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DARREN CLEVINGER AND THE PUTATIVE CLASS

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

15 DARREN CLEVINGER on behalf of himself
and all others similarly situated;

16 Plaintiff,

17 v.

18 WELCH FOODS INC., A COOPERATIVE;
19 THE PROMOTION IN MOTION
COMPANIES, INC., a Delaware corporation;
20 and DOES 1 through 25, inclusive;

21 Defendants.
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CASE NO.: 30-2020-01145532-CU-BT-CXC

Honorable William Cluster
Department CX-104
Complaint Filed: June 29, 2020

**FIRST AMENDED 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.;**

1 Plaintiff Darren Clevenger (“Plaintiff”), by and through his attorneys, DiVincenzo
2 Schoenfield Stein and Lanza & Smith, PLC, brings this class action complaint on behalf of himself
3 and all others similarly situated (the “Class”), alleging facts related to his own purchases based on
4 personal 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 Defendants’ practice of
7 “slack-filling” boxes of their Welch’s® Reduced Sugar Fruit Snacks, Fruit ‘n Yogurt™ Snacks, and
8 certain boxes of Welch’s® Fruit Snacks. The practice of using oversized containers with substantial,
9 nonfunctional, empty space inside them is called “slack-fill” and is illegal under California and
10 Federal law. Both Federal and California laws have long prohibited nonfunctional slack-fills for food
11 containers. Although the legislative and administrative basis and policies behind the law are based,
12 in part, on findings that this practice leads consumers to believe they are receiving a greater quantity
13 of the food than is in the package (even if the quantity or weight is accurately displayed on the
14 label), Plaintiff’s claims are based solely on the grounds that Defendants’ conduct is unlawful and
15 unfair. Plaintiff does **not** assert any claims based on misrepresentation.

16 2. Welch’s® Fruit Snacks with Reduced Sugar and Welch’s® Fruit ‘n Yogurt™ boxes
17 contain eight pouches of snacks, compared to ten pouches in the same size boxes of other flavors of
18 Welch’s® Fruit Snacks. The boxes of Welch’s® Fruit Snacks with Reduced Sugar and Welch’s®
19 Fruit ‘n Yogurt™ Snacks thus contain a significant amount of nonfunctional slack-fill compared to
20 other flavors of Welch’s® Fruit Snacks. In those boxes, Welch’s® includes two more identically
21 sized pouches and 33% more content by volume. Additionally, Defendants manufacture and package
22 Welch’s® Fruit Snacks for sale at Costco (the “Costco Fruit Snacks”) in a box containing 90
23 packages, but the box can hold, at least, 110 packages – i.e., at least 22% more content, meaning this
24 package is also slack-filled. By violating Federal and California slack-fill laws, Defendants’ products
25 are deemed “misbranded” and cannot legally be sold in interstate commerce. Defendants’ abuses of
26 state and federal laws violate the unlawful and unfair prongs of California’s Unfair Competition Law
27 (Bus & Prof. Code §17200, *et seq.*) (“UCL”), for which Plaintiff asserts claims for unlawful and
28 unfair practices only; he does *not* assert claims for deceptive or fraudulent practices under the UCL.

1 Defendants' conduct also violates California's Consumer Legal Remedies Act, Section 1750 of the
2 Cal. Civil Code, *et seq* ("CLRA").

3
4 **PARTIES**

5 3. Plaintiff is, and at all relevant times was, an adult residing in Orange County,
6 California. Clevenger purchased Defendant's Welch's® Fruit Snacks for some time from various
7 stores, including but not limited to, Walmart and Albertson's in Orange County, California.
8 Clevenger noticed that the Welch's® Fruit Snacks with Reduced Sugar contained significant
9 amounts of empty space. Specifically, he realized that Welch's® boxes of Fruit Snacks with
10 Reduced Sugar contained two less pouches per box than other non-premium varieties of Welch's®
11 Fruit Snacks ("Regular Fruit Snacks"). He also noticed that Welch's® Fruit 'n Yogurt™ Snacks he
12 had purchased also only contained eight pouches despite the box being the exact same size as
13 Regular Fruit Snacks boxes with ten pouches. Clevenger suffered injury in fact as a result of
14 Defendants' conduct because the boxes were illegally slack-filled -- containing at least two less
15 pouches of snacks than they should have but for the illegal slack-fill. Therefore, the products were
16 misbranded and could not legally be sold.

17 4. Defendant Welch Foods Inc. is a cooperative based and headquartered in Concord,
18 Massachusetts, and incorporated in Michigan. Welch's products include grape juices, jams, fruit
19 snacks, and jellies, which are sold internationally.

