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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 ANTHONY BUSO, individually and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 PENGUIN TRADING, INC., a Delaware
15 corporation doing business as FRUIT
BLISS; and DOES 1 through 10, inclusive,

16 Defendants.
17

Case No. 2:17-cv-7025

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMAND

INTRODUCTION

1
2 1. The average consumer spends a mere 13 seconds making an in-store
3 purchasing decision, or between 10 to 19 seconds for an online purchase.¹ That decision
4 is heavily dependent on a product's packaging, and particularly the package dimensions:
5 "Most of our studies show that 75 to 80 percent of consumers don't even bother to look
6 at any label information, no less the net weight . . . Faced with a large box and a smaller
7 box, both with the same amount of product inside . . . consumers are apt to choose the
8 larger box because they think it's a better value."² This lawsuit charges Defendant with
9 intentionally packaging its Fruit Bliss Organic fruit products in opaque containers that
10 contain approximately 50% empty space. Consumers, in reliance on the size of the
11 containers, purchased the Fruit Bliss Organic fruit products, which they would not have
12 purchased had they known that the containers were substantially empty.

13 2. Anthony Buso ("Plaintiff"), individually and on behalf of all others similarly
14 situated, brings this Class Action Complaint for damages, injunctive relief, and any other
15 available legal or equitable remedies, resulting from the unlawful and deceptive actions
16 of Penguin Trading Inc. dba Fruit Bliss ("Defendant") with respect to the packaging of
17 its Fruit Bliss Organic fruit products. Plaintiff alleges as follows upon personal
18 knowledge as to himself and his own acts and experiences, and, as to all other matters,
19 upon information and belief, including investigation conducted by his attorneys.

20 3. Plaintiff purchased Defendant's Fruit Bliss Organic Deglet Nour Dates
21 product in the first half of 2017 in San Diego, California. Plaintiff expected to receive a
22 full container of the Fruit Bliss Organic Deglet Nour Dates product, which is packaged
23

24 ¹ [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-windowdown.html)
25 [20-second-windowdown.html](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-windowdown.html) (citing the Ehrenberg-Bass Institute of Marketing Science's
26 report "Shopping Takes Only Seconds...In-Store and Online").

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

1 in non-transparent containers, as depicted below. Plaintiff was surprised and
2 disappointed when he opened the Fruit Bliss Organic Deglet Nour Dates product to
3 discover that the container had **nearly 80% empty space**, or slack-fill. Had Plaintiff
4 known about the slack-fill at the time of purchase, he would not have bought Defendant's
5 product.

6 4. Defendant's conduct violates consumer protection and labeling laws.

7 **JURISDICTION AND VENUE**

8 5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332,
9 because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a member
10 of the putative class is a citizen of a different state than Defendant, and the amount in
11 controversy exceeds the sum or value of \$5,000,000, excluding interest and costs. See 28
12 U.S.C. § 1332(d)(2).

13 6. The Court has jurisdiction over the state law claims because they form part
14 of the same case or controversy under Article III of the United States Constitution.

15 7. The Court has personal jurisdiction over Defendant because its Fruit Bliss
16 Organic fruit products are advertised, marketed, distributed and sold through the State of
17 California; Defendant engaged in the wrongdoing alleged in this Complaint throughout
18 the United States, including in the State of California; Defendant is authorized to do
19 business in the State of California; and Defendant has sufficient minimum contacts with
20 the State of California, rendering the exercise of jurisdiction by the Court permissible
21 under traditional notions of fair play and substantial justice. Moreover, Defendant is
22 engaged in substantial activity with the State of California.

23 8. Venue is proper in the United States District Court for the Central District
24 of California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events
25 giving rise to the claims occurred within this judicial district, Defendant has marketed
26 and sold the Fruit Bliss Organic fruit products at issue in this action in this judicial
27 district, and it conducts business within this judicial district.

28 **PARTIES**

1 9. Plaintiff Anthony Buso is a citizen of the State of California and resides in
2 Poway, California. Plaintiff purchased a Fruit Bliss Organic Deglet Nour Dates product
3 for personal consumption during the last four years in San Diego, California. Plaintiff
4 purchased the Product in reliance on Defendant's packaging in containers made, formed
5 or filled as to be misleading and containing non-functional slack-fill. Had Plaintiff
6 known the truth about Defendant's misrepresentations, he would not have purchased the
7 Fruit Bliss Organic Deglet Nour Dates product.

