S282968

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, *Plaintiff-Appellant*, v. VANLAW FOOD PRODUCTS, INC., a California corporation, *Defendant-Appellee*.	No. 22-55432 D.C. No. 8:21-cv-01060-DOC-ADS ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF CALIFORNIA

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted October 17, 2023
Pasadena, California

Filed December 6, 2023

Before: Richard A. Paez and Holly A. Thomas, Circuit Judges, and Jed S. Rakoff,[*] District Judge.

Order

[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY**

Certification Order / California Law

The panel certified the following question to the California Supreme Court:

> Is a contractual clause that substantially limits damages for an intentional wrong but does not entirely exempt a party from liability for all possible damages valid under California Civil Code Section 1668?

ORDER

We respectfully ask the Supreme Court of California to exercise its discretion to decide the certified question set forth in section II of this order. We provide the following information in accordance with California Rule of Court 8.548(b).

I. Administrative Information

The caption of this case is:

No. 22-55432

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff-Appellant,

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

v.

VANLAW FOOD PRODUCTS, INC., a California corporation, Defendant-Appellee.

The names and addresses of counsel for the parties are:

> For Plaintiff-Appellant New England Country Foods, LLC: Michael K. Hagemann, M.K. Hagemann, P.C., 1801 Century Park East, Suite 2400, Century City, California 90067.
>
> For Defendant-Appellee Vanlaw Food Products, Inc.: Krista L. DiMercurio, Mark D. Magarian, Magarian and DiMercurio, APLC, 20 Corporate Park, Suite 255, Irvine, California 92606.

If our request for certification is granted, we designate New England Country Foods, LLC as petitioner. It is the appellant before our court.

II. Certified Question

We certify to the Supreme Court of California the following question of state law:

> *Is a contractual clause that substantially limits damages for an intentional wrong but does not entirely exempt a party from liability for all possible damages valid under California Civil Code Section 1668?*

We certify this question pursuant to California Rule of Court 8.548. The answer to this question will determine the outcome of the appeal currently pending in our court. We

will accept and follow the decision of the California Supreme Court as to this question. Our phrasing of the question should not restrict the California Supreme Court's consideration of the issues involved.

III. Statement of Facts

On June 16, 2021, appellant, New England Country Foods ("NECF"), sued appellee, Vanlaw Food Products ("Vanlaw"). The allegations in the complaint are as follows.

In 1999, NECF began selling a barbeque sauce with several proprietary aspects to Trader Joe's, which in turn sold it to the public. After initially manufacturing the product itself, NECF entered into an "Operating Agreement" with Vanlaw, whereby Vanlaw agreed to manufacture NECF's barbeque sauce. Near the end of the agreement, Vanlaw offered to "clone" NECF's barbeque sauce and sell it directly to Trader Joe's, effectively undercutting NECF. Trader Joe's subsequently accepted and terminated its 19-year relationship with NECF as a result. Vanlaw was ultimately unable to clone the barbeque sauce, and Trader Joe's pursued an alternative option.

The contractual relationship between NECF and Vanlaw was governed by a Mutual Non-Disclosure Agreement and Operating Agreement. NECF contends that the Mutual Non-Disclosure Agreement forbade Vanlaw from reverse engineering NECF's barbeque sauce. NECF therefore sued Vanlaw, asserting five causes of action: (1) breach of contract, for breaching the prohibition on reverse engineering in the Mutual Non-Disclosure Agreement and the implied covenant of good-faith and fair dealing; (2) intentional interference with contractual relations; (3) intentional interference with prospective economic relations; (4) negligent interference with prospective economic

relations; and (5) breach of fiduciary duty. In its initial complaint, NECF sought past and future lost profits, attorneys' fees, litigation costs, and punitive damages.

However, the Operating Agreement contained a "limitation on liability" clause that stated, "[t]o the extent allowed by applicable law: (a) in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind[.]" In addition, an indemnification provision stated, "in no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind (including but not limited to loss of profits, business revenues, business interruption and the like)."

Vanlaw moved to dismiss the complaint, arguing, in relevant part, that the foregoing clauses in the Operating Agreement barred NECF's claims. The district court agreed and dismissed NECF's complaint with leave to amend. The district court concluded that the limitation of liability clauses barred the complaint because they only permitted NECF to recover "direct damages or injunctive relief," yet NECF was attempting to recover "past and future lost profits, attorneys' fees and costs, and punitive damages." The district court also found that the limitation of liability clauses were permissible under California law because California Civil Code Section 1668 only "prevent[s] contracts that completely exempt parties from liability, not simply limit damages." However, the district court granted NECF "leave to amend its [c]omplaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt [appellee] from liability."

NECF then amended its complaint to add two new allegations: (1) that its harm was only in the "form of lost profits (both past and future)" and (2) "the limitation-of-liability provisions in the Operating Agreement . . . if applied, would completely exempt Defendant from liability from the wrong alleged herein because said provisions purport to bar all claims for, 'loss of profits.'" Vanlaw again moved to dismiss the complaint, arguing that the limitation of liability clauses in the Operating Agreement still barred NECF's lawsuit. The district court agreed and dismissed NECF's first amended complaint with prejudice. The district court again held that the limitation of liability provision was permissible under California Civil Code Section 1668 because it "does not bar all liability, just liability for specific types of relief." NECF could still seek unpaid royalties, direct damages, or injunctive relief.

IV. Explanation of Certification Request

The dispositive issue on appeal is whether contractual limitation of liability clauses for intentional wrongs that bar certain forms of damages, but not all possible damages, are valid under California Civil Code Section 1668. There is an unresolved split of authority on this question among California state courts.

In general, limitation of liability clauses are permissible. *See Lewis v. YouTube, LLC*, 244 Cal. App. 4th 118, 125 (2015). However, California Civil Code Section 1668 limits the permissible scope of such clauses. It provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668. The California

Supreme Court has explained that an "exculpatory clause [that] affects the public interest" is invalid under this statutory provision. *See Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 98–104 (1963) (invaliding an exculpatory provision in a hospital-patient contract); *Henrioulle v. Marin Ventures, Inc.*, 20 Cal. 3d 512, 519–21 (1978) (invalidating exculpatory provisions in residential leases). In addition, the California Supreme Court has held that provisions exculpating all liability for "intentional wrongdoing" and "gross negligence" are invalid under Section 1668. *See Westlake Cmty. Hosp. v. Superior Ct.*, 17 Cal. 3d 465, 479 (1976) (holding that a bylaw that "bar[red] . . . plaintiff's claim based on the *intentional* wrongdoing of the hospital or its staff" was invalid under Section 1668 (emphasis in original)); *City of Santa Barbara v. Superior Ct.*, 41 Cal. 4th 747, 751 (2007) (holding "that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy"). Accordingly, Section 1668 will "invalidate[] contracts that purport to exempt an individual or entity from liability for future intentional wrongs," "gross negligence," and "ordinary negligence when the public interest is involved or . . . a statute expressly forbids it." *Spenser S. Busby, APLC v. BACTES Imaging Sols., LLC*, 74 Cal. App. 5th 71, 84 (2022) (internal quotation marks omitted) (quoting *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011)).

However, the California Supreme Court has not addressed the precise question at the center of this appeal: whether a limitation of liability clause that exempts a party from liability for some but not all possible damages is permissible under California Civil Code Section 1668.

California's lower courts are currently split on the issue. Some California courts have upheld such clauses. *See, e.g.*, *Farnham v. Superior Ct.*, 60 Cal. App. 4th 69, 77 (1997) (finding "that a contractual *limitation* on the liability of directors for defamation arising out of their roles as directors is equally valid where, as here, the injured party retains his right to seek redress from the corporation" (emphasis in original)); *CAZA Drilling (Cal.), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 475 (2006) ("[T]he challenged provisions . . . represent a valid limitation on liability rather than an improper attempt to exempt a contracting party from responsibility for violation of law within the meaning of [S]ection 1668."). Other courts have invalidated or acknowledged the potential invalidity of such clauses. *See Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 98–101 (1966) (finding a limitation of liability statement void under Section 1668); *Health Net of Cal., Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224, 239 (2003) (declining to address the precise issue but noting that "[S]ection 1668 has, in fact, been applied to invalidate provisions that merely limit liability").

The statutory language of Section 1668 seems susceptible to both readings. The use of the word "exempt" in the statute may indicate that only provisions that categorically bar all liability are invalid. However, when read within its broader context—that "all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility"—the term "exempt" may be interpreted to mean that even liability provisions that bar only certain kinds of damages run afoul of this statute, because they could have the indirect effect of effectively exempting a party from liability. The guidance of the California Supreme

Court on this issue is critical to clarifying the meaning of this statutory language.

This unresolved issue of state law is pivotal in this case and important for all parties who contract under California law. Count Two, intentional interference with contractual relations, and Count Three, intentional interference with prospective economic relations, are intentional wrongs. *See Ramona Manor Convalescent Hosp. v. Care Enters.*, 177 Cal. App. 3d 1120, 1130–31 (1986). Count Five, breach of the fiduciary duty of loyalty, is "a willful injury to the . . . property of another under Civil Code [S]ection 1668." *Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 56–57 (2003).

If the limitation of liability clauses in the Operating Agreement are permissible under Section 1668, the district court's decision to dismiss these causes of action must stand. However, if a limitation of liability clause cannot limit material damages for intentional wrongs, the district court's decision must be reversed, and these causes of action must be permitted to proceed.

Thus, whether a limitation of liability clause that limits some or even most, but not all, damages for intentional wrongs is permissible will determine whether plaintiff is permitted to proceed with these claims. Accordingly, we certify this question to the California Supreme Court.

V. Accompanying Materials

The Clerk is hereby directed to file in the Supreme Court of California, under official seal of the United States Court of Appeals for the Ninth Circuit, copies of all relevant briefs and excerpts of the record, and an original and ten copies of this order and request for certification, along with a

certification of service on the parties, pursuant to California Rule of Court 8.548(c), (d).

This case is withdrawn from submission. Further proceedings before this court are stayed pending final action by the Supreme Court of California. The Clerk is directed to administratively close this docket pending further order. The parties shall notify the clerk of this court within seven days after the Supreme Court of California accepts or rejects certification, and again within seven days if that court accepts certification and subsequently renders an opinion. The panel retains jurisdiction over further proceedings.

QUESTION CERTIFIED.

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 22−55432 **Docketed:** 04/28/2022
Nature of Suit: 4190 Other Contract Actions **Termed:** 12/06/2023
New England Country Foods, LLC v. Vanlaw Food Products, Inc.
Appeal From: U.S. District Court for Central California, Santa Ana
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0973−8 : 8:21−cv−01060−DOC−ADS
Trial Judge: David O. Carter, District Judge
Date Filed: 06/16/2021

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
02/01/2022	02/03/2022	04/27/2022	04/27/2022

Prior Cases:
None

Current Cases:
None

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company Plaintiff − Appellant,	Michael K. Hagemann, Attorney Direct: 310−773−4900 Email: mhagemann@mkhlaw.com Fax: 310−773−4901 [COR LD NTC Retained] M.K. Hagemann, P.C. Firm: 310−499−4695 1801 Century Park East Suite 2400 Century City, CA 90067
v.	
VANLAW FOOD PRODUCTS, INC., a California corporation Defendant − Appellee,	Krista L. DiMercurio, Attorney Direct: 714−415−3412 Email: krista@magarianlaw.com [COR LD NTC Retained] Magarian and DiMercurio, APLC Suite 255 20 Corporate Park Irvine, CA 92606 Mark D. Magarian, Esquire, Attorney Direct: 714−415−3412 Email: mark@magarianlaw.com Fax: 714−276−9944 [COR LD NTC Retained] Magarian and DiMercurio, APLC Suite 255 20 Corporate Park Irvine, CA 92606

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff − Appellant,

v.

VANLAW FOOD PRODUCTS, INC., a California corporation,

Defendant − Appellee.

04/28/2022	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellant New England Country Foods, LLC Mediation Questionnaire due on 05/05/2022. Appellant New England Country Foods, LLC opening brief due 06/27/2022. Appellee Vanlaw Food Products, Inc. answering brief due 07/26/2022. Appellant's optional reply brief is due 21 days after service of the answering brief. [12433774] (JMR) [Entered: 04/28/2022 02:11 PM]
04/29/2022	2	Filed (ECF) Appellant New England Country Foods, LLC Mediation Questionnaire. Date of service: 04/29/2022. [12435098] [22−55432] (Hagemann, Michael) [Entered: 04/29/2022 03:39 PM]
04/29/2022	3	The Mediation Questionnaire for this case was filed on 04/29/2022. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non−litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[12435286]. [22−55432] (AD) [Entered: 04/29/2022 06:44 PM]
05/03/2022	4	MEDIATION CONFERENCE SCHEDULED − DIAL−IN AssessmentConference, 06/09/2022, 2:00 p.m., PACIFIC Time. See order for instructions and details. [12437077] (VS) [Entered: 05/03/2022 01:35 PM]
05/03/2022	5	Filed order MEDIATION (RGA): The briefing schedule previously set by the court is amended as follows: appellant's opening brief is due July 27, 2022; appellee's answering brief is due August 26, 2022; appellant's optional reply brief is due within 21 days from the service date of the answering brief. [12437262] (AF) [Entered: 05/03/2022 03:13 PM]
05/04/2022	6	Filed (ECF) Appellant New England Country Foods, LLC Correspondence: STIPULATED NOTICE THAT NO TRANSCRIPTS ARE NECESSARY ON APPEAL [F.R.A.P. 10(b); CIRCUIT RULE 10−3.1(c)]. Date of service: 05/04/2022 [12437882] [22−55432] (Hagemann, Michael) [Entered: 05/04/2022 10:52 AM]
06/09/2022	7	MEDIATION CONFERENCE SCHEDULED − DIAL−IN Conference, 07/13/2022, 2:00 p.m., Pacific Time. The briefing schedule previously set by the court is amended as follows: Appellant New England Country Foods, LLC opening brief due 08/22/2022. Appellee Vanlaw Food Products, Inc. answering brief due 09/21/2022. Appellants optional reply brief is due within 21 days afer service of the answering brief. See order for details. [12467916] (VS) [Entered: 06/09/2022 04:53 PM]
07/05/2022	8	MEDIATION CONFERENCE RESCHEDULED − DIAL−IN Conference, 07/20/2022, 2:00 p.m. Pacific Time. (originally scheduled on 07/13/2022). [12486466] (VS) [Entered: 07/05/2022 02:26 PM]
07/20/2022	9	MEDIATION CONFERENCE SCHEDULED − DIAL−IN Conference, 08/09/2022, 10:30 a.m., Pacific Time. See order for details. [12498696] (VS) [Entered: 07/20/2022 04:03 PM]
08/16/2022	10	Filed order MEDIATION (RGA): The briefing schedule previously set by the court is amended as follows: appellant's opening brief is due January 27, 2023; appellee's answering brief is due February 27, 2023; appellant's optional reply brief is due within 21 days from the service date of the answering brief. [12517939] (WL) [Entered: 08/16/2022 11:01 AM]
08/25/2022	11	Filed order MEDIATION (RGA): A video mediation will be held on October 12, 2022, at 10:00 a.m., Pacific Time. Counsel will receive an email from the Mediation Office in advance with instructions for participating in the conference. Unless excused by the Circuit Mediator prior to the scheduled conference, each party shall be represented by counsel of record and a client representative having full authority to negotiate and settle the case on any terms at the conference. Mediation statements of 10 pages or less shall be submitted to the Circuit Mediator via e−mail [Roxane_Ashe@ca9.uscourts.gov] on or before October 05, 2022 by 12:00 p.m. (Noon). Mediation statements shall contain brief

		statements of the following.... Mediation statements shall not be filed with the court....It is recommended that counsel review with their clients the information contained in the Mediation Program web site: http://www.ca9.uscourts.gov/mediation. (SEE ORDER FOR FULL TEXT) [12526644] (WL) [Entered: 08/25/2022 03:48 PM]
10/12/2022	12	MEDIATION CONFERENCE SCHEDULED − Further Conference, 10/19/2022, 11:00 a.m. Pacific Time. See order for details. [12561605] (CL) [Entered: 10/12/2022 02:32 PM]
10/24/2022	13	MEDIATION CONFERENCE SCHEDULED − Video Conference,11/17/2022, 10:00 a.m., Pacific Time. See order for details. [12571253] (VS) [Entered: 10/24/2022 11:04 AM]
11/17/2022	14	MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. All further inquiries regarding this appeal, including request for extensions of time, should be directed to the Clerk's Office. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant settlement discussions while the appeal is pending. [12590416] (VS) [Entered: 11/17/2022 03:01 PM]
01/20/2023	15	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant New England Country Foods, LLC. New requested due date is 02/27/2023. [12634853] [22−55432] (Hagemann, Michael) [Entered: 01/20/2023 12:59 PM]
01/20/2023	16	**Streamlined request [15] by Appellant New England Country Foods, LLC to extend time to file the brief is approved. Amended briefing schedule: Appellant New England Country Foods, LLC opening brief due 02/27/2023. Appellee Vanlaw Food Products, Inc. answering brief due 03/29/2023. The optional reply brief is due 21 days from the date of service of the answering brief.** [12634996] (JN) [Entered: 01/20/2023 02:08 PM]
02/27/2023	17	Submitted (ECF) Opening Brief for review. Submitted by Appellant New England Country Foods, LLC. Date of service: 02/27/2023. [12663184] [22−55432] (Hagemann, Michael) [Entered: 02/27/2023 08:11 PM]
02/27/2023	18	Submitted (ECF) excerpts of record. Submitted by Appellant New England Country Foods, LLC. Date of service: 02/27/2023. [12663187] [22−55432] (Hagemann, Michael) [Entered: 02/27/2023 08:16 PM]
02/28/2023	19	Filed clerk order: The opening brief [17] submitted by New England Country Foods, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The excerpts of record [18] submitted by New England Country Foods, LLC are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12663471] (KT) [Entered: 02/28/2023 10:08 AM]
03/02/2023	20	Received 6 paper copies of Opening Brief [17] filed by New England Country Foods, LLC. [12666316] (NAR) [Entered: 03/02/2023 03:16 PM]
03/02/2023	21	Received 3 paper copies of excerpts of record [18] in 4 volume(s) and index volume filed by New England Country Foods, LLC. [12666319] (NAR) [Entered: 03/02/2023 03:22 PM]
03/22/2023	22	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee Vanlaw Food Products, Inc.. New requested due date is 04/28/2023. [12679445] [22−55432] (Magarian, Mark) [Entered: 03/22/2023 11:26 AM]
03/22/2023	23	**Streamlined request [22] by Appellee Vanlaw Food Products, Inc. to extend time to file the brief is approved. Amended briefing schedule: Appellee Vanlaw Food Products, Inc. answering brief due 04/28/2023. The optional reply brief is due 21 days from the date of service of the answering**

brief. [12679470] (BG) [Entered: 03/22/2023 11:44 AM]

04/28/2023 24 Submitted (ECF) Answering Brief for review. Submitted by Appellee Vanlaw Food Products, Inc.. Date of service: 04/28/2023. [12705035] [22−55432] (Magarian, Mark) [Entered: 04/28/2023 12:43 PM]

04/28/2023 25 Filed clerk order: The answering brief [24] submitted by Vanlaw Food Products, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be submitted to the principal office of the Clerk. [12705089] (KT) [Entered: 04/28/2023 01:39 PM]

05/05/2023 26 Received 6 paper copies of Answering Brief [24] filed by Vanlaw Food Products, Inc.. [12709820] (NAR) [Entered: 05/05/2023 11:44 AM]

05/05/2023 27 Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellant New England Country Foods, LLC. New requested due date is 06/20/2023. [12709844] [22−55432] (Hagemann, Michael) [Entered: 05/05/2023 11:55 AM]

05/05/2023 28 **Streamlined request [27] by Appellant New England Country Foods, LLC to extend time to file the brief is approved. Amended briefing schedule: the optional reply brief is due 06/20/2023.** [12710128] (DLM) [Entered: 05/05/2023 03:49 PM]

06/13/2023 29 Filed (ECF) Appellant New England Country Foods, LLC Unopposed Motion to extend time to file Reply brief until 07/18/2023. Date of service: 06/13/2023. [12735341] [22−55432] (Hagemann, Michael) [Entered: 06/13/2023 11:45 PM]

06/14/2023 30 Filed clerk order (Deputy Clerk: MCD): Granting Unopposed Motion [29] (ECF Filing) filed by Appellant for a second extension of time to file reply brief. Appellant New England Country Foods, LLC reply brief due July 18, 2023. [12735595] (TH) [Entered: 06/14/2023 10:47 AM]

06/16/2023 31 This case is being considered for an upcoming oral argument calendar in Pasadena

Please review the Pasadena sitting dates for October 2023 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully.

When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date.

If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[12737844]. [22−55432] (KS) [Entered: 06/16/2023 12:21 PM]

06/16/2023 32 Filed (ECF) Attorney Mr. Michael K Hagemann for Appellant New England Country Foods, LLC response to notice for case being considered for oral argument. Date of service: 06/16/2023. [12738129] [22−55432] (Hagemann, Michael) [Entered: 06/16/2023 03:15 PM]

07/18/2023 33 Filed (ECF) Appellant New England Country Foods, LLC Motion to take judicial notice of 12 state−court filings (7 already in the February 27, 2023 Excerpts of the Record and 5 attached to the motion as exhibits, including two appellate opinions) and 4 facts. Date of service: 07/18/2023. [12757687] [22−55432] (Hagemann, Michael) [Entered: 07/18/2023 10:31 PM]

07/18/2023	34	Submitted (ECF) Reply Brief for review. Submitted by Appellant New England Country Foods, LLC. Date of service: 07/18/2023. [12757688] [22−55432] (Hagemann, Michael) [Entered: 07/18/2023 11:48 PM]
07/19/2023	35	Filed clerk order: The reply brief [34] submitted by New England Country Foods, LLC is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [12757770] (KT) [Entered: 07/19/2023 09:15 AM]
07/24/2023	36	Received 6 paper copies of Reply Brief [34] filed by New England Country Foods, LLC. [12760588] (NAR) [Entered: 07/24/2023 02:46 PM]
08/06/2023	37	Notice of Oral Argument on Tuesday, October 17, 2023 − 09:00 A.M. − Courtroom 3 − Scheduled Location: Pasadena CA. The hearing time is the local time zone at the scheduled hearing location. View the Oral Argument Calendar for your case **here**. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Anyone appearing in person must review and comply with our Protocols for In Person Hearings, available **here**. At this time, an election to appear remotely by video will not require a motion. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance. Please note however that if you do elect to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so. Be sure to review the **GUIDELINES** for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self−represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 28 days before Tuesday, October 17, 2023. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[12768767]. [22−55432] (KS) [Entered: 08/06/2023 06:17 AM]
10/04/2023	38	Filed (ECF) Acknowledgment of hearing notice by Attorney Mr. Michael K Hagemann for Appellant New England Country Foods, LLC. Hearing in Pasadena on 10/17/2023 at 9:00 am (Courtroom: 3). Filer sharing argument time: No. (Argument minutes: 15) Appearance in person or by video: I wish to appear in person. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 10/04/2023. [12804257] [22−55432] (Hagemann, Michael) [Entered: 10/04/2023 11:31 AM]
10/04/2023	39	Filed (ECF) notice of appearance of Krista L. DiMercurio (Magarian & DiMercurio, APLC, 20 Corporate Park, Suite 255, Irvine, CA 92606) for Appellee Vanlaw Food Products, Inc.. Date of service: 10/04/2023. (Party was previously proceeding with counsel.) [12804360] [22−55432] (Magarian, Mark) [Entered: 10/04/2023 12:28 PM]

10/04/2023	40	Added Attorney Krista L DiMercurio for Appellee Vanlaw Food Products, Inc., in case 22−55432. [12804557] (HH) [Entered: 10/04/2023 02:39 PM]
10/04/2023	41	Filed (ECF) Acknowledgment of hearing notice by Attorney Krista L DiMercurio for Appellee Vanlaw Food Products, Inc.. Hearing in Pasadena on 10/17/2023 at 9:00 AM (Courtroom: 3). Filer sharing argument time: No. (Argument minutes: 15) Appearance in person or by video: I wish to appear in person. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 10/04/2023. [12804797] [22−55432] (DiMercurio, Krista) [Entered: 10/04/2023 04:17 PM]
10/17/2023	42	ARGUED AND SUBMITTED TO RICHARD A. PAEZ, HOLLY A. THOMAS and JED S. RAKOFF. The audio and video recordings of this hearing are available on our website at http://www.ca9.uscourts.gov/media/. [12811086] (DLM) [Entered: 10/17/2023 02:52 PM]
12/06/2023	43	Order filed for PUBLICATION (RICHARD A. PAEZ, HOLLY A. THOMAS and JED S. RAKOFF) We respectfully ask the Supreme Court of California to exercise its discretion to decide the certified question set forth in section II of this order. [SEE ORDER FOR FULL TEXT] This case is withdrawn from submission. Further proceedings before this court are stayed pending final action by the Supreme Court of California. The Clerk is directed to administratively close this docket pending further order. The parties shall notify the clerk of this court within seven days after the Supreme Court of California accepts or rejects certification, and again within seven days if that court accepts certification and subsequently renders an opinion. The panel retains jurisdiction over further proceedings. QUESTION CERTIFIED. [12833716] (MM) [Entered: 12/06/2023 09:53 AM]

Docket No. 22-55432

In the

United States Court of Appeals

for the

Ninth Circuit

NEW ENGLAND COUNTRY FOODS, LLC,
Plaintiff-Appellant,

v.

VANLAW FOOD PRODUCTS, INC.,
Defendant-Appellee.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8:21-CV-01060-DOC-ADS · HONORABLE DAVID O. CARTER

BRIEF OF APPELLANT

M.K. HAGEMANN, P.C.
MICHAEL K. HAGEMANN, ESQ. (264570)
1801 Century Park East, Suite 2400
Century City, CA 90067
(310) 773-4900 Telephone
(310) 773-4901 Facsimile
mhagemann@mkhlaw.com

Attorneys for Appellant,
New England Country Foods, LLC

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant New England Country Foods, LLC is a Limited Liability Company, not a corporation.

DATED: February 27, 2023

M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Appellant NEW ENGLAND COUNTRY FOODS, LLC

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JURISDICTIONAL STATEMENT

The basis for the district court's subject-matter jurisdiction is diversity jurisdiction. 28 U.S.C. § 1332(a). Namely, this is a civil action where the matter in controversy exceeds $75,000.00 between a non-California citizen (Plaintiff-Appellant New England Country Foods, LLC, hereinafter "NECF") and a California citizen (Defendant-Appellee Vanlaw Food Products, Inc, hereinafter "Vanlaw"). (4-ER-693.); (2-ER-131.)

The basis for this Court's jurisdiction is that the district court for the Central District of California rendered a final decision in the aforementioned civil action. 28 U.S.C. § 1291. Namely, the district court granted Vanlaw's motion to dismiss NECF's First-Amended Complaint in its entirety without leave to amend on January 20, 2022. (1-ER-4.) Then, the district court entered judgment against NECF and in favor of Vanlaw on February 1, 2022. (1-ER-2.)

NECF filed a notice of appeal on April 27, 2022. (2-ER-12.) While judgment was entered February 1, 2022, the notice of appeal was nonetheless timely filed because the district court, by written order filed February 22, 2022, extended the deadline to file the notice of appeal until thirty days after the Court ruled on Vanlaw's February 15, 2022 motion for attorney's fees. Fed. R. Civ. P. 58(e); Fed. R. App. P. 4(a)(4)(A)(iii); (2-ER-26); (2-ER-24.) The district court

denied Vanlaw's motion for attorney's fees in its entirety on March 29, 2022. (2-ER-18.)

This appeal is an appeal from a judgment that disposes of all of NECF's claims.

STATEMENT OF ISSUES

The Complaint alleges that Vanlaw agreed in late 2013/early 2014 to manufacture barbeque sauce based on NECF's recipe for NECF's customer, Trader Joe's (the ubiquitous grocery store). Near the end of the term of the manufacturing agreement between NECF and Vanlaw, Vanlaw secretly told Trader Joe's that it could clone NECF's barbeque sauce so Trader Joe's could purchase barbeque sauce directly from Vanlaw instead of going through NECF. Trader Joe's agreed and terminated NECF's 19-year relationship.

This appeal presents this Court with de novo review of a judgment of dismissal following the granting of a motion to dismiss NECF's First-Amended Complaint without leave to amend. While there were many moving grounds raised by Vanlaw, the sole ground for dismissal not categorially rejected by the district court was a putative "limitation of liability" provision in the written agreement between the parties.

ADDENDUM OF STATUTES AND RULES

NECF's Addendum of Statutes and Rules is separately bound. Cir. R. 28-2.7.

SUMMARY OF ARGUMENT

NECF contended and still contends, that section 1668 of the California Civil Code, and at least two California Supreme Court decisions[1], directly hold that the putative "limitation of liability" provision cannot be applied here to bar any claims given the facts alleged in the pleadings (i.e. intentional conduct versus ordinary negligence). The state trial court agreed with NECF on the "limitation of liability" issue. Vanlaw has appealed the state-court judgment, and NECF believes the state Court of Appeal will issue its decision on or before July 20, 2023.

Further, the district court appeared to initially agree with NECF on the enforceability of the "limitation of liability" in its ruling on the first motion to dismiss, albeit only if NECF pled, "the available remedies [were] unavailable or so deficient as to effectively exempt [Vanlaw] from liability." (2-ER-149.) However, it appears the district court changed its position after *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal.App.4th 1118 (Cal. Ct. App.

[1] *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 755 (2007); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 91 (1995).

2012) ("*Food Safety*") was heavily referenced in Vanlaw's second motion to dismiss[2].

NECF's position on the issues in this appeal is as follows:

1) Once the state-court appeal decision is issued, NECF will be able to invoke issue preclusion (a/k/a collateral estoppel) on the "limitation of liability" issue in its favor. If this Court disagrees, then…
2) The factual findings and procedure posture of *Food Safety* distinguish it from the facts and procedural posture present here and the district court should have instead followed the California Supreme Court authority cited in footnote 1, above, to deny the motion in full[3]. If this Court disagrees, then…
3) The putative "limitation of liability" provision should not be applied to the second, third, fourth, and fifth claim. *Food Safety* only dismissed the "breach of the contract, bad faith, and negligence" claims on the limitation-

[2] It appears *Food Safety* was cited for the first time in the first reply, but it was not heavily focused upon, (2-ER-202), and was not cited in the district court's ruling on the first motion to dismiss. (2-ER-148-49.)

[3] It also appears the district court may have mistaken NECF's argument regarding the, "implied covenant of good faith and fair dealing," with a claim NECF never made and isn't making: bad-faith breach of contract by an insurance company. (1-ER-8 (top of page).) As cited in footnote 1, above, the California Supreme Court has held parties cannot prospectively waive claims for breach of express terms nor claims for breaching the implied covenant of good faith and fair dealing. Clearly a claim for breach of contract can arise from breach of an express term, an implied term, or both. Here, both are alleged.

of-liability clause. *Food Safety* expressly refused to dismiss the intentional torts on that ground. Rather, *Food Safety* dismissed the intentional torts due to the lack of evidence creating a triable issue of facts as to liability or damages. It appears the district court here held the breach of contract claim essentially "preempts" all other claims. *But see, Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 175 (1980) ("a wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief, and in such circumstances the existence of the contractual relationship will not bar the injured party from pursuing redress in tort.") (citations omitted).

STATEMENT OF THE CASE

A. The Core Factual Allegations At Issue

Both the Original Complaint, and the First-Amended Complaint, allege that Vanlaw and NECF entered into two contracts in connection with Vanlaw manufacturing food based on NECF's recipes, including in connection with NECF's 19-year relationship with Trader Joe's. (4-ER-692); (2-ER-130.) Both Complaints allege that Vanlaw secretly told Trader Joe's that it could clone NECF's barbeque sauce so Trader Joe's could purchase barbeque sauce directly from Vanlaw instead of going through NECF. (*Id.*) Trader Joe's agreed and terminated NECF's 19-year

relationship. (*Id.*) NECF alleges this constitutes:

(1) BREACH OF CONTRACT;
(2) INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS;
(3) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS;
(4) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS;
(5) BREACH OF FIDUCIARY DUTY OF UNDIVIDED LOYALTY
(*Id.*)

Both the Original Complaint, and the First-Amended Complaint, allege and attach the "Mutual Non-Disclosure" and "Operating Agreement" between the parties as Exhibits A and B, respectively. (2-ER-110.); (2-ER-114.); (4-ER-702.); (4-ER-706.)

As to breach of contract, both Complaints allege:

> [Vanlaw] committed breaches of those written agreements, within the last four years, by offering to Trader Joe's to wrongfully clone [NECF]'s propriety sauce which violated: (i) the reverse-engineering prohibition in Exhibit A, paragraph 3, and (ii) the implied covenant of good-faith and fair dealing implied in both Exhibits A and B.
> (4-ER-697 ¶ 29); (2-ER-135 ¶ 31).

As to Vanlaw's claimed exculpation from all liability:

Paragraph 13 of the Operating Agreement states:

> Limitation of Liability
> To the extent allowed by applicable law: (a) in no event will either party be liability for any loss of profits, loss of business, interruption of business, or any indirect, special, incidental or consequential damages of any kind …

Paragraph 20 of the Operating Agreement states at the top of the third

paragraph:

> Notwithstanding the above, in no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind…

B. Procedural Posture - The State-Court Action

1. Vanlaw's December 21, 2017 Complaint in State Court

Vanlaw commenced Orange County Superior Court Case Number 30-2017-00962844-CU-BC-CJC by filing a terse complaint against NECF in state court on December 21, 2017. (3-ER-324.) Essentially the sole substantive allegation was:

> [Vanlaw] agreed to, and did, supply [NECF] with goods (bottles) pursuant to [NECF]'s Purchase Orders, in return for [NECF]'s timely payment to [Vanlaw] upon receipt of [Vanlaw]'s invoices (30 days).
> (3-ER-326.)

No agreements were attached to Vanlaw's state-court complaint. (*Id.*)

2. Vanlaw's Explanation of Its December 21, 2017 State-Court Complaint in Its State-Court Trial Brief

Vanlaw alleged that on July 22, 2015 (over three months before the Operating Agreement (2-ER-114, 4-ER-706) was signed.) NECF transmitted a "blanket" purchase order to Vanlaw for 15,000 cases (360,000 bottles) of sriracha sauce, but NECF only ended up purchasing 6,515 cases (156,360 bottles). (3-ER-606.); (*See, also*, (2-ER-282.)) Vanlaw had purchased a total of 300,000 "custom" empty bottles in reliance on the "blanket" purchase order, so when NECF didn't make any additional purchases, Vanlaw still had about 5,579 2/3 cases (133,912

bottles) of unused "custom" bottles that it could not use on other products. (3-ER-606.) Vanlaw sought damages for its cost of purchasing the unused "custom" bottles it could not use, plus the costs of storing the bottles. (*Id.*) Vanlaw's claims in state court had nothing to do with Trader Joe's. (*Id.*) Trader Joe's was never even a potential customer for the sriracha sauce at issue in Vanlaw's state-court complaint. (*Id.*)

3. NECF's February 19, 2019 Cross-Complaint in State Court

On February 19, 2019, NECF filed a cross-complaint against Vanlaw in the state court action. (3-ER-336.)

4. NECF's State Court Cross-Complaint, According to Vanlaw

According to Vanlaw:

> …the original Cross-Complaint [] simply alleges that [Vanlaw] owes less than one hundred thousand dollars for failing to pay some royalty fees for products sold and charging excess on material and management fees.
> (3-ER-403, lines 6-9.)

5. NECF Unsuccessfully Seeks Leave to Amend Its Cross-Complaint in Early 2021 To Add the Allegations Now Contained in the June 16, 2021 Federal Complaint

On March 2, 2021, the state-court clerk accepted for filing NECF's January 27, 2021 motion for leave to file a first-amended cross-complaint. (3-ER-350.)

The proposed first-amended cross-complaint sought to add the allegations which comprise the current federal-court complaint. (3-ER-363.)

Vanlaw opposed on the ground:

> The [Proposed First-Amended Cross-Complaint] is self-explanatory, but to highlight: (1) **it is based upon an entirely new set of facts completely unrelated** to the [February 19, 2019] Cross-Complaint that [Vanlaw] has been defending for over two years;
> (3-ER-411 lines 10-12.) (emphasis added).

The state court agreed with Vanlaw, and denied NECF's motion for leave to amend its cross-complaint on April 16, 2021:

> Based upon the grounds that allowing [NECF] to assert an **entirely new factual dispute** and four new causes of action on the eve of trial after discovery has been closed would cause [Vanlaw] substantial prejudice, the motion is denied.
> (3-ER-427.) (citations omitted).

There was no finding of "bad faith" by NECF. (*Id.*)

6. NECF Prevails at Trial, Including on Vanlaw's "Limitation of Liability" Defense

NECF obtained a judgment against Vanlaw on September 9, 2021 in state court after trial. (2-ER-249.)

In its state-court trial brief filed July 9, 2021, Vanlaw had argued the limitation-of-liability provision barred a portion of NECF's recovery. (4-ER-612, lines 8 to 12, 4-ER-622, lines 13 to 15.) It was raised again by Vanlaw in its request for a statement of decision filed July 30, 2021. (4-ER-680, lines 4 to 9.)

Vanlaw's "limitation of liability" defense was expressly rejected by the state court as indicated in the Statement of Decision filed concurrently with the September 9, 2021 judgment:

> **[VANLAW'S] REQUEST 2**: Whether the Court found that the limitation of liability clauses in the Operating Agreement (paragraphs 13 and 20) preclude Cross-Complainant from recovering damages for Cross-Defendant's alleged failure to use commercially reasonable efforts to ship cases of BBQ Sauce.
>
> **[THE STATE COURT'S] RESPONSE 2:** The Court did not find the "limitation of liability" clauses barred any damages claimed in this Action on either side for three independent grounds:
>
> a) The testimony of Mr. Gilbert regarding the unshipped orders was that Vanlaw did not ship the December, 2017 orders because Vanlaw believed it could not ship them before December 31, 2017. This testimony indicates Vanlaw made an intentional decision not to ship orders based on an erroneous legal understanding of the Operating Agreement, *inter alia*, as discussed in more detail in Response 3, below. Thus, the Court finds the failure by Vanlaw to ship all of the orders placed by Trader Joe's was intentional, not merely ordinary negligence. And Parties cannot, by contract, limit the damages for intentional (or even grossly negligent) conduct. Civ. Code § 1668; *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755.
>
> b) Contractual Interpretation – The Court must interpret both the "commercially-reasonable" provision (Ex. 1 ¶ 10(e)) and the "limitation-of-liability" clauses (Ex. 1 ¶ ¶ 12, 20) in concert. Contract language must be interpreted, "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." *TitanCorp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-74. As such, a finding that the "limitation-of-liability" clauses bar claims for violating the "commercially-reasonable" provision would render the "commercially-reasonable" provision nugatory, thus the Court cannot and does not so interpret the "limitation-of-liability" clauses as such. *See, also,* Civ. Code §§ 1641

("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."), 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."), 3523 ("For every wrong there is a remedy.") As such, the Court interprets the "limitation-of-liability" clauses to limit liability for ordinary negligence of non-contractual tort duties owed by the parties to each other. This interpretation has the added benefit of according with both section 1668 of the Civil Code and *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755. As discussed above, Mr. Gilbert testified that Vanlaw (i) intentionally violated (ii) an express contractual provision – paragraph 10(e) of Exhibit 1. Thus, for both of those reasons, the "limitation-of-liability" clauses do not apply to bar any damages by NECF here.

c) Judicial Estoppel / Judicial Admission: Vanlaw sought both in its complaint (judicial admission) and at trial (judicial estoppel) incidental damages in the form of the cost of purchasing empty bottles. Namely, there is no evidence NECF ordered empty bottles from Vanlaw. Rather, Vanlaw claims in the complaint and at trial is that it was damaged because NECF failed to purchase 360,000 finished sriracha bottles pursuant to the "blanket" purchase order. (Ex. 233.) Vanlaw cannot take the inconsistent position that NECF cannot obtain damages but Vanlaw can. Even after NECF pointed out this inconsistency in its closing arguments, Vanlaw chose not to withdraw its claim from damages on the empty bottles. This Court has awarded damages on the empty bottles. Thus, Vanlaw is judicially estopped from asserting that the "limitation of liability clauses" bars NECF's damages, but not theirs, and has also judicially admitted that that the "limitation of liability clause" does not apply to incidental damages.

Relevant Testimony:
<u>Thomson Testimony</u>
Q: Are there 12,550 unshipped orders in Exhibit 232?
A: Yes.
Q: Could VanLaw have shipped all of those 12,550 unshipped orders using commercial and reasonable efforts, in your expert opinion?

A: Yes, very definitely.
(July 14, 2021 Transcript at 99:24-100:4.)

Gilbert Testimony

Q: Now, there is a document that I have on the screen here (indicating). This is Exhibit 232. And I'll represent to you that these are Trader Joe's-produced purchase orders, at least a table of them. And again, they were produced by Trader Joe's. And at the end here (indicating) -- oops. I did something wrong. Okay. So at the end of this document -- maybe you can call it out. Okay, there are some zeros in this particular column (indicating) -- I think I can do this -- right here. See these (indicating)?
A: Yes.
Q: Okay. And over here (indicating), these are, I'll represent to you, apparently the orders of cases, and they're zeroed out here (indicating). Do you believe that VanLaw attempted to do everything it could to fulfill their product through the end of the relationship?
A: We did everything. Yes, we did.
Q: Is there anything -- did you intentionally attempt to stop fulfilling their orders at any point?
A: Only orders that would have been required to be produced and done after the end of the agreement.
Q: To the extent that -- are you aware -- regardless of this document that we're looking at, are you aware of any orders that you were unable to fulfill?
A: Yes --
Q: Okay.
A: -- not because we couldn't make it from a manufacturing standpoint, but because we didn't have the right to make it from an agreement standpoint.
Q: After the termination of the three-year term?
A: Correct.
(July 14, 2021 Transcript at 146:9-147:15.) (emphasis added.)

Thomson Testimony

Q: NOW, YOU HEARD MR. GILBERT TESTIFY ABOUT THE FACT THAT HE BELIEVED HE COULD NOT SHIP THOSE DECEMBER 2017 ORDERS BEFORE THE CONTRACT TERMINATED, RIGHT?
A: YES.

Q: OKAY. WAS IT YOUR UNDERSTANDING OF THE OPERATING AGREEMENT THAT THE RELEVANT TIME PERIOD WAS THE DATE THE ORDERS WERE SUBMITTED, SUCH THAT IF AN WAS SUBMITTED WITHIN THE CONTRACT PERIOD THERE WAS AN OBLIGATION TO MANUFACTURE THOSE ORDERS EVEN IF THEY WERE GOING TO BE SHIPPED OUTSIDE OF THE TERMS OF THE AGREEMENT?
A: CORRECT. I WOULD JUST LIKE A SLIGHT COPY CHANGE ON THAT THAT IT WAS A MATTER OF WHEN THE ORDERS WERE RECEIVED, WHEN WE THEY WERE SUBMITTED BY TRADER JOE'S AND RECEIVED BY VANLAW. CORRECT.
Q: OKAY. AND IS PARAGRAPH 10(E) THE BASIS FOR THAT BELIEVE? I'LL SHOW YOU WHAT THAT IS VERY QUICKLY. EXHIBIT 1, PARAGRAPH 10(E). RIGHT HERE. IS THAT THE BASIS OF YOUR BELIEF? "AGREES TO USE COMMERCIALLY REASONABLE EFFORTS"?
A: CORRECT.
Q: IS YOUR EXPERT OPINION IS IT AN INDUSTRY STANDARD THAT A CO-MANUFACTURER IS RESPONSIBLE TO USE COMMERCIALLY REASONABLE EFFORTS TO MANUFACTURE ORDERS PLACED WITHIN THE CONTRACT TERM?
A: CORRECT, YES.
(July 19, 2021 Morning Transcript at 13:21-14:19.)

Relevant Closing Arguments:
NECF's Closing Argument
IN THE HEIGHT OF IRONY – WE'RE NOT ARGUING THIS. I WANT TO BE VERY CLEAR. WE'RE NOT ARGUING THAT THE INCIDENTAL DAMAGES BARRES THEIR CLAIM, BUT IT'S HIGHLY IRONIC, BECAUSE THEIR CLAIM ON THE COMPLAINT IS A COMPLAINT FOR INCIDENTAL DAMAGES, THE BOTTLES. SO THEY'RE TALKING OUT OF BOTH SIDES OF THEIR MOUTH. AND HOW THE STORAGE FEES ARE SOMEHOW DIFFERENT THAN THE BOTTLES.
(July 19, 2021 Afternoon Transcript at 57:26-58:5. Vanlaw's rebuttal, not quoted herein, at 58:26-62:19.)

(2-ER-240.)

7. Vanlaw Has Appealed and the Appeal Should be Decided Shortly

On November 8, 2021, Vanlaw filed a notice of appeal of the state-court judgment. (2-ER-166.) That appeal is fully briefed, and it is believed the state Court of Appeal will set oral argument for the next available oral argument window, which is April 17 to 21, 2023[4].

C. Procedural Posture - This Federal Action

1. NECF Commences This Action on June 16, 2021

On June 16, 2021, NECF filed its complaint against Vanlaw in this action in the Central District of California. (4-ER-692.) The federal complaint contains the new allegations it was not permitted to add to its state-court cross-complaint. *Compare* (4-ER-692) *with* (3-ER-387.)

2. The First Motion to Dismiss Is Granted with Leave to Amend

In meeting-and-conferring on the first motion to dismiss, Vanlaw wrote:

> If NECF believes the state Court should have allowed the claims in the Complaint to be in the state court action, the recourse would be an appeal of the denial of the motion to amend the cross-complaint, *not a new, separate action*.
> (2-ER-284.) (emphasis in original).

Vanlaw argued in its first motion to dismiss, filed August 26, 2021, that

[4] Status of Case No. G060848 is here: https://appellatecases.courtinfo.ca.gov/search.cfm?dist=43 and the Court's oral argument calendar is here: https://www.courts.ca.gov/documents/2023_AMENDED_ORAL_ARGUMENT_CALENDAR_DATES_YEAR.pdf

claim preclusion (a/k/a res judicata) and issue preclusion (a/k/a collateral estoppel) barred all of the claims in the complaint. (3-ER-315.) NECF's opposition, filed September 3, 2021, argued there was no judgment yet. (2-ER-276.) In Vanlaw's reply filed on September 13, 2021, it attached a copy of the state-court judgment, entered on September 9, 2021 in favor of NECF and against Vanlaw, in support of its issue preclusion and claim preclusion arguments. (2-ER-249.)

On November 9, 2021, the district court issued the following order:

> Text Only Order re First NOTICE OF MOTION AND MOTION to Dismiss Case Pursuant to FRCP 12(b)(6)[14] by Judge David O. Carter. The Court notes from [Vanlaw's] Reply that the state court issued a final judgment in the underlying state action. The Court requests supplemental briefing of no more than ten pages from the parties on the effect of the state courts final judgment on the issue preclusion and claim preclusion arguments in [Vanlaw's] Motion to Dismiss (Dkt. 14). [Vanlaw's] briefing is due November 12 at 4:00 pm Pacific; [NECF's] briefing is due November 19 at 4:00 pm Pacific time.
> (4-ER-724 – Docket Entry No. 22.)

Vanlaw never notified the district court of its state-court appeal, even in the brief it filed about the judgment four days after it appealed said judgment. (2-ER-178.)

On November 23, 2021, the district court issued its ruling, denying all purported defenses in support of the motion except the "limitation of liability" defense, but which the district court suggested additional pleading by NECF could defeat the defense on a subsequent motion to dismiss:

> And in *Health Net*, the court voided a provision limiting recovery to

> prospective relief because it "did not compensate [plaintiff] for any lost revenue" and therefore "exempts [defendant] completely from responsibility for completed wrongs." *Id.* at 240-41. [¶] Here, no meaningful injunctive relief is available to Plaintiff, as Defendant stopped making the allegedly reverse-engineered sauce recipe after it failed to meet Trader Joe's expectations. See Compl. ¶ 23. The Court will not attempt to hypothesize what direct damages may be available to compensate Plaintiff for its alleged injuries. As such, the Court GRANTS Defendant's Motion based on the limitation on liability provision and DISMISSES Plaintiff's Complaint. Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability.
> (2-ER-149.)

3. The Complaint is Amended to Plead Facts the First Ruling Suggested Were Sufficient to Defeat a Motion to Dismiss

On December 18, 2021 NECF amended its complaint as ordered, with the only material changes being the addition of Paragraphs 26 and 27:

> 26. Upon information and belief, all of [NECF]'s harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to [NECF] from the wrongs committed by [Vanlaw] are a loss of profits.
> 27. As such, the putative limitation-of-liability provisions in the Operating Agreement ([4-ER-706] §§ 13, 20), if applied, would completely exempt [Vanlaw] from liability from the wrongs alleged herein because said provisions purport to bar all claims for, "loss of profits." [Vanlaw] should be judicially estopped from claiming otherwise because it filed a motion to dismiss the entire complaint on the ground of said limitation-of-liability provisions, inter alia. (Mot. 31:14-17: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint." ([3-ER-316]) And said motion was granted by the Court on that ground (with leave to amend). ([2-ER-142.])
> (2-ER-134.)

4. The Second Motion to Dismiss Is Granted without Leave to Amend Despite Pleading Facts the First Ruling Suggested Were Sufficient to Defeat a Motion to Dismiss

On December 22, 2021, Vanlaw filed a motion to dismiss NECF's First-Amended Complaint solely on "Limitation of Liability" and "Speculative Damages". (2-ER-76.) NECF filed an opposition. (2-ER-66.) Vanlaw filed a reply. (2-ER-53.) The district court granted the motion without leave to amend on "Limitation of Liability" grounds only, premised almost entirely on *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126 (2012). (1-ER-7.)

5. NECF's Notice of Appeal Was Timely Filed

NECF filed a notice of appeal on April 27, 2022. (2-ER-12.) While judgment was entered February 1, 2022, the notice of appeal was nonetheless timely filed because the district court, by written order filed February 22, 2022, extended the deadline to file the notice of appeal until thirty days after the Court ruled on Vanlaw's February 15, 2022 motion for attorney's fees. (2-ER-26); (2-ER-24.) The district court denied Vanlaw's motion for attorney's fees in its entirety on March 29, 2022. (2-ER-18.) The parties stipulated that transcripts are not necessary for this appeal. (2-ER-10.)

ARGUMENT

A. The Standard of Review Applicable Here is De Novo (Cir. R. 28-2.5)

NECF is asking this Court to reverse the February 1, 2022 judgment (1-ER-2), as well as the January 20, 2022 order granting the motion to dismiss the First-Amended Complaint. (1-ER-4.) All rulings NECF is asking this Court to review in this appeal are contained in the January 20, 2022 order. (*Id.*) NECF opposed the motion to dismiss at issue on January 3, 2022. (2-ER-66.)

A district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) for failure to state a claim is reviewed de novo. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021) (reviewing de novo an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)); *Pirani v. Slack Techs., Inc.*, 13 F.4th 940, 946 (9th Cir. 2021); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 938 (9th Cir. 2018); *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018) (reviewing denial of a motion to dismiss); *Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See Mudpie, Inc.*, 15 F.4th at 889; Pirani,

13 F.4th at 946; *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017).

The district court's interpretation and meaning of contract provisions are questions of law reviewed de novo. *See Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1058 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 909 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021); *Ashker v. Newsom*, 968 F.3d 939, 944 (9th Cir. 2020) (reviewing the interpretation of a settlement contract); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016); *Conrad v. Ace Property & Cas. Ins. Co.*, 532 F.3d 1000, 1004 (9th Cir. 2008); *Lamantia v. Voluntary Plan Administrators, Inc.*, 401 F.3d 1114, 1118 (9th Cir. 2005); *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1264 (9th Cir. 2003) (noting no deference accorded to decision of district court).

The district court's interpretation of state contract law is also reviewed de novo. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 949 (9th Cir. 2006); *Jorgensen v. Cassiday*, 320 F.3d 906, 914 (9th Cir. 2003).

Here, the parties agree that California substantive and contract law is applicable. *Nguyen v. Barnes & Noble, Inc.*, 763 F. 3d 1171, 1175 (9th Cir. 2014); *Wash. Mut. Bank, FA v. Super. Ct.*, 24 Cal. 4th 906, 919 (2001).

B. Issue Preclusion Will Apply to Bar the "Limitation of Liability" Defense Unless the State Trial Court's Decision on "Limitation of Liability" Is Disturbed on Appeal

Federal courts look to California law when considering the preclusive effect of a California state-court judgment. *Brodheim v. Cry*, 584 F.3d 1262, 1268 (9th Cir. 2009).

Issue preclusion a/k/a claim preclusion, "precludes relitigation of issues argued and decided in prior proceedings." *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990) (citations omitted). The elements are:

1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding; and
2) [the] issue must have been actually litigated in the former proceeding; and
3) [the issue] must have been necessarily decided in the former proceeding; and
4) the decision in the former proceeding must be final and on the merits; and
5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Id.

Here, the state-court decided the "limitation-of-liablity" issue as set forth in Section B(6) of the Statement of the Case, above. Thus, the only (currently) missing element of issue preclusion is the fourth element: "final and on the merits."

The reason NECF is raising this issue now and in advance of finality is that NECF anticipates the appeal will be decided well before a decision on this appeal, and NECF intends to file a motion for judicial notice once the Court of Appeal issues its decision, and NECF does not want Vanlaw to argue it was somehow prejudiced.

C. The Facts and Procedural Posture of *Food Safety* Are Clearly Distinguishable

1. The Pre-Litigation Facts of Food Safety

Eco Safe marketed ozone-based food disinfection equipment. 209 Cal.App.4th at 1121. In 2006 and 2007, Eco Safe engaged in preliminary discussions with the Carl's Jr. restaurant chain. *Id.* at 1121-22. Eco Safe entered into an agreement with Food Safety, a testing agency. *Id.* at 1122. Under the agreement, Food Safety was to perform a "challenge study" of Eco Safe's equipment. *Id.*

In a report dated May 21, 2008, Food Safety compared Eco Safe's ozone solution to their competitor's chlorine rinse on six different combinations (lettuce and tomatoes, each with three different pathogens). *Id.* For E. Coli in lettuce, Food Safety's report found Eco Safe's ozone solution was significantly more effective than its competitors. *Id.* However, in the other five combinations, Food Safety found Eco Safe's ozone solution was comparable to its competitors. *Id.*

Eco Safe issued a press release describing the challenge study results as "excellent." *Id.* It made similar positive comments to Carl's Jr. *Id.* Nonetheless, Carl's Jr. was not interested in using Eco Safe's equipment in its restaurants. *Id.* Eco Safe then refused to pay Food Safety for the study. *Id.*

The contract between Eco Safe and Food Safety provided that:

> Limited Warranty and Limits of Liability.
> IN NO EVENT SHALL [FOOD SAFETY] BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING (BUT NOT LIMITED TO) DAMAGES FOR LOSS OF PROFIT OR GOODWILL REGARDLESS OF (A) THE NEGLIGENCE (EITHER SOLE OR CONCURRENT) OF [FOOD SAFETY] AND (B) WHETHER [FOOD SAFETY] HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES. [Food Safety's] total liability to you in connection with the work herein covered for any and all injuries, losses, expenses, demands, claims or damages whatsoever arising out of or in any way related to the work herein covered, from any cause or causes, shall not exceed an amount equal to the lesser of (a) damages suffered by you as the direct result thereof, or (b) the total amount paid by you to [Food Safety] for the services herein covered. We accept no legal responsibility for the purposes for which you use the test results.
> *Id.* at 1126.

2. Events in the Food Safety Trial Court

Food Safety sued Eco Safe for breach of contract, *inter alia*, for the cost of the study ($10,171.26). *Id.* at 1122-23. Eco Safe filed a cross-complaint against Food Safety for: (1) negligence, (2) breach of contract, (3) breach of the implied covenant of good faith and fair dealing, (4) fraud, and (5) deceit. *Id.* at 1123.

Food Safety filed for summary "judgment" on Eco Safe's entire cross-complaint, which was granted by the trial court[5].

3. Holding of the Food Safety Trial Court – Negligence

As to negligence, Food Safety held that limitation-of-liability provisions are generally enforceable as to claims of ordinary negligence. *Id.* at 1126. NECF agrees. And it appears the *Food Safety* Court did not find any evidence amounting to anything more than ordinary negligence, at most. *Id.*, *passim*.

4. Holding of the Food Safety Trial Court – Breach of Contract and Breach of the Implied Covenant

a. *Food Safety*'s Inapt Citation to *Markborough California, Inc.*

As to breach of contract / breach of the implied covenant, *Food Safety* (incorrectly) held that limitation-of-liability provisions are also generally enforceable:

[5] It's unclear how judgment could have been entered, and an appeal ripe, as it appears summary judgment was not granted on Food Safety's claims against Eco Safe, nor had it gone to trial. *California Dental Assn. v. California Dental Hygienists' Assn.*, 222 Cal. App. 3d 49, 59 (Cal. Ct. App. 1990) ("there cannot be such a final judgment with respect to parties as to whom a cross-complaint remains pending, even though the complaint has been fully adjudicated.") (citations omitted). And it appears attorney's fees were prematurely awarded, too. *Roberts v. Packard, Packard & Johnson*, 217 Cal. App. 4th 822 (Cal. Ct. App. 2013) (only one prevailing party); *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.*, 173 Cal. App. 4th 1533, 1541 (Cal. Ct. App. 2009). However, it appears Eco Safe never made these arguments.

> With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy.

Id. at 1126 (citing to *Markborough California, Inc. v. Superior Court*, 227 Cal. App. 3d 705, 714 (Cal. Ct. App. 1991).) (Hereinafter, the "Overbroad Sentence.")

Here, the *Food Safety* Court clearly misstates the law because there is no argument or explanation for this proposition, and the **sole** supporting authority for the above proposition is *Markborough*. But *Markborough* **does not hold** what *Food Safety* cites it for. *Markborough* is a construction-defect case applying a construction-defect-specific statute as is apparent from even the summary of the holding in *Markborough*:

> In this case we hold that a provision **in a construction contract** limiting a party's liability to the developer of the property for damages caused by the engineer's professional errors and omissions is valid under **Civil Code section 2782.5** if the parties had an opportunity to accept, reject or modify the provision.

Markborough, 227 Cal. App. 3d 705, 708 (emphasis added). Section 1668 of the California Civil Code is not referenced or cited at all in *Markborough*.

Section 2782.5 of the California Civil Code states:

> Nothing contained in Section 2782 shall prevent a party to a construction contract and the owner or other party for whose account the construction contract is being performed from negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract.

Cal. Civ. Code § 2782.5.

The term "construction contract" is statutorily defined:

> As used in Sections 2782 and 2782.5, "construction contract" is defined as any agreement or understanding, written or oral, respecting the construction, surveying, design, specifications, alteration, repair, improvement, renovation, maintenance, removal of or demolition of any building, highway, road, parking facility, bridge, water line, sewer line, oil line, gas line, electric utility transmission or distribution line, railroad, airport, pier or dock, excavation or other structure, appurtenance, development or other improvement to real or personal property, or an agreement to perform any portion thereof or any act collateral thereto, or to perform any service reasonably related thereto, including, but not limited to, the erection of all structures or performance of work in connection therewith, electrical power line clearing, tree trimming, vegetation maintenance, the rental of all equipment, all incidental transportation, moving, lifting, crane and rigging service and other goods and services furnished in connection therewith.
> Cal. Civ. Code § 2783.

Clearly section 2783 does not apply to *Food Safety*, or the facts here.

b. Numerous Authorities Hold That Parties Cannot Prospectively Waive All Liability for Breach of Contract

Section 1668 of the California Civil Code states:

> All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.
> Cal. Civ. Code § 1668.

In addition to fraud, willful injury, and violation of the law, limitations of claims on gross negligence are similarly not permitted. *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 755 (2007). In other words, a party may only

limit their liability for ordinary negligence. *Id.* And there are even times when a party cannot even limit their liability for ordinary negligence, like: violation of law or regulation, or when otherwise against public policy. *See Health Net of Cal., Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224 (Cal. Ct. App. 2003).

Fundamentally, there is no difference between an express term and an implied term when it comes to enforcement. *Digerati Holdings, LLC v. Young Money Entertainment, LLC*, 194 Cal. App. 4th 873, 885 (Cal. Ct. App. 2011) ("Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.")

The California Supreme Court held very clearly in *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85 that parties cannot waive the covenant of good faith and fair dealing:

> [P]arties of roughly equal bargaining power are … not [] permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured.
>
> *Id.* at 91.

Enforcing the limitation-of-liability provision to absolutely bar a claim for breach of the implied covenant, as the district court did here, is equivalent to finding a waiver of the covenant of good faith and fair dealing, which is not permitted by the aforementioned California Supreme Court authority.

