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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

FILED
MAY 6 2014
U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CLERK

Tracey Hechler, on behalf of herself
and others similarly situated,

Plaintiff,

v.

Bai Brands LLC d/b/a Bai 5,
a New Jersey Corporation,

Defendant.

CV 14 2848

Case No.:

CLASS ACTION COMPLAINT

VITALIANO, J.

CO'D, A

Plaintiff, Tracey Hechler ("Plaintiff"), on behalf of herself and others similarly situated, by and through her undersigned attorneys, hereby files this Class Action Complaint against Defendant, Bai Brands LLC d/b/a Bai 5 ("Bai 5" or "Defendant"), and states as follows based upon her own personal knowledge and the investigation of her counsel:

NATURE OF THE ACTION

1. Defendant engaged in and continues to engage in a widespread, uniform marketing campaign using its product packaging, the website www.drinkbai.com and social media sites such as Facebook to mislead consumers about the antioxidant value of its beverages. Defendant's beverage is called "Bai 5 Antioxidant Infusions." Such beverages are sold in 18 ounce bottles and include the following flavors: (1) Brasilia Blueberry, (2) Malawi Mango, (3) Ipanema Pomegranate, (4) Sumutra Dragonfruit, (5) Costa Rica Clementine, (6) Tanzania Lemonade Tea, (7) Congo Pear, (8) Panama Peach and (9) Limu Lemon (collectively the "Products"). The label on each of the Products prominently features the term "Antioxidant Infusions" in large lettering and also includes the terms "Antioxidant Packed Beverage," "Hello Antioxidants!" "Antioxidant Goodness Inside," "Bai 5 Proprietary Antioxidant Blend: Organic Coffeefruit and White Tea Extract" and "Good Bai Free Radicals." The label also reads: "We infuse the antioxidant power of the superfruit, add a splash of exotic fruit juices and voila! You have 100% natural, free-radical crushing Bai 5." There is no further description on the label of the particular antioxidants present even though federal regulations require that nutrient content claims using the term "antioxidant" disclose the name of the specific nutrient that is an antioxidant, *see* 21 C.F.R. § 101.54(g)(4). In fact, the only mention of any specific antioxidants on the label is on the nutritional panel on each of the Products where it states, in miniscule letters: "Not a significant source of calories from... Vitamin A [and] Vitamin C...." The entire premise of the Products is that the drinks contain a mysterious, super-powerful source of antioxidants derived from "coffee's secret superfruit." However, Defendant, in violation of federal, state and common law, falsely and misleadingly fails to list the names of any of the antioxidants allegedly contained in the Products.

2. Plaintiff brings this consumer class action on behalf of herself and all other persons nationwide, who, from the applicable limitations period up to and including the present (the “Class Period”), purchased for consumption and not resale any of the Products.

3. During the Class Period, Defendant made and continues to make improper nutrient content claims. The Products are trademarked and called “Antioxidant Infusions®” and their labels not only contain that term in large letters, but also contains other antioxidant nutritional content claims such as “Antioxidant Packed Beverage” and “Hello Antioxidants!” without any further description of the particular antioxidants present. Federal regulations require that nutrient claims that use the term “antioxidant” disclose the name of the specific nutrient that is the antioxidant, *see* 21 C.F.R. § 101.54(g)(4). The Products do not specify any of the names of the antioxidants with which its drinks are purportedly infused and such failure is (i) unfair, deceptive and fraudulent, (ii) is an unconscionable trade and business practice and (iii) is false advertising.

4. Defendant’s actions constitute violations of the federal Food Drug & Cosmetic Act (“FDCA”) Section 403(a)(1) (21 U.S.C. 343(a)(1)) and New York’s Deceptive Acts or Practices Law, Gen. Bus. Law § 349, as well as other similar deceptive and unfair practices and/or consumer protection laws in other states.

5. Defendant violated statutes enacted in each of the fifty states and the District of Columbia, that are designed to protect consumers against unfair, deceptive, fraudulent and unconscionable trade and business practices and false advertising. These statutes are:

- 1) Alabama Deceptive Trade Practices Act, Ala. Statues Ann. §§ 8-19-1, *et seq.*;
- 2) Alaska Unfair Trade Practices and Consumer Protection Act, Ak_ Code § 45.50.471, *et seq.*;
- 3) Arizona Consumer Fraud Act, Arizona Revised Statutes, §§ 44-1521, *et seq.*;
- 4) Arkansas Deceptive Trade Practices Act, Ark. Code § 4-88-101, *et seq.*;
- 5) California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*, and California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200, *et seq.*;
- 6) Colorado Consumer Protection Act, Colo. Rev. Stat. § 6 - 1-101, *et seq.*;
- 7) Connecticut Unfair Trade Practices Act, Conn. Gen. Stat § 42-110a, *et seq.*;

