

CV 15 2334

LEE LITIGATION GROUP, PLLC

C.K. Lee (CL 4086)
30 East 39th Street, Second Floor
New York, NY 10016
Tel.: 212-465-1188
Fax: 212-465-1181

Attorney for Plaintiffs and the Class

BRODIE, J.

LEVY, M.J.

CONFIDENTIAL
UNRECORDED
FILED
APR 23 2015
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----x
JAIME LAM, :
RICHARD A. RIZZU, :
FREDDIE ESCOBAR, :
DAVID MYERS, :
JOHN DOE (NEW JERSEY), :
JOHN DOE (MICHIGAN), ;
JOHN DOE (FLORIDA) :
and JOHN DOES 1-100, :
on behalf of themselves and others similarly :
situated, :

Plaintiffs,

- against -

CONAGRA FOODS, INC., :
Defendant.
-----x

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, JAIME LAM, RICHARD A. RIZZU, FREDDIE ESCOBAR, DAVID MYERS, JOHN DOE (NEW JERSEY), JOHN DOE (MICHIGAN), JOHN DOE (FLORIDA) and JOHN DOES 1-100 (together, "Plaintiffs") individually, and on behalf of all other persons similarly situated, by their undersigned attorneys, as and for their Complaint against the Defendant, ConAgra Foods, Inc., allege the following based upon personal knowledge as to themselves and their own action, and, as to all other matters, respectfully allege, upon information and belief, as follows (Plaintiffs believe that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery):

NATURE OF THE ACTION

1. This action seeks redress for a deceptive and otherwise improper business practice that Defendant, ConAgra Foods, Inc. (hereinafter, “CONAGRA” or “Defendant”), engages in with respect to the packaging of its “Slim Jim®” products. The Slim Jim® products are dried sausage snack products that are marketed and categorized as “meat sticks” and come in a variety of flavors. The Slim Jim® snacks are sold individually and in various count packages of individually wrapped sticks (ranging from four to one hundred counts). The Original and Mild flavored Slim Jim® are sold in a thin cardboard package of four individually wrapped sticks with a net weight of 1.12 oz (32g) and a “Handi Pak” box containing twelve thin cardboard packages of four individually wrapped sticks with a net weight of 1.12 oz (32g) each (herein the “Slim Jim® Products” or “Products”).

2. The Slim Jim® Products are packaged in containers made, formed or filled as to be misleading and contain non-functional slack-fill in violation of the Federal Food Drug & Cosmetic Act (“FDCA”) Section 403(d) (21 U.S.C. 343(d)), the Code of Federal Regulations Title 21 part 100, *et. seq.*, various state laws with requirements mirroring the FDCA, and the consumer protection laws of the fifty states and the District of Columbia. The size of the box in comparison to the actual Product makes it appear that the consumer is buying more than what is actually being sold. Additionally, the “actual size” depiction of the snack stick on the box is misleadingly larger than the real actual size of the Product to make it appear that the consumer is buying more than what is actually being sold.

3. The Slim Jim® Products are sold in a box that is $5\frac{1}{4}$ inches in height, $2\frac{1}{2}$ inches in length and $\frac{5}{8}$ inches in width. Inside the box are four individually wrapped cylindrical Slim Jim® sticks that are $3\frac{5}{8}$ inches long and $\frac{3}{8}$ inches in diameter. Thus, the size of the box is designed to give the impression that there is more product in the box than there actually is. The

size of the Slim Jim® box in relation to the actual amount of the Product contained therein gives the false impression that the consumer is buying more than they are actually receiving.

4. The Slim Jim® Products' packaging depicts the "actual size" of each meat stick to be $3\frac{7}{8}$ inches tall and $\frac{5}{8}$ inches wide when the true actual size of the stick is only $3\frac{5}{8}$ inches tall with a diameter of $\frac{3}{8}$ inches; yielding an implied volume increase of 197% than what is provided. The "actual size" depiction on the Slim Jim® packaging in relation to the actual amount of the Product contained therein gives the false impression that the consumer is buying more than they are actually receiving.

5. Plaintiffs and Class members viewed Defendant's misleading Product packaging, reasonably relied in substantial part on the representations and were thereby deceived in deciding to purchase the Products for a premium price.

6. On December 22, 2011, the District Attorneys of Yolo and Sacramento counties of the State of California filed a complaint against Defendant for packaging its "Slim Jim®" product with non-functional slack-fill. The complaint states,

"Beginning on an exact date unknown to the plaintiff, but at least within three (3) years prior to the date of filing of this Complaint, defendant [ConAgra Foods, Inc.], with the intent to induce members of the general public to purchase its 'Slim Jim' food products (hereinafter 'products'), made or caused to be made representations to the public which were untrue and misleading. Said untrue or misleading statements, which are unlawful under Business and Professions Code section 17500, included, but were not limited to, advertizing [sic] and packaging of products in containers which had:

(a) void space not visible by consumers, referred to as 'nonfunctional slack fill.' This nonfunctional slack fill packaging, when displayed for sale to the public of the State of California, caused false representations to the public by implying that defendant's products filled the entire package."

See **EXHIBIT 1**, Complaint, *People v. Conagra Foods, Inc.*, Case No. CV11-2794 (2011).

Pursuant to the Final Judgment entered in that case, Defendant was "enjoined and restrained from directly or indirectly packaging its 'Slim Jim®' brand food products or its successor

products in containers made, formed or filled so as to be misleading to consumers, an act which is in violation of California Business and Professional Code sections 12606.2, 17200 and 17500” and was also required to pay \$200,000.00 in settlement. *See EXHIBIT 2*, Final Judgment, *People v. Conagra Foods, Inc.*, Case No. CV11-2794 (2011). However, Defendant’s Products packaging still contain non-functional slack-fill to this day.

7. Plaintiffs bring this proposed consumer class action on behalf of themselves and all other persons nationwide, who from the applicable limitations period up to and including the present (the “Class Period”), purchased for consumption and not resale of the Slim Jim® Products.

8. During the Class Period, Defendant manufactured, marketed and sold the Products throughout the United States. Defendant purposefully sold the Products in containers made, formed or filled as to be misleading and with non-functional slack-fill.

9. Defendant violated statutes enacted in each of the fifty states and the District of Columbia that are designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising. These statutes are:

- a. Alabama Deceptive Trade Practices Act, Ala. Statues Ann. §§ 8-19-1, *et seq.*;
- b. Alaska Unfair Trade Practices and Consumer Protection Act, Ak_ Code § 45.50.471, *et seq.*;
- c. Arizona Consumer Fraud Act, Arizona Revised Statutes, §§ 44-1521, *et seq.*;
- d. Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.*;
- e. California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and California’s Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.*;
- f. Colorado Consumer Protection Act, Colo. Rev. Stat. § 6 - 1-101, *et seq.*;
- g. Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.*;
- h. Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et seq.*;
- i. District of Columbia Consumer Protection Procedures Act, D.C. Code § 28 3901, *et seq.*;
- j. Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*;
- k. Georgia Fair Business Practices Act, § 10-1-390 *et seq.*;
- l. Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statues § 480 1, *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statutes § 481A-1, *et seq.*;
- m. Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.*;

- n.* Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*;
- o.* Indiana Deceptive Consumer Sales Act, Indiana Code Ann. §§ 24-5-0.5-0.1, *et seq.*;
- p.* Iowa Consumer Fraud Act, Iowa Code §§ 714.16, *et seq.*;
- q.* Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et seq.*;
- r.* Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §§ 365.020, *et seq.*;
- s.* Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § § 51:1401, *et seq.*;
- t.* Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et seq.*, and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et seq.*,
- u.* Maryland Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq.*;
- v.* Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- w.* Michigan Consumer Protection Act, § § 445.901, *et seq.*;
- x.* Minnesota Prevention of Consumer Fraud Act, Minn. Stat §§ 325F.68, *et seq.*; and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43, *et seq.*;
- y.* Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*;
- z.* Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;
- aa.* Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code §30-14-101, *et seq.*;
- bb.* Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59 1601, *et seq.*, and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et seq.*;
- cc.* Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et seq.*;
- dd.* New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et seq.*;
- ee.* New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et seq.*;
- ff.* New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57 12 1, *et seq.* ;
- gg.* New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §§ 349, *et seq.*;
- hh.* North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et seq.*;
- ii.* North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes §§ 75-1, *et seq.*;
- jj.* Ohio Deceptive Trade Practices Act, Ohio Rev. Code. Ann. §§ 4165.01. *et seq.*;
- kk.* Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.*;
- ll.* Oregon Unfair Trade Practices Act, Rev. Stat § 646.605, *et seq.*;
- mm.* Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. § § 201-1, *et seq.*;
- nn.* Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1, *et seq.*;
- oo.* South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.*;
- pp.* South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 1, *et seq.*;
- qq.* Tennessee Trade Practices Act, Tennessee Code Annotated §§ 47-25-101, *et seq.*;
- rr.* Texas Stat. Ann. §§ 17.41, *et seq.*, Texas Deceptive Trade Practices Act, *et sep.*;
- ss.* Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1, *et seq.*;
- tt.* Vermont Consumer Fraud Act, Vt. Stat. Ann. tit.9, § 2451, *et seq.*;
- uu.* Virginia Consumer Protection Act, Virginia Code Ann. §§59.1-196, *et seq.*;
- vv.* Washington Consumer Fraud Act, Wash. Rev, Code § 19.86.010, *et seq.*;
- ww.* West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-6-101, *et seq.*;
- xx.* Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100. 18, *et seq.*;
- yy.* Wyoming Consumer Protection Act, Wyoming Stat. Ann. §§40-12-101, *et seq.*

10. Defendant's misbranding is intentional. Defendant has been unjustly enriched as a result of its conduct. Through these unfair and deceptive practices, CONAGRA has collected millions of dollars from the sale of its Products that it would not have otherwise earned.

11. Plaintiffs' claims are not barred by the doctrine of preemption because courts routinely recognize that state law causes of action are **not** preempted by the Nutritional Labeling and Education Act (codified as the FDCA, 21 U.S.C. 343 *et seq.*) if they "seek to impose requirements that are identical to those imposed by the FDCA." *Ackerman v. Coca-Cola Co.*, No. 09-0395, 2010 WL 2925955, at *6 (E.D.N.Y. July 21, 2010) (citing *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 432 (2005)).

12. Plaintiffs' claims are not barred by the doctrine of primary jurisdiction. Courts routinely refuse to apply the doctrine of primary jurisdiction to consumer cases. The primary jurisdiction doctrine does not apply when "the issue at stake is legal in nature and lies within the traditional realm of judicial competence." *In re Frito-Lay N. Am., Inc. All Natural Litig.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512, at *8 (E.D.N.Y. Aug. 29, 2013) (citing *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 851 (2d Cir.1988)). The claims alleged herein are "far less about science than [they are] about whether a label is misleading ... and the reasonable-consumer inquiry upon which some of the claims in this case depends is one to which courts are eminently well suited, even well versed." *In re Frito-Lay N. Am.*, 2013 WL 4647512 at *8.

