

1 **STUART M. PAYNTER (SBN 226147)**
2 **THE PAYNTER LAW FIRM PLLC**
3 **1200 G Street N.W., Suite 800**
4 **Washington, D.C. 20005**
5 **Telephone: (202) 626-4486**
6 **Facsimile: (866) 734-0622**
7 **Email: stuart@smplegal.com**

8 **-and-**

9 **WILLIAM F. MURPHY (SBN 82482)**
10 **WILLIAM P. WILSON (SBN 230444)**
11 **DILLINGHAM & MURPHY LLP**
12 **225 Bush Street, Sixth Floor**
13 **San Francisco, CA 94104**
14 **Telephone: (415) 397-2700**
15 **Facsimile: (415) 397-3300**
16 **Email: wpw@dillinghammurphy.com**

17 **Attorneys for Plaintiffs Weaver and Kossen**

18 **SUPERIOR COURT OF CALIFORNIA**

19 **COUNTY OF SAN FRANCISCO - UNLIMITED JURISDICTION**

20 **JOSHUA A. WEAVER and JEREMY S.**
21 **KOSSEN on behalf of themselves and a class of**
22 **persons similarly situated,**

23 **Plaintiffs,**

24 **v.**

25 **NESTLÉ USA, INC.,**

26 **Defendant.**

ENDORSED
FILED
Superior Court of California
County of San Francisco

SEP 24 2009

GORDON PARKER, Clerk
BY: _____
Deputy Clerk

Case No. CGC-08-476890

**SECOND AMENDED CLASS-ACTION
COMPLAINT FOR**

1. BUSINESS AND PROFESSIONS
CODE SECTION 16720 ET SEQ.;
2. BUSINESS AND PROFESSIONS
CODE SECTION 17200 ET SEQ.;

3. UNJUST ENRICHMENT;

4. CIVIL CONSPIRACY;

5. BUSINESS AND PROFESSIONS
CODE SECTION 17500 ET SEQ.

(JURY TRIAL DEMANDED)

Complaint Filed: June 27, 2008 _____

27 Plaintiffs, by and through their attorneys, based on their individual experiences, the
28 investigation of counsel, and information and belief allege as follows:

///

BY FAX

1 **INTRODUCTION**

2 1. This action arises out of a conspiracy among the world’s leading manufacturers of
3 chocolate confectionary products to fix, raise, maintain or stabilize prices for those products in
4 Canada and the United States beginning in 2002 and continuing through at least 2007. In addition
5 to Nestle USA, Inc., ("Defendant" or “Nestle USA”) the participants in this conspiracy included,
6 but are not limited to, The Hershey Company, Hershey Canada, Inc., Mars Incorporated, Mars
7 Canada, Inc., Mars Snackfoods US LLC, Nestle S.A., Societe des Produits Nestle S.A., Nestec
8 S.A., Nestle Canada, Inc., and Cadbury plc, Cadbury Holdings ltd, Cadbury Adams Canada, Inc.,
9 and Cadbury Adams USA LLC (collectively “co-conspirators”). Through their anticompetitive
10 and illegal conduct, Nestle USA and its co-conspirators have imposed significant illegal
11 overcharges on individuals who purchased chocolate confectionary products in California during
12 that period. This complaint is filed on behalf of all California citizens who purchased chocolate
13 confectionary products in California that were manufactured or distributed by Nestle USA and its
14 co-conspirators from 2002 to the present (“the Relevant Period”), excluding persons purchasing
15 directly from Nestle USA and its co-conspirators. Plaintiffs seek to recover on behalf of
16 themselves and all similarly situated persons all monies illegally obtained by Nestle USA and its
17 co-conspirators and to enjoin future illegal conduct by Nestle USA.

18 **JURISDICTION AND VENUE**

19 2. This Court has jurisdiction over this action pursuant to California Code of Civil
20 Procedure section 410.10. Venue in San Francisco County is proper pursuant to California Code
21 of Civil Procedure section 395.5, because Nestle USA’s liability to Plaintiffs arose and the injuries
22 sued upon occurred at least in part in San Francisco County and Plaintiff Joshua Weaver is a
23 resident of San Francisco County.

24 3. Personal jurisdiction is proper over Defendant because (a) Nestle USA is
25 headquartered and has its principal place of business in California, (b) Nestle USA has sold,
26 shipped and/or delivered substantial quantities of chocolate confectionary products in California,
27 (c) Nestle USA has and had substantial contacts with California, including but not limited to
28 agents in California, and (d) Nestle USA engaged in an illegal scheme and price-fixing conspiracy

1 that was directed at and had the intended effect of causing injury to persons residing in or doing
2 business in California.

3 **PARTIES**

4 **Plaintiffs**

5 4. Plaintiff Joshua Weaver is a resident of San Francisco, California and California
6 citizen. Mr. Weaver has purchased Nestle USA and its co-conspirators' chocolate confectionary
7 products throughout the period of his residence, including but not limited to Nestle USA's
8 Butterfinger chocolate bar.

9 5. Plaintiff Jeremy Kossen is a resident of Santa Barbara, California and California
10 citizen. Mr. Kossen has purchased Nestle USA and its co-conspirators' chocolate confectionary
11 products throughout the period at issue in this lawsuit, including but not limited to Nestle USA's
12 Butterfinger chocolate bar.

13 **Defendant and Its Co-conspirators**

14 6. Defendant Nestle USA, Inc. is a Delaware corporation with its principal place of
15 business at 800 North Brand Boulevard, Glendale, California. Nestle USA is a wholly-owned
16 subsidiary of the Swiss chocolatier Nestle S.A. Nestle USA is grouped into various divisions,
17 including chocolate and confectionery, coffee and beverages, food services, ice cream, nutrition,
18 water, and pet care. Throughout the relevant period, Nestle USA manufactured and sold chocolate
19 confectionery products to purchasers in California, directly and through wholesalers, distributors
20 and retailers. Examples of Nestle USA's chocolate confectionary products include the
21 Butterfinger, 1000 Grand and Baby Ruth chocolate bars.

22 7. Co-conspirator Nestle S.A. is a Swiss company with its principal place of business
23 at Avenue Nestle 5, CH-1800, Vevey, Vaud, Switzerland. It is the world's largest food and
24 beverage company and is the parent company of Nestle USA and co-conspirator Nestle Canada.

25 8. Co-conspirator Nestec S.A. is a Swiss company with its principal place of business
26 at Avenue Nestle 5, CH-1800, Vevey, Vaud, Switzerland. It is a wholly owned subsidiary of
27 Nestle S.A. that owns the patents and technical know-how to produce Nestle-brand products. It
28 provides product design and manufacturing support across Nestle S.A. subsidiaries.

