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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JESSICA LITTLEJOHN, on behalf of
herself, all others similarly situated,
and the general public,

Plaintiff,

v.

FERRARA CANDY COMPANY,
Inc., an Illinois Corporation,

Defendant.

Case No.: 3:18-cv-00658-AJB-WVG

**FIRST AMENDED CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

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1 Jessica Littlejohn (“Plaintiff”), on behalf of herself and all other similarly situated,
2 by and through her undersigned counsel, hereby brings this action against Ferrara Candy
3 Company, Inc. (“Ferrara” or “Defendant”), and upon information and belief and
4 investigation of counsel, alleges as follows:

5 **I. JURISDICTION AND VENUE**

6 1. This Court has original jurisdiction over this action under the Class Action
7 Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d). The Defendant is a citizen of a state
8 different from that of the Plaintiff, the putative class size is greater than 100 persons, and
9 the amount in controversy in the aggregate for the putative Class exceeds the sum or value
10 of \$5 million exclusive of interest and costs.

11 2. This Court has both general and specific personal jurisdiction over the
12 Defendant Ferrara Candy Company, Inc.

13 3. The Court has personal jurisdiction over Defendant because the company has
14 affirmatively established and maintained contacts with the State of California.

15 4. This Court has specific personal jurisdiction arising from Defendant’s
16 decision to advertise and sell the Products in California. Defendant has sufficient
17 minimum contacts with this State and sufficiently avail themselves of the markets of this
18 State through the manufacture, promotion, sales, and marketing of the Products to
19 consumers within the State to render the exercise of jurisdiction by this Court reasonable.

20 5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a
21 substantial part of the events or omissions giving rise to the claim occurred in this venue,
22 including specifically the relevant transactions between Plaintiff and the Defendant, and,
23 in the alternative, the Defendant is subject to the Court’s personal jurisdiction with respect
24 to this action.

25 **II. NATURE OF THE ACTION**

26 6. This is a consumer class action lawsuit for violations of California’s
27 consumer protection laws.

28 7. Defendant Ferrara manufactures, packages, distributes, advertises, markets,

1 and sells a variety of sweet and tart flavored candy products.

2 8. The Products' labeling and advertising is false and misleading and the
3 Products are misbranded under California law.

4 9. The Products are labeled as if they contain only natural ingredients and are
5 flavored only with natural ingredients when the Products in fact contain undisclosed
6 artificial flavors in violation of state and federal law.

7 10. Defendant's packaging, labeling, and advertising scheme is intended to give
8 California consumers the impression that they are buying a premium, "all natural" product
9 with natural flavoring ingredients instead of a product that is artificially flavored.

10 11. Plaintiff, who was deceived by Defendant's unlawful conduct and purchased
11 the Products in California, brings this action on her own behalf and on behalf of California
12 consumers to remedy Defendant's unlawful acts.

13 12. On behalf of the Class as defined herein, Plaintiff seeks an order compelling
14 Defendant to, *inter alia*: (1) cease packaging, distributing, advertising and selling the
15 Products in violation of U.S. FDA regulations and California consumer protection law;
16 (2) re-label or recall all existing deceptively packaged Products; (3) conduct a corrective
17 advertising campaign to fully inform California consumers; (4) award Plaintiff and other
18 Class members restitution, actual damages, and punitive damages; and (5) pay all costs of
19 suit, expenses, and attorney fees.

20 **III. PARTIES**

21 13. Defendant Ferrara Candy Company, Inc. ("Ferrara" or "Defendant") is an
22 Illinois corporation with its principal place of business at 1 Tower Lane #2700, Oakbrook
23 Terrace, Illinois, 60181.

24 14. Ferrara is registered with the California Secretary of State to do business in
25 California as entity number C3703442.

26 15. Ferrara manufactures, advertises, markets, distributes, and sells the Products
27 in California and throughout the United States. Ferrara distributes its Products in
28 California from its corporate office located at 1 Tower Lane #2700, Oakbrook Terrace,

1 Illinois, 60181. Ferrara, directly and through its agents, has substantial contacts with and
2 derives substantial benefits and income from and through the State of California.

3 16. Plaintiff Jessica Littlejohn is a resident and citizen of San Diego County,
4 California, and purchased the Products multiple times in San Diego County and southern
5 California for personal and household consumption.

6 **IV. FACTUAL ALLEGATIONS**

7 **A. Defendant Does Not Disclose That the Products Contain Artificial Flavors.**

8 17. Defendant manufactures, distributes, and sells a variety of sweet and tart
9 flavored candies under the brand name, “SweeTARTS” (the “Products”).

10 18. The Products all contain artificial flavors but Defendant does not disclose this
11 to consumers; they label and advertise the Products as if they were only naturally-flavored.

12 19. Below is a true and accurate representation of the front-of-package labeling
13 of one of the Products, taken from Defendant’s promotional advertising for the Products.



1 20. The Products' labels claim that it contains "*NO ARTIFICIAL FLAVORS.*"

2 21. This is false.

3 22. The Products all contain a synthetic flavoring chemical identified in the
4 ingredient list as "malic acid."

5 23. This "malic acid" is a synthetic petrochemical that confers a "tart, fruit-like"
6 flavor and simulates the flavor of actual fruit.

7 24. The Products' labels violate California law in multiple regards.

