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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 JUST BORN, INC., a Pennsylvania
15 corporation; and DOES 1 through 10,
16 inclusive,

17 Defendants.

Case No. '17CV1630 JAH JMA

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMAND

INTRODUCTION

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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 “Mike and Ike Original Fruits”
10 product in opaque containers that contain approximately 30% empty space.
11 Consumers, in reliance on the size of the containers, purchased the Mike and Ike
12 product, which they would not have purchased had they known that the containers were
13 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 Just Born, Inc. (“Defendant” or “Just Born”) with respect to the
18 packaging of its Mike and Ike Original Fruits product. Plaintiff alleges as follows upon
19 personal knowledge as to himself and his own acts and experiences, and, as to all other
20 matters, upon information and belief, including investigation conducted by his
21 attorneys.

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24 ¹ [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-
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
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 this judicial district, and it conducts business within this judicial district. In addition,
2 Plaintiff resides in this judicial district.

3 **PARTIES**

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

11 10. Plaintiff is informed and believes, and upon such information and belief
12 alleges, that Defendant Just Born, Inc. is a Pennsylvania corporation with its principal
13 place of business located in Bethlehem, Pennsylvania. Plaintiff is informed and
14 believes, and upon such information and belief alleges, that Defendant, at all times
15 relevant, conducted business in the State of California and within the Southern District
16 of California.

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

23 12. At all relevant times, each and every Defendant was acting as an agent
24 and/or employee of each of the other Defendants and was acting within the course
25 and/or scope of said agency and/or employment with the full knowledge and consent of
26 each of the Defendants. Each of the acts and/or omissions complained of herein were
27 alleged and made known to, and ratified by, each of the other Defendants (Just Born,
28 Inc. and DOE Defendants will hereafter collectively be referred to as "Defendant").

1 **FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

27 15. None of the above safe-harbor provisions applies to the Mike and Ike
28 Original Fruits product. Defendant intentionally incorporated non-functional slack-fill

1 in its packaging of the Mike and Ike Original Fruits product in order to mislead
2 consumers, including Plaintiff and Members of the Class.

3 **Defendant’s Product Contains Non Functional Slack-Fill**

4 16. Defendant’s Mike and Ike Original Fruits product is sold in non-
5 transparent containers. The containers have significant slack-fill, as described below.

6 17. Approximately 30% of the interior of the Mike and Ike Original Fruits
7 container, which concerns the product purchased by Plaintiff, is comprised of empty
8 space, or non-functional slack fill.



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12 18. Judging from the sizes of the container, a reasonable consumer would
13 expect them to be substantially filled with product. Consumers are misled into believing
14 that they are purchasing substantially more Mike and Ike Original Fruits product than
15 they receive.

16 19. There is no functional reason for including more than 30% slack-fill in the
17 Mike and Ike Original Fruits product.

18 20. Plaintiff is informed and believes, and upon such information and belief
19 alleges, that consumers have relied upon, and are continuing to rely upon, the size of
20 the Mike and Ike Original Fruits product containers as the basis for making purchasing
21 decisions. Consumers believe that the Mike and Ike Original Fruits product containers
22 are substantially full because they cannot see the actual contents within the
23 nontransparent container.

24 21. Plaintiff is informed and believes, and upon such information and belief
25 alleges, that Defendant is selling and will continue to sell the Mike and Ike Original
26 Fruits products using these blatantly deceptive and misleading slack-filled containers.

27 22. Defendant's packaging and advertising of the Mike and Ike Original Fruits
28 products violate the CFPLA, as set forth above.

1 **Plaintiff Relied on Defendant’s Misleading and Deceptive Conduct and Was**
2 **Injured as a Result**

3 23. The types of misrepresentations made, as described herein, were
4 considered by Plaintiff and Class Members (as would be considered by a reasonable
5 consumer) when deciding to purchase the Mike and Ike Original Fruits product.
6 Reasonable consumers, including Plaintiff and Class Members, attached importance to
7 whether Defendant’s Mike and Ike Original Fruits products were misbranded, i.e., not
8 legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

9 24. Plaintiff and the Class Members did not know, and had no reason to know,
10 that the Mike and Ike Original Fruits product contained non-functional slack-fill.

