 distributors, and sellers that do not engage in the same unlawful, unfair, and unethical
13 behavior.

14 153. Moreover, Defendants' practices violate public policy expressed by specific
15 constitutional, statutory, or regulatory provisions, including the Sherman Law, the False
16 Advertising Law, and the FDA regulations cited herein.

17 154. Plaintiffs' and the California sub-class members' purchases of the Products
18 took place in California.

19 155. Defendants labeled the Products in violation of federal regulations and
20 California law requiring truth in labeling.

21 156. Defendants consciously failed to disclose material facts to Plaintiffs and the
22 Class in Defendants' advertising and marketing of the Products.

23 157. Defendants' conduct is unconscionable because, among other reasons, it
24 violates 21 C.F.R. § 101.22(c), which requires all foods containing artificial flavoring to
25 include:

26 A statement of artificial flavoring . . . [which] shall be placed on the food or
27 on its container or wrapper, or on any two or all three of these, as may be
28 necessary to render such a statement likely to be read by the ordinary person

1 under customary conditions of purchase and use of such food.

2 158. Defendants' conduct is "unconscionable" because it violates, *inter alia*, 21
3 C.F.R. § 101.22, which requires all food products distributed in commerce in the U.S. for
4 which artificial flavoring provides a characterizing flavor to disclose this fact prominently
5 on the product's front label.

6 159. Defendants intended that Plaintiffs and the Class rely on Defendants' acts or
7 omissions so that Plaintiffs and the other Class members would purchase the Products.

8 160. Had Defendants disclosed all material information regarding the Products in
9 their advertising and marketing, Plaintiffs and the Class would not have purchased the
10 Products or would have paid less for the Products.

11 161. Plaintiffs and the Class suffered injury in fact and lost money or property as
12 a result of Defendants' deceptive advertising: they were denied the benefit of the bargain
13 when they purchased the Products based on Defendants' violation of the applicable laws
14 and regulations, and purchased the Products in favor of competitors' products, which are
15 less expensive, contain no artificial flavoring, or are lawfully labeled.

16 162. Plaintiffs and the Class suffered an ascertainable loss of money. Defendants'
17 acts, omissions and practices detailed herein proximately caused Plaintiffs and other
18 members of the Class to suffer an ascertainable loss in the form of, *inter alia*, monies spent
19 to purchase the Products they otherwise would not have, and they are entitled to recover
20 such damages, together with appropriate penalties, including restitution, damages,
21 attorneys' fees and costs of suit.

22 163. Section 17200 also prohibits any "unfair, deceptive, untrue or misleading
23 advertising." For the reasons set forth above, Defendants engaged in unfair, deceptive,
24 untrue and misleading advertising in violation of California Business & Professions Code
25 § 17200.

26 164. Pursuant to California Business & Professions Code §17203, Plaintiffs seek
27 an order requiring Defendants to immediately cease such acts of unlawful, unfair and
28 fraudulent business practices and requiring Defendants to return the full amount of money

improperly collected to all those who purchased the Products.

FOURTH CAUSE OF ACTION

Violation of False Advertising Law (“FAL”)

Cal. Bus. & Prof. Code §§ 17500, *et seq.*

(on behalf of the California Class)

165. Plaintiffs reallege and incorporate by reference each and every allegation contained elsewhere in this Complaint as if fully set forth herein.

166. Plaintiffs’ FAL claim is based on purchases made by California Class members from May 13, 2017 to the present.

167. Defendants distributed, in California and in interstate commerce, Products that unlawfully fail to disclose artificial flavoring on their packaging as required by federal food labeling regulations.

168. The Products’ labeling and advertising in California falsely represent the Products as if they were solely naturally-flavored.

169. Some versions of the Products’ packaging and advertising distributed by ACC further claimed that the Products were “100% Natural.” This was false.

170. Under California’s False Advertising Law, Business and Professions Code §17500 *et seq.*,

“It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property . . . to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device . . . any statement, concerning that real or personal property . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. . . .” Cal. Bus. & Prof. Code §17500

171. The labeling and advertising statements on Products that Defendants

distributed, communicating to consumers that the Products were solely flavored with the natural fruit juices identified on the front labels, or was “100% Natural,” and concealing the fact that the Products contained a synthetic artificial flavor, were untrue and misleading, and Defendants at a minimum by the exercise of reasonable care should have known that labeling was untrue or misleading.