JURISDICTION AND VENUE

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

14. The Court has jurisdiction over the federal claims alleged herein pursuant to 28 U.S.C § 1331 because it arises under the laws of the United States.

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

16. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C § 1332 because the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of different states.

17. The Court has personal jurisdiction over Defendant because its Slim Jim® Products are advertised, marketed, distributed and sold throughout New York State; Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State; Defendant is authorized to do business in New York State; and Defendant has sufficient minimum contacts with New York and/or otherwise has intentionally availed itself of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendant is engaged in substantial and not isolated activity within New York State.

18. Venue is proper in this District pursuant to 28 U.S.C § 1391(a) and (b), because a substantial part of the events giving rise to Plaintiff LAM's claims occurred in this District, and Defendant is subject to personal jurisdiction in this District. Plaintiff LAM purchased and consumed Defendant's Products in Queens County. Moreover, Defendant distributed, advertised, and sold the Products, which are the subject of the present Complaint, in this District.

PARTIES

Plaintiffs

19. Plaintiff JAIME LAM is, and at all times relevant hereto has been, a citizen of the State of New York and resides in Queens County. Plaintiff LAM has purchased the Slim Jim®

Products for personal consumption in Queens County. On May 14, 2014, Plaintiff LAM purchased a “Handi Pak” 12-pack box of Original flavored Slim Jim® Products for the purchase price of \$13.48 (or more) from Amazon.com. The “Handi Pak” 12-pack box contains twelve packages of Slim Jim® Products, each individual package measuring 5 ¼ inches in height, 2 ½ inches in length and ⅝ inches in width. Plaintiff LAM purchased the Products in reliance on Defendant’s packaging in containers made, formed or filled as to be misleading and contained non-functional slack-fill. Had Plaintiff LAM known the truth about Defendant’s misrepresentations, she would not have purchased the premium priced Products but would have purchased less expensive meat stick products.

20. Plaintiff RICHARD A. RIZZU is a citizen of the State of Illinois and resides in Chicago, Illinois. Plaintiff RIZZU has purchased the Product for personal consumption at retail stores such as Costco and Wal-Mart, as well as gas stations located in Chicago, Illinois. Specifically, within the twelve-month period prior to filing, Plaintiff RIZZU purchased an Original flavored Product in Chicago, Illinois. Plaintiff RICHARD A. RIZZU purchased such Product at a premium price of \$3.99 (or more). Plaintiff RIZZU purchased the Products in reliance on Defendant’s packaging in containers made, formed or filled as to be misleading and contained non-functional slack-fill. Had Plaintiff RIZZU known the truth about Defendant’s misrepresentations, he would not have purchased the premium priced Products but would have purchased less expensive meat stick products.

21. Plaintiff DAVID MYERS is a citizen of the State of California and resides in Fair Oaks, California. Plaintiff MYERS has purchased the Products of the Original and the Mild flavors for personal consumption at different retail stores in Citrus Heights, California. Specifically, within the twelve-month period prior to filing, Plaintiff MYERS purchased the

Product in Citrus Heights, California. Plaintiff MYERS purchased the Product at a premium price of \$3.99 (or more). Plaintiff MYERS purchased the Products in reliance on Defendant's packaging in containers made, formed or filled as to be misleading and contained non-functional slack-fill. Had Plaintiff MYERS known the truth about Defendant's misrepresentations, he would not have purchased the premium priced Products but would have purchased less expensive meat stick products.

22. Plaintiff FREDDIE ESCOBAR is a citizen of the State of California and resides in San Bernardino, California. Within the twelve-month period prior to filing, Plaintiff ESCOBAR purchased the Original flavored Product in San Bernardino, California at a premium price of \$3.99 (or more). Plaintiff ESCOBAR purchased the Product in reliance on Defendant's packaging in containers made, formed or filled as to be misleading and contained non-functional slack-fill. Had Plaintiff ESCOBAR known the truth about Defendant's misrepresentations, he would not have purchased the premium priced Products but would have purchased less expensive meat stick products.

23. Plaintiff JOHN DOE (NEW JERSEY) is, and at all relevant times hereto has been a citizen of the state of New Jersey. Plaintiff JOHN DOE (NEW JERSEY) has purchased the Products for personal consumption within the State of New Jersey. Plaintiff JOHN DOE (NEW JERSEY) purchased the Products at a premium price and was financially injured as a result of Defendants' deceptive conduct as alleged herein.

24. Plaintiff JOHN DOE (MICHIGAN) is, and at all relevant times hereto has been a citizen of the state of Michigan. Plaintiff JOHN DOE (MICHIGAN) has purchased the Products for personal consumption within the State of Michigan. Plaintiff JOHN DOE (MICHIGAN)

purchased the Products at a premium price and was financially injured as a result of Defendants' deceptive conduct as alleged herein.

25. Plaintiff JOHN DOE (FLORIDA) is, and at all relevant times hereto has been a citizen of the state of Florida. Plaintiff JOHN DOE (FLORIDA) has purchased the Products for personal consumption within the State of Florida. Plaintiff JOHN DOE (FLORIDA) purchased the Products at a premium price and was financially injured as a result of Defendants' deceptive conduct as alleged herein.

26. Plaintiffs JOHN DOES 1-100 are, and at all times relevant hereto has been, citizens of the any of the fifty states and the District of Columbia. During the Class Period, Plaintiffs JOHN DOES 1-100 purchased the Products for personal consumption or household use within the United States. Plaintiffs purchased the Products at a premium price and were financially injured as a result of Defendants' deceptive conduct as alleged herein.

Defendant

27. Defendant CONAGRA is a Delaware corporation with its headquarters at One ConAgra Drive, Omaha, Nebraska 68102 and address for service of process at The Prentice-Hall Corporation System, Inc., 2711 Centerville Road, Wilmington, DE 19808. Defendant manufactured, advertised, marketed and sold Slim Jim® Products and other food products to millions of consumers nationwide, including in New York, California, and Illinois.

FACTUAL ALLEGATIONS

Federal & State Laws and Regulations Regarding Misbranded Food

28. Under the Federal Food Drug and Cosmetic Act (herein “FDCA”), Section 403(d) (codified as 21 U.S.C. § 343(d)), a food shall be deemed misbranded “[i]f its container is so made, formed, or filled as to be misleading.” Consumer protection laws of the fifty states and the District of Columbia correspond to the requirements of the FDCA, 21 U.S.C. §§ 343 *et seq.*

29. Defendant’s packaging and advertising of the Products also violate various state laws against misbranding which mirror federal law. New York, California and Illinois state law broadly prohibit the misbranding of food in language identical to that found in regulations promulgated pursuant to the FDCA, 21 U.S.C. §§ 343 *et seq.*:

Pursuant to N.Y. AGM. LAW § 201, “[f]ood shall be deemed to be misbranded: 1. If its labeling is false or misleading in any particular... 4. If its container is so made, formed, colored or filled as to be misleading.”

Pursuant to California’s Sherman Food, Drug and Cosmetics Law, California Health and Safety Code § 110690, “Any food is misbranded if its container is so made, formed, or filled as to be misleading.”

Pursuant to Illinois Food, Drug and Cosmetic Act., 410 ILCS 620/11, “A food is misbranded ... (d) If its container is so made, formed or filled as to be misleading.”

30. Additionally, pursuant to 21 C.F.R. 100.100:

In accordance with section 403(d) of the 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 durable commemorative or promotional packages; or

(6) Inability to increase 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 non-mandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

However, none of the above safe-harbor provisions applies to the Products. Defendant intentionally incorporated non-functional slack-fill in its packaging of the Products in order to mislead the consumers, including Plaintiffs and members of the Class. *Waldman v. New Chapter, Inc.*, 714 F. Supp. 2d 398, 405 (E.D.N.Y. 2010) (“Misleading consumers is not a valid reason to package a product with slack-fill. *See* 21 C.F.R. § 100.100(a)(1–6).”).

Defendant’s Products Contain Non-Functional Slack-Fill

31. Defendant manufactures and distributes various snack products such as meat sticks under the brand Slim Jim®, including the Slim Jim® Products.

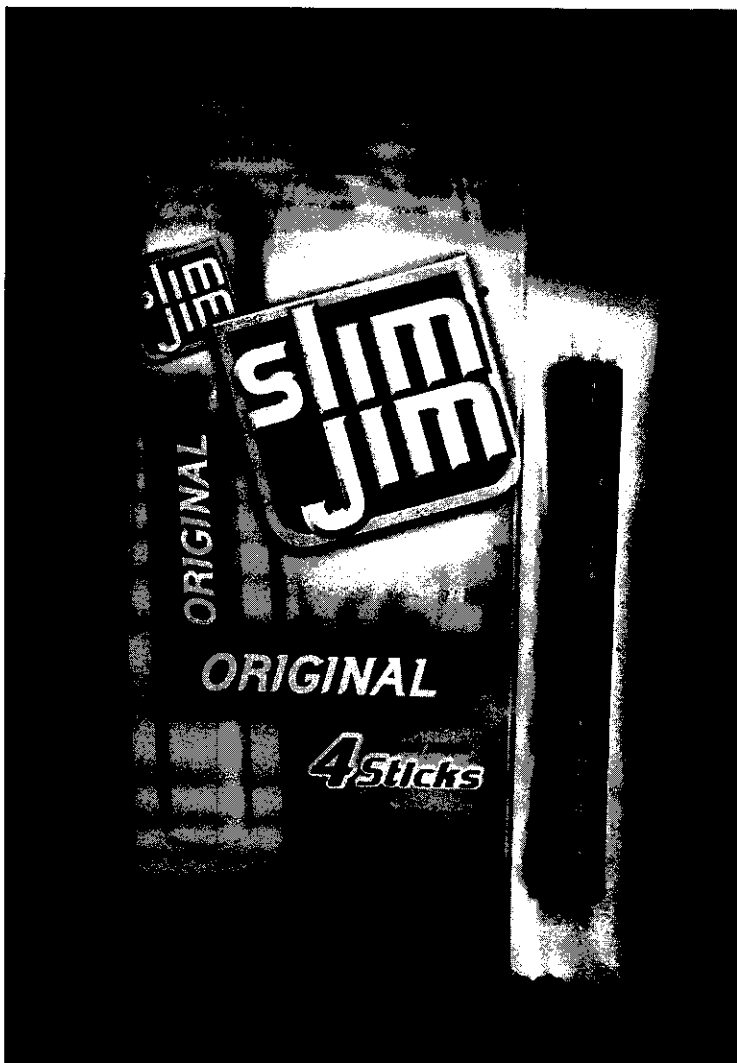
32. Defendant sells its Products at most supermarket chains, convenience stores and major retail outlets throughout the United States, including but not limited to Costco, The Food Emporium, Walgreens and Rite Aid. The Slim Jim® website also facilitates sales by linking the particular snack, flavor and pack size selected towards an affiliated retailer such as WalMart, Office Depot, Lowe’s and Amazon.com.