And enforcing the limitation-of-liability provision to absolutely bar a claim for breach of an express term would render the entire agreement illusory. For example: "I promise to do X, but if I don't, you can't sue me." This concept appears to be what the California Supreme Court held in *Asmus v. Pacific Bell*, 23 Cal. 4th 1, 15 (2000):

> [A] promise to render a future performance, if [the promisor] want to when the time arrives [is] no[t a] promise at all.
> Removing all liability for breaching a contract is thus an illusory promise.

Thus, it's not a proper interpretation of the Operating Agreement to find there are no remedies for violating express contractual terms. *TitanCorp. v. Aetna Casualty and Surety Co.*, 22 Cal. App. 4th 457, 473-74 (Cal. Ct. App. 1994) ("we should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory."); *See, also,* Cal. Civ. Code §§ 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."), 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."), 3523 ("For every wrong there is a remedy.")

And it makes no sense that parties are not free to waive the implied covenant of good faith and fair dealing, but are permitted to waive enforcement of express

terms, especially like here when it's alleged the express terms were breached in bad faith, not negligently.

Finally, there are California Court of Appeal cases which hold that a limitation-of-liability provision cannot be enforced for breach of contract claims. For example, in *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 99 (1966), the California Court of Appeal held claims for express and implied warranty could not be limited. And an express warranty is nothing more than "a contractual promise from the seller that the goods conform to the promise." *Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 928 (Cal. Ct. App. 2015).

c. Despite One Overbroad Sentence, *Food Safety* Can be Reconciled with Other Authorities as Contracts Can Be Breached with Ordinary Negligence or Willfully, etc.

As discussed in numerous cases, the line between negligence and breach of contract is frequently blurred. *See, e.g., North American Chemical Co. v. Superior Court*, 59 Cal. App. 4th 764, 773-76 (Cal. Ct. App. 1997); *Perry v. Robertson*, 201 Cal. App. 3d 333 (Cal. Ct. App. 1988); *Tolstoy Constr. Co. v. Minter*, 78 Cal. App. 3d 665 (Cal. Ct. App. 1978).

Further, as discussed by the California Supreme Court, a statute (such as the anti-SLAPP statute) may disregard cause-of-action labels, and instead focus solely on the conduct alleged:

> In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity.
> *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002).

Thus, one way to harmonize *Food Safety* is to essentially disregard the Overbroad Sentence as dictum as it's not necessary to the holding in *Food Safety* – it appears *Food Safety* found the breach of contract to simply be an act of ordinary negligence, at most. *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (only well-reasoned dicta of the Ninth Circuit is binding)[6].

If this Court does not believe it can disregard the Overbroad Sentence in *Food Safety* as dictum, then it can and must refuse to follow the Overbroad Sentence as violative of the authorities cited in subsection (b), above, which include California Supreme Court cases, such as *Freeman & Mills, Inc.* which cannot be reconciled with a categorical dismissal of a breach of the implied covenant claim on limitation-of-liability grounds. *Cal. Pro-Life Council, Inc. v. Getman*, 328 F. 3d 1088, 1099 (9th Cir. 2003) (the Ninth Circuit Court of Appeals need not follow the California Court of Appeal if there is convincing evidence the California Supreme Court would rule otherwise); *see, by analogy, Auto Equity Sales, Inc. v. Super. Ct.*, 57 Cal. 2d 450, 455 (1962) (state trial courts can decide

[6] State intermediate appellate decisions aren't binding on this Court as discussed in *Cal. Pro-Life Council, Inc.* on this page especially when they contradict other cases and cite another case for a proposition that the other case does not support.

which Court of Appeal case is better reasoned when there is any split of authority.) While NECF is not aware of any authority that discusses appellate decisions being void, as stated in footnote 5, above, it appears that the Court in *Food Safety* lacked fundamental jurisdiction on its face because there was not a valid judgment, thus it doesn't seem unreasonable to argue the opinion is *void ab initio*.

Alternatively, this Court can certify this question to the California Supreme Court if this Court has any doubts how the California Supreme Court would rule on what is a momentous and important issue. *See, e.g., Klein v. United States, 537 F.3d 1027, 1032* (9th Cir. 2008), *certified question answered*, 50 Cal. 4th 68 (2010) (certifying a question to the California Supreme Court because of doubts over whether the relevant intermediate court of appeals decision was correct); *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1002 (9th Cir. 2008), *certified question answered*, 46 Cal. 4th 661 (2009) (same). This certification option was not available to the district court. Cal. R. Ct. R. 8.548(a).

D. Even if *Food Safety* Is Somehow Applied to Bar the First Claim, It Does Not Bar Any Other Claims

Even *Food Safety* concedes dismissal of intentional tort claims on limitation-of-liability grounds is not proper. 209 Cal. App. 4th at 1126. For the authorities cited in section (C)(4)(b), above, the second, third, fourth, and fifth claim were not

properly dismissed. The second, third, and fifth claim are clearly intentional, not negligent, torts.

The fourth claims for negligent interference should survive because the facts incorporated by reference evidence gross negligence. *City of Santa Barbara*, 41 Cal.4th at 755. Alternatively, leave to expressly state: "gross negligence" should be granted.

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CONCLUSION

This Court can and must rule in one of three possible ways:

1) Reversing the judgment and reversing the order of dismissal and remanding for discovery/trial; or if the Court disagrees,
2) Seeking certification from the California Supreme Court regarding whether the Overbroad Sentence from *Food Safety* accurately states California law for non-construction-defect disputes; or if the Court disagrees,
3) Vacating the judgment and vacating the order of dismissal and remanding for the district court to determine issue preclusion (a/k/a collateral estoppel).

DATED: February 27, 2023

M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Appellant NEW ENGLAND COUNTRY FOODS, LLC

CERTIFICATE OF COMPLIANCE

I am the attorney for Appellant NEW ENGLAND COUNTRY FOODS, LLC.

This brief contains 7,484 words, including zero words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

DATED: February 27, 2023 M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Appellant NEW ENGLAND COUNTRY FOODS, LLC

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

DATED: February 27, 2023 M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Appellant NEW ENGLAND COUNTRY FOODS, LLC

Docket No. 22-55432

In the

United States Court of Appeals

for the

Ninth Circuit

NEW ENGLAND COUNTRY FOODS, LLC,
Plaintiff-Appellant,

v.

VANLAW FOOD PRODUCTS, INC.,
Defendant-Appellee.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8:21-CV-01060-DOC-ADS · HONORABLE DAVID O. CARTER

ADDENDUM OF STATUTES AND RULES

M.K. HAGEMANN, P.C.
MICHAEL K. HAGEMANN, ESQ. (264570)
1801 Century Park East, Suite 2400
Century City, CA 90067
(310) 773-4900 Telephone
(310) 773-4901 Facsimile
mhagemann@mkhlaw.com

Attorneys for Appellant,
New England Country Foods, LLC

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FEDERAL STATUTES

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

FEDERAL RULES

Fed. R. App. P. 4(a)(4)

Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

…
(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
…

Fed. R. Civ. P. 12(b)

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
…
(6) failure to state a claim upon which relief can be granted
…

Fed. R. Civ. P. 58(e)

Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.

CALIFORNIA STATUTES

Cal. Civ. Code § 1641

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

Cal. Civ. Code § 1643

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

Cal. Civ. Code § 1668

All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

Cal. Civ. Code § 2782.5

Nothing contained in Section 2782 shall prevent a party to a construction contract and the owner or other party for whose account the construction contract is being performed from negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract.

Cal. Civ. Code § 2783

As used in Sections 2782 and 2782.5, "construction contract" is defined as any agreement or understanding, written or oral, respecting the construction, surveying, design, specifications, alteration, repair, improvement, renovation, maintenance, removal of or demolition of any building, highway, road, parking facility, bridge, water line, sewer line, oil line, gas line, electric utility transmission or distribution line, railroad, airport, pier or dock, excavation or other structure, appurtenance, development or other improvement to real or personal property, or an agreement to perform any portion thereof or any act collateral thereto, or to perform any service reasonably related thereto, including, but not limited to, the erection of all structures or performance of work in connection therewith, electrical power line clearing, tree trimming, vegetation maintenance, the rental of all equipment, all incidental transportation, moving, lifting, crane and rigging service and other goods and services furnished in connection therewith.

Cal. Civ. Code § 3523

For every wrong there is a remedy.

CALIFORNIA RULES

Cal. R. Ct. R. 8.548(a)

On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if:

(1) The decision could determine the outcome of a matter pending in the requesting court; and

(2) There is no controlling precedent.

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M.K. HAGEMANN, P.C.
MICHAEL K. HAGEMANN, ESQ. (264570)
1801 Century Park East, Suite 2400
Century City, CA 90067
(310) 773-4900 Telephone
(310) 773-4901 Facsimile
mhagemann@mkhlaw.com

Attorneys for Appellant,
New England Country Foods, LLC

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3	310	14		Vanlaw's Motion to Dismiss (No. 1) (Continued from Vol. 2)	8/26/2021
3	318	14	1	*Request for Judicial Notice*	8/26/2021
3	324	14	2	*Exhibit 1 - Vanlaw's December 21, 2017 State-Court Complaint*	8/26/2021
3	330	14	3	*Exhibit 2 - NECF's January 30, 2018 Answer to Vanlaw's State-Court Complaint*	8/26/2021
3	336	14	4	*Exhibit 3 - NECF's February 19, 2019 State-Court Cross-Complaint*	8/26/2021

3	344	14	5	*Exhibit 4 - Vanlaw's March 20, 2019 Answer to NECF's State-Court Cross-Complaint*	8/26/2021
3	350	14	6	*Exhibit 5 - NECF's January 27, 2021 State-Court Motion for Leave to Amend Its Cross-Complaint [Accepted March 2, 2021]*	8/26/2021
3	359	14	7	*Exhibit 6 - Declaration of Michael K. Hagemann in Support of Motion at Exhibit 5 [Accepted March 2, 2021]*	8/26/2021
3	398	14	8	*Exhibit 7 - Vanlaw's March 29, 2021 Opposition to Motion at Exhibit 5*	8/26/2021
3	416	14	9	*Exhibit 8 - NECF's April 5, 2021 Reply in Support of Motion at Exhibit 5*	8/26/2021
3	427	14	10	*Exhibit 9 - April 16, 2021 Minute Order ruling on Motion at Exhibit 5*	8/26/2021
3	429	14	11	*Exhibit 10 - Vanlaw's June 10, 2021 State-Court Motion in Limine No. 1*	8/26/2021
3	595	14	12	*Exhibit 11 - NECF's July 9, 2021 Opposition to Motion at Exhibit 10*	8/26/2021
3	606	14	13	*Exhibit 12 - Vanlaw's Trial Brief filed in the State Court Action on July 9, 2021 (Continued on Vol. 4)*	8/26/2021

Volume 4 of 4					
4	610	14	13	*Exhibit 12 - Vanlaw's Trial Brief filed in the State Court Action on July 9, 2021 (Continued from Vol. 3)*	8/26/2021
4	625	14	14	*Exhibit 13 - NECF's Trial Brief filed in the State Court Action on July 9, 2021*	8/26/2021
4	651	14	15	*Exhibit 14 - Vanlaw's July 2, 2021 Notice of Related Cases filed in State Court*	8/26/2021
4	654	14	16	*Exhibit 15 - Operating Agreement (State-Court Trial Exhibit 1)*	8/26/2021
4	665	14	17	*Exhibit 16 - July 13, 2021 State-Court Trial Minute Order*	8/26/2021
4	667	14	18	*Exhibit 17 - July 14, 2021 State-Court Trial Minute Order*	8/26/2021
4	669	14	19	*Exhibit 18 - July 18, 2021 State-Court Trial Minute Order*	8/26/2021
4	671	14	20	*Exhibit 19 - July 22, 2021 State-Court Intended Decision*	8/26/2021
4	677	14	21	*Exhibit 20 - Vanlaw's July 30, 2021 State-Court Request for Statement of Decision*	8/26/2021

4	683	14	22	*Vanlaw's Notice of Pendency of Other Actions*	8/26/2021
4	687	14	23	*Vanlaw's Certification and Notice of Interested Parties*	8/26/2021
4	688	5		NECF's Amended Certification and Notice of Interested Parties	6/16/2021
4	689	2		NECF's Civil Coversheet	6/16/2021
4	692	1		NECF's Complaint	6/16/2021
4	702	1	1	*Exhibit A - Mutual Non-Disclosure Agreement*	6/16/2021
4	706	1	2	*Exhibit B - Operating Agreement*	6/16/2021
4	713	1	3	*Exhibit C - Emails Obtained in State-Court Discovery*	6/16/2021
4	719	1	4	*Exhibit D - Termination Email*	6/16/2021
4	722			District Court Docket (February 26, 2023)	2/26/2023

Docket No. 22-55432

In the

United States Court of Appeals

for the

Ninth Circuit

NEW ENGLAND COUNTRY FOODS, LLC,
Plaintiff-Appellant,

v.

VANLAW FOOD PRODUCTS, INC.,
Defendant-Appellee.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8:21-CV-01060-DOC-ADS · HONORABLE DAVID O. CARTER

EXCERPTS OF RECORD
VOLUME 1 OF 4 – PAGES 1 TO 8

M.K. HAGEMANN, P.C.
MICHAEL K. HAGEMANN, ESQ. (264570)
1801 Century Park East, Suite 2400
Century City, CA 90067
(310) 773-4900 Telephone
(310) 773-4901 Facsimile
mhagemann@mkhlaw.com

Attorneys for Appellant,
New England Country Foods, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation;

Defendants.

Case No.: 8:21-cv-01060-DOC-ADS

JUDGMENT FOLLOWING ORDER GRANTING DEFENDANT VANLAW FOOD PRODUCTS, INC.'S MOTION TO DISMISS [36]

On January 20, 2022, Docket No. 35, on Motion of VANLAW FOOD PRODUCTS, INC., a California corporation ("Defendant") brought under F.R.C.P. 12(b)(6), the Court entered an Order **DISMISSING** this action **WITH PREJUDICE** for failure to state a claim upon which relief may be granted.

Judgment is accordingly entered in favor of Defendant and against Plaintiff NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company ("Plaintiff"). Attorney fees and costs to be determined pursuant to motion.

Dated: February 1, 2022

David O. Carter

Hon. DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 21-01060-DOC-ADS Date: January 20, 2022

Title: NEW ENGLAND COUNTRY FOODS, LLC v. VANLAW FOOD PRODUCTS, INC.

PRESENT: THE HONORABLE DAVID O. CARTER, U.S. DISTRICT JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO DISMISS [29]

Before the Court is a second Motion to Dismiss ("Motion" or "Mot.") (Dkt. 29) brought by Defendant VanLaw Food Products, Inc. ("Defendant"). The Court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Having reviewed the moving papers submitted by the parties, the Court **GRANTS** Defendant's Motion and **VACATES** the hearing scheduled for January 24, 2022.

I. Background

For several years, Defendant manufactured Plaintiff New England Country Foods, LLC's ("Plaintiff") proprietary barbecue sauce under a Mutual Non-Disclosure Agreement and sold it to Trader Joe's Company ("Trader Joe's"), a large grocery chain. First Amended Complaint ("FAC") (Dkt. 27) ¶¶ 7, 10-11. Negotiations to extend the contract failed and the relationship terminated in December 2017. *Id.* ¶ 19.

Plaintiff alleges that Defendant began cloning Plaintiff's proprietary sauce in 2015 and that Trader Joe's terminated Plaintiff's contract in favor of Defendant's version of the sauce. *Id.* ¶¶ 15, 21.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 21-01060-DOC-ADS Date: January 20, 2022

In December 2017, Defendant sued Plaintiff in Orange County Superior Court for breach of contract arising from Plaintiff's alleged failure to pay for bottles for sriracha sauce, unrelated to the barbecue sauce at issue here. As part of discovery in the state case, in July 2019, Plaintiff obtained email communications from 2017 between Defendant and a Trader Joe's representative discussing plans for Defendant to recreate Plaintiff's barbecue sauce. FAC ¶ 13; Compl. Ex. C (Dkt. 1-3).

Plaintiff filed its Complaint in this case on June 16, 2021 (Dkt. 1). Defendant brough a motion to dismiss, which the Court granted on November 23, 2021 ("November Order") (Dkt. 25). The Court held that the Operating Agreement between the parties included a Limitation on Liability section limiting suits to direct damages or injunctive relief, which barred Plaintiff's claims for lost profits, punitive damages, and attorneys' fees. November Order at 7-8. The Court granted leave to amend the Complaint "to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability." *Id.* at 8.

Plaintiff filed its FAC on December 8, 2021. The FAC alleges, "Upon information and belief, all of Plaintiff's harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to Plaintiff from the wrongs committed by Defendant are a loss of profits." FAC ¶ 26. Plaintiff also alleges that the Limitation on Liability provision "would completely exempt Defendant from liability for the wrongs alleged herein." *Id.* ¶ 27.

Defendant brought this Motion to Dismiss on November 22, 2021. Plaintiff filed its Opposition ("Opp'n") (Dkt. 33) on January 3, 2022, and Defendant filed its Reply (Dkt. 34) on January 10, 2022.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a

formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

Defendant renews its argument that the the Operating Agreement's Limitation on Liability section bars Plaintiff's FAC. Mot. at 27. That provision states that "in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind." Operating Agreement § 13 (Dkt. 1-2).

Plaintiff explicitly states that it has suffered no damages that fall within those allowed under the provision, and instead states that "all of Plaintiff's harm . . . is a form of lost profits (both past and future)." FAC ¶ 26. Plaintiff's claims are thus facially barred by the Limitation on Liability provision.

"Under California law, parties may agree by their contract to the limitation of their liability in the event of a breach." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1048 (C.D. Cal. 2003) (citing *Artukovich v. Pac. States Cast Iron Pipe Co.*, 78 Cal. App. 2d 1, 4 (1947) and *Markborough Cal., Inc. v. Super Ct.*, 227 Cal. App. 3d 705, 714 (1991)). "[W]here parties agree to a limitation of damages provision, courts should not alter the bargained-for risk allocation unless a breach of contract is so fundamental that it causes a loss which is not part of that allocation." *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 547 (9th Cir. 1985) (citation omitted). The alleged breach here is neither "oppressive" nor "total and fundamental," as the parties bargained for a liability limitation that applied to the reverse engineering prohibition provision. *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 709 (9th Cir. 1990).

As a result, Plaintiff can bring its claims only if the Limitation provision is invalidated by California Civil Code § 1668, which bars limitations on damages for intentional or grossly negligent conduct as against public policy. Plaintiff's argument as to public policy appears to be that "[f]or every wrong there is a remedy." Opp'n at 5 (quoting CAL. CIV. CODE § 3523).

Defendant argues that California courts have invalidated provisions under § 1668 only when they bar *all* money damages, not merely limit them to specific types of damages. Mot. at 28; *see Health Net of Cal., Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224, 227 (2003) (voiding "[a]n unqualified prohibition against the recovery of damages in the context of a commercial transaction"). A California Court of Appeals case, *Food Safety Net*, is instructive given its somewhat similar fact pattern, where a contract limited liability to "the lesser of (a) damages suffered by you as the direct result thereof, or (b) the total amount paid by you to [defendant] for the services herein covered." *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126 (2012). Since the plaintiff had not suffered any direct damages or paid anything to the defendant, the court found that the limitation barred recovery for breach of contract. *Id.* at 1127. Moreover (and contrary to Plaintiff's assertion, Opp'n at 6), the court held that its "conclusion necessarily encompasses [plaintiff's] bad faith claim, as breaches of

the covenant of good faith implied within contracts are not tortious outside the context of insurance policies." *Id.* (citing *Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28, 43 (1999)).

Plaintiff responds that enforcing the Limitation on Liability effectively renders the reverse-engineering provision nugatory. Opp'n at 3. But with the Limitation provision in place, Defendant is still liable for unpaid royalties or direct damages from reverse-engineering Plaintiff's product, and Plaintiff could seek injunctive relief to stop Defendant selling its reverse-engineered sauce. The provision does not bar all liability, just liability for specific types of relief.

The Court understands the frustrating position Plaintiff finds itself in, having allegedly been wronged but not in a form compensable by the contract. But Plaintiff makes no suggestion that the contract is invalid or the product of unequal bargaining power. Indeed, the contract places the same limitations on Defendant's remedies, were Plaintiff to reverse-engineer Defendant's sauce in turn. The Court may not erase bargained-for contract provisions simply because one party now wishes they were different. Accordingly, Defendant's Motion is GRANTED WITH PREJUDICE.

IV. Disposition

For the reasons set forth above, the Court GRANTS Defendant's Motion to Dismiss and DISMISSES Plaintiff's First Amended Complaint without leave to amend. The hearing scheduled for January 24, 2022 is hereby VACATED.

The Clerk shall serve this minute order on the parties.

Docket No. 22-55432

In the

United States Court of Appeals

for the

Ninth Circuit

NEW ENGLAND COUNTRY FOODS, LLC,
Plaintiff-Appellant,

v.

VANLAW FOOD PRODUCTS, INC.,
Defendant-Appellee.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8:21-CV-01060-DOC-ADS · HONORABLE DAVID O. CARTER

EXCERPTS OF RECORD
VOLUME 2 OF 4 – PAGES 9 TO 308

M.K. HAGEMANN, P.C.
MICHAEL K. HAGEMANN, ESQ. (264570)
1801 Century Park East, Suite 2400
Century City, CA 90067
(310) 773-4900 Telephone
(310) 773-4901 Facsimile
mhagemann@mkhlaw.com

Attorneys for Appellant,
New England Country Foods, LLC

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff/Appellant NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation,

Defendant.

District Court Case No.: 8:21-cv-01060-DOC-ADS

Appeals Court Case No.: 22-55432

STIPULATED NOTICE THAT NO TRANSCRIPTS ARE NECESSARY ON APPEAL [F.R.A.P. 10(b); CIRCUIT RULE 10-3.1(c)]

IT IS HEREBY STIPULATED BY AND BETWEEN ALL PARTIES AS FOLLOWS:

There were no oral hearings or other oral proceedings in this Action. Thus, pursuant to F.R.A.P. 10(b) and Circuit Rule 10-3.1(c), counsel for all parties to this Action and Appeal hereby certify that none of the parties intend to designate any portion of the transcript.

So Certified,

DATED: May 4, 2022

M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

DATED: May 4, 2022

MAGARIAN & DIMERCURIO,
A PROFESSIONAL LAW CORPORATION

By: /s/ Krista L. DiMercurio
Krista L. DiMercurio
Attorneys for Defendant VANLAW FOOD PRODUCTS, INC.

[Michael K. Hagemann attests that Ms. DiMercurio concurs in this filing's content and has authorized its filing. L.R. 5-4.3.4(a)(2)(i) /s/ Michael K. Hagemann]

Name Michael K. Hagemann (State Bar No. 264570)
Address 1801 Century Park East, Suite 2400
City, State, Zip Century City, CA 90067
Phone (310) 773-4900
Fax (310) 773-4901
E-Mail mhagemann@mkhlaw.com

☐ FPD ☐ Appointed ☐ CJA ☐ Pro Per ☒ Retained

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

New England Country Foods, LLC PLAINTIFF(S), v. Van Law Food Products, Inc. DEFENDANT(S).	CASE NUMBER: 8:21-cv-01060-DOC-ADS **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that New England Country Foods, LLC hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

☐ Order (specify):

☒ Judgment (specify):
after granting motion to dismiss

☐ Other (specify):

Imposed or Filed on February 1, 2022. Entered on the docket in this action on February 3, 2022.
(The deadline to appeal was extended to April 28, 2022 pursuant to F.R.C.P. 58(e), F.R.A.P. 4(a)(4)(A)(iii), and Dkt. 38, 40, and 45.)
A copy of said judgment or order is attached hereto.

April 27, 2022
Date

Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d). (Attorney names and address are set forth in the attachment)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation;

Defendants.

Case No.: 8:21-cv-01060-DOC-ADS

JUDGMENT FOLLOWING ORDER GRANTING DEFENDANT VANLAW FOOD PRODUCTS, INC.'S MOTION TO DISMISS [36]

On January 20, 2022, Docket No. 35, on Motion of VANLAW FOOD PRODUCTS, INC., a California corporation ("Defendant") brought under F.R.C.P. 12(b)(6), the Court entered an Order **DISMISSING** this action **WITH PREJUDICE** for failure to state a claim upon which relief may be granted.

Judgment is accordingly entered in favor of Defendant and against Plaintiff NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company ("Plaintiff"). Attorney fees and costs to be determined pursuant to motion.

Dated: February 1, 2022

David O. Carter

Hon. DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CALIFORNIA - CENTRAL

Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

U.S. District Court case number: 8:21-cv-01060-DOC-ADS

Notice is hereby given that the appellant(s) listed below hereby appeal(s) to the United States Court of Appeals for the Ninth Circuit.

Date case was first filed in U.S. District Court: 06/16/2021

Date of judgment or order you are appealing: 02/01/2022

Docket entry number of judgment or order you are appealing: 37

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

◉ Yes ○ No ○ IFP was granted by U.S. District Court

List all Appellants *(List **each** party filing the appeal. Do not use "et al." or other abbreviations.)*

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company

Is this a cross-appeal? ○ Yes ◉ No

If yes, what is the first appeal case number?

Was there a previous appeal in this case? ○ Yes ◉ No

If yes, what is the prior appeal case number?

Your mailing address (if pro se):

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature /s/ Michael K. Hagemann **Date** Apr 27, 2022

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Form 1 *Rev. 12/01/2021*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 6. Representation Statement

Instructions for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s) *(List **each** party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:
NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company

Name(s) of counsel (if any):
Michael K. Hagemann of M.K. HAGEMANN, P.C.

Address: 1801 Century Park East, Suite 2400; Century City, CA 90067

Telephone number(s): (310) 773-4900

Email(s): mhagemann@mkhlaw.com

Is counsel registered for Electronic Filing in the 9th Circuit? ◉ Yes ○ No

---

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:
VANLAW FOOD PRODUCTS, INC., a California corporation

Name(s) of counsel (if any):
Krista L. DiMercurio and Mark D. Magarian of MAGARIAN and DIMERCURIO APLC

Address: 20 Corporate Park, Suite 255; Irvine, CA 92606

Telephone number(s): (714) 415-3412

Email(s): krista@magarianlaw.com and mark@magarianlaw.com

To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ○ No

Appellees

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 8:21-cv-01060-DOC-ADS Date: March 29, 2022

Title: New England Country Foods, LLC v. Vanlaw Food Products, Inc.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Dajanae Carrigan/Deborah Lewman	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEYS' FEES [38]

On February 15, 2022, Defendant Vanlaw Food Products, Inc. ("Defendant") filed its Motion for Attorneys' Fees and Costs ("Motion" or "Mot.") (Dkt. 38). The Court finds this matter suitable for resolution without oral argument. Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Having reviewed the papers and considered the parties' arguments, the Court **DENIES** Defendant's Motion.

I. Background

Plaintiff brought this action on June 16, 2021. Complaint ("Compl.") (Dkt. 1). This action arises out of a contract between Plaintiff and Defendant, in which Defendant would manufacture and sell Plaintiff's proprietary barbecue sauce. *See generally* Order Dismissing Plaintiff's First Amended Complaint ("Order") (Dkt. 35). Defendant filed their first Motion to Dismiss ("MTD 1") (Dkt. 14) under Fed. R. Civ. P. 12(b)(6) on August 26, 2021. The Court held that the contract between the parties limited damages to direct damages or injunctive relief, thus barring Plaintiff's claims. Order at 2. The Court dismissed Plaintiff's complaint with leave to amend. *Id.* Plaintiff filed their First Amended Complaint ("FAC") (Dkt. 27) on December 8, 2021. The FAC alleged, "Upon

information and belief, all of Plaintiff's harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to Plaintiff from the wrongs committed by Defendant are a loss of profits." FAC ¶ 26. Plaintiff also alleged that the Limitation on Liability provision "would completely exempt Defendant from liability for the wrongs alleged herein." *Id.* ¶ 27. The Court dismissed Plaintiff's FAC with prejudice on January 20, 2022, holding that the contract barred any damages Plaintiff claimed to have suffered. Order at 4-5.

Plaintiff and Defendant are opposing parties in a state action in the Superior Court of California, County of Orange ("the State Action"). *Vanlaw Food Products, Inc. v. New England Country Foods, LLC*, 30-2017-00962844-CU-BC-CJC. Plaintiff originally sought to bring the allegations that form the substance of their Complaint by amending their cross-complaint in the State Action. MTD 1 at 8. Plaintiff was unsuccessful. *Id.* at 8-9.

Defendant brought their Motion on February 15, 2022. Mot. Plaintiff opposed ("Opp'n") (Dkt. 41) on February 28, 2022. Defendant replied ("Reply") (Dkt. 43) on March 7, 2022.

II. Legal Standard

Attorneys' fee law is substantive for *Erie*[1] purposes, so in diversity cases state law applies. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 973 (9th Cir. 2013). Therefore, the Court applies California state law for this Motion.

California state law allows an award of attorneys' fees when a contract provides for the award of attorneys' fees for a party that prevails on all contract claims in a contract dispute. *Scott Co. of California v. Blount, Inc.*, 20 Cal. 4th 1103 (1999); CAL. CIV. CODE § 1717. Attorneys' fee awards are calculated with the lodestar method. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133-35 (2001). The trial court first determines the reasonable hours expended on the case and a reasonable hourly rate. *Id.* The trial court, after excising any unnecessary or duplicative hours, multiplies the reasonable hours expended by the reasonable hourly rate to determine the lodestar amount. *Id.* Then the lodestar may be adjusted based on other factors. *Id.* The trial court exercises its sound discretion throughout the process. *Id.*

The trial court has broad discretion to deny an unreasonable fee award altogether. *Id.* at 1137. California courts have recognized that if trial courts are required to award a reasonable fee in the face of an unreasonable fee request, movants would be encouraged

[1] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

to make unreasonable fee requests because the only possible consequence would be receipt of a reasonable fee award. *Serrano v. Unruh*, 32 Cal. 3d 621, 635 (1982). Outright denial of an unreasonable fee request is acceptable to discourage such behavior. *Id.*

III. Discussion

Contemporaneous time records are the most reliable billing records. *Taylor v. Cty. of Los Angeles*, 50 Cal. App. 5th 205, 207 (2020). Computers and timekeeping software have made keeping accurate and detailed billing records easier than ever before. *See also id.* at 214.

Krista DiMercurio ("DiMercurio") is a partner at Magarian & DiMercurio, the law firm representing Defendant in this action. DiMercurio Decl. ¶ 15 (Dkt. 38-1). DiMercurio charges $375 per hour, sometimes less for administrative tasks. *Id.* ¶ 32. Mark Magarian ("Magarian") is a partner at Magarian & DiMercurio. Magarian Decl. ¶ 13. Magarian charged $450 per hour in this case. *Id.* ¶ 32. Both attorneys declared that the billing records are accurate and submitted billing records in support of their Motion. Billing Records ("BR") (Dkt. 38-3). The Court has significant concerns about the reliability of Defendant's billing records and the excessiveness of the proposed award. These concerns are summarized below.

Time Expenditures Claimed by Counsel on Motions

The Court finds that the time claimed by counsel to draft both motions to dismiss filed in this case is excessive. Defendant's Motion to Dismiss Plaintiff's FAC ("MTD 2") (Dkt. 29) was ultimately successful.

Defendant's MTD 1 consisted of large sections of bullet points and quotes that at times spanned multiple pages. *See, e.g.*, MTD 1 at 27-29. Large portions of the research needed to prepare MTD 1 would have already been done during research for the State Action, particularly on the issue of compulsory counterclaims. Opp'n at 20. Plaintiff's counsel appears to have spent a total of 71 hours on MTD 1. (Dkt. 41-3 Ex. B). This is grossly excessive when large portions of MTD 1 are bullet points and block quotes from cases and practice guides.

Defendant's MTD 2 was quite similar with lengthy quotations, MTD 2 at 21-23, and bullet point lists, *id.* at 7-11. Additionally, Plaintiff's FAC was extremely similar to Plaintiff's Complaint, and only raised the new issue regarding the enforceability of the limitation of liability provisions in the contract. *Compare* Compl. *with* FAC ¶¶ 26-27. Nevertheless, Defendant's counsel spent 33 hours on MTD 2. (Dkt. 41-4 Ex. C). This is

grossly excessive when only one new allegation on a previously-analyzed legal issue has been presented. Plaintiff made two arguments in MTD 2: the limitation of liability provision should be enforced, and Plaintiff's damages were too speculative. *See generally* MTD 2. 33 hours for two relatively simple arguments is excessive.

Defendant's counsel spent 26.50 hours on the present Motion. (Dkt. 41-5 Ex. D). This is also grossly excessive. The Motion is not complex or complicated. There is no reason that two partners should spend so much time drafting the present Motion. Over half the Motion is the procedural history of the case, Mot. at 1-17, although there are some exceptions, *id.* at 13-14. The next portion appears to be copy-pasted from another source, although the Court is not certain. *Id.* at 18-25. In particular the phrases: "(discussed at ¶ 19:250.2)", *id.* at 19, and "See ¶ 17:895 ff", *id.* at 21, suggest copy-pasting from a practice guide or a treatise. Only in the last two pages does Defendant apply the law to the present case. *Id.* at 25-26.

The Court finds that these time expenditures are grossly excessive and indicate an inflated fee claim.

Defendant's Inconsistent Arguments Regarding Counterclaims

Defendant argued in state court that Plaintiff's proposed amended Cross-Complaint "is based upon an entirely new set of facts completely unrelated to the original Cross-Complaint." (Dkt. 14-8, Ex. 7). When Plaintiff filed their Complaint in this Court, Defendant argued that Plaintiff's Complaint was actually a compulsory counterclaim that should have been brought in the State Action. MTD 1 at 7.

Defendant cannot have it both ways. Defendant cannot argue that Plaintiff's claims cannot be brought in state court and then argue that Plaintiff's claims must be brought in state court. This sort of litigation conduct detracts from judicial economy and consumes valuable resources.

Defendant's Billing for Delivering Courtesy Copies to the Court

DiMercurio billed a total of three hours for delivering courtesy copies to the Court. BR. On November 15, 2021, January 10, 2022, and February 15, 2022, DiMercurio billed one hour each day to deliver courtesy copies to the Court. BR. This is not compensable. Additionally, billing for this raises genuine concerns about the reliability of the billing records. The Court finds it excessive to have a partner performing work that should be performed by a courier.

Billing Entries Involving "Communication" or "Discussion"

Both Magarian and DiMercurio frequently billed for time spent communicating in the firm or discussing within the firm various aspects of the case. *See generally* BR. This is a legitimate use of an attorney's time. The Court would expect to see that when DiMercurio bills for communicating within the firm about the case, Magarian would also have a time entry stating that he discussed or communicated regarding the case, or at least, Magarian would have a time entry in close temporal proximity to DiMercurio's claimed communication or discussion. The presence of such a corresponding entry would suggest reliability.

However, the billing records frequently show either DiMercurio or Magarian billing for discussing or communicating about the case, but no corresponding entry appears. For example, on June 18, 2021, August 2, 2021, November 12, 2021, December 22, 2021, and January 21, 2022, DiMercurio's billing entries stated that she discussed the case within the firm. BR. However, there are no corresponding entries from another attorney indicating discussion. In some instances, such as December 22, 2021, no other attorney had any time entry that day. It is unclear with whom DiMercurio discussed the case with if no other attorney worked on the case that day. The billing records indicate that Magarian billed time spent meeting with DiMercurio on January 31, 2022, but no corresponding entry from DiMercurio appears.

Likewise, there are many billing entries stating that an attorney communicated within the firm regarding the case. Frequently no corresponding billing entry appears. The Court realizes that "communicate" might mean simply sending an email, and lack of a contemporaneous billing entry does not indicate unreliability. However, there are several examples of an attorney billing for communicating within the firm when the record indicates that no other attorney worked on the case at all for several days. One example is on September 10, 2021, where Magarian billed for communicating with DiMercurio regarding the Court's scheduling notice and no other attorney billed anything on that day or until September 13, 2021. On February 7, 2022, Magarian billed for communicating with DiMercurio regarding attorneys' fees and DiMercurio's only billing entry for that day was for communicating with opposing counsel, not for communicating with Magarian. DiMercurio did not bill again on this case until a week later.

Inconsistencies like these within the billing records suggest the records are unreliable.

Time Entries for "Updating" Time Entries

DiMercurio spent 0.6 hours updating the time entries in anticipation of the Motion on January 26, 2022. Neither the DiMercurio nor the Magarian declaration indicated that

either attorney had cut unnecessary hours. *See* DiMercurio Decl. (Dkt. 38-1); Magarian Decl. (Dkt. 38-2). Common usage suggests that "updating" something involves changing or altering it. This suggests to the Court that the billing records submitted were changed in anticipation of this Motion. If DiMercurio or Magarian were updating the time entries to cut hours expended on the case they would have said so in their declarations, because that would increase the likelihood of a favorable fee award. This suggests that any change to the billing records was something other than the culling of unnecessary or duplicative hours. This undermines the reliability of the billing records.

Overall findings

The Court finds that these entries indicate the billing records are unreliable. The Court also finds it likely that the fee request is excessive.

Customers paying hundreds of dollars an hour are entitled to accurate and detailed billing records. *See generally Taylor*, 50 Cal. App. 5th, at 214-15. An opposing party who faces tens of thousands of dollars in potential liability for attorneys' fees is entitled to sufficiently accurate and detailed records to enable them to challenge the claimed fee award. The Court is entitled to reliable billing records so that it may have an accurate record to determine fee awards. When an attorney plays fast and loose with their billing records, they save time and energy, but those savings are not free. The price is paid when those records are scrutinized. Innocent inconsistencies may give rise to insidious inferences by the fact finder. Such a situation is easily avoided with contemporaneous, detailed, and consistent time records.

For the reasons detailed above, the Court finds that the billing records provided are unreliable and indicate an attempt to seek an excessive fee award. Additionally, the billing records are so unreliable as to deprive Plaintiff a fair opportunity to challenge the claimed fee award. The Court will not reward such behavior.

IV. Disposition

For the reasons set forth above, the Court **DENIES** Defendant's motion in its entirety.

The Clerk shall serve this minute order on the parties.

Initials of Deputy Clerk: dca/dgo

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation,

Defendant.

Case No. 8:21−cv−01060−DOC−ADS

ORDER EXTENDING THE DEADLINE TO APPEAL UNTIL 30 DAYS AFTER THIS COURT RULES ON THE MOTION FOR ATTORNEY'S FEES (DKT. 38) [F.R.C.P. 58(E)]; [F.R.A.P. 4(a)(4)(A)(iii)]

Courtroom: 9 D

Judge: Hon. David O. Carter

Complaint Filed: June 16, 2021

The Court, having read and considered the STIPULATION TO EXTEND THE DEADLINE TO APPEAL UNTIL 30 DAYS AFTER THIS COURT RULES ON THE MOTION FOR ATTORNEY'S FEES (DKT. 38) [F.R.C.P. 58(E)]; [F.R.A.P. 4(a)(4)(A)(iii)] and finding good cause shown, HEREBY ORDERS THAT,

The deadline to appeal the Judgment (Dkt. 35/37) is extended such that the parties have thirty days after the motion for attorney's fees (Dkt. 38) is decided by this Court to file a notice of appeal. Specifically, pursuant to Rule 58(e) of the Federal Rules of Civil Procedure, the motion for attorney's fees (Dkt. 38) shall have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

DATED: February 22, 2022

Hon. David O. Carter
United States District Court Judge

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
20 Corporate Park, Suite 255
Irvine, California 92606
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION FOR ATTORNEY FEES AS PREVAILING PARTY AGAINST PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC** Date: March 21, 2022 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN THAT on March 21, 2022, at 8:30 a.m., before the Hon. David O. Carter, in Courtroom 9D of the United States Courthouse for the Central District of California, Southern Division, 411 W. 4th Street, Santa Ana, California, Defendant VANLAW FOOD PRODUCTS, INC. ("Defendant" or "VLF") will and hereby does move for an order against Plaintiff NEW ENGLAND COUNTRY FOOD PRODUCTS, LLC ("Plaintiff" or "NECF") for an award of attorney fees pursuant to contract in the amount of $53,127.50.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which commenced on January 31, 2022 and concluded on February 7, 2022.

Pursuant to LR 54-7, this Motion is made within fourteen (14) days following entry of judgment in favor of Defendant, which occurred on February 1, 2022.

As set forth in the accompanying Memorandum of Points and Authorities, the grounds for this motion are: (1) On January 20, 2022, this Court granted Defendant's Motion to Dismiss the entire action pursuant to FRCP 12(b)(6), and subsequently entered judgment in favor of Defendant; (2) Defendant is the

prevailing party pursuant to Civil Code Section 1717; and (3) the Operating Agreement and Mutual Nondisclosure Agreement (which forms a part of the Operating Agreement) upon which this action was based both contain clauses that require (e.g., they use the word "shall") an award of attorney fees to the prevailing party as follows, respectively: (a) "[t]he prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorneys' fees incurred in enforcing this Agreement," (ECF 28-2, pg. 5, ¶14) and (b) "[i]f any party brings an action against any other party hereto by reason of the breach of any covenant, promise, warranty, representation, obligation or condition hereof, or otherwise arising out of or relating to this Agreement, whether for declaratory or other relief, the prevailing party in such suit shall be entitled to its costs of suit and reasonable attorneys' fees." (ECF 28-1, pg. 3, ¶12)

This motion is based on: this Notice, the attached Memorandum of Points and Authorities, the Declarations of Mark D. Magarian and Krista L. DiMercurio and exhibits submitted therewith, the pleadings and papers filed in this action, and such further argument and matters as may be offered at or before the time for hearing on this motion.

Dated: February 15, 2022

MAGARIAN & DIMERCURIO,
A PROFESSIONAL LAW CORPORATION

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 16, 2021, Plaintiff filed this lawsuit, and seven months later, on January 20, 2022, the Court granted Defendant's Motion to Dismiss pursuant to FRCP 12(b)(6) without leave to amend, resulting in a dismissal of the case with prejudice, and entry of judgment in favor of Defendant. More specifically, pursuant to the Court's January 20, 2022 Order Granting Motion to Dismiss ("the Order"), the Court found, in pertinent part:

> "Defendant renews its argument that the [] Operating Agreement's Limitation on Liability section bars Plaintiff's FAC. Mot. at 27. That provision states that "in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind." Operating Agreement § 13 (Dkt. 1-2).
>
> Plaintiff explicitly states that it has suffered no damages that fall within those allowed under the provision, and instead states that "all of Plaintiff's harm . . . is a form of lost profits (both past and future)." FAC ¶ 26. Plaintiff's claims are thus facially barred by the Limitation on Liability provision…
>
> The Court may not erase bargained-for contract provisions simply because one party now wishes they were different. Accordingly, Defendant's Motion is GRANTED WITH PREJUDICE." (ECF 35, pp. 3-4)

When a party obtains a simple, unqualified victory by completely prevailing on, or defeating, all contract claims and the contract provides for attorney fees,

California Civil Code 1717[1] entitles that party to recover reasonable attorney fees. (*Scott Co. of Calif. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109; *Hsu v. Abbara*, 9 Cal.4th 863, 865-866; *David S. Karton A Law Corp. v. Dougherty* (2014) 231 Cal.App.4th 600, 608-609; see also, the Rutter Group, Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E) Moreover, a clause allowing recovery of fees in any action relating to "any dispute under [the agreements]" is broad enough to encompass tort claims as well as contract claims. (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 336; *Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 988-989, 993-995; see also, the Rutter Group, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

With the foregoing in mind, the Operating Agreement and Mutual Nondisclosure Agreement ("NDA") (which forms a part of the Operating Agreement) upon which this action was based both contain clauses that require (e.g., they use the word "shall") an award of attorney fees to the prevailing party as follows, respectively: (a) "[t]he prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorneys' fees incurred in enforcing this Agreement," (ECF 28-2, pg. 5, ¶14) and (b) "[i]f any

[1] State law governs the construction of a contract for recovery of attorney fees. (*Matter of Sheridan* (7th Cir. 1997) 105 F.3d 1164, 1167)

party brings an action against any other party hereto by reason of the breach of any covenant, promise, warranty, representation, obligation or condition hereof, or otherwise arising out of or relating to this Agreement, whether for declaratory or other relief, the prevailing party in such suit shall be entitled to its costs of suit and reasonable attorneys' fees." (ECF 28-1, pg. 3, ¶12)

It cannot be disputed that the entire action arose exclusively out of the Operating Agreement and the NDA (which forms a part of the Operating Agreement). In fact, not only did the action arise out of such agreements, the result in favor of Defendant relied exclusively on the agreements as it rested solely on the Limitation of Liability clauses set forth therein.

Accordingly, and as set forth in more detail herein and in the accompanying Declarations, Defendant should be awarded its reasonable attorney fees in the amount of $53,127.50.

II. STATEMENT OF FACTS

The Complaint and First Amended Complaint

The Complaint and First Amended Complaint ("FAC") allege various tort and contract causes of action, all arising out of the Operating Agreement, including the NDA contained therein. More specifically, the Complaint and FAC allege that when the Operating Agreement was about to expire and Defendant determined the

parties could not agree upon renewal terms, it decided to work with Trader Joe's to clone Plaintiff's BBQ sauce recipe, in violation of the terms of the Operating Agreement and NDA. Plaintiff further alleges in the Complaint and FAC that Defendant and Trader Joe's were unsuccessful in the effort to clone, but it nonetheless sought in excess of $6,000,000.00 in past and future lost profits from Defendant, because it blames Defendant for Trader Joe's decision to stop selling the BBQ sauce. (ECF 1, ¶¶7-25; ECF 28, ¶¶7-27)

Both the Complaint and the FAC disclose (in Exh. B, ECF 1-2 and 28-2, ¶¶13 and 20) that the parties agreed that neither would be liable to the other for lost profits or punitive damages, but the sole damages sought in the Complaint and FAC were lost profits and punitive damages. (ECF 1, ¶25 and Prayer; ECF 28, ¶¶25-27 and Prayer)

Both the Complaint and FAC seek attorney fees pursuant to contract. (ECF 1 and ECF 28, Prayer, ¶2)

Motion to Dismiss Complaint

On August 26, 2021, Defendant filed a Motion to Dismiss the Complaint on three separate grounds, including that "the contractual limitation of liability clauses set forth in the Operating Agreement (Complaint, Exh. B) completely bar the claims and relief sought in this action." ("the First Motion to Dismiss") (ECF 14,

pg. 3:4-7) In other words, Defendant has always maintained that the Limitation of Liability clauses barred the action.

With respect to the Limitation of Liability clauses, Defendant argued, in part: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint. The Complaint does not allege that they are unenforceable or otherwise inapplicable. Accordingly, as an alternative argument to what is set forth herein, all claims are barred by the Operating Agreement." (ECF 14, pg. 31; for further discussion, see also ECF 14, pp. 13:19-15:7, 24:21-25:17)

This meant that while the clause barred the Complaint as drafted, Defendant recognized (at least initially) that Plaintiff likely had the right to try to plead around it. This is because the Complaint was unclear as to whether (and why) Plaintiff was essentially ignoring the clause in bringing the action.

After Plaintiff filed its Opposition to the First Motion to Dismiss, it became clear to Defendant that Plaintiff could not in fact plead around the Limitation of Liability clauses. Defendant argued in its Reply that Plaintiff had essentially conceded this point and that the case should end right then and there:

> "VanLaw is compelled to first address the limitation of liability clauses. This issue is the starting point of this reply because NECF's opposition establishes that: (1) it is in fact a complete defense to the action; and (2) NECF cannot plead around it. In other words, this

> Court can and should dismiss the action on these grounds alone, without even deciding whether this action is a compulsory cross-complaint that should have been filed in the State Court Action." (ECF 20, pg. 4:2-10)

Defendant devoted the majority of its Reply to asking the Court to dismiss the action based upon the Limitation of Liability clauses alone. (ECF 20, pp. 4-14)

Knowing how steadfast Defendant was in this argument, Plaintiff could have sought to dismiss the action at that time, but chose not to, forcing Defendant to incur additional fees.

On November 9, 2021 (after Defendant had filed its Reply), the Court requested further briefing on the following issue: "The Court requests supplemental briefing of no more than ten pages from the parties on the effect of the state courts final judgment on the issue preclusion and claim preclusion arguments in Defendants Motion to Dismiss (Dkt. 14)." (ECF 22)

Thereafter, the parties complied with the request for further briefing. (ECF 23 and 24)

While this request for supplemental briefing is a non-issue in terms of the overall success Defendant achieved in this case, Defendant feels compelled to bring special attention to it because Plaintiff disclosed in the meet and confer process for the present Motion that it would oppose the present Motion in its entirety as follows: "Unclean hands is a basis to deny attorney's fees, and you

failed to disclose your appeal of the state-court judgment to the Court which mislead the Court and wasted the Court's and my time." (DiMercurio Decl., ¶29) To justify this outright personal and punitive attack on Defendant's counsel, Plaintiff would need to somehow establish that Defendant acted with bad faith, *intentionally concealing* something that is part of a public record from this Court. In reality, Defendant was given a few days to brief the issue and it simply did not recognize the legal significance of the pending appeal on the issue about which the parties were asked to brief. But this does not equate to unclean hands. If it did, anyone who ever lost a motion or any other legal argument for that matter would have unclean hands. This outright unfounded attack on counsel's integrity should be ignored in its entirety. (DiMercurio Decl., ¶29)

On November 23, 2021, the Court granted Defendant's First Motion to Dismiss based upon the Limitation of Liability clauses, with leave to amend, as follows:

> "[T]he Court GRANTS Defendant's Motion based on the limitation on liability provision and DISMISSES Plaintiff's Complaint. Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability." (ECF 25, pp. 7-8)

With respect to the *red herring* described directly above (relating to the state court appeal), the Court found, simply: "Under California law, a judgment is not

final for purposes of claim preclusion during the pendency of an appeal. *Eichman*, 759 F.2d at 1439 (citing *Agarwal v. Johnson*, 25 Cal. 3d 932, 954 n.11 (1979)). As such, claim preclusion cannot bar this case from proceeding during the pendency of the appeal." (ECF 25, pg. 7). In other words, this Court made no findings of unclean hands or any other improper conduct on the part of Defendant.

Motion to Dismiss First Amended Complaint

On December 8, 2021, Plaintiff filed its FAC in an effort to plead around the Limitation of Liability clauses. (ECF 28) It added two paragraphs (26 and 27), and other than that, the FAC mirrored the Complaint. (ECF 1 and 28)

On December 22, 2021, not believing that Plaintiff had successfully pled around the Limitation of Liability clauses, Defendant filed a Motion to Dismiss the FAC ("the Second Motion to Dismiss"). The Second Motion to Dismiss focused primarily on the bar that the Limitation of Liability clauses created, and secondarily (but relatedly) argued that the damages alleged in the case were too speculative. (ECF 29)

In its Second Motion to Dismiss, Defendant emphasized that the legal issue was not even a close call; the action was clearly barred. (ECF 29) Once again, Plaintiff could have chosen to seek dismissal of its FAC rather than oppose the

Motion, thereby stopping the parties from incurring further attorney fees. Instead, Plaintiff opposed the Motion, and then Defendant filed a Reply. (ECF 33 and 34)

In its Reply, Defendant emphasized:

> "The FAC – combined with NECF's Opposition – establish that NECF cannot get around the limitation of liability clauses that it undisputedly bargained for and agreed to. Rather than accepting its fate and honoring the clauses that would equally protect it against similar damages claims by VanLaw, NECF tries to liken this case to cases that involved important public interests, all in an effort to get around the fact that it simply did not suffer any damages as a result of any of the conduct alleged in the FAC. Despite relying heavily on these cases involving public interest, NECF does not dispute the fact that this is a private transaction between two businesses who had every right to bargain for the limitations imposed by the Operating Agreement.
>
> NECF was already given an opportunity to plead around the limitation of liability clause and it has failed to do so. Likewise, NECF failed in its Opposition to offer any additional allegations that it could plead in order to overcome the Motion to Dismiss. Along those lines, glaringly missing from the Opposition is any acknowledgement or explanation of the fact that there are damages that would be available to NECF had NECF suffered such damages [the Motion states, at pg. 28:22-29:4: "Importantly, the clauses would not stop Plaintiff from seeking, for example, direct damages such as disgorgement of profits actually earned by Defendant/Trader Joe's or royalties (calculated consistent with the Operating Agreement) on barbeque sauce sold by Defendant to Trader Joe's. The FAC admits that no such damages were suffered *because the reverse engineering never actually occurred, and no one benefitted from the alleged attempted recipe clone*."]. This should be viewed as a concession that what NECF is really saying is that the clause should not be enforced *not because the clause itself is unenforceable but because NECF did not suffer any available damages*. To reiterate the problem: If this case is allowed to proceed beyond the pleading stage simply because

> NECF did not suffer any available damages then all parties who bargain for similar limitation of liability provisions should be cautioned that they are not protected. Indeed, all a plaintiff would have to do is argue that it did not suffer any of the available damages and therefore the clauses should be ignored.
>
> NECF has failed to provide this Court with a single reason why this case can proceed. Accordingly, the Motion should be granted *without leave to amend*." (ECF 34, pp. 2-4)

On January 20, 2022, the Court granted the Second Motion to Dismiss, without leave to amend, dismissing the case with prejudice, relying entirely upon the Limitation of Liability clauses invoked in the First and Second Motion to Dismiss. (ECF 35)

III. HOURLY RATES AND HOURS BILLED

The accompanying Declarations of Mark Magarian and Krista DiMercurio set forth the hourly rates and hours billed; and Exhibit 1 contains the detailed billing records, which speak for themselves.

To highlight what is set forth in those Declarations:

- Defendant is seeking $53,127.50, which is simply the recovery of the attorney fees *actually billed* (i.e., not a lodestar enhancement) in order to successfully defend this lawsuit.
- The majority of the work was performed by Krista DiMercurio, who bills at a lower rate of $375.00 compared to Mark Magarian's

rate of $450.00. More specifically, Ms. DiMercurio billed 125.7 hours and Mr. Magarian billed 14.7 hours.

- This case was litigated for eight months, and the majority of the work was focused on obtaining a dismissal at the pleading stage rather than prolonging the litigation. In other words, the attorneys chose a cost-effective course of action that ultimately saved Defendant a significant amount of money.
- Mark Magarian and Krista DiMercurio (the two main attorneys on the case) have over forty years of combined experience in business litigation, and their hourly rates are entirely reasonable in the community.

IV. ARGUMENT

A. Law Governing Motion

"Any motion or application for attorneys' fees shall be served and filed within fourteen (14) days after the entry of judgment or other final order, unless otherwise ordered by the Court. Such motions and their disposition shall be governed by L.R. 7-3, *et seq.*" (L.R. 54-7)

"[19:254] **State law governs contract interpretation:** State law governs the construction of a contract for recovery of attorney fees. [*Matter of*

Sheridan (7th Cir. 1997) 105 F3d 1164, 1167] Moreover, '[s]tate law controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision.' [*Mathis v. Exxon Corp.* (5th Cir. 2002) 302 F3d 448, 461; see *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.* (9th Cir. 2013) 738 F3d 960, 972-974 & fn. 41 (*discussed at* ¶ 19:250.2); *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.* (10th Cir. 2017) 888 F3d 455, 462 (en banc) (nunc pro tunc)—in diversity action, state law governs method of calculating proper fee]." (Recovery of Attorney Fees, Rutter Group Prac. Guide Fed. Civ. Trials & Ev. Ch. 19-B)

"[17:780] **Fees Authorized by Contract:** Under a properly-worded attorney fee provision, attorney fees authorized by contract may be recoverable in a *breach of contract* action (*see* ¶ *17:781 ff.*) *or* in a *tort* action arising out of the contract (*see* ¶ *17:945 ff.*). [17:781] **Civ.C. § 1717 fee recovery:** In an action to enforce a contract authorizing an award of fees and costs to one party, the party 'prevailing on the contract' is entitled to reasonable fees. [See Civ.C. § 1717]" (Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

"[17:835] **'Prevailing party' for contractual fee awards:** The 'prevailing' party is the party who recovered *greater relief* in the action on the contract. [Civ.C. § 1717(b)(1)] Civ.C. § 1717(a) authorizes such awards '[i]n any action on

a contract.' *See ¶ 17:895 ff.* Trial courts determine the prevailing party 'only upon final resolution of the contract claims and only by a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [*Hsu v. Abbara* (1995) 9 C4th 863, 876, 39 CR2d 824, 833 (internal quotes omitted)]

[17:836] **Where one party obtains complete victory:** When a party obtains a simple, unqualified victory by completely prevailing on, or defeating, all contract claims and the contract provides for attorney fees, § 1717 entitles that party to recover reasonable attorney fees. [*Scott Co. of Calif. v. Blount, Inc.* (1999) 20 C4th 1103, 1109, 86 CR2d 614, 618; *Hsu v. Abbara*, supra, 9 C4th at 865-866, 39 CR2d at 825-826; *David S. Karton A Law Corp. v. Dougherty* (2014) 231 CA4th 600, 608-609, 180 CR3d 55, 60-61]" (Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

"[17:875] **Compare—unqualified win on contract claim:** But where the litigated contract claim results in an unqualified victory for one side ('purely good news for one party and bad news for the other'), the prevailing party is entitled to attorney fees under § 1717 *as a matter of law*. The trial court *may not invoke equitable considerations* unrelated to litigation success (e.g., the party's behavior during discovery or settlement negotiations) to deny the fee award. [*Hsu v. Abbara*, supra, 9 C4th at 876, 39 CR2d at 832; *Foothill v. Lyon/Copley Corona*

Assocs., L.P. (1996) 46 CA4th 1542, 1554-1555, 54 CR2d 488, 495]" (Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

"[17:946] Prevailing party attorney fee clause may include tort actions: A contract provision for attorney fees to the prevailing party *may* be broad enough to authorize a fee award in tort as well as contract actions. [*Santisas v. Goodin*, supra, 17 C4th at 608, 71 CR2d at 836; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 1343, 5 CR2d 154, 158]

- [17:947] Claims 'arising out of' contract: For example, many contracts provide for fees to the prevailing party 'in any action *arising out of* the contract.' Under such a provision, attorney fees are awardable on both contract and tort claims that 'arise out of' the contract. [*Santisas v. Goodin*, supra, 17 C4th at 608, 71 CR2d at 836—real estate sales agreement providing for fee award 'in any litigation arising out of the execution of this agreement' embraced both tort and contract claims arising out of agreement and sale of property; *Drybread v. Chipain Chiropractic Corp.* (2007) 151 CA4th 1063, 1071-1072, 60 CR3d 580, 586—commercial sublease agreement providing for fee award in 'any action or other proceeding arising out of this Sublease concerning the subleased premises' was

broad enough to include noncontract claims; *Hemphill v. Wright Family, LLC* (2015) 234 CA4th 911, 913-915, 184 CR3d 326, 327-328—residential lease providing for fee award in 'any action aris[ing] out of … tenancy …' encompassed tenant's negligence and strict liability claims against landlord]

- [17:948] Claims 'relating to' contract: Similarly, a clause allowing fees in any action 'relating to' the contract is broad enough to include tort claims as well as contract claims. [*Moallem v. Coldwell Banker Comm'l Group, Inc.* (1994) 25 CA4th 1827, 1831, 31 CR2d 253, 255; *GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 CA5th 1240, 1248-1250, 208 CR3d 428, 434-436—'Legal Services Agreement' fee provision ('any dispute between us relating to this agreement') was broad enough to infer parties' intent to include professional malpractice action]
- [17:949] Any dispute under agreement: A clause allowing recovery of fees in any action relating to 'any dispute under [the agreements]' is broad enough to encompass tort claims as well as contract claims. [*Thompson v. Miller* (2003) 112 CA4th 327, 336, 4 CR3d 905, 913—

agreement for sale of stock shares].” (Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

“[17:915] **Amount recoverable:** Contracts providing for ‘reasonable’ expenses and attorney fees rely on the court to determine the amount. [Civ.C. § 1717—reasonable attorney fees ‘shall be fixed by the court’; *PLCM Group, Inc. v. Drexler* (2000) 22 C4th 1084, 1094-1095, 95 CR2d 198, 206; *EnPalm, LLC v. Teitler Family Trust* (2008) 162 CA4th 770, 774, 75 CR3d 902, 905; see *Syers Properties III, Inc. v. Rankin* (2014) 226 CA4th 691, 698, 700-702, 172 CR3d 456, 461, 462-464—trial judge is in best position to value services rendered by counsel in courtroom]

[17:916] **Reasonable hourly rate:** Normally, ‘[t]he reasonable market value of the attorney’s services is the measure of a reasonable hourly rate.’ [*Nemecek & Cole v. Horn* (2012) 208 CA4th 641, 651, 145 CR3d 641, 649 (internal quotes omitted)—retainer agreement provided for prevailing party’s recovery of reasonable attorney fees]

Normally, a ‘reasonable’ hourly rate used to calculate the lodestar is the prevailing rate for similar work in the community where the court is located. [See *Syers Properties III, Inc. v. Rankin*, supra, 226 CA4th at 695-696, 701-702, 172 CR3d at 458-459, 463-464—trial court’s rate calculation was supported by

adjusted *Laffey Matrix* (official source of rates based on District of Columbia area, adjusted to San Francisco Bay Area) and counsel's more than 20 years' experience in litigation of this kind (trial judge considered services rendered as 'sophisticated' legal work and stated the hourly rate requested was 'not even close to the highest hourly rate that I have seen in this area'); *see* ¶ *17:744 ff.*]

The reasonable hourly rate standard applies whether the attorney claiming the fees is: in-house counsel; retained on a straight contingent fee basis; charging at a discounted or below-market rate; or not charging for services. [*Nemecek & Cole v. Horn*, supra, 208 CA4th at 651, 145 CR3d at 649]" (Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

"[17:919] **Effect of fee arrangement with client:** In determining a reasonable attorney fee award, the court may consider the lawyer's fee arrangement with the client as some *evidence* of the value of the services rendered. But the arrangement is *not* controlling, and the court may properly award a different sum. [*Vella v. Hudgins* (1984) 151 CA3d 515, 521, 198 CR 725, 729; see *Nemecek & Cole v. Horn*, supra, 208 CA4th at 651-652, 145 CR3d at 649-650 (upholding attorney fee award of more than twice amount actually incurred)] The result, of course, is that the victorious client may be obligated to pay the lawyer far more than the court has awarded. [*Vella v. Hudgins*, supra, 151

CA3d at 521, 198 CR at 729—contingency fee agreement obligated client to pay lawyer $100,000, but after considering all relevant factors, court ordered other party to pay only $50,000] If a valid and enforceable fee agreement specifies an attorney's hourly rate, a lodestar determination is not required and the court will determine fees pursuant to the terms of the parties' agreement. 'This objective standard is necessary because the litigation adversary *is not a party to* the prevailing party's attorney fee agreement.' [*Pech v. Morgan* (2021) 61 CA5th 841, 854, 276 CR3d 97, 106 (emphasis in original)]" (Attorney Fees as Costs, Cal. Prac. Guide Civ. Trials & Ev. Ch. 17-E)

B. Application

Collectively, the attorneys' fees and provisions in this case are broad, encompassing every claim brought by Plaintiff:

- The Operating Agreement states: "[t]he prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorneys' fees incurred in enforcing this Agreement."
- The NDA states: "[i]f any party brings an action against any other party hereto by reason of the breach of any covenant, promise, warranty, representation, obligation or condition hereof, or otherwise

arising out of or relating to this Agreement, whether for declaratory or other relief, the prevailing party in such suit shall be entitled to its costs of suit and reasonable attorneys' fees."

