

Benjamin M. Lopatin, Esq.  
Cal. SBN: 281730  
*lopatin@hwrlawoffice.com*  
THE LAW OFFICES OF  
HOWARD W. RUBINSTEIN, P.A.  
One Embarcadero Center  
Suite 500  
San Francisco, CA 94111  
Tel.: (800) 436-6437  
Fax: (415) 692-6607

Attorney for Plaintiff Dominika Surzyn  
and the Proposed Class

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**DOMINIKA SURZYN**, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

**DIAMOND FOODS, INC.**, a Delaware  
limited liability company, and DOES 1 through  
10, inclusive,

Defendants.

CASE NO.: 4:14-cv-136

JUDGE:

**COMPLAINT**

**CLASS ACTION**

*JURY TRIAL DEMANDED*

Plaintiff, DOMINIKA SURZYN (“Plaintiff”), individually and on behalf of all others  
similarly situated, by and through her undersigned counsel, hereby files this Complaint, and  
makes the following allegations against Defendant, DIAMOND FOODS, INC., and DOES 1  
through 10, inclusive (“Defendant”), in support thereof:

**I. INTRODUCTION**

1. At all material times hereto, Defendant has unlawfully, fraudulently, unfairly,  
misleadingly, and/or deceptively represented that at least the following five (5) varieties of its  
Kettle Brand TIAS Tortilla Chips are “All Natural,” while they contain unnatural, synthetic,  
and/or artificial ingredients, including, but are not limited to, maltodextrin and/or dextrose:

a) Kettle Brand TIAS All Natural Nacho Cheddar Tortilla Chips

i. Unnatural ingredient: maltodextrin;

- 1           b) Kettle Brand TIAS All Natural Zesty Ranch Tortilla Chips
- 2                 i. Unnatural ingredient: maltodextrin;
- 3           c) Kettle Brand TIAS All Natural Salsa Picante Tortilla Chips
- 4                 i. Unnatural ingredients: maltodextrin and dextrose;
- 5           d) Kettle Brand TIAS All Natural Sweet Baja Barbeque Tortilla Chips
- 6                 i. Unnatural ingredient: maltodextrin;
- 7           e) Kettle Brand TIAS All Natural Chili Con Queso Tortilla Chips
- 8                 i. Unnatural ingredient: dextrose;

9           (collectively, “the Products”).

10           2.       The Products are not “natural,” and certainly not “All Natural,” because they  
11 contain unnatural, synthetic ingredients, including but not limited to, maltodextrin and/or  
12 dextrose.

13           3.       Defendant manufactures, markets, advertises, and sells the Products as being “All  
14 Natural” on the front packaging of the Products.

15           4.       At all material times hereto, the Products made the exact same “All Natural” claim  
16 in the exact same prominently displayed location on the front packaging for the aforementioned  
17 Products in paragraph one (1).

18           5.       The representation that the Products are “All Natural” is central to the marketing  
19 of the Products and is displayed prominently on their packaging. The misrepresentations were  
20 uniform and were communicated to Plaintiff and every other member of the Class.

21           6.       Furthermore, the “All Natural” claim is false, misleading, and likely to deceive  
22 reasonable consumers in the same respect—that being due to their unnaturalness for containing  
23 unnatural, synthetic, and/or artificial ingredients.

24           7.       Contrary to Defendant’s representations, the Products, at all material times hereto,  
25 are not “All Natural,” because the Products contain unnatural, synthetic, and/or artificial  
26 ingredients, such as maltodextrin and/or dextrose. The Products are simply not “All Natural,”  
27 therefore rendering Defendant’s uniform claim unlawful, fraudulent, unfair, deceptive,  
28 misleading, and/or likely to deceive reasonable consumers.

1 8. Plaintiff is seeking damages individually and on behalf of the Class.

2 9. In addition, Plaintiff is seeking an Order requiring Defendant to cease using  
3 unnatural, synthetic, and/or artificial ingredients in its “All Natural” Products, and/or Ordering  
4 Defendant to cease from representing the Products are “All Natural” on the packaging for the  
5 Products that contain unnatural, synthetic, and/or artificial ingredients.

6 10. Plaintiff expressly does not seek to contest or enforce any state law that has  
7 requirements beyond those required by Federal laws or regulations.

8 **II. JURISDICTION AND VENUE**

9 11. This Court has jurisdiction over the subject matter presented by this Complaint,  
10 because it is a class action arising under the Class Action Fairness Act of 2005 (“CAFA”), Pub.  
11 L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction of the  
12 Federal Courts of any class action in which any member of the plaintiff class is a citizen of a state  
13 different from any defendant, and in which the matter in controversy exceeds in the aggregate the  
14 sum of \$5,000,000.00, exclusive of interest and costs.

15 12. Pursuant to 28 U.S.C. § 1332(d)(2)(A), Plaintiff alleges that the total claims of the  
16 individual members of the Plaintiff Class in this action are in excess of \$5,000,000.00, in the  
17 aggregate, exclusive of interest and costs, and as set forth below, diversity of citizenship exists  
18 under CAFA because Plaintiff is a citizen of the State of California, and Defendant can be  
19 considered a citizen of the State of Delaware.

20 13. This Court has personal jurisdiction over Defendant because, *inter alia*, Plaintiff’s  
21 claims arise out of Defendant’s conduct within the State of California.

