

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLARKSON LAW FIRM, P.C.
Ryan J. Clarkson (SBN 257074)
rclarkson@clarksonlawfirm.com
Shireen M. Clarkson (SBN 237882)
sclarkson@clarksonlawfirm.com
Matthew T. Theriault (SBN 244037)
mtheriault@clarksonlawfirm.com
Bahar Sodaify (SBN 289730)
bsodaify@clarksonlawfirm.com
9255 Sunset Blvd., Ste. 804
Los Angeles, CA 90069
Tel: (213) 788-4050
Fax: (213) 788-4070

Attorneys for Plaintiffs

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

FEB 18 2020

BY 
EDUARDO HERNANDEZ, DEPUTY

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MARY MATESKI, ALISA CLAWSON,
individually and on behalf of all others
similarly situated,

Plaintiff,

vs.

JUST BORN, INC., and DOES 1 through 10,
inclusive,

Defendants.

Case No. CIVDS1926742

FIRST AMENDED COMPLAINT

1. VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT, CIVIL CODE § 1750, *et. seq.*
2. VIOLATION OF CALIFORNIA FALSE ADVERTISING LAW, BUSINESS & PROFESSIONS CODE § 17500, *et. seq.*
3. VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW, BUSINESS & PROFESSIONS CODE § 17200, *et. seq.*
4. UNJUST ENRICHMENT
5. COMMON LAW FRAUD

Plaintiffs, Mary Mateski and Alisa Clawson, individually and on behalf of all others similarly situated (“Plaintiffs”), bring this first amended complaint against Just Born, Inc. (“Defendant”), and allege as follows:

SUMMARY OF THE ACTION

1
2 1. This is a class action lawsuit brought on behalf of all purchasers of Hot Tamales® and
3 Mike and Ike® brand candy products (the “Product(s)”) manufactured by Defendant and packaged
4 for sale or resale to consumers in an opaque cardboard box. True and correct representations of the
5 Products’ front labels are set forth below.



24 2. Defendant misleads and shortchanges consumers by falsely and deceptively
25 misrepresenting the amount of candy actually contained in each box of Product. Defendant
26 uniformly under-fills the opaque boxes by at least 55%. Every box is filled only 45% full with
27 candy product. The 55% balance is empty space, or “slack fill,” nearly all of which serves no
28 legitimate or lawful function.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PARTIES

3. Plaintiffs Mateski and Clawson are, and at all times relevant hereto were, citizens of California, residing in the County of San Bernardino. In making their purchases, Plaintiffs relied upon the opaque packaging, including the size of the box, as an indication for how much candy was contained in the box.

4. The Products’ packaging was prepared and approved by Defendant and its agents and disseminated statewide and nationwide, as well as designed to encourage consumers to purchase the Products. If Plaintiffs had known that the boxes contained nonfunctional slack fill, they would not have purchased the Products, let alone paid for candy product they never received.

5. Just Born, Inc. is a corporation headquartered in Bethlehem, Pennsylvania. Just Born maintains its principal business office at 1300 Stefko Blvd., Bethlehem, PA 18017. Just Born, directly and through its agents, has substantial contacts with and receives substantial benefits and income from and through the State of California. Just Born is the owner, manufacturer, and distributor of the Products, and is the company that created and/or authorized the false, misleading, and deceptive packaging for the Products.

JURISDICTION AND VENUE

6. This Court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, Section 10, because this case is a cause not given by statute to other trial courts.

7. Plaintiffs have standing to bring this action pursuant to the California Consumers Legal Remedies Act, Civil Code Section 1750 *et seq.*; California False Advertising Law, Business & Professions Code Section 17500, *et seq.*; and California Unfair Competition Law, Business & Professions Code Section 17200, *et seq.*

8. Defendant and other out-of-state participants can be brought before this Court pursuant to the provisions of Code of Civil Procedure Section 395.5.

9. Defendant is subject to personal jurisdiction in California based upon sufficient minimum contacts which exist between it and California.

///

1 quantity of candy product meaningfully different from their expectation of a quantity of candy
2 product commensurate with the size of the box.

3 18. Plaintiffs Mateski and Clawson purchased boxes of Hot Tamales® 5 oz. candy
4 Product from stores in San Bernardino, California in early 2019. They paid approximately \$1.00 to
5 \$2.00 for the Products.

6 19. Plaintiffs reasonably and detrimentally relied on the size of the box as a representation
7 by Defendant of the quantity of candy product contained in the Products' containers.

8 20. Only upon opening their respective candy boxes did Plaintiffs discover to their shock
9 and disappointment that the Products' boxes were less than half-full, while over half of the boxes
10 constituted slack fill, virtually all of which was nonfunctional.

11 21. Prior to the point of sale, the Products' packaging does not allow for a visual or audial
12 confirmation of the contents of the Products. The Products' opaque packaging prevents a consumer
13 from observing the contents before opening. Even if a consumer were to "shake" the Products
14 before opening, it is impossible for the reasonable consumer to discern the presence of any
15 nonfunctional slack fill.

16 22. The other information that Defendant provides about quantity of candy product on the
17 front label and back label of the Products does not enable a consumer to form any meaningful
18 understanding about how to gauge the quantity of contents of the Products as compared to the size
19 of the boxes themselves.

20 23. The front labels of the Products indicate a net weight of 5.0 ounces (141 grams). The
21 nutritional panel on the backs of the Products report a serving size of 1.5 ounces and total of 3.5
22 servings per container.

23 24. Disclosures of net weight and serving sizes in a measurement of ounces or grams does
24 not allow the reasonable consumer to make any meaningful conclusion about the quantity of candy
25 product contained in the Products' boxes that would be different from the reasonable consumer's
26 expectation that the quantity of candy product is commensurate with the size of the box.

27 25. Plaintiffs would not have purchased the Products had they known the Products
28 contained slack fill which serves no functional or lawful purpose.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

26. During Plaintiffs' investigations, Plaintiffs confirmed that Defendant uniformly under-fills the Products' boxes, rendering a whopping 55% of each box slack fill, nearly all of which serves no functional or lawful purpose. A true and correct representation of the inside of the Hot Tamales® and Mike and Ike® boxes are pictured below.



27. The Products are made, formed, and filled as to be misleading. The Products therefore are misbranded.

28. The slack fill contained in the Products does not serve a legitimate or lawful purpose.

29. The slack fill contained in the Products does not protect the contents of the packages.

30. In fact, the greater the slack fill, the more room the contents have to bounce around during shipping and handling, and the more likely the contents are to break and sustain damage.

///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

31. If, on the other hand, the amount of candy product contained in each box were commensurate with the size of the box as consumers expect, then the candy product would have less room to move around during shipping and handling, and would be less likely to sustain damage.

32. As such, the slack fill present in the Products makes the candy product more susceptible to damage, and in fact causes the candy product to often sustain damage.

33. The Products are packaged in a box and sealed with heated glue. A true and correct representation of the heated glue is shown in the image below.



34. The equipment used to seal the carton does not breach the inside of the Products' container during the packaging process. The heated glue is applied to an exterior flap of the box, which is then sealed over the top by a second exterior flap.

35. Neither the heated glue application nor the sealing equipment requires slack fill during the manufacturing process. Even if there were no slack fill present in the Products' boxes, the machines used for enclosing the contents in the package would work without disturbing the packaging process.

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

36. The slack fill present in the Products’ container is not a result of the candy product settling during shipping and handling. Given the Products’ density, shape, and composition, any settling occurs immediately at the point of filling the box. No additional product settling occurs during subsequent shipping and handling.

37. The Products do not use packaging that is part of a reusable container with any significant value to the Products independent of their function to hold the candy product.

38. For example, the Products’ container is not a commemorative item.

39. The Products’ container is a box intended to be discarded into the recycling bin immediately after the contents have been completely consumed.

40. Defendant can easily increase the quantity of candy product contained in each Product container or, alternatively, decrease the size of the containers or change the label in a way that eliminates the deception such as, for example, adding a fill line, transparent window, or actual size depiction accompanied by the words actual size.

41. Contrast Defendant’s packaging of the Products with a comparator product like “Boston Baked Beans” (“BBB”), a candy product manufactured by Ferrara Candy Company and similarly sold at movie theaters located throughout the United States. A true and correct representation of the front of the BBB product is shown in the image below.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

42. BBB is sold in identical packaging to that of the Products, i.e., opaque boxes of identical size, shape, volume, and material.

43. BBB is packaged using nearly identical fill and heated glue enclosing machines to those of the Products.

44. BBB is a coated candy of nearly identical size, shape, and density of that of the Products.

45. However, contrary to the Products, BBB has insubstantial slack fill. A true and correct representation is pictured in the image below.



46. BBB's packaging provides additional evidence that the slack fill present in the Products is nonfunctional.

47. BBB's packaging provides additional evidence that the slack fill present in the Products is not necessary to protect (and in fact does not protect) the contents of the Products.

48. BBB's packaging provides additional evidence that the slack fill present in the Products is not a requirement of the machines used for enclosing the contents of the Products.

49. BBB's packaging provides additional evidence that the slack fill present in the Products is not a result of unavoidable product settling during shipping and handling.

1 50. BBB's packaging provides additional evidence that the slack fill present in the
2 Products is not needed to perform a specific function.

3 51. BBB's packaging provides additional evidence that the slack fill present in the
4 Products is not part of a legitimate reusable container.

5 52. BBB's packaging provides additional evidence that Defendant is able to increase the
6 level of fill.

7 53. BBB's packaging provides additional evidence that Defendant has reasonable
8 alternative designs available to package its Products.

9 54. Plaintiffs did not expect that the Products would contain nonfunctional slack fill,
10 especially given that nonfunctional slack fill, as opposed to functional slack fill, is prohibited by
11 California law and federal law.

12 55. Defendant's conduct threatens consumers by using deceptive and misleading slack
13 filled containers. Defendant's conduct also threatens other companies, large and small, who play
14 by the rules. Defendant's conduct stifles competition and has a negative impact on the marketplace,
15 and reduces consumer choice.

16 56. There is no practical reason for the nonfunctional slack fill present in the Products
17 other than to mislead consumers as to the actual volume of the Products being purchased by
18 consumers while simultaneously providing Defendant with a financial windfall as a result of money
19 saved from lower supply costs and money earned from consumers who pay for product they never
20 receive.

21 57. Plaintiffs make the allegations herein upon personal knowledge as to themselves and
22 their own acts and experiences, and as to all other matters, upon information and belief, including
23 investigation conducted by their attorneys.

24 **CLASS ALLEGATIONS**

25 58. Plaintiffs bring this action on their own behalf and on behalf of all other persons
26 similarly situated. Plaintiffs seek to represent a Class consisting of "All persons in the United States
27 of America who purchased one or more of Defendant's Products at any time during the time period
28 February 3, 2013 through the present (the "Class Period"). Excluded from the Class are any officers,

1 directors, or employees of Defendant, and the immediate family members of any such person. Also
2 excluded is any judge who may preside over this case.”

3 59. The Classes are so numerous that their individual joinder herein is impracticable. On
4 information and belief, the Classes number over one million throughout the United States. The
5 Classes are sufficiently numerous because millions of units of the Products have been sold in the
6 United States during the Class Period.

7 60. There is a well-defined community of interest in the questions of law and fact involved
8 affecting the parties to be represented. The questions of law and fact common to the Class
9 predominate over questions which may affect individual Class members. Common questions of
10 law and fact include, but are not limited to, the following:

11 a. Whether Defendant’s conduct constitutes an unfair method of competition, or
12 unfair or deceptive act or practice, in violation of Civil Code Section 1750, *et seq.*;

13 b. Whether Defendant misrepresented the approval of the FDA, United States
14 Congress, and California Legislature that the Products’ packaging complied with federal and
15 California slack fill regulations and statutes in violation of Civil Code Section 1750, *et seq.*;

16 c. Whether Defendant used deceptive representations in connection with the sale
17 of the Products in violation of Civil Code Section 1750, *et seq.*;

18 d. Whether Defendant represented the Products have characteristics or quantities
19 that they do not have in violation of Civil Code Section 1750, *et seq.*;

20 e. Whether Defendant advertised the Products with intent not to sell them as
21 advertised in violation of Civil Code Section 1750, *et seq.*;

22 f. Whether Defendant represented that the Products have been supplied in
23 accordance with a previous representation of quantity of candy product contained therein by way of
24 its packaging when it has not, in violation of Civil Code Section 1750, *et seq.*;

25 g. Whether Defendant’s packaging is untrue or misleading in violation of
26 Business and Professions Code Section 17500, *et seq.*;

1 h. Whether Defendant knew or by the exercise of reasonable care should have
2 known its packaging was and is untrue or misleading in violation of Business and Professions Code
3 Section 17500, *et seq.*;

4 i. Whether Defendant’s conduct is an unfair business practice within the
5 meaning of Business and Professions Code Section 17200, *et seq.*;

6 j. Whether Defendant’s conduct is a fraudulent business practice within the
7 meaning of Business and Professions Code Section 17200, *et seq.*;

8 k. Whether Defendant’s conduct is an unlawful business practice within the
9 meaning of Business and Professions Code Section 17200, *et seq.*;

10 l. Whether Defendant’s packaging is false or misleading and therefore
11 misbranded in violation of California Health and Safety Code sections 110660, 110665, or 110670;

12 m. Whether the Products contain nonfunctional slack fill in violation of 21 C.F.R.
13 100.100, *et seq.*;

14 n. Whether Plaintiffs and the Classes paid more money for the Products than they
15 actually received; and

16 o. How much more money Plaintiffs and the Classes paid for the Products than
17 they actually received.

18 61. Plaintiffs’ claims are typical of the claims of the Classes, and Plaintiffs will fairly and
19 adequately represent and protect the interests of the Classes. Plaintiffs have retained competent and
20 experienced counsel in class action and other complex litigation.

21 62. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result
22 of Defendant’s false representations. Plaintiffs purchased the Products under the false belief that
23 the Products contained an amount of candy product commensurate with the size of the box.
24 Plaintiffs relied on Defendant’s packaging and would not have purchased the Products if they had
25 known that the Products contained nonfunctional slack fill.