8 10. Plaintiff is informed and believes, and upon such information and belief
9 alleges, that Defendant Penguin Trading Inc. is a Delaware corporation doing business
10 as Fruit Bliss, with its principal place of business located in Brooklyn, New York.
11 Plaintiff is informed and believes, and upon such information and belief alleges, that
12 Defendant, at all times relevant, conducted business in the State of California and within
13 the Southern District of California.

14 11. The true names and capacities of the Defendants sued herein as DOES 1
15 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such
16 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is
17 legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court
18 to amend this Complaint to reflect the true names and capacities of the DOE Defendants
19 when such identities become known.

20 12. At all relevant times, each and every Defendant was acting as an agent
21 and/or employee of each of the other Defendants and was acting within the course and/or
22 scope of said agency and/or employment with the full knowledge and consent of each of
23 the Defendants. Each of the acts and/or omissions complained of herein were alleged
24 and made known to, and ratified by, each of the other Defendants (Penguin Trading Inc.
25 dba Fruit Bliss and DOE Defendants will hereafter collectively be referred to as
26 "Defendant").

27 **FACTUAL ALLEGATIONS**

28 **California Law Prohibits Non-functional Slack-Fill**

1 13. Many federal and state consumer protection and labeling laws prohibit
2 deceptive packaging and labeling of products and commodities. In California, the Fair
3 Packaging and Labeling Act (“CFPLA”) “is designed to protect purchasers of any
4 commodity within its provisions against deception or misrepresentation. Packages and
5 their labels should enable consumers to obtain accurate information as to the quantity of
6 the contents and should facilitate value comparisons.” (California Business &
7 Professions Code § 12601.)

8 14. In this context, the CFPLA provides: “No food containers shall be made,
9 formed, or filled as to be misleading.” (California Business & Professions Code §
10 12606.2(b).) “A container that does not allow the consumer to fully view its contents
11 shall be considered to be filled as to be misleading if it contains nonfunctional slack fill.”
12 (California Business & Professions Code § 12606.2(c).) Section 12606.2(c) defines
13 “slack fill” as “the difference between the actual capacity of a container and the volume
14 of product contained therein.” Similarly, section 12606.2(c) defines “nonfunctional slack
15 fill” as “the empty space in a package that is filled to substantially less than its capacity
16 for reasons other than any one or more of the following:

- 17 (1) Protection of the contents of the package.
18 (2) The requirements of machines used for enclosing the contents of the package.
19 (3) Unavoidable product settling during shipping and handling.
20 (4) The need for the package to perform a specific function, such as where packaging
21 plays a role in the preparation or consumption of a food, if that function is inherent to the
22 nature of the food and is clearly communicated to consumers.
23 (5) The fact that the product consists of a food packaged in a reusable container where
24 the container is part of the presentation of the food and has value that is both significant
25 in proportion to the value of the product and independent of its function to hold the food,
26 such as a gift product consisting of a food or foods combined with a container that is
27 intended for further use after the food is consumed or durable commemorative or
28 promotional packages.

(6) Inability to increase the level of fill or to further reduce the size of the package, such as where some minimum package size is necessary to accommodate required food labeling exclusive of any vignettes or other nonmandatory designs or label information, discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.” (California Business & Professions Code § 12606.2(c)(1)-(6).)

15. None of the above safe-harbor provisions applies to the Fruit Bliss Organic fruit products. Defendant intentionally incorporated non-functional slack-fill in its packaging of the Fruit Bliss Organic fruit products in order to mislead consumers, including Plaintiff and Members of the Class.

Defendant’s Products Contain Non Functional Slack-Fill

16. Defendant’s Fruit Bliss Organic fruit products are sold in non-transparent containers. The containers have significant slack-fill, as described below.

17. Nearly 80% of the interior of the Fruit Bliss Organic fruit product containers, which concern the Fruit Bliss Organic Deglet Nour Dates product purchased by Plaintiff, is comprised of empty space, or non-functional slack fill.





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11 18. Judging from the sizes of the container, a reasonable consumer would expect
12 them to be substantially filled with product. Consumers are misled into believing that
13 they are purchasing substantially more Fruit Bliss Organic fruit product than they receive.

14 19. There is no functional reason for including so much slack-fill in the Fruit
15 Bliss Organic fruit products.

16 20. Plaintiff is informed and believes, and upon such information and belief
17 alleges, that consumers have relied upon, and are continuing to rely upon, the size of the
18 Fruit Bliss Organic fruit product containers as the basis for making purchasing decisions.
19 Consumers believe that the Fruit Bliss Organic fruit product containers are substantially
20 full because they cannot see the actual contents within the nontransparent container.

