

Ben F. Pierce Gore (SBN 128515)
PRATT & ASSOCIATES
1871 The Alameda, Suite 425
San Jose, CA 95126
Telephone: (408) 429-6506
Fax: (408) 369-0752
pgore@prattattorneys.com

Sarah Sterling Starns (admitted *pro hac vice*)
Barrett Law Group, P.A.
P.O. Box 927
Lexington, MS 39095
Telephone: (662) 834-2488
Fax: (662) 834-2628
sstarns@barrettlawgroup.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARY SWEARINGEN and ROBERT FIGY,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

AMAZON PRESERVATION PARTNERS,
INC. d/b/a ZOLA ACAI,

Defendant.

Case No. 13-CV-4402-WHO

**FIRST AMENDED CLASS ACTION
AND REPRESENTATIVE ACTION
COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF**

Action Filed: September 23, 2013

1 Plaintiffs, Mary Swearingen and Robert Figy bring this lawsuit against Defendant,
 2 Amazon Preservation Partners, Inc. d/b/a Zola Açai (“ZOLA” or “Defendant”) based upon their
 3 personal knowledge as to their acts and upon information and belief as to all other matters. In
 4 order to remedy the harm arising from Defendant’s illegal conduct which has resulted in unjust
 5 profits, Plaintiffs bring this action on behalf of themselves and a nationwide class of consumers
 6 who, within the last four years prior to the filing of the original complaint (September 23, 2013),
 7 purchased Defendant’s products labeled with the ingredient “Organic Evaporated Cane Juice” or
 8 “Evaporated Cane Juice” (both terms referred to as “ECJ” throughout) (referred to herein as
 9 “Misbranded Beverage Products”).¹

10 **INTRODUCTION**

11 1. This case seeks to recover for the injuries suffered by Plaintiffs and the Class as a
 12 direct result of the Defendant’s unlawful sale of Misbranded Beverage Products. Defendant’s
 13 actions violate numerous California statutes as well as the unlawful, unfair and fraudulent
 14 business practices prongs of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §
 15 17200, *et seq.* (“UCL”); California’s False Advertising Law, California Bus. & Prof. Code §
 16 17500, *et seq.*, and the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*
 17 (“CLRA”). Defendant packaged and labeled its beverage products in violation of California’s
 18 Sherman Law which adopts, incorporates, and is, in all relevant aspects, identical to the federal
 19 Food Drug & Cosmetic Act, 21 U.S.C. § 301 *et seq.* (“FDCA”) and the regulations adopted
 20 pursuant to that act. These violations render Defendant’s beverage products “misbranded.”

21 2. Under California law, misbranded beverage products cannot be legally sold or
 22 possessed, lack economic value and are legally worthless. Indeed, the sale or possession of
 23 misbranded beverage products is a criminal act in California.

24 3. By selling such illegal products to unsuspecting consumers like Plaintiffs,
 25 Defendant profited at Plaintiffs’ expense and unlawfully deprived Plaintiffs of the money they

26
 27 ¹ This case includes the “Purchased Product” and the “Substantially Similar Products”
 28 (collectively “Misbranded Beverage Products”) as defined herein.

1 paid to purchase the illegal beverage products that were illegal to sell, possess or resell and had
 2 no economic value while simultaneously exposing Plaintiffs to potential legal risk by virtue of
 3 their possession of misbranded beverage products.

4 **DEFINITIONS**

5 4. The “Class Period” is September 23, 2009 to the present.

6 5. “Purchased Product” is the product that was purchased by Plaintiffs during the
 7 Class Period. Both Plaintiffs Mary Swearingen and Robert Figy purchased Defendant’s Açai with
 8 Pomegranate. Photographs of the Purchased Product are attached as Exhibits 1 and 2. The
 9 Purchase Product listed “Organic Evaporated Cane Juice” as an ingredient.²

10 6. “Substantially Similar Products” are Defendant’s other beverage products listed
 11 below in Table 1 that bear the identical unlawful and illegal label statement as that found on the
 12 Purchased Product. Defendant uses unlawful labels containing the unlawful terms “organic
 13 evaporated cane juice” or “evaporated cane juice” on the labels of all the Substantially Similar
 14 Products as is more fully described below. ECJ is a term which is specifically banned from use on
 15 labels under California and federal law.

16 7. “Misbranded Beverage Products” are the Purchased Product and the Substantially
 17 Similar Products. Upon information and belief, the Purchased Product and Substantially Similar
 18 Products are Defendant’s products sold during the class period. Plaintiffs reserve the right to
 19 supplement this list if evidence adduced during discovery shows that Defendant’s other products
 20 had labels which violate the same provisions of the Sherman Law and have the same label
 21 representations as the Purchased Product:

Table 1	
Defendant’s Misbranded Beverage Products	
Açai with Pomegranate – Ex. 3	
Açai Original Juice – Ex. 4	
Açai with Blueberry – Ex. 5	

27 ² Use of the term “organic” ECJ is regulated by the same California and federal law as non-
 28 organic ECJ. Plaintiffs are not challenging Defendant’s use of the term “organic.”

1 been no purchases.

2 11. Plaintiffs did not know, and had no reason to know, that Defendant's products
3 were misbranded under the Sherman Law and that the products bore food labeling claims, despite
4 failing to meet the requirements to make those food labeling claims. Similarly, Plaintiffs did not
5 know, and had no reason to know, that Defendant's products were false and misleading.

6 12. Identical California and federal laws require truthful, accurate information on the
7 labels of packaged foods. The law is clear: misbranded food cannot legally be sold, possessed,
8 has no economic value, and is legally worthless. Purchasers of misbranded food are entitled to
9 restitution or damages.

10 13. Identical California and federal laws regulate the content of labels on packaged
11 food. The FDCA of requirements were adopted by the California Sherman Law. Under both the
12 Sherman Law and FDCA section 403(a), food is "misbranded" if "its labeling is false or
13 misleading in any particular," or if it does not contain certain information on its label or its
14 labeling. 21 U.S.C. § 343(a).

15 14. Under the FDCA, the term "false" has its usual meaning of "untruthful," while the
16 term "misleading" is a term of art. Misbranding reaches not only false claims, but also those
17 claims that might be technically true, but still misleading. If any representation in the labeling is
18 misleading, the entire food is misbranded and no other statement in the labeling cure a misleading
19 statement.

20 15. Under California law, a food product that is "misbranded" cannot legally be
21 manufactured, advertised, distributed, held or sold. Misbranded products cannot be legally sold,
22 possessed, lack economic value, and are legally worthless. Plaintiffs and members of the Class
23 who purchased these products were deprived of their money as a result of Defendant's unlawful
24 and misleading label statements.

25 16. If a manufacturer, like Defendant, is going to make a claim on a food label, the
26 label must meet certain legal requirements that help consumers make informed choices and
27 ensure that they are not misled and that label claims are truthful, accurate and backed by scientific
28

1 evidence. As described more fully below, Defendant has sold products that are misbranded and
2 are worthless because (i) the labels violate the Sherman Law and, separately, (ii) Defendant made,
3 and continues to make, false, misleading and deceptive claims on its labels.

4 17. Plaintiffs bring this action under California law, which is identical to federal law,
5 because of Defendant's food labeling practices which are both (i) unlawful and (ii) deceptive and
6 misleading to consumers because they make unlawful and misleading ECJ claims.

7 **BACKGROUND**

8 18. Defendant's beverage products, with their distinctive packaging and array of
9 flavors, are available at most major supermarket chains and other retail outlets from coast to
10 coast. Defendant's beverage products have unlawfully utilized the illegal term ECJ in the
11 ingredient list on their labels.

12 19. Defendant unlawfully uses the illegal term ECJ on its package labels, instead of
13 the proper term sugar. The ingredient Defendant called "Organic Evaporated Cane Juice" or
14 "Evaporated Cane Juice" was in fact sugar or dried sugar cane syrup. Regardless of whether the
15 ingredient in question was sugar or cane syrup, calling the ingredient ECJ was unlawful and
16 violated the same state and federal statutory and regulatory provisions and was contrary to FDA
17 policy and guidance. Moreover, the use of the term ECJ renders the products misbranded and
18 illegal to sell or possess regardless of whether the ECJ was actually sugar or cane syrup. While
19 Plaintiffs allege that the ingredient in question was in fact sugar, Plaintiffs' allegations that the
20 ingredient listed as ECJ was sugar should be read to mean the ingredient listed as ECJ was sugar
21 or, in the alternative, dried cane syrup.

22 20. Plaintiffs purchased Defendant's Açai with Pomegranate juice.

23 21. Prior to purchasing this product, Plaintiffs read the labels on the product and saw
24 that the label included the term "Organic Evaporated Cane Juice" as one of the
25 "INGREDIENTS." Plaintiffs desired to purchase healthy drink products, free of added or
26 excessive sugar. The ingredients on the label of the Purchased Product appeared to be healthy.
27 Plaintiffs, as any health-conscious consumer would likely agree, believed that the product they
28

1 purchased was a product made without added sugar. Plaintiffs did not realize that the product
2 contained added sugar due to Defendant's use of deceptive verbiage "Organic Evaporated Cane
3 Juice," a term Plaintiffs reviewed when reading the label. Plaintiffs read and relied upon this
4 misleading and deceptive language, "Organic Evaporated Cane Juice" when making their
5 decision to purchase the product. Defendant's unlawful and misleading label statement was a
6 substantial factor in Plaintiffs' decision to purchase the product. As a result, Plaintiffs suffered
7 injury as they lost money buying Defendant's deceptively labeled product when they could have
8 chosen to purchase alternative products that did not contain added sugar or to refrain from buying
9 the product at all. Plaintiffs specifically relied on the product's ingredient labeling when they
10 made their decision to purchase the product. This product was a mislabeled beverage product and,
11 as a result, Plaintiffs suffered injury.

12 22. Exemplar labels of the product purchased by Plaintiffs are provided as Exhibits 1-
13 2. Exhibit 3 is a copy of the label along with the ingredient list obtained from Defendant's
14 website, <http://zolaacai.com/products/acai-with-pomegranate/>. These Exhibits are true, correct
15 and accurate photographs of the Purchased Product labels (front of package and back of package,
16 including the ingredient list) and of the product depiction on Defendant's website.

17 23. During the Class Period, the Purchased Product listed "Organic Evaporated Cane
18 Juice" as an ingredient.

19 24. The ingredient Defendant lists as "Organic evaporated Cane Juice" is not derived
20 from a fruit or vegetable.

21 25. The ingredient Defendant calls "Organic Evaporated Cane Juice" is "sugar" or
22 "dried cane sirup."³

23 26. If a manufacturer makes a claim on a food label, the label must meet certain legal
24 requirements that help consumers make informed choices and ensure that they are not misled.
25 Defendant has made, and continues to make, unlawful as well as false and deceptive claims in
26

27 ³ Alternative, "sirup" may be spelled "syrup." *See* 21 C.F.R. 168.30(c).

1 violation of federal and California laws that govern the types of representations that can be made
2 on food labels. These laws recognize that reasonable consumers are likely to choose products
3 claiming to have a health or nutritional benefit over otherwise similar beverage products that do
4 not claim such properties or benefits or that disclose certain ingredients. More importantly, these
5 laws recognize that the failure to disclose the presence of risk-increasing nutrients is deceptive
6 because it conveys to consumers the net impression that a food makes only positive contributions
7 to a diet or does not contain any nutrients at levels that raise the risk of diet-related diseases or
8 health-related conditions.

9 27. Defendant has violated federal and California labeling regulations by listing sugar
10 and/or sugar cane syrups as “evaporated cane juice.” According to the FDA, the term “evaporated
11 cane juice” is not the common or usual name of any type of sweetener, including sugar or dried
12 cane syrup because sugar has a standard of identity defined by regulations in 21 C.F.R. §
13 101.4(b)(20); 21 C.F.R. 184.1854. The common or usual name for this ingredient is “sugar.”
14 According to the FDA, sweeteners derived from sugar cane or sugar cane syrup should not be
15 listed in the ingredient declaration by names that suggest that the ingredients are juice, such as
16 “evaporated cane juice.” The FDA considers such representations to be “false and misleading”
17 under section 403(a)(1) of the FDCA (21 U.S.C. § 343(a)(1)) because they fail to reveal the basic
18 nature of the food and its characterizing properties (i.e., that the ingredients are sugars or syrups)
19 as required by 21 C.F.R. § 102.5.

20 28. Defendant’s violations of law include the illegal advertising, marketing,
21 distribution, delivery, and sale of Defendant’s Misbranded Beverage Products to consumers in
22 California and throughout the United States.

23 29. Consumers have paid a premium price for Misbranded Beverage Products that
24 they have been misled into believing do not contain added sugars or syrups.

25 **PARTIES, JURISDICTION AND VENUE**

26 30. Plaintiffs MARY SWEARINGEN and ROBERT FIGY are citizens of the state of
27 California. During the Class Period, Plaintiffs purchased in San Francisco, California,

1 Defendant's Açai with Pomegranate that unlawfully listed the term "Organic Evaporated Cane
2 Juice" on its label as an ingredient.

3 31. Defendant is organized and existing under the laws of the state of Delaware.
4 Defendant's headquarters is located at 1501-A Vermont Street, San Francisco, California 94107.
5 Defendant manufactures, advertises, markets, and sells illegal products labeled as containing ECJ
6 to tens of thousands of consumers nationwide, including many residing in California.

7 32. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §
8 1332(d) because this is a class action in which: (1) there are over 100 members in the proposed
9 Class; (2) members of the proposed Class have a different citizenship from Defendant; and (3) the
10 claims of the proposed Class members exceed \$5,000,000 in the aggregate.

11 33. The Court has personal jurisdiction over Defendant because a substantial portion
12 of the wrongdoing alleged in this Complaint occurred in California, Defendant is authorized to do
13 business in California, Defendant has sufficient minimum contacts with California, and
14 Defendant otherwise intentionally availed itself of the markets in California through the
15 promotion, marketing and sale of products sufficient to render the exercise of jurisdiction by this
16 Court permissible under traditional notions of fair play and substantial justice.

17 34. Because a substantial part of the events or omissions giving rise to these claims
18 occurred in this District and because the Court has personal jurisdiction over Defendant, venue is
19 proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b).

20 **FACTUAL ALLEGATIONS**

21 **A. Identical California and Federal Laws Regulate Food Labeling**

22 35. Food manufacturers are required to comply with identical federal and state laws
23 and regulations that govern the labeling of food and beverage products. First and foremost among
24 these is the FDCA and its labeling regulations, including those set forth in 21 C.F.R. § 101 *et seq.*

25 36. Pursuant to the Sherman Law, California has expressly adopted the general
26 labeling requirements as its own and indicated that "[a]ll food labeling regulations and any
27 amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993,
28

1 or adopted on or after that date shall be the food regulations of this state.” Cal. Health & Safety
2 Code § 110100.

3 37. In addition to its blanket adoption of federal labeling requirements, California has
4 also enacted a number of laws and regulations that adopt and incorporate specific enumerated
5 federal food laws and regulations. For example, a food product is misbranded under Cal. Health
6 & Safety Code § 110660 if its labeling is false and misleading in one or more particulars. Further,
7 it is misbranded under Cal. Health & Safety Code § 110725 if it fails to use the common or usual
8 name to identify an ingredient in the product.

9 **B. Defendant’s Use of “Organic Evaporated Cane Juice” and “Evaporated Cane Juice”**
10 **as an Ingredient on Its Labels is Unlawful**

11 38. Defendant’s Açai with Pomegranate, Açai Original Juice, Açai with Blueberry,
12 and Coconut Water Espresso have unlawfully utilized the illegal terms “Organic Evaporated Cane
13 Juice” or “Evaporated Cane Juice” in the ingredient list on their labels.

14 39. Defendant unlawfully uses the illegal term “Organic Evaporated Cane Juice” or
15 “Evaporated Cane Juice” on its package labels, instead of the proper term “sugar.”

16 40. Defendant uses the term ECJ to make its products appear healthier than a product
17 that contains added sugar as an ingredient. These illegal label terms are used to increase sales and
18 to charge a premium by making a product seem healthier than it is in reality by making it appear
19 that no sugar has been added as an ingredient to Defendant’s beverage products. The Purchased
20 Product and Substantially Similar Products at issue in this case make the same label
21 misrepresentations and violate the same regulations of the Sherman Law as the Purchased
22 Products.

23 41. Exemplar depictions of Defendant’s Misbranded Beverage Products are attached
24 as Exhibits 1-6. These Exhibits are true, correct and accurate photographs of the Purchased
25 Product and depictions of Defendant’s Misbranded Beverage Products including the ingredient
26 lists found on Defendant’s website, <http://zolaacai.com/>. These Exhibits demonstrate Defendant’s
27 identical ECJ package labels. During the Class Period, Defendant’s beverage products identified
28 in Table 1 listed ECJ as an ingredient.

42. Defendant's product labeling fails to accurately identify sugar as an ingredient of its products. Rather, the labeling identifies "Organic Evaporate Cane Juice" as an ingredient, despite the fact that the FDCA requires that the ingredient be called "sugar" or "cane syrup." The ingredient is not "juice," but is "sugar" or "syrup." 21 C.F.R. § 101.14 (a)(1) provides "[i]ngredients required to be declared on the label or labeling of a food . . . shall be listed by common or usual name" 21 C.F.R. § 102.5 requires that the common or usual name must accurately describe "the basic nature of the food or its characterizing properties or ingredients," and may not be "confusingly similar to the name of any other food that is not reasonably encompassed within the same name." These federal regulations have been adopted by California pursuant to the Sherman Law. The FDA has expressly stated that ECJ is not the common or usual name of any food ingredient. The FDA's determination of this issue is dispositive. The FDA has further held that the term ECJ fails to reveal the basic nature of the food and its characterizing properties, *i.e.* the ingredient is sugar or syrup and not juice. The FDA's determination on this issue is dispositive.

43. Consistent with the common and usual name regulations, the FDA has specifically warned companies not to use the term "Evaporated Cane Juice." The FDA has issued these warnings because a label containing the term ECJ (1) is "false and misleading"; (2) it is a violation of a number of labeling regulations designed to ensure that manufacturers label their products with the common and usual names of the ingredients they use and accurately describe the ingredients they utilize; and (3) the ingredient in question is not a juice. According to the FDA's published policy, ECJ is simply an unlawful way of describing sugar.

44. In October 2009, the FDA issued Guidance for Industry: Ingredients Declared as Evaporated Cane Juice, Draft Guidance, ("2009 Guidance") which advised industry that:

[T]he term "evaporated cane juice" has started to appear as an ingredient on food labels, most commonly to declare the presence of sweeteners derived from sugar cane syrup. However, FDA's current policy is that sweeteners derived from sugar cane syrup should not be declared as "evaporated cane juice" because that term falsely suggests that the sweeteners are juice (Refs. 1, 2, 3)

. . . .

As provided in 21 CFR 101.4(a)(1), “Ingredients required to be declared on the label or labeling of a food . . . shall be listed by common or usual name . . .” The common or usual name for an ingredient is the name established by common usage or by regulation (21 CFR 102.5(d)). The common or usual name must accurately describe the basic nature of the food or its characterizing properties or ingredients, and may not be “confusingly similar to the name of any other food that is not reasonably encompassed within the same name” (21 CFR 102.5(a)).

. . . Sugar cane products with common or usual names defined by regulation are sugar (21 CFR 101.4(b)(20)) and cane sirup (alternatively spelled “syrup”) (21 CFR 168.130). Other sugar cane products have common or usual names established by common usage (e.g., molasses, raw sugar, brown sugar, turbinado sugar, muscovado sugar, and demerara sugar).

. . . .

The intent of this draft guidance is to advise the regulated industry of FDA’s view that the term “evaporated cane juice” is not the common or usual name of any type of sweetener, including dried cane syrup. Because cane syrup has a standard of identity defined by regulation in 21 CFR 168.130, the common or usual name for the solid or dried form of cane syrup is “dried cane syrup.”

Sweeteners derived from sugar cane syrup should not be listed in the ingredient declaration by names which suggest that the ingredients are juice, such as “evaporated cane juice.” FDA considers such representations to be false and misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they fail to reveal the basic nature of the food and its characterizing properties (i.e., that the ingredients are sugars or syrups) as required by 21 CFR 102.5. Furthermore, sweeteners derived from sugar cane syrup are not juice and should not be included in the percentage juice declaration on the labels of beverages that are represented to contain fruit or vegetable juice (see 21 CFR 101.30).

Draft Guidance for Industry: Ingredients Declared as Evaporated Cane Juice; Draft Guidance (October 2009),

<http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labellingnutrition/ucm181491.htm>. (footnotes omitted) (emphasis added).

45. The FDA’s position is clear: labels listing “Evaporated Cane Juice” are “false and misleading.” *Id.* ECJ is an unlawful term because it is not the common or usual name for sugar. The ingredient listed as “Evaporated Cane Juice” on Defendant’s labels is really “sucrose” as defined in 21 C.F.R. § 184.1854, which is required to be listed as “sugar.” While FDA regulations generally provide that “[t]he name of an ingredient shall be a specific name and not a collective (generic) name,” the regulations expressly provide that “[f]or purposes of ingredient labeling, the term *sugar* shall refer to sucrose, which is obtained from sugar cane or sugar beets in accordance with the provisions of 184.1854 of this chapter.” 21 C.F.R. § 101.4(b)(20) (emphasis in original).

21 C.F.R. 184.1854 lists the chemical names and identifies “sucrose,” CAS number and structure of sugar/sucrose (C₁₂H₂₂O₁₁, CAS Reg. No. 57-50-11-1, β-D-fructofuranosyl-α-D-glucopyranoside) as well as its common names (sugar, sucrose, cane sugar, or beet sugar). 21 C.F.R. § 184.1854 also confirms that the definition of sugar/sucrose covers and includes products “obtained by crystallization from sugar cane or sugar beet juice that have been extracted by pressing or diffusion, then clarified and evaporated.” The ingredient identified as ECJ meets this definition and is sucrose. As such, Defendant cannot call its sweetener ingredient “Evaporated Cane Juice,” but must call it “sugar” or alternatively, “dried cane syrup” pursuant to FDA regulations.

46. It is well established FDA policy that ingredients must always be declared by their common and usual names. In its January 2013 *Guidance for Industry: A Food Labeling Guide (6. Ingredients Lists)*, the FDA advises:

6. Should the common or usual name always be used for ingredients?

Answer: Always list the common or usual name for ingredients unless there is a regulation that provides for a different term. For instance, use the term “sugar” instead of the scientific name “sucrose.”

“INGREDIENTS: Apples, Sugar, Water, and Spices”

See also section 4 question 3. 21 CFR 101.4(a)

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm064880.htm>.

47. Defendant could have easily complied with the FDA and Sherman Law labeling regulations simply by following the FDA’s clear example and listing “sugar” on the ingredient list instead of resorting to the illegal term “Evaporated Cane Juice.”

48. When the food industry first approached the FDA in 1999 with the idea of calling sugar ECJ, the FDA responded with a guidance letter to an industry consulting firm (“2000 Guidance Letter”), saying that certain sweeteners have “well recognized common or usual name[s]” and the common or usual name of “[t]he product extracted from sugar cane is either ‘sugar’ [21 CFR § 104.(b)(20) and 184.1854], or ‘cane sirup’ [21 CFR § 168.130].” See

1 <http://www.regulations.gov/#!documentDetail;D=FDA-2009-D-0430-0005>. The 2000 Guidance
 2 letter went on to point out to the industry that sweeteners such as the sugar at issue here:

3 The product extracted from sugar cane is either "sugar" (21 CFR §1 01.4(b)(20)
 4 and § 184.1854), or "cane syrup" if the product conforms to the standard of
 5 identity for "cane sirup" (21 CFR §168.130)

6

7 . . . should not be declared in the ingredient declaration by names which suggest
 8 that the ingredients are juice, e.g. "evaporated _ juice" or "nectar", or in such a
 9 way as to suggest that the ingredients contain no sugar, e.g. "natural extract of _."
 10 Such representations are false and misleading and fail to reveal the basic nature of
 11 the food and its characterizing properties, i.e. the ingredients are sugar or syrups.
 They are not juice As you know, many of FDA's criminal prosecutions of
 manufacturers and seizures of fruit juices for economic adulteration have involved
 precisely these sweeteners being misrepresented in such a way as to mislead
 consumers

12 . . . We trust that the foregoing will be helpful in providing guidance on the
 appropriate labeling of these ingredients.

13 *Id.*

14 49. Since it issued the 2000 Guidance Letter, the FDA has sent out numerous warning
 15 letters to food manufacturers putting the food industry on notice that ECJ is not the common or
 16 usual name of any sweetener, and that its use of food labels is unlawful. Pursuant to FDA policy,
 17 warning letters are issued for violations of regulations that the FDA considers to be "violations of
 18 regulatory significance." The FDA warning letters, some of which were issued before 2009 and
 19 others after the 2009 ECJ Guidance, have all expressly stated that "Evaporated Cane Juice" is not
 20 the common or usual name of any type of sweetener and that it is not "juice." The FDA has stated
 21 that the proper way to declare this ingredient can be found on the FDA website in the 2009 ECJ
 22 Guidance.

23 See <http://www.fda.gov/ICECI/enforcementactions/warningletters/2012/ucm316268.htm>; see also
 24 <http://www.fda.gov/ICECI/enforcementactions/warningletters/2012/ucm326550.htm>.

25 50. The FDA has not wavered from its position that "Evaporated Cane Juice" is a false
 26 and misleading term that violates numerous labeling regulations and misbrands products since it
 27 was first set out in 2000. Despite the FDA's numerous policy statements, warning letters and
 28

1 guidance, including the issuance of the 2009 ECJ Guidance which merely reiterates a position the
2 FDA has taken for at least a full decade, Defendant failed to remove the unlawful term “ECJ”
3 from its Misbranded Beverage Products’ ingredient lists.

4 51. Defendant continued to use the unlawful term ECJ despite being aware of the
5 unsuccessful efforts of the organic food trade association to have the FDA withdraw the ECJ
6 guidance, including a December 4, 2009, letter submitted to the FDA by the trade association.

7 52. Plaintiffs and the Class lost money due to their purchase of Defendant’s products
8 with the illegal terms “Organic Evaporated Cane Juice” and “Evaporated Cane Juice” listed on
9 their labels. Plaintiffs and the Class would not have purchased these products had they known the
10 products (1) contained sugar as an added ingredient, and (2) were illegal to sell and possess nor
11 would they have expended the purchase price for products that were worthless due to their
12 illegality.

13 53. Plaintiffs and the Class have been damaged by Defendant’s illegal conduct in that
14 they purchased misbranded and worthless products that were illegal to sell or possess.

15 54. Plaintiffs’ unlawful ECJ claims are brought pursuant to the unlawful prong of
16 California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 and the California’s
17 Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* Plaintiffs allege that Defendant
18 packaged and labeled the Purchased Product and Substantially Similar Products in violation of
19 California’s Sherman Law which adopts, incorporates, and is, in all relevant aspects, identical to
20 the Federal Food Drug & Cosmetics Act, 21 U.S.C. § 301 *et seq.* (“FDCA”). Purchased Product
21 and Class Products with this identical type of ECJ labeling violations are “misbranded.”

22 55. 21 C.F.R. §§ 101.3, 101.4 and 102.5, which have been adopted by California,
23 prohibit manufacturers from referring to foods by anything other than their common and usual
24 names.⁴

25 _____
26 ⁴ Pursuant to 21 C.F.R. § 102.5 the common or usual name must accurately describe the basic
27 nature of the food or its characterizing properties or ingredients, and may not be “confusingly
28 similar to the name of any other food that is not reasonably encompassed within the same name.”
(21 C.F.R. 102.5(a)). Defendant’s use of the term ECJ fails this requirement because that term
does not accurately describe the basic nature of the food or its characterizing properties or
ingredients, and may not be “confusingly similar to the name of any other food that is not
FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF

1 56. Federal regulations and California law provide that sugar is proper and common
2 name to be used whenever the ingredient is “obtained by crystallization from sugar cane or sugar
3 beet and has been extracted by pressing or diffusion and then clarified and evaporated. *See* 21
4 C.F.R. §§ 101.4, 101.4(b)(20) and 184.1854.

5 57. The Federal Register makes clear that the definition of sugar/sucrose in 21 C.F.R.
6 § 184.1854 was specifically modified by the FDA to cover sugar/sucrose that was obtained by the
7 evaporation of sugar cane juice stating:

8 In addition, the agency notes that the description of sucrose in proposed §
9 184.1854(a) does not explicitly cover the extraction, by pressing, of sugar cane
10 juice from sugar cane or beet juice from sugar beets and also does not mention the
11 evaporation of the extracted sugar cane juice or beet juice. Therefore, the agency
has modified § 184.1854(a) to include “pressing” as a possible extraction
procedure and “evaporated” as a step in the refinement of sucrose.

12 GRAS Status of Corn Sugar, Corn Syrup, Invert Sugar, and Sucrose, 53 Fed. Reg. 44862-01
13 (Nov. 7, 1998) (codified at 21 C.F.R. § 184.1854).

14 58. Defendant has violated the regulatory provisions detailed above by failing to use
15 the common or usual name for sugar as mandated by law. In particular, Defendant used the
16 unlawful term “ECJ” on its products in violation of numerous federal and state labeling
17 regulations designed to protect consumers from illegal misbranded products in direct violation of
18 express FDA policy as quoted above.

19 59. Defendant violated 21 C.F.R. §§ 101.4 and 102.5 (adopted and incorporated by
20 reference by Sherman Law § 110100 and Sherman Law § 110725). Sherman Law § 110725
21 mandates that a product is misbranded if the common and usual ingredient names are not used.
22 Therefore, Defendant violated the UCL’s unlawful prong by misbranding its products with ECJ
23 instead of using the term “sugar,” or in the alternative term “dried cane syrup.”

24 60. Defendant’s act of selling an illegally misbranded product violates Sherman Law §
25

26 reasonably encompassed within the same name. Here the true nature of the ingredient is a type of
27 added sugar added to sweeten food. The characterizing properties of this ingredient were falsely
misrepresented as a juice when in fact they were a sugar or syrup. Defendant hid this fact by
28 unlawfully using a confusing name (a type of juice) that is not reasonably encompassed within the
same name.

FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF

1 110760 which makes it unlawful for any person to manufacture, sell, deliver, hold, or offer for
2 sale any food that is misbranded. The sale of a misbranded product results in an independent
3 violation of the unlawful prong of the UCL that is separate from any labeling violation.

4 61. Pursuant to Sherman Law § 11825, the sale of such a misbranded product (*i.e.* one
5 whose label fails to use the common and usual ingredient name as required by law) constitutes a
6 criminal act punishable by up to twelve months in jail. As a result, the injury to the Class arises
7 from Defendant illegally selling a product it misbranded, the sale of which is a criminal act.
8 Plaintiffs and the Class have been unlawfully deprived of money in an illegal transaction that
9 occurred because Defendant sold them a worthless, illegal product that could not be legally sold
10 or possessed. Due to the law's prohibition of possession of such a product, consumers have been
11 unwittingly placed, solely and directly by Defendant's conduct, in a legal position that no
12 reasonably consumer would choose. Consumers have thus been directly injured by the
13 Defendant's illegal act of unlawfully selling them an illegal product. This harm goes beyond mere
14 economic injury.

15 62. Numerous FDA warning letters, which are issued only for violations of regulatory
16 significance, have made it clear that the use of the term "Evaporated Cane Juice" is unlawful
17 because the term does not represent the common or usual name of a food or ingredient. These
18 warning letters state that foods that bear labels that contain the term "Evaporated Cane Juice" are
19 misbranded.

20 63. Under California law, a food product that is misbranded cannot be legally
21 manufactured, advertised, distributed, possessed, or sold. Because these products are illegal to
22 possess, they have no economic value and are legally worthless. Indeed, the sale or possession of
23 misbranded food is a criminal act in California. The sale of misbranded products is illegal under
24 federal law as well, as previously stated, and can result in the seizure of the misbranded products
25 and risk of imprisonment of those involved.

26 64. Pursuant to California Civ. Code § 3523 it is codified legal maxim that "for every
27 wrong there is a remedy." The unlawful sale of misbranded food and beverage products that are
28

1 illegal to sell or possess as a matter of express statutory law pursuant to Sherman Law §
2 110760—standing alone without any allegations of deception by Defendant other than the
3 implicit misrepresentation that its products are legal to sell or possess, or any review of or
4 reliance on the particular labeling claims by Plaintiffs—give rise to Plaintiffs’ right to recover for
5 the damages suffered as a result for the illegal sale. Such illegal sales constitute illegal contracts
6 and as such are void and entitle Plaintiffs and the Class to damages and restitution under the
7 common law and numerous statutory provisions enacted by California including but not limited to
8 California Civ. Code §§ 1427, 1428, 1549, 1619, 1621, 1667, 1668, 1712, 3281-82, 3294, 3300,
9 3333, 3345, 3360, 3366-68, 3523, and 3539. In short, Defendant’s injury causing unlawful
10 conduct is the only necessary element needed for liability. However, Plaintiffs did in fact rely in
11 substantial part upon the misrepresentation “ECJ” in deciding to purchase Defendant’s product.

12 65. Plaintiffs were injured by the loss of the purchase price in an illegal transaction,
13 the illegality of which Plaintiffs were unaware. Defendant misled Plaintiffs to believing that the
14 Defendant’s products were legal to purchase and possess. Had Plaintiffs known that Defendant’s
15 products were misbranded, they would not have bought Defendant’s products. Plaintiffs relied on
16 Defendant’s explicit ECJ representations. As a result of such reliance, Plaintiffs thought that the
17 products were preferable to other similar products lacking such statement. Plaintiffs also relied
18 upon Defendant’s implicit representation based on Defendant’s material omission of material
19 facts that its products were legal to sell and possess. Reasonable consumers would be and were
20 misled in the same manner as Plaintiffs. In addition, Plaintiffs were injured because they were
21 unwittingly placed in legal jeopardy due to the possession of Defendant’s illegal and misbranded
22 products. No reasonable consumer would buy a product that was illegal to sell or possess.

23 66. Defendant’s act of selling a misbranded product violates Sherman Law § 110760,
24 which makes it unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any
25 food that is misbranded. The sale of a misbranded product results in an independent violation of
26 the unlawful prong that is separate from the labeling violations listed above. When Plaintiffs
27 purchased Defendant’s Açai with Pomegranate, there was causation and injury as Plaintiffs’
28

1 relied on Defendant's misrepresentation/omission that misbranded the product. This injury arises
 2 from the unlawful sale of an illegal product that is a crime to sell and a crime to possess. Plaintiffs
 3 were deprived of money by an illegal sale and given a worthless illegal product in return. In
 4 addition, due to the law's prohibition of possession of such a product, consumers have been
 5 unwittingly placed by Defendant's conduct in a legal position that no reasonable consumer would
 6 agree to be placed.

7 67. Thus, in this case, where Defendant unlawfully sold products containing the
 8 unlawful term "ECJ" there is 1) a violation of specific labeling regulations and 2) an independent
 9 violation of the unlawful prong due to Defendant's sale of an illegal product that is unlawful to
 10 possess. Plaintiffs would not have bought the Purchased Product had they known or had
 11 Defendant disclosed the material fact that the Purchased Product was illegal to sell and possess.
 12 Plaintiffs were injured by Defendant's unlawful act of selling them an illegal product that was
 13 illegal to sell or possess.

14 **C. Defendant's Use of ECJ as an Ingredient on Its Labels is Fraudulent, Deceptive and**
 15 **Misleading Because it Fails to Identify Added Sugar.**

16 68. Plaintiffs are health conscious consumers who wish to avoid added sugars in the
 17 food and beverage products they purchase. Added sugar is a recognized term that has a distinct
 18 meaning as described below. Plaintiffs were unaware that Defendant's product they purchased
 19 contained "added sugars" that were *added* as an ingredient into Defendant's beverage products
 20 during processing or preparation. While Plaintiffs were aware that Defendant's beverage products
 21 contained some sugars, they believed these sugars were naturally occurring sugars that were
 22 found *naturally* in the ingredients used by Defendant. The reason that Plaintiffs were unaware of
 23 this fact was that Defendant utilized the false and misleading term ECJ to identify the *added*
 24 *sugar* it added as an ingredient to its food product. The FDA deems the term "Evaporated Cane
 25 Juice" to be "false and misleading" because 1) it "fail[s] to reveal the basic nature of the food and
 26 its characterizing properties (*i.e.*, that the ingredients are sugars or syrups)" and 2) "sweeteners
 27 derived from sugar cane syrup are not juice." *See* Draft Guidance for Industry: Ingredients
 28 Declared as Evaporated Cane Juice; Draft Guidance (October 2009) ("2009 Draft Guidance"),

1 available at

2 [http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingn](http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm181491.htm)
3 [utrition/ucm181491.htm](http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm181491.htm).

4 69. Plaintiffs scanned the ingredient list of the Purchased Product for forms of added
5 sugar and failed to recognize the term “Evaporated Cane Juice” as a form of added sugar. This is
6 hardly surprising since 1) the FDA considers the term to be false and misleading because it fails
7 to reveal that the ingredient is a sugar or syrup; 2) juice is considered to be a healthy food that
8 does not contain added sugars; 3) most lists of added sugars and sugar aliases do not list ECJ as
9 an added sugar or sugar alias; and 4) consumer studies confirm that most purchase decisions are
10 made in a fraction of a second and thus the potential for a false and misleading term to mislead is
11 significant. Moreover, as discussed below, the nutrition facts panel listing of total sugars does not
12 allow a consumer to determine if a product has any added sugars. Consumers are only able to
13 determine the presence of added sugars by reading a products’ ingredient list. Companies like
14 Defendant that mislabel their sugars in the ingredient list with false and misleading terms frustrate
15 this capability by hiding the added sugar. In addition, the inclusion of words such as “juice” or
16 “cane” into the false and misleading term “Evaporated Cane Juice” do not mitigate the false and
17 misleading nature of the term and in fact, in the case of a word like “juice,” actually makes it
18 misleading in the eyes of the FDA since it is an added sugar and not a juice. In contrast, the
19 failure to utilize words like “sugar” or “syrup” to describe the ingredient identified by Defendant
20 as evaporated cane juice is false and misleading because it conceals the fact that the ingredient is
21 in fact an added sugar, namely an added sugar or syrup sweetener.

22 70. Plaintiffs’ desire to avoid added sugars was reasonable. Added sugar is a known
23 health risk that consumers are advised to avoid by the United States government, scientific and
24 educational institutions, and food-related companies such as grocery store chains and food
25 manufacturers. All of these entities know and publish: 1) there is a distinction between added
26 sugars and naturally occurring sugars; 2) added sugars have no beneficial nutritional value and
27 contribute only empty calories and have recognized health risks; 3) consumers should either
28

1 eliminate or greatly limit their consumption of added sugars and foods containing added sugars;
 2 4) it is the ingredient list and not the nutrition facts panel of a food's label that informs consumers
 3 of the presence of added sugars; and 5) consumers need to be careful to avoid added sugar that is
 4 disguised by another name.

5 71. The 2010 Dietary Guidelines promulgated by the U.S. Department of Health and
 6 Human Services and the U.S. Department of Agriculture make clear that 1) there is a distinction
 7 between added sugars and naturally occurring sugars; 2) consumers should either eliminate or
 8 greatly limit their consumption of added sugars and foods containing added sugars; 3) it is the
 9 ingredient list and not the nutrition facts portion of a food's label that informs consumers of the
 10 presence of added sugars. *See*, Dietary Guidelines for Americans 2010, U.S. Department of
 11 Agriculture and U.S. Department of Health and Human Services, available at
 12 <http://www.health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf>.

13 72. The 2010 Dietary Guidelines indicate that consumers should “[l]imit calorie intake
 14 from . . . added sugars” and “[c]hoose foods prepared with little or no added sugars.” *Id.* The
 15 2010 Dietary Guidelines further state: “[u]se the Nutrition Facts label to choose . . . packaged
 16 foods with less total sugars, and use the ingredients list to choose foods with little or no added
 17 sugars.” *Id.* These Guidelines indicate that:

18 An important underlying principle is the need to control calorie intake to manage
 19 body weight and limit the intake of food components that increase the risk of
 20 certain chronic diseases. This goal can be achieved by consuming fewer foods
 21 that are high in sodium, solid fats, **added sugars**, and refined grains and, for those
 22 who drink, consuming alcohol in moderation.

21 *Id.* (emphasis added).

22 73. The 2010 Dietary Guidelines defines “added sugars”:

23 **Added sugars**—Sugars, syrups, and other caloric sweeteners that are added to
 24 foods during process-ing, preparation, or consumed separately. Added sugars do
 25 not include naturally occurring sugars such as those in fruit or milk. Names for
 26 added sugars include: brown sugar, corn sweetener, corn syrup, dextrose,
 27 fructose, fruit juice concentrates, glucose, high-fructose corn syrup, honey, invert
 28 sugar, lactose, maltose, malt syrup, molasses, raw sugar, turbinado sugar,
 trehalose, and sucrose.

27 *Id.* (emphasis in original).

74. Further, the 2010 Dietary Guidelines make clear that consumers who wish to avoid added sugars must read the ingredient list and cannot rely on the Nutrition Facts line item listing of total sugars:

THE FOOD LABEL: A USEFUL TOOL

“Using the Food Label to Track Calories, Nutrients, and Ingredients” (Appendix 4) provides detailed guidance that can help Americans make healthy food choices.

The Nutrition Facts label provides information on the amount of calories; beneficial nutrients, such as dietary fiber and calcium; as well as the amount of certain food components that should be limited in the diet, including saturated fat, *trans* fat, cholesterol, and sodium.

The ingredients list can be used to find out whether a food or beverage contains solid fats, added sugars, whole grains, and refined grains.

Id. (emphasis added).

75. Table A4-2 of the 2010 Dietary Guidelines lists the following examples of added ingredients that can be listed as an ingredient in a food product’s ingredient list:

- Anhydrous dextrose
- Lactose
- Brown sugar
- Malt syrup
- Confectioner’s powdered sugar
- Maltose
- Corn syrup
- Maple syrup
- Corn syrup solids
- Molasses
- Dextrin
- Nectars (e.g., peach nectar, pear nectar)
- Fructose
- Pancake syrup
- High-fructose corn syrup
- Raw sugar
- Honey
- Sucrose
- Invert sugar
- Sugar
- White granulated sugar

Id.

76. The list above does not list ECJ as a form of added sugar. The 2010 Dietary Guidelines indicate that while ECJ is not recognized by the FDA as an ingredient name, this added sugar is sometimes listed as an ingredient on the labels of food and beverage products:

Other added sugars may be listed as an ingredient but are not recognized by FDA as an ingredient name. These include cane juice, evaporated corn sweetener, fruit

juice concentrate, crystal dextrose, glucose, liquid fructose, sugar cane juice, and fruit nectar.

Id.

77. Other federal government agencies adopt a similar approach to added sugars. For instance, the National Institute of Health 1) confirms the health risks posed by added sugar; 2) indicates the need to read the ingredient list to find added sugars; and 3) utilizes a list that fails to include the false and misleading term evaporated cane juice.

78. The National Institute of Health publishes the following about “added sugar”:

Added Sugars

With both the USDA Food Patterns and the Dietary Approaches to Stop Hypertension (DASH) Eating Plan, added sugars mean more calories without more nutrients. For some people, added sugars can lead to higher levels of fats in the blood, raising their risk of heart disease.

Read the ingredients label to see if the processed food you are eating has added sugar. In addition to other updates, the FDA recently proposed to include “Added Sugars” on the Nutrition Facts label to inform consumers of their sugar intake. Learn more about how FDA’s Proposed Changes Aim to Better Inform Food Choices. Key words on the label to look for:

- | | |
|----------------------------|----------------|
| • brown sugar | • invert sugar |
| • corn sweetener | • lactose |
| • corn syrup | • maltose |
| • dextrose | • malt syrup |
| • fructose | • molasses |
| • fruit juice concentrate | • raw sugar |
| • glucose | • sucrose |
| • high-fructose corn syrup | • sugar |
| • honey | • maple syrup |

<http://www.nia.nih.gov/health/publication/whats-your-plate/solid-fats-added-sugars> (internal hyperlinks removed).

79. The United States government’s approach to added sugars is echoed by other scientific, educational and medical entities. For example, the American Heart Association (“AHA”) states the following about added sugar:

Naturally occurring sugars and added sugars

There are two types of sugars in American diets: naturally occurring sugars and added sugars.

- Naturally occurring sugars are found *naturally* in foods such as fruit (fructose) and milk (lactose).
- Added sugars include *any* sugars or caloric sweeteners that are *added* to foods or beverages during processing or preparation (such as putting sugar in your coffee or adding sugar to your cereal). Added sugars (or added sweeteners) can include natural sugars such as white sugar, brown sugar and honey as well as other caloric sweeteners that are chemically manufactured (such as high fructose corn syrup).

http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Sugars-101_UCM_306024_Article.jsp.

80. The American Heart Association cautions consumers that the nutrition facts panel is not the place to look for added sugar:

Finding added sugars in food

Unfortunately, you can't tell easily by looking at the nutrition facts panel of a food if it contains added sugars. The line for "sugars" includes both added and natural sugars. Naturally occurring sugars are found in milk (lactose) and fruit (fructose). Any product that contains milk (such as yogurt, milk or cream) or fruit (fresh, dried) contains some *natural* sugars.

Reading the ingredient list on a processed food's label can tell you if the product contains added sugars, just not the exact amount if the product also contains natural sugars.

Names for added sugars on labels include:

- Brown sugar
- Corn sweetener
- Corn syrup
- Fruit juice concentrates
- High-fructose corn syrup
- Honey
- Invert sugar
- Malt sugar
- Molasses
- Raw sugar
- Sugar
- Sugar molecules ending in "ose" (dextrose, fructose, glucose, lactose, maltose, sucrose)
- Syrup

Id. Like the United States government's list, this list also fails to contain the term evaporated cane juice.

81. In addition, the AHA warns that consumers "need to reduce added sugar" in their diets and therefore the AHA has recommended very strict added sugar guidelines stating:

FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF

Need to reduce added sugars

Although sugars are not harmful to the body, our bodies don't *need* sugars to function properly. Added sugars contribute additional calories and zero nutrients to food.

Over the past 30 years, Americans have steadily consumed more and more added sugars in their diets, which has contributed to the obesity epidemic. Reducing the amount of added sugars we eat cuts calories and can help you improve your heart health and control your weight.

The American Heart Association recommends limiting the amount of added sugars you consume to no more than half of your daily discretionary calorie allowance. For most American women, this is no more than 100 calories per day and no more than 150 calories per day for men (or about 6 teaspoons per day for women and 9 teaspoons per day for men).

Id. (emphasis added).

82. The Harvard School of Public Health takes the same position with respect to added sugar:

Your body doesn't need to get any carbohydrate from added sugar. That's why the Healthy Eating Pyramid says sugary drinks and sweets should be used sparingly, if at all, and the Healthy Eating Plate does not include foods with added sugars

. . . .

The American Heart Association (AHA) has recommended that Americans drastically cut back on added sugar to help slow the obesity and heart disease epidemics.

- The AHA suggests an added-sugar limit of no more than 100 calories per day (about 6 teaspoons or 24 grams of sugar) for most women and no more than 150 calories per day (about 9 teaspoons or 36 grams of sugar) for most men.
- There's no nutritional need or benefit that comes from eating added sugar. A good rule of thumb is to avoid products that have a lot of added sugar

<http://www.hsph.harvard.edu/nutritionsource/carbohydrates/added-sugar-in-the-diet/>.

83. The Harvard School of Public Health further notes that "[s]ome ingredient lists mask the amount of sugar in a product." The Harvard School of Public Health informs consumers on how to avoid being fooled by such practices:

How to spot added sugar on food labels

Spotting added sugar on food labels can requires [sic] some detective work. Though food and beverage manufacturers list a product's total amount of sugar

per serving on the Nutrition Facts Panel, they are not required to list how much of that sugar is added sugar versus naturally occurring sugar. That's why you'll need to scan the ingredients list of a food or drink to find the added sugar.

Id.

84. While the Harvard School of Public Health notes it is possible to compare different products and utilize math to figure out the amount (as opposed to the presence of) added sugar in certain types of properly labeled products that disclose the presence of added sugar, the comparison approach suggested by the school does not work when the added sugar is disguised by false and misleading term like ECJ that conceals the presence of added sugar. According to the Harvard School of Public Health:

When you eat an apple or carrot or bowl of steel-cut oatmeal, you know what you are eating—an apple or carrot or steel-cut oats. That's not the case with ready-to-eat breakfast cereals, cookies, frozen dinners, or any of the thousands of other processed foods. Think of these as terra incognita, and the ingredient list on the package as your map to it. But like an old pirate map, some ingredient lists are designed to confuse and muddle rather than lead you to the treasure. The biggest sleight of hand involves sugar.

. . . .

Nutrition sleuths can compare the labels of two similar products—one with sugar, one without—and do a little math to figure out how much sugar is added sugar. For example, a 6-ounce, fat-free plain Stonyfield Farm yogurt has 12 grams of sugar. The ingredients list shows no added sugar, so all of the yogurt's sugar comes from lactose, the sugar that is naturally found in milk. A fat-free vanilla Stonyfield Farm yogurt has 24 grams of sugar; the extra 12 grams is added sugar from "naturally milled organic sugar."

<http://web.archive.org/web/20130202092421/http://www.hsph.harvard.edu/nutritionsource/cereal-sugar-content/>.

85. This approach does not work where there is no sweetener listed in the ingredient list that is recognized as an added sugar. In such a situation, it is only possible to determine that one product has more total sugar than another but because of the concealed added sugar this would appear to consumers as merely the difference between levels of naturally occurring sugar in the two products. It is also impractical to expect consumers who make purchase decisions in a fraction of a second to have to perform mathematical calculations utilizing information gleaned from two separate product labels.

86. A term like ECJ that purports to be a juice conceals the presence of added sugars

1 because by definition, 100% juice is a source of natural sugars and no added sugars. Thus as
 2 confirmed by the University of Florida “100% fruit juice has no added sugars.”
 3 <http://edis.ifas.ufl.edu/pdffiles/FY/FY135800.pdf>. Thus, accurate descriptions are necessary in
 4 ingredient lists because:

5 Although the panel is helpful for finding total sugar, it does not differentiate
 6 between natural sugar and added sugars. For example, sugar would be listed on
 7 the Nutrition Facts Panel for both 100% orange juice and an orange drink, but
 only the orange drink will have sugar added to it.

8 *Id.*

9 87. The Mayo Clinic is also on record confirming 1) the difference between added
 10 sugar and naturally occurring sugar; 2) the health risks posed by added sugar; 3) the need to avoid
 11 added sugars and limit consumption of foods containing added sugars; 4) the importance of the
 12 ingredient list in identifying added sugar; 5) the inability to use the nutrition facts panel’s line
 13 item for sugar to determine whether added sugar was present; and 6) the numerous names used
 14 for added sugars. According to the Mayo Clinic:

15 **Added sugar: Don't get sabotaged by sweeteners**

16 Do you know how much sugar is in your diet? See why added sugar is a concern
 17 and how you can cut back

18

19 "Added sugar" refers to sugars and syrups added to foods during processing. . . .

20

21 **Why is added sugar a problem?**

22 Foods with a lot of added sugar contribute extra calories to your diet but provide
 23 little nutritional value. In addition, added sugar is often found in foods that also
 24 contain solid fats.

Eating too many foods with added sugar and solid fats sets the stage for potential
 health problems, such as:

- 25 • Poor nutrition. If you fill up on foods laden with added sugar, you may skimp on
 26 nutritious foods, which means you could miss out on important nutrients, vitamins
 27 and minerals. Regular soda plays an especially big role. It's easy to fill up on
 sweetened soft drinks and skip low-fat milk and even water — giving you lots of
 extra sugar and calories and no other nutritional value.
- 28 • Weight gain. There's usually no single cause for being overweight or obese. But

added sugar may contribute to the problem. Many foods and beverages contain lots of sugar, making them more calorie-dense. When you eat foods that are sugar sweetened, it is easier to consume more calories than if the foods are unsweetened.

- Increased triglycerides. Triglycerides are a type of fat in the bloodstream and fat tissue. Eating an excessive amount of added sugar can increase triglyceride levels, which may increase your risk of heart disease.
- Tooth decay. All forms of sugar promote tooth decay by allowing bacteria to proliferate and grow. The more often and longer you snack on foods and beverages with either natural sugar or added sugar, the more likely you are to develop cavities, especially if you don't practice good oral hygiene.

Recommendations regarding added sugar

In the 2010 Dietary Guidelines for Americans, the U.S. Department of Agriculture (USDA) recommends that no more than about 5 to 15 percent of your total daily calories come from added sugar and solid fats.

The American Heart Association has even more-specific guidelines for added sugar — no more than 100 calories a day from added sugar for most women and no more than 150 calories a day for most men. That's about 6 teaspoons of added sugar for women and 9 for men.

Unfortunately, most Americans get more than 22 teaspoons — or 355 calories — of added sugar a day, which far exceeds these recommendations.

<http://www.mayoclinic.org/healthy-living/nutrition-and-healthy-eating/in-depth/added-sugar/art-20045328>.

88. The Mayo Clinic reports:

Recognizing added sugar

Identifying added sugar can be confusing. Most people look at the Nutrition Facts part of the label for the total number of grams of sugar in a serving of the product. It's important to realize, however, that the amount shown includes natural sugars found in certain ingredients, such as grain, fruit and milk. The only reliable way to identify added sugar is to look at the ingredient list.

....

Different names for added sugar

Sugar goes by many different names, depending on its source and how it was made. This can also make it hard to identify added sugar, even when you read ingredient lists and food labels.

<http://www.mayoclinic.org/healthy-living/nutrition-and-healthy-eating/in-depth/added-sugar/art-20045328?pg=2>.

89. Not only do government and nationally recognized health institutions and

1 associations advise on the manners in which to detect and determine added sugar, but reputable
 2 food related companies such as grocery store chains and food manufacturers have adopted a
 3 similar approach with respect to added sugars. For example, the Shoprite grocery store chain
 4 states:

5 The nutrition panel of packaged foods lists the total amount of sugars in a serving
 6 of food. This number includes sugars found naturally in food as well as the sugar
 7 that is added. The ingredient list must state all the sugars which are added to the
 product.

8 Sugar can often be “disguised” on food labels since there are many different
 forms and names for sugar. . . .

9

10 **What’s the bottom line?**

11 Choose healthy foods that contain natural sugars most often and limit your
 12 consumption of foods high in added sugar. Be an informed shopper. Read the
 ingredient panel to be sure you are truly getting a product without a lot of added
 13 sugar. And as always, remember that a healthy diet is one that is balanced and
 includes a variety of foods from all food groups in moderation.

14 [http://www.shoprite.com/dietitians-corner/archives/sugar-by-any-other-name-is-still-](http://www.shoprite.com/dietitians-corner/archives/sugar-by-any-other-name-is-still-sugar/)
 15 [sugar/](http://www.shoprite.com/dietitians-corner/archives/sugar-by-any-other-name-is-still-sugar/).

16 90. Similarly, the Publix grocery store chain advises consumers of added sugars:

17 Controlling added sugars is important because it helps us avoid excess calories,
 18 which can lead to increased weight and triglycerides—two factors that can put
 you at higher risk of obesity, heart attack and stroke.

19 The AHA suggests women limit their intake of added sugars to 6 teaspoons daily;
 20 men should limit intake to 9 teaspoons. The recommendations do not apply to
 naturally occurring sugars, such as those found in fruits, vegetables or dairy
 21 products.

22 Check food label ingredients for hidden sugars like corn syrup, fructose, dextrose,
 molasses or evaporated cane juice

23 <http://www.publix.com/wellness/greenwise/products/ProductDetail.do?id=1930>.

24 91. Atkins Nutritionals, the company behind the Atkins line of food products has also
 25 weighed in on added sugars:

26 **Finding Added Sugars**

27 Taking control of your health is about focusing on carbohydrate foods that are
 28 high in nutrients and fiber. That’s why added sugar in any form should be avoided

1 in the weight loss phases of Atkins. No matter what it's called sugar has virtually
2 no nutritional value.

3 **What's the Difference?**

4 *Naturally occurring sugars*, found in dairy products or in fruit or vegetables, for
5 instance, are an organic part of the food, and they are perfectly acceptable. An
6 example: sugar free ice cream has some naturally occurring sugars from the milk
7 and cream with which it is made. That same ice cream might also include some
8 strawberries (which contain fruit sugar). Both sugars are natural, making the ice
9 cream suitable for healthy lifestyles.

10 *Added sugars* lurk in many foods and not just in the form of sucrose (table sugar).
11 Added sugar is often disguised with misleading names in packaged foods. These
12 include cane sugar and evaporated cane juice, brown sugar, beet sugar or any
13 other ingredient ending in "sugar," as well as syrups (or syrup solids) such as
14 maple, corn or cane. Many ingredients ending in "ose" are also sugars, although
15 exceptions include sucralose and cellulose.

16 To complicate matters, a natural sugar, such as fructose, is considered an added
17 sugar from a regulatory point of view and can also take the form of an added
18 sugar when it's included in processed foods. The Nutrition Facts panel tells you
19 the number of grams of sugars in a serving, but because it lumps together all
20 sugars, it does not distinguish between integral and added sugars. Instead, you'll
21 need to go to the ingredients list. If you see fructose listed instead of fruit, for
22 example, even though that sugar has a natural source, you'll know it's an added
23 ingredient you should limit your exposure to. Here are various aliases for added
24 sugars:

- 25 • Brown sugar
- 26 • Cane syrup
- Corn sweetener
- Corn syrup
- Corn syrup solids
- Dextrose
- Fructose
- Fruit juice concentrate
- Galactose
- Glucose
- High-fructose corn syrup
- Honey
- Invert sugar
- Lactose
- Malt
- Maltose
- Malt syrup
- Maple syrup
- Molasses
- Raw sugar
- Rice syrup
- Sucrose

27 <http://www.atkins.com/Science/Articles---Library/Sugar/Finding-Added-Sugars.aspx>.

28 92. Defendant's beverage products with ECJ as an ingredient have significant added

1 sugar. This added sugar is hidden from consumers, such as Plaintiffs, by Defendant's unlawful
2 practice of using the false and misleading term "Evaporated Cane Juice" in the ingredient lists of
3 its beverage products instead of the term sugar which is the name mandated by state and federal
4 law. The labeling laws violated by Defendant were designed to ensure that consumers receive the
5 information they need to make informed decisions so that, for example, consumers looking for
6 added sugar can find it when they look for it in the ingredient list.

7 93. Plaintiffs would not have bought the Purchased Product had they known it
8 contained added sugar. Although Plaintiffs read the ingredient list of the Purchased Product, they
9 did not realize that ECJ was 1) sugar or syrup; 2) a form of added sugar; 3) a refined sugar; or 4)
10 not a juice. Any reasonable consumer would have been misled by the false and misleading terms
11 "Organic Evaporated Cane Juice" or "Evaporated Cane Juice."

12 94. Plaintiffs would not have bought the Purchased Product had they known it
13 contained an added sugar or syrup; a refined sugar or sweetener; or that evaporated cane juice
14 was not a juice but rather sugar or syrup and an added sugar and a refined sweetener. The
15 nutrition facts panel of the Purchased Product bought by Plaintiffs did not reveal the presence of
16 added sugars, and the false and misleading term "Evaporated Cane Juice" in the ingredient list
17 concealed the presence of any added sugar or refined sugar.

18 95. When Plaintiffs read the ingredient list, they did not realize that there was added
19 sugar in the Purchased Product because they did not recognize the term "Organic Evaporated
20 Cane Juice" as being sugar because the term (which the FDA has held to be a false and
21 misleading) misled them. ECJ was not the common or usual term for the ingredient in question,
22 which was actually a refined form of sugar or cane syrup. Defendant's use of a term that included
23 the word "juice," but not the words "sugar" or "syrup" failed to accurately characterize the
24 ingredient in question and the FDA concurs with this allegation. While Plaintiffs could determine
25 the total amount of sugars in the product from the nutritional facts table, they could not determine
26 if there were any added sugars or syrups because the Defendant's ingredient list on the Purchased
27 Product concealed the presence of such added sugars by the use of the false and misleading term

1 “Organic Evaporated Cane Juice.” Plaintiffs could also not determine the relative amount of any
 2 added sugars because the term “ECJ” was not recognized by them as a sugar and thus its relative
 3 position in the ingredient list (where ingredients are required to be listed in descending order by
 4 weight) did not inform them of the level of added sugar.

5 96. Defendant’s failure to utilize either the term “sugar” or the term “syrup” to
 6 describe the ingredient identified on the Purchased Product as “Organic Evaporated Cane Juice”
 7 failed to reveal the basic nature of the ingredient and its characterizing properties (*i.e.*, that the
 8 ingredients are sugars or syrups). According to the FDA:

9 However, FDA’s regulatory approach for the nomenclature of sugar and syrups is
 10 that sugar is a solid, dried, and crystallized food; whereas syrup is an aqueous
 11 solution or liquid food. FDA’s regulations permit the term “sugar” as part of the
 12 name for food that is solid, dried, and crystallized, specifically the standards of
 13 identity for dextrose monohydrate (21 CFR 168.111) and lactose (21 CFR
 14 168.122), and the GRAS regulation for sucrose (21 CFR 184.1854).[1] FDA’s
 15 regulations provide for the terms “syrup” or “sirup” for food that is liquid or is an
 aqueous solution, specifically the standards of identity for glucose sirup (21 CFR
 168.120), cane sirup (21 CFR 168.130), maple sirup (21 CFR 168.140), sorghum
 sirup, (21 CFR 168.160), and table sirup (21 CFR 168.180). FDA’s approach is
 consistent with the common understanding of sugar and syrup as referenced in a
 dictionary.

16 FDA Response to Petition from Corn Refiners Association to Authorize “Corn Sugar” as
 17 an Alternate Common or Usual Name for High Fructose Corn Syrup (HFCS), May 30,
 18 2012, available at
 19 [http://www.fda.gov/aboutFDA/CentersOffices/OfficeofFoods/CFSAN/CFSANFOIAElec](http://www.fda.gov/aboutFDA/CentersOffices/OfficeofFoods/CFSAN/CFSANFOIAElectronicReadingRoom/ucm305226.htm#_ftn2)
 20 [tronicReadingRoom/ucm305226.htm#_ftn2](http://www.fda.gov/aboutFDA/CentersOffices/OfficeofFoods/CFSAN/CFSANFOIAElectronicReadingRoom/ucm305226.htm#_ftn2).

21 97. Based on the inclusion of the word “evaporated” in the term evaporated cane juice,
 22 Plaintiffs would show that the sweetener in the Defendant’s beverage products is sugar, a dried
 23 crystallized ingredient, as defined in 21 C.F.R. §§ 101.4(b)(20) and 184.1854. However, even if
 24 the added sugar was a form of cane syrup, it would make no difference. In either case, the
 25 Defendant utilized a false and misleading term, “Evaporated Cane Juice,” to conceal the fact that
 26 Defendant was utilizing an added sugar to sweeten its products. In either case the false and
 27 misleading term “Evaporated Cane Juice” failed to reveal the basic nature of the ingredient and its

1 characterizing properties (*i.e.*, that the ingredients are sugars or syrups).

2 98. While FDA regulations provide that “[t]he name of an ingredient shall be a
3 specific name and not a collective (generic) name,” the regulations expressly provide that “[f]or
4 purposes of ingredient labeling, the term “*sugar*” shall refer to sucrose, which is obtained from
5 sugar cane or sugar beets in accordance with the provisions of 184.1854 of this chapter. 21 C.F.R.
6 § 101.4(b)(20). The ingredient identified as ECJ meets this definition and is sucrose. As such,
7 Defendant was required to identify the ingredient in question as sugar and could not call it
8 evaporated cane juice.

9 99. The term “sugar” indicates to reasonable consumers the ingredient sugar.
10 Similarly, the term “syrup” connotes a type of sweetener that contains sugar. “Syrup” is defined
11 by numerous dictionaries as some variation of “a concentrated solution of sugar in water”; “a
12 concentrated solution of sugar in water”; “a concentrated solution of a sugar, such as sucrose, in
13 water”; “a thick sticky liquid consisting of a concentrated solution of a sugar and water”; “a very
14 sweet, thick light colored liquid made by dissolving sugar in water”; “a sweet liquid made from
15 sugar and water”; etc. Thus, had Defendant used the words “sugar” or “syrup” to describe the
16 ingredient it described as “Organic Evaporated Cane Juice” or “Evaporated Cane Juice” it could
17 have informed consumers of the presence of added sugar. Defendant’s failure to utilize either
18 term concealed the presence of added sugars in Defendant’s beverage products.

19 100. Defendant further concealed the presence of added sugars in its beverage products
20 by utilizing the false and misleading term “Evaporated Cane Juice” to describe an added
21 sweetener that was not in fact juice, but was rather sugar. *See*,
22 <http://www.regulations.gov/#!documentDetail;D=FDA-2009-D-0430-0005>.

23 101. The FDA has repeatedly made their policy on sweeteners derived from sugar clear:

24 FDA’s current policy is that sweeteners derived from sugar cane syrup
25 should not be declared as “evaporated cane juice” because that term falsely
26 suggests that the sweeteners are juice. “Juice” is defined by 21 CFR 120.1(a) as
27 “the aqueous liquid expressed or extracted from one or more fruits or vegetables,
28 purees of the edible portions of one or more fruits or vegetables, or any
concentrates of such liquid or puree.” Although FDA does not dispute that sugar
cane is a member of the vegetable kingdom in the broad sense of classifying an
article as “animal,” “vegetable,” or “mineral,” the agency considers the term

“vegetable” in the context of the juice definition to refer more narrowly to edible plant parts that consumers are accustomed to eating as vegetables in their diet. Sugar cane is not a vegetable in this sense. While consumers can purchase pieces of sugar cane, consumers do not eat sugar cane as a “vegetable” but instead use it as a source of sugar by chewing on the cane or its fibers or by placing the cane in a beverage to sweeten it. There are other plant juices used for human food that similarly are not “vegetable juice” or “fruit juice” for purposes of the juice definition; e.g., maple syrup and sorghum syrup. In summary, FDA’s view is that the juice or extract of sugar cane is not the juice of a plant that consumers are accustomed to eating as a vegetable in their diet and is not, therefore, “juice” as contemplated by the regulation defining that term.

2009 Guidance,

<http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labellingnutrition/ucm181491.htm>. (references omitted) (emphasis added).

102. The FDA has further confirmed that:

... “evaporated cane juice” and other sweeteners derived from sugar cane syrup are not “juice” as defined in 21 CFR 120.1. . .

....

... Sweeteners derived from sugar cane syrup should not be listed in the ingredient declaration by names which suggest that the ingredients are juice, such as “evaporated cane juice.” FDA considers such representations to be false and misleading under section 403(a)(1) of the Act (21 U.S.C. 343(a)(1)) because they fail to reveal the basic nature of the food and its characterizing properties (i.e., that the ingredients are sugars or syrups) as required by 21 CFR 102.5. Furthermore, sweeteners derived from sugar cane syrup are not juice. . . .

Id.

103. Thus, it was false and misleading for Defendant to use the term “ECJ” to identify the added sugar derived from sugar cane it used as an ingredient. Moreover, reasonable consumers do not consider juice to be a sugar or syrup or a refined sugar. Thus, it was false and misleading for Defendant to use the term “ECJ” to describe the refined sugar (or in the alternative syrup), nor do reasonable consumers consider juice to be an added sugar. To the contrary, consumers are instructed by the federal government and other entities that if they wish to avoid added sugar they should look for juice because juice is not an added sugar, nor does it contain added sugar and is thus a way to avoid added sugars. Therefore, it was false and misleading for Defendant to use the term “Evaporated Cane Juice” to describe the added sugar in its beverage products used as a sweetener.

104. Moreover, it is clear that the term “Evaporated Cane Juice” was intended to, and
FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF
Case No. 13-CV-4402-WHO

1 did, mislead consumers about the presence of sugars. In fact, industry participants have openly
2 discussed this act.

3 105. For example, the in-house magazine for Whole Foods contains an article entitled
4 “Could Cane Juice Evaporate?” which discusses ECJ:

5 A regulatory issue on the U.S. Food and Drug Administration’s (FDA)
6 backburner, and one that is therefore flying under the radar involves the fate of
7 the sweetener evaporated cane juice. Like high fructose corn syrup’s ongoing
8 name battle, this is a question of language, not substance. According to Jim
9 Morano, Ph.D., technical affiliate of Suzanne’s Specialties, New Brunswick, NJ,
10 FDA has taken exception to the use of the word “juice” to describe this sugar
11 cane-based sweetener on product labels.

12

13 The agency feels that the term fails to reveal the defining property of the
14 sweetener that the ingredients are sugars or syrups, and so the term may be false
15 and misleading to consumers.

16 “It’s only been the last 15 years that we’ve had the ability to use sugar. In the
17 beginning in the health food industry, sugar was a bad word,” says Morano. Sugar
18 was often considered to be a violation of the natural tenet, even though it is, of
19 course, natural. Though times have changed, this negative connotation still clings
20 to sugar for many shoppers. Therefore, if FDA takes away the term “evaporated
21 cane juice,” essentially dictating that it be referred to as a type of cane sugar,
22 Morano believes the jig may be up for this sweetener, at least when it comes the
23 natural market.

24 <http://wholefoodsmagazine.com/grocery/features/sweeteners-rising>.

25 106. Similarly, according to the CEO of ASSURKKAR Sugar Company in Costa Rica,
26 which provides raw sugar to U.S. companies, says that the term “Evaporated Cane Juice” is
27 wrongly used in the food industry. “Nowadays, the food companies are trying to sell more
28 ‘natural’ products, so they use the most impressive or high impact wording to call the customers’
attention,” he said. In reality, the “Evaporated Cane Juice” that is used in food and beverage
products is a very processed form of sugar, unequivocally the same as refined white sugar.

[http://www.processedfreeamerica.org/index.php?option=com_content&view=article&id=535:raw](http://www.processedfreeamerica.org/index.php?option=com_content&view=article&id=535:raw-sugar)
-sugar.

107. Additionally, Judy Sanchez, a spokesperson for the U.S. Sugar Corporation,
confirms that “all sugar is evaporated cane juice. . . . They just use that for a natural-sounding
name for a product.” <http://www.npr.org/blogs/thesalt/2012/10/18/163098211/evaporated-cane->

juice-sugar-in-disguise.

108. Defendant's use of the word "cane" was not sufficient to advise Plaintiffs that "ECJ" was sugar. The term "cane" is not exclusively a reference to sugar or sugar cane. Many other types of cane exist and are used in foods, for example, bamboo cane and sorghum cane, both which produce juice. *See e.g.* 21 C.F.R. § 168.160 ("sorghum cane"). Corn is a form of cane. There are over one thousand species of bamboo and over ten thousand members of the family of plants that includes corn and sugar cane. Most common berries such as blackberries, raspberries, blue berries and goji berries grow on canes and are referred to as "cane berries." Of course, Defendant utilized the term "cane" with the term "juice," a defined, regulated term not commonly associated with sugar or added sugar.

109. Moreover, the cane sugar utilized as an ingredient by Defendant was far removed from natural sugar cane or unrefined sugar cane juice. Natural sugar cane is described by sources as healthy and nutritious, containing vitamins, minerals, enzymes fibers, and phytonutrients that help the body digest naturally occurring sugars, such as lactose, glucose and fructose. It is also reported to contain vitamins A, C, B1, B2, B6, niacin, and pantothenic acid, which work synergistically with the minerals to nourish the body. Sugar cane also reportedly contains a unique mix of antioxidant polyphenols. The polyphenols, vitamins and minerals present in sugar cane are claimed to help slow down the absorption of the sugars and prevent the sharp rise in blood sugar levels associated with refined sugar.⁵ Similarly, raw sugar cane juice has been described as a "wonder food" that has many beneficial properties. For example, one website states:

Sugarcane is a tall grass with a stout, jointed and fibrous stalk that looks similar to bamboo. As a member of the grass family, its juice has a high potency equivalent to wheatgrass juice, only with less chlorophyll and more sugar content. However, counter to what you might think, sugarcane juice contains only about fifteen percent total sugar content, all of which is in a raw unrefined form. The rest of the juice consists of water brimming with an abundance of vitamins and minerals.

⁵ *See* McCaffree, D., The Truth About Evaporated Cane Juice, Processed-Free America (Nov. 1 2010) available at <http://www.processedfreeamerica.org/resources/health-news/405-the-truth-about-evaporated-cane-juice?format=pdf>.

Sugarcane is rich in calcium, chromium, cobalt, copper, magnesium, manganese, phosphorous, potassium and zinc. It also contains iron and vitamins A, C, B1, B2, B3, B5, and B6, plus a high concentration of phytonutrients (including chlorophyll), antioxidants, proteins, soluble fiber and numerous other health supportive compounds. Working synergistically, these nutrients provide a supremely health-promoting food which has been studied for its role in fighting cancer, stabilizing blood sugar levels in diabetics, assisting in weight loss, reducing fevers, clearing the kidneys, preventing tooth decay, and a host of other health benefits.

http://www.processedfreeamerica.org/index.php?option=com_content&view=article&id=535:raw-sugar. The ECJ in Defendant's beverage products contain none of these health benefits because during processing the nutrients have been pressed, boiled and strained out.⁶

110. Thus, evaporated cane juice is neither "juice" nor only subject to "evaporation" – a process that absent pressing, boiling, and separation would leave the sugar crystals with their nutrients still intact. *Id.* In truth, evaporated cane juice is little different than added refined sugar. Refined sugar and evaporated cane juice both have 111 calories per ounce. Both types of sugar come from the same cane crop and are about 99% sucrose (*i.e.*, empty calories) and not the 15% sucrose content ascribed to raw sugar cane juice. *Id.* "Another important aspect of natural sugar cane is the balance of the different types of sugars. Raw natural sugar has a balance of sucrose, glucose, and fructose; whereas refined sugars are almost exclusively sucrose (the fructose and glucose have been washed out). The more sucrose, the more it raises your blood sugar." *Id.*

111. Defendant's use of the term "Organic Evaporated Cane Juice" or "Evaporated Cane Juice" misleads consumers into paying a premium price for inferior or undesirable ingredients or for products that contain ingredients not listed on the label.

D. Defendant has Knowingly Violated Numerous Federal and California Laws.

112. Defendant has violated Cal. Health & Safety Code § 110390 which makes it

⁶ "During refinement, the sugarcane juice is pressed from the sugar cane and boiled at high temperatures. The boiling destroys the enzymes and many of the nutrients. The juice is then separated into a sugar stream and a molasses stream. Most of the minerals from the sugar cane go into the molasses, leaving the sugar stream virtually void of nutrients. To further refine it (removing any remaining nutrients), the sugar stream is then crystallized through evaporation." McCaffree, D., The Truth About Evaporated Cane Juice, Processed-Free America (Nov. 1 2010) available at <http://www.processedfreeamerica.org/resources/health-news/405-the-truth-about-evaporated-cane-juice?format=pdf>.

1 unlawful to disseminate false or misleading food advertisements or statements on products and
 2 product packaging, labeling or any other medium used to directly or indirectly induce the
 3 purchase of a food product.

4 113. Defendant has violated Cal. Health & Safety Code § 110395 which makes it
 5 unlawful to manufacture, sell, deliver, hold or offer to sell any falsely advertised food.

6 114. Defendant has violated Cal. Health & Safety Code §§ 110398 and 110400 which
 7 make it unlawful to advertise misbranded food or to deliver or proffer for delivery any food that
 8 has been falsely advertised.

9 115. Defendant has violated Cal. Health & Safety Code § 110760 which makes it
 10 unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is
 11 misbranded.

12 116. Defendant has violated Cal. Health & Safety Code § 110765 which makes it
 13 unlawful for any person to misbrand any food.

14 117. Defendant has violated Cal. Health & Safety Code § 110770 which makes it
 15 unlawful for any person to receive in commerce any food that is misbranded or to deliver or
 16 proffer for delivery any such food.

17 118. Defendant has violated Cal. Health & Safety Code § 110725 which makes it
 18 unlawful for any person to fail to list each ingredient by its common and usual name.

19 **E. Plaintiffs Purchased Defendant's Misbranded Beverage Products.**

20 119. Plaintiffs care about the nutritional content of food and seek to maintain a healthy
 21 diet.

22 120. Plaintiffs read and reasonably relied on the labels on Defendant's Purchased
 23 Product before purchasing it as described herein. Plaintiffs relied on Defendant's labeling as
 24 described herein and based and justified the decision to purchase Defendant's products, in
 25 substantial part, on the label.

26 121. At point of sale, Plaintiffs did not know, and had no reason to know, that the
 27 Purchased Product was unlawful and misbranded as set forth herein, and would not have bought

1 the product had they known the truth about it, *i.e.* that the product was illegal to purchase and
2 possess.

3 122. After Plaintiffs learned that Defendant's Purchased Product was falsely labeled,
4 they stopped purchasing it.

5 123. As a result of Defendant's unlawful misrepresentations, Plaintiffs and thousands of
6 others in California and throughout the United States purchased the Purchased Product and the
7 Substantially Similar Products at issue.

8 124. Defendant's labeling as alleged herein is false and misleading and was designed to
9 increase sales of the products at issue. Defendant's misrepresentations are part of its systematic
10 labeling practice and a reasonable person would attach importance to Defendant's
11 misrepresentations in determining whether to purchase the products at issue.

12 125. A reasonable person would also attach importance to whether Defendant's
13 products are "misbranded," *i.e.*, legally salable, and capable of legal possession, and to
14 Defendant's representations about these issues in determining whether to purchase the products at
15 issue. Plaintiffs would not have purchased Defendant's products had they known they were not
16 capable of being legally sold or held.

17 126. Plaintiffs' purchases of the Purchased Product damaged Plaintiffs because
18 misbranded products cannot be legally sold, possess, have no economic value, and are legally
19 worthless.

20 **CLASS ALLEGATIONS**

21 127. Plaintiffs bring this action as a class action pursuant to Federal Rule of Procedure
22 23(b)(2) and 23(b)(3) on behalf of the following "Class": All persons in the United States who,
23 within the Class Period, purchased one or more of the following ZOLA products which list
24 "Organic Evaporated Cane Juice" or "Evaporated Cane Juice" as an ingredient:

- 25 • Açaí with Pomegranate
- 26 • Açaí Original Juice
- 27 • Açaí with Blueberry
- Coconut Water Espresso

28 128. The following persons are expressly excluded from the Class: (1) Defendant and
FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF

1 its subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the
 2 proposed Class; (3) governmental entities; and (4) the Court to which this case is assigned and its
 3 staff.

4 129. This action can be maintained as a Class Action because there is a well-defined
 5 community of interest in the litigation and the proposed Class is easily ascertainable.

6 130. Numerosity: Based upon Defendant's publicly available sales data with respect to
 7 the misbranded products at issue, it is estimated that the Class numbers in the thousands and that
 8 joinder of all Class members is impracticable.

9 131. Common Questions Predominate: This action involves common questions of law
 10 and fact applicable to each Class member that predominate over questions that affect only
 11 individual Class members. Thus, proof of a common set of facts will establish the right of each
 12 Class member to recover. Questions of law and fact common to each Class member include, for
 13 example:

- 14 a. Whether Defendant engaged in unlawful, unfair or deceptive business
 15 practices by failing to properly package and label its beverage products it
 sold to consumers;
- 16 b. Whether the beverage products at issue were misbranded as a matter of
 law;
- 17 c. Whether Defendant made unlawful and misleading ingredient claims with
 18 respect to its beverage products sold to consumers;
- 19 d. Whether Defendant violated California Bus. & Prof. Code § 17200, *et*
 20 *seq.*; California Bus. & Prof. Code § 17500, *et seq.*; the Consumers Legal
 Remedies Act, Cal. Civ. Code § 1750, *et seq.*, Cal. Civ. Code § 1790, *et*
seq.; 15 U.S.C. § 2301, *et seq.*; and the Sherman Law;
- 21 e. Whether Plaintiff and the Class are entitled to equitable and injunctive
 22 relief;
- 23 f. Whether Defendant's unlawful, unfair and/or deceptive practices harmed
 Plaintiff and the Class; and
- 24 g. The amount by which was unjustly enriched by its deceptive practices.

25 132. Typicality: Plaintiffs' claims are typical of the claims of the Class because
 26 Plaintiffs bought Defendant's Purchased Product during the Class Period. Defendant's unlawful
 27 actions concern the same business practices described herein irrespective of where they occurred
 28 FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
 INJUNCTIVE RELIEF

1 or were experienced. Plaintiffs and the Class sustained similar injuries arising out of Defendant's
2 conduct in violation of California law. The injuries of each member of the Class were caused
3 directly by Defendant's wrongful conduct. In addition, the factual underpinning of Defendant's
4 misconduct is common to all Class members and represents a common thread of misconduct
5 resulting in injury to all members of the Class. Plaintiffs' claims arise from the same practices and
6 course of conduct that give rise to the claims of the Class members and are based on the same
7 legal theories.

8 133. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class.
9 Neither Plaintiffs nor Plaintiffs' counsel have any interests that conflict with or are antagonistic to
10 the interests of the Class members. Plaintiffs have retained highly competent and experienced
11 Class action attorneys to represent their interests and those of the members of the Class. Plaintiffs
12 and Plaintiffs' counsel have the necessary financial resources to adequately and vigorously
13 litigate this Class action, and Plaintiffs and their counsel are aware of their fiduciary
14 responsibilities to the Class members and will diligently discharge those duties by vigorously
15 seeking the maximum possible recovery for the Class.

16 134. Superiority: There is no plain, speedy or adequate remedy other than by
17 maintenance of this Class action. The prosecution of individual remedies by members of the Class
18 will tend to establish inconsistent standards of conduct for Defendant and result in the impairment
19 of Class members' rights and the disposition of their interests through actions to which they were
20 not parties. Class action treatment will permit a large number of similarly situated persons to
21 prosecute their common claims in a single forum simultaneously, efficiently and without the
22 unnecessary duplication of effort and expense that numerous individual actions would engender.
23 Further, as the damages suffered by individual members of the Class may be relatively small, the
24 expense and burden of individual litigation would make it difficult or impossible for individual
25 members of the Class to redress the wrongs done to them, while an important public interest will
26 be served by addressing the matter as a Class action. Class treatment of common questions of law
27 and fact would also be superior to multiple individual actions or piecemeal litigation in that Class

1 treatment will conserve the resources of the Court and the litigants, and will promote consistency
2 and efficiency of adjudication.

3 135. The prerequisites to maintaining a Class action for injunctive or equitable relief
4 pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds
5 generally applicable to the Class, thereby making appropriate final injunctive or equitable relief
6 with respect to the Class as a whole.

7 136. The prerequisites to maintaining a Class action pursuant to Fed. R. Civ. P. 23(b)(3)
8 are met as questions of law or fact common to Class members predominate over any questions
9 affecting only individual members, and a Class action is superior to other available methods for
10 fairly and efficiently adjudicating the controversy.

11 137. Plaintiffs and Plaintiffs' counsel are unaware of any difficulties that are likely to
12 be encountered in the management of this action that would preclude its maintenance as a Class
13 action.

14 **CAUSES OF ACTION**

15 **FIRST CLAIM FOR RELIEF** 16 **Business and Professions Code § 17200, *et seq.*** **Unlawful Business Acts and Practices**

17 138. Plaintiffs incorporate by reference each allegation set forth above.

18 139. Defendant's use of the term "Organic Evaporated Cane Juice" and "Evaporated
19 Cane Juice" in the ingredients list of its Misbranded Beverage Products constitutes unlawful
20 business acts and practices.

21 140. Under California law, unlawful injury causing conduct, such as Defendant's
22 unlawful sale of an illegal product, is the only element necessary for the UCL claim. Plaintiffs
23 would not have bought the Purchased Product had they known they were not capable of being
24 legally sold or held. No reasonable consumer would have knowingly purchased a product that
25 was illegal to sell or possess.

26 141. Defendant sold the Misbranded Beverage Products in California during the Class
27 Period.

28 142. Defendant is a corporation and, therefore, is a "person" within the meaning of the
FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF

1 Sherman Law.

2 143. Defendant's business practices are unlawful under § 17200, *et seq.* by virtue of
3 Defendant's violations of the advertising provisions of Article 3 of the Sherman Law and the
4 misbranded food provisions of Article 6 of the Sherman Law.

5 144. Defendant's business practices are unlawful under § 17200, *et seq.* by virtue of
6 Defendant's violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*

7 145. Defendant sold Plaintiffs and the Class the Misbranded Beverage Products that
8 were not capable of being sold or held legally and have no economic value and which were
9 legally worthless. Plaintiffs and the Class lost money as a direct result of Defendant's unlawful
10 conduct.

11 146. As a result of Defendant's illegal business practices, Plaintiffs and the Class,
12 pursuant to California Bus. & Prof. Code § 17203, are entitled to an order enjoining such future
13 conduct and such other orders and judgments which may be necessary to disgorge Defendant's
14 ill-gotten gains and to restore to any Class member any money paid for the Misbranded Beverage
15 Products.

16 147. Defendant's unlawful business acts present a threat and reasonable continued
17 likelihood of injury to Plaintiffs and the Class.

18 148. As a result of Defendant's conduct, Plaintiffs and the Class, pursuant to Business
19 and Professions Code § 17203, are entitled to an order enjoining such future conduct by
20 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's
21 ill-gotten gains and restore any money paid for the Misbranded Beverage Products.

22 **SECOND CLAIM FOR RELIEF**
23 **Business and Professions Code § 17200 *et seq.***
Unfair Business Acts and Practices

24 149. Plaintiffs incorporate by reference each allegation set forth above.

25 150. Defendant's conduct as set forth herein constitutes unfair business acts and
26 practices.

27 151. Defendant sold Misbranded Beverage Products in California and throughout the

1 United States during the Class Period.

2 152. Plaintiffs and members of the Class suffered a substantial injury by virtue of
3 buying Defendant's Misbranded Beverage Products that they would not have purchased absent
4 Defendant's illegal conduct.

5 153. Defendant's deceptive marketing, advertising, packaging, and labeling of
6 Misbranded Beverage Products and sale of unsalable misbranded products that were illegal to
7 possess was of no benefit to Plaintiffs and members of the Class, and the harm to consumers is
8 substantial.

9 154. Defendant sold Plaintiffs and the Class Misbranded Beverage Products that were
10 not capable of being legally sold or held and that had no economic value and were legally
11 worthless. Plaintiffs and the Class paid a premium price for the Misbranded Beverage Products.

12 155. Plaintiffs and the Class who purchased Defendant's Misbranded Beverage
13 Products had no way of reasonably knowing that the products were misbranded and were not
14 properly marketed, advertised, packaged and labeled, and thus could not have reasonably
15 avoided the injury they suffered.

16 156. The consequences of Defendant's conduct as set forth herein outweigh any
17 justification, motive or reason therefor. Defendant's conduct is and continues to be unlawful,
18 illegal, immoral, unethical, unscrupulous, contrary to public policy, and is substantially injurious
19 to Plaintiffs and the Class.

20 157. As a result of Defendant's conduct, Plaintiffs and Class members, pursuant to
21 Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by
22 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's
23 ill-gotten gains and restore any money paid for Defendant's Misbranded Beverage Products by
24 Plaintiffs and the Class.

25 **THIRD CLAIM FOR RELIEF**
26 **Business and Professions Code § 17200 *et seq.***
Fraudulent Business Acts and Practices

27 158. Plaintiffs incorporate by reference each allegation set forth above.

1 159. Defendant's conduct as set forth herein constitutes fraudulent business practices
2 under California Business and Professions Code sections § 17200 *et seq.*

3 160. Defendant sold Misbranded Beverage Products in California and throughout the
4 United States during the Class Period.

5 161. Defendant's misleading marketing, advertising, packaging and labeling of the
6 Misbranded Beverage Products and misrepresentations and material omissions that the products
7 were salable, capable of possession and not misbranded were likely to deceive reasonable
8 consumers, and in fact, did deceive Plaintiffs and members of the Class. Plaintiffs allege that they
9 reviewed the label on the Purchased Product that they bought, reasonably relied in substantial part
10 on the label, and were thereby deceived, in deciding to purchase this product. Defendant has
11 engaged in fraudulent business acts and practices.

12 162. Defendant's fraud and deception was a substantial factor in Plaintiffs' decision and
13 the Class' decision to purchase Defendant's Misbranded Beverage Products that they would
14 otherwise not have purchased had they known the true nature of those products.

15 163. Defendant sold Plaintiffs and the Class Misbranded Beverage Products that were
16 not capable of being sold or held legally and that had no economic value and were legally
17 worthless. Plaintiffs and the Class were deprived of money by purchasing the Misbranded
18 Beverage Products.

19 164. As a result of Defendant's conduct as set forth herein, Plaintiffs and the Class,
20 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future
21 conduct by Defendant, and such other orders and judgments which may be necessary to disgorge
22 Defendant's ill-gotten gains and restore any money paid for Defendant's Misbranded Beverage
23 Products by Plaintiffs and the Class.

24 **FOURTH CLAIM FOR RELIEF**
25 **Business and Professions Code § 17500 *et seq.***
 Misleading and Deceptive Advertising

26 165. Plaintiffs incorporate by reference each allegation set forth above.

27 166. Plaintiffs asserts this claim for relief for violations of California Business and
28

1 Professions Code § 17500 *et seq.* for misleading and deceptive advertising against Defendant.

2 167. Defendant sold Misbranded Beverage Products in California and throughout the
3 United States during the Class Period.

4 168. Defendant engaged in a scheme of offering Misbranded Beverage Products for sale
5 to Plaintiffs and members of the Class by way of, *inter alia*, product packaging and labeling, and
6 other promotional materials. These materials misrepresented and/or omitted the true contents and
7 nature of Defendant's Misbranded Beverage Products. Defendant's advertisements and
8 inducements were made within California and throughout the United States and come within the
9 definition of advertising as contained in Business and Professions Code §17500 *et seq.* in that
10 such product packaging and labeling, and promotional materials were intended as inducements to
11 purchase Defendant's Misbranded Beverage Products and are statements disseminated by
12 Defendant to Plaintiffs and the Class that were intended to reach members of the Class.
13 Defendant knew, or in the exercise of reasonable care should have known, that these statements
14 were misleading and deceptive as set forth herein. Plaintiffs allege that they reviewed the label on
15 the Purchased Product, reasonably relied in substantial part on the label, and were thereby
16 deceived, in deciding to purchase this product.

17 169. In furtherance of its plan and scheme, Defendant prepared and distributed within
18 California and nationwide via product packaging and labeling, and other promotional materials,
19 statements that misleadingly and deceptively represented the composition and the nature of
20 Defendant's Misbranded Beverage Products. Plaintiffs and the Class necessarily and reasonably
21 relied on Defendant's materials and were the intended targets of such representations.

22 170. Defendant's conduct in disseminating misleading and deceptive statements in
23 California and nationwide to Plaintiffs and the Class was and is likely to deceive reasonable
24 consumers by obfuscating the true composition and nature of Defendant's Misbranded Beverage
25 Products in violation of the "misleading prong" of California Business and Professions Code
26 §17500 *et seq.*

27 171. As a result of Defendant's violations of the "misleading prong" of California
28

1 Business and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the
 2 expense of Plaintiffs and the Class. Misbranded products cannot be legally sold or held, have no
 3 economic value and are legally worthless. Plaintiffs and the Class lost money due to their
 4 purchase of Defendant's products with the illegal terms "Organic Evaporated Cane Juice" and
 5 "Evaporated Cane Juice" listed on their labels.

6 172. Plaintiffs and the Class, pursuant to Business and Professions Code § 17535, are
 7 entitled to an order enjoining such future conduct by Defendant, and such other orders and
 8 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any
 9 money paid for Defendant's Misbranded Beverage Products by Plaintiffs and the Class.

10 **FIFTH CLAIM FOR RELIEF**
 11 **Business and Professions Code § 17500 *et seq.***
 12 **Untrue Advertising**

13 173. Plaintiffs incorporate by reference each allegation set forth above.

14 174. Plaintiffs assert this claim for relief against Defendant for violations of California
 15 Business and Professions Code § 17500 *et seq.* regarding untrue advertising.

16 175. Defendant sold Misbranded Beverage Products in California and throughout the
 17 United States during the Class Period.

18 176. Defendant engaged in a scheme of offering Defendant's Misbranded Beverage
 19 Products for sale to Plaintiffs and the Class by way of product packaging and labeling, and other
 20 promotional materials. These materials misrepresented and/or omitted the true contents and
 21 nature of Defendant's Misbranded Beverage Products. Defendant's advertisements and
 22 inducements were made in California and throughout the United States and come within the
 23 definition of advertising as contained in Business and Professions Code §17500 *et seq.* in that the
 24 product packaging and labeling, and promotional materials were intended as inducements to
 25 purchase Defendant's Misbranded Beverage Products, and are statements disseminated by
 26 Defendant to Plaintiffs and the Class. Defendant knew, or in the exercise of reasonable care
 27 should have known, that these statements were untrue.

28 177. In furtherance of its plan and scheme, Defendant prepared and distributed in
 FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
 INJUNCTIVE RELIEF

1 California and nationwide via product packaging and labeling, and other promotional materials,
 2 statements that falsely advertise the composition of Defendant's Misbranded Beverage Products,
 3 and falsely misrepresented the nature of those products. Plaintiffs and the Class were the
 4 intended targets of such representations and would reasonably be deceived by Defendant's
 5 materials. Plaintiffs allege that they reviewed the label on the Purchased Product, reasonably
 6 relied in substantial part on the label, and were thereby deceived in deciding to purchase these
 7 products.

8 178. Defendant's conduct in disseminating untrue advertising throughout California
 9 deceived Plaintiffs and members of the Class by obfuscating the contents, nature and quality of
 10 Defendant's Misbranded Beverage Products in violation of the "untrue prong" of California
 11 Business and Professions Code § 17500.

12 179. As a result of Defendant's violations of the "untrue prong" of California Business
 13 and Professions Code § 17500 *et seq.*, Defendant has been unjustly enriched at the expense of
 14 Plaintiffs and the Class. Misbranded products cannot be legally sold or held, have no economic
 15 value, and are legally worthless. Plaintiffs and the Class lost money due to their purchase of
 16 Defendant's products with the illegal terms "Organic Evaporated Cane Juice" and "Evaporated
 17 Cane Juice" listed on their labels.

18 180. Plaintiffs and the Class, pursuant to Business and Professions Code § 17535, are
 19 entitled to an order enjoining such future conduct by Defendant, and such other orders and
 20 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any
 21 money paid for Defendant's Misbranded Beverage Products by Plaintiffs and the Class.

22 **SIXTH CLAIM FOR RELIEF**
 23 **Consumers Legal Remedies Act, Cal. Civ. Code §1750 *et seq.***

24 181. Plaintiffs incorporate by reference each allegation set forth above.

25 182. This claim for relief is brought pursuant to the CLRA. Defendant's violations of
 26 the CLRA were and are willful, oppressive and fraudulent, thus supporting an award of punitive
 27 damages.

