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11
 12 **UNITED STATES DISTRICT COURT**
 13 **SOUTHERN DISTRICT OF CALIFORNIA**

14
 15
 16 EVA GRAUSZ, on behalf of herself, all
 17 others similarly situated, and the general
 18 public,

19 **Plaintiff,**

20 v.

21 **THE HERSHEY COMPANY,**
 22 **Defendant.**

Case No: '23CV0028 AJB NLS

CLASS ACTION

COMPLAINT FOR VIOLATIONS OF:

CAL. BUS. & PROF. CODE §§17200 *et seq.*;

CAL. BUS. & PROF. CODE §§17500 *et seq.*;

CAL. CIV. CODE §§ 1750 *et seq.*;

**BREACH OF IMPLIED WARRANTIES ; and
 UNJUST ENRICHMENT**

DEMAND FOR JURY TRIAL

1 Plaintiff Eva Grausz, on behalf of herself, all others similarly situated, and the general
2 public, by and through her undersigned counsel, hereby sues The Hershey Company
3 (“Hershey”), and alleges the following upon her own knowledge, or where she lacks personal
4 knowledge, upon information and belief, including the investigation of her counsel.

5 INTRODUCTION

6 1. Hershey, the ubiquitous American confectionary company, manufactures and
7 sells various chocolate products, including Hershey’s Special Dark Mildly Sweet Chocolate,
8 Lily’s Extra Dark Chocolate 70% Cocoa, and Lily’s Extremely Dark Chocolate 85% Cocoa
9 [the “Products”]. Hershey sells the Products throughout the United States, including in
10 California.

11 2. A December 2022 report by Consumer Reports states that “[r]esearch has found
12 that some dark chocolate bars contain cadmium and lead—two heavy metals linked to a host
13 of health problems in children and adults,” in amounts such that “eating just an ounce a day
14 would put an adult over a level that public health authorities and [Consumer Report’s]
15 experts say may be harmful for at least one of those heavy metals.” Among those containing
16 substantial levels of lead and cadmium are the Products, as pictured below.



1 8. The Court has personal jurisdiction over Hershey as a result of Hershey’s
2 substantial, continuous and systematic contacts with the State, and because Hershey has
3 purposely availed itself of the benefits and privileges of conducting business activities within
4 the State, including by marketing, distributing, and selling the Products in California.

5 9. Venue is proper in this Southern District of California pursuant to 28 U.S.C. §
6 1391(b) and (c), because Hershey resides (*i.e.*, is subject to personal jurisdiction) in this
7 district, and because a substantial part of the events or omissions giving rise to the claims
8 occurred in this district.

9 **PARTIES**

10 10. Plaintiff Eva Grausz is a resident of San Diego County, California.

11 11. Defendant Hershey is a Delaware corporation with its principal place of
12 business in Hershey, Pennsylvania.

13 **FACTS**

14 **I. Lead and Cadmium are Toxic and are Present in the Hershey Products at Unsafe**
15 **Levels**

16 12. California recognizes that certain chemicals and elements are “known to the
17 state to cause cancer or reproductive toxicity . . . if in the opinion of the state's qualified
18 experts it has been clearly shown through scientifically valid testing according to generally
19 accepted principles to cause cancer or reproductive toxicity.” *See* Cal. Health & Safety Code
20 § 25249.8(b). Lead, and cadmium in the case of the Lily’s Extremely Dark Chocolate 85%
21 Cocoa, in the amounts found in the Products, are on the list of chemicals known to cause
22 cancer and/or reproductive harm.

23 13. The harmful effects of lead are well-documented, particularly on children.
24 Exposure puts children at risk for lowered IQ, behavioral problems (such as attention deficit
25 hyperactivity disorder (ADHD)), type 2 diabetes, and cancer, among other health issues.
26 Heavy metals also pose risks to adults. Even modest amounts of heavy metals can increase
27 the risk of cancer, cognitive and reproductive problems, and other adverse conditions. As
28 such, it is important to limit exposure.

