

BURSOR & FISHER, P.A.

L. Timothy Fisher (State Bar No. 191626)
Julia A. Luster (State Bar No. 295031)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
jluster@bursor.com

SALPETER GITKIN, LLP

James P. Gitkin (*pro hac vice* pending)
One East Broward Boulevard, Suite 1500
Ft. Lauderdale, FL 33301
Telephone: (954) 467-8622
Facsimile: (954) 467-8623
E-Mail: jim@salpetergitkin.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LUIS DIEGO ZAPATA FONSECA,
individually and on behalf of all others similarly
situated,

Plaintiff,

v.

VIGO IMPORTING CO.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Luis Diego Zapata Fonseca (“Plaintiff”) brings this action on behalf of himself and
2 all others similarly situated against Defendant Vigo Importing Co. (“Vigo” or “Defendant”).
3 Plaintiff makes the following allegations pursuant to the investigation of his counsel and based
4 upon information and belief, except as to the allegations specifically pertaining to himself, which
5 are based on personal knowledge.

6 **NATURE OF ACTION**

7 1. This is a class action lawsuit on behalf of purchasers of Vigo octopus products (the
8 “Octopus Products”) that Vigo has labeled and sold as octopus when in reality the products
9 contained jumbo squid, which is significantly cheaper and of a lower quality than octopus.

10 2. Independent DNA testing determined that Vigo’s Octopus Products are actually
11 jumbo squid and not octopus. Octopus and jumbo squid are both cephalopods, but are otherwise
12 completely different species.



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26 **Jumbo Squid**



Octopus

3. The scientific classification for jumbo squid is as follows:

Kingdom	Animalia
Phylum	Mollusca
Class	Cephalopoda
Order	Teuthida
Family	Ommastrephidae
Genus	Dosidicus
Species	Dosidicus gigas

4. The scientific classification Octopus is as follows:

Kingdom	Animalia
Phylum	Mollusca
Class	Cephalopoda

Order	Octopoda
Family	Octopodidae
Genus	Octopus
Species	Octopus vulgaris

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5. In recent years, the cost of octopus has increased rapidly as octopus populations have dwindled around the world due to over-fishing. In 2005, the European Union imposed new restrictions on octopus fishing because the octopus might be at risk of “dying out ... if controls are not enforced to stop overfishing.” In 2010, the Food and Agriculture Organization of the United Nations reported that octopus populations “remain overexploited.” In 2014, the Monterey Bay Aquarium issued a report on the state of octopus stocks around the world. The report concluded that “octopus stocks are in poor shape.” In July, 2014, SeafoodSource.com reported that octopus supplies had fallen by 45 percent in approximately one year, causing a dramatic increase in the price of octopus.

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6. At the same time that octopus populations have been declining, jumbo squid populations have been thriving. In 2010, Scientific American magazine reported that “[a]lthough many of the Pacific Ocean’s big species are floundering, one large creature of the deep seems to be flourishing. The Humboldt squid (*Dosidicus gigas*, also known as jumbo squid, owing to its sizable nature) has been steadily expanding its population and range.” On May 11, 2013, Stanford biologist William Gilly gave a TED talk in which he explained that the jumbo squid is thriving due to its ability to adapt to changing ocean conditions caused by global warming.

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7. As a result of these developments, the cost of octopus has risen dramatically compared to the cost of squid. In addition, due to similarities in texture, squid can easily be substituted for octopus without the consumer being able to tell the difference particularly when sold in a sauce like garlic sauce or marinara sauce.

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8. Vigo sells two different Octopus Products at issue in this case: (1) Octopus in Marinade Sauce and (2) Octopus in Soy and Olive Oil. The word “Octopus” is prominently

1 displayed on the label of each box in a large font as shown below. Nowhere on the box does it
2 state that the Octopus Products contain squid instead of octopus.



16 9. Plaintiff is informed and believes that Vigo has intentionally replaced the octopus in
17 its Octopus Products with squid as a cheap substitute to save money because it knew an ordinary
18 consumer would have trouble distinguishing the difference.

19 10. Plaintiff asserts claims on behalf of himself and a nationwide class of purchasers of
20 Vigo octopus products for breach of express warranty, breach of the implied warranty of
21 merchantability, breach of the implied warranty of fitness for a particular purpose, unjust
22 enrichment, violation of California's Consumers Legal Remedies Act ("CLRA"), violation of
23 California's Unfair Competition Law ("UCL"), violation of California's False Advertising Law
24 ("FAL"), negligent misrepresentation, and fraud.

25 **PARTIES**

26 11. Plaintiff Luis Diego Zapata Fonseca is a citizen of California who resides in Salinas,
27 California. While living in California, Plaintiff purchased Vigo Octopus Products through
28 Amazon.com. Throughout the class period, he has purchased Vigo Octopus in Soy and Olive Oil.

1 Plaintiff purchased the Vigo Octopus Products in reliance on the representation that they contained
2 octopus, and he would not have purchased the Vigo Octopus Products on the same terms if he had
3 known that they contained squid instead of octopus.

4 12. Defendant Vigo Importing Co. is a Florida corporation with its principal place of
5 business in Tampa, Florida. Vigo is a food manufacturer and distributor. Vigo focuses primarily
6 on serving Hispanic communities. Vigo products are sold in stores across the United States
7 including Target, K-Mart, Wal-Mart, CVS, and Wegmans. Vigo products are also sold extensively
8 online at Amazon.com.

9 13. Whenever reference is made in this Complaint to any representation, act, omission,
10 or transaction of Vigo, that allegation shall mean that Vigo did the act, omission, or transaction
11 through its officers, directors, employees, agents, and/or representatives while they were acting
12 within the actual or ostensible scope of their authority.

13 **JURISDICTION AND VENUE**

14 14. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A)
15 because this case is a class action where the aggregate claims of all members of the proposed class
16 are in excess of \$5,000,000.00, exclusive of interest and costs, and most members of the proposed
17 class are citizens of states different from Vigo. This Court also has supplemental jurisdiction over
18 state law claims pursuant to 28 U.S.C. § 1367.

19 15. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because
20 a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this
21 District. Plaintiff is a citizen of California and resides in this District, and purchased Vigo octopus
22 products in this District. Moreover, Vigo distributed and sold the Octopus Products, which is the
23 subject of the present complaint, in this District.

24 **CLASS REPRESENTATION ALLEGATIONS**

25 16. Plaintiff seeks to represent a class defined as all persons in the United States who
26 purchased the Octopus Products (the "Class"). Excluded from the Class are persons who made
27 such purchase for purpose of resale.
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1 17. Plaintiff also seeks to represent a subclass of all Class members who purchased the
2 Octopus Products in California (the “Subclass”).

3 18. Members of the Class and Subclass are so numerous that their individual joinder
4 herein is impracticable. On information and belief, members of the Class and Subclass number in
5 the millions. The precise number of Class members and their identities are unknown to Plaintiff at
6 this time but may be determined through discovery. Class members may be notified of the
7 pendency of this action by mail and/or publication through Vigo’s distribution records and third
8 party retailers and vendors.

9 19. Common questions of law and fact exist as to all Class members and predominate
10 over questions affecting only individual Class members. Common legal and factual questions
11 include, but are not limited to: whether Vigo’s Octopus Products are squid rather than octopus;
12 whether Vigo warranted that its Octopus Products were octopus when in fact they were squid; and
13 whether Vigo committed statutory and common law fraud by doing so.

14 20. The claims of the named Plaintiff are typical of the claims of the Class in that the
15 named Plaintiff purchased Vigo Octopus Products in reliance on the representations and warranties
16 described above and suffered a loss as a result of that purchase.

17 21. Plaintiff is an adequate representative of the Class and Subclass because his interests
18 do not conflict with the interests of the Class members he seeks to represent, he has retained
19 competent counsel experienced in prosecuting class actions, and he intends to prosecute this action
20 vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and
21 his counsel.

22 22. The class mechanism is superior to other available means for the fair and efficient
23 adjudication of the claims of Class and Subclass members. Each individual Class member may
24 lack the resources to undergo the burden and expense of individual prosecution of the complex and
25 extensive litigation necessary to establish Vigo’s liability. Individualized litigation increases the
26 delay and expense to all parties and multiplies the burden on the judicial system presented by the
27 complex legal and factual issues of this case. Individualized litigation also presents a potential for
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1 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
2 management difficulties and provides the benefits of single adjudication, economy of scale, and
3 comprehensive supervision by a single court on the issue of Vigo's liability. Class treatment of the
4 liability issues will ensure that all claims and claimants are before this Court for consistent
5 adjudication of the liability issues.

6 **COUNT I**

7 **Breach of Express Warranty**

8 23. Plaintiff hereby incorporates by reference the allegations contained in all preceding
9 paragraphs of this complaint.

10 24. Plaintiff brings this claim individually and on behalf of the proposed Class against
11 Vigo.

12 25. Vigo, as the designer, manufacturer, marketer, distributor, and/or seller, expressly
13 warranted that its Octopus Products contained octopus.

14 26. In fact, the Octopus Products contain squid instead of octopus and Vigo's express
15 warranties that the Octopus Products contained octopus are therefore false.

16 27. As a direct and proximate cause of Vigo's breach of express warranty, Plaintiff and
17 Class members have been injured and harmed because: (a) they would not have purchased the
18 Octopus Products on the same terms if they had known the true facts that the Octopus Products
19 contained squid instead of octopus; (b) they paid a price premium for the Octopus Products due to
20 Vigo's promises that it contained octopus; and (c) Vigo's Octopus Products did not have the
21 characteristics, ingredients, uses or benefits, as promised.

22 **COUNT II**

23 **Breach of the Implied Warranty of Merchantability**

24 28. Plaintiff hereby incorporates by reference the allegations contained in all preceding
25 paragraphs of this complaint.

26 29. Plaintiff brings this claim individually and on behalf of the proposed Class against
27 Vigo.
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1 30. Vigo, as the designer, manufacturer, marketer, distributor, and/or seller, impliedly
2 warranted that the Octopus Products contained octopus.

3 31. Vigo breached the warranty implied in the contract for the sale of its Octopus
4 Products because it could not pass without objection in the trade under the contract description, the
5 goods were not of fair average quality within the description, and the goods were unfit for their
6 intended and ordinary purpose because the Octopus Products contained squid instead of octopus.
7 As a result, Plaintiff and Class members did not receive the goods as impliedly warranted by Vigo
8 to be merchantable.

9 32. Plaintiff and Class members purchased the Octopus Products in reliance upon
10 Vigo's skill and judgment and the implied warranties of fitness for the purpose.

11 33. The Octopus Products were not altered by Plaintiff or Class members.

12 34. The Octopus Products were defective when it left the exclusive control of Vigo.

13 35. Vigo knew that the Octopus Products would be purchased and used without
14 additional testing by Plaintiff and Class members.

15 36. The Octopus Products were defectively designed and unfit for their intended
16 purpose, and Plaintiff and Class members did not receive the goods as warranted.

17 37. As a direct and proximate cause of Vigo's breach of the implied warranty, Plaintiff
18 and Class members have been injured and harmed because: (a) they would not have purchased the
19 Octopus Products on the same terms if they had known the true facts that the Octopus Products
20 contained squid instead of octopus; (b) they paid a price premium for the Octopus Products due to
21 Vigo's promises that it contained octopus; and (c) Vigo's Octopus Products did not have the
22 characteristics, ingredients, uses or benefits, as promised.

23 **COUNT III**

24 **Breach of the Implied Warranty of Fitness for a Particular Purpose**

25 38. Plaintiff hereby incorporates by reference the allegations contained in all preceding
26 paragraphs of this complaint.

1 contained octopus when in fact they contained squid. These misrepresentations caused injuries to
2 Plaintiff and Class members because they would not have purchased the Octopus Products if the
3 true facts were known.

4 48. Because Vigo's retention of the non-gratuitous benefits conferred on it by Plaintiff
5 and Class members is unjust and inequitable, Vigo must pay restitution to Plaintiff and Class
6 members for its unjust enrichment, as ordered by the Court.

7 **COUNT V**

8 **Violation of California's Consumers Legal Remedies Act,**

9 **California Civil Code §§ 1750, *et seq.***

10 **(Injunctive Relief Only)**

11 49. Plaintiff hereby incorporates by reference the allegations contained in all preceding
12 paragraphs of this complaint.

13 50. Plaintiff brings this claim individually and on behalf of the proposed Subclass
14 against Vigo.

15 51. California's Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits
16 "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses,
17 benefits, or quantities which they do not have or that a person has a sponsorship, approval, status,
18 affiliation, or connection which he or she does not have."

19 52. California's Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(9), prohibits
20 "[a]dvertising goods or services with intent not to sell them as advertised."

21 53. Vigo violated this provision by misrepresenting that its Octopus Products contained
22 octopus when in fact they contained squid.

23 54. Plaintiff and the Subclass suffered injuries caused by Vigo because: (a) they would
24 not have purchased the Octopus Products on the same terms if they had known the true facts that
25 the Octopus Products contained squid instead of octopus; (b) they paid a price premium for the
26 Octopus Products due to Vigo's promises that it contained octopus; and (c) Vigo's Octopus
27 Products did not have the characteristics, ingredients, uses or benefits, as promised.
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COUNT IX

Fraud

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4 79. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

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6 80. Plaintiff brings this claim individually and on behalf of the proposed Class against Vigo.

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8 81. As discussed above, Vigo provided Plaintiff and Class members with false or misleading material information and failed to disclose material facts about its Octopus Products, including but not limited to the fact that it contained squid when the product was represented to contain octopus. These misrepresentations and omissions were made with knowledge of their falsehood.

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12 82. The misrepresentations and omissions made by Vigo, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase the Octopus Products.

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15 83. Vigo's fraudulent actions caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

PRAAYER FOR RELIEF

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18 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Vigo, as follows:

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21 a. For an order certifying the nationwide Class and the Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as the representative of the Class and Subclass and Plaintiff's attorneys as Class Counsel to represent members of the Class and Subclass;
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24 b. For an order declaring that Vigo's conduct violates the statutes referenced herein;
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26 c. For an order finding in favor of Plaintiff, the nationwide Class, and the Subclass on all counts asserted herein;
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- 1 d. For compensatory and punitive damages in amounts to be determined by the Court
2 and/or jury;
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4 e. For prejudgment interest on all amounts awarded;
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6 f. For an order of restitution and all other forms of equitable monetary relief;
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8 g. For injunctive relief as pleaded or as the Court may deem proper; and
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10 h. For an order awarding Plaintiff, the Class, and the Subclass their reasonable
11 attorneys' fees and expenses and costs of suit.

12 **DEMAND FOR TRIAL BY JURY**

13 Plaintiff demands a trial by jury of all issues so triable.

14 Dated: April 19, 2016

15 **BURSOR & FISHER, P.A.**

16 By: /s/ L. Timothy Fisher

17 L. Timothy Fisher

18 L. Timothy Fisher (State Bar No. 191626)
19 Julia A. Luster (State Bar No. 295031)
20 1990 North California Boulevard, Suite 940
21 Walnut Creek, CA 94596
22 Telephone: (925) 300-4455
23 Facsimile: (925) 407-2700
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E-Mail: jim@salpetergitkin.com

Attorneys for Plaintiff

CLRA Venue Declaration Pursuant to California Civil Code Section 1780(d)

I, Luis Diego Zapata Fonseca, declare as follows:

1. I am a plaintiff in this action and a citizen of the State of California. I have personal knowledge of the facts stated herein and, if called as a witness, I could and would testify competently thereto.

2. The complaint I in this action is filed in the proper place because I purchased Vigo Importing Company octopus products in this District and Defendant conducts a substantial amount of business in this District.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct, executed on April 15, 2016 at Salinas, California.

Diego Zapata F.
Luis Diego Zapata Fonseca

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS
LUIS DIEGO ZAPATA FONSECA, individually and on behalf of all others similarly situated,

DEFENDANTS
VIGO IMPORTING CO.,

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

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

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

(c) Attorneys (Firm Name, Address, and Telephone Number)
L. Timothy Fisher, Bursor & Fisher, P.A.
1990 N. California Blvd., Suite 940
Walnut Creek, CA 94596 Tel: (925) 300-4455

Attorneys (If Known)

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

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

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

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

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

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

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

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. Section 1332(d)(2)(A)
Brief description of cause:
Plaintiff alleges that Defendant sold squid that was labeled as octopus.

VII. REQUESTED IN COMPLAINT:

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

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 04/19/2016 SIGNATURE OF ATTORNEY OF RECORD /s/ L. Timothy Fisher

IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA