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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 MARK CORDES, individually and on
behalf of all others similarly situated,
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Plaintiff,
13

v.
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BOULDER BRANDS USA, INC., a
15 Delaware corporation; and DOES 1
through 10, inclusive,
16

Defendants.
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Case No. 2:18-cv-6534

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMAND

INTRODUCTION

1
2 1. The average consumer spends a mere 13 seconds making an in-store
3 purchasing decision, or between 10 to 19 seconds for an online purchase.¹ That
4 decision is heavily dependent on a product's packaging, and particularly the package
5 dimensions: "Most of our studies show that 75 to 80 percent of consumers don't even
6 bother to look at any label information, no less the net weight Faced with a large
7 box and a smaller box, both with the same amount of product inside . . . consumers are
8 apt to choose the larger box because they think it's a better value."² This lawsuit
9 charges Defendant with unlawfully and unfairly packaging its Glutino Gluten Free
10 Pretzels products in opaque containers that contain more than 40% empty space. Most
11 consumers purchased the products without knowing that the containers were
12 substantially empty.

13 2. Mark Cordes ("Plaintiff"), individually and on behalf of all others
14 similarly situated, brings this Class Action Complaint for damages, injunctive relief,
15 and any other available legal or equitable remedies, resulting from the unlawful actions
16 of Boulder Brands USA, Inc. ("Defendant") with respect to the packaging of its Glutino
17 Gluten Free Pretzels products. Plaintiff alleges as follows upon personal knowledge as
18 to himself and his own acts and experiences, and, as to all other matters, upon
19 information and belief, including investigation conducted by his attorneys.

20 3. Plaintiff purchased Defendant's Glutino Gluten Free Fudge Covered
21 Pretzels product in June 2018 in La Habra, California. He purchased the product for
22 the dual purpose of enjoying its contents and determining whether the container was
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24 ¹ [http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-window.html)
25 [20-second-window.html](http://www.nielsen.com/us/en/insights/news/2015/make-the-most-of-yourbrands-20-second-window.html) (citing the Ehrenberg-Bass Institute of Marketing Science's
26 report "Shopping Takes Only Seconds...In-Store and Online").

27 ² [http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/pro-](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm)
28 [duct-packaging/overview/product-packaging-ov.htm](http://www.consumerreports.org/cro/magazinearchive/2010/january/shopping/product-packaging/overview/product-packaging-ov.htm) (quoting Brian Wansink,
professor and director of the Cornell Food and Brand Lab, who studies shopping
behavior of consumers).

1 lawfully filled. Plaintiff was surprised when he opened the product that the container
2 had **more than 40% empty space**, or slack-fill.

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

4 **JURISDICTION AND VENUE**

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

10 6. The Court has jurisdiction over the state law claim because it forms part of
11 the same case or controversy under Article III of the United States Constitution.

12 7. The Court has personal jurisdiction over Defendant because its Glutino
13 Gluten Free Pretzels products are advertised, marketed, distributed and sold through the
14 State of California; Defendant engaged in the wrongdoing alleged in this Complaint
15 throughout the United States, including in the State of California; Defendant is
16 authorized to do business in the State of California; and Defendant has sufficient
17 minimum contacts with the State of California, rendering the exercise of jurisdiction by
18 the Court permissible under traditional notions of fair play and substantial justice.
19 Moreover, Defendant is engaged in substantial activity with the State of California.

20 8. Venue is proper in the United States District Court for the Central District
21 of California pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events
22 giving rise to the claims occurred within this judicial district, Defendant has marketed
23 and sold the Glutino Gluten Free Pretzels products at issue in this action in this judicial
24 district, and it conducts business within this judicial district.

25 **PARTIES**

26 9. Plaintiff Mark Cordes is a citizen of the State of California and resides in
27 Whittier, California. Plaintiff purchased Defendant's Glutino Gluten Free Fudge
28

1 Covered Pretzels product for personal consumption during the last four years in La
2 Habra, California.

3 10. Plaintiff is informed and believes, and upon such information and belief
4 alleges, that Defendant Boulder Brands USA, Inc. is a Delaware corporation with its
5 principal place of business located in Boulder, Colorado. Plaintiff is informed and
6 believes, and upon such information and belief alleges, that Defendant, at all times
7 relevant, conducted business in the State of California and within the Southern District
8 of California.

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

15 12. At all relevant times, each and every Defendant was acting as an agent
16 and/or employee of each of the other Defendants and was acting within the course
17 and/or scope of said agency and/or employment with the full knowledge and consent of
18 each of the Defendants. Each of the acts and/or omissions complained of herein were
19 alleged and made known to, and ratified by, each of the other Defendants (Boulder
20 Brands USA, Inc. and DOE Defendants will hereafter collectively be referred to as
21 “Defendant”).

