

1 PACIFIC TRIAL ATTORNEYS
A Professional Corporation
2 Scott J. Ferrell, Bar No. 202091
sferrell@pacifictrialattorneys.com
3 Victoria C. Knowles, Bar No. 277231
vknowles@pacifictrialattorneys.com
4 4100 Newport Place Drive, Ste. 800
Newport Beach, CA 92660
5 Tel: (949) 706-6464
Fax: (949) 706-6469

Electronically FILED by
Superior Court of California,
County of Los Angeles
10/12/2023 11:57 PM
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6 Attorneys for Plaintiff
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

11 HENRY KOUYOUMDJIAN, individually and on
12 behalf of all others similarly situated,

Case No. **23STCV24993**

13 Plaintiffs,

CLASS ACTION COMPLAINT

14 v.

15 TENDER & TRUE PET NUTRITION, LLC, a
16 Nebraska limited liability corporation,

17 Defendant.
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INTRODUCTION

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2 1. Defendant TENDER & TRUE PET NUTRITION, LLC (“Defendant”) manufactures
3 and sells the popular line of cat food (the “Product”) throughout California. To increase profits at the
4 expense of consumers and fair competition, Defendant deceptively sells its products in oversized
5 packaging that does not reasonably inform consumers that they are nearly half empty. In short,
6 Defendant dupes unsuspecting consumers across America to pay premium prices for empty space.

7 2. Defendant markets the Product in a systematically misleading manner by representing it
8 as adequately filled when, in fact, it contains an unlawful amount of empty space or “slack-fill.”
9 Defendant underfills the Product for no lawful reason.

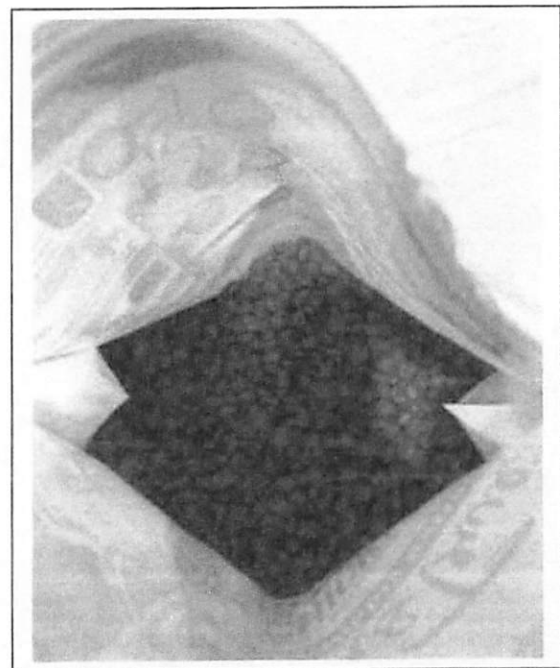
10 3. Defendant underfills the Product to save money (by not filling the containers) and to
11 deceive consumers into purchasing the Product over its competitors’ products. Defendant’s slack-fill
12 scheme not only harms consumers, but it also harms its competitors who have implemented labeling
13 changes designed to alert consumers to the true amount of product in each container.

14 4. Plaintiff and consumers have, accordingly, suffered injury in fact caused by the false,
15 unfair, deceptive, unlawful, and misleading practices set forth herein, and seek injunctive relief, as
16 well as, inter alia, compensatory damages, statutory damages, restitution, and attorneys’ fees.

17 5. Several state and federal courts have found that cases involving nearly identical claims
18 are meritorious and appropriate for class treatment. *See, e.g., Winkelbauer v. Orgain Mgmt. et. al*, Case
19 No. 20STCV44583 (L.A.S.C. May 20, 2021) (defendant’s demurrer to claims involving slack-filled
20 protein powder products overruled); *Barrett v. Optimum Nutrition*, Case No. 2:21-cv-04398-DMG-SK
21 (C.D. Cal. Jan. 12, 2022) (defendant’s FRCP 12(b)(6) motion to dismiss slack-filled protein powder
22 claims denied); *Padilla v. The Whitewave Foods Co., et. al.*, Case No. 2:18-cv-09327-JAK-JC (C.D.
23 Cal. July 26, 2019) (defendant’s FRCP 12(b)(6) motion to dismiss slack-filled supplement container
24 claims denied); *Matic v. United States Nutrition, Inc.*, Case No. 2:18-cv-09592-PSG-AFM (C.D. Cal.
25 Mar. 27, 2019) (defendant’s FRCP 12(b)(6) motion to dismiss slack-filled supplement container claims
26 denied); *Merry, et al. v. International Coffee & Tea, LLC dba The Coffee Bean*, Case No.
27 CIVDS1920749 (San Bernardino Superior Court Jan. 27, 2020) (defendant’s demurrer to slack-filled
28 powder container claims overruled); *Coleman v. Mondelez Int’l Inc.*, Case No. 2:20-cv-08100-FMO-

1 AFM (C.D. Cal. July 26, 2021) (defendant's FRCP 12(b)(6) motion to dismiss slack-filled Swedish
2 Fish® candy box claims denied); *Iglesias v. Ferrara Candy Co.*, Case No. 3:17-cv-00849-VC (N.D.
3 Cal. July 25, 2017) (defendant's FRCP 12(b)(6) motion to dismiss slack-filled Jujufruits® and
4 Lemonhead® candy box claims denied and nationwide settlement class certified) (cert. granted Oct.
5 31, 2018); *Tsuchiyama v. Taste of Nature, Inc.*, Case No. BC651252 (L.A.S.C. Feb. 28, 2018)
6 (defendant's motion for judgment on the pleadings involving slack-filled Cookie Dough Bites® candy
7 box claims denied and nationwide settlement subsequently certified through Missouri court); *Gordon*
8 *v. Tootsie Roll Industries, Inc.*, Case No. 2:17-cv-02664-DSF-MRW (C.D. Cal. Oct. 4, 2017)
9 (defendant's FRCP 12(b)(6) motions to dismiss slack-filled Junior Mints® and Sugar Babies® candy
10 box claims denied); *Escobar v. Just Born, Inc.*, Case No. 2:17-cv-01826-BRO-PJW (C.D. Cal. June
11 12, 2017) (defendant's FRCP 12(b)(6) motion to dismiss slack-filled Mike N' Ike® and Hot Tamales®
12 candy box claims denied, and California class action certified over opposition) (cert. granted June 19,
13 2019); *Thomas v. Nestle USA, Inc.*, Cal. Sup. Case No. BC649863 (April 29, 2020) (certifying as a
14 class action, over opposition, slack-fill claims brought under California consumer protection laws).

15 6. The below pictures illustrate the deceptive nature of the packaging and the substantial
16 non-functional slack fill inside the Product:



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PARTIES

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7. Plaintiff is a resident of California. Within the class period, Plaintiff purchased the Product for household use. In making the purchase, Plaintiff relied upon the opaque packaging, including the size of the container and product label, which was prepared and approved by Defendant and its agents and disseminated statewide, as well as designed to encourage consumers like Plaintiff to purchase the Product. Plaintiff understood the size of the container and product label to indicate that the amount of product contained therein was commensurate with the size of the container, and would not have purchased the Product, or would not have paid a price premium for the Product, had he known that the size of the container and product label were false and misleading. If the Product's packaging and labels were not misleading, then Plaintiff would purchase the Product in the future. Plaintiff intends to purchase the Product in the future but cannot reasonably do so without an injunctive relief order from the Court ensuring Defendant's packaging, labeling, and filling of the Product is accurate and lawful, at which point he will reasonably be able to rely upon Defendant's representations about the Product.

8. Defendant is a Nebraska limited liability company with its principal place of business located in Omaha, Nebraska. Defendant, directly and through its agents, conducts business nationwide. Defendant has substantial contacts with and receives substantial benefits and income from and through the State of California. Defendant is the owner, manufacturer, and distributor of the Product, and is the company that created and/or authorized the false, misleading, and deceptive packaging for the Product.

9. In committing the wrongful acts alleged herein, Defendant planned and participated in and furthered a common scheme by means of false, misleading, and deceptive representations to induce members of the public to purchase the Product. Defendant participated in the making of such representations in that it did disseminate or cause to be disseminated said misrepresentations.

10. Defendant, upon becoming involved with the manufacture, advertising, and sale of the Product, knew or should have known that its advertising of the Product's packaging, specifically by representing that they were full, was false, deceptive, and misleading. Defendant affirmatively misrepresented the amount of product contained in the packaging in order to convince the public and consumers of the Product to purchase the Product, resulting in profits to Defendant and damage and detriment of the consuming public.

1 11. Defendant has created and still perpetuates a falsehood that Product's packaging
2 contains an amount of product commensurate with the size of the box, though they actually contain
3 nonfunctional, unlawful slack-fill. As a result, Defendant's consistent and uniform advertising claims
4 about the Product are false, misleading, and/or likely to deceive in violation of California packaging
5 and advertising laws.

6 **JURISDICTION AND VENUE**

7 12. As a court of general jurisdiction, this Court has jurisdiction over all claims presented
8 to it.

9 13. Venue is proper in this County because the Defendant does not reside in this state,
10 meaning that venue is proper in any county that Plaintiff selects.

11 14. Defendant is subject to personal jurisdiction in California based upon sufficient
12 minimum contacts which exist between Defendant and California. Defendant is authorized to do and is
13 doing business in California.

14 **FACTUAL BACKGROUND**

15 15. The amount of product inside any product packaging is material to any consumer
16 seeking to purchase that product. The average consumer spends only 13 seconds deciding whether to
17 make an in-store purchase;¹ this decision is heavily dependent on a product's packaging, including the
18 package dimensions. Research has demonstrated that packages that seem larger are more likely to be
19 purchased because consumers expect package size to accurately represent the quantity of the good
20 being purchased².

21 16. Accordingly, Defendant chose a certain size container for its Product to convey to
22 consumers that they are receiving a certain and substantial amount of product commensurate with the
23 size of the container. Such representations constitute an express warranty regarding the Product's
24 content.