11 25. Defendant’s product packaging was a material factor in Plaintiff’s and the
12 Class Members’ decisions to purchase the Mike and Ike Original Fruits product. Based
13 on Defendant’s product packaging, Plaintiff and the Class Members believed that they
14 were getting more Mike and Ike Original Fruits product than was actually being sold.
15 Had Plaintiff known Defendant’s packaging was slack-filled, he would not have bought
16 the slack-filled Mike and Ike Original Fruits product.

17 26. Plaintiff and the Class Members paid the full price of the Mike and Ike
18 Original Fruits product and received less Mike and Ike Original Fruits product than
19 they expected due to the non-functional slack-fill in the Mike and Ike Original Fruits
20 products.

21 27. There is no practical reason for the non-functional slack-fill used to
22 package the Mike and Ike Original Fruits products other than to mislead consumers as
23 to the actual volume of the Mike and Ike Original Fruits products being purchased by
24 consumers.

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

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CLASS ACTION ALLEGATIONS

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

5 **All California residents who made retail purchases of Mike and Ike**
6 **products in containers with non-functional slack-fill, during the applicable**
7 **limitations period up to and including final judgment in this action.**

8 30. The proposed Class excludes current and former officers and directors of
9 Defendant, Members of the immediate families of the officers and directors of
10 Defendant, Defendant’s legal representatives, heirs, successors, assigns, and any entity
11 in which it has or has had a controlling interest, and the judicial officer to whom this
12 lawsuit is assigned.

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

15 32. The Mike and Ike Original Fruits products sold by Defendant suffer from
16 virtually the same misleading product bottling, labeling and nonfunctional slack-fill.

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

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

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

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

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

- 21 i. Whether Defendant labeled, packaged, marketed, advertised and/or
22 sold Mike and Ike Original Fruits products to Plaintiff, and those similarly
23 situated, using false, misleading and/or deceptive packaging and labeling;
- 24 ii. Whether Defendant's actions constitute violations of the CFPLA,
25 California Business & Professions Code § 12601 *et seq.*;
- 26 iii. Whether Defendant omitted and/or misrepresented material facts in
27 connection with the labeling, packaging, marketing, advertising and/or sale of its
28 Mike and Ike Original Fruits products;

1 iv. Whether Defendant’s labeling, packaging, marketing, advertising
2 and/or selling of Mike and Ike Original Fruits products constituted an unfair,
3 unlawful or fraudulent practice;

4 v. Whether Defendant’s packaging of the Mike and Ike Original Fruits
5 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 Mike
17 and Ike Original Fruits product for personal, family or household purposes. Plaintiff
18 and the Class Members are “consumers” as that term is defined by the CLRA in Cal.
19 Civ. Code § 1761(d). Plaintiff and the Class Members are not sophisticated experts with
20 independent knowledge of corporate branding, labeling and packaging practices.

21 46. The Mike and Ike Original Fruits products that Plaintiff and other Class
22 Members purchased from Defendant were “goods” within the meaning of Cal. Civ.
23 Code § 1761(a).

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

27 48. Defendant violated California law because the Mike and Ike Original
28 Fruits products are packaged in containers made, formed or filled as to be misleading

1 and which contain non-functional slack-fill, and because they are intentionally
2 packaged to prevent the consumer from being able to fully see their contents.

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

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

18 51. Plaintiff and the Class Members are not sophisticated experts about
19 corporate branding, labeling and packaging practices. Plaintiff and the Class acted
20 reasonably when they purchased the Mike and Ike Original Fruits products based on
21 their belief that Defendant's representations were true and lawful.

