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Darren Clevenger, David Bloom and the Classes

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

16 DARREN CLEVINGER and DAVID BLOOM  
17 on behalf of themselves and all others similarly  
18 situated,

CASE NO. 30-2022-01298406-CU-BT-CXC

19 Plaintiffs,

**CLASS ACTION COMPLAINT  
FOR:**

20 v.

**Violation of Cal. Unfair Competition,  
Cal. Business & Professions Code  
§17200, et seq.**

21 WELCH FOODS INC., A COOPERATIVE;  
22 PIM BRANDS, INC., formerly THE  
23 PROMOTION IN MOTION COMPANIES,  
24 INC., a Delaware Corporation; and DOES 1  
25 through 25, inclusive,

26 Defendants.

1 Plaintiffs Darren Clevenger and David R. Bloom (“Plaintiffs”), by and through  
2 their attorneys, DiVincenzo Schoenfield Stein and Lanza & Smith, PLC, bring this  
3 class action complaint on behalf themselves and all others similarly situated (the  
4 “Classes”), alleging facts related to their own purchases based on personal knowledge  
5 and all other facts based upon the investigation of counsel.

#### 6 NATURE OF THE ACTION

7 1. This is re-filing of *Darren Clevenger v. Welch Foods Inc., et al.*, Orange  
8 County Superior Court case No. 30-2020-01145532-CU-BT-CXC, previously filed on  
9 June 29, 2020 and assigned to Hon. William D. Claster, Dept. CX-104. As explained  
10 in the “Procedural History” section, below, on September 24, 2020, Defendants  
11 removed the original case, which alleged both CLRA and UCL violations, to federal  
12 district court. After litigating the case for two years in federal court, which included  
13 surviving multiple motions to dismiss, and *certifying the case as a class action*,  
14 Defendants successfully moved to have the UCL claim (the one previously removed  
15 asserting federal jurisdiction) dismissed for lack of federal jurisdiction. The federal  
16 court issued an Order on December 14, 2022, dismissing the UCL count for lack of  
17 jurisdiction, *not* on the merits, and expressly granting Plaintiffs and the class the right  
18 to re-file these claims in state court. The UCL claims are Plaintiffs’ primary claims.  
19 Based on the history of the case, the UCL claims will relate back to the original filing  
20 of the complaint in this Court on June 29, 2020.

21 2. This is a consumer protection class action arising from Defendants’  
22 practice of “slack-filling” boxes of their Welch’s® Reduced Sugar Fruit Snacks, Fruit  
23 ‘n Yogurt™ Snacks, and certain boxes of Welch’s® Fruit Snacks. The practice of  
24 using oversized containers with substantial, nonfunctional, empty space inside them is  
25 called “slack-fill” and is illegal under California and federal law. Both federal and  
26 California laws have long prohibited nonfunctional slack-fills for food containers.  
27 Although the legislative and administrative basis and policies behind the law are  
28 based, in part, on findings that this practice misleads consumers to believe they are

1 receiving a greater quantity of the food than is in the package (even if the quantity or  
2 weight is accurately displayed on the label), Plaintiffs' claims are based solely on the  
3 grounds that Defendants' conduct is unlawful and unfair. Plaintiffs do **not** assert any  
4 claims based on misrepresentation.

5         3. For products sold to retailers such as grocery stores and mass market  
6 stores like Target, Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n  
7 Yogurt™ boxes contain eight pouches of snacks, compared to ten larger pouches in  
8 the same size boxes of other flavors of Welch's® Fruit Snacks. The boxes of  
9 Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n Yogurt™ Snacks  
10 thus contain substantial nonfunctional slack-fill compared to other flavors of  
11 Welch's® Fruit Snacks. In those boxes, Welch's® includes two more (sometimes four  
12 more) larger sized pouches and with as much as 44% more content by volume.  
13 Defendants have slack-filled Welch's® Fruit Snacks in other ways, including  
14 reducing the weight of the pouches for certain flavors of Fruit Snacks and, during the  
15 class period, using a 15% larger box packed with the exact same snack content.

16         4. Additionally, Defendants manufacture and package Welch's® Fruit  
17 Snacks for sale at Costco in a box containing ninety .8 oz. pouches (previously eighty  
18 .9 oz. pouches), but Plaintiffs' expert determined Defendants could package thirteen  
19 more pouches (approximately 15% more) in the same box.

20         5. By violating federal and California slack-fill laws, Defendants' products  
21 are deemed "misbranded" and cannot legally be sold in interstate commerce.  
22 Defendants' violations of state and federal laws violate the unlawful and unfair prongs  
23 of California's Unfair Competition Law (Bus & Prof. Code §17200, *et seq.*) ("UCL"),  
24 for which Plaintiffs assert claims for unlawful and unfair practices only; they do *not*  
25 assert claims for deceptive or fraudulent practices under the UCL.