22 14. Venue is proper in this District under 28 U.S.C. § 1391(b)(2), because Defendant  
23 conducts business in, and may be found in, this judicial District, and a substantial part of the  
24 events or omissions giving rise to Plaintiff’s claims occurred in this judicial District. The  
25 Declaration of Benjamin M. Lopatin, pursuant to Civil Code § 1780(c) of the Consumers Legal  
26 Remedies Act, Civil Code §§ 1750, *et seq.* (“CLRA”), regarding venue, is submitted concurrently  
27 with this Complaint and is fully incorporated herein by reference.

28

**III. PARTIES**

1  
2 15. Plaintiff, Dominika Surzyn, is an individual who at all times relevant herein was  
3 over the age of 18, and is a citizen of the State of California, resident of the County of Alameda.

4 16. Plaintiff believes the allegations contained herein to be true. All allegations herein  
5 are based on information and belief, and are likely to have evidentiary support after a reasonable  
6 opportunity to conduct discovery.

7 17. Defendant, Diamond Foods, Inc., is a corporation incorporated under the laws of  
8 the State of Delaware, with its principal place of business located in the State of California  
9 located at 600 Montgomery Street, 13<sup>th</sup> Floor, San Francisco, California 94111.

10 18. Diamond Foods, Inc., lists with the California Secretary of State a Registered  
11 Agent designated as Stephen Kim, located at 600 Montgomery Street, 13<sup>th</sup> Floor, San Francisco,  
12 California 94111.

13 19. Therefore, Diamond Foods, Inc., can be considered a “citizen” of the State of  
14 Delaware for diversity purposes.

15 20. The true names and capacities of Defendants named herein as Does 1 through 10,  
16 inclusive, are unknown to Plaintiff who therefore sue said Defendants, and each of them, by such  
17 fictitious names. Plaintiff will amend this Complaint to identify their true names and capacities  
18 when the same has been ascertained.

19 21. Defendant named herein and each of said fictitiously named Defendants are legally  
20 responsible in some manner for the occurrences herein alleged.

21 22. Defendant promoted and marketed the Products at issue in this jurisdiction and in  
22 this judicial District. The advertising for the Products relied upon by Plaintiff was prepared  
23 and/or approved by Defendant and its agents, and was disseminated by Defendant and its agents  
24 through advertising containing the misrepresentations alleged herein.

25 23. The advertising for the Products was designed to encourage consumers to purchase  
26 the Products and reasonably misled the reasonable consumer, i.e. Plaintiff and the Class into  
27 purchasing the Products. Defendant is the owner, manufacturer and distributor of the Products,  
28

1 and is the company that created and/or authorized the unlawful, fraudulent, unfair, misleading  
2 and/or deceptive advertising and statements for the Products.

3 24. Plaintiff alleges that, at all times relevant herein, Defendant and its subsidiaries,  
4 affiliates, and other related entities, as well as their respective employees, were the agents,  
5 servants and employees of Defendant, and at all times relevant herein, each was acting within the  
6 purpose and scope of that agency and employment.

7 25. Plaintiff further alleges on information and belief that at all times relevant herein,  
8 the distributors and retailers who delivered and sold the Products, as well as their respective  
9 employees, also were Defendant's agents, servants and employees, and at all times herein, each  
10 was acting within the purpose and scope of that agency and employment.

11 26. In addition, Plaintiff alleges that, in committing the wrongful acts alleged herein,  
12 Defendant, in concert with its subsidiaries, affiliates, and/or other related entities and their  
13 respective employees, planned, participated in and furthered a common scheme to induce  
14 members of the public to purchase the Products by means of untrue, misleading, deceptive, and/or  
15 fraudulent representations, and that Defendant participated in the making of such representations  
16 in that it disseminated those misrepresentations and/or caused them to be disseminated.

17 27. Whenever reference in this Complaint is made to any act by Defendant or its  
18 subsidiaries, affiliates, distributors, retailers and other related entities, such allegation shall be  
19 deemed to mean that the principals, officers, directors, employees, agents, and/or representatives  
20 of Defendant committed, knew of, performed, authorized, ratified and/or directed that act or  
21 transaction on behalf of Defendant while actively engaged in the scope of their duties.

#### 22 **IV. FACTUAL ALLEGATIONS**

##### 23 **A. Defendant's Advertising of the "All Natural" Products**

24 28. Defendant manufactures, distributes, markets, advertises, and sells the Products  
25 aforementioned in paragraph one (1) throughout the State of California and in this judicial  
26 District, which uniformly claim to be "All Natural," when in fact, they are not, because they  
27 contain unnatural, synthetic, and/or artificial ingredients, including but not limited to,  
28 maltodextrin and/or dextrose.

1           29. Through a variety of advertising, including the front packaging of the Products,  
2 Defendant has made untrue and misleading material statements and representations regarding the  
3 Products, which have been relied upon by Plaintiff and members of the Class.

4           30. Defendant's "All Natural" statement prominently displayed on the front of the box  
5 for the Products' and on the front of each individual packaging for the Products is untrue,  
6 misleading, and likely to deceive reasonable consumers, such as Plaintiff and members of the  
7 Class, because the Products are not "All Natural," due to the presence of unnatural, synthetic,  
8 and/or artificial ingredients in the Products.

9           31. Defendant unlawfully markets, advertises, sells and distributes the Products to  
10 California purchasers in California grocery stores, food chains, mass discounters, mass  
11 merchandisers, club stores, convenience stores, drug stores and/or dollar stores, as being "All  
12 Natural."

13           32. All of the Products' packaging uniformly and consistently states that the Products  
14 are All Natural on the front of the box for each of the Products and on the front of each individual  
15 packaging for the Products that come inside each box.

16           33. As a result, all consumers within the Class, including Plaintiff, who purchased the  
17 Products were exposed to the same "All Natural" claim in the same location on the front box and  
18 individual packaging for the Products.

19           34. Unfortunately for consumers, they were charged a price premium for these alleged  
20 All Natural Products over Products that did not claim to be "All Natural."

21           35. Defendant's All Natural representations convey a series of express and implied  
22 claims which Defendant knows are material to the reasonable consumer, and which Defendant  
23 intends for consumers to rely upon when choosing to purchase the Products.

24                           **B. Maltodextrin and Dextrose Are Not Natural**

25           36. Maltodextrin and dextrose are unnatural, synthetic, and/or an artificial ingredient,  
26 and its presence in the Products causes the Products to not be "All Natural."  
27  
28

1           37.     *Maltodextrin* is a saccharide polymer that is produced through partial acid and  
2 enzymatic hydrolysis of corn starch.<sup>1</sup> The acid hydrolysis process is specifically deemed to be a  
3 relatively severe process that renders an ingredient no longer “natural.”<sup>2</sup>

4           38.     *Dextrose* is enzymatically synthesized in a similar manner, crystallizing D-glucose  
5 with one molecule of water.

6           39.     Synthetic chemicals are often used to extract and purify the enzymes used to  
7 produce maltodextrin and dextrose. The microorganisms, fungi, and bacteria used to produce  
8 these enzymes are also often synthetically produced.

9           40.     Despite all these unnatural ingredients, Defendant knowingly markets the Products  
10 as “All Natural.”

11           **C. Defendant Deceptively Markets the Products as “All Natural” to Induce Consumers**  
12   **to Purchase the Products**

13           41.     A representation that a product is “All Natural” and/or “Natural” is material to a  
14 reasonable consumer. According to Consumers Union, “Eighty-six percent of consumers expect  
15 a ‘natural’ label to mean processed foods do not contain any artificial ingredients.”<sup>3</sup>

16           42.     Defendant markets and advertises the Products as “All Natural” to increase sales  
17 of the Products and Defendant is well-aware that claims of food being “All Natural” are material  
18 to consumers. Despite knowing that maltodextrin and/or dextrose are not natural ingredients,  
19 Defendant has engaged in a widespread marketing and advertising campaign to portray the  
20 Products as being “All Natural.”

21           43.     Defendant engaged in this misleading and deceptive campaign to charge a  
22 premium for the Products and take away market share from other similar products. As stated  
23 herein, such representations and the widespread marketing campaign portraying the Products as

---

24 1. Maltodextrins, GMO Compass, [http://www.gmo-](http://www.gmo-compass.org/eng/database/ingredients/148.maltodextrins.html)  
25 [compass.org/eng/database/ingredients/148.maltodextrins.html](http://www.gmo-compass.org/eng/database/ingredients/148.maltodextrins.html) (last visited Jan. 9, 2014).

26 2. *See id.*

27 3. Notice of the Federal Trade Commission, Comments of Consumers Union on Proposed  
28 Guides for Use of Environmental Marketing Claims, 16 CFR § 260, Dec. 10, 2010,  
<http://www.ftc.gov/os/comments/greenguiderevisions/00289-57072.pdf> (last visited Jan. 9, 2014).

1 being “All Natural” are misleading and likely to deceive reasonable consumers because the  
2 Products are not “All Natural” due to being made with unnatural ingredients.

3 44. Reasonable consumers frequently rely on food label representations and  
4 information in making purchase decisions.

5 45. Here, Plaintiff and the other Class members reasonably relied to their detriment on  
6 Defendant’s misleading representations and omissions. Defendant’s misleading affirmative  
7 statements about the “naturalness” of its Products obscured the material facts that Defendant  
8 failed to disclose about the unnaturalness of its Products.

9 46. Plaintiff and the other Class members were among the intended recipients of  
10 Defendant’s deceptive representations and omissions.

11 47. Defendant made the deceptive representations and omissions on the Products with  
12 the intent to induce Plaintiff’s and the other Class members’ purchase of the Products.

13 48. Defendant’s deceptive representations and omissions are material in that a  
14 reasonable person would attach importance to such information and would be induced to act upon  
15 such information in making purchase decisions. Thus, Plaintiff’s and the other Class members’  
16 reliance upon Defendant’s misleading and deceptive representations and omissions may be  
17 presumed. The materiality of those representations and omissions also establishes causation  
18 between Defendant’s conduct and the injuries sustained by Plaintiff and the Class.

19 49. Defendant’s false, misleading, and deceptive misrepresentations and omissions are  
20 likely to continue to deceive and mislead reasonable consumers and the general public, as they  
21 have already deceived and misled Plaintiff and the other Class members.