1 14. “No amount of lead is known to be safe.”¹ Exposure to lead may cause anemia,
2 weakness, and kidney and brain damage.² Lead affects almost every organ and system in the
3 body and accumulates over time, leading to severe health risks and toxicity, including
4 inhibiting neurological function, anemia, kidney damage, seizures, and in extreme cases,
5 coma and death.³ Lead can also cross the fetal barrier during pregnancy, exposing the mother
6 and developing fetus to serious risks, including reduced growth and premature birth.⁴ Lead
7 exposure is also harmful to adults as more than 90 percent of the total body burden of lead
8 is accumulated in the bones, where it is stored.⁵ Lead in bones may be released into the
9 blood, re-exposing organ systems long after the original exposure.⁶

10 15. Cadmium, also a heavy metal, likewise poses a serious safety risk to consumers
11 because it can cause cancer and is a known teratogen, an agent which causes malformation
12 of an embryo. Exposure to cadmium can affect the kidneys, lungs and bones.⁷ There may be
13 no safe level of exposure to a carcinogen, so all contact should be reduced to the lowest
14 possible level.⁸ It is considered a class 1 carcinogen by the World Health Organization.⁹
15 Even at low exposure, cadmium can cause nausea, vomiting, diarrhea and abdominal pain.
16

17 ¹ See <https://www.npr.org/sections/thetwo-way/2016/08/13/489825051/lead-levels-below-epalimits-can-still-impact-your-health>

18 ² <https://www.cdc.gov/niosh/topics/lead/health.html>

19 ³ *Id.*

20 ⁴ See <https://www.cdc.gov/nceh/lead/prevention/pregnant.htm>

21 ⁵ See State of New York Department of Health, “Lead Exposure in Adults: A Guide for
22 Health Care Providers,” available online at
23 <https://www.health.ny.gov/publications/2584.pdf>.

24 ⁶ *Id.*

25 ⁷ <https://www.betterhealth.vic.gov.au/health/healthyliving/cadmium>

26 ⁸ New Jersey Department of Health Fact Sheet (available online at
<https://www.nj.gov/health/eoh/rtkweb/documents/fs/0305.pdf>)

27 ⁹ <https://www.unep.org/explore-topics/chemicals-waste/what-we-do/emerging-issues/lead-and-cadmium>
28

1 And, because cadmium builds up in the body, even at low dosage, repeated exposure can
2 cause liver and kidney damage, anemia and loss of smell. According to the Centers for
3 Disease Control, “exposure to low levels of cadmium in . . . food . . . over time may build up
4 cadmium in the kidneys and cause kidney disease and fragile bones” and is indisputably
5 “considered a cancer-causing agent.”¹⁰

6 16. It is undisputed that the Products contain lead and cadmium, and that Hershey
7 has known as much for at least the last five years. In 2017, Hershey (and several other
8 manufacturers and distributors of dark chocolate products) received notice that at least some
9 of its dark chocolate products, including Hershey’s Special Dark Mildly Sweet Chocolate,
10 contained excessive cadmium and/or lead, including by being provided with certificates of
11 merit that independent experts confirmed the presence of heavy metals in the Hershey
12 Products. However, Hershey failed to warn consumers that consuming the Products exposes
13 consumers to those chemicals.

14 17. Moreover, in December 2022, Consumer Reports, a consumer protection and
15 advocacy organization dedicated to independent product testing, consumer-oriented
16 research, and investigative journalism, tested 28 different dark chocolate bars for lead and
17 cadmium. The results showed that, for example, the Hershey’s Special Dark Mildly Sweet
18 Chocolate contained 1.325mcg of lead per ounce, which is more than 2.6x the Maximum
19 Allowable Dose Level [“MADL”] of 0.5mcg per ounce set by the California Office of
20 Environmental Health Hazard Assessment [“OEHHA”].

21 18. Notably, the lead is getting into the Hershey Products *after* harvesting. As
22 Consumer Reports notes, “lead seems to get into cacao after beans are harvested. The
23 researchers found that the metal was typically on the outer shell of the cocoa bean, not in the
24 bean itself. Moreover, lead levels were low soon after beans were picked and removed from
25 pods but increased as beans dried in the sun for days. During that time, lead-filled dust and
26
27

28 ¹⁰ <https://tinyurl.com/y4f2kku7>

1 dirt accumulated on the beans.” Thus, on information and belief, Hershey itself is responsible
2 for lead being present in the Products.

3 **II. Reasonable Consumers Do Not Expect Heavy Metals in the Hershey Products;**
4 **Hershey Nevertheless Failed to Disclose the Presence of Lead or Cadmium in the**
5 **Products**

6 19. The global dark chocolate market has witnessed significant growth in recent
7 years and is expected to continue growing into 2023.¹¹

8 20. The growth of dark chocolate sales is premised, in part, on reasonable
9 consumers’ belief that dark chocolate is actually *healthier* than other food choices, and
10 especially healthier than other confectionaries and milk chocolates. “The pervasive health
11 and wellness trend continues to influence dark chocolate market, with manufacturers
12 incorporating organic ingredients and natural sweeteners. The preference for dark chocolate
13 over milk chocolates on accounts its health benefits continues to remain intact,” especially
14 as demand for healthy products, generally, increases.¹² Thus, the safety and health effects of
15 the Products are material facts to reasonable consumers.

16 21. Given the negative effects of toxic lead and cadmium on human development,
17 especially in embryos and children, and on adult health, the presence of toxic heavy metals
18 in the Products is a material fact to reasonable consumers, including Plaintiff and members
19 of the Class.

20 22. A company as ubiquitous as Hershey has earned significant public trust that its
21 foods are safe and fit for regular consumption. Reasonable consumers believe that Hershey
22 would not sell products that are unsafe.

23 23. Hershey knew that if the presence of toxic heavy metals in its Products was
24 disclosed to Plaintiff and the Class members, they would be unwilling to purchase the
25 Products or would pay less for them.

26
27 ¹¹ <https://www.persistencemarketresearch.com/market-research/dark-chocolate-market.asp>

28 ¹² *Id.*

1 24. In light of Hershey's knowledge that Plaintiff and the Class members would be
2 unwilling to purchase the Products or would pay less for the Products if they knew that the
3 Products contained toxic heavy metals, Hershey intentionally and knowingly concealed this
4 fact from Plaintiff and the Class Members and did not disclose the presence of lead or
5 cadmium on the label of the Products.

6 25. Hershey knew or should have known that Plaintiff and the Class members
7 would rely upon the packages of the Products and intended for them to do so but failed to
8 disclose the presence of lead or cadmium.

9 26. Hershey knew or should have known that it owed consumers a duty of care to
10 adequately test for lead, cadmium, and other heavy metals, particularly considering that it
11 was provided notice of independent expert testing of some of its dark chocolate bars. Had
12 Hershey done so, it would have known that its Products contained significant levels of lead
13 and cadmium. Alternatively, Hershey *did* know that its Products contained significant levels
14 of heavy metals and purposely hid that fact from consumers.

15 27. Additionally, Hershey knew or should have been aware that a reasonable
16 consumer would consume the Products regularly, and possibly multiple Products daily,
17 leading to repeated exposure to both lead and cadmium, which each independently
18 accumulate in the body and its systems over time.

19 28. Hershey knew or should have known it could control the levels of lead and
20 cadmium in the Products by properly monitoring for heavy metal presence, sourcing
21 ingredients with less heavy metals, or none at all, adjusting its formulation to reduce or
22 eliminate heavy metals, or improve its manufacturing process to eliminate introduction of
23 lead caused by Hershey itself.

24 29. Prior to purchasing the Products, Plaintiff and the Class members were exposed
25 to, saw, read, and understood the labels of the Products, and relied upon the same in
26 purchasing the Products, but Hershey failed to disclose the presence of heavy metals.

27 30. As a result of Hershey's concealment of the fact that the Products contained
28 toxic heavy metals, including lead and cadmium, Plaintiff and the Class members reasonably

1 believed the Products were free from substances that would negatively affect children’s
2 development as well as their own health.

3 31. Plaintiff and the Class members purchased the Hershey Products in reliance
4 upon Hershey’s labels that contained omissions.

5 32. Had Plaintiff and the Class members known that the Products contained toxic
6 heavy metals, rendering them unsafe for consumption, they would not have been willing to
7 purchase the Products or would have paid less for them.

8 33. Therefore, as a direct and proximate result of Hershey’s omissions concerning
9 the Products, Plaintiff and the Class Members purchased the Products and paid more than
10 they were worth.

11 34. Plaintiff and the Class members were harmed in the form of the monies they
12 paid for the Products which they would not otherwise have paid had they known the truth
13 about the Products. Since the presence of toxic heavy metals, including lead and cadmium,
14 in the Products renders them unsafe for human consumption, the Products that Plaintiff and
15 the Class members purchased are worthless, or at a minimum are worth less than Plaintiff
16 and the Class paid for them.

