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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS IGLESIAS, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FERRARA CANDY CO., and DOES 1
through 10, inclusive,

Defendants.

) Case No.

) **CLASS ACTION COMPLAINT**

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

) **DEMAND FOR JURY TRIAL**

Plaintiff Thomas Iglesias, individually and on behalf of all others similarly situated, brings this class action complaint against Ferrara Candy Co. (“Defendant”) and Does 1 through 10, inclusive (collectively referred to herein as “Defendants”) and alleges as follows:

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SUMMARY OF THE ACTION

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



2. Defendant intentionally misleads and shortchanges consumers by falsely and deceptively misrepresenting the amount of candy actually contained in each box of Product. Defendant uniformly under-fills the opaque boxes by 41%. Every box is filled only 59% full with candy product. The 41% balance is empty space, or “slack-fill,” nearly all of which serves no legitimate or lawful function.

PARTIES

3. Plaintiff is, and at all times relevant hereto was, a citizen of California residing in the County of San Francisco. Plaintiff made a one-time purchase of Jujufruits® 5 oz. box at a San Francisco-based location of a nationwide movie chain in California in 2016. In making his purchase, Plaintiff relied upon the opaque

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

6 4. Ferrara Candy Company is a corporation headquartered in Oakbrook
7 Terrace, Illinois. Ferrara maintains its principal business office at 1 Tower Lane
8 #2700, Oakbrook Terrace, IL, 60181. Ferrara, directly and through its agents, has
9 substantial contacts with and receives substantial benefits and income from and
10 through the State of California. Ferrara is the owner, manufacturer, and distributor
11 of the Product, and is the company that created and/or authorized the false,
12 misleading, and deceptive packaging for the Product.

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

23 **JURISDICTION AND VENUE**

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

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

1 Advertising Law, Business and Professions Code Section 17500, *et seq.*; and
 2 California Unfair Competition Law, Business and Professions Code Section 17200,
 3 *et seq.*

4 8. This lawsuit includes all products manufactured by Defendant which are
 5 substantially similar to Jujufruits® 5 oz. boxes, including all candy products within
 6 the Jujufruits®, Lemonhead®, RedHots®, Trolli®, Chuckles®, Black Forest
 7 Gummi®, Jawbuster/Jawbreaker®, Brach's®, Super Bubble®, Rainblo®, and
 8 Atomic Fireball® product lines which are packaged and sold in opaque boxes.

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

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

13 11. Venue is proper in this Court because Defendant conducts business in this
 14 District, Defendant receives substantial compensation from sales in this District, and
 15 Defendant made numerous misrepresentations which had a substantial effect in this
 16 District, including, distribution and sale of the Product throughout this District's retail
 17 outlets, we well as distribution of print media and internet advertisements.

18 **FACTUAL ALLEGATIONS**

19 12. The average consumer spends only 13 seconds to make an in-store
 20 purchasing decision.¹ That decision is heavily dependent on a product's packaging,
 21 and particularly the package dimensions: "Most of our studies show that 75 to 80
 22 percent of consumers don't even bother to look at any label information, no less the
 23 net weight Faced with a large box and a smaller box, both with the same amount
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28 ¹ <http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-window.html> (citing the Ehrenberg-Bass Institute of Marketing Science's report "Shopping Takes Only Seconds...In-Store and Online").

1 of product inside . . . consumers are apt to choose the larger box because they think
2 it's a better value.”²

3 13. Slack-fill is the difference between the actual capacity of a container and
4 the volume of product contained therein.

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

7 15. Defendant packages the Product in an opaque rectangular box with the
8 following dimensions: 5.5 inches tall by 3 inches wide by .75 inches deep.

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

13 17. Plaintiff and other consumers of the Product made their purchase
14 decisions based upon a visual observation of the Product's packaging through the
15 showcase window of a movie theater concession stand or retail outlet store shelf.

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

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

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

1 20. Plaintiff made a one-time purchase of a box of Jujufruits® 5 oz. candy
2 product during a visit to a San Francisco-based location of nationwide movie theater
3 chain in California in 2016.

4 21. Plaintiff paid approximately \$4.00 for the Product.

5 22. At the time Plaintiff purchased the Product, the Product was in a glass
6 showcase, behind a concession counter.