8 25. First, because the Products contain artificial flavoring ingredients that
9 simulate and reinforce the characterizing flavor, the front label is required by law to
10 disclose those additional flavors rather than state, as it does, that the Products contain no
11 artificial flavors. Cal. Heath & Saf. Code § 109875 *et seq.* (Sherman Law), incorporating
12 21 C.F.R. § 101.22.¹

13 26. The Products' labels state that they contain "*NO ARTIFICIAL FLAVORS.*"
14 By operation of California law, this label falsely informs consumers that the Product is
15 flavored only with natural ingredients.

16 27. Further, the Products' ingredient list violates state and federal law because it
17 misleadingly identifies the malic acid ingredient only as the generic "malic acid" instead
18 of using the specific, non-generic name of the ingredient. *See* 21 C.F.R. § 101.4(a)(1).

19 28. FDA regulations provide that ingredients "shall be listed by common or usual
20 name" and that "[t]he name of the ingredient shall be listed by a specific name and not a
21 collective (generic) name." 21 C.F.R. § 101.4(a)(1) & (b). It is clear that there are two
22 forms of malic acid, therefore, d-l malic acid is the specific name for one type of malic
23 acid and its use in the Product should be specifically labeled on the Products' label.

24 _____
25 ¹ California's Sherman Food, Drug, and Cosmetic Act, Cal. Health & Saf. Code § 109875
26 *et seq.*, incorporates into California law all regulations enacted pursuant to the U.S. Food
27 Drug and Cosmetic Act. An act or omission that would violate an FDCA regulation
28 necessarily therefore violates California's Sherman Law. *Id.* at § 110100. Regulatory
citations in text are to California's Sherman Law and reference the corresponding federal
regulation for convenience.

1 29. Far more deceptive, however, is the fact that the Products claim on the front
2 label that they contain “*NO ARTIFICIAL FLAVORS.*”

3 30. The Products all contain an artificial flavor made from petrochemicals.

4 31. Defendant Ferrara includes the industrial chemical d-l malic acid² in the
5 Products, in a racemic mixture of d- and l-isomers. This ingredient helps make the
6 Products taste more like fruit.

7 32. There are two forms of malic acid: l-malic acid, which “occurs naturally in
8 various foods” and d-l malic acid, which does not occur naturally and is instead made
9 commercially. 21 C.F.R. § 184.1069(a).

10 33. This “malic acid” is not a naturally-occurring compound but is in fact
11 manufactured in petrochemical plants from benzene or butane – components of gasoline
12 and lighter fluid, respectively – through a series of chemical reactions, some of which
13 involve highly toxic chemical precursors and byproducts.

14 34. Both the natural and unnatural forms of malic acid are considered GRAS
15 (generally recognized as safe) for use as flavorings; the d-malic acid form, however, has
16 never been thoroughly studied for its health effects in human beings.

17 35. Both forms provide a “tart, fruity” flavor when added to food products.³

18 36. Defendant uses the artificial form, d-l malic acid, but pretends otherwise,
19 conflating the natural and the artificial flavorings and deceiving consumers.

20 37. Because the Products contain an artificial flavoring chemical, federal and
21 state law require both front- and back-label disclosures to inform consumers.

22 38. They have neither.

23 39. The labels in fact falsely advertise “*NO ARTIFICIAL FLAVORS.*”

24 40. California law, incorporating U.S. Food, Drug, and Cosmetic Act regulations
25 by reference, requires that a food’s label accurately describe the nature of the food product
26 and its characterizing flavors. 21 C.F.R. § 102.5(a).

27 _____
28 ² D-malic acid is also called d-hydroxybutanedioic acid or (R)-(+)-2-Hydroxysuccinic acid.

³ <https://thechemco.com/chemical/malic-acid/>; last visited Mar. 20, 2018.

1 41. Under FDA regulations, a recognizable primary flavor identified on the front
2 label of a food Product is referred to as a “characterizing flavor.” 21 C.F.R. § 101.22.

3 42. FDA regulations and California law hold that if “the label, labeling, or
4 advertising of a food makes any direct or indirect representations with respect to the
5 primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other
6 means” then such flavor is considered the “characterizing flavor.” 21 C.F.R. § 101.22(i).

7 43. “Fruit-flavored” is a primary recognizable flavor identified on the Products’
8 front labels. This is therefore a characterizing flavor under California law.

9 44. If a product’s characterizing flavor is not created exclusively by the
10 characterizing flavor ingredient, the product’s front label must state that the product’s
11 flavor was simulated or reinforced with either or both natural or artificial flavorings. If any
12 artificial flavor is present which “simulates, resembles or reinforces” the characterizing
13 flavor, the food must be prominently labeled as “Artificially Flavored.” 21 C.F.R. §
14 101.22(i) (3), (4).

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

20 46. Such statements must be in boldface print on the front display panel and of
21 sufficient size for an average consumer to notice. *Id.*

22 47. The Products’ synthetic d-l malic acid simulates, resembles, and reinforces
23 the characterizing fruit flavor for the Products.

24 48. Under these regulations, Defendant was required to display prominently on
25 the Products’ front labels a notice sufficient to allow California consumers to understand
26 that the Products contained artificial flavoring.

27 49. Defendant failed to do so, deceiving consumers and violating California law.

28 50. Accordingly, Plaintiff was unaware that the Products contained artificial

1 flavoring when she purchased them.

2 51. When purchasing the Products, Plaintiff was seeking a product of particular
3 qualities, one that was flavored only with the natural ingredients claimed on the label and
4 which did not contain artificial flavoring.