- 8) Delaware Deceptive Trade Practices Act, 6 Del. Code § 2511, *et seq.*;
- 9) District of Columbia Consumer Protection Procedures Act, D.C. Code § 28 3901, *et seq.*;
- 10) Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. Ann. § 501.201, *et seq.*;
- 11) Georgia Fair Business Practices Act, § 10-1-390 *et seq.*;
- 12) Hawaii Unfair and Deceptive Practices Act, Hawaii Revised Statutes § 480 1, *et seq.*, and Hawaii Uniform Deceptive Trade Practices Act, Hawaii Revised Statutes § 481A-1, *et seq.*;
- 13) Idaho Consumer Protection Act, Idaho Code § 48-601, *et seq.*;
- 14) Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1, *et seq.*;
- 15) Indiana Deceptive Consumer Sales Act, Indiana Code Ann. §§ 24-5-0.5-0.1, *et seq.*;
- 16) Iowa Consumer Fraud Act, Iowa Code §§ 714.16, *et seq.*;
- 17) Kansas Consumer Protection Act, Kan. Stat. Ann §§ 50 626, *et seq.*;
- 18) Kentucky Consumer Protection Act, Ky. Rev. Stat. Ann. §§ 367.110, *et seq.*, and the Kentucky Unfair Trade Practices Act, Ky. Rev. Stat. Ann §§ 365.020, *et seq.*;
- 19) Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § § 51:1401, *et seq.*;
- 20) Maine Unfair Trade Practices Act, 5 Me. Rev. Stat. § 205A, *et seq.*, and Maine Uniform Deceptive Trade Practices Act, Me. Rev. Stat. Ann. 10, § 1211, *et seq.*;
- 21) Maryland Consumer Protection Act, Md. Com. Law Code § 13-101, *et seq.*;
- 22) Massachusetts Unfair and Deceptive Practices Act, Mass. Gen. Laws ch. 93A;
- 23) Michigan Consumer Protection Act, § § 445.901, *et seq.*;
- 24) Minnesota Prevention of Consumer Fraud Act, Minn. Stat §§ 325F.68, *et seq.*; and Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43, *et seq.*;
- 25) Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*;
- 26) Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010, *et seq.*;
- 27) Montana Unfair Trade Practices and Consumer Protection Act, Mont. Code §30-14-101, *et seq.*;
- 28) Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59 1601, *et seq.*, and the Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301, *et seq.*;
- 29) Nevada Trade Regulation and Practices Act, Nev. Rev. Stat. §§ 598.0903, *et seq.*;
- 30) New Hampshire Consumer Protection Act, N.H. Rev. Stat. § 358-A:1, *et seq.* ;
- 31) New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8 1, *et seq.*;
- 32) New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57 12 1, *et seq.*;
- 33) New York Deceptive Acts and Practices Act, N.Y. Gen. Bus. Law §§ 349, *et seq.*;
- 34) North Dakota Consumer Fraud Act, N.D. Cent. Code §§ 51 15 01, *et seq.*;
- 35) North Carolina Unfair and Deceptive Trade Practices Act, North Carolina General Statutes §§ 75-1, *et seq.*;
- 36) Ohio Deceptive Trade Practices Act, Ohio Rev. Code. Ann. §§ 4165.01. *et seq.*;
- 37) Oklahoma Consumer Protection Act, Okla. Stat. 15 § 751, *et seq.*;
- 38) Oregon Unfair Trade Practices Act, Rev. Stat § 646.605, *et seq.*;
- 39) Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Penn. Stat. Ann. § § 201-1, *et seq.*;
- 40) Rhode Island Unfair Trade Practices And Consumer Protection Act, R.I. Gen. Laws § 6-13.1-1, *et seq.*;
- 41) South Carolina Unfair Trade Practices Act, S.C. Code Laws § 39-5-10, *et seq.*;
- 42) South Dakota's Deceptive Trade Practices and Consumer Protection Law, S.D. Codified Laws §§ 37 24 1, *et seq.*;
- 43) Tennessee Trade Practices Act, Tennessee Code Annotated §§ 47-25-101, *et seq.*;
- 44) Texas Stat. Ann. §§ 17.41, *et seq.*, Texas Deceptive Trade Practices Act
- 45) Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1, *et seq.*;

- 46) Vermont Consumer Fraud Act, Vt. Stat. Ann. tit.9, § 2451, *et seq.*;
- 47) Virginia Consumer Protection Act, Virginia Code Ann. §§59.1-196, *et seq.*;
- 48) Washington Consumer Fraud Act, Wash. Rev. Code § 19.86.010, *et seq.*;
- 49) West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-6-101, *et seq.*;
- 50) Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100.18, *et seq.*;
- 51) Wyoming Consumer Protection Act, Wyoming Stat. Ann. §§40-12-101, *et seq.*

6. Bai 5 has also been unjustly enriched as a result of its conduct. As a result of these unfair and deceptive practices, Bai 5 has collected millions of dollars from the sales of the Products that it would not have otherwise earned. While simultaneously marketing the Product as a powerful source of antioxidants, Bai 5 deceived the Plaintiff and other consumers nationwide by failing to specify the antioxidants contained in the Products, if any actually exist.

JURISDICTION AND VENUE

7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332, because this is a class action, as defined by 28 U.S.C § 1332(d)(1)(B), in which a member of the putative class is a citizen of a different state than Defendant, and the amount in controversy exceeds the sum or value of \$5,000,000, excluding interest and costs, *see* 28 U.S.C. § 1332(d)(2).

8. The Court has jurisdiction over the federal claims alleged herein pursuant to 28 U.S.C § 1331 because it arises under the laws of the United States.

9. The Court has jurisdiction over the state law claims because they form part of the same case or controversy under Article III of the United States Constitution.

10. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to 28 U.S.C § 1332 because the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of different states.

11. The Court has personal jurisdiction over Defendant because the Products are advertised, marketed, distributed and sold throughout New York State; Defendant engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York

State; Defendant is authorized to do business in New York State; and Defendant has sufficient minimum contacts with New York and/or otherwise has intentionally availed itself of the markets in New York State, rendering the exercise of jurisdiction by the Court permissible under traditional notions of fair play and substantial justice. Moreover, Defendant is engaged in substantial and not isolated activity within New York State.

12. Venue is proper in this district pursuant to 28 U.S.C § 1391(a) and (b), because a substantial part of the events giving rise to Plaintiff's claims occurred in this District, and Defendant is subject to personal jurisdiction in this District. Plaintiff purchased and consumed Defendant's beverages in Queens County and Westchester County.

PARTIES

13. Plaintiff is a citizen of the State of New York and resides in Westchester County. For the past year, Plaintiff has purchased different flavored Products for personal consumption within the State of New York. Plaintiff has purchased the Products throughout 2013 and 2014. Plaintiff purchased the Products from stores located in Queens County and Westchester County. The purchase price was approximately \$2.29 for one 18 ounce bottle of Bai 5.

