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

Dina Lipkind *and* Lyle Takeshita, Chad
Fenwick, *individually and on behalf of all
others similarly situated,*

Plaintiffs,

– against –

PEPSICO, INC.,

Defendant.

No. _____

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiffs Dina Lipkind, Lyle Takeshita and Chad Fenwick (together, “Plaintiffs”), individually and on behalf of all others similarly situated, bring this Class Action Complaint against PepsiCo, Inc. (“PepsiCo” or “Defendant”), and on the basis of personal knowledge, information and belief, and investigation of counsel, allege as follows:

NATURE OF THE ACTION

1. “Naked” is a juice and smoothie beverage line that PepsiCo manufactures, markets, and sells.
2. PepsiCo markets its Naked beverages as highly nutritious drinks comprised of super nutrients—“only the best ingredients”¹—in liquid form.
3. PepsiCo does this by naming each Naked beverage after a food or ingredient perceived by consumers to be highly nutritious, like kale, and filling its labels with photographs of these same ingredients.
4. PepsiCo’s claims are false and misleading because the drinks do not have the ingredient profile represented.
5. Instead, Naked beverages predominantly consist of cheaper and less nutritious ingredients like apple juice.
6. PepsiCo also labels Naked beverages with the prominent claim, “NO SUGAR ADDED,” which consumers perceive to mean that the drinks are low in sugar—consisting primarily of the low-sugar vegetables and super ingredients heavily emphasized in juiced form.
7. The “NO SUGAR ADDED” claim is not qualified with the words, “not a low calorie food,” nor a reference to the nutrition facts panel for information on sugar and calorie content, as required by regulations.
8. Naked beverages contain between 35 and 61 grams of sugar per serving—that is, between approximately 6 and 15 teaspoons of sugar each. A can of Pepsi has 41 grams of sugar, or approximately 10 teaspoons of sugar.

¹ *Our Products: Juices & Smoothies*, NAKEDJUICE.COM (2016), <http://goo.gl/vVHGBD>; *Our Products: Veggies*, NAKEDJUICE.COM (2016), <http://goo.gl/GMzREL>; Naked Juice (@nakedjuice), INSTAGRAM, <https://goo.gl/cXIDo6> (last visited Sept. 6, 2016).

9. PepsiCo's "the goodness inside" ingredient key misrepresents that drinking Naked products is akin to consuming, whole, the fruits and vegetables pictured on the label, when it is not, and that the vitamins in Naked products come from its fruits and vegetables when, in fact, many are added by the manufacturer.

10. Relying on PepsiCo's marketing, Plaintiffs bought Naked beverages but were deceived into believing that such products contained a different ingredient value and nutritional profile than they do.

11. Plaintiffs would not have purchased Naked beverages had they known that they lacked the ingredient value and nutritional profile marketed by PepsiCo.

12. Plaintiffs seek damages, other monetary relief, declaratory relief, and an injunction to stop PepsiCo's misleading, false, and illegal marketing of its Naked beverages.

PARTIES

Plaintiff Dina Lipkind

13. Plaintiff Dina Lipkind is a resident of Brooklyn, New York.

14. During the period between September 2010, and the present, Ms. Lipkind purchased Naked Kale Blazer and Green Machine at Whole Foods and the Park Slope Food Coop, in the Park Slope neighborhood of Brooklyn, New York, for personal, family, or household use.

15. The Naked beverage names and labels promoted the products as predominantly consisting of high-value ingredients, and as having "NO SUGAR ADDED," without any qualification of the latter.

16. Ms. Lipkind read and believed PepsiCo's representations, express and implied, that the products predominately consisted of the named and pictured ingredients and were low in sugar. She relied on these representations when purchasing the products, and would not have purchased

the products had she realized their true ingredient profile and value.

17. Ms. Lipkind paid for Naked beverages predominantly consisting of high-value ingredients and little sugar, but she received products predominantly consisting of apple juice and orange juice and containing substantial amounts of sugar.

18. Had PepsiCo not made the false and misleading representations that the products predominantly consisted of high-value ingredients and were low sugar, Ms. Lipkind would not have been willing to pay the same amount for the products, and, consequently, would not have been willing to purchase the products.

19. Ms. Lipkind purchased more of, or paid more for, the Naked beverages than she would have had she known the truth about the products.

20. The Naked beverages Ms. Lipkind received were worth less than the products for which she paid. Ms. Lipkind was injured in fact and lost money as a result of PepsiCo's improper conduct.

21. If Ms. Lipkind knew the Naked beverage labels were truthful and non-misleading, she would continue to purchase the products in the future. At present, however, Ms. Lipkind cannot purchase the products because she cannot be confident that the labeling of the products is, and will be, truthful and non-misleading.

Plaintiff Lyle Takeshita

22. Plaintiff Lyle Takeshita is a resident of Los Angeles, California.

23. During the period between September 2010, and the present, Mr. Takeshita purchased Naked Kale Blazer and other Naked beverages at Vons Market in the Haceda Heights neighborhood of Los Angeles, California, for personal, family, or household use.

24. The Naked beverage name and label promoted the product as predominantly

consisting of high-value, nutritious ingredients, and as having “NO SUGAR ADDED” without qualification.

25. Mr. Takeshita read and believed PepsiCo’s representations, express and implied, that the products predominately consisted of high-value ingredients and were low in sugar. He relied on these representations when purchasing the products, and he would not have purchased it had he realized its true ingredient value and profile.

26. Mr. Takeshita paid for Naked beverages predominantly consisting of high-value ingredients and little sugar, but he received products predominantly consisting of apple juice and orange juice and containing substantial amounts of sugar.

27. Had PepsiCo not made the false and misleading representations that the products predominately consisted of high-value ingredients and were low sugar, Mr. Takeshita would not have been willing to pay the same amount for the products, and, consequently, he would not have been willing to purchase the products.

28. Mr. Takeshita purchased more of, or paid more for, the Naked beverages than he would have had he known the truth about the products.

29. The Naked beverages Mr. Takeshita received were worth less than the products for which he paid. Mr. Takeshita was injured in fact and lost money as a result of PepsiCo’s improper conduct.

