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Darren Clevenger, David Bloom and the Classes

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF ORANGE

DARREN CLEVENGER and DAVID BLOOM on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WELCH FOODS INC., A COOPERATIVE; PIM BRANDS, INC., formerly THE PROMOTION IN MOTION COMPANIES, INC., a Delaware Corporation; and DOES 1 through 25, inclusive,

Defendants.

CASE NO. 30-2022-01298406-CU-BT-CXC

FIRST AMENDED CLASS ACTION COMPLAINT FOR:

Violation of Cal. Unfair Competition, Cal. Business & Professions Code §17200, *et seq.*

Assigned for All Purposes
Judge Randall J. Sherman
Dept. CX105

Plaintiffs Darren Clevenger and David R. Bloom ("Plaintiffs"), by and through their attorneys, DiVincenzo Schoenfield Stein and Lanza & Smith, PLC, bring this amended class action complaint on behalf themselves and all others similarly situated (the "Classes"), alleging facts related to their own purchases based on personal knowledge and all other facts based upon the investigation of counsel.

NATURE OF THE ACTION

1. This is re-filing of *Darren Clevenger v. Welch Foods Inc., et al.,* Orange County Superior Court case No. 30-2020-01145532-CU-BT-CXC, previously filed on June 29, 2020 and assigned to Hon. William D. Claster, Dept. CX-104. As explained in the "Procedural History" section, below, on September 24, 2020, Defendants removed the original case, which alleged both CLRA and UCL violations, to federal district court. After litigating the case for two years in federal court, which included surviving multiple motions to dismiss, and *certifying the case as a class action*, Defendants successfully moved to have the UCL claim (the one previously removed asserting federal jurisdiction) dismissed for lack of federal jurisdiction. The federal court issued an Order on December 14, 2022, dismissing the UCL count for lack of jurisdiction, *not* on the merits, and expressly granting Plaintiffs and the class the right to re-file these claims in state court. The UCL claims are Plaintiffs' primary claims. Based on the history of the case, the UCL claims will relate back to the original filing of the complaint in this Court on June 29, 2020.

2. This is a consumer protection class action arising from Defendants' practice of "slack-filling" boxes of their Welch's® Reduced Sugar Fruit Snacks, Fruit 'n Yogurt™ Snacks, and certain boxes of Welch's® Fruit Snacks. The practice of using oversized containers with substantial, nonfunctional, empty space inside them is called "slack-fill" and is illegal under California and federal law. Both federal and California laws have long prohibited nonfunctional slack-fills for food containers. Although the legislative and administrative basis and policies behind the law are based, in part, on findings that this practice misleads consumers to believe they are

receiving a greater quantity of the food than is in the package (even if the quantity or weight is accurately displayed on the label), Plaintiffs' claims are based solely on the grounds that Defendants' conduct is unlawful and unfair. Plaintiffs do **not** assert any claims based on misrepresentation.

3. For products sold to retailers such as grocery stores and mass market stores like Target, Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n Yogurt™ boxes contain eight pouches of snacks, compared to ten larger pouches in the same size boxes of other flavors of Welch's® Fruit Snacks. The boxes of Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n Yogurt™ Snacks thus contain substantial nonfunctional slack-fill compared to other flavors of Welch's® Fruit Snacks. In those boxes, Welch's® includes two more (sometimes four more) larger sized pouches and with as much as 44% more content by volume. Defendants have slack-filled Welch's® Fruit Snacks in other ways, including reducing the weight of the pouches for certain flavors of Fruit Snacks and, during the class period, using a 15% larger box packed with the exact same snack content.

4. Additionally, Defendants manufacture and package Welch's® Fruit Snacks for sale at Costco in a box containing ninety .8 oz. pouches (previously eighty .9 oz. pouches), but Plaintiffs' expert determined Defendants could package thirteen more pouches (approximately 15% more) in the same box.

5. By violating federal and California slack-fill laws, Defendants' products are deemed "misbranded" and cannot legally be sold in interstate commerce. Defendants' violations of state and federal laws violate the unlawful and unfair prongs of California's Unfair Competition Law (Bus & Prof. Code §17200, *et seq*.) ("UCL"), for which Plaintiffs assert claims for unlawful and unfair practices only; they do *not* assert claims for deceptive or fraudulent practices under the UCL.

PARTIES

6. Plaintiff Darren Clevenger ("Clevenger") is, and at all relevant times was, an adult residing in Orange County, California. Clevenger purchased Defendant's Welch's® Fruit Snacks for some time from various stores, including but not limited to, Walmart and Albertson's in Orange County, California. Clevenger noticed that the Welch's® Fruit Snacks with Reduced Sugar contained significant amounts of empty space. Specifically, he realized that Welch's® boxes of Fruit Snacks with Reduced Sugar contained two less pouches per box than other non-premium varieties of Welch's® Fruit Snacks ("Regular Fruit Snacks"). He also noticed that Welch's® Fruit 'n Yogurt™ Snacks he had purchased also only contained eight pouches despite the box being the exact same size as Regular Fruit Snacks boxes with ten pouches. The Regular Fruit Snacks are also sold at Target in boxes containing 22 pouches; but Target sells Reduced Sugar Fruit Snacks in the same size box containing only 18 pouches, i.e., 22% to 36% less content. Clevenger suffered injury in fact as a result of Defendants' conduct because the boxes were illegally slack-filled -- containing at least two less pouches of snacks than they should have but for the illegal slack-fill. Therefore, the products were misbranded and could not legally be sold.