17 **III. The Products’ Labeling Violates California and Federal Food Labeling Law**

18 35. The Products’ labeling violates California Health and Safety Code §§ 109875,
19 *et. seq.* (the “Sherman Law”), which has expressly adopted the federal food labeling
20 requirements as its own. *See, e.g., id.* § 110100; *id.* § 110670 (“Any food is misbranded if
21 its labeling does not conform with the requirements for nutrition labeling as set forth in
22 Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulation adopted pursuant
23 thereto.”). Specifically, Hershey “fail[ed] to reveal facts that are material in light of other
24 representations made or suggested by the statement[s], word[s], design[s], device[s], or any
25 combination thereof,” in violation of 21 C.F.R. § 1.21(a)(1). Such facts include the
26 detrimental health consequences of consuming the Products given that they contain lead and
27 cadmium, which is unsafe in any amount. In addition, such facts include the detrimental
28 health consequences of consuming the Products, including inhibiting neurological function,

1 anemia, kidney damage, seizures, and in extreme cases, coma and death, which are all
2 material to a consumer choosing a food product.

3 **IV. Plaintiff's Purchase, Reliance, And Injury**

4 36. Mr. Grausz regularly purchased Lily's Extremely Dark Chocolate 85% Cocoa
5 during the Class Period, often making her purchases from Target stores in San Diego.

6 37. When purchasing the Product, Plaintiff was seeking a chocolate bar she
7 believed to be healthier than other confectionaries, by virtue of its higher cocoa (and thus
8 lesser sugar) content. Moreover, Plaintiff would have avoided any food she knew contained
9 toxic ingredients, especially heavy metals like lead and cadmium. She would also have
10 avoided purchasing any food she knew could increase her risk of inhibited neurological
11 function, anemia, kidney damage, seizures, coma, or death.

12 38. Plaintiff acted reasonably in purchasing the Product, whose label did not
13 disclose the presence of lead or cadmium, or the attendant health risks in consuming the
14 Product.

15 39. By omitting that its Products contains lead or cadmium, Hershey was able to
16 gain a greater share of the snack market, specifically the confectionary and dark chocolate
17 market, than it would have otherwise and to increase the size of the market.

18 40. Plaintiff paid more for the Product, and would only have been willing to pay
19 less, or unwilling to purchase it at all, absent Hershey's omissions regarding the lead and
20 cadmium content described herein.

21 41. Plaintiff would not have purchased the Product if she had known that it was
22 misbranded pursuant to California and FDA regulations, or that they contained toxic lead or
23 cadmium in the amounts found in the Products.

24 42. For these reasons, the Products were worth less than what Plaintiff and the Class
25 Members paid for them.

26 43. Plaintiff and the Class lost money as a result of Hershey's omissions and unfair
27 practices in that they did not receive what they paid for when purchasing the Products.
28

1 44. Plaintiff still wishes to purchase snack foods, including dark chocolate, and
2 continues to see the Hershey Products at stores where she shops. She would purchase
3 Hershey Products in the future if, because of an injunction requiring Hershey to disclose lead
4 or cadmium when present, she could be assured by the absence of a disclosure that the
5 Products no longer contained lead or cadmium. But unless Hershey is enjoined in the manner
6 Plaintiff requests, she may not be able to reasonably determine whether the lead or cadmium
7 in the Products has been addressed, or whether Hershey is continuing to omit its presence.

8 45. Plaintiff's substantive right to a marketplace free of fraud, where she is entitled
9 to rely with confidence on representations such as those made by Hershey, continues to be
10 violated every time Plaintiff is exposed to the Products' labels.

11 46. Plaintiff's legal remedies are inadequate to prevent these future injuries.

12 **CLASS ACTION ALLEGATIONS**

13 47. While reserving the right to redefine or amend the class definition prior to or as
14 part of a motion seeking class certification, pursuant to Federal Rule of Civil Procedure 23,
15 Plaintiff seeks to represent a class of all persons in the United States, or alternatively in
16 California, who, at any time from four years preceding the date of the filing of this Complaint
17 to the time a class is notified (the "Class Period"), purchased, for personal or household use,
18 and not for resale or distribution, the Hershey Products (the "Class").

19 48. The members in the proposed Class are so numerous that individual joinder of
20 all members is impracticable, and the disposition of the claims of all Class Members in a
21 single action will provide substantial benefits to the parties and Court.

22 49. Questions of law and fact common to Plaintiff and the Class include:

- 23 a. whether the omissions on the Products labels with respect to lead content
24 are material, or likely to be material, to a reasonable consumer;
- 25 b. whether the omissions on the Products labels with respect to cadmium
26 content are material, or likely to be material, to a reasonable consumer;
- 27 c. whether the omissions regarding lead content were reasonably likely to
28 deceive a reasonable consumer;

- d. whether the omissions regarding cadmium content were reasonably likely to deceive a reasonable consumer;
- e. whether Hershey's conduct violates public policy;
- f. whether Hershey's conduct violates state or federal food statutes or regulations;
- g. whether Hershey made and breached warranties;
- h. the proper amount of damages, including punitive damages;
- i. the proper amount of restitution;
- j. the proper scope of injunctive relief; and
- k. the proper amount of attorneys' fees.

50. These common questions of law and fact predominate over questions that affect only individual Class Members.

51. Plaintiff's claims are typical of Class Members' claims because they are based on the same underlying facts, events, and circumstances relating to Hershey's conduct. Specifically, all Class Members, including Plaintiff, were subjected to the same misleading and deceptive conduct when they purchased the Products and suffered economic injury because the Products are misrepresented. Absent Hershey's business practice of deceptively and unlawfully labeling the Products by omitting material information regarding its toxic lead and cadmium content, Plaintiff and Class Members would not have purchased the Products or would have paid less for them.

52. Plaintiff will fairly and adequately represent and protect the interests of the Class, has no interests incompatible with the interests of the Class, and has retained counsel competent and experienced in class action litigation, and specifically in litigation involving the false and misleading advertising of foods and beverages.

53. Class treatment is superior to other options for resolution of the controversy because the relief sought for each Class Member is small, such that, absent representative litigation, it would be infeasible for Class Members to redress the wrongs done to them.

1 54. Hershey has acted on grounds applicable to the Class, thereby making
2 appropriate final injunctive and declaratory relief concerning the Class as a whole.

3 55. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.
4 23(a), 23(b)(2), and 23(b)(3).

5 **CAUSES OF ACTION**

6 **FIRST CAUSE OF ACTION**

7 **Violations of the Unfair Competition Law**

8 **Cal. Bus. & Prof. Code §§ 17200 *et seq.***

9 56. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
10 as if set forth fully herein.

11 57. The UCL prohibits any “unlawful, unfair or fraudulent business act or
12 practice.” Cal. Bus. & Prof. Code § 17200.

13 58. Under California Business & Professions Code §17200, any business act or
14 practice that is likely to deceive members of the public constitutes a fraudulent business act
15 or practice.

16 59. The acts, omissions, misrepresentations, practices, and non-disclosures of as
17 alleged herein constitute business acts and practices.

18 **Fraudulent**

19 60. A statement or practice is fraudulent under the UCL if it is likely to deceive a
20 significant portion of the public, applying an objective reasonable consumer test.

21 61. As set forth herein, Hershey’s omissions regarding the toxic lead and cadmium
22 content of the Products is likely to deceive reasonable consumers and the public.

23 **Unlawful**

24 62. As set forth herein, Hershey’s omissions are “unlawful” under the UCL in that
25 they violate at least the following laws:

- 26 • The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
- 27 • The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*;
- 28 • The Song-Beverly Act, Cal. Civ. Code, §§ 1790 *et seq.*;

- 1 • The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*; and
- 2 • The California Sherman Food, Drug, and Cosmetic Law, Cal. Health & Safety
- 3 Code §§ 110100 *et seq.*

4 63. By violating these laws, Defendant has engaged in unlawful business acts and
5 practices, which constitute unfair competition within the meaning of Business & Professions
6 Code § 17200.

7 **Unfair**

8 64. Hershey's conduct with respect to the labeling, advertising, and sale of the
9 Products was unfair because Hershey's conduct was immoral, unethical, unscrupulous, or
10 substantially injurious to consumers, and the utility of its conduct, if any, does not outweigh
11 the gravity of the harm to its victims.

12 65. Hershey's conduct with respect to the labeling, advertising, and sale of the
13 Products was also unfair because it violates public policy as declared by specific
14 constitutional, statutory or regulatory provisions, including but not necessarily limited to the
15 False Advertising Law, portions of the Federal Food, Drug, and Cosmetic Act, the Song
16 Beverly Act, and portions of the California Sherman Food, Drug, and Cosmetic Law.