30. If Mr. Takeshita knew the Naked beverage labels were truthful and non-misleading, he would continue to purchase the products in the future. At present, however, he cannot purchase the products because Mr. Takeshita cannot be confident that the labeling of the products is, and will be, truthful and non-misleading.

Plaintiff Chad Fenwick

31. Plaintiff Chad Fenwick is a resident of Chatsworth, California.

32. During the period between September 2010, and the present, Mr. Chatsworth purchased Naked Kale Blazer, Green Machine, Very Berry, and other Naked beverages at Von's Market and Ralph's Market in Chatsworth, California, for personal, family, or household use.

33. The Naked beverage name and label promoted the product as predominantly consisting of high-value, nutritious ingredients, and as having "NO SUGAR ADDED" without qualification.

34. Mr. Fenwick read and believed PepsiCo's representations, express and implied, that the products predominately consisted of high-value ingredients and were low in sugar. He relied on these representations when purchasing the products, and he would not have purchased it had he realized its true ingredient value and profile.

35. Mr. Fenwick paid for Naked beverages predominantly consisting of high-value ingredients and little sugar, but he received products predominantly consisting of apple juice and orange juice and containing substantial amounts of sugar.

36. Had PepsiCo not made the false and misleading representations that the products predominantly consisted of high-value ingredients and were low sugar, Mr. Takeshita would not have been willing to pay the same amount for the products, and, consequently, he would not have been willing to purchase the products.

37. Mr. Fenwick purchased more of, or paid more for, the Naked beverages than he would have had he known the truth about the products.

38. The Naked beverages Mr. Fenwick received were worth less than the products for which he paid. Mr. Fenwick was injured and lost money as a result of PepsiCo's improper conduct.

39. If Mr. Fenwick knew the Naked beverage labels were truthful and non-misleading, he would continue to purchase the products in the future. At present, however, he cannot purchase the products because Mr. Fenwick cannot be confident that the labeling of the products is, and will be, truthful and non-misleading.

Defendant PepsiCo, Inc.

40. Defendant PepsiCo, Inc., is a public corporation organized and existing under the laws of the State of North Carolina.

41. PepsiCo's principal place of business is at 700 Anderson Hill Road, Purchase, New York 10577.

42. PepsiCo is one of the world's largest food companies, having generated \$34.7 billion in gross profit in 2015.

43. PepsiCo wholly owns the Naked product line, having acquired Naked Juice Co., the manufacturer of the line, in 2007.

JURISDICTION AND VENUE

Jurisdiction

44. This Court has original subject-matter jurisdiction over this proposed class action pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), which provides for the original jurisdiction of federal district courts over "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and [that] is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). Because Messrs. Takeshita and Fenwick are citizens of the State of California and PepsiCo is citizen of the States of North Carolina and New York, at least one member of the

plaintiff class is a citizen of a State different from Defendant. Further, Plaintiffs allege the matter in controversy is well in excess of \$5,000,000 in the aggregate, exclusive of interest and costs. Finally, Plaintiffs allege “the number of members of all proposed plaintiff classes in the aggregate” is greater than 100. *See* 28 U.S.C. § 1332(d)(5)(B).

45. This Court has personal jurisdiction over PepsiCo for reasons including that Plaintiffs’ claims arise out of PepsiCo’s conduct within the State of New York, in part because Plaintiff Lipkind purchased Naked beverages within the State of New York based on PepsiCo’s dissemination of false and misleading information about the nature, quality, and/or ingredients of the products.

Venue

46. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred within this District, including Plaintiff Lipkind’s purchases of the Naked beverages based on PepsiCo’s dissemination of false and misleading information about the nature, quality, and/or ingredients of the products.

FACTUAL ALLEGATIONS

I. Consumers Increasingly Demand More Nutritious, Low- and No-Sugar Foods and Are Willing to Pay More for Them.

47. American consumers are increasingly seeking out and purchasing foods that they perceive are principally made of ingredients that are healthful and nutritious.²

48. Certain fruits and vegetables attract especially strong consumer interest,³ as do

² Nancy Gagliardi, *Consumers Want Healthy Foods—And Will Pay More for Them*, FORBES (Feb. 18, 2015, 11:30 AM), <http://goo.gl/A7Z5WN> (last visited Apr. 5, 2016) (88% of respondents willing to pay more for healthier foods); *see* INT’L FOOD INFO. COUNCIL FOUND., WHAT’S YOUR HEALTH WORTH?: FOOD & HEALTH SURVEY 2015, at 42 (2015), <http://goo.gl/4g5wNb>.

³ *See* INT’L FOOD INFO. COUNCIL FOUND., *supra* note 2, at 25 (showing that in 2015, 82% of Americans made an effort to consume more fruits and vegetables).

drinks that consumers perceive to be low in sugar and healthful.

49. As Andrea Theodore, head of marketing for PepsiCo's Naked Emerging Brands, put it, "super ingredients . . . bring the nutrients that consumers want."⁴

50. More, "consumers believe that foods and beverages are part of what is going to help them live long and vibrantly. Because of that, they're willing to spend more. There's value in [the Naked Juice brand proposition]. It's worth its weight in gold"⁵

51. Consistently, PepsiCo's "kale product has been out since 2014, and it's become a top 10 item."⁶

II. PepsiCo's Marketing of the Naked Products Capitalizes on Consumer Demand for Beverages that Consumers Perceive as Healthier and Low-Sugar.

52. Conscious of consumers' increased interest in more nutritious beverages and growing concern over excessive sugar, as well as consumer willingness to pay more for products perceived to meet these interests, PepsiCo misleadingly and illegally markets the Naked beverages listed in Table 1 below, as predominantly packed with nutritious "super" ingredients ("just the healthiest," "the best of [nature]") when they are not; and misleadingly markets the Naked beverages listed in Table 2 below as having "NO SUGAR ADDED," without qualification, when the products contain high levels of sugar.⁷ In doing so, PepsiCo deceptively seeks to capitalize on consumer health trends.

A. PepsiCo Misleadingly Markets Numerous Naked Beverages as Predominantly Containing Ingredients that Consumers Perceive to Be High-Value and Nutritious.

⁴ Dale Buss, *Kale Yeah: 5 Questions with Naked Juice Brand's Andrea Theodore*, BRANDCHANNEL.COM (Feb. 16, 2016), <http://goo.gl/klZYT5>.