7 23. Glass showcases are uniformly used for the sale of the Product at all
8 movie theater concession counters throughout California and the United States as a
9 security measure and for customer convenience.

10 24. Therefore, Plaintiff, like all purchasers of the Product from movie theater
11 concession stands, did not have the opportunity to inspect the Product's packaging
12 for other representations of quantity of candy product contained therein other than
13 the size of the box itself.

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

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

24 27. Plaintiff reasonably and detrimentally relied on the size of the box as a
25 representation by Defendant of the quantity of candy product contained in the
26 Product's containers.

27 28. Once Plaintiff took his seat in the movie theater, Plaintiff opened the top
28 of the Product's box. Only then did he discover—to his disappointment—that the

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1 Product’s box was only roughly half full, while the other half constituted
 2 nonfunctional slack-fill.

3 29. Prior to the point of sale, the Product’s packaging does not allow for a
 4 visual or audial confirmation of the contents of the Product. The Product’s opaque
 5 packaging prevents a consumer from observing the contents before opening. Even if
 6 a consumer were to “shake” the Product before opening, it is impossible for the
 7 consumer to discern the presence of any nonfunctional slack-fill.

8 30. The other information that Defendant provides about quantity of candy
 9 product on the front label and back label of the Product does not enable a consumer
 10 to form any meaningful understanding about how to gauge the quantity of contents
 11 of the Product as compared to the size of the box itself.

12 31. The front label of the Product indicates a net weight of 5.0 ounces (142
 13 grams). The nutritional panel on the back of the Product reports a serving size of 15
 14 pieces (40 grams) and total of 3.5 servings per container. True and correct
 15 representations of the Product’s front and back labels are set forth below.



23 32. Disclosures of net weight and serving sizes in a measurement of ounces
 24 or grams does not allow the reasonable California or American consumer to make
 25 any meaningful conclusion about the quantity of candy product contained in the
 26 Product’s boxes that would be different from the reasonable consumer’s expectation
 27 that the quantity of candy product is commensurate with the size of the box. Nor does
 28

1 a disclosure in terms of candy pieces where there is no “actual size” image pictured
2 on the packaging, as is the case here.

3 33. Plaintiff would not have purchased the Product had he known the Product
4 contained slack-fill which serves no functional or lawful purpose.

5 34. During Plaintiff’s investigation, Plaintiff confirmed that Defendant
6 uniformly under-fills the Product’s boxes, rendering an extraordinary 41% of each
7 box slack-fill, nearly all of which serves no functional or lawful purpose. A true and
8 correct representation of the inside of the Jujufruits® box is pictured below.



17 35. The Product is made, formed, and filled as to be misleading. The Product
18 therefore is misbranded.

19 36. The slack-fill contained in the Product does not serve a legitimate or
20 lawful purpose.

21 37. The slack-fill contained in the Product does not protect the contents of the
22 packages.

23 38. In fact, the greater the slack-fill, the more room the contents have to
24 bounce around during shipping and handling, and the more likely the contents are to
25 break and sustain damage.

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

3 40. As such, the slack-fill present in the Product makes the candy product
4 more susceptible to damage.

5 41. The Product is packaged in a box and sealed with heated glue. A true and
6 correct representation of the heated glue seal is shown in the image below.



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

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

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

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

27 46. At the side of the Product's box, at the very top, the Product's packaging
28 bears a partially perforated tab approximately one inch in length with the word

1 “OPEN” beneath it. A true and correct representation of the side of the box containing
 2 the partially perforated dispensing tab is shown in the image below.



7 47. Defendant apparently places the partially perforated tab on the side of the
 8 Product as a method to dispense the contents of the Product. However, the placement
 9 and perforation pattern of the tab, *inter alia*, evidence Defendant knows or should
 10 know that the reasonable consumer does not actually use said perforated tabs to
 11 dispense the candy product. The true purpose behind Defendant's inclusion of the
 12 partially perforated tab is to conceal the nonfunctional slack-fill contained in the
 13 Product.

14 48. The tab of each Product's box is not completely perforated. Therefore,
 15 when a consumer tears along the perforated line, he has obstructed access to the candy
 16 content. Given the size of the candy content in comparison to the opening of the
 17 Product's tab, a consumer encounters difficulty when trying to dispense the Product.
 18 Undoubtedly, a reasonable consumer will opt against using the Product's partially
 19 perforated tab while watching a movie in a dark theater, as was the case for Plaintiff.