26 63. A class action is superior to other available methods for fair and efficient adjudication
27 of this controversy. The expense and burden of individual litigation would make it impracticable or
28 impossible for the Classes to prosecute their claims individually.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

64. The trial and litigation of Plaintiffs’ claims are manageable. Individual litigation of the legal and factual issues raised by Defendant’s conduct would increase delay and expense to all parties and the court system. The class action device presents far fewer management difficulties and provides the benefits of a single, uniform adjudication, economies of scale, and comprehensive supervision by a single court.

65. Defendant has acted on grounds generally applicable to the entirety of the Classes, thereby making final injunctive relief and/or corresponding declaratory relief appropriate with respect to the Classes as a whole. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendant.

66. Absent a class action, Defendant will likely retain the benefits of its wrongdoing. Because of the small size of the individual Class members’ claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein. Absent a representative action, the Classes will continue to suffer losses and Defendant will be allowed to continue these violations of law and to retain the proceeds of their ill-gotten gains.

COUNT ONE

Violation of California Consumers Legal Remedies Act,

California Civil Code § 1750, *et seq.*

67. Plaintiffs repeat and re-allege all allegations of the previous paragraphs, and incorporate the same as if set forth herein at length.

68. Plaintiffs bring this cause of action pursuant to Civil Code Section 1750, *et seq.*, the Consumers Legal Remedies Act (“CLRA”), on their own behalf and on behalf of all other persons similarly situated. Plaintiffs seek to represent a Class consisting of “All persons in the United States of America who purchased one or more of Defendant’s Products at any time during the class period. Excluded from the Class are any officers, directors, or employees of Defendant, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.”

69. The Classes consist of millions of persons, the joinder of whom is impracticable.

70. There are questions of law and fact common to the Classes, which questions are

1 substantially similar and predominate over questions affecting the individual Class members,
2 including but not limited to those questions listed in Paragraph 54, above.

3 71. The CLRA prohibits certain “unfair methods of competition and unfair or deceptive
4 acts or practices” in connection with a sale of goods.

5 72. The practices described herein, specifically Defendant’s packaging, advertising, and
6 sale of the Products, were intended to result in the sale of the Products to the consuming public and
7 violated and continue to violate the CLRA by (1) misrepresenting the approval of the Products as
8 compliant with 21 C.F.R §100.100 and the Sherman Law; (2) using deceptive representations in
9 connection with the Products; (3) representing the Products have characteristics and quantities that
10 they do not have; (4) advertising and packaging the Products with intent not to sell them as
11 advertised and packaged; and (5) representing that the Products have been supplied in accordance
12 with a previous representation as to the quantity of candy product contained within each box, when
13 they have not.

14 73. Defendant fraudulently deceived Plaintiffs and the Classes by representing that the
15 Products’ packaging which includes substantial nonfunctional slack fill actually conforms with
16 federal and California slack fill regulations and statutes including the Sherman Law and 21 C.F.R.
17 100.100.

18 74. Defendant packaged the Products in boxes which contain substantial nonfunctional
19 slack fill by making material misrepresentations to fraudulently deceive Plaintiffs and the Classes.

20 75. Defendant fraudulently deceived Plaintiffs and the Classes by misrepresenting the
21 Products as having characteristics and quantities which they do not have, e.g., that the Products are
22 free of nonfunctional slack fill when they are not. In doing so, Defendant misrepresented and
23 concealed material facts from Plaintiffs and the Classes. Said misrepresentations and concealment
24 deceived Plaintiffs and the Classes and deprived them of their legal rights and money.

25 76. Defendant fraudulently deceived Plaintiffs and the Classes by packaging and
26 advertising the Products with intent not to sell them as advertised, by under-filling the Products’
27 containers and instead replacing candy product with nonfunctional slack fill. In doing so, Defendant
28 misrepresented and concealed material facts from Plaintiffs and the Classes. Said

1 misrepresentations and concealment deceived Plaintiffs and the Classes and deprived them of their
2 legal rights and money.

3 77. Defendant fraudulently deceived Plaintiffs and the Classes by representing that the
4 Products were supplied in accordance with an accurate representation as the quantity of candy
5 product contained therein when they were not. Defendant presented the physical dimensions of the
6 Products' packaging to Plaintiffs and the Classes before the point of purchase and gave Plaintiffs
7 and the Classes a reasonable expectation that the quantity of candy product contained therein was
8 commensurate with the size of packaging. In doing so, Defendant misrepresented and concealed
9 material facts from Plaintiffs and the Classes. Said misrepresentations and concealment deceived
10 Plaintiffs and the Classes and deprived them of their legal rights and money.

11 78. Defendant knew or should have known, through the exercise of reasonable care, that
12 the Products' packaging was misleading.

13 79. Defendant's actions as described herein were unfair, unlawful, fraudulent, deceptive,
14 and misleading.