## PARTIES

1  
2           6. Plaintiff Darren Clevenger (“Clevenger”) is, and at all relevant times  
3 was, an adult residing in Orange County, California. Clevenger purchased  
4 Defendant’s Welch’s® Fruit Snacks for some time from various stores, including but  
5 not limited to, Walmart and Albertson’s in Orange County, California. Clevenger  
6 noticed that the Welch’s® Fruit Snacks with Reduced Sugar contained significant  
7 amounts of empty space. Specifically, he realized that Welch’s® boxes of Fruit  
8 Snacks with Reduced Sugar contained two less pouches per box than other non-  
9 premium varieties of Welch’s® Fruit Snacks (“Regular Fruit Snacks”). He also  
10 noticed that Welch’s® Fruit ‘n Yogurt™ Snacks he had purchased also only contained  
11 eight pouches despite the box being the exact same size as Regular Fruit Snacks boxes  
12 with ten pouches. The Regular Fruit Snacks are also sold at Target in boxes containing  
13 22 pouches; but Target sells Reduced Sugar Fruit Snacks in the same size box  
14 containing only 18 pouches, i.e., 22% to 36% less content. Clevenger suffered injury  
15 in fact as a result of Defendants’ conduct because the boxes were illegally slack-filled  
16 -- containing at least two less pouches of snacks than they should have but for the  
17 illegal slack-fill. Therefore, the products were misbranded and could not legally be  
18 sold.

19           7. Plaintiff David Bloom, M.D. (“Bloom”) is, and at all relevant times was,  
20 an adult residing in Orange County, California. Bloom purchased Defendants’  
21 Welch’s® Fruit Snacks sold at Costco stores (the “Costco Fruit Snacks”) in 2018,  
22 2019, 2020 and 2021 in Orange County, including San Juan Capistrano and Laguna  
23 Niguel. The boxes the Costco Fruit Snacks were sold in contained significant amounts  
24 of empty space. Specifically, although the boxes contained only 90 pouches, Bloom  
25 was able to fit 110 pouches into the box. Plaintiffs’ expert later determined that,  
26 allowing for the needs of the packaging process, Defendants could include thirteen  
27 more pouches (approximately 15% more) in the Costco box. Plaintiff also purchased  
28 the prior 80-count boxes from Costco. Bloom suffered injury in fact as a result of

1 Defendants' conduct because the boxes were illegally slack-filled, as they had at least  
2 15% less pouches of snacks than they should have but for the illegal slack-fill.  
3 Therefore, the products were misbranded and could not legally be sold. Further,  
4 evidence from Costco confirms its policy against knowingly purchasing or reselling  
5 unlawful products.

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

9 9. Defendant PIM Brands, Inc., formerly The Promotion in Motion  
10 Companies, Inc. "(PIM)") is a Delaware corporation with its headquarters in Allendale,  
11 New Jersey. Plaintiffs allege that PIM makes, markets, and/or distributes the subject  
12 products under a license agreement with Welch Foods. Plaintiffs allege that PIM  
13 participates in the making, marketing, and distribution of the subject products for  
14 Welch Foods, whereby Welch Foods and PIM jointly control and share responsibility  
15 for the manufacture, branding, marketing, and/or distribution of the subject products.  
16 At all relevant times the subject packaging is and was subject to approval by Welch.

17 10. In addition to the Defendants named in this action, upon information and  
18 belief, there are other parties, known and unknown, who participated in the conduct as  
19 alleged herein. The true names and capacities, whether individual, corporate, associate  
20 or otherwise, of defendants named herein as DOES 1 through 25, inclusive, are  
21 presently unknown to Plaintiffs, who therefore sue said defendants by such fictitious  
22 names. Each of these fictitiously named defendants is responsible for the events and  
23 occurrences alleged herein which were legally and proximately cause by their  
24 conduct. Plaintiffs will seek leave to amend this pleading to state the true names and  
25 capacities of such fictitiously named defendants if ascertained.

26  
27  
28

**JURISDICTION AND VENUE**

1  
2           11. This action was initially filed in Orange County Superior Court on June  
3 29, 2020. It alleged only state law claims under the CLRA and UCL. Defendants  
4 removed the case to federal court on September 24, 2020, asserting federal diversity  
5 jurisdiction under CAFA. On December 14, 2022, on a motion brought by Defendants  
6 to dismiss the UCL claims (which they had previously alleged were subject to federal  
7 jurisdiction), the District Court declined to exercise equity jurisdiction (because the  
8 UCL claims are for restitution) and dismissed the UCL claims without prejudice—  
9 expressly granting Plaintiffs and the certified class leave to re-file the claims in State  
10 Court. Accordingly, this Complaint relates back to the original filing. This Complaint  
11 alleges only claims under California’s UCL, Business and Professions Code §17200,  
12 et seq., seeking injunctive relief and restitution.