⁵ *Id.* (brackets in original).

⁶ *Id.*

⁷ The Naked beverages listed in Tables 1 and 2 are hereinafter referred to collectively as "Naked Products."

53. PepsiCo misleadingly markets its Naked beverages as predominantly consisting of high-value and nutritious “super” ingredients, including by naming them after such ingredients, when other cheaper and less nutritious ingredients predominate, as indicated in Table 1 below.

Table 1 – Misleading Predominance

Naked Product Name	Predominant Ingredient
Naked Juice Açai Machine	Apple Juice
Naked Juice Berry Almond	Apple Juice
Naked Juice Berry Blast	Apple Juice
Naked Juice Blue Machine	Apple Juice
Naked Juice Bright Beets	Apple Juice
Naked Juice Chia Cherry Lime	Apple Juice
Naked Juice Chia Sweet Peach	Apple Juice
Naked Juice Double Berry	Apple Juice
Naked Juice Green Machine	Apple Juice
Naked Juice Kale Blazer	Orange Juice
Naked Juice Power-C Machine	Apple Juice
Naked Juice Protein & Greens	Apple Juice
Naked Juice Probiotic Machine Tropical Mango	Apple Juice
Naked Juice Protein Zone	Apple Juice
Naked Juice Protein Zone Mango	Apple Juice
Naked Juice Red Machine	Apple Juice
Naked Juice Sea Greens	Apple Juice

54. Exhibit 1 attached hereto shows the labels and true ingredients of each of the products identified in Table 1.

55. PepsiCo misleadingly markets its Naked beverages as “NO SUGAR ADDED,” without proper qualification, implying that the drinks are low in sugar, when they are in fact high

in sugar—and often higher in sugar than a can of Pepsi, as indicated in Table 2 below. By comparison, a 12-ounce can of Pepsi contains 41 grams of sugar, and a 12-ounce can of Coca-Cola contains 39 grams of sugar.⁸

Table 2 – Misleadingly Labeled “No Sugar Added”

Naked Product Name	Serving Size (fl oz)	Sugar Per Serving (g)	Sugar Per Serving (tsp)
Naked Juice Açai Machine	15.2	46	11.5
Naked Juice Berry Almond	15.2	36	9
Naked Juice Berry Blast	15.2	49	12.25
Naked Juice Blue Machine	15.2	55	13.75
Naked Juice Bright Beets	15.2	35	8.75
Naked Juice Chia Cherry Lime	15.2	53	13.25
Naked Juice Chia Sweet Peach	15.2	46	11.5
Naked Juice Double Berry	15.2	55	13.75
Naked Juice Green Machine	15.2	53	13.25
Naked Juice Kale Blazer	15.2	34	8.5
Naked Juice Mighty Mango	15.2	57	14.25
Naked Juice Orange Carrot	15.2	49	12.25
Naked Juice Orange Mango	15.2	51	12.75
Naked Juice Pomegranate Blueberry	15.2	61	15.25
Naked Juice Power-C Machine	15.2	44	11
Naked Juice Probiotic Machine Tropical Mango	15.2	53	13.25
Naked Juice Proteins & Greens	15.2	53	13.25
Naked Juice Protein Zone	15.2	53	13.25
Naked Juice Protein Zone Mango	15.2	53	13.25

⁸ *The Facts About Your Favorite Beverages*, PEPSICOBEVERAGEFACTS.COM (last updated Aug. 22, 2016), <http://goo.gl/pZY6fG>; *Coca-Cola Product Facts*, COCA-COLAPRODUCTFACTS.COM (2014), <http://goo.gl/cQt56i>.

Naked Product Name	Serving Size (fl oz)	Sugar Per Serving (g)	Sugar Per Serving (tsp)
Naked Juice Red Machine	15.2	48	12
Naked Juice Sea Greens	15.2	47	11.75
Naked Juice Strawberry Banana	15.2	44	11

56. Unlike PepsiCo, Odwalla juices qualify their “no sugar added” claim with the following, *equally prominent* text, “not a reduced calorie food, see nutrition facts for sugar and calorie content.”

57. Read in the context of PepsiCo’s entire Naked label and marketing scheme, for example in conjunction with Kale Blazer’s “green leafy goodness” claim, kale imagery and more, the “NO SUGAR ADDED” claim implies that the product is low sugar and comprised of juiced vegetables—that is, the vegetables pictured on the label—and not high-sugar, unnamed and unpictured, fruit juices.

58. Equally, on the bottom side of the bottle, camouflaged amongst all the voluntary, bolded, boxed and colorful claims, is the tiny-text claim that “ALL SUGARS COME FROM THE FRUIT AND/OR VEGETABLES. NOT A LOW CALORIE FOOD.” This text is ambiguous in implication and lacks the prominence required under 21 C.F.R. § 101.2. It also omits instruction to seek “further information on sugar and calorie content” in the nutrition panel, as required by 21 C.F.R. § 101.60(c)(2)(v). *See infra* Image 14.

59. The labels, Nutrition Facts, and ingredients of the products identified in Table 2 are attached hereto in Exhibit 2.

60. Despite their contents, PepsiCo characterized each of the Products as containing

“only . . . the best ingredients”⁹ and “[j]ust the healthiest fruits & vegetables.”¹⁰

61. PepsiCo’s “goodness inside” key extends the misrepresentation, implying that juice is equivalent to digesting whole fruits and vegetables. Underscoring this intent, PepsiCo’s President of Americas Beverages touted that Naked Kale Blazer is “another great example of taking a health-and-wellness trend that was in the food form and bringing it over to a convenient beverage format” because it “provides all of the benefits you get from kale.”¹¹

62. Naked Products also bear the claims, “*the Naked truth*,” and “Nutrition is delicious by *Nature*. And we include only the best of it.” See, e.g., Image 2.