172. Defendants participated in and profited from the false advertising displayed on the Products’ labels.

173. Defendants’ conduct violated California’s False Advertising Law.

FIFTH CAUSE OF ACTION

Breach of Express Warranties

Cal. Comm. Code § 2313

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

174. Plaintiffs reallege and incorporate by reference the allegations found elsewhere in the Complaint as if set forth in full herein.

175. Plaintiffs’ breach of express warranty claim is based on purchases made by Class members from May 13, 2016 to the present.

176. The Products’ front labels misleadingly claim by operation of California law that the Products are flavored only with the listed characterizing flavors.

177. The Products’ front labels fail to disclose the use of artificial flavoring “immediately and conspicuously preced[ing] or follow[ing]” the names of the characterizing flavors, as required by law. *See* 21 C.F.R. 101.22(i)(3).

178. The failure to disclose the use of artificial flavoring on the Products’ front labels, by operation of law, informs consumers that the Products do not contain artificial flavors.

179. The Products’ front labels falsely warrant by operation of law that the Products are flavored only with the listed fruits.

180. Some versions of the Products’ labels distributed by ACC also warranted that the Products were “100% Natural.”

1 181. These promises became part of the basis of the bargain between the parties
2 and thus constituted express warranties, which Defendants breached as the Products are
3 artificially flavored.

4 182. Defendants sold the goods to Plaintiffs and other consumers who bought the
5 goods from Defendants.

6 183. As a result, Plaintiffs and other consumers did not receive goods as warranted
7 by Defendants.

8 184. Within a reasonable amount of time after Plaintiffs discovered that the
9 Products contained synthetic flavoring ingredients, Plaintiffs notified the Defendants of
10 such breach.

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

13 **SIXTH CAUSE OF ACTION**

14 **Breach of Implied Warranties**

15 **Cal. Comm. Code § 2314**

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

17 186. Plaintiffs reallege and incorporate all of the allegations elsewhere in the
18 Complaint as if set forth in full herein.

19 187. Plaintiffs' breach of implied warranty claim is based on purchases made by
20 Class members from May 13, 2016 to the present.

21 188. Defendants' label representations also created implied warranties that the
22 Products were suitable for a particular purpose, specifically as beverage products
23 containing no artificial flavors. Defendants breached this warranty as well.

24 189. Because the Products do not contain an "artificially flavored" disclosure as
25 required by law, the Products' front labels misleadingly imply that the Products are not
26 flavored with artificial flavoring ingredients and are flavored solely with the natural
27 ingredients comprising the characterizing flavors.

28 190. As alleged in detail above, at the time of purchase Defendants had reason to

1 know that Plaintiffs as well as all members of the Class, intended to use the Products as
2 beverage products that did not contain artificial flavoring.

3 191. This became part of the basis of the bargain between the parties.

4 192. Based on that implied warranty, Defendants sold the goods to Plaintiffs and
5 other Class members who bought the goods from Defendants.

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

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

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

14 196. In addition, the Products were not merchantable in California, as they were
15 not of the same quality as other products in the category generally acceptable in the trade.

16 197. The Products would not pass without objection in the trade when packaged
17 with their existing labels, because the Products were misbranded and illegal to sell in
18 California. *See* Cal. Comm. Code 2314(2)(a).

19 198. The Products also were not acceptable commercially and breached their
20 implied warranty because they were not adequately packaged and labeled as required. Cal.
21 Comm. Code 2314(2)(e).

22 199. The Products also were not acceptable commercially and breached their
23 implied warranty because they did not conform to the promises or affirmations of fact
24 made on the containers or labels, Cal. Comm. Code 2314(2)(f), and other grounds as set
25 forth in Commercial Code section 2314(2).

26 200. By offering the Products for sale and distributing the Products in California,
27 Defendants also warranted that the Products were not misbranded and were legal to
28 purchase in California. Because the Products were misbranded in several regards and were

1 therefore illegal to sell or offer for sale in California, Defendants breached this warranty
2 as well.

3 201. As a result of this breach, Plaintiffs and other California consumers did not
4 receive goods as impliedly warranted by Defendants.

5 202. Defendants' conduct violated similar state warranty laws in states other than
6 California.

7 203. Within a reasonable amount of time after the Plaintiffs discovered that the
8 Products contained synthetic ingredients, Plaintiffs notified the Defendants of such
9 breach.

10 204. As a proximate result of this breach of warranty, Plaintiffs and other
11 California and other states' consumers have been damaged in an amount to be determined
12 at trial.

