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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG 05 2021

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN BERNARDINO

13 **CIV SB 2122624**

14 ELSA MERIDA, individually and on behalf of
15 all others similarly situated,

16 Plaintiff,

17 vs.

18 MONDELEZ INTERNATIONAL, INC., a
19 Virginia Corporation; MONDELEZ GLOBAL
20 LLC, a Delaware Limited Liability Company;
21 and DOES 1 through 10, inclusive,

22 Defendants.

Case No.

CLASS ACTION COMPLAINT

1. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS AND PROFESSIONS CODE § 17200, *et seq.*
2. FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17500, *et seq.*
3. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, *et. seq.*
4. UNJUST ENRICHMENT
5. COMMON LAW FRAUD
6. INTENTIONAL MISREPRESENTATION
7. NEGLIGENT MISREPRESENTATION

DEMAND FOR JURY TRIAL

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INTRODUCTION

1. Defendants manufacture one of the most popular theater box candy products in the world. To increase profits at the expense of consumers and fair competition, Defendants deceptively sell all flavors, varieties, and sizes of Sour Patch Kids sold in opaque containers (the “Products”) in oversized boxes that do not reasonably inform consumers that they are more than half empty. Defendants’ “slack-fill” scam dupes unsuspecting consumers across America to pay premium prices for empty space. The opaque box measures to a vertical height of approximately 15.4 cm, while the product inside only measures to a vertical height of approximately 8.2 cm. Below is a true and correct image of the Product, evidencing the deception. The red line represents the actual fill line, below which is product, and above which is nonfunctional empty space.



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2. While other similar lawsuits against Defendants’ competitors have all but curbed this unfair business practice, Defendants remain one of the last holdouts, ignoring the industry trend towards transparency in the hopes of obtaining an unfair competitive advantage in the marketplace. This class action aims to remedy Defendants’ unfair business practice by forcing it to follow the industry trend toward greater transparency and eliminating consumer deception.

3. Defendants market the Products in a systematically misleading manner by representing them as adequately filled when, in fact, they contain an unlawful amount of empty space or “slack-fill.” Defendants underfill the Products for no lawful reason. The front of the Products’ packaging does not include any information that would reasonably apprise Plaintiff of the quantity of candy relative to the size of the box, such as (1) a fill line; or (2) an actual size depiction accompanied by the words “actual size” and numerical piece count. Defendants do this to save money (by not filling the boxes) and to deceive consumers into purchasing the Products over their competitors’ products. Defendants’ slack-fill scheme not only harms consumers, it also harms Defendants’ competitors who have implemented labeling changes designed to alert consumers to the true amount of product in each box. Accordingly, Defendants have violated the California Consumers Legal Remedies Act, particularly California Civil Code sections 1770(a)(2), 1770(a)(4), 1770(a)(5), 1770(a)(9), and 1770(a)(16). As such, Defendants have committed *per se* violations of Business & Professions Code section 17200, *et seq.* and Business & Professions Code section 17500, *et seq.* and Civil Code section 1750, *et seq.*

4. Plaintiff and consumers have accordingly suffered injury in fact caused by the false, fraudulent, unfair, deceptive, unlawful, and misleading practices set forth herein, and seek injunctive relief, as well as, *inter alia*, compensatory damages, statutory damages, restitutionary damages, and attorneys’ fees.

DEFENDANTS’ COMPETITORS HAVE REMEDIED SLACK-FILL VIOLATIONS, BUT DEFENDANTS THUS FAR HAVE REFUSED

5. Defendants’ major competitors have modified their labeling, and/or packaging, and/or manufacturing processes to dispel consumer deception and confusion.

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1 6. Tootsie Roll Industries, Inc. modified its labeling of Junior Mints® and Sugar
2 Babies® to dispel consumer deception and confusion by adding to the front label an actual size
3 depiction, accompanied by the words “actual size” and a piece count.

4 7. Taste of Nature, Inc. modified its labeling and manufacturing processes of Cookie
5 Dough Bites®, Chocolate Chip Cookie Dough Bites®, Fudge Brownie Cookie Dough Bites®,
6 Santa’s Village Chocolate Chip Cookie Dough Bites®, Cookies N’ Cream Cookie Dough Bites®,
7 Cinnamon Bun Bites®, Red Velvet Cupcake Bites®, Moon Pie Bites®, Strawberry Dream
8 Bites®, Birthday Cake Cookie Dough Bites®, Peanut Butter Cookie Dough Bites®, Muddy
9 Bears®, Shari Candies Cherry Sour Balls®, Despicable Me 2 Sour Gummies®, Sqwigglies®, and
10 Hello Kitty Treats® to dispel consumer deception and confusion by agreeing to include an actual
11 size depiction, accompanied by the words “actual size,” and/or increase its fill levels.

12 8. Just Born, Inc. modified its labeling of Hot Tamales® and Mike and Ike® to dispel
13 consumer deception and confusion by agreeing to add a fill level line and/or an actual size
14 depiction to help dispel consumer deception and confusion.

15 9. Ferrara Candy Company, agreed to modify its manufacturing processes of
16 Jujufruits®, Jujubes®, Now & Later®, Lemonhead®, Applehead®, Cherryhead®, Grapehead®,
17 RedHots®, Trolli®, Chuckles®, Black Forest®, Jawbuster®, Jawbreaker®, Brach’s®, Boston
18 Baked Beans®, Super Bubble®, Rainblo®, and Atomic Fireball to dispel consumer deception and
19 confusion by increasing the fill levels of those products.

20 10. Ferrara Candy Co. and Ferrero U.S.A., Inc. agreed to modify the labeling of
21 Raisinets®, Buncha Crunch®, Butterfinger Bites®, Rainbow Nerds®, SweeTarts®, Spree®,
22 Runts®, Gobstopper®, Sno-Caps®, and Nestlé Toll House® Candy Shop Semi-Sweet Chocolate
23 Morsels in a manner that dispels consumer deception and confusion.

24 11. Rather than following the industry trend and ceasing the false, fraudulent, unfair,
25 deceptive, unlawful, and misleading business practice alleged herein, Defendants continue to
26 prioritize their own bottom line over consumer protection and deceive consumers as to the amount
27 of candy contained in the Products.