21 21. Plaintiff is informed and believes, and upon such information and belief
22 alleges, that Defendant is selling and will continue to sell the Fruit Bliss Organic fruit
23 products using these blatantly deceptive and misleading slack-filled containers.

24 22. Defendant's packaging and advertising of the Fruit Bliss Organic fruit
25 products violate the CFPLA, as set forth above.

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1 **Plaintiff Relied on Defendant’s Misleading and Deceptive Conduct and Was Injured**
2 **as a Result**

3 23. The types of misrepresentations made, as described herein, were considered
4 by Plaintiff and Class Members (as would be considered by a reasonable consumer) when
5 deciding to purchase the Fruit Bliss Organic fruit products. Reasonable consumers,
6 including Plaintiff and Class Members, attached importance to whether Defendant’s Fruit
7 Bliss Organic fruit products were misbranded, i.e., not legally salable, or capable of legal
8 possession, and/or contain non-functional slack-fill.

9 24. Plaintiff and the Class Members did not know, and had no reason to know,
10 that the Fruit Bliss Organic fruit products contained non-functional slack-fill.

11 25. Defendant’s product packaging was a material factor in Plaintiff’s and the
12 Class Members’ decisions to purchase the Fruit Bliss Organic fruit products. Based on
13 Defendant’s product packaging, Plaintiff and the Class Members believed that they were
14 getting more Fruit Bliss Organic fruit product than was actually being sold. Had Plaintiff
15 known Defendant’s packaging was slack-filled, he would not have bought the slack-filled
16 Fruit Bliss Organic Deglet Nour Dates product.

17 26. Plaintiff and the Class Members paid the full price of the Fruit Bliss Organic
18 fruit products and received less Fruit Bliss Organic fruit product than they expected due
19 to the non-functional slack-fill in the Fruit Bliss Organic fruit products.

20 27. There is no practical reason for the non-functional slack-fill used to package
21 the Fruit Bliss Organic fruit products other than to mislead consumers as to the actual
22 volume of the Fruit Bliss Organic fruit products being purchased by consumers.

23 28. As a result of Defendant’s misrepresentations, Plaintiff and thousands of
24 others throughout California purchased the Products. Plaintiff and the Class (defined
25 below) have been damaged by Defendant’s deceptive and unfair conduct.

26 **CLASS ACTION ALLEGATIONS**

27 29. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal
28 Rules of Civil Procedure on behalf of himself and the following class (collectively, the

1 “Class” or “Classes”), defined as:

2 **All California residents who made retail purchases of Fruit Bliss Organic**
3 **fruit products in with non-functional slack-fill, as defined by California**
4 **Business & Professions Code § 12606.2, during the applicable limitations**
5 **period up to and including final judgment in this action.**

6 30. The proposed Class excludes current and former officers and directors of
7 Defendant, Members of the immediate families of the officers and directors of Defendant,
8 Defendant’s legal representatives, heirs, successors, assigns, and any entity in which it
9 has or has had a controlling interest, and the judicial officer to whom this lawsuit is
10 assigned.

11 31. Plaintiff reserves the right to revise the Class definition based on facts
12 learned in the course of litigating this matter.

13 32. The Fruit Bliss Organic fruit products sold by Defendant suffer from
14 virtually the same misleading product bottling, labeling and nonfunctional slack-fill.

15 33. Numerosity: This action has been brought and may properly be maintained
16 as a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the Federal
17 Rules of Civil Procedure. While the exact number and identities of other Class Members
18 are unknown to Plaintiff at this time, Plaintiff is informed and believes that there are
19 hundreds of thousands of Members in the Class. Based on sales of the Fruit Bliss Organic
20 fruit products it is estimated that the Class is composed of more than 10,000 persons.
21 Furthermore, even if subclasses need to be created for these consumers, it is estimated
22 that each subclass would have thousands of Members. The Members of the Class are so
23 numerous that joinder of all Members is impracticable and the disposition of their claims
24 in a class action rather than in individual actions will benefit the parties and the courts.

25 34. Typicality: Plaintiff’s claims are typical of the claims of the Members of the
26 Class as all Members of the Class are similarly affected by Defendant’s wrongful
27 conduct, as detailed herein.

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1 35. Adequacy: Plaintiff will fairly and adequately protect the interests of the
2 Members of the Class in that he has no interests antagonistic to those of the other
3 Members of the Class. Plaintiff has retained experienced and competent counsel.

