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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAROLINA ALDUEY and JOHN DOES 1-100
on behalf of themselves and others similarly situated,

Plaintiffs,

v.

POM WONDERFUL, LLC, and
ROLL INTERNATIONAL CORPORATION,

Defendants.

Case No.:

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, CAROLINA ALDUEY and JOHN DOES 1-100 ("Plaintiffs"), on behalf of themselves and all others similarly situated, by and through their undersigned attorneys, hereby file this Class Action Complaint against Defendants, POM WONDERFUL LLC ("POM") and ROLL INTERNATIONAL CORPORATION ("Roll") (collectively, "Defendants") and state as follows based upon their own personal knowledge and the investigation of their counsel (Plaintiffs believe that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery):

NATURE OF THE ACTION

1. In today's increasingly health-conscious society, consumers are more motivated to seek out products with health benefits. As a result, consumers rely more than ever on accurate information when it comes to making smart food choices. When it comes to packaged foods, consumers rely on the standards promulgated by federal and state laws to ensure that these labels are accurate and not misleading.

2. Manufacturers are fully conscious of this trend, and have moved to market their products in a way to capitalize on the demand for healthy options. Some manufacturers have intentionally mislabeled products in an effort to profit from the desire for healthy foods. As a result, federal and state regulations have been enacted which place a greater requirement on specificity and accuracy when manufacturers make various claims about their products.

3. Against this backdrop, Defendants engaged in and continue to engage in a widespread, uniform marketing campaign using the product packaging and the website www.pomwonderful.com to mislead consumers about the antioxidant content of its "Pom Tea" beverages (herein, the "Products"). Specifically, the label on Defendants' packaging describes the Products as an "**Antioxidant Super Tea.**" In addition, Defendants claim that green tea is "**one of nature's original antioxidants,**" and that Pom Tea contains the "**antioxidant goodness of pomegranate.**" Such claims are deceptive and misleading because Defendants fail to specify the antioxidants that the product contains, and in fact, falsely claims that green tea is itself an antioxidant.

4. During the Class Period, Defendants made and continue to make improper nutrient content claims. In an effort to profit from consumers' increasing desire to purchase healthier foods, Defendants state that the Products (as defined in paragraph 14 below) are an "antioxidant

super tea," and that "green tea is one of nature's original 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 an antioxidant. Defendants do not identify what vitamins or minerals are the antioxidants which the Products contain other than a misleading claim that green tea qualifies as an antioxidant, As a result, reasonable consumers are left to impute any number of antioxidants (real or imagined) to the claims.

5. Plaintiffs and Class members reviewed Defendants' misleading marketing and Product packaging, reasonably relied in substantial part on the labels and were thereby deceived in deciding to purchase the Products for a premium price.

6. Plaintiffs bring this proposed consumer class action on behalf of themselves 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 making unlawful nutrient content claims as to antioxidants.

7. Defendants' 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 those similar deceptive and unfair practices and/or consumer protection laws in other states.

8. Defendants 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 Statues § 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.*

9. Defendants have been unjustly enriched as a result of their conduct. As a result of these unfair and deceptive practices, Defendants have collected millions of dollars from the sales of the Products that they would not have otherwise earned. Defendants deceived the Plaintiffs and other consumers nationwide by failing to specify the antioxidants contained in the Products, if any actually exist.

JURISDICTION AND VENUE

10. 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 Defendants, 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).

11. 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.

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

13. 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.

14. The Court has personal jurisdiction over Defendants because the Products are advertised, marketed, distributed, and sold throughout New York State; Defendants engaged in the wrongdoing alleged in this Complaint throughout the United States, including in New York State; Defendants are authorized to do business in New York State; and Defendants have sufficient minimum contacts with New York and/or otherwise have intentionally availed themselves 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, Defendants are engaged in substantial and not isolated activity within New York State.

15. 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 Defendants are subject to personal jurisdiction in this District. Plaintiff ALDUEY purchased and consumed Defendants' Products in New York County.

PARTIES

16. Plaintiff ALDUEY is a citizen of the State of New York and resides in New York County. Plaintiff has purchased POM Pomegranate Lychee Green Tea and POM Pomegranate Peach Passion White Tea (together, the "Products") as ingredients for personal consumption within the State of New York. Plaintiff purchased the Products from stores located in New York City. The purchase price was $4.99 (or more) for an individual bottle of POM tea.

