

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

ESTEBAN LESMEZ, as an individual  
consumer, and on behalf of all others similarly situated, : CIVIL ACTION NO.:

*Plaintiff,*

:  
: **CLASS ACTION COMPLAINT FOR**  
: **EQUITABLE RELIEF AND DAMAGES**

vs.

: *Jury Trial Requested*

EINSTEIN NOAH RESTAURANT  
GROUP, INC., a foreign corporation.

*Defendant.*

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Plaintiff, ESTEBAN LESMEZ (“Plaintiff”), by and through his undersigned counsel, brings this Class Action Complaint, and hereby alleges against Defendant, EINSTEIN NOAH RESTAURANT GROUP, INC. (“Einstein Bros” or “Defendant”), as follows:

**INTRODUCTION**

1. Einstein Bros is a well-known bagel store throughout the State of Florida and the United States. In addition to selling bagels, Einstein Bros is also in the business of selling their own freshly squeezed and poured orange juice.

2. Einstein Bros labels, markets, advertises, sells and/or distributes its own brand of Orange Juice (the “Product”), to purchasers throughout the State of Florida.

3. In marketing, advertising, and labeling the Product, Defendant made and continues to make uniform false, deceptive, unfair, and/or misleading claims regarding its representation that the Product is “100% Pure Squeezed Orange Juice.”

4. At issue here is Defendant's false, deceptive, unfair and misleading statement that is likely to deceive reasonable consumers, such as Plaintiff and the putative Class. Defendant has mistakenly, misleadingly, or negligently represented that the Product is "100% Pure Squeezed Orange Juice," when in fact, it is made from water and concentrate.

5. As a result, Plaintiff brings this class action to secure, among other things, damages and equitable relief, declaratory relief, restitution, and in the alternative to damages, relief for unjust enrichment, for a Class of similarly situated Florida purchasers, against Defendant, for: (1) false, deceptive, unfair, and unlawful business practices in violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), FLA. STAT. §§ 501.201, *et seq.*; (2) Negligent Misrepresentation; (3) Unjust Enrichment; (4) Breach of the Implied Warranty of Merchantability; (5) Breach of Express Warranty; and (6) Violation of Magnusson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*

6. Plaintiff further seeks an Order prohibiting Defendant from representing the Product as being "100% Pure Squeezed Orange Juice." Because the Product is made from water and concentrate, the Statement acts as a false, deceptive, unfair and/or misleading representation, which is likely to mislead, and actually does mislead, the reasonable consumer.

7. All allegations herein are based on information and belief and/or are likely to have evidentiary support after reasonable opportunity for further investigation and discovery

#### **PARTIES**

8. Plaintiff is an individual consumer who, at all times material hereto, was and is a resident of Broward County, Florida, and at all relevant times is *sui juris*. Plaintiff respectfully requests a jury trial on all claims. Plaintiff purchased the Product in Florida, within this judicial

district, during the four (4) years prior to filing of this Complaint (the “Class Period”). Plaintiff purchased the Product for personal consumption during the Class Period.

9. Plaintiff purchased the Product on April 9, 2014, from an Einstein Bros located within this judicial district at 310 N. University Drive Coral Springs, Florida 33071. Plaintiff paid approximately \$3.79, plus tax for the large size of the Product.

10. Plaintiff purchased the Product in reliance on Defendant’s representations, including a large sign located directly above where Product is displayed for purchase stating “FRESH-POURED ORANGE JUICE” and depicting freshly sliced oranges, as well as the label on the Product’s container, a Einstein’s Bro’s cup, stating “100% Pure Squeezed Orange Juice.” Even the receipt for the Product describes it as “Fresh Juice.” After ingesting the Product, Plaintiff became aware that it was not in fact purely squeezed orange by the Product’s taste. A color photograph portraying the sign hanging above the refrigerator where Product was displayed for purchased, the Product as it appeared on the shelf before purchased by Plaintiff, and the receipt that was given to Plaintiff for his purchase, are depicted below for demonstrative purposes:







11. Defendant, EINSTEIN NOAH RESTAURANT GROUP, INC ("Defendant" or "Einstein Bros"), is a corporation organized under the laws of the State of Delaware, with its principal place of business at 555 Zang Street, Suite 300, Lakewood, Colorado, 80228. Therefore, Defendant can be considered a citizen of the state of Colorado or Delaware for purposes of diversity jurisdiction or diversity of citizenship. Defendant lists Corporation Service Company as its registered agent, and can be found at 1560 Broadway, Suite 2090, Denver, Colorado 80202.