An objective review of the billing records submitted herewith reveals that every dollar Defendant spent on this action was necessary and reasonable. The records also reflect Defendant's genuine efforts to avoid the case lingering as long as it did, asking this Court to dismiss the action from the outset without leave to amend. Unfortunately, Plaintiff chose to move forward despite the clear bar that was imposed by the Limitation of Liability clauses.

Defendant should be awarded $53,127.50 in attorney fees.

V. CONCLUSION

Defendant's Motion should be granted pursuant to Civil Code Section 1717, resulting in an award of $53,127.50 in attorney fees.

Dated: February 15, 2022

MAGARIAN & DIMERCURIO, APLC

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 20 Corporate Park, Suite 255, Irvine, CA 92606.

I, the undersigned, hereby further certify that on this 15th day of February of 2022, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION FOR ATTORNEY FEES AS PREVAILING PARTY AGAINST PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC**

was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on February 15, 2022.

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
20 Corporate Park, Suite 255
Irvine, California 92606
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S REPLY TO OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: January 24, 2022 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

I. INTRODUCTION

The FAC – combined with NECF's Opposition – establish that NECF cannot get around the limitation of liability clauses that it undisputedly bargained for and agreed to. Rather than accepting its fate and honoring the clauses that would equally protect it against similar damages claims by VanLaw,[1] NECF tries to liken this case to cases that involved important public interests,[2] all in an effort to get around the fact that it simply did not suffer any damages as a result of any of the conduct alleged in the FAC. Despite relying heavily on these cases involving public interest, NECF does not dispute the fact that this is a private transaction

[1] As a reminder, each party sold one another's product – VanLaw sold NECF's barbeque sauce and NECF sold VanLaw's sriracha sauce. (FAC, Exhibit B, page 1, "1. Products") Accordingly, each party equally gave up its ability to seek, among other things, incidental damages, lost profits, and punitive damages with respect to the sale of their respective products, including the reverse engineering clause.

[2] See, Opposition, Section II.A.2., pp. 5-6, citing *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224 and *City of Santa Barbara v. Superior Court* (2007) 41 Cal. 4th 747. After a lengthy analysis of the applicable clause, *Health Net* concludes: "[the] exculpatory clause affects the public interest and therefore violates section 1668." (*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 239) Likewise, the Supreme Court in *Santa Barbara* carefully examined a limitation of liability clause, and concluded: "an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy. Applying that general rule in the case now before us, we hold that the agreement, to the extent it purports to release liability for future gross negligence, violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750–751)

between two businesses who had every right to bargain for the limitations imposed by the Operating Agreement.

NECF was already given an opportunity to plead around the limitation of liability clause and it has failed to do so.[3] Likewise, NECF failed in its Opposition to offer any additional allegations that it could plead in order to overcome the Motion to Dismiss. Along those lines, glaringly missing from the Opposition is any acknowledgement or explanation of the fact that there are damages that would be available to NECF had NECF suffered such damages [the Motion states, at pg. 28:22-29:4: "Importantly, the clauses would not stop Plaintiff from seeking, for example, direct damages such as disgorgement of profits actually earned by Defendant/Trader Joe's or royalties (calculated consistent with the Operating Agreement) on barbeque sauce sold by Defendant to Trader Joe's. The FAC admits that no such damages were suffered *because the reverse engineering never actually occurred, and no one benefitted from the alleged attempted recipe*

[3] NECF seems to interpret the Court's Order as an invitation to plead anything so long as it pleads *something* additional about the clauses. NECF argues that the Court would not have provided leave to amend had the Court believed NECF could never survive a future Motion to Dismiss. (Opposition, 2:10-13) But the Court made clear in its Order that it would not "attempt to hypothesize" as to what might be available to NECF. Therefore, the Court provided NECF an opportunity to amend. (Order Granting Motion to Dismiss, Docket 25, pp. 7-8) VanLaw is not – as NECF suggests – asking this Court to reconsider anything. It is informing this Court that the amendment does not change the outcome of this case.

clone."]. This should be viewed as a concession that what NECF is really saying is that the clause should not be enforced *not because the clause itself is unenforceable but because NECF did not suffer any available damages*. To reiterate the problem: If this case is allowed to proceed beyond the pleading stage simply because NECF did not suffer any available damages then all parties who bargain for similar limitation of liability provisions should be cautioned that they are not protected. Indeed, all a plaintiff would have to do is argue that it did not suffer any of the available damages and therefore the clauses should be ignored.

NECF has failed to provide this Court with a single reason why this case can proceed. Accordingly, the Motion should be granted *without leave to amend.*

II. THE CLAUSES AT ISSUE ARE NOT "NUGATORY"

NECF argues that the clauses at issue are expressly and impliedly "nugatory" because they "*bar a remedy on an express contract provision*." (Opposition, 3:26) This argument reveals that NECF is improperly interpreting the law to mean that, if the plaintiff did not suffer any available damages, then the clause must be interpreted as nugatory. As this Court already noted, *the test is whether the clause "completely exempt[s] parties from liability, not simply limit[s] damages."* (Order Granting Motion to Dismiss, Docket 25, pp. 7-8) It does not matter that the provision bars *the specific remedy* that NECF is seeking, as it does

not act to exempt VanLaw from all potential damages or liability. It simply has the impact of barring the specific damages sought by NECF in this action.

III. THE ISSUE BEFORE THE COURT IS A LEGAL ONE

NECF asks this Court to hold off interpreting the clauses until some later unknown date, but ignores the fact that there is no dispute as to the plain language of the agreement or the commercial nature of the transaction that resulted in the bargained-for provisions. At pg. 4:24-5:6 of its Opposition, NECF argues that the clauses are "subject to varying interpretations" and that there is a "reasonable dispute" as to what they establish. That is not accurate. This is a legal issue as to whether the clause bars the relief sought in this case. The Court has everything it needs before it in order to rule on the issue.

IV. CIVIL CODE 1668 DOES NOT PREVENT ENFORCEMENT

***City of Santa Barbara v. Superior Court (2007)* 41 Cal.4th 747**

VanLaw has already addressed at length *Santa Barbara* and its applicability to the present case. (See Reply to Motion to Dismiss Complaint, pp. 4:11-13:5) And this Court has already adopted at least part of VanLaw's analysis of the distinguishing characteristics between that case and the present case ["Defendant correctly notes that Section 1668 merely acts to prevent contracts that completely

exempt parties from liability, not simply limit damages. Reply at 4-5."]. (Order Granting Motion to Dismiss, Docket 25, pp. 7-8)

To reiterate why *Santa Barbara* has no place in the present dispute: The clause at issue was *not* a limitation of *damages* clause between two parties to a commercial agreement. Rather, it was a traditional waiver, disclaimer, and release of *all liability for "any negligent act.*" The case involved a horrible tragedy: the drowning death of a disabled young child at summer camp. The agreement at issue herein is not a contract of adhesion where a participant in a recreational activity was required to assume all risk of the activity. This is a fully-negotiated contract between two entities who mutually agreed to limit their damages.

***Health Net of California, Inc. v. Department of Health Services* (2003)**

113 Cal.App.4h 224

VanLaw also already fully analyzed *Health Net* (See Motion, 24:1-28:7).

Again, what NECF ignores is that *Health Net* involved public interests and the clauses at issue involved *an unqualified prohibition against the recovery of damages in the context of a commercial transaction, resulting in complete insulation for any and all violations of the Welfare & Institutions Code.* The clause in the present case limits available damages and neither directly nor indirectly extinguishes all liability on the part of VanLaw.

***Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012)**

209 Cal.App.4th 1118

NECF tries to distance itself from *Food Safety* for obvious reasons. But NECF cannot change the fact that it (unlike *Santa Barbara* and *Health Net*) involved: two parties in a commercial transaction that had equal bargaining power, a commonly-enforced limitation of liability clause (limiting the available damages), and no issue of public interest.

NECF's focus seems to be on the *conduct* involved in the cases, arguing that this case is more like one involving fraud or gross negligence. NECF cites no legal or factual authority to support this argument. And in fact, *Food Safety* did address this very issue, finding that the conduct involved (whether alleged in tort on contract) emanated out of the written agreement, barring all such claims:

> "In granting summary judgment, the trial court determined that Eco Safe's negligence and bad faith claims asserted nothing more than a breach of Food Safety's contractual obligations, and that Eco Safe's claim (or claims) for the breach of these obligations failed in light of a contract provision limiting Food Safety's liability. As explained below, we agree with these determinations…
>
> We conclude there are no triable issues whether this clause bars Eco Safe from recovering damages under its claims for breach of the contract, bad faith, and negligence….
>
> The clause limits Food Safety's liability for '*any* ... damages whatsoever arising out of' the study to 'the *lesser* of (a) damages suffered by [Eco Safe] as the direct result thereof, or [¶] (b) the total

> amount paid by [Eco Safe] to [Food Safety] for the services herein covered.' (Italics added.) ***Because it is undisputed that Eco Safe has paid nothing to Food Safety for the study, the clause thus prohibits a recovery for breach of contract. This conclusion necessarily encompasses Eco Safe's bad faith claim, as breaches of the covenant of good faith implied within contracts are not tortious outside the context of insurance policies.*** (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, 86 Cal.Rptr.2d 855, 980 P.2d 407.)…
>
> ***In view of this broad and unqualified language, the clause must be regarded as establishing a limitation on Food Safety's liability sufficient to encompass Eco Safe's claims for breach of contract, bad faith, and negligence.***" *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1125-1128) [Emphasis added]

A review of the FAC makes clear that every claim in this case arises exclusively out of (and cannot survive without) the Operating Agreement, including the NDA contained therein. Nothing in the controlling cases distinguishes between an intentional breach of a contractual provision versus a negligent one. But worth noting is the fact that the allegations in *Food Safety* (all of which arose out of contractual provisions and would not have existed but for those contractual provisions) most definitely involved allegations of *intentional* acts, all of which were ultimately barred by the limitation of liability clause:

> "In asserting a claim for breach of contract, the FACC alleged that Food Safety had breached its contract with Eco Safe because the 'deeply flawed' study was 'not conducted as proposed' and 'provided unsupported conclusions.' Regarding the bad faith claim, the FACC alleged that Food Safety breached the implied covenant of good faith

> by employing 'slovenly procedures which seemed to be slanted towards a preconceived conclusion,' rather than 'modern day scientific and laboratory procedures.' Similarly, in connection with the negligence claim, the FACC alleged that Food Safety had 'failed to exercise due care in properly inoculating the [samples in] the last five tests as required under the [c]hallenge [s]tudy.'" *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1125)

While the fraud and deceit claims in *Food Safety* failed for different reasons (e.g., Section 1668 does not allow a party to disclaim liability for fraud and deceit, but the economic loss rule did bar the claims), there is no place for a discussion of fraud and deceit in the present case because those claims are not alleged. Again, this is a case that arises entirely out of contract and would not exist without a specific contractual provision. NECF seems to understand this, which is why is tries to make policy arguments rather than factual and legal arguments. For example, NECF *implies* that the fraud and deceit causes of action in *Food Safety* survived (which they did not) and it makes the leap that because the limitation of liability clause did not bar the fraud and deceit cause of action, none of NECF's tort causes of action should be barred. (Opposition, 6:4-9). Again, *Food Safety* did in fact dispose of all contract and tort claims arising out of the contract because "***[i]n view of this broad and unqualified language, the clause must be regarded as establishing a limitation on Food Safety's liability sufficient to encompass Eco***

Safe's claims for breach of contract, bad faith, and negligence." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1128)

The Implied Covenant Of Good Faith And Fair Dealing

Finally, while *Food Safety* does address the issue, VanLaw is compelled to address the breach of implied covenant of good faith and fair dealing cause of action separately as NECF places a lot of emphasis on that cause of action:

- "There is no obligation to deal fairly or in good faith absent an existing contract. ***If there exists a contractual relationship between the parties … the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract."*** (*Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992)* 11 Cal.App.4th 1026, 1032, internal citations omitted, emphasis added.)

- "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. ***Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery***." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, emphasis added)

The alleged breach of the covenant of good faith and fair dealing is nothing more than an attempt to obtain tort recovery on an express contractual provision. Thus, the claim stands and falls with the other contract claims, and is most definitely encompassed by the limitation of liability clauses.

V. DAMAGES

NECF argues that its damages are not too speculative essentially because it "had a 19-year history with Trader Joe's." This, it argues, distinguishes its damages claim from the one in *Food Safety* because this meant that NECF had "concrete prospects of selling to Trader Joe's in the future." (Opposition, 8:4-9). This is literally the only factual argument that NECF makes on the issue of damages. Its other arguments relate to fact that this is not a summary judgment case and that it should be able to present evidence of damages. However, this case is unique in that NECF truly only has one form of speculative damages it will seek, regardless of the evidence. This is because the FAC admits that VanLaw did not actually reverse engineering anything, meaning that neither VanLaw nor Trader Joe's ever benefitted in any manner from the alleged acts. The FAC also admits that Trader Joe's simply went a different direction and does not at all explain why NECF would have earned profits *but for* the alleged failed attempted reverse engineering. Because of the admitted nature of the claims, the anticipated lost profits will never be anything but *speculative, remote, imaginary, contingent, or merely possible, and therefore they cannot serve as a legal basis for recovery*.

VI. CONCLUSION

NECF's FAC should be dismissed *without leave to amend*.

Dated: January 10, 2022

MAGARIAN & DIMERCURIO, APLC

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 20 Corporate Park, Suite 255, Irvine, CA 92606.

I, the undersigned, hereby further certify that on this 10th day of January of 2022, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S REPLY TO OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on January 10, 2022

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation, Defendant.	Case No. 8:21−cv−01060−DOC−ADS **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF [F.R.C.P. 12(b)(6)]** Courtroom: 9 D Judge: Hon. David O. Carter Date: January 24, 2022 Time: 8:30 a.m. Complaint Filed: June 16, 2021

Plaintiff New England Country Foods, LLC (hereinafter "NECF"), hereby submits its to Defendant Vanlaw Food Products, Inc. (hereinafter "Vanlaw")'s second motion to dismiss the first-amended complaint, as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court has already ruled on one of the two issues in this motion, and this motion is essentially a motion for reconsideration on that issue. Namely, with respect to the putative limitation-of-liability clause, this Court ruled:

> Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability.
>
> (Order p.8 [Dkt 25].)

This Court could not have granted leave on the above terms if pleading, "the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability" was not sufficient to survive a motion to dismiss. Plaintiff has compliantly pled:

> 26. Upon information and belief, all of Plaintiff's harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to Plaintiff from the wrongs committed by Defendant are a loss of profits.
>
> 27. As such, the putative limitation-of-liability provisions in the Operating Agreement (Ex. B, Dkt. 1-2, §§ 13, 20), if applied, **would completely exempt Defendant from liability from the wrongs alleged herein** because said provisions purport to bar all claims for, "loss of profits." Defendant should be judicially estopped from claiming otherwise because it filed a motion to dismiss the entire complaint on the ground of said limitation-of-liability provisions, inter alia. (Mot. 31:14-17: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint." (Dkt. 14.)) And said motion was granted by the Court on that ground (with leave to amend). (Dkt. 25.)
>
> (First Am. Compl. [Dkt 26].) (emphasis added)

As to the second issue, the claim that damages are too speculative, Vanlaw's arguments appear inchoate. Case law is very clear that Plaintiff's damages are not too speculative. Even brand-new businesses can recover lost profits, but here Plaintiff alleges it had a 19-year relationship that was wrongfully disrupted. The

case relied upon by Vanlaw is a summary-judgment case for a business that had sold nothing and had produced no evidence it would, so it's clearly inapplicable. In light of modern notice-pleading requirements, it strains credibility that a motion to dismiss could ever be granted for damages being too speculative.

II. ARGUMENT

This motion should be denied. However, if the Court is inclined to grant any part of this motion, NECF seeks leave to amend its First-Amended Complaint. For example, NECF could allege any of the facts stated in this opposition, or at oral argument, that the Court finds relevant to this motion, but which are not contained in the First-Amended Complaint. Or, based on the final ruling, NECF believes it could allege facts that address the concerns of the Court just as it did with the Court's November 23, 2021 order. [Dkt. 25.]

A. The "Limitation of Liability" Clauses Do Not Apply for Several Reasons

1. The Rules of Contract Interpretation Do Not Allow an Interpretation Which Effectively Negates Express or Implied Contractual Provisions

The breaches alleged in the First Cause of Action in the First-Amended Complaint consists of:

> (i) the reverse-engineering prohibition in Exhibit A, paragraph 3, and
> (ii) the implied covenant of good-faith and fair dealing implied in both Exhibits A and B.

(First Am. Compl. ¶ 31 [Dkt. 27.])

a. Express Provisions of a Contract Should Not Be Interpreted as Nugatory

As to (i), paragraph 3 of Exhibit A, ([Dkt. 28-1]), to read the "limitation of liability" clauses to bar a remedy on an express contract provision would be to render that provision nugatory, which is not permissible under the canons of contract interpretation. *TitanCorp. v. Aetna Casualty and Surety Co.*, 22 Cal. App.

4th 457, 473-74 (Cal. Ct. App. 1994). *See, also,* Cal. Civ. Code §§ 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."), 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."), 3523 ("For every wrong there is a remedy.") Further, while Exhibit A was incorporated by reference in Section 12 of Exhibit B [Dkt. 28-2], section 11 of Exhibit A expressly allows the parties, "such remedies as may be available at law."

b. Implied Provisions of a Contract Should Not Be Interpreted as Nugatory

As to (ii), NECF also alleges a breach of the implied covenant of good faith and fair dealing of both Exhibits A and B. (Compl. [Dkt. 27 ¶ 31].) This covenant is implied in all agreements. *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658 (Cal. 1958). Parties are, "not [] permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured." *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 91 (Cal. 1995). Since the parties have not attempted to change those standards, any interpretation the effectively reads out the implied covenant by depriving NECF of a remedy is impermissible.

c. Courts are Loathe to Interpret Contract Terms Against a Plaintiff in the Pleading Stage, even if the Contents are Undisputed

"The incorporation-by-reference doctrine does not override the fundamental rule that courts must interpret the allegations and factual disputes in favor of the plaintiff at the pleading stage." *Khoja v. Orexigan Therapeutics, Inc.*, 899 F.3d 988, 1014 (9th Cir. 2018) (citations omitted). Just like a contract, "[i]t is improper to judicially notice a transcript when the substance of the transcript 'is subject to

varying interpretations, and there is a reasonable dispute as to what the [transcript] establishes." *See* id. at 1000. *See, also, Fremont Indemnity Co. v. Fremont General Corp.*, 148 Cal. App. 4th 97, 114-15 (Cal. Ct. App. 2007) ("For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper.")

2. Even If the Court Interprets the Provisions to Bar the Damages Alleged, Section 1668 Prevents Its Enforcement

The conduct NECF has alleged Vanlaw engaged in is clearly intentional, not simply ordinary negligence. (First. Am. Compl. [Dkt. 27 *passim*].) Parties cannot, by contract, limit damages for future intentional (or even grossly negligent) conduct. Cal. Civ. Code § 1668 (organized under Title 4 – Unlawful Contracts); *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 755 (Cal. 2007). *See, also,* Cal. Civ. Code § 3523 ("For every wrong there is a remedy.") While there is a claim for "negligent interference with prospective economic advantage" argued in the alternative in the complaint, that claim incorporates intentional conduct by virtue of paragraph 47. (First Am. Compl. [Dkt. 27 ¶ 47].) Certainly, the conduct incorporated by reference is also sufficient to satisfy the gross negligence standard of *City of Santa Barbara.* 41 Cal. 4th at 754 ("'Gross negligence' long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'") (citations omitted).

And as this Court correctly noted:

> Section 1668 has "been applied to invalidate provisions that merely limit liability." *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224, 239 (2003) (collecting cases). For example, in *Klein*, the court voided a provision limiting liability to a refund of purchase price where a manufacturer had fraudulently misrepresented 'rogue' mixed seed as pedigreed. *Id.* at 240 (citing *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 99 (1966)). And in *Health Net*, the court voided a provision limiting

> recovery to prospective relief because it "did not compensate [plaintiff] for any lost revenue" and therefore "exempts [defendant] completely from responsibility for completed wrongs." *Id.* at 240-41.
>
> (Order p. 8 [Dkt. 25.])

Vanlaw relies heavily on *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal.App.4th 1118 (Cal. Ct. App. 2012) (*Food Safety*) in its motion. [Dkt. 29.] First, it should be noted that the *Food Safety* Court found that fraud and deceit were not barred by the limitation-of-liability provision. *Id.* at 1126. Thus, *Food Safety* holds that the Court must deny the motion to dismiss as to the second through fifth cause of action.

As to the first cause of action, *Food Safety* is distinguishable for six independent reasons:

1) The procedural posture: the appellate court affirmed the granting of summary judgment in *Food Safety*, and not a demurrer/motion to dismiss. *Id.* at 1123.

2) It's factually distinct. It appears the Court found the contract to have been breached by ordinary negligence at most. *Id.* at 1127-28 ("The trial court concluded — correctly, in our view — that the [negligence] claim asserted no tort claim because it relied exclusively on a negligent breach of the contract.") Here, the acts are alleged to be willful. Cal. Civ. Code § 1668.

3) *Food Safety* doesn't discuss contract interpretation arguments, i.e. the parties could not have intended that contractual obligations were illusory/nugatory.

4) *Food Safety* doesn't discuss the implied covenant of good faith, which cannot be waived as discussed in the California Supreme Court case of *Freeman & Mills, Inc.* cited above.

5) *Food Safety*, a Court of Appeal decision, doesn't discuss section 1668 of the California Civil Code with respect to breach-of-contract claims, nor does it

discuss the then-five-year-old *City of Santa Barbara* California Supreme Court decision.

6) Finally, and most troublingly, *Food Safety* relies **solely** on *Markborough California, Inc. v. Superior Court*, 227 Cal. App. 3d 705, 714 (Cal. Ct. App. 1981) (*Markborough*) for the proposition that, "claims for breach of contract, limitation of liability clauses are enforceable unless … ." *Food Safety*, 209 Cal.App.4th at 1126. However, *Markborough* does not contain those or similar words, nor does it even arguably stand for that proposition outside the construction-contract context. Rather, *Markborough* is a discussion of the then-recently-enacted section 2782.5 of the California Civil Code, which expressly allows contractual limitation-of-liability under certain circumstances in construction contracts. There is no construction contract here. *Markborough* doesn't even discuss section 1668 of the California Civil Code. And *Markborough*, a California Court of Appeal case, predates the California Supreme Court's decision in *City of Santa Barbara* by 26 years. Further, while there was apparently a claim for breach of contract in *Markborough*, the word "breach" appears only once in the opinion on page 708, and only in passing without any analysis. Rather, *Markborough* was clearly about ordinary negligence. Finally, it should also be noted that the limitation-of-liability in *Markborough* was not zero, but the amount he was paid - $67,640.00. *Markborough*, 227 Cal. App. 3d at 709. This fact distinguishes *Markborough* from the instant case as well as *Food Safety* because express contractual terms are not nugatory when damages are merely limited versus entirely eliminated.

B. The Damages Alleged Are Not Too Uncertain

Vanlaw's citation to *Food Safety* for the proposition that this Court can dismiss the First-Amended Complaint ignores the actual opinion and the procedural posture of *Food Safety*. Even the heading discussing this issue in the Food Safety opinion belies Vanlaw's argument: "E. Insufficient **Evidence** of

Damages." *Food Safety*, 209 Cal.App.4th at 1126 (emphasis added). It strains credibility that a Court could dismiss a claim for uncertain damages at the pleading stage.

Factually, the damages in *Food Safety* are about as far away from the damage facts pled in the First-Amended Complaint as possible. In *Food Safety*, the party claiming damages, Eco Safe, had an unproven product that it had never sold before and with no concrete prospects of selling in the future. *Id.* at 1132-34. In stark contrast, NECF pleads it had a 19-year history with Trader Joe's that only ended because of Vanlaw's wrongful conduct. See, e.g.:

> Upon information and belief based on Exhibit C, as a result of being told Defendant could clone and undercut Plaintiff, Trader Joe's terminated the 19-year relationship on December 22, 2017. The last shipment of product was in January 2018.
>
> (First. Am. Compl. ¶ 21 [Dkt. 27].)

Vanlaw has supplied no authority that there is a heightened pleading standard whereby NECF must essentially prove its entitlement to lost profit in great detail in its First-Amended complaint. Rather, their position appears to be a departure from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.") (citations omitted).

To the extent it's relevant, the Court can take note that the parties have already exchanged initial disclosures [Dkt. 31], which includes the requirement to provide: "a computation of each category of damages claimed by the disclosing party." Fed. R. Civ. P. 26(a)(1)(A)(iii). To the extent the Court wanted NECF to expound upon its damages in its pleading, which NECF believes is not required and will waste everyone's time, NECF could provide more detail.

While NECF contends its grossly premature to discuss this line of cases, *Sargon Enterprises,Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (Cal. 2012) is a California Supreme Court case, and is the seminal case on lost-

profit damages, and is heavily cited in the "Sources and Authority" for the California Jury Instructions, CACI 352 ("Contracts: Loss of Profits - No Profits Earned") and 353 ("Contracts: Loss of Profits - Some Profits Earned").

> Key quotes from that case are on pages 774 and 775 of the opinion:
> Regarding lost business profits, the cases have generally distinguished between established and unestablished businesses. Where the operation of an established business is prevented or interrupted, as by a breach of contract damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales.
> …
> Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions.
> …
> Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled.
>
> *Sargon Enterprises, Inc.*, 55 Cal.4th at 774-75 (citations omitted and text cleaned up to improve readability).

Another cases which is helpful on the issue of damages (and in general because of its many similarities to this case), albeit with a far different procedural posture from a motion to dismiss, is *I-Ca Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257. In that case, the Plaintiff was awarded future profits for contractual interference by the jury, and which was affirmed on appeal. *Id.* 267, 293.

III. CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss in its entirety.

DATED: January 3, 2022

M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
20 Corporate Park, Suite 255
Irvine, California 92606
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: January 24, 2022 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN THAT on January 24, 2022, at 8:30 a.m., before the Hon. David O. Carter, in Courtroom 9D of the United States Courthouse for the Central District of California, Southern Division, 411 W. 4th Street, Santa Ana, California, Defendant VANLAW FOOD PRODUCTS, INC. ("Defendant" or "VLF") will and hereby does move to dismiss Plaintiff NEW ENGLAND COUNTRY FOOD PRODUCTS, LLC's ("Plaintiff" or "NECF") First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6) for failure to state a claim upon which relief can be granted.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which commenced on December 15, 2021 and concluded on December 16, 2021.

As set forth in the accompanying Memorandum of Points and Authorities, the grounds for this motion are: (1) the contractual limitation of liability clauses set forth in the Operating Agreement (FAC, Exh. B) completely bar the claims and relief sought in this action; and (2) the damages sought by Plaintiff are so speculative that they fail as a matter of law.

This motion is based on: this Notice, the attached Memorandum of Points and Authorities, the pleadings and papers filed in this action, and such further argument and matters as may be offered at or before the time for hearing on this motion.

Dated: December 22, 2021

MAGARIAN & DIMERCURIO, A PROFESSIONAL LAW CORPORATION

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

NECF's FAC should be dismissed pursuant to F.R.C.P. 12(b)(6) because:

1. The limitation of liability clauses set forth in the Operating Agreement (FAC, Exh. B) completely bar the claims and relief sought in this action.

    a. The Limitation on Liability section in the Operating Agreement expressly forbids, among other things, either party from recovering "*loss of profits, loss of business, interruption of business, or…any indirect, special, incidental or consequential damages of any kind*." It also states: "*[I]n no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind*…" (FAC, Exh. B, ¶¶13, 20) The *only* damages NECF seeks in the Complaint are: (1) "*past and future lost profits*" and (2) punitive damages. (FAC, ¶¶25, 32, 39, 46, 54, 59, and Prayer). All such damages are alleged to have emanated from a single act: namely, *an alleged attempt (that never came to fruition nor resulted in any benefit to Defendant or Trader Joe's) on the part of Defendant to reverse engineer Plaintiff's barbeque sauce for the benefit of Trader Joe's.* (FAC, ¶¶7-25)

b. Therefore, on its face, the FAC discloses a complete defense to all claims and relief sought. The Court already agreed with this with respect to the original Complaint and *granted* Defendant's Motion to Dismiss the original Complaint, with leave to amend, as follows: "the Court GRANTS Defendant's Motion based on the limitation on liability provision and DISMISSES Plaintiff's Complaint. Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability." (Order Granting Motion to Dismiss, Docket 25, pp. 7-8) In response, Plaintiff added the following two paragraphs to the FAC, and made no other changes:

   i. "26. Upon information and belief, all of Plaintiff's harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to Plaintiff from the wrongs committed by Defendant are a loss of profits.

   ii. 27. As such, the putative limitation-of-liability provisions in the Operating Agreement (Ex. B, Dkt. 1-2, §§ 13, 20), if applied, would completely exempt Defendant from liability from the wrongs alleged herein because said provisions purport to bar all claims for, 'loss of profits.' Defendant should be judicially estopped from claiming otherwise because it filed a motion to dismiss the entire complaint on the ground of said limitation-of-liability provisions, inter

alia. (Mot. 31:14-17: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint." (Dkt. 14.)) And said motion was granted by the Court on that ground (with leave to amend). (Dkt. 25.)"

c. It is clear that Plaintiff mistakes the fact that *it did not suffer any available damages to mean that the clause itself is exculpatory*. In other words, Plaintiff seems to argue that a clause such as the one in this case could never act as a complete bar to an action (even when the plaintiff *bargained for* such a clause) because plaintiffs could simply assert that they did not suffer any damages available under the contract, and therefore the clause is unfair/unenforceable. That position is not consistent with the law. For example, and as explained in more detail herein:

i. The most factually similar case that Defendant found is *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118. It involved two parties to a commercial transaction with equal bargaining power, a very similar limitation of liability clause, no public interest, and (perhaps most importantly) it completely barred all claims (contract and tort) *because the plaintiff did not suffer*

any damages available under the contract and instead only alleged damages that were barred by the agreement. The court granted summary judgment, finding:

1. "We conclude there are no triable issues whether this clause bars Eco Safe from recovering damages under its claims for breach of the contract, bad faith, and negligence. To begin, the clause is an element of the contract between Eco Safe and Food Safety. We further conclude that the clause effectively limits Food Safety's liability for breaches of contractual obligations and ordinary negligence, as nothing before us suggests that the clause is unconscionable or affects the public interest….In opposing summary judgment, Eco Safe identified no evidence that the clause was the product of unequal bargaining power, that it contravened public policy, or that it affected the public interest, as specified in *Tunkl*. Accordingly, the clause regulated Eco Safe's potential recovery with respect to its claims for breach of the contract and ordinary negligence. The clause limits Food Safety's liability for '*any* ... damages whatsoever arising out of' the study to 'the *lesser* of (a) damages suffered by [Eco Safe] as the direct result thereof, or [¶] (b) the total amount paid by [Eco Safe] to [Food Safety] for the services herein covered.' (Italics added.) *Because it is undisputed that Eco Safe has paid nothing to Food Safety for the study, the clause thus prohibits a recovery for breach of contract.*[1] …Because the parties submitted no extrinsic evidence bearing on the

[1] In other words, it was undisputed that Eco Safe did not suffer either of the two forms of damages available under the agreement. Had they suffered such damages, the action would not have been barred. ***Similarly, in the present case, the FAC makes clear that Plaintiff did not suffer any form of damages that would be available to it under the agreements.*** For example, the FAC admits that neither Trader Joe's nor Defendant earned any money from the alleged attempted reverse engineering, meaning that there would be no direct harm to Plaintiff such as unpaid royalties under the Operating Agreement.

> meaning of the clause, its interpretation is a question of law. [citations] We therefore inquire into the parties' intentions, as disclosed by the language of the contract. [citations] As noted above, following the warranty provision, the clause states that '[i]n *no* event' is Food Safety liable for damages—including damages for negligence— 'arising out of or *in any way related to* the work herein covered, *from any cause or causes.*' (Italics added.) In view of this broad and unqualified language, the clause must be regarded as establishing a limitation on Food Safety's liability sufficient to encompass Eco Safe's claims for breach of contract, bad faith, and negligence." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126-1128)

2. In addition, and *alternatively*, the damages sought by Plaintiff are so speculative that they fail as a matter of law. Plaintiff describes its damages and the causation thereof as follows: While Trader Joe's told Plaintiff (in writing) that it "conducted a category review and determined [that it would] like to discontinue" Plaintiff's barbeque sauce, its real reason was that it thought (based upon vague promises) that Defendant *might* be able to clone Plaintiff's barbeque sauce. Despite allegedly still wanting to sell the exact same barbeque sauce (just a cloned version through Defendant), Trader Joe's ultimately chose to go with a completely different barbeque sauce allegedly because Defendant was unsuccessful in its alleged attempted clone. (FAC, ¶¶21-23) In essence,

Plaintiff makes the leap that the *attempted* reverse engineering and decision on the part of Trader Joe's to sell an altogether different barbeque sauce resulted in $6,000,000 of *anticipated* lost profits, yet fails to allege that Plaintiff would have received such profits *but for* the alleged unlawful conduct of Defendant. Once again, and as explained in more detail herein, *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, is directly on point:

a. "Generally, 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' [citations] *Thus, '[l]ost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking.* But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. [Citation.]' [citations] *Under these principles, lost profits based on a future contract cannot be recovered when the contract is uncertain or speculative.* …" (*Id.* at 1132–1133) [Emphasis added]

Accordingly, the entire FAC should be dismissed.

II. THE OPERATING AGREEMENT

The FAC, including all causes of action, arises entirely out of the Operating Agreement (which incorporates and makes part of the Operating Agreement a Mutual Nondisclosure Agreement ("the NDA")).

The NDA

Every cause of action in the FAC describes the unlawful act as an offer/attempt to clone, and the prohibition against cloning arises solely out of the NDA, under the so-called reverse-engineering clause. (See FAC, ¶¶10, 15-25, 31, 37, 38, 43, 44, 45, 52, 53, 56, 57, 58)

The pertinent clause states in its entirety:

> "*Neither party (nor any of its agents) shall reverse engineer, disassemble or decompile any prototypes, software or other tangible objects which embody the other party's Confidential Information and which are provided to the party hereunder without the express written consent of the Discloser*." (FAC, Exh. A, ¶3)

The Operating Agreement

The Operating Agreement contains the following pertinent provisions:

- "VLF will provide manufacturing, shipping, billing and collection services in support of sales of NECF's product, [BBQ Sauce], to Trader Joe's Markets ('TJ's') or any of TJ's designated suppliers. VLF will pay a royalty fee to NECF as detailed below….
- The [NDA] into which the parties entered on 12/2/13 is incorporated into this Agreement as Exhibit A…
- *To the extent allowed by applicable law: (a) in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for an indirect, special, incidental or consequential damages of any kind, even if such party has been advised of the possibility of such damages; and (b) each party's entire liability to the other party for damages concerning the performance or nonperformance by such party in any way related to the subject matter of this Agreement, and regardless of the form of any claim or action, will not exceed the amount*

of gross revenues earned by VLF or NECF from the Products, whichever is greater, for the twenty-four (24) months prior to the events giving rise to the alleged liability….

- *[I]n no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind (including but not limited to loss of profits, business revenues, business interruption and the like), arising from or relating to the relationship between VLF and NECF, regardless of whether the claim under which such damages are sought is based upon breach of warranty, breach of contract, negligence, tort, strict liability, statute, regulation or any other legal theory or law, even if either party has been advised by the other party of the possibility of such damages…*" (FAC, Exh. B, ¶¶1, 12, 13, 20)

III. THE ORIGINAL COMPLAINT AND FIRST MOTION TO DISMISS

The original Complaint in the present action is identical to the FAC with the exception of two paragraphs that Plaintiff added to the FAC (see Section IV, below). The original Complaint alleges various tort and contract causes of action, all arising exclusively out of the Operating Agreement, including the NDA contained therein.

The original Complaint alleges that when the Operating Agreement was about to expire and VLF determined the parties could not agree upon renewal terms, it decided to work with Trader Joe's to attempt to clone NECF's barbeque sauce recipe. Ultimately, it alleges that VLF and Trader Joe's were unsuccessful in the effort to clone, but it nonetheless seeks in excess of $6,000,000.00 in past and

future lost profits from VLF, because it blames VLF for Trader Joe's decision to stop selling the BBQ sauce. (Complaint, ¶¶7-25)

The original Complaint discloses (in Exh. B, ¶¶13 and 20) that the parties agreed that neither would be liable to the other for, among other things, lost profits or punitive damages, but yet the sole damages sought in the original Complaint are lost profits and punitive damages. (Complaint, ¶25 and Prayer)

Defendant filed a motion to dismiss the original Complaint on various grounds. The motion to dismiss was granted on the grounds of the limitation of liability clauses. This Court found:

> "Finally, Defendant argues that the Operating Agreement's Limitation on Liability section bars Plaintiff's Complaint in its entirety. Mot. at 14. That provision states that 'in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind.' Operating Agreement § 13 (Dkt. 1-2). Effectively, the provision appears to allow the parties to seek only direct damages or injunctive relief. Plaintiff's Complaint seeks only past and future lost profits, Compl. ¶¶ 25, 37, 44, 52, 57, attorneys' fees and costs, and punitive damages.
>
> Plaintiff contests the validity of the provision by arguing that parties cannot limit by contract damages for future intentional or grossly negligent conduct. Opp'n at 28 (citing CAL. CIV. CODE § 1668). Defendant correctly notes that Section 1668 merely acts to prevent contracts that completely exempt parties from liability, not simply limit damages. Reply at 4-5. Plaintiff responds that allowing this limitation would essentially bar it a remedy on the reverse-engineering prohibition provision and the implied covenant of good faith and fair dealing. Opp'n at 28-29.

> Section 1668 has 'been applied to invalidate provisions that merely limit liability.' *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224, 239 (2003) (collecting cases). For example, in *Klein*, the court voided a provision limiting liability to a refund of purchase price where a manufacturer had fraudulently misrepresented 'rogue' mixed seed as pedigreed. *Id.* at 240 (citing *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 99 (1966)). And in *Health Net*, the court voided a provision limiting recovery to prospective relief because it 'did not compensate [plaintiff] for any lost revenue' and therefore 'exempts [defendant] completely from responsibility for completed wrongs.' *Id.* at 240-41.
>
> Here, no meaningful injunctive relief is available to Plaintiff, as Defendant stopped making the allegedly reverse-engineered sauce recipe after it failed to meet Trader Joe's expectations. *See* Compl. ¶ 23. The Court will not attempt to hypothesize what direct damages may be available to compensate Plaintiff for its alleged injuries. As such, the Court GRANTS Defendant's Motion based on the limitation on liability provision and DISMISSES Plaintiff's Complaint. Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability." (Order Granting Motion to Dismiss, Docket 25, pp. 7-8)

IV. THE FAC

Simply put, Plaintiff was unable to amend its original Complaint consistent with the order as it failed to *seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability*. Again, as explained herein, the test is not whether the plaintiff suffered the types of damages available

under the contract; it is whether the contract extinguishes all potential liability for a given act.

Plaintiff added the following two paragraphs to the original Complaint:

> "26. Upon information and belief, all of Plaintiff's harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to Plaintiff from the wrongs committed by Defendant are a loss of profits.
>
> 27. As such, the putative limitation-of-liability provisions in the Operating Agreement (Ex. B, Dkt. 1-2, §§ 13, 20), if applied, would completely exempt Defendant from liability from the wrongs alleged herein because said provisions purport to bar all claims for, "loss of profits." Defendant should be judicially estopped from claiming otherwise because it filed a motion to dismiss the entire complaint on the ground of said limitation-of-liability provisions, inter alia. (Mot. 31:14-17: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint." (Dkt. 14.)) And said motion was granted by the Court on that ground (with leave to amend). (Dkt. 25.)

V. ARGUMENT

A. Law Governing Motion

"[9:187] **Function of Rule 12(b)(6) motion:** A Rule 12(b)(6) motion is similar to the common law general demurrer—i.e., it tests the *legal sufficiency* of the claim or claims stated in the complaint. [*Strom v. United States* (9th Cir. 2011) 641 F3d 1051, 1067; *SEC v. Cross Fin'l Services, Inc.* (CD CA 1995) 908 F.Supp. 718, 726-727 (quoting text); *Beliveau v. Caras* (CD CA 1995) 873 F.Supp. 1393, 1395 (citing text); *United States v. White* (CD CA 1995) 893 F.Supp. 1423, 1428

(citing text)]" (Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

"[9:193.5] **Affirmative defenses disclosed on face of complaint:** By contrast, a Rule 12(b)(6) motion to dismiss for failure to state a claim can be used when plaintiff has included allegations in the complaint that, on their face, disclose some absolute defense or bar to recovery: 'If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.' [*Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F3d 778, 783, fn. 1; *Hensley Mfg. v. ProPride, Inc.* (6th Cir. 2009) 579 F3d 603, 613; *Hearn v. R.J. Reynolds Tobacco Co.* (D AZ 2003) 279 F.Supp.2d 1096, 1102 (citing text)] To grant a Rule 12(b)(6) motion on the basis of an affirmative defense, the facts establishing that defense must (i) 'be definitively ascertainable from the complaint and other allowable sources of information,' and (ii) 'suffice to establish the affirmative defense with certitude.' [*Gray v. Evercore Restructuring L.L.C.* (1st Cir. 2008) 544 F3d 320, 324 (internal quotes omitted); *ASARCO, LLC v. Union Pac. R.R. Co.* (9th Cir. 2014) 765 F3d 999, 1004—defendant must show 'some obvious bar to securing relief' on face of complaint] Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

"[9:212] **Documents attached to complaint:** Material properly submitted with the complaint (i.e., exhibits under Rule 10(c)) may be considered as part of the complaint for purposes of a Rule 12(b)(6) motion to dismiss. [FRCP 10(c)—copy of 'written instrument' attached as exhibit to pleading is part of pleading for all purposes; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.* (9th Cir. 1990) 896 F2d 1542, 1555; *Bogie v. Rosenberg* (7th Cir. 2013) 705 F3d 603, 609; *Petrie v. Electronic Game Card, Inc.* (9th Cir. 2014) 761 F3d 959, 964, fn. 6; *see ¶ 8:680 ff.*] Thus, documents attached to the complaint and incorporated therein by reference are treated as part of the complaint when ruling on a Rule 12(b)(6) motion. [*In re NVIDIA Corp. Secur. Litig.* (9th Cir. 2014) 768 F3d 1046, 1051; *Hearn v. R.J. Reynolds Tobacco Co.* (D AZ 2003) 279 F.Supp.2d 1096, 1102 (citing text); *Dorsey v. Portfolio Equities, Inc.* (5th Cir. 2008) 540 F3d 333, 338]" (Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

B. Limitation Of Liability Clauses

Civil Code Section 1668 states: "All contracts which have for their object, directly or indirectly, ***to exempt anyone from responsibility*** for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." [Emphasis added]

The general rule is that a contract limitation on the scope of remedies available only runs afoul of Civil Code 1668 if it has the impact of exempting the party from responsibility for the wrong. (*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4h 224, 239-240)

***Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012)**

209 Cal.App.4th 1118

As stated in the Introduction, the *Food Safety* case is strikingly similar to this case.

The clause as issue in that case was as follows:

> "Limited Warranty and Limits of Liability." The clause states in pertinent part: "IN NO EVENT SHALL [FOOD SAFETY] BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING (BUT NOT LIMITED TO) DAMAGES FOR LOSS OF PROFIT OR GOODWILL REGARDLESS OF (A) THE NEGLIGENCE (EITHER SOLE OR CONCURRENT) OF [FOOD SAFETY] AND (B) WHETHER [FOOD SAFETY] HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGES. [Food Safety's] total liability to you in connection with the work herein covered for any and all injuries, losses, expenses, demands, claims or damages whatsoever arising out of or in any way related to the work herein covered, from any cause or causes, shall not exceed an amount equal to the lesser of (a) damages suffered by you as the direct result thereof, or (b) the total amount paid by you to [Food Safety] for the services herein covered. We accept no legal responsibility for the purposes for which you use the test results." (*Id.* at 1126)

The court analyzed the clause as follows:

"In granting summary judgment, the trial court determined that Eco Safe's negligence and bad faith claims asserted nothing more than a breach of Food Safety's contractual obligations, and that Eco Safe's claim (or claims) for the breach of these obligations failed in light of a contract provision limiting Food Safety's liability. As explained below, we agree with these determinations.

Generally, 'a limitation of liability clause is intended to protect the wrongdoer defendant from unlimited liability.' (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 503, pp. 552-554.) Clauses of this type '***have long been recognized as valid in California***.' (*Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, 714, 277 Cal.Rptr. 919.) With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy. (*Id.* at p. 714, 277 Cal.Rptr. 919.) Furthermore, they are enforceable with respect to claims for ordinary negligence unless the underlying transaction 'affects the public interest' under the criteria specified in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 98-100, 32 Cal.Rptr. 33, 383 P.2d 441 (*Tunkl*). (*McCarn v. Pacific Bell Directory* (1992) 3 Cal.App.4th 173, 177-183, 4 Cal.Rptr.2d 109 (*McCarn*).) However, limitation of liability clauses are ineffective with respect to claims for fraud and misrepresentation. (*Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471-1473, 266 Cal.Rptr. 593; Civ.Code, § 1668.)

We conclude there are no triable issues whether this clause bars Eco Safe from recovering damages under its claims for breach of the contract, bad faith, and negligence. To begin, the clause is an element of the contract between Eco Safe and Food Safety. As explained in *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 222, fn. 3, 31 Cal.Rptr.2d 525, in seeking summary judgment, 'a defendant may rely on the complaint's factual allegations, which constitute judicial admissions. [Citations.] Such admissions are conclusive concessions of the truth of a matter and effectively

remove it from the issues.' This principle encompasses allegations that a contract incorporates specified terms or clauses. (*St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248, 4 Cal.Rptr.3d 416.) ***Here, the FACC alleged that the contract between Eco Safe and Food Safety contained the written terms in the exhibits attached to the complaint, which included the Standard Terms document. Accordingly, this allegation constituted a binding admission by Eco Safe that its contract with Food Safety included the limitation of liability clause.***

We further conclude that the clause effectively limits Food Safety's liability for breaches of contractual obligations and ordinary negligence, as nothing before us suggests that the clause is unconscionable or affects the public interest. We find guidance from *McCarn,* in which the appellate court affirmed the enforceability of a similar clause with respect to a claim for negligence. (*McCarn, supra,* 3 Cal.App.4th at pp. 177-183, 4 Cal.Rptr.2d 109.) There, the pertinent clause limited a publisher's liability for errors in printing advertisements to 'pro rata abatement of the charges payable' for the advertisements. (*Id.* at pp. 177-178, 4 Cal.Rptr.2d 109, capitalization & boldface omitted.) In finding the clause enforceable, the court placed special emphasis on the fact that the contract—though standardized in form—permitted the parties to renegotiate or eliminate the clause. (*Id.* at pp. 181-182, 4 Cal.Rptr.2d 109.)

In opposing summary judgment, Eco Safe identified no evidence that the clause was the product of unequal bargaining power, that it contravened public policy, or that it affected the public interest, as specified in Tunkl. Accordingly, the clause regulated Eco Safe's potential recovery with respect to its claims for breach of the contract and ordinary negligence.

The clause limits Food Safety's liability for '*any* ... damages whatsoever arising out of' the study to 'the *lesser* of (a) damages suffered by [Eco Safe] as the direct result thereof, or [¶] (b) the total amount paid by [Eco Safe] to [Food Safety] for the services herein covered.' (Italics added.) ***Because it is undisputed that Eco Safe has***

paid nothing to Food Safety for the study, the clause thus prohibits a recovery for breach of contract. This conclusion necessarily encompasses Eco Safe's bad faith claim, as breaches of the covenant of good faith implied within contracts are not tortious outside the context of insurance policies. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, 86 Cal.Rptr.2d 855, 980 P.2d 407.)…

The clause also bars Eco Safe's recovery under its claim for negligence. The trial court concluded—correctly, in our view—that the claim asserted no tort claim because it relied exclusively on a negligent breach of the contract. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 554, 87 Cal.Rptr.2d 886, 981 P.2d 978 [mere allegation of negligent breach of a contractual obligation is insufficient to support recovery in tort].) The claim was thus only for breach of contract. However, even if Eco Safe had alleged a claim for ordinary negligence, the limitation of liability clause would have precluded a recovery because it expressly encompassed 'the negligence (either sole or concurrent) of' Food Safety.…

Because the parties submitted no extrinsic evidence bearing on the meaning of the clause, its interpretation is a question of law. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839.) ***We therefore inquire into the parties' intentions, as disclosed by the language of the contract.*** (*Eltinge & Graziadio Dev. Co. v. Childs* (1975) 49 Cal.App.3d 294, 297, 122 Cal.Rptr. 369.) As noted above, following the warranty provision, the clause states that '[i]n *no* event' is Food Safety liable for damages—including damages for negligence—'arising out of or *in any way related to* the work herein covered, *from any cause or causes.*' (Italics added.) ***In view of this broad and unqualified language, the clause must be regarded as establishing a limitation on Food Safety's liability sufficient to encompass Eco Safe's claims for breach of contract, bad faith, and negligence.*** *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1125-1128)

***Health Net of California, Inc. v. Department of Health Services* (2003)**

113 Cal.App.4h 224

The *Health Net* court (unlike the *Food Safety* court) refused to enforce the limitation of liability clause as a bar to the claims, albeit under a completely different set of facts and circumstances as the present case. Still, *Health Net*'s analysis is helpful to this case because it thoroughly analyzes the law and legal principles involved, all of which, when applied to the present case, support the granting of this motion.

The court described the limitation clause as follows:

> "Amendment A07 revised Section 3.1 of the Standard Agreement (hereinafter Section 3.1)—the contractual clause at issue here. Section 3.1, headed 'Interpretation of Contract,' provides in its revised form as follows: 'If it is necessary to interpret this Contract, all applicable laws may be used as aids in interpreting the Contract. However, the parties agree that any such applicable laws shall not be interpreted to create contractual obligations upon DHS or Contractor [(Health Net)], unless such applicable laws are expressly incorporated into this Contract in some section other than this Section 3.1, Interpretation of Contract. Except for Section 3.19, Sanctions and Section 3.20, Liquidated Damages Provision, *the parties agree that any remedies for DHS'[s] or Contractor's non-compliance with laws not expressly incorporated into this Contract, or any covenants implied to be part of this Contract, shall not include money damages, but may include equitable remedies such as injunctive relief or specific performance.* In the event any provision of this Contract is held invalid by a court, the remainder of this Contract shall not be affected. This Contract is the product of mutual negotiation, and if any ambiguities should arise in the interpretation of this Contract,

> both parties shall be deemed authors of this Contract.'" (Italics added.)
>
> Amendment A07 also deleted former Section 3.2 of the Standard Agreement. The pertinent effect of this deletion was to eliminate any reference in the agreement to the sections of the Welfare and Institutions Code regarding the Two–Plan Model (Welf. & Inst.Code, § 14087.305) and the related regulations promulgated by DHS (Cal.Code Regs., tit. 22, §§ 50185.5, 53800 et seq.), which the trial court found DHS had violated here. And as a result, Section 3.1 operated to prohibit the recovery of damages for DHS's violation of these statutory and regulatory provisions because that section bars the recovery of damages for the failure to comply with any laws *not expressly incorporated* into the contract." (*Id.* at 228-229)

The court refused to enforce this provision to bar the claims alleged, analyzing the issue as follows:

> "While courts have often observed that the application of section 1668 is not as broad as its language suggests, they have nonetheless held that under the statute, 'a party [cannot] contract away liability for his fraudulent or intentional acts or for his negligent violations of *statutory* law.' (*Gardner v. Downtown Porsche Audi* (1986) 180 Cal.App.3d 713, 716, 225 Cal.Rptr. 757.) We see no reason why this settled interpretation of section 1668 should not be extended to cover *regulatory* violations in light of the fact that regulations, by definition, merely 'implement, interpret, or make specific' statutory law (Gov.Code, § 11342.600) and given that the language of section 1668 is not limited to statutory violations but more broadly refers to any 'violation of law.' It also makes no difference that the contractual clause here bars only the recovery of damages, and not equitable relief, because section 1668 can apply to a limitation on liability (*Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 99–101, 54 Cal.Rptr. 609 (*Klein*)), at least where the limitation rises to the level of an 'exempt[ion] ... from responsibility for [a] ... violation of law' in the words of section 1668. ***An unqualified prohibition against the recovery of damages in the***

context of a commercial transaction certainly qualifies as such an exemption.…

Based on these canons of statutory construction, we cannot construe section 1668 to invalidate all contracts that seek to exempt a party from responsibility for *any* violation of law, including any common law or contractual violation; otherwise, there would be no need for the statute to separately identify fraud or willful injury, in addition to any 'violation of law,' as prohibited objects of an exculpation. Further, '[d]espite its purported application to '[a]ll contracts,' section 1668 does not bar either contractual indemnity or insurance, notwithstanding that (aside from semantics) the practical effect of both is an 'exempt[ion]' from liability for negligence.' (*Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74, 70 Cal.Rptr.2d 85 (*Farnham*) ['Section 1668 is not strictly applied'].) Accordingly, '[d]espite its broad language, section 1668 does not apply to every contract' or *every* violation of law. (See *Vilner v. Crocker National Bank* (1979) 89 Cal.App.3d 732, 735, 152 Cal.Rptr. 850; *Farnham, supra,* 60 Cal.App.4th at p. 74, 70 Cal.Rptr.2d 85.)…

Accordingly, despite differences in the interpretation of the scope of section 1668, California courts have construed the statute for more than 85 years to at least invalidate contract clauses that relieve a party from responsibility for future statutory and regulatory violations. (See, e.g., *Union Constr. Co. v. Western Union Tel. Co.* (1912) 163 Cal. 298, 314–315, 125 P. 242 [statute requiring telegraph company to use great care and diligence in the transmission and delivery of messages]; *In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1064–1065, 64 Cal.Rptr.2d 522 [statute requiring financial disclosures prior to marital settlement agreement]; *Halliday v. Greene, supra,* 244 Cal.App.2d at p. 488, 53 Cal.Rptr. 267 [general industry safety order requiring two escape exits from work area]; *Hanna v. Lederman* (1963) 223 Cal.App.2d 786, 792, 36 Cal.Rptr. 150 [municipal code section specifying sprinkler system alarm requirements]; see *Delta Air Lines, Inc. v. Douglas Aircraft Co., supra,* 238 Cal.App.2d at pp. 105–106, 47 Cal.Rptr. 518 [FAA regulation].)

> ***In this instance, DHS has invoked Section 3.1 of the agreement to exculpate it from liability for damages to Health Net for the violation of statutory law (Welf. & Inst.Code, § 14087.305, subd. (j)), as defined by its implementing regulations*** (Cal.Code Regs., tit. 22, §§ 50185.5, subds. (b)(12), (g)(8), 53820). Such an exculpatory clause violates section 1668." (*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4h 224, 227-229, 233-236)

Application to the Present Case

The analysis in the present case is actually quite simple. Under no stretch of the imagination can Plaintiff's claims survive the limitation of liability clauses to which it agreed to be bound.

First and foremost, clauses like the one at issue are routinely enforced. [Clauses of this type '***have long been recognized as valid in California***.' (See *Food Safety*, *supra*, analyzing a similar clause and citing *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, 714]

Like the parties in *Food Safety*, the two parties in this commercial transaction had equal bargaining power, and the transaction at issue involves commonly-enforced limitation of liability clauses (limiting the available damages), and no issue of public interest. Plaintiff made no attempt to plead around these facts because it cannot. To distinguish *Health Net*, that case involved public interests and the clauses at issue involved *an unqualified*

prohibition against the recovery of damages in the context of a commercial transaction, resulting in complete insulation for any and all violations of the Welfare & Institutions Code. Again, the clause in the present case limits available damages and neither directly nor indirectly extinguishes all liability on the part of Defendant.

It is now clear by and through the FAC that Plaintiff mistakes the fact that *it did not suffer any available damages to mean that the clause itself is an exculpatory one.* That argument is not supported by the law. Like the plaintiff in *Food Safety*, the limitation of liability clauses are indeed a bar to the Plaintiff's claims, because while the plaintiff did not suffer any of the available damages, the clauses did not have the impact of exempting the defendant from liability had the plaintiff suffered a form of available damages. Again, the test is not whether the plaintiff *suffered* the types of damages available under the contract. The test is whether the contract extinguishes all liability for a given act.

Plaintiff is essentially seeking anticipated lost profits, which is admittedly barred by the clauses. Importantly, the clauses would not stop Plaintiff from seeking, for example, direct damages such as disgorgement of profits actually earned by Defendant/Trader Joe's or royalties (calculated consistent with the Operating Agreement) on barbeque sauce sold by Defendant to Trader Joe's. The

FAC admits that no such damages were suffered *because the reverse engineering never actually occurred, and no one benefitted from the alleged attempted recipe clone.*

If the bargained-for clauses at issue in this case are not enforced as a bar to Plaintiff's claims simply because Plaintiff did not *suffer* any of the damages available, then parties to these transactions should beware as such clauses are essentially meaningless.

C. Speculative Damages

On a related note, the damages are so speculative that they fail as a matter of law.

