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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SHANA BECERRA, on behalf of herself,
all others similarly situated, and the general
public,

Plaintiff,

v.

DR PEPPER/SEVEN UP, INC.

Defendant.

Case No.: 17-cv-5921-WHO

CLASS ACTION

**THIRD AMENDED COMPLAINT FOR
VIOLATIONS OF CALIFORNIA'S
FALSE ADVERTISING LAW,
CONSUMERS LEGAL REMEDIES ACT,
& UNFAIR COMPETITION LAW; AND
BREACH OF EXPRESS & IMPLIED
WARRANTIES**

DEMAND FOR JURY TRIAL

1 Pursuant to the Court’s order granting leave to amend (Dkt. No. 54 at 12), plaintiff
2 Shana Becerra, on behalf of herself, all others similarly situated, and the general public, by
3 and through her undersigned counsel, hereby brings this Third Amended Complaint against
4 Dr Pepper/Seven Up, Inc. (“DPSU”), and alleges the following upon her own knowledge, or
5 where she lacks personal knowledge, upon information and belief including the investigation
6 of her counsel.

7 **INTRODUCTION**

8 1. DPSU’s popular beverage, Diet Dr. Pepper, is sweetened with aspartame, a non-
9 caloric sweetener, rather than sugar. Because of the product’s use of the term “diet,” its lack
10 of calories, and the manner in which DPSU markets it, consumers reasonably believe that
11 drinking Diet Dr. Pepper will assist in weight loss or healthy weight management.

12 2. Scientific evidence demonstrates this is wrong because nonnutritive sweeteners
13 like aspartame interfere with the body’s ability to properly metabolize calories, leading to
14 weight gain and increased risk of metabolic disease, diabetes, and cardiovascular disease.

15 3. Accordingly, DPSU’s marketing Diet Dr. Pepper as “diet” is false, misleading,
16 and unlawful.

17 4. Plaintiff brings this action on behalf of herself, other Diet Dr. Pepper consumers,
18 and the general public, to enjoin DPSU from continuing to misleadingly advertise Diet Dr.
19 Pepper, and to recover restitution and damages for the class.

20 **INTRADISTRICT ASSIGNMENT**

21 5. Pursuant to N.D. Cal. Civ. L.R. 3-2(c), (d) & 3-5(b), this action is properly
22 assigned to the San Francisco Division because the action arises in Sonoma County in that a
23 substantial part of the events or omissions which give rise to plaintiff’s claims occurred in
24 Sonoma County.

25 **THE PARTIES**

26 6. Plaintiff Shana Becerra is a resident of Santa Rosa, California.

27 7. Dr Pepper/Seven Up, Inc. is a Delaware corporation with its principal place of
28 business at 5301 Legacy Drive, Plano, Texas 75024.

1 **JURISDICTION AND VENUE**

2 8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §
3 1332(d)(2)(A), the Class Action Fairness Act, because the matter in controversy exceeds the
4 sum or value of \$5,000,000 exclusive of interest and costs, and at least one member of the
5 class of plaintiffs is a citizen of a State different from DPSU. In addition, more than two-
6 thirds of the members of the class reside in states other than the state in which Defendant is
7 a citizen and in which this case is filed, and therefore any exceptions to jurisdiction under 28
8 U.S.C. § 1332(d) do not apply.

9 9. The Court has personal jurisdiction over DPSU pursuant to Cal. Code Civ. P. §
10 410.10, as a result of DPSU’s substantial, continuous and systematic contacts with the State,
11 and because DPSU has purposely availed itself of the benefits and privileges of conducting
12 business activities within the State.

13 10. Venue is proper in this Northern District of California pursuant to 28 U.S.C. §
14 1391(b) and (c), because DPSU resides (*i.e.*, is subject to personal jurisdiction) in this district,
15 and a substantial part of the events or omissions giving rise to the claims occurred in this
16 district.

17 **FACTS**

18 **A. Diet Dr. Pepper is Marketed to Assist in Weight Loss and Healthy Weight**
19 **Management Due to Its Non-Caloric Artificial Sweetener, Aspartame**

20 11. A diet version of Dr. Pepper was first introduced to the market in 1962.

21 12. DPSU uses the term “diet” in Diet Dr. Pepper, on both its label and in
22 advertising.

23 13. Dictionary definitions of the term “diet” commonly refer to weight loss, or to
24 other health benefits resulting from a special or limited selection of food or drink, including,
25 for example, the following definitions”:

26 a. “eat sparingly, for health reasons or to lose weight.”¹

27
28 ¹ <https://www.vocabulary.com/dictionary/diet>

1 b. “to limit the food that you take, esp. in order to lose weight.”².

2 c. “A special course of food to which a person restricts themselves,
3 either to lose weight or for medical reasons.”³

4 d. “If you are on a diet, you eat special kinds of food or you eat less
5 food than usual because you are trying to lose weight.”⁴

6 e. “A regulated selection of foods, as for medical reasons or cosmetic
7 weight loss.”⁵

8 f. “A regimen of eating and drinking sparingly so as to reduce one’s
9 weight.”⁶

10 g. “A particular selection of food, especially as designed or prescribed
11 to improve a person’s physical condition or to prevent or treat a disease.”⁷

12 h. “A limited amount of food that someone eats because they are
13 trying to become thinner.”⁸

14 14. DPSU uses the term “diet” to market Diet Dr. Pepper because the product is
15 sweetened with a non-caloric artificial sweetener, aspartame, rather than sugar. DPSU’s
16 implicit promise is that, because Diet Dr. Pepper does not contain sugar or calories, it will
17 assist in weight loss, or at least healthy weight management, *i.e.*, will not cause weight gain
18 (in the same way that drinking water could not possibly result in weight gain), and that it is
19 useful for those who must limit their sugar intakes.

20
21
22 ² <https://dictionary.cambridge.org/us/dictionary/english/diet>

23 ³ <https://en.oxforddictionaries.com/definition/diet>

24 ⁴ <https://www.collinsdictionary.com/dictionary/english/diet>

25 ⁵ <https://www.ahdictionary.com/word/search.html?q=diet>

26 ⁶ [https://www.merriamwebster.com/dictionary/diet?utm_campaign=sd&utm_medium=serp
&utm_source=jsonld](https://www.merriamwebster.com/dictionary/diet?utm_campaign=sd&utm_medium=serp&utm_source=jsonld)

27 ⁷ <http://www.dictionary.com/browse/diet?s=t>

28 ⁸ https://www.macmillandictionary.com/dictionary/american/diet_1

1 15. Dr Pepper reinforces this message through the use of advertisements that
2 emphasize the beneficial effects of Diet Dr Pepper on body weight and composition.

3 16. For example, DPSU's early marketing of Diet Dr Pepper, and its predecessor,
4 Sugar Free Dr Pepper, is demonstrative of how DPSU has historically positioned this product
5 as one that will assist in weight loss, healthy weight management and not cause weight gain.

6 17. For example, a 1978 commercial for Sugar Free Dr Pepper, the early name for
7 Diet Dr Pepper, depicts a group of thin females working out in a dance class, where the
8 dancers sing "we really work up a thirst around here, but we like to keep our shape," and
9 concluding with the jingle tagline "Sugar Free Dr Pepper, tastes fattening but its not."

10 https://www.youtube.com/watch?v=EgMEU-Vj_QQ.

11 18. Another 1970s commercial for Diet Dr Pepper also included the jingle "Sugar
12 Free Dr Pepper, tastes fattening but its not." *See*

13 <https://www.youtube.com/watch?v=Q12qCNf-BQQ>

14 19. DPSU continued to use the "tastes fattening but its not" tagline to market Sugar
15 Free Dr Pepper into the 1980s, including through a television commercial showing a group
16 of thin females out shopping, singing "when you're into the latest fashions, you know a
17 fattening drink's a waste, but diet soft drinks drinks have no style 'cause they've got that diet
18 taste, but not Sugar Free Dr Pepper! Sugar Free Dr Pepper, tastes fattening but it's not. How
19 can sugar free taste so sugarful? What a great taste this one's got. Sugar Free Dr Pepper, tastes
20 fattening but it's not." <https://www.youtube.com/watch?v=NAYEhw3D8F4>.

21 20. A 1985 Sugar Free Dr Pepper advertisement depicts a woman falling into a
22 tomb, finding a bottle, and rubbing it to reveal a genie. The genie asks for the wish of the
23 woman and she says, "well, I am thirsty, but on a diet." At which point the genie produces a
24 water fountain and champagne, each of which the woman rejects, until the genie ultimately
25 presents a bottle of Sugar Free Dr Pepper. This ad clearly implies that Diet Dr Pepper is good
26 for a person who is on a diet. *See* <https://www.youtube.com/watch?v=BvDepHIQ3tg>.

27 21. In the 1980s, DPSU also ran a series of television commercials for Sugar Free
28 Dr Pepper with the jingle "Here's the taste we've been missing, it's really mmmm mmmm,

1 and the look is extremely [catcall whistle]. It really tastes mmmm mmmm and it looks [catcall
 2 whistle].” During the commercial people are visibly checking out other people as they walk
 3 by on the beach in swimsuits, with one male model even lifting his sunglasses to get a closer
 4 look at the female models walking by. See <https://www.youtube.com/watch?v=I17QbQ0N-1A&feature=youtu.be>;
 5 see also [https://www.youtube.com/watch?v=XOxkczmIsGQ&
 6 feature=youtu.be](https://www.youtube.com/watch?v=XOxkczmIsGQ&feature=youtu.be) (another television commercial featuring the tagline “It really tastes mmmm
 7 mmmm and it looks [catcall whistle]” while people watch thin and fit models pass by)

8 22. This theme was also conveyed through print advertisements, such as the one
 9 below, depicting a thin woman in her bikini and stating that “Just keep sipping, watch what
 10 you eat, and pretty soon you’ll start looking better and better too. Sugar Free Dr Pepper. You
 11 can drink a lot of it.” This conveys the message to consumers that they can drink as much
 12 Sugar Free Dr Pepper as they wish, without any negative impact on their weight.



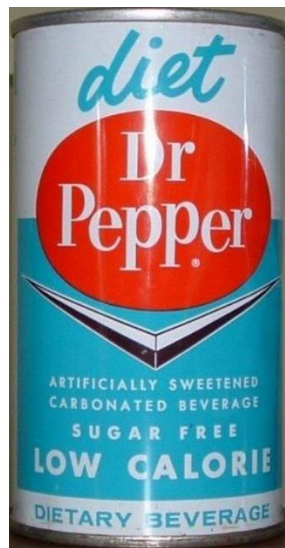
1 23. Similarly, another Sugar Free Dr Pepper advertisement depicted a scale, with
2 the phrase “drink a lot & watch your weight” written on it.



8 24. In 1986, DPSU changed the name of Sugar Free Dr Pepper to the current Diet
9 Dr Pepper “after research showed that increasingly health conscious Americans preferred
10 drinks labeled *diet*.”⁹ In other words, the term “diet” better aligns with the message DPSU
11 was conveying about its product—“tastes fattening but its not.”

12 25. After the name change, DPSU’s advertising continued to falsely and
13 misleadingly convey Diet Dr Pepper as aiding in healthy weight management and not causing
14 weight gain.

15 26. For example, the original cans of Diet Dr Pepper were labeled as a “dietary
16 beverage.”



28 ⁹ <https://drpeppermuseum.com/the-slimming-effects/>

1 27. A 1987 Diet Dr Pepper television advertisement depicts a thin, beautiful woman
2 on a beach chair and the narrated voice says, with the words floating from the bottom of the
3 screen to the top, “dazzling damsel in distress seeks knight in shining armor to rescue me
4 from the dull and boring. Must be brave and bold. A natural born hero *with my body’s best*
5 *interests at heart.*” Music begins to play with the lyrics, “the bold new taste of Diet Dr Pepper,
6 throw your diet a curve.” This affirmatively represents that Diet Dr Pepper has the woman’s
7 body’s best interest at heart and will not cause negative health effects such as weight gain,
8 reinforced by the statement that drinking Diet Dr Pepper will throw your diet a curve,
9 implying that the product is useful to those on a diet. See
10 <https://www.youtube.com/watch?v=Z84V2tzppXA&feature=youtu.be>.

11 28. A 1988 Diet Dr Pepper television advertisement depicts a physically fit male
12 dancer dancing, and the narrator says, with the words floating from the bottom of the screen
13 to the top, “In shape, in step ex-street dancer seeks an upbeat upstart to side-step the usual.
14 I’ve been a piper. Wouldn’t you like to be a piper too?” The music then begins to play
15 with the lyrics, “the upbeat instep taste of Diet Dr Pepper, throw your diet a curve” with the
16 words “throw your diet a curve” displayed on the screen. This again clearly affirmatively
17 implies that drinking Diet Dr Pepper will keep a consumer in shape, and will throw their diet
18 a curve, thus not leading to weight gain.
19 <https://www.youtube.com/watch?v=yo5nTFsUs80&feature=youtu.be>.

20 29. This 1997 Diet Dr Pepper ad depicts a series of beautiful fit women in bikinis
21 drinking Diet Dr Pepper, implying that drinking Diet Dr Pepper will lead to the fit bodies of
22 the models in the ads. <https://www.youtube.com/watch?v=Ap41YNDLX7s>.

