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8 *Counsel for Plaintiff Mojan Kazemi*  
9 *and the Proposed Class*

10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 **MOJAN KAZEMI**, individually and on  
13 behalf of all others similarly situated,

14 Plaintiff,

15 v.

16 **DAVE’S GOURMET, INC.**, a Virginia  
17 corporation,

18 Defendant.

CASE NO.: 16-cv-5269

JUDGE:

**COMPLAINT**

**CLASS ACTION**

1. Violations of Bus. & Prof. Code §§ 17500 *et seq.* (False Advertising Law);
2. Violations of Bus. & Prof. Code §§ 17200 *et seq.* (Fraudulent Prong of Unfair Competition Law);
3. Violations of Bus. & Prof. Code §§ 17200 *et seq.* (Unfair Prong of Unfair Competition Law);
4. Violations of Bus. & Prof. Code §§ 17200 *et seq.* (Unlawful Prong of Unfair Competition Law);
5. Violations of Florida’s Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201, *et seq.*; and
6. Negligent Misrepresentation.

*JURY TRIAL DEMANDED*

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1 Plaintiff, Mojan Kazemi (“Plaintiff”), individually, and on behalf of all others similarly  
2 situated (“Putative Class”), by and through the undersigned counsel, and pursuant to all applicable  
3 *Federal Rules of Civil Procedure*, hereby files this Class Action Complaint, and alleges against  
4 Defendant, Dave’s Gourmet, Inc., (“Dave’s Gourmet” or “Defendant”), as follows:

5 **I. INTRODUCTION**

6 1. At all material times hereto, Defendant has unlawfully, fraudulently, unfairly,  
7 misleadingly, and/or deceptively represented that several varieties of its pasta sauces contain  
8 Evaporated Cane Juice (“ECJ”), despite the fact that ECJ is a term which is prohibited from use  
9 on food labels under California, Florida, and federal law. Defendant’s pasta sauces include, but  
10 are not limited to, the following varieties:

- 11 a. Red Heirloom Pasta Sauce;
  - 12 b. Butternut Squash Pasta Sauce;
  - 13 c. Roasted Garlic & Sweet Basil Pasta Sauce;
  - 14 d. Spicy Heirloom Marinara Pasta Sauce; and
  - 15 e. all other substantially similar products
- 16 (collectively “Products”).

17 2. The Products’ ECJ ingredient listing is false or likely to deceive reasonable  
18 consumers because ECJ is a term which is prohibited from use on food labels under California,  
19 Florida, and federal law because it misleads consumers into thinking they are not purchasing the  
20 functional equivalent of “sugar.”

21 3. Therefore, Plaintiff brings this class action individually, and on behalf of all others  
22 similarly situated, to secure, among other things, equitable relief, declaratory relief, restitution, and  
23 in the alternative damages, for a Putative Class of similarly situated purchasers, against Defendant,  
24 for: (1) Violations of Business and Professions Code §§ 17500 *et seq.* (False Advertising Law or  
25 FAL); (2) Violations of Business and Professions Code §§ 17200 *et seq.* (Fraudulent Prong of  
26 UCL); (3) Violations of Business and Professions Code §§ 17200 *et seq.* (Unfair Prong of Unfair  
27 Competition Law or UCL); (4) Violations of Business and Professions Code §§ 17200 *et seq.*

1 (Unlawful Prong of UCL); (5) Violations of Florida’s Deceptive and Unfair Trade Practices Act,  
2 FLA. STAT. §§ 501.201, *et seq.*; and (6) Negligent Misrepresentation.

3 4. In addition, Plaintiff is seeking an Order requiring Defendant to cease from  
4 representing on the packaging, website, and all other advertising that the Products contain ECJ.

5 5. Plaintiff expressly does not seek to contest or enforce any state law that has  
6 requirements beyond those required by federal laws or regulations.

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

9 **II. JURISDICTION AND VENUE**

10 7. This Court has jurisdiction over the subject matter presented by this Class Action  
11 Complaint because it is a class action arising under the Class Action Fairness Act of 2005  
12 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original  
13 jurisdiction of the Federal Courts of any class action in which any member of the Putative Class is  
14 a citizen of a state different from any Defendant, and in which the matter in controversy exceeds in  
15 the aggregate the sum of \$5,000,000.00, exclusive of interest and costs. Pursuant to 28 U.S.C. §  
16 1332(d)(2)(A), Plaintiff alleges that the total claims of the individual members of the Putative Class  
17 in this action are in excess of \$5,000,000.00, in the aggregate, exclusive of interest and costs, and  
18 as set forth below, diversity of citizenship exists under CAFA because, as more fully set forth  
19 below, Plaintiff is a citizen of Florida and Defendant can be considered a citizen of Virginia for  
20 diversity purposes.

21 8. Venue in this judicial district is proper pursuant to 28 U.S.C. §1391(a) because, as  
22 set forth below, Defendant conducts business in, and may be found in, this district, and Plaintiff  
23 purchased the subject Products of this action in this judicial district.

24 **III. PARTIES**

25 9. Plaintiff, Mojan Kazemi, is an individual more than 18 years old, and is a citizen of  
26 Florida, who resides in Palm Beach County. Plaintiff respectfully requests a jury trial on all damage  
27 claims.  
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1           10. Defendant Dave's Gourmet is a Virginia corporation with its principal place of  
2 business located at 2000 Mckinnon Avenue, Bldg. 428, Suite 5, San Francisco, California 94124.  
3 Defendant can be considered a "citizen" of California or Virginia for diversity purposes. At all  
4 times material hereto Defendant promoted and marketed the Products at issue in this jurisdiction  
5 and in this judicial district.

6           11. The advertising for the Products relied upon by Plaintiff was prepared and/or  
7 approved by Defendant and its agents, with such advertising originating in this State, and was  
8 disseminated by Defendant and its agents through advertising containing the misrepresentations  
9 alleged herein.

10           12. The advertising for the Products was designed to encourage consumers to purchase  
11 the Products and reasonably misled the reasonable consumer, i.e. Plaintiff and the Putative Class  
12 into purchasing the Products.

13           13. Defendant is the owner, manufacturer, and distributor of the Products, and is the  
14 company that created and/or authorized the unlawful, fraudulent, unfair, misleading, and/or  
15 deceptive advertising and statements for the Products.

16           14. Plaintiff alleges that, at all times relevant herein, Defendant and its subsidiaries,  
17 affiliates, and other related entities, as well as their respective employees, were the agents, servants  
18 and employees of Defendant, and at all times relevant herein, each was acting within the purpose  
19 and scope of that agency and employment.

20           15. Plaintiff further alleges on information and belief that at all times relevant herein,  
21 the distributors and retailers who delivered and sold the Products, as well as their respective  
22 employees, also were Defendant's agents, servants, and employees, and at all times herein, each  
23 was acting within the purpose and scope of that agency and employment.

24           16. In addition, Plaintiff alleges that, in committing the wrongful acts alleged herein,  
25 Defendant, in concert with its subsidiaries, affiliates, and/or other related entities and their  
26 respective employees, planned, participated in and furthered a common scheme to induce members  
27 of the public to purchase the Products by means of untrue, misleading, deceptive, and/or fraudulent  
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1 representations, and that Defendant participated in the making of such representations in that it  
2 disseminated those misrepresentations and/or caused them to be disseminated.

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

8 **IV. FACTUAL ALLEGATIONS**

9 **Defendant's Unlawful Advertising of the Products**

10 18. At all material times hereto, Defendant manufactures, distributes, markets,  
11 advertises, and sells the Products that list ECJ as an ingredient when in fact, that claim is false,  
12 deceptive, and likely to mislead reasonable consumers, because ECJ is a term which is prohibited  
13 from use on food labels under California, Florida, and federal law.

14 19. Defendant's listing of ECJ is displayed on the ingredient panel of each individual  
15 packaging of the Products.

16 20. Defendant unlawfully markets, advertises, sells and distributes the Products  
17 throughout the United States to purchasers in grocery stores, food chains, mass discounters, mass  
18 merchandisers, club stores, convenience stores, drug stores, and/or dollar stores as containing ECJ.

19 21. All of the Products' labeling and/or packaging uniformly and consistently state that  
20 the Products contain ECJ.

21 22. As a result, all consumers within the Putative Class, including Plaintiff, who  
22 purchased the Products, were exposed to the same ECJ deception in the same location on the  
23 ingredient label of the packaging for the Products.

24 23. Plaintiff and members of the Putative Class would have paid less for the Products  
25 or would not have purchased the Products had they known that the Products' listing of ECJ as an  
26 ingredient claim was false, misleading, and deceptive.

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1           24. In addition, Plaintiff and members of the Putative Class, were charged a price  
2 premium for the Products over and above other comparable products that do not claim to list ECJ  
3 as an ingredient.

4 **Identical California, Florida, and federal laws Regulate Food Labeling**

5           25. Food manufacturers are required to comply with federal and state laws and  
6 regulations governing the labeling of the food products. Primary among these laws is the Federal  
7 Food, Drug, and Cosmetic Act (“FDCA”) and its labeling regulations, including those set forth in  
8 21 C.F.R. 101.

9           26. California, Florida, and federal law have placed similar requirements on food  
10 companies that are designed to ensure that the claims companies make to consumers about their  
11 products are both honest and accurate.

12           27. Pursuant to California’s Sherman Food, Drug & Cosmetic Law (the “Sherman  
13 Act”), California has expressly adopted the federal labeling requirements and indicated that “[a]ll  
14 food labeling regulations and any amendments to those regulations adopted pursuant to the federal  
15 act, in effect on January 1, 1993, or adopted on or after that date shall be the food regulations of  
16 this state.” *California Health & Safety Code* §§ 110100 *et seq.*

17           28. Additionally, pursuant to the Florida Food Safety Act, the purpose of that chapter is  
18 to “[p]rovide legislation which shall be uniform, as provided in this chapter, and administered so  
19 far as practicable in conformity with the provisions of, and regulations issued under the authority  
20 of, the Federal Food, Drug, and Cosmetic Act [...] to the extent that it expressly prohibits the false  
21 advertisement of food.” FLA. STAT. § 500.02.

22           29. California and Florida have also enacted various laws and regulations that adopt and  
23 incorporate specific enumerated federal food laws and regulations. For example, food products are  
24 misbranded under section 110660 of the *California Health & Safety Code* if their labeling is false  
25 and misleading in one or more particulars. Additionally, under Florida law, the “manufacture, sale  
26 or delivery, holding or offering for sale of any food that is adulterated or misbranded” is prohibited.  
27 FLA. STAT. § 500.04(1).

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1           30.     Likewise, under the FDCA section 403(a), a food is “misbranded” if “its labeling is  
2 false or misleading in any particular,” or “its advertising is false or misleading in a material  
3 respect.” 21 U.S.C. § 343(a).

4           31.     Thus, the California and Florida claims alleged herein are parallel to those of the  
5 FDCA.

6           **Defendant’s Use of “Evaporated Cane Juice” As an Ingredient on Its Labels**  
7 **is False, Deceptive, and Misleading**

8           32.     Defendant has unfairly, unlawfully, deceptively, and misleadingly represented that  
9 the Products contain ECJ as an ingredient on the ingredient label of its packaging. Notably, the  
10 proper term to use instead of ECJ is “sugar.”<sup>1</sup>

11           33.     Defendant’s listing of ECJ as an ingredient is false or likely to deceive reasonable  
12 consumers because Defendant uses the term “ECJ” to make its Products appear healthier than a  
13 product that contains added sugar as an ingredient.

14           34.     The labeling and advertising for the Products was designed to encourage consumers  
15 to purchase the Products with the belief that the Products contain no sugar and are healthier, when  
16 in fact, the Products contain the functional equivalent of sugar: ECJ.

17           35.     Defendant’s product labeling fails to accurately identify sugar as an “added  
18 ingredient” of its food products. Rather, the label identifies ECJ as an ingredient, despite the fact  
19 that the FDCA requires that the ingredient be called “sugar” or “dried cane syrup.” The ingredient  
20 is not “juice,” but is “sugar” or “syrup.” 21 C.F.R. § 101.4 (a)(1) provides “[i]ngredients required  
21 to be declared on the label or labeling of a food...shall be listed by common or usual name... .”  
22 The common or usual name for an ingredient is the name established by common usage or by  
23 regulation. 21 C.F.R. § 102.5. These federal regulations have been adopted by California pursuant  
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26 1. Plaintiff alleges that the ingredient called “evaporated cane juice” used by Defendant was in  
27 fact sugar. It is possible, however, that instead of adding crystallized sugar as the ingredient at issue  
28 that the Defendant added dried sugar cane syrup as the ingredient at issue. The common and usual  
name of such a syrup is “dried cane syrup” as detailed in 21 C.F.R. § 168.130. Regardless of  
whether the ingredient in question was sugar or dried cane syrup, calling the ingredient ECJ is  
unlawful and violates the same state and federal statutory and regulatory provisions and is contrary  
to FDA policy and guidance.

1 to the Sherman Law. As discussed below, ECJ is not the common or usual name of any sweetener  
2 as established by common usage or by regulation.

3 36. Further, the Food and Drug Administration (“FDA”) has specifically warned  
4 companies not to use the term “evaporated cane juice.” The FDA has issued these warnings because  
5 a label containing the term “evaporated cane juice” (1) is “false and misleading;” (2) it is a violation  
6 of a number of labeling regulations designed to ensure that manufacturers label their products with  
7 the common and usual names of the ingredients they use and accurately describe the ingredients  
8 they utilize; and (3) the ingredient in question is not a juice.

9 37. According to the FDA’s published policy, “evaporated cane juice” is simply a “false  
10 and misleading” way of describing sugar, and therefore, it is improper to disguise sugar in a product  
11 as a type of “juice.”

12 38. In October of 2009, the FDA issued *Guidance for Industry: Ingredients Declared*  
13 *as Evaporated Cane Juice, Draft Guidance*,<sup>2</sup> (“2009 ECJ Guidance”) which advised industry that  
14 sweeteners derived from sugar cane syrup should not be listed in the ingredient declaration by  
15 names which suggest that the ingredients are juice, such as “evaporated cane juice.” The **FDA**  
16 **considers such representations to be “false and misleading”** under section 403(a)(1) of the Act  
17 (21 U.S.C. § 343(a)(1)) because they fail to reveal the basic nature of the food and its characterizing  
18 properties (i.e., that the ingredients are sugars or syrups) as required by 21 C.F.R. section 102.5.

19 39. 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 Further, the *Florida Statutes* mandate that a product is misbranded if the common and usual  
23 ingredient names are not used. FLA. STAT. § 500.09(b).

24 40. As a result of Defendant’s misrepresentations, Plaintiff purchased the Products  
25 instead of other similar products that did not make the false ECJ ingredient listing.

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28 2. See *ECJ Guidance*, FDA, <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm181491.htm> (last visited Sept. 13, 2016).



1           41. Plaintiff and members of the Putative Class relied upon Defendant's ECJ ingredient  
2 listing in making their purchase of the Products.

3           42. Plaintiff and members of the Putative Class would not have purchased the Products  
4 if they did not contain ECJ, or in the alternative, Plaintiff and members of the Putative Class would  
5 not have paid the premium purchase price they paid for the Products.

6           43. Thus, Defendant's ECJ ingredient listing is false, misleading, and likely to deceive  
7 reasonable consumers such as Plaintiff and the Putative Class, into purchasing the Products.

8           44. Plaintiff and the other Putative Class members reasonably relied to their detriment  
9 on Defendant's misleading representations and omissions.

10          45. Plaintiff and the other Putative Class members were among the intended recipients  
11 of Defendant's deceptive representations and omissions.

12          46. Upon information and belief, Defendant made the deceptive representations and  
13 omissions regarding the Products with the intent to induce Plaintiff's and the other Putative Class  
14 members' purchase of the Products.

15          47. Defendant's representations and omissions are material in that a reasonable person  
16 would attach importance to such information and would be induced to act upon such information  
17 in making purchase decisions.

18          48. Thus, Plaintiff's and the other Putative Class members' reliance upon Defendant's  
19 misleading and deceptive representations and omissions may be presumed. The materiality of those  
20 representations and omissions also establishes causation between Defendant's conduct and the  
21 injuries sustained by Plaintiff and the Putative Class.

22          49. Upon information and belief, in making the false, misleading, and deceptive  
23 representations and omissions, Defendant knew and intended that consumers would pay a price  
24 premium for the Products over comparable products that are not represented as containing ECJ,  
25 thereby furthering Defendant's private interest of increasing sales for the Products, and decreasing  
26 the sales of products by Defendant's competitors that do not claim to contain ECJ.

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1           50. As an immediate, direct, and proximate result of Defendant's false, misleading, and  
2 deceptive representations and omissions, Defendant injured Plaintiff and the other Putative Class  
3 members in that Plaintiff and other Putative Class members:

- 4           a. paid a sum of money for the Products that was not as represented;  
5           b. paid a premium price for the Products that was not as represented;  
6           c. were deprived the benefit of the bargain because the Products they purchased were  
7           different than what Defendant warranted;  
8           d. were deprived the benefit of the bargain because the Products they purchased had  
9           less value than what was represented by Defendant;  
10          e. did not receive a product that measured up to their expectations as created by  
11          Defendant;  
12          f. purchased a product that was of a lower quality than what Defendant promised;  
13          g. were denied the benefit of knowing what they ingested; and  
14          h. were denied the benefit of truthful consumer food labels.

15          51. Had Defendant not made the false, misleading, and deceptive representations and  
16 omissions, Plaintiff and the other Putative Class members would not have been economically  
17 injured because Plaintiff and the other Putative Class members would have paid less for the  
18 Products or would not have purchased the Products at all.

19          52. Accordingly, Plaintiff and the other Putative Class members have suffered injury in  
20 fact and lost money or property as a result of Defendant's wrongful conduct.

21          53. Plaintiff and the Putative Class face a real and immediate threat of future harm in  
22 the form of deceptively labeled, packaged, and marketed Products sold at inflated prices based upon  
23 the deception that the Products contain ECJ, despite the fact that ECJ is a term which is prohibited  
24 from use on food labels under California, Florida, and federal law. Absent an injunctive order,  
25 Plaintiff and the Putative Class cannot rely on Defendant's Products to be truthful and non-  
26 misleading, and the Products will continue to be sold at an artificially inflated price beyond its true  
27 market value.  
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1           54. Defendant’s ongoing wrongful conduct and practices, if not enjoined, will subject  
2 Plaintiff, Putative Class members, and other members of the public to substantial continuing harm  
3 and will cause irreparable injury to the public. Absent the injunctive power of this Court, Defendant  
4 will be permitted to continue to deceive and mislead members of the Putative Class and consuming  
5 public at large.

6 **Plaintiff’s Purchase and Reliance on Defendant’s Misrepresentations**

7           55. During the Class Period, Plaintiff purchased the Products, including the Red  
8 Heirloom variety, for personal use on or about September 4, 2016 from a retail store located in  
9 Boca Raton, Florida for the premium purchase price of approximately \$4.79.

10          56. In purchasing the Product, Plaintiff saw, read, and relied upon the ECJ ingredient  
11 listing displayed on the Products’ ingredient label. Plaintiff interpreted the representation that the  
12 Products contain ECJ to mean that the Products did not contain any sugar, rather than containing  
13 sugar’s functional equivalent: ECJ.

14          57. Plaintiff has been economically damaged by Plaintiff’s purchase of the Products  
15 because Plaintiff relied upon the Products’ unfair, unlawful, deceptive, and misleading labeling and  
16 advertising in making Plaintiff’s purchasing decision.

17          58. Therefore, the Products are worth less than what Plaintiff paid for and/or Plaintiff  
18 did not receive what Plaintiff reasonably intended to receive.

19          59. Plaintiff would not have paid the premium purchase price for the Products, or in the  
20 alternative, Plaintiff would not have purchased the Products if Plaintiff had known that the Products  
21 contain sugar.

22 **V. CLASS ACTION ALLEGATIONS**

23          60. Plaintiff re-alleges and incorporates by reference the allegations set forth in each of  
24 the preceding paragraphs of this Class Action Complaint as if fully set forth herein.

25          61. Pursuant to *Federal Rule of Civil Procedure 23*, Plaintiff bring this class action and  
26 seeks certification of the claims and certain issues in this action on behalf of a Putative Class defined  
27 as Statewide Classes and additionally and/or alternatively, a Nationwide Class as follows:  
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a. **Nationwide Class.** Plaintiff brings this action on behalf of Plaintiff and on behalf of a nationwide class, as follows:

i. **Nationwide Class.**

- 1. Pursuant to Rule 23(a) and (b)(2), all individuals who purchased one or more of the Products throughout the United States, for personal use and not resale, during the four-year period preceding the date of the filing of this Complaint, through and to the date Notice is provided to the Class;
- 2. Pursuant to Rule 23(a) and (b)(3) all individuals who purchased one or more of the Products, throughout the United States for personal use and not resale, during the four-year period preceding the date of the filing of this Complaint, through and to the date Notice is provided to the Class.

ii. **Statewide Class.** Plaintiff brings this action on behalf of Plaintiff and on behalf of a statewide class, as follows:

1. **Florida Class.**

- a. Pursuant to Rule 23(a) and (b)(2), all individuals who purchased one or more of the Products throughout the State of Florida, for personal use and not resale, during the four-year period preceding the date of the filing of this Complaint, through and to the date Notice is provided to the Class;
- b. Pursuant to Rule 23(a) and (b)(3), all individuals who purchased one or more of the Products throughout the State of Florida, for personal use and not resale, during the four-year period preceding the date of the filing of this Complaint, through and to the date Notice is provided to the Class.

62. Plaintiff respectfully reserves the right to amend the Class definition if further investigation and discovery indicates that the Class definition should be narrowed, expanded, or

1 otherwise modified, including a reservation of the right to seek to certify subclasses, if discovery  
2 reveals that modifying the class definitions and/or seeking additional subclasses would be  
3 appropriate, including subclasses by state and/or purchase location.

4 63. Excluded from the Putative Class are governmental entities, Defendant, any entity  
5 in which Defendant has a controlling interest, and Defendant's officers, directors, affiliates, legal  
6 representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded  
7 from the Putative Class is any judge, justice, or judicial officer presiding over this matter and the  
8 members of their immediate families and judicial staff.

9 64. Defendant's representations, practices, and/or omissions were applied uniformly to  
10 all members of the Putative Class, including any subclass, so that the questions of law and fact are  
11 common to all members of the Putative Class and any subclass.

12 65. All members of the Putative Class and any subclass were and are similarly affected  
13 by the deceptive advertising for the Products, and the relief sought herein is for the benefit of  
14 Plaintiff and members of the Putative Class and any subclass.

15 **Numerosity—Federal Rule of Civil Procedure 23(a)(1)**

16 66. Based on the annual sales of the Products and the popularity of the Products, it is  
17 readily apparent that the number of consumers in both the Putative Class and any subclass are so  
18 large as to make joinder impractical, if not impossible. Members of the Putative Class and any  
19 subclass may be notified of the pendency of this action by recognized, Court-approved notice  
20 dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or  
21 published notice.

22 **Commonality and Predominance—Federal Rules of Civil Procedure 23(a)(2) and (b)(3)**

23 67. Questions of law and fact common to the Putative Class and any subclass exist that  
24 predominate over questions affecting only individual members, including:

- 25 a. Whether Defendant's business practices and representations related to the  
26 marketing, labeling, and sales of the Products were unfair, deceptive, fraudulent,  
27 and/or unlawful in any respect, thereby violating Cal. Bus. & Prof. Code §§ 17200  
28 *et seq.*;

- 1           b. Whether Defendant violated Cal. Bus. & Prof. Code §§ 17500 *et seq.*, with its  
2           practices and representations related to the marketing, labeling, and sales of the  
3           Products;  
4           c. Whether Defendant violated Florida Deceptive and Unfair Trade Practices Act,  
5           Sections 501.201 to 201.213, *Florida Statutes* by engaging in false, deceptive, or  
6           misleading advertising or unfair methods of competition;  
7           d. Whether Defendant’s conduct as set forth above constitutes negligent  
8           misrepresentation;  
9           e. Whether knowledge of the fact that the Products contain sugar, and not ECJ, is  
10          material to a reasonable consumer;  
11          f. Whether the claim that the Products contain ECJ is misleading to a reasonable  
12          consumer;  
13          g. Whether a reasonable consumer is likely to be deceived by claims that the Products  
14          contain ECJ, despite the fact that ECJ is a term which is prohibited from use on food  
15          labels under California, Florida, and federal law;  
16          h. Whether Defendant’s conduct as set forth above injured consumers, and if so, the  
17          extent of the injury.

18          **Typicality—Federal Rule of Civil Procedure 23(a)(3)**

19           68. The claims asserted by Plaintiff in this action are typical of the claims of the  
20          members of the Putative Class and any subclass, as the claims arise from the same course of conduct  
21          by Defendant, and the relief sought within the Putative Class and any subclass is common to the  
22          members of each. Further, there are no defenses available to Defendant that are unique to Plaintiff.

23          **Adequacy of Representation—Federal Rule of Civil Procedure 23(a)(4):**

24           69. Plaintiff will fairly and adequately represent and protect the interests of the members  
25          of the Putative Class and any subclass.

26           70. Plaintiff has retained counsel competent and experienced in both consumer  
27          protection and class action litigation. The Putative Class’s and any subclass’s interests will be fairly  
28          and adequately protected by Plaintiff’s counsel. Undersigned counsel has represented consumers

1 in a wide variety of actions where they have sought to protect consumers from fraudulent and  
2 deceptive practices.

3 **Declaratory and Injunctive Relief—Federal Rule of Civil Procedure 23(b)(2)**

4 71. Certification also is appropriate because Defendant acted, or refused to act, on  
5 grounds generally applicable to both the Putative Class and any subclass, thereby making  
6 appropriate the final injunctive relief and declaratory relief sought on behalf of the Putative Class  
7 and any subclass as respective wholes. Further, given the large number of consumers of the  
8 Products, allowing individual actions to proceed in lieu of a class action would run the risk of  
9 yielding inconsistent and conflicting adjudications.

10 **Superiority—Federal Rule of Civil Procedure 23(b)(3)**

11 72. A class action is a fair and appropriate method for the adjudication of the  
12 controversy, in that it will permit a large number of claims to be resolved in a single forum  
13 simultaneously, efficiently, and without the unnecessary hardship that would result from the  
14 prosecution of numerous individual actions and the duplication of discovery, effort, expense and  
15 burden on the courts that individual actions would engender.

16 73. The benefits of proceeding as a class action, including providing a method for  
17 obtaining redress for claims that would not be practical to pursue individually, outweigh any  
18 difficulties that might be argued with regard to the management of this class action. Absent a class  
19 action, it would be highly unlikely that the representative Plaintiff or any other members of the  
20 Putative Class or any subclass would be able to protect their own interests because the cost of  
21 litigation through individual lawsuits might exceed expected recovery.

22 74. Certification of this class action is appropriate under *Federal Rule of Civil*  
23 *Procedure* Rule 23, because the questions of law or fact common to the respective members of the  
24 Putative Class and any subclass predominate over questions of law or fact affecting only individual  
25 members. This predominance makes class litigation superior to any other method available for a  
26 fair and efficient decree of the claims.

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28 **VI. CAUSES OF ACTION**

**COUNT I**

**Violation of False Advertising Law—Cal. Bus. & Prof. Code §§ 17500 *et seq.***

***(Brought on Behalf of Plaintiff and the Putative Nationwide Class Against Defendant)***

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4 75. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the  
5 preceding paragraphs one (1) through seventy-four (74) of this Complaint as if fully set forth herein  
6 verbatim.

7 76. Throughout the Class Period Defendant engaged in a public advertising and  
8 marketing campaign representing that the Products contain ECJ, despite the fact that ECJ is a term  
9 which is prohibited from use on food labels under California and federal law.

10 77. Defendant's advertisements and marketing representations are misleading, untrue,  
11 and likely to deceive reasonable consumers.

12 78. Defendant engaged in its advertising and marketing campaign with the intent to  
13 directly induce customers to purchase the Products based on false claims.

14 79. In violation of California Bus. & Prof. Code §§ 17500 *et seq.*, Defendant  
15 disseminated, or caused to be disseminated, the deceptive Products' labeling and advertising  
16 representations.

17 80. Defendant's labeling and advertising representations for the Products are by their  
18 very nature unfair, deceptive, and/or unlawful within the meaning of California Bus. & Prof. Code  
19 §§ 17500 *et seq.*

20 81. The representations were at all material times hereto likely to deceive reasonable  
21 consumers, including Plaintiff and members of the Putative Class.

22 82. Defendant violated California Bus. & Prof. Code §§ 17500 *et seq.*, in making and  
23 disseminating the deceptive representations alleged herein.

24 83. Defendant knew or should have known that the representations were false,  
25 misleading, and likely to deceive reasonable consumers, such as Plaintiff and members of the  
26 Putative Class.

27 84. As a direct and proximate result of Defendant's wrongful conduct, Plaintiff and  
28 similarly situated purchasers of the Products have suffered economic damages.



1 85. Plaintiff was injured in fact and lost money as a result of Defendant's conduct of  
2 improperly advertising the Products as described herein.

3 86. Plaintiff would have paid less for the Products or would not have purchased the  
4 Products but for Defendant's misleading statements about the Products.

5 87. Pursuant to Bus. & Prof. Code § 17535, Plaintiff, individually and on behalf of all  
6 similarly situated purchasers, seeks an order of this Court requiring Defendant to restore to  
7 purchasers of the Products all monies that may have been acquired by Defendant as a result of such  
8 false, unfair, deceptive, and/or unlawful acts or practices. Plaintiff and members of the Putative  
9 Class seek declaratory relief, restitution for monies wrongfully obtained, disgorgement of ill-gotten  
10 revenues and/or profits, injunctive relief enjoining Defendant from disseminating its untrue and  
11 misleading statements, and other relief allowable under California Business & Professions Code  
12 Section 17535.

13 88. Furthermore, as a result of Defendant's violations of the FAL, Plaintiff and similarly  
14 situated purchasers of the Products are entitled to restitution for out-of-pocket expenses and  
15 economic harm.

16 89. Pursuant to Civil Code § 3287(a), Plaintiff and similarly situated purchasers of the  
17 Products are further entitled to pre-judgment interest as a direct and proximate result of Defendant's  
18 wrongful conduct. The amount on which interest is to be calculated is a sum certain and capable of  
19 calculation, and Plaintiff and similarly situated purchasers of the Products are entitled to interest in  
20 an amount according to proof.

21 **COUNT II**

22 **Violation of UCL: Fraudulent Prong—Cal. Bus. & Prof. Code §§ 17200 et seq.**

23 **(Brought on Behalf of Plaintiff and the Putative Nationwide Class Against Defendant)**

24 90. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the  
25 preceding paragraphs one (1) through seventy-four (74) of this Complaint as if fully set forth herein  
26 verbatim.

27 91. Cal. Bus. & Prof. Code § 17200 prohibits any "fraudulent...business act or  
28 practice." To prove a cause of action under the "fraudulent" prong of the UCL, the plaintiff need

1 only show that Plaintiff and members of the Putative Class are “likely to be ‘deceived’” by the  
2 conduct.<sup>3</sup> Notably, a UCL violation can be established even if no one was actually deceived, relied  
3 upon the fraudulent practice, or sustained any injury.

4 92. Thus, Defendant’s acts and practices are fraudulent in that they have deceived and/or  
5 are likely to deceive, Plaintiff and members of the Putative Class. Specifically, Defendant’s  
6 business practices as alleged herein are fraudulent because they are likely to deceive Plaintiff and  
7 members of the Putative Class into believing the Products have characteristics, uses, and benefits  
8 they do not have, including that they contain ECJ, despite the fact that ECJ is a term which is  
9 prohibited from use on food labels under California and federal law.

10 93. Plaintiff has standing to pursue this claim as Plaintiff has suffered injury in fact and  
11 has lost money or property as a result of Defendant’s actions as set forth herein.

12 94. Defendant’s deceptive and fraudulent business acts and practices were the direct and  
13 proximate cause of Plaintiff’s and members of the Putative Class’s injuries. Plaintiff and members  
14 of the Putative Class relied on Defendant’s deceptive and fraudulent business acts and practices to  
15 their detriment in that but for Defendant’s misrepresentation that the Products contain ECJ, despite  
16 the fact that ECJ is a term which is prohibited from use on food labels under California and federal  
17 law, Plaintiff and members of the Putative Class would have paid less for the Products, would not  
18 have purchased the Products, and/or the Products are worth less because of the true state of the  
19 Products. Moreover, Plaintiff and members of the Putative Class were denied the benefit of the  
20 bargain when they decided to purchase the Products over competitor products that are less  
21 expensive and/or are properly labeled as containing “sugar.”

22 95. Finally, upon information and belief, Defendant is aware that the claims it made  
23 about the Products are false, misleading, and likely to deceive reasonable consumers.

24 96. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, individually, and on  
25 behalf of the Putative Class, seeks an order of this Court for injunctive relief and disgorging and  
26 restoring all monies that have been acquired by Defendant as a result of Defendant’s business acts

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3. See *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009); *Stearns v. TicketMaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011).

1 or practices described herein. Plaintiff, the Putative Class, and the general public may be irreparably  
2 harmed or denied an effective and complete remedy in the absence of such an order.

3 97. As a result of Defendant's violations of the UCL, Plaintiff and the Putative Class  
4 are entitled to restitution for out-of-pocket expenses and economic harm.

5 98. Pursuant to Civil Code § 3287(a), Plaintiff and the Putative Class are further entitled  
6 to pre-judgment interest as a direct and proximate result of Defendant's unfair and fraudulent  
7 conduct. The amount on which interest is to be calculated is a sum certain and capable of  
8 calculation, and Plaintiff and the Putative Class are entitled to interest in an amount according to  
9 proof.

### 10 COUNT III

#### 11 Violation of UCL: Unfair Prong—Cal. Bus. & Prof. Code §§ 17200 et seq.

#### 12 *(Brought on Behalf of Plaintiff and the Putative Nationwide Class Against Defendant)*

13 99. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the  
14 preceding paragraphs one (1) through seventy-four (74) of this Complaint as if fully set forth herein  
15 verbatim.

16 100. Cal. Bus. & Prof. Code § 17200 prohibits any "unfair...business act or practice."  
17 Defendant's business practices, as alleged herein, are "unfair" within the meaning of the UCL  
18 because: (1) Defendant's conduct caused, or is likely to cause, substantial injury to Plaintiff and the  
19 members of the Putative Class; (2) such injury is not reasonably avoidable by Plaintiff and members  
20 of the Putative Class due to Defendant's exclusive knowledge of the exact character and content of  
21 the Products' ingredients; and (3) the injury is not outweighed by any countervailing benefits to  
22 competition or Plaintiff and members of the Putative Class.

23 101. Further, Defendant committed "unfair" business acts or practices by engaging in  
24 conduct that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to Plaintiff  
25 and members of the Putative Class; and engaging in conduct that undermines or violates the spirit  
26 or intent of the consumer protection laws alleged herein.<sup>4</sup>

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4. See *People v. Casa Blanca Convalescent Home, Inc.*, 159 Cal. App. 3d 509, 530 (1984).

1           102. Plaintiff and members of the Putative Class suffered injury in fact and lost money  
2 or property as a result of Defendant’s deceptive advertising: they were denied the benefit of the  
3 bargain when they decided to purchase the Products over competitor products that are less  
4 expensive and/or are properly labeled as containing “sugar.”

5           103. First, the injury to Plaintiff and members of the Putative Class is substantial because  
6 but for Defendant’s misrepresentation that the Products contain ECJ, Plaintiff and members of the  
7 Putative Class would have paid less for the Products, would not have purchased the Products, and/or  
8 the Products are worth less because of the true state of the Products. Moreover, Plaintiff and  
9 members of the Putative Class were denied the benefit of the bargain when they decided to purchase  
10 the Products over competitor products that are less expensive and/or are properly labeled as  
11 containing “sugar.”

12           104. Second, given the fact that Defendant had exclusive knowledge of the exact  
13 character and content of the Products’ ingredients and Plaintiff and members of the Putative Class  
14 had no reason to believe that the Products contain sugar, the resulting injury is not of the variety  
15 that Plaintiff and members of the Putative Class could reasonably have avoided.

16           105. Third, the injury to Plaintiff and members of the Putative Class is not outweighed  
17 by any countervailing benefits to competition or Plaintiff and members of the Putative Class. Any  
18 purported benefits to Plaintiff and members of the Putative Class from the inclusion of the ECJ  
19 ingredient listing on the Products, if any, is negated by the deceptive advertising that the Products  
20 contain ECJ.

21           106. Finally, Defendant had an improper motive (profit before accurate marketing) in its  
22 practices related to the deceptive labeling and advertising of the Products, as set forth above, which  
23 is immoral, unethical, oppressive, unscrupulous, and substantially injurious to Plaintiff and  
24 members of the Putative Class. Defendant’s conduct also offends established public policies against  
25 engaging in false and misleading advertising, unfair competition, and deceptive conduct towards  
26 consumers.

27           107. Plaintiff reserves the right to allege further conduct that constitutes other unfair  
28 business acts or practices.

1 108. As purchasers and consumers of Defendant's Products, and as members of the  
2 general public who purchased and used the Products, Plaintiff and the Putative Class are entitled to  
3 bring this class action seeking all available remedies under the UCL.

4 109. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, individually, and on  
5 behalf of the Putative Class, seeks an order of this Court for injunctive relief and disgorging and  
6 restoring all monies that have been acquired by Defendant as a result of Defendant's business acts  
7 or practices described herein. Plaintiff, members of the Putative Class, and the general public may  
8 be irreparably harmed or denied an effective and complete remedy in the absence of such an order.

9 110. As a result of Defendant's violations of the UCL, Plaintiff and the Putative Class  
10 are entitled to restitution for out-of-pocket expenses and economic harm.

11 111. Pursuant to Civil Code § 3287(a), Plaintiff and the Putative Class are further entitled  
12 to pre-judgment interest as a direct and proximate result of Defendant's unfair and fraudulent  
13 conduct. The amount on which interest is to be calculated is a sum certain and capable of  
14 calculation, and Plaintiff and the Putative Class are entitled to interest in an amount according to  
15 proof.

16 **COUNT IV**

17 **Violation of the UCL: Unlawful Prong—Cal. Bus. & Prof. Code §§ 17200 et seq.**

18 ***(Brought on Behalf of Plaintiff and the Putative Nationwide Class Against Defendant)***

19 112. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the  
20 preceding paragraphs one (1) through seventy-four (74) of this Complaint as if fully set forth herein  
21 verbatim.

22 113. Cal. Bus. & Prof. Code § 17200 prohibits any “unlawful...business act or practice.”  
23 A business practice is “unlawful” under the UCL if it violates any other law or regulation.  
24 Defendant's acts, omissions, misrepresentations, practices, and non-disclosures as alleged herein  
25 constitute “unlawful” business acts and practices because Defendant's conduct violates the FAL.

26 114. Defendant's conduct is also “unlawful” in that it violates § 43(a) the Lanham Act,  
27 15 U.S.C. § 1125(a) by introducing false statements of fact into interstate commerce about its  
28 Products that were material in that they were likely to influence consumers' purchasing decisions,

1 and that had a tendency to deceive, or actually deceived a substantial portion of Defendant’s  
2 audience, resulting in injury.

3 115. Defendant’s conduct is further “unlawful” in that it violates the FDCA and its  
4 implementing regulations as follows:

- 5 a. 21 U.S.C. § 331(a) (prohibiting the “introduction or delivery for introduction into  
6 interstate commerce of any food, drug, device tobacco Products, or cosmetic that is  
7 ... misbranded”);
- 8 b. 21 U.S.C. § 331(b) (prohibiting the “misbranding of any food, drug, device, tobacco  
9 Products, or cosmetic in interstate commerce”);
- 10 c. 21 U.S.C. § 331(c) (prohibiting the “receipt in interstate commerce of any food,  
11 drug, device, tobacco Products, or cosmetic that is ... misbranded, and the delivery  
12 or proffered delivery thereof for pay or otherwise”);
- 13 d. 21 U.S.C. § 331(g) (prohibiting the “giving of a guaranty or undertaking...which  
14 guaranty or undertaking is false”);
- 15 e. 21 U.S.C. § 343(a) (which deems any food misbranded when the label contains a  
16 statement that is “false or misleading in any particular”);
- 17 f. 21 C.F.R. § 101.4(a)(1) (“[i]ngredients required to be declared on the label or  
18 labeling of a food...shall be listed by common or usual name...”);
- 19 g. 21 C.F.R. § 102.5(a) (“The common or usual name of a food, which may be a coined  
20 term, shall accurately identify or describe, in as simple and direct terms as possible,  
21 the basic nature of the food or its characterizing properties or ingredients”);

22 116. Defendant further violates the FDCA’s implementing regulation, 21 C.F.R. § 1.21,  
23 because the Products’ packaging fails to reveal material facts, namely, that the Products actually  
24 contain “sugar,” “in light of other representations made;” specifically, the ECJ ingredient listing  
25 described herein as misleading due to the fact that ECJ is a term which is prohibited from use on  
26 food labels.

27 117. Defendant’s conduct is further “unlawful” by violating the California Sherman  
28 Food, Drug, and Cosmetic Law (“Sherman Law”), *see* Cal. Health & Safety Code §§ 109875-

1 111900, which incorporates the provisions of the FDCA. *See id.* §§ 110110-110115. Specifically,  
2 but not limited to, the following provisions:

- 3 h. § 110290 (“In determining whether the labeling or advertisement of a food...is  
4 misleading, all representations made or suggested by statement, word, design,  
5 device sound, or any combination of these shall be taken into account. The extent  
6 that the labeling or advertising fails to reveal facts concerning the food...or  
7 consequences of customary use of the food...shall also be considered.”);
- 8 i. § 110390 (“It is unlawful for any person to disseminate any false advertisement of  
9 any food...An advertisement is false if it is false or misleading in any particular.”);
- 10 j. § 110395 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer  
11 for sale any food...that is falsely advertised.”);
- 12 k. § 110398 (“It is unlawful for any person to advertise any food ...that is  
13 misbranded.”);
- 14 l. § 110400 (“It is unlawful for any person to receive in commerce any food...that is  
15 falsely advertised or to deliver or proffer for delivery any such food.”);
- 16 m. § 110680 (“Any food is misbranded if its labeling or packaging does not conform  
17 to the requirements of Chapter 4 (commencing with Section 110290).”);
- 18 n. § 110705 (“Any food is misbranded if any word, statement, or other information  
19 required pursuant to this part to appear on the label or labeling is not prominently  
20 placed upon the label or labeling and in terms as to render it likely to be read and  
21 understood by the ordinary individual under customary conditions of purchase and  
22 use.”);
- 23 o. § 110725(a) (“Any food fabricated from two or more ingredients is misbranded  
24 unless it bears a label clearly stating the common or usual name of each ingredient”).
- 25 p. § 110760 (“It is unlawful for any person to manufacture, sell, deliver, hold, or offer  
26 for sale any food that is misbranded.”);
- 27 q. § 110765 (“It is unlawful for any person to misbrand any food.”); and
- 28

1           r. § 110770 (“It is unlawful for any person to receive in commerce any food that is  
2           misbranded or to deliver or proffer for delivery any such food.”).

3           118. As detailed above, Defendant’s misrepresentations constitute violations of the  
4           FDCA and the Sherman Law, and, as such, violate the UCL’s “unlawful” prong.

5           119. Defendant’s unlawful practices include disseminating false and/or misleading  
6           representations about the Products.

7           120. Defendant used these deceptive misrepresentations to induce Plaintiff and members  
8           of the Putative Class to purchase products that were of lesser value and quality than advertised.

9           121. As a result of Defendant’s misleading advertising, Plaintiff suffered injury in fact  
10          and lost money or property. Plaintiff was denied the benefit of the bargain when Plaintiff decided  
11          to purchase Defendant’s Products over other comparable products that are less expensive and/or  
12          are properly labeled as containing “sugar.”

13          122. Thus, Plaintiff and members of the Putative Class relied on Defendant’s unlawful  
14          business acts and practices to their detriment in that but for Defendant’s misrepresentation that the  
15          Products contain ECJ, despite the fact that ECJ is a term which is prohibited from use on food  
16          labels, Plaintiff and members of the Putative Class would have paid less for the Products, would  
17          not have purchased the Products, and/or the Products are worth less because of the true state of the  
18          Products.

19          123. Because Defendant’s business conduct in advertising, marketing, and selling the  
20          Products using false and misleading statements, in violation of the FAL and/or other federal and  
21          state laws or regulations alleged herein, it constitutes a per se violation of the “unlawful” prong of  
22          the UCL.

23          124. As purchasers and consumers of Defendant’s Products, and as members of the  
24          general public who purchased and used the Products, Plaintiff and the Putative Class are entitled to  
25          and bring this class action seeking all available remedies under the UCL.

26          125. Pursuant to California Bus. & Prof. Code § 17203, Plaintiff, individually and on  
27          behalf of the Putative Class, seeks an order of this Court for injunctive relief and disgorging and  
28          restoring all monies that may have been acquired by Defendant as a result of such unlawful business



1 acts or practices. Plaintiff, the Putative Class, and the general public may be irreparably harmed  
2 and/or denied an effective and complete remedy in the absence of such an order.

3 126. As a result of Defendant's violations of the UCL, Plaintiff and the Putative Class  
4 are entitled to restitution for out-of-pocket expenses and economic harm.

5 127. Pursuant to Civil Code § 3287(a), Plaintiff and the Putative Class are further entitled  
6 to pre-judgment interest as a direct and proximate result of Defendant's unlawful business conduct.  
7 The amount on which interest is to be calculated is a sum certain and capable of calculation, and  
8 Plaintiff and the Putative Class are entitled to interest in an amount according to proof.

9 **COUNT V**

10 **Violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, et**

11 **seq.**

12 ***(Brought on behalf of Plaintiff and the Putative Florida Class Against Defendant)***

13 128. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the  
14 preceding paragraphs one (1) through seventy-four (74) of this Complaint as if fully set forth herein  
15 verbatim.

16 129. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade  
17 Practices Act, Sections 501.201 to 201.213, *Florida Statutes*. The express purpose of FDUTPA is  
18 to "protect the consuming public...from those who engage in unfair methods of competition, or  
19 unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."  
20 FLA. STAT. § 501.202(2).

21 130. The sale of the Products at issue in this case was a "consumer transaction" within  
22 the scope of the Florida Deceptive and Unfair Trade Practices Act, Sections 501.201 to 201.213,  
23 *Florida Statutes*.

24 131. Plaintiff is a "consumer" as defined by Section 501.203, *Florida Statutes*.  
25 Defendant's Products are a "good" within the meaning of the Act. Defendant is engaged in trade  
26 or commerce within the meaning of the Act.

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

4           133. Section 501.204(2), *Florida Statutes* states that “due consideration be given to the  
5 interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1)  
6 of the Trade Commission Act.” Defendant’s unfair and deceptive practices are likely to mislead –  
7 and have misled – the consumer acting reasonably under the circumstances and, therefore, violate  
8 Section 500.04, Florida Statutes and 21 U.S.C. Section 343.

9           134. Defendant has violated the Act by engaging in the unfair and deceptive practices  
10 described above, which offend public policies and are immoral, unethical, unscrupulous and  
11 substantially injurious to consumers. Specifically, Defendant has represented that the Products  
12 contain ECJ, despite the fact that ECJ is a term which is prohibited from use on food labels.

13           135. Plaintiff and Putative Class Members have been aggrieved by Defendant’s unfair  
14 and deceptive practices in that they purchased and consumed Defendant’s Products.

15           136. Reasonable consumers rely on Defendant to honestly represent the true nature of  
16 their ingredients.

17           137. Defendant has deceived reasonable consumers, like Plaintiff and the Putative Class,  
18 into believing the Products did not contain any sugar, rather than containing sugar’s functional  
19 equivalent: ECJ.

20           138. The knowledge required to discern the true nature of Defendant’s Products is beyond  
21 that of the reasonable consumer—namely that the ECJ is sugar’s functional equivalent. Defendant’s  
22 representations lead reasonable consumers to believe that the Products had no added sugar, when  
23 in fact, ECJ is sugar’s functional equivalent.

24           139. The damages suffered by the Plaintiff and the Putative Class were directly and  
25 proximately caused by the deceptive, misleading, and unfair practices of Defendant, as described  
26 above.

1 140. Pursuant to Section 501.211(1), *Florida Statutes*, Plaintiff and the Putative Class  
2 seek a declaratory judgment and court order enjoining the above described wrongful acts and  
3 practices of the Defendant, and for restitution and disgorgement.

4 141. Additionally, pursuant to sections 501.211(2) and 501.2105, *Florida Statutes*,  
5 Plaintiff and the Putative Class make claims for damages, attorney's fees, and costs.

6 142. WHEREFORE, Plaintiff demands judgment for damages against Defendant,  
7 including all costs associated with prosecuting this matter, prejudgment interest, and attorney's fees  
8 if so warranted, and such further relief as this Court deems just and proper.

9 **COUNT VI**

10 **Negligent Misrepresentation**

11 ***(Brought on Behalf of Plaintiff and the Putative Nationwide Class Against Defendant)***

12 143. Plaintiff re-alleges and fully incorporates by reference all allegations set forth in the  
13 preceding paragraphs one (1) through seventy-four (74) of this Complaint as if fully set forth herein  
14 verbatim.

15 144. Defendant has negligently represented a material fact to the public, including  
16 Plaintiff and the Putative Class, that the Products contain ECJ, despite the fact that ECJ is a term  
17 which is prohibited from use on food labels.

18 145. Defendant knew or should have known that these omissions would materially affect  
19 Plaintiff's and the Putative Class's decisions to purchase the Products.

20 146. Plaintiff and other reasonable consumers, including the Putative Class, reasonably  
21 relied on Defendant's representations set forth herein, and, in reliance thereon, purchased the  
22 Products.

23 147. The reliance by Plaintiff and the Putative Class was reasonable and justified in that  
24 Defendant appeared to be, and represented itself to be, a reputable business, and it distributed the  
25 Products through reputable companies.

26 148. Plaintiff would not have been willing to pay for Defendant's Products if they knew  
27 that the Products were deceptively marketed as containing ECJ when in fact ECJ is the functional  
28 equivalent of sugar.

1 149. As a direct and proximate result of these misrepresentations, Plaintiff and members  
2 of the Putative Class were induced to purchase and consume Defendant’s Products, and have  
3 suffered damages to be determined at trial in that, among other things, they have been deprived of  
4 the benefit of their bargain in that they bought Products that were not what they were represented  
5 to be, and they have spent money on Products that had less value than was reflected in the premium  
6 purchase price they paid for the Products.

7 150. Plaintiff and the Putative Class seek all applicable damages, awards, and relief  
8 allowable as a result of Defendant’s Negligent Misrepresentation.

9 **VII. PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff, individually, and on behalf of all others similarly situated, prays  
11 for relief pursuant to each cause of action set forth in this Class Action Complaint as follows:

- 12 1. For an order certifying that the action may be maintained as a class action, certifying  
13 Plaintiff as representative of the Putative Class, and designating Plaintiff’s attorneys Class counsel;
- 14 2. For an award of declaratory and equitable relief for all causes of action as follows:
  - 15 (a) Enjoining Defendant from making any ECJ ingredient listing related to the  
16 Products found to violate the FAL, FDUTPA, and UCL as set forth above;
  - 17 (b) Enjoining Defendant from continuing to engage, use, or employ any unfair  
18 and/or deceptive business acts or practices related to the design, testing,  
19 manufacture, assembly, development, marketing, and advertising of the  
20 Products for the purpose of selling the Products in such a manner as set forth  
21 in detail above or making any claims found to violate the FAL, FDUTPA,  
22 and UCL as set forth above;
  - 23 (c) Requiring Defendant to make full restitution of all monies wrongfully  
24 obtained as a result of the conduct described in this Complaint;
  - 25 (d) Restoring all monies that may have been acquired by Defendant as a result  
26 of such unfair and/or deceptive acts or practices; and
  - 27 (e) Requiring Defendant to disgorge all ill-gotten gains flowing from the  
28 conduct described herein.

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- 3. For actual damages in an amount to be determined at trial for all causes of action;
- 4. For an award of attorney’s fees the Court might deem just, appropriate, or proper;
- 5. For an award of costs;
- 6. For any other award the Court might deem just, appropriate, or proper; and
- 7. For pre- and post-judgment interest on any amounts awarded.

**VIII. DEMAND FOR JURY TRIAL**

Plaintiff respectfully demands a jury trial on all issues so triable.

**DATED: September 14, 2016**

**Respectfully Submitted,**

*/s/ Benjamin M. Lopatin*  
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*Counsel for Plaintiff Mojan Kazemi  
 and the Proposed Class*

JS-CAND 44 (Rev. 07/16)

### CIVIL COVER SHEET

The JS-CAND 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 in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p><b>I. (a) PLAINTIFFS</b></p> <p>Mojan Kazemi, individually and on behalf of all others similarly situated</p> <p><b>(b)</b> County of Residence of First Listed Plaintiff <b>Broward County, Florida</b> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p><b>(c)</b> Attorneys (Firm Name, Address, and Telephone Number)</p> <p>Benjamin M. Lopatin, Esq. (SBN 281730) blopatin@ELPlawyers.com EGGNATZ, LOPATIN &amp; PASCUCCI, LLP</p>	<p><b>DEFENDANTS</b></p> <p>DAVE'S GOURMET, INC., a Virginia corporation</p> <p>County of Residence of First Listed Defendant <b>San Francisco, CA</b> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)</p>
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<p><b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)</p> <p>1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/></p> <p>2 U.S. Government Defendant <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) <input type="checkbox"/></p>	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4	Citizen of Another State	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

<p><b>CONTRACT</b></p> <p>110 Insurance</p> <p>120 Marine</p> <p>130 Miller Act</p> <p>140 Negotiable Instrument</p> <p>150 Recovery of Overpayment Of Veteran's Benefits</p> <p>151 Medicare Act</p> <p>152 Recovery of Defaulted Student Loans (Excludes Veterans)</p> <p>153 Recovery of Overpayment of Veteran's Benefits</p> <p>160 Stockholders' Suits</p> <p>190 Other Contract</p> <p>195 Contract Product Liability</p> <p>196 Franchise</p>	<p><b>TORTS</b></p> <p><b>PERSONAL INJURY</b></p> <p>310 Airplane</p> <p>315 Airplane Product Liability</p> <p>320 Assault, Libel &amp; Slander</p> <p>330 Federal Employers' Liability</p> <p>340 Marine</p> <p>345 Marine Product Liability</p> <p>350 Motor Vehicle</p> <p>355 Motor Vehicle Product Liability</p> <p>360 Other Personal Injury</p> <p>362 Personal Injury - Medical Malpractice</p> <p><b>PERSONAL INJURY</b></p> <p>365 Personal Injury - Product Liability</p> <p>367 Health Care/Pharmaceutical Personal Injury</p> <p>368 Asbestos Personal Injury Product Liability</p> <p><b>PERSONAL PROPERTY</b></p> <p>370 Other Fraud</p> <p>371 Truth in Lending</p> <p>380 Other Personal Property Damage</p> <p>385 Property Damage Product Liability</p>	<p><b>FORFEITURE/PENALTY</b></p> <p>625 Drug Related Seizure of Property 21 USC § 881</p> <p>690 Other</p> <p><b>LABOR</b></p> <p>710 Fair Labor Standards Act</p> <p>720 Labor/Management Relations</p> <p>740 Railway Labor Act</p> <p>751 Family and Medical Leave Act</p> <p>790 Other Labor Litigation</p> <p>791 Employee Retirement Income Security Act</p> <p><b>IMMIGRATION</b></p> <p>462 Naturalization Application</p> <p>465 Other Immigration Actions</p>	<p><b>BANKRUPTCY</b></p> <p>422 Appeal 28 USC § 158</p> <p>423 Withdrawal 28 USC § 157</p> <p><b>PROPERTY RIGHTS</b></p> <p>820 Copyrights</p> <p>830 Patent</p> <p>840 Trademark</p> <p><b>SOCIAL SECURITY</b></p> <p>861 HIA (1395ff)</p> <p>862 Black Lung (923)</p> <p>863 DIWC/DIWW (405(g))</p> <p>864 SSID Title XVI</p> <p>865 RSI (405(g))</p> <p><b>FEDERAL TAX SUITS</b></p> <p>870 Taxes (U.S. Plaintiff or Defendant)</p> <p>871 IRS-Third Party 26 USC § 7609</p>	<p><b>OTHER STATUTES</b></p> <p>375 False Claims Act</p> <p>376 Qui Tam (31 USC § 3729(a))</p> <p>400 State Reapportionment</p> <p>410 Antitrust</p> <p>430 Banks and Banking</p> <p>450 Commerce</p> <p>460 Deportation</p> <p>470 Racketeer Influenced and Corrupt Organizations</p> <p>480 Consumer Credit</p> <p>490 Cable/Sat TV</p> <p>850 Securities/Commodities/Exchange</p> <p>890 Other Statutory Actions</p> <p>891 Agricultural Acts</p> <p>893 Environmental Matters</p> <p>895 Freedom of Information Act</p> <p>896 Arbitration</p> <p>899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p>950 Constitutionality of State Statutes</p>
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**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 (specify)  6 Multidistrict Litigation-Transfer  8 Multidistrict Litigation-Direct File

**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. § 1332(d)(2)(A) and 28 U.S.C. § 2201**

Brief description of cause:  
**Consumer protection class action for economic damages and equitable relief**

**VII. REQUESTED IN COMPLAINT:**  CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ **5000001.00** CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S), IF ANY** (See instructions): JUDGE DOCKET NUMBER

**IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)** (Place an "X" in One Box Only)  SAN FRANCISCO/OAKLAND  SAN JOSE  EUREKA-MCKINLEYVILLE

DATE: 09/14/2016 SIGNATURE OF ATTORNEY OF RECORD: /s/ Benjamin M. Lopatin