22 **FACTUAL ALLEGATIONS**

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

24 13. Many federal and state consumer protection and labeling laws prohibit
25 deceptive packaging and labeling of products and commodities. In California, the Fair
26 Packaging and Labeling Act (“CFPLA”) “is designed to protect purchasers of any
27 commodity within its provisions against deception or misrepresentation. Packages and
28 their labels should enable consumers to obtain accurate information as to the quantity of

1 the contents and should facilitate value comparisons.” (California Business &
2 Professions Code § 12601.)

3 14. In this context, the CFPLA provides: “No food containers shall be made,
4 formed, or filled as to be misleading.” (California Business & Professions Code §
5 12606.2(b).) “A container that does not allow the consumer to fully view its contents
6 shall be considered to be filled as to be misleading if it contains nonfunctional slack
7 fill.” (California Business & Professions Code § 12606.2(c).) Section 12606.2(c)
8 defines “slack fill” as “the difference between the actual capacity of a container and the
9 volume of product contained therein.” Similarly, section 12606.2(c) defines
10 “nonfunctional slack fill” as “the empty space in a package that is filled to substantially
11 less than its capacity for reasons other than any one or more of the following:

12 (1) Protection of the contents of the package.

13 (2) The requirements of machines used for enclosing the contents of the package.

14 (3) Unavoidable product settling during shipping and handling.

15 (4) The need for the package to perform a specific function, such as where packaging
16 plays a role in the preparation or consumption of a food, if that function is inherent to
17 the nature of the food and is clearly communicated to consumers.

18 (5) The fact that the product consists of a food packaged in a reusable container where
19 the container is part of the presentation of the food and has value that is both significant
20 in proportion to the value of the product and independent of its function to hold the
21 food, such as a gift product consisting of a food or foods combined with a container that
22 is intended for further use after the food is consumed or durable commemorative or
23 promotional packages.

24 (6) Inability to increase the level of fill or to further reduce the size of the package, such
25 as where some minimum package size is necessary to accommodate required food
26 labeling exclusive of any vignettes or other nonmandatory designs or label information,
27 discourage pilfering, facilitate handling, or accommodate tamper-resistant devices.”
28 (California Business & Professions Code § 12606.2(c)(1)-(6).)

1 15. None of the above safe-harbor provisions applies to the Glutino Gluten
2 Free Pretzels products. Defendant intentionally incorporated non-functional slack-fill
3 in its packaging of the Glutino Gluten Free Pretzels products. As such, the packaging is
4 per se illegal, and reliance upon the packaging by absent class members is presumed.

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

6 16. Defendant's Glutino Gluten Free Pretzels products are, and at all relevant
7 times were, sold in non-transparent containers. The containers have significant slack-
8 fill, as described below.

9 17. More than 40% of the interior of the Glutino Gluten Free Pretzels product
10 containers, which concern the Glutino Gluten Free Fudge Covered Pretzels product
11 purchased by Plaintiff, is comprised of empty space, or non-functional slack fill.





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13 18. The containers (1) do not allow consumers to fully view its contents; and
14 (2) contains nonfunctional slack fill. As such, the packaging is per se illegal.

15 19. Defendant is selling and will continue to sell the Glutino Gluten Free
16 Pretzels products using these illegal slack-filled containers.

17 20. Defendant's packaging and advertising of the Glutino Gluten Free Pretzels
18 products violate the CFPLA, as set forth above.

19 21. Class Members did not know, and had no reason to know, that the Glutino
20 Gluten Free Pretzels products illegally contained non-functional slack-fill.

21 22. Defendant's product packaging is presumed to be a material factor in
22 absent Class Members' decisions to purchase the Glutino Gluten Free Pretzels products.
23 Based on Defendant's illegal packaging, there is a presumption that product packaging,
24 reasonable Class Members expected to receive more Glutino Gluten Free Pretzels
25 product than was actually being sold.

26 23. There is no practical reason for the non-functional slack-fill used to
27 package the Glutino Gluten Free Pretzels products.

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1 24. As a result of Defendant's illegal packaging, thousands of consumers
2 purchased the Products and have been damaged by Defendant's illegal conduct.

3 **CLASS ACTION ALLEGATIONS**

4 25. Plaintiff brings this action as a class action pursuant to Rule 23 of the
5 Federal Rules of Civil Procedure on behalf of herself and the following class
6 (collectively, the "Class" or "Classes"), defined as:

7 **All California residents who made retail purchases of Defendant's Glutino**
8 **Gluten Free Pretzels products with non-functional slack-fill, as defined by**
9 **California Business & Professions Code § 12606.2, during the applicable**
10 **limitations period up to and including final judgment in this action.**

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

16 27. Plaintiff reserves the right to revise the Class definition based on facts
17 learned in the course of litigating this matter.

18 28. The Glutino Gluten Free Pretzels products sold by Defendant suffer from
19 illegal product bottling, labeling and nonfunctional slack-fill.

