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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TERRI JACKSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiff,	)	**CIVIL ACTION CASE NUMBER:**
v.	)	**(CLASS ACTION)**
KERVAN USA, LLC	)	
Defendant.	)	

INDIVIDUAL AND CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Terri Jackson ("Plaintiff"), files this class action complaint on behalf of herself and all others similarly situated in the United States ("the class") and State of Alabama (the "sub-class"), alleging facts related to her own purchase based on personal knowledge and other facts based upon the investigation of counsel.

NATURE OF THE ACTION

1. The Plaintiff Terri Jackson is a resident of Shelby County, Alabama. The Defendant Kervan USA, LLC is a limited liability company with its headquarters located in Whitehall, Pennsylvania.

2. This is a consumer protection class action arising from Kervan USA, LLC ("Defendant" or "Kervan"), engaging in the practice of "slack-filling" boxes of its Mermaids Fruit Snacks gummies candy ("the product" or "gummies candy"). The practice of using oversized containers with substantial, nonfunctional, empty space inside is called "slack-fill" and is illegal under Alabama and Federal law. Both Federal and Alabama laws have long prohibited nonfunctional slack-fill for food containers. The policies behind the law are

based, in part, on finding that this practice leads consumers to believe that they are receiving a greater quantity of the food than is in the package (even if the quantity or weight is accurately displayed on the label). Plaintiff's claims are based on the grounds that Defendant's conduct is deceptive and unfair, thus rendering the product as unmerchantable for the purpose intended, in addition to other violations.

3. Defendant's Mermaids Fruit Snacks gummies candy containers are marketed with a significant amount of nonfunctional slack-fill. Specifically, the boxes consistently have over 80% empty space. By violating Federal and Alabama slack-fill laws, Defendant's products are deemed "misbranded".

PARTIES

4. Ms. Jackson is, and at all relevant times, was an adult residing in Shelby County, Alabama. From time to time, she has shopped at the Dollar Tree stores in the Shelby County area. On October 8, 2021, Plaintiff visited the Dollar Tree store at 300 Colonial Promenade, Alabaster, Shelby County, Alabama and purchased several items, including two (2) boxes of the subject product; namely Mermaids Fruit Snacks gummy candy. She was, at purchase, impressed that said product was packaged in larger boxes (5" x 7.5") than most all of the other candies (3.75" x 6") which were offered for sale near the product. All of said candy were priced at or about the same amount. Attached hereto as Exhibit A is a copy of the Plaintiff's purchase receipt.

5. Defendant is a limited liability company organized and existing under the laws of Pennsylvania. Defendant lists its operating headquarters as 1139 Lehigh Ave., Whitehall, PA 18052.

6. Defendant is a Turkish company and is Turkey's # 1 producer and exporter of Gummies, Licorice and Marshmallow candy featuring Bebeto and Yumy Yumy brands. In

2011, Kervan expanded to the United States selling bulk candy. Kervan is currently shipping over 200 different candy varieties throughout the United States. Kervan's gummies are also marketed under the Crayola, Curious George, Peanuts and Sunkist licenses. Kervan's stated goal is to produce gummies for all ages.

JURISDICTION AND VENUE

7. This court has original jurisdiction over this civil action under the Class Action Fairness Act of 2005. The amount in controversy exceeds the sum or value of Seventy-five thousand dollars ($75,000), exclusive of interest and costs and there is diversity of citizenship because named Plaintiff and certain members of the class are citizens of a different state than Defendant, as required by 28 U.S.C. § 1332(d)(2).

8. Venue is proper in this judicial district because Defendant conducts substantial business in this district and the events giving rise to Plaintiff's claim occurred in this district; the unlawful conduct complained of herein occurred in this district.

STATEMENT OF FACTS

9. Plaintiff's individual claim and her claim on behalf of all others in Alabama and in the United States who are similarly situated is based on Defendant violating Federal and Alabama law. Defendant markets several varieties of gummies in addition to Mermaids Fruit Snacks gummy candy. Upon information and belief, all are in violation of Alabama's Food Code, the Federal Food, Drug and Cosmetics Act and the FDA regulations promulgated thereunder. This Complaint only complains, however, about Defendant's Mermaid Fruit Snacks.

10. Among Plaintiff's purchases aforementioned were two (2) boxes of Defendant's gummies candy (see the attached Exhibits B). Plaintiff fully expected that the gummies candy boxes contained significantly more candy than the smaller boxes of candy which

the merchant had placed in its shelves alongside the subject gummies. Hence, she purchased two. In fact, the gummies boxes being bigger than the other competitive boxed candies had much more slack-fill than its competitors. Upon Plaintiff purchasing the product and opening same, she was more than amazed at its dire contents.

