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

Case No. 3:14-CV-00169-L-NLS

CLASS ACTION

**FIRST AMENDED CONSOLIDATED
COMPLAINT FOR:**

THAMAR SANTISTEBAN CORTINA,
ANDREW J. PARK, and JILLIANN
PEREZ, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

GOYA FOODS, INC.,

Defendant.

**VIOLATIONS OF THE CALIFORNIA
UNFAIR COMPETITION LAW, CAL.
BUS. & PROF. CODE §§ 17200 *ET. SEQ.*;
THE CALIFORNIA FALSE
ADVERTISING LAW, CAL. BUS. &
PROF. CODE §§ 17500 *ET. SEQ.*; THE
CALIFORNIA CONSUMERS LEGAL
REMEDIES ACT, CAL. CIV. CODE §§
1750 *ET SEQ.*; AND PROPOSITION 65,
CAL. HEALTH & SAFETY CODE §
25249.5 *ET SEQ.*;**

BREACH EXPRESS WARRANTY;

**INTENTIONAL AND NEGLIGENT
MISREPRESENTATION; AND**

UNJUST ENRICHMENT.

DEMAND FOR JURY TRIAL

1 Plaintiffs Thamar Santisteban Cortina, Andrew J. Park, and Jillian Perez
2 (“Plaintiffs”), on behalf of themselves, all others similarly situated, and the general public,
3 by and through their undersigned counsel, hereby bring this action against Defendant Goya
4 Foods, Inc. (“Goya” or “Defendant”), and allege the following upon their own knowledge, or
5 where they lack personal knowledge, upon information and belief including the investigation
6 of their counsel.

7 **INTRODUCTION**

8 1. Goya sells throughout the United States beverages including “Malta Goya” cola
9 soft drinks, Goya Sangria, and Goya Ginger Beer. These beverages contain an amount of 4-
10 methylimidazole (4-MeI), a carcinogen, sufficient to expose consumers to substantial health
11 risks. Goya, however, deceptively omits that the Goya beverages contain very high levels
12 amounts of 4-MeI, and that the 4-MeI presents a potential health harm.

13 2. In addition, Goya misleadingly advertises Malta Goya as a “nutritious” soft
14 drink, despite these high 4-MeI levels.

15 3. Goya also failed to include a Proposition 65 warning on the Goy beverages, as
16 it was required.

17 4. Plaintiffs bring this action on behalf of themselves and a class of California
18 consumers to rectify the injuries caused by Goya’s unlawful practices, and to enjoin Goya’s
19 ongoing deceptive omissions concerning the amount of 4-MeI in the Goya beverages.

20 **THE PARTIES**

21 5. Plaintiff Thamar Santisteban Cortina is a resident of Bonita, California. Plaintiff
22 Cortina gave the notice required under Proposition 65 on February 10, 2014.

23 6. Plaintiff Andrew J. Park is a resident of Los Angeles, California.

24 7. Plaintiff Jillian Perez is a resident of Inglewood, California. Plaintiff Perez
25 gave the required notice under Proposition 65 on April 3, 2014.

26 8. Defendant Goya Foods, Inc. is a New Jersey corporation with its principle place
27 of business at 100 Seaview Drive, Secaucus, New Jersey 07096.

JURISDICTION AND VENUE

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2 9. 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 Goya. In addition, more than two-thirds of
6 the members of the class reside in states other than the state in which Goya is a citizen and in
7 which this case is filed, and therefore any exceptions to jurisdiction under 28 U.S.C. § 1332(d)
8 do not apply.

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

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

FACTS

16
17 11. Goya is “the largest, Hispanic-owned food company in the United States,”¹ with
18 3,500 employees and revenue of \$1.5 billion in 2012.² The company sells and distributes over
19 1,500 different Latin cuisine products. Recently, Goya joined Michelle Obama’s “My Plate”
20 initiative, established to improve the nutrition and well-being of Americans.

