

FEB 06 2013

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 use of the Clerk of Court for the purpose of initiating the civil docket sheet.

PLAINTIFFS

North American Olive Oil Association ("NAOOA")

DEFENDANTS

Kangadis Food Inc., d/b/a The Gourmet Factory

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Timothy J. Treanor, SIDLEY AUSTIN LLP, 787 Seventh Avenue New York, New York 10019, (212) 839-5300

ATTORNEYS (IF KNOWN)

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE) (DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

NAOOA brings suit under 15 U.S.C. § 1125(a), and N.Y. Gen. Bus. Law §§ 349 & 350 to stop Defendant's deceptive marketing.

Has this or a similar case been previously filed in SDNY at any time? No [X] Yes [ ] Judge Previously Assigned

If yes, was this case Vol. [ ] Invol. [ ] Dismissed. No [ ] Yes [ ] If yes, give date & Case No

IS THIS AN INTERNATIONAL ARBITRATION CASE? No [X] Yes [ ]

(PLACE AN [x] IN ONE BOX ONLY)

NATURE OF SUIT

Table with columns: TORTS, ACTIONS UNDER STATUTES, CONTRACT, PERSONAL INJURY, FORFEITURE/PENALTY, LABOR, REAL PROPERTY, IMMIGRATION. Includes sub-sections like INSURANCE, AIRPLANE LIABILITY, MOTOR VEHICLE, etc.

Check if demanded in complaint:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S D N Y ? IF SO, STATE:

DEMAND \$ OTHER JUDGE DOCKET NUMBER

Check YES only if demanded in complaint

JURY DEMAND: [X] YES [ ] NO

NOTE: Please submit at the time of filing an explanation of why cases are deemed related

(PLACE AN x IN ONE BOX ONLY)

ORIGIN

- 1 Original Proceeding
- 2 Removed from State Court
  - a. all parties represented
  - b. At least one party is pro se.
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from (Specify District)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judge Judgment

(PLACE AN x IN ONE BOX ONLY)

BASIS OF JURISDICTION

IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1332, 1441)

- 1 U.S. PLAINTIFF
- 2 U.S. DEFENDANT
- 3 FEDERAL QUESTION (U.S. NOT A PARTY)
- 4 DIVERSITY

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

	PTF	DEF		PTF	DEF		PTF	DEF
CITIZEN OF THIS STATE	[ ]	[ ]	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	[ ]	[ ]	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	[ ]	[ ]
CITIZEN OF ANOTHER STATE	[ ]	[ ]	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[ ]	[ ]	FOREIGN NATION	[ ]	[ ]

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

North American Olive Oil Association  
 3301 Route 66  
 Suite 205, Bldg. C  
 Neptune, NJ 07753

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

Kangadis Food Inc., d/b/a The Gourmet Factory  
 55 Corporate Drive  
 Hauppauge, NY 11788

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Check one: THIS ACTION SHOULD BE ASSIGNED TO:  WHITE PLAINS  MANHATTAN  
 (DO NOT check either box if this a PRISONER PETITION/PRISONER CIVIL RIGHTS COMPLAINT.)

DATE 2/6/13 SIGNATURE OF ATTORNEY OF RECORD



ADMITTED TO PRACTICE IN THIS DISTRICT

[ ] NO  
 YES (DATE ADMITTED Mo \_\_\_\_\_ Yr 1998)  
 Attorney Bar Code # \_\_\_\_\_

RECEIPT #

Magistrate Judge is to be designated by the Clerk of the Court.

**GORENSTEIN**

Magistrate Judge \_\_\_\_\_ is so Designated.

Ruby J. Krajick, Clerk of Court by \_\_\_\_\_ Deputy Clerk, DATED \_\_\_\_\_

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)

JUDGE RAKOFF

13 CV 0868

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

NORTH AMERICAN OLIVE OIL  
ASSOCIATION,

Plaintiff,

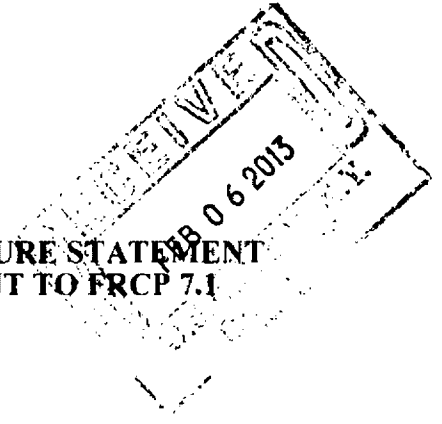
-against-

KANGADIS FOOD INC., d/b/a THE  
GOURMET FACTORY,

Defendant.

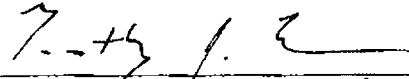
Case No.

DISCLOSURE STATEMENT  
PURSUANT TO FRCP 7.1



Pursuant to Federal Rule of Civil Procedure 7.1, plaintiff North American Olive Oil Association (“NAOOA”), by and through its undersigned counsel, hereby certifies that NAOOA is a subsidiary section of the Association of Food Industries (“AFI”), a private 501(c)(6) non-profit organization; AFI is not a publicly held entity, and has no parent company. No publicly held entity owns ten percent (10%) or more of AFI.

SIDLEY AUSTIN LLP

By:   
Timothy J. Treanor (ttreanor@sidley.com)  
787 Seventh Avenue  
New York, New York 10019  
(212) 839-5300

Attorneys for Plaintiff NORTH  
AMERICAN OLIVE OIL  
ASSOCIATION

UNITED STATES DISTRICT COURT

for the

Southern District of New York

NORTH AMERICAN OLIVE OIL ASSOCIATION

Plaintiff

v.

KANGADIS FOOD INC., d/b/a THE GOURMET FACTORY

Defendant

JUDGE RAKOFF

Civil Action No.

13 CV 0868

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) KANGADIS FOOD INC.
76-01 77TH AVENUE
GLENDALE, NEW YORK, 11385

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Timothy J. Treanor
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
ttreanor@sidley.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

RUBY J. KRAJICK

CLERK OF COURT

Date: 02/06/2013

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

JUDGE RAKOFF

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

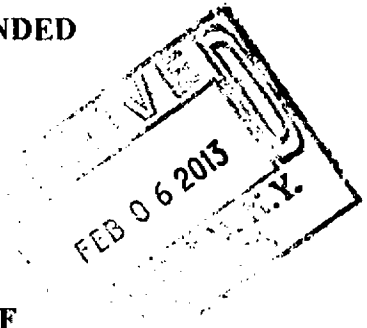
13 CV 0868

-----X  
NORTH AMERICAN OLIVE OIL ASSOCIATION,  
  
Plaintiff,  
  
vs.  
  
KANGADIS FOOD INC., d/b/a THE GOURMET  
FACTORY,  
  
Defendant.  
-----X

No. \_\_\_\_\_  
ECF CASE

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**



**COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**

1. Plaintiff, the North American Olive Oil Association (“NAOOA,” or “the Association”), by and through its undersigned counsel, hereby files this Complaint against Defendant Kangadis Food Inc., d/b/a The Gourmet Factory (“Gourmet Factory”), and avers as follows:

**NATURE OF THE ACTION**

2. Pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and New York’s General Business Law §§ 349 and 350, Plaintiff NAOOA brings this action against Defendant Gourmet Factory for its unlawful, misleading, and deceptive misbranding of edible oil products sold to consumers and businesses. Defendant markets oils for human consumption under the “Capatriti” brand as “100% Pure Olive Oil.” But Defendant’s “100% Pure Olive Oil” is nothing of the sort; instead of “olive oil,” Gourmet Factory’s adulterated product consists of mostly – if not completely – an industrially produced, chemically derived fat known as “olive-pomace oil” or “olive-residue oil” (collectively referred to hereinafter as “Pomace”).

3. Pomace is a byproduct extracted from leftover olive skins and pits using a combination of chemical solvents and high temperatures. Unsurprisingly, because Pomace can

be obtained only through heating and solvent treatments, it does not appear in pure olive oil. And, although it comes from olives, it is *not* olive oil.

4. Calling a product “olive oil” when it contains Pomace or any other non-olive oil is barred by an array of olive-oil-making conventions, standard industry practices, international regulations, and federal and state laws. According to every authority that might form the basis for consumer expectations, a product containing more than a negligible amount of Pomace must contain a prominent disclosure of that fact on the label. Gourmet Factory does not disclose its use of Pomace, and instead misleads purchasers as to the very nature of its product by, among other things, disguising Pomace as “100% Pure Olive Oil.”

5. The NAOOA has reason to believe that Gourmet Factory’s misbranding is either intentional or reflects a profound disregard for quality control. Olive oil and Pomace arise out of distinct production processes; the price of Pomace is a fraction of the price of authentic olive oils (typically as much as 30% to 40% less); and any reasonable quality-control check would detect the presence of Pomace. A packer or distributor of olive oils therefore does not unwittingly mislabel Pomace as olive oil.