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26 ¹ Randall Beard, *Make the Most of Your Brand's 20-Second Window*, NIELSEN, Jan. 13, 2015,
27 <https://www.nielsen.com/insights/2015/make-the-most-of-your-brands-20-second-window/> (last
visited September 2023).

28 ² P. Raghubir & A. Krishna, *Vital Dimensions in Volume Perception: Can the Eye Fool the Stomach?*,
36 J. MARKETING RESEARCH 313-326 (1999).

1 17. Slack-fill is the difference between the actual capacity of a container and the volume of
2 product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less
3 than its capacity for illegitimate or unlawful reasons.

4 18. Defendant falsely represents the quantity of product in each of the Product's opaque
5 containers through its packaging. The size of each container leads the reasonable consumer to believe
6 he or she is purchasing a container full of cat food when, in reality, they are actually receiving
7 significantly less than what is represented by the size of the container.

8 19. Even if Plaintiff and other reasonable consumers of the Product had a reasonable
9 opportunity to review, prior to the point of sale, other representations of quantity, such as net weight,
10 they did not and would not have reasonably understood or expected such representations to translate to
11 a quantity of product meaningfully different from their expectation of an amount of product with the
12 size of the container.

13 20. Prior to the point of sale, the Product's packaging does not allow for a visual or audial
14 confirmation of the contents of the Product. The Product's opaque packaging prevents a consumer
15 from observing the contents before opening. Even if a reasonable consumer were to "shake" the
16 Product before opening the container, the reasonable consumer would not be able to discern the
17 presence of any nonfunctional slack-fill, let alone the significant amount of nonfunctional slack-fill
18 that is present in the Product.

19 21. The other information that Defendant provides about the quantity of product on the
20 front and back labels of the Product does not enable reasonable consumers to form any meaningful
21 understanding about how to gauge the quantity of contents of the Product as compared to the size of
22 the container itself. For instance, the front of the Product's packaging does not have any labels that
23 would provide Plaintiff with any meaningful insight as to the amount of product to be expected, such
24 as a fill line.

25 22. Disclosures of net weight and serving sizes in ounces, pounds, or grams do not allow
26 the reasonable consumer to make any meaningful conclusions about the quantity of product contained
27 in the containers that would be different from their expectation that the quantity of product is
28 commensurate with the size of the container.

1 23. Plaintiff would not have purchased the Product had he known that the Product
2 contained slack-fill that serves no functional or lawful purpose.

3 **None of the Slack-Fill Statutory Exceptions Apply to the Product**

4 24. Pursuant to 21 C.F.R. § 100.100, “a food shall be deemed to be misbranded if its
5 container is so made, formed, or filled as to be misleading.” An opaque container “shall be considered
6 to be filled as to be misleading if it contains nonfunctional slack-fill.” *Id.* Nonfunctional slack-fill is
7 empty space within packaging that is filled to less than its capacity for reasons other than provided for
8 in the enumerated slack fill exceptions.

9 **A. 21 C.F.R. 100.10(a)(1) – Protection of the Contents**

10 25. The slack-fill in the Product’s containers does not protect the contents of the packages.
11 In fact, there is no need to protect the Product with the slack-fill present.

12 **B. 21 C.F.R. 100.100(a)(2) – Requirements of the Machines**

13 26. The machines used to package the Products would not be affected if there was more
14 product added. At most, a simple recalibration of the machines would be required. Upon information
15 and belief, adjusting these machines is rather simple.

16 27. Because the packages are filled to less than half of their capacity, Defendant can
17 increase the Product’s fill level significantly without affecting how the containers are sealed, or it can
18 disclose the fill-level on the outside labeling to inform consumers of the amount of product actually in
19 the container, consistent with the law.

20 **C. 21 C.F.R. 100.100(a)(3) – Settling During Shipping and Handling**

21 28. The slack-fill present in the Product’s containers is not a result of the product settling
22 during shipping and handling. Given the Product’s density, shape, and composition, any settling
23 occurs immediately at the point of fill. No measurable product settling occurs during subsequent
24 shipping and handling.

25 29. Even if *some* product settling may occur, there is no reason why the Product’s
26 containers are more than half empty, when competitor products are filled nearly 90% full.

27 **D. 21 C.F.R. 100.100(a)(4) – Specific Function of Package**

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1 30. The packages do not perform a specific function that necessitates the slack-fill. This
2 safe harbor would only apply if a specific function were “inherent to the nature of the food and []
3 clearly communicated to consumers.” The packages do not perform a function that is inherent to the
4 nature of the food. Defendant did not communicate a specific function to consumers, making this
5 provision inapplicable.

6 **E. 21 C.F.R. 100.100(a)(5) – Reusable Container**

7 31. The Product’s packaging is not reusable or of any significant value to the Product
8 independent of its function to hold the product. The Product’s containers are intended to be discarded
9 immediately after the product is used.

10 **F. 21 C.F.R. 100.100(a)(6) – Inability to Increase Fill or Decrease Container Size**

11 32. The slack-fill present in the Product’s containers does not accommodate required
12 labeling, discourage pilfering, facilitate handling, or prevent tampering.

