

ORIGINAL

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FILED
Superior Court of California
County of Los Angeles

FEB 23 2017

Sherri R. Carter, Executive Officer/Clerk
By Judi Lara, Deputy

13 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
14 COUNTY OF LOS ANGELES

By Fax

15 EVAN TSUCHIYAMA, individually and on
16 behalf of all others similarly situated,

17 Plaintiff,

18 vs.

19 TASTE OF NATURE, INC., and DOES 1
20 through 10, inclusive,

21 Defendants.

Case No. BC 6 5 1 2 5 2

CLASS ACTION COMPLAINT

1. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, et. seq.
2. VIOLATION OF CALIFORNIA FALSE ADVERTISING LAW, BUSINESS & PROFESSIONS CODE § 17500, et. seq.
3. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS & PROFESSIONS CODE § 17200, et. seq.

DEMAND FOR JURY TRIAL

CIT/CASE: BC651252
 LEA/DEF#:
 RECEIPT #: CCH5087276
 DATE PAID: 02/23/17 11:18 AM
 PAYMENT: \$1,435.00
 RECEIVED: 310
 CHECK: \$435.00
 CASH: \$0.00
 CHANGE: \$0.00
 CARD: \$0.00

22 Plaintiff Evan Tsuchiyama, individually and on behalf of all others similarly
23 situated, brings this class action complaint against Taste of Nature, Inc. ("Defendant")
24 and Does 1 through 10, inclusive (collectively referred to herein as "Defendants") and
25 alleges as follows:
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SUMMARY OF THE ACTION

1. This is a class action lawsuit brought on behalf of all purchasers of Chocolate Chip Cookie Dough Bites® brand candy products (the “Product(s)”) sold at retail outlets and movie theaters throughout California and the United States. A true and correct representation of the Product’s front label is set forth.



2. Defendant intentionally misleads and shortchanges consumers by falsely and deceptively misrepresenting the amount of candy actually contained in each box of Product. Defendant uniformly under-fills the opaque boxes by at least 50%. Every box is filled at most 50% full with candy product. The 50% balance is empty space, or “slack-fill,” nearly all of which serves no legitimate or lawful function.

PARTIES

3. Plaintiff is, and at all times relevant hereto was, a citizen of California residing in the county of Los Angeles. Plaintiff made a one-time purchase of Chocolate Chip Cookie Dough Bites® 4.0 oz. box at a location of a national movie theater chain in Los Angeles, California in 2016. In making his purchase, Plaintiff relied upon the opaque packaging, including the size of the box, which was prepared

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1 and approved by Defendant and its agents and disseminated statewide and
2 nationwide, as well as designed to encourage consumers to purchase the Product. If
3 Plaintiff had known that the box contained nonfunctional slack-fill, he would not have
4 purchased the Product, let alone paid for candy product he never received.

5 4. Taste of Nature, Inc. is a corporation headquartered in Santa Monica,
6 California. Taste of Nature maintains its principal business office at 2828 Donald
7 Douglas Loop North, Santa Monica, CA, 90405. Taste of Nature directly and through
8 its agents, has substantial contacts with and receives substantial benefits and income
9 from and through the State of California. Taste of Nature is the owner, manufacturer,
10 and distributor of the Product, and is the company that created and/or authorized the
11 false, misleading, and deceptive packaging for the Product.

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

22 **JURISDICTION AND VENUE**

23 6. This Court has jurisdiction over all causes of action asserted herein
24 pursuant to the California Constitution, Article VI, Section 10, because this case is a
25 cause not given by statute to other trial courts.

26 7. Plaintiff has standing to bring this action pursuant to the California
27 Consumers Legal Remedies Act, Civil Code Section 1750, *et seq.*; California False
28 Advertising Law, Business and Professions Code Section 17500, *et seq.*; and

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1 California Unfair Competition Law, Business and Professions Code Section 17200,
2 *et seq.*

3 8. The Products include all products manufactured by Defendant which are
4 substantially similar to 3.1 oz. and 4.0 oz. boxes of candy within the following
5 product lines: Chocolate Chip Cookie Dough Bites®, Cookie Dough Bites®, Shari
6 Candies Cherry Sour Balls®, Care Bears Gummi Bears®, Chocolate Chip Cookie
7 Dough Bites®, Cookies N Cream Cookie Dough Bites®, Moon Pie Bites®,
8 Despicable Me 2 Sour Gummies®, Fudge Brownie Cookie Dough Bites®, Hello
9 Kitty Treats®, Muddy Bears®, Peanut Butter Cookie Dough Bites®, Red Velvet
10 Cupcake Bites®, Sqwigglies®, Cinnamon Bun Bites®, Strawberry Dream Bites®,
11 and Birthday Cake Cookie Dough® product lines which are packaged and sold in
12 opaque boxes.

13 9. Out-of-state participants can be brought before this Court pursuant to the
14 provisions of California Code of Civil Procedure Section 395.5.

15 10. Defendant is subject to personal jurisdiction in California based upon
16 sufficient minimum contacts which exist between it and California.

17 11. Venue is proper in this Court because Defendant conducts business in Los
18 Angeles County, Defendant receives substantial compensation from sales in Los
19 Angeles County, and Defendant made numerous misrepresentations which had a
20 substantial effect in Los Angeles County, including, distribution and sale of the
21 Product throughout Los Angeles County retail outlets, we well as distribution of print
22 media and internet advertisements.

23 **FACTUAL ALLEGATIONS**

24 12. The average consumer spends only 13 seconds to make an in-store
25 purchasing decision.¹ That decision is heavily dependent on a product's packaging,
26 and particularly the package dimensions: "Most of our studies show that 75 to 80

27 ¹ <http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html> (citing the Ehrenberg-Bass Institute of Marketing Science's report "Shopping Takes Only Seconds...In-Store and Online").
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1 percent of consumers don't even bother to look at any label information, no less the
2 net weight Faced with a large box and a smaller box, both with the same amount
3 of product inside . . . consumers are apt to choose the larger box because they think
4 it's a better value."²

5 13. Research has consistently demonstrated that consumers rarely read details
6 beyond the final price of the product, and often, not even that.³

7 14. Container size and shape on consumer perception, "[p]ackages that
8 appear larger will be more likely to be purchased."⁴

9 15. Slack-fill is the difference between the actual capacity of a container and
10 the volume of product contained therein.

11 16. Nonfunctional slack-fill is the empty space in a package that is filled to
12 less than its capacity for reasons which are illegitimate or unlawful.

13 17. Defendant packages each Product in a clear plastic bag that is sealed
14 within an opaque rectangular box with the following dimensions: 6 inches tall by 4.25
15 inches wide by .75 inches deep.

16 18. The size of the box in and of itself is a representation by Defendant as to
17 the amount of candy contained in the box. Plaintiff and other consumers of the
18 Product detrimentally and reasonably relied on this representation of quantity when
19 they purchased the Product.

20 19. Plaintiff and other consumers of the Product made their purchase
21 decisions based upon a visual observation of the Product's external box packaging
22 through the showcase window of a movie theater concession stand or retail outlet
23 store shelf.

24 ²[http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/productpackaging/
25 overview/product-packaging-ov.htm](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/productpackaging/overview/product-packaging-ov.htm) (quoting Brian Wansink, professor and director of the Cornell
26 Food and Brand Lab, who studies shopping behavior of consumers).

27 ³ Dickson, P. & Sawyer, G., *Point of Purchase Behavior and price Perceptions of Supermarket
28 Shoppers*, Marketing Science Institute Report No. 86-102, Cambridge, MA: Marketing Science
Institute (1986).

⁴ Raghubir, P. & Krishna, A., *Vital Dimensions in Volume Perception: Can the Eye Fool the
Stomach?*, 36 *Journal of Marketing Research*, No. 3, 313-326 (1999).

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1 20. Plaintiff and other consumers of the Product who purchased the Product
2 at a movie theater did not have a reasonable opportunity to view any other
3 representations of quantity contained on the Product's packaging, e.g., net weight or
4 serving disclosures.

5 21. Even if Plaintiff and other consumers of the Product had a reasonable
6 opportunity to review prior to the point of sale other representations of quantity like
7 net weight or serving disclosures, such as consumers who purchased the Product at a
8 retail outlet, they did not and would not have reasonably understood or expected it to
9 translate to a quantity of candy product meaningfully different from their expectation
10 of a quantity of candy product commensurate with the size of the box.

11 22. Plaintiff made a one-time purchase of a box of Chocolate Chip Cookie
12 Dough® 4.0 oz. candy product during a visit to a movie theatre in Los Angeles,
13 California in 2016.

14 23. Plaintiff paid approximately \$4.00 for the Product.

15 24. At the time Plaintiff purchased the Product, the Product was in a glass
16 showcase, behind a concession counter.

17 25. Glass showcases are uniformly used for the sale of the Product at all
18 movie theater concession counters throughout California and the United States as a
19 security measure and for customer convenience.

20 26. Therefore, Plaintiff, like all purchasers of the Product from movie theater
21 concession stands, did not have the opportunity to inspect the Product's packaging
22 for other representations of quantity of candy product contained therein other than
23 the size of the box itself.

24 27. For example, Plaintiff did not have the opportunity to inspect any net
25 weight or serving disclosures contained on the box. Instead, he observed the Product
26 from a distance through the showcase window and pointed it out to the concession
27 counter employee. Plaintiff then paid for the Product before he took physical
28 possession of the Product.

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1 28. Furthermore, Research indicates that 90% of consumers make a purchase
2 after only visually examining the front of the packaging but without physically having
3 the product in their hands, as in this case.⁵

4 29. Even if Plaintiff had been given the opportunity to review all parts of the
5 packaging and observed other representations of quantity such as net weight or
6 serving disclosures, Plaintiff would not have reasonably understood or expected it to
7 translate to a quantity of candy product meaningfully different from his expectation
8 of a quantity of candy product commensurate with the size of the box.

9 30. Plaintiff reasonably and detrimentally relied on the size of the box as a
10 representation by Defendant of the quantity of candy product contained in the
11 Product's containers.

12 31. Once Plaintiff took his seat in the movie theater, Plaintiff opened the top
13 of the Product's box and pulled out the inner clear plastic bag that contained the
14 Product's candy contents. Only then did he discover—to his disappointment—that
15 the Product's packaging at most 50% full, while the remaining space constituted
16 nonfunctional slack-fill.

17 32. Prior to the point of sale, the Product's packaging does not allow for a
18 visual or audial confirmation of the contents of the Product. The Product's opaque
19 packaging prevents a consumer from observing the contents before opening. Even if
20 a consumer were to "shake" the Product before opening, it is impossible for the
21 consumer to discern the presence of any nonfunctional slack-fill.

22 33. The other information that Defendant provides about quantity of candy
23 product on the front label and back label of the Product does not enable a consumer
24 to form any meaningful understanding about how to gauge the quantity of contents
25 of the Product as compared to the size of the box itself.

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28 ⁵ Clement, J., Visual influence on in-store buying decisions: an eye-track experiment on the visual
influence of packaging design, 23 Journal of Marketing Management, 917-928 (2007).

1 34. Consumers often do not consult quantity indications on packages but use
2 alternative methods, such as visual impressions of the package size, total package
3 price, or previous purchase experience, to judge product quantity and to calculate
4 product value.⁶

5 35. The front label of the Product indicates a net weight of 4.0 ounces (113
6 grams). The nutritional panel on the back of the Product reports a serving size of 40
7 grams and total of 3 servings per container. True and correct representations of the
8 Product's front and back labels with annotations of other quantity disclosures are set
9 forth below.



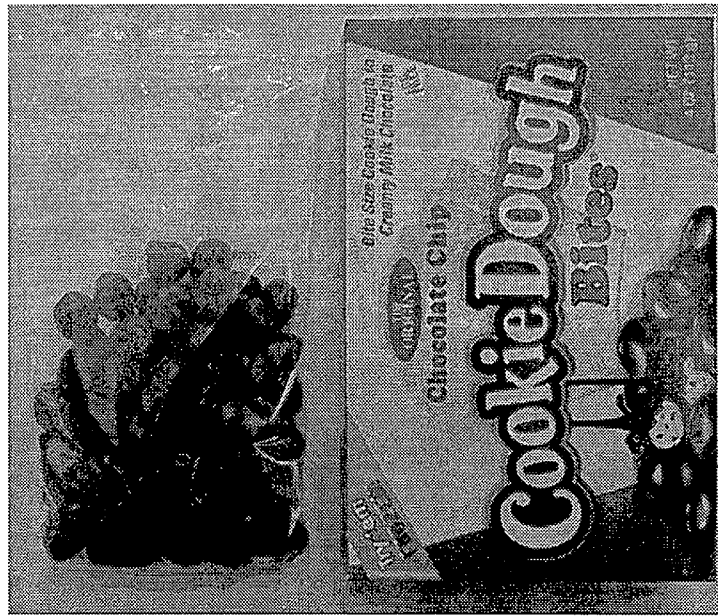
17 36. Disclosures of net weight and serving sizes in a measurement of ounces
18 or grams does not allow the reasonable California or American consumer to make
19 any meaningful conclusion about the quantity of candy product contained in the
20 Product's boxes that would be different from the reasonable consumer's expectation
21 that the quantity of candy product is commensurate with the size of the box.

22 37. Plaintiff would not have purchased the Product had he known the Product
23 contained slack-fill which serves no functional or lawful purpose.

24 38. During Plaintiff's investigation, Plaintiff confirmed that Defendant
25 uniformly under-fills the Product's' boxes, rendering at least a whopping 50% of each
26 box slack-fill, nearly all of which serves no functional or lawful purpose. A true and
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⁶ Gupta K, O. et al., *Package downsizing: is it ethical?* 21 AI & Society 239-250 (2007).

1 correct representation of a side-by-side comparison of the bag of candy inside the
2 Product and the Product's exterior box is pictured below.



12 39. The Product is made, formed, and filled as to be misleading. The Product
13 therefore is misbranded.

14 40. The slack-fill contained in the Product does not serve a legitimate or
15 lawful purpose.

16 41. The slack-fill contained in the Product does not protect the contents of the
17 packages.

18 42. In fact, the greater the slack-fill, the more room the contents have to
19 bounce around during shipping and handling, and the more likely the contents are to
20 break and sustain damage.

21 43. The Product's density, shape and composition allows Defendant to
22 completely fill the Product's plastic bag packaging with candy product, and still
23 protect the contents from damage during shipping and handling. The clear plastic bag
24 within the Product's container alone can sufficiently cushion at least 50% more candy
25 contents, without any slack-fill in the packaging of the Product.

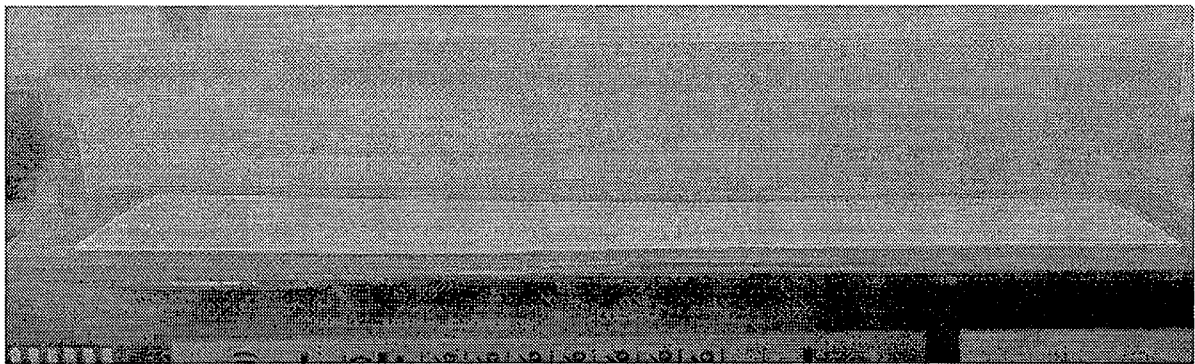
26 44. If, on the other hand, the amount of candy product contained in each box
27 were commensurate with the size of the box as consumers expect, then the candy
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1 product would have less room to move around during shipping and handling, and
2 would be less likely to sustain damage.

3 45. As such, the slack-fill present in the Product makes the candy product
4 more susceptible to damage, and in fact causes the candy product to often sustain
5 damage.

6 46. The Product is packaged in a box and sealed with heated glue. A true and
7 correct representation of the heated glue is shown below.



14 47. The equipment used to seal the carton does not breach the inside of the
15 Product's containers during the packaging process. The heated glue is applied to an
16 exterior flap of the box, which is then sealed over the top by a second exterior flap.

17 48. Neither the heated glue application nor the sealing equipment require
18 slack-fill during the manufacturing process. Even if there were no slack-fill present
19 in the Product's boxes, the machines used for enclosing the contents in the package
20 would work without disturbing the packaging process.

21 49. The slack-fill present in the Product's container is not a result of the candy
22 product settling during shipping and handling. Given the Product's density, shape,
23 and composition, any settling occurs immediately at the point of filling the box. No
24 additional product settling occurs during subsequent shipping and handling.

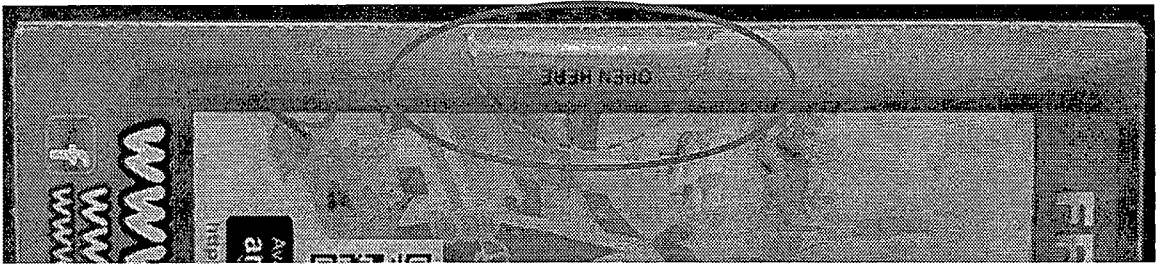
25 50. Contrary to a powder product, for example, the contents of the Product
26 are of a great enough density such that any slack-fill present at the point of sale was
27 present at the time of filling the containers and packaging the contents.

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51. At one end of the Product's box, the Product's packaging bears a perforated tab, one-half inch in length and one inch in width, labeled "OPEN HERE." A true and correct representation of the side of the box containing the perforated dispensing tab is shown in the image below.



52. Defendant ostensibly includes the perforated tab as a convenient method of opening the exterior box packaging of the Product, so that a consumer does not have to break the glued flaps at the top. However, the perforated tab does not genuinely have any function because the Product's candy contents are enclosed in a plastic bag.

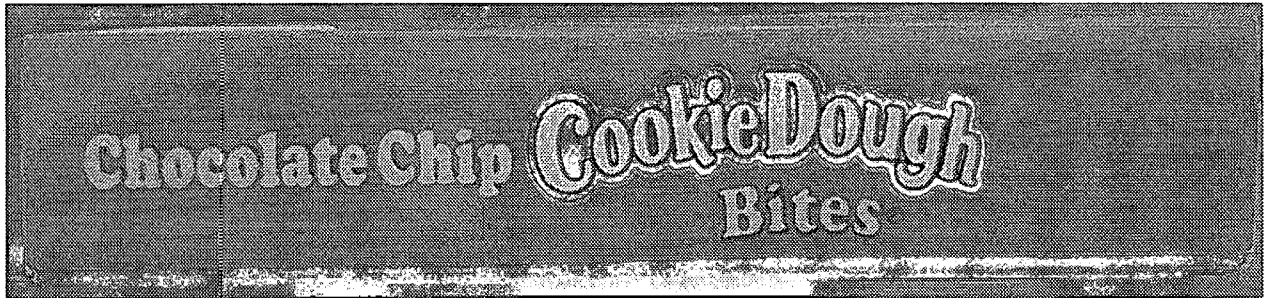
53. A reasonable consumer can open the Product's box by undoing its glued seal and still access the candy contents without any spillage. Defendant knows or should know that the reasonable consumer does not need the perforated tab to dispense the candy product.

54. The placement and color of the perforated tab, *inter alia*, evidence Defendant knows or should now that the reasonable consumer does not actually use the perforated tab to dispense the candy product. The true purpose behind Defendant's inclusion of the perforated tab is to conceal the nonfunctional slack-fill contained in the Product.

55. The perforated tab of the Product's box is the same color as the packaging of the Product. Therefore, it is hidden and difficult to see. Undoubtedly, a reasonable consumer cannot see the side tab while watching a movie in a dark theater.

56. Reasonable consumers instinctually open the Product by undoing the Product's glued seal. Neither one of the Product's glued seals direct the consumer to a perforated side tab. Before consumers break the glued seal of the Product to open

1 the packaging, they do not encounter any instructions about dispensing the contents
2 from the side of the package. A true and correct representation of the exterior of
3 Product's glued seals is shown below.



9 57. The perforated side tab on the Product's packaging does not perform any
10 specific function that is inherent to the nature of the contents. Nor is it clearly
11 communicated to consumers. A reasonable consumer can easily obtain the Product
12 from the top of its packaging, without any side tab. Therefore, the Product's
13 packaging does not require any functional slack-fill to accommodate a perforated side
14 tab.

15 58. The Product does not use packaging that is part of a reusable container
16 with any significant value to the Product independent of its function to hold the candy
17 product.

18 59. For example, the Product's plastic bag and container are not
19 commemorative items.

20 60. The Product's packaging solely includes plastic bags and box containers
21 that are intended to be discarded into the recycling bin immediately after the contents
22 have been completely consumed.

23 61. Defendant can easily increase the quantity of candy product contained in
24 each Product container or, alternatively, decrease the size of the containers, by 50%.

25 62. The "Nutrition Facts" panel on the back of each box states "Servings Per
26 Container about 3." By arithmetic, each serving would be the equivalent of: 100%
27 expected total fill, divided by 3 servings, yielding a value of 33% of volume per
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1 serving. Given the Product can accommodate at least an additional 50% of candy
2 product, consumers are being shortchanged a minimum of 1.5 serving per box.

3 63. Plaintiff did not expect that the Product would contain nonfunctional
4 slack-fill, especially given that nonfunctional slack-fill, as opposed to functional
5 slack-fill, is prohibited by California law and federal law.

6 64. Defendant's conduct threatens California consumers by using
7 intentionally deceptive and misleading slack-filled containers. Defendant's conduct
8 also threatens other companies, large and small, who "play by the rules." Defendant's
9 conduct stifles competition and has a negative impact on the marketplace, and reduces
10 consumer choice.

11 65. There is no practical reason for the nonfunctional slack-fill present in the
12 Product other than to mislead consumers as to the actual volume of the Product being
13 purchased by consumers while simultaneously providing Defendant with a financial
14 windfall as a result of money saved from lower supply costs.

15 66. Plaintiff makes the allegations herein upon personal knowledge as to
16 himself and his own acts and experiences, and as to all other matters, upon
17 information and belief, including investigation conducted by his attorneys.

18 **CLASS ALLEGATIONS**

19 67. Plaintiff brings this action on his own behalf and on behalf of all other
20 persons similarly situated. Plaintiff seeks to represent a Class consisting of "All
21 persons who purchased the Product in United States for personal use and not for
22 resale during the time period February 23, 2013, through the present. Excluded from
23 the Class are Defendants' officers, directors, and employees, and any individual who
24 received remuneration from Defendants in connection with that individual's use or
25 endorsement of the Product."

26 68. In the alternative, Plaintiff seeks to represent a Class consisting of "All
27 persons who purchased the Product in the State of California for personal use and not
28 for resale during the time period February 23, 2013, through the present. Excluded

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1 from the Class are Defendants' officers, directors, and employees, and any individual
2 who received remuneration from Defendants in connection with that individual's use
3 or endorsement of the Product."

4 69. The Class is so numerous that their individual joinder herein is
5 impracticable. On information and belief, the Class numbers in the hundreds of
6 thousands or more throughout the United States and California. The Class is
7 sufficiently numerous because hundreds of thousands of units of the Product have
8 been sold in California during the time period February 23, 2013, through the present
9 (the "Class Period").

10 70. There is a well-defined community of interest in the questions of law and
11 fact involved affecting the parties to be represented. The questions of law and fact
12 common to the Class predominate over questions which may affect individual Class
13 members. Common questions of law and fact include, but are not limited to, the
14 following:

15 a. Whether Defendant's conduct constitutes an unfair method of
16 competition, or unfair or deceptive act or practice, in violation of Civil Code Section
17 1750, *et seq.*;

18 b. Whether Defendant misrepresented the approval of the FDA,
19 United States Congress, and California Legislature that the Product's packaging
20 complied with federal and California slack-fill regulations and statutes in violation of
21 Civil Code Section 1750, *et seq.*;

22 c. Whether Defendant used deceptive representations in connection
23 with the sale of the Product in violation of Civil Code Section 1750, *et seq.*;

24 d. Whether Defendant represented the Product has characteristics or
25 quantities that it does not have in violation of Civil Code Section 1750, *et seq.*;

26 e. Whether Defendant advertised the Product with intent not to sell it
27 as advertised in violation of Civil Code Section 1750, *et seq.*;

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1 f. Whether Defendant represented that the Product has been supplied
2 in accordance with a previous representation of quantity of candy product contained
3 therein by way of its packaging when it has not, in violation of Civil Code Section
4 1750, *et seq.*;

5 g. Whether Defendant's packaging is untrue or misleading in
6 violation of Business and Professions Code Section 17500, *et seq.*;

7 h. Whether Defendant knew or by the exercise of reasonable care
8 should have known its packaging was and is untrue or misleading in violation of
9 Business and Professions Code Section 17500, *et seq.*;

10 i. Whether Defendant's conduct is an unfair business practice within
11 the meaning of Business and Professions Code Section 17200, *et seq.*;

12 j. Whether Defendant's conduct is a fraudulent business practice
13 within the meaning of Business and Professions Code Section 17200, *et seq.*;

14 k. Whether Defendant's conduct is an unlawful business practice
15 within the meaning of Business and Professions Code Section 17200, *et seq.*;

16 l. Whether Defendant's packaging is false or misleading and
17 therefore misbranded in violation of California Health and Safety Code sections
18 110660, 110665, or 110670;

19 m. Whether the Product contains nonfunctional slack-fill in violation
20 of 21 C.F.R. 100.100, *et seq.*;

21 n. Whether the Product contains nonfunctional slack-fill in violation
22 of California Business and Professions Code Section 12606.2, *et seq.*;

23 o. Whether Plaintiff and the Class paid more money for the Product
24 than they actually received; and

25 p. How much money Plaintiff and the Class paid for the Product than
26 they actually received.

27 71. Plaintiff's claims are typical of the claims of the Class, and Plaintiff will
28 fairly and adequately represent and protect the interests of the Class. Plaintiff has

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1 retained competent and experienced counsel in class action and other complex
2 litigation.

3 72. Plaintiff and the Class have suffered injury in fact and have lost money as
4 a result of Defendant's false representations. Plaintiff purchased the Product under
5 the false belief that the Product contained an amount of candy product commensurate
6 with the size of the box. Plaintiff relied on Defendant's packaging and would not have
7 purchased the Product if he had known that the Product contained nonfunctional
8 slack-fill.

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

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

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

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

3 **COUNT ONE**

4 **Violation of California Consumers Legal Remedies Act,**
5 **California Civil Code Section 1750, *et seq.***

6 77. Plaintiff repeats and realleges all allegations of the previous paragraphs,
7 and incorporates the same as if set forth herein at length.

8 78. Plaintiff brings this cause of action pursuant to Civil Code Section 1750,
9 *et seq.*, the Consumers Legal Remedies Act (“CLRA”), on his own behalf and on
10 behalf of all other persons similarly situated. Plaintiff seeks to represent a Class
11 consisting of “All persons who purchased the Product in United States for personal
12 use and not for resale during the time period February 23, 2013, through the present.
13 Excluded from the Class are Defendants’ officers, directors, and employees, and any
14 individual who received remuneration from Defendants in connection with that
15 individual’s use or endorsement of the Product.”

16 79. In the alternative, Plaintiff seeks to represent a Class consisting of “All
17 persons who purchased the Product in the State of California for personal use and not
18 for resale during the time period February 23, 2013, through the present. Excluded
19 from the Class are Defendants’ officers, directors, and employees, and any individual
20 who received remuneration from Defendants in connection with that individual’s use
21 or endorsement of the Product.”

22 80. The Class consists of thousands of persons, the joinder of whom is
23 impracticable.

24 81. There are questions of law and fact common to the Class, which questions
25 are substantially similar and predominate over questions affecting the individual
26 Class members, including but not limited to those questions listed in Paragraph 69,
27 above.

28 82. The CLRA prohibits certain “unfair methods of competition and unfair or

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1 deceptive acts or practices” in connection with a sale of goods.

2 83. The practices described herein, specifically Defendant’s packaging,
3 advertising, and sale of the Product, were intended to result and did result in the sale
4 of the Product to the consuming public and violated and continue to violate the CLRA
5 by (1) misrepresenting the approval of the Product as compliant with 21 C.F.R
6 Section 100.100, California Business and Professions Code Section 12606.2, and the
7 Sherman Law; (2) using deceptive representations in connection with the Product;
8 (3) representing the Product has characteristics and quantities that they do not have;
9 (4) advertising and packaging the Product with intent not to sell it as advertised and
10 packaged; and (5) representing that the Product has been supplied in accordance with
11 a previous representation as to the quantity of candy product contained within each
12 box, when it has not.

13 84. Defendant fraudulently deceived Plaintiff and the Class by representing
14 that the Product’s packaging, which includes at least 50% nonfunctional slack-fill,
15 actually conforms with federal and California slack-fill regulations and statutes
16 including the Sherman Law, California Business and Professions Code Section
17 12606.2, and 21 C.F.R. 100.100.

18 85. Defendant packaged the Product in boxes which contain at least 50%
19 nonfunctional slack-fill by making material misrepresentations to fraudulently
20 deceive Plaintiff and the Class.

21 86. Defendant fraudulently deceived Plaintiff and the Class by
22 misrepresenting the Product as having characteristics and quantities which it does not
23 have, e.g., that the Product is free of nonfunctional slack-fill when it is not. In doing
24 so, Defendant intentionally misrepresented and concealed material facts from
25 Plaintiff and the Class. Said misrepresentations and concealment were done with the
26 intention of deceiving Plaintiff and the Class and depriving them of their legal rights
27 and money.

28 87. Defendant fraudulently deceived Plaintiff and the Class by packaging and

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1 advertising the Product with intent not to sell it as advertised, by intentionally under-
2 filling the Product's plastic bags and cardboard containers and instead replacing
3 candy product with nonfunctional slack-fill. In doing so, Defendant intentionally
4 misrepresented and concealed material facts from Plaintiff and the Class. Said
5 misrepresentations and concealment were done with the intention of deceiving
6 Plaintiff and the Class and depriving them of their legal rights and money.

7 88. Defendant fraudulently deceived Plaintiff and the Class by representing
8 that the Product was supplied in accordance with an accurate representation as the
9 quantity of candy product contained therein when they were not. Defendant presented
10 the physical dimensions of the Product's packaging to Plaintiff and the Class before
11 the point of purchase and gave Plaintiff and the Class a reasonable expectation that
12 the quantity of candy product contained therein commensurate with the size of
13 packaging. In doing so, Defendant intentionally misrepresented and concealed
14 material facts from Plaintiff and the Class. Said misrepresentations and concealment
15 were done with the intention of deceiving Plaintiff and the Class and depriving them
16 of their legal rights and money.

17 89. Defendant knew or should have known, through the exercise of
18 reasonable care, that the Product's packaging was misleading.

19 90. Defendant's actions as described herein were done with conscious
20 disregard of Plaintiff's rights, and Defendant was wanton and malicious in its
21 concealment of the same.

22 91. Defendant's packaging of the Product was a material factor in Plaintiff's
23 and the Class's decisions to purchase the Product. Based on Defendant's packaging
24 of the Product, Plaintiff and the Class reasonably believed that they were getting more
25 candy product than they actually received. Had they known the truth of the matter,
26 Plaintiff and the Class would not have purchased the Product.

27 92. Plaintiff and the Class have suffered injury in fact and have lost money as
28 a result of Defendant's unfair, unlawful, and fraudulent conduct. Specifically,

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1 Plaintiff paid for candy product he never received. Plaintiff would not have purchased
2 the Product had he known the boxes contained nonfunctional slack-fill.

3 93. Defendant's false and misleading packaging should be enjoined due to
4 the false, misleading, and/or deceptive nature of Defendant's packaging. In addition,
5 Defendant should be compelled to provide restitution and damages to consumers who
6 paid for candy product they never received due to Defendant's representation that it
7 contained a commensurate amount of candy product for a box of its size.

8 94. By letter dated September 15, 2016, Plaintiff advised Defendant of its
9 false and misleading claims pursuant to California Civil Code Section 1782(a).

10 **COUNT TWO**

11 **Violation of California False Advertising Law,**

12 **Business & Professions Code Section 17500, et seq.**

13 95. Plaintiff repeats and realleges the allegations set forth in the preceding
14 paragraphs, and incorporates the same as if set forth herein at length.

15 96. Plaintiff brings this cause of action pursuant to Business and Professions
16 Code Section 17500, et seq., on his own behalf and on behalf of all other persons
17 similarly situated. Plaintiff seeks to represent a Class consisting of "All persons who
18 purchased the Product in United States for personal use and not for resale during the
19 time period February 23, 2013, through the present. Excluded from the Class are
20 Defendants' officers, directors, and employees, and any individual who received
21 remuneration from Defendants in connection with that individual's use or
22 endorsement of the Product."

23 97. In the alternative, Plaintiff seeks to represent a Class consisting of "All
24 persons who purchased the Product in the State of California for personal use and not
25 for resale during the time period February 23, 2013, through the present. Excluded
26 from the Class are Defendants' officers, directors, and employees, and any individual
27 who received remuneration from Defendants in connection with that individual's use
28 or endorsement of the Product."

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1 98. California’s False Advertising Law, California Business and Professions
2 Code Section 17500, *et seq.*, makes it “unlawful for any person to make or
3 disseminate or cause to be made or disseminated before the public in this state, in any
4 advertising device or in any other manner or means whatever, including over the
5 Internet, any statement, concerning personal property or services, professional or
6 otherwise, or performance or disposition thereof, which is untrue or misleading and
7 which is known, or which by the exercise of reasonable care should be known, to be
8 untrue or misleading.”

9 99. Defendant knowingly manipulated the physical dimensions of the
10 Product’s boxes, or stated another way, under-filled the amount of candy product in
11 each of the Product, by including at least 50% nonfunctional slack-fill as a means to
12 mislead the public about the amount of candy product contained in each package.

13 100. Defendant controlled the packaging of the Product. It knew or should
14 have known, through the exercise of reasonable care that its representations about the
15 quantity of candy product contained in the Product was untrue and misleading.

16 101. The general public bases its purchasing decisions on the dimensions of a
17 product’s packaging. Consumers generally do not look at any label information, such
18 as net weight or serving disclosures. Instead, the general public chooses a larger box
19 because it leads them to believe they are receiving a better value.

20 102. Defendant’s action of packaging the Product with a minimum of 50%
21 nonfunctional slack-fill instead of including more candy content in the plastic bag, or
22 placing the plastic bag of candy product in smaller cardboard containers, is likely to
23 deceive the general public.

24 103. Defendant’s actions in violation of Section 17500 were false and
25 misleading such that the general public is and was likely to be deceived.

26 104. Pursuant to Business and Professions Code Section 17535, Plaintiff and
27 the Class seek an order of this Court enjoining Defendant from continuing to engage,
28 use, or employ their practice of under-filling the Product’s containers. Likewise,

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1 Plaintiff and the Class seek an order requiring Defendant to disclose such
2 misrepresentations, and additionally request an order awarding Plaintiff and the Class
3 restitution of the money wrongfully acquired by Defendant by means of
4 responsibility attached to Defendant's failure to disclose the existence and
5 significance of said misrepresentations in an amount to be determined at trial.

6 105. Plaintiff and the Class have suffered injury in fact and have lost money as
7 a result of Defendant's false representations. Plaintiff purchased the Product in
8 reliance upon the claims by Defendant that the Product was of the quantity
9 represented by Defendant's packaging and advertising. Plaintiff would not have
10 purchased the Product if he had known that the claims and advertising as described
11 herein were false.

12 **COUNT THREE**

13 **Violation of California Unfair Competition Law,**
14 **Business & Professions Code Section 17200, *et seq.***

15 106. Plaintiff repeats and realleges the allegations set forth above, and
16 incorporate the same as if set forth herein at length.

17 107. Plaintiff brings this cause of action pursuant to Business and Professions
18 Code Section 17200, *et seq.*, on his own behalf and on behalf of all other persons
19 similarly situated. Plaintiff seeks to represent a Class consisting of "All persons who
20 purchased the Product in United States for personal use and not for resale during the
21 time period February 23, 2013, through the present. Excluded from the Class are
22 Defendants' officers, directors, and employees, and any individual who received
23 remuneration from Defendants in connection with that individual's use or
24 endorsement of the Product."

25 108. In the alternative, Plaintiff seeks to represent a Class consisting of "All
26 persons who purchased the Product in the State of California for personal use and not
27 for resale during the time period February 23, 2013, through the present. Excluded
28 from the Class are Defendants' officers, directors, and employees, and any individual

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1 who received remuneration from Defendants in connection with that individual's use
2 or endorsement of the Product."

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

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

9 111. The legislature of California has incorporated 21 C.F.R. Section 100.100,
10 which prohibits nonfunctional slack-fill, into the State's Business and Professions
11 Code Section 12606.2 *et seq.*

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

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

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

20 115. The California Sherman Food, Drug, and Cosmetic Act ("Sherman
21 Law"), Cal. Health & Safety Code Section 109875 *et seq.*, has adopted wholesale the
22 food labeling requirements of the FDCA and NLEA as the food regulations of
23 California. Cal. Health & Safety Code Section 110100.

24 116. The Sherman Law declares any food to be misbranded if it is false or
25 misleading in any particular, if the labeling does not conform with the requirements
26 for nutrition labeling set forth in certain provisions of the NLEA. Cal. Health &
27 Safety Code Sections 110660, 110665, 110670.

28 117. The UCL prohibits "any unlawful, unfair... or fraudulent business act or

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1 practice.” Cal. Bus & Prof. Code § 17200.

2 **A. “Unfair” Prong**

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

8 119. Defendant’s action of leaving at least 50% nonfunctional slack-fill in its
9 Product does not confer any benefit to consumers.

10 120. Defendant’s action of leaving at least 50% nonfunctional slack-fill in its
11 Product causes injuries to consumers because they do not receive a quantity of candy
12 commensurate with their reasonable expectation.

13 121. Defendant’s action of leaving a minimum of 50% nonfunctional slack-fill
14 in its Product causes injuries to consumers because they do not receive a level of
15 hunger satiety commensurate with their reasonable expectation.

16 122. Defendant’s action of leaving at least 50% nonfunctional slack-fill in its
17 Product causes injuries to consumers because they end up overpaying for the Product
18 and receiving a quantity of candy less than what they expected to receive.

19 123. Consumers cannot avoid any of the injuries caused by the 50% or more
20 nonfunctional slack-fill in Defendant’s Product.

21 124. Accordingly, the injuries caused by Defendant’s activity of including a
22 minimum of 50% nonfunctional slack-fill in the Product outweighs any benefits.

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

28 126. Here, Defendant’s conduct of including at least 50% nonfunctional slack-

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1 fill in the Product’s packaging has no utility and financially harms purchasers. Thus,
2 the utility of Defendant’s conduct is vastly outweighed by the gravity of harm.

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

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

10 129. The minimum of 50% of nonfunctional slack-fill contained in the Product
11 is tethered to a legislative policy declared in California according to Cal. Business
12 and Professions Code Section 12606.2 and Cal. Health & Safety Code Section
13 110100.

14 130. Defendant’s packaging of the Product, as alleged in the preceding
15 paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unfair
16 conduct.

17 131. Defendants knew or should have known of its unfair conduct.

18 132. As alleged in the preceding paragraphs, the misrepresentations by
19 Defendant detailed above constitute an unfair business practice within the meaning
20 of California Business and Professions Code Section 17200.

21 133. There existed reasonably available alternatives to further Defendant’s
22 legitimate business interests, other than the conduct described herein. Defendant
23 could have used packaging appropriate for the amount of candy product contained
24 within the Product.

25 134. All of the conduct alleged herein occurs and continues to occur in
26 Defendant’s business. Defendant’s wrongful conduct is part of a pattern or
27 generalized course of conduct repeated on thousands of occasions daily.

28 135. Pursuant to Business and Professions Code Sections 17203, Plaintiff and

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1 the Class seek an order of this Court enjoining Defendant from continuing to engage,
2 use, or employ its practice of under-filling the Product's boxes. Likewise, Plaintiff
3 and the Class seek an order requiring Defendant to disclose such misrepresentations,
4 and additionally request an order awarding Plaintiff restitution of the money
5 wrongfully acquired by Defendant by means of responsibility attached to Defendant's
6 failure to disclose the existence and significance of said misrepresentations in an
7 amount to be determined at trial.

8 136. Plaintiff and the Class have suffered injury in fact and have lost money as
9 a result of Defendant's unfair conduct. Plaintiff paid an unwarranted premium for
10 these products. Specifically, Plaintiff paid for at least 50% of candy product he never
11 received. Plaintiff would not have purchased the Product if he had known that the
12 Product's packaging contained nonfunctional slack-fill.

13 **B. "Fraudulent" Prong**

14 137. California Business and Professions Code Section 17200, *et seq.*,
15 considers conduct fraudulent and prohibits said conduct if it is likely to deceive
16 members of the public. *Bank of Wes v. Superior Court*, 2 Cal. 4th 1254, 553 (1992).

17 138. Members of the public base their purchasing decisions on the dimensions
18 of a product's packaging. They generally do not view label information or net weight
19 and serving disclosures. Members of the public choose a larger box because they
20 automatically assume it has better value.

21 139. Defendant's conduct of packaging the Product with a minimum of 50%
22 nonfunctional slack-fill is likely to deceive members of the public.

23 140. Defendant's packaging of the Product, as alleged in the preceding
24 paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes
25 fraudulent conduct.

26 141. Defendant knew or should have known of its fraudulent conduct.

27 142. As alleged in the preceding paragraphs, the misrepresentations by
28 Defendant detailed above constitute a fraudulent business practice in violation of

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1 California Business & Professions Code Section 17200.

2 143. Defendant had reasonable available alternatives to further its legitimate
3 business interests, other than the conduct described herein. Defendant could have
4 used packaging appropriate for the amount of Product contained therein.

5 144. All of the conduct alleged herein occurs and continues to occur in
6 Defendant's business. Defendant's wrongful conduct is part of a pattern or
7 generalized course of conduct repeated on thousands of occasions daily.

8 145. Pursuant to Business and Professions Code Sections 17203, Plaintiff and
9 the Class seek an order of this Court enjoining Defendant from continuing to engage,
10 use, or employ their practice of under-filling the Product's containers. Likewise,
11 Plaintiff and the Class seek an order requiring Defendant to disclose such
12 misrepresentations, and additionally request an order awarding Plaintiff restitution of
13 the money wrongfully acquired by Defendant by means of responsibility attached to
14 Defendant's failure to disclose the existence and significance of said
15 misrepresentations in an amount to be determined at trial.

16 146. Plaintiff and the Class have suffered injury in fact and have lost money as
17 a result of Defendant's fraudulent conduct. Plaintiff paid an unwarranted premium
18 for these products. Specifically, Plaintiff paid for at least 50% of candy product he
19 never received. Plaintiff would not have purchased the Product if he had known that
20 the boxes contained nonfunctional slack-fill.

21 **C. "Unlawful" Prong**

22 147. California Business and Professions Code Section 17200, *et seq.*,
23 identifies violations of other laws as "unlawful practices that the unfair competition
24 law makes independently actionable." *Velazquez v. GMAC Mortg. Corp.*, 605 F.
25 Supp. 2d 1049, 1068 (C.D. Cal. 2008).

26 148. Defendant's packaging of the Product, as alleged in the preceding
27 paragraphs, violates California Civil Code Section 1750, *et seq.*, California Business
28 and Professions Code Section 17500, *et seq.*, California's Sherman Law, Cal.

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1 Business and Professions Code Section 12606.2 *et. seq.*, the FDCA, and 21 C.F.R
2 Section 100.100.

3 149. Defendant's packaging of the Product, as alleged in the preceding
4 paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes
5 unlawful conduct.

6 150. Defendant knew or should have known of its unlawful conduct.

7 151. As alleged in the preceding paragraphs, the misrepresentations by
8 Defendant detailed above constitute an unlawful business practice within the meaning
9 of California Business and Professions Code Section 17200.

10 152. There were reasonably available alternatives to further Defendant's
11 legitimate business interests, other than the conduct described herein. Defendant
12 could have used packaging appropriate for the amount of candy product contained
13 therein.

14 153. All of the conduct alleged herein occurred and continues to occur in
15 Defendant's business. Defendant's wrongful conduct is part of a pattern or
16 generalized course of conduct repeated on thousands of occasions daily.

17 154. Pursuant to Business and Professions Code Sections 17203, Plaintiff and
18 the Class seek an order of this Court enjoining Defendant from continuing to engage,
19 use, or employ their practice of under-filling the Product's boxes. Likewise, Plaintiff
20 and the Class seek an order requiring Defendant to disclose such misrepresentations,
21 and additionally request an order awarding Plaintiff restitution of the money
22 wrongfully acquired by Defendant by means of responsibility attached to Defendant's
23 failure to disclose the existence and significance of said misrepresentations in an
24 amount to be determined at trial.

25 155. Plaintiff and the Class have suffered injury in fact and have lost money
26 as a result of Defendant's unlawful conduct. Plaintiff paid an unwarranted premium
27 for these products. Specifically, Plaintiff paid for a minimum of 50 % candy
28 product he never received. Plaintiff would not have purchased the Product if he had

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known that the packaging contained nonfunctional slack-fill.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and on behalf of the Class defined herein, prays for judgment and relief on all Causes of Action as follows:

- A. For an order certifying the Class, appointing Plaintiff as class representative, and designating Plaintiff's counsel as counsel for the Class;
- B. For all forms of relief set forth above;
- C. Damages against Defendant in an amount to be determined at trial, together with pre- and post-judgment interest at the maximum rate allowable by law on any amounts awarded;
- D. Restitution and/or disgorgement in an amount to be determined at trial;
- E. Punitive damages;
- F. An order enjoining Defendant from continuing to engage in the unlawful conduct and practices described herein;
- G. Reasonable attorney fees and costs; and
- H. Granting such other and further as may be just and proper.

JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all triable issues.

DATED: February 23, 2017

CLARKSON LAW FIRM, P.C.

/s/ Ryan J. Clarkson
Ryan J. Clarkson, Esq.
Shireen M. Clarkson, Esq.
Shalini M. Dogra, Esq.
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