22 52. Plaintiff and the Class suffered injuries caused by Defendant because (a)
23 they would not have purchased the Mike and Ike Original Fruits products on the same
24 terms absent Defendant's illegal and misleading conduct as set forth herein; (b) they
25 purchased the Mike and Ike Original Fruits products due to Defendant's
26 misrepresentations and deceptive packaging in containers made, formed or filled as to
27 be misleading and containing non-functional slack-fill; and (c) the Mike and Ike
28 Original Fruits products did not have the quantities as promised.

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

8 54. Wherefore, Plaintiff seeks injunctive relief for these violations of the
9 CLRA.

10 **SECOND CAUSE OF ACTION**

11 **VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW,**
12 **California Business & Professions Code § 17200, et seq.**

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

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

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

21 58. Defendant violated California law because the Mike and Ike Original
22 Fruits products are packaged in containers made, formed or filled as to be misleading
23 and that contain non-functional slack-fill and because they are intentionally packaged to
24 prevent the consumer from being able to fully see their contents.

25 **A. “Unlawful” Prong**

26 59. Defendant’s business practices, described herein, violated the “unlawful”
27 prong of the UCL by violating the CFPLA, California Business & Professions Code §
28 12601 *et seq.*

1 price for the Mike and Ike Original Fruits products due to Defendant’s
2 misrepresentations; and (c) the Mike and Ike Original Fruits products did not have the
3 quantities as represented.

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

10 **THIRD CAUSE OF ACTION**

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

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

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

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

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

25 69. Defendant engaged in a scheme of offering misbranded Mike and Ike
26 Original Fruits products for sale to Plaintiff and the Class Members by way of
27 packaging the Mike and Ike Original Fruits products in containers made, formed or
28 filled as to be misleading and which contain nonfunctional slack-fill. Such practice

1 misrepresented the content and quantity of the misbranded Mike and Ike Original Fruits
2 products. Defendant’s advertisements were made in California and come within the
3 definition of advertising as contained in Bus. & Prof Code §§ 17500, et seq. in that the
4 product packaging was intended as inducements to purchase Defendant’s Mike and Ike
5 Original Fruits products. Defendant knew its conduct was unauthorized, inaccurate, and
6 misleading.

7 70. Defendant violated California law because the Mike and Ike Original
8 Fruits products are packaged in containers made, formed or filled as to be misleading
9 and which contain non-functional slack-fill and because they are intentionally packaged
10 to prevent the consumer from being able to fully see their contents.

11 71. Defendant violated Section 17500, et seq. by misleading Plaintiff and the
12 Class to believe that the Mike and Ike Original Fruits product packaging contains more
13 Mike and Ike Original Fruits product than it in fact contains, as described herein.

14 72. Defendant knew or should have known, through the exercise of reasonable
15 care that the Mike and Ike Original Fruits products were and continue to be
16 misbranded, and that its representations about the quantities of the Mike and Ike
17 Original Fruits products were untrue and misleading.

18 73. Plaintiff and the Class Members lost money or property as a result of
19 Defendant’s FAL violations because (a) they would not have purchased the Mike and
20 Ike Original Fruits products on the same terms absent Defendant’s illegal conduct as set
21 forth herein, or if the true facts were known concerning Defendant’s representations;
22 (b) they paid a price for the Mike and Ike Original Fruits products due to Defendant’s
23 misrepresentations; and (c) the Mike and Ike Original Fruits products did not have the
24 benefits, or quantities as promised, and as a result the class is entitled to monetary and
25 injunctive relief.

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PRAYER FOR RELIEF

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

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

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

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

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

(E) For prejudgment interest on all amounts awarded;

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

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

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

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

Date: August 11, 2017

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS
A Professional Corporation

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

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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: August 11, 2017

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS
A Professional Corporation

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

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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: August 11, 2017

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS
A Professional Corporation

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

EXHIBIT 1



April 21, 2017

SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Just Born, Inc.