15 80. Defendant's Products packaging was a material factor in Plaintiffs' and the Classes'
16 decisions to purchase the Products. Based on Defendant's Products packaging, Plaintiffs and the
17 Classes reasonably believed that they were getting more candy product than they actually received.
18 Had they known the truth of the matter, Plaintiffs and the Classes would not have purchased the
19 Products.

20 81. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result
21 of Defendant's unfair, unlawful, and fraudulent conduct. Specifically, Plaintiffs paid for candy
22 product they never received. Plaintiffs and the Classes would not have purchased the Products had
23 they known the boxes contained nonfunctional slack fill.

24 82. Defendant's false and misleading packaging should be enjoined due to the false,
25 misleading, and/or deceptive nature of Defendant's packaging. In addition, Defendant should be
26 compelled to provide restitution to consumers who paid for candy product they never received due
27 to Defendant's representation that it contained substantially more (and a commensurate amount of)
28 candy product for a box of its size.

1 83. By letter dated August 23, 2016, Plaintiffs advised Defendant of its false and
2 misleading claims pursuant to California Civil Code Section 1782(a).

3 **COUNT TWO**

4 **Violation of California False Advertising Law,**
5 **Business & Professions Code § 17500, *et seq.***

6 84. Plaintiffs repeat and re-allege the allegations set forth in the preceding paragraphs,
7 and incorporate the same as if set forth herein at length.

8 85. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section
9 17500, *et seq.*, on their own behalf and on behalf of all other persons similarly situated. Plaintiffs
10 seek to represent a Class consisting of “All persons in the United States of America who purchased
11 one or more of Defendant’s Products at any time during the class period. Excluded from the Class
12 are any officers, directors, or employees of Defendant, and the immediate family members of any
13 such person. Also excluded is any judge who may preside over this case.”

14 86. California’s False Advertising Law, California Business and Professions Code
15 Section 17500, *et seq.*, makes it “unlawful for any person to make or disseminate or cause to be
16 made or disseminated before the public in this state, in any advertising device or in any other manner
17 or means whatever, including over the Internet, any statement, concerning personal property or
18 services, professional or otherwise, or performance or disposition thereof, which is untrue or
19 misleading and which is known, or which by the exercise of reasonable care should be known, to
20 be untrue or misleading.”

21 87. Defendant knowingly manipulated the physical dimensions of the Products’ boxes, or
22 stated another way, under-filled the amount of candy product in each of the Products, by including
23 substantial nonfunctional slack fill as a means to mislead the public about the amount of candy
24 product contained in each package.

25 88. Defendant controlled the packaging of the Products. It knew or should have known,
26 through the exercise of reasonable care that its representations about the quantity of candy product
27 contained in the Products were untrue and misleading.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

89. The general public bases its purchasing decisions on the dimensions of a Products’ packaging. Consumers generally do not look at any label information, such as net weight or serving disclosures. Instead, the general public chooses a larger box because it leads them to believe they are receiving a better value.

90. Defendant’s packaging with substantial nonfunctional slack fill instead of including more candy product or smaller boxes or modified labels that disclose the quantity of candy (e.g., a fill line, transparent window, or actual size depiction accompanied by the term actual size) is likely to deceive the general public.

91. Defendant’s actions in violation of Section 17500 were false and misleading such that the general public is and was likely to be deceived.

92. Pursuant to Business and Professions Code Section 17535, Plaintiffs and the Classes seek an order of this Court requiring Defendant to either (i) place an actual size depiction of an individual piece of the Products’ candy accompanied by the term “actual size,” or (ii) place a fill line on the Products’ box. Additionally, Plaintiffs request an order awarding Plaintiffs and the Classes restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant’s failure to disclose the existence and significance of said misrepresentations.

93. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant’s false representations. Plaintiffs and the Classes purchased the Products in reliance upon the claims by Defendant that the Products were of the quantity represented by Defendant’s packaging and advertising. Plaintiffs and the Classes would not have purchased the Products if they had known that the claims and advertising as described herein were false.

COUNT THREE

**Violation of California Unfair Competition Law,
Business & Professions Code § 17200, et seq.**

94. Plaintiffs repeat and re-allege the allegations set forth above, and incorporate the same as if set forth herein at length.

95. Plaintiffs bring this cause of action pursuant to Business and Professions Code Section 17200, et seq., on their own behalf and on behalf of all other persons similarly situated. Plaintiffs

1 seek to represent a Class consisting of “All persons in the United States of America who purchased
2 one or more of Defendant’s Products at any time during the class period. Excluded from the Class
3 are any officers, directors, or employees of Defendant, and the immediate family members of any
4 such person. Also excluded is any judge who may preside over this case.”