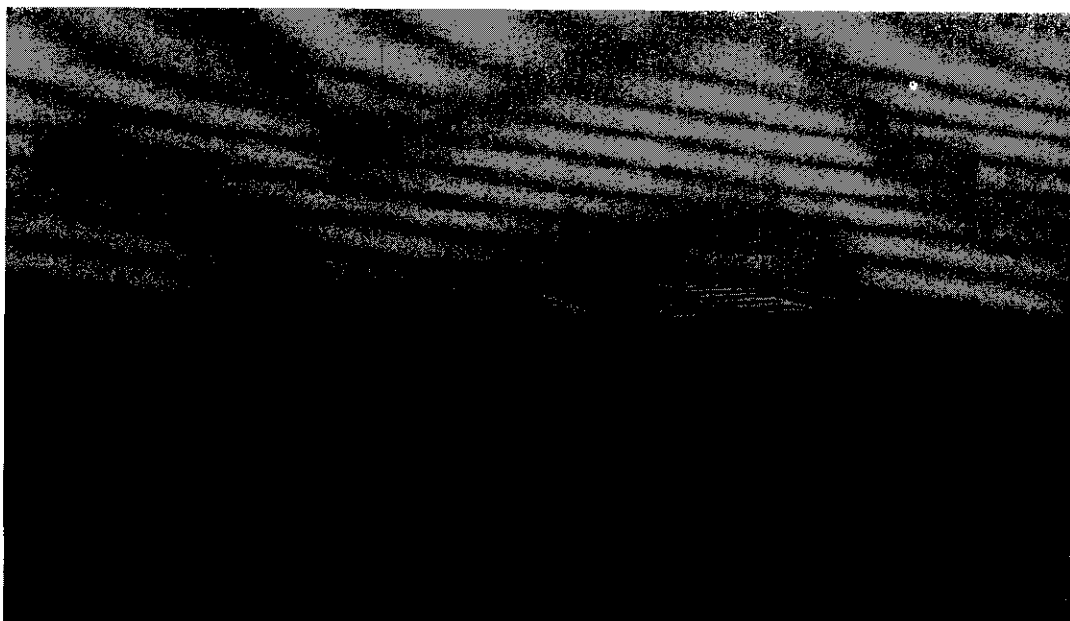
33. Defendant has routinely employed slack-filled packaging containing non-functional slack-fill to mislead consumers into believing that they were receiving more than they actually were.

34. Defendant lacked any lawful justification for doing so.

35. The packaging of the Slim Jim® Products that Plaintiffs purchased was 5 ¼ inches in height, 2 ½ inches in length and 5⁄8 inches wide. The meat sticks inside the packaging were individually wrapped.

36. Pictures of the Product and packaging are shown below:





37. The individual wrapping of the Slim Jim® is 5 inches long and $\frac{7}{8}$ inches wide.

38. The actual Slim Jim® Product inside of the individual wrapping is only $3 \frac{5}{8}$ inches in height with a diameter of $\frac{3}{8}$ inches.

39. The volume of the cardboard package containing four individually wrapped sticks is approximately 8.2 cubic inches whereas the volume of each Slim Jim® stick is only approximately 0.4 cubic inches and the volume of all four Slim Jim® sticks combined is 1.6

cubic inches leaving a difference of 6.6 cubic inches or approximately 80% of non-functional slack-fill.

40. The Slim Jim® “Handi Pak” box contains twelve cardboard packages with identical measurements and volume as the individually sold four-pack Slim Jim® packages. Each of the packages contains four individually wrapped sticks and have approximately 80% non-functional slack-fill.

41. Non-functional “slack-fill is the difference between the actual capacity of a container and the volume of product contained within.” 21 C.F.R. 100.00. Plaintiffs and Class members were (and a consumer would reasonably be) misled about the volume of the product contained within the box in comparison to the size of the Slim Jim® Products’ packaging. Plaintiffs paid the full price of the Slim Jim® Products and only received 20% of what Defendant represented they would be getting due to the 80% non-functional slack-fill. In order for Plaintiffs and Class members to be made whole, they would have to have paid less for the Products, or, in the alternative, they would need to receive a refund of the purchase price of the Products equal to the percentage of non-functional slack-fill in the Products.

42. Further, the Slim Jim® Product packaging depicts the meat stick in its individual wrap as “actual size” on the front of the box itself. The dimensions of the stick as depicted on the box are $3 \frac{7}{8}$ inches long and $\frac{5}{8}$ inches wide when the actual sizes as noted above, are respectively only $3 \frac{3}{4}$ inches and $\frac{3}{8}$ inches. This seemingly slight increase in depiction would imply a volume of 1.19 cubic inches of meat per stick rather than the actual 0.4 cubic inches, thus yielding an implied volume increase of 197% than what is actually provided.

43. The size of the boxes in relation to the actual amount of the Product contained therein as well as the false depiction of the “actual size” of the Product on the boxes was

intended to mislead Plaintiffs and Class members into believing that they were getting more of the Product than what was actually being sold. Plaintiffs and Class members viewed and reasonably relied on such misleading packaging in purchasing the Slim Jim® Products.

44. Under the FDCA, 21 U.S.C. § 343(d), a food shall be deemed misbranded “[i]f its container is so made, formed, or filled as to be misleading.”

45. Under the Federal Food Drug and Cosmetic Act (herein “FDCA”), the term “false” has its usual meaning of “untruthful,” while the term “misleading” is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire food is misbranded. No other statement in the labeling cures a misleading statement. “Misleading” is judged in reference to “the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze.” *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

46. Defendant’s packaging and advertising of the Products violate various state laws against misbranding with requirements which mirror the FDCA, including N.Y. AGM. LAW § 201, California Health and Safety Code § 110690, and Illinois Food, Drug and Cosmetic Act., 410 ILCS 620/11.

47. Defendant’s Products are misbranded under New York, California and Illinois state law because they misled Plaintiffs and Class members about the volume of the Products contained within the Slim Jim® box in comparison to the size of the Slim Jim® Products’ packaging. The size of the Slim Jim® box in relation to the actual amount of the Product contained therein gives the false impression that the consumer is buying more than they are actually receiving.

Plaintiffs Relied on Defendant's Misleading and Deceptive Conduct and Were Injured as a Result

48. The types of misrepresentations made above were considered by Plaintiffs and Class members (as would be considered by a reasonable consumer) when deciding to purchase the Products. Reasonable consumers, including Plaintiffs and Class members, attached importance to whether Defendant's Products were "misbranded," *i.e.*, not legally salable, or capable of legal possession, and/or contain non-functional slack-fill.

49. Plaintiffs and Class members did not know, and had no reason to know, that the Slim Jim® Products contained non-functional slack-fill.

50. Defendant's Product packaging was a material factor in Plaintiffs' and Class members' decisions to purchase the Products. Based on Defendant's Product packaging, Plaintiffs and Class members believed that they were getting more of the Slim Jim® Products than was actually being sold. Had Plaintiffs known Defendant's packaging was slack-filled, they would not have bought the slack-filled Products.

51. Defendant's Product packaging as alleged herein is deceptive and misleading and was designed to increase sales of the Slim Jim® Products. Defendant's misrepresentations are part of its systematic Product packaging practice.

52. Plaintiffs and Class members paid the full price of the Products and received less of what Defendant represented they would be getting due to the non-functional slack-fill in the Products. In order for Plaintiffs and Class members to be made whole, Plaintiffs and Class members would have to have paid less for the Products. In the alternative, Plaintiffs and members of the Class are damaged by the percentage of non-functional slack-fill relative to the purchase price they paid.

53. There is no practical reason for the non-functional slack-fill used to package the Products other than to mislead consumers as to the actual volume of the Products being purchased by consumers.

54. In reliance on Defendant's deception, consumers – including Plaintiffs and members of the proposed Class – have purchased Products that contain non-functional slack-fill. Moreover, and Class members have paid a premium for the Products over other meat stick snacks sold on the market (see below).

<u>BRAND</u>	<u>PRODUCT</u>	<u>PACKAGE SIZE</u>	<u>PRICE PER OUNCE¹</u>
Ostrim High Protein Snack	Beef & Ostrich, Teriyaki	1.50 ounce package	\$1.08/ounce
Jack Link's	Beef Stick - Original	0.92 ounce package	\$1.04/ounce
Old Wisconsin	Snack Sticks - Beef	1.5 ounce package	\$0.91/ounce
Slim Jim	Smoked Snack Stick Original/Mild (the "Products")	1.12 ounce package	\$3.56/ounce

55. At the point of sale, Plaintiffs and Class members relied on Defendant's misbranded packaging in deciding to purchase the Slim Jim® Products. Plaintiffs and Class members did not know, and had no reason to know, that the Slim Jim® Products were misbranded as set forth herein, and would not have bought the Products had they known the truth about them.

56. Defendant's non-functional slack-fill packaging is misleading and in violation of FDCA and consumer protection laws of each of the fifty states and the District of Columbia, and the Products at issue are misbranded as a matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held or sold in the United States. Plaintiffs and Class

¹ Pricing information obtained from www.Amazon.com.

members would not have bought the Products had they known they were misbranded and illegal to sell or possess.

57. As a result of Defendant's misrepresentations, Plaintiffs and thousands of others throughout the United States purchased the Products.

58. Plaintiffs and the Class (defined below) have been damaged by Defendant's deceptive and unfair conduct in that they purchased Products with non-functional slack-fill and paid prices they otherwise would not have paid had Defendant not misrepresented the Products' actual size.

59. Plaintiffs have standing to sue in this case because Plaintiffs have "(1) a personal injury in fact, (2) which is caused by Defendant's misleading packaging and labeling practices alleged herein, and (3) which a favorable decision will likely redress." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir.2012). Courts have routinely held that economic injury is sufficient for the standing requirement. *See, e.g., In re Frito-Lay N. Am.*, 2013 WL 4647512 at *11.

