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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHAN ERRANT and JOHN DOES 1-100, on behalf of themselves and others similarly situated, Plaintiff, - against - GUITTARD CHOCOLATE CO., Defendant.	JURY TRIAL DEMANDED CLASS ACTION COMPLAINT Case No.

Plaintiffs JOHAN ERRANT and JOHN DOES 1-100 (together, "Plaintiffs"), individually and on behalf of all other persons similarly situated, by their undersigned attorneys, as and for their Complaint against the Defendant, alleges the following based upon personal knowledge as to themselves and their own action, and, as to all other matters, respectfully alleges, upon information and belief, as follows (Plaintiffs believe that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery):

NATURE OF THE ACTION

1. This action seeks redress for a deceptive and otherwise improper business practice that Defendant, GUITTARD CHOCOLATE CO. (hereinafter, "Defendant" or "GUITTARD"), engages in with respect to the packaging of its "Grand Cacao Drinking Chocolate" (hereinafter, the "Product"). The Product is a gourmet Dutch process cocoa powder and ground chocolate

drink mix with a net weight of 10 oz. The Product is packaged in a container with non-functional slack-fill in violation of the Federal Food Drug & Cosmetic Act ("FDCA") Section 403 (21 U.S.C. 343 (d)), Section 403(d) (21 U.S.C. 343(d)), the Code of Federal Regulations Title 21 part 100, *et seq.* and New York General Business Code § 349 and § 350. The size of the container in comparison to the actual volume of the product contained makes it appear that the consumer is buying more than what is actually being sold. The Product is packaged in a plastic container that is approximately 6.00" in height and 3.00" in diameter. The powder inside the container only measures up to approximately 3.25" from the bottom of the container. Thus, the size of the container is designed to give the impression that there is more in the packaging than there actually is.

2. The price of the Product was $10.99 (or more).

3. The size of the container in relation to the volume of the product contained therein gives the false impression that the consumer is buying more than they are actually receiving.

4. Plaintiffs and Class members viewed Defendant's misleading Product packaging, reasonably relied in substantial part on the representations and were thereby deceived in deciding to purchase the Products for a premium price.

5. Plaintiffs bring this proposed consumer class action on behalf of themselves and all other persons nationwide, who from the applicable limitations period up to and including the present (the "Class Period"), purchased for consumption and not resale of the Guittard® gourmet chocolate and cocoa powder Product.

6. During the Class Period, Defendant manufactured, marketed and sold the Product throughout the United States. Defendant purposefully sold the Product with non-functional slack-fill.

7. Defendant's actions constitute violations of the federal Food Drug & Cosmetic Act ("FDCA") Section 403 (21 U.S.C. 343 (d)), Section 403(d) (21 U.S.C. 343(d)), the Code of Federal Regulations Title 21 part 100, *et seq.* and New York's Deceptive Acts or Practices New York Gen. Bus. Law § 349, as well as those similar deceptive and unfair practices/and/or consumer protection laws in other states.

8. Defendant violated statutes enacted in each of the fifty states and the District of Columbia that are designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising. These statutes are:

a. Alabama Deceptive Trade Practices Act, Ala. Statues Ann. §§ 8-19-1, *et seq.;*
b. Alaska Unfair Trade Practices and Consumer Protection Act, Ak_ Code § 45.50.471, *et seq.;*
c. Arizona Consumer Fraud Act, Arizona Revised Statutes, §§ 44-1521, *et seq.;*
d. Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.;*
e. California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.,* and California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.;*
f. Colorado Consumer Protection Act, Colo. Rev. Stat. § 6 - 1-101, *et seq.;*
g. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.;*
h. Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et seq.;*
i. District of Columbia Consumer Protection Procedures Act, D.C. Code § 28 3901, *et seq.;*
j. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.;*
k. Georgia Fair Business Practices Act, § 10-1-390 *et seq.;*
l. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statues § 480 1, *et seq.,* and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statutes § 481A-1, *et seq.;*
m. Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.;*
n. Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.;*
o. Indiana Deceptive Consumer Sales Act, Indiana Code Ann. §§ 24-5-0.5-0.1, *et seq.;*
p. Iowa Consumer Fraud Act, Iowa Code §§ 714.16, *et seq.;*
q. Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et seq.;*
r. Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et seq.,* and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §§ 365.020, *et seq.;*
s. Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § § 51:1401, *et seq.;*
t. Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et seq.,* and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et seq.,*
u. Maryland Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq.;*
v. Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
w. Michigan Consumer Protection Act, § § 445.901, *et seq.;*

