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*Attorney for Plaintiffs*

7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 CHELSEA GARLAND AND LEROY  
10 JACOBS, individually and on behalf of  
11 all others similarly situated,

12 Plaintiffs,

13 - against -

14 THE KROGER CO.,

15 Defendant.

Case No. '24CV0240 LL BLM

Class Action Complaint

Jury Trial Demanded

16 Plaintiffs Chelsea Garland (“Plaintiff Garland”) and Leroy Jacobs (“Plaintiff  
17 Jacobs”) allege upon information and belief, except for allegations about Plaintiffs,  
18 which are based on personal knowledge:

19 **I. CONSUMER DEMAND FOR NATURAL FLAVORS**

20 1. According to the Wall Street Journal, “As consumer concern rises over  
21 artificial ingredients, more food companies are reconstructing recipes” to remove  
22 artificial flavors.<sup>1</sup>

23 2. According to Nielsen, the absence of artificial flavors is very important  
24 for over 40% of respondents to their Global Health & Wellness Survey.

25 3. The trade journal, Perfumer & Flavorist, described “The Future of  
26 Artificial Flavors & Ingredients” as bleak, given consumer opposition to these

27 <sup>1</sup> Lauren Manning, How Big Food is Using Natural Flavors to Win Consumer Favor,  
28 Wall Street Journal.

1 synthetic ingredients.<sup>2</sup>

2 4. Mintel concluded that avoidance of artificial flavors is just as strong as  
3 consumers' desire for natural flavors, in "Artificial: Public Enemy No. 1."<sup>3</sup>

4 5. Surveys by Nielsen, New Hope Network, and Label Insight confirmed  
5 that between sixty and eighty percent of the public tries to avoid artificial flavors,  
6 believing them to be potentially unhealthy and contributing to a wide range of  
7 maladies.

8 6. Over eighty percent of them believe foods with artificial flavors are less  
9 healthy than those with only natural flavors.

10 7. One expert noted that "When [consumers] think about whether a food is  
11 healthy or not, [they] likely consider whether or not it has the word 'artificial' in the  
12 ingredients list."

## 13 **II. LEGAL BACKGROUND**

14 8. Over 100 years ago, consumers were similarly concerned, based on the  
15 reports of muckraking journalists, about the harmful and untested chemicals that were  
16 added to their food.

17 9. In response to this unregulated environment where synthetic molecules  
18 manufactured in laboratories substituted for the wholesome ingredients promoted on  
19 food packaging, the Pure Food and Drug Act of 1906 required disclosure of artificial  
20 flavoring to ensure the public would get what they paid for.

21 10. These requirements were strengthened when Congress adopted the  
22 Federal Food, Drug and Cosmetic Act ("FFDCA") in 1938. 21 U.S.C. § 301 *et seq.*

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23 <sup>2</sup> Jim Kavanaugh, *The Future of Artificial Flavors & Ingredients*, *Perfumer &*  
24 *Flavorist*, June 12, 2017.

25 <sup>3</sup> Alex Smolokoff, *Natural Color and Flavor Trends in Food and Beverage*, *Natural*  
26 *Products Insider*, Oct. 11, 2019; Thea Bourianne, *Exploring Today's Top Ingredient*  
27 *Trends and How They Fit into Our Health-Conscious World*, March 26-28, 2018;  
28 Nancy Gagliardi, *Consumers Want Healthy Foods – And Will Pay More For Them*,  
*Forbes*, Feb 18, 2015; Lauren Manning, *How Big Food is Using Natural Flavors to*  
*Win Consumer Favor*, *Wall Street Journal*.

1 11. California and Illinois adopted these laws and regulations through the  
2 Sherman Food, Drug, and Cosmetic Law (“Sherman Law”) and Illinois Food, Drug  
3 and Cosmetic Act (“IFDCA”). Cal. Health & Safety Code (“HSC”) § 109875, *et seq.*;  
4 410 ILCS 620 *et seq.*

5 12. The newly established Food and Drug Administration (“FDA”) was  
6 aware of how companies used advanced scientific knowledge to substitute dangerous  
7 and unhealthy flavoring chemicals in place of promoted ingredients like fruits and  
8 natural fruit flavors.

9 13. Beyond the potential to cause physical harm, these synthetic substances  
10 were significantly cheaper than the natural ingredients and natural flavors they  
11 replaced.

12 14. To facilitate an honest marketplace and protect consumers, the rules  
13 required that the source of a food’s taste, whether the pictured ingredients, natural  
14 flavors from those ingredients, or completely synthetic sources, be conspicuously  
15 disclosed to the buyer as part of a food’s name. 21 C.F.R. § 101.22(i)(1).

16 15. According to one scholar, this rule “is premised on the simple notion that  
17 consumers value ‘the real thing’ versus a close substitute and should be able to rely  
18 on the label to readily distinguish between the two.”<sup>4</sup>

19 16. This was supported by research showing that “consumers initially [] rely  
20 on extrinsic cues such as visual information on labels and packaging” to make quick  
21 purchasing decisions.<sup>5</sup>

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22  
23 <sup>4</sup> Steven Steinborn, Hogan & Hartson LLP, Regulations: Making Taste Claims, PreparedFoods.com, August 11, 2006.