13           12. Based on the misconduct alleged, the Superior Court has personal  
14 jurisdiction over Defendants pursuant to Cal. Code of Civil Procedure §410.10  
15 because at all times relevant, they conducted significant, continuous business in  
16 California. Defendants have marketed and sold over several years many millions of  
17 dollars of food to California residents for their consumption.

18           13. Venue is proper in this county under Business and Professions Code  
19 §17203 and Code of Civil Procedure §§395(a) and 395.5. Defendants transact  
20 business and receive substantial compensation from sales in Orange County.  
21 Defendants intentionally distribute their products for sale to consumers in Orange  
22 County. Plaintiffs reside in Orange County and purchased Defendants’ products in  
23 Orange County.

## FACTUAL ALLEGATIONS

1  
2 14. Defendants market Welch’s® Fruit Snacks and Fruit ‘n Yogurt Snacks.  
3 Defendants offer the Fruit Snacks with a higher sugar content labeled “Welch’s ®  
4 Fruit Snacks” (referred to herein as the “Regular Fruit Snacks”) or with a lower sugar  
5 content labeled as “Welch’s® Reduced Sugar Fruit Snacks.” Collectively, Plaintiffs  
6 sometimes refer to all these snacks as “Welch’s Snacks.” These snacks are offered in a  
7 variety of flavors. As is relevant to this case, Defendants sell the snacks through two  
8 different distribution channels: (i) “retail” — meaning grocery stores and mass  
9 markets such as Target, Walmart, etc. and (ii) Costco, which is a members only  
10 wholesale club. Due to differences in the Costco packaging and the facts and legal  
11 theory relating to establishing liability (including Defendants’ defenses) for the Costco  
12 claims, Plaintiffs, and the federal district court, believe the case is best managed by  
13 certifying two classes: one of retail purchasers and one of Costco purchasers.

14 15. **Retail Packaging.** At issue on the retail side of this case are Welch’s  
15 Snacks sold in 8, 10, 18 or 22 count packages. All of Welch’s Snacks at issue are  
16 packed in foil pouches containing between .7 and .9 ounces of the snack product.  
17 They are then packaged in a box containing either 8 or 10 pouches (the same size box)  
18 18 or 22 pouches (again, the same size box). Although, it may be that all the boxes are  
19 illegally slack-filled, for purposes of this case, Plaintiffs are not contending that the  
20 current box containing ten .9 oz pouches of Welch’s Snacks are slack-filled. Rather,  
21 during the class period, Defendants have used and continue to pack the Welch’s  
22 Snacks in several different configurations which clearly contain non-functional slack-  
23 fill because they: (i) used a bigger box for the same (or smaller) contents; (ii) reduce  
24 the number of pouches placed in the same size box; and/or (iii) reduce the amount  
25 (weight) of fruit snacks placed in the pouch which is then placed in the same size box.  
26 In several cases they use a combination of these tactics which further increases the  
27 amount of slack-fill. For example, when this case was filed, Welch’s® Fruit ‘n Yogurt  
28 Snacks were sold in a box containing eight .8 oz pouches, while the same size box was

1 used for ten .9 oz pouches of Regular Fruit Snacks. Since the filing of Plaintiffs' case,  
2 Defendants have gone a step further, reducing the Fruit 'n Yogurt Snacks from .8 to .7  
3 oz per pouch (effectively removing the contents of one pouch, while still being able to  
4 market the box as an 8-pouch package).

5 16. Defendants package Welch's® Reduced Sugar Fruit Snacks and Fruit 'n  
6 Yogurt™ Snacks in boxes they substantially under-fill. The boxes contain a  
7 substantial amount of unnecessary empty space, *i.e.* non-functional slack-fill. This is  
8 apparent because Defendants include only eight pouches of snacks in these flavors,  
9 but include ten pouches in identically sized boxes of other flavors. The boxes with ten  
10 pouches have a net weight of .9 oz each (9 oz total), whereas the box with eight  
11 pouches have a net weight of .7 oz to .8 oz each (5.6 oz to 6.4 oz. total). As such,  
12 Defendants under-fill the eight pouch boxes are at least 20% by quantity and up to  
13 44% by weight.

14 17. Further, between June of 2018 and late 2019 Defendants transitioned the  
15 8/10 count box from a larger box to the current box, which is 15% smaller. The  
16 current smaller box accommodates the same content (size and number of pouches) as  
17 the larger box, thus demonstrating the larger box contained at least 15% unlawful  
18 slack-fill. Notably, Defendants used the larger box for the same .9 oz ten count of the  
19 Regular Fruit Snacks as they currently sell in the smaller box. The transition from the  
20 larger box for the Regular Fruit Snacks (except the "Superfruit" variety) occurred in  
21 late 2019, meaning that the Regular Fruit Snacks sold in the 10-count box prior late  
22 2019 were unlawfully slack-filled. Additionally, certain flavors of the Regular Fruit  
23 Snacks (e.g., "Summer Fruit" and "Super Fruit") are sold in .8 oz pouches, rather than  
24 .9 oz packages, in the 10 and/or 22 count boxes.

25 18. Plaintiffs will use a **comparative analysis** to prove Defendants  
26 unlawfully slack-fill the retail packages. Using the current 10-count and 22-count .9  
27 ounce box as the baseline, Plaintiffs will show Defendants actually either put more  
28 fruit snacks in the same size box (for the 8-count and 18-count and reduced pouch



1 weight products) or previously sold the same content in a larger box during the class  
2 period.

3 19. Welch's Snacks are individually foil wrapped and packaged in colored  
4 cardboard boxes. Consumers cannot see the empty space contained in the product  
5 packaging, *i.e.* the non-functional slack-fill. These boxes are substantially under-filled  
6 and contain a substantial amount of unnecessary space, *i.e.* non-functional slack-fill.

7 20. **Costco Packaging.** During the class period, the Costco packaging for  
8 Welch's® Fruit Snacks at issue in this case has been sold in a one size opaque  
9 corrugated cardboard box which was initially packaged with eighty .9 oz packages  
10 and later changed to ninety .8 oz packages. Based on Plaintiffs' investigation and  
11 expert report, the box can hold, at least, 103 pouches while still allowing adequate  
12 head room to be filled by Defendants' machinery. In fact, Defendants represented to  
13 Plaintiff Bloom at his deposition that a box more than 20% smaller than the current  
14 Costco box could accommodate the same 90 pouches of fruit snacks.

15 21. In contrast to the comparative analysis used to prove the unlawful slack-  
16 fill in the retail products, Plaintiffs will prove the unlawful slack-fill in the Costco  
17 boxes by presenting evidence, including expert testimony and evidence obtained from  
18 Defendants, showing Defendants could (and should) include at least thirteen more  
19 pouches in the Costco box.

20 22. **Nonfunctional Slack-fill Is Unlawful.** Both federal and California law  
21 prohibit nonfunctional slack-fill for food containers, which would include fruit snacks  
22 and its packaging. As explained below, California has codified the federal law and  
23 regulations.

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

27 "In accordance with Section 403(d) of the [Food Drug and  
28 Cosmetic Act], a food shall be deemed to be misbranded if

1 its container is so made, formed, or filled as to be  
2 misleading.

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

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

11 (2) The requirements of the machines used for enclosing the  
12 contents in such package;

13 (3) Unavoidable product settling during shipping and  
14 handling;

15 (4) The need for the package to perform a specific function  
16 (e.g., where packaging plays a role in the preparation or  
17 consumption of a food), where such function is inherent to  
18 the nature of the food and is clearly communicated to  
19 consumers;

20 (5) The fact that the product consists of a food packaged in a  
21 reusable container where the container is part of the  
22 presentation of the food and has value which is both  
23 significant in proportion to the value of the product and  
24 independent of its function to hold the food, e.g., a gift  
25 product consisting of a food or foods combined with a  
26 container that is intended for further use after the food is  
27 consumed; or a durable commemorative or promotional  
28 packages; or

(6) Inability to increase the level of fill or to further reduce  
the size of the package (e.g., where some minimum package  
size is necessary to accommodate required food labeling  
(excluding any vignettes or other nonmandatory designs or  
label information), discourage pilfering, facilitate handling,  
or accommodate tamper-resistant devices).

24. 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 any of Defendants’ unlawfully slack-filled boxes is prohibited under 21 U.S.C.  
§331.

25. **The Slack-Fill Also Violates California Law.** California law expressly  
prohibits nonfunctional slack-fill. California has adopted the federal regulations and

1 codified them as the California “Fair Packaging and Labeling Act” (“FPLA”). Bus &  
 2 Prof Code §12606, et seq. The FPLA states that it “applies to food containers subject  
 3 to Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec.  
 4 343(d)) and Section 100.100 of Title 21 of the Code of Federal Regulations.” Bus &  
 5 Prof. Code §12606.2(a). The FPLA uses identical language, as is relevant here, to 21  
 6 CFR §100.100. Bus & Prof Code §12606.2(b) and (c)(1)-(6). The text of FPLA  
 7 contains additional provisions which, based on the express language of the statute, are  
 8 inoperative.<sup>1</sup>

9         26. The offending Welch’s Snacks alleged above, including the retail boxes  
 10 of Welch’s Snacks in the larger box, do not meet any of the six exemptions under  
 11 federal or California law.

12         27. Defendant PIM’s corporate representative has testified that, for many of  
 13 the items at issue, the packing requirements of the machine(s) did not require reducing  
 14 the content of the boxes from ten to eight pouches or reducing the content of the  
 15 pouches from .9 oz. Rather, PIM admittedly reduced content of the snack product as a  
 16 “pricing issue” to maximize its profits.