28 183. Plaintiffs and the Class are entitled to actual and punitive damages against
 FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
 INJUNCTIVE RELIEF

1 Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2),
2 Plaintiffs and the Class are entitled to an order enjoining the above-described acts and practices,
3 providing restitution to Plaintiffs and the Class, ordering payment of costs and attorney's fees,
4 and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code §
5 1780.

6 184. Defendant's actions, representations and conduct have violated, and continue to
7 violate the CLRA, because they extend to transactions that are intended to result, or which have
8 resulted, in the sale of goods or services to consumers.

9 185. Defendant sold Misbranded Beverage Products in California and in the United
10 States during the Class Period.

11 186. Plaintiffs and members of the Class are "consumers" as that term is defined by the
12 CLRA in Cal. Civ. Code §1761(d).

13 187. Defendant's Misbranded Beverage Products were and are "goods" within the
14 meaning of Cal. Civ. Code §1761(a).

15 188. By engaging in the conduct set forth herein, Defendant violated and continues to
16 violate Section 1770(a)(5), of the CLRA, because Defendant's conduct constitutes unfair methods
17 of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular
18 ingredients, characteristics, uses, benefits, and quantities of the goods.

19 189. By engaging in the conduct set forth herein, Defendant violated and continues to
20 violate Section 1770(a)(7) of the CLRA, because Defendant's conduct constitutes unfair methods
21 of competition and unfair or fraudulent acts or practices, in that Defendant misrepresents the
22 particular standard, quality or grade of the goods.

23 190. By engaging in the conduct set forth herein, Defendant violated and continues to
24 violate Section 1770(a)(9) of the CLRA, because Defendant's conduct constitutes unfair methods
25 of competition and unfair or fraudulent acts or practices, in that Defendant advertises goods with
26 the intent not to sell the goods as advertised.

27 191. By engaging in the conduct set forth herein, Defendant violated and continues to

1 violate Section 1770(a)(16) of the CLRA, because Defendant's conduct constitutes unfair
 2 methods of competition and unfair or fraudulent acts or practices, in that Defendant represents
 3 that a subject of a transaction has been supplied in accordance with a previous representation
 4 when she have not.

5 192. Plaintiffs request that the Court enjoin Defendant from continuing to employ the
 6 unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2). If
 7 Defendant is not restrained from engaging in these practices in the future, Plaintiffs and the class
 8 will continue to suffer harm.

9 193. Pursuant to Section 1782(a) of the CLRA, on October 31, 2013, Plaintiffs' counsel
 10 served Defendant with notice of Defendant's violations of the CLRA. As authorized by
 11 Defendant's counsel, Plaintiffs' counsel served Defendant by certified mail, return receipt
 12 requested. Defendant has not responded.

13 194. Plaintiffs and the Class, having given proper notice to Defendant, are entitled to
 14 actual and punitive damages against Defendant for its violations of the CLRA. In addition,
 15 pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiffs and the Class are entitled to an order enjoining
 16 the above-described acts and practices, providing restitution to Plaintiffs and the Class, ordering
 17 payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the
 18 Court pursuant to Cal. Civ. Code § 1780.

19 **SEVENTH CLAIM FOR RELIEF**
 20 **(Breach Of Implied Warranty Of Merchantability)**

21 195. Plaintiffs incorporate by reference each allegation set forth above.

22 196. Implied in the purchase of Misbranded Beverage Products by Plaintiffs and the
 23 Class is the warranty that the Purchased Product is legal and can be lawfully resold.

24 197. Defendant knowingly and intentionally misbranded its Misbranded Beverage
 25 Products.

26 198. Defendant knew those Misbranded Beverage Products were illegal.

27 199. When Defendant sold those products they impliedly warranted that the products
 28

1 were legal and could be lawfully resold.

2 200. Plaintiffs would not have knowingly purchased a product that was illegal and
3 unsellable.

4 201. No reasonable consumer would knowingly purchase products that are illegal and
5 unsellable.

6 202. The purchased Misbranded Beverage Product was unfit for the ordinary purpose
7 for which Plaintiffs and the Class purchased them.

8 203. In fact, these Misbranded Beverage Products were illegal, misbranded and
9 economically worthless.

10 204. As a result, Plaintiffs and the Class were injured through their purchase of an
11 unsuitable, useless, illegal, and unsellable product.

12 205. By reason of the foregoing, Plaintiffs and the Class were damaged in the amount
13 they paid for Misbranded Beverage Products.

14 **JURY DEMAND**

15 Plaintiffs hereby demand a trial by jury of all claims.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, and
18 on behalf of the general public, pray for judgment against Defendant as follows:

19 A. For an order certifying this case as a class action and appointing Plaintiffs and
20 Plaintiffs' counsel to represent the Class;

21 B. For an order awarding, as appropriate, damages, restitution or disgorgement to
22 Plaintiffs and the Class for all claims for relief;

23 C. For an order requiring Defendant to immediately cease and desist from selling
24 Misbranded Beverage Products in violation of law; enjoining Defendant from continuing to
25 market, advertise, distribute, and sell these products in the unlawful manner described herein; and
26 ordering Defendant to engage in corrective action;

27 D. For all equitable remedies available pursuant to Cal. Civ. Code § 1780;

28 FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION COMPLAINT FOR EQUITABLE AND
INJUNCTIVE RELIEF

- 1 E. For an order awarding attorneys' fees and costs;
2 F. For an order awarding punitive damages;
3 G. For an order awarding pre-and post-judgment interest; and
4 H. For an order providing such further relief as this Court deems proper.
5

6 Dated: April 7, 2014.

7 Respectfully submitted,

8 /s/ Sterling Starns
9 Sarah Sterling Starns (admitted *pro hoc vice*)
10 Barrett Law Group, P.A.
11 P.O. Box 927
12 404 Court Square
13 Lexington, MS 39095
14 662-834-2488
15 Fax: 662-834-2628
16 Email: sstarns@barrettlawgroup.com

17 Ben F. Pierce Gore (SBN 128515)
18 PRATT & ASSOCIATES
19 1871 The Alameda, Suite 425
20 San Jose, CA 95126
21 Telephone: (408) 429-6506
22 Fax: (408) 369-0752
23 pgore@prattattorneys.com
24
25
26
27
28

Exhibit 1



Exhibit 1

Exhibit 2

93% Juice

Refrigerate After Opening
 Consume Within 7 Days of Opening
 Gently Flash Pasteurized

Nutrition Facts

Serving Size 8 fl oz (240mL)
 Servings Per Container 1.5

Amount Per Serving

Calories 120 **Calories from Fat** 15

% Daily Value*

Total Fat 2g **3%**

Saturated Fat 1g **4%**

Trans Fat 0g

Cholesterol 0mg **0%**

Sodium 26mg **1%**

Potassium 18mg **1%**

Total Carb. 25g **8%**

Dietary Fiber 1g **3%**

Sugars 21g

Protein 1g

Vitamin A 5% • **Vitamin C** 4%

Calcium 2% • **Iron** 2%

Vitamin E 8%

* Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.



INGREDIENTS: Organic Brazilian Açaí Pulp, Organic Evaporated Cane Juice, Organic Pomegranate Juice (Filtered Water, Organic Pomegranate Juice Concentrate), Citric Acid, Soy Lecithin, Natural Flavors.

CONTAINS SOY
GLUTEN FREE
100% VEGAN
GMO FREE

Exhibit 3

- [Açaí with Blueberry](#)
- [Açaí with Pomegranate](#)
- [Coconut Water - 17.5 oz](#)
- [Coconut Water - 1 Liter](#)
- [Coconut Water with Pulp](#)
- [Coconut Water Espresso](#)
- [Coconut Water Lemonade](#)

Açaí with Pomegranate

The tart and tang of pomegranate meets the exotic [Açaí berry](#). Zola Açaí with Pomegranate is for people looking for great tasting nutrition.

Do you know why our Açaí tastes so good?

Zola Brazilian Açaí goes from berry to bottle fast. Real fast. So you get more of that natural goodness: fresh berry flavor, [antioxidant power](#), and heart healthy omega fatty acids. You can see it in the vibrant color and taste it in every sip.

Buy Now

Each 8oz serving offers:

- Antioxidants & Omega Fatty Acids 3, 6, & 9
- USDA Organic & Kosher certified
- Sustainably harvested
- Gluten and GMO free
- 100% Vegan

Ingredients: Organic Açaí Juice (Filtered Water, Organic Açaí Puree), Organic Evaporated Cane Juice, Organic Pomegranate Juice (Filtered Water, Organic Pomegranate Juice Concentrate), Citric Acid, Natural Flavors.

For nutritional information click here [12 oz](#) or [32 oz](#)

 **Why does Zola taste so good?**



- [Home](#)
- [Products](#)
- [Why Zola?](#)
- [World Fruits](#)
- [News](#)
- [Store Locator](#)
- [Buy Zola](#)
- [About](#)
- [Newsletter & Mailing List Signup](#)
- Questions: 415.775.6355
- To Order: 888.879.9652

Copyright © 2014 Zola. All rights reserved. [Privacy Statement](#).

Exhibit 4

Açaí Original Juice

Our Original Açaí has the luscious taste of wild berries with a kiss of chocolate. A delicious way to start the day.

Do you know why our Açaí tastes so good?

Zola Brazilian Açaí goes from berry to bottle fast. Real fast. So you get more of that natural goodness: fresh berry flavor, [antioxidant power](#), and heart healthy omega fatty acids. You can see it in the vibrant color and taste it in every sip.

Buy Now

Each 8oz serving offers:

- Antioxidants & Omega Fatty Acids 3, 6, & 9
- USDA Organic & Kosher certified
- Sustainably harvested
- Gluten and GMO free
- 100% Vegan

Ingredients: Organic Açaí Juice (Filtered Water, Organic Açaí Puree), Organic Evaporated Cane Juice, Citric Acid, Natural Flavors.

For nutritional information click here [12 oz](#) or [32 oz](#)

 **Why does Zola taste so good?**



- [Home](#)
- [Products](#)
- [Why Zola?](#)
- [World Fruits](#)
- [News](#)
- [Store Locator](#)
- [Buy Zola](#)
- [About](#)
- [Newsletter & Mailing List Signup](#)
- Questions: 415.775.6355
- To Order: 888.879.9652

Copyright © 2014 Zola. All rights reserved. [Privacy Statement](#).

Exhibit 5

- [Community](#)
 - [Fan Club](#)
 - [In-Kind Donations](#)
 - [News](#)
- [Store Locator](#)
- [Buy Zola](#)
- [About](#)

- [Açaí Original Juice](#)
- [Açaí with Blueberry](#)
- [Açaí with Pomegranate](#)
- [Coconut Water - 17.5 oz](#)
- [Coconut Water - 1 Liter](#)
- [Coconut Water with Pulp](#)
- [Coconut Water Espresso](#)
- [Coconut Water Lemonade](#)

Açaí with Blueberry

We combined the natural sweetness of summer-ripe blueberries with the fresh taste of our [Original Açaí](#) juice in this delicious blend. Not too sweet, not too tart, Zola Açaí with Blueberry is a perfect mix of refreshment and vital nutrients.

Do you know why our Açaí tastes so good?

Zola Brazilian Açaí goes from berry to bottle fast. Real fast. So you get more of that natural goodness: fresh berry flavor, [antioxidant power](#), and heart healthy omega fatty acids. You can see it in the vibrant color and taste it in every sip.

[Buy Now](#)

Each 8oz serving offers:

- Antioxidants & Omega Fatty Acids 3, 6, & 9
- USDA Organic & Kosher certified
- Sustainably harvested
- Gluten and GMO free
- 100% Vegan

Ingredients: Organic Açaí Juice (Filtered Water, Organic Açaí Puree), Organic Evaporated Cane Juice, Organic Blueberry Juice (Filtered Water, Organic Blueberry Juice Concentrate), Citric Acid, Natural Flavors.

For nutritional information click here [12 oz](#) or [32 oz](#)

 **Why does Zola taste so good?**



- [Home](#)
- [Products](#)
- [Why Zola?](#)
- [World Fruits](#)
- [News](#)
- [Store Locator](#)
- [Buy Zola](#)
- [About](#)
- [Newsletter & Mailing List Signup](#)
- Questions: 415.775.6355
- To Order: 888.879.9652

Copyright © 2014 Zola. All rights reserved. [Privacy Statement](#).

Exhibit 6

- [Coconut Water Espresso](#)
- [Coconut Water Lemonade](#)

Coconut Water with Espresso

NEW! Zola's newest addition, Coconut Water with Espresso makes it easy to stay naturally hydrated and ready to go. Each can has 5 essential electrolytes, more potassium than a banana,* and 125 mg of caffeine – as much as a 2 oz. shot of espresso. A delicious way to rehydrate, recharge and recover!

Coco-Motivation™ Each Can Offers:

- As much caffeine as a 2 oz. shot of espresso**
- More potassium per can than one whole banana*
- Supports natural hydration
- Essential electrolytes: potassium, sodium, calcium, phosphorus and magnesium
- 100% Natural & Delicious
- Gluten and GMO Free
- BPA Free Can

Ingredients: Coconut Water, Espresso Coffee (Water, Espresso Coffee Beans), Evaporated Cane Juice, Milk, Carrageenan, Natural Flavor

For nutritional information click here [Coconut Water with Espresso 17.5 oz can](#)

*One medium banana contains 422 mg of potassium

**125mg of caffeine per can



Why does Zola taste so good?



- [Home](#)
- [Products](#)
- [Why Zola?](#)
- [World Fruits](#)
- [News](#)
- [Store Locator](#)
- [Buy Zola](#)
- [About](#)
- [Newsletter & Mailing List Signup](#)
- Questions: 415.775.6355
- To Order: 888.879.9652

Copyright © 2014 Zola. All rights reserved. [Privacy Statement](#).