4 36. Superiority: A class action is superior to other available methods for the fair
5 and efficient adjudication of this controversy. Since the damages sustained by individual
6 Class Members may be relatively small, the expense and burden of individual litigation
7 makes it impracticable for the Members of the Class to individually seek redress for the
8 wrongful conduct alleged herein. Furthermore, the adjudication of this controversy
9 through a class action will avoid the potentially inconsistent and conflicting adjudications
10 of the claims asserted herein. There will be no difficulty in the management of this action
11 as a class action. If Class treatment of these claims were not available, Defendant would
12 likely unfairly receive thousands of dollars or more in improper revenue.

13 37. Common Questions Predominate: Common questions of law and fact exist
14 as to all Members of the Class and predominate over any questions solely affecting
15 individual Members of the Class. Among the common questions of law and fact
16 applicable to the Class are:

17 i. Whether Defendant labeled, packaged, marketed, advertised and/or
18 sold Fruit Bliss Organic fruit products to Plaintiff, and those similarly situated,
19 using false, misleading and/or deceptive packaging and labeling;

20 ii. Whether Defendant's actions constitute violations of the CFPLA,
21 California Business & Professions Code § 12606.2;

22 iii. Whether Defendant omitted and/or misrepresented material facts in
23 connection with the labeling, packaging, marketing, advertising and/or sale of its
24 Fruit Bliss Organic fruit products;

25 iv. Whether Defendant's labeling, packaging, marketing, advertising
26 and/or selling of Fruit Bliss Organic fruit products constituted an unfair, unlawful
27 or fraudulent practice;

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1 v. Whether Defendant's packaging of the Fruit Bliss Organic fruit
2 products constituted nonfunctional slack-fill;

3 vi. Whether, and to what extent, injunctive relief should be imposed on
4 Defendant to prevent such conduct in the future;

5 vii. Whether the Members of the Class have sustained damages as a result
6 of Defendant's wrongful conduct;

7 viii. The appropriate measure of damages and/or other relief; and

8 ix. Whether Defendant should be enjoined from continuing its unlawful
9 practices.

10 38. The class is readily definable, and prosecution of this action as a Class action
11 will reduce the possibility of repetitious litigation. Plaintiff knows of no difficulty which
12 will be encountered in the management of this litigation which would preclude his
13 maintenance of this matter as a Class action.

14 39. The prerequisites to maintaining a class action for injunctive relief or
15 equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to
16 act on grounds generally applicable to the Class, thereby making appropriate final
17 injunctive or equitable relief with respect to the Class as a whole.

18 40. The prerequisites to maintaining a class action for injunctive relief or
19 equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to
20 the Class predominate over any questions affecting only individual Members; and a class
21 action is superior to other available methods for fairly and efficiently adjudicating the
22 controversy.

23 41. The prosecution of separate actions by Members of the Class would create
24 a risk of establishing inconsistent rulings and/or incompatible standards of conduct for
25 Defendant. Additionally, individual actions may be dispositive of the interest of all
26 Members of the Class, although certain Class Members are not parties to such actions.

27 42. Defendant's conduct is generally applicable to the Class as a whole and
28 Plaintiff seeks, inter alia, equitable remedies with respect to the Class as a whole. As

1 such, Defendant’s systematic policies and practices make declaratory relief with respect
2 to the Class as a whole appropriate.

3 **CAUSES OF ACTION**

4 **FIRST CAUSE OF ACTION**

5 **VIOLATION OF CALIFORNIA’S CONSUMER LEGAL REMEDIES ACT,**

6 **Cal. Civ. Code § 1750, *et seq.***

7 43. Plaintiff realleges and incorporates herein by reference the allegations
8 contained in all preceding paragraphs, and further alleges as follows:

9 44. Plaintiff brings this claim individually and on behalf of the Class for
10 Defendant’s violations of California’s Consumer Legal Remedies Act (“CLRA”), Cal.
11 Civ. Code 1761(d).

12 45. Plaintiff and the Class Members are consumers who purchased the Fruit
13 Bliss Organic fruit products for personal, family or household purposes. Plaintiff and the
14 Class Members are “consumers” as that term is defined by the CLRA in Cal. Civ. Code
15 § 1761(d). Plaintiff and the Class Members are not sophisticated experts with
16 independent knowledge of corporate branding, labeling and packaging practices.

17 46. The Fruit Bliss Organic fruit products that Plaintiff and other Class
18 Members purchased from Defendant were “goods” within the meaning of Cal. Civ. Code
19 § 1761(a).