12. Defendant is the owner, and distributor of the Product, and is the company that created and/or authorized the false, misleading and deceptive labeling and advertising for the Product and is the company that promoted, marketed, and sold the Product at issue in this judicial district.

13. The labeling and advertising for the Product, including the presentation of the Product throughout Defendant's stores, relied upon by Plaintiff and other reasonable consumers, was prepared and/or approved by Defendant and its agents, and was disseminated by Defendant and its agents through labeling and advertising containing the misrepresentations alleged herein. The labeling and advertising for the Product and the presentation of the Product within Defendant's stores was designed to encourage consumers to purchase the Product and reasonably misled the reasonable consumer, i.e. Plaintiff and the Class.

14. Defendant affirmatively misrepresented, and continues to misrepresent, the true nature of the Product to convince the public to purchase and use the Product, resulting in significant detriment to the consuming public.

15. Plaintiff alleges that, at all relevant times, Defendant and its affiliates, and other related entities, as well as their respective employees, were the agents, servants and employees of Defendant, and at all relevant times, each acted within the purpose and scope of that agency and employment.

16. Additionally, Plaintiff alleges that, in committing the wrongful acts alleged herein, Defendant, in concert with its affiliates, and/or other related entities and their respective employees, planned, participated in and furthered a common scheme to induce members of the public to purchase the Product by means of false, misleading, unfair, deceptive and fraudulent

representations, and that Defendant participated in the making of such representations in that it disseminated those misrepresentations and/or caused them to be disseminated.

17. Whenever reference in this Complaint is made to any act by Defendant or its affiliates, distributors, retailers and other related entities, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents, and/or representatives of Defendant committed, knew of, performed, authorized, ratified and/or directed that act or transaction on behalf of Defendant while actively engaged in the scope of their duties.

18. This Court has jurisdiction over the subject matter presented by this Complaint because it is a class action arising under the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the plaintiff class is a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs.

19. Plaintiff alleges that the total claims of the individual members of the Plaintiff Class in this action are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2), (5). As set forth below, Plaintiff is a citizen of Florida, and Defendant can be considered a citizen of Colorado. Therefore, diversity of citizenship exists under CAFA and diversity jurisdiction, as required by 28 U.S.C. §§ 1332(a)(1), (d)(2)(A). Furthermore, the total number of members of the proposed Plaintiff Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

20. This Court also has jurisdiction over this class action pursuant to Florida’s Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201, *et seq.*

21. Specifically, FLA. STAT. § 501.211 states, in pertinent part:



(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

(2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105. However, damages, fees, or costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

22. The Product's label is misleading and deceptive pursuant to Florida's Food Safety Act, FLA. STAT. § 501.001, *et seq.*, which is identical in all material respects to the Food and Drug Administration's ("FDA") Federal Food Drug and Cosmetic Act ("FFDCA"), 21 U.S.C. §§ 343, 343-1.

23. Plaintiff's claims do not seek to contest or enforce anything in Florida's Food Safety Act that is beyond the FFDCA or FDA regulation requirements. Instead, Plaintiff's claims are predicated on the fact that Defendants' naming, labeling, and marketing are misleading, deceptive, and unfair according to Florida's Food Safety Act, but only in regards to the provisions that are identical in material aspects to the FFDCA or FDA regulations already imposed by the Federal Government, particularly, FLA. STAT. § 501.204 which states:

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2006.

### **FACTUAL ALLEGATIONS**

24. Defendant has uniformly represented throughout the Class Period, and continues to represent that the Product is “100% Pure Squeezed Orange Juice” (the “Statement”) by prominently displaying this language in large letters on the top of the Product’s packaging, and in other advertising. However, contrary to Defendant’s representations, the Product is not 100% purely squeezed due to the fact that it is made from water and juice concentrate. In fact, the Product is not “squeezed” at all. The Statement on the Product entices consumers to buy Defendant’s Product under misleading circumstances. The Statement is misleading because it leads the reasonable consumer believe it is fresh, purely squeezed orange juice (expressed) from oranges, when in fact, it is not.

