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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARKUS WILSON and DOUG CAMPEN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FRITO-LAY NORTH AMERICA, INC. and PEPSICO, INC.,

Defendants.

Case No. 3:12-CV-01586-JW

AMENDED CLASS ACTION AND REPRESENTATIVE ACTION

AMENDED COMPLAINT FOR DAMAGES, EQUITABLE AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

Plaintiffs, Markus Wilson and Doug Campen ("Plaintiffs") through their undersigned attorneys, bring this lawsuit against Defendants Frito-Lay North America, Inc. And Pepsico, Inc. ("Defendants") as to their own acts upon personal knowledge, and as to all other matters upon information and belief. In order to remedy the harm arising from Defendants' illegal conduct, which has resulted in unjust profits, Plaintiffs bring this action on behalf of a class of California consumers who, within the last four years, purchased potato chips and other snack food products distributed or sold by Defendants that were 1) labeled or advertised as "All Natural" despite containing artificial or unnatural ingredients, flavorings, coloring, and/or chemical preservatives;

2) labeled or advertised as having "0 grams Trans Fat" but which contained more than 13 grams of fat per 50 grams; 3) labeled or advertised as having "No MSG" despite containing MSG; 4) represented as being "low sodium" despite having more than 140 mgs of sodium per serving size and per 50 grams; 5) labeled or advertised as healthy despite containing disqualifying nutrient levels; or 6) labeled or advertised with an unauthorized health claim (referred to herein as "Misbranded Food Products").

INTRODUCTION

1. Every day millions of Americans purchase and consume packaged foods. To protect these consumers, identical California and federal laws require truthful, accurate information on the labels of packaged foods. This case is about companies that flout those laws and sell misbranded food to unsuspecting consumers. The law, however, is clear: misbranded food cannot legally be manufactured, held, advertised, distributed or sold. Misbranded food is worthless as a matter of law, and purchasers of misbranded food are entitled to a refund of their purchase price.

2. Defendant Frito-Lay North America, Inc. ("Frito-Lay") is a wholly owned subsidiary of Defendant PepsiCo, Inc. ("PepsiCo"). Defendants manufacture, market and sell a variety of "snack" foods, including Misbranded Food Products. Frito-Lay is a business unit within Pepsi Co, and is a self-described market leader in the snack food industry. Historically, snack foods have not been viewed as being a form of health food but as consumer preferences have begun to favor healthier options, Defendants have chosen to implement a health and wellness strategy to reposition their products as a healthy option. In furtherance of their health and wellness strategy Defendants claim that "Frito-Lay continues to help meet consumers' ever-changing snack needs, most notably in the areas of weight management and positive nutrition, which along with heart health, comprise our focus in well-being." As part of this health and wellness strategy Defendants make a number of false claims about their products. These include false and unlawful "all Natural," "No MSG," "0 grams Trans Fat," "healthy," "low sodium," and health and disease related claims.

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3. Defendants' reason for doing so was driven by their pecuniary interests. As stated by Defendant Frito-Lay's parent company, Defendant PepsiCo, in the Risk Factors section of the most recent annual report it filed with the S.E.C.:

> We are a consumer products company operating in highly competitive categories and rely on continued demand for our products. To generate revenues and profits, we must sell products that appeal to our customers and to consumers. Any significant changes in consumer preferences or any inability on our part to anticipate or react to such changes could result in reduced demand for our products and erosion of our competitive and financial position. Our success depends on: our ability to anticipate and respond to shifts in consumer trends, including increased demand for products that meet the needs of consumers who are increasingly concerned with health and wellness.

4. For example, Defendants have made the following claims in connection with their potato chips:

> Lay's® potato chips are prepared with healthier oils, which are 85% unsaturated, making it a source of healthier mono- and polyunsaturated fats.
>
> Frito-Lay's products start with simple ingredients: potatoes or corn, healthier oils, salt and sometimes seasoning are added for great taste.
>
> All of Frito-Lay's snack chips contain 0 grams Trans Fat, are low in saturated fat and cholesterol-free.
>
> You might be surprised at how much good stuff goes into your favorite snack. Good stuff like potatoes, which naturally contain vitamin C and essential minerals. Or corn, one of the world's most popular grains, packed with Thiamin, vitamin B6, and Phosphorous – all necessary for healthy bones, teeth, nerves and muscles.
>
> And it's not just the obvious ingredients. Our all-natural sunflower, canola, corn and soybean oils are considered to be healthier oils by the FDA because they contain good polyunsaturated and monounsaturated fats, which help lower total and LDL "bad" cholesterol and maintain HDL "good" cholesterol levels. They also contain <20% of the bad saturated fat, which raises LDL, cholesterol and 0g of trans fat. Even salt, when eaten in moderation as part of a balanced diet, provides sodium which is essential for the body.
>
> You can think of the three different types of fats as the Good, the Bad and the Ugly. Good fats are unsaturated - monounsaturated and polyunsaturated fats. You'll find high levels of these good fats in nuts, fish and vegetable oils such as corn, soybean, canola, and sunflower oils to name a few. They've been shown to reduce levels of LDL (bad) cholesterol, and maintain HDL (good) cholesterol. Frito-Lay snack chips and nuts contain mostly good fats.

> Snacking is an important part of a healthy diet, whether you want to lose weight, sustain energy or simply live a better lifestyle.
>
> Evidence suggests that snacking is inversely related to body weight and may promote a healthier diet.Snacks may benefit special populations including people with diabetes, children and adolescents, older adults, and pregnant women.

5. Defendants recognize that health claims drive food sales, and actively promote the purported health benefits of their Misbranded Food Products, notwithstanding the fact that such promotion violates California and federal law. For example, Defendants tout the healthiness of Lay's Potato Chips, as follows:

6. If a manufacturer is going to make a claim on a food label, the label must meet certain legal requirements that help consumers make informed choices and ensure that they are not misled. As described more fully below, Defendants have made, and continue to make, false and deceptive claims in violation of California and federal laws that govern the types of representations that can be made on food labels. These laws recognize that reasonable consumers are likely to choose products claiming to have a health or nutritional benefit over otherwise similar food products that do not claim such benefits. More importantly, these laws recognize that the failure to disclose the presence of risk-increasing nutrients is deceptive because it conveys to consumers the net impression that a food makes only positive contributions to a diet, or does not contain any nutrients at levels that raise the risk of diet-related disease or health-related condition.

7. Under California law, which is identical to federal law, a number of the Defendants' food labeling practices are unlawful because they are deceptive and misleading to consumers: These include:

A. Representing food products to be "all natural" or "natural" when they contain significant quantities of chemical preservatives, synthetic chemicals, added artificial color and other artificial ingredients;

B. Failing to disclose the presence of MSG, chemical preservatives and artificial added colors in the ingredient lists of food products as required by law;

C. Making unlawful nutrient content claims on the labels of food products that fail to meet the minimum nutritional requirements legally required for the nutrient content claims being made;

D. Making unlawful and unapproved health claims about their products that are prohibited by law; and

E. Making unlawful claims that suggest to consumers that their products can prevent the risk or treat the effects of certain diseases like cancer or heart disease.

8. These practices are not only illegal but they mislead consumers and deprive them of the information they require to make informed purchasing decisions. Thus, for example, a mother who reads labels because she wants to purchase all natural and healthy food and does not wish to feed her child unhealthy foods or highly processed foods containing unnatural chemicals or MSG would be misled by Defendants' practices and labeling.

9. Similarly, California and federal laws have placed numerous requirements on food companies that are designed to ensure that the claims that companies make about their products to consumers are truthful, accurate and backed by acceptable forms of scientific proof. When companies such as Defendants make false and unlawful "all Natural," "No MSG," "0g Trans Fat," or other nutrient content or health related claims that are prohibited by regulation, consumers such as Plaintiffs are misled.

10. Identical California and federal laws regulate the content of labels on packaged food. The requirements of the federal Food Drug & Cosmetic Act ("FDCA") were adopted by the California legislature in the Sherman Food Drug & Cosmetic Law (the "Sherman Law"). California Health & Safety Code § 109875, *et seq*. Under both the Sherman Law and FDCA section 403(a), food is "misbranded" if "its labeling is false or misleading in any particular," or if it does not contain certain information on its label or its labeling. 21 U.S.C. § 343(a).

11. Under the 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 anyone representation in the labeling is misleading, the entire food is misbranded, nor can any other statement in the labeling cure 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.

12. In promoting the health benefits of their Misbranded Food Products, Defendants claim to understand the importance of communicating responsibly about their products. Nevertheless, Defendants have made, and continue to make, false and deceptive claims on their Misbranded Food Products in violation of California and federal laws that govern the types of representations that can be made on food labels. In particular, in making their improper "0 grams Trans Fat" claims on their Misbranded Food Products, Defendants have violated nutrient content labeling regulations mandated by federal and California law which require a disclosure of nutrients (fat, saturated fat, cholesterol, and sodium) present in a food at a level that the FDA has concluded

increases the risk of diet-related disease or health-related condition, required whenever a nutrient content claim is made.

13. Similarly, in making their unlawful No MSG claims on their Misbrand Food Products containing MSG and their "All Natural" claims on their Misbranded Food Products which contain artificial ingredients, flavorings, coloring, and/or chemical preservatives, Defendants have violated labeling regulations mandated by California and federal law, which forbid the use of such misleading labeling.

14. Similarly, Defendants have made, and continue to make, unlawful nutrient content and health related claims on food labels of their Misbranded Food Products that are prohibited by California and federal law and which render these products misbranded. Under federal and California law, Defendants' Misbranded Food Products cannot legally be manufactured, advertised, distributed, held or sold. Defendants' false and misleading labeling practices stem from their global marketing strategy. Thus, the violations and misrepresentations are similar across product labels and product lines.

15. Defendants' violations of law include: (1)the illegal advertising, marketing, distribution, delivery and sale of Defendants' Misbranded Food Products to consumers in California and throughout United States; (2) the utilization of false and unlawful "All Natural," "No MSG," "low sodium," "0 grams Trans Fat," and other nutrient content and health related claims; (3) the failure to properly disclose the high levels of fat and other disqualifying nutrients in their Misbranded Food Productson the Misbranded Food Products' packaging and labeling as required by law; and (4) the failure to include statements on the Misbranded Food Products' packaging and labeling that are mandated by law.

PARTIES

16. Plaintiff Markus Wilson is a resident of Santa Rosa, California who purchased Defendants' Misbranded Food Products, including Lay's Classic Potato Chips, in California during the four (4) years prior to the filing of this action (the "Class Period").

17. Plaintiff Doug Campen is a resident of San Jose, California who purchased Defendants' Misbranded Food Products, including Lay's Classic Potato Chips, Lay's Honey

Barbeque Potato Chips, Lay's Kettle Cooked Mesquite BBQ, Cheetos Puffs, and Fritos Original Corn Chips in California during the Class Period.