63. PepsiCo’s marketing of Kale Blazer is representative of its overall marketing strategy for Naked products.

64. Although Kale Blazer is predominantly orange juice, it is not named “orange juice with kale and apple juice,” or “orange juice with kale and apple flavors,” nor does the label predominantly show oranges and apples. Instead:

- a. PepsiCo calls the product “Kale Blazer,” plasters the front label with pictures of kale and other “dark leafy” greens, and conspicuously claims “dark leafy goodness” and “VEGGIES” on the front label. The label’s color scheme heavily emphasizes various shades of the color green. Orange juice and apple juice—of which the product largely consists—are not named or pictured anywhere on the front label. The label also misleadingly bears the following claim, which does not mention orange juice or apple juice, “Kale is the king of the garden. And, when it’s blended with cucumber, spinach, celery and a pinch of ginger, you get a royal roundtable of yum. Long live greens.” See Images 1–2.

⁹ *Our Products: Juices & Smoothies*, NAKEDJUICE.COM, *supra* note 1; *Our Products: Veggies*, NAKEDJUICE.COM, *supra* note 1; Naked Juice (@nakedjuice), INSTAGRAM, *supra* note 1.

¹⁰ Naked Juice (@nakedjuice), INSTAGRAM, *supra* note 1.

¹¹ Jessica Jacobsen, *Making IDEAS a REALITY: PepsiCo Americas Beverages focuses on Innovation with Consumers and Customers in Mind*, BEVERAGEINDUSTRY (July 2014), <http://goo.gl/OV307W>.

Image 1



Image 2



- b. PepsiCo launched a national marketing blitz, using magazines, billboards, buses, Twitter, and the like. The campaign features: the Kale Blazer bottle—already replete with misleading kale imagery—cloaked in more kale leaves; the trademarked tagline “Endorsed by Kale”; puns prominently featuring the word kale, such as “have your kale and drink it too”; and the designation “100% juice.” See Images 3–5.

Image 3



Image 4

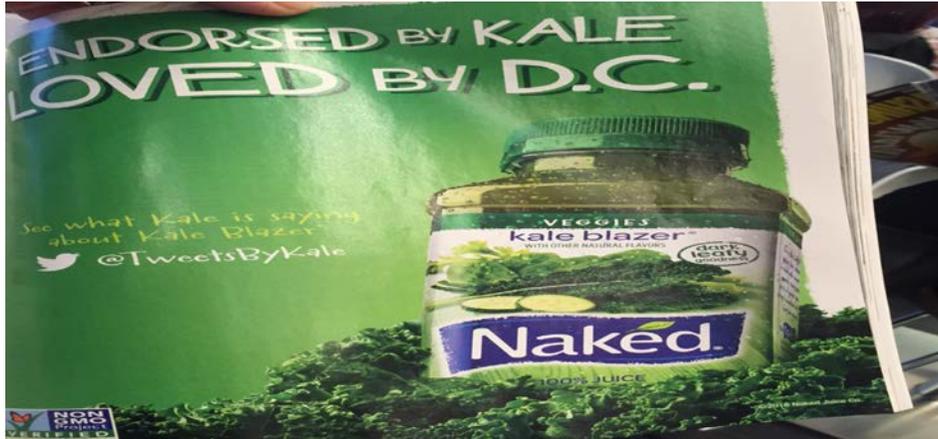


Image 5



- c. PepsiCo created a Twitter handle (@TweetsByKale) to promote Kale Blazer, with tweets like, “if you can’t eat ‘em, drink ‘em,” and regularly posts images on Instagram that feature Kale Blazer bottles surrounded by kale leaves, or other images exaggerating its presence in the Product. Similarly, PepsiCo authors promotional articles on sites like BuzzFeed, wherein PepsiCo extolls the various benefits of kale and exaggerates its presence in the drink. *See, e.g.,* Images 6–13.¹²

¹² Images 6–10 can be found at: Naked Juice, *10 Reasons You Can’t Quit Kale*, BUZZFEED (Nov. 7, 2014), <http://goo.gl/iehbZj>. Image 11 can be found at: @TweetsByKale, TWITTER (Feb. 15, 2016, 1:55 PM), <http://goo.gl/AF5Mh9>. Image 12 can be found at: @NakedJuice, TWITTER (Mar. 26, 2015, 4:16 PM), <http://goo.gl/sEbHqz>. Image 13 can be found at: Naked Juice, *The goodness inside comes from inside the inside*, FACEBOOK (Mar. 26, 2015), <http://goo.gl/nQFniV>.

Image 6

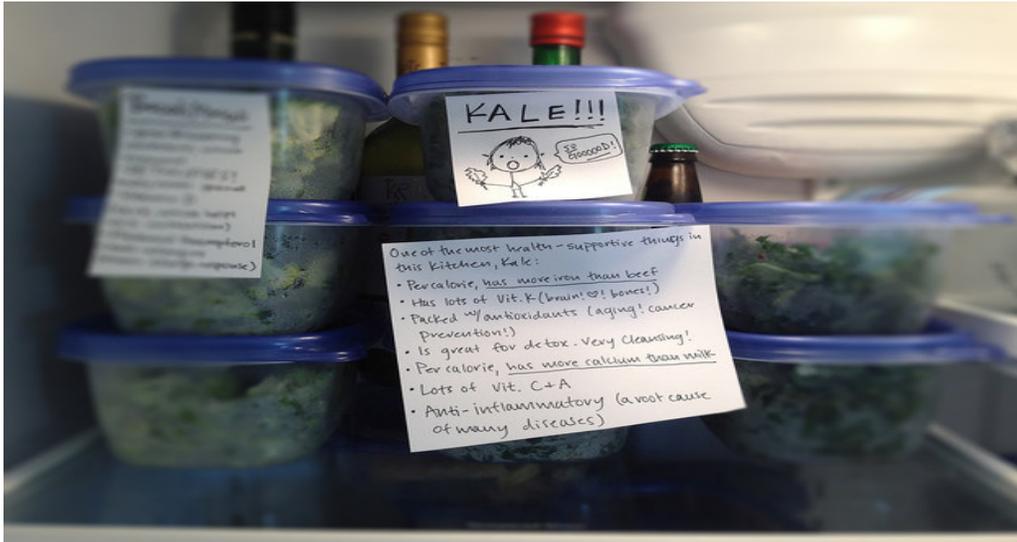


Image 7

2. Kale also tastes good no matter how you prepare it.



The Notebook / New Line Cinema / thinkstock / Via evan-werewolf.tumblr.com

Image 8

4. And if you did that, you might actually live forever because kale has **tons of antioxidants** that combat aging.



Image 9

Enjoy Naked Juice's new **Kale Blazer** juice smoothie to pack more kale into your diet.