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

12. Defendant falsely represents the quantity of candy in each of the Products' opaque boxes through its packaging. The size of each box leads the reasonable consumer to believe he or she is purchasing a box full or near-full of candy product when, in reality, what he or she actually receives is only a small percentage of what is represented by the size of the box.

13. Even if Plaintiff and other reasonable consumers of the product had/have a reasonable opportunity to review, prior to the point of sale, other representations of quantity, such as net weight or serving disclosures, they did not and would not have reasonably understood or expected such representations to translate to a quantity of candy product meaningfully different from their expectation of a quantity of candy product commensurate with the size of the box.

14. Experts have conducted a randomized conjoint experiment which included a 3,788-participant consumer survey. The results from the survey confirmed that the size of the candy's packaging has a significant impact on a consumer's choice to purchase the candy.

15. Prior to the point of sale, Defendant's gummies candy packaging does not allow for a visual or audial confirmation of the contents of the same. The Product's boxed

packaging prevents a consumer from observing the contents before opening. Even if a reasonable consumer were to "shake" the Product before opening the box, the reasonable consumer would not be able to discern the presence of any nonfunctional slack fill, let alone the consistent 80% nonfunctional slack-fill that is present in the Product. Furthermore, gummy candy does not rattle or shake. Defendant also wraps its gummies candy in six separate 0.7 oz. individual containers (see Exhibit C) inside each box which hampers a purchaser from shaking same before purchasing. Feeling of the box does not allow a customer to judge its contents due to said wrappings.

16. The other information that Defendant provides about the quantity of candy product on the front and back labels of the Product does not enable reasonable consumers to form any meaningful understanding about how to gauge the quantity of contents of the Product as compared to the size of the box itself. For instance, the front of the Product's packaging does not have any labels that would provide Plaintiff with any meaningful concept of the product's quantity in relation to the box size, nor other insight as to the amount of candy to be expected, such as a fill line or actual size depiction accompanied by the words "actual size". The Defendant does list on the front of each package: "NET WT. 6 x 0.7 oz (20g) POUCH TOTAL NET WT. 4.2 oz (120g)". However, a reasonable consumer has no real understanding as to the actual contents in relation to the box size based on net weight.

17. Disclosures of net weight or serving size in ounces or grams does not allow the reasonable consumer to make any meaningful conclusion about the quantity of candy contained in the Product's boxes. Thus, the net weight disclosures on the Product does not give consumers an accurate expectation regarding product fill level.

18. Plaintiff and class members would not have purchased the Product had they known that the Product contained immense slack-fill that serves no functional or lawful purpose.

Defendant uniformly under-fills the Product's boxes, rendering 80% + of each box empty, which serves no functional or lawful purpose. And then seals each box with heated glue.

19. The equipment used to seal the box does not breach the inside of the Products' containers during the packaging process. The heated glue is applied to an exterior flap of the box, which is then sealed over the top by a second exterior flap. Neither the heated glue application nor the sealing equipment requires slack-fill during the manufacturing process. Even if there were no slack-fill present in the Products' boxes, the machines used for enclosing the contents in the package would work without disturbing the packaging process. Competitors' boxed candy is packaged using identical fill procedure and heated glue enclosing process to that of Defendant's gummies.

20. Defendant marketed the Product in a systematically misleading manner by representing such as adequately filled when, in fact, such contained an unlawful amount of empty space or "slack-fill." Defendant underfilled the Products for no lawful reason. The only purpose of this practice by Defendant was to deceive customers (by not filling the boxes) into purchasing Defendant's Products. Defendant's slack-fill scheme not only has harmed thousands of consumers in Alabama to date but continues to harm thousands of consumers outside Alabama.

21. Plaintiff and the Class Members accordingly suffered injury in fact caused by the false, unfair, deceptive, unlawful, and misleading practices set forth herein, which Plaintiff, as hereinafter recited, requests this Court to end.

REASONABLE CONSUMER

22. At to the point of sale, Mermaids Fruit Snacks gummies candy packaging does not allow for a visual or audial confirmation of the contents of the same. The Product's boxed

packaging prevents a consumer from observing the contents before opening. Even if a reasonable consumer were to "shake" the Product before opening the box, the reasonable consumer would not be able to discern the presence of any nonfunctional slack fill, let alone the 80+% nonfunctional slack-fill that is present in the Product.[1] Feeling of the box does not allow a customer to judge its contents either.