13 33. Defendant can easily increase the quantity of product in each container (or,
14 alternatively, decrease the size of the containers) significantly.

15 34. Because none of the safe harbor provisions apply to the Product’s packaging, the
16 packages contain nonfunctional slack-fill in violation of 21 C.F.R. 100.100 and are, therefore, filled as
17 to be misleading. Plaintiff shall proffer expert testimony to establish these facts once this case reaches
18 the merits more definitively.

19 35. Defendant’s false, deceptive, and misleading label statements are unlawful under state
20 consumer protection and packaging laws.

21 36. Defendant’s misleading and deceptive practices proximately caused harm to Plaintiff
22 and the Class – i.e. spend more money than they would have otherwise spent had they known the
23 extent of the Product’s non-functional slack-fill.

24 **CLASS ACTION ALLEGATIONS**

25 37. Plaintiff brings this action on her own behalf and on behalf of all other persons
26 similarly situated. The Class which Plaintiff seeks to represent comprises:

27 **All persons who purchased the Product in California for personal use during the four**
28 **years prior to the filing of this Complaint to the present (the “Class”).**

1 38. The Class is comprised of thousands of persons. The Class is so numerous that joinder
2 of all members is impracticable and the disposition of their claims in a class action will benefit the
3 parties and the Court.

4 39. Common questions of law and fact exist as to all Class members and predominate over
5 questions affecting only individual Class members. Common questions of law and fact include, but are
6 not limited to, the following:

- 7 a. The true nature and amount of product contained in each Product's packaging;
- 8 b. Whether the marketing, advertising, packaging, labeling, and other promotional
9 materials for the Product are deceptive;
- 10 c. Whether Defendant misrepresented that the Product's packaging complied with
11 California slack-fill regulations and statutes;
- 12 d. Whether the Product contains nonfunctional slack-fill in violation of 21 C.F.R. §
13 100.100, *et seq.*;
- 14 e. Whether Defendant's conduct is an unlawful business act or practice within the
15 meaning of Business and Professions Code § 17200, *et seq.*;
- 16 f. Whether Defendant's conduct is an unfair business act or practice within the meaning
17 of Business and Professions Code § 17200, *et seq.*;
- 18 g. Whether Defendant's advertising is untrue or misleading within the meaning of
19 Business and Professions Code § 17500, *et seq.*;
- 20 h. Whether Defendant made false and misleading representations in its advertising and
21 labeling of the Product;
- 22 i. Whether Defendant knew or should have known that the misrepresentations were false;
- 23 j. Whether Plaintiff and the Class paid more money for the Product than they actually
24 received;
- 25 k. How much more money Plaintiff and the Class paid for the Product than they actually
26 received; and
- 27 l. Whether Defendant was unjustly enriched at the expense of Plaintiff and the Class
28 members.

1 40. Plaintiff's claims are typical of the claims of the proposed Class, as the representations
2 and omissions made by Defendant are uniform and consistent and are contained on packaging and
3 labeling that was seen and relied on by Plaintiff and members of the Class.

4 41. Plaintiff will fairly and adequately represent and protect the interests of the proposed
5 Class. Plaintiff has retained competent and experienced counsel in class action and other complex
6 litigation.

7 42. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
8 Defendant's false, deceptive, and misleading representations. Plaintiff purchased the Product because
9 of the size of the container and the product labels, which he believed to be indicative of the amount of
10 product contained therein as commensurate with the size of the container. Plaintiff relied on
11 Defendant's representations and would not have purchased the Product if he had known that the
12 packaging, labeling, and advertising as described herein was false and misleading.

13 43. The Class is identifiable and readily ascertainable. Notice can be provided to such
14 purchasers using techniques and a form of notice similar to those customarily used in class actions and
15 by Internet publication, radio, newspapers, and magazines.

16 44. A class action is superior to other available methods for fair and efficient adjudication
17 of this controversy. The expense and burden of individual litigation would make it impracticable or
18 impossible for the Class to prosecute their claims individually. The trial and the litigation of Plaintiff's
19 claims are manageable. Individual litigation of the legal and factual issues raised by Defendant's
20 conduct would increase delay and expense to all parties and the court system. The class action device
21 presents far fewer management difficulties and provides the benefits of a single, uniform adjudication,
22 economies of scale, and comprehensive supervision by a single court.

23 45. Defendant has acted on grounds generally applicable to the entire Class, thereby
24 making final injunctive relief and/or corresponding declaratory relief appropriate with respect to the
25 Class as a whole. The prosecution of separate actions by individual Class members would create the
26 risk of inconsistent or varying adjudications with respect to individual members of the Class that
27 would establish incompatible standards of conduct for Defendant.

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1 46. Absent a class action, Defendant will likely retain the benefits of its wrongdoing.
2 Because of the small size of the individual Class members' claims, few, if any, Class members could
3 afford to seek legal redress for the wrongs complained of herein. Absent a representative action, the
4 Class members will continue to suffer losses and Defendant will be allowed to continue these
5 violations of law and to retain the proceeds of its ill-gotten gains.