Image 10



Because you really can't get enough.

Image 11



Kale
@TweetsByKale

I'm Kale and I approve this message. #Kale4KaleBlazer
#YesWeKale

4:55 PM - 15 Feb 2016

Follow

Image 12



Naked Juice
@nakedjuice

The goodness inside comes from inside the inside the inside.

IF YOU CAN'T EAT 'EM, DRINK 'EM.

The goodness inside comes from inside the inside the inside.
Vine by Naked Juice
[View on Vine](#)

RETWEETS 7 LIKES 13

4:16 PM - 26 Mar 2015

Follow

Image 13



Image 14



65. Further, while the Kale Blazer label states “Kale flavored 8 juice blend” in very small print on the bottom of the label, such statement is neither prominent nor adjacent to the Kale Blazer name. Instead, it’s overwhelmed by PepsiCo’s other marketing and messaging, in contravention of 21 C.F.R. §§ 102.33 and 102.5, and 21 U.S.C. § 343(a)(1). More, this requisite

“flavor” qualification is either entirely missing from or obscured—by imagery of kale—in PepsiCo’s tweets, billboards, magazine advertisements, and the like. *See* Images 3-5.

66. By misrepresenting the amount of the named ingredients and non-named ingredients (through omission), and by implying that Naked beverages are low in sugar, PepsiCo misleads consumers into believing that the products have a different nutrition and ingredient profile than they do.

RELIANCE AND ECONOMIC INJURY

67. When purchasing Naked Products, Plaintiffs sought products that were healthful and of the nutrition and ingredient profile advertised—that is, consisting predominantly of the “super” ingredients named and depicted on the product labels, and low in sugar.

68. Plaintiffs read and relied on the misleading names, claims, and overall labels of the Naked Products and additional misrepresentations in PepsiCo’s print, billboard, and/or online advertising campaign for the products.

69. Based on this reliance, Plaintiffs believed the Naked Products had the aforementioned nutritional qualities and ingredients they sought.

70. Plaintiffs would not have purchased the Naked Products absent these misrepresentations. Instead of receiving products that contained the named ingredient(s) as the predominant ingredient(s), and which were healthful and low in sugar, Plaintiffs received products that consisted primarily of other cheaper and less nutritious ingredients and/or were not as healthful as they perceived. As a result, Plaintiffs received beverages that lacked the nutritional profile that they reasonably believed the products had.

71. Plaintiffs lost money as a result of PepsiCo’s deceptive conduct because Plaintiffs did not receive the products for which they paid.

72. Plaintiffs altered their position to their detriment and suffered damages in an amount equal to the amounts they paid for the Naked Products they purchased.

73. Plaintiffs would purchase the Naked Products at issue again in the future should they have the qualities advertised in their names, on their labels, and in their billboard, print, and online advertisements.

74. By engaging in false and misleading marketing, PepsiCo reaped, and continues to reap, increased sales and profits.

75. PepsiCo knows that the qualities it markets are material to a consumer's decision to purchase its Naked Products.

76. PepsiCo deliberately cultivates these misperceptions through its marketing of the Naked Products. Indeed, PepsiCo relies and capitalizes on consumer misconceptions about the Naked Products.

CLASS ACTION ALLEGATIONS

77. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, Plaintiffs bring this action individually and on behalf of a proposed class defined as follows:

The Injunctive Relief Class. All persons residing in the United States and its territories who purchased one or more of the Naked Products for their own use, and not for resale, since October 2, 2010. Plaintiffs ask the Court to adjudicate only liability, declaratory relief, and injunctive relief through the Injunctive Relief Class; the Injunctive Relief Class does not seek any form of monetary relief.

78. Additionally, pursuant to Rule 23(a) and (b)(3), Plaintiffs bring this action individually and on behalf of a proposed class (the "Monetary Relief Class") defined as follows:

The Monetary Relief Class. All persons residing in the United States and its territories who purchased one or more of the Naked Products for their own use, and not for resale, since October 2, 2010. Plaintiffs ask the Court to adjudicate all remedies through the Monetary Relief Class.

79. Additionally, pursuant to Rule 23(a) and (b)(3), Plaintiff Lipkind brings this action

individually and on behalf of a proposed class (the “New York Subclass”) defined as follows:

The New York Subclass. All persons who purchased one or more of the Naked Products in the State of New York for their own use, and not for resale, since October 2, 2010. Plaintiff Lipkind asks the Court to adjudicate all remedies through the New York Subclass.

80. Additionally, pursuant to Rule 23(a) and (b)(3), Plaintiff Takeshita brings this action individually and on behalf of a proposed class (the “California Subclass”) defined as follows:

The California Subclass. All persons residing in the State of California who purchased one or more of the Naked Products for their own use, and not for resale, since October 2, 2010. Plaintiff Takeshita asks the Court to adjudicate all remedies through the Misleading Predominance California Subclass.

81. Collectively, the Injunctive Relief Class, the Monetary Relief Class, the New York Subclass, and the California Subclass are the “Class.”

82. Excluded from the Class are: (a) Defendant; (b) Defendant’s board members, executive-level officers, and attorneys, and immediate family members of any of the foregoing persons; (c) governmental entities; (d) the Court, the Court’s immediate family, and the Court staff; and (e) any person that timely and properly excludes himself or herself from the Class in accordance with Court-approved procedures.

83. Certification of Plaintiffs’ claims for class-wide treatment is appropriate because Plaintiffs can prove the elements of the claims on a class-wide basis using the same evidence as individual Class members would use to prove the elements in individual actions alleging the same claims.

84. **Numerosity.** The Class consists of many thousands of persons throughout the United States, New York, and California. The Class is so numerous that joinder of all members is impracticable, and the disposition of each of the Class’s claims in a class action will benefit the

parties and the Court.

85. **Commonality and Predominance.** Common questions of law and fact predominate over any questions affecting only individual Class members. These common questions have the capacity to generate common answers that will drive resolution of this action.

These common questions include whether:

- a. PepsiCo contributed to, committed, or is responsible for the conduct alleged herein;
- b. PepsiCo's conduct constitutes the violations of law alleged herein;
- c. PepsiCo acted willfully, recklessly, negligently, or with gross negligence in committing the violations of law alleged herein;
- d. Plaintiffs and the Class members are entitled to injunctive relief; and
- e. Plaintiffs and the Class members are entitled to restitution and damages.

86. Because they saw the name, label, and marketing of the Naked Products, and because they purchased the Naked Products, all Class members were subject to the same wrongful conduct.

87. Absent PepsiCo's material deceptions, misstatements, and omissions, Plaintiffs and the other Class members would not have purchased the Naked Products.

88. **Typicality.** Plaintiffs' claims are typical of the claims of the Class because Plaintiffs and the Class members all purchased the Naked Products and were injured thereby. The claims of Plaintiffs and the Class members are based on the same legal theories and arise from the same false and misleading conduct.

89. **Adequacy of Representation.** Plaintiffs are adequate representatives of the Class because their interests do not conflict with those of the Class members. Each Class member seeks damages reflecting a similar and discrete purchase, or similar and discrete purchases, that each

Class member made. Plaintiffs have retained competent and experienced class action counsel who intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the Class members' interests.

90. **Injunctive or Declaratory Relief.** The requirements for maintaining a class action 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 relief or corresponding declaratory relief with respect to the Class as a whole.

91. **Superiority.** A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all Class members is impracticable. The amount at stake for each Class member, while significant, is such that individual litigation would be inefficient and cost-prohibitive. Additionally, adjudication of this controversy as a class action will avoid the possibility of inconsistent and potentially conflicting adjudication of the claims asserted herein. Plaintiffs anticipate no difficulty in the management of this action as a class action.

92. **Notice to the Class.** Plaintiffs and their counsel anticipate that notice to the proposed Class will be effectuated through recognized, Court-approved notice dissemination methods, which may include United States mail, electronic mail, Internet postings, and/or published notice.

CLAIMS FOR RELIEF

FIRST CLAIM

Unjust Enrichment / Breach of Quasi-Contract (By Plaintiffs, on Behalf of the Class)

93. Plaintiffs repeat each and every allegation contained in the paragraphs above and incorporate such allegations by reference herein.

94. Plaintiffs bring this claim for unjust enrichment / breach of quasi-contract on behalf of the Class.

95. As a direct and proximate result of Defendant's acts set forth herein, Defendant has been unjustly enriched.

96. As a result of Defendant's deceptive, fraudulent, and misleading labeling, advertising, marketing, and sales of the Naked Products, Defendant unjustly enriched itself at the expense of Plaintiffs and the Class members, through Plaintiffs' and the Class members' payment of the purchase price for the products.

97. Defendant's conduct created a quasi-contract with Plaintiffs and the Class members, through which Defendant received a benefit of monetary compensation without providing the benefits Defendant promised to Plaintiffs and the Class members—i.e., a predominant amount of the named high-value, nutritious ingredients in the products.

98. Under the circumstances, it would be against equity and good conscience to permit Defendant to retain the ill-gotten benefits it received from Plaintiffs and the Class members, in light of the fact that the Naked Products that Plaintiffs and the Class members purchased were not what Defendant purported them to be. Thus, it would be unjust or inequitable for Defendant to retain the benefit without restitution to Plaintiffs and the Class members for the monies paid to Defendant for the Naked Products.

99. Plaintiffs and the Class members seek restitution of, disgorgement of, and/or the imposition of a constructive trust upon all profits, benefits, and compensation Defendant obtained from its improper conduct alleged herein.

100. Therefore, Plaintiffs pray for relief as set forth below.

SECOND CLAIM
Violation of New York's Consumer Protection from Deceptive Acts and Practices Law,

N.Y. GEN. BUS. LAW § 349 *et seq.*
New York General Business Law Section 349
(By Plaintiff Lipkind, on Behalf of the New York Subclass)

101. Plaintiff Lipkind repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

102. Plaintiff Lipkind brings this claim on behalf of the New York Subclass for violation of section 349 of New York’s Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW § 349 *et seq.*

103. Section 349 prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [the State of New York].” N.Y. GEN. BUS. LAW § 349(a).

104. PepsiCo’s labeling and marketing of the Naked Products, as alleged herein, constitute “deceptive” acts and practices, as such conduct misled Plaintiff Lipkind and the New York Subclass as to the amount of the named ingredients and/or the total amount of sugar in the Naked Products.

105. Subsection (h) of section 349 grants private plaintiffs a right of action for violation of New York’s Consumer Protection from Deceptive Acts and Practices Law, as follows:

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section 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.

N.Y. GEN. BUS. LAW § 349(h).

106. In accordance with subsection (h) of section 349, Plaintiff Lipkind seeks an order

enjoining PepsiCo from continuing the unlawful deceptive acts and practices set out above. Absent a Court order enjoining the unlawful deceptive acts and practices, PepsiCo will continue its false and misleading marketing of the amount of the named ingredients and/or the total amount of sugar in the Naked Products and, in doing so, irreparably harm each of the New York Subclass members.

107. As a consequence of PepsiCo's deceptive acts and practices, Plaintiff Lipkind and other members of the New York Subclass suffered an ascertainable loss of monies. By reason of the foregoing, Plaintiff Lipkind and other members of the New York Subclass also seek actual damages or statutory damages of \$50 per violation, whichever is greater, as well as punitive damages. N.Y. GEN. BUS. LAW § 349(h).

108. Therefore, Plaintiff Lipkind prays for relief as set forth below.

THIRD CLAIM
Violation of New York's Consumer Protection from Deceptive Acts and Practices Law,
N.Y. GEN. BUS. LAW § 349 *et seq.*
New York General Business Law Section 350
(By Plaintiff Lipkind, on Behalf of the New York Subclass)

109. Plaintiff Lipkind repeats each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

110. Plaintiff Lipkind brings this claim on behalf of the New York Subclass for violation of section 350 of New York's Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW § 349 *et seq.*

111. Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in [the State of New York]." N.Y. GEN. BUS. LAW § 350.