20 49. Reasonable consumers instinctually open the Product by tearing open the
 21 Product's glued seal, as Plaintiff did. Defendant's inconvenient design of the
 22 Product's side tab further incentivizes consumers to open the Product by breaking
 23 one of its glued seals, as was the case with Plaintiff.

24 50. Defendant can reasonably foresee that consumers open the Product by
 25 undoing one of the glued seals of the packaging. Thus, Defendant knows that any
 26 perforated side tab it places on the Product's packaging must create an opening that
 27 accounts for the size of the Product's candy contents. The fact that Defendant fails to
 28 do this, instead of designing the tab with total perforation, demonstrates that

1 Defendant does not genuinely intend for the side tab to be used, and that the
2 reasonable consumer does not actually use it, as in Plaintiff's case.

3 51. The partially perforated side tab on the Product's packaging does not
4 perform any specific function that is inherent to the nature of the contents. A
5 reasonable consumer can easily dispense the Product from one of the ends of its
6 packaging, without any side tab. Therefore, the Product's packaging does not require
7 any functional slack-fill to accommodate a perforated side tab.

8 52. The Product does not use packaging that is part of a reusable container
9 with any significant value to the Product independent of its function to hold the candy
10 product.

11 53. For example, the Product's container is not a commemorative item.

12 54. The Product's container is a box intended to be discarded into the
13 recycling bin immediately after the contents have been completely consumed.

14 55. Defendant can easily increase the quantity of candy product contained in
15 each Product container or, alternatively, decrease the size of the containers, by 41%.

16 56. The "Nutrition Facts" panel on the back of each box states "Servings Per
17 Container about 3.5." By arithmetic, each serving would be the equivalent of: 100%
18 expected total fill, divided by 3.5 servings, yielding a value of 28.6% of volume per
19 serving. Given the Product can accommodate an additional 41% of candy product,
20 consumers are being shortchanged roughly 1.4 servings per box.

21 57. Contrast Defendant's packaging of the Product with a comparator product
22 like "Boston Baked Beans" ("BBB"), a candy product also manufactured by
23 Defendant and similarly sold at movie theaters located throughout California and the
24 United States. A true and correct representation of the front of the BBB product is
25 shown in the image below.



1 58. BBB is sold in identical packaging to that of the Product, i.e., opaque
2 boxes of identical size, shape, volume, and material.

3 59. BBB is packaged using nearly identical fill and heated glue enclosing
4 machines to those of the Product.

5 60. BBB is a coated candy of nearly identical size, shape, and density of that
6 of the Product.

7 61. However, contrary to the Product, BBB has very little slack-fill and zero
8 nonfunctional slack-fill. A true and correct representation is pictured in the image
9 below.



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17 62. BBB's packaging provides additional evidence that the slack-fill present
18 in the Product is nonfunctional to the tune of 41%.

19 63. BBB's packaging provides additional evidence that the slack-fill present
20 in the Product is not necessary to protect and in fact does not protect the contents of
21 the Product.

22 64. BBB's packaging provides additional evidence that the slack-fill present
23 in the Product is not a requirement of the machines used for enclosing the contents of
24 the Product.

25 65. BBB's packaging provides additional evidence that the slack-fill present
26 in the Product is not a result of unavoidable product settling during shipping and
27 handling.
28

1 66. BBB’s packaging provides additional evidence that the slack-fill present
2 in the Product is not needed to perform a specific function.

3 67. BBB’s packaging provides additional evidence that the slack-fill present
4 in the Product is not part of a legitimate reusable container.

5 68. BBB’s packaging provides additional evidence that Defendant is able to
6 increase the level of fill.

7 69. BBB’s packaging provides additional evidence that Defendant has
8 reasonable alternative designs available to package its Products.

9 70. Plaintiff did not expect that the Product would contain nonfunctional
10 slack-fill, especially given that nonfunctional slack-fill, as opposed to functional
11 slack-fill, is prohibited by California law and federal law.

12 71. Defendant’s conduct threatens California consumers by using
13 intentionally deceptive and misleading slack-filled containers. Defendant’s conduct
14 also threatens other companies, large and small, who “play by the rules.” Defendant’s
15 conduct stifles competition and has a negative impact on the marketplace, and reduces
16 consumer choice.

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

21 73. Plaintiff makes the allegations herein upon personal knowledge as to
22 himself and his own acts and experiences, and as to all other matters, upon
23 information and belief, including investigation conducted by his attorneys.

24 **CLASS ALLEGATIONS**

25 74. Plaintiff brings this action on his own behalf and on behalf of all other
26 persons similarly situated. Plaintiff seeks to represent a Class consisting of “All
27 persons who purchased the Product in United States for personal use and not for
28 resale during the time period February 21, 2013, through the present. Excluded from

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

4 75. In the alternative, Plaintiff seeks to represent a Class consisting of “All
5 persons who purchased the Product in the State of California for personal use and not
6 for resale during the time period February 21, 2013, through the present. Excluded
7 from the Class are Defendants’ officers, directors, and employees, and any individual
8 who received remuneration from Defendants in connection with that individual’s use
9 or endorsement of the Product.”

10 76. The Class meets all prerequisites under Federal Rule of Civil Procedure
11 23(a).

12 77. The Class is so numerous that their individual joinder herein is
13 impracticable. On information and belief, the Class numbers in the hundreds of
14 thousands or more throughout the United States and California. The Class is
15 sufficiently numerous because hundreds of thousands of units of the Product have
16 been sold in California during the time period February 21, 2013, through the present
17 (the “Class Period”).

18 78. The questions of law and fact common to the Class predominate over
19 questions which may affect individual Class members. Common questions of law
20 and fact include, but are not limited to, the following:

21 a. Whether Defendant’s conduct constitutes an unfair method of
22 competition, or unfair or deceptive act or practice, in violation of Civil Code Section
23 1750, *et seq.*;

24 b. Whether Defendant misrepresented the approval of the FDA,
25 United States Congress, and California Legislature that the Product’s packaging
26 complied with federal and California slack-fill regulations and statutes in violation of
27 Civil Code Section 1750, *et seq.*;

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

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

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

7 f. Whether Defendant represented that the Product has been supplied
8 in accordance with a previous representation of quantity of candy product contained
9 therein by way of its packaging when it has not, in violation of Civil Code Section
10 1750, *et seq.*;

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

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

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

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

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

22 l. Whether Defendant's packaging is false or misleading and
23 therefore misbranded in violation of California Health and Safety Code sections
24 110660, 110665, or 110670;

25 m. Whether the Product contain nonfunctional slack-fill in violation
26 of 21 C.F.R. 100.100, *et seq.*;

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

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

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

5 79. Plaintiff's claims are typical of the claims of the Class, as the
6 representations made by Defendant are uniform and consistent and are made through
7 packaging that was seen and relied on by Plaintiff and the Class. Further, Plaintiff is
8 a member of the Class he seeks to represent.

9 80. Plaintiff and his counsel will fairly and adequately represent and protect
10 the interests of the Class. Plaintiff has retained competent and experienced counsel
11 in class action and other complex litigation. Neither Plaintiff nor his counsel have
12 any conflict of interest with other members of the Class.

13 81. Prosecuting separate actions by individual class members would create a
14 risk of inconsistent or varying adjudications with respect to individual class members
15 that would establish incompatible standards of conduct for the party opposing the
16 Class.

17 82. Prosecuting separate actions by individual class members would create a
18 risk of adjudications with respect to individual class members that, as a practical
19 matter, would be dispositive of the interests of the other members not parties to the
20 individual adjudications or would substantially impair or impede their ability to
21 protect their interests.

22 83. Defendant has acted on grounds generally applicable to the entire Class,
23 thereby making final injunctive relief and/or corresponding declaratory relief
24 appropriate with respect to the Class as a whole.

25 84. Plaintiff and the Class have suffered injury in fact and have lost money as
26 a result of Defendant's false representations. Plaintiff purchased the Product under
27 the false belief that the Product contained an amount of candy product commensurate
28 with the size of the box. Plaintiff relied on Defendant's packaging and would not have

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1 purchased the Product if he had known that the Product contained nonfunctional
2 slack-fill.

3 85. Notice can be provided to such purchasers in a form and manner that
4 meets Due Process requirements, including by using techniques and a form of notice
5 similar to those customarily used in class actions, and by internet publication, radio,
6 newspaper, and magazine.

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

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

16 88. Absent a class action, Defendant will likely retain the benefits of its
17 wrongdoing. Because of the small size of the individual Class members' claims, few,
18 if any, Class members could afford to seek legal redress for the wrongs complained
19 of herein. Absent a representative action, the Class will continue to suffer losses and
20 Defendant will be allowed to continue these violations of law and to retain the
21 proceeds of their ill-gotten gains.

22 **COUNT ONE**

23 **Violation of California Consumers Legal Remedies Act,**

24 **California Civil Code § 1750, *et seq.***

25 89. Plaintiff repeats and realleges all allegations of the previous paragraphs,
26 and incorporates the same as if set forth herein at length.

27 90. Plaintiff brings this cause of action pursuant to Civil Code Section 1750,
28 *et seq.*, the Consumers Legal Remedies Act ("CLRA"), on his own behalf and on

1 behalf of all other persons similarly situated. Plaintiff seeks to represent a Class
2 consisting of “All persons who purchased the Product in United States for personal
3 use and not for resale during the time period February 21, 2013, through the present.
4 Excluded from the Class are Defendants’ officers, directors, and employees, and any
5 individual who received remuneration from Defendants in connection with that
6 individual’s use or endorsement of the Product.”

7 91. In the alternative, Plaintiff seeks to represent a Class consisting of “All
8 persons who purchased the Product in the State of California for personal use and not
9 for resale during the time period February 21, 2013, through the present. Excluded
10 from the Class are Defendants’ officers, directors, and employees, and any individual
11 who received remuneration from Defendants in connection with that individual’s use
12 or endorsement of the Product.”

13 92. The Class consists of thousands of persons, the joinder of whom is
14 impracticable.

15 93. There are questions of law and fact common to the Class, which questions
16 are substantially similar and predominate over questions affecting the individual
17 Class members, including but not limited to those questions listed hereinabove.

18 94. The CLRA prohibits certain “unfair methods of competition and unfair or
19 deceptive acts or practices” in connection with a sale of goods.

20 95. The practices described herein, specifically Defendant’s packaging,
21 advertising, and sale of the Product, were intended to result in the sale of the Product
22 to the consuming public and violated and continue to violate the CLRA by (1)
23 misrepresenting the approval of the Product as compliant with 21 C.F.R Section
24 100.100, California Business and Professions Code Section 12606.2, and the
25 Sherman Law; (2) using deceptive representations in connection with the Product;
26 (3) representing the Product has characteristics and quantities that it does not have;
27 (4) advertising and packaging the Product with intent not to sell it as advertised and
28 packaged; and (5) representing that the Product has been supplied in accordance with

1 a previous representation as to the quantity of candy product contained within each
2 box, when it has not.

3 96. Defendant fraudulently deceived Plaintiff and the Class by representing
4 that the Product's packaging which includes 41% nonfunctional slack-fill actually
5 conforms with federal and California slack-fill regulations and statutes including the
6 Sherman Law, California Business and Professions Code Section 12606.2, and 21
7 C.F.R. Section 100.100.

8 97. Pursuant to 21 C.F.R. Section 100.100 and California Business and
9 Professions Code Section 12606.2: "A container that does not allow the consumer to
10 fully view its contents shall be considered to be filled as to be misleading if it contains
11 nonfunctional slack-fill."

12 98. Defendant packaged the Product in boxes which contain 41%
13 nonfunctional slack-fill by making material misrepresentations to fraudulently
14 deceive Plaintiff and the Class.

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

22 100. Defendant fraudulently deceived Plaintiff and the Class by packaging and
23 advertising the Product with intent not to sell it as advertised, by intentionally under-
24 filling the Product's containers and instead replacing candy product with
25 nonfunctional slack-fill. In doing so, Defendant intentionally misrepresented and
26 concealed material facts from Plaintiff and the Class. Said misrepresentations and
27 concealment were done with the intention of deceiving Plaintiff and the Class and
28 depriving them of their legal rights and money.

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

11 102. Defendant knew or should have known, through the exercise of
12 reasonable care, that the Product's packaging was misleading.

13 103. Defendant's actions as described herein were done with conscious
14 disregard of Plaintiff's rights, and Defendant was wanton and malicious in its
15 concealment of the same.

16 104. Defendant's Product packaging was a material factor in Plaintiff's and the
17 Class's decisions to purchase the Product. Based on Defendant's Product packaging,
18 Plaintiff and the Class reasonably believed that they were getting more candy product
19 than they actually received. Had they known the truth of the matter, Plaintiff and the
20 Class would not have purchased the Product.

21 105. Plaintiff and the Class have suffered injury-in-fact and have lost money
22 as a result of Defendant's unfair, unlawful, and fraudulent conduct. Specifically,
23 Plaintiff paid for candy product he never received. Plaintiff would not have purchased
24 the Product had he known the boxes contained nonfunctional slack-fill.

25 106. Plaintiff seeks injunctive relief against Defendant, including an order that
26 prohibits Defendant from engaging in the misconduct described herein and requires
27 Defendant to perform a corrective advertising campaign. Defendant's false and
28 misleading packaging should be enjoined due to the false, misleading, and/or

1 deceptive nature of Defendant’s packaging.

2 107. By letter dated August 1, 2016, Plaintiff advised Defendant of its false
3 and misleading claims pursuant to California Civil Code Section 1782(a).

4 **COUNT TWO**

5 **Violation of California False Advertising Law,**
6 **Business & Professions Code § 17500, *et seq.***

7 108. Plaintiff repeats and realleges the allegations set forth in the preceding
8 paragraphs, and incorporates the same as if set forth herein at length.

9 109. Plaintiff brings this cause of action pursuant to Business and Professions
10 Code Section 17500, *et seq.*, on his own behalf and on behalf of all other persons
11 similarly situated. Plaintiff seeks to represent a Class consisting of “All persons who
12 purchased the Product in United States for personal use and not for resale during the
13 time period February 21, 2013, through the present. Excluded from the Class are
14 Defendants’ officers, directors, and employees, and any individual who received
15 remuneration from Defendants in connection with that individual’s use or
16 endorsement of the Product.”

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

23 111. California’s False Advertising Law, California Business and Professions
24 Code Section 17500, *et seq.*, makes it “unlawful for any person to make or
25 disseminate or cause to be made or disseminated before the public in this state, in any
26 advertising device or in any other manner or means whatever, including over the
27 Internet, any statement, concerning personal property or services, professional or
28 otherwise, or performance or disposition thereof, which is untrue or misleading and

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1 which is known, or which by the exercise of reasonable care should be known, to be
2 untrue or misleading.”

3 112. Defendant knowingly manipulated the physical dimensions of the
4 Product’s box, or stated another way, under-filled the amount of candy product in the
5 Product, by including 41% nonfunctional slack-fill as a means to mislead the public
6 about the amount of candy product contained in each package.

7 113. Defendant controlled the packaging of the Product. It knew or should
8 have known, through the exercise of reasonable care that its representations about the
9 quantity of candy product contained in the Product were untrue and misleading.

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

14 115. Defendant’s packaging with 41% nonfunctional slack-fill instead of
15 including more candy product or smaller boxes is likely deceive the general public.

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

18 117. Plaintiff and the Class have suffered injury-in-fact and have lost money
19 as a result of Defendant’s false representations. Plaintiff purchased the Product in
20 reliance upon the claims by Defendant that the Product was of the quantity
21 represented by Defendant’s packaging and advertising. Plaintiff would not have
22 purchased the Product if she had known that the claims and advertising as described
23 herein were false.

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

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1 **COUNT THREE**

2 **Violation of California Unfair Competition Law,**
3 **Business & Professions Code § 17200, *et seq.***

4 119. Plaintiff repeats and realleges the allegations set forth above, and
5 incorporate the same as if set forth herein at length.

6 120. Plaintiff brings this cause of action pursuant to Business and Professions
7 Code Section 17200, *et seq.*, on his own behalf and on behalf of all other persons
8 similarly situated. Plaintiff seeks to represent a Class consisting of “All persons who
9 purchased the Product in United States for personal use and not for resale during the
10 time period February 21, 2013, through the present. Excluded from the Class are
11 Defendants’ officers, directors, and employees, and any individual who received
12 remuneration from Defendants in connection with that individual’s use or
13 endorsement of the Product.”