1 9. Co-conspirator Societe des Produits Nestle S.A. is a Swiss company with its
2 principal place of business at Avenue Nestle 5, CH-1800, Vevey, Vaud, Switzerland. It is a
3 wholly owned subsidiary of Nestle S.A. that holds legal title to Nestle-brand trademarks.

4 10. Co-conspirator Nestle Canada Inc. is a Canadian corporation with its principal
5 place of business at 25 Sheppard Avenue West, Floors 18-22, North York, Ontario. Nestle
6 Canada is a wholly-owned subsidiary of Nestle S.A. Nestle Canada manufactures and sells
7 chocolate products in Canada. In addition, during the relevant period it has manufactured
8 chocolate for sale in the United States by Defendant Nestle USA.

9 11. Co-conspirator The Hershey Company (“Hershey”) is a Delaware corporation with
10 its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania. Throughout the
11 relevant period, Hershey manufactured and sold chocolate confectionary products to purchasers in
12 the United States, directly or through its predecessors, affiliates, subsidiaries or retailers. Hershey
13 chocolate confectionary products are marketed and sold throughout California under the
14 Hershey’s, Hershey’s Kisses and Reese’s brand names. Hershey also manufactures and distributes
15 various other chocolate confectionery products, such as the 5th Avenue bar, the Krackel bar, Milk
16 Duds, the Special Dark bar and the Harmony Bar. Certain products are manufactured and
17 distributed in the United States under license from other chocolate manufacturers. For example,
18 the Kit Kat bar is manufactured and distributed under license from Nestle S.A., while the York
19 Peppermint Patties, Peter Paul Mounds, Peter Paul Almond Joy, Cadbury and Caramello brands
20 are manufactured and distributed under license from Cadbury Schweppes.

21 12. Co-conspirator Hershey Canada is a Canadian corporation with its principal place
22 of business at Airport Corporate Centre, 5750 Explorer Drive, Suite 500, Mississauga, Ontario.
23 Hershey Canada is a wholly-owned subsidiary of The Hershey Company that manufactures,
24 distributes, and sells confectionery products in Canada. In addition, during the relevant period, it
25 has manufactured chocolate for sale in the United States including California.

26 13. Co-conspirator Mars Incorporated is a Delaware corporation with its principal place
27 of business at 6885 Elm Street, McLean, Virginia. From its origins in candy and confectionery
28 products, Mars Incorporated has diversified to become a world leader in several other markets,

1 including snack foods, pet care products, and drinks. Throughout the relevant period, Mars
2 Incorporated manufactured and sold chocolate confectionery products to purchasers in the United
3 States, including in California, directly or through its predecessors, affiliates, subsidiaries or
4 retailers.

5 14. Co-conspirator Mars Snackfood U.S. LLC is headquartered at 800 High Street,
6 Hackettstown, New Jersey. It is a business unit of Mars, Inc. and is responsible for the
7 manufacture and sale of chocolate and non-chocolate confectionery products across various
8 facilities located throughout the United States, including California, directly or through its
9 predecessors, affiliates, subsidiaries or retailers.

10 15. Co-conspirator Mars Canada, Inc is a Canadian corporation with its principal place
11 of business at 37 Holland Drive, Bolton, Ontario. Mars Canada is the Canadian subsidiary of
12 Mars, Incorporated. Before May 8, 2007, Mars Canada was known as Effem Inc. During the
13 relevant period, Mars Canada sold chocolate confectionery products in Canada. In addition,
14 during the relevant period, it has manufactured chocolate for sale in the United States including
15 California.

16 16. Co-conspirator Cadbury plc is a British company with its principal executive
17 offices at 25 Berkeley Sq., London, England. Cadbury plc is the world's largest confectionery
18 company, with a 10% share of the global market. During the relevant period, Cadbury plc
19 manufactured, sold and/or distributed chocolate confectionery products in the United States
20 including California.

21 17. Co-conspirator Cadbury Holdings Ltd (formerly known as Cadbury Schweppes plc)
22 is an English company with its principal executive offices at 25 Berkeley Sq., London, England.
23 Cadbury Holdings is a wholly-owned subsidiary of Cadbury plc. During the relevant period,
24 Cadbury Holdings licensed The Hershey Company to manufacture and distribute York Peppermint
25 Patties, Peter Paul Monds and Peter Paul Almond Joy worldwide, as well as Cadbury and
26 Caramello branded products in the United States. During the relevant period, Cadbury Holdings
27 manufactured, sold and/or distributed chocolate confectionery products in the United States
28 including California.

- 1 (c) The length and scope of any illegal conspiracy;
- 2 (d) The amount of damages owing to the class;
- 3 (e) Whether punitive damages are appropriate and if so, the amount;
- 4 (f) The nature of appropriate injunctive relief to deter future wrongful conduct.

5 21. Named Plaintiffs' claims are typical of the claims of the members of the class they
6 seek to represent. Plaintiffs and the class members all purchased Defendant and its co-
7 conspirators' chocolate confectionary products in California.

8 22. Plaintiffs are adequate representatives of the class because: (a) their interests do not
9 conflict with the interests of the class members they seek to represent; (b) Plaintiffs have retained
10 counsel who are competent and experienced in complex class action and unfair trade practices
11 litigation; and (c) Plaintiffs intend to prosecute this action vigorously. The interests of the
12 members of the class will be fairly and adequately protected by Plaintiffs and their counsel. The
13 interests of Plaintiffs are coincident with, and not antagonistic to, those of the class members.

14 23. The class action device is superior to other available means for the fair and efficient
15 adjudication of the claims of Plaintiffs and of class members. Judicial management of this
16 litigation is essential because of the severe economic consequences of the Defendant's past and
17 future unlawful activities. Technical issues will arise that will be too complex to be effectively
18 litigated and decided in individual cases. This class action is the only method by which all of the
19 class members' common claims can economically and expeditiously be adjudicated in one
20 proceeding and thereby preclude the possibility of multiple trials in California.

21 **CHOCOLATE CONFECTIONARY PRODUCT MARKET**

22 **A Market Ripe for Collusion**

23 24. Chocolate comprises a number of raw and processed foods that are produced from
24 the seed of the tropical cacao tree. The seeds of the cacao tree have an intense bitter taste, and
25 must be fermented to develop their flavor. After being roasted and ground, the resulting products
26 are known as cocoa or chocolate. Chocolate is any product made primarily of cocoa solids and
27 cocoa fat. The different flavors of chocolate can be obtained by varying the time and temperature
28 when roasting the beans, by adjusting the relative quantities of the cocoa solids and cocoa fat, and

1 by adding non-chocolate ingredients.

2 25. The term “chocolate confectionary products”, as used in this Complaint, refers to
3 chocolate bars, boxed chocolates, and seasonal novelty chocolates.

4 26. Chocolate bars are divided into block and countline segments. The block segment is
5 comprised of molded blocks of chocolate that can be prepared as is or with additional ingredients,
6 and are traditionally sold in standard weight and sizes. Products in this segment include Hershey’s
7 Chocolate Bar and Cadbury’s Dairy Milk bar. The countline segment consists of chocolate-
8 covered products sold by count rather than weight. Examples of products in this segment include
9 Mars’ Snickers bar and M&M’s and Nestlé’s Kit Kat bar.

10 27. Boxed chocolates are assorted chocolates sold together in a box or similar
11 container, and are mainly sold as gifts. Examples of products in this segment include Cadbury’s
12 Milk Tray and Hershey’s Pot of Gold.

13 28. Seasonal novelty chocolates are chocolates that tend to be sold near, and marketed
14 for, particular holidays, such as Christmas, Easter, Valentine’s Day, and Halloween.

15 29. Chocolate confectionary products constitute a distinct product market recognized
16 by Nestle USA and its co-conspirators, the trade associations that serve the confectionery industry
17 and other bodies that have examined the industry. According to statistics reported by the United
18 States Department of Agriculture, wholesale sales of chocolate candy in the U.S. total
19 approximately \$10.2 billion, while retail sales totaled \$15.6 billion. A June 2007 report from
20 Matrade New York reported that U.S. chocolate candy sales in 2006 totaled approximately 56% of
21 all candy sales.

22 30. Important characteristics of the chocolate confectionary products market encourage
23 and facilitate anticompetitive price-fixing between Nestle USA and its co-conspirators.

24 31. Chocolate confectionary products are undifferentiated commodity products. Thus,
25 Nestle USA and any of its co-conspirators can produce and sell, for example, a certain type of
26 chocolate candy bar, seasonal novelty chocolate, or boxed chocolate that is fungible with a
27 chocolate candy bar, seasonal novelty chocolate, or boxed chocolate offered by a co-conspirator.

28 32. The market for chocolate confectionery products is highly concentrated. Nestle

1 USA and its co-conspirators The Hershey Company and Mars collectively possess approximately
2 80% of the U.S. chocolate confectionery products market, with The Hershey Company possessing
3 about 45%, Mars, Incorporated about 27%, and Nestle USA about 9%.

4 33. In addition, there are high barriers to entry to the chocolate confectionery products
5 market in the form of technical know-how, capital investment, access to distribution channels and
6 advertising. Specifically, the manufacture of confectionery products is highly technical, requiring
7 considerable understanding of food technology, including hardware (processing machinery and
8 computers), software and formulation technology. Technical know-how is required to integrate
9 these elements in an effective production system that is efficient and results in a high-quality,
10 innovative product. The construction of this production system is extremely capital intensive. For
11 example, a confectionery plant with the scale to supply the United States market costs
12 approximately \$100,000,000.

13 34. This production system, however, has little utility absent access to supply channels.
14 Wholesale distributors, chain grocery stores, mass merchandisers, chain drug stores, vending
15 companies, wholesale clubs, convenience stores, dollar stores, concessionaires, and department
16 stores form the most significant distribution channels for confectionery sales and the creation of a
17 distribution network is also extremely capital intensive.

18 35. Finally, because of the size of the United States market and its overall high
19 advertising costs, chocolate makers in the United States must spend an extremely large amount on
20 advertising in order to penetrate the market.

21 36. All the above factors are barriers to the entry of new competitors and, in fact,
22 prevent the entry of new competitors. Because of their high collective market share globally as
23 well as in the U.S. and Canada, Nestle USA and its co-conspirators collectively are able to
24 exercise market power in the United States and Canada, including the ability to raise prices and
25 erect barriers to entry.

26 37. The chocolate confectionery products market is also characterized by cross-
27 licensing agreements that facilitate anticompetitive collusion. Specifically, Hershey and Cadbury
28 have a licensing arrangement whereby Hershey has the exclusive right to manufacture and/or sell

1 Cadbury products in the United States. In addition, Hershey has a licensing agreement with Nestle
2 S.A. whereby Hershey has a right to sell and/or manufacture certain Nestle products in the United
3 States. These license agreements contain terms that allow Cadbury and Nestle S.A to audit
4 Hershey's sales of the licensed products. These audit rights allow Cadbury and Nestle S.A to
5 unlawfully obtain key pricing and cost information. Once obtained by Nestle S.A. this data is
6 freely available to Nestle USA and to the Chocolate, Confectionery and Biscuits Strategic
7 Business and Strategic Demand Units discussed in more detail below.

8 38. In addition to a market structure that encourages collusion, Nestle USA and many
9 of its co-conspirators are members of trade groups and associations that facilitate anticompetitive
10 conduct by providing opportunities to exchange pricing information. The most significant of
11 these is the National Confectioners Association ("NCA"). The NCA is a trade association that
12 represents the entire confection industry. It is one of the oldest trade associations in the world.
13 The NCA Executive Board includes at least one high-ranking executive with pricing knowledge
14 from Nestle USA, The Hershey Company and Mars Snackfood.

15 **Integration of United States and Canadian "Markets"**

16 39. The U.S. is the leading exporter of chocolate confectionery products to Canada as
17 well as the leading importer of chocolate confectionery products from Canada. A 2004 United
18 States Department of Agriculture report noted that in 2003, 46% of U.S. confectionery exports
19 were to Canada. A 2005 United States Department of Agriculture report noted that "the United
20 States supplied 45% of Canadian chocolate candy imports by value." The 2007 Matrade New
21 York report cited above indicated that in 2004-06, Canada was the largest exporter of chocolate
22 food products to the U.S., with annual total customs values ranging from \$690 to \$705 million.
23 This cross-border trade is facilitated by (1) the low cost to transport chocolate confectionery
24 between the U.S. and Canada and (2) the minimal import/export duties. Thus, while it is possible
25 to identify a United States "market" and a Canadian "market" for statistical purposes, from an
26 economic perspective the United States and Canada comprise one integrated market.

27 40. Demonstrating this integration, the Canadian and U.S. operations of the Nestle
28 USA and its co-conspirators are tightly interwoven. Thus, for example, sales of Hershey's

1 chocolate confectionery products in the U.S. and Canada are overseen by its North American
2 Commercial Group. Likewise, Cadbury's confectionery sales in the U.S. and Canada are overseen
3 by its Americas Confectionery operating unit. Chocolate sales of Nestle USA and Nestle Canada
4 are overseen by unified Chocolate, Confectionery & Biscuits Strategic Business and Strategic
5 Demand Units which span both Nestle Canada and Nestle USA. Supervisory authority for these
6 Strategic Business Units rests with Nestec S.A.

7 41. In addition, in 2004 Nestle USA and Nestle Canada formed a joint steering
8 committee for "Shared Services" whose members include both the chief executive officer of
9 Nestle Canada and the chief executive officer of Nestle USA. In addition to sharing certain human
10 resource, supply chain and finance costs, Nestle Canada and Nestle USA share and coordinate
11 "sales" and "trade promotion/category managements." Trade promotion refers to discounts and
12 payments given to major retailers generally for preferred shelf space. It is a significant expense for
13 Nestle USA and Nestle Canada, a significant component of net price of chocolate sold by Nestle
14 USA and Nestle Canada, and has major ramifications for the net profits of Nestle USA and Nestle
15 Canada.

16 42. This shared pricing, financial, and supply-chain data is accessible to Nestle USA,
17 Nestle Canada and their parent company through an internet based system known as GLOBE,
18 which aggregates financial, marketing, sales and supply data for dissemination throughout the
19 members of the Nestle group. Significantly, the GLOBE system is run by a subsidiary of Nestle
20 Canada known as Nestle Globe Inc.

21 43. Nestle USA and Nestle Canada manufacturing operations are also inter-related.
22 Specifically, Nestle Canada manufactures chocolate in Canada on behalf of Nestle USA. For
23 example, during the relevant period, Nestle-brand chocolate "turtles", Toll House Candy Bars,
24 Aero Bars and Coffee Crisps were all manufactured in Canada by Nestle Canada and sold in the
25 United States by Nestle USA.

26 44. Although as a separate entity, Nestle USA could theoretically institute independent
27 price increases, it in fact never does so without the guidance of its parent company's Chocolate,
28 Confectionery & Biscuits Strategic Business and Strategic Demand Units, which span both Nestle

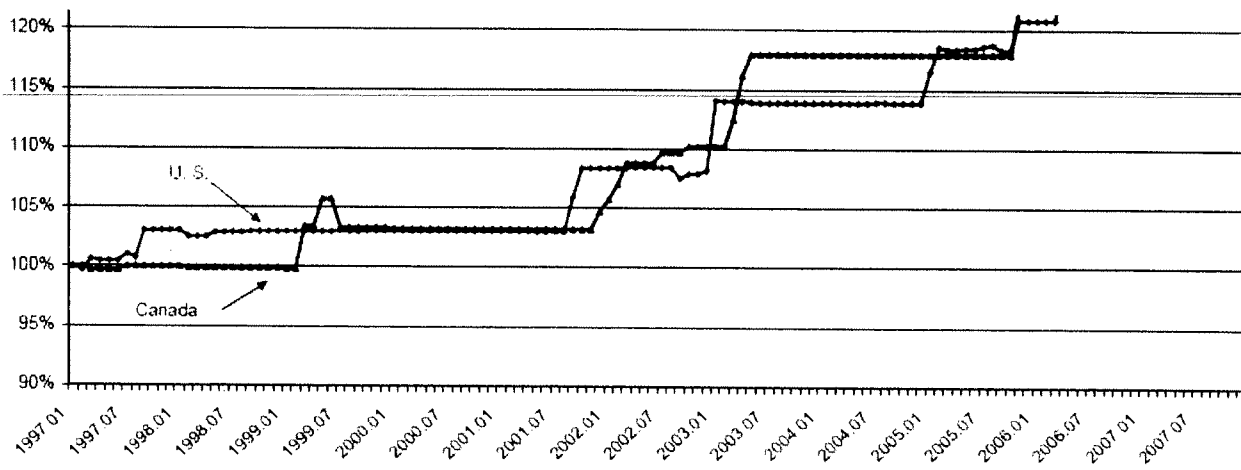
1 Canada and Nestle USA, and without consulting Nestle Canada, which manufactures a large
2 portion of Nestle USA's chocolate confectionery products.

3 45. Because the United States and Canada function as a single geographic market,
4 chocolate purchasers have the ability to purchase chocolate products in either the United States or
5 Canada. In addition, many large direct purchasers of chocolate confectionery products have
6 operations in both the United States and Canada. Consequently, it would not be feasible for Nestle
7 USA to institute a price increase in the United States without input from individuals with
8 knowledge of the pricing and pricing strategies for Nestle-brand products in Canada. Similarly, it
9 would not be feasible for Nestle Canada to institute a price increase in Canada without input from
10 individuals with knowledge of the pricing and pricing strategies for Nestle-brand products in the
11 United States. Nestle USA does not institute price increases without coordinating with Nestle
12 Canada and Nestle Canada does not institute price increases without coordinating with Nestle
13 USA.

14 46. Because chocolate purchasers can easily conduct price arbitrage across the
15 Canada/United States border, it would be economically impossible for Nestle Canada to conspire
16 to fix the price of chocolate in Canada above competitive levels unless Nestle USA also agreed to
17 participate in the price-fixing conspiracy. Similarly, it would be economically impossible for
18 Nestle USA to conspire to fix the price of chocolate in the United States above competitive levels
19 unless Nestle Canada also agreed to participate in the price-fixing conspiracy.

20 47. The existence of cross-licensing agreements between Nestle S.A. and its supposed
21 competitors only highlights the impossibility of a price-fixing conspiracy that includes Nestle
22 Canada but not Nestle USA. To give just a few examples: During the period 2002-2007, (a)
23 Hershey manufactured and sold Kit-Kat bars in the United States pursuant to a license with Nestle
24 S.A. while Nestle Canada manufactured and sold Kit Kat bars in Canada; (b) Hershey
25 manufactured the Oh Henry-brand chocolate bar in Canada while Nestle USA sold the Oh Henry
26 bar in the United States; and (c) Nestle Canada manufactured and sold Hershey-brand Rolo bars in
27 Canada while Hershey manufactured and sold the Rolo bar in the United States. Given this web of
28 cross-licensing agreements, it would not be possible for Hershey and Nestle Canada to agree to set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Source for U. S. PPI: Bureau of Labor Statistics, ols.gov/ppi, PCU 3113204, Chocolate and Chocolate-type Confectionery Products made from Cacao Beans
Source for Canadian PPI: Statistics Canada, cansim2.statcan.ca, Table 329-0040 / 1574720, Chocolate Confectionery

NESTLE USA AND ITS CO-CONSPIRATORS' UNLAWFULLY COORDINATED PRICE INCREASES IN THE UNITED STATES.

49. From 1996-2002 the price of chocolate confectionery products sold in the United States by Nestle USA and its co-conspirators was essentially unchanged. But beginning late in that period, Nestle USA and its co-conspirators' profits from chocolate confectionery products suffered because of increasing health concerns, and changing consumer preferences, with respect to chocolate consumption. From 2002-2006 the compound annual growth rate for manufacturer shipments of chocolate confectionery products was an anemic 1.0% according to the U.S. Department of Commerce.

50. In the face of these negative market trends, Nestle USA could have competed by cutting costs and responding to customer demands. Instead, Nestle USA responded by entering into a conspiracy and unlawful agreement with the co-conspirators identified above to fix prices for chocolate confectionery products in the United States. Pursuant to this conspiracy, Nestle USA and its co-conspirators unlawfully agreed to and in fact instituted the following coordinated increases in the United States:

- a. First Coordinated Price Increase: On or about December 9, 2002, Mars increased wholesale prices on standard-size chocolate bars by approximately 10.7%. A few days later, on or about December 11, 2002, Hershey announced a price increase (which was effective January 1, 2003) for the wholesale price of its domestic standard size, king size, variety pack, six-pack, and ten-pack candy bar lines. The increase raised the price of standard-size candy bars in particular by approximately 10.7%. Hershey spokeswoman

1 Christine Dugan said Hershey raised prices after rival Mars recently raised its prices. On
2 or about December 13, 2002, Nestle USA announced a price increase of approximately
3 10.3% on its standard-size chocolate bars. Nestle USA and its co-conspirators instituted
4 these price increases even though in a December 2002 earnings presentation directly
5 following the price increases, Hershey's CEO reduced estimates of sales growth in light of
6 slack demand, increased competition and inventory reduction by retailers.

7 b. Second Coordinated Price Increase: On or about December 15, 2004, Hershey
8 again increased the wholesale prices for many of its chocolate confectionery products.
9 Hershey increased the price of its standard-size bars by approximately 5.5% and also
10 increased prices for king-size bars, six-packs, variety packs, and peg bags. Significantly,
11 Hershey's increase came weeks after Mars raised its prices for its chocolate confectionery
12 product baglines by similar amounts on or about November 19, 2004. On or about
13 December 17, 2004 (only two days after Hershey's price increase), Mars increased the
14 price of its standard-size bars by approximately 5.5% and also increased prices for its king-
15 size bars and six-packs. Nestle USA then increased prices on its standard-size bars by
16 approximately 5.7% on or about December 22, 2004, and also increased prices on its king-
17 size bars, six-packs, and peg bags.

18 c. Third Coordinated Price Increase. On or about March 23, 2007, Mars announced
19 price increases of approximately 5.3% on its standard-size bars, six-packs, and variety
20 packs and also increased prices for other chocolate confectionery products, citing the need
21 to help offset costs. Hershey then announced price increases on or about April 4, 2007,
22 purportedly due to rising costs, particularly cocoa. Hershey increased its prices for
23 standard size bars, six-packs, and variety-packs by approximately 5.2% and also increased
24 prices for other chocolate confectionery products. Mars and Hershey both publicly noted
25 that their previous price increases were more than two years ago. Nestle USA also raised
26 prices for its chocolate confectionery products on or about April 5, 2007, by an average of
27 approximately 5%, including a 5.4% increase in the price of its standard size bars,
28 purportedly due to rising commodity, packaging, and energy costs.

1 51. Nestle USA and its co-conspirators have publicly and falsely asserted that their
2 price increases were justified by increases in costs of raw materials. In fact, the price increases
3 were the product of an unlawful price-fixing conspiracy and cannot be explained by purported
4 changes in the price of raw materials for the products. Indeed, with respect to the First
5 Coordinated Price increase in 2002, Hershey's CEO publicly told investors in July 2003 that
6 Hershey's profit margins for chocolate confectionery products had increased both as a result of the
7 2002 price increase and as a result of *decreasing* raw material costs.

8 52. Nor can increased input costs explain Nestle USA and its co-conspirators remaining
9 price increases.

10 53. Cocoa beans account for more than 25% of the cost of inputs for chocolate
11 confectionery products. The price of cocoa beans either decreased or remained stable from 2003-
12 2007. Although there were sporadic increases in the price of cocoa, they were short-lived and
13 easily offset by futures contracts and/or forward purchasing. Nestle USA and its co-conspirators
14 used these forward purchasing and futures contracts to cover future manufacturing requirements
15 and to take advantage of downward market fluctuations when possible and to reduce risks
16 associated with upward fluctuations in input costs.

17 54. Sugar accounts for about 16% of the cost of inputs for Nestle USA and its co-
18 conspirators chocolate confectionery products. Sugar prices were stable during the period 2003-
19 2007 with the exception of a brief spike in late 2005 following the 2005 hurricane season. Prices,
20 however, soon fell as sugar crops recovered.

21 55. Likewise, the price of milk, which represents about 12% of Nestle USA and its co-
22 conspirators' input costs, fluctuated within a relative narrow range during the period 2003-2007
23 and was moving down as often as it was moving up.

24 56. Independent economic analysis of chocolate confectionery prices in the United
25 States by researchers at the Copenhagen Business School has concluded that the claim that
26 manufacturers are "merely passing on increases in the marginal costs due to rising sugar, cocoa
27 and milk prices does not seem to correspond to reality because the price increases are larger than
28 the increases in marginal costs." Indeed, the researchers concluded that the increases in chocolate

1 confectionery prices were nearly *fifty times* the increases that would be expected solely as the
2 result in changes in underlying commodity prices. The researchers reached this conclusion by
3 calculating Nestle USA and its co-conspirators' marginal costs and comparing variations in these
4 marginal costs with actual observed price increases.

5 57. Other than cocoa beans, sugar and milk, no other input accounts for more than 5%
6 of Nestle USA or its co-conspirators total input for its chocolate confectionery products and no
7 other input, labor or other cost can explain Nestle USA's or its co-conspirators' price increases.
8 For example, Hershey publicly stated that its December 2004 price increase was the result of
9 higher fuel prices. In reality, however, an examination of the United States On-Highway Diesel
10 Fuel Price Index published by the United States Energy Information Administration demonstrates
11 that fuel prices were relatively stable at less than \$2.00 a gallon at the time the price increase was
12 announced by Hershey.

13 58. Further demonstrating the falseness of Nestle USA's explanations for its price
14 increases is the fact that Nestle USA's profit margins remained constant or increased during the
15 Relevant Period. Specifically, Nestle USA, through the Chocolate, Confectionery and Biscuits
16 operating segment discussed above, reported EBIT from 2001-2007 of 11.0%, 10.9%, 10.3%,
17 11.2%, 11.7%, 11.4% and 11.4% each year. In a competitive market free from price-fixing,
18 marginal cost increases would have resulted in *decreases* to Nestle USA's profit margins because
19 Nestle USA and its co-conspirators would have been able to only partially offset any cost increase
20 by increased prices. The fact that Nestle USA was able to actually *increase* its profit margins as
21 demand remained stagnant or declined demonstrates that its prices were not the product of a
22 competitive market but rather were the product of an unlawful price-fixing conspiracy.

23 59. The price increases alleged above were a significant departure from prior pricing
24 practices. In the period 1995-2002, Nestle USA and its co-conspirators had been unable to get any
25 announced price increase for chocolate confectionery products to "stick". This is because a
26 chocolate manufacturer that pre-announces a price increase in a competitive market faces
27 significant negative market repercussions if its competitors fail to take a similar price increase. If
28 the competitors failed to match the announced price increase, the prospect of significant lost sales

1 would force the manufacturer to rescind the announced price increase. Rescinding the increase
2 would cause significant disruption in the marketplace because, upon learning of a planned price
3 increase, customers incur substantial management time and expense to plan for and implement the
4 increase. A manufacturer therefore loses significant customer goodwill by announcing and then
5 rescinding a price increase. In announcing price increases starting in December 2002, however,
6 Nestle USA and its co-conspirators knew their announced price increases would “stick” because
7 they had expressly agreed to them.

8 60. Also confirming the existence of the price-fixing agreement is the fact that Nestle
9 USA and Hershey had significant excess manufacturing capacity available to produce chocolate
10 confectionery products during the period 2002-2007. In a competitive market, Nestle USA and
11 Hershey’s unilateral interests in response to a price increase would have been to increase unit sales
12 by offering lower prices than their competitors. With a relatively small market share of
13 approximately ten percent, this incentive would have been particularly strong for Nestle USA.
14 Yet, in fact, Nestle USA did not lower prices in order to gain market share. Nestle USA did not
15 lower prices because it had unlawfully agreed with its co-conspirators to maintain the higher prices
16 outlined above.

17 61. On December 20, 2007, Mars’ spokeswoman, Alice Nathanson, confirmed that it
18 was contacted by the United States Department of Justice about the company’s alleged
19 anticompetitive pricing practices in the United States chocolate confectionery industry. That same
20 day, a Nestle USA spokeswoman, Laurie MacDonald, also acknowledged the DOJ’s antitrust
21 investigation of Nestle USA’s pricing practices. The DOJ investigation coincided with the
22 departure of a number of senior executives of Hershey’s in the United States. Specifically,
23 Hershey Co. CEO Richard H. Lenny announced his retirement on November 11, 2007 at the
24 unusually young age of 56. On November 30, 2007, Hershey Co. announced that its Senior Vice
25 President, Global Chief Growth Officer, and former head of U.S. Confectionery and Chief
26 Marketing Officer, Thomas K. Hernquist, had resigned at age 49.

27 ///

28 ///

1 **Existence of Canadian Price-Fixing Conspiracy Confirms**

2 **Fixing of Prices in the United States**

3 62. In July 2007, Canada's Competition Bureau ("the Bureau") initiated an
4 investigation into the chocolate confectionary product market based on information provided by a
5 "Cooperating Company" involved in the conspiracy. According to news reports, Cadbury is likely
6 the Cooperating Company that turned evidence over to the Bureau and is cooperating with cartel
7 investigators, as Cadbury is not named as one of the companies under investigation.

8 63. Canada is one of the few countries with a "leniency program," where the first
9 member of a cartel to blow the whistle gets lighter treatment.

10 64. On November 21, 2007 Ontario's Superior Court issued search warrants to the
11 Bureau to investigate a scheme to fix the prices of chocolate confectionary products among the
12 Canadian subsidiaries Hersheys, Mars, Nestle S.A., and Cadbury. The Court stated that it was
13 granting the search warrants "based on evidence that there are reasonable grounds to believe that a
14 number of suppliers in the chocolate confectionery industry have engaged in activities contrary to
15 the conspiracy provisions of the Competition Act."

16 65. The search warrants require the Canadian co-conspirators of Nestle USA to
17 surrender thousands of corporate documents, emails, correspondence, and computer files that
18 pertain to their chocolate confectionary product pricing arrangements. Nestle Canada has publicly
19 admitted that the Bureau has contacted them in connection with an investigation of unlawful
20 conduct.

21 66. According to John Pecman, the Bureau's assistant deputy commissioner in the
22 criminal division, the Bureau "can confirm that [it is] investigating alleged anticompetitive
23 practices in the chocolate confectionery industry," and that "the volume of commerce affected [] is
24 definitely potentially in the billions of dollars per year."

25 67. According to affidavits submitted to obtain search warrants in Canada ("the
26 Affidavits"), senior executives at the Canadian subsidiaries of Hershey's, Mars, Nestle S.A., and
27 other companies met secretly in coffee shops, restaurants and at industry conventions to set prices
28 paid for chocolate confectionary products since at least February 2002.

1 68. According to the Affidavits, the conspiracy involved the highest ranking executives
2 within each company. The Affidavits detail numerous unlawful meetings between top executives
3 of Nestle Canada and top executives of other chocolate companies during which these executives
4 conspired and agreed to fix the prices of chocolate confectionery products.

5 69. To give just some examples of the unlawful meetings in furtherance of the price-
6 fixing conspiracy, Robert Leonidas, who was then President of Nestle Canada's confectionery
7 business, is alleged to have told a competitor in June 2005, during a Canadian trade association's
8 annual meeting, "I want you to hear it from the top - I take my pricing very seriously." This
9 comment was intended to assure the competitor that Nestle Canada would adhere to the unlawfully
10 fixed prices.

11 70. Similarly on February 23, 2004, one unidentified witness participated in a breakfast
12 meeting with Bob Leonidas, where they discussed trade promotion, cooperative advertising and in-
13 store product promotions. According to the witness, it was known in the industry that Leonidas
14 disagreed with the industry's prevailing approach to trade promotion and that the witness's
15 company was going to reduce trade promotion on chocolate confectionery products.

16 71. The same unidentified witness also participated in a 7:30 a.m. breakfast meeting
17 with Bob Leonidas on February 15, 2006, at the Second Cup coffee shop in Toronto, where the
18 price of seasonal chocolate confectionery products was discussed.

19 72. A lunch meeting took place at the Auberge de Pommier restaurant on July 4, 2007,
20 where price increases were discussed and coordinated. During the meeting, the President of Nestle
21 Canada's confectionery business, Sandra Martinez de Arevalo, suggested that the Cooperating
22 Company lead a price increase in 2007, and that Nestle Canada would take the price increase in the
23 third quarter. The Cooperating Company's unidentified witness said that s/he responded that they
24 may not be prepared to take a price increase in 2007, but might be prepared to take one in 2008,
25 and further said that they would follow on chocolate confectionery products but would not lead the
26 price increase.

27 73. Additionally, meetings took place at food conventions in Vancouver and Niagra-on-
28 the-Lake, Ontario in 2007. At an event hosted by a mutual customer, Leonidas informed a

1 Cadbury executive that Nestle Canada was planning to increase prices in February 2008 and
2 encouraged him to attend an upcoming meeting of the Food & Consumer Products of Canada
3 (“FCPC”) trade group. According to the Affidavits, at the September 27, 2007 FCPC meeting,
4 when one participant balked at price discussions, Eric Lent, General Manager of Hershey Canada
5 Inc. allegedly replied, “Don’t worry, we can talk about it. Bob [Leonidas] and I talk all the time.”

6 74. At one point during the conspiracy, Leonidas handed envelopes stuffed with pricing
7 information to a competitor with an instruction that the competitor avoid being seen picking up the
8 information at Nestle Canada’s offices, and that it was better not to be seen at Nestle Canada’s
9 office at all. The envelope contained a document with information about Nestle Canada’s planned
10 price increase on chocolate confectionary in 2005.

11 75. According to the Affidavits, the Cooperating Company received an email with
12 Nestle Canada’s price increase information, including that Nestle Canada was increasing the price
13 of its confectionery portfolio by approximately five to seven percent, effective October 31, 2005
14 for base confectionery and April 18, 2006 for seasonal confectionery. This pricing information
15 was discussed among the Cooperating Company’s leadership team and prompted them to consider
16 and announce a price increase on chocolate confectionary products.

17 76. The existence of coordinated price increases in Canada confirms that prices in the
18 United States were set pursuant to the same conspiracy because, as discussed above, it would not
19 be possible for Nestle Canada to fix prices in Canada unless Nestle USA also fixed prices in the
20 United States. Moreover, price increases in the United States were timed consistent with collusive
21 activity in Canada. Absent knowledge of and participation in the unlawful price-fixing agreement,
22 there would be no reason that price increases in the United States would be consistent with price
23 increases in Canada undertaken pursuant to an unlawful price-fixing agreement.

24 77. Significantly, as discussed above, the unlawful meetings in Canada between Nestle
25 Canada and its competitors included numerous meetings between Robert Leonidas, President and
26 Chief Executive Officer of Nestle Canada and competing chocolate manufacturers during which
27 Nestle Canada entered into unlawful agreements with its competitors with regard to the nature and
28 amount of trade promotion. In his capacity as Chief Executive Officer of Nestle Canada, Mr.

1 Leonidas was also a member of the Shared Services steering committee responsible for
2 coordination with Nestle USA with respect to sales and trade promotion. Because trade promotion
3 is a significant component of Nestle USA's net price, it would not be possible for Nestle USA to
4 coordinate on trade promotion with Nestle Canada without being aware of and participating in the
5 unlawful conspiracy to fix prices in the United States and Canada.

6 **ALLEGATIONS OF ANTITRUST INJURY**

7 78. The combination and conspiracy alleged herein had and is having the following
8 effects, among others:

- 9 (a) prices charged to Plaintiffs and the Class for chocolate confectionary
10 products have been fixed or stabilized at higher, artificially derived, non-
11 competitive levels;
- 12 (b) Plaintiffs and the Class have been deprived of the benefits of free, open
13 and unrestricted competition in the market for chocolate confectionary
14 products; and
- 15 (c) competition in establishing the prices paid in the United States and
16 California for chocolate confectionery products has been unlawfully
17 restrained, suppressed and eliminated.

18 79. Plaintiffs and the Class have paid supracompetitive prices for chocolate
19 confectionary products as a result of Nestle USA and its co-conspirators' illegal contract,
20 combination, and conspiracy to restrain trade as alleged. This is an antitrust injury of the type that
21 the antitrust laws were meant to punish and prevent.

22 **FRAUDULENT CONCEALMENT**

23 80. Nestle USA and its co-conspirators fraudulently concealed their participation in the
24 conspiracy alleged herein by, inter alia, engaging in secret meetings and communications in
25 furtherance of the conspiracy, and by holding themselves out as competitors to the public, to
26 Plaintiffs, and to the Class. Because of such fraudulent concealment, Plaintiffs and the Class could
27 not have discovered the existence of this conspiracy any earlier than its public disclosure.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NO FEDERAL CAUSE OF ACTION

81. Plaintiffs hereby expressly disclaim any and all federal causes of action.

FIRST CAUSE OF ACTION

VIOLATION OF THE CARTWRIGHT ACT

(California Business & Professions Code § 16720, et seq.)

82. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

83. Since 2002 and up to and through at least 2007, Nestle USA conspired and agreed to unreasonably restrain and fix prices in the market for chocolate confectionary products, in violation of Business and Professions Code section 16720, by the price-fixing conspiracy alleged above.

84. As a direct consequence of the conspiracy competition in the market for chocolate confectionary products has been restrained, suppressed, and eliminated. Plaintiffs and class members have been deprived of the benefit of a free, competitive marketplace for chocolate confectionary products.

SECOND CAUSE OF ACTION

VIOLATION OF THE UNFAIR COMPETITION ACT

(California Business & Professions Code § 17200, et seq.)

85. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully set forth herein.

86. Nestle USA has engaged in acts of unfair competition, as defined in Business and Professions Code section 17200, including but not limited to violation of Business and Professions Code section 16720 as alleged above.

87. As a direct consequence of the conspiracy competition in the market for chocolate confectionary products has been restrained, suppressed, and eliminated. Plaintiffs and Class members have been deprived of the benefit of a free, competitive marketplace for chocolate confectionary products.

///

1 **THIRD CAUSE OF ACTION**

2 **UNJUST ENRICHMENT**

3 88. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully
4 set forth herein.

5 89. To the detriment of Plaintiffs and members of the Class, Defendant has been and
6 continues to be unjustly enriched as a result of the unlawful and/or wrongful conduct. Nestle USA
7 has unjustly benefited through the sale of chocolate confectionary products that were the product
8 of inflated, supracompetitive prices to consumers. Between the parties, it would be unjust for
9 Nestle USA to retain the benefits of chocolate sold at inflated, supracompetitive prices.
10 Accordingly, Plaintiffs and members of the class seek full restitution of Nestle USA's enrichment,
11 benefits, and ill gotten gains acquired as a result of the unlawful and/or wrongful conduct alleged
12 herein.

13 **FOURTH CAUSE OF ACTION**

14 **CIVIL CONSPIRACY**

15 90. Plaintiffs incorporate by reference the allegations in the above paragraphs as if fully
16 set forth herein.

17 91. Since 2002 and up to and through at least 2007, Nestle USA conspired and agreed
18 to unreasonably restrain and fix prices in the market for chocolate confectionary products. Nestle
19 USA has acted in furtherance of the conspiracy by, among other things, instituting coordinated
20 price-increases as agreed among Defendant and its co-conspirators.

21 92. As a direct consequence of the conspiracy, competition in the market for chocolate
22 confectionary products has been restrained, suppressed, and eliminated. Plaintiffs and Class
23 members have been deprived of the benefit of a free, competitive marketplace for chocolate
24 confectionary products in violation of Business and Professions Code section 16720, by the price-
25 fixing conspiracy alleged above.

26 93. Nestle USA is liable for all injury caused by the price-fixing conspiracy alleged
27 above.

28 ///

1 **FIFTH CAUSE OF ACTION**

2 **(California Business & Professions Code § 17500, et seq.)**

3 94. Plaintiffs reallege and incorporate by reference the allegations in the above
4 paragraphs as if fully set forth herein.

5 95. Beginning at an exact date unknown to Plaintiffs, but since at least 2002, Nestle
6 USA has committed acts of untrue and misleading advertising, as defined by Business and
7 Professions Code § 17500, et seq., by engaging in the acts, omissions and practices referred to
8 below with intent to induce members of the public to enter into revenue producing transactions.

9 96. Nestle USA has advertised its chocolate confectionery products and prices for
10 chocolate confectionery products and in so advertising has omitted to disclose the material fact
11 that its prices are the product of an illegal price-fixing conspiracy.

12 97. Nestle USA advertises that its “reason for being is to understand, anticipate and
13 best fulfill [its] consumers' needs” and that it is “focused on [its] customers.” Nestle USA’s
14 representations that it focuses on consumer needs are false and misleading because in fact it has
15 participated in an unlawful price-fixing conspiracy with the intention and effect of injuring
16 consumers by selling chocolate confectionery products at an unlawfully inflated prices.

17 98. Nestle USA’s omissions and affirmative misrepresentations have injured Plaintiffs
18 and class members because had Nestle USA revealed its participation in the price-fixing
19 conspiracy, it would not have been possible for the conspiracy to continue and prices would have
20 returned to competitive levels.

21 99. Plaintiffs and class members are accordingly entitled to restitution and injunctive
22 relief, plus interest and attorneys’ fees, pursuant to California Code of Civil Procedure § 1021.5,
23 and request the following relief: (a) That Defendant be ordered to cease and desist from continuing
24 to engage in the business acts and practices, which are misleading or likely to deceive the general
25 public as alleged herein. These practices include, but are not necessarily limited to, selling
26 chocolate confectionery products and advertising prices for chocolate confectionery products
27 without disclosing that it participates in an unlawful price-fixing conspiracy and making false and
28 misleading representations that its “reason for being” is to “fulfill [its’] consumers’ needs”; (b)

1 That Defendant make full restitution to Plaintiffs and Class members, plus interest for the amount
2 of the illegal overcharge; and (c) that Defendant be ordered to immediately restore its prices to
3 competitive levels.

4 **JURY DEMAND**

5 100. Plaintiffs demand a trial by jury, of all issues triable of right by jury.

6 **PRAYER FOR RELIEF**

7 WHEREFORE Plaintiffs demand:

8 (1) That this case be certified as a class action pursuant to section 382 of the California
9 Code of Civil Procedure;

10 (2) That Plaintiffs and class members recover actual damages incurred as a result of the
11 Defendant and its co-conspirators illegal conduct, as provided by law, in an amount to be
12 determined at trial;

13 (3) That Plaintiffs and class members recover punitive damages, as provided by law,
14 and prejudgment interest on those damages, in an amount to be determined at trial;

15 (4) That Defendant be required to disgorge and restore to Plaintiffs and the class
16 members any monies received from the sale of chocolate confectionary products at supra-
17 competitive prices;

18 (5) That the Court award Plaintiffs and the class members threefold the damages
19 sustained by Plaintiffs and the class members;

20 (5) That the Court grant Plaintiffs injunctive relief against threatened continued
21 unlawful conduct, as described herein.

22 (6) That the Plaintiffs recover the costs of this suit, including reasonable attorneys' fees
23 as provided by law; and

24 ///
25 ///
26 ///
27 ///
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(7) That Plaintiffs and class members be granted such other, further, and different legal or equitable relief as the nature of the case may require or as may be deemed just and appropriate by this Court.

Respectfully submitted,

Dated: September 24, 2009

DILLINGHAM & MURPHY, LLP

By: 

Attorneys for Plaintiffs
JOSHUA A. WEAVER and
JEREMY S. KOSSEN
WILLIAM F. MURPHY (SBN 082482)
WILLIAM P. WILSON (SBN 230444)
225 Bush Street, Sixth Floor
San Francisco, CA 94104
Telephone: (415) 397-2700
Facsimile: (415) 397-3300
Email: wfm@dillinghammurphy.com
Email: wpw@dillinghammurphy.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am a citizen of the United States, and employed in the City and County of San Francisco. I am over the age of eighteen (18) years, and not a party to the within above-entitled action. My business address is 225 Bush Street, 6th Floor, San Francisco, California 94104-4207. On September 24, 2009, I served the following on each party listed below:

SECOND AMENDED CLASS-ACTION COMPLAINT FOR

1. **BUSINESS AND PROFESSIONS CODE SECTION 16720 ET SEQ.;**
2. **BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.;**
3. **UNJUST ENRICHMENT;**
4. **CIVIL CONSPIRACY;**
5. **BUSINESS AND PROFESSIONS CODE SECTION 17500 ET SEQ.**

- (BY MAIL)** By depositing for collection and mailing, following ordinary business practices, a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the U.S. Postal Service. The correspondence is deposited with the U.S. Postal Service the same day in the ordinary course of business.
- (BY PERSONAL SERVICE)** By causing a true copy thereof enclosed in a sealed envelope, to be personally delivered on the date indicated below.
- (BY OVERNIGHT DELIVERY)** By causing a true copy thereof, enclosed in a sealed envelope, to be delivered via overnight courier service.
- (BY FEDERAL EXPRESS NEXT DAY DELIVERY)** By causing a true copy thereof, enclosed in a sealed envelope, to be delivered via overnight courier service.

Roxann E. Henry
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004

Leigh Aimee Kirmsse, Esq.
Howrey LLP
525 Market St #3600
San Francisco, CA, 94105

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

Executed on September 24, 2009, at San Francisco, California.


Deborah Sanchez