

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

SARA WEISBLUM and ANTOINETTE  
BAZIKOS, individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

SIROB IMPORTS INC.

Defendant.

Civil Action No.

**CLASS ACTION COMPLAINT**

Plaintiffs Sara Weisblum and Antoinette Bazikos (“Plaintiffs”) by their attorneys, make the following allegations pursuant to the investigations of counsel and upon information and belief, except as to the allegations specifically pertaining to themselves or their counsel, which are based on personal knowledge.

**NATURE OF THE ACTION**

1. This is a class action against Sirob Imports Inc. (“Defendant”) for misbranding edible oil products sold to consumers. Defendant markets oils for human consumption under the “Kalamata” brand as “100% Pure olive oil.” But Defendant’s “100% Pure olive oil” is nothing of the sort. Instead of “olive oil,” Defendant’s product consists of an industrially produced, chemically derived fat known as “olive-pomace oil” or “olive-residue oil” (hereafter “Pomace Oil”).

2. Pomace Oil is extracted from olive pomace using a combination of carcinogenic chemical solvents and high temperatures. Olive pomace is a waste byproduct of the olive oil making process consisting of leftover olive skins and pits, among other things. Unsurprisingly,

because Pomace Oil is obtained only through chemical solvent treatments and high temperatures, it does not appear in pure olive oil. And, as a factual and legal matter, Pomace Oil is *not* olive oil.

3. Pomace Oil is considerably cheaper than pure olive oil, and it has a different chemical composition, sensory profile (i.e., taste and aroma), nutritional benefits, culinary uses, and performance characteristics than pure olive oil. For example, Pomace Oil has a different composition of vitamins and antioxidants than pure olive oil. Olive oil tastes and smells like olives, but Pomace Oil is tasteless and odorless. When cooking, Pomace Oil has a different smoke point than pure olive oil, and it is not typically used in dishes and recipes that call for pure olive oil.

4. Despite vigilant policing by responsible industry members, the cost difference between pure olive oil and Pomace Oil creates a financial incentive for fraudsters like Defendant to adulterate olive oils with cheaper oils (such as olive residue oil or seed oils) and thereby disguise Pomace Oil as olive oil.

5. Calling a product “olive oil” when it contains Pomace Oil or any other non-olive oil is barred by an array of olive oil conventions, standard industry practices, international regulations, and federal and state laws. According to various authorities, including New York state law, a product containing more than a negligible amount of Pomace Oil must contain a prominent disclosure of that fact on the product label. Defendant does not disclose its use of Pomace Oil, and instead misleads purchasers as to the very nature of its product by, among other things, disguising Pomace as “100% Pure olive oil.”

6. The label and packaging of Kalamata “100% Pure olive oil” clearly and conspicuously misrepresents that the product is “100% Pure olive oil” in 4 places: the front, back, and on both sides of the product packaging.

7. Defendant’s misbranding is intentional. Olive oil and Pomace Oil arise out of distinct production processes, and any reasonable quality-control check would detect the presence of Pomace Oil. A packer or distributor of olive oils therefore does not unwittingly mislabel Pomace as olive oil. This is particularly so in the case of Defendant, which also offers Pomace Oil products for sale.

8. The mislabeling of Kalamata “100% Pure olive oil” renders the product completely worthless. Pomace Oil is not remotely what an ordinary consumer understands olive oil to be. Thus, by mislabeling its product as “100% Pure olive oil,” Defendant misrepresents the very nature of the product that it sells, and thereby dupes reasonable consumers into purchasing something other than what they intended to buy and expected to receive. Nevertheless, Kalamata “100% Pure olive oil” is labeled and sold as pure olive oil, and it commands a substantial price premium over other Pomace Oil products. For example, Kalamata “100% Pure olive oil” commands an 82% price premium, per fluid ounce, over Marconi Olive Pomace Oil, a competing Pomace brand:

<b>Brand</b>	<b>Quantity</b>	<b>Price</b>	<b>Unit Price</b>
Kalamata “100% Pure olive oil”	101 fl. oz.	\$17.99	\$0.178 per fl. oz.
Marconi Olive Pomace Oil	128 fl. oz.	\$12.49	\$0.098 per fl. oz.

Plaintiffs and class members have thus been hit with a costly double-whammy: a premium purchase price for a worthless product.

9. Through this lawsuit, Plaintiffs seek to recover, for themselves and all other similarly situated purchasers of Kalamata “100% Pure olive oil” in the United States, a full refund of their purchase price.