22 50. In making the false, misleading, and deceptive representations and omissions,  
23 Defendant knew and intended that consumers would pay a premium for “All Natural” labeled  
24 products over comparable products that are not labeled “All Natural” furthering Defendant’s  
25 private interest of increasing sales for its Products and decreasing the sales of products that are  
26 truthfully offered as “All Natural” by Defendant’s competitors, or those that do not claim to be  
27 “All Natural.”  
28



1           51. As an immediate, direct, and proximate result of Defendant's false, misleading,  
2 and deceptive representations and omissions, Defendant injured Plaintiff and the other Class  
3 members in that they:

- 4           a) paid a sum of money for Products that were not as represented;
- 5           b) paid a premium price for Products that were not as represented;
- 6           c) were deprived the benefit of the bargain because the Products they purchased were  
7           different than what Defendant warranted;
- 8           d) were deprived the benefit of the bargain because the Products they purchased had  
9           less value than what was represented by Defendant;
- 10          e) did not receive Products that measured up to their expectations as created by  
11          Defendant;
- 12          f) ingested a substance that was other than what was represented by Defendant;
- 13          g) ingested a substance that Plaintiff and the other members of the Class did not  
14          expect or consent to;
- 15          h) ingested a product that was artificial, synthetic, or otherwise unnatural;
- 16          i) ingested a substance that was of a lower quality than what Defendant promised;
- 17          j) were denied the benefit of knowing what they ingested;
- 18          k) were denied the benefit of truthful food labels;
- 19          l) were forced unwittingly to support an industry that contributes to environmental,  
20          ecological, and/or health damage;
- 21          m) were denied the benefit of supporting an industry that sells natural foods and  
22          contributes to environmental sustainability; and
- 23          n) were denied the benefit of the beneficial properties of the natural foods promised.

24           52. Had Defendant not made the false, misleading, and deceptive representations and  
25 omissions, Plaintiff and the other Class members would not have been economically injured.

26           53. Among other things, Plaintiff and the other Class members would not have been  
27 denied the benefit of the bargain, they would not have ingested a substance that they did not  
28 expect or consent to.

1 54. Plaintiff and the other Class members did not obtain the full value of the  
2 advertised Products due to Defendant's misrepresentations and omissions. Plaintiff and the other  
3 Class members purchased, purchased more of, or paid more for, the Products than they would  
4 have done, had they known the truth about the Products' unnaturalness.

5 55. Accordingly, Plaintiff and the other Class members have suffered injury in fact  
6 and lost money or property as a result of Defendant's wrongful conduct.

7 **D. Plaintiff's Purchase and Reliance on the "All Natural" Statement**

8 56. Plaintiff has purchased one or more of the Products during the Class Period,  
9 including, but not limited to, a purchase made during 2013 from a Whole Foods market located in  
10 Alameda County, California, for the purchase price of approximately \$3.00 to \$4.00.

11 57. The Products purchased by Plaintiff claimed to be "All Natural" on the front  
12 packaging, which Plaintiff perceived, read, and relied on in making Plaintiff's decision to  
13 purchase the Products. Plaintiff interpreted the "All Natural" claim to mean that the Tortilla  
14 Chips did not contain any unnatural, synthetic, and/or artificial ingredients.

15 58. Subsequent to purchasing the Products, Plaintiff discovered that they contain  
16 maltodextrin and/or dextrose, which are unnatural and/or synthetic ingredients, and thus, the  
17 Products containing these unnatural, synthetic, and/or artificial ingredients are not "All Natural."

18 **E. Plaintiff Has Suffered Economic Damages**

19 59. Plaintiff and members of the Class would not have purchased the Products had  
20 they known that they were not "All Natural."

21 60. Likewise, if Plaintiff and members of the Class had known the Products contained  
22 unnatural, synthetic, and/or artificial ingredients, they would not have purchased them.

23 61. Defendant's "All Natural" statement related to the Products is material to a  
24 consumer's purchase decision because reasonable consumers, such as Plaintiff and members of  
25 the Class, care whether products contain unnatural, synthetic, and/or artificial ingredients, and  
26 thus attach importance to an "All Natural" claim when making a purchasing decision.

27  
28

1 62. As a result of purchasing the Products that claim to be “All Natural,” but contain  
2 maltodextrin and/or dextrose, Plaintiff and members of the Class have suffered economic  
3 damages.

4 63. Defendant’s “All Natural” advertising for the Products was and is false,  
5 misleading, and/or likely to deceive reasonable consumers. Therefore, the Products are valueless,  
6 worth less than what Plaintiff and members of the Class paid for them, and/or are not what  
7 Plaintiff and members of the Class reasonably intended to receive.

8 64. Plaintiff and the Class seek damages equal to the aggregate purchase price paid for  
9 the Products during the Class Period because the Products are worthless due to not being “All  
10 Natural,” due to the presence of unnatural, synthetic, and/or artificial ingredients.

11 65. Moreover, Plaintiff and members of the Class paid a price premium for the “All  
12 Natural” Products, over other similar products that do not claim to be “All Natural.”

13 **V. CLASS ACTION ALLEGATIONS**

14 66. Plaintiff re-alleges and incorporates by reference the allegations set forth in each  
15 of the preceding paragraphs of this Complaint.

16 67. This action is maintainable as a class action under Rule 23(a) and (b)(3) of the  
17 Federal Rules of Civil Procedure.

18 68. Pursuant to Federal Rule of Civil Procedure 23 and Cal. Civil Code § 1781,  
19 Plaintiff brings this class action and seeks certification of the claims and certain issues in this  
20 action on behalf of a Class defined as:

21 **all California residents who have purchased for personal use**  
22 **one or more of the following products: (1) Kettle Brand TIAS**  
23 **All Natural Nacho Cheddar Tortilla Chips; (2) Kettle Brand**  
24 **TIAS All Natural Zesty Ranch Tortilla Chips; (3) Kettle Brand**  
25 **TIAS All Natural Salsa Picante Tortilla Chips; (4) Kettle Brand**  
26 **TIAS All Natural Sweet Baja Barbeque Tortilla Chips; or**  
27 **Kettle Brand TIAS All Natural Chili Con Queso Tortilla Chips,**  
28

1           **from January 9, 2010, through and to the date notice is**  
2           **provided to the Class.**

3           69. Excluded from the Class are governmental entities, Defendant, any entity in which  
4 Defendant has a controlling interest, and Defendant's officers, directors, affiliates, legal  
5 representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded  
6 from the Class is any judge, justice, or judicial officer presiding over this matter and the members  
7 of their immediate families and judicial staff.

8           70. Plaintiff reserves the right to amend the Class definition if further information and  
9 discovery indicates that the Class definition should be narrowed, expanded or otherwise modified.

10           71. **Numerosity:** The Class comprises many thousands of persons throughout the State  
11 of California. The class is so numerous that joinder of all members is impracticable, and the  
12 disposition of their claims in a Class Action will benefit the parties and the Court.

13           72. **Commonality:** The questions of law and fact common to the Class have the  
14 capacity to generate common answers that will drive resolution of this action. Common questions  
15 of law and fact include, but are not limited to, the following:

- 16           a) Whether Defendant's practices and representations related to the marketing,  
17 labeling and sales of the Products in California were unfair, deceptive, fraudulent,  
18 and/or unlawful in any respect, thereby violating Cal. Bus. & Prof. C. §§ 17200, *et*  
19 *seq.*;
- 20           b) Whether Defendant's practices and representations related to the marketing,  
21 labeling and sales of the Products in California were unfair, deceptive and/or  
22 unlawful in any respect, thereby violating Cal. Bus. & Prof. C. §§ 17500, *et seq.*;
- 23           c) Whether Defendant violated Cal. Civ. C. §§ 1750, *et seq.* with its practices and  
24 representations related to the marketing, labeling and sales of the Products within  
25 California;
- 26           d) Whether the Products are "All Natural;"
- 27           e) Whether the ingredients contained in the Products are "All Natural;"
- 28

- 1 f) Whether the claim “All Natural” on the Products’ packaging and advertising is  
2 material to a reasonable consumer;
- 3 g) Whether the claim “All Natural” on the Products’ packaging and advertising is  
4 false to a reasonable consumer.
- 5 h) Whether the claim “All Natural” on the Products’ packaging and advertising is  
6 likely to deceive a reasonable consumer;
- 7 i) Whether the claim “All Natural” on the Products’ packaging and advertising is  
8 misleading to a reasonable consumer;
- 9 j) Whether a reasonable consumer is likely to be deceived by a claim that a product  
10 is “All Natural” where the product contains unnatural, synthetic, and/or artificial  
11 ingredients; and
- 12 k) Whether Defendant’s conduct as set forth above injured consumers and if so, the  
13 extent of the injury.

14 73. **Typicality:** Plaintiff’s claims, and Defendant’s defenses thereto, are typical of the  
15 claims of the Class, as the representations made by Defendant are consistent and uniform and are  
16 contained in the advertisements and labels that every member of the Class was necessarily  
17 exposed to in purchasing the Products. Thus, there exists a presumption that all Class members  
18 relied upon said uniform and consistent advertising and representations to their detriment.  
19 Additionally, all members of the Class have the same or similar injury (loss of purchase price)  
20 based on Defendant’s false and misleading marketing and advertising.

21 74. **Adequacy:** Plaintiff does not have any conflicts with any other members of the  
22 Class, and will fairly and adequately represent and protect the interests of the members of the  
23 Plaintiff Class. Plaintiff has retained counsel competent and experienced in both consumer  
24 protection and class action litigation.

25 75. **Predominance:** As set forth in detail herein, common issues of fact and law  
26 predominate because all of Plaintiff’s claims are based on a uniform false and misleading  
27 advertising message which all class members were necessarily exposed to.  
28



1           81. In violation of California Bus. & Prof. Code §§ 17500, *et seq.*, Defendant  
2 disseminated, or caused to be disseminated, the deceptive Products' labeling and advertising  
3 representations.

4           82. Defendant's labeling and advertising representations for the Products are by their  
5 very nature unfair, deceptive and/or unlawful within the meaning of California Bus. & Prof. Code  
6 §§ 17500 *et seq.*

7           83. The representations were at all material times hereto likely to deceive reasonable  
8 consumers, including Plaintiff and members of the Class.

9           84. Defendant violated California Bus. & Prof. Code §§ 17500 *et seq.*, in making and  
10 disseminating the deceptive representations alleged herein.

11           85. Defendant knew or should have known that the representations were false,  
12 misleading, and likely to deceive reasonable consumers, such as Plaintiff and members of the  
13 Class.

14           86. As a direct and proximate result of Defendant's wrongful conduct, Plaintiff and  
15 similarly situated California purchasers of the Products have suffered economic damages.

16           87. Plaintiff was injured in fact and lost money as a result of Defendant's conduct of  
17 improperly advertising the Products as described herein.

18           88. Plaintiff would not have purchased the Products but for Defendant's misleading  
19 statements about the Products.

20           89. Pursuant to Bus. & Prof. Code § 17535, Plaintiff, individually and on behalf of all  
21 similarly situated California purchasers, seeks an order of this Court requiring Defendant to  
22 restore to purchasers of the Products all monies that may have been acquired by Defendant as a  
23 result of such false, unfair, deceptive and/or unlawful acts or practices. Plaintiff and members of  
24 the Class seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-  
25 gotten revenues and/or profits, injunctive relief enjoining Defendant from disseminating its untrue  
26 and misleading statements, and other relief allowable under California Business & Professions  
27 Code Section 17535.

28

1 90. Furthermore, as a result of Defendant's violations of the FAL, Plaintiff and  
2 similarly situated California purchasers of the Products are entitled to restitution for out-of-pocket  
3 expenses and economic harm.

4 91. Pursuant to Civil Code § 3287(a), Plaintiff and similarly situated California  
5 purchasers of the Products are further entitled to pre-judgment interest as a direct and proximate  
6 result of Defendant's wrongful conduct. The amount on which interest is to be calculated is a sum  
7 certain and capable of calculation, and Plaintiff and similarly situated California purchasers of the  
8 Products are entitled to interest in an amount according to proof.

9 **COUNT II**

10 ***Violation of the Unfair and Fraudulent Prongs of California Business & Professions Code***

11 ***§§ 17200 et seq.***

12 ***(Brought on behalf of Plaintiff and the California Class)***

13 92. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in  
14 the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

15 93. This cause of action is brought on behalf of Plaintiff and members of the general  
16 public, pursuant to Cal. Bus. & Prof. Code §§ 17200 *et seq.*, which provides that "unfair  
17 competition shall mean and include any unlawful, unfair or deceptive business act or practice and  
18 unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter I  
19 (commencing with Section 17500) as Part 3 of Division 7 of the Business and Professions Code."

20 94. In its marketing and advertising, Defendant makes false and misleading statements  
21 regarding the uses and benefits of the Products.

22 95. Specifically, Defendant has represented that their Products are "All Natural," when  
23 in fact the Products contain unnatural, synthetic, and/or artificial ingredients.

24 96. The misrepresentations Defendant makes about the Products constitutes an unfair  
25 and fraudulent business practice within the meaning of California Business & Professions Code  
26 section 17200, *et seq.*

27 97. Defendant committed "unfair" and/or "fraudulent" business acts or practices by,  
28 among other things: (1) engaging in conduct where the utility of such conduct, if any, is



1 outweighed by the gravity of the consequences to Plaintiff and members of the Class; (2)  
2 engaging in conduct that is immoral, unethical, oppressive, unscrupulous, or substantially  
3 injurious to Plaintiff and members of the Class; and (3) engaging in conduct that undermines or  
4 violates the spirit or intent of the consumer protection laws alleged herein.

5 98. As detailed above, Defendant's unfair and/or fraudulent practices include  
6 disseminating false and/or misleading representations regarding the Products.

7 99. Defendant is aware that the claims it made about the Products are false,  
8 misleading, and likely to deceive reasonable consumers.

9 100. Plaintiff would not have purchased the Products but for Defendant's misleading  
10 statements about the Products.

11 101. Plaintiff was injured in fact and lost money as a result of Defendant's conduct.

12 102. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact  
13 and has lost money or property as a result of Defendant's actions as set forth herein.

14 103. Defendant's business practices, as alleged herein, are unfair because: (1) the injury  
15 to consumers is substantial; (2) the injury is not outweighed by any countervailing benefits to  
16 consumers or competition; and (3) consumers could not reasonably have avoided the information  
17 because Defendant intentionally misled the consuming public by means of the claims made with  
18 respect to the Products as set forth herein.

19 104. Defendant's business practices as alleged herein are fraudulent because they are  
20 likely to deceive customers into believing the Products have characteristics, uses and benefits  
21 they do not have.

22 105. In addition, Defendant's use of various forms of advertising media to advertise,  
23 including the Products' labeling, call attention to, or give publicity to, the sale of goods or  
24 merchandise which are not as represented in any manner, which constitutes unfair competition,  
25 unfair, deceptive, untrue or misleading advertising, and an unlawful business practice within the  
26 meaning of Business & Professions Code sections 17200, *et seq.*

1 106. Defendant's wrongful business practices constituted a continuing course of  
2 conduct of unfair competition since Defendant is marketing and selling the Products in a manner  
3 likely to deceive the public.

4 107. Defendant has peddled its misrepresentations through advertising in California,  
5 including the Products' labeling.

6 108. There were reasonably available alternatives to further Defendant's legitimate  
7 business interests, other than the conduct described herein.

8 109. Plaintiff and the putative members of the Class were misled into purchasing the  
9 Products by Defendant's deceptive and fraudulent conduct as alleged herein.

10 110. Defendant had an improper motive (profit before accurate marketing) in its  
11 practices related to the deceptive labeling and advertising of the Products, as set forth above.

12 111. The use of such unfair and fraudulent business acts and practices was under the  
13 sole control of Defendant, and was deceptively hidden from members of the general public in  
14 Defendant's marketing, advertising and labeling of the Products.

15 112. As purchasers and consumers of Defendant's Products, and as members of the  
16 general public who purchased and used the Products, Plaintiff and the Class are entitled to bring  
17 this class action seeking all available remedies under the UCL.

18 113. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, individually, and on  
19 behalf of the Class, seeks an order of this Court for injunctive relief and disgorging and restoring  
20 all monies that have been acquired by Defendant as a result of Defendant's business acts or  
21 practices described herein. Plaintiff, the Class, and the general public may be irreparably harmed  
22 or denied an effective and complete remedy in the absence of such an order.

23 114. As a result of Defendant's violations of the UCL, Plaintiff and the Class are  
24 entitled to restitution for out-of-pocket expenses and economic harm.

25 115. Pursuant to Civil Code § 3287(a), Plaintiff and the Class are further entitled to pre-  
26 judgment interest as a direct and proximate result of Defendant's unfair and fraudulent conduct.  
27 The amount on which interest is to be calculated is a sum certain and capable of calculation, and  
28 Plaintiff and the Class are entitled to interest in an amount according to proof.

**COUNT III**

***Violation of the Unlawful Prong of California Business & Professions Code §§ 17200 et seq.  
(Brought on behalf of Plaintiff and the California Class)***

116. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

117. This cause of action is brought on behalf of Plaintiff and members of the Class pursuant to Cal. Bus. & Prof. Code §§ 17200 *et seq.*, which provides that “unfair competition shall mean and include any unlawful, unfair or deceptive business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter I (commencing with Section 17500) as Part 3 of Division 7 of the Business and Professions Code.”

118. As detailed above, Defendant’s unlawful practices include disseminating false and/or misleading representations about the Products.

119. Specifically, Defendant has represented that their Products are “All Natural,” when in fact the Products contain unnatural, synthetic, and/or artificial ingredients.

120. Plaintiff would not have purchased the Products, but for Defendant’s misleading statements about the Products.

121. Plaintiff was injured in fact and lost money as a result of Defendant’s conduct.

122. Plaintiff paid for the Products, but did not receive what he reasonably expected.

123. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact and has lost money or property as a result of Defendant’s actions as set forth herein.

124. Defendant’s business practices, as alleged herein, are unfair because: (1) the injury to consumers is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) consumers could not reasonably have avoided the information because Defendant intentionally misled the consuming public by means of the claims made with respect to the Products as set forth herein.

125. In its marketing and advertising, Defendant makes false and misleading statements regarding the uses and benefits of the Products.

1 126. Such marketing, advertising and sale of the Products by Defendant is unlawful  
2 because (1) they are violating sections 1770(a)(5), 1770(a)(7) and 1770(a)(9) of the CLRA,  
3 California Civil Code section 1750, *et seq.*; and (2) they are violating the FAL, California  
4 Business & Professions Code section 17500, *et seq.*

5 127. Because Defendant’s business conduct in advertising, marketing and selling the  
6 Products using false and misleading statements, in violation of the CLRA, FAL, and/or other  
7 federal and state laws or regulations, it constitutes a per se violation of the “unlawful” prong of  
8 the UCL.

9 128. As purchasers and consumers of Defendant’s Products, and as members of the  
10 general public who purchased and used the Products, Plaintiff and the Class are entitled to and  
11 bring this class action seeking all available remedies under the UCL.

12 129. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, individually and on  
13 behalf of the Class, seeks an order of this Court for injunctive relief and disgorging and restoring  
14 all monies that may have been acquired by Defendant as a result of such unlawful business acts or  
15 practices. Plaintiff, the Class and the general public may be irreparably harmed and/or denied an  
16 effective and complete remedy in the absence of such an order.

17 130. As a result of Defendant’s violations of the UCL, Plaintiff and the Class are  
18 entitled to restitution for out-of-pocket expenses and economic harm.

19 131. Pursuant to Civil Code § 3287(a), Plaintiff and the Class are further entitled to pre-  
20 judgment interest as a direct and proximate result of Defendant’s unlawful business conduct. The  
21 amount on which interest is to be calculated is a sum certain and capable of calculation, and  
22 Plaintiff and the Class are entitled to interest in an amount according to proof.

23 **COUNT IV**

24 ***Violation of the California Consumers Legal Remedies Act –***

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

26 ***(Brought on behalf of Plaintiff and the California Class)***

27 132. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in  
28 the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

1 133. This cause of action is brought pursuant to the California Consumers Legal  
2 Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* (the “CLRA”).

3 134. Defendant has represented that their Products are “All Natural,” when in fact the  
4 Products contain unnatural, synthetic, and/or artificial ingredients.

5 135. This cause of action seeks monetary damages and injunctive relief pursuant to  
6 California Civil Code § 1782.

7 136. Defendant’s actions, representations, and conduct have violated the CLRA,  
8 because they extend to transactions that are intended to result, or that have resulted, in the sale of  
9 goods to consumers.

10 137. Plaintiff and all members of the Class are “consumers” as that term is defined by  
11 the CLRA in California Civil Code § 1761(d).

12 138. Defendant sold the Products, which are “goods” within the meaning of California  
13 Civil Code § 1761(a), to Plaintiff and other members of the Class during the Class Period.

14 139. Plaintiff is an individual who purchased the Products for personal use.

15 140. The purchases of the Products by Plaintiff and California purchasers of the  
16 Products were and are “transactions” within the meaning of Civil Code §1761(e).

17 141. Defendant’s marketing, labeling and advertising and sales of the Product within  
18 California violated the CLRA in at least the following respects as set forth in detail above:

- 19 a. In violation of Civil Code §1770(a)(5), Defendant represented that the  
20 Products have characteristics, ingredients, uses, and benefits which they do not  
21 have;
- 22 b. In violation of Civil Code §1770(a)(7), Defendant represented that the  
23 Products are of a particular standard, quality, or grade, which they are not;
- 24 c. In violation of Civil Code §1770(a)(9), Defendant advertised the Products with  
25 an intent not to sell the Products as advertised; and
- 26 d. In violation of Civil Code §1770(a)(16), Defendant represented that the subject  
27 of the sale of the Products has been supplied in accordance with a previous  
28 representation when it has not.

1 142. Defendant knew or should have known about the Products' misrepresentations.

2 143. Defendant's actions as described herein were done with conscious disregard of  
3 Plaintiff's rights, and Defendant was wanton and malicious in its concealment of same.

4 144. Defendant's wrongful business practices constitute a continuing course of conduct  
5 in violation of the CLRA.

6 145. Plaintiff and other members of the putative Class have suffered injury in fact and  
7 have lost money as a result of Defendant's misrepresentations.

8 146. Plaintiff seeks an award of restitution and actual damages in accordance with the  
9 provisions of the CLRA.

10 147. Plaintiff also seeks equitable relief in the form of an order for injunctive relief:

11 a) Requiring Defendant to make full restitution of all monies wrongfully obtained as  
12 a result of the conduct described above;

13 b) Requiring Defendant to disgorge all ill-gotten gains flowing from the conduct  
14 described above; and

15 c) Enjoining Defendant from engaging, using, or employing its advertising and  
16 marketing tactics to sell the Products, as described above.

17 148. Pursuant to the notice requirements under the CLRA, on January 9, 2014, Plaintiff  
18 sent Defendant a letter via U.S.P.S. Certified Mail, notifying Defendant in writing of the  
19 particular violations of the CLRA, and demanding that Defendant take certain corrective actions  
20 within the mandated thirty (30) day time period. In the event Defendant fails to adequately  
21 respond within the thirty (30) day time period, Plaintiff intends to amend this Complaint to  
22 include a request for punitive damages and statutory damages pursuant to the CLRA.

23 149. Pursuant to the CLRA, Plaintiff separately seeks, and is entitled to, costs,  
24 attorney's fees, and any other applicable relief allowable under the CLRA.

25

26

27

28

**COUNT V**

***Negligent Misrepresentation***

***(Brought on behalf of Plaintiff and the California Class)***

150. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the preceding paragraphs of this Complaint as if fully set forth herein verbatim.

151. Defendant has represented that their Products are “All Natural,” when in fact the Products contain unnatural, synthetic, and/or artificial ingredients.

152. Defendant had no reasonable grounds for believing its representations were true.

153. Defendant should have known about the Products’ misrepresentations.

154. In making these representations to Plaintiff and the Class, Defendant intended to induce Plaintiff and the Class to purchase the Products.

155. At all times herein, Plaintiff and the Class were unaware of the falsity of the Products’ statements.

156. Plaintiff and the Class reasonably acted in response to the statements made by Defendant when they purchased the Products.

157. As a proximate result of Defendant’s negligent misrepresentations, Plaintiff and Class members purchased the Products.

158. As a result, Plaintiff and the Class have been economically damaged in an amount to be determined at trial.

**VII. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff, individually and on behalf of all others similarly situated, prays for a judgment and relief on all causes of action as follows:

A. For an order certifying that the action may be maintained as a class action, certifying Plaintiff as representative of the Class, and designating Plaintiff’s attorneys as Class counsel.

B. For an award of equitable relief as follows:

i. Enjoining Defendant from making any “Natural” claims for the Products found to violate the UCL, FAL, or CLRA as set forth above;

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ii. Requiring Defendant to make full restitution of all monies wrongfully obtained as a result of the conduct as set for above;

iii. Requiring Defendant to disgorge all ill-gotten gains flowing from the conduct as set forth above.

C. For actual damages in an amount to be determined at trial.

D. For an award of attorneys’ fees pursuant to, *inter alia*, § 1780(d) of the CLRA and California Code of Civil Procedure § 1021.5.

E. For an award of costs.

F. For such further relief this Court deems just, appropriate, or proper.

G. For pre- and post-judgment interest on any amounts awarded.

**VIII. JURY DEMAND**

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

**DATED: January 9, 2014**

**Respectfully Submitted,**

*/s/ Benjamin M. Lopatin*  
Benjamin M. Lopatin, Esq.  
Cal. SBN: 281730  
*lopatin@hwrlawoffice.com*  
THE LAW OFFICES OF  
HOWARD W. RUBINSTEIN, P.A.  
One Embarcadero Center, Suite 500  
San Francisco, CA 94111  
Tel.: (800) 436-6437  
Fax: (415) 692-6607

*Attorney for Plaintiff Dominika Surzyn  
and the Proposed Class*