21 12. Among its many products, Goya manufactures, distributes, promotes, advertises
22 for sale, and soft drink called Malta Goya, Goya Sangria, and Goya Ginger Beer.

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¹ See www.goya.com/english/about.html (last visited July 25, 2014).

26 ² See Erin Carlyle, “How Goya Became One of America’s Fastest-Growing Food
27 Companies,” *Forbes Magazine* (May 27, 2013), available at tinyurl.com/bq6r4rq (last visited
28 July 25, 2014).

1 13. The soft drink marketplace in which Malta Goya competes is a multi-billion
2 dollar industry. Well-aware that consumers in recent years are trying to lead healthier
3 lifestyles, Goya has made efforts to tap into this market segment by promoting Malta Goya
4 as a “rich, non-alcoholic, *nutritious* soft drink, brewed from the finest barley and hops.”³

5 14. Like many soft drinks, Malta Goya contains caramel coloring, giving it its
6 distinctive cola-brown color. During the manufacture of some—but not all—types of caramel
7 coloring (types III and IV) an impurity is generated, 4-MeI, which has been found by the
8 National Toxicology Program to cause lung tumors in laboratory animals, and the
9 International Agency for Research on Cancer determined to be “possibly carcinogenic to
10 humans.”

11 15. California’s Office of Environmental Health Hazard Assessment (“OEHHA”)
12 describes 4-MeI as “*a compound used to make certain pharmaceuticals, photographic*
13 *chemicals, dyes and pigments, cleaning and agricultural chemicals, and rubber products.*”

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

19 17. According to testing performed by Consumer Reports, Malta Goya sold from
20 April 2013 to September 2013 in California contained an average 352.5 micrograms of 4-
21 MeI per 12-ounce serving, and in New York, an average of 342.7 micrograms, the average
22 more than 115 times Dr. Rangan’s maximum recommended level.

23 18. Additionally, testing performed by Consumer Reports showed that Malta Goya
24 that was sold in December 2013 in California contained an average 316.1 micrograms of 4-
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27 ³ See www.goya.com/english/product_subcategory/Beverages/Malta#60 (last visited July 25,
28 2014).

1 MeI per 12-ounce serving, and in New York, an average of 307.5 micrograms, the average
2 more than 100 times Dr. Rangan’s maximum recommended level.

3 19. By comparison, Consumer Reports testing showed that during the same time
4 periods in California and New York, Diet Coke, Coke Zero, and Coca-Cola contained
5 between 3.4 and 4.3 micrograms per 12-ounce serving.

6 20. Like Malta Goya, Goya Sangria and Goya Ginger Beer contained high levels of
7 4-MeI during approximately the same time period.

8 21. Despite the very high levels of 4-MeI in these beverages during these time
9 periods, Goya deceptively failed to disclose to the consuming public material facts about the
10 levels of 4-MeI in the beverages, as well as the substance’s known potential health risks.

11 22. Goya had and continues to have exclusive knowledge of such material facts
12 concerning the amount of 4-MeI in the Goya beverages.

13 23. Goya has actively concealed from Plaintiffs and putative class members such
14 material facts concerning the amount of 4-MeI in the Goya beverages and its potential health
15 harms.

16 24. In advertising and selling the Goya beverages, Goya has and continues to
17 deceptively omit that the beverages contain dangerous levels of 4-MeI that expose consumers
18 to a heightened risk of cancer.

19 25. Goya also affirmatively misrepresents that Malta Goya is “nutritious,” in light
20 of the potential health harms associated with the very high levels of 4-MeI in Malta Goya.

21 26. Immediately following service of the first CLRA notice letter in this action,
22 Goya recalled all Malta Goya being sold in California, but has continued to sell it elsewhere
23 throughout the United States.

