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

Case No.: 17-cv-5921

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

Plaintiff,

v.

DR. PEPPER SNAPPLE GROUP, INC.,

Defendant.

CLASS ACTION

**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 Plaintiff Shana Becerra, on behalf of herself, all others similarly situated, and the
2 general public, by and through her undersigned counsel, hereby brings this action against Dr.
3 Pepper Snapple Group, Inc. (“DPSG”), and alleges the following upon her own knowledge,
4 or where she lacks personal knowledge, upon information and belief including the
5 investigation of her counsel.

6 **INTRODUCTION**

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

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

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

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

19 **INTRADISTRICT ASSIGNMENT**

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

24 **THE PARTIES**

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

26 7. Dr. Pepper Snapple Group, Inc. is a Delaware corporation with its principal
27 place of business at 5301 Legacy Drive, Plano, Texas 75024.

JURISDICTION AND VENUE

1
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, at least one member of the class
5 of plaintiffs is a citizen of a State different from DPSG. In addition, more than two-thirds of
6 the members of the class reside in states other than the state in which Defendant is a citizen
7 and in which this case is filed, and therefore any exceptions to jurisdiction under 28 U.S.C. §
8 1332(d) do not apply.

9 9. The Court has personal jurisdiction over DPSG pursuant to Cal. Code Civ. P. §
10 410.10, as a result of DPSG’s substantial, continuous and systematic contacts with the State,
11 and because DPSG 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 DPSG 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. DPSG uses the term “diet” in Diet Dr. Pepper, on both its label and in
21 advertising.

22 12. Dictionary definitions of the term “diet” commonly refer to weight loss.

23 13. DPSG uses the term “diet” to market Diet Dr. Pepper because the product is
24 sweetened with a non-caloric artificial sweetener, aspartame, rather than sugar. Because a
25 representation that a product is “diet” inherently and necessarily implies it will assist in
26 weight loss, DPSG’s implicit promise is that, because Diet Dr. Pepper does not contain
27 calories, it will assist in weight loss, or at least health weight management, *i.e.*, will not cause
28 weight gain (in the same way that drinking water could not possibly result in weight gain).

1 14. 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.

4 **B. Aspartame Causes Weight Gain**

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

8 16. Although aspartame does not contain calories, scientific research demonstrates
9 that it, like other nonnutritive sweeteners, is likely to cause weight gain.

10 17. A 2009 review article found that the “addition of [nonnutritive sweeteners] to
11 diet poses no benefit for weight loss or reduced weight gain without energy restriction,” and
12 noted “long-standing and recent concerns that inclusion of [nonnutritive sweeteners] in the
13 diet promotes energy intake and contributes to obesity.”¹

14 18. Another review article, in 2010, found that “[d]ata from large, epidemiologic
15 studies support the existence of an association between artificially-sweetened beverage
16 consumption and weight gain in children.”²

17 19. Another review article from 2010 said “research studies suggest that artificial
18 sweeteners may contribute to weight gain.”³

19 20. A 2013 review article by a federally-funded Purdue University researcher, Susan
20 E. Swithers, assessed differences between diet soda consumers and non-consumers among
21

22 ¹ Mattes RD, et al., “Nonnutritive Sweetener Consumption in Humans: Effects on Appetite
23 and Food Intake and Their Putative Mechanisms.” *Am. J. Clin. Nutr.*, Vol. 89, No. 1, pp. 1-
24 14 (Jan. 2009).

25 ² Brown RJ, et al., “Artificial Sweeteners: a Systematic Review of Metabolic Effects in
26 Youth.” *Int’l J. of Ped. Obesity*, Vol. 5, No. 4, pp. 305-12 (Aug. 2010).

27 ³ Yang, Q., “Gain Weight by ‘Going Diet?’ Artificial Sweeteners and the Neurobiology of
28 Sugar Cravings.” *Yale J. of Bio. & Med.*, Vol. 83, No. 2, pp. 101-108 (June 2010) [hereinafter
“Yang”].

