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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 ROBERT PRATT, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 vs.

17 **WHOLE FOORS MARKET**
18 **CALIFORNIA, INC.; MRS**
19 **GOOCH’S NATURAL FOODS**
20 **MARKET, INC.; WFM-WO, INC.;**
21 **and WFM PRIVATE LABEL, L.P.**

22 Defendants.

Case No. CV 12-05652 EJD

CLASS ACTION AND REPRESENTATIVE ACTION

AMENDED COMPLAINT FOR DAMAGES, EQUITABLE AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

23 Plaintiff, through his undersigned attorneys, brings this lawsuit against Defendants Whole
24 Foods Market California, Inc., Mrs. Gooch’s Natural Foods Market, Inc., WFM-WO, Inc., and
25 WFM Private Label, L.P., (hereinafter referred to as “Whole Foods” and/or Defendants) as to his
26 own acts, upon personal knowledge, and as to all other matters upon information and belief.

27 **I. DEFINITIONS**

28 1. “Class Period” is November 2, 2008 to the present.

2. “Purchased Products” are the products listed below that were purchased by
Plaintiff during the Class Period.

a. 365 Everyday Value Organic Chicken Broth

- 1 b. 365 Everyday Value Tomato Ketchup
- 2 c. 365 Everyday Value Organic Ketchup
- 3 d. 365 Everyday Value Apple Cinnamon Instant Oatmeal
- 4 e. 365 Everyday Value Whipped Topping
- 5 f. 365 Everyday Value Cola
- 6 g. 365 Everyday Value Ginger Ale
- 7 h. 365 Everyday Value Root Beer
- 8 i. Natural Italian Soda in green apple flavor
- 9 j. Natural Italian Soda in blood orange flavor

10 3. “Substantially Similar Products” are the products that: (i) make the same label
11 representations, as described herein, as the Purchased Products and (ii) violate the same
12 regulations of the Sherman Food Drug & Cosmetic Law, California Health & Safety Code §
13 109875 *et seq.* (the “Sherman Law”) as the Purchased Products, as described herein.

14 **II. SUMMARY OF THE CASE**

15 4. Plaintiff’s case has two distinct facets. First, the “UCL unlawful” part. Plaintiff’s
16 first cause of action is brought pursuant to the unlawful prong of California’s Unfair Competition
17 Law, Cal. Bus. & Prof. Code § 17200 (“UCL”). Plaintiff alleges that Defendants package and
18 label the Purchased Products in violation of California’s Sherman Law which adopts, incorporates
19 – and is identical – to the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.* (“FDCA”).
20 These violations (which do not require a finding that the labels are “misleading”) render the
21 Purchased Products “misbranded” which is no small thing. Under California law, a food product
22 that is misbranded cannot legally be manufactured, advertised, distributed, held or sold.
23 Misbranded products cannot be legally sold, possessed, have no economic value, and are legally
24 worthless. Indeed, the sale, purchase or possession of misbranded food is a criminal act in
25 California and the FDA even threatens food companies with seizure of misbranded products. This
26 “misbranding” – standing alone without any allegations of deception by Defendants or review of
27 or reliance on the labels by Plaintiff – give rise to Plaintiff’s first cause of action under the UCL.
28 To state a claim under the unlawful prong, Plaintiff need only allege that she would not have

1 purchased the product had she known it was misbranded because she would have a product that is
2 illegal to own or possess.

3 5. Second, the “fraudulent” part. Plaintiff alleges that the illegal statements contained
4 on the labels of the Purchased Products – aside from being unlawful under the Sherman Law – are
5 also misleading, deceptive, unfair and fraudulent. Plaintiff describes these labels and how they are
6 misleading. Plaintiff alleges that prior to purchase she reviewed the illegal statements on the
7 labels on the Purchased Products, reasonably relied in substantial part on the labels, and was
8 thereby deceived, in deciding to purchase these products. Had Plaintiff known the truth about the
9 products there would have been no purchases.

10 6. Plaintiff did not know, and had no reason to know, that the Purchased Products
11 were misbranded under the Sherman Law and bore food labeling claims that failed to meet the
12 requirements to make those food labeling claims. Similarly, Plaintiff did not know, and had no
13 reason to know, that Defendants’ Purchased Products were false and misleading.

14 **III. BACKGROUND**

15 7. Every day, millions of Americans purchase and consume packaged foods. Identical
16 federal and California laws require truthful, accurate information on the labels of packaged foods.
17 This case is about companies that flout those laws. The law is clear: misbranded food cannot
18 legally be manufactured, held, advertised, distributed or sold. Misbranded food has no economic
19 value and is worthless as a matter of law, and purchasers of misbranded food are entitled to a
20 refund of their purchase price.

21 8. Whole Foods is the largest retailer of natural and organic foods in the United
22 States, Canada and the United Kingdom.

23 9. Whole Foods’ sales revenues for 2011 from the sale of its products topped \$10
24 billion.

25 10. As part of its overall marketing strategy, Whole Foods has recognized the desire
26 of many of its consumers to eat a healthier diet. Whole Foods recognizes that naturalness and
27 health claims drive sales, and, therefore, actively promotes the naturalness and health benefits of
28 its products.

1 11. For example, Whole Foods makes the following representations regarding its
2 products:

- 3 • “People are increasingly embracing healthier lifestyles to improve the quality of their lives
4 and minimize their healthcare costs.”
- 5 • “As America’s healthiest grocery store, we are uniquely positioned to benefit from this
6 major demographic evolution.”
- 7 • We believe that many customers choose to shop our stores because of their interest in
8 health, nutrition and food safety. We believe that our customers hold us to higher food
9 safety standards than other supermarkets.”

10 12. Whole Foods actively promotes the purported naturalness and health benefits of
11 the Purchased Products and Substantially Similar Products, notwithstanding the fact that such
12 promotion violates California and federal law.

13 13. For example, the label of Whole Food’s 365 Organic Everyday Chicken Broth
14 purchased by Plaintiff fails to disclose that it contains sugar as an ingredient. Instead, the label
15 lists “ORGANIC EVAPORATED CANE JUICE” as an ingredient, when such a term is not the
16 common or usual name for this ingredient and this ingredient is not “juice” at all. Whole Foods
17 fails to disclose the fact that “EVAPORATED CANE JUICE” is, in its ordinary and commonly
18 understood terms, “sugar,” or dried sugar cane syrup.

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

1 nutrients at levels that raise the risk of diet-related disease or health-related condition.

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

8 16. Under the FDCA, the term “false” has its usual meaning of “untruthful,” while the
9 term “misleading” is a term of art. Misbranding reaches not only false claims, but also those
10 claims that might be technically true, but still misleading. If any one representation in the
11 labeling is misleading, the entire food is misbranded, nor can any other statement in the labeling
12 cure a misleading statement. “Misleading” is judged in reference to “the ignorant, the unthinking
13 and the credulous who, when making a purchase, do not stop to analyze.” *United States v. El-O-*
14 *Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove
15 that anyone was actually misled.

16 17. In promoting the naturalness and health benefits of the Purchased Products and
17 Substantially Similar Products, Defendants claim to understand the importance of communicating
18 responsibly about its products. Nevertheless, Defendants have made, and continue to make, false
19 and deceptive claims on the Purchased Products and Substantially Similar Products in violation of
20 federal and California laws that govern the types of representations that can be made on food
21 labels. In particular, in making their unlawful “no sugar added” and “evaporated cane juice”
22 claims on the Purchased Products and Substantially Similar Products, Defendants have violated
23 ingredient and nutrient content labeling regulations mandated by federal and California law by
24 listing sugar and/or sugar cane syrups as “evaporated cane juice and by using prohibited terms
25 like “no sugar added” on products that fail to comply with the nutritional requirements for making
26 such claims. According to the FDA, the term “evaporated cane juice” is not the common or usual
27 name of any type of sweetener, including dried cane syrup. Because cane syrup has a standard of
28 identity defined by regulation in 21 CFR 168.130, the common or usual name for the solid or

1 dried form of cane syrup is “sugar” or “dried cane syrup.” According to the FDA, sweeteners
2 derived from sugar cane syrup should not be listed in the ingredient declaration by names which
3 suggest that the ingredients are juice, such as “evaporated cane juice.” The FDA considers such
4 representations to be false and misleading under section 403(a)(1) of the Act (21 U.S.C.
5 343(a)(1)) because they fail to reveal the basic nature of the food and its characterizing properties
6 (i.e., that the ingredients are sugars or syrups) as required by 21 CFR 102.5. Similarly, 21 CFR
7 101.60 prohibits the use of the term “no sugar added” on products that are as high in calories as
8 the Defendants’ unlawfully labeled products or which contain ingredients that are barred because
9 they are or act as added sugar.

10 18. By making unlawful “all natural,” “natural” and “naturale” claims on the
11 Purchased Products and Substantially Similar Products, Defendants have violated labeling
12 regulations mandated by federal and California law, which forbid the use of such labeling if the
13 product contains artificial ingredients, flavorings, coloring, and/or chemical preservatives.
14 Similarly, by claiming their products are free of artificial ingredients, flavorings, coloring, and/or
15 chemical preservatives when they actual contain such components or by failing to describe the
16 functions of such components Defendants have engaged in labeling practices that are unlawful
17 and false and misleading.

18 19. Defendants have made, and continue to make, unlawful claims on food labels of
19 the Purchased Products and Substantially Similar Products that are prohibited by federal and
20 California law, and which render these products misbranded. Under federal and California law,
21 the Purchased Products and Substantially Similar Products cannot legally be manufactured,
22 advertised, distributed, held or sold. Defendants’ false and misleading labeling practices stem
23 from its marketing strategy. Thus, the violations and misrepresentations are similar across
24 product labels and product lines with numerous products bearing the same exact type of unlawful
25 claims as the unlawfully labeled products purchased by the Plaintiff.

26 20. Defendants’ violations of law include the illegal advertising, marketing,
27 distribution, delivery and sale of the Purchased Products and Substantially Similar Products to
28 consumers in California and throughout the United States.

PARTIES

1
2 21. Plaintiff, Robert Pratt is a resident of Los Gatos, California who purchased the
3 Purchased Products during the four (4) years prior to the filing of this Complaint (the “Class
4 Period”).

5 22. Whole Foods Market California, Inc. is a California corporation doing business in
6 the State of California and throughout the United States of America. It can be served with
7 process by serving its registered agent: CT Corporation System, 818 W. 7th St., Los Angeles, CA
8 90017-3407.

9 23. WFM-WO, Inc. is a Delaware Corporation, doing business in the State of
10 California and throughout the United States of America. It can be served with process in
11 California by serving their local registered agent at: CT Corporation System, 818 W. 7th St., Los
12 Angeles, CA 90017-3407.

13 24. WFM Private Label, L.P. is a Delaware Corporation, doing business in the State of
14 California and throughout the United States of America. It can be served with process by serving
15 their registered agent: CT Corporation System, 350 N. Saint Paul St., Suite 2900, Dallas, TX
16 75201-4234.

17 25. Mrs. Gooch’s Natural Foods Markets, Inc. is a Nebraska Corporation, doing
18 business in the State of California and throughout the United States of America. It can be served
19 with process by serving their registered agent: CT Corporation System, 1024 K St., Lincoln, NE
20 68508-2851.

21 26. Defendants are a leading producer and distributor of retail packaged grocery
22 products, including the Purchased Products and Substantially Similar Products. Defendants sell
23 their food products to consumers through its stores throughout the United States under labels such
24 as Whole Foods Market, 365 Organic Everyday Value and 365 Everyday Value.

25 **IV. JURISDICTION AND VENUE**

26 27. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)
27 because this is a class action in which: (1) there are over 100 members in the proposed class;
28 (2) members of the proposed class have a different citizenship from Defendant; and (3) the claims

1 of the proposed class members exceed \$5,000,000 in the aggregate.

2 28. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to
3 28 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is
4 between citizens of different states.

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

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

14 V. FACTUAL ALLEGATIONS

15 A. Identical California And Federal Laws Regulate Food Labeling

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

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

24 33. In addition to its blanket adoption of federal labeling requirements, California has
25 also enacted a number of laws and regulations that adopt and incorporate specific enumerated
26 federal food laws and regulations. For example, food products are misbranded under California
27 Health & Safety Code § 110660 if their labeling is false and misleading in one or more
28 particulars; are misbranded under California Health & Safety Code § 110665 if their labeling fails

1 to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and
2 regulations adopted thereto; are misbranded under California Health & Safety Code § 110670 if
3 their labeling fails to conform with the requirements for nutrient content and health claims set
4 forth in 21 U.S.C. § 343(r) and regulations adopted thereto; are misbranded under California
5 Health & Safety Code § 110705 if words, statements and other information required by the
6 Sherman Law to appear on their labeling are either missing or not sufficiently conspicuous; are
7 misbranded under California Health & Safety Code § 110725 if the label fails to state the
8 common or usual name of ingredients in a food fabricated of two or more ingredients; are
9 misbranded under California Health & Safety Code § 110735 if they are represented as having
10 special dietary uses but fail to bear labeling that adequately informs consumers of their value for
11 that use; and are misbranded under California Health & Safety Code § 110740 if they contain
12 artificial flavoring, artificial coloring and chemical preservatives but fail to adequately disclose
13 that fact on their labeling.

14 **B. FDA Enforcement History**

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

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

22 FDA's research has found that with FOP labeling, people are less likely to
23 check the Nutrition Facts label on the information panel of foods (usually, the
24 back or side of the package). It is thus essential that both the criteria and
25 symbols used in front-of-package and shelf-labeling systems be nutritionally
26 sound, well-designed to help consumers make informed and healthy food
27 choices, and not be false or misleading. The agency is currently analyzing FOP
28 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

1 Cosmetic Act that prohibit false or misleading claims and restrict nutrient
2 content claims to those defined in FDA regulations. Therefore, FOP and shelf
3 labeling that is used in a manner that is false or misleading misbrands the
4 products it accompanies. Similarly, a food that bears FOP or shelf labeling with
5 a nutrient content claim that does not comply with the regulatory criteria for the
6 claim as defined in Title 21 Code of Federal Regulations (CFR) 101.13 and
7 Subpart D of Part 101 is misbranded. We will consider enforcement actions
8 against clear violations of these established labeling requirements. . .

9 Accurate food labeling information can assist consumers in making healthy
10 nutritional choices. FDA intends to monitor and evaluate the various FOP
11 labeling systems and their effect on consumers' food choices and perceptions.
12 FDA recommends that manufacturers and distributors of food products that
13 include FOP labeling ensure that the label statements are consistent with FDA
14 laws and regulations. FDA will proceed with enforcement action against
15 products that bear FOP labeling that are explicit or implied nutrient content
16 claims and that are not consistent with current nutrient content claim
17 requirements. FDA will also proceed with enforcement action where such FOP
18 labeling or labeling systems are used in a manner that is false or misleading.

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

24 37. Despite the issuance of the 2009 FOP Guidance, Defendants did not remove the
25 unlawful and misleading food labeling claims from the Purchased Products and Substantially
26 Similar Products.

27 38. On March 3, 2010, the FDA issued an “Open Letter to Industry from [FDA
28 Commissioner] Dr. Hamburg” (“Open Letter”). The Open Letter reiterated the FDA’s concern
29 regarding false and misleading labeling by food manufacturers. In pertinent part the letter stated:

30 In the early 1990s, the Food and Drug Administration (FDA) and the food
31 industry worked together to create a uniform national system of nutrition
32 labeling, which includes the now-iconic Nutrition Facts panel on most food
33 packages. Our citizens appreciate that effort, and many use this nutrition
34 information to make food choices. Today, ready access to reliable information
35 about the calorie and nutrient content of food is even more important, given the
36 prevalence of obesity and diet-related diseases in the United States. This need
37 is highlighted by the announcement recently by the First Lady of a coordinated
38 national campaign to reduce the incidence of obesity among our citizens,
39 particularly our children.

