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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
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13 YOUSSEF KAMAL, and GILLIAN NEELY,)
on their own behalf and on behalf of all others)
14 similarly situated,)

15 Plaintiffs,)

16 vs.)

17 EDEN CREAMERY, LLC, dba HALO TOP)
CREAMERY,)

18 Defendant.)
19)
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Case No. **'18CV1298 BAS AGS**

CLASS ACTION COMPLAINT FOR
DAMAGES, INJUNCTIVE RELIEF AND
RESTITUTION

JURY TRIAL DEMANDED

1 Plaintiffs identified below (collectively, “Plaintiffs”), individually, and on behalf of the Class
2 defined below of similarly situated persons, file this Class Action Complaint. Plaintiffs file suit against
3 Eden Creamery, LLC, dba Halo Top Creamery (hereinafter “Halo Top,” the “Company” or
4 “Defendant”). Plaintiffs bring this action based upon personal knowledge of the facts pertaining to
5 themselves, and on information and belief as to all other matters, by and through undersigned counsel.

6 I. NATURE OF THE ACTION

7 1. Halo Top underfills its “pints” of ice cream. Dramatically so at times, and as a course of
8 business. Purchasers of the premium-priced ice cream simply have no idea how much ice cream they
9 will get each and every time they buy a Halo Top “pint.” And Halo Top has been doing this for years.

10 2. In spite of this practice, Halo Top has become the self-described “best-selling pint of ice
11 cream in America.” Halo Top has successfully marketed itself as a “guilt-free” ice cream with
12 extremely low calories and containing other health benefits, such as protein. As one of the important
13 selling points to consumers, the number of calories *per pint* is prominently displayed on the pint-
14 container, generally 280 to 360 calories per pint.

15 3. As a result of its low-calorie content, claimed health benefits and clever social media
16 marketing campaigns, Halo Top has developed a cult-like following among consumers over the past
17 few years. According to media reports, by the end of 2017 Halo Top accounted for more than 5% of the
18 ice cream market, selling more of its “pints” than Ben & Jerry’s and Haagen-Dazs. And like these
19 competitors, Halo Top charges a premium for its “pints” – as much as \$6.99 each.

20 4. But because Halo Top routinely underfills its pint containers, Plaintiffs and the Class
21 unknowingly paid for a full pint of Halo Top ice cream but did not receive a full pint of Halo Top ice
22 cream. Halo Top knows it is short-changing its customers, but refuses to do anything about it.
23 Defendant’s misconduct continues to this day.

24 II. THE PARTIES

25 5. Plaintiff Youssif Kamal is a California citizen and resides in Los Angeles, California.
26 He has, from time-to-time and within the last three years, purchased pint containers of Halo Top ice
27 cream and received less than a full pint of ice cream. Plaintiff Kamal intends to continue purchasing
28 Halo Top ice cream pints in the future and wants to ensure every pint is a full pint.

1 6. Plaintiff Gillian Neely is a California citizen and resides in San Diego, California. She
2 has, from time-to-time and within the last three years, purchased pint containers of Halo Top ice cream
3 and received less than a full pint of ice cream.

4 7. Plaintiffs bring this action on their own behalf and on behalf of all others similarly
5 situated, namely all other individuals who have purchased pint containers of Halo Top ice cream and
6 received less than a full pint of ice cream.

7 8. Defendant Eden Creamery LLC is a California limited liability corporation conducting
8 business in California and throughout the United States as Halo Top Creamery (together, herein "Halo
9 Top"). Defendant Eden Creamery LLC is the sole owner of Halo Top Creamery, and its principal
10 business purpose is to operate as Halo Top Creamery. Eden Creamery is a corporation organized and
11 existing under the laws of the State of California with its principal place of business and headquarters at
12 4470 West Sunset Blvd., Los Angeles, California.

13 9. Halo Top produces and sells low-calorie, protein-based, and low-sugar ice creams and
14 retails related accessories. The company sells its ice cream pints through retail grocery stores and its
15 online portal, www.halotop.com. It is engaged in continuous and significant business in the City and
16 County of Los Angeles consisting of, among other things, retail operations, advertising, and marketing,
17 activities.

18 **III. JURISDICTION AND VENUE**

19 10. This Court has diversity jurisdiction over the claims asserted herein on behalf of a
20 nationwide class pursuant to 28 U.S.C. §1332, as amended in February 2005 by the Class Action
21 Fairness Act. Jurisdiction is proper because:

22 (a) The proposed class includes more than 100 members, and many of the class
23 members are citizens of states that are diverse from the state of Defendant's citizenship, the amount in
24 controversy in this class action exceeds five million dollars, exclusive of interest and costs; and,

25 (b) Defendant has purposefully availed itself of the privilege of conducting business
26 activities within the State of California, where Halo Top is incorporated; has its principal place of
27 business; where its officers direct, control, and coordinate Halo Top's activities, and where Halo Top
28 engaged in the unlawful conduct alleged herein.

1 11. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391, because a
2 substantial part of the challenged conduct or omissions complained of herein occurred in this judicial
3 district, and defendant caused harm to at least one of the named plaintiffs and numerous class members
4 in this judicial district.

5 **IV. SUBSTANTIVE ALLEGATIONS**

6 12. Eden Creamery LLC doing business as Halo Top Creamery was founded in 2011 and
7 produces, markets and sells ice cream in the U.S. and abroad. Halo Top’s popularity (in part) comes
8 from the fact that it has created various flavors of self-proclaimed “lifestyle” ice cream – ice cream that
9 contains fewer calories than “full fat” ice cream, less sugar, and Halo Top adds protein to many of its
10 flavors.

11 13. In the past few years Halo Top has grown extremely rapidly. According to Inc.
12 magazine, the company took in “revenue of \$49 million in 2016, up almost 21,000 percent over a three-
13 year period.” A related December 2017 Inc. magazine story estimates annual revenue for the Company
14 at \$100 million. And Halo Top now is also expanding internationally.

15 14. According to that same article, “Halo Top has found its way into every major grocery
16 chain in the U.S., more than 19,000 stores nationwide. Since the start of this year (2017), the company
17 has sold 50 million pints, making it the best-selling pint of ice cream in the U.S., surpassing long-time
18 industry leaders like Haagen-Dazs and Ben & Jerry’s.”

19 15. Like those competitors, Halo Top also charges customers a premium price. According to
20 a March 2017 article on AdAge.com Halo Top ice cream retails between \$3.99 and \$6.99 per pint, with
21 an average price of \$4.89.

22 16. Halo Top sells the vast majority of its ice cream to retail customers in an opaque pint
23 container. That the container is a pint is prominently displayed on the container. Moreover, much of
24 the company’s marketing and advertising focuses on the pint itself:

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17. For example, one of the main selling points of the ice cream is the low-calorie count. The carton label itself prominently displays that calorie count in a large font in the center of the carton, and measures those calories “per pint”. Thus, on the front of virtually every pint container of ice cream the consumer is told the number of calories in the ice cream, as supposedly measured by that pint.

18. According to an August 2017 article in Food magazine, “[i]f you look at the nutrition label on each pint of Halo Top, the serving size is still the typical half-cup, but the brand plays up the ‘go ahead and eat a whole pint’ idea. Each pint’s label lists its total calorie count in big, central type – bigger type than even is used for the flavor’s name or the Halo Top logo.”

19. Much of Halo Top’s marketing to consumers also focuses on the “pint.” For example, on the first page of the Company website www.halotop.com the Company offers a link to help the

1 consumer “find our pints” and contains links with pictures of the pint containers, encouraging the
2 consumer to “select your favorite pints.” See www.halotop.com. And in an August 2, 2017 Time
3 Magazine article, the Company’s CEO Justin Woolverton stated, “Halo Top is something where people
4 can eat the whole pint, or a lot more than a quarter of a cup of ice cream. It can fit into their diet
5 without breaking the calorie bank.”

6 20. Halo Top pursues an aggressive social media marketing campaign on sites like
7 Facebook, Instagram and Twitter. These marketing efforts also focus on the Halo Top pint. According
8 to an August 2017 article in Fortune, “Halo Top’s advertising leans heavily on the idea that consumers
9 can eat an entire pint without feeling guilty (its lids are emblazoned with the command to ‘stop when
10 you get to the bottom.’).”

11 21. The retail ice cream pint container used by Halo Top itself has become an easily
12 recognizable standard measure of ice cream for consumers. Halo Top’s tapered cylinder pint containers
13 are virtually identical in shape and size to those of its main competitors, including Haagen-Dazs and
14 Ben & Jerry’s. Consumers readily understand these containers to hold a pint of ice cream.

15 22. And what constitutes a “pint” is not up for debate. It is a standardized measurement of
16 volume in the United States, and is commonly understood as such by consumers.

17 23. According to the United States Department of Commerce’s National Institute of
18 Standards and Technology, a pint is a U.S. Customary Unit of Measurement. It is a unit of Liquid
19 Volume equal to 28.875 cubic inches. Four gills equal a pint, and two pints equal a quart. Eight pints
20 equal a gallon, or 231 cubic inches by volume.

21 24. Moreover, it is the primary measure of volume for retail sales of ice cream. Halo Top
22 and its competitors Ben & Jerry’s and Haagen-Dazs (and others) all sell ice cream in the recognizable
23 pint container, and monitor their sales on that basis. This allows consumers to compare by price, calorie
24 content, fat content, and other metrics when selecting an ice cream.

25 25. But just as consumers expect to be paying the advertised price for a full gallon of
26 gasoline, so too they expect to be paying the advertised price for a full pint of ice cream. But when
27 purchasing a pint of Halo Top ice cream, consumers frequently do not get a full pint.

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1 assigns of Defendant, and any members of their immediate families; (b) Plaintiffs’ counsel; (c) judicial
2 officers and their immediate family members and associated court staff assigned to this case; and, (d)
3 persons or entities who or which timely and properly exclude themselves from the Class. Plaintiffs
4 reserve the right to amend the Class definition if discovery and further investigation reveal that the
5 Class should be expanded or otherwise modified.

6 33. The Class likely consists of hundreds of thousands, if not millions of people. According
7 to published reports, Halo Top sold more than 50 million pints in 2017. Due to the small amount of
8 damages on an individual basis, the geographic dispersity of class members, and the large number of
9 class members, it is impracticable to bring all class members before the Court.

10 34. The claims of the class representatives are typical of the claims of the members of the
11 class because the class representatives and all other members of the class were damaged by the same
12 wrongful conduct committed by Defendant – delivering to consumers underfilled pints of ice cream.
13 Plaintiffs advance the same legal theories and claims on behalf of themselves and all other Class
14 members, and no defense is available to Defendant that is unique to any Plaintiff.

15 35. Plaintiffs and their counsel will fairly and adequately protect the interests of the class.
16 The interests of the class representatives are coincident with, and not antagonistic to, the interests of the
17 other members of the class.

18 36. The class representatives have retained counsel competent and experienced in the
19 prosecution of class action litigation such as this.

20 37. Questions of law and fact common to the members of the class are central here and
21 predominate over questions that may affect only individual members. Among the questions of law and
22 fact common to the class are:

- 23 (a) Whether Halo Top sells underfilled pints of ice cream to consumers;
- 24 (b) Whether Halo Top violated California Business & Professions Code §17200 by
25 engaging in an “unlawful” business practice as alleged herein;
- 26 (c) Whether Halo Top violated California Business & Professions Code §17200 by
27 engaging in a “unfair” business practice as alleged herein;

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1 (d) Whether Halo Top violated California Business & Professions Code §17200 by
2 engaging in a “fraudulent” business practice as alleged herein;

3 (e) Whether Halo Top violated California Business & Professions Code §17500, *et*
4 *seq.*, through false and misleading advertising regarding the contents of its ice cream pints; and

5 (f) Whether Halo Top’s conduct violated the other provisions of statutory and
6 common law outlined in this complaint.

7 38. Damages for any individual class member are likely insufficient to justify the cost of
8 individual litigation so that, in the absence of class treatment, Defendant’s violations of law inflicting
9 substantial damages in the aggregate would go un-remedied.

10 39. The State of California has a special interest in regulating the affairs of corporations
11 established under California law, that do business here, as well as persons who live here. Defendant is
12 incorporated in California and based in Los Angeles, California. Defendant designed and implemented
13 the unlawful and deceptive conduct described in this Complaint from their headquarters in California.
14 Additionally, Defendant likely has more Halo Top consumers in California than in any other state.
15 Accordingly, there is a substantial nexus between Defendant’s unlawful behavior and California such
16 that the California courts should take cognizance of this action on behalf of a class of individuals who
17 reside in California and the United States.

18 **FIRST CAUSE OF ACTION**

19 **Unlawful, Fraudulent, and Unfair Business Practices**
20 **in Violation of California’s Unfair Competition Law**

21 40. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the
22 preceding paragraphs of this Complaint.

23 41. By committing the acts and practices alleged herein, Halo Top has engaged in unlawful,
24 fraudulent, and unfair business practices in violation of the UCL:

25 (a) Unlawful Conduct: As a result of engaging in the conduct alleged in this
26 Complaint, Halo Top has violated the UCL’s proscription against engaging in unlawful conduct by
27 virtue of: (i) its fraudulent and deceitful conduct in violation of California Civil Code §§1709 through
28 1711; (ii) its violations of the Consumers Legal Remedies Act, California Civil Code §§1770(a)(5),

1 (a)(7), and (a)(9); and (iii) its engagement in false advertising and marketing in violation of California
2 Business and Professions Code §17500 *et seq.*;

3 (b) Fraudulent Conduct: Halo Top has violated the UCL’s proscription against fraud
4 as a result of engaging in the fraudulent and deceitful conduct alleged herein throughout this Complaint;
5 and

6 (c) Unfair Conduct: Halo Top has violated the UCL’s proscription against unfair
7 conduct as a result of engaging in the conduct alleged in this Complaint, which violates legislatively-
8 declared policies articulated in, inter alia, California Civil Code §§1710, 1711, and 1770(a)(5), (a)(7),
9 and (a)(9).

10 42. Halo Top’s violations of the UCL continue to this day. As a direct and proximate result
11 of Halo Top’s violations of the UCL, Plaintiffs have suffered actual damage in that, inter alia, they paid
12 more for their ice creams than they would have paid if Halo Top had not concealed the true volume of
13 its ice cream, or they would not have purchased the ice cream at all.

14 43. Pursuant to §17203 of the UCL, Plaintiffs and the class seek an order that requires Halo
15 Top: (a) to stop underfilling its pint containers of ice creams or, in the alternative, to stop selling
16 underfilled pints, and immediately remove any such underfilled pints from store shelves; (b) to properly
17 label the amounts contained in its ice cream containers; (c) to reimburse purchasers of ice creams with
18 the purchase price they paid for those pints that Halo Top failed to disclose were defective and
19 underfilled; (d) to make full restitution of all moneys wrongfully obtained from its violations of the
20 UCL, as alleged in this Complaint; and (f) requires Halo Top to pay the attorney fees and costs incurred
21 by counsel for Plaintiffs and the proposed class in accordance with California Code of Civil Procedure
22 §1021.5.

23 **SECOND CAUSE OF ACTION**

24 **Unfair and Deceptive Acts and Practices**
25 **in Violation of California’s Consumers Legal Remedies Act**

26 44. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the
27 preceding paragraphs of this Complaint.
28

1 45. This claim for relief is brought pursuant to the CLRA. Plaintiffs and members of the
2 class are “consumers,” as that term is defined by California Civil Code §1761(d) because they bought
3 ice cream for personal, family, or household purposes.

4 46. Defendant is a “person” under California Civil Code §1761(c).

5 47. Plaintiffs and Class Members have engaged in a “transaction” with Halo Top, as that
6 term is defined by California Civil Code §1761(e), by purchasing Halo Top ice cream.

7 48. The conduct alleged in this Complaint constitutes unfair methods of competition and
8 unfair and deceptive acts and practices for the purposes of the CLRA, and was undertaken by Halo Top
9 in transactions intended to result in, and which resulted in, the sale of goods to consumers; namely, to
10 sell pints of ice cream.

11 49. By engaging in the conduct described herein, Halo Top has violated California Civil
12 Code §1770(a)(5), (a)(7), and (a)(9) by, *inter alia*, misrepresenting and concealing the true nature,
13 contents and volume of its pints of ice cream.

14 50. By concealing the true volumes to Plaintiffs and members of the proposed class, Halo
15 Top has represented, and continues to represent, that ice creams have characteristics, uses and benefits,
16 or qualities that they do not have, and that they are of a particular standard, quality, or amount, when
17 they are not, in violation of California Civil Code §1770(a)(5) and (a)(7).

18 51. By engaging in the conduct alleged herein, above, Halo Top has also advertised, and
19 continues to advertise, goods with the intent not to sell them as advertised, in violation of California
20 Civil Code §1770(a)(9).

21 52. Pursuant to §1782 of the CLRA, Plaintiffs have sent written notice to Halo Top by
22 certified mail regarding its violations of the CLRA, thereby providing Halo Top with an opportunity to
23 correct or otherwise rectify the problems alleged herein within 30 days of receipt of that notice.

24 53. Unless Halo Top agrees to correct, replace, or otherwise rectify the problems created by
25 Halo Top’s conduct as alleged herein, Plaintiffs will seek an order awarding actual damages and,
26 because Halo Top engaged in the conduct alleged herein deliberately and with willful and malicious
27 intent, punitive damages.

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1 54. Under this cause of action, Plaintiff now seeks an order requiring Halo Top to: (a) cease
2 violating the CLRA by ensuring that each and every pint of ice cream is in fact a true pint by volume at
3 the point of purchase, or (b) ensure that if a pint is not a full pint by volume at the point of purchase, the
4 true volume measure is prominently displayed on the outside of the carton; (c) remove all underfilled
5 and/or improperly labelled pints of ice cream from store shelves across the country; (d) initiate a
6 corrective advertising campaign to re-educate consumers concerning the true contents of its ice cream
7 pints; and (e) awarding plaintiffs and the class their attorneys' fees and costs.

8 **THIRD CAUSE OF ACTION**
9 **Breach of Implied Contract**

10 55. Plaintiffs incorporate the substantive allegations contained in each and every paragraph
11 of this Complaint.

12 56. Defendant solicited and invited Plaintiffs and the members of the Class to buy pints of
13 ice cream. Plaintiffs and Class Members accepted Defendant's offers and bought ice cream pints from
14 Defendant.

15 57. When Plaintiffs and Class Members bought ice cream from Defendant, they paid for a
16 pint of ice cream. In so doing, Plaintiffs and Class Members entered into implied contracts with
17 Defendant to which Defendants agreed to provide defect-free pints of ice cream.

18 58. Plaintiffs and Class Members would not have bought ice cream from Defendants in the
19 absence of the implied contract between them and Defendant, and would not have paid the prices they
20 did pay.

21 59. Plaintiffs and Class Members fully performed their obligations under the implied
22 contracts with Defendant.

23 60. Defendant breached the implied contracts it made with Plaintiffs and Class Members by
24 purposefully selling them less than a pint of ice cream, and by failing to properly disclose that at the
25 time of that the parties entered into an agreement.

26 61. As a direct and proximate result of Defendants' breaches of the implied contracts
27 between Defendant and Plaintiffs and Class Members, Plaintiffs and Class Members sustained actual
28 losses and damages as described in detail above.

1 **VI. PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for
3 relief in this Complaint as follows:

4 A. For an order certifying that the action may be maintained as a class action, on behalf of
5 the proposed class and any other subclass(es) the Court may deem appropriate and appointing Plaintiffs
6 as class representatives and their counsel as class counsel;

7 B. Finding that Defendant engaged in the unlawful conduct as alleged herein;

8 C. Awarding Plaintiffs and the other class members injunctive relief;

9 D. For an award of monetary damages, including but not limited to, compensatory,
10 incidental and consequential damages commensurate with proof at trial for the acts complained of
11 herein;

12 E. For an award of punitive damages in an amount consistent with applicable statutes and
13 precedent for those causes of action that permit such recovery;

14 F. For an order awarding attorney fees and costs;

15 G. For equitable relief requiring restitution to plaintiffs and the class and disgorgement of
16 the revenues wrongfully retained as a result of Defendants' wrongful conduct;

17 H. For an award of pre- and post-judgment interest on any amounts awarded; and

18 I. For any and all other relief the Court deems just and appropriate.

19 **DEMAND FOR JURY TRIAL**

20 Based on the foregoing, Plaintiffs, on behalf of themselves and all others similarly situated,
21 hereby demand a jury trial for all claims so triable.

22 DATED: June 15, 2018

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