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

13 21. A 2014 study found that “consumption of commonly used [non-caloric artificial
14 sweetener] formulations drives the development of glucose intolerance through induction of
15 compositional and functional alterations to the intestinal microbiota,” and because of this
16 “link [between] [non-caloric artificial sweetener] consumption, symbiosis and metabolic
17 abnormalities,” found that artificial sweeteners “may have directly contributed to enhancing
18 the exact epidemic that they themselves were intended to fight.”⁵

19 22. In 2015, researchers reported “a striking dose-response relationship,” wherein
20 “increasing [diet soda intake] was associated with escalating abdominal obesity, a pathway
21 for cardiometabolic risk,” and noted that “[h]igh incidences of overweight and obesity,
22 hypertension, metabolic syndrome, diabetes mellitus, kidney dysfunction, heart attack, and
23

24
25 ⁴ Swithers, SE, “Artificial Sweeteners Produce the Counterintuitive Effect of Inducing
26 Metabolic Derangements.” *Trends in Endocrinology & Metab.*, Vol. 24, No. 9, pp. 431-41
(Sept. 2013).

27 ⁵ Suez J, et al., “Artificial Sweeteners Induce Glucose Intolerance by Altering the Gut
28 Microbiota.” *Nature*, pp.181-86 (Oct. 2014).

1 hemorrhagic stroke have all recently been associated with frequent [nonnutritive sweetener
2 intake] and [diet soda intake].”⁶

3 23. Epidemiological studies also implicate artificial sweeteners in causing weight
4 gain. For example, the San Antonio Heart Study “observed a class, positive dose-response
5 relationship between [artificially sweetened] beverage consumption and long-term weight
6 gain,” and found that consuming more than 21 artificially sweetened beverages per week,
7 compared to those who consumed none, “was associated with almost-doubled risk” of
8 overweight or obesity.⁷

9 24. A study of beverage consumption among children and adolescents aged 6-19
10 found that “BMI is positively associated with consumption of diet carbonated beverages.”⁸

11 25. A two-year study of 164 children found that “[i]ncreases in diet soda
12 consumption were significantly greater for overweight and subjects who gained weight as
13 compared to normal weight subjects.”⁹

14 26. A July 2017 study found that artificial sweeteners did not lead to any significant
15 weight loss in more than 1,000 participants in seven clinical trials. At the same time,
16 combined data from 30 observational studies involving more than 400,000 participants
17

18
19 ⁶ Fowler, S, et al., “Diet Soda Intake is Associated with Long-Term Increases in Waist
20 Circumference in a Biethnic Cohort of Older Adults: The San Antonio Longitudinal Study of
Aging.” *J. of the Am. Geriatrics Society* (March 17, 2015).

21 ⁷ Fowler, S, et al., “Fueling the Obesity Epidemic? Artificially Sweetened Beverage Use and
22 Long-Term Weight Gain.” *Obesity*, Vol. 16, No. 8, pp. 1894-900 (Aug. 2008).

23 ⁸ Forshee RA, et al., “Total Beverage Consumption and Beverage Choices Among Children
24 and Adolescents.” *Int’l J. of Food Sci. & Nutr.*, Vol. 54, No. 4, pp. 297-307 (July 2003); *see*
25 *also* Berkey CS, et al., “Sugar-Added Beverage and Adolescent Weight Change.” *Obesity*
26 *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”).

27 ⁹ Blum, JW, et al., “Beverage Consumption Patterns in Elementary School Aged Children
28 Across a Two-Year Period.” *J. of Am. Coll. of Nutr.*, Vol. 24, No. 2, pp. 93-98 (Apr. 2005).

1 showed that artificial sweeteners are associated with obesity, high blood pressure, type 2
2 diabetes and heart health problems.¹⁰

3 27. A study published in August 2017 suggested artificial sweetener use increases
4 the risk of type 2 diabetes by 21%, which is about half the increased risk seen with sugar-
5 sweetened beverage use, at 43%.¹¹ Another study indicates daily diet soda consumption is
6 associated with a 36% increase in risk of metabolic syndrome, and a 67% increase in risk of
7 type 2 diabetes compared with non-drinkers.¹²

8 28. Recent research, published in August 2017, suggests the likely mechanism of
9 the counterintuitive effect of non-caloric sweeteners contributing to weight gain and other
10 chronic, metabolic illness.