23 30. In a 2001 Diet Dr Pepper television commercial, models run through the snow
24 in bathing suits, mimicking the popular show “Baywatch,” highlighting their extremely fit
25 bodies, and demonstrating that drinking Diet Dr Pepper will lead to a fit body like the models
26 and Baywatch characters. <https://www.youtube.com/watch?v=PrgssrfRu4I>.

27 31. DPSU also ran a series of advertisement depicting fattening foods such as cake,
28 cookies, ice cream, and donuts, with the tag line “nothing diet about it,” sending the message

1 to consumers that Diet Dr Pepper is the guilt-free and non-fattening alternative to those other
2 fattening foods. Examples of these advertisements are depicted below:



23 32. Another recent Diet Dr Pepper advertisement depicts a lean male model,
24 reinforcing the notion that drinking Diet Dr. Pepper will lead to a physique much like the
25 model.



33. DPSU also reinforced its messaging that Diet Dr Pepper assists in weight loss, healthy weight management, and does not cause weight gain, in other, less direct ways.

34. For example, DPSU is a member of the American Beverage Association, a trade association that represents America’s non-alcoholic beverage industry. In fact, a search of “Dr Pepper” in the member directory of the American Beverage Association yields 149 results.

35. The American Beverage Association, on behalf of its members, including DPSU, funded a study of the effects of diet soft drinks. According to the American Beverage Association, which published an article about the study in the “Research & Education” section of its website, this industry funded study purports to show that “diet beverages can help with weight loss. In fact, those in the study who drank diet beverages over the course of 12 weeks lost an average of 4 pounds more than those who didn’t drink diet beverages.”¹⁰

¹⁰ <https://www.ameribev.org/education-resources/blog/post/good-news-about-diet-beverages/> (dated May 27, 2014).

1 36. An article published 3 days later, on May 30, 2014, also in the “Research &
2 Education” section of the American Beverage Association website, asks its readers if they
3 are “[l]ooking for ways to shed a few pounds before swimsuit season kicks into high gear?
4 Did you know that soft drinks can be an effective tool for weight loss? It’s true . . . low-
5 calorie sweeteners can help reduce calories and sugar intake and aid in maintaining a healthy
6 weight – or even dropping some weight. . . . Many people trying to lose weight often choose
7 diet beverages that contain low-calorie sweeteners as a way to reduce their caloric intake. So,
8 if it fits your lifestyle – try one of the many low- and no-calorie beverages that our member
9 companies produce!”¹¹

10 37. The “many low- and no-calorie beverages” portion of the article is hyperlinked
11 to a webpage stating “America’s beverage companies—Coca-Cola, Dr Pepper, and Pepsi—
12 have come together to support your family’s efforts to balance what you eat, drink, and do.
13 We know that an important part of finding that balance is reducing the sugar from beverages
14 in your family’s diet.”¹² This page includes a link titled “Beverage Choices.” Clicking on
15 “Beverage Choices” brings you to a page that allows you to “[e]xplore beverages choices
16 from Dr Pepper,” including Diet Dr Pepper.

17 38. DPSU is thus funding, through the American Beverage Association, marketing
18 of diet soft drinks as not only assisting in healthy weight management, but in affirmatively
19 aiding in weight loss. This is a message that has been consistently conveyed since DPSU
20 began marketing Sugar Free Dr Pepper, and continued with its marketing of Diet Dr Pepper.

21 39. DPSU, through the American Beverage Association, maintains this position
22 despite that in 1983, its predecessor, the National Soft Drink Association, sponsored an
23 objection to the use of aspartame in soft drinks, an objection that the Association ultimately
24 did not formally lodge with the Food and Drug Administration. Among the Association’s
25

26 ¹¹ <https://www.ameribev.org/education-resources/blog/post/how-about-a-diet-soda/> (dated
27 May 30, 2014)

28 ¹² <http://www.balanceus.org/en/>

1 objections to aspartame was this: “Aspartame has been demonstrated to inhibit the
2 carbohydrate-induced-synthesis of the neurotransmitter serotonin (Wurtman affidavit).
3 Serotonin blunts the sensation of craving carbohydrates and thus is part of the body's feedback
4 system that helps limit consumption of carbohydrate to appropriate levels. *Its inhibition by*
5 *aspartame could lead to the anomalous result of a diet product causing increased*
6 *consumption of carbohydrates.*”¹³ Thus, the objection was based, in part, on the notion that
7 because aspartame caused the increased consumption of carbohydrates, it would not be
8 appropriate for use in diet soft drinks.

9 40. Physicians and other researchers agree that consumers purchase “diet” soft
10 drinks to assist in healthy management and to aid in their efforts to lose weight. *See, e.g.,*
11 Madjd, et al., “Effects On Weight Loss In Adults Of Replacing Diet Beverages With Water
12 During A Hypoenergetic Diet: A Randomized, 24-Wk Clinical Trial,” *Am. J. Clin. Nutr.* Vol.
13 102, No. 6, pp. 1305-1312 (Nov. 2015) (“The general population believes that diet beverages
14 (DBs) can help them to lose weight, and many obese people drink DBs, believing that this
15 simple strategy would be helpful in reducing weight”); Pearlman, et al, “The Association
16 Between Artificial Sweeteners and Obesity,” *Curr. Gastroenterol Rep.*, doi: 10.1007/s11894-
17 017-0602-9 (Nov. 2017) (“Artificial sweeteners are marketed as a healthy alternative to sugar
18 and as a tool for weight loss”); Yang, Q., “Gain Weight by ‘Going Diet?’ Artificial
19 Sweeteners and the Neurobiology of Sugar Cravings.” *Yale J. of Bio. & Med.*, Vol. 83, No.
20 2, pp. 101-108 (June 2010) (“Intuitively, people choose non-caloric artificial sweeteners over
21 sugar to lose or maintain weight”).

22 41. The term “diet” also signifies something more (or less) than that the product
23 contains no sugar. American soft drink manufacturers have, at one time or another, marketed
24

25 ¹³ “Objections of the National Soft Drink Association to a Final Rule Permitting the use of
26 Aspartame in Carbonated Beverages and Carbonated Beverage Syrup Bases and a Request
27 for a Hearing on the Objections” (July 28, 1983) (emphasis added). The 1983 NSDA draft
28 appears at Congressional Record – Senate – May 7, 1985, beginning at p. 10818, with the
critical language quoted above at p. 10822.

1 a “No Sugar” drink. DPSU’s predecessor, for example, sold Sugar Free Dr Pepper in the
 2 1970s; *see* <https://www.youtube.com/watch?v=Vl8PnuLIJSM>. Other manufacturers
 3 simultaneously sell “Diet” alongside “No Sugar,” “Sugar Free” or “Zero Calorie” products,
 4 and consumers consequently are put on notice that there is a distinction between “diet” and
 5 “no sugar.”

6 42. An April 2018 survey of 400 California diet soft drink consumers, and 400
 7 nationwide soft drink consumers confirms that the vast majority of consumers expect a diet
 8 soft drink to either help them lose weight, or help maintain or not affect their weight (75.8%
 9 of California diet soft drink consumers and 77.0% of Nationwide diet soft drink consumers).
 10 Similarly, 77.1% of the 157 California consumers that had purchased Diet Dr Pepper, and
 11 78.8% of nationwide consumers that had purchased Diet Dr Pepper, expected it to help them
 12 lose weight, or help them maintain/not affect their weight. The complete survey results are
 13 shown in the table below.

	California consumers (400 respondents)	Nationwide consumers (400 respondents)	California Diet Dr Pepper consumers (157 respondents)	Nationwide Diet Dr Pepper consumers (175 respondents)
Expect soft drinks labeled “diet” to help you lose weight	12.5%	15.0%	8.3%	11.4%
Expect soft drinks labeled “diet” to help you maintain/not affect your weight	63.3%	62.0%	68.8%	67.4%
Expect soft drinks labeled “diet” will make you gain weight	3.3%	2.0%	2.5%	0.6%
Don’t have an expectation	21.0%	21.0%	20.4%	20.6%

1 43. Due to the prominent use of the term “diet” in the product’s name, Diet Dr.
2 Pepper, consumers reasonably believe that the product will assist in weight loss, or at least
3 healthy weight management, for example, by not causing weight gain, and that consuming
4 Diet Dr Pepper will not increase their vulnerability to diabetes.

5 **B. Aspartame - The Undisclosed Dangers**

6 44. Artificial, nonnutritive sweeteners were first introduced in the early 20th
7 century, and thus humans have been consuming them for only about a century. They are
8 typically 300 - 13,000 times sweeter than sugar.

9 45. Although aspartame does not contain calories, a recent and growing body of
10 scientific research demonstrates that it, like other nonnutritive sweeteners, causes weight
11 gain, is more harmful to a diet than consumption of water, and contributes to the development
12 of diabetes.

13 46. Studies of animals have already established that aspartame causes “marked
14 glucose intolerance,” by changing intestinal microbiota. Suez J, et al., “Artificial Sweeteners
15 Induce Glucose Intolerance by Altering the Gut Microbiota.” *Nature*, pp.181-86 (Oct. 2014).
16 This was true of aspartame, saccharin and sucralose, the three artificial sweeteners tested in
17 that study. Another animal study confirmed that aspartame consumption “resulted in
18 hyperglycemia and an impaired ability to respond to insulin.” Palmnas, et al., “Low-Dose
19 Aspartame Consumption Differentially Affects Gut Microbiota-Host Metabolic Interactions
20 in the Diet- Induced Obese Rat,” *PLOS ONE*, Vol. 9 Issue 10 (Oct. 2014). Hyperglycemia is
21 a hallmark sign of both Type 1 and Type 2 diabetes.

22 47. The effects are long-term, transferrable from mother to child. “[A]nimals whose
23 mothers consumed aspartame during pregnancy consumed more energy than those born to
24 mothers fed a standard diet, both during short-term and in a long-term exposure to palatable
25 food.” Those offspring consumed more sweet foods during their own adulthoods, and
26 showed “a greater susceptibility to alterations in metabolic parameters, such as increased
27 glucose, LDL and triglycerides.” Von Poser Toigo, “Metabolic and Feeding Behavior
28 Alterations Provoked by Prenatal Exposure to Aspartame,” *Appetite*, Vol. 87, pp. 168-74

1 (2015). *See also* Azad, et al, “Association Between Artificially Sweetened Beverage
2 Consumption During Pregnancy and Infant Body Mass Index,” *JAMA Pediatr.*, Vol. 170,
3 No. 7, pp. 662-70, doi:10.1001/jamapediatrics.2016.0301 (July 2016) (“Interestingly, rodent
4 studies have shown that maternal NNS [Non-nutritive sweeteners, such as aspartame]
5 consumption in pregnancy also predisposes offspring to obesity, with NNS exposed offspring
6 exhibiting stronger preferences for sweet foods, increased postnatal weight gain, altered lipid
7 profiles, and increased insulin resistance in adulthood.”).

8 48. The study by Azad, et al., referred to in the preceding paragraph, established that
9 the same holds true for humans. “To our knowledge, our results provide the first human
10 evidence to support these findings, suggesting that prenatal NNS exposure may contribute to
11 infant weight gain and early childhood obesity.” *Id.*

12 49. In addition to its contribution to the development of diabetes, aspartame does
13 not assist with weight loss, or even with weight maintenance. Indeed, as the National Soft
14 Drink Association put it in 1983, consumption of aspartame leads to “the anomalous result”
15 of a diet product increasing its consumer’s weight.

16 50. Once again, animals have led the way.¹⁴ “There now exists a body of evidence,
17 from a number of investigators, that animals chronically exposed to any of a range of LCSs
18 [low-calorie sweeteners] – including saccharin, sucralose, acesulfame potassium, aspartame,
19 or the combination of erythritol + aspartame – have exhibited one or more of the following
20 conditions: increased food consumption, lower post-prandial thermogenesis, increased
21 weight gain, greater percent body fat, decreased GLP-1 release during glucose tolerance
22 testing, and significantly greater fasting glucose, glucose area under the curve during glucose
23 tolerance testing, and hyperinsulinemia, compared with animals exposed to plain water or –
24 in many cases – even to calorically-sweetened foods or liquids.” Fowler, “Low-Calorie
25

26 ¹⁴ “Human research must rely on subjective ratings and voluntary diet control. Rodent models
27 helped elucidate how artificial sweeteners contribute to energy balance.” Yang, “Gain
28 Weight by ‘Going Diet?’ Artificial Sweeteners and the Neurobiology of Sugar Cravings,”
Yale J. Bio. & Med. Vol. 83, No. 2, pp. 101-108 (June 2010).

1 Sweetener Use And Energy Balance: Results From Experimental Studies In Animals, And
2 Large-Scale Prospective Studies In Humans,” *Physiol Behav.* 2016 Oct. 1 Vol. 164, Pt. B,
3 pp. 517-523, doi: 10.1016/j.physbeh.2016.04.047 (April 2016).

4 51. Aspartame produces the same conditions in humans: “These studies have
5 offered both support for, and biologically plausible mechanisms to explain, the results from
6 a series of large-scale, long-term prospective observational studies conducted in humans, in
7 which longitudinal increases in weight, abdominal adiposity, and incidence of overweight
8 and obesity have been observed among study participants who reported using diet sodas and
9 other LCS-sweetened beverages daily or more often at baseline. Furthermore, frequent use
10 of diet beverages has been associated prospectively with increased long term risk and/or
11 hazard of a number of cardiometabolic conditions usually considered to be among the
12 sequelae of obesity: hypertension, metabolic syndrome, diabetes, depression, kidney
13 dysfunction, heart attack, stroke, and even cardiovascular and total mortality. Reverse
14 causality does not appear to explain fully the increased risk observed across all of these
15 studies, the majority of which have included key potential confounders as covariates.” *Id.*

16 52. “Using different models and approaches to account for initial “indication” and
17 changing usage patterns, we consistently found low-calorie sweetener use associated with
18 weight gain and expanding waistline.” Chia, et al., “Chronic Low-Calorie Sweetener Use
19 and Risk of Abdominal Obesity among Older Adults: A Cohort Study,” *PLoS ONE*,
20 doi:10.1371/journal.pone.0167241(Nov. 2016). The study was long-term and adjusted for
21 virtually all contrary factors. “The strengths of our study include the follow-up period of up
22 to 28 years and the use of 7-day food diaries at multiple follow-up visits. The food diary
23 provides details of low-calorie sweetener use in all food products including coffee, tea, and
24 dessert, which allow for a more comprehensive assessment of low-calorie sweetener
25 consumption beyond diet soda. Previous studies assessed diet soda consumption using food
26 frequency questionnaires with participant assessment done at study centers [19±24] or using
27 mailed questionnaires. In addition, we took into consideration diet quality using the DASH
28 score. Lastly, since we accounted for body composition at the time of assessment of low-

1 calorie sweetener use, the possibility that risk of weight gain largely explains the observed
2 associations between low-calorie sweetener use and forms of obesity is minimized.” *Id.*

3 53. Viewed differently, studies have not shown that consumption of aspartame
4 offers any of the benefits which would be expected from a “diet” drink. “The addition of
5 NNS [non-nutritive sweeteners] to diets poses no benefit for weight loss or reduced weight
6 gain without energy restriction. There are long-standing and recent concerns that inclusion
7 of NNS in the diet promotes energy intake and contributes to obesity.” Mattes and Popkin,
8 “Nonnutritive Sweetener Consumption In Humans: Effects On Appetite And Food Intake
9 And Their Putative Mechanisms,” *Am. J. Clin. Nutr.*, Vol. 89, pp. 1–14 (2009). “The absence
10 of evidence to support the role of ASBs [artificially sweetened beverages] in preventing
11 weight gain and the lack of studies on other long-term effects on health strengthen the position
12 that ASBs should not be promoted as part of a healthy diet.” Borges, et al., “Artificially
13 Sweetened Beverages and the Response to the Global Obesity Crisis,” *PLoS Med.*,
14 doi:10.1371/journal.pmed.1002195 (Jan. 2017).

15 54. Multiple studies have consistently supported these conclusions. For example,

16 a. A 2009 review article found that the “addition of [nonnutritive
17 sweeteners] to diet poses no benefit for weight loss or reduced weight gain
18 without energy restriction,” and noted “long-standing and recent concerns that
19 inclusion of [nonnutritive sweeteners] in the diet promotes energy intake and
20 contributes to obesity.”¹⁵

21 b. Another review article, in 2010, found that “[d]ata from large,
22 epidemiologic studies support the existence of an association between
23 artificially-sweetened beverage consumption and weight gain in children.”¹⁶

25 ¹⁵ Mattes RD, et al., “Nonnutritive Sweetener Consumption in Humans: Effects on Appetite
26 and Food Intake and Their Putative Mechanisms.” *Am. J. Clin. Nutr.*, Vol. 89, No. 1, pp. 1-
27 14 (Jan. 2009).

28 ¹⁶ Brown RJ, et al., “Artificial Sweeteners: a Systematic Review of Metabolic Effects in
Youth.” *Int’l J. of Ped. Obesity*, Vol. 5, No. 4, pp. 305-12 (Aug. 2010).

1 c. Another review article from 2010 said “research studies suggest
2 that artificial sweeteners may contribute to weight gain.”¹⁷

3 d. A 2013 review article by a federally-funded Purdue University
4 researcher, Susan E. Swithers, assessed differences between diet soda consumers
5 and non-consumers among over 450,000 participants across 14 independent
6 prospective cohort studies, with an average 16-year follow-up. Swithers found
7 that “accumulating evidence suggests that frequent consumers of these sugar
8 substitutes may also be at increased risk of excessive weight gain, metabolic
9 syndrome, type 2 diabetes, and cardiovascular disease,” and that “frequent
10 consumption of high-intensity sweeteners may have the counterintuitive effect
11 of inducing metabolic derangements.” She further stated that “[r]ecent data from
12 humans and rodent models have provided little support for [artificially
13 sweetened beverages] in promoting weight loss or preventing negative health
14 outcomes such as [type 2 diabetes], metabolic syndrome, and cardiovascular
15 events. Instead, a number of studies suggest people who regularly consume
16 [artificially sweetened beverages] are at increased risk compared to those that
17 do not consume [artificially sweetened beverages],” and “with the magnitude of
18 the increased risks similar to those associated with [sugar-sweetened
19 beverages].”¹⁸

20 e. A 2014 study found that “consumption of commonly used [non-
21 caloric artificial sweetener] formulations drives the development of glucose
22 intolerance through induction of compositional and functional alterations to the
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25 ¹⁷ Yang, Q., “Gain Weight by ‘Going Diet?’ Artificial Sweeteners and the Neurobiology of
26 Sugar Cravings.” *Yale J. of Bio. & Med.*, Vol. 83, No. 2, pp. 101-108 (June 2010) [hereinafter
“Yang”].

27 ¹⁸ Swithers, SE, “Artificial Sweeteners Produce the Counterintuitive Effect of Inducing
28 Metabolic Derangements.” *Trends in Endocrinology & Metab.*, Vol. 24, No. 9, pp. 431-41
(Sept. 2013).

1 intestinal microbiota,” and because of this “link [between] [non-caloric artificial
2 sweetener] consumption, symbiosis and metabolic abnormalities,” found that
3 artificial sweeteners “may have directly contributed to enhancing the exact
4 epidemic that they themselves were intended to fight.”¹⁹

5 f. In 2015, researchers reported “a striking dose-response
6 relationship,” wherein “increasing [diet soda intake] was associated with
7 escalating abdominal obesity, a pathway for cardiometabolic risk,” and noted
8 that “[h]igh incidences of overweight and obesity, hypertension, metabolic
9 syndrome, diabetes mellitus, kidney dysfunction, heart attack, and hemorrhagic
10 stroke have all recently been associated with frequent [nonnutritive sweetener
11 intake] and [diet soda intake].”²⁰

12 g. Epidemiological studies also implicate artificial sweeteners in
13 causing weight gain. For example, the San Antonio Heart Study “observed a
14 classic, positive dose-response relationship between [artificially sweetened]
15 beverage consumption and long-term weight gain,” and found that consuming
16 more than 21 artificially sweetened beverages per week, compared to those who
17 consumed none, “was associated with almost-doubled risk” of overweight or
18 obesity.²¹

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¹⁹ Suez J, et al., “Artificial Sweeteners Induce Glucose Intolerance by Altering the Gut
24 Microbiota.” *Nature*, pp.181-86 (Oct. 2014).

25 ²⁰ Fowler, S, et al., “Diet Soda Intake is Associated with Long-Term Increases in Waist
26 Circumference in a Biethnic Cohort of Older Adults: The San Antonio Longitudinal Study of
Aging.” *J. of the Am. Geriatrics Society* (March 17, 2015).

27 ²¹ Fowler, S, et al., “Fueling the Obesity Epidemic? Artificially Sweetened Beverage Use and
28 Long-Term Weight Gain.” *Obesity*, Vol. 16, No. 8, pp. 1894-900 (Aug. 2008).

1 h. A study of beverage consumption among children and adolescents
2 aged 6-19 found that “BMI is positively associated with consumption of diet
3 carbonated beverages.”²²

4 i. A two-year study of 164 children found that “[i]ncreases in diet
5 soda consumption were significantly greater for overweight and subjects who
6 gained weight as compared to normal weight subjects.”²³

7 j. A July 2017 study found that artificial sweeteners did not lead to
8 any significant weight loss in more than 1,000 participants in seven clinical
9 trials. At the same time, combined data from 30 observational studies involving
10 more than 400,000 participants showed that artificial sweeteners are associated
11 with obesity, high blood pressure, type 2 diabetes and heart health problems.²⁴

12 k. A study published in August 2017 suggested artificial sweetener
13 use increases the risk of type 2 diabetes by 21%, which is about half the
14 increased risk seen with sugar-sweetened beverage use, at 43%.²⁵ Another study
15 indicates daily diet soda consumption is associated with a 36% increase in risk
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18 ²² Forshee RA, et al., “Total Beverage Consumption and Beverage Choices Among Children
19 and Adolescents.” *Int’l J. of Food Sci. & Nutr.*, Vol. 54, No. 4, pp. 297-307 (July 2003); *see*
20 *also* Berkey CS, et al., “Sugar-Added Beverage and Adolescent Weight Change.” *Obesity*
21 *Research*, Vol. 12, No. 5, pp. 778-88 (May 2004) (in study of more than 10,000 U.S. children
aged 9-14, finding, for boys, intakes of diet soda “were significantly associated with weight
gains”).

22 ²³ Blum, JW, et al., “Beverage Consumption Patterns in Elementary School Aged Children
23 Across a Two-Year Period.” *J. of Am. Coll. of Nutr.*, Vol. 24, No. 2, pp. 93-98 (Apr. 2005).

24 ²⁴ Azad, MB, et al., “Nonnutrative sweeteners and cardiometabolic health: a systematic review
25 and meta-analysis of randomized controlled trials and prospective cohort studies.” *Canadian*
Medical Association Journal, Vol. 189, No. 28, pp. E929-E939 (July 17, 2017).

26 ²⁵ Huang, M, et al., “Artificially sweetened beverages, sugar-sweetened beverages, plain
27 water, and incident diabetes mellitus in postmenopausal women: the prospective Women’s
28 Health Initiative observational study.” *Am. J. Clin. Nutr.*, Vol. 106, No. 2, pp. 614-22 (Aug.
2017).

1 of metabolic syndrome, and a 67% increase in risk of type 2 diabetes compared
2 with non-drinkers.²⁶

3 1. As recently as April 23, 2018 – a week before filing this amended
4 complaint – a new study confirmed that aspartame disrupts the biochemical
5 pathways related to fat and energy metabolism.²⁷

6 **DPSU’S UNLAWFUL ACTS**

7 **A. DPSU Misleadingly Marketed Diet Dr. Pepper as Promoting Weight Loss or** 8 **Healthy Weight Management**

9 55. Because the aspartame in Diet Dr. Pepper is likely to cause weight gain, and
10 does not help in weight loss or healthy weight management, and aspartame increases the risk
11 of diabetes, DPSU’s marketing the product as “diet” is false and misleading.

12 56. DPSU is, or reasonably should be aware, of the scientific evidence that
13 consuming aspartame can cause weight gain, does not contribute to weight loss or healthy
14 weight management, and increases the risk of diabetes. That evidence has been published and
15 in the public domain, and recounted in major news outlets.

16 57. Despite that DPSU is, or reasonably should have been aware that promoting Diet
17 Dr. Pepper as “diet” was false and misleading, DPSU continued to do so anyway, because
18 this representation is the major driver of Diet Dr. Pepper sales.

19 58. Moreover, while touting Diet Dr. Pepper as “diet,” DPSU deceptively omitted
20 material information, namely that despite its lack of calories, the consumption of Diet Dr.
21 Pepper can lead to weight gain, does not assist in weight loss or healthy weight management,
22 and contributes to metabolic disease, diabetes, and cardiovascular disease.

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24
25 ²⁶ Nettleton, JA, et al., “Diet soda intake and risk of incident metabolic syndrome and type 2
26 diabetes in Multi-Ethnic Study of Artherosclerosis (MESA).” *Diabetes Care*, Vol. 32, No. 4,
pp. 688-94 (Apr. 2009).

27 ²⁷ Hoffman, B. et al., “The Influence of Sugar and Artificial Sweeteners on Vascular Health
28 during the Onset and Progression of Diabetes,” presented at the annual Experimental
Biology meeting in San Diego.

1 **B. DPSU Violated FDA and California Food Labeling Regulations**

2 59. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (“FDCA”),
3 governs the labeling of foods and beverages. Pursuant to the California Sherman Food, Drug,
4 and Cosmetic Law, Cal. Health & Safety Code §§ 109875 *et seq.* (the “Sherman Law”),
5 California has adopted the FDCA and its implementing regulations as its own law, *see id.* §
6 110100.

7 60. The FDCA prohibits the labeling of food that is “false or misleading in any
8 particular,” 21 U.S.C. § 343(a).

9 61. FDA regulations provide that companies may use the term “diet” in the brand
10 name or label of a soft drink described in section 343(r)(2)(D) *only* when it is not false or
11 misleading. *See* 21 U.S.C. § 343(r)(2)(D); 21 C.F.R. § 101.13(q)(2).

12 62. DPSU’s labeling Diet Dr. Pepper as “diet” is false and misleading for the reasons
13 described herein. Accordingly, DPSU has violated 21 U.S.C. §§ 343(a) and 343(r)(2)(D), 21
14 C.F.R. § 101.13(q)(2), and the corresponding sections of California’s Sherman Law, *see* Cal.
15 Health & Safety Code §§ 110660, 100670.

16 63. In labeling Diet Dr. Pepper, DPSU also “fail[ed] to reveal facts that are material
17 in light of other representations made or suggested by the statement[s], word[s], design[s],
18 device[s], or any combination thereof,” in violation of 21 C.F.R. § 1.21(a)(1). Such facts
19 include that consuming the aspartame in Diet Dr. Pepper can lead to weight gain or make it
20 difficult to maintain a healthy weight.

21 64. In labeling Diet Dr. Pepper, DPSU similarly failed to reveal facts that were
22 “[m]aterial with respect to the consequences which may result from use of the article under”
23 both “[t]he conditions prescribed in such labeling,” and “such conditions of use as are
24 customary or usual,” in violation of § 1.21(a)(2). Namely, DPSU failed to disclose the
25 increased risk of weight gain, and of serious chronic disease, likely to result from the usual
26 consumption of Diet Dr. Pepper in the customary manner.

PLAINTIFF’S PURCHASE, RELIANCE, AND INJURY

1
2 65. Plaintiff Shana Becerra has been a regular purchaser of Diet Dr. Pepper for many
3 years. For over 13 years, plaintiff has purchased several cans of Diet Dr. Pepper each month,
4 usually from the Safeway located at 2785 Yulupa Avenue, in Santa Rosa, California.

5 66. Plaintiff has struggled with obesity since childhood. She purchased and
6 consumed Diet Dr. Pepper in large part because she believed, based on DPSU’s advertising
7 the product as “Diet,” that it would contribute to healthy weight management, and, due to its
8 lack of calories, would not cause her to gain weight.

9 67. Plaintiff would not have purchased Diet Dr. Pepper at the price she paid, and
10 may not have purchased it at all, absent DPSU’s false, misleading, and unlawful labeling.

11 68. Diet Dr. Pepper cost more than a product, represented to be a diet product, would
12 cost if the truth were revealed that the product was not a diet product at all.

13 69. If DPSU were enjoined from making the misleading claims, the market demand
14 and price for Diet Dr. Pepper would drop, as it has been artificially and fraudulently inflated
15 due to DPSU’s use of false, misleading, and unlawful labeling.

16 70. For these reasons, Diet Dr. Pepper was worth less than what plaintiff paid for it.

17 71. Instead of receiving a beverage that would help assist plaintiff in achieving and
18 maintaining a healthy weight, plaintiff received a beverage whose consumption is likely to
19 lead to weight gain.

20 72. Plaintiff lost money as a result of DPSU’s deceptive claims and unfair practices
21 in that she did not receive what she paid for when purchasing Diet Dr. Pepper.

22 73. Plaintiff detrimentally altered her position and suffered damages in an amount
23 equal to what she paid for the product.

24 74. Plaintiff might purchase Diet Dr. Pepper in the future, for example as a treat, if
25 the product were properly labeled.

CLASS ACTION ALLEGATIONS

1
2 75. Pursuant to Fed. R. Civ. P. 23, plaintiff seeks to represent a class comprised of
3 all persons in California who, on or after October 16, 2013 purchased, for personal or
4 household use, and not for resale, Diet Dr. Pepper in cans or bottles.

5 76. Plaintiff nevertheless reserves the right to divide into subclasses, expand,
6 narrow, or otherwise modify the class definition prior to (or as part of) filing a motion for
7 class certification.

8 77. The members in the proposed class and subclass are so numerous that individual
9 joinder of all members is impracticable, and the disposition of the claims of all class members
10 in a single action will provide substantial benefits to the parties and Court. Fed. R. Civ. P.
11 23(a)(1).

12 78. There are questions of law and fact common to the class, Fed. R. Civ. P. 23(a)(2),
13 which plaintiff may seek to litigate on an individual basis pursuant to Fed. R. Civ. P. 23(c)(4),
14 including without limitation:

15 a. Whether Diet Dr. Pepper sold during the class period was likely to result
16 in weight gain, or increased risk of metabolic disease, diabetes, and cardiovascular
17 disease;

18 b. Whether advertising Diet Dr. Pepper as “diet” would be likely to deceive
19 a reasonable consumer;

20 c. Whether Diet Dr. Pepper sold during the class period was misbranded
21 because it was in violation of any FDA or California state food labeling statute or
22 regulation;

23 d. Whether DPSU expressly or impliedly warranted that Diet Dr. Pepper was
24 “diet”;

25 e. Whether DPSU impliedly warranted that Diet Dr. Pepper would assist in
26 weight loss or healthy weight management;

27 f. Whether DPSU breached any express or implied warranties;

28 g. The proper injunctive or prospective relief; and

1 h. The proper amount of reasonable litigation expenses and attorneys' fees.

2 79. Plaintiff's claims are typical of class members' claims in that they are based on
3 the same underlying facts, events, and circumstances relating to DPSU's conduct.

4 80. Plaintiff will fairly and adequately represent and protect the interests of the class,
5 has no interests incompatible with the interests of the class, and has retained counsel
6 competent and experienced in class action litigation, including within the food and beverage
7 industry.

8 81. Class treatment is superior to other options for resolution of the controversy
9 because the relief sought for each class member is small such that, absent representative
10 litigation, it would be infeasible for class members to redress the wrongs done to them.

11 82. Questions of law and fact common to the class predominate over any questions
12 affecting only individual class members.

13 83. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.
14 23(a), (b)(2), and (b)(3), and may be appropriate for certification "with respect to particular
15 issues" under Rule 23(c)(4).

16 **CAUSES OF ACTION**

17 **FIRST CAUSE OF ACTION**

18 **VIOLATIONS OF THE CALIFORNIA FALSE ADVERTISING LAW,**

19 **CAL. BUS. & PROF. CODE §§ 17500 *ET SEQ.***

20 84. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
21 as if fully set forth herein.

22 85. The FAL prohibits any statement in connection with the sale of goods "which is
23 untrue or misleading," Cal. Bus. & Prof. Code § 17500.

24 86. DPSU's use of the term "diet" in marketing Diet Dr. Pepper is deceptive in light
25 of the strong evidence that aspartame causes weight gain and physical illnesses, as described
26 above.

27 87. DPSU knew, or reasonably should have known, that marketing Diet Dr. Pepper
28 as "diet" was untrue or misleading.

1 93. In compliance with Cal. Civ. Code § 1782(d), an affidavit of venue was filed
2 with the original Complaint.

3 **THIRD CAUSE OF ACTION**
4 **VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW,**
5 **CAL. BUS. & PROF. CODE §§ 17200 ET SEQ.**

6 94. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
7 as if fully set forth herein.

8 95. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice,”
9 Cal. Bus. & Prof. Code § 17200.

10 **Fraudulent**

11 96. DPSU’s use of the term “diet” to market Diet Dr. Pepper is likely to deceive
12 reasonable consumers.

13 **Unfair**

14 97. DPSU’s conduct with respect to the labeling, advertising, and sale of Diet Dr.
15 Pepper was and is unfair because DPSU’s conduct was and is immoral, unethical,
16 unscrupulous, or substantially injurious to consumers and the utility of its conduct, if any,
17 does not outweigh the gravity of the harm to its victims.

18 98. DPSU’s conduct with respect to the labeling, advertising, and sale of Diet Dr.
19 Pepper was also unfair because it violated public policy as declared by specific constitutional,
20 statutory or regulatory provisions, including the False Advertising Law, the Federal Food,
21 Drug, and Cosmetic Act, and the California Sherman Food, Drug, and Cosmetic Law.

22 99. DPSU’s conduct with respect to the labeling, advertising, and sale of Diet Dr.
23 Pepper was also unfair because the consumer injury was substantial, not outweighed by
24 benefits to consumers or competition, and not one consumers themselves could reasonably
25 have avoided.

26 **Unlawful**

27 100. The acts alleged herein are “unlawful” under the UCL in that they violate at least
28 the following laws:

- 1 a. The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
- 2 b. The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*; and
- 3 c. The Federal Food, Drug, and Cosmetic Act, 28 U.S.C. §§ 301 *et seq.*, and
- 4 its implementing regulations, 21 C.F.R. §§ 101 *et seq.*; and
- 5 d. The California Sherman Food, Drug, and Cosmetic Law, Cal. Health &
- 6 Safety Code §§ 109875, *et seq.*

7 **FOURTH CAUSE OF ACTION**

8 **BREACH OF EXPRESS WARRANTY, CAL. COM. CODE § 2313(1)**

9 101. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
10 as if fully set forth herein.

11 102. Through the label of Diet Dr. Pepper, DPSU made affirmations of fact or
12 promises, and made descriptions of goods, that formed part of the basis of the bargain, in that
13 plaintiff and the class purchased Diet Dr. Pepper in reasonable reliance on those statements.
14 Cal. Com. Code § 2313(1).

15 103. Specifically, DPSU made statements that Diet Dr. Pepper is “diet.”

16 104. DPSU breached its express warranties by selling products that are not “diet,”
17 *i.e.*, do not assist in weight loss or healthy weight management, but which in fact cause weight
18 gain.

19 105. That breach actually and proximately caused injury in the form of the lost
20 purchase price that plaintiff and class members paid for Diet Dr. Pepper.

21 106. Plaintiff gave DPSU notice of the breach before filing or asserting the claim, but
22 DPSU failed to remedy the breach.

23 107. As a result, plaintiff seeks, no behalf of herself and other class members, actual
24 damages arising as a result of DPSU’s breach of express warranty.

1 **FIFTH CAUSE OF ACTION**
2 **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY,**
3 **CAL. COM. CODE § 2314**

4 108. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
5 as if fully set forth herein.

6 109. DPSU, through its acts and omissions set forth herein, in the sale, marketing and
7 promotion of Diet Dr. Pepper, made representations to plaintiff and the class that Diet Dr.
8 Pepper would assist in weight loss or healthy weight management, and would not contribute
9 to weight gain or cause illness, as described above.

10 110. DPSU is a merchant with respect to the goods of this kind which were sold to
11 plaintiffs and the class, and there was, in the sale to plaintiffs and other consumers, an implied
12 warranty that those goods were merchantable.

13 111. However, DPSU breached that implied warranty in that Diet Dr. Pepper does
14 not contribute to weight loss or healthy weight management, and instead contributes to weight
15 gain and increases the risk of illness, as set forth in detail herein.

16 112. As an actual and proximate result of DPSU's conduct, plaintiff and the class did
17 not receive goods as impliedly warranted by DPSU to be merchantable in that they did not
18 conform to promises and affirmations made on the container or label of the goods.

19 113. Plaintiff gave DPSU notice of the breach before filing or asserting the claims,
20 but DPSU failed to remedy the breach.

21 114. As a result, plaintiff seeks, on behalf of herself and other class members, actual
22 damages arising as a result of DPSU's breaches of implied warranty.

23 **PRAYER FOR RELIEF**

24 115. Wherefore, plaintiff, on behalf of herself, all others similarly situated, and the
25 general public, prays for judgment against DPSU as to each and every cause of action, and
26 the following remedies:
27
28

1 a. An Order certifying this action as a class action, appointing plaintiff as
2 Class Representative, appointing her counsel as Class Counsel, and requiring DPSU to
3 bear the cost of class notice;

4 b. An Order enjoining DPSU from marketing Diet Dr. Pepper as “diet” so
5 long as it is sweetened with a non-nutritive artificial sweetener;

6 c. An Order requiring DPSU to engage in a corrective advertising campaign.

7 d. An Order requiring DPSU to pay restitution to restore funds that may have
8 been acquired by means of any act or practice declared by this Court to be an unlawful,
9 unfair, or fraudulent business act or practice, untrue or misleading advertising, or a
10 violation of the UCL, FAL, or CLRA;

11 e. An Order requiring DPSU to pay all statutory, compensatory, and punitive
12 damages permitted under the causes of action alleged herein;

13 f. An Order requiring DPSU to disgorge or return all monies, revenues,
14 profits, or other unjust enrichment obtained by means of any wrongful or unlawful act
15 or practice;

16 g. Pre- and post-judgment interest;

17 h. Costs, expenses, and reasonable attorneys’ fees; and

18 i. Any other and further relief as may later be requested, or which the Court
19 deems necessary, just, or proper.

20 **JURY DEMAND**

21 116. Plaintiff hereby demands a trial by jury on all issues so triable.

22
23 Dated: April 30, 2018

/s/ Jack Fitzgerald

24 **THE LAW OFFICE OF JACK FITZGERALD, PC**

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