### **THE PARTIES**

10. Plaintiff Sara Weisblum is a citizen of New York who resides in Forest Hills, New York. In 2013, Ms. Weisblum purchased a 101 fl. oz. tin of Kalamata “100% Pure olive oil” at Super Stop and Shop in West Hempstead, New York. The front, back, and both sides of the 101 fl. oz. tin she purchased prominently represented that the tin contained “100% Pure olive oil” in large letters. Ms. Weisblum saw these representations prior to and at the time of purchase, and understood them as representations, warranties, promises, and affirmations of fact that the product was, in fact, 100% pure olive oil. These representations were material and induced Ms. Weisblum to purchase the product. Moreover, Ms. Weisblum relied on these representations and warranties in deciding to purchase Kalamata “100% Pure olive oil,” and these representations and warranties were part of the basis of the bargain, in that she would not have purchased Kalamata “100% Pure olive oil” if she had known that the product was not, in fact, 100% pure olive oil but contained Pomace Oil. In fact, had she known the truth, Ms. Weisblum would not have purchased Kalamata “100% Pure olive oil” at any price. As a result of this mislabeling, Ms. Weisblum’s expectations that Kalamata “100% Pure olive oil” was, in fact, pure olive oil were not satisfied.

11. Plaintiff Antoinette Bazikos is a citizen of New Jersey who resides in Glasboro, New Jersey. On or about September 19, 2013, Ms. Bazikos purchased a 101 fl. oz. tin of Kalamata “100% Pure olive oil” at ShopRite in Glasboro, New Jersey. She paid \$17.99 for the product. The front, back, and both sides of the tin she purchased prominently represented that the tin contained “100% Pure olive oil” in large letters. Ms. Bazikos saw these representations

prior to and at the time of purchase, and understood them as representations, warranties, promises, and affirmations of fact that the product was, in fact, 100% pure olive oil. These representations were material and induced Ms. Bazikos to purchase the product. Moreover, Ms. Bazikos relied on these representations and warranties in deciding to purchase Kalamata “100% Pure olive oil,” and these representations and warranties were part of the basis of the bargain, in that she would not have purchased Kalamata “100% Pure olive oil” if she had known that the product was not, in fact, 100% pure olive oil but contained Pomace Oil. In fact, had she known the truth, Ms. Bazikos would not have purchased Kalamata “100% Pure olive oil” at any price. As a result of this mislabeling, Ms. Bazikos’s expectations that Kalamata “100% Pure olive oil” was, in fact, pure olive oil were not satisfied.

12. Defendant Sirob Imports Inc. is a New York corporation, with its principal place of business at 21 Gear Avenue, Lindenhurst, New York. Defendant holds itself out as an importer of olive oils, olives, and other foodstuffs. Among other products, Defendant imports and distributes olive oils under the Kalamata and Abruzzo brands. Defendant markets and sells these oils widely throughout New York, New Jersey, and other states. Plaintiffs reserve their rights to amend this Complaint to add different or additional defendants, including without limitation any officer, director, employee, supplier, or distributor of Defendant who has knowingly and willfully aided, abetted, or conspired in the false and deceptive conduct alleged herein.

### **JURISDICTION AND VENUE**

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least one class member is a citizen of a state different from Defendant. In fact, according to industry-wide

through-the-register retailer sales data, Defendant has sold approximately \$11 million of its misbranded Kalamata “100% Pure olive oil” to consumers in the Northeast United States since January 2009.

14. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this District. Plaintiff Weisblum is a citizen of New York who resides in this District, and she purchased Kalamata “100% Pure olive oil” from Defendant in this District. Moreover, Defendant distributed, advertised, and sold Kalamata “100% Pure olive oil” in this District.

### **FACTUAL BACKGROUND**

#### **I. Olive Oil Has Long Been Prized For Its Culinary Value And Health Benefits**

15. Olive oil comes from the fruit of the olive tree (*Olea europaea* L.), a species native to the Mediterranean basin. Olive tree cultivation was first documented as far back as 4,000 B.C., in parts of what is now Syria and Iran, with sources as old as Egyptian hieroglyphics and the Bible discussing olive oil production. By the time of the Roman Empire, olive oil had become a staple of Mediterranean trade. Although olive production has, in recent years, spread to Australia, South Africa, Chile, Argentina, and the United States, nearly 95 percent of the world’s olive oil continues to be produced in the Mediterranean basin.

16. Since ancient times, people have recognized olive oil’s substantial and beneficial effects on human health. Olive oil contains monounsaturated fatty acids, which leading healthcare professionals consider a “healthy dietary fat” that can lower bad LDL cholesterol and raise good HDL cholesterol. For this reason, the United States Food and Drug Administration (“FDA”) approved a qualified heart health claim for olive oil in 2004 that was based on more

than 70 clinical intervention studies conducted in a number of countries. A diet with olive oil as a main source of fat has been linked to health benefits favorably affecting susceptibility to cardiovascular disease, diabetes, stroke, cancer, and more. Evidence shows that olive oil helps the body absorb beneficial nutrients from vegetables and other healthy ingredients in meals. Olive oil also is an excellent source of vitamins E and K.

17. Consumers use olive oil in many ways. Many add olive oil to salad dressings, marinades, baked goods, sauces, and pastas. In addition, olive oil's high smoke point makes it one of the most stable fats for cooking and frying, and, unlike some other oils, many of its healthful qualities persist after heating.