23. Importantly, the other information that Defendant provides about the box's contents on the front and back labels of the Product does not enable reasonable consumers to form any meaningful understanding about how to gauge the quantity of contents of the Product as compared to the size of the box itself. For instance, the front of the Product's packaging does not have any labels that would provide Plaintiff with any meaningful concept of the product's quantity in relation to the box size, nor other insight as to the amount of candy to be expected, such as a fill line or actual size depiction accompanied by the words "actual size". The Defendant does list the net weight on the front of each package, which is meaningless to a reasonable consumer as to the amount of slack-fill. Said statement of weight coupled with the side of the box stating that the box contains "6 servings" does not inform a reasonable consumer of the boxes' 80+% air.

24. Disclosures of net weight or serving size in ounces or grams does not allow the reasonable consumer to make any meaningful conclusion about the quantity of candy contained in the Product's boxes. Thus, the net weight disclosures on the Product does not give consumers an accurate expectation regarding product fill level.

25. As the FDA explains in the Federal Register:

> Consumers develop expectations as to the amount of product they are purchasing based, at least in part, on

[1] Gummy candy does not shake. Defendant wraps its gummies in a cellophane-like wrap inside each box which hampers a purchaser from shaking same before purchasing. A reasonable consumer would not be shaking packages anyway.

> the size of the container. The congressional report that accompanied the FPLA stated: "Packages have replaced the salesman. Therefore, it is urgently required that the information set forth on these packages be sufficiently adequate to apprise the consumer of their contents and to enable the purchaser to make value comparisons among comparable products" (H.R. 2076, 89th Cong., 2d sess., p. 7 (September 23, 1966)). Thus, packaging becomes the "final salesman" between the manufacturer and the consumer, communicating information about the quantity and quality of product in a container. Further, Congress stated (S. Rept. 361, supra at 9) that "Packages only partly filled create a false impression as to the quantity of food which they contain despite the declaration of quantity of contents on the label."

58 Fed. Reg. 64123-01, 64131 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100) (emphasis added).

26. Furthermore, Research indicates that 90% of consumers make a purchase after only a perfunctory viewing of the front of the packaging but without physically having the product in their hands.[2]

27. The information that Defendant provides about contents on the front and side label of the Product does not enable reasonable consumers to form any meaningful understanding about how to gauge the quantity of contents of the Product as compared to the size of the box itself.

28. Consumers rarely consult quantity indications on packages but use alternative methods, such as visual impressions of the package size, total package price, or previous purchase experience, to judge product quantity and to calculate product value.[3]

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[2] 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)

[3] Gupta K, O. et al., *Package downsizing: is it ethical?* 21 AI & Society 239-250 (2007)

29. Defendant's obvious intent was/is to deceive consumers, especially children, into buying the product while saving the expenses of adequate contents. Plaintiff and class members would not have purchased the Product had they known that the Product contained 80% empty space that serves no functional or lawful purpose. Defendant uniformly under-fills the Product's boxes, rendering 80+% of each box empty, which serves no functional or lawful purpose, and then seals each box with heated glue.

30. The equipment used to seal the box does not breach the inside of the Products' containers during the packaging process. The heated glue is applied to an exterior flap of the box, which is then sealed over the top by a second exterior flap. Neither the heated glue application nor the sealing equipment requires slack-fill during the manufacturing process. Even if there were no slack-fill present in the Products' boxes, the machines used for enclosing the contents in the package would work without disturbing the packaging process. Competitors' boxed candy is packaged using identical fill and heated glue enclosing process to those of Defendant's gummies.

31. Congress has recognized that the law preventing misleading packaging is "intended to reach deceptive methods of filling . . . where the package is only partly filled and, *despite the declaration of quantity of contents on the label*, created the impression that it contains more food than it does." S. Rep. No. 493, 73d Cong., 2d sess. 9 (1934) (emphasis added).

32. In addition, the FDA, in promulgating an identical federal regulation, 21 C.F.R. § 100.100, concluded that an accurate disclosure of a product's net weight on the product packaging does not exempt a manufacturer from complying with slack-fill regulations, finding that "the presence of an accurate net weight statement does not eliminate the misbranding . . ." *Misleading Containers; Nonfunctional Slack-Fill*, 58 Fed. Reg. 64,123,

64,128 (Dec. 6, 1993) (codified at 21 C.F.R. pt. 100). Moreover, the FDA has emphasized that "[t]o rule that an accurate net weight statement protects against misleading fill would render the prohibition against misleading fill . . . redundant." *Id*. at 64,129.

33. Defendant marketed the Product in a systematically misleading manner by representing such as adequately filled when, in fact, such contained an unlawful amount of empty space or "slack-fill." Defendant underfills the Product for no lawful reason. The only purpose of this practice by Defendant was to save money (by not filling the boxes) in order to deceive consumers into purchasing Defendant's Products and enhance profits over its competitors. Defendant's slack-fill scheme not only has harmed thousands of consumers in Alabama to date but continues to harm thousands of consumers outside Alabama for the Defendants' profitability.

34. Plaintiff and the Class Members accordingly suffered injury in fact caused by the false, unfair, deceptive, unlawful, and misleading practices set forth, as herein recited.

APPLICABLE LAW

35. Except for minor and irrelevant exclusions, pursuant to Ala. Admin. Code r. 420-3-20-.02 (Ala. Admin. Code [2021 Ed.]), Alabama has adopted as law in Alabama the federal food related CFRs (Code of Federal Regulations) referenced hereafter. All following references to the CFR and Federal Food, Drug and Cosmetic Act (FDA) are thereby law in Alabama.

36. **Slack-Fill Violates Federal Law.** Federal statutes and regulations prohibit nonfunctional slack fill. The Federal Food Drug and Cosmetic Act, 21 U.S.C. §403(d) and 21 C.F.R. §100.100 provide:

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

> (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:
>
> (1) Protection of the contents of the package;
>
> (2) The requirements of the machines used for enclosing the contents in such package;
>
> (3) Unavoidable product settling during shipping and handling;
>
> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
>
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or a durable commemorative or promotional packages; or
>
> (6) Inability to increase the level of fill or to further reduce the size of the package (e.g., where some minimal package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant device).

37. The FDA deems a product containing nonfunctional slack fill to be "misbranded" within the meaning of the Food Drug and Cosmetic Act. As such, the sale of the packages of Defendant's boxes with only 16% to 18% candy contents is prohibited under 21 U.S.C. §331. Defendant's boxes of the product do not meet any of the six exemptions under applicable law:

(a) Defendant's slack-fill does not protect the contents of the packages. The Defendant's gummies candy per box with each contents individually plastic wrapped (6 x 0.7 oz), does not gain any additional protection from the extra space in the box. If the boxes were filled, *i.e.* the six individual 0.7 oz container in each box was commensurate with the size of the packaging, the contents would have less room to move around during shipping and be less likely to sustain damage. See 21 CFR §100.100(a)(1).

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

(c) The slack-fill is not caused by product settling during shipping and handling. Given the product's density, shape, and composition, any settling occurs immediately at the point of filling the box, if at all. Upon information and belief, Defendant individually wraps the six, 0.7 oz bags of gummies before placing them in the boxes, which are then sealed. No additional product settling occurs during subsequent shipping and handling (see 21 CFR §100.100(a)(3).

(d) The slack-fill space is not needed to perform a specific function, such as preparing the food. The wrapped product is removed from the packaging for

consumption (e.g., the candy is not prepared or consumed in the cardboard packaging box). See 21 CFR §100.100(a)(4).

(e) Defendant's packaging itself lacks independent value from the food it contains. The cardboard packaging is not a commemorative item nor is it a reusable container which is part of the presentation of the food, nor is it intended for use after the food is consumed. See 21 CFR §100.100(a)(5).

(f) The slack-filled package was not necessary to prevent pilfering nor accommodate required food labeling. Indeed, Defendant should be able to double or possibly triple the product in each box. Alternatively, Defendant could readily reduce the size of the containers to eliminate the nonfunctional slack-fill. See 21 CFR §100.100(a)(6).

38. Thus, there is no lawful reason for the substantial non-functional slack-fill contained in Defendant's packaging of its gummies candy. Defendant is effectively deceiving reasonable consumers (especially children) because its packaging is substantially larger than necessary to contain candy included per box. Further, to cause children to select Defendant's bigger boxes of candy, Defendant lures children to select the Defendant's product by placing a cartoon mermaid on each boxes' front panel.

39. Defendant failed to comply with consumer protection and packaging statutes designed to prevent this deception, and relied on the larger than normal box to further this deception even in the face of other lawsuits against similar companies, including two certified class actions for the same violations, which were based on slack-fill of candy boxes of much less egregious facts. This class action aims to remedy Defendant's practice of unethical and illegal candy marketing.

40. Several state and federal courts have found that cases involving nearly identical claims as the present are meritorious and appropriate for class treatment: *Tsuchiyama v. Taste of Nature, Inc.,* Case No. BC651252 (L.A.S.C.) (defendant's motion for judgment on the pleadings involving slack-filled Cookie Dough Bites® candy box claims denied and nationwide settlement subsequently certified through Missouri court); *Gordon v. Tootsie Roll Industries, Inc.,* Case No. 2:17-cv-02664-DSF-MRW (C.D. Cal.; Defendant changed box (defendant's FRCP 12(b)(6) motion to dismiss slack-filled Junior Mints® and Sugar Babies® candy box claims denied); *Escobar v. Just Born, Inc.,* Case No. 2:17-cv-01826-BRO-PJW (C.D. Cal.) (defendant's FRCP 12(b)(6) motion to dismiss slack-filled Mike N' Ike® and Hot Tamales® candy box claims denied and California class action certified, then settled.); *Thomas v. Nestle USA, Inc.,* Cal. Sup. Case No. BC649863 (April 29, 20020) (certified as a class action slack-fill claim brought under California consumer protection laws; settled for over $1 million). Plaintiff's claim against the subject Defendant is based on the Defendant's slack-fill marketing which is more egregious than the above cases.

41. Defendant, upon becoming involved with the manufacture, advertising, and sale of the Product, knew or should have known that its sale of the Product, specifically by representing that the boxes were full or near-full, were false, deceptive, and misleading. Defendant affirmatively misrepresents the amount of candy product contained in the Products' boxes in order to convince the public and the Products' consumers (especially children) to purchase the Products all to the financial damage and detriment of the Plaintiff and the consuming public, which damage has occurred and continues presently to consumers.

42. Defendant, upon becoming involved with the manufacture, distribution, advertising, labeling, marketing, and sale of the Product, knew or should have known that the represented claim about the Product and, in particular, the claims suggesting that the Product's boxes were full or near-full with candy product when they are not, were false, misleading, and deceptive. Defendant affirmatively misrepresents the nature and characteristics of the Product in order to convince the consuming (primarily children) public to purchase the Product, resulting in unwarranted extra profits to the Defendant and to the detriment of the Plaintiff and consuming public.

43. Defendant is obviously creating a falsehood that its candy boxes contain an amount of candy commensurate with the size of the box, though the boxes actually contain substantial nonfunctional, unlawful slack-fill. As a result, Defendant's consistent and uniform marketing and packaging of the Product is false, misleading, and deceptive in violation of Alabama law and federal CFR regulations.

44. The amount of product inside any product's packaging is material to any consumer seeking to purchase that product. The average (Reasonable) consumer spends only 13 seconds deciding whether to make an in-store purchase,[4] which decision is heavily dependent on a product's packaging, including the package dimensions. As stated above, research has demonstrated that packages that seem larger are more likely to be purchased.[5] Furthermore, it is known by Defendant and throughout the business of candy marketing that the primary purchasing public are children who obviously select the biggest box of candy, i.e., Defendant's Mermaids Fruit Snacks.

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[4] 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./.

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

45. Accordingly, Defendant chose a certain size box for its Product to convey to consumers, especially children, that they are receiving a substantial amount of candy commensurate with the size of the box. Such representations were knowingly false.

CLASS ALLEGATIONS

46. Plaintiff individually, and for the Classes, incorporates by reference all preceding paragraphs as though fully set forth herein.

47. Plaintiff brings this case individually, and as a class action, pursuant to R. 23, Fed. R. Civ. Proc., on behalf of all persons who have purchased Defendant's Mermaids Fruit Snacks gummies in the United States and Alabama as covered immediately below.

48. Plaintiff seeks to represent the following Classes:

- **All persons residing in the United States who purchased Mermaids Fruit Snacks gummies in the last six (6) years.**

And the following sub-class:

- **All persons residing in the State of Alabama who purchased Mermaids Fruit Snacks gummies in the last six (6) years.**

Excluded from the Classes are the following:

i. Any and all federal, state, or local governments, including but not limited to their department, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions;

ii. Individuals, if any who timely opt out of this proceeding using the correct protocol for opting out;

iii. Current or former employees of Defendant;

iv. Individuals, if any, who have previously settled or compromised claim(s) relating to Mermaids Fruit Snacks; and

v. Any currently sitting federal judge and/or person within the third degree of consanguinity to any federal judge.

49. Plaintiff seeks a judgment on a Class-wide basis for himself and the Class under Alabama's breach-of-warranty law and breach of implied agreement of good faith.

50. Defendant violated the rights of each Member of the Class in the same fashion based upon Defendant's uniform actions in its marketing, producing, selling, design and distributing of its Mermaids Fruit Snacks gummies candy.

51. Plaintiff should be approved to maintain this action as a class action for the following reasons:

52. **Numerosity:** Members of the Class are so numerous that individual joinder is impracticable. The proposed Class contains thousands of Members. The Class is therefore sufficiently numerous to make joinder impracticable, if not impossible.

53. **Common Questions of Fact and Law Exist:** Common questions of fact and law exist as to all Members of the Class, including whether Defendant marketed, designed, produced and distributed the Product with its representations, implied and expressed warranties and breaches of agreement in fact and implied.