20 47. Defendant’s actions, representations, and conduct have violated, and
21 continue to violate the CLRA, because they extend to transactions that intended to result,
22 or which have resulted in, the sale of goods to consumers.

23 48. Defendant violated California law because the Fruit Bliss Organic fruit
24 products are packaged in containers made, formed or filled as to be misleading and which
25 contain non-functional slack-fill, and because they are intentionally packaged to prevent
26 the consumer from being able to fully see their contents.

27 49. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5),
28 prohibits “Misrepresenting that goods or services have sponsorship, approval,

1 characteristics, ingredients, uses, benefits, or quantities which they do not have or that a
2 person has a sponsorship, approval, status, affiliation, or connection which he or she does
3 not have.” By engaging in the conduct set forth herein, Defendant violated and continues
4 to violate Section 1770(a)(5) of the CLRA, because Defendant’s conduct constitutes
5 unfair methods of competition and unfair or fraudulent acts or practices, in that it
6 misrepresents that the Fruit Bliss Organic fruit products have quantities they do not have.

7 50. Cal. Civ. Code § 1770(a)(9) further prohibits “[a]dvertising goods or
8 services with intent not to sell them as advertised.” By engaging in the conduct set forth
9 herein, Defendant violated and continues to violate Section 1770(a)(9), because
10 Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent
11 acts or practices, in that it advertises goods as containing more product than they in fact
12 contain.

13 51. Plaintiff and the Class Members are not sophisticated experts about
14 corporate branding, labeling and packaging practices. Plaintiff and the Class acted
15 reasonably when they purchased the Fruit Bliss Organic fruit products based on their
16 belief that Defendant’s representations were true and lawful.

17 52. Given the materiality of Defendant’s misrepresentations, Plaintiff and the
18 Class Members are entitled to a presumption of reliance.

19 53. Plaintiff and the Class suffered injuries caused by Defendant because (a)
20 they would not have purchased the Fruit Bliss Organic fruit products on the same terms
21 absent Defendant’s illegal and misleading conduct as set forth herein; (b) they purchased
22 the Fruit Bliss Organic fruit products due to Defendant’s misrepresentations and
23 deceptive packaging in containers made, formed or filled as to be misleading and
24 containing non-functional slack-fill; and (c) the Fruit Bliss Organic fruit products did not
25 have the quantities as promised.

26 54. On or about July 27, 2017, prior to filing this action, Plaintiff sent a CLRA
27 notice letter to Defendant which complies with California Civil Code 1782(a). Plaintiff
28 sent Fruit Bliss, individually and on behalf of the proposed Class, a letter via Certified

1 Mail, advising Defendant that it is in violation of the CLRA and demanding that it cease
2 and desist from such violations and make full restitution by refunding the monies
3 received therefrom. A true and correct copy of the letter is attached hereto as Exhibit 1.

4 55. Wherefore, Plaintiff seeks injunctive relief for these violations of the CLRA.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff prays for relief and judgment against Defendant as
7 follows:

8 (A) For an Order certifying the Class pursuant to Federal Rule of Civil
9 Procedure 23, appointing Plaintiff as class representatives, and designating
10 Plaintiff's counsel as counsel for the Class;

11 (B) For an Order declaring that Defendant's conduct violated the CLRA,
12 Cal. Civ. Code § 1750, et seq.;

13 (C) For injunctive relief as pleaded or as the Court may deem proper;

14 (D) For an order of restitution and all other forms of equitable monetary
15 relief, as pleaded;

16 (E) For compensatory damages in amounts to be determined by the Court
17 and/or jury;

18 (F) For punitive damages;

19 (G) For prejudgment interest on all amounts awarded;

20 (H) For an Order awarding Plaintiff and the Class their reasonable attorneys'
21 fees and expenses and costs of suit as pleaded pursuant to, *inter alia*, Cal. Civ.
22 Code § 1780(e) and Cal. Civ. Proc. Code § 1021.5; and

23 (I) For such other and further relief as the Court deems just and proper.

24 Date: September 22, 2017

Respectfully submitted,

25 PACIFIC TRIAL ATTORNEYS
26 A Professional Corporation

27 By: /s/Scott J. Ferrell
28 Scott J. Ferrell
Attorneys for Plaintiff

DEMAND FOR TRIAL BY JURY

Plaintiff, individually and on behalf of all others similarly situated, hereby demands a jury trial on all claims so triable.

Date: September 22, 2017

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS
A Professional Corporation

By: /s/Scott J. Ferrell
Scott J. Ferrell
Attorneys for Plaintiff