

1 Robert J. Stein, III (CA Bar No. 212495)
rstein@DSSLaw.com
2 Anthony E. DiVincenzo (CA Bar No. 259714)
aedivincenzo@dsschicagolaw.com
3 DIVINCENZO SCHOENFIELD STEIN
3 Park Plaza, Suite 1650
4 Irvine, CA 92614
Tel: (714) 881-7002

5 Anthony Lanza (CA Bar No. 156703)
6 tony@lanzasmith.com
Ramin T. Montakab (CA Bar No. 297551)
7 ramin@lanzasmith.com
LANZA & SMITH, PLC
8 3 Park Plaza, Suite 1650
Irvine, CA 92614
9 Tel: (949) 221-0490

10 Attorneys for Plaintiff
THERESA REISFELT AND THE CLASS

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF ORANGE**
14

15 THERESA REISFELT on behalf of herself and
all others similarly situated,

16 Plaintiff,

17 v.

18 TOPCO ASSOCIATES, LLC, a Delaware
19 Limited Liability Company, and DOES 1 through
20 25, inclusive,

21 Defendants.

CASE NO.: 30-2020-01141971-CU-BT-CXC

CLASS ACTION COMPLAINT FOR:

1. **Violation of Cal. Unfair Competition, Cal. Business & Professions Code §17200, et seq.**
2. **Violation of Cal. Consumers Legal Remedies Act, Cal. Civil Code §1750, et seq.;**

22
23
24 Assigned for All Purposes
Judge William Claster

25
26 CX-104

1 Plaintiff Theresa Reisfelt (“Plaintiff”), by and through her attorneys, DiVincenzo Schoenfield
2 Stein and Lanza & Smith, PLC, brings this class action complaint on behalf of herself and all others
3 similarly situated (the “Class”), alleging facts related to her own purchases based on personal
4 knowledge and other facts based upon the investigation of counsel.

5 NATURE OF THE ACTION

6 1. This is a consumer protection class action arising from Topco Associates LLC
7 (“Defendant” or “Topco”), engaging in the practice of “slack-filling” boxes of its microwave
8 popcorn branded as Full Circle Market™. The practice of using oversized containers with
9 substantial, nonfunctional, empty space inside them is called “slack-fill” and is illegal under
10 California and Federal law. Both Federal and California laws have long prohibited nonfunctional
11 slack-fills for food containers. Although the legislative and administrative basis and policies behind
12 the law are based, in part, on findings that this practice leads consumers to believe they are receiving
13 a greater quantity of the food than is in the package (even if the quantity or weight is accurately
14 displayed on the label), Plaintiff’s claims are based solely on the grounds that Defendant’s conduct is
15 unlawful and unfair. Plaintiff does **not** assert any claims based on misrepresentation.

16 2. Defendant’s Full Circle Market™ microwavable popcorn boxes contain a significant
17 amount of nonfunctional slack-fill. Specifically, the boxes have roughly 25% empty space – enough
18 to easily fit an additional bag of popcorn. By violating Federal and California slack-fill laws,
19 Defendant’s products are deemed “misbranded” and cannot legally be sold in interstate commerce.
20 Defendant’s abuses of state and federal laws violate the unlawful and unfair prongs of California’s
21 Unfair Competition Law (Bus & Prof. Code §17200, *et seq.*) (“UCL”), for which Plaintiff asserts
22 claims for unlawful and unfair practices only; she does *not* assert claims for deceptive or fraudulent
23 practices under the UCL. Defendant’s conduct also violates California’s Consumer Legal Remedies
24 Act, Section 1750 of the Cal. Civil Code, *et seq* (“CLRA”).

25 PARTIES

26 3. Plaintiff is, and at all relevant times was, an adult residing in Orange County,
27 California. Reisfelt enjoyed Defendant’s Full Circle Market™ microwavable popcorn and purchased
28 the product on several occasions from Stater Bros. Markets stores located in Tustin, Orange County,

1 continuous business in California. Based on information and belief, Defendant has marketed and
2 sold millions of dollars of food goods to California residents for their consumption.

3 8. Venue is proper in this county under Business and Professions Code §17203 and
4 Code of Civil Procedure §§395(a) and 395.5. Defendant transacts business and receives substantial
5 compensation from sales in Orange County. Defendant intentionally distributed its products for sale
6 to consumers in Orange County retail stores. Plaintiff resides in Orange County and purchased
7 Defendant's products in Orange County.

8 FACTUAL ALLEGATIONS

9 9. Topco packaged and distributed its Full Circle Market™ brand of microwavable
10 popcorn in boxes that were substantially under-filled and contained a substantial amount of
11 unnecessary empty space, *i.e.* non-functional slack-fill. This is apparent because Defendant's boxes
12 only contain three bags of popcorn, whereas they can comfortably fit four bags of popcorn without
13 any manipulation of the box. Because four (rather than three) of the popcorn bags can comfortably
14 fit in each box, indeed, the boxes are at least 25% under filled.

15 10. Defendant's microwavable popcorn bags are individually plastic wrapped and
16 packaged in colored cardboard boxes. Consumers cannot see the empty space contained in the
17 product packaging, *i.e.* the non-functional slack-fill. The boxes are substantially under-filled and
18 contain substantial amount of unnecessary space, *i.e.* non-functional slack-fill.

19 11. Both federal and California law prohibit nonfunctional slack-fill for food containers,
20 which would include microwavable popcorn and its packaging. As explained below, California has
21 codified the federal law and regulations.

22 12. **The Slack-Fill Violates Federal Law.** Federal statutes and regulations prohibit
23 nonfunctional slack fill. Pursuant to the Federal Food Drug and Cosmetic Act, 21 U.S.C. §403(d)
24 and 21 C.F.R. §100.100 provides:

25 "In accordance with Section 403(d) of the [Food Drug and Cosmetic
26 Act], a food shall be deemed to be misbranded if its container is so
27 made, formed, or filled as to be misleading.

28 (a) A container that does not allow the consumer to fully view its
contents shall be considered to be filled as to be misleading if it

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:

- (1) Protection of the contents of the package;
- (2) The requirements of the machines used for enclosing the contents in such package;
- (3) Unavoidable product settling during shipping and handling;
- (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
- (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or a durable commemorative or promotional packages; or
- (6) Inability to increase the level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

13. The FDA deems a product containing nonfunctional slack fill to be “misbranded” within the meaning of the Food Drug and Cosmetic Act. As such, the sale of the packages of Defendant’s boxes with only three Pops is prohibited under 21 U.S.C. §331.

14. **The Slack-Fill Also Violates California Law.** California law expressly prohibits nonfunctional slack-fill. California has adopted the federal regulations and codified them as the California “Fair Packaging and Labeling Act” (“FPLA”). Bus & Prof Code §12606, et seq. The FPLA states that it “applies to food containers subject to Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)) and Section 100.100 of Title 21 of the Code of Federal Regulations.” Bus & Prof. Code §12606.2(a). The FPLA uses identical language, as is relevant here,

1 to 21 CFR §100.100. Bus & Prof Code §12606.2(b) and (c)(1)-(6). The text of FPLA contains
2 additional provisions which, based on the express language of the statute, are inoperative.¹

3 15. Defendant's Full Circle Market™ boxes of microwavable popcorn do not meet any of
4 the six exemptions under federal or California law.

5 16. Defendants' slack-fill does not protect the content of the packages. The three bags of
6 microwavable popcorn per box, each individually plastic wrapped, do not gain any additional
7 protection from the extra space in the box. If the boxes were filled, *i.e.* the number of bags in each
8 box was commensurate with the size of the packaging, the bags would have less room to move
9 around during shipping and be less likely to sustain damage. See 21 CFR §100.100(a)(1); Cal. Bus
10 & Prof. Code § 12606.2(a)(1).

11 17. The requirements of packaging machines do not justify or require the slack-fill.
12 Defendant's boxes are sealed with hot glue. As such, upon information and belief, the equipment
13 used to manufacture and seal the boxes does not breach the inside of boxes during the packaging
14 process. The hot glue is applied to an exterior flap of the box which is then sealed by a second
15 exterior flap that is folded down onto the glued surface. Neither the hot glue nor the sealing
16 equipment requires a substantial amount of slack-fill in the box during the manufacturing and
17 packaging processes. See 21 CFR §100.100(a)(2); Cal. Bus & Prof. Code § 12606.2(a)(2).

18 18. The slack-fill is not caused by product settling during shipping and handling. Given
19 the product's density, shape, and composition, any settling occurs immediately at the point of filling
20 the box. No additional product settling occurs during subsequent shipping and handling (see 21 CFR
21 §100.100(a)(3); Cal. Bus & Prof. Code § 12606.2(a)(3)).

22
23
24 _____
25 ¹ Bus & Prof Code §§12606.2(c)(7)-(8) add additional requirements and exemptions which are not
26 included in the 21 C.F.R. 100.100 or otherwise imposed under 21 U.S.C. §343(d). As such, pursuant
27 to Bus & Prof Code §§12606.2(e) and (f) they are inoperative. To wit, Bus & Prof. §12606.2(f)
28 states "If the requirements of this section do not impose the same requirements as are imposed by
Section 403(d) of the Federal Food Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any
regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not
identical to the federal requirements, and for this purpose, those federal requirements are
incorporated into this section and shall apply as if they were set forth in this section."

1 19. The slack-fill space is not needed to perform a specific function, such as preparing the
2 food. The popcorn bags are removed from the packing for consumption (e.g., the microwavable
3 popcorn is not prepared or consumed in the cardboard packing box). See 21 CFR §100.100(a)(4);
4 Cal. Bus & Prof. Code § 12606.2(a)(4).

5 20. Defendant's packaging itself lacks independent value from the food it contains. The
6 cardboard packaging is not a commemorative item nor is it a reusable container which is part of the
7 presentation of the food, nor is it intended for use after the food is consumed. See 21 CFR
8 §100.100(a)(5); Cal. Bus & Prof. Code § 12606.2(a)(5).

9 21. The slack-filled package was not necessary to prevent pilfering and accommodate
10 required food labeling. Indeed, as will be determined through discovery, Defendant should be able to
11 include four popcorn bags in each box. Alternatively, Defendant could reduce the size of the
12 containers to eliminate the nonfunctional slack-fill. See 21 CFR §100.100(a)(6); Cal. Bus & Prof.
13 Code § 12606.2(a)(6).

14 22. There is no lawful reason for the substantial non-functional slack-fill contained in
15 Defendant's packaging of its Full Circle Market™ microwavable popcorn. Defendant is
16 overcharging reasonable consumers because its packaging is substantially larger than necessary to
17 contain the three microwavable popcorn bags included per box.

18 **CLASS ALLEGATIONS**

19 23. Plaintiff brings count I (the UCL Cause of Action) as a class action pursuant to
20 California Code of Civil Procedure §382 on behalf of a Class consisting of:

21 All persons who made retail purchases in the State of California of Full Circle Market™
22 Microwavable Popcorn from June 9, 2016, through the date a class is certified.

23 Excluded from the Class are the officers, directors, or employees of Defendant; any entity in
24 which Defendant has a controlling interest; and any affiliate, legal representative, heir or
25 assign of Defendant. Also excluded from the Class are the judge to whom this case is
26 assigned and any member of the judge's immediate family.
27
28

1 24. The Class is so numerous that joinder of all members is impracticable. Plaintiff
2 believes the class consists of, at least, many thousands of members. As a result, individual joinder of
3 all purchasers is impractical.

4 25. Plaintiff's claims are typical of the claims of the other members of the Class, as
5 Plaintiff and all other members of the Class sustained injuries arising out of Defendant's conduct as
6 alleged herein. The slack-filled containers were the same for all members of the class. Further,
7 Plaintiff is a member of the Class she seeks to represent.

8 26. Plaintiff will fairly and adequately protect the interests of the members of the Class
9 and has retained counsel competent and experienced in complex class action litigation. Plaintiff has
10 no interests that are contrary to, or in conflict with, those of the other members of the Class. Plaintiff
11 and counsel are committed to the vigorous prosecution of this action on behalf of all Class members.

12 27. Common questions of law and fact exist as to all members of the Class and
13 predominate over any questions affecting solely individual members of the Class. Among the
14 questions of law and fact common to the Class are:

- 15 a) Whether Defendant's Full Circle Market™ Microwavable Popcorn packages contain
16 non-functional slack-fill in violation of California Business and Professions Code
§12606.2 (FPLA), *et seq.*;
 - 17 b) Whether Defendant's Full Circle Market™ Microwavable Popcorn packages contain
18 non-functional slack-fill in violation of 21 U.S.C. §403(d) *et seq.* and 21 C.F.R.
100.100;
 - 19 c) The number of popcorn bags that could or should be contained in Defendant's
20 packaging;
 - 21 d) Whether Defendant's packages were misbranded and prohibited from being sold in
interstate commerce under 21 U.S.C. §331;
 - 22 e) Whether Defendant's conduct is an unfair business practice within the meaning of
23 California Business and Professions Code §17200, *et seq.*;
 - 24 f) Whether Defendant's conduct is an unlawful business practice within the meaning of
California Business and Professions Code §17200, *et seq.*;
 - 25 g) The appropriate measure of restitution and/or other relief; and
 - 26 h) Whether Defendant should be enjoined from continuing its unlawful practices.
- 27
28