13 205. As a result, Plaintiffs and the Class are entitled to injunctive and equitable
14 relief, restitution, and an order for the disgorgement of the funds by which Defendants
15 were unjustly enriched.

16 **SEVENTH CAUSE OF ACTION**

17 **Negligent Misrepresentation**

18 **Cal. Civ. Code §§ 1709-1710 and the common law of all states**

19 **(on behalf of the Nationwide Class and the California Class)**

20 **(against Defendant ACC only)**

21 206. Plaintiffs reallege and incorporate the allegations elsewhere in the Complaint
22 as if set forth in full herein.

23 207. Plaintiffs' negligent misrepresentation claim is based on purchases made by
24 Class members from May 13, 2018 to the present.

25 208. Defendant ACC had a duty to disclose to Plaintiffs and the Class members
26 the use of artificial flavoring ingredients on the front label of the Products pursuant to
27 California and federal law. Defendant ACC was in a superior position than Plaintiffs and
28 the Class members such that reliance by Plaintiffs and the Class members was justified.

1 Defendant ACC possessed the skills and expertise to know the type of information that
2 would influence a consumer's purchasing decision.

3 209. During the applicable Class period, Defendant ACC negligently or carelessly
4 misrepresented, omitted, and concealed from consumers material facts regarding the
5 Products, including the use of artificial flavoring ingredients.

6 210. The label representations on Products that Defendant ACC distributed
7 negligently misrepresented the Products as if they were exclusively naturally flavored.

8 211. Defendant ACC was negligent in distributing Products labeled as if they were
9 exclusively naturally flavored and in failing to identify the Products as artificially
10 flavored.

11 212. Defendant ACC represented the Products to Plaintiffs and the Class as solely
12 naturally flavored as if this were true. Defendant ACC intended for Plaintiffs and the Class
13 to rely on this representation.

14 213. Defendant ACC's representations were not true.

15 214. The Products are not exclusively naturally flavored but are instead artificially
16 flavored as described herein.

17 215. Defendant ACC failed to secure a reasonable basis for believing that the
18 Products were naturally flavored at the time or any time relevant to this action.

19 216. Defendant ACC was careless in ascertaining the truth of its representations
20 in that it knew or should have known that Plaintiffs and the Class members would not
21 have realized the use of artificial flavoring ingredients in the Products.

22 217. Plaintiffs and the Class reasonably relied on this representation. Plaintiffs and
23 the Class members were unaware of Defendant ACC's unlawful misrepresentations and
24 omissions and, as a result, justifiably relied on them when making the decision to purchase
25 the Products.

26 218. Plaintiffs and the Class were harmed thereby as alleged herein. Plaintiffs and
27 the Class members would not have purchased the Products, or would have paid less for
28 the Products, if the true facts had been known.

219. Plaintiffs and the Class's reliance was a substantial factor in that harm.

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

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves, all others similarly situated in California, and all others similarly situated in the U.S., pray for judgment against Defendants as follows:

- A. An order confirming that this action is properly maintainable as a class action as defined above, appointing Plaintiffs and their undersigned counsel to represent the Class and Subclass, and requiring Defendants to bear the cost of class notice;
- B. An order declaring that the conduct complained of herein violates the CLRA;
- C. An order declaring that the conduct complained of herein violates the UCL;
- D. An order declaring that the conduct complained of herein violates the FAL;
- E. An order declaring that the conduct complained of herein violates corresponding consumer protection laws in states other than California;
- F. An order declaring that the conduct complained of herein breached express warranties, implied warranties, or both;
- G. An order requiring Defendants to disgorge any benefits received from Plaintiffs and the Class and any unjust enrichment realized as a result of the improper and misleading labeling, advertising, and marketing of the Product;
- H. An order requiring Defendants to pay restitution and damages to Plaintiffs and Class members so that they may be restored any money which was acquired by means of any unfair, deceptive, unconscionable or negligent acts;
- I. An award of punitive damages in an amount to be proven at trial;
- J. An order enjoining Defendants' deceptive and unfair practices;
- K. An order requiring Defendants to conduct corrective advertising;

- L. An award of pre-judgment and post-judgment interest;
- M. An award of attorney fees and costs; and
- N. Such other and further relief as this Court may deem just, equitable, or proper.

VIII. JURY DEMAND

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

DATED: April 23, 2021

Respectfully Submitted,

/s/ Ronald A. Marron

Ronald A. Marron

**LAW OFFICES OF
RONALD A. MARRON,
APLC**

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***Counsel for Plaintiffs and the
Proposed Class***

EXHIBIT 1

LAW OFFICES OF
RONALD A. MARRON

A PROFESSIONAL LAW CORPORATION

651 Arroyo Drive
San Diego, California 92103

Tel: 619.696.9006
Fax: 619.564.6665

October 15, 2020

Via: Certified Mail, receipt acknowledgment with signature requested

Vilore Foods Company, Inc.
ATTN: Legal Department
3838 Medical Drive,
San Antonio, Texas 78229

Arizona Canning Company, Inc.
ATTN: Legal Department
8755 South Rita Road,
Tucson, Arizona 85747

Re: California Consumers Legal Remedies Act (CLRA) Demand Letter

To Whom It May Concern:

PLEASE TAKE NOTICE that the Law Offices of Ronald A. Marron (“Law Firm”) represents Warren Gross, Deborah Levin, Shelby Cooper, and Edward Buchanan (collectively, “our clients”), purchasers of Kern’s Nectar drinks (the “Products”). This notice and demand letter provides Vilore Foods Company, Inc. and Arizona Canning Company, Inc. (“You”) with a notice and demand for corrective action arising from Your misrepresentations and constitutes the required 30-day notice before claims for damages may be filed under the Consumers Legal Remedies Act, California Civ. Code 1750 *et seq.* (“CLRA”).

Our clients purchased the Products for personal and household use multiple times in California. These Products are falsely advertised and misbranded under California law as each such Product contains undisclosed artificial flavoring. An example of the front labels of two of the Products are shown below:



The Products' front labels fail to identify the Products as artificially flavored. However, the Products' back-labels state that the Products include "malic acid."

The Product labels fail to identify the Products as artificially flavored though they contain artificial malic acid. The Product labels are therefore misleading and violate U.S. federal and California state labeling laws; constitute false advertising as well as unfair competition; and violate the CLRA under California law.

While some forms of malic acid are natural, the malic acid in the Products were found to be an artificial flavoring made from petrochemicals. Malic acid comes in two chemical forms. The l-malic acid form is a fruit acid that is found in fruits and vegetables and may be isolated from those sources, though it may also be produced industrially by chemical synthesis. The d- form of malic acid is not derived from natural sources, however; it is produced by chemical synthesis from certain petrochemicals, chiefly butane or benzene, through an intermediate conversion to maleic anhydride.

Kern's Products include d-malic acid, the synthetic petrochemical version of the compound. U.S. FDA regulations, incorporated verbatim into California's Sherman Law, define an artificial flavor as "... any substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof." 21 C.F.R. 101.22 (a)(1).

The d-malic acid in Kern's Nectar products are derived from a petrochemical, not from "a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof." *Id.* The malic acid in the identified Products is therefore an artificial flavor under U.S. federal and California law. *Id.*

Artificial flavors in food products must, under both U.S. and California law, be disclosed as such in the back-label ingredient list and on the front label in any product for which the artificial flavor simulates, resembles, or reinforces the characterizing flavor. *See* 21 C.F.R. 101.22 (c), (g)(3), (h), and (i). The malic acid in the Products simulate, resemble, or reinforce the characterizing labeled fruit flavor.

Your failure to disclose the artificial flavoring material on both the front and back labels of the Products therefore violates Federal regulations and California law.¹ The Products are misbranded and falsely advertised under California law, violate the CLRA as well as other California laws and regulations, and are illegal to sell in California with the current labeling.

Because the Products' labels fail to disclose the use of artificial flavoring, our clients were not aware at the time they purchased the Products that they were artificially flavored. Had the labels properly disclosed this, as required by California and Federal law, our clients and the class of California and/or U.S. consumers they propose to represent would not have purchased the Products or would not have paid the advertised prices for them.

¹ This failure to disclose likely violates other states' consumer protection statutes as well.

Additional related products

California's CLRA notice procedure requires that all products intended to be included in CLRA litigation also be listed in the notice letter. The following Kern's products, in addition to the above-identified Products, also contain undisclosed artificial flavoring in the form of d-malic acid and are therefore included in this notice letter as well:

- Kern's Apricot Nectar;
- Kern's Guava Nectar;
- Kern's Peach Nectar;
- any other Kern's Nectar beverages or juice blends containing artificial d-malic acid that were offered for sale during the Class period (collectively the "Additional Products").

