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9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 MARK TRAMMELL, *individually and on* )  
13 *behalf of all those similarly situated,* )

14 *Plaintiff,* )

No. **'23CV1884 H JLB**

15 v. )

**CLASS ACTION COMPLAINT**

16 KLN ENTERPRISES, INC. dba Wiley )  
17 Wallaby, *a Minnesota corporation,* )

**JURY TRIAL DEMANDED**

18 *Defendant.* )  
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Mark Trammell (“Plaintiff”), individually and on behalf of all others similarly situated throughout the state of California, by and through undersigned counsel, hereby brings this action against KLN Enterprises, Inc. dba Wiley Wallaby (“Wiley Wallaby”), alleging that its Wiley Wallaby Very Berry licorice (“the Products”), which are manufactured, packaged, labeled, advertised, distributed, and sold by Defendant, are misbranded and falsely advertised because they contain artificial flavoring, and upon information and belief and investigation of counsel alleges as follows:

**PARTIES**

1. Plaintiff Mark Trammell is and at all times relevant was a citizen of the state of California, domiciled in San Diego, California.



1 wires and mails, both directly and through electronic and print publications that are directed to  
2 commercial and individual consumers in this district; and operating an e-commerce web site  
3 that offers the Products for sale to commercial and individual consumers in this district, as well  
4 as offering the Products for sale through third-party e-commerce websites, through both of  
5 which commercial and individual consumers residing in this district have purchased the  
6 Products.  
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8 10. Defendant knowingly directs electronic activity and ships the Products into this  
9 district with the intent to engage in business interactions for profit, and it has in fact engaged in  
10 such interactions.

11 11. Defendant also sells the Products to retailers and wholesalers in this district for  
12 the purpose of making the Products available for purchase by individual consumers in this  
13 district.  
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15 12. The losses of some Class members were sustained in this district.

16 13. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of  
17 the events or omissions giving rise to Plaintiff's claims occurred within this district.

18 14. Venue is also proper pursuant to 28 U.S.C. § 1391(c)(2) because this Court  
19 maintains personal jurisdiction over Defendant.  
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## 21 **FACTUAL ALLEGATIONS**

### 22 **A. Consumers Pay A Premium for "Clean Labels."**

23 15. Across the globe, consumers are increasingly attuned to claims that foods are "all-  
24 natural," minimally processed, or otherwise free of artificial flavors and preservatives.

25 16. For example, a 2018 survey by L.E.K. Consulting found that overwhelming  
26 numbers of consumers were committed or casual adherents to so-called "clean label" food  
27 attributes: "No artificial ingredients" (69 percent); "No preservatives" (67 percent); or "All-  
28 natural" (66 percent). These were the three most attractive attributes in the consumer survey.

1 Roughly 60 to 70 percent of consumers reported a willingness to pay a price premium for “clean  
2 label” foods. See <https://www.lek.com/insights/ei/next-generation-mindful-food-consumption>.

3 17. This consumer preference has led to an explosion in the category of “clean label”  
4 foods and beverages. Leading analyst Allied Market Research estimated that the “natural foods  
5 and drinks” category would grow by an estimated compound annual growth rate of 13.7 percent  
6 from 2016 to 2023, reaching \$191 billion in annual sales by 2023. See  
7 <https://www.alliedmarketresearch.com/natural-food-and-drinks-market>.

8  
9 18. Trammell purchased the Products on or about May 23, 2023 from a Target in  
10 Encinitas, California.

11 19. Trammell is a student who attempts to eat “clean.” He carefully reviews food  
12 product labels, including the Products’ label, to understand the characteristics of the products he  
13 consumes, and he prefers to consume only products that contain all-natural ingredients and  
14 flavorings.  
15

16 **B. Defendant’s Use of Synthetic Flavorings and Deceptive Labels.**

17 20. Defendant KLN Enterprises, Inc. dba Wiley Wallaby formulates, manufactures,  
18 and sells *inter alia* licorice candies.

19 21. The front label (or “principal display panel”) of the Products state that the Products  
20 are “Naturally Flavored” and “Natural Strawberry and Raspberry Flavored,” while the back  
21 label states that the Products are “Free of ... Artificial Colors & Flavors.” These claims are  
22 reinforced by depictions of fruits:  
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22. These label claims are false. The Products are flavored using an artificial flavoring, DL malic acid, that is derived from petrochemicals.

23. While there is a naturally occurring form of malic acid, it is extremely expensive to formulate in large quantities and is almost never used in mass-produced food products. Instead, testing conducted on June 28, 2023 by an independent third-party laboratory of the Products purchased by Plaintiff, confirmed the presence of the “D” isomer of malic acid in the Products. This means that the malic acid that Defendant uses in these Products is DL malic acid, a synthetic substance derived from petrochemicals.<sup>1</sup> The isomer testing method employed in this case is an industry standard method for identifying the use of DL malic acid.

24. DL malic acid is manufactured in petrochemical plants from benzene or butane—components of gasoline and lighter fluid, respectively—through a series of chemical reactions, some of which involve highly toxic chemical precursors and byproducts.

<sup>1</sup> DL malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

1           25. Federal regulations note explicitly that “DL-malic acid does not occur naturally.”  
2 21 C.F.R. § 184.1069(a).

3           26. Fruit flavors in a food are imparted by the interactions between sugars, acids,  
4 lipids, and various volatile compounds. The relative sweetness or tartness of a fruit flavor is  
5 determined by the ratio between the sugars (mainly glucose and fructose) and acids, such as  
6 citric and malic acid.

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8           27. The quality and consumer acceptability of fruit flavors is based on their perceived  
9 sweetness and tartness, which in turn is driven by the ratio between sugars and acids. Berries,  
10 watermelons, cherries, and other fruits have their own natural ratio of sugars and acids.

11           28. The malic acid used in the Products is used to create, simulate, and/or reinforce  
12 the fruit flavors stated on the labels, also known as the “characterizing flavors.” However,  
13 Defendant pretends otherwise, conflating natural and artificial flavorings, misbranding the  
14 Products and deceiving consumers.

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16 **C. Requirements for Labelling**

17           29. Federal regulations promulgated pursuant to the Food, Drug, and Cosmetic Act  
18 (“FDCA”), which are independently enacted pursuant to the Sherman Law (*see* Cal. Health &  
19 Saf. Code § 109875, *et seq.*) as substantive requirements of California law, require that a food’s  
20 label accurately describe the nature of the food product and its characterizing flavors. 21 C.F.R.  
21 § 102.5(a).

22           30. Artificial flavor is defined as “any substance, the function of which is to impart  
23 flavor, which is not derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible  
24 yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy  
25 products, or fermentation products thereof.” 21 C.F.R § 101.22(a)(1).

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1           31. Natural flavor is defined as “essential oil, oleoresin, essence or extractive, protein  
2 hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the  
3 flavoring constituents” from fruits or vegetables, “whose significant function in food is flavoring  
4 rather than nutritional.” 21 C.F.R § 101.22(a)(3).

5           32. Any recognizable primary flavor identified directly or indirectly on the front label  
6 of a food product, whether by word, vignette, depiction of a fruit, or other means is referred to  
7 as a “characterizing flavor.” 21 C.F.R. § 101.22.

8           33. Here, the Products’ labels state the characterizing flavor and also use depictions  
9 of fruits to identify the characterizing flavor.

10           34. If a food product’s characterizing flavor is not created exclusively by the named  
11 flavor ingredient, the product’s front label must state that the product’s flavor was simulated or  
12 reinforced with either natural or artificial flavorings or both. If any artificial flavor is present  
13 which “simulates, resembles or reinforces” the characterizing flavor, the front label must  
14 prominently inform consumers that the product is “Artificially Flavored.” 21 C.F.R. §  
15 101.22(i)(2).

16           35. A food product’s label also must include a statement of the “presence or absence  
17 of any characterizing ingredient(s) or component(s) . . . when the presence or absence of such  
18 ingredient(s) or component(s) in the food has a material bearing on price or consumer  
19 acceptance . . . and consumers may otherwise be misled about the presence or absence of the  
20 ingredient(s) or component(s) in the food.” 21 C.F.R. § 102.5.

21           36. Such statement must be in boldface print on the front display panel and of  
22 sufficient size for an average consumer to notice.

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1           37. California’s Sherman Food, Drug, and Cosmetic Law, Cal. Health & Saf. Code §  
2 109875, *et seq.*, enacts as enforceable provisions of state law all food flavoring and additive  
3 regulations of the FDCA.

4           38. By changing the ratio between sugars and acids that is naturally found in berries,  
5 the DL malic acid used in the Products reinforces, simulates, or creates the characterizing  
6 flavors, regardless of any other effect it may have or purpose for which it was included.

7           39. DL malic acid is not a “natural flavor” as this term is defined by federal and state  
8 regulations and is not derived from a fruit or vegetable or any other natural source. The Products  
9 therefore contain artificial flavorings.

