

1 Howard Rubinstein (Fla. SBN: 104108)  
2 Attorney at Law  
3 914 Waters Avenue, Suite 20  
4 Aspen, Colorado 81611  
5 Tel.: (832) 715-2788  
6 *(To apply as counsel pro hac vice)*

7 Harold M. Hewell (Cal. SBN: 171210)  
8 Hewell Law Firm, APC  
9 1901 First Avenue, Second Floor  
10 San Diego, California 92101  
11 Tel: (619) 235-6854  
12 Fax: (619)235-9122  
13 E-mail: hmhewell@hewell-lawfirm.com  
14 Attorneys for Plaintiff

11  
12 **UNITED STATES DISTRICT COURT**  
13 **EASTERN DISTRICT OF CALIFORNIA**

14 **JANINE SUGAWARA**, individually and  
15 on behalf of all others similarly  
16 situated,

17 *Plaintiff,*

18 vs.

19 **PEPSICO, INC.**, a North Carolina  
20 corporation,

21 *Defendants.*

22 : **CASE NO.:**  
23 :  
24 : **COMPLAINT FOR INJUNCTIVE RELIEF,**  
25 : **RESTITUTION AND DAMAGES**

26 : **CLASS ACTION**

27 : **JURY TRIAL REQUESTED**  
28

1 Plaintiff JANINE SUGAWARA, by and through her attorneys, hereby complains and  
2 alleges as follows:

3 **I. PARTIES**

4 1. Ms. Sugawara (hereinafter "Plaintiff"), is an individual consumer who at all  
5 times material hereto, was and is a resident of California. For purposes of diversity  
6 jurisdiction, she is a "citizens" of California. She respectfully requests a jury trial.

7 2. Defendant PepsiCo, Inc. ("PepsiCo") is a corporation organized and existing under  
8 the laws of the North Carolina with its principal office located at 700 Anderson Hill Road,  
9 Purchase, New York 10577. It lists with the California Secretary of State a registered agent  
10 listing of "Corporation Service Company Which Will Do Business in California as CSC -  
11 Lawyers Incorporating Service, P.O. Box 526036, Sacramento, California 95852. For  
12 diversity purposes, PepsiCo may be considered to be a citizen of the North Carolina or New  
13 York. PepsiCo merged with The Quaker Oats Company ("Quaker"), in 2001, and Quaker is  
14 now a unit of PepsiCo. Quaker's products include "Captain Crunch® with Crunch Berries"  
15 ("Product"). At all times relevant hereto, PepsiCo was and is doing business in the County of  
16 San Diego, California.

17 3. Plaintiff is informed and believes and thereon alleges that at all times herein  
18 mentioned, the subsidiaries, affiliates and other related entities of PepsiCo were the agents,  
19 servants and employees of PepsiCo, and at all times herein mentioned, each was acting  
20 within the purpose and scope of said agency and employment, and PepsiCo ratified and  
21 approved the acts of said agents and employees. Plaintiff also is informed and believe and  
22 thereon allege that at all times herein mentioned, the employees of PepsiCo, its  
23 subsidiaries, affiliates and other related entities were the agents, servants and employees  
24 of PepsiCo, and at all times herein mentioned, each was acting within the purpose and  
25 scope of said agency and employment, and PepsiCo ratified and approved the acts of said  
26 agents and employees.

27 **II. JURISDICTION AND VENUE**

28 4. This Court has jurisdiction over the subject matter presented by this Complaint

1 because it is a class action arising under the Class Action Fairness Act of 2005 (“CAFA”),  
2 Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction  
3 of the Federal Courts of any class action in which any member of the Plaintiff Class is a  
4 citizen of a state different from any defendant, and in which the matter in controversy  
5 exceeds in the aggregate the sum of \$5,000,000, exclusive of interest and costs. Plaintiff  
6 alleges that the total claims of individual class members in this action are well in excess of  
7 \$5,000,000 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. §  
8 1332(d)(2), (5). The Plaintiff is a citizen of California, whereas, as set forth above, PepsiCo  
9 may be considered a citizen of either North Carolina or New York. Therefore, diversity of  
10 citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A). Furthermore,  
11 Plaintiff alleges that more than two-thirds of all of the members of the proposed Plaintiff  
12 Class in the aggregate are citizens of a state other than California, where this action is  
13 originally being filed, and that the total number of members of the proposed Class is  
14 greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

15 5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because  
16 Defendant conducts business within, may be found in, and is subject to personal  
17 jurisdiction in this district. The original of the “Declaration of Harold M. Hewell Pursuant  
18 to Civil Code §1780(c) of the Consumer Legal Remedies Act, Civil Code §§1750 et seq.”  
19 regarding venue under the California Consumer Legal Remedies Act is attached as Exhibit  
20 “A” to this Complaint and is incorporated herein by reference.

### 21 **III. GENERAL ALLEGATIONS**

22 6. All allegations in this Complaint are based on information and belief and/or are  
23 likely to have evidentiary support after reasonable opportunity for further investigation  
24 or discovery.

25 7. Whenever reference in this Complaint is made to any act or transaction of  
26 PepsiCo, such allegation shall be deemed to mean that the principals, officers, directors,  
27 employees, agents, and/or representatives of PepsiCo committed, knew of, performed,  
28 authorized, ratified and/or directed such act or transaction on behalf of PepsiCo while

1 actively engaged in the scope of their duties.

#### 2 IV. FACTUAL ALLEGATIONS

3 8. Defendant PepsiCo manufactures, markets, and promotes the Product referenced  
4 above. In addition to the use of the word, “Berries” in the product name, pictures of brightly  
5 colored cereal shaped to resemble berries of various sorts are prominently displayed on  
6 the principal display panel (“PDP”) of the Product. The advertising, marketing and  
7 promotional copy for the Product also includes such misleading and deceptive statements  
8 as, “Crunch Berries is a combination of Crunch biscuits and colorful red, purple, teal and  
9 green *berries* (Emphasis added). In truth, however, the product contains no actual berries  
10 of any kind; the only fruit content is a nominal amount of strawberry fruit concentrate,  
11 reinforced with “natural and artificial flavors.” Natural flavoring provides no nutritional  
12 value.<sup>1</sup> The rest of the ingredients are: corn flour, sugar, oat flour, brown sugar, coconut oil,  
13 salt, sodium citrate, nonfat dry milk, whey, partially hydrogenated soybean oil, malic acid,  
14 niacinamide, reduced iron, zinc oxide, yellow 5, red 40, mono and diglycerides, yellow 6,  
15 blue 1, thiamin mononitrate, pyridoxine hydrochloride, BHT, riboflavin and folic acid. True  
16 and correct representations of this Product are attached hereto as Exhibit “B” and  
17 incorporated by reference herein.

18 9. The use of the word “Berries” in the Product name, coupled with the brightly  
19 depicted fruit-shaped cereal on the PDP, constitutes the “characterizing flavor”<sup>2</sup> of the  
20 Product. This is reinforced by the use of such representations as “[c]runch Berries is a  
21 combination of Crunch biscuits and colorful red, purple, teal and green berries” used in  
22 the Product’s advertising, marketing, promotion and sale. However, since the Product  
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24 <sup>1</sup> 21 CFR § 101.22(a)(3). “The term natural flavor or natural flavoring means the essential  
25 oil...or fermentation products thereof, whose significant function in food is flavoring rather than  
nutritional.”

