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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 ANTHONY BUSO, individually and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 ACH FOOD COMPANIES, INC., a
15 Delaware corporation; and DOES 1
16 through 10, inclusive,

17 Defendants.

Case No. '17CV1872 JAH MDD

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMAND

INTRODUCTION

1
2 1. The average consumer spends a mere 13 seconds making an in-store
3 purchasing decision, or between 10 to 19 seconds for an online purchase.¹ That
4 decision is heavily dependent on a product's packaging, and particularly the package
5 dimensions: "Most of our studies show that 75 to 80 percent of consumers don't even
6 bother to look at any label information, no less the net weight Faced with a large
7 box and a smaller box, both with the same amount of product inside . . . consumers are
8 apt to choose the larger box because they think it's a better value."² This lawsuit
9 charges Defendant with intentionally packaging its Fleischmann's Simply Homemade®
10 Baking Mix products in opaque containers that contain approximately 50% empty
11 space. Consumers, in reliance on the size of the containers, purchased the
12 Fleischmann's Simply Homemade® Baking Mix products, which they would not have
13 purchased had they known that the containers were substantially empty.

14 2. Anthony Buso ("Plaintiff"), individually and on behalf of all others
15 similarly situated, brings this Class Action Complaint for damages, injunctive relief,
16 and any other available legal or equitable remedies, resulting from the unlawful and
17 deceptive actions of ACH Food Companies, Inc. ("Defendant") with respect to the
18 packaging of its Fleischmann's Simply Homemade® Baking Mix products. Plaintiff
19 alleges as follows upon personal knowledge as to himself and his own acts and
20 experiences, and, as to all other matters, upon information and belief, including
21 investigation conducted by his attorneys.

22 3. Plaintiff purchased Defendant's Fleischmann's Simply Homemade®
23

24 ¹ [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-windowdown.html)
25 [20-second-windowdown.html](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-windowdown.html) (citing the Ehrenberg-Bass Institute of Marketing Science's
26 report "Shopping Takes Only Seconds...In-Store and Online").

27 ² [http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/pro-](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm)
28 [duct-packaging/overview/product-packaging-ov.htm](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).

1 Baking Mix Cornbread product in June of 2017 in Poway, California. Plaintiff
2 expected to receive a full container of the Fleischmann's Simply Homemade® Baking
3 Mix Cornbread product, which is packaged in non-transparent containers, as depicted
4 below. Plaintiff was surprised and disappointed when he opened the Fleischmann's
5 Simply Homemade® Baking Mix Cornbread product to discover that the container had
6 more than 50% empty space, or slack-fill. Had Plaintiff known about the slack-fill at
7 the time of purchase, he would not have bought Defendant's product.

8 4. Defendant's conduct violates consumer protection and labeling laws.

9 **JURISDICTION AND VENUE**

10 5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332,
11 because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a
12 member of the putative class is a citizen of a different state than Defendant, and the
13 amount in controversy exceeds the sum or value of \$5,000,000, excluding interest and
14 costs. See 28 U.S.C. § 1332(d)(2).

15 6. The Court has jurisdiction over the state law claims because they form part
16 of the same case or controversy under Article III of the United States Constitution.

17 7. The Court has personal jurisdiction over Defendant because its
18 Fleischmann's Simply Homemade® Baking Mix products are advertised, marketed,
19 distributed and sold through the State of California; Defendant engaged in the
20 wrongdoing alleged in this Complaint throughout the United States, including in the
21 State of California; Defendant is authorized to do business in the State of California;
22 and Defendant has sufficient minimum contacts with the State of California, rendering
23 the exercise of jurisdiction by the Court permissible under traditional notions of fair
24 play and substantial justice. Moreover, Defendant is engaged in substantial activity
25 with the State of California.

26 8. Venue is proper in the United States District Court for the Southern
27 District of California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the
28 events giving rise to the claims occurred within this judicial district, Defendant has

1 marketed and sold the Fleischmann's Simply Homemade® Baking Mix products at
2 issue in this action in this judicial district, and it conducts business within this judicial
3 district. In addition, Plaintiff resides in this judicial district.