20 29. Numerosity: This action has been brought and may properly be maintained
21 as a class action against Defendant under Rules 23(b)(1)(B) and 23(b)(3) of the Federal
22 Rules of Civil Procedure. While the exact number and identities of other Class
23 Members are unknown to Plaintiff at this time, Plaintiff is informed and believes that
24 there are hundreds of thousands of Members in the Class. Based on sales of the Glutino
25 Gluten Free Pretzels products it is estimated that the Class is composed of more than
26 10,000 persons. Furthermore, even if subclasses need to be created for these consumers,
27 it is estimated that each subclass would have thousands of Members. The Members of
28 the Class are so numerous that joinder of all Members is impracticable and the

1 disposition of their claims in a class action rather than in individual actions will benefit
2 the parties and the courts.

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

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

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

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

- 23 i. Whether Defendant labeled, packaged, marketed, advertised and/or
24 sold Glutino Gluten Free Pretzels products using illegal packaging and labeling;
25 ii. Whether Defendant's actions constitute violations of the CFPLA,
26 California Business & Professions Code § 12606.2;
27 iii. Whether Defendant omitted and/or represented that its Glutino
28 Gluten Free Pretzels products have quantities that they do not have;

1 iv. Whether Defendant's labeling, packaging, marketing, advertising
2 and/or selling of Glutino Gluten Free Pretzels products constituted an unfair or
3 unlawful practice;

4 v. Whether Defendant's packaging of the Glutino Gluten Free Pretzels
5 products constituted nonfunctional slack-fill;

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

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

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

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

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

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

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

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

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

7 **CAUSE OF ACTION**

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

9 **Cal. Civ. Code § 1750, et seq.**

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

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

15 41. Plaintiff and the Class Members are consumers who purchased the Glutino
16 Gluten Free Pretzels products for personal, family or household purposes. Plaintiff and
17 the Class Members are “consumers” as that term is defined by the CLRA in Cal. Civ.
18 Code § 1761(d).

19 42. The Glutino Gluten Free Pretzels products that Plaintiff and other Class
20 Members purchased from Defendant were “goods” within the meaning of Cal. Civ.
21 Code § 1761(a).

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

25 44. Defendant violated California law because the Glutino Gluten Free
26 Pretzels products are packaged in containers made, formed or filled to contain non-
27 functional slack-fill.

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1 45. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5),
2 prohibits “Representing that goods or services have sponsorship, approval,
3 characteristics, ingredients, uses, benefits, or quantities which they do not have or that a
4 person has a sponsorship, approval, status, affiliation, or connection which he or she
5 does not have.” By engaging in the conduct set forth herein, Defendant violated and
6 continues to violate Section 1770(a)(5) of the CLRA, because Defendant’s conduct
7 constitutes illegal and unlawful competition.

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

12 47. Given the materiality of Defendant’s misrepresentations, absent Class
13 Members are entitled to a presumption of reliance.

14 48. Plaintiff and the Class suffered injuries caused by Defendant because the
15 Glutino Gluten Free Pretzels product did not have the qualities as promised and were
16 unlawfully packaged.

17 49. On or about June 21, 2018, prior to filing this action, Plaintiff sent a CLRA
18 notice letter to Defendant which complies with California Civil Code 1782(a). Plaintiff
19 sent Boulder Brands USA, Inc. dba Glutino, individually and on behalf of the proposed
20 Class, a letter via Certified Mail, advising Defendant that it is in violation of the CLRA
21 and demanding that it cease and desist from such violations and make full restitution by
22 refunding the monies received therefrom. A true and correct copy of the letter is
23 attached hereto as Exhibit 1.

24 50. Wherefore, Plaintiff seeks injunctive relief for these violations of the
25 CLRA.

26 **PRAYER FOR RELIEF**

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

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

4 (B) For an Order declaring that Defendant's conduct violated the CLRA,
5 Cal. Civ. Code § 1750, *et seq.*;

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

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

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

11 (F) For punitive damages;

12 (G) For prejudgment interest on all amounts awarded;

13 (H) For an Order awarding Plaintiff and the Class their reasonable
14 attorneys' fees and expenses and costs of suit as pleaded pursuant to, *inter alia*,
15 Cal. Civ. Code § 1780(e) and Cal. Civ. Proc. Code § 1021.5; and

16 (I) For such other and further relief as the Court deems just and proper.
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18 Date: July 29, 2018

Respectfully submitted,

19 PACIFIC TRIAL ATTORNEYS
20 A Professional Corporation

21 By: /s/Scott J. Ferrell
22 Scott J. Ferrell
23 Attorneys for Plaintiff
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DEMAND FOR TRIAL BY JURY

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

Date: July 29, 2018

Respectfully submitted,

PACIFIC TRIAL ATTORNEYS
A Professional Corporation

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