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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MARIANNA BELLI, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

NESTLÉ USA, INC.,

Defendant.

Case No. 5:14-cv-00283

Related to: 12-cv-02272 (PSG)

**CLASS ACTION AND  
REPRESENTATIVE ACTION  
COMPLAINT FOR EQUITABLE  
AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

1 Plaintiff, through her undersigned attorneys, brings this lawsuit against Defendant Nestlé  
 2 USA, Inc. (“Defendant” or “Nestlé”) as to her own acts upon personal knowledge and as to all  
 3 other matters upon information and belief.

#### 4 **DEFINITIONS**

- 5 1. “Class Period” is May 4, 2008 to the present.
- 6 2. “Eskimo Pie” is Nestlé Eskimo Pie Dark Chocolate bars. A picture of the Eskimo  
 7 Pie purchased by Plaintiff is attached as Exhibit 1 and specific descriptions of the relevant label  
 8 representations are included below.

#### 9 **SUMMARY OF THE CASE**

10 3. Plaintiff’s case has two distinct facets. First, the “misbranding” part. This case  
 11 seeks to recover for the injuries suffered by the Plaintiff and the class as a direct result of the  
 12 Defendant’s unlawful sale of misbranded food products. Defendant packaged and labeled its  
 13 Eskimo Pie in violation of California’s Sherman Law which adopts, incorporates, and is, in all  
 14 relevant aspects, identical to the federal Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.*  
 15 (“FDCA”) and the regulations adopted pursuant to that act. These violations render Defendant’s  
 16 food products “misbranded.” Defendant’s actions violate the unlawful prong of California’s  
 17 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (“UCL”) and the Consumers Legal  
 18 Remedies Act, Cal. Civ. Code §1750 (“CLRA”).

19 4. Under California law, misbranded food products cannot be legally sold or  
 20 possessed, have no economic value and are legally worthless. Indeed, the sale or possession of  
 21 misbranded food products is a criminal act in California.

22 5. By selling such illegal products to the unsuspecting Plaintiff, the Defendant  
 23 profited at the Plaintiff’s expense and unlawfully deprived Plaintiff of the money she paid to  
 24 purchase food products that were illegal to sell, possess or resell and had no economic value.

25 6. The unlawful sale of a misbranded product that was illegal to sell or possess gives  
 26 rise to causes of action under the UCL and CLRA. In the present case, Plaintiff was injured by  
 27  
 28

1 the Defendant's illegal sale of its misbranded Eskimo Pie. Plaintiff paid money to purchase illegal  
2 products that were worthless and could not be legally sold or possessed.

3 7. Plaintiff was unwittingly placed in a worse legal situation as a result of  
4 Defendant's unlawful sale of illegal products to them. Plaintiff would not have purchased  
5 Defendant's Eskimo Pie had she known that the product was illegal and could not be lawfully  
6 possessed. No reasonable consumer would purchase such a product. The class suffered the same  
7 injuries as Plaintiff due to the class' purchase of Eskimo Pie.

8 8. Defendant has violated the Sherman Law § 110760, which makes it unlawful for  
9 any person to manufacture, sell, deliver, hold or offer for sale any food that is misbranded. As  
10 discussed below, the illegal sale of a misbranded product to a consumer results in an independent  
11 violation of the unlawful prong of the UCL and CLRA that is separate and apart from the  
12 underlying unlawful labeling practice that resulted in the product being misbranded. Plaintiffs  
13 reasonably relied on the fact that the Defendant's Eskimo Pie was legal to sell and possess and  
14 that Defendants' labeling and label claims were legal.

15 9. Due to Defendant's misbranding and sale of Eskimo Pie and Plaintiff's reliance on  
16 the Defendants' labels, Plaintiff lost money by purchasing unlawful products.

17 10. Second, the "misleading" part. In addition to being misbranded under the Sherman  
18 Law, Eskimo Pie has label statements that are misleading, deceptive and fraudulent. The label  
19 statement is "*No Sugar Added.*"

20 11. Prior to purchase, Plaintiff reviewed the illegal "No Sugar Added" statement on  
21 the labels of Eskimo Pie she purchased, reasonably relied, in substantial part, on this misleading  
22 statement, and was thereby misled in deciding to buy Eskimo Pie. Plaintiff was deceived into  
23 purchasing Eskimo Pie in substantial part because of these label statements and because of these  
24 statements believed that Eskimo Pie was healthier than other similar products and/or healthier  
25 than Eskimo Pie without the statement.

26 12. Defendant also misled Plaintiff to believe that Eskimo Pie was legal to purchase  
27 and possess. Had Plaintiff known that Eskimo Pie was misbranded she would not have bought  
28

1 Defendant's Eskimo Pie. Plaintiffs relied (a) on the Defendant's explicit representations that its  
2 product had "No Sugar Added" and was thus healthier than other similar products lacking such  
3 statements and/or Eskimo Pie without such a statement, and (b) the Defendant's implicit  
4 representation based on Defendant's material omission of material facts that Eskimo Pie was legal  
5 to sell and possess.

6 13. Reasonable consumers would be, and were, misled in the same manner as  
7 Plaintiffs.

8 14. Defendant had a duty to disclose the illegality of its misbranded products because  
9 (a) it had exclusive knowledge of material facts not known or reasonably accessible to the  
10 Plaintiffs; and (b) the Defendant actively concealed a material fact from the Plaintiff. The  
11 Defendant had a duty to disclose the information required by the labeling laws discussed herein  
12 because of the disclosure requirements contained in those laws and because in making its "No  
13 Sugar Added" claim made partial representations that are misleading because other material facts  
14 have not been disclosed.

#### 15 **PARTIES, JURISDICTION AND VENUE**

16 15. Plaintiff is a resident of San Jose, California who purchased Defendant's Eskimo  
17 Pie during the Class Period. Copies of the label purchased by Plaintiff are attached as Exhibit 1.

18 16. Defendant Nestlé USA, Inc. is a privately held Delaware corporation with its  
19 corporate headquarters and principal place of business in Glendale, California.

20 17. Defendant is a leading producer of retail food products, including Eskimo Pie. It  
21 sells its food products to consumers through grocery and other retail stores throughout California  
22 and the United States.

23 18. California law applies to all claims set forth in this complaint because Nestlé is a  
24 California resident and all of the misconduct alleged herein was contrived in, implemented in, and  
25 has a shared nexus with California. The formulation and execution of the unlawful and  
26 misleading practices alleged herein, occurred in, or emanated from California. Accordingly,  
27  
28

1 California has significant contacts and/or a significant aggregation of contacts with the claims  
2 asserted by Plaintiff and all class members.

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

7 20. This Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C. §  
8 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is between  
9 citizens of different states.

10 21. This Court has personal jurisdiction over Defendant because: (i) a substantial  
11 portion of the wrongdoing alleged in this Complaint occurred in California, (ii) Defendant is  
12 authorized to do business in California, (iii) Defendant has sufficient minimum contacts with  
13 California, and (iv) Defendant otherwise intentionally availed itself of the markets in California  
14 through the promotion, marketing and sale of merchandise, sufficient to render the exercise of  
15 jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

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

## 19 BACKGROUND

### 20 A. Identical California and Federal Law Regulate Food Labeling

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

24 24. Pursuant to the Sherman Law, California has expressly adopted the federal  
25 labeling requirements as its own and indicated that “[a]ll food labeling regulations and any  
26 amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993,  
27 or adopted on or after that date shall be the food regulations of this state.” California Health &  
28

1 Safety Code § 110100.

2 25. Under both the Sherman Law and FDCA Section 403(a), food is “misbranded” if  
3 “its labeling is false or misleading in any particular,” or if it does not contain certain information  
4 on its label or its labeling. Cal. Health & Safety Law §§ 110660, 110705; 21 U.S.C. § 343.

5 26. In addition to its blanket adoption of federal labeling requirements, California has  
6 also enacted a number of laws and regulations that adopt and incorporate specific enumerated  
7 federal food laws and regulations. As described herein, Defendant has violated the following  
8 Sherman Law sections: California Health & Safety Code § 110390 (unlawful to disseminate false  
9 or misleading food advertisements that include statements on products and product packaging or  
10 labeling or any other medium used to directly or indirectly induce the purchase of a food  
11 product); California Health & Safety Code § 110395 (unlawful to manufacture, sell, deliver, hold  
12 or offer to sell any falsely advertised food); California Health & Safety Code §§ 110398 and  
13 110400 (unlawful to advertise misbranded food or to deliver or proffer for delivery any food that  
14 has been falsely advertised); California Health & Safety Code § 110660 (misbranded if label is  
15 false and misleading); California Health & Safety Code § 110665 (misbranded if label fails to  
16 conform to the requirements set forth in 21 U.S.C. § 343(q)); California Health & Safety Code §  
17 110670 (misbranded if label fails to conform with the requirements of 21 U.S.C. § 343(r));  
18 California Health & Safety Code § 110705 (misbranded if words, statements and other  
19 information required by the Sherman Law are either missing or not sufficiently conspicuous);  
20 California Health & Safety Code § 110765 (which makes it unlawful for any person to misbrand  
21 any food); California Health & Safety Code § 110770 (unlawful for any person to receive in  
22 commerce any food that is misbranded or to deliver or proffer for delivery any such food).

23 27. Plaintiff's claims are brought for violation of the Sherman Law.

24 **B. FDA Enforcement History**

25 28. In recent years the FDA has become increasingly concerned that food  
26 manufacturers have been disregarding food labeling regulations. To address this concern, the  
27 FDA elected to take steps. In October 2009, the FDA issued a *Guidance for Industry: Letter*  
28

1 regarding Point Of Purchase Food Labeling and on March 3, 2010 the FDA issued “*Open Letter*  
 2 *to Industry from [FDA Commissioner] Dr. Hamburg*” to inform the food industry of its concerns  
 3 and to place the industry on notice that food labeling compliance was an area of enforcement  
 4 priority. Additionally, the FDA has sent warning letters to the industry, including many of  
 5 Defendant’s peer food manufacturers as well as a December 4, 2009 Warning Letter to Nestle,  
 6 Inc., for some of the same types of misbranded labels and deceptive labeling claims described  
 7 herein.