40 With that in mind, I have made improving the scientific accuracy and
41 usefulness of food labeling one of my priorities as Commissioner of Food and

1 Drugs. The latest focus in this area, of course, is on information provided on
2 the principal display panel of food packages and commonly referred to as
3 “front-of-pack” labeling. The use of front-of-pack nutrition symbols and other
4 claims has grown tremendously in recent years, and it is clear to me as a
5 working mother that such information can be helpful to busy shoppers who are
6 often pressed for time in making their food selections. ...

7
8 As we move forward in those areas, I must note, however, that there is one area
9 in which more progress is needed. As you will recall, we recently expressed
10 concern, in a “Dear Industry” letter, about the number and variety of label
11 claims that may not help consumers distinguish healthy food choices from less
12 healthy ones and, indeed, may be false or misleading.

13
14 At that time, we urged food manufacturers to examine their product labels in
15 the context of the provisions of the Federal Food, Drug, and Cosmetic Act that
16 prohibit false or misleading claims and restrict nutrient content claims to those
17 defined in FDA regulations. As a result, some manufacturers have revised their
18 labels to bring them into line with the goals of the Nutrition Labeling and
19 Education Act of 1990. Unfortunately, however, we continue to see products
20 marketed with labeling that violates established labeling standards.

21
22 To address these concerns, FDA is notifying a number of manufacturers that
23 their labels are in violation of the law and subject to legal proceedings to
24 remove misbranded products from the marketplace. While the warning letters
25 that convey our regulatory intentions do not attempt to cover all products with
26 violative labels, they do cover a range of concerns about how false or
27 misleading labels can undermine the intention of Congress to provide
28 consumers with labeling information that enables consumers to make informed
and healthy food choices

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.

39. In addition to its guidance to industry, the FDA has sent warning letters to
industry, including the Defendants and many of Defendants’ peer food manufacturers for the
same types of unlawful nutrient content claims described above.

40. In these letters dealing with unlawful nutrient content claims the FDA indicated
that as a result of the same type of claims utilized by the Defendants, products were in “violation

1 of the Federal Food, Drug, and Cosmetic Act ... and the applicable regulations in Title 21, Code
2 of Federal Regulations, Part 101 (21 CFR 101)” and were “misbranded within the meaning of
3 section 403(r)(1)(A) because the product label bears a nutrient content claim but does not meet
4 the requirements to make the claim.” Similarly, letters such as the one received by the Defendant
5 for unlawful “all natural” claims similar to those at issue here indicated that the products at issue
6 were “misbranded under section 403(a)(1) of the Act” because their labels were “false and
7 misleading.”

8 41. The warning letters were hardly isolated as the FDA has issued over 10 other
9 warning letters to other companies for the same type of food labeling claims at issue in this case.

10 42. The FDA stated that the agency not only expected companies that received
11 warning letters to correct their labeling practices but also anticipated that other firms would
12 examine their food labels to ensure that they are in full compliance with food labeling
13 requirements and make changes where necessary. Defendants did not change the labels on the
14 Purchased Products and Substantially Similar Products in response to the warning letters sent to
15 other companies.

16 43. Defendants also have ignored the FDA’s Guidance for Industry, A Food Labeling
17 Guide which details the FDA’s guidance on how to make food labeling claims. Defendants
18 continue to utilize unlawful claims on the labels of the Purchased Products and Substantially
19 Similar Products. Despite all warnings, the Purchased Products and Substantially Similar
20 Products continue to run afoul of FDA guidance as well as federal and California law.

21 44. Despite the FDA’s numerous warnings to industry, Defendants have continued to
22 sell products bearing unlawful food labeling claims without meeting the requirements to make
23 them.

24 45. Plaintiff did not know, and had no reason to know, that the Purchased Products
25 were misbranded and bore food labeling claims despite failing to meet the requirements to make
26 those food labeling claims. Similarly, Plaintiff did not know, and had no reason to know, that the
27 Purchased Products were misbranded because their labeling was false and misleading.
28

1 **VI. OVERVIEW OF APPLICABLE SHERMAN LAW VIOLATIONS**

2 **A. Evaporated Cane Juice Claims**

3 46. The following Purchased Products contain an “evaporated cane juice” claim:

- 4
- 5 • 365 Everyday Value Organic Chicken Broth (ECJ)
 - 6 • 365 Everyday Value Tomato Ketchup (ECJ)
 - 7 • 365 Everyday Value Organic Ketchup (ECJ)
 - 8 • 365 Everyday Value Apple Cinnamon Instant Oatmeal (ECJ)

9 47. 21 C.F.R. §§ 101.3, 101.4 and 102.5, which have been adopted by California,
10 prohibit manufacturers from referring to foods and their component ingredients by anything other
11 than their common and usual names. There are also independent provisions of California law
12 imposing parallel requirements that foods and ingredients to be identified by their common or
13 usual names (California Health & Safety Code §§ 110720, 11725).

14 48. Defendants have violated these provisions by failing to use the common or usual
15 name for ingredients mandated by law.

16 49. Defendants have violated the FDA’s express policy with respect to the listing of
17 certain ingredients such as sugar or dried sugar cane syrup. As stated by the FDA “FDA’s current
18 policy is that sweeteners derived from sugar cane syrup should not be declared as ‘evaporated
19 cane juice’ because that term falsely suggests that the sweeteners are juice.”

20 50. The FDA “considers such representations to be false” and misleading under
21 §403(a)(1) of the Act (21 U.S.C. 343(a)(1) because they fail to reveal the basic nature of the food
22 and its characterizing properties (i.e., that the ingredients are sugars or syrups) as required by 21
23 U.S.C. 102.5.

24 51. In October of 2009, the U. S. Food and Drug Administration issued Guidance for
25 Industry: Ingredients Declared as Evaporated Cane Juice, which advised industry that:

26 “...the term “evaporated cane juice” has started to appear as an ingredient on food labels,
27 most commonly to declare the presence of sweeteners derived from sugar cane syrup.
28 However, FDA’s current policy is that sweeteners derived from sugar cane syrup should
not be declared as “evaporated cane juice” because that term falsely suggests that the
sweeteners are juice...”

“Juice” is defined by 21 CFR 120.1(a) as “the aqueous liquid expressed or extracted from
one or more fruits or vegetables, purees of the edible portions of one or more fruits or
vegetables, or any concentrates of such liquid or puree.” ...

1 “As provided in 21 CFR 101.4(a)(1), “Ingredients required to be declared on the label or
2 labeling of a food . . . shall be listed by common or usual name” The common or
3 usual name for an ingredient is the name established by common usage or by regulation
4 (21 CFR 102.5(d)). The common or usual name must accurately describe the basic nature
5 of the food or its characterizing properties or ingredients, and may not be “confusingly
6 similar to the name of any other food that is not reasonably encompassed within the same
7 name” (21 CFR 102.5(a))...

8 “Sugar cane products with common or usual names defined by regulation are sugar (21
9 CFR 101.4(b)(20)) and cane sirup (alternatively spelled “syrup”) (21 CFR 168.130). Other
10 sugar cane products have common or usual names established by common usage (e.g.,
11 molasses, raw sugar, brown sugar, turbinado sugar, muscovado sugar, and demerara
12 sugar)...

13 “The intent of this draft guidance is to advise the regulated industry of FDA’s view that
14 the term “evaporated cane juice” is not the common or usual name of any type of
15 sweetener, including dried cane syrup. Because cane syrup has a standard of identity
16 defined by regulation in 21 CFR 168.130, the common or usual name for the solid or dried
17 form of cane syrup is “dried cane syrup.”...

18 “Sweeteners derived from sugar cane syrup should not be listed in the ingredient
19 declaration by names which suggest that the ingredients are juice, such as “evaporated
20 cane juice.” FDA considers such representations to be false and misleading under section
21 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they fail to reveal the basic nature of
22 the food and its characterizing properties (i.e., that the ingredients are sugars or syrups) as
23 required by 21 CFR 102.5.

24 52. Despite the issuance of the 2009 FDA Guidance, Defendants did not remove the
25 improper and misleading food labeling ingredients from the Purchased Products and Substantially
26 Similar Products.