24 27. Thamar Santisteban Cortina began purchasing Malta Goya beverages in 2007 or
25 2008, and from then until early this year (she stopped purchasing Malta Goya after learning
26 of its 4-MeI content) was a regular Malta Goya purchaser and drinker, usually purchasing the
27 beverages about once per month at either the Northgate Market located at 1058 Third Avenue,
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1 in Chula Vista, California, or the Mercado Internacional located at 1415 Third Avenue, Chula
2 Vista. She typically purchased individual bottles, usually 10-12 at a time. In the course of
3 purchasing the Malta Goya bottles, Ms. Cortina viewed and read their labels many times, but
4 the product's 4-MeI content was never disclosed. Had Goya disclosed information about its
5 4-MeI content, and its potential health risks, Ms. Cortina would not have purchased Malta
6 Goya.

7 28. Andrew J. Park purchased Malta Goya in 2013 from Lavorio Market in Los
8 Angeles, reading the product's label, which did not disclose its 4-MeI content. Had Goya
9 disclosed information about its 4-MeI content, and its potential health harms, Mr. Park would
10 not have purchased Malta Goya.

11 29. Jillian Perez purchased Malta Goya from a Northgate Market near her home,
12 many times over the past several years. In the course of purchasing the Malta Goya, Ms. Perez
13 viewed and read the product's label many times, but the product's 4-MeI content was never
14 disclosed. Had Goya disclosed information about its 4-MeI content, and its potential health
15 harms, Ms. Perez would not have purchased Malta Goya.

16 30. Plaintiffs and members of the putative class would not have purchased the Goya
17 beverages, or would have only been willing to pay less for them, if they knew the beverages
18 contained a substance known to be a carcinogen and believed to be dangerous at the levels
19 actually present in the beverages.

20 31. Goya was able to command a price for the Goya beverages higher than a fair
21 market price by concealing and deceptively omitting material information about their 4-MeI
22 content and potential health harms.

23 **CLASS ACTION ALLEGATIONS**

24 32. Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs seek to represent a
25 class of all persons in California who purchased, during the four years preceding the filing of
26 the initial Complaint, primarily for personal, family, or household use, and not for resale,
27 Malta Goya, Goya Sangria, or Goya Ginger Beer.

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

4 34. Questions of law and fact common to Plaintiffs and the class, and which
5 predominate over individual issues, include, but are not necessarily limited to the following:

- 6 a. Whether Goya engaged in the conduct alleged herein;
 - 7 b. Whether, and to what extent, Goya beverages sold in California during
8 the past four years contained 4-MeI;
 - 9 c. Whether 4-MeI is potentially dangerous in the amounts contained in the
10 Goya beverages;
 - 11 d. Whether information concerning the amount of 4-MeI in the Goya
12 beverages, or its potential health risks, is material to a reasonable
13 consumer;
 - 14 e. Whether a duty arose in Goya, separate and apart from its duty pursuant
15 to Proposition 65, to disclose the facts concerning the 4-MeI in its Goya
16 beverages;
 - 17 f. Whether Goya engaged in false or misleading advertising;
 - 18 g. Whether Goya's practices were deceptive, unfair, improper, and/or
19 misleading;
 - 20 h. Whether Goya made intentional omissions and/or misrepresentations;
 - 21 i. Whether Goya made negligent omissions and/or misrepresentations;
 - 22 j. Whether Goya's conduct as alleged herein constitutes and resulted in
23 unjust enrichment;
 - 24 k. Whether Goya's statements created express warranties concerning the
25 Goya beverages and, if so, whether Goya's conduct as alleged herein
26 constitutes breach of express warranty;
 - 27 l. Whether Goya failed to make a warning required by Proposition 65.
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1 m. The proper equitable and injunctive relief; and

2 n. The proper amount of restitution.

3 35. Plaintiffs' claims are typical of class members' claims in that they are based on
4 the same underlying facts, events, and circumstances relating to Goya's conduct.

5 36. Plaintiffs will fairly and adequately represent and protect the interests of the
6 class, have no interests incompatible with the interests of the class, and have retained counsel
7 competent and experienced in class litigation.