7. Plaintiff David Bloom, M.D. ("Bloom") at all relevant times was an adult residing in Orange County, California. Bloom purchased Defendants' Welch's® Fruit Snacks sold at Costco stores (the "Costco Fruit Snacks") in 2018, 2019, 2020 and 2021 in Orange County, including San Juan Capistrano and Laguna Niguel. The boxes the Costco Fruit Snacks were sold in contained significant amounts of empty space. Specifically, although the boxes contained only 90 pouches, Bloom was able to fit 110 pouches into the box. Plaintiffs' expert later determined that, allowing for the needs of the packaging process, Defendants could include thirteen more pouches (approximately 15% more) in the Costco box. Plaintiff also purchased the prior 80-count boxes from Costco. Bloom suffered injury in fact as a result of Defendants'

conduct because the boxes were illegally slack-filled, as they had at least 15% less pouches of snacks than they should have but for the illegal slack-fill. Therefore, the products were misbranded and could not legally be sold. Further, evidence from Costco confirms its policy against knowingly purchasing or reselling unlawful products.

8. Defendant Welch Foods Inc. is a cooperative based and headquartered in Concord, Massachusetts, and incorporated in Michigan. Welch's products include grape juices, jams, fruit snacks, and jellies, which are sold internationally.

9. Defendant PIM Brands, Inc., formerly The Promotion in Motion Companies, Inc. "(PIM") is a Delaware corporation with its headquarters in Allendale, New Jersey. Plaintiffs allege that PIM makes, markets, and/or distributes the subject products under a license agreement with Welch Foods. Plaintiffs allege that PIM participates in the making, marketing, and distribution of the subject products for Welch Foods, whereby Welch Foods and PIM jointly control and share responsibility for the manufacture, branding, marketing, and/or distribution of the subject products. At all relevant times the subject packaging is and was subject to approval by Welch.

10. In addition to the Defendants named in this action, upon information and belief, there are other parties, known and unknown, who participated in the conduct as alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as DOES 1 through 25, inclusive, are presently unknown to Plaintiffs, who therefore sue said defendants by such fictitious names. Each of these fictitiously named defendants is responsible for the events and occurrences alleged herein which were legally and proximately cause by their conduct. Plaintiffs will seek leave to amend this pleading to state the true names and capacities of such fictitiously named defendants if ascertained.

JURISDICTION AND VENUE

11. This action was initially filed in Orange County Superior Court on June 29, 2020. It alleged only state law claims under the CLRA and UCL. Defendants removed the case to federal court on September 24, 2020, asserting federal diversity jurisdiction under CAFA. On December 14, 2022, on a motion brought by Defendants to dismiss the UCL claims (which they had previously alleged were subject to federal jurisdiction), the District Court declined to exercise equity jurisdiction (because the UCL claims are for restitution) and dismissed the UCL claims without prejudice—expressly granting Plaintiffs and the certified class leave to re-file the claims in State Court. Accordingly, this Complaint relates back to the original filing. This Complaint alleges only claims under California's UCL, Business and Professions Code §17200, et seq., seeking injunctive relief and restitution.

12. Based on the misconduct alleged, the Superior Court has personal jurisdiction over Defendants pursuant to Cal. Code of Civil Procedure §410.10 because at all times relevant, they conducted significant, continuous business in California. Defendants have marketed and sold over several years many millions of dollars of food to California residents for their consumption.

13. Venue is proper in this county under Business and Professions Code §17203 and Code of Civil Procedure §§395(a) and 395.5. Defendants transact business and receive substantial compensation from sales in Orange County. Defendants intentionally distribute their products for sale to consumers in Orange County. Plaintiffs reside in or at all relevant times resided in Orange County and purchased Defendants' products in Orange County.

FACTUAL ALLEGATIONS

14. Defendants market Welch's® Fruit Snacks and Fruit 'n Yogurt Snacks. Defendants offer the Fruit Snacks with a higher sugar content labeled "Welch's ® Fruit Snacks" (referred to herein as the "Regular Fruit Snacks") or with a lower sugar content labeled as "Welch's® Reduced Sugar Fruit Snacks." Collectively, Plaintiffs sometimes refer to all these snacks as "Welch's Snacks." These snacks are offered in a variety of flavors. As is relevant to this case, Defendants sell the snacks through two different distribution channels: (i) "retail" — meaning grocery stores and mass markets such as Target, Walmart, etc. and (ii) Costco, which is a members only wholesale club. Due to differences in the Costco packaging and the facts and legal theory relating to establishing liability (including Defendants' defenses) for the Costco claims, Plaintiffs, and the federal district court, believe the case is best managed by certifying two classes: one of retail purchasers (where a comparative analysis is used to prove illegal slack-fill); and one of Costco purchasers.