4 **PARTIES**

5 9. Plaintiff Anthony Buso is a citizen of the State of California and resides in
6 Poway, California. Plaintiff purchased a Fleischmann's Simply Homemade® Baking
7 Mix Cornbread product for personal consumption during the last four years in Poway,
8 California. Plaintiff purchased the Product in reliance on Defendant's packaging in
9 containers made, formed or filled as to be misleading and containing non-functional
10 slack-fill. Had Plaintiff known the truth about Defendant's misrepresentations, he
11 would not have purchased the Fleischmann's Simply Homemade® Baking Mix
12 Cornbread product.

13 10. Plaintiff is informed and believes, and upon such information and belief
14 alleges, that Defendant ACH Food Companies, Inc. is a Delaware corporation with its
15 principal place of business located in Cordova, Tennessee. Plaintiff is informed and
16 believes, and upon such information and belief alleges, that Defendant, at all times
17 relevant, conducted business in the State of California and within the Southern District
18 of California.

19 11. The true names and capacities of the Defendants sued herein as DOES 1
20 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such
21 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is
22 legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of
23 Court to amend this Complaint to reflect the true names and capacities of the DOE
24 Defendants when such identities become known.

25 12. At all relevant times, each and every Defendant was acting as an agent
26 and/or employee of each of the other Defendants and was acting within the course
27 and/or scope of said agency and/or employment with the full knowledge and consent of
28 each of the Defendants. Each of the acts and/or omissions complained of herein were

1 alleged and made known to, and ratified by, each of the other Defendants (ACH Food
2 Companies, Inc. and DOE Defendants will hereafter collectively be referred to as
3 “Defendant”).

4 **FACTUAL ALLEGATIONS**

5 **California Law Prohibits Non-functional Slack-Fill**

6 13. Many federal and state consumer protection and labeling laws prohibit
7 deceptive packaging and labeling of products and commodities. In California, the Fair
8 Packaging and Labeling Act (“CFPLA”) “is designed to protect purchasers of any
9 commodity within its provisions against deception or misrepresentation. Packages and
10 their labels should enable consumers to obtain accurate information as to the quantity of
11 the contents and should facilitate value comparisons.” (California Business &
12 Professions Code § 12601.)

13 14. In this context, the CFPLA provides: “No container shall be made, formed,
14 or filled as to be misleading. A container that does not allow the consumer to fully view
15 its contents shall be considered to be filled as to be misleading if it contains
16 nonfunctional slack fill.” (California Business & Professions Code § 12606(b).)
17 Section 12606(b) defines “nonfunctional slack fill” as “the empty space in a package
18 that is filled to substantially less than its capacity for reasons other than any one or
19 more of [among other things] the following:

- 20 (1) Protection of the contents of the package.
21 (2) The requirements of machines used for enclosing the contents of the package.
22 (3) Unavoidable product settling during shipping and handling.
23 (4) The need to utilize a larger than required package or container to provide adequate
24 space for the legible presentation of mandatory and necessary labeling information....
25 (5) The fact that the product consists of a commodity that is packaged in a decorative or
26 representational container where the container is part of the presentation of the product
27 and has value that is both significant in proportion to the value of the product and
28 independent of its function to hold the product.

1 (6) An inability to increase the level of fill or to further reduce the size of the
2 package....

3 (7) The product container bears a reasonable relationship to the actual amount of
4 product contained inside, and the dimensions of the actual product container, the
5 product, or the amount of product therein is visible to the consumer at the point of sale,
6 or where obvious secondary use packaging is involved.

7 (8) The dimensions of the product or immediate product container are visible through
8 the exterior packaging....

9 (9) The presence of any headspace within an immediate product container necessary to
10 facilitate the mixing, adding, shaking, or dispensing of liquids or powders by
11 consumers prior to use.

12 (10) The exterior packaging contains a product delivery or dosing device if the device is
13 visible....

14 (11) The exterior packaging or immediate product container is a kit that consists of a
15 system, or multiple components....

16 (12) The exterior packaging of the product is routinely displayed using tester units or
17 demonstrations to consumers in retail stores....

18 (13) The exterior packaging consists of single or multiunit presentation boxes of
19 holiday or gift packages if the purchaser can adequately determine the quantity and
20 sizes of the immediate product container at the point of sale.

21 (14) The exterior packaging is for a combination of one purchased product, together
22 with a free sample or gift, wherein the exterior packaging is necessarily larger than it
23 would otherwise be due to the inclusion of the sample or gift, if the presence of both
24 products and the quantity of each product are clearly and conspicuously disclosed on
25 the exterior packaging.

26 (15) The exterior packaging or immediate product container encloses computer
27 hardware or software designed to serve a particular computer function....” (California
28 Business & Professions Code § 12606(b)(1)-(15).)

1 15. None of the above safe-harbor provisions applies to the Fleischmann's
2 Simply Homemade® Baking Mix products.

3 **Defendant's Products Contain Non Functional Slack-Fill**

4 16. Defendant's Fleischmann's Simply Homemade® Baking Mix products are
5 sold in non-transparent containers.

6 17. Approximately 50% of the interior of the Fleischmann's products
7 containers are comprised of empty space, or non-functional slack fill, as illustrated by
8 the below picture:



1
2 18. Judging from the sizes of the container, a reasonable consumer would
3 expect them to be substantially filled with product. Consumers are misled into believing
4 that they are purchasing substantially more Fleischmann's Simply Homemade® Baking
5 Mix product than they receive.

6 19. There is no functional reason for including more than 50% slack-fill in the
7 Fleischmann's Simply Homemade® Baking Mix products.

8 20. Plaintiff is informed and believes, and upon such information and belief
9 alleges, that consumers have relied upon, and are continuing to rely upon, the size of
10 the Fleischmann's Simply Homemade® Baking Mix product containers as the basis for
11 making purchasing decisions. Consumers believe that the Fleischmann's Simply
12 Homemade® Baking Mix product containers are substantially full because they cannot
13 see the actual contents within the nontransparent container.

14 21. Plaintiff is informed and believes, and upon such information and belief
15 alleges, that Defendant is selling and will continue to sell the Fleischmann's Simply
16 Homemade® Baking Mix products using these blatantly deceptive and misleading
17 slack-filled containers.

18 22. Defendant's packaging and advertising of the Fleischmann's Simply
19 Homemade® Baking Mix products violate the CFPLA, as set forth above.

20 **Plaintiff Relied on Defendant's Misleading and Deceptive Conduct and Was**
21 **Injured as a Result**

22 23. The types of misrepresentations made, as described herein, were
23 considered by Plaintiff and Class Members (as would be considered by a reasonable
24 consumer) when deciding to purchase the Fleischmann's Simply Homemade® Baking
25 Mix products. Reasonable consumers, including Plaintiff and Class Members, attached
26 importance to whether Defendant's Fleischmann's Simply Homemade® Baking Mix
27 products were misbranded, i.e., not legally salable, or capable of legal possession,
28 and/or contain non-functional slack-fill.

1 24. Plaintiff and the Class Members did not know, and had no reason to know,
2 that the Fleischmann’s Simply Homemade® Baking Mix products contained non-
3 functional slack-fill.

4 25. Defendant’s product packaging was a material factor in Plaintiff’s and the
5 Class Members’ decisions to purchase the Fleischmann’s Simply Homemade® Baking
6 Mix products. Based on Defendant’s product packaging, Plaintiff and the Class
7 Members believed that they were getting more Fleischmann’s Simply Homemade®
8 Baking Mix product than was actually being sold. Had Plaintiff known Defendant’s
9 packaging was slack-filled, he would not have bought the slack-filled Fleischmann’s
10 Simply Homemade® Baking Mix Cornbread product.

11 26. Plaintiff and the Class Members paid the full price of the Fleischmann’s
12 Simply Homemade® Baking Mix products and received less Fleischmann’s Simply
13 Homemade® Baking Mix product than they expected due to the non-functional slack-
14 fill in the Fleischmann’s Simply Homemade® Baking Mix products.

15 27. There is no practical reason for the non-functional slack-fill used to
16 package the Fleischmann’s Simply Homemade® Baking Mix products other than to
17 mislead consumers as to the actual volume of the Fleischmann’s Simply Homemade®
18 Baking Mix products being purchased by consumers.

