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UNITED STATES DISTRICT COURT  
8  
9 NORTHERN DISTRICT OF CALIFORNIA  
10  
11 SAN FRANCISCO DIVISION

11 SCOTT MILLER AND STEVE LEYTON, individuals, on  
behalf of themselves, the general public and those similarly  
12 situated

13 Plaintiffs,

14 v.

15 GHIRARDELLI CHOCOLATE COMPANY;

16 Defendant  
17  
18  
19

CASE NO. C 12-04936 LB

SECOND AMENDED CLASS  
ACTION COMPLAINT FOR  
VIOLATION OF THE CALI-  
FORNIA CONSUMERS LE-  
GAL REMEDIES ACT; FALSE  
ADVERTISING; FRAUD, DE-  
CEIT, AND/OR MISREPRE-  
SENTATION; AND UNFAIR  
BUSINESS PRACTICES

JURY TRIAL DEMANDED

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1 Scott Miller and Steve Leyton, by and through their counsel, bring this Second Amended  
2 Class Action Complaint (“Class Action Complaint”) against Defendant Ghirardelli Chocolate  
3 Company, on behalf of themselves and those similarly situated, for violations of the Consumer  
4 Legal Remedies Act, false advertising, violation of the Unfair Competition Law, and fraud, deceit  
5 and/or misrepresentation. The following allegations are based upon information and belief,  
6 including the investigation of Plaintiffs’ counsel, unless stated otherwise.

7 **INTRODUCTION**

8 1. Defendant deceptively informed and led its customers to believe that they were  
9 purchasing, for a premium price, white baking chips containing chocolate, while failing to  
10 adequately disclose that the baking chips contain no chocolate, white chocolate, or cocoa  
11 derivatives of any kind and that they were “artificial” or “imitation.” Defendant obtained  
12 substantial profits from these unlawful and deceptive sales.

13 **PARTIES**

14 2. Scott Miller (“Miller”) is, and at all times alleged in this Class Action Complaint  
15 was, an individual and a resident of Auburndale, Florida.

16 3. Steve Leyton (“Leyton”) is, and at all times alleged in this Class Action Complaint  
17 was, an individual and a resident of San Diego, California. Leyton and Miller are collectively  
18 referred to as “Plaintiffs”.

19 4. Defendant Ghirardelli Chocolate Company (“Ghirardelli”) is a corporation  
20 incorporated under the laws of the State of California, having its principal place of business in  
21 San Leandro, California. Ghirardelli is a wholly owned subsidiary of Lindt & Sprüngli AG.

22 **JURISDICTION AND VENUE**

23 5. This action is brought by Plaintiffs pursuant, *inter alia*, to the California Business  
24 and Professions Code, section 17200, *et seq.* Plaintiffs and Defendant are “persons” within the  
25 meaning of the California Business and Professions Code, section 17201.

26 6. The injuries, damages and/or harm upon which this action is based, occurred or  
27 arose out of activities engaged in by Defendant within, affecting, and emanating from, the State  
28 of California.



- 1           b. “In all of its chocolate products, Ghirardelli uses a proprietary blend of cocoa  
2           beans that has been refined over the company’s 160-year history to provide the  
3           company’s distinct and intense chocolate taste.”
- 4           c. “Ghirardelli roasts the cocoa beans in-house to ensure the company’s signature  
5           flavor profile is consistently maintained in all chocolate products. We also use a  
6           different roasting process whereby they remove the shell first and then roast the  
7           small nibs inside. Because the nibs are fairly uniform in size, we have more  
8           control over the temperature and time, so it can get a more specific flavor. Other  
9           companies roast their beans before removing the shell, which requires over-  
10          roasting the outside portion of the bean in order to roast the inside. This could  
11          impart a burned flavor to their chocolate.”
- 12          d. “Finally, Ghirardelli uses an intensive refining process to ensure that its chocolate  
13          truly melts in your mouth! Ghirardelli has no grainy feel because we refine most of  
14          our chocolate flakes until they are 18 microns (human hair is 100 microns in  
15          diameter). Other mass market chocolates are refined to only 50 microns.”

16          13. Ghirardelli states that its product line includes its signature SQUARES™  
17 chocolate, chocolate bars, other chocolate confections, chocolate chip cookies, “baking  
18 chocolate,” and chocolate beverages.

19          14. Ghirardelli markets and sells Ghirardelli® Chocolate Premium Baking Chips –  
20 Classic White (“Fake White Chocolate Chips”) even though they contain no chocolate, white  
21 chocolate or cocoa butter.

22          **Regulations Governing Labeling Of Chocolate And White Chocolate**

23          15. The United States Food and Drug Administration (“FDA”) has issued regulations  
24 requiring that a food label “accurately identify or describe, in as simple and direct terms as  
25 possible, the basic nature of the food or its characterizing properties or ingredients,” that it “not  
26 be confusingly similar to the name of any other food that is not reasonably encompassed within  
27 the same name.” 21 C.F.R. § 102.5(a). The label also must “include a statement of the presence or  
28 absence of any characterizing ingredient(s) or component(s) and/or the need for the user to add

1 any characterizing ingredient(s) or component(s) when the presence or absence of such  
2 ingredient(s) or component(s) in the food has a material bearing on price or consumer acceptance  
3 or when the labeling or the appearance of the food may otherwise create an erroneous impression  
4 that such ingredient(s) or component(s) is present when it is not, and consumers may otherwise be  
5 misled about the presence or absence of the ingredient(s) or component(s) in the food.” *Id.* §  
6 102.5(c). Such statement must be in boldface print of sufficient size on the front display panel.  
7 *Id.*

8 16. The FDA regulations further provide that “If the label, labeling, or advertising of a  
9 food makes any direct or indirect representations with respect to the primary recognizable  
10 flavor(s), by word, vignette, e.g., depiction of a fruit, or other means” then “such flavor shall be  
11 considered the characterizing flavor” and one of the following tests must be met: (1) the food  
12 must contain the “characterizing food ingredient, e.g., strawberries in ‘strawberry shortcake’” in  
13 an amount sufficient to “independently characterize the food,” (2) if the ingredient is present but  
14 insufficient to independently characterize the food,” the word “natural flavor” must be present,  
15 (3) if the flavor is simulated by being derived from another product, then the product must be  
16 labeled “either with the flavor of the product from which the flavor is [actually] derived or as  
17 ‘artificially flavored,’” and (4) if any artificial flavor is present “which simulates, resembles or  
18 reinforces the characterizing flavor,” the food must be labeled “artificially flavored.” 21 C.F.R. §  
19 101.22(i)(1)-(2). The regulation goes on to provide that such statements must appear on the  
20 display panel, immediately and conspicuously following the name of the characterizing flavor,  
21 without intervening text or graphics. *Id.* § 101.22(i)(3). The regulation further provides that  
22 “Where the characterizing flavor and a trademark or brand are presented together, other written,  
23 printed, or graphic matter that is a part of or is associated with the trademark or brand may  
24 intervene if the required words [e.g., “naturally flavored” or “artificially flavored”] are in such  
25 relationship with the trademark or brand as to be clearly related to the characterizing flavor.” *Id.*  
26 §101.22(i)(3)(1).

27 17. FDA regulations also require that “a food shall be deemed to be misbranded if it is  
28 an imitation of another food unless its label bears, in type of uniform size and prominence, the

1 word ‘imitation’ and, immediately thereafter, the name of the food imitated.” 21 C.F.R.  
2 § 101.3(e). There is an exception to this rule if the substituting food that resembles another food  
3 (i) “is not nutritionally inferior to the food for which it substitutes and which it resembles,”  
4 (ii) complies with the provisions of [21 C.F.R.] § 102.5 of this chapter” [see above] and “is not  
5 false or misleading.” *Id.* § 101.3(e)(2).

6 18. The FDA has also adopted standards of identify for “chocolate” and “white  
7 chocolate.” The regulations provide that “Chocolate” must contain “chocolate liquor” made by  
8 “finely grinding cacao nibs” such that the chocolate liquor is “not less than 50 percent nor more  
9 than 60 percent by weight of cacao fat.” 21 C.F.R. § 163.111 *et seq.* The regulations further  
10 provide that “White chocolate is the solid or semiplastic food prepared by mixing and grinding  
11 cocoa butter with one or more of the optional dairy ingredients listed in [21 C.F.R. §  
12 163.124(b)(2)] and one or more optional nutritive carbohydrate sweeteners. **It contains a**  
13 **minimum of 20 percent cocoa butter**, a minimum of 14 percent of total milk solids, a minimum  
14 of 3.5 percent milkfat, and a maximum of 55 percent nutritive carbohydrate sweeteners.” *Id.*  
15 §163.124 (emphasis added); 67 Fed. Reg. 62171, 62173 (Oct. 4, 2002) (establishing standard of  
16 identity for white chocolate; explaining that “Because products bearing the name “chocolate”  
17 would be expected to contain some cacao-derived ingredients, we believe that it is necessary to  
18 ensure that ‘white chocolate’ contains cacao-derived ingredients.”)

19 19. Interpreting the above regulations at the time it issued the white chocolate standard  
20 of identity, the FDA considered the argument that “white chocolate-type products made with  
21 ingredients not derived from cacao could be identified as ‘white chocolate-flavored’ or  
22 ‘artificially flavored’ to sufficiently distinguish them from white chocolate products derived from  
23 cacao. The comment further stated that consumers could look at the ingredient list to discover the  
24 substitution of less expensive ingredients not derived from cacao; thus, current regulations are  
25 sufficient to prevent economic deception.” It ruled as follows:

26 FDA does not agree that identifying white chocolate products made from  
27 cheaper noncacao ingredients as “artificially flavored” or “white chocolate-flavored”  
28 would be sufficiently descriptive with regard to the composition of white chocolate.

1 These terms refer to the characterizing flavor of a food, not its composition. The  
2 terms suggest products that are flavored to taste like white chocolate, but they do not  
3 provide guidance as to white chocolate's composition. Thus, use of such terms does  
4 not negate the need for a standard of identity, but rather further supports its need  
5 because, without a definition and standard for "white chocolate," there is no way to  
6 define "white chocolate-flavored." Moreover, FDA regulations governing use of the  
7 term "flavored" Sec. 101.22(i)(1)(i) (21 CFR 101.22(i)(1)(i)) provide that a product  
8 that is expected to contain an ingredient, e.g., "white chocolate," must bear the term  
9 "flavored" in the name of the food if the food contains natural flavor derived from  
10 that ingredient and either an amount of the ingredient insufficient to independently  
11 characterize the food or none of the ingredient. Therefore, unless a food contains the  
12 flavoring constituents derived from white chocolate, it cannot be named "white  
13 chocolate-flavored."

14 Once a standard for white chocolate has been "white chocolate-flavored"  
15 could be used to describe a food that is commonly expected to contain the  
16 characterizing food ingredient, white chocolate, and which contains natural flavor  
17 derived from such an ingredient (i.e., cocoa butter or cacao fat) (Sec. 101.22(i)(1)(i)).  
18 The term "artificially-flavored white chocolate" could be used in cases where the  
19 food contains an artificial flavor that simulates, resembles, or reinforces the  
20 characterizing flavor (Sec. 101.22(i)(2)).

21 The only constituent in white chocolate that is derived from the cacao bean is  
22 cacao fat (i.e., cocoa butter); therefore, the agency assumes that if a cheaper  
23 ingredient that was not derived from cacao were used to replace the cacao-derived  
24 ingredient, the substitute ingredient would be some type of fat or oil used to replace  
25 the cacao fat. In this case, the agency would treat such products as substitute or  
26 imitation white chocolate products (21 CFR 101.3(e)) and would not regulate them by  
27 requiring that they be labeled "white chocolate-flavored."

28 *See* 67 Fed. Reg. 62171, 62174 (*citing* 21 C.F.R. § 101.22(i)(1)(i)).

1           20. Each of the regulations discussed above has been independently adopted as part of  
2 the Sherman Food, Drug and Cosmetic Law, California Health and Safety Code (“Cal. Health &  
3 Saf. Code”) § 109875, et seq. *See* Cal. Health & Saf. Code §§ 110100(a), 110380, 110505  
4 (adopting FDA standards).

5 **Ghirardelli’s Sale of the Fake White Chocolate Chips Violates These Regulations**

6           21. The packaging for the Fake White Chocolate chips is inconsistent with the FDA  
7 regulations, and those embodied in the state law for a uniform reason: the packaging prominently  
8 uses the term “chocolate” on the primary label panel when the products, in fact, contain no  
9 chocolate or white chocolate, cocoa butter, cacao fat, or any cacao derivatives.

10           22. The word “Chocolate” is used on the front panel immediately following the brand  
11 name “Ghirardelli®” in a manner that suggests that it is the “characterizing flavor,” 21 C.F.R. §  
12 101.22(i), of the product. The label shows “Ghirardelli®” is the brand name (as it is followed by  
13 the registered trademark symbol) and “Chocolate” as the flavor (as it is in a smaller font and not  
14 followed by any trademark symbol. The label does not state the brand name as “Ghirardelli  
15 Chocolate Company.” Moreover, even if it had done so, or even if “Ghirardelli® Chocolate”  
16 were deemed to be a “trademark or brand,” the regulations would require the statements about  
17 “artificial” or “imitation” immediately following that trademark or brand. *Id.* §§ 101.22(i)(3),  
18 101.3.<sup>1</sup>

19           23. Defendant intentionally prices its Fake White Chocolate Chips as the same price as  
20 its real chocolate chips (*i.e.*, their milk chocolate, semi-sweet chocolate, and bittersweet chocolate  
21 chips). These actions further deceive customers into believing that the Fake White Chocolate  
22 Chips contain chocolate. As a result, customers pay a premium for the Fake White Chocolate  
23 Chips that cost Defendant far less to manufacture than real chocolate products.

24           24. Defendant did not disclose that the Fake White Chocolate Chips were not  
25 chocolate, white chocolate, nor were they flavored with chocolate or white chocolate. To do so,  
26 they would at a minimum have been required to state in the appropriate font size and type, on the  
27

28 <sup>1</sup> The use of the word “Flavor” on the Fake Ground White Chocolate does not cure the violation,  
as the FDA has explained in the quotation above. *See* 67 Fed. Reg. 62171, 62174.



1 front or primary label panel, “Imitation” (or, if one of the other ingredients was designed to  
2 simulate the chocolate flavor, to state that ingredient as the flavor or to state “artificial” or  
3 “artificially flavored.”) Accordingly, the packaging violated the state and federal regulations set  
4 forth above.

5 **The Fake White Chocolate Chips Marketing Was Deceptive For Additional Reasons**

6 25. The packaging of the Fake White Chocolate Chips is deceptive for additional  
7 reasons. It refers to the product as “Classic White” to deceptively mislead consumers into  
8 believing that it is classic white chocolate. It states that the product is “Premium” leading  
9 consumers to incorrectly believe that, unlike its competitors, the product is a premium white  
10 chocolate chip product. It then goes on to deceptively state: “The luxuriously deep flavor and  
11 smooth texture of Ghirardelli Premium Baking Chocolate delivers the ultimate chocolate  
12 indulgence.” But because there is no chocolate or white chocolate in Defendant’s chips, the  
13 product cannot deliver a “deep chocolate flavor or texture” or the “ultimate chocolate  
14 indulgence.” The label further says that the product contains the “Finest grind for smoothest  
15 texture and easiest melting” but in fact, unlike real white chocolate, the product is not “ground”  
16 from cocoa beans.

17 26. The use of the language about “luxuriously deep ...ultimate chocolate indulgence”  
18 and “finest grind for smoothest texture and easiest melting” is particularly misleading because the  
19 *identical* language appears on the packaging of another product made by Defendant: the  
20 Ghirardelli® Chocolate White Chocolate Premium Baking Bar. But the latter product *does* in fact  
21 contain white chocolate (a.k.a. at least 20% cocoa butter.) Indeed, the first listed ingredient is  
22 “White chocolate.” Thus, consumers who see both products (which are likely to appear near each  
23 other on the retail shelves or Defendant’s Website, and which are sold at the same price) will  
24 assume that both contain the same ingredients except that one is a bar one and other is the chips,  
25 but the products are otherwise the same.

26 27. The use of the term “Classic White” in the Fake White Chocolate Chips increases  
27 the deception because it suggests that the product is unchanged from the original (e.g., Coke  
28 Classic). In this case, the “original” white chocolate product is the “Ghirardelli® Chocolate

1 Premium Baking Bar – White Chocolate” which does contain white chocolate. Furthermore,  
2 Defendant uses the same term—“Classic White”—in the name of its “Ghirardelli® Chocolate  
3 Classic White Flavored Sauce” which does contain cocoa butter. And Defendant also sells other  
4 candy bars apparently containing real white chocolate: the “Ghirardelli® Chocolate Sublime  
5 White Cookies Jubilee Bar” and “Ghirardelli® Chocolate Sublime White Vanilla Dream Bar.”  
6 Nothing would lead a reasonable consumer to think that a “Sublime White” product is real white  
7 chocolate, while some (but not all) “Classic White” products are not real white chocolate.

8 28. As defined by Webster’s Dictionary, “chocolate” is “a food prepared from ground  
9 roasted cacao beans” and “white chocolate” is “a confection of cocoa butter, sugar, milk solids,  
10 lecithin, and flavorings.”

11 29. Beyond Defendant’s affirmative misrepresentations, it also fails to adequately  
12 disclose that its Fake White Chocolate Chips are not white chocolate and/or that they do not  
13 contain any white chocolate or cocoa butter.

14 **Ghirardelli’s Website And Other Marketing For the Fake White Chocolate Chips**  
15 **Compounded—And Proves—The Deception**

16 30. Beyond Defendant’s false and deceptive packaging, it falsely and deceptively  
17 markets and advertises the Fake White Chocolate Chips on its Website, and in other widely  
18 available advertising and marketing materials.

19 31. As explained above, Defendant’s Website touts the history and preeminence of  
20 Ghirardelli Chocolate products with no indication that any of them are not in fact chocolate.

21 32. Until after the filing of this lawsuit, the Website listed the product name of the  
22 Fake White Chocolate Chips as “Classic White Chocolate Baking Chips” (whereas the package  
23 states “Premium Baking Chips – Classic White”). These misrepresentations not only further the  
24 deception for customers and retailers who review the Website, but they show that even the  
25 Defendant’s employees who have created the Website were misled into believing that the Fake  
26 White Chocolate Chips are real white chocolate.