15. **Retail Packaging.** At issue on the retail side of this case are Welch's Snacks sold mostly in 8, 10, 18 or 22 count packages. Almost all of Welch's Snacks at issue are packed in foil pouches containing between .7 and .9 ounces of the snack product. They are then packaged in a box typically containing either 8 or 10 pouches (the same size box) 18 or 22 pouches (again, the same size box). Although, it may be that all the boxes are illegally slack-filled, for purposes of this case, Plaintiffs are not contending that the current box containing ten .9 oz pouches of Welch's Snacks are slack-filled. Rather, during the class period, Defendants have used and continue to pack the Welch's Snacks in several different configurations which clearly contain non-functional slack-fill because they: (i) used a bigger box for the same (or smaller) contents; (ii) reduce the number of pouches placed in the same size box; and/or (iii) reduce the amount (weight) of fruit snacks placed in the pouch which is then placed in the same size box. In several cases they use a combination of these tactics which further increases the amount of slack-fill. For example, when this case was filed,

Welch's® Fruit 'n Yogurt Snacks were sold in a box containing eight .8 oz pouches, while the same size box was used for ten .9 oz pouches of Regular Fruit Snacks. Since the filing of Plaintiffs' case, Defendants have gone a step further, reducing the Fruit 'n Yogurt Snacks from .8 to .7 oz per pouch (effectively removing the contents of one pouch, while still being able to market the box as an 8-pouch package). The FDA has labeled this unlawful practice as "package shorting," defined generally as "reducing the amount of product in a container without reducing the volume of the container." See, 21 CFR Part 100, FDA, Misleading Containers, Nonfunctional Slack-Fill, 58 FR 64123 at 64135.

16. Defendants package Welch's® Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks in boxes they substantially under-fill. The boxes contain a substantial amount of unnecessary empty space, *i.e.* non-functional slack-fill. This is apparent because Defendants include only eight pouches of snacks in these flavors, but include ten pouches in identically sized boxes of other flavors. The boxes with ten pouches have a net weight of .9 oz each (9 oz total), whereas the box with eight pouches have a net weight of .7 oz to .8 oz each (5.6 oz to 6.4 oz. total). As such, Defendants under-fill the eight pouch boxes are at least 20% by quantity and up to 44% by weight.

17. Further, between June of 2018 and late 2019 Defendants transitioned the 8/10 count box from a larger box to the current box, which is 15% smaller. The current smaller box accommodates the same content (size and number of pouches) as the larger box, thus demonstrating the larger box contained at least 15% unlawful slack-fill. Notably, Defendants used the larger box for the same .9 oz ten count of the Regular Fruit Snacks as they currently sell in the smaller box. The transition from the larger box for the Regular Fruit Snacks (except the "Superfruit" variety) occurred in late 2019, meaning that the Regular Fruit Snacks sold in the 10-count box prior late 2019 were unlawfully slack-filled. Additionally, certain flavors of the Regular Fruit

Snacks (e.g., "Summer Fruit" and "Super Fruit") are sold in .8 oz pouches, rather than .9 oz packages, in the 10 and/or 22 count boxes.

18. Plaintiffs will use a **comparative analysis** to prove Defendants unlawfully slack-fill the retail packages. Using the current 10-count and 22-count .9 ounce box as the baseline, Plaintiffs will show Defendants actually either put more fruit snacks in the same size box (for the 8-count and 18-count and reduced pouch weight products) or previously sold the same content in a larger box during the class period.

19. Welch's Snacks are individually foil wrapped and packaged in colored cardboard boxes. Consumers cannot see the empty space contained in the product packaging, *i.e.* the non-functional slack-fill. These boxes are substantially under-filled and contain a substantial amount of unnecessary space, i.e. non-functional slack-fill.

20. **Costco Packaging.** During the class period, the Costco packaging for Welch's® Fruit Snacks at issue in this case has been sold in a one size opaque corrugated cardboard box which was initially packaged with eighty .9 oz packages and later changed to ninety .8 oz packages. Based on Plaintiffs' investigation and expert report, the box can hold, at least, 103 pouches while still allowing adequate head room to be filled by Defendants' machinery. In fact, Defendants represented to Plaintiff Bloom at his deposition that a box more than 20% smaller than the current Costco box could accommodate the same 90 pouches of fruit snacks.

21. In contrast to the comparative analysis used to prove the unlawful slack-fill in the retail products, Plaintiffs will prove the unlawful slack-fill in the Costco boxes by presenting evidence, including expert testimony and evidence obtained from Defendants, showing Defendants could (and should) include at least thirteen more pouches in the Costco box.

