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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – UNLIMITED CIVIL

JENNIFER GOODWIN, Individually And On Behalf Of All Others Similarly Situated,

Plaintiff,

v.

WHOLE FOODS MARKET, INC.; MRS. GOOCH'S NATURAL FOOD MARKETS, INC; WHOLE FOODS MARKET CALIFORNIA, INC.,

Defendants.

Case No.: 21STCV40456

THIRD AMENDED CLASS ACTION COMPLAINT FOR DAMAGES AND PUBLIC INJUNCTIVE RELIEF FOR VIOLATIONS OF:

1) **CONSUMER LEGAL REMEDIES ACT, CAL. CIVIL CODE §§ 1750, *ET SEQ.*;**

2) **UNFAIR COMPETITION LAW, CAL. BUS. & PROF. §§ 17200, *ET SEQ.*;**

3) **FALSE ADVERTISING LAW, CAL. BUS. & PROF. §§ 17500, *ET SEQ.*; AND,**

4) **NEGLIGENT MISREPRESENTATION.**

JURY TRIAL DEMANDED

INTRODUCTION

1. The average consumer spends a mere 13 seconds making an in-store purchasing decision, or between 10 to 19 seconds for an online purchase.[1] That decision is heavily dependent on a product's packaging, and particularly the package dimensions. "Most of our studies show that 75 to 80 percent of consumers don't even bother to look at any label information, no less the net weight … Faced with a large box and a smaller box, both with the same amount of product inside … consumers are apt to choose the larger box because they think it's a better value."[2]

2. This lawsuit challenges the unfair and unlawful business practices of MRS. GOOCH'S NATURAL FOOD MARKETS, INC. ("Mrs. Gooch's") and WHOLE FOODS MARKET CALIFORNIA, INC. ("WFM California") (jointly, "Defendants") resulting from Defendants' intentional packaging of its 365 by Whole Foods Market Organic Hot Cocoa Flavor Mix, Rich Chocolate ("Product")[3] in large and opaque 12 oz containers that contain approximately **44% empty space**. Consumers, in reliance on the size of the containers, paid a price for the Product which they would not have paid had they known that the containers were substantially empty.

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[1] Randall Beard, *Make The Most Of Your Brand's 20-Second Window*, http:/www.nielsen.com/us/en/insights/news/2015/make-the-most-of-your-brands-20-second-windown.html (January 13, 2015) *citing* the Ehrenberg-Bass Institute of Marketing Science's report "Shopping Takes Only Seconds…In-Store and Online."

[2] http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm (quoting Brian Wansink, professor and director of the Cornell Food and Brand Lab, who studies shopping behavior of consumers).

[3] https://www.wholefoodsmarket.com/product/365-by-whole-foods-market-organic-hot-cocoa-flavor-mix-rich-chocolate-canister-12-oz-b074hbmft4 (last visited on June 7, 2021). The Product was previously named "365 Everyday Value Organic Hot Cocoa Rich Chocolate Flavor Mix" prior to approximately the year 2020.

3. Jennifer Goodwin ("Plaintiff"), individually and on behalf of all others similarly situated, brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from Defendants' unlawful and deceptive actions, with respect to the packaging of their Product.

4. Plaintiff alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

5. Mrs. Gooch's is a California Corporation that was acquired by Whole Foods Market, Inc. in 1993.[4] Mrs. Gooch's is a subsidiary corporation of Whole Foods Market, Inc.[5]

6. WFM California is a California Corporation that was formed in 1988.[6] Like Mrs. Gooch's, WFM California is a subsidiary corporation of Whole Foods Market, Inc.[7]

7. Whole Foods Market Inc. is a multinational supermarket chain that sells health food products including 365 by Whole Foods Market products at brick-and-mortar Whole Foods stores.

8. Defendants offer products for sale online, including on wholefoodsmarket.com, and the website of its parent company, Amazon.com, Inc.

9. In June of 2021, a 12 oz container of the Product sold for approximately $3.99.[8]

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[4] *See* Whole Foods Market History, https://www.wholefoodsmarket.com/company-info/whole-foods-market-history (last visited Dec. 9, 2021); *see also* https://www.latimes.com/archives/la-xpm-1993-05-13-fi-34954-story.html.

[5] *See SEC Archives*, Subsidiaries of Whole Foods Market, Inc., https://www.sec.gov/Archives/edgar/data/865436/000093066102004403/dex211.htm (last visited Oct. 8, 2024).

[6] https://bizfileonline.sos.ca.gov/search/business (last visited Oct. 8, 2024).

[7] *See, supra*, n.5.

[8] *See supra* note 3; https://www.amazon.com/365-Everyday-Value-Organic-

10. According to wholefoodsmarket.com, Whole Foods is "the world's leader in natural and organic foods, with 500+ stores in North America and the UK." In addition, Whole Foods claims that it "seek[s] out the finest natural and organic foods available, maintain[s] the strictest quality standards in the industry, and [has] an unshakeable commitment to sustainable agriculture."[9]

11. On or about March 22, 2021, Plaintiff purchased the Product from a Whole Foods store (located in Valencia, California), expecting to receive a full container of the Product. The Product is packaged in non-transparent containers, as depicted below.