18. Defendant Frito-Lay North America, Inc. is a Texas corporation with its principal place of business at 7701 Legacy Drive, Plano, Texas.

19. Defendant PepsiCo, Inc. is a North Carolina corporation with its principal place of business at 700 Anderson Hill Road, Purchase, New York. Defendants are leading producers of retail food products, including the Misbranded Food Products. Defendants sell their food products to consumers through grocery and other retail stores throughout California.

JURISDICTION AND VENUE

20. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d) because this is a class action in which: (1) there are over 100 members in the proposed class; (2) members of the proposed class have a different citizenship from Defendants; and (3) the claims of the proposed class members exceed $5,000,000 in the aggregate.

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

22. The Court has jurisdiction over the California claims alleged herein pursuant to 28 U.S.C. § 1367, because they form part of the same case or controversy under Article III of the United States Constitution.

23. 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.

24. The Court has personal jurisdiction over Defendants because a substantial portion of the wrongdoing alleged in this Amended Complaint occurred in California, Defendants are authorized to do business in California, have sufficient minimum contacts with California, and otherwise intentionally avail themselves of the markets in California through the promotion, marketing and sale of merchandise, sufficient to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

25. Because a substantial part of the events or omissions giving rise to these claims occurred in this District and because the Court has personal jurisdiction over Defendants, venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b).

FACTUAL ALLEGATIONS

A. Identical California And Federal Laws Regulate Food Labeling

26. Food manufacturers are required to comply with identical state and federal laws and regulations that govern the labeling of food products. First and foremost among these is the FDCA and its labeling regulations, including those set forth in 21 C.F.R. § 101.

27. Pursuant to the Sherman Law, California has expressly adopted the federal labeling requirements as its own and indicated that "[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food regulations of this state." California Health & Safety Code § 110100.

28. In addition to its blanket adoption of federal labeling requirements, California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. For example, food products are misbranded under California Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars; are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110670 if their labeling fails to conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r) and regulations adopted thereto; are misbranded under California Health & Safety Code § 110705 if words, statements and other information required by the Sherman Law to appear on their labeling are either missing or not sufficiently conspicuous; are misbranded under California Health & Safety Code § 110735if they are represented as having special dietary uses but fail to bear labeling that adequately informs consumers of their value for that use; and are misbranded under California Health & Safety Code § 110740if they contain artificial flavoring, artificial coloring and chemical preservatives but fail to adequately disclose that fact on their labeling.

B. FDA Enforcement History

29. In recent years the FDA has become increasingly concerned that food manufacturers have been disregarding food labeling regulations. To address this concern, the FDA elected to take steps to inform the food industry of its concerns and to place the industry on notice that food labeling compliance was an area of enforcement priority.

30. In October 2009, the FDA issued a *Guidance For Industry: Letter regarding Point Of Purchase Food Labeling*("2009 FOP Guidance") to address its concerns about front of package labels. The 2009 FOP Guidance advised the food industry:

> FDA's research has found that with FOP labeling, people are less likely to check the Nutrition Facts label on the information panel of foods (usually, the back or side of the package). It is thus essential that both the criteria and symbols used in front-of-package and shelf-labeling systems be nutritionally sound, well-designed to help consumers make informed and healthy food choices, and not be false or misleading. The agency is currently analyzing FOP labels that appear to be misleading. The agency is also looking for symbols that either expressly or by implication are nutrient content claims. We are assessing the criteria established by food manufacturers for such symbols and comparing them to our regulatory criteria.
>
> It is important to note that nutrition-related FOP and shelf labeling, while currently voluntary, is subject to the provisions of the Federal Food, Drug, and Cosmetic Act that prohibit false or misleading claims and restrict nutrient content claims to those defined in FDA regulations. Therefore, FOP and shelf labeling that is used in a manner that is false or misleading misbrands the products it accompanies. Similarly, a food that bears FOP or shelf labeling with a nutrient content claim that does not comply with the regulatory criteria for the claim as defined in Title 21 Code of Federal Regulations (CFR) 101.13 and Subpart D of Part 101 is misbranded. We will consider enforcement actions against clear violations of these established labeling requirements. . .
>
> … Accurate food labeling information can assist consumers in making healthy nutritional choices. FDA intends to monitor and evaluate the various FOP labeling systems and their effect on consumers' food choices and perceptions. FDA recommends that manufacturers and distributors of food products that include FOP labeling ensure that the label statements are consistent with FDA laws and regulations. FDA will proceed with enforcement action against products that bear FOP labeling that are explicit or implied nutrient content claims and that are not consistent with current nutrient content claim requirements. FDA will also proceed with enforcement action where such FOP labeling or labeling systems are used in a manner that is false or misleading.

31. The 2009 FOP Guidance recommended that "manufacturers and distributors of food products that include FOP labeling ensure that the label statements are consistent with FDA law and regulations" and specifically advised the food industry that it would "proceed with enforcement action where such FOP labeling or labeling systems are used in a manner that is false or misleading."

32. Despite the issuance of the 2009 FOP Guidance, Defendants did not remove the unlawful and misleading labeling claims from their Misbranded Food Products.

33. On March 3, 2010, the FDA issued an "Open Letter to Industry from [FDA Commissioner] Dr. Hamburg" (hereinafter, "Open Letter").The Open Letter reiterated the FDA's concern regarding false and misleading labeling by food manufacturers. In pertinent part the letter stated:

> In the early 1990s, the Food and Drug Administration (FDA) and the food industry worked together to create a uniform national system of nutrition labeling, which includes the now-iconic Nutrition Facts panel on most food packages. Our citizens appreciate that effort, and many use this nutrition information to make food choices. Today, ready access to reliable information about the calorie and nutrient content of food is even more important, given the prevalence of obesity and diet-related diseases in the United States. This need is highlighted by the announcement recently by the First Lady of a coordinated national campaign to reduce the incidence of obesity among our citizens, particularly our children.
>
> With that in mind, I have made improving the scientific accuracy and usefulness of food labeling one of my priorities as Commissioner of Food and Drugs. The latest focus in this area, of course, is on information provided on the principal display panel of food packages and commonly referred to as "front-of-pack" labeling. The use of front-of-pack nutrition symbols and other claims has grown tremendously in recent years, and it is clear to me as a working mother that such information can be helpful to busy shoppers who are often pressed for time in making their food selections. …
>
> As we move forward in those areas, I must note, however, that there is one area in which more progress is needed. As you will recall, we recently expressed concern, in a "Dear Industry" letter, about the number and variety of label claims that may not help consumers distinguish healthy food choices from less healthy ones and, indeed, may be false or misleading.
>
> At that time, we urged food manufacturers to examine their product labels in the context of the provisions of the Federal Food, Drug, and Cosmetic Act that prohibit false or misleading claims and restrict nutrient content claims to those defined in

FDA regulations. As a result, some manufacturers have revised their labels to bring them into line with the goals of the Nutrition Labeling and Education Act of 1990. Unfortunately, however, we continue to see products marketed with labeling that violates established labeling standards.

To address these concerns, FDA is notifying a number of manufacturers that their labels are in violation of the law and subject to legal proceedings to remove misbranded products from the marketplace. While the warning letters that convey our regulatory intentions do not attempt to cover all products with violative labels, they do cover a range of concerns about how false or misleading labels can undermine the intention of Congress to provide consumers with labeling information that enables consumers to make informed and healthy food choices. For example:

- Nutrient content claims that FDA has authorized for use on foods for adults are not permitted on foods for children under two. Such claims are highly inappropriate when they appear on food for infants and toddlers because it is well known that the nutritional needs of the very young are different than those of adults.
- Claims that a product is free of trans fats, which imply that the product is a better choice than products without the claim, can be misleading when a product is high in saturated fat, and especially so when the claim is not accompanied by the required statement referring consumers to the more complete information on the Nutrition Facts panel.
- Products that claim to treat or mitigate disease are considered to be drugs and must meet the regulatory requirements for drugs, including the requirement to prove that the product is safe and effective for its intended use.
- Misleading "healthy" claims continue to appear on foods that do not meet the long- and well-established definition for use of that term.
- Juice products that mislead consumers into believing they consist entirely of a single juice are still on the market. Despite numerous admonitions from FDA over the years, we continue to see juice blends being inaccurately labeled as single-juice products.

These examples and others that are cited in our warning letters are not indicative of the labeling practices of the food industry as a whole. In my conversations with industry leaders, I sense a strong desire within the industry for a level playing field and a commitment to producing safe, healthy products. That reinforces my belief that FDA should provide as clear and consistent guidance as possible about food labeling claims and nutrition information in general, and specifically about how the growing use of front-of-pack calorie and nutrient information can best help consumers construct healthy diets.

I will close with the hope that these warning letters will give food manufacturers further clarification about what is expected of them as they review their current labeling. I am confident that our past cooperative efforts on nutrition information and claims in food labeling will continue as we jointly develop a practical, science-based front-of-pack regime that we can all use to help consumers choose healthier

foods and healthier diets.

34. Notwithstanding the Open Letter, Defendants have continued to utilize unlawful food labeling claims including unlawful healthy claims, unlawful trans fat and other nutrient claims, and unlawful health and disease related claims despite the express guidance of the FDA in the Open Letter warning against such claims. Defendants also continue to ignore the FDA's Guidance for Industry, A Food Labeling Guide, which detailed the FDA's guidance on how to make nutrient content and other labeling claims about food products. As such, Defendants' Misbranded Food Products continue to run afoul of FDA guidance as well as California and federal law.

35. In addition to its guidance to industry, the FDA has sent warning letters to the industry, including many of Defendants' peer food manufacturers, for the same types of improper 0 grams Trans Fat and other unlawful nutrient content claims utilized by Defendants .In these letters dealing with unlawful nutrient content claims, the FDA indicated that, as a result of the same type of 0 gram trans fat and other unlawful nutrient content claims utilized by Defendants, products were in "violation of the Federal Food, Drug, and Cosmetic Act … and the applicable regulations in Title 21, Code of Federal Regulations, Part 101 (21 CFR§ 101)" and "misbranded within the meaning of section 403(r)(1)(A) because the product label bears a nutrient content claim but does not meet the requirements to make the claim." Similarly, letters for unlawful "all natural" claims similar to those at issue here, indicated that the products at issue were "misbranded under section 403(a)(1) of the Act" because their labels were "false and misleading."

36. These warning letters were hardly isolated as the FDA has issued over 10 other warning letters to other companies for the same type of improper and unlawful food labeling claims at issue in this case.

37. The FDA stated that the agency not only expected companies that received warning letters to correct their labeling practices but also anticipated that other firms would examine their food labels to ensure that they are in full compliance with food labeling requirements and make changes where necessary. Defendants did not change the labels on its Misbranded Food Products in response to the warning letters sent to other companies.

38. Defendant also continued to ignore the FDA's Guidance for Industry, A Food Labeling Guide which details the FDA's guidance on how to make food labeling claims. Defendants continued to utilize unlawful claims on the labels of their Misbranded Food Products. As such, the Defendants' Misbranded Food Products continue to run afoul of FDA guidance as well as identical federal and California law.