18. Given the many health benefits and culinary uses of olive oils, it is no surprise that the market for olive oil has grown enormously over the last several decades. Since 1990, total consumption of olive oil in the United States has more than doubled, reaching 70 million gallons in 2009. With broader consumer recognition of olive oil's considerable health benefits, consumption in the United States seems poised to continue to increase for years to come.

## **II. Pomace Oil Is Not Olive Oil**

19. "Olive oil," as it is scientifically, commercially, and legally defined, is "the oil consisting of a blend of refined olive oil and virgin olive oils fit for consumption as they are." The components of this blend consist of: virgin olive oil, defined as "the oils obtained from the fruit of the olive tree solely by mechanical or other physical means under conditions, particularly thermal conditions, that do not lead to alterations in the oil, and which have not undergone any treatment other than washing, decantation, centrifugation and filtration;" and refined olive oil,

defined as “the olive oil obtained from virgin olive oils by refining methods which do not lead to alterations in the initial glyceridic structure.”<sup>1</sup>

20. In contrast, Pomace Oil is a highly processed industrial fat derived by applying heat and chemical solvents to the pomace byproduct left over from the production of olive oil. *See* 47 Fed. Reg. 42123 (Sept. 24, 1982) (“[S]olvent extraction is a standard procedure for removing oil from substances having low oil contents, such as safflower and cotton seeds. Olives, however, have a high oil content and the oil is easily removed by a mechanical or physical process, such as pressing. Solvent extraction of oil from olives is used to remove the residual oil from the pomace and pits remaining from pressing operations.”). The cost of producing oil in this manner is a fraction of the cost of producing olive oil.

21. Because of their different chemical and sensory profiles, the various grades of olive oil are fit for completely different types of culinary uses. However, “[f]rom a sensory standpoint, [Pomace Oil] lacks the flavor, delicacy, and bountiful healthful properties of extra virgin olive oil. If used in the kitchen at all, pomace oil is mostly used in industrial settings or in restaurants as a deep frying agent because of its high smoke point (240 degrees Celsius).”<sup>2</sup>

22. This is also because Pomace Oil is tasteless and odorless, and therefore lacks the olive flavor and aroma of olive oil which is the most important attribute affecting consumers’ decisions to purchase olive oil. *See* University of California, Davis Olive Center survey (May 2013) (showing that perceived flavor was the most important factor influencing consumer decisions to purchase olive oil, with over 80% of respondents rating flavor as “extremely

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<sup>1</sup> International Olive Council, Trade Standard Applying to Olive Oils and Olive-Pomace Oils, COI/T.15/NCNo.3/Rev 6 at 3.3.3 (Nov. 2011) [hereinafter “IOC Trade Standards”].

<sup>2</sup> Daniel Williams, Olive Pomace Oil: Not What You Might Think, *Olive Oil Times*, Sep. 9, 2010, <http://www.oliveoiltimes.com/olive-oil-basics/olive-oil-grades/olive-pomace-oil/6210>.



important” or “very important”); *see also* N.Y. Comp. Codes R. & Regs. tit. 1, § 269(a)(5) (“Refined olive-pomace oil . . . is odorless and tasteless.”).

23. Despite this fact, Defendant, who also sells products advertised as Pomace Oil, recommends those products for use “in certain kinds of cooking in restaurants,” while it recommends its Kalamata 100% Pure olive oil product “for salads and cooking.”<sup>3</sup>

24. Moreover, as a matter of economics, Pomace Oil is a different and inferior product from olive oil. Olive oil commands a substantial price premium over Pomace Oil thereby reflecting its higher market demand from consumers. At the same time, olive oil also outsells Pomace Oil in quantity even though Pomace Oil is much cheaper per fluid ounce.

25. As a matter of chemistry, Pomace Oil is also significantly different from olive oil. According to Professor Rodney J. Mailer, Ph.D., an expert in edible oil chemistry, Pomace Oil contains “high levels of wax, erythrodiol, and uvaol.” Professor Mailer has further stated that “Pomace [O]il is also higher in undesirable chemicals such as trans fats . . . Under any standard, pomace oil is not olive oil, and in no case could it be called or understood to be olive oil. The extraction process results in a product which is significantly inferior due to the lack of antioxidants and flavor, and may contain traces of PAHs [polycyclic aromatic hydrocarbons] or solvents such as hexane used to extract the oil.”

26. In addition, every state, federal and industry labeling standard distinguishes between olive oil and Pomace Oil, and requires the latter to be labeled as such. *See* 7 C.F.R. § 240.1535 (voluntary USDA standard providing that “[o]live-pomace oils shall not be labeled as ‘olive oil’”); 47 Fed. Reg. at 42,123 (FDA notice explaining that, under certain unnamed labeling standards, “oil extracted from olive pomace and pits by chemical means and refined to make it

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<sup>3</sup> <http://www.boborisfoods.com/oliveoil.html> (last accessed Nov. 11, 2013).

edible must be labeled either ‘refined olive-residue oil’ or ‘refined extracted olive-residue oil’); N.Y. Agric. & Mkts. Law § 204–a(a), (b) (separately defining “olive oil” and “olive pomace oil” and establishing “rules and regulations for the production and labeling of olive oils,” the violation of which renders the product “misbranded”); N.Y. Comp. Codes R. & Regs. tit. 1, § 269(a)(1), (c) (establishing separate “standards of identity” for “olive oil” and “olive pomace oil”); International Olive Council, IOC Trade Standard, COI/T.15/NC No. 3/Rev.6 § 2.2 (Nov. 2011) (trade standard of U.N.-based intergovernmental body providing that “[o]live oil is the oil obtained solely from the fruit of the olive tree ..., to the exclusion of oils obtained using solvents or re-esterification processes”); Conn. Gen. Stat. § 21a-100-8 (requiring olive oil sold in Connecticut to “meet the International Olive Council standards”).