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

20 122. Congress passed the Federal Food, Drug, and Cosmetic Act (“FDCA”),
21 and in so doing established the Federal Food and Drug Administration (“FDA”) to
22 “promote the public health” by ensuring that “foods are safe, wholesome, sanitary,
23 and properly labeled.” 21 U.S.C. § 393.

24 123. The FDA has implemented regulations to achieve this objective. *See,*
25 *e.g.*, 21 C.F.R. § 101.1 *et seq.*

26 124. The legislature of California has incorporated 21 C.F.R. Section 100.100,
27 which prohibits nonfunctional slack-fill, into California’s Business and Professions
28 Code Section 12606.2, *et seq.*

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

4 126. In 1990, Congress passed an amendment to the FDCA, the Nutrition
5 Labeling and Education Act (“NLEA”), which imposed a number of requirements
6 specifically governing food nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343 *et*
7 *seq.*

8 127. Plaintiff is not suing under the FDCA, but under California state law.

9 128. The California Sherman Food, Drug, and Cosmetic Act (“Sherman
10 Law”), Cal. Health & Safety Code § 109875 *et seq.*, has adopted wholesale the food
11 labeling requirements of the FDCA and NLEA as the food regulations of
12 California. Cal. Health & Safety Code § 110100.

13 129. The Sherman Law declares any food to be misbranded if it is false or
14 misleading in any particular, if the labeling does not conform with the requirements
15 for nutrition labeling set forth in certain provisions of the NLEA. Cal. Health &
16 Safety Code §§ 110660, 110665, 110670.

17 130. The UCL prohibits “any unlawful, unfair... or fraudulent business act or
18 practice.” Cal. Bus & Prof. Code § 17200.

19 **A. “Unfair” Prong**

20 131. Under California’s False Advertising Law, California Business and
21 Professions Code Section 17200, *et seq.*, a challenged activity is “unfair” when “any
22 injury it causes outweighs any benefits provided to consumers and the injury is one
23 that the consumers themselves could not reasonably avoid.” *Camacho v. Auto Club*
24 *of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

25 132. Defendant’s action of leaving 41% nonfunctional slack-fill in its Product
26 does not confer any benefit to consumers.

27 133. Defendant’s action of leaving 41% nonfunctional slack-fill in its Product
28 causes injuries to consumers because they do not receive a quantity of candy

1 commensurate with their reasonable expectation.

2 134. Defendant's action of leaving 41% nonfunctional slack-fill in its Product
3 causes injuries to consumers because they do not receive a level of hunger satiety
4 commensurate with their reasonable expectation.

5 135. Defendant's action of leaving 41% nonfunctional slack-fill in its Product
6 causes injuries to consumers because they end up overpaying for the Product and
7 receiving a quantity of candy less than what they expected to receive.

8 136. Consumers cannot avoid any of the injuries caused by the 41%
9 nonfunctional slack-fill in Defendant's Product.

10 137. Accordingly, the injuries caused by Defendant's activity of including
11 41% nonfunctional slack-fill in the Product outweighs any benefits.

12 138. Some courts conduct a balancing test to decide if a challenged activity
13 amounts to unfair conduct under California Business and Professions Code Section
14 17200. They "weigh the utility of the defendant's conduct against the gravity of the
15 harm to the alleged victim." *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169
16 (9th Cir. 2012).

17 139. Here, Defendant's conduct of including 41% nonfunctional slack-fill in
18 the Product's packaging has no utility and financially harms purchasers. Thus, the
19 utility of Defendant's conduct is vastly outweighed by the gravity of harm.

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

23 141. The California legislature maintains a declared policy of prohibiting
24 nonfunctional slack-fill in consumer goods, as reflected in California's Business and
25 Professions Code Section 12606.2 and California Health and Safety Code Section
26 110100.

27 142. The 41% of nonfunctional slack-fill contained in the Product is tethered
28 to a legislative policy declared in California according to California Business and

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1 Professions Code Section 12606.2 and California Health and Safety Code Section
2 110100.

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

6 144. Defendant knew or should have known of its unfair conduct.

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

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

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

17 148. Pursuant to Business and Professions Code Sections 17203, Plaintiff and
18 the Class seek an order of this Court enjoining Defendant from continuing to engage,
19 use, or employ its practice of under-filling the Product's box. Likewise, Plaintiff and
20 the Class seek an order requiring Defendant to disclose such misrepresentations, and
21 perform a corrective advertising campaign.