Attention: Legal Department

1300 Stefko Boulevard

Bethlehem, PA 18017-6672

Re: Violations of California Civil Code § 1782 and Cal. Civ. Code § 1750 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 by Just Born, Inc. (“Mike & Ike”) pursuant to the California Civil Code § 1782. We hereby demand that you take immediate corrective action within thirty (30) days as further described below.

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

My client recently purchased a 5 ounce package of Mike & Ike Original Fruits (the “Product”), packaged in a large, opaque container. Upon opening the package, my client learned that the Product contained significant empty space or “slack-fill”; indeed, as shown in the attached picture, the package was thirty (30%) empty. Mike & Ike intentionally packed its product in non-transparent containers with non-functional

4100 NEWPORT PLACE DRIVE, SUITE 800 NEWPORT BEACH, CA 92660

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slack-fill; this constitutes an unfair and unlawful business practice that must be stopped. This conduct allows Mike & Ike to increase its sales, charge a premium price for its product, and capture market share from its competitors.

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). In addition, even if our client and the putative class recover actual damages instead of statutory minimum damages, given the sheer number of purchasers of Mike & Ike Products, the damages liability will surely be substantial. *Morales v. Conopco, Inc.*, No. 2:13-2213 WBS EFB, 2016 WL 6094504, at *5 (E.D. Cal. Oct. 18, 2016) (granting final approval of class action settlement totaling \$3.25 million even though “Defendant’s line of products only cost several dollars, and plaintiffs’ analysis found the premium paid for a “Naturals” product was approximately sixty-eight cents per product.”).

3. Conclusion

We respectfully request on behalf of our client and the class that, within thirty (30) days, Mike & Ike (1) cease and desist from continued sale of all Mike & Ike Product containing non-functional slack-fill; (2) initiate corrective action; and (3) refund the purchase price of all misrepresented Mike & Ike Product purchased by the class, plus reimbursement for interest. Please comply with this demand within thirty (30) days from receipt of this letter. If not, please be advised that we intend to file a class action lawsuit upon expiration of the aforesaid thirty (30) day period.

Additionally, this letter serves as notice to Mike & Ike of its duty to preserve and retain all documents, tangible items, and electronically stored information that is potentially relevant to this matter.

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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 and contact Pacific Trial Attorney's Managing Partner, David Reid, immediately. Mr. Reid can be reached by telephone in the office at (949) 706-6464 or by email at dreid@pacifictrialattorneys.com.

Sincerely,

A handwritten signature in black ink that reads 'Scott Ferrell'. The signature is written in a cursive style with a large, prominent 'S' and 'F'.

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

SJF/mkj

LOCKER CODE INSIDE FOR A THREE GAME SWEET STREAK!  **NBA 2K17**

MILK & MIKE[®]

BRAND

ORIGINAL FRUITS

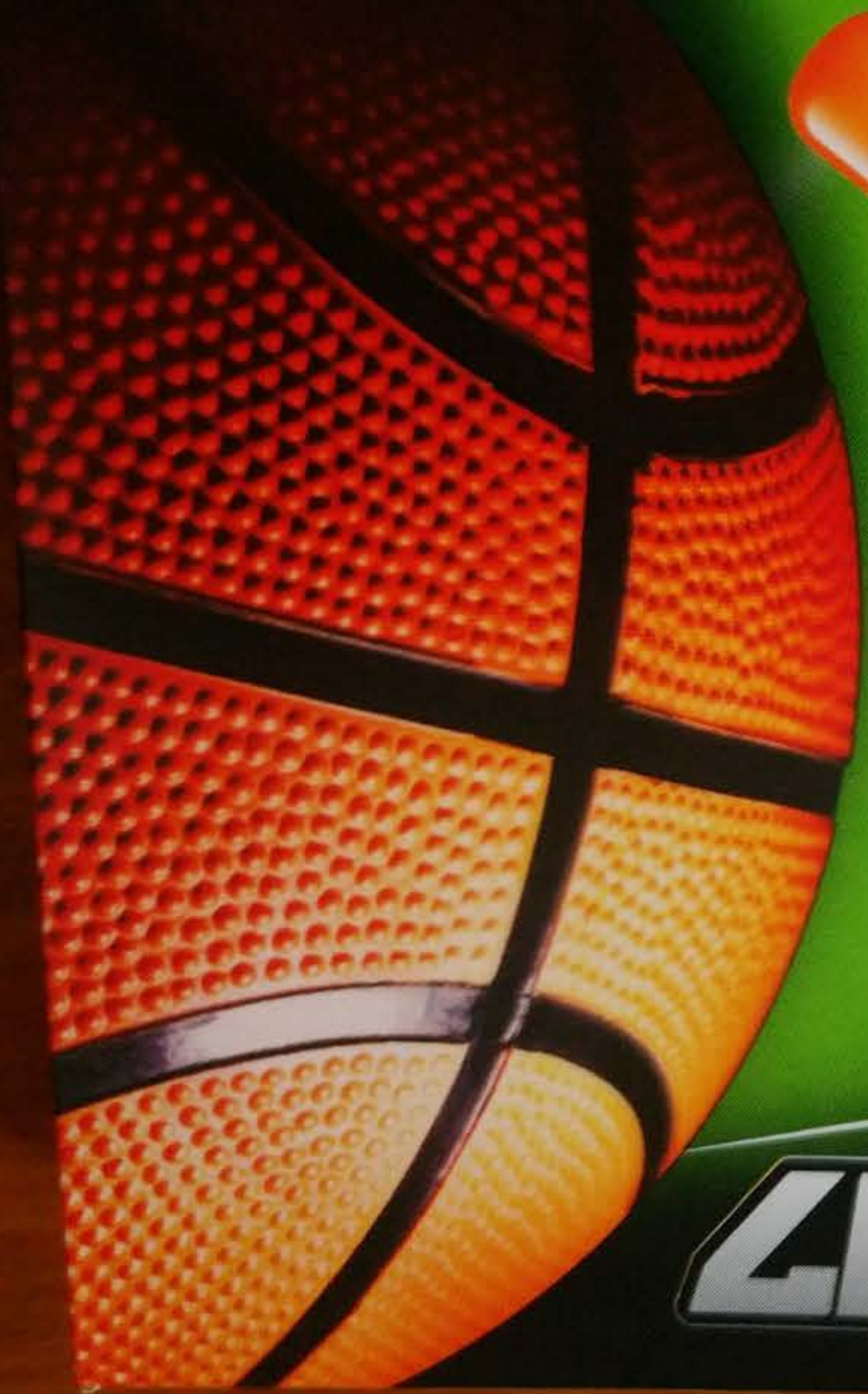
Chewy Assorted Fruit Flavored Candies

150
CALORIES
PER SERVING

3.5 SERVINGS
PER PACKAGE

NET WT 5.0 OZ (141g)

NATURALLY & ARTIFICIALLY FLAVORED



-  Cherry
-  Lemon
-  Strawberry
-  Lime
-  Orange

Mike and Ike

ORIGINAL FRUITS BRAND

LOCKER CODE INSIDE FOR A THREE GAME SWEET STREAK!



NBA 2K LOCKER CODE PRINTED INSIDE THE PACK TO BE USED DIRECTLY IN GAME FOR A THREE GAME PLAYER ATTRIBUTE BOOST. REDEEM TODAY!

THIS LOCKER CODE IS VALID FROM FEBRUARY 1, 2017 AT 12:01 AM PT TO SEPTEMBER 15, 2017 AT 11:59 PM PT.

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Satisfaction Guarantee
Quality candy is our family tradition. If you are not satisfied with the quality of this product, please save the unused portion and package. Contact us at 1-888-MIKEIKE M-F 9AM-5PM E.S.T. or www.mikeandike.com

Nutrition Facts

Serving Size 1.5 oz (42g/about 1/4 cup)
Servings Per Container about 3.5

Amount Per Serving	
Calories 150	Calories from Fat 0
	% Daily Value*
Total Fat 0g	0%
Saturated Fat 0g	0%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 30mg	1%
Total Carbohydrate 37g	12%
Sugars 26g	
Protein 0g	

Not a significant source of Fiber, Vitamin A, Vitamin C, Calcium, and Iron.