CLASS ACTION ALLEGATIONS

The Nationwide Class

60. Plaintiffs brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class (the "Class"):

All persons or entities in the United States who made retail purchases of Slim Jim® Products in containers made, formed or filled as to be misleading and contain non-functional slack-fill, specifically four-packs of individually wrapped sticks with a Net wt of 1.12 oz (32g) or "Handi Pak" boxes containing twelve four-packs of individually wrapped sticks each with a Net wt of 1.12 oz (32g), during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

The New York Class

61. Plaintiff LAM seeks to represent a class consisting of the following subclass (the “New York Class”):

All New York residents who made retail purchases of Slim Jim® Products in containers made, formed or filled as to be misleading and contain non-functional slack-fill, specifically four-packs of individually wrapped sticks with a Net wt of 1.12 oz (32g) or “Handi Pak” boxes containing twelve four-packs of individually wrapped sticks each with a Net wt of 1.12 oz (32g), during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

The California Class

62. Plaintiffs MYERS and ESCOBAR seek to represent a class consisting of the following subclass (the “California Class”):

All California residents who made retail purchases of Slim Jim® Products in containers made, formed or filled as to be misleading and with non-functional slack-fill, specifically four-packs of individually wrapped sticks with a Net wt of 1.12 oz (32g) or “Handi Pak” boxes containing twelve four-packs of individually wrapped sticks each with a Net wt of 1.12 oz (32g), during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

The Illinois Class

63. Plaintiff RIZZU seeks to represent a class consisting of the following subclass (the “Illinois Class”):

All Illinois residents who made retail purchases of Slim Jim® Products in containers made, formed or filled as to be misleading and contain non-functional slack-fill, specifically four-packs of individually wrapped sticks with a Net wt of 1.12 oz (32g) or “Handi Pak” boxes containing twelve four-packs of individually wrapped sticks each with a Net wt of 1.12 oz (32g), during the applicable limitations period, and/or such subclasses as the Court may deem appropriate.

The proposed Classes exclude current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant’s legal

representatives, heirs, successors, assigns, and any entity in which it has or has had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

64. Plaintiffs reserve the right to revise the Class definition based on facts learned in the course of litigating this matter.

65. Numerosity: This action has been brought and may properly be maintained as a class action against Defendants under Rules 23(b)(1)(B) and 23(b)(3) of the Federal Rules of Civil Procedure. While the exact number and identities of other Class members are unknown to Plaintiffs at this time, Plaintiffs are informed and believe that there are hundreds of thousands of members in the Nationwide Class, New York Class, California Class, and Illinois Class. Based on sales of the Products, it is estimated that each Class is composed of more than 10,000 persons. Furthermore, even if subclasses need to be created for these consumers, it is estimated that each subclass would have thousands of members. The members of the Class are so numerous that joinder of all members is impracticable and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the courts. Other members of the Class may be identified from records maintained by Defendant and may be notified of the pendency of this action by mail, or by advertisement, using the form of notice similar to that customarily used in class actions such as this.

66. Typicality: Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendant's wrongful conduct, as detailed herein.

67. Adequacy: Plaintiffs will fairly and adequately protect the interests of the members of the Class in that they have no interests antagonistic to those of the other members of the Class. Plaintiffs have retained experienced and competent counsel.

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

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

- i. Whether Defendant labeled, packaged, marketed, advertised and/or sold Slim Jim Products to Plaintiffs, and those similarly situated, using false, misleading and/or deceptive packaging and labeling;
- ii. Whether Defendant's action constitute violations of 21 C.F.R. 100, *et. seq.*;
- iii. Whether Defendant's actions constitute violations of food labeling laws in of the fifty states and the District of Columbia;
- iv. Whether Defendant's actions constitute violations of consumer protection laws of the fifty states and the District of Columbia;
- v. Whether Defendant omitted and/or misrepresented material facts in connection with the labeling, packaging, marketing, advertising and/or sale of Slim Jim® Products;

- vi. Whether Defendant's labeling, packaging, marketing, advertising and/or selling Slim Jim® Products constituted an unfair, unlawful or fraudulent practice;
- vii. Whether Defendant's packaging of the Slim Jim® Products constituted non-functional slack-fill;
- viii. Whether Defendant's improperly mischaracterized the size of the meat sticks of the Slim Jim® Products by its deceptively large representation on the Slim Jim® Products' packaging;
- ix. Whether, and to what extent, injunctive relief should be imposed on Defendant to prevent such conduct in the future;
- x. Whether the members of the Class have sustained damages as a result of Defendant's wrongful conduct;
- xi. The appropriate measure of damages and/or other relief;
- xii. Whether Defendant has been unjustly enriched by its scheme of using false, misleading and/or deceptive labeling, packaging or misrepresentations, and;
- xiii. Whether Defendant should be enjoined from continuing its unlawful practices.

70. The class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiffs know of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class action.

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

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

73. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interest of all members of the Class, although certain Class members are not parties to such actions.

74. Defendant's conduct is generally applicable to the Class as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

CAUSES OF ACTION

COUNT I

INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

75. Plaintiff LAM repeats and realleges each and every allegation contained above as if fully set forth herein, and further alleges as follows:

76. Plaintiff LAM brings this claim individually and on behalf of the other members of the New York Class for an injunction for violations of New York's Deceptive Acts or Practices Law, ("NY GBL") § 349.

77. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

78. Any person who has been injured by reason of any violation of NY GBL § 349 may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

79. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Slim Jim® Products in packages resulting in approximately 80% non-functional slack-fill are unfair, deceptive and misleading and are in violation of the NY GBL § 349 and 21 C.F.R. 100.100 in that said Slim Jim® Products are misbranded. 21. C.F.R. 100.100 provides in part:

In accordance with section 403(d) of the [FDCA], 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 within.

80. Defendant should be enjoined from packaging its Slim Jim® Products with 80% non-functional slack-fill as described above pursuant to NY GBL § 349 and 21 C.F.R. 100.100.

81. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Slim Jim® Products in packages displaying a falsely larger depiction of the "actual size" of the product on the box are unfair, deceptive and misleading and are in violation of the NY GBL § 349 in that said Slim Jim® Products are misbranded.

82. Under NY GBL §§ 349 and 350, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law §§ 349 and 350 claims, it was error. Justifiable reliance by the plaintiff is not an

element of the statutory claim.” *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

83. Defendant should be enjoined from packaging its Slim Jim® Products with a falsely larger depiction of the “actual size” of the Product on the box as described above pursuant to NY GBL § 349.

84. Plaintiff LAM, on behalf of herself and all others similarly situated, respectfully demands a judgment enjoining Defendant’s conduct, awarding costs of this proceeding and attorneys’ fees, as provided by NY GBL, and such other relief as this Court deems just and proper.

COUNT II

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

85. Plaintiff LAM repeats and realleges each and every allegation contained above as if fully set forth herein, and further alleges as follows:

86. Plaintiff LAM brings this claim individually and on behalf of the other members of the New York Class for violations of NY GBL § 349.

87. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misbranding its Slim Jim® Products as seeming to contain more in the packaging than is actually included.

88. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Slim Jim® Products in packages resulting in approximately 80% non-functional slack-fill are unfair, deceptive and misleading and are in violation of 21 CFR 100.100 in that said Slim Jim® Products are misbranded.

89. The practices employed by Defendant, whereby Defendant advertised, promoted, marketed and sold its Slim Jim® Products in packages displaying a falsely larger depiction of the “actual size” of the Product on the box are unfair, deceptive and misleading and are in violation of the NY GBL § 349 in that said Slim Jim® Products are misbranded.

90. The foregoing deceptive acts and practices were directed at consumers.

91. Plaintiff LAM and the other Class members suffered a loss as a result of Defendant’s deceptive and unfair trade acts. Specifically, as a result of Defendant’s deceptive and unfair acts and practices, Plaintiff LAM and the other Class members suffered monetary losses associated with the purchase of Slim Jim® Products, i.e., receiving only approximately 20% of the capacity of the packaging due to approximately 80% non-functional slack-fill as well as receiving less of the Product than falsely depicted on the box as “actual size.”

COUNT III

INJUNCTIONS FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAWS § 350 (UNLAWFUL FALSE ADVERTISING ACT)

92. Plaintiff LAM repeats and realleges each and every allegation contained above as if fully set forth herein, and further alleges as follows:

93. Plaintiff LAM brings this claim individually and on behalf of the other members of the New York Class for violations of NY GBL § 350.

94. NY GBL § 350 provides that false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state are unlawful.

95. NY GBL § 350-a defines “false advertising” as “advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect.”

96. Any person who has been injured by reason of any violation of the NY GBL may bring an action in his own name to enjoin unlawful act or practice, an action to recover his actual damages or five hundred dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to ten thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

97. As fully alleged above, by advertising, marketing, distributing, labeling and selling Slim Jim® Products to Plaintiff LAM and other members of the Class, Defendant engaged in, and continues to engage in, false advertising.

98. Defendant engaged in false advertising by advertising, marketing, distributing and selling Slim Jim® Products in containers made, formed or filled as to be misleading and contain approximately 80% non-functional slack-fill.

99. Defendant engaged in false advertising by depicting the "actual size" of the Slim Jim® Product as larger than it actually is on the front of the box.

100. Plaintiff LAM and other members of the Class further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the members of the Class will be irreparably harmed unless the unlawful actions of Defendants are enjoined, in that Defendant will continue to falsely advertise a higher content of product than is actually contained.

101. Defendant should be enjoined from packaging its Slim Jim® Products in containers made, formed or filled as to be misleading and contain 80% non-functional slack-fill and falsely advertising its Slim Jim® Products as containing more product than is actually contained.

102. Defendant should be enjoined from packaging its Slim Jim® Products with a falsely larger depiction of the “actual size” of the product on the box to the detriment of consumers.

103. In this regard, Defendant has violated, and continues to violate, NY GBL § 350, which makes false advertising unlawful. As a direct and proximate result of Defendant’s violation of NY GBL § 350 above, Plaintiff LAM and other members of the Class have suffered damages in an amount to be determined at trial.

COUNT IV

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW 350 (UNLAWFUL FALSE ADVERTISING ACT)

104. Plaintiff LAM repeats and realleges each and every allegation contained above as if fully set forth herein, and further alleges as follows:

105. Plaintiff LAM brings this claim individually and on behalf of the other members of the New York Class for violations of NY GBL § 350.

106. As fully alleged above, by advertising, marketing, distributing, labeling and selling Slim Jim® Products to Plaintiff LAM and other members of the Class, Defendant engaged in, and continues to engage in, false advertising.

107. Defendant engaged in false advertising by advertising, marketing, distributing and selling Slim Jim® Products in containers made, formed or filled as to be misleading and contain approximately 80% non-functional slack-fill.

108. Defendant engaged in false advertising by depicting the “actual size” of the Slim Jim® Product as larger than it actually is on the front of the box.

109. The foregoing false advertising acts were directed at consumers.

110. Plaintiff LAM and other members of the Class suffered a loss as a result of Defendant's false advertising. Specifically, as a result of Defendant's false advertising, Plaintiff LAM and other Class members suffered monetary losses associated with the purchase of Slim Jim® Products in four-packs, i.e., receiving less of the product than would be reasonably expected from such packaging size and as advertised as part of the box size and by receiving less of the product than falsely depicted on the box as "actual size."