17. Plaintiffs JOHN DOES are, and at all relevant times hereto are citizens of various states of the United States and the District of Columbia. Plaintiffs JOHN DOES have purchased the Products for personal consumption. Plaintiffs JOHN DOES purchased the Products at a premium price and were financially injured as a result of Defendants' deceptive conduct as alleged herein.

18. Defendant POM WONDERFUL LLC is incorporated in the State of Delaware and is headquartered in Los Angeles, California. POM promotes, markets, distributes and sells POM Wonderful pomegranate products throughout the United States, including to many consumers in the state of New York. 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.

19. Defendant ROLL INTERNATIONAL CORPORATION is incorporated in the State of Delaware and is headquartered in Los Angeles, California. Roll assists POM in its false and misleading advertising to millions of consumers in New York.

FACTUAL ALLEGATIONS

20. Food manufacturers are required to comply with federal and state laws and regulations that govern the labeling of food products. These regulations include the FDCA and its labeling regulations, particularly those set forth in 21 C.F.R. § 101. In addition to these federal requirements, each state has enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations.

The Federal Regulatory Scheme

21. The FDCA empowers the Food and Drug Administration ("FDA") to (a) protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," 21 U.S.C. § 393(b)(2)(A); (b) promulgate regulations pursuant to this authority; and (c) enforce its regulations through administrative proceedings. See 21 C.F.R. § 7.1 et seq.

22. The FDCA deems a food as "misbranded" if its labeling "is false or misleading in any particular." 21 U.S.C.A. § 343(a).

23. New York broadly prohibits the misbranding of food in language identical to that found in the FDCA.

24. New York's Agriculture and Marketing Law provides in relevant part that food shall be deemed misbranded "[i]f its labeling is false or misleading in any particular," and incorporates the FDCA's labeling provisions. See Agriculture and Markets Law § 201(1); N.Y. Comp. Codes R. & Regs. tit. 1, § 259.1. 34.

25. Part 259.1 of Title 1 of the New York Codes, Rules and Regulations of the State of New York (1 NYCRR 259.1), states as follows with regard to the packaging and labeling of food and adopts the regulatory requirements under the FDCA:

> "For the purpose of the enforcement of article 17 of the Agriculture and Markets Law, and except where in conflict with the statutes of this State or with rules and regulations promulgated by the commissioner, the commissioner hereby adopts the current regulations as they appear in title 21 of the Code of Federal Regulations (revised as of April 1, 2013; U.S. Government Printing Office, Washington, DC 20402), in the area of food packaging and labeling..."

26. Defendants manufacture, market and sell the Products throughout the United States, and proclaim them to be an "antioxidant super tea," "one of nature's original antioxidants," and having "pomegranate antioxidant power."

27. The Products are available at most supermarket chains and major retail outlets throughout the United States, including but not limited to Target, Stop & Shop, and Pathmark.

Defendants Make Unlawful Antioxidant Claims

28. Pursuant to Section 403 of the FDCA, a claim that characterizes the level of a nutrient in a food is a "nutrient content claim" that must be made in accordance with the regulations that authorize the use of such claims. 21 U.S.C. § 343(r)(1)(A).

29. Nutrient content claims are claims about specific nutrients contained in a product. They are typically made on food packaging in a font large enough to be read by the average

consumer. Because consumers rely upon these claims when making purchasing decisions, the regulations govern what claims can be made in order to prevent misleading claims.

30. Section 403(r)(1)(A) of the FDCA governs the use of expressed and implied nutrient content claims on labels of food products that are intended for sale for human consumption.

31. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims.

32. An "expressed nutrient content claim" is defined as any direct statement about the level (or range) of a nutrient in the food (*e.g.*, "low sodium" or "contains 100 calories"). *See* 21 C.F.R. § 101.13(b)(1).

33. An "implied nutrient content claim" is defined as any claim that: (i) describes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (e.g., "high in oat bran"); or (ii) suggests that the food, because of its nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (e.g., "healthy, contains 3 grams (g) of fat"). 21 C.F.R. § 101.13(b)(2)(i-ii).