39. Despite the FDA's numerous warnings to industry, Defendants have continued to sell products bearing unlawful labeling claims without meeting the requirements to make them.

40. Plaintiffs did not know, and had no reason to know, that the Defendants' Misbranded Food Products were misbranded and bore food labeling claims despite failing to meet the requirements to make those food labeling claims. Similarly, Plaintiffs did not know, and had no reason to know, that the Defendants' Misbranded Food Products were misbranded because their labeling was false and misleading.

C. Defendants' Products Are Misbranded

1. Defendants Make Unlawful "All Natural" Claims

41. Defendants recognized that consumers were increasingly seeking "all natural" food options. According to Defendants they "offer products made with natural ingredients" because "[w]e know people are increasingly looking for snack made with natural ingredients" and they wanted to "meet everyone's needs." Similarly, according to Ann Mukherjee who was Frito-Lay's senior vice president and chief marketing officer in 2010:

> As the snack food category leader, we have insights that show consumers are seeking a wider range of products made with all natural ingredients. At Frito-Lay North America we want to provide our customers with a broad portfolio of snack options that taste great and are made with real food ingredients.

42. Rather than reformulate all of their food products so that they were only composed of the "all natural ingredients" they knew consumers were seeking out, the Defendants simply mislabeled a number of their unnatural products and placed false "all natural" representations on these products' labels and labeling and falsely depicted these products in their advertising and marketing materials and on their websites as "all natural."

43. The Defendants' promoted such falsely labeled and misrepresented products with "the largest integrated marketing campaign in the history of the company [Frito-Lay]." This campaign included television advertising print advertising, in-store promotions, digital and social mediums and packaging. Moreover, advertising, marketing and packaging was designed to drive consumers to online content and, in fact, product labels invited consumers to go to these online sources of information. The Plaintiffs were exposed to this campaign, and as discussed below, misled by specific misrepresentations made by Defendants as part of this campaign on which they relied. In particular, they were misled by the Defendants' false "all natural" claims about their products that was the focus of this unprecedented campaign.

44. As part of this campaign, Defendants began placing seals or emblems on their food product's packaging that indicated that these products were "Made With All Natural Ingredients" and that the products contained "No MSG" and "No Preservatives" and "No Artificial Flavors." The Defendants called this seal or emblem their "all natural stamp" and told consumers it was designed so that consumers could "easily identify our products made with all natural ingredients" and help them "find all natural Frito-Lay products." This seal or emblem was bolstered by other similar statements elsewhere on the labels. Frito Lay further represented to consumers that "[t]he products made with all natural ingredients do not contain any artificial ingredients or synthetic ingredients, and they do not contain any artificial flavors or artificial preservatives, or ingredients such as monosodium glutamate (MSG)." These statements and representations were false as the products contained unnatural, artificial and synthetic ingredients. They also contained preservatives, MSG, and artificial flavors.

45. The Plaintiffs bought Misbranded Food Products whose labels and labeling bore Defendants' "all natural stamp" and which Defendants falsely represented as being "All Natural." These products were falsely labeled and misbranded because contrary to the various false representations that they were "All Natural" they bore various ingredients such as added color that were unnatural. For example, the Lay's Honey Barbeque Potato Chips purchased by Plaintiffs were falsely represented as being "All Natural" but, in fact, contained artificial caramel coloring and maltodextrin, a highly processed chemical which does not exist in nature and which cannot be

considered natural under even the most elastic definition of that term. These chips also contained other ingredients like citric acid that are used as chemical preservatives and artificial flavorings in food and whose use as a food ingredient the FDA has repeatedly warned precludes any representation of naturalness about the food. Similarly, the Lay's Kettle Cooked Mesquite BBQ Potato Chips purchased by Plaintiffs were falsely represented as being "All Natural" but in fact contained artificial and unnatural maltodextrin and citric acid.

46. In its rule-making and warning letters to manufacturers, the FDA has repeatedly stated its policy to restrict the use of the term "natural" in connection with added color, synthetic substances and flavors as provided in 21 C.F.R. § 101.22which has been adopted by California.

47. The FDA has also repeatedly affirmed its policy regarding theuse of the term "natural" as meaning that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food.

48. The FDA considers use of the term "natural" on a food label to be truthful and non-misleading when "nothing artificial or synthetic…has been included in, or has been added to, a food that would not normally be expected to be in the food." *See* 58 FR 2302, 2407, January 6, 1993.

49. Any coloring or preservative can preclude the use of the term "natural" even if the coloring or preservative is derived from natural sources. Further, the FDA distinguishes between natural and artificial flavors in 21 C.F.R. § 101.22.

50. Defendants' "All Natural" labeling practices violate FDA Compliance Policy Guide Sec. 587.100, which states: "[t]he use of the words 'food color added,''natural color,' or similar words containing the term 'food' or 'natural' may be erroneously interpreted to mean the color is a naturally occurring constituent in the food. Since all added colors result in an artificially colored food, we would object to the declaration of any added color as 'food' or 'natural.'"

51. Likewise, California Health & Safety Code § 110740 prohibits the use of artificial flavoring, artificial coloring and chemical preservatives unless those ingredients are adequately disclosed on the labeling.

52. The FDA has sent out numerous warning letters concerning this issue. *See, e.g.*, (August 16, 2001 FDA warning letter to Oak Tree Farm Dairy because there was citric acid in its all natural iced tea); (August 29, 2001 FDA warning letter to Hirzel Canning Company because there was citric acid or calcium chloride in its all natural tomato products); (August 2, 2001 FDA warning letter to GMP Manufacturing, Inc. stating: "[t]he products, Cytomax Exercise and Recovery Drink (Peachy Keen flavor) and Cytomax Lite (Lemon Iced Tea Flavor) are misbranded because they contain colors but are labeled using the term "no artificial colors."). Defendants are aware of these FDA warning letters.

53. Defendants have nonetheless unlawfully labeled a number of their food products as being "All Natural" when they actually contain artificial ingredients and flavorings, artificial coloring and chemical preservatives. Defendants' mislabeling and misbranding of its food products is widespread and extends across product lines and brands.

54. For example, other purportedly "All Natural" food products sold and distributed by Defendants such as their Stacy brand of chips contain ascorbic acid being used as a chemical preservative.

55. A reasonable consumer would expect that when Defendants label their products as "All Natural," the product's ingredients are "natural" as defined by the federal government and its agencies. A reasonable consumer would also expect that when Defendants label their products as "All Natural" the product ingredients are "natural" under the common use of that word. A reasonable consumer would understand that "All Natural" products do not contain synthetic, artificial, or excessively processed ingredients.

56. Consumers such as the Plaintiffs are thus misled into purchasing Defendants' products with synthetic and artificial and unnatural ingredients that are not "All Natural" as falsely represented on their labeling. Defendants' products in this respect are misbranded under federal and California law.

57. Plaintiffs relied on Defendants' "all natural" and natural claims when making their purchase decisions over the last four years and were misled because they erroneously believed the express misrepresentations that the Defendants' products they were purchasing were natural as

represented. Purchasing natural products was important to Plaintiffs in trying to buy "healthy" food products. Plaintiffs would not have purchased these products had they known that the Defendants' products were not natural.

58. For these reasons, Defendants' "all natural" and natural claims at issue in this Amended Complaint are false and misleading and in violation of identical California and federal law, and the products at issue are misbranded as a matter of law. Therefore, Defendants' Misbranded Food Products are misbranded as a matter of California and federal law and cannot be sold or held and thus are legally worthless. Plaintiff and members of the Class who purchased these products paid an unwarranted premium for these products.

2. Defendants Make Unlawful "No MSG" Claims

59. Defendants recognized that consumers were increasingly seeking to avoid monosodium glutamate ("MSG") and thus were looking for "No MSG" food options. According to the Defendants "[s]ome people report sensitivity to MSG and prefer to avoid foods containing MSG."

60. Rather than reformulate all of their food products so that they did not contain the MSG Defendants knew consumers were seeking to avoid, the Defendants simply mislabeled a number of their MSG laden products and placed false "No MSG" representations on these products' labels and labeling and falsely depicted these products in their advertising and marketing materials and on their websites as being free of MSG.

61. The Defendants were correct in their statement that some people are sensitive or intolerant of MSG and that some consumers seek to avoid the chemical. The FDA's Center for Food Safety and Applied Nutrition has received hundreds of reports of MSG related adverse reactions and complaints. A study commissioned by the FDA reported that a percentage of the population may react to MSG and develop MSG complex, a condition characterized by one or more of the following symptoms: burning sensation in the back of the neck, forearms, and chest; numbness in the back of the neck radiating to the arms and back; tingling, warmth and weakness in the face, temples, upper back, neck and arms; facial pressure or tightness; chest pain; headache;

nausea; rapid heartbeat; bronchospasm (difficulty breathing) in MSG intolerant people with asthma; drowsiness and weakness.

62. The FDA also noted that there were numerous books and media reports reporting "widespread and sometimes life-threatening adverse reactions to MSG" and claims that "even small amounts of manufactured glutamates may cause adverse reactions."

63. In light of these facts, many consumers choose to avoid or at least limit MSG in their diet. Plaintiffs were such consumers. Unfortunately they were misled by the Defendants into purchasing products containing MSG that were misrepresented as having "No MSG" by the Defendants.

64. The FDA has indicated that "consumers frequently use the term MSG to mean all free glutamate" and therefore "[f]or this reason, FDA considers foods who labels say "No MSG" or "No Added MSG" to be misleading if the food contains ingredients that are sources of free glutamates, such as hydrolyzed protein." Despite this guidance, the Defendants engaged in exactly the practice the FDA warned was "misleading" to consumers. In doing so the Defendants misled the Plaintiffs and members of the Class who reasonably relied on the Defendants' false and misleading "No MSG" claims.

65. As discussed above, Defendants' promoted such falsely labeled and misrepresented products with "the largest integrated marketing campaign in the history of the company [Frito-Lay]." This campaign included television advertising print advertising, in-store promotions, digital and social mediums and packaging. Moreover, advertising, marketing and packaging was designed to drive consumers to online content and product labels invited consumers to go to these online sources of information. Plaintiffs were exposed to this campaign and as discussed below mislead by specific misrepresentations made by Defendants' as part of this campaign on which they relied. In particular, they were misled by the Defendants false "No MSG" claims about their products that was the focus of this unprecedented campaign.

66. As part of this campaign, Defendants began placing seals or emblems on their food product's packaging that indicated that these products were "Made With All Natural Ingredients" and that the products contained "No MSG" and "No Preservatives" and "No Artificial Flavors."

