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E-filing

FILED
SEP 29 2010

12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

15 **SKYE ASTIANA on behalf of herself and all**
16 **others similarly situated,**

EV 10 4387
CASE NO.

17 **Plaintiff,**

CLASS ACTION

18 **v.**

**COMPLAINT FOR DAMAGES,
EQUITABLE, DECLARATORY AND
INJUNCTIVE RELIEF**

19 **BEN & JERRY'S HOMEMADE, INC.,**

DEMAND FOR JURY TRIAL

20 **Defendant.**

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1 Plaintiff, by her attorneys, brings this class action against Defendant Ben & Jerry's
2 Homemade, Inc. ("B&J" or "Defendant"), on her own behalf and on behalf of all others similarly
3 situated, and alleges as follows based upon the investigation of her counsel:

4 INTRODUCTION

5 1. This is a class action on behalf of a California class of consumers who purchased Ben
6 & Jerry's Homemade, Inc.'s "all natural" Ice Cream products which contained alkalized cocoa
7 beginning September 28, 2006 through the present ("Class Period"). Since at least 2006, B&J has
8 packaged, marketed and sold its Ice Cream products as being "all natural" despite the fact they
9 contain alkalized cocoa - a non-natural processed ingredient that additionally contains potassium
10 carbonate, a man made, synthetic ingredient.¹

11 2. Throughout the Class Period, B&J prominently displayed the moniker "all natural" on
12 the labels of its Ice Cream products, cultivating a healthy and socially conscious image in an effort to
13 promote the sale of these products. Indeed, as a result of this false and misleading labeling B&J was
14 able to sell these products to thousands of consumers in California and throughout the United States
15 and to profit handsomely from these transactions.

16 3. Plaintiff alleges B&J's conduct violates the unlawful, unfair and fraudulent prongs of
17 California's Business and Professions Code section 17200, *et. seq.* (the "UCL"), and the California
18 Business & Professions Code 17500 *et. seq.* (the "FAA"). Plaintiff also alleges that B&J's conduct is
19 grounds for restitution on the basis of quasi-contract/unjust enrichment.

20 PARTIES

21 4. Plaintiff Skye Astiana is currently a resident of Klamath Falls, Oregon. From at least
22 September 28, 2006 to September, 2007, Plaintiff Astiana was domiciled in California, residing in
23 San Francisco and Mill Valley, California. While Ms. Astiana was a California resident, she
24 purchased on multiple occasions B&J's All Natural Chocolate Fudge Brownie Ice Cream as well as
25 other of B&J's Ice Cream products at the Whole Foods grocery store near her then residence in Mill
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28 ¹ As used throughout this Complaint, "Ice Cream" products includes B&J's "all natural" premium
Ice Creams, yogurts and sorbets identified in paragraph 18 of this Complaint.

1 Valley California.² Ms. Astiana believed the Ice Cream she purchased was all natural and relied on
2 this representation in making the purchase. Upon information and belief, the Ice Cream Ms. Astiana
3 purchased contained cocoa processed with alkali - a non-natural processed ingredient that
4 additionally contains potassium carbonate, a man made, synthetic ingredient.

5 5. Defendant Ben & Jerry's Homemade, Inc. was founded in 1977 in Vermont and
6 currently maintains its headquarters at 30 Community Drive, South Burlington, VT 05403-6828.
7 From its inception, to the present day, B&J claims to produce a wide variety of super premium Ice
8 Cream, Ice Cream novelties, low fat Ice Cream, low fat yogurt and sorbet, using Vermont dairy
9 products and high quality, all natural ingredients. Ben & Jerry's products are distributed nationwide
10 in supermarkets, grocery stores, convenience stores, franchise Ben & Jerry's scoop shops,
11 restaurants and other venues. In 2000 B&J's was acquired by Unilever, one of the world's largest
12 consumer products companies in a deal estimated at \$326 million.

13 JURISDICTION AND VENUE

14 6. Jurisdiction of this Court is proper under 28 U.S.C. §1332, as complete diversity
15 between the parties exists. Representative Plaintiff Skye Astiana was a California resident at the
16 time she purchased Defendant's products at issue in this litigation. Defendant's principle place of
17 business is Vermont and it is a wholly owned subsidiary of Unilever plc, a foreign corporation.