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1 Plaintiff understood the size of the box and product label to indicate the amount of candy
2 contained therein was commensurate with the size of the box, and she would not have purchased
3 the Product, or would not have paid a price premium for the Product, had she known that the size
4 of the boxes and product labels were false and misleading. If the Products’ packaging and labels
5 were not misleading, then Plaintiff would purchase the Product in the future.

6 14. Defendant Mondelez International Inc. (“International”) is a Virginia corporation
7 headquartered in Illinois. International maintains its principal place of business at 905 West Fulton
8 Market, Suite 200, Chicago, Illinois 60607. International directly and through their agents, has
9 substantial contacts with and receives substantial benefits and income from and through the State
10 of California. International is the owner, manufacturer, distributor, advertiser, and seller of the
11 Products, and is the company that created and/or authorized the false, misleading, and deceptive
12 advertisements and/or packaging and labeling for the Products.

13 15. Defendant Mondelez Global LLC (“Global”) is a Delaware limited liability
14 company headquartered in Illinois. Global maintains its principal place of business at 905 West
15 Fulton Market, Suite 200, Chicago, Illinois 60607. Global, directly and through its agents, has
16 substantial contacts with and receives substantial benefits and income from and through the State
17 of California. Global is the owner, manufacturer, distributor, advertiser, and seller of the Products,
18 and is the company that created and/or authorized the false, misleading, and deceptive
19 advertisements and/or packaging and labeling for the Products.

20 16. In committing the wrongful acts alleged herein, Defendants planned and
21 participated in and furthered a common scheme by means of false, misleading, deceptive, and
22 fraudulent representations to induce members of the public to purchase the Products. Defendants
23 participated in the making of such representations in that they did disseminate or cause to be
24 disseminated said misrepresentations.

25 17. Defendants, upon becoming involved with the manufacture, advertising, and sale of
26 the Products, knew or should have known that the advertising of the Products’ boxes, specifically
27 by representing that they were full, was false, deceptive, and misleading. Defendants
28 affirmatively misrepresented the amount of candy product contained in the Products’ boxes in

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1 order to convince the public and consumers of the Products to purchase the Products, resulting in
2 profits of millions of dollars or more to Defendants, all to the damage and detriment of the
3 consuming public.

4 18. Defendants have created and still perpetuate a falsehood that their candy boxes
5 contain an amount of candy commensurate with the size of the box, though they actually contain
6 nonfunctional, unlawful slack-fill. As a result, Defendants' consistent and uniform advertising
7 claims about the Products are false, misleading, and/or likely to deceive in violation of California
8 and federal advertising laws.

9 19. The true names and capacities, whether individual, corporate, associate, or
10 otherwise of certain manufacturers, distributors, and/or their alter egos sued herein as DOES 1
11 through 10 inclusive are presently unknown to Plaintiff who therefore sues these individuals
12 and/or entities by fictitious names. Plaintiff will seek leave of this Court to amend the Complaint
13 to show their true names and capacities when the same have been ascertained. Plaintiff is
14 informed and believes and based thereon alleges that DOES 1 through 10 were authorized to do
15 and did business in Los Angeles County. Plaintiff is further informed and believes and based
16 thereon alleges that DOES 1 through 10 were and/or are, in some manner or way, responsible for
17 and liable to Plaintiff for the events, happenings, and unlawful and deceptive conduct hereinafter
18 set forth below.

19 **JURISDICTION AND VENUE**

20 20. This Court has jurisdiction over all causes of action asserted herein pursuant to the
21 California Constitution, Article VI, section 10, because this case is a cause not given by statute to
22 other trial courts.

23 21. Plaintiff has standing to bring this action pursuant to Business & Professions Code
24 Section 17200, et seq.

25 22. Out-of-state participants can be brought before this Court pursuant to the provisions
26 of Code of Civil Procedure Section 395.5.

27 23. Defendants are subject to personal jurisdiction in California based upon sufficient
28 minimum contacts which exist between Defendants and California.

1 24. Venue is proper in this Court because Defendants conduct business in San
2 Bernardino County, Defendants receive substantial compensation from sales in San Bernardino
3 County, and Defendants made numerous misrepresentations that had a substantial effect in San
4 Bernardino County, including, but not limited to, the Product’s packaging and labeling.
5 Moreover, Plaintiff purchased the Product in San Bernardino County.

6 **FACTUAL BACKGROUND**

7 25. The amount of product inside any product packaging is material to any consumer
8 seeking to purchase that product. The average consumer spends only 13 seconds deciding
9 whether to make an in-store purchase,¹ which decision is heavily dependent on a product’s
10 packaging, including the package dimensions. Research has demonstrated that packages that
11 seem larger are more likely to be purchased.²

12 26. Accordingly, Defendants chose certain sized boxes for their Products to convey to
13 consumers that they are receiving an amount of candy commensurate with the size of each box.
14 Such representations constitute an express warranty regarding the quantity of the Products’
15 content.

16 27. Slack-fill is the difference between the actual capacity of a container and the
17 volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that
18 is filled to less than its capacity for illegitimate or unlawful reasons.

19 28. Defendants falsely represent the quantity of candy in each of the Products’ opaque
20 boxes through the packaging. The size of each box leads the reasonable consumer to believe he or
21 she is purchasing a box full of candy product when, in reality, what he or she actually receives is
22 about 47% less than what is represented by the size of the box.

23 29. Even if Plaintiff and other reasonable consumers of the Products had a reasonable
24 opportunity to review, prior to the point of sale, other representations of quantity, such as net
25 weight or serving disclosures, they did not and would not have reasonably understood or expected

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27 ¹ Randall Beard, *Make the Most of Your Brand’s 20-Second Window*, NIELSEN, Jan. 13, 2015,
<https://www.nielsen.com/us/en/insights/article/2015/make-the-most-of-your-brands-20-second-window/>.

28 ² P. Raghurir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*, 36 J. MARKETING RESEARCH 313-326 (1999).

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1 such representations to translate to a quantity of candy product meaningfully different from their
2 expectation of a quantity of candy product commensurate with the size of the box.

3 30. Prior to the point of sale, the Products’ packaging does not allow for a visual or
4 audial confirmation of the contents of the Products. The Products’ opaque packaging prevents a
5 consumer from observing the contents before opening. Even if a reasonable consumer were to
6 “shake” the Products before opening the box, the reasonable consumer would not be able to
7 discern the presence of any nonfunctional slack fill, let alone the 47% nonfunctional slack-fill that
8 is present in the Products.

9 31. The other information that Defendants provide about the quantity of candy product
10 on the front and back labels of the Products does not enable reasonable consumers to form any
11 meaningful understanding about how to gauge the quantity of contents of the Products as
12 compared to the size of each box itself. For instance, the front of the Products’ packaging does
13 not have any labels that would provide Plaintiff with any meaningful insight as to the amount of
14 candy to be expected, such as a fill line or an actual size depiction accompanied by the words
15 “actual size” and a numerical piece count.

16 32. Disclosures of net weight and serving sizes in ounces or grams do not allow the
17 reasonable consumer to make any meaningful conclusions about the quantity of candy contained
18 in the Products’ boxes that would be different from the reasonable consumer’s expectation that
19 the quantity of candy product is commensurate with the size of the box.

20 33. The net weight and serving size disclosures do not allow Plaintiff to make – and
21 Plaintiff did not make – any meaningful conclusions about the quantity of candy product
22 contained in the Products’ box that was different than Plaintiff’s expectations that the quantity of
23 candy product would be commensurate with the size of the box.

24 34. Plaintiff would not have purchased the Products had she known that the Products
25 contained slack-fill that serves no functional or lawful purpose.

26 **None of the Slack-Fill Statutory Exceptions Apply to the Products**

27 35. Pursuant to 21 C.F.R. § 100.100, “a food shall be deemed to be misbranded if its
28 container is so made, formed, or filled as to be misleading.” Opaque containers “shall be

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1 considered to be filled as to be misleading if it contains nonfunctional slack-fill.” *Id.*
2 Nonfunctional slack-fill is empty space within packaging that is filled to less than its capacity for
3 reasons other than provided for in the six enumerated slack fill exceptions.

4 **A. Cal. Bus. & Prof. Code § 12606.2(c)(1) – Protection of the Contents**

5 36. The slack-fill contained in the Products’ packaging does not protect the contents of
6 the package. In fact, the greater the amount of slack-fill, the more room the contents have to
7 bounce around during shipping and handling, making it more likely that the contents will break or
8 sustain damage. As such, the slack-fill present in the Products’ packaging makes the candy
9 product more, not less susceptible to damage.

10 37. There is no risk that the candies would stick together if Defendants increased the fill
11 level of the boxes. The candies are packed closely together in a small bag within the boxes.
12 Defendants could easily increase the Products’ fill-level because the individual candies are already
13 tightly packed together within these bags. The candy is also coated in sugar, decreasing the
14 likelihood that the candies will stick together.

15 **B. Cal. Bus. & Prof. Code § 12606.2(c)(2) – Requirements of the Machines**

16 38. The machines used to package the Products would not be affected if there was more
17 candy added. At most, a simple recalibration of the machines would be required. Upon
18 information and belief, adjusting these machines is rather simple.

19 39. Because the packages are only filled to 53% of their capacity, Defendants can
20 increase the Products’ fill level significantly without affecting how the boxes are sealed, or they
21 can disclose the fill-level on the outside labeling to inform consumers of the amount of candy
22 actually in the box, consistent with the law.

23 **C. Cal. Bus. & Prof. Code § 12606.2(c)(3) – Settling During Shipping and Handling**

24 40. The slack-fill present in the Products’ containers is not a result of the candy product
25 settling during shipping and handling. Given the Products’ density, shape, and composition, any
26 settling occurs immediately at the point of fill. No measurable product settling occurs during
27 subsequent shipping and handling.

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1 41. The contents of the Products are of a great enough density that any slack-fill present
2 at the point of sale was present at the time of filling the containers and packaging the contents.

3 42. The candies are packed closely together in a small bag within the boxes. As such,
4 there is no likelihood that the candy will undergo settling based on how each individual candy
5 lands in the packages.

6 **D. Cal. Bus. & Prof. Code § 12606.2(c)(4) – Specific Function of Package**

7 43. The packages do not perform a specific function that necessitates the slack-fill. This
8 safe harbor only applies if a specific function is “inherent to the nature of the food and is clearly
9 communicated to consumers.” The packages do not perform a function that is inherent to the
10 nature of the food. The packages are not always sold upright; the packages are often sold laying on
11 their side. Further, Defendants did not communicate this specific function to consumers, making
12 this provision inapplicable.

13 **E. Cal. Bus. & Prof. Code § 12606.2(c)(5) – Reusable Container**

14 44. The Products’ packaging is not reusable or of any significant value to the Products
15 independent of its function to hold the candy product. The Products’ containers are paperboard
16 boxes, intended to be discarded immediately after the candy is eaten.

17 **F. Cal. Bus. & Prof. Code § 12606.2(c)(6) – Inability to Increase Fill or Decrease Box Size**

18 45. The slack-fill present in the Products’ containers does not accommodate required
19 labeling, discourage pilfering, facilitate handling, or prevent tampering.

20 46. Defendants can easily increase the quantity of candy product contained in each box
21 (or, alternatively, decrease the size of the containers) by approximately 47% more volume.

22 47. Because none of the safe harbor provisions apply to the Products’ packaging, the
23 packages contain nonfunctional slack-fill in violation of Cal. Bus. & Prof. Code § 12606.2 and
24 are, therefore, filled as to be misleading. Plaintiff shall proffer expert testimony to establish these
25 facts once this case reaches the merits more definitively.

26 **Comparator Products Serve as Additional Evidence of Nonfunctional Slack-Fill**

27 48. Contrast Defendants’ packaging of the Products with a comparator product, such as
28 “Boston Baked Beans” (“Boston Beans”), a candy product manufactured by Ferrara Candy

1 Company, and similarly sold at movie theaters and retail outlets located throughout the United
2 States. A true and correct representation of the front of the Boston Beans product is shown in the
3 image below.



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12 49. Boston Beans are sold in identical packaging to that of the Products, i.e., opaque
13 boxes of identical size, shape, volume, and material. Boston Beans are packaged using nearly
14 identical fill and heated glue enclosing machines to those of the Products.

15 50. Boston Beans are coated candies of similar size, shape, and density of that of the
16 Products. However, contrary to the Products, Boston Beans have very little slack-fill and
17 negligible nonfunctional slack-fill. A true and correct representation of the open container of
18 Boston Beans is pictured in the image below.



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27 51. Boston Beans' packaging provides additional evidence that the slack-fill present in
28 the Products' packaging is nonfunctional to the tune of 47%.

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1 Said definition may be further defined or amended by additional pleadings, evidentiary hearings,
2 a class certification hearing, and orders of this Court.

3 62. On March 25, 2019, the United States District Court for the Central District of
4 California certified a class action against another of Defendants’ competitors involving nearly
5 identical claims and products under Federal Rule of Civil Procedure 23. *See Escobar v. Just Born,*
6 *Inc.*, Case No. 2:17-cv-01826-BRO-PJW (C.D. Cal. Mar. 25, 2019).

7 63. On April 29, 2020, a California State Court certified a class action against
8 Defendants’ competitor for nearly identical claims involving similar products under California
9 law. *See Thomas v. Nestle USA, Inc.*, Los Angeles Superior Court Case No. BC 649863 (Apr. 29,
10 2020).

11 64. The Class is comprised of many thousands of persons. The Class is so numerous
12 that joinder of all members is impracticable and the disposition of their claims in a class action
13 will benefit the parties and the Court.

14 65. There is a well-defined community of interest in the questions of law and fact
15 involved affecting the parties to be represented in that the Class was exposed to the same
16 common and uniform false and misleading advertising and omissions. The questions of law and
17 fact common to the Class predominate over questions which may affect individual Class
18 members. Common questions of law and fact include, but are not limited to, the following:

- 19 a. The true nature and amount of product contained in each Products’ packaging;
- 20 b. Whether the marketing, advertising, packaging, labeling, and other promotional
- 21 materials for the Products are deceptive;
- 22 c. Whether Defendants misrepresented the approval of the FDA, United States
- 23 Congress, and California Legislature that the Products’ packaging complied with
- 24 federal and California slack-fill regulations and statutes;
- 25 d. Whether the Products contain nonfunctional slack-fill in violation of California
- 26 Business and Professions Code Section 12606.2, *et seq.*;
- 27 e. Whether the Products contain nonfunctional slack-fill in violation of 21 C.F.R.
- 28 Section 100.100, *et seq.*;

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- 1 f. Whether Defendants’ conduct is an unlawful business act or practice within the
- 2 meaning of Business and Professions Code section 17200, *et seq.*;
- 3 g. Whether Defendants’ conduct is a fraudulent business act or practice within the
- 4 meaning of Business and Professions Code section 17200, *et seq.*;
- 5 h. Whether Defendants’ conduct is an unfair business act or practice within the
- 6 meaning of Business and Professions Code section 17200, *et seq.*;
- 7 i. Whether Defendants’ advertising is untrue or misleading within the meaning of
- 8 Business and Professions Code section 17500, *et seq.*;
- 9 j. Whether Defendants made false and misleading representations in their advertising
- 10 and labeling of the Products;
- 11 k. Whether Defendants knew or should have known that the misrepresentations alleged
- 12 herein were false;
- 13 l. Whether Plaintiff and the Class paid more money for the Products than they actually
- 14 received;
- 15 m. How much more money Plaintiff and the Class paid for the Products than they
- 16 actually received;
- 17 n. Whether Defendants committed common law fraud; and
- 18 o. Whether Defendants were unjustly enriched at the expense of Plaintiff and the Class
- 19 members;

20 66. Plaintiff’s claims are typical of the claims of the proposed Class, as the

21 representations and omissions made by Defendants are uniform and consistent and are contained

22 in advertisements and on packaging that was seen and relied on by Plaintiff and members of the

23 Class.

24 67. Plaintiff will fairly and adequately represent and protect the interests of the proposed

25 Class. Plaintiff has retained competent and experienced counsel in class action and other complex

26 litigation. Plaintiff’s Counsel prosecuted the largest slack-fill nationwide class action settlement in

27 2018. Plaintiff’s Counsel also was the first law firm to successfully certify a slack-fill lawsuit

28 involving theater box candy confectioners (twice, in 2019 and 2020, respectively).

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1 68. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
2 Defendants’ false, deceptive, and misleading representations. Plaintiff purchased the Products
3 because of the size of the box and the product label, which she believed to be indicative of the
4 amount of candy product contained therein as commensurate with the size of the box. Plaintiff
5 relied on Defendants’ representations and would not have purchased the Products if she had
6 known that the packaging, labeling, and advertising as described herein was false and misleading.

7 69. The Class is identifiable and readily ascertainable. Notice can be provided to such
8 purchasers using techniques and a form of notice similar to those customarily used in class
9 actions and by Internet publication, radio, newspapers, and magazines.

10 70. A class action is superior to other available methods for fair and efficient
11 adjudication of this controversy. The expense and burden of individual litigation would make it
12 impracticable or impossible for proposed members of the Class to prosecute their claims
13 individually.

14 71. The trial and the litigation of Plaintiff’s claims are manageable. Individual litigation
15 of the legal and factual issues raised by Defendants’ conduct would increase delay and expense to
16 all parties and the court system. The class action device presents far fewer management
17 difficulties and provides the benefits of a single, uniform adjudication, economies of scale, and
18 comprehensive supervision by a single court.

19 72. Defendants have acted on grounds generally applicable to the entire Class, thereby
20 making final injunctive relief and/or corresponding declaratory relief appropriate with respect to
21 the Class as a whole. The prosecution of separate actions by individual Class members would
22 create the risk of inconsistent or varying adjudications with respect to individual members of the
23 Class that would establish incompatible standards of conduct for Defendant.

24 73. Absent a class action, Defendants will likely retain the benefits of their wrongdoing.
25 Because of the small size of the individual Class members’ claims, few, if any, Class members
26 could afford to seek legal redress for the wrongs complained of herein. Absent a representative
27 action, the Class members will continue to suffer losses and Defendants will be allowed to
28 continue these violations of law and to retain the proceeds of their ill-gotten gains.

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COUNT ONE

VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW

BUSINESS & PROFESSIONS CODE § 17200, et seq.

74. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and incorporates the same as if set forth herein at length.

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

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

77. The legislature of California has incorporated 21 C.F.R. Section 100.100, which prohibits nonfunctional slack-fill, into the State’s Business and Professions Code at Section 12606.2 et seq.

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

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

80. Plaintiff is not suing under the FDCA, but under California state law.

81. The California Sherman Food, Drug, and Cosmetic Act (“Sherman Law”), Cal. Health & Safety Code Section 109875 et seq., has adopted wholesale the food labeling requirements of the FDCA and NLEA as the food regulations of California. Cal. Health & Safety Code Section 110100.

82. The Sherman Law declares any food to be misbranded if it is false or misleading in any particular, if the labeling does not conform with the requirements for nutrition labeling set

1 forth in certain provisions of the NLEA. Cal. Health & Safety Code Sections 110660, 110665,
2 110670.

3 83. The UCL prohibits “any unlawful, unfair... or fraudulent business act or practice.”
4 Cal. Bus & Prof. Code § 17200.

5 **A. “Unfair Prong”**

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

10 85. Defendants’ action of leaving 47% nonfunctional slack-fill in the Products does not
11 confer any benefit to consumers.

12 86. Defendants’ action of leaving 47% nonfunctional slack-fill in the Products causes
13 injuries to consumers, who do not receive a quantity of candy commensurate with their
14 reasonable expectations.

15 87. Defendants’ action of leaving 47% nonfunctional slack-fill in the Products causes
16 injuries to consumers, who do not receive a level of hunger satiety commensurate with their
17 reasonable expectations.

18 88. Defendants’ action of leaving 47% nonfunctional slack-fill in the Products causes
19 injuries to consumers, who end up overpaying for the Products and receiving a quantity of candy
20 less than what they expected to receive.

21 89. Consumers cannot avoid any of the injuries caused by the 47% or more
22 nonfunctional slack-fill in Defendants’ Products.

23 90. Accordingly, the injuries caused by Defendants’ inclusion of 47% nonfunctional
24 slack-fill in the Products outweigh any benefits.

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

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1 92. Here, Defendants’ conduct of including 47% nonfunctional slack-fill in the
2 Products’ packaging has no utility and financially harms purchasers. Thus, the utility of
3 Defendants’ conduct is vastly outweighed by the gravity of harm.

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

7 94. The California legislature maintains a declared policy of prohibiting nonfunctional
8 slack-fill in consumer goods, as reflected in State’s Business and Professions Code Section
9 12606.2 and California Health and Safety Code Section 110100.

10 95. The 47% of nonfunctional slack-fill contained in the Products is tethered to a
11 legislative policy declared in California according to Cal. Bus. and Prof. Code Section 12606.2
12 and Cal. Health & Safety Code Section 110100.

13 96. Defendants’ packaging of the Products, as alleged in the preceding paragraphs, is
14 false, deceptive, misleading, and unreasonable, and constitutes unfair conduct.

15 97. Defendants knew or should have known of their unfair conduct.

16 98. As alleged in the preceding paragraphs, the misrepresentations by Defendants
17 detailed above constitute an unfair business practice within the meaning of California Business
18 and Professions Code Section 17200.

19 99. There existed reasonably available alternatives to further Defendants’ legitimate
20 business interests, other than the conduct described herein. Defendants could have used
21 packaging appropriate for the amount of candy product contained within the Products.

22 100. All of the conduct alleged herein occurs and continues to occur in Defendants’
23 businesses. Defendants’ wrongful conduct is part of a pattern or generalized course of conduct
24 repeated on thousands of occasions daily.

25 101. Plaintiff and the Class have suffered injury in fact and have lost money as a result
26 of Defendants’ unfair conduct. Plaintiff paid an unwarranted premium for the Product.
27 Specifically, Plaintiff paid for 47% of candy product she never received. Plaintiff would not have
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1 purchased the Product if she had known that the Products’ packaging contained nonfunctional
2 slack-fill.

3 **B. “Fraudulent” Prong**

4 102. California Business and Professions Code Section 17200, et seq., considers conduct
5 fraudulent and prohibits said conduct if it is likely to deceive members of the public. *Bank of the*
6 *West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

7 103. Defendants’ conduct of packaging the Products with 47% nonfunctional slack-fill is
8 likely to deceive members of the public.

9 104. Defendants’ packaging of the Products, as alleged in the preceding paragraphs, is
10 false, deceptive, misleading, unreasonable, and constitutes fraudulent conduct.

11 105. Defendants knew or should have known of their fraudulent conduct.

12 106. As alleged in the preceding paragraphs, the misrepresentations by Defendants
13 detailed above constitute a fraudulent business practice in violation of California Business &
14 Professions Code Section 17200.

15 107. Defendants had reasonably available alternatives to further their legitimate business
16 interests, other than the conduct described herein. Defendants could have used packaging
17 appropriate for the proportion of product contained therein.

18 108. All of the conduct alleged herein occurs and continues to occur in Defendants’
19 business. Defendants’ wrongful conduct is part of a pattern or generalized course of conduct
20 repeated on thousands of occasions daily.

21 109. Plaintiff and the Class have suffered injury in fact and have lost money as a result
22 of Defendants’ fraudulent conduct. Plaintiff paid an unwarranted premium for this product.
23 Specifically, Plaintiff paid for 47% of candy product she never received. Plaintiff would not have
24 purchased the Products if she had known that the boxes contained nonfunctional slack-fill.

25 **C. “Unlawful” Prong**

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

3 111. Defendants’ packaging of the Products, as alleged in the preceding paragraphs,
4 violates California Civil Code Section 1750, *et. seq.*, California Business and Professions Code
5 Section 17500, *et. seq.*, Cal. Business and Professions Code Section 12606.2 *et. seq.*, and 21
6 C.F.R Section 100.100.

7 112. Defendants’ packaging of the Products, as alleged in the preceding paragraphs, is
8 false, deceptive, misleading, and unreasonable, and constitutes unlawful conduct.

9 113. Defendants knew or should have known of their unlawful conduct.

10 114. As alleged in the preceding paragraphs, the misrepresentations by Defendants
11 alleged herein constitute an unlawful business practice within the meaning of California Business
12 and Professions Code Section 17200.

13 115. There were reasonably available alternatives to further Defendants’ legitimate
14 business interests, other than the conduct described herein. Defendants could have used
15 packaging appropriate for the amount of candy product contained therein.

16 116. All of the conduct alleged herein occurred and continues to occur in Defendants’
17 businesses. Defendants’ unlawful conduct is part of a pattern or generalized course of conduct
18 repeated on thousands of occasions daily.

19 117. Plaintiff and the Class have suffered injury in fact and have lost money as a result
20 of Defendants’ unlawful conduct. Plaintiff paid an unwarranted premium for this product.
21 Specifically, Plaintiff paid for 47% of candy product she never received. Plaintiff would not have
22 purchased the Product if she had known that the packaging contained nonfunctional slack-fill.

23 118. As a result of the business acts and practices described above, Plaintiff and
24 members of the Class, pursuant to § 17203, are entitled to an order enjoining such future
25 wrongful conduct on the part of Defendants and such other orders and judgments that may be
26 necessary to disgorge Defendants’ ill-gotten gains and to restore to any person in interest any
27 money paid for the Products as a result of the wrongful conduct of Defendant.
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- 1 a. Plaintiff and members of the Class are entitled to equitable relief as no adequate
2 remedy at law exists.
- 3 (1) The applicable limitations period is four years for claims brought under the
4 UCL, which is one year longer than the applicable statute of limitations under
5 the FAL and CLRA. Thus, class members who purchased the Products between
6 3 and 4 years prior to the filing of the complaint will be barred from the Class if
7 equitable relief were not granted under the UCL.
- 8 (2) The scope of actionable misconduct under the unfair prong of the UCL is
9 broader than the other causes of action asserted herein to include, for example,
10 the overall unfair marketing scheme of underfilling the Products’ packaging.
11 Thus, Plaintiff and class members may be entitled to restitution under the UCL,
12 while not entitled to damages under other causes of action asserted herein (e.g.,
13 the FAL requires actual or constructive knowledge of the falsity; the CLRA is
14 limited to certain types of plaintiffs (an individual who seeks or acquires, by
15 purchase or lease, any goods or services for personal, family, or household
16 purposes) and other statutorily enumerated conduct).
- 17 (3) Injunctive relief is appropriate on behalf of Plaintiff and members of the Class
18 because Defendants continue to deceptively underfill the Products’ packaging.
19 Injunctive relief is necessary to prevent Defendants from continuing to engage
20 in this unfair, fraudulent, and/or unlawful conduct described herein and to
21 prevent future harm—none of which can be achieved through available legal
22 remedies. Further, injunctive relief, in the form of packaging or label
23 modifications, is necessary to dispel public misperception about the Products
24 that has resulted from years of Defendants’ unlawful marketing efforts. Such
25 modifications could include, but are not limited to, shrinking the packaging,
26 adding more candy to the packaging, or adding an actual size depiction
27 accompanied by a piece count on the front label. Such relief is not available
28 through a legal remedy, as monetary damages may be awarded to remedy past

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harm (i.e., purchasers who have been misled), while injunctive relief is necessary to remedy future harm (i.e., prevent future purchasers from being misled), under the current circumstances where the dollar amount of future damages is not reasonably ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the damages caused by Defendants’ future harm (e.g., the dollar amount that Plaintiff and Class members will pay for the underfilled Products), rendering injunctive relief a necessary remedy.

119. Pursuant to Civil Code § 3287(a), Plaintiff and the Class are further entitled to pre-judgment interest as a direct and proximate result of Defendants’ unfair and fraudulent business conduct. The amount on which interest is to be calculated is a sum certain and capable of calculation, and Plaintiff and the Class are entitled to interest in an amount according to proof.

COUNT TWO

FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS & PROFESSIONS CODE § 17500, et seq.

120. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and incorporates the same as if set forth herein at length.

121. California’s False Advertising Law, California Business and Professions Code Section 17500, et seq., makes it “unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, in any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning personal property or services, professional or otherwise, or performance or disposition thereof, 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.”

122. Defendants knowingly manipulated the physical dimensions of the Products’ box, or stated another way, under-filled the amount of candy product in Products, by including 47% nonfunctional slack-fill as a means to mislead the public about the amount of candy product contained in each package.

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1 123. Defendants controlled the packaging of the Products. They knew or should have
2 known, through the exercise of reasonable care, that their representations about the quantity of
3 candy product contained in the Products were untrue and misleading.

4 124. Defendants’ actions of packaging the Products with 47% nonfunctional slack-fill
5 instead of including more candy content in the box, or decreasing the size of the box, are likely to
6 deceive the general public.

7 125. Defendants’ actions were false and misleading, such that the general public is and
8 was likely to be deceived, in violation of Section 17500.

9 126. Pursuant to Business and Professions Code Section 17535, Plaintiff and the Class
10 seek an order of this Court enjoining Defendants from continuing to engage, use, or employ their
11 practice of under-filling the Products’ boxes. Likewise, Plaintiff and the Class seek an order
12 requiring Defendants to disclose such misrepresentations, and additionally request an order
13 awarding Plaintiff and the Class restitution of the money wrongfully acquired by Defendants by
14 means of responsibility attached to Defendants’ failure to disclose the existence and significance
15 of said misrepresentations in an amount to be determined at trial.

16 a. Plaintiff and members of the Class are entitled to equitable relief as no adequate
17 remedy at law exists.

18 (1) The scope of permissible plaintiffs under the FAL is broader than the CLRA to
19 include, for example, individuals or entities who purchased the Products for
20 non-personal, non-family, and non-household purposes. Thus, Plaintiff and
21 class members may be entitled to restitution under the FAL, while not entitled
22 to damages under the CLRA.

23 (2) Injunctive relief is appropriate on behalf of Plaintiff and members of the Class
24 because Defendants continue to deceptively underfill the Products’ packaging.
25 Injunctive relief is necessary to prevent Defendants from continuing to engage
26 in the unlawful conduct described herein and to prevent future harm—none of
27 which can be achieved through available legal remedies. Further, injunctive
28 relief, in the form of packaging or label modifications, is necessary to dispel

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public misperception about the Products that has resulted from years of Defendants’ unfair, fraudulent, and unlawful marketing efforts. Such modifications would include, but are not limited to, shrinking the packaging, adding more candy to the packaging, or adding an actual size depiction accompanied by a piece count on the front label. Such relief is also not available through a legal remedy as monetary damages may be awarded to remedy past harm (i.e., purchasers who have been misled), while injunctive relief is necessary to remedy future harm (i.e., prevent future purchasers from being misled), under the current circumstances where the dollar amount of future damages is not reasonably ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the damages caused by Defendants’ future harm (e.g., the dollar amount that Plaintiff and Class members overpay pay for the underfilled Products), rendering injunctive relief a necessary remedy.

127. Plaintiff and the Class have suffered injury in fact and have lost money as a result of Defendants’ false representations. Plaintiff purchased the Products in reliance upon the claims by Defendants that the Products were of the quantity represented by Defendants’ packaging and advertising. Plaintiff would not have purchased the Products if she had known that the claims and advertising as described herein were false.

COUNT THREE

**VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT,
CALIFORNIA CIVIL CODE § 1750, et seq.**

128. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and incorporates the same as if set forth herein at length.

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

130. The practices described herein, specifically Defendants’ packaging, advertising, and sale of the Products, were intended to result and did result in the sale of the Products to the consuming public and violated and continue to violate sections 1770(a)(2), 1770(a)(4),

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1 1770(a)(5), 1770(a)(9), and 1770(a)(16) of the CLRA by (1) misrepresenting the approval of the
2 Products as compliant with 21 C.F.R. Section 100.100, California Business and Professions Code
3 Section 12606.2, and the Sherman Law; (2) using deceptive representations in connection with
4 the Products; (3) representing the Products have characteristics and quantities that they do not
5 have; (4) advertising and packaging the Products with intent not to sell them as advertised and
6 packaged; and (5) representing that the Products have been supplied in accordance with a
7 previous representation as to the quantity of candy product contained within each box, when they
8 have not.

9 131. Defendants fraudulently deceived Plaintiff and the Class by representing that the
10 Products’ packaging, which includes 47% nonfunctional slack-fill, actually conforms to federal
11 and California slack-fill regulations and statutes including the Sherman Law, California Business
12 and Professions Code Section 12606.2, and 21 C.F.R. 100.100.

13 132. Defendants packaged the Products in boxes that contain 47% nonfunctional slack-
14 fill and made material misrepresentations to fraudulently deceive Plaintiff and the Class.

15 133. Defendants fraudulently deceived Plaintiff and the Class by misrepresenting the
16 Products as having characteristics and quantities which they do not have, e.g., that the Products
17 are free of nonfunctional slack-fill when they are not. In doing so, Defendants intentionally
18 misrepresented and concealed material facts from Plaintiff and the Class. Said misrepresentations
19 and concealment were done with the intention of deceiving Plaintiff and the Class and depriving
20 them of their legal rights and money.

21 134. Defendants fraudulently deceived Plaintiff and the Class by packaging and
22 advertising the Products with intent not to sell them as advertised and by intentionally under-
23 filling the Products’ boxes and replacing candy product with nonfunctional slack-fill. In doing so,
24 Defendants intentionally misrepresented and concealed material facts from Plaintiff and the
25 Class. Said misrepresentations and concealment were done with the intention of deceiving
26 Plaintiff and the Class and depriving them of their legal rights and money.

27 135. Defendants fraudulently deceived Plaintiff and the Class by representing that the
28 Products were supplied in accordance with an accurate representation as to the quantity of candy

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1 product contained therein when it was not. Defendants presented the physical dimensions of the
2 Products’ packaging to Plaintiff and the Class before the point of purchase and gave Plaintiff and
3 the Class a reasonable expectation that the quantity of product contained therein would be
4 commensurate with the size of packaging. In doing so, Defendants intentionally misrepresented
5 and concealed material facts from Plaintiff and the Class. Said misrepresentations and
6 concealment were done with the intention of deceiving Plaintiff and the Class and depriving them
7 of their legal rights and money.

8 136. Defendants knew or should have known, through the exercise of reasonable care,
9 that the Products’ packaging was misleading.

10 137. Defendants’ actions as described herein were done with conscious disregard of
11 Plaintiff’s rights, and Defendants were wanton and malicious in their concealment of the same.

12 138. Defendants’ packaging of the Products was a material factor in Plaintiff’s and the
13 Class’s decisions to purchase the Products. Based on Defendants’ packaging of the Products,
14 Plaintiff and the Class reasonably believed that they were getting more product than they actually
15 received. Had they known the truth of the matter, Plaintiff and the Class would not have
16 purchased the Products.

17 139. Plaintiff and the Class have suffered injury in fact and have lost money as a result
18 of Defendants’ unfair, unlawful, and fraudulent conduct. Specifically, Plaintiff paid for candy
19 product she never received. Plaintiff would not have purchased the Products had she known the
20 boxes contained nonfunctional slack-fill.

21 140. Plaintiff respectfully requests that the Court enjoin Defendants from continuing to
22 employ the unlawful methods, acts, and practices alleged herein pursuant to § 1780(a)(2).
23 Additionally, Defendants should be compelled to provide restitution and damages to consumers
24 who paid for candy product they never received due to Defendants’ representation that the
25 Products contained an amount of candy commensurate with the size of the boxes.

26 a. Plaintiff and members of the Class are entitled to equitable relief as no adequate
27 remedy at law exists.

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(1) Injunctive relief is appropriate on behalf of Plaintiff and members of the Class because Defendants continue to deceptively underfill the Products’ packaging. Injunctive relief is necessary to prevent Defendants from continuing to engage in the unlawful conduct described herein and to prevent future harm—none of which can be achieved through available legal remedies. Further, injunctive relief, in the form of packaging or label modifications, is necessary to dispel public misperception about the Products that has resulted from years of Defendants’ unfair, fraudulent, and unlawful marketing efforts. Such modifications would include, but are not limited to, shrinking the packaging, adding more candy to the packaging, or adding an actual size depiction accompanied by a piece count on the front label. Such relief is also not available through a legal remedy as monetary damages may be awarded to remedy past harm (i.e., purchasers who have been misled), while injunctive relief is necessary to remedy future harm (i.e., prevent future purchasers from being misled), under the current circumstances where the dollar amount of future damages is not reasonably ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the damages caused by Defendants’ future harm (e.g., the dollar amount that Plaintiff and Class members overpay pay for the underfilled Products), rendering injunctive relief a necessary remedy.

141. By letter dated August 2, 2021, Plaintiff advised Defendants of their false and misleading claims pursuant to California Civil Code Section 1782(a).

COUNT FOUR

Restitution Based on Quasi-Contract/Unjust Enrichment

142. Plaintiff repeats and realleges the allegations set forth above and incorporates the same as if set forth herein at length.

143. Plaintiff brings this cause of action individually and on behalf of the members of the Class against Defendant.

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1 144. By means of Defendants’ wrongful conduct alleged herein, Defendants knowingly
2 sold the Products to Plaintiff and members of the Class in a manner that was unfair,
3 unconscionable, and oppressive.

4 145. Defendants knowingly received and retained wrongful benefits and funds from
5 Plaintiff and members of the Class. In so doing, Defendants acted with conscious disregard for
6 the rights of Plaintiff and members of the Class.

7 146. As a result of Defendants wrongful conduct as alleged herein, Defendants have
8 been unjustly enriched at the expense of, and to the detriment of, Plaintiff and members of the
9 Class.

10 147. Defendants’ unjust enrichment is traceable to, and resulted directly and proximately
11 from, the false, deceptive, and misleading conduct alleged herein.

12 148. Under the common law doctrine of unjust enrichment, it is inequitable for
13 Defendants to be permitted to retain the benefits they received, without justification, from selling
14 the Products to Plaintiff and members of the class in an unfair, unconscionable, and oppressive
15 manner. Defendants’ retention of such funds under such circumstances constitutes unjust
16 enrichment.

17 149. The financial benefits derived by Defendants rightfully belong to Plaintiff and
18 members of the Class. Defendants should be compelled to return in a common fund for the
19 benefit of Plaintiff and members of the Class all wrongful or inequitable proceeds received by
20 Defendant.

21 150. Plaintiff and members of the Class have no adequate remedy at law.

22 **COUNT FIVE**

23 **Common Law Fraud**

24 151. Plaintiff repeats and realleges all of the allegations contained in the preceding
25 paragraphs and incorporates the same as if set forth herein at length.

26 152. Plaintiff brings this cause of action individually and on behalf of the members of
27 the Class against Defendants.
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1 nonfunctional and unlawful slack-fill. Defendants misrepresented the quantity of candy product
2 contained within the Products’ packaging.

3 162. Defendants’ misrepresentations regarding the Products are material to a reasonable
4 consumer, as they relate to the quantity of product received by consumers. A reasonable
5 consumer would attach importance to such representations and would be induced to act thereon in
6 making his or her purchase decision.

7 163. At all relevant times when such misrepresentations were made, Defendants knew or
8 should have known that the representations were misleading.

9 164. Defendants intended for Plaintiff and the Class to rely on the size and style of the
10 Products’ packaging, as evidenced by Defendants’ intentional manufacturing, marketing, and
11 selling of packaging that is significantly larger than is necessary to contain the volume of the
12 contents within them.

13 165. Plaintiff and members of the Class reasonably and justifiably relied on Defendants’
14 intentional misrepresentations when purchasing the Products, and had they known the truth, they
15 would not have purchased the Products or would have purchased it at significantly lower prices.

16 166. As a direct and proximate result of Defendants’ intentional misrepresentations,
17 Plaintiff and members of the Class have suffered injury in fact.

18 **COUNT SEVEN**

19 **Negligent Misrepresentation**

20 167. Plaintiff repeats and realleges all of the allegations contained above and
21 incorporates the same as if set forth herein at length.

22 168. Plaintiff brings this cause of action individually and on behalf of the Class against
23 Defendants.

24 169. Defendants have filled and packaged the Products in a manner indicating that the
25 Products are adequately filled with candy product. However, the Products contain 47% less candy
26 product than required and instead contain a substantial amount of nonfunctional slack-fill.
27 Therefore, Defendants have misrepresented the amount of candy product contained in the
28 Products.

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1 170. Defendants’ misrepresentations regarding the Products are material to a reasonable
2 consumer, as they relate to the quantity of product received by the consumer. A reasonable
3 consumer would attach importance to such representations and would be induced to act thereon in
4 making his or her purchase decision.

5 171. At all relevant times when such misrepresentations were made, Defendants knew or
6 should have known that the Products were not adequately filled with candy but instead contained
7 substantial amounts of nonfunctional slack-fill.

8 172. Defendants intended for Plaintiff and the Class to rely on the size and style of the
9 Products’ packaging, as evidence by Defendants’ packaging that is significantly larger than is
10 necessary to contain the volume of the candy product therein.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays
13 for judgment and relief on all causes of action as follows:

- 14 A. An order enjoining Defendants from continuing to label, package, and/or
- 15 advertise the Products as challenged herein so as to dispel the consumer
- 16 deception;
- 17 B. Damages against Defendants in an amount to be determined at trial, together
- 18 with pre- and post- judgement interest at the maximum rate allowable by
- 19 law on any amounts awarded;
- 20 C. Restitution and/or disgorgement in an amount to be determined at trial;
- 21 D. Reasonable attorneys’ fees and costs; and
- 22 E. Granting such other and further as may be just and proper.

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JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all triable issues.

DATED: August 5, 2021

CLARKSON LAW FIRM, P.C.



Ryan J. Clarkson, Esq.
Zachary T. Chrzan, Esq.
Attorneys for Plaintiff

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