6 **FIRST CAUSE OF ACTION**

7 **VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW**

8 **BUSINESS & PROFESSIONS CODE § 17200, *et seq.***

9 47. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and
10 incorporate the same as if set forth herein at length.

11 48. Plaintiff brings this claim individually and on behalf of the Class.

12 49. Congress passed the Federal Food, Drug, and Cosmetic Act ("FDCA"), and in so doing
13 established the Federal Food and Drug Administration ("FDA") to "promote the public health" by
14 ensuring that "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393.

15 50. The FDA has implemented regulations to achieve this objective. *See, e.g.*, 21 C.F.R. §
16 101.1 *et seq.*

17 51. The legislature of California has incorporated 21 C.F.R. Section 100.100, which
18 prohibits nonfunctional slack-fill, into the State's Business & Professions Code § 12606.2, *et seq.*

19 52. The FDA enforces the FDCA and accompanying regulations; "[t]here is no private right
20 of action under the FDCA." *Ivie v. Kraft Foods Global, Inc.*, 2013 U.S. Dist. LEXIS 25615, 2013 WL
21 685372, at *1 (internal citations omitted).

22 53. The California Sherman Food, Drug, and Cosmetic Act ("Sherman Law"), Cal. Health
23 & Safety Code Section 109875 *et seq.*, has adopted wholesale the food labeling requirements of the
24 FDCA and NLEA as the food regulations of California. Cal. Health & Safety Code § 110100.

25 54. The Sherman Law declares any food to be misbranded if it is false or misleading or if
26 the labeling does not conform with the requirements for nutrition labeling set forth in certain
27 provisions of the NLEA. Cal. Health & Safety Code §§ 110660, 110665, 110670.

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1 55. The UCL prohibits “any unlawful [or] unfair... business act or practice.” Cal. Bus &
2 Prof. Code § 17200.

3 **A. “Unfair Prong”**

4 56. Under California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, a
5 challenged activity is “unfair” when “any injury it causes outweighs any benefits provided to
6 consumers and the injury is one that the consumers themselves could not reasonably avoid.” *Camacho*
7 *v. Auto Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

8 57. Defendant’s actions alleged herein do not confer any benefit to consumers.

9 58. Defendant’s actions alleged herein cause injuries to consumers, who do not receive a
10 quantity of Product commensurate with their reasonable expectations.

11 59. Defendant’s actions alleged herein cause injuries to consumers, who do not receive a
12 level of product commensurate with their reasonable expectations.

13 60. Defendant’s actions alleged herein cause injuries to consumers, who end up overpaying
14 for the Product and receiving a quantity of product less than what they expected to receive.

15 61. Consumers cannot avoid any of the injuries caused by Defendant’s actions as alleged
16 herein.

17 62. Accordingly, the injuries caused by Defendant’s conduct alleged herein outweigh any
18 benefits.

19 63. Some courts conduct a balancing test to decide if a challenged activity amounts to
20 unfair conduct under California Business & Professions Code § 17200. They “weigh the utility of the
21 defendant’s conduct against the gravity of the harm to the alleged victim.” *Davis v. HSBC Bank*
22 *Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

23 64. Here, Defendant’s challenged conduct of has no utility and financially harms
24 purchasers. Thus, the utility of Defendant’s conduct is vastly outweighed by the gravity of harm.

25 65. Some courts require that “unfairness must be tethered to some legislative declared
26 policy or proof of some actual or threatened impact on competition.” *Lozano v. AT&T Wireless Servs.*
27 *Inc.*, 504 F. 3d 718, 735 (9th Cir. 2007).
28

1 66. The California legislature maintains a declared policy of prohibiting nonfunctional
2 slack-fill in consumer goods, as reflected in California Business & Professions Code § 12606.2 and
3 Cal. Health & Safety Code § 110100.

4 67. The significant nonfunctional slack-fill contained in the Product is tethered to a
5 legislative policy declared in California according to Cal. Business & Professions Code § 12606.2 and
6 Cal. Health & Safety Code § 110100.

7 68. Defendant's packaging of the Product, as alleged herein, is false, deceptive, misleading,
8 and unreasonable, and constitutes unfair conduct.

9 69. Defendant knew or should have known of its unfair conduct.

10 70. As alleged in the preceding paragraphs, the misrepresentations by Defendant detailed
11 above constitute an unfair business practice within the meaning of California Business & Professions
12 Code § 17200.

13 71. There existed reasonably available alternatives to further Defendant's legitimate
14 business interests other than the conduct described herein. Defendant could have used packaging
15 appropriate for the amount of product contained within the Product or Defendant could have filled the
16 Product significantly more to meet consumers' reasonable expectations based on the size of the
17 Product packaging.

18 72. All of Defendant's conduct alleged herein occurs and continues to occur in Defendant's
19 business. Defendant's unfair conduct is part of a pattern or generalized course of conduct repeated on
20 thousands of occasions daily.