8 29. Defendant did see, or should have seen, these warnings. Defendant did not change  
 9 its labels in response to any warning letters.

### 10 **SHERMAN LAW VIOLATIONS AND ESKIMO PIE**

#### 11 **A. Eskimo Pie is Misbranded Under the Sherman Law**

12 30. The label on the package of Eskimo Pie violates the Sherman Law and is therefore  
 13 misbranded. Defendant sold Eskimo Pie to Plaintiff and the class.

14 31. The label on the package of Eskimo Pie purchased by Plaintiff states “No Sugar  
 15 Added.” All packages of Eskimo Pie sold in the Class Period have the same “No Sugar Added”  
 16 statement.

17 32. “No Sugar Added” is a nutrient content claim.

18 33. 21 C.F.R. § 101.60 contains special requirements for nutrient claims that use the  
 19 phrase “no sugar added.” 21 C.F.R. § 101.60 has been adopted and expressly incorporated by the  
 20 Sherman Law, California Health & Safety Code § 110100, and provides in 101.60(c)(2) that:

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

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

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

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

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

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

34. 21 C.F.R. § 101.60(b)(2) provides that:

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

35. The labels for Defendant’s Eskimo Pie have “no sugar added” on the front panel, so under 21 C.F.R. § 101.60(c)(2), there must be an additional two statements on the label: (1) a statement that the product is not “low calorie” or “calorie reduced” (unless the exception applies) and (2) a statement that directs consumer’s attention to the nutrition panels for further information on sugar and calorie content.

36. There is no statement that directs consumer’s attention to the nutrition panels for further information on sugar and calorie content on the label of Defendant’s Eskimo Pie. For this reason, Eskimo Pie does not satisfy element (v) of 21 C.F.R. § 101.60(c)(2) and is misbranded.

37. There is also no statement that the product is not “low calorie” or “calorie reduced” on the label of Defendant’s Eskimo Pie. This product does not meet the requirements for a “low” or “reduced calorie” food under California and federal law so the exception within the first requirement of 21 C.F.R. § 101.60(c)(2) does not apply. The label must therefore bear such a statement. For this reason, Defendant’s Eskimo Pie does not satisfy element (v) of 21 C.F.R. § 101.60(c)(2) and is therefore misbranded.

38. Eskimo Pie is not “low calorie” as defined in 21 C.F.R. § 101.60(b)(2). The label



1 states that this product has a serving size of 50 grams per bar. Each serving has 150 calories.  
2 This exceeds the 40 calorie limit imposed by 21 C.F.R. § 101.60(b)(2) for a product to be  
3 considered “low calorie.”

4 39. Eskimo Pie is not “reduced calorie” as defined in 21 C.F.R. § 101.60(b)(4)(i) and  
5 21 C.F.R. § 101.13(j)(1)(ii) because it does not contain at least 25% fewer calories than an  
6 appropriate “market basket” reference product.

7 40. Eskimo Pie is 50 grams per serving size with 150 calories per bar. To be “reduced  
8 calorie” the amount of calories per serving is determined, however, based on a reference amount  
9 customarily consumed of 85 grams. Eskimo Pie is therefore not 150 calories per bar for these  
10 purposes, but really 255 calories per bar. For Eskimo Pie to be 25% less calories than an  
11 appropriate market based reference product such a similar product must have at least 340 calories.  
12 Most, if not all, such similar products have fewer than 340 calories. For example, the Haagen-  
13 Dazs Vanilla Milk Chocolate ice cream bars have a serving size of 280 calories per 83 grams. If  
14 this was the reference product, Eskimo Pie would have to be 210 calories per reference amount  
15 customarily consumed to label itself “reduced calorie.” Because it made a no sugar added claim,  
16 Defendant was also required by 21 C.F.R. § 105.66 to place a conspicuous labeling statement on  
17 the package of Eskimo Pie bars to inform consumers that the product contained both nutritive  
18 and non-nutritive sweeteners to alert consumers of the fact that the product contained calorific  
19 sweeteners.

20 41. Defendant’s violations of the Sherman Law include Defendant’s illegal labeling  
21 practices which misbrand Eskimo Pie as well as the illegal advertising, marketing, distribution,  
22 delivery and sale of Defendant’s misbranded Eskimo Pie to consumers in California and  
23 throughout the United States.

24 42. Defendant could have easily complied with the labeling regulations by simply  
25 adding two statements on the label: (1) a statement that the product is not “low calorie” or  
26 “calorie reduced” (because the exception does not apply) and (2) a statement that directs  
27 consumer’s attention to the nutrition panels for further information on sugar and calorie content.  
28

1           43. As a result, consumers, including Plaintiff and the class, bought products that fail  
2 to comply with the mandatory labeling requirements and standards established by law such that  
3 the products are misbranded and rendered unfit for sale.

4           44. Plaintiff and the class have been damaged by Defendant's illegal conduct in that  
5 she purchased misbranded and worthless products that were illegal to sell or possess based on  
6 Defendant's illegal labeling of the products and otherwise lost money.

7           45. Plaintiff reasonably relied on the omission of fact/misrepresentation that  
8 Defendant's Eskimo Pie was not misbranded under the Sherman Law and were therefore legal to  
9 buy and possess. Plaintiff would not have purchased Eskimo Pie had she known she were illegal  
10 to purchase and possess.

11           46. Because of the violations of 21 C.F.R. § 101.60 and Sherman Law § 110100,  
12 Defendant's products are misbranded under Sherman Law § 110660, Sherman Law § 110670 and  
13 Sherman Law § 110705. Defendant's act of selling a misbranded product violates Sherman Law §  
14 110760 which prohibits the sale or possession of misbranded products.

15           47. Defendant's sale of misbranded Eskimo Pie results in an independent violation of  
16 the unlawful prong that is separate from the labeling violation. Plaintiff has two distinct claims  
17 under the unlawful prong. The first arises from Defendant's unlawful "No Sugar Added" label  
18 statement on its Eskimo Pie. The second is when Plaintiff relied on these claims to her detriment  
19 when purchasing Defendant's Eskimo Pie. Plaintiff was injured and has a claim arising from the  
20 purchase of a product in reliance on the illegal "No Sugar Added" labeling claim made by  
21 Defendant. Plaintiff has been deprived of money in an illegal sale and given a worthless illegal  
22 product in return. In addition, due to the law's prohibition of possession of such a product,  
23 Plaintiff has been unwittingly placed by the Defendant's conduct in a legal position that no  
24 reasonable consumer would agree to be placed.

25           **B. The "No Sugar Added" Label Statement on Eskimo Pie Is Misleading and**  
26           **Deceptive**

27           48. Plaintiff read and relied upon Defendant's front of package "No Sugar Added"  
28 label statement on Eskimo Pie and Plaintiff was thus deceived.

1           49.     21 C.F.R. § 101.60(c)(1) states that “consumers may *reasonably be expected* to  
2 regard terms that represent that the food contains no sugars or sweeteners e.g., ‘sugar free,’ or ‘no  
3 sugar,’ as indicating a product which is low in calories or significantly reduced in calories.”  
4 (emphasis added).

5           50.     Because consumers may reasonably be expected to regard terms that represent that  
6 the food contains “no sugar added” or sweeteners as indicating a product which is in fact low in  
7 calories or significantly reduced in calories, consumers are misled when foods that are not low-  
8 calorie as a matter of law are falsely represented, through the use of phrases like “no sugar added”  
9 that she are not allowed to bear due to its high calorific levels and absence of mandated  
10 disclaimer or disclosure statements.

11           51.     Eskimo Pie is not low calorie or significantly reduced in calories.

12           52.     Defendant’s conduct misled Plaintiff because, with Defendant failing to include  
13 the required disclosure that Eskimo Pie is not “low calorie” or “calorie reduced,” Plaintiff was  
14 misled into believing Defendant’s Eskimo Pie to be a healthier choice than other similar products  
15 and/or Eskimo Pie without such a statement. Plaintiff is conscious of the healthiness of the  
16 products she purchases, and Defendant’s omitted information deprived Plaintiff of her ability to  
17 take into account those foods’ contributions, or not, to Plaintiff’s total dietary composition.

18           53.     Plaintiff reasonably relied on the “No Sugar Added” label representation when  
19 making her purchase decision and was misled by the “No Sugar Added” representation as  
20 described herein. Plaintiff was also misled by the defendant’s failure to conspicuously disclose  
21 the fact that its product contained nutritive sweeteners as required by law.

22           54.     Plaintiff would not have purchased Eskimo Pie had she known the truth about this  
23 product, *i.e.*, that it was not as healthy as described. Plaintiff had other food alternatives that  
24 satisfied such standards and Plaintiff also had cheaper alternatives. Reasonable consumers would  
25 have been misled in the same identical manner as Plaintiff.

26           55.     Plaintiff was misled to believe that Eskimo Pie was healthier than other similar  
27 products and/or Eskimo Pie without such a statement, and, as a result, she purchased Eskimo Pie.  
28

1 Plaintiff was misled and deceived through the very means and methods the FDA sought to  
2 regulate.

3 56. Plaintiff and the class would not have purchased Eskimo Pie had she not been  
4 misled by Defendant's "No Sugar Added" claim.

5 **PLAINTIFF AND ESKIMO PIE**

6 57. Plaintiff cares about the nutritional content of food and seeks to maintain a healthy  
7 diet.

8 58. During the Class Period, Plaintiff spent more than \$25.00 on Eskimo Pie.

9 59. Plaintiff read and reasonably relied on the labels as described herein when buying  
10 Eskimo Pie. Plaintiff relied on Defendant's labeling and based and justified the decision to  
11 purchase Defendant's products, in substantial part, on these labels.

12 60. At point of sale, Plaintiff did not know, and had no reason to know, the truth about  
13 Eskimo Pie as described herein, and the fact Eskimo Pie was misbranded as set forth herein.  
14 Plaintiff would not have bought the products had she known the truth about them.

15 61. After Plaintiff learned that Defendant's Eskimo Pie was falsely labeled, Plaintiff  
16 stopped purchasing them.

17 62. As a result of Defendant's actions, Plaintiff and thousands of others in California  
18 and throughout the United States purchased Eskimo Pie.

19 63. Defendant's labeling as alleged herein is false and misleading and was designed to  
20 increase sales of the products at issue. Defendant's misrepresentations are part of its systematic  
21 labeling practice and a reasonable person would attach importance to Defendant's  
22 misrepresentations in determining whether to buy Eskimo Pie.

23 64. A reasonable person would also attach importance to whether Defendant's  
24 products were "misbranded," *i.e.*, legally salable, and capable of legal possession, and to  
25 Defendant's representations about these issues in determining whether to purchase the products at  
26 issue. Plaintiff would not have purchased Defendant's products had she known she were not  
27 capable of being legally sold or held.  
28

1           65. Plaintiff had cheaper alternatives available and paid an unwarranted premium for  
2 Eskimo Pie.

3                           **DEFENDANT HAS VIOLATED CALIFORNIA LAW**

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

8           67. Defendant has violated California Health & Safety Code § 110395 which makes it  
9 unlawful to manufacture, sell, deliver, hold, sell or offer to sell any falsely advertised food.

10          68. Defendant has violated California Health & Safety Code §§ 110398 and 110400  
11 which make it unlawful to advertise misbranded food or to deliver or proffer for delivery any  
12 food that has been falsely advertised.

13          69. Defendant has violated California Health & Safety Code § 110660 because its  
14 labeling is false and misleading in one or more ways, as follows:

15               a. Defendant's Eskimo Pie is misbranded under California Health & Safety  
16 Code § 110665 because its labeling fails to conform to the requirements for nutrient labeling set  
17 forth in 21 U.S.C. § 343(q) and the regulations adopted thereto;

18               b. Defendant's Eskimo Pie is misbranded under California Health & Safety  
19 Code § 110670 because its labeling fails to conform with the requirements for nutrient content  
20 and health claims set forth in 21 U.S.C. § 343(r) and the regulations adopted thereto; and

21               c. Defendant's Eskimo Pie is misbranded under California Health & Safety  
22 Code § 110705 because words, statements and other information required by the Sherman Law to  
23 appear on its labeling either are missing or not sufficiently conspicuous.

24          70. Defendant has violated California Health & Safety Code § 110760 which makes it  
25 unlawful for any person to manufacture, advertise, distribute, hold, sell or offer for sale, any food  
26 that is misbranded.

71. Defendant has violated California Health & Safety Code § 110765 which makes it unlawful for any person to misbrand any food.

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

### CLASS ACTION ALLEGATIONS

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

All persons in the United States since May 4, 2008 who purchased Eskimo Pie Dark Chocolate with labels that state “No Sugar Added.”

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

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

76. Numerosity: Based upon Defendant’s publicly available sales data with respect to the misbranded products at issue, it is estimated that the class numbers in the thousands and that joinder of all class members is impracticable.

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

- a. Whether the Eskimo Pie is misbranded under the Sherman Law;
- b. Whether Defendants violated the Sherman Law;
- c. Whether Defendant made unlawful and/or misleading claims with respect to its Eskimo Pie sold to consumers;

- d. Whether Defendant engaged in unlawful and misleading, unfair or deceptive business practices by failing to properly package and label its Eskimo Pie sold to consumers;
- e. Whether Defendant violated California Bus. & Prof. Code § 17200 *et seq.*, California Bus. & Prof. Code § 17500 *et seq.*, the Consumers Legal Remedies Act, Cal. Civ. Code §1750 *et seq.*, and the Sherman Law;
- f. Whether Plaintiff and the class are entitled to equitable and/or injunctive relief; and
- g. Whether Defendant's unlawful and misleading, unfair and/or deceptive practices harmed Plaintiff and the class.

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

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

80. Superiority: There is no plain, speedy or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class

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

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

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

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

## CAUSES OF ACTION

### FIRST CAUSE OF ACTION

#### **Business and Professions Code § 17200 *et seq.* - Unlawful Business Acts and Practices**

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



1           85. Defendant's conduct constitutes unlawful business acts and practices.

2           86. Defendant sold Eskimo Pie in California and the United States during the Class  
3 Period.

4           87. Defendant is a corporation and, therefore, is a "person" within the meaning of the  
5 Sherman Law.

6           88. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of  
7 Defendant's violations of the advertising provisions of Article 3 of the Sherman Law and the  
8 misbranded food provisions of Article 6 of the Sherman Law.

9           89. Defendant's business practices are unlawful under § 17200 *et seq.* by virtue of  
10 Defendant's violations of § 17500 *et seq.*, which forbids untrue and misleading advertising.

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

13           91. Defendant sold Plaintiff and the class Eskimo Pie that were not capable of being  
14 sold or held legally and which were legally worthless.

15           92. As a result of Defendant's illegal business practices, Plaintiff and the class,  
16 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future  
17 conduct and such other orders and judgments which may be necessary to disgorge Defendant's  
18 ill-gotten gains and to restore to any class member any money paid for Eskimo Pie.

19           93. Defendant's unlawful business acts present a threat and reasonable continued  
20 likelihood of injury to Plaintiff and the class. Plaintiff and the class paid a premium price for  
21 Eskimo Pie.

22           94. As a result of Defendant's conduct, Plaintiff and the class, pursuant to Business  
23 and Professions Code § 17203, are entitled to an order enjoining such future conduct by  
24 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's  
25 ill-gotten gains and restore any money paid for Defendant's Eskimo Pie by Plaintiff and the class.  
26  
27  
28

## SECOND CAUSE OF ACTION

### **Business and Professions Code § 17200 *et seq.* - Unfair Business Acts and Practices**

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

96. Defendant's conduct as set forth herein constitutes unfair business acts and practices.

97. Defendant sold Eskimo Pie in California and the United States during the Class Period.

98. Plaintiff and members of the class suffered a substantial injury by virtue of buying Defendant's Eskimo Pie that she would not have purchased absent Defendant's illegal conduct.

99. Defendant's deceptive marketing, advertising, packaging and labeling of its Eskimo Pie and its sale of unsalable misbranded products that were illegal to possess was of no benefit to consumers, and the harm to consumers and competition is substantial.

100. Defendant sold Plaintiff and the Eskimo Pie that were not capable of being legally sold or held and that were legally worthless.

101. Plaintiff and the class who purchased Defendant's Eskimo Pie had no way of reasonably knowing that the products were misbranded and were not properly marketed, advertised, packaged and labeled, and thus could not have reasonably avoided the injury each of them suffered.

102. The consequences of Defendant's conduct as set forth herein outweigh any justification, motive or reason therefore. Defendant's conduct is and continues to be immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious to Plaintiff and the class. Plaintiff and the class paid a premium price for Eskimo Pie.

103. As a result of Defendant's conduct, Plaintiff and the class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid for Defendant's Eskimo Pie by Plaintiff and the class.

### THIRD CAUSE OF ACTION

#### **Business and Professions Code § 17200 *et seq.* - Fraudulent Business Acts and Practices**

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

105. Defendant's conduct as set forth herein constitutes fraudulent business practices under California Business and Professions Code sections § 17200 *et seq.*

106. Defendant sold Eskimo Pie in California and the United States during the Class Period.

107. Defendant's misleading marketing, advertising, packaging and labeling of Eskimo Pie and misrepresentation that the products were salable, capable of possession and not misbranded were likely to deceive reasonable consumers, and in fact, Plaintiff and members of the class were deceived. Defendant has engaged in fraudulent business acts and practices.

108. Defendant's fraud and deception caused Plaintiff and the class to purchase Defendant's Eskimo Pie that she would otherwise not have purchased had she known the true nature of those products.

109. Defendant sold Plaintiff and the class Eskimo Pie that were not capable of being sold or held legally and that were legally worthless. Plaintiff and the class paid a premium price for the Eskimo Pie.

110. As a result of Defendant's conduct as set forth herein, Plaintiff and the class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid for Defendant's Eskimo Pie by Plaintiff and the class.

### FOURTH CAUSE OF ACTION

#### **Business and Professions Code § 17500 *et seq.* - Misleading and Deceptive Advertising**

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

112. Plaintiff asserts this cause of action for violations of California Business and Professions Code § 17500 *et seq.* for misleading and deceptive advertising against Defendant.

1           113. Defendant sold Eskimo Pie in California and the United States during the Class  
2 Period.

3           114. Defendant engaged in a scheme of offering Defendant's Eskimo Pie for sale to  
4 Plaintiff and members of the class by way of, *inter alia*, product packaging and labeling, and  
5 other promotional materials. These materials misrepresented and/or omitted the true contents and  
6 nature of Defendant's Eskimo Pie. Defendant's advertisements and inducements were made  
7 within California and come within the definition of advertising as contained in Business and  
8 Professions Code § 17500 *et seq.* in that such product packaging and labeling, and promotional  
9 materials were intended as inducements to purchase Defendant's Eskimo Pie and are statements  
10 disseminated by Defendant to Plaintiff and the class that were intended to reach members of the  
11 class. Defendant knew, or in the exercise of reasonable care should have known, that these  
12 statements were misleading and deceptive as set forth herein.

13           115. In furtherance of its plan and scheme, Defendant prepared and distributed within  
14 California and nationwide via product packaging and labeling, and other promotional materials,  
15 statements that misleadingly and deceptively represented the composition and the nature of  
16 Defendant's Eskimo Pie. Plaintiff and the class necessarily and reasonably relied on Defendant's  
17 materials, and were the intended targets of such representations.

18           116. Defendant's conduct in disseminating misleading and deceptive statements in  
19 California and nationwide to Plaintiff and the class was and is likely to deceive reasonable  
20 consumers by obfuscating the true composition and nature of Defendant's Eskimo Pie in violation  
21 of the "misleading prong" of California Business and Professions Code § 17500 *et seq.*

22           117. As a result of Defendant's violations of the "misleading prong" of California  
23 Business and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the  
24 expense of Plaintiff and the class. Misbranded products cannot be legally sold or held and are  
25 legally worthless. Plaintiff and the class paid a premium price for the Eskimo Pie.

26           118. Plaintiff and the class, pursuant to Business and Professions Code § 17535, are  
27 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
28

1 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any  
 2 money paid for Defendant's Eskimo Pie by Plaintiff and the class.

### 3 **FIFTH CAUSE OF ACTION**

#### 4 **Business and Professions Code § 17500 *et seq.* - Untrue Advertising**

5 119. Plaintiff incorporates by reference each allegation set forth above.

6 120. Plaintiff asserts this cause of action against Defendant for violations of California  
 7 Business and Professions Code § 17500 *et seq.*, regarding untrue advertising.

8 121. Defendant sold Eskimo Pie in California and the United States during the Class  
 9 Period.

10 122. Defendant engaged in a scheme of offering Defendant's Eskimo Pie for sale to  
 11 Plaintiff and the class by way of product packaging and labeling, and other promotional materials.  
 12 These materials misrepresented and/or omitted the true contents and nature of Defendant's  
 13 Eskimo Pie. Defendant's advertisements and inducements were made in California and come  
 14 within the definition of advertising as contained in Business and Professions Code § 17500 *et seq.*  
 15 in that the product packaging and labeling, and promotional materials were intended as  
 16 inducements to purchase Defendant's Eskimo Pie, and are statements disseminated by Defendant  
 17 to Plaintiff and the class. Defendant knew, or in the exercise of reasonable care should have  
 18 known, that these statements were untrue.

19 123. In furtherance of its plan and scheme, Defendant prepared and distributed in  
 20 California and nationwide via product packaging and labeling, and other promotional materials,  
 21 statements that falsely advertise the composition of Defendant's Eskimo Pie, and falsely  
 22 misrepresented the nature of those products. Plaintiff and the class were the intended targets of  
 23 such representations and would reasonably be deceived by Defendant's materials.

24 124. Defendant's conduct in disseminating untrue advertising throughout California  
 25 deceived Plaintiff and members of the class by obfuscating the contents, nature and quality of  
 26 Defendant's Eskimo Pie in violation of the "untrue prong" of California Business and Professions  
 27 Code § 17500.  
 28

125. As a result of Defendant's violations of the "untrue prong" of California Business and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the expense of Plaintiff and the class. Misbranded products cannot be legally sold or held and are legally worthless. Plaintiff and the class paid a premium price for the Eskimo Pie.

126. Plaintiff and the class, pursuant to Business and Professions Code § 17535, are entitled to an order enjoining such future conduct by Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid for Defendant's Eskimo Pie by Plaintiff and the class.

### SIXTH CAUSE OF ACTION

#### Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*

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

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

129. Plaintiff and the class are entitled to actual and punitive damages against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiff and the class are entitled to an order enjoining the above-described acts and practices, providing restitution to Plaintiff and the class, ordering payment of costs and attorney's fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

130. Defendant's actions, representations and conduct have violated, and continue to violate the CLRA, because she extend to transactions that are intended to result, or which have resulted, in the sale of goods or services to consumers.

131. Defendant sold Eskimo Pie in California and in the United States during the Class Period.

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

133. Defendant's Eskimo Pie were and are "goods" within the meaning of Cal. Civ.

1 Code §1761(a).

2 134. By engaging in the conduct set forth herein, Defendant violated and continues to  
3 violate Section 1770(a)(5), of the CLRA, because Defendant's conduct constitutes unfair methods  
4 of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular  
5 ingredients, characteristics, uses, benefits and quantities of the goods.

6 135. By engaging in the conduct set forth herein, Defendant violated and continues to  
7 violate Section 1770(a)(7) of the CLRA, because Defendant's conduct constitutes unfair methods  
8 of competition and unfair or fraudulent acts or practices, in that Defendant misrepresents the  
9 particular standard, quality or grade of the goods.

10 136. By engaging in the conduct set forth herein, Defendant violated and continues to  
11 violate Section 1770(a)(9) of the CLRA, because Defendant's conduct constitutes unfair methods  
12 of competition and unfair or fraudulent acts or practices, in that Defendant advertises goods with  
13 the intent not to sell the goods as advertised.

14 137. By engaging in the conduct set forth herein, Defendant violated and continues to  
15 violate Section 1770(a)(16) of the CLRA, because Defendant's conduct constitutes unfair  
16 methods of competition and unfair or fraudulent acts or practices, in that Defendant represents  
17 that a subject of a transaction has been supplied in accordance with a previous representation  
18 when she have not.

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

23 139. Pursuant to Section 1782(a) of the CLRA, on June 25, 2012, Plaintiff's counsel  
24 served Defendant with notice of Defendant's violations of the CLRA. As authorized by  
25 Defendant's counsel, Plaintiff's counsel served Defendant by certified mail, return receipt  
26 requested. Defendant has not responded.

27 140. Plaintiff makes certain claims in this complaint that were not included in the  
28

1 original complaint filed on May 4, 2012, and were not included in Plaintiff CLRA demand notice.

2 141. This cause of action does not currently seek monetary relief and is limited solely to  
3 injunctive relief, as to Defendant's violations of the CLRA not included in the original  
4 Complaint. Plaintiff intends to amend this to seek monetary relief in accordance with the CLRA  
5 after providing Defendant with notice of Plaintiff's new claims pursuant to Cal. Civ. Code §  
6 1782.

7 142. At the time of any amendment seeking damages under the CLRA, Plaintiff will  
8 demonstrate that the violations of the CLRA by Defendant were willful, oppressive and  
9 fraudulent, thus supporting an award of punitive damages.