27. These differences recently led J. Rakoff to conclude in another lawsuit concerning a different brand of purported “100% Pure Olive Oil” that “it is literally false, and not simply potentially misleading, to advertise Pomace [Oil] as ‘100% Pure Olive Oil.’” *NAOOA v. Kangadis Food Inc.*, 13 Civ. 868 (JSR) (S.D.N.Y. Feb. 6, 2013), Dkt. 30 at 17.

### **III. No Law, Regulation, Or Standard Permits Pomace Oil To Be Labeled As Olive Oil**

28. Although Pomace Oil can sometimes be refined or mixed with olive oil to make it fit for human consumption, no recognized regulatory body or organization in the world permits Pomace Oil or products containing Pomace Oil to be passed off as “olive oil.” Rather, these oils must be labeled as some form of “olive-pomace” or “olive-residue oil.”

29. According to the FDA, “[s]olvent-extracted olive oil is lower in quality than pressed olive oils due to the higher free fatty acid content caused by breakdown to triglycerides by enzymes liberated from the olive material during the pressing operations. As the free fatty acid content increases, the flavor and keeping quality of the oil deteriorate and the oil must

undergo several refining processes to make it suitable for human consumption. For these reasons, the agency believes that it is reasonable to identify a solvent extracted olive oil as a ‘residue oil.’” 47 Fed. Reg. 42123 (Sept. 24, 1982).

30. Despite vigilant policing by responsible industry members, the cost disparities between olive oil and other vegetable oils nevertheless create a financial incentive for fraudsters to adulterate olive oils with cheaper oils (such as Pomace Oil or seed oils) and disguise it as olive oil.

31. Various state, federal, and international bodies have promulgated standards to guard against deceptive mislabeling, including standards to distinguish olive oil from Pomace Oil. Relevant here are three regulatory bodies: the FDA, the New York State legislature, and the International Olive Council. They have adopted standards that reflect the longstanding industry practices that underlie relevant consumer expectations.

**A. The FDA Labeling Requirements**

32. The FDA has promulgated the following definitions for classifying olive-derived oils:

The name “virgin olive oil” may be used only for the oil resulting from the first pressing of the olives and which is suitable for human consumption without further processing. The name “refined olive oil” refers to the oil obtained from subsequent pressings and which is made suitable for human consumption by refining processes which neutralize the acidity and remove particulate matter. Oil extracted from olive pomace and pits by chemical means and refined to make it edible must be labeled either “refined olive-residue oil” or “refined extracted olive residue oil.” Blends of virgin olive oil and refined olive oil may be labeled as “olive oil,” but blends of olive oil with other edible fats or oils must be labeled in accordance with 21 C.F.R. § 102.37.

47 Fed. Reg. 42,123 (Sept. 24, 1982).

33. C.F.R. § 102.37(b) in turn provides that: “When the label bears any representation, other than in the ingredient listing, of the presence of olive oil in the mixture, the descriptive name shall be followed by a statement of the percentage of olive oil contained in the product.”

**B. New York’s Agriculture And Markets Law**

34. Similarly, under New York law, “olive oil” is defined as the oil “obtained solely from the fruit of the olive tree (*olea europaea*), to the exclusion of oils obtained using solvents or reesterification processes and of any mixture with oils of other kinds.” N.Y. Agric. & Mkts. Law § 204-a(1)(a). “[R]efined olive oil” is the “olive oil obtained from virgin olive oils by refining methods which do not lead to alterations in the initial glyceridic structure. It has free acidity, expressed as oleic acid, of not more than 0.3 grams per hundred grams.” *Id.* § 204-a(1)(c). “Olive-pomace oil” is “oil obtained by treating olive pomace with solvents or other physical treatments.” *Id.* § 204-a(1)(b).

35. New York’s legislature has made it “unlawful for any person to manufacture, pack, possess, sell, offer for sale, and/or expose for sale any compound or blended oil of any kind which purports to be an olive oil mixture unless the container thereof be permanently and conspicuously labeled ‘compound oil’ or ‘blended oil’ with a statement of the different ingredients thereof and the specific percentage of olive oil, the total percentage of other vegetable oils and the specific percentage of each other ingredient comprising more than one half of one per centum of the mixture.” *Id.* §204-a. In particular, no olive oil containing “more than one-half of one per centum” of Pomace Oil may legally be sold in New York unless it is “conspicuously labeled ‘compound oil’ or ‘blended oil,’” and unless its label discloses the presence and amount of Pomace Oil therein. *Id.*

36. “Failure to meet the[se] standards . . . shall render olive oil sold in intrastate commerce in the state misbranded.” *Id.* § 204-a(3)(b).

**C. The International Olive Council’s Chemical And Labeling Requirements**

37. The International Olive Council (“IOC”) promulgates world-recognized standards used to determine the quality and purity of olive oils. Although the United States is not an IOC member, the IOC’s standards undergird the FDA and New York olive oil regulations.

38. The IOC was formed in 1959, in Madrid, Spain, under the auspices of the United Nations, with the purpose of creating universal industry trade standards. Today, IOC member countries account for 98% of the world’s olive oil production.

39. The IOC actively monitors and seeks to prevent olive oil fraud throughout its member countries. In addition, the IOC has certified a small number of laboratories around the world that meet rigorous guidelines for performing chemical and sensory tests of olive oils.<sup>4</sup>

40. The IOC has developed a number of tests that enable one to differentiate olive oil from Pomace Oil. For example:

- a. Erythrodiol and uvaol are two compounds commonly found in Pomace Oil and grapeseed oil. If these compounds constitute more than 4.5 percent of an oil’s total sterol content, then the oil is not olive oil. It is either Pomace Oil or grapeseed oil. *See* IOC Trade Standards at 3.3.3.
- b. Olive skins contain almost all of an olive’s wax. Thus, authentic olive oil, which is pressed from olive flesh, contains only miniscule amounts of wax; Pomace Oil, which is made, in part, from olive skins, contains

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<sup>4</sup> International Olive Council, List Of Chemical Testing Laboratories Recognized By The International Olive Council For The Period From 1.12.2011 to 30.11.2012, T.21/Doc. n° 13/Rev. 14 (Nov. 2011).

significant amounts of wax. As a result, oils that have a wax content in excess of 350 mg/kg are Pomace Oil, not olive oil. *See* IOC Trade Standards at 3.4.

- c. A ratio greater than 0.3 between triacylglycerols with equivalent carbon number 42 (ECN 42) and the theoretical ECN 42 (a number calculated using standard formulations based on an oil's fatty acid composition) demonstrates the presence of Pomace Oil and/or seed oils. *See* IOC Trade Standards at 3.5.

41. Under IOC standards, just like under FDA and New York regulations, Pomace Oil cannot be labeled as olive oil. Nor is it permissible to blend Pomace Oil with olive oil and label the mixture as "olive oil." IOC Trade Standards at 2.2.3 ("In no case shall this blend be called 'olive oil.'").

#### **IV. Laboratory Testing Confirms That Kalamata-Brand Products Are Not "100% Pure Olive Oil" And Instead Contain Pomace Oil**

42. As part of its pre-suit investigation, Plaintiffs' counsel shipped a sealed 101 fluid ounce tin of Kalamata "100% Pure olive oil" to the UC Davis Olive Center's Sensory and Chemistry Laboratory in Davis, California. The lab performed tests for wax content, triacylglycerols, and sterols.

43. The results did not leave any room for doubt. For the following criteria, the samples exceeded several times the established thresholds for distinguishing olive oil from Pomace Oil:

	<b>Maximum for Olive Oil</b>	<b>Kalamata Lot No. 52912</b>
<b>Wax Content</b>	$\leq 350$ mg/kg	2,050 mg/kg
<b>Erythrodiol &amp; Uvaol Content</b>	$\leq 4.5\%$	21.46%
<b>ECN 42 Triacylglycerol</b>	$\leq  0.3 $	1.28

44. These results cannot be blamed on merely poor quality olive oil or the handling and storage of the particular tins purchased for testing. These results simply could not have occurred if these lots of ostensibly “100% Pure olive oil” contained only oils extracted from olives solely through mechanical methods. In other words, markers of Pomace Oil and seed oil at these levels do not appear in olive oil by happenstance. Importantly, no matter which standard is used to determine olive oil quality, or distinguish between olive oil and Pomace Oil or seed oils, the fact remains that the chemical profile of the Kalamata “100% Pure olive oil” cannot be reconciled with the chemical profile of olive oil – a defect that Defendant does not disclose on its labeling.

45. Furthermore, because of the extreme differences in production processes between Pomace Oil and olive oil, the presence of Pomace Oil in even one tin means at minimum that all of the tins with the same lot code contain Pomace Oil as well.

#### **V. Kalamata’s False And Misleading Label**

46. The front and back label on the product packaging of Kalamata “100% Pure olive oil” prominently displays the product’s name. Additionally, the front and back label of the

packaging represents that the product contains “100% Pure olive oil.” This text appears in large, conspicuous letters and is surrounded by images of olive branches.



47. One side of the container also represents “Product of Greece Italy and Spain.” Additionally, the product’s name is prominently displayed on the side label.