12. Plaintiff was surprised and disappointed when she opened the Product to discover that the container had approximately 44% empty space, or slack-fill. Had Plaintiff known about the slack-fill at the time of purchase, she would not have bought Defendants' Product.

13. Defendants' conduct is misleading to reasonable consumers.

JURISDICTION AND VENUE

14. Subject matter jurisdiction is proper in this Court for the California statutory causes of action.

15. This Court has personal jurisdiction over Mrs. Gooch's because it conducts business in the County of Los Angeles, State of California, and Plaintiff was injured in the County of Los Angeles where Plaintiff resides.

16. This Court has personal jurisdiction over WFM California because it conducts business in the State of California, and WFM California consents to jurisdiction for settlement purposes only.

17. Venue is proper.

Chocolate/dp/B074HBMFT4/ref=cm_cr_srp_d_product_top?ie=UTF8 (last visited on June 7, 2021).

[9] https://www.wholefoodsmarket.com/company-info (last visited June 7, 2021).

PARTIES

18. Plaintiff is a citizen of the State of California and resides in the Country of Los Angeles, State of California.

19. Upon information and belief, Mrs. Gooch's is a corporation whose State of Incorporation is California, and whose headquarters are located in Glendale, California. Mrs. Gooch's is a subsidiary of Whole Foods Market, Inc., incorporated in the State of Texas and headquartered in Austin, Texas.

20. Upon information and belief, WFM California is a corporation whose State of Incorporation is California, and whose headquarters are located in Emeryville, California. WFM California is a subsidiary of Whole Foods Market, Inc., incorporated in the State of Texas and headquartered in Austin, Texas.

21. Upon information and belief, Mrs. Gooch's and WFM California own and operate the Whole Foods Market stores in California, with Mrs. Gooch's owning an operating the stores located generally south of Fresno, California.

FACTUAL ALLEGATIONS

Federal and California Law Prohibit Non-functional Slack Full

22. The Federal Food Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq*., governs the sale of foods, drugs and cosmetics in the United States. The classification of a product as a food, drug, or cosmetic affects the regulations by which the manufacturer must abide. In general, a product is characterized according to its intended use, which may be established, among other ways, by: (a) claims stated on the product's labeling, in advertising, on the Internet, or in other promotional materials; (b) consumer perception established through the product's reputation, for example by asking why the consumer is buying it and what the consumer expects it to do; or (c) the inclusion of ingredients well-known to have therapeutic use, for example fluoride in toothpaste. The Product is characterized and understood by consumers to be a food.

23. Under the FDCA, the term "false" has its usual meaning of untruthful, while

the term "misleading" is a term of art.

24. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading.

25. If any representation on the labeling is misleading, the entire Product is misbranded. No other statement in the labeling cures a misleading statement.

26. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

27. California has its own FDCA equivalent, the California Fair Packaging and Labeling Act ("CFPLA"), Cal. Bus. & Prof. Code § 12606.2, which also seeks to prevent companies from misleading consumers about the amount of a given product contained within a package they are purchasing.

28. Specifically, CFPLA is considered the "Slack Fill" law for food products in California. *See* Bus. & Prof. Code § 12606.2(a). Pursuant to this statute, "[n]o food containers shall be made, formed, or filled as to be misleading." *Id.* § 12606.2(b).

29. Moreover, "[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill." *Id.* § 12606.2(c).

A. Misbranding of Foods

30. The Product, a hot cocoa mix, is packaged in a container roughly 9 centimeters tall, not including the thin double seams at the top and bottom of the container.

31. Approximately 44% of the container's volume is slack-fill, as only 5 centimeters out of the 9 centimeter container is filled with Product. The package contains no scoop for its contents.

32. Under the FDCA, 21 U.S.C. § 343, a food shall be deemed to be misbranded if "(a) . . . (1) its labeling is false or misleading in any particular"; or "(d) If its container is so made, formed, or filled as to be misleading."

33. Pursuant to 21 C.F.R. §100.100, a food is misbranded if "its container is so made, formed or filled as to be misleading." In addition, "(a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein.

34. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:

> (1) Protection of the contents of the package;
>
> (2) The requirements of the machines used for enclosing the contents in such package;
>
> (3) Unavoidable product settling during shipping and handling;
>
> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
>
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or durable commemorative or promotional packages; or
>
> (6) Inability to increase level of fill or to further reduce the size of the package.
>
> . . .
>
> 21 C.F.R. 100.100(a)(1)-(6).

35. None of the above federal safe-harbor provisions apply to the Product.

36. Plaintiff is informed and believes that:

(1) The Product, a hot cocoa powder, does not require protective packaging, as it is not fragile or breakable;

(2) The machines used to package the Product do not require 44% of the container to include slack fill;

(3) Such considerable slack fill cannot be explained by unavoidable product settling during shipping and handling, as fine powder is not the sort of product that "settles" significantly enough to require nearly double the amount of packaging space;

(4) The packaging performs no specific function such as a role in the preparation or consumption of a food—it merely contains the Product;

(5) To the extent that the Product is packaged in a reusable container, the container is not part of the presentation of the food and has no value significant in proportion to the value of the Product and independent of its function to hold the Product; and

(6) Defendants could easily increase the level of Product fill or further reduce the size of the package.