17 66. Hershey's conduct with respect to the labeling, advertising, and sale of the
18 Products was and is also unfair because the consumer injury was substantial, not outweighed
19 by benefits to consumers or competition, and not one consumers themselves could
20 reasonably have avoided. Specifically, the increase in profits obtained by Hershey through
21 the misleading labeling does not outweigh the harm to Class Members who were deceived
22 into purchasing the Products unaware that they contain toxic lead or cadmium and are of the
23 type that can increase the risk of poor health. Consumers could not have reasonably avoided
24 the harm because this would have required that they conduct their own research into the lead
25 and/or cadmium content of the Products, which could only feasibly be revealed by laboratory
26 testing, which is not a reasonable expectation. Further, the harm could have easily been
27 avoided by Hershey as it would have cost them only minimally to place a warning on the
28

1 label that the Products contain toxic lead and cadmium. Alternatively, Hershey could have
2 done more to ensure heavy metals, including lead and cadmium, were not in the Products.

3 67. Hershey profited from the sale of the falsely, deceptively, and unlawfully
4 advertised the Hershey Products to unwary consumers.

5 68. Plaintiff and Class Members are likely to continue to be damaged by Hershey's
6 deceptive trade practices, because Hershey continues to disseminate misleading information.
7 Thus, injunctive relief enjoining Hershey's deceptive practices is proper.

8 69. Hershey's conduct caused and continues to cause substantial injury to Plaintiff
9 and other Class Members. Plaintiff has suffered injury in fact as a result of Hershey's
10 unlawful conduct.

11 70. In accordance with Bus. & Prof. Code § 17203, Plaintiff seeks an order
12 enjoining Hershey from continuing to conduct business through unlawful, unfair, and/or
13 fraudulent acts and practices.

14 71. Plaintiff and the Class also seek an order for the restitution of all monies from
15 the sale of the Products, which were unjustly acquired through acts of unlawful competition.

16 72. Because Plaintiff's claims under the "unfair" prong of the UCL sweep more
17 broadly than their claims under the FAL, CLRA, or UCL's "fraudulent" prong, Plaintiff's
18 legal remedies are inadequate to fully compensate Plaintiff for all of Hershey's challenged
19 behavior.

20 **SECOND CAUSE OF ACTION**

21 **Violations of the False Advertising Law**

22 **Cal. Bus. & Prof. Code §§ 17500 *et seq.***

23 73. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
24 as if set forth fully herein.

25 74. California's False Advertising Law prohibits any statement in connection with
26 the sale of goods "which is untrue or misleading." Cal. Bus. & Prof. Code § 17500.

1 75. As set forth herein, the Plaintiff purchased a Product based on the label, which
2 constituted advertising and which omitted the presence of toxic lead and cadmium in the
3 Products.

4 76. Plaintiff and the Class Members paid money for the Hershey Products.
5 However, they did not obtain the full value or any value of the Products due to Hershey's
6 omissions regarding the nature of the Products. Accordingly, Plaintiff and the Class
7 Members suffered an injury in fact and lost money or property as a direct result of Hershey's
8 omissions.

9 77. Hershey's conduct is ongoing and continuing, such that prospective injunctive
10 relief is necessary, especially given Plaintiff's desire to purchase the Products in the future
11 and hope to rely on Hershey's marketing and packaging.

12 78. Plaintiff and members of the Class are entitled to injunctive and equitable relief,
13 and restitution in the amount they spent on the Products.

14 79. Here, equitable relief is appropriate because Plaintiff may lack an adequate
15 remedy at law if, for instance, damages resulting from their purchase of the Products is
16 determined to be an amount less than the premium price of the Products. Without
17 compensation for the full premium price of the Products, Plaintiff would be left without the
18 parity in purchasing power to which they are entitled.

19 80. Injunctive relief is also appropriate, and indeed necessary, to require Hershey
20 to provide full and accurate disclosures regarding the Products so that Plaintiff and Class
21 members can reasonably rely on the Products' packaging as well as those of Hershey's
22 competitors who may then have an incentive to follow Hershey's deceptive practices, further
23 misleading consumers.