Our clients assert that these Additional Products also contain undisclosed or concealed artificial flavors, are therefore also mislabeled and misbranded under California law, and are similarly unlawful to sell in California. By this letter, our clients provide the required CLRA notice regarding the Additional Products.

Class members in the proposed class of purchasers that our clients will represent in a putative class action purchased one or more of the Kern's products described herein. On behalf of themselves, all others similarly situated, and the general public, our clients therefore hereby demand that You remedy the above-described violations within 30 days of your receipt of this letter. This letter demands that you take prompt and specific corrective action, to include:

1. Revising the Products' and the Additional Products' labeling such that all labels properly disclose any included artificial flavoring and do not improperly imply that the product is flavored only by natural flavor ingredients when it contains artificial flavoring, or,
2. reformulating the Products and the Additional Products so that they do not include undisclosed artificial flavors; and,
3. recalling, or in the alternative, issuing mandatory corrected labels and instructions for re-labeling all currently unsold improperly-labeled stock; and,
4. conducting a corrective advertising campaign to inform consumers regarding the former improper product labeling; and,
5. initiating a process to refund monies paid by California consumers who purchased the above-listed Products and Additional Products that contained undisclosed artificial flavoring from July 1, 2014 to the present, where such products were not labeled to disclose the included artificial flavoring.

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Please also be advised that the alleged unfair methods of competition or unfair or deceptive acts or practices are in violation of the Consumers Legal Remedies Act (“CLRA”) and include, but are not necessarily limited to:

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

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

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

If You do not promptly initiate these corrective actions, our clients, on behalf of themselves, all others similarly situated, and the general public, will bring legal claims for actual and punitive damages under the CLRA and any other applicable consumer laws and regulations, to compel these steps, as well as seeking any other legally-appropriate restitution and/or damages, attorneys’ fees, costs, incentive awards, and the costs of class notice and administration.

I would also like to remind you of your legal duty to preserve all records relevant to such potential litigation. *See National Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-57 (N.D. Cal. 2006). We anticipate that at a minimum all e-mails, letters, reports, notes, minutes of meetings, voice mails, internal corporate instant messages, and laboratory and other records that relate to the formulation, testing, advertising, and marketing of the indicated Kern’s Products will be sought in the forthcoming discovery process. You therefore must inform any employees, contractors, and third-party agents such as product ingredient suppliers, product and flavor formulation consultants, and advertising agencies handling these product accounts to preserve all such relevant information.

Very truly yours,

/s/ Ronald A. Marron
Ronald A. Marron

VENUE AFFIDAVIT

I, Warren Gross, declare as follows:

1. I am a Plaintiff in this action. I make this affidavit pursuant to California Civil Code Section 1780(d).
2. The Complaint in this action is filed in a proper place for trial of this action because Defendants conduct business in the County of San Diego and at least some of the transactions that form the basis of this complaint have taken place in the County of San Diego.

I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on Apr 20, 2021 in Tucson, Arizona.

Warren gross

Warren Gross

VENUE AFFIDAVIT

I, Deborah Levin, declare as follows:

1. I am a Plaintiff in this action. I make this affidavit pursuant to California Civil Code Section 1780(d).
2. The Complaint in this action is filed in a proper place for trial of this action because Defendants conduct business in the County of San Diego and at least some of the transactions that form the basis of this complaint have taken place in the County of San Diego.

I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on Apr 20, 2021 in California.


Deborah levin (Apr 20, 2021 13:40 PDT)

Deborah Levin

VENUE AFFIDAVIT

I, Shelby Cooper, declare as follows:

1. I am a Plaintiff in this action. I make this affidavit pursuant to California Civil Code Section 1780(d).
2. The Complaint in this action is filed in a proper place for trial of this action because Defendants conduct business in the County of San Diego and at least some of the transactions that form the basis of this complaint have taken place in the County of San Diego.

I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on Apr 20, 2021 in California.


Shelby Cooper (Apr 20, 2021 13:30 PDT)

Shelby Cooper

VENUE AFFIDAVIT

I, Edward Buchannan, declare as follows:

1. I am a Plaintiff in this action. I make this affidavit pursuant to California Civil Code Section 1780(d).
2. The Complaint in this action is filed in a proper place for trial of this action because Defendants conduct business in the County of San Diego and at least some of the transactions that form the basis of this complaint have taken place in the County of San Diego.

I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on Apr 20, 2021 in California.

EDWARD BUCHANNAN
EDWARD BUCHANNAN (Apr 20, 2021 14:01 PDT)

Edward Buchannan