24 <sup>5</sup> Lancelot Miltgen et al., “Communicating Sensory Attributes and Innovation through  
25 Food Product Labeling,” *Journal of Food Products Marketing*, 22.2 (2016): 219-239;  
26 Helena Blackmore et al., “A Taste of Things to Come: The Effect of Extrinsic and  
27 Intrinsic Cues on Perceived Properties of Beer Mediated by Expectations,” *Food  
28 Quality and Preference*, 94 (2021): 104326; Okamoto and Ippetta, “Extrinsic  
Information Influences Taste and Flavor Perception: A Review from Psychological  
and Neuroimaging Perspectives,” *Seminars in Cell & Developmental Biology*, 24.3,

1 17. To reach this goal, the FDA defined a flavor as a substance which imparts  
2 taste. 21 C.F.R. §§ 101.22(a)(1) and (3).

3 18. Then, it defined natural flavor as the “essential oil, oleoresin, essence or  
4 extractive” from fruits or vegetables, “whose significant function [] is flavoring rather  
5 than nutritional.” 21 C.F.R § 101.22(a)(3).

6 19. In contrast, artificial flavor refers to “any substance, the function of  
7 which is to impart flavor” from synthetic or chemical sources. 21 C.F.R §  
8 101.22(a)(1).

9 **III. FLAVOR OF BLUEBERRIES**

10 20. Taste is a combination of sensations arising from specialized receptor  
11 cells in the mouth.<sup>6</sup>

12 21. Taste is complex, because, for instance, the taste of sour includes the  
13 sourness of vinegar (acetic acid), sour milk (lactic acid), lemons (citric acid), apples  
14 (malic acid), and wines (tartaric acid).

15 22. Each of those acids is responsible for unique sensory characteristics of  
16 sourness.

17 23. Fruit flavors, including the flavor of blueberries, are the sum of the  
18 interaction between their nonvolatile compounds, such as sugars and organic acids,  
19 and volatile compounds, including aromatic hydrocarbons, aldehydes, ketones and  
20 esters.

21 24. The prototypical sweet, tart, sour and fruity taste of blueberries is based  
22 on the interaction of their free sugars, glucose and fructose, with its main organic  
23 acids of malic acid and secondary predominant organic acids of citric acid and quinic  
24 acid.<sup>7</sup>

25  
26 \_\_\_\_\_  
27 Academic Press, 2013.

28 <sup>6</sup> Gary Reineccius, *Flavor Chemistry and Technology* § 1.2 (2d ed. 2005).

<sup>7</sup> Y.H. Hui, et al., *Handbook of Fruit and Vegetable Flavors*, p. 693 (2010).

	<b>Fruit</b>	<b>First Predominant Acids</b>	<b>Second Predominant Acids</b>
1	Apple	Malic Acid (95%)	Tartaric Acid, Fumaric Acid
2	Apricot	Malic Acid (70%)	Citric Acid, Tartaric Acid
3	Blackberry	Malic Acid	Citric Acid
4	Blueberry (Highbush, Jersey)	Malic Acid	Citric Acid, Quinic Acid
5	Cherry	Malic Acid (94%)	Tartaric Acid
6	Cherry (Tropical)	Malic Acid (32%)	Citric Acid
7	Chili Pepper (habanero)	Citric Acid	Malic Acid, Succinic Acid
8	Coconut	Malic Acid	Citric Acid
9	Cranberries (American varietals)	Malic Acid (64%)	Citric Acid
10			
11	Dragon fruit	Malic Acid	Citric Acid
12	Grape	Malic Acid (60%)	Tartaric Acid
13	Grapefruit	Citric Acid	Malic Acid
14	Guava	Citric Acid	Malic Acid
15	Kiwi	Quinic Acid, Citric Acid	Malic Acid
16	Lemon	Citric Acid	Malic Acid
17	Lime	Citric Acid	Malic Acid
18	Mango	Citric Acid	Malic Acid, Tartaric Acid
19	Orange	Citric Acid	Malic Acid
20	Peach	Malic Acid (73%)	Citric Acid
21	Pear	Malic Acid (77%)	Citric Acid
22	Pineapple	Citric Acid	Malic Acid
23	Pomegranate	Malic Acid (>50%)	Citric Acid (>22%)
24	Raspberry	Citric Acid	Malic Acid, Tartaric Acid
25	Strawberry (wild pentaploid, Turkish cultivars)	Malic Acid, Tartaric Acid	Citric Acid
26	Tamarind	Tartaric Acid	Citric Acid, Malic Acid
27	Watermelon	Malic Acid (99%)	Fumaric Acid

25. L-Malic acid gives blueberries their characteristic tart, sour, sweet and  
fruity taste valued by consumers.

26. The amount and proportion of malic acid is a critical factor in producing



1 the preferred tart, sweet and sour blueberry taste valued by consumers.

2 **IV. DESPITE PROMOTING BLUEBERRIES AND NATURAL FLAVOR,**  
3 **TASTE IS FROM ARTIFICIAL FLAVORING**

4 27. According to Paul Manning, president of Sensient Technologies,  
5 “Consumer desire for naturally flavored products is an emerging trend.”<sup>8</sup>

6 28. To capture this trend, The Kroger Co. (“Defendant”) sells Blueberry  
7 Fruit & Grain Cereal Bars in various shades of blue packaging with pictures of fresh  
8 blueberries, bursting from a bar with dark blue filling, described as “Naturally  
9 Flavored” and “Made with Real Fruit” under the Kroger brand (“Product”).