17         28. Defendants’ slack-fill does not protect the content of the packages. The  
 18 Fruit Snacks and Fruit ‘n Yogurt™ Snacks are each individually wrapped, and do not  
 19 gain additional protection from the extra space in the box compared to the boxes with  
 20 ten pouches. See 21 CFR §100.100(a)(1); Cal. Bus & Prof. Code § 12606.2(a)(1).

21         29. The requirements of packaging machines do not justify or require the  
 22 slack-fill. Defendants’ boxes are sealed with hot glue. As such, upon information and  
 23

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

1 belief, the equipment used to manufacture and seal the boxes does not breach the  
2 inside of boxes during the packaging process. The hot glue is applied to an exterior  
3 flap of the box which is then sealed by a second exterior flap that is folded down onto  
4 the glued surface. Neither the hot glue nor the sealing equipment requires a substantial  
5 amount of headspace in the box during the manufacturing and packaging processes.  
6 See 21 CFR §100.100(a)(2); Cal. Bus & Prof. Code § 12606.2(a)(2).

7         30. The slack-fill is not caused by product settling during shipping and  
8 handling. Although Defendants assert there is some product settling after the  
9 packaging, they cannot quantify the amount of settling. For the retail products the fact  
10 that Defendants put more, and larger, pouches of the Regular Fruit Snack in the same  
11 size box (and, in fact, reduced the size of the box by 15% without reducing the  
12 contents) proves the slack-fill is not caused by settling. For the Costco box, Plaintiffs'  
13 ability to fit more pouches in the box, their expert's determination that the box can  
14 accommodate 13 additional pouches with sufficient headspace for packaging the  
15 product, along with other evidence (including the fact that the box contains  
16 significantly more headspace than PIM's corporate representative testified would be  
17 expected if the box was full when it was packaged), shows the slack-fill is not a result  
18 of the pouches settling during shipping and handling. (*See*, 21 CFR §100.100(a)(3);  
19 Cal. Bus & Prof. Code § 12606.2(a)(3)).

20         31. The slack-fill space is not needed to perform a specific function, such as  
21 preparing the food. The Fruit Snacks and Fruit 'n Yogurt™ Snacks are removed from  
22 the packing for consumption (e.g., the Fruit Snacks are not consumed nor prepared in  
23 the cardboard packing). See 21 CFR §100.100(a)(4); Cal. Bus & Prof. Code §  
24 12606.2(a)(4).

25         32. Defendants' packaging itself lacks independent value from the food it  
26 contains. The cardboard packaging is not a commemorative item nor is it a reusable  
27 container which is part of the presentation of the food, nor is it intended for use after  
28

1 the food is consumed. See 21 CFR §100.100(a)(5); Cal. Bus & Prof. Code §  
2 12606.2(a)(5).

3 33. The slack-filled package was not necessary to prevent pilfering or  
4 accommodate required food labeling. Indeed, Defendants include at least ten pouches  
5 of its product in each box that is the same size as the Reduced Sugar and Fruit ‘n  
6 Yogurt™ snacks containing only eight pouches, and the current box is 15% smaller  
7 than the box previously used for eight or ten pouches. Alternatively, Defendants could  
8 reduce the size of the containers to eliminate the nonfunctional slack-fill. See 21 CFR  
9 §100.100(a)(6); Cal. Bus & Prof. Code § 12606.2(a)(6).

10 34. There is no lawful reason for the substantial non-functional slack-fill  
11 contained in Defendants’ packaging of the Welch’s Snacks. Defendants overcharge  
12 consumers because the fruit snack packaging contains substantially less fruit snacks  
13 than its capacity.

14 35. Plaintiffs allege that PIM designs the packaging which is then subject to  
15 Welch’s approval before it can be placed into the stream of commerce. Further,  
16 Welch’s retains extensive power and control over the marketing and sale of Welch’s  
17 Snacks. Despite being on notice that such products are sold in violation of state and  
18 federal law, Defendants have not demanded a recall nor taken other action to correct  
19 or ameliorate their wrongful conduct, but instead continue to allow and profit from the  
20 sale of the unlawful slack-filled products.

### 21 **PROCEDURAL HISTORY**

22 36. This case was originally filed by Darren Clevenger on June 29, 2020, in  
23 the Orange County Superior Court where it was assigned to the Hon. William Cluster  
24 (complex litigation). It initially alleged the Retail Class claims under the UCL and  
25 CLRA against the current Defendants. Prior to being removed to federal court, it was  
26 amended to add the Costco claims. On September 24, 2020, Defendants removed the  
27 case to the District Court where it was assigned to Judge Cormac J. Carney.  
28

1           37. After removal, Defendants filed a motion to dismiss on both substantive  
2 grounds (failure to state a claim) and Article III standing, with respect to the claims  
3 for injunctive relief, based on the different standing requirements in federal court. On  
4 November 18, 2020, the federal court granted the motion with respect to the Article III  
5 standing and dismissed the injunctive claims without prejudice. The federal court  
6 dismissed the Costco claims without prejudice, on the grounds that Plaintiff Clevenger  
7 had not purchased the distinct Costco products and the theory of proving the slack-fill  
8 was different for the Costco claims, as they did not use a comparative analysis like the  
9 retail claims. The District Court upheld the remaining UCL and CLRA claims.  
10 Defendants sought to certify for interlocutory appeal the denial of their motion to  
11 dismiss, but the federal court denied that request on December 29, 2020.