14. Defendant is a company organized and existing under the laws of the state of New Jersey. Defendant's headquarters is located at 1800 E. State Street, Suite 153, Hamilton, NJ 08609. Defendant manufactured, advertised, marketed and sold its Products without listing the specific antioxidants contained therein (if any exist) to hundreds of thousands of consumers nationwide, including New York.

FACTUAL ALLEGATIONS

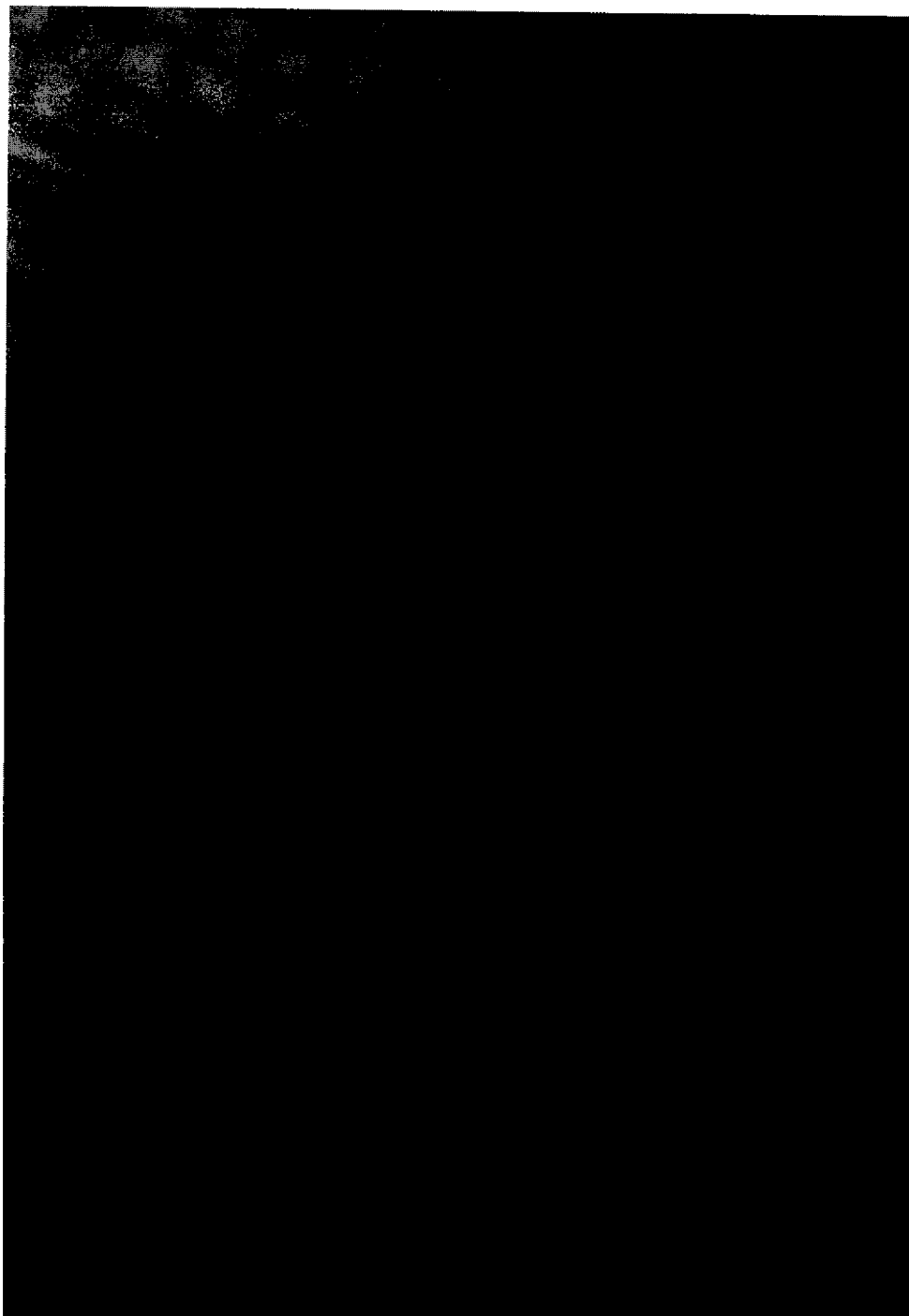
15. Defendant manufactures, markets and sells the Products throughout the United States.

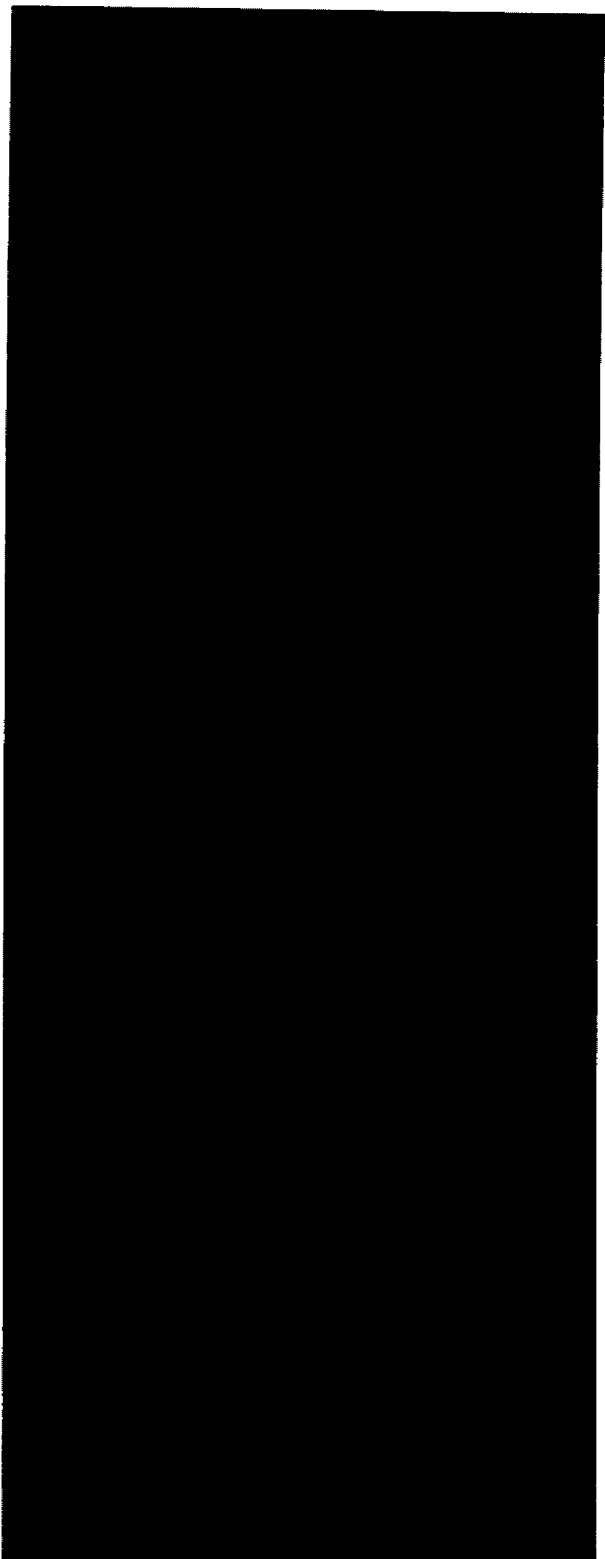
16. The Products are available at most supermarket chains and major retail outlets throughout the United States, including but not limited to Target, Costco, Fairway, Shoprite Safeway, 7 Eleven, Food Emporium, Walgreens, Waldbaums and Duane Reade.