111. In this regard, Defendant has violated, and continues to violate, GBL § 350, which makes false advertising unlawful. As a direct and proximate result of Defendant's violation of GBL § 350 above, Plaintiff LAM and other members of the Class have suffered damages in an amount to be determined at trial.

COUNT V

VIOLATION OF ILLINOIS' CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS § 505, et seq.

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

113. Plaintiff RIZZU brings this claim individually and on behalf of the other members of the Illinois Class for violations of Illinois' Consumer Fraud and Deceptive Business Practice Act, ("ICFA"), 815 ILC § 505, et seq.

114. Plaintiff RIZZU and Illinois Class members are consumers who purchased the Products for personal, family or household purposes. Plaintiff RIZZU and the Illinois Class members are "consumers" as that term is defined by the ICFA, 815 ILC § 505/1(e) as they purchased the Products for personal consumption or for a member of their household and not for resale.

115. Products that Plaintiff RIZZU and other Illinois Class members purchased from Defendant were “merchandise” within the meaning of the ICFA, 815 ILC § 505/1(b).

116. Under Illinois law, 815 ILC § 505/2, “[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.” By engaging in the conduct set forth herein, Defendant violated and continues to violate § 505/2 of the ICFA, because Defendant’s conduct constitutes unfair methods of competition and unfair or deceptive acts or practices, in that it misrepresents that the Products have characteristics and quantities they do not have.

117. Defendant’s packaging with containers made, formed or filled as to be misleading and contain non-functional slack-fill constitute a deceptive act or practice under the ICFA because it has misled Plaintiff RIZZU and the Illinois Class to believe that the Products contained more contents than they actually do.

118. Defendant intended that Plaintiff RIZZU and other members of the Illinois Class rely on their deceptive act or practice.

119. Defendant’s deceptive act or practice occurred in the course of trade or commerce. “The terms “trade” and “commerce” mean the advertising, offering for sale, sale, or distribution of any services and any property....” 815 ILC § 505/1(f). Defendant’s deceptive act or practice occurred in the advertising, offering for sale, sale, or distribution of the Products.

120. Plaintiff RIZZU and the Illinois Class suffered actual damage proximately caused by Defendant because (a) they would not have purchased the Products on the same terms absent Defendant's illegal and misleading conduct as set forth herein, or if the true facts were known concerning Defendant's representations; (b) they paid a price premium for the Products due to Defendant's misrepresentations and deceptive packaging in containers made, formed or filled as to be misleading and with non-functional slack-fill; and (c) the Products did not have the characteristics or quantities as promised.

121. Wherefore, Plaintiff RIZZU seeks damages, restitution, and injunctive relief for these violations of the ICFA.

COUNT VI

VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT, Cal. Civ. Code § 1750, *et seq.*

122. Plaintiffs MYERS and ESCOBAR reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

123. Plaintiffs MYERS and ESCOBAR bring this claim individually and on behalf of the other members of the California Class for Defendant's violations of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1761(d).

124. Plaintiffs MYERS and ESCOBAR and California Class members are consumers who purchased the Products for personal, family or household purposes. Plaintiffs MYERS and ESCOBAR and the California Class members are "consumers" as that term is defined by the CLRA in Cal. Civ. Code § 1761(d). Plaintiffs MYERS and ESCOBAR and the California Class members are not sophisticated experts with independent knowledge of corporate branding, labeling and packaging practices.

125. Products that Plaintiffs MYERS and ESCOBAR and other California Class members purchased from Defendant were “goods” within the meaning of Cal. Civ. Code § 1761(a).

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

127. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

128. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5) of the CLRA, because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents that the Products have characteristics and quantities they do not have.

129. Cal. Civ. Code § 1770(a)(9) further prohibits “[a]dvertising goods or services with intent not to sell them as advertised.” By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(9), because Defendant’s conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it advertises goods with the intent not to sell the goods as advertised.

130. Plaintiffs MYERS and ESCOBAR and the California Class members are not sophisticated experts about the corporate branding, labeling and packaging practices. Plaintiffs MYERS and ESCOBAR and the California Class acted reasonably when they purchased the Products based on their belief that Defendant's representations were true and lawful.

131. Plaintiffs MYERS and ESCOBAR and the California Class suffered injuries caused by Defendant because (a) they would not have purchased the Products on the same terms absent Defendant's illegal and misleading conduct as set forth herein; (b) they paid a price premium for the Products due to Defendant's misrepresentations and deceptive packaging in containers made, formed or filled as to be misleading and contain non-functional slack-fill; and (c) the Products did not have the characteristics or quantities as promised.

132. On or about January 22, 2015, prior to filing this action, a CLRA notice letter was served on Defendant which complies in all respects with California Civil Code § 1782(a). Plaintiffs MYERS and ESCOBAR sent CONGARA FOODS, INC., individually and on behalf of the proposed Class, a letter via certified mail, return receipt requested, advising Defendant that they are in violation of the CLRA and demanding that they cease and desist from such violations and make full restitution by refunding the monies received therefrom. A true and correct copy of Plaintiffs MYERS and ESCOBAR's letter is attached hereto as **EXHIBIT 3**.

133. Wherefore, Plaintiffs MYERS and ESCOBAR seek damages, restitution, and injunctive relief for these violations of the CLRA.

COUNT VII

VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW, California Business & Professions Code §§ 17200, et seq.

134. Plaintiffs MYERS and ESCOBAR reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

135. Plaintiffs MYERS and ESCOBAR bring this claim individually and on behalf of the members of the proposed California Class for Defendant's violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*

136. The UCL provides, in pertinent part: "Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising"

137. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

138. Defendant's business practices, described herein, violated the "unlawful" prong of the UCL by violating Section 403(r) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 343(d), California Health & Safety Code § 110690, the CLRA, and other applicable law as described herein.

139. Defendant's business practices, described herein, violated the "unfair" prong of the UCL in that their conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits. Defendant's advertising is of no benefit to consumers, and its failure to comply with the FDCA and parallel California labeling requirements and deceptive advertising concerning the quantity of the Products offends the public policy advanced by the FDCA to ensure that "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2)(A).

140. Defendant violated the “fraudulent” prong of the UCL by misleading Plaintiffs MYERS and ESCOBAR and the California Class to believe that the Products contained more contents than they actually do and that such packaging and labeling practices were lawful, true and not intended to deceive or mislead the consumers.

141. Plaintiffs MYERS and ESCOBAR and the California Class members are not sophisticated experts about the corporate branding, labeling, and packaging practices of the Products. Plaintiffs MYERS and ESCOBAR and the California Class acted reasonably when they purchased the Products based on their belief that Defendant’s representations were true and lawful.

142. Plaintiffs MYERS, ESCOBAR and the California Class lost money or property as a result of Defendant’s UCL violations because (a) they would not have purchased the Products on the same terms absent Defendant’s illegal conduct as set forth herein, or if the true facts were known concerning Defendant’s representations; (b) they paid a price premium for the Products due to Defendant’s misrepresentations; and (c) the Products did not have the characteristics or quantities as promised.

COUNT VIII

VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAW, California Business & Professions Code §§ 17500, et seq.

143. Plaintiffs MYERS and ESCOBAR reallege and incorporate herein by reference the allegations contained in all preceding paragraphs, and further allege as follows:

144. Plaintiffs MYERS and ESCOBAR bring this claim individually and on behalf of the members of the proposed California Class for Defendant’s violations of California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500, *et seq.*

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

146. Defendant engaged in a scheme of offering misbranded Products for sale to Plaintiffs MYERS and ESCOBAR and the California Class members by way of packaging the Products in containers made, formed or filled as to be misleading and contain non-functional slack-fill. Such practice misrepresented the content and quantity of the misbranded Products. Defendant’s advertisements and inducements were made in California and come within the definition of advertising as contained in Bus. & Prof. Code § 17500, et seq. in that the product packaging was intended as inducements to purchase Defendant’s Products. Defendant knew that these statements were unauthorized, inaccurate, and misleading.

147. Defendant violated federal and California law because the Products are packaged in containers made, formed or filled as to be misleading and contain non-functional slack-fill and because they are intentionally packaged to prevent the consumer from being able to fully see their contents.

148. Defendant violated § 17500, et seq. by misleading Plaintiffs MYERS and ESCOBAR and the California Class to believe that the packaging with non-functional slack-fill made about the Products were true as described herein.

149. Defendant knew or should have known, through the exercise of reasonable care that the Products were and continue to be misbranded, and that its representations about the characteristics and quantities of the Products were untrue and misleading.

150. Plaintiffs MYERS and ESCOBAR and the California Class lost money or property as a result of Defendant's FAL violations because (a) they would not have purchased the Products on the same terms absent Defendant's illegal conduct as set forth herein, or if the true facts were known concerning Defendant's representations; (b) they paid a price premium for the Products due to Defendant's misrepresentations; and (c) the Products did not have the characteristics, benefits, or quantities as promised.

COUNT IX

NEW JERSEY CONSUMER FRAUD ACT, N.J.S.A.56:8-1, *ET SEQ.*

151. Plaintiff JOHN DOE (NEW JERSEY) realleges and incorporates by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

152. Plaintiff JOHN DOE (NEW JERSEY) brings this claim individually and on behalf of the other members of the New Jersey Class for violations of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1, et seq.

153. At all relevant times, Defendant was and is a "person," as defined by N.J.S.A. 56:8-1(d).

154. At all relevant times, Defendant's Products constituted "merchandise," as defined by N.J.S.A. 56:8-1(c).

155. At all relevant times, Defendant's manufacturing, marketing, advertising, sales and/or distribution of the Products at issue met the definition of "advertisement" set forth by N.J.S.A. 56:8-1(a).

156. At all relevant times, Defendant's manufacturing, marketing, advertising, sales and/or distribution of the Products at issue met the definition of "sale" set forth by N.J.S.A. 56:8-1(e).

157. N.J.S.A. 56:8-2 provides that "[t]he act, use or employment by any person of any unconscionable practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission, ...is declared to be an unlawful practice..."

158. Defendant has made and continues to make deceptive, false and misleading statements concerning the packaging of its Products, namely manufacturing, selling, marketing, packaging and advertising the Products, as alleged herein. Defendant falsely represented that the Products contain much more product than they actually do.

159. As described in detail above, Defendant uniformly misrepresented to Plaintiff JOHN DOE (NEW JERSEY) and each member of the New Jersey Class, by means of its advertising, marketing and other promotional materials, and on the Products' labeling and packaging, the Products' contents.

160. Defendant has therefore engaged in practices which are unconscionable, deceptive and fraudulent and which are based on false pretenses, false promises, misrepresentations, and the knowing concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission in its manufacturing, advertising, marketing, selling and distribution of the Products. Defendant has therefore violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et seq.

161. As a direct and proximate result of Defendant's improper conduct, Plaintiff JOHN DOE (NEW JERSEY) and other members of the New Jersey Class have suffered damages and

ascertainable losses of moneys and/or property, by paying more for the Products than they would have, and/or by purchasing the Products which they would not have purchased, if the benefits of taking such Products had not been misrepresented, in amounts to be determined at trial.

COUNT X

**MICHIGAN CONSUMER PROTECTION ACT,
MCL §§ 445.901. ET SEQ.**

162. Plaintiff JOHN DOE (MICHIGAN) realleges and incorporates by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

163. Plaintiff JOHN DOE (MICHIGAN) brings this claim individually and on behalf of the Michigan Class for Defendant's violations under the Michigan Consumer Protection Act, MCL §§ 445.901. et seq. (the "MCPA").

164. Defendant's actions constitute unlawful, unfair, deceptive and fraudulent actions/practices as defined by the MCPA, MCL §445.901, et seq., as they occurred in the course of trade or commerce.

165. As part of its fraudulent marketing practices, Defendant engaged in a pattern and practice of knowingly and intentionally making numerous false representations and omissions of material facts, with the intent to deceive and fraudulently induce reliance by Plaintiff JOHN DOE (MICHIGAN) and the members of the Michigan Class. These false representations and omissions were uniform and identical in nature as they all failed to disclose that the Products are packaged in in containers made, formed or filled as to be misleading and contain non-functional slack-fill.

166. Defendant has made and continues to make deceptive, false and misleading statements concerning the packaging of its Slim Jim® Products, namely manufacturing, selling, marketing, packaging and advertising the Products with false and misleading statements, as

alleged herein. Defendant falsely represented that the Products contain much more product than they actually do.

167. Had Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class known the misleading and/or deceptive nature of Defendant's claims, they would not have purchased the Products. Defendant's acts, practices and omissions, therefore, were material to Plaintiffs' decision to purchase the Products at a premium price, and were justifiably relied upon by Plaintiffs.

168. The unfair and deceptive trade acts and practices have directly, foreseeably and proximately caused damage to Plaintiff JOHN DOE (MICHIGAN) and other members of the Michigan Class.

169. The Defendant's practices, in addition, are unfair and deceptive because they have caused Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class substantial harm, which is not outweighed by any countervailing benefits to consumers or competition, and is not an injury consumers themselves could have reasonably avoided.

170. The Defendant's acts and practices have misled and deceived the general public in the past, and will continue to mislead and deceive the general public into the future, by, among other things, causing them to purchase Products with false and misleading statements concerning their content at a premium price.

171. Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class are entitled to preliminary and permanent injunctive relief ordering the Defendant to immediately cease these unfair business practices, as well as disgorgement and restitution to Plaintiff JOHN DOE (MICHIGAN) and the Michigan Class of all revenue associated with its unfair practices, or such revenues as the Court may find equitable and just.

COUNT XI

**VIOLATION OF FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT,
FLA. STAT. ANN. § 501.201, *ET SEQ.***

172. Plaintiff JOHN DOE (FLORIDA) realleges and incorporates by reference the allegations contained in all preceding paragraphs, and further alleges as follows:

173. Plaintiff JOHN DOE (FLORIDA) brings this claim individually and on behalf of the Florida Class for Defendant's violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*

174. Section 501.204(1) of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") makes "unfair or deceptive acts or practices in the conduct or any trade or commerce" in Florida unlawful.

175. Throughout the Class Period, by advertising, marketing, distributing, and/or selling the Products in containers made, formed or filled as to be misleading and contain non-functional slack-fill, to Plaintiff JOHN DOE (FLORIDA) and other Florida Class members, Defendant violated the FDUTPA by engaging in false advertising concerning the Products.

176. Defendant has made and continues to make deceptive, false and misleading statements concerning the Products, namely manufacturing, selling, marketing, packaging and advertising the Products as alleged herein. Defendant falsely represented that the Products contain much more product than they actually do.

177. Plaintiff JOHN DOE (FLORIDA) and other Florida Class members seek to enjoin such unlawful acts and practices as described above. Each of the Florida Class members will be irreparably harmed unless the unlawful actions of Defendant are enjoined in that they will continue to be unable to rely on the Defendant's misleading packaging and advertising.

178. Had Plaintiff JOHN DOE (FLORIDA) and the Florida Class members known the misleading and/or deceptive nature of Defendant's claims, they would not have purchased the Products.

179. Plaintiff JOHN DOE (FLORIDA) and the Florida Class members were injured in fact and lost money as a result of Defendant's conduct of improperly packaging the Products in containers made, formed or filled as to be misleading and contain non-functional slack-fill. Plaintiff JOHN DOE (FLORIDA) and the Florida Class members paid for Defendant's premium priced Products, but received Products that were worth less than the Products for which they paid.

180. Plaintiff JOHN DOE (FLORIDA) and the Florida Class seek declaratory relief, enjoining Defendant from continuing to disseminate its false and misleading statements, actual damages plus attorney's fees and court costs, and other relief allowable under the FDUTPA.

COUNT XII

NEGLIGENT MISREPRESENTATION (All States)

181. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein, and further allege as follows:

182. Defendant, directly or through its agents and employees, made false representations, concealment and nondisclosures to Plaintiffs and members of the Class.

183. Defendant as the manufacturer, packager, labeler and initial seller of the Slim Jim® Products purchased by Plaintiffs and Class members had a duty to disclose the true nature of the Products and not sell them in containers made, formed or filled as to be misleading and contain non-functional slack-fill. Defendant had exclusive knowledge of material facts not known or reasonably accessible to Plaintiffs and Class members; Defendant actively concealed

material facts from Plaintiffs and Class members and Defendant made partial representations that are misleading because some other material fact has not been disclosed. Defendant's failure to disclose the information it had a duty to disclose constitutes material misrepresentations and materially misleading omissions which misled Plaintiffs and Class members who relied on Defendant in this regard to disclose all material facts accurately, truthfully and fully.

184. Plaintiffs and members of the Class reasonably relied on Defendants' representation that their Products contain more product than actually packaged.

185. In making the representations of fact to Plaintiffs and members of the Class described herein, Defendant has failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendant's negligence and carelessness.

186. Defendant, in making the misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true. Defendant made and intended the misrepresentations to induce the reliance of Plaintiffs and members of the Class.

187. As the sole manufacturer of their products, Defendant is in the unique position of being able to provide accurate information about their products. Therefore there is a special and privity-like relationship between Defendant and Plaintiffs and other consumers. *See Ebin v. Kangadis*, 297 F.R.D. 561 (S.D.N.Y. March 24, 2014) (granting class certification on negligent misrepresentation claim where plaintiffs purchased olive oil with misrepresentations in a commercial transaction).

188. Defendant has a duty to correct the misinformation it disseminated through its advertising of the Products. By not informing Plaintiffs and members of the Class, Defendant breached its duty. Defendant also gained financially from and as a result of this breach.

189. By and through such deceit, misrepresentations and/or omissions, Defendant intended to induce Plaintiffs and members of the Class to alter their position to their detriment. Plaintiffs and members of the Class relied upon these false representations when purchasing Slim Jim® Products in individual packages and “Handi Pak” boxes, which reliance was justified and reasonably foreseeable.

190. As a direct and proximate result of Defendant’s wrongful conduct, Plaintiffs and members of the Class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the amounts paid for Slim Jim® Products, and any interest that would have been accrued on all those monies, all in an amount to be determined according to proof at time of trial.

191. Defendant acted with intent to defraud, or with reckless or negligent disregard of the rights of Plaintiffs and members of the Class.

192. Plaintiffs and members of the Class are entitled to punitive damages.

COUNT XIII

BREACH OF EXPRESS WARRANTIES (All States and the District of Columbia)

193. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein, and further allege as follows:

194. Defendant provided Plaintiffs and other members of the Class with written warranties, including, but not limited to, warranties that its Slim Jim® Products depicted on its packaging as “actual size” with dimensions of 3 7/8 inches tall and 5/8 inches wide.

195. Defendant breached these warranties by failing to provide the Products as advertised and described above.

196. This breach resulted in damages to Plaintiffs and the other members of the Class who bought Defendant's Products but did not receive the goods as warranted in that the Products were not the size that they claim to be.

197. As a proximate result of Defendant's breach of warranties, Plaintiffs and the other Class members have suffered damages in an amount to be determined by the Court and/or jury, in that, among other things, they purchased and paid for Products that did not conform to what Defendant promised in its promotion, marketing, advertising and packaging and they were deprived of the benefit of their bargain and spent money on Products that had less value than warranted.

COUNT XIV

COMMON LAW FRAUD (All States and the District of Columbia)

198. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein, and further allege as follows:

199. Defendant intentionally made materially false and misleading representations regarding the size, amount and contents of the Slim Jim® Products.

200. Plaintiffs and the Class were induced by, and relied on, Defendant's false and misleading packaging, representations and omissions and did not know at the time that they were purchasing the Product that they were only purchasing an amount of product that was much less than the size of the box in which the Product was packaged.

201. Defendant knew or should have known of its false and misleading labeling, packaging and misrepresentations and omissions. Defendant nevertheless continued to promote and encourage customers to purchase the Product in a misleading and deceptive manner.

202. Plaintiffs and the Class have been injured as a result of Defendant's fraudulent conduct.

203. Defendant is liable to Plaintiffs and the Class for damages sustained as a result of defendant's fraud, in an amount to be determined at trial.

COUNT XV

UNJUST ENRICHMENT (All States and the District of Columbia)

204. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein, and further allege as follows:

205. As a result of Defendant's deceptive, fraudulent and misleading labeling, packaging, advertising, marketing and sales of Slim Jim® Products, Defendant was enriched, at the expense of Plaintiffs and the Class, through the payment of the purchase price for Defendant's Slim Jim® Products.

206. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits that it received from Plaintiffs, and all others similarly situated, in light of the fact that the quantity of the Slim Jim® Products purchased by Plaintiffs and the Class, was not what Defendant purported it to be by its labeling and packaging. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiff, and all others similarly situated, for 80% of the purchase price of Slim Jim® Products, which represents the percentage of the amount of product actually received (20%) to the size of the packaging.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

- (A) For an Order certifying the nationwide Class and under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representative of the Class and Plaintiffs' attorneys as Class Counsel to represent members of the Class;
- (B) For an Order certifying the New York Class, appointing Plaintiff JAIME LAM representative of the New York Class, and designating her counsel as counsel for the New York Class;
- (C) For an Order certifying the Illinois Class, appointing Plaintiff RICHARD A. RIZZU representative of the Illinois Class, and designating his counsel as counsel for the Illinois Class;
- (D) For an Order certifying the California Class, appointing Plaintiffs FREDDIE ESCOBAR and DAVID MYERS representatives of the California Class, and designating his counsel as counsel for the California Class;
- (E) For an Order declaring the Defendant's conduct violates the statutes referenced herein;
- (F) For an order finding in favor of Plaintiffs and the Class;
- (G) For compensatory and punitive damages in amounts to be determined by the Court and/or jury;
- (H) For prejudgment interest on all amounts awarded;
- (I) For an order of restitution and all other forms of equitable monetary relief;
- (J) For injunctive relief as pleaded or as the Court may deem proper;
- (K) For an Order awarding Plaintiffs and the Class their reasonable attorneys' fees and expenses and costs of suit; and

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

DEMAND FOR TRIAL BY JURY

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

Dated: April 23, 2015

Respectfully submitted,

LEE LITIGATION GROUP, PLLC

C.K. Lee (CL 4086)

30 East 39th Street, Second Floor

New York, NY 10016

Tel.: 212-465-1188

Fax: 212-465-1181

Attorney for Plaintiffs and the Class

BY: 
C.K. Lee, Esq.

EXHIBIT 1

FILED
YOLO SUPERIOR COURT

DEC 22 2011

1 JEFF W. REISIG, District Attorney
LAWRENCE BARLLY, Deputy District Attorney, Bar. No. 114456
2 Consumer Fraud and Environmental Protection Division
Yolo County District Attorney's Office
3 301 Second Street
Woodland, CA 95695
4 Phone: (530) 666-8180
Fax: (530) 666-8185

By 
Deputy

5 JAN SCULLY, District Attorney
6 RUTH YOUNG, Deputy District Attorney, Bar No. 133606
Consumer & Environmental Protection Division
7 Sacramento County District Attorney's Office
906 G Street, Suite 700
8 Sacramento, CA 95814
Phone: (916) 874-6174
9 Fax: (916) 874-7660

10 VERN PIERSON, District Attorney
JAMES A CLINCHARD, Deputy District Attorney, Bar No. 200746
11 Consumer & Environmental Protection Division
El Dorado County District Attorney's Office
12 515 Main Street
Placerville, CA 95667
13 Phone: (530) 621-6472
Fax: (530) 621-1280

14 Attorneys for the People

15
16 SUPERIOR COURT OF CALIFORNIA, COUNTY OF YOLO
17
18

19 THE PEOPLE OF THE STATE OF CALIFORNIA,

20 Plaintiff,

21 vs.

22 CONAGRA FOODS, INC.,
a Delaware Corporation

23 Defendant.
24

NO. CV11-2794

COMPLAINT FOR
INJUNCTION, CIVIL
PENALTIES, AND OTHER
RELIEF

25 JEFF W. REISIG, District Attorney of Yolo County, by LAWRENCE BARLLY, Deputy
26 District Attorney; JAN SCULLY, District Attorney for the County of Sacramento, by Deputy
27 District Attorney RUTH YOUNG and VERN PIERSON, District Attorney of El Dorado County,
28 by JAMES A. CLINCHARD Deputy District Attorney; acting on information and belief, allege:

The PEOPLE of the State of California v. CONAGRA FOODS, INC., Complaint

JURISDICTION AND VENUE

1
2 1. Acting to protect the general public from untrue and misleading representations
3 and unlawful business practices, plaintiffs brings this suit in the name of THE PEOPLE OF THE
4 STATE OF CALIFORNIA. Plaintiffs, by this action and pursuant to Business and Professions
5 Code sections 17200, 17203, 17204, 17205, 17206, 17500, 17535 and 17536, seek to enjoin
6 defendant from engaging in unfair and unlawful business practices as alleged herein and seek to
7 obtain civil penalties and remedies for the defendant's violation of the above statutes, and seek to
8 recover its costs and cost of investigation pursuant Business and Professions Code section
9 12015.5.

10 2. At all times mentioned herein, defendant has transacted business and committed
11 violations of law as hereinafter described within the Counties of Sacramento, El Dorado, and
12 Yolo, in the State of California.

13 **DEFENDANT**

14 3. Defendant, ConAgra Foods, Inc., is, and was at all times mentioned herein, a
15 Delaware corporation, with its principal offices located at One ConAgra Drive, Omaha
16 Nebraska, 68102.

17 4. At all times herein mentioned in this Complaint, defendant has been, and is
18 engaged in the business of manufacturing, and/or packaging, and/or distributing food products
19 which are offered for sale to California consumers.

20 5. When reference is made to any act or omission of defendant or its officers, agents
21 or employees, such allegations shall be deemed to mean that the officers, directors, employees or
22 representatives of defendant did, or authorized, such act while engaged in the management,
23 direction, representation or control of the affairs of said defendant, and did so while acting within
24 the course and scope of their duties.

25 ///

26 ///

27 ///

28 ///

FIRST CAUSE OF ACTION

UNTRUE OR MISLEADING STATEMENTS
(Business and Professions Code section 17500)

1
2
3
4 6. Plaintiff incorporates paragraphs 1 through 5 of this Complaint herein by
5 reference.

6 7. Beginning on an exact date unknown to the plaintiff, but at least within three (3)
7 years prior to the date of filing of this Complaint, defendant, with the intent to induce members
8 of the general public to purchase its "Slim Jim" food products (hereinafter "products"), made or
9 caused to be made representations to the public which were untrue and misleading. Said untrue
10 or misleading statements, which are unlawful under Business and Professions Code section
11 17500, included, but were not limited to, advertizing and packaging of products in containers
12 which had:

13 (a) void space not visible by consumers, referred to as "nonfunctional slack
14 fill." This nonfunctional slack fill packaging, when displayed for sale to the
15 public of the State of California, caused false representations to the public by
16 implying that defendant's products filled the entire package.

17 (b) net weight statements that were not in the lower one-third of the principal
18 display panel which, when displayed for sale to the public of the State of
19 California, caused false representations to the public by obfuscating the net
20 weight of the products being considered for purchase.

21 (c) weight statements that were greater than the actual weight of the product,
22 referred to as "short weight" which, when displayed for sale to the public of the
23 State of California, caused false representations to the public by misleading the
24 public as to the correct weight of the products.

25 8. The representations and statements made by defendant, as set forth in the
26 paragraphs above, were untrue or misleading when made, and were known, or should have been
27 known, by defendant to be untrue or misleading.

28 ///

1 9. Unless enjoined by order of this court, defendant will retain the ability to and
2 could make untrue or misleading statements in violation of Business and Professions Code
3 section 17500.

4 **SECOND CAUSE OF ACTION**
5 **UNFAIR COMPETITION**

6 **(Business and Professions Code section 17200)**

7
8 10. Plaintiff re-alleges and incorporates herein by reference all allegations contained
9 in paragraphs 1 through 9 inclusive, of this Complaint.

10 11. Beginning on an exact date unknown to plaintiff, but at least within four (4) years
11 prior to the filing of this Complaint, defendant engaged in unlawful acts or practices in the
12 conduct of its business, which acts or practices constituted unfair competition within the meaning
13 of section 17200 of the Business and Professions Code, and which included, but are not limited
14 to:

- 15 (A) Defendant made, or caused to be made, untrue or misleading
16 representations regarding the packaging of its products as more fully
17 described in paragraph 7 above, in violation of Business and Professions
18 Code section 17500.
- 19 (B) Defendant violated section 12602 of the Business and Professions Code,
20 in that defendant packaged its products in non-conforming type packages.
21 Said non-conforming packages contained extra space by volume in the
22 interior of the package. The extra space provided no benefit to the
23 contents of the packaging and misled consumers.
- 24 (C) Defendant violated section 12606.2 of the California Business and
25 Professions Code, in that defendant is packaged its products in containers
26 made, formed, or filled as to be misleading to a potential customer as to
27 the actual size and filling of the package with defendant's products.
- 28

1 (D) Defendant violated section 12606.2 of the California Business and
2 Professions Code, in that defendant packaged its products in containers
3 made, formed or filled as to mislead a potential customer by using
4 packaging which created a void space not filled with defendant's product,
5 and which was not viewable or discernable by the potential consumer.

6 13. The conduct of defendant as set forth above demonstrates the necessity for
7 granting injunctive relief restraining such and similar acts of unfair competition pursuant to
8 California Business and Professions Code section 17203 and 17535. Unless enjoined and
9 restrained by order of the court, defendant will retain the ability to, and may engage in, said acts
10 of unfair competition, and misleading advertising.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT AS FOLLOWS:

13 1. Pursuant to California Business & Professions Code sections 17204 and 17535,
14 defendant and its officers, directors, agents, employees, representatives, and all persons acting in
15 concert or participating with it, with actual or constructive notice of this injunction, be
16 permanently enjoined and restrained from engaging in the following acts while advertising or
17 attempting to sell any of its candy products to The People Of The State Of California:

18 (A) Making any oral or written representations in violation of California
19 Business and Professions Code section 17500 including, but not limited to,
20 those acts set forth in the first cause of action of this complaint.

21 (B) Engaging in any business practices in violation of California Business and
22 Professions Code section 17200 including, but not limited to, those acts
23 set forth in the second cause of action of this complaint.

24 2. Defendant herein be assessed a civil penalty of Two Thousand Five Hundred
25 Dollars (\$2,500) for each act of false or misleading advertising engaged in, in violation of
26 California Business and Professions Code section 17500 as provided in section 17536.

27 ///

28 ///

1 3. Defendant herein be assessed a civil penalty of Two Thousand Five Hundred
2 Dollars (\$2,500) for each act of unlawful or unfair business practice engaged in, in violation of
3 California Business and Professions Code section 17200 as provided in section 17206.

4 4. Plaintiff recover its costs.

5 5. Plaintiff have such other and further relief as the nature of the case may require,
6 and the Court deems proper to fully and successfully dissipate the false and misleading
7 representations, and the unfair, unlawful and fraudulent business practices complained of herein,
8 and the effects thereof.

9 DATED: December 20, 2011

Respectfully submitted,

JEFF W. REISIG
DISTRICT ATTORNEY

10
11
12 By: *Lawrence Barlly*
13 LAWRENCE BARLLY
14 Deputy District Attorney
15 Attorney for Plaintiff

16 DATED: 12-20-11

Respectfully submitted,

JAN SCULLY
DISTRICT ATTORNEY

17
18 By: *Ruth Young*
19 RUTH YOUNG
20 Deputy District Attorney
21 Attorney for Plaintiff

22
23 DATED: 12/21/11

Respectfully submitted,

VERN PIERSON
DISTRICT ATTORNEY

24
25
26 By: *James A. Clinchard*
27 JAMES A CLINCHARD
28 Deputy District Attorney
Attorney for Plaintiff

EXHIBIT 2

1 JEFF W. REISIG, District Attorney
2 LAWRENCE BARLLY, Deputy District Attorney, Bar. No. 114456
3 Consumer Fraud and Environmental Protection Division
4 Yolo County District Attorney's Office
5 301 Second Street
6 Woodland, CA 95695
7 Phone: (530) 666-8180
8 Fax: (530) 666-8185

FILED
YOLO SUPERIOR COURT
DEC 22 2011

6 JAN SCULLY, District Attorney
7 RUTH YOUNG, Deputy District Attorney, Bar No. 133606
8 Consumer & Environmental Protection Division
9 Sacramento County District Attorney's Office
10 906 G Street, Suite 700
11 Sacramento, CA 95814
12 Phone: (916) 874-6174
13 Fax: (916) 874-7660

BY 
DEPUTY

10 VERN PIERSON, District Attorney
11 JAMES A CLINCHARD, Deputy District Attorney, Bar No. 200746
12 Consumer & Environmental Protection Division
13 El Dorado County District Attorney's Office
14 515 Main Street
15 Placerville, CA 95667
16 Phone: (530) 621-6472
17 Fax: (530) 621-1280

15 Attorneys for the People

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 COUNTY OF YOLO

20 THE PEOPLE OF THE STATE OF
21 CALIFORNIA,

Dept. Case No. CV11-2794

22 Plaintiff,

23 vs.

FINAL JUDGMENT

25 CONAGRA FOODS, INC.,

27 Defendant(s)

1 Plaintiff, THE PEOPLE OF THE STATE OF CALIFORNIA, having filed its complaint
2 herein, through their attorneys, JEFF W. REISIG, District Attorney of Yolo County, by
3 LAWRENCE BARLLY, Deputy District Attorney, JAN SCULLY, District Attorney for the
4 County of Sacramento by Deputy District Attorney RUTH YOUNG and VERN PIERSON,
5 District Attorney of El Dorado County, by JAMES A. CLINCHARD, Deputy District Attorney,
6 and GREENBERG TRAUIG LLP, by JAMES MICHAEL MATTESICH, a licensed California
7 attorney for defendant, ConAgra Foods, Inc. a Delaware Corporation, having stipulated that this
8 Final Judgment can be entered without the taking of proof, without this stipulated Final
9 Judgment constituting evidence or an admission by defendant, and good cause appearing
10 therefore;
11
12

13 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

- 14 1. This court has jurisdiction over the subject matter hereof and the parties hereto.
- 15 2. Pursuant to Business and Professions Code sections 17203 and 17535, defendant,
16 and its successor(s), officers, employees, agents, representatives, and all persons acting in concert or
17 participation with any of them, with actual or constructive notice of this Final Judgment, are
18 permanently enjoined and restrained from directly or indirectly packaging its "Slim Jim" brand food
19 products or its successor products in containers made, formed or filled so as to be misleading to
20 consumers, an act which is in violation of California Business and Professions Code sections
21 12606.2, 17200 and 17500.
- 22 3. Defendant shall use good faith efforts to make available and fully and clearly
23 explain the injunctive language of this Final Judgment, including the terms and conditions
24 thereof, to each of its officers, employees, contractors and/or designers of packaging and/or
25 anyone, including any entity, who may be responsible for the packaging of goods offered to
26 California consumers.
- 27 5. Defendant shall pay Two Hundred Thousand Dollars (\$200,000.00) in settlement of
28 this matter as set forth below and pursuant to Business and Professions Code sections 12015.5,

1 17206 and 17536. Delivery shall be made, on or before the expiration of thirty days following
2 Entry of Judgment, to the Office of the Yolo County District Attorney, 301 Second Street,
3 Woodland, CA 95695, attention Larry Barlly.

4 (A) Payment of \$5,500.00 shall be made to the YOLO COUNTY
5 DEPARTMENT OF AGRICULTURE, which is allocated for the costs of its
6 investigation.

7 (B) Payment in the amount of \$64,833.00 shall be made payable to THE
8 SACRAMENTO COUNTY DISTRICT ATTORNEY'S OFFICE of which

9 (i) \$59,833.00 shall be allocated as civil penalties; and

10 (ii) \$5,000.00 shall be allocated as the costs of its investigation.

11 (C) Payment in the amount of \$64,833.00 shall be made payable to THE EL
12 DORADO COUNTY DISTRICT ATTORNEY'S OFFICE of which

13 (i) \$59,833.00 shall be allocated as civil penalties; and

14 (ii) \$5,000.00 shall be allocated as the costs of its investigation.

15 (D) Payment in the amount of \$64,834.00 shall be made payable to THE YOLO
16 COUNTY DISTRICT ATTORNEY'S OFFICE of which

17 (i) \$59,834.00 shall be allocated as civil penalties; and

18 (ii) \$5,000.00 shall be allocated as the costs of its investigation.

19 (E) Time is of the essence. Any payment not received by the date it is due, or in an
20 amount less than stated in this Final Judgment, is deemed a violation of this Final
21 Judgment and the entire unpaid balance of is immediately due and payable and
22 statutory interest of TEN PERCENT (10%) shall accrue on the entire remaining
23 balance without further demand or notice.

24 6. The failure of the People to enforce any provision of this Final Judgment shall
25 neither be deemed a waiver of such provision nor shall it in any way affect the validity of this
26 Final Judgment. The failure of the People to enforce any provision shall not preclude it from
27 later enforcing the same or other provisions of this Final Judgment.

28 7. Except as otherwise expressly provided herein, each party shall bear its own

1 attorney's fees and costs.

2 8. The language used for the obligations set forth in the Final Judgment are solely
3 for the purposes of settlement and compromise and are in no way intended to be an alteration of
4 California law in any other action.

5 9. Jurisdiction is retained for the purpose of enabling any party to this stipulated
6 Final Judgment to apply to the Court for such further orders and directions as may be necessary
7 and appropriate for the construction and carrying out of this stipulated Final Judgment, for the
8 modification or dissolution of any injunctive provisions hereof, for enforcement of compliance
9 herewith, or for the punishment of violations hereof.

10 9. This Judgment has been reviewed by the Court, and based upon the representations of
11 the parties, the Court finds that it has been entered in good faith and is, in all respects, fair, just,
12 and equitable to protect the public and the individuals who may have been affected by the issues
13 related as more fully described in the Complaint.

14 10. The clerk is directed to enter this stipulated Final Judgment forthwith.

15
16
17 DATED: 22 Dec. 2011

18
19 

20 JUDGE OF THE SUPERIOR COURT
21 DANIEL P. MAGUIRE
22
23
24
25
26
27
28

EXHIBIT 3

LEE LITIGATION GROUP, PLLC

30 EAST 39TH STREET, SECOND FLOOR
NEW YORK, NY 10016
TEL: 212-465-1180
FAX: 212-465-1181
INFO@LEELITIGATION.COM

WRITER'S DIRECT: 212-465-1188
cklee@leelitigation.com

January 22, 2015

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Legal Department
ConAgra Foods, Inc.
One ConAgra Drive
Omaha, Nebraska 68102

Marshall Beil, Esq.
McGuire Woods
1345 Avenue of the Americas,
7th Floor
New York, NY 10105-0106

Re: Demand Letter re:

Slim Jim® Smoked Snack Stick, Original Flavor, 4 Sticks,
Net Weight. 1.12 oz.; and
Slim Jim® Smoked Snack Stick, Mild Flavor, 4 Sticks, Net
Weight. 1.12 oz. (together, the “Products”)

To Whom It May Concern:

This demand letter serves as a notice and demand for corrective action on behalf of my clients, David Myers and Freddie Escobar, as well as all other persons similarly situated, arising from violations of numerous provisions of California law including the Consumers Legal Remedies Act, Civil Code § 1770, including but not limited to subsections (a)(5) and (9) and violations of consumer protection laws of each of the fifty states and the District of Columbia. This demand letter serves as notice pursuant to state laws concerning your deceptive and misleading Product packaging.

You have participated in the manufacture, marketing and sale of the Slim Jim® Products. Such Products contain non-functional slack-fill in violation of consumer protection laws of each of the fifty states and the District of Columbia as well as Federal Food Drug & Cosmetic Act (“FDCA”) Section 403 (21 U.S.C. 343) and consumer protection laws of each of the fifty states and the District of Columbia. Each of the Products is packaged in a container that is filled to substantially less than its capacity for reasons other than the safe harbors specified in the law. As a result, consumers are misled as to the volume of the Products.

David Myers and Freddie Escobar, residents of California, purchased the Slim Jim Products and are acting on behalf of a class defined as all persons in each of the fifty states and the District of Columbia who purchased the Products (hereafter, the "Class").

To cure the defects described above, we demand that you (i) cease and desist from continuing to package the Products with non-functional slack-fill; (ii) issue an immediate recall on any Products with non-functional slack-fill; and (iii) make full restitution to all purchasers throughout the United States of all purchase money obtained from sales thereof.

We further demand that you preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to the following:

- (i) All documents concerning the manufacture, labeling and packaging process for the Products;
- (ii) All communications with the U.S. Food and Drug Administration concerning the product development, labeling, packaging, marketing and sales of the Products;
- (iii) All documents concerning the advertisement, marketing, or sale of the Products; and
- (iv) All communications with customers concerning complaints or comments concerning the Products.

We are willing to negotiate to attempt to resolve the demands asserted in this letter. If you wish to enter into such discussions, please contact me immediately. If I do not hear from you promptly, I will conclude that you are not interested in resolving this dispute short of litigation. If you contend that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents promptly.

Very truly yours,



C.K. Lee, Esq.

U.S. Postal ServiceTM
CERTIFIED MAIL[®] RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com[®]

OMAHA OFFICIAL USE

7014 2870 0000 2949 7888

Postage	\$ 40.49
Certified Fee	\$3.30
Return Receipt Fee (Endorsement Required)	\$2.70
Restricted Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$ 46.49

Postmark Here
 70
 01/22/2015

Sent To
 Street & Apt. No.
 or PO Box No.
 City, State, ZIP+4[®]
 Legal Department
 ConAgra Foods, Inc.
 One ConAgra Drive
 Omaha, Nebraska 68102

PS Form 3800, July 2014 See Reverse for Instructions

U.S. Postal ServiceTM
CERTIFIED MAIL[®] RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com[®]

NEW YORK OFFICIAL USE

7014 2870 0000 2949 7871

Postage	\$ 40.49
Certified Fee	\$3.30
Return Receipt Fee (Endorsement Required)	\$2.70
Restricted Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$ 46.49

Postmark Here
 70
 01/22/2015

Sent To
 Street & Apt. No.
 or PO Box No.
 City, State, ZIP+4[®]
 Marshall Beil, Esq.
 McGuire Woods
 1345 Avenue of the Americas,
 7th Floor
 New York, NY 10105-0106

PS Form 3800, July 2014