

1 LEXINGTON LAW GROUP
Mark N. Todzo, State Bar No. 168389
2 Meredyth Merrow, State Bar No. 328337
503 Divisadero Street
3 San Francisco, CA 94117
Telephone: (415) 913-7800
4 Facsimile: (415) 759-4112
mtodzo@lexlawgroup.com
5 mmerrow@lexlawgroup.com

6 Attorneys for Plaintiff
7 DAVID AMBROSE

8
9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12
13
14 DAVID AMBROSE, on behalf of himself and all
15 others similarly situated,

16 Plaintiff,

17 v.

18 THE KROGER CO.

19 Defendant.
20
21

Case No.

CLASS ACTION COMPLAINT

1 Plaintiff David Ambrose (“Plaintiff”), on behalf of himself and those similarly
2 situated, based on information, belief and investigation of his counsel, except for information
3 based on personal knowledge, hereby alleges:

4 **INTRODUCTION**

5 1. Defendant The Kroger Co. (“Defendant”) advertises, markets and sells disposable
6 plates and bowls as compostable (the “Products”). A compostable product is one that will
7 entirely break down into usable compost. The Products, however, contain significant amounts of
8 perfluoroalkyl and polyfluoroalkyl substances (“PFAS”), which do not break down and never
9 become part of usable compost. Compost is used as soil-conditioning material or fertilizer, so
10 when compost is contaminated with PFAS, the PFAS then contaminate the soil treated or
11 fertilized with that compost and whatever grows or grazes on that soil.

12 2. PFAS are known as forever chemicals because they do not break down over time.
13 When PFAS are introduced into the environment, they seep into and contaminate both land and
14 water and then never leave. Once introduced into soil, PFAS contaminate crops grown in the soil
15 and meat farmed from animals that graze there.

16 3. Many consumers concerned with the environmental problems associated with the
17 proliferation of trash and waste actively seek to purchase products that are compostable so such
18 products can be introduced into the soil rather than into landfills. These consumers are willing to
19 pay more for such products, which often cost significantly more than non-compostable alternative
20 products. Indeed, the Products cost significantly more than non-compostable disposable plates
21 and bowls.

22 4. This Complaint seeks to remedy Defendant’s unlawful, unfair and deceptive
23 business practices with respect to the advertising, marketing and sales of the Products as
24 compostable, when, in fact, they are not.

25 5. Plaintiff purchased the Products in reliance on Defendant’s false representations
26 that the Products are compostable. Plaintiff viewed Defendant’s false representations on the
27 labels of the Products. If Plaintiff had known that the Products were not compostable, Plaintiff
28 would not have purchased the Products and/or would not have paid the premium price for

1 compostable plates. Defendant has thus breached its express warranty under the California
2 Commercial Code § 2313 and violated the Business and Profession Code § 17200 based on
3 fraudulent, unlawful and unfair acts and practices.

4 6. Plaintiff and the Class seek an order enjoining Defendant's acts of unfair
5 competition and other unlawful conduct, an award of damages to compensate them for
6 Defendant's acts of unfair competition, false and misleading advertising, and breaches of
7 warranty, and restitution to the individual victims of Defendant's fraudulent, unlawful and unfair
8 acts and practices.

9 **PARTIES**

10 7. Plaintiff David Ambrose is a resident of Irvine, California. When given the
11 choice, Plaintiff buys products that are compostable, recyclable or reusable so that he can
12 minimize his impact on the environment. Plaintiff purchased the Products approximately twice a
13 month from 2017 until March 2020. Plaintiff purchased the Products at Ralphs stores in Orange,
14 Irvine, and Tustin, California. Plaintiff purchased the Products to fill last-minute catering orders
15 and was not reimbursed for his purchases. Plaintiff specifically selected the Products in reliance
16 on Defendant's representations that the Products are compostable. The false representations are
17 located on the labels and other marketing materials for the Products. Had Plaintiff known that the
18 Products contained PFAs chemicals, and thus could not break down in an industrial composting
19 facility, he would not have purchased the Products. Instead, he paid considerably more for the
20 Products than he would have for similar products that are not advertised as compostable. Plaintiff
21 would purchase the Products again if they were truly compostable. Given that PFAS are not an
22 identifiable part of the Products, Plaintiff will be unable to determine the truthfulness of
23 Defendant's representations absent imposition of the injunctive relief prayed for in this complaint.

24 8. Defendant The Kroger Co. is an Ohio corporation with its principal place of
25 business in Columbus, Ohio. Defendant The Kroger Co. manufactures, distributes and sells the
26 Products in California.

1 **JURISDICTION AND VENUE**

2 9. This Court has jurisdiction over Defendant because Defendant is a corporation or
3 other entity that has sufficient minimum contacts in California, is a citizen of California, or
4 otherwise intentionally avails itself of the California market either through the distribution, sale or
5 marketing of the Products in the State of California or by having facilities located in California so
6 as to render the exercise of jurisdiction over it by the California courts consistent with traditional
7 notions of fair play and substantial justice.

8 10. Venue is proper pursuant to 28 U.S.C. § 1391(a) because a substantial part of the
9 events or omissions giving rise to the claim occurred in this District.

10 11. **Intradistrict Assignment (L.R. 3-2(c) and (d) and 3.5(b))**: This action arises in
11 Alameda County, in that a substantial part of the events which give rise to the claims asserted
12 herein occurred in Alameda County. Pursuant to L.R. 3-2(c), all civil actions which arise in
13 Alameda County shall be assigned to the San Francisco or Oakland Division.

14 **BACKGROUND FACTS**

15 12. Due to the overwhelming amount of landfilled waste accumulating in the
16 environment, biodegradable and compostable foodware options have become increasingly
17 popular. As people look to invest in sustainable alternatives to single-use plastics and packaging,
18 consumers, including the Plaintiff, actively seek out products that are compostable, recyclable, or
19 reusable, to prevent the increase in global waste and to minimize their environmental footprints.

20 13. The California Business and Professions Code § 17580.5 makes it “unlawful for
21 any person to make any untruthful, deceptive, or misleading environmental marketing claim,
22 whether explicit or implied.” Pursuant to that section, the term “environmental marketing claim”
23 includes any claim contained in the Guides for use of Environmental Marketing Claims published
24 by the Federal Trade Commission (the “Green Guides”). *Ibid*; *see also* 16 C.F.R. § 260.1, *et seq.*
25 Under the Green Guides, “[i]t is deceptive to misrepresent, directly or by implication, that a
26 product or package is compostable.” 16 C.F.R. § 260.7(a). “A marketer claiming that an item is
27 compostable should have competent and reliable scientific evidence that all the materials in the
28

1 item will break down into, or otherwise become part of, usable compost...in a safe and timely
2 manner...in an appropriate composting facility...” 16 C.F.R. § 260.7(b).

3 14. The Green Guides’ definition of “compostable” is consistent with reasonable
4 consumer expectations. For instance, the dictionary defines the verb “compost” as: to convert (a
5 material such as plant debris) to compost. The dictionary defines the noun “compost” as a
6 mixture that consists largely of decayed organic matter and is used for fertilizing and conditioning
7 the land.” Merriam-Webster Dictionary (2020).¹ Accordingly, reasonable consumers expect that
8 products advertised, marketed, sold, labeled, and/or represented as compostable will be converted
9 into usable organic matter that decomposes into fertilizer to condition the land, and that such
10 products will not introduce toxic chemicals into the fertilizer or land.

11 15. The Green Guides specifically prohibit marketers from labeling products
12 compostable if those products release toxins into the compost as they break down, noting that “a
13 claim is deceptive if the presence of...toxins prevents the compost from being usable.” 16 C.F.R.
14 § 260.7(d), Example 2.