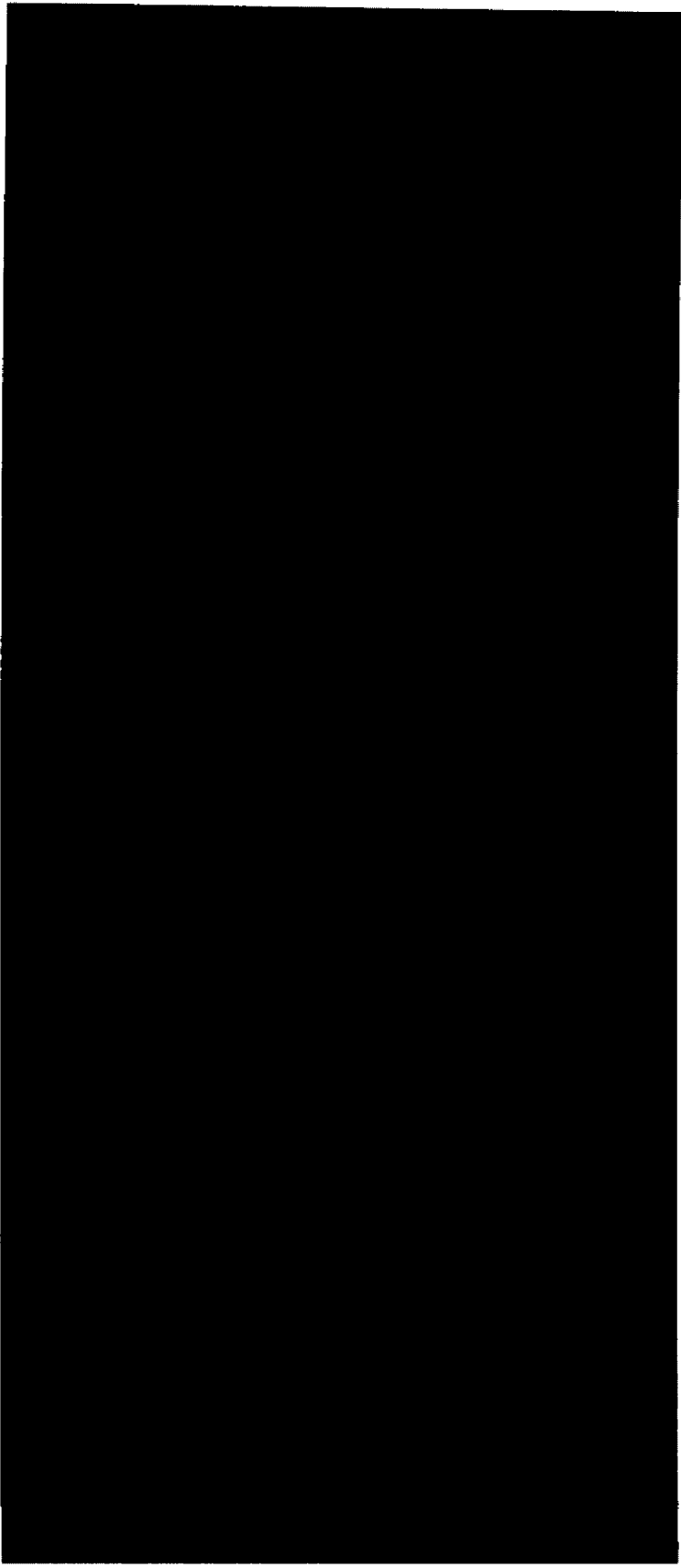
Defendant Makes Unlawful Antioxidant Claims