5 96. Congress passed the Federal Food, Drug, and Cosmetic Act (“FDCA”), and in so
6 doing established the Federal Food and Drug Administration (“FDA”) to “promote the public
7 health” by ensuring that “foods are safe, wholesome, sanitary, and properly labeled.” 21 U.S.C. §
8 393.

9 97. The FDA has implemented regulations to achieve this objective. *See, e.g.*, 21 C.F.R.
10 § 101.1 *et seq.*

11 98. The FDA enforces the FDCA and accompanying regulations; “[t]here is no private
12 right of action under the FDCA.” *Ivie v. Kraft Foods Global, Inc.*, 2013 U.S. Dist. LEXIS 25615,
13 2013 WL 685372, at *1 (internal citations omitted).

14 99. In 1990, Congress passed an amendment to the FDCA, the Nutrition Labeling and
15 Education Act (“NLEA”), which imposed a number of requirements specifically governing food
16 nutritional content labeling. *See, e.g.*, 21 U.S.C. § 343 *et seq.*

17 100. Plaintiffs are not suing under the FDCA, but under California state law.

18 101. The California Sherman Food, Drug, and Cosmetic Act (“Sherman Law”), Cal.
19 Health & Safety Code § 109875 *et seq.*, has adopted wholesale the food labeling requirements of
20 the FDCA and NLEA as the food regulations of California. Cal. Health & Safety Code § 110100.

21 102. The Sherman Law declares any food to be misbranded if it is false or misleading in
22 any particular, if the labeling does not conform to the requirements for nutrition labeling set forth
23 in certain provisions of the NLEA. Cal. Health & Safety Code §§ 110660, 110665, 110670.

24 103. The UCL prohibits “any unlawful, unfair... or fraudulent business act or practice.”
25 Cal. Bus & Prof. Code § 17200.

26 **A. “Unfair” Prong**

27 104. Under California’s False Advertising Law, Cal. Bus. & Prof. Code Section 17200, *et*
28 *seq.*, a challenged activity is “unfair” when “any injury it causes outweighs any benefits provided

1 to consumers and the injury is one that the consumers themselves could not reasonably avoid.”
2 *Camacho v. Auto Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

3 105. Defendant’s action of leaving substantial nonfunctional slack fill in its Products does
4 not confer any benefit to consumers.

5 106. Defendant’s action of leaving substantial nonfunctional slack fill in its Products
6 causes injuries to consumers because they do not receive a quantity of candy commensurate with
7 their reasonable expectation.

8 107. Defendant’s action of leaving substantial nonfunctional slack fill in its Products
9 causes injuries to consumers because they do not receive a level of hunger satiety commensurate
10 with their reasonable expectation.

11 108. Defendant’s action of leaving substantial nonfunctional slack fill in its Products
12 causes injuries to consumers because they end up overpaying for the Products and receiving a
13 quantity of candy less than what they expected to receive.

14 109. Consumers cannot avoid any of the injuries caused by the substantial nonfunctional
15 slack fill in Defendant’s Products.

16 110. Accordingly, the injuries caused by Defendant’s activity of including substantial
17 nonfunctional slack fill in the Products outweighs any benefits.

18 111. Some courts conduct a balancing test to decide if a challenged activity amounts to
19 unfair conduct under California Business and Professions Code Section 17200. They “weigh the
20 utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Davis v.*
21 *HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

22 112. Here, Defendant’s conduct of including substantial nonfunctional slack fill in the
23 Products’ packaging has no utility and financially harms purchasers. Thus the utility of Defendant’s
24 conduct is vastly outweighed by the gravity of harm.

25 113. Some courts require that “unfairness must be tethered to some legislative declared
26 policy or proof of some actual or threatened impact on competition.” *Lozano v. AT&T Wireless*
27 *Servs. Inc.*, 504 F. 3d 718, 735 (9th Cir. 2007).

28 114. The California legislature maintains a declared policy of prohibiting nonfunctional

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

slack fill in consumer goods, as reflected in California Health and Safety Code Section 110100.

115. The substantial nonfunctional slack fill contained in the Products is tethered to a legislative policy declared in California according to Cal. Health & Safety Code § 110100.

116. Defendant’s packaging of the Products, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes unfair conduct.

117. Defendant knew or should have known of its unfair conduct.

118. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute an unfair business practice within the meaning of California Business and Professions Code Section 17200.

119. There were reasonably available alternatives to further Defendant’s legitimate business interests, other than the conduct described herein. Defendant could have used packaging appropriate for the amount of candy product contained within the Products.

120. All of the conduct alleged herein occurs and continues to occur in Defendant’s business. Defendant’s wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

121. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes seek an order of this Court requiring Defendant to either (i) place an actual size depiction of an individual piece of the Products’ candy accompanied by the term “actual size,” or (ii) place a fill line on the Products’ box. Additionally, Plaintiffs request an order awarding Plaintiffs and the Classes restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant’s failure to disclose the existence and significance of said misrepresentations.

122. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant’s unfair conduct. Plaintiffs and the Classes paid an unwarranted premium for this product. Specifically, Plaintiffs and the Classes paid for substantial empty space instead of candy product they never received. Plaintiffs would not have purchased the Products if they had known that the Products’ packaging contained nonfunctional slack fill.

///

///

B. “Fraudulent” Prong

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

123. California Business and Professions Code Section 17200, *et seq.*, considers conduct fraudulent and prohibits said conduct if it is likely to deceive members of the public. *Bank of Wes v. Superior Court*, 2 Cal. 4th 1254, 553 (1992).

124. Members of the public base their purchasing decisions on the dimensions of a Products’ packaging. They generally do not view label information or net weight and serving disclosures. Members of the public choose a larger box because they automatically assume it has better value.

125. Defendant’s conduct of packaging the Products with substantial nonfunctional slack fill is likely to deceive members of the public.

126. Defendant’s packaging of the Products, as alleged in the preceding paragraphs, is false, deceptive, misleading, and unreasonable, and constitutes fraudulent conduct.

127. Defendant knew or should have known of its fraudulent conduct.

128. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed above constitute a fraudulent business practice in violation of California Business & Professions Code Section 17200.

129. There were reasonably available alternatives to further Defendant’s legitimate business interests other than the conduct described herein. Defendant could have used packaging appropriate for the amount of product contained therein.

130. All of the conduct alleged herein occurs and continues to occur in Defendant’s business. Defendant’s wrongful conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily.

131. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes seek an order of this Court requiring Defendant to either (i) place an actual size depiction of an individual piece of the Products’ candy accompanied by the term “actual size,” or (ii) place a fill line on the Products’ box. Additionally, Plaintiffs request an order awarding Plaintiffs and the Classes restitution of the money wrongfully acquired by Defendant by means of responsibility attached to Defendant’s failure to disclose the existence and significance of said misrepresentations.

1 132. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result
2 of Defendant’s fraudulent conduct. Plaintiffs paid an unwarranted premium for these Products.
3 Specifically, Plaintiffs and the Classes paid for substantial empty space instead of candy product
4 they never received. Plaintiffs and the Classes would not have purchased the Products if they had
5 known that the boxes contained substantial nonfunctional slack fill.

6 C. “Unlawful” Prong

7 133. California Business and Professions Code Section 17200, *et seq.*, identifies violations
8 of other laws as “unlawful practices that the unfair competition law makes independently
9 actionable.” *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

10 134. Defendant’s packaging of the Products, as alleged in the preceding paragraphs,
11 violates California Civil Code Section 1750, *et. seq.*, California Business and Professions Code
12 Section 17500, *et. seq.*, California’s Sherman Law, the FDCA, and 21 C.F.R §100.100.

13 135. Defendant’s packaging of the Products, as alleged in the preceding paragraphs, is
14 false, deceptive, misleading, and unreasonable, and constitutes unlawful conduct.

15 136. Defendant knew or should have known of its unlawful conduct.

16 137. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed
17 above constitute an unlawful business practice within the meaning of California Business and
18 Professions Code Section 17200.

19 138. There were reasonably available alternatives to further Defendant’s legitimate
20 business interests, other than the conduct described herein. Defendant could have used packaging
21 appropriate for the amount of candy product contained therein or made label changes that eliminate
22 the deception such as, by way of example and without limitation, adding a fill line, transparent
23 window, or actual size depiction accompanied by the phrase “actual size.”

24 139. All of the conduct alleged herein occurred and continues to occur in Defendant’s
25 business. Defendant’s wrongful conduct is part of a pattern or generalized course of conduct
26 repeated on thousands of occasions daily.

27 140. Pursuant to Business and Professions Code Sections 17203, Plaintiffs and the Classes
28 seek an order of this Court requiring Defendant to add more candy to the existing boxes or modify

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the packaging or product label. To dispel consumer deception, Plaintiffs suggest, by way of example and without limitation, the following: either (i) place an actual size depiction of an individual piece of the Products’ candy accompanied by the term “actual size,” or (ii) place a fill line on the Products’ box.

141. Plaintiffs and the Classes have suffered injury in fact and have lost money as a result of Defendant’s unlawful conduct. Plaintiffs paid an unwarranted premium for these Products. Specifically, Plaintiffs and the Classes paid for substantial empty space instead of candy product they never received. Plaintiffs and the Classes would not have purchased the Products if they had known that the Products contained nonfunctional slack fill.

COUNT FOUR

Unjust Enrichment

142. Plaintiffs repeat and reallege the allegations set forth above, and incorporate the same as if set forth herein at length.

143. By means of Defendant’s wrongful conduct alleged herein, Defendant knowingly sold the Products to Plaintiffs and members of the Classes in a manner that was unfair, unconscionable, and oppressive.

144. Defendant knowingly received and retained wrongful benefits and funds from Plaintiffs and members of the Classes. In so doing, Defendant acted with conscious disregard for the rights of Plaintiffs and members of the Classes.

145. As a result of Defendant’s wrongful conduct as alleged herein, Defendant has been unjustly enriched at the expense of, and to the detriment of, Plaintiffs and members of the Classes.

146. Defendant’s unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

147. Under the common law doctrine of unjust enrichment, it is inequitable for Defendant to be permitted to retain the benefits it received, without justification, from selling the Products to Plaintiffs and members of the Classes in an unfair, unconscionable, and oppressive manner. Defendant’s retention of such funds under such circumstances constitutes unjust enrichment.

148. The financial benefits derived by Defendant rightfully belong to Plaintiffs and

1 members of the Class. Defendant should be compelled to return in a common fund for the benefit
2 of Plaintiffs and members of the Classes all wrongful or inequitable proceeds received by them.

3 149. Plaintiffs and members of the Classes have no adequate remedy at law.

4 **COUNT FIVE**

5 **Common Law Fraud**

6 150. Plaintiffs repeat and reallege all of the allegations contained in the preceding
7 paragraphs and incorporate the same as if set forth herein at length.

8 151. Plaintiffs bring this cause of action individually and on behalf of the members of the
9 Class against Defendant.

10 152. Defendant has willfully, falsely, and knowingly filled and packaged the Products in a
11 manner indicating that the Products are filled with an amount of candy commensurate with the size
12 of the container. However, the Products contain only approximately 45% candy product and instead
13 contain a substantial amount of nonfunctional slack fill. Defendant has misrepresented the quantity
14 of candy contained in the Products.

15 153. Defendant's misrepresentations are and were material (i.e., the type of
16 misrepresentations to which a reasonable person would attach importance and would be induced to
17 act thereon in making his or her purchase decision), because they relate to the quantity of candy
18 contained in the Products.

19 154. Defendant knew of, or showed reckless disregard for, the fact that the Products
20 contained a substantial amount of nonfunctional slack fill.

21 155. Defendant intended for Plaintiffs and the Classes to rely on these representations, as
22 evidenced by Defendant's intentional manufacturing of packaging that is substantially larger than
23 necessary to hold the volume of the contents contained within them.

24 156. Plaintiffs and the Classes have reasonably and detrimentally relied on Defendant's
25 misrepresentations when purchasing the Products and, had they known the truth, they would not
26 have purchased the Products or would have purchased them at significantly lower prices.

27 157. Therefore, as a direct and proximate result of Defendant's fraud, Plaintiffs and
28 members of the Classes have suffered injury in fact.

CLARKSON LAW FIRM, P.C.
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and on behalf of the Classes defined herein, pray for judgment and relief on all Causes of Action as follows:

- A. For an order enjoining Defendant’s misleading product packaging process;
- B. Restitution; and
- D. Reasonable attorney fees and costs.

DATED: February 18, 2020

CLARKSON LAW FIRM, P.C.



Ryan J. Clarkson, Esq.
Shireen M. Clarkson, Esq.
Matthew T. Theriault, Esq.
Bahar Sodaify, Esq.

Attorneys for Plaintiffs

Clarkson Law Firm, P.C.
9255 Sunset Blvd, Ste. 804
Los Angeles, CA 90069

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

I am employed in the County of LOS ANGELES, State of CALIFORNIA. I am over the age of 18 and not a party to within action; my business address is **9255 Sunset Blvd., Suite 804, Los Angeles, CA 90069.**

On February 18, 2020, I served the foregoing document described as

- FIRST AMENDED COMPLAINT

on interested parties in this action by sending a true copy of the document to the following parties as follows:

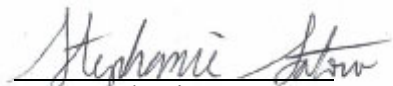
LEWIS BRISBOIS BISGAARD & SMITH LLP
 ERIC Y. KIZIRIAN
 Eric.Kizirian@lewisbrisbois.com
 LEO A. BAUTISTA
 Leo.Bautista@lewisbrisbois.com
 JOSEPHINE BROSAS
 Josephine.Brosas@lewisbrisbois.com
 633 West 5th Street, Suite 1400
 Los Angeles, California 90071
 Telephone: (213) 250-1800
 Facsimile: (213) 250-7900

 X (BY ELECTRONIC SERVICE) I caused the document(s) to be sent to the offices of the addressees via electronic mail.

 X (BY US MAIL) I caused such envelope(s) with postage thereon fully prepaid, to be placed in the United States mail at Los Angeles, California, pursuant to California Code of Civil Procedure § 1013(a). I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

Executed on February 18, 2020, at Los Angeles, California.

 X (STATE) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


 Stephanie Satow