The Defendants called this seal or emblem their "all natural stamp" and told consumers it was designed so that consumers could "easily identify our products made with all natural ingredients" and help them "find all natural Frito-Lay products." This seal or emblem was bolstered by other similar statements elsewhere on the labels. Frito Lay further represented to consumers that [t]he products made with all natural ingredients do not contain any artificial ingredients or synthetic ingredients, and they do not contain any artificial flavors or artificial preservatives, or ingredients such as monosodium glutamate (MSG)." These statements and representations were false as the products contained MSG.

67. The Defendants also promised that any Frito-Lay products containing MSG will list MSG in the ingredient statement." This was false as the Defendants failed to disclose the presence of MSG in their products or their products' ingredient lists.

68. The Plaintiffs bought Misbranded Food Products whose labels and labeling bore the Defendants' "all natural stamp" and which Defendants falsely represented as having "No MSG." These products were falsely labeled and misbranded because contrary to the various false representations that they contained "No MSG" they contained various ingredients such as yeast extract that are sources of MSG. For example, the Lay's Honey Barbeque Potato Chips purchased by Plaintiffs were falsely represented as having "NO MSG" but in fact contained yeast extract, a source of MSG. Similarly, the Lay's Kettle Cooked Mesquite BBQ Potato Chips purchased by Plaintiffs were falsely represented as having "NO MSG" but in fact contained yeast extract, a source of MSG.

69. A reasonable consumer would expect that when Defendants label their products with a "No MSG" claim the product and the product's ingredients will not contain MSG or free glutamates and would not be using the term "No MSG" in way deemed "misleading" by the FDA. A reasonable consumer would also expect that when Defendants label their products with a "No MSG" claim the product and the product ingredients have no MSG under the common use of that word. A reasonable consumer would understand that "NO MSG" products do not contain MSG or free glutamates.

70. Consumers such as Plaintiffs are thus misled into purchasing Defendants' purportedly "No MSG" products that actually contain MSG or free glutamates and that are not MSG free as falsely represented on their labeling. Defendants' products in this respect are misbranded under federal and California law.

71. Plaintiffs relied on Defendants' "No MSG" claims when making their purchase decisions over the last four years and were misled because they erroneously believed the express misrepresentations that the Defendants' products they were purchasing were devoid of MSG and free glutamates as represented. Purchasing "No MSG" products was important to Plaintiffs in trying to buy "healthy" food products. Plaintiffs would not have purchased these products had they known that the Defendants' products contained MSG or glutamates.

72. For these reasons, Defendants' "No MSG" claims at issue in this Amended Complaint are false and misleading and in violation of identical California and federal law, and the products at issue are misbranded as a matter of law. Therefore, Defendants' Misbranded Food Products are misbranded as a matter of California and federal law and cannot be sold or held and thus are legally worthless. Plaintiffs and members of the Class who purchased these products paid an unwarranted premium for these products.

3. California and Federal Law Regulate Nutrient Content Claims

73. Pursuant to Section 403 of the FDCA, a claim that characterizes the level of a nutrient in a food is a "nutrient content claim" that must be made in accordance with the regulations that authorize the use of such claims. 21 U.S.C. § 343(r)(1)(A). California expressly adopted the requirements of 21 U.S.C. § 343(r) in Section 110670 of the Sherman Law.

74. Nutrient content claims are claims about specific nutrients contained in a product. They are typically made on food packaging in a font large enough to be read by the average consumer. Because consumers rely upon these claims when making purchasing decisions, the regulations govern what claims can be made in order to prevent misleading claims.

75. Section 403(r)(1)(A) of the FDCA governs the use of expressed and implied nutrient content claims on labels of food products that are intended for sale for human consumption. 21 C.F.R. § 101.13.

76. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims, which California has expressly adopted. California Health & Safety Code § 110100.

77. An "expressed nutrient content claim" is defined as any direct statement about the level (or range) of a nutrient in the food (*e.g.*, "low sodium" or "contains 100 calories"). 21 C.F.R. § 101.13(b)(1).

78. An "implied nutrient content claim" is defined as any claim that: (i) describes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (*e.g.*, "high in oat bran"); or (ii) suggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (*e.g.*, "healthy, contains 3 grams (g) of fat"). 21 C.F.R. § 101.13(b)(2)(i-ii).

79. These regulations authorize use of a limited number of defined nutrient content claims. In addition to authorizing the use of only a limited set of defined nutrient content terms on food labels, these regulations authorize the use of only certain synonyms for these defined terms.If a nutrient content claim or its synonym is not included in the food labeling regulations it cannot be used on a label. Only those claims, or their synonyms, that are specifically defined in the regulations may be used. All other claims are prohibited. 21 CFR 101.13(b).

80. Only approved nutrient content claims will be permitted on the food label, and all other nutrient content claims will misbrand a food. It is thus clear which types of claims are prohibited and which types are permitted. Manufacturers are on notice that the use of an unapproved nutrient content claim is prohibited conduct. 58 FR 2302. In addition, 21 USC 343(r)(2),whose requirements have been adopted by California, prohibits using unauthorized undefined terms and declares foods that do so to be misbranded.

81. Similarly, the regulations specify absolute and comparative levels at which foods qualify to make these claims for particular nutrients (*e.g.*, .low fat, . . . more vitamin C) and list synonyms that may be used in lieu of the defined terms. Certain implied nutrient content claims (*e.g.*, "healthy") also are defined. The daily values (DVs) for nutrients that the FDA has established for nutrition labeling purposes have application for nutrient content claims, as well. Claims are

defined under current regulations for use with nutrients having established DVs; moreover, relative claims are defined in terms of a difference in the percent DV of a nutrient provided by one food as compared to another. *See. e.g.*21 C.F.R. §§ 101.13 and 101.54.

4. Defendants Make Unlawful Nutrient Content Claims

a. Defendants Make Unlawful "0 Grams Trans Fat" Claims

82. To appeal to consumer preferences, Defendants have repeatedly made improper nutrient content claims on products containing disqualifying levels of fat, saturated fat, cholesterol or sodium. These nutrient content claims were improper because they have failed to include disclosure statements required by law that are designed to inform consumers of the inherently unhealthy nature of those products in violation of 21 C.F.R. § 101.13(h), which has been incorporated in California's Sherman Law.

83. 21 C.F.R. § 101.13 (h)(l) provides that:

> If a food … contains more than 13.0 g of fat, 4.0 g of saturated fat, 60 milligrams (mg) of cholesterol, or 480 mg of sodium per reference amount customarily consumed, per labeled serving, or, for a food with a reference amount customarily consumed of 30 g or less … per 50 g … then that food must bear a statement disclosing that the nutrient exceeding the specified level is present in the food as follows: "See nutrition information for __ content" with the blank filled in with the identity of the nutrient exceeding the specified level, e.g., "See nutrition information for fat content."

84. Defendants repeatedly violate this provision. Defendants' Misbranded Food Products' packaging prominently makes "0 grams Trans Fat" claims despite disqualifying levels of fat that far exceed the 13 gram disclosure threshold. Moreover, some of the Misbranded Food Products' packaging bearing the improper "0 grams Trans Fat" claim not only fails to bear the mandated warning about total fat, but also bears a statement telling consumers to "see nutrition facts for saturated fat info," thus misdirecting consumers to a nutrient in which the product is low, while failing to draw their attention to the harmful levels of the nutrient (total fat) they are mandated by law to disclose.

85. Pursuant to 21 C.F.R. § 101.13(h), Defendants are prohibited from making the unqualified nutrient claims of "0 grams Trans Fat" on their food products if their products contain fat in excess of 13 grams, saturated fat in excess of 4 grams, cholesterol in excess of 60 milligrams,

or sodium in excess of 480mg per 50 grams, unless the product also displays a disclosure statement that informs consumers of the product's fat, saturated fat and sodium levels.

86. These regulations are intended to ensure that consumers are not misled to believe that a product that claims, for instance, to be low in trans fat, but actually has other unhealthy fat levels, is a healthy choice, because of the lack of trans fats.

87. Nevertheless, Defendants' product labels state that the product contains "0 grams Trans Fat" without such a disclosure even though their Misbranded Food Products contain fat in excess of 13 grams.

88. The Defendants continue to make their unlawful "0 grams Trans Fat" claims despite the express guidance of the FDA in the Open Letter warning that "claims that a product is free of trans fats, which imply that the product is a better choice than products without the claim, can be misleading when a product is high in saturated fat [or sodium, cholesterol or total fat], and especially so when the claim is not accompanied by the required statement referring consumers to the more complete information on the Nutrition Facts panel."

89. Defendants also continue to ignore the FDA's Guidance for Industry, A Food Labeling Guide, which detailed the FDA's guidance on how to make nutrient content and other labeling claims about food products that contain "one or more nutrients [like total fat at levels] in the food that may increase the risk of disease or health related condition that is diet related." Defendants continue to utilize improper trans fat nutrient claims on the labels of their Misbranded Food Products. As such, Defendants' Misbranded Food Products continue to run afoul of FDA guidance as well as California and federal law.

90. In addition to its guidance to industry, the FDA has sent warning letters to the industry, including many of Defendants' peer food manufacturers, for the same types of improper 0 grams Trans Fat and other unlawful nutrient content claims described above. In these letters dealing with unlawful nutrient content claims, the FDA indicated that, as a result of the same type of 0 gramtrans fat and other unlawful nutrient content claims utilized by Defendants, products were in "violation of the Federal Food, Drug, and Cosmetic Act … and the applicable regulations in Title

21, Code of Federal Regulations, Part 101 (21 CFR § 101)" and "misbranded within the meaning of section 403(r)(1)(A) because the product label bears a nutrient content claim but does not meet the requirements to make the claim."

91. Despite the FDA's numerous warnings to industry, Defendants have continued to sell products bearing improper "0 grams Trans Fat" nutrient content and other unlawful food labeling claims without meeting the requirements to make them.

92. In addition to failing to make mandated disclosures informing consumers that their Misbranded Food Products contained unhealthy components, such as fat, saturated fat, cholesterol and sodium at levels that the FDA has concluded increases the risk of diet-related disease or health-related condition, the Defendants also disseminated materials designed to convince consumers that the unhealthy levels of fat in their products were not a problem, notwithstanding the FDA position that such high levels of fat were unhealthy and increased the risk of diet-related disease or health-related condition. Defendants claimed their Misbranded Food Products contained "mostly good fats" and were low in "bad fats." Similarly, Defendants claimed that, far from being a problem, high levels of fat could actually play a role in a healthy diet, stating:

> The Role of Fat in a Healthy Diet
>
> Fat has gotten a bad reputation over the last few decades due to a misconception that all types of fat have a negative impact on health, such as increasing the risk for chronic conditions like heart disease. Now scientists are switching the focus from total fat to type of fat because type of fat may have the greatest impact on health. Research in this area has prompted government agencies and health organizations to revise dietary recommendations for fat intake to emphasize the quality of fat in the diet rather than the quantity of fat.

93. Based on the fat, saturated fat, cholesterol and sodium content of Defendants' products, pursuant to federal and California law, Defendants must include a warning statement adjacent to the trans fat nutrient claim that informs consumers of the high levels of fat, saturated fat, cholesterol or sodium. No such disclosure statement currently exists on Defendants' Misbranded Food Products.