48. The other side of the container represents, “Best pure olive oil Kalamata of Greece incomparable in taste flavor used for salads and cooking.” Additionally, the product’s name is prominently displayed on the side label.



49. Each of these representations is false and misleading. As discussed above, Kalamata “100% Pure olive oil” is neither olive oil nor 100% pure olive oil. Moreover, unlike

pure olive oil, Pomace Oil is unsuitable “for salads and cooking” because it is flavorless and odorless, unlike olive oil.

**VI. Defendant’s Mislabeling Has Caused Harm To Plaintiffs And Members Of The Class**

50. The results of the independent testing demonstrate that Defendant, under the Kalamata brand, mislabels its “100% Pure olive oil” product. Instead of 100% pure olive oil, the oil either is completely Pomace Oil, or is adulterated with Pomace Oil and/or other seed oils. Moreover, Defendant has used Pomace Oil or seed and nut oils to adulterate the product in far more than the above-described three lots, and has been willfully and deceptively passing off the adulterated oil as “100% Pure Olive Oil.”

51. Defendant has acted willfully and knowingly in misbranding its products. Given the existence of industry standard quality-control measures, it is highly unlikely that the mislabeling at issue here is either accidental or negligent. Moreover, Defendant has an economic motive to mislabel its products, namely that pure olive oil is sold at a price premium over Pomace Oil. Furthermore, it is industry standard for food manufacturers, like Kalamata, to periodically test their products, and any industry standard quality-control check would detect the presence of Pomace Oil. Finally, because Defendant sells products that purport to be Pomace Oil and products that purport to be “100% Pure olive oil,” it is clear that Defendant understands the differences between the two very different products. Therefore, it is implausible that Defendant’s adulterated oils would go unnoticed for multiple years, unless the mislabeling was intentional. Accordingly, Defendant knows that its oils are not “100% Pure olive oil,” and intentionally deceives consumers into purchasing its mislabeled oil products.

52. Defendant’s actions have caused harm and are likely to continue to cause harm Plaintiffs, the public, and to members of the class. A reasonable consumer purchasing a product

labeled “100% Pure olive oil” would expect it to adhere not just to federal, state, and international guidelines, but that it meets the basic, millennia-old understanding that “olive oil” means the unadulterated oil that comes from mechanically pressing olives – *not* from a chemical process that uses heat and carcinogenic solvents to extract oil from a waste byproduct of the olive oil making process. Defendant’s mislabeling thus deceives consumers.

53. The strong consumer preference for olive oil over Pomace Oil is evidenced by the almost complete lack of consumer demand for Pomace Oil for human consumption in the United States, despite the significantly cheaper price of Pomace Oil compared to olive oil.

54. Defendant has introduced its adulterated and misbranded edible oil into interstate commerce, offering it for sale in several states including but not limited to New York and New Jersey. These oils bore the same deceptive representation that their contents were “100% Pure olive oil” when, in fact, they should have been labeled as Pomace Oil or as a blend containing seed oils.

### **CLASS REPRESENTATION ALLEGATIONS**

55. Plaintiffs seek to represent a class defined as all persons in the United States who purchased Kalamata 100% Pure olive oil (the “Class”). Excluded from the Class are persons who made such purchase for purpose of resale.

56. Plaintiff Weisblum also seeks to represent a subclass of all Class members who purchased Kalamata “100% Pure olive oil” in New York (the “New York Subclass”).

57. Plaintiff Bazikos also seeks to represent a subclass of all Class members who purchased Kalamata “100% Pure olive oil” in New Jersey (the “New Jersey Subclass”).

58. Members of the Class and Subclasses are so numerous that their individual joinder herein is impracticable. The precise number of Class members and their identities may be determined through discovery. Class members may be notified of the pendency of this action

by mail and/or publication through the distribution records of Defendant and third party retailers and vendors.

59. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to: whether Kalamata “100% Pure olive oil” is, in fact, 100% pure olive oil; whether Defendant negligently mislabeled Kalamata “100% Pure olive oil;” whether Defendant intentionally deceived Plaintiffs and Class members by mislabeling Kalamata “100% Pure olive oil;” and whether reasonable consumers equate Pomace Oil with olive oil.

60. The claims of the named Plaintiffs are typical of the claims of the Class and Subclasses in that the named Plaintiffs purchased one or more containers of Kalamata “100% Pure olive oil.”

61. Plaintiffs are adequate representatives of the Class and Subclasses because their interests do not conflict with the interests of the Class members they seek to represent, they have retained competent counsel experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiffs and their counsel.

62. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class and Subclass members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant’s liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action

device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

### **COUNT I**

#### **(Violation Of The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*)**

63. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

64. Plaintiffs bring this claim individually and on behalf of the members of the proposed Class, New York Subclass, and New Jersey Subclass against Defendant.

65. Kalamata "100% Pure olive oil" is a consumer product as defined in 15 U.S.C. § 2301(1).

66. Plaintiffs and Class members are consumers as defined in 15 U.S.C. § 2301(3).

67. Defendant is a supplier and warrantor as defined in 15 U.S.C. § 2301(4) and (5).

68. In connection with the sale of Kalamata "100% Pure olive oil," Defendant issued written warranties as defined in 15 U.S.C. § 2301(6), which warranted that Kalamata "100% Pure olive oil" was, in fact, 100% pure olive oil.

69. In fact, Kalamata "100% Pure olive oil" is an adulterated product that consists of Pomace Oil, not 100% pure olive oil.

70. This warranty constitutes a promise that the product is defect free, in that it actually contains "100% Pure Olive Oil." Moreover, this warranty constitutes a promise that the product will perform within the specifications of pure olive oil (*e.g.*, nutritional benefits, sensory

profile, smoke point, culinary uses, and composition of sterols and free fatty acids) within a specific period of time (*i.e.*, the “Best If Used By” date stamped on each container).

71. In fact, Kalamata “100% Pure olive oil” is a mislabeled Pomace Oil product that is not 100% pure olive oil.

72. By reason of Defendant’s breach of warranty, Defendant violated the statutory rights due to Plaintiffs and Class members pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*, thereby damaging Plaintiffs and Class members.

73. Plaintiffs and Class members were injured as a direct and proximate result of Defendant’s breach because (a) they would not have purchased Kalamata “100% Pure olive oil” if they had known it was not, in fact, 100% pure olive oil, and (b) they overpaid for Kalamata “100% Pure olive oil” because it is sold at a price premium when compared to Pomace Oil.

## **COUNT II**

### **(Breach Of Express Warranty)**

74. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

75. Plaintiffs bring this claim individually and on behalf of the members of the proposed Class, New York Subclass, and New Jersey Subclass against Defendant.

76. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, expressly warranted that Kalamata “100% Pure olive oil” was, in fact, 100% pure olive oil.

77. In fact, Kalamata “100% Pure olive oil” is an adulterated product that consists of Pomace Oil, not 100% pure olive oil.

78. As a direct and proximate cause of Defendant’s breach of express warranty, Plaintiffs and Class members have been injured and harmed because (a) they would not have purchased Kalamata “100% Pure olive oil” if they had known it was not, in fact, 100% pure

olive oil, and (b) they overpaid for Kalamata “100% Pure olive oil” because it is sold at a price premium when compared to Pomace Oil.

### **COUNT III**

#### **(Breach Of Implied Warranty Of Merchantability)**

79. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

80. Plaintiff Bazikos brings this claim individually and on behalf of the members of the proposed New Jersey Subclass against Defendant.

81. Defendant, as the designer, manufacturer, marketer, distributor, and/or seller, impliedly warranted that Kalamata “100% Pure olive oil” was, in fact, 100% pure olive oil.

82. Defendant breached the warranty implied in the contract for the sale of Kalamata “100% Pure olive oil” because it could not pass without objection in the trade under the contract description, the goods were not of fair average quality within the description, the goods were not adequately labeled as the purchase transaction may require, the goods did not conform to the promises or affirmations of fact made on the label and product packaging, and the goods were unfit for their intended and ordinary purpose because Kalamata “100% Pure olive oil” is an adulterated product that consists of Pomace Oil, not 100% pure olive oil. As a result, Plaintiffs and Class members did not receive the goods as impliedly warranted by Defendant to be merchantable.

83. Plaintiffs and Class members purchased Kalamata “100% Pure olive oil” in reliance upon Defendant’s skill and judgment and the implied warranties of fitness for the purpose.

84. Kalamata “100% Pure olive oil” was not altered by Plaintiffs or Class members.



85. Kalamata “100% Pure olive oil” was defective when it left the exclusive control of Defendant.

86. Defendant knew that Kalamata “100% Pure olive oil” would be purchased and used without additional testing by Plaintiffs and Class members.

87. Kalamata “100% Pure olive oil” was defectively designed and unfit for its intended purpose, and Plaintiffs and Class members did not receive the goods as warranted.

88. As a direct and proximate cause of Defendant’s breach of warranty, Plaintiffs and Class members have been injured and harmed because (a) they would not have purchased Kalamata “100% Pure olive oil” if they had known it was not, in fact, 100% pure olive oil, and (b) they overpaid for Kalamata “100% Pure olive oil” because it is sold at a price premium when compared to Pomace Oil.

#### **COUNT IV**

##### **(Deceptive Acts Or Practices, New York Gen. Bus. Law § 349)**

89. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

90. Plaintiff Weisblum brings this claim individually and on behalf of the members of the proposed New York Subclass against Defendant.

91. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by misrepresenting that Kalamata “100% Pure olive oil” was, in fact, 100% pure olive oil.

92. The foregoing deceptive acts and practices were directed at consumers.

93. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the characteristics of Kalamata “100% Pure olive oil” to induce consumers to purchase same.

94. Plaintiff Weisblum and members of the New York Subclass were injured because (a) they would not have purchased Kalamata “100% Pure olive oil” if they had known it was not, in fact, 100% pure olive oil, and (b) they overpaid for Kalamata “100% Pure olive oil” because it is sold at a price premium when compared to Pomace Oil.

95. On behalf of herself and other members of the New York Subclass, Plaintiff Weisblum seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or fifty dollars, whichever is greater, and reasonable attorneys’ fees.

### **COUNT V**

#### **(Violation Of The New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1, *et seq.*)**

96. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

97. Plaintiff Bazikos brings this claim individually and on behalf of the members of the proposed New Jersey Subclass against Defendant.

98. Defendant made misrepresentations about Kalamata “100% Pure olive oil” to consumers, including but not limited to, the representation that the product is, in fact, 100% pure olive oil.

99. Defendant engaged in an unconscionable commercial conduct because Kalamata “100% Pure olive oil” is an adulterated product that consists of Pomace Oil, not 100% pure olive oil.

100. Plaintiff Bazikos and members of the New Jersey Subclass suffered an ascertainable loss caused by Defendant’s misrepresentations because (a) they would not have purchased Kalamata “100% Pure olive oil” if they had known it was not, in fact, 100% pure

olive oil, and (b) they overpaid for Kalamata “100% Pure olive oil” because it is sold at a price premium when compared to Pomace Oil.

101. Defendant’s dissemination of these misrepresentations in order to sell more of its product was actuated by actual malice and/or accompanied by a wanton and willful disregard of harm to Plaintiff Bazikos and members of the New Jersey Subclass.

## **COUNT VI**

### **(Negligent Misrepresentation)**

102. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

103. Plaintiffs bring this claim individually and on behalf of the members of the proposed Class, New York Subclass, and New Jersey Subclass against Defendant.

104. As discussed above, Defendant represented that Kalamata “100% Pure olive oil” is, in fact, 100% pure olive oil but failed to disclose that it is actually an adulterated product that consists of Pomace Oil, not 100% pure olive oil. Defendant had a duty to disclose this information.

105. At the time Defendant made these representations, Defendant knew or should have known that these representations were false or made them without knowledge of their truth or veracity.

106. At an absolute minimum, Defendant negligently misrepresented and/or negligently omitted material facts about Kalamata “100% Pure olive oil.”

107. The negligent misrepresentations and omissions made by Defendant, upon which Plaintiffs and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiffs and Class members to purchase Kalamata “100% Pure olive oil.”

108. Plaintiffs and Class members would not have purchased Kalamata “100% Pure olive oil” if the true facts had been known.

109. The negligent actions of Defendant caused damage to Plaintiffs and Class members, who are entitled to damages and other legal and equitable relief as a result.

## **COUNT VII**

### **(Fraud)**

110. Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this Complaint.

111. Plaintiffs bring this claim individually and on behalf of the members of the proposed Class, New York Subclass, and New Jersey Subclass against Defendant.

112. As discussed above, Defendant provided Plaintiffs and Class members with false or misleading material information and failed to disclose material facts about Kalamata “100% Pure olive oil,” including but not limited to the fact that it is an adulterated product that consists of Pomace Oil, not 100% pure olive oil. These misrepresentations and omissions were made with knowledge of their falsehood.

113. The misrepresentations and omissions made by Defendant, upon which Plaintiffs and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiffs and Class members to purchase Kalamata “100% Pure olive oil.”

114. The fraudulent actions of Defendant caused damage to Plaintiffs and Class members, who are entitled to damages and other legal and equitable relief as a result.

## **PRAYER FOR RELIEF**

115. WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Defendant, as follows:

- A. For an order certifying the nationwide Class and the Subclasses under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representatives of the Class and Subclasses and Plaintiffs' attorneys as Class Counsel to represent members of the Class and Subclasses;
- B. For an order declaring the Defendant's conduct violates the statutes referenced herein;
- C. For an order finding in favor of Plaintiffs, the nationwide Class, and the Subclasses on all counts asserted herein;
- D. For compensatory and punitive damages in amounts to be determined by the Court and/or jury;
- E. For prejudgment interest on all amounts awarded;
- F. For an order of restitution and all other forms of equitable monetary relief;
- G. For injunctive relief as pleaded or as the Court may deem proper; and
- H. For an order awarding Plaintiffs, the Class, and the Subclasses their reasonable attorneys' fees and expenses and costs of suit.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all causes of action and issues so triable.

Dated: November 13, 2013

Respectfully submitted,

BURSOR & FISHER, P.A.

By:           /s/ Joseph I. Marchese            
  Joseph I. Marchese

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*Attorneys for Plaintiffs*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question, 4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Contains various legal categories and checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, \_\_\_\_\_, counsel for \_\_\_\_\_, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

monetary damages sought are in excess of \$150,000, exclusive of interest and costs,

the complaint seeks injunctive relief,

the matter is otherwise ineligible for the following reason

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

**NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)**

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County: \_\_\_\_\_
- 2.) If you answered "no" above:
  - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? \_\_\_\_\_
  - b) Did the events of omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? \_\_\_\_\_

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? \_\_\_\_\_

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain) No

I certify the accuracy of all information provided above.

Signature: \_\_\_\_\_