Food Safety is once again completely on point:

> "Generally, 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.' (*Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 367-368, 28 Cal.Rptr. 357.) Thus, '[l]ost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. [Citation.]' (*S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536, 30 Cal.Rptr.2d 286.) ***Under these principles, lost profits based on a future contract cannot be recovered when the contract is uncertain or speculative.*** (*Continental Car-Na-Var Corp. v. Moseley* (1944) 24 Cal.2d 104, 113, 148 P.2d 9; see *Ramsey v. Penry* (1942) 53 Cal.App.2d 773, 778, 128 P.2d 399 [plaintiff was not entitled to recover compensation based on future sales of stock in the absence of evidence that stock could be sold]; *Citri-Lite Co. v.*

> *Cott Beverages, Inc.* (E.D.Cal.2010) 721 F.Supp.2d 912, 937-938 [***plaintiff could not recover lost profits based on renewal of contract when there was no evidence contract would be renewed***]; *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 975-976, 22 Cal.Rptr.3d 340, 102 P.3d 257 [discussing cases].)
>
> To show that Eco Safe was unable to demonstrate lost profits from the study, Food Safety presented evidence supporting the following version of the underlying facts: During Eco Safe's prestudy discussions with Carl's Jr., they exchanged no agreements or other documents indicating that Carl's Jr. proposed to buy or lease Eco Safe's equipment. According to Huetinck's deposition testimony, he never discussed entering into a contract on behalf of Carl's Jr. to buy Eco Safe's equipment…
>
> Although there are factual disputes whether Carl's Jr. requested the challenge study, the record is devoid of evidence that Carl's Jr. intended to buy or lease Eco Safe's equipment upon completion of a defect-free study favorable to Eco Safe. Although Eco Safe gave Carl's Jr. information regarding the terms upon which it could buy or lease equipment, there is no evidence that the parties negotiated any agreement, however tentative, regarding the purchase or lease of the equipment. On the contrary, Huetinck stated that no purchase agreement was discussed. Moreover, the evidence shows that in declining to pursue further discussions with Eco Safe after the study, Huetinck relied in part on concerns regarding the unproven safety of ozone-based equipment that the study did not address. It is thus speculation that Eco Safe lost profits as the result of the purported defects in the study." (*Food Safety Net Services v. Eco Safe Systems USA, Inc*. (2012) 209 Cal.App.4th 1118, 1132-1134)

The FAC admits that Defendant did not actually reverse engineering anything, meaning that neither Defendant nor Trader Joe's ever benefitted in any manner from the alleged acts. As stated herein, the FAC at best alleges

an *attempted reverse engineering.* It then makes the leap that the *anticipated* lost profits were suffered because Trader Joe's went another direction after the reverse engineering failed. The alleged attempted reverse engineering is not at all tied to the anticipated lost profits. Indeed, the FAC admits that Trader Joe's simply went a different direction and does not at all explain why Plaintiff would have earned profits *but for* the alleged failed attempted reverse engineering. Plaintiff is attempting to do exactly what the plaintiff in *Food Safety* was prohibited from doing: seek anticipated lost profits which are *speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery*.

VI. CONCLUSION

NECF's FAC should be dismissed *without leave to amend* pursuant to F.R.C.P. 12(b)(6).

Dated: December 22, 2021

MAGARIAN & DIMERCURIO, APLC

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 20 Corporate Park, Suite 255, Irvine, CA 92606.

I, the undersigned, hereby further certify that on this 22nd day of December of 2021, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on December 22, 2021

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation, Defendant.	Case No. 8:21−cv−01060−DOC−ADS Judge: Hon. David O. Carter **EXHIBITS TO FIRST-AMENDED COMPLAINT [27]** Complaint Filed: June 16, 2021

Plaintiff New England Country Foods, LLC, hereby re-files the exhibits, Exhibits A through D, to its First-Amended Complaint against Defendant Van Law Food Products, Inc., a California Corporation in compliance with Local Rule 15-2.

DATED: December 8, 2021

M.K. HAGEMANN, P.C.

By: _____
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

MUTUAL NONDISCLOSURE AGREEMENT

THIS MUTUAL NONDISCLOSURE AGREEMENT ("this Agreement") is made and entered into as of December 2, 2013 between **New England Country Foods LLC** ("NECF "), **PO Box 2010, Manchester VT 05254 and One Broadway Fourteenth Floor, Cambridge MA 02142** and **Van Law Food Products, Inc., 2325 Moore Avenue, Fullerton, CA 92833**.("Company"). NECF and/or Company shall be sometimes referred to herein individually as a "party" and collectively as the "parties."

RECITALS

A. NECF is engaged generally in the food manufacturing business.

B. Company is engaged generally in co-manufacturing for the food industry.

C. The parties wish to explore (and may upon separate written agreement of both parties, pursue) a business opportunity of mutual interest (the "Project") and, in connection with this opportunity and the resulting business relationship, any party may disclose to the other certain confidential technical, marketing, and business information and strategies which the disclosing party ("Discloser") desires the receiving party ("Receiver") to treat as confidential.

D. The parties deem it advisable to enter into this Agreement to govern the manner in which the confidentiality of certain information will be protected, purposes for which such information may be used and the manner and timing of the return of such information upon conclusion or abandonment of the Project.

AGREEMENT

In consideration of the foregoing and the representations, warranties and covenants set forth below, NECF and Company hereby agree as follows:

1. "Confidential Information" means any information disclosed or made accessible by either party to the other party, either directly or indirectly, in writing, orally, or by inspection or observation of tangible objects (including, but not limited to, documents, prototypes, samples, plant(s), and equipment), whether or not designated as "Confidential", "Proprietary" or some similar designation, including without limitation the existence of this Agreement (except to the extent reasonably necessary for its enforcement) and the fact of discussions about this highly confidential business relationship. Confidential Information may also include information disclosed to a Discloser by third parties.

2. Exceptions. Confidential Information shall not include any information which the Receiver can prove: (i) was publicly known and made generally available in the public domain prior to the time of disclosure by the Discloser; (ii) becomes publicly known and made generally available after disclosure hereunder through no action or inaction of the Receiver; (iii) is at the time of disclosure hereunder already lawfully in the possession of the Receiver, as shown by the Receiver's files and records immediately prior to the time of disclosure; (iv) is obtained by the Receiver from a third party without restriction as to confidentiality or use without a breach of such third party's obligations of confidentiality; or (v) is independently developed by the Receiver without use of or reference to the Discloser's Confidential Information, as shown by documents and other competent evidence in the Receiver's possession.

3. Non-use and Non-disclosure. Each party agrees not to use any Confidential Information of the other party for any purpose except: (i) to evaluate and engage in discussions concerning one or more potential business projects and/or arrangements between the parties; and (ii) to the extent the parties enter into a business relationship, as provided in or contemplated by such definitive agreement(s) as may be executed in connection with such relationship. Except as may become reasonably necessary to enforce this Agreement or any other written agreement between the parties hereto, each party agrees not to disclose any Confidential Information of the other party to any third party or to any of the Discloser's employees, except to those persons (including parents, subsidiaries or affiliates), who are required to have the information for the permissible uses set forth above and are bound by obligations of confidentiality of and restrictions as to the use of such Confidential Information substantially similar to those set forth in this Agreement. Neither party (nor any of its agents) shall reverse engineer, disassemble or decompile any prototypes, software or other tangible objects which embody the other party's Confidential Information and which are provided to the party hereunder without the express written consent of the Discloser.

4. Disclosure Required by Law. In the event any Confidential Information is required to be disclosed by a party under the terms of a valid and effective subpoena or order issued by a court of competent jurisdiction, or by a demand or information request from an executive or administrative agency or other governmental authority, the party requested or required to disclose such Confidential Information: (i) shall, unless prohibited by the terms of a subpoena, order, or demand, promptly notify the Discloser of the existence, terms and circumstances surrounding such demand or request; (ii) shall cooperate with Discloser, as appropriate, in seeking such protective orders or relief from such disclosure as may be available; and (iii) shall maintain the confidentiality of the Discloser's Confidential Information in accordance with the terms hereof to the fullest extent practicable under the circumstances. If the Receiver is prohibited from notifying the Discloser of a subpoena, order, or demand, the Receiver shall exercise its reasonable efforts to limit the extent of disclosure.

5. Maintenance of Confidentiality. Each party, as Receiver, agrees that it shall take reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of Discloser's Confidential Information. Without limiting the foregoing, each party shall take at least those measures that it takes to protect its own confidential information of a similar nature. Receiver shall not make any copies of Discloser's Confidential Information unless the same are previously approved in writing by Discloser. Receiver shall reproduce Discloser's proprietary rights notices on any such approved copies, in the same manner in which such notices are set forth in or on the original.

6. No Obligation. Nothing herein shall obligate either party to proceed with any transaction between them and each party reserves the right, in its sole discretion, to terminate the discussions contemplated by this Agreement concerning the business opportunity.

7. No Warranty. ALL CONFIDENTIAL INFORMATION IS PROVIDED "AS IS". NEITHER PARTY MAKES ANY WARRANTIES, EXPRESS, IMPLIED OR OTHERWISE, REGARDING ITS ACCURACY, COMPLETENESS OR PERFORMANCE.

8. Return of Materials. All documents and other tangible objects containing or representing Confidential Information that have been disclosed by either party hereto to the other, and all copies thereof in the possession of the Receiver, shall be and remain the property of the Discloser and shall be promptly returned upon the expiration of the term of this Agreement or when otherwise requested by NECF or Company, as applicable. Company shall return to NECF all Confidential Information disclosed by NECF to Company pursuant hereto and NECF shall return to Company all Confidential Information disclosed by Company to NECF pursuant hereto in each case together with all copies, summaries and extracts thereof. All electronic copies (including data on computer hard drives, floppy disks, CD-ROMs, tapes, or other media) of Confidential Information of either party shall be and remain the property of that party and shall, upon written request of that party, be promptly returned to it or, at that party's sole option, destroyed. Upon return or destruction, the party destroying or returning such copies shall certify in writing that all such copies have been returned or destroyed.

9. No License. Nothing in this Agreement is intended to grant any rights to either party under any patent mark, work right, or copyright of the other party, nor shall this Agreement grant any party any rights in or to the Confidential Information of the other party except as expressly set forth herein.

10. Term. The obligations of each Receiver hereunder shall survive until such time as all Confidential Information of the other party disclosed hereunder becomes publicly known and made generally available through no action or inaction of the Receiver. In the event the foregoing is found by a court of law to be unduly restrictive, in no event shall the foregoing commitments of the Undersigned end before a period terminating on the later to occur of the date (a) five (5) years following the date of this Agreement or (b) three (3) years from the date on which Confidential Information is last disclosed under this Agreement.

11. Remedies. Each party agrees that any violation or threatened violation of this Agreement may cause irreparable injury to the other party, entitling the other party to equitable relief, including injunction, in addition to such remedies as may be available at law.

12. Litigation Expense. If any party brings an action against any other party hereto by reason of the breach of any covenant, promise, warranty, representation, obligation or condition hereof, or otherwise arising out of or relating to this Agreement, whether for declaratory or other relief, the prevailing party in such suit shall be entitled to its costs of suit and reasonable attorneys' fees.

13. Miscellaneous. This Agreement shall bind and inure to the benefit of the parties hereto and their parents, subsidiaries, affiliates, successors and assigns. This Agreement shall be governed by the laws of the State of Vermont, the State of Massachusetts and the State of California excluding the conflict of laws principles thereof.

This document contains the entire agreement between the parties with respect to the subject matter hereof. Each party expressly represents that it has not relied upon any representation of any other party or its attorney, outside of the express provisions of this Agreement, and that it has relied solely on counsel of its choice to advise it with respect to the terms here.

Failure to enforce any provision of this Agreement shall not constitute a waiver thereof or of any other provision. This Agreement may not be amended, nor any obligation waived, except by a writing signed by both parties hereto.

New England Country Foods LLC	Company: Van Law Food Products, Inc.
Signature:	Signature:
Name: M. Peter Thomson	Name: John Gilbert
Date: 12/2/13	Date: 12/2/13
Address: One Broadway, Fourteenth Floor	Address: 2325 Monroe Avenue
Cambridge, MA 02142	Fullerton, CA 92833
Title: President	Title: Vice President Sales & Marketing
Phone: 802.233.0518	Phone: 714.578.3126
Facsimile: 617.401.3795	Facsimile: 714.870.5609

Operating Agreement

Introduction

This Operating Agreement ("Agreement") is entered into as of January 1, 2015 by and among New England Country Foods LLC ("NECF"), a Vermont limited liability company with its offices located at P. O. Box 2010, Manchester Village, Vermont, 05254 and One Broadway, Fourteenth Floor, Cambridge, MA 02142, and Van Law Food Products, Inc. ("VLF"), a California company with its offices located at 2325 Moore Avenue, Fullerton, CA 02833. NECF and VLF shall be collectively referred to as "the parties."

WHEREAS, NECF and VLF have certain food products, including but not limited to, Trader Joe's "TJ's Bold & Smoky Kansas City Style Barbecue Sauce" and the "VLF Sriracha Hot Chili and Garlic Sauce" (Formula #1014-149-v2) ("Products") which the Parties believe have significant commercial potential and wish to fully exploit such commercial potential.

NOW THEREFORE, the parties agree to this exclusive Operating Agreement as follows:

1. The Products

   a) "TJ's Bold & Smoky Kansas City Style Barbecue Sauce": VLF will provide manufacturing, shipping, billing and collection services in support of sales of NECF's product, "TJ's Bold & Smoky Kansas City Style Barbecue Sauce", to Trader Joe's Markets ("TJ's") or any of TJ's designated suppliers. VLF will pay a royalty fee to NECF as detailed below.

   b) "VLF Sriracha Hot Chili and Garlic Sauce": VLF grants to NECF the exclusive right to sell "VLF Sriracha Hot Chili and Garlic Sauce" under NECF's own brand name to the corrections industry, including prison commissaries and prison foodservice, and the preapproved designated accounts within the dollar store class of trade.

2. The Property

VLF agrees to not alter in any way without the written consent of NECF: (a) the established formulation of the NECF's Property, (b) the established formulation of VLF's Property and (c) the specifications of any of the raw materials and packaging components used to manufacture any of the Products subject to this Agreement.

The term "Property" means all proprietary rights, including but not limited to trademarks, trade secrets, formulas (including but not limited to spice formulas), research data, know-how, and specifications related to the invention commonly known as the Products.

3. Territory

The rights granted to VLF and NECF carry no geographic restrictions.

NECF0263

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4. Term; Termination

This Agreement shall commence on the Effective Date and, subject to earlier termination as set forth below, shall continue for a period of three (3) years (the "Initial Term"). This Agreement may be extended following the Initial Term for successive one-year periods (each, a "Renewal Term") if pricing is agreed upon not less than ninety (90) days prior to the termination of the Initial Term or the then-current Renewal Term, unless this Agreement is otherwise terminated. For purposes of this Agreement, the Initial Term and the Renewal Term(s) shall be collectively referred to herein as the "Term." This agreement may be terminated:

a) by either Party without notice in the event the other Party becomes insolvent or is the subject of a voluntary or involuntary bankruptcy petition;

b) by either party at any time on or after a "Change of Control" (as defined below); provided, however, that either party shall provide the other with prior written notice of not less than one hundred eighty (180) days specifying the date of termination.

c) by either party for Cause (as defined below) immediately following the applicable cure period of forty-five (45) days except in the case of Force Majeure where a ninety (90) day cure period is applicable.

"Cause" means a Party's failure to comply with any material term or condition of this Agreement after receipt of written notice detailing the alleged material breach and such breach remains uncured for a period of forty-five (45) days following the date of such notice.

"Change of Control" means the stockholders of the Company approve a merger or consolidation of either Party with any other corporation, or the stockholders of either Party approve a plan of complete liquidation of itself or an agreement for the sale or disposition by itself of all or substantially all the assets of the Party.

Notwithstanding the foregoing rights of termination, the covenants, representations and warranties of the parties shall survive the termination of this Agreement as applicable to any Products sold by VLF to NECF or the Designee during the Term. The rights to terminate this Agreement set forth above shall not prejudice any other right or any other remedy of any party. Except (i) as otherwise provided in this Agreement and (ii) with respect to any rights that have accrued prior to termination, no party shall have any obligation to the other under this Agreement following termination.

This Agreement shall extend for a period of three (3) years from the Effective Date, January 1, 2015 (the "Term").

5. Royalty Fees: "TJ's Bold & Smoky Kansas City Style Barbecue Sauce"

VLF agrees to pay to NECF a Royalty Fee of $3.30 per 12 unit case on the retail product, i.e. TJ's Bold & Smoky Kansas City Style Barbecue Sauce, based on a sell price of $17.80 per case "FOB" VLF's Fullerton plant. All royalties ("Royalties") provided for under this Agreement shall accrue on the day product is shipped to Trader Joe's Markets ("TJ's"). Payment to NECF will be due by the end of the month after payment is received by VLF from TJ's. Interest shall accrue from the date of any past due payment at the interest rate of 1.0% per month.

NECF0264

"Best efforts" will be made by both parties to negotiate price increase(s) with Trader Joe's as justified by continued increases in input costs. The benefit of said price increases will accrue to the benefit of both Parties by mutual agreement.

Pricing will be reviewed quarterly and price adjustments will be made based on documented raw, packaging, freight or operational changes, as mutually agreed to. These changes may or may not adjust the royalty fee, as agreed to quarterly.

6. Case Cost: "VLF Sriracha Hot Chili and Garlic Sauce"

NECF agrees to pay to VLF a case cost of $18.86 per 24 unit case of 8oz of the product, i.e. "VLF Sriracha Hot Chili and Garlic Sauce, "FOB" VLF's Fullerton plant. Payment to VLF will be due thirty (30) days after receipt by NECF of VLF's invoice for goods NECF has received. Interest shall accrue from the date of any past due payment at the interest rate of 1.0% per month.

Pricing will be reviewed quarterly and price adjustments will be made based on documented raw, packaging, freight or operational changes, as mutually agreed to. These changes may or may not adjust the VLF Case Cost, as mutually agreed to quarterly.

7. Documentation

VLF will forward to NECF batch records from each batch of the Products produced under this Agreement ("Van Law Batching Sheet") in form and substance similar to the established production batch documentation. In addition, VLF will forward six (6) samples from each batch of production (two from the beginning of the batch, two from the middle of the batch and two from the end of the batch); NECF will determine the method of transportation from VLF's offices to NECF's offices, at NECF's expense.

8. Audit

VLF shall keep books of account and records sufficient to confirm the accuracy of the sales and production of NECF's Product ("TJ's Bold & Smoky Kansas City Style Barbecue Sauce") throughout the Term of this Agreement. A representative of NECF or an independent auditor, appointed by NECF and acceptable to VLF, shall have the right to inspect and audit VLF's records at NECF's expense. Said audit will (a) be allowed to occur periodically as determined but no more frequently than once per year, (b) require ten (10) days' prior written notice, (c) be required to occur during normal business hours and (d) be performed only upon execution of a confidentiality agreement reasonably acceptable to VLF.

If the previously reported sales of NECF's Product are found to be inaccurate, VLF shall promptly reimburse NECF for all reasonable costs of the audit including reasonable travel expenses along with the amount due, with interest on such sums. Interest shall accrue from the date the payment was originally due and the interest rate shall be 1.0% per month, or the maximum rate permitted by law, whichever is less. All books of account and records shall be made available in the United States and kept available for at least two years after the termination of this Agreement.

9. Third Party Certification

VLF is committed to the continuous improvement of its operations. During the term of this Agreement, VLF will conduct regular third party audits of its operations and maintain its Safe Quality Food ("SQF") Certification. VLF will maintain a Certification Level 3 or greater similar to that which was secured during the 2/28/13 (#03229) audit performed by an SQF authorized auditor. VLF will forward to NECF copies upon receipt of these annual third party audits performed on behalf of VLF.

10. Warranties

VLF represents and warrants that:

(a) any goods sold to TJ's or NECF shall be of merchantable quality; shall be consistent with any samples submitted to and accepted by TJ's or NECF; and shall be of uniform kind, quality, quantity, and net weight within each unit and among all units sold pursuant to said purchase order;

(b) all food products will have legibly printed on all packages coding information according to a coding method agreed upon in advance by NECF and TJ's;

(c) the goods sold to TJ's and NECF were produced, harvested, manufactured, processed, packaged, labeled, transported, delivered, and sold in compliance with all applicable federal, state, and local laws and regulations of the United States of America and all of its subdivisions;

(d) the resale of any of the goods by TJ's or NECF would not be in violation of any federal, state, or local law or regulation of the United States of America or any of its subdivisions, or the laws of any other country, state, or international governing body, including but not limited to all Weights and Measures regulations applicable to the goods. Said products shall fully comply at the time of purchase and/or through the date listed as the "expiration" or "sell by" date;

(e) agrees to use commercially reasonable efforts to manufacture, distribute, and sell the Products in accordance with commercially reasonable requests from TJ's and NECF during the Term of this Agreement.

11. Insurance

VLF and NECF agree to obtain and maintain appropriate product liability insurance at all times during the term of this agreement as required by TJ's. VLF and NECF will each name the other as an "Additional Insured", providing a supporting Certificate of Insurance on an annual basis to each other.

12. Confidentiality

The parties acknowledge that each may be furnished or have access to confidential information that relates to each other's business (the "Confidential Information"). Confidential Information is such information that is received orally or in written form, may or may not be marked with the word "Confidential" or some similar warning, and is reasonably understood to be confidential. The absence of such a label, stamp or written warning does not relieve the party to whom such "Confidential Information" has been provided, whether in written or oral form, from its responsibilities to the other party. The parties agree to maintain the Confidential Information in confidence and to restrict access to

such Confidential Information only on a need-to-know basis. Except as otherwise permitted under this Agreement, neither party, without prior written approval of the other, shall use or otherwise disclose to others, or permit the use by others of the Confidential Information.

The restrictions will not apply with respect to any Confidential Information which: (a) was or becomes publicly known through no fault of the receiving party; (b) was known or becomes known to the receiving party from a source other than the disclosing party; or (c) is independently developed by the receiving party. If a receiving party is required by law to disclose the disclosing party's Confidential Information, the receiving party will take commercially reasonable actions to limit the disclosure and cooperate fully with the disclosing party in protecting against any such disclosure and/or obtaining a protective order narrowing the scope of such disclosure and/or use of the Confidential Information.

The Mutual Non-Disclosure Agreement into which the parties entered on 12/2/13 is incorporated into this Agreement as Exhibit A.

13. Limitation on Liability

To the extent allowed by applicable law: (a) in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind, even if such party has been advised of the possibility of such damages; and (b) each party's entire liability to the other party for damages concerning performance or nonperformance by such party in any way related to the subject matter of this Agreement, and regardless of the form of any claim or action, will not exceed the amount of gross revenues earned by VLF or NECF from the Products, whichever is greater, for the twenty-four (24) months prior to the events giving rise to the alleged liability.

14. Attorneys' Fees and Expenses

The prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorneys' fees incurred in enforcing this Agreement.

15. Governing Law, Jurisdiction

This Agreement shall be governed in accordance with the laws of the State of Vermont, State of Massachusetts and the State of California. Each party: (a) consents to the jurisdiction and venue of the federal courts located in Bennington County, Vermont, Middlesex County, Massachusetts or Orange County, California in any action arising out of or relating to this Agreement or the subject matter thereof; (b) waives any objection it might have to jurisdiction or venue of such forums or that the forum is inconvenient; and (c) agrees not to bring any such action in any other jurisdiction or venue to which either party might be entitled by domicile or otherwise.

16. Amendment and Waiver

Only in writing signed by all parties hereto may amend this Agreement.

17. Time of the Essence

It is agreed that time is of the essence in all matters herein.

18. No Joint Venture

Nothing contained in this Agreement shall be construed to place the parties in the relationship of agent, employee, franchisee, officer, partners, or joint ventures. Neither party may create or assume any obligation on behalf of the other.

19. Assignability

Neither Party may assign or transfer its rights or obligations pursuant to this Agreement without the prior written consent of the other Party. Such consent shall not be unreasonably withheld.

20. Indemnification

VLF shall indemnify and hold harmless NECF and its Designee(s), and their respective officers, directors, officers, stockholders, agents and employees (the "NECF Indemnified Parties") from and against any and all damages, losses, liabilities, claims, suits, costs and expenses (including reasonable attorney fees) resulting from or relating to any breach by VLF of any provision, warranty or covenant, or any nonfulfillment of any obligation by VLF, under this Agreement. VLF further agrees to indemnify and hold harmless the NECF Indemnified Parties from and against any and all damages, loss, cost, liability or expense (including reasonable attorney fees) incurred by any such party in connection with any complaints, demands, claims or legal actions alleging illness, injury, death or damage as a result of the consumption or use of any Product; provided, however, that VLF shall not be required to indemnify the NECF Indemnified Parties against a defect or defects in any Product that independent investigation shows originated after the Product left the custody of VLF.

NECF shall indemnify and hold harmless VLF and its Designee(s), and their respective officers, directors, officers, stockholders, agents and employees (the "VLF Indemnified Parties") from and against any and all damages, losses, liabilities, claims, suits, costs and expenses (including reasonable attorney fees) resulting from or relating to any breach by NECF of any provision, warranty or covenant, or any nonfulfillment of any obligation by NECF, under this Agreement. NECF further agrees to indemnify and hold harmless the VLF Indemnified Parties from and against any and all damages, loss, cost, liability or expense (including reasonable attorney fees) incurred by any such party in connection with any complaints, demands, claims or legal actions alleging illness, injury, death or damage as a result of the consumption or use of any Product; provided, however, that NECF shall not be required to indemnify the VLF Indemnified Parties against a defect or defects in any Product that independent investigation shows originated after the Product left the custody of NECF.

Notwithstanding the above, in no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind (including but not limited to loss of profits, business revenues, business interruption and the like), arising from or relating to the relationship between VLF and NECF, regardless of whether the claim under which such damages are sought is based upon breach of warranty, breach of contract, negligence, tort, strict liability, statute, regulation or any other legal theory or law, even if either party has been advised by the other of the possibility of such damages; provided, however, that such limitation shall not apply to any costs incurred by NECF or its Designee(s) as a result of the payment of punitive, special, incidental or consequential damages related to, arising from or in connection with any claim, demand, damage, liability, loss, cost, or expense (including without limitation reasonable attorneys' fees) related to health, safety, product adulteration, personal injury or death.

Each party has signed this Agreement through its authorized representative. The parties, having read this Agreement, indicate their consent to the terms and conditions by their signature below.

NECF:

New England Country Foods LLC

By M. Peter Thomson, President

Signature _____ Date 10/28/15

VLF:

Van Law Food Products, Inc.

By John Gilbert, President

Signature _____ Date 10/28/2015

NECF0269

Hi John
When you have a chance, can you forward me any documentation you have in regards to this topic? Emails, letters, text messages.

Thank you.
Jasmine

From: John Gilbert [mailto:gilbertj@vanlaw.com]
Sent: Wednesday, July 19, 2017 10:33 AM
To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>; Julie Lee <jlee@traderjoes.com>
Subject: RE: KC BBQ

Good Morning Jasmine, we have made KC BBQ as part of a three-year contractual agreement (that expires at the end of this year) with a company called New England Country Foods, owned by M. Peter Thompson. He previously had this product made by others and, at one time, might have produced it himself. He has represented to us that he has supplied Trader Joe's with this for eighteen years, that he "owns" the formula for this product, and also that he "owns" the Trader Joe's label. The claim of TJ label ownership by him has always sounded puzzling to us, but we have figured that is between him and Trader Joe's.

We would not have any legal documents or knowledge of those. At one point I believe that Dustin was working through the issue, however I am not sure what happened with those conversations?

From: Jasmine Mkrtchyan [mailto:jmkrtchyan@traderjoes.com]
Sent: Tuesday, July 18, 2017 5:26 PM
To: John Gilbert <gilbertj@vanlaw.com>; Julie Lee <jlee@traderjoes.com>
Subject: RE: KC BBQ

Hi John

Thank you for the information. Julie padded some of her orders and thankfully we won't be in an out of stock situation.

I'm still trying to understand how a third party entity is the owner of our private label product. Is there a legal document citing this?

Jasmine

From: John Gilbert [mailto:gilbertj@vanlaw.com]
Sent: Tuesday, July 18, 2017 11:56 AM
To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>; Julie Lee <jlee@traderjoes.com>
Subject: KC BBQ

We have bad news on the KC BBQ. The [redacted] for the product which is from [redacted], was originally confirmed to ship to us on 6/30, which would have been easily in time for all production. As I sent you a note last week, they are well behind and had promised us deliveries on multiple dates including last Monday 7/10, then Friday 7/14, then we were told it was on a truck on 7/14 to arrive on 7/17 first thing. WE had production and all crews lined up to produce, however the truck did not show up. The news we just received and we are now tracking as we have not been getting, what we feel was accurate and timely information, is that the truck will be here sometime Wednesday or Thursday. As such we have rebuilt our schedule for the week and have

crews coming in this Saturday on overtime to run production for two shifts on Saturday, which will get us back in stock and shipping. We are also running next Wednesday to cover ALL orders that are in-house and build stock.

We apologize for this delay, unfortunately this vendor and ingredient requirement is not something that we have control over. New England Country Foods, who is the owner of the formula and claims the Trader Joe's Kansas City BBQ label specifies that we use the [redacted]

We will keep you posted. Donna from our Customer Service team is reaching out as well.

John Gilbert
President
Email: gilbertj@vanlaw.com
Office: 714-578-3126

Hi Jasmine, how about Friday afternoon? 1:30 or 2 work for you? November 10?

From: Jasmine Mkrtchyan [mailto:jmkrtchyan@traderjoes.com]
Sent: Wednesday, November 1, 2017 4:34 PM
To: John Gilbert <gilbertj@vanlaw.com>
Subject: RE: Meeting request

Hi John

Thank you for the update. I'm able to meet Thursday or Friday afternoon.

Jasmine

From: John Gilbert [mailto:gilbertj@vanlaw.com]
Sent: Wednesday, November 1, 2017 11:46 AM
To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
Subject: Meeting request

Jasmine, we should have everything picked up and disposed in the next day or so. We had a couple of divisions that we were waiting to confirm that we could come in, but most have been handled.

Would you have time next week, anytime Wednesday afternoon through Friday for a meeting?

Would like to discuss findings on Taco Sauce and options
BBQ Sauce and New England Country Foods

John Gilbert
President
Email: gilbertj@vanlaw.com
Office: 714-578-3126

Let's chat Thursday at 10:00AM.

-----Original Message-----
From: John Gilbert [mailto:gilbertj@vanlaw.com]
Sent: Tuesday, December 12, 2017 1:50 PM
To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
Subject: Re: KC BBQ

Yes pretty much any day but tomorrow mid day does not work. Other than that whenever it works for you

John Gilbert
President
Email: gilbertj@vanlaw.com
Office: 714-578-3126
[http://www.vanlaw.com/vlfp.png]

On Dec 12, 2017, at 4:35 PM, Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com<mailto:jmkrtchyan@traderjoes.com>> wrote:

Hi John

Do you have time to chat later this week?

Jasmine

-----Original Message-----
From: John Gilbert [mailto:gilbertj@vanlaw.com]
Sent: Tuesday, December 12, 2017 1:34 PM
To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com<mailto:jmkrtchyan@traderjoes.com>>
Subject: KC BBQ

As discussed when we last met, we have made numerous attempts to try and resolve the issues with New England Country Foods and their claim to own the formula. We have made a very lucrative proposal to him which he is choosing to ignore. At this point we can no longer buy his proprietary spice pack and as such cannot continue making the barbecue sauce with the current formula. We've been trying to resolve this for four months. We are not sure where to go from here? Are you're open to looking at organic?

John Gilbert
President
Email: gilbertj@vanlaw.com<mailto:gilbertj@vanlaw.com>
Office: 714-578-3126
[http://www.vanlaw.com/vlfp.png]

>> We are continuing to receive orders, which we will not be able to fill. We continue to hope that Peter will respond and allow for the continuation of production, however he may have other plans for supplying you that we are not aware of.
>>
>> I would really like to have a conversation with you to discuss this matter.
>>
>> -----Original Message-----
>> From: John Gilbert
>> Sent: Tuesday, December 19, 2017 7:59 AM
>> To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
>> Subject: RE: TJ Taco Sauce reformulation
>>
>> Good Morning Jasmine. Any chance we can talk today??
>>
>> On the KC BBQ we really need to have a conversation
>>
>> -----Original Message-----
>> From: John Gilbert
>> Sent: Thursday, December 14, 2017 10:13 AM
>> To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
>> Subject: Re: TJ Taco Sauce reformulation
>>
>> Oops sorry. Didn't mean to decline.
>>
>> Yes Monday is great. Let me know what time?
>>
>> Hope you feel better.
>>
>>
>> John Gilbert
>> President
>> Email: gilbertj@vanlaw.com
>> Office: 714-578-3126
>>
>> This email (including any attachments hereto) is intended only for the use of the individual or entity to which it is addressed and may contain material that is confidential. If you are not the intended recipient, please do not disseminate, distribute or copy this communication, by e-mail or otherwise. Instead, please notify us immediately by return e-mail (including the original message in your reply) or by telephone (714-578-3129) and then permanently delete and discard all copies of the e-mail.
>>> On Dec 14, 2017, at 1:10 PM, Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com> wrote:
>>>
>>> I saw an email from you declining the call. Can we connect Monday? I'm feeling under the weather.
>>>
>>> -----Original Message-----
>>> From: John Gilbert [mailto:gilbertj@vanlaw.com]
>>> Sent: Thursday, December 14, 2017 10:01 AM
>>> To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
>>> Subject: Re: TJ Taco Sauce reformulation
>>>
>>> Let me work in it
>>>
>>> On Dec 14, 2017, at 12:48 PM, Jasmine Mkrtchyan
<jmkrtchyan@traderjoes.com<mailto:jmkrtchyan@traderjoes.com>> wrote:
>>>
>>> Several people in the office sampled the new version and we all agree that the acidity level on the new one is off the charts, to the point of us not being able to taste any of the flavors. Can you achieve a stable product by hot filling the current version?
>>>
>>> From: John Gilbert [mailto:gilbertj@vanlaw.com]
>>> Sent: Tuesday, December 12, 2017 11:34 AM
>>> To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com<mailto:jmkrtchyan@traderjoes.com>>
>>> Subject: RE: TJ Taco Sauce reformulation

Can you send me a DC Notice on the bbq

John Gilbert
President
Email: gilbertj@vanlaw.com
Office: 714-578-3126

This email (including any attachments hereto) is intended only for the use of the individual or entity to which it is addressed and may contain material that is confidential. If you are not the intended recipient, please do not disseminate, distribute or copy this communication, by e-mail or otherwise. Instead, please notify us immediately by return e-mail (including the original message in your reply) or by telephone (714-578-3129) and then permanently delete and discard all copies of the e-mail.
> On Dec 21, 2017, at 9:40 AM, Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com> wrote:
>
> Yes it does
>
> Thank you
> Jasmine
>
> -----Original Message-----
> From: John Gilbert [mailto:gilbertj@vanlaw.com]
> Sent: Thursday, December 21, 2017 5:05 AM
> To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
> Subject: Re: TJ Taco Sauce reformulation
>
> Anytime. Does 10 am today work?
>
>
> John Gilbert
> President
> Email: gilbertj@vanlaw.com
> Office: 714-578-3126
>
> This email (including any attachments hereto) is intended only for the use of the individual or entity to which it is addressed and may contain material that is confidential. If you are not the intended recipient, please do not disseminate, distribute or copy this communication, by e-mail or otherwise. Instead, please notify us immediately by return e-mail (including the original message in your reply) or by telephone (714-578-3129) and then permanently delete and discard all copies of the e-mail.
>> On Dec 20, 2017, at 5:26 PM, Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com> wrote:
>>
>> Hi John
>>
>> Let me know when you're available tomorrow. I'm in the office until 2:30PM.
>>
>> Thank you
>> Jasmine
>>
>>
>>
>> -----Original Message-----
>> From: John Gilbert [mailto:gilbertj@vanlaw.com]
>> Sent: Wednesday, December 20, 2017 7:38 AM
>> To: Jasmine Mkrtchyan <jmkrtchyan@traderjoes.com>
>> Subject: RE: TJ Taco Sauce reformulation
>>
>> Jasmine, we need to have a conversation about the KC BBQ. We have repeatedly tried to work out a deal with New England Country Foods to continue production of the formula, however, despite lucrative offers to continue supply, he has not responded. As he owns the rights to the spice pack and current formula, we are not in a positon to continue supply as our agreement with him expires 12/31, and we can no longer purchase the spice pack for the current formulation.
>>

From: John Gilbert
Sent: Thursday, December 28, 2017 4:22 PM
To: M. Peter Thomson <petert.necf@gmail.com>
Subject: FW: VLF Revised Operating Agreement

Peter,

Since August/September - and informally for the several months prior - we have worked diligently to attempt to negotiate a new agreement acceptable to VLF for continuing to work with NECF after this agreement expired (now). Throughout that time, we have made a very fair and equitable offer to NECF. As you are fully aware, you chose not to respond to that offer, and we then sent you a Last and Final Offer, which required a response by December 8, 2017, you did not respond.

At this point, we only have a small amount of Spice Pack left, and will no longer be purchasing any additional Spice Pack. Your lack of communication left us in the position of not being able to purchase more Spice Packs at significant expense as we were unsure of your intentions and we were not privy to your plans beginning January 1, 2018. It was entirely possible that you had planned to switch the production to another packer to supply this product to Trader Joe's. All we knew was that we had no clarity that we would have an agreement and therefore we could not produce this product. Given all that context, it would have been an imprudent fiduciary decision for our owners and lenders, and frankly quite foolish for us to speculatively purchase tens of thousands of dollars in additional Spice Packs and molasses that would last far into 2018, knowing your history of claiming no responsibility for raw materials or packaging purchased on behalf of products, projects or the promise of future business for you.

Further to this situation, we have just received a notification from Trader Joe's on December 22, 2017 (below) indicating that after completing a Category Review they are discontinuing this item, and wish to wind down purchasing of it from us. We will therefore have to determine how any of our "stub" inventories of ingredients or packaging specific to this NECF product can be used up or paid for by NECF.

Below please find a copy of the email sent to us from Trader Joe's.

John Gilbert
President
Email: gilbertj@vanlaw.com
Office: 714-578-3126

From: Jasmine Mkrtchyan [mailto:jmkrtchyan@traderjoes.com]
Sent: Friday, December 22, 2017 9:04 AM

To: John Gilbert <gilbertj@vanlaw.com>
Cc: Julie Lee <jlee@traderjoes.com>
Subject: Trader Joe's Bold & Smoky Kansas City Style Barbecue Sauce

Hi John

Per our conversation, we've conducted a category review and determined we'd like to discontinue SKU 31314 Trader Joe's Bold & Smoky Kansas City Style Barbecue Sauce.

Please let me know what components and finished goods you have on hand so that we can start the wind down process.

Thank you
Jasmine Mkrtchyan
Category Manager
[redacted]
800 South Shamrock Ave.
Monrovia, CA 91016
626-599-2879
jmkrtchyan@traderjoes.com

Finally, to be clear regarding your implied "doorstep" comment, we worked with a Broker from Ignite Farms to create most of the items that we have currently at Trader Joe's, and the rest we have created ourselves. Our business and any success we enjoy with Trader Joe's is based on our performance in our relationship with Trader Joe's as a reliable and innovative supplier, and on our operational strengths as a company.

John Gilbert
President
Email: gilbertj@vanlaw.com
Office: 714-578-3126

VANLAW FOOD PRODUCTS, INC.
CUSTOM FORMULATIONS • PRIVATE LABEL • CONTRACT PACKAGING
2325 MOORE AVE, FULLERTON, CA 92833
P.O. BOX 2388, FULLERTON, CA 92837
(714) 870 • 9091 • FAX (714) 870 • 5609
SALAD DRESSINGS • MARINADES • BBQ SAUCES • BAR MIXES • PANCAKE SYRUPS
BEVERAGE BASES • FLAVORS, COLORS, & EXTRACTS • ICE CREAM TOPPINGS
SNOW CONE SYRUPS • SPAGHETTI & PIZZA SAUCES • ORGANIC, ALL NATURAL, & GLUTEN FREE

From: M. Peter Thomson [mailto:petert.necf@gmail.com]
Sent: Thursday, December 28, 2017 11:53 AM
To: John Gilbert <gilbertj@vanlaw.com>
Subject: VLF Revised Operating Agreement

John -

Attached please find a new Operating Agreement which incorporates the original Agreement and an Addendum.

The Addendum incorporates the majority of the elements of your 9/7/17 proposal with certain

modifications. These are highlighted below:

- one-year renewal
- straight $2.80 per case royalty fee on all cases shipped by VLF to TJ's. Any freight costs and increased case sell price associated with these shipments accrue to VLF.
- monthly royalty payments including copies of all VLF invoices associated with that month's payment
- only six "Royalty Calculator Recaps" per year

As to the excess bottles, three points:

- per paragraph 18 of the original Operating Agreement, "neither party may create or assume any obligation on behalf of the other". That statement, in and of itself, releases NECF from any responsibility for these excess bottles.
- in my May 19, 2017 letter to you, I detailed in great detail how we had specifically requested that VLF not take any material inventory position on any packaging components associated with that Sriracha project. For the reasons outlined, NECF does not believe it has any responsibility for the excess bottles purchased by VLF.
- nonetheless, in the interest of moving to resolution of this long festering issue, NECF is willing to accept fifty percent (50%) of the responsibility for these excess bottles upon receipt of (a) appropriate documentation and (b) the full quantity of bottles in question.

I encourage you to agree to the attached Operating Agreement Addendum.

We are pleased that VLF has developed the Trader Joe's relationship to the point where it is "a valuable and critical part of our (VLF) business value" since NECF arrived at your "doorstep" some four (4) years ago, at which point VLF had been unable to develop any business with TJ's, despite your repeated and best efforts.

If we have a conflict free 2018, i.e. payments and documents flow according to the established schedule, NECF will enthusiastically entertain a three year extension of this new Operating Agreement and Addendum.

Peter

M. Peter Thomson
President
New England Country Foods, LLC
802.233.0518

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation,

Defendant.

Case No. 8:21−cv−01060−DOC−ADS

Judge: Hon. David O. Carter

FIRST-AMENDED COMPLAINT FOR:

(1) BREACH OF CONTRACT;
(2) INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS;
(3) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS;
(4) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS;
(5) BREACH OF FIDUCIARY DUTY OF UNDIVIDED LOYALTY

DEMAND FOR JURY TRIAL

Complaint Filed: June 16, 2021

Plaintiff New England Country Foods, LLC (hereinafter "Plaintiff"), hereby files its First-Amended Complaint (hereinafter "Complaint") against Defendant Van Law Food Products, Inc., a California Corporation (hereinafter "Defendant"), as follows:

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a), as the matter in controversy exceeds $75,000.00 and is between citizens of different States.

2. This Court has general personal jurisdiction over Defendant, as Defendant resides in this judicial district and does business in this judicial district, and this Court has long arm jurisdiction over Defendant pursuant to California Civil Procedure § 410.10 et seq.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) in that Defendant resides in the Central District of California.

4. The Southern Division is proper pursuant to General Order No. 21-01 I.B.1.a.(1)(c) because Defendant resides in the County of Orange and this case does not involve the United States.

THE PARTIES

5. Plaintiff is, and at all times pertinent to this Complaint was, a limited liability company, formed under the laws of the State of Vermont, with its principal place of business located in the State of Vermont. None of Plaintiff's members are citizens of the State of California, thus Plaintiff is not a citizen of the State of California.

6. Plaintiff is informed and believes, and on that basis alleges, that Defendant is a corporation formed under the laws of the State of California, with its

principal place of business located in the County of Orange, in the State of California, and is thus a citizen of the State of California.

GENERAL ALLEGATIONS

7. Plaintiff starting doing business with Trader Joe's Company, a California Corporation (hereinafter "Trader Joe's") in 1999 by selling a premium barbeque sauce. This sauce was manufactured with several proprietary aspects. Trader Joe's signed a non-disclosure agreement as to one of those proprietary aspects.

8. This sauce was incredibility popular at Trader Joe's and sales continued to grow rapidly at all relevant times.

9. Plaintiff initially manufactured the premium barbeque sauce in-house, but subsequently decided to hire other companies to manufacture its premium barbeque sauce.

10. On or around December 2, 2013 Plaintiff and Defendant entered into a Mutual Non-Disclosure Agreement in anticipation of having Defendant manufacture Plaintiff's premium barbeque sauce. Exhibit A, (Dkt. 1-1), is true and correct copy of the Mutual Non-Disclosure Agreement.

11. Shortly thereafter, on or around February 15, 2014, Defendant began manufacturing Plaintiff's premium barbeque sauce for Trader Joe's.

12. On or about October 28, 2015, and effective January 1, 2015, Plaintiff and Defendant entered into a written agreement, titled "Operating Agreement," pursuant to which Defendant was to "provide manufacturing, shipping, billing and collection services" in relation to Plaintiff's sale of certain products to Trader Joe's, as well as other services. Exhibit B, (Dkt. 1-2), is a true and correct copy of said Operating Agreement. Exhibit A is incorporated by reference by Paragraph 12 of Exhibit B, the Operating Agreement.

13. Exhibit C, (Dkt. 1-3), are true and correct copies of various e-mails which were obtained from Defendant, in discovery in another action, on or shortly after July 19, 2019.

14. Plaintiff was informed by Defendant that prior to entering into the Operating Agreement, Defendant had not done any business with Trader Joe's. Defendant developed a relationship with Trader Joe's while acting as Plaintiff's agent for its proprietary sauce.

15. Unbeknownst to Plaintiff, Defendant had been attempting to clone its propriety sauce since approximately July, 2015 in violation of Exhibit A, paragraph 3, *inter alia*.

16. The Operating Agreement was scheduled to end on December 31, 2017, and the parties began negotiating an extension starting around May of 2017.

17. Upon information and belief based on Exhibit C, Defendant was unwilling to lose the approximately $350,00.00 per year in profit it generated from manufacturing Plaintiff's propriety sauce. Defendant's Plan "A" was to extend the contract with Plaintiff on terms favorable to Defendant. Plan "B" was to clone Defendant's propriety sauce and sell direct to Trader Joe's and undercut Plaintiff.

18. Upon information and belief based on Exhibit C, John Gilbert, President of Defendant began laying the groundwork for Plan "B" with Jasmine Mkrtchyan of Trader Joe's around July 4, 2017, and Ms. Mkrtchyan was receptive to this plan.

19. Upon information and belief based on Exhibit C, in late November of 2017 or early December of 2017, Defendant determined that Plaintiff would not relent on terms that were unacceptable to Defendant such as transparency and prompt payment, thus there would be no extension. Thus, Defendant pursued Plan "B."

20. Upon information and belief based on Exhibit C, on or around December 14, 2017, John Gilbert, President of Defendant informed Jasmine

Mkrtchyan of Trader Joe's that Plan "A" had failed, and it wished to execute Plan "B." Ms. Mkrtchyan agreed.

21. Upon information and belief based on Exhibit C, as a result of being told Defendant could clone and undercut Plaintiff, Trader Joe's terminated the 19-year relationship on December 22, 2017. The last shipment of product was in January 2018.

22. Plaintiff was not told the real reason the 19-year relationship was terminated. Rather, Trader Joe's told Plaintiff (through Defendant) only that, it had, "conducted a category review and determined [Trader Joe's would] like to discontinue," the premium barbeque sauce. Exhibit D, (Dkt. 1-4), is how Plaintiff was notified of the termination.

23. Upon information and belief based on Exhibit C, John Gilbert overpromised and underdelivered. Much to the disappointment of Jasmine Mkrtchyan, after Jasmine Mkrtchyan terminated Trader Joe's relationship with Plaintiff, Defendant was not able to successfully clone Plaintiff's barbeque sauce, which forced Jasmine Mkrtchyan to find a substitute barbeque sauce that was neither Plaintiff's nor Defendant's sauce.

24. Plaintiff did not discover Defendant's wrongful actions, above, until after it received the e-mails in Exhibit C shortly after July 19, 2019.

25. The present value of past and future lost profits to Plaintiff from Trader Joe's caused by Defendant's execution of Plan "B" was and is no less than $6,000,000.00.

26. Upon information and belief, all of Plaintiff's harm from the wrongful conduct alleged herein is a form of lost profits (both past and future). Further, the only possible harm to Plaintiff from the wrongs committed by Defendant are a loss of profits.

27. As such, the putative limitation-of-liability provisions in the Operating Agreement (Ex. B, Dkt. 1-2, §§ 13, 20), if applied, would completely

exempt Defendant from liability from the wrongs alleged herein because said provisions purport to bar all claims for, "loss of profits." Defendant should be judicially estopped from claiming otherwise because it filed a motion to dismiss the entire complaint on the ground of said limitation-of-liability provisions, *inter alia*. (Mot. 31:14-17: "the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint." (Dkt. 14.)) And said motion was granted by the Court on that ground (with leave to amend). (Dkt. 25.)

FIRST CAUSE OF ACTION

(BREACH OF CONTRACT)

28. The allegations contained in paragraphs 1 through 27 of this Complaint are re-alleged and incorporated by reference as if fully set forth herein.

29. As previously stated herein, Plaintiff and Defendant entered into written agreements as set forth in Exhibits A and B.

30. In furtherance of those written agreements Plaintiff performed all conditions, covenants, and the promises required of it, except for any obligations from which it has been excused, or for which the performance has been prevented by Defendant.

31. Defendant committed breaches of those written agreements, within the last four years, by offering to Trader Joe's to wrongfully clone Plaintiff's propriety sauce which violated: (i) the reverse-engineering prohibition in Exhibit A, paragraph 3, and (ii) the implied covenant of good-faith and fair dealing implied in both Exhibits A and B.

32. As a result of the breaches of the written agreements by Defendants, Plaintiff has suffered damages in an amount to be determined according to proof at trial, but believed to be in excess of $6,000,000.00.

33. Plaintiff has been further damaged by having to pay attorneys' fees and costs to enforce its rights under the written agreements set forth in Exhibits A and B. Plaintiff seeks recovery of its reasonable attorneys' fees and costs, as permitted under those written agreements.

SECOND CAUSE OF ACTION

(INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS)

34. The allegations contained in paragraphs 1 through 33 of this Complaint are re-alleged and incorporated by reference as if fully set forth herein.

35. There was an at-will contract between Trader Joe's and Plaintiff.

36. Defendant was aware of this contract.

37. Mr. Gilbert's accepted offer, on behalf of Defendant, to wrongfully clone Plaintiff's propriety sauce prevented performance.

38. Mr. Gilbert's accepted offer, on behalf of Defendant, to wrongfully clone Plaintiff's propriety sauce was intended to prevent performance.

39. Plaintiff lost both past and future profits from Trader Joe's business in no less than $6,000,000.00 in present value terms.

THIRD CAUSE OF ACTION

(INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS)

40. The allegations contained in paragraphs 1 through 39 of this Complaint are re-alleged and incorporated by reference as if fully set forth herein.

41. Trader Joe's and Plaintiff were in an economic relationship that probably would have resulted in an economic benefit to Plaintiff.

42. Defendant knew of this relationship.

43. Mr. Gilbert's accepted offer, on behalf of Defendant, to wrongfully

clone Plaintiff's propriety sauce was wrongful.

44. Mr. Gilbert's accepted offer, on behalf of Defendant, to wrongfully clone Plaintiff's propriety sauce disrupted the relationship between Plaintiff and Trader Joe's.

45. Mr. Gilbert's accepted offer, on behalf of Defendant, to wrongfully clone Plaintiff's propriety sauce was intended to disrupt the relationship between Plaintiff and Trader Joe's.

46. Plaintiff lost both past and future profits from Trader Joe's business in no less than $6,000,000.00 in present value terms.

FOURTH CAUSE OF ACTION

(NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS)

47. The allegations contained in paragraphs 1 through 46 of this Complaint are re-alleged and incorporated by reference as if fully set forth herein.

48. Trader Joe's and Plaintiff were in an economic relationship that probably would have resulted in an economic benefit to Plaintiff.

49. Defendant knew of this relationship.

50. Defendant knew or should have known that this relationship would be disrupted if they failed to act with reasonable care.

51. Defendants failed to act with reasonable care.

52. Mr. Gilbert's accepted offer, on behalf of Defendant, to clone Plaintiff's propriety sauce was wrongful.

53. Mr. Gilbert's accepted offer, on behalf of Defendant, to wrongfully clone Plaintiff's propriety sauce disrupted the relationship between Plaintiff and Trader Joe's.

54. Plaintiff lost both past and future profits from Trader Joe's business

in no less than $6,000,000.00 in present value terms.

FIFTH CAUSE OF ACTION

(BREACH OF FIDUCIARY DUTY OF UNDIVIDED LOYALTY)

55. The allegations contained in paragraphs 1 through 54 of this Complaint are re-alleged and incorporated by reference as if fully set forth herein.

56. Plaintiff and Defendant were in a relationship such that Defendant owed Plaintiff fiduciary duties, at least as to Defendant's communications with Trader Joe's on Plaintiff's behalf.

57. Defendant knowingly and wrongfully acted against Plaintiff's interest when Mr. Gilbert offered, on behalf of Defendant, to wrongfully clone Plaintiff's propriety sauce.

58. Plaintiff did not give consent to offer to clone its sauce.

59. Plaintiff lost both past and future profits from Trader Joe's business in no less than $6,000,000.00 in present value terms as a result of the lie by Mr. Gilbert.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For an award of damages in the amount in excess of $6,000,0000.00 with the exact amount to be proved at trial;

2. For an award of attorneys' fees incurred in this case as permitted by contract;

3. For an award of costs of suit incurred herein as permitted by contract and statute;

4. For punitive damages on the second, third, fourth and fifth cause of action; and

5. For such other and further relief as the Court may deem just and

proper.

DATED: December 8, 2021

M.K. HAGEMANN, P.C.

By: _____
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

REQUEST FOR JURY TRIAL

Plaintiff NEW ENGLAND COUNTRY FOODS, LLC hereby requests a jury trial on all the issues so triable.

DATED: December 8, 2021

M.K. HAGEMANN, P.C.

By: _____
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

JS-5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 21-01060-DOC-ADS Date: November 29, 2021

Title: NEW ENGLAND COUNTRY FOODS, LLC v. VANLAW FOOD PRODUCTS, INC.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER CLARIFYING MOTION TO DISMISS [14]

On November 23, 2021, the Court granted Defendant's Motion to Dismiss and closed this case (Dkt. 25). The case was administratively closed in error and is now reopened. Plaintiff shall file any amended complaint by December 21, 2021, or the case will be closed.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11 Initials of Deputy Clerk: kdu

CIVIL-GEN

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 21-01060-DOC-ADS Date: November 23, 2021

Title: NEW ENGLAND COUNTRY FOODS, LLC v. VANLAW FOOD PRODUCTS, INC.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO DISMISS [14]

Before the Court is a Motion to Dismiss ("Motion" or "Mot.") (Dkt. 14) brought by Defendant VanLaw Food Products, Inc. ("VanLaw" or "Defendant"). The Court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; C.D. Cal. R. 7-15. Having reviewed the moving papers submitted by the parties, the Court **GRANTS** Defendant's Motion.

I. Background

A. Facts

This case arises out of a dispute over manufacturing a proprietary sauce. *See generally* Complaint ("Compl.") (Dkt. 1). Plaintiff began manufacturing a premium barbecue sauce for Trader Joe's Company ("Trader Joe's") in 1999. *Id.* ¶ 7. In 2013, Plaintiff decided to outsource manufacture of its sauce to Defendant. *Id.* ¶¶ 9-10. Plaintiff and Defendant signed a Mutual Non-Disclosure Agreement in December 2013 and Defendant began manufacturing Plaintiff's sauce in February 2014. *Id.* ¶¶ 10-11. In October 2015, Plaintiff and Defendant signed an Operating Agreement which

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 21-01060-DOC-ADS Date: November 23, 2021

incorporated the Non-Disclosure Agreement, under which Defendant would provide shipping, billing, and collection services for Plaintiff in addition to manufacturing products for Trader Joe's. *Id.* ¶ 12.

The parties began negotiating an extension prior to the Operating Agreement expiring in December 2017. *Id.* ¶ 16. Negotiations failed and the relationship between Plaintiff and Defendant terminated. *Id.* ¶ 19. On December 17, 2017, Trader Joe's terminated its relationship with Plaintiff. *Id.* ¶ 21. Plaintiff alleges that Defendant began cloning Plaintiff's proprietary sauce in 2017 and that Trader Joe's terminated Plaintiff's contract in favor of contracting for Defendant's version of the sauce. *Id.* ¶¶ 18, 21.

In December 2017, Defendant sued Plaintiff in Orange County Superior Court ("the State Action") for breach of contract arising from Plaintiff's alleged failure to pay for bottles for sriracha sauce, unrelated to the barbecue sauce at issue here. Mot. at 16. Plaintiff filed a cross-complaint in February 2019 for breaches of the barbecue sauce contract, including failure to pay royalties, raw material fees, and management fees. *Id.* at 17. Plaintiff's cross-complaint valued Defendant's breaches at $89,394.28. *Id.*

As part of discovery in the State Action, in July 2019, Plaintiff obtained email communications from 2017 between Defendant and a Trader Joe's representative discussing plans for Defendant to make the barbecue sauce and issues with Plaintiff's ownership of the recipe. Compl. ¶ 24; Compl. Ex. B (Dkt. 1-2). In March 2021, Plaintiff sought to amend its cross-complaint in the State Action to add allegations that Defendant cloned Plaintiff's barbecue sauce recipe. Mot. at 17-18. Plaintiff's motion noted the risk of Plaintiff forfeiting its counter-claims if it was denied leave to amend. *Id.* at 18-19; Mot. Ex. 5 at 5-6. The state court denied Plaintiff's motion for leave to amend in April 2021. Mot. at 19; App. Ex. 9. The State Action was tried in July 2021. Mot. at 21.

In this federal action, filed in June 2021, Plaintiff brings claims against Defendant for breach of contract, intentional interference with contractual relations, intentional and negligent interference with prospective economic relations, and breach of fiduciary duty. *See generally* Compl.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 21-01060-DOC-ADS Date: November 23, 2021

B. Procedural History

On June 16, 2021, Plaintiff filed its Complaint in this Court. Defendant filed the present Motion to Dismiss on August 26, 2021. Plaintiff opposed the motion ("Opp'n") on September 3 (Dkt. 18), and Defendant filed its Reply on September 13 (Dkt. 20).

The state court issued a Statement of Decision on September 9, 2021 ("State Action Statement of Decision") (Dkt. 20-2). On November 9, 2021, the Court requested supplemental briefing from the parties on the effect of the state court's entry of judgment (Dkt. 22). Defendant filed supplemental briefing ("Def.'s Supp. Briefing") on November 12 (Dkt. 23) and Plaintiff filed a response ("Pl.'s Supp. Briefing") on November 19 (Dkt. 24).

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555, n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and

thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments, and thus leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. Discussion

Defendant argues that Plaintiff's claims are barred by the compulsory cross-complaint rule, res judicata, collateral estoppel, and an affirmative defense of a limitation of liability clause. *See generally* Mot. The Court considers each argument in turn.

A. Compulsory cross-complaint rule

"Federal courts will not permit an action to be maintained where the claims asserted should have been brought as a compulsory counterclaim in an earlier action." *In re Crown Vantage, Inc.*, 421 F.3d 963, 973 n.7 (9th Cir. 2005). An earlier action includes a state court action. *Cheiker v. Prudential Ins. Co.*, 820 F.2d 334, 336 (9th Cir. 1987). Whether "claims are compulsory counterclaims which should have been pleaded in [an] earlier [] state court action is a question of state law." *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987). California's compulsory cross-complaint statute provides:

> [I]f a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.

CAL. CIV. PROC. CODE § 426.30(a). California law defines "related cause of action" as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." *Id.* § 426.10(c). The term "transaction" "may embrace a series of acts or

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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occurrences logically interrelated." *Saunders v. New Capital for Small Bus., Inc.* 231 Cal. App. 2d 324, 336 (1964). As such, an "absolute identity of factual backgrounds" is not required between the two claims, "but only a logical relationship between them." *Align Tech., Inc. v. Tran*, 179 Cal. App. 4th 949, 960 (2009). The purpose of the compulsory cross-complaint statute is to prevent piecemeal litigation. *Id.* at 959; *Cheiker*, 820 F.2d at 337. However, "preclusion provisions like the compulsory cross-complaint statute should be read narrowly." *Maldonado v. Harris*, 370 F.3d 945, 952 n.4 (9th Cir. 2004) (citing *Datta v. Staab*, 171 Cal. App. 2d 613, 619 (1959) and *Carroll v. Import Motors, Inc.*, 33 Cal. App. 4th 1429 (1995)).

Defendant argues that the claims in the Complaint are forfeited as they were not brought in the State Action. Mot. at 26. Plaintiff responds that it did not have the information needed to bring the current claims at the time of filing its answer. Opp'n at 13-14. Here, Plaintiff's claims involve the same business relationship with Defendant and the same Operating Agreement as do both parties' claims in the State Action. In this respect, the situation here is analogous to that in *Align Tech*, where the initial claims concerned breaches of an employee's obligations, and the cross-claims concerned breaches of the employer's reciprocal obligations. *See Align Tech*, 179 Cal. App. 4th at 962. The California court held that the cross-claims were compulsory as they "arose out of the employment relationship between the parties," even though "the substantive breaches of duty and contract alleged" differ from those asserted in the earlier suit. *Id.*

However, Defendant's claims in the State Action stemmed from breaches of a purchase order for sriracha sauce, not from breach of the Operating Agreement or Non-Disclosure Agreement relating to barbecue sauce. Opp'n at 16-17. Notably, Defendant did not always view the claims as related; Defendant's opposition to Plaintiff's motion to amend in the State Action argued that the claims were "based on an entirely new set of facts completely unrelated to the original Cross-Complaint." *Id.* at 18 (quoting Defendant's Opposition to Plaintiff's Motion for Leave to Amend Cross-Complaint at 14 (Dkt. 14-8)). As the Ninth Circuit has explained, "statements of fact contained in a brief *may* be considered admissions of the party in the discretion of the district court." *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988). Since "preclusion provisions like the compulsory cross-complaint statute should be read narrowly," the Court finds that these claims are not sufficiently related to be barred. *Maldonado v. Harris*, 370 F.3d 945, 952 n.4 (9th Cir. 2004).