24 81. Restitution and/or injunctive relief may also be more certain, prompt, and
25 efficient than other legal remedies requested herein. The return of the full price or full
26 premium price, and an injunction requiring either (1) adequate disclosures of the existence
27 of toxic lead and cadmium in the Products or (2) the removal of lead and cadmium from the
28 Products, will ensure that Plaintiff and other Class Members are in the same place they would

1 have been in had Hershey's wrongful conduct not occurred, *i.e.*, in the position to make an
2 informed decision about the purchase of the Products absent omissions.

3 82. Because the Court has broad discretion to award restitution under the FAL and
4 could, when assessing restitution under the FAL, apply a standard different than that applied
5 to assessing damages under the CLRA or commercial code (for Plaintiff's breach of warranty
6 claims), and restitution is not limited to returning to Plaintiff and class members monies in
7 which they have an interest, but more broadly serves to deter the offender and others from
8 future violations, the legal remedies available under the CLRA and commercial code are
9 more limited than the equitable remedies available under the FAL, and are therefore
10 inadequate.

11 **THIRD CAUSE OF ACTION**

12 **Violations of the Consumers Legal Remedies Act**

13 **Cal. Civ. Code §§ 1750 *et seq.***

14 83. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
15 as if set forth fully herein.

16 84. The CLRA prohibits deceptive practices in connection with the conduct of a
17 business that provides goods, property, or services primarily for personal, family, or
18 household purposes.

19 85. Hershey's false and misleading labeling and other policies, acts, and practices
20 were designed to, and did, induce the purchase and use of the Hershey Products for personal,
21 family, or household purposes by Plaintiff and Class Members, and violated and continue to
22 violate the following sections of the CLRA:

- 23 a. § 1770(a)(5): representing that goods have characteristics, uses, or
24 benefits which they do not have;
- 25 b. § 1770(a)(7): representing that goods are of a particular standard, quality,
26 or grade if they are of another;
- 27 c. § 1770(a)(9): advertising goods with intent not to sell them as advertised;
28 and

1 86. Hershey profited from the sale of the falsely, deceptively, and unlawfully
2 advertised Products to unwary consumers.

3 87. Hershey's wrongful business practices constituted, and constitute, a continuing
4 course of conduct in violation of the CLRA.

5 88. Plaintiff and the Class have suffered harm and seek only injunctive relief and
6 restitution, at this time.

7 89. In compliance with Cal. Civ. Code § 1780(d), an affidavit of venue is filed
8 concurrently herewith.

9 **FOURTH CAUSE OF ACTION**

10 **Breach of Implied Warranty Under the Song-Beverly Act**

11 **Cal. Civ. Code §§ 1790 *et seq.***

12 90. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
13 as if set forth in full herein.

14 91. Under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790, *et*
15 *seq.*, every sale of consumer goods in this State is accompanied by both a manufacturer's
16 and retail seller's implied warranty that the goods are merchantable, as defined in that Act.
17 In addition, every sale of consumer goods in this State is accompanied by both a
18 manufacturer's and retail seller's implied warranty of fitness when the manufacturer or
19 retailer has reason to know that the goods as represented have a particular purpose and that
20 the buyer is relying on the manufacturer's or retailer's skill or judgment to furnish suitable
21 goods consistent with that represented purpose.

22 92. The Products are "consumer goods" within the meaning of Cal. Civ. Code §
23 1791(a).

24 93. Plaintiff and the Class Members who purchased one or more of the Hershey
25 Products are "retail buyers" within the meaning of Cal. Civ. Code § 1791.

26 94. Hershey is in the business of manufacturing, assembling, producing and/or
27 selling the Products to retail buyers, and therefore is a "manufacturer" and "seller" within
28 the meaning of Cal. Civ. Code § 1791.

1 95. Hershey impliedly warranted to retail buyers that the Products were
2 merchantable in that they (a) would pass without objection in the trade or industry under the
3 contract description, and (b) were fit for the ordinary purposes for which the Products are
4 used. For a consumer good to be “merchantable” under the Act, it must satisfy both of these
5 elements. Hershey breached these implied warranties because the Products were unsafe in
6 that they contained toxic lead and cadmium. Therefore, the Products would not pass without
7 objection in the trade or industry and were not fit for the ordinary purpose for which they are
8 used, which is consumption by consumers, including children.

9 96. Plaintiff and the Class purchased the Products in reliance upon Hershey’s skill
10 and judgment in properly packaging and labeling the Products.

11 97. The Products were not altered by Plaintiff or other Class Members.