19 28. As a result of Defendant’s misrepresentations, Plaintiff and thousands of
20 others throughout California purchased the Products. Plaintiff and the Class (defined
21 below) have been damaged by Defendant’s deceptive and unfair conduct.

22 **CLASS ACTION ALLEGATIONS**

23 29. Plaintiff brings this action as a class action pursuant to Rule 23 of the
24 Federal Rules of Civil Procedure on behalf of himself and the following class
25 (collectively, the “Class” or “Classes”), defined as:

26 **All California residents who made retail purchases of Fleischmann’s**
27 **products in containers with non-functional slack-fill, as defined by**
28

1 **California Business & Professions Code § 12606, during the applicable**
2 **limitations period up to and including final judgment in this action.**

3 30. The proposed Class excludes current and former officers and directors of
4 Defendant, Members of the immediate families of the officers and directors of
5 Defendant, Defendant's legal representatives, heirs, successors, assigns, and any entity
6 in which it has or has had a controlling interest, and the judicial officer to whom this
7 lawsuit is assigned.

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

10 32. The Fleischmann's Simply Homemade® Baking Mix products sold by
11 Defendant suffer from virtually the same misleading product packaging, labeling and
12 nonfunctional slack-fill.

13 33. Numerosity: This action has been brought and may properly be maintained
14 as a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the Federal
15 Rules of Civil Procedure. While the exact number and identities of other Class
16 Members are unknown to Plaintiff at this time, Plaintiff is informed and believes that
17 there are hundreds of thousands of Members in the Class. Based on sales of the
18 Fleischmann's Simply Homemade® Baking Mix products it is estimated that the Class
19 is composed of more than 10,000 persons. Furthermore, even if subclasses need to be
20 created for these consumers, it is estimated that each subclass would have thousands of
21 Members. The Members of the Class are so numerous that joinder of all Members is
22 impracticable and the disposition of their claims in a class action rather than in
23 individual actions will benefit the parties and the courts.

24 34. Typicality: Plaintiff's claims are typical of the claims of the Members of
25 the Class as all Members of the Class are similarly affected by Defendant's wrongful
26 conduct, as detailed herein.

27 ///

28 ///

1 35. Adequacy: Plaintiff will fairly and adequately protect the interests of the
2 Members of the Class in that he has no interests antagonistic to those of the other
3 Members of the Class. Plaintiff has retained experienced and competent counsel.

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

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

18 i. Whether Defendant labeled, packaged, marketed, advertised and/or
19 sold Fleischmann's Simply Homemade® Baking Mix products to Plaintiff, and
20 those similarly situated, using false, misleading and/or deceptive packaging and
21 labeling;

22 ii. Whether Defendant's actions constitute violations of the CFPLA,
23 California Business & Professions Code § 12601 *et seq.*;

24 iii. Whether Defendant omitted and/or misrepresented material facts in
25 connection with the labeling, packaging, marketing, advertising and/or sale of its
26 Fleischmann's Simply Homemade® Baking Mix products;

1 iv. Whether Defendant’s labeling, packaging, marketing, advertising
2 and/or selling of Fleischmann’s Simply Homemade® Baking Mix products
3 constituted an unfair, unlawful or fraudulent practice;

4 v. Whether Defendant’s packaging of the Fleischmann’s Simply
5 Homemade® Baking Mix products constituted nonfunctional slack-fill;

6 vi. Whether, and to what extent, injunctive relief should be imposed on
7 Defendant to prevent such conduct in the future;

8 vii. Whether the Members of the Class have sustained damages as a
9 result of Defendant’s wrongful conduct;

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

11 ix. Whether Defendant should be enjoined from continuing its unlawful
12 practices.

13 38. The class is readily definable, and prosecution of this action as a Class
14 action will reduce the possibility of repetitious litigation. Plaintiff knows of no
15 difficulty which will be encountered in the management of this litigation which would
16 preclude his maintenance of this matter as a Class action.

17 39. The prerequisites to maintaining a class action for injunctive relief or
18 equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to
19 act on grounds generally applicable to the Class, thereby making appropriate final
20 injunctive or equitable relief with respect to the Class as a whole.

21 40. The prerequisites to maintaining a class action for injunctive relief or
22 equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common
23 to the Class predominate over any questions affecting only individual Members; and a
24 class action is superior to other available methods for fairly and efficiently adjudicating
25 the controversy.