22. **Nonfunctional Slack-fill Is Unlawful.** Both federal and California law prohibit nonfunctional slack-fill for food containers, which would include fruit snacks

and its packaging. As explained below, California has codified the federal law and regulations.

23. **The Slack-Fill Violates Federal Law.** Federal statutes and regulations prohibit nonfunctional slack-fill. Pursuant to the Federal Food Drug and Cosmetic Act, 21 U.S.C. §403(d) and 21 C.F.R. §100.100 provides:

> "In accordance with Section 403(d) of the [Food Drug and Cosmetic Act], a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.
>
> (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:
>
> (1) Protection of the contents of the package;
>
> (2) The requirements of the machines used for enclosing the contents in such package;
>
> (3) Unavoidable product settling during shipping and handling:
>
> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
>
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or a durable commemorative or promotional packages; or
>
> (6) Inability to increase the level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

24. The FDA deems a product containing nonfunctional slack-fill to be "misbranded" within the meaning of the Food Drug and Cosmetic Act. As such, the sale of any of Defendants' unlawfully slack-filled boxes is prohibited under 21 U.S.C. §331.

25. **The Slack-Fill Also Violates California Law.** California law expressly prohibits nonfunctional slack-fill. California has adopted the federal regulations and codified them as the California "Fair Packaging and Labeling Act" ("FPLA"). Bus & Prof Code §12606, et seq. The FPLA states that it "applies to food containers subject to Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)) and Section 100.100 of Title 21 of the Code of Federal Regulations." Bus & Prof. Code §12606.2(a). The FPLA uses identical language, as is relevant here, to 21 CFR §100.100. Bus & Prof Code §12606.2(b) and (c)(1)-(6). The text of FPLA contains additional provisions which, based on the express language of the statute, are inoperative.[1]

26. The offending Welch's Snacks alleged above, including the retail boxes of Welch's Snacks in the larger box, do not meet any of the six exemptions under federal or California law.

27. Defendant PIM's corporate representative has testified that, for many of the items at issue, the packing requirements of the machine(s) did not require reducing the content of the boxes from ten to eight pouches or reducing the content of the pouches from .9 oz. Rather, PIM admittedly reduced content of the snack product as a "pricing issue" to maximize its profits.

[1] Bus & Prof Code §§12606.2(c)(7)-(8) add additional requirements and exemptions which are not included in the 21 C.F.R. 100.100 or otherwise imposed under 21 U.S.C. §343(d). As such, pursuant to Bus & Prof Code §§12606.2(e) and (f) they are inoperative. To wit, Bus & Prof. §12606.2(f) states "If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose, those federal requirements are incorporated into this section and shall apply as if they were set forth in this section."

28. Defendants' slack-fill does not protect the content of the packages. The Fruit Snacks and Fruit 'n Yogurt™ Snacks are each individually wrapped, and do not gain additional protection from the extra space in the box compared to the boxes with ten pouches. See 21 CFR §100.100(a)(1); Cal. Bus & Prof. Code § 12606.2(a)(1).

29. The requirements of packaging machines do not justify or require the slack-fill. Defendants' boxes are sealed with hot glue. As such, upon information and belief, the equipment used to manufacture and seal the boxes does not breach the inside of boxes during the packaging process. The hot glue is applied to an exterior flap of the box which is then sealed by a second exterior flap that is folded down onto the glued surface. Neither the hot glue nor the sealing equipment requires a substantial amount of headspace in the box during the manufacturing and packaging processes. See 21 CFR §100.100(a)(2); Cal. Bus & Prof. Code § 12606.2(a)(2).

30. The slack-fill is not caused by product settling during shipping and handling. Although Defendants assert there is some product settling after the packaging, they cannot quantify the amount of settling. For the retail products the fact that Defendants put more, and larger, pouches of the Regular Fruit Snack in the same size box (and, in fact, reduced the size of the box by 15% without reducing the contents) proves the slack-fill is not caused by settling. For the Costco box, Plaintiffs' ability to fit more pouches in the box, their expert's determination that the box can accommodate 13 additional pouches with sufficient headspace for packaging the product, along with other evidence (including the fact that the box contains significantly more headspace than PIM's corporate representative testified would be expected if the box was full when it was packaged), shows the slack-fill is not a result of the pouches settling during shipping and handling. (*See*, 21 CFR §100.100(a)(3); Cal. Bus & Prof. Code § 12606.2(a)(3)).

31. The slack-fill space is not needed to perform a specific function, such as preparing the food. The Fruit Snacks and Fruit 'n Yogurt™ Snacks are removed from the packing for consumption (e.g., the Fruit Snacks are not consumed nor prepared in

the cardboard packing). See 21 CFR §100.100(a)(4); Cal. Bus & Prof. Code § 12606.2(a)(4).

32. Defendants' packaging itself lacks independent value from the food it contains. The cardboard packaging is not a commemorative item nor is it a reusable container which is part of the presentation of the food, nor is it intended for use after the food is consumed. See 21 CFR §100.100(a)(5); Cal. Bus & Prof. Code § 12606.2(a)(5).