26 <sup>2</sup> 21 CFR § 101.22(i). (“If the label, labeling, or advertising of a food makes any direct or  
27 indirect representations with respect to the primary recognizable flavor(s), by word, vignette,  
e.g., depiction of a fruit, or other means, or if for any other reason the manufacturer or  
28 distributor of a food wishes to designate the type of flavor in the food other than through the  
statement of ingredients, such flavor shall be considered the characterizing flavor....”)

1 contains only a nominal amount of fruit concentrate, Plaintiff contends that Defendant's  
2 marketing, promoting, labeling and advertising of the Product in this manner is deceptive  
3 and likely to mislead and deceive a "reasonable consumer" such as herself in violation of  
4 California statutes and common law causes of action that parallel, and do not conflict with,  
5 the labeling requirements established by the Federal Food, Drug, and Cosmetic Act  
6 ("FDCA").<sup>3</sup> See California's Sherman Food, Drug, and Cosmetic Law.<sup>4</sup> To counter the  
7 deceptive and misleading representations on the PDP and in the product advertising,  
8 marketing and promotion, Plaintiff contends that the phrase "Strawberry artificially  
9 flavored cereal" should be placed immediately after the name of the food in letters not less  
10 than one-half the size of those of the characterizing flavor ("Berries").<sup>5</sup> Such labeling  
11 would eliminate the deceptive nature of the labeling, advertising, marketing and  
12 promotion as set forth in detail above. Such labeling would notify the consumer that the  
13 Product contains only a nominal amount of fruit, as well as artificial flavoring.

14 10. During the past four years, Plaintiff at various times purchased the PepsiCo  
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16 <sup>3</sup> Codified at 21 U.S.C. §§ 301, et seq., with implementing regulations found at 21 C.F.R. §§  
17 1.1, et seq.

18 <sup>4</sup> Cal. Health and Safety Code §§ 109875 et seq. (The FDCA labeling regulations also have  
19 been incorporated into California law by reference. California Section 110100 of the California  
20 Health and Safety Code provides: "All food labeling regulations and any amendments to those  
21 regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or  
22 after that date shall be the food labeling regulations of this state.")

23 <sup>5</sup> 21 CFR § 101.22(i)(2). ("If the label, labeling, or advertising of a food makes any direct or  
24 indirect representations with respect to the primary recognizable flavor(s), by word, vignette,  
25 e.g., depiction of a fruit, or other means, or if for any other reason the manufacturer or distributor  
26 of a food wishes to designate the type of flavor in the food other than through the statement of  
27 ingredients, such flavor shall be considered the characterizing flavor and shall be declared in the  
28 following way...(2) If the food contains any artificial flavor which simulates, resembles or  
reinforces the characterizing flavor, the name of the food on the principal display panel or panels  
of the label shall be accompanied by the common or usual name(s) of the characterizing flavor,  
in letters not less than one-half the height of the letters used in the name of the food and the name  
of the characterizing flavor shall be accompanied by the word(s) "artificial" or "artificially  
flavored", in letters not less than one-half the height of the letters in the name of the  
characterizing flavor, e.g., "artificial vanilla", "artificially flavored strawberry", or "grape  
artificially flavored".)

1 Product named above. Plaintiff purchased this Product because she had been exposed to  
2 the advertising and representations of PepsiCo and Quaker as set forth above. The  
3 Plaintiff was misled by the original packaging on the product representing that the  
4 product contained real fruit. She trusted the Quaker label because of the company's long  
5 history of producing other wholesome breakfast cereals. She relied on the  
6 representations on the packaging of the product, rather than inspecting the specific  
7 ingredients. Plaintiff has learned of a study of popular foods and beverages that certain  
8 products marketed as containing fruit contained no or minimal fruit content. A true and  
9 correct copy of an on-line version of a front-page Los Angeles *Times* article about that  
10 study is attached hereto as Exhibit "C" to this complaint and incorporated herein by  
11 reference. She has learned through the study below, that these products include the  
12 Product of this Complaint.

13           11. The Strategic Alliance for Healthy Food and Activity Environments  
14 (hereinafter "Strategic Alliance") is a statewide coalition of California's leading public  
15 health and health care, parks and recreation, transportation, and nutrition organizations  
16 committed to promoting environmental and policy changes to support healthy eating and  
17 regular physical activity. On or about January 26, 2007, the Strategic Alliance published  
18 the results of a study examining the ingredients of the widely advertised foods with  
19 references to fruit on the packaging. A true and correct copy of the study is attached  
20 hereto as Exhibit "D" and incorporated by reference. The subject PepsiCo Product was a  
21 focus of the research. The study concluded, among other things, that despite advertising  
22 and packaging that suggests the presence of fruit, over half of the food products studied  
23 contain no fruit at all. Many of the foods in the study, including the subject PepsiCo  
24 Product, had brightly colored packages containing images of fruits and/or words related  
25 to fruits regardless of the actual content of fruit ingredients. The study concluded that  
26 there is reason to be concerned that current packaging labels and advertising are  
27 misleading consumers about the nutritional value of some of the most popular foods and  
28 snacks.

1 **V. CLASS ALLEGATIONS**

2 12. Pursuant to California Civil Code § 1781, California Code of Civil Procedure §  
3 382, and Federal Rule of Civil Procedure 23, Plaintiff brings this action on behalf of herself  
4 and all other California consumers who purchased the Product during the class period,  
5 which is defined as the four years preceding the filing of this action. The practices and  
6 omissions of PepsiCo were applied uniformly to all members of the Class, so that the  
7 questions of law and fact are common to all members of the Class. All putative Class  
8 members were and are similarly affected by having purchased and used the above-  
9 mentioned Product and the relief sought herein is for the benefit of Plaintiff and members  
10 of the putative class.

11 13. Plaintiff is informed and believes, and on that basis alleges, that the Plaintiff  
12 Class is so numerous that joinder of all members would be impracticable. Based on the  
13 annual sales of the Product and the popularity of the Product, it is apparent that the  
14 number of consumers of the Product, both nationwide and in California alone, would at  
15 least be in the many tens of thousands, thereby making joinder impossible.