5 52. Plaintiff is not alone in these purchasing preferences. As reported in Forbes
6 Magazine, 88% of consumers polled recently indicated they would pay more for foods
7 perceived as natural or healthy. “All demographics [of consumers]—from Generation Z to
8 Baby Boomers—say they would pay more” for such products, specifically including foods
9 with no artificial flavors.⁴

10 53. Defendant Ferrara itself conducted research on their candy brands and stated
11 it “tried 50 different formulations over eight months to find colors from natural sources
12 that worked in its gummy bears before settling on spirulina extract and carrot juice to get
13 green and orange colors, respectively.”⁵

14 54. Defendant thereupon began advertising the Products as having “*No Artificial*
15 *Flavors*” – they didn’t remove the artificial flavor, they just didn’t disclose it to consumers.

16 55. California’s Health & Safety Code states that “[a]ny food is misbranded if it
17 bears or contains any artificial flavoring, artificial coloring, or chemical preservative,
18 unless its labeling states that fact.” Cal. Health & Saf. Code § 110740.

19 56. California law required Defendant to include sufficient notice on the
20 Products’ labels to alert California consumers that the Products are artificially flavored.

21 57. Defendant failed to do so.

22 58. Because the Products violated California labeling law, they were misbranded
23 when distributed or offered for sale in California.

24 59. Accordingly, Defendant’s misbranded Products were illegal to distribute or
25

26 ⁴ *Consumers Want Healthy Foods--And Will Pay More For Them*, FORBES MAGAZINE (Feb.
27 15, 2015), <https://www.forbes.com/sites/nancygagliardi/2015/02/18/consumers-want-healthy-foods-and-will-pay-more-for-them/#4b8a6b4b75c5>; last visited Mar. 9, 2018.

28 ⁵<https://www.wsj.com/articles/how-big-food-is-using-natural-flavors-to-win-consumer-favor-1448989427>; last visited June 29, 2018.

1 sell in California. Cal. Health & Safety Code § 110740; § 110760; § 110765.

2 60. Plaintiff and the Class lost money as a result of Defendant’s conduct because
 3 they were induced to purchase Products that contained undisclosed artificial flavors and to
 4 pay a price premium for those Products.

5 61. John Compton, the CEO of a competing snack food manufacturer, spoke to
 6 investors at the Morgan Stanley Consumer & Retail Conference, stating, “We have talked
 7 extensively to consumers about this idea, and they come back and tell us the number one
 8 motivation for purchase is products that claim to be all natural.”

9 62. Defendant’s labeling and advertising reflects those consumer preferences –
 10 not by making the Products solely with natural ingredients, but instead by concealing the
 11 fact that the Products are artificially flavored.

12 63. Table 1, below, lists the Products included in this Action.

Table 1: The Products

SweeTARTS Original
SweeTARTS Mini Chewy
SweeTARTS Giant Chewy
SweeTARTS Chews
SweeTARTS Extreme Sour Chewy
SweeTARTS Chewy Sours
SweeTARTS Sour Gummies
SweeTARTS Gummies
SweeTARTS Whipped & Tangy
SweeTARTS Cherry Punch
Soft & Chewy Ropes
SweeTARTS Tangy Strawberry
Soft & Chewy Ropes
SweeTARTS Jelly Beans

28 64. Each of these Products contain the artificial flavoring chemical d-l malic

1 acid but promises “*NO ARTIFICIAL FLAVORS*” on the package label. Each is therefore
2 falsely and deceptively labeled and advertised and misbranded under California law.

3 65. Each of these Products’ labels deceived consumers into paying a price
4 premium for an artificially-flavored product that was worth less than the naturally-
5 flavored product promised by the labels.

6 **B. Defendant’s Competitors Label Their Products Lawfully.**

7 66. Defendant not only deceived consumers but also gained an unfair
8 commercial advantage in the marketplace by labeling the Products deceptively.

9 67. Manufacturers of competing products label their products lawfully by
10 labeling their artificially-flavored candies as “Artificially Flavored.”

11 68. Other competing major manufacturers, offering products whose labels
12 suggest, as Defendant’s do, that their products are naturally flavored truly are flavored
13 only with natural ingredients.

14 69. Defendant, however, conceals their use of artificial flavoring, deceiving
15 consumers, illegally cutting costs and increasing profits, and competing unfairly and
16 unlawfully in the marketplace, hurting their competitors as well as consumers.

17 70. Defendant’s conduct injures competing manufacturers that do not engage in
18 the same illegal behavior. These manufacturers compete for market share and limited shelf
19 space, as well as for consumers’ buying preferences and dollars.

20 71. Defendant’s competitors do so lawfully. Defendant does not.

21 **C. Plaintiff’s Purchases of the Misbranded Products**

22 72. Plaintiff Littlejohn purchased various SweeTARTS Products, including
23 SweeTARTS Original, SweeTARTS Giant Chewy, and SweeTARTS Chewy Sours in
24 California during the Class Period.

25 73. Plaintiff purchased several varieties of the Products multiple times, most
26 recently the SweeTARTS Chewy Sours at the 7-Eleven located at 7607 Broadway,
27 Lemon Grove, California.

28 74. Plaintiff and the Class members purchased the Products at the marked retail

1 prices, which generally ranged during the Class Period from \$1.00 to \$3.50 per retail
2 package. The Products are offered in varied sizes, including, but not limited to 1.8-oz tubes, 5-oz boxes,
3 and 12-oz bags.

4 75. Plaintiff's most recent purchase was on or about March 2018.

5 76. Plaintiff first discovered Defendant's unlawful acts described herein in
6 March 2018, when she learned the Product's characterizing flavor was deceptively
7 created or reinforced using artificial flavoring even though Defendant failed to disclose
8 that fact on the Products' label.

9 77. Plaintiff was deceived by and relied upon the Products' deceptive labeling,
10 and specifically the omission of the fact that it contained artificial flavorings. Plaintiff
11 purchased the Product believing it was naturally-flavored, based on the Products'
12 deceptive labeling and failure to disclose that it was artificially flavored.

13 78. Plaintiff and the Class members, as reasonable consumers, are not required
14 to subject consumer food products to laboratory analysis, to scrutinize the back of the label
15 to discover that the product's front label is false and misleading, or to search the label for
16 information that state and federal regulations require be displayed prominently on the front
17 – and, in fact, under state law are entitled to rely on statements that Defendant deliberately
18 placed on the Product's labeling.

19 79. Defendant, but not Plaintiff or the Class, knew or should have known that
20 this labeling was in violation of federal regulations and state law.

21 80. Because Plaintiff and Class members reasonably assumed the Products to be
22 free of artificial flavoring based on the Products' labels, they did not receive the benefit
23 of their purchases. Instead of receiving the benefit of products free of artificial flavoring,
24 each received a Product that was unlawfully labeled and deceived the consumer into
25 believing that it was exclusively naturally flavored and contained no artificial flavoring,
26 in violation of state and federal labeling regulations.

27 81. Plaintiff would not have purchased the Product in the absence of Defendant's
28 misrepresentations and omissions. Had Defendant not violated California law, Plaintiff

1 would not have been injured.

2 82. The Products were worth less than what Plaintiff and the Class paid for them,
3 and Class members would not have paid as much as they have for the Products absent
4 Defendant's false and misleading statements and omissions.

5 83. Plaintiff lost money as a result of Defendant's unlawful behavior. Plaintiff
6 altered her position to her detriment and suffered loss in an amount equal to the amount of
7 the price premium paid for the Product relative to the price had the Products been
8 accurately labeled or the price of other similar products lawfully labeled.

9 84. Plaintiff intends to, desires to, and will purchase the Product again when she
10 can do so with the assurance that the Products' labels, which indicate that the Products are
11 naturally-flavored and contain no artificial flavors, are lawful and consistent with the
12 Products' ingredients.

13 **V. DELAYED DISCOVERY**

14 85. Plaintiff did not discover that Defendant's labeling of the Products was false
15 and misleading until March 2018, when she learned the Products contained undisclosed
16 artificial flavoring.

17 86. Plaintiff and the Class are reasonably diligent consumers who exercised
18 reasonable diligence in their purchase and consumption of the Products. Nevertheless, they
19 would not have been able to discover Defendant's deceptive practices and lacked the means
20 to discover them given that, like nearly all consumers, they rely on and are entitled to rely
21 on the manufacturer's obligation to label its products in compliance with federal
22 regulations and state law. Furthermore, Defendant's labeling practices and non-
23 disclosures—in particular, failing to identify the artificial flavor in the ingredient list, or to
24 disclose that the Product contained artificial flavoring, or to accurately identify the kind of
25 malic acid that Defendant put in the Product—impeded Plaintiff's and the Class members'
26 abilities to discover the deceptive and unlawful labeling of the Product throughout the Class
27 Period.

28 87. Because Defendant actively concealed their illegal conduct, preventing

1 Plaintiff and the Class from discovering their violations of state law, Plaintiff and the Class
2 are entitled to delayed discovery and an extended Class Period tolling the applicable
3 statute of limitations.

4 **VI. CLASS ACTION ALLEGATIONS**

5 88. Plaintiff brings this action on behalf of herself and all others similarly situated
6 (the “Class”) pursuant to Federal Rule of Civil Procedure 23.

7 89. The Class is defined as follows:

8 All California citizens who purchased the Products in
9 California on or after January 1, 2012 until the date notice
10 to the Class is disseminated in this action, excluding
11 Defendant and Defendant’s officers, directors, employees,
12 agents and affiliates, and the Court and its staff.

13 90. During the Class Period, the Products unlawfully contained the undisclosed
14 artificial flavors d-malic acid or d-l malic acid and were otherwise improperly labeled as
15 alleged herein. Defendant failed to label the Products as required by California law and
16 the Class was damaged as described herein.

17 91. The proposed Class meets all criteria for a class action, including numerosity,
18 typicality, superiority, and adequacy of representation.

19 92. The proposed Class satisfies numerosity. The Products are offered for sale at
20 over a thousand supermarkets in California; the Class numbers at a minimum in the tens
21 of hundreds or thousands. Individual joinder of the Class members in this action is
22 impractical. Addressing the Class members’ claims through this class action will benefit
23 Class members, the parties, and the courts.

24 93. The proposed Class satisfies typicality. Plaintiff’s claims are typical of and
25 are not antagonistic to the claims of other Class members. Plaintiff and the Class members
26 all purchased the Products, were deceived by the false and deceptive labeling, and lost
27 money as a result, purchasing a Product that was illegal to sell in California.

28 94. The proposed Class satisfies superiority. A class action is superior to any

1 other means for adjudication of the Class members' claims because each Class member's
2 claim is modest, based on the Product's retail purchase price which is generally under
3 \$5.00. It would be impractical for individual Class members to bring individual lawsuits
4 to vindicate their claims.