6. Mislabeling Pomace as olive oil causes substantial injury to consumers, competitors, and the market for olive oils. Mislabeling food products is particularly egregious because a consumer is entitled to know what he or she is ingesting. Moreover, marketing a product as something that it is not severely damages the overwhelming majority of olive oil producers who sell authentic olive oil and market it truthfully. Gourmet Factory’s conduct is exactly this sort of egregious misconduct. By selling a product it represents to be olive oil at implausibly low prices, Gourmet Factory diverts olive-oil-seeking-consumers away from authentic products, and dupes them into purchasing something that is *not* olive oil. Producers, distributors, and retailers of olive oils then suffer from artificially deflated prices, the diversion of customers seeking legitimate olive oil, and the erosion of consumer confidence in the olive oil market, and in food labeling in general. The NAOOA is filing this action to stop Gourmet Factory’s harmful and destructive business practices.

law, which are so related to the federal claims brought herein as to form part of the same case or controversy.

10. Venue is proper in this District under 28 U.S.C. §§ 1391 (b)(1)-(2) and (d) because a substantial part of the acts giving rise to this claim occurred in this jurisdiction, and because Defendant resides in this District for venue purposes. Defendant's widespread sales of oil products throughout this District are sufficient to subject it to personal jurisdiction if this District were a separate state.

### **FACTUAL BACKGROUND**

#### **I. Olive Oil Has Long Been Prized For Its Culinary Value And Health Benefits.**

11. Olive oil comes from the fruit of the olive tree (*Olea europaea* L.), a species native to the Mediterranean basin. Olive tree cultivation was first documented as far back as 4,000 B.C., in parts of what is now Syria and Iran, with sources as old as Egyptian hieroglyphics and the Bible discussing olive oil production. By the time of the Roman Empire, olive oil had become a staple of Mediterranean trade. Although olive production has, in recent years, spread to Australia, South Africa, Chile, Argentina, and the United States, nearly 95 percent of the world's olive oil continues to be produced in the Mediterranean basin.

12. Since ancient times, people have recognized olive oil's substantial and beneficial effects on human health. Olive oil contains monounsaturated fatty acids, which leading health care professionals consider a "healthy dietary fat" that can lower bad LDL cholesterol and raise good HDL cholesterol. For this reason, the United States Food and Drug Administration ("FDA") approved a qualified heart health claim for olive oil in 2004 that was based on more than 70 clinical intervention studies conducted in a number of countries. A diet with olive oil as a main source of fat has been linked to health benefits favorably affecting susceptibility to cardiovascular disease, diabetes, stroke, cancer, and more. Evidence shows that olive oil helps the body absorb beneficial nutrients from vegetables and other healthy ingredients in meals. Olive oil also is an excellent source of vitamins E and K.



13. Consumers use olive oil in many ways. Many add olive oil to salad dressings, marinades, baked goods, sauces, and pastas. In addition, olive oil's high smoke point makes it one of the most stable fats for cooking and frying, and, unlike some other oils, many of its healthful qualities persist after heating.

14. Given the many health benefits and culinary uses of olive oils, it is no surprise that the market for olive oil has grown enormously over the last several decades. Since 1990, total consumption of olive oil in the United States has more than doubled, reaching 70 million gallons in 2009. With broader consumer recognition of olive oil's considerable health benefits, consumption in the United States seems poised to continue to increase for years to come.

## **II. Pomace Is Not Olive Oil.**

15. "Olive oil," as it is scientifically, commercially, and legally defined, is "the oil consisting of a blend of refined olive oil and virgin olive oils fit for consumption as they are." The components of this blend consist of: virgin olive oil, defined as "the oils obtained from the fruit of the olive tree solely by mechanical or other physical means under conditions, particularly thermal conditions, that do not lead to alterations in the oil, and which have not undergone any treatment other than washing, decantation, centrifugation and filtration;" and refined olive oil, defined as "the olive oil obtained from virgin olive oils by refining methods which do not lead to alterations in the initial glyceridic structure."<sup>1</sup>

16. In contrast, Pomace is a highly processed industrial fat derived by applying heat and chemical solvents to the olive skins and pits left over from the production of olive oil. See 47 Fed. Reg. 42123 (Sept. 24, 1982) ("[S]olvent extraction is a standard procedure for removing oil from substances having low oil contents, such as safflower and cotton seeds. Olives, however, have a high oil content and the oil is easily removed by a mechanical or physical process, such as pressing. Solvent extraction of oil from olives is used to remove the residual oil

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<sup>1</sup> International Olive Council, Trade Standard Applying to Olive Oils and Olive-Pomace Oils, COI T.15/NC No.3/Rev 6 at 3.3.3 (Nov. 2011) [hereinafter "IOC Trade Standards"].

from the pomace and pits remaining from pressing operations.”). The cost of producing oil in this manner is a fraction of the cost of producing olive oil.

### **III. No Law, Regulation, Or Standard Permits Pomace To Be Labeled As Olive Oil.**

17. Although Pomace can sometimes be refined or mixed with olive oil to make it fit for human consumption, no recognized regulatory body or organization in the world permits Pomace or products containing Pomace to be passed off as “olive oil.” Rather, these oils must be labeled as some form of “olive-pomace” or “olive-residue oil.”

18. According to the FDA, “[s]olvent-extracted olive oil is lower in quality than pressed olive oils due to the higher free fatty acid content caused by breakdown to triglycerides by enzymes liberated from the olive material during the pressing operations. As the free fatty acid content increases, the flavor and keeping quality of the oil deteriorate and the oil must undergo several refining processes to make it suitable for human consumption. For these reasons, the agency believes that it is reasonable to identify a solvent extracted olive oil as a ‘residue oil.’” 47 Fed. Reg. 42123 (Sept. 24, 1982).

19. Despite vigilant policing by responsible industry members, the cost disparities between olive oil and other vegetable oils nevertheless create a financial incentive for fraudsters to adulterate olive oils with cheaper oils (such as Pomace or seed oils) and disguise it as olive oil.

20. This type of fraud, if left unchecked, is both very profitable and difficult for the average consumer to detect. The industrial processes used to refine impurities out of Pomace ends up yielding a product that is essentially flavorless, and thus, may not be immediately noticeable to a consumer as something other than a refined oil – especially when mixed with other ingredients in salad dressings or sauces. The differences between Pomace and olive oil are readily apparent, however, through basic chemical testing.

21. Various state, federal, and international bodies have promulgated standards to guard against deceptive mislabeling, including standards to distinguish olive oil from Pomace. Relevant here are three regulatory bodies: the FDA, the New York State legislature, and the

International Olive Council. They have adopted standards that reflect the longstanding industry practices that underlie relevant consumer expectations.

**A. The FDA Labeling Requirements**

22. The FDA has promulgated the following definitions for classifying olive-derived oils:

The name “virgin olive oil” may be used only for the oil resulting from the first pressing of the olives and which is suitable for human consumption without further processing. The name “refined olive oil” refers to the oil obtained from subsequent pressings and which is made suitable for human consumption by refining processes which neutralize the acidity and remove particulate matter. Oil extracted from olive pomace and pits by chemical means and refined to make it edible must be labeled either “refined olive-residue oil” or “refined extracted olive-residue oil.” Blends of virgin olive oil and refined olive oil may be labeled as “olive oil,” but blends of olive oil with other edible fats or oils must be labeled in accordance with 21 C.F.R. § 102.37.

47 Fed. Reg. 42,123 (Sept. 24, 1982).

23. 21 C.F.R. § 102.37(b) in turn provides that: “When the label bears any representation, other than in the ingredient listing, of the presence of olive oil in the mixture, the descriptive name shall be followed by a statement of the percentage of olive oil contained in the product.”

**B. New York’s Agriculture And Markets Law**

24. Similarly, under New York law, “olive oil” is defined as the oil “obtained solely from the fruit of the olive tree (*olea europaea*), to the exclusion of oils obtained using solvents or reesterification processes and of any mixture with oils of other kinds.” N.Y. Agric. & Mkts. Law § 204-a(1)(a). “[R]efined olive oil” is the “olive oil obtained from virgin olive oils by refining methods which do not lead to alterations in the initial glyceridic structure. It has free acidity, expressed as oleic acid, of not more than 0.3 grams per hundred grams.” *Id.* § 204-a(1)(c). “Olive-pomace oil” is “oil obtained by treating olive pomace with solvents or other physical treatments.” *Id.* § 204-a(1)(b).

25. New York's legislature has made it "unlawful for any person to manufacture, pack, possess, sell, offer for sale and/or expose for sale any compound or blended oil of any kind which purports to be an olive oil mixture unless the container thereof be permanently and conspicuously labeled "compound oil" or "blended oil" with a statement of the different ingredients thereof and the specific percentage of olive oil, the total percentage of other vegetable oils and the specific percentage of each other ingredient comprising more than one-half of one per centum of the mixture." *Id.* § 204-a. In particular, no olive oil containing "more than one-half of one per centum" of Pomace may legally be sold in New York unless it is "conspicuously labeled 'compound oil or 'blended oil,'" and unless its label discloses the presence and amount of Pomace therein. *Id.*

26. "Failure to meet the[se] standards . . . shall render olive oil sold in intrastate commerce in the state misbranded." *Id.* § 204-a(3)(b).