21 73. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
22 Defendant's unfair conduct. Plaintiff paid an unwarranted premium for the Product. Specifically,
23 Plaintiff paid for product never received. Plaintiff would not have purchased the Product if Plaintiff
24 had known that the Product's packaging contained nonfunctional slack-fill.

25 **B. "Unlawful" Prong**

26 74. California Business & Professions Code § 17200, *et seq.*, identifies violations of other
27 laws as "unlawful practices that the unfair competition law makes independently actionable."
28 *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

1 75. Defendant's packaging of the Product, as alleged in the preceding paragraphs, violates
2 California Civil Code § 1750, *et. seq.*, California Business & Professions Code § 17500, *et. seq.*, and
3 21 C.F.R § 100.100.

4 76. Defendant's packaging of the Product, as alleged herein, is false, deceptive, misleading,
5 and unreasonable, and constitutes unlawful conduct.

6 77. Defendant knew or should have known of its unlawful conduct.

7 78. As alleged herein, the misrepresentations by Defendant detailed above constitute an
8 unlawful business practice within the meaning of California Business & Professions Code § 17200.

9 79. There were reasonably available alternatives to further Defendant's legitimate business
10 interests other than the conduct described herein. Defendant could have either used packaging
11 appropriate for the amount of product contained therein or indicated the actual contents with a clear
12 and conspicuous fill line.

13 80. All of the conduct alleged herein occurred and continues to occur in Defendant's
14 business. Defendant's unlawful conduct is part of a pattern or generalized course of conduct repeated
15 on thousands of occasions daily.

16 81. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
17 Defendant's unlawful conduct. Plaintiff paid an unwarranted premium for the Product. Specifically,
18 Plaintiff paid for product never received. Plaintiff would not have purchased the Product if Plaintiff
19 had known that the packaging contained nonfunctional slack-fill.

20 82. As a result of the conduct described herein, Plaintiff and members of the Class,
21 pursuant to section 17203, are entitled to an order enjoining such future wrongful conduct on the part
22 of Defendant and such other orders and judgments that may be necessary to disgorge Defendant's ill-
23 gotten gains and to restore to any person in interest any money paid for the Product as a result of the
24 wrongful conduct of Defendant.

25 83. Plaintiff and members of the Class are entitled to equitable relief as no adequate remedy
26 at law exists.

27 a. The applicable limitations period is four years for claims brought under the UCL,
28 which is one year longer than the applicable statute of limitations under the FAL and

1 CLRA. Thus, class members who purchased the Product between 3 and 4 years prior to
2 the filing of the complaint will be barred from the Class if equitable relief were not
3 granted under the UCL.

4 b. The scope of actionable misconduct under the unfair prong of the UCL is broader than
5 the other causes of action asserted herein to include, for example, the overall unfair
6 marketing scheme of underfilling the Product's packaging. Thus, Plaintiff and class
7 members may be entitled to restitution under the UCL, while not entitled to damages
8 under other causes of action asserted herein (e.g., the FAL requires actual or
9 constructive knowledge of the falsity; the CLRA is limited to certain types of plaintiffs
10 (an individual who seeks or acquires, by purchase or lease, any goods or services for
11 personal, family, or household purposes) and certain statutorily enumerated conduct).

12 c. Injunctive relief is appropriate on behalf of Plaintiff and members of the Class because
13 Defendant continues to deceptively underfill the Product's packaging. Injunctive relief
14 is necessary to prevent Defendant from continuing to engage in this unfair and/or
15 unlawful conduct described herein and to prevent future harm—none of which can be
16 achieved through available legal remedies. Further, injunctive relief, in the form of
17 packaging or label modifications, is necessary to dispel public misperception about the
18 Product that has resulted from years of Defendant's unlawful marketing efforts. Such
19 modifications could include, but are not limited to, shrinking the packaging, adding
20 more product to the packaging, or adding a fill line on the front label. Such relief is not
21 available through a legal remedy, as monetary damages may be awarded to remedy past
22 harm (i.e., purchasers who have been misled), while injunctive relief is necessary to
23 remedy future harm (i.e., prevent future purchasers from being misled), under the
24 current circumstances where the dollar amount of future damages is not reasonably
25 ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the
26 damages caused by Defendant's future harm (e.g., the dollar amount that Plaintiff and
27 Class members will pay for the underfilled Product), rendering injunctive relief a
28 necessary remedy.

1 84. Pursuant to Civil Code § 3287(a), Plaintiffs and the Class are further entitled to
2 prejudgment interest as a direct and proximate result of Defendant's unfair and unlawful business
3 conduct. The amount on which interest is to be calculated is a sum certain and capable of calculation,
4 and Plaintiff and the Class are entitled to interest in an amount according to proof.

5 **SECOND CAUSE OF ACTION**

6 **FALSE AND MISLEADING ADVERTISING IN VIOLATION OF**
7 **BUSINESS & PROFESSIONS CODE § 17500, *et seq.***

8 85. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and
9 incorporate the same as if set forth herein at length.

10 86. Plaintiff brings this claim individually and on behalf of the Class.

11 87. California's False Advertising Law, California Business and Professions Code Section
12 17500, *et seq.*, makes it "unlawful for any person to make or disseminate or cause to be made or
13 disseminated before the public in this state, in any advertising device or in any other manner or means
14 whatever, including over the Internet, any statement, concerning personal property or services,
15 professional or otherwise, or performance or disposition thereof, which is untrue or misleading and
16 which is known, or which by the exercise of reasonable care should be known, to be untrue or
17 misleading."

18 88. Defendant knowingly manipulated the physical dimensions of the Product's containers,
19 or stated another way, under-filled the amount of product in the Product, as a means to mislead the
20 public about the amount of product contained in each package.

21 89. Defendant controlled the packaging of the Product. It knew or should have known,
22 through the exercise of reasonable care, that its representations about the quantity of product contained
23 in the Product were untrue and misleading.

24 90. Defendant's action of packaging the Product with nonfunctional slack-fill, instead of
25 including more product in the container or decreasing the size of the container, is likely to deceive the
26 general public.

27 91. Defendant's actions were false and misleading, such that the general public is and was
28 likely to be deceived, in violation of Section 17500.

1 92. As a direct and proximate result of Defendant's conduct alleged herein in violation of
2 the FAL, Plaintiff and members of the Class, pursuant to Section 17535, are entitled to an order of this
3 Court enjoining such future wrongful conduct on the part of Defendant and requiring Defendant to
4 disclose the true nature of its misrepresentations.

5 93. Plaintiff and members of the Class are entitled to equitable relief as no adequate remedy
6 at law exists.

7 a. The scope of permissible plaintiffs under the FAL is broader than the CLRA to include,
8 for example, individuals or entities who purchased the Product for nonpersonal, non-
9 family, and non-household purposes. Thus, Plaintiff and class members may be entitled
10 to restitution under the FAL, while not entitled to damages under the CLRA

11 b. Injunctive relief is appropriate on behalf of Plaintiff and members of the Class because
12 Defendant continues to deceptively underfill the Product's packaging. Injunctive relief
13 is necessary to prevent Defendant from continuing to engage in the unlawful conduct
14 described herein and to prevent future harm—none of which can be achieved through
15 available legal remedies. Further, injunctive relief, in the form of packaging or label
16 modifications, is necessary to dispel public misperception about the Product that has
17 resulted from years of Defendant's unfair and unlawful marketing efforts. Such
18 modifications would include, but are not limited to, shrinking the packaging, adding
19 more product to the packaging, or adding a fill line the front label. Such relief is also
20 not available through a legal remedy as monetary damages may be awarded to remedy
21 past harm (i.e., purchasers who have been misled), while injunctive relief is necessary
22 to remedy future harm (i.e., prevent future purchasers from being misled), under the
23 current circumstances where the dollar amount of future damages is not reasonably
24 ascertainable at this time. Plaintiff is, currently, unable to accurately quantify the
25 damages caused by Defendant's future harm (e.g., the dollar amount that Plaintiff and
26 Class members overpay for the underfilled Products), rendering injunctive relief a
27 necessary remedy.
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1 94. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
 2 Defendant’s false representations. Plaintiff purchased the Product in reliance upon the claims by
 3 Defendant that the Product was of the quantity represented by Defendant’s packaging and advertising.
 4 Plaintiff would not have purchased the Product if Plaintiff had known that the packaging and labeling
 5 as alleged herein were false.

6 95. Plaintiff and members of the Class also request an order requiring Defendant disgorge
 7 its ill-gotten gains and/or award full restitution of all monies wrongfully acquired by Defendant by
 8 means of such acts of false advertising, plus interests and attorneys’ fees.

9 **THIRD CAUSE OF ACTION**

10 **VIOLATION OF CALIFORNIA CONSUMERS LEGAL REMEDIES ACT,**

11 **CALIFORNIA CIVIL CODE § 1750, et seq.**

12 96. Plaintiff repeats and re-alleges the allegations set forth in the preceding paragraphs and
 13 incorporate the same as if set forth herein at length.

14 97. The CLRA prohibits certain “unfair methods of competition and unfair or deceptive
 15 acts or practices” in connection with a sale of goods.

16 98. The practices described herein, specifically Defendant’s packaging, advertising, and
 17 sale of the Product, were intended to result and did result in the sale of the Product to the consuming
 18 public and violated and continue to violate sections 1770(a)(2), 1770(a)(5), 1770(a)(7), and 1770(a)(9)
 19 of the CLRA by: (1) misrepresenting the approval of the Product as compliant with 21 C.F.R §
 20 100.100 and the Sherman Law; (2) representing the Product has characteristics and quantities that it
 21 does not have; (3) advertising and packaging the Product with intent not to sell it as advertised and
 22 packaged; and (4) representing that the Product has been supplied in accordance with a previous
 23 representation as to the quantity of product contained within each container, when it has not.

24 99. Defendant deceived and continues to deceive Plaintiff and the Class by representing
 25 that the Product’s packaging, which includes significant nonfunctional slack-fill, actually conforms to
 26 federal and California slack-fill regulations and statutes including the Sherman Law and 21 C.F.R. §
 27 100.100.

28

1 100. Defendant packaged the Product in containers that contain significant nonfunctional
2 slack-fill and made material misrepresentations to deceive Plaintiff and the Class.

3 101. Defendant deceived Plaintiff and the Class by misrepresenting the Product as having
4 characteristics and quantities which it does not have, e.g., that the Product is free of nonfunctional
5 slack-fill when it is not. In doing so, Defendant intentionally misrepresented and concealed material
6 facts from Plaintiff and the Class. Said misrepresentations and concealment were done with the
7 intention of deceiving Plaintiff and the Class and depriving them of their legal rights and money.

8 102. Defendant deceived Plaintiff and the Class by packaging and advertising the Product
9 with intent not to sell it as advertised and by intentionally underfilling the Product's containers and
10 replacing product with nonfunctional slack-fill. In doing so, Defendant intentionally misrepresented
11 and concealed material facts from Plaintiff and the Class. Said misrepresentations and concealment
12 were done with the intention of deceiving Plaintiff and the Class and depriving them of their legal
13 rights and money.

14 103. Defendant deceived Plaintiff and the Class by representing that the Product was
15 supplied in accordance with an accurate representation as to the quantity of product contained therein
16 when they were not. Defendant presented the physical dimensions of the Product's packaging to
17 Plaintiff and the Class before the point of purchase and gave Plaintiff and the Class a reasonable
18 expectation that the quantity of product contained therein would be commensurate with the size of the
19 packaging. In doing so, Defendant intentionally misrepresented and concealed material facts from
20 Plaintiff and the Class. Said misrepresentations and concealment were done with the intention of
21 deceiving Plaintiff and the Class and depriving them of their legal rights and money.

22 104. Defendant knew or should have known, through the exercise of reasonable care, that
23 the Product's packaging was misleading.

24 105. Defendant's packaging of the Product was a material factor in Plaintiff's and the
25 Class's decisions to purchase the Product. Based on Defendant's packaging of the Product, Plaintiff
26 and the Class reasonably believed that they were getting more product than they actually received. Had
27 they known the truth of the matter, Plaintiff and the Class would not have purchased the Product.

28

1 106. Plaintiff and the Class have suffered injury in fact and have lost money as a result of
2 Defendant's unfair and unlawful conduct. Specifically, Plaintiff paid for product he never received.
3 Plaintiff would not have purchased the Product had he known the container contained nonfunctional
4 slack-fill.

5 107. Plaintiff respectfully requests that the Court enjoin Defendant from continuing to
6 employ the unlawful methods, acts, and practices alleged herein pursuant to section 1780(a)(2). In
7 addition, Defendant should be compelled to provide restitution and damages to consumers who paid
8 for Product that are not what they expected to receive due to Defendant's misrepresentations.

9 108. Plaintiff and members of the Class are entitled to equitable relief as no adequate remedy
10 at law exists. Injunctive relief is appropriate on behalf of Plaintiff and members of the Class because
11 Defendant continues to deceptively underfill the Product's packaging. Injunctive relief is necessary to
12 prevent Defendant from continuing to engage in the unlawful conduct described herein and to prevent
13 future harm – none of which can be achieved through available legal remedies. Further, injunctive
14 relief, in the form of packaging or label modifications, is necessary to dispel public misperception
15 about the Product that has resulted from years of Defendant's unfair and unlawful marketing efforts.
16 Such modifications would include, but are not limited to, shrinking the packaging, adding more
17 product to the packaging, or adding a fill line on the front label. Such relief is also not available
18 through a legal remedy as monetary damages may be awarded to remedy past harm (i.e., purchasers
19 who have been misled), while injunctive relief is necessary to remedy future harm (i.e., prevent future
20 purchasers from being misled), under the current circumstances where the dollar amount of future
21 damages is not reasonably ascertainable at this time. Plaintiff is, currently, unable to accurately
22 quantify the damages caused by Defendant's future harm (e.g., the dollar amount that Plaintiff and
23 Class members overpay for the underfilled Product), rendering injunctive relief a necessary remedy.

24 109. Plaintiff provided the requisite pre-filing notice in accordance with the CLRA.
25 Defendant did not respond.

26 PRAYER FOR RELIEF


27 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays for
28 judgment and relief on all causes of action as follows:

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- A. An Order certifying the Class, appointing Plaintiff as class representative, and designating Plaintiff's counsel as counsel for the Class;
- B. An order enjoining Defendant from continuing to package and/or label the Product as challenged herein;
- C. Damages against Defendant in an amount to be determined at trial, together with pre- and post- judgement interest at the maximum rate allowable by law on any amounts awarded;
- D. Restitution and/or disgorgement in an amount to be determined at trial;
- E. Reasonable attorneys' fees and costs; and
- F. Granting such other and further as may be just and proper.

Dated: October 12, 2023

PACIFIC TRIAL ATTORNEYS, APC

By: 

Scott. J. Ferrell
Attorneys for Plaintiff

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Certain Bags of Tender & True Dry Cat Food Sold Nearly Half Empty, Class Action Alleges](#)