18 7. Upon information and belief, the amount in controversy exceeds \$5,000,000 for
19 Representative Plaintiff and Class members collectively, exclusive of interest and costs, by virtue of
20 the combined purchase prices paid by Plaintiff and the Class, and the profit reaped by Defendant
21 from its transactions with Plaintiff and the Class, as a direct and proximate result of the wrongful
22 conduct alleged herein, and by virtue of the injunctive and equitable relief sought.

23 8. Venue is proper within this judicial district pursuant to 28 U.S.C. § 1391(b) and (c).
24 Defendant maintains offices and has agents, transacts business or is found within this judicial
25 district. Moreover, a substantial portion of the underlying transactions and events complained of
26 herein occurred, and affected persons and entities, in this judicial district, and Defendant has
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28 ² The other ice cream products include Cherry Garcia, Chocolate, Chocolate Chip Cookie Dough, Chocolate Fudge Brownie, Chubby Hubby, Chunky Monkey and New York Super Fudge Chunk.

1 received substantial compensation from such transactions and business activity in this judicial
2 district, including as the result of purchases of Defendant's Ice Cream products from retail locations
3 herein. Finally, Defendant inhabits and/or may be found in this judicial district, and the interstate
4 trade and commerce described herein is and has been carried out in part within this judicial district.

5 **BACKGROUND**

6 9. The cocoa bean is a seed that grows on trees native to South America. The fermented
7 and dried cocoa seed is the basic ingredient in chocolate. Chocolate is a name given to products that
8 are derived from cocoa which are then mixed with some sort of fat (e.g. cocoa butter, oil) and finely
9 powdered sugar to produce a solid edible product.

10 10. To make chocolate, the beans are processed, roasted, cracked and shelled. The
11 resulting pieces called nibs are further processed into a chocolate liquor, butter or powder. The
12 cocoa powder is typically used in the flavoring of Ice Creams.

13 11. Unsweetened baking cocoa powder is typically rendered in one of two forms: a
14 natural cocoa or a non-natural version known as Dutch-process cocoa. Both are made by pulverizing
15 partially defatted chocolate liquor and removing nearly all the cocoa butter. Natural cocoa is light in
16 color and somewhat acidic with a strong chocolate flavor. Non-natural dutch-process cocoa is
17 processed with alkali to neutralize its natural acidity. Dutch cocoa is slightly milder in taste, with a
18 deeper and warmer color than natural cocoa. Dutch-process cocoa is frequently used when the
19 product calls for the blending of cacao with liquids. Unfortunately, Dutch processing destroys most
20 of the flavonols present in cocoa -- the water-soluble plant pigments that are believed to give dark
21 chocolate health benefits in the form of antioxidant, anti-inflammatory and antiviral properties.

22 **ALKALIZED COCOA IS UNNATURAL**

23 12. Although the FDA does not directly regulate the term "natural," the FDA has
24 established a policy defining the outer boundaries of the use of that term by clarifying that a product
25 is not natural if it contains color, artificial flavors, or synthetic substances.

26 <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm094536.htm> and

27 <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm>.

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1 13. The FDA also does recognize alkalization as a non-natural process and accordingly
2 requires that "when any optional alkali ingredient is used, the name of the food shall be accompanied
3 by the statement "Processed with alkali", or "Processed with -----", the blank being filled in with
4 the common or usual name of the specific alkali ingredient used in the food."

5 14. In addition, Ben & Jerry's Ice Cream products containing alkalized cocoa are
6 processed with potassium carbonate which is a recognized synthetic substance.

7 **BEN & JERRY'S USE OF ALKALIZED COCOA**

8 15. American consumers are health conscious and frequently take nutrition information
9 into consideration in selecting and purchasing food items. Product package labels, including
10 nutrition labels, are vehicles that convey nutrition information to consumers which they can and do
11 use to make purchasing decisions. As noted by Food and Drug Administration Commissioner
12 Margaret Hamburg during an October 2009 media briefing, "[s]tudies show that consumers trust and
13 believe the nutrition facts information and that many consumers use it to help them build a healthy
14 diet."

