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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 MARK TRAMMELL, *individually and on*) No. 3:23-cv-01884-H-JLB
13 *behalf of all those similarly situated,*)
14) **AMENDED CLASS ACTION**
15 *Plaintiff,*) **COMPLAINT**
16)
17 v.) **JURY TRIAL DEMANDED**
18)
19 KLN ENTERPRISES, INC. dba Wiley)
20 Wallaby, *a Minnesota corporation,*)
21)
22 *Defendant.*)
23)
24)
25)

26
27 Mark Trammell (“Plaintiff”), individually and on behalf of all others similarly situated
28 throughout the state of California, by and through undersigned counsel, hereby brings this action
against KLN Enterprises, Inc. dba Wiley Wallaby (“Wiley Wallaby”), alleging that its Wiley
Wallaby Very Berry licorice (“the Products”), which are manufactured, packaged, labeled,
advertised, distributed, and sold by Defendant, are misbranded and falsely advertised because
they contain artificial flavoring, and upon information and belief and investigation of counsel
alleges as follows:

29 **PARTIES**

30 1. Plaintiff Mark Trammell is and at all times relevant was a citizen of the state of
31 California, domiciled in San Diego, California.

1 wires and mails, both directly and through electronic and print publications that are directed to
2 commercial and individual consumers in this district; and operating an e-commerce web site
3 that offers the Products for sale to commercial and individual consumers in this district, as well
4 as offering the Products for sale through third-party e-commerce websites, through both of
5 which commercial and individual consumers residing in this district have purchased the
6 Products.
7

8 10. Defendant knowingly directs electronic activity and ships the Products into this
9 district with the intent to engage in business interactions for profit, and it has in fact engaged in
10 such interactions.

11 11. Defendant also sells the Products to retailers and wholesalers in this district for
12 the purpose of making the Products available for purchase by individual consumers in this
13 district.
14

15 12. The losses of some Class members were sustained in this district.

16 13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of
17 the events or omissions giving rise to Plaintiff's claims occurred within this district.

18 14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court
19 maintains personal jurisdiction over Defendant.
20

21 **FACTUAL ALLEGATIONS**

22 **A. Consumers Pay A Premium for "Clean Labels."**

23 15. Across the globe, consumers are increasingly attuned to claims that foods are "all-
24 natural," minimally processed, or otherwise free of artificial flavors and preservatives.

25 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
26 numbers of consumers were committed or casual adherents to so-called "clean label" food
27 attributes: "No artificial ingredients" (69 percent); "No preservatives" (67 percent); or "All-
28 natural" (66 percent). These were the three most attractive attributes in the consumer survey.

1 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
2 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

3 17. This consumer preference has led to an explosion in the category of “clean label”
4 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
5 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
6 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
7 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

8
9 18. Trammell purchased the Products on or about May 23, 2023 from a Target in
10 Encinitas, California.

11 19. Trammell is a student who attempts to eat “clean.” He prefers to consume only
12 products that contain all-natural flavorings.

13
14 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

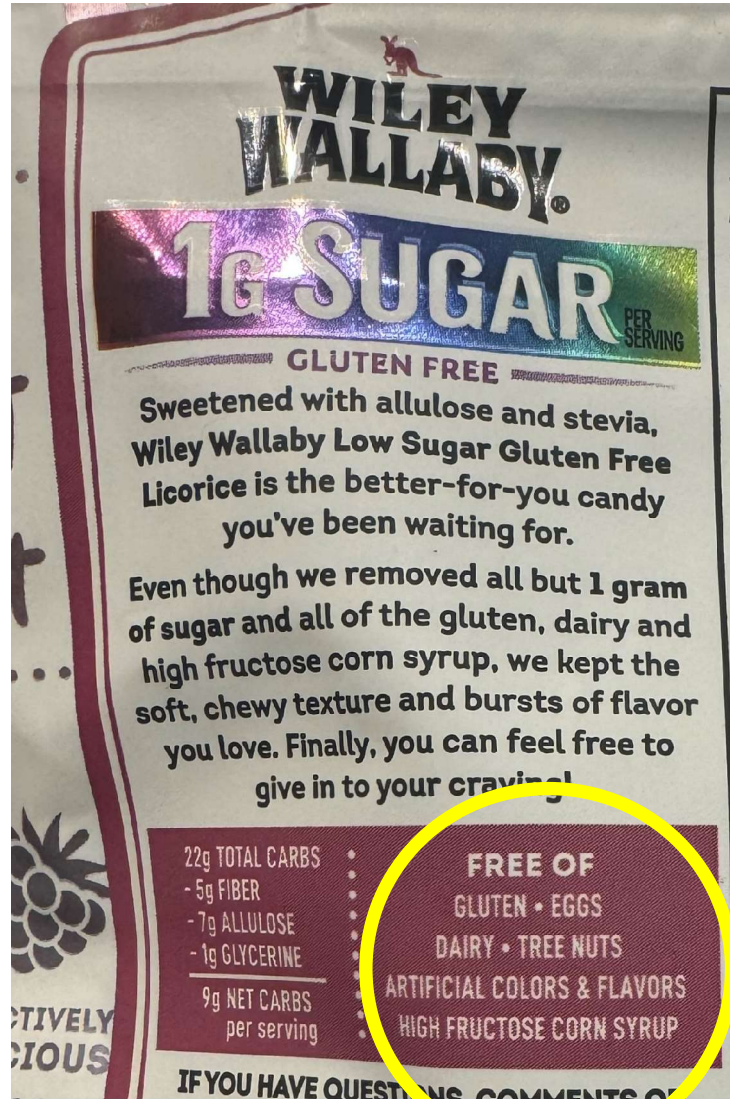
15 20. Defendant KLN Enterprises, Inc. dba Wiley Wallaby formulates, manufactures,
16 and sells *inter alia* licorice candies. KLN is solely responsible for the contents of the Products’
17 labelling.

18 21. The front label (or “principal display panel”) of the Products state that the Products
19 are “Naturally Flavored,” while the back label states that the Products are “Free of ... Artificial
20 Colors & Flavors.” These claims are reinforced by depictions of fruits:
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22. These statements are false and/or misleading. All of the Products contain an ingredient known as “malic acid” which is used as a flavoring in the Products. The form of malic acid used in these Products is artificial, as set forth in greater detail below.

23. The word “malic” in malic acid derives from the Latin *malum*, for apple. Malic acid derived from natural fruit sources (usually apples) is commonly known as “L malic acid” instead of its scientific name, 2-Hydroxybutanedioic acid. L malic acid is quite expensive and is generally cost-prohibitive to use in mass-produced foods and beverages.

1 24. There is a synthetic or artificial version of malic acid derived from a petroleum
2 substrate and other synthetic components. It is commonly referred to as DL malic acid, instead
3 of its scientific name of d-hydroxybutanedioic acid. DL malic acid is manufactured in
4 petrochemical plants from benzene or butane—components of gasoline and lighter fluid,
5 respectively—through a series of chemical reactions, some of which involve highly toxic
6 chemical precursors and byproducts.
7

8 25. Federal regulations state explicitly that “DL-malic acid does not occur naturally.”
9 21 C.F.R. § 184.1069(a).

10 26. When testing malic acid to determine whether it is artificial (DL) or natural (L)
11 malic acid, the industry standard is to test for the presence of the “D isomer” of malic acid. This
12 isomer is not present in any amount in L malic acid. Therefore, the presence of the D isomer of
13 malic acid in any amount in a food or beverage indicates the use of artificial DL malic acid
14 instead of natural L malic acid.
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16 27. Counsel for Plaintiff commissioned testing of the specific items that were
17 purchased by Plaintiff. That testing was conducted on or about June 28, 2023 by Krueger Food
18 Laboratories, Inc. of Chelmsford, Massachusetts, a reputable independent food testing and
19 analysis laboratory that has conducted testing for the food and beverage industry since 1984.
20

21 28. This testing by Krueger Food Laboratories revealed that the D isomer was present
22 the Product purchased by Plaintiff. This testing therefore establishes that the malic acid used in
23 these Products is DL malic acid, and not L malic acid. And as stated explicitly in federal
24 regulations incorporated as substantive state law, “DL-malic acid does not occur naturally.” 21
25 C.F.R. § 184.1069(a).
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1 **C. Malic Acid Is Used In the Products As A Flavor.**

2 29. Fruit flavors in a food are imparted by the interactions between sugars, acids,
3 lipids, and various volatile compounds. The overall profile of a fruit flavor in a food is
4 determined by the ratio between the sugars (mainly glucose and fructose) and acids, such as
5 citric and malic acid. Fruits such as blueberries and strawberries have their own natural ratio of
6 sugars and acids.

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8 30. That is, as a matter of food chemistry, there is no such flavor as “strawberry” or
9 the like. Rather, there is a ratio between acids and sugars that is consistent with what the human
10 tongue senses and understands as the flavor “strawberry,” and that is naturally found in
11 strawberries.

12 31. By adjusting the ratio between sugars and acids through the use of malic acid in
13 foods and beverages, a manufacturer is enabled to create or simulate from scratch a “flavor”
14 such as strawberry, through replication of the sugar/acid ratio present in strawberries in nature.

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16 32. In addition, by adding malic acid to a food or beverage, the manufacturer is
17 enabled to reinforce the characterizing fruit flavor of the food product. That is, food
18 manufacturers are enabled to adjust the flavor notes of a fruit flavor such as strawberry,
19 increasing the food product’s commercial acceptability.

20 33. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
21 (“FDCA”) require that a food’s label accurately describe the nature of the food product and its
22 characterizing flavors. 21 C.F.R. § 102.5(a).

23
24 34. Artificial flavor is defined as “any substance, the function of which is to impart
25 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
26 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
27 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

28

1 35. Natural flavor is defined as “essential oil, oleoresin, essence or extractive, protein
2 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the
3 flavoring constituents” from fruits or vegetables, “whose significant function in food is flavoring
4 rather than nutritional.” 21 C.F.R § 101.22(a)(3).
5

6 36. Any recognizable primary flavor identified directly or indirectly on the front label
7 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
8 as a “characterizing flavor.” 21 C.F.R. § 101.22.

9 37. If a food product’s characterizing flavor is not created exclusively by the named
10 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
11 reinforced with either natural or artificial flavorings or both. Specifically, if any component is
12 present used that “simulates, resembles or reinforces” the characterizing flavor, the front label
13 must prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
14 101.22(i)(2).
15

16 38. That is, pursuant to 21 C.F.R. § 101.22(i)(2) even if a food or beverage is flavored
17 with strawberries, its label must state that it is “Artificially Flavored” if an artificial substance
18 is used to reinforce the flavor profile of the food product.

19 39. A food product’s label also must include a statement of the “presence or absence
20 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
21 ingredient(s) or component(s) in the food has a material bearing on price or consumer
22 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
23 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.
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25 40. Such statement must be in boldface print on the front display panel and of
26 sufficient size for an average consumer to notice.
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1 41. That is, whenever a food manufacturer uses malic acid to simulate or reinforce the
2 characterizing flavor of a food or beverage, it is required under federal regulations to state that
3 the food or beverage is “Artificially Flavored” if the malic acid used to simulate or reinforce the
4 characterizing flavor is DL malic acid.

5 42. By changing the ratio between sugars and acids that is naturally found in fruits,
6 the DL malic acid used in the Products by Defendant reinforces, simulates, or creates the
7 characterizing flavors, regardless of any other effect it may have or purpose for which it was
8 included. The DL malic acid in the Products is therefore an “flavor” within the meaning of 21
9 C.F.R. § 101.22(i)(2) whose use must be disclosed through an “Artificially Flavored” statement
10 on the front label if it is not derived from natural sources.

11 43. DL malic acid is an “artificial flavor” and not a “natural flavor” as those terms are
12 defined at 21 C.F.R § 101.22(a)(1) and (a)(3) and corresponding state regulations, because it
13 is not derived from a fruit or vegetable or any other natural source, but rather from a petroleum
14 substrate. Therefore, pursuant to 21 C.F.R. § 101.22(i)(2) and corresponding state regulations,
15 its use must be disclosed through an “Artificially Flavored” statement on the front label of the
16 Products.
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18 44. Further, the presence of artificial malic acid in the Products has a material bearing
19 on price or consumer acceptance of the Products, and consumers may be and have been misled
20 about the presence or absence of the artificial DL malic acid that is a component in the Product.
21 *See* 21 C.F.R. § 102.5. Among the consumers misled about the presence of artificial malic acid
22 in the Products is the Plaintiff, as set forth below.

23 45. Because the Products contain artificial flavoring, federal regulations and
24 corresponding state law incorporating and enacting those regulations require the Products to
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1 display both front- and back-label disclosures to inform consumers that the Products are
2 artificially flavored. *See* 21 C.F.R. § 101.22(i)(2).

3 46. The Products have none of the required disclosures regarding the use of artificial
4 flavors. In fact, the Products’ front and back labels bear the false and deceptive statements that
5 they are “Naturally Flavored” and “Free of ... Artificial Colors & Flavors.”
6

7 47. Plaintiffs reserve the right to amend this Complaint to add further products that
8 contain similar label misrepresentations as testing of the Defendant’s food products continues.

9 **D. Plaintiff Reasonably Relied on Defendant’s Labelling Statements.**

10 49. Labels are the chief means by which food product manufacturers convey critical
11 information to consumers, and consumers have been conditioned to rely on the accuracy of the
12 claims made on these labels.

13 50. Further, federal law and corresponding state law and regulations both reflect and
14 create reasonable consumer expectations concerning the contents of foods and beverages. That
15 is, consumers have been conditioned to expect that a food product that states that it is “Naturally
16 Flavored” and “Free of ... Artificial Colors & Flavors” does not have its flavor created,
17 simulated, or reinforced by flavoring agents derived from petroleum substrates.
18

19 51. Plaintiff reviewed the labels on the Products prior to his purchase, and reviewed
20 the flavoring claims being made on those labels. Plaintiff reasonably understood Defendant’s
21 “Naturally Flavored” and “Free of ... Artificial Colors & Flavors” statements, as well as its
22 failure to disclose the use of artificially derived malic acid, to mean that the Products contain
23 only natural flavorings. These representations were false.
24

25 52. As relates to flavorings, there is no functional difference between the statement
26 that a product is “Naturally Flavored” and “Free of ... Artificial Colors & Flavors” and
27 statements that a product is “all natural,” “100% natural,” “free of artificial ingredients,” or the
28

1 like. These are all equivalent statements with identical legal import as it relates to reasonable
2 consumer expectations regarding the flavoring used in a food product.