*Percent Daily Values are based on a 2,000 calorie diet.

INGREDIENTS: SUGAR, CORN SYRUP, MODIFIED FOOD STARCH, FRUIT JUICE FROM CONCENTRATE (PEAR, ORANGE, STRAWBERRY, CHERRY, LIME, LEMON), CONTAINS LESS THAN 2% OF THE FOLLOWING: CITRIC ACID, MALIC ACID, PIMARIC ACID, SODIUM CITRATE, NATURAL AND ARTIFICIAL FLAVORS, DEXTRIN, CONFECTIONERS GLAZE, CARNAUBA WAX, MEDIUM CHAIN TRIGLYCERIDES, RED #40, YELLOW #5 (TARTRAZINE), YELLOW #6, BLUE #1. GLUTEN FREE

©2016 JUST BORN, INC., BETHLEHEM, PA 18017 U.S.A.

Per Serving (about 1/4 cup)

CALORIES 150	SAT FAT 0g 0% DV	SODIUM 30mg 1% DV	SUGARS 26g
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PERCENT DV IS BASED ON A 2,000 CALORIE DIET



MIKEANDIKE.COM

A great candy isn't made... It's JUST BORN®

1004081



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)

DEFENDANTS JUST BORN, INC., a Pennsylvania 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) '17CV1630 JAH JMA

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) PTF DEF Citizen of This State 1 1 Incorporated or Principal Place of Business In This State Citizen of Another State 2 2 Incorporated and Principal Place of Business In Another State Citizen or Subject of a Foreign Country 3 3 Foreign Nation 4 4 5 5 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) CONTRACT 110 Insurance 120 Marine 130 Miller Act 140 Negotiable Instrument 150 Recovery of Overpayment & Enforcement of Judgment 151 Medicare Act 152 Recovery of Defaulted Student Loans (Excludes Veterans) 153 Recovery of Overpayment of Veteran's Benefits 160 Stockholders' Suits 190 Other Contract 195 Contract Product Liability 196 Franchise REAL PROPERTY 210 Land Condemnation 220 Foreclosure 230 Rent Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property TORTS PERSONAL INJURY 310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury 362 Personal Injury - Medical Malpractice 365 Personal Injury - Product Liability 367 Health Care/Pharmaceutical Personal Injury Product Liability 368 Asbestos Personal Injury Product Liability 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability LABOR 710 Fair Labor Standards Act 720 Labor/Management Relations 740 Railway Labor Act 751 Family and Medical Leave Act 790 Other Labor Litigation 791 Employee Retirement Income Security Act FORFEITURE/PENALTY 625 Drug Related Seizure of Property 21 USC 881 690 Other BANKRUPTCY 422 Appeal 28 USC 158 423 Withdrawal 28 USC 157 LABOR SOCIAL SECURITY 861 HIA (1395ff) 862 Black Lung (923) 863 DIWC/DIWW (405(g)) 864 SSID Title XVI 865 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS—Third Party 26 USC 7609 OTHER STATUTES 375 False Claims Act 376 Qui Tam (31 USC 3729(a)) 400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commerce 460 Deportation 470 Racketeer Influenced and Corrupt Organizations 480 Consumer Credit 490 Cable/Sat TV 850 Securities/Commodities/Exchange 890 Other Statutory Actions 891 Agricultural Acts 893 Environmental Matters 895 Freedom of Information Act 896 Arbitration 899 Administrative Procedure Act/Review or Appeal of Agency Decision 950 Constitutionality of State 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 08/11/2017 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.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Mike and Ike Maker Just Born, Inc. Hit with Slack-Fill Class Action](#)