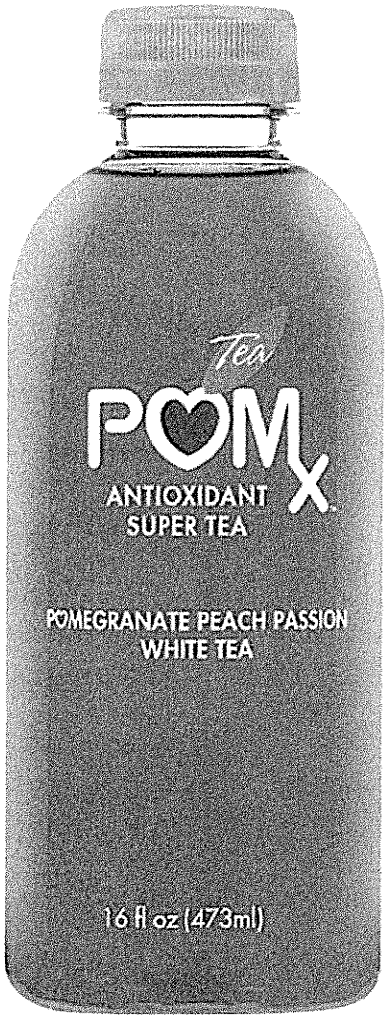
34. FDA regulations authorize the use of a limited number of defined nutrient content claims. In addition, FDA's regulations authorize the use of only certain synonyms for these defined terms. If a nutrient content claim or its synonym is not included in the food labeling regulations, it cannot be used on a label. Only those claims, or their synonyms, that are specifically defined in the regulations may be used. All other claims are prohibited. 21 CFR §101.13(b).

35. Only approved nutrient content claims will be permitted on the food label, and all other nutrient content claims will misbrand a food. It should thus be clear which type of claim is prohibited and which permitted. Food manufacturers are on notice that the use of an unapproved

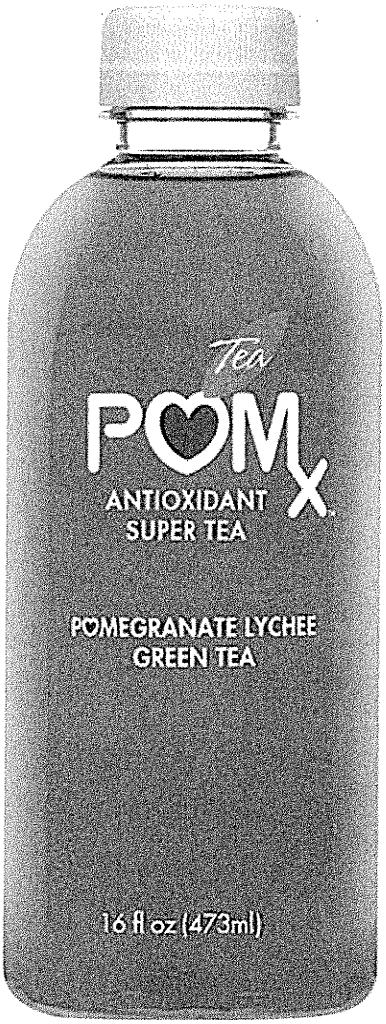
nutrient content claim is prohibited conduct. 58 FR 2302. In addition, 21 USC §343(r)(2) prohibits using unauthorized undefined terms, and it declares foods that do so to be misbranded.

36. Despite the clear directive, as described herein, prohibiting Defendants from making certain nutrient content claims, Defendants make such claims. On its product labels, Defendants tout that its products are not only "nature's original antioxidants," but have been further enhanced with the "antioxidant goodness of pomegranate." Copies of the product labels are reproduced below:

Pomegranate Peach Passion White Tea

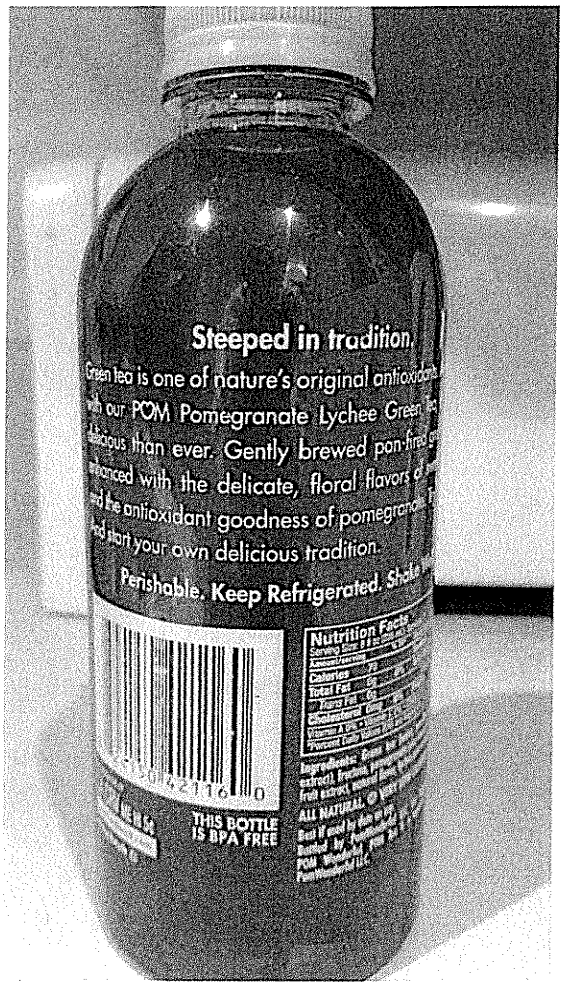


Pomegranate Lychee Green Tea

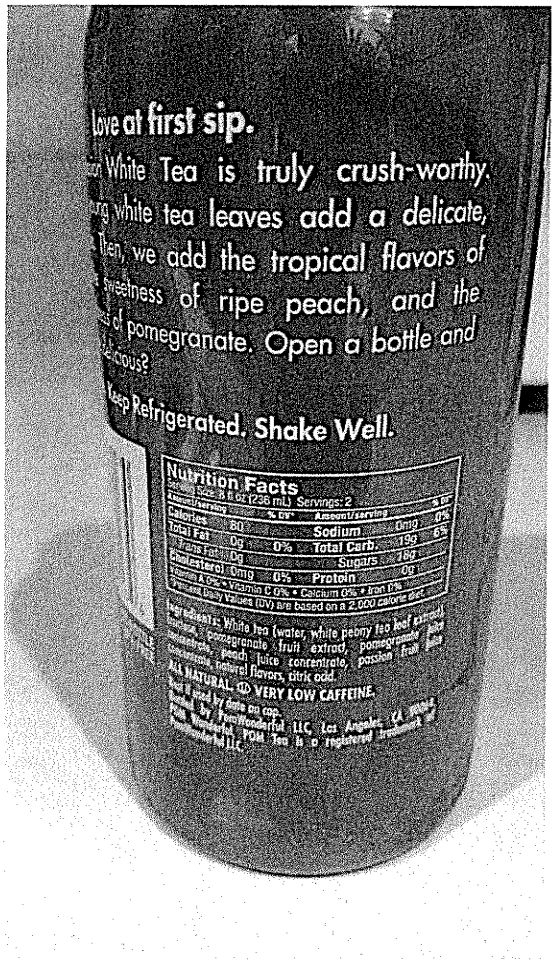


Pomegranate Peach Passion White Tea

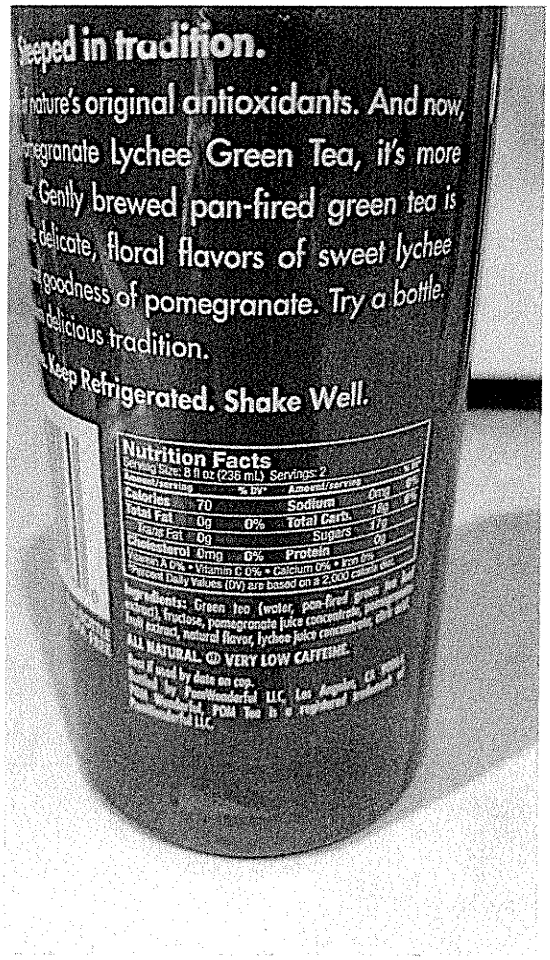
Pomegranate Lychee Green Tea



Pomegranate Peach Passion White Tea



Pomegranate Lychee Green Tea



37. 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;

(3) The label claim 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"),[1] *see* 21 C.F.R. § 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" or "rich in" 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.