27 53. In addition to the guidance to industry, the FDA has sent warning letters to
28 industry, including many of Defendants’ peer food manufacturers for the same types of improper
claims described above.

54. In these letters the FDA indicated that, as a result of the same types of 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 claim but does not meet the requirements to make the claim.”

55. The warning letters were hardly isolated as the FDA has issued other warning
letters to other companies for the same type of food labeling claims at issue in this case.

56. The FDA stated that the agency not only expected companies that received

1 warning letters to correct their labeling practices but also anticipated that other firms would
2 examine their food labels to ensure that they are in full compliance with food labeling
3 requirements and make changes where necessary. Defendants did not change the labels on the
4 Purchased Products and Substantially Similar Products in response to these warning letters.

5 57. Defendants also continued to ignore the 2009 FOP Guidance which detailed the
6 FDA's guidance on how to make food labeling claims. Defendants ignored this guidance as well
7 and continued to utilize improper claims on the labels of the Purchased Products and Substantially
8 Similar Products. As such, the Purchased Products and Substantially Similar Products continue to
9 run afoul of 2009 FOP Guidance as well as federal and California law.

10 58. Despite the FDA's numerous warnings to industry, Defendants have continued to
11 sell products bearing improper food labeling claims without meeting the requirements to make
12 them.

13 59. Plaintiff did not know, and had no reason to know, that the Purchased Products
14 were misbranded and bore food labeling claims despite failing to meet the requirements to make
15 those food labeling claims. The "evaporated cane juice" and common name of ingredients and
16 juice regulations discussed herein are intended to ensure that consumers are not misled as to the
17 actual or relative levels of nutrients in food products. Plaintiff would not have bought these
18 products had they been accurately labeled with all ingredients described by their common and
19 usual name.

20 60. Defendants label and distribute various products such as the 365 Everyday Value
21 Organic Chicken Broth, 365 Everyday Value Tomato Ketchup and 365 Everyday Value Organic
22 Ketchup bought by the Plaintiff, the labels of which misleadingly list "evaporated cane juice" as
23 an ingredient. Similarly, the Defendants label and distribute various products such as the 365
24 Everyday Value Apple Cinnamon Instant Oatmeal bought by the Plaintiff, the labels of which
25 misleadingly list "evaporated cane juice solids" as an ingredient. According to the FDA,
26 "evaporated cane juice" is not the common or usual name of any type of sweetener, including
27 dried cane syrup." The FDA provides that "cane syrup has a standard of identity defined by
28 regulation in 21 CFR 168.130; the common or usual name for the solid or dried form of cane

1 syrup is ‘dried cane syrup.’” The labels of 365 Organic Everyday Value Chicken Broth, 365
2 Everyday Value Tomato Ketchup, 365 Everyday Value Organic Ketchup and 365 Everyday
3 Value Apple Cinnamon Instant Oatmeal are reproduced in Exhibit 1 attached hereto.

4 61. For these reasons, Defendants’ labels at issue in this Complaint are misleading and
5 violate 21 C.F.R. §§ 343 (a) and California law, and the products at issue are misbranded as a
6 matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held
7 or sold and thus have no economic value and are legally worthless. Plaintiff and the class paid a
8 premium price for the Purchased Products and Substantially Similar Products.

9 **B. “Natural” Claims**

10 62. The following Purchased Products have an unlawful and misleading “natural” (or
11 “Naturale”) claim:

- 12 • 365 Everyday Value Cola ("Natural")
- 13 • 365 Everyday Value Ginger Ale ("Natural")
- 14 • 365 Everyday Value Root Beer ("Natural")
- 15 • Natural Italian Soda in green apple flavor ("Naturale")
- 16 • Natural Italian Soda in blood orange flavor ("Naturale")

17 63. In its rule-making and warning letters to manufacturers, the FDA has repeatedly
18 stated its policy to restrict the use of the term “natural” in connection with added color, synthetic
19 substances and flavors as provided in 21 C.F.R. § 101.22.

20 64. The FDA has also repeatedly affirmed its policy regarding the use of the term
21 “natural” as meaning that nothing artificial or synthetic (including all color additives regardless of
22 source) has been included in, or has been added to, a food that would not normally be expected to
23 be in the food.

24 65. The FDA considers use of the term “natural” on a food label to be truthful and
25 non-misleading when “nothing artificial or synthetic...has been included in, or has been added to,
26 a food that would not normally be expected to be in the food.” *See* 58 FR 2302, 2407, January 6,
27 1993.

28 66. 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.

1 67. The Defendants make numerous unlawful “all natural, “natural” and “naturale”
2 claims on its products. For example, Defendants’ labeling practices of its “all natural” and
3 “natural” sodas violate the 2009 FOP Guidance Sec. 587.100, which states: “[t]he use of the
4 words ‘food color added,’ ‘natural color,’ or similar words containing the term ‘food’ or ‘natural’
5 may be erroneously interpreted to mean the color is a naturally occurring constituent in the food.
6 Since all added colors result in an artificially colored food, we would object to the declaration of
7 any added color as ‘food’ or ‘natural.’”

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

11 69. The FDA has sent out numerous warning letters concerning this issue.
12 Defendants are aware of these FDA warning letters.

13 70. Defendants have unlawfully labeled some of its food products as being “All
14 Natural,” “Natural” or “Naturale” when they actually contain artificial ingredients and flavorings,
15 artificial coloring and chemical preservatives. For example, Defendants’ 365 Everyday Value
16 Cola bought by the Plaintiff is represented to be “all natural” but contains caramel coloring,
17 tartaric acid, citric acid and carbon dioxide. Defendants’ 365 Everyday Value Ginger Ale and
18 Root Beer bought by the Plaintiff are represented to be “all natural” but contain caramel coloring,
19 citric acid and carbon dioxide. Similarly, Defendants sold the Natural Italian Soda in green apple
20 and blood orange flavors bought by the Plaintiff, the labels of which misleadingly represented
21 them as “natural” when they actually contain artificial ingredients such as citric acid or ascorbic
22 acid used to preserve food and/or impart tart flavor to products that lack such flavor naturally.
23 Defendants also sold the Whole Foods Market Natural Green Apple Italian Soda in green apple
24 and blood orange flavors bought by the Plaintiff, the labels of which misleadingly represented
25 them as “naturale” when they contained color additives such as beet or black carrot juices.

26 71. The labels of Defendants’ All Natural Soda and Bibita Naturale products are
27 reproduced in Exhibit 1 attached hereto.

28 72. 21 C.F.R. § 70.3(f) makes clear that “where a food substance such as beet juice is

1 deliberately used as a color, as in pink lemonade, it is a color additive.” Similarly, any coloring
2 or preservative can preclude the use of the term “natural” even if the coloring or preservative is
3 derived from natural sources. The FDA distinguishes between natural and artificial flavors in 21
4 C.F.R. § 101.22.

5 73. The FDA has also repeatedly affirmed its policy regarding the use of the term
6 “natural” as meaning that nothing artificial or synthetic (including all color additives regardless of
7 source) has been included in, or has been added to, a food that would not normally be expected to
8 be in the food. Any coloring or preservative can preclude the use of the term “natural” even if the
9 coloring or preservative is derived from natural sources.

10 74. A reasonable consumer would expect that when Defendants label and represent
11 their products as “All Natural, “Natural,” or “Naturale,” the product’s ingredients are “natural” as
12 defined by the federal government and its agencies. A reasonable consumer would also expect
13 that when Defendants label their products as “All Natural, “Natural,” or “Naturale,” the product
14 ingredients are “natural” under the common use of that word. A reasonable consumer would
15 understand that “natural” products do not contain synthetic, artificial, or excessively processed
16 ingredients.

17 75. Consumers are thus misled into purchasing Defendants’ products with ingredients
18 that are not natural as falsely represented on their labeling. Defendants’ products in this respect
19 are misbranded under federal and California law. Plaintiff did not know, and had no reason to
20 know, that the Purchased Products were misbranded, and bore natural claims despite failing to
21 meet the requirements to make those natural claims. Plaintiff would not have bought these
22 products had they been accurately labeled and disclosed the information required by law.
23 Because of this improper manner in which ingredients were described, Plaintiff purchased
24 Defendants’ products and paid premiums for them. Defendants have violated these referenced
25 regulations and thus misled Plaintiff and the Class who were injured as a result and suffered
26 economic loss.