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23 29. However, “Naturally Flavored” and “Made with Real Fruit” are false,  
24 deceptive, and/or misleading, because the Product uses artificial flavoring ingredients  
25 to create, simulate, resemble and reinforce its filling’s blueberry taste.

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27  
28 <sup>8</sup> Keith Nunes, Using natural ingredients to create authentic, fresh flavors, Food  
Business News, Sept. 20, 2018.

1 30. This is not disclosed on the front label or the fine print on the back or  
2 side in the ingredient list.

3 31. While the ingredient list in fine print indicates the filling contains  
4 blueberries and natural flavor, it also includes the synthetic form of malic acid.



**INGREDIENTS:** BLUEBERRY FLAVORED FILLING (SUGAR, GLYCERIN, CORN SYRUP, WATER, BLUEBERRY PUREE, APPLE PUREE, MALTODEXTRIN, APPLE POWDER, PECTIN, XANTHAN GUM, MALIC ACID, CITRIC ACID, SODIUM ALGINATE, DICALCIUM PHOSPHATE, SODIUM CITRATE, MONO AND DIGLYCERIDES, ASCORBIC ACID - A PRESERVATIVE, POTASSIUM SORBATE - A PRESERVATIVE, NATURAL FLAVOR, COLORS [RED 40, BLUE 1]), WHOLE OAT

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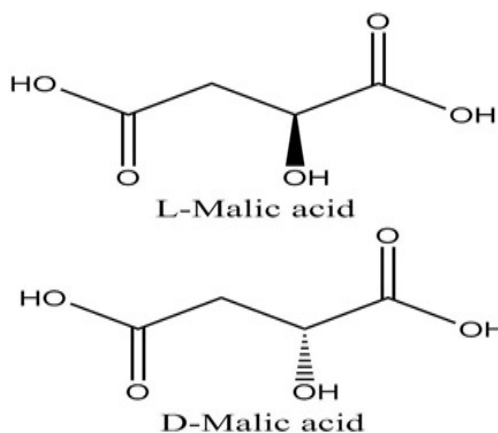
20 32. Since the ingredients are listed in order of predominance by weight,  
21 listing “Malic Acid” before “Natural Flavor” means the filling contains more artificial  
22 fruit flavoring than natural fruit flavor. 21 C.F.R. § 101.4(a)(1).

23 A. Two Types of Malic Acid

24 33. Malic acid has two isomers, or arrangements of atoms, L-Malic Acid and  
25 D-Malic Acid. 21 C.F.R. § 184.1069.

26 34. These are right and left-hand versions of the same molecular formula.<sup>9</sup>

27  
28 <sup>9</sup> Dan Chong and Jonathan Mooney, Chirality and Stereoisomers (2019).



8 35. L-Malic Acid occurs naturally in blueberries and is responsible for their  
9 characterizing fruity, sour, tart and/or sweet taste.

10 36. D-Malic Acid does not occur naturally anywhere.

11 37. D-Malic Acid is found as a racemic mixture of the D and L isomers, or  
12 DL-Malic Acid.

13 38. The production of DL-Malic Acid begins with petroleum.

14 39. It involves a catalytic process with numerous chemical reactions,  
15 including heating maleic anhydride with water under extreme pressure at 180°C.

16 40. This results in an equilibrium mixture of malic and fumaric acids.

17 41. The soluble fumaric acid is filtered and recycled, and the synthetic, or  
18 DL-, malic acid is concentrated and crystallized.

19 B. Distinguishing L- from DL- Malic Acid

20 42. Since the two types of malic acid are closely related, companies may  
21 replace naturally occurring L-Malic Acid with the lower cost and synthetic DL-Malic  
22 Acid.

23 43. According to Wilhelmsen, where adulteration involves the direct  
24 addition of a foreign substance, well-defined detection limits, sufficiently validated  
25 detection methods and knowledge the adulterant and/or its marker are not found in  
26 the food product makes detection possible.<sup>10</sup>

27 <sup>10</sup> Eric C. Wilhelmsen, "Food Adulteration," in Food Science and Technology, Marcel  
28 Dekker (2004).



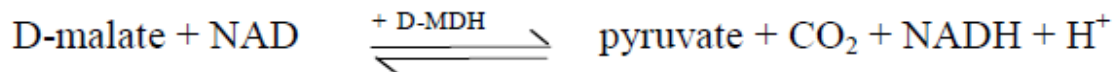
1 44. Any detection is indicative of adulteration, without complicated  
2 statistical or other analysis.

3 45. Since plants do not synthesize D-Malic acid, its presence in certain foods  
4 above established thresholds indicates synthetic malic acid has been added.

5 46. The most accepted method used to determine if a food contains DL-  
6 Malic Acid is based, in part, on a standard adopted by the European Union for the  
7 enzymatic determination of the total content of D-malic acid in fruit juices and related  
8 products. EN 12138:1997.

9 47. This enzymatic approach is based on D-malate dehydrogenase (“D-  
10 MDH”), an enzyme that oxidizes D-malic acid (“D-malate”) to pyruvate and carbon  
11 dioxide in the presence of an appropriate cofactor.

12 48. D-malate is oxidized by nicotinamide adenine dinucleotide (“NAD”) to  
13 oxaloacetate.



15  
16 49. The oxaloacetate formed by this reaction is split into pyruvate and  
17 carbonic acid.