5 95. Because Defendant's misrepresentations were made on the label of the
6 Products themselves, all Class members including Plaintiff were exposed to and continue
7 to be exposed to the omissions and affirmative misrepresentations. If this action is not
8 brought as a class action, Defendant can continue to deceive consumers and violate
9 California law with impunity.

10 96. The proposed Class representative satisfies adequacy of representation. The
11 Plaintiff is an adequate representative of the Class as she seeks relief for the Class, her
12 interests do not conflict with the interests of the Class members, and she has no interest
13 antagonistic to those of other Class members. Plaintiff has retained counsel competent in
14 the prosecution of consumer fraud and class action litigation.

15 97. There is a well-defined community of interest in questions of law and fact
16 common to the Class, and these predominate over any individual questions affecting
17 individual Class members in this action.

18 98. Questions of law and fact common to Plaintiff and the Class include:

- 19 a. Whether Defendant failed to disclose the presence of the
20 artificial flavoring ingredient d-l malic acid in the Products;
- 21 b. Whether Defendant's label statement, "No Artificial Flavors"
22 was a false or misleading statement of fact;
- 23 c. Whether Defendant's labeling omissions and representations
24 constituted false advertising under California law;
- 25 d. Whether Defendant's conduct constituted a violation of
26 California's Unfair Competition Law;
- 27 e. Whether Defendant's conduct constituted a violation of
28 California's Consumer Legal Remedies Act;

- 1 f. Whether Defendant’s label statement, “No Artificial Flavors”
- 2 was an affirmative representation of the Product’s composition
- 3 and conveyed an express warranty;
- 4 g. Whether Defendant’s conduct constitutes a breach of implied
- 5 warranties under California’s Commercial Code;
- 6 h. Whether Defendant’s conduct violates U.S. Food and Drug
- 7 Administration labeling regulations;
- 8 i. Whether the statute of limitations should be tolled on behalf of
- 9 the Class;
- 10 j. Whether the Class is entitled to restitution, rescission, actual
- 11 damages, punitive damages, attorneys’ fees and costs of suit, and
- 12 injunctive relief; and
- 13 k. Whether members of the Class are entitled to any such further
- 14 relief as the Court deems appropriate.

15 99. Plaintiff will fairly and adequately protect the interests of the Class, has no
16 interests that are incompatible with the interests of the Class, and has retained counsel
17 competent and experienced in class litigation.

18 100. Defendant has acted on grounds applicable to the entire Class, making final
19 injunctive relief or declaratory relief appropriate for the Class as a whole.

20 101. Class treatment is therefore appropriate under Federal Rule of Civil
21 Procedure 23. Plaintiff will, if notice is required, confer with Defendant and seek to
22 present the Court with a stipulation and proposed order on the details of a class notice
23 plan.

24 ///

25 ///

26 ///

27 ///

1 **VII. CAUSES OF ACTION**

2 **I.**

3 **FRAUD BY OMISSION**

4 **CAL. CIV. CODE §§ 1709-1710**

5 102. Plaintiff re-alleges and incorporates by reference the allegations made
6 elsewhere in the Complaint as if set forth in full herein.

7 103. Defendant actively concealed material facts, in whole or in part, with the
8 intent to induce Plaintiff and the members of the Class to purchase the Products.
9 Specifically, Defendant actively concealed the truth about the Products by not disclosing
10 the existence of artificial flavoring ingredients on the front label of the Products as is
11 required by California and federal law.

12 104. Plaintiff and the Class were unaware of these omitted material facts and
13 would not have purchased the Products, or would have paid less for the Products, if they
14 had known of the concealed facts.

15 105. Plaintiff and the Class suffered injuries that were proximately caused by
16 Defendant's active concealments and omissions of material facts.

17 106. Defendant's fraudulent concealments and omissions were a substantial factor
18 in causing the harm suffered by Plaintiff and the Class members as they would not have
19 purchased the products at all if all material facts were properly disclosed.

20 **II.**

21 **NEGLIGENT MISREPRESENTATION**

22 **CAL. CIV. CODE §§ 1709-1710**

23 107. Plaintiff re-alleges and incorporates by reference the allegations made
24 elsewhere in the Complaint as if set forth in full herein.

25 108. Defendant had a duty to disclose to Plaintiff and the Class members the
26 existence of artificial flavoring ingredients on the front labels of the Products pursuant to
27 California and federal law. Defendant was in a superior position than Plaintiff and the
28 Class members such that reliance by Plaintiff and the Class members was justified.

1 Defendant possessed the skills and expertise to know the type of information that would
2 influence a consumer's purchasing decision.

3 109. During the applicable Class period, Defendant negligently or carelessly
4 misrepresented, omitted, and concealed from consumers material facts regarding the
5 Products, including the existence of artificial flavoring ingredients.

6 110. Defendant was careless in ascertaining the truth of their representations in
7 that they knew or should have known that Plaintiff and the Class members would not have
8 realized the true existence of artificial flavoring ingredients in the Products.

9 111. Plaintiff and the Class members were unaware of the falsity of Defendant's
10 misrepresentations and omissions and, as a result, justifiably relied on them when making
11 the decision to purchase the Products.

12 112. Plaintiff and the Class members would not have purchased the Products, or
13 would have paid less for the Products, if the true facts had been known.

14 **III.**

15 **VIOLATIONS OF THE CONSUMERS LEGAL REMEDIES ACT**

16 **CAL. CIV. CODE §§ 1750, *et seq.***

17 113. Plaintiff re-alleges and incorporates by reference the allegations made
18 elsewhere in the Complaint as if set forth in full herein.

19 114. The California Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et*
20 *seq.* ("CLRA") prohibits any unfair, deceptive and unlawful practices, and unconscionable
21 commercial practices in connection with the sale of any goods or services to consumers.

22 115. Plaintiff and the Class are "consumers" as defined by Cal. Civ. Code
23 § 1761(d).

24 116. The Products are a "good" as defined by Cal. Civ. Code § 1761.

25 117. Defendant's failure to label the Products in accord with federal and state
26 labeling regulations, omitting the required information that the Products contain artificial
27 flavoring, was an unfair, deceptive, unlawful and unconscionable commercial practice.

28 118. Defendant's conduct violates the Consumer Legal Remedies Act including

1 but not limited to, the following provisions:

2 § 1770(a)(5): representing that goods have characteristics, uses, or benefits
3 which they do not have.

4 § 1770(a)(7): representing that goods are of a particular standard, quality, or
5 grade if they are of another.

6 § 1770(a)(9): advertising goods with intent not to sell them as advertised.

7 § 1770(a)(16): representing the subject of a transaction has been supplied in
8 accordance with a previous representation when it has not.

9 119. As a result of Defendant's violations, Plaintiff and the Class suffered
10 ascertainable losses in the form of the price premium they paid for the unlawfully labeled
11 and marketed Products, which they would not have paid had the Products been labeled
12 correctly, and in the form of the reduced value of the actual Products compared to the
13 Products as advertised.

14 120. On or about March 23, 2018, prior to filing this action, Plaintiff sent a CLRA
15 notice letter to Defendant which complies with California Civil Code § 1782(a). Plaintiff
16 sent Defendant, individually and on behalf of the proposed Class, a letter via Certified
17 Mail, advising Defendant that they are in violation of the CLRA and demanding that they
18 cease and desist from such violations and make full restitution by refunding the monies
19 received therefrom. A copy of Plaintiff's March 23, 2018 CLRA letter is attached hereto
20 as Exhibit 1.

21 121. Wherefore, Plaintiff seeks injunctive relief for Defendant's violations of the
22 CLRA. If Defendant fails to take the corrective action detailed in Plaintiff's CLRA letter
23 within thirty days of the date of the letter, then Plaintiff will seek leave to amend her
24 complaint to add a claim for damages under the CLRA.

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1 IV.

2 VIOLATIONS OF THE UNFAIR COMPETITION LAW

3 (UNLAWFUL PRONG)

4 CAL. BUS. & PROF. CODE §§ 17200, *et seq.*

5 122. Plaintiff re-alleges and incorporates by reference each and every allegation
6 contained elsewhere in this Complaint, as if fully set forth herein.

7 123. Section 17200 of the California Business & Professions Code (“Unfair
8 Competition Law” or “UCL”) prohibits any “unlawful . . . business act or practice.”

9 124. The UCL borrows violations of other laws and statutes and considers those
10 violations also to constitute violations of California law.

11 125. Defendant’s practices as described herein were at all times during the Class
12 Period and continue to be unlawful under, *inter alia*, California’s Sherman Law.

13 126. Defendant’s conduct in unlawfully labeling, advertising, and distributing the
14 Products in commerce in California violated California law.

15 127. The Products’ labels fail to disclose that they contain synthetic artificial
16 flavoring in violation of 21 C.F.R. § 101.22 and California’s Sherman Law.

17 128. The Products contain d-l malic acid.

18 129. The d-l malic acid is an artificial flavoring material that creates, simulates,
19 and reinforces the Products’ characterizing fruit flavors.

20 130. The d-l malic acid in the Products is not derived from a natural material as
21 defined in 21 C.F.R. § 101.22 and is therefore by law an artificial flavor.

22 131. Defendant fails to inform consumers of the presence of the artificial flavor in
23 the Products, on either the front or back-label as required by law.

24 132. Defendant’s practices are therefore unlawful as defined in Section 17200.

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V.

**VIOLATIONS OF THE UNFAIR COMPETITION LAW
(UNFAIR PRONG)**

CAL. BUS. & PROF. CODE §§ 17200, *et seq.*

133. Plaintiff re-alleges and incorporates by reference each and every allegation contained elsewhere in this Complaint as if fully set forth herein.

134. Section 17200 of the California Business & Professions Code (“Unfair Competition Law” or “UCL”) prohibits any “unfair . . . business act or practice.”

135. Defendant’s practices violate the Unfair Competition Law “unfair” prong as well.

136. Defendant’s practices as described herein are “unfair” within the meaning of the California Unfair Competition Law because the conduct is unethical and injurious to California residents and the utility of the conduct to Defendant does not outweigh the gravity of the harm to consumers.

137. While Defendant’s decision to label the Products deceptively and in violation of California law may have some utility to Defendant in that it allows Defendant to sell the Products to consumers who otherwise would not purchase an artificially-flavored food product at the retail price or at all if it were labeled correctly, and to realize higher profit margins than if they formulated or labeled the Product lawfully, this utility is small and far outweighed by the gravity of the harm Defendant inflicts upon California consumers.

138. Defendant’s conduct also injures competing food product manufacturers and sellers that do not engage in the same unlawful, unfair, and unethical behavior.