33. The slack-filled package was not necessary to prevent pilfering or accommodate required food labeling. Indeed, Defendants include at least ten pouches of its product in each box that is the same size as the Reduced Sugar and Fruit 'n Yogurt™ snacks containing only eight pouches, and the current box is 15% smaller than the box previously used for eight or ten pouches. Alternatively, Defendants could reduce the size of the containers to eliminate the nonfunctional slack-fill. See 21 CFR §100.100(a)(6); Cal. Bus & Prof. Code § 12606.2(a)(6).

34. There is no lawful reason for the substantial non-functional slack-fill contained in Defendants' packaging of the Welch's Snacks. Defendants overcharge consumers because the fruit snack packaging contains substantially less fruit snacks than its capacity.

35. Plaintiffs allege that PIM designs the packaging which is then subject to Welch's approval before it can be placed into the stream of commerce. Further, Welch's retains extensive power and control over the marketing and sale of Welch's Snacks. Despite being on notice that such products are sold in violation of state and federal law, Defendants have not demanded a recall nor taken other action to correct or ameliorate their wrongful conduct, but instead continue to allow and profit from the sale of the unlawful slack-filled products.

PROCEDURAL HISTORY

36. This case was originally filed by Darren Clevenger on June 29, 2020, in the Orange County Superior Court where it was assigned to the Hon. William Claster

(complex litigation). It initially alleged the Retail Class claims under the UCL and CLRA against the current Defendants. Prior to being removed to federal court, it was amended to add the Costco claims. On September 24, 2020, Defendants removed the case to the District Court where it was assigned to Judge Cormac J. Carney.

37. After removal, Defendants filed a motion to dismiss on both substantive grounds (failure to state a claim) and Article III standing, with respect to the claims for injunctive relief, based on the different standing requirements in federal court. On November 18, 2020, the federal court granted the motion with respect to the Article III standing and dismissed the injunctive claims without prejudice. The federal court dismissed the Costco claims without prejudice, on the grounds that Plaintiff Clevenger had not purchased the distinct Costco products and the theory of proving the slack-fill was different for the Costco claims, as they did not use a comparative analysis like the retail claims. The District Court upheld the remaining UCL and CLRA claims. Defendants sought to certify for interlocutory appeal the denial of their motion to dismiss, but the federal court denied that request on December 29, 2020.

38. Plaintiffs filed a Second Amended Complaint, adding plaintiff Bloom, who purchased the Costco products and re-alleging the Costco claims. Plaintiffs also added Defendants' Reduced Sugar Fruits Snacks to the Retail Class definition, as Defendants packed them in the same box as regular Fruit Snacks, but significantly reduced the quantity for the Reduced Sugar variety. Defendants moved to dismiss the Reduced Sugar Fruit Snack claims (and to strike class allegations). On April 1, 2021, the federal court denied that motion, holding the Reduced Sugar Fruit Snacks were substantially similar to the products Plaintiffs purchased, thus Plaintiffs had standing to pursue those claims.

39. During the pendency of the case in federal court the parties engaged in full discovery. Merits (fact) discovery is complete; expert discovery is not. The parties have exchanged initial expert disclosures. Rebuttals are currently due in late-January 2023.

40. On January 14, 2022, Plaintiffs filed a motion in federal court for leave to file a Third Amended Complaint. The amendments added additional products to the Retail Class because some of the products Plaintiffs only learned about through the discovery process (Defendants previously sold certain products in a significantly larger box containing the same quantity of fruit snacks as the current, smaller, boxes – thus showing they slack-filled the previous boxes). Some of the products Defendants began selling only after the filing of the original Complaint. Defendants opposed the amendments; their opposition was overruled. On February 25, 2022, Plaintiffs filed their Third Amended Class Action Compliant (currently the operative complaint in federal court), which challenges the same offending products as this Complaint.

41. On April 19, 2022, Plaintiffs filed in federal court their Motion for Class Certification. The Motion was extensively briefed, including a sur-reply filed by Defendants. On September 12, 2022, the federal court heard more than an hour of argument on the Motion. On September 13, 2022, the court granted the motion in its entirety, certifying both the Retail and Costco classes for the UCL and CLRA claims. Certification was ordered under Federal Rule of Civil Procedure 23(b)(3), which requires additional showings that common questions of law or fact predominate and that a class action is superior to other methods of adjudicating the claims.

42. On September 26, 2022, Defendants filed a Rule 23(f) petition with the Ninth Circuit Court of Appeals, requesting review of the class certification order. On December 8, 2022, the Court of Appeals denied that petition.

43. Apparently unhappy with the rulings from their chosen federal venue, on October 6, 2022, Defendants notified Plaintiffs they intended to file a motion for judgment on the pleadings, seeking to dismiss the UCL claims they had removed on the grounds the court lacked jurisdiction to adjudicate those claims. Defendants were now asking the court *not* to exercise jurisdiction over the claims *they* had removed and spent two years asking the court to adjudicate in their favor (by seeking decisions on merits through motions to dismiss).