38. The antioxidant labeling for Defendants' POM teas violates federal law because (1) the label does not specify which antioxidants the Products allegedly contain where it makes the claim, other than a vague claim that green tea qualifies as a type of antioxidant, and (2) since the antioxidant is not specified, Defendants lack 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. Although certain vitamins and minerals are listed on the Nutrition Facts panel, consumers are not informed which of the ingredients listed therein have antioxidant

[1] Alternatively, when used as part of a nutrient content claim, the term "antioxidant" or "antioxidants" (such as "high in antioxidants") may be linked by a symbol (such as an asterisk) that refers to the same symbol that appears elsewhere on the same panel of a product label followed by the name or names of the nutrients with the recognized antioxidant activity. If this is done, the list of nutrients must appear in letters of a type size height no smaller than the larger of one half of the type size of the largest nutrient content claim or 1/16 inch.

properties. Furthermore, none of the vitamins and minerals listed are actually indicated as being contained in the product in quantities even constituting 1% of the FDA recommended daily intake. Without more information, consumers are left to guess which ingredients listed have antioxidant properties, and the amount of such antioxidants contained in the Products.

39. Under the Federal Food Drug and Cosmetic Act (herein "FDCA"), the term "false" has its usual meaning of "untruthful," while the term "misleading" is a term of art. Misbranding reaches not only false claims, but also those claims that might be technically true, but still misleading. If any one representation in the labeling is misleading, the entire food is misbranded. No other statement in the labeling cures a misleading statement. "Misleading" is judged in reference to "the ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9th Cir. 1951). Under the FDCA, it is not necessary to prove that anyone was actually misled.

40. Defendants' labeling, marketing and advertising of the Products violate various state laws against misbranding. New York State law broadly prohibits the misbranding of food in language identical to that found in regulations promulgated pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("FDCA"):

> Pursuant to N.Y. AGM. LAW § 201, "[f]ood shall be deemed to be misbranded: 1. If its labeling is false or misleading in any particular."

41. Defendant's Products are misbranded under New York law because they make improper nutrient content claims.

42. On Defendant's website's list of ingredients for POM Wonderful teas, both POM Pomegranate Lychee Green Tea and Peach Passion White Tea list an ingredient called POMX, described as a pomegranate antioxidant extract). The ingredient list on the physical labels for the products are identical except that POMX has been replaced with a description of a "pomegranate

fruit extract," an even more vague statement. In either form, this information is insufficient for the purposes of federal or state regulations governing antioxidants and similar nutrients. The specific antioxidants must be disclosed and fully described as per 21 C.F.R. § 101.54(g).

43. These same violations were condemned in other warning letters to other companies. On August 23, 2010, the FDA sent a warning letter to Unilever, the parent company of Lipton Tea, informing Unilever of Lipton Tea's failure to comply with the FDCA and its regulations for remarkably similar nutrient content claims to those the Defendants are presently making on their product labels. The FDA warning letter to Unilever stated, in pertinent part:

Unauthorized Nutrient Content Claims

> Under section 403(r)(1)(A) of the Act [21 U.S.C. 343(r)(1)(A)], a claim that characterizes the level of a nutrient which is of the type required to be in the labeling of the food must be made in accordance with a regulation promulgated by the Secretary (and, by delegation, FDA) authorizing the use of such a claim. The use of a term, not defined by regulation, in food labeling to characterize the level of a nutrient misbrands a product under section 403(r)(1)(A) of the Act.
>
> Nutrient content claims using the term "antioxidant" must also comply with the requirements listed in 21 CFR 101.54(g). These requirements state, in part, that for a product to bear such a claim, an RDI must have been established for each of the nutrients that are the subject of the claim (21 CFR 101.54(g)(1)), and these nutrients must have recognized antioxidant activity (21 CFR 101.54(g)(2). The level of each nutrient that is the subject of the claim must also be sufficient to qualify for the claim under 21 CFR 101.54(b), (c), or (e) (21 CFR 101.54(g)(3)). For example, to bear the claim "high in antioxidant vitamin C," the product must contain 20 percent or more of the RDI for vitamin C under 21 CFR 101.54(b). **Such a claim must also include the names of the nutrients that are the subject of the claim as part of the claim or, alternatively, the term "antioxidant" or "antioxidants" may be linked by a symbol (e.g., an asterisk) that refers to the same symbol that appears elsewhere on the same panel of the product label, followed by the name or names of the nutrients with recognized antioxidant activity (21 CFR 101.54(g)(4)). The use of a nutrient content claim that uses the term "antioxidant" but does not comply with the requirements of 21 CFR 101.54(g) misbrands a product under section 403(r)(2)(A)(i) of the Act.**
>
> Your webpage entitled "Tea and Health" and subtitled "Tea Antioxidants" includes the statement, "LIPTON Tea is made from tea leaves rich in naturally

> protective antioxidants." The term "rich in" is defined in 21 CFR 101.54(b) and may be used to characterize the level of antioxidant nutrients (21 CFR 101.54(g)(3)). However, this claim does not comply with 21 CFR 101.54(g)(4) because it does not include the nutrients that are the subject of the claim or use a symbol to link the term "antioxidant" to those nutrients. Thus, this claim misbrands your product under section 403(r)(2)(A)(i) of the Act.
>
> This webpage also states: "[t]ea is a naturally rich source of antioxidants." The term "rich source" characterizes the level of antioxidant nutrients in the product and, therefore, this claim is a nutrient content claim (see section 403(r)(1) of the Act and 21 CFR 101.13(b)). Even if we determined that the term "rich source" could be considered a synonym for a term defined by regulation (e.g., "high" or "good source"), nutrient content claims that use the term "antioxidant" must meet the requirements of 21 CFR 101.54(g). The claim "tea is a naturally rich source of antioxidants" does not include the nutrients that are the subject of the claim or use a symbol to link the term "antioxidant" to those nutrients, as required by 21 CFR 101.54(g)(4). Thus, this claim misbrands your product under section 403(r)(2)(A)(i) of the Act.
>
> http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm224509.htm.

44. In addition to the FDA warning letter discussed above, the FDA has issued warning letters addressing similar unlawful antioxidant nutrient content claims. *See, e.g.*, FDA warning letter dated February 22, 2010 to Fleminger Inc. regarding its misbranded TeaForHealth products because the admonition "[d]rink high antioxidant green tea" . . . "does not include the nutrients that are the subject of the claim or use a symbol to link the term antioxidant to those nutrients." These warning letters were hardly isolated. Defendants are aware of these FDA warning letters but make even greater claims about green tea, notably that it is not only high in antioxidant content, but is itself an antioxidant.

45. Defendants are in violation despite numerous enforcement actions and warning letters pertaining to several other companies addressing the type of misleading antioxidant nutrient content claims described herein.

46. The types of misrepresentations made above would be considered by a reasonable consumer when deciding to purchase the product.

47. Plaintiffs did not know, and had no reason to know, that Defendants' Products were misbranded, and bore improper antioxidant nutrient content claims.

48. For these reasons, Defendants' antioxidant claims at issue in this Complaint are misleading and in violation of 21 C.F.R. § 101.54 and consumer protection laws of each of the 50 states and the District of Columbia, and the Products at issue are misbranded as a matter of law. Misbranded products cannot be legally manufactured, advertised, distributed, held or sold in the United States.

49. Because of these unlawful antioxidant nutrient content claims, Plaintiffs and Class members purchased the Products and paid a premium for them. The antioxidant nutrient content claims regulations discussed herein are intended to ensure that consumers are not misled as to the healthiness of food products or the actual or relative levels of nutrients in food products. Defendant has violated these referenced regulations and consumer protection laws of the 50 states and the District of Columbia.

Plaintiffs were Injured as a Result of Defendants' Misleading and Deceptive Conduct

50. Defendants' labeling as alleged herein is false and misleading and was designed to increase sales of the products at issue. Defendants' misrepresentations are part of their systematic labeling practice.

51. Plaintiffs and Class members read the labels on Defendants' Products, including labels making unlawful antioxidant claims.

52. Defendants' labeling claims were a material factor in Plaintiff's and Class members' decisions to purchase Defendants' Products. Based on Defendants' claims, Plaintiffs and Class

members believed that the Products were a better and healthier choice than other available products.

53. As a result of Defendants' misleading labeling, Plaintiffs and Class members did not know which the Products included, and had no understanding of the purported "antioxidant benefits" POM touts its Products provide. Federal regulations require that nutrient claims that use the term "antioxidant" disclose the name of the specific nutrient that is an antioxidant. Defendants do not identify what vitamins or minerals the Products contain and as a result, reasonable consumers are left to impute any number of antioxidants (real or imagined) to the phrases.

54. Plaintiffs relied on Defendants' package labeling.

55. At point of sale, Plaintiffs did not know, and had no reason to know, that Defendants' Products were misbranded as set forth herein, and would not have bought the Products had he known the truth about them.

56. At point of sale, Plaintiffs did not know, and had no reason to know, that Defendants' antioxidant claims were unlawful as set forth herein, and would not have bought the Products had he known the truth about them.

57. Reasonable consumers would be, and were, misled in the same manner as Plaintiffs in that a reasonable consumer might impute a vast variety of health benefits from the claims that Defendants' products were filled with "antioxidant goodness" making it a "super tea."

58. As a result of Defendants' misrepresentations, Plaintiffs and thousands of others in New York purchased the Products.

59. Defendant's labeling, advertising, and marketing as alleged herein is false and misleading and designed to increase sales of the Products. Defendants' misrepresentations are

part of an extensive labeling, advertising and marketing campaign, and a reasonable person would attach importance to Defendants' representations in determining whether to purchase the Products at issue. Plaintiffs and Class members would not have purchased the Defendants' misbranded Products had they known they were misbranded.

CLASS ACTION ALLEGATIONS

60. Plaintiffs bring 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 Defendants, members of the immediate families of the officers and directors of Defendants, Defendants' 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.

61. Plaintiffs reserve the right to revise the Class definition based on facts learned in the course of litigating this matter.

62. 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 Plaintiffs at this time, Plaintiffs are informed and believe that there are thousands of Class members. Thus, the Class is so numerous that individual joinder of all Class members is impracticable.

63. Questions of law and fact arise from Defendants' 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 the antioxidant labeling on the Products violates federal, state or common law;

b. whether Defendants have made deceptive nutrient content and anti-oxidant claims;

c. whether Defendants have been unjustly enriched at the expense of Plaintiffs and the other Class members by its misconduct;

d. whether Defendants must disgorge any and all profits they have made as a result of its misconduct;

e. whether Defendant should be barred from marketing its products as being "antioxidant super teas" and "one of nature's original antioxidants."

64. Plaintiffs' claims are typical of those of the Class members because Plaintiffs and the other Class members sustained damages arising out of the same wrongful conduct, as detailed herein. Plaintiffs purchased the Products during the Class Period and sustained similar injuries arising out of Defendants' conduct in violation of New York State law. Defendants' 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 Defendants' wrongful misconduct. In addition, the factual underpinning of Defendants' misconduct is common to all Class members and represents a common thread of misconduct resulting in injury to all members of the Class. Plaintiffs' 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.

65. Plaintiffs will fairly and adequately represent and pursue the interests of the Class and has retained competent counsel experienced in prosecuting nationwide class actions. Plaintiffs

understand the nature of their claims herein, has no disqualifying conditions, and will vigorously represent the interests of the Class. Neither Plaintiffs nor Plaintiffs' counsel have any interests that conflict with or are antagonistic to the interests of the Class. Plaintiffs have retained highly competent and experienced class action attorneys to represent their interests and those of the Class. Plaintiffs and Plaintiffs' counsel have the necessary financial resources to adequately and vigorously litigate this class action, and Plaintiffs 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.

66. 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.

67. The prerequisites to maintaining a class action for injunctive relief or equitable relief pursuant to Rule 23(b)(2) are met, as Defendants have 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.

68. 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.

69. 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 Defendants. 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.

70. Defendants' conduct is generally applicable to the Class as a whole and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Class as a whole. As such, Defendants' 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)

71. Plaintiffs reallege and incorporate herein by reference paragraphs 1 – 70 herein and further allege as follows:

72. Plaintiffs bring 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 § 349 ("NY GBL").

73. 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.

74. Under the New York Gen. Bus. Code § 349, it is not necessary to prove justifiable reliance. ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law [§] 349 . . . claims, it was error. Justifiable reliance by the Plaintiff is not an element of the statutory claim." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (N.Y. App. Div. 2012) (internal citations omitted)).

75. Any person who has been injured by reason of any violation of the NY GBL may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his 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.

76. The practices employed by Defendants, whereby Defendants advertised, promoted, and marketed that their Products are "antioxidant super teas" and inclusive of "antioxidant goodness" are unfair, deceptive, and misleading and are in violation of the N.Y. Agric. and Markets Law § 201 in that said Products are misbranded.

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

78. Defendants should be enjoined from marketing their Products as being "antioxidant super teas" or as having "antioxidant goodness" without further specification as described above pursuant to NY GBL § 349.

79. Plaintiff, on behalf of herself and all others similarly situated, respectfully demands a judgment enjoining Defendants' 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)

80. Plaintiffs reallege and incorporate herein by reference paragraphs 1 – 79 herein and further allege as follows:

81. Plaintiffs bring this claim individually and on behalf of the other members of the Class for violations of New York's Deceptive Acts or Practices Law, Gen. Bus. Law § 349.

82. By the acts and conduct alleged herein, Defendants committed unfair or deceptive acts and practices by failing to make clear which antioxidants its products contain.

83. The practices employed by Defendants whereby Defendants failed to clearly state which antioxidants are in the Products are unfair, deceptive, and misleading and are in violation of the N.Y. Agric. and Markets Law § 201 in that said products are misbranded.

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

85. Plaintiffs and the other Class members suffered a loss as a result of Defendants' deceptive and unfair trade acts. Specifically, as a result of Defendants 'deceptive and unfair trade acts and practices, Plaintiffs and the other Class members suffered monetary losses associated with the purchase of the Products, *i.e.*, the purchase price of the Product and/or the premium paid by Plaintiffs and the Class for said products.

COUNT III

NEGLIGENT MISREPRESENTATION
(All States and the District of Columbia)

86. Plaintiffs reallege and incorporate herein by reference paragraphs 1 – 85 of this Complaint, as if fully set forth herein.

87. Defendants, directly or through its agents and employees, made false representations, concealments, and nondisclosures to Plaintiffs and members of the Class. Defendants, through their labeling, advertising and marketing of the Products, make uniform representations regarding the Products.

88. Defendants as the manufacturers, packagers, labelers and initial sellers of the Products purchased by the Plaintiffs had a duty to disclose the true nature of the Products and not

sell them with improper nutrient content claims. Defendants had exclusive knowledge of material facts not known or reasonably accessible to the Plaintiff; Defendants actively concealed material facts from the Plaintiffs and Defendants made partial representations that are misleading because some other material fact has not been disclosed. Defendants' failure to disclose the information they had a duty to disclose constitutes material misrepresentations and materially misleading omissions which misled the Plaintiffs who relied on Defendants in this regard to disclose all material facts accurately and truthfully and fully.

89. Plaintiffs and members of the Class reasonably relied on Defendants' representation regarding antioxidants in the Products.

90. In making the representations of fact to Plaintiffs 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.

91. 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 Plaintiffs and members of the Class.

92. Plaintiffs and members of the Class would have acted differently had they not been misled – i.e., they would not have paid money for the Products in the first place.

93. Defendant has a duty to correct the misinformation it disseminated through its advertising of the Products. By not informing Plaintiffs and members of the Class, Defendant breached its duty. Defendant also gained financially from, and as a result of this breach.

94. By and through such deceit, misrepresentations and/or omissions, Defendant intended to induce Plaintiffs and members of the Class to alter their position to their detriment.

95. Plaintiffs 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.

96. As a direct and proximate result of Defendant's wrongful conduct, Plaintiffs 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 amounts paid for Orgain nutritional shakes, 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.

97. Defendant acted with intent to defraud, or with reckless or negligent disregard of the rights of Plaintiffs and members of the Class.

98. Plaintiffs and members of the Class are entitled to punitive damages.

99. Therefore, Plaintiffs pray for relief as set forth below.

COUNT IV

UNJUST ENRICHMENT
(All States)

100. Plaintiffs reallege and incorporate herein by reference paragraphs 1 – 99 of this Complaint, as if fully set forth herein.

101. Defendants received certain monies as a result of their uniform deceptive and misleading marketing of their teas with their inexplicit references to antioxidants in the products that are excessive and unreasonable.

102. Plaintiffs and the Class conferred a benefit on Defendants through purchasing their teas, and Defendants have knowledge of this benefit and have voluntarily accepted and retained the benefits conferred on them.

103. Defendants will be unjustly enriched if they are allowed to retain such funds, and each Class member is entitled to an amount equal to the amount they enriched Defendants and for which Defendants have been unjustly enriched.

PRAYER FOR RELIEF

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

A. For an order certifying the nationwide Class and under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representative of the Class and and Plaintiffs' attorneys as Class Counsel to represent members of the Class;

B. For an order declaring the Defendants' conduct violates the statutes referenced herein;

C. For an order finding in favor of Plaintiffs 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 Plaintiffs 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: January 12, 2015

Respectfully submitted,

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