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Moreover, with respect to timing, all of Plaintiff's current claims relate to Defendant's communications and negotiations with Trader Joe's in 2017, before the filing of the State Action. However, Plaintiff alleges that it did not discover the facts underlying the current claims until it received email discovery on July 19, 2019. Opp'n at 21-22; Compl. ¶ 24. Although Plaintiff raised this argument in its Opposition, Defendant does not address it in its Reply. The statute makes claims compulsory if the defendant "has" them "at the time of serving his answer to the complaint." While Plaintiff "had" this cause of action at the time of the answer, in that the conduct complained of had occurred before that point, Plaintiff did not learn about it until receiving information in discovery two years later. It would be overly harsh, and against the policy favoring decision on the merits, to forfeit Plaintiff's claims simply because it did not know about secret negotiations between third parties at the time its answer was due, before the majority of discovery had taken place. As such, the Court DENIES Defendant's Motion as to the compulsory cross-complaint rule.

B. Claim preclusion

Federal courts must give state court decisions preclusive effect as per the preclusion rules of that state. *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 84 (1984). While federal courts use a "transactional nucleus of facts" test, "California courts employ the 'primary rights' theory to determine what constitutes the same cause of action for claim preclusion purposes." *Brodheim v. Cry*, 584 F.3d 1262, 1268 (9th Cir. 2009) (quoting *Maldonado v. Harris*, 370 F.3d 945, 952 (9th Cir. 2004)). "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174 (1983). "The bar applies if the cause of action could have been brought, whether or not it was actually asserted or decided in the first lawsuit." *Ivanoff v. Bank of Am., N.A.*, 9 Cal. App. 5th 719, 727 (2017). "However, under California law, not all claims that may have been brought in an earlier case are barred in a later action; rather only those that derive from the same primary right are precluded." *Brodheim*, 584 F.3d at1268 n.2 (citing *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal.4th 623, 641 (2007)).

Plaintiff argues that since it appealed the state court's judgment on November 8, 2021, there is no final judgment such that claim preclusion could apply. Pl.'s Supp.

Briefing at 2-3. Under California law, a judgment is not final for purposes of claim preclusion during the pendency of an appeal. *Eichman*, 759 F.2d at 1439 (citing *Agarwal v. Johnson,* 25 Cal. 3d 932, 954 n.11 (1979)). As such, claim preclusion cannot bar this case from proceeding during the pendency of the appeal.

C. Issue preclusion

Issue preclusion "prohibits the relitigation of issues argued and decided in a previous case even if the second suit raises different causes of action." *Ivanoff*, 9 Cal. App. 5th at 727. Defendant claims that "while it is impossible to set forth herein all possible issues that issues that are estopped, a few that come to mind are: interpretation of the Operating Agreement, including the attorney fee clause; the history and relationship of the parties; and the termination of the Operating Agreement." Mot. at 13. Plaintiff responds that Defendant "has not identified any finding the state court made on any issue related to the merits of this case." Pl.'s Supp. Briefing at 10.

While Defendant has the burden of proof on this affirmative defense, *see Schaffer v. Weast*, 546 U.S. 49 (2005), the Court notes that the State Action concerned the barbecue sauce only to the extent that it analyzed and decided various royalty deductions, which are not at issue here. *See* State Action Statement of Decision at 8-9. As such, issue preclusion does not apply to the issues in this suit.

D. Limitation of liability clauses

Finally, Defendant argues that the Operating Agreement's Limitation on Liability section bars Plaintiff's Complaint in its entirety. Mot. at 14. That provision states that "in no event will either party be liable for any loss of profits, loss of business, interruption of business, or for any indirect, special, incidental or consequential damages of any kind." Operating Agreement § 13 (Dkt. 1-2). Effectively, the provision appears to allow the parties to seek only direct damages or injunctive relief. Plaintiff's Complaint seeks only past and future lost profits, Compl. ¶¶ 25, 37, 44, 52, 57, attorneys' fees and costs, and punitive damages.

Plaintiff contests the validity of the provision by arguing that parties cannot limit by contract damages for future intentional or grossly negligent conduct. Opp'n at 28 (citing CAL. CIV. CODE § 1668). Defendant correctly notes that Section 1668 merely acts to prevent contracts that completely exempt parties from liability, not simply limit

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damages. Reply at 4-5. Plaintiff responds that allowing this limitation would essentially bar it a remedy on the reverse-engineering prohibition provision and the implied covenant of good faith and fair dealing. Opp'n at 28-29.

Section 1668 has "been applied to invalidate provisions that merely limit liability." *Health Net of California, Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224, 239 (2003) (collecting cases). For example, in *Klein*, the court voided a provision limiting liability to a refund of purchase price where a manufacturer had fraudulently misrepresented 'rogue' mixed seed as pedigreed. *Id.* at 240 (citing *Klein v. Asgrow Seed Co.*, 246 Cal. App. 2d 87, 99 (1966)). And in *Health Net*, the court voided a provision limiting recovery to prospective relief because it "did not compensate [plaintiff] for any lost revenue" and therefore "exempts [defendant] completely from responsibility for completed wrongs." *Id.* at 240-41.

Here, no meaningful injunctive relief is available to Plaintiff, as Defendant stopped making the allegedly reverse-engineered sauce recipe after it failed to meet Trader Joe's expectations. *See* Compl. ¶ 23. The Court will not attempt to hypothesize what direct damages may be available to compensate Plaintiff for its alleged injuries. As such, the Court GRANTS Defendant's Motion based on the limitation on liability provision and DISMISSES Plaintiff's Complaint. Plaintiff is given leave to amend its Complaint to seek remedies permitted under the Operating Agreement and/or to plead why the available remedies are unavailable or so deficient as to effectively exempt Defendant from liability.

IV. Disposition

For the reasons set forth above, the Court GRANTS Defendant's Motion to Dismiss and DISMISSES Plaintiff's Complaint with leave to amend.

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11 Initials of Deputy Clerk: kdu

CIVIL-GEN

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation, Defendant.	Case No. 8:21−cv−01060−DOC−ADS **PLAINTIFF'S SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF [F.R.C.P. 12(b)(6)]** Courtroom: 9 D Judge: Hon. David O. Carter Date: September 27, 2021 Time: 8:30 a.m. Complaint Filed: June 16, 2021

Plaintiff New England Country Foods, LLC (hereinafter "NECF"), hereby submits its supplemental opposition to Defendant Vanlaw Food Products, Inc. (hereinafter "Vanlaw")'s motion to dismiss the complaint, as follows:

I. SUPPLEMENTAL INTRODUCTION

Vanlaw has failed to disclose a material fact to this Court, and this failure to disclose renders its affirmative representations to this Court misleading. Namely, on November 8, 2021, Vanlaw appealed the September 9, 2021 state-court judgment that is the basis of its res judicata and issue preclusion affirmative defenses. (Ex. C.) Thus, Vanlaw committed deceit upon this Court, and its motion denied and default entered accordingly. This is not the only instance of deceit as discussed, below, in section II(C). Alternatively, the res judicata affirmative defense is premature, and issue preclusion (which Vanlaw only speculates may apply) is likely premature.

II. SUPPLEMENTAL ARGUMENT

A. Res Judicata (a/k/a Claim Preclusion) Does Not Bar This Action

Federal courts look to California law when considering the preclusive effect of a California state-court judgment. *Brodheim v. Cry*, 584 F.3d 1262, 1268 (9th Cir. 2009). Federal and California res-judicata law are not the same. *Id.*; *Guerrero v. Department of Corrections & Rehabilitation*, 28 Cal. App. 5th 1091, 1099 (Cal. Ct. App. 2018).

> Under California law, res judicata bars claims in a subsequent proceeding if: (1) [a] claim or issue raised in the present action is **identical** to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.

People v. Barragan, 32 Cal. 4th 236, 253 (Cal. 2004) (citation omitted) (emphasis added). To determine whether a claim is "identical," California's res judicata doctrine rests on the "primary right theory," which posits that "a cause of action is comprised of (1) a 'primary right' of the plaintiff; (2) a primary duty of the defendant; and (3) a wrongful act by the defendant constituting a breach of that duty." *See Franceschi v. Franchise Tax Bd.*, 1 Cal. App. 5th 247, 257-58 (Cal. Ct. App. 2016) (cleaned up).

1. The Burden of Persuasion is on Vanlaw

"Res Judicata" is expressly enumerated in Rule 8(c) as an "Affirmative Defense." *See, also, Taylor v. Sturgell*, 553 U.S. 880, 907 (2008). Thus, Vanlaw has the burden of persuasion. *See* (Opp'n 13:9-12 [Dkt. 18].)

2. All Doubts Must Be Resolved in Favor of NECF

The Ninth Circuit has held that California's preclusion provisions should be read narrowly to avoid a forfeiture:

[P]reclusion provisions … should be read narrowly.

Maldonado v. Harris, 370 F.3d 945, n. 4 (9th Cir. 2004) (emphasis added) (citations at Opp'n 14:24-28 [Dkt. 18].) Res judicata is certainly a preclusion provision: it's also known as claim **preclusion**. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, n. 1 (1984).

Forfeiture of claims is the functional equivalent of forfeiture of money, which is thus penal in nature. As such, res judicata should be governed by the Rule of Lenity, and all doubts must be resolved in favor of NECF. *See* (Opp'n 15:4-9 [Dkt. 18].)

Finally, "Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some **obvious** bar to securing relief on the face of the complaint." *See* (Opp'n 16:5-6 [Dkt. 18].) Thus, any doubts about the application of the incredibly vague and ambiguous res judicata doctrine, and which requires **"identical"** claims, must be resolved in favor of NECF.

3. There Is No Final Judgment

A final judgment is required to invoke res judicata. *Barragan*, 32 Cal. 4th at 253; *Sandoval v. Superior Court*, 140 Cal. App. 3d 933, n. 1 (Cal. Ct. App. 1983). A California judgement is not final until the deadline to appeal has passed, or the appeal is finally determined. *Id.*; Cal. Code Civ. Proc § 1049.

4. Case Law Establishes That the State and Federal Actions Seek Redress of Different Primary Rights

Title Guarantee Trust Co. v. Monson, 11 Cal. 2d 621 (Cal. 1938) ("*TGT*") is a California Supreme Court case. Although it is older, it was cited, with approval, by *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888 (Cal. 2002). In *TGT*, the Steins executed 140 promissory notes in favor of American Mortgage Company ("AMC"), secured by deeds of trust (with assignment of rents) on real property. *TGT*, 11 Cal. 2d at 624. The Steins transferred the real property to the Monsons, and then there was default on the debt. *Id.* AMC sued the Monsons to foreclose (no damages were sought) and obtained a judgment. *Id.* After AMC obtained possession from said judgment, they filed a new lawsuit against the Monsons for damages: the failure to tender rents pursuant to the deed of trust. *Id.* at 624-25. In denying the Monson's res judicata argument, the Court noted:

> [I]n the [first] action for specific performance an issue of damages on account of rents of the property that either theretofore or thereafter had been, or which might be collected by the defendants, might have been raised in such action--**nevertheless it was not a necessary or indispensable issue therein. To the contrary, it was incidental only to the main issue in the action, and may be considered as constituting a separate and distinct cause of action.**
>
> *Id.* at 633 (emphasis added.)

The instant case is stronger than *TGT* because the state-court action between Vanlaw and NECF is far more distinct from the Complaint [Dkt. 1] than the two actions in *TGT*. Namely, the two actions in *TGT* are essentially different remedies from the same exact breach (failing to pay the underlying promissory notes.) Here, there are different wrongful acts giving rise to different harms.

In *Sawyer v. First City Financial Corp.*, 124 Cal. App.3d 390 (Cal. Ct. App. 1981), the Sawyers sold real property in exchange for a promissory note and cash. *Id.* at 395. In the first action, the Sawyers filed suit against several defendants for a deficiency judgment, *inter alia*, on various contractual theories after the borrower defaulted on their promissory note and the foreclosure sale price was insufficient to pay the Sawyers back. *Id.* at 396-97. One month before the first action was tried,

the Sawyers filed a second action alleged fraud in relation to the promissory note against the defendants in the first action and others. *Id.* at 397. The Sawyers attempted to consolidate the actions, but their request was denied because it was too close to trial. *Id.* at 397-98. The Court went into great detail about the res judicata doctrine. *Id.* at 399-403. The Court noted:

> One would assume that the question of litigation of claims arising from one transaction first on the basis of contract, and then on alleged tort theories, would have received substantial appellate attention. The authorities, however, are surprisingly sparce.
>
> *Id.* at 400-01.

Ultimate, the *Sawyer* Court found that the two actions were not the same cause of action, thus res judicata was not applicable:

> Surely one's breach of contract by failing to pay a note violates a "primary right" which is separate from the "primary right" not to have the note stolen. That the two causes of action might have been joined in one lawsuit under our permissive joinder provisions (see 3 Witkin, supra, at p. 1915) does not prevent the plaintiff from bringing them in separate suits if he elects to do so. While the monetary loss may be measurable by the same promissory note amount, and hence in a general sense the same "harm" has been done in both cases, theoretically the plaintiffs have been "harmed" differently by tortious conduct destroying the value of the note, than by the contractual breach of simply failing to pay it.
>
> *Id.* at 402-03.

Here, there are many similarities to *Sawyer*, like the denied attempt to consolidate (e.g. the motion for leave), and that the obligation to pay what is owed under an agreement is not the same as the right to be free from intentional interference with contractual relations. But this case is even stronger than *Sawyer* because here there is an entirely different harm between the two actions. The harm in the state-court cross-complaint were the unpaid past royalties. The harm in the federal court action is the future value of the Trader Joe's business.

Three other cases the Court may wish to review, but which are more

factually distinct from the instant facts than the cases above are:

Branson v. Sun-Diamond Growers, 24 Cal.App.4th 327 (Cal. Ct. App. 1994) (indemnity from the same damages from two different sources: statute and contract, are two different causes of action); and

Site Mgmt. Servs., Inc. v. Cingular Wireless LLC, No. D057106, 2014 WL 971714 (Cal. Ct. App. Mar. 13 2014) (Not Certified for Publication) (breach of the same contract multiple times results in a different causes of action for each breach (citing *Lilienthal Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854 (Cal. Ct. App. 1993).); and

Nakash v. Superior Court, 196 Cal. App. 3d 59 (Cal. Ct. App. 1987) applied the federal rule of res judicata, and thus is generally inapplicable. *Id.* at 62, 68. However, it noted that even if the general background facts were in common, even the harsher federal res judicata test would not apply if the specific facts were substantially different:

> The trial court correctly determined that in the case at bench while some of the *general* circumstances of the successive suits were the same, the specific, pertinent transactional nucleus of facts was not; the second suit would require the production of substantially different proof.

Id. at 70 (italics in original).

5. The Judicial Admission Doctrine Applies

NECF incorporates by reference this argument from its opposition [Dkt. 18] on page 17, line 10 through page 18, line 23. Further, the failure to check the referenced boxes are judicial admissions that res judicata does not apply.

6. None of The Authorities Cited by Vanlaw Are Relevant

Hi-Desert Medical Center v. Douglas (2015) 239 Cal.App.4th 717 is misleadingly quoted. Vanlaw quoted the Court of Appeal quoting the trial court on page 728. *Id.* It does not appear the Court of Appeal adopted the trial court's statement on that issue. For example, in the Court of Appeal's recitation of facts,

they make no mention of the attempt to seek leave in *Mission I*. *Id.* at 721-22. Further, the Court of Appeal criticized the appellants for making no attempt to seek leave to amend:

> They do not explain why they did not at least attempt to amend their original writ petition to include a claim for disgorgement if that is what they believed they needed to do.

Id. at n. 14.

This criticism by the Court of Appeal of the appellants in note 14, above, appears to contradict the cursory quote of the trial court that Dignity sought leave in *Mission I*, which Vanlaw appears to assert as a fact material to the Court's decision in *Hi-Desert Medical Center*. Since the Court of Appeal did not discuss this issue, nor is there a sufficient factual background to determine anything about the alleged "attempt" to seek leave, this Court simply cannot rely on the trial court's unsupported statement which wasn't even discussed by the Court of Appeal. Unanswered questions include: Was the alleged "attempt" to seek leave a written motion? Was it opposed? What did the opposition say? Why was it denied? What legal doctrines did Dignity argue prevented the Court from applying res judicata?

As to the issue of primary rights, the appellants conceded it was the same primary rights. *Id.* at 728 ("This admission is fatal.") (quoting the trial court). As such, this case does not assist the Court in determining the primary-rights issue here.

International Union of Operating Engineers-Employers Construction Industry Pension, Welfare and Training Trust Funds v. Karr, 994 F.2d 1426 (9th Cir. 1993) ("*IU Trusts*") is wholly inapplicable here. *IU Trusts* is about the res judicata effect of two federal judgments, not California judgments. *Id.* at 1429. As discussed in the preamble to this subsection A, the standard for federal judgments is different. As such, any discussion about the res judicata effect of federal judgments, like the discussion in *IU Trusts*, is inapplicable here.

Thibodeau v. Crum, 4 Cal.App.4th 749 (Cal. Ct. App. 1992) is clearly

distinguishable on two independent grounds. First and foremost, it does not appear the Court applied the "primary rights" doctrine. *Id.* This appears to be because the underlying "judgment" giving rise to res judicata was actually an unconfirmed arbitration award. *Id.* at 758-59. Thus, the arbitration rules of res judicata would arguably apply in *Thibodeau* just as the state court's rules apply here:

> [A]rbitrating parties are obliged, in the manner of *Sutphin*, to place before their arbitrator all matters within the scope of the arbitration, related to the subject matter, and relevant to the issues … [t]he arbitration, mandated by the Thibodeau/Eller construction agreement, was intended to settle all existing claims between the Thibodeaus and their general contractor and subcontractors regarding the Thibodeau project.
>
> *Id.* at 755, 758.

Second are the underlying facts. The plaintiff in *Thibodeau* argued, and the arbitrator discussed (including in his award) the issue raised in the second litigation. Rather than inserting a large block quote, NECF directs the Court to the paragraphs beginning with, "Judy Thibodeau testified at trial that radiating cracks" on page 755 and ending with, "Nor does it exempt them from application of the doctrine of res judicata" on page 756 of the *Thibodeau* opinion. These paragraphs evidence that the Court of Appeal believed the second action was arbitrated in the first "action":

> The driveway was, in fact, within the scope of the arbitration; it is mentioned several times in the arbitration award. We can conceive of no logical reason why the arbitration should encompass the chunks but not the cracks.
>
> *See, e.g. id.* at 756.

Here, as the Court can see from the Statement of Decision [Dkt. 20-2], there was no discussion of the interference that is the basis of the instant complaint [Dkt. 1]. Rather, what was discussed was royalty underpayments, plain and simple. [Dkt. 20-2].

7. Plaintiff Discovered the Wrongful Acts That Are the Subject of This Complaint After Filing Its Cross-Complaint

Delayed discovery is an exception to preclusion from res judicata. *See* (Opp'n 27:11-14 [Dkt. 18].) *See, also*, *Thibodeau*, 4 Cal. App. 4th at 757 (citing *Neil Norman, Ltd. v. William Kasper & Co.*, 149 Cal. App. 3d 942 (Cal. Ct. App. 1983).)

Here, the state-court cross complaint was filed February 19, 2019. [Dkt. 14-4]. And the Complaint [Dkt. 1 ¶ 24] pleads:

> Plaintiff did not discover Defendant's wrongful actions, above, until after it received the e-mails in Exhibit C shortly after July 19, 2019.

8. The Doctrine of Judicial Estoppel, Waiver, Unclean Hands, Issue Preclusion, and Invited Error Bars This Affirmative Defense

As to judicial estoppel, waiver, and unclean hands, NECF incorporates by reference its arguments from its opposition [Dkt. 18] on page 22, line 8 through page 24, line 15.

For the reasons set forth in the opposition on page 24, line 19 to page 25, line 3, the Court can and should find the order denying the motion for leave to amend the cross-complaint [Dkt. 14-10] is sufficiently final that it is fair to invoke issue preclusion against Vanlaw in this context.

If the original cross-complaint [Dkt. 14-4], and the proposed amendments [Dkt. 14-7] were truly the same "cause of action," as tacitly argued by Vanlaw now in their motion to dismiss, leave to amend would have been required to be granted by the trial court. *See* Cal. Code. Civ. Proc. §§ 469, 470; *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 296 (Cal. 1985); *Morgan v. Superior Court*, 172 Cal. App. 2d 527, 530 (Cal. Ct. App. 1959); *Landis v. Superior Court*, 232 Cal. App. 2d 548, 557 (Cal. Ct. App. 1965).

As such, the Court found (at Vanlaw's request) that the claims in the federal complaint [Dkt. 1] are not the same "cause of action" as the cross-complaint [Dkt. 14-4] within the meaning or res judicata, and Vanlaw should be precluded from disputing that in its motion to dismiss.

As to invited error, NECF incorporates by reference this argument from its opposition [Dkt. 18] on page 25, lines 16 through 25.

9. Plaintiff Was Prevented from Filing This Complaint in the Earlier Action

In *Guerrero*, the Court found that there is a jurisdictional exception to res judicata in both federal and state res judicata law. *See Guerrero*, 28 Cal. App. 5th at 1103-04. *Guerrero* should be interpreted broadly to stand for the proposition that if a party is prevented from bringing certain claims by the first court, res judicata does not apply under California law. This interpretation is consistent with page 1107 of the *Guerrero* opinion:

> If there was a tactical choice on this record, it was exercised by the [party seeking to invoke res judicata] - to waive Eleventh Amendment immunity, or to face claims for damages in a separate action … .

See, also, Branson v. Sun-Diamond Growers, 24 Cal. App. 4th 327, 344 (Cal. Ct. App. 1994).

Similarly, here, NECF could not assert the claims in the Complaint filed in this action because the state court wouldn't allow it. (Order [Dkt. 14-10].) And this ability was prevented, tactically, by Vanlaw when it opposed NECF's motion for leave to amend the cross-complaint.

10. Forcing NECF To Appeal Is Inequitable and Serves No Purpose

NECF incorporates by reference this argument from its opposition [Dkt. 18] on page 26, lines 10 through 20.

B. Collateral Estoppel (a/k/a Issue Preclusion) Does Not Bar This Action

Vanlaw has not identified any finding the state court has made on any issue related to the merits of this case, period. Let alone one that that would warrant granting this motion in whole or in part.

C. The Court Should Enter Vanlaw's Default

A person unlawfully conceals a fact when they, "make[] representations but

do[] not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead." *Warner Constr. Corp. v. L.A.*, 2 Cal. 3d 285, 294 (Cal. 1970). The burden of disclosure to the Court appears even higher for litigants. *See, e.g.,* Cal. R. Prof. Conduct, Rule 3.3. And like intentional misrepresentation, concealment is a species of deceit. Cal. Civ. Code § 1710(3).

Further, it should be noted this is not an isolated instance. It is deceitful to argue opposite positions with two different courts as Vanlaw has done in state court and this Court regarding the similarity of NECF's various claims to each other. *See* (Opp'n 17:10-18:23 [Dkt. 18].)

The Court has the inherent authority to enter Vanlaw's default as a sanction for deceit upon the Court. Namely, a district court "'can sanction a party … in response to abusive litigation practices.'" *Pringle v. Adams*, No. SACV 10-1656-JST RZX, 2012 WL 1103939, at *7 (C.D. Cal. Mar. 30, 2012) (quoting *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006)). Entry of a default judgment is permitted when the disobedient party has "willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). It is well settled that the entry of default judgment is warranted when "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings." *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995); *see also Phoeceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982) ("It is firmly established that the courts have inherent power to dismiss an action or enter a default judgment to ensure the orderly administration of justice and the integrity of their orders.").

Further, after issuing an order to show cause, Rule 11(c)(3) serves as an additional independent basis to enter Vanlaw's default. Fed. R. Civ. P. 11(c)(3).

DATED: November 19, 2021 By: /s/ Michael K. Hagemann

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation,

Defendant.

Case No. 8:21−cv−01060−DOC−ADS

SUPPLEMENTAL DECLARATION OF MICHAEL K. HAGEMANN

Courtroom: 9 D
Judge: Hon. David O. Carter
Date: September 27, 2021
Time: 8:30 a.m.

Complaint Filed: June 16, 2021

SUPPLEMENTAL DECLARATION OF MICHAEL K. HAGEMANN

I, Michael K. Hagemann, declare:

4. I am an attorney licensed to practice law in the State of California and am attorney of record for Plaintiff New England Country Foods, LLC in the above-entitled action. I have personal knowledge of the facts stated herein. If called and sworn as a witness, I could testify competently to the following:

5. Exhibit C, filed concurrently, is a true and correct copy of a document I obtained from https://ocjustice.occourts.org/civilwebShoppingNS/Login.do [ROA # 324] on November 15, 2021 around 12:33 pm. I also received an unconformed copy of Exhibit C on November 8, 2021 by e-mail from Krista L. DiMercurio at 3:18 pm.

6. Exhibit D, filed concurrently, is a true and correct copy of a document I obtained from https://ocjustice.occourts.org/civilwebShoppingNS/Login.do [ROA # 326] on November 15, 2021 around 12:33 pm. I also received a copy on Exhibit D in the mail on November 17, 2021.

7. Exhibit E, filed concurrently, is a true and correct copy of a document I obtained from https://ocjustice.occourts.org/civilwebShoppingNS/Login.do [ROA # 330] on November 19, 2021 around 9:28 am. I also received an unconformed copy of Exhibit E on November 18, 2021 by e-mail from OneLegal at 9:39 pm.

Executed November 19, 2021 at Irvine, California.

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

By: /s/ Michael K. Hagemann
Michael K. Hagemann

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation, Defendant.	Case No. 8:21−cv−01060−DOC−ADS **PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF [F.R.C.P. 12(b)(6)]** Courtroom: 9 D Judge: Hon. David O. Carter Date: September 27, 2021 Time: 8:30 a.m. Complaint Filed: June 16, 2021

Plaintiff New England Country Foods, LLC (hereinafter "NECF"), hereby requests judicial notice of the following items pursuant to the Rule 201 of the Federal Rules of Evidence:

REQUESTS FOR JUDICIAL NOTICE

1) That Exhibit C, filed concurrently, is a true and correct copy of the Notice of Appeal served and then filed by Defendant Vanlaw Food Products, Inc. ("Vanlaw") in the Superior Court of California, County of Orange, Case No. 30-2017-00962844-CU-BC-CJC (the "State-Court Action") on November 8, 2021, which can be verified by the Court at: https://ocjustice.occourts.org/civilwebShoppingNS/Login.do [ROA # 324] (Hagemann Decl. ¶ 5.)

2) That Exhibit D, filed concurrently, is a true and correct copy of the Notification of Filing Notice of Appeal served and then filed by the clerk on November 9, 2021 in the State-Court Action, which can be verified by the Court at: https://ocjustice.occourts.org/civilwebShoppingNS/Login.do [ROA # 326] (Hagemann Decl. ¶ 6.)

3) That Exhibit E, filed concurrently, is a true and correct copy of the Appellant's Notice Designating Record on Appeal (Unlimited Civil Case) served and then filed by Vanlaw in the State-Court Action on November 18, 2021, which can be verified by the Court at: https://ocjustice.occourts.org/civilwebShoppingNS/Login.do [ROA # 330] (Hagemann Decl. ¶ 7.)

4) That Vanlaw appealed the September 9, 2021 State-Court Action

judgment [Dkt. 20-3] on November 8, 2021, which was 60 days after the September 9, 2021 judgment [Dkt. 20-3] was entered and served by the clerk. Cal. R. Ct. 8.104(a)(1); (RJN Nos. 1, 2.)

DATED: November 19, 2021

M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

APP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 164755; 255774 NAME: Mark D. Magarian; Krista L. DiMercurio FIRM NAME: Magarian & DiMercurio, APLC STREET ADDRESS: 20 Corporate Park, Ste. 255 CITY: Irvine STATE: CA ZIP CODE: 92606 TELEPHONE NO.: 714-415-3412 FAX NO.: 714-276-9944 E-MAIL ADDRESS: mark@magarianlaw.com; krista@magarianlaw.com ATTORNEY FOR (name): Plaintiff VanLaw Food Products Inc.	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Orange STREET ADDRESS: 700 Civic Center Drive West MAILING ADDRESS: CITY AND ZIP CODE: Santa Ana 92701 BRANCH NAME: Central Justic Center	
PLAINTIFF/PETITIONER: VanLaw Food Products Inc. DEFENDANT/RESPONDENT: New England Country Foods, LLC	
[x] NOTICE OF APPEAL [ ] CROSS-APPEAL (UNLIMITED CIVIL CASE)	CASE NUMBER: 30-2017-00962844-CU-BC-CJC

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

1. NOTICE IS HEREBY GIVEN that (name): VanLaw Food Products Inc.
   appeals from the following judgment or order in this case, which was entered on *(date)*: September 9, 2021
   - [ ] Judgment after jury trial
   - [x] Judgment after court trial
   - [ ] Default judgment
   - [ ] Judgment after an order granting a summary judgment motion
   - [ ] Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
   - [ ] Judgment of dismissal after an order sustaining a demurrer
   - [ ] An order after judgment under Code of Civil Procedure, § 904.1(a)(2)
   - [ ] An order or judgment under Code of Civil Procedure, § 904.1(a)(3)–(13)
   - [ ] Other *(describe and specify code section that authorizes this appeal):*

2. For cross-appeals only:
   a. Date notice of appeal was filed in original appeal:
   b. Date superior court clerk mailed notice of original appeal:
   c. Court of Appeal case number *(if known)*:

Date: November 8, 2021

Mark D. Magarian
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-002 [Rev. January 1, 2017]

NOTICE OF APPEAL/CROSS-APPEAL (UNLIMITED CIVIL CASE)
(Appellate)

Cal. Rules of Court, rule 8.100
www.courts.ca.gov

For your protection and privacy, please press the Clear This Form button after you have printed the form. Print this form Save this form Clear this form

APP-009E

PROOF OF ELECTRONIC SERVICE (Court of Appeal)	
Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.	
Case Name: VanLaw Food Products, Inc. v. New England Country Foods, LLC Court of Appeal Case Number: Superior Court Case Number: 30-2017-00962844-CU-BC-CJC	

1. At the time of service I was at least 18 years of age.
2. a. My [ ] residence [x] business address is *(specify)*:
   20 Corporate Park, Suite 255, Irvine, CA 92606

   b. My electronic service address is *(specify)*: krista@magarianlaw.com
3. I electronically served the following documents *(exact titles)*:
   Notice of Appeal/Cross-Appeal (Unlimited Civil Case) (Appellate)
4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: Michael Hagemann
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   New England Country Foods, LLC

   b. Electronic service address of person served: mhagemann@mkhlaw.com
   c. On *(date)*: November 8, 2021

   [ ] The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

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

Date: November 8, 2021

Krista L. DiMercurio
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

PROOF OF ELECTRONIC SERVICE
(Court of Appeal)

www.courts.ca.gov

For your protection and privacy, please press the Clear This Form button after you have printed the form. Print this form Save this form Clear this form

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Central Justice Center 700 Civic Center Drive West Santa Ana, CA 92701	
APPELLANT: VanLaw Food Products, Inc. RESPONDENT: New England Country Foods, LLC	
SUPERIOR COURT CASE TITLE: VanLaw Food Products, Inc. vs. New England Country Foods, LLC	CASE NUMBER: 30-2017-00962844
Judicial Officer: Robert J. Moss / Judgment/Order Date: 09/09/2021	
NOTIFICATION OF FILING NOTICE OF APPEAL	

You are notified that on 11/8/2021 a notice of appeal was filed in the above entitled action.

CLERK'S CERTIFICATE OF MAILING

Appellant(s)Plaintiff	**Attorney for Appellant(s)**
VanLaw Food Products, Inc.	Mark D. Magarian (SBN 164755) Krista L. DiMercurio (SBN 255774) Magarian & DiMercurio, APLC 20 Corporate Park, Ste. 255 Irvine, CA 92606 714-415-3412 mark@magarianlaw.com krista@magarianlaw.com
Respondent(s)Defendant	**Attorney for Respondent(s)**
New England Country Foods, LLC	Michael K. Hagemann (SBN 264570) M.K. Hagemann, P.C. 1801 Century Park East Suite 2400 Century City, CA 90067 310-773-4900 mhagemann@mkhlaw.com

A copy of this notice was sent via interoffice delivery to the Court of Appeal:

4th District Court of Appeal, Division 3
601 W. Santa Ana Blvd.
Santa Ana, California 92701

I certify that I am not a party to this action and that this notice was mailed in accordance with Section 1013a of the Code of Civil Procedure. A copy of this Notification of Filing Notice of Appeal was deposited in the United States mail, in a sealed envelope with postage fully prepaid addressed as shown above. The mailing and this certification occurred at *(place)* Santa Ana, California, on *(date)* 11/09/2021.

DAVID H. YAMASAKI, Clerk of the Court

By: _____
E. Partida, Deputy Clerk

APP-003

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: Krista DiMercurio FIRM NAME: MAGARIAN & DIMERCURIO, APLC STREET ADDRESS: 20 Corporate Park, Suite 255 CITY: Irvine STATE: CA ZIP CODE: 92606 TELEPHONE NO.: 714-415-3412 FAX NO.: 714-276-9944 E-MAIL ADDRESS: krista@magarianlaw.com ATTORNEY FOR (*name*): Plaintiff/Cross-Defendant VanLaw Food Products, Inc. STATE BAR NUMBER: 255774	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE STREET ADDRESS: 700 Civic Center Drive West MAILING ADDRESS: CITY AND ZIP CODE: Santa Ana 92701 BRANCH NAME: Central Justice Center	
PLAINTIFF/PETITIONER: VanLaw Food Products, Inc. DEFENDANT/RESPONDENT: New England Country Foods OTHER PARENT/PARTY:	
APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	SUPERIOR COURT CASE NUMBER: 30-2017-00962844
RE: Appeal filed on *(date)*: November 8, 2021	COURT OF APPEAL CASE NUMBER *(if known)*:
Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.	

1. **RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT**

I choose to use the following method of providing the Court of Appeal with a record of the documents filed in the superior court *(check a, b, c, or d, and fill in any required information)*:

a. [✖] A clerk's transcript under rule 8.122. *(You must check (1) or (2) and fill out the clerk's transcript section (item 4) on pages 2 and 3 of this form.)*

(1) [✖] I will pay the superior court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.

(2) [ ] I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record *(check (a) or (b))*:

(a) [ ] An order granting a waiver of court fees and costs under rules 3.50–3.58; or

(b) [ ] An application for a waiver of court fees and costs under rules 3.50–3.58. *(Use Request to Waive Court Fees (form FW-001) to prepare and file this application.)*

b. [ ] An appendix under rule 8.124.

c. [ ] The original superior court file under rule 8.128. (NOTE: *Local rules in the Court of Appeal, First, Third, and Fourth Appellate Districts, permit parties to stipulate (agree) to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.*)

d. [ ] An agreed statement under rule 8.134. *(You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)*

2. **RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT**

I choose to proceed *(you must check a or b below)*:

a. [ ] WITHOUT a record of the oral proceedings (what was said at the hearing or trial) in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in deciding whether an error was made in the superior court proceedings.

APP-003

CASE NAME: VanLaw Food Products v. New England Country Foods	SUPERIOR COURT CASE NUMBER:

2. b. [x] WITH the following record of the oral proceedings in the superior court *(you must check (1), (2), or (3) below)*:

(1) [x] A reporter's transcript under rule 8.130. *(You must fill out the reporter's transcript section (item 5) on pages 3 and 4 of this form.)* I have *(check all that apply)*:

(a) [x] Deposited with the superior court clerk the approximate cost of preparing the transcript by including the deposit with this notice as provided in rule 8.130(b)(1).

(b) [ ] Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).

(c) [ ] Attached the reporter's written waiver of a deposit under rule 8.130(b)(3)(A) for *(check either (i) or (ii))*:

(i) [ ] all of the designated proceedings.

(ii) [ ] part of the designated proceedings.

(d) [ ] Attached a certified transcript under rule 8.130(b)(3)(C).

(2) [ ] An agreed statement. *(Check and complete either (a) or (b) below.)*

(a) [ ] I have attached an agreed statement to this notice.

(b) [ ] All the parties have stipulated (agreed) in writing to try to agree on a statement. *(You must attach a copy of this stipulation to this notice.)* I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.

(3) [ ] A settled statement under rule 8.137. *(You must check (a), (b), or (c) below, and fill out the settled statement section (item 6) on page 4.)*

(a) [ ] The oral proceedings in the superior court were not reported by a court reporter.

(b) [ ] The oral proceedings in the superior court were reported by a court reporter, but I have an order waiving fees and costs.

(c) [ ] I am asking to use a settled statement for reasons other than those listed in (a) or (b). *(You must serve and file the motion required under rule 8.137(b) at the same time that you file this form. You may use form APP-025 to prepare the motion.)*

3. **RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE COURT OF APPEAL**

[ ] I request that the clerk transmit to the Court of Appeal under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court *(give the title and date or dates of the administrative proceeding)*:

Title of Administrative Proceeding	Date or Dates

4. **NOTICE DESIGNATING CLERK'S TRANSCRIPT**

(You must complete this section if you checked item 1a above indicating that you choose to use a clerk's transcript as the record of the documents filed in the superior court.)

a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed, or if that is not available, the date the document was signed.

	Document Title and Description	Date of Filing
(1)	Notice of appeal	November 8, 2021
(2)	Notice designating record on appeal *(this document)*	November 18, 2021
(3)	Judgment or order appealed from	September 9, 2021
(4)	Notice of entry of judgment *(if any)*	September 10, 2021
(5)	Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order *(if any)*	
(6)	Ruling on one or more of the items listed in (5)	
(7)	Register of actions or docket *(if any)*	

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CASE NAME:	SUPERIOR COURT CASE NUMBER:

4. **NOTICE DESIGNATING CLERK'S TRANSCRIPT**

b. **Additional documents.** *(If you want any documents from the superior court proceeding in addition to the items listed in 4a. above to be included in the clerk's transcript, you must identify those documents here.)*

[✖] I request that the clerk include in the transcript the following documents that were filed in the superior court proceeding. *(You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)*

	Document Title and Description	Date of Filing
(8)	Complaint	12/21/17
(9)	Answer to Complaint	1/30/18
(10)	Motion for Leave to File Cross-Complaint	12/12/18
(11)	Declaration in Support	12/12/18

[✖] See additional pages. *(Check here if you need more space to list additional documents. List these documents on a separate page or pages labeled "Attachment 4b," and start with number (12).)*

c. **Exhibits to be included in clerk's transcript**

[✖] I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court. *(For each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the superior court clerk within 10 days after service of this notice designating the record. (Rule 8.122(a)(3).))*

	Exhibit Number	Description	Admitted (Yes/No)
(1)	232	Report	Yes
(2)	205	Civil Subpoena (Duces Tecum)	Yes
(3)	201	Mutual Non Disclosure Agreement	Yes
(4)	37	January 31, 2014 Email	Yes

[✖] See additional pages. *(Check here if you need more space to list additional exhibits. List these exhibits on a separate page or pages labeled "Attachment 4c," and start with number (5).)*

5. **NOTICE DESIGNATING REPORTER'S TRANSCRIPT**

You must complete both a and b in this section if you checked item 2b(1) above indicating that you choose to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.

a. **Format of the reporter's transcript**

I request that the reporters provide *(check one)*:

(1) [✖] My copy of the reporter's transcript in electronic format.

(2) [ ] My copy of the reporter's transcript in paper format.

(3) [ ] My copy of the reporter's transcript in electronic format and a second copy in paper format.

(Code Civ. Proc., § 271.)

APP-003

CASE NAME:	SUPERIOR COURT CASE NUMBER:

5. b. **Proceedings**

I request that the following proceedings in the superior court be included in the reporter's transcript. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)*

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1) 7/13/21	C14	Full	Court Trial	Candace Myers	☒ Yes ☐ No
(2) 7/14/21	C14	Full	Court Trial	Patrick Brezna	☒ Yes ☐ No
(3) 7/19/21	C14	Partial AM	Court Trial	Unknown	☐ Yes ☒ No
(4) 7/19/21	C14	Partial PM	Court Trial	Patrick Brezna	☐ Yes ☒ No

☐ See additional pages. *(Check here if you need more space to list additional proceedings. List these exhibits on a separate page or pages labeled "Attachment 5b," and start with number (5).)*

6. **NOTICE DESIGNATING PROCEEDINGS TO BE INCLUDED IN SETTLED STATEMENT**

(You must complete this section if you checked item 2b(3) above indicating you choose to use a settled statement.) I request that the following proceedings in the superior court be included in the settled statement. *(You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)*

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1)					☐ Yes ☐ No
(2)					☐ Yes ☐ No
(3)					☐ Yes ☐ No
(4)					☐ Yes ☐ No

☐ See additional pages. *(Check here if you need more space to list additional proceedings. List these proceedings on a separate page or pages labeled "Attachment 6," and start with number (5).)*

7. a. The proceedings designated in 5b or 6 ☒ include ☐ do not include all of the testimony in the superior court.

b. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. *(Rule 8.130(a)(2) and rule 8.137(d)(1) provide that your appeal will be limited to these points unless the Court of Appeal permits otherwise.)* Points are set forth: ☐ Below ☐ On a separate page labeled "Attachment 7."

Date: November 18, 2021

Krista L. DiMercurio
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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ATTACHMENT 4(b)

12. Minutes	2/15/19
13. Cross-Complaint	2/19/19
14. Notice of Ruling	2/19/19
15. Answer to Cross-Complaint	3/20/19
16. Motion in Limine No. 1	6/10/21
17. Minutes	6/21/21
18. Exhibit List	7/9/21
19. Trial Brief (VanLaw)	7/9/21
20. Opposition to Motion in Limine No. 1	7/9/21
21. Trial Brief (New England Country Foods)	7/9/21
22. Declaration of Michael Hagemann	7/9/21
23. Declaration of Peter Thomson	7/9/21
24. Exhibit List	7/12/21
25. Minutes	7/13/21
26. Minutes	7/14/21
27. Minutes for 7/19/21	7/22/21
28. Minutes for 7/22/21	7/22/21
29. Clerk's Certificate of Mailing	7/22/21
30. Request for Statement of Decision	7/30/21
31. Notice – Other (New England Country Foods)	8/3/21
32. Notice of Objection	8/24/21
33. Notice – Other (VanLaw Food Products)	8/24/21
34. Statement of Decision Received on 8/24/21	8/24/21
35. Statement of Decision Received on 8/24/21	8/24/21
36. Proposed Judgment	8/24/21
37. Objection (VanLaw Food Products) – 5 pages	9/2/21
38. Objection (VanLaw Food Products) – 3 pages	9/2/21
39. Statement of Decision	9/9/21
40. Judgment	9/9/21
41. Clerk's Certificate of Electronic Service – 3 pages	9/10/21
42. Clerk's Certificate of Electronic Service – 35 pages	9/10/21

ATTACHMENT 4(c)

5. 50	July 21, 2014 Email	Yes
6. 235	4/9/14 Check	Yes
7. 225	April 11, 2014 Email	Yes
8. 47	June 17, 2014 Email	Yes
9. 219	July 29, 2014 Email	Yes
10. 206	BBQ Sauce Photo	Yes
11. 207	Sriracha Sauce Photo	Yes
12. 1	Operating Agreement	Yes
13. 93	June 29, 2015 Email	Yes
14. 97	July 15, 2015 Email	Yes
15. 56	Payment Summary	Yes
16. 98	July 21, 2015 Email	Yes
17. 233	July 22, 2015 Email	Yes
18. 100	August 31, 2015 Email	Yes
19. 226	VanLaw Invoice	Yes
20. 117	May 19, 2017 Letter	Yes
21. 141	November 14, 2017 Email	Yes
22. 148	December 28, 2017 Email	Yes
23. 111	VanLaw Invoice	Yes
24. 133	July 26, 2017 Letter	Yes
25. 150	January 19, 2018 Email	Yes
26. 151	January 22, 2018 Email	Yes
27. 155	February 16, 2018 Email	Yes
28. 158	February 28, 2018 Email	Yes
29. 160	March 2, 2018 Email	Yes
30. 172	All Shipments Spreadsheet	Yes
31. 174	Photos	Yes
32. 224	January 16, 2014 Email	Yes
33. 212	July 14, 2017 Email	Yes
34. 213	January 17, 2014 Email	Yes
35. 214	Check Printout	Yes
36. 218	January 4, 2017 Letter	Yes
37. 228	August 5, 2014 Email	Yes
38. 231	June 29, 2015 Email	Yes
39. 232	Shipments Spreadsheet	Yes
40. 237	May 1, 2015 Email	Yes
41. 36	January 22, 2014 Email	Yes
42. 42	April 17, 2014 Email	Yes
43. 57	August 11, 2014 Email	Yes
44. 62	September 7, 2014 Email	Yes
45. 66	October 6, 2014 Email	Yes
46. 110	December 8, 2015 Email	Yes
47. 145	December 5, 2017 Email	Yes
48. 230	VanLaw Invoice	Yes

49. 105	October 27, 2015 Email	Yes
50. 215	Payments Detail	Yes
51. 229	Vendor Quick Report	Yes
52. 211	Purchase Orders	Yes
53. 86	April 23, 2015 Email	Yes
54. 136	September 7, 2017 Letter	Yes
55. 238	July 22, 2015 Email	Yes
56. 102	September 17, 2015 Email	Yes
57. 106	October 28, 2015 Email	Yes
58. 99	July 24, 2015 Email	Yes
59. 239	Demonstrative Spreadsheet	Yes
60. 240	Tomato Upcharge Calculations	Yes
61. 241	Orders Shipped	Yes
62. 242	Orders Placed	Yes
63. 243	Cases Owed Royalty	Yes

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 20 Corporate Park, Suite 255, Irvine, California 92606, and my electronic service address is krista@magarianlaw.com.

On November 18, 2021, I served the foregoing document described as:

APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL

on the interested parties in this action as follows:

Michael Hagemann
mhagemann@mkhlaw.com

- □ By placing true copies enclosed in a sealed envelope addressed to each addressee as stated on the attached mailing list.
- □ BY MAIL:
- □ I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing with the U.S. Postal Service. Under that practice, and in the ordinary course of business, correspondence would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at our business address in Orange County, California. Each of the above envelopes was sealed and placed for collection and mailing on that date following ordinary business practices.
- ■ BY ESERVICE. I hereby certify that the above-referenced documents were served electronically on the parties listed herein at their most recent known email address of record by submitting an electronic version of the documents.
- □ BY OVERNIGHT MAIL: FEDEX STANDARD OVERNIGHT
- □ BY PERSONAL SERVICE: I caused to be delivered such envelope(s) by hand to the office of the addressee(s).

Executed on Noveember 18, 2021, at Irvine, California.

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Krista DiMercurio — *Krista DiMercurio*

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
20 Corporate Park, Suite 255
Irvine, California 92606
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: September 27, 2021 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

Pursuant to order of this Court, dated November 9, 2021, requesting "supplemental briefing of no more than ten pages on the effect of the state courts final judgment on the issue preclusion and claim preclusion arguments in Defendants Motion to Dismiss (Dkt. 14)," Defendant hereby submits its supplemental brief in support of its motion to dismiss the complaint.

I. CLAIM PRECLUSION/RES JUDICATA

Defendant set forth the general rules on claim preclusion/res judicata, citing several leading cases, in the Motion at pp. 30-31, but of course the judgment in the State Court Action had not yet been entered. Now that judgment has been entered, there is no doubt that (in addition to the other grounds set forth in the moving papers) this action is barred by claim preclusion/res judicata. Rather than rehash the general rules, Defendant focuses this brief primarily on the two cases that are particularly on point, both of which rely upon the same general rules cited in the motion. But before turning to those cases, Defendant is compelled to point out that what NECF is trying to do (using a denial of a motion to amend to justify filing the claims in a separate lawsuit) is entirely improper. The case of *Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717 has already decided this issue:

> "The fact that [Dignity Health's] subsequent attempt to amend its pleading in the underlying *Mission I* trial court proceeding to include a request for monetary relief to address the *Mission II* decision was not successful does not entitle it to seek the same relief in a new lawsuit. ***To hold otherwise would allow an unsuccessful party to keep filing separate lawsuits until it obtains a desired outcome. [Citation.] Put another way, [Dignity Health] may not collaterally challenge the trial court's denial of its request to amend the pleading in Mission I by filing this action***." (*Id.* at 728) [Emphasis added]

Against this backdrop, Defendant now addresses the remainder of the issues:

A. *International Union of Operating Engineers-Employers Construction Industry Pension, Welfare and Training Trust Funds v. Karr* (1993, Ninth Circuit) 994 F.2d 1426 ("*Karr*")

i. Facts And Procedural Background

Karr arose out of a dispute between a Trust (the purpose of which was to provide retirement, medical and training benefits to eligible employees) and Karr (who was doing business as a construction company called AUC and was required to make contributions to the Trust and provide timely reports to the Trust).

The Trust filed three actions against Karr: the first, filed on May 29, 1986, to collect delinquent contributions from May 1, 1985 through September 30, 1985 and November 1, 1985 through May 31, 1986 and to audit AUC/Karr's records; the second, filed on March 21, 1989, to collect delinquent contributions for July through October of 1988 (claims that did not exist at the time the first action was filed), but with no request to audit records; and a third, filed on August 24, 1990, to compel an audit of Karr/AUC's records from January 1, 1986 through March 21, 1989 and to recover any funds owed during that time period. (*Karr* at 1428)

The third action was dismissed by the trial court on the grounds of claim preclusion because it "arose out of the same transaction as the first two actions for delinquent payments." (*Karr* at 1428) The Trust appealed, arguing that "the present

action to compel an audit and to recover funds found by the audit to be owed under the Trust Agreement, is separate and distinct from the prior actions to collect delinquent contribution payments owed under the Trust Agreement for the same time periods." (*Karr* at 1429) The Court of Appeal affirmed.

As to whether the audit period of January 1, 1986 through April 12, 1988 asserted in the third action was barred by claim preclusion, the Court of Appeal found that the request to audit that time period was clearly barred, because such relief had expressly been requested in the first action, which had been dismissed.

Then it turned its the analysis to the audit period of April 13, 1988 through March 21, 1989 asserted in the third action (an audit period that had never been asserted in any prior action): the question for the Court of Appeal was whether the claims for that period were barred by the second action even though an audit for that period had never actually been litigated in any prior action.

ii. Legal Analysis

The Court of Appeal analyzed the issue as follows:

> "The Trusts' second action, filed on March 21, 1989, did not include a claim to compel an audit. We must decide whether the Trusts' present claim to compel an audit for the period April 13, 1988, through March 21, 1989 could have and should have been brought in the Trusts' second action to recover delinquent payments. In determining whether successive claims constitute the same cause of action, we consider (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the

second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982). 'The last of these criteria is the most important.' *Id.* at 1202 (footnote omitted).

'Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together.' *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir.1992), *cert. denied*, 506 U.S. 1050, 113 S.Ct. 970, 122 L.Ed.2d 125 (1993). ***We are persuaded that the Trusts' claim for accurate payments arises out of the same transactional nucleus of facts as the prior actions for delinquent payments. The Trusts' second action was premised on AUC's alleged breach of the same Trust Agreements and involved overlapping time periods with this present action. We have held that claims based on a breach of the same contract should be brought in the same action so long as the alleged breaches antedate the original action.*** *See McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir.1986) (***holding plaintiff's action for breach of contract was barred under doctrine of res judicata because breach arose prior to filing of original action for breach of contract***). *See also* Restatement (Second) of Judgments § 25 cmt. b, illus. 2 (***illustrating that all contractual breaches arising prior to filing of original action for breach of contract must be brought in same action to avoid bar of res judicata***)." (*Karr* at 1429-1430) [Emphasis added]

B. *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749 ("*Thibodeau*")

i. Facts And Procedural Background

Thibodeau involved a construction project that arose out of a contract with a general contractor and several contracts with subcontractors. In that case, the

Thibodeaus filed an arbitration against the general contractor, Eller, alleging various defects with the construction project. (*Thibodeau* at 752-3)

One of the issues asserted by the Thibodeaus in the arbitration was that their driveway (which was constructed by subcontractor Crum) had chunks breaking off from it. However, Crum was not a party to the arbitration. (*Thibodeau* at 752-3)

The arbitration resulted in a partial victory for the Thibodeaus and a partial victory for Eller: the Thibodeaus were found to owe Eller monies, but they were offset by the damage from the construction defects. (*Thibodeau* at 753)

After the arbitration concluded, the Thibodeaus sued Crum for an issue related to the driveway that had not been asserted in the arbitration: namely, there were significant cracks (apart from the broken chunks) in the driveway. The evidence was that the cracks were present at the time the arbitration was filed such that they could have been asserted in the arbitration, but they became worse over time after the arbitration concluded. The trial court in the Thibodeau/Crum action rejected Crum's res judicata defense and found in the Thibodeaus' favor. Crum appealed and the Court of Appeal reversed. (*Thibodeau* at 753-4)

ii. Legal Analysis

The *Thibodeau* court reasoned:

> " '[U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper

> pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable.' [citations] ['[T]he law will not allow litigation to be conducted in a piecemeal fashion.'"; Code Civ.Proc., §§ 1908, subd. (a)(2), 1911; 7 Witkin, Cal.Procedure (3d ed. 1985) Judgment, § 188 et seq., p. 621.)…
>
> We conclude that if the radiating cracks in the driveway were not encompassed within the Thibodeau/Eller arbitration, they most certainly should have been. The cracks began appearing immediately after construction of the driveway and well before the arbitration. The Thibodeaus were aware of the cracks and complained about them long before the arbitration. And the driveway continued to deteriorate during the pendency of the arbitration. The driveway was, in fact, within the scope of the arbitration; it is mentioned several times in the arbitration award. We can conceive of no logical reason why the arbitration should encompass the chunks but not the cracks. The fact that the Thibodeaus' attention was drawn to more egregious construction deficiencies does not excuse their failure to seek damages for the cracks through the arbitration proceeding. Nor does it exempt them from application of the doctrine of res judicata." (*Thibodeau* at 755-6)

C. Application To The Present Case

First, there is no dispute that the claims asserted in this action by NECF existed at the time the State Court Action was filed. The alleged unlawful conduct occurred in November and December of 2017, before the State Court Action was commenced, *and more than a year before NECF's Cross-Complaint was filed in*

the state court. (Complaint, ¶¶18-25; RJN, Exh. 3) With this in mind, the *Karr* court stated: "*[w]e have held that claims based on a breach of the same contract should be brought in the same action so long as the alleged breaches antedate the original action.*" Likewise, the *Thibodeau* court focused heavily on when the claims arose: "[t]he cracks began appearing immediately after construction of the driveway and well before the arbitration." (*Thibodeau* at 756) The analysis really could stop here because there is simply no dispute that the claims asserted in this action antedated the filing of the Cross-Complaint by more than one year.

Along these same lines, there is no doubt that the claims asserted in this action were "within the scope of the [State Court] action, related to the subject-matter and relevant to the issues, so that [they] *could* have been raised." (*Thibodeau* at 755-6) Again, it is well established that claims arising out of a contract must be litigated in a single action so long as all such claims existed when the action was commenced.[1] This is where NECF will raise the *red herring*: it

[1] Notably, the proposed amended Cross-Complaint in the State Court Action invoked the Operating Agreement only. (RJN, Exh. 6, Exh. 2 thereto at ¶13) The federal Complaint characterizes the alleged claims in a slightly different manner by claiming they arise out of both the Operating Agreement and the NDA. It begs a question as to why the proposed amended Cross-Complaint avoided alleging a direct breach of the NDA while the federal Complaint relies more heavily upon the NDA. Perhaps the goal was to argue that a different contractual relationship is at issue in the federal case. But this judicial manipulation does not change the result: the NDA was within the scope and related to the subject matter of the original action such that the claims related to it could have been brought in that case. The NDA was even addressed in the state court's Statement of Decision. (See RJN, Exh. 21)

will argue that, because the state court denied its motion for leave to amend the Cross-Complaint to assert the claims it now asserts in this action, it was precluded from making the claims and therefore it *could not* raise them. (Opposition, 26:5-6) To follow its logic, any time a motion to amend is denied, a litigant can just file a new related action (even in an entirely different forum), asserting the exact claims that it sought to assert in its amended pleading. In essence, defendants would be forced to never oppose such motions because if the motion is denied, they would always be facing an entirely new lawsuit and would have no res judicata protection. NECF is essentially arguing that the denial of a motion for leave to amend renders res judicata inapplicable, including its prohibition against *piecemeal litigation*. In this case, the denial of the motion established simply that NECF lacked diligence (and perhaps good faith), to the prejudice of VanLaw, in asserting the claims. It was not an invitation to engage in piecemeal litigation.

Aside from logic, this is the law. As stated above, the case of *Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717 has already addressed this very issue and it precludes NECF from doing what it is trying to do:

> "The fact that [Dignity Health's] subsequent attempt to amend its pleading in the underlying *Mission I* trial court proceeding to include a request for monetary relief to address the *Mission II* decision was not successful does not entitle it to seek the same relief in a new lawsuit. ***To hold otherwise would allow an unsuccessful party to keep filing separate lawsuits until it obtains a***

> ***desired outcome. [Citation.] Put another way, [Dignity Health] may not collaterally challenge the trial court's denial of its request to amend the pleading in Mission I by filing this action***." (*Id.* at 728)

II. ISSUE PRECLUSION/COLLATERAL ESTOPPEL

The elements of issue preclusion/collateral estoppel are addressed in the Motion at page 30.

In support of its Reply, VanLaw provided this Court with the Statement of Decision. (Suppl. RJN, Exh. 21) It is a thirty-five page document, detailing countless issues that were decided in the State Court Action. Worth noting is the fact that the state court characterized the Cross-Complaint as being all about the barbeque sauce and Trader Joe's role as the exclusive seller of the barbeque sauce. (RJN, Exh. 21, p. 3) While NECF is purporting to assert different theories of liability related to the barbeque sauce and Trader Joe's, there is no question that this federal case is also all about the barbeque sauce and Trader Joe's as exclusive seller of the barbeque sauce, including the agreements related thereto that were already litigated. While it is impossible to determine at this stage just how many issues will overlap, there is no doubt that (if this court, *arguendo*, allows this case to proceed) issue preclusion will come into play throughout this case each time an issue that was already decided in the State Court Action is presented in this action.

Dated: November 12, 2021

MAGARIAN & DIMERCURIO, APLC

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 20 Corporate Park, Suite 255, Irvine, CA 92606

I, the undersigned, hereby further certify that on this 12th day of November of 2021, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]**

was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on November 12, 2021

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
20 Corporate Park, Suite 255
Irvine, California 92606
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S REPLY TO OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: September 27, 2021 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

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I. LIMITATION OF LIABILITY DEFENSE

VanLaw is compelled to first address the limitation of liability clauses. This issue is the starting point of this reply because NECF's opposition establishes that: (1) it is in fact a complete defense to the action; and (2) NECF cannot plead around it.[1] In other words, this Court can and should dismiss the action on these grounds alone, without even deciding whether this action is a compulsory cross-complaint that should have been filed in the State Court Action.[2]

NECF relies upon Civil Code 1668 and the case of *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747 for the proposition that the clauses in the Operating Agreement violate public policy by attempting to exempt the parties from liability for future intentional or grossly negligent conduct.[3] NECF is wrong:

---

[1] Without saying it directly, NECF's sole argument is that the clauses (to which both entities mutually agreed) are unenforceable under the law and/or public policy, even though the Complaint does not make this allegation. NECF is not arguing that a factual amendment to the Complaint would cure the issue (e.g., such as duress or fraud in entering into the agreement, or ambiguity in the clauses). NECF's argument is purely a legal, so even an amendment that alleged that the clauses are unenforceable under the cases cited in NECF's Opposition would result in another motion to dismiss, because the law does not support NECF's attempt to avoid the clauses.

[2] The compulsory cross-complaint arguments are equally as strong. However, NECF has gone to great lengths to complicate that issue. NECF has not done so with the limitation of liability clauses.

[3] NECF actually mischaracterizes the statute and the case by arguing that parties cannot "*limit damages* for future intentional (or even grossly negligent) conduct." (Opposition, 28: 2-3) [Emphasis added] Neither the statute nor the case stands for this proposition. Rather, as explained above, they stand for the proposition that a contract cannot (directly or indirectly) "exempt" or "release" a party from liability for future intentional or grossly negligent conduct.