44. On October 21, 2022, Defendants filed their motion for judgment on the pleadings. The basis for that motion was the Ninth Circuit's August 20, 2020 (a month prior to Defendants' removal) opinion in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020). *Sonner* held federal courts could not exercise equity jurisdiction over a claim for restitution (the only monetary relief available under the UCL) unless plaintiffs were able to show they lacked an adequate remedy at law. Defendants were aware of *Sonner* when they removed the case in 2020, as Defendant's counsel (Venable) was legal counsel in *Sonner.*

45. Despite Plaintiffs' objections, on December 14, 2022, the federal court found it was bound by *Sonner* to dismiss the equitable (UCL) claims, as the CLRA afforded Plaintiffs an "adequate" remedy (even though the CLRA requires proving additional elements, provides for damages instead of restitution, and has a shorter statute of limitations). These differences mean Plaintiffs and the class can prevail under the UCL but still lose under the CLRA; and can obtain a greater recovery under the UCL. The federal court, however, made clear the dismissal was for lack of jurisdiction – not on the merits – and expressly stated the dismissal was "without prejudice to Plaintiffs bringing the claims in state court."

46. Accordingly, Plaintiffs promptly re-filed their UCL claims here. Defendants demurred to the complaint, which the Court denied on August 4, 2023. Defendants next filed a petition for writ of mandate and request for immediate stay, both of which were denied on April 8, 2024, through an order issued by the Fourth Appellate District, Court of Appeal for California.

CLASS ALLEGATIONS

47. Plaintiffs bring this case on behalf of two classes: a class of Retail Purchasers (Comparative Analysis) and a separate class of Costco Purchasers.

48. **Prior Certification.** On September 13, 2022, pursuant to Federal Rule of Civil Procedure 23(b)(3), the federal District Court certified the classes as set forth

below for the Retail Purchasers and Costco Purchasers. The only differences in the definition of the classes, and the claims covered here, are (1) the class period ending date being extended here to the date this Court certifies such classes; (2) the addition of certain later created offending product; and (3) the injunctive relief claims are viable in State court.. After certifying both classes, the federal court dismissed the UCL count based on lack of equitable jurisdiction (with leave to re-file in this Court); and then, on May 30, 2023, dismissed the remaining CLRA count without leave to refile (pursuant to Plaintiffs' request) and de-certified both classes (again, pursuant to Plaintiffs' request).

49. **The Retail (Comparative Analysis) Class.** Plaintiffs bring Count I as a class action pursuant to California Code of Civil Procedure §382 on behalf of a class consisting of:

> All persons who made retail purchases in the State of California of Welch's ® Fruit Snacks, Welch's® Reduced Sugar Fruit Snacks, Welch's® Fruit 'n Yogurt™ Snacks, sold in an 8, 10, 18, 22, 26 or 85 count box or any other box containing less Welch's Fruit Snacks (of any variety or flavor) than Defendants include or previously included in the same size box, except for Welch's Fruit Snacks sold in a box measuring 5.75" x 1.75" x 7.5" and containing ten .9 oz pouches of Fruit Snacks or a box containing twenty-two .9 oz pouches of Fruit Snacks. The class period will be from June 30, 2016, through the date a class is certified.
>
> Excluded from the Class are the officers, directors, or employees of each Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from the Class are the judge to whom this case is assigned and any member of the judge's immediate family.

50. **The Costco Class.** Plaintiffs bring Count II an as a class action pursuant to California Code of Civil Procedure §382 on behalf of a class consisting of:

> All persons who made retail purchases from Costco in the State of California of Welch's ® Fruit Snacks in a box containing either eighty or ninety pouches of Fruit Snacks. The class period will be from June 30, 2016, through the date a class is certified.
>
> Excluded from the Class are the officers, directors, or employees of each Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from the Class are the judge to whom this

case is assigned and any member of the judge's immediate family.

51. Plaintiffs propose the Darren Clevenger be appointed as the representative for the Retail (Comparative Analysis) Class and David Bloom be appointed as the representative for the Costco Class.

52. **Numerosity.** Each Class is so numerous that joinder of all members is impracticable. Defendants have alleged under CAFA that the class consists of at least "tens of thousands of Californians." Discovery has confirmed that each of the classes involves more than one million packages of Welch's Snacks. As a result, individual joinder of all purchasers is impractical.

53. **Typicality.** Plaintiffs' claims, and Defendants' defenses, are typical of the claims and defenses of the other members of the Classes they seek to represent, as Plaintiffs and all other members of their respective Classes sustained injuries arising out of Defendants' conduct as alleged herein. The slack-filled containers were the same for all members of their respective classes. Further, Plaintiffs are members of the Class they seek to represent.

54. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of their respective Classes and have retained counsel competent and experienced in complex class action litigation. Plaintiffs have no interests that are contrary to, or in conflict with, those of the other members of the Classes. Plaintiffs and counsel are committed to the vigorous prosecution of this action on behalf of all Class members.

55. **Common Questions Predominate.** Common questions of law and fact exist as to all members of the Classes and predominate over any questions affecting solely individual members of the Classes. Among the questions of law and fact common to the Classes are:

a) Whether Defendants' packing of Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks or other Fruit Snacks contained non-functional slack-fill in violation of California Business and Professions Code §12606.2 (FPLA), *et seq.*;

b) Whether packages of Defendants' Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks or other Fruit Snacks contained non-functional slack-fill in violation of 21 U.S.C. §403(d) *et seq.* and 21 C.F.R. 100.100;

c) The number of Fruit Snack pouches (of all varieties) that could or should be contained in Defendants' packaging;

d) Whether Defendants' packages were misbranded and prohibited from being sold in interstate commerce under 21 U.S.C. §331;

e) Whether Defendants' conduct is an unfair business practice within the meaning of California Business and Professions Code §17200, *et seq.*;

f) Whether Defendants' conduct is an unlawful business practice within the meaning of California Business and Professions Code §17200, *et seq.*;

g) Whether, and to what extent, Defendant Welch approved of the packaging and/or had the ability to require that the packaging not be sack-filled and/or require recall or other corrective action;

h) The appropriate measure of restitution and/or other relief; and

i) Whether Defendants should be enjoined from continuing their unlawful practices.

Additionally, Defendants' affirmative defenses are common to the class members as they focus primarily on the reasons their packages contain slack-fill. The packaging of a given product does not vary among class members.

56. **Superiority of Class Treatment.** Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. Joinder of all members is impractical. Further, the amount at stake for many of the Class members is small, meaning that few, if any, Class members could afford to maintain individual suits against Defendants. The expense and burden of individual litigation would make it impracticable or impossible for the Classes to prosecute their claims individually.

57. Defendants acted on grounds generally applicable to the entire Class, thereby making final relief appropriate with respect to the Class as a whole.

58. Without a class action, Defendants will likely retain the benefit of their wrongdoing and could continue their unlawful course of action, which would result in further damages to the Classes. Plaintiffs envision no difficulty in the management of this action as a class action. Indeed, the federal court already determined that class certification was appropriate and superior for adjudication of these claims.

FIRST CAUSE OF ACTION
For Violation of California Unfair Competition Law,
Cal. Business & Professions Code §17200, *et seq (*UCL)
for the Retail (Comparative Analysis) Class

59. Plaintiffs reallege the foregoing paragraphs and incorporate them as if fully set forth herein.

60. At all relevant times, the UCL was in full force and effect.

61. The UCL prohibits the use of "any unlawful, unfair or fraudulent business act or practice." (Bus & Prof. Code §17200).

62. Section 17203 of the UCL empowers the Court to enjoin any conduct that violates the UCL and "make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

63. Plaintiffs have "suffered injury in fact and [have] lost money or property as a result of the unfair competition" as complained of herein. Bus & Prof. Code §17204. Plaintiffs have paid money for Defendants' products that contained nonfunctional slack-fill and were "misbranded." As such, the products could not legally be sold in interstate commerce. The monies that Plaintiffs and the class members paid for the products resulted from unfair and illegal competition by Defendants and Plaintiffs and the class members are entitled to an order restoring those monies to them and an order enjoining Defendants from selling nonfunctionally slack-filled products in the State of California. Additionally, even if Defendants' Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks and other Fruit Snacks could have legally been sold in interstate commerce, Plaintiffs overpaid and/or acquired less than they would have if the same packages had not contained nonfunctional slack-fill.

64. Defendants' conduct violated the unlawful prong of the UCL, as it violated the California FPLA and the Federal Food Drug and Cosmetic Act (and regulations promulgated thereunder), both of which prohibit nonfunctional slack-fill. Further, by violating the federal slack-fill regulations, Defendants' products are deemed "misbranded" and, thus, illegal to sell. 21 U.S.C. §331. It is not necessary for Plaintiffs to establish that Defendants violated both laws. A violation of either law establishes a violation of the UCL.

65. The federal District Court has already ruled that the *only* defenses available to Defendants under the unlawful prong of the UCL are the enumerated exceptions under the FLPA and FDCA.

66. Defendants' conduct also violated the unfair practices prong of the UCL. Defendants' conduct violates both California and federal public policy, as shown by their respective prohibitions on nonfunctional slack-fill and prohibitions on introducing misbranded products into interstate commerce. The conduct is also anti-competitive and puts competitors who follow the law at a disadvantage. Defendants' conduct suppresses competition and has a negative impact on the marketplace, decreasing consumer choice. Further, Defendants' conduct causes significant aggregate harm to consumers, causing them to overpay and/or receive less product, because the increased empty space in the packages is nonfunctional slack-fill.

67. Defendants' violations of the UCL entitle Plaintiffs and the class members to injunctive relief and full restitution.

SECOND CAUSE OF ACTION
For Violation of California Unfair Competition Law,
Cal. Business & Professions Code §17200, *et seq (*UCL)
for the Costco Class

68. Plaintiffs reallege the paragraphs 1 through 58 and incorporate them as if fully set forth herein.

69. At all relevant times, the UCL was in full force and effect.

70. The UCL prohibits the use of "any unlawful, unfair or fraudulent business act or practice." (Bus & Prof. Code §17200).

71. Section 17203 of the UCL empowers the Court to enjoin any conduct that violates the UCL and "make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

72. Plaintiffs have "suffered injury in fact and [have] lost money or property as a result of the unfair competition" as complained of herein. Bus & Prof. Code §17204. Plaintiffs have paid money for Defendants' products that contained nonfunctional slack-fill and were "misbranded." As such, the products could not legally be sold in interstate commerce. The monies that Plaintiffs and the class members paid for the products resulted from unfair and illegal competition by Defendants and Plaintiffs and the class members are entitled to an order restoring those monies to them and an order enjoining Defendants from selling nonfunctionally slack-filled products in the State of California. Evidence Plaintiffs obtained from Costco confirms Costco's policy against knowingly purchasing or selling unlawful products. *A fortiori,* members of the Costco class should not have paid anything for the illegally filled products as alleged herein. Additionally, even if Defendants' Fruit Snacks could have legally been sold in interstate commerce, Plaintiffs overpaid and/or acquired less than they would have if the same packages were lawful.

73. Defendants' conduct violated the unlawful prong of the UCL, as it violated the California FPLA and the Federal Food Drug and Cosmetic Act (and regulations promulgated thereunder), both of which prohibit nonfunctional slack-fill. Further, by violating the federal slack-fill regulations, Defendants' products are deemed "misbranded" and, thus, illegal to sell. 21 U.S.C. §331. It is not necessary for Plaintiffs to establish that Defendants violated both laws. A violation of either law establishes a violation of the UCL.

74. The federal District Court has already ruled that the *only* defenses available to Defendants under the unlawful prong of the UCL are the enumerated exceptions under the FLPA and FDCA.

75. Defendants' conduct also violated the unfair practices prong of the UCL. Defendants' conduct violates both California and federal public policy, as shown by their respective prohibitions on nonfunctional slack-fill and prohibition on introducing misbranded products into interstate commerce. The conduct is also anti-competitive and puts competitors who follow the law at a disadvantage. Defendants' conduct suppresses competition and has a negative impact on the marketplace, decreasing consumer choice. Further, Defendants' conduct causes significant aggregate harm to consumers, causing them to overpay, because the increased empty space in the packages is nonfunctional slack-fill.

76. Defendants' violations of the UCL entitle Plaintiffs and the class members to injunctive relief and full restitution.

PRAYER FOR RELIEF

Wherefore, Plaintiffs, on behalf of themselves and the class members, pray for the following relief:

A. For an order certifying this case as a class action with a Retail (Comparative Analysis) Class and a separate Costco Class, both certified under California Code of Civil Procedure §382, as alleged herein, and appointing Plaintiffs

as Class Representatives and Plaintiffs' Counsel as Lead Class Counsel;

B. For an order declaring Defendants have violated the statutes as alleged herein;

C. For preliminary, permanent and mandatory injunctive relief prohibiting Defendants and those acting in concert with them from committing continuing and future violations of the laws as alleged herein;

D. For an order awarding Plaintiffs and Class members restitution under the UCL in an amount to be determined at trial;

E. For an award of reasonable attorneys' fees and all costs of suit as provided for by California Code of Civil Procedure § 1021.5, and/or all other applicable statutory, legal and/or equitable doctrines, including, but not limited, to the common fund doctrine.

F. For such other relief as the Court deems just and proper.

DIVINCENZO SCHOENFIELD STEIN and LANZA & SMITH, PLC

Dated: May 20, 2024

By: */s/ Anthony Lanza*
Anthony Lanza
Robert J. Stein III
Attorneys for Plaintiffs
Daren Clevenger, David Bloom and the classes

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

Darren Clevenger, et al. v. Welch Foods, Inc., et al.

OCSC Case No.: 30-2022-01298406-CU-BT-CXC

I am a citizen of the United States, over the age of 18 years, and employed in the County of Orange, California. I am not a party to the within action. My business address is 3 Park Plaza, Suite 1650, Irvine, CA, 92614.

On **May 20, 2024**, I served the following documents: **FIRST AMENDED COMPLAINT,** on the interested parties in this action as follows:

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____ **BY MAIL**: I caused such envelopes (with postage thereon fully prepaid) to be placed in the United States mail at Irvine, California. I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business. I am aware that on motion of parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposition for mailing specified in the affidavit.

__X__ **BY ELECTRONIC TRANSMISSION:** Through use of the Electronic Filing Service Provider One Legal accepted by the Superior Court of California, County of Orange, I caused a copy of the above documents to be served by e-mail to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed **May 20, 2024,** at Irvine, California.

/s/Leona Smialek
Leona Smialek