15 16. Defendant advertises, markets and sells its Products as compostable, yet the
16 Products contain PFAS, highly persistent synthetic fluorinated chemicals which have been
17 associated with cancer, developmental toxicity, immunotoxicity and other health effects.²

18 17. PFAS’ characteristic carbon-fluorine bonds make them extremely resistant to
19 degradation, even at high temperatures. And, the most commonly used PFAS have been detected
20 globally in water, soil, sediment, wildlife, and human blood samples.³ The strength of the bond
21 between carbon and fluorine means that these chemicals do not degrade in the environment. In
22 fact, according to the National Institute of Environmental Health Sciences, scientists are unable to
23

24 _____
25 ¹ Merriam-Webster Dictionary (2020); accessible at: [https://www.merriam-
webster.com/dictionary/compost](https://www.merriam-webster.com/dictionary/compost); last accessed on: May 16, 2020.

26 ² Schaidler, L., et al., “Fluorinated Compounds in U.S. Fast Food Packaging” Environ Sci Technol
27 Lett. 2017 ; 4(3): 105–111. doi:10.1021/acs.estlett.6b00435, (August 22, 2018), accessible at:
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6104644/pdf/nihms983267.pdf>, last accessed on
28 May 13, 2020.

³ *Id.* at p. 2.

1 estimate an environmental half-life for PFAS.⁴ Due to the highly persistent nature of these
2 chemicals they break down very slowly, if at all, in the environment and in human bodies.⁵

3 18. Because PFAS do not break down, they accumulate in air, soil, water and in the
4 human body. One report by the Centers for Disease Control and Prevention National Health and
5 Nutrition Examination Survey found PFAS in the blood of 97 percent of Americans.⁶

6 19. PFAS were created to be resistant to grease, oil, water, and heat, for use in non-
7 stick cookware.⁷ Due to the grease and water-resistant properties of fluorinated compounds,
8 PFAS are often added to paper plates, bowls, food storage and packaging products (together,
9 “foodware”). This leads to increased PFAS exposure in humans and in the environment. For
10 products sold as compostable containing PFAS, there is the added concern that PFAS will seep
11 into the ground and soil, contaminating otherwise-usable compost streams. According to experts,
12 fluorinated food contact materials are a source of PFAS in the environment, and because of their
13 environmental persistence “PFASs should be considered incompatible with compostable food
14 packaging.”⁸

15 20. A recent study of sixteen replacement fluorinated compounds used in foodware,
16 conducted by the Center for Environmental Health, showed that some PFAS can act like the
17 hormone estrogen, while others cause liver damage in animal studies.⁹ These fluorinated

18 _____
19 ⁴ National Institute of Environmental Health Sciences, accessible at:
<https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm>, last accessed on May 5, 2020.

20 ⁵ U.S. Environmental Protection Agency, “PFOA, PFOS and Other PFASs”, accessible at:
21 <https://www.epa.gov/pfas/basic-information-pfas>, last accessed on May 5, 2020. *See also*
Center for Environmental Health, “Avoiding Hidden Hazards” January 2018 (revised April
2018), at p. 3.

22 ⁶ National Institute of Environmental Health Sciences, accessible at:
23 <https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm>, last accessed on May 5, 2020.

24 ⁷ U.S. Food & Drug Administration “Per and Polyfluoroalkyl Substances (PFAS)”, accessible at:
<https://www.fda.gov/food/chemicals-and-polyfluoroalkyl-substances-pfas>, last accessed on May
25 5, 2020.

26 ⁸ Schaidler, L., et al., “Fluorinated Compounds in U.S. Fast Food Packaging” *Environ Sci Technol*
27 *Lett.* 2017 ; 4(3): 105–111. doi:10.1021/acs.estlett.6b00435, (August 22, 2018), accessible at:
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6104644/pdf/nihms983267.pdf>, last accessed on
28 May 13, 2020 at p. 8.

⁹ Center for Environmental Health, “Avoiding Hidden Hazards” January 2018 (revised April
2018) at p. 7.

1 compounds can move from foodware into water and other liquids.¹⁰ Foodware containing PFAS
2 can also contaminate food items. Worse yet, for contaminated foodware products that are
3 compostable, PFAS can leach from the product into the compost stream, contaminating the
4 compost itself and organic matter grown using that composted material.

5 21. There is evidence that exposure to PFAS can lead to a number of adverse health
6 effects, including, but not limited to reproductive and developmental, liver and kidney and
7 immunological effects in laboratory animals.¹¹ The most consistent findings from human
8 epidemiology studies are related to infant birth weights, effects on the immune system, cancer
9 and thyroid hormone disruption.¹²

10 22. Over the past two decades, PFAS have come under increasing scrutiny from
11 toxicologists, ecologists and regulators given their persistence and connection to serious potential
12 health effects.¹³

13 23. Humans are exposed to PFAS by consuming PFAS-contaminated water and food
14 as well as through the use of products that contain PFAS.

15 24. The claims made by Defendant that the Products are compostable are uniform,
16 consistent, and material. Because the claims are false and misleading, ordinary consumers,
17 including members of the Class, are likely to be deceived by such representations.

18 25. By encouraging consumers to place the Products in their compost collection bins,
19 Defendant is contaminating entire compost streams with toxic materials that will not break down
20 over time—contaminating otherwise-usable and sustainable compost streams. These Products are
21 then mixed with other composted materials in an industrial composting facility and turned into
22 soil fertilizer for crops and other foods. However, the PFAS will remain, thus contaminating the
23 crops grown in that soil. Environmentally motivated consumers who purchase the Products in the
24 belief that they are compostable are thus unwittingly hindering sustainable composting efforts.

25 _____
26 ¹⁰ *Id.*

27 ¹¹ *Id.*

28 ¹² *Id.*

¹³ *Id.* at p. 3.

1 26. The Green Guides are clear: “[a] marketer claiming that an item is compostable
2 should have competent and reliable scientific evidence that all the materials in the item will break
3 down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch)
4 in a safe and timely manner (i.e., in approximately the same time as the materials with which it is
5 composted) in an appropriate composting facility, or in a home compost pile or device.” 16
6 C.F.R. § 260.7(b). Here, the Products are not compostable because they are made with PFAS,
7 which cannot break down over time. Defendant’s marketing of the Products as compostable is
8 thus a direct violation of the Green Guides. Because the Products are not compostable,
9 Defendant’s representations are thus per se deceptive under the Green Guides and under
10 California law.

CLASS ACTION ALLEGATIONS

11
12 27. Plaintiff brings this suit individually and as a class action pursuant to Federal Rule
13 of Civil Procedure Rule 23, on behalf of himself and the following Class of similarly situated
14 individuals:

15 All persons who purchased the Products in California during the
16 applicable statute of limitations period (the “Class”). Specifically
17 excluded from the Class are Defendant; the officers, directors or
18 employees of Defendant; any entity in which Defendant has a
19 controlling interest; and any affiliate, legal representative, heir or
20 assign of Defendant. Also excluded are any judicial officer
21 presiding over this action and the members of his/her immediate
22 family and judicial staff, and any juror assigned to this action.

23 28. Plaintiff is unable to state the precise number of potential members of the proposed
24 Class because that information is in the possession of Defendant. However, the number of Class
25 members is so numerous that joinder would be impracticable for purposes of Rule 23(a)(1). The
26 exact size of the proposed Class and the identity of its members will be readily ascertainable from
27 the business records of Defendant and Defendant’s retailers as well as Class members’ own
28

1 records and evidence. The disposition of the claims of the members of the Class in this class
2 action will substantially benefit both the parties and the Court.

3 29. There is a community of interest among the members of the proposed Class in that
4 there are questions of law and fact common to the proposed Class for purposes of Rule 23(a)(2),
5 including whether Defendant's labels, advertisements and packaging include uniform
6 misrepresentations that misled Plaintiff and the other members of the Class to believe the
7 Products are compostable when they are not. Proof of a common set of facts will establish the
8 liability of Defendant and the right of each member of the Class to relief.

9 30. Plaintiff asserts claims that are typical of the claims of the entire Class for
10 purposes of Rule 23(a)(3). Plaintiff and all members of the Class have been subjected to the same
11 wrongful conduct because they have purchased the Products that are labeled and sold as plates
12 and bowls that are compostable, when they are not in fact compostable.

13 31. Plaintiff will fairly and adequately represent and protect the interests of the other
14 members of the Class for purposes of Rule 23(a)(4). Plaintiff has no interests antagonistic to
15 those of other members of the Class. Plaintiff is committed to the vigorous prosecution of this
16 action and has retained counsel experienced in complex litigation of this nature to represent him.
17 Plaintiff anticipates no difficulty in the management of this litigation as a class action.

18 32. Class certification is appropriate under Rule 23(b)(2) because Defendant has acted
19 on grounds that apply generally to the Class, so that final injunctive relief or corresponding
20 declaratory relief, is appropriate respecting the Class as a whole. Defendant utilizes advertising
21 campaigns that include uniform misrepresentations that misled Plaintiff and the other members of
22 the Class.

23 33. Class certification is appropriate under Rule 23(b)(3) because common questions
24 of law and fact substantially predominate over any questions that may affect only individual
25 members of the Class. These common legal and factual questions, which do not vary among
26 Class members and which may be determined without reference to the individual circumstances
27 of any Class member include, but are not limited to the following:

28 a. whether Defendant advertises and markets the Products by representing that

- 1 the Products are compostable;
- 2 b. whether the Products contain PFAS;
- 3 c. whether the Products are compostable as advertised and labeled by Defendant;
- 4 d. whether Defendant’s marketing, advertising and labeling claims regarding the
- 5 compostability of the Products are likely to deceive a reasonable consumer;
- 6 e. whether Defendant’s representations regarding the compostability of the
- 7 Products are likely to be read and understood by a reasonable consumer;
- 8 f. whether Defendant’s representations regarding the compostability of the
- 9 Products violate the Green Guides;
- 10 g. whether Defendant’s claims regarding the compostability of the Products
- 11 would be material to a reasonable consumer of the Products;
- 12 h. whether Defendant’s conduct in advertising, marketing and labeling of the
- 13 Products constitutes a violation of California consumer protection laws;
- 14 i. whether Defendant’s representations concerning the Products constitute
- 15 express warranties with regard to the Products;
- 16 j. whether Defendant breached the express warranties it made with regard to the
- 17 Products;
- 18 k. whether Defendant has been unjustly enriched from the sale of the Products;
- 19 l. and
- 20 m. whether Plaintiff and the Class members are entitled to injunctive, equitable
- 21 and monetary relief.

22 34. Defendant utilizes marketing, advertisements and labeling that include uniform
23 misrepresentations that misled Plaintiff and the other members of the Class. Defendant’s claims
24 regarding the compostability of the Products are one of the most prominent features of
25 Defendant’s marketing, advertising and labeling of the Products. Nonetheless, the Products are
26 not in fact compostable. Thus, there is a well-defined community of interest in the questions of
27 law and fact involved in this action and affecting the parties.

1 package is compostable. A marketer claiming that an item is compostable should have competent
2 and reliable scientific evidence that all the materials in the item will break down into, or
3 otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and
4 timely manner (i.e., in approximately the same time as the materials with which it is composted)
5 in an appropriate composting facility, or in a home compost pile or device. A marketer should
6 clearly and prominently qualify compostable claims to the extent necessary to avoid deception if:
7 (1) the item cannot be composted safely or in a timely manner in a home compost pile or device;
8 or (2) the claim misleads reasonable consumers about the environmental benefit provided when
9 the item is disposed of in a landfill.” 16 C.F.R. § 260.7(a)-(c). By misrepresenting that the
10 Products are compostable as described above, Defendant is violating Business & Professions
11 Code § 17580.5.

12 39. Defendant’s conduct also violates Section 5 of the Federal Trade Commission Act
13 (“FTC Act”), 15 U.S.C. § 45, which prohibits unfair methods of competition and unfair or
14 deceptive acts or practices in or effecting commerce. By misrepresenting that the Products are
15 compostable, Defendant is violating Section 5 of the FTC Act.