25. Manufacturers must comply with parallel federal and state laws and regulations governing labeling products. Among these are the Federal Food, Drug and Cosmetic Act (FDCA) and its labeling regulations.

26. The Product is unlawfully misbranded because the Statement is false and/or misleading to a reasonable consumer.

27. The Statement is an unfair business practice, and is false, deceptive, and misleading to a reasonable consumer because the Product is not purely squeezed orange juice, but rather made from water and concentrate. The Statement, along with the presentation of the Product throughout Defendant’s stores misleads the reasonable consumer to believe the Product is purely squeezed orange juice.

28. The Statement is a marketing gimmick because the Product is made from water and concentrate. The Product is sold in an Einstein’s Bro’s plastic cup, rather than a sealed container, reinforcing the message that the Product is freshly squeezed from oranges.

29. Reasonable consumers, such as Plaintiff, and all other similarly situated consumers, believed that when Defendant used the specific objective Statement “100% Pure Squeezed Orange Juice” that Defendant meant “pure squeezed orange juice” to mean just that. Pure means not mixed with anything else. The Product is not pure squeezed because it consists primarily of water, along with orange juice concentrate. No portion of the Product is pure squeezed at all. The Statement “100% Pure Squeezed Orange Juice” is reinforced by other marketing tools such as displaying a sign above the Product which reads, “Fresh-Poured Orange Juice” and depicts fresh orange slices, along with the container for the Product being a regular Einstein’s Bro’s plastic cup, leading the consumer to believe that fresh squeezed orange juice was poured in to the cup.

30. Reasonable consumers understand the statement “100% Pure Squeezed Orange Juice” to mean its normal and common meaning; that the Product has been squeezed from orange’s to make the juice. Reasonable consumers should not be required to decipher Defendant’s fast and loose play on the English language when buying pure freshly squeezed orange juice.

31. As a result, Defendant has made a false, deceptive unfair, and/or misleading material statement and representation regarding the Product that has been relied upon by Plaintiff and members of the Class.

32. Defendant’s “100% Pure Squeezed Orange Juice” representations convey a series of express and implied claims that Defendant knows are material to the reasonable consumer and which Defendant intends for consumers to rely upon when purchasing the Product.

**Plaintiffs and the Class Suffered Damages**

33. All consumers who purchased the Product were exposed to the same “100% Pure Squeezed Orange Juice” Statement. Unfortunately for consumers, they were induced into purchasing the Product rather than other comparable products. Defendant then charged a premium

for the Product that is not purely squeezed from oranges and that contains similar ingredients found in other orange juices that are not pure squeezed.

34. Reasonable consumers must and do rely on companies such as Defendant to honestly label their products, and Defendant intends for and knows that consumers rely upon labeling statements in making purchasing decisions. Such reliance by consumers is also eminently reasonable, since Defendant is prohibited from making false or misleading statements on their products under federal and Florida law.

35. Plaintiff and members of the Class have been economically damaged by their purchase of the Product.

36. Plaintiff has been damaged by his purchase of the Product because the Product is worth less than what Plaintiff paid for it and/or Plaintiff did not receive what he reasonably intended to receive.

37. Plaintiff contends that the Product was rendered valueless because it is unlawfully misbranded and not what Defendant represented it to be. The Statement constitutes an unfair business practice. Thus, Plaintiff and the Class have been economically damaged in the amount of the full retail purchase price charged for each purchase of the Product throughout the Class period, plus tax. A misbranded Product has no market value since it is unlawful.

38. Alternatively, because the Product is worth less than what Plaintiff and the Class paid for it, Plaintiff contends that a minimum, he and the Class have been economically damaged in the amount of the difference between the premium price charged for the Product and the true value of the Product. The Statement allows Defendant to charge a price premium for the Product above its true market value.

39. The true value of the Product is no more than the market value of equivalent orange juices made from water and concentrate.

40. Additionally, Plaintiff contends that Defendant should be prohibited from claiming that the Product is “100% Pure Squeezed Orange Juice,” when it is made from concentrate.