12           38. Plaintiffs filed a Second Amended Complaint, adding plaintiff Bloom,  
13 who purchased the Costco products and re-alleging the Costco claims. Plaintiffs also  
14 added Defendants' Reduced Sugar Fruits Snacks to the Retail Class definition, as  
15 Defendants packed them in the same box as regular Fruit Snacks, but significantly  
16 reduced the quantity for the Reduced Sugar variety. Defendants moved to dismiss the  
17 Reduced Sugar Fruit Snack claims (and to strike class allegations). On April 1, 2021,  
18 the federal court denied that motion, holding the Reduced Sugar Fruit Snacks were  
19 substantially similar to the products Plaintiffs purchased, thus Plaintiffs had standing  
20 to pursue those claims.

21           39. During the pendency of the case in federal court the parties engaged in  
22 full discovery. Merits (fact) discovery is complete; expert discovery is not. The parties  
23 have exchanged initial expert disclosures. Rebuttals are currently due in late-January  
24 2023.

25           40. On January 14, 2022, Plaintiffs filed a motion in federal court for leave to  
26 file a Third Amended Complaint. The amendments added additional products to the  
27 Retail Class because some of the products Plaintiffs only learned about through the  
28 discovery process (Defendants previously sold certain products in a significantly

1 larger box containing the same quantity of fruit snacks as the current, smaller, boxes –  
2 thus showing they slack-filled the previous boxes). Some of the products Defendants  
3 began selling only after the filing of the original Complaint. Defendants opposed the  
4 amendments; their opposition was overruled. On February 25, 2022, Plaintiffs filed  
5 their Third Amended Class Action Complaint (currently the operative complaint in  
6 federal court), which challenges the same offending products as this Complaint.

7       41. On April 19, 2022, Plaintiffs filed in federal court their Motion for Class  
8 Certification. The Motion was extensively briefed, including a sur-reply filed by  
9 Defendants. On September 12, 2022, the federal court heard more than an hour of  
10 argument on the Motion. On September 13, 2022, the court granted the motion in its  
11 entirety, certifying both the Retail and Costco classes for the UCL and CLRA claims.  
12 Certification was ordered under Federal Rule of Civil Procedure 23(b)(3), which  
13 requires additional showings that common questions of law or fact predominate and  
14 that a class action is superior to other methods of adjudicating the claims.

15       42. On September 26, 2022, Defendants filed a Rule 23(f) petition with the  
16 Ninth Circuit Court of Appeals, requesting review of the class certification order. On  
17 December 8, 2022, the Court of Appeals denied that petition.

18       43. Apparently unhappy with the rulings from their chosen federal venue, on  
19 October 6, 2022, Defendants notified Plaintiffs they intended to file a motion for  
20 judgment on the pleadings, seeking to dismiss the UCL claims they had removed on  
21 the grounds the court lacked jurisdiction to adjudicate those claims. Defendants were  
22 now asking the court *not* to exercise jurisdiction over the claims *they* had removed and  
23 spent two years asking the court to adjudicate in their favor (by seeking decisions on  
24 merits through motions to dismiss).

25       44. On October 21, 2022, Defendants filed their motion for judgment on the  
26 pleadings. The basis for that motion was the Ninth Circuit's August 20, 2020 (a month  
27 prior to Defendants' removal) opinion in *Sonner v. Premier Nutrition Corp.*, 971 F.3d  
28 834 (9th Cir. 2020). *Sonner* held federal courts could not exercise equity jurisdiction

1 over a claim for restitution (the only monetary relief available under the UCL) unless  
2 plaintiffs were able to show they lacked an adequate remedy at law. Defendants were  
3 aware of *Sonner* when they removed the case in 2020, as Defendant’s counsel  
4 (Venable) was legal counsel in *Sonner*.

5 45. Despite Plaintiffs’ objections, on December 14, 2022, the federal court  
6 found it was bound by *Sonner* to dismiss the equitable (UCL) claims, as the CLRA  
7 afforded Plaintiffs an “adequate” remedy (even though the CLRA requires proving  
8 additional elements, provides for damages instead of restitution, and has a shorter  
9 statute of limitations). These differences mean Plaintiffs and the class can prevail  
10 under the UCL but still lose under the CLRA; and can obtain a greater recovery under  
11 the UCL. The federal court, however, made clear the dismissal was for lack of  
12 jurisdiction – not on the merits – and expressly stated the dismissal was “without  
13 prejudice to Plaintiffs bringing the claims in state court.”