16 14. Questions of law and fact common to the Plaintiff Class and the subclasses exist  
17 that predominate over questions affecting only individual members, including, inter alia,  
18 the following:

- 19 (a) Whether Defendant’s practices and representations made in connection  
20 with the advertising, marketing, promotion, labeling and sales of the  
21 Product as set forth herein were deceptive, unlawful or unfair in any  
22 respect, thereby violating California's Unfair Competition Law (“UCL”),  
23 California Bus. & Prof. Code § 17200 et seq.;
- 24 (b) Whether Defendant’s practices and representations made in connection  
25 with the advertising, marketing, promotion, labeling and sales of the  
26 Product as set forth herein were deceptive, unlawful or unfair in any  
27 respect, thereby violating California's False Advertising Law (“FAL”),  
28 California Bus. & Prof. Code § 17500 et seq.;

- 1 (c) Whether Defendant's practices and representations made in connection  
2 with the advertising, marketing, promotion, labeling and sales of the  
3 Product as set forth herein were false and/or misleading in any respect;
- 4 (d) Whether Defendant breached any implied or express warranties in  
5 connection with the practices and representations made in the advertising,  
6 marketing, promotion, labeling and sales of the Product as set forth herein,  
7 at the expense of and to the detriment of Plaintiff and Class members;
- 8 (e) Whether Defendant violated Civil Code §1770(a)(5) et seq. ("CLRA") by the  
9 practices and representations made in connection with the advertising,  
10 marketing, promotion, labeling and sales of the Product as set forth herein;  
11 and
- 12 (f) Whether Defendant's conduct as set forth herein injured California  
13 consumers and if so, the extent of the injury.

14 15. The claims asserted by Plaintiff in this action are typical of the claims of the  
15 members of the Plaintiff Class and all subclasses as described herein, the claims arise from  
16 the same course of conduct by PepsiCo, and the relief sought is common.

17 16. Plaintiff will fairly and adequately represent and protect the interests of the  
18 members of the Plaintiff Class and all subclasses. Plaintiff has retained counsel competent  
19 and experienced in both consumer protection and class action litigation.

20 17. Certification of this class action is appropriate under FRCP 23(b) and California  
21 Code of Civil Procedure § 382, and California Civil Code § 1781, because the questions of  
22 law or fact common to the respective Class members predominate over questions of law  
23 or fact affecting only individual members. This predominance makes class litigation  
24 superior to any other method available for the fair and efficient adjudication of these  
25 claims. Absent a class action, it would be highly unlikely that the representative Plaintiff  
26 or any other class member would be able to protect their own interests, because the cost  
27 of litigation through individual lawsuits might exceed expected recovery. Certification also  
28 is appropriate because PepsiCo acted or refused to act on grounds generally applicable to

1 the Class, thereby making appropriate final injunctive relief with respect to the Class as a  
2 whole. Further, given the large number of consumers of the Product, allowing individual  
3 actions to proceed in lieu of a class action would run the risk of yielding inconsistent and  
4 conflicting adjudications.

5 18. A class action is a fair and appropriate method for the adjudication of the  
6 controversy, in that it will permit a large number of claims to be resolved in a single forum  
7 simultaneously, efficiently, and without the unnecessary hardship that would result from  
8 the prosecution of numerous individual actions and the duplication of discovery, effort,  
9 expense and burden on the courts that such individual actions would engender. The  
10 benefits of proceeding as a class action, including providing a method for obtaining  
11 redress for claims that it would not be practicable to pursue individually, outweigh any  
12 difficulties that might be argued with regard to the management of this class action.

#### 13 **VI. FIRST CAUSE OF ACTION**

#### 14 **(Cal. Bus. & Prof. Code § 17200, et seq.)**

15 19. Plaintiff realleges and incorporates by reference the allegations set forth in  
16 each of the preceding paragraphs of this Complaint.

17 20. This cause of action is brought on behalf of Plaintiff and members of the general  
18 public pursuant to California Bus. & Prof. Code § 17200, et seq., which provides that  
19 "unfair competition shall mean and include any unlawful, unfair or deceptive business act  
20 or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited  
21 by Chapter 1 (commencing with Section 17500) as Part 3 of Division 7 of the Business and  
22 Professions Code."

23 21. Based on information and belief, Plaintiff alleges that PepsiCo committed the  
24 unlawful, unfair, and deceptive practices set forth above in this Complaint.

25 22. The practices offend public policy, are unconscionable, are oppressive and  
26 unscrupulous, and cause substantial injury to consumers.

27 23. The acts and concealment of material facts, as described in this Complaint, have  
28 a capacity, tendency or likelihood to deceive or confuse members of the general public

1 regarding the contents and nutritional value of the Product and the true ingredients and  
2 nutritional value thereof.

3           24. Plaintiff is informed and believes, and based on such information and belief  
4 alleges that, PepsiCo committed an unfair business act or practice. The utility of PepsiCo's  
5 misleading and/or deceptive advertising, promotion, labeling and/or marketing for the  
6 purpose of selling the Product is negligible, if any, when weighed against the extent of  
7 harm to the general public, Plaintiff and class members. The harmful impact upon  
8 members of the general public and the Class who were and are misled and deceived with  
9 respect to PepsiCo's advertising, promotion, marketing and labeling of the Product far  
10 outweighs any reasons or justifications by PepsiCo for not disclosing the truth about the  
11 actual content of fruit in the Product in their advertising, promotion, marketing and  
12 labeling. As alleged in this Complaint, PepsiCo had an improper motive (profit over  
13 truthful advertising, promotion, labeling and marketing) in misrepresenting and/or  
14 omitting the truth about the composition and contents of the Product in their advertising,  
15 promotion, marketing and labeling. The utilization of unlawful, unfair and/or deceptive  
16 practices was and is under the sole control of PepsiCo and was fraudulently and  
17 deceptively hidden from members of the general public in PepsiCo's advertising,  
18 promotion, marketing and labeling.

19           25. As a purchaser of the Product and as a member of the general public in  
20 California who has been injured by PepsiCo's unlawful and/or unfair practices, Plaintiff is  
21 entitled to and do bring this class action seeking all available remedies under California's  
22 Unfair Competition Law, including declaratory and injunctive relief and restitution, as well  
23 as attorneys' fees and costs.

24           26. PepsiCo committed an unlawful, unfair, or deceptive act or practice by making  
25 written and/or oral material representations (and material omissions) as set forth above  
26 that have a capacity, tendency, or likelihood to deceive or confuse members of the general  
27 public regarding the actual contents or composition of the Product, as referred to in this  
28 Complaint. The violations of the CLRA, set forth in detail below, constitute a predicate

1 violation of the UCL as alleged herein and substantiate the deception inherent in the  
2 representations made by PepsiCo.

3           27. The unlawful, unfair and/or deceptive acts and practices of PepsiCo, as alleged  
4 in this Complaint, present a threat to members of the general public in that PepsiCo is able  
5 to carry on this scheme of misrepresentation and omission without suffering the  
6 consequences of legal action and violations of law.

7           28. Plaintiff is informed and believes and based thereon alleges that PepsiCo  
8 continues these unlawful, unfair and/or deceptive business practices alleged herein.

9           29. PepsiCo's acts, misrepresentations, concealment of material facts, and failures  
10 to disclose as alleged in this Complaint, constitute an unlawful, unfair or deceptive  
11 business practice within the meaning of the California Bus. & Prof. Code § 17200, et seq.  
12 Plaintiff and members of the general public were, and are likely to be deceived by  
13 PepsiCo's scheme to misrepresent the actual fruit content of the Product, as alleged in this  
14 Complaint.

15           30. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, on behalf of herself  
16 and members of the general public, seeks an order of this Court:

17           (a) Enjoining PepsiCo from continuing to engage, use, or employ any unlawful,  
18 unfair and/or deceptive business act or practice and unfair, deceptive,  
19 untrue or misleading advertising, promotion or marketing and any act  
20 prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of  
21 Division 7 of the Business and Professions Code; and

22           (b) Restoring all monies that may have been acquired by PepsiCo as a result of  
23 such unlawful, unfair, or deceptive act or practices.