10           40. Because the Products contain artificial flavoring, California law requires the  
11 Products to display both front- and back-label disclosures to inform consumers that the Products  
12 are artificially flavored.

13           41. The Products have none of the required disclosures regarding the use of artificial  
14 flavors.

15           42. Plaintiff reserves the right to amend this Complaint to add further products that  
16 contain similar label misrepresentations as testing continues.

17           43. Labels are the chief means by which food product manufacturers convey critical  
18 information to consumers, and consumers have been conditioned to rely on the accuracy of the  
19 claims made on these labels. As the California Supreme Court stated in a case involving alleged  
20 violations of the UCL and FAL, “Simply stated: labels matter. The marketing industry is based  
21 on the premise that labels matter, that consumers will choose one product over another similar  
22 product based on its label.” *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 328 (2011).

23           44. Plaintiff reviewed the label on the Products prior to his purchase and reviewed the  
24 natural flavoring claims being made on the label. Consumers including Plaintiff who viewed the  
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1 Products' labels reasonably understood Defendant's "Naturally Flavored," "Natural Strawberry  
2 and Raspberry Flavored," and "Free of ... Artificial Colors & Flavors" claims, as well as its  
3 failure to disclose the use of artificially derived malic acid, to mean that the Products contain  
4 only natural flavorings. These representations were false.

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6 49. Consumers including Plaintiff reasonably relied on Defendant's label claims as  
7 described herein such that they would not have purchased the Products from Defendant if the  
8 truth about the Products was known, or would have only been willing to pay a substantially  
9 reduced price for the Products had they known that Defendant's representations were false and  
10 misleading.

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12 50. In the alternative, because of its deceptive and false labelling and advertising  
13 statements, Defendant was enabled to charge a premium for the Products relative to key  
14 competitors' products, or relative to the average price charged in the marketplace.

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16 51. Consumers including Plaintiff especially rely on label and advertising claims  
17 made by food product manufacturers such as Wiley Wallaby, as they cannot confirm or disprove  
18 those claims simply by viewing or even consuming the Products.

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20 52. Plaintiff suffered economic injury by Defendant's fraudulent and deceptive  
21 conduct as stated herein, and there is a causal nexus between Defendant's deceptive conduct and  
22 Plaintiff's injury.

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**CLASS ACTION ALLEGATIONS**

53. Plaintiff brings this action individually and as representative of all those similarly  
situated pursuant to Federal Rule of Civil Procedure 23 on behalf of all consumers in the state  
of California who purchased the Products within four years prior to the filing of this Complaint.

1           54. Excluded from the Class are Defendant and its affiliates, parents, subsidiaries,  
2 employees, officers, agents, and directors. Also excluded are any judicial officers presiding over  
3 this matter and the members of their immediate families and judicial staff.

4           55. Plaintiff reserves the right to alter the Class definition, and to amend this  
5 Complaint to add additional Subclasses, as necessary to the full extent permitted by applicable  
6 law.

7           56. Certification of Plaintiff’s claims for class-wide treatment is appropriate because  
8 Plaintiff can prove the elements of the claims on a class-wide basis using the same evidence as  
9 individual Class members would use to prove those elements in individual actions alleging the  
10 same claims.

11           57. **Numerosity – Rule 23(a)(1):** The size of the Class is so large that joinder of all  
12 Class members is impracticable. Plaintiff believes and avers there are thousands of Class  
13 members geographically dispersed throughout the state of California.

14           58. **Existence and Predominance of Common Questions of Law and Fact – Rule**  
15 **23(a)(2), (b)(3):** There are questions of law and fact common to the Class. These questions  
16 predominate over any questions that affect only individual Class members. Common legal and  
17 factual questions and issues include but are not limited to:  
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- 20           a. Whether the marketing, advertising, packaging, labeling, and other promotional  
21 materials for Defendant’s Products is misleading and deceptive;
  - 22           b. Whether a reasonable consumer would understand Defendant’s “Naturally  
23 Flavored,” “Natural Strawberry and Raspberry Flavored,” and “Free of ...  
24 Artificial Colors & Flavors.” claims, as described herein, to indicate that the  
25 Products contained only natural flavorings and ingredients, and reasonably relied  
26 upon those representations;  
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- 1 c. Whether Defendant was unjustly enriched at the expense of the Plaintiff and Class
- 2 members;
- 3 d. Whether Defendant breached an express warranty;
- 4 e. the proper amount of damages;
- 5 f. the proper scope of injunctive relief; and
- 6 g. the proper amount of attorneys' fees.

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8 59. Defendant engaged in a common course of conduct in contravention of the laws

9 Plaintiff seeks to enforce individually and on behalf of the Class. Similar or identical violations

10 of law, business practices, and injuries are involved. Individual questions, if any, pale by

11 comparison, in both quality and quantity, to the numerous common questions that predominate

12 this action. The common questions will yield common answers that will substantially advance

13 the resolution of the case.

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15 60. In short, these common questions of fact and law predominate over questions that

16 affect only individual Class members.

17 61. **Typicality – Rule 23(a)(3):** Plaintiff's claims are typical of the claims of the Class

18 members because they are based on the same underlying facts, events, and circumstances

19 relating to Defendant's conduct.

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21 62. Specifically, all Class members, including Plaintiff, were harmed in the same way

22 due to Defendant's uniform misconduct described herein; all Class members suffered similar

23 economic injury due to Defendant's misrepresentations; and Plaintiff seeks the same relief as

24 the Class members.

25 63. There are no defenses available to Defendant that are unique to the named

26 Plaintiff.

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1           64.   **Adequacy of Representation – Rule 23(a)(4):** Plaintiff is a fair and adequate  
2 representative of the Class because Plaintiff’s interests do not conflict with the Class members’  
3 interests. Plaintiff will prosecute this action vigorously and is highly motivated to seek redress  
4 against Defendant.

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6           65.   Furthermore, Plaintiff has selected competent counsel who are experienced in  
7 class action and other complex litigation. Plaintiff and Plaintiff’s counsel are committed to  
8 prosecuting this action vigorously on behalf of the Class and have the resources to do so.

9           66.   **Superiority – Rule 23(b)(3):** The class action mechanism is superior to other  
10 available means for the fair and efficient adjudication of this controversy for at least the  
11 following reasons

- 12           a.   the damages individual Class members suffered are small compared to the burden  
13           and expense of individual prosecution of the complex and extensive litigation  
14           needed to address Defendant’s conduct such that it would be virtually impossible  
15           for the Class members individually to redress the wrongs done to them. In fact,  
16           they would have little incentive to do so given the amount of damage each member  
17           has suffered when weighed against the costs and burdens of litigation;
- 18           b.   the class procedure presents fewer management difficulties than individual  
19           litigation and provides the benefits of single adjudication, economies of scale, and  
20           supervision by a single Court;
- 21           c.   the prosecution of separate actions by individual Class members would create a  
22           risk of inconsistent or varying adjudications, which would establish incompatible  
23           standards of conduct for Defendant; and
- 24           d.   the prosecution of separate actions by individual Class members would create a  
25           risk of adjudications with respect to them that would be dispositive of the interests  
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1 of other Class members or would substantively impair or impede their ability to  
2 protect their interests.

3 67. Unless the Class is certified, Defendant will retain monies received as a result of  
4 its unlawful and deceptive conduct alleged herein.

5 68. Unless a class-wide injunction is issued, Defendant will likely continue to  
6 advertise, market, promote, and sell its Products in an unlawful and misleading manner, as  
7 described throughout this Complaint, and members of the Class will continue to be misled,  
8 harmed, and denied their rights under the law. Defendant would like to purchase the Products  
9 and other products produced by Defendant in the future, but cannot currently do so because he  
10 cannot rely on the Products' labelling, given the deceptions regarding flavoring found there. An  
11 injunction prohibiting future deceptive labelling is therefore warranted and would provide  
12 Plaintiff and the Class relief.  
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15 69. **Ascertainability.** To the extent ascertainability is required, the Class members are  
16 readily ascertainable from Defendant's records and/or its agents' records of retail and online  
17 sales, as well as through public notice.

18 70. Defendant has acted on grounds applicable to the Class as a whole, thereby  
19 making appropriate final injunctive and declaratory relief concerning the Class as a whole.  
20

21 **COUNT 1**  
22 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,**  
23 **CAL. CIV. CODE § 1750 *et seq.***

24 71. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the  
25 extent necessary, pleads this cause of action in the alternative.

26 72. Plaintiff is a "consumer" within the meaning of the Consumer Legal Remedies  
27 Act ("CLRA"), Cal. Civ. Code § 1761(d).  
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1           73. The sale of Defendant’s Products to Plaintiff and Class members was a  
2 “transaction” within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

3           74. The Products purchased by Plaintiff and Class members are “goods” within the  
4 meaning of the CLRA, Cal. Civ. Code § 1761(a).

5           75. As alleged herein, Defendant’s business practices are a violation of the CLRA  
6 because Defendant deceptively failed to reveal facts that are material in light of the flavoring  
7 representations that were made by Defendant on the labels of its Products and elsewhere.

8           76. Defendant’s ongoing failure to provide material facts about its Products on its  
9 labels violates the following subsections of Cal. Civ. Code § 1770(a) in these respects:  
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- 11           a. Defendant’s acts and practices constitute misrepresentations that its Products have  
12 characteristics, benefits, or uses which they do not have;  
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- 14           b. Defendant misrepresented that its Products are of a particular standard, quality,  
15 and/or grade, when they are of another;  
16
- 17           c. Defendant’s acts and practices constitute the advertisement of goods, without the  
18 intent to sell them as advertised;  
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- 20           d. Defendant’s acts and practices fail to represent that transactions involving its  
21 Products involve actions that are prohibited by law, particularly the use of  
22 misleading nutritional labelling; and  
23
- 24           e. Defendant’s acts and practices constitute representations that its Products have  
25 been supplied in accordance with previous representations when they were not.

26           77. By reason of the foregoing, Plaintiff and the Class have been irreparably harmed,  
27 entitling them to injunctive relief.

28           78. Pursuant to Cal. Civ. Code § 1782, Plaintiff notified Defendant in writing of the  
particular violations of the CLRA described herein and demanded Defendant rectify the actions

1 described above by providing complete monetary relief, agreeing to be bound by their legal  
2 obligations and to give notice to all affected customers of their intent to do so. Plaintiff sent this  
3 notice by certified mail to Defendant, at least 30 days before the filing of this Complaint.

4 79. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff and the Class are entitled  
5 to recover actual damages sustained as a result of Defendant's violations of the CLRA. Such  
6 damages include, without limitation, monetary losses and actual, punitive, and consequential  
7 damages, in an amount to be proven at trial.

8 80. Pursuant to Cal. Civ. Code §§ 1770 and 1780, Plaintiff is entitled to enjoin  
9 publication of misleading and deceptive nutritional labels on Defendant's Products and to  
10 recover reasonable attorneys' fees and costs.

11  
12 **COUNT 2**  
13 **UNJUST ENRICHMENT**

14 81. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to the  
15 extent necessary, pleads this cause of action in the alternative.

16 82. Defendant, through its marketing and labeling of the Products, misrepresented and  
17 deceived consumers regarding the flavoring in the Products.

18 83. Defendant did so for the purpose of enriching itself and it in fact enriched itself  
19 by doing so.

20 84. Consumers conferred a benefit on Defendant by purchasing the Products,  
21 including an effective premium above their true value. Defendant appreciated, accepted, and  
22 retained the benefit to the detriment of consumers.

23 85. Defendant continues to possess monies paid by consumers to which Defendant is  
24 not entitled.  
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1           93. As a direct and proximate cause of Defendant’s breach of express warranty,  
2 Plaintiff and Class members have been injured and harmed because: (a) they would not have  
3 purchased the Products on the same terms if they knew the truth about the Products’ unnatural  
4 ingredients; (b) they paid a price premium based on Defendant’s express warranties; and (c) the  
5 Products do not have the characteristics, uses, or benefits that were promised.  
6

7   **PRAYER FOR RELIEF**

8           WHEREFORE, Plaintiff respectfully request the Court grant the following relief against  
9 Defendant:

- 10           a. Certifying the Class;
- 11           b. Declaring that Defendant violated the statutes cited herein and/or was unjustly  
12           enriched and/or breached an express warranty;
- 13           c. Awarding actual and other damages;
- 14           d. Ordering an awarding of injunctive relief, including enjoining Defendant from  
15           continuing the unlawful practices as set forth herein, and ordering Defendant to  
16           engage in a corrective advertising campaign;
- 17           e. Ordering Defendant to pay reasonable attorneys’ fees and litigation costs to Plaintiff;
- 18           f. Ordering Defendant to pay both pre- and post-judgment interest on any amounts  
19           awarded; and
- 20           g. Such other relief as the Court may deem just and proper.  
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23           **TRIAL BY JURY IS DEMANDED ON ANY COUNTS SO TRIABLE.**  
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Respectfully submitted,

/s/ Charles C. Weller  
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October 16, 2023

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Wiley Wallaby Very Berry Licorice Not as Naturally Flavored as Advertised, Class Action Says](#)

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