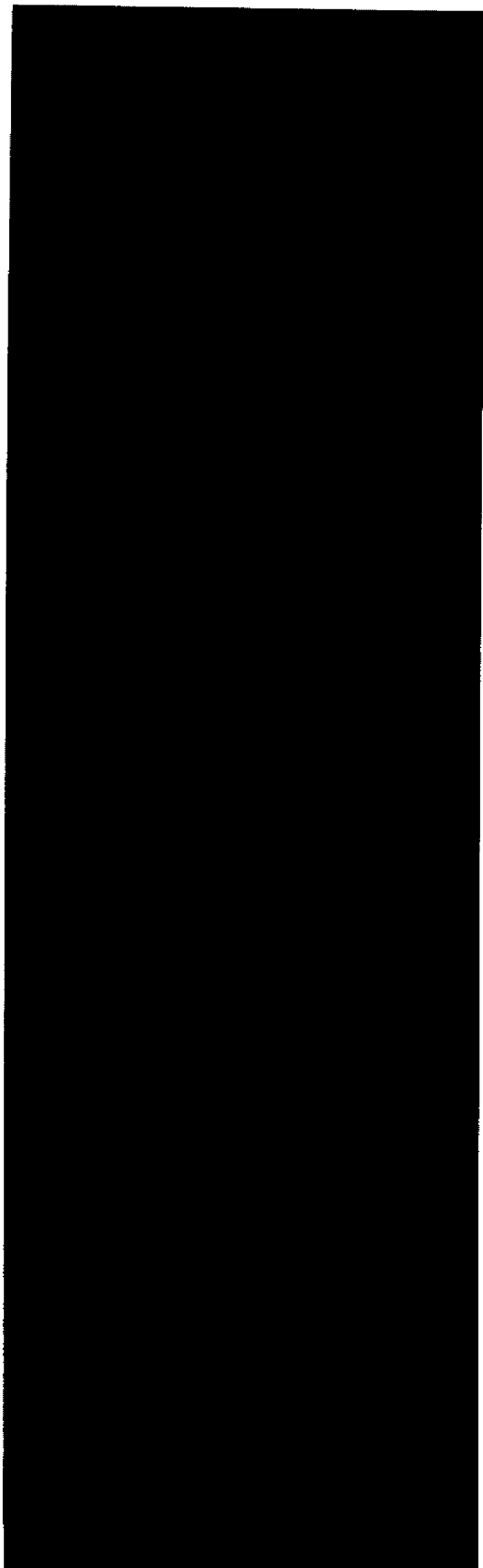
17. Defendant exaggerates the purported antioxidant qualities of its Products on its labels. Products, called “Bai 5 Antioxidant Infusions,” prominently feature the term “Antioxidant Infusions” in large, capital lettering on their label. The label also includes the terms “Antioxidant Packed Beverage,” “Hello Antioxidants!” “Antioxidant Goodness Inside,” “Bai 5 Proprietary Antioxidant Blend: Organic Coffeefruit and White Tea Extract” and “Good Bai Free Radicals.” The label also reads: “We infuse the antioxidant power of the superfruit, add a splash of exotic fruit juices and voila! You have 100% natural, free-radical crushing Bai 5.” Below are samples of the labels that contain Defendant’s unlawful antioxidant claims:











18. The following is an excerpt from Defendant's website under a section entitled "What's Inside" and a subsection entitled "Antioxidants 101":

What's Inside

- Meet Our Superfruit
- Antioxidants 101
- Smart Sweeteners

Antioxidants 101



What are Antioxidants?

Antioxidants are natural substances found in healthy foods and drinks that fight free radicals and stop the damaging process of oxidation. When you see a slice of apple turn from clear and fresh to mottled and brown you are witnessing the process of oxidation. When you prevent that action from occurring by misting a slice of apple with lemon juice you are preventing damage with the power and simplicity of antioxidants. It's stress, lack of sleep, pollution, tobacco smoke, alcohol, direct sunlight, high fat and sugary foods, and even exercise that can cause oxidizing, cell-damaging free radicals to develop. It's antioxidants that can fight back.

Where Do We Source Our Antioxidants?

Our antioxidants come from coffeefruit which we source from the high altitude coffee fields of Indonesia. It's the tropical climate and strong Equatorial sun that make coffee from Indonesia some of the finest and deep-bodied in the world. It's coffeefruit, rich in free-radical fighting properties, that protect coffee beans against damaging UV rays with a rich red fruit. By the time coffee has been harvested and separated from its fruity covering a powerful resource of antioxidants has been created, one that we infuse into every bottle of Bai 5.

<http://www.drinkbai.com/whats-inside/antioxidant-101> (April 14, 2014). Accordingly, in what appears to be a section on its website where Bai 5 will provide the required antioxidant specifics, there is again not a single mention of an actual antioxidant. Nor is there a mention of a single antioxidant anywhere on Bai 5's website on the amounts of antioxidants contained in the Products. Defendant, throughout its website, continually refers to the "coffee superfruit," but never mentions whether any actual antioxidants are ingredients in the Products. For example, from the website's FAQ:

What are Bai 5-Calorie Antioxidant Infusions?

Bai 5-Calorie Antioxidant Infusions are innovative beverages that harnesses the goodness of coffee's superfruit, one of nature's most powerful antioxidants. Every bottle of Bai 5 delivers a thirst-quenching experience that is 100% natural, infused with one gram of free-radical fighting superfruit, sweetened naturally and flavored with exotic fruit juices. In addition to being delicious, Bai 5-Calorie Antioxidant Infusions are Kosher, vegan, gluten- and soy-free.

<http://www.drinkbai.com/about-faq> (May 5, 2014).

19. Company founder, Ben Weiss, explains the history of Bai 5 on the website as follows:

For two decades I traveled to exotic regions around the world in search of the best-quality, green coffee available. It was on one of those trips, during a visit to Indonesia, that I stumbled upon something unexpected: coffeefruit, the casing that surrounds the coffee bean, is an antioxidant powerhouse. I've been determined to share the secret of coffeefruit ever since.

Back home I turned my family's kitchen into a makeshift lab for more than a year mixing coffeefruit and exotic fruit juices to create a great-tasting, healthful beverage. The result? An antioxidant-rich, refreshing line called Bai. In August 2009 Bai was founded. The name - the Mandarin word for "pure" - was chosen to represent the simple, natural goodness of a beverage dedicated to fostering great health.

. . . Within months of its founding, Bai [launched], Bai 5, a low-sugar, 5-calorie beverage created in response to customer's interest in even more healthful options to sugary, high-calorie drinks. The first Bai 5 infusion, Sumatra Dragonfruit, became an instant best seller.