16 40. Defendant’s conduct also violates California Business & Professions Code
17 § 17500, which prohibits knowingly making, by means of any advertising device or otherwise,
18 any untrue or misleading statement with the intent to sell a product or to induce the public to
19 purchase a product. By misrepresenting that the Products are compostable, Defendant is violating
20 Business & Professions Code § 17500.

21 41. Defendant’s conduct is also a breach of warranty. Defendant’s representations that
22 the Products are compostable constitute affirmations of fact made with regard to the Products, as
23 well as descriptions of the Products, that are part of the basis of the bargain between Defendant
24 and purchasers of the Products. Because those representations are material, false and misleading,
25 Defendant has breached its express warranties as to the Products and has violated California
26 Commercial Code § 2313.

27 42. By violating the FTC Act, Business & Professions Code §§ 17500 and 17580.5,
28 and California Commercial Code § 2313, Defendant has engaged in unlawful business acts and

1 practices which constitute unfair competition within the meaning of Business & Professions Code
2 § 17200. Plaintiff would not have purchased the Products, or would not have paid as much for
3 Products, but for Defendant's unlawful business practices. Plaintiff has thus suffered injury in
4 fact and lost money or property as a direct result of Defendant's misrepresentations and material
5 omissions.

6 43. An action for injunctive relief and restitution is specifically authorized under
7 Business & Professions Code § 17203.

8 44. Plaintiff would purchase the Products again in the future if they were truly
9 compostable.

10 Wherefore, Plaintiff prays for judgment against Defendant, as set forth hereafter.

11 **SECOND CAUSE OF ACTION**

12 **(Plaintiff, on Behalf of Himself, the Class and the General Public,**
13 **Alleges Violations of California Business & Professions Code § 17200,**
14 ***et seq.* Based on Fraudulent Acts and Practices)**

15 45. Plaintiff realleges and incorporates herein by reference Paragraphs 1 through 44 of
16 this Complaint.

17 46. Under Business & Professions Code § 17200, any business act or practice that is
18 likely to deceive members of the public constitutes a fraudulent business act or practice.

19 47. Defendant has engaged and continues to engage in conduct that is likely to deceive
20 members of the public. This conduct includes, but is not limited to, representing that the Products
21 are compostable.

22 48. Plaintiff purchased the Products in reliance on Defendant's representations that the
23 Products are compostable. Defendant's claims that the Products are compostable are material,
24 untrue and misleading. These compostable claims are prominent on all of Defendant's marketing,
25 advertising and labeling materials, even though Defendant is aware that the claims are false and
26 misleading. Also, because Defendant's compostable claims violate Business & Professions Code
27 § 17580.5, such claims are deceptive *per se*. Defendant's claims deceived Plaintiff, who relied on
28 those claims and are likely to deceive reasonable consumers. Plaintiff would not have purchased

1 the Products, or would not have paid as much for the Products, but for Defendant's false
2 representations that the Products are compostable. Plaintiff has thus suffered injury in fact and
3 lost money or property as a direct result of Defendant's misrepresentations and material
4 omissions.

5 49. By committing the acts alleged above, Defendant has engaged in fraudulent
6 business acts and practices, which constitute unfair competition within the meaning of Business
7 & Professions Code § 17200.

8 50. An action for injunctive relief and restitution is specifically authorized under
9 Business & Professions Code § 17203.

10 51. Plaintiff would purchase the Products again in the future if they were truly
11 compostable.

12 Wherefore, Plaintiff prays for judgment against Defendant, as set forth hereafter.

13 **THIRD CAUSE OF ACTION**

14 **(Plaintiff, on Behalf of Himself, the Class and the General Public,**
15 **Alleges Violations of California Business & Professions Code § 17200, et seq.**
16 **Based on Unfair Acts and Practices)**

17 52. Plaintiff realleges and incorporates herein by reference Paragraphs 1 through 51 of
18 this Complaint.

19 53. Under California Business & Professions Code § 17200, any business act or
20 practice that is unethical, oppressive, unscrupulous or substantially injurious to consumers, or that
21 violates a legislatively declared policy, constitutes an unfair business act or practice.