41. Plaintiff contends that Defendant should be required to remove the Statement from the Product so that consumers will receive the benefit of their bargain and no longer be subject to future deception. Without the requested injunctive relief Plaintiff and the Class will continue suffer to future harm, as Defendant’s Statement is meaningless and exposes Plaintiff and the Class to future deception. With such Statement remaining on the Product, Plaintiff is entitled to pursue injunctive relief on behalf of her and all similarly situated consumers in order to protect the consuming public from future false, deceptive, misleading and/or unfair advertising by Defendant.

42. In sum, Plaintiff and the other Class members paid a sum of money for a Product that was not as represented; paid a premium price for a Product that was not as represented; were deprived the benefit of the bargain because the Product they purchased was different than what Defendant warranted; were deprived the benefit of the bargain because the Product they purchased had less value than what was represented by Defendant; did not receive a Product that measured up to their expectations as created by Defendant; used and ingested a substance that was other than what was represented by Defendant; used and ingested a substance that was of a lower quality than what Defendant promised; and were denied the benefit of a truthful Product label.

43. Plaintiff therefore brings this class action to secure, among other things, equitable relief and damages for the Class against Defendant for false, deceptive, unfair and/or misleading advertising in violation of Florida’s Deceptive and Unfair Trade Practices Act, Fla. Stat. §§501.201 et. seq., along with unjust enrichment, negligent misrepresentation, and breach of warranty claims.

44. Plaintiff's claims are aimed at the features of the naming and labeling which are voluntary and not required by FDA regulations that Einstein Bros selected in order to maximize the label's deceptive impact upon Plaintiff and other consumers. Einstein Bros' marketing misleads consumers to believe that its Product is made purely from fresh squeezed oranges. Einstein Bros' marketing campaign is designed to cause consumers to buy their Product as a result of this deceptive message, and Einstein Bros have succeeded.

#### **CLASS ACTION ALLEGATIONS**

45. Plaintiff incorporates all previous paragraphs alleged in this Complaint as if fully alleged herein.

46. Plaintiff brings this action on behalf of himself and all other similarly situated consumers pursuant to Federal Rules of Civil Procedure 23(a) and 23(b). The Class of persons whom Plaintiffs seek to represent is defined as:

- a) All persons who purchased one or more of the Products in the United States and its territories during the period from May 27, 2010, for personal use and not resale, through and to the date Notice is provided to the Class.
- b) In additionally, or in the alternative, all Florida residents who purchased the Product, during the period from May 27, 2010, for personal use and not resale, through and to the date Notice is provided to the Class.
- c) Plaintiff reserves the right to broaden or narrow the Class after a reasonable opportunity to conduct discovery.
- d) Excluded from the Class is Defendant, any parent, subsidiary or affiliate of Defendant, any entity in which Defendant has a controlling interest, and the respective officers, directors, employees, agents, legal representatives,

heirs, predecessors, successors, and assigns of such excluded persons or entities.

47. Plaintiff and Class members are so numerous that joinder of all members individually, in one action or otherwise, is impracticable.

48. There are questions of law and fact common to the Class.

49. Plaintiff's claims are typical of the claims of other Class members. The named Plaintiff is a member of the Class of affected consumers described herein.

50. The named Plaintiff is willing and prepared to serve the Court and the proposed Class in a representative capacity with all of the obligations and duties material thereto. Plaintiff will fairly and adequately protect the interests of the Class and has no interests adverse to or which directly and irrevocably conflict with the interests of other members of the Class.

51. The self-interests of the named Class representatives are co-extensive with, and are not antagonistic to, those of the absent Class members. The proposed representative will undertake to represent and protect the interests of the absent Class members.

52. The named Plaintiff has engaged the services of counsel indicated below. Counsel is adequately experienced in complex class action litigation, will effectively prosecute this action, and will assert and protect the rights of, and otherwise will represent the named Class representative and absent Class members.

53. This action is also appropriate as a class action pursuant to Rule 23(b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure.