27 33. Defendant sells a cookbook with recipes for its products, including the Fake White  
28 Chocolate Chips, which further shows that even its own agents and employees have been

1 deceived into believing that the Fake White Chips are real white chocolate. For example, the  
2 cookbook contains a recipe for “Tiramisu-Me” in which the ingredient list includes a “White  
3 Chocolate Mixture” containing mascarpone cheese and “1/4 cup Ghirardelli Classic White  
4 Chocolate Chips.” The recipe then goes on to instruct the reader to “mix the mascarpone cheese  
5 and white chocolate chips.” The Ghirardelli Chocolate Company, *The Ghirardelli Chocolate  
6 Cookbook: Recipes and History from America’s Premier Chocolate Maker* (Ten Speed Press:  
7 2007).

8         34. Defendant also trains its store personnel at its branded retail locations (including  
9 the flagship store at Ghirardelli Square and the store at Union Square, both in San Francisco), to  
10 inform customers that *all* the Ghirardelli products are real chocolate products. Customers who  
11 ask, for example, for “white chocolate chips” are directed to the Fake White Chocolate Chips  
12 without being told that the product contains no chocolate. In one instance, an investigator asked a  
13 Ghirardelli store retail employee if there were any non-chocolate Ghirardelli products that he  
14 could purchase for a friend with a chocolate allergy; the employee stated (as trained to do), that  
15 there were none.

16         35. Until after the filing of this lawsuit, Defendant permitted customers to search its  
17 website by choosing to “Shop By Product,” and then to choose the “White Chocolate” category.  
18 This process causes the Website to present the Fake White Chocolate Chips alongside the real  
19 White Chocolate Baking Bar and the Classic White Chocolate Flavored Sauce, which, as  
20 discussed above, do contain white chocolate and/or cocoa butter, which compounds the  
21 deception.

22         36. Defendant also advertises, for example, on the Internet by purchasing key words  
23 such as “white chocolate,” and asking consumers if they “Want White Chocolate?” If consumers  
24 follow the link on Defendant’s advertisements, they are taken to Defendant’s website and offered  
25 the Fake White Chocolate Chips.

26         37. Finally, Defendant permits its marketing partners, including grocery stores, to  
27 advertise, market, advertise and sell its Fake White Chocolate Chips. Defendant provides its  
28 marketing partners information that specifically refers to these Fake White Chocolate Chips as

1 real white chocolate. For example, in sales sheets, sales presentations, and other marketing  
2 materials, Ghirardelli categorizes the Fake White Chocolate Chips as “Baking Chocolate.” And  
3 some of the marketing materials provided by Defendant to retailers for the Fake White Chocolate  
4 Chips tells retailers that the product name is “Classic White Chocolate Chips.” Retailers in turn  
5 use this name when displaying the product on store shelves.

6 **Ghirardelli’s Marking and Sale of its Fake White Chocolate Chips Is Misleading When**  
7 **Compared to Competitors’**

8 38. Defendant’s competitors more adequately disclose the truth about their products  
9 that are imitation or artificially flavored white chocolate.

10 39. The Hershey Company, for example, sells a competitive product to Defendant’s  
11 Fake White Chocolate Chips, which it calls “Premier White Chips.” But unlike the Defendant’s  
12 Fake White Chocolate Chips, Hershey specifically states, immediately under the name of the  
13 product, “Artificially Flavored Creamy Vanilla.” Moreover, nowhere does the Hershey’s  
14 package state “chocolate.” Indeed, the Hershey product offers a recipe for “White Chip  
15 Chocolate Cookies” (rather than “White Chocolate Chip Cookies”), which specifically requires  
16 that the user add cocoa powder. As a result, the retail price for Hershey’s Premier White Chips is  
17 less than Defendant’s Fake White Chocolate Chips.

18 40. Similarly, the Nestle S.A. company sells, for less money than Defendant’s Fake  
19 White Chocolate Chips, “Toll House Premier White Morsels.” Like Hershey, but unlike  
20 Defendant, the Nestle package (1) discloses that its “Premier White Morsels” are “creamy  
21 vanilla-flavored baking pieces” and (2) nowhere states that the “Premier White Morsels” are  
22 “chocolate” or “white chocolate.”

23 **MILLER’S EXPERIENCE**

24 41. On June 24, 2012, Miller desired to purchase white chocolate chips.

25 42. Prior to purchasing the Ghirardelli® Chocolate Premium Baking Chips — Classic  
26 White, Miller reviewed the packaging to satisfy himself that he was purchasing white chocolate.  
27 Miller specifically reviewed Defendant’s statements on the package that the product is  
28 “Chocolate,” “Premium Baking Chocolate,” “Classic White,” “Premium Baking Chips,” the

1 “Finest grind,” “melt-in-your mouth,” and had “The luxuriously deep flavor and smooth texture  
2 of Ghirardelli Premium Baking Chocolate delivers the ultimate chocolate indulgence.” Miller  
3 further relied on Defendant’s failure to adequately disclose that the product was artificial or  
4 imitation, was not chocolate, was not “white chocolate” and that it contained no cocoa butter. He  
5 then purchased Defendant’s Ghirardelli® Chocolate Premium Baking Chips — Classic White  
6 from a Publix supermarket in Auburndale, Florida for \$3.29.

7 43. The next day, Miller tasted Defendant’s Ghirardelli® Chocolate Premium Baking  
8 Chips — Classic White and noticed that they did not at all taste like white chocolate. He then  
9 looked closely at the ingredients list on the back of the packaging and noticed that the product did  
10 not contain any white chocolate, chocolate, cocoa or cocoa butter.

11 44. Had Defendant not misrepresented (by omission and commission) the true nature  
12 of its Fake White Chocolate Chips, Miller would not have purchased Defendant’s product or, at a  
13 very minimum, he would have paid less for the product.

#### 14 **LEYTON’S EXPERIENCE**

15 45. In or around May 2013, Leyton desired to purchase real white chocolate chips.

16 46. Leyton visited Keil’s Fresh Food Store, an upscale grocery store in San Diego, and  
17 perused the baking chips and chocolate products. He located the “Ghirardelli® Chocolate  
18 Premium Baking Chips — Classic White” and read the front of the packaging. Leyton had  
19 visited Ghirardelli Square, and was familiar with the brand, which he understood to be a premium  
20 chocolate company. Leyton did not see anything stating that the product was not chocolate, not  
21 white chocolate, or that it contained no cocoa butter. In reliance on those omissions and the word  
22 “chocolate,” on the package, Leyton believed the product would be white chocolate and decided  
23 to buy the product. He purchased Defendant’s Ghirardelli® Chocolate Premium Baking Chips —  
24 Classic White for approximately \$4.29.

25 47. On or about May 19, 2013, Leyton attempted to melt some of the Fake White  
26 Chocolate Chips. Because they did not melt properly and gave off a bad odor, Leyton again  
27 attempted to melt the chips. After that failed and the bad odor persisted, he reviewed the package  
28 and discovered that it was not a “premium” or “chocolate” product at all. He learned that the

1 product did not contain any white chocolate, chocolate, cocoa or cocoa butter. And he learned  
2 that the product contained palm oil and palm kernel oil, ingredients not associated with premium  
3 chocolate.

4 48. On or about May 20, 2013, Leyton complained to Defendant. He informed  
5 Ghirardelli that he had been misled by the company's branding, and did not believe Defendant  
6 should market the chips as white chocolate. In response, Defendant mailed Leyton a coupon,  
7 which Leyton threw away.

8 49. Had Defendant not misrepresented (by omission and commission) the true nature  
9 of its Fake White Chocolate Chips, Leyton would not have purchased Defendant's products or, at  
10 a very minimum, he would have paid less for the product. Indeed, Leyton has not purchased any  
11 of Defendant's products since May 2013.

#### 12 **CLASS ALLEGATIONS**

13 50. Plaintiffs bring this action against Defendant on behalf of themselves and all  
14 others similarly situated, as a class action pursuant to Rule 23 of the Federal Rules of Civil  
15 Procedure. Leyton and Miller seek to represent a "White Chips Class" comprised of all persons  
16 who, between August 17, 2008 and the present, purchased, in the United States, "Ghirardelli®  
17 Chocolate Premium Baking Chips – Classic White." For purposes of this Class Action  
18 Complaint, the unmodified word "Class" and the phrase "Class Members" shall refer collectively  
19 to all members of the White Chips Class, including the named Plaintiffs.

20 51. This action has been brought and may properly be maintained as a class action  
21 against Defendant pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure  
22 because there is a well-defined community of interest in the litigation and the proposed class is  
23 easily ascertainable.

24 52. Numerosity: Plaintiffs does not know the exact size of the White Chips Class, but  
25 it is estimated that it is composed of more than 100 persons. The persons in the Class are so  
26 numerous that the joinder of all such persons is impracticable and the disposition of their claims  
27 in a class action rather than in individual actions will benefit the parties and the courts.

28 53. Common Questions Predominate: This action involves common questions of law

1 and fact to the potential class because each class member’s claim derives from the deceptive,  
2 unlawful and/or unfair statements and omissions that led Defendant’s customers to believe that  
3 the Fake White Chocolate Chips were (or at a minimum contained) chocolate, white chocolate,  
4 cocoa and/or cocoa butter. The common questions of law and fact predominate over individual  
5 questions, as proof of a common or single set of facts will establish the right of each member of  
6 the Class to recover. The questions of law and fact common to the Class are:

7 a) whether the use of the word “Chocolate” on the primary display panel of the  
8 Fake White Chocolate Chips, in the absence of the word “Imitation” or “Artificially Flavored,”  
9 violated Federal and/or California state law;

10 b) whether Defendant unfairly, unlawfully and/or deceptively failed to inform  
11 White Chips Class members that its Fake White Chocolate Chips were not (and did not contain)  
12 chocolate, white chocolate, cocoa or cocoa butter;

13 c) whether Defendant misled White Chips Class members by, inter alia,  
14 representing that their Fake White Chocolate Chips were or had “chocolate,” “baking chocolate,”  
15 “premium” chocolate, “ground” chocolate, “classic white” chocolate, delivered the “ultimate  
16 chocolate indulgence,” “melt-in-your mouth,” “finest grind,” “the luxuriously deep flavor and  
17 smooth texture of Ghirardelli Premium Baking Chocolate,” and/or “the ultimate chocolate  
18 indulgence”;

19 d) whether Defendant’s advertising and marketing regarding their Fake White  
20 Chocolate Chips sold to White Chips Class members was likely to deceive White Chips Class  
21 members or was unfair;

22 e) whether Defendant engaged in the alleged conduct knowingly, recklessly, or  
23 negligently;

24 f) The amount of profits and revenues earned by Defendant as a result of the  
25 conduct;

26 g) whether class members are entitled to restitution, injunctive and other  
27 equitable relief and, if so, what is the nature (and amount) of such relief; and

28 h) whether class members are entitled to payment of actual, incidental,

1 consequential, exemplary and/or statutory damages plus interest thereon, and if so, what is the  
2 nature of such relief.

3         54.     Typicality: Plaintiff Miller's claims are typical of the White Chips Class because,  
4 on June 24, 2012, he purchased one of the Fake White Chocolate Products, namely Defendant's  
5 Ghirardelli<sup>®</sup> Chocolate Premium Baking Chips – Classic White, in reliance on Defendant's  
6 misrepresentations and omissions that it was white chocolate. Plaintiff Leyton's claims are  
7 typical of the White Chips Class because, in May of 2013, he purchased Defendant's Ghirardelli<sup>®</sup>  
8 Chocolate Premium Baking Chips – Classic White, in reliance on Defendant's misrepresentations  
9 and omissions that it was white chocolate. Thus, Plaintiffs and class members sustained the same  
10 injuries and damages arising out of Defendant's conduct in violation of the law. The injuries and  
11 damages of each class member were caused directly by Defendant's wrongful conduct in  
12 violation of law as alleged.

13         55.     Adequacy: Plaintiffs will fairly and adequately protect the interests of all class  
14 members because it is in their best interests to prosecute the claims alleged herein to obtain full  
15 compensation due to them for the unfair and illegal conduct of which they complain. Plaintiffs  
16 also have no interests that are in conflict with or antagonistic to the interests of class members.  
17 Plaintiffs have retained highly competent and experienced class action attorneys to represent their  
18 interests and that of the class. By prevailing on their own claims, Plaintiffs will establish  
19 Defendant's liability to all class members. Plaintiffs and their counsel have the necessary  
20 financial resources to adequately and vigorously litigate this class action, and Plaintiffs and  
21 counsel are aware of their fiduciary responsibilities to the class members and are determined to  
22 diligently discharge those duties by vigorously seeking the maximum possible recovery for class  
23 members.

24         56.     Superiority: There is no plain, speedy, or adequate remedy other than by  
25 maintenance of this class action. The prosecution of individual remedies by members of the class  
26 will tend to establish inconsistent standards of conduct for Defendant and result in the impairment  
27 of class members' rights and the disposition of their interests through actions to which they were  
28 not parties. Class action treatment will permit a large number of similarly situated persons to



1 prosecute their common claims in a single forum simultaneously, efficiently, and without the  
2 unnecessary duplication of effort and expense that numerous individual actions would engender.  
3 Furthermore, as the damages suffered by each individual member of the class may be relatively  
4 small, the expenses and burden of individual litigation would make it difficult or impossible for  
5 individual members of the class to redress the wrongs done to them, while an important public  
6 interest will be served by addressing the matter as a class action.

7 57. Nexus to California. The State of California has a special interest in regulating the  
8 affairs of corporations that do business here. Defendant has its principal place of business in  
9 California, and the acts complained of herein emanated from decisions made by Defendant in  
10 California. Accordingly, there is a substantial nexus between Defendant's unlawful behavior and  
11 California such that the California courts should take cognizance of this action on behalf of a  
12 class of individuals who reside anywhere in the United States.

13 58. Plaintiffs are unaware of any difficulties that are likely to be encountered in the  
14 management of this action that would preclude its maintenance as a class action.

### 15 **CAUSES OF ACTION**

16 Plaintiffs do not plead, and hereby disclaims, causes of action under the Food Drug and  
17 Cosmetic Act ("FDCA") and regulations promulgated thereunder by the FDA. Plaintiffs rely on  
18 the FDCA and FDA regulations only to the extent such laws and regulations have been separately  
19 enacted as state law or regulation or provide a predicate basis of liability under the state and  
20 common laws cited in the following causes of action.

#### 21 **PLAINTIFFS' FIRST CAUSE OF ACTION**

#### 22 **(Violation of the Consumers Legal Remedies Act, California Civil Code § 1750, *et seq.*) 23 On Behalf of Leyton and Miller and the White Chips Class**

24 59. Plaintiffs reallege and incorporate the paragraphs of this Class Action Complaint  
25 as if set forth herein.

26 60. This cause of action is brought pursuant to the California Consumers Legal  
27 Remedies Act, California Civil Code § 1750, *et seq.* ("CLRA").

28 61. Defendant's actions, representations and conduct have violated, and continue to  
violate the CLRA, because they extend to transactions that are intended to result, or which have

1 resulted, in the sale or lease of goods or services to consumers.

2 62. Plaintiffs and other class members are “consumers” as that term is defined by the  
3 CLRA in California Civil Code § 1761(d).

4 63. The Fake White Chocolate Chips that Plaintiffs (and others similarly situated class  
5 members) purchased from Defendant were “goods” within the meaning of California Civil Code  
6 § 1761(a).

7 64. By engaging in the actions, representations and conduct set forth in this Class  
8 Action Complaint, Defendant has violated, and continues to violate, § 1770(a)(2), § 1770(a)(5),  
9 § 1770(a)(7), § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California Civil Code  
10 §1770(a)(2), Defendant’s acts and practices constitute improper representations regarding the  
11 source, sponsorship, approval, or certification of the goods they sold. In violation of California  
12 Civil Code §1770(a)(5), Defendant’s acts and practices constitute improper representations that  
13 the goods they sell have sponsorship, approval, characteristics, ingredients, uses, benefits, or  
14 quantities, which they do not have. In violation of California Civil Code §1770(a)(7),  
15 Defendant’s acts and practices constitute improper representations that the goods they sell are of a  
16 particular standard, quality, or grade, when they are of another. In violation of California Civil  
17 Code §1770(a)(8), Defendant has disparaged the goods, services, or business of another by false  
18 or misleading representation of fact. In violation of California Civil Code §1770(a)(9), Defendant  
19 has advertised goods or services with intent not to sell them as advertised.

20 65. Specifically, Defendant’s acts and practices led customers to falsely believe that its  
21 Fake White Chocolate Chips were (or contained) chocolate, white chocolate and/or its principal  
22 ingredient, cocoa butter. Finally, regarding California Civil Code §1770(a)(8), Ghirardelli falsely  
23 or deceptively markets and advertises that, unlike other chocolate manufacturers, it does the  
24 following:

- 25 • “makes chocolate starting from the cocoa bean through to finished products”;
- 26 • maintains intensive quality assurance in the selection of cocoa beans and accepts  
27 only the highest-quality beans;
- 28

- 1 • rejects as many as 40% of the beans that are offered to it, and the chocolate beans that are not selected by Ghirardelli are sold to other manufacturers;
- 2 • uses a proprietary blend of cocoa beans that has been refined over the company's 150-year history to provide the company's distinct and intense chocolate taste;
- 3 • roasts the cocoa beans in-house to ensure the company's signature flavor profile is consistently maintained in all chocolate products; and
- 4 • uses a different roasting process whereby it remove the shell first and then roast the small nibs inside and has more control over the temperature and time, so it can get a more specific flavor, whereas other companies roast their beans before removing the shell, which requires over-roasting the outside portion of the bean in order to roast the inside, which could impart a burned flavor to their chocolate.

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9 66. Plaintiff requests that this Court enjoin Defendant from continuing to employ the  
10 unlawful methods, acts and practices alleged herein pursuant to California Civil Code  
11 § 1780(a)(2). If Defendant is not restrained from engaging in these types of practices in the  
12 future, Plaintiff and the other members of the Class will continue to suffer harm.

13 67. More than thirty days prior to the filing of this Class Action Complaint, Plaintiff  
14 Miller gave notice and demand that Defendant correct, repair, replace or otherwise rectify the  
15 unlawful, unfair, false and/or deceptive practices relating to the Fake White Chocolate Chips  
16 complained of herein. On October 9, 2013, Leyton himself also gave notice and demand that  
17 Defendant correct, repair, replace, or otherwise rectify the unlawful, unfair, false and/or deceptive  
18 practices relating to the Fake White Chocolate Chips complained of herein. Despite receiving the  
19 aforementioned notices and demands, Defendant failed to do so in that, among other things, it  
20 failed to identify similarly situated customers, notify them of their right to correction, repair,  
21 replacement or other remedy; and provide that remedy. Accordingly, Plaintiffs seek, pursuant to  
22 California Civil Code § 1780(a)(3), on behalf of themselves and those similarly situated class  
23 members, compensatory damages, punitive damages and restitution of any ill-gotten gains due to  
24 Defendant's acts and practices.

25 68. Plaintiffs also requests that this Court award them their costs and reasonable  
26 attorneys' fees pursuant to California Civil Code § 1780(d).

**PLAINTIFFS' SECOND CAUSE OF ACTION**  
**(False Advertising, Business and Professions Code § 17500, et seq. ("FAL"))**  
**On Behalf of Leyton and Miller and the White Chips Class**

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3       69.     Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
4 Complaint as if set forth herein.

5       70.     Beginning at an exact date unknown to Plaintiffs, but within three (3) years  
6 preceding the filing of the Class Action Complaint, Defendant made untrue, false, deceptive  
7 and/or misleading statements in connection with the advertising and marketing of its Fake White  
8 Chocolate Chips.

9       71.     Defendant made representations and statements (by omission and commission)  
10 that led reasonable customers to believe that they were purchasing real white chocolate chips.  
11 Defendant further deceptively failed to inform Plaintiffs, and those similarly situated, that its Fake  
12 White Chocolate Chips did not contain any chocolate, white chocolate, cocoa or cocoa butter.

13       72.     Plaintiffs and those similarly situated relied to their detriment on Defendant's  
14 false, misleading and deceptive advertising and marketing practices, including each of the  
15 misrepresentations and omissions set forth in paragraphs 22, 26-30, 33-38, 42-43, and 48 above.  
16 Had Plaintiffs and those similarly situated been adequately informed and not intentionally  
17 deceived by Defendant, they would have acted differently by, without limitation, refraining from  
18 purchasing Defendant's Fake White Chocolate Chips or paying less for them.

19       73.     Defendant's acts and omissions are likely to deceive the general public.

20       74.     Defendant engaged in these false, misleading and deceptive advertising and  
21 marketing practices to increase its profits. Accordingly, Defendant has engaged in false  
22 advertising, as defined and prohibited by section 17500, et seq. of the California Business and  
23 Professions Code.

24       75.     The aforementioned practices, which Defendant used, and continue to use, to its  
25 significant financial gain, also constitutes unlawful competition and provides an unlawful  
26 advantage over Defendant's competitors as well as injury to the general public.

27       76.     Plaintiffs seek, on behalf of those similarly situated, full restitution of monies, as  
28 necessary and according to proof, to restore any and all monies acquired by Defendant from

1 Plaintiffs, the general public, or those similarly situated by means of the false, misleading and  
2 deceptive advertising and marketing practices complained of herein, plus interest thereon.

3 77. Plaintiffs seek, on behalf of those similarly situated, an injunction to prohibit  
4 Defendant from continuing to engage in the false, misleading and deceptive advertising and  
5 marketing practices complained of herein. The acts complained of herein occurred, at least in  
6 part, within three (3) years preceding the filing of the Class Action Complaint.

7 78. Plaintiffs and those similarly situated are further entitled to and do seek both a  
8 declaration that the above-described practices constitute false, misleading and deceptive  
9 advertising, and injunctive relief restraining Defendant from engaging in any such advertising and  
10 marketing practices in the future. Such misconduct by Defendant, unless and until enjoined and  
11 restrained by order of this Court, will continue to cause injury in fact to the general public and the  
12 loss of money and property in that the Defendant will continue to violate the laws of California,  
13 unless specifically ordered to comply with the same. This expectation of future violations will  
14 require current and future customers to repeatedly and continuously seek legal redress in order to  
15 recover monies paid to Defendant to which Defendant is not entitled. Plaintiff, those similarly  
16 situated and/or other consumers nationwide have no other adequate remedy at law to ensure  
17 future compliance with the California Business and Professions Code alleged to have been  
18 violated herein.

19 79. As a direct and proximate result of such actions, Plaintiffs and the other members  
20 of the Class have suffered, and continue to suffer, injury in fact and have lost money and/or  
21 property as a result of such false, deceptive and misleading advertising in an amount which will  
22 be proven at trial, but which is in excess of the jurisdictional minimum of this Court.

23 **PLAINTIFFS' THIRD CAUSE OF ACTION**  
24 **(Fraud, Deceit and/or Misrepresentation)**  
25 **On Behalf of Leyton and Miller and the White Chips Class**

26 80. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
27 Complaint as if set forth herein.

28 81. In or around May 2013, Defendant fraudulently and deceptively led Leyton to

1 believe that Defendant's Fake White Chocolate Chips were real white chocolate chips. On or  
2 about June 24, 2012, Defendant fraudulently and deceptively led Miller to believe that  
3 Defendant's Fake White Chocolate Chips were real white chocolate chips. Defendant also failed  
4 to inform Leyton and Miller that Defendant's Fake White Chocolate Chips are not and do not  
5 contain chocolate or white chocolate and are not derived from white chocolate / cocoa butter.

6 82. Defendant made identical misrepresentations and omissions regarding Defendant's  
7 Fake White Chocolate Chips to all members of the White Chips Class.

8 83. Defendant's omissions were material at the time they were made. They concerned  
9 material facts that were essential to the analysis undertaken by Plaintiffs as to whether to purchase  
10 Defendant's Fake White Chocolate Chips.

11 84. In not so informing Plaintiffs and the members of the Class, Defendant breached  
12 its duty to them. Defendant also gained financially from, and as a result of, its breaches.

13 85. Plaintiffs and those similarly situated relied to their detriment on Defendant's  
14 fraudulent omissions. Had Plaintiffs and those similarly situated been adequately informed and  
15 not intentionally deceived by Defendant, they would have acted differently by, without limitation,  
16 not purchasing (or paying less for) Defendant's Fake White Chocolate Chips.

17 86. Defendant had a duty to inform White Chips Class members at the time of their  
18 purchase of that the Fake White Chocolate Chips that the product they were purchasing was not  
19 chocolate or white chocolate and did not contain any cocoa butter. Defendant omitted to provide  
20 this information to Class members. Class and members relied to their detriment on Defendant's  
21 omissions. These omissions were material to the decisions of Class members to purchase the  
22 Fake White Chocolate Chips, respectively. In making these omissions, Defendant breached its  
23 duties to Class members. Defendant also gained financially from, and as a result of, its breaches.

24 87. By and through such fraud, deceit, misrepresentations and/or omissions, Defendant  
25 intended to induce Plaintiffs and those similarly situated to alter their position to their detriment.  
26 Specifically, Defendant fraudulently and deceptively induced Plaintiffs and those similarly  
27 situated to, without limitation, to purchase the Fake White Chocolate Chips.

28 88. Plaintiffs and those similarly situated justifiably and reasonably relied on

1 Defendant's omissions, and, accordingly, were damaged by Defendant.

2 89. As a direct and proximate result of Defendant's misrepresentations, Plaintiffs and  
3 those similarly situated have suffered damages, including, without limitation, the amount they  
4 paid for the Fake White Chocolate Chips.

5 90. Defendant's conduct as described herein was willful and malicious and was  
6 designed to maximize Defendant's profits even though Defendant knew that it would cause loss  
7 and harm to Plaintiffs and those similarly situated.

8 **PLAINTIFFS' FOURTH CAUSE OF ACTION**  
9 **(Unfair, Unlawful and Deceptive Trade Practices,**  
10 **Business and Professions Code § 17200, et seq.)**  
11 **On Behalf of Leyton and Miller and the White Chips Class**

12 91. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
13 Complaint as if set forth herein.

14 92. Within four (4) years preceding the filing of this Class Action Complaint, and at  
15 all times mentioned herein, Defendant has engaged, and continue to engage, in unfair, unlawful  
16 and deceptive trade practices in California by engaging in the unfair, deceptive and unlawful  
17 business practices outlined in this Second Amended Class Action Complaint.

18 93. In particular, Defendant has engaged, and continues to engage, in unlawful trade  
19 practices with respect to the White Chips Class by including the word "Chocolate" on the primary  
20 display panel of the Fake White Chocolate Chips without stating that the products are "Imitation,"  
21 "Artificial" and/or "Artificially Flavored," in violation of Cal. Health & Safety Code § 110100(a),  
22 110380, and 110505, which incorporate 21 C.F.R. §§ 101.3, 101.22 and 102.5.

23 94. In addition, Defendant has engaged and continues to continues to engage in unfair,  
24 unlawful and deceptive trade practices with respect to the White Chips Class by, without  
25 limitation, the following:

26 a. deceptively representing to Plaintiffs, and the White  
27 Chips Class, that the Fake White Chocolate Chips were and/or contained chocolate  
28 and/or white chocolate;

b. failing to inform Plaintiffs, and the White Chips Class, that the Fake White

1 Chocolate Chips were not and did not contain chocolate, white chocolate and/or cocoa butter;

2 95. In addition, Defendant has engaged and continues to continues to engage in unfair,  
3 unlawful and deceptive trade practices with respect to the White Chips Class by, without  
4 limitation:

5 a. engaging in fraud, deceit, and misrepresentation as described herein;

6 b. violating the CLRA as described herein;

7 c. violating the FAL as described herein; and

8 d. violating the Sherman Food, Drug and Cosmetic Act, Cal. Health & Saf.

9 Code, including without limitation sections 110300, 110340, 110380, 110385, 110390, 110395,  
10 110398, 110400, 110505, 110660, 110680, 110760, 110765, and/or 110770.

11 96. Plaintiffs and those similarly situated relied to their detriment on Defendant's  
12 unfair, deceptive and/or unlawful business practices. Had Plaintiffs and those similarly situated  
13 been adequately informed and not deceived by Defendant, they would have acted differently by  
14 not purchasing (or paying less for) Defendant's Fake White Chocolate Chips.

15 97. Defendant's acts and omissions are likely to deceive the general public.

16 98. Defendant engaged in these practices to increase its profits. Accordingly,  
17 Defendant has violated section 17200, et seq. of the California Business and Professions Code.

18 99. The aforementioned practices, which Defendant has used to its significant  
19 financial gain, also constitute unlawful competition and provide an unlawful advantage over  
20 Defendant's competitors as well as injury to the general public.

21 100. Plaintiffs seek, on behalf of those similarly situated, full restitution of monies, as  
22 necessary and according to proof, to restore any and all monies acquired by Defendant from  
23 Plaintiffs, the general public, or those similarly situated by means of the unfair and/or deceptive  
24 trade practices complained of herein, plus interest thereon.

25 101. Plaintiffs seek, on behalf of those similarly situated, an injunction to prohibit  
26 Defendant from continuing to engage in the practices complained of herein.

27 102. The acts complained of herein occurred, at least in part, within four (4) years  
28 preceding the filing of this Class Action Complaint.





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- 3. punitive damages, the amount of which is to be determined at trial;  
and
- 4. statutory damages as provided by Civil Code section 1780(b), the amount of which is to be determined at trial.

B. On Causes of Action Number 2 against Defendant and in favor of Plaintiffs and the other members of each Class:

- 1. for restitution pursuant to, without limitation, the California Business & Professions Code §§ 17500, et seq.; and
- 2. for injunctive relief pursuant to, without limitation, the California Business & Professions Code §§ 17500, et seq.;

C. On Cause of Action Number 3 against Defendant and in favor of Plaintiffs and the other members of each Class:

- 1. an award of compensatory damages, the amount of which is to be determined at trial; and
- 2. an award of punitive damages, the amount of which is to be determined at trial.

D. On Causes of Action Number 4 against Defendant and in favor of Plaintiffs and the other members of each Class:

- 1. for restitution pursuant to, without limitation, California Business & Professions Code §§ 17200, et seq.; and
- 2. for injunctive relief pursuant to, without limitation, California Business & Professions Code §§ 17200, et seq.;

E. On all causes of action against Defendant and in favor of Plaintiffs, class members and the general public:

- 1. for reasonable attorneys' fees according to proof pursuant to applicable law (*see, e.g.*, Cal. Civ. Code ¶ 1780(e); Cal. Code Civ. Proc. § 1021.5);
- 2. for costs of suit incurred; and

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3. for such further relief as this Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiffs hereby demand a trial by jury.

Dated: January 15, 2013

**GUTRIDE SAFIER LLP**

/s/Kristen G. Simplicio  
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