26 41. The prosecution of separate actions by Members of the Class would create
27 a risk of establishing inconsistent rulings and/or incompatible standards of conduct for
28

1 Defendant. Additionally, individual actions may be dispositive of the interest of all
2 Members of the Class, although certain Class Members are not parties to such actions.

3 42. Defendant’s conduct is generally applicable to the Class as a whole and
4 Plaintiff seeks, inter alia, equitable remedies with respect to the Class as a whole. As
5 such, Defendant’s systematic policies and practices make declaratory relief with respect
6 to the Class as a whole appropriate.

7 **CAUSES OF ACTION**

8 **FIRST CAUSE OF ACTION**

9 **VIOLATION OF CALIFORNIA’S CONSUMER LEGAL REMEDIES ACT,**

10 **Cal. Civ. Code § 1750, et seq.**

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

13 44. Plaintiff brings this claim individually and on behalf of the Class for
14 Defendant’s violations of California’s Consumer Legal Remedies Act (“CLRA”), Cal.
15 Civ. Code 1761(d).

16 45. Plaintiff and the Class Members are consumers who purchased the
17 Fleischmann’s Simply Homemade® Baking Mix products for personal, family or
18 household purposes. Plaintiff and the Class Members are “consumers” as that term is
19 defined by the CLRA in Cal. Civ. Code § 1761(d). Plaintiff and the Class Members are
20 not sophisticated experts with independent knowledge of corporate branding, labeling
21 and packaging practices.

22 46. The Fleischmann’s Simply Homemade® Baking Mix products that
23 Plaintiff and other Class Members purchased from Defendant were “goods” within the
24 meaning of Cal. Civ. Code § 1761(a).

25 47. Defendant’s actions, representations, and conduct have violated, and
26 continue to violate the CLRA, because they extend to transactions that intended to
27 result, or which have resulted in, the sale of goods to consumers.

28 ///

1 48. Defendant violated California law because the Fleischmann's Simply
2 Homemade® Baking Mix products are packaged in containers made, formed or filled
3 as to be misleading and which contain non-functional slack-fill, and because they are
4 intentionally packaged to prevent the consumer from being able to fully see their
5 contents.

6 49. California's Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5),
7 prohibits "Misrepresenting that goods or services have sponsorship, approval,
8 characteristics, ingredients, uses, benefits, or quantities which they do not have or that a
9 person has a sponsorship, approval, status, affiliation, or connection which he or she
10 does not have." By engaging in the conduct set forth herein, Defendant violated and
11 continues to violate Section 1770(a)(5) of the CLRA, because Defendant's conduct
12 constitutes unfair methods of competition and unfair or fraudulent acts or practices, in
13 that it misrepresents that the Fleischmann's Simply Homemade® Baking Mix products
14 have quantities they do not have.

15 50. Cal. Civ. Code § 1770(a)(9) further prohibits "[a]dvertising goods or
16 services with intent not to sell them as advertised." By engaging in the conduct set forth
17 herein, Defendant violated and continues to violate Section 1770(a)(9), because
18 Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent
19 acts or practices, in that it advertises goods as containing more product than they in fact
20 contain.

21 51. Plaintiff and the Class Members are not sophisticated experts about
22 corporate branding, labeling and packaging practices. Plaintiff and the Class acted
23 reasonably when they purchased the Fleischmann's Simply Homemade® Baking Mix
24 products based on their belief that Defendant's representations were true and lawful.

25 52. Plaintiff and the Class suffered injuries caused by Defendant because (a)
26 they would not have purchased the Fleischmann's Simply Homemade® Baking Mix
27 products on the same terms absent Defendant's illegal and misleading conduct as set
28 forth herein; (b) they purchased the Fleischmann's Simply Homemade® Baking Mix

1 products due to Defendant’s misrepresentations and deceptive packaging in containers
2 made, formed or filled as to be misleading and containing non-functional slack-fill; and
3 (c) the Fleischmann’s Simply Homemade® Baking Mix products did not have the
4 quantities as promised.

5 53. On or about July 21, 2017, prior to filing this action, Plaintiff sent a CLRA
6 notice letter to Defendant which complies with California Civil Code 1782(a). Plaintiff
7 sent ACH Food Companies, Inc., individually and on behalf of the proposed Class, a
8 letter via Certified Mail, advising Defendant that it is in violation of the CLRA and
9 demanding that it cease and desist from such violations and make full restitution by
10 refunding the monies received therefrom. A true and correct copy of the letter is
11 attached hereto as Exhibit 1.

12 54. Wherefore, Plaintiff seeks injunctive relief for these violations of the
13 CLRA.

14 **SECOND CAUSE OF ACTION**

15 **VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW,**

16 **California Business & Professions Code § 17200, et seq.**

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

19 56. Plaintiff brings this claim individually and on behalf of the Members of the
20 Class for Defendant’s violations of California’s Unfair Competition Law, Cal. Bus. &
21 Prof. Code §§ 17200, et seq.

22 57. The UCL provides, in pertinent part: “Unfair competition shall mean and
23 include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue
24 or misleading advertising...”

25 58. Defendant violated California law because the Fleischmann’s Simply
26 Homemade® Baking Mix products are packaged in containers made, formed or filled
27 as to be misleading and that contain non-functional slack-fill and because they are
28

1 intentionally packaged to prevent the consumer from being able to fully see their
2 contents.

3 **A. “Unlawful” Prong**

4 59. Defendant’s business practices, described herein, violated the “unlawful”
5 prong of the UCL by violating the CFPLA, California Business & Professions Code §
6 12601 *et seq.*

7 60. Specifically, Defendant violated section 12606 of the Business and
8 Professions Code, in that Defendant packaged its Fleischmann’s Simply Homemade®
9 Baking Mix products in non-conforming type containers. Said non-conforming
10 packages contained extra space by volume in the interior of the container. The extra
11 space provided no benefit to the contents of the packaging and misled consumers. In
12 addition, Defendant packaged its Fleischmann’s Simply Homemade® Baking Mix
13 products in containers made, formed, or filled as to be misleading to a potential
14 customer as to the actual size and filling of the package with Defendant’s
15 Fleischmann’s Simply Homemade® Baking Mix products.

16 **B. “Unfair” Prong**

17 61. Defendant’s business practices, described herein, violated the “unfair”
18 prong of the UCL in that its conduct is substantially injurious to consumers, offends
19 public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of
20 the conduct outweighs any alleged benefits. Defendant’s advertising is of no benefit to
21 consumers.

22 **C. “Fraudulent” Prong**

23 62. Defendant violated the “fraudulent” prong of the UCL by misleading
24 Plaintiff and the Class to believe that the Fleischmann’s Simply Homemade® Baking
25 Mix products contained more content than they actually contain and that such
26 packaging and labeling practices were lawful, true and not intended to deceive or
27 mislead consumers.

28 ///

1 63. Plaintiff and the Class Members are not sophisticated experts about the
2 corporate branding, labeling, and packaging practices of the Fleischmann’s Simply
3 Homemade® Baking Mix products. Plaintiff and the Class acted reasonably when they
4 purchased the Fleischmann’s Simply Homemade® Baking Mix products based on their
5 belief that Defendant’s representations were true and lawful.

6 64. Plaintiff and the Class lost money or property as a result of Defendant’s
7 UCL violations because (a) they would not have purchased the Fleischmann’s Simply
8 Homemade® Baking Mix products on the same terms absent Defendant’s illegal
9 conduct as set forth herein, or if the true facts were known concerning Defendant’s
10 representations; (b) they paid a price for the Fleischmann’s Simply Homemade®
11 Baking Mix products due to Defendant’s misrepresentations; and (c) the Fleischmann’s
12 Simply Homemade® Baking Mix products did not have the quantities as represented.

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

19 **THIRD CAUSE OF ACTION**

20 **VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAW,**

21 **California Business & Professions Code § 17500, et seq.**

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

24 67. Plaintiff brings this claim individually and on behalf of the Members of the
25 Class for Defendant’s violations of California’s False Advertising Law (“FAL”), Cal.
26 Bus. & Prof. Code §§ 17500, et seq.