18 50. The quantity of NADH formed is proportional to the concentration of D-  
19 malic acid and measured at a wavelength of 334, 340 or 365 nm.

20 51. Laboratory analysis of the Product’s filling was performed based on this  
21 enzymatic method in accordance with accepted industry standards and protocols.

22 52. Applying D-MDH, D-Malic acid was preferentially oxidized over L-  
23 Malic acid.

24 53. The result was that the synthetic D-isomer of malic acid was identified,  
25 indicating the Product used artificial, DL-Malic Acid and not L-Malic Acid.

26 54. This confirmed the Product contains more artificial fruit flavoring than  
27 natural fruit flavoring, because malic acid is listed ahead of natural flavor on the  
28

1 ingredient list.

2 55. The combination of DL-Malic Acid with the free sugars from blueberries  
3 is not equivalent to the taste of blueberries and natural flavors.

4 56. The addition of DL-Malic Acid imparts, creates, simulates, resembles  
5 and/or reinforces the characteristic tart, fruity, sweet and sour taste that blueberries  
6 are known for.

7 57. DL-Malic Acid is not a “natural flavor” as defined by federal and state  
8 regulations, because it is not from a fruit, vegetable, or other natural source, but from  
9 petroleum, made through chemical reactions.

10 58. DL-Malic Acid is an artificial flavoring ingredient.

11 59. DL-Malic Acid does not supplement, enhance, or modify the original  
12 taste of blueberries, because it is a core component of its taste. 21 C.F.R. §  
13 170.3(o)(11).

14  
15 **V. “NATURALLY FLAVORED” DESCRIPTION IS MISLEADING**

16 60. The consumer protection statutes of California and Illinois are based on  
17 the standards of the Federal Trade Commission (“FTC”), which recognizes the effect  
18 of advertising includes not just representations made or suggested by words and  
19 images, “but also the extent to which [it] fails to reveal facts material in the light of  
20 such representations.” 15 U.S.C. § 55(a)(1).

21 61. California and Illinois apply the FTC standard in considering whether a  
22 food’s label is misleading.

23 62. These laws consider not only representations made or suggested by  
24 statements and images, but also the extent to which they fail to prominently and  
25 conspicuously reveal facts relative to the proportions or absence of certain ingredients  
26 or other facts concerning ingredients in the food, which are of material interest to  
27 consumers. HSC § 110290; 410 ILCS 620/2.11.

28 63. The Product’s labeling fails to prominently and conspicuously reveal

1 facts relative to the proportions or absence of blueberries, natural flavor and artificial  
2 flavor.

3 64. This is because “Blueberry – Naturally Flavored” tells consumers the  
4 filling’s taste is from blueberries and natural flavor even though it is provided in part  
5 by DL-Malic Acid, an artificial flavoring ingredient.

6 65. The replacement of blueberries and natural flavor with DL-Malic Acid,  
7 an artificial flavoring ingredient, is of material interest to consumers, because these  
8 ingredients cost more than manufactured chemical compounds and because  
9 consumers seek to avoid artificial flavors.

10 66. The failure to disclose the source of the Product’s blueberry taste  
11 misleads consumers who expect they are buying a product whose taste comes only  
12 from blueberries and natural flavor.

13 67. The Product is “misbranded” and misleads consumers because its  
14 labeling is false or misleading in any particular. 21 U.S.C. § 343(a)(1); HSC § 110660;  
15 410 ILCS 620/11(a).

16 68. The Product is “misbranded” and misleading because even though  
17 consumers will expect its taste to be only from the identified ingredients of blueberries  
18 and natural flavors, its taste comes in part from the artificial flavoring ingredient of  
19 DL-Malic Acid. 21 U.S.C. § 343(a)(1); HSC § 110660; 410 ILCS 620/11(a).

20 69. The Product is “misbranded” and misleading because “Made with Real  
21 Fruit” is a “half-truth,” because even though the filling includes the depicted fruit of  
22 blueberries, it includes artificial flavoring in the form of DL-Malic Acid to supply a  
23 blueberry taste, present in greater amount than added natural flavors. 21 U.S.C. §  
24 343(a)(1); HSC § 110660; 410 ILCS 620/11(a).

25 70. The Product is “misbranded” and misleading because its labeling fails to  
26 conspicuously display the required information that its blueberry taste is provided by  
27 artificial flavoring. 21 U.S.C. § 343(f). HSC § 110705; 410 ILCS 620/11(f).

28 71. The Product is “misbranded” and misleading because it includes the

1 artificial flavoring of DL-Malic Acid but “it [does not] bear[s] labeling stating that  
2 fact.” 21 U.S.C. § 343(k); HSC § 110740; 410 ILCS 620/11(k).

3 72. The Product is “misbranded” and misleading because “Naturally  
4 Flavored Blueberry Fruit & Grain Cereal Bars” is not a truthful or non-misleading  
5 “common or usual name.” 21 U.S.C. § 343(i); HSC § 110720; 410 ILCS 620/11(i).

6 73. “Naturally Flavored Blueberry Fruit & Grain Cereal Bars” does not  
7 “accurately identif[y] or describe[s], in as simple and direct terms as possible, the  
8 basic nature of the food or its characterizing properties or ingredients.” 21 C.F.R. §  
9 102.5(a); 21 C.F.R. § 101.3(b)(2).

10 74. This is because it fails to disclose the source of its blueberry taste, based  
11 on the presence of DL-Malic Acid, an artificial flavoring ingredient which imparts the  
12 taste of blueberries. 21 C.F.R. § 101.22(i)(2).

13 75. Federal and state regulations require that because the filling’s taste is  
14 represented as “Blueberry,” yet contains DL-Malic Acid that imparts the flavor of  
15 blueberries, “Blueberry” is required to “be accompanied by the word(s) ‘artificial’ or  
16 ‘artificially flavored,’” such as “Artificial Blueberry Flavored Fruit & Grain Cereal  
17 Bars” or “Artificially Flavored Blueberry Fruit & Grain Cereal Bars.” 21 C.F.R. §  
18 101.22(i)(2).

19 76. Instead, “Blueberry” is directly above the term, “Naturally Flavored,”  
20 when this is false and misleading, based on the use of DL-Malic Acid, an artificial  
21 flavoring ingredient, to provide a blueberry taste.

22 **VI. CONCLUSION**

23 77. By adding the synthetic ingredient of DL-Malic Acid, purchasers do not  
24 receive a product that is “Naturally Flavored” but one that is artificially flavored.

25 78. The Product could have included more of the highlighted fruit ingredient  
26 of blueberries, L-Malic Acid from blueberries or natural flavoring from sources other  
27 than blueberries but used artificial DL-Malic Acid because it cost less and/or more  
28

1 accurately imparted, provided, simulated, resembled, and reinforced the taste of  
2 blueberries.

3 79. By adding the synthetic ingredient of DL-Malic Acid, purchasers get a  
4 smaller amount of blueberries and natural flavor than what is promised by the front  
5 label.

6 80. Consumers buying fruit filled cereal bars labeled as naturally flavored  
7 without any indication that artificial flavoring supplies the filling's taste are seeking  
8 to avoid synthetic ingredients like DL-Malic Acid, created in a laboratory.

9 81. As a result of the false and misleading representations and omissions, the  
10 Product is sold at a premium price, around \$2.99 for eight bars, excluding tax and  
11 sales, higher than similar products, represented in a non-misleading way, and higher  
12 than it would be sold for absent the misleading representations and omissions.

### 13 PARTIES

14 82. Plaintiff Chelsea Garland is a citizen of San Diego County, California.

15 83. Plaintiff Leroy Jacobs is a citizen of Cook County, Illinois.

16 84. Defendant The Kroger Co. is an Ohio corporation with a principal place  
17 of business in Ohio.

18 85. While Kroger sells leading national brands of products, it also sells many  
19 products under one of its private label brands, Kroger.

20 86. Private label products are made by third-party manufacturers and sold  
21 under the name of the retailer, or its sub-brands.

22 87. Previously referred to as "generic" or "store brand," private label  
23 products have increased in quality, and often are superior to their national brand  
24 counterparts.

25 88. Products under the Kroger brand have an industry-wide reputation for  
26 quality.

27 89. In releasing products under the Kroger brand, Defendant's foremost  
28 criteria was to have high-quality products that were equal to or better than the national



1 brands.

2 90. Kroger gets national brands to produce its private label items due its loyal  
3 customer base and tough negotiating.

4 91. Private label products under the Kroger brand benefit by their association  
5 with consumers' appreciation for the Kroger brand overall.

6 92. That Kroger-branded products met this high bar was or would be proven  
7 by focus groups, which rated them above their name brand equivalent.

8 93. A survey by The Nielsen Co. "found nearly three out of four American  
9 consumers believe store brands [like Kroger] are good alternatives to national brands,  
10 and more than 60 percent consider them to be just as good."

11 94. Private label products generate higher profits for retailers like Kroger  
12 because national brands spend significantly more on marketing, contributing to their  
13 higher prices.

14 95. The development of private label items is a growth area for Kroger, as  
15 they select only top suppliers to develop and produce Kroger products.

16 96. Plaintiffs are like most consumers and prefer foods with natural  
17 ingredients and natural flavors.

18 97. Plaintiffs are like most consumers and try to avoid foods with artificial  
19 flavors, based on the belief they are potentially harmful, not natural and unhealthy.

20 98. Plaintiffs are like most consumers and look to the front label of foods to  
21 see what they are buying and to learn basic information about it.

22 99. Plaintiffs are like most consumers and are accustomed to the front label  
23 of packaging telling them if what they are buying gets its taste from artificial  
24 flavoring.

25 100. Plaintiffs are like most consumers and when they see that a front label  
26 does not disclose artificial flavoring, they expect its taste is from the identified  
27 ingredients and/or natural flavoring.

28 101. Plaintiffs are like most consumers and when they see a label that tells

1 them a food is “Naturally Flavored,” they do not expect its taste to be from artificial  
2 flavoring and/or that it will contain artificial flavoring ingredients.

3 102. Plaintiffs read, saw and relied on the label’s statements of Naturally  
4 Flavored Blueberry Fruit & Grain Cereal Bars in blue packaging with pictures of  
5 blueberries, bursting from a cereal bar with dark blue filling, described as “Made with  
6 Real Fruit,” and expected its filling’s blueberry taste was from blueberries and natural  
7 flavors, not artificial flavor.

8 103. Plaintiffs relied on the omission of artificial flavoring from the front label  
9 as it related to the taste of the Product’s filling.