22 149. Plaintiff and the Class have suffered injury in fact and have lost money as
23 a result of Defendant's unfair conduct. Plaintiff paid an unwarranted premium for
24 these products. Specifically, Plaintiff paid for 41% of candy product he never
25 received. Plaintiff would not have purchased the Product if he had known that the
26 Product's packaging contained nonfunctional slack-fill.

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B. “Fraudulent” Prong

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

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

152. Defendant’s conduct of packaging the Product with 41% nonfunctional slack-fill is likely to deceive members of the public.

153. Defendant’s packaging of the Product, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes fraudulent conduct.

154. Defendant knew or should have known of its fraudulent conduct.

155. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute a fraudulent business practice in violation of California Business & Professions Code Section 17200.

156. There were reasonably available alternatives to further Defendant’s legitimate business interests other than the conduct described herein. Defendant could have used packaging appropriate for the amount of Product contained therein.

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

158. Pursuant to Business and Professions Code Sections 17203, Plaintiff and the Class seek an order of this Court enjoining Defendant from continuing to engage, use, or employ their practice of under-filling the Product’s container. Likewise, Plaintiff and the Class seek an order requiring Defendant to disclose such misrepresentations, and perform a corrective advertising campaign.

1 159. Plaintiff and the Class have suffered injury in fact and have lost money as
2 a result of Defendant's fraudulent conduct. Plaintiff paid an unwarranted premium
3 for these products. Specifically, Plaintiff paid for 41% of candy product he never
4 received. Plaintiff would not have purchased the Product if he had known that the
5 boxes contained nonfunctional slack-fill.

6 C. "Unlawful" Prong

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

11 161. Defendant's packaging of the Product, as alleged in the preceding
12 paragraphs, violates California Civil Code Section 1750, *et. seq.*, California Business
13 and Professions Code Section 17500, *et. seq.*, California's Sherman Law, California
14 Business and Professions Code Section 12606.2, *et seq.*, the FDCA, and 21 C.F.R
15 Section 100.100.

16 162. Defendant's packaging of the Product, as alleged in the preceding
17 paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes
18 unlawful conduct.

19 163. Defendant knew or should have known of its unlawful conduct.

20 164. As alleged in the preceding paragraphs, the misrepresentations by
21 Defendant detailed above constitute an unlawful business practice within the meaning
22 of California Business and Professions Code Section 17200.

23 165. There were reasonably available alternatives to further Defendant's
24 legitimate business interests, other than the conduct described herein. Defendant
25 could have used packaging appropriate for the amount of candy product contained
26 therein.

27 166. All of the conduct alleged herein occurred and continues to occur in
28 Defendant's business. Defendant's wrongful conduct is part of a pattern or

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1 generalized course of conduct repeated on thousands of occasions daily.

2 167. Pursuant to Business and Professions Code Sections 17203, Plaintiff and
3 the Class seek an order of this Court enjoining Defendant from continuing to engage,
4 use, or employ their practice of under-filling the Product’s box. Likewise, Plaintiff
5 and the Class seek an order requiring Defendant to disclose such misrepresentations,
6 and perform a corrective advertising campaign.

7 168. Plaintiff and the Class have suffered injury in fact and have lost money
8 as a result of Defendant’s unlawful conduct. Plaintiff paid an unwarranted premium
9 for these products. Specifically, Plaintiff paid for 41% candy product he never
10 received. Plaintiff would not have purchased the Product if he had known that the
11 Product contained nonfunctional slack-fill.

12 **PRAYER FOR RELIEF**

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

15 A. For an order certifying the class and appointing Plaintiff as class
16 representative pursuant to Rule 23 of the Federal Rules of Civil Procedure, and
17 designating Plaintiff’s counsel as counsel for the Class;

18 B. For an order granting all forms of relief set forth above;

19 C. For an order enjoining Defendant from continuing to engage in the
20 unlawful conduct and practices described herein;

21 D. For an order awarding Plaintiff his costs of suit incurred herein, including
22 expert witness fee and reasonable attorneys’ fees and pre and post-judgment interest,
23 at the legal rate; and

24 E. For an order granting such other and further as may be just and proper.

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JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all triable issues.

DATED: February 21, 2017

CLARKSON LAW FIRM, P.C.

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