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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ian Smith, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

Inventure Foods, Inc., Terry E.
McDaniel, Macon Bryce Edmonson,
Ashton D. Asensio, Paul J. Lapadat,
Timothy A. Cole, and Joel D. Stewart,

Defendants.

Case No.:

CLASS ACTION COMPLAINT

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF SECTIONS 14(e),
14(d)(4), AND 20(a) OF THE
SECURITIES EXCHANGE ACT OF
1934**

JURY DEMAND

Plaintiff Ian Smith (“Plaintiff”), on behalf of himself and the proposed Class defined herein, brings this class action suit for violations of Sections 14(e), 14(d)(4), and 20(a) of the Securities Exchange Act of 1934. In support of this Class Action Complaint, Plaintiff, by his attorneys, alleges upon information and belief, except for his own acts, which are alleged on knowledge, as follows:

NATURE OF THE ACTION

Plaintiff brings this action on behalf of himself and the public stockholders of Inventure Foods, Inc. (“Inventure Foods” or the “Company”) against the Company and

1 Inventure Foods’s Board of Directors (collectively, the “Board” or the “Individual
2 Defendants,” as further defined below) for violations of Sections 14(e), 14(d)(4), and
3 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”), §§ 78n(d)(4), 78n(e) and
4 78t(a) respectively), and U.S. Securities and Exchange Commission (the “SEC”) Rules
5 14d-9 (17 C.F.R. § 240.14d-9) and SEC Regulation G, 17 C.F.R. 244.100 in connection
6 with the proposed merger transaction (“Proposed Transaction”) between Inventure Foods
7 and Heron Sub, Inc. (“Merger Sub”), a direct and wholly-owned subsidiary of Utz
8 Quality Foods, LLC (“Parent”) (collectively, “Utz”).

9 1. On October 26, 2017, the Company announced that it had entered into an
10 agreement and plan of merger (the “Merger Agreement”) with Utz, by which Utz will
11 acquire all of the outstanding shares of Inventure Foods common stock through an all-
12 cash tender offer at a purchase price of \$4.00 per share (the “Tender Offer”).

13 2. The Tender Offer commenced on November 15, 2017, and the Company
14 concurrently filed a 14D-9 on Schedule 14D-9 (the “14D-9”) with the SEC,
15 recommending that the Company’s stockholders tender their shares for the Tender Offer
16 price. The Tender Offer is set to expire on December 13, 2017.

17 3. Plaintiff alleges that the 14D-9 is materially false and/or misleading
18 because, *inter alia*, it fails to disclose certain material internal financial information about
19 the Company, relied on by the Individual Defendants to recommend the Proposed
20 Transaction and by the Company’s financial advisor, Rothschild Inc. (“Rothschild”), to
21 render an opinion that the Proposed Transaction is fair to Inventure Foods stockholders,
22 which omissions render the 14D-9 incomplete and/or misleading.

23 4. In particular, the 14D-9 omits material information regarding: (i) certain of
24 the Company’s financial projections and generally accepted accounting principles
25 (“GAAP”) reconciliation of those projections; and (ii) the valuation analyses performed
26 by Rothschild in support of its fairness opinion.
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PARTIES

1
2 10. Plaintiff is, and has been at all relevant times, the owner of shares of
3 Inventure Foods common stock.

4 11. Defendant Inventure Foods is a Delaware corporation with its principal
5 executive offices located at 5415 East High Street, Suite 350, Phoenix, Arizona 85054.
6 Inventure Foods’s common stock trades on the Nasdaq under the ticker symbol “SNAQ”.

7 12. Individual Defendant Terry E. McDaniel has served as Chief Executive
8 Officer and as a director of the Company since 2008, and as Interim Chairman since
9 2017.

10 13. Individual Defendant Macon Bryce Edmonson has served as a director of
11 the Company since 2006.

12 14. Individual Defendant Ashton D. Asensio has served as a director of the
13 Company since 2006.

14 15. Individual Defendant Paul J. Lapadat has served as a director of the
15 Company since 2013.

16 16. Individual Defendant Timothy A. Cole has served as a director of the
17 Company since 2014.

18 17. Individual Defendant Joel D. Stewart has served as a director of the
19 Company since 2017.

20 18. The Individual Defendants referred to in paragraphs 13-18 are collectively
21 referred to herein as the “Individual Defendants” and/or the “Board.”
22

CLASS ACTION ALLEGATIONS

23
24 19. Plaintiff brings this action individually and as a class action on behalf of all
25 holders of Inventure Foods stock who are being, and will be, harmed by Defendants’
26 actions described herein (the “Class”). Excluded from the Class are Defendants herein
27 and any person, firm, trust, corporation, or other entity related to, controlled by, or
28

1 affiliated with, any Defendant, including the immediate family members of the Individual
2 Defendants.

3 20. This action is properly maintainable as a class action under Federal Rule of
4 Civil Procedure 23.

5 21. The Class is so numerous that joinder of all members is impracticable.
6 According to the 14D-9, as of November 6, 2017, there were 19,827,000 shares issued
7 and outstanding. On information and belief, these shares are held by thousands of
8 beneficial holders who are geographically dispersed across the country.

9 22. There are questions of law and fact which are common to the Class and
10 which predominate over questions affecting any individual Class member. The common
11 questions include, inter alia, the following:

- 12 a. whether Defendants have violated Sections 14 and 20 of the
13 Exchange Act, and SEC regulations promulgated thereunder, in
14 connection with the Proposed Transaction; and
15 b. whether Plaintiff and the other members of the Class would be
16 irreparably harmed and/or otherwise damaged were the transaction
17 complained of herein consummated.
18

19 23. Plaintiff's claims are typical of the claims of the other members of the
20 Class and Plaintiff does not have any interests adverse to the Class.

21 24. Plaintiff is an adequate representative of the Class, has retained competent
22 counsel experienced in litigation of this nature, and will fairly and adequately protect the
23 interests of the Class.
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1 PHOENIX and HANOVER, Pa., Oct. 26, 2017 (GLOBE
2 NEWSWIRE) -- Inventure Foods, Inc. (NASDAQ:SNAK)
3 (“Inventure Foods” or the “Company”), a leading specialty
4 food marketer and manufacturer, and Utz Quality Foods, LLC
5 (“Utz”), the largest privately-held and family-managed
6 branded salty snack manufacturer and marketer in the United
7 States, today announced they entered into a merger agreement
8 pursuant to which Utz has agreed to acquire all of the
9 Company’s outstanding shares of common stock in an all-
10 cash transaction.

11 Under the terms of the merger agreement, an indirect
12 subsidiary of Utz will commence a tender offer to acquire all
13 of the outstanding shares of the Company’s common stock at
14 a price of \$4.00 per share in cash, for a total purchase price of
15 approximately \$165 million, including the assumption of
16 approximately \$75 million of debt and debt-like items, net of
17 cash, approximately \$8 million of the Company’s estimated
18 closing costs and approximately \$3 million due to equity
19 award holders. The acquisition is structured as an all-cash
20 tender offer for all of the outstanding shares of Inventure
21 Foods common stock, to be followed by a merger in which
22 each remaining untendered share of Inventure Foods will be
23 converted into the right to receive the same \$4.00 per share
24 cash price paid in the tender offer.

25 The transaction, which was unanimously approved by the
26 Boards of both Inventure Foods and Utz, is subject to the
27 tender of more than 50 percent of the fully diluted shares of
28 Inventure Foods common stock, the receipt of certain
regulatory approvals and other customary closing conditions.
The transaction is not subject to a financing contingency and
is expected to close by the end of the fourth quarter of 2017.
The tender offer is expected to commence within ten business
days.

“This transaction is the result of diligent analysis and
thoughtful strategic deliberations by our Board of Directors
and the result of the strategic and financial review we
initiated in July 2016,” stated Terry McDaniel, Chief
Executive Officer of Inventure Foods. “Our Board, with the
advice of independent advisors, determined that this

1 transaction will deliver immediate and certain cash value to
2 our stockholders and new opportunities for our snack brands.”

3 “We are tremendously excited about the opportunity to
4 acquire Inventure Foods,” said Dylan Lissette, Chief
5 Executive Officer of Utz Quality Foods. “The Company’s
6 specialty snack food products and brands, as well as its
7 geographic footprint, customer relationships and distribution
8 strengths, are highly complementary to our business and we
9 look forward to continuing Inventure’s strong heritage of
10 innovation in both healthy and indulgent snacking. We have
11 also been extremely impressed with the team at Inventure,
12 and look forward to working together going forward.”

13 31. The Tender Offer appears inadequate in light of the Company’s financial
14 performance and prospects for future growth in view of an announced initiatives to
15 increase profits, including the sale of its frozen fruit business late in the third quarter.
16 Indeed, the Tender Offer represents *a 60% drop from* the Company’s 52-week high of
17 \$10.04 per share.

18 32. Thus, it appears that Inventure Foods is well-positioned for financial
19 growth, and that the Tender Offer fails to adequately compensate the Company’s
20 shareholders. It is imperative that Defendants disclose the material information they have
21 omitted from the 14D-9, discussed in detail below, so that the Company’s shareholders
22 can properly assess the fairness of the Tender Offer for themselves and make an informed
23 decision concerning whether to tender their shares.

24 **II. The 14D-9 Omits Material Information**

25 33. On November 15, 2017, Inventure Foods filed the 14D-9 with the SEC in
26 support of the Tender Offer. As alleged below and elsewhere herein, the 14D-9 contains
27 material misrepresentations and omissions of fact that must be cured to allow Inventure
28 Foods’s stockholders to make an informed decision with respect to the Tender Offer.
Specifically, the 14D-9 omits material information regarding: (i) certain of the

1 Company's financial projections and generally accepted accounting principles ("GAAP")
2 reconciliation of those projections; and (ii) the valuation analyses performed by the
3 Company's financial advisor, Rothschild, in support of its fairness opinion.

4 ***The Company's Financial Forecasts***

5 34. The 14D-9 discloses the value of non-GAAP metric Adjusted EBITDA that
6 was utilized by the Board in the "Forecasts" and the "NOL Forecasts", and defines
7 Adjusted EBITDA as derived by adding to operating income depreciation, amortization
8 and impairments, but fails to: (i) provide the value of the underlying line items (i)
9 earnings, (ii) interest, (iii) taxes, (iv) depreciation, and (v) amortization.

10 35. Additionally, the 14D-9 fails to reconcile Adjusted EBITDA to its most
11 comparable GAAP equivalent and disclose the projected GAAP equivalent measure
12 resulting from the NOL Forecasts, e.g., net income. 14D-9, 48.

13 36. The 14D-9 discloses the Company performed a Liquidation and
14 Restructuring Analysis (14D-9, 48-49) to assist the Board in reviewing strategic
15 alternatives, but the 14D-9 fails to disclose any of the variables and assumptions
16 underlying these forecasts including projections of (i) timing of a transaction or
17 liquidation, (ii) results of operations for the fourth quarter of 2017, (iii) additional
18 customer chargebacks and allowances, (iv) net liquidation value of inventory, (v)
19 liquidation value of trade and other receivables, (vi) net liquidation value of assets of
20 discontinued operations, (vii) liquidation value of other current assets, (viii) liquidation
21 value of fixed assets, (ix) current and non-current liabilities, (x) liquidation value of
22 trademarks and other intangibles; (xi) settlement payments to terminate the Company's
23 real estate lease obligations, (xii) settlement payments to terminate the Company's
24 obligations under its employment agreements, (xiii) settlement payments to terminate the
25 Company's production orders and letters of credit, (xiv) settlement payments to terminate
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1 the Company's obligations under its vendor contracts and (xv) legal, tax, accounting and
2 related costs. 14D-9, 49.

3 37. The Company also prepared an Illustrative Chapter 7 Liquidation Analysis
4 (14D-9, 50), to estimate recoveries in a Chapter 7 liquidation but failed to disclose the
5 "unaudited book values as of September 2, 2017 and October 6, 2017, respectively,
6 which, for purposes of this analysis, were assumed to be representative of the Company's
7 assets and liabilities at the commencement of a Chapter 7 liquidation process" on which
8 these forecasts were based.

9 38. When a company discloses non-GAAP financial measures in a 14D-9, the
10 Company must also disclose all projections and information necessary to make the non-
11 GAAP measures not misleading, and must provide a reconciliation (by schedule or other
12 clearly understandable method), of the differences between the non-GAAP financial
13 measure disclosed or released with the most comparable financial measure or measures
14 calculated and presented in accordance with GAAP. 17 C.F.R. § 244.100.

15 39. The SEC increased its scrutiny of the use of non-GAAP financial measures
16 in communications with shareholders. The former SEC Chairwoman, Mary Jo White,
17 stated that the frequent use by publicly traded companies of unique, company-specific
18 non-GAAP financial measures (as Inventure Foods has included in the 14D-9 here),
19 implicates the centerpiece of the SEC's disclosures regime:
20

21 In too many cases, the non-GAAP information, which is
22 meant to supplement the GAAP information, has become the
23 key message to investors, crowding out and effectively
24 supplanting the GAAP presentation. Jim Schnurr, our Chief
25 Accountant, Mark Kronforst, our Chief Accountant in the
26 Division of Corporation Finance and I, along with other
27 members of the staff, have spoken out frequently about our
28 concerns to raise the awareness of boards, management and
investors. And last month, the staff issued guidance
addressing a number of troublesome practices which can
make non-GAAP disclosures misleading: the lack of equal or

1 greater prominence for GAAP measures; exclusion of normal,
2 recurring cash operating expenses; individually tailored non-
3 GAAP revenues; lack of consistency; cherry-picking; and the
4 use of cash per share data. I strongly urge companies to
5 carefully consider this guidance and revisit their approach to
6 non-GAAP disclosures. I also urge again, as I did last
7 December, that appropriate controls be considered and that
8 audit committees carefully oversee their company's use of
9 non-GAAP measures and disclosures.¹

10 40. The SEC has repeatedly emphasized that disclosure of non-GAAP
11 projections can be inherently misleading, and has therefore heightened its scrutiny of the
12 use of such projections.² Indeed, on May 17, 2016, the SEC's Division of Corporation
13 Finance released new and updated Compliance and Disclosure Interpretations ("C&DIs")
14 on the use of non-GAAP financial measures that demonstrate the SEC's tightening
15 policy.³ One of the new C&DIs regarding forward-looking information, such as financial
16 projections, explicitly requires companies to provide any reconciling metrics that are
17 available without unreasonable efforts. The SEC has consistently required companies to
18 reconcile non-GAAP financial measures with their respective GAAP equivalents in the
19 context of merger and tender offer transactions.

19 ¹ Mary Jo White, Keynote Address, International Corporate Governance Network
20 Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board
21 Diversity, Non-GAAP, and Sustainability (June 27, 2016),
<https://www.sec.gov/news/speech/chair-white-icgn-speech.html>.

22 ² See, e.g., Nicolas Grabar and Sandra Flow, *Non-GAAP Financial Measures: The*
23 *SEC's Evolving Views*, Harvard Law School Forum on Corporate Governance and
24 Financial Regulation (June 24, 2016), [https://corpgov.law.harvard.edu/2016/06/24/non-](https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/)
25 [gaap-financial-measures-the-secs-evolving-views/](https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/); Gretchen Morgenson, *Fantasy Math*
26 *Is Helping Companies Spin Losses Into Profits*, N.Y. Times, Apr. 22, 2016,
27 [http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?r=0)
28 [losses-into-profits.html?r=0](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?r=0).

29 ³ *Non-GAAP Financial Measures, Compliance & Disclosure Interpretations*, U.S.
30 SECURITIES AND EXCHANGE COMMISSION (May 17, 2016), [https://www.sec.gov/divisions](https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm)
31 [/corpfin/guidance/nongaapinterp.htm](https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm).

1 ***Rothschild's Valuation Analyses and Fairness Opinion***

2 41. With respect to Rothschild's *Discounted Cash Flow Analysis* ("DCF"), that
3 was created in support of a fairness opinion presented to the Board and was a factor the
4 14D-9 discloses that Rothschild made adjustments to the Company's standalone,
5 unlevered, after-tax free cash flows ("unlevered free cash flows" or "UFCF"). 14D-9, 45.
6 Rothschild calculated the estimated present value of Inventure Foods's UFCF by
7 discounting the Company's terminal value and cash flow to present value using a
8 discount rate range of 13.5% to 15.5%. However, the 14D-9 fails to disclose (i) the
9 projected UFCF, (ii) the adjustments that were made, e.g., the adjustment made from the
10 Company's net debt), and Rothschild's rationale for the adjustments made.

11 42. These key inputs are material to Inventure Foods shareholders, and their
12 omission renders the summaries of Rothschild's DCF valuation analysis incomplete and
13 misleading. As a highly-respected professor explained in one of the most thorough law
14 review articles regarding the fundamental flaws with the valuation analyses bankers
15 perform in support of fairness opinions, in a discounted cash flow analysis a banker takes
16 management's forecasts, and then makes several key choices "each of which can
17 significantly affect the final valuation." Steven M. Davidoff, *Fairness Opinions*, 55 Am.
18 U.L. Rev. 1557, 1576 (2006). Such choices include "the appropriate discount rate, and
19 the terminal value..." *Id.* As Professor Davidoff explains:

21 There is substantial leeway to determine each of these, and
22 any change can markedly affect the discounted cash flow
23 value. . . . The substantial discretion and lack of guidelines
24 and standards also makes the process vulnerable to
25 manipulation to arrive at the "right" answer for fairness. This
26 raises a further dilemma in light of the conflicted nature of the
27 investment banks who often provide these opinions.

28 *Id.* at 1577-78.

1 43. Clearly, shareholders would find the aforementioned information material
2 since the Board’s unanimous recommendation that shareholders tender their shares in
3 connection with the Proposed Transaction was based in part on the following:

4 The oral opinion of Rothschild, delivered to the Board on
5 October 25, 2017, subsequently confirmed in writing, that, as
6 of October 25, 2017, and on the basis of and subject to the
7 qualifications, limitations and assumptions set forth therein,
8 the Offer Price or the Merger Consideration, as applicable,
9 payable to the holders of outstanding Shares (other than
10 Excluded Shares (as defined below)) in the Offer and Merger
11 pursuant to the Merger Agreement, was fair from a financial
12 point of view to such holders[. . .].

13 14D-9, 35.

14 44. The above-referenced omitted information, if disclosed, would significantly
15 alter the total mix of information available to Inventure Foods’s stockholders.
16 Accordingly, based on the foregoing disclosure deficiencies in the 14D-9, Plaintiff seeks
17 injunctive and other equitable relief to prevent the irreparable injury that Inventure Foods
18 stockholders will suffer, absent judicial intervention, if Inventure Foods’s stockholders
19 are required to decide whether or not to tender their shares without the above-referenced
20 material misstatements and omissions being remedied.

21 **CLAIMS FOR RELIEF**

22 **COUNT I**

23 **Claims Against All Defendants for Violations of § 14(e) of the**
24 **Securities Exchange Act of 1934**

25 45. Plaintiff incorporates each and every allegation set forth above as if fully
26 set forth herein.

27 46. Section 14(e) of the Exchange Act provides that it is unlawful “for any
28 person to make any untrue statement of a material fact or omit to state any material fact

1 necessary in order to make the statements made, in the light of the circumstances under
2 which they are made, not misleading . . .” 15 U.S.C. § 78n(e).

3 47. As discussed above, Inventure Foods filed and delivered the 14D-9 to its
4 stockholders, which Defendants knew, or recklessly disregarded, contained material
5 omissions and misstatements described herein.
6

7 48. Defendants violated §14(e) of the Exchange Act by issuing the 14D-9 in
8 which they made untrue statements of material facts or failed to state all material facts
9 necessary in order to make the statements made, in the light of the circumstances under
10 which they are made, not misleading, in connection with the tender offer commenced in
11 conjunction with the Proposed Transaction. Defendants knew or recklessly disregarded
12 that the 14D-9 failed to disclose material facts necessary in order to make the statements
13 made, in light of the circumstances under which they were made, not misleading.
14
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16 49. The 14D-9 was prepared, reviewed and/or disseminated by Defendants. It
17 misrepresented and/or omitted material facts, including material information about the
18 consideration offered to stockholders via the tender offer, the intrinsic value of the
19 Company, the Company’s financial projections, and Rothschild’s valuation analyses and
20 resultant fairness opinion.
21

22 50. In so doing, Defendants made untrue statements of material fact and
23 omitted material information necessary to make the statements that were made not
24 misleading in violation of § 14(e) of the Exchange Act. By virtue of their positions
25 within the Company and/or roles in the process and in the preparation of the 14D-9,
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1 Defendants were aware of this information and their obligation to disclose this
2 information in the 14D-9.

3 51. The omissions and misleading statements in the 14D-9 are material in that a
4 reasonable stockholder would consider them important in deciding whether to tender
5 their shares or seek appraisal. In addition, a reasonable investor would view the
6 information identified above which has been omitted from the 14D-9 as altering the “total
7 mix” of information made available to stockholders.
8

9 52. Defendants knowingly, or with deliberate recklessness, omitted the material
10 information identified above from the 14D-9, causing certain statements therein to be
11 materially incomplete and therefore misleading. Indeed, while Defendants undoubtedly
12 had access to and/or reviewed the omitted material information in connection with
13 approving the Proposed Transaction, they allowed it to be omitted from the 14D-9,
14 rendering certain portions of the 14D-9 materially incomplete and therefore misleading.
15

16 53. The misrepresentations and omissions in the 14D-9 are material to Plaintiff,
17 and Plaintiff will be deprived of his entitlement to make a fully informed decision if such
18 misrepresentations and omissions are not corrected prior to the expiration of the Tender
19 Offer.
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22 **COUNT II**

23 **Claims Against All Defendants for Violations of § 14(d)(4) of the**
24 **Securities Exchange Act of 1934 and SEC Rule 14d-9 (17 C.F.R. § 240.14d-9)**

25 54. Plaintiff repeats and realleges the preceding allegations as if fully set forth
26 herein.
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1 55. Defendants have caused the 14D-9 to be issued with the intention of
2 soliciting stockholder support of the Proposed Transaction.

3 56. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated
4 thereunder require full and complete disclosure in connection with tender offers.
5

6 57. The 14D-9 violates § 14(d)(4) and Rule 14d-9 because it omits material
7 facts, including those set forth above, which render the 14D-9 false and/or misleading.

8 58. Defendants knowingly, or with deliberate recklessness, omitted the material
9 information identified above from the 14D-9, causing certain statements therein to be
10 materially incomplete and therefore misleading. Indeed, while Defendants undoubtedly
11 had access to and/or reviewed the omitted material information in connection with
12 approving the Proposed Transaction, they allowed it to be omitted from the 14D-9,
13 rendering certain portions of the 14D-9 materially incomplete and therefore misleading.
14

15 59. The misrepresentations and omissions in the 14D-9 are material to Plaintiff,
16 and Plaintiff and Inventure Foods stockholders will be deprived of their entitlement to
17 make a fully informed decision if such misrepresentations and omissions are not
18 corrected prior to the expiration of the tender offer.
19

20 60. The misrepresentations and omissions in the 14D-9 are material to Plaintiff,
21 and Plaintiff and Inventure Foods stockholders will be deprived of their entitlement to
22 make a fully informed decision if such misrepresentations and omissions are not
23 corrected prior to the expiration of the tender offer.
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COUNT III

**Against the Individual Defendants for
Violations of § 20(a) of the 1934 Act**

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4 61. Plaintiff repeats and realleges the preceding allegations as if fully set forth
5 herein.

6 62. The Individual Defendants acted as controlling persons of Inventure Foods
7 within the meaning of Section 20(a) of the 1934 Act as alleged herein. By virtue of their
8 positions as officers and/or directors of Inventure Foods and participation in and/or
9 awareness of the Company's operations and/or intimate knowledge of the false
10 statements contained in the 14D-9, they had the power to influence and control and did
11 influence and control, directly or indirectly, the decision making of the Company,
12 including the content and dissemination of the various statements that plaintiff contends
13 are false and misleading.

14
15
16 63. Each of the Individual Defendants was provided with or had unlimited
17 access to copies of the 14D-9 alleged by Plaintiff to be misleading prior to and/or shortly
18 after these statements were issued and had the ability to prevent the issuance of the
19 statements or cause them to be corrected.

20
21 64. In particular, each of the Individual Defendants had direct and supervisory
22 involvement in the day-to-day operations of the Company, and, therefore, is presumed to
23 have had the power to control and influence the particular transactions giving rise to the
24 violations as alleged herein, and exercised the same. The 14D-9 contains the unanimous
25

1 recommendation of the Individual Defendants to approve the Proposed Transaction.
2 They were thus directly involved in the making of the 14D-9.

3 65. By virtue of the foregoing, the Individual Defendants violated Section 20(a)
4 of the 1934 Act.

5
6 66. As set forth above, the Individual Defendants had the ability to exercise
7 control over and did control a person or persons who have each violated Section 14(d) of
8 the 1934 Act and Rule 14d-9, by their acts and omissions as alleged herein. By virtue of
9 their positions as controlling persons, these Defendants are liable pursuant to Section
10 20(a) of the 1934 Act. As a direct and proximate result of Defendants' conduct, Plaintiff
11 is threatened with irreparable harm.
12

13
14 **PRAYER FOR RELIEF**

15 **WHEREFORE**, Plaintiff prays for judgment and relief as follows:

16
17 A. Ordering that this action may be maintained as a class action and certifying
18 Plaintiff as the Class representative and Plaintiff's counsel as Class counsel;

19 B. Enjoining Defendants and all persons acting in concert with them from
20 proceeding with the Tender Offer or consummating the Proposed Transaction, unless and
21 until the Company discloses the material information discussed above, which has been
22 omitted from the 14D-9;

23 C. In the event Defendants consummate the Proposed Transaction, awarding
24 damages to Plaintiff and the Class;

25 D. Awarding Plaintiff the costs of this action, including reasonable allowance
26 for Plaintiff's attorneys' and experts' fees; and
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1 E. Granting such other and further relief as this Court may deem just and
2 proper.

3 **JURY DEMAND**

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5 Plaintiff demands a trial by jury.

6 Dated: November 20, 2017

7 **DECONCINI MCDONALD YETWIN**
8 **& LACY, P.C.**

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23 *Counsel for Plaintiff*
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the District of Arizona.

The completed cover sheet must be printed directly to PDF and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s): Ian Smith

Defendant(s): ; Ashton D. Asensio ; Paul J. Lapadat ; Timothy A. Cole ; Joel D. Stewart

County of Residence: Outside the State of Arizona

County of Residence: Maricopa

County Where Claim For Relief Arose: Maricopa

Plaintiff's Atty(s):

Defendant's Atty(s):

**Gary F. Urman (Ian Smith)
DeConcini McDonald Yetwin & Lacy, P.C.
2525 E. Broadway, Suite 200
Tucson, Arizona 85716
(520) 322-5000**

II. Basis of Jurisdiction: **3. Federal Question (U.S. not a party)**

III. Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff:- N/A

Defendant:- N/A

IV. Origin : **1. Original Proceeding**

V. Nature of Suit: **850 Securities/Commodities/Exchange**

VI.Cause of Action: **Sections 14(a) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d)(4), 78n(e), 78t(a)**

VII. Requested in Complaint

Class Action: **Yes**

Dollar Demand:

Jury Demand: **Yes**

VIII. This case is not related to another case.

Signature: /s/ Gary F. Urman

Date: 11/20/2017

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the *Back* button in your browser and change it. Once correct, save this form as a PDF and include it as an attachment to your case opening documents.

Revised: 01/2014