14 46. Accordingly, Plaintiffs promptly re-filed their UCL claims here.

### 15 CLASS ALLEGATIONS

16 47. Plaintiffs bring this case on behalf of two classes: a class of Retail  
17 Purchasers and a separate class of Costco Purchasers.

18 48. **Prior Certification.** On September 13, 2022, pursuant to Federal Rule of  
19 Civil Procedure 23(b)(3), the federal District Court certified the classes as set forth  
20 below for the Retail Purchasers and Costco Purchasers. The only differences in the  
21 definition of the classes, and the claims covered here, are (1) the class period ending  
22 date being extended here to the date this Court certifies such classes, and (2) the  
23 injunctive relief claims are viable in State court. As of this filing, the federal court  
24 dismissed the UCL class counts with leave to refile them in this Court. The federal  
25 court has retained jurisdiction over a Retail and Costco class only for the CLRA  
26 claims.  
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1           49.    **The Retail Class.** Plaintiffs bring Count I as a class action pursuant to  
2 California Code of Civil Procedure §382 on behalf of a class consisting of:

3           All persons who made retail purchases in the State of California of  
4 Welch’s ® Fruit Snacks, Welch’s® Reduced Sugar Fruit Snacks,  
5 Welch’s® Fruit ‘n Yogurt™ Snacks, sold in an 8, 10, 18, or 22 count  
6 box except for Welch’s Fruit Snacks sold in a box measuring 5.75” x  
7 1.75” x 7.5” and containing ten .9 oz pouches of Fruit Snacks or a box  
8 containing twenty-two .9 oz pouches of Fruit Snacks. The class period  
9 will be from June 30, 2016, through the date a class is certified.

10           Excluded from the Class are the officers, directors, or employees of  
11 each Defendant; any entity in which any Defendant has a controlling  
12 interest; and any affiliate, legal representative, heir or assign of any  
13 Defendant. Also excluded from the Class are the judge to whom this  
14 case is assigned and any member of the judge’s immediate family.

15           50.    **The Costco Class.** Plaintiffs bring Count II an as a class action pursuant  
16 to California Code of Civil Procedure §382 on behalf of a class consisting of:

17           All persons who made retail purchases from Costco in the State of  
18 California of Welch’s ® Fruit Snacks in a box containing either eighty  
19 or ninety pouches of Fruit Snacks. The class period will be from June  
20 30, 2016, through the date a class is certified.

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

26           51.    Plaintiffs propose the Darren Clevenger be appointed as the  
27 representative for the Retail Class and David Bloom be appointed as the representative  
28 for the Costco Class.

          52.    **Numerosity.** Each Class is so numerous that joinder of all members is  
impracticable. Defendants have alleged under CAFA that the class consists of at least  
“tens of thousands of Californians.” Discovery has confirmed that each of the classes  
involves more than one million packages of Welch’s Snacks. As a result, individual  
joinder of all purchasers is impractical.

          53.    **Typicality.** Plaintiffs’ claims, and Defendants’ defenses, are typical of  
the claims and defenses of the other members of the Classes they seek to represent, as  
Plaintiffs and all other members of their respective Classes sustained injuries arising

1 out of Defendants' conduct as alleged herein. The slack-filled containers were the  
2 same for all members of their respective classes. Further, Plaintiffs are members of the  
3 Class they seek to represent.

4       **54. Adequacy.** Plaintiffs will fairly and adequately protect the interests of  
5 the members of their respective Classes and have retained counsel competent and  
6 experienced in complex class action litigation. Plaintiffs have no interests that are  
7 contrary to, or in conflict with, those of the other members of the Classes. Plaintiffs  
8 and counsel are committed to the vigorous prosecution of this action on behalf of all  
9 Class members.

10       **55. Common Questions Predominate.** Common questions of law and fact  
11 exist as to all members of the Classes and predominate over any questions affecting  
12 solely individual members of the Classes. Among the questions of law and fact  
13 common to the Classes are:

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

1           Additionally, Defendants’ affirmative defenses are common to the class  
2 members as they focus primarily on the reasons their packages contain slack-fill. The  
3 packaging of a given product does not vary among class members.

4           **56. Superiority of Class Treatment.** Class action treatment is superior to  
5 the alternatives for the fair and efficient adjudication of the controversy alleged  
6 herein. Such treatment will permit a large number of similarly situated persons to  
7 prosecute their common claims in a single forum simultaneously, efficiently, and  
8 without the duplication of effort and expense that numerous individual actions would  
9 entail. No difficulties are likely to be encountered in the management of this class  
10 action that would preclude its maintenance as a class action, and no superior  
11 alternative exists for the fair and efficient adjudication of this controversy. Joinder of  
12 all members is impractical. Further, the amount at stake for many of the Class  
13 members is small, meaning that few, if any, Class members could afford to maintain  
14 individual suits against Defendants. The expense and burden of individual litigation  
15 would make it impracticable or impossible for the Classes to prosecute their claims  
16 individually.