3 53. Plaintiff reasonably relied on these label statements such that he would not have
4 purchased the Products from Defendant if the truth about the Products was known, or would
5 have only been willing to pay a substantially reduced price for the Products had he known that
6 Defendant's representations regarding flavoring were false and misleading.
7

8 54. In the alternative, because of its deceptive and false labelling statements,
9 Defendant was enabled to charge Plaintiff a premium for the Products relative to key
10 competitors' products, or relative to the average price charged in the marketplace. In fact, KLN's
11 prices for the Products are higher than those of competing food products, due *inter alia* to the
12 premium associated with naturally flavored foods—which the Products are not.
13

14 55. Consumers including Plaintiff especially rely on label claims made by food
15 product manufacturers such as Defendant, as they cannot confirm or disprove those claims
16 simply by viewing or even consuming the Products. That is, consumers depend on food
17 manufacturers to tell the truth about the characteristics of their products while making decisions
18 about which products to buy and consume. Here, Defendant has not told the truth about the
19 flavoring used in the Products.
20

21 56. Plaintiff suffered economic injury by Defendant's fraudulent and deceptive
22 conduct as stated herein, and there is a causal nexus between Defendant's deceptive conduct and
23 Plaintiff's injury.

24 57. Defendant is in the best position to know what content it placed on its front and
25 back labels and what chemicals and ingredients are in the Products. Plaintiff nonetheless
26 satisfies the requirements of Rule 9(b) by alleging the following facts with particularity:
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- 1 a. **Who**: Defendant made material misrepresentations of fact regarding the flavoring
2 of the Products on both the front and back labels of the Products when it stated that
3 the Products were “Naturally Flavored” and “Free of ... Artificial Colors and
4 Flavors.” The labelling of these Products are entirely within the control of
5 Defendant. These representations and omissions constitute material
6 misrepresentation and omissions regarding the use of an artificial flavoring
7 (specifically, DL malic acid) used to create, simulate, or reinforce the characterizing
8 flavor of the Products.
9
- 10 b. **What**: Defendant knew, or should have known, that the DL malic acid used in the
11 Products was an artificial flavoring. Defendant’s conduct here was, and continues
12 to be, fraudulent because it misrepresented that the Products purchased by Plaintiff
13 were “Naturally Flavored” and “Free of ... Artificial Colors and Flavors” and
14 thereby induced Plaintiff to purchase a Product he otherwise would not have
15 purchased, or would have paid a lesser amount for.
16
- 17 c. **When**: Defendant made the material misrepresentations and omissions set forth
18 herein during the putative Class Period, including prior to and at the time Plaintiff
19 purchased the Products from Defendant in May 2023, and continues to do so, despite
20 Defendant’s knowledge that the Products contained and continue to contain
21 artificial flavorings.
22
- 23 d. **Where**: Defendant’s misrepresentations and omissions, as set forth herein, were
24 made on the Products’ front and back labels, including the specific Product
25 purchased by Plaintiff. This Complaint sets forth the precise misrepresentations
26 made and includes a photograph of the Product’s label containing these
27 misrepresentations.
28

- 1 e. **How:** Defendant made material misrepresentations of fact and omissions on its front
2 and back labels when it stated that the Products were “Naturally Flavored” and “Free
3 of ... Artificial Colors & Flavors” despite the Products containing an artificial
4 flavoring, DL malic acid, used to create, simulate, or reinforce the characterizing
5 flavor of the Products within the meaning of 21 C.F.R. § 101.22(i)(2).
6
- 7 f. **Why:** Defendant made the material misrepresentations of fact and omissions as set
8 forth herein in order to induce the purchase of the Products by those persons
9 including Plaintiff who prefer to purchase food products that use only natural
10 flavorings, or to induce those persons to purchase the Products at a higher price than
11 they otherwise would have paid had the truth about the use of DL malic acid in the
12 Products been known.
13

14 CLASS ACTION ALLEGATIONS

15 58. Plaintiff brings this action individually and as representative of all those similarly
16 situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers in the state
17 of California who purchased the Products within four years prior to the filing of this Complaint.

18 59. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,
19 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over
20 this matter and the members of their immediate families and judicial staff.
21

22 60. Plaintiff reserves the right to alter the Class definition, and to amend this
23 Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable
24 law.

25 61. Certification of Plaintiff’s claims for class-wide treatment is appropriate because
26 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
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1 individual Class members would use to prove those elements in individual actions alleging the
2 same claims.

3 62. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all
4 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
5 members geographically dispersed throughout the state of California.
6

7 63. **Existence and Predominance of Common Questions of Law and Fact – Rule**
8 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions
9 predominate over any questions that affect only individual Class members. Common legal and
10 factual questions and issues include but are not limited to:

- 11 a. Whether the marketing, advertising, packaging, labeling, and other promotional
12 materials for Defendant’s Products is misleading and deceptive;
13
14 b. Whether a reasonable consumer would understand Defendant’s “Naturally
15 Flavored” and “Free of ... Artificial Colors & Flavors” claims, as described
16 herein, to indicate that the Products contained only natural flavorings and
17 ingredients, and reasonably relied upon those representations;
18
19 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class
20 members;
21
22 d. Whether Defendant breached an express warranty;
23
24 e. the proper amount of damages;
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26 f. the proper scope of injunctive relief; and
27
28 g. the proper amount of attorneys’ fees.

64. Defendant engaged in a common course of conduct in contravention of the laws
Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
of law, business practices, and injuries are involved. Individual questions, if any, pale by

1 comparison, in both quality and quantity, to the numerous common questions that predominate
2 this action. The common questions will yield common answers that will substantially advance
3 the resolution of the case.

4
5 65. In short, these common questions of fact and law predominate over questions that
6 affect only individual Class members.

7 66. **Typicality – Rule 23(a)(3):** Plaintiff’s claims are typical of the claims of the Class
8 members because they are based on the same underlying facts, events, and circumstances
9 relating to Defendant’s conduct.

10 67. Specifically, all Class members, including Plaintiff, were harmed in the same way
11 due to Defendant’s uniform misconduct described herein; all Class members suffered similar
12 economic injury due to Defendant’s misrepresentations; and Plaintiff seeks the same relief as
13 the Class members.
14

15 68. There are no defenses available to Defendant that are unique to the named
16 Plaintiff.

17 69. **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate
18 representative of the Class because Plaintiff’s interests do not conflict with the Class members’
19 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
20 against Defendant.
21

22 70. Furthermore, Plaintiff has selected competent counsel who are experienced in
23 class action and other complex litigation. Plaintiff and Plaintiff’s counsel are committed to
24 prosecuting this action vigorously on behalf of the Class and have the resources to do so.

25 71. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other
26 available means for the fair and efficient adjudication of this controversy for at least the
27 following reasons
28

- 1 a. the damages individual Class members suffered are small compared to the burden
2 and expense of individual prosecution of the complex and extensive litigation
3 needed to address Defendant’s conduct such that it would be virtually impossible
4 for the Class members individually to redress the wrongs done to them. In fact,
5 they would have little incentive to do so given the amount of damage each member
6 has suffered when weighed against the costs and burdens of litigation;
7
8 b. the class procedure presents fewer management difficulties than individual
9 litigation and provides the benefits of single adjudication, economies of scale, and
10 supervision by a single Court;
11
12 c. the prosecution of separate actions by individual Class members would create a
13 risk of inconsistent or varying adjudications, which would establish incompatible
14 standards of conduct for Defendant; and
15
16 d. the prosecution of separate actions by individual Class members would create a
17 risk of adjudications with respect to them that would be dispositive of the interests
18 of other Class members or would substantively impair or impede their ability to
19 protect their interests.

20 72. Unless the Class is certified, Defendant will retain monies received as a result of
21 its unlawful and deceptive conduct alleged herein.

22 73. Unless a class-wide injunction is issued, Defendant will likely continue to
23 advertise, market, promote, and sell its Products in an unlawful and misleading manner, as
24 described throughout this Complaint, and members of the Class will continue to be misled,
25 harmed, and denied their rights under the law. Defendant would like to purchase the Products
26 and other products produced by Plaintiff in the future, but cannot currently do so because he
27 cannot rely on the Products’ labelling, given the deceptions regarding flavoring found there. An
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1 injunction prohibiting future deceptive labelling is therefore warranted and would provide
2 Plaintiff and the Class relief.

3 74. Furthermore, Plaintiff has not merely alleged an "informational" injury, but has
4 also alleged that Defendant has been enabled to charge a price premium for the Products.
5 Plaintiff has therefore alleged that compliance with federal and state regulations regarding the
6 presence of artificial flavors in the Products would cause a decrease in the price of the Products
7 at which Plaintiff and members of the Class would be willing to buy the Products. As a result,
8 Plaintiff has alleged more than simply an interest in Defendant telling the truth on its labels, but
9 an economic injury that further supports prospective injunctive relief.

10 75. **Ascertainability.** To the extent ascertainability is required, the Class members are
11 readily ascertainable from Defendant's records and/or its agents' records of retail and online
12 sales, as well as through public notice.

13 76. Defendant has acted on grounds applicable to the Class as a whole, thereby
14 making appropriate final injunctive and declaratory relief concerning the Class as a whole.

15
16
17 **COUNT 1**
18 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**
19 **CAL. CIV. CODE § 1750 *et seq.***

20 71. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
21 extent necessary, pleads this cause of action in the alternative.

22 72. Plaintiff is a "consumer" within the meaning of the Consumer Legal Remedies
23 Act ("CLRA"), Cal. Civ. Code § 1761(d).

24 73. The sale of Defendant's Products to Plaintiff and Class members was a
25 "transaction" within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

26 74. The Products purchased by Plaintiff and Class members are "goods" within the
27 meaning of the CLRA, Cal. Civ. Code § 1761(a).

1 75. As alleged herein, Defendant’s business practices are a violation of the CLRA
2 because Defendant deceptively failed to reveal facts that are material in light of the flavoring
3 representations that were made by Defendant on the labels of its Products and elsewhere.

4 76. Defendant’s ongoing failure to provide material facts about its Products on its
5 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:

- 6
- 7 a. Defendant’s acts and practices constitute misrepresentations that its Products have
8 characteristics, benefits, or uses which they do not have;
 - 9 b. Defendant misrepresented that its Products are of a particular standard, quality,
10 and/or grade, when they are of another;
 - 11 c. Defendant’s acts and practices constitute the advertisement of goods, without the
12 intent to sell them as advertised;
 - 13 d. Defendant’s acts and practices fail to represent that transactions involving its
14 Products involve actions that are prohibited by law, particularly the use of
15 misleading nutritional labelling; and
 - 16 e. Defendant’s acts and practices constitute representations that its Products have
17 been supplied in accordance with previous representations when they were not.
18

19 77. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
20 entitling them to injunctive relief.
21

22 78. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the
23 particular violations of the CLRA described herein and demanded Defendant rectify the actions
24 described above by providing complete monetary relief, agreeing to be bound by their legal
25 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this
26 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.
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1 79. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled
2 to recover actual damages sustained as a result of Defendant’s violations of the CLRA. Such
3 damages include, without limitation, monetary losses and actual, punitive, and consequential
4 damages, in an amount to be proven at trial.
5

6 80. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin
7 publication of misleading and deceptive nutritional labels on Defendant’s Products and to
8 recover reasonable attorneys’ fees and costs.

9 **COUNT 2**
10 **UNJUST ENRICHMENT**

11 81. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
12 extent necessary, pleads this cause of action in the alternative.

13 82. Defendant, through its marketing and labeling of the Products, misrepresented and
14 deceived consumers regarding the flavoring in the Products.

15 83. Defendant did so for the purpose of enriching itself and it in fact enriched itself
16 by doing so.
17

18 84. Consumers conferred a benefit on Defendant by purchasing the Products,
19 including an effective premium above their true value. Defendant appreciated, accepted, and
20 retained the benefit to the detriment of consumers.

21 85. Defendant continues to possess monies paid by consumers to which Defendant is
22 not entitled.

23 86. Under the circumstances it would be inequitable for Defendant to retain the benefit
24 conferred upon it and Defendant’s retention of the benefit violates fundamental principles of
25 justice, equity, and good conscience.
26

27 87. Plaintiff seeks disgorgement of Defendant’s ill-gotten gains and restitution of
28 Defendant’s wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed

1 appropriate by the Court, and such other relief as the Court deems just and proper to remedy
2 Defendant's unjust enrichment.

3 88. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact as
4 a result of Defendant's actions as set forth above.
5

6 **COUNT 3**
7 **BREACH OF EXPRESS WARRANTY**

8 89. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the
9 extent necessary, pleads this cause of action in the alternative.

10 90. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller,
11 expressly warranted that the Products were "Naturally Flavored" and were "Free of ... Artificial
12 Colors & Flavors."

13 91. Defendant's express warranties, and its affirmations of fact and promises made to
14 Plaintiff and the Class and regarding the Products, became part of the basis of the bargain
15 between Defendant and Plaintiff and the Class, which creates an express warranty that the
16 Products would conform to those affirmations of fact, representations, promises, and
17 descriptions.
18

19 92. The Products do not conform to the express warranty that the Products were
20 "Naturally Flavored" and were "Free of ... Artificial Colors & Flavors," because they contain
21 ingredients that are unnatural and synthetic, *i.e.*, DL malic acid.

22 93. As a direct and proximate cause of Defendant's breach of express warranty,
23 Plaintiff and Class members have been injured and harmed because: (a) they would not have
24 purchased the Products on the same terms if they knew the truth about the Products' unnatural
25 ingredients; (b) they paid a price premium based on Defendant's express warranties; and (c) the
26 Products do not have the characteristics, uses, or benefits that were promised.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully request the Court grant the following relief against Defendant:

- a. Certifying the Class;
- b. Declaring that Defendant violated the statutes cited herein and/or was unjustly enriched and/or breached an express warranty;
- c. Awarding actual and other damages;
- d. Ordering an awarding of injunctive relief, including enjoining Defendant from continuing the unlawful practices as set forth herein, and ordering Defendant to engage in a corrective advertising campaign;
- e. Ordering Defendant to pay reasonable attorneys’ fees and litigation costs to Plaintiff;
- f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded; and
- g. Such other relief as the Court may deem just and proper.

TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.

Respectfully submitted,

/s/ Charles C. Weller
Charles C. Weller (Cal. SBN: 207034)
Attorney for Plaintiff

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San Diego, California 92126
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May 22, 2024

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8 Attorney for Plaintiff Mark Trammell

9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 MARK TRAMMELL, *individually and on*)
13 *behalf of all those similarly situated,*)
14)
15 *Plaintiff,*)
16 v.)
17 KLN ENTERPRISES, INC. dba Wiley)
18 Wallaby, *a Minnesota corporation,*)
19)
20 *Defendant.*)

No. 3:23-cv-01884-H-
JLB
AMENDED CLASS ACTION
COMPLAINT
JURY TRIAL DEMANDED

21 Mark Trammell (“Plaintiff”), individually and on behalf of all others similarly situated
22 throughout the state of California, by and through undersigned counsel, hereby brings this action
23 against KLN Enterprises, Inc. dba Wiley Wallaby (“Wiley Wallaby”), alleging that its Wiley
24 Wallaby Very Berry licorice (“the Products”), which are manufactured, packaged, labeled,
25 advertised, distributed, and sold by Defendant, are misbranded and falsely advertised because
26 they contain artificial flavoring, and upon information and belief and investigation of counsel
27 alleges as follows:

28 **PARTIES**

1. Plaintiff Mark Trammell is and at all times relevant was a citizen of the state of
California, domiciled in San Diego, California.

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2. Defendant KLN Enterprises, Inc. dba Wiley Wallaby is a Minnesota corporation with its principal place of business in Perham, Minnesota.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to the Class Action Fairness Act, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28 of the United States Code); specifically, under 28 U.S.C. § 1332(d), which provides for the original jurisdiction of the federal district courts over “any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A).

4. Plaintiff seeks to represent Class members who are citizens of states different from the Defendant.

5. The matter in controversy in this case exceeds \$5,000,000 in the aggregate, exclusive of interests and costs.

6. In addition, “the number of members of all proposed plaintiff classes in the aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

7. In the alternative, this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). The amount in controversy excludes \$75,000, exclusive of interest and costs.

8. This Court has personal jurisdiction over Defendant because this action arises out of and relates to Defendant’s contacts with this forum.

9. Those contacts include but are not limited to sales of the Products directly to commercial and individual consumers located in this district, including Plaintiff; shipping the Products to commercial and individual consumers in this district, including Plaintiff; knowingly directing advertising and marketing materials concerning the Products into this district through

1 wires and mails, both directly and through electronic and print publications that are directed to
2 commercial and individual consumers in this district; and operating an e-commerce web site
3 that offers the Products for sale to commercial and individual consumers in this district, as well
4 as offering the Products for sale through third-party e-commerce websites, through both of
5 which commercial and individual consumers residing in this district have purchased the
6 Products.
7

8 10. Defendant knowingly directs electronic activity and ships the Products into this
9 district with the intent to engage in business interactions for profit, and it has in fact engaged in
10 such interactions.

11 11. Defendant also sells the Products to retailers and wholesalers in this district for
12 the purpose of making the Products available for purchase by individual consumers in this
13 district.
14

15 12. The losses of some Class members were sustained in this district.

16 13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of
17 the events or omissions giving rise to Plaintiff's claims occurred within this district.

18 14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court
19 maintains personal jurisdiction over Defendant.
20

21 **FACTUAL ALLEGATIONS**

22 **A. Consumers Pay A Premium for "Clean Labels."**

23 15. Across the globe, consumers are increasingly attuned to claims that foods are "all-
24 natural," minimally processed, or otherwise free of artificial flavors and preservatives.

25 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming
26 numbers of consumers were committed or casual adherents to so-called "clean label" food
27 attributes: "No artificial ingredients" (69 percent); "No preservatives" (67 percent); or "All-
28 natural" (66 percent). These were the three most attractive attributes in the consumer survey.

1 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean
2 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

3 17. This consumer preference has led to an explosion in the category of “clean label”
4 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods
5 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent
6 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See
7 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

8
9 18. Trammell purchased the Products on or about May 23, 2023 from a Target in
10 Encinitas, California.

11 19. Trammell is a student who attempts to eat “clean.” He ~~carefully reviews food~~
12 ~~product labels, including the Products’ label, to understand the characteristics of the products he~~
13 ~~consumes, and he~~ prefers to consume only products that contain all-natural ~~ingredients and~~
14 flavorings.
15

16 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

17 20. Defendant KLN Enterprises, Inc. dba Wiley Wallaby formulates, manufactures,
18 and sells *inter alia* licorice candies. ~~KLN is solely responsible for the contents of the Products’~~
19 ~~labelling.~~

20 21. The front label (or “principal display panel”) of the Products state that the Products
21 are “Naturally Flavored” ~~and “Natural Strawberry and Raspberry Flavored,”~~ while the back
22 label states that the Products are “Free of ... Artificial Colors & Flavors.” These claims are
23 reinforced by depictions of fruits:
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~~22. These label claims are false. The Products are flavored using an artificial~~
~~flavoring, DL-malic acid, that is derived from petrochemicals.~~

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22. These statements are false and/or misleading. All of the Products contain an ingredient known as “malic acid” which is used as a flavoring in the Products. The form of malic acid used in these Products is artificial, as set forth in greater detail below.

23. The word “malic” in malic acid derives from the Latin *malum*, for apple. Malic acid derived from natural fruit sources (usually apples) is commonly known as “L malic acid” instead of its scientific name, 2-Hydroxybutanedioic acid. L malic acid is quite expensive and is generally cost-prohibitive to use in mass-produced foods and beverages.

1 24. There is a synthetic or artificial version of malic acid derived from a petroleum
2 substrate and other synthetic components. It is commonly referred to as DL malic acid, instead
3 of its scientific name of d-hydroxybutanedioic acid. DL malic acid is manufactured in
4 petrochemical plants from benzene or butane—components of gasoline and lighter fluid,
5 respectively—through a series of chemical reactions, some of which involve highly toxic
6 chemical precursors and byproducts.

7
8 25. Federal regulations state explicitly that “DL-malic acid does not occur naturally.”
9 21 C.F.R. § 184.1069(a).

10 26. When testing malic acid to determine whether it is artificial (DL) or natural (L)
11 malic acid, the industry standard is to test for the presence of the “D isomer” of malic acid. This
12 isomer is not present in any amount in L malic acid. Therefore, the presence of the D isomer of
13 malic acid in any amount in a food or beverage indicates the use of artificial DL malic acid
14 instead of natural L malic acid.

15
16 27. Counsel for Plaintiff commissioned testing of the specific items that were
17 purchased by Plaintiff. That testing was conducted on or about June 28, 2023 by Krueger Food
18 Laboratories, Inc. of Chelmsford, Massachusetts, a reputable independent food testing and
19 analysis laboratory that has conducted testing for the food and beverage industry since 1984.

20
21 23.—This testing by Krueger Food Laboratories revealed that the D isomer was present
22 the Product purchased by Plaintiff. This testing therefore establishes that the malic acid used in
23 these Products is DL malic acid, and not L malic acid~~While there is a naturally occurring form~~
24 ~~of malic acid, it is extremely expensive to formulate in large quantities and is almost never used~~
25 ~~in mass-produced food products. Instead, testing conducted on June 28, 2023 by an independent~~
26 ~~third-party laboratory of the Products purchased by Plaintiff, confirmed the presence of the “D”~~
27 ~~isomer of malic acid in the Products. This means that the malic acid that Defendant uses in these~~
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1 ~~Products is DL malic acid, a synthetic substance derived from petrochemicals.¹ The isomer~~
2 ~~testing method employed in this case is an industry standard method for identifying the use of~~
3 ~~DL malic acid.~~

4 ~~24. DL malic acid is manufactured in petrochemical plants from benzene or butane—~~
5 ~~components of gasoline and lighter fluid, respectively—through a series of chemical reactions,~~
6 ~~some of which involve highly toxic chemical precursors and byproducts.~~

7 ~~25. Federal regulations note explicitly that “DL malic acid does not occur naturally.”~~
8 ~~21 C.F.R. § 184.1069(a).~~

9 ~~26. Fruit flavors in a food are imparted by the interactions between sugars, acids,~~
10 ~~lipids, and various volatile compounds. The relative sweetness or tartness of a fruit flavor is~~
11 ~~determined by the ratio between the sugars (mainly glucose and fructose) and acids, such as~~
12 ~~citric and malic acid.~~

13 ~~27. The quality and consumer acceptability of fruit flavors is based on their perceived~~
14 ~~sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Berries,~~
15 ~~watermelons, cherries, and other fruits have their own natural ratio of sugars and acids.~~

16 ~~28. The malic acid used in the Products is used to create, simulate, and/or reinforce~~
17 ~~the fruit flavors stated on the labels, also known as the “characterizing flavors.” However,~~
18 ~~Defendant pretends otherwise, conflating natural and artificial flavorings, misbranding the~~
19 ~~Products and deceiving consumers. And as stated explicitly in federal regulations incorporated~~
20 ~~as substantive state law, “DL-malic acid does not occur naturally.” 21 C.F.R. § 184.1069(a).~~

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~~¹DL malic acid is also called d-hydroxybutanedioic acid or (R) (+)-2-Hydroxysuccinic acid.~~

1 **C. Requirements for Labelling**

2 **C. Malic Acid Is Used In the Products As A Flavor.**

3 29. Fruit flavors in a food are imparted by the interactions between sugars, acids,
4 lipids, and various volatile compounds. The overall profile of a fruit flavor in a food is
5 determined by the ratio between the sugars (mainly glucose and fructose) and acids, such as
6 citric and malic acid. Fruits such as blueberries and strawberries have their own natural ratio of
7 sugars and acids.

