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FILED
SEP 22 2009
FEDERAL DISTRICT COURT
SACRAMENTO, CALIFORNIA
M H JS

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

BZ

10 ROY WERBEL , individually and on
11 behalf of all others similarly situated,

CASE NO: 9 44567

12 *Plaintiff,*

COMPLAINT FOR INJUNCTIVE RELIEF,
RESTITUTION AND DAMAGES

13 vs.

14 PEPSICO, INC., a North Carolina
15 corporation; and DOES 1 through 10,
16 inclusive,

17 *Defendants.*

CLASS ACTION

JURY TRIAL REQUESTED

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23 Plaintiff Roy Werbel, by and through his attorneys, hereby complains and
24 alleges as follows:

25 I. PARTIES

26 1. Roy Werbel (hereinafter "Plaintiff"), is an individual consumer who at all times
27 material hereto, was and is a resident of California. For purposes of diversity
28 jurisdiction, he is a "citizen" of California. He respectfully requests a jury trial.

1 whereas, as set forth above, PepsiCo may be considered a citizen of either North
2 Carolina or New York. Therefore, diversity of citizenship exists under CAFA as required
3 by 28 U.S.C. § 1332(d)(2)(A). Furthermore, Plaintiff alleges that more than two-thirds of
4 all of the members of the proposed Plaintiff Class in the aggregate are citizens of a
5 state other than California, where this action is originally being filed, and that the total
6 number of members of the proposed Class is greater than 100, pursuant to 28 U.S.C. §
7 1332(d)(5)(B).

8 5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because
9 Defendant conducts business within, may be found in, and is subject to personal
10 jurisdiction in this district. The original of the "Declaration of Jeffrey S. Kravitz,
11 Pursuant to Civil Code §1780(c) of the Consumer Legal Remedies Act, Civil Code
12 §§1750 et seq." regarding venue under the California Consumer Legal Remedies Act is
13 filed as Exhibit "A" , and is incorporated herein by reference.

14 **III. GENERAL ALLEGATIONS**

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

18 7. Whenever reference in this Complaint is made to any act or transaction of
19 PepsiCo, such allegation shall be deemed to mean that the principals, officers,
20 directors, employees, agents, and/or representatives of PepsiCo committed, knew of,
21 performed, authorized, ratified and/or directed such act or transaction on behalf of
22 PepsiCo while actively engaged in the scope of their duties.

23 **IV. FACTUAL ALLEGATIONS**

24 8. Defendant PepsiCo manufactures, markets, and promotes the Product
25 referenced above.

26 9. In addition to the use of the word "berries" in the Product name, the Product's
27 principal display panel ("PDP") - the portion of the Product box designed to face
28 consumers as they shop in a market aisle - features the Product's namesake, "Cap'n

1 Crunch” thrusting a spoonful of “Crunchberries” at the prospective buyer.

2 10. The Crunchberries are pieces of cereal in bright fruit colors, shaped to
3 resemble berries. Close inspection reveals that the Crunchberries on the PDP are not
4 really berries, but the colorful Crunchberries, combined with the “berry” in the Product
5 name, conveys only one message: that Cap’n Crunch is not all sugar and starch – it
6 contains redeeming fruit.

7 11. This message is supplemented and reinforced by marketing which
8 represents, in a matter-of-fact manner: “Crunch Berries is a combination of Crunch
9 biscuits *and colorful red, purple, teal and green berries*” (Emphasis added).

10 12. There can be no other reason for the emphasis on berries than to lead
11 consumers to believe the Product is made with real fruit content. Neither PepsiCo nor
12 Quaker is a novice when it comes to marketing.

13 13. In truth, however, the Product contains no actual berries of any kind. If the
14 consumer takes the box from the shelf and examines the fine print of the ingredient list,
15 he or He will discover that the only fruit content is a touch of strawberry fruit
16 concentrate – twelfth in order on the ingredient list, just after partially hydrogenated
17 soybean oil and “natural and artificial flavors,” and just before malic acid.

18 14. Natural flavoring provides no nutritional value.¹ The rest of the ingredients
19 are: corn flour, sugar, oat flour, brown sugar, coconut oil, salt, sodium citrate, nonfat dry
20 milk, whey, niacinamide, reduced iron, zinc oxide, yellow 5, red 40, mono and
21 diglycerides, yellow 6, blue 1, thiamin mononitrate, pyridoxine hydrochloride, BHT,
22 riboflavin and folic acid. True and correct representations of the Product labeling and
23 marketing copy are attached hereto as Exhibit “B” and incorporated by reference
24 herein.

25 15. Plaintiff contends that Defendant’s marketing of the Product in this manner is
26 deceptive and likely to mislead and deceive a “reasonable consumer” such as himself

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28 ¹ 21 CFR § 101.22(a)(3). “The term natural flavor or natural flavoring means the essential oil...or fermentation products thereof, whose significant function in food is flavoring rather than nutritional.”

1 in violation of California statutes and common law causes of action that parallel, and do
2 not conflict with, the labeling requirements established by the Federal Food, Drug, and
3 Cosmetic Act ("FDCA").² See California's Sherman Food, Drug, and Cosmetic Law.³

4 16. During the past four years, Plaintiff, at various times purchased the Product,
5 in large part because he had been exposed to advertising and representations of
6 PepsiCo and Quaker as set forth above. He was misled by the packaging and
7 marketing, which by design and intent convey the message that the Product contains
8 real fruit. He trusted the Quaker label because of the company's long history of
9 producing other wholesome breakfast cereals

10 17. However, Plaintiff has since learned that many popular foods and beverages
11 are marketed as if they are made with fruit, but actually contain little or no fruit at all.
12 The Strategic Alliance for Healthy Food and Activity Environments (hereinafter
13 "Strategic Alliance") has published the results of a study examining the ingredients of
14 widely advertised foods with references to fruit on the packaging. A true and correct
15 copy of the study, annotated to highlight references to the Product, is attached hereto
16 as Exhibit "C" and incorporated by reference.

17 18. The study concluded, among other things, that despite advertising and
18 packaging that suggests the presence of fruit, more than half of the food products
19 studied – including the Product - contain no fruit at all. The study concluded that there
20 is reason to be concerned that current packaging labels and advertising are misleading
21 consumers about the nutritional value of some of the most popular foods and snacks.

22 19. Plaintiff relied on PepsiCo's marketing representations. Had he known that
23 "Cap'n Crunch® with Crunchberries" contained no fruit, He would not have purchased it.

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² Codified at 21 U.S.C. §§ 301, et seq., with implementing regulations found at 21 C.F.R. §§ 1.1, et seq.

26 ³ Cal. Health and Safety Code §§ 109875 et seq. (The FDCA labeling regulations also have been
27 incorporated into California law by reference. California Section 110100 of the California Health and
28 Safety Code provides: "All food labeling regulations and any amendments to those regulations adopted
pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food
labeling regulations of this state.")

1 In doing so, he was deprived of the benefit of his bargain; the deceptive
2 representations described above cost him money because he received a Product of
3 less value than he paid for it.

4 20. The defendant is aware of the potential for members of the public to be
5 misled about the existence of natural berries in their product and have taken no steps
6 to protect the public. On December 4, 1967, the examining attorney from the US Patent
7 and Trademark Office sent to the defendant a letter stating that the trademark
8 application for Crunch Berries could not be approved because:

9 *The word BERRIES is considered either merely descriptive or deceptively*
10 *misdescriptive of the good here and should be disclaimed apart from the mark shown.*

11 A copy of the PTO document is attached here as exhibit "D".

12 **V. CLASS ALLEGATIONS**

13 21. Pursuant to California Civil Code § 1781, California Code of Civil Procedure
14 § 382, and Federal Rule of Civil Procedure 23, Plaintiff brings this action on behalf of
15 himself and all other California consumers who purchased the Product during the class
16 period, which is defined as the four years preceding the filing of this action. The
17 practices and omissions of PepsiCo were applied uniformly to all members of the
18 Class, so that the questions of law and fact are common to all members of the Class.
19 All putative Class members were and are similarly affected by having purchased and
20 used the above-mentioned Product and the relief sought herein is for the benefit of
21 Plaintiff and members of the putative class.

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

27 23. Questions of law and fact common to the Plaintiff Class and the subclasses
28 exist that predominate over questions affecting only individual members, including, inter

1 alia, the following:

- 2 (a) Whether Defendant's practices and representations made in connection
3 with the advertising, marketing, promotion, labeling and sales of the
4 Product as set forth herein were deceptive, unlawful or unfair in any
5 respect, thereby violating California's Unfair Competition Law ("UCL),
6 California Bus. & Prof. Code § 17200 et seq.;
- 7 (b) Whether Defendant's practices and representations made in connection
8 with the advertising, marketing, promotion, labeling and sales of the
9 Product as set forth herein were deceptive in any respect, thereby
10 violating California's False Advertising Law ("FAL"), California Bus. &
11 Prof. Code § 17500 et seq.;
- 12 (c) Whether Defendant's practices and representations made in connection
13 with the advertising, marketing, promotion, labeling and sales of the
14 Product as set forth herein were deceptive and/or misleading in any
15 respect;
- 16 (d) Whether Defendant breached any implied or express warranties in
17 connection with the practices and representations made in the
18 advertising, marketing, promotion, labeling and sales of the Product as
19 set forth herein, at the expense of and to the detriment of Plaintiff and
20 Class members;
- 21 (e) Whether Defendant violated Civil Code §1770(a)(5) et seq. ("CLRA") by
22 the practices and representations made in connection with the
23 advertising, marketing, promotion, labeling and sales of the Product as
24 set forth herein; and
- 25 (f) Whether Defendant's conduct as set forth herein injured consumers, and
26 if so, the extent of the injury.

27 24. The claims asserted by Plaintiff in this action are typical of the claims of the
28 members of the Plaintiff Class and all subclasses as described herein, the claims arise

1 from the same course of conduct by PepsiCo, and the relief sought is common.

2 25. Plaintiff will fairly and adequately represent and protect the interests of the
3 members of the Plaintiff Class and all subclasses. Plaintiff has retained competent
4 counsel.

5 26. Certification of this class action is appropriate under FRCP 23(b) and
6 California Code of Civil Procedure § 382, and California Civil Code § 1781, because
7 the questions of law or fact common to the respective Class members predominate
8 over questions of law or fact affecting only individual members. This predominance
9 makes class litigation superior to any other method available for the fair and efficient
10 adjudication of these claims. Absent a class action, it would be highly unlikely that the
11 representative Plaintiff or any other Class member would be able to protect their own
12 interests, because the cost of litigation through individual lawsuits might exceed
13 expected recovery. Certification also is appropriate because PepsiCo acted or refused
14 to act on grounds generally applicable to the Class, thereby making appropriate final
15 injunctive relief with respect to the Class as a whole. Further, given the large number of
16 consumers of the Product, allowing individual actions to proceed in lieu of a class
17 action would run the risk of yielding inconsistent and conflicting adjudications.

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

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VI. FIRST CAUSE OF ACTION

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

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

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

11 30. Plaintiff alleges that PepsiCo committed the unlawful, unfair, and deceptive
12 practices set forth above in this Complaint.

13 31. These practices offend public policy, are unconscionable, are oppressive
14 and unscrupulous, and cause substantial injury to consumers.

15 32. The acts and concealment of material facts, as described in this First
16 Amended Complaint, have a capacity, tendency or likelihood to deceive or confuse the
17 "reasonable consumer" regarding the contents and nutritional value of the Product.

18 33. Plaintiff alleges that PepsiCo committed an unfair business act or practice as
19 set forth above. The utility of PepsiCo's misleading and/or deceptive advertising,
20 promotion, labeling and/or marketing for the purpose of selling the Product is negligible,
21 if any, when weighed against the extent of harm to the general public, Plaintiff and
22 Class members. The harmful impact upon members of the general public and the Class
23 who were and are misled and deceived with respect to PepsiCo's advertising,
24 promotion, marketing and labeling of the Product far outweighs any reasons or
25 justifications by PepsiCo for engaging in these practices. As alleged in this First
26 Amended Complaint, PepsiCo had an improper motive (profit over truthful advertising,
27 promotion, labeling and marketing) in misrepresenting and/or omitting the nature of the
28 Product in its advertising, promotion, marketing and labeling. These deceptive and

1 misleading practices were and are under the sole control of PepsiCo, and they were
2 deceptively hidden from members of the general public in PepsiCo's advertising,
3 promotion, marketing and labeling of the Product.

4 34. As a purchaser of the Product, and as a member of the general public in
5 California who has been injured by PepsiCo's unlawful and/or unfair practices, Plaintiff
6 is entitled to and does bring this class action seeking all available remedies under
7 California's Unfair Competition Law, including declaratory and injunctive relief and
8 restitution, as well as attorneys' fees and costs.

9 35. PepsiCo committed a deceptive act or practice by making written and oral
10 material representations and omissions as set forth above that have a capacity,
11 tendency, or likelihood to deceive or confuse a reasonable consumer as to the
12 Product's actual nature, as described above.

13 36. The violations of the CLRA, set forth in detail below, constitute a predicate
14 violation of the UCL's "unlawful prong," and substantiate the deception inherent in the
15 representations made by PepsiCo.

16 37. The unfair, deceptive and/or unlawful acts and practices of PepsiCo, as
17 alleged in this Complaint, present a threat to members of the general public in that
18 PepsiCo is able to carry on this scheme of misrepresentation and omission without
19 consequence.

20 38. Plaintiff alleges that PepsiCo continues these unfair, deceptive and/or
21 unlawful business practices described herein.

22 39. PepsiCo's acts, misrepresentations, concealment of material facts, and
23 failures to disclose as alleged in this Complaint, constitute unfair, deceptive and/or
24 unlawful business practices within the meaning of the California Bus. & Prof. Code §
25 17200, et seq. Plaintiff and members of the general public were, and are likely to be
26 deceived by PepsiCo's scheme to misrepresent the fruit content of the Product, as
27 alleged in this Complaint.

28 40. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, on behalf of

1 himself and members of the general public, seeks an order of this Court:

2 (a) Enjoining PepsiCo from continuing to engage, use, or employ any
3 business practice found by this Court to be unfair, deceptive and/or
4 unlawful under the UCL; and

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

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

11 42. As a result of PepsiCo's violation of the UCL, Plaintiff and the Class are
12 entitled to restitution for out-of-pocket expenses and economic harm suffered.

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

18 **VII. SECOND CAUSE OF ACTION**

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

20 44. Plaintiff realleges and incorporates by reference the allegations set forth in
21 each of the preceding paragraphs of this Complaint.

22 45. In violation of California Bus & Prof. Code § 17500, PepsiCo has
23 disseminated, or caused to be disseminated, deceptive and misleading statements in
24 advertisements, promotion labeling and/or marketing for the Product as set forth above.

25 46. PepsiCo's representations in the advertisements, promotions, labeling
26 and/or marketing of the Product are deceptive and misleading because the Product
27 contains only nominal fruit content.

28 47. Plaintiff alleges that PepsiCo continues to disseminate, or cause to be

1 disseminated, the deceptive and misleading representations described herein.

2 48. PepsiCo is disseminating representations about the Product, which by their
3 very nature are deceptive and misleading within the meaning of California Bus. & Prof.
4 Code §17500, et seq. Such representations are likely to deceive a reasonable
5 consumer and present a continuing threat to the general public; they will continue to
6 mislead consumers into purchasing the Product on deceptive premises. The violations
7 of the CLRA, set forth in detail below, constitute a predicate violation of the FAL as
8 alleged herein and substantiate the deception inherent in the representations made by
9 PepsiCo.

10 49. In making and disseminating the representations alleged herein, PepsiCo
11 knew or should have known that they were deceptive and misleading, and it acted in
12 violation of California Bus. & Prof. Code § 17500, et seq.

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

- 17 (a) Enjoining PepsiCo from continuing to engage, use, or employ any
18 business practice this Court finds to be in violation of the FAL; and
19 (b) Restoring all monies that may have been acquired by means of
20 PepsiCo's deceptive and misleading statements described herein.

21 51. If PepsiCo's conduct is not enjoined, Plaintiff and the members of the Class
22 will continue to be damaged by PepsiCo's deceptive and misleading advertising.

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

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VIII. THIRD CAUSE OF ACTION

(Intentional Misrepresentation)

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

5 54. PepsiCo has represented to the public, including Plaintiff, by packaging,
6 advertising, labeling and other means that the Product has characteristics, ingredients,
7 and qualities that it does not have, as set forth in detail above and incorporated herein.
8 Plaintiff and each Class member were exposed to these representations each time they
9 purchased the Product at the point of sale for each purchase of the Product.

10 55. PepsiCo's representations were deceptive in that the Product contains no
11 fruit content of any nutritional value.

12 56. At the time PepsiCo made the representations herein alleged, PepsiCo knew
13 the representations were deceptive.

14 57. PepsiCo intentionally made the representations above for the purpose of
15 deceiving Plaintiff and Class members into purchasing a product that is not what it is
16 represented to be, thereby depriving them of the benefit of their bargain.

17 58. Plaintiff and Class members reasonably relied upon Defendant's
18 representations as set forth above, because they believed Defendant and Quaker to be
19 reputable companies.

20 59. As a proximate result of these acts, Plaintiff and other consumers were
21 induced to spend an amount of money to be determined at trial on the Product; the
22 deceptive representations described above cost them money because they received a
23 Product of less value than they paid for it, a product they would not had purchased but
24 for the misrepresentations.

25 60. Plaintiff and other consumers, in purchasing, using, and consuming the
26 Product as herein alleged, relied upon PepsiCo's above representations, all to their
27 damage as hereinabove alleged. In doing the things aforementioned, PepsiCo was
28 guilty of malice, oppression, and fraud, and Plaintiff and Class members are, therefore,

1 entitled to recover exemplary or punitive damages.
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4 **IX. FOURTH CAUSE OF ACTION**

5 **(Breach of Express Warranty)**

6 61. Plaintiff realleges and incorporates by reference the allegations set forth in
7 each of the preceding paragraphs of this Complaint.

8 62. Defendant made and continues to make express warranties for the Product
9 as described in detail above and incorporated herein, including but not limited to the
10 statement that the Product contains berries.

11 63. As stated herein, the Product contains only nominal fruit content of no
12 nutritional value. This constitutes a breach of express warranties based on all laws that
13 support the express warranty claims by Plaintiff and other Class members. These laws
14 include but are not limited to California Common Law, the California Uniform
15 Commercial Code and California Civil Code section 1790 et seq. (California's Song-
16 Beverly Act).

17 64. The failure of the Product to be as expressly warranted by Defendant has
18 caused Plaintiff and Class members damages as herein described, in that, among
19 other things, they were induced to spend an amount of money to be determined at trial
20 on the Product; the breach of express warranties described above cost them money
21 because they received a Product of less value than they paid for it, a product they
22 would not had purchased but for the express warranties.

23 65. Plaintiff gave timely notice to Defendant of this breach on behalf of
24 themselves and all members of Plaintiff Classes either directly, or indirectly, including
25 upon the filing of the original complaint and the mailing of the CLRA notice letter
26 described below. Plaintiff could not return the Product to Defendant for correction as
27 the defect was irreparable.
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X. FIFTH CAUSE OF ACTION

(Breach of Implied Warranty)

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

5 67. PepsiCo represented to consumers, including Plaintiff and other Class
6 members, by packaging, advertising, labeling and other means described in detail
7 above and incorporated herein, that the Product was a substantially fruit-based product
8 deriving nutritional value from fruit.

9 68. PepsiCo is a merchant of food products, and knew the qualities sought in the
10 Product by Plaintiff and Class members; there was in the sale of the Product an implied
11 warranty that the goods were merchantable and fit for the purpose they were sought.

12 69. PepsiCo breached the warranties implied in the contract for sale of the
13 Product as it does not have the characteristics, qualities, and uses represented by
14 Defendant and sought by Plaintiff and Class members. In fact, the Product contains
15 only nominal fruit content of no nutritional value, as set forth above.

16 70. As a result thereof, Plaintiff and other consumers did not receive goods as
17 impliedly warranted by PepsiCo.

18 71. As a proximate result of these breaches of warranty by PepsiCo, Plaintiff and
19 Class members suffered damages in an amount to be determined at trial, in that,
20 among other things, they were induced to spend an amount of money on the Product;
21 the breach of implied warranties described above cost them money because they
22 received a Product of less value than they paid for it, a product they would not had
23 purchased but for the express warranties.

24 **XI. SIXTH CAUSE OF ACTION:**

25 **(Consumers Legal Remedies Act)**

26 72. Plaintiff realleges and incorporates by reference the allegations set forth in
27 each of the preceding paragraphs of this Complaint.

28 73. This cause of action is brought pursuant to the CLRA.

1 74. Plaintiff and each member of the Class are “consumers” within the meaning
2 of Civil Code §1761(d).

3 75. The purchases of the Product by Plaintiff and each member of the Class
4 were and are “transactions” within the meaning of Civil Code §1761(e).

5 76. PepsiCo's marketing, promotion, and sales of the Product within California,
6 as alleged herein, violated and continues to violate the CLRA in at least the following
7 respects as set forth in detail above:

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

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

- 18 (a) Enjoining PepsiCo from continuing to engage in any practice determined
19 by this Court to violate the CLRA;
- 20 (b) Requiring PepsiCo to make full restitution of all monies wrongfully
21 obtained as a result of the conduct described above;
- 22 (c) Requiring PepsiCo to disgorge all ill-gotten gains flowing from the conduct
23 described above; and
- 24 (d) Enjoining PepsiCo from such deceptive business practices in the future.

25 78. Pursuant to the requirements of the CLRA, Plaintiff, by and through counsel,
26 notified PepsiCo in writing of the particular violations of Section 1770 of the CLRA and
27 demanded certain corrective actions. Plaintiff sent that notice by certified mail, return-
28 receipt requested. PepsiCo failed to respond to Plaintiff's demand within thirty days of

1 that letter, and pursuant to section 1782 of the CLRA, Plaintiff amends this pleading to
2 request statutory damages, actual damages, plus punitive damages, interest and
3 attorneys' fees.

4 79. Regardless of an award of damages, however, Plaintiff also seeks and is
5 entitled to, pursuant to Section 1780(a)(2) of the CLRA, an order for the equitable relief
6 described above, as well as costs, attorney's fees and any other relief which the Court
7 deems proper.

8 **XII. PRAYER FOR RELIEF**
9 **(AGAINST ALL DEFENDANTS)**

10 WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated,
11 and for members of the general public, prays for relief as follows:

- 12 1. For an order certifying that this action may be maintained as a class action.
13 2. For an award of equitable relief:

14 (a) Enjoining Defendant from engaging in acts and/or practices
15 determined by this Court to be in violation of the UCL, the FAL
16 and/or the CLRA;

17 (b) Requiring Defendant to make full restitution of all monies obtained
18 as a result of any act and/or practice determined by this Court to
19 be in violation of the UCL, the FAL and/or the CLRA; and

20 (c) Requiring Defendant to disgorge all ill-gotten gains flowing from
21 any act and/or practice determined by this Court to be in violation
22 of the UCL, the FAL and/or the CLRA.

23 3. For actual and punitive damages under the CLRA in an amount to be proven
24 at trial, including any damages as may be provided for by statute.

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

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

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

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


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

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6 Pursuant to FRCP 38 a Jury Trial is demanded.

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8 RESPECTFULLY SUBMITTED:

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10 Dated: September 22, 2009

KRAVITZ LAW OFFICE



Jeff Kravitz
Attorney for Plaintiff

Exhibit "A"

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3 Declaration Re: Cal. Civil Code § 1780 (c)

4 I, Jeffrey S. Kravitz do hereby declare:

5 1. I am an attorney at law duly admitted to practice before this Court and
6 before all the Courts of the State of California. I am the attorney of record for the Plaintiff
7 in this case. The matters stated herein are true to my own knowledge, except as to
8 those matters stated as to information and belief and to those matters, I believe them to
9 be true. If call upon a could and will competently testify to the matters herein.
10

11 2. California Civil Code § 1780 (c) provides that a plaintiff seeking to bring a
12 claim under section 1780 (a) of the California Consumer Legal Remedies Act, such as
13 in this case may commence that action "in the county in which the person against whom
14 it is brought resides, has his or principal place of business, or is doing business, or in
15 the county where the transaction or any substantial portion thereof occurred."
16

17 3. Accordingly, this judicial District is a proper venue in which to bring this
18 action as the defendant at all relevant times in this action was and/or is "doing business"
19 within the County of this district by marketing, advertising and selling the subject product
20 of this action, and/or other of their products within said County.
21

22
23 I declare under penalty of perjury under the laws of the United States and California that
24 the foregoing is true and correct.
25

26 Executed on September 21, 2009 in Sacramento California
27

28

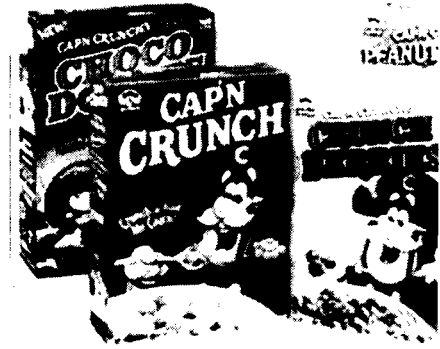
JEFFREY S. KRAVITZ

Exhibit “B”

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 B-2 page 23 of 35~~ B-2



CAP'N CRUNCH'S CRUNCH

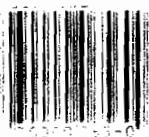
SWEETENED CORN &
OAT CEREAL

Glow in The Dark

NET WT 15 OZ • 425 g



CAP'N CRUNCH'S
CRUNCH
SWEETENED CORN &
OAT CEREAL



CRUNCH

Nutrition Facts

Amount Per Serving		% Daily Value*
Total Fat	10g	20%
Total Crust	10g	20%
Total Crunch	10g	20%
Total Cereal	10g	20%
Total Sugar	10g	20%
Total Protein	10g	20%
Total Fiber	10g	20%
Total Fat	10g	20%
Total Crust	10g	20%
Total Crunch	10g	20%
Total Cereal	10g	20%
Total Sugar	10g	20%
Total Protein	10g	20%
Total Fiber	10g	20%

Ingredients: Sweetened corn, oat cereal, sugar, salt, malted barley, natural vanilla flavor, artificial colors, and natural flavors. Contains 2% or less of: soy flour, guar gum, and natural flavors.

CONTAINS MILK INGREDIENTS

Questions or Comments?

B-3

CRUNCH A-TIZED

CRUNCH A-TIZED



FIND JEAN LAFOCETE!

Where do pirates go on vacation?

Get a CRUNCH-A-TIZED start to an ACTIVE day!

CRUNCH ROCK ISLAND

CRUNCH VOLCANO ISLAND

START!

Why did the pirate wear a parka?

What did the pirate ask Cap'n?

MT. CRUNCH ISLAND

This way to Search the High Seas with Cap'n for fun and prizes!
www.capunrunch.com

Search the High Seas

1. Scan your Cap'n Crunch A-TIZED box.
2. Go to www.capunrunch.com to search the High Seas.
3. Enter your unique code to see if you're on the Grand Prize list! Don't trade on ocean codes! See below for how to get one.

Grand Prize: \$20,000 Cash + 2.0 Digital Video Camera

1st Prize: \$10,000 Cash + 1.0 Digital Video Camera

2nd Prize: \$5,000 Cash + 1.0 Digital Video Camera

3rd Prize: \$2,500 Cash + 1.0 Digital Video Camera

4th Prize: \$1,250 Cash + 1.0 Digital Video Camera

5th Prize: \$625 Cash + 1.0 Digital Video Camera

6th Prize: \$312.50 Cash + 1.0 Digital Video Camera

7th Prize: \$156.25 Cash + 1.0 Digital Video Camera

8th Prize: \$78.125 Cash + 1.0 Digital Video Camera

9th Prize: \$39.0625 Cash + 1.0 Digital Video Camera

10th Prize: \$19.53125 Cash + 1.0 Digital Video Camera

11th Prize: \$9.765625 Cash + 1.0 Digital Video Camera

12th Prize: \$4.8828125 Cash + 1.0 Digital Video Camera

13th Prize: \$2.44140625 Cash + 1.0 Digital Video Camera

14th Prize: \$1.220703125 Cash + 1.0 Digital Video Camera

15th Prize: \$610.353125 Cash + 1.0 Digital Video Camera

16th Prize: \$305.1765625 Cash + 1.0 Digital Video Camera

17th Prize: \$152.58828125 Cash + 1.0 Digital Video Camera

18th Prize: \$76.294140625 Cash + 1.0 Digital Video Camera

19th Prize: \$38.1470703125 Cash + 1.0 Digital Video Camera

20th Prize: \$19.07353515625 Cash + 1.0 Digital Video Camera

B-4

EXHIBIT "C"

WHERE'S THE FRUIT?

This document was prepared by Prevention Institute
Principal authors:

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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.

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Prevention

Putting prevention
at the center of community well-being

~~Exhibit 111~~ C-1

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 phrase 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: Advertising 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

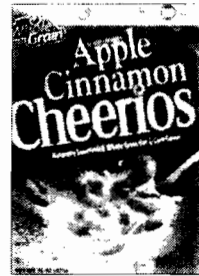
the brands that contained words and images on the package related to fruit and/or fruit ingredients. Of the 70 branded products we reviewed, 37 had references to fruit on the packaging.

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**, oat meal, corn starch, **corn syrup**, dried apple pieces, mango and orange juice, calcium carbonate, salt, sodium, tri-sodium phosphate, zinc, and iron, vitamin E, B vitamin, artificial flavor, vitamin B6, vitamin B2, vitamin B1, vitamin E, B vitamin, vitamin B12, vitamin D, wheat starch, vitamin



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



C-3

TABLE 1. FRUIT CONTENT BY BRAND

Category	# of Products	% of Total Products	Brands
Fruit	10	27%	Apple Cinnamon Cheerios Apple Jacks Berry Burst Cheerios (Strawberry) Banana Triple Berry Eggo Waffles Apple Cinnamon Berkeyberry Strawberry Keurig Egg's Pop (Strawberry) Quaker Chewy 9g Quaker Granola Bars Banana Apple Smucker's Jam Strawberry (Fruit) Strawberry Fruit Pops (Strawberry) Garden of Eatin' Fruit Snacks Strawberry
100% Fruit Juice	2	6%	Capri Sun Fruit Waves (Grape) Juicy Juice
Minimal Fruit	6	16%	5% Juice Drink Sunny D Light Fruit Drinks 10% Juice Drink Capri Sun (Strawberry) Hi-C Fruit Drinks Bobo's Strawberry Kool-Aid Jammers Food Products Popsicle Orange Cherry Grape Skittles
No Fruit	19	51%	Beverages (Nestle Milk and Drink Mix strawberry) Food Products All麦加, Berry Berry Kix Bubble Tape Captain Crunch with Crunch berries, Dannon Danimals (Strawberry Explosion) Loop (Strawberry) Chewy Juicy Fruit Gum Life (Wrigley) Pop Party Pebbles Push Pop Cherry (Ritter) Cheer Starbursts Tix Cereal Trix Cereal Strawberry Kiwi (Zellers) Yoplait Go-Gurt Yogurt (Strawberry) Popcorn

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 Dietetic Association (AAP) and the U.S. Dietary Guidelines recommend that children be encouraged to eat whole fruit. If only juice is consumed, they recommend only 100% fruit juice that intake is limited to 4-6 ounces per day. AAP, JSDHHS

C-9

PERCENTAGE OF CALORIES FROM SUGAR

Category	Range (%)	Median (%)
Fruit: 10 products	4-90	~
100% Fruit Juice: 2 products	36-92	~
Minimal Fruit: 6 products	~	~
2 to 10% Juice: 4 products	90-100	~
Food: 2 products	70-75	~
No Fruit: 19 products	32-100	~

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 reveals 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



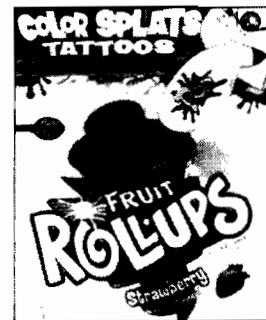
PERCENTAGE OF CALORIES FROM SUGAR FOR SELECTED PRODUCT TYPES

Category	Range (%)	Average (%)
Cereals: 9 products	32-50	41
Fruit Drinks: 8 products	86-100	95
Fruit Roll-ups: 1 product	~	~
Yogurt: 2 products	50-58	54
Yogurt: 3 products	55-68	~

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 Cakes*

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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EXHIBIT "D"

FD-1-69

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U.S. DEPARTMENT OF COMMERCE
PATENT OFFICE
WASHINGTON

PAPER No. 1

All communications respecting
this application should give the
serial number, date of filing,
and name of the applicant.

Mailed DEC 4 1967

Woodson, Pattishall &
McAuliffe
1225 Nineteenth St. N. W.
Washington, D. C. 20038

Ser. No.: 283,072

Applicant: The Quaker Oats Company

MARK: CRUNCH BERRIES

The word BERRIES is considered either merely
descriptive or deceptively misdescriptive of the goods
here and should be disclaimed apart from the mark shown.

A search of the Office records fails to show
that the mark, when applied to applicant's goods, is
confusingly similar to any registered mark.

DE Freed
Examiner, Div. II

DEFreed:feh (Wo 7-2876)

**A proper response to this Office action must be received within 6 months
from the date of this action in order to avoid ABANDONMENT.**