15 16. The prevalence of claims about nutritional content on food packaging in the United
16 States has increased in recent years as manufacturers have sought to provide consumers with
17 nutrition information and thereby influence their purchasing decisions. The results of the FDA's
18 most recent Food Label and Package Survey found that approximately 4.8 percent of food products
19 sold in the United States had either a health claim or a qualified health claim on the food package,
20 and that more than half (53.2%) of the food products reviewed had nutrient content claims on the
21 packaging.

22 17. Treating cocoa with an alkalizing agent changes the chemical structure, taste, and
23 appearance of cocoa and reduces its acidity and flavonol content. In addition, the alkalized cocoa in
24 Ben & Jerry's Ice Cream products was processed with and thus contains potassium carbonate, a
25 recognized synthetic substance.

26 18. According to a complaint filed with the FDA in 2010 by the Center for Science in the
27 Public Interest ("CSPI"), and as confirmed by Ben & Jerry's Ice Cream labels, cocoa processed with
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1 alkali is used as an ingredient in 36 of Ben & Jerry's Ice Cream flavors which otherwise claim to be
2 "all natural." Those Ice Cream flavors are:

3 **a. Ben & Jerry's "All-Natural" Flavors - Ice Cream**

4 Banana Split
5 Boston Cream Pie
6 Brownie Batter
7 Cake Batter
8 Cheesecake Brownie
9 Cherry Garcia
10 Chocolate
11 Chocolate Chip Cookie Dough
12 Chocolate Fudge Brownie
13 Chocolate Macadamia
14 Chubby Hubby
15 Chunky Monkey
16 Dublin Mudslide
17 Fossil Fuel
18 Half Baked
19 Imagine Whirled Peace
20 Karamel Sutra
21 Milk & Cookies
22 Mint Chocolate Chunk
23 Mint Chocolate Cookie
24 Mud Pie
25 Neapolitan Dynamite
26 New York Super Fudge Chunk
27 Oatmeal Cookie Chunk
28 Peanut Butter Cup
Phish Food
S'mores
Triple Caramel Chunk
Turtle Soup
Vanilla Caramel Fudge

22 **b. Ben & Jerry's "All Natural" Frozen Yogurts (Froyos)**

23 Froyo Cherry Garcia
24 Froyo Chocolate Fudge Brownie
25 Froyo Half-Baked

25 **c. Ben & Jerry's "All Natural" Popsicles**

26 Cherry Garcia
27 Fudgy Brownies
28 Half Baked

19. The CSPI warned as early as 2002 that B&J had been misbranding their products as
"all natural" when in truth they were not.

1 "Ben & Jerry's enjoys a carefully-cultivated public image as an eco-friendly, worker-friendly
2 brand—the kind of company whose label claims should be truthful," CSPI executive director
3 Michael F. Jacobson said. "So it's sad that Ben & Jerry's is trying to pass off products laden
4 with these factory-spun ingredients as 'natural,' when there's little natural about them. These
5 ingredients are man-made and simply don't occur in nature."

6 20. According to the Ben & Jerry's corporate website, their product mission is to "make
7 distribute and sell the finest quality "all natural" Ice Cream and euphoric concoctions with a
8 continued commitment to incorporating wholesome, "natural" ingredients and incorporating
9 business practices that respect the earth and the environment." (emphasis added).
10 <http://www.benjerry.com/activism/mission statement>.

11 21. The labeling of products as "all natural" carry implicit health benefits to consumers –
12 benefits that consumers are often willing to pay a premium over comparable products that are not
13 "all natural." Over the past 30 years B&J has cultivated and reinforced a corporate image that has
14 catered to this "all natural" theme and have boldly emblazed this moniker on each and every one of
15 its Ice Cream products, despite the fact it uses a synthetic ingredient in the form of alkalized cocoa.

16 22. B&J's has used the "all natural" label to shape its brand and sell its product. Yet, the
17 existence of alkalized cocoa in its Ice Creams renders the use of the label "all natural," false and
18 misleading. In manufacturing its Ice Cream products, Defendant had a choice between using natural
19 or unnatural processed cocoa. It chose the later, but nonetheless labeled its Ice Cream products as
20 "all natural." As a matter of its self characterized socially conscious corporate morality, and as
21 matter of law, B&J must now reconcile its labeling with the true content of its products.

22 CLASS ACTION ALLEGATIONS

23 23. Plaintiff brings this action on behalf of herself and on behalf of all other members of
24 the Class ("Class"), defined as all consumers who, on or after September 28, 2006, purchased in the
25 State of California B&J's Ice Cream products that were labeled all natural but contained alkalized
26 cocoa. Plaintiff brings this Class pursuant to Federal Rule of Civil Procedure 23(a), and (b)(1),
27 23(b)(2) and 23(b)(3).

28 24. Upon information and belief, there are thousands of Class members who are
geographically dispersed throughout the State of California. Therefore, individual joinder of all
members of the Class would be impracticable.

1 25. Common questions of law or fact exist as to all members of the Class. These
2 questions predominate over the questions affecting only individual class members. These common
3 legal or factual questions include:

- 4 a. whether B&J labels its Ice Cream products as "all natural;"
- 5 b. whether the alkalized cocoa used in B&J's Ice Cream products
6 is natural;
- 7 c. whether B&J's "all natural" labeling of its Ice Cream products is
8 likely to deceive class members or the general public;
- 9 d. whether B&J's representations are unlawful;
- 10 e. the appropriate measure of resitutionary disgorgement and/or
11 restitution.

12 26. Plaintiff's claims are typical of the claims of the Class, in that Plaintiff was a
13 consumer who purchased B&J's "all natural" Ice Cream products that contained alkalized cocoa in
14 California during the Class Period. Plaintiff, therefore, is no different in any relevant respect from
15 any other class member, and the relief sought is common to the Class.

16 27. Plaintiff is an adequate representative of the Class because her interests do not
17 conflict with the interests of the class members he seeks to represent, and she has retained counsel
18 competent and experienced in conducting complex class action litigation. Plaintiff and her counsel
19 will adequately protect the interests of the Class.

20 28. A class action is superior to other available means for the fair and efficient
21 adjudication of this dispute. The damages suffered by each individual class member likely will be
22 relatively small, especially given the burden and expense of individual prosecution of the complex
23 litigation necessitated by B&J's conduct. Thus, it would be virtually impossible for the class
24 members individually to effectively redress the wrongs done to them. Moreover, even if the class
25 members could afford individual actions, it would still not be preferable to class wide litigation.
26 Individualized actions present the potential for inconsistent or contradictory judgments. By contrast,
27 a class action presents far fewer management difficulties and provides the benefits of single
28 adjudication, economies of scale, and comprehensive supervision by a single court.

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SECOND CAUSE OF ACTION
("Unfair" Business Practices in Violation of
The Unfair Competition Law ("UCL"), Bus. & Prof. Code 17200, et seq.)

36. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates them as if they were fully written herein.

37. The UCL defines unfair business competition to include any "unlawful, unfair or fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising. Cal. Bus. Prof. Code 17200.

38. A business act or practice is "unfair" under the Unfair Competition Law if the reasons, justifications and motives of the alleged wrongdoer are outweighed by the gravity of the harm to the alleged victims.

39. B&J has and continues to violate the "unfair" prong of the UCL through its misleading description of its products as all natural when indeed a main ingredient is not natural and contains a synthetic substance. The gravity of the harm to members of the Class resulting from such unfair acts and practices outweighs any conceivable reasons, justifications and/or motives of B&J for engaging in such deceptive acts and practices. By committing the acts and practices alleged above, B&J has engaged, and continues to be engaged, in unfair business practices within the meaning of California Business and Professions Code 17200 et seq.

40. Through its unfair acts and practices, B&J has obtained, and continues to unfairly obtain, money from members of the Class. As such, Plaintiff requests that this Court cause B&J to restore this money to Plaintiff and all Class members, to disgorge the profits B & J has made on its Ice Cream products, and to enjoin B&J from continuing to violate the Unfair Competition Law as discussed herein. Otherwise, the Class may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

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THIRD CAUSE OF ACTION

**("Fraudulent" Business Practices in Violation of
The Unfair Competition Law ("UCL"), Bus. & Prof. Code 17200, et seq.)**

41. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates them as if they were fully written herein.

42. The UCL defines unfair business competition to include any "unlawful, unfair or fraudulent" act or practice, as well as any "unfair, deceptive, untrue or misleading" advertising. Cal. Bus. & Prof. Code §17200.

43. A business act or practice is "fraudulent" under the Unfair Competition Law if it actually deceives or is likely to deceive members of the consuming public.

44. B&J's acts and practices of mislabeling their products as all natural despite the fact they contained alkalized cocoa that is not natural and also contains a synthetic substance has the effect of misleading consumers into believing the product something it is not.

45. As a result of the conduct described above, B&J has been, and will continue to be, unjustly enriched at the expense of Plaintiff and members of the proposed Class. Specifically, B&J has been unjustly enriched by the profits it has obtained from Plaintiff and the Class from the purchases of Ice Cream products made by them.

46. Through its unfair acts and practices, B&J has improperly obtained, and continues to improperly obtain, money from members of the Class. As such, Plaintiff requests that this Court cause B&J to restore this money to Plaintiff and all Class members, to disgorge the profits B & J has made on its Ice Cream products, and to enjoin B&J from continuing to violate the Unfair Competition Law as discussed herein. Otherwise, the Class may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

**FOURTH CAUSE OF ACTION
(False Advertising in Violation of
California Business & Professions Code 17500, et seq.)**

47. Plaintiff hereby incorporates the foregoing paragraphs of this Complaint and restates them as if they were fully written herein.

1 48. Plaintiff hereby incorporates by reference the allegations contained above. This cause
2 of action is brought by Plaintiff on behalf of himself, the Class members, and the general public.

3 49. Defendant uses advertising on its packaging to sell its Ice Cream products. Defendant
4 is disseminating advertising concerning its goods which by its very nature is deceptive, untrue, or
5 misleading within the meaning of California Business & Professions Code 17500, *et seq.* because
6 those advertising statements contained on its product labels are misleading and likely to deceive, and
7 continue to deceive, members of the putative class and the general public.

8 50. In making and disseminating the statements alleged herein, Defendant knew or should
9 have known that the statements were untrue or misleading, and acted in violation of California
10 Business & Professions Code 17500, *et seq.*

11 51. The misrepresentations and non-disclosures by Defendant of the material facts
12 detailed above constitute false and misleading advertising and therefore constitute a violation of,
13 California Business & Professions Code 17500, *et seq.*

14 52. Through its deceptive acts and practices, Defendant has improperly and illegally
15 obtained money from Plaintiff and members of the putative class. As such, Plaintiff requests that
16 this Court cause Defendant to restore this money to Plaintiff and members of the putative class, and
17 to enjoin Defendant from continuing to violate California Business & Professions Code §17500, *et*
18 *seq.*, as discussed above. Otherwise, Plaintiff and those similarly situated will continue to be harmed
19 by Defendant's false and/or misleading advertising.

20 53. Pursuant to California Business & Professions Code 17535, Plaintiff seeks an order of
21 this Court ordering Defendant to fully disclose the true nature of its misrepresentations. Plaintiff
22 additionally requests an order requiring Defendant to disgorge its ill-gotten gains and/or award full
23 restitution of all monies wrongfully acquired by Defendant by means of such acts of false
24 advertising, plus interest and attorneys fees so as to restore any and all monies which were acquired
25 and obtained by means of such untrue and misleading advertising, misrepresentations and omissions,
26 and which ill-gotten gains are still retained by Defendant. Plaintiff and the putative Class may be
27 irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.
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1 E. An order requiring an accounting for, and imposition of a constructive trust upon, all
2 monies received by B&J as a result of the unfair, misleading, fraudulent and unlawful conduct
3 alleged herein.

4 F. Such other and further relief as may be deemed necessary or appropriate.

5 **DEMAND FOR JURY TRIAL**

6 Plaintiff hereby demands a trial by jury on all causes of action and/or issues so triable.
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8 Dated: September 29, 2010

By: s/Michael D. Braun

Michael D. Braun

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