See 21 C.F.R. 100.100(a)(1)-(6).

37. Under the CFPLA, "[s]lack fill is the difference between the actual capacity of a container and the volume of product contained therein." Bus. & Prof. Code § 12606.2(c). "Nonfunctional slack fill is the empty space in a package that is filled to substantially less than its capacity for reasons other than" one of the enumerated safe harbor provisions. *Id*.

38. The CFPLA imposes requirements which mirror the federal law, but also adds further safe-harbors. *See* Cal. Bus. & Prof. Code § 12606.2(c)(7)-(8).

39. California Business & Professions Code states, "[n]o container shall be made, formed, or filled as to be misleading" and "[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill." *See* Cal. Bus. & Prof. Code §

12606(b) (incorporating the safe-harbor provisions of the Code of Federal Regulations); *see also* Cal. Health & Safety Code § 110690 ("Any food is misbranded if its container is so made, formed, or filled as to be misleading.").

40. In addition to incorporating the safe-harbor provisions found in the Code of Federal Regulations, which are listed above, the CFPLA also provides that slack-fill is permissible when:

> (7) One or more of the following [apply]:
>
> > (A) The dimensions of the product or immediate product container are visible through the exterior packaging.
> >
> > (B) The actual size of the product or immediate product container is clearly and conspicuously depicted on any side of the exterior packaging, excluding the bottom, accompanied by a clear and conspicuous disclosure that the depiction is the "actual size" of the product or immediate product container. . . .
> >
> > (C) A line or a graphic that represents the product or product fill and a statement communicating that the line or graphic represents the product or product fill such as "Fill Line," both of which are clearly and conspicuously depicted on exterior packaging or the immediate product container if visible at point of sale. If the product is subject to settling, the line shall represent the minimum amount of product after settling.
>
> (8) The mode of commerce does not allow the consumer to view or handle the physical container or product.
>
> Cal. Bus. & Prof. Code § 12606.2(c)(7)-(8).

41. None of the above safe-harbor provisions apply to the Product. Plaintiff is informed and believes that:

> (1) The dimensions of the Product are not visible through the exterior packaging;
>
> (2) The actual size of the Product is not depicted on any side of the exterior

packaging;

(3) The packaging contains no line or graphic representing the Product fill; and

(4) The mode of commerce allows the consumer to view or handle the physical container holding the Product, whether the Product is purchased at a brick-and-mortar Whole Foods store or through an online seller.

See Cal. Bus. & Prof. Code § 12606.2(c)(7)-(8).

42. The contents of the Product are in a powdered form that do not need slack fill to protect the contents.

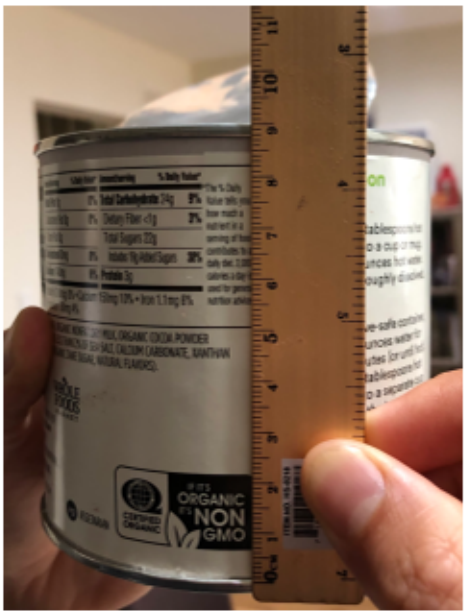
43. Defendants intentionally incorporated non-functional slack-fill in their packaging of the Product in order to mislead consumers, including Plaintiff and Members of the Class.

Defendants' Product Contains Non-Functional Slack-Fill

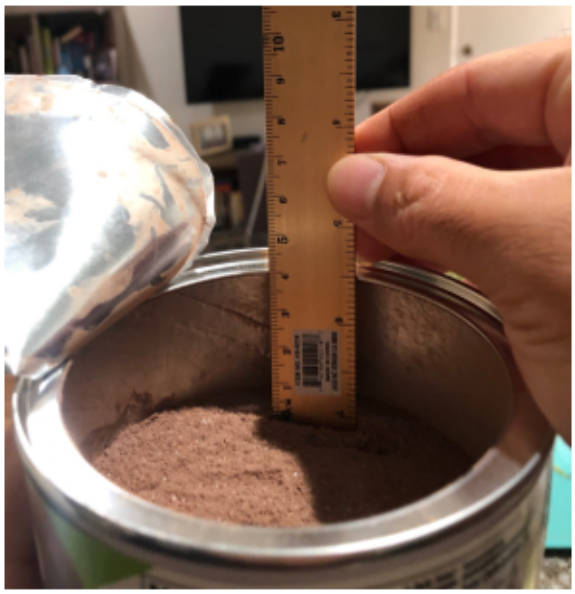
44. Defendants' Product is sold in non-transparent containers with significant slack-fill, as described below. The Product container depicted below is roughly 9 centimeters tall, not including the thin double seams at the top and bottom of the container. *See* Photograph A below.