27 68. Under the FAL, the State of California makes it “unlawful for any person
28 to make or disseminate or cause to be made or disseminated before the public in this

1 state in any advertising device . . . or in any other manner or means whatever,
2 including over the Internet, any statement, concerning . . . personal property or services,
3 professional or otherwise, or performance or disposition thereof, which is untrue or
4 misleading and which is known, or which by the exercise of reasonable care should be
5 known, to be untrue or misleading.”

6 69. Defendant engaged in a scheme of offering misbranded Fleischmann’s
7 Simply Homemade® Baking Mix products for sale to Plaintiff and the Class Members
8 by way of packaging the Fleischmann’s Simply Homemade® Baking Mix products in
9 containers made, formed or filled as to be misleading and which contain nonfunctional
10 slack-fill. Such practice misrepresented the content and quantity of the misbranded
11 Fleischmann’s Simply Homemade® Baking Mix products. Defendant’s advertisements
12 were made in California and come within the definition of advertising as contained in
13 Bus. & Prof Code §§ 17500, et seq. in that the product packaging was intended as
14 inducements to purchase Defendant’s Fleischmann’s Simply Homemade® Baking Mix
15 products. Defendant knew its conduct was unauthorized, inaccurate, and misleading.

16 70. Defendant violated California law because the Fleischmann’s Simply
17 Homemade® Baking Mix products are packaged in containers made, formed or filled
18 as to be misleading and which contain non-functional slack-fill and because they are
19 intentionally packaged to prevent the consumer from being able to fully see their
20 contents.

21 71. Defendant violated Section 17500, et seq. by misleading Plaintiff and the
22 Class to believe that the Fleischmann’s Simply Homemade® Baking Mix product
23 packaging contains more Fleischmann’s Simply Homemade® Baking Mix product than
24 it in fact contains, as described herein.

25 72. Defendant knew or should have known, through the exercise of reasonable
26 care that the Fleischmann’s Simply Homemade® Baking Mix products were and
27 continue to be misbranded, and that its representations about the quantities of the
28 Fleischmann’s Simply Homemade® Baking Mix products were untrue and misleading.

1 73. Plaintiff and the Class Members lost money or property as a result of
2 Defendant's FAL violations because (a) they would not have purchased the
3 Fleischmann's Simply Homemade® Baking Mix products on the same terms absent
4 Defendant's illegal conduct as set forth herein, or if the true facts were known
5 concerning Defendant's representations; (b) they paid a price for the Fleischmann's
6 Simply Homemade® Baking Mix products due to Defendant's misrepresentations; and
7 (c) the Fleischmann's Simply Homemade® Baking Mix products did not have the
8 benefits, or quantities as promised, and as a result the class is entitled to monetary and
9 injunctive relief.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays for relief and judgment against Defendant as
12 follows:

13 (A) For an Order certifying the Class pursuant to Federal Rule of Civil
14 Procedure 23, appointing Plaintiff as class representatives, and designating
15 Plaintiff's counsel as counsel for the Class;

16 (B) For an Order declaring that Defendant's conduct violated the CLRA,
17 Cal. Civ. Code § 1750, et seq., and awarding (i) injunctive relief, (ii) costs of
18 suit, and (iii) reasonable attorneys' fees;

19 (C) For an Order declaring that Defendant's conduct violated California's
20 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq., and
21 California's False Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq., and
22 awarding (i) injunctive relief, (ii) actual damages, (iii) prejudgment and post
23 judgment interest; (iv) exemplary and/or punitive damages pursuant to Cal. Civ.
24 Code § 3294, (v) costs of suit, and (iv) reasonable attorneys' fees pursuant to,
25 inter alia, Cal. Code of Civ. Proc § 1021.5;

26 (D) For compensatory damages in amounts to be determined by the Court
27 and/or jury;

28 (E) For prejudgment interest on all amounts awarded;

1 (F) For an order of restitution and all other forms of equitable monetary
2 relief, as pleaded;

3 (G) For injunctive relief as pleaded or as the Court may deem proper;

4 (H) For an Order awarding Plaintiff and the Class their reasonable
5 attorneys' fees and expenses and costs of suit as pleaded; and

6 (I) For such other and further relief as the Court deems just and proper.