**C. The International Olive Council's Chemical And Labeling Requirements**

27. The International Olive Council ("IOC") promulgates the world-recognized standards used to determine the quality and purity of olive oils. Although the United States is not an IOC member, the IOC's standards undergird the FDA and New York olive oil regulations.

28. The IOC was formed in 1959, in Madrid, Spain, under the auspices of the United Nations, with the purpose of creating universal industry trade standards. Today, IOC member countries account for 98% of the world's olive oil production.

29. The IOC actively monitors and seeks to prevent olive oil fraud throughout its member countries. In addition, the IOC has certified a small number of laboratories around the world that meet rigorous guidelines for performing chemical and sensory tests of olive oils.<sup>2</sup>

30. The IOC has developed a number of tests that enable one to differentiate olive oil from Pomace. For example:

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<sup>2</sup> International Olive Council, List Of Chemical Testing Laboratories Recognized By The International Olive Council For The Period From 1.12.2011 to 30.11.2012, T.21/Doc. n° 13/Rev. 14 (Nov. 2011)

- a. Erythrodiol and uvaol are two compounds commonly found in Pomace and grapeseed oil. If these compounds constitute more than 4.5 percent of an oil's total sterol content, then the oil is not olive oil. It is either Pomace or grapeseed oil. *See* IOC Trade Standards at 3.3.3.
- b. Olive skins contain almost all of an olive's wax. Thus, authentic olive oil, which is pressed from olive flesh, contains only miniscule amounts of wax; Pomace, which is made, in part, from olive skins, contains significant amounts of wax. As a result, oils that have a wax content in excess of 350 mg/kg are Pomace, not olive oil. *See* IOC Trade Standards at 3.4.
- c. A ratio greater than 0.3 between triacylglycerols with equivalent carbon number 42 (ECN 42) and the theoretical ECN 42 (a number calculated using standard formulations based on an oil's fatty acid composition) demonstrates the presence of Pomace and/or seed oils. *See* IOC Trade Standards at 3.5.

31. Under IOC standards, just like under FDA and New York regulations, no one can label Pomace as olive oil. Nor is it permissible to blend Pomace with olive oil and labeling the mixture as "olive oil." IOC Trade Standards at 2.2.3 ("In no case shall this blend be called 'olive oil.'").

**IV. Laboratory Testing Confirms That Capatriti-Brand Products Are Not "100% Pure Olive Oil" And Instead Contain Pomace.**

32. Gourmet Factory has gained significant market share by selling purported "olive oil" at implausibly low prices – prices that have been more in line with prices for Pomace than for olive oil. Specifically, under the Capatriti brand, Gourmet Factory sells its "100% Pure Olive Oil" at prices far below those of competitors selling an authentic, 100% olive oil product. Legitimate producers selling olive oil cannot match such prices, except by selling their products at a loss.

33. For example, a review of Capatriti's tins in grocery stores in New York and surrounding regions reveals that a 101-ounce tin of Capatriti's "100% Pure Olive Oil" sells for between \$8.99 and \$14.99; whereas a 101-ounce tin of similarly labeled olive oil from NAOOA members sells for between \$19.99 and \$29.99. Gourmet Factory's prices – one-third to one-half of what its competitors charge to sell authentic products – are more consistent with the typical prices charged for Pomace.

34. Gourmet Factory is acutely aware of the difference between pure olive oil and Pomace. In 2008, the Connecticut legislature adopted criteria used by the IOC to measure olive oil quality and punish the sale of olive oils that – to cut production costs – are watered down with hazelnut, soy, or peanut oils. *See Conn. Agencies Regs. § 21a-100-8 (2008) (adopting IOC standards of identify for olive oils and pomace oils).* NAOOA supported adoption of these standards. In 2009, however, Dennis Kangadis, Gourmet Factory's vice president, tried and failed to enjoin the Connecticut Department of Consumer Protection from enforcing these criteria and banning misbranded olive oil that did not comply with those standards.<sup>3</sup> Gourmet Factory's counsel at the time stated that "The Gourmet Factory's reputation and business relationships have already been harmed by [the] adoption of the state Olive Oil Standards."

35. As a result of Connecticut's adoption of IOC standards and Gourmet Factory's lawsuit to forestall their enactment, Gourmet Factory clearly was on notice about the relevant standards that distinguish olive oil from Pomace.

36. The NAOOA retained an independent third party that specializes in imported food safety to purchase tins of Capatriti-brand "100% Pure Olive Oil" from store shelves in New York and New Jersey for testing in August 2012. Images of three such products – each from separate lots (52312, 61812, and 71612), – acquired by the third party are reproduced below:

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<sup>3</sup> *See Kangadis Food, Inc. v. Farrell*, No. CV-084041370-S, 2009 WL 1140487 (Conn. Super. Ct. Mar. 26, 2009).



37. The independent third party sampling company then carefully packed and shipped nine tins of the Capatriti-brand "100% Pure Olive Oil" – three from each of the three lots – to one of the foremost experts in the world on olive oil testing, Professor Lanfranco Conte.

38. Professor Conte previously served for ten years as the Chief Chemist for the Food Fraud Detection Unit at Italy's Ministry of Agriculture. He currently is a Full Professor of Food Chemistry at the University of Udine, Italy, where he teaches Food Chemistry, Chemical Analysis of Foods, and Food Quality Certification, and is the Chair of the Educational Board of Food Science and Technology Course, Chair of the Course in Food Science and Technology, and Head of the Department of Food Science. He is an executive member of multiple scientific and regulatory bodies, including: the Olive Oil Chemist Experts of the European Union, the International Olive Council, the European Food Safety Authority, and the Olive Oil Division at the European Federation of Scientific Society for the Study of Lipids (co-chair of the Managing Board). He has authored approximately 150 scientific papers in peer-reviewed journals and four book chapters, serves as a peer-reviewer for several scientific journals, and serves as the co-editor of the Italian Journal of Food Sciences.

39. Professor Conte received the nine tins on September 11, 2012. He then stored them in a dry, temperature-controlled room, which he uses to store numerous olive oil samples for research purposes. Professor Conte then prepared samples for testing by following a

generally accepted methodology that is designed to ensure that the laboratory is blind to the identity of the brand of oil being tested. He chose one tin from each lot at random, stirred the oil within the tin to account for any separation or settling, and then carefully filled two 500-milliliter, opaque bottles with oil from each tin, which he labeled with the corresponding lot numbers. Professor Conte then submitted the samples for a full suite of testing at an IOC-certified laboratory in Madrid, Spain.

40. Upon receiving the results in late October 2012, Professor Conte definitively concluded that the samples of “100% Pure Olive Oil,” contrary to their labels’ assertions, were not olive oil. Based on a number of separate objective chemical criteria, these samples of “100% Pure Olive Oil” were, at best, some type of Pomace, and, at worst, may also contain seed oils. As such, none of the samples was – or could properly be labeled, represented, or commonly understood to be – olive oil.

41. The results did not leave room for doubt. On several criteria, the samples exceeded *by five to six times* the established thresholds for distinguishing olive oil from Pomace:

	Maximum for Olive Oil	Capatriti Lot No. 52912	Capatriti Lot No. 61812	Capatriti Lot No. 71612
Wax content	≤ 850 mg/kg	1,862 mg/kg	2,238 mg/kg	2,181 mg/kg
Erythrodiol & Uvaol content	≤ 4.5%	26.4%	20.7%	22.3%
ECN 42 Triacylglycerol	≤ 0.3	1.1	0.6	0.4

42. These results cannot be blamed on merely poor quality olive oil or the handling and storage of the particular tins purchased for testing. These results simply could not have occurred if these lots of ostensibly “100% Pure Olive Oil” contained only oils extracted from olives exclusively through mechanical methods. In other words, markers of Pomace and seed oil at these levels do not appear in olive oil by happenstance. Importantly, no matter what standard is used to determine olive oil quality, or distinguish between olive oil and Pomace or seed oils,



the fact remains that the chemical profile of the Capatriti-brand “100% Pure Olive Oil” cannot be reconciled with the chemical profile of olive oil – a defect that Gourmet Factory does not disclose on its labeling.

43. Furthermore, because of the extreme differences in production processes between Pomace and olive oil, the presence of pomace oil in even one tin means that all of the tins with the same lot code contain Pomace.

**V. Gourmet Factory’s Mislabeling And Anticompetitive Conduct Has Caused Harm To the NAOOA, Its Members, And The Public.**

44. The results of the NAOOA’s independent testing demonstrate that Gourmet Factory, under the Capatriti brand, mislabels its “100% Pure Olive Oil.” Instead of 100% pure olive oil, the oil either is completely Pomace, or is adulterated with Pomace and/or other seed oils. In light of the below-market prices at which Gourmet Factory sells Capatriti-brand olive oil, and given the unlikelihood that such exceptional test results could occur by chance in all three lots that were randomly selected for testing, the NAOOA believes that Gourmet Factory has used Pomace or adulterated oils in far more than the above-described three lots, and has been willfully and deceptively passing off Pomace and/or seed oil as “100% Pure Olive Oil.”

45. Gourmet Factory’s actions have caused harm and are likely to continue to cause harm to the public. Consumers purchasing something labeled “100% Pure Olive Oil” believe that they are purchasing a product that adheres not just to federal, state, and international guidelines, but that meets the basic, millennia-old understanding that “olive oil” means the unadulterated oil that comes from pressing olives – *not* from a chemical process that uses heat and solvents to extract oil from the residue of an olive’s pits and skin. Gourmet Factory’s mislabeling thus has a tendency to and actively does deceive consumers. The strong consumer preference for olive oil over Pomace is evidenced by the almost complete lack of consumer demand for Pomace for human consumption in the United States despite the significantly cheaper price of Pomace compared to olive oil.

46. Gourmet Factory's mislabeling constitutes unfair competition because it allows Gourmet Factory to obtain a premium price for inferior Capatriti-brand Pomace – misrepresented to be "100% Pure Olive Oil" – which can be manufactured at a fraction of the cost of authentic olive oils sold by members of the NAOOA and other legitimate producers of olive oils. The price differential between Pomace and authentic olive oil enables Gourmet Factory to unjustly enrich itself at the expense of consumers and legitimate business competitors, such as Plaintiff's members.

47. Gourmet Factory has introduced its adulterated and misbranded edible oil into interstate commerce, offering it for sale in several states. For instance, Plaintiff purchased oils from the offending lots described above in New York and New Jersey. All of these oils bore the same deceptive representation that their contents were nothing but "100% Pure Olive Oil" when, in fact, they should have been labeled as Pomace or labeled as a blend containing seed oils.

48. On information and belief, Gourmet Factory has acted willfully in misbranding its products. Passing off Pomace or oil made from non-olive sources (e.g. seeds) as "100% Pure Olive Oil" is not something that can be done by accident or through mere negligence. Accordingly, on information and belief, Plaintiff alleges that Gourmet Factory intends and knows that its oils are not "100% Pure Olive Oil," and Gourmet Factory intends to deceive consumers into purchasing its adulterated edible oil products.

49. These actions have harmed Plaintiff and its constituent members in several ways. Members of the NAOOA sell olive oil products that directly compete with Defendant's products. The NAOOA's members, however, sell properly labeled products at comparatively higher prices. They are unable to compete on price when Gourmet Factory falsely and deceptively labels something other than olive oil as "100% Pure Olive Oil."

50. The presence of misbranded olive oil in the market also diminishes the positive public perception of olive oil quality, not to mention consumer faith in food labeling in general, exacerbating the irreparable harm to Plaintiff and its members caused by Gourmet Factory's misconduct.

51. To assist the olive oil industry in its efforts to ensure the accuracy of product labeling through regular testing, any statutory damages or other financial recovery the NAOOA obtains in this case will be earmarked to fund its continuing efforts to hold producers and distributors of olive oils accountable to consumers and to maintaining a level playing field for healthy competition.

### **CAUSES OF ACTION**

#### **FIRST COUNT**

#### **False Advertising And Unfair Competition Under The Lanham Act 15 U.S.C. § 1125(a)(1)**

52. The NAOOA hereby repeats and realleges, as is fully set forth herein, the allegation set forth in paragraphs 1 through 51 above.

53. Gourmet Factory's false and misleading descriptions or representations of fact concerning the nature, characteristics, and qualities of products sold in interstate commerce as olive oil – including, but not limited to, Capatriti-brand "100% Pure Olive Oil" – are material, literally false, misleading, and in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Gourmet Factory's use of the phrases "100% pure olive oil" to advertise and market its adulterated products is literally and demonstrably false.

54. Gourmet Factory's conduct is willful, deliberate, intentional, and in bad faith.

55. Because Pomace can be produced and sold far more cheaply than authentic olive oil, Gourmet Factory's willful misrepresentation is material, in that it is likely to influence consumer purchasing decisions.

56. Because the difference between Pomace and authentic olive oil is not visible to the naked eye, consumers must necessarily rely on a label's representations about the contents within. Accordingly, Gourmet Factory's false and misleading representations are likely to and do deceive consumers – including potential purchasers of olive oils sold by members of the NAOOA – into purchasing Gourmet Factory's mislabeled oil instead of higher-priced, authentic olive oil, giving Gourmet Factory an unfair competitive advantage and harming consumers.

57. Plaintiff NAOOA and its members – who directly compete with Defendant – have been and will likely continue to be damaged by Plaintiff’s false and misleading representations.

58. Plaintiff NAOOA and its members have suffered and, unless Gourmet Factory is enjoined, will likely continue to suffer irreparable injury by reason of the false and misleading claims made by Gourmet Factory about its adulterated products.

**SECOND COUNT**  
**Unfair Competition And False Advertising Under New York Law**  
**New York Gen. Bus. Law §§ 349 and 350**

59. The NAOOA hereby repeats and realleges, as is fully set forth herein, the allegations set forth in paragraphs 1 through 58, above.

60. The misleading misrepresentations and willful conduct of Gourmet Factory constitute unfair trade practices in violation of New York Gen. Bus. Law § 349 and false advertising under New York Gen. Bus. Law § 350-e.

61. Gourmet Factory’s deceptive labeling is consumer-oriented; it is expressly aimed at deceiving consumers into buying an adulterated and inferior product.

62. Gourmet Factory’s false labeling is material. Not only does it misrepresent the very nature of the products Gourmet Factory sells, but consumers cannot tell, at the point of purchase, whether Capatriti’s tins labeled as “100% Pure Olive Oil” actually do contain such oil or instead contain Pomace or some other seed oil blend. Thus, Gourmet Factory’s misrepresentations are likely to mislead a reasonable, price-sensitive consumer acting reasonably under the circumstances.

63. The NAOOA, on behalf of itself and its constituent members, has suffered injury and, unless Gourmet Factory is enjoined, will likely continue to suffer harm, as a result of Gourmet Factory’s anticompetitive and deceptive conduct.

64. Gourmet Factory’s conduct is willful, deliberate, intentional, and in bad faith.

**DEMAND FOR JUDGMENT**

65. WHEREFORE, Plaintiff NAOOA respectfully requests that the Court enter judgment for NAOOA and against Gourmet Factory:

- A. Finding that Gourmet Factory's characterization and marketing adulterated products as "100% Pure Olive Oil":
- (1) constitutes a misrepresentation of the nature, characteristics, and qualities of its goods in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);
  - (2) constitutes deceptive practices, unfair competition, and false advertising under New York General Business Law §§ 349 and 350; and
  - (3) was knowing, intentional, and/or in bad faith;
- B. Preliminarily and permanently enjoining Gourmet Factory, its respective officers, directors, employees, agents, subsidiaries, representatives, distributors, dealers, parents, related companies, and all persons in active concert or participation with any of them from engaging in any sales, marketing, advertising, or labeling that implies or makes any representations that products containing impermissible amounts of Pomace or other non-olive oils are "olive oil," and from making any claim that could mislead any person into believing that Gourmet Factory's adulterated products are "100% Pure Olive Oil," until appropriate and reasonable safeguards are put into place that would detect and prevent similar instances of adulteration and/or contamination;
- C. Requiring Gourmet Factory to cease and desist immediately from marketing, advertising, or selling the mislabeled oils challenged in this Complaint or any other similarly mislabeled olive oil products, until appropriate and reasonable safeguards are put into place that would detect and prevent similar instances of adulteration and/or contamination;
- D. Requiring Gourmet Factory to take reasonable steps to notify retailers and the ultimate purchasers of its products deceptively mislabeled as "100% Pure Olive Oil" of the presence of Pomace or other adulterations;

- E. Awarding the NAOOA treble statutory damages for Gourmet Factory's willful, intentional, and bad faith conduct under N.Y. Gen. Bus. Law §§ 349(h) and 350-e;
- F. Granting the NAOOA its costs and expenses in this action, including investigation expenses, expert fees, and reasonable attorneys' fees;
- G. Granting the NAOOA such other relief against Gourmet Factory as this Court may deem just and proper.

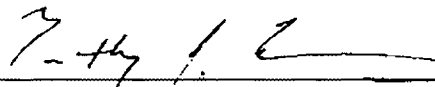
**DEMAND FOR A JURY TRIAL**

66. Plaintiff NAOOA hereby requests a trial by jury on all issues so triable.

Dated: February 6, 2013

Respectfully submitted,

**SIDLEY AUSTIN LLP**

BY:   
Timothy J. Treador  
**SIDLEY AUSTIN LLP**  
787 Seventh Avenue  
New York, NY 10019  
Telephone: (212) 839-5300  
Facsimile: (212) 839-5599  
ttreador@sidley.com

Mark E. Haddad (*pro hac vice forthcoming*)  
Sean Commons (*pro hac vice forthcoming*)  
Nitin Reddy (*pro hac vice forthcoming*)  
**SIDLEY AUSTIN LLP**  
555 West Fifth Street, Suite 4000  
Los Angeles, CA 90013  
Telephone: (213) 896-6000  
Facsimile: (213) 896-6600  
mhaddad@sidley.com  
scommons@sidley.com  
nreddy@sidley.com

*Attorneys for the North American Olive Oil  
Association*