24           31. Plaintiff and members of the general public may be irreparably harmed and/or  
25 denied an effective and complete remedy if such an order is not granted. The unlawful,  
26 unfair and/or deceptive acts and practices of PepsiCo, as described above, present a  
27 serious threat to Plaintiff and members of the general public.

28           32. As a result of PepsiCo's violation of the UCL, Plaintiff and the Class are entitled

1 to restitution for out-of-pocket expenses and economic harm suffered.

2 33. Pursuant to Civil Code § 3287(a), Plaintiff and the Class are further entitled to  
3 pre-judgment interest as a direct and proximate result of PepsiCo's wrongful conduct. The  
4 amount of damages suffered by Plaintiff and the Class as a result of said acts is a sum  
5 certain and capable of calculation and Plaintiff and Class members are entitled to interest  
6 in an amount to be set forth according to proof.

7 **VII. SECOND CAUSE OF ACTION**

8 **(Cal. Bus. & Prof. Code §17500, et seq.)**

9 34. Plaintiff realleges and incorporates by reference the allegations set forth in  
10 each of the preceding paragraphs of this Complaint.

11 35. In violation of California Bus & Prof. Code § 17500, PepsiCo has disseminated,  
12 or caused to be disseminated, false and misleading statements in advertisements,  
13 promotion labeling and/or marketing for the Product as set forth above.

14 36. PepsiCo's representations in the advertisements, promotions, labeling and/or  
15 marketing of the Product are untrue and/or misleading because the Product contains only  
16 nominal fruit content.

17 37. Plaintiff is informed and believes and based thereon alleges, that PepsiCo  
18 continues to disseminate, or cause to be disseminated, such false and misleading labeling  
19 and statements as alleged herein.

20 38. PepsiCo is disseminating labeling and advertising concerning the Product,  
21 which by its very nature is unfair, deceptive, untrue or misleading within the meaning of  
22 California Bus. & Prof. Code §17500, et seq. Such advertisements are likely to deceive the  
23 consuming public and present a continuing threat to consumers in that they will continue  
24 to mislead consumers into purchasing the Product on false premises. The violations of the  
25 CLRA, set forth in detail below, constitute a predicate violation of the FAL as alleged  
26 herein and substantiate the deception inherent in the representations made by PepsiCo.

27 39. In making and disseminating the labeling and statements alleged herein,  
28 PepsiCo knew or should have known that the statements were untrue and/or misleading,

1 and acted in violation of California Bus. & Prof. Code § 17500, et seq.

2 40. As a direct and proximate result of PepsiCo's wrongful conduct, Plaintiff and the  
3 Class Members have suffered substantial monetary and non-monetary damage. Pursuant  
4 to California Business and Professions Code § 17535, Plaintiff, on behalf of themselves and  
5 members of the general public, seek an order of this Court:

- 6 (a) Enjoining PepsiCo from continuing to engage, use, or employ any act  
7 prohibited by Chapter 1 (commencing with Section 17500) of part 3 of  
8 Division 7 of the Business and Professions Code; and  
9 (b) Restoring all monies that may have been acquired by means of PepsiCo's  
10 false and misleading statements in advertisements, promotions, labeling  
11 and/or marketing described herein.

12 As such, Plaintiff and the members of the Class request that this Court cause PepsiCo to  
13 restore this money to them, and to enjoin PepsiCo from continuing to violate California  
14 Bus. & Prof. Code §17500 et seq., as alleged above. If PepsiCo's conduct is not enjoined,  
15 Plaintiff and the members of the Class will continue to be damaged by PepsiCo's false and  
16 misleading advertising.

17 41. Pursuant to Civil Code § 3287(a), Plaintiff and members of the Class are further  
18 entitled to pre-judgment interest as a direct and proximate result of PepsiCo's wrongful  
19 conduct. The amount of funds paid by Plaintiff and Class members as a result of said acts  
20 was a sum certain and capable of calculation, and Plaintiff and Class members are entitled  
21 to interest in an amount to be set forth according to proof.

22 **VIII. THIRD CAUSE OF ACTION**

23 **(Negligent Misrepresentation)**

24 42. Plaintiff realleges and incorporates by reference the allegations set forth in  
25 each of the preceding paragraphs of this Complaint.

26 43. PepsiCo has represented to the public, including Plaintiff, by packaging,  
27 labeling, advertising, and other means, that the Product has characteristics, ingredients,  
28 and qualities that it does not have, as set forth in detail above and incorporated herein.



1 other things, induced to spend an amount to be determined at trial on the Product  
2 manufactured, distributed, and sold by PepsiCo, and thereby lost money by purchasing a  
3 product that was not what it was represented to be, and which they would not had  
4 purchased but for the misrepresentations.

5 55. Plaintiff and other consumers, in purchasing, using, and consuming the Product  
6 as herein alleged, did rely on PepsiCo's above representations, all to their damage as  
7 hereinabove alleged. In doing the things aforementioned, PepsiCo was guilty of malice,  
8 oppression, and fraud, and Plaintiff and Class members are, therefore, entitled to recover  
9 exemplary or punitive damages.

10 **X. FIFTH CAUSE OF ACTION**  
11 **(Breach of Express Warranty)**

12 56. Plaintiff realleges and incorporates by reference the allegations set forth in  
13 each of the preceding paragraphs of this Complaint.

14 57. Plaintiff is informed and believes and thereon alleges that Defendant made  
15 different express warranties, including but not limited to, that the Product was a  
16 substantially fruit-based product as represented by the characterizing flavor.

17 58. As stated herein, the Product contains only nominal fruit content. This  
18 constitutes breaches of all applicable express and implied warranties as alleged in this  
19 complaint, based on all laws that support the Plaintiff' and other Class members' breach of  
20 implied and express warranty claims regarding the Product; these laws include but are  
21 not limited to California Common Law, the California Uniform Commercial Code and  
22 California Civil Code section 1790, et. seq. (California Song-Beverly Act). The failure of the  
23 Product to be as expressly warranted by Defendant has caused Plaintiff and Class  
24 members damages as herein described, in that, among other things, they spent an amount  
25 to be determined at trial on the Product manufactured, distributed, and sold by PepsiCo,  
26 and thereby lost money by purchasing a product that was not what it was represented to  
27 be, and which She would not had purchased but for the misrepresentations.

28 59. Plaintiff gave timely notice to Defendant of this breach on behalf of themselves



1 **XII. SEVENTH CAUSE OF ACTION:**  
2 **(Consumers Legal Remedies Act)**

3 66. Plaintiff realleges and incorporates by reference the allegations set forth in  
4 each of the preceding paragraphs of this Complaint.

5 67. This cause of action is brought pursuant to the CLRA.

6 68. Plaintiff and each member of the Class are “consumers” within the meaning of  
7 Civil Code §1761(d).

8 69. The transactions that Plaintiff and each member of the Class entered into are  
9 “transactions” within the meaning of Civil Code §1761(e).

10 70. PepsiCo’s marketing, promotion, and sales of the Product within California, as  
11 alleged herein, amount to a violation of the CLRA.

12 71. PepsiCo violated, and continues to violate, the CLRA in at least the following  
13 respects as set forth in detail above:

- 14 (a) In violation of Civil Code §1770(a)(2), PepsiCo misrepresented the  
15 composition or contents of the Product;
- 16 (b) In violation of Civil Code §1770(a)(5), PepsiCo represented that the Product  
17 has characteristics, ingredients, uses, and benefits which it does not have;
- 18 (c) In violation of Civil Code §1770(a)(7), PepsiCo represented that the Product  
19 is of a particular standard, quality, or grade, which it is not; and
- 20 (d) In violation of Civil Code §1770(a)(9), PepsiCo advertised the Product with  
21 an intent not to sell the Product as advertised.

22 72. Plaintiff seeks and is entitled to equitable relief in the form of an order:

- 23 (a) Enjoining PepsiCo from continuing to engage in the deceptive business  
24 practices described above;
- 25 (b) Requiring PepsiCo to make full restitution of all monies wrongfully obtained  
26 as a result of the conduct described above;
- 27 (c) Requiring PepsiCo to disgorge all ill-gotten gains flowing from the conduct  
28 described above;

1 (d) Requiring PepsiCo to provide public notice of the true nature of the Product;  
2 and

3 (e) Enjoining PepsiCo from such deceptive business practices in the future.

4 73. Pursuant to Section 1782 of the CLRA, Plaintiff is notifying PepsiCo in writing of  
5 the particular violations of Section 1770 of the CLRA (the Notice) and is demanding,  
6 among other things, that PepsiCo cease marketing the Product as set forth in detail above.  
7 Plaintiff is sending Notice by means of by certified mail, return-receipt requested to  
8 PepsiCo concurrent with the service of this Complaint. If PepsiCo fails to respond to  
9 Plaintiff's demand within thirty days of this letter, pursuant to section 1782 of the CLRA,  
10 Plaintiff will amend this Complaint to request statutory damages, actual damages, plus  
11 punitive damages, interest and attorneys' fees. Regardless of such an amendment to seek  
12 damages, however, Plaintiff seeks and is entitled to, pursuant to Section 1780(a)(2) of the  
13 CLRA, an order as set forth herein enjoining the above-described wrongful acts and  
14 practices of PepsiCo, plus costs and attorney's fees and any other relief which the Court  
15 deems proper.

16 **XIV. PRAYER FOR RELIEF**

17 **(AGAINST ALL DEFENDANTS)**

18 WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, and for  
19 members of the general public, prays for relief, jointly and severally, pursuant to each  
20 cause of action set forth in this Complaint as follows:

21 1. For an order certifying that the action may be maintained as a class action.

22 2. For an award of equitable relief as follows:

23 (a) Enjoining Defendant from continuing to engage in the unlawful,  
24 unfair and fraudulent business practices and deceptive labeling and  
25 advertising described in this Complaint;

26 (b) Requiring Defendant to make full restitution of all monies wrongfully  
27 obtained as a result of the conduct described in this Complaint;

28 (c) Requiring Defendant to disgorge all ill-gotten gains flowing from the

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conduct described in this Complaint; and

(d) Requiring Defendant to provide public notice of the true nature of the Product.

3. For actual and punitive damages under the CLRA in an amount to be proven at trial, including any damages as may be provided for by statute upon the filing of a First Amended Complaint should the demanded corrections not take place within the thirty-day notice period.

4. For an award of attorney's fees pursuant to, inter alia, Section 1780(d) of the CLRA and Code of Civil Procedure § 1021.5.

5. For actual damages in an amount to be determined at trial for the Third, Fourth, Fifth and Sixth Causes of Action.

6. For punitive damages in an amount to be determined at trial for the Fourth Cause of Action.

7. For an award of costs and any other relief the Court might deem appropriate.

8. For pre- and post-judgment interest on any amounts awarded.

HEWELL LAW FIRM, APC

Dated: May 27, 2008

/s/ Harold M. Hewell  
Harold M. Hewell

## EXHIBIT LIST

| EXHIBIT  | PAGES                 |
|--|-----------------------|
| <b>Exhibit “A”:</b><br>Declaration Of Harold M.<br>Hewell Regarding Venue<br>Pursuant To Civil Code §1780(c)<br>of the Consumer Legal<br>Remedies Act, Civil Code §§1750,<br>et seq. | A - 22 through A - 23 |
| <b>Exhibit “B”:</b><br>Product.  | B - 25 through B - 26 |
| <b>Exhibit “C”:</b><br>Los Angeles <i>Times</i> article.   | C - 28 through C - 29 |
| <b>Exhibit “D”:</b><br>Study by the Prevention Institute, published by<br>The Strategic Alliance for Healthy Food and<br>Activity Environments.                                      | D - 31 through D - 37 |

Exhibit “A”

1 Howard Rubinstein (Fla. SBN: 104108)  
2 Attorney at Law  
3 914 Waters Avenue, Suite 20  
4 Aspen, Colorado 81611  
5 Tel.: (832) 715-2788  
6 *(To apply as counsel pro hac vice)*

7 Harold M. Hewell (Cal. SBN: 171210)  
8 Hewell Law Firm, APC  
9 1901 First Avenue, Second Floor  
10 San Diego, California 92101  
11 Tel: (619) 235-6854  
12 Fax: (619)235-9122  
13 E-mail: hmhewell@hewell-lawfirm.com  
14 Attorneys for Plaintiff

11  
12 **UNITED STATES DISTRICT COURT**  
13 **EASTERN DISTRICT OF CALIFORNIA**

14 **JANINE SUGAWARA**, individually and  
15 on behalf of all others similarly  
16 situated,

17 *Plaintiff,*

18 vs.

19 **PEPSICO, INC.**, a North Carolina  
20 corporation;

21 *Defendants.*

22 : **CASE NO.:**

23 :  
24 : **DECLARATION OF HAROLD M. HEWELL**  
25 : **REGARDING VENUE PURSUANT TO CIVIL**  
26 : **CODE §1780(c) OF THE CONSUMER LEGAL**  
27 : **REMEDIES ACT, CIVIL CODE §§1750, ET SEQ.**

28 : **CLASS ACTION**

29 : **JURY TRIAL REQUESTED**

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I, Harold M. Hewell, hereby declare:

1. I am an attorney at law duly admitted to practice before this Court and all the courts of the State of California. I am one of the attorneys of record for Plaintiff in the above-entitled action. The matters stated below are true as to my own knowledge, except as to those matters stated as to information and belief, and as to those matters, I believe them to be true. If called upon, I could competently testify to the matters herein.

2. Civil Code § 1780(c) provides that a plaintiff seeking to bring a claim under Section 1780(a) of the California Consumer Legal Remedies Act, such as in the above entitled action, may commence that action “in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.”

3. Accordingly, this judicial district is a proper venue in which to bring this action, as defendant at all relevant times in this action was and/or is “doing business” within the County of this district by marketing, advertising and selling the subject product of this action, and/or other of their products, within said County.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed Wednesday, May 21, 2008, at San Diego, California.

/s/ Harold M. Hewell  
Harold M. Hewell

Exhibit “B”



## our brands **Cap'n Crunch®**

Quaker Cap'n Crunch® was introduced in 1963 and has become one of the most successful pre-sweet ready-to-eat cereals ever launched. Today, Cap'n Crunch is the #1 pre-sweetened kids cereal in the U.S.

Cap'n Crunch has a unique, indescribable taste, with deliciously crunchy, sweet biscuits both kids and adults love. Cap'n Crunch is also available in several other delicious varieties. **Crunch Berries is a combination of Crunch biscuits and colorful red, purple, teal and green berries.** Peanut Butter Crunch has a sweet peanut butter flavor along with the brand's trademark crunchy texture. The newest cereal in the line is Oops! ChocoDonuts, a chocolate donut flavored and shaped cereal with multi-colored sprinkles.



## learn more about Cap'n Crunch®

Visit the Cap'n Crunch® web site:

□ <http://www.capncrunch.com>

Varieties/Flavors:

- Cap'n Crunch® (8oz, 12oz, 16oz, 22oz)
- Cap'n Crunch® Crunchberries (15oz, 21oz)
- Cap'n Crunch® Peanut Butter Crunch (15oz, 20.7oz)
- Cap'n Crunch® Oops! ChocoDonuts (13oz)

Availability:

- Cap'n Crunch is available throughout the United States and Canada.

Exhibit “C”



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### 'Fruit' in that juice? It could be red dye Many foods marketed toward children are misleading in their packaging, report says.

By Mary Engel, Times Staff Writer  
January 26, 2007

About half of the most aggressively marketed children's food with pictures or names of fruit on the packaging contains no fruit at all, according to a report to be released today at the 2007 California Childhood Obesity Conference in Anaheim.

Some of the least fruity products were cereal and yogurt, said lead author Leslie Mikkelsen, a dietitian for Prevention Institute, an Oakland-based nonprofit that promotes community-based health and safety programs.

She pointed to a box of Berry Berry Kix that showed a big spoonful of cereal with what at least looked like raspberries and blueberries.

"Parents do think cereals are a good way to start the day," Mikkelsen said, and they look at this one and think "it has the goodness of fruit."

But in fact, said Mikkelsen, pointing to the ingredients listed on the box, "all that's in there is red dye and blue dye."

Similarly, Yoplait Go-Gurt Strawberry Splash yogurt contained no strawberries. General Mills, the maker of both the cereal and the yogurt, declined to comment, saying the company had not seen the report.

Of the 37 products examined, 19 contained no fruit ingredients and six had only minimal amounts of fruit juice. Two contained 100% fruit juice, and 10 contained actual whole fruits, which have less sugar and more fiber and nutrients than juice alone.

"Today's parents are looking for healthier products for their children, but the food industry isn't making it easy for them," Mikkelsen said.

The six-page report, "Where's the Juice? Fruit Content of the Most Highly Advertised Children's Food and Beverages," was sponsored by the Strategic Alliance for Health Food and Activity Environments, a statewide coalition of public health and nutrition organizations. It comes amid growing concern about rising rates of obesity in children and adolescents, and a related surge in Type 2 diabetes.

Based on the 2004 California Physical Fitness Test, which is administered in public schools to fifth-, seventh- and ninth-graders, one study showed that the proportion of overweight children climbed to 28.1%, up from 26.5% in 2001.

As a result of these increases, the marketing of nonnutritious foods, their accessibility on school campuses and their content — such as sugar and trans fats — also are coming under closer scrutiny and regulation.

For this report, the researchers used data from a recent Kaiser Family Foundation study to identify the top-spending food advertisers on children's television programs.

The report excluded fast-food advertisers and concentrated on 37 items that could be bought in grocery stores and that showed pictures of fruit or used the words "fruit" or "fruity" on the packaging.

Children's marketing heavily emphasizes candy and sodas, and some of the products found to contain no fruit — such as Juicy Fruit gum and Wild Cherry Life Savers — were hardly surprising. Indeed, Mikkelsen said she was surprised to find that Popsicles and Skittles actually did contain a small amount of fruit juice.

But, she said, parents have different expectations of fruit "flavored" drinks, which often contain less than 10% juice.

"I really don't think a lay person knows that fruit drink doesn't mean fruit juice, especially if it has these beautiful pictures of fruit on it," she said.

Rosa Soto of Whittier, the mother of an 8-year-old son, agreed.

"A lot of parents think they can trust the labels," she said, meaning the colorful picture of an apple or orange, not the small-print ingredients that manufacturers are required to list.

Soto volunteers as a "team mom" for her son's football, basketball and baseball teams, and encourages other parents to bring water to their children's practice sessions and games. Many show up with fruit drinks that contain more sugar than nutrients.

"They're trying their very best to provide healthy snacks," she said.

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Exhibit “D”

# WHERE'S THE FRUIT?

## Fruit Content of the Most Highly-Advertised Children's Food and Beverages

This document was prepared by Prevention Institute

Principal authors:

Leslie Mikkelsen, RD, MPH

Caitlin Merlo, BS

Virginia Lee, MPH

Carol Chao, BA

© January 2007

Prevention Institute is a nonprofit, national center dedicated to improving community health and well-being by building momentum for effective primary prevention. Primary prevention means taking action to build resilience and to prevent problems before they occur. The Institute's work is characterized by a strong commitment to community participation and promotion of equitable health outcomes among all social and economic groups. Since its founding in 1997, the organization has focused on injury and violence prevention, traffic safety, health disparities, nutrition and physical activity, and youth development. This, and other Prevention Institute documents, are available at no cost on our website.

265 29th Street  
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at the center of community well-being

# WHERE'S THE FRUIT?

## Fruit Content of the Most Highly-Advertised Children's Food and Beverages

### INTRODUCTION

Surveys of children's food habits reveal a disturbing trend over the last 60 years. Up to 80% of today's young children have diets that are considered "poor" or "in need of improvement" (Nestle, 2006). Children are consuming less than the daily recommended servings of fruits, vegetables and whole grains, while consuming excess calories in the form of added sugars and fats (IOM, 2006). The appearance of Type II diabetes (formerly known as adult-onset diabetes) in adolescents and younger children has sounded an alarm around the country that ensuring a good diet (and regular physical activity) for children is a public health priority. Establishing good dietary habits in childhood promotes healthy growth and development and helps prevent diabetes, cardiovascular disease and cancer in adulthood.

Parents are concerned about their children's health and try to make healthful food choices for their children, frequently operating under time and financial pressures. They scan the supermarket aisles, often with children in tow, looking for affordable, tasty and nutritious items to feed their families. Today's large supermarkets may display as many as 40,000 products, so these choices can be daunting (Nestle, 2006). The information contained on product packages is one source of information for these choices, augmented by marketing messages encountered before entering the supermarket.

Parents are not the only targets of these marketing messages. Children are seen as prime marketing targets for their direct purchasing power, influence on parental and household purchases, and to cultivate early brand loyalty that will influence their purchases as adults. An



STUDY PRODUCTS

estimated \$10 billion per year is spent for food and beverage marketing to children and youth in the United States (IOM, 2006). This amounts to more than \$1 million spent every hour of every day. The majority of these food and beverage products are high in sugar, salt, fat, and calories and low in nutrients (IOM, 2006). After being exposed to marketing messages, children may ask their parents to purchase these products at the supermarket. In fact, children influence household purchase decisions at an estimated value of \$500 billion annually for 2 to 14 year olds (IOM, 2006).

In order to attract children, advertising and packages tend to be dynamic, brightly colored and frequently include a branded fictional character or familiar children's icon. While taste and fun are the primary appeals to children, good nutrition is valued by parents. Although specific health claims and nutrient content claims are regulated by the Food and Drug Administration (FDA), there are still many phrases food and beverage manufacturers include on packages that potentially mislead par-

ents. Terms such as high-energy, low-fat, multi-grain, all natural, or fruit-flavored connote a healthy aura, and regularly appear on highly-advertised products such as breakfast cereals, fruit drinks and children's snacks. It requires some working knowledge of nutrition to read the ingredients list and nutrition facts panel to realize these products are frequently high in added sweeteners and contain very little of the whole grains, fruits and vegetables and low-fat dairy products recommended by the US Dietary Guidelines.

Parents may have difficulty making healthy choices for their children because the advertising and packaging does not clearly represent the product's contents. This study focuses on one aspect of this parental challenge—products linked with fruit, via pictures or references to fruit in the product name or phrases on the label. Fruit is a healthy food for snacks and mealtime, rich in dietary fiber, vitamins and minerals, and children need a recommended two to four servings per day (AAP, 2001). The purpose of this study was to determine whether indications of fruit on the packaging of the most heavily marketed products to children represented actual fruit in the product. We also calculated the proportion of sugar in these products, as one proxy for the overall nutritional value.

## METHODS

We used the list of brands included in the Kaiser Family Foundation's recent study, *It's Child's Play: Advergaming and the Online Marketing of Food to Children* that were identified as the top-spending children's food advertisers on TV (Moore, 2006). Ninety-six brand-name products were identified by the Kaiser Family Foundation study, grouped according to food categories. We excluded 26 items from our study. The excluded items included brand-name products that clearly did not contain fruit (e.g., Pringles, Doritos, Kraft Macaroni & Cheese, and Coca-Cola). We also excluded restaurants since we based our study on products that are available in supermarkets.

The remaining 70 branded products were included in the study. We visited a local grocery store and reviewed the packaging for the 70 items and identified

the brands that contained words and images on the package related to fruit and/or fruit ingredients. Of the 70 branded products we reviewed, 37 had references to fruit on the packaging.

These 37 products were the focus of our study. We used the ingredient list to determine whether the item contained fruit, the form of the fruit, and the types of sugar in the product. The percentage of calories from sugars was calculated for each product based on information provided on the Nutrition Facts label, and we reviewed the ingredients panel (see box below) to identify all the added sweeteners. For products that contained fruit, we contacted the manufacturers to learn how much fruit was contained in a serving. The manufacturers considered the actual amount of fruit ingredients used to be confidential (proprietary) information. Therefore we were not able to report on the amount of fruit contained in the products. We also examined the references to fruit on the packages, which included both words and pictures.

### FOOD LABELS FOR TWO STUDY BRANDS

\*Sugars are highlighted in bold

**Apple Cinnamon Cheerios:** Whole grain oats, **sugar, brown sugar**, cornmeal, corn starch, **corn syrup**, dried apple pieces, canola and/or rice bran oil, calcium carbonate, salt, cinnamon, trisodium phosphate, zinc, and iron, vitamin C, a B vitamin, artificial flavor, vitamin B6, vitamin B2, vitamin B1, vitamin A, a B vitamin, vitamin B12, vitamin D, wheat starch, vitamin E



**Strawberry Splash Yoplait Go-Gurt Yogurt:** Cultured pasteurized grade A milk, **sugar, high fructose corn syrup**, nonfat milk, modified corn starch, kosher gelatin, tricalcium phosphate, natural and artificial flavor, potassium sorbate, carrageenan, red #40, blue #1



**TABLE 1. FRUIT CONTENT BY BRAND**

| Category         | # of Products | % of Total Products | Brands  |
|------------------|---------------|---------------------|---|
| Fruit            | 10            | 27%                 | Apple Cinnamon Cheerios, Apple Jacks, Berry Burst Cheerios ( <i>Strawberry Banana, Triple Berry</i> ), Eggo Waffles ( <i>Apple Cinnamon, Blueberry, Strawberry</i> ), Kellogg's Pop Tarts ( <i>Strawberry</i> ), Quaker Chewy 90 Calorie Granola Bars ( <i>Baked Apple</i> ), Smucker's Jam ( <i>Strawberry</i> ), Fruit by the Foot ( <i>Strawberry</i> ), Fruit Rollups ( <i>Strawberry</i> ), Gushers Fruit Snack ( <i>Strawberry</i> )  |
| 100% Fruit Juice | 2             | 6 %                 | Capri Sun Fruit Waves ( <i>Grape</i> ), Juicy Juice   |
| Minimal Fruit    | 6             | 16%                 | <b>5% Juice Drink:</b> Sunny Delight Fruit Drinks <b>10% Juice Drink:</b> Capri Sun Juice Drink ( <i>Strawberry</i> ), Hi-C Fruit Drinks ( <i>Boppin' Strawberry</i> ), Kool-Aid Jammers <b>Food Products:</b> Popsicle ( <i>Orange, Cherry, Grape</i> ), Skittles  |
| No Fruit         | 19            | 51%                 | <b>Beverages:</b> Nestle Nesquick Milk and Drink Mix ( <i>Strawberry</i> ), Tang <b>Food Products:</b> Air Heads, Berry Berry Kix, Bubble Tape, Captain Crunch with Crunch Berries, Dannon Danimals XL ( <i>Strawberry Explosion</i> ), Froot Loops, Fruity Cheerios, Juicy Fruit Gum, Life Savers ( <i>Wild Cherry</i> ), Post Fruity Pebbles, Push Pop ( <i>Cherry</i> ), Ring Pop ( <i>Cherry</i> ), Starbursts, Trix Cereal, Trix Yogurt ( <i>Strawberry Kiwi</i> ), Twizzlers, Yoplait Go-Gurt Yogurt ( <i>Strawberry Splash</i> ) |

**RESULTS**

**Fruit Content**

We sorted the 37 products into four categories based on the type of fruit ingredient they contained:

- 1. Fruit:** including fruit and fruit from concentrate
- 2. 100% Fruit Juice**
- 3. Minimal Fruit Juice:** drinks containing 2-10% fruit juice (no brands contained 11-99% juice), products containing fruit juice
- 4. No Fruit:** including products with no fruit, with only natural fruit flavors [which have no nutritional value (21CFR101.22)], or fruit juice concentrate (which is classified as an added sweetener) (USDHHS, 2005).

Ten products (27%) contained fruit and two (6%) contained 100% fruit juice. The remaining 25 products (67%) contained no or minimal fruit. Table 1 summarizes the results.

**Sugar Content**

Most of the products had at least two forms of added sugars, usually high fructose corn syrup/corn syrup and sugar. In the **Fruit** category, there was a wide range of percentage of calories from sugar, with Eggo Waffles having the lowest percentage and Smucker's Jam having the highest. Fruit Juice is high in naturally occurring sugars, and the **100% Juice** products averaged 89% of calories from sugar. The juice drinks in the **Minimal Fruit** category contained high fructose corn syrup and fruit concentrates and three of the four products had 100% of the calories from sugar.

**100% FRUIT JUICE** does not contain the equivalent fiber, vitamins, and minerals of whole fruit. The American Academy of Pediatrics (AAP), and the US Dietary Guidelines recommends that children be encouraged to eat whole fruits to meet their recommended daily fruit intake. If fruit juice is consumed, they recommend only 100% juice and that intake is limited to 4 to 12 oz. per day, depending on age (AAP, USDHHS).

## PERCENTAGE OF CALORIES FROM SUGAR

| Category                      | Range (%) | Median (%) |
|-------------------------------|-----------|------------|
| Fruit (10 products)           | 14-96     | 46         |
| 100% Fruit Juice (2 products) | 86-92     | 89         |
| Minimal Fruit (6 products)    |           |            |
| 2 to 10% juice (4 products)   | 90-100    | 100        |
| Food (2 products)             | 70-75     | 72         |
| No Fruit (19 products)        | 32-100    | 62         |

**No Fruit** products generally had two or more forms of added sugars in the ingredient list, including high fructose corn syrup.

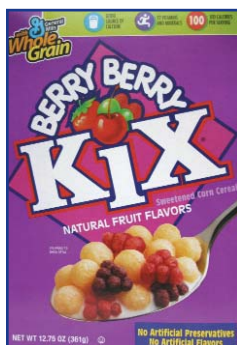
### The Packaging

Many of the foods in this study had brightly colored packages containing images of fruits and/or words related to fruits regardless of the actual content of fruit ingredients.

Of the 19 products that contained no fruit ingredients, 12 made two references to fruit, six had one reference to fruit, and one had three references to fruit. References to fruit included: pictures of fruit, use of the word “fruit” or “fruity” in the product name and/or description, advertising “fruit flavors” on the package, and using the name of a fruit to describe the product’s flavor (i.e., “strawberry kiwi” yogurt and “wild cherry” lifesavers).

For example, the box for *Berry Berry Kix* cereal uses an image of a cluster of several types of fruit above the letter “i” in Kix, the words “Natural Fruit Flavors,” and a photo of a large spoonful of the cereal which includes clusters that appear to be raspberries and blackberries. The list of ingredients re-veals that there are no fruit ingredients in this product besides natural fruit flavors, which, as noted above, have no nutritional value.

*Hi-C’s Boppin’ Strawberry Drink* boxes show images of whole strawberries skimming above a stream of fuchsia colored liquid and use the phrase “made with

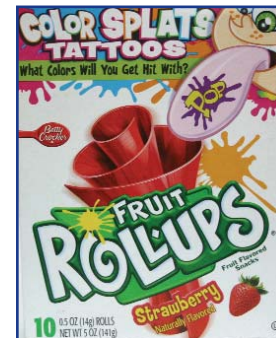


## PERCENTAGE OF CALORIES FROM SUGAR FOR SELECTED PRODUCT TYPES

| Category                                | Range (%) | Average (%) |
|---|-----------|-------------|
| Cereals (9 products)                    | 32-50     | 41          |
| Fruit Drinks (8 products)               | 86-100    | 95          |
| Fruit Roll-up type product (2 products) | 50-58     | 54          |
| Yogurt (3 products)                     | 55-68     | 61          |

real fruit juice” on the package. The Nutrition Facts panel states that the beverage is only 10% fruit juice and high fructose corn syrup and sugar are listed before the juice ingredients. *Capri Sun*, also features pictures of strawberries floating in a stream, and includes the statements “All Natural,” “Strawberry” in large yellow and red highlighted text. “Strawberry Flavored Juice Blend” appears in much smaller, black letters. The phrase “10% Fruit Juice” only appears at the top of the Nutrition Facts panel on the side of the box.

Three fruit snack products—*Fruit by the Foot*, *Fruit Roll-ups*, and *Fruit Gushers*—all state “Strawberry” in large letters on the label and the phrase “Fruit Flavored Snacks.” Pears or grape from concentrate are the first ingredient for all of these products. Yet the absence of dietary fiber, the listing of sugar and corn syrup as the second and third ingredients, and the average 50% calories from sugar imply there is very little real fruit in the product.



### DISCUSSION

We found that nearly two-thirds of highly-advertised children’s food products with images or references to fruit on the package contained little or no fruit and were high in added sweeteners. The packages might lead a parent to believe they are a healthier option for their children, when many do not actually deliver any of the nutritional benefits of whole fruit. With the

exception of a few products, children are not benefiting nutritionally from these highly-advertised products.

Only two out of the six beverages in the study contained 100% fruit juice. The remaining four products were primarily water and added sweeteners. As noted above, without a careful reading of detailed nutrition panels on the side of the package, it is not readily apparent that these products barely contain fruit juice. These products are calorie vehicles without any nutritional benefits, and there is a growing body of research that sweetened beverage consumption is associated with excess weight gain in children (Ludwig, 2001). One recent study found that low-income preschool children, who were already at risk to be overweight, were twice as likely to become overweight with the consumption of sweetened beverages (including drinks such as vitamin C-containing juices, other juices, fruit drinks, and soda) (Welsh, 2005).

Most of the food products in this study were high in added sweeteners. Adding sugar is a cheap way for food manufacturers to make food taste good (Brownell, 2004). Young children consume added sugars at well above recommended levels, and adolescents are consuming about double the recommended amounts of added sugars in their diets (IOM, 2006).

## CONCLUSION

There is reason to be concerned that current package labels and advertising are misleading parents and children. The Dietary Guidelines for Americans include fruit as an important part of a nutritionally-balanced diet. It is not the image of fruit, but actual fruit that is healthy for children. The packaging of these products reminds people of fruit and its nutritional value without delivering the benefits. Health conscious parents may be drawn to products that seem healthier for their children, but even parents who read labels may have a hard time identifying actual fruit content and determining the amount of sugar since added sweeteners are often listed under different names. Parents may find difficulty in making sense of the misleading messages displayed on children's food products. Parents deserve, and public health impera-

tives require, packaging that does not mislead consumers into thinking they are making healthy choices.

Food manufacturers can clear up this confusion by removing misleading images and statements from packaging such as allusions to fruit in products that contain little or no fruit, discontinuing advertising of highly-sweetened foods and beverages to children, and reformulating existing food and beverages to both significantly decrease added sweeteners and increase fruits, vegetables and whole grains.

The findings of this study also suggest that there may be an important role for government regulation. Current FDA regulations on health claims and product definitions such as those for fruit drinks are not sufficiently protecting parents and children; these regulations need to be updated to ensure the packaging clearly states fruit content on the cover. Further, parents and children would be assisted by requiring that added dietary sugars be included on the nutrition facts panel, so they can better understand how much sweetener is in these products.

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