

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RUSSELL CHRISTOFF,

Plaintiff and Respondent,

v.

NESTLÉ USA, INC.,

Defendant and Appellant.

B182880

(Los Angeles County
Super. Ct. No. EC036163)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT*

It is ordered that the opinion filed June 29, 2007, be modified as follows:

On page 24, add the following as a second paragraph to footnote 10:

Nestlé also argues that section 3344 effects a penalty or forfeiture requiring the application of Code of Civil Procedure section 340, subdivision (a). That argument, however, is not consistent with the definitions of penalty and forfeiture. The recovery of profits is not a mandatory penalty irrespective of the actual damages sustained but is instead based on a theory of unjust enrichment. (See *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1242; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 978.)

There is no change in the judgment.

Appellant's petition for rehearing is denied.

*COOPER, P.J.,

RUBIN, J.,

BOLAND, J.