139. Moreover, Defendant’s practices violate public policy expressed by specific constitutional, statutory, or regulatory provisions, including the Sherman Law, the False Advertising Law, and the FDA regulations cited herein.

140. Plaintiff’s and the Class’s purchases of the Products occurred in California.

141. Defendant labeled the Products in violation of federal regulations and California law requiring truth in labeling.

1 142. Defendant consciously failed to disclose material facts to Plaintiff and the
2 Class in Defendant's advertising and marketing of the Product.

3 143. Defendant's conduct is unconscionable because, among other reasons, it
4 violates 21 C.F.R. § 101.22(c), which requires all foods containing artificial flavoring
5 to include:

6 A statement of artificial flavoring . . . [which] shall be placed on the
7 food or on its container or wrapper, or on any two or all three of these,
8 as may be necessary to render such a statement likely to be read by the
9 ordinary person under customary conditions of purchase and use of
10 such food.

11 144. Defendant's conduct is "unconscionable" because it violates, *inter alia*, 21
12 C.F.R. § 101.22(c), which requires all food products for which artificial flavoring provides
13 a characterizing flavor to disclose this fact prominently on the product's front label.

14 145. Defendant intended that Plaintiff and the Class rely on Defendant's acts or
15 omissions so that Plaintiff and the other Class members would purchase the Products.

16 146. Had Defendant disclosed all material information regarding the Products in
17 product advertising and marketing, Plaintiff and the Class either would not have purchased
18 the Products or would have paid less than they did for the Products.

19 147. Plaintiff and Class members suffered injury in fact and lost money or
20 property as a result of Defendant's deceptive advertising: they were denied the benefit of
21 the bargain when they decided to purchase the Product based on Defendant's violation of
22 the applicable laws and regulations, or to purchase the Product in favor of competitors'
23 products, which are less expensive, contain no artificial flavoring, or are lawfully labeled.

24 148. Plaintiff suffered an ascertainable loss of money. The acts, omissions and
25 practices of Defendant detailed herein proximately caused Plaintiff and other members
26 of the Class to suffer an ascertainable loss in the form of, *inter alia*, monies spent to
27 purchase the Products they otherwise would not have at the prices charged, and they are
28 entitled to recover such damages, together with appropriate penalties, including

1 restitution, damages, attorneys’ fees and costs of suit.

2 149. Section 17200 also prohibits any “unfair, deceptive, untrue or misleading
3 advertising.” For the reasons set forth above, Defendant engaged in unfair, deceptive,
4 untrue and misleading advertising and violated Business & Professions Code § 17200.

5 150. Pursuant to California Business & Professions Code § 17203, Plaintiff seeks
6 an order requiring Defendant to immediately cease such acts of unlawful, unfair and
7 fraudulent business practices and requiring Defendant to return the amount of money
8 improperly collected to all those who purchased the Products.

9 **VI.**

10 **VIOLATIONS OF THE FALSE ADVERTISING LAW**

11 **CAL. BUS. & PROF. CODE §§ 17500, *et seq.***

12 151. Plaintiff re-alleges and incorporates by reference each and every allegation
13 contained elsewhere in this Complaint as if fully set forth herein.

14 152. Defendant made, distributed, and advertised in California and in interstate
15 commerce, Products that unlawfully fail to disclose artificial flavoring on the packaging
16 as required by federal food labeling regulations.

17 153. The Products’ labeling and advertising in California falsely describe it as if
18 it were naturally-flavored and advertises that the Products contain “No Artificial Flavors.”

19 154. Under California’s False Advertising Law (“FAL”), Business and
20 Professions Code § 17500, *et seq.*,

21 “It is unlawful for any person, firm, corporation or association, or any
22 employee thereof with intent directly or indirectly to dispose of real or
23 personal property . . . to make or disseminate or cause to be made or
24 disseminated before the public in this state, or to make or disseminate
25 or cause to be made or disseminated from this state before the public in
26 any state, in any newspaper or other publication, or any advertising
27 device . . . any statement, concerning that real or personal property . . .
28 which is untrue or misleading, and which is known, or which by the

1 exercise of reasonable care should be known, to be untrue or
2 misleading. . . .” Cal. Bus. & Prof. Code § 17500.

3 155. Defendant’s labeling and advertising statements, communicating to
4 consumers that the Products contain “No Artificial Flavors” and concealing the fact that
5 they contain a synthetic artificial flavor, were untrue and misleading and Defendant at a
6 minimum, by the exercise of reasonable care, should have known those actions were false
7 or misleading.

8 156. Defendant’s conduct violated California’s False Advertising Law.

9 **VII.**

10 **BREACH OF EXPRESS WARRANTIES**

11 CAL. COMM. CODE § 2313

12 157. Plaintiff re-alleges and incorporates by reference the allegations found
13 elsewhere in the Complaint as if set forth in full herein.

14 158. The Products’ labels warrant that the Product has “No Artificial Flavors.”

15 159. The Products’ front labels also misleadingly advertise by operation of
16 California law that the Products are flavored only with natural flavors.

17 160. These promises became part of the basis of the bargain between the parties
18 and thus constituted an express warranty, which Defendant breached; the Products are
19 artificially flavored.

20 161. Defendant sold the goods to Plaintiff and other consumers who bought the
21 goods from Defendant.

22 162. As a result, Plaintiff and other consumers did not receive goods as warranted
23 by Defendant.

24 163. Within a reasonable amount of time after Plaintiff discovered that the Product
25 contained synthetic ingredients, Plaintiff notified the Defendant of such breach.

26 164. As a proximate result of this breach of warranty by Defendant, Plaintiff and
27 other consumers have been damaged in an amount to be determined at trial.

28 165. As a result, Plaintiff, the Class, and the general public are entitled to

1 injunctive and equitable relief, restitution, and an order for the disgorgement of the funds
2 by which Defendant was unjustly enriched.

3 **VIII.**

4 **BREACH OF IMPLIED WARRANTIES**

5 CAL. COMM. CODE § 2314

6 166. Plaintiff re-alleges and incorporates the allegations elsewhere in the
7 Complaint as if set forth in full herein.

8 167. Defendant's label representations also created implied warranties that the
9 product was suitable for a particular purpose, specifically as a naturally-flavored food
10 product. Defendant breached this warranty as well.

11 168. The Products' front labels misleadingly imply that the Products are flavored
12 with the natural ingredients comprising the characterizing flavors.

13 169. As alleged in detail above, at the time of purchase Defendant had reason to
14 know that Plaintiff, as well as all members of the Class, intended to use the Product as a
15 naturally-flavored food product.

16 170. This became part of the basis of the bargain between the parties.

17 171. Based on that implied warranty, Defendant sold the goods to Plaintiff and
18 other Class members who bought the goods from Defendant.

19 172. At the time of purchase, Defendant knew or had reason to know that Plaintiff
20 and the Class members were relying on Defendant's skill and judgment to select or furnish
21 a product that was suitable for this particular purpose, and Plaintiff justifiably relied on
22 Defendant's skill and judgment.

23 173. The Products were not suitable for this purpose.

24 174. Plaintiff purchased the Product believing it had the qualities Plaintiff sought,
25 based on the deceptive advertising and labeling, but the Product was actually
26 unsatisfactory to Plaintiff for the reasons described herein.

27 175. The Products were not merchantable in California, as they were not of the
28 same quality as similar products in the product category generally acceptable in the trade.

1 176. The Products would not pass without objection in the trade when packaged
2 with the existing labels, because the Products were misbranded and illegal to sell in
3 California. Cal. Comm. Code § 2314(2)(a).

4 177. The Products also were not acceptable commercially and breached the
5 implied warranty because they were not adequately packaged and labeled as required. Cal.
6 Comm. Code § 2314(2)(e).

7 178. The Products also were not acceptable commercially and breached the
8 implied warranty because they did not conform to the promises or affirmations of fact
9 made on the container or label, Cal. Comm. Code § 2314(2)(f), and other grounds as
10 set forth in Commercial Code section 2314(2).

11 179. By offering the Products for sale and distributing the Products in California,
12 Defendant also warranted that the Products were not misbranded and were legal to
13 purchase in California. Because the Products were misbranded in several regards and were
14 therefore illegal to sell or offer for sale in California, Defendant breached this warranty as
15 well.

16 180. As a result of this breach, Plaintiff and other California consumers did not
17 receive goods as impliedly warranted by Defendant.

18 181. Within a reasonable amount of time after the Plaintiff discovered that the
19 Products contained synthetic ingredients, Plaintiff notified the Defendant of such breach.

20 182. As a proximate result of this breach of warranty, Plaintiff and other California
21 consumers have been damaged in an amount to be determined at trial.

22 183. As a result, Plaintiff, the Class, and the general public are entitled to
23 injunctive and equitable relief, restitution, and an order for the disgorgement of the funds
24 by which Defendant was unjustly enriched.

25 **VIII. PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated in
27 California, and the general public, prays for judgment against Defendant as follows:

28 A. An order confirming that this action is properly maintainable as a class action

- 1 as defined above;
- 2 B. An order appointing Plaintiff as class representative of the Class, and The
- 3 Law Office of Ronald A. Marron as counsel for the Class;
- 4 C. An order requiring Defendant to bear the cost of Class notice;
- 5 D. An order declaring that the conduct complained of herein violates the CLRA;
- 6 E. An order declaring that the conduct complained of herein violates the UCL;
- 7 F. An order declaring that the conduct complained of herein violates the FAL;
- 8 G. An order declaring that the conduct complained of herein breached express
- 9 warranties, implied warranties, or both;
- 10 H. An order requiring Defendant to disgorge any benefits received from Plaintiff
- 11 and any unjust enrichment realized as a result of the improper and misleading
- 12 labeling, advertising, and marketing of the Products;
- 13 I. An order requiring Defendant to pay restitution and damages to Plaintiff and
- 14 Class members so that they may be restored any money which was acquired
- 15 by means of any unfair, deceptive, unconscionable or negligent acts;
- 16 J. An award of punitive damages in an amount to be proven at trial;
- 17 K. An order enjoining Defendant's deceptive and unfair practices;
- 18 L. An order requiring Defendant to conduct corrective advertising;
- 19 M. An award of pre-judgment and post-judgment interest;
- 20 N. An award of attorney fees and costs; and
- 21 O. Such other and further relief as this Court may deem just, equitable, or proper.

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1 **IX. JURY DEMAND**

2 Plaintiff demands a trial by jury on all claims for damages. Plaintiff does not seek a
3 jury trial for claims sounding in equity.

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5 DATED: July 6, 2018

Respectfully Submitted,

6 /s/ Ronald A. Marron

7 Ronald A. Marron

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16 ***Counsel for Plaintiff and the
17 Proposed Class***