54. **Typicality:** Plaintiff's claims are typical of the claims of the Class. Alabama and federal food law form the framework of Defendant's legal requirements as reasonable and necessary standards by which Defendant is to comply. Violations of same impose the following causes of action. Furthermore, Plaintiff and all Members of the Class sustained monetary and economic injuries arising out of Defendant's unlawful conduct. Plaintiff is advancing the same claims and legal theories on behalf of herself and all putative Class Members.

55. **Adequacy:** Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class – all seek redress and prevention for the same unlawful conduct. Plaintiff has retained Counsel who is competent and highly experienced in complex class action litigation, and he intends to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiff and her counsel. Plaintiff's claims, like those of the Class, are antagonistic to Defendant.

56. **Predominance:** Common questions of fact and law predominate over any questions affecting individual Class Members.

57. **Superiority:** A class action is superior to other available means of fair and efficient adjudication. The injury suffered by each individual Class Member is very small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendant's conduct. It would be impossible for all Members of the Class to effectively redress the wrongs done to them on an individual basis. Therefore, a class action is the only reasonable means by which Plaintiff and the Class may pursue their claims. Moreover, even if the Members of the Class could pursue such individual litigation, the court system could not. Individualized litigation increases the delay and expense to all parties, and to the court system, by the complex legal and factual issues of this case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

58. Plaintiff brings this action for herself and on behalf of a class of individuals in the State of Alabama and throughout the United States who purchased said Mermaids Fruit Snacks gummies.

COUNT I

DECEPTIVE PRACTICE STATUTES

(On Behalf of the Plaintiff and the Class)

Plaintiff adopts all of paragraphs above as if fully set out herein.

59. Ms. Jackson, for himself and on behalf of the class and subclass, brings this action under the consumer protection statutes of all fifty (50) states:

a. Alabama Deceptive Trade Practices Act, ALA. Code § 8-19-1, *et. seq.*;

b. Alaska Unfair Trade Practices and Consumer Protection Act, Ak. Code § 45.50.471, *et. seq.*;

c. Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et. seq.*;

d. California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et. seq.* and Unfair Competitive Law, Cal. Bus. Prof. Code §§ 17200 – 17210 *et. seq.*;

e. Colorado Consumer Protection Act, Colo Rev. Stat § 6-1-101, *et. seq.*;

f. Connecticut Unfair Trade Practices Act, Conn. Gen Stat § 42-110a, *et. seq.*;

g. Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et. seq.*;

h. District of Columbia Consumer Protection Procedure Act, D.C. Code §§ 28-3901, *et. seq.*;

i. Florida Deceptive and Unfair Trade Practices, Act *Florida Statutes*§ 501.201, *et. seq.*;

j. Georgia Fair Business Practices Act, § 10-1-390 *et. seq.*;

k. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statutes § 480 1, *et. seq.* and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statute § 481A-1, *et. seq.*;

l. Idaho Consumer Protection Act, Idaho Code § 48-601, *et. seq.*;

m. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et. seq.*;

n. Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et. seq.*;

o. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et. seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann § 365.020, *et. seq.*;

p. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. §§ 51:1401, *et. seq.*;

q. Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et. seq.*, and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et. seq.*;

r. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen Laws ch. 93A;

s. Michigan Consumer Protection Act, §§ 445.901, *et. seq.*;

t. Minnesota Prevention of Consumer Fraud Act, Minn. Stat §§ 325F.68, *et. seq.*; and Minnesota Uniform Deceptive Trade Practices Act, Minn Stat. § 325D.43, *et. seq.*;

u. Mississippi Consumer Protection Act, Miss. Code An. §§ 75-24-1, *et. seq.*;

v. Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et. seq.*;

w. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code § 30-14-101, *et. seq.*;

x. Nebraska Consumer Protection Act, neb. Rev. Stat. § 59 1601 *et. seq.*, and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et. seq.*;

y. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et. seq.*;

z. New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et. seq.*;

aa. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et. seq.*;

bb. New Mexico Unfair Practices Act, N.M. Sta. Ann. §§ 57 12 1, *et. seq.*;

cc. New York General Business Law ("GBL") §§ 349 & 350;

dd. North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et. seq.*;

ee. Ohio Rev. Code Ann. §§ 1345.02 and 1345.03; Ohio Admin. Code §§ 109;

ff. Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et. seq.*;

gg. Oregon Unfair Trade Practices Act, Ore. Rev. Stat. § 646.608€ & (g);

hh. Rhode Island Unfair Trade Practices and Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1 *et. seq.*;

ii. South Carolina Unfair Trade Practices Act, S.C. Code Law § 39-5-10, *et. seq.*;

jj. South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 1, *et. seq.*;

kk. Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et. seq.*;

ll. Vermont Consumer Fraud Act, Vt. Stat. Ann. Tit. 9, § 2451, *et. seq.*;

mm. Washington Consumer Fraud Act, Wash. Rev. Code § 19.86/0101, *et. seq.*;

nn. West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-6-101, *et. seq.*;

oo. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100.18, *et. seq.*;

60. Defendant's acts, practices, labeling, advertising, packaging, representations and omissions, while unique to the parties, have a broader impact on the public.