17           **57.** Defendants acted on grounds generally applicable to the entire Class,  
18 thereby making final relief appropriate with respect to the Class as a whole.

19           **58.** Without a class action, Defendants will likely retain the benefit of their  
20 wrongdoing and could continue their unlawful course of action, which would result in  
21 further damages to the Classes. Plaintiffs envision no difficulty in the management of  
22 this action as a class action. Indeed, the federal court already determined that class  
23 certification was appropriate and superior for adjudication of these claims.

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**FIRST CAUSE OF ACTION**  
**For Violation of California Unfair Competition Law,**  
**Cal. Business & Professions Code §17200, *et seq* (UCL)**  
**for the Retail Class**

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4 59. Plaintiffs reallege the foregoing paragraphs and incorporate them as if  
5 fully set forth herein.

6 60. At all relevant times, the UCL was in full force and effect.

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

9 62. Section 17203 of the UCL empowers the Court to enjoin any conduct that  
10 violates the UCL and “make such orders or judgments, including the appointment of a  
11 receiver, as may be necessary to prevent the use or employment by any person of any  
12 practice which constitutes unfair competition, as defined in this chapter, or as may be  
13 necessary to restore to any person in interest any money or property, real or personal,  
14 which may have been acquired by means of such unfair competition.”

15 63. Plaintiffs have “suffered injury in fact and [have] lost money or property  
16 as a result of the unfair competition” as complained of herein. Bus & Prof. Code  
17 §17204. Plaintiffs have paid money for Defendants’ products that contained  
18 nonfunctional slack-fill and were “misbranded.” As such, the products could not  
19 legally be sold in interstate commerce. The monies that Plaintiffs and the class  
20 members paid for the products resulted from unfair and illegal competition by  
21 Defendants and Plaintiffs and the class members are entitled to an order restoring  
22 those monies to them and an order enjoining Defendants from selling nonfunctionally  
23 slack-filled products in the State of California. Additionally, even if Defendants’  
24 Reduced Sugar Fruit Snacks and Fruit ‘n Yogurt™ Snacks and other Fruit Snacks  
25 could have legally been sold in interstate commerce, Plaintiffs overpaid and/or  
26 acquired less than they would have if the same packages had not contained  
27 nonfunctional slack-fill.  
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1           64. Defendants’ conduct violated the unlawful prong of the UCL, as it  
2 violated the California FPLA and the Federal Food Drug and Cosmetic Act (and  
3 regulations promulgated thereunder), both of which prohibit nonfunctional slack-fill.  
4 Further, by violating the federal slack-fill regulations, Defendants’ products are  
5 deemed “misbranded” and, thus, illegal to sell. 21 U.S.C. §331. It is not necessary for  
6 Plaintiffs to establish that Defendants violated both laws. A violation of either law  
7 establishes a violation of the UCL.

8           65. The federal District Court has already ruled that the *only* defenses  
9 available to Defendants under the unlawful prong of the UCL are the enumerated  
10 exceptions under the FLPA and FDCA.

11           66. Defendants’ conduct also violated the unfair practices prong of the UCL.  
12 Defendants’ conduct violates both California and federal public policy, as shown by  
13 their respective prohibitions on nonfunctional slack-fill and prohibitions on  
14 introducing misbranded products into interstate commerce. The conduct is also anti-  
15 competitive and puts competitors who follow the law at a disadvantage. Defendants’  
16 conduct suppresses competition and has a negative impact on the marketplace,  
17 decreasing consumer choice. Further, Defendants’ conduct causes significant  
18 aggregate harm to consumers, causing them to overpay and/or receive less product,  
19 because the increased empty space in the packages is nonfunctional slack-fill.

20           67. Defendants’ violations of the UCL entitle Plaintiffs and the class  
21 members to injunctive relief and full restitution.

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1 Counsel as Lead Class Counsel;

2 B. For an order declaring Defendants have violated the statutes as alleged  
3 herein;

4 C. For preliminary, permanent and mandatory injunctive relief prohibiting  
5 Defendants and those acting in concert with them from committing continuing and  
6 future violations of the laws as alleged herein;

7 D. For an order awarding Plaintiffs and Class members restitution under the  
8 UCL in an amount to be determined at trial;

9 E. For an award of reasonable attorneys' fees and all costs of suit as  
10 provided for by California Code of Civil Procedure § 1021.5, and/or all other  
11 applicable statutory, legal and/or equitable doctrines, including, but not limited, to the  
12 common fund doctrine.

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

14 DIVINCENZO SCHOENFIELD STEIN  
15 and LANZA & SMITH, PLC

16 Dated: December 21, 2022

17 By: /s/ Anthony Lanza  
18 Anthony Lanza  
19 Robert J. Stein III  
20 Attorneys for Plaintiffs  
21 Daren Clevenger, David Bloom  
22 and the classes  
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