22 54. Defendant has engaged and continues to engage in conduct which is immoral,
23 unethical, oppressive, unscrupulous and substantially injurious to consumers. This conduct
24 includes, but is not limited to, advertising and marketing the Products as compostable when they
25 are not. By taking advantage of consumers concerned about the environmental impact of non-
26 sustainable waste, Defendant's conduct, as described herein, far outweighs the utility, if any, of
27 such conduct.
28

1 55. Defendant has engaged and continue to engage in conduct that violates the
2 legislatively declared policy of the Green Guides. The Green Guides mandate that “it is
3 deceptive to misrepresent, directly or by implication, that a product or package is compostable.”
4 16 C.F.R. § 260.7(a). It further states that “[a] marketer claiming that an item is compostable
5 should have competent and reliable scientific evidence that all the materials in the item will break
6 down into, or otherwise become part of usable compost...in a safe and timely manner.” 16
7 C.F.R. § 260.7(b). Defendant’s conduct also violates the policies underlying Business and
8 Professions Code §17580.5, which prohibits untruthful, deceptive or misleading environmental
9 marketing claims. As explained above, the Products are not compostable and the PFAS contained
10 within the Products do break down into useable compost over time. Moreover, the PFAS
11 contaminate the compost, thereby contaminating the soil treated with the compost.

12 56. Defendant’s conduct, including failing to disclose that the Products contain PFAS
13 which cannot break down into usable compost, is substantially injurious to consumers. Such
14 conduct has caused and continues to cause substantial injury to consumers because consumers
15 would not have purchased the Products but for Defendant’s representations that the Products are
16 compostable. Consumers are concerned about environmental issues in general and PFAS
17 contamination in particular. Defendant’s representations are therefore material to such
18 consumers. Misleading causes injury to such consumers that is not outweighed by any
19 countervailing benefits to consumers or competition. Indeed, no benefit to consumers or
20 competition results from Defendant’s conduct. Defendant gains an unfair advantage over its
21 competitors, whose advertising must comply with the FTC Act, Cal. Business & Professions
22 Code § 17580.5, and the Green Guides. Since consumers reasonably rely on Defendant’s
23 representations of the Products and injury results from ordinary use of the Products, consumers
24 could not have reasonably avoided such injury.

25 57. Although Defendant knows that the Products are not compostable, Defendant
26 failed to disclose that fact to Plaintiff and the Class.

27
28

1 58. By committing the acts alleged above, Defendant has engaged in unfair business
2 acts and practices which constitute unfair competition within the meaning of California Business
3 & Professions Code § 17200.

4 59. An action for injunctive relief and restitution is specifically authorized under
5 California Business & Professions Code § 17203.

6 60. Plaintiff would purchase the Products again in the future if they were truly
7 compostable.

8 61. Plaintiff would not have purchased the Products, or would not have paid as much
9 for Products, but for Defendant's unfair business practices. Plaintiff has thus suffered injury in
10 fact and lost money or property as a direct result of Defendant's misrepresentations and material
11 omissions.

12 Wherefore, Plaintiff prays for judgment against Defendant, as set forth hereafter.

13 **FOURTH CAUSE OF ACTION**

14 **(Plaintiff, on Behalf of Himself and the Class, Alleges Breach of Express Warranty)**

15 62. Plaintiff realleges and incorporates herein by reference Paragraphs 1 through 61 of
16 this Complaint.

17 63. The Uniform Commercial Code § 2-313 provides that an affirmation of fact or
18 promise made by the seller to the buyer which relates to the goods and becomes part of the basis
19 of the bargain creates an express warranty that the goods shall conform to the promise.

20 64. As detailed above, Defendant marketed and sold the Products as compostable.
21 Defendant's representations that the Products are compostable constitute affirmations of fact
22 made with regard to the Products as well as descriptions of the Products.

23 65. Defendant's representations regarding the compostability of the Products are
24 uniformly made in the Products' advertising, internet sites and other marketing materials, and on
25 the Products' labeling and packaging materials, and are thus part of the basis of the bargain
26 between Defendant and purchasers of the Products.

