

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BAKER BOTTS L.L.P.
Jonathan A. Shapiro (SBN# 257199)
jonathan.shapiro@bakerbotts.com
101 California Street, Suite 3600
San Francisco, CA 94111
Telephone: (415) 291-6204
Facsimile: (415) 291-6304

Van H. Beckwith (*pro hac vice* to be filed)
van.beckwith@bakerbotts.com
Jessica E. Underwood (*pro hac vice* to be filed)
jessica.underwood@bakerbotts.com
2001 Ross Avenue, Suite 600
Dallas, TX 75201-2980
Telephone: (214) 953-6500
Facsimile: (214) 953-6503

Attorneys for Defendants
DR PEPPER SNAPPLE GROUP, INC. AND
DR PEPPER/SEVEN UP, INC.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL AND
ROBIN DALE, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

DR PEPPER SNAPPLE GROUP, INC., DR
PEPPER/SEVEN UP, INC., and DOES 1-50,

Defendants.

Case No. _____

**DEFENDANTS DR PEPPER SNAPPLE
GROUP, INC. AND DR PEPPER/SEVEN
UP, INC.’S NOTICE OF REMOVAL TO
FEDERAL COURT PURSUANT TO 28
U.S.C. §§ 1332(a) AND (d), 1441(b), 1446,
AND 1453**

1 **DEFENDANTS’ NOTICE OF REMOVAL**

2 Pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendants Dr Pepper Snapple
3 Group, Inc. (“DPSG”)¹ and Dr Pepper/Seven Up, Inc. (“DPSU”) remove the above-captioned
4 civil action, formerly pending in the Superior Court in the State of California, County of Santa
5 Cruz, to the United States District Court for the Northern District of California, San Jose
6 Division. A copy of the service of process, summons, and Class Action Complaint are attached
7 as Exhibit A (Complaint) (“Exh. A”). As grounds for removal, Defendants state the following:

8 **Introduction**

9 1. Plaintiff Jackie Fitzhenry-Russell is a resident of Santa Cruz, California. *See* Exh.
10 A, ¶ 5.

11 2. Plaintiff Robin Dale is a resident of Guernville, California. *See id.* ¶ 6.

12 3. Defendant Dr Pepper Snapple Group, Inc. (“DPSG”) is, and was at the time this
13 matter was filed, incorporated under the laws of the State of Delaware, with its principal place of
14 business in Plano, Texas. *See id.* ¶ 7.

15 4. Defendant Dr Pepper/Seven Up, Inc. (“DPSU”) is, and was at the time this matter
16 was filed, incorporated under the laws of the State of Delaware, with its principle place of
17 business in Plano, Texas. *See id.* ¶ 8.

18 5. On December 18, 2016, Plaintiffs filed the instant action in the Superior Court of
19 the State of California, County of Santa Cruz. *See id.* at 1. Plaintiffs served Defendants on
20 January 5, 2017. *See id.*

21 6. Defendants now remove this action to this Court pursuant to 28 U.S.C. §§ 1332,
22 1441, 1446, and 1453. This Court has removal jurisdiction over this action on at least two
23 separate bases, as set forth below.

24 **First Ground for Removal: Class Action Removal Jurisdiction**

25 7. This Court has removal jurisdiction of this action pursuant to 28 U.S.C.
26 §§ 1332(d), 1453 (federal jurisdiction over class actions as established by the Class Action

27 _____
28 ¹In removing this action, DPSG does not waive any argument that it is not appropriately
named as a defendant to this action.

1 Fairness Act (“CAFA”). Pursuant to §§ 1332(d)(2) and 1453(b), a putative “class action” may
2 be removed to the appropriate United States District Court if (in relevant part): (a) the amount in
3 controversy with respect to the putative class exceeds \$5,000,000, exclusive of interest and costs,
4 and (b) there is minimum diversity insofar as any member of the putative class is a citizen of a
5 state different from any defendant.

6 8. This action is a putative “class action” within the meaning of §§ 1332(d)(1)(B) and
7 1453(a), because Plaintiffs (i) seek to bring it “on behalf of themselves, the general public, and
8 those similarly situated,” *see* Exh. A, ¶ 1; and (ii) seek to represent a class of persons in a civil
9 action filed under CAL. CIV. CODE § 1781 and CAL. BUS. & PROF. CODE 17200, *et seq.*, which
10 “authoriz[e] an action to be brought by 1 or more representative persons as a class action.” The
11 exclusions of 28 U.S.C. § 1332(d)(5) do not apply. *See* Exh. A, ¶ 74 (Complaint alleging class
12 “composed of more than 100 persons”).

13 9. There is more than \$5,000,000 in controversy. Under § 1332(d)(6), the amount in
14 controversy in a putative class action is determined by aggregating the amount at issue in the
15 claims of all members of the putative class.

16 10. When removal is sought under CAFA, the amount in controversy requirement
17 should be “interpreted expansively.” *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th
18 Cir. 2015) (citing S. Rep. No. 109-14, at 42 (2005)). “In measuring the amount in controversy, a
19 court must assume that the allegations of the complaint are true and that a jury will return a
20 verdict for the plaintiff on all claims made in the complaint.” *Korn v. Polo Ralph Lauren Corp.*,
21 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008). If the Court is uncertain whether the amount in
22 controversy exceeds \$5 million, “the court should err in favor of exercising jurisdiction over the
23 case.” *Yeroushalmi v. Blockbuster, Inc.*, No. CV 05-225-AHM(RCX), 2005 WL 2083008, at *3,
24 (C.D. Cal. July 11, 2005) (citing S. Rep. No. 109-14, at 42 (2005)). Attorney’s fees sought by the
25 plaintiff are included in the amount in controversy. *Jasso v. Money Mart Express, Inc.*, No. 11-
26 CV-5500 YGR, 2012 WL 699465, at *6–7 (N.D. Cal. Mar. 1, 2012).

1 11. If a plaintiff fails to plead an amount in controversy in a class action complaint, a
2 defendant seeking removal must prove by only a preponderance of the evidence that the damages
3 claimed exceed \$5,000,000. *Ibarra*, 775 F.3d at 1196.

4 12. Here, Plaintiffs do not plead an amount in controversy. Rather, they seek
5 declaratory and injunctive relief, restitution, compensatory damages equal to the aggregate
6 amount of all purchases by the putative class during the Class Period (i.e., from December 23,
7 2012 through the present, Compl. ¶ 72), and attorneys' fees and costs. *See* Compl. ¶¶ 105, 115,
8 117. Plaintiffs explicitly identify the sale of six beverages ("CD Products") during the Class
9 Period as the basis for their claims. *See* Compl. ¶ 21 (identifying Canada Dry Ginger Ale,
10 Canada Dry Ginger Ale - Made With Real Sugar, Canada Dry Diet Ginger Ale, Canada Dry
11 Blackberry Ginger Ale, Canada Dry Cranberry Ginger Ale, and Diet Cranberry Ginger Ale).

12 **(a) The compensatory damages and restitution sought by Plaintiffs well exceed**
13 **\$5,000,000.**

14 13. Plaintiffs seek compensatory damages, equal to the aggregate amount of all
15 purchases by the putative class during the Class Period, and restitution. *See* Compl. ¶ 105
16 (Plaintiffs and putative class allegedly "suffered damages, including, without limitation, the
17 amount they paid" for the CD Products); *id.* ¶ 115 ("plaintiffs and the class members lost the
18 amount they paid" for CD Products); *see also id.* ¶ 117 (requesting recovery of "all monies
19 acquired by Defendants" from the sales of CD Products alleged in the Complaint).

20 14. The aggregate "amount [] paid" by Plaintiffs and the putative class for CD
21 Products in California well exceeds \$5,000,000. *See* Exh. B, Falk Decl. ¶ 6 ("Exh. B").

22 15. Indeed, California sales of Canada Dry Diet Ginger Ale -- which is *just one* of the
23 six CD Products alleged in the Complaint -- exceeded \$7.25 million in *each* of the four calendar
24 years embraced by the Class Period. *Id.* ¶ 7. Thus, the alleged damages sought from the
25 California sales of that one product, during any year embraced by the Class Period, *alone* is
26 enough to satisfy CAFA's \$5,000,000 amount-in-controversy requirement.

1 **(b) The 100 class members requirement has been satisfied.**

2 16. The proposed class contains at least 100 members, as is also required for removal
3 under CAFA. *See* 28 U.S.C. § 1332(d)(5)(B). Plaintiffs seek to represent a class of “[a]ll persons
4 who, between December 23, 2012 and the present, purchased any of Defendants’ [CD] Products
5 [as specified in the Complaint].” Compl. ¶ 72. Plaintiffs estimate that the proposed class “is
6 composed of more than 100 persons” and that “[t]he persons in the Class are so numerous that the
7 joinder of all such persons is impracticable.” *Id.* ¶ 74.

8 **(c) Minimum diversity is satisfied.**

9 17. Finally, the requisite “minimum diversity” of citizenship exists under CAFA, 28
10 U.S.C. §§ 1332(d)(2) and (d)(7). Plaintiffs are all citizens of California. *See* Exh. A, ¶¶ 5–6
11 (Complaint identifying both named plaintiffs as residents of California). Defendants DPSG and
12 DPSU are citizens of Texas and Delaware, because they are corporations incorporated under the
13 laws of Delaware, with their principal places of business in Plano, Texas. *See id.* ¶¶ 7–8. Thus,
14 Defendants are citizens of a state different from at least one putative class member, and the
15 requisite diversity exists under 28 U.S.C. § 1332(d)(2)(A).

16 18. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C.
17 § 1332(d), and it may be removed to this Court under 28 U.S.C. §§ 1441, 1446, and 1453(b).

18 **Second Ground for Removal: Diversity Jurisdiction**

19 19. This Court also separately has removal jurisdiction of this action pursuant to 28
20 U.S.C. § 1332(a) (diversity jurisdiction where more than \$75,000 is in controversy).

21 20. The required diversity under 28 U.S.C. § 1332(a)(1) exists because, as set forth
22 above, Defendants are citizens of Texas and Delaware and Plaintiffs are citizens of California.
23 *See supra* ¶ 17.

24 21. The amount in controversy exceeds \$75,000, exclusive of interest and costs. In
25 addition to compensatory damages and restitution, Plaintiffs seek to “enjoin[]” Defendants from,
26 among other things, advertising, labelling, distributing, and selling CD Products as ‘Made from
27 Real Ginger.’” Compl. ¶¶ 85, 98, 119, Prayer For Relief A(2)-(4), B(2). If so enjoined, even the
28 cost of removing existing products bearing the “Made from Real Ginger” label from retailers in

1 California would well exceed \$75,000. *See* Exh. B, ¶ 9; *Gonzales v. CarMax Auto Superstores,*
2 *LLC*, 840 F.3d 644, 648–49 (9th Cir. 2016) (noting that the amount in controversy to establish
3 diversity jurisdiction includes, *inter alia*, the cost of complying with requested injunction). Still
4 greater expense would be incurred should Defendants be required to undertake other steps
5 required to comply with the injunction sought by the Complaint. Exh. B, ¶ 9.

6 22. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C.
7 §§ 1332(a) and it may be removed to this Court under 28 U.S.C. §§ 1441 and 1446.

8 **Compliance With Procedural Requirements**

9 23. Because this Notice of Removal was filed within 30 days of the receipt of the
10 Complaint and Summons, each served upon Defendants on January 5, 2017, this Notice of
11 Removal is timely under 28 U.S.C. § 1446(b).

12 24. Removal to this District and Division is proper pursuant to 28 U.S.C. § 1441(a),
13 since the U.S. District Court for the Northern District of California embraces the place where the
14 state court action was formerly pending.

15 25. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all process, pleadings
16 and orders served upon Defendants in the state court action are attached hereto.

17 26. Pursuant to 28 U.S.C. § 1446(d), Defendants have served this Notice of Removal
18 on Plaintiffs and have filed a Notice of Defendants' Notice of Removal with the Superior Court.

19 **Conclusion**

20 For all of the reasons stated above, this action is within the original jurisdiction of this
21 Court pursuant to 28 U.S.C. § 1332(a) and (d). Accordingly, this action is removable pursuant to
22 28 U.S.C. §§ 1441(a) and 1453.

23 WHEREFORE, Defendants give notice that the above-described action pending against
24 them in the Superior Court for the County of Santa Cruz is removed to this Court.

25
26
27
28

1 DATED: February 3, 2017

By: /s/ Jonathan A. Shapiro

2
3 **BAKER BOTTS L.L.P.**

Jonathan A. Shapiro (SBN# 257199)
jonathan.shapiro@bakerbotts.com
101 California Street, Suite 3600
San Francisco, CA 94111
Telephone: (415) 291-6204
Facsimile: (415) 2916304

4
5
6
7 Van H. Beckwith (*pro hac vice* to be filed)
van.beckwith@bakerbotts.com
Jessica E. Underwood (*pro hac vice* to be filed)
jessica.underwood@bakerbotts.com
2001 Ross Avenue, Suite 600
Dallas, TX 75201-2980
Telephone: (214) 953-6500
Facsimile: (214) 953-6503

8
9
10
11 Attorneys for Defendants
DR PEPPER SNAPPLE GROUP, INC. AND
DR PEPPER/SEVEN UP, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE
Jackie Fitzhenry-Russell, et. al. v. Dr Pepper Snapple Group, Inc., et. al.
USDC-ND, San Jose Division, Case No. _____

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to the action. My business address is 101 California Street, Suite 3600, San Francisco, California, 94111. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On February 3, 2017, I served the following document:

DEFENDANTS DR PEPPER SNAPPLE GROUP, INC. AND DR PEPPER/SEVEN UP, INC.'S NOTICE OF REMOVAL TO FEDERAL COURT PURSUANT TO 28 U.S.C. §§ 1332(a) AND (d), 1441(b), 1446, AND 1453

I served the document on the following persons at the following address (including a fax number and email addresses, if applicable):

Gutride Safier LLP Adam J. Gutride, Esq. Seth A. Safier, Esq. Marie A. McCrary, Esq. Kristen G. Simplicio, Esq. <i>Attorneys for Plaintiff</i>	100 Pine Street, Suite 1250 San Francisco, CA 94111 Tel: 415.271.6469 Fax: 415.449.6469
---	--

The document was served by the following means:

(BY U.S. MAIL) I enclosed the document in a sealed envelope or package addressed to the persons at the address listed above and placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope of package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 1/3/17 _____
Katrina E. Hardy
Katrina E. Hardy

Exhibit A



**Service of Process
Transmittal**

01/05/2017

CT Log Number 530445766

TO: Wayne R Lewis
Dr Pepper Snapple Group
5301 Legacy Dr
Plano, TX 75024-3109

RE: Process Served in California

FOR: Dr Pepper Snapple Group, Inc. (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: JACKIE FITZHENRY-RUSSELL AND ROBIN DALE, individuals, on behalf of themselves, the general public and those similarly situated, Pltfs. vs. Dr Pepper Snapple Group, Inc., etc., et al., Dfts.

DOCUMENT(S) SERVED: Summons, Complaint, Exhibit(s), Cover Sheet, Attachment(s)

COURT/AGENCY: Santa Cruz County - Superior Court - Santa Cruz, CA
Case # 16CV03345

NATURE OF ACTION: Product Liability Litigation - Manufacturing Defect - Canada Dry Ginger

ON WHOM PROCESS WAS SERVED: C T Corporation System, Los Angeles, CA

DATE AND HOUR OF SERVICE: By Process Server on 01/05/2017 at 11:42

JURISDICTION SERVED : California

APPEARANCE OR ANSWER DUE: Within 30 days after service

ATTORNEY(S) / SENDER(S): Adam J. Outride
Gutride Safier LLP
100 Pine Street, Suite 1250
San Francisco, CA 94111
415-271-6469

ACTION ITEMS: CT has retained the current log, Retain Date: 01/06/2017, Expected Purge Date: 01/11/2017

Image SOP

Email Notification, Wayne R Lewis wayne.lewis@dpsg.com

Email Notification, Harold Busch harold.busch@dpsg.com

Email Notification, Janet Barrett janet.barrett@dpsg.com

SIGNED: C T Corporation System
ADDRESS: 818 West Seventh Street
Los Angeles, CA 90017
TELEPHONE: 213-337-4615

1/5/17

1142

SUM-100

**SUMMONS
(CITACION JUDICIAL)**

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

DR. PEPPER SNAPPLE GROUP, INC. and its wholly owned subsidiary, DR. PEPPER/SEVEN UP, INC., and DOES 1-50

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

JACKIE FITZHENRY-RUSSELL AND ROBIN DALE, individuals, on behalf of themselves, the general public and those similarly situated,

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
12/28/2016 9:59:17 AM
Alex Calvo, Clerk
By Amanda Lucas
Deputy, Santa Cruz County

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.**

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

Santa Cruz Courthouse, 701 Ocean Street, Santa Cruz, CA 95060

CASE NUMBER:
(Número del Caso) 16CV03345

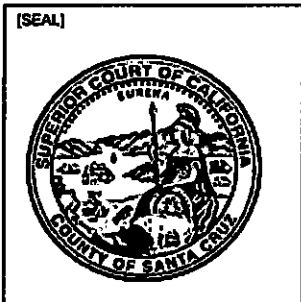
The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Kristen Simplicio, Gutride Safier LLP, 100 Pine St., Suite 1250, San Francisco CA 94111 (415) 992-7549

DATE:
(Fecha) 12/28/2016

ALEX CALVO
Clerk, by
(Secretario) Amanda Lucas, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

- 1. as an individual defendant.
- 2. as the person sued under the fictitious name of (specify):

3. on behalf of (specify): DR. PEPPER SNAPPLE GROUP, INC. AND ITS WHOLLY OWNED SUBSIDIARY, DR. PEPPER/SEVEN UP, INC.

- under: CCP 416.10 (corporation) CCP 416.60 (minor)
- CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
- CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
- other (specify):

4. by personal delivery on (date):

1 **GUTRIDE SAFIER LLP**
ADAM J. GUTRIDE (State Bar No. 181446)
2 SETH A. SAFIER (State Bar No. 197427)
3 MARIE A. MCCRARY (State Bar No. 262670)
KRISTEN G. SIMPLICIO (State Bar No. 263291)
4 100 Pine Street, Suite 1250
San Francisco, CA 94111
5 Telephone: (415) 271-6469
6 Facsimile: (415) 449-6469

FILED
12/28/2016 9:59:17 AM
Alex Calvo, Clerk
By: Amanda Lucas
Deputy Santa Cruz County

7 Attorneys for Plaintiffs

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SANTA CRUZ

10 JACKIE FITZHENRY-RUSSELL AND ROBIN
11 DALE, individuals, on behalf of themselves, the
general public and those similarly situated,

CASE NO. 16CV03345

UNLIMITED CIVIL CASE

12 Plaintiffs,

COMPLAINT FOR VIOLATION OF THE
CALIFORNIA CONSUMERS LEGAL
REMEDIES ACT; FALSE
13 ADVERTISING; FRAUD, DECEIT,
14 AND/OR MISREPRESENTATION; AND
UNFAIR BUSINESS PRACTICES

15 v.

16 DR. PEPPER SNAPPLE GROUP, INC. and its
wholly owned subsidiary, DR. PEPPER/SEVEN
UP, INC., and DOES 1-50,

JURY TRIAL DEMANDED

17 Defendants.
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

1
2 1. Plaintiffs Jackie Fitzhenry-Russell and Robin Dale, by and through their counsel,
3 brings this class action against Defendants Dr. Pepper Snapple Group, Inc., its wholly owned
4 subsidiary, Dr. Pepper/Seven Up, Inc., and Does 1-50, inclusive, on behalf of themselves, the
5 general public, and those similarly situated, for violations of the Consumer Legal Remedies Act
6 and Unfair Competition Law and false advertising, fraud, deceit and/or misrepresentation. The
7 following allegations are based upon information and belief, including the investigation of
8 Plaintiffs' counsel, unless stated otherwise.

9 2. This case concerns Defendants' false and deceptive labeling, advertising,
10 marketing, and sale of the soft drink, Canada Dry Ginger Ale, as "MADE FROM REAL
11 GINGER." This representation leads consumers to reasonably believe that Defendants' soft drink
12 is made from, and contains, real ginger root, and that consumers who drink the soft drink will
13 receive the health benefits associated with consuming real ginger root.

14 3. In truth, Defendants' soft drink is not made from real ginger root. Instead, Canada
15 Dry Ginger Ale is made from carbonated water, high fructose corn syrup, citric acid,
16 preservatives, and a chemical flavor compound that is manufactured to mimic the taste of ginger,
17 but provides none of the health benefits of real ginger root.

18 4. Throughout the Class Period, Defendants prominently made the claim "MADE
19 FROM REAL GINGER" on the front label panel of all of its Canada Dry Ginger Ale cans and
20 bottles, cultivating a wholesome and healthful image in an effort to promote the sale of its soft
21 drink and to compete with small batch ginger ales that do use real ginger root. Consumers value
22 the representation "MADE FROM REAL GINGER" because studies have found that real ginger
23 root has health benefits when consumed. Defendants' Canada Dry Ginger Ale product labels did
24 not disclose that the soft drink contains no real ginger and that the ginger flavor in the soft drink
25 was manufactured through an artificial process to create a chemical substance that tastes like
26 ginger root. The result is a labeling scheme that is designed to mislead consumers, and which
27 does so effectively.

28 **PARTIES**

1 5. Jackie Fitzhenry-Russell (“Fitzhenry-Russell”) is, and at all times alleged in this
2 Class Action Complaint was, an individual and a resident of Santa Cruz, California.

3 6. Robin Dale (“Dale”) is, and at all times alleged in this Class Action Complaint
4 was, an individual and a resident of Guernville, California. (Dale and Fitzhenry-Russell shall be
5 collectively referred to as “Plaintiffs.”)

6 7. Defendant Dr. Pepper Snapple Group, Inc. (“DPS”) is a corporation existing under
7 the laws of the State of Delaware, having its principal place of business in Plano, Texas.

8 8. Defendant Dr. Pepper/Seven Up, Inc (“DPSU”) is a corporation existing under the
9 laws of the State of Delaware, having its principal place of business in Plano, Texas. DPSU is a
10 wholly-owned subsidiary of DPS.

11 9. The true names and capacities of Defendants sued as Does 1 through 50, inclusive,
12 are unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names pursuant to
13 section 474 of the California Code of Civil Procedure. Plaintiffs will seek leave of Court to
14 amend this Class Action Complaint when said true names and capacities have been ascertained.

15 10. The Parties identified in paragraphs 6 - 8 of this Class Action Complaint are
16 collectively referred to hereafter as “Defendants.”

17 11. At all times herein mentioned, each of the Defendants was the agent, servant,
18 representative, officer, director, partner or employee of the other Defendants and, in doing the
19 things herein alleged, was acting within the scope and course of his/her/its authority as such
20 agent, servant, representative, officer, director, partner or employee, and with the permission and
21 consent of each Defendant.

22 12. At all times herein mentioned, each of the Defendants was a member of, and
23 engaged in, a joint venture, partnership and common enterprise, and acted within the course and
24 scope of, and in pursuance of, said joint venture, partnership and common enterprise.

25 13. At all times herein mentioned, the acts and omissions of each of the Defendants
26 concurred and contributed to the various acts and omissions of each and all of the other
27 Defendants in proximately causing the injuries and damages as herein alleged.

28 14. At all times herein mentioned, each of the Defendants ratified each and every act

1 or omission complained of herein.

2 15. At all times herein mentioned, each of the Defendants aided and abetted the acts
3 and omissions of each and all of the other Defendants in proximately causing the damages, and
4 other injuries, as herein alleged.

5 **JURISDICTION AND VENUE**

6 16. This action is brought by Plaintiffs pursuant, *inter alia*, to the California Business
7 and Professions Code, section 17200, *et seq.* Plaintiffs and Defendants are “persons” within the
8 meaning of the California Business and Professions Code, section 17201.

9 17. The injuries, damages and/or harm upon which this action is based, occurred or
10 arose out of activities engaged in by Defendants within, affecting, and emanating from, the State
11 of California. Defendants regularly conduct and/or solicit business in, engage in other persistent
12 courses of conduct in, and/or derive substantial revenue from products provided to persons in the
13 State of California.

14 18. Defendants have engaged, and continue to engage, in substantial and continuous
15 business practices in the State of California, including in the County of Santa Cruz and County of
16 Sonoma.

17 19. In accordance with California Civil Code Section 1780(d), Fitzhenry- Russell
18 concurrently files herewith a declaration establishing that, at various times throughout the class
19 period, she purchased Canada Dry Ginger Ale in Santa Cruz, California and Capitola, California.
20 (Fitzhenry- Russell’s declaration is attached hereto as Exhibit A.)

21 20. Plaintiffs accordingly allege that jurisdiction and venue are proper in this Court.

22 **SUBSTANTIVE ALLEGATIONS**

23 **Defendants’ Ginger Ales.**

24 21. Defendant DPS, through its wholly-owned subsidiary DPSU, manufactures,
25 distributes, markets, advertises, and sells soft drinks in the United States under several brand
26 names, including “Canada Dry.” Defendants’ packaging for the following varieties of Canada
27 Dry Ginger Ale predominately, uniformly, and consistently state on the principal display panel of
28 the product labels that they are “MADE FROM REAL GINGER” (referred to collectively herein

1 as the “Products”):

- 2 a) Ginger Ale;
- 3 b) Ginger Ale – Made With Real Sugar;
- 4 c) Diet Ginger Ale;
- 5 d) Blackberry Ginger Ale;
- 6 e) Cranberry Ginger Ale; and
- 7 f) Diet Cranberry Ginger Ale.

8 22. The representation that the Products are “MADE FROM REAL GINGER” was
9 uniformly communicated to Plaintiffs and every other person who purchased any of the Products
10 in California. An exemplar of each of the Products product label is attached hereto as Exhibit B.
11 The same or substantially similar product label has appeared on each respective product (as those
12 shown in Exhibit B) during the entirety of the Class Period.

13 23. As described in detail below, Defendants’ advertising and labeling of the Products,
14 as made from “REAL GINGER” is false, misleading, and intended to induce consumers to
15 purchase the ginger ales, at a premium price, while ultimately failing to meet consumer
16 expectations. These representations deceive and mislead reasonable consumers into believing that
17 the Products are made from, and contain, real ginger root.

18 24. In fact, the Products are not made from real ginger. The Products are made from
19 carbonated water, high fructose corn syrup, citric acid, preservatives, and “natural flavor,” which
20 is a chemical flavoring compound that is manufactured to mimic the taste of ginger, but does not
21 contain ginger as a reasonable consumer understands it to mean and contains none of the health
22 benefits of real ginger root.

23 **Consumer Demand for Real Ginger**

24 25. Many American consumers are health conscious and seek wholesome, natural
25 foods to keep a healthy diet, so they routinely take nutrition information into consideration in
26 selecting and purchasing food items. Product package labels convey nutrition information to
27 consumers that they use to make purchasing decisions. As noted by FDA commissioner Margaret
28 Hamburg during an October 2009 media briefing, “[s]tudies show that consumers trust and

1 believe the nutrition facts information and that many consumers use it to help them build a
2 healthy diet.” Consumers attribute a myriad of benefits to ginger and foods made from real ginger
3 root.

4 26. Ginger root has been used for thousands of years for the treatment of numerous
5 ailments, such as colds, nausea, arthritis, migraines, and hypertension. Scientific studies have
6 confirmed that ginger has anti-inflammatory effects and aids in relaxing muscles, is effective in
7 alleviating symptoms of nausea and vomiting, has anti-carcinogenic qualities, and appears to
8 reduce cholesterol and improve lipid metabolism, thereby helping to decrease the risk of
9 cardiovascular disease and diabetes. The benefits of consuming ginger have been widely
10 publicized to consumers in the United States in recent years.

11 **Federal and State Regulations Governing Food Labeling**

12 27. The Food and Drug Administration has defined “natural flavor” to mean “the
13 essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of
14 roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice,
15 fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar
16 plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof,
17 whose significant function in food is flavoring rather than nutritional.” 21 C.F.R. 501.22(a)(3). In
18 other words, a “natural flavor” is one that contains some oil, protein, or essence from a plant or
19 animal. But it bears little resemblance to the actual plant or animal from which it is derived.
20 Rather, natural flavors are made in a laboratory by scientists who make determinations on how to
21 replicate a flavor using chemicals found in nature.

22 28. While it may be that ginger root is used in the creation of the natural flavor, it is
23 not ginger as a reasonable consumer would understand it. Rather, the scientists that created the
24 “natural flavor” added to the Products would have isolated proteins from the cells and tissue of
25 the ginger root or extracted oils or essences from the ginger root. But because those isolated
26 compounds may not actually taste like ginger, the scientist would have then combined those
27 extractions with any number of other extractions from other plants and animals to create a
28 flavoring substance that tastes like ginger. *See* <https://www.scientificamerican.com/article/what->

1 is-the-difference-be-2002-07-29/ (describing the process for creating natural flavors) (last
2 accessed October 21, 2016).

3 29. Identical federal and California laws regulate the content of labels on packaged
4 food and require truthful, accurate information on the labels of packaged foods. The requirements
5 of the federal Food, Drug & Cosmetic Act (“FDCA”), and its labeling regulations, including
6 those set forth in 21 C.F.R. §§ 101 and 102, were adopted by the California legislature in the
7 Sherman Food Drug & Cosmetic Law (the “Sherman Law”). California Health & Safety Code §
8 110100 (“All food labeling regulations and any amendments to those regulations adopted
9 pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be
10 the food labeling regulations of this state.”). The federal laws and regulations discussed below are
11 applicable nationwide to all sales of packaged food products. Additionally, no state imposes
12 different requirements on the labeling of packaged food for sale in the United States.

13 30. Under both the Sherman Law and FDCA section 403(a), food is “misbranded” if
14 “its labeling is false or misleading in any particular,” or if it does not contain certain information
15 on its label or in its labeling. California Health & Safety Code § 110660; 21 U.S.C. § 343(a).

16 31. Under the FDCA, the term *false* has its usual meaning of “untruthful,” while the
17 term *misleading* is a term of art that covers labels that are technically true, but are likely to
18 deceive consumers. Under the FDCA, if any single representation on the labeling is false or
19 misleading, the entire food is misbranded, and no other statement in the labeling can cure a
20 misleading statement.

21 32. Further in addition to its blanket adoption of federal labeling requirements,
22 California has also enacted a number of laws and regulations that adopt and incorporate specific
23 enumerated federal food laws and regulations. *See* California Health & Safety Code § 110660
24 (misbranded if label is false and misleading); California Health & Safety Code § 110705
25 (misbranded if words, statements and other information required by the Sherman Law are either
26 missing or not sufficiently conspicuous); and California Health & Safety Code § 110740
27 (misbranded if contains artificial flavoring, artificial coloring and chemical preservatives but fails
28 to adequately disclose that fact on label).

1 33. Under California law, a food product that is “misbranded” cannot legally be
2 manufactured, advertised, distributed, sold, or possessed. Misbranded products have no economic
3 value and are legally worthless.

4 34. Representing that a soft drink is made from “real ginger” is a statement of fact, and
5 use of this phrase on the labels of packaged food is limited by the aforementioned misbranding
6 laws and regulations.

7 **Defendants’ Marketing and Labeling of its Ginger Ales Violates State and Federal Food**
8 **Labeling Laws**

9 35. The Products are unlawful, misbranded and violate the Sherman Law, California
10 Health & Safety Code § 110660, *et seq.*, because the Products’ labels include the phrase “MADE
11 WITH REAL GINGER,” even though they are not made using real ginger. Instead, the Products
12 are flavored with a complex chemical flavoring that is manufactured to mimic the taste of ginger,
13 and was created not by using actual ginger root, but in a laboratory through the isolation of
14 proteins, essences, and oils from the cells and tissues of plants and animals and combining them
15 in such a way as to mimic the taste of ginger as a consumer would recognize it. The Products are
16 not made from, and do not contain, real ginger as a reasonable consumer would understand it to
17 mean, nor do the products contain any of the health benefits that would be obtained if real ginger
18 root were used or present.

19 36. Defendants’ marketing, advertising, and sale of the Products violates the false
20 advertising provisions of the Sherman Law (California Health & Safety Code § 110390, *et seq.*),
21 including but not limited to:

- 22 a. Section 110390, which makes it unlawful to disseminate false or misleading food
23 advertisements that include statements on products and product packaging or
24 labeling or any other medium used to directly or indirectly induce the purchase of
25 a food product;
- 26 b. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or
27 offer to sell any falsely or misleadingly advertised food; and
- 28 c. Sections 110398 and 110400, which make it unlawful to advertise misbranded

1 food or to deliver or proffer for delivery any food that has been falsely or
2 misleadingly advertised.

3 37. Defendants' marketing, advertising, and sale of the Products violates the
4 misbranding provisions of the Sherman Law (California Health & Safety Code § 110660, *et*
5 *seq.*), including but not limited to:

- 6 d. Section 110665 (a food is misbranded if its labeling does not conform with the
7 requirements for nutrition labeling as set forth in 21 U.S.C. Sec. 343(q));
- 8 e. Section 110705 (a food is misbranded if words, statements and other information
9 required by the Sherman Law to appear food labeling is either missing or not
10 sufficiently conspicuous);
- 11 f. Section 110740 (a food is misbranded if it contains artificial flavoring, artificial
12 coloring and chemical preservatives but fail to adequately disclose that fact on
13 their labeling);
- 14 g. Section 110760, which makes it unlawful for any person to manufacture, sell,
15 deliver, hold, or offer for sale any food that is misbranded;
- 16 h. Section 110765, which makes it unlawful for any person to misbrand any food;
17 and
- 18 i. Section 110770, which makes it unlawful for any person to receive in commerce
19 any food that is misbranded or to deliver or proffer for delivery any such food.

20 38. Defendants have violated 21 U.S.C. § 343(a), and the standards set by FDA
21 regulations, including but not limited to 21 C.F.R. §§ 101.3, 101.13, 101.14, 101.22, and 101.65
22 which have been incorporated by reference in the Sherman Law, by failing to include on their
23 product labels the nutritional information required by law.

24 **Defendants' Marketing and Labeling of its Ginger Ales is False, Deceptive and Misleading**

25 39. A reasonable consumer would expect that the Products contain what Defendants
26 identifies them to contain on the product labels. A reasonable consumer would expect that when
27 Defendants label the Products as being "MADE WITH REAL GINGER," the soft drinks are
28 made with, and contain, real ginger as commonly understood and would not be contrary to the

1 policies or regulations of the State of California and/or the FDA.

2 40. Moreover, Defendants do not disclose on the product labels that the Products are
3 flavored with a chemical compound that was manufactured to mimic the flavor of ginger.
4 Consumers lack the meaningful ability to test or independently ascertain the truthfulness of
5 Defendants' food labeling claims, especially at the point of sale. Consumers would not know the
6 true nature of the ginger flavoring merely by reading the ingredient label; its discovery requires
7 investigation beyond the grocery store and knowledge of food chemistry beyond that of the
8 average consumer. An average consumer does not have the specialized knowledge necessary to
9 ascertain that the ginger flavor in the soft drink is not from the presence of real ginger in the soft
10 drink but instead comes from the chemical compounded added to the drink to make it taste like
11 ginger. That, combined with Defendants' active concealment in representing the Products as
12 being "MADE FROM REAL GINGER," and not disclosing otherwise, gave the average
13 reasonable consumer no reason to suspect that Defendants' representations on the packages were
14 not true, and therefore consumers had no reason to investigate the soft drinks contained real
15 ginger. Thus, reasonable consumers relied on Defendants' representations regarding the nature of
16 the Products. Such reliance by consumers is also eminently reasonable, since food companies are
17 prohibited from making false or misleading statements on their products under federal law.

18 41. Defendants intend and know that consumers will and do rely upon food labeling
19 statements in making their purchasing decisions. Label claims and other forms of advertising and
20 marketing drive product sales, particularly if placed prominently on the front of product
21 packaging, as Defendants have done with the "MADE WITH REAL GINGER" claim.

22 **Defendants' Website and Other Marketing Confirms That Defendants Intends to Deceive**
23 **Consumers**

24 42. Defendants' own long standing advertising and marketing materials show that
25 Defendants intended to deceive consumers into believing the false and deceptive packaging of the
26 Products.

27 43. For example, Defendants' website located at www.canadadry.com ("Defendants'
28 Website") touts that its soft drinks are "MADE FROM REAL GINGER." In particular, the

1 homepage of Defendants' Website states *three times* that the soft drinks are "MADE FROM
2 REAL GINGER." A screenshot of Defendants' Website's homepage appears below:



15
16
17 **THE ROOT OF RELAXATION**

18 We all need a break from the hustle and bustle of every day. Find your moment to relax with the crisp, soothing taste of real ginger and
19 refreshing bubbles. Canada Dry Ginger Ale, the Root of Relaxation.

20 <http://canadadry.com> (last accessed July 17, 2016).

21 44. Further, Defendants' advertising campaign emphasizes that the ginger ales are
22 "MADE WITH REAL GINGER." They additionally emphasize that the ginger ales have the
23 health benefits associated with real ginger, including, as discussed, above relaxation. In particular,
24 Defendants' commercial depicts a bottle of Canada Dry Ginger Ale and "Jack's Ginger Farm."
25 The voice-over narrates, "Find your way to relaxation with the crisp soothing taste of real ginger
26 and bubbles. Canada Dry. The root of relaxation." This commercial, which was broadcast
27 throughout the United States, including in California, and appears on Defendants' Website, is
28 intended to emphasize and capitalize upon Defendants' representation that the Products are
"MADE FROM REAL GINGER."

1 45. Defendants also permit and encourage their marketing partners, including grocery
2 stores, to advertise, market, advertise and sell the Products as a soft drink “MADE FROM REAL
3 GINGER.” Defendants provide their marketing partners information, including posters, signs, end
4 cap displays, etc., that specifically represent that the Products are “MADE FROM REAL
5 GINGER.” Further, in sales sheets, sales presentations, and other marketing materials,
6 Defendants state that the Products are “MADE FROM REAL GINGER.”

7 46. In short, Defendants’ advertising and marketing campaign confirms that
8 Defendants intend that consumers be effectively deceived by Defendants’ misrepresentations on
9 the Products’ product labels. More specifically, Defendants intend that consumers who read the
10 Products’ product labels believe that the Products are made from, and contain, real ginger.

11 **Defendants’ Employ Misleading Marketing Their Ginger Ales To Increase Profits and Gain**
12 **a Competitive Edge**

13 47. Defendants do not use real ginger in their sodas as doing so is more expensive than
14 using flavoring compound. In recent years, numerous studies have found the presence of lead in
15 ginger, and manufacturers and retailers of other products containing ginger root, such as cookies
16 and candies, have been sued by the California Attorney General. Thus, the diligent sourcing and
17 testing procedures that would be required when using real ginger to ensure the product they are
18 selling is safe are more expensive to adopt than simply using “natural flavor.” In addition, the
19 cost of real ginger has increased in recent years, due to changes in weather in China, which
20 produces 75% of the world’s ginger. *See* [http://www.producenews.com/news-dep-menu/test-](http://www.producenews.com/news-dep-menu/test-featured/9579-ginger-prices-skyrocket-on-shrinking-supply)
21 [featured/9579-ginger-prices-skyrocket-on-shrinking-supply](http://www.producenews.com/news-dep-menu/test-featured/9579-ginger-prices-skyrocket-on-shrinking-supply) (last accessed October 21, 2016).

22 48. In the last decade, in response to news reports about the dangers of high fructose
23 corn syrup and soda’s role in contributing to the increased rates of obesity and diabetes in this
24 country, many consumers are drinking less soda, and are seeking out instead, healthier beverages,
25 like iced teas and flavored waters. *See* [http://www.nytimes.com/2015/10/04/upshot/soda-industry-](http://www.nytimes.com/2015/10/04/upshot/soda-industry-struggles-as-consumer-tastes-change.html?_r=0)
26 [struggles-as-consumer-tastes-change.html?_r=0](http://www.nytimes.com/2015/10/04/upshot/soda-industry-struggles-as-consumer-tastes-change.html?_r=0) (last accessed October 21, 2016). And while soda
27 sales are declining, one segment of the category is on the rise – small companies and brands that
28 emphasize their use of natural ingredients, such as Reed’s, Bruce Cost, Maine Root, and Grown

1 Up Soda have entered the market. In 2014, the Specialty Food Association noted that healthy
2 beverages were growing in popularity, as was the market for more sophisticated, specialty sodas
3 containing all natural ingredients. See [https://www.specialtyfood.com/news/article/rise-healthy-
5 beverages/](https://www.specialtyfood.com/news/article/rise-healthy-
4 beverages/) (last accessed October 21, 2016). Thus, many small craft soda companies are
6 flourishing in response to increased consumer demand for alternatives to sodas made with high
7 fructose corn syrup, artificial ingredients, and preservatives. Facing a public hostile to “Big Soda”
8 and finding its sales dwindling due to the newer, healthier brands, Defendants have an incentive
9 to emphasize the presence of ginger in the Products to appeal to consumers seeking real
10 ingredients instead of a traditional soda.

10 49. In making the false, misleading, and deceptive representations, Defendants
11 distinguish their ginger ales from their competitors’ products. Defendants knew and intended that
12 consumers would purchase, and pay a premium for, ginger ales labeled as being made from
13 “REAL GINGER,” over comparable ginger ales that do not contain these representations on the
14 product labels. By using this branding strategy, Defendants are stating that their ginger ales are
15 superior to, better than, and more nutritious and healthful than other brands of ginger ales that do
16 not proclaim to be made from “REAL GINGER.” For example, other brands of ginger ales that
17 do not contain the false, misleading, and deceptive representation that they are made from “REAL
18 GINGER,” include brands such as Dr. Brown’s and Vernors.

19 50. Further, Defendants knew and intended their representations to help them compete
20 with small batch bottling companies that do make ginger ales using real ginger root. Defendants
21 added the “MADE WITH REAL GINGER” representation to their product labels to compete with
22 such small batch bottling companies that have increased in popularity in recent years. For
23 example, Bruce Cost Ginger Ale is made with fresh whole ginger root and represents this fact to
24 consumers in its advertising and on its product packaging.

25 51. Because consumers pay a price premium for products made with real ginger, by
26 labeling their products as containing real ginger without actually using the expensive ingredient,
27 Defendants are able to both increase their sales and retain more in profits.

28 52. Defendants engaged in the practices complained of herein to further their private

1 interests of: (i) increasing sales their ginger ales, while decreasing the sales of ginger ales that do
2 not claim to be made from real ginger and those ginger ales that are truthfully offered as made
3 with real ginger by Defendants' competitors, and/or (ii) commanding a higher price for their
4 ginger ales because consumers will pay more for these soft drinks due to the consumers' demand
5 for products containing real ginger because of the perceived benefits.

6 **Defendants Intend to Continue To Market Beverages as Being Made with "Real Ginger"**
7 **that Do Not Contain Ginger.**

8 53. Because of the growing market described in paragraph 48 and because Defendants
9 know consumers rely on representations about the presence of real ginger in beverages,
10 Defendants have an incentive to continue to make such false representations. In addition, other
11 trends suggest that Defendants have no incentive to change their labeling practices.

12 54. For example, ginger ale is a particularly strong growing flavor in the healthy soda
13 category. In December 2015, a brand manager for one of Defendants' brands, Schweppes,
14 described ginger as a "growing flavor trend." See [http://www.prnewswire.com/news-](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html)
15 [releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html)
16 [300188635.html](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html).

17 55. To capitalize on the market, Defendants may not only continue to misleading
18 advertise the Products, but they could seek to replicate the misrepresentation in other ways. For
19 example, DPS owns the Schweppes brand, under which it markets and sells a ginger ale in retail
20 stores around the country. While Schweppes does not currently advertise its ginger ale as being
21 made with real ginger, Defendants have an incentive to replicate the successful misrepresentation
22 on that product. That same Defendant also own the soda brand Stewart's, under which a ginger
23 ale was previously sold. While Defendant only sells other kinds of Stewart's soda today, the
24 booming market for ginger ales creates an incentive to do so, in which case Defendant could
25 decide to falsely sell as containing real ginger.

26 56. Defendants are also likely seeking to diversity their beverage portfolio in response
27 to the changing market, the booming craft soda market, and the decreased demand for traditional
28 sodas from big manufacturers. Recently, Coca-Cola Company purchased the small soda brands of

1 Blue Sky and Hansen's, which both make ginger ales. Defendants, who have in the past acquired
2 smaller companies that compete with their bigger brands (e.g. acquiring the fruit juice company
3 Nantucket Nectar despite selling a much larger fruit juice line under the Snapple brand name),
4 will likely desire to do the same to maintain their competitive edge and ensure they are offering
5 ginger ales at all segments of the market.

6 PLAINTIFFS' EXPERIENCES

7 Plaintiff Fitzhenry-Russell

8 57. Fitzhenry-Russell has purchased several cases of the Products from Safeway,
9 located in Santa Cruz, CA, and a Lucky, located in Capitola, CA. Over the last two years,
10 Fitzhenry-Russell purchased approximately one case each year. For the two years prior to that,
11 she purchased about one case per month. She typically purchased the original flavor of Canada
12 Dry ginger ale made by Defendants.

13 58. Fitzhenry-Russell made each of her purchases of the Products after reading and
14 relying on the truthfulness of Defendants' product labels that promised that the Products were
15 "MADE WITH REAL GINGER." In addition, on several occasions over the past few years,
16 Fitzhenry-Russell saw the TV advertisement described in paragraph 44, which reinforced her
17 belief that Defendants' products actually contained ginger root and would provide the health
18 benefits of ginger.

19 59. At the time of each purchase, Fitzhenry-Russell saw, read and relied on the
20 "MADE WITH REAL GINGER" statement on the front of the package of the ginger ale. She was
21 attracted to the Products because, when given a choice, she prefers to consume soft drinks made
22 with real ginger for health benefits, namely stomach calming or relaxation. But on each of the
23 Products purchased by Fitzhenry-Russell, Defendants misrepresented the contents of the product
24 as being "MADE WITH REAL GINGER" when they were not. Fitzhenry-Russell believed that
25 the statement meant that each of the Products that she purchased was made with, and contained,
26 real ginger. She reasonably relied on the labels and advertising Defendants placed on the primary
27 display panel of the product.

28 60. At the time of each purchase of the Products, Fitzhenry-Russell did not know that

1 the Products that she purchased were not made with real ginger, but instead were made with a
2 chemical flavoring compound derived from ginger and manufactured to mimic the flavor of
3 ginger and which does not contain any of the health benefits of real ginger. As a result of
4 Defendants' misrepresentations and omissions, the Products have no, or, at, a minimum, a much
5 lower, value to Fitzhenry-Russell.

6 61. Fitzhenry-Russell not only purchased the Products because their label said that
7 they were "MADE WITH REAL GINGER," but she also paid more money for the ginger ales
8 than she would have paid for other a similar soft drink that was not labeled as containing real
9 ginger.

10 62. Had Defendants not misrepresented (by omission and commission) the true nature
11 of the Products, Fitzhenry-Russell would not have purchased them or, at a very minimum, she
12 would have paid less for the soft drink.

13 **Plaintiff Dale**

14 63. Dale has purchased a number of bottles of the Products from Safeway, located in
15 Guernville, California. Over the last four years, Dale purchased two liter bottles regularly,
16 typically one bottle every two or three months. She typically purchased the original flavor of
17 Canada Dry ginger ale made by Defendants.

18 64. Dale made each of her purchases of the Products after reading and relying on the
19 truthfulness of Defendants' product labels that promised that the Products were "MADE WITH
20 REAL GINGER."

21 65. At the time of each purchase, Dale saw, read and relied on the "MADE WITH
22 REAL GINGER" statement on the front of the package of the ginger ale. She was attracted to the
23 Products because, when given a choice, she prefers to consume soft drinks made with real ginger
24 for health benefits, namely stomach calming or relaxation. But on each of the Products purchased
25 by Dale, Defendants misrepresented the contents of the product as being "MADE WITH REAL
26 GINGER" when they were not. Dale believed that the statement meant that each of the Products
27 that she purchased was made with, and contained, real ginger. She reasonably relied on the labels
28 and advertising Defendants placed on the primary display panel of the product.

1 66. At the time of each purchase of the Products, Dale did not know that the Products
2 that she purchased were not made with real ginger, but instead were made with a chemical
3 flavoring compound derived from ginger and manufactured to mimic the flavor of ginger and
4 which does not contain any of the health benefits of real ginger. As a result of Defendants'
5 misrepresentations and omissions, the Products have no, or, at, a minimum, a much lower, value
6 to Dale.

7 67. Dale not only purchased the Products because their label said that they were
8 "MADE WITH REAL GINGER," but she also paid more money for the ginger ales than she
9 would have paid for other a similar soft drink that was not labeled as containing real ginger.

10 68. Had Defendants not misrepresented (by omission and commission) the true nature
11 of the Products, Dale would not have purchased them or, at a very minimum, she would have paid
12 less for the soft drink.

13 69. Plaintiffs and members of the Class have been economically damaged by their
14 purchase of the Products because the advertising for the Products was and is untrue and/or
15 misleading under California law; therefore, the Products are worth less than what Plaintiffs and
16 members of the Class paid for them and/or Plaintiffs and members of the Class did not receive
17 what they reasonably intended to receive.

18 70. As a direct and proximate result of Defendants' unfair and wrongful conduct, as
19 set forth herein, Plaintiffs and the class members: (1) were misled into purchasing the Products;
20 (2) received a product that failed to meet their reasonable expectations and Defendants' promises;
21 (3) paid a premium sum of money for a product that was not as represented and, thus, were
22 deprived of the benefit of the bargain because the purchased ginger ale had less value than what
23 was represented by Defendants; and (4) ingested a substance that was other than what was
24 represented by Defendants and that Plaintiffs and class members did not expect.

25 71. Plaintiffs continue to desire to purchase ginger ale made with real ginger root,
26 including brands marketed and sold by Defendants. Both Fitzhenry-Russell and Dale both
27 regularly visit stores such as Safeway where Defendants' Products and other ginger ale beverages
28 are sold. Because of changes in the market, neither Fitzhenry nor Dale know at any given time,

1 which brands are owned by Defendants and whether their representations as to the presence of
2 ginger are truthful. Thus, Plaintiffs are likely to be repeatedly presented with false or misleading
3 information when shopping for ginger ale, making it difficult to make informed purchasing
4 decisions. Should Defendants begin to market and sell a new brand of ginger ale, Plaintiffs could
5 be at risk for buying another one of Defendants' products in reliance on the same or similar
6 misrepresentation.

7 **CLASS ALLEGATIONS**

8 72. Plaintiffs bring this action against Defendants, on behalf of herself and all others
9 similarly situated, as a class action pursuant to section 1781 of the California Civil Code.
10 Plaintiffs seek to represent the following groups of similarly situated persons, defined as follows:

11 All persons who, between December 23, 2012 and the present, purchased any
12 of Defendants' the Products.

13 73. This action has been brought and may properly be maintained as a class action
14 against Defendants because there is a well-defined community of interest in the litigation and the
15 proposed class is easily ascertainable.

16 74. Numerosity: Plaintiffs do not know the exact size the Class, but they are estimated
17 that it is composed of more than 100 persons. The persons in the Class are so numerous that the
18 joinder of all such persons is impracticable and the disposition of their claims in a class action
19 rather than in individual actions will benefit the parties and the courts.

20 75. Common Questions Predominate: This action involves common questions of law
21 and fact to the potential classes because each class member's claim derives from the deceptive,
22 unlawful and/or unfair statements and omissions that led consumers to believe that the Products
23 were made with, and contained, real ginger. The common questions of law and fact predominate
24 over individual questions, as proof of a common or single set of facts will establish the right of
25 each member of the Class to recover. The questions of law and fact common to the Class are:

- 26 a) whether the Products are "MADE WITH REAL GINGER;"
27 b) whether Defendants unfairly, unlawfully and/or deceptively misrepresented
28 that the Products are "MADE WITH REAL GINGER;"
c) whether the use of the phrase "MADE WITH REAL GINGER" on the

- 1 primary display panel of the Products violated Federal and/or California
2 state law;
- 3 d) whether the advertising of the product as Made with Real Ginger causes it
4 to command a premium in the market as compared with similar products
5 that do not make such a claim;
- 6 e) whether Defendants' advertising and marketing regarding the Products sold
7 to the class members was likely to deceive the class members and/or was
8 unfair;
- 9 f) Whether a "MADE WITH REAL GINGER" claim on product packaging
10 and advertising is material to a reasonable consumer;
- 11 g) whether Defendants engaged in the alleged conduct knowingly, recklessly,
12 or negligently;
- 13 h) the amount of profits and revenues earned by Defendants as a result of the
14 conduct;
- 15 i) whether class members are entitled to restitution, injunctive and other
16 equitable relief and, if so, what is the nature (and amount) of such relief;
17 and
- 18 j) whether class members are entitled to payment of actual, incidental, .
19 consequential, exemplary and/or statutory damages plus interest thereon,
20 and if so, what is the nature of such relief.

21 76. Typicality: Fitzhenry-Russell's claims are typical of the Class because she
22 purchased at least eight cases of the Products – in reliance on Defendants' misrepresentations and
23 omissions that they were "MADE WITH REAL GINGER." Dale's claims are typical of the Class
24 because she purchased at least twelve two liter bottles of the Products – in reliance on
25 Defendants' misrepresentations and omissions that they were "MADE WITH REAL GINGER."
26 Thus, Plaintiffs and the class members sustained the same injuries and damages arising out of
27 Defendants' conduct in violation of the law. The injuries and damages of each class member
28 were caused directly by Defendants' wrongful conduct in violation of law as alleged.

1 or regulation or provide a predicate basis of liability under the state and common laws cited in the
2 following causes of action.

3 **PLAINTIFFS' FIRST CAUSE OF ACTION**

4 **(Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code §
5 1750, *et seq.*)**

6 **On Behalf of Plaintiffs and the Class**

7 80. Plaintiffs reallege and incorporate the paragraphs of this Class Action Complaint
8 as if set forth herein.

9 81. Defendants' actions, representations and conduct have violated, and continue to
10 violate the CLRA, because they extend to transactions that are intended to result, or which have
11 resulted, in the sale or lease of goods or services to consumers.

12 82. Plaintiffs and other class members are "consumers" as that term is defined by the
13 CLRA in California Civil Code § 1761(d).

14 83. The Products that Plaintiffs (and other similarly situated class members) purchased
15 from Defendants were "goods" within the meaning of California Civil Code § 1761(a).

16 84. Defendants' acts and practices, set forth in this Class Action Complaint, led
17 customers to falsely believe that the Products were made with, and contained, real ginger. By
18 engaging in the actions, representations and conduct set forth in this Class Action Complaint,
19 Defendants have violated, and continues to violate, § 1770(a)(2), § 1770(a)(5), § 1770(a)(7),
20 § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California Civil Code §1770(a)(2),
21 Defendants' acts and practices constitute improper representations regarding the source,
22 sponsorship, approval, or certification of the goods they sold. In violation of California Civil
23 Code §1770(a)(5), Defendants' acts and practices constitute improper representations that the
24 goods they sell have sponsorship, approval, characteristics, ingredients, uses, benefits, or
25 quantities, which they do not have. In violation of California Civil Code §1770(a)(7), Defendants'
26 acts and practices constitute improper representations that the goods they sell are of a particular
27 standard, quality, or grade, when they are of another. In violation of California Civil Code
28 §1770(a)(8), Defendants have disparaged the goods, services, or business of another by false or
misleading representation of fact. In violation of California Civil Code §1770(a)(9), Defendants

1 have advertised goods or services with intent not to sell them as advertised. Finally, regarding
2 California Civil Code §1770(a)(8), Defendants falsely or deceptively market and advertise that,
3 unlike other soft drink manufacturers, it sells ginger ales that are made from "REAL GINGER."

4 85. Plaintiffs request that this Court enjoin Defendants from continuing to employ the
5 unlawful methods, acts and practices alleged herein pursuant to California Civil Code
6 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the
7 future, Plaintiffs and the other members of the Class will continue to suffer harm.

8 86. CLRA § 1782 NOTICE. Irrespective of any representations to the contrary in
9 this Class Action Complaint, Plaintiffs specifically disclaim, at this time, any request for
10 damages under any provision of the CLRA. Plaintiffs, however, hereby provides Defendants
11 with notice and demand that within thirty (30) days from that date, Defendants correct, repair,
12 replace or otherwise rectify the unlawful, unfair, false and/or deceptive practices complained of
13 herein. Defendants' failure to do so will result in Plaintiffs amending this Class Action Complaint
14 to seek, pursuant to California Civil Code § 1780(a)(3), on behalf of themselves and those
15 similarly situated Class Members, compensatory damages, punitive damages and restitution of
16 any ill-gotten gains due to Defendants' acts and practices.

17 87. Plaintiffs also requests that this Court award their costs and reasonable attorneys'
18 fees pursuant to California Civil Code § 1780(d).

19 **PLAINTIFFS' SECOND CAUSE OF ACTION**
20 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**
21 **On Behalf Plaintiffs and the Class**

22 88. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
23 Complaint as if set forth herein.

24 89. Beginning at an exact date unknown to Plaintiffs, but within three (3) years
25 preceding the filing of the Class Action Complaint, Defendants made untrue, false, deceptive
26 and/or misleading statements in connection with the advertising and marketing of the Products.

27 90. Defendants made representations and statements (by omission and commission)
28 that led reasonable customers to believe that the Products that they were purchasing were made
from, and contained, real ginger root.

1 91. Plaintiffs and those similarly situated relied to their detriment on Defendants'
2 false, misleading and deceptive advertising and marketing practices, including each of the
3 misrepresentations and omissions set forth in paragraphs 22-24, 35-46, and 57-68 above. Had
4 Plaintiffs and those similarly situated been adequately informed and not intentionally deceived by
5 Defendants, they would have acted differently by, without limitation, refraining from purchasing
6 Defendants' ginger ales or paying less for them.

7 92. Defendants' acts and omissions are likely to deceive the general public.

8 93. Defendants engaged in these false, misleading and deceptive advertising and
9 marketing practices to increase its profits. Accordingly, Defendants have engaged in false
10 advertising, as defined and prohibited by section 17500, *et seq.* of the California Business and
11 Professions Code.

12 94. The aforementioned practices, which Defendants used, and continue to use, to
13 their significant financial gain, also constitutes unlawful competition and provides an unlawful
14 advantage over Defendants' competitors as well as injury to the general public.

15 95. As a direct and proximate result of such actions, Plaintiffs and the other class
16 members have suffered, and continue to suffer, injury in fact and have lost money and/or property
17 as a result of such false, deceptive and misleading advertising in an amount which will be proven
18 at trial, but which is in excess of the jurisdictional minimum of this Court.

19 96. Plaintiffs seek, on behalf of themselves and those similarly situated, full restitution
20 of monies, as necessary and according to proof, to restore any and all monies acquired by
21 Defendants from Plaintiffs, the general public, or those similarly situated by means of the false,
22 misleading and deceptive advertising and marketing practices complained of herein, plus interest
23 thereon.

24 97. Plaintiffs seek, on behalf of themselves and those similarly situated, a declaration
25 that the above-described practices constitute false, misleading and deceptive advertising.

26 98. Plaintiffs seek, on behalf of themselves and those similarly situated, an injunction
27 to prohibit Defendants from continuing to engage in the false, misleading and deceptive
28 advertising and marketing practices complained of herein. Such misconduct by Defendants,

1 unless and until enjoined and restrained by order of this Court, will continue to cause injury in
2 fact to the general public and the loss of money and property in that Defendants will continue to
3 violate the laws of California, unless specifically ordered to comply with the same. This
4 expectation of future violations will require current and future consumers to repeatedly and
5 continuously seek legal redress in order to recover monies paid to Defendants to which they are
6 not entitled. Plaintiffs, those similarly situated and/or other consumers nationwide have no other
7 adequate remedy at law to ensure future compliance with the California Business and Professions
8 Code alleged to have been violated herein.

9 **PLAINTIFFS' THIRD CAUSE OF ACTION**
10 **(Fraud, Deceit and/or Misrepresentation)**
11 **On Behalf of Plaintiffs and the Class**

12 99. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
13 Complaint as if set forth herein.

14 100. Throughout the last four years, at weekly and monthly intervals, Defendants
15 fraudulently and deceptively informed Plaintiffs that the Products were "MADE WITH REAL
16 GINGER." Further, at weekly and monthly intervals over the last four years, Defendants failed to
17 inform Plaintiffs that the Products were not made with real ginger but instead were made from a
18 chemical compound manufactured to mimic the flavor of ginger.

19 101. These misrepresentations and omissions were known exclusively to, and actively
20 concealed by, Defendants, not reasonably known to Plaintiffs, and material at the time they were
21 made. Defendants knew the composition of the Products, and they knew that the soft drinks were
22 flavored with a chemical compound intended to mimic the taste of ginger. Defendants'
23 misrepresentations and omissions concerned material facts that were essential to the analysis
24 undertaken by Plaintiffs as to whether to purchase Defendants' ginger ales. In misleading
25 Plaintiffs and not so informing Plaintiffs, Defendants breached their duty to her. Defendants also
26 gained financially from, and as a result of, their breach.

27 102. Plaintiffs and those similarly situated relied to their detriment on Defendants'
28 misrepresentations and fraudulent omissions. Had Plaintiffs and those similarly situated been
adequately informed and not intentionally deceived by Defendants, they would have acted

1 differently by, without limitation: (i) declining to purchase the Products, (ii) purchasing less of
2 them, or (iii) paying less for the Products.

3 103. By and through such fraud, deceit, misrepresentations and/or omissions,
4 Defendants intended to induce Plaintiffs and those similarly situated to alter their position to their
5 detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiffs and those
6 similarly situated to, without limitation, to purchase the Products.

7 104. Plaintiffs and those similarly situated justifiably and reasonably relied on
8 Defendants' misrepresentations and omissions, and, accordingly, were damaged by Defendants.

9 105. As a direct and proximate result of Defendants' misrepresentations and/or
10 omissions, Plaintiffs and those similarly situated have suffered damages, including, without
11 limitation, the amount they paid for the Products.

12 106. Defendants' conduct as described herein was wilful and malicious and was
13 designed to maximize Defendants' profits even though Defendants knew that it would cause loss
14 and harm to Plaintiffs and those similarly situated.

15 **PLAINTIFFS' FOURTH CAUSE OF ACTION**
16 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions**
17 **Code § 17200, *et seq.*)**
18 **On Behalf of Plaintiffs and the Class**

19 107. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action
20 Complaint as if set forth herein.

21 108. Within four (4) years preceding the filing of this lawsuit, and at all times
22 mentioned herein, Defendants have engaged, and continues to engage, in unlawful, unfair, and
23 fraudulent trade practices in California by engaging in the unlawful, unfair, and fraudulent
24 business practices outlined in this complaint.

25 109. In particular, Defendants have engaged, and continues to engage, in unlawful
26 practices by, without limitation, violating the following state and federal laws: (i) the CLRA as
27 described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman
28 Law (Article 3), including without limitation, California Health & Safety Code §§ 110390,
110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article

1 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705,
2 110740, 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and
3 branding of food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to
4 21 C.F.R. 101.3, 101.4, 101.13, 101.14, and 101.22, which are incorporated into the Sherman
5 Law (California Health & Safety Code §§ 110100(a), 110380, and 110505).

6 110. In particular, Defendants have engaged, and continues to engage, in unfair and
7 fraudulent practices by, without limitation, the following: (i) misrepresenting that the Products are
8 made from, and contain, real ginger;” and (ii) failing to inform Plaintiff, and those similarly
9 situated, that the Products that they purchased are made with a compound manufactured to mimic
10 the flavor of ginger.

11 111. Plaintiffs and those similarly situated relied to their detriment on Defendants’
12 unlawful, unfair, and fraudulent business practices. Had Plaintiffs and those similarly situated
13 been adequately informed and not deceived by Defendants, they would have acted differently by,
14 without limitation: (i) declining to purchase the Products, (ii) purchasing less of the Products, or
15 (iii) paying less for the Products.

16 112. Defendants’ acts and omissions are likely to deceive the general public.

17 113. Defendants engaged in these deceptive and unlawful practices to increase their
18 profits. Accordingly, Defendants have engaged in unlawful trade practices, as defined and
19 prohibited by section 17200, *et seq.* of the California Business and Professions Code.

20 114. The aforementioned practices, which Defendants have used to its significant
21 financial gain, also constitute unlawful competition and provide an unlawful advantage over
22 Defendants’ competitors as well as injury to the general public.

23 115. As a direct and proximate result of such actions, Plaintiffs and the other class
24 members, have suffered and continue to suffer injury in fact and have lost money and/or property
25 as a result of such deceptive and/or unlawful trade practices and unfair competition in an amount
26 which will be proven at trial, but which is in excess of the jurisdictional minimum of this Court.
27 Among other things, Plaintiffs and the class members lost the amount they paid for the Products.

28 116. As a direct and proximate result of such actions, Defendants have enjoyed, and

1 continues to enjoy, significant financial gain in an amount which will be proven at trial, but which
2 is in excess of the jurisdictional minimum of this Court.

3 117. Plaintiffs seek, on behalf of themselves and those similarly situated, full restitution
4 of monies, as necessary and according to proof, to restore any and all monies acquired by
5 Defendants from Plaintiffs, the general public, or those similarly situated by means of the
6 deceptive and/or unlawful trade practices complained of herein, plus interest thereon.

7 118. Plaintiffs seeks, on behalf of those similarly situated, a declaration that the above-
8 described trade practices are fraudulent, unfair, and/or unlawful.

9 119. Plaintiffs seeks, on behalf of those similarly situated, an injunction to prohibit
10 Defendants from continuing to engage in the deceptive and/or unlawful trade practices
11 complained of herein. Such misconduct by Defendants, unless and until enjoined and restrained
12 by order of this Court, will continue to cause injury in fact to the general public and the loss of
13 money and property in that Defendants will continue to violate the laws of California, unless
14 specifically ordered to comply with the same. This expectation of future violations will require
15 current and future consumers to repeatedly and continuously seek legal redress in order to recover
16 monies paid to Defendants to which they were not entitled. Plaintiff, those similarly situated
17 and/or other consumers nationwide have no other adequate remedy at law to ensure future
18 compliance with the California Business and Professions Code alleged to have been violated
19 herein.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiffs prays for judgment as follows:

22 A. On Cause of Action Number 1 (for violation of the Consumers Legal Remedies
23 Act), 2 (for violation of the False Advertising Law) and 4 (for violation of the
24 Unfair Competition Law) against Defendants and in favor of Plaintiffs and the
25 other members of the Class as follows:

- 26 1. Declaring that Defendants' use of the phrase "Made with Real Ginger" on
27 the Products is unlawful and likely to deceive reasonable consumers;
28 2. Enjoining Defendants, directly or through any corporation, partnership,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any ginger beverage from making a “Made with Real Ginger” claim unless the product contains real ginger;

3. Enjoining Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any ginger beverage from making other claims about the inclusion of real ginger in the product (such as “contains real ginger”) unless the representation is non-misleading; and

4. Enjoining Defendants, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any soda to not provide to others the means and instrumentalities with which to make any representation prohibited by the above. For the purposes of this paragraph, “means and instrumentalities” means any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of such product or service.

B. On Causes of Action Numbers 2 (for violation of the False Advertising Law) and 4 (for violation of the Unfair Competition Law) against Defendants and in favor of Plaintiffs and the other members of the Class:

1. For restitution pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*;
2. For injunctive relief pursuant to, without limitation, the California Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*; and
3. For a declaration that Defendants’ above-described trade practices are

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

fraudulent and/or unlawful.

C. On Cause of Action Number 3 (for fraud, deceit and/or misrepresentation) against Defendants and in favor of Plaintiffs and the other members of the Class:

1. An award of compensatory damages, the amount of which is to be determined at trial; and
2. An award of punitive damages, the amount of which is to be determined at trial.

D. On all Causes of Action against Defendants and in favor of Plaintiffs and the other members of the Class:

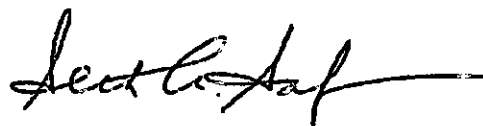
1. For reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;
2. For costs of suit incurred; and
3. For such further relief as this Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury.

Dated: December 23, 2016

GUTRIDE SAFIER LLP



_____ /

Adam J. Gutride, Esq.
Seth A. Safier, Esq.
Marie A. McCrary, Esq.
Kristen G. Simplicio, Esq.
100 Pine Street, Suite 1250
San Francisco, CA 94111

Attorneys for Plaintiffs

EXHIBIT A

EXHIBIT A

I, Jackie Fitzhenry-Russell, declare:

1. I am the Plaintiff in this action. If called upon to testify, I could and would competently testify to the matters contained herein based upon my personal knowledge.

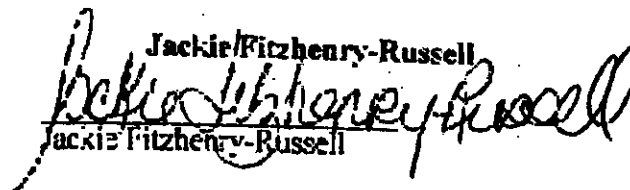
2. I submit this Declaration pursuant to California Code of Civil Procedure section 2215.5 and California Civil Code section 1780(d).

3. As set forth in my complaint, over the last four years, I purchased a number of cases of Canada Dry Ginger Ale from Safeway store in Santa Cruz, California and a Lucky store in Capitola, California.

4. I later learned the Canada Dry Ginger Ale I purchased was not made with real ginger.

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

Executed this 22 day of December 2016, in Santa Cruz, California.

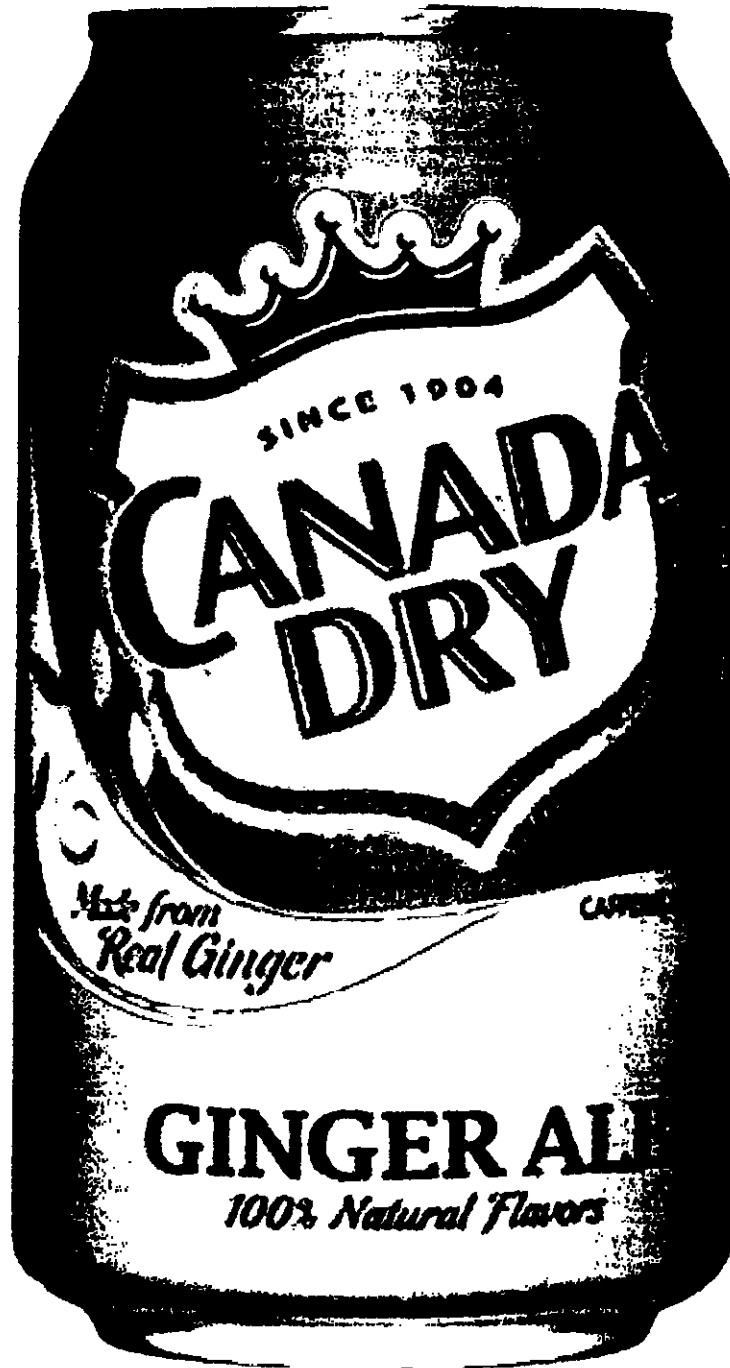
Jackie Fitzhenry-Russell

Jackie Fitzhenry-Russell

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

EXHIBIT B

12/22/2016

imageService (2000x2000)



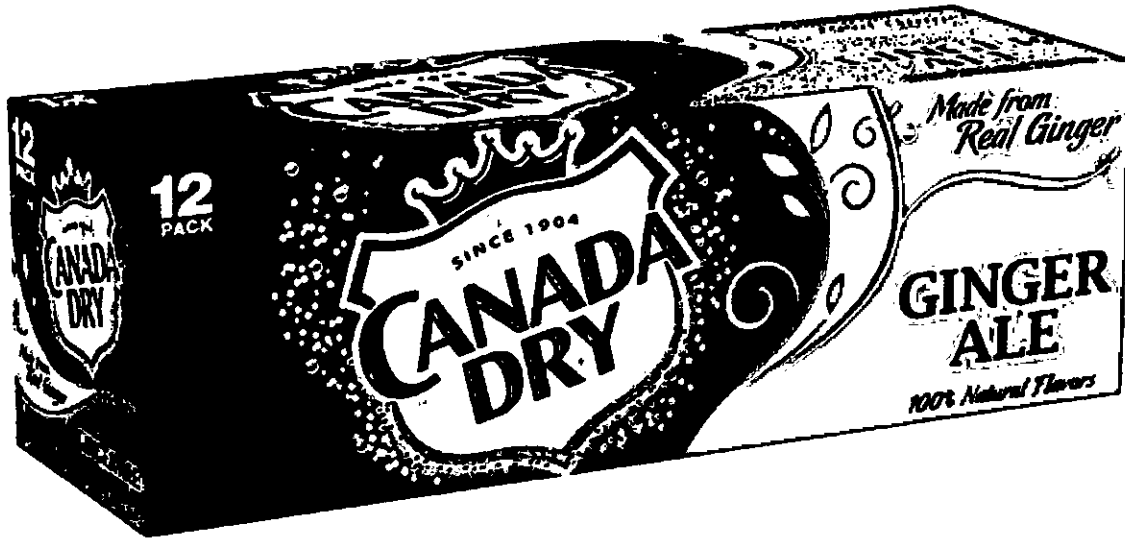
12/22/2016

78000152463.jpg (600x600)



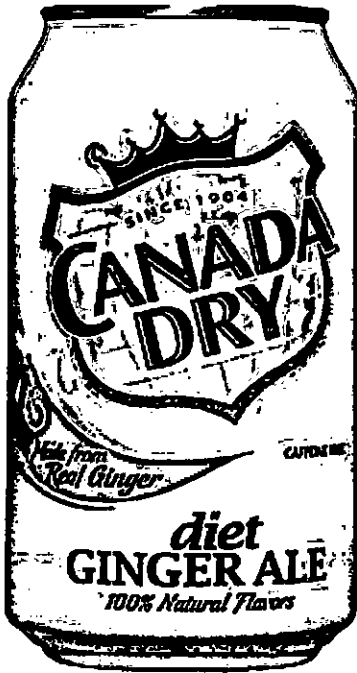
12/22/2016

0078000152160_CL_version_type_large.jpeg (600x600)



12/22/2016

s0426972_sc7 (380x380)



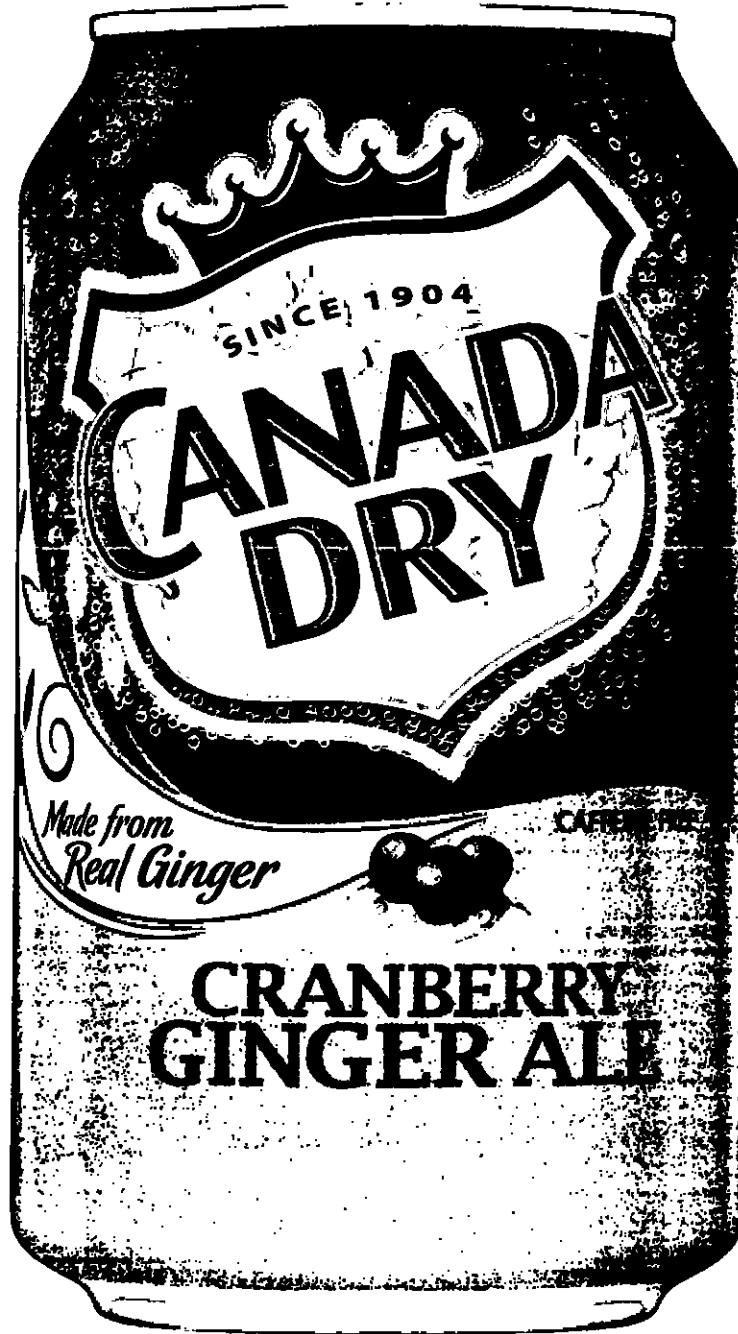
12/22/2016

128654.jpg (460x284)



12/22/2016

37bfe94c-bd64-426b-a5e2-5fb28c4d722f_1.e150eb3537b2c4384e652e3a1d550343.jpeg (3432x3432)



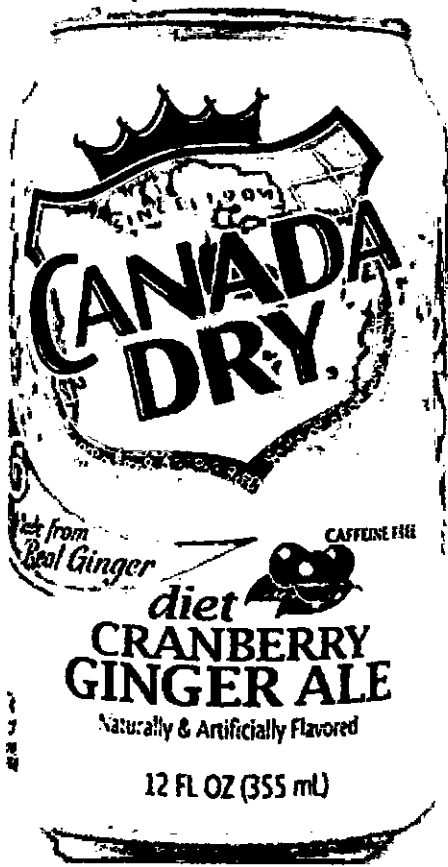
12/22/2016

6a7d8fd1-e962-4da2-80f0-43c5e65c6a54_1.2caa993c9936a56dcca8c706f642540a.jpeg (3394x3394)



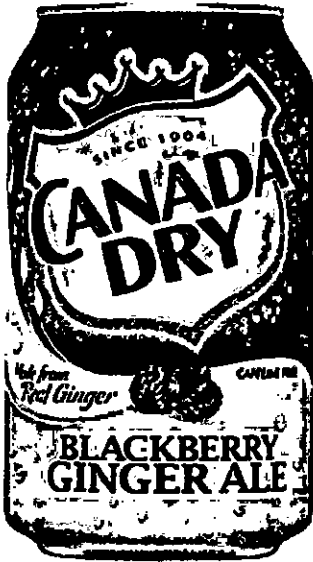
12/22/2016

Canada-Dry-Cranberry-Ginger-Ale-Diet.jpg (235x459)



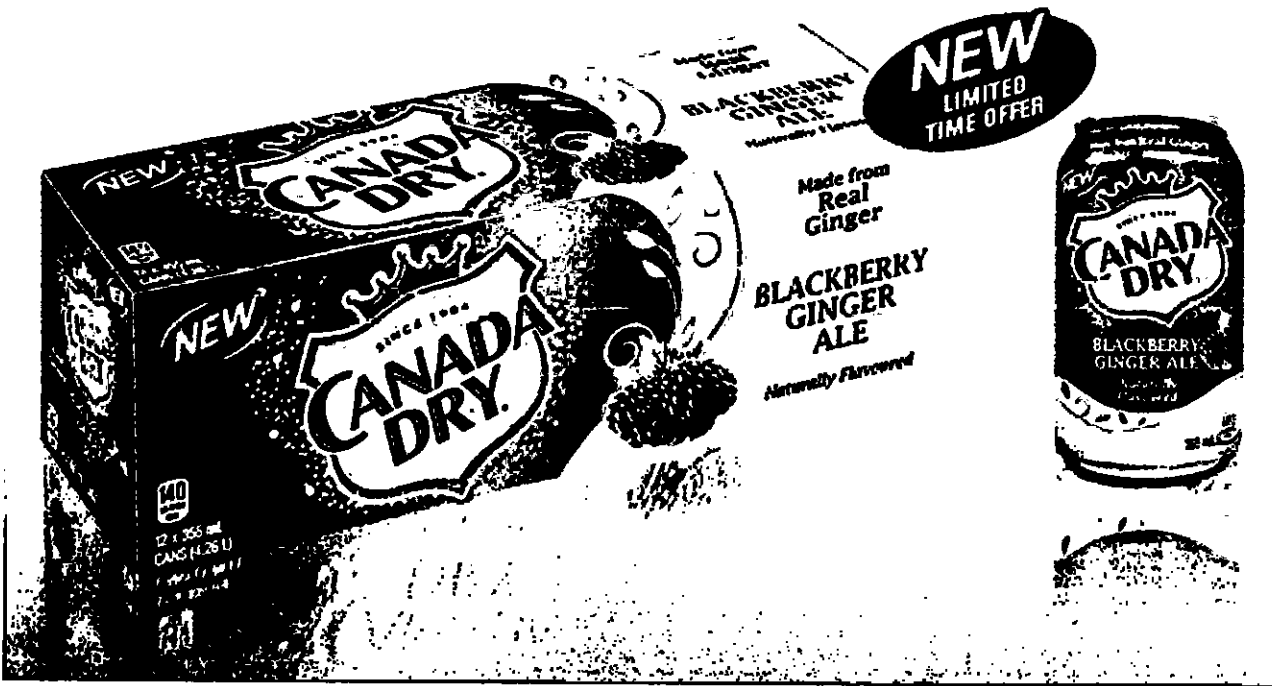
12/22/2016

CANADA_DRY_GINGER_ALE_BLACKBERRY_12.png (175x350)



12/22/2016

Canada-Dry-Blackberry-Ginger-Ale-is-back-for-a-limited-time.jpg (678x509)



CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address)		FOR COURT USE ONLY	
ADAM J. GUTRIDE (#181116) SETH A. SAFIER (#197427) MARIC A. MCCRARY (#262670) KRISTEN G. SIMPLICIO (#3632911) Gutride Safier LLP 100 Pine Street, Suite 1250, San Francisco, CA 94111 TELEPHONE NO: (415)271-6469 FAX NO: (415) 449-6469		FILED 12/28/2016 9:59:17 AM Alex Galvo, Clerk By: Amanda Lucas Deputy, Santa Cruz County	
ATTORNEY FOR (Name): PLAINTIFF JACKIE FITZHENRY-RUSSELL SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Cruz STREET ADDRESS: 701 Ocean Street MAILING ADDRESS: CITY AND ZIP CODE: Santa Cruz, CA 95060 INMARCH NAME: Santa Cruz Courthouse		CASE NUMBER 16CV03345 JUDGE: DEPT:	
CASE NAME: Fitzhenry-Russell v. Dr. Pepper Snapple Group, et al			
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorists (48) Other PIP/D/W/D (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PIP/D/W/D (23) Non-PIP/D/W/D (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PIP/D/W/D tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (16) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (3A) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (3B)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Arbitration/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input checked="" type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
---	--	--

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive
4. Number of causes of action (specify): four
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: December 23, 2016 _____
(TYPE OR PRINT NAME) (SIGNATURE) OF PARTY OR ATTORNEY FOR PARTY

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ Santa Cruz Branch 701 Ocean Street, Room 110 Santa Cruz, CA 95060	<p style="text-align: center;">FILED</p> <p style="text-align: center;">12/28/2016</p> <p style="text-align: center;">Alex Calvo, Clerk</p> <p style="text-align: center;">By: Amanda Lucas</p> <p style="text-align: center;">Deputy, Santa Cruz County</p>
Jackie Fitzhenry-Russell, et al vs Dr. Pepper Snapple Group, Inc., et al	
CASE MANAGEMENT INFORMATION AND SETTING	CASE NO: 16CV03345

This case is in Santa Cruz County's Case Management Program. It is the duty of each party to be familiar with the California Rules of Court and the date, time and place of the first case management conference.

This notice must be served with the summons on all defendants and cross-defendants. Notice of any other pending case management conference must be served on subsequently named defendants and cross-defendants.

Attention Defendant: You have 30 days after the summons is served on you to file a written response to the complaint with the court. The date below does not extend the time to file a response. See the summons for instructions for responding to the summons and complaint. A written response may not be necessary in all cases. To make this determination it is important to seek legal advice and information. See the referrals at the bottom of this form.

The first Case Management Conference hearing date is:

Date: 04/28/2017 Time: 8:30 Santa Cruz Department 5

Address of the Court: 701 Ocean Street, Santa Cruz, California

Telephonic court appearances are provided through CourtCall to the court. To make arrangements to appear at the Case Management Conference by telephone, please call the program administrator for CourtCall at (888) 882-6878 at least five (5) court days prior to the hearing. DO NOT CALL THE COURT.

If you are in need of legal advice or legal information on how to proceed in your case you may call or visit the following resources:

1. Santa Cruz County Bar Association Lawyer Referral Service: Phone 831-425-4755 (Fee based service).
2. Santa Cruz County Law Library: 701 Ocean Street, Room 70 Basement, Santa Cruz, CA 95060 Phone 831-454-2205, www.lawlibrary.org, for hours and other resources.
3. Santa Cruz Superior Court Self Help Center: 1 Second Street, Room 301, Watsonville, CA 95076 Phone 831-786-7200, option 4, www.santacruzcourt.org, for hours and workshop options.
4. Watsonville Law Center: 831-722-2845.

Exhibit B

1 **BAKER BOTTS L.L.P.**
Jonathan A. Shapiro (SBN# 257199)
2 jonathan.shapiro@bakerbotts.com
101 California Street, Suite 3600
3 San Francisco, CA 94111
Telephone: (415) 291-6204
4 Facsimile: (415) 291-6304

5 Van H. Beckwith (*pro hac vice* to be filed)
van.beckwith@bakerbotts.com
6 Jessica Underwood (*pro hac vice* to be filed)
jessica.underwood@bakerbotts.com
7 2001 Ross Avenue
Suite 600
8 Dallas, TX 75201-2980
Telephone: 214-953-6500
9 Facsimile: 214-953-6503

10 Attorneys for Defendants
DR PEPPER SNAPPLE GROUP, INC. and
11 DR PEPPER/SEVEN UP, INC.

12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 JACKIE FITZHENRY-RUSSELL AND
15 ROBIN DALE, on behalf of themselves and
all others similarly situated,

16 Plaintiffs,

17 v.

18 DR PEPPER SNAPPLE GROUP, INC., DR
19 PEPPER/SEVEN UP, INC., and DOES 1
through 50,

20 Defendants.
21

Case No. _____

**DECLARATION OF DAVID FALK IN
SUPPORT OF REMOVAL TO FEDERAL
COURT PURSUANT TO 28 U.S.C.
§§ 1332(d), 1441(b), AND 1446.**

22
23
24
25
26
27
28

1 I, David Falk, declare as follows:

2 1. I am over 21 years of age and competent to make this declaration. I have personal
3 knowledge of the facts set forth herein, which are known to me to be true and correct. If called as
4 a witness, I could and would competently testify to the facts below.

5 2. I am employed as the Vice President of Brand & Content Marketing for the
6 subsidiaries of Dr Pepper Snapple Group, Inc. ("DPSG"), including Dr Pepper/Seven Up, Inc.
7 ("DPSU"). Both DPSG and DPSU are defendants in the above-captioned lawsuit. My office is
8 located at 5301 Legacy Drive, Plano, Texas 75024, which is the headquarters of DPSG and its
9 subsidiaries, including Defendant DPSU.

10 3. In my role, I am personally knowledgeable about, and bear responsibility for, the
11 Canada Dry brand nationally, including the marketing, advertising, labeling, distribution, and
12 sales of Canada Dry products in California (and elsewhere). I am personally knowledgeable
13 about five beverages identified in Paragraph 21 of the Complaint, namely, Canada Dry Ginger
14 Ale, Canada Dry Diet Ginger Ale, Canada Dry Blackberry Ginger Ale, Canada Dry Cranberry
15 Ginger Ale, and Diet Cranberry Ginger Ale.¹ (For ease of reference, the six products identified
16 in Paragraph 21 are collectively "CD Products.")

17 4. I understand that Plaintiffs in this case have asserted claims and seek relief on
18 behalf of themselves and a putative class of consumers they define as all those who purchased the
19 CD Products during the period December 23, 2012 through the present (or the alleged "Class
20 Period").

21 5. Among other allegations, Plaintiffs and the putative class allegedly "suffered
22 damages, including, without limitation, the amount they paid" for the CD Products. Compl.
23 ¶ 105; *see also id.* ¶ 115 ("plaintiffs and the class members lost the amount they paid" for CD
24 Products).

25 6. The aggregate "amount paid" by Plaintiffs and the putative class for the CD
26 products in California during the alleged Class Period well exceeds \$5,000,000.

27 _____
28 ¹ I am not familiar with "Canada Dry Ginger Ale - Made With Real Sugar," which is the sixth
product identified in Paragraph 21 of the Complaint.

1 7. Indeed, California sales of Canada Dry Diet Ginger Ale -- which is just *one* of the
2 six CD Products for which Plaintiffs and the putative class seek to recover the "amount they paid"
3 -- exceeded \$7,250,000 *in each* of the four calendar years embraced by the Class Period.

4 8. Plaintiffs also seek to "enjoin" Defendants from, among other things, advertising,
5 labelling, distributing, and selling CD Products as "Made from Real Ginger." Compl. ¶¶ 85, 98,
6 119.

7 9. If so enjoined, the cost of complying with such an injunction would be substantial.
8 Even the cost of removing existing products bearing the "Made from Real Ginger" label from
9 retailers in California would well exceed \$75,000. (Still greater expense would be incurred to
10 undertake other steps that would be required to comply with such an injunction sought by the
11 Complaint.)

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

13 Executed in Plano, Texas this 1st day of February, 2017.

14
15
16 
17 _____
18 Dave Falk

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)
(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS
County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Table with columns: CITIZENSHIP, PTF, DEF

IV. NATURE OF SUIT (Place an "X" in One Box Only)
Grid with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation-Transfer, 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Brief description of cause:

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions): JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE: SIGNATURE OF ATTORNEY OF RECORD: /s/ Jonathan Shapiro