54. This action involves questions of law and fact common to Plaintiff and all members of the Class. These common questions predominate over any issues affecting individual members of the Class and include:



- a) Whether Defendant engaged in unfair methods of competition; unconscionable acts and practices, and unfair and deceptive acts and practices in the conduct of its labeling and advertising of the Product;
- b) Whether Defendant materially misrepresented that the Product is “100% Pure Squeezed Orange Juice”;
- c) Whether the Product is in fact made from squeezed oranges;
- d) Whether the Statement “100% Pure Squeezed Orange Juice” is likely to mislead a reasonable consumer;
- e) Whether the Product’s presentation and display is likely to mislead a reasonable consumer;
- f) Whether Defendant knew that the Product was not purely made from squeezed oranges;
- g) Whether Plaintiff and Class members are entitled to injunctive relief enjoining Defendant from continuing to make the Statement that the Product is “100% Pure Squeezed Orange Juice”;
- h) Whether Defendant should be made to engage in a corrective advertising campaign advising consumers that the Product is not “100% Pure Squeezed Orange Juice”;
- i) Whether Plaintiff and Class Members have been economically harmed and the proper measure of relief.

55. Judicial determination of the common legal and factual issues essential to this case would be far more efficient and economical as a class action than in piecemeal individual determinations.

56. There is no plain, speedy or adequate remedy other than by maintenance of this lawsuit as a class action because individual damages are relatively small, making it economically infeasible for Class members to pursue remedies individually.

57. The prosecution of separate actions by individual members of the Class, even if theoretically possible, would create a risk of inconsistent or varying adjudications with respect to individual Class members against Defendant and would establish incompatible standards of conduct for Defendant.

58. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

- a) Given the complexity of issues involved in this action and the expense of litigating the claims, few, if any, Class members could afford to seek legal redress individually for the wrongs that Defendant committed against them, and absent Class members have no substantial interest in individually controlling the prosecution of individual actions;
- b) When Defendant's liability has been adjudicated, claims of all Class members can be determined by the Court;
- c) This action will cause an orderly and expeditious administration of the Class claims and foster economies of time, effort and expense, and ensure uniformity of decisions; and
- d) Without a class action, many Class members would continue to suffer injury, and Defendant's violations of law will continue without redress while Defendant continues to reap and retain the substantial proceeds of its wrongful conduct.

59. Plaintiff knows of no difficulty that will be encountered in the management of this litigation, which would preclude its maintenance as a class action.

60. Defendant has acted on grounds applicable to the Class generally; therefore, Plaintiff seeks equitable and injunctive relief on behalf of the entire Class on grounds generally applicable to the entire Class.

**COUNT I**  
**VIOLATIONS OF FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT,**  
**FLA. 501.201, ET SEQ.**

61. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty (60) of this Complaint as if fully set forth herein.

62. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*. The express purpose of the Act is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce” Section 501.202(2).

63. The sale of the Product at issue in this cause was a “consumer transaction” within the scope of the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213, *Florida Statutes*.

64. Section 501.204(1), *Florida Statutes* declares as unlawful “unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce”.

65. Section 501.204(2), *Florida Statutes* states that “due consideration be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Trade Commission Act.” Defendant’s unfair and deceptive practices are likely to mislead

– and have misled – the consumer acting reasonably under the circumstances and, therefore, violate Section 500.04, Florida Statutes.

66. Defendant has violated the Act by engaging in the unfair and deceptive practices described above, which offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers. Specifically, Defendant has expressly and impliedly represented that the Product is made purely from squeezed oranges, when in fact, it is made from water and concentrate.

67. Defendant's sale of the Product is an unfair method of competition, unconscionable act and practice, and an unfair and deceptive act and practice in the conduct of its business.

68. The material misrepresentations and omissions alleged herein constitute deceptive and unfair trade practices, in that they were intended to and did deceive Plaintiff and the general public, into believing that the Product was made purely from squeezed oranges and not from concentrate.

69. Had Plaintiff and Class members known the Product's statement was false and used as a "marketing gimmick," they would not have purchased the Product.

70. As a result of Defendant's deceptive and unfair acts, Plaintiff and Class members have been damaged in the amount of the aggregate retail sales of the Product throughout the Class period. The Product is unlawfully misbranded and rendered valueless because the Statement is false and misleading, and the Product is not derived from purely squeezed orange juice. Had Plaintiff and the Class known about the true nature of the Product, they would not have purchased it. Alternatively, Plaintiff and the Class are entitled to the difference between the premium price paid for the Product and the price they would have paid had they known that the Product was not purely squeezed orange juice, but rather made from water and concentrate. Because Plaintiff and

the Class would not have purchased the Product had they known it was made from water and concentrate, Plaintiff contends the Class is entitled to restitution of the full retail purchase price.

71. Defendant's conduct offends established public policy, and is immoral, unethical, oppressive, unscrupulous and substantially injurious to consumers.

72. Defendant should also be ordered to cease its deceptive and unfair advertising, and should be made to engage in a corrective advertising campaign, to inform consumers that the Product is promoting something that is not possible to achieve.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

**COUNT II:**  
**NEGLIGENT MISREPRESENTATION**

73. Plaintiff re-alleges and incorporates by reference the allegations set forth in the preceding paragraphs numbered one (1) through sixty (60) of this Complaint as if fully set forth herein verbatim.

74. Defendant has negligently represented that the Product is "100% Pure Squeezed Orange Juice."

75. Defendant has represented that the Product is "100% Pure Squeezed Orange Juice," when in fact, the Product is made exclusively from water and concentrate, and not squeezed at all.

76. Defendant has misrepresented a material fact to the public, including Plaintiff and Class Members, about the Product.

77. The Product are marketed directly to consumers by Defendant, comes in a container (cup) prepared by Defendant, and does not change from the time it leaves Defendant's possession until it is advertised to consumers.

78. Defendant knows the Product's misstatements are material to the reasonable consumer and Defendant intends for consumers to rely upon the misstatements when choosing to purchase the Products.

79. Defendant has omitted the fact that the Product is not squeezed, but rather consists of water and concentrate.

80. Defendant knew or should have known that these misstatements or omissions would materially affect Plaintiff's and Class members' decisions to purchase the Product.

81. Plaintiff and other reasonable consumers, including the Class members, reasonably relied on Defendant's representations set forth herein, and, in reliance thereon, purchased the Product.

82. The reliance by Plaintiff and Class members was reasonable and justified in that Defendant appeared to be, and represented itself to be, a reputable business.

83. Plaintiff and Class members would not have been willing to pay for Defendant's Product if they knew that the Product was merely water and concentrate.

84. As a direct and proximate result of Defendant's misrepresentations, Plaintiff and members of the Class were induced to purchase Defendant's Product, and have suffered damages to be determined at trial, in that, among other things, they have been deprived of the benefit of their bargain in that they bought a Product that was not what Defendant represented it to be, and they have spent money on the Product that had less value than was reflected in the premium purchase price they paid for the Product.

85. Plaintiff seeks all available remedies, damages, and awards as a result of Defendant's negligent misrepresentations.

WHEREFORE, Plaintiff seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint

**COUNT III**  
**UNJUST ENRICHMENT**

86. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty (60) of this Complaint as if fully set forth herein.

87. Plaintiff and Class members conferred a benefit on Defendant by purchasing the Product at a premium price.

88. The Product is sold in Defendant's store, is marketed directly to consumers by Defendant, comes in a container (cup) prepared by Defendant, and does not change from the time it leaves Defendant's hand until it reaches the consumer.

89. Defendant received the money paid by Plaintiff and Class members and thus knew of the benefit conferred upon them.

90. Defendant accepted and retained the benefit in the amount of the profits it earned from sales to Plaintiff and Class members.

91. Defendant has profited from its unlawful, unfair, misleading, and deceptive practices and advertising at the expense of Plaintiff and Class members, under circumstances in which it would be unjust for Defendant to be permitted to retain the benefit.



92. As a result of purchasing the Product, Plaintiff and the Class spent money on a useless Product that they otherwise would not have purchased.

93. Pursuant to Fed. R. Civ. P. 8(d)(2)-(3), Plaintiff (alternatively) does not have an adequate remedy at law against Defendant.

94. Plaintiff and Class members are entitled to restitution of the excess amount paid for the Product, over and above what they would have paid had they known that the Product was not what Defendant represented it to be. Because Plaintiff and the Class would not have paid anything for the Product had they known it was merely a “marketing gimmick,” Plaintiff and the Class are entitled to restitution of the full purchase price.

