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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

Case No.: '14CV0168 H JMA

CLASS ACTION

**COMPLAINT FOR:**

THAMAR SANTISTEBAN CORTINA, on  
behalf of herself and all others similarly  
situated,

**VIOLATIONS OF THE CALIFORNIA  
UNFAIR COMPEITION LAW, CAL.  
BUS. & PROF. CODE §§ 17200 ET. SEQ.;**

Plaintiff,

**VIOLATIONS OF THE CALIFORNIA  
FALSE ADVERTISING LAW, CAL.  
BUS. & PROF. CODE §§ 17500 ET. SEQ.;**  
**AND**

v.

PEPSICO, INC.,

**VIOLATIONS OF THE CALIFORNIA  
CONSUMERS LEGAL REMEDIES ACT,  
CAL. CIV. CODE §§ 1750 ET SEQ.**

Defendant.

DEMAND FOR JURY TRIAL

1 Plaintiff THAMAR SANTISTEBAN CORTINA, on behalf of herself, all others  
2 similarly situated, and the general public, by and through her undersigned counsel, hereby  
3 brings this action against Defendant PEPSICO, INC. (“PEPSI”), and alleges the following  
4 upon her own knowledge, or where she lacks personal knowledge, upon information and  
5 belief including the investigation of her counsel.

6  
7 **INTRODUCTION**

8 1. PEPSI sells soft drinks including Pepsi, Diet Pepsi, and Pepsi One throughout  
9 the state of California. Pepsi, Diet Pepsi and Pepsi One contain an amount of 4-  
10 methylimidazole (4-MeI), a carcinogen, sufficient to expose California consumers to  
11 substantial health risks. PEPSI, however, deceptively omits that the Pepsi beverages contain  
12 these amounts of 4-MeI. Plaintiff brings this action on behalf of herself and a class of  
13 California consumers to rectify the injuries caused by PEPSI’S unlawful practices, and to  
14 enjoin PEPSI’S ongoing deceptive omissions concerning the amount of 4-MeI in the Pepsi  
15 beverages.

16  
17 **THE PARTIES**

18 2. Plaintiff THAMAR SANTISTEBAN CORTINA is a resident of Bonita,  
19 California.

20 3. Defendant PEPSICO, INC. is a North Carolina company with its principle place  
21 of business at 700 Anderson Hill Road, Purchase, New York 10577.

22  
23 **JURISDICTION AND VENUE**

24 4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §  
25 1332(d)(2)(A), the Class Action Fairness Act, because the matter in controversy exceeds the  
26 sum or value of \$5,000,000 exclusive of interest and costs, at least one member of the class  
27 of plaintiffs is a citizen of a State different from Defendant. In addition, more than two-thirds  
28

1 of the members of the class reside in states other than the state in which Defendant is a citizen  
2 and in which this case is filed, and therefore any exceptions to jurisdiction under 28 U.S.C. §  
3 1332(d) do not apply.

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

8 6. Venue is proper in this Southern District of California pursuant to 28 U.S.C. §  
9 1391(b) and (c), because Defendant resides (i.e., is subject to personal jurisdiction) in this  
10 district, and a substantial part of the events or omissions giving rise to the claims occurred in  
11 this district.

12  
13 **FACTS**

14 **A. Background Facts**

15 7. 4-MeI is an impurity generated during the manufacture of caramel colors III and  
16 IV used in some soft drinks.

17 8. 4-MeI has been found by the National Toxicology Program to cause lung tumors  
18 in laboratory animals.

19 9. According to Urvashi Rangan, a toxicologist and Executive Director of the  
20 Consumer Reports Food Safety & Sustainability Center, “There is no ‘safe’ level of 4-MeI,  
21 but if you have to set a threshold, it should be well below the Prop 65 level (29  
22 micrograms/day) – and more like 3 micrograms/day.” Ragan calls exposure to 4-MeI “an  
23 unnecessary risk.”

24 10. According to testing performed by Consumer reports, in December 2013, Pepsi  
25 sold in California contained an average 29.1 micrograms of 4-MeI per can.

26 11. According to testing performed by Consumer reports, from April to September  
27 2013, Diet Pepsi sold in California contained an average 30.5 micrograms of 4-MeI per can.  
28

1 12. According to testing performed by Consumer reports, from April to September  
2 2013, Pepsi One sold in California contained an average 43.5 micrograms of 4-MeI per can,  
3 and during December 2013, Pepsi One sold in California contained an average of 39.5  
4 micrograms of 4-MeI per can.

5 **B. PEPSI'S Unlawful Practices**

6 13. PEPSI has had and continues to have exclusive knowledge of material facts  
7 concerning the amount of 4-MeI in the Pepsi beverages.

8 14. PEPSI has actively concealed from Plaintiff and the class material facts  
9 concerning the amount of 4-MeI in the Pepsi beverages, as well as its potential health harms.

10 15. In advertising and selling Pepsi, Diet Pepsi, and Pepsi One, PEPSI has and  
11 continues to deceptively omit that these soft drinks contain dangers levels of 4-MeI that  
12 expose consumers to cancer.

13 **C. Plaintiff's Purchase & Injury**

14 16. Plaintiff is a regular Diet Pepsi and Pepsi One purchaser and drinker. She has  
15 been purchasing and consuming the beverages either daily or weekly for at least the last 8-10  
16 years, including in cans, 12-oz. bottles, and 2 liter bottles, purchasing them from various  
17 grocery and convenience stores, and other locations throughout San Diego County.

18 17. Plaintiff would not have purchased the Pepsi beverages if she knew they  
19 contained a substance known to be a carcinogen and believed to be dangerous at the levels  
20 actually present in the beverages.

21  
22 **CLASS ACTION ALLEGATIONS**

23 18. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks to represent a  
24 class of all persons who purchased in California during the four years preceding the filing of  
25 this Complaint, Pepsi, Diet Pepsi, or Pepsi One primarily for personal, family, or household  
26 use, and not for resale.

1 19. The members in the proposed class and subclass are so numerous that individual  
2 joinder of all members is impracticable, and the disposition of the claims of all class members  
3 in a single action will provide substantial benefits to the parties and Court.

4 20. Questions of law and fact common to Plaintiff and the class include:

- 5 a. Whether the Pepsi beverages contain 4-MeI and the amount;
- 6 b. Whether 4-MeI is potentially dangerous in the amounts in the Pepsi  
7 beverages;
- 8 c. Whether information concerning the amount of 4-MeI in the Pepsi  
9 beverages is material to a reasonable consumer;
- 10 d. Whether a duty arose in PEPSI to disclose the facts concerning the 4-MeI  
11 in its beverages;
- 12 e. The proper equitable and injunctive relief; and
- 13 f. The proper amount of restitution.

14 21. Plaintiff's claims are typical of class members' claims in that they are based on  
15 the same underlying facts, events, and circumstances relating to PEPSI'S conduct.

16 22. Plaintiff will fairly and adequately represent and protect the interests of the  
17 classes, has no interests incompatible with the interests of the classes, and has retained  
18 counsel competent and experienced in class litigation.

19 23. The class is sufficiently large for purposes of class litigation because it contains  
20 at least hundreds of thousands of members who purchased the Pepsi beverages in California  
21 the past 4 years.

22 24. Class treatment is superior to other options for resolution of the controversy  
23 because the relief sought for each class member is relatively small such that, absent  
24 representative litigation, it would be infeasible for class members to redress the wrongs done  
25 to them.

26 25. Questions of law and fact common to the classes predominate over any questions  
27 affecting only individual class members.  
28

1 26. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.  
2 23(a), 23(b)(2), and 23(b)(3).

3  
4 **CAUSES OF ACTION**

5 **FIRST CAUSE OF ACTION**

6 **VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW,**

7 **CAL. BUS. & PROF. CODE §§ 17200 *ET SEQ.***

8 ***(FRAUDULENT PRONG)***

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

11 28. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice,”  
12 Cal. Bus. & Prof. Code § 17200.

13 29. PEPSI’S deceptive omission of the dangerous amount of 4-MeI in the Pepsi  
14 beverages is a “fraudulent” practice within the meaning of the UCL in that the omission is  
15 likely to deceive reasonable consumers and the public.

16 30. In accordance with Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an Order  
17 enjoining PEPSI from continuing to conduct business through fraudulent acts and practices,  
18 and to commence a corrective advertising campaign.

19 31. On behalf of herself and the class, Plaintiff also seeks an Order for the restitution  
20 of all monies from the sale of the Pepsi beverages, which were unjustly acquired through acts  
21 of fraudulent competition.

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23 **SECOND CAUSE OF ACTION**

24 **VIOLATION OF THE CALIFORNIA FALSE ADVERTISING LAW,**

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

26 32. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint  
27 as if fully set forth herein.

1 33. The FAL prohibits any statement in connection with the sale of goods “which is  
2 untrue or misleading,” Cal. Bus. & Prof. Code § 17500, including deceptive omissions of  
3 material fact.

4 34. PEPSI’S deceptive omission of the amount and health harms of the 4-MeI in the  
5 Pepsi beverages was likely to deceive reasonable consumers and the public.

6 35. PEPSI knew, or reasonably should have known, that it was deceptively omitting  
7 material information.

8 36. Plaintiff and the class are entitled to injunctive and equitable relief and  
9 restitution.

10  
11 **THIRD CAUSE OF ACTION**

12 **VIOLATIONS OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT,**  
13 **CAL. CIV. CODE §§ 1750 *ET SEQ.***

14 **(By the California Class)**

15 37. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint  
16 as if fully set forth herein.

17 38. The CLRA prohibits deceptive practices in connection with the conduct of a  
18 business that provides goods, property, or services primarily for personal, family, or  
19 household purposes.

20 39. PEPSI’S policies, acts, and practices were designed to, and did, result in the  
21 purchase and use of the products primarily for personal, family, or household purposes, and  
22 violated and continue to violate the following sections of the CLRA:

- 23 a. § 1770(a)(5): representing that goods have characteristics, uses, or benefits  
24 which they do not have;
- 25 b. § 1770(a)(7): representing that goods are of a particular standard, quality,  
26 or grade if they are of another;
- 27 c. CVS disparaged the goods, services, or business of another by false or  
28

1 misleading representation of fact, within the meaning of Cal. Civ. Code §  
2 1770(a)(8);

3 d. § 1770(a)(9): advertising goods with intent not to sell them as advertised;  
4 and

5 e. § 1770(a)(16): representing the subject of a transaction has been supplied  
6 in accordance with a previous representation when it has not.

7 40. As a result, plaintiff and the class members have suffered irreparable harm and  
8 are entitled to injunctive and equitable relief, and reasonable attorneys' fees and costs.  
9 Plaintiff does not currently seek damages for her CLRA claim.

10 41. In compliance with Cal. Civ. Code § 1782(d), plaintiff's affidavit of venue is  
11 filed concurrently herewith.

12  
13 **PRAYER FOR RELIEF**

14 42. Wherefore, Plaintiff, on behalf of himself, all others similarly situated and the  
15 general public, prays for judgment against PEPSI as to each and every cause of action,  
16 including:

17 a. An Order certifying this as a class action and appointing plaintiff and her  
18 counsel to represent the classes;

19 b. An Order enjoining PEPSI from selling Pepsi, Diet Pepsi, or Pepsi One in  
20 California so long as the beverages contain a potentially dangerous  
21 amount of 4-MeI, if PEPSI deceptively omits that amount;

22 c. An Order compelling PEPSI to conduct a corrective advertising  
23 campaign;

24 d. An Order requiring PEPSI to disgorge or return all monies, revenues, and  
25 profits obtained by means of any wrongful act or practice;

26 e. An Order requiring PEPSI to pay restitution to restore all funds acquired  
27 by means of any act or practice declared by this Court to be a fraudulent  
28



- 1 business act or practice, untrue or misleading advertising, or a violation  
2 of the UCL, FAL or CLRA, plus pre-and post-judgment interest thereon;  
3 f. An Order awarding costs, expenses, and reasonable attorneys' fees; and  
4 g. Any other and further relief the Court deems necessary, just, or proper.  
5

6 **JURY DEMAND**

7 43. Plaintiff hereby demands a trial by jury on all issues so triable.  
8

9 Dated: January 23, 2014

/s/ Jack Fitzgerald \_\_\_\_\_

10 Jack Fitzgerald

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12 FITZGERALD, PC**

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