20 5. Defendant The Promotion in Motion Companies, Inc., "(PMI)" is a Delaware
21 corporation with its headquarters in Allendale, New Jersey. Plaintiff alleges, based on information
22 and belief, that PMI makes, markets, and/or distributes the subject products under a license
23 agreement with Welch Foods. Plaintiff alleges, based on information and belief, that PMI
24 participates in the making, marketing, and distribution of the subject products for Welch Foods,
25 whereby Welch Foods and PMI jointly control and share responsibility for the manufacture,
26 branding, marketing, and/or distribution of the subject products. At all relevant times the subject
27 packaging is and was subject to approval by Welch.

1 pouches of snacks in these flavors, but included ten pouches in identically sized boxes of other
2 flavors. The boxes with ten pouches have a net weight of 9 oz, whereas the box with eight pouches
3 have a net weight of 6.4 oz. As such, the eight pouch boxes are at least 20% under-filled by quantity
4 and at least 30% under-filled by weight.

5 11. Defendants’ Fruit Snacks and Fruit ‘n Yogurt™ Snacks are individually plastic
6 wrapped and packaged in colored cardboard boxes. Consumers cannot see the empty space
7 contained in the product packaging, *i.e.* the non-functional slack-fill. These boxes are substantially
8 under-filled and contain substantial amount of unnecessary space, *i.e.* non-functional slack-fill.

9 12. Additionally, Welch’s® Fruit Snacks sold at Costco are sold in a cardboard box
10 containing 90 pouches with significant empty space. The box can hold, at least, 110 pouches.

11 13. Both federal and California law prohibit nonfunctional slack-fill for food containers,
12 which would include fruit snacks and its packaging. As explained below, California has codified the
13 federal law and regulations.

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

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

20 (a) A container that does not allow the consumer to fully view its
21 contents shall be considered to be filled as to be misleading if it
22 contains nonfunctional slack-fill. Slack-fill is the difference between
23 the actual capacity of a container and the volume of product contained
24 therein. Nonfunctional slack-fill is the empty space in a package that is
25 filled to less than its capacity for reasons other than:

26 (1) Protection of the contents of the package;

27 (2) The requirements of the machines used for enclosing the contents
28 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;

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(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).

15. 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 Defendants’ boxes with only eight pouches is prohibited under 21 U.S.C. §331.

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

17. The boxes of Welch's® Reduced Sugar Fruit Snacks and Fruit ‘n Yogurt™ Snacks and Costco boxes of Welch’s® Fruit Snacks do not meet any of the six exemptions under federal or California law.

¹ Bus & Prof Code §§12606.2(c)(7)-(8) add additional requirements and exemptions which are not included in the 21 C.F.R. 100.100 or otherwise imposed under 21 U.S.C. §343(d). As such, pursuant to Bus & Prof Code §§12606.2(e) and (f) they are inoperative. To wit, Bus & Prof. §12606.2(f) 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 18. Defendants' slack-fill does not protect the content of the packages. The Fruit Snacks
2 and Fruit 'n Yogurt™ Snacks each individually plastic wrapped, and do not gain additional
3 protection from the extra space in the box compared to the boxes with ten pouches. See 21 CFR
4 §100.100(a)(1); Cal. Bus & Prof. Code § 12606.2(a)(1).

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

12 20. The slack-fill is not caused by product settling during shipping and handling. Given
13 the product's density, shape, and composition, any settling occurs immediately at the point of filling
14 the box. No additional product settling occurs during subsequent shipping and handling (see 21 CFR
15 §100.100(a)(3); Cal. Bus & Prof. Code § 12606.2(a)(3)).

16 21. The slack-fill space is not needed to perform a specific function, such as preparing the
17 food. The Fruit Snacks and Fruit 'n Yogurt™ Snacks are removed from the packing for consumption
18 (e.g., the Fruit Snacks are not consumed nor prepared in the cardboard packing). See 21 CFR
19 §100.100(a)(4); Cal. Bus & Prof. Code § 12606.2(a)(4).

20 22. Defendants' packaging itself lacks independent value from the food it contains. The
21 cardboard packaging is not a commemorative item nor is it a reusable container which is part of the
22 presentation of the food, nor is it intended for use after the food is consumed. See 21 CFR
23 §100.100(a)(5); Cal. Bus & Prof. Code § 12606.2(a)(5).

24 23. The slack-filled package was not necessary to prevent pilfering or accommodate
25 required food labeling. Indeed, Defendants are able to include at least ten pouches of its product in
26 each box that is the same size as the Reduced Sugar and Fruit 'n Yogurt™ snacks containing only
27 eight pouches. Alternatively, Defendants could reduce the size of the containers to eliminate the
28 nonfunctional slack-fill. See 21 CFR §100.100(a)(6); Cal. Bus & Prof. Code § 12606.2(a)(6).