94. Plaintiffs bought Misbranded Food Products whose labels and labeling bore the Defendants' "0 grams Trans Fat" claim." These products were falsely labeled and misbranded because there were ineligible to bear this claim and by bearing it in violation of the rules they unlawfully deceived Plaintiffs into the erroneous belief that they made only positive dietary contributions and did not contain disqualifying nutrients at levels deemed by the FDA to pose a risk of a diet related disease or condition. The false implicit representations of health were misleading and unlawful.

95. Plaintiffs bought a number of products bearing such unlawful "0 grams Trans Fat" claims. For example, the Lay's Honey Barbeque Potato Chips; Lay's Kettle Cooked Mesquite BBQ Potato Chips, Cheetos and Fritos purchased by Plaintiffs all bore this unlawful claim and all were ineligible to bear it because of their disqualifying nutrient levels.

96. A reasonable consumer would expect that when Defendants label their products with a nutrient content claim the product would be eligible to bear such a claim and meets the minimum nutritional requirements to make such a claim and that Defendants would not be using nutrient content claim in a way deemed misleading by the FDA or other regulator. A reasonable consumer would understand that products bearing nutrient content claims do not contain disqualifying levels of harmful nutrients that preclude the claim and that all required warnings and disclosures would be made as required.

97. Consumers such as Plaintiffs are thus misled into purchasing Defendants' purportedly healthy "0 grams Trans Fat" products that fail to adequately warn of their risks and falsely are depicted as healthier dietary components than they actually are. Defendants' products in this respect are misbranded under federal and California law.

98. Plaintiffs relied on Defendants' "0 grams Trans Fat " claims when making their purchase decisions over the last four years and were misled because they erroneously believed the express misrepresentations that the Defendants' products they were purchasing 1) lacked undisclosed disqualifying nutrient levels, and 2) were healthier dietary components than they actually were. Purchasing such products was important to Plaintiffs in trying to buy "healthy" food products. Plaintiffs would not have purchased these products had they known that the Defendants'

products were ineligible to bear the "0 grams Trans Fat" claims because of disqualifying nutrient levels of potentially harmful nutrients deemed to place consumers at an elevated risk of a diet related disease or condition.

99. For these reasons, Defendants' "0 grams Trans Fat" claims at issue in this Amended Complaint are false and misleading and in violation of identical California and federal law, and the products at issue are misbranded as a matter of law. Therefore, Defendants' Misbranded Food Products are misbranded as a matter of California and federal law and cannot be sold or held and thus are legally worthless. Plaintiff and members of the Class who purchased these products paid an unwarranted premium for these products.

b. Defendants Make Unlawful Low Sodium Nutrient Content Claims

100. In order to appeal to consumer preferences, Defendants have repeatedly made false and unlawful "low sodium" nutrient content claims about the sodium levels in their products. These claims misrepresent and greatly understate the levels of sodium in their Misbranded Food Products. In doing so these claims violate 21 C.F.R. § 101.61 which has been adopted by the State of California.

101. Defendants recognized that because of the significant health risks associated with sodium intake, consumers were increasingly seeking to avoid or limit sodium in their diets and thus were looking for low sodium food options.

102. Rather than reformulate all of their food products so that they were at or below the "low" sodium benchmarks they knew consumers were seeking, the Defendants simply misrepresented a number of their sodium laden products and made false "low sodium" representations about these products and falsely depicted these products in their labeling, advertising and marketing materials and on their websites as being "low sodium" options when in fact they exceed the maximum levels of sodium that a "low sodium" product can possess.

103. Pursuant to 21 C.F.R. § 101.6(b)(4) the term "low sodium" may be used on the labels or labeling of food if the food has a reference amount of less than 30 grams or less and contains 140 mgs or less sodium per reference amount customarily consumed and per 50 grams. By this definition most if not all of the Defendants' snack chips are not "low sodium" products.

101. Notwithstanding this fact, Defendants misrepresent and understate the levels of sodium in their snack chips. According to Defendants "Snack chips are actually not as high in sodium as most people think…[i]n fact a serving of most Frito-Lay snack chips … has three times less sodium than a bowl of low sodium soup." This is simply a false statement. By definition "low sodium" soup could not contain more than 140 mgs of sodium per serving (which is 8 ounces). Three times less than this would thus be no more than 47 mgs of sodium. In fact, the sodium levels of most, if not all, of the Defendants' snack chips were far in excess of this level with many such as the ones bought by the Plaintiffs being approximately 2 to 5 times more than this.

104. This false representation coupled with Defendants' other statements about sodium and how its products were not as high in sodium as one would think based on taste or other factors unlawfully overstated the healthiness of Defendants' snack chips while understating their relative sodium levels.

105. The Plaintiffs bought Misbranded Food Products whose labeling and marketing materials falsely represented that the Misbranded Food Products were the relative sodium levels represented by a "low sodium" option. These products were falsely labeled and misbranded because contrary to the various false representations that they were a "low sodium" option, they contained disqualifying levels of sodium precluding such a representation. For example, the Lay's Honey Barbeque Potato Chips, Lay's Kettle Cooked Mesquite BBQ Potato Chips, and Fritos purchased by Plaintiffs were all incapable of complying with the "low sodium" standard and in fact were far higher than Defendants in comparison with "low sodium" soup options.

106. A reasonable consumer would expect that when Defendants represent their products are a "low sodium" option claim the product will in fact be "low" in sodium and that Defendants are not using the term "low sodium" in a way that violates the law. A reasonable consumer would understand that if a Defendant compares its product with another product, that comparison will be truthful and accurate and not false and misleading.

107. Consumers such as the Plaintiffs are thus misled into purchasing Defendants' purportedly "low sodium" products that actually contain levels of sodium higher than the maximum upper limit for a "low sodium" product and that are not "low sodium" as falsely represented on

their labeling and in their marketing materials. Defendants' products in this respect are misbranded under federal and California law.

108. Plaintiffs relied on Defendants' "low sodium" claims when making their purchase decisions over the last four years and were misled because they erroneously believed the express misrepresentations that the Defendants' products they were purchasing were "low sodium" as represented. Purchasing "low sodium" products was important to Plaintiffs in trying to buy "healthy" food products. Plaintiffs would not have purchased these products had they known that the Defendants' products sodium claims were false.

109. For these reasons, Defendants' "low sodium" claims at issue in this Amended Complaint are false and misleading and in violation of identical California and federal law and the products at issue are misbranded as a matter of law. Therefore, Defendants' Misbranded Food Products are misbranded as a matter of California and federal law and cannot be sold or held and thus are legally worthless. Plaintiff and members of the Class who purchased these products paid an unwarranted premium for these products.

C. Defendants Make Other Unlawful Nutrient Content Claims

110. In order to appeal to consumer preferences, Defendants have repeatedly made false and unlawful nutrient content claims about other nutrients that either fail to utilize one of the limited defined terms or use one the defined terms improperly or fail to incorporate mandated disclosure statements warning about otherwise disqualifying nutrient levels. These nutrient content claims are unlawful because they fail to comply with the nutrient content claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54, which are incorporated in California's Sherman Law.

111. For example, the nutrient content claims that Defendants make with respect to the potassium and calcium and Vitamin C levels of their potato chips are false and unlawful. The Defendants' claims that their Misbranded Food Products are good sources of these nutrients are unlawful and false because Defendants make such claims without making the mandatory disclosures of disqualifying nutrient levels required by 21 C.F.R. §§ 101.13(b). These claims are false and misleading for the same reason that Defendants "0 grams Trans Fat" claims are false and misleading.

112. Defendants also make false statements using defined terms that they use improperly. For example, they claim that "Frito-Lay snack chips and nuts 'contain' mostly good fats" but good fats are a nutrient without and RDI or DV so that it cannot satisfy the 10% DV threshold required to make a claim using the term contain.

112a. Similarly, the Defendants' representations that their snack chips are "source" of important nutrients are unlawful because they utilize and undefined nutrients claim.

113. FDA enforcement actions targeting identical or similar claims to those made by Defendants have made clear the unlawfulness of such claims. For example, on March 24, 2011, the FDA sent Jonathan Sprouts, Inc. a warning letter where it specifically targeted a "source" type claim like the one used by Defendants. In that letter the FDA stated:

> Your Organic Clover Sprouts product label bears the claim "Phytoestrogen Source[.]" Your webpage entitled "Sprouts, The Miracle Food! - Rich in Vitamins, Minerals and Phytochemicals" bears the claim "Alfalfa sprouts are one of our finest food sources of . . . saponin." These claims are nutrient content claims subject to section 403(r)(1)(A) of the Act because they characterize the level of nutrients of a type required to be in nutrition labeling (phytoestrogen and saponin) in your products by use of the term "source." Under section 403(r)(2)(A) of the Act, nutrient content claims may be made only if the characterization of the level made in the claim uses terms which are defined by regulation. However, FDA has not defined the characterization "source" by regulation. Therefore, this characterization may not be used in nutrient content claims.

114. It is thus clear that a "source" claim like the one utilized by Defendants are unlawful because the "FDA has not defined the characterization 'source' by regulation" and thus such a "characterization may not be used in nutrient content claims." Claims that Defendants' products contain or are made with an ingredient that is known to contain a particular nutrient, or is prepared in a way that affects the content of a particular nutrient in the food, can only be made if those products are a "good source" of the nutrient that is associated with the ingredient or type of preparation. Thus, the Defendants' statements that certain ingredients in their snack food products contain or are sources of certain minerals and vitamins trigger a "good source" (10 percent or more of the RDI or the DRV per reference amount customarily consumed) which their snack food products cannot demonstrate. Thus, the Defendants' claims that the potatoes and corntheir snack chips are manufactured from contribute nutrients like iron, thiamin, magnesium, and niacin are

unlawful and misleading because the actual levels of the nutrients in Defendants' snack chips like the Lay's potato chips and Fritos purchased by the Plaintiffs are not remotely close to the levels required to make a good source claim for these nutrients. Similarly, the claim that the oils used to make Frito-Lay snack chips contribute nutrients like Vitamin E is unlawful and misleading because the actual levels of the nutrients in Defendants' snack chips like the Lay's potato chips and Fritos purchased by the Plaintiffs are not remotely close to the levels required to make a good source claim for these nutrients. The nutrient content claims regulations discussed above are intended to ensure that consumers are not misled as to the actual or relative levels of nutrients in food products.

115. The types of misrepresentations made above would be considered by a reasonable consumer like the Plaintiffs when deciding to purchase the products.

116. Plaintiffs relied on Defendants' nutrient content claims when making their purchase decisions and were misled because they erroneously believed the implicit misrepresentation that the Defendants' products they were purchasing met the minimum nutritional threshold to make such claims. Plaintiffs would not have purchased these products had they known that the Defendants' products did not in fact satisfy such minimum nutritional requirements with regard to antioxidants and other nutrients. Plaintiffs had other food alternatives that satisfied such standards and Plaintiffs also had cheaper alternatives.