112. New York General Business Law section 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.” N.Y. GEN. BUS. LAW § 350-a.1. The section also provides that advertising can be false by omission, as it further defines “false advertising” to include “advertising [that] fails to reveal facts material in the light of such representations with respect to the commodity . . . to which the advertising relates.” *Id.*

113. PepsiCo’s labeling, marketing, and advertising of the Naked Products, as alleged herein, are “misleading in a material respect” and, thus, constitute “false advertising,” as they falsely represent the Naked Products as being predominantly comprised of their named ingredients and/or low in total sugar.

114. Plaintiff Lipkind seeks an order enjoining PepsiCo from continuing this false advertising. Absent enjoining this false advertising, PepsiCo will continue to mislead Plaintiff Lipkind and the other members of the New York Subclass as to the amount of the named ingredients and/or the total amount of sugar in the Naked Products and, in doing so, irreparably harm each of the New York Subclass members.

115. As a direct and proximate result of PepsiCo’s violation of New York General Business Law section 350, Plaintiff Lipkind and the other members of the New York Subclass have also suffered an ascertainable loss of monies. By reason of the foregoing, Plaintiff Lipkind and the other members of the New York Subclass also seek actual and punitive damages.

116. Therefore, Plaintiff Lipkind prays for relief as set forth below.

FOURTH CLAIM
Violation of California’s Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.*
Unlawful Conduct Prong
(By Plaintiffs Takeshita and Fenwick, on Behalf of the California Subclass)

117. Plaintiffs Takeshita and Fenwick repeat each and every allegation contained in the paragraphs above and incorporate such allegations by reference herein.

118. Plaintiffs Takeshita and Fenwick bring this claim on behalf of the California Subclass for violation of the “unlawful” prong of California’s Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.* (the “UCL”).

119. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” CAL. BUS. & PROF. CODE § 17200.

120. The acts, omissions, misrepresentations, practices, and non-disclosures of PepsiCo, as alleged herein, constitute “unlawful” business acts and practices in that they violate the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (the “FFDCA”), and its implementing regulations, including, at least, the following sections:

- a. 21 U.S.C. § 343(a), which deems food misbranded when its labeling contains a statement that is “false or misleading in any particular,” with “misleading” defined to “take[] into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material,” 21 U.S.C. § 321(n);
- b. 21 U.S.C. § 321(n), which states the nature of a false and misleading advertisement;
- c. 21 C.F.R. § 101.18(b), which prohibits true statements about ingredients that are misleading in light of the presence of other ingredients;
- d. 21 C.F.R. § 102.5(c), which prohibits the naming of foods so as to create an erroneous impression about the presence or absence of ingredient(s) or component(s) therein;
- e. 21 C.F.R. § 101.2(c), which requires that “[a]ll information appearing on the principal display panel or the information panel . . . appear prominently and conspicuously”;
- f. 21 C.F.R. § 101.15(a), which states the reasons by which information required to appear on a food label may lack the necessary prominence and conspicuousness; and
- g. 21 C.F.R. § 101.6, which provides that a “no added sugar” claim can only be made “if the product bears a statement that the food is not ‘low calorie’ . . . and that directs consumers’ attention to the nutrition panel for further

information on sugar and calorie content.”

121. PepsiCo’s conduct is further “unlawful” because it violates California’s False Advertising Law, CAL. BUS. & PROF. CODE § 17500 *et seq.* (the “FAL”), and California’s Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.* (the “CLRA”), as discussed in the claims below.

122. PepsiCo’s conduct also violates California’s Sherman Food, Drug, and Cosmetic Law, CAL. HEALTH & SAFETY CODE § 109875 *et seq.* (the “Sherman Law”), including, at least, the following sections:

- a. section 110100 (adopting all FDA regulations as state regulations);
- b. section 110290 (“In determining whether the labeling or advertisement of a food . . . is misleading, all representations made or suggested by statement, word, design, device, sound, or any combination of these, shall be taken into account. The extent that the labeling or advertising fails to reveal facts concerning the food . . . or consequences of customary use of the food . . . shall also be considered.”);
- c. section 110390 (“It is unlawful for any person to disseminate any false advertisement of any food. . . . An advertisement is false if it is false or misleading in any particular.”);
- d. section 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food . . . that is falsely advertised.”);
- e. section 110398 (“It is unlawful for any person to advertise any food, drug, device, or cosmetic that is adulterated or misbranded.”);
- f. section 110400 (“It is unlawful for any person to receive in commerce any food . . . that is falsely advertised or to deliver or proffer for delivery any such food”); and
- g. section 110660 (“Any food is misbranded if its labeling is false or misleading in any particular.”).

123. Each of the challenged statements made, and actions taken, by PepsiCo violates the FFDCA, CLRA, FAL, and Sherman Law, and, consequently, violates the “unlawful” prong of the

UCL.

124. PepsiCo leveraged its deception to induce Plaintiff Takeshita and the members of the California Subclass to purchase products that were of lesser value and quality than advertised.

125. PepsiCo's deceptive advertising caused Plaintiff Takeshita and the members of the California Subclass to suffer injury in fact and to lose money or property, as it denied them the benefit of the bargain. Had Plaintiff Takeshita and the members of the California Subclass been aware of PepsiCo's false and misleading advertising tactics, they would not have purchased the Naked Products.

126. In accordance with California Business and Professions Code section 17203, Plaintiff Takeshita seeks an order enjoining PepsiCo from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

127. Plaintiffs Takeshita and Fenwick also seek an order for the disgorgement and restitution of all monies from the sale of the Naked Products that PepsiCo unjustly acquired through acts of unlawful, unfair, and/or fraudulent competition.

128. Therefore, Plaintiffs Takeshita and Fenwick pray for relief as set forth below.

FIFTH CLAIM

**Violation of California's Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 *et seq.*
Unfair and Fraudulent Conduct Prongs
(By Plaintiffs Takeshita and Fenwick, on Behalf of the California Subclass)**

129. Plaintiffs Takeshita and Fenwick repeat each and every allegation contained in the paragraphs above and incorporate such allegations by reference herein.

130. Plaintiffs Takeshita and Fenwick bring this claim on behalf of the California Subclass for violation of the "unfair" and "fraudulent" prongs of the UCL.

131. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice."