8
9 30. That is, as a matter of food chemistry, there is no such flavor as “strawberry” or
10 the like. Rather, there is a ratio between acids and sugars that is consistent with what the human
11 tongue senses and understands as the flavor “strawberry,” and that is naturally found in
12 strawberries.

13 31. By adjusting the ratio between sugars and acids through the use of malic acid in
14 foods and beverages, a manufacturer is enabled to create or simulate from scratch a “flavor”
15 such as strawberry, through replication of the sugar/acid ratio present in strawberries in nature.

16
17 32. In addition, by adding malic acid to a food or beverage, the manufacturer is
18 enabled to reinforce the characterizing fruit flavor of the food product. That is, food
19 manufacturers are enabled to adjust the flavor notes of a fruit flavor such as strawberry,
20 increasing the food product’s commercial acceptability.

21 33. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act
22 (“FDCA”) require that a food’s label accurately describe the nature of the food product and its
23 characterizing flavors. 21 C.F.R. § 102.5(a).

24
25 34. Artificial flavor is defined as “any substance, the function of which is to impart
26 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible
27 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy
28 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

1 35. Natural flavor is defined as “essential oil, oleoresin, essence or extractive, protein
2 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the
3 flavoring constituents” from fruits or vegetables, “whose significant function in food is flavoring
4 rather than nutritional.” 21 C.F.R § 101.22(a)(3).

5 36. Any recognizable primary flavor identified directly or indirectly on the front label
6 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to
7 as a “characterizing flavor.” 21 C.F.R. § 101.22.

8 37. If a food product’s characterizing flavor is not created *exclusively* by the named
9 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or
10 reinforced with either natural or artificial flavorings or both. Specifically, if any component is
11 present used that “simulates, resembles or reinforces” the characterizing flavor, the front label
12 must prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §
13 101.22(i)(2).

14 38. That is, pursuant to 21 C.F.R. § 101.22(i)(2) even if a food or beverage is flavored
15 with strawberries, its label must state that it is “Artificially Flavored” if an artificial substance
16 is used to reinforce the flavor profile of the food product.

17 39. A food product’s label also must include a statement of the “presence or absence
18 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such
19 ingredient(s) or component(s) in the food has a material bearing on price or consumer
20 acceptance . . . and consumers may otherwise be misled about the presence or absence of the
21 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.

22 40. Such statement must be in boldface print on the front display panel and of
23 sufficient size for an average consumer to notice.

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1 41. That is, whenever a food manufacturer uses malic acid to simulate or reinforce the
2 characterizing flavor of a food or beverage, it is required under federal regulations to state that
3 the food or beverage is “Artificially Flavored” if the malic acid used to simulate or reinforce the
4 characterizing flavor is DL malic acid.

5 42. By changing the ratio between sugars and acids that is naturally found in fruits,
6 the DL malic acid used in the Products by Defendant reinforces, simulates, or creates the
7 characterizing flavors, regardless of any other effect it may have or purpose for which it was
8 included. The DL malic acid in the Products is therefore an “flavor” within the meaning of 21
9 C.F.R. § 101.22(i)(2) whose use must be disclosed through an “Artificially Flavored” statement
10 on the front label if it is not derived from natural sources.

11 43. DL malic acid is an “artificial flavor” and not a “natural flavor” as those terms are
12 defined at 21 C.F.R § 101.22(a)(1) and (a)(3) and corresponding state regulations, because it
13 is not derived from a fruit or vegetable or any other natural source, but rather from a petroleum
14 substrate. Therefore, pursuant to 21 C.F.R. § 101.22(i)(2) and corresponding state regulations,
15 its use must be disclosed through an “Artificially Flavored” statement on the front label of the
16 Products.

17 44. Further, the presence of artificial malic acid in the Products has a material bearing
18 on price or consumer acceptance of the Products, and consumers may be and have been misled
19 about the presence or absence of the artificial DL malic acid that is a component in the Product.
20 See 21 C.F.R. § 102.5. Among the consumers misled about the presence of artificial malic acid
21 in the Products is the Plaintiff, as set forth below.

22 45. Because the Products contain artificial flavoring, federal regulations and
23 corresponding state law incorporating and enacting those regulations require the Products to
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1 display both front- and back-label disclosures to inform consumers that the Products are
2 artificially flavored. See 21 C.F.R. § 101.22(i)(2).

3 46. The Products have none of the required disclosures regarding the use of artificial
4 flavors. In fact, the Products’ front and back labels bear the false and deceptive statements that
5 they are “Naturally Flavored” and “Free of ... Artificial Colors & Flavors.”

6 47. Plaintiffs reserve the right to amend this Complaint to add further products that
7 contain similar label misrepresentations as testing of the Defendant’s food products continues.

8 **D. Plaintiff Reasonably Relied on Defendant’s Labelling Statements.**

9 49. Labels are the chief means by which food product manufacturers convey critical
10 information to consumers, and consumers have been conditioned to rely on the accuracy of the
11 claims made on these labels.

12 50. Further, federal law and corresponding state law and regulations both reflect and
13 create reasonable consumer expectations concerning the contents of foods and beverages. That
14 is, consumers have been conditioned to expect that a food product that states that it is “Naturally
15 Flavored” and “Free of ... Artificial Colors & Flavors” does not have its flavor created,
16 simulated, or reinforced by flavoring agents derived from petroleum substrates.

17 51. Plaintiff reviewed the labels on the Products prior to his purchase, and reviewed
18 the flavoring claims being made on those labels. Plaintiff reasonably understood Defendant’s
19 “Naturally Flavored” and “Free of ... Artificial Colors & Flavors” statements, as well as its
20 failure to disclose the use of artificially derived malic acid, to mean that the Products contain
21 only natural flavorings. These representations were false.

22 52. As relates to flavorings, there is no functional difference between the statement
23 that a product is “Naturally Flavored” and “Free of ... Artificial Colors & Flavors” and
24 statements that a product is “all natural,” “100% natural,” “free of artificial ingredients,” or the
25 statements that a product is “all natural,” “100% natural,” “free of artificial ingredients,” or the
26 statements that a product is “all natural,” “100% natural,” “free of artificial ingredients,” or the
27 statements that a product is “all natural,” “100% natural,” “free of artificial ingredients,” or the
28 statements that a product is “all natural,” “100% natural,” “free of artificial ingredients,” or the

1 like. These are all equivalent statements with identical legal import as it relates to reasonable
2 consumer expectations regarding the flavoring used in a food product.