61. As reasonable consumers, Plaintiff and class members desired to purchase the Product with the reasonable assumption that the subject goods complied with applicable law, regulations and the represented whole nut contents, when such did not; Defendant is guilty of marketing said goods:

- so that such causes confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services;

- by representing that said goods have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities that they do not have;
- by representing that said goods are of a particular standard, quality or grade;
- by marketing the said goods in violation of law;
- by engaging in an unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce; and
- by representing said goods are of a quality that they are not.

62. After mailing on June 6, 2022 a claim notice to Defendant, pursuant to law and not receiving any constructive response, Plaintiff asserts a statutory claim under the Alabama Deceptive Practices Act, Code of Alabama, §§ 8-19-1, et seq. and the aforementioned statutes of all other 49 states.

63. By engaging in the aforementioned unlawful and deceptive acts, Defendant caused monetary damage to Plaintiff and a class and subclass of similarly situated persons by engaging in a trade or commerce harmful to Plaintiff and the putative classes.

64. Plaintiff individually and on behalf of the class and subclass request the following relief:

a. the sum of $100 for each one of the purchased Honey Roasted Peanuts;

b. three times actual damages;

c. appropriate injunctive relief;

d. attorneys' fees and costs; and

e. such other, further and general relief for which Plaintiff and the class might be equitably qualified.

COUNT II

BREACH OF WARRANTY

(On Behalf of the Plaintiff and the Class)

65. Plaintiff realleges and incorporates by reference all paragraphs of this Complaint as if fully set forth herein.

66. Plaintiff and the class members formed contracts with Defendant at the time they purchased the product from Defendant. The terms of such contracts included implied promises and affirmations of fact by Defendant that said products were being marketed in compliance with applicable law and that the product contained contents commensurate with the size of the container. Further, the Defendant's presentation of the product's contents amounted(s) to a breach of warranty.

67. The implication of said marketing is that a requirement of law became part of the basis of the bargain, and is part of the contract between Defendant on the one hand and Plaintiff and the class members on the other hand.

68. The implied affirmation made by Defendant was made to induce Plaintiff and the class members to purchase Mermaids Fruit Snacks gummies from Defendant.

69. Defendant intended that Plaintiff and the class members would rely on said affirmations in making their purchases, and Plaintiff and the class members did so.

70. All conditions precedent to Defendant's liability under these warranties have been fulfilled by Plaintiff and the class members (a.) giving Defendant sufficient statutory notice before this filing and (b.) by paying for the goods at issue. Additionally, Defendant had actual and/or constructive notice of their own false marketing and sales practices but to date have taken no action to remedy their breaches of implied or express warranty.

71. Defendant breached the terms of the warranty because the product purchased by

Plaintiffs and the class members did not conform to the implied affirmations of fact by Defendant – that they were being sold according to law by representing candy's contents as being commensurate with the size of the container. In fact, they were not.

72. As a direct and proximate result of Defendant's breach of warranty, Plaintiff and the class members have been injured and have suffered actual damages because the subject Mermaids Fruit Snacks gummies upon attempting to use, same were rendered not merchantable for the intended purpose by violating federal and Alabama food law, causing Plaintiff and the class to be damaged by their not receiving the benefit of the bargain.

COUNT III

BREACH OF CONTRACT

(On Behalf of the Plaintiff and the Class)

73. Plaintiff realleges and incorporates by reference all previous paragraphs of this Complaint as if fully set forth herein.

74. Plaintiff and the class members entered into implied agreements with Defendant.

75. The agreements provided that Plaintiff and the class members would pay Defendant for its boxed candy.

76. The contracts further provided that Defendant would provide Plaintiff and the class members subject candy as required by law with contents commensurate with its container.

77. Plaintiff and the class members paid Defendant for the product that they purchased, and satisfied all other conditions of the agreements.

78. Defendant breached the implied agreements with Plaintiff and the class members by failing to comply with the material terms of providing the candy as required by law by being under-filled as above recited.

79. As a direct and proximate result of Defendant's breach, Plaintiff and the class

members have been injured and have suffered actual damages due to the candy being less than as represented.