8 37. The class is sufficiently large for purposes of class litigation because they
9 contain at least hundreds of thousands of members who purchased the Goya beverages in
10 California, during the past four years.

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

15 39. Questions of law and fact common to the class and subclass predominate over
16 any questions affecting only individual class members.

17 40. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P.
18 23(a), 23(b)(2), and 23(b)(3).

19 **CAUSES OF ACTION**

20 **FIRST CAUSE OF ACTION**

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

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

23 ***(FRAUDULENT PRONG)***

24 41. Plaintiffs reallege and incorporate the allegations in paragraphs 1-31 of the
25 Complaint as if fully set forth herein.

26 42. The UCL prohibits any "unlawful, unfair or fraudulent business act or practice,"
27 Cal. Bus. & Prof. Code § 17200.

1 43. Goya’s deceptive omission of the dangerous amount of 4-MeI in the Goya
2 beverages is a “fraudulent” practice within the meaning of the UCL in that the omission is
3 likely to deceive reasonable consumers and the public.

4 44. In accordance with Cal. Bus. & Prof. Code § 17203, Plaintiffs seek an Order
5 enjoining Goya from continuing to conduct business through fraudulent acts and practices,
6 and to commence a corrective advertising campaign.

7 45. On behalf of themselves and the California Class, Plaintiffs also seek an Order
8 for the restitution of all monies from the sale of the Goya beverages, which were unjustly
9 acquired through acts of fraudulent competition.

10 46. This Cause of Action is not predicated on the violation of Proposition 65 but,
11 rather, is based on Goya’s failure to disclose Goya’s 4-MeI content, which duty arose
12 separately from, and independently of, Proposition 65.

13 **SECOND CAUSE OF ACTION**

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

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

16 47. Plaintiffs reallege and incorporate the allegations in paragraphs 1-40 of the
17 Complaint as if fully set forth herein.

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

21 49. Goya’s deceptive omission of the amount and health harms of the 4-MeI in the
22 Goya beverages was likely to deceive reasonable consumers and the public.

23 50. Goya knew, or reasonably should have known, that it was deceptively omitting
24 material information.

25 51. Plaintiffs and the Class are entitled to injunctive and equitable relief and
26 restitution.

1 52. This Cause of Action is not predicated on the violation of Proposition 65 but,
2 rather, is based on Goya's failure to disclose Goya's 4-MeI content, which duty arose
3 separately from, and independently of, Proposition 65.

4 **THIRD CAUSE OF ACTION**

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

7 53. Plaintiffs reallege and incorporate the allegations in paragraphs 1-40 of the
8 Complaint as if fully set forth herein.

9 54. The CLRA prohibits deceptive practices in connection with the conduct of a
10 business that provides goods, property, or services primarily for personal, family, or
11 household purposes.

12 55. Goya's policies, acts, and practices were designed to, and did, result in the
13 purchase and use of the products primarily for personal, family, or household purposes, and
14 violated and continue to violate the following sections of the CLRA:

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

23 56. As a result, Plaintiffs and the class members have suffered irreparable harm and
24 are entitled to injunctive and equitable relief, actual damages, punitive damages, and
25 reasonable attorneys' fees and costs.

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1 57. This Cause of Action is not predicated on the violation of Proposition 65 but,
2 rather, is based on Goya’s failure to disclose Goya’s 4-MeI content, which duty arose
3 separately from, and independently of, Proposition 65.

4 **FOURTH CAUSE OF ACTION**
5 **INTENTIONAL MISREPRESENTATION**

6 58. Plaintiffs reallege and incorporate the allegations in paragraphs 1-40 of the
7 Complaint as if fully set forth herein.

8 59. During the relevant time period, Goya represented to Plaintiffs and class
9 members that the Goya beverages were safe for consumption. These representations were
10 contained in Goya’s advertising, on its website, and on the labels of the Goya beverages. The
11 representations that were made to class members were substantially similar for the purposes
12 of this litigation.

13 60. However, Goya failed to disclose that the Goya beverages contain high levels of
14 4-MeI. Therefore, Goya’s representations were false and misleading.

15 61. When Goya made the subject representations, Goya knew they were false, and
16 made the representations with the intent to deceive and defraud Plaintiffs and class members
17 to induce them to act in reliance on those representations, or with the expectation that they
18 would so act. The purpose of representing that the Goya beverages were safe for consumption
19 was to deceive Plaintiffs and class members into purchasing them. Goya knew that if it
20 informed the public of the true facts no one would consume the Goya beverages.

21 62. Plaintiffs and class members, at the time the representations were made by Goya,
22 and at the time they took the actions herein alleged, were ignorant of the falsity of the
23 representations and believed them to be true. In reliance on these representations, Plaintiffs
24 and class members were induced to purchase and consumer the Goya beverages. Had
25 Plaintiffs and Class members known the actual facts, they would not have taken such action.
26 Reliance on Goya’s representations was justified because Goya was offering the beverages
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1 through reputable retail establishments throughout California. Plaintiffs and class members
2 had no reason to believe that Goya would act otherwise than as represented in its advertising.

3 63. In violation of the law, Goya, under a duty to speak, suppressed material facts
4 from Plaintiffs and class members regarding the presence of 4-MeI in the Goya beverages, as
5 well as its potential health harms.

6 64. As a result of Goya's fraudulent conduct, Plaintiffs and class members paid
7 monies to Goya to which it was not entitled, and have suffered monetary damages in an
8 amount to be proven at trial.

9 65. The aforementioned conduct of Goya was an intentional misrepresentation,
10 omission, deceit, or concealment of a material fact or facts known to Goya with the intent to
11 deprive Plaintiffs and class members of property or legal rights or otherwise cause injury; and
12 was despicable conduct that subjected Plaintiffs and class members to a cruel and unjust
13 hardship in conscious disregard of their rights, so as to justify an award of exemplary and
14 punitive damages.

15 66. This Cause of Action is not predicated on the violation of Proposition 65 but,
16 rather, is based on Goya's failure to disclose Goya's 4-MeI content, which duty arose
17 separately from, and independently of, Proposition 65.

18 **FIFTH CAUSE OF ACTION**

19 **NEGLIGENT MISREPRESENTATION**

20 67. Plaintiffs reallege and incorporate the allegations in paragraphs 1-40 of the
21 Complaint as if fully set forth herein.

22 68. Goya made representations to Plaintiffs and class members that Goya was safe
23 for consumption, which was contained in Goya's advertising, on its website, and on the labels
24 of the Goya beverages. The representations that were made to class members were
25 substantially similar for the purposes of this litigation.

1 69. However, Goya’s representations were false in that the Goya beverages contain
2 4-MeI at very high levels, in an amount believed to expose consumers to substantial potential
3 health risks.

4 70. When Goya made the representations set forth above, it knew or should have
5 known them to be false, and made the representations with the intention to deceive and
6 defraud Plaintiffs and class members to induce them to act in reliance upon those
7 representations, or with the expectation that they would so act.

8 71. Plaintiffs and class members, at the time the representations were made by Goya,
9 and at the time they took the actions herein alleged, were ignorant of the falsity of the
10 representations and believed them to be true. In reliance on these representations, Plaintiffs
11 and class members were induced to purchase and consumer the Goya beverages. Had
12 Plaintiffs and class members known the actual facts, they would not have taken such action.
13 Reliance on Goya’s representations was justified because Goya was offering the Goya
14 beverages for sale through reputable retail establishments throughout California. Plaintiffs
15 and class members had no reason to believe that Goya would act otherwise than as
16 represented in its advertising.

17 72. In violation of the law, Goya, under a duty to speak, suppressed material facts
18 from Plaintiffs and the class regarding the presence of 4-MeI in the Goya beverages, as well
19 as its potential health harms.

20 73. As a result of Goya’s fraudulent conduct, Plaintiffs and class members paid
21 monies to Goya to which it was not entitled, and have suffered monetary damages in an
22 amount to be proven at trial.

23 74. This Cause of Action is not predicated on the violation of Proposition 65 but,
24 rather, is based on Goya’s failure to disclose Goya’s 4-MeI content, which duty arose
25 separately from, and independently of, Proposition 65.

1 **SIXTH CAUSE OF ACTION**

2 **UNJUST ENRICHMENT**

3 75. Plaintiffs reallege and incorporate the allegations in paragraphs 1-40 of the
4 Complaint as if fully set forth herein.

5 76. By its wrongful acts and omissions, Goya was unjustly enriched at the expense
6 of Plaintiffs and class members, who did not receive the goods to which they were entitled,
7 namely beverages that did not contain very high levels of 4 MeI, for the payments made to
8 Goya, and thus Plaintiffs and class members were unjustly deprived.

9 77. It would be inequitable and unconscionable for Goya to retain the profit, benefit
10 and/or other compensation it obtained from its deceptive, misleading, and unlawful conduct
11 alleged herein.

12 78. Plaintiffs and class members seek restitution from Goya, and seek an Order from
13 the Court disgorging all profits, benefits, and other compensation obtained by Goya from its
14 wrongful conduct.

15 79. This Cause of Action is not predicated on the violation of Proposition 65 but,
16 rather, is based on Goya's failure to disclose Goya's 4-MeI content, which duty arose
17 separately from, and independently of, Proposition 65.

18 **SEVENTH CAUSE OF ACTION**

19 **BREACH OF EXPRESS WARRANTY**

20 80. Plaintiffs reallege and incorporate the allegations in paragraphs 1-40 of the
21 complaint as if fully set forth herein.

22 81. Goya made an express warranty and/or approved the use of the express warranty
23 to Plaintiffs and class members, namely that the Goya beverages were safe for consumption,
24 and even beneficial to consumers.

25 82. This promise regarding the nature of the Goya beverages marketed by Goya,
26 specifically related to the goods being purchased and became the basis of the bargain.
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1 83. Plaintiffs and class members purchased the Goya products based on the belief
2 that they conformed to the express warranties that were made on the products' packaging.

3 84. Goya breached the express warranty made to Plaintiffs and class members by
4 failing to supply goods that conformed to the warranty made. Instead, Plaintiffs and class
5 members obtained beverages containing very high levels of 4-MeI, presenting a substantial
6 potential health harm. If Plaintiffs and class members had known of the true nature of the
7 Goya beverages, they would not have purchased the beverages. As a result, Plaintiffs and
8 class members suffered injury, and deserve to be compensated for the damages they suffered.

9 85. Plaintiffs and class members are therefore entitled to recover damages of the
10 amounts they paid for the Goya beverages.

11 86. This Cause of Action is not predicated on the violation of Proposition 65 but,
12 rather, is based on Goya's failure to disclose Goya's 4-MeI content, which duty arose
13 separately from, and independently of, Proposition 65.

14 **EIGHTH CAUSE OF ACTION**
15 **VIOLATION OF PROPOSITION 65**

16 87. Plaintiffs Cortina and Perez reallege and incorporate the allegations in
17 paragraphs 1-40 of the complaint as if fully set forth herein.

18 88. On January 30, 2014, Goya was given Proposition 65 notice by Elmer Zelaya,
19 concerning the 4-MeI levels in the Goya beverages. Goya was given additional Proposition
20 65 notice on February 10, 2014, by Plaintiff Cortina; on March 31, 2014 by multiple
21 individuals; and on April 3, 2014, by Plaintiff Perez.

22 89. On January 7, 2011, California Proposition 65's list of "Chemical Known to the
23 State to Cause Cancer or Reproductive Toxicity"⁴ named 4- MeI as a chemical that is known
24 to the state to cause cancer or birth defects.

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27 ⁴ http://oehha.ca.gov/prop65/prop65_list/files/P65single013114.pdf (last visited July 25,
28 2014).

1 90. Moreover, the OEHHA mandated that any products which expose consumers to
2 more than 29 micrograms of 4-MeI are required to carry a clear and reasonable health-
3 warning label.

4 91. Goya knowingly and intentionally exposed individuals to 4-MeI at levels that
5 exceeded that threshold mandated by OEHHA while failing to provide the proper warning
6 for the consumer to see.

7 92. In fact, Defendant's Malta Goya beverage exceeded the allowable micrograms
8 by more than 12 times the maximum threshold mandated by the State of California.

9 93. During said violations, Goya failed to provide a clear and reasonable warning to
10 Plaintiffs and class members, as required by Cal. Health & Safety Code § 25249.6, for the
11 harmful carcinogenic levels of the chemical 4-MeI in the Goya beverages.

12 94. As a result, Goya may be enjoined from selling the Goya beverages without the
13 required warning, Cal. Health & Safety Code § 25249.7(a), and is liable for statutory damages
14 under *id.* § 25249.7(b) of up to \$2,500 per day, per product, for each day any Goya beverage
15 was available for sale in California if the beverage contained more than 29 micrograms of 4-
16 MeI per 12-ounce serving, if the beverage did not contain a Proposition 65 warning, as well
17 as for plaintiffs' attorneys' fees.

18 **NINTH CAUSE OF ACTION**

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

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

21 **(UNLAWFUL PRONG)**

22 95. Plaintiffs Cortina and Perez reallege and incorporate the allegations in
23 paragraphs 1-40 and 85-92 of the Complaint as if fully set forth herein.

24 96. Goya's failure to make the clear and reasonable warning mandated by
25 Proposition 65 is an "unlawful" practice within the meaning of the UCL.

26 97. Had Goya made such a warning, Plaintiffs Cortina and Perez would not have
27 purchased the Goya beverages.

1 98. On behalf of themselves and the California Class, Plaintiffs Cortina and Perez
2 seek injunctive and equitable relief, as well as the restitution of all monies from the sale of
3 the Goya beverages which were unjustly acquired through acts of unlawful competition.

4 **PRAYER FOR RELIEF**

5 99. Wherefore, Plaintiffs, on behalf of themselves, all others similarly situated and
6 the general public, prays for judgment against Goya as to each and every cause of action,
7 including:

- 8 a. An Order certifying this as a class action and appointing Plaintiffs and
9 their counsel to represent the classes;
- 10 b. An Order enjoining Goya from selling the Goya beverages so long as they
11 contain a potentially dangerous amount of 4-MeI, if Goya omits the
12 disclosure of that content and its potential health harms;
- 13 c. An Order requiring Goya to make a Proposition 65 warning on any
14 beverage it sells in California that contains more than 29 micrograms of
15 4-MeI per 12-ounce serving;
- 16 d. An Order compelling Goya to conduct a corrective advertising campaign;
- 17 e. An Order requiring Goya to disgorge or return all monies, revenues, and
18 profits obtained by means of any wrongful act or practice;
- 19 f. An Order requiring Goya to pay restitution to restore all funds acquired
20 by means of any act or practice declared by this Court to be a fraudulent
21 business act or practice, untrue or misleading advertising, unjust
22 enrichment, or a violation of the UCL, FAL or CLRA, plus pre-and post-
23 judgment interest thereon;
- 24 g. An Order requiring Goya to pay actual or statutory damages for all causes
25 of action in which such damages are permitted;
- 26 h. An Order requiring Goya to pay punitive or exemplary damages;
- 27 i. An Order awarding costs, expenses, and reasonable attorneys' fees; and
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1 j. Any other and further relief the Court deems necessary, just, or proper.

2 **JURY DEMAND**

3 Plaintiffs hereby demand a trial by jury on all issues so triable.

4 Dated: July 25, 2014

By: /s/ Jack Fitzgerald

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