117. For these reasons, Defendants' nutrient content claims at issue in this Amended Complaint are false and misleading and in violation of 21 C.F.R. §§ 101.13and 101.54 and identical California law, and the products at issue are misbranded as a matter of law. Defendants have violated these referenced regulations. Therefore, Defendants' Misbranded Food Products are misbranded as a matter of federal and California law and cannot be sold or held and thus are legally worthless.

118. Plaintiffs were misled by the Defendants' unlawful labeling practices and actions into purchasing products they would not have otherwise purchased had they known the truth about those products. Plaintiffs had other food alternatives that that satisfied such standards and Plaintiffs also had cheaper alternatives. Plaintiff would not have purchased these products had they known

that the Defendants' products contained disqualifying nutrients at levels deemed high enough to pose risk of a diet related disease or condition.

119. Defendants' claims in this respect are false and misleading and the products are in this respect misbranded under identical federal and California laws, Misbranded products cannot be legally sold and are legally worthless. Plaintiffs and members of the Class who purchased these products paid an unwarranted premium for these products.

5. Defendants Make Unlawful Health Claims

120. Defendants have violated identical California and federal law by making numerous unapproved health claims about their products. They have also violated identical California and federal law by making numerous unapproved claims about the ability of their products to cure, mitigate, treat and prevent various diseases that render their products unapproved drugs under California and federal law. Moreover, in promoting the ability of their Misbranded Food Products to have an effect on certain diseases such as cancer and heart disease and diabetes among others, Defendants have violated the advertising provisions of the Sherman law.

121. A health claim is a statement expressly or implicitly linking the consumption of a food substance (*e.g.*, ingredient, nutrient, or complete food) to risk of a disease (*e.g.*, cardiovascular disease) or a health-related condition (*e.g.*, hypertension). *See* 21 C.F.R. §101.14(a)(1), (a)(2), and (a)(5). Only health claims made in accordance with FDCA requirements, or authorized by FDA as qualified health claims, may be included in food labeling. Other express or implied statements that constitute health claims, but that do not meet statutory requirements, are prohibited in labeling foods.

122. 21 C.F.R. § 101.14, which has been expressly adopted by California, provides when and how a manufacturer may make a health claim about its product. A "Health Claim" means any claim made on the label or in labeling of a food, including a dietary supplement, that expressly or by implication, including "third party" references, written statements (*e.g.*, a brand name including a term such as "heart"), symbols (*e.g.*, a heart symbol), or vignettes, characterizes the relationship of any substance to a disease or health-related condition. Implied health claims include those statements, symbols, vignettes, or other forms of communication that suggest, within the context in

which they are presented, that a relationship exists between the presence or level of a substance in the food and a disease or health-related condition (*see* 21 CFR § 101.14(a)(1)).

123. Further, health claims are limited to claims about disease risk reduction, and cannot be claims about the diagnosis, cure, mitigation, or treatment of disease. An example of an authorized health claim is: "Three grams of soluble fiber from oatmeal daily in a diet low in saturated fat and cholesterol may reduce the risk of heart disease. This cereal has 2 grams per serving."

124. A claim that a substance may be used in the diagnosis, cure, mitigation, treatment, or prevention of a disease is a drug claim and may not be made for a food. 21 U.S.C. § 321(g)(1)(D).

125. The use of the term "healthy" is not a health claim but rather an implied nutrient content claim about general nutrition that is defined by FDA regulation. In general, the term may be used in labeling an individual food product that:

> Qualifies as both low fat and low saturated fat; Contains 480 mg or less of sodium per reference amount and per labeled serving, and per 50 g (as prepared for typically rehydrated foods) if the food has a reference amount of 30 g or 2 tbsps or less;
>
> Does not exceed the disclosure level for cholesterol (*e.g.*, for most individual food products, 60 mg or less per reference amount and per labeled serving size); *and*
>
> Except for raw fruits and vegetables, certain frozen or canned fruits and vegetables, and enriched cereal-grain products that conform to a standard of identity, provides at least 10% of the daily value (DV) of vitamin A, vitamin C, calcium, iron, protein, *or* fiber per reference amount. Where eligibility is based on a nutrient that has been added to the food, such fortification must comply with FDA's fortification policy.

21 C.F.R. § 101.65(d)(2). Defendants are aware of this rule and expressly state in their marketing materials that [f]or a food to be labeled "healthy" it must meet a specific set of criteria established by the Food and Drug Administration" before referencing some of the criteria.

126. The FDA's regulation on the use of the term healthy also encompasses other, derivative uses of the term health (*e.g.*, healthful, healthier) in food labeling. 21 C.F.R. § 101.65(d).

127. Defendants have violated the provisions of § 21 C.F.R. §101.14, 21 C.F.R. §101.65, 21 C.F.R. §101.76, 21 U.S.C. § 321(g)(1)(D) and 21 U.S.C. § 352(f)(1) by including certain claims on their product labeling and website. Despite being aware of the criteria and restrictions that pertain to "healthy" claims, the Defendants make numerous unlawful "healthy" claims about their Misbranded Food Products and their components. The Defendants indicate that these products and their ingredients are "healthy, "healthier," "healthful," and an "important part of a healthier diet. Defendants indicate that snacking on their snacks offers "health benefits." Defendants also state that fried foods like its snack chips are not "unhealthy" which is in effect a claim that these products are healthy. The Defendants do this in violation of 21 C.F.R. §101.65 which has been adopted by California and which precludes the use of these terms about the Defendants products such as the potato chips, Cheetos and Fritos purchased by Plaintiffs which have disqualifying levels of unhealthy nutrients like fat.

i. 128. In addition to their unlawful "healthy" claims, Defendants make a number of unlawful health related claims. For example, Defendants claim that the ingredients in all of its chips "support heart health and "that "the healthier oils … used in all Frito-Lay snack chips, are high in polyunsaturated and monounsaturated fats that have been proven to reduce LDL (bad) cholesterol and maintain HDL (good) cholesterol levels, which have been associated with a reduction in the risk for heart disease. "Defendants also suggest that snacking on their products can have a beneficial or preventive effect on other diseases and conditions such as diabetes, hypoglycemia, gastric emptying or dumping syndrome.

129. The therapeutic claims on Defendants' website establish that Defendants' products are drugs because they are intended for use in the cure, mitigation, treatment, or prevention of disease. Defendants' products are not generally recognized as safe and effective for the above referenced uses and, therefore, the products would be "new drug[s]" under section 201(p) of the Act [21 U.S.C. § 321(p)]. New drugs may not be legally marketed in the U.S. without prior approval from the FDA as described in section 505(a) of the Act [21 U.S.C. § 355(a)]. FDA approves a new

drug on the basis of scientific data submitted by a drug sponsor to demonstrate that the drug is safe and effective. Defendants also violated California Health & Safety Code § 110403 which prohibits the advertisement of products that are represented to have any effect on enumerated conditions, disorders and diseases including cancer and heart diseases unless the materials have federal approval.

130. Plaintiffs saw such health related claims and relied on the Defendants' health claims which influenced their decision to purchase the Defendants' products. Plaintiffs would not have bought the products had they known Defendants' claims were unapproved and that the products were thus misbranded.

131. Plaintiffs and members of the Class was misled into the belief that such claims were legal and had passed regulatory muster and were supported by science capable of securing regulatory acceptance. Because this was not the case, Plaintiffs and members of the Class have been deceived.

132. Defendants' materials and advertisements not only violate regulations adopted by California such as 21 C.F.R. § 101.14, they also violate California Health & Safety Code § 110403 which prohibits the advertisement of products that are represented to have any effect on enumerated conditions, disorders and diseases including cancer and heart diseases unless the materials have federal approval.

133. Plaintiffs and members of the Class have been misled by Defendants' unlawful labeling practices and actions into purchasing products they would not have otherwise purchased had they known the truth about these products. Plaintiffs and members of the Class who purchased these products paid an unwarranted premium for these products.

134. Defendants' health related claims are false and misleading and the products are in this respect misbranded under identical California and federal laws. Misbranded products cannot be legally sold and thus are legally worthless.

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D. Defendants Have Violated California Law By Manufacturing, Advertising, Distributing and Selling Misbranded Food Products

135. Defendants have manufactured, advertised, distributed and sold products that are misbranded under California law. Misbranded products cannot be legally manufactured, advertised, distributed, sold or held and are legally worthless as a matter of law.

136. Defendants have violated California Health & Safety Code § 110390which makes it unlawful to disseminate false or misleading food advertisements that include statements on products and product packaging or labeling or any other medium used to directly or indirectly induce the purchase of a food product.

137. Defendants have violated California Health & Safety Code § 110395 which makes it unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food.

138. Defendants have violated California Health & Safety Code §§ 110398 and 110400 which make it unlawful to advertise misbranded food or to deliver or proffer for delivery any food that has been falsely advertised.

139. Defendants have violated California Health & Safety Code § 110660 because their labeling is false and misleading in one or more ways.

140. Defendants' Misbranded Food Products are misbranded under California Health & Safety Code § 110665 because their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and the regulations adopted thereto.

141. Defendants' Misbranded Food Products are misbranded under California Health & Safety Code § 110670 because their labeling fails to conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r) and the regulations adopted thereto.

142. Defendants' Misbranded Food Products are misbranded under California Health & Safety Code § 110705 because words, statements and other information required by the Sherman Law to appear on their labeling either are missing or not sufficiently conspicuous.

143. Defendants' Misbranded Food Products are misbranded under California Health & Safety Code § 110735 because they purport to be or are represented for special dietary uses, and their labels fail to bear such information concerning their vitamin, mineral, and other dietary

properties as the Secretary determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses.

144. Defendants' Misbranded Food Products are misbranded under California Health & Safety Code § 110740 because they contain artificial flavoring, artificial coloring and chemical preservatives but fail to adequately disclose that fact on their labeling.

145. Defendants have violated California Health & Safety Code § 110760 which makes it unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded.

146. Defendants have violated California Health & Safety Code § 110765 which makes it unlawful for any person to misbrand any food.

147. Defendants have violated California Health & Safety Code § 110770 which makes it unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food.

148. Defendants have violated the standard set by 21 C.F.R. §101.13(h), which has been incorporated by reference in the Sherman Law, by failing to include on their product labels the nutritional information required by law.

E. Plaintiffs Purchased Defendants' Misbranded Food Products

149. Plaintiffs care about the nutritional content of food and seek to maintain a healthy diet.

150. Since 2008, and throughout the Class Period, Plaintiffs purchased Defendants' Misbranded Food Products, including Lay's Classic Potato Chips, Lay's Honey Barbeque Potato Chips, Lay's Kettle Cooked Mesquite BBQ, Cheetos Puffs, and Fritos Original Corn Chipson occasions during the Class Period. During the Class Period, Plaintiffs each spent more than $25.00 on Defendants Misbranded Food Products.

151. Plaintiffs read the labels on Defendants' Misbranded Food Products, including the "All Natural," "No MSG," "0 grams Trans Fat," and other nutrient content label claims, before purchasing them. Defendants' failure to disclose the presence of risk-increasing nutrients in connection with its "0 grams Trans Fat" and other nutrient content claims were deceptive because

they falsely conveyed to the Plaintiffs the net impression that the Misbranded Food Products they bought made only positive contributions to a diet, and did not contain any nutrients at levels that raised the risk of diet-related disease or health- related condition. The "No MSG" Claim was false because it falsely conveyed to the Plaintiffs that the Misbranded Food Products were free of MSG and free glutamates when they were not. The "All Natural" claim was false because it falsely conveyed to the Plaintiffs that the Misbranded Food Products contained only natural ingredients when in fact they contained artificial ingredients and colors. The "low sodium" claim was false because the products were not "low" in sodium and they had more than the amounts of sodium there were represented to have.

152. Plaintiffs relied on Defendants' package labeling including the "All Natural," "No MSG," "0 grams Trans Fat,"and other nutrient content claims, and based and justified the decision to purchase Defendants' products in substantial part on Defendants' package labeling including the "All Natural," "No MSG," "0 grams Trans Fat," and other nutrient content claims. Plaintiffs read Defendants' website and web claims concerning Defendants' Misbranded Food Products, including the "All Natural," "No MSG," "0 grams Trans Fat," and other nutrient content claims as well as the health and disease related claims before purchasing them.

153. Plaintiffs reasonably relied on Defendants' package labeling, packaging, and website and justified the decision to purchase Defendants' Misbranded Food Products in substantial part on Defendants' package labeling and web claims as well as product packaging, including the "All Natural," "No MSG," "0 grams Trans Fat," and other nutrient content claims and the representations that the products were natural and healthy.

154. At point of sale, Plaintiffs did not know, and had no reason to know, that Defendants' products were misbranded as set forth herein, and would not have bought the products had they known the truth about them.

155. After Plaintiffs learned that Defendants' Misbranded Food Products were falsely labeled, they stopped purchasing them.

156. At point of sale, Plaintiffs did not know, and had no reason to know, that Defendants' "All Natural, " No MSG," "0 grams Trans Fat," and other nutrient content claims"

label claims were unlawful and unauthorized as set forth herein, and would not have bought the products had they known the truth about them.

157. As a result of Defendants unlawful misrepresentations, Plaintiffs and thousands of others in California and throughout the United States purchased the Misbranded Food Products at issue.

158. Defendants' labeling, advertising and marketing as alleged herein are false and misleading and were designed to increase sales of the products at issue. Defendants' misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a reasonable person would attach importance to Defendants' misrepresentations in determining whether to purchase the products at issue.

159. A reasonable person would also attach importance to whether Defendants' products were legally salable, and capable of legal possession, and to Defendants' representations about these issues in determining whether to purchase the products at issue. Plaintiffs would not have purchased Defendants' Misbranded Food Products had they known they were not capable of being legally sold or held.

160. Defendants' Misbranded Food Products 1) whose essential characteristics had been misrepresented by the Defendants, 2) which had their nutritional and health benefits misrepresented and overstated by the Defendants, and 3) which were misbranded products which could not be resold and whose very possession was illegal, were worthless to the Plaintiffs and as a matter of law.

CLASS ACTION ALLEGATIONS

161. Plaintiffs brings this action as a class action pursuant to Federal Rule of Procedure 23(b)(2) and 23(b)(3)on behalf of the following class:

> All persons in California who, within the last four years, purchased potato chips and other snack food products distributed or sold by Frito Lay that were 1) labeled or advertised as "All Natural" despite containing artificial, synthetic or unnatural ingredients, flavorings, coloring, and/or chemical preservatives; 2) labeled or advertised as having "0 grams Trans Fat" but which contained more than 13 grams of fat per 50 grams; 3) labeled or advertised as having "No MSG" despite containing MSG; 4) represented as being "low sodium" despite having more than 140 mgs of sodium per serving size or per

50 grams; 5) labeled or advertised as healthy despite containing disqualifying nutrient levels; or 6) labeled or advertised with an unauthorized health claim(the "Class").

162. The following persons are expressly excluded from the Class: (1) Defendants and their subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and its staff.

163. This action can be maintained as a class action because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

164. Numerosity: Based upon Defendants' publicly available sales data with respect to the misbranded products at issue, it is estimated that the Class numbers in the thousands, and that joinder of all Class members is impracticable.

165. Common Questions Predominate: This action involves common questions of law and fact applicable to each Class member that predominate over questions that affect only individual Class members. Thus, proof of a common set of facts will establish the right of each Class member to recover. Questions of law and fact common to each Class member include, just for example:

a. Whether Defendants engaged in unlawful, unfair or deceptive business practices by failing to properly package and label their Misbranded Food Products sold to consumers;

b. Whether the food products at issue were misbranded or unlawfully packaged and labeled as a matter of law;

c. Whether Defendants made unlawful and misleading "All Natural" or "No MSG" claims with respect to their food products sold to consumers;

d. Whether Defendants made unlawful and misleading "0g trans fat," "low sodium" and other nutrient content or health claims with respect to their food products sold to consumers;

e. Whether Defendants failed to disclose the presence of preservatives or falsely represented that their products did not contain preservatives or artificial ingredients;

f. Whether Defendant used unlawful and misleading nutritional information and statements of identity;

g. Whether Defendants violated California Bus. & Prof. Code §

17200,*et seq*., California Bus. & Prof. Code § 17500,*et seq*., the Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq*., California Civ. Code § 1790, *et seq*., 15 U.S.C. § 2301, *et seq*., and the Sherman Law;

h. Whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief;

i. Whether Defendants' unlawful, unfair and/or deceptive practices harmed Plaintiffs and the Class; and

j. Whether Defendants were unjustly enriched by their deceptive practices.

166. Typicality: Plaintiffs claims are typical of the claims of the Class because Plaintiffs bought Defendants' Misbranded Food Products during the Class Period. Defendants' unlawful, unfair and/or fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. Plaintiffs and the Class sustained similar injuries arising out of Defendants' conduct in violation of California law. The injuries of each member of the Class were caused directly by Defendants' wrongful conduct. In addition, the factual underpinning of Defendants' misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiffs' claims arise from the same practices and course of conduct that give rise to the claims of the Class members and are based on the same legal theories.

167. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class. Neither Plaintiffs nor Plaintiffs' counsel have any interests that conflict with or are antagonistic to the interests of the Class members. Plaintiffs have retained highly competent and experienced class action attorneys to represent their interests and those of the members of the Class. Plaintiffs and Plaintiffs' counsel have the necessary financial resources to adequately and vigorously litigate this class action, and Plaintiffs and counsel are aware of their fiduciary responsibilities to the Class members and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

168. Superiority: There is no plain, speedy or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the Class will tend to establish inconsistent standards of conduct for Defendants and result in the impairment

of Class members' rights and the disposition of their interests through actions to which they were not parties. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of effort and expense that numerous individual actions would engender. Further, as the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them, while an important public interest will be served by addressing the matter as a class action. Class treatment of common questions of law and fact would also be superior to multiple individual actions or piecemeal litigation in that class treatment will conserve the resources of the Court and the litigants, and will promote consistency and efficiency of adjudication.

169. The prerequisites to maintaining a class action for injunctive or equitable relief pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

170. The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3) are met as questions of law or fact common to class members 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.

171. Plaintiffs and Plaintiffs' counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Business and Professions Code § 17200, *et seq.*
Unlawful Business Acts and Practices

172. Plaintiffs incorporate by reference each allegation set forth above.

173. Defendants' conduct constitutes unlawful business acts and practices.

174. Defendants sold Misbranded Food Products in California and throughout the United States during the Class Period.

175. Defendants are corporations and, therefore, each is a "person" within the meaning of the Sherman Law.

176. Defendants' business practices are unlawful under § 17200, *et seq*. by virtue of Defendants' violations of the advertising provisions of Article 3 of the Sherman Law and the misbranded food provisions of Article 6 of the Sherman Law.

177. Defendants' business practices are unlawful under § 17200, *et seq*. by virtue of Defendants' violations of § 17500, *et seq.*, which forbids untrue and misleading advertising.

178. Defendants' business practices are unlawful under § 17200, *et seq*. by virtue of Defendants' violations of the Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq*.

179. Defendants sold Plaintiffs and the Class Misbranded Food Products that were not capable of being sold, or held legally and which were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

180. As a result of Defendants' illegal business practices, Plaintiffs and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and to restore to any Class Member any money paid for the Misbranded Food Products.

181. Defendants' unlawful business acts present a threat and reasonable continued likelihood of injury to Plaintiffs and the Class.

182. As a result of Defendants' conduct, Plaintiffs and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiffs and the Class.

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SECOND CAUSE OF ACTION
Business and Professions Code § 17200, *et seq.*
Unfair Business Acts and Practices

183. Plaintiffs incorporate by reference each allegation set forth above.

184. Defendants' conduct as set forth herein constitutes unfair business acts and practices.

185. Defendants sold Misbranded Food Products in California and throughout the United States during the Class Period.

186. Plaintiffs and members of the Class suffered a substantial injury by virtue of buying Defendants' Misbranded Food Products that they would not have purchased absent Defendants' illegal conduct.

187. Defendants' deceptive marketing, advertising, packaging and labeling of their Misbranded Food Products and their sale of unsalable misbranded products that were illegal to possess was of no benefit to consumers, and the harm to consumers and competition is substantial.

188. Defendants sold Plaintiffs and the Class Misbranded Food Products that were not capable of being legally sold or held and that were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

189. Plaintiffs and the Class who purchased Defendants' Misbranded Food Products had no way of reasonably knowing that the products were misbranded and were not properly marketed, advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of them suffered.

190. The consequences of Defendants' conduct as set forth herein outweigh any justification, motive or reason therefor. Defendants' conduct is and continues to be immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious toPlaintiffs and the Class.

191. As a result of Defendants' conduct, Plaintiffs and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiffs and the Class.

THIRD CAUSE OF ACTION
Business and Professions Code § 17200, *et seq.*
Fraudulent Business Acts and Practices

192. Plaintiffs incorporate by reference each allegation set forth above.

193. Defendants' conduct as set forth herein constitutes fraudulent business practices under California Business and Professions Code sections § 17200, *et seq.*

194. Defendants sold Misbranded Food Products in California and throughout the United States during the Class Period.

195. Defendants' misleading marketing, advertising, packaging and labeling of the Misbranded Food Products and their misrepresentations that the products were salable, capable of legal possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiffs and members of the Class were deceived. Defendants have engaged in fraudulent business acts and practices.

196. Defendants' fraud and deception caused Plaintiffs and the Class to purchase Defendants Misbranded Food Products that they would otherwise not have purchased had they known the true nature of those products.