x. Minnesota Prevention of Consumer Fraud Act, Minn. Stat §§ 325F.68, *et seq.;* and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43, *et seq.;*
y. Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.;*
z. Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.;*
aa. Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code §30-14-101, *et seq.;*
bb. Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59 1601, *et seq.,* and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et seq.;*
cc. Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et seq.;*
dd. New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et seq. ;*
ee. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 *1, et seq.;*
ff. New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57 12 *1, et seq. ;*
gg. New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §§ 349, *et seq.;*
hh. North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et seq.;*
ii. North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes §§ 75-1, *et seq.;*
jj. Ohio Deceptive Trade Practices Act, Ohio Rev. Code. Ann. §§ 4165.01. *et seq.;*
kk. Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.;*
ll. Oregon Unfair Trade Practices Act, Rev. Stat § 646.605, *et seq.;*
mm. Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. § § 201-1, *et seq.;*
nn. Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1, *et seq.;*
oo. South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.;*
pp. South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 *1, et seq.;*
qq. Tennessee Trade Practices Act, Tennessee Code Annotated §§ 47-25-101, *et seq.;*
rr. Texas Stat. Ann. §§ 17.41, *et seq.,* Texas Deceptive Trade Practices Act, *et sep.;*
ss. Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1, *et seq.;*
tt. Vermont Consumer Fraud Act, Vt. Stat. Ann. tit.9, § 2451, *et seq.;*
uu. Virginia Consumer Protection Act, Virginia Code Ann. §§59.1-196, *et seq.;*
vv. Washington Consumer Fraud Act, Wash. Rev, Code § 19.86.010, *et seq.;*
ww. West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-6-101, *et seq.;*
xx. Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100. 18, *et seq.;*
yy. Wyoming Consumer Protection Act, Wyoming Stat. Ann. §§40-12-101, *et seq.*

9. Defendant has been unjustly enriched as a result of its conduct. Through these unfair and deceptive practices, GUITTARD CHOCOLATE CO. has collected millions of dollars from the sale of its Product that it would not have otherwise earned.

JURISDICTION AND VENUE

10. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a member of the putative

class is a citizen of a different state than Defendant, and the amount in controversy exceeds the sum or value of $5,000,000, excluding interest and costs. *See* 28 U.S.C. § 1332(d)(2).

11. The Court has jurisdiction over the federal claims alleged herein pursuant to 28 U.S.C § 1331 because it arises under the laws of the United States.

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

13. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C § 1332 because the matter in controversy exceeds the sum or value of $75,000 and is between citizens of different states.

14. The Court has personal jurisdiction over Defendant because its Product is advertised, marketed, distributed and sold throughout New York State; Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State; Defendant is authorized to do business in New York State; and Defendant has sufficient minimum contacts with New York and/or otherwise has intentionally availed itself of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendant is engaged in substantial and not isolated activity within New York State.

15. Venue is proper in this district pursuant to 28 U.S.C § 1391(a) and (b), because a substantial part of the events giving rise to Plaintiff ERRANT's claims occurred in this District, and Defendant is subject to personal jurisdiction in this District. Plaintiff ERRANT purchased Defendant's Product in New York County. Moreover, Defendant distributed, advertised, and sold the Product, which are the subject of the present Complaint, in this District.

PARTIES

Plaintiffs

16. Plaintiff JOHAN ERRANT is, and at all relevant times hereto has been a resident of the state of New York and resides in New York County. Plaintiff ERRANT was exposed to Defendant's Product packaging, and, in reliance on its representations, purchased the slack-filled Product for personal consumption within the State of New York. Specifically, within the twelve month period prior to the filing of this Complaint, Plaintiff ERRANT purchased the Product at Westside Market in the Lower East Side neighborhood in New York County. Plaintiff ERRANT purchased the Product for the premium price of $10.99 (or more), and was financially injured as a result of Defendant's deceptive conduct as alleged herein. Further, should Plaintiff ERRANT encounter any Guittard® gourmet chocolate and cocoa powder Products in the future, he could not rely on the truthfulness of the packaging, absent corrective changes to the packaging. However, Plaintiff ERRANT would still be willing to purchase the current formulation of the Guittard® Product, absent the price premium, so long as Defendants engage in corrective advertising. The Product purchased by Plaintiff ERRANT is substantially similar to all the other Products, is similarly packaged in a misleading container and contains non-functional slack-fill in violation of New York law; and he has standing to represent purchasers of the Product.