Civil Code Section 1668 states, in full: "All contracts which have for their object, directly or indirectly, ***to exempt anyone from responsibility*** for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." [Emphasis added]

In *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, the Supreme Court held:

> "We conclude, consistent with dicta in California cases and with the vast majority of out-of-state cases and other authority, ***that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence***, generally is unenforceable as a matter of public policy. Applying that general rule in the case now before us, we hold that the agreement, ***to the extent it purports to release liability for future gross negligence, violates public policy and is unenforceable***." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750–751) [Emphasis added]

The clause at issue was *not* a limitation of *damages* clause between two parties to a commercial agreement. Rather, it was a traditional waiver, disclaimer, and release of *all liability for "any negligent act.*" (*Id.* at 750)

The case involved a horrible tragedy: the drowning death of a disabled young child at summer camp. The Supreme Court reasoned:[4]

- "The traditional skepticism concerning agreements ***designed to release liability for future torts***, reflected in *Gardner, [v. Downtown Porsche Audi* (1986)] 180 Cal.App.3d 713, 225 Cal.Rptr. 757, and many other cases, long has been expressed in Civil Code section 1668 (hereafter cited as section 1668), which (unchanged since its adoption in 1872) provides: 'All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his [or her] own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.'…
- In *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (*Tunkl*), ***we applied section 1668 in the context of a release required by a nonprofit research hospital as a condition of providing medical treatment***. ***In that case, the plaintiff had signed a contract releasing the operators of the hospital—the Regents of the University of California— ' 'from any and all liability' ' for '***

[4] Each added emphasis from the *Santa Barbara* case is designed to emphasize the rule that liability for future intentional or gross negligent cannot be *fully released or disclaimed*, which is not the case here wherein the parties agreed to *limit the damages available for such conduct.*

'negligent ... acts or omissions of its employees' " so long as the hospital used due care in selecting those employees. (*Id.,* at p. 94, 32 Cal.Rptr. 33, 383 P.2d 441.) Thereafter, the plaintiff sued for ordinary negligence based on the treatment received from two of the hospital's doctors.

- Turning to section 1668, Justice Tobriner's unanimous opinion for the court noted that past decisions had differed concerning the reach of that statute (*Tunkl, supra,* 60 Cal.2d 92, 96–97, 32 Cal.Rptr. 33, 383 P.2d 441), but that those decisions agreed in one significant respect: they consistently 'held that [an agreement's] exculpatory provision may stand only if it does not "involve [and impair] 'the public interest.' " (*Id.,* at p. 96, 32 Cal.Rptr. 33, 383 P.2d 441.) Exploring the meaning and characteristics of the concept of 'public interest' as illuminated by the prior cases (*id.,* at pp. 96–98, 32 Cal.Rptr. 33, 383 P.2d 441), we read those precedents as recognizing a general rule that an '*exculpatory clause which affects the public interest cannot stand.*' (*Id.,* at p. 98, 32 Cal.Rptr. 33, 383 P.2d 441, italics added.)" (41 Cal.4th 747 at 754-755) [Emphasis added]
- "As the parties observe, no published California case has upheld, or voided, ***an agreement purporting to release liability for***

future gross negligence. Some decisions have stated, in dictum, that such a release is unenforceable. (*Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74, 70 Cal.Rptr.2d 85 [‘***exemptions from all liability for ... gross negligence ... have been consistently invalidated***’]; *Health Net, supra,* 113 Cal.App.4th 224, 234, 6 Cal.Rptr.3d 235 [liability for future gross negligence cannot be released].) Others carefully have specified that liability for ‘ordinary’ or ‘simple’ negligence generally may be released (that is, so long as doing so is consistent with *Tunkl, supra*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441)—thereby implicitly differentiating gross negligence from the class of conduct as to which liability generally may be released. Indeed, for more than three decades, Witkin has asserted that ***California law categorically bars the prior release of liability for future gross negligence***: ‘The present view is that a contract exempting from liability for ordinary negligence is valid where no public interest is involved.... [¶] ***But there can be no exemption from liability for* intentional wrong [or]** ***gross negligence*** ....’ (1 Witkin, *supra,* Contracts, § 660, pp. 737–738, italics added; see also 1 Witkin, Summary of Cal. Law (9th ed.1987), Contracts, § 631, p. 569 [same]; 1 Witkin, Summary of Cal. Law (8th ed.1973), Contracts, § 485,

pp. 411–412 [essentially identical]; 1 Witkin, Summary of Cal. Law (7th ed.1960), Contracts, § 200, p. 226 ['The Contracts Restatement declares that a person can contract to ***exempt himself from liability*** ***for ordinary negligence, but not for gross negligence'***].) As defendants observe, however, Witkin does not cite any relevant California decision in support of that proposition.

- On the other hand, as defendants and their amici curiae also observe, a number of cases have upheld agreements insofar as they release liability for future ordinary negligence in the context of sports and recreation programs, on the basis that such agreements do not concern necessary services, and hence do not transcend the realm of purely private matters and implicate the 'public interest' under *Tunkl*, *supra*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441. Our lower courts have upheld releases of liability concerning ordinary negligence related to gymnasiums and fitness clubs, auto and motorcycle racing events, ski resorts and ski equipment, bicycle races, skydiving or flying in 'ultra light' aircraft, and various other recreational activities and programs such as horseback riding, white-water rafting, hypnotism, and scuba diving. Most, but not all, other jurisdictions have held similarly. In light of these decisions,

some more recent appellate decisions have concluded categorically that private agreements made 'in the recreational sports context' releasing liability for future ordinary negligence 'do not implicate the public interest and therefore are not void as against public policy.' (E.g., *Benedek, [v. PLC Santa Monica* (2002)*]* 104 Cal.App.4th [1351] at pp. 1356–1357, 129 Cal.Rptr.2d 197.) (41 Cal.4th 747, 758-760) [Emphasis added]

- "The reasoning of the foregoing out-of-state decisions holding that liability for future gross negligence never can, or generally cannot, be released, is based upon a public policy analysis that is different from the 'public interest' factors considered under *Tunkl*, *supra*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441. *Tunkl's* public interest analysis focuses upon the overall transaction—with special emphasis upon the importance of the underlying service or program, and the relative bargaining relationship of the parties—in order to determine whether an agreement releasing future liability for *ordinary* negligence is unenforceable. By contrast, the out-of-state cases cited and alluded to above, ***declining to enforce an agreement to release liability for future gross negligence***, focus instead upon the degree or extent of the misconduct at issue, as

well as the 'public policy to discourage' (or at least not facilitate) 'aggravated wrongs.' (Prosser & Keeton, *supra*, § 68, p. 484.) Those cases hold, in essence, that an agreement that would remove a party's obligation to adhere to even a minimal standard of care, thereby sheltering aggravated misconduct, is unenforceable as against public policy. (E.g., *New Light [v. Wells Fargo Alarm* (1994)*]* 247 Neb. 57, 525 N.W.2d 25, 29–31; *Zavras [v. Capeway Rovers Motorcycle Club* (1997)*]* 44 Mass.App.Ct. 17, 687 N.E.2d 1263, 1265; *Wheelock [v. Sport Kites, Inc.* (D. Hawai'i 1993)*]* 839 F.Supp. 730, 736.)" (41 Cal.4th 747, 762) [Empasis added]

- "For the reasons discussed above—that is, adherence to the 'public policy to discourage,' or at least not facilitate, 'aggravated wrongs' (Prosser & Keeton, *supra*, § 68, p. 484)—and consistent with *Donnelly [v. Southern Pacific Co.* (1941)*]* 18 Cal.2d 863, 118 P.2d 465, and the Court of Appeal below, as well as the vast majority of other jurisdictions, ***we conclude that public policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a minimal standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for***

future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (41 Cal.4th 747, 776-777) [Emphasis added]

With the foregoing in mind:

- The commercial agreement at issue herein is not a contract of adhesion where a participant in a recreational activity was required to assume all risk of the activity. This is a fully-negotiated contract between two entities who mutually agreed to limit their damages.
- The clauses at issue do not purport to disclaim, waive, or release liability for any conduct (e.g., negligent or intentional conduct); *they simply limit the types and extent of damages available to either party*.
- NECF attempts to make a practical argument that the clauses (in limiting available damages) effectively render the reverse-engineering provision meaningless and disclaim the implied covenant of good faith and fair dealing. In reality, they do no such thing. For example, the clauses do not prohibit NECF from pursuing any form of direct damages that are not otherwise expressly excluded from the agreement, nor do they prohibit NECF from pursuing injunctive relief. In the context of this case, the

clauses simply bar lost profits and punitive damages. Indeed, the clear and unambiguous intent of these parties with admitted equal bargaining power was to allow each party to fully enforce its rights against the other while limiting the extent of damages available.

- A case directly on point (not cited by NECF) upheld a strikingly similar limitation of damages clause (e.g., that specifically excluded lost profits) with respect to all claims emanating out of the agreement that contained the limitation clause (e.g., breach of contract, negligence, and breach of the covenant of good faith and fair dealing). The Court focused on the gravamen of the claims (dismissing both contract and tort claims), agreeing with the lower's court's grant of summary judgment, finding:
    - "In granting summary judgment, the trial court determined that Eco Safe's negligence and bad faith claims asserted nothing more than a breach of Food Safety's contractual obligations, and that Eco Safe's claim (or claims) for the breach of these obligations failed in light of a contract provision limiting Food Safety's liability…[W]e agree with these determinations." (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1125–1126; entire discussion is contained at 1125-1128)

- Likewise, in *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4h 224 (also not cited by NECF), the court made clear that a contract limitation on the scope of remedies available only runs afoul of Civil Code 1668 if it has the impact of exempting the party from responsibility for the wrong. (*Id.* at 239-240)

Accordingly, the clauses should be enforced.

II. RES JUDICATA AND COLLATERAL ESTOPPEL

On September 10, 2021, the court in the State Court Action entered Judgment *and* issued a detailed Statement of Decision (adopting, *verbatim*, the proposed Statement of Decision submitted by NECF). See, Request for Judicial Notice, submitted herewith. Accordingly, this Court should dismiss the case on the grounds of res judicata and collateral estoppel as set forth in the moving papers.

III. COMPULSORY CROSS-COMPLAINT

A. NECF's Own Conduct Forbids It From Invoking The Equitable Principles Upon Which It Relies

All of the "equitable" arguments raised by NECF should be ignored. This is because, in accordance with the maxim that no one can take advantage of his or her own wrong, those who seek the aid of equity must into court in good faith and with

clean hands. (*Samuelson v. Ingraham* (1969) 272 Cal.App.2d 804) The very equitable principles upon which NECF relies bar it from relying upon equity.

In seeking leave to amend its Cross-Complaint in the State Court Action, NECF took the position that the proposed amended cross-complaint was compulsory. (See Request for Judicial Notice, Exh. 5, pp. 5:24-7:12, arguing at pp. 6:23-7:8 that it risked "forfeiture" of causes of action if the court did not grant the motion) In fact, in reply to VanLaw's Opposition to the motion for leave to amend, NECF told the state court that VanLaw implicitly agreed with the more liberal pleading standing for the proposed amended cross-complaint by not disputing its application. (See Request for Judicial Notice, Exh. 8, pp. 2:6-12) NECF now offers this Court a different interpretation of VanLaw's Opposition to that same motion, arguing that VanLaw affirmatively told the state court that the proposed amended cross-complaint was not compulsory.

As VanLaw understood it, NECF asked the state court to apply C.C.P. Sections 426.50 and 428.50 (addressing the filing compulsory claims) in harmony with C.C.P. Sections 473 and 567 (address amending all pleadings, generally); asking the court to look at the ordinary amendment standards more liberally in light of the compulsory nature of the claims. (See Request for Judicial Notice, Exh. 6, p. 6:15-20) And VanLaw did not dispute that approach.

Based upon NECF's own arguments about equity, including unclean hands, NECF is estopped from relying upon equity to defend the filing of this action. Rather, the only relevant inquiry is whether – *under the law* – this action is indeed a compulsory cross-complaint that needed to be filed in the State Court Action.

B. VanLaw Has Not Taken Different Positions

Even if (*arguendo*) this Court were to consider equitable arguments raised by NECF, VanLaw has not taken inconsistent positions. Specifically:

- VanLaw addressed – consistent with what NECF argued in its moving papers – the undue prejudice to VanLaw that would result from the amended pleading. In fact, both VanLaw and NECF were aligned that the potential undue prejudice caused by the amended cross-complaint was a relevant factor for the court to consider.
- NECF ignores the fact that VanLaw actually led its Opposition with the argument that the declaration in support of NECF's motion contained outright *lies and omissions*. The evidence (and *leading argument*) presented by VanLaw was wholly consistent with NECF's position that bad faith was also a relevant factor for the state court to consider. (See Request for Judicial Notice, Exh. 7, pp. 2:8-5:11)

- Finally, VanLaw's Opposition is (and was) entirely accurate in stating that the proposed amended Cross-Complaint was a completely new pleading based upon new facts (different than those that NECF had initially alleged) and claims that would change the entire landscape of the case and force the parties to start over. But, as explained below and in more detail in the moving papers, *those facts and arguments are not determinative as to whether the cross-complaint was compulsory.* As NECF correctly argues in its Opposition to the present motion, the standard is not whether the amended claims and facts in the proposed cross-complaint are different than those in the original cross-complaint (everyone agrees they were not); it is whether they (by definition) *arise out of the same transactions or occurrences as the State Court Action*.

C. The State Court Did Not Make A Finding As To Whether The Proposed Amended Cross-Complaint Was Compulsory

A trial court's reasoning stated in a ruling is not determinative of whether the correct result was reached, nor is a trial court required to state all reasons for its ruling. (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329-330; *Beckett v. Kaynar Mfg. Co.* (1958) 49 C2d 695, 699) NECF argues that the state court did not find the proposed amended cross-complaint to be compulsory. This is not true.

In fact, the parties will never know whether the state court considered the proposed amended cross-complaint to be compulsory, nor will they know whether the state court found that NECF acted in bad faith. The state court did not address those issues, nor was it required to.

D. NECF Has Failed To Rebut VanLaw's Arguments

In order to avoid the compulsory nature of this action, NECF makes the argument (unsupported by the law) that the only relevant evidence for this Court to consider is the complaint filed by VanLaw in the State Court Action. Yet, NECF cites to multiple documents outside of that pleading in its Opposition. In any event, that argument is absurd. The only way for this Court to know what whether the transactions and occurrences were already litigated is to look at all relevant documents from the State Court Action. Despite NECF's attempt to distinguish the facts in *Align* from the present case, there is simply no disputing that – like the parties in *Align* – VanLaw and NECF have already litigated their contractual business relationship in the State Court Action. (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 962) This bars the federal action.

Dated: September 13, 2021

MAGARIAN & DIMERCURIO, APLC

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 20 Corporate Park, Suite 255, Irvine, CA 92606

I, the undersigned, hereby further certify that on this 13th day of September of 2021, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S REPLY TO OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]**

was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on September 13, 2021

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
20 Corporate Park, Suite 255
Irvine, California 92606
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: September 27, 2021 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN THAT, pursuant to Federal Rule of Evidence (F.R.E.) 201, Defendant VANLAW FOOD PRODUCTS, INC. ("VLF" or "Defendant") hereby requests that the Court take judicial notice of the following court records from the case of *VanLaw Food Products, Inc. v. New England Country Foods, LLC*, Superior Court of California, County of Orange, Case No. 30-2017-00962844-CU-BC-CJC ("the State Court Action"), attached as Exhibits 1-20, in support of VLF's motion to dismiss Plaintiff NEW ENGLAND COUNTRY FOOD PRODUCTS, LLC's ("Plaintiff" or "NECF") Complaint pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6) for failure to state a claim upon which relief can be granted:

1. Statement of Decision filed in the State Court Action on September 9, 2021, attached hereto as **Exhibit 21**.
2. Judgment filed in the State Court Action on September 9, 2021, attached hereto as **Exhibit 22**.

A party may base a motion on facts or events of which the judge may take judicial notice. This is limited to facts not subject to reasonable dispute and either "generally known" in the community, or "capable of accurate and ready

determination" by reference to sources whose accuracy cannot be reasonably questioned. (F.R.E. 201; see *Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 688-690 (overruled on other grounds by *Galbraith v. County of Santa Clara* (9th Cir. 2001) 307 F.3d 1119, 1125-1126))

Courts must take judicial notice of the contents of *court files in other lawsuits*. (F.R.E. 201(d); see *Mullis v. United States Bank. Ct.* (9th Cir. 1987) 828 F.2d 1385, 1388, fn. 9; *Lyon v. Gila River Indian Comm.* (9th Cir. 2010) 626 F.3d 1059, 1075—abuse of discretion to deny judicial notice request when all necessary information supplied)

Dated: September 13, 2021

MAGARIAN & DIMERCURIO, A PROFESSIONAL LAW CORPORATION

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 20 Corporate Park, Suite 255, Irvine, CA 92606.

I, the undersigned, hereby further certify that on this 13th day of September of 2021, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]**

was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on September 13, 2021

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Central Justice Center 700 W. Civic Center Drive Santa Ana, CA 92702	
SHORT TITLE: VanLaw Food Products, Inc. vs. New England Country Foods, LLC	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2017-00962844-CU-BC-CJC**

I certify that I am not a party to this cause. I certify that the following document(s), Statement of Decision dated 09/09/21, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on September 10, 2021, at 9:35:59 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

M.K. HAGEMANN, P.C.
MHAGEMANN@MKHLAW.COM

MAGARIAN & DIMERCURIO, APLC
KRISTA@MAGARIANLAW.COM

QUINTANA LAW GROUP, APC
ANDRES@QLGLAW.COM

QUINTANA LAW GROUP, APC
JOHN@QLGLAW.COM

Clerk of the Court, by: Dherrera, Deputy

objections over-ruled
ROBERT J. MOSS

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
1801 Century Park East
Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901
mhagemann@mkhlaw.com

Attorneys for Defendant/Cross-Complainant
NEW ENGLAND COUNTRY FOODS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

VANLAW FOOD PRODUCTS, INC., a California corporation,

Plaintiff,

vs.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company, and DOES 1 to 10,

Defendants.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company,

Cross-Complainant,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation, and ROES 1 to 10,

Cross-Defendants.

Case No.: 30-2017-00962844-CU-BC-CJC

Dept.: C14

Judge: Hon. Robert J. Moss

[PROPOSED] STATEMENT OF DECISION

Filing Date: December 21, 2017

Trial Date: July 13, 2021

STATEMENT OF DECISION

This Action came on regularly for trial on July 13, 2021 in Department C14 of the Superior Court, the Hon. Robert J. Moss Judge presiding; Plaintiff and Cross-Defendant Vanlaw Food Productions, Inc. ("Vanlaw") appearing by attorneys Krista L. DiMercurio and Mark D. Magarian, and Defendant and Cross-Complainant New England Country Foods, LLC ("NECF") appearing by attorney Michael K. Hagemann.

Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the cause was submitted to the Court on July 19, 2021.

Having considered the evidence and the arguments, on July 22, 2021, the Court issued an Intended Decision. (ROA # 254.) On July 30, 2021, Plaintiff/Cross-Defendant Vanlaw Food Products, Inc. requested a Statement of Decision. (ROA # 257.)

Having considered Vanlaw's Request for a Statement of Decision, as well as the evidence and arguments presented at trial, the Court's final decision is set forth below. Section A, below, is the **verbatim** contents of the Court's intended decision of July 22, 2021 (ROA # 254). Section B, below, has the Court's responses to the requests in Vanlaw's Request for a Statement of Decision. (ROA # 257.) To the extent any finding in Section B conflicts with a finding in Section A, the finding in Section B shall prevail.

A. FINAL DECISION

On the complaint: **Judgment for plaintiff, VanLaw Food Products, Inc. against defendant New England Country Foods, LLC in the sum of $27,441.25 plus pre-judgment interest.**

On the cross-complaint: **Judgment for cross-complainant New England Country Foods, LLC against cross-defendant VanLaw Food Products, Inc. in the sum of $115,571.31, plus pre-judgment interest.**

1. FACTS: Plaintiff/cross-defendant VanLaw Food Products, Inc. (VanLaw) is a contract food product manufacturer located in Orange County, California. VanLaw manufactures, packages, and labels food products for other companies according to their specifications. Defendant/cross-complainant, New England Country Food Products, LLC (NECF), is a food product manufacturer located in Vermont.

This case involves two products that VanLaw produced for NECF, a barbeque sauce (which is the subject of the cross-complaint) and a sriracha sauce (which is the subject of the complaint.)

The relationship between VanLaw and NECF began in December of 2013 when NECF requested VanLaw to produce the barbeque sauce. For years NECF had manufactured the sauce in-house and sold it exclusively to non-party Trader Joes's under Trader Joe's label. A few years before contracting with VanLaw, NECF had decided to stop producing the sauce in-house and contracted with another company to make it. Apparently dissatisfied with the other contract manufacturer, NECF entered into the relationship with VanLaw.

In the beginning, VanLaw would manufacture, label, and package the barbeque sauce and simply sell it to NECF, who would in turn sell it to Trader Joe's. Naturally, NECF would sell it to Trader Joe's for more than it paid VanLaw to manufacture the sauce, to earn a profit. VanLaw would charge NECF $14.80 per case to manufacture the sauce and NECF would sell it to Trader Joe's for $17.80 per case, resulting in a gross profit of $3.30 per case for NECF. However, for reasons that are irrelevant to this case, in approximately June of 2014, the relationship changed. Instead of selling the sauce to NECF who, in turn, would resell it to Trader Joe's, VanLaw began selling the sauce directly to Trader Joe's and paying a royalty to NECF on each case of the sauce that was shipped to Trader Joe's.

This new relationship was created at the request of Trader Joe's and both parties consented to it.

Remarkably, during the first year (2014) of the relationship between VanLaw and NECF there was no written agreement between them, except for a non-disclosure agreement. Under the first half of 2014, when VanLaw was simply selling the sauce to NECF, it was at the price set forth above. NECF would simply issue purchase orders to VanLaw at the understood price, and VanLaw would invoice NECF when the product shipped. When they switched to the royalty arrangement in mid-year, VanLaw would pay NECF a royalty of $3.30 per case shipped (with deductions as will be discussed below) to approximate the gross profit NECF was enjoying before the change in relationship.

In approximately April of 2015, the second year of their relationship, NECF asked VanLaw to produce a second product for them, the sriracha sauce. The sriracha sauce was not a product NECF had developed. Rather, NECF asked VanLaw to develop it so NECF could broker it to its customers. NECF had a relationship with non-party Department of Corrections in Texas and planned to sell a low cost sriracha sauce which could be purchased by inmates in the prison commissaries. VanLaw agreed to manufacture the sriracha sauce for NECF. The sriracha sauce was to be manufactured, labeled and packaged by VanLaw and sold to NECF, similar to the original arrangement with the barbeque sauce.

When the parties first began discussing the sriracha sauce, NECF provided very optimistic forecasts of how much sriracha sauce they would be needing. NECF projected they should anticipate 5,600 cases (x 24 bottles/case = 134,000 bottles) per month for the rest of the year for the first customer and expected that volume to double when a second customer, supposedly waiting in the wings, was secured. (Ex. 93.)

VanLaw made it clear to NECF that the longest lead-time in order to produce the sriracha sauce was obtaining the bottles. They indicated it would take 6 weeks to order and obtain the bottles and two weeks after that to produce and ship the sriracha sauce. (Ex. 97.) For that reason, the parties agreed VanLaw would submit a purchase order for 360,000 bottles (Ex. 233), but that VanLaw would only order 150,000 bottles at any one time, as needed.

NECF contends that the purchase order for the bottles was a "blanket" purchase order, meaning it was a "place holder" until specific purchase orders followed. VanLaw contends the purchase order authorized them to acquire up to 360,000 bottles for NECF, but in tranches of 150,000. The court finds VanLaw's interpretation more persuasive.

VanLaw ordered the first 150,000 bottles and used them to fill orders for the sriracha sauce. It then ordered the second 150,000 bottles, used some of them to fill orders, but the orders stopped coming in. While NECF argued that the reason orders stopped coming in was VanLaw's failure to ship the products in a timely manner, there was no competent evidence this was the case. VanLaw was left with 133,912 empty bottles which remain in storage to this day. After several months VanLaw invoiced NECF for the bottles it had ordered (Ex 111,) and NECF refused to pay for them.

Defendant NECF argued that the bottles were stock bottles that could have simply been returned to the bottle manufacturer for a modest re-stocking fee. However, this was merely argument, with no competent evidence to support it. Plaintiff offered testimony that the bottles were "custom" bottles that had to be made to order and were not kept in stock by the bottle manufacturer, which the court found to be credible.

In 2015, the second year of their relationship while the sriracha sauce production was getting underway, the parties began to negotiate a written agreement to document their relationship. This culminated in an "operating agreement." (Ex. 1.) The operating agreement was executed by the parties on October 28, 2015, but was made retroactive to January 1, 2015. The agreement was for 3 years, to terminate on 12/31/2017. It referenced both the barbeque sauce and the sriracha sauce.

With respect to the barbeque sauce, the operating agreement provides at p. 2, paragraph 5: "VLF agrees to pay to NECF a Royalty Fee of $3.30 per 12 unit case on the retail product…." The operating agreement makes no reference to any deductions to be withheld from the royalty payments. The operating agreement also provides at p. 6 paragraph 16: "Amendment and Waiver Only in writing signed by all parties hereto may amend this Agreement." The court interprets this somewhat unartfully drawn provision to mean any modifications of the agreement had to be in writing signed by both parties.

Notwithstanding these provisions, VanLaw withheld from each royalty check 3 deductions. First, a $0.50 deduction per case for pressure sensitive labels; second, a $0.037 per case deduction for tomato paste up-charge; and, third, a $0.26 for "fulfillment" expense.

NECF concedes that it agreed with the pressure sensitive label deductions and does not contest that deduction, effectively reducing the royalty to $2.80 per case.

With respect to the tomato paste deduction, NECF concedes that it agreed to this deduction for one year only from August 1, 2015 to July 31, 2016. Tomato paste is a major component of the barbeque sauce and during that one year the price of tomato products spiked because of drought conditions. The following year, tomato product pricing returned to pre-drought levels, yet VanLaw continued to make the

deduction.

Finally, NECF does contest the "fulfillment" deduction and contends it never agreed to this or any other amount. Cross-defendant's witness, Gilbert, testified vaguely that the "fulfillment" deduction represented extra costs to which VanLaw was subjected because of the change in how the barbeque sauce was sold directly to Trader Joe's including customer service efforts, arranging for freight when the product was not picked up by Trader Joe's, and other added expenses. However, there was no testimony as to how the precise amount of the deduction was calculated and no writing signed by NECF's representative acceding to this modification.

2. Procedural posture: VanLaw filed its complaint on 12/21/17 naming NECF as the sole defendant. The complaint states four causes of action for breach of contract and three common counts. The complaint seeks payment for the unused sriracha bottles in the sum of $27,441.25.

NECF filed its cross-complaint on 2/19/2019 naming VanLaw as the sole defendant. The cross-complaint states two causes of action for breach of contract and an accounting. The complaint articulates the following items of damage: 1) unpaid royalty fees of $14,205.41; 2) interest on late royalty fees paid of $17,833.42; 3) refusing to pay for excess raw material charges (the tomato paste up-charge?) of $4,824.52; and 4) unauthorized management fees (the fulfillment deduction?) of $52,530.92; for a total of $89,394.28.

3. DISCUSSION: The complaint by VanLaw is simple and straightforward. Plaintiff seeks the cost of the empty sriracha bottles it acquired on behalf of NECF pursuant to the purchase order issued to plaintiff by defendant. The court is not persuaded that the purchase order meant anything other than what it appeared to be on its face. Because of

the lead time in acquiring bottles to produce the sriracha sauce, plaintiff had to order enough bottles to have on hand so as not to delay production and the fulfillment of orders. Plaintiff exhibited good faith by only ordering the bottles in tranches of 150,000. The fact that plaintiff used all of the bottles in the first tranche and some of the bottles in the second tranche further supports plaintiff's good faith.

As mentioned above, the court is not persuaded that the cause of the cessation of orders was plaintiff's fault. No one testified from the end user of the sriracha sauce that there was any dissatisfaction with the timing of deliveries or the product itself. For whatever reason, orders stopped coming in. NECF ordered the bottles in anticipation of selling more sauce than it did and must absorb the loss.

The court is also not persuaded by the argument that plaintiff failed to mitigate its damages. The bottles are still there and can be picked up by defendant, once they are paid for, and defendant can use them, sell them, or try to return them just as easily as plaintiff to offset the damages owed.

Because there was a sum certain owed a reasonable time after the invoice for the bottles was issued (30 days), plaintiff is entitled to prejudgment interest from that date to the date of judgment.

The cross-complaint is more complicated, but also compelling. The parties entered into a written agreement, albeit belatedly. The agreement specified the amount of the royalty due on each case of barbeque sauce shipped and makes no mention of any deductions. The agreement provides that any changes or modifications to the agreement must be in writing. While cross-defendant concedes the deduction for the pressure sensitive labels and one year of the tomato paste up-charge deduction, he contests the continuation of the

tomato paste up-charge deduction for the balance of the agreement and the entirety of the "fulfillment" deduction.

Cross-defendant's witness, Gilbert, testified that there was oral agreement to the continuation of the tomato paste up-charge deduction to cover another increase in costs and the "fulfillment" deduction, but cross-complainant's witness, Thomson, denies he ever agreed to these deductions. Both witnesses seemed like upstanding, credible businessmen, but the cross-defendant has the burden of proving there was some modification of the written agreement and he has failed to meet that burden of proof. Moreover, while there was some mention of these issues in emails, there is no evidence of a writing signed by both parties as required by the contract. The court can only conclude that the two contested deductions were not authorized and, therefore, are compensable.

Regarding the amount of damages on the cross-complaint, cross-complainant appears to have abandoned the argument alleged in the complaint that it is owed interest on late royalty payments as this element was not argued. Likewise, in final argument cross-complainant did not ask for an accounting. Instead, cross-complainant argued it is entitled to be compensated for the unauthorized deductions from royalty payments.

The argument is best summarized in demonstrative exhibit no. 243, which the court found persuasive. Cross-defendant did not really argue that this calculation was wrong. There were a total of 215,424 cases of barbeque sauce sold to Trader Joe's after the royalty arrangement began. 215,424 x $2.80/case ($3.30/case – the $0.50/case conceded pressure label deduction) = $603,187.20.

From this total, cross-complainant subtracts the 12 month conceded tomato paste up-charge deduction of $0.037/case. 53,541 cases were sold during the crop year 8/1/15 –

7/31/16. 53,541 x $0.037 = $1981.02. $603,187.20 - $1981.02 = $601,206.18 as the total royalty owed.

The royalty payments received from cross-defendant over the term of the agreement was $485,634.87. $603,187.30 - $485,634.87 = $115,571.31 as the balance still owed. While the interest calculation will be tedious as technically there was a sum certain due after each shipment was paid by Trader Joe's, cross-complainant is entitled to pre-judgment interest.

If either side requests a statement of decision, defendant/cross-complainant OCEF to prepare as well as the judgment. Since the net judgment undoubtedly will be in favor of cross-complainant, cross-complainant is the prevailing party and entitled to attorney fees pursuant to post trial motion.

Court orders clerk to give notice.

B. SPECIFIC RESPONSES TO STATEMENT OF DECISION REQUESTS

Issues Related to Cross-Complainant's Claim That it is Owed Royalties on Shipped Orders

REQUEST 1: Whether the Court interpreted paragraph 16 of the Operating Agreement (Exhibit 1) ["Amendment and Waiver Only in writing signed by all parties hereto may amend this Agreement."] to mean that adjustments pursuant to paragraph 5 ["Pricing will be reviewed quarterly and price adjustments will be made based on documented raw, packaging, freight or operational changes, as mutually agreed to. These changes may or may not adjust the royalty fee, as agreed to quarterly"] needed to be in writing signed by the parties.

RESPONSE 1: Yes. The Court found that the parties mutually intended that an agreement to reduce the royalties would need to be in writing signed by all parties. *See, also*, Civ. Code §§ 1625 (parole evidence rule), 1698(c) (modifications in writing), Code Civ. Proc. § 1856 (parole evidence rule). The Court noted that there were writings for both the pressure-sensitive labels (50 cents per case) and temporary tomato paste upcharge (3.7 cents per case from August 1, 2015 to July 31, 2016), (Exs. 213, 219), plus those amounts were admitted by NECF.

The Court did not find there was any agreement in any form between the parties to any reductions from the $3.30 royalty, except: (1) the pressure-sensitive labels (50 cents per case); and (2) the temporary tomato paste upcharge (3.7 cents per case from August 1, 2015 to July 31, 2016).

REQUEST 1(a): If so, whether the Court's interpretation was at all impacted by the fact that Cross-Complainant conceded to charges (temporary tomato paste upcharge and label fee) that were not in writing signed by the parties.

RESPONSE 1(a): As stated above, the Court noted that there were writings for both the pressure-sensitive labels (50 cents per case) and temporary tomato paste upcharge (3.7 cents per case from August 1, 2015 to July 31, 2016). *See* Exs. 213, 219. Since NECF conceded at trial that it agreed to reduce the royalty for the pressure-sensitive labels and temporary tomato paste upcharge, it wasn't relevant to the Court whether the temporary tomato paste upcharge and label fee e-mails were sufficient writings.

REQUEST 2: Whether the Court adopted Trader Joe's figure of 202,907 cases shipped [Exhibit 232] over VanLaw's figure of 202,714 cases shipped [Exhibit 172]. (fn1: "Exhibit 243 relied upon by the Court in its tentative decision purports to adopt Trader

Joe's figure, even though Trader Joe's did not testify as to the accuracy of that figure while Nicole Fabian did testify as to the accuracy of the totals in Exhibit 172.")

RESPONSE 2: The Court adopted Trader Joe's figure of 202,907 cases shipped for the reasons set forth, below, in Response 2(a).

REQUEST 2(a): If so, on what grounds?

RESPONSE 2(a): Trader Joe's figures were introduced by NECF through Exhibit 232 without objection pursuant to a subpoena and custodian-of-records declaration. Vanlaw's figures were introduced in Exhibit 172 by witness Nicole Fabian over NECF's objections. Ms. Fabian essentially testified that the figures in Exhibit 172 were the numbers contained in Vanlaw's computer. Ms. Fabian testified she did not personally enter the numbers, nor did she personally verify the underlying numbers:

> Q: DID YOU VALIDATE ANY OF THE DATA ON THIS TAB, THE PO DETAILS BBQ?
> A: I PULLED THAT INFORMATION DIRECTLY OUT OF DECOM.
> Q: DID YOU CROSS-CHECK IT WITH ANY OTHER DATA SOURCES?
> A: I DO NOT BELIEVE SO. I WOULDN'T HAVE BECAUSE WE WOULD HAVE DONE IT AT THE TIME OF SHIPMENT.
> Q: OKAY.
> A: THE DEPARTMENT WOULD HAVE DONE IT AT THE TIME OF SHIPMENT.
> ...
> Q: OKAY. SO, I MEAN, WE – YOU'RE NOT ABLE TO AUTHENTICATE TRADER JOE'S PURCHASE ORDERS SO I CAN'T – AS A WITNESS, YOU'RE NOT A GOOD WITNESS TO TALK ABOUT THE NUMBER OF ORDERS, RIGHT?
> A: I CANNOT SPEAK TO WHAT WAS ORDERED, CORRECT.
> Q: OKAY.
> A: I CAN ONLY SPEAK TO THAT THAT WAS ENTERED INTO OUR ERP SYSTEM.

(July 14, 2021 Transcript at 154:10-20, 156:8-15.)

Thus, as a starting point, the Court is in equipoise with equally-authenticated figures.

However, as set forth below, there was evidence and internal inconsistencies that suggested Vanlaw's figures in Exhibit 172 were not accurate, and there was no evidence or internal inconsistencies to suggests that Trader Joe's figures in Exhibit 232 were inaccurate. Thus, any one ground, below, is sufficient for the Court to find Trader Joe's figures are more likely accurate by a preponderance of the evidence.

The Court notes the following inconsistencies with Exhibit 172:

a) Internal inconsistencies: there are three shipments, totaling 1,764 cases as set forth below, that show up on "PO details BBQ," in Exhibit 172, but do not show up in the royalty calculation sheets in Exhibit 172 which are "Comm till 5.31.17," or "Comm after 5.31.17 - 1.31.18:"

1. Trader Joe's Purchase Order Number 75802281 (Ex. 172, Sheet "PO details BBQ," Row Number 173) – 252 cases shipped
2. Trader Joe's Purchase Order Number 76250011 (Ex. 172, Sheet "PO details BBQ," Row Number 169) – 420 cases shipped
3. Trader Joe's Purchase Order Number 106398534 (Ex. 172, Sheet "PO details BBQ," Row Number 76) – 1,092 cases shipped

Thus, there is an internal inconsistency in Exhibit 172 that suggests Vanlaw did not even account for the royalties on at least **1,764** shipped cases using Vanlaw's own data from "PO details BBQ" of Exhibit 172.

b) Mathematical Inconsistencies: In Exhibit 172, Sheet "Comm till 5.31.17," there are calculations for royalties that do not appear to match even Vanlaw's claimed royalty

rate when only $17.80 per case was charged (which indicated freight could not explain the difference), such as:

TJs PO No.	VLF Ex. 172 Sheet 3 - Royalty	VLF Claimed Case Qty. Shipped	VLF's Price Per Case	Royalty @ $2.54	Shortfall @ $2.54	Royalty @ $2.50	Shortfall @ $2.50
56227263	$3,810.48	1,680	$17.80	$4,267.20	$456.72	$4,200.00	$389.52
56227265	$3,335.48	1,680	$17.80	$4,267.20	$931.72	$4,200.00	$864.52
56583090	$3,810.48	1,680	$17.80	$4,267.20	$456.72	$4,200.00	$389.52
56583092	$3,260.48	1,680	$17.80	$4,267.20	$1,006.72	$4,200.00	$939.52
66695428	$4,198.32	1,550	$17.80	$3,937.00	-$261.32	$3,875.00	-$323.32
67633172	$5,964.32	1,680	$17.80	$4,267.20	-$1,697.12	$4,200.00	-$1,764.32
73788613	$344.50	504	$17.80	$1,280.16	$935.66	$1,260.00	$915.50
76250039	$5,037.98	1,344	$17.80	$3,413.76	-$1,624.22	$3,360.00	-$1,677.98
106106624	$3,148.74	500	$17.80	$1,270.00	-$1,878.74	$1,250.00	-$1,898.74
106398521	$4,139.98	1,260	$17.80	$3,200.40	-$939.58	$3,150.00	-$989.98
106398532	$2,728.91	504	$17.80	$1,280.16	-$1,448.75	$1,260.00	-$1,468.91

The Court notes that it will not rely on either party for their mathematical calculations as Vanlaw apparently wants the Court to do with Ms. Fabian's conclusory testimony that NECF was paid in full. The Court can do its own mathematical calculations, and the parties are responsible for providing evidence of the facts to support the underlying calculations.

c) Inconsistences in quantities ordered: there are 10 purchase orders whereby the quantity purchased differs between Exhibit 172, Vanlaw's figures, and Exhibit 232,

Trader Joe's figures. Exhibit 211 could be used to determine the correct quantity ordered for eight of the ten purchase orders. As set forth in the table below, all eight orders that could be verified supported Trader Joe's figures. The quantity ordered for the last two orders could not be determined because Vanlaw instructed Trader Joe's to stop emailing purchase orders to NECF effective on or around June 22, 2017. Thus, while NECF introduced the purchase orders it received into evidence as Exhibit 211, Vanlaw did not, so there were no post-June 22, 2017 Trader Joe's purchase orders introduced into evidence.

Ex. 172 (VLF) / Ex. 232 (TJs) - PO	Ex. 172 (VLF) - Row No.	Ex. 172 (VLF) - Order	Ex. 172 (VLF) - Ordered	Ex. 232 (TJs) - QTY Ordered	Ex. 172 (VLF) - Shipped	Ex. 232 (TJs) - QTY Received	Difference in Ordered Quantity	PO In Evidence (Ex. 211) - DEF. EX. PAGE
70841256	208	20150540900	402	1,512	402	402	1,110	00445
73785978	Not on Ex. 172			1,512	N/A	0	1,512	00453
73788608	185, 197	20160750500	1,512	756	756	756	-756	00465
73788613	184, 193	2016-07513-00, 2016-08144-00	1,008	504	504	502	-504	00459
73788619	181, 195	2016-07511-00, 2016-08175-00	1,680	840	840	840	-840	00455
79709256	86, 150	2016-12533-00, 2017-18354-00	574	588	574	574	14	00523
104942805	90, 91	2017-17884-00, 2017-17884-01	1,273	1,008	1,008	1,008	-265	00606
108380500	53, 54	2017-21191-00, 2017-21191-01	1,914	957	957	957	-957	00658
109329859	Not on Ex. 172			168	N/A	0	168	N/A - Issued 7/6/17 Per Ex. 232, which is after 6/22/17

109511839	Not on Ex. 172			840	N/A	0	840	N/A - Issued 7/12/17 Per Ex. 232, which is after 6/22/17
						TOTAL	322	

d) Inconsistent evidence of payments by Vanlaw: According to Exhibit 172, Sheet "Comm till 5.31.17," cell E306, Vanlaw owed NECF royalties of $375,862.26 from "6/14/14 to 5/31/17". And according to Exhibit 172, Sheet "Comm after 5.31.17 - 1.31.18," cell V85, Vanlaw owed NECF additional royalties of $127,984.43 presumably after 5/31/17 in light of the name of the sheet. $375,862.26 plus $127,984.43 equals $503,846.69.

Ms. Fabian testified that NECF had been paid in full. However, the evidence of the amounts and dates of payments from Vanlaw was inconsistent, not cogent, and limited. Namely, parsing the check numbers and check amounts in Exhibit 172 results in the following check totals:

Ex. 172 - Check Nos. Identified	Ex. 172 - Sum of Payments for Each Check	Ex. 172 - VLF Claimed Amount of Check in Comments
202857	$28,027.32	[Not Found]
203975	$4,260.48	[Not Found]
204546	$17,823.44	$17,823.44
204989	$8,236.64	$8,236.64
210012	$21,131.60	$21,131.60
210269	$4,038.32	[Not Found]
210968	$38,237.85	$38,237.85
212144	$5,122.32	$5,122.32
212600	$14,050.96	$14,050.96

213071	$22,707.60	"$37239.92 Over Paid $14532.32 -> used to offset in Sept check"
213739	$19,990.28	"$5457.96 + offset over paid in Aug 14532.32"
214314	$8,433.64	$8,433.64
215018	$5,870.26	$5,870.26
223247	$10,175.16	$13,196.70
223248	$8,675.35	$8,675.35
223284	$0.00	$28,122.84
223281	$17,954.68	$25,860.77
223526	$14,845.70	$14,485.70
223921	$30,242.68	[Not Found]
223994	[Not Found]	[Not Found]
224278	$30,486.68	[Not Found]
224688	$18,563.22	[Not Found]
225177	$5,131.56	[Not Found]
225476	$11,698.46	[Not Found]
225925	$20,418.82	[Not Found]
ACH	$11,442.98	[Not Found]
Offset-223281-223284	$17,246.88	[Not Found]
Offset-223284	$17,880.69	[Not Found]
Totals	$412,693.56	$209,248.07

According to cross-examination of Ms. Fabian by NECF, summing up the payment amounts in Exhibit 172 (see column "Ex. 172 - Sum of Payments for Each Check" which totals $412,693.56) was the method to determine how much Vanlaw paid NECF. NECF inquired upon, and Ms. Fabian had no knowledge, one way or the other, to dispute the bounced checks listed in Exhibit 215, and presented in Exhibit 222 as testified to by Mr. Thomson. Check Number 223248, listed in Exhibit 172, undisputedly bounced, so

$8,675.35 would have to be subtracted from $412,693.56 to get the amount Vanlaw paid NECF from Exhibit 172.

In contrast, NECF had a very simple and concise payment history at Exhibit 215, which was not disputed by Ms. Fabian, nor in any arguments by Vanlaw. And Exhibit 215 showed that NECF received royalty payments totaling $414,249.77 (excluding the $71,385.10 sriracha invoice transfer), which actually exceeded Vanlaw's own numbers. That is to say, NECF presented evidence that it was paid even more than Vanlaw contended it paid NECF.

e) Unexplained charges and credits: Exhibit 172, Sheet "Comm till 5.31.17" has charges and credits that had no explanation by Vanlaw at trial. For example:

Special Circumstances:
166701 - $453.60
166700 - $453.60
166702 - $999.60
166699 - $924.00

The above totals $2,830.00 in favor of NECF.

On row 92 of "Comm till 5.31.17," there's a charge to NECF of $2,998.00 with no explanation.

While these amounts essentially cancel out, the presence of unexplained credits and charges suggests a lack of reliability.

f) Unexplained freight: there are no freight charges listed in Exhibit 172, Sheet "Comm till 5.31.17." Vanlaw claims it is entitled to freight exceeding the amount it collected from Trader Joe's. However, only Sheet "Comm after 5.31.17 - 1.31.18" has freight amounts listed. And no freight invoices were produced by Vanlaw. Even if the Court accepted the freight amounts in "Comm after 5.31.17 - 1.31.18" as accurate, the Court could not rely on the royalty calculations in Sheet "Comm till 5.31.17" because there are no freight amounts listed therein.

g) Wrong sales price: PO number 56750889 in "PO details BBQ," Cell S253 has the wrong sales price. Vanlaw was never authorized to sell for $14.50 per case, nor was there any evidence that it actually sold for $14.50 per case. The purchase order also indicates a sales price of $17.80 per case. (Ex. 211, DEF. EX. PAGE 00394.)

h) Freight charged for an order that wasn't shipped: There's a freight charge in Exhibit 172, Sheet "Comm after 5.31.17 - 1.31.18" for an order that wasn't shipped – PO Number "0106984427 – A" ("Comm after 5.31.17 - 1.31.18" row no. 27) for $1,357.65. The purchase order indicates this order was not to be shipped. (Ex. 211, DEF. EX. PAGE 00640.)

REQUEST 3: Whether the Court found Exhibit 172 to be inaccurate in its conclusion that Cross-Complainant was paid in full, and instead found that Exhibit 243 was accurate in terms of whether Cross-Complainant was paid in full.

RESPONSE 3: In order to determine how much in royalties, if anything, were owed to NECF by Vanlaw, the Court first had to determine how much in royalties were earned by NECF. Next, the Court had to determine how much of the royalties were paid. As stated above, the Court will not rely on either party for their mathematical calculations as Vanlaw apparently wants the Court to do with Ms. Fabian's conclusory testimony that

NECF was paid in full. The Court can do its own mathematical calculations, and the parties are responsible for providing evidence of the facts to support the underlying calculations.

As to the first finding, the amount of royalties earned, the Court found Exhibit 172 to be unreliable for both its mathematical calculations and the underlying data for the reasons stated above. As such the Court used Trader Joe's figures in Exhibit 232 to determine the case quantities as set forth in Exhibit 243. Next the Court multiplied the case quantities by the royalty rate it found: $2.80 per case. Finally, the Court subtracted the temporary tomato paste upcharge for 53,541 cases (August 1, 2015 to July 31, 2016) at the rate of 3.7 cents per case pursuant to Exhibits 240 and 232. (Exhibit 240 was derived from Exhibit 232.) Thus, the Court determined the royalties earned were $601,206.18.

As to the second finding, the amount of payments, the Court found Exhibit 172 to be unreliable for both its mathematical calculations and the underlying data for the reasons stated above. Thus, the Court used NECF's numbers from Exhibit 215, $485,634.87, for the reasons stated above. As discussed above, had the Court used Vanlaw's payment figures from Exhibit 172, the amount of payments would have been lower, and Vanlaw would have owed NECF even more than this Court found.

REQUEST 3(a): In other words, whether, but for the findings that the $0.26 fulfilment fee and the $0.037 tomato upcharge were unauthorized, the Court would have found that Cross-Complainant had been paid in full as set forth in Exhibit 172.

RESPONSE 3(a): Even if the Court found agreed with Vanlaw regarding the $0.26 fulfilment fee and the $0.037 tomato upcharge, which it did not for the reasons stated above, the royalty amount would have been $2.503 per case. Thus, the total royalty owed would be 215,424 x $2.503 = $539,206.27. The total payments made would not change,

so Vanlaw would still owe NECF $539,206.27 minus $485,634.87 = $53,571.40 under that hypothetical. Again, for the reasons stated above, the Court found there was no agreement on the $0.26 fulfilment fee, and that the $0.037 tomato upcharge was only in place for one year (August 1, 2015 to July 31, 2016).

REQUEST 3(a)(1): If so, whether the accurate math would be: 202,714 cases shipped [total of column Q on Exhibit 172] times $.30 per case [$.26 fulfillment fee per case and $.04 tomato paste upcharge] minus $1,981.02 [conceded tomato upcharge from Exhibit 243] equals $58,833.18 as the total underpaid royalties. (fn2: "The tentative decision seems to suggest that this is the math that the Court intended to use as it does not seem to suggest the Court found that Cross-Defendant would have been liable to Cross-Complainant but for the fulfillment fee and tomato upcharge. For example, the tentative decision states: "Regarding the amount of damages on the cross-complaint, cross-complainant appears to have abandoned the argument alleged in the complaint that it is owed interest on late royalty payments as this element was not argued. Likewise, in final argument cross-complainant did not ask for an accounting. Instead, cross-complainant argued it is entitled to be compensated for the unauthorized deductions from royalty payments." This seems to suggest that the Court only intended to find in favor of Cross-Complainant on this sole issue.")

RESPONSE 3(a)(1): For the reasons stated above, the Court did not find Exhibit 172 reliable. Rather, the Court relied on Trader Joe's figures in Exhibit 232. Thus, the math would not be calculated using Exhibit 172.

As stated above, even if the Court agreed with Vanlaw regarding the $0.26 fulfilment fee and the $0.037 tomato upcharge, which it did not for the reasons stated above, the royalty amount would have been $2.503 per case. Thus, the total royalty owed would be 215,424 x $2.503 = $539,206.27. The total payments made would not change, so Vanlaw would

still owe NECF $539,206.27 minus $485,634.87 = $53,571.40 under that hypothetical. Again, for the reasons stated above, the Court found there was no agreement on the $0.26 fulfilment fee, and the $0.037 tomato upcharge was only in place for one year (August 1, 2015 to July 31, 2016).

The parties stipulated on the first day of trial, and the Court agreed, that prejudgment interest would be determined post-judgment after the Court ruled on the principal amounts owed. Otherwise, the parties would have to present a plethora of hypothetical interest calculations. As such, NECF had no obligation to argue the amount of prejudgment interest at trial. The Court also notes that Exhibit 172, Sheet "Comm till 5.31.17," cell E310 contains what appears to be an interest charge of approximately $12,334.44 pursuant to Exhibit 117 (page "VANLAW 407", "Sriracha finished goods" section), as indicated in. NECF has claims for interest, too, that it has not asserted by virtue of the parties' stipulation and Court's order. Pursuant to the stipulation of the parties, and the Court's order, quoted below, this interest charge by Vanlaw is premature at this phase of the trial.

> July 13, 2021 Oral Stipulation and Order re: Interest
> **MR. HAGEMANN:** ONE MORE HOUSEKEEPING ITEM, YOUR HONOR. SO I DON'T KNOW IF MS. DIMERCURIO HAS HAD A CHANCE TO THINK ABOUT IT, BUT WE TALKED ABOUT INTEREST. AND ONE OF THE ISSUES IN THIS CASE IS THAT THERE MIGHT BE PRETTY SUBSTANTIAL INTEREST, IN THE NEIGHBORHOOD OF 50 PERCENT OF PRINCIPAL AMOUNT OWED. THERE ARE A LOT OF DIFFERENT HYPOTHETICALS, A LOT OF DIFFERENT ISSUES WITH, YOU KNOW, THIS, AS YOU KNOW, LIKE FULFILLMENT FEES, THE TOMATO PASTE. THINGS OF THAT NATURE. THERE ARE A LOT OF DIFFERENT POTENTIAL FINDINGS THE COURT COULD MAKE ON THE PRINCIPAL SUM OWED. SO WHAT I SUGGESTED TO MS. DIMERCURIO IS WHY DON'T WE HAVE A TRIAL -- AND OBVIOUSLY THE COURT WOULD HAVE TO BE AMENABLE TO THIS -- WHY DON'T WE HAVE A TRIAL AND WE CAN RESOLVE THE INTEREST VIA MOTION -- IT'S NOT GOING TO REQUIRE ANY LIVE WITNESSES -- TO RESOLVE THE INTEREST ISSUE. IT'S GOING TO BE A MATTER OF CALCULATION. THE

ALTERNATIVE WOULD REQUIRE US TO DO A LOT OF HYPOTHETICALS FOR THE COURT. AND I THINK MAKES MORE SENSE FOR THE COURT TO SAY THIS IS THE ROYALTY RATE ON THIS MANY CASES, NOW BRIEF THE ISSUE OF INTEREST.
THE COURT: I USUALLY DO THAT ANYWAY. YOU KNOW, ISSUE A JUDGMENT FOR OR AGAINST WHICHEVER PARTY. AND THEN I EITHER ALLOW PREJUDGMENT INTEREST OR NOT BASED ON THE FACTS AND THE LAW. AND IF I ALLOW IT, THEN A JUDGMENT CAN BE AMENDED TO ADD THE INTEREST IF THE PARTIES AGREE. IF NOT, WE CAN HAVE ARGUMENT.
MS. DIMERCURIO: THAT'S FINE, YOUR HONOR. I WOULD THINK IT WOULD BE A POST TRIAL MOTION.
THE COURT: YES. I THINK IT WOULD BE ANYWAY.
MS. DIMERCURIO: DECLARATION. YEAH. THAT'S FINE.
THE COURT: SO, I MEAN, YOU CAN ARGUE THAT WE SHOULD GET PREJUDGMENT INTEREST. I'LL CONSIDER THAT. MY FINAL FINDING WILL BE WITH PREJUDGMENT INTEREST OR NOT. AND IF I ADD THE INTEREST, THEN YOU CAN SUBMIT YOUR PROPOSAL. AND IF COUNSEL AGREES, THAT WILL BE THE AMOUNT OF THE INTEREST.
MR. HAGEMANN: DO YOU HAVE ANY INTEREST IN STIPULATING WHOEVER PREVAILS IS ENTITLED TO PREJUDGMENT INTEREST OF 10 PERCENT?
MS. DIMERCURIO: NO.
THE COURT: WE CAN JUST WAIT.

REQUEST 3(b): Or, did the Court find that Cross-Defendant's calculations in Exhibit 172 were incorrect?

RESPONSE 3(b): For the reasons stated above, the Court found Cross-Defendant's calculations in Exhibit 172 were incorrect.

REQUEST 3(b)(1): If so, why?

RESPONSE 3(b)(1): For the reasons stated above, especially those in Response 2(a). As stated above, the Court will not rely on either party for their mathematical calculations as Vanlaw apparently wants the Court to do with Ms. Fabian's conclusory testimony that

NECF was paid in full. The Court can do its own mathematical calculations, and the parties are responsible for providing evidence of the facts to support the underlying calculations.

Issues Related to Cross-Complainant's Claim That it is Owed Damages on Unshipped Orders

REQUEST 1: Whether the Court granted or denied Cross-Defendant's Motion in Limine No. 1, seeking to exclude evidence related to Cross-Complainant's claim that it is entitled to damages for Cross-Defendant's alleged failure to use commercially reasonable efforts to ship ordered cases of BBQ Sauce.

RESPONSE 1: The Court denied Cross-Defendant's Motion in Limine No. 1.

REQUEST 1(a): If the Motion was denied, on what grounds? Specifically, what evidence did the Court rely upon to conclude that the alleged breach was disclosed in the pleadings or discovery?

RESPONSE 1(a): The Court denied Cross-Defendant's Motion in Limine No. 1 for all seven independent grounds set forth in NECF's opposition, which includes:

a) NECF did disclose, in discovery, the information Vanlaw claims was not disclosed. Namely, on July 29, 2019 in its supplemental response to Special Interrogatory No. 4 (and several other responses) NECF stated: "The amount [demanded in the Complaint] is based on the royalty fee ($3.30/case) times the case demand as ordered by [Trader Joe's] (207,106)." (Ex. D. to Mot., ROA # 215.)

The cases shipped, according to Vanlaw, was only 202,714. Trader Joe's has a slightly higher number at 202,907 cases shipped. (Ex. 6 to Hagemann Decl., ROA # 241.) Thus, it's clear that NECF was claiming royalties on unshipped orders.

Further, on that same date, July 29, 2019, NECF produced a revised royalty statement (an Excel Workbook) as NECF0753 in which the calculation of royalties in column Z, rows 345 to 351, of sheet "royalty by month" includes royalties on cases of barbeque sauce that were ordered but not shipped totaling $12,280.03. (Ex. 2 to Thomson Decl., ROA # 242, page 10 of 11, cf "Qty Shipped" and "Qty Ordered" with "Total Due for Royalty" column.) In addition to NECF0753 being referenced repeatedly in NECF's July 29, 2019 written discovery responses in Exhibit D to the Motion (ROA # 215) as the source of NECF's demand for payment, it was inquired upon extensively by Vanlaw as Exhibit 16 to the January 30, 2020 deposition of M. Peter Thomson, the President and person-most-knowledgeable for NECF. (Exs. 4, 7 to Thomson Decl., ROA # 242.) That deposition was held over six months after NECF0753 was produced, which allowed Vanlaw ample time to review NECF0753 in detail.

The Operating Agreement, Trial Exhibit 1, clearly states both: (i) the royalties are paid on cases of barbeque sauce shipped, and (ii) VLF has a duty to use commercially-reasonable efforts to fulfil orders. (Ex. 1, §§ 5, 10(e).) Thus, there is only one logical argument for NECF's claim in discovery for royalties on unshipped orders given the written agreement calls for payments on shipped orders: that Vanlaw failed to use commercial reasonable efforts to fulfil orders. Had Vanlaw simply asked, "why do you contend you are entitled to royalties on unshipped orders?", then NECF would have provided that answer.

Six additional independent grounds for denying this motion (as more fully set forth in the opposition – ROA # 229) are:

b) Vanlaw had all the underlying facts even before this litigation started. 100% of the underlying facts necessary to make a claim for royalties on unshipped barbeque sauce are within the knowledge of Vanlaw. Namely, those facts are: (a) the number of cases ordered that were not shipped (known to VLF and Trader Joe's, but not NECF because Vanlaw told Trader Joes to stop sending purchase orders to NECF the last 6 months of the relationship), and (b) the steps Vanlaw took to fulfil those orders, especially those orders placed in December, 2017. NECF did not even know the exact number of orders shipped and unshipped until Trader Joe's responded to NECF's trial subpoena on May 18, 2021. Arguments should not be excluded if the underlying facts are disclosed. There's a reason discovery is subdivided into fact discovery and expert discovery.

c) Since it's undisputed certain orders were not shipped, Vanlaw has the burden of proof pursuant to section 500 of the Evidence Code, so exclusion serves no purpose. *See, also*, Evid. Code § 412.

d) Vanlaw chose not to conduct an expert deposition of Mr. Thomson.

e) There was no prejudice to Vanlaw. The Court specifically notes the parties amended both their exhibit lists (ROA # 225, 239) and witness lists (ROA # 213) about one month after the motion *in limine* (ROA # 215) was filed. Vanlaw had ample opportunity to address this issue at trial by calling relevant witnesses or introducing relevant documents, and even attempted to do so at trial with the testimony of Mr. Gilbert as discussed in Response 2, below. (July 14, 2021 Transcript at 146:9-147:15.)

f) The sole authority cited by Vanlaw doesn't apply here. Vanlaw cites to exactly one authority for the proposition this Court can exclude evidence, *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, but this case is clearly distinguishable because there is no willful failure to disclose here like there was in *Thoren*. Further, Vanlaw is seeking

to exclude an argument, which is not discussed in *Thoren*. *Bentley v. Mountain* (1942) 51 Cal.App.2d 95 and *Wise v. Southern Pac. Co.* (1963) 223 Cal.App.2d 50 are demurrer cases. This is not a demurrer, so the Court is unsure why Vanlaw is citing to those cases.

g) Vanlaw has unclean hands. The doctrine of unclean hands bars a party with unclean hands from seeking a judicial remedy. *Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1110. Vanlaw has unclean hands on two independent grounds. One, Vanlaw blinded NECF in the last six months of the relationship by instructing Trader Joes to cease sending purchase orders to NECF in violation of their e-mail agreement. (Ex. 3 to Thomson Decl., ROA # 242.) Two, Vanlaw failed to educate its person-most-knowledgeable as required by section 2025.230 of the Code of Civil Procedure and would likely have been sanctioned but-for the discovery motion cutoff. (Mot. at ROA #107, Order at ROA # 117.) NECF tried but was unable to abate this harm, as its motion to re-open discovery was opposed by Vanlaw, and the Court denied it. (Mot. at ROA # 144, Order at ROA # 195.)

REQUEST 2: Whether the Court found that the limitation of liability clauses in the Operating Agreement (paragraphs 13 and 20) preclude Cross-Complainant from recovering damages for Cross-Defendant's alleged failure to use commercially reasonable efforts to ship cases of BBQ Sauce.

RESPONSE 2: The Court did not find the "limitation of liability" clauses barred any damages claimed in this Action on either side for three independent grounds:

a) The testimony of Mr. Gilbert regarding the unshipped orders was that Vanlaw did not ship the December, 2017 orders because Vanlaw believed it could not ship them before December 31, 2017. This testimony indicates Vanlaw made an intentional decision not to ship orders based on an erroneous legal understanding of the

Operating Agreement, *inter alia*, as discussed in more detail in Response 3, below. Thus, the Court finds the failure by Vanlaw to ship all of the orders placed by Trader Joe's was intentional, not merely ordinary negligence. And Parties cannot, by contract, limit the damages for intentional (or even grossly negligent) conduct. Civ. Code § 1668; *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755.

b) Contractual Interpretation – The Court must interpret both the "commercially-reasonable" provision (Ex. 1 ¶ 10(e)) and the "limitation-of-liability" clauses (Ex. 1 ¶ ¶ 12, 20) in concert. Contract language must be interpreted, "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." *TitanCorp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-74. As such, a finding that the "limitation-of-liability" clauses bar claims for violating the "commercially-reasonable" provision would render the "commercially-reasonable" provision nugatory, thus the Court cannot and does not so interpret the "limitation-of-liability" clauses as such. *See, also,* Civ. Code §§ 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."), 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."), 3523 ("For every wrong there is a remedy.") As such, the Court interprets the "limitation-of-liability" clauses to limit liability for ordinary negligence of non-contractual tort duties owed by the parties to each other. This interpretation has the added benefit of according with both section 1668 of the Civil Code and *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 755. As discussed above, Mr. Gilbert testified that Vanlaw (i) intentionally violated (ii) an express contractual provision – paragraph 10(e) of Exhibit 1. Thus, for both of those reasons, the "limitation-of-liability" clauses do not apply to bar any damages by NECF here.

c) Judicial Estoppel / Judicial Admission: Vanlaw sought both in its complaint (judicial admission) and at trial (judicial estoppel) incidental damages in the form of the cost of purchasing empty bottles. Namely, there is no evidence NECF ordered empty bottles from Vanlaw. Rather, Vanlaw claims in the complaint and at trial is that it was damaged because NECF failed to purchase 360,000 finished sriracha bottles pursuant to the "blanket" purchase order. (Ex. 233.) Vanlaw cannot take the inconsistent position that NECF cannot obtain damages but Vanlaw can. Even after NECF pointed out this inconsistency in its closing arguments, Vanlaw chose not to withdraw its claim from damages on the empty bottles. This Court has awarded damages on the empty bottles. Thus, Vanlaw is judicially estopped from asserting that the "limitation of liability clauses" bars NECF's damages, but not theirs, and has also judicially admitted that that the "limitation of liability clause" does not apply to incidental damages.

Relevant Testimony:

Thomson Testimony

Q: Are there 12,550 unshipped orders in Exhibit 232?
A: Yes.
Q: Could VanLaw have shipped all of those 12,550 unshipped orders using commercial and reasonable efforts, in your expert opinion?
A: Yes, very definitely.

(July 14, 2021 Transcript at 99:24-100:4.)

Gilbert Testimony

Q: Now, there is a document that I have on the screen here (indicating). This is Exhibit 232. And I'll represent to you that these are Trader Joe's-produced purchase orders, at least a table of them. And again, they were produced by Trader Joe's. And at the end here (indicating) -- oops. I did something wrong. Okay. So at the end of this document -- maybe you can call it out. Okay, there are some zeros in this particular column (indicating) -- I think I can do this -- right here. See these (indicating)?
A: Yes.
Q: Okay. And over here (indicating), these are, I'll represent to you, apparently the orders of cases, and they're zeroed out here (indicating). Do you believe that VanLaw attempted to do everything it could to fulfill their product through the end of the relationship?

A: We did everything. Yes, we did.
Q: Is there anything -- did you intentionally attempt to stop fulfilling their orders at any point?
A: Only orders that would have been required to be produced and done after the end of the agreement.
Q: To the extent that -- are you aware -- regardless of this document that we're looking at, are you aware of any orders that you were unable to fulfill?
A: Yes --
Q: Okay.
A: -- not because we couldn't make it from a manufacturing standpoint, but because we didn't have the right to make it from an agreement standpoint.
Q: After the termination of the three-year term?
A: Correct.

(July 14, 2021 Transcript at 146:9-147:15.) (emphasis added.)

Thomson Testimony

Q: NOW, YOU HEARD MR. GILBERT TESTIFY ABOUT THE FACT THAT HE BELIEVED HE COULD NOT SHIP THOSE DECEMBER 2017 ORDERS BEFORE THE CONTRACT TERMINATED, RIGHT?
A: YES.
Q: OKAY. WAS IT YOUR UNDERSTANDING OF THE OPERATING AGREEMENT THAT THE RELEVANT TIME PERIOD WAS THE DATE THE ORDERS WERE SUBMITTED, SUCH THAT IF AN WAS SUBMITTED WITHIN THE CONTRACT PERIOD THERE WAS AN OBLIGATION TO MANUFACTURE THOSE ORDERS EVEN IF THEY WERE GOING TO BE SHIPPED OUTSIDE OF THE TERMS OF THE AGREEMENT?
A: CORRECT. I WOULD JUST LIKE A SLIGHT COPY CHANGE ON THAT THAT IT WAS A MATTER OF WHEN THE ORDERS WERE RECEIVED, WHEN WE THEY WERE SUBMITTED BY TRADER JOE'S AND RECEIVED BY VANLAW. CORRECT.
Q: OKAY. AND IS PARAGRAPH 10(E) THE BASIS FOR THAT BELIEVE? I'LL SHOW YOU WHAT THAT IS VERY QUICKLY. EXHIBIT 1, PARAGRAPH 10(E). RIGHT HERE. IS THAT THE BASIS OF YOUR BELIEF? "AGREES TO USE COMMERCIALLY REASONABLE EFFORTS"?
A: CORRECT.
Q: IS YOUR EXPERT OPINION IS IT AN INDUSTRY STANDARD THAT A CO-MANUFACTURER IS RESPONSIBLE TO USE COMMERCIALLY REASONABLE EFFORTS TO MANUFACTURE ORDERS PLACED WITHIN THE CONTRACT TERM?
A: CORRECT, YES.

(July 19, 2021 Morning Transcript at 13:21-14:19.)

Relevant Closing Arguments:

> NECF's Closing Argument
> IN THE HEIGHT OF IRONY – WE'RE NOT ARGUING THIS. I WANT TO BE VERY CLEAR. WE'RE NOT ARGUING THAT THE INCIDENTAL DAMAGES BARRES THEIR CLAIM, BUT IT'S HIGHLY IRONIC, BECAUSE THEIR CLAIM ON THE COMPLAINT IS A COMPLAINT FOR INCIDENTAL DAMAGES, THE BOTTLES. SO THEY'RE TALKING OUT OF BOTH SIDES OF THEIR MOUTH. AND HOW THE STORAGE FEES ARE SOMEHOW DIFFERENT THAN THE BOTTLES.

(July 19, 2021 Afternoon Transcript at 57:26-58:5. Vanlaw's rebuttal, not quoted herein, at 58:26-62:19.)

REQUEST 2(a): If the Court found that the limitation of liability clauses do not preclude the damages, what are the grounds for this finding?

RESPONSE 2(a): The reasons are set forth in Response 2, above.

REQUEST 3: Whether, and on what grounds, the Court found in favor of Cross-Complainant on its claim that Cross-Defendant damaged it in the amount of $35,047.60 for failing to use commercially reasonable efforts to ship cases of BBQ Sauce. (n3: "All of the math Cross-Complainant's Exhibit 243 is based upon cases ordered, including those that were not shipped. In other words, it assumed that Cross-Complainant would prevail on its claim that Cross-Defendant failed to use commercially reasonable efforts to ship all ordered cases. The tentative decision suggests that the Court did not intend for Cross-Complaint to prevail on that claim, as it states: "technically there was a sum certain due after each shipment was paid by Trader Joe's…," but Trader Joe's was not paid for unshipped cases. If the Court did not intend for Cross-Complainant to prevail on that claim, then the proposed damages would need to be reduced as follows (from Exhibit

243): 12,517 cases that were not paid for by Trader Joe's (meaning cases that were not shipped) times $2.80 per case (the alleged appropriate royalty rate as set forth in Exhibit 243) equals $35,047.60.")

RESPONSE 3: The Court first notes that, according to Trader Joe's figures in Exhibit 232, there were 12,517 cases that were ordered but not shipped. Of those 12,517 unshipped cases, 4,392 of the unshipped cases were orders placed in December, 2017, and the remaining 8,125 unshipped cases were placed prior to December, 2017.

Pursuant to Exhibit 1, the undisputed Operating Agreement, paragraph 10(e), Vanlaw had a duty to:

> use commercially reasonable efforts to manufacture, distribute, and sell the Products in accordance with commercially reasonable requests from TJ's and NECF during the Term of this Agreement.
>
> (Ex. 1 ¶ 10(e).)

Peter Thomson testified in his capacity as an expert witness that Vanlaw could have, with commercially reasonable efforts, shipped all 12,517 cases ordered that were not shipped. (July 14, 2021 Transcript at 99:24-100:4, quoted above in Response 2.)

No witness from Vanlaw, not even John Gilbert, testified about the 8,125 unshipped cases that were in orders placed prior to December, 2017. Mr. Gilbert did testify regarding the 4,392 unshipped orders in December, 2017. He testified that Vanlaw did not ship those orders because Vanlaw believed that it could not ship them prior to the end the term of the Operating Agreement, i.e., December 31, 2017. (July 14, 2021 Transcript at 146:9-147:15, quoted above in Response 2.)

Mr. Thomson then testified that his understanding of the contract, as well as the industry standard, was that Vanlaw's duty included all orders received during the term. (July 19,

2021 Morning Transcript at 13:21-14:19, quoted above in Response 2.) This testimony was unrebutted.

First, the Court finds Mr. Thomson's testimony regarding the 8,125 unshipped cases that were in order placed prior to December, 2017 unrebutted, and thus finds that it is undisputed that Vanlaw could have shipped an additional 8,125 cases for orders placed prior to December, 2017 had it used commercially reasonable efforts as required by Paragraph 10(e) of the Operating Agreement (Ex. 1.)

Second, the Court finds in favor of NECF's proffered interpretation of Paragraph 10(e) of the Operating Agreement (Ex. 1.) on three independent grounds:

1) The plain meaning of "requests from TJ's and NECF during the Term of this Agreement," means requests received from TJ's during the "Term of this Agreement."
2) To the extent this term is used in a technical sense, Civ. Code §§ 1644, 1645, NECF was the only party to proffer a technical interpretation. (July 19, 2021 Morning Transcript at 13:21-14:19, quoted above in Response 2.)
3) While the Court does not believe there was any ambiguity that cannot be resolved by the plain meaning or technical meaning, any putative ambiguity was resolved by Mr. Thomson's testimony about the meaning of the term. (July 19, 2021 Morning Transcript at 13:21-14:19, quoted above in Response 2.)

Since the Court finds Paragraph 10(e) to require Vanlaw to use commercially reasonable efforts to ship orders received from TJ's during the "Term of this Agreement," which was undisputed to be through December 31, 2017, and it's undisputed that orders for 4,392 cases were received in early December 2017, and Mr. Gilbert testified the sole reason Vanlaw failed to ship those orders was an erroneous understanding of the Operating

Agreement, the Court finds that Vanlaw failed to use commercial-reasonable efforts. In fact, by Mr. Gilbert's own testimony, Vanlaw took no efforts. (July 14, 2021 Transcript at 146:9-147:15, quoted above in Response 2.)

Thus, in conclusion, for the foregoing reasons, the Court finds that Vanlaw failed to use commercially reasonable efforts to ship 12,517 cases that were ordered and were not shipped.

REQUEST 3a: If not, whether the proposed damages in favor of Cross-Complainant set forth in the under-submission ruling, dated July 22, 2021, should be reduced by $35,047.60.

RESPONSE 3(a): The damages should not be reduced for the reasons set forth, above.

REQUEST 3(b): If so, whether, and why, the Court adopted Peter Thomson's testimony about why VanLaw should have shipped 12,517 ordered cases rather than the testimony of John Gilbert as to the why VanLaw did not ship ordered cases of BBQ Sauce beyond December of 2017.

RESPONSE 3(b): See Response 3, above.

DATED: 9/9, 2021

By: _____
Hon. Robert J. Moss
ROBERT J. MOSS

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Central Justice Center 700 W. Civic Center Drive Santa Ana, CA 92702	
SHORT TITLE: VanLaw Food Products, Inc. vs. New England Country Foods, LLC	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2017-00962844-CU-BC-CJC**

I certify that I am not a party to this cause. I certify that the following document(s), Judgment dated 09/09/21, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on September 10, 2021, at 9:35:34 AM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

M.K. HAGEMANN, P.C.
MHAGEMANN@MKHLAW.COM

MAGARIAN & DIMERCURIO, APLC
KRISTA@MAGARIANLAW.COM

QUINTANA LAW GROUP, APC
ANDRES@QLGLAW.COM

QUINTANA LAW GROUP, APC
JOHN@QLGLAW.COM

Clerk of the Court, by: Dherrera, Deputy

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
1801 Century Park East
Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901
mhagemann@mkhlaw.com

Attorneys for Defendant/Cross-Complainant
NEW ENGLAND COUNTRY FOODS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

VANLAW FOOD PRODUCTS, INC., a California corporation, Plaintiff, vs. NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company, and DOES 1 to 10, Defendants.	Case No.: 30-2017-00962844-CU-BC-CJC Dept.: C14 Judge: Hon. Robert J. Moss **[PROPOSED] JUDGMENT** Filing Date: December 21, 2017 Trial Date: July 13, 2021
NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company, Cross-Complainant, vs. VANLAW FOOD PRODUCTS, INC., a California corporation, and ROES 1 to 10, Cross-Defendants.	

JUDGMENT

This action came on regularly for trial on July 13, 2021 in Department C14 of the Superior Court, the Hon. Robert J. Moss Judge presiding; Plaintiff and Cross-Defendant Vanlaw Food Productions, Inc. ("Vanlaw") appearing by attorneys Krista L. DiMercurio and Mark D. Magarian, and Defendant and Cross-Complainant New England Country Foods, LLC ("NECF") appearing by attorney Michael K. Hagemann.

Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the cause was submitted to the Court on July 19, 2021, and IT IS NOW ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment on the Complaint is entered in favor of Vanlaw and against NECF in the amount of $27,441.25 in damages, plus prejudgment interest.
2. Judgment on the Cross-Complaint is entered in favor of NECF and against Vanlaw in the amount of $115,571.31 in damages, plus prejudgment interest.
3. The net amount of damages on the Complaint and the Cross-Complaint is **$88,130.06** in favor of NECF and against Vanlaw.
4. Vanlaw shall also pay **net** prejudgment interest on the above damages to NECF in the amount of $_____.
5. NECF shall recover its costs from Vanlaw in the amount of $_____.
6. NECF shall recover its reasonably incurred attorney's fees from Vanlaw in the amount of $_____.
7. The total amount Vanlaw shall pay to NECF is $_____.

DATED: 9/9, 2021

By: _____
Hon. Robert J. Moss

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation, Defendant.	Case No. 8:21−cv−01060−DOC−ADS **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF [F.R.C.P. 12(b)(6)]** Courtroom: 9 D Judge: Hon. David O. Carter Date: September 27, 2021 Time: 8:30 a.m. Complaint Filed: June 16, 2021

Plaintiff New England Country Foods, LLC (hereinafter "NECF"), hereby submits its opposition to Defendant Vanlaw Food Products, Inc. (hereinafter "Vanlaw")'s motion to dismiss the complaint, as follows:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion is a quintessential example of why the Courts have equitable doctrines such as judicial admission, judicial estoppel, and waiver.

In opposing NECF's state-court motion for leave to amend the cross-complaint to include the allegations contained in the complaint in this action, Vanlaw argued how fundamentally different these two cases are. (*See* § III(B)(5).) The Court agreed with Vanlaw about how fundamentally different these two cases are, and the Court applied the permissive cross-complaint rules regarding leave to amend, i.e. prejudice, versus the compulsory cross-complaint rule which requires a finding of "bad faith." (Order [Dkt. 14-10].)

Having successfully prevented NECF from bringing its claims in state-court, Vanlaw is now complaining to this Court about receiving exactly what it requested from the state court, and is now arguing the complete opposite of what it argued in state court. (Interestingly, in its notice of related case filed in state court, Vanlaw recently implicitly conceded the complaint in this action is not a compulsory cross-complaint by virtue of the boxes not checked. (Not. of Related Case [Dkt. 14-15].))

Indeed, in meeting-and-conferring on this motion, Vanlaw implies the state-court committed error in denying the motion for leave to amend, and that NECF's sole remedy is to appeal the erroneous denial of the motion for leave to amend, a motion Vanlaw successfully opposed. (Vanlaw Opp'n [Dkt. 14-8].); (Ex. B.)

Vanlaw has already chosen a lane, and the state-court has accepted Vanlaw's lane: that the complaint in this action is not a compulsory cross-complaint. Having prevailed on that theory, Vanlaw is now bound to that lane and cannot run NECF off the road.

There are a plethora of additional grounds for denying the motion on the compulsory cross-complaint issues discussed as well, including delayed discovery

(the complaint pleads the claims in the complaint in this action weren't know when the answer was filed).

The res judicata (claim preclusion) and collateral estoppel (issue preclusion) arguments are premature. There is no judgment yet, just an "intended" decision. (Order [Dkt. 14-20].) Nor would the intended decision, if it were a judgment, negatively affect the complaint in this action vis-à-vis either doctrine.

The "limitation of liability" clause argument fails for several reasons, including that intentional conduct is alleged, and intentional conduct (and even grossly negligent conduct) cannot be waived, nor damages limited, in advance. Nor does contract interpretation allow Vanlaw's interpretation, which would render performance of the contract illusory as there would be no remedy for non-performance.

II. STATEMENT OF FACTS

A. Vanlaw's Complaint in State Court

Vanlaw filed a terse complaint in state court on December 21, 2017. (Compl. [Dkt. 14-2].) Essentially the sole substantive allegation was:

> Plaintiff agreed to, and did, supply Defendant with goods (bottles) pursuant to Defendant's Purchase Orders, in return for Defendant's timely payment to Plaintiff upon receipt of Plaintiff's invoices (30 days).
> (Compl. at p. 3 [Dkt. 14-2].)

No agreements were attached to the complaint. (*Id.*)

B. Vanlaw's Explanation of Its Complaint in Its Trial Brief

Vanlaw alleged that on July 22, 2015 (over three months before the Operating Agreement [Dkt. 1-2] was signed.) NECF transmitted a "blanket" purchase order to Vanlaw for 15,000 cases (360,000 bottles) of sriracha sauce, but NECF only ended up purchasing 6,515 cases (156,360 bottles). (Br. [Dkt. 14-13]); (*See, also*, Ex. A (Trial Ex. 233).) Vanlaw had purchased at total of 300,000 "custom" empty bottles in reliance on the "blanket" purchase order, so when NECF didn't make any additional purchases, Vanlaw was still had about 5,579 2/3

cases (133,912 bottles) of unused "custom" bottles that it could not use on other products. (Br. [Dkt. 14-13].) Vanlaw sought damages for its cost of purchasing the unused "custom" bottles it could not use, plus the costs of storing the bottles. (*Id.*) Vanlaw's claims in state court had nothing to do with Trader Joe's. (*Id.*) Trader Joe's was never even a potential customer for the sriracha sauce at issue in Vanlaw's state-court complaint. (*Id.*)

C. NECF's State Court Cross-Complaint, According to Vanlaw

"[T]he original Cross-Complaint [] simply alleges that [Vanlaw] owes less than one hundred thousand dollars for failing to pay some royalty fees for products sold and charging excess on material and management fees." (Vanlaw Opp'n at 6:4-9 [Dkt. 14-8].) (emphasis added).

D. The Difference Between the State-Court Case and the Complaint In this Action, According to Vanlaw

> The [Complaint in this Federal Action] is self-explanatory, but to highlight: (1) **it is based upon an entirely new set of facts completely unrelated** to the [state-court] Cross-Complaint that Plaintiff has been defending for over two years;

(Vanlaw Opp'n at 14:10-12 [Dkt. 14-8].) (emphasis added).

E. The State Court Denied Leave to Amend the Cross-Complaint

> The state court ruled in denying NECF's motion for leave to amend: Based upon the grounds that allowing Cross-Complainant to assert an **entirely new factual dispute** and four new causes of action on the eve of trial after discovery has been closed would cause Cross-Defendant substantial prejudice, the motion is denied.

(Order [Dkt. 14-10]) (citations omitted).

There was no finding of "bad faith." (*Id.*)

F. Vanlaw's Proposal Regarding the State-Court Denial of Leave to Amend: NECF Should Appeal It

In meeting-and-conferring on this motion, Vanlaw wrote: "If NECF believes the state Court should have allowed the claims in the Complaint to be in the state

court action, the recourse would be an appeal of the denial of the motion to amend the cross-complaint, *not a new, separate action*." (Ex. B.) (emphasis in original).

G. NECF's Request for Judicial Notice

NECF requests the Court take judicial notice that Exhibit A, filed concurrently, is State-Court Trial Exhibit 233, which is the July 22, 2015 purchase order referenced in Vanlaw's Trial Brief. [Dkt. 14-13]; (Hagemann Decl. ¶ 2.)

NECF requests the Court take judicial notice that Exhibit B, filed concurrently, is a true and correct copy of an e-mail sent from Vanlaw's Counsel to NECF's counsel on August 12, 2021. (Hagemann Decl. ¶ 3.)

III. ARGUMENT

This motion should be denied. However, if the Court is inclined to grant any part of this motion, NECF seeks leave to amend the Complaint. For example, NECF could allege any of the facts stated in this opposition, or at oral argument, that the Court finds relevant to this motion, but which are not contained in the Complaint and cannot otherwise be judicially noticed. Or, based on the final ruling, NECF believe it could allege facts that address the concerns of the Court.

A. Vanlaw's Request for Judicial Notice

NECF has no objection to Vanlaw's Request for Judicial Notice, so long as that notice is limited to the fact that documents attached to the motion were filed on the dates indicated within the document. NECF also has no objection to this Court accepting the orders as reflecting what was ordered. NECF also notes what appears to be a typo with respect to Exhibit 19 in the request for judicial notice. [Dkt. 14-1.] That order [Dkt. 14-20] was entered July 22, 2021, not July 2, 2021, as can be seen from the order itself. NECF does object to the use of any document being used to establish the truth of the facts asserted by Vanlaw or found by the state court therein. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 994 (9th Cir. 2018).

Additionally, in determining the relatedness (or lack thereof) to the Complaint in this Action, NECF asserts that only the state-court complaint [Dkt. 14-2] is relevant as discussed, below.

B. The Compulsory Cross-Complaint Rule Does Not Bar This Action for Several Reasons

Because the initial complaint at issue for this affirmative defense was filed in California State Court [Dkt. 14-2], the relevant law on this issue is section 426.30 of the California Code of Civil Procedure, not Rule 13 of the Federal Rules of Civil Procedure. *Valley View Angus Ranch, Inc. v. Duke Energy Field Services, Inc.*, 497 F.3d 1096, 1100 (10th Cir. 2007) ("[W]e look to state law to determine if a claim is a compulsory counterclaim, and, if so, the effect of a failure to raise such a claim."). Section 426.30(a) states:

> Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.

Cal. Code Civ. Proc. § 426.30(a).

Section 426.10 defines, "[r]elated cause of action" as:

> a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.

Cal Code Civ. Proc. § 426.10(c).

It's important to note the only relevant "evidence" for determining relatedness (or lack thereof) for the compulsory cross-complaint rule on a motion to dismiss is the Complaint in this action and Vanlaw's state-court complaint filed December 21, 2017. [Dkt. 14-2]; Code Civ. Proc. § 426.10(c) ("as the cause of action which the plaintiff alleges in his complaint.") (emphasis added).

1. The Burden of Persuasion is on Vanlaw

While not expressly enumerated in Rule 8(c), the Compulsory Cross-Complaint Rule is an affirmative defense because it doesn't relate to the elements of NECF's claims. *Hulsey v. Koehler*, 218 Cal. App. 3d 1150, 1158 (Cal. Ct. App. 1990) (certified for partial publication); *see, also*, Fed. R. Civ. P. 8(c); *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (an affirmative defense "is a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven.") (citation omitted).

Thus, Vanlaw has the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49 (2005) ("the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.") (citations omitted).

2. Only the State-Court Complaint, and the Federal Complaint, Are Relevant to The Relatedness Requirement for This Affirmative Defense

The compulsory cross-complaint rule requires a defendant to file compulsory claims in a cross-complaint before, or at the same time, as their answer. Cal. Code Civ. Proc. § 426.30(a). Absent a pleading challenge, a compulsory cross-complaint is thus due within thirty days of service of the complaint. Cal. Code Civ. Proc. §§ 412.20(a)(3), 585.

This Court can take judicial notice that thirty days is not enough time to conduct any meaningful discovery. In fact, only depositions could even theoretically occur within this time period as written discovery would be due after the answer was due[1]. Thus, a defendant will almost assuredly have only the

[1] Written discovery personally served on the date of service of the Complaint would be due by midnight on the day the Answer was due, and could be served by U.S. Mail.

complaint to rely upon when determining whether a cross-complaint is required. As such, NECF contends that only Vanlaw's state-court complaint [Dkt. 14-2] and the Complaint in this Action are relevant for this affirmative defense. This interpretation is also consistent with the statute. Cal. Code Civ. Proc. § 426.10(c) ("as the cause of action which the plaintiff alleges in his complaint.") (emphasis added).

To hold that what is later presented in motions, discovery, trial evidence, or trial briefs are relevant to establish the relatedness of the two complaints would make all cross-complaints compulsory. Namely, a plaintiff could hide the true nature of their case in their complaint, which is generally permitted by California Courts. *Lickiss v. Financial Industry Regulatory Authority*, 208 Cal. App. 4th 1125, 1135 (Cal. Ct. App. 2012) (demurrers for uncertainty disfavored in light of ability to conduct discovery) (citations omitted). And then the plaintiff could subsequently raise issues in common with potential permissive cross-complaints, and thus bar what would otherwise be permissive cross-complaints based on the compulsory cross-complaint rule. It would also conflict with *Align Technology, Inc. v. Tran*, 179 Cal. App. 4th 949, 968-70 (Cal. Ct. App. 2009), the primary case relied upon by NECF, which rejected the notion that there is a duty to assert a compulsory cross-complaint discovered after filing an answer.

3. All Doubts Must Be Resolved in Favor of NECF

The Ninth Circuit has ruled, albeit in a footnote, that section 426.30 should be read narrowly:

> We note that our reading of § 426.30 is consistent with the California courts' recognition that **preclusion provisions like the compulsory cross-complaint statute should be read narrowly**. *See Datta v. Staab*, 173 Cal.App.2d 613, 343 P.2d 977, 980 (1959) (stating that the predecessor to § 426.30 "should be narrowly construed"); *see also Carroll v. Import Motors, Inc.*, 33 Cal.App.4th 1429, 39 Cal.Rptr.2d 791, 796 (1995) (noting, in the context of § 426.30, that "equity abhors a forfeiture").

Maldonado v. Harris, 370 F.3d 945, n. 4 (9th Cir. 2004) (emphasis added).

Further strengthen the conclusion in the footnote, section 426.30 is effectively a penal statute in that it results in forfeiture of otherwise valid claims, and certainly claims have value (typically monetary). As such, any ambiguities in that statute must be resolved in favor of NECF pursuant to the, "Rule of Lenity." *See People v. Cornett*, 53 Cal. 4th 1261, 1271 (Cal. 2012); *Leslie Salt Co. v. USA*, 55 F.3d 1388, 1398 (9th Cir. 1995) ("The rule of lenity has not been limited to criminal statutes, particularly when the civil sanctions in question are punitive in character.")

Section 426.30, as further defined by section 426.10, is about as vague and ambiguous as a statue can get. As one California Appellate Court put it, "[f]ew cases have construed the relatedness requirement of the compulsory cross-complaint statute. Accordingly, whether an unasserted claim is a 'related' cause of action that is barred by section 426.30 can be a difficult question to answer." *Align Technology, Inc.*, 179 Cal.App.4th at 952-53. In other words, these two statutes require the Courts to draw lines and the statue provides zero guidance on where to draw this line vis-à-vis what must be sufficiently in common to warrant application of section 426.30. *See ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.*, 5 Cal. App. 5th 69, 83 (Cal. Ct. App. 2016) ("Thus, although claims were loosely 'related' -- in the sense that they involved some of the same parties and concerned, directly or indirectly, the failure of ZF Devices – ZF's cross-complaint was not logically related to TAT's claim: The trial of the claims did not involve a 'duplication of time and effort based upon there being factual or legal issues relevant to both claims.'") (citations omitted).

If the California Legislature wanted defendants to assert all the claims they had against the plaintiff, regardless of their relatedness to the claims in the complaint, they would have so drafted section 426.30 accordingly, and at least the statute would be clear. Instead, absent identical issues, where to draw the line of

being sufficiently "related," (versus loosely related) to result in a forfeiture is arbitrary.

Finally, "Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some **obvious** bar to securing relief on the face of the complaint." *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F3d 999, 1004 (9th Cir. 2014) (emphasis added).

In concert with an incredibly terse complaint, a statue that must be interpreted in favor of NECF, the burden of persuasion on Vanlaw, the Ninth Circuit footnote in *Maldonado*, 370 F.3d at n. 4, and the procedural posture (motion to dismiss), any doubts about the application of the incredibly vague and ambiguous compulsory cross-complaint rules must be resolved in favor of NECF.

4. The Complaint in this Action is Not Related to the State Court Complaint as Pled by Vanlaw

First and foremost, the state-court complaint is not based on the Operating Agreement (Ex. B to Compl. [Dkt. 1-2]) or Mutual Non-Disclosure Agreement. (Ex. A to Compl. [Dkt. 1-1].) This is evident for several reasons:

- Neither of those two agreements are attached to the state-court complaint [Dkt. 14-2], yet California generally requires them to be attached (or alleged verbatim). *Harris v. Rudin, Richman & Appel*, 74 Cal. App. 4th 299, 307 (Cal. Ct. App. 1999) (certified for partial publication).
- The "essential terms of the agreement" alleged:

  > Plaintiff agreed to, and did, supply Defendant with goods (bottles) pursuant to Defendant's Purchase Orders, in return for Defendant's timely payment to Plaintiff upon receipt of Plaintiff's invoices (30 days).
  > [Dkt. 14-2, p. 3],

  …specifically refers to a purchase order. Not the Operating Agreement or Mutual Non-Disclosure Agreement.

Additionally, neither "Trader Joe's" nor "barbeque sauce" is mentioned anywhere in the state-court complaint (for good reason – Trader Joe's and barbeque sauce had nothing to do with the complaint as discussed, below.)

There is simply no way the Court can find, based on the state-court complaint as pled [Dkt. 14-2], the state-court complaint is sufficiently related to the complaint in this action to force NECF to forfeit its claims.

5. Vanlaw Emphasized, in State Court, How Different this Case and the State-Court Case Are; Thus, The Judicial Admission Doctrine Applies

In *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-227 (9th Cir. 1988), the Ninth Circuit held "that statements of fact contained in a brief may be considered admissions of the party in the discretion of the court." *See, also, Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) (finding that party's prior statement regarding privity was a judicial admission and citing to several other cases on this subject).

Vanlaw argued, in opposition to NECF's state-court motion for leave to amend the cross-complaint, how different the two cases are:

> This is not a routine request to amend a pleading. [NECF]'s motion to amend its Cross-Complaint is nothing more than an unauthorized attempt to *start the case over*

(Vanlaw Opp'n at 2:2-4 [Dkt. 14-8].) (emphasis in original).

> [NECF] is proposing **an entirely new** Cross-Complaint that alleges that [Vanlaw] engaged in tortious conduct by trying to steal [NECF]'s sauce recipe as opposed to the original Cross-Complaint which simply alleges that [Vanlaw] owes less than one hundred thousand dollars for failing to pay some royalty fees for products sold and charging excess on material and management fees. The proposed new pleading seeks over $6,000,000.00 in damages as well as punitive damages. It goes without saying that this case would essentially be starting over if the Court permits the amendment.

(Vanlaw Opp'n at 6:4-9 [Dkt. 14-8].) (emphasis added).

II. STATEMENT OF FACTS

A. Complaint

On December 21, 2017, [Vanlaw] initiated this action by filing a Complaint for breach of contract related to [NECF]'s failure to pay for bottles that [Vanlaw] purchased on its behalf.

(Vanlaw Opp'n at 6:22-25 [Dkt. 14-8].) (emphasis in original).

And the most direct:

The proposed amended Cross-Complaint is self-explanatory, but to highlight: (1) **it is based upon an entirely new set of facts completely unrelated** to the original Cross-Complaint that Plaintiff has been defending for over two years;

(Vanlaw Opp'n at 14:10-12 [Dkt. 14-8].) (emphasis added).

Finally, in the Notice of Related Case filed by Vanlaw, it did not check the box for:

arises from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact.

[Dkt. 14-15]

This language fairly closely matches section 426.10(c) of the Code of Civil Procedure.

Nor did Vanlaw check:

is likely for other reasons to require substantial duplication of judicial resources if heard by different judges.

[Dkt. 14-15]

These failures to check boxes are judicial admissions that the compulsory cross-complaint rule do not apply.

6. The Complaint in this Action is Not Related to the State Court Complaint, even if this Court Considers Post-Pleading Arguments and Evidence

To the extent this Court disagrees with NECF's argument that only the state-court complaint [Dkt. 14-2] is relevant to the relatedness issue of the compulsory cross-complaint rule, the Court can turn to Vanlaw's own trial brief to see how unrelated to the two cases are. [Dkt. 14-13]. To grossly summarize what was actually argued in state court as evidenced by said brief: Vanlaw alleged that on July 22, 2015 (over three months before the Operating Agreement [Dkt. 1-2] was signed.) NECF transmitted a "blanket" purchase order to Vanlaw for 15,000 cases (360,000 bottles) of sriracha sauce, but NECF only ended up purchasing 6,515 cases (156,360 bottles). (Br. [Dkt. 14-13]); (*See, also*, Ex. A (Trial Ex. 233).) Vanlaw had purchased at total of 300,000 "custom" empty bottles in reliance on the "blanket" purchase order, so when NECF didn't make any additional purchases, Vanlaw was still had about 5,579 2/3 cases (133,912 bottles) of unused "custom" bottles that it could not use on other products. (Br. [Dkt. 14-13].) Vanlaw sought damages for its cost of purchasing the unused "custom" bottles it could not use, plus the costs of storing the bottles. (*Id.*) Vanlaw's claims in state court had nothing to do with Trader Joe's. (*Id.*) Trader Joe's was never even a potential customer for the sriracha sauce at issue in Vanlaw's state-court complaint. (*Id.*)

In contrast, the Complaint in this action relates to interference by Vanlaw with NECF's relationship with Trader Joe's (who purchased barbeque sauce) and which occurred several years after the sriracha sauce purchase order (Ex. A (Trial Ex. 233.)) at issue in the state-court complaint. The Complaint in this action has nothing to do with sriracha sauce or that purchase order whatsoever.

7. None of The Authorities Cited by Vanlaw Contain Similar Facts

The only case Vanlaw quotes and discusses in detail in its motion is *Align Technology, Inc.*, 179 Cal.App.4th at 949. In the prior state-court case, Tran (counter) sued Align Technology, Inc. for wrongful termination. *Id.* at 953. In a

subsequent case, Align Technology, Inc. sued Tran for, "breach of contract and conversion of patents belonging to the company." *Id.* The Court found those two complaints were sufficiently related to invoke the compulsory cross-complaint rule. *Id.*

Here, *Align Technology, Inc.* does not have similar facts to this instant case (nor does any case that NECF could locate), plus some of *Align Technology, Inc.*'s statements of law appear to conflict with later California cases and Ninth Circuit precedent.

First, it's important to note that the contract at issue in the state-court complaint [Dkt. 14-2] was the purchase order for sriracha sauce as discussed above. The Complaint here consists of only one claim for breach of contract (mainly based on the Mutual Non-Disclosure Agreement). The Complaint in this action is loosely based on the contracts attached thereto as evidenced by their being only one contract claim. [Dkt. 1]. And the state-court complaint of Vanlaw [Dkt. 14-2] is not based on either agreement attached to the Complaint in this action (as evidenced by their being no reference or attachment of those agreements).

Second, there is no evidence, or even argument, here of, "duplication of time and effort," as required to invoke section 426.30 as suggested by *Align Technology, Inc.*, 179 Cal.App.4th at 960. NECF would also note that to the extent there are an issues in common, none of which are known to NECF at this time, issue preclusion (collateral estoppel) would be available to obviate the need to retry them. However, the Court can see from Vanlaw's section on this subject in the motion, no new issues are identified.

Third, subsequent case law has suggested *Align Technology, Inc.*'s may not be good law as evidenced by the use of the "Cf." signal when citing to *Align Technology, Inc. See ZF Micro Devices, Inc*, 5 Cal. App. 5th at 84.

Fourth, to the holding in *Align Technology, Inc.* that the compulsory cross-complaint rule should be liberally construed would appear to directly conflict with

the Ninth Circuit's requirement of narrow interpretation of section 426.30, thus casting doubt on the applicability of the entire case. *Maldonado*, 370 F.3d at n. 4. Not only is the Ninth Circuit correct for the reasons states in subsection 3, above, this Court is bound by the Ninth Circuit's interpretations of California state law. *See Paskenta Band of Nomlaki Indians v. Crosby*, Case No. 15-00538, 2015 WL 4879650, at *6 (E.D. Cal. Aug. 14, 2015) (quoting *Brown v. Gen. Steel Domestic Sales, LLC*, Case No. 08-00779, 2008 WL 2128057, at *5 (C.D. Cal. May 19, 2008)).

Finally, and most importantly, both Courts in *Align Technology, Inc.*, 179 Cal.App.4th at 970, and the case cited therein (*AL Holding Co. v. O'Brien & Hicks, Inc.*, 75 Cal. App. 4th 1310, 1314 (Cal. Ct. App. 1999)) imply that it is relevant, and a good fact, if the party sought leave to assert a cross-complaint. Here, NECF did seek leave, but it was denied at Vanlaw's insistence. [Dkt. 14-8, 14-10].

8. Plaintiff Discovered the Wrongful Acts That Are the Subject of This Complaint After Filing Its Answer

"To be considered a compulsory cross-complaint, a related cause of action must have existed at the time of the service of [the] answer to [the] complaint." *Crocker Nat. Bank v. Emerald*, 221 Cal. App. 3d 852, 864 (Cal. Ct. App. 1990).

Several Courts have implicitly found that this exception also applies to claims unknown at the time of filing the answer, including Defendant's primary authority: *Align Technology, Inc.* 179 Cal. App. 4th at 968-70 (discussing delayed discovery and finding that there was not delayed discovery); *See, also*, *Wanamaker v Albrecht*, 99 F.3d 1151 (10th Cir. 1996) ("Since the Albrechts may not have discovered the existence of these claims until after they filed their answer, it may be true that the claims were not compulsory under the California statute, Cal. Civ. Proc. Code § 426.30")

Here, the state-court answer was filed January 30, 2018. [Dkt. 14-3]. And the Complaint pleads:

> 24. Plaintiff did not discover Defendant's wrongful actions, above, until after it received the e-mails in Exhibit C shortly after July 19, 2019.
>
> [Dkt. 1].

9. Because Defendant Successfully Opposed Plaintiff's Motion for Leave to Amend, The Doctrine of Judicial Estoppel Bars This Affirmative Defense

"[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50 (citation and internal quotation marks omitted). Although judicial estoppel is "probably not reducible to any general formulation of principle, ... several factors typically inform the decision whether to apply the doctrine in a particular case." *Id.* at 750 (citations and internal quotation marks omitted). "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quotation marks omitted). "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Id. at 751. "In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts."

Here, Vanlaw has taken at least two clearly inconsistent positions, both of which were accepted by the state court judge in its order denying NECF leave to amend the cross-complaint [Dkt. 14-10], both of which are an attempt to derive an unfair advantage for Vanlaw and cause an unfair detriment to NECF (forfeiture of claims), and thus both justify judicially estopping Vanlaw from asserting the affirmative defense of compulsory cross-complaint (and res judicata (claim preclusion), once a judgment is entered):

Vanlaw's Inconsistent Position No. 1:

Past Position: It is not proper to bring the claims that are the subject of this federal complaint in state court. (Vanlaw Opp'n [Dkt. 14-8].)

Current position: It was improper to fail to bring the claims that are the subject of this federal complaint in state court. (Vanlaw Mot. [Dkt. 14].)

Vanlaw's Inconsistent Position No. 2:

Past Position: The state court action and the claims that are the subject of this federal complaint in state court are completely unrelated. (Vanlaw Opp'n [Dkt. 14-8].)

Current position: The state court action and the claims that are the subject of this federal complaint in state court are related. (Vanlaw Mot. [Dkt. 14].)

10. Because Defendant Successfully Opposed Plaintiff's Motion for Leave to Amend, The Doctrine of Waiver Bars This Affirmative Defense

To the extent Vanlaw had a right to have the claims that are the subject of this federal complaint consolidated in state court, it knowingly and intentionally waived those putative rights by opposing, successfully, NECF's motion for leave to amend the cross-complaint. (Vanlaw Opp'n [Dkt. 14-8]); (Order [Dkt. 14-10].) *Roesch v. De Mota*, 24 Cal.2d 563, 572 (Cal. 1944); *Wind Dancer Production Group v. Walt Disney Pictures*, 10 Cal. App. 5th 56, 78 (Cal. Ct. App. 2017); *United States v. Mezzanatto*. 513 U.S. 196, 201 (1995) ("A party may waive any

provision, either of a contract or of a statute, intended for his benefit.") (citations omitted).

11. Because Defendant Successfully Opposed Plaintiff's Motion for Leave to Amend, The Doctrine of Unclean Hands Bars This Affirmative Defense

The doctrine of unclean hands clearly can constitute an affirmative defense to both legal and equitable claims. *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 978 (Cal. Ct. App. 1999); *Aguayo v. Amaro*, 213 Cal.App.4th 1102, 1110 (Cal. Ct. App. 2013). NECF contends there is no reason why the doctrine of unclean hands should not be extended to bar affirmative defenses, which are essentially a "claim," in that it has elements and defeats a claim even if the plaintiff can satisfy all the elements.

As such, Vanlaw's opposition to the motion for leave to amend followed promptly by a complete reverse of positions constitutes misconduct directly relates to the affirmative defense of the compulsory cross-complaint rule.

12. Because Defendant Successfully Opposed Plaintiff's Motion for Leave to Amend, The Doctrine of Issue Preclusion Bars This Affirmative Defense

While it is true that a final judgment is typically required before the Court will find issue preclusion, that is not a hard-and-fast rule. *McMillan v. Lowe's Home Centers, LLC*, Case No. 1:15-cv-00695-DAD-SMS at *4-9, 2016 WL 232319 (E.D. Cal. Jan. 20, 2016) (citing *Luben Industries, Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983) and *St. Paul Fire & Marine Insurance Co. v. F.H.*, 55 F.3d 1420 (9th Cir. 1995), *inter alia*.)

Here, the Court can and should find the order denying the motion for leave to amend the cross-complaint [Dkt. 14-10] is sufficiently final that it is fair to invoke issue preclusion against Vanlaw in this context as Vanlaw cannot appeal that order since they requested denial. (Opp'n [Dkt. 14-8].); *Diamond Springs*

Lime Co. v. American River Constructors, 16 Cal. App. 3d 581, 606 (Cal. Ct. App. 1971) ("In a nonjury case, an appellant will not be permitted to challenge a finding made at his own request.") (citations omitted).

Further, this Court can take judicial notice of the fact that there was no finding of "bad faith." [Dkt. 14-10]. A finding of "bad faith," is required to deny a motion for leave to amend a cross-complaint. Cal. Code Civ. Proc. § 426.50; *Silver Orgs. v. Frank*, 217 Cal.App.3d 94, 99 (Cal. Ct. App. 1990). Rather, the Court found only, "prejudice," which is the standard for permissive, not compulsory, cross-complaints. Cal. Code Civ. Proc. §§ 473(a), 428.50, 576.

As such, the Court found (at Vanlaw's request) that the claims in the federal complaint [Dkt. 1] are permissive, not compulsory, and Vanlaw should be precluded from disputing that.

13. Because Defendant Successfully Opposed Plaintiff's Motion for Leave to Amend, The Doctrine of Invited Error Bars This Affirmative Defense

The doctrine of invited error holds that a party cannot challenge a ruling where they themselves contributed to that error. *Diamond Springs Lime Co.*, 16 Cal. App. 3d at 606 ("Generally, a party who invites error is estopped from using it as ground for reversal on appeal.") (citations omitted).

Here, Vanlaw claims that NECF should appeal the allegedly erroneous trial court ruling. (Ex. B.) However, Vanlaw cannot conscript NECF to do what Vanlaw itself cannot by virtue of the invited error doctrine. Rather, the equity behind the invited-error doctrine should bar Vanlaw's attempt to invoke the compulsory cross-complaint rule when it invited the alleged error, and the only way to cure the alleged error at the state court level is to appeal.

14. Plaintiff Was Prevented from Filing This Complaint in the Earlier Action

In *Maldonado v. Harris*, 370 F.3d 945, 951-52 (9th Cir. 2004), the Court held that since the defendant in the first case could not bring a Section 1983, Title 42 action against the plaintiff in the first action (Caltrans), section 426.30 of the California Code of Civil did not apply.

Similarly, here, NECF could not assert the claims in the complaint filed in this action because the Court wouldn't allow it. (Order [Dkt. 14-10].)

15. Forcing NECF To Appeal an Order Vanlaw Requested and That It Now Tacitly Contends Is Error Is Inequitable and Serves No Purpose

In meeting-and-conferring over this motion, Vanlaw has suggested that NECF could appeal the denial of its motion for leave to amend the cross-complaint. (Ex. B.) Because the state-court claims have already been tried [Dkt. 14-20], forcing NECF to appeal the denial of its motion for leave to amend the cross-complaint would not serve any legitimate purpose. Namely, if the California Court of Appeal reversed the trial court on that issue (or even if the trial court reversed itself), the new claims would still need to be tried separate from the claims already tried. Whether those claims are tried in federal or state court is irrelevant. Thus, the Court should use its equitable powers to deny Vanlaw's affirmative defense of compulsory cross-complaint (and res judicata, once a judgment is entered.)

C. Res Judicata (a/k/a Claim Preclusion) Does Not Bar This Action for Several Reasons

There is no judgment yet, and a final judgment is required to invoke res judicata. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896 (Cal. 2002).

It is possible there might be a judgment between now and the hearing. However, since there is no judgment attached to the motion, the motion cannot be granted on this ground.

Once the judgment is entered, state law on res judicata will apply. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379-80 (1985). Assuming the proposed judgment becomes the judgment, NECF is prepared to argue why res judicata does not bar any of the claims, including on the following grounds: the cross-complaint does not seek to vindicate the same primary rights as the complaint in this action, and that any doubts should be resolved in favor of NECF for the reasons set forth in the compulsory cross-complaint section, above.

Further, the judicial admission, judicial estoppel, waiver, unclean hands, issue preclusion, and invited error arguments, above, apply equally here as well. Plus, delayed discovery, which also applies to res judicata, applies here just like it does, above. *Ratliff v. JP Morgan Chase Bank NA*, Case No. 3:17-cv-02155-EMC [Dkt. 74], 2017 WL 2876141, at *12 (N.D. Cal. 2017 Nov. 29, 2017) (citing *Allied Fire Protection v. Diede Construction, Inc.*, 127 Cal. App. 4th 150, 156 (Cal. Ct. App. 2005)).

D. Collateral Estoppel (a/k/a Issue Preclusion) Does Not Bar This Action for Several Reasons

Vanlaw has not identified any finding the state court has made on any issue related to the merits of this case, period. Let alone one that that would warrant granting this motion in whole or in part.

Further, there's no final judgment yet, just an "intended" decision, [Dkt. 14-14-19.] so that predicate for issue preclusion does not yet apply. *McMillan*, Case No. 1:15-cv-00695-DAD-SMS at *4-9, 2016 WL 232319 (citing *Luben Industries, Inc.*, 707 F.2d at 1037 and *St. Paul Fire & Marine Insurance Co.*, 55 F.3d at 1420, *inter alia*.)

E. The "Limitation of Liability" Clauses Do Not Apply for Several Reasons

The conduct NECF has alleged Vanlaw engaged in is clearly intentional, not simply ordinary negligence. (Compl. [Dkt. 1 *passim*].) Parties cannot, by contract, limit damages for future intentional (or even grossly negligent) conduct. Cal. Civ. Code § 1668; *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 755 (Cal. 2007). *See, also,* Cal. Civ. Code § 3523 ("For every wrong there is a remedy.") While there is a claim for "negligent interference with prospective economic advantage" argued in the alternative in the complaint, that claim incorporates intentional conduct by virtue of paragraph 45. (Compl. [Dkt. 1 ¶ 45].) Certainly, the conduct incorporated by reference is also sufficient to satisfy the gross negligence standard of *City of Santa Barbara.* 41 Cal. 4th at 754 ("'Gross negligence' long has been defined in California and other jurisdictions as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'") (citations omitted).

Additionally, as to the breach of contract claim:

(1) NECF alleges a violation of the reverse-engineering prohibition in the Mutual Non-Disclosure Agreement (Exhibit A to the Complaint) at paragraph 3. (Compl. [Dkt. 1 ¶ 29].) To read the "limitation of liability" clause to bar a remedy on an express contract provision would be to render that provision nugatory, which is not permissible under the canons of contract interpretation. *TitanCorp. v. Aetna Casualty and Surety Co.*, 22 Cal. App. 4th 457, 473-74 (Cal. Ct. App. 1994). *See, also,* Cal. Civ. Code §§ 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."), 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."), 3523 ("For every wrong there is a remedy.")

(2) NECF also alleges a breach of the implied covenant of good faith and fair dealing. (Compl. [Dkt. 1 ¶ 29].) This covenant is implied in all agreements.

Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 658 (Cal. 1958). Parties are, "not [] permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured." *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 91 (Cal. 1995). Since the parties have not attempted to change those standards, any interpretation the effectively reads out the implied covenant by depriving NECF of a remedy is equally impermissible as rendering an express term nugatory.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss in its entirety.

DATED: September 3, 2021

M.K. HAGEMANN, P.C.

By: /s/ Michael K. Hagemann
Michael K. Hagemann
Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

M.K. HAGEMANN, P.C.
Michael K. Hagemann (State Bar No. 264570)
mhagemann@mkhlaw.com
1801 Century Park East, Suite 2400
Century City, CA 90067
Tel: (310) 773-4900
Fax: (310) 773-4901

Attorneys for Plaintiff NEW ENGLAND COUNTRY FOODS, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company,

Plaintiff,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation,

Defendant.

Case No. 8:21−cv−01060−DOC−ADS

DECLARATION OF MICHAEL K. HAGEMANN

Courtroom: 9 D
Judge: Hon. David O. Carter
Date: September 27, 2021
Time: 8:30 a.m.

Complaint Filed: June 16, 2021

DECLARATION OF MICHAEL K. HAGEMANN

I, Michael K. Hagemann, declare:

1. I am an attorney licensed to practice law in the State of California and am attorney of record for Plaintiff New England Country Foods, LLC in the above-entitled action. I have personal knowledge of the facts stated herein. If called and sworn as a witness, I could testify competently to the following:

2. I was the lead trial attorney for the state-court case between Defendant Vanlaw Food Products, Inc. and Plaintiff New England Country Foods, LLC, and I attended every moment of trial. Exhibit A, filed concurrently, is a true and correct copy of State-Court Trial Exhibit 233, which is the July 22, 2015 purchase order referenced in Vanlaw's Trial Brief. (Br. [Dkt. 14-13].)

3. Exhibit B, filed concurrently, is a true and correct copy of an e-mail sent from Vanlaw's Counsel, Ms. DiMercurio to me on August 12, 2021.

Executed September 3, 2021 at Irvine, California.

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

By: /s/ Michael K. Hagemann
Michael K. Hagemann

M Peter Thomson <petert.necf@gmail.com>

Sriracha "Blanket" PO 9/1-12/31/15

1 message

M. Peter Thomson <petert.necf@gmail.com> Wed, Jul 22, 2015 at 7:44 PM
To: Babette Halpin <halpinb@vanlaw.com>
Cc: John Gilbert <gilbertj@vanlaw.com>

As discussed ...

Actual PO's to follow as quickly as they can be secured!

Peter

Sriracha blanket PO 090115 thru 123115.pdf
249K

New England Country Foods LLC

BILL TO:

New England Country Foods LLC
One Broadway
Fourteenth Floor
Cambridge, MA 02142

Purchase Order

ORDER DATE:	NUMBER:
7/22/2015	901431

TO:
Van Law Food Products, Inc. John Gilbert 2325 Moore Avenue Fullerton, CA 92833

SHIP TO:
New England Country Foods, LLC One Broadway Fourteenth Floor Cambridge MA 02142

Terms	Ship Via	Expected
Net 30 Days	Best Way	9/11/2015

Item	Description	Unit	Rate ($)	Amount ($)
GE OR Sriracha 87811	Good Eats Original Sriracha 8oz. - "blanket" purchase order for period September 1 through December 31, 2015	15,000	18.96	284,400.00
			Total	$284,400.00

Phone #	Facsimile #
617-682-3650	617-401-3795

Authorized Signature _____

Approved _____

Michael K. Hagemann

From: Krista DiMercurio <krista@magarianlaw.com>
Sent: Thursday, August 12, 2021 10:26 AM
To: Michael K. Hagemann
Subject: NECF v. VanLaw - FEDERAL - Motion to Dismiss Pursuant to Rule 12b - Meet and Confer

Hi Michael.

I hope you are well. Pursuant to Local Rule 7-3, we are required to complete a meet and confer in advance of our Motion to Dismiss pursuant to FRC 12b. We have until August 19 to complete it. I suggest doing it via Zoom if you are agreeable to that. Unfortunately, I am out Wednesday and Thursday. Do you have availability Monday or Tuesday? If not, I believe we can agree to one more extension of one week for my responsive pleading deadline without approval from the judge.

The issues we plan on raising will be as follows:

1. The Complaint is barred pursuant to C.C.P. Section 426.30 due to the relationship between it and the Complaint and Cross-Complaint that were already litigated in the state court action. If NECF believes the state Court should have allowed the claims in the Complaint to be in the state court action, the recourse would be an appeal of the denial of the motion to amend the cross-complaint, *not a new, separate action*.
2. Additionally, and *alternatively*, the Complaint is barred by the doctrines of res judicata and/or collateral estoppel due to at least some of the issues already being adjudicated in the state court action.
3. Finally, a 12b motion lies where the Complaint discloses a complete defense, and the Plaintiff fails to plead around it. (See for example, *Gray v. Evercore Restructuring LLC* (1st Cir. 2018) 544 F.3d 320). Here, by attaching the Operating Agreement, the Complaint discloses a complete defense in the limitation of liability section in that (on its face) it bars the relief sought in the Complaint. If NECF contends that clause is unenforceable, it needed to plead around that defense.

Let me know if you are available to discuss on Monday or Tuesday.

Thank you.

Krista
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Krista L. DiMercurio
Magarian & DiMercurio,
A Professional Law Corporation
315 N. Puente St., Unit A
Brea, CA 92821
Phone: (714) 415-3412
Fax: (714) 276-9944
Cell: (714) 270-1014

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
315 N. Puente Street, Unit A
Brea, California 92821
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: September 27, 2021 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN THAT on September 27, 2021, at 8:30 a.m., before the Hon. David O. Carter, in Courtroom 9D of the United States Courthouse for the Central District of California, Southern Division, 411 W. 4th Street, Santa Ana, California, Defendant VANLAW FOOD PRODUCTS, INC. ("Defendant" or "VLF") will and hereby does move to dismiss Plaintiff NEW ENGLAND COUNTRY FOOD PRODUCTS, LLC's ("Plaintiff" or "NECF") Complaint pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6) for failure to state a claim upon which relief can be granted.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on August 16, 2021.

As set forth in the accompanying Memorandum of Points and Authorities, the grounds for this motion are: (1) Pursuant to California Code of Civil Procedure ("C.C.P.") Section 426.30, F.R.C.P. 13, and case law, the Complaint is actually a disguised *compulsory cross-complaint* that NECF could have only filed in the related state court action: *VanLaw Food Products, Inc. v. New England County Foods, LLC*, Superior Court of California, County of Orange, Case No. 30-2017-

00962844-CU-BC-CJC ("the State Court Action"); (2) the State Court Action has a fatal *res judicata/collateral estoppel* impact on this federal action; and, (3) *alternatively*, the contractual limitation of liability clauses set forth in the Operating Agreement (Complaint, Exh. B) completely bar the claims and relief sought in this action.

This motion is based on: this Notice, the attached Memorandum of Points and Authorities, the Request for Judicial Notice and exhibits submitted therewith, the Notice of Pendency of Action, the pleadings and papers filed in this action, and such further argument and matters as may be offered at or before the time for hearing on this motion.

Dated: August 26, 2021

MAGARIAN & DIMERCURIO,
A PROFESSIONAL LAW CORPORATION

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

NECF's Complaint should be dismissed pursuant to F.R.C.P. 12(b)(6) because:

1. The Complaint is actually a disguised *compulsory cross-complaint* that NECF could have only filed in the State Court Action.[1]
    a. On December 21, 2017, VLF commenced the State Court Action against NECF for breach of contract (including the very Operating Agreement upon which NECF is suing VLF in this action[2]) relating to NECF's failure to pay a VLF invoice. (RJN, Exh. 1; RJN, Exh. 12, 3:11-4:2)
        i. Notably, NECF's Complaint in this federal action, at ¶13, references the State Court Action. It alleges that NECF obtained the critical evidence (the emails attached to the Complaint as Exh. C) from "*discovery in another action*,"

[1] The State Court Action was tried before the Hon. Robert Moss in July of this year.