197. Defendants sold Plaintiffs and the Class Misbranded Food Products that were not capable of being sold or held legally and that were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

198. As a result of Defendants' conduct as set forth herein, Plaintiffs and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge

Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiffs and the Class.

FOURTH CAUSE OF ACTION
Business and Professions Code § 17500, *et seq.*
Misleading and Deceptive Advertising

199. Plaintiffs incorporate by reference each allegation set forth above.

200. Plaintiffs assert this cause of action for violations of California Business and Professions Code § 17500, *et seq.* for misleading and deceptive advertising against Defendants.

201. Defendants sold Misbranded Food Products in California and throughout the United States during the Class Period.

202. Defendants engaged in a scheme of offering Defendants Misbranded Food Products for sale to Plaintiffs and members of the Class by way of, *inter alia*, product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendants Misbranded Food Products. Defendants' advertisements and inducements were made within California and throughout the United States and come within the definition of advertising as contained in Business and Professions Code §17500, *et seq.* in that such product packaging and labeling, and promotional materials were intended as inducements to purchase Defendants' Misbranded Food Products and are statements disseminated by Defendants to Plaintiffs and the Class that were intended to reach members of the Class. Defendants knew, or in the exercise of reasonable care should have known, that these statements were misleading and deceptive as set forth herein.

203. In furtherance of their plan and scheme, Defendants prepared and distributed within California and nationwide via product packaging and labeling, and other promotional materials, statements that misleadingly and deceptively represented the composition and the nature of Defendants' Misbranded Food Products. Plaintiffs and the Class necessarily and reasonably relied on Defendants' materials, and were the intended targets of such representations.

204. Defendants' conduct in disseminating misleading and deceptive statements in California and nationwide to Plaintiffs and the Class was and is likely to deceive reasonable

consumers by obfuscating the true composition and nature of Defendants Misbranded Food Products in violation of the "misleading prong" of California Business and Professions Code § 17500, *et seq*.

205. As a result of Defendants' violations of the "misleading prong" of California Business and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of Plaintiffs and the Class. Misbranded products cannot be legally sold or held and are legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

206. Plaintiffs and the Class, pursuant to Business and Professions Code § 17535, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiffs and the Class.

FIFTH CAUSE OF ACTION
Business and Professions Code § 17500, *et seq.*
Untrue Advertising

207. Plaintiffs incorporate by reference each allegation set forth above.

208. Plaintiffs assert this cause of action against Defendants for violations of California Business and Professions Code § 17500, *et seq.*, regarding untrue advertising.

209. Defendants sold Misbranded Food Products in California and throughout the United States during the Class Period.

210. Defendants engaged in a scheme of offering Defendants' Misbranded Food Products for sale to Plaintiffs and the Class by way of product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendants' Misbranded Food Products. Defendants' advertisements and inducements were made in California and throughout the United States and come within the definition of advertising as contained in Business and Professions Code §17500, *et seq*. in that the product packaging and labeling, and promotional materials were intended as inducements to purchase Defendants' Misbranded Food Products, and are statements disseminated by Defendants to Plaintiffs and the

Class. Defendants knew, or in the exercise of reasonable care should have known, that these statements were untrue.

211. In furtherance of their plan and scheme, Defendants prepared and distributed in California and nationwide via product packaging and labeling, and other promotional materials, statements that falsely advertise the composition of Defendants' Misbranded Food Products, and falsely misrepresented the nature of those products. Plaintiffs and the Class were the intended targets of such representations and would reasonably be deceived by Defendants' materials.

212. Defendants' conduct in disseminating untrue advertising throughout California deceived Plaintiffs and members of the Class by obfuscating the contents, nature and quality of Defendants' Misbranded Food Products in violation of the "untrue prong" of California Business and Professions Code §17500.

213. As a result of Defendants' violations of the "untrue prong" of California Business and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of Plaintiffs and the Class. Misbranded products cannot be legally sold or held and are legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

214. Plaintiffs and the Class, pursuant to Business and Professions Code § 17535, are entitled to an order enjoining such future conduct by Defendants, and such other orders and judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any money paid for Defendants' Misbranded Food Products by Plaintiffs and the Class.

SIXTH CAUSE OF ACTION
Consumers Legal Remedies Act, Cal. Civ. Code §1750, *et seq.*

215. Plaintiffs incorporate by reference each allegation set forth above.

216. This cause of action is brought pursuant to the CLRA. Defendant's violations of the CLRA are willful, oppressive and fraudulent, thus supporting an award of punitive damages.

217. Plaintiffs and the Class, having given proper notice to Defendants, are entitles to actual and punitive damages against Defendants for their violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiffs and the Class are entitled to an order enjoining

the above-described acts and practices, providing restitution to Plaintiffs and the Class, ordering payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

218. Defendants' actions, representations and conduct have violated, and continue to violate the CLRA, because they extend to transactions that are intended to result, or which have resulted, in the sale of goods to consumers.

219. Defendants' conduct in mislabeling and misbranding its food products originated from and was approved at Defendants' headquarters in California.

220. Defendants sold Misbranded Food Products in California and throughout the United States during the Class Period.

221. Plaintiffs and members of the Class are "consumers" as that term is defined by the CLRA in Cal. Civ. Code §1761(d).

222. Defendants' Misbranded Food Products were and are "goods" within the meaning of Cal. Civ. Code §1761(a).

223. By engaging in the conduct set forth herein, Defendants violated and continue to violate Sections 1770(a)(5) of the CLRA, because Defendants' conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they misrepresent the particular ingredients, characteristics, uses, benefits and quantities of the goods.

224. By engaging in the conduct set forth herein, Defendants violated and continue to violate Section 1770(a)(7) of the CLRA, because Defendants' conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they misrepresent the particular standard, quality or grade of the goods.

225. By engaging in the conduct set forth herein, Defendants violated and continue to violate Section 1770(a)(9) of the CLRA, because Defendants' conduct constitutes unfair methods of

competition and unfair or fraudulent acts or practices in that they advertise goods with the intent not to sell the goods as advertised.

226. By engaging in the conduct set forth herein, Defendants have violated and continue to violate Section 1770(a)(16) of the CLRA, because Defendants' conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices in that they represent that a subject of a transaction has been supplied in accordance with a previous representation when it has not.

227. Plaintiffs requests that the Court enjoin Defendants from continuing to employ the unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2). If Defendants are not restrained from engaging in these practices in the future, Plaintiffs and the Class will continue to suffer harm.

SEVENTH CAUSE OF ACTION
Restitution Based on Unjust Enrichment/Quasi-Contract

228. Plaintiffs incorporate by reference each allegation set forth above.

229. As a result of Defendants' fraudulent and misleading labeling, advertising, marketing and sales of Defendants' Misbranded Food Products Defendants were enriched at the expense of Plaintiffs and the Class.

230. Defendants sold Misbranded Food Products to Plaintiffs and the Class that were not capable of being sold or held legally and which were legally worthless. It would be against equity and good conscience to permit Defendants to retain the ill-gotten benefits they received from Plaintiffs and the Class, in light of the fact that the products were not what Defendants purported them to be. Thus, it would be unjust and inequitable for Defendants to retain the benefit without restitution to Plaintiffs and the Class of all monies paid to Defendants for the products at issue.

231. As a direct and proximate result of Defendants' actions, Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

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EIGHTH CAUSE OF ACTION
Beverly-Song Act (Cal. Civ. Code § 1790, *et seq.*)

232. Plaintiffs incorporate by reference each allegation set forth above.

233. Plaintiffs and members of the Class are "buyers" as defined by Cal. Civ. Code § 1791(b).

234. Defendants are "manufacturers" and "sellers" as defined by Cal. Civ. Code § 1791(j) & (l).

235. Defendants' food products are "consumables" as defined by Cal. Civ. Code § 1791(d).

236. Defendants' "All Natural," "No MSG" and other health and nutrient content claims constitute "express warranties" as defined by Cal. Civ. Code § 1791.2.

237. Defendants, through their package labels, create express warranties by making the affirmation of fact and promising that their Misbranded Food Products comply with food labeling regulations under federal and California law.

238. Despite Defendants' express warranties regarding their food products, they do not comply with food labeling regulations under federal and California law.

239. Defendants breached their express warranties regarding their Misbranded Food Products in violation of Cal. Civ. Code § 1790, *et seq.* Defendants also breached their implied warranties regarding their Misbranded Food Products.

240. Defendants sold Plaintiffs and members of the Class Defendants' Misbranded Food Products that were not capable of being sold or held legally and which were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

241. As a direct and proximate result of Defendants' actions, Plaintiffs and the Class have suffered damages in an amount to be proven at trial pursuant to Cal. Civ. Code § 1794.

242. Defendants' breaches of warranty were willful, warranting the recovery of civil penalties pursuant to Cal. Civ. Code § 1794.

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NINTH CAUSE OF ACTION
Magnuson-Moss Act (15 U.S.C. § 2301, *et seq.*)

243. Plaintiffs incorporate by reference each allegation set forth above.

244. Plaintiffs and members of the Class are "consumers" as defined by 15 U.S.C. § 2301(3).

245. Defendants are "suppliers" and "warrantors" as defined by 15 U.S.C. § 2301(4) & (5).

246. Defendants' food products are "consumer products" as defined by 15 U.S.C. § 2301(1).

247. Defendants' "All Natural," "No MSG," and other health and nutrient content claims constitute "express warranties."

248. Defendants, through their package labels, create express warranties by making the affirmation of fact and promising that their Misbranded Food Products comply with food labeling regulations under federal and California law.

249. Despite Defendants' express warranties regarding their food products, they do not comply with food labeling regulations under federal and California law.

250. Defendants breached their express warranties regarding their Misbranded Food Products in violation of 15 U.S.C. §§ 2301, *et seq.* Defendants also breached their implied warranties regarding their Misbranded Food Products

251. Defendants sold Plaintiffs and members of the Class Misbranded Food Products that were not capable of being sold or held legally and which were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

252. As a direct and proximate result of Defendants' actions, Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of their claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, and on behalf of the general public, pray for judgment against Defendants as follows:

A. For an order certifying this case as a class action and appointing Plaintiffs and their counsel to represent the Class;

B. For an order awarding, as appropriate, damages, restitution or disgorgement to Plaintiffs and the Class for all causes of action;

C. For an order requiring Defendants to immediately cease and desist from selling their Misbranded Food Products listed in violation of law; enjoining Defendants from continuing to market, advertise, distribute, and sell these products in the unlawful manner described herein; and ordering Defendants to engage in corrective action;

D. For all remedies available pursuant to Cal. Civ. Code § 1780;

E. For an order awarding attorneys' fees and costs;

F. For an order awarding punitive damages;

G. For an order awarding pre-and post-judgment interest; and

H. For an order providing such further relief as this Court deems proper.

Dated: August 16, 2012

Respectfully submitted,

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