10 143. Consequently, Plaintiff and the class will be entitled to actual and punitive  
11 damages against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code  
12 § 1782(a)(2), Plaintiff and the class will be entitled to an order enjoining the above described acts  
13 and practices, providing restitution to Plaintiff and the class, ordering payment of costs and  
14 attorney's fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal.  
15 Civ. Code § 1780.

#### 16 **JURY DEMAND**

17 Plaintiff hereby demands a trial by jury of her claims.

#### 18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, and on  
20 behalf of the general public, prays for judgment against Defendant as follows:

21 A. For an order certifying this case as a class action and appointing Plaintiff and her  
22 counsel to represent the class;

23 B. For an order awarding, as appropriate, damages, restitution or disgorgement to  
24 Plaintiff and the class for all causes of action;

25 C. For an order requiring Defendant to immediately cease and desist from selling its  
26 Eskimo Pie listed in violation of law; enjoining Defendant from continuing to market, advertise,  
27 distribute, and sell these products in the unlawful manner described herein; and ordering  
28



1 Defendant to engage in corrective action;

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

3 E. For an order awarding attorney's fees and costs;

4 F. For an order awarding punitive damages;

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

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

7 Dated: January 17, 2014.

8 Respectfully submitted,

9  
10 Pierce Gore

11 Ben F. Pierce Gore (SBN 128515)  
12 PRATT & ASSOCIATES  
13 1871 The Alameda, Suite 425  
14 San Jose, CA 95126  
15 (408) 429-6506  
16 pgore@prattattorneys.com

17 Charles Barrett  
18 CHARLES BARRETT, P.C.  
19 6518 Hwy. 100, Suite 210  
20 Nashville, TN 37205  
21 (615) 515-3393  
22 charles@cfbfirm.com  
23  
24  
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26  
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## **EXHIBIT 1**







# Nutrition Facts

Serving Size 1 Bar (50g)

Servings Per Container 6

## Amount Per Serving

**Calories** 150    **Calories from Fat** 90

**% Daily Value\***

**Total Fat** 10g    **15%**

Saturated Fat 7g    **35%**

Trans Fat 0g

**Cholesterol** 5mg    **2%**

**Sodium** 45mg    **2%**

**Total Carbohydrate** 13g    **4%**

Dietary Fiber 2g    **8%**

Sugars 2g

Sugar Alcohol 6g

**Protein** 2g

Vitamin A 4%    •    Vitamin C 0%

Calcium 8%    •    Iron 6%

\* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

**INGREDIENTS:** SKIM MILK, CHOCOLATEY COATING (MALTITOL\*, CHOCOLATE, COCONUT OIL, SOYBEAN OIL, MILK FAT, COCOA PROCESSED WITH ALKALI, SOY LECITHIN, ARTIFICIAL FLAVOR, SUCRALOSE), CREAM, MALTITOL SYRUP\*, MALTODEXTRIN, POLYDEXTROSE, GLYCERIN, NATURAL FLAVOR, MILK MINERALS CONCENTRATE, CELLULOSE GUM, MONO AND DIGLYCERIDES, SALT, SORBITOL\*, GUAR GUM, SUCRALOSE, CARRAGEENAN, LIPIC ACID, VITAMIN A PALMITATE, ACESULFAME POTASSIUM.

**MANUFACTURED ON SHARED EQUIPMENT WITH PRODUCTS THAT CONTAIN PEANUT INGREDIENTS.**

**\*SENSITIVE INDIVIDUALS MAY EXPERIENCE A LAXATIVE EFFECT FROM EXCESS CONSUMPTION OF THIS INGREDIENT.**

**DISTRIBUTED BY:**



**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

Marianna Belli, individually and on behalf of all others similarly situated,

**DEFENDANTS**

Nestle USA, Inc.

(b) County of Residence of First Listed Plaintiff **Sonoma**  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) Attorneys (Firm Name, Address, and Telephone Number)

Ben F. Pierce Gore, Pratt & Assoc, 1871 The Alameda, Suite 425, San Jose, CA 95126 (408) 429-6506

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS---Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer w/Disabilities - Employment <input type="checkbox"/> 446 Amer w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. § 1332(d)

Brief description of cause:  
Class Action/food labeling violations

**VII. REQUESTED IN COMPLAINT:**

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE Paul S. Grewal

DOCKET NUMBER 12-cv-02272

DATE  
01/17/2014

SIGNATURE OF ATTORNEY OF RECORD  
s/Ben F. Pierce Gore

**IX. DIVISIONAL ASSIGNMENT** (Civil L.R. 3-2)

(Place an "X" in One Box Only)

☐ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA

AO 440 (Rev. 06/12) Summons in a Civil Action

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UNITED STATES DISTRICT COURT

for the

\_\_\_\_\_ District of \_\_\_\_\_

\_\_\_\_\_  
*Plaintiff(s)*

v.

\_\_\_\_\_  
*Defendant(s)*

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Civil Action No. \_\_\_\_\_

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_ .

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_ , a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

☐ I returned the summons unexecuted because \_\_\_\_\_ ; or

☐ Other *(specify)*: \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: