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11 Attorneys for Plaintiff Mary Hall, on behalf of  
herself and all others similarly situated

12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

14  
15 MARY HALL, on behalf of herself and all  
16 others similarly situated,

17 Plaintiff,

18 vs.

19 PEPSICO, INC., a North Carolina corporation,

20 Defendant.

CASE NO.

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

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SHERMAN OAKS, CALIFORNIA 91403

1 Individual and representative Plaintiff Mary Hall (“Plaintiff”), on behalf of herself and all  
2 others similarly situated (the “Class”), complains as follows:

### 3 INTRODUCTION

4 1. Defendant Pepsico, Inc. (“Pepsico” or “Defendant”) is the manufacturer, marketer  
5 and distributor of some of the most popular soft drinks in the world, including Pepsi, Diet Pepsi  
6 and Pepsi One (hereinafter, “Pepsi Beverages”). During the Class Period,<sup>1</sup> Pepsico knowingly and  
7 actively concealed the material fact that the Pepsi Beverages contain the toxic and cancer-causing  
8 chemical known as 4-Methylimidazole (“4-MEI”) at levels above the safety threshold set by the  
9 State of California in Proposition 65.<sup>2</sup>

10 2. On August 22, 2012, Pepsico acknowledged that Proposition 65 recognized 4-MEI  
11 as a chemical known to the State of California to cause cancer and promised its consumers that its  
12 work to meet the new requirements “has been completed in California.”<sup>3</sup> However, despite  
13 Pepsico’s promise to consumers that it had removed the cancer-causing chemical, Pepsi Beverages  
14 sold in California still contain 4-MEI in excess of Proposition 65’s threshold.

15 3. Defendant’s concealment and misrepresentations regarding the presence of 4-MEI  
16 in Pepsi Beverages constitute concealment of a material fact and material misrepresentations that  
17 induced Plaintiff and similarly situated Class members to purchase the Pepsi Beverages.

18 4. The fact that Pepsi Beverages contain 4-MEI is undeniably material to reasonable  
19 consumers, as even Pepsico has recognized that “[c]onsumers are clearly changing their habits,  
20 preferences and consumption patterns. Food safety and security are now front and center in the  
21 minds of governments and consumers . . . .”<sup>4</sup>

22 5. Plaintiff and similarly situated Class members did not know and could not have  
23 \_\_\_\_\_

24 <sup>1</sup> The Class Period is the period from March 7, 2010 to the present.

25 <sup>2</sup> Safe Drinking Water and Toxic Enforcement Act of 1986 (Cal. Health & Safety Code §§  
25249.5 *et seq.*) (“Proposition 65”).

26 <sup>3</sup> Pepsico, Caramel Coloring Press Release, *available at*  
27 [http://www.pepsico.com/Download/Caramel\\_Coloring.pdf](http://www.pepsico.com/Download/Caramel_Coloring.pdf) (last visited Jan. 30, 2013) (emphasis  
added).

28 <sup>4</sup> Pepsico, Inc., 2012 Annual Report, *available at* <http://www.pepsico.com/Investors/Annual-Reports-and-Proxy-Information>.

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1 been reasonably expected to know that the Pepsi Beverages contained 4-MEI. This Complaint  
2 does not allege a violation of Proposition 65. However, Proposition 65 is relevant to the extent it  
3 provides guidance as to a reasonable consumer’s purchasing decisions in California. Reasonable  
4 consumers purchased the Pepsi Beverages believing that they were in compliance with all relevant  
5 California regulations and safe according to California regulatory thresholds. Reasonable  
6 consumers would not have purchased the Pepsi Beverages had they known they contained 4-MEI  
7 in excess of the California safety threshold.

8 6. Plaintiff is filing this case as a class action on behalf of herself and all similarly  
9 situated purchasers of the Pepsi Beverages. Through this lawsuit, Plaintiff seeks to enjoin the sale  
10 of the Pepsi Beverages and obtain restitutionary and monetary relief for the thousands of Class  
11 members who have purchased the Pepsi Beverages and unwittingly been exposed to elevated  
12 levels of 4-MEI as a result of Defendant’s conduct.

13 **JURISDICTION AND VENUE**

14 7. This Court has jurisdiction over this matter pursuant to the Class Action Fairness  
15 Act, 28 U.S.C. §§ 1332(d), because the aggregate claims of the Class exceed the sum or value of  
16 \$5,000,000, and there is diversity of citizenship between proposed Class members and Defendant.  
17 This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

18 8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a) and (c).

19 9. A venue affidavit pursuant to California Civil Code § 1780(d) is attached hereto as  
20 Exhibit “A.”

21 **THE PARTIES**

22 10. Plaintiff Mary Hall, at all material times herein, was and still is a resident of  
23 Concord, California. During the Class Period, Ms. Hall purchased Pepsi, Pepsi One and Diet  
24 Pepsi. At the time of these purchases Plaintiff did not know nor could have reasonably known that  
25 the Pepsi Beverages she purchased contained 4-MEI in excess of the safety threshold in  
26 California. Plaintiff would not have purchased Pepsi, Diet Pepsi and Pepsi One had she known  
27 that the products contained 4-MEI in excess of the safety threshold in California.

28 11. Defendant Pepsico, Inc. is a North Carolina Corporation with its principal place of

1 business located at 700 Anderson Hill Road, Purchase, New York 10577. Pepsico made \$65  
2 billion in net revenue in 2012, with beverages representing 49% of that revenue. Also in 2012,  
3 Pepsico made over \$21 billion in beverages in the Americas alone. Pepsico’s roster of name brand  
4 snack and beverage products includes, but is not limited to, Pepsi, Diet Pepsi, Pepsi Max, Pepsi  
5 One, Tropicana, Lay’s, Ruffles, Gatorade, Doritos, 7-Up, Mountain Dew, Doritos, Sierra Mist and  
6 Fritos. During the Class Period Defendant has conducted substantial business in the State of  
7 California.

8 **FACTUAL ALLEGATIONS**

9 12. Pepsico is an international producer of some of the most popular soft drinks and  
10 snack foods in the United States and throughout the world.

11 13. Pepsico manufactures, markets, distributes and sells dark sodas, including Pepsi,  
12 Diet Pepsi and Pepsi One, which contain caramel coloring that gives the sodas the dark brown  
13 color familiar to consumers.

14 14. Caramel colorings are manufactured in several ways. Soft drinks with caramel  
15 coloring are generally manufactured with Caramel Color IV. Caramel Color IV is produced by  
16 using an ammonia or ammonia-sulfate process. During this process, 4-Methylimidazole (also  
17 known as 4-MEI) can be produced as a by-product. The by-product is widely used in the  
18 manufacture of various industrial chemicals and products.

19 15. The caramel coloring used in the Pepsi Beverages is Caramel Color IV, which  
20 contains a high level of 4-MEI.

21 16. According to the International Agency for Research on Cancer (IARC)  
22 Monographs, 4-MEI does not occur in nature, and human exposure results from caramel coloring  
23 in food and beverages as well as cigarette smoke. The IARC contends that “there is sufficient  
24 evidence in experimental animals for the carcinogenicity of 4-methylimidazole.”

25 17. In 2007, the National Toxicology Program published the results of a two-year study  
26 that evaluated the effects of long-term exposure to 4-MEI in mice and rats. The study resulted in  
27 “clear evidence” of increased cancer in mice as well as “equivocal evidence” of increased cancer  
28 in female rats.

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1 18. The California Environmental Protection Agency, Office of Environmental Health  
 2 Hazard Assessment (OEHHA), listed 4-MEI as a chemical known to the State of California to  
 3 cause cancer under Proposition 65 on January 7, 2011. The listing of 4-MEI was “based on [the  
 4 National Toxicology Program’s] findings of clear evidence of carcinogenicity in its studies  
 5 showing the development of lung cancer in male mice and female mice from 4-MEI exposure.”<sup>5</sup>

6 19. Proposition 65 establishes a “No Significant Risk Level” (NSRL), which is defined  
 7 as the level of exposure that is calculated to result in no more than one excess case of cancer in an  
 8 exposed population of 100,000, assuming exposure over a 70 year lifespan. The NSRL has  
 9 determined the human cancer potency of 4-MEI to be at 29 micrograms per day.<sup>6</sup>

10 20. According to Proposition 65, businesses must provide a warning if they  
 11 manufacture or sell products in California that cause exposures of amounts of 4-MEI that exceed  
 12 the NSRL. If businesses manufacture or sell a product in California that has a higher than  
 13 allowable limit of 4-MEI, they “risk civil lawsuits brought by state or local prosecutors or  
 14 members of the public.”<sup>7</sup>

15 21. Indeed, in its Annual Reports from at least 2010 to 2012, Pepsico recognized it  
 16 must comply with Proposition 65 in California:

17 We are also subject to Proposition 65 in California, a law which requires that a  
 18 specific warning appear on any product sold in California that contains a substance  
 19 listed by that State as having been found to cause cancer or birth defects. If we  
 20 were required to add warning labels to any of our products or place warnings in  
 certain locations where our products are sold, sales of those products could suffer  
 not only in those locations but elsewhere.<sup>8</sup>

21 22. In response to the inclusion of 4-MEI on the Proposition 65 list of cancer-causing  
 22 chemicals, and acutely aware of the negative impact a warning label could have on its sales,  
 23 \_\_\_\_\_

24 <sup>5</sup> Cal. Envntl. Prot. Agency, Office of Envntl. Health Hazard Assessment, *No Significant Risk Level*  
 25 *(NSRL) For the Proposition 65 Carcinogen 4-Methylimidazole* (2011), available at  
[http://www.catagle.com/106-1/100711\\_4MEIfindings.htm](http://www.catagle.com/106-1/100711_4MEIfindings.htm).

26 <sup>6</sup> *Id.*

27 <sup>7</sup> Office of Envntl. Health Hazard Assessment,  
[http://oehha.ca.gov/public\\_info/facts/4MEIfacts\\_021012.html](http://oehha.ca.gov/public_info/facts/4MEIfacts_021012.html) (last visited Jan. 30, 2014).

28 <sup>8</sup> Pepsico Annual Report 2010, 2011, 2012 available at  
<http://www.pepsico.com/Investors/Annual-Reports-and-Proxy-Information>.

1 PepsiCo feigned action and released a public statement on August 22, 2012, which stated in  
2 relevant part:

3 “[W]hen the regulatory requirements on 4-MEI changed in California, PepsiCo  
4 moved immediately to meet the new requirements and in order to maintain a  
5 harmonized supply chain globally committed to rolling out the changes across the  
6 rest of the U.S. and internationally. **The work has been completed in California**  
and several other U.S. states, and we are on track to complete the roll out by  
February 2014.”<sup>9</sup>

7 23. To the detriment of consumers, PepsiCo’s promise that as of August 22, 2012, the  
8 Pepsi Beverages no longer contained 4-MEI at levels in excess of the NSRL was false and  
9 misleading. In fact, PepsiCo concealed that the Pepsi Beverages sold in California still contained—  
10 and continue to contain up until the time of this action—4-MEI at levels in excess of the NSRL.

11 24. Evidence of PepsiCo’s mass deception was uncovered vis-à-vis the results of  
12 Consumer Reports’ testing of the 4-MEI levels in Pepsi Beverages found in California.

13 25. Specifically, on January 23, 2014, Consumer Reports reported that it conducted  
14 tests on the presence of 4-MEI in Pepsi, Diet Pepsi, and Pepsi One on products purchased in  
15 California in April 2013 and in December 2013. Consumer Reports found the amount of 4-MEI  
16 contained in the Pepsi Beverages to be well in excess of the 29 micrograms allowed per can or  
17 bottle and concluded that the results present serious health risks to consumers.

18 26. Specifically, Consumer Reports found that Diet Pepsi contained 30.5 micrograms  
19 of 4-MEI in April-September 2013. It found that Pepsi One contained 43.5 micrograms of 4-MEI  
20 in April-September 2013 and 39.5 micrograms of 4-MEI in December 2013.<sup>10</sup>

21 27. The amounts of 4-MEI in the Pepsi Beverages were considerably higher than  
22 PepsiCo’s primary competitor, Coca-Cola, whose Coke, Diet Coke and Coke Zero brand sodas  
23 tested by Consumer Reports all tested at levels at or below 29 micrograms.

24 \_\_\_\_\_  
25 <sup>9</sup> PepsiCo, Caramel Coloring Press Release, *available at*  
26 [http://www.pepsico.com/Download/Caramel\\_Coloring.pdf](http://www.pepsico.com/Download/Caramel_Coloring.pdf) (last visited Jan. 30, 2013) (emphasis  
added).

27 <sup>10</sup> Consumer Reports, *Caramel color: The health risk that may be in your soda*, *available at*  
28 <http://www.consumerreports.org/cro/news/2014/01/caramel-color-the-health-risk-that-may-be-in-your-soda/index.htm> (last visited Jan. 30, 2014).

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1 28. Plaintiff is informed, believes and thereon alleges that Pepsico had actual and  
2 constructive knowledge that the Pepsi Beverages contained 4-MEI in excess of the levels  
3 permissible under Proposition 65, in direct contravention of its public statements to consumers.  
4 Despite this knowledge, Pepsico actively concealed the presence of 4-MEI in the Pepsi Beverages  
5 and failed and refused to include a warning, listing or other disclosure of the presence of 4-MEI on  
6 its website, advertisements or on any of its Pepsi Beverages.

7 29. Proposition 65 provides guidance as to a reasonable consumer’s purchasing  
8 decisions in California. Reasonable consumers purchased the Pepsi Beverages believing that they  
9 were in compliance with all relevant California regulations and safe according to California  
10 regulatory thresholds. Reasonable consumers would not have purchased Pepsi Beverages had they  
11 known they contained 4-MEI in excess of the NSRL.

12 30. The presence of a toxic chemical, such as 4-MEI, in consumer products is a  
13 material fact which a reasonable person would attach importance to in choosing whether or not to  
14 purchase the Pepsi Beverages. This is especially true in light of the existence and availability of  
15 caramel coloring substitutes that do not contain 4-MEI.

16 31. Plaintiff and other members of the Class will continue to suffer injury if Pepsico’s  
17 deceptive conduct is not enjoined. Furthermore, Plaintiff and other members of the Class have  
18 been damaged in that they paid money for Pepsi Beverages that they would not have purchased or  
19 paid a premium price for had they known the truth.

20 **RULE 9(b) ALLEGATIONS**

21 32. Federal Rule of Civil Procedure (“Rule”) 9(b) provides that “[i]n alleging fraud or  
22 mistake, a party must state with particularity the circumstances constituting fraud or mistake.”  
23 Fed. R. Civ. P. 9(b). As detailed in the paragraphs above, Plaintiff has satisfied the requirements  
24 of Rule 9(b) by establishing the following elements with sufficient particularity in this Complaint:

25 33. WHO: Defendant Pepsico made material misrepresentations and failed to disclose,  
26 or adequately disclose, material facts regarding the presence and amount of 4-MEI in the Pepsi  
27 Beverages as detailed herein. Except as identified herein, Plaintiff is unaware, and therefore  
28 unable to identify, the true names and identities of those individuals at Pepsico who are

1 responsible for such material misrepresentations and/or omissions.

2 34. WHAT: Defendant made material misrepresentations regarding the presence and  
3 amount of 4-MEI contained in the Pepsi Beverages, and concealed and omitted the presence and  
4 amount of 4-MEI contained in the Pepsi Beverages. Defendant's misrepresentations were material  
5 because a reasonable consumer would not have purchased the Pepsi Beverages if he/she knew that  
6 Defendant's representations were false and/or misleading.

7 35. WHEN: Defendant made the material misrepresentations, omissions, and non-  
8 disclosures detailed herein continuously during the Class Period.

9 36. WHERE: Defendant's material misrepresentations, omissions, and non-disclosures  
10 detailed herein were made, inter alia, on the advertising and labeling for the Pepsi Beverages, and  
11 in public statements distributed on Defendant's website as well as other media.

12 37. HOW: Defendant made material and repeated misrepresentations and omissions  
13 regarding the presence and amount of 4-MEI in the Pepsi Beverages in its advertising and labeling  
14 for the Pepsi Beverages and in public statements on Defendant's website as well as other media.

15 38. WHY: Defendant made material misrepresentations, omissions, and non-  
16 disclosures detailed herein for the express purpose of inducing Plaintiff and other reasonable  
17 consumers to purchase the Pepsi Beverages. Defendant profited by selling its Pepsi Beverages to  
18 thousands of unsuspecting California consumers.

19 **CLASS ALLEGATIONS**

20 39. Plaintiff brings this action individually and as a class action on behalf of the  
21 following Class:

22 All individuals residing in the State of California who purchased  
23 Pepsi, Diet Pepsi or Pepsi One for personal use and not for resale  
24 during the four years preceding the filing of this Complaint.  
25 Excluded from the Class are Defendant, its parent companies,  
26 subsidiaries and affiliates, any co-conspirators, all governmental  
27 entities, and any judges or justices assigned to hear any aspect of  
28 this action.

40. Plaintiff reserves the right to re-define the Class prior to certification.

41. This action is brought and may properly be maintained as a class action pursuant to  
Federal Rule of Civil Procedure 23. This action satisfies the numerosity, typicality, adequacy,



1 predominance and superiority requirements of those provisions.

2       42.     The Class is so numerous that the individual joinder of all of its members is  
3 impracticable. The exact number and identities of Class members are unknown to Plaintiff at this  
4 time and can only be ascertained through appropriate discovery.

5       43.     Common questions of law and fact exist as to all members of the Class which  
6 predominate over any questions affecting only individual members of the Class. These common  
7 legal and factual questions, which do not vary from Class member to Class member, and which  
8 may be determined without reference to the individual circumstances of any Class member  
9 include, but are not limited to, the following:

- 10           a.     Whether Defendant concealed that the Pepsi Beverages contained levels of  
11                   4-MEI in excess of the NSRL;
- 12           b.     Whether Defendant's concealment, omissions and misrepresentations were  
13                   material to reasonable consumers;
- 14           c.     Whether Defendant engaged in conduct which constitutes negligent  
15                   misrepresentation;
- 16           d.     Whether Defendant's conduct constitutes an unfair, unlawful and/or  
17                   fraudulent business practice (Cal. Bus. & Prof. Code §§ 17200 *et seq.*);
- 18           e.     Whether Defendant's conduct constitutes a violation of the Consumers  
19                   Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*);
- 20           f.     Whether Plaintiff and the Class are entitled to compensatory damages, and  
21                   if so, the nature of such damages;
- 22           g.     Whether Plaintiff and the Class are entitled to restitutionary relief; and
- 23           h.     Whether Plaintiff and the Class are entitled to injunctive relief.

24       44.     Plaintiff's claims are typical of the claims of the members of the Class, and the  
25 representative Plaintiff's interests coincide with and are not antagonistic to those of the other Class  
26 members she seeks to represent.

27       45.     Plaintiff and all members of the Class have sustained damages and are facing  
28 irreparable harm arising out of Defendant's common course of conduct as complained of herein.

1 The damages of each member of the Class were caused directly by Defendant's wrongful conduct  
2 as alleged herein.

3 46. Plaintiff will fairly and adequately protect the interests of the members of the Class.  
4 Plaintiff has retained attorneys experienced in the prosecution of class actions, including complex  
5 employment, consumer and product defect class actions, and Plaintiff intends to prosecute this  
6 action vigorously.

7 47. A class action is superior to other available methods for the fair and efficient  
8 adjudication of this controversy, since individual litigation of the claims of all Class members is  
9 impracticable. Even if every Class member could afford individual litigation, the court system  
10 could not. It would be unduly burdensome to the courts in which individual litigation of numerous  
11 cases would proceed. Individualized litigation would also present the potential for varying,  
12 inconsistent, or contradictory judgments and would magnify the delay and expense to all parties  
13 and to the court system resulting from multiple trials of the same complex factual issues. By  
14 contrast, the conduct of this action as a class action, with respect to some or all of the issues  
15 presented herein, presents fewer management difficulties, conserves the resources of the parties  
16 and of the court system, and protects the rights of each Class member.

17 48. The prosecution of separate actions by individual Class members may create a risk  
18 of adjudications with respect to them that would, as a practical matter, be dispositive of the  
19 interests of the other Class members not parties to such adjudications, or that would substantially  
20 impair or impede the ability of such non-party Class members to protect their interests.

21 49. Individual actions by Class members would establish incompatible standards of  
22 conduct for Defendant.

23 50. Defendant has acted or refused to act in respects generally applicable to the Class,  
24 thereby making appropriate final and injunctive relief with regard to the members of the Class as a  
25 whole, as requested herein.

26 51. Pursuant to California Code of Civil Procedure § 1021.5, Plaintiff and the Class  
27 seek reasonable attorneys' fees as this lawsuit seeks the enforcement of an important right  
28 affecting the public interest and satisfies the statutory requirements for an award of attorneys' fees.

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**FIRST CAUSE OF ACTION**  
**VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**  
**(CAL. CIV. CODE §§ 1750 ET SEQ.)**  
**(Plaintiff and the Class Against Defendant)**  
**(Injunctive Relief Only)**

52. Plaintiff and the Class incorporate by reference the allegations of the preceding paragraphs of this Complaint as if set forth in full herein.

53. Defendant has engaged in and continues to engage in business practices in violation of California Civil Code §§ 1750 *et seq.* (the “Consumers Legal Remedies Act”) by making false and unsubstantiated representations concerning the safety, composition and quality of the Pepsi Beverages. Furthermore, Defendant has actively concealed and failed to disclose that the Pepsi Beverages contain 4-MEI, knowing that such information is material to a reasonable consumer’s purchasing decision. These business practices are misleading and/or likely to mislead consumers and should be enjoined.

54. Defendant has engaged in deceptive acts or practices intended to result in the sale the Pepsi Beverages violation of California Civil Code § 1770. Defendant knew and/or should have known that its representations and concealments of material fact concerning the characteristics, composition and quality of the Pepsi Beverages were material and likely to mislead the public. Specifically, Defendant failed to disclose that the Pepsi Beverages contained elevated toxic and unsafe chemicals, including but not limited to, 4-MEI.

55. Defendant’s conduct alleged herein violates the Consumers Legal Remedies Act, including but not limited to, the following provisions: (1) using deceptive representations in connection with goods or services in violation of California Civil Code § 1770(a)(4); (2) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have in violation of Cal. Civ. Code § 1770(a)(5); and/or (3) advertising goods or services with intent not to sell them as advertised in violation of Cal. Civ. Code § 1770(a)(9). As a direct and proximate result of Defendant’s conduct, as set forth herein, Defendant has received ill-gotten gains and/or profits including, but not limited to, money.

1 Therefore, Defendant has been unjustly enriched.

2 56. There is no other adequate remedy at law, and Plaintiff and the Class will suffer  
3 irreparable harm unless Defendant's conduct is enjoined.

4 57. Pursuant to California Civil Code §1780(d), Plaintiff requests that this Court  
5 enjoin Defendant from continuing to employ the unlawful methods, acts, and practices alleged  
6 herein. If Defendant is not restrained from engaging in these types of practices in the future,  
7 Plaintiff and other members of the Class will continue to suffer harm.

8 58. This cause of action does not, at this point, seek monetary damages, but is  
9 confined solely to injunctive relief. On March 3, 2014, counsel for Plaintiff and the Class  
10 provided Defendant with written notice that its conduct is in violation of the Consumers Legal  
11 Remedies Act. Plaintiff and the Class will amend their Complaint after thirty (30) days of having  
12 provided this notice to seek damages under the Consumer Legal Remedies Act. *See* Cal. Civ.  
13 Code § 1782(d).

14 59. Regardless of an award of damages, Plaintiff also separately seeks and is entitled  
15 to, pursuant to section 1780(d) of the CLRA, an order for the equitable relief described above, as  
16 well as costs, attorneys' fees and any other relief which the Court deems proper.

17 **SECOND CAUSE OF ACTION**

18 **NEGLIGENT MISREPRESENTATION**

19 **(Plaintiff and the Class Against Defendant)**

20 60. Plaintiff and the Class incorporate by reference the allegations of the preceding  
21 paragraphs of this Complaint as if set forth in full herein.

22 61. During the Class Period Defendant represented to California consumers through the  
23 advertising, marketing and sale of its Pepsi Beverages that the Pepsi Beverages did not contain 4-  
24 MEI, knowing that such information is material to a reasonable consumer's purchasing decision

25 62. Defendant's representations regarding the characteristics of the Pepsi Beverages  
26 were false because the Pepsi Beverages were contaminated with levels of 4-MEI in excess of those  
27 allowable under Proposition 65.

28 63. Defendant's misrepresentations regarding the characteristics of the Pepsi Beverages

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1 were material because a reasonable consumer would attach importance to them in determining  
2 whether to purchase and consume Defendant's products.

3 64. Defendant's material misrepresentations concerning the safety and quality of the  
4 Pepsi Beverages were false and made without reasonable grounds for believing them to be true.

5 65. Defendant made material misrepresentations concerning the safety and quality of  
6 the Pepsi Beverages with the intent to induce Plaintiff and the Class to purchase and consume the  
7 Pepsi Beverages.

8 66. Plaintiff and the Class reasonably and materially relied on Defendant's material  
9 misrepresentations in choosing to purchase and consume Defendant's Pepsi Beverages.

10 67. As a direct and proximate result of Defendant's conduct, Plaintiff and the Class  
11 have incurred damages in an amount to be proven at trial. Plaintiff and the Class are not seeking  
12 damages arising out of personal injuries.

13 **THIRD CAUSE OF ACTION**

14 **UNLAWFUL, FRAUDULENT & UNFAIR BUSINESS PRACTICES**

15 **(CAL. BUS. & PROF. §§ 17200 ET SEQ.)**

16 **(Plaintiff and the Class Against Defendant)**

17 68. Plaintiff incorporates by reference the preceding paragraphs of this Complaint as  
18 though fully set forth herein.

19 69. Plaintiff is informed and believes, and thereon alleges that Defendant's actions as  
20 described herein constitute unfair competition within the meaning of California's Unfair  
21 Competition Law ("UCL"), insofar as the UCL prohibits "any unlawful, unfair or fraudulent  
22 business act or practice" or "unfair, deceptive, untrue or misleading advertising."

23 70. Defendant has unfairly and fraudulently made false and unsubstantiated  
24 representations concerning the safety, effectiveness and quality of the Pepsi Beverages without  
25 having any reasonable basis for doing so. Furthermore, Defendant has materially misrepresented  
26 and concealed the presence of dangerous and toxic contaminants contained in the Pepsi Beverages.  
27 Reasonable consumers purchased the Pepsi Beverages believing that they were in compliance with  
28 all relevant California regulations and safe according to California regulatory thresholds.

1 Reasonable consumers would not have purchased the Pepsi Beverages had they known they  
2 contained 4-MEI.

3 71. Defendant’s conduct constitutes an “unfair” business practice within the meaning  
4 of the UCL insofar as Defendant’s business practices alleged herein are immoral, unethical,  
5 oppressive, unscrupulous and/or substantially injurious to consumers.

6 72. Defendant’s conduct constitutes a “fraudulent” business practice within the  
7 context of the UCL insofar as Defendant’s misrepresentations and omissions regarding the safety,  
8 efficacy and quality of its Pepsi Beverages are likely to deceive members of the public.

9 73. These above-described unlawful, unfair and fraudulent business practices and  
10 unfair competition by Defendant continues to present a threat to Plaintiff and the Class. Plaintiff  
11 is informed and believes, and thereon alleges, that Defendant has systematically perpetrated  
12 deceptive and unfair practices upon members of the public and has intentionally deceived Plaintiff  
13 and the Class.

14 74. Defendant’s refusal to stop concealing the truth and making the aforementioned  
15 unsubstantiated representations concerning the safety, risks and qualities of Defendant’s Pepsi  
16 Beverages constitutes a continuing and ongoing unlawful activity prohibited by the UCL, and  
17 justifies the issuance of an injunction requiring Defendant to act in accordance with the law.

18 75. As a direct and proximate result of Defendant’s unlawful, fraudulent and unfair  
19 business practices in violation of the UCL, Plaintiff and the Class have suffered injury in fact and  
20 have suffered economic harm by losing money as a result of purchasing Defendant’s Pepsi  
21 Beverages.

22 Defendant has been unjustly enriched as a result of money collected through the sale of the Pepsi  
23 Beverages. As a result of the aforementioned conduct, Plaintiff and the Class are entitled to  
24 monetary restitution and restitutionary disgorgement of profits.///

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PEARSON, SIMON & WARSHAW, LLP  
15165 VENTURA BOULEVARD, SUITE 400  
SHERMAN OAKS, CALIFORNIA 91403

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of herself and all other similarly situated, prays for relief and judgment against Defendant, as follows:

1. For an order certifying the Class, and appointing Plaintiff and her counsel to represent the Class;
2. For damages suffered by Plaintiff and the Class;
3. For restitution to Plaintiff and the Class of all monies wrongfully obtained by Defendant;
4. For preliminary and injunctive relief requiring Defendant to accurately represent the qualities of the Pepsi Beverages;
5. For reasonable attorneys' fees as permitted under the applicable statutes;
6. For Plaintiff's costs incurred;
7. For prejudgment interest; and
8. For such other and further relief which the court deems just and proper.

PEARSON, SIMON & WARSHAW, LLP  
15165 VENTURA BOULEVARD, SUITE 400  
SHERMAN OAKS, CALIFORNIA 91403

**PEARSON, SIMON & WARSHAW, LLP**  
BRUCE L. SIMON  
DANIEL L. WARSHAW  
BOBBY POUYA

DATED: March 7, 2014

By:           /s/ Daniel L. Warshaw            
DANIEL L. WARSHAW

Counsel for Plaintiff and the putative Class

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**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury of all of the claims asserted in this Complaint so triable.

**PEARSON, SIMON & WARSHAW, LLP**  
BRUCE L. SIMON  
DANIEL L. WARSHAW  
BOBBY POUYA

DATED: March 7, 2014

By:           /s/ Daniel L. Warshaw            
DANIEL L. WARSHAW

Counsel for Plaintiff and the putative Class

PEARSON, SIMON & WARSHAW, LLP  
15165 VENTURA BOULEVARD, SUITE 400  
SHERMAN OAKS, CALIFORNIA 91403



# EXHIBIT A

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**EXHIBIT "A"**

**AFFIDAVIT OF DANIEL L. WARSHAW**

**PURSUANT TO CALIFORNIA CIVIL CODE § 1780**

Daniel L. Warshaw declares:

1. I am an attorney duly admitted to practice before this Court. I am a partner in the law firm of Pearson, Simon & Warshaw, LLP, attorneys of record for Plaintiff Mary Hall.

2. I am one of the attorneys principally responsible for the handling of this matter. I am personally familiar with the facts set forth in this declaration. If called as a witness, I could and would competently testify to the matters stated herein.

3. This action has been commenced in a county described in California Civil Code § 1780 as a proper place for the trial of the action. The transactions or a substantial portion thereof occurred in San Francisco County, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 7, 2014, at Sherman Oaks, California.

/s/ Daniel L. Warshaw  
Daniel L. Warshaw

PEARSON, SIMON & WARSHAW, LLP  
15165 VENTURA BOULEVARD, SUITE 400  
SHERMAN OAKS, CALIFORNIA 91403

CIVIL COVER SHEET

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

I. (a) PLAINTIFFS
MARY HALL, on behalf of herself and all others similarly situated
(b) County of Residence of First Listed Plaintiff Contra Costa County, CA
(c) Attorneys (Firm Name, Address, and Telephone Number)
Daniel L. Warshaw (Bar No. 185365); Bobby Pouya (Bar No. 245527)
PEARSON, SIMON & WARSHAW, LLP (818) 788-8300
15165 Ventura Blvd., Ste. 400, Sherman Oaks, CA 91403

DEFENDANTS
PEPSICO, INC., a North Carolina corporation
County of Residence of First Listed Defendant Westchester County, NY
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
PTF DEF
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IV. NATURE OF SUIT (Place an "X" in One Box Only)
Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

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

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)
Brief description of cause:
Violation of California's Unfair Competition Law, California's Consumers Legal Remedies Act & Misrepresentation

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

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE Edward M. Chen DOCKET NUMBER C14-00478 EMC

DATE 03/05/2014 SIGNATURE OF ATTORNEY OF RECORD /s/ Daniel L. Warshaw

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

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.