17. Plaintiffs JOHN DOES 1-100 are, and at all times relevant hereto has been, citizens of the any of the fifty states and the District of Columbia. During the Class Period, Plaintiffs JOHN DOES 1-100 purchased the Products for personal consumption or household use within the United States. Plaintiffs purchased the Products at a premium price and were financially injured as a result of Defendant's deceptive conduct as alleged herein.

Defendant

18. Defendant GUITTARD CHOCOLATE CO. is a corporation organized under the laws of California with its headquarters at 10 Guittard Road, Burlingame, CA 94010 and an address for service of process located at the same address. GUITTARD CHOCOLATE CO. manufactured, advertised, marketed and sold the Product and other chocolate products to millions of consumers nationwide, including in New York.

FACTUAL ALLEGATIONS

19. Defendant GUITTARD CHOCOLATE CO. develops, manufactures and distributes various types of chocolate intended for different purposes. Defendant sells the Product at many gourmet specialty stores, supermarket chains, convenience stores and major retail outlets throughout the United States, including but not limited to Amazon.com, Whole Foods and Wegman's.

20. Pursuant to C.F.R. 100.100:

> In accordance with section 403(d) of the act, a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.
>
> (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:
>
> (1) Protection of the contents of the package;
>
> (2) The requirements of the machines used for enclosing the contents in such package;
>
> (3) Unavoidable product settling during shipping and handling;

> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
>
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
>
> (6) Inability to increase level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other non-mandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices

21. Defendant has routinely employed slack-filled packaging containing non-functional slack-fill to mislead consumers into believing that they were receiving more than they actually were.

22. Defendant lacked any lawful justification for doing so.

23. Within the twelve month period prior to filing, Plaintiff ERRANT purchased the Product for the purchase price of $10.99 (or more). The plastic container that he purchased was approximately 6.00” in height with a diameter of 3.00”. The powder inside the container only measures up to approximately 2.75” from the bottom of the container. Thus, the size of the container is designed to give the impression that there is more in the packaging than there actually is.

24. The Product and packaging are shown below, with a line indicating where the chocolate and cocoa powder approximately measures:


Guittard
EST 1868 • SAN FRANCISCO
GRAND CACAO
DRINKING CHOCOLATE
Sweet Ground Cocoa
RARE RED DUTCH PROCESS
COCOA POWDER & GROUND CHOCOLATE
FOR HOT CHOCOLATE AND BAKING
NON GMO* • PEANUT FREE • GLUTEN FREE

A mere visual estimate shows that the contents barely fill up over half of the container. In making their purchase, Plaintiffs and members of the proposed Class relied on the size of the container to believe that the entire volume of the packaging would be filled to capacity with gourmet chocolate powder.

25. The volume capacity of the container is approximately 42.41 cubic inches. The approximate volume of powder contained is only 22.97 cubic inches, leaving a difference 19.44 cubic inches. There is approximately 46% non-functional slack-fill.

26. The size of the container in relation to the actual volume of the product contained therein was intended to mislead the consumer into believing the consumer was getting more of the product than what was actually in the container.

27. There is no doubt that there is no practical reason purported for the non-functional slack-fill used to package the Product other than to mislead consumers as to the actual volume of chocolate powder in the Product.

28. As a result of Defendant's deception, consumers – including Plaintiffs and members of the proposed Class – have purchased a Product that contains non-functional slack-fill. Moreover, they have paid a premium for the Product over other chocolate and cocoa powders sold in the market. At $10.99, the 10 ounce Product costs almost $1.10 per ounce. A sample of other chocolate and cocoa powder products are shown below:

BRAND	PRICE	SELLER
Guittard® Grand Cacao Drinking Chocolate	**$10.99/10 ounces = $1.10/ounce**	**Amazon**
Nestle® Rich Chocolate Hot Cocoa Mix	$4.78/27.7 ounces = $0.17/ounce	Amazon
Cadbury® Drinking Chocolate	$8.99/9 ounces = $1.00/ounce	Amazon

29. In the alternative, Plaintiffs and members of the Class are damaged by the percentage of non-functional slack-fill relative to the purchase price. Thus, given the 46% non-functional slack-fill for a $10.99 container, Plaintiffs and members of the proposed Class are owed $5.06 for each container purchased.

30. Under the Federal Food Drug and Cosmetic Act (herein "FDCA"), the term "false" has its usual meaning of "untruthful," while the term "misleading" is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire food is misbranded. No other statement in the labeling cures a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

31. Defendant's packaging and advertising of the Product violates various state laws against misbranding. New York State law broadly prohibits the misbranding of food in language identical to that found in regulations promulgated pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*:

> Pursuant to N.Y. AGM. LAW § 201, "[f]ood shall be deemed to be misbranded: 1. If its labeling is false or misleading in any particular… 4. If its container is so made, formed, colored or filled as to be misleading."

32. Defendant's Product is misbranded under New York law because it misled Plaintiffs and members of the proposed Class about the volume of the Product within the container in comparison to the size of the Product's packaging. The size of the container in relation to the actual amount of the Product contained therein gives the false impression that the consumer is buying more than they are actually receiving.

33. The types of misrepresentations made above would be considered by a reasonable consumer when deciding to purchase the Product. A reasonable person would attach importance to whether Defendant's Product is "misbranded," *i.e.,* not legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

34. Plaintiffs did not know, and had no reason to know, that the Product contained non-functional slack fill.

35. Defendant's Product packaging was a material factor in Plaintiffs' and Class members' decisions to purchase the Products. Based on Defendant's Product packaging, Plaintiffs and members of the proposed Class believed that they were getting more of the Product than was actually being sold. Had Plaintiff ERRANT known that Defendant's packaging contained non-functional slack-fill, he would not have purchased the Product.

36. Defendant's Product packaging as alleged herein is deceptive and misleading and was designed to increase sales of the Product. Defendant's misrepresentations are part of its systematic product packaging practice.

37. At the point of sale, Plaintiffs and Class members did not know, and had no reason to know, that the Product was misbranded as set forth herein, and would not have bought the Product had they known the truth about it.

38. Defendant's non-functional slack-fill packaging is misleading and in violation of FDA and consumer protection laws of each of the fifty states and the District of Columbia, and the Product at issue is misbranded as a matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held or sold in the United States. Plaintiffs and Class members would not have bought the Product had they known it was misbranded and illegal to sell or possess.

39. As a result of Defendant's misrepresentations, Plaintiffs and millions of others throughout the United States purchased the Product.

40. Plaintiffs and members of the proposed Class (defined below) have been damaged by Defendant's deceptive and unfair conduct in that they purchased a Product with non-

functional slack-fill and paid a price premium they otherwise would not have paid had Defendant not misrepresented the Product's actual size.

CLASS ACTION ALLEGATIONS

The Nationwide Class

41. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class (the "Class"):

> All persons or entities in the United States who made retail purchases of the Product in packages containing non-functional slack-fill, specifically containers containing 10 ounces of chocolate and cocoa powder, during the applicable limitations period.

The New York Class

42. Plaintiff JOHN DOE (NEW YORK) seeks to represent a class consisting of the following subclass (the "New York Class"):

> All persons or entities in the United States who made retail purchases of the Product in packages containing non-functional slack-fill, specifically containers containing 10 ounces of chocolate and cocoa powder, during the applicable limitations period.

43. The proposed Classes exclude current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, assigns, and any entity in which it has or has had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

44. The members of the proposed Classes are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through the appropriate discovery, Plaintiffs believe that there are thousands of members in the proposed Classes. Other members of the Classes may be identified from records maintained by Defendant and may be notified of the pendency of this

action by mail, or by advertisement, using the form of notice similar to that customarily used in class actions such as this.

45. Plaintiffs' claims are typical of the claims of the members of the Classes as all members of the Classes are similarly affected by Defendant's wrongful conduct.

46. Plaintiffs will fairly and adequately protect the interests of the members of the Classes in that they have no interests antagonistic to those of the other members of the Classes. Plaintiffs have retained experienced and competent counsel.

47. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages sustained by individual Class members may be relatively small, the expense and burden of individual litigation make it impracticable for the members of the Classes to individually seek redress for the wrongful conduct alleged herein. If Class treatment of these claims were not available, Defendant would likely unfairly receive hundreds of thousands of dollars or more in improper charges.

48. Common questions of law and fact exist as to all members of the Classes and predominate over any questions solely affecting individual members of the Classes. Among the common questions of law fact to the Classes are:

i. Whether Defendant labeled, packaged, marketed, advertised and/or sold the Product to Plaintiffs, and those similarly situated, using false, misleading and/or deceptive packaging and labeling;

ii. Whether Defendant's action constitute violations of 16 C.F.R. 100, *et seq.;*

iii. Whether Defendant's actions constitute violations of the New York General Business Law § 349;

iv. Whether Defendant omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising and/or sale of the Product;

v. Whether Defendant's labeling, packaging, marketing, advertising and/or selling of the Product constituted an unfair, unlawful or fraudulent practice;

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

vii. Whether the members of the Classes have sustained damages as a result of Defendant's wrongful conduct;

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

ix. Whether Defendant has been unjustly enriched by its scheme of using false, misleading and/or deceptive labeling, packaging or misrepresentations, and;

x. Whether Defendant should be enjoined from continuing its unlawful practices.

49. The class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class action.

50. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by any individual class member are too small to make it economically feasible for an individual class member to prosecute a separate action, and it is desirable for judicial efficiency to concentrate the litigation of the claims in this forum. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action.

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

52. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Classes predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

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

54. Defendant's conduct is generally applicable to the Classes as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Classes as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Classes as a whole appropriate.

CAUSES OF ACTION

COUNT I

INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

55. Plaintiff ERRANT repeats and realleges each and every allegation contained above as if fully set forth herein and further alleges the following:

56. Plaintiff ERRANT brings this claim individually and on behalf of the other members of the Class for an injunction for violations of New York's Deceptive Acts or Practices Law, General Business Law ("NY GBL") § 349.

57. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

58. Under the New York Gen. Bus. Code § 349, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law [§] 349 . . . claims, it was error. Justifiable reliance by the Plaintiff is not an element of the statutory claim." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

59. Any person who has been injured by reason of any violation of NY GBL § 349 may bring an action in her own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the Defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing Plaintiff.

60. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Product in packages resulting in approximately 46% slack-fill are unfair, deceptive and misleading and are in violation of the NY GBL § 349 and 21 C.F.R. 100.100 in that said Product is misbranded. 21. C.F.R. 100.100 provides in part:

> In accordance with section 403(d) of the [FDCA], a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading. (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-

fill is the difference between the actual capacity of a container and the volume of product contained within.

61. The foregoing deceptive acts and practices were directed at consumers.

62. Defendant should be enjoined from packaging its Product with 46% slack-fill as described above pursuant to NY GBL § 349 and 21 C.F.R. 100.100.

63. Plaintiff ERRANT, on behalf of himself and all others similarly situated, respectfully demands a judgment enjoining Defendant's conduct, awarding costs of this proceeding and attorneys' fees, as provided by NY GBL, and such other relief as this Court deems just and proper.

COUNT II

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

64. Plaintiff ERRANT repeats and realleges each and every allegation contained above as if fully set forth herein and further alleges as follows:

65. Plaintiff ERRANT brings this claim individually and on behalf of the other members of the Class for violations of New York's Deceptive Acts or Practices Law, Gen. Bus. Law § 349.

66. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misbranding its Product as appearing to contain more in the packaging than is actually included.

67. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Product in packages resulting in approximately 46% slack-fill are unfair, deceptive and misleading and are in violation of 21 CFR 100.100 in that said Product is misbranded.

68. The foregoing deceptive acts and practices were directed at consumers.

69. Plaintiff ERRANT and the other Class members suffered a loss as a result of Defendant's deceptive and unfair trade acts. Specifically, as a result of Defendant's deceptive and unfair acts and practices, Plaintiff ERRANT and the other Class members suffered monetary losses associated with the purchase of the Product, i.e., receiving only approximately 54% of the capacity of the packaging due to approximately 46% slack-fill.

COUNT III

NEGLIGENT MISREPRESENTATION
(All States and the District of Columbia)

70. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein and further allege as follows:

71. Defendant, directly or through its agents and employees, made false representations, concealment and nondisclosures to Plaintiffs and members of the proposed Classes. Defendant, through its labeling, advertising and marketing of the Product, makes uniform representations regarding the Product.