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

5 30. Common questions of law and fact exist as to all members of the Class and
6 predominate over any questions affecting solely individual members of the Class. Among the
7 questions of law and fact common to the Class are:

- 8 a) Whether Defendants' packing of Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™
9 Snacks or other Fruit Snacks contained non-functional slack-fill in violation of
California Business and Professions Code §12606.2 (FPLA), *et seq.*;
- 10 b) Whether packages of Defendants' Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™
11 Snacks or other Fruit Snacks contained non-functional slack-fill in violation of 21
U.S.C. §403(d) *et seq.* and 21 C.F.R. 100.100;
- 12 c) The number of Fruit Snack pouches (of all varieties) that could or should be
13 contained in Defendants' packaging;
- 14 d) Whether Defendants' packages were misbranded and prohibited from being sold in
interstate commerce under 21 U.S.C. §331;
- 15 e) Whether Defendants' conduct is an unfair business practice within the meaning of
16 California Business and Professions Code §17200, *et seq.*;
- 17 f) Whether Defendants' conduct is an unlawful business practice within the meaning of
California Business and Professions Code §17200, *et seq.*;
- 18 g) Whether, and to what extent, Defendant Welch approved of the packaging and/or had
19 the ability to require that the packaging not be sack-filled and/or require recall or
other corrective action;
- 20 h) The appropriate measure of restitution and/or other relief; and
- 21 i) Whether Defendants should be enjoined from continuing their unlawful practices.

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

3 32. Defendants acted on grounds generally applicable to the entire Class, thereby making
4 final relief appropriate with respect to the Class as a whole. Prosecution of separate actions by
5 individual members of the Class could create the risk of inconsistent or varying adjudications with
6 respect to individual members of the Class that could establish incompatible standards of conduct for
7 Defendants.

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

13 34. Without a class action, Defendants will likely retain the benefit of their wrongdoing
14 and could continue a course of action, which would result in further damages to the Class. Plaintiff
15 envisions no difficulty in the management of this action as a class action.

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

21 35. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth
22 herein.

23 36. At all relevant times, the UCL was in full force and effect.

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

26 38. Section 17203 of the UCL empowers the Court to enjoin any conduct that violates the
27 UCL and “make such orders or judgments, including the appointment of a receiver, as may be
28 necessary to prevent the use or employment by any person of any practice which constitutes unfair
competition, as defined in this chapter, or as may be necessary to restore to any person in interest

1 any money or property, real or personal, which may have been acquired by means of such unfair
2 competition.”

3 39. Plaintiff has “suffered injury in fact and has lost money or property as a result of the
4 unfair competition” as complained of herein. Bus & Prof. Code §17204. Plaintiff has paid money for
5 Defendants’ products that contained nonfunctional slack-fill and were “misbranded.” As such, the
6 products could not legally be sold in interstate commerce. The monies that Plaintiff and the class
7 members paid for the products resulted from unfair and illegal competition by Defendants and
8 Plaintiff and the class members are entitled to an order restoring those monies to them and an order
9 enjoining Defendants from selling nonfunctionally slack-filled products in the State of California.
10 Additionally, even if Defendants’ Reduced Sugar Fruit Snacks and Fruit ‘n Yogurt™ Snacks and
11 other Fruit Snacks could have legally been sold in interstate commerce, Plaintiff overpaid and/or
12 acquired less than he would have if the same packages had not contained nonfunctional slack-fill.

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

19 41. Defendants’ conduct also violated the unfair practices prong of the UCL. Defendants’
20 conduct violates both California and federal public policy, as shown by their respective prohibitions
21 on nonfunctional slack-fill and prohibition on introducing misbranded products into interstate
22 commerce. The conduct is also anti-competitive and puts competitors who follow the law at a
23 disadvantage. Defendants’ conduct suppresses competition and has a negative impact on the
24 marketplace, decreasing consumer choice. Further, Defendants’ conduct causes significant aggregate
25 harm to consumers, causing them to overpay, because the increased empty space in the packages is
26 nonfunctional slack-fill.

1 42. Defendants’ violations of the UCL entitle Plaintiff and the class members to seek
2 injunctive relief, including, but not limited to ordering Defendants to permanently cease their illegal
3 conduct and provide full restitution to Plaintiff and the class members.

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

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

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

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

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

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

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

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

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

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

1 violations of law herein alleged;

2 D. For an order awarding Plaintiff and Class members restitution and/or disgorgement
3 under the UCL and damages under the CLRA in an amount to be determined at trial;

4 E. For an award of reasonable attorneys' fees and all costs of suit as provided for by
5 California Code of Civil Procedure § 1780(e), California Code of Civil Procedure § 1021.5, and/or
6 all other applicable law and/or equitable doctrines;

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

8 DIVINCENZO SCHOENFIELD STEIN
9 and LANZA & SMITH, PLC

10 Dated: August 25, 2020

By: /s/ Anthony Lanza
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Attorneys for Plaintiff
DAREN CLEVINGER,
AND THE CLASS

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