12 98. Hershey knew that the Products would be purchased and used without
13 additional testing by Plaintiff and the Class.

14 99. As a direct and proximate cause of Hershey’s breach of the implied warranty,
15 Plaintiff and the Class have been injured and harmed because they would not have purchased
16 the Products or would have paid less for the Products if they knew the truth about the
17 Products, namely, that they contained toxic lead and cadmium.

18 **FIFTH CAUSE OF ACTION**

19 **Breach of Implied Warranty of Merchantability, Cal. Com. Code § 2314**

20 100. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
21 as if set forth in full herein.

22 101. As set forth herein, Hershey manufactured and sold the Products, and prior to
23 the time the Products were purchased by Plaintiff and other Class Members, impliedly
24 warranted that the Products were of merchantable quality and fit for their ordinary use,
25 consumption by consumers, including children.

26 102. Hershey is a merchant with respect to the goods of this kind which were sold to
27 Plaintiff and the Class, and there were, in the sale to Plaintiff and the Class, implied
28 warranties that those goods were merchantable.

1 110. As a result, Plaintiff and Class Members are entitled to equitable relief including
2 restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits
3 which may have been obtained by Hershey as a result of such business practices.

4 **PRAYER FOR RELIEF**

5 111. Wherefore, Plaintiff, on behalf of herself, all others similarly situated, and the
6 general public, prays for judgment against Hershey as to each and every cause of action, and
7 the following remedies:

8 a. An Order declaring this action to be a proper class action, appointing
9 Plaintiff as Class Representative, and appointing Plaintiff's undersigned counsel as
10 Class Counsel;

11 b. An Order requiring Hershey to bear the cost of Class Notice;

12 c. An Order compelling Hershey to destroy all misleading and deceptive
13 advertising materials and product labels, and to recall all offending Products;

14 d. An Order requiring Hershey to disgorge all monies, revenues, and profits
15 obtained by means of any wrongful act or practice;

16 e. An Order requiring Hershey to pay restitution to restore all funds
17 acquired by means of any act or practice declared by this Court to be an unlawful,
18 unfair, or fraudulent business act or practice, or untrue or misleading advertising, plus
19 pre-and post-judgment interest thereon;

20 f. An Order requiring Hershey to pay compensatory damages and punitive
21 damages as permitted by law;

22 g. An award of attorneys' fees and costs; and

23 h. Any other and further relief that Court deems necessary, just, or proper.

JURY DEMAND

112. Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: January 6, 2023

/s/ Trevor Flynn

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Eva Grausz, on behalf of herself, all others similarly situated, and the general public

(b) County of Residence of First Listed Plaintiff San Diego (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Fitzgerald Joseph LLP; 2341 Jefferson Street, Suite 200, San Diego, California 92110; (619) 215-1741

DEFENDANTS

The Hershey Company

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'23CV0028 AJB NLS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship options: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, PERSONAL INJURY, LABOR, IMMIGRATION, FORFEITURE/PENALTY, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. s. 1332(d)(2) (the Class Action Fairness Act)

Brief description of cause: False Advertising (Violation of California's UCL, FAL, CLRA); Breach of Warranties; Unjust Enrichment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE: Jan 6, 2023 SIGNATURE OF ATTORNEY OF RECORD: /s/ Trevor Flynn

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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 10 ***Counsel for Plaintiff***

11
 12 **UNITED STATES DISTRICT COURT**
 13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 EVA GRAUSZ, on behalf of herself, all
 15 others similarly situated, and the general
 16 public,

17 Plaintiff,

18 v.

19 THE HERSHEY COMPANY,

20 Defendant.

**CONSUMERS LEGAL REMEDIES
 ACT VENUE AFFIDAVIT [Cal. Civ.
 Code § 1780(d)]**

1 I, Eva Grausz, declare as follows:

2 1. I am a plaintiff in this action. I make this affidavit as required by California Civil
3 Code § 1780(d).

4 2. The Complaint in this action is filed in a proper place for the trial of this action
5 because defendant is doing business in this county and because the transactions that are the
6 subject of the action occurred in this county.

7
8 I declare under penalty of perjury under the laws of the United States that the foregoing
9 is true and correct to the best of my knowledge.

10
11 Executed this 6th day of January, 2023, in San Diego, California

12
13
14 DocuSigned by:
Eva Grausz
E270F1130775434...
15 _____
Eva Grausz