3 53. Plaintiff reasonably relied on these label statements such that he would not have
4 purchased the Products from Defendant if the truth about the Products was known, or would
5 have only been willing to pay a substantially reduced price for the Products had he known that
6 Defendant’s representations regarding flavoring were false and misleading.

7
8 54. In the alternative, because of its deceptive and false labelling statements,
9 Defendant was enabled to charge Plaintiff a premium for the Products relative to key
10 competitors’ products, or relative to the average price charged in the marketplace. In fact, KLN’s
11 prices for the Products are higher than those of competing food products, due *inter alia* to the
12 premium associated with naturally flavored foods—which the Products are not.

13
14 55. Consumers including Plaintiff especially rely on label claims made by food
15 product manufacturers such as Defendant, as they cannot confirm or disprove those claims
16 simply by viewing or even consuming the Products. That is, consumers depend on food
17 manufacturers to tell the truth about the characteristics of their products while making decisions
18 about which products to buy and consume. Here, Defendant has not told the truth about the
19 flavoring used in the Products.

20
21 4.—Plaintiff suffered economic injury by Defendant’s fraudulent and deceptive
22 conduct as stated herein, and there is a causal nexus between Defendant’s deceptive conduct and
23 Plaintiff’s injury~~Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act~~
24 ~~(“FDCA”), which are independently enacted pursuant to the Sherman Law (see Cal. Health &~~
25 ~~Saf. Code § 109875, et seq.) as substantive requirements of California law, require that a food’s~~
26 ~~label accurately describe the nature of the food product and its characterizing flavors. 21 C.F.R.~~
27 ~~§ 102.5(a).~~

1 ~~2. Artificial flavor is defined as “any substance, the function of which is to impart~~
2 ~~flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible~~
3 ~~yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy~~
4 ~~products, or fermentation products thereof.” 21 C.F.R. § 101.22(a)(1).~~

5 ~~3. Natural flavor is defined as “essential oil, oleoresin, essence or extractive, protein~~
6 ~~hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the~~
7 ~~flavoring constituents” from fruits or vegetables, “whose significant function in food is flavoring~~
8 ~~rather than nutritional.” 21 C.F.R. § 101.22(a)(3).~~

9 ~~4. Any recognizable primary flavor identified directly or indirectly on the front label~~
10 ~~of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to~~
11 ~~as a “characterizing flavor.” 21 C.F.R. § 101.22.~~

12 ~~5. Here, the Products’ labels state the characterizing flavor and also use depictions~~
13 ~~of fruits to identify the characterizing flavor.~~

14 ~~6. If a food product’s characterizing flavor is not created exclusively by the named~~
15 ~~flavor ingredient, the product’s front label must state that the product’s flavor was simulated or~~
16 ~~reinforced with either natural or artificial flavorings or both. If any artificial flavor is present~~
17 ~~which “simulates, resembles or reinforces” the characterizing flavor, the front label must~~
18 ~~prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §~~
19 ~~101.22(i)(2).~~

20 ~~7. A food product’s label also must include a statement of the “presence or absence~~
21 ~~of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such~~
22 ~~ingredient(s) or component(s) in the food has a material bearing on price or consumer~~
23 ~~acceptance . . . and consumers may otherwise be misled about the presence or absence of the~~
24 ~~ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.~~

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1 ~~8. Such statement must be in boldface print on the front display panel and of~~
2 ~~sufficient size for an average consumer to notice.~~

3 ~~9. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §~~
4 ~~109875, et seq., enacts as enforceable provisions of state law all food flavoring and additive~~
5 ~~regulations of the FDCA.~~

6 ~~10. By changing the ratio between sugars and acids that is naturally found in berries,~~
7 ~~the DL malic acid used in the Products reinforces, simulates, or creates the characterizing~~
8 ~~flavors, regardless of any other effect it may have or purpose for which it was included.~~

9 ~~11. DL malic acid is not a “natural flavor” as this term is defined by federal and state~~
10 ~~regulations and is not derived from a fruit or vegetable or any other natural source. The Products~~
11 ~~therefore contain artificial flavorings.~~

12 ~~12. Because the Products contain artificial flavoring, California law requires the~~
13 ~~Products to display both front and back label disclosures to inform consumers that the Products~~
14 ~~are artificially flavored.~~

15 ~~13. The Products have none of the required disclosures regarding the use of artificial~~
16 ~~flavors.~~

17 ~~14. Plaintiff reserves the right to amend this Complaint to add further products that~~
18 ~~contain similar label misrepresentations as testing continues.~~

19 ~~15. Labels are the chief means by which food product manufacturers convey critical~~
20 ~~information to consumers, and consumers have been conditioned to rely on the~~
21 ~~accuracy of the claims made on these labels. As the California Supreme Court stated~~
22 ~~in a case involving alleged violations of the UCL and FAL, “Simply stated: labels~~
23 ~~matter. The marketing industry is based on the premise that labels matter, that~~
24 ~~matter. The marketing industry is based on the premise that labels matter, that~~
25 ~~matter. The marketing industry is based on the premise that labels matter, that~~
26 ~~matter. The marketing industry is based on the premise that labels matter, that~~
27 ~~matter. The marketing industry is based on the premise that labels matter, that~~
28 ~~matter. The marketing industry is based on the premise that labels matter, that~~

1 consumers will choose one product over another similar product based on its label.”
2 *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).

3 16. Plaintiff reviewed the label on the Products prior to his purchase and reviewed the
4 natural flavoring claims being made on the label. Consumers including Plaintiff who
5 viewed the Products’ labels reasonably understood Defendant’s “Naturally
6 Flavored,” “Natural Strawberry and Raspberry Flavored,” and “Free of ... Artificial
7 Colors & Flavors” claims, as well as its failure to disclose the use of artificially
8 derived malic acid, to mean that the Products contain only natural flavorings. These
9 representations were false.

10
11 49. Consumers including Plaintiff reasonably relied on Defendant’s label claims as
12 described herein such that they would not have purchased the Products from Defendant if the
13 truth about the Products was known, or would have only been willing to pay a substantially
14 reduced price for the Products had they known that Defendant’s representations were false and
15 misleading.

16
17 50. In the alternative, because of its deceptive and false labelling and advertising
18 statements, Defendant was enabled to charge a premium for the Products relative to key
19 competitors’ products, or relative to the average price charged in the marketplace.

20
21 51. Consumers including Plaintiff especially rely on label and advertising claims
22 made by food product manufacturers such as Wiley Wallaby, as they cannot confirm or disprove
23 those claims simply by viewing or even consuming the Products.

24 56. Plaintiff suffered economic injury by Defendant’s fraudulent and deceptive
25 conduct as stated herein, and there is a causal nexus between Defendant’s deceptive conduct and
26 Plaintiff’s injury.

1 57. Defendant is in the best position to know what content it placed on its front and
2 back labels and what chemicals and ingredients are in the Products. Plaintiff nonetheless
3 satisfies the requirements of Rule 9(b) by alleging the following facts with particularity:

4 a. **Who:** Defendant made material misrepresentations of fact regarding the flavoring
5 of the Products on both the front and back labels of the Products when it stated that
6 the Products were “Naturally Flavored” and “Free of ... Artificial Colors and
7 Flavors.” The labelling of these Products are entirely within the control of
8 Defendant. These representations and omissions constitute material
9 misrepresentation and omissions regarding the use of an artificial flavoring
10 (specifically, DL malic acid) used to create, simulate, or reinforce the characterizing
11 flavor of the Products.

12 b. **What:** Defendant knew, or should have known, that the DL malic acid used in the
13 Products was an artificial flavoring. Defendant’s conduct here was, and continues
14 to be, fraudulent because it misrepresented that the Products purchased by Plaintiff
15 were “Naturally Flavored” and “Free of ... Artificial Colors and Flavors” and
16 thereby induced Plaintiff to purchase a Product he otherwise would not have
17 purchased, or would have paid a lesser amount for.

18 c. **When:** Defendant made the material misrepresentations and omissions set forth
19 herein during the putative Class Period, including prior to and at the time Plaintiff
20 purchased the Products from Defendant in May 2023, and continues to do so, despite
21 Defendant’s knowledge that the Products contained and continue to contain
22 artificial flavorings.

23 d. **Where:** Defendant’s misrepresentations and omissions, as set forth herein, were
24 made on the Products’ front and back labels, including the specific Product
25

1 purchased by Plaintiff. This Complaint sets forth the precise misrepresentations
2 made and includes a photograph of the Product’s label containing these
3 misrepresentations.

4 e. **How:** Defendant made material misrepresentations of fact and omissions on its front
5 and back labels when it stated that the Products were “Naturally Flavored” and “Free
6 of ... Artificial Colors & Flavors” despite the Products containing an artificial
7 flavoring, DL malic acid, used to create, simulate, or reinforce the characterizing
8 flavor of the Products within the meaning of 21 C.F.R. § 101.22(i)(2).

9 f. **Why:** Defendant made the material misrepresentations of fact and omissions as set
10 forth herein in order to induce the purchase of the Products by those persons
11 including Plaintiff who prefer to purchase food products that use only natural
12 flavorings, or to induce those persons to purchase the Products at a higher price than
13 they otherwise would have paid had the truth about the use of DL malic acid in the
14 Products been known.

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18 **CLASS ACTION ALLEGATIONS**

19 ~~53.~~58. Plaintiff brings this action individually and as representative of all those similarly
20 situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers in the state
21 of California who purchased the Products within four years prior to the filing of this Complaint.

22 ~~54.~~59. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,
23 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over
24 this matter and the members of their immediate families and judicial staff.
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1 ~~55-60~~. Plaintiff reserves the right to alter the Class definition, and to amend this
2 Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable
3 law.

4 ~~56-61~~. Certification of Plaintiff’s claims for class-wide treatment is appropriate because
5 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as
6 individual Class members would use to prove those elements in individual actions alleging the
7 same claims.

8 ~~57-62~~. **Numerosity – Rule 23(a)(1)**: The size of the Class is so large that joinder of all
9 Class members is impracticable. Plaintiff believes and avers there are thousands of Class
10 members geographically dispersed throughout the state of California.

11 ~~58-63~~. **Existence and Predominance of Common Questions of Law and Fact – Rule**
12 **23(a)(2), (b)(3)**: There are questions of law and fact common to the Class. These questions
13 predominate over any questions that affect only individual Class members. Common legal and
14 factual questions and issues include but are not limited to:

- 15
- 16 a. Whether the marketing, advertising, packaging, labeling, and other promotional
17 materials for Defendant’s Products is misleading and deceptive;
 - 18 b. Whether a reasonable consumer would understand Defendant’s “Naturally
19 Flavored;” ~~–“Natural Strawberry and Raspberry Flavored,”~~ and “Free of ...
20 Artificial Colors & Flavors;” claims, as described herein, to indicate that the
21 Products contained only natural flavorings and ingredients, and reasonably relied
22 upon those representations;
 - 23 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class
24 members;
 - 25 d. Whether Defendant breached an express warranty;
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- 1 e. the proper amount of damages;
- 2 f. the proper scope of injunctive relief; and
- 3 g. the proper amount of attorneys' fees.

4 59-64. Defendant engaged in a common course of conduct in contravention of the laws
5 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations
6 of law, business practices, and injuries are involved. Individual questions, if any, pale by
7 comparison, in both quality and quantity, to the numerous common questions that predominate
8 this action. The common questions will yield common answers that will substantially advance
9 the resolution of the case.

10
11 60-65. In short, these common questions of fact and law predominate over questions that
12 affect only individual Class members.

13
14 61-66. Typicality – Rule 23(a)(3): Plaintiff's claims are typical of the claims of the Class
15 members because they are based on the same underlying facts, events, and circumstances
16 relating to Defendant's conduct.

17 62-67. Specifically, all Class members, including Plaintiff, were harmed in the same way
18 due to Defendant's uniform misconduct described herein; all Class members suffered similar
19 economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as
20 the Class members.

21
22 63-68. There are no defenses available to Defendant that are unique to the named
23 Plaintiff.

24 64-69. Adequacy of Representation – Rule 23(a)(4): Plaintiff is a fair and adequate
25 representative of the Class because Plaintiff's interests do not conflict with the Class members'
26 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress
27 against Defendant.

28

1 65-70. Furthermore, Plaintiff has selected competent counsel who are experienced in
2 class action and other complex litigation. Plaintiff and Plaintiff's counsel are committed to
3 prosecuting this action vigorously on behalf of the Class and have the resources to do so.

4 66-71. **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other
5 available means for the fair and efficient adjudication of this controversy for at least the
6 following reasons

- 7
- 8 a. the damages individual Class members suffered are small compared to the burden
9 and expense of individual prosecution of the complex and extensive litigation
10 needed to address Defendant's conduct such that it would be virtually impossible
11 for the Class members individually to redress the wrongs done to them. In fact,
12 they would have little incentive to do so given the amount of damage each member
13 has suffered when weighed against the costs and burdens of litigation;
 - 14 b. the class procedure presents fewer management difficulties than individual
15 litigation and provides the benefits of single adjudication, economies of scale, and
16 supervision by a single Court;
 - 17 c. the prosecution of separate actions by individual Class members would create a
18 risk of inconsistent or varying adjudications, which would establish incompatible
19 standards of conduct for Defendant; and
 - 20 d. the prosecution of separate actions by individual Class members would create a
21 risk of adjudications with respect to them that would be dispositive of the interests
22 of other Class members or would substantively impair or impede their ability to
23 protect their interests.

24 67-72. Unless the Class is certified, Defendant will retain monies received as a result of
25 its unlawful and deceptive conduct alleged herein.
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1 72. Plaintiff is a “consumer” within the meaning of the Consumer Legal Remedies
2 Act (“CLRA”), Cal. Civ. Code § 1761(d).

3 73. The sale of Defendant’s Products to Plaintiff and Class members was a
4 “transaction” within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

5 74. The Products purchased by Plaintiff and Class members are “goods” within the
6 meaning of the CLRA, Cal. Civ. Code § 1761(a).

7 75. As alleged herein, Defendant’s business practices are a violation of the CLRA
8 because Defendant deceptively failed to reveal facts that are material in light of the flavoring
9 representations that were made by Defendant on the labels of its Products and elsewhere.
10

11 76. Defendant’s ongoing failure to provide material facts about its Products on its
12 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:
13

- 14 a. Defendant’s acts and practices constitute misrepresentations that its Products have
15 characteristics, benefits, or uses which they do not have;
- 16 b. Defendant misrepresented that its Products are of a particular standard, quality,
17 and/or grade, when they are of another;
- 18 c. Defendant’s acts and practices constitute the advertisement of goods, without the
19 intent to sell them as advertised;
- 20 d. Defendant’s acts and practices fail to represent that transactions involving its
21 Products involve actions that are prohibited by law, particularly the use of
22 misleading nutritional labelling; and
- 23 e. Defendant’s acts and practices constitute representations that its Products have
24 been supplied in accordance with previous representations when they were not.
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26 77. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,
27 entitling them to injunctive relief.
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Respectfully submitted,

/s/ Charles C. Weller
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