Today, as Bai continues to grow, one thing is clear: the secret of coffeefruit antioxidant power is finally out.

<http://www.drinkbai.com/about/our-story> (May 5, 2014). Again, the purported antioxidant power of Bai 5 is intensely promoted without any mention whatsoever of actual antioxidants as required by federal law. Further, references to the coffeefruit as an antioxidant are nonsensical. Antioxidants are biochemical molecules, not fruits nor casings of fruit. Certain vitamins and minerals, such as Vitamins C or E, may be antioxidants. Fruits themselves, such as apples, oranges or coffee fruits, are not antioxidants.

20. Bai 5 also has a strong Facebook presence and uses the following image, which includes the words "Antioxidant Packed," as its avatar:



<https://www.facebook.com/DrinkBai> (May 5, 2014).

21. Federal regulations regulate antioxidant claims as a particular type of nutrient content claim. Specifically, 21 C.F.R. § 101.54(g) contains special requirements for nutrient claims that use the term “antioxidant”:

- (1) The name of the antioxidant must be disclosed;
- (2) There must be an established Referenced Daily Intakes (“RDI”) for that antioxidant, and if not, no “antioxidant” claim can be made about it (*see* 21 CFR § 101.54(g)(1));
 - a. The vitamins and minerals with their established RDIs as listed at 21 C.F.R. § 101.9(c)(8)(iv) are:

NUTRIENT	RDI
Vitamin A	5,000 International Units
Vitamin C	60 milligrams
Calcium	1,000 milligrams
Iron	18 milligrams
Vitamin D	400 International Units
Vitamin E	30 International Units
Vitamin K	80 micrograms
Thiamin	1.5 milligrams
Riboflavin	1.7 milligrams
Niacin	20 milligrams
Vitamin B ₆	2.0 micrograms
Folate	400 micrograms
Vitamin B ₁₂	6 micrograms
Biotin	300 micrograms
Pantothenic acid	10 milligrams
Phosphorus	1,000 milligrams
Iodine	150 micrograms
Magnesium	400 milligrams
Zinc	15 milligrams
Selenium	70 micrograms
Copper	2.0 milligrams
Manganese	2.0 milligrams
Chromium	120 micrograms
Molybdenum	75 micrograms
Chloride	3,400 milligrams

- (3) Any food label making antioxidant claims must include the specific name of the nutrient that is an antioxidant and cannot simply say “antioxidants” (e.g., “high in antioxidant vitamins C and E”) (*see* 21 CFR § 101.54(g)(4));
- (4) The nutrient that is the subject of the antioxidant claim must also have recognized antioxidant activity, *i.e.*, there must be scientific evidence that after it is eaten and absorbed from the gastrointestinal tract, the substance participates in physiological, biochemical or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions (*see* 21 C.F.R. § 101.54(g)(2)); and
- (5) The antioxidant nutrient must meet the requirements for nutrient content claims in 21 C.F.R. § 101.54(b) for “high,” “rich in” “excellent source of” claims or 21 C.F.R. § 101.54(c) for “good source,” “contains” or “provides” claims. For example, to use a “high” claim, the food would have to contain 20% or more of the Daily Reference Value (“DRV”) or RDI per serving: e.g., at least 16 milligrams of Vitamin C in order to label a product “high in antioxidant Vitamin C” (*see* 21 CFR § 101.54(g)(3)).

22. The antioxidant labeling for Defendant’s Products violate federal law because:

- (1) it does not specify which of the permissible antioxidants listed in the above chart the Products are allegedly “packed” with; and
- (2) since the antioxidant is not specified, Defendant lacks adequate evidence that the unknown antioxidant nutrients participate in physiological, biochemical or cellular processes that inactivate free radicals or prevent free radical-initiated

chemical reactions after they are eaten and absorbed from the gastrointestinal tract; and

- (3) that it meets the nutrient content claims to contain enough of it to label it as a “high” or even a “good source.”

23. As stated above, the only mention of specific antioxidants anywhere on the Products’ labels is a statement that Products are *not* a significant source of Vitamins A and C. For the Products to be “antioxidant packed” and “free-radical crushing” (i.e. the Products have “high” levels of antioxidants), the Products must contain at least 20% or more of the DRV or RDI for at least one of the antioxidant ingredients listed in Paragraph 21(2) above. The Products’ labels do not indicate that any such requirement is satisfied.

24. Without any antioxidant ingredients (or illegal or misrepresented antioxidant claims), the Products are no different than a bottle of water. Given that a bottle of water is typically \$1.00, Plaintiff and the Class members are harmed approximately \$1.29 for each bottle of the Product purchased.

25. For these reasons, Defendant’s antioxidant claims at issue in this Complaint are misleading and in violation of 21 C.F.R. § 101.54 and are misbranded as a matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held or sold in the United States.

CLASS ACTION ALLEGATIONS

26. Plaintiff brings this action as a class action pursuant Rule 23 of the Federal Rules of Civil Procedure on behalf of the following class (the “Class”):

All persons or entities in the United States who made retail purchases of the Products during the applicable limitations period, and/or such subclasses as the Court may deem appropriate. Excluded from the Class are current and former officers and

directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, assigns, and any entity in which they have or have had a controlling interest. Also excluded from the Class is the judicial officer to whom this lawsuit is assigned.

27. Plaintiff reserves the right to revise the Class definition based on facts learned in the course of litigating this matter.

28. This action is proper for class treatment under Rules 23(b)(1)(B) and 23(b)(3) of the Federal Rules of Civil Procedure. While the exact number and identities of other Class members are unknown to Plaintiff at this time, Plaintiff is informed and believes that there are thousands of Class members. Thus, the Class is so numerous that individual joinder of all Class members is impracticable.

29. Questions of law and fact arise from Defendant's conduct described herein. Such questions are common to all Class members and predominate over any questions affecting only individual Class members and include:

- a. whether failing to list the specific antioxidants purportedly contained in the Products is false and misleading;
- b. whether failing to list specific the antioxidants purportedly contained in the Products renders the Products misbranded;
- c. whether failing to list amount of antioxidants, by weight, purportedly contained in the Products is false and misleading or renders the Products misbranded;
- d. whether Defendant engaged in a marketing practice intended to deceive consumers by failing to list the specific antioxidants purportedly contained in the Products;

- e. whether the antioxidant labeling on Products violates federal, state or common law;
- f. whether Defendant has made deceptive nutrient content and antioxidant claims;
- g. whether Defendant has been unjustly enriched at the expense of Plaintiff and the other Class members by its misconduct;
- h. whether Defendant must disgorge any and all profits it has made as a result of its misconduct; and
- i. whether Defendant should be barred from marketing the Products as being a powerful source of antioxidants.

30. Plaintiff's claims are typical of those of the Class members because Plaintiff and the other Class members sustained damages arising out of the same wrongful conduct, as detailed herein. Plaintiff purchased Defendant's beverages during the Class Period and sustained similar injuries arising out of Defendant's conduct in violation of New York State law. Defendant's unlawful, unfair and fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. The injuries of the Class were caused directly by Defendant's wrongful misconduct. In addition, the factual underpinning of Defendant's misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the members of the Class and are based on the same legal theories.

31. Plaintiff will fairly and adequately represent and pursue the interests of the Class and has retained competent counsel experienced in prosecuting nationwide class actions. Plaintiff understands the nature of her claims herein, has no disqualifying conditions and will vigorously

represent the interests of the Class. Neither Plaintiff nor Plaintiff's counsel have any interests that conflict with or are antagonistic to the interests of the Class. Plaintiff has retained highly competent and experienced class action attorneys to represent her interests and those of the Class. Plaintiff and Plaintiff's counsel have the necessary financial resources to adequately and vigorously litigate this class action, and Plaintiff and counsel are aware of their fiduciary responsibilities to the Class and will diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

32. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The damages suffered by any individual class member are too small to make it economically feasible for an individual class member to prosecute a separate action, and it is desirable for judicial efficiency to concentrate the litigation of the claims in this forum. Furthermore, the adjudication of this controversy through a class action will avoid the potentially inconsistent and conflicting adjudications of the claims asserted herein. There will be no difficulty in the management of this action as a class action.

33. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

34. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(3) are met, as questions of law or fact common to the Class predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

35. The prosecution of separate actions by members of the Class would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. Additionally, individual actions may be dispositive of the interest of all members of the Class, although certain Class members are not parties to such actions.

36. Defendant's conduct is generally applicable to the Class as a whole and Plaintiff seeks, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendant's systematic policies and practices make declaratory relief with respect to the Class as a whole appropriate.

CAUSES OF ACTION

COUNT I

INJUNCTION FOR VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

37. Plaintiff realleges and incorporates herein by reference the above paragraphs as if set forth herein and further alleges as follows:

38. Plaintiff brings this claim individually and on behalf of the other members of the Class for an injunction for violations of New York's Deceptive Acts or Practices Law, Gen. Bus. Law ("NY GBL") § 349.

39. NY GBL § 349 provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are . . . unlawful."

40. Any person who has been injured by reason of any violation of the NY GBL § 349 may bring an action in her own name to enjoin such unlawful act or practice, an action to recover her actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual

damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

41. The practices employed by Defendant, whereby Defendant advertised, promoted and marketed the Products as being a powerful source of antioxidants, when there are no actual antioxidant ingredients listed on the label (or whether antioxidant ingredients exist at all in the Products) are unfair, deceptive and misleading.

42. The foregoing deceptive acts and practices were directed at consumers.

43. Defendant should be enjoined from marketing its beverages as being a powerful source of antioxidants without further specification as described above pursuant to NY GBL § 349.

44. Plaintiff, on behalf of herself and all others similarly situated, respectfully demands a judgment enjoining Defendant's conduct, awarding costs of this proceeding and attorneys' fees, as provided by NY GBL, and such other relief as this Court deems just and proper.

COUNT II

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 349 (DECEPTIVE AND UNFAIR TRADE PRACTICES ACT)

45. Plaintiff realleges and incorporates herein by reference the above paragraphs as if set herein and further alleges as follows:

46. Plaintiff brings this claim individually and on behalf of the other members of the Class for violations of NY GBL § 349.

47. The practices employed by Defendant, whereby Defendant advertised, promoted and marketed the Products as being a powerful source of antioxidants, when there are no actual antioxidant ingredients listed on the label (or whether antioxidant ingredients exist at all in the Products) are unfair, deceptive and misleading.

48. The foregoing deceptive acts and practices were directed at consumers.

49. Plaintiff and the other Class members suffered a loss as a result of Defendant's deceptive and unfair trade acts. Specifically, as a result of Defendant's deceptive and unfair trade acts and practices, Plaintiff and the other Class members suffered monetary losses associated with the purchase of the Products, namely, the purchase price of the Product and/or the premium paid by Plaintiff and the Class for the Products.

COUNT III

NEGLIGENT MISREPRESENTATION (All States and District of Columbia)

50. Plaintiff realleges and incorporates herein by reference the above as if set forth herein and further alleges as follows:

51. Defendant, directly or through its agents and employees, made false representations, concealments, and nondisclosures to Plaintiff and members of the Class.

52. In making the representations of fact to Plaintiff and members of the Class described herein, Defendant has failed to fulfill its duties to disclose the material facts set forth above. The direct and proximate cause of this failure to disclose was Defendant's negligence and carelessness.

53. Defendant, in making the misrepresentations and omissions, and in doing the acts alleged above, knew or reasonably should have known that the representations were not true. Defendant made and intended the misrepresentations to induce the reliance of Plaintiff and members of the Class.

54. Plaintiff and members of the Class relied upon these false representations and nondisclosures by Defendant when purchasing the Products, which reliance was justified and reasonably foreseeable.

55. As a result of Defendant's wrongful conduct, Plaintiff and members of the Class have suffered and continue to suffer economic losses and other general and specific damages, including but not limited to the premium price paid for the Products, and any interest that would have been accrued on those monies, all in an amount to be determined according to proof at time of trial.

COUNT IV

BREACH OF EXPRESS WARRANTIES (All States and District of Columbia)

56. Plaintiff realleges and incorporates herein by reference the above paragraphs as if set forth herein and further alleges as follows:

57. Defendant breached these warranties by providing the Products which make improper nutrient content claims as to antioxidants.

58. This breach resulted in damages to Plaintiff and the other members of the Class who bought Defendant's Products but did not receive the goods as warranted in that the Products were not as healthy as they appear to be.

59. As a proximate result of Defendant's breach of warranties, Plaintiff and the other Class members have suffered damages in an amount to be determined by the Court and/or jury, in that, among other things, they purchased and paid for the Products that did not conform to what Defendant promised in its promotion, marketing, advertising, packaging and labeling, and Plaintiff and the Class were deprived of the benefit of their bargain and spent money on the Products that did not have any value (or had less value than warranted) or the Products that they would not have purchased and used had they known the true facts about them.

COUNT V

**UNJUST ENRICHMENT
(All States and District of Columbia)**

60. Plaintiff realleges and incorporates herein by reference the above paragraphs as if set forth herein and further alleges as follows:

61. Defendant received certain monies as a result of its uniform deceptive marketing of the Products that are excessive and unreasonable.

62. Plaintiff and the Class conferred a benefit on Defendant through purchasing its purportedly antioxidant-“packed” Products and Defendant has knowledge of this benefit and has voluntarily accepted and retained the benefits conferred on it.

63. Defendant will be unjustly enriched if it is allowed to retain such funds, and each Class member is entitled to an amount equal to the amount they enriched Defendant and for which Defendant has been unjustly enriched.

COUNT VI

MAGNUSON-MOSS ACT (15 U.S.C. § 2301, *et seq.*)

64. Plaintiff realleges and incorporates herein by reference the above paragraphs as if set forth herein and further alleges as follows:

65. Plaintiff and the Class are "consumers" as defined by 15 U.S.C. § 2301(3).

66. Defendant is a "supplier" and "warrantor" as defined by 15 U.S.C. § 2301(4) and (5).

67. Defendant's food products are "consumer products" as defined by 15 U.S.C. § 2301(1).

68. Defendant's nutrient and health content claims constitute "express warranties."

69. Defendant, through its package labels, create express warranties by making the affirmation of fact and promising that its beverages comply with food labeling regulations under federal and state law.

70. Despite Defendant's express warranties regarding the Products, they do not comply with food labeling regulations under federal and state law.

71. Defendant breached its express warranties regarding its beverages in violation of 15 U.S.C. § 2301, *et seq.*

72. Defendant sold Plaintiff and the Class beverages that were not capable of being sold or legally held, and which were legally worthless. Plaintiff and the Class paid a premium price for the beverages.

73. As a direct and proximate result of Defendant's actions, Plaintiff and the Class have suffered damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seek judgment against Defendant, as follows:

- A. For an order certifying the nationwide Class and under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and and Plaintiff's attorneys as Class Counsel to represent members of the Class;
- B. For an order declaring the Defendant's conduct violates the statutes referenced herein;
- C. For an order finding in favor of Plaintiff and the nationwide Class;
- D. For compensatory and punitive damages in amounts to be determined by the Court and/or jury;

- E. For prejudgment interest on all amounts awarded;
- F. For an order of restitution and all other forms of equitable monetary relief;
- G. For injunctive relief as pleaded or as the Court may deem proper;
- H. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit; and
- I. Any other relief the Court may deem appropriate.

DEMAND FOR TRIAL BY JURY

Plaintiff, individually and on behalf of all others similarly situated, hereby demands a jury trial on all claims so triable.

Dated: May 6, 2014

Respectfully submitted,

LEE LITIGATION GROUP, PLLC
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Attorney for Plaintiff and the Class

By: _____

C.K. Lee

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK**

Douglas C Palmer
Clerk of Court

Michele Gapinski
Chief Deputy

Corey Nguyen
Chief Deputy

Carol McMahon
Chief Deputy



**Theodore Roosevelt Federal Courthouse
Emanuel Cellar Federal Courthouse**

225 Cadman Plaza East
Brooklyn, NY 11201
(718) 613-2270

Alfonse D'Amato Federal Courthouse

100 Federal Plaza
Central Islip, NY 11722
(718) 613-2270

NOTICE

In accordance with Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, the parties are notified that **if** all parties consent a United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. You may consent to the magistrate judge who has been assigned to this case or to a new magistrate judge selected at random. Attached is a **blank** copy of the consent form that should be signed and filed electronically **only if all** parties wish to consent **and it is signed by all parties**. A consent form may also be accessed at the following link: <http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf>

You may withhold your consent without adverse substantive consequences.

Do NOT return or file the consent unless all parties have signed the consent.

AO 85 (Rev. GFP [" : I54234+Notice, Consent, and Reference of a Civil Action to a Magistrate Judge

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF NEW YORK

Plaintiff
v.
Defendant
Civil Action No.

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent. You may consent to the magistrate judge assigned to this case or to a new magistrate judge selected at random.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings. Select one: The parties consent to ___ the magistrate judge who is assigned to this case ___ a new magistrate judge selected at random.

Table with 3 columns: Parties' printed names, Signatures of parties or attorneys, Dates. Includes three rows of blank lines for entry.

In order for the Consent to be valid, all parties must sign this form and agree to the selection of the magistrate judge. Reference Order

IT IS ORDERED: This case is referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date:
District Judge's signature
Printed name and title

Note: This form is to be used to consent to the exercise of jurisdiction by a United States Magistrate Judge. Do not return this form to a Judge.