CAL. BUS. & PROF. CODE § 17200.

132. The false and misleading labeling of the Naked Products, as alleged herein, constitute “unfair” business acts and practices because such conduct is immoral, unscrupulous, and offends public policy. Further, the gravity of PepsiCo’s conduct outweighs any conceivable benefit of such conduct.

133. The acts, omissions, misrepresentations, practices, and non-disclosures of PepsiCo, as alleged herein, constitute “fraudulent” business acts and practices, because PepsiCo’s conduct is false and misleading to Plaintiff Takeshita and the members of the California Subclass.

134. PepsiCo’s labeling and marketing of the Naked Products is likely to deceive reasonable consumers about the relative amount of named ingredients and/or the total amount of sugar in the Naked Products.

135. PepsiCo either knew or reasonably should have known that the claims on the labels of the Naked Products were likely to deceive reasonable consumers.

136. In accordance with California Business & Professions Code section 17203, Plaintiff Takeshita seeks an order enjoining PepsiCo from continuing to conduct business through unlawful, unfair, and/or fraudulent acts and practices and to commence a corrective advertising campaign.

137. Plaintiffs Takeshita and Fenwick also seek an order for the disgorgement and restitution of all monies from the sale of the Naked Products that were unjustly acquired through act of unlawful, unfair, and/or fraudulent competition.

138. Therefore, Plaintiffs Takeshita and Fenwick pray for relief as set forth below.

SIXTH CLAIM

**Violation of California’s False Advertising Law, CAL. BUS. & PROF. CODE § 17500 *et seq.*
(By Plaintiffs Takeshita and Fenwick, on Behalf of the California Subclass)**

139. Plaintiffs Takeshita and Fenwick repeat each and every allegation contained in the

paragraphs above and incorporate such allegations by reference herein.

140. Plaintiffs Takeshita and Fenwick brings this claim on behalf of the California Subclass for violation of the FAL.

141. The FAL prohibits making any false or misleading advertising claim. CAL. BUS. & PROF. CODE § 17500.

142. As alleged herein, PepsiCo, in its labeling and advertising of the Naked Products, makes “false [and] misleading advertising claim[s],” as it deceives consumers as to the relative amount of named ingredients and/or the total amount of sugar in the Naked Products.

143. In reliance on these false and misleading advertising claims, Plaintiffs Takeshita and Fenwick and the members of the California Subclass purchased and used the Naked Products without the knowledge that the products contain only a small overall and relative amount of their named ingredients and/or a substantial amount of total sugar.

144. PepsiCo knew or should have known that the labeling and marketing of the Naked Products was likely to deceive consumers.

145. As a result, Plaintiffs Takeshita and Fenwick and the California Subclass members seek injunctive and equitable relief, restitution, and an order for the disgorgement of the funds by which PepsiCo was unjustly enriched.

146. Therefore, Plaintiff Takeshita prays for relief as set forth below.

SEVENTH CLAIM
Violation of California’s Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.*
(By Plaintiffs Takeshita and Fenwick, on Behalf of the California Subclass)

147. Plaintiffs Takeshita and Fenwick repeat each and every allegation contained in the paragraphs above and incorporates such allegations by reference herein.

148. Plaintiffs Takeshita and Fenwick bring this claim on behalf of the California

Subclass for violation of the CLRA, seeking injunctive relief only.

149. The CLRA adopts a statutory scheme prohibiting various deceptive practices in connection with the conduct of a business providing goods, property, or services primarily for personal, family, or household purposes.

150. PepsiCo's policies, acts, and practices were designed to, and did, result in the purchase and use of the Naked Products primarily for personal, family, or household purposes, and violated and continue to violate the following sections of the CLRA:

- a. section 1770(a)(5), which prohibits representing that goods have a particular composition or contents that they do not have;
- b. section 1770(a)(5), which also prohibits representing that goods have characteristics, uses, or benefits that they do not have;
- c. section 1770(a)(7), which prohibits representing that goods are of a particular standard, quality, or grade if they are of another;
- d. section 1770(a)(9), which prohibits advertising goods with intent not to sell them as advertised; and
- e. section 1770(a)(16), which prohibits representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

151. As a result, in accordance with California Civil Code section 1780(a)(2), Plaintiff Takeshita and the members of the California Subclass have suffered irreparable harm and seek injunctive relief in the form of an order:

- a. enjoining PepsiCo from continuing to engage in the deceptive practices described above;
- b. requiring PepsiCo to provide public notice of the true nature of the Naked Products; and
- c. enjoining PepsiCo from such deceptive business practices in the future.

152. Pursuant to section 1782 of the CLRA, Plaintiffs Takeshita and Fenwick hereby

notifying PepsiCo in writing of its particular violations of section 1770 of the CLRA and is demanding, among other actions, that PepsiCo cease marketing the Naked Products as set forth in detail above and correct, repair, replace, or otherwise rectify the Naked Products that are in violation of section 1770 as set forth in detail above. If PepsiCo fails to respond to Plaintiffs' demand within 30 days of this notice, pursuant to section 1782 of the CLRA, Plaintiffs will amend this Class Action Complaint to request, in addition to the above relief, statutory damages, actual damages, punitive damages, interest, and attorneys' fees.

153. Therefore, Plaintiffs Takeshita and Fenwick pray for relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the members of the Class, respectfully request the Court to enter an Order:

- A. certifying the proposed Class under Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3), as set forth above;
- B. declaring that Defendant is financially responsible for notifying the Class members of the pendency of this suit;
- C. declaring that Defendant has committed the violations of law alleged herein;
- D. providing for any and all injunctive relief the Court deems appropriate;
- E. awarding statutory damages in the maximum amount for which the law provides;
- F. awarding monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount that the Court or jury will determine, in accordance with applicable law;
- G. providing for any and all equitable monetary relief the Court deems appropriate;
- H. awarding punitive or exemplary damages in accordance with proof and in an

amount consistent with applicable precedent;

- I. awarding Plaintiffs their reasonable costs and expenses of suit, including attorneys' fees;
- J. awarding pre- and post-judgment interest to the extent the law allows; and
- K. for such further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a trial by jury on all claims so triable.

Date:

Respectfully submitted,

REESE LLP

By: _____

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