10 104. Plaintiffs did not expect that in addition to blueberries and natural  
11 flavors, the Product’s fruit filling would use artificial flavoring in the form of the  
12 synthetic compound of DL-Malic Acid to provide its blueberry taste.

13 105. Plaintiffs did not expect that the Product would use DL-Malic Acid in  
14 place of adding more blueberries and natural flavors.

15 106. Plaintiffs bought the Product with the labeling identified here, including  
16 “Naturally Flavored” and “Made With Real Fruit,” on blue packaging with pictures  
17 of blueberries, at around the above-referenced price.

18 107. Plaintiff Garland purchased the Product between January 2020 and  
19 January 2024 at Kroger-owned and controlled stores in San Diego County, California  
20 and/or other areas.

21 108. Plaintiff Jacobs purchased the Product between January 2021 and  
22 January 2024 at Kroger-owned and controlled stores in Illinois.

23 109. Plaintiffs paid more for the Product than they would have had they  
24 known its fruit filling’s taste was from artificial flavoring instead of only from  
25 blueberries and natural flavor, as they would not have bought it or would have paid  
26 less.

27 110. The Product was worth less than what Plaintiffs paid, and they would not  
28 have paid as much absent Defendant’s false and misleading statements and omissions.

1 111. Plaintiffs chose between Defendant’s Product and products represented  
2 similarly, but which did not misrepresent their attributes, features, and/or components.

3 112. Plaintiff Garland intends to, seeks to, and will purchase the Product again  
4 when she can do so with the assurance its representations are consistent with its  
5 attributes, features, and/or composition.

6 113. Plaintiff Garland is unable to rely on the representations not only of this  
7 Product, but other similar cereal bars described as being naturally flavored and/or  
8 made with real fruit, because she is unsure whether those representations are truthful.

9 114. If Defendant’s labeling were to be truthful, Plaintiff Garland could rely  
10 on the labeling of other such products.

11 **JURISDICTION**

12 115. Jurisdiction is based on the Class Action Fairness Act of 2005  
13 (“CAFA”). 28 U.S.C. § 1332(d)(2).

14 116. The aggregate amount in controversy exceeds \$5 million, including any  
15 statutory or punitive damages, exclusive of interest and costs.

16 117. Plaintiff Garland is a citizen of California.

17 118. Defendant is a citizen of Ohio based on its corporate formation and the  
18 location of its principal place of business.

19 119. The class of persons Plaintiff Garland seeks to represent includes persons  
20 who are citizens of a different state from which Defendant is a citizen.

21 120. The members of the proposed class Plaintiff Garland seeks to represent  
22 are more than one hundred, because the Product has been sold at grocery stores owned  
23 and operated by Kroger under the names including Ralphs in this State and online to  
24 citizens of this State.

25 121. The Court has jurisdiction over Defendant because it transacts business  
26 within California and sells the Product to consumers within California from grocery  
27 stores owned and operated by Kroger under the names including Ralphs in this State  
28 and online to citizens of this State.

1 122. Defendant transacts business in California, through the sale of the  
2 Product to citizens of California from grocery stores owned and operated by Kroger  
3 under the names including Ralphs in this State and online to citizens of this State.

4 123. Defendant has committed tortious acts within this State through the  
5 distribution and sale of the Product, which is misleading to consumers in this State.

6 124. Defendant has committed tortious acts outside this State by labeling,  
7 representing and selling the Product in a manner which causes injury to consumers  
8 within this State by misleading them as to its contents, amount and/or quality, by  
9 regularly doing or soliciting business, or engaging in other persistent courses of  
10 conduct to sell the Product to consumers in this State, and/or derives substantial  
11 revenue from the sale of the Product in this State.

12 125. Defendant has committed tortious acts outside this State by labeling the  
13 Product in a manner which causes injury to consumers within this State by misleading  
14 them as to its contents, origin, amount and/or quality, through causing the Product to  
15 be distributed throughout this State, such that it expects or should reasonably expect  
16 such acts to have consequences in this State and derives substantial revenue from  
17 interstate or international commerce.

18 **VENUE**

19 126. Venue in this District is proper because a substantial or the entire part  
20 of the events or omissions giving rise to these claims occurred in San Diego County,  
21 which is where Plaintiff Garland's causes of action accrued.

22 127. Plaintiff Garland purchased, paid money towards or for, used and/or  
23 consumed the Product in reliance on the labeling identified here in San Diego County.

24 128. Plaintiff Garland became aware the labeling was false and misleading in  
25 San Diego County.

26 129. Plaintiff Garland resides in San Diego County.

27 **CLASS ALLEGATIONS**

28 130. This action is brought on behalf of the following classes ("Class"):

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**California Class:** All persons in California who purchased Kroger Blueberry Fruit & Grain Cereal Bars bearing the labeling identified here in California during the statutes of limitations for each cause of action alleged; and

**Illinois Class:** All persons in Illinois who purchased Kroger Blueberry Fruit & Grain Cereal Bars bearing the labeling identified here in Illinois during the statutes of limitations for each cause of action alleged.

131. Excluded from the Class are (a) Defendant, Defendant’s board members, executive-level officers, and attorneys, and immediate family members of any of the foregoing persons; (b) governmental entities; (c) the Court, the Court’s immediate family, and Court staff and (d) any person that timely and properly excludes himself or herself from the Class.

132. Common questions of issues, law, and fact predominate and include whether Defendant’s representations were and are misleading and if Plaintiffs and class members are entitled to damages.

133. Plaintiffs’ claims and basis for relief are typical to other members because all were subjected to the same unfair, misleading, and deceptive representations, omissions, and actions.

134. Plaintiffs are adequate representatives because their interests do not conflict with other members.

135. No individual inquiry is necessary since the focus is only on Defendant’s practices and the class is definable and ascertainable.

136. The class of persons is sufficiently numerous because the Product has been sold with the representations and omissions identified here for several years throughout the States Plaintiffs are seeking to represent, and it was bought by thousands of consumers.

137. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.



1 138. Plaintiffs’ Counsel is competent and experienced in complex class action  
2 litigation and intends to protect class members’ interests adequately and fairly.

3 139. Plaintiff Garland seeks injunctive relief on behalf of the California Class  
4 because the practices continue.

5 **CLAIMS FOR RELIEF**

6 **FIRST CLAIM**

7 **Violation of California’s Unfair Competition Law,  
8 Cal. Bus. & Prof. Code § 17200, *et seq.***

9 140. Plaintiff Garland incorporates the allegations in the paragraphs above as  
10 if fully set forth herein.

11 141. California’s Unfair Competition Law, BPC § 17200, *et seq.* (“UCL”),  
12 prohibits any unlawful, unfair or fraudulent business act or practice and unfair,  
13 deceptive, untrue or misleading advertising.

14 142. Defendant’s representations and omissions are “unlawful” because they  
15 violate the following provisions of the FFDCA and the Sherman Law including:

- 16 a. 21 U.S.C. § 343(a)(1) and HSC § 110660, which deem food  
17 misbranded when its label is “false or misleading in any  
18 particular”;
- 19 b. 21 U.S.C. § 343(f) and HSC § 110705, which prohibit  
20 labeling that fails to conspicuously display required  
21 information;
- 22 c. 21 U.S.C. § 343(i) and HSC § 110720, which prohibit  
23 labeling that does not contain a truthful and non-misleading  
24 “common or usual name”; and
- 25 d. 21 U.S.C. § 343(k) and HSC § 110740, which prohibit the  
26 use of artificial flavors without disclosing their use.

27 143. Defendant’s conduct is “unlawful” because it violates California’s False  
28 Advertising Law, BPC § 17500, *et seq.* (“FAL”), and Consumer Legal Remedies Act,

1 Cal. Civ. Code § 1750, *et seq.* (“CLRA”).

2 144. Each of the challenged statements and omissions made and actions taken  
3 by Defendant as described violates the FFDCA, Sherman Law and FAL, and therefore  
4 violates the “unlawful” prong of the UCL.

5 145. The purpose of the UCL is to protect consumers against unfair and  
6 deceptive practices.

7 146. Defendant’s false and deceptive representations and omissions are  
8 material in that they are likely to influence consumer purchasing decisions.

9 147. The labeling of the Product violated the UCL because the representations  
10 and omissions its filling’s taste was only from the identified ingredients of blueberries  
11 and natural flavor, when it contained added artificial flavoring in the form of DL-  
12 Malic Acid, was unfair and deceptive to consumers.

13 148. Plaintiff Garland believed the Product’s filling got its taste only from the  
14 identified ingredients of blueberries and natural flavor, even though it contained  
15 added artificial flavoring in the form of DL-Malic Acid.

16 149. Plaintiff Garland paid more for the Product and would not have paid as  
17 much if she knew that in addition to blueberries and natural flavor, the filling’s taste  
18 was from added artificial flavoring in the form of DL-Malic Acid.

19 150. Plaintiff Garland seeks to recover for economic injury and/or loss she  
20 sustained based on the misleading labeling and packaging of the Product, a deceptive  
21 practice under the UCL, by paying more for it than she otherwise would have.

22 151. Plaintiff Garland will produce evidence showing how she and consumers  
23 paid more than they otherwise would have paid for the Product, relying on  
24 Defendant’s representations and omissions, using statistical and economic analyses,  
25 hedonic regression, hedonic pricing, conjoint analysis and other advanced  
26 methodologies.

27 152. As a result of Defendant’s misrepresentations and omissions, Plaintiff  
28 Garland and class members suffered damages in the price premium paid for the

1 Product, which is the difference between what they paid for it and how much it would  
2 have been sold for without the false and misleading representations and omissions  
3 identified here.

4 153. In accordance with Cal. Bus. & Prof. Code § 17203, Plaintiff Garland  
5 seeks an order enjoining Defendant from continuing to conduct business through  
6 unlawful, unfair, and/or fraudulent acts and practices and to commence corrective  
7 advertising.

8 **SECOND CLAIM**  
9 **Violation of California’s False Advertising Law,**  
10 **Cal. Bus. & Prof. Code § 17500, *et seq.***

11 154. Plaintiff Garland incorporates the allegations in the paragraphs above as  
12 if fully set forth herein.

13 155. The FAL prohibits false and/or misleading representations and  
14 omissions.

15 156. Defendant makes “false [and] misleading advertising claim[s]” by  
16 deceiving consumers that the Product’s filling got its taste only from the identified  
17 ingredients of blueberries and natural flavor, even though it contained added artificial  
18 flavoring in the form of DL-Malic Acid.