7 Date: September 14, 2017

Respectfully submitted,

8 PACIFIC TRIAL ATTORNEYS
9 A Professional Corporation

10 By: /s/Scott J. Ferrell
11 Scott J. Ferrell
12 Attorneys for Plaintiff

DEMAND FOR TRIAL BY JURY

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

Date: September 14, 2017

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS
A Professional Corporation

By: /s/Scott J. Ferrell
Scott J. Ferrell
Attorneys for Plaintiff

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

ANTHONY BUSO, individually and on behalf of all others similarly situated,

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

(c) Attorneys (Firm Name, Address, and Telephone Number) Scott J. Ferrell, Pacific Trial Attorneys, APC 4100 Newport Place Drive, Suite 800, Newport Beach, CA 92660 Telephone: 949-706-6464

DEFENDANTS

ACH FOOD COMPANIES, INC., a Delaware corporation; and DOES 1 through 10, inclusive,

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

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

Attorneys (If Known)

'17CV1872 JAH MDD

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

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

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

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

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

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES.

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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C § 1332(d)(1)(B)
Brief description of cause: Class action complaint for damages and injunctive relief

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 09/13/2017 SIGNATURE OF ATTORNEY OF RECORD /s/Scott J. Ferrell

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT 1



July 21, 2017

SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

ACH Food Companies, Inc.
7171 Goodlett Farms Parkway
Cordova, TN 38016
Attention: Legal Department

Re: Violations of California Civil Code § 1782 et seq.

Ladies and Gentlemen:

This law firm has been retained to prosecute a class action lawsuit against you for violation of the Consumers Legal Remedies Act, California Civil Code § 1750 *et seq.* (“CLRA”). As relevant here, the CLRA prohibits unfair and unlawful methods of competition and unfair business practices. This includes packaging products in containers containing non-functional slack-fill or empty space.

As shown below, you have packaged your products in containers containing non-functional slack-fill or empty space. This amounts to a clear, ongoing, and unequivocal violation of the CLRA. Accordingly, you are liable to my client and to the putative class for substantial monetary damages. This letter serves as notice and demand for corrective action within thirty (30) days as further described below.

1. My Client Purchased A Product Containing Non-Functional Slack-Fill.

My client recently purchased Fleischmann’s Simply Homemade Cornbread Baking Mix in a large, opaque cardboard box. Upon opening the box, my client learned that the box contained significant empty space or “slack-fill”; indeed, the package was over fifty percent (50%) empty.¹ It appears that you have intentionally packaged this product in non-transparent containers with non-functional slack fill; this allows you to increase sales, charge a premium price, and unfairly capture market share.

¹ Upon request, we can provide you with photographic evidence of the packaging disparity.

ACH Food Companies, Inc.
July 21, 2017
Page 2



2. My Client and Each Class Member Are Entitled to Statutory Minimum Damages of \$1,000.00 Per Violation From You.

“The CLRA allows for restitutionary and injunctive relief, as well as compensatory and punitive damages and attorney fees.” *Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th 912, 923–924, 90 Cal. Rptr. 3d 225 (2009). Under the CLRA, “in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000).” Cal. Civ. Code § 1780(a)(1). Thus, if you are found liable for violations of the CLRA, at a minimum, the class would be entitled to damages of \$1,000 for each violation. See *Pickman v. American Exp. Co.*, No. C 11-05326 WHA, 2012 WL 258842, at *2 (N.D. Cal. Jan. 27, 2012).

3. Conclusion

We respectfully request on behalf of our client and the class that you (1) cease and desist from continued sale any products containing non-functional slack-fill; (2) initiate corrective action; and (3) refund the purchase price of all products. If you decline we intend to file a class action lawsuit upon expiration of the aforesaid thirty (30) day period. If you believe that any of the assertions in this letter are inaccurate or would like to discuss a confidential pre-filing resolution of this case, I urge you to retain counsel to contact me.

Sincerely,

A handwritten signature in black ink that reads 'Scott J. Ferrell'.

Scott J. Ferrell, Esq.
For Pacific Trial Attorneys
A National Litigation Firm

SJF/mkj

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Consumer Claims ACH Food Slack Fills Fleischmann's Simply Homemade Baking Mix](#)