[2] NECF's federal Complaint also alleges a breach of a Nondisclosure Agreement ("the NDA") which is effectively an allegation of breach of the Operating Agreement, because the NDA is part of the Operating Agreement. (See, for example, NECF's Complaint, ¶12 and Exh. A and B; see also, Request for Judicial Notice ("RJN") Exh. 15, which was Trial Exhibit 1 in the State Court Action)

which (as explained in more detail herein) is the State Court Action. NECF obviously determined that the State Court Action was significant enough to reference in the Complaint. Despite the admitted relationship of the State Court Action to this case, NECF failed to file a *Notice of Pendency of Other Actions or Proceedings pursuant to L.R. 83-1.4*, notifying this Court about it.

b. On February 19, 2019, NECF filed a Cross-Complaint in the State Court Action against VLF alleging various breaches of the Operating Agreement, again the very same one upon which this action is based.[3] (RJN, Exh. 3, ¶¶6-15) *In other words, and as explained in more detail herein, NECF cannot dispute that the Operating Agreement was at the forefront of the State Court Action.*

c. Earlier this year, NECF sought leave in the State Court Action to amend its Cross-Complaint to add the same allegations that form the basis of its federal Complaint. (RJN, Exhs. 5, 6) The Court

[3] In fact, the Cross-Complaint details the various ways that VLF allegedly breached the Operating Agreement, and it alleges that VLF owes NECF a total of $89,394.28 *for all breaches of the Operating Agreement.* This is a far cry from the millions NECF is seeking in this action for additional alleged breaches of the same agreement.

denied NECF's request for leave to amend. (RJN, Exh. 9) In its motion for leave to file an amended Cross-Complaint, NECF argued that it risked forfeiting its proposed new claims if the Court denied its Motion.[4] (RJN, Exh. 5, 5:24-6:12) *In Opposition to this Motion, it will need to take the opposite position.*

d. On July 13-19, 2021, the State Court Action was tried before the Hon. Robert Moss. On July 22, 2021, the Court announced its tentative decision on the trial. (See RJN, Exh. 19) VLF anticipates a final Statement of Decision and a judgment soon, and will notify this Court if that occurs before the hearing.

e. The federal Complaint alleges various contract and tort causes of action all arising out of VLF's alleged attempt to clone NECF's proprietary sauce recipe in violation of the Operating Agreement, including the NDA that is part of the Operating Agreement. NECF seeks in excess of $6,000,000.00 in damages. All of these allegations arise entirely out of the very same manufacturing

[4] NECF was effectively urging the Court to apply a liberal pleading standard due to the fact that the claims in the proposed amended Cross-Complaint were compulsory, and the Court refused to allow the amendment.

relationship and Operating Agreement that the parties just litigated in the State Court Action.

f. With these facts in mind:

i. Under California law: If defendant's cause of action against plaintiff *is related* to the subject matter of the complaint, it *must* be raised by cross-complaint; failure to plead it will *bar* defendant from asserting it in any later lawsuit. (C.C.P. Section 426.30; see *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1313-1314) Causes of action arise out of the "same transaction or occurrence" if the factual or legal issues are *logically related*. They need not be absolutely identical. (*ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd*. (2016) 5 Cal.App.5th 69, 83; *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 993-994 - "transaction is construed broadly; it is not confined to a single, isolated act or occurrence…but may embrace a series of acts or occurrences logically interrelated" (internal quotes omitted)) ***In cases sounding in contract, the compulsory cross-***

complaint statute is not limited to the specific breach alleged in plaintiff's complaint. Rather, the statute's "spirit and intent" require that the **entire contractual relationship** ***be deemed included within the word "transaction."*** (See *Align Tech., Inc. v. Bao Tran* (2009) 179 Cal.App.4th 949, 962)

ii. Likewise, under federal law: "A pleading *must state as a counterclaim any claim that*—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." (F.R.C.P. 13)

2. Relatedly, the State Court Action has a fatal *res judicata/collateral estoppel* impact on this federal action.

a. The law: "The doctrine of res judicata… 'rests upon the sound policy of limiting litigation by preventing a party who has had *one fair adversary hearing* on an issue from again drawing it into controversy and subjecting the other party to further expense in its

reexamination.' " (*Vella v. Hudgins* (1977) 20 Cal. 3d 251, 257; *Bernhard v. Bank of American National Trust & Savings Assoc.* (1942) 19 Cal.2d 807, 811) "***But the rule goes further. If the matter was within the scope of the action, related to the subject matter and relevant to the issues so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. [Citations.]***" (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589) [Emphasis added] "***The bar applies if the cause of action could have been brought, whether or not it was actually asserted or decided in the first lawsuit***." (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 727 [emphasis added], citing *Busick v. Workermen's Comp. Appeals Bd.* (1972) 8 Cal.3d 967, 974) In fact, **a judgment bars a later claim involving the "same transactional nucleus of facts" even when the new evidence has been discovered to support the claim and new legal theories advanced.** (*Int'l Union of Operating Engineers-Employers Cons. Industry Pension, Welfore & Training Trust Funds v. Karr* (9th Cir. 1993) 994 F.2d 1426, 1430) Collateral generally precludes

relitigation of issues that were already decided in another proceeding. (*People v. Sims* (1982) 32 Cal.3d 468, 484)

b. With respect to *res judicata*, NECF will never be able to dispute that the claims in the federal Complaint *could have been brought* in the State Court Action. Indeed, the claims as pled in this federal action already existed at the time the lawsuit commenced, and NECF sought to add them to the Cross-Complaint in the State Court Action. (RJN, Exh. 1; Complaint, ¶¶18-21) With respect to collateral estoppel, while it is impossible to set forth herein all possible issues that issues that are estopped, a few that come to mind are: interpretation of the Operating Agreement, including the attorney fee clause; the history and relationship of the parties; and the termination of the Operating Agreement.[5]

3. Alternatively, the contractual limitation of liability clauses set forth in the Operating Agreement (Complaint, Exh. B) completely bar the claims and relief sought in this action.

[5] As set forth herein, VLF has requested a detailed Statement of Decision in the State Court Action, asking the Court to address specific key issues that were litigated at trial. Assuming the Court adopts this request, there will likely be additional issues that are estopped.

a. The Limitation on Liability section in the Operating Agreement expressly forbids, among other things, either party from recovering "*loss of profits, loss of business, interruption of business, or…any indirect, special, incidental or consequential damages of any kind*." It also states: "*[I]n no event shall either party be liable for any punitive, special, incidental or consequential damages of any kind*…" (Complaint, Exh. B, ¶¶13, 20) The *only* damages NECF seeks in the Complaint are: (1) "*past and future lost profits*" and (2) punitive damages. (Complaint, ¶25 and Prayer)

b. Therefore, on its face, the Complaint discloses a complete defense to all claims and relief sought. "A Rule 12(b)(6) motion to dismiss for failure to state a claim can be used when plaintiff has included allegations in the complaint that, on their face, disclose some absolute defense or bar to recovery… To grant a Rule 12(b)(6) motion on the basis of an affirmative defense, the facts establishing that defense must (i) 'be definitively ascertainable from the complaint and other allowable sources of information,' and (ii) 'suffice to establish the affirmative defense with certitude.' [*Gray v. Evercore Restructuring L.L.C.* (1st Cir. 2008) 544 F3d 320, 324

(internal quotes omitted); *ASARCO, LLC v. Union Pac. R.R. Co.* (9th Cir. 2014) 765 F3d 999, 1004—defendant must show 'some obvious bar to securing relief' on face of complaint]" (Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

Accordingly, the entire Complaint should be dismissed.

II. THE RELATIONSHIP BETWEEN THE PARTIES

The relationship between VLF and NECF started in December of 2013. In simple terms, NECF had been manufacturing and selling its barbeque sauce to Trader Joe's and it needed to engage a food manufacturer to assist. Thereafter, and subject to the NDA, VLF began manufacturing the barbeque sauce for NECF. In the very early stages, VLF would manufacture and sell the product to NECF and NECF would sell it directly to Trader Joe's. For a variety of reasons, that arrangement quickly changed and VLF took over all aspects of producing the product (including fulfillment, customer service, invoicing, collection, labeling, packaging, and the like); and began selling and shipping the product directly to Trader Joe's pursuant to purchase orders issued by Trader Joe's. It in turn paid a royalty fee (less costs) to NECF. The parties thereafter explored various options for formalizing the arrangement, such as a license agreement or an operating

agreement. (See, Complaint, ¶¶7-12; RJN, Exh. 19, pp. 1-2; RJN, Exh. 12, pp. 2:11-3:9)

Ultimately, VLF and NECF entered into an Operating Agreement (signed in October of 2015, but retroactive to January 1, 2015). (See, Complaint, ¶12; RJN, Exh. 19, p. 2; RJN, Exh. 15) It provided, among other things, that: (1) VLF would provide "manufacturing, shipping, billing, and collection services" for NECF's product *TJ's Bold & Smoky Kansas City Barbeque Sauce ("the BBQ Sauce")* to Trader Joe's Markets; and (2) NECF would sell VLF's product *VLF Sriracha Hot Chili and Garlic Sauce ("the Sriracha Sauce")* under NECF's brand name to the corrections industry, including prison commissaries. (RJN, Exh. 15, paragraphs 1.a. and 1.b.)

III. THE STATE COURT ACTION

A. The Complaint And Cross-Complaint

VLF initiated the State Court Action on December 17, 2017. The Complaint alleged breach of contract related to NECF's failure to pay an invoice relating to bottles that VLF had ordered for NECF to fill orders of Sriracha Sauce pursuant to paragraph 1.b. of the Operating Agreement and a subsequent purchase order. (RJN, Exh. 1; RJN, Exh. 15, paragraph 1.b.; RJN, Exh. 12, pp. 3:10-4:2)

NECF filed an Answer to the Complaint on January 30, 2018. (RJN, Exh. 2)

On February 19, 2019, more than a year into the litigation, NECF filed a Cross-Complaint against VLF for various breaches of the Operating Agreement. (RJN, Exh. 3) NECF's Cross-Complaint set forth a precise dollar amount for all alleged breaches by VLF of the Operating Agreement: $89,394.28, plus interest. (RJN, Exh. 3, ¶9) The Cross-Complaint alleged that VLF "committed breaches of [the Operating Agreement], within the last two years, by among other things:" failing to pay $14,205.41 in unpaid royalties, $17,833.42 in interest on the unpaid royalties, $4,824.52 in raw material fees, and $52,530.92 in management fees (also known as fulfillment fees). (RJN, Exh. 3, ¶13)

VLF filed an Answer to the Cross-Complaint on March 20, 2019. (RJN, Exh. 4)

B. NECF's Motion To File An Amended Cross-Complaint That Is Essentially Identical To This Federal Complaint

In March of this year, NECF sought to amend its Cross-Complaint. (RJN, Exhs. 5, 6) The redlined version of the proposed amended Cross-Complaint is contained at RJN, Exh. 6, Exh. 2 thereto. The proposed amended allegations are virtually identical to the allegations contained in NECF's federal Complaint, with some important differences addressed below.

In a nutshell, the proposed amended Cross-Complaint alleges a further breach of the Operating Agreement (and related tort claims) relating to VLF's alleged attempt to clone NECF's sauce. More specifically, it alleges that, when VLF determined that the parties would not be able to agree to extend the Operating Agreement that was set to expire in December of 2017, VLF decided to go with a Plan "B" to instead clone NECF's sauce and sell it directly to Trader Joe's. It blames VLF for Trader Joe's ultimate decision to stop selling NECF's BBQ sauce, but also alleges that VLF was not successful in carrying out Plan "B." (RJN, Exh. 6, Exh. 2 thereto at ¶¶6-24, 28-53, Prayer) *Importantly, the proposed amended Cross-Complaint makes clear that this conduct is a further breach of paragraphs 1, 2, and 12 of the Operating Agreement*. (RJN, Exh. 6, Exh. 2 thereto at ¶13) *As set forth below, the federal Complaint characterizes the alleged breaches in a slightly different manner by claiming they violate both the Operating Agreement and the NDA. It begs a question as to why the proposed amended Cross-Complaint seems to have avoided alleging a direct breach of the NDA while the federal Complaint relies more heavily upon the NDA.*

NECF's motion for leave to amend the Cross-Complaint also makes clear that the emails that form the basis of NECF's claims were produced in the State Court Action. (RJN, Exh. 6, ¶¶6-7) NECF also argued in part that the Court

should apply a more liberal pleading standard due to the risk of NECF forfeiting its compulsory counterclaims. (RJN, Exh. 5, 5:24-6:12)

VLF opposed NECF's request to amend the Cross-Complaint, arguing: (1) that the statements of NECF's former counsel attributed to VLF's counsel in support of the motion were *false*; and (2) VLF would be substantially prejudiced by the amendment. (RJN, Exh. 7, pp. 2:2-6:20)

On April 16, 2021, the Court denied NECF's motion for leave to amend the Cross-Complaint. (RJN, Exh. 9)

C. Notice Of Related Case

On July 2, 2021, shortly after VLF learned that NECF had commenced the present action, VLF filed in the State Court Action a Notice of Related Case pursuant to Cal. Rule of Court 3.300, alerting the state court of this action. (RJN, Exh. 14) At no time did NECF respond to or otherwise express any disagreement as to the related nature of the State Court Action and the present action.[6]

[6] "**…(b) Duty to provide notice** Whenever a party in a civil action knows or learns that the action or proceeding is related to another action or proceeding pending, dismissed, or disposed of by judgment in any state or federal court in California, the party must serve and file a Notice of Related Case…. **(g) Response** Within 5 days after service on a party of a Notice of Related Case, the party may serve and file a response supporting or opposing the notice. The response must state why one or more of the cases listed in the notice are not related or why other good cause exists for the court not to transfer the cases to or from a particular court or department. The response must be filed in all pending cases listed in the notice and must be served on all parties in those cases." (Cal. Rule of Court, 3.300)

D. VLF's Motion In Limine

Prior to the trial in the State Court Action, VLF filed a motion in limine, seeking to exclude evidence relating to a *new* alleged breach of the Operating Agreement that had not been disclosed in discovery or the Cross-Complaint. Namely, NECF planned on arguing that VLF breached the Operating Agreement by failing to use commercially reasonable efforts to ship NECF's product. NECF opposed the motion in limine, arguing that it had disclosed this alleged breach in discovery. (RJN, Exhs. 10, 11)

The reason why this motion in limine is important is because: (1) it shows that this federal Complaint is not the first time that NECF has attempted to allege new breaches of the Operating Agreement that were not included in its Cross-Complaint; and (2) it highlights the various attempts made by VLF in discovery (both written and through deposition) to discover and defend *all* alleged breaches of the Operating Agreement in the State Court Action, only to find itself in federal Court defending against new breaches of the same Operating Agreement. (RJN, Exhs. 10, 11)

E. The Trial Briefs

Plaintiff and Defendant each filed trial briefs in the State Court Action. They summarize each parties' views of the claims, issues, and defenses. (RJN,

Exhs. 12, 13) Notably, VLF emphasized the impact of the limitation of liability clauses contained in the Operating Agreement. (RJN, pp. 6:4-12,10:21-11:3, 11:8-16, 16:13-15)

F. The Trial

The State Court Action was tried before the Hon. Robert Moss on July 13, 14, and 19, 2021. (RJN, Exhs. 16-19)

G. Post-Trial

On July 22, 2021, the Court in the State Court Action announced its tentative decision pursuant to Cal. Rule of Court 3.1590(a).[7] (RJN, Exh. 19) The tentative decision includes several proposed factual findings and centers around the overall relationship of the parties, the Operating Agreement, and the alleged breaches thereof.

Not believing that the tentative decision addressed all of the controverted issues that were before the Court, VLF requested a statement of decision, pursuant

[7] "(a) On the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk." (Cal. Rule of Court, 3.1590)

to Cal. Rule of Court 3.1590(d),[8] asking the Court to address certain specific issues. For example:

> "Whether the Court found that the limitation of liability clauses in the Operating Agreement (paragraphs 13 and 20) preclude Cross-Complainant from recovering damages for Cross-Defendant's alleged failure to use commercially reasonable efforts to ship cases of BBQ Sauce. If the Court found that the limitation of liability clauses do not preclude the damages, what are the grounds for this finding?" (RJN, Exh. 20, p. 4:4-9)

Cal. Rule of Court 3.1590 sets forth the precise procedural steps that eventually result in a judgment. The next step will be for the Court to decide whether it will adopt its tentative decision or modify it in light of VLF's request for statement of decision. VLF anticipates finality in the next couple of weeks.

IV. THE PRESENT ACTION

The Complaint in the present action alleges various tort and contract causes of action, all arising out of the Operating Agreement, including the NDA contained therein. As set forth above, the federal Complaint focuses more on the language in

[8] "(d) Within 10 days after announcement or service of the tentative decision, whichever is later, any party that appeared at trial may request a statement of decision to address the principal controverted issues..." (Cal. Rule of Court, 3.1590)

the NDA whereas the proposed amended Cross-Complaint in the State Court Action focuses solely on the language in the Operating Agreement. (RJN, Exh. 6, Exh. 2 thereto at ¶13; Complaint, ¶29) This is despite the fact that both the federal Complaint and the proposed amended Cross-Complaint allege the same wrongdoing: namely, when the Operating Agreement was about to expire and VLF determined the parties could not agree upon renewal terms, it decided to work with Trader Joe's to clone NECF's BBQ sauce recipe. Ultimately, it alleges that VLF and Trader Joe's were unsuccessful in the effort to clone, but it nonetheless seeks in excess of $6,000,000.00 in past and future lost profits from VLF, because it blames VLF for Trader Joe's decision to stop selling the BBQ sauce. (Complaint, ¶¶7-25)

Also worth reiterating:

- The Complaint acknowledges that the NDA is part of the Operating Agreement. (RJN, ¶12)
- The Complaint references the State Court Action in that it alleges NECF obtained the critical evidence (the emails attached to the Complaint as Exh. C) from "*discovery in another action*." (Complaint, ¶13)

- The Complaint discloses (in Exh. B, ¶¶13 and 20) that the parties agreed that neither would be liable to the other for lost profits or punitive damages, but the sole damages sought in the Complaint are lost profits and punitive damages. (Complaint, ¶25 and Prayer)

V. ARGUMENT

A. Law Governing Motion

"[9:187] **Function of Rule 12(b)(6) motion:** A Rule 12(b)(6) motion is similar to the common law general demurrer—i.e., it tests the *legal sufficiency* of the claim or claims stated in the complaint. [*Strom v. United States* (9th Cir. 2011) 641 F3d 1051, 1067; *SEC v. Cross Fin'l Services, Inc.* (CD CA 1995) 908 F.Supp. 718, 726-727 (quoting text); *Beliveau v. Caras* (CD CA 1995) 873 F.Supp. 1393, 1395 (citing text); *United States v. White* (CD CA 1995) 893 F.Supp. 1423, 1428 (citing text)]" (Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

"[9:193.5] **Affirmative defenses disclosed on face of complaint:** By contrast, a Rule 12(b)(6) motion to dismiss for failure to state a claim can be used when plaintiff has included allegations in the complaint that, on their face, disclose some absolute defense or bar to recovery: 'If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other

Docket No. 22-55432

In the

United States Court of Appeals

for the

Ninth Circuit

NEW ENGLAND COUNTRY FOODS, LLC,
Plaintiff-Appellant,

v.

VANLAW FOOD PRODUCTS, INC.,
Defendant-Appellee.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8:21-CV-01060-DOC-ADS · HONORABLE DAVID O. CARTER

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M.K. HAGEMANN, P.C.
MICHAEL K. HAGEMANN, ESQ. (264570)
1801 Century Park East, Suite 2400
Century City, CA 90067
(310) 773-4900 Telephone
(310) 773-4901 Facsimile
mhagemann@mkhlaw.com

Attorneys for Appellant,
New England Country Foods, LLC

expensively obtained evidence on summary judgment establishes the identical facts.' [*Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F3d 778, 783, fn. 1; *Hensley Mfg. v. ProPride, Inc.* (6th Cir. 2009) 579 F3d 603, 613; *Hearn v. R.J. Reynolds Tobacco Co.* (D AZ 2003) 279 F.Supp.2d 1096, 1102 (citing text)] To grant a Rule 12(b)(6) motion on the basis of an affirmative defense, the facts establishing that defense must (i) 'be definitively ascertainable from the complaint and other allowable sources of information,' and (ii) 'suffice to establish the affirmative defense with certitude.' [*Gray v. Evercore Restructuring L.L.C.* (1st Cir. 2008) 544 F3d 320, 324 (internal quotes omitted); *ASARCO, LLC v. Union Pac. R.R. Co.* (9th Cir. 2014) 765 F3d 999, 1004—defendant must show 'some obvious bar to securing relief' on face of complaint] Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

"[9:211]…For purposes of a Rule 12(b)(6) motion… the court can 'augment' the facts and inferences from the body of the complaint with 'data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.' [*Haley v. City of Boston* (1st Cir. 2011) 657 F3d 39, 46; *Coto Settlement v. Eisenberg* (9th Cir. 2010) 593 F3d 1031, 1038]" (Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

"[9:212] **Documents attached to complaint:** Material properly submitted with the complaint (i.e., exhibits under Rule 10(c)) may be considered as part of the complaint for purposes of a Rule 12(b)(6) motion to dismiss. [FRCP 10(c)—copy of 'written instrument' attached as exhibit to pleading is part of pleading for all purposes; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.* (9th Cir. 1990) 896 F2d 1542, 1555; *Bogie v. Rosenberg* (7th Cir. 2013) 705 F3d 603, 609; *Petrie v. Electronic Game Card, Inc.* (9th Cir. 2014) 761 F3d 959, 964, fn. 6; *see* ¶ *8:680 ff.*] Thus, documents attached to the complaint and incorporated therein by reference are treated as part of the complaint when ruling on a Rule 12(b)(6) motion. [*In re NVIDIA Corp. Secur. Litig.* (9th Cir. 2014) 768 F3d 1046, 1051; *Hearn v. R.J. Reynolds Tobacco Co.* (D AZ 2003) 279 F.Supp.2d 1096, 1102 (citing text); *Dorsey v. Portfolio Equities, Inc.* (5th Cir. 2008) 540 F3d 333, 338]" (Motions to Dismiss (Rule 12(b)), Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial Ch. 9-D)

B. Compulsory Cross-Complaints And Forfeiture Of Related Claims

As set forth in the Introduction (pp. 7-8), C.C.P. Section 426.30 and F.R.C.P. 13 govern whether the claims in the Complaint are forfeited by virtue of not being brought in the State Court Action.

The case of *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 962 is particularly useful in the present case because it deals with claims arising out of a contract and it analyzes both of the above-referenced statutes. It provides, in pertinent part:

> "We conclude that Align's position involves an improperly narrow application of the logical relatedness standard. As discussed below—based upon both case law construing California's compulsory cross-complaint statute and federal cases interpreting the analogous Rule 13(a)—we find that the claims alleged by Align in the complaint are logically related to the claims asserted in the Tran cross-complaint in the prior suit.
>
> Align's side law business and patent misappropriation claims here, along with Tran's claims in the cross-complaint, arose out of the employment relationship between the parties. (See *Saunders [v. New Capital for Small Businesses, Inc. (*1964)] 231 Cal.App.2d [324] at p. 338, 41 Cal.Rptr. 703 [claims between parties arose out of same fiduciary relationship].) The claims here concerned alleged breaches of Tran's obligations to his employer, while those in the cross-complaint involved alleged breaches of Align's obligations to its

employee. Further, some of the causes of action asserted by Align here—breach of contract, breach of loyalty, unfair competition, and conversion—were identical to those alleged by it against Tran in the prior complaint. And Align claimed in its complaint—as it did in the prior complaint—that Tran breached his obligations under the Inventions Agreement. (See *Currie Medical [Specialties, Inc. v. Bowen* (1982] 136 Cal.App.3d [774] at p. 777, 186 Cal.Rptr. 543 [rights and obligations under distributorship agreement relevant to competing claims between contracting parties]; see also 6 Wright, Miller & Kane, Fed. Practice and Procedure (2d ed.1990) § 1410, p. 68 [logical relationship test satisfied when one contract is basis for both claim and counterclaim].) ***The fact that the substantive breaches of duty and contract alleged by Align here differ from those asserted against Tran in the prior suit does not negate a finding of logical relatedness, particularly in view of the fact that Tran cross-complained against Align in the prior suit for alleged breaches of obligations arising out of the same employment relationship.*** In this regard, we find the reasoning of a case applying the federal compulsory counterclaim statute useful: ***'The word***

> ***'transaction' in Rule 13(a) cannot be read in such a restrictive sense as to limit compulsory counterclaims in actions for breach of contract to those addressed to the specific breach on which a plaintiff bases his claim for breach. The spirit and intent of Rule 13(a) requires that the entire contractual relationship be deemed to be included within the word 'transaction' in cases sounding in contract.*** [Citation.]' (*King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc.* (D.C.N.Y.1962) 208 F.Supp. 271, 275.)" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 962) [Emphasis added]

The allegations and claims in the Complaint date back to November and December of 2017. (Complaint, ¶¶18-25) In other words, they have existed since the moment the State Court Action was commenced. They undisputedly meet the "logical relationship test" set forth in *Align, supra.* Indeed, when compared to the State Court Action, they involve the same business relationship between the parties, and the same Operating Agreement. Moreover, both actions contain a cause of action for breach of the Operating Agreement; the federal Complaint simply adds related tort causes of action, which also emanate out of the Operating Agreement. It is totally irrelevant that the federal Complaint alleges different

breaches of the Operating Agreement than the State Court Action, because "***the entire contractual relationship [is] deemed to be included within the word 'transaction' in cases sounding in contract.***" (*Id.* at 962)

C. Res Judicata And Collateral Estoppel

The Introduction, at pp. 9-10, sets forth the law governing res judicata and collateral estoppel. Some important points worth noting here:

- With respect to *res judicata*, the purpose is to prevent "piecemeal litigation by splitting a single cause of action on a different legal theory or for different relief." (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245) This is of course why the doctrine bars a "***cause of action could have been brought, whether or not it was actually asserted or decided in the first lawsuit***." (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 727 [emphasis added], citing *Busick v. Workermen's Comp. Appeals Bd.* (1972) 8 Cal.3d 967, 974)
- With respect to collateral estoppel, the elements are: (1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding; (2) the issue must have been actually litigated and necessarily decided in the former proceedings; (3) the

decision in the former proceedings must be final and on the merits; and (4) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*People v. Sims* (1982) 32 Cal.3d. 468, 484)

The entire relationship of the parties, including the Operating Agreement, has already been litigated. This is simply no disputing this. NECF is attempting to engage in piecemeal litigation on the Operating Agreement while simultaneously ensuring that various issues will be retried in this federal action.

D. Limitation Of Liability Clauses

To reiterate what is already stated herein, the limitation of liability clauses disclose a complete defense in that they bar all of the claims and remedies sought in the Complaint. The Complaint does not allege that they are unenforceable or otherwise inapplicable. Accordingly, as an alternative argument to what is set forth herein, all claims are barred by the Operating Agreement.

VI. CONCLUSION

NECF's Complaint should be dismissed pursuant to F.R.C.P. 12(b)(6).

Dated: August 26, 2021

MAGARIAN & DIMERCURIO, APLC

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 315 N. Puente St., Ste. A, Brea, CA 92821.

I, the undersigned, hereby further certify that on this 26th day of August of 2021, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on August 26, 2021

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

MARK D. MAGARIAN (State Bar No. 164755)
mark@magarianlaw.com
KRISTA L. DIMERCURIO (State Bar No. 255774)
krista@magarianlaw.com
MAGARIAN & DIMERCURIO, APLC
315 N. Puente Street, Unit A
Brea, California 92821
Tel: 714-415-3412
Fax: 714-276-9944

Attorney for Defendant VANLAW FOOD PRODUCTS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont Limited Liability Company, Plaintiff, vs. VANLAW FOOD PRODUCTS, INC., a California corporation; Defendants.	Case No.: 8:21-cv-01060-DOC-ADS **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** Date: September 27, 2021 Time: 8:30 AM Courtroom: 9D Judge: David O. Carter

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN THAT, pursuant to Federal Rule of Evidence (F.R.E.) 201, Defendant VANLAW FOOD PRODUCTS, INC. ("VLF" or "Defendant") hereby requests that the Court take judicial notice of the following court records from the case of *VanLaw Food Products, Inc. v. New England Country Foods, LLC*, Superior Court of California, County of Orange, Case No. 30-2017-00962844-CU-BC-CJC ("the State Court Action"), attached as Exhibits 1-20, in support of VLF's motion to dismiss Plaintiff NEW ENGLAND COUNTRY FOOD PRODUCTS, LLC's ("Plaintiff" or "NECF") Complaint pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6) for failure to state a claim upon which relief can be granted:

1. The Complaint filed in the State Court Action on December 21, 2017, attached hereto as **Exhibit 1**.
2. The Answer to the Complaint filed in the State Court Action on January 30, 2018, attached hereto as **Exhibit 2**.
3. The Cross-Complaint filed in the State Court Action on February 19, 2019, attached hereto as **Exhibit 3**.

4. The Answer to the Cross-Complaint filed in the State Court Action on March 20, 2019, attached hereto as **Exhibit 4**.
5. NECF's Notice of Motion and Motion for Leave to Amend the Original Cross-Complaint filed in the State Court Action on March 2, 2021, attached hereto as **Exhibit 5**.
6. Declaration of Michael K. Hagemann in Support of NECF's Motion for Leave to Amend the Original Cross-Complaint filed in the State Court Action on March 2, 2021, attached hereto as **Exhibit 6**.
7. VLF's Opposition to NECF's Motion for Leave to Amend the Original Cross-Complaint filed in the State Court Action on March 29, 2021, attached hereto as **Exhibit 7**.
8. NECF's Reply to VLF's Opposition to NECF's Motion for Leave to Amend the Original Cross-Complaint filed in the State Court Action on April 5, 2021, attached hereto as **Exhibit 8**.
9. Minute Order on NECF's Motion for Leave to Amend the Original Cross-Complaint filed in the State Court Action on April 16, 2021, attached hereto as **Exhibit 9**.
10. VLF's Motion in Limine No. 1 filed in the State Court Action on June 10, 2021, attached hereto as **Exhibit 10**.

11. NECF's Opposition to VLF's Motion in Limine No. 1 filed in the State Court Action on July 9, 2021, attached hereto as **Exhibit 11**.

12. VLF's Trial Brief filed in the State Court Action on July 9, 2021, attached hereto as **Exhibit 12**.

13. NECF's Trial Brief filed in the State Court Action on July 9, 2021, attached hereto as **Exhibit 13**.

14. Notice of Related Case filed in the State Court Action on July 2, 2021, attached hereto as **Exhibit 14**.

15. Operating Agreement, which was Trial Exhibit 1 in the State Court Action, attached hereto as **Exhibit 15**.

16. Minute Order filed in the State Court Action on July 13, 2021, attached hereto as **Exhibit 16**.

17. Minute Order filed in the State Court Action on July 14, 2021, attached hereto as **Exhibit 17**.

18. Minute Order filed in the State Court Action on July 19, 2021, attached hereto as **Exhibit 18**.

19. Minute Order filed in the State Court Action on July 2, 2021, attached hereto as **Exhibit 19**.

20. VLF's Request for Statement of Decision filed in the State Court Action on July 30, 2021, attached hereto as **Exhibit 20**.

A party may base a motion on facts or events of which the judge may take judicial notice. This is limited to facts not subject to reasonable dispute and either "generally known" in the community, or "capable of accurate and ready determination" by reference to sources whose accuracy cannot be reasonably questioned. (F.R.E. 201; see *Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 688-690 (overruled on other grounds by *Galbraith v. County of Santa Clara* (9th Cir. 2001) 307 F.3d 1119, 1125-1126))

Courts must take judicial notice of the contents of *court files in other lawsuits*. (F.R.E. 201(d); see *Mullis v. United States Bank. Ct.* (9th Cir. 1987) 828 F.2d 1385, 1388, fn. 9; *Lyon v. Gila River Indian Comm.* (9th Cir. 2010) 626 F.3d 1059, 1075—abuse of discretion to deny judicial notice request when all necessary information supplied)

Dated: August 26, 2021

MAGARIAN & DIMERCURIO, A PROFESSIONAL LAW CORPORATION

/s/ Krista L. DiMercurio
Krista L. DiMercurio, Attorney for Defendant VANLAW FOOD PRODUCTS, INC.
krista@magarianlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, am a citizen of the United States, am at least 18 years of age, and am not a party to the above-entitled action. My business address is 315 N. Puente St., Ste. A, Brea, CA 92821.

I, the undersigned, hereby further certify that on this 26th day of August of 2021, a true copy of the within **DEFENDANT VANLAW FOOD PRODUCTS, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS COMPLAINT FILED BY PLAINTIFF NEW ENGLAND COUNTRY FOODS, LLC [F.R.C.P. 12(b)(6)]** was served on each party appearing pro se and on the attorney of record for each other party separately appearing by delivering a copy of the same via the United States District Court's online case filing system, CM/ECF, to:

Michael K. Hagemann
M.K. Hagemann, P.C.
mhagemann@mkhlaw.com

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

Executed on August 26, 2021

/s/ Krista L. DiMercurio

Krista L. DiMercurio, Esq.
krista@magarianlaw.com

PLD-C-001

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Mark Magarian (164755) Krista DiMercurio (255744)
Magarian & DiMercurio, A Professional Law Corporation

1265 N. Manassero St. Ste. 304, Anaheim, CA 92807
TELEPHONE NO: 714-415-3412 FAX NO. (Optional): 714-695-0564
E-MAIL ADDRESS (Optional): mark@magarianlaw.com
ATTORNEY FOR (Name): VanLaw Food Products, Inc.

FOR COURT USE ONLY

ELECTRONICALLY FILED
Superior Court of California,
County of Orange
12/21/2017 at 11:24:48 AM
Clerk of the Superior Court
By Tamarah Rabb,Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Orange
STREET ADDRESS: 700 Civic Center Drive West
MAILING ADDRESS:
CITY AND ZIP CODE: Santa Ana 92701
BRANCH NAME: Central Justice Center

PLAINTIFF: VanLaw Food Products, Inc., a California corporation

DEFENDANT: New England Country Foods, LLC, a Vermont limited liability company

☑ DOES 1 TO 10

CONTRACT

☑ COMPLAINT ☐ AMENDED COMPLAINT (Number):

☐ CROSS-COMPLAINT ☐ AMENDED CROSS-COMPLAINT (Number):

Jurisdiction (check all that apply):
☐ ACTION IS A LIMITED CIVIL CASE
Amount demanded ☐ does not exceed $10,000
☐ exceeds $10,000 but does not exceed $25,000
☑ ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)
☐ ACTION IS RECLASSIFIED by this amended complaint or cross-complaint
☐ from limited to unlimited
☐ from unlimited to limited

CASE NUMBER:
30-2017-00962844-CU-BC-CJC

Judge James J. Di Cesare

1. Plaintiff* (name or names):
VanLaw Food Products, Inc., a California corporation
alleges causes of action against defendant* (name or names):
New England Country Foods, LLC, a Vermont limited liability company ("NECF")
2. This pleading, including attachments and exhibits, consists of the following number of pages: 6
3. a. Each plaintiff named above is a competent adult
☑ except plaintiff (name): VanLaw Food Products, Inc.
(1) ☑ a corporation qualified to do business in California
(2) ☐ an unincorporated entity (describe):
(3) ☐ other (specify):

b. ☐ Plaintiff (name):
a. ☐ has complied with the fictitious business name laws and is doing business under the fictitious name (specify):

b. ☐ has complied with all licensing requirements as a licensed (specify):
c. ☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3c.
4. a. Each defendant named above is a natural person
☑ except defendant (name): NECF
(1) ☐ a business organization, form unknown
(2) ☐ a corporation
(3) ☐ an unincorporated entity (describe):
(4) ☐ a public entity (describe):
(5) ☑ other (specify): a Vermont LLC

☐ except defendant (name):
(1) ☐ a business organization, form unknown
(2) ☐ a corporation
(3) ☐ an unincorporated entity (describe):
(4) ☐ a public entity (describe):
(5) ☐ other (specify):

* If this form is used as a cross-complaint, plaintiff means cross-complainant and defendant means cross-defendant.

Form Approved for Optional Use
Judicial Council of California
PLD-C-001 [Rev. January 1, 2007]

COMPLAINT—Contract

Code of Civil Procedure, § 425.12

Request for Judicial Notice Exhibit 1
RJN007

PLD-C-001

SHORT TITLE:	CASE NUMBER:
VanLaw Food Products, Inc. v. New England Country, LLC	

4. *(Continued)*
   b. The true names of defendants sued as Does are unknown to plaintiff.
      (1) ☑ Doe defendants *(specify Doe numbers):* 1-5 were the agents or employees of the named defendants and acted within the scope of that agency or employment.
      (2) ☑ Doe defendants *(specify Doe numbers):* 6-10 are persons whose capacities are unknown to plaintiff.
   c. ☐ Information about additional defendants who are not natural persons is contained in Attachment 4c.
   d. ☐ Defendants who are joined under Code of Civil Procedure section 382 are *(names):*

5. ☐ Plaintiff is required to comply with a claims statute, **and**
   a. ☐ has complied with applicable claims statutes, *or*
   b. ☐ is excused from complying because *(specify):*

6. ☐ This action is subject to ☐ Civil Code section 1812.10 ☐ Civil Code section 2984.4.
7. This court is the proper court because
   a. ☐ a defendant entered into the contract here.
   b. ☐ a defendant lived here when the contract was entered into.
   c. ☐ a defendant lives here now.
   d. ☑ the contract was to be performed here.
   e. ☐ a defendant is a corporation or unincorporated association and its principal place of business is here.
   f. ☐ real property that is the subject of this action is located here.
   g. ☑ other *(specify):*
      The contract specifically provides for jurisdiction in Orange County, CA.
8. The following causes of action are attached and the statements above apply to each *(each complaint must have one or more causes of action attached):*
   ☑ Breach of Contract
   ☑ Common Counts
   ☐ Other *(specify):*

9. ☐ Other allegations:

10. **Plaintiff prays** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
    a. ☑ damages of: $ 27,441.00
    b. ☑ interest on the damages
       (1) ☑ according to proof
       (2) ☐ at the rate of *(specify):* percent per year from *(date):*
    c. ☑ attorney's fees
       (1) ☐ of: $
       (2) ☑ according to proof.
    d. ☑ other *(specify):*
       Storage costs, according to proof, and such other relief as the court deems appropriate.
11. ☐ The paragraphs of this pleading alleged on information and belief are as follows *(specify paragraph numbers):*

Date: December 20, 2017

Mark D. Magarian
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PLAINTIFF OR ATTORNEY)

(If you wish to verify this pleading, affix a verification.)

PLD-C-001(1)

SHORT TITLE:	CASE NUMBER:
VanLaw Food Products, Inc. v. New England Country, LLC	

FIRST (number) **CAUSE OF ACTION—Breach of Contract**

ATTACHMENT TO ☑ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

BC-1. Plaintiff *(name)*: VanLaw Food Products, Inc.

alleges that on or about *(date)*: January 1, 2015

a ☑ written ☐ oral ☐ other *(specify)*:

agreement was made between *(name parties to agreement)*:

Plaintiff and Defendant

☐ A copy of the agreement is attached as Exhibit A, or

☑ The essential terms of the agreement ☐ are stated in Attachment BC-1 ☑ are as follows *(specify)*:

Plaintiff agreed to, and did, supply Defendant with goods (bottles) pursuant to Defendant's Purchase Orders, in return for Defendant's timely payment to Plaintiff upon receipt of Plaintiff's invoices (30 days).

BC-2. On or about *(dates)*: May 7, 2016 defendant breached the agreement by ☐ the acts specified in Attachment BC-2 ☑ the following acts *(specify)*:

Defendant failed to make timely payment to Plaintiff upon receipt of Plaintiff's Invoice.

BC-3. Plaintiff has performed all obligations to defendant except those obligations plaintiff was prevented or excused from performing.

BC-4. Plaintiff suffered damages legally (proximately) caused by defendant's breach of the agreement

☐ as stated in Attachment BC-4 ☑ as follows *(specify)*:

Defendant has failed to make a timely payment to Plaintiff in the sum of $27,441.00. In addition, Plaintiff has be required to store the goods that were purchased by Defendant.

BC-5. ☑ Plaintiff is entitled to attorney fees by an agreement or a statute

☐ of $

☑ according to proof.

BC-6. ☑ Other:

Storage costs, according to proof, and such other relief as the court deems appropriate.

PLD-C-001(2)

SHORT TITLE: VanLaw Food Products, Inc. v. New England Country, LLC	CASE NUMBER:

SECOND (number) **CAUSE OF ACTION—Common Counts**

ATTACHMENT TO ☑ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

CC-1. Plaintiff *(name):* VanLaw Food Products, Inc.

alleges that defendant *(name):* NECF

became indebted to ☑ plaintiff ☐ other *(name):*

a. ☑ within the last four years
(1) ☑ on an open book account for money due.
(2) ☐ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☐ within the last ☐ two years ☐ four years
(1) ☐ for money had and received by defendant for the use and benefit of plaintiff.
(2) ☐ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff.
☐ the sum of $
☐ the reasonable value.
(3) ☐ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
☐ the sum of $
☐ the reasonable value.
(4) ☐ for money lent by plaintiff to defendant at defendant's request.
(5) ☐ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
(6) ☐ other *(specify):*

CC-2. $ 27,441.00 , which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest ☑ according to proof ☐ at the rate of _____ percent per year from *(date):* May 7, 2016

CC-3. ☑ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of $
☑ according to proof.

CC-4. ☑ Other:
Storage costs, according to proof, and such other relief as the court deems appropriate.

PLD-C-001(2)

SHORT TITLE: VanLaw Food Products, Inc. v. New England Country, LLC	CASE NUMBER:

THIRD (number) **CAUSE OF ACTION—Common Counts**

ATTACHMENT TO ☑ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

CC-1. Plaintiff *(name):* VanLaw Food Products, Inc.

alleges that defendant *(name):* NECF

became indebted to ☑ plaintiff ☐ other *(name):*

a. ☑ within the last four years
(1) ☐ on an open book account for money due.
(2) ☑ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☐ within the last ☐ two years ☐ four years
(1) ☐ for money had and received by defendant for the use and benefit of plaintiff.
(2) ☐ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff.
☐ the sum of $
☐ the reasonable value.
(3) ☐ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
☐ the sum of $
☐ the reasonable value.
(4) ☐ for money lent by plaintiff to defendant at defendant's request.
(5) ☐ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
(6) ☐ other *(specify):*

CC-2. $ 27,441.00 , which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest ☑ according to proof ☐ at the rate of _____ percent per year from *(date):* May 7, 2016

CC-3. ☑ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of $
☑ according to proof.

CC-4. ☑ Other:
Storage costs, according to proof, and such other relief as the court deems appropriate.

PLD-C-001(2)

SHORT TITLE: VanLaw Food Products, Inc. v. New England Country, LLC	CASE NUMBER:

FOURTH (number) **CAUSE OF ACTION—Common Counts**

ATTACHMENT TO ☑ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

CC-1. Plaintiff *(name):* VanLaw Food Products, Inc.

alleges that defendant *(name):* NECF

became indebted to ☑ plaintiff ☐ other *(name):*

a. ☐ within the last four years
(1) ☐ on an open book account for money due.
(2) ☐ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☑ within the last ☑ two years ☐ four years
(1) ☐ for money had and received by defendant for the use and benefit of plaintiff.
(2) ☐ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff.
☐ the sum of $
☐ the reasonable value.
(3) ☑ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
☑ the sum of $ 27,441.00
☐ the reasonable value.
(4) ☐ for money lent by plaintiff to defendant at defendant's request.
(5) ☐ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
(6) ☐ other *(specify):*

CC-2. $ 27,441.00 , which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest ☑ according to proof ☐ at the rate of _____ percent per year from *(date):* May 7, 2016

CC-3. ☑ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of $
☑ according to proof.

CC-4. ☑ Other:
Storage costs, according to proof, and such other relief as the court deems appropriate.

Andres F. Quintana (SBN 190525)
John M. Houkom (SBN 203240)
QUINTANA LAW GROUP
A Professional Law Corporation
26135 Mureau Road, Suite 203
Calabasas, California 91302
Telephone: (818) 914-2100
Facsimile: (818) 914-2101
E-mail: Andres@qlglaw.com
John@qlglaw.com

Attorneys for Defendant New England Country Foods, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

VANLAW FOOD PRODUCTS, INC., a California corporation,

Plaintiff,

vs.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company, and DOES 1 to 10,

Defendants.

CASE NO. 30-2017-00962844-CU-BC-CJC
[Complaint filed December 21, 2017]

DEFENDANT NEW ENGLAND COUNTRY FOODS, LLC'S ANSWER TO COMPLAINT

Defendant New England Country Foods, LLC ("NECF") hereby answers Plaintiff VanLaw Food Products, Inc.'s ("Plaintiff") Complaint, as follows:

I.

GENERAL DENIAL

Pursuant to California *Code of Civil Procedure* § 431.30, NECF denies, both generally and specifically, each and every material allegation contained in the unverified Complaint on file herein, and further denies that Plaintiff is entitled to the relief sought in the Complaint, or to recovery in any other amount, or to recovery at all.

II.

AFFIRMATIVE DEFENSES

As for separate and affirmative defenses to the Complaint, NECF alleges as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure To State Facts Sufficient To Constitute A Cause Of Action)

The Complaint, and each cause of action against NECF alleged therein, fails to state facts sufficient to constitute a cause of action against NECF.

SECOND AFFIRMATIVE DEFENSE

(Mistake)

The Complaint, and each cause of action against NECF alleged therein, is barred by reasons of the provisions of California *Civil Code* §§ 1567, 1576, 1577, and 1578 respecting mistake of fact and law.

THIRD AFFIRMATIVE DEFENSE

(Waiver)

The Complaint, and each cause of action against NECF alleged therein, is barred by the doctrine of waiver.

FOURTH AFFIRMATIVE DEFENSE

(Estoppel)

The Complaint, and each cause of action against NECF alleged therein, is barred by the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

(Unclean hands)

Any recovery on the Complaint, and each cause of action against NECF alleged therein, is barred in whole or in part because Plaintiff comes to the Court with unclean hands.

SIXTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

Any recovery on the Complaint, and each cause of action against NECF alleged therein, is barred in whole or in part because Plaintiff would be unjustly enriched if Plaintiff recovered any damages or relief from NECF for injuries alleged to have been suffered by Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

(Failure To Mitigate Damages)

Any recovery on the Complaint, and each cause of action against NECF alleged therein, is barred in whole or in part by Plaintiff's failure to mitigate its alleged damages.

EIGHTH AFFIRMATIVE DEFENSE

(Failure To Allege Causes Of Action With Sufficient Particularity)

Any recovery on the Complaint, and each cause of action against NECF alleged therein, fails to describe the claims made against NECF with sufficient particularity to enable NECF to determine what defenses it may have in response to Plaintiff's claims. NECF therefore reserves the right to assert all defenses which may be pertinent to Plaintiff's claims once the precise nature of such claims are ascertained through discovery.

NINTH AFFIRMATIVE DEFENSE

(Ambiguity)

Any recovery on the Complaint against NECF is barred in whole or in part on the ground that Plaintiff's causes of action are ambiguous.

TENTH AFFIRMATIVE DEFENSE

(Offset)

Any recovery on the Complaint against NECF is barred in whole or in part on the ground that NECF is entitled to a credit for money owed by Plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Act in a Commercially Reasonable Manner)

Any recovery on the Complaint against NECF is barred in whole or in part on the ground that Plaintiff failed to follow the procedures required by the Uniform Commercial Code in the sale of goods to NECF.

WHEREFORE, NECF prays as follows:

1. That Plaintiff take nothing from NECF by reason of its Complaint;

2. That the Complaint be dismissed in its entirety with prejudice, and judgment be entered herein in favor of NECF and against Plaintiff;

3. For NECF's costs and expenses of suit incurred herein;

4. For the reasonable attorneys' fees incurred by NECF herein; and

5. For such other and further relief as the Court deems just and proper.

DATED: January 30, 2018

QUINTANA LAW GROUP
A Professional Law Corporation

By: _____
Andres F. Quintana, Esq.
John M. Houkom, Esq.
Attorneys For Defendant New England Country Foods, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 26135 Mureau Road, Suite 203, Calabasas, California 91302.

On January 30, 2018, I served the document described as DEFENDANT NEW ENGLAND COUNTRY FOODS, LLC'S ANSWER TO COMPLAINT on counsel for the parties in this action, or on the parties in propria persona, addressed as stated on the attached service list.

[X] BY MAIL: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

EXECUTED on January 30, 2018 at Calabasas, California.

Andres Quintana

SERVICE LIST

Mr. Mark Magarian
Ms. Krista DiMercurio
Magarian & DiMercurio, APC
1265 N. Manassero Street, Suite 304
Anaheim, California 92807
Phone (714) 415-3412
Fax (714) 695-0564

Attorneys for Plaintiff VanLaw Food Products, Inc.

Andres F. Quintana (SBN 190525)
John M. Houkom (SBN 203240)
QUINTANA LAW GROUP
A Professional Law Corporation
26135 Mureau Road, Suite 203
Calabasas, California 91302
Telephone: (818) 914-2100
Facsimile: (818) 914-2101
E-mail: Andres@qlglaw.com
John@qlglaw.com

Attorneys for Defendant and Cross-Complainant
New England Country Foods, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

VANLAW FOOD PRODUCTS, INC., a California corporation,

Plaintiff,

vs.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company, and DOES 1 to 10,

Defendants.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company,

Cross-Complainant,

vs.

VAN LAW FOOD PRODUCTS, INC., a California corporation, and ROES 1 to 10,

Cross-Defendants.

CASE NO. 30-2017-00962844-CU-BC-CJC
[Complaint filed December 21, 2017]

CROSS-COMPLAINANT NEW ENGLAND COUNTRY FOODS, LLC'S CROSS-COMPLAINT FOR BREACH OF CONTRACT AND ACCOUNTING

[DEMAND FOR JURY TRIAL]

Defendant and Cross-Complainant New England Country Foods, LLC, hereby files the Cross-Complaint against Plaintiff and Cross-Defendant Van Law Food Products, Inc., a California Corporation, and Roes 1 through 10, inclusive, as follows:

THE PARTIES

1. Cross-Complainant New England Country Foods, LLC is, and at all times pertinent to this Cross-Complaint was, a limited liability company, formed under the laws of the State of Vermont, with its principal place of business located in the State of Vermont.

2. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-Defendant Van Law Food Products, Inc. is a corporation formed under the laws of the State of California, with its principal place of business located in the County of Orange, in the State of California.

3. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-Defendants Roes 1 through 10, inclusive, were in some manner responsible for the acts and injuries complained of herein and were, at all times relevant herein, acting on their own behalf and as the representatives, employees, agents, managing directors, joint venturers and/or other business partners of Cross-Defendants, or any of them.

4. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-Complainant is ignorant of the true names and capacities of Cross-Defendants sued herein as Roes 1 through 10, inclusive, whether individual, corporate, successor-in-interest, partnership, associate or otherwise, and therefore sues these Cross-Defendants by such fictitious names, pursuant to California *Code of Civil Procedure* section 475. Cross-Complainant will seek leave of Court to amend this Cross-Complaint to include the true names and capacities of the Cross-Defendants sued as Roes 1 through 10, inclusive, when those names and capacities are ascertained.

5. At all pertinent times herein mentioned, Cross-Complainant is informed and believes, and thereon alleges, that each of the Cross-Defendants, including Roes 1 through 10, was acting for himself, herself, or itself, as well as the agent, employee, representative, managing director, successor-in-interest, joint venturer and/or other business partner of the remaining Cross-Defendants and was acting within the course and scope of such relationship. Cross-Complainant is

further informed and believes, and thereon alleges, that each of the Cross-Defendants, including Roes 1 through 10, herein gave consent to, ratified, and/or authorized the acts alleged herein to each of the remaining Cross-Defendants. At all pertinent times herein mentioned, Cross-Complainant is further informed and believe, and thereon alleges, that, as a result, Cross-Defendants, including Roes 1 through 10, are jointly and severally liable for the acts alleged herein.

GENERAL ALLEGATIONS

6. On or about October 28, 2015, and effective January 1, 2015, Cross-Complainant New England Country Foods, LLC and Cross-Defendant Van Law Food Products, Inc. entered into a written agreement, titled "Operating Agreement", pursuant to which Cross-Defendant Van Law Food Products, Inc. was to "provide manufacturing, shipping, billing and collection services" in relation to Cross-Complainant New England Country Foods, LLC's sale of certain products to a designated customer, as well as other services.

7. Under the express terms of the Operating Agreement, Cross-Complainant New England Country Foods, LLC and Cross-Defendant Van Law Food Products, Inc. agreed to specific responsibilities and obligations between themselves, including the payment of royalties and the reimbursement of certain costs, on a specified schedule.

8. Cross-Complainant is informed and believes, and on that basis alleges, that, as of May 19, 2017, the total owed to Cross-Complainant New England Country Foods, LLC by Cross-Defendant Van Law Food Products, Inc., under the terms of the Operating Agreement, was one-hundred and two thousand, three-hundred and three dollars, and thirty cents ($102,303.30). On that same date, Cross-Complainant made a written demand for the payment of that outstanding amount.

9. Despite that demand, Cross-Defendant Van Law Food Products, Inc. failed and refused to pay the amount due and owing from it to Cross-Complainant New England Country Foods, LLC, and Cross-Complainant is informed and believes, and on that basis alleges, that Cross-Defendant currently owe Cross-Complainant in excess of eighty-nine thousand, three-hundred and ninety-four dollars and twenty-eight cents ($89,394.28), plus applicable interest.

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FIRST CAUSE OF ACTION

(AGAINST ALL CROSS-DEFENDANTS FOR BREACH OF WRITTEN AGREEMENT)

10. The allegations contained in paragraphs 1 through 9 of this Cross-Complaint are re-alleged and incorporated by reference as if fully set forth herein.

11. As previously stated herein, Cross-Complainant and Cross-Defendant Van Law Food Products, Inc. and Roes 1 through 10 entered into a written agreement pertaining to the supply of certain services and goods to by Cross-Defendant Van Law Food Products, Inc. and Roes 1 through 10 to Cross-Complainant New England Country Foods, LLC, titled and referred to herein as the "Operating Agreement".

12. In furtherance of that written agreement Cross-Complainant performed all conditions, covenants, and the promises required of it under the Operating Agreement, except for any obligations from which it has been excused, or for which the performance has been prevented by Cross-Defendants, or any of them.

13. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-Defendants, including and Roes 1 through 10, committed breaches of that written agreement, within the last two years, by among other things:

(a) Failing and refusing to pay royalty fees due to Cross-Complainant in an amount currently believed to be no less than fourteen-thousand, two-hundred and five dollars and forty-one cents ($14,205.41), under the express terms of the Operating Agreement;

(b) Failing and refusing to pay interest on late royalty fees in an amount currently believed to be no less than seventeen-thousand, eight-hundred and thirty-three dollars and forty-two cents ($17,833.42), calculated with the interest rate stated in the Operating Agreement;

(c) Failing and refusing to pay for unauthorized, excess raw material fees, which are not permitted under the Operating Agreement, in an amount currently believed to be no less than four-thousand, eight-hundred and twenty-four dollars and fifty-two cents ($4,824.52); and,

(d) Failing and refusing to pay for unauthorized management fees, which are not permitted under the Operating Agreement, in an amount currently believed to be no less than fifty-two thousand, five-hundred and thirty dollars and ninety-two cents ($52,530.92).

14. As a result of the breaches of the written agreement by Cross-Defendants, and each of them, Cross-Complainant has suffered damages in an amount to be determined according to proof at trial but believed to be in excess of eighty-nine thousand, three-hundred and ninety-four dollars and twenty-eight cents ($89,394.28), plus applicable interest.

15. Cross-Complainant has been further damaged by having to pay attorneys' fees and costs to enforce its rights under the Operating Agreement. Cross-Complainant seeks recovery of its reasonable attorneys' fees and costs, as permitted under that written agreement, as well as any applicable pre-judgment and post-judgment interest.

SECOND CAUSE OF ACTION

(AGAINST CROSS-DEFENDANT VAN LAW FOOD PRODUCTS, INC. FOR ACCOUNTING)

16. The allegations contained in paragraphs 1 through 15 of this Cross-Complaint are re-alleged and incorporated by reference as if fully set forth herein.

17. Cross-Complainant is informed and believes, and on that basis alleges, that Cross-Defendant Van Law Food Products, Inc. and Roes 1 through 10 owe Cross-Complainant monies, under the terms of the Operating Agreement, in an amount in excess of eighty-nine thousand, three-hundred and ninety-four dollars and twenty-eight cents ($89,394.28), plus applicable interest, but the specific amount of money due from Cross-Defendants, including Roes 1 through 10, to the Cross-Complainant is unknown to the Cross-Complainant and cannot be ascertained without a detailed accounting.

18. Cross-Complainant is entitled to an accounting of the funds due to it from Cross-Defendant Van Law Food Products, Inc. and Roes 1 through 10, under the terms of the Operating Agreement, in particular, to an accounting of all revenues and expenses of that entity in regard to the performance of the Operating Agreement.

WHEREFORE, Plaintiff and Cross-Complainant New England Country Foods, LLC prays for judgment against Cross-Defendants Van Law Food Products, Inc. and Roes 1 through 10, inclusive, as follows:

1. For an award of damages in the amount in excess of eighty-nine thousand, three-hundred and ninety-four dollars and twenty-eight cents ($89,394.28) with the exact amount to be proved at trial;

2. For an accounting of all revenues and expenses related to the performance of the Operating Agreement;

3. For an award of interest as permitted by contractual agreement and by law;

4. For an award of attorneys' fees incurred in this case as permitted by contract;

5. For an award of costs of suit incurred herein as permitted by contract and statute; and,

6. For such other and further relief as the Court may deem just and proper.

DATED: February 19, 2019

QUINTANA LAW GROUP
A Professional Law Corporation

By: _____
Andres F. Quintana, Esq.
John M. Houkom, Esq.
Attorneys For Defendant and Cross-Complainant
New England Country Foods, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 26135 Mureau Road, Suite 203, Calabasas, California 91302.

On February 19, 2019, I served the document described as CROSS-COMPLAINANT NEW ENGLAND COUNTRY FOODS, LLC'S CROSS-COMPLAINT FOR BREACH OF CONTRACT AND ACCOUNTING, on counsel for the parties in this action, or on the parties in propria persona, addressed as stated on the attached service list.

[X] BY MAIL: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service on that same day. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

EXECUTED on February 19, 2019 at Calabasas, California.

Beatriz Singleton

SERVICE LIST

Mr. Mark Magarian
Ms. Krista DiMercurio
Magarian & DiMercurio, APC
1265 N. Manassero Street, Suite 304
Anaheim, California 92807
Phone (714) 415-3412
Fax (714) 695-0564

Attorneys for Plaintiff Van Law Food Products, Inc.

MARK D. MAGARIAN (State Bar No. 164755)
KRISTA L. DIMERCURIO (State Bar No. 255774)
MAGARIAN & DIMERCURIO, A PROFESSIONAL LAW CORPORATION
Anaheim Hills Corporate Park
1265 N. Manassero Street, Suite 304
Anaheim, California 92807
Tel: 714-415-3412
Fax: 714-695-0564

Attorney for Plaintiff/Cross-Defendant VANLAW FOOD PRODUCTS, INC

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE—CENTRAL JUSTICE CENTER

VANLAW FOOD PRODUCTS, INC., a California corporation,

Plaintiff,

vs.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company; and DOES 1 through 10 inclusive,

Defendants.

NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company,

Cross-Complainant,

vs.

VANLAW FOOD PRODUCTS, INC., a California corporation; and ROES 1 through 10 inclusive,

Cross-Defendants.

Case No.: 30-2017-00962844-CU-BC-CJC

CROSS-DEFENDANT'S ANSWER TO CROSS-COMPLAINANT'S CROSS-COMPLAINT

Complaint Filed: December 21, 2017
Trial Date: June 10, 2019

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Cross-Defendant VANLAW FOOD PRODUCTS, INC., a California corporation (referred to herein as "Defendant") answers Cross-Complainant NEW ENGLAND COUNTRY FOODS, LLC, a Vermont limited liability company (referred to herein as "Plaintiff")'s Complaint, as follows:

GENERAL DENIAL

Pursuant to California Code of Civil Procedure §§ 430.30(b) and 431.30(d), Defendant denies generally and specifically, each and every, all and singular, the allegations of said Complaint and each and every part thereof; and, further answering said allegations, said Defendant denies that Plaintiff sustained damages as alleged, or otherwise, or at all.

DEFENDANT'S AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that the Complaint, and each of its purported causes of action therein, fail to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff, by its acts and omissions, released, relinquished and waived any right to recover from Defendant on the causes of action alleged in the Complaint.

THIRD AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that no conduct by or attributable to Defendant was the cause in fact or legal cause of the damages, if any, suffered by Plaintiff.

FOURTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that by Plaintiff's acts and omissions, Plaintiff is estopped from asserting any claims upon which Plaintiff now seek relief.

FIFTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff, by its acts and omissions, has failed to mitigate its damages. Alternatively, Defendant alleges that any recovery by Plaintiff should be reduced by those damages that Plaintiff failed to mitigate.

SIXTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff's causes of action are barred by the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that any alleged actions which Defendant took with respect to the Complaint were privileged and justified.

EIGHTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that, should it be determined that Plaintiff has been damaged, then said damages were proximately caused by Plaintiff's own conduct and no such damages are attributable to Defendant.

NINTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff failed to exercise reasonable and ordinary care, caution, or prudence to avoid damage, if any.

TENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that the conduct alleged in the Complaint was done with the consent of Plaintiff.

ELEVENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff waived its right to performance of any alleged contract.

TWELFTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff has failed to state facts sufficient to support an award of attorney's fees.

THIRTEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff's causes of action are barred by the statute of frauds.

FOURTEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff's causes of action are barred by the applicable limitations period, statutory or contractual, *California Code of Civil Procedure* §§ 337, 338, 339, 340, 343.

FIFTEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff lacks standing to raise the claims alleged in its Complaint against Defendant.

SIXTEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that Plaintiff's causes of action are barred by the doctrine of laches.

SEVENTEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that it lacked capacity to enter into the alleged contract.

EIGHTEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that the alleged contract is void or voidable.

NINETEENTH AFFIRMATIVE DEFENSE

As a separate affirmative defense to the Complaint, and to each cause of action therein, Defendant alleges that the alleged debt or obligation is the sole and exclusive responsibility of third parties and/or other parties.

YET UNKNOWN AFFIRMATIVE DEFENSES

Defendant has insufficient knowledge or information on which to form a belief as to whether additional, as yet unstated, defenses are available. Defendant reserves the right to amend its Answer to assert additional defenses in the event discovery indicates that it would be appropriate.

PRAYER

WHEREFORE, Defendant prays for judgment against Plaintiff as follows:

1. That Plaintiff take nothing by its Complaint;
2. That judgment be entered dismissing with prejudice the Complaint against Defendant;
3. For attorney's fees and costs herein to the extent allowed by statute or contract; and
4. For such other and further relief as the Court may deem just and proper.

Dated: March 19, 2019

MAGARIAN & DIMERCURIO, APLC

Krista L. DiMercurio, Attorney for Plaintiff/Cross-Defendant