19 157. In reliance on this false and misleading advertising, Plaintiff Garland  
20 purchased and consumed the Product without knowledge it contained added artificial  
21 flavoring in the form of DL-Malic Acid.

22 158. Defendant knew or should have known that its representations and  
23 omissions were likely to deceive consumers.

24 159. Plaintiff Garland seeks injunctive and equitable relief, restitution, and an  
25 order for the disgorgement of the funds by which Defendant was unjustly enriched.

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**THIRD CLAIM**  
**Violation of California's Consumers Legal Remedies Act,  
Cal. Civ. Code § 1750, et seq.**

160. Plaintiff Garland incorporates the allegations in the paragraphs above as if fully set forth herein.

161. The CLRA prohibits deceptive practices in connection with the conduct of a business providing goods, property, or services primarily for personal, family, or household purposes.

162. Defendant's policies, acts, and practices were designed to, and did, result in Plaintiff Garland's purchase, consumption and/or use of the Product primarily for personal, family, or household purposes, and violated and continue to violate sections of the CLRA, including:

- a. Civil Code § 1770(a)(5), because Defendant represented that the Product had characteristics, attributes, features, capabilities, uses, benefits, and qualities it did not have;
- b. Civil Code § 1770(a)(9), because Defendant advertised the Product with an intent not to sell it as advertised; and
- c. Civil Code § 1770(a)(16), because Defendant represented that the Product had been supplied in accordance with its previous representations, when it was not.

163. Pursuant to Cal. Civ. Code § 1782(a), Plaintiff Garland has or will send a CLRA Notice to Defendant concurrently with the filing of this action or shortly thereafter, which details and includes these violations of the CLRA, demand correction of these violations, and provide the opportunity to correct these business practices.

164. If Defendant does not correct these business practices, Plaintiff Garland will amend or seek leave to amend the Complaint to add claims for monetary relief, including restitution and actual damages under the CLRA, and injunctive relief to enjoin the unlawful methods, acts and practices alleged, pursuant to Cal. Civ. Code §

1 1780.

2 **FOURTH CLAIM**

3 **Illinois Consumer Fraud and Deceptive Business  
Practices Act (“ICFA”), 815 ILCS 505/1, *et seq.***

4 165. Plaintiff Jacobs incorporates the allegations in the paragraphs above as  
5 if fully set forth herein.

6 166. The purpose of the ICFA is to protect consumers against unfair, wrongful  
7 and deceptive practices.

8 167. Defendant’s false and deceptive representations and omissions are  
9 material in that they are likely to influence consumer purchasing decisions.

10 168. The labeling of the Product violated the ICFA because the  
11 representations and omissions its filling’s taste was only from the identified  
12 ingredients of blueberries and natural flavor, when it contained added artificial  
13 flavoring in the form of DL-Malic Acid, was false, and unfair, wrongful, unethical  
14 and deceptive to consumers.

15 169. Plaintiff Jacobs believed the Product’s filling got its taste only from the  
16 identified ingredients of blueberries and natural flavor, even though it contained  
17 added artificial flavoring in the form of DL-Malic Acid.

18 170. Plaintiff Jacobs paid more for the Product and would not have paid as  
19 much if he knew that in addition to blueberries and natural flavor, the filling’s taste  
20 was from added artificial flavoring in the form of DL-Malic Acid.

21 171. Plaintiff Jacobs seeks to recover for economic injury and/or loss he  
22 sustained based on the misleading labeling and packaging of the Product, a deceptive  
23 practice under the ICFA, by paying more for it than he otherwise would have.

24 172. Plaintiff Jacobs will produce evidence showing how he and consumers  
25 paid more than they otherwise would have paid for the Product, relying on  
26 Defendant’s representations and omissions, using statistical and economic analyses,  
27 hedonic regression, hedonic pricing, conjoint analysis and other advanced  
28 methodologies.



1 173. As a result of Defendant's misrepresentations and omissions, Plaintiff  
2 Jacobs and class members suffered damages in the price premium paid for the  
3 Product, which is the difference between what they paid for it and how much it would  
4 have been sold for without the false and misleading representations and omissions  
5 identified here.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs, on behalf of themselves and members of the  
8 proposed Class, pray for judgment and relief as follows:

- 9 A. Certification of the Class, designating Plaintiffs as representatives and  
10 Plaintiffs' Counsel as counsel for the Class;
- 11 B. A declaration that Defendant has committed the violations alleged;
- 12 C. For injunctive relief the Court deems appropriate;
- 13 D. For restitution and disgorgement pursuant to, without limitation, the  
14 California Business & Professions Code §§ 17200, *et seq.* and Cal Civ.  
15 Code § 1780, except for monetary damages under the CLRA;
- 16 E. Compensatory damages, the amount to be determined at trial, except for  
17 monetary damages under the CLRA;
- 18 F. For attorneys' fees, costs, and interest;
- 19 G. For such further relief as this Court may deem just and proper.

20 **DEMAND FOR JURY TRIAL**

21 Plaintiffs demand a jury trial on all causes of action so triable.

22  
23 Dated: February 5, 2024

24 Respectfully submitted,

25 /s/ Manfred P. Muecke

26 Manfred P. Muecke (SBN 222893)

27 **Manfred APC**

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*Counsel for Plaintiffs*

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Kroger Blueberry Fruit & Grain Cereal Bars Not as Naturally Flavored as Advertised, Class Action Alleges](#)

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