72. Defendant as the manufacturer, packager, labeler and initial seller of the Guittard® gourmet chocolate and cocoa powder Product purchased by the Plaintiffs had a duty to disclose the true nature of the Product and not sell them with non-functional slack-fill. Defendant had exclusive knowledge of material facts not known or reasonably accessible to the Plaintiffs; Defendant actively concealed material facts from the Plaintiffs and Defendant made partial representations that are misleading because some other material fact has not been disclosed. Defendant's failure to disclose the information it had a duty to disclose constitutes material misrepresentations and materially misleading omissions which misled the Plaintiffs who relied on Defendant in this regard to disclose all material facts accurately and truthfully and fully.

73. Plaintiffs and members of the Class reasonably relied on Defendant's representation that its Product contains more product than actually packaged.

74. In making the representations of fact to Plaintiffs and members of the proposed Classes described herein, Defendant has failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendant's negligence and carelessness.

75. Defendant, in making the misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true. Defendant made and intended the misrepresentations to induce the reliance of Plaintiffs and members of the proposed Classes.

76. Plaintiffs and members of the proposed Classes would have acted differently had they not been mislead – i.e. they would not have paid money for the Product in the first place.

77. Defendant has a duty to correct the misinformation it disseminated through its advertising of the Product. By not informing Plaintiffs and members of the Class, Defendant breached its duty. Defendant also profited financially as a result of this breach.

78. Plaintiffs and members of the proposed Classes relied upon these false representations and non-disclosures by Defendant when purchasing the Product, upon which reliance was justified and reasonably foreseeable.

79. As a direct and proximate result of Defendant's wrongful conduct, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for the Product, and any interest that would have been accrued on all those monies, all in an amount to be determined according to proof at time of trial.

80. Defendant acted with intent to defraud, or with reckless or negligent disregard of the rights of Plaintiffs and members of the proposed Classes.

81. Plaintiffs and members of the proposed Classes are entitled to punitive damages.

82. Therefore, Plaintiffs pray for relief as set forth below.

COUNT IV

COMMON LAW FRAUD
(All States and the District of Columbia)

83. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein and further allege as follows:

84. Defendant intentionally made materially false and misleading representations regarding the size, volume and contents of the Product.

85. Plaintiffs and the members of the proposed Classes were induced by, and relied on, Defendant's false and misleading packaging, representations and omissions and did not know at the time that they were purchasing the product that they were only purchasing an amount of product that was much less than the size of the container in which the product was packaged.

86. Defendant knew or should have known of its false and misleading labeling, packaging and misrepresentations and omissions. Defendant nevertheless continued to promote and encourage customers to purchase the product in a misleading and deceptive manner.

87. Plaintiffs and members of the proposed Classes have been injured as a result of Defendant's fraudulent conduct.

88. Defendant is liable to Plaintiffs and members of the proposed Class for damages sustained as a result of Defendant's fraud, in an amount to be determined at trial.

COUNT V

UNJUST ENRICHMENT
(All States and the District of Columbia)

89. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein and further allege as follows:

90. As a result of Defendant's deceptive, fraudulent and misleading labeling, packaging, advertising, marketing and sales of its Product, Defendant was enriched, at the expense of Plaintiffs and members of the proposed Classes, through the payment of the purchase price for Defendant's Product.

91. Plaintiffs and members of the proposed Class conferred a benefit on Defendant through purchasing the Product, and Defendant has knowledge of this benefit and has voluntarily accepted and retained the benefits conferred on it.

92. Defendant will be unjustly enriched if it is allowed to retain such funds, and each Class member is entitled to an amount equal to the amount they enriched Defendant and for which Defendant has been unjustly enriched.

93. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiffs, and all others similarly situated, in light of the fact that the quantity of the Product purchased by Plaintiff and the Class, was not what Defendant purported it to be by its labeling and packaging. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiff, and all others similarly situated, for 46% of the purchase price of Product, which represents the percentage of the amount of product actually received (54%) to the size of the packaging.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, prays for relief and judgment against Defendant as follows:

(A) For an Order certifying the nationwide Class and under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representative of the Classes and Plaintiffs' attorneys as Class Counsel to represent members of the Classes;

(B) For an Order declaring the Defendant's conduct violates the statutes referenced herein;

(C) For an order finding in favor of Plaintiffs and the Classes;

(D) For compensatory and punitive damages in amounts to be determined by the Court and/or jury;

(E) For prejudgment interest on all amounts awarded;

(F) For an order of restitution and all other forms of equitable monetary relief;

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

(H) For an Order awarding Plaintiffs and the Classes their reasonable attorneys' fees and expenses and costs of suit; and

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

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.

Dated: November 13, 2015

Respectfully submitted,

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