WHEREFORE, Plaintiffs seek relief in the form of injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney’s fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

**COUNT IV**  
**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

95. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty (60) of this Complaint as if fully set forth herein.

96. Plaintiff and other members of the Class purchased the Product believing Defendant’s statement that it was purely made from squeezed oranges. In doing so, Plaintiff and other Members of the Class reasonably relied on Defendant’s skill and judgment to select and furnish suitable goods for that intended purpose, and on or about that time, Defendant sold the Product to Plaintiff and other members of the Class.

97. Plaintiff and Class members were the foreseeable users of the Product. The Product is sold in Defendant’s cup and in Defendant’s store, is marketed directly to consumers by

Defendant, and does not change from the time it leaves Defendant's hand until it reaches the consumer.

98. At the time of sale, Defendant had reason to know that there is a difference between purely squeezed orange juice and orange juice made from concentrate, and that Plaintiff and members of the Class were relying on Defendant's Statement, along with Defendant's skill and judgment to select and furnish suitable and harmless goods, so there was an implied warranty that the goods were fit for this intended and ordinary purpose.

99. However, Defendant breached the warranty implied at the time of sale in that Plaintiff and members of the Class did not receive suitable goods, but rather misbranded, defective and non-merchantable goods, and goods that were not fit for the intended purpose of providing consumers with purely squeezed orange juice. The Product's defective nature existed at the time the Product left the possession of the Defendant. Additionally, as set forth above, the Product was inadequately packaged and labeled.

100. Plaintiff and the Class used the Product in its intended manner.

101. As a proximate result of this breach of warranty by Defendant, Plaintiff and members of the Class have suffered actual damages in an amount to be determined at trial, in that they were induced to purchase a product they would not have purchased had they known the true facts about, and that lacks the value Defendant represented the Product had, which was reflected in the purchase price. Plaintiff provided pre-suit notice of this claim to Defendant on or about May 1, 2014.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief

that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

**COUNT V:**  
**BREACH OF EXPRESS WARRANTY**

102. Plaintiff re-alleges and incorporates by reference the allegations set forth in the preceding paragraphs numbered one (1) through sixty (60) of this Complaint as if fully set forth herein verbatim.

103. Defendant has expressly represented that the Product is “100% Pure Squeezed Orange Juice,” when in fact, the Product is not squeezed at all, but rather made from water and concentrate.

104. The Product is marketed directly to consumers by Defendant, comes in a container (cup) prepared by Defendant, and does not change from the time it leaves Defendant’s possession until it reaches the consumer.

105. Plaintiff is informed and believes, and thereon alleges, that Defendant made an express warranty, including, but not limited to, that the Product is “100% Pure Squeezed Orange Juice.”

106. Defendant breached its express warranty by claiming that the Product is “100% Pure Squeezed Orange Juice,” because the Product is not squeezed (expressed).

107. As a proximate result of the failure of the Products to perform as expressly warranted by Defendant, Plaintiff and members of the Class have suffered actual damages in an amount to be determined at trial, in that they were induced to purchase a product they would not have purchased had they known the true facts about, and have spent money on the Products that were not what they were represented to be and that lack the value Defendant represented the Products to have.

108. Plaintiff gave timely notice to Defendant of its breach of warranty through a Notice letter sent to Defendant on or about May 1, 2014.

109. Plaintiff seeks all available remedies, damages, and awards as a result of Defendant's breach of express warranty.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

**COUNT VI**  
**VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT (15 U.S.C. §§ 2301 *et seq.*)**

110. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs one (1) through sixty (60), and Count III of this Complaint as if fully set forth herein.

111. As set forth above, Defendant breached the implied warranty of merchantability and an express warranty regarding the Product.

112. Plaintiff and the Class are consumers as defined in 15 U.S.C. § 2301(3).

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

114. The Product is a consumer product as defined in 15 U.S.C. § 2301(6).

115. By reason of Defendant's breach of the above implied warranty merchantability, Defendant has violated the statutory rights due to Plaintiff and members of the Class pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, thereby economically damaging Plaintiff and the Class. The Act is intended to increase the enforceability of these warranties.