11 29. In nature, sweetness signals energy. Generally, the greater the sweetness, the
12 more calories that are available, so the human brain has evolved to expect the two to come
13 together. When they do not, the brain can become confused, thinking there are fewer calories
14 to burn. That is, artificial sweeteners, including aspartame, appear to promote weight gain,
15 and to trigger metabolic syndrome and diabetes, because the brain misreads the number of
16 calories present and reduces metabolism, resulting in more calories being stored in the body
17 as fat.

18 30. This recent research came about when Yale University researcher Dana Small
19 set out to determine whether the rewarding character of sweet foods was due to the calories
20

21 ¹⁰ Azad, MB, et al., “Nonnutrative sweeteners and cardiometabolic health: a systematic review
22 and meta-analysis of randomized controlled trials and prospective cohort studies.” *Canadian
23 Medical Association Journal*, Vol. 189, No. 28, pp. E929-E939 (July 17, 2017).

24 ¹¹ Huang, M, et al., “Artificially sweetened beverages, sugar-sweetened beverages, plain
25 water, and incident diabetes mellitus in postmenopausal women: the prospective Women’s
26 Health Initiative observational study.” *Am. J. Clin. Nutr.*, Vol. 106, No. 2, pp. 614-22 (Aug.
27 2017).

28 ¹² Nettleton, JA, et al., “Diet soda intake and risk of incident metabolic syndrome and type 2
diabetes in Multi-Ethnic Study of Artherosclerosis (MESA).” *Diabetes Care*, Vol. 32, No. 4,
pp. 688-94 (Apr. 2009).

1 those foods contain. Small created five beverages. Each was sweetened with sucralose, an
2 artificial sweetener, to taste about as sweet as a drink containing about 75 calories of sugar.
3 Small then varied the calories by adding different amounts of a tasteless carbohydrate called
4 maltodextrin, so that the five beverages contained 0, 27.5, 75, 112.5, and 150 calories. After
5 subjects consumed each drink six times over a period of weeks, Small scanned their brains to
6 see how each affected brain reward circuits, expecting that the higher-calorie drinks would
7 stimulate a stronger reward response. However, the most “reinforcing” drink was the 75
8 calorie one, which stimulated a stronger brain response than both the 0 calorie and 150 calorie
9 drinks.¹³

10 31. This research led Small to test the body’s metabolic response, which is the
11 energy the body expends to process calories. The results repeated themselves, with the
12 metabolic response to the high-calorie drink lower than the metabolic response to the
13 medium-calorie drink. Thus, the researchers found that when there was a “mismatch”
14 between sweetness and calories present, the calories present fail to trigger the body’s
15 metabolism. In addition, reward circuits in the brain did not register that calories had been
16 consumed.¹⁴

17 32. This research demonstrates that sweetness plays a role in how the body responds
18 to food, inasmuch as it regulates the metabolic signal.

19 33. In sum, calories consumed in a mismatched condition, such as when a person
20 drinks a Diet Dr. Pepper while eating food, are not efficiently metabolized at the time of
21 ingestion, and may therefore be processed later, or stored, which can drive weight gain and
22 further interfere with metabolism.

23
24
25
26 ¹³ See Veldhuizen, MG, et al., “Integration of Sweet Taste and Metabolism Determines
27 Carbohydrate Reward.” *Current Biology*, Vol. 27, Issue 16, pp. 2476-85 (Aug. 2017).

28 ¹⁴ See *id.*

1 34. In addition, some research has shown that sweetness—whether from sugar or
 2 non-caloric, artificial sources—increases appetite, which can lead to weight gain.¹⁵
 3 Moreover, “[i]nconsistent coupling between sweet taste and caloric content can lead to
 4 compensatory overeating and positive energy balance.”¹⁶

DPSG’S UNLAWFUL ACTS

A. DPSG Misleadingly Marketed Diet Dr. Pepper as Promoting Weight Loss or 7 Healthy Weight Management

8 35. Because the aspartame in Diet Dr. Pepper is likely to cause weight gain, rather
 9 than to help in weight loss or healthy weight management, DPSG’s marketing the product as
 10 “diet” is false and misleading.