1 28. Class action treatment is superior to the alternatives for the fair and efficient
2 adjudication of the controversy alleged herein. Such treatment will permit a large number of
3 similarly situated persons to prosecute their common claims in a single forum simultaneously,
4 efficiently, and without the duplication of effort and expense that numerous individual actions would
5 entail. No difficulties are likely to be encountered in the management of this class action that would
6 preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient
7 adjudication of this controversy.

8 29. Defendant has acted on grounds generally applicable to the entire Class, thereby
9 making final relief appropriate with respect to the Class as a whole. Prosecution of separate actions
10 by individual members of the Class could create the risk of inconsistent or varying adjudications
11 with respect to individual members of the Class that could establish incompatible standards of
12 conduct for Defendant.

13 30. A class action is superior to other available methods for the fair and efficient
14 adjudication of this controversy since joinder of all members is impractical. Further, the amount at
15 stake for many of the Class members is small, meaning that few, if any, Class members could afford
16 to maintain individual suits against Defendant. The expense and burden of individual litigation
17 would make it impracticable or impossible for the Class to prosecute their claims individually.

18 31. Without a class action, Defendant will likely retain the benefit of their wrongdoing
19 and could continue a course of action, which would result in further damages to the Class. Plaintiff
20 envisions no difficulty in the management of this action as a class action.

21 **FIRST CAUSE OF ACTION**
22 **For Violation of California Unfair Competition Law,**
23 **Cal. Business & Professions Code §17200, *et seq* (UCL)**

24 32. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth
25 herein.

26 33. At all relevant times, the UCL was in full force and effect.

27 34. The UCL prohibits the use of “any unlawful, unfair or fraudulent business act or
28 practice.” (Bus & Prof. Code §17200)

1 35. Section 17203 of the UCL empowers the Court to enjoin any conduct that violates the
2 UCL and “make such orders or judgments, including the appointment of a receiver, as may be
3 necessary to prevent the use or employment by any person of any practice which constitutes unfair
4 competition, as defined in this chapter, or as may be necessary to restore to any person in interest
5 any money or property, real or personal, which may have been acquired by means of such unfair
6 competition.”

7 36. Plaintiff has “suffered injury in fact and has lost money or property as a result of the
8 unfair competition” as complained of herein. Bus & Prof. Code §17204. Plaintiff has paid money for
9 Defendant’s products that contained nonfunctional slack-fill and were “misbranded.” As such, the
10 products could not legally be sold in interstate commerce. The monies that Plaintiff and the class
11 members paid for the products resulted from unfair and illegal competition by Defendant and
12 Plaintiff and the class members are entitled to an order restoring those monies to them and an order
13 enjoining Defendant from selling nonfunctionally slack-filled products in the State of California.
14 Additionally, even if Defendant’s Full Circle Market™ Microwavable Popcorn packages could have
15 legally been sold in interstate commerce, Plaintiff overpaid and/or acquired less than she would have
16 if the same packages had not contained nonfunctional slack-fill.

17 37. Defendant’s conduct violated the unlawful prong of the UCL, as it violated the
18 California FPLA and the Federal Food Drug and Cosmetic Act (and regulations promulgated
19 thereunder), both of which prohibit nonfunctional slack-fill. Further, by violating the federal slack-
20 fill regulations, Defendant’s products are deemed “misbranded” and, thus, illegal to sell. 21 U.S.C.
21 §331. It is not necessary for Plaintiff to establish that Defendant violated both laws. A violation of
22 either law establishes a violation of the UCL.

23 38. Defendant’s conduct also violated the unfair practices prong of the UCL. Defendant’s
24 conduct violates both California and federal public policy, as shown by their respective prohibitions
25 on nonfunctional slack-fill and prohibition on introducing misbranded products into interstate
26 commerce. The conduct is also anti-competitive and puts competitors who follow the law at a
27 disadvantage. Defendant’s conduct suppresses competition and has a negative impact on the
28 marketplace, decreasing consumer choice. Further, Defendant’s conduct causes significant aggregate

1 harm to consumers, causing them to overpay, because the increased empty space in the packages is
2 nonfunctional slack-fill.

3 39. Defendant’s violations of the UCL entitle Plaintiff and the class members to seek
4 injunctive relief, including, but not limited to ordering Defendant to permanently cease their illegal
5 conduct and provide full restitution to Plaintiff and the class members.

6 **SECOND CAUSE OF ACTION**
7 **For Violation of California Consumers Legal Remedies Act,**
8 **California Civil Code §1750, *et seq.* (CLRA)**

9 40. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth
10 herein.

11 41. The CLRA prohibits certain “unfair methods of competition and unfair or deceptive
12 acts or practices.” Civil Code § 1770(a)(5) prohibits conduct which is unfair or unlawful because a
13 person represents that goods have “characteristics” or “quantities” that they do not have. By
14 including the nonfunctional slack-fill in violation of California and Federal law, as described above,
15 Defendant has committed unfair and unlawful acts, practices, and methods of competition in
16 violation of the CLRA.

17 42. Plaintiff brings this cause of action pursuant to Civil Code §1750, *et seq.*, the CLRA,
18 on her own behalf and on behalf of all other persons similarly situated pursuant to Cal. Civil Code
19 §§1781(a) & (b).

20 43. The CLRA provides its own class certification standards, which makes class
21 certification mandatory where the requirements are met. Section 1781 provides:

22 (b) the Court shall permit the suit to be maintained on behalf of all
23 members of the represented class if all of the following conditions
24 exist:

25 (1) It is impracticable to bring all members of the class before the
26 court.

27 (2) The questions of law or fact common to the class are substantially
28 similar and predominate over the questions affecting the individual
members.

(3) The claims or defenses of the representative plaintiff is typical of
the claims or defenses of the class.

1 (4) The representative plaintiff will fairly and adequately protect the
2 interests of the class

3 44. For the reasons stated in paragraphs 3 to 31, all of the requirements of California
4 Civil Code §1781(b) are met. Plaintiff seeks certification of a CLRA class defined as stated above in
5 paragraph 23, except the beginning date will be June 9, 2017 (rather than 2016).

6 45. Plaintiff and the proposed class members have each been harmed by Defendant's
7 violations of the CLRA in that she and class members have paid for Full Circle Market™ popcorn
8 products that were packaged to contain significant nonfunctional slack-fill. Therefore, Plaintiff and
9 the class members have overpaid and/or been short-changed due to the unlawful packaging.

10 46. Pursuant to California Civil Code §1780(a), Plaintiff, on behalf of herself and the
11 class, seeks: (i) an order enjoining Defendant's wrongful conduct; (ii) an order of restitution; (iii)
12 any and all other relief the Court deems proper. Plaintiff reserves the right to amend this complaint
13 to also seek actual damages, as permitted under Civil Code §§1780(a)(1) and 1782(e), after she has
14 met the demand requirements under Civil Code §1782(a), if Defendant fails to fully cure.

15 **PRAYER FOR RELIEF**

16 Wherefore, Plaintiff, on behalf of herself and the putative Class members, prays for the
17 following relief:

18 A. For an order certifying this case as a class action under California Code of Civil
19 Procedure §382 (UCL), and California Civil Code § 1781 (CLRA), as alleged herein, and appointing
20 Plaintiff as a Class Representative and Plaintiff's Counsel as Lead Class Counsel;

21 B. For an order that Defendant has violated the statutes as alleged herein;

22 C. For preliminary, permanent and mandatory injunctive relief prohibiting Defendant, its
23 officers, agents and those acting in concert with them, from committing in the future those violations
24 of law herein alleged;

25 D. For an order awarding Plaintiff and Class members restitution and/or disgorgement in
26 an amount to be determined at trial;

27 E. For an award of reasonable attorneys' fees and all costs of suit as provided for by
28 California Code of Civil Procedure § 1780(e), California Code of Civil Procedure § 1021.5, and/or

1 all other applicable law and/or equitable doctrines;

2 F. For such other relief as the Court deems just and proper.

3

4

DIVINCENZO SCHOENFIELD STEIN
and LANZA & SMITH, PLC

5

Dated: June 8, 2020

6

By: /s/ Anthony Lanza

7

Anthony Lanza

8

Ramin T. Montakab

9

Attorneys for Plaintiff

10

THERESA REISFELT,

11

AND THE CLASS

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28