27 66. California has codified and adopted the provisions of the Uniform Commercial
28 Code governing express warranties (Cal. Com. Code § 2313).

1 77. These misrepresentations and omissions caused injuries to Plaintiff and the Class
2 members because they would not have purchased the Products, or would not have paid as much
3 for the Products, had they known that the Products are not compostable, and instead, contaminate
4 the compost stream.

5 78. Because Defendant's retention of the non-gratuitous benefits conferred to them by
6 Plaintiff and the Class members is unjust and inequitable, Defendant ought to pay restitution to
7 Plaintiff and the Class members for their unjust enrichment.

8 79. As a direct and proximate result of Defendant's unjust enrichment, Plaintiff and
9 the Class members are entitled to restitution or disgorgement in an amount to be proved at trial.

10 Wherefore, Plaintiff prays for judgment against Defendant, as set forth hereafter.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff prays for judgment and relief against Defendant as follows:

13 A. That the Court declare this a class action;

14 B. That the Court preliminarily and permanently enjoin Defendant from conducting
15 its businesses through the unlawful, unfair or fraudulent business acts or practices, untrue and
16 misleading advertising, and other violations of law described in this Complaint;

17 C. That the Court order Defendant to cease and refrain from marketing and promotion
18 of the Products that state or imply that the Products are compostable;

19 D. That the Court order Defendant to implement whatever measures are necessary to
20 remedy the unlawful, unfair or fraudulent business acts or practices, untrue and misleading
21 advertising and other violations of law described in this Complaint;

22 E. That the Court order Defendant to notify each and every Class member of the
23 pendency of the claims in this action in order to give such individuals an opportunity to obtain
24 restitution and damages from Defendant;

25 F. That the Court order Defendant to pay restitution to restore all Class members all
26 funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair or
27 fraudulent business act or practice, untrue or misleading advertising, plus pre- and post-judgment
28 interest thereon;

1 G. That the Court order Defendant to disgorge all money wrongfully obtained and all
2 revenues and profits derived by Defendant as a result of their acts or practices as alleged in this
3 Complaint;

4 H. That the Court award damages to Plaintiff and the Class to compensate them for
5 the conduct alleged in this Complaint;

6 I. That the Court grant Plaintiff her reasonable attorneys' fees and costs of suit
7 pursuant to California Code of Civil Procedure § 1021.5, the common fund doctrine, or any other
8 appropriate legal theory; and

9 J. That the Court grant such other and further relief as may be just and proper.

10 **JURY DEMAND**

11 Plaintiff demands a trial by jury on all causes of action so triable.

12
13 Dated: June 16, 2020

Respectfully submitted,

14 LEXINGTON LAW GROUP

15
16 /s/ Mark Todzo

17 Mark N. Todzo, (State Bar No. 168389)
18 Meredyth Merrow, (State Bar No. 328337)
19 LEXINGTON LAW GROUP
20 503 Divisadero Street
21 San Francisco, CA 94117
22 Telephone: (415) 913-7800
23 Facsimile: (415) 759-4112
24 mtodzo@lexlawgroup.com
25 mmerrow@lexlawgroup.com

26
27 Attorneys for Plaintiff
28 DAVID AMBROSE

CIVIL COVER SHEET

The JS-CAND 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 in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
DAVID AMBROSE, on behalf of himself and all others similarly situated
(b) County of Residence of First Listed Plaintiff Orange County
(c) Attorneys (Firm Name, Address, and Telephone Number)
Mark N. Todzo, LEXINGTON LAW GROUP, 503 Divisadero Street, San Francisco, CA 94117, Telephone: 415-913-7800

DEFENDANTS
THE KROGER CO.
County of Residence of First Listed Defendant Hamilton County
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question
4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3

Table with 5 columns: CONTRACT, TORTS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Rows include various legal categories like Insurance, Personal Injury, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing
Brief description of cause: Plaintiff asserts putative class action against Defendant for alleged violation of various California state consumer protection laws

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions): JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 06/16/2020 SIGNATURE OF ATTORNEY OF RECORD /s Mark N. Todzo