COUNT IV

NEGLIGENCE

(On Behalf of the Plaintiff and the Class)

80. Plaintiff repeats and incorporates all paragraphs of this Complaint as if fully set forth herein.

81. Plaintiff alternatively claims that Defendant in a negligence manner marketed and sold to Plaintiff and the class the product heretofore mentioned.

82. Plaintiff claims that said marketing of Mermaids Fruit Snacks gummies without regard to the legal requirements, was done and is presently continuing in a negligent manner and as a proximate result thereof, the Plaintiff and the class were damaged as herein claimed.

83. Plaintiff further alleges that said marketing of Mermaids Fruit Snacks gummies in a negligent manner is violative of Alabama and federal legal requirements and should be restrained and be caused to cease.

84. Plaintiff prays that due to the damage proximately caused by Defendant to Plaintiff and the class that relief is demanded as hereinafter requested.

COUNT V

WANTONNESS

(On Behalf of the Plaintiff and the Classes)

85. Plaintiff repeats and incorporates all paragraphs of this Complaint as if fully set forth herein.

86. Plaintiff claims that Defendants in a wanton manner has marketed and is marketing to Plaintiff and the classes the products heretofore mentioned.

87. Plaintiff claims that said marketing of the subject product without regard to the legal requirements, was done and is presently continuing in a wanton manner and as a proximate result thereof, the Plaintiff and the classes were damaged as herein claimed.

88. Plaintiff further alleges that said marketing by Defendants of misbranded product in a wanton manner, is violative of legal requirements throughout the United States and should be restrained and be caused to cease, as hereinafter claimed.

89. Plaintiff prays that due to the damage proximately caused by Defendant to Plaintiff and the classes that punitive monetary relief is also demanded as hereinafter requested.

COUNT VI

COUNT UNDER THE ALABAMA DECLARATORY JUDGMENT ACT

(On Behalf of the Plaintiff and the Class)

90. Plaintiff repeats and incorporates by reference all paragraphs of this Complaint as if fully set forth herein.

91. Plaintiff and the Alabama public, including the putative classes, need and are entitled to, an order for declaratory relief declaring that Defendants' sales practices alleged herein violate the Alabama Food Code, and by declaring that the aforementioned refusal by Defendants to follow the Alabama Food Code is in violation of the requirement to place the true nature of the product on the PDP as abovementioned.

92. Defendant is presently continuing each of these complained-of practices in Alabama and the United States. Plaintiff has previously served legal notice on Defendant to comply with legally required labeling as aforstated. Defendant has refused and continue to knowingly ignore such responsibility despite other similar competitors to Defendant

complying with the referenced law. This matter should be settled and a declaratory judgment will assist in same. Plaintiff therefore alleges that the requested declaratory judgement is in the public interest.

93. Plaintiff on behalf of the aforementioned classes has a significant interest in this matter in that each has been, and will again in the future, along with putative class members, be continuously subjected to the unlawful policies and practices alleged herein. As with Plaintiff, members of putative class are continuously and unwittingly subjected to the Defendant's knowing disregard of the Alabama Food Code and FDA regulations and are regularly subjected to Defendant's deceptive marketing.

94. Further, Plaintiff alleges on behalf of the afore-mentioned putative classes that class members routinely purchase subject products from Defendant, and are entitled to know that the purported product will legally display its true contents at the time of purchase. Until a change is legally declared, Plaintiff and members of the public will be regularly subjected to Defendant's unlawful conduct which is alleged herein and will be subject to such conduct in the future.

95. Based on the foregoing, a justifiable controversy is presented in this case, rendering declaratory judgment appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this case be certified and maintained as a class action and that judgment be entered in favor of Plaintiff and the class members against Defendant as follows:

A. Enter an order certifying the proposed classes, designating Plaintiff as the representative for the class members that she seeks to represent, and designating the undersigned as class counsel;

B. Declare that Defendant is financially responsible for notifying all class members of Defendant's deceptive receipt, shipping, advertising, sales, and marketing practices alleged herein;

C. Award damages to Plaintiff and members of both abovementioned classes in an amount appropriate to compensate them for purchasing the product;

D. Find that Defendant's conduct alleged herein be adjudged and decreed in violation of the law cited above;

E. Grant injunctive and declaratory relief to end the challenged conducts;

F. Grant reasonable attorneys' fees pursuant to law and as otherwise permitted by statute, with reimbursement of all costs and expenses incurred in the prosecution of this action; and

G. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

BY: /s/ *Charles M. Thompson*
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PLAINTIFF DEMANDS TRIAL BY STRUCK JURY

/s/ *Charles M. Thompson*
Charles M. Thompson
Attorney for Plaintiff

SERVE DEFENDANT via certified mail at this address:

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Bethlehem, PA 18018