27 **C. “No Sugar Added” Claims**

28 76. The following Purchased Products have an unlawful and misleading “no sugar

1 added” claim:

- 2 • 365 Everyday Value Whipped Topping

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

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

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

14 80. An “express nutrient content claim” is defined as any direct statement about the
15 level (or range) of a nutrient in the food (*e.g.*, “low sodium” or “contains 100 calories”). *See* 21
16 C.F.R. § 101.13(b)(1).

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

23 82. FDA regulations authorize the use of a limited number of defined nutrient content
24 claims. In addition, FDA’s regulations authorize the use of only certain synonyms for these
25 defined terms. If a nutrient content claim or its synonym is not included in the food labeling
26 regulations, it cannot be used on a label. Only those claims, or their synonyms, that are
27 specifically defined in the regulations may be used. All other claims are prohibited. 21 CFR
28 §101.13(b).

1 83. Only approved nutrient content claims will be permitted on the food label, and all
2 other nutrient content claims will misbrand a food. It should thus be clear which type of claim is
3 prohibited and which permitted. Food manufacturers are on notice that the use of an unapproved
4 nutrient content claim is prohibited conduct. 58 FR 2302. In addition, 21 USC §343(r)(2)
5 prohibits using unauthorized undefined terms, and it declares foods that do so to be misbranded.

6 84. Defendants have unlawfully made “No Sugar Added” nutrient content claims with
7 respect to products like its 365 Everyday Value Whipped Topping product bought by the Plaintiff.

8 85. Misbranded products cannot be legally sold under California Law. *See* Cal. Health
9 and Safety Code § 110760. Misbranded products cannot be legally sold under Federal Law.
10 *See* 21 U.S.C. §§ 331, 333.

11 86. Federal and California law regulates “no sugar added” claims as a particular type
12 of nutrient content claim. Specifically, 21 C.F.R. § 101.60 contains special requirements for
13 nutrient claims that use the phrase “no sugar added.” Pursuant to the Sherman Law, California
14 has expressly adopted the federal labeling requirements of 21 C.F.R. § 101.60 as its own.
15 California Health & Safety Code § 110100.

16 87. 21 C.F.R. § 101.60(c)(2) provides in pertinent part, with emphasis added:

17 (2) The terms “no added sugar,” “without added sugar,” or “**no sugar added**”
18 may be used only if:

19 (i) No amount of sugars, as defined in §101.9(c)(6)(ii), or any other ingredient that
20 contains sugars that functionally substitute for added sugars is added during
processing or packaging; and

21 (ii) The product does not contain an ingredient containing added sugars such as
jam, jelly, or concentrated fruit juice; and

22 (iii) The sugars content has not been increased above the amount present in the
23 ingredients by some means such as the use of enzymes, except where the intended
functional effect of the process is not to increase the sugars content of a food, and
24 a functionally insignificant increase in sugars results; and

25 (iv) The food that it resembles and for which it substitutes normally contains
added sugars; and

26 (v) *The product bears a statement that the food is not “low calorie” or “calorie*
27 *reduced” (unless the food meets the requirements for a “low” or “reduced calorie”*
28 *food) and that directs consumers’ attention to the nutrition panel for further*
information on sugar and calorie content.

1 79. 21 C.F.R. § 101.60(b)(2) provides that:

2 The terms "low-calorie," "few calories," "contains a small amount of calories,"
3 "low source of calories," or "low in calories" may be used on the label or in
4 labeling of foods, except meal products as defined in § 101.13(l) and main dish
5 products as defined in § 101.13(m), provided that: (i)(A) The food has a reference
6 amount customarily consumed greater than 30 grams (g) or greater than 2
7 tablespoons and does not provide more than 40 calories per reference amount
8 customarily consumed; or (B) The food has a reference amount customarily
consumed of 30 g or less or 2 tablespoons or less and does not provide more than
40 calories per reference amount customarily consumed and, except for sugar
substitutes, per 50 g(ii) If a food meets these conditions without the benefit of
special processing, alteration, formulation, or reformulation to vary the caloric
content, it is labeled to clearly refer to all foods of its type and not merely to the
particular brand to which the label attaches (e.g., "celery, a low-calorie food").

9 88. In September 2007, the FDA issued a guidance letter to the food industry that
10 indicated the FDA was concerned about unlawful sugar free type claims "that fail to bear the
11 required disclaimer statement when these foods are not "low" or "reduced in" calories or fail to
12 bear the required disclaimer statement in the location or with the conspicuousness required by
13 regulation." The letter stated:

14 Dear Manufacturer:

15 The Food and Drug Administration (FDA) is concerned about the number of
16 products we have seen that contain claims regarding the absence of sugar, such as,
17 "sugar free" but that fail to bear the required disclaimer statement when these foods
18 are not "low" or "reduced in" calories or fail to bear the required disclaimer
19 statement in the location or with the conspicuousness required by regulation. As
20 part of our continuing effort to reduce the incidence of obesity in the United States,
21 FDA wants to ensure that consumers are provided with the label information they
22 need to make informed choices for maintaining a healthy diet. We are highlighting
23 accurate claims about the absence of sugar as a regulatory priority. The agency
24 intends to take appropriate action against products that we encounter that bear a
25 claim about the absence of sugar (e.g., sugar free) but that fail to meet each of the
26 requirements of the regulation that defines "sugar free." We intend to pay particular
27 attention to those foods that are required to bear a disclaimer statement under the
28 regulation that defines "sugar free," but that fail to do so or otherwise fail to comply
with the regulation, 21 CFR 101.60(c). Therefore, we are taking this opportunity to
remind food manufacturers and distributors of conventional food products that the
definition of "sugar free" includes several requirements.

Under the authority of the Nutrition Labeling and Education Act of 1990, FDA
issued regulations for the nutrient content claim "sugar free" 58 Federal Register
(FR) 2302 at 2415. "Sugar free" is defined in Title 21 of the Code of Federal
Regulations 101.60(c) ...

FDA has historically taken the position that consumers may associate claims

1 regarding the absence of sugar with weight control and with foods that are low-
2 calorie or that have been altered to reduce calories significantly. Therefore, the
3 definition for "sugar free" includes the requirement that any food that is not low or
4 reduced in calorie disclose that fact. Without such information some consumers
5 might think the food was offered for weight control. See 56 FR 60421 at 60435.
6 Consequently, the definition for "sugar free" includes the requirement that the food
7 be labeled with the claim "low-calorie" or "reduced calorie" or bear a relative claim
8 of special dietary usefulness labeled in compliance with 21 CFR 101.60(b)(2),
9 (b)(3), (b)(4), or (b)(5) or such claim is immediately accompanied, each time it is
10 used, by one of the following disclaimer statements: "not a reduced calorie food,"
11 "not a low-calorie food," or "not for weight control" (see 21 CFR 101.60(c)(1)(iii)).
12 The disclaimer statement, when required, must accompany the claim each time it is
13 used. In addition, the disclaimer statement is subject to the requirements of 21 CFR
14 101.2(c) and must appear prominently and conspicuously but in no case may the
15 letters be less than one-sixteenth inch in height.

16 FDA encourages food manufacturers and distributors to review their labels and
17 ensure that any food that bears a claim regarding the absence of sugar meet each of
18 the requirements for that claim including the placement and conspicuousness of the
19 disclaimer statement in 21 CFR 101.60(c)(1)(iii) when required. FDA will take
20 appropriate action, consistent with our priorities and resources, when we find
21 problems with the use of nutrient content claims regarding the absence of sugar in
22 foods.

23 89. The food industry ignored this FDA guidance and engaged in the exact labeling
24 practices the FDA sought to eliminate.

25 90. In addition to the industry guidance companies ignored, the FDA has repeatedly
26 taken enforcement action and issued warning letters against several other companies addressing
27 the type of misleading sugar free nutrient content claims described above.

28 91. The enforcement actions and warning letters were hardly isolated, as the FDA has
taken action against several other companies finding that the products were misbranded within the
meaning of section 403 because the products' labels bore "sugar free" claims but did not meet the
requirements to make such a claim.

92. The food industry ignored the FDA's repeated enforcement actions and issuance of
warning letters and continued to use unlawful sugar free claims on their product labels and in
their advertising and marketing materials when they were prohibited from doing so.

93. Defendants claim that their product 365 Everyday Value Whipped Topping has
"No Sugar Added."

1 94. The labels of Defendants' 365 Everyday Value Whipped Topping products are
2 reproduced in Exhibit 1 attached hereto.

3 95. Defendants' 365 Everyday Value Whipped Topping product does not satisfy
4 element (v) of 21 C.F.R. § 101.60(c)(2) and is therefore misbranded under federal and state law.

5 96. Notwithstanding the fact that 21 C.F.R. § 101.60(c)(2)(v) bars the use of the term
6 "no sugar added" on foods that are not low-calorie unless they bear an express warning
7 immediately adjacent to each use of the terms that discloses that the food is not "low calorie" or
8 "calorie reduced," Defendants have touted their non low-calorie products as having "no sugar
9 added" and chosen to omit the mandated disclosure statements.

10 97. In doing so, Defendants have ignored 21 C.F.R. § 101.60(c)(1), which states that:

11 98. Consumers may reasonably be expected to regard terms that represent that the food
12 contains no sugars or sweeteners e.g., "sugar free," or "no sugar," as indicating a product which is
13 low in calories or significantly reduced in calories.

14 99. Because consumers may reasonably be expected to regard terms that represent
15 that the food contains "no sugar added" or sweeteners as indicating a product which is low in
16 calories or significantly reduced in calories, consumers are misled when foods that are not low-
17 calorie as a matter of law are falsely represented, through the unlawful use of phrases like "no
18 sugar added" that they are not allowed to bear due to its high calorific levels and absence of
19 mandated disclaimer or disclosure statements.

20 100. The labeling for Defendants' products violates California law and federal law. For
21 these reasons, Defendants' "no sugar added" claims at issue in this Complaint are misleading and
22 in violation of 21 C.F.R. § 101.60(c)(2) and California law, and the product at issue is misbranded
23 as a matter of law. Misbranded products cannot be legally sold and thus have no economic value
24 and are legally worthless.

25 101. Defendants are in violation despite numerous enforcement actions and warning
26 letters pertaining to several other companies addressing the type of misleading sugar-related
27 nutrient content claim described herein.

28 102. Plaintiff did not know, and had no reason to know, that Defendants' product was

1 misbranded, and bore nutrient content claims despite failing to meet the requirements to make
2 those nutrient content claims. Plaintiff would not have bought this product had it disclosed the
3 information required by law.

4 103. Defendants' 365 Everyday Value Whipped Topping is misbranded under federal
5 and California law as it contains disqualifying levels of calories that prohibit the claim from being
6 made absent a mandated disclosure statement warning of the higher caloric level of the products
7 and thus violates 21 CFR §101.60(c)(2).

8 104. Because of this improper nutrient content claim, Plaintiff purchased this product
9 and paid a premium for it. The nutrient content claims regulations discussed herein are intended
10 to ensure that consumers are not misled as to the actual or relative levels of nutrients in food
11 products. Defendants have violated these referenced regulations. .

12 **VII. DEFENDANTS HAVE VIOLATED CALIFORNIA LAW**

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

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

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

22 108. Defendants have violated California Health & Safety Code § 110660 because their
23 products' labeling are false and misleading in one or more ways.

24 109. Defendants have violated California Health & Safety Code § 110665 because their
25 labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q)
26 and the regulations adopted thereto.

27 110. Defendants have violated California Health & Safety Code § 110670 because their
28 labeling fails to conform with the requirements for nutrient content and health claims set forth in

1 21 U.S.C. § 343(r) and the regulations adopted thereto.

2 111. Defendants have violated California Health & Safety Code § 110705 because
3 words, statements and other information required by the Sherman Law to appear on their labeling
4 either are missing or not sufficiently conspicuous.

5 112. Defendants have violated California Health & Safety Code § 110725 as they fail to
6 state the common or usual name of each ingredient.

7 113. Defendants violated California Health & Safety Code § 110740 because they
8 contain artificial flavoring, artificial coloring and chemical preservatives but fail to adequately
9 disclose that fact on their labeling.

10 114. Defendants have violated California Health & Safety Code § 110755 because they
11 purport to be or are represented for special dietary uses, and its labels fail to bear such information
12 concerning their vitamin, mineral, and other dietary properties as the Secretary determines to be,
13 and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for
14 such uses.

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

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

20 117. Defendants have violated California Health & Safety Code § 110770 which make
21 it unlawful for any person to receive in commerce any food that is misbranded or to deliver or
22 proffer for deliver any such food.

23 118. Defendants have violated the standards set by 21 C.F.R. § 1.21, 101.3, 101.4,
24 101.13, 101.60, and 102.5 which have been incorporated by reference in the Sherman Law, by
25 using terms unlawfully, failing to include on its product labels the nutritional information required
26 by law and by utilizing unlawful labeling practices.

1 **VIII. PLAINTIFF BOUGHT THE PURCHASED PRODUCTS**

2 122. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy
3 diet.

4 123. Plaintiff purchased the Purchased Products since 2008 and throughout during the
5 Class Period. Plaintiff has spent more than \$25.00 on the Purchased Products.

6 119. Plaintiff read and reasonably relied on the labels on the Purchased Products before
7 purchasing them as described herein. Plaintiff relied on Defendants' labeling as described herein
8 and based and justified the decision to purchase Defendants' products, in substantial part, on these
9 labels.

10 125. Plaintiff relied on Defendants' package labeling including the Ingredient,
11 "EVAPORATED CANE JUICE" and the "natural" claims and "No Sugar Added" nutrient
12 content claims, and the representation that products were free of artificial colors, preservatives or
13 flavors and based and justified the decision to purchase Defendants' products in substantial part
14 on Defendants' package labeling claims.

15 120. At point of sale, Plaintiff did not know, and had no reason to know, that the
16 Purchased Products were unlawful and misbranded as set forth herein, and would not have bought
17 the products had he known the truth about them, including the fact that that the products were
18 illegal to purchase and possess.

19 121. After Plaintiff learned that Defendants' Purchased Products were falsely labeled,
20 he stopped purchasing them.

21 128. As a result of Defendants' unlawful conduct, Plaintiff and thousands of others in
22 California and throughout the United States purchased the Purchased Products and the
23 Substantially Similar Products at issue.

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

1 130. A reasonable person would also attach importance to whether Defendants'
2 products were legally salable, and capable of legal possession, and to Defendants' representations
3 about these issues in determining whether to purchase the products at issue. Plaintiff would not
4 have purchased Defendants' products had he known they were not capable of being legally sold
5 or held.

6 122. Plaintiff's purchase of the Purchased Products damaged Plaintiff because
7 misbranded products cannot be legally sold, possessed, have no economic value, and are legally
8 worthless.

9 123. Plaintiff's purchase of the Purchased Products damaged Plaintiff because Plaintiff
10 paid an unwarranted premium for the Purchased Products when cheaper alternatives were
11 available.

12 **IX. CLASS ACTION ALLEGATIONS**

13 124. Plaintiff brings this action as a class action pursuant to Federal Rule of Procedure
14 23(b)(2) and 23(b)(3) on behalf of the following class:

15 All persons in the United States, and alternatively, in a subclass of consumers in
16 California who, within the last four years, purchased any of the Purchased
Products or Substantially Similar Products

17 (1) containing "evaporated cane juice" as an ingredient;

18 (2) labeled or advertised as "All Natural, " Natural," or "Naturale" despite containing
19 artificial or unnatural ingredients, flavorings, coloring, and/or chemical preservatives;

20 (3) labeled "No Sugar Added" but which (a) contained concentrated fruit juice
21 and/or (b) provided more than 40 calories per reference amount customarily
22 consumed but which failed to bear a statement (i) disclosing that the product was
not "low calorie" or "calorie reduced" and (ii) directing consumers' attention to
the nutrition panel for further information on sugar and calorie content;

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

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

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

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

- 9 a. Whether Defendants engaged in unlawful, unfair or deceptive business
10 practices by failing to properly package and label products sold to
consumers;
- 11 b. Whether the food products at issue were misbranded or unlawfully
12 packaged and labeled as a matter of law;
- 13 c. Whether the Defendants made unlawful and misleading “all natural” or
“natural” or “naturale” claims;
- 14 d. Whether the Defendants failed to use the common or usual name of all its
15 products’ ingredients and instead utilized the unlawful and misleading
term “evaporated cane juice;”
- 16 e. Whether Defendants made unlawful and misleading “no sugar added”
17 claims with respect to their food products sold to consumers;
- 18 f. Whether Defendants made unlawful and misleading express or implied
19 nutrient content claims with respect to their food products sold to
consumers;
- 20 g. Whether Defendants made unlawful and misleading representations that its
products were free from artificial colors, flavors or preservatives
- 21 h. Whether Defendants failed to adequately disclose the calorie or sugar
22 content of its food products sold to consumers;
- 23 i. Whether Defendants violated California Bus. & Prof. Code § 17200 *et*
24 *seq.*, California Bus. & Prof. Code § 17500 *et seq.*, the California
Consumers Legal Remedies Act, Cal. Civ. Code. § 1750 *et seq.*, and the
Sherman Law;
- 25 j. Whether Plaintiff and the Class are entitled to equitable and/or injunctive
26 relief;
- 27 k. Whether Defendants’ unlawful, unfair and/or deceptive practices harmed
Plaintiff and the Class; and
- 28 l. Whether Defendants were unjustly enriched by its deceptive practices.

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

11 130. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.
12 Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to
13 the interests of the Class members. Plaintiff has retained highly competent and experienced class
14 action attorneys to represent his interests and those of the members of the Class. Plaintiff and
15 Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate
16 this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class
17 members and will diligently discharge those duties by vigorously seeking the maximum possible
18 recovery for the Class.

19 131. Superiority: There is no plain, speedy or adequate remedy other than by
20 maintenance of this class action. The prosecution of individual remedies by members of the Class
21 will tend to establish inconsistent standards of conduct for Defendants and result in the
22 impairment of Class members' rights and the disposition of their interests through actions to
23 which they were not parties. Class action treatment will permit a large number of similarly
24 situated persons to prosecute their common claims in a single forum simultaneously, efficiently
25 and without the unnecessary duplication of effort and expense that numerous individual actions
26 would engender. Further, as the damages suffered by individual members of the Class may be
27 relatively small, the expense and burden of individual litigation would make it difficult or
28 impossible for individual members of the Class to redress the wrongs done to them, while an

1 important public interest will be served by addressing the matter as a class action. Class treatment
2 of common questions of law and fact would also be superior to multiple individual actions or
3 piecemeal litigation in that class treatment will conserve the resources of the Court and the
4 litigants, and will promote consistency and efficiency of adjudication.

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

9 133. The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3)
10 are met as questions of law or fact common to class members predominate over any questions
11 affecting only individual members, and a class action is superior to other available methods for
12 fairly and efficiently adjudicating the controversy.

13 134. Plaintiff and Plaintiff's counsel are unaware of any difficulties that are likely to be
14 encountered in the management of this action that would preclude its maintenance as a class
15 action.

16 X. CAUSES OF ACTION

17 FIRST CAUSE OF ACTION 18 Business and Professions Code § 17200, *et seq.* 19 Unlawful Business Acts and Practices

20 135. Plaintiff incorporates by reference each allegation set forth above.

21 136. Defendants' conduct constitutes unlawful business acts and practices.

22 137. Defendants sold the Purchased Products and Substantially Similar Products in
23 California and throughout the United States during the Class Period.

24 138. Defendants are corporations and a limited partnership and, therefore, each is a
25 "person" within the meaning of the Sherman Law.

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

140. Defendants' business practices are unlawful under § 17200, *et seq.* by virtue of

1 Defendants' violations of § 17500, *et seq.*, which forbids untrue and misleading advertising.

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

4 142. Defendants sold Plaintiff and the Class products that were not capable of being
5 sold, or held legally and which had no economic value and were legally worthless for which
6 Plaintiff and the class paid a premium price for these products.

7 143. As a result of Defendants' illegal business practices, Plaintiff and the Class,
8 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future
9 conduct and such other orders and judgments which may be necessary to disgorge Defendants'
10 ill-gotten gains and to restore to any Class Member any money paid for the Purchased Products
11 and Substantially Similar Products.

12 144. Defendants' unlawful business acts present a threat and reasonable continued
13 likelihood of injury to Plaintiff and the Class.

14 145. As a result of Defendants' conduct, Plaintiff and the Class, pursuant to Business
15 and Professions Code § 17203, are entitled to an order enjoining such future conduct by
16 Defendants, and such other orders and judgments which may be necessary to disgorge
17 Defendants' ill-gotten gains and restore any money paid by Plaintiff and the Class for
18 Defendants' Purchased Products and Substantially Similar Products.

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

22 146. Plaintiff incorporates by reference each allegation set forth above.

23 147. Defendants' conduct as set forth herein constitutes unfair business acts and
24 practices.

25 148. Defendants sold the Purchased Products and Substantially Similar Products in
26 California and throughout the United States during the Class Period.

27 149. Plaintiff and members of the Class suffered a substantial injury by virtue of buying
28 Defendants' Purchased Products and Substantially Similar Products that they would not have
purchased absent Defendants' illegal conduct.

1 150. Defendants' deceptive marketing, advertising, packaging and labeling of the
2 Purchased Products and Substantially Similar Products and their sale of unsalable misbranded
3 products that were illegal to possess was of no benefit to consumers, and the harm to consumers
4 and competition is substantial.

5 151. Defendants sold the Purchased Products and Substantially Similar Products that
6 were not capable of being legally sold or held and that had no economic value and were legally
7 worthless. Plaintiff and the Class paid a premium price for the Purchased Products and
8 Substantially Similar Products .

9 152. Plaintiff and the Class who purchased the Purchased Products and Substantially
10 Similar Products had no way of reasonably knowing that the products were misbranded and were
11 not properly marketed, advertised, packaged and labeled, and thus could not have reasonably
12 avoided the injury each of them suffered.

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

17 154. As a result of Defendants' conduct, Plaintiff and the Class, pursuant to Business
18 and Professions Code § 17203, are entitled to an order enjoining such future conduct by
19 Defendants, and such other orders and judgments which may be necessary to disgorge
20 Defendants' ill-gotten gains and restore any money paid for Defendants' Purchased Products and
21 Substantially Similar Products by Plaintiff and the Class.

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

25 155. Plaintiff incorporates by reference each allegation set forth above.

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

28 157. Defendants sold the Purchased Products and Substantially Similar Products in
California and throughout the United States during the Class Period.

1 158. Defendants' misleading marketing, advertising, packaging and labeling of the
2 Purchased Products and Substantially Similar Products and misrepresentation that the products
3 were salable, capable of possession and not misbranded were likely to deceive reasonable
4 consumers, and in fact, Plaintiff and members of the Class were deceived. Defendants have
5 engaged in fraudulent business acts and practices.

6 159. Defendants' fraud and deception caused Plaintiff and the Class to purchase the
7 Purchased Products and Substantially Similar Products that they would otherwise not have
8 purchased had they known the true nature of those products.

9 160. Defendants sold Plaintiff and the Class the products that were not capable of being
10 sold or held legally and that had no economic value and were legally worthless for which Plaintiff
11 and the Class paid a premium price.

12 161. As a result of Defendants' conduct as set forth herein, Plaintiff and the Class,
13 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future
14 conduct by Defendants, and such other orders and judgments which may be necessary to disgorge
15 Defendants' ill-gotten gains and restore any money paid for Defendants' Purchased Products and
16 Substantially Similar Products by Plaintiff and the Class.

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

20 162. Plaintiff incorporates by reference each allegation set forth above.

21 163. Plaintiff asserts this cause of action for violations of California Business and
22 Professions Code § 17500, *et seq.* for misleading and deceptive advertising against Defendants.

23 164. Defendants sold the Purchased Products and Substantially Similar Products in
24 California and throughout the United States during the Class Period.

25 165. Defendants engaged in a scheme of offering the Purchased Products and
26 Substantially Similar Products for sale to Plaintiff and members of the Class by way of, *inter alia*,
27 product packaging and labeling. These materials misrepresented and/or omitted the true contents
28 and nature of the products. Defendants' advertisements and inducements were made within
California and throughout the United States and come within the definition of advertising as

1 contained in Business and Professions Code §17500, *et seq.* in that such product packaging and
2 labeling were intended as inducements to purchase the products and are statements disseminated
3 by Defendants to Plaintiff and the Class that were intended to reach members of the Class.
4 Defendants knew, or in the exercise of reasonable care should have known, that these statements
5 were misleading and deceptive as set forth herein.

6 166. In furtherance of its plan and scheme, Defendants prepared and distributed within
7 California and nationwide via product packaging and labeling statements that misleadingly and
8 deceptively represented the composition and the nature of the products. Plaintiff and the Class
9 necessarily and reasonably relied on Defendants' materials, and were the intended targets of such
10 representations.

11 167. Defendants' conduct in disseminating misleading and deceptive statements in
12 California and nationwide to Plaintiff and the Class was and is likely to deceive reasonable
13 consumers by obfuscating the true composition and nature of the Purchased Products and
14 Substantially Similar Products in violation of the "misleading prong" of California Business and
15 Professions Code § 17500, *et seq.*

16 168. As a result of Defendants' violations of the "misleading prong" of California
17 Business and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the
18 expense of Plaintiff and the Class. Misbranded products cannot be legally sold or held and thus
19 have no economic value and are legally worthless. Plaintiff and the Class paid a premium price
20 for the Purchased Products and Substantially Similar Products.

21 169. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are
22 entitled to an order enjoining such future conduct by Defendants, and such other orders and
23 judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any
24 money paid for the Purchased Products and Substantially Similar Products by Plaintiff and the
25 Class.

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

170. Plaintiff incorporates by reference each allegation set forth above.

1 171. Plaintiff asserts this cause of action against Defendants for violations of California
2 Business and Professions Code § 17500, *et seq.*, regarding untrue advertising.

3 172. Defendants sold the Purchased Products and Substantially Similar Products in
4 California and throughout the United States during the Class Period.

5 173. Defendants engaged in a scheme of offering the Purchased Products and
6 Substantially Similar Products for sale to Plaintiff and the Class by way of product packaging and
7 labeling. These materials misrepresented and/or omitted the true contents and nature of the
8 Purchased Products and Substantially Similar Products. Defendants' advertisements and
9 inducements were made in California and throughout the United States and come within the
10 definition of advertising as contained in Business and Professions Code §17500, *et seq.* in that the
11 product packaging and labeling were intended as inducements to purchase the Purchased Products
12 and Substantially Similar Products, and are statements disseminated by Defendants to Plaintiff
13 and the Class. Defendants knew, or in the exercise of reasonable care should have known, that
14 these statements were untrue.

15 174. In furtherance of its plan and scheme, Defendants prepared and distributed in
16 California and nationwide via product packaging and labeling statements that falsely advertise the
17 composition of the Purchased Products and Substantially Similar Products, and falsely
18 misrepresented the nature of those products. Plaintiff and the Class were the intended targets of
19 such representations and would reasonably be deceived by Defendants' materials.

20 175. Defendants' conduct in disseminating untrue advertising throughout California
21 deceived Plaintiff and members of the Class by obfuscating the contents, nature and quality of the
22 Purchased Products and Substantially Similar Products in violation of the "untrue prong" of
23 California Business and Professions Code § 17500.

24 176. As a result of Defendants' violations of the "untrue prong" of California Business
25 and Professions Code § 17500, *et seq.*, Defendants have been unjustly enriched at the expense of
26 Plaintiff and the Class. Misbranded products cannot be legally sold or held and thus have no
27 economic value and are legally worthless. Plaintiff and the Class paid a premium price for the
28 Purchased Products and Substantially Similar Products.

1 177. Plaintiff and the Class, pursuant to Business and Professions Code § 17535, are
2 entitled to an order enjoining such future conduct by Defendants, and such other orders and
3 judgments which may be necessary to disgorge Defendants' ill-gotten gains and restore any
4 money paid for the Purchased Products and Substantially Similar Products by Plaintiff and the
5 Class.

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

8 178. Plaintiff incorporates by reference each allegation set forth above.

9 179. This cause of action is brought pursuant to the CLRA. This cause of action does
10 not currently seek monetary damages and is limited solely to injunctive relief. Plaintiff intends to
11 amend this Complaint to seek damages in accordance with the CLRA after providing Defendants
12 with notice pursuant to Cal. Civ. Code § 1782.

13 180. At the time of any amendment seeking damages under the CLRA, Plaintiff will
14 demonstrate that the violations of the CLRA by Defendants were willful, oppressive and
15 fraudulent, thus supporting an award of punitive damages.

16 181. Consequently, Plaintiff and the Class will be entitled to actual and punitive
17 damages against Defendants for their violations of the CLRA. In addition, pursuant to Cal. Civ.
18 Code § 1782(a)(2), Plaintiff and the Class will be entitled to an order enjoining the above-
19 described acts and practices, providing restitution to Plaintiff and the Class, ordering payment of
20 costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court
21 pursuant to Cal. Civ. Code § 1780.

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

25 183. Defendants sold the Purchased Products and Substantially Similar Products in
26 California and throughout the United States during the Class Period.

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

1 185. The Purchased Products and Substantially Similar Products were and are “goods”
2 within the meaning of Cal. Civ. Code §1761(a).

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

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

11 188. By engaging in the conduct set forth herein, Defendants violated and continue to
12 violate Section 1770(a)(9) of the CLRA, because Defendants’ conduct constitutes unfair methods
13 of competition and unfair or fraudulent acts or practices in that it advertises goods with the intent
14 not to sell the goods as advertised.

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

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

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

26 191. Plaintiff incorporates by reference each allegation set forth above.

27 192. As a result of Defendants’ fraudulent and misleading labeling, advertising,
28 marketing and sales of the Purchased Products and Substantially Similar Products, Defendants

1 were enriched at the expense of Plaintiff and the Class.

2 193. Defendants sold of the Purchased Products and Substantially Similar Products to
3 Plaintiff and the Class that were not capable of being sold or held legally and which had no
4 economic value and were legally worthless. It would be against equity and good conscience to
5 permit Defendants to retain the ill-gotten benefits it received from Plaintiff and the Class, in light
6 of the fact that the products were not what Defendants purported them to be. Thus, it would be
7 unjust and inequitable for Defendants to retain the benefit without restitution to Plaintiff and the
8 Class of all monies paid to Defendants for the products at issue.

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

11 **XI. JURY DEMAND**

12 Plaintiff hereby demands a trial by jury of his claims.

13 **XII. PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, and on
15 behalf of the general public, prays for judgment against Defendants as follows:

16 A. For an order certifying this case as a class action and appointing Plaintiff and his
17 counsel to represent the Class;

18 B. For an order awarding, as appropriate, damages, restitution or disgorgement to
19 Plaintiff and the Class for all causes of action other than the CLRA, as Plaintiff does not seek
20 monetary relief under the CLRA, but intends to amend his Complaint to seek such relief;

21 C. For an order requiring Defendants to immediately cease and desist from selling the
22 Purchased Products and Substantially Similar Products in violation of law; enjoining Defendants
23 from continuing to market, advertise, distribute, and sell these products in the unlawful manner
24 described herein; and ordering Defendants to engage in corrective action;

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

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

27 F. For an order awarding punitive damages;

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

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

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Dated: May 2, 2013.

Respectfully submitted,

/s/
Pierce Gore (SBN 128515)
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