45. Between the double seams, approximately 4 centimeters, or 44% of the interior of the container, is comprised of empty space, or non-functional slack fill. *See* Photographs B, C below.

PHOTOGRAPH A



PHOTOGRAPH B



PHOTOGRAPH C



46. Judging from the size of the container, a reasonable consumer would expect it to be nearly completely filled with Product. Consumers are misled into believing that they are purchasing substantially more Product than they receive.

47. There is no functional reason for including 44% slack-fill in the Product container.

48. Indeed, as evidenced by the above three pictures, this Product is in powder

form rendering the slack-fill completely unnecessary for function as the Product cannot be damaged or lose its shape.

49. On information and belief, consumers have relied upon, and are continuing to rely upon, the size of the Product container as the basis for making purchasing decisions.

50. Consumers believe that the Product container is substantially full because they cannot see the actual contents within the non-transparent container.

51. On information and belief, Defendants are selling and will continue to sell the Product using these blatantly deceptive and misleading slack-filled containers.

52. Defendants utilize this unlawful and unfair practice of including non-functional slack-fill in the Product by concealing the powdered hot chocolate within an entirely opaque, hard tin-type circular box so that the consumer is unable to see or feel any part of the actual amount of the contents within the package. Only when the consumer opens the tin lid will they be able to look inside the packaging and see the actual mix comprises of about half of the size of the tin box.

53. Thus, Defendants' packaging and advertising of the Product violates various state and federal laws against misbranding, as described herein.

Plaintiff Relied on Defendants' Misleading and Deceptive Conduct and Was Injured as a Result

54. The types of misrepresentations made, as described herein, were considered by Plaintiff and Class Members (as would be considered by a reasonable consumer) when deciding to purchase the Product.

55. Reasonable consumers, including Plaintiff and Class Members, attached importance to whether Defendants' Product was misbranded, i.e., not legally salable, or capable of legal possession, and/or contained non-functional slack-fill.

56. Plaintiff and the Class Members did not know, and had no reason to know, that the Product contained non-functional slack-fill.

57. Defendants' Product packaging was a material factor in Plaintiff and the Class Members' decisions to purchase the Product. Based on Defendants' Product packaging, Plaintiff and the Class Members believed at the time of sale that they were getting more Product than was actually being sold.

58. Had Plaintiff known Defendants' packaging was slack-filled, she would not have bought the Product.

59. Plaintiff and the Class Members paid the full price of the Product and received less Product than they expected due to the non-functional slack-fill in the Product container.

60. Plaintiff wants to purchase the Product again but cannot be certain that Plaintiff would not be misled again in the future unless and until Defendants make appropriate changes to their Product advertising and/or Product containers, as requested herein.

61. There is no practical reason for the non-functional slack-fill used to package the Product other than to mislead consumers as to the actual volume of the Product being purchased by consumers.

62. As a result of Defendants' misrepresentations, Plaintiff and thousands of others throughout California purchased the Product. Plaintiff and the Class (defined below) have been damaged by Defendants' deceptive and unfair conduct.

63. Defendants advertise and sell over 3,500 products under the "365" brand, some of which include but not limited to beverages, vitamins, and grains.[10]

64. In addition to the Product, Plaintiff would also like to purchase one or more of the products sold by Defendants under the 365 brand, but Plaintiff cannot be certain that such products would not include non-functional slack-fill, particularly when sold in opaque containers.

[10] *See* https://www.wholefoodsmarket.com/departments/365-products, last accessed on February 11, 2022.

65. Upon information and belief, additional products of Defendants in the same product line, i.e., the 365 brand, contain non-functional slack-fill in the product container, including but not limited to Defendant's Long Grain & Wild Rice – Rice Pilaf, 6 oz. (the "Rice Pilaf Product").[11]

66. In January of 2021, Whole Foods was sued in federal court in Illinois for claims of non-functional slack-fill as it concerns its Rice Pilaf Product. *See Jacobs v. Whole Foods Marketing Group, Inc.*, No. 1:22-cv-00002 (N.D. Ill.), filed on January 1, 2022.

67. Based on Plaintiff's investigation, through counsel, a box of the Rice Pilaf Product purchased in February 2022, from Mrs. Gooch's store in Newport Beach, California, contains over 50% empty space, including non-functional slack-fill.

68. Specifically, the Rice Pilaf Product is packaged in a box that measures about 6.75 inches in height, 4.2 inches in length and 1.5 inches wide.

69. Since the Rice Pilaf Product is packaged in an opaque box, consumers are unable to see from the exterior packaging how much product is contained within the box to learn before their purchase that it only contains approximately 2.50 inches of actual product (including the seasoning packet).

70. Because the Rice Pilaf Product's box does not allow consumers to view its contents, and contains nonfunctional slack-fill, the packaging is misleading to consumers.

Upon information and belief, there is no functional reason for including over 50% slack-fill in the Rice Pilaf Product box. The Rice Pilaf Product is in a dry solid form, rendering the empty space unnecessary for function, as the Rice Pilaf Product cannot be easily damaged or lose its shape.

[11] For the avoidance of doubt, the present lawsuit brought by Ms. Goodwin does not assert a cause of action against Defendant as it concerns the Rice Pilaf Product.

CLASS ACTION ALLEGATIONS

71. Plaintiff brings this action as a class action pursuant to California Code of Civil Procedure Section 382 on behalf of herself and the following California class (collectively, the "Class"), defined as:

> All persons who purchased one or more of the Product from Whole Foods Market in California or, if purchased remotely (such as online), while present in California, since November 3, 2017 to the present.

72. The proposed Class excludes current and former officers and directors of Defendants, members of the immediate families of the officers and directors of Defendants, Defendants' legal representatives, heirs, successors, assigns, and any entity in which it has or has had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

73. Plaintiff reserves the right to revise the Class definition based on facts learned in the course of litigating this matter.

74. Numerosity: This action has been brought and may properly be maintained as a class action against Defendants under California Code of Civil Procedure Section

75. While the exact number and identities of other Class Members are unknown to Plaintiff at this time, Plaintiff is informed and believes that there are thousands, if not hundreds of thousands, of Members in the Class. Based on sales of the Product, it is estimated that the Class is composed of more than 10,000 persons. The Members of the Class are so numerous that joinder of all Members is impracticable and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the courts.

76. Typicality: Plaintiff's claims are typical of the claims of the Members of the Class as all Members of the Class are similarly affected by Defendants' wrongful conduct, as detailed herein.

77. Adequacy: Plaintiff will fairly and adequately protect the interests of the Members of the Class in that she has no interests antagonistic to those of the other Members of the Class. Plaintiff has retained experienced and competent counsel.

78. Superiority: A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the damages sustained by individual Class Members may be relatively small, the expense and burden of individual litigation makes it impracticable for the Members of the Class to individually seek redress for the wrongful conduct alleged herein. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action. If class treatment of these claims were not available, Defendants would likely unfairly receive thousands of dollars or more in improper revenue.

79. Common Questions Predominate: Common questions of law and fact exist as to all Members of the Class and predominate over any questions solely affecting individual Members of the Class. Among the common questions of law and fact applicable to the Class are:

i. Whether Defendants sold the Product in an opaque container;

ii. Whether Defendants sold the Product in containers containing at least 30% empty space;

iii. Whether Defendants labeled, packaged, marketed, advertised and/or sold the Product to Plaintiff, and those similarly situated, using false, misleading and/or deceptive packaging and labeling;

iv. Whether Defendants' actions constitute violations of the FDCA, 21 U.S.C. §§ 301, *et. seq*.;

v. Whether Defendants' actions constitute violations of CFPLA, Cal. Bus. & Prof. Code § 12606.2;

vi. Whether Defendants omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising and/or sale of its Product;

vi. Whether Defendants' labeling, packaging, marketing, advertising and/or selling of the Product constituted an unfair, unlawful or fraudulent practice;

vii. Whether Defendants' packaging of the Product constituted nonfunctional slack-fill;

ix. Whether, and to what extent, injunctive relief should be imposed on Defendants to prevent such conduct in the future;

x. Whether the Members of the Class have sustained damages as a result of Defendants' wrongful conduct;

xi. The appropriate measure of damages and/or other relief; and

xii. Whether Defendants should be enjoined from continuing their unlawful practices.

80. The Class is readily definable, and prosecution of this action as a class action will reduce the possibility of repetitious litigation. Plaintiff knows of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a class action.

81. The prerequisites to maintaining a class action for injunctive relief or equitable relief are met, as Defendants have 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 for injunctive relief or equitable relief are also met, as questions of law or fact common to the Class 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. The prosecution of separate actions by Members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendants. Additionally, individual actions may be dispositive of the interest of all Members of the Class, although certain Class Members are not parties to such actions.

84. Defendants' conduct is generally applicable to the Class as a whole and Plaintiff seeks, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendants' systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate, in particular where Plaintiff alleges that at least two products sold by Mrs. Gooch's under the same 365 brand contain non-functional slack-fill.

FIRST CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT, ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*

85. Plaintiff realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

86. Plaintiff brings this claim individually and on behalf of the Class for Defendants' violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq*.

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

88. Plaintiff and the Class Members are consumers who purchased the Product for personal, family or household purposes.

89. Defendant is a "person" as defined by Cal. Civ. Code § 1761(c).

90. Plaintiff and the Class Members are "consumers" as that term is defined by the CLRA in California Civil Code § 1761(d). Plaintiff and the Class Members are

not sophisticated experts with independent knowledge of corporate branding, labeling and packaging practices.

91. The Product that Plaintiff and other Class Members purchased from Defendants was a "good" within the meaning of California Civil Code § 1761(a).

92. Defendants violated federal and California law because the Product is packaged in containers made, formed or filled as to be misleading, as it contains non-functional slack-fill and is intentionally packaged to prevent the consumer from being able to fully see its contents.

93. California Civil Code § 1770(a)(5), prohibits "[m]isrepresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have."

94. By engaging in the conduct set forth herein, Defendants violated and continue to violate the CLRA—specifically, section 1770(a)(5) of the California Civil Code—because Defendants' conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents that the Product has quantities and ingredients it does not have.

95. California Civil Code § 1770(a)(9) further prohibits "[a]dvertising goods or services with intent not to sell them as advertised."

96. By engaging in the conduct set forth herein, Defendants violated and continue to violate section 1770(a)(9), because Defendants' conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it advertises a good as containing more Product and ingredients than it in fact contains.

97. Plaintiff and the Class Members are not sophisticated experts about corporate branding, labeling and packaging practices. Plaintiff and the Class acted reasonably when they purchased the Product based on their belief that Defendants' representations were true and lawful.

98. Plaintiff and the Class suffered injuries caused by Defendants because (a) they would not have purchased the Product on the same terms absent Defendants' illegal and misleading conduct as set forth herein; (b) they paid a price premium for the Product due to Defendants' misrepresentations and deceptive packaging in containers made, formed or filled as to be misleading and containing non-functional slack-fill; and (c) the Product did not have the quantities and ingredients as promised.

99. Plaintiff and Class members reasonably relied upon Defendants' representations regarding Defendants' Product, and Plaintiff and the Class reasonably expected that the Product would not be illegally labeled in a misleading manner. Thus, Plaintiff and the Class reasonably relied to their detriment on Defendants' misleading representations.

100. Defendants knew or should have known that its representations about their Product as described herein violated state and federal consumer protection laws, and that these statements would be relied upon by Plaintiffs and Class members.

101. As a direct and proximate result of Defendants' violations of Cal. Civ. Code §§ 1750, *et seq*., Plaintiff and each Class member have suffered harm in the form of paying monies to Defendants for the Product when they otherwise would not have paid for it if they knew it was illegally labeled and contained significantly less product that the packaging lead them to believe.

102. Pursuant to California Civil Code § 1782(a), on or about July 1, 2021 Plaintiff sent Defendants, through their parent corporation Whole Foods Market Inc., individually and on behalf of the proposed Class, a letter via Certified Mail, advising of the violations of the CLRA alleged herein, and demanding that they cease and desist from such violations and make full restitution by refunding the monies received therefrom.

103. On August 10, 2021, Plaintiff sent a second demand letter, via Certified Mail, to Defendants' parent corporation Whole Foods Market Inc., pursuant to California Civil Code § 1782(a), again advising of the alleged violations of the CLRA and

demanding that they cease and desist from such violations and make full restitution to Plaintiff and Class Members

104. Defendants were adequately put on notice of Plaintiff's July 1, 2021 and August 10, 2021 notice of violation and demand for corrective action pursuant to California Civil Code § 1782(a). Indeed, these two demand letters were sent via Certified mail to Whole Foods Market Inc.'s registered agent for service of process in Texas as well as its corporate headquarters in Austin, Texas. Defendants are California corporate subsidiaries of Whole Foods Market Inc.

105. In compliance with California Civil Code § 1782(a), Plaintiff also served these July 2021 and August 2021 demand letters, via Certified Mail, to the "place where the transaction occurred" (i.e. the Whole Foods Market physical retail store located in Valencia, California). *See* California Civil Code § 1782(a). Plaintiff's August 10, 2021, notice of violation and demand for corrective action pursuant to California Civil Code § 1782(a) was delivered to this Valencia, California store location where Plaintiff purchased the Product on or about August 31, 2021.

106. Defendants failed, within 30 days of receipt of Plaintiff's demands, to provide Plaintiff with an appropriate correction, repair, replacement, or other remedy, and have offered no relief or cure for the Class Members. In fact, Defendants have not provided any response to Plaintiff's CLRA demands.

107. Under Cal. Civ. Code § 1780(a) and (b), Plaintiff and the putative Classes are entitled to, and seek, public injunctive relief prohibiting such conduct in the future.

108. Pursuant to § 1782 (e), Plaintiff and the Class assert claims for damages and attorneys' fees and costs.

Attached hereto as **Exhibit A** is a sworn declaration from Plaintiff pursuant to Cal. Civ. Code § 1780(d).

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SECOND CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW, ("UCL"), California Business & Professions Code §§ 17200, *et seq*.

109. Plaintiff realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

110. Plaintiff brings this claim individually and on behalf of the Members of the Class for Defendants' violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*.

111. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising . . .."

112. Defendants violated federal and California law because their Product is packaged in containers made, formed or filled as to be misleading, as it contains non-functional slack-fill, does not include ingredients depicted on the packaging, and is intentionally packaged to prevent the consumer from being able to fully see its contents.

A. "Unlawful" Prong

113. Defendants' business practices, described herein, violated the "unlawful" prong of the UCL by violating section 352 of the FDCA, 21 U.S.C. § 301, the CLRA, California Business & Professions Code § 12606 (CFPLA), California Health & Safety Code § 110690, the CLRA, and other applicable law as described herein.

114. Defendants violated the FDCA and CFPLA, in that Defendants packaged their Product in non-conforming type containers by using non-functional slack fill. Said non-conforming packages contained extra space by volume in the interior of the container. The extra space provided no benefit to the contents of the packaging and misled consumers. In addition, Defendants packaged their Product in containers

made, formed, or filled as to be misleading to a potential customer as to the actual size and filling of the package with Defendants' Product.

115. In addition, Defendants violated the CLRA by representing that Plaintiffs and Class members were receiving a Product that was correctly filled, when in fact Defendants were selling their Products using illegal and misleading packaging.

116. Defendants had other reasonably available alternatives to further its business interests, other than the unlawful conduct described herein, such as appropriately labeling its Product.

117. Instead, Defendants deliberately and illegally misled consumers for Defendants' own economic gain.

118. Plaintiff and Class members reserve the right to allege other violations of law, which constitute other unlawful business practices or acts, as such conduct is ongoing and continues to this date.

B. "Unfair" Prong

119. Defendants' business practices, described herein, violated the "unfair" prong of the UCL in that its conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits. Defendants' advertising is of no benefit to consumers.

120. Without limitation, it is an unfair business act or practice for Defendants to knowingly mislabel their Product leading consumers to believing they are getting more Product that actually contained in the packaging. Plaintiff could not have reasonably avoided the injury suffered.

121. Plaintiff reserves the right to allege further conduct that constitutes other unfair business acts or practices.

C. "Fraudulent" Prong

122. Defendants violated the "fraudulent" prong of the UCL by misleading Plaintiff and the Class to believe that the Product contained more content and

ingredients than it actually contained, and that such packaging and labeling practices were lawful, true and not intended to deceive or mislead consumers.

123. Plaintiff and the Class Members are not sophisticated experts about the corporate branding, labeling, and packaging practices of the Product. Plaintiff and the Class acted reasonably when they purchased the Product based on their belief that Defendants' representations were true and lawful.

124. Plaintiff and the Class lost money or property as a result of Defendants' UCL violations because (a) they would not have purchased the Product on the same terms absent Defendants' illegal conduct as set forth herein, or if the true facts were known concerning Defendants' representations; (b) they paid a price premium for the Product due to Defendants' misrepresentations; and (c) the Product did not have the quantities and ingredients as represented.

125. The conduct of Defendants as set forth above demonstrates the necessity for granting injunctive relief restraining such and similar acts of unfair competition pursuant to California Business and Professions Code. Unless enjoined and restrained by order of the court, Defendants will retain the ability to, and may engage in, said acts of unfair competition, and misleading advertising. As a result, Plaintiff and the Class are entitled to injunctive and monetary relief.

THIRD CAUSE OF ACTION

VIOLATION OF CALIFORNIA'S FALSE ADVERTISING LAW, ("FAL"), California Business & Professions Code §§ 17500, *et seq*.

126. Plaintiff realleges and incorporates herein by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

127. Plaintiff brings this claim individually and on behalf of the Members of the Class for Defendants' violations of California's False Advertising Law ("FAL"), California Business & Professions Code §§ 17500, *et seq*.

128. Under the FAL, the State of California makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state … in any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement, concerning . . . personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

129. Defendants engaged in a scheme of offering a misbranded Product for sale to Plaintiff and the Class Members by way of packaging the Product in containers made, formed or filled as to be misleading and which contained non-functional slack-fill.

130. Such practice misrepresented the content and quantity of the misbranded Product. Defendants' advertisements were made in California and come within the definition of advertising as contained in California Business & Professions Code §§ 17500, *et seq*. in that the product packaging was intended as inducements to purchase Defendants' Product. Defendants knew their conduct was unauthorized, inaccurate, and misleading.

131. Defendants violated federal and California law because the Product is packaged in containers made, formed or filled as to be misleading, as the Product contains non-functional slack-fill, does not include ingredients depicted on the packaging, and is intentionally packaged to prevent the consumer from being able to fully see its contents.

132. Defendants violated section 17500, *et seq.* by misleading Plaintiff and the Class to believe that the Product packaging contains more Product and ingredients than it in fact contains, as described herein.

133. Defendants knew or should have known, through the exercise of reasonable care that the Product was and continues to be misbranded, and that their

representations about the quantities and ingredients of the Product were untrue and misleading.

134. Plaintiff and the Class Members lost money or property as a result of Defendant's FAL violations because (a) they would not have purchased the Product on the same terms absent Defendants' illegal conduct as set forth herein, or if the true facts were known concerning Defendants' representations; (b) they paid a price premium for the Product due to Defendants' misrepresentations; and (c) the Product did not have the ingredients, or quantities as promised, and as a result the class is entitled to monetary and injunctive relief.

FOURTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

135. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein, and further alleges as follows:

136. Defendants, directly or through their agents and employees, made false representations, concealments and non-disclosures to Plaintiff and Members of the Class.

137. Defendants as the manufacturers, packagers, labelers and initial sellers of the Product purchased by Plaintiff and Class Members had a duty to disclose the true quantity and ingredients of the Product and to refrain from selling it in containers made, formed or filled as to be misleading and which contain non-functional slack-fill and do not include ingredients depicted on the packaging.

138. Defendants had exclusive knowledge of material facts not known or reasonably accessible to Plaintiff and Class Members; Defendants actively concealed material facts from Plaintiff and Class Members; and Defendants made partial representations that are misleading because some other material fact has not been disclosed.

139. Defendants' failure to disclose the information it had a duty to disclose constitutes material misrepresentations and materially misleading omissions which

misled Plaintiff and Class Members, who relied on Defendants in this regard to disclose all material facts accurately, truthfully and fully.

140. Plaintiff and Members of the Class reasonably relied on Defendants' representation that the Product contains more Product and ingredients than actually packaged.

141. In making the representations of fact to Plaintiff and Members of the Class described herein, Defendants have failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendants' negligence and carelessness.

142. Defendants, in making the misrepresentations and omissions, and in engaging in the acts alleged above, knew or reasonably should have known that the representations were not true. Defendants made and intended the misrepresentations to induce the reliance of Plaintiff and Members of the Class.

143. As the manufacturer of its Product, Defendants are in the unique position of being able to provide accurate information about their Product. Therefore, there is a special and privity-like relationship between Defendants and Plaintiff and other consumers.

144. Defendants have a duty to correct the misinformation it disseminated through their advertising of the Product. By not informing Plaintiff and Members of the Class, Defendant breached its duty. Defendant also gained financially from and as a result of this breach.

145. By and through such deceit, misrepresentations and/or omissions, Defendants intended to induce Plaintiff and Members of the Class to alter their position to their detriment. Plaintiff and Members of the Class relied upon these false representations when purchasing the Product in over-sized containers depicting ingredients not included in the Product, which reliance was justified and reasonably foreseeable.

146. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and Members of the Class have suffered and continue to suffer economic losses and

other general and specific damages, including but not limited to the amounts paid for the Product, and any interest that would have been accrued on those monies, all in an amount to be determined according to proof at time of trial.

147. Defendants acted with intent to defraud, or with reckless or negligent disregard of the rights of Plaintiff and Members of the Class.

148. Plaintiff and Members of the Class are entitled to relief in an amount to be proven at trial, and injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment against Defendants, and each of them, as follows:

- For an Order certifying the Class and appointing Plaintiff as class representative, and designating Plaintiff's counsel as counsel for the Class;
- For an Order declaring that Defendants' conduct violated the CLRA, California Civil Code §§ 1750, *et seq.*, and awarding (i) injunctive relief, (ii) costs of suit, and (iii) reasonable attorneys' fees;
- For an Order declaring that Defendants' conduct violated California's Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq.*; and California's False Advertising Law, California Business & Professions Code §§ 17500, *et seq.*; and awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post judgment interest; (iv) exemplary and/or punitive damages pursuant to California Civil Code § 3294, (v) costs of suit, and (iv) reasonable attorneys' fees pursuant to, *inter alia*, California Code of Civil Procedure § 1021.5;
- An Order compelling Defendants to recall and destroy all misleading and deceptive advertising materials, including through public injunctive relief;
- For an Order requiring Defendants to disgorge all monies, revenues, and profits obtained by means of any wrongful act or practice;

- For an order requiring imposition of a constructive trust and and/or disgorgement of Defendants' ill-gotten gains and to pay restitution to Plaintiff and all members of the Class and to restore to Plaintiff and members of the Class all funds acquired by means of any act or practice declared by this court to be an unlawful, fraudulent, or unfair business act or practice, in violation of laws, statutes or regulations, or constituting unfair competition, plus pre- and post-judgment interest thereon;
- For an Order finding that Defendants made Negligent Misrepresentations, and awarding special, general, and compensatory damages to Plaintiff and the Class;
- For pre and post-judgment interest on all amounts awarded;
- For actual damages, injunctive relief, restitution, and punitive damages pursuant to California Code of Civil Procedure § 1780;
- For an order of restitution and all other forms of equitable monetary relief, as pleaded;
- For public injunctive relief as pleaded or as the Court may deem proper;
- For an Order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit as pleaded; and
- For such other and further relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff, individually and on behalf of all others similarly situated, hereby demands a jury trial on all claims so triable.

Dated: October 28, 2024

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: _____

Abbas Kazerounian, Esq.
ATTORNEY FOR PLAINTIFF

[Additional Counsel for Plaintiff]
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Exhibit A

DECLARATION OF JENNIFER GOODWIN

I, JENNIFER GOODWIN, DECLARE:

1. On or about March 22, 2021, I purchased 365 by Whole Foods Market Organic Hot Cocoa Flavor Mix, Rich Chocolate (Canister), 12 oz (the "Product").
2. At the time of my payment and review of the Product, I was in the County of Los Angeles, State of California, where I also reside.
3. It is my understanding that Defendant, WHOLE FOODS, INC., does business in the County of Los Angeles, State of California.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on November 1st, 2021, 2021.

By: _____

Jennifer Goodwin

KAZEROUNI LAW GROUP, APC

Public court record.

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Court: Superior Court of California, County of Los Angeles
Case number: 21STCV40456
Filed: 2024-10-28

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