11 36. DPSG is, or reasonably should be aware, of the scientific evidence that
 12 consuming aspartame can cause weight gain. That evidence has been in the published and in
 13 the public domain, and recounted in major news outlets.

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

17 38. Moreover, while touting Diet Dr. Pepper as “diet,” and containing zero calories,
 18 DPSG deceptively omitted material information, namely that despite its lack of calories, the
 19 consumption of Diet Dr. Pepper can lead to weight gain and contribute to metabolic disease,
 20 diabetes, and cardiovascular disease.

B. DPSG Violated FDA and California Food Labeling Regulations

22 39. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (“FDCA”),
 23 governs the labeling of foods and beverages. Pursuant to the California Sherman Food, Drug,
 24 and Cosmetic Law, Cal. Health & Safety Code §§ 109875 *et seq.* (the “Sherman Law”),
 25

26 ¹⁵ See Yang, *supra* n.3 (“Preload experiments generally have found that sweet taste, whether
 27 delivered by sugar or artificial sweeteners, enhanced human appetite.”).

28 ¹⁶ *Id.*

1 California has adopted the FDCA and its implementing regulations as its own law, *see id.* §
2 110100.

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

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

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

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

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

23 **PLAINTIFF’S PURCHASE, RELIANCE, AND INJURY**

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

27 46. Plaintiff has struggled with obesity since childhood. She purchased and
28 consumed Diet Dr. Pepper in large part because she believed, based on DPSG’s advertising

1 the product as “Diet,” that it would contribute to healthy weight management, and, due to its
2 lack of calories, would not cause her to gain weight.

3 47. Plaintiff would not have purchased Diet Dr. Pepper at the price she paid, and
4 may not have purchased it at all, absent DPSG’s false, misleading, and unlawful labeling.

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

7 49. If DPSG were enjoined from making the misleading claims, the market demand
8 and price for Diet Dr. Pepper would drop, as it has been artificially and fraudulently inflated
9 due to DPSG’s use of false, misleading, and unlawful labeling.

10 50. For these reasons, the Diet Dr. Pepper was worth less than what plaintiff paid
11 for it.

12 51. Instead of receiving a beverage that would help assist plaintiff in achieving and
13 maintaining a healthy weight, plaintiff received a beverage whose consumption is likely to
14 lead to weight gain.

15 52. Plaintiff lost money as a result of DPSG’s deceptive claims and unfair practices
16 in that she did not receive what she paid for when purchasing the Diet Dr. Pepper.

17 53. Plaintiff detrimentally altered her position and suffered damages in an amount
18 equal to what she paid for the product.

19 54. Plaintiff might purchase Diet Dr. Pepper in the future, for example as a treat, if
20 the product were properly labeled.

21 **CLASS ACTION ALLEGATIONS**

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

25 56. Plaintiff nevertheless reserves the right to divide into subclasses, expand,
26 narrow, or otherwise modify the class definition prior to (or as part of) filing a motion for
27 class certification.
28

1 57. 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. Fed. R. Civ. P.
4 23(a)(1).

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

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

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

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

16 d. Whether DPSG expressly or impliedly warranted that Diet Dr. Pepper was
17 “diet”;

18 e. Whether DPSG impliedly warranted that Diet Dr. Pepper would assist in
19 weight loss or healthy weight management;

20 f. Whether DPSG breached any express or implied warranties;

21 g. The proper injunctive or prospective relief; and

22 h. The proper amount of reasonable litigation expenses and attorneys’ fees.

23 59. Plaintiff’s claims are typical of class members’ claims in that they are based on
24 the same underlying facts, events, and circumstances relating to DPSG’s conduct.

25 60. Plaintiff will fairly and adequately represent and protect the interests of the class,
26 has no interests incompatible with the interests of the class, and has retained counsel
27 competent and experienced in class action litigation, including within the food and beverage
28 industry.

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

4 62. Questions of law and fact common to the class predominate over any questions
5 affecting only individual class members.

6 63. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.
7 23(a), (b)(2), and (b)(3), and may be appropriate for certification “with respect to particular
8 issues” under Rule 23(c)(4).

9 **CAUSES OF ACTION**

10 **FIRST CAUSE OF ACTION**

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

13 64. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
14 as if fully set forth herein.

15 65. The FAL prohibits any statement in connection with the sale of goods “which is
16 untrue or misleading,” Cal. Bus. & Prof. Code § 17500.

17 66. DPSG’s use of the term “diet” in marketing Diet Dr. Pepper is deceptive in light
18 of the strong evidence that aspartame causes weight gain.

19 67. DPSG knew, or reasonably should have known, that marketing Diet Dr. Pepper
20 as “diet” was untrue or misleading.

21 **SECOND CAUSE OF ACTION**

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

24 68. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
25 as if fully set forth herein.

26 69. The CLRA prohibits deceptive practices in connection with the conduct of a
27 business that provides goods, property, or services primarily for personal, family, or
28 household purposes.

1 70. DPSG’s policies, acts, and practices were designed to, and did, result in the
2 purchase and use of the Diet Dr. Pepper primarily for personal, family, or household purposes,
3 and violated and continue to violate the following sections of the CLRA:

- 4 a. § 1770(a)(5): representing that goods have characteristics, uses,
5 or benefits which they do not have;
- 6 b. § 1770(a)(7): representing that goods are of a particular standard,
7 quality, or grade if they are of another;
- 8 c. § 1770(a)(9): advertising goods with intent not to sell them as
9 advertised; and
- 10 d. § 1770(a)(16): representing the subject of a transaction has been
11 supplied in accordance with a previous representation when it
has not.

12 71. Plaintiff, on behalf of herself and the class, seeks injunctive relief, restitution,
13 and reasonable attorneys’ fees and costs.

14 72. In compliance with Cal. Civ. Code § 1782, plaintiff sent written notice to DPSG
15 of her claims. Although plaintiff does not currently seek damages for her claims under the
16 CLRA, if DPSG refuses to remedy the violation within 30 days of receiving the notice letter,
17 plaintiff may thereafter amend this Complaint to seek actual and statutory damages.

18 73. In compliance with Cal. Civ. Code § 1782(d), an affidavit of venue is filed
19 herewith.

20 **THIRD CAUSE OF ACTION**

21 **VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW,**

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

23 74. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
24 as if fully set forth herein.

25 75. The UCL prohibits any “unlawful, unfair or fraudulent business act or practice,”
26 Cal. Bus. & Prof. Code § 17200.

1 **Fraudulent**

2 76. DPSG’s use of the term “diet” to market Diet Dr. Pepper is likely to deceive
3 reasonable consumers.

4 **Unfair**

5 77. DPSG’s conduct with respect to the labeling, advertising, and sale of Diet Dr.
6 Pepper was and is unfair because DPSG’s conduct was and is immoral, unethical,
7 unscrupulous, or substantially injurious to consumers and the utility of its conduct, if any,
8 does not outweigh the gravity of the harm to its victims.

9 78. DPSG’s conduct with respect to the labeling, advertising, and sale of Diet Dr.
10 Pepper was also unfair because it violated public policy as declared by specific constitutional,
11 statutory or regulatory provisions, including the False Advertising Law, the Federal Food,
12 Drug, and Cosmetic Act, and the California Sherman Food, Drug, and Cosmetic Law.

13 79. DPSG’s conduct with respect to the labeling, advertising, and sale of Diet Dr.
14 Pepper was also unfair because the consumer injury was substantial, not outweighed by
15 benefits to consumers or competition, and not one consumers themselves could reasonably
16 have avoided.

17 **Unlawful**

18 80. The acts alleged herein are “unlawful” under the UCL in that they violate at least
19 the following laws:

- 20 a. The False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
 - 21 b. The Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*; and
 - 22 c. The Federal Food, Drug, and Cosmetic Act, 28 U.S.C. §§ 301 *et seq.*, and
23 its implementing regulations, 21 C.F.R. §§ 101 *et seq.*; and
 - 24 d. The California Sherman Food, Drug, and Cosmetic Law, Cal. Health &
25 Safety Code §§ 109875, *et seq.*
- 26
27
28

1 **FOURTH CAUSE OF ACTION**

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

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

5 82. Through the label of Diet Dr. Pepper, DPSG made affirmations of fact or
6 promises, and made descriptions of goods, that formed part of the basis of the bargain, in that
7 plaintiff and the class purchased the Diet Dr. Pepper in reasonable reliance on those
8 statements. Cal. Com. Code § 2313(1).

9 83. Specifically, DPSG made statements that Diet Dr. Pepper is “diet.”

10 84. DPSG breached its express warranties by selling products that are not “diet,”
11 *i.e.*, do not assist in weight loss or healthy weight management, but which in fact cause weight
12 gain.

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

15 86. Plaintiff gave DPSG notice of the breach before filing or asserting the claim, but
16 DPSG failed to remedy the breach.

17 87. As a result, plaintiff seeks, on behalf of herself and other class members, actual
18 damages arising as a result of DPSG’s breach of express warranty.

19 **FIFTH CAUSE OF ACTION**

20 **BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY,**

21 **CAL. COM. CODE § 2314**

22 88. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint
23 as if fully set forth herein.

24 89. DPSG, through its acts and omissions set forth herein, in the sale, marketing and
25 promotion of Diet Dr. Pepper, made representations to plaintiff and the class that Diet Dr.
26 Pepper would assist in weight loss or health weight management, and would not contribute
27 to weight gain.
28

1 90. DPSG is a merchant with respect to the goods of this kind which were sold to
2 plaintiffs and the class, and there was, in the sale to plaintiffs and other consumers, an implied
3 warranty that those goods were merchantable.

4 91. However, DPSG breached that implied warranty in that Diet Dr. Pepper does
5 not contribute to weight loss or healthy weight management, and instead contributes to weight
6 gain, as set forth in detail herein.

7 92. As an actual and proximate result of DPSG's conduct, plaintiff and the class did
8 not receive goods as impliedly warranted by DPSG to be merchantable in that they did not
9 conform to promises and affirmations made on the container or label of the goods.

10 93. Plaintiff gave DPSG notice of the breach before filing or asserting the claims,
11 but DPSG failed to remedy the breach.

12 94. As a result, plaintiff seeks, on behalf of herself and other class members, actual
13 damages arising as a result of DPSG's breaches of implied warranty.

14 **PRAYER FOR RELIEF**

15 95. Wherefore, plaintiff, on behalf of herself, all others similarly situated, and the
16 general public, prays for judgment against DPSG as to each and every cause of action, and
17 the following remedies:

18 a. An Order certifying this action as a class action, appointing plaintiff as
19 Class Representative, appointing her counsel as Class Counsel, and requiring DPSG to
20 bear the cost of class notice;

21 b. An Order enjoining DPSG from marketing Diet Dr. Pepper as "diet" so
22 long as it is sweetened with a non-nutritive artificial sweetener;

23 c. An Order requiring DPSG to engage in a corrective advertising campaign.

24 d. An Order requiring DPSG to pay restitution to restore funds that may have
25 been acquired by means of any act or practice declared by this Court to be an unlawful,
26 unfair, or fraudulent business act or practice, untrue or misleading advertising, or a
27 violation of the UCL, FAL, or CLRA;
28

1 e. An Order requiring DPSG to pay all statutory, compensatory, and punitive
2 damages permitted under the causes of action alleged herein;

3 f. An Order requiring DPSG to disgorge or return all monies, revenues,
4 profits, or other unjust enrichment obtained by means of any wrongful or unlawful act
5 or practice;

6 g. Pre- and post-judgment interest;

7 h. Costs, expenses, and reasonable attorneys' fees; and

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

10 **JURY DEMAND**

11 96. Plaintiff hereby demands a trial by jury on all issues so triable.

12
13 Dated: October 16, 2017

/s/ Jack Fitzgerald

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

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