116. Therefore, Plaintiff and the Class seek all available remedies, damages, and awards under the Magnuson-Moss Warranty act.

WHEREFORE, Plaintiffs seek relief in the form of actual and compensatory damages, injunctive relief in the form of corrective advertising, equitable relief including restitution, pre and post judgment interest, reimbursement of costs, reasonable attorney's fees, and for any other relief that this Court deems just and proper, as set forth more fully below in the Prayer for Relief section of this Complaint.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment as follows:

- (a) Certification of the Class, certifying Plaintiff as representative of the Class, and designating her counsel as counsel for the Class;
  - (b) For a declaration that Defendants has committed the violations of law alleged herein;
  - (c) Awarding compensatory damages to all Counts where such relief is permitted;
  - (d) Enjoining Defendants from further misrepresenting the ingredients of the Product;
  - (e) Ordering Defendants to engage in a corrective advertising and labeling/disclosure campaign;
  - (e) Awarding equitable monetary relief, including restitution;
  - (f) Awarding Plaintiff and the Class members the costs of this action, including attorney's fees and expenses;
  - (g) Awarding pre- and post-judgment interest at the legal rate on the foregoing sums;
- and
- (h) Awarding such further relief as this Court may deem just and proper.

**IX. DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all claims so triable.

**DATED: May 27, 2014**

**Respectfully Submitted,**

By:

/s/ Joshua H. Eggnatz

Joshua H. Eggnatz, Esq.

Fla. Bar. No.: 0067926

**THE EGGNATZ LAW FIRM, P.A.**

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Weston, FL 33326

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JEggnatz@EggnatzLaw.com

*Trial Counsel for Plaintiff and the Proposed  
Class*

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.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS

ESTEBAN LESMEZ, as an individual consumer, and on behalf of all others similarly situated

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

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

The Eggnatz Law Firm, P.A. 1920 N. Commerce Parkway, Ste. 1, Weston, FL 33326, (954)634-4355

DEFENDANTS

EINSTEIN NOAH RESTAURANT GROUP, INC., a foreign corporation.

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

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

Attorneys (If Known)

James W. Vitrano, Esq., General Counsel, 555 Zang Street, Suite 300 Lakewood, CO 80228

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

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

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant
4 Diversity (Indicate Citizenship of Parties in Item III)

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

- PTF DEF PTF DEF
Citizen of This State 1 1 Incorporated or Principal Place of Business In This State 4 4
Citizen of Another State 2 2 Incorporated and Principal Place of Business In Another State 5 5
Citizen or Subject of a Foreign Country 3 3 Foreign Nation 6 6

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

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Personal Injury, Contract Product Liability, etc.

V. ORIGIN

- 1 Original Proceeding
2 Removed from State Court
3 Re-filed (See VI below)
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment
8 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S)

a) Re-filed Case YES NO b) Related Cases YES NO

JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 1332 (d)(2): Claims for Violations of Florida's Deceptive & Unfair Trade Practices Act, et al. LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

DATE May 27, 2014 SIGNATURE OF ATTORNEY OF RECORD /s/ Joshua H. Eggnatz, Esq.

FOR OFFICE USE ONLY

RECEIPT # aaaaaaaaaa AMOUNT aaaaaaaaaa IFF aaaaaaaaaa JUDGE aaaaaaaaaa\*\*\*\*\*MAG JUDGE aaaaaaaaaa



**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading 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. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

**Refiled (3) Attach copy of Order for Dismissal of Previous case. Also complete VI.**

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

Remanded from Appellate Court. (8) Check this box if remanded from Appellate Court.

**VI. Related/Refiled Cases.** This section of the JS 44 is used to reference related pending cases or re-filed cases. Insert the docket numbers and the corresponding judges name for such cases.

**VII. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

**VIII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

\_\_\_\_\_ District of \_\_\_\_\_

<i>Plaintiff(s)</i>	)	
	)	
v.	)	Civil Action No.
	)	
	)	
<i>Defendant(s)</i>	)	

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff’s attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: \_\_\_\_\_

\_\_\_\_\_ *Signature of Clerk or Deputy Clerk*

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: