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The Honorable Rosanna Malouf Peterson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HAROLD MAPLE, Individually and
on behalf of all others similarly
situated,

Plaintiff,
v.

COSTCO WHOLESALE
CORPORATION, a Washington
corporation; NIAGARA BOTTLING
LLC, a California limited liability
company; and DOES1-100,
inclusive,

Defendants.

No. 2:12-cv-05166-TOR

SECOND AMENDED CLASS
ACTION COMPLAINT FOR
DAMAGES

HAROLD MAPLE, hereinafter "Plaintiff," individually and on behalf of all
others similarly situated, alleges as follows.

1 **INTRODUCTION**

2 1. This is a class action on behalf of a class of Washington consumers
3 who purchased, in Washington, VitaRain Tropical Mango (“Drink”), an alleged
4 vitamin enhanced water beverage, beginning at least four years prior to the
5 filing of this Complaint to the present (“Class Period”). Since at least 2008,
6 Niagara Bottling LLC packaged, marketed, and sold its VitaRain Tropical Mango,
7 as a “natural tonic” containing “natural caffeine” and “all natural caffeine”
8 despite the fact that the Drink contains unnatural ingredients, and ingredients
9 derived from synthetic and/or non-natural processes, including synthetic
10 caffeine, all the while using the deceptive and misleading name VitaRain to
11 market the Drink.

12 2. Throughout the Class Period, Niagara Bottling LLC, while promoting
13 and marketing this Drink as “a natural tonic” and helping “to maintain essential
14 fluid balance,” and containing “natural caffeine” and “all natural caffeine,” has
15 failed to disclose anywhere on any visible label or otherwise that VitaRain
16 Tropical Mango contains synthetic caffeine and other unnatural ingredients.
17 While the outer label on the case package of VitaRain does state that VitaRain
18 Tropical Mango contains “natural caffeine,” the caffeine is not natural. Plaintiff

1 alleges that the name of the Drink itself, VitaRain, gives the impression that the
2 Drink is nutritional, healthy and full of vitamins only, which is misleading and
3 deceptive in light of the actual ingredients in the Drink, and that the Drink's label
4 represents that it is a "natural tonic." However, the Drink contains unnatural
5 ingredients and ingredients derived from synthetic and/or non-natural
6 processes, including synthetic caffeine. In addition to the other claims and
7 factual allegations asserted in this amended complaint, Defendants created an
8 impression, through use of the name "VitaRain" and other representations, that
9 the Drink was "natural" and therefore, because it was not natural, they had a
10 duty to inform consumers that it was not natural, and failing to so inform
11 consumers amounts to fraudulent misrepresentation and concealment.

12 3. Plaintiff alleges that the conduct of Niagara Bottling LLC violates the
13 Washington Consumer Protection Act. Plaintiff also alleges that the conduct of
14 Niagara Bottling LLC is grounds for restitution and disgorgement on the basis of
15 quasi contract/unjust enrichment. Plaintiff further seeks an injunction.

16 4. Plaintiff alleges that Costco Wholesale Corporation violated the same
17 laws by marketing, distributing, and selling the vitamin enhanced water
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1 beverage, VitaRain Tropical Mango, in its stores throughout the United States of
2 America.

3 **PARTIES**

4 5. Plaintiff Harold Maple was a resident of Richland, Washington and is
5 now a resident of Tampa, Florida. At the time Mr. Maple purchased the Drink,
6 he was a Washington resident, and at the time of filing this suit, he was a
7 resident of Washington. Mr. Maple purchased several bottles of the Drink from
8 a Costco Wholesale store located at 8505 West Gage Boulevard, Kennewick,
9 Washington. Based upon the product labeling and the name of the Drink that he
10 read, Mr. Maple reasonably believed that he was purchasing a generic
11 equivalent to Vitaminwater, as the name of the Drink itself, VitaRain, gives the
12 impression that the Drink is nutritional, healthy and full of vitamins only, which
13 is misleading and deceptive in light of the actual ingredients in the Drink. More
14 specifically, Plaintiff contends that he read the name of the Drink, VitaRain, and
15 read portions of the outer label of the package and nowhere did he see a
16 disclosure that the Drink contained unnatural or synthetic ingredients.
17 Moreover, the Drink did not contain “natural caffeine.” In fact, the Drink,
18 labeled as a “natural tonic” on the bottle, also contained other non-natural

1 ingredients. Plaintiff further contends Defendants knowingly failed to reveal
2 that the Drink contained unnatural ingredients including synthetic caffeine.

3 6. Defendant Niagara Bottling LLC maintains its headquarters at 2560
4 East Philadelphia Street, Ontario, California 91761.

5 7. Defendant Costco Wholesale Corporation is the marketer,
6 distributor, and seller of the Drink and is located in Issaquah, Washington.

7 8. At all relevant times, Defendants Costco Wholesale Corporation and
8 Niagara Bottling LLC and Does 1-100 did and do business in Benton County,
9 Washington. There exists a unity of interest and ownership between each of
10 them, such that individuality and separateness between them has ceased and
11 each entity is the alter ego of each of the other entities.

12 9. The true names and capacities, whether individual, corporate,
13 associate or otherwise of Defendant Does 1-100, inclusive, are unknown to
14 Plaintiff at this time. Plaintiff therefore sues these Defendants by such fictitious
15 names. Plaintiff will amend this Complaint to allege their true names and
16 capacities when such information is ascertained. Plaintiff is informed and
17 believes and thereon alleges that each of the fictitiously named Defendants is
18 legally responsible in some manner for the events and happenings herein

1 referred to, and thereby proximately caused the injuries and damages to Plaintiff
2 as alleged herein.

3 10. Plaintiff is informed and believes and thereon alleges that at all times
4 herein mentioned, each of the Defendants, including each of the Doe
5 Defendants, was the co-conspirator, partner, joint venturer, successor, aide,
6 abettor, agent, ostensible agent, servant, representative, associate, borrowed
7 servant, and/or employee of each of the remaining Defendants, and was at all
8 times herein mentioned acting within the course and scope of said conspiracy,
9 agency, ostensible agency, and/or borrowed servant authority and employment
10 and with the consent, permission and/or ratification of co-Defendants and each
11 of them. Defendants are responsible and liable in some manner for the
12 damages or injuries sustained or threatened to be sustained by Plaintiff and
13 class members.

14 11. Whenever this Complaint references any acts of any Defendant or
15 one of its unnamed agents or co-conspirators, such allegation shall be deemed
16 to mean the act of all the other Defendants, unless the reference is in a
17 particular cause of action, in which case it shall be deemed to mean the act of all
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1 the other Defendants named in that cause of action, and each of them acting
2 individually, jointly, and severally.

3 12. Defendants aided and abetted each other in accomplishing the
4 wrongful acts. In doing so, Defendants acted with an awareness of their
5 wrongdoing and realized that their conduct substantially assisted in the
6 accomplishment of the wrongful scheme.

7 13. Each Defendant committed, conspired to commit, and/or ratified
8 each of the acts and omissions in the Complaint.

9 **Plaintiff's Dealings With Defendants**

10 14. On November 4, 2010, Harold Maple purchased a sealed bottle of
11 VitaRain Tropical Mango Vitamin Enhanced Water Beverage, hereinafter the
12 "Drink," from a Costco Wholesale store located at 8505 West Gage Boulevard,
13 Kennewick, Washington. As further alleged herein, based upon the product
14 labeling and the name of the Drink that he read, Mr. Maple reasonably believed
15 that he was purchasing a generic equivalent to Vitaminwater, as the name of the
16 Drink itself, VitaRain, gives the impression that the Drink is nutritional, healthy
17 and full of vitamins only, which is misleading and deceptive in light of the actual
18 ingredients in the Drink. At all material times herein, Costco Wholesale

1 Corporation was a distributor of the Drink which was manufactured and bottled
2 by Niagara Bottling LLC.

3 15. Upon information and belief, based upon an analysis by an
4 independent lab hired by Niagara Bottling, LLC, the Drink is manufactured using
5 gelatin capsules that contain caffeine in powdered form. Plaintiff contends that
6 Defendants failed to disclose that the Drink contained unnatural ingredients
7 including synthetic caffeine and other unnatural ingredients. Plaintiff contends
8 that the name of the Drink itself, VitaRain, gives the impression that the Drink is
9 nutritional, healthy and full of vitamins only and thus, is misleading and
10 deceptive in light of the actual ingredients in the Drink, that the “natural
11 caffeine” listed on the label is incorrect and misleading, that the powdered
12 caffeine used to make the Drink is synthetic and not natural, and that the Drink,
13 labeled as a “natural tonic,” contains other non-natural ingredients. Plaintiff
14 further alleges that there is a subclass who specifically purchased the Drink after
15 reading that the Drink contained “natural caffeine.”

16 16. The Plaintiff would not have purchased the Drink had it not been
17 marketed with the name, VitaRain, and had he known that it contained synthetic
18 caffeine and other “non-natural” ingredients. Plaintiff, and such other class

1 representatives as may be appointed, suffered damages resulting from the loss
2 of money and property as a result of Defendants' unlawful conduct.

3 **Synthetic Caffeine and Other Unnatural Ingredients.**

4 17. Although the Food and Drug Administration ("FDA") does not directly
5 regulate the term "natural," the FDA has established a policy for defining the
6 outer boundaries of the use of the term by clarifying that a product is not
7 natural if it contains color, artificial flavors, or synthetic substances. See e.g.,
8 <http://www.fda.gov/forconsumers/consumerupdates/ucm094536.htm> and
9 <http://www.fda.gov/aboutfda/transparency/basics/ucm214868.htm>. Plaintiff
10 contends that the name of the Drink itself, VitaRain, gives the impression that
11 the Drink is nutritional, healthy and full of vitamins only and thus, is misleading
12 and deceptive in light of the actual ingredients in the Drink, and that the
13 powdered caffeine inside the gelatin capsule found by Mr. Maple was synthetic,
14 non-natural caffeine. It is not "natural caffeine" as represented on the label. It
15 is not "all natural" as represented on the label.

16 18. Additionally, the Drink's label represents that it is a "natural tonic."
17 However, the Drink contains unnatural ingredients and ingredients derived from
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1 synthetic and/or non-natural processes, including, but not limited to, synthetic
2 caffeine, sucralose and acesulfame potassium.

3 **CLASS ALLEGATIONS**

4 **Definition of the Class**

5 19. Plaintiff brings this action individually and on behalf of all
6 Washington consumers as the Court may determine to be appropriate for class
7 certification, pursuant to Washington Civil Rule 23 (CR 23). Plaintiff seeks to
8 represent a class of Washington consumers defined as *all Washington*
9 *purchasers* of VitaRain Tropical Mango Vitamin Enhanced Water Beverage (the
10 “Drink”) from Costco in Washington during the four years preceding the filing of
11 the original Complaint through the resolution of this action.

12 ***Numerosity***

13 20. Plaintiff is informed and believes that as of the filing of this
14 complaint, Defendants have sold the drink to hundreds or thousands of
15 Washington consumers. Accordingly, the members of the class are so numerous
16 that joinder is impractical.

17 ***Commonality***

1 21. There is a well-defined community of interest in the relevant
2 questions of law and fact affecting the putative class members, and common
3 questions of law and fact predominate over any individual questions affecting
4 the class members, including but not limited, to the following:

5 a) whether the name of the Drink itself, VitaRain, gives the
6 impression that the Drink is nutritional, healthy and full of
7 vitamins only and thus, is misleading and deceptive based on
8 the actual ingredients in the Drink.

9 b) whether Defendants adequately informed the class that the
10 Drink contained synthetic, non-natural ingredients including
11 synthetic caffeine;

12 c) whether synthetic caffeine used in the Drink is “all natural;”

13 d) whether the phrase “all natural caffeine” is likely to deceive
14 class members or the general public;

15 e) whether the Drink is a “natural tonic” when it contains
16 unnatural ingredients;

17 f) whether the phrase “natural tonic” is likely to deceive class
18 members or the general public;

- 1 g) whether Defendants' representations are unlawful; and
2 h) the appropriate measure of restitutionary disgorgement
3 and/or restitution.

4 ***Typicality***

5 22. Plaintiff's claims are typical of the claims of the class in that Plaintiff
6 is a consumer who purchased Defendants' "VitaRain" Drink, Defendants'
7 "natural caffeine" Drink, "all natural caffeine" Drink and "natural tonic" Drink
8 that contains synthetic caffeine and other unnatural ingredients during the Class
9 Period.

10 23. Plaintiff, therefore, is no different in any relevant respect from any
11 other class member and the relief sought is common to the class.

12 ***Adequate Representation***

13 24. Plaintiff is an adequate representative of the class because his
14 interest does not conflict with the interest of the class members that he seeks to
15 represent. Plaintiff has retained counsel competent and experienced in
16 conducting complex class action litigation. Plaintiff and his counsel will
17 adequately protect the interests of the class.

1 **Consumer Protection Act (RCW Chapter 19.86) (“CPA”) Against All Defendants**
2 **and Does 1-100, inclusive**

3 27. Plaintiff re-alleges and incorporates by reference all allegations
4 contained in the Complaint as if set forth separately in this cause of action.

5 28. This cause of action is brought pursuant to the Washington
6 Consumer Protection Act, RCW Ch. 19.86. Plaintiff brings this cause of action on
7 his own behalf and on behalf of class members all of whom are similarly situated
8 consumers within the meaning of RCW Ch. 19.86.

9 29. Defendants have violated the Washington Consumer Protection Act,
10 RCW Ch. 19.86 by:

- 11 a) Using the name “VitaRain” to give the impression that the Drink
12 is nutritional, healthy and full of vitamins only when it does not
13 based on the actual ingredients in the Drink.
- 14 b) failing to adequately inform the consumer that the Drink
15 contained synthetic unnatural ingredients, including synthetic
16 caffeine;
- 17 c) representing that the Drink contains “all natural caffeine” when
18 it does not;

1 d) representing that the Drink contains “natural caffeine” when it
2 does not;

3 e) representing that the Drink is a “natural tonic” when it contains
4 unnatural ingredients.

5 30. As a result of such actions, Plaintiff and class members have been
6 damaged in an amount that is within the jurisdiction of this court.

7 31. Plaintiff and class members have suffered damages as a result of
8 Defendants’ unlawful conduct because they purchased a Drink they would
9 otherwise not have purchased in light of the use of the name, VitaRain, and that
10 they would not otherwise have purchased had the correct disclosures been
11 made and/or would not have purchased the Drink if Defendants properly
12 disclosed that non-natural caffeine was contained in the Drink and/or other
13 unnatural ingredients were contained in the “natural tonic” Drink.

14 32. Defendants misrepresented and concealed from Plaintiff and class
15 members that the Drink contained non-natural, not “all natural caffeine” as
16 stated in the label, and that the “natural tonic” Drink contained unnatural
17 ingredients.

1 33. Defendants' misrepresentations and omissions described in the
2 preceding paragraphs were intentional, or alternatively made without the use of
3 reasonable procedures adopted to avoid such an error.

4 34. Defendants have directly or indirectly engaged in substantially similar
5 conduct to Plaintiff and each member of the class.

6 35. Such wrongful actions and conduct are ongoing and continuing.
7 Unless Defendants are enjoined from continuing to engage in such wrongful
8 actions and conduct, members of the consuming public will continue to be
9 damaged by Defendants' conduct.

10 36. Defendants and each of them have aided and abetted and
11 encouraged and rendered substantial assistance in accomplishing the wrongful
12 conduct and the wrongful goals and other wrongdoing complained of herein. In
13 taking the action as particularized herein to aid and abet and substantially assist
14 the commission of these wrongful acts and other wrongdoings complained of,
15 each of the Defendants acted with an awareness of his/her/its primary
16 wrongdoing and realized that his/her/its conduct would substantially assist the
17 accomplishment of the wrongful conduct, wrongful goals, and wrongdoing.

1 37. Plaintiff and the class members are entitled to an injunction pursuant
2 to RCW Ch. 19.86 et seq., prohibiting the Defendants from continuing to engage
3 in the above-described violations of the CPA; actual damages for Plaintiff and
4 class members; restitution of property; and treble damages. Plaintiff and class
5 members further seek reasonable attorney's fees under RCW 19.86.090.

6 38. Plaintiff reserves the right to amend this Complaint as more
7 information becomes known.

8 **PRAYER**

9 WHEREFORE, Plaintiff on behalf of himself and on behalf of those class
10 members similarly situated, prays as follows:

11 1. For an order certifying that this action as properly brought may be
12 maintained as a class action; that Plaintiff may be appointed class
13 representative; and Plaintiff's counsel may be appointed as class counsel;

14 2. For restitution in such amount that Plaintiff and all class members
15 paid to purchase Defendants' Drink or the profits Defendants obtained from
16 those transactions;

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2013, I caused to be served a true and correct copy of the foregoing *SECOND AMENDED CLASS ACTION COMPLAINT FOR DAMAGES*, by the method indicated below, and addressed to the following:

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