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*Attorneys for Defendant*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL, ON  
BEHALF OF HERSELF AND ALL  
OTHERS SIMILARLY SITUATED

Plaintiff,

v.

THE COCA-COLA COMPANY,

Defendant.

Case No. 5:17-cv-00603

**NOTICE OF REMOVAL**

PLEASE TAKE NOTICE that Defendant The Coca-Cola Company (“Coca-Cola” or “Defendant”) hereby notices removal of this civil action pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453 from the Superior Court of the State of California, County of Santa Cruz, to the United States District Court for the Northern District of California, San Jose Division. The grounds for removal are set forth below.

**BACKGROUND**

1. Named Plaintiff Jackie Fitzhenry-Russell is a resident of Santa Cruz, California.  
(Compl. ¶ 5.)

2. Defendant, Coca-Cola, is a Delaware corporation with its principal place of business in Georgia. (Compl. ¶ 6.) Defendant markets the soft drink Seagram’s® Ginger Ale (“the Product”) across the United States.

3. On December 28, 2016, Plaintiff commenced this action by filing a Class Action Complaint in California Superior Court in the County of Santa Cruz. A true and correct copy of the Complaint is attached hereto as Exhibit A.

4. On January 5, 2017, Defendant was served with the Summons and Complaint. A true and correct copy of the Proof of Service is attached hereto as Exhibit B.

5. Plaintiff’s claims in this case relate to the statement “MADE WITH REAL GINGER,” which appears on the label and packaging of the Product. Although the Product complies with all applicable federal rules and regulations governing food labeling and ingredients, Plaintiff contends that the phrase “MADE WITH REAL GINGER” would lead a reasonable consumer to believe that the Product contains “real ginger root,” and that drinking the Product confers “the health benefits associated with consuming real ginger root.” (Compl. ¶ 2 (emphasis added).)

6. Plaintiff now seeks to assert claims under the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.*, the False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*, and the Unfair Competition Law, *Id.* § 17200, *et seq.*, on behalf of a putative class of consumers consisting of “[a]ll persons”—without geographic limitation—who purchased the Product between December 23, 2012 and the present (“the Class Period”). (Compl. ¶¶ 63, 71–78, 79–89, 98–110.) Plaintiff also purports to assert a class-wide cause of action for common-law fraud. (Compl. ¶¶ 90–97.)

7. This Notice of Removal is timely because it is filed within thirty days of Defendant’s receipt of the Complaint by service, as required by 28 U.S.C. § 1446(b).

8. Removal to the San Jose Division of the Northern District of California is proper because it is the division within which the state action is pending. *See* 28 U.S.C. § 1446(a); Civil L-R 3-2(e).

9. In accordance with 28 U.S.C. § 1446(b), Defendant is filing with the state court, and

serving on the Plaintiff, a Notice of Removal. Promptly upon filing this Notice of Removal, copies will be filed with the Clerk of Court in the state court action.

### **BASIS FOR REMOVAL JURISDICTION**

10. This Court has jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”), Pub L. 109-2, 119 Stat. 4 (2005) (“CAFA”), codified in various sections of Title 28 of the United States Code including 28 U.S.C. §§ 1332(d) and 1453.

11. CAFA provides that a class action against a non-governmental entity may be removed to federal court if: (1) the number of proposed class members is not less than 100; (2) any member of the proposed class of plaintiffs is a citizen of a state different from any defendant; and (3) the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5), & 1453(b).

12. As set forth below, all of the requirements for removal are satisfied in this case.<sup>1</sup>

#### **A. There are more than 100 Putative Class Members.**

13. CAFA’s first requirement is that the proposed class comprises at least 100 members. *See* 28 U.S.C. § 1332(d)(5).

14. Plaintiff’s proposed class includes “[a]ll persons who, between December 23, 2012 and the present, purchased any of Defendants’ the Product [*sic*].” (Compl. ¶ 63.)

15. Plaintiff admits that, although she “does not know the exact size,” the class she purports to represent consists of “more than 100 persons.” (Compl. ¶ 65.)

16. Defendant’s sales data relating to the Product confirm that the potential class is greater than 100 consumers. *See* Exhibit C (Declaration of Kevin Hamilton).

17. Accordingly, the putative class satisfies the numerosity requirement for CAFA jurisdiction. *See* 28 U.S.C. § 1332(d)(5).

#### **B. Minimal Diversity Exists Between the Parties.**

18. CAFA’s second requirement, that any one member of the proposed class be a citizen of a state different from any defendant, is also satisfied. *See id.* § 1332(d)(2).

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<sup>1</sup> Removal is also proper pursuant to 28 U.S.C. § 1332(a) because there is complete diversity between Plaintiff and Defendant and the amount in controversy exceeds \$75,000.

19. CAFA requires only “minimal” diversity, *i.e.*, at least one plaintiff must be diverse in citizenship from any defendant. *Id.* § 1332(d)(2)(A).

20. Plaintiff alleges that she resides in Santa Cruz, and is thus a citizen of California for jurisdiction purposes. (Compl. ¶ 5.) She also purports to represent a nationwide class of consumers who purchased the Product over the last five years. (Compl. ¶ 63.) As such, the putative class likely includes citizens of all 50 states.

21. At the time this lawsuit was filed and at all times since, Defendant was and is a Delaware corporation with its principal place of business in Atlanta, Georgia. (Compl. ¶ 6.) Therefore, at the time this action was filed and at all times since, Defendant was and is a citizen of Delaware and Georgia. *See* 28 U.S.C. § 1332(c)(1).

22. There is thus diversity of citizenship between Plaintiff and Defendant, *see* 28 U.S.C. § 1332(d)(2), which not only satisfies CAFA’s minimal diversity requirement but also precludes application of the “local controversy” or “home state” exceptions of 28 U.S.C. §§ 1332(d)(3) and (d)(4).

**C. The Amount in Controversy Exceeds \$5,000,000.**

23. Third, and finally, CAFA requires that the “matter in controversy [must] exceed[] the sum or value of \$5,000,000, exclusive of interest and costs.” *See* 28 U.S.C. § 1332(d)(2). “In any class action, the claims of the individual class members must be aggregated to determine whether the matter in controversy” meets this threshold. *Id.* § 1332(d)(6).

24. For purposes of removal, a defendant need only make a “short and plain statement” showing that the grounds for federal jurisdiction are met. *Id.* § 1446; *see Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 553–54 (2014). The Supreme Court has explained that this requires merely a “plausible allegation” that the amount in controversy is greater than the jurisdictional threshold, not evidentiary submissions. *Dart*, 135 S. Ct. at 554. Even where, as here, the complaint does not specify the amount of damages sought, a defendant seeking removal of a putative class action is only required to show by a preponderance of evidence that the aggregate amount in controversy exceeds the jurisdictional minimum.” *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 981 (9th Cir. 2013); *accord Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676,

683 (9th Cir. 2006).

25. Defendant disputes all liability and damages. However, given the definition of the putative class and the volumes of sales of the Product that occurred during the putative Class Period, Plaintiff's claims on behalf of herself and her proposed class for compensatory and punitive damages, and injunctive relief, if granted, would well exceed \$5,000,000.

**1. A Reasonable Estimate of Compensatory Damages Exceeds \$5,000,000.**

26. Plaintiff has failed to specify the amount of compensatory damages sought. (*See generally* Compl. Prayer for Relief.)

27. However, Plaintiff alleges that, but for the challenged advertising statement, she and the putative class members "would not have purchased" the Product—"or, at a very minimum, she would have paid less for the soft drink." (Compl. ¶ 59.)

28. Plaintiff also seeks "full restitution" of the purchase price for the Product paid by members of the class during the Class Period. (Compl. ¶¶ 87, 108, Prayer for Relief ¶ B.1.)

29. Plaintiff's theory of damages thus implicates Defendant's nationwide sales of the Product in setting the amount in controversy. Using data and records that Defendant maintains in the normal course of business, Defendant has conducted an analysis of sales of the Product to consumers in California over the Class Period, and determined that Defendant's revenues from the Plaintiff's home state alone were in excess of \$5,000,000. *See* Exhibit C.<sup>2</sup> When nationwide sales of the Product to members of the class across all states are taken into account, that number increases multi-fold, and far surpasses the minimum amount-in-controversy necessary to support removal under CAFA. *See id.*

30. Accordingly, the amount in controversy exceeds the jurisdictional threshold based on estimated compensatory damages alone. In addition, Plaintiff requests punitive damages for alleged fraud under California law. (Compl. Prayer for Relief ¶ C.2.)

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<sup>2</sup> In determining whether the amount-in-controversy requirement is met, the court may consider evidence outside the complaint, including affidavits or declarations, or other "summary-judgment-type evidence relevant to the amount in controversy at the time of removal." *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (citation omitted)).

1                   **2. The Value of an Injunction Further Supports CAFA Jurisdiction.**

2           31. The potential value of injunctive relief is further aggregated with compensatory  
3 damages to determine if the amount in controversy exceeds the CAFA threshold. *Cohn v. Petsmart,*  
4 *Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). The amount in controversy in class actions requesting an  
5 injunction may be determined by the cost of compliance by Defendant. *See id.*

6           32. In this case, Plaintiff seeks an injunction pursuant to the CLRA, the FAL, and the  
7 UCL enjoining Defendant from using certain ingredients or making particular advertising statements  
8 in conjunction with “any ginger beverage.” (*See* Compl. ¶¶ 76, 89, 100, Prayer for Relief ¶¶ A.1–4,  
9 B.2.)

10          33. The potential costs to Defendant of complying with such an injunction would be  
11 significant. Depending on the specific relief awarded, it is possible that Defendant would have to  
12 redesign the Product’s packaging—or the packaging of other products not at issue in this case—  
13 and/or implement changes to the manufacturing process. These costs, though difficult to quantify,  
14 could easily total hundreds of thousands, or even millions of dollars.

15          34. Accordingly, based on Defendant’s potential liability for damages and injunctive  
16 relief, the amount in controversy easily exceeds \$5,000,000.

17                   **COCA-COLA HAS COMPLIED WITH ALL PREREQUISITES FOR REMOVAL.**

18          35. For all of the foregoing reasons, this action is properly removed to this Court.

19          36. Defendant reserves the right to amend or supplement this Notice of Removal, and  
20 reserves all rights and defenses, including those available under Federal Rule of Civil Procedure 12.

21 ///

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23 ///

1 WHEREFORE, Defendant respectfully removes this action from the Superior Court of the  
2 State of California, County of Santa Cruz (Case No. 16CV03346), to this Court pursuant to 28  
3 U.S.C. §§ 1332, 1441, 1446, and 1453. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of  
4 Removal is being contemporaneously filed with the Clerk of the Santa Cruz County Superior Court  
5 and served upon plaintiff.

6  
7 Dated: February 6, 2017

Respectfully submitted,

8 /s/ Tammy B. Webb

9 Tammy B. Webb  
SHOOK HARDY & BACON L.L.P.  
One Montgomery, Suite 2700  
10 San Francisco, CA 94104  
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12  
13 Steven A. Zalesin (*pro hac vice* pending)  
Michelle W. Cohen (*pro hac vice* pending)  
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sazalesin@pbwt.com  
17 mcohen@pbwt.com

18 *Attorneys for Defendant*  
19 *The Coca-Cola Company*  
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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**

JACKIE FITZHENRY-RUSSELL, on behalf of herself and others similarly situated

(b) County of Residence of First Listed Plaintiff **Santa Cruz, CA**

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, Email and Telephone Number)

Adam J. Gutride / Gutride Safier LLP, 100 Pine Street, Suite 1250  
San Francisco, CA 94111 ; Tel: 415.271.6469

**DEFENDANTS**

THE COCA-COLA COMPANY

County of Residence of First Listed Defendant **Fulton County, GA**

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: INLAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Tammy B. Webb, SBN 227593  
Shook Hardy & Bacon L.L.P., One Montgomery, Suite 2700  
San Francisco, CA 94104; Tel: 415.544.1900

**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)

- |   |                                       |                            |   |                            |                                       |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment Of Veteran's Benefits <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC § 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC § 158 <input type="checkbox"/> 423 Withdrawal 28 USC § 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC § 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
		<b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC § 7609	

**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
- ☐ 6 Multidistrict Litigation-Transfer
- ☐ 8 Multidistrict Litigation-Direct File
- (Specify)

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. sections 1332, 1441, 1446 & 1453

Brief description of cause: Putative class action under California consumer protection statutes including the Consumer Legal Remedies Act, the False Advertising Law, and the Unfair Competition Law.

**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: February 6, 2017

SIGNATURE OF ATTORNEY OF RECORD: /s/ Tammy B. Webb



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Tammy B. Webb, SBN 227593  
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Michelle W. Cohen (*pro hac* to be filed)  
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*Attorneys for Defendant*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL, ON  
BEHALF OF HERSELF AND ALL OTHERS  
SIMILARLY SITUATED

Plaintiff,

v.

THE COCA-COLA COMPANY,

Defendant.

Case No. 5:17-cv-00603

**DECLARATION OF TAMMY B.  
WEBB IN SUPPORT OF  
DEFENDANT'S NOTICE OF  
REMOVAL**

I, Tammy B. Webb, hereby declare as follows:

1. I am an attorney duly licensed to practice before all the Courts of this State, and I am an attorney with the law firm of Shook, Hardy & Bacon L.L.P., counsel for record for Defendant The Coca-Cola Company in this action. The statements in this declaration are made on the basis of my own personal knowledge and I could, and would, competently testify thereto if called upon to do so. This declaration is made in support of Defendant's Notice of Removal.

2. Attached as **Exhibit A** is a true and correct copy of the Complaint filed in *Fitzhenry-Russell v. The Coca-Cola Company*, Santa Cruz County Superior Court, Case No. 16-CV-03346.

1           3.       Attached as **Exhibit B** is a true and correct copy of the Proof of Service on Defendant  
2 of the Summons and Complaint, dated January 5, 2017.

3           4.       Attached as **Exhibit C** is a true and correct copy of the Declaration of Kevin  
4 Hamilton in support of Defendant's Notice of Removal, dated February 6, 2017.

5           I declare, under penalty of perjury of the laws of the State of California, on this 6<sup>th</sup> day of  
6 February, 2017 in San Francisco, California, that the foregoing is true and correct.

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8                               /s/ Tammy B. Webb  
9                               Tammy B. Webb  
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# **Exhibit A**

**GUTRIDE SAFIER LLP**

ADAM J. GUTRIDE (State Bar No. 181446)  
SETH A. SAFIER (State Bar No. 197427)  
MARIE A. MCCRARY (State Bar No. 262670)  
KRISTEN G. SIMPLICIO (State Bar No. 263291)  
100 Pine Street, Suite 1250  
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Attorneys for Plaintiff

FILED  
12/28/2016 10:00:20 AM  
Alex Galvo, Clerk  
By: Alexandra Lucas  
Deputy, Santa Cruz County

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SANTA CRUZ**

JACKIE FITZHENRY-RUSSELL, an  
individual, on behalf of herself, the general  
public and those similarly situated,

Plaintiff,

v.

THE COCA COLA COMPANY, and DOES 1-  
50,

Defendants.

CASE NO. 16CV03346

UNLIMITED CIVIL CASE

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

JURY TRIAL DEMANDED

## INTRODUCTION

1  
2 1. Plaintiff Jackie Fitzhenry-Russell, by and through her counsel, brings this class  
3 action against Defendants The Coca Cola Company and Does 1-50, inclusive, on behalf of  
4 herself, the general public, and those similarly situated, for violations of the Consumer Legal  
5 Remedies Act and Unfair Competition Law and false advertising, fraud, deceit and/or  
6 misrepresentation. The following allegations are based upon information and belief, including  
7 the investigation of Plaintiffs' counsel, unless stated otherwise.

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

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

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

## PARTIES

27  
28 5. Jackie Fitzhenry-Russell ("Plaintiff") is, and at all times alleged in this Class

1 Action Complaint was, an individual and a resident of Santa Cruz, California.

2 6. Defendant The Coca Cola Company is a corporation existing under the laws of the  
3 State of Delaware, having its principal place of business in Atlanta, Georgia.

4 7. The true names and capacities of Defendants sued as Does 1 through 50, inclusive,  
5 are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names pursuant to  
6 section 474 of the California Code of Civil Procedure. Plaintiff will seek leave of Court to amend  
7 this Class Action Complaint when said true names and capacities have been ascertained.

8 8. The Parties identified in paragraphs 6 - 8 of this Class Action Complaint are  
9 collectively referred to hereafter as "Defendants."

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

15 10. At all times herein mentioned, each of the Defendants was a member of, and  
16 engaged in, a joint venture, partnership and common enterprise, and acted within the course and  
17 scope of, and in pursuance of, said joint venture, partnership and common enterprise.

18 11. At all times herein mentioned, the acts and omissions of each of the Defendants  
19 concurred and contributed to the various acts and omissions of each and all of the other  
20 Defendants in proximately causing the injuries and damages as herein alleged.

21 12. At all times herein mentioned, each of the Defendants ratified each and every act  
22 or omission complained of herein.

23 13. At all times herein mentioned, each of the Defendants aided and abetted the acts  
24 and omissions of each and all of the other Defendants in proximately causing the damages, and  
25 other injuries, as herein alleged.

26 **JURISDICTION AND VENUE**

27 14. This action is brought by Plaintiff pursuant, *inter alia*, to the California Business  
28 and Professions Code, section 17200, *et seq.* Plaintiff and Defendants are "persons" within the

1 meaning of the California Business and Professions Code, section 17201.

2 15. The injuries, damages and/or harm upon which this action is based, occurred or  
3 arose out of activities engaged in by Defendants within, affecting, and emanating from, the State  
4 of California. Defendants regularly conduct and/or solicit business in, engage in other persistent  
5 courses of conduct in, and/or derive substantial revenue from products provided to persons in the  
6 State of California.

7 16. Defendants have engaged, and continue to engage, in substantial and continuous  
8 business practices in the State of California, including in the County of Santa Cruz.

9 17. In accordance with California Civil Code Section 1780(d), Plaintiff concurrently  
10 files herewith a declaration establishing that, at various times throughout the class period, she  
11 purchased Seagram's Ginger Ale in Santa Cruz, California and Capitola, California. (Plaintiff's  
12 declaration is attached hereto as Exhibit A.)

13 18. Plaintiff accordingly alleges that jurisdiction and venue are proper in this Court.

#### 14 **SUBSTANTIVE ALLEGATIONS**

##### 15 **Defendants' Ginger Ales.**

16 19. Defendants manufacture, distribute, market, advertise, and sell soft drinks in the  
17 United States under several brand names, including "Seagram's." Defendants' packaging for the  
18 its Seagram's Ginger Ale predominately, uniformly, and consistently state on the principal  
19 display panel of the product labels that it is "MADE FROM REAL GINGER" (referred to herein  
20 as the "Product").

21 20. The representation that the Product is "MADE FROM REAL GINGER" was  
22 uniformly communicated to Plaintiff and every other person who purchased any of the Products  
23 in California. An exemplar the Product's product label is attached hereto as Exhibit B. The same  
24 or substantially similar product label has appeared on each bottle or can sold (as those shown in  
25 Exhibit B) during the entirety of the Class Period.

26 21. As described in detail below, Defendants' advertising and labeling of the Product,  
27 as made from "REAL GINGER" is false, misleading, and intended to induce consumers to  
28 purchase the ginger ales, at a premium price, while ultimately failing to meet consumer



1 expectations. These representations deceive and mislead reasonable consumers into believing that  
2 the Product is made from, and contain, real ginger root.

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

#### 8 **Consumer Demand for Real Ginger**

9 23. Many American consumers are health conscious and seek wholesome, natural  
10 foods to keep a healthy diet, so they routinely take nutrition information into consideration in  
11 selecting and purchasing food items. Product package labels convey nutrition information to  
12 consumers that they use to make purchasing decisions. As noted by FDA commissioner Margaret  
13 Hamburg during an October 2009 media briefing, “[s]tudies show that consumers trust and  
14 believe the nutrition facts information and that many consumers use it to help them build a  
15 healthy diet.” Consumers attribute a myriad of benefits to ginger and foods made from real ginger  
16 root.

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

#### 24 **Federal and State Regulations Governing Food Labeling**

25 25. The Food and Drug Administration has defined “natural flavor” to mean “the  
26 essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of  
27 roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice,  
28 fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar

1 plant material, meat, seafood, poultry, eggs, dairy Product, or fermentation products thereof,  
2 whose significant function in food is flavoring rather than nutritional.” 21 C.F.R. 501.22(a)(3). In  
3 other words, a “natural flavor” is one that contains some oil, protein, or essence from a plant or  
4 animal. But it bears little resemblance to the actual plant or animal from which it is derived.  
5 Rather, natural flavors are made in a laboratory by scientists who make determinations on how to  
6 replicate a flavor using chemicals found in nature.

7         26. While it may be that ginger root is used in the creation of the natural flavor, it is  
8 not ginger as a reasonable consumer would understand it. Rather, the scientists that created the  
9 “natural flavor” added to the Product would have isolated proteins from the cells and tissue of the  
10 ginger root or extracted oils or essences from the ginger root. But because those isolated  
11 compounds may not actually taste like ginger, the scientist would have then combined those  
12 extractions with any number of other extractions from other plants and animals to create a  
13 flavoring substance that tastes like ginger. See [https://www.scientificamerican.com/article/what-](https://www.scientificamerican.com/article/what-is-the-difference-be-2002-07-29/)  
14 [is-the-difference-be-2002-07-29/](https://www.scientificamerican.com/article/what-is-the-difference-be-2002-07-29/) (describing the process for creating natural flavors) (last  
15 accessed October 21, 2016).

16         27. Identical federal and California laws regulate the content of labels on packaged  
17 food and require truthful, accurate information on the labels of packaged foods. The requirements  
18 of the federal Food, Drug & Cosmetic Act (“FDCA”), and its labeling regulations, including  
19 those set forth in 21 C.F.R. §§ 101 and 102, were adopted by the California legislature in the  
20 Sherman Food Drug & Cosmetic Law (the “Sherman Law”). California Health & Safety Code §  
21 110100 (“All food labeling regulations and any amendments to those regulations adopted  
22 pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be  
23 the food labeling regulations of this state.”). The federal laws and regulations discussed below are  
24 applicable nationwide to all sales of packaged food Product. Additionally, no state imposes  
25 different requirements on the labeling of packaged food for sale in the United States.

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

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

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

14           31. Under California law, a food product that is “misbranded” cannot legally be  
 15 manufactured, advertised, distributed, sold, or possessed. Misbranded Product has no economic  
 16 value and are legally worthless.

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

20 **Defendants’ Marketing and Labeling of its Ginger Ales Violates State and Federal Food**  
 21 **Labeling Laws**

22           33. The Product is unlawful, misbranded and violate the Sherman Law, California  
 23 Health & Safety Code § 110660, *et seq.*, because the Product’s labels include the phrase “MADE  
 24 WITH REAL GINGER,” even though they are not made using real ginger. Instead, the Product is  
 25 flavored with a complex chemical flavoring that is manufactured to mimic the taste of ginger, and  
 26 was created not by using actual ginger root, but in a laboratory through the isolation of proteins,  
 27 essences, and oils from the cells and tissues of plants and animals and combining them in such a  
 28 way as to mimic the taste of ginger as a consumer would recognize it. The Product is not made

1 from, and do not contain, real ginger as a reasonable consumer would understand it to mean, nor  
2 do the products contain any of the health benefits that would be obtained if real ginger root were  
3 used or present.

4 34. Defendants' marketing, advertising, and sale of the Product violates the false  
5 advertising provisions of the Sherman Law (California Health & Safety Code § 110390, *et. seq.*),  
6 including but not limited to:

- 7 a. Section 110390, which makes it unlawful to disseminate false or misleading food  
8 advertisements that include statements on products and product packaging or  
9 labeling or any other medium used to directly or indirectly induce the purchase of  
10 a food product;
- 11 b. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or  
12 offer to sell any falsely or misleadingly advertised food; and
- 13 c. Sections 110398 and 110400, which make it unlawful to advertise misbranded  
14 food or to deliver or proffer for delivery any food that has been falsely or  
15 misleadingly advertised.

16 35. Defendants' marketing, advertising, and sale of the Product violates the  
17 misbranding provisions of the Sherman Law (California Health & Safety Code § 110660, *et.*  
18 *seq.*), including but not limited to:

- 19 d. Section 110665 (a food is misbranded if its labeling does not conform with the  
20 requirements for nutrition labeling as set forth in 21 U.S.C. Sec. 343(q));
- 21 e. Section 110705 (a food is misbranded if words, statements and other information  
22 required by the Sherman Law to appear food labeling is either missing or not  
23 sufficiently conspicuous);
- 24 f. Section 110740 (a food is misbranded if it contains artificial flavoring, artificial  
25 coloring and chemical preservatives but fail to adequately disclose that fact on  
26 their labeling);
- 27 g. Section 110760, which makes it unlawful for any person to manufacture, sell,  
28 deliver, hold, or offer for sale any food that is misbranded;

1 h. Section 110765, which makes it unlawful for any person to misbrand any food;  
2 and

3 i. Section 110770, which makes it unlawful for any person to receive in commerce  
4 any food that is misbranded or to deliver or proffer for delivery any such food.

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

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

10 37. A reasonable consumer would expect that the Product contains what Defendants  
11 identifies them to contain on the product labels. A reasonable consumer would expect that when  
12 Defendants label the Product as being "MADE WITH REAL GINGER," the soft drinks are made  
13 with, and contain, real ginger as commonly understood and would not be contrary to the policies  
14 or regulations of the State of California and/or the FDA.

15 38. Moreover, Defendants do not disclose on the product labels that the Product is  
16 flavored with a chemical compound that was manufactured to mimic the flavor of ginger.  
17 Consumers lack the meaningful ability to test or independently ascertain the truthfulness of  
18 Defendants' food labeling claims, especially at the point of sale. Consumers would not know the  
19 true nature of the ginger flavoring merely by reading the ingredient label; its discovery requires  
20 investigation beyond the grocery store and knowledge of food chemistry beyond that of the  
21 average consumer. An average consumer does not have the specialized knowledge necessary to  
22 ascertain that the ginger flavor in the soft drink is not from the presence of real ginger in the soft  
23 drink but instead comes from the chemical compounded added to the drink to make it taste like  
24 ginger. That, combined with Defendants' active concealment in representing the Product as being  
25 "MADE FROM REAL GINGER," and not disclosing otherwise, gave the average reasonable  
26 consumer no reason to suspect that Defendants' representations on the packages were not true,  
27 and therefore consumers had no reason to investigate the soft drinks contained real ginger. Thus,  
28 reasonable consumers relied on Defendants' representations regarding the nature of the Product.

1 Such reliance by consumers is also eminently reasonable, since food companies are prohibited  
2 from making false or misleading statements on their products under federal law.

3 39. Defendants intend and know that consumers will and do rely upon food labeling  
4 statements in making their purchasing decisions. Label claims and other forms of advertising and  
5 marketing drive product sales, particularly if placed prominently on the front of product  
6 packaging, as Defendants have done with the “MADE WITH REAL GINGER” claim.

7 **Defendants’ Website and Other Marketing Confirms That Defendants Intends to Deceive**  
8 **Consumers**

9 40. Defendants’ own long standing advertising and marketing materials show that  
10 Defendants intended to deceive consumers into believing the false and deceptive packaging of the  
11 Product.

12 41. Defendants’ advertising campaign typically shows a picture of the bottle or can of  
13 the Product, where the words “MADE WITH REAL GINGER” Are prominently featured. The  
14 can with those words appears both on Defendants’ websites and in a variety of print  
15 advertisements .

16 42. Defendants also permit and encourage their marketing partners, including grocery  
17 stores, to advertise, market, advertise and sell the Product as a soft drink “MADE FROM REAL  
18 GINGER.” Defendants provide their marketing partners information, including posters, signs, end  
19 cap displays, etc., that specifically represent that the Product is “MADE FROM REAL  
20 GINGER.” Further, in sales sheets, sales presentations, and other marketing materials,  
21 Defendants state that the Product is “MADE FROM REAL GINGER.”

22 43. In short, Defendants’ advertising and marketing campaign confirms that  
23 Defendants intend that consumers be effectively deceived by Defendants’ misrepresentations on  
24 the Product’s product labels. More specifically, Defendants intend that consumers who read the  
25 Product’s labels believe that the Product is made from, and contain, real ginger.

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

28 44. Defendants do not use real ginger in their Product as doing so is more expensive  
than using flavoring compound. In recent years, numerous studies have found the presence of



1 lead in ginger, and manufacturers and retailers of other products containing ginger root, such as  
2 cookies and candies, have been sued by the California Attorney General. Thus, the diligent  
3 sourcing and testing procedures that would be required when using real ginger to ensure the  
4 product they are selling is safe are more expensive to adopt than simply using “natural flavor.” In  
5 addition, the cost of real ginger has increased in recent years, due to changes in weather in China,  
6 which produces 75% of the world’s ginger. *See* [http://www.producenews.com/news-dep-](http://www.producenews.com/news-dep-menu/test-featured/9579-ginger-prices-skyrocket-on-shrinking-supply)  
7 [menu/test-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,  
8 2016).

9       45. In the last decade, in response to news reports about the dangers of high fructose  
10 corn syrup and soda’s role in contributing to the increased rates of obesity and diabetes in this  
11 country, many consumers are drinking less soda, and are seeking out instead, healthier beverages,  
12 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)  
13 [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  
14 sales are declining, one segment of the category is on the rise – small companies and brands that  
15 emphasize their use of natural ingredients, such as Reed’s, Bruce Cost, Maine Root, and Grown  
16 Up Soda have entered the market. In 2014, the Specialty Food Association noted that healthy  
17 beverages were growing in popularity, as was the market for more sophisticated, specialty sodas  
18 containing all natural ingredients. *See* [https://www.specialtyfood.com/news/article/rise-healthy-](https://www.specialtyfood.com/news/article/rise-healthy-beverages/)  
19 [beverages/](https://www.specialtyfood.com/news/article/rise-healthy-beverages/) (last accessed October 21, 2016). Thus, many small craft soda companies are  
20 flourishing in response to increased consumer demand for alternatives to sodas made with high  
21 fructose corn syrup, artificial ingredients, and preservatives. Facing a public hostile to “Big Soda”  
22 and finding its sales dwindling due to the newer, healthier brands, Defendants have an incentive  
23 to emphasize the presence of ginger in the Product to appeal to consumers seeking real  
24 ingredients instead of a traditional soda.

25       46. In making the false, misleading, and deceptive representations, Defendants  
26 distinguish their ginger ales from their competitors’ Product. Defendants knew and intended that  
27 consumers would purchase, and pay a premium for, ginger ales labeled as being made from  
28 “REAL GINGER,” over comparable ginger ales that do not contain these representations on the



1 product labels. By using this branding strategy, Defendants are stating that their ginger ales are  
2 superior to, better than, and more nutritious and healthful than other brands of ginger ales that do  
3 not proclaim to be made from "REAL GINGER." For example, other brands of ginger ales that  
4 do not contain the false, misleading, and deceptive representation that they are made from "REAL  
5 GINGER," include brands such as Dr. Brown's and Vernors.

6 47. Further, Defendants knew and intended their representations to help them compete  
7 with small batch bottling companies that do make ginger ales using real ginger root. Defendants  
8 added the "MADE WITH REAL GINGER" representation to their product labels to compete with  
9 such small batch bottling companies that have increased in popularity in recent years. For  
10 example, Bruce Cost Ginger Ale is made with fresh whole ginger root and represents this fact to  
11 consumers in its advertising and on its product packaging.

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

15 49. Defendants engaged in the practices complained of herein to further their private  
16 interests of: (i) increasing sales their ginger ales, while decreasing the sales of ginger ales that do  
17 not claim to be made from real ginger and those ginger ales that are truthfully offered as made  
18 with real ginger by Defendants' competitors, and/or (ii) commanding a higher price for their  
19 ginger ales because consumers will pay more for these soft drinks due to the consumers' demand  
20 for products containing real ginger because of the perceived benefits.

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

23 50. Because of the growing market described in paragraph 45 and because Defendants  
24 know consumers rely on representations about the presence of real ginger in beverages,  
25 Defendants have an incentive to continue to make such false representations. In addition, other  
26 trends suggest that Defendants have no incentive to change their labeling practices.

27 51. For example, ginger ale is a particularly strong growing flavor in the healthy soda  
28 category. In December 2015, a brand manager for a competing brand, Schweppes, described

1 ginger as a “growing flavor trend.” See [http://www.prnewswire.com/news-releases/schweppes-](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html)  
2 [introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html).

3 52. To capitalize on the market, Defendants may not only continue to misleading  
4 advertise the Product, but they could seek to replicate the misrepresentation in other ways. For  
5 example, Defendant currently markets a Diet Ginger Ale, but does not advertise it as being made  
6 with real ginger. Given the trends in the market, Defendant could decide it to be more profitable  
7 to start doing so. Defendants also recently purchased the small soda brands of Blue Sky and  
8 Hansen’s, which both make ginger ales, and Defendants could decide to start falsely advertising  
9 those Product. Finally, Defendants own other brands of soda, such as Coca Cola, Barq’s, Fanta,  
10 and for which there are a variety of flavors. While Defendant does not currently sell any ginger  
11 ale under these brand names, the booming market for ginger ales creates an incentive to do so.

12 53. Defendants are also likely seeking to diversity their beverage portfolio in response  
13 to the changing market, the booming craft soda market, and the decreased demand for traditional  
14 sodas from big manufacturers. Defendants, who have in the past acquired smaller companies that  
15 compete with their bigger brands (e.g. acquiring Blue Sky despite selling sodas under the Coca  
16 Cola and Sprite brand names), will likely desire to do the same to maintain their competitive edge  
17 and ensure they are offering ginger ales at all segments of the market.

#### 18 **PLAINTIFF’S EXPERIENCES**

19 54. Plaintiff has purchased several cases of the Product from Safeway, located in Santa  
20 Cruz, CA, and a Lucky, located in Capitola, CA. Over the last two years, Plaintiff purchased  
21 approximately one case each year. For the two years prior to that, she purchased approximately  
22 two cases of the Product every month.

23 55. Plaintiff made each of her purchases of the Product after reading and relying on  
24 the truthfulness of Defendants’ product labels that promised that the Product were “MADE WITH  
25 REAL GINGER.”

26 56. At the time of each purchase, Plaintiff saw, read and relied on the “MADE WITH  
27 REAL GINGER” statement on the front of the package of the ginger ale. She was attracted to the  
28 Product because, when given a choice, she prefers to consume soft drinks made with real ginger

1 for health benefits, namely stomach calming or relaxation. But on each of the Product purchased  
2 by Fitzhenry-Russell, Defendants misrepresented the contents of the product as being “MADE  
3 WITH REAL GINGER” when they were not. Plaintiff believed that the statement meant that each  
4 of the Product that she purchased was made with, and contained, real ginger. She reasonably  
5 relied on the labels and advertising Defendants placed on the primary display panel of the  
6 product.

7 57. At the time of each purchase of the Product, Plaintiff did not know that the Product  
8 that she purchased were not made with real ginger, but instead were made with a chemical  
9 flavoring compound derived from ginger and manufactured to mimic the flavor of ginger and  
10 which does not contain any of the health benefits of real ginger. As a result of Defendants’  
11 misrepresentations and omissions, the Product has no, or, at, a minimum, a much lower, value to  
12 Plaintiff.

13 58. Plaintiff not only purchased the Product because their label said that they were  
14 “MADE WITH REAL GINGER,” but she also paid more money for the ginger ales than she  
15 would have paid for other a similar soft drink that was not labeled as containing real ginger.

16 59. Had Defendants not misrepresented (by omission and commission) the true nature  
17 of the Product, Plaintiff would not have purchased them or, at a very minimum, she would have  
18 paid less for the soft drink.

19 60. Plaintiff and members of the Class have been economically damaged by their  
20 purchase of the Product because the advertising for the Product was and is untrue and/or  
21 misleading under California law; therefore, the Product is worth less than what Plaintiffs and  
22 members of the Class paid for them and/or Plaintiff and members of the Class did not receive  
23 what they reasonably intended to receive.

24 61. As a direct and proximate result of Defendants’ unfair and wrongful conduct, as  
25 set forth herein, Plaintiffs and the class members: (1) were misled into purchasing the Product; (2)  
26 received a product that failed to meet their reasonable expectations and Defendants’ promises; (3)  
27 paid a premium sum of money for a product that was not as represented and, thus, were deprived  
28 of the benefit of the bargain because the purchased ginger ale had less value than what was

1 represented by Defendants; and (4) ingested a substance that was other than what was represented  
2 by Defendants and that Plaintiffs and class members did not expect.

3 62. Plaintiff continues to desire to purchase ginger ale made with real ginger root,  
4 including brands marketed and sold by Defendants. Plaintiff regularly visits stores such as  
5 Safeway where Defendants' Product and other ginger ale beverages are sold. Because of changes  
6 in the market, Plaintiff does not know at any given time, which brands are owned by Defendants  
7 and whether their representations as to the presence of ginger are truthful. Thus, Plaintiff is likely  
8 to be repeatedly presented with false or misleading information when shopping for ginger ale,  
9 making it difficult to make informed purchasing decisions. Should Defendants begin to market  
10 and sell a new brand of ginger ale, Plaintiff could be at risk for buying another one of Defendants'  
11 Product in reliance on the same or similar misrepresentation.

#### 12 CLASS ALLEGATIONS

13 63. Plaintiff brings this action against Defendants, on behalf of herself and all others  
14 similarly situated, as a class action pursuant to section 1781 of the California Civil Code.  
15 Plaintiff seek to represent the following groups of similarly situated persons, defined as follows:

16 All persons who, between December 23, 2012 and the present, purchased any  
17 of Defendants' the Product.

18 64. This action has been brought and may properly be maintained as a class action  
19 against Defendants because there is a well-defined community of interest in the litigation and the  
20 proposed class is easily ascertainable.

21 65. Numerosity: Plaintiff does not know the exact size the Class, but they are  
22 estimated that it is composed of more than 100 persons. The persons in the Class are so numerous  
23 that the joinder of all such persons is impracticable and the disposition of their claims in a class  
24 action rather than in individual actions will benefit the parties and the courts.

25 66. Common Questions Predominate: This action involves common questions of law  
26 and fact to the potential classes because each class member's claim derives from the deceptive,  
27 unlawful and/or unfair statements and omissions that led consumers to believe that the Product  
28 was made with, and contained, real ginger. The common questions of law and fact predominate  
over individual questions, as proof of a common or single set of facts will establish the right of

1 each member of the Class to recover. The questions of law and fact common to the Class are:

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

26 67. Typicality: Plaintiff’s claims are typical of the Class because she purchased at least  
 27 eight cases of the Product – in reliance on Defendants’ misrepresentations and omissions that they  
 28 were “MADE WITH REAL GINGER.” Thus, Plaintiff and the class members sustained the same

1 injuries and damages arising out of Defendants' conduct in violation of the law. The injuries and  
2 damages of each class member were caused directly by Defendants' wrongful conduct in  
3 violation of law as alleged.

4         68.     Adequacy: Plaintiff will fairly and adequately protect the interests of all class  
5 members because it is in her best interests to prosecute the claims alleged herein to obtain full  
6 compensation due to her for the unfair and illegal conduct of which she complains. Plaintiff also  
7 has no interests that are in conflict with, or antagonistic to, the interests of class members.  
8 Plaintiff has retained highly competent and experienced class action attorneys to represent her  
9 interests and that of the classes. By prevailing on her own claims, Plaintiff will establish  
10 Defendants' liability to all class members. Plaintiff and her counsel have the necessary financial  
11 resources to adequately and vigorously litigate this class action, and Plaintiff and counsel are  
12 aware of their fiduciary responsibilities to the class members and are determined to diligently  
13 discharge those duties by vigorously seeking the maximum possible recovery for class members.

14         69.     Superiority: There is no plain, speedy, or adequate remedy other than by  
15 maintenance of this class action. The prosecution of individual remedies by members of the  
16 classes will tend to establish inconsistent standards of conduct for Defendants and result in the  
17 impairment of class members' rights and the disposition of their interests through actions to  
18 which they were not parties. Class action treatment will permit a large number of similarly  
19 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,  
20 and without the unnecessary duplication of effort and expense that numerous individual actions  
21 would engender. Furthermore, as the damages suffered by each individual member of the classes  
22 may be relatively small, the expenses and burden of individual litigation would make it difficult  
23 or impossible for individual members of the class to redress the wrongs done to them, while an  
24 important public interest will be served by addressing the matter as a class action.

25         70.     Plaintiffs are unaware of any difficulties that are likely to be encountered in the  
26 management of this action that would preclude its maintenance as a class action.

27                     **CAUSES OF ACTION**

28         Plaintiff does not plead, and hereby disclaims, causes of action under the FDCA and



1 regulations promulgated thereunder by the FDA. Plaintiff relies on the FDCA and FDA  
 2 regulations only to the extent such laws and regulations have been separately enacted as state law  
 3 or regulation or provide a predicate basis of liability under the state and common laws cited in the  
 4 following causes of action.

5 **PLAINTIFF'S FIRST CAUSE OF ACTION**

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

7 **On Behalf of Plaintiff and the Class**

8 71. Plaintiff realleges and incorporate the paragraphs of this Class Action Complaint  
 9 as if set forth herein.

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

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

15 74. The Product that Plaintiff (and other similarly situated class members) purchased  
 16 from Defendants were "goods" within the meaning of California Civil Code § 1761(a).

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



1 §1770(a)(8), Defendants have disparaged the goods, services, or business of another by false or  
 2 misleading representation of fact. In violation of California Civil Code §1770(a)(9), Defendants  
 3 have advertised goods or services with intent not to sell them as advertised. Finally, regarding  
 4 California Civil Code §1770(a)(8), Defendants falsely or deceptively market and advertise that,  
 5 unlike other soft drink manufacturers, it sells ginger ales that are made from "REAL GINGER."

6 76. Plaintiff requests that this Court enjoin Defendants from continuing to employ the  
 7 unlawful methods, acts and practices alleged herein pursuant to California Civil Code  
 8 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the  
 9 future, Plaintiffs and the other members of the Class will continue to suffer harm.

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

19 78. Plaintiff also requests that this Court award her costs and reasonable attorneys'  
 20 fees pursuant to California Civil Code § 1780(d).

21 **PLAINTIFF'S SECOND CAUSE OF ACTION**  
 22 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**  
 23 **On Behalf Plaintiff and the Class**

24 79. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
 25 Complaint as if set forth herein.

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

81. Defendants made representations and statements (by omission and commission)

1 that led reasonable customers to believe that the Product that they were purchasing were made  
2 from, and contained, real ginger root.

3 82. Plaintiff and those similarly situated relied to their detriment on Defendants' false,  
4 misleading and deceptive advertising and marketing practices, including each of the  
5 misrepresentations and omissions set forth in paragraphs 19-22, 29-39, and 50-55 above. Had  
6 Plaintiff and those similarly situated been adequately informed and not intentionally deceived by  
7 Defendants, they would have acted differently by, without limitation, refraining from purchasing  
8 Defendants' ginger ales or paying less for them.

9 83. Defendants' acts and omissions are likely to deceive the general public.

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

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

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

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

26 88. Plaintiff seek, on behalf of herself and those similarly situated, a declaration that  
27 the above-described practices constitute false, misleading and deceptive advertising.

28 89. Plaintiff seeks, on behalf of herself and those similarly situated, an injunction to

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

11 **PLAINTIFF'S THIRD CAUSE OF ACTION**  
 12 **(Fraud, Deceit and/or Misrepresentation)**  
 13 **On Behalf of Plaintiff and the Class**

14 90. Plaintiff realleges and incorporate by reference the paragraphs of this Class Action  
 15 Complaint as if set forth herein.

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

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

93. Plaintiff and those similarly situated relied to their detriment on Defendants'

1 misrepresentations and fraudulent omissions. Had Plaintiffs and those similarly situated been  
 2 adequately informed and not intentionally deceived by Defendants, they would have acted  
 3 differently by, without limitation: (i) declining to purchase the Product, (ii) purchasing less of  
 4 them, or (iii) paying less for the Product.

5 94. By and through such fraud, deceit, misrepresentations and/or omissions,  
 6 Defendants intended to induce Plaintiff and those similarly situated to alter their position to their  
 7 detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiff and those  
 8 similarly situated to, without limitation, to purchase the Product.

9 95. Plaintiff and those similarly situated justifiably and reasonably relied on  
 10 Defendants' misrepresentations and omissions, and, accordingly, were damaged by Defendants.

11 96. As a direct and proximate result of Defendants' misrepresentations and/or  
 12 omissions, Plaintiff and those similarly situated have suffered damages, including, without  
 13 limitation, the amount they paid for the Product.

14 97. Defendants' conduct as described herein was wilful and malicious and was  
 15 designed to maximize Defendants' profits even though Defendants knew that it would cause loss  
 16 and harm to Plaintiff and those similarly situated.

17 **PLAINTIFF'S FOURTH CAUSE OF ACTION**  
 18 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions**  
 19 **Code § 17200, et seq.)**  
 20 **On Behalf of Plaintiff and the Class**

21 98. Plaintiff realleges and incorporates by reference the paragraphs of this Class  
 22 Action Complaint as if set forth herein.

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

27 100. In particular, Defendants have engaged, and continues to engage, in unlawful  
 28 practices by, without limitation, violating the following state and federal laws: (i) the CLRA as  
 described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman

1 Law (Article 3), including without limitation, California Health & Safety Code §§ 110390,  
 2 110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article  
 3 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705,  
 4 110740, 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and  
 5 branding of food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to  
 6 21 C.F.R. 101.3, 101.4, 101.13, 101.14, and 101.22, which are incorporated into the Sherman  
 7 Law (California Health & Safety Code §§ 110100(a), 110380, and 110505).

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

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

18 103. Defendants’ acts and omissions are likely to deceive the general public.

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

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

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

1 Among other things, Plaintiffs and the class members lost the amount they paid for the Product.

2 107. As a direct and proximate result of such actions, Defendants have enjoyed, and  
3 continues to enjoy, significant financial gain in an amount which will be proven at trial, but which  
4 is in excess of the jurisdictional minimum of this Court.

5 108. Plaintiff seeks, on behalf of herself and those similarly situated, full restitution of  
6 monies, as necessary and according to proof, to restore any and all monies acquired by  
7 Defendants from Plaintiffs, the general public, or those similarly situated by means of the  
8 deceptive and/or unlawful trade practices complained of herein, plus interest thereon.

9 109. Plaintiff seeks, on behalf of those similarly situated, a declaration that the above-  
10 described trade practices are fraudulent, unfair, and/or unlawful.

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

## 22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff prays for judgment as follows:

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

28 1. Declaring that Defendants' use of the phrase "Made with Real Ginger" on



the Product is unlawful and likely to deceive reasonable consumers;

2. 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 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 Plaintiff 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 fraudulent and/or unlawful.

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

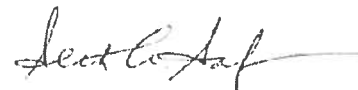
1. For reasonable attorneys' fees according to proof pursuant to, without limitation, the California Legal Remedies Act and California Code of Civil Procedure § 1021.5;
2. For costs of suit incurred; and
3. For such further relief as this Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands 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 Plaintiff

# **EXHIBIT A**

**EXHIBIT A**

1, 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.

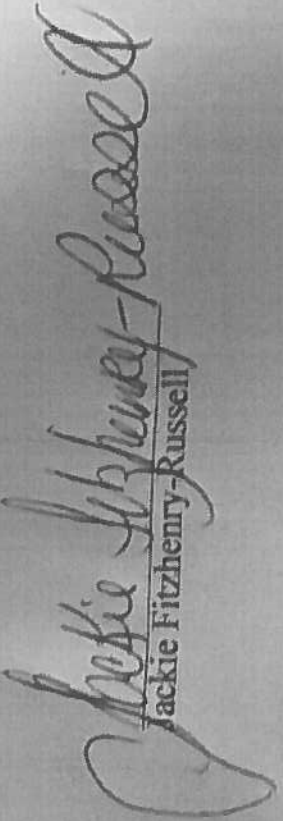
2. I submit this Declaration pursuant to California Code of Civil Procedure section 2215.5 and California Civil Code section 1780(d).

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

4. I later learned that the Seagram's 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.

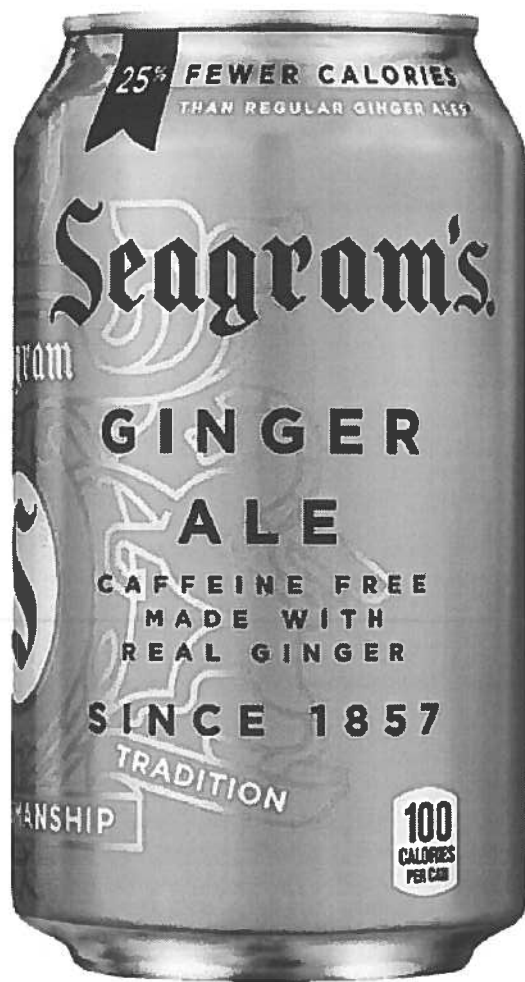
Executed this \_\_\_\_ day of December 2016, in Santa Cruz, California.

  
Jackie Fitzhenry-Russell

# **EXHIBIT B**

12/22/2016

Seagrams\_GingerAle\_12oz.png (300x514)





# **Exhibit B**





**Service of Process  
Transmittal**

01/05/2017

CT Log Number 530445862

**TO:** Russell S. Bonds  
The Coca-Cola Company  
1 Coca Cola Plz NW  
Atlanta, GA 30313-2499

**RE: Process Served in California**

**FOR:** The Coca-Cola Company (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, etc., Pltf. vs. THE COCA COLA COMPANY, et al., Dfts.

**DOCUMENT(S) SERVED:** Summons, Complaint

**COURT/AGENCY:** Santa Cruz County - Superior Court - Santa Cruz, CA  
Case # 16CV03346

**NATURE OF ACTION:** Violation of the Consumers Legal Remedies Act (the "CLRA"), California Civil Code 1750, et seq.

**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. GUTRIDE  
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, Nancy Quattrocchi nquattrocchi@na.ko.com

Email Notification, Russell S. Bonds rbonds@coca-cola.com

**SIGNED:** C T Corporation System

**ADDRESS:** 818 West Seventh Street  
Los Angeles, CA 90017

**TELEPHONE:** 213-337-4615

**SUMMONS  
(CITACION JUDICIAL)****NOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO):**

THE COCA COLA COMPANY, and DOES 1-50

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

JACKIE FITZHENRY-RUSSELL, an individual, on behalf of herself, the general public and those similarly situated,

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)FILED  
12/28/2016 10:00:20 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](http://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](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://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](http://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](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://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):

CASE NUMBER:  
(Número del Caso) 16CV03346

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

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

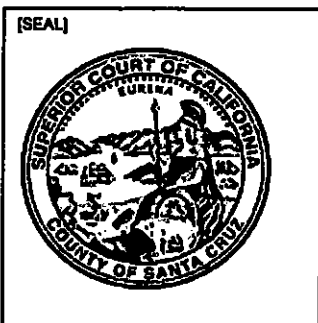
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Kristen Simpicio, Gutride Safier LLP, 100 Pine St., Suite 1250, San Francisco CA 94111 (415) 992-7549

DATE:  
(Fecha) 12/20/2016

ALEX CALVO  
Clerk, by Amanda Lucas, Deputy  
(Secretario) (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): The Coca Cola Company

- 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):

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

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SANTA CRUZ**

JACKIE FITZHENRY-RUSSELL, an  
individual, on behalf of herself, the general  
public and those similarly situated,

Plaintiff,

v.

THE COCA COLA COMPANY, and DOES 1-  
50,

Defendants.

**CASE NO. 16CV03346**

**UNLIMITED CIVIL CASE**

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

**JURY TRIAL DEMANDED**

FILED  
12/28/2016 10:00:20 AM  
Alex Galvo, Clerk  
By: Amanda Lucas  
Deputy, Santa Cruz County

## **INTRODUCTION**

1  
2 1. Plaintiff Jackie Fitzhenry-Russell, by and through her counsel, brings this class  
3 action against Defendants The Coca Cola Company and Does 1-50, inclusive, on behalf of  
4 herself, the general public, and those similarly situated, for violations of the Consumer Legal  
5 Remedies Act and Unfair Competition Law and false advertising, fraud, deceit and/or  
6 misrepresentation. The following allegations are based upon information and belief, including  
7 the investigation of Plaintiffs' counsel, unless stated otherwise.

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

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

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

## **PARTIES**

27  
28 5. Jackie Fitzhenry-Russell ("Plaintiff") is, and at all times alleged in this Class

1 Action Complaint was, an individual and a resident of Santa Cruz, California.

2 6. Defendant The Coca Cola Company is a corporation existing under the laws of the  
3 State of Delaware, having its principal place of business in Atlanta, Georgia.

4 7. The true names and capacities of Defendants sued as Does 1 through 50, inclusive,  
5 are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names pursuant to  
6 section 474 of the California Code of Civil Procedure. Plaintiff will seek leave of Court to amend  
7 this Class Action Complaint when said true names and capacities have been ascertained.

8 8. The Parties identified in paragraphs 6 - 8 of this Class Action Complaint are  
9 collectively referred to hereafter as "Defendants."

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

15 10. At all times herein mentioned, each of the Defendants was a member of, and  
16 engaged in, a joint venture, partnership and common enterprise, and acted within the course and  
17 scope of, and in pursuance of, said joint venture, partnership and common enterprise.

18 11. At all times herein mentioned, the acts and omissions of each of the Defendants  
19 concurred and contributed to the various acts and omissions of each and all of the other  
20 Defendants in proximately causing the injuries and damages as herein alleged.

21 12. At all times herein mentioned, each of the Defendants ratified each and every act  
22 or omission complained of herein.

23 13. At all times herein mentioned, each of the Defendants aided and abetted the acts  
24 and omissions of each and all of the other Defendants in proximately causing the damages, and  
25 other injuries, as herein alleged.

26 **JURISDICTION AND VENUE**

27 14. This action is brought by Plaintiff pursuant, *inter alia*, to the California Business  
28 and Professions Code, section 17200, *et seq.* Plaintiff and Defendants are "persons" within the

1 meaning of the California Business and Professions Code, section 17201.

2 15. The injuries, damages and/or harm upon which this action is based, occurred or  
3 arose out of activities engaged in by Defendants within, affecting, and emanating from, the State  
4 of California. Defendants regularly conduct and/or solicit business in, engage in other persistent  
5 courses of conduct in, and/or derive substantial revenue from products provided to persons in the  
6 State of California.

7 16. Defendants have engaged, and continue to engage, in substantial and continuous  
8 business practices in the State of California, including in the County of Santa Cruz.

9 17. In accordance with California Civil Code Section 1780(d), Plaintiff concurrently  
10 files herewith a declaration establishing that, at various times throughout the class period, she  
11 purchased Seagram's Ginger Ale in Santa Cruz, California and Capitola, California. (Plaintiff's  
12 declaration is attached hereto as Exhibit A.)

13 18. Plaintiff accordingly alleges that jurisdiction and venue are proper in this Court.

#### 14 **SUBSTANTIVE ALLEGATIONS**

##### 15 **Defendants' Ginger Ales.**

16 19. Defendants manufacture, distribute, market, advertise, and sell soft drinks in the  
17 United States under several brand names, including "Seagram's." Defendants' packaging for the  
18 its Seagram's Ginger Ale predominately, uniformly, and consistently state on the principal  
19 display panel of the product labels that it is "MADE FROM REAL GINGER" (referred to herein  
20 as the "Product").

21 20. The representation that the Product is "MADE FROM REAL GINGER" was  
22 uniformly communicated to Plaintiff and every other person who purchased any of the Products  
23 in California. An exemplar the Product's product label is attached hereto as Exhibit B. The same  
24 or substantially similar product label has appeared on each bottle or can sold (as those shown in  
25 Exhibit B) during the entirety of the Class Period.

26 21. As described in detail below, Defendants' advertising and labeling of the Product,  
27 as made from "REAL GINGER" is false, misleading, and intended to induce consumers to  
28 purchase the ginger ales, at a premium price, while ultimately failing to meet consumer

1 expectations. These representations deceive and mislead reasonable consumers into believing that  
2 the Product is made from, and contain, real ginger root.

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

8 **Consumer Demand for Real Ginger**

9 23. Many American consumers are health conscious and seek wholesome, natural  
10 foods to keep a healthy diet, so they routinely take nutrition information into consideration in  
11 selecting and purchasing food items. Product package labels convey nutrition information to  
12 consumers that they use to make purchasing decisions. As noted by FDA commissioner Margaret  
13 Hamburg during an October 2009 media briefing, “[s]tudies show that consumers trust and  
14 believe the nutrition facts information and that many consumers use it to help them build a  
15 healthy diet.” Consumers attribute a myriad of benefits to ginger and foods made from real ginger  
16 root.

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

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

25 25. The Food and Drug Administration has defined “natural flavor” to mean “the  
26 essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of  
27 roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice,  
28 fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar



1 plant material, meat, seafood, poultry, eggs, dairy Product, or fermentation products thereof,  
2 whose significant function in food is flavoring rather than nutritional.” 21 C.F.R. 501.22(a)(3). In  
3 other words, a “natural flavor” is one that contains some oil, protein, or essence from a plant or  
4 animal. But it bears little resemblance to the actual plant or animal from which it is derived.  
5 Rather, natural flavors are made in a laboratory by scientists who make determinations on how to  
6 replicate a flavor using chemicals found in nature.

7       26. While it may be that ginger root is used in the creation of the natural flavor, it is  
8 not ginger as a reasonable consumer would understand it. Rather, the scientists that created the  
9 “natural flavor” added to the Product would have isolated proteins from the cells and tissue of the  
10 ginger root or extracted oils or essences from the ginger root. But because those isolated  
11 compounds may not actually taste like ginger, the scientist would have then combined those  
12 extractions with any number of other extractions from other plants and animals to create a  
13 flavoring substance that tastes like ginger. See [https://www.scientificamerican.com/article/what-](https://www.scientificamerican.com/article/what-is-the-difference-be-2002-07-29/)  
14 [is-the-difference-be-2002-07-29/](https://www.scientificamerican.com/article/what-is-the-difference-be-2002-07-29/) (describing the process for creating natural flavors) (last  
15 accessed October 21, 2016).

16       27. Identical federal and California laws regulate the content of labels on packaged  
17 food and require truthful, accurate information on the labels of packaged foods. The requirements  
18 of the federal Food, Drug & Cosmetic Act (“FDCA”), and its labeling regulations, including  
19 those set forth in 21 C.F.R. §§ 101 and 102, were adopted by the California legislature in the  
20 Sherman Food Drug & Cosmetic Law (the “Sherman Law”). California Health & Safety Code §  
21 110100 (“All food labeling regulations and any amendments to those regulations adopted  
22 pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be  
23 the food labeling regulations of this state.”). The federal laws and regulations discussed below are  
24 applicable nationwide to all sales of packaged food Product. Additionally, no state imposes  
25 different requirements on the labeling of packaged food for sale in the United States.

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

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

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

14           31. Under California law, a food product that is “misbranded” cannot legally be  
 15 manufactured, advertised, distributed, sold, or possessed. Misbranded Product has no economic  
 16 value and are legally worthless.

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

20 **Defendants’ Marketing and Labeling of its Ginger Ales Violates State and Federal Food**  
 21 **Labeling Laws**

22           33. The Product is unlawful, misbranded and violate the Sherman Law, California  
 23 Health & Safety Code § 110660, *et seq.*, because the Product’s labels include the phrase “MADE  
 24 WITH REAL GINGER,” even though they are not made using real ginger. Instead, the Product is  
 25 flavored with a complex chemical flavoring that is manufactured to mimic the taste of ginger, and  
 26 was created not by using actual ginger root, but in a laboratory through the isolation of proteins,  
 27 essences, and oils from the cells and tissues of plants and animals and combining them in such a  
 28 way as to mimic the taste of ginger as a consumer would recognize it. The Product is not made

1 from, and do not contain, real ginger as a reasonable consumer would understand it to mean, nor  
2 do the products contain any of the health benefits that would be obtained if real ginger root were  
3 used or present.

4 34. Defendants' marketing, advertising, and sale of the Product violates the false  
5 advertising provisions of the Sherman Law (California Health & Safety Code § 110390, *et. seq.*),  
6 including but not limited to:

- 7 a. Section 110390, which makes it unlawful to disseminate false or misleading food  
8 advertisements that include statements on products and product packaging or  
9 labeling or any other medium used to directly or indirectly induce the purchase of  
10 a food product;  
11 b. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or  
12 offer to sell any falsely or misleadingly advertised food; and  
13 c. Sections 110398 and 110400, which make it unlawful to advertise misbranded  
14 food or to deliver or proffer for delivery any food that has been falsely or  
15 misleadingly advertised.

16 35. Defendants' marketing, advertising, and sale of the Product violates the  
17 misbranding provisions of the Sherman Law (California Health & Safety Code § 110660, *et.*  
18 *seq.*), including but not limited to:

- 19 d. Section 110665 (a food is misbranded if its labeling does not conform with the  
20 requirements for nutrition labeling as set forth in 21 U.S.C. Sec. 343(q));  
21 e. Section 110705 (a food is misbranded if words, statements and other information  
22 required by the Sherman Law to appear food labeling is either missing or not  
23 sufficiently conspicuous);  
24 f. Section 110740 (a food is misbranded if it contains artificial flavoring, artificial  
25 coloring and chemical preservatives but fail to adequately disclose that fact on  
26 their labeling);  
27 g. Section 110760, which makes it unlawful for any person to manufacture, sell,  
28 deliver, hold, or offer for sale any food that is misbranded;

h. Section 110765, which makes it unlawful for any person to misbrand any food;  
and

i. Section 110770, which makes it unlawful for any person to receive in commerce  
any food that is misbranded or to deliver or proffer for delivery any such food.

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

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

37. A reasonable consumer would expect that the Product contains what Defendants  
identifies them to contain on the product labels. A reasonable consumer would expect that when  
Defendants label the Product as being "MADE WITH REAL GINGER," the soft drinks are made  
with, and contain, real ginger as commonly understood and would not be contrary to the policies  
or regulations of the State of California and/or the FDA.

38. Moreover, Defendants do not disclose on the product labels that the Product is  
flavored with a chemical compound that was manufactured to mimic the flavor of ginger.  
Consumers lack the meaningful ability to test or independently ascertain the truthfulness of  
Defendants' food labeling claims, especially at the point of sale. Consumers would not know the  
true nature of the ginger flavoring merely by reading the ingredient label; its discovery requires  
investigation beyond the grocery store and knowledge of food chemistry beyond that of the  
average consumer. An average consumer does not have the specialized knowledge necessary to  
ascertain that the ginger flavor in the soft drink is not from the presence of real ginger in the soft  
drink but instead comes from the chemical compounded added to the drink to make it taste like  
ginger. That, combined with Defendants' active concealment in representing the Product as being  
"MADE FROM REAL GINGER," and not disclosing otherwise, gave the average reasonable  
consumer no reason to suspect that Defendants' representations on the packages were not true,  
and therefore consumers had no reason to investigate the soft drinks contained real ginger. Thus,  
reasonable consumers relied on Defendants' representations regarding the nature of the Product.

1 Such reliance by consumers is also eminently reasonable, since food companies are prohibited  
2 from making false or misleading statements on their products under federal law.

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

7 **Defendants' Website and Other Marketing Confirms That Defendants Intends to Deceive**  
8 **Consumers**

9 40. Defendants' own long standing advertising and marketing materials show that  
10 Defendants intended to deceive consumers into believing the false and deceptive packaging of the  
11 Product.

12 41. Defendants' advertising campaign typically shows a picture of the bottle or can of  
13 the Product, where the words "MADE WITH REAL GINGER" Are prominently featured. The  
14 can with those words appears both on Defendants' websites and in a variety of print  
15 advertisements .

16 42. Defendants also permit and encourage their marketing partners, including grocery  
17 stores, to advertise, market, advertise and sell the Product as a soft drink "MADE FROM REAL  
18 GINGER." Defendants provide their marketing partners information, including posters, signs, end  
19 cap displays, etc., that specifically represent that the Product is "MADE FROM REAL  
20 GINGER." Further, in sales sheets, sales presentations, and other marketing materials,  
21 Defendants state that the Product is "MADE FROM REAL GINGER."

22 43. In short, Defendants' advertising and marketing campaign confirms that  
23 Defendants intend that consumers be effectively deceived by Defendants' misrepresentations on  
24 the Product's product labels. More specifically, Defendants intend that consumers who read the  
25 Product's labels believe that the Product is made from, and contain, real ginger.

26 **Defendants' Employ Misleading Marketing Their Ginger Ales To Increase Profits and Gain**  
27 **a Competitive Edge**

28 44. Defendants do not use real ginger in their Product as doing so is more expensive  
than using flavoring compound. In recent years, numerous studies have found the presence of

1 lead in ginger, and manufacturers and retailers of other products containing ginger root, such as  
2 cookies and candies, have been sued by the California Attorney General. Thus, the diligent  
3 sourcing and testing procedures that would be required when using real ginger to ensure the  
4 product they are selling is safe are more expensive to adopt than simply using “natural flavor.” In  
5 addition, the cost of real ginger has increased in recent years, due to changes in weather in China,  
6 which produces 75% of the world’s ginger. *See* [http://www.producenews.com/news-dep-](http://www.producenews.com/news-dep-menu/test-featured/9579-ginger-prices-skyrocket-on-shrinking-supply)  
7 [menu/test-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,  
8 2016).

9       45. In the last decade, in response to news reports about the dangers of high fructose  
10 corn syrup and soda’s role in contributing to the increased rates of obesity and diabetes in this  
11 country, many consumers are drinking less soda, and are seeking out instead, healthier beverages,  
12 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)  
13 [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  
14 sales are declining, one segment of the category is on the rise – small companies and brands that  
15 emphasize their use of natural ingredients, such as Reed’s, Bruce Cost, Maine Root, and Grown  
16 Up Soda have entered the market. In 2014, the Specialty Food Association noted that healthy  
17 beverages were growing in popularity, as was the market for more sophisticated, specialty sodas  
18 containing all natural ingredients. *See* [https://www.specialtyfood.com/news/article/rise-healthy-](https://www.specialtyfood.com/news/article/rise-healthy-beverages/)  
19 [beverages/](https://www.specialtyfood.com/news/article/rise-healthy-beverages/) (last accessed October 21, 2016). Thus, many small craft soda companies are  
20 flourishing in response to increased consumer demand for alternatives to sodas made with high  
21 fructose corn syrup, artificial ingredients, and preservatives. Facing a public hostile to “Big Soda”  
22 and finding its sales dwindling due to the newer, healthier brands, Defendants have an incentive  
23 to emphasize the presence of ginger in the Product to appeal to consumers seeking real  
24 ingredients instead of a traditional soda.

25       46. In making the false, misleading, and deceptive representations, Defendants  
26 distinguish their ginger ales from their competitors’ Product. Defendants knew and intended that  
27 consumers would purchase, and pay a premium for, ginger ales labeled as being made from  
28 “REAL GINGER,” over comparable ginger ales that do not contain these representations on the

1 product labels. By using this branding strategy, Defendants are stating that their ginger ales are  
 2 superior to, better than, and more nutritious and healthful than other brands of ginger ales that do  
 3 not proclaim to be made from "REAL GINGER." For example, other brands of ginger ales that  
 4 do not contain the false, misleading, and deceptive representation that they are made from "REAL  
 5 GINGER," include brands such as Dr. Brown's and Vernors.

6 47. Further, Defendants knew and intended their representations to help them compete  
 7 with small batch bottling companies that do make ginger ales using real ginger root. Defendants  
 8 added the "MADE WITH REAL GINGER" representation to their product labels to compete with  
 9 such small batch bottling companies that have increased in popularity in recent years. For  
 10 example, Bruce Cost Ginger Ale is made with fresh whole ginger root and represents this fact to  
 11 consumers in its advertising and on its product packaging.

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

15 49. Defendants engaged in the practices complained of herein to further their private  
 16 interests of: (i) increasing sales their ginger ales, while decreasing the sales of ginger ales that do  
 17 not claim to be made from real ginger and those ginger ales that are truthfully offered as made  
 18 with real ginger by Defendants' competitors, and/or (ii) commanding a higher price for their  
 19 ginger ales because consumers will pay more for these soft drinks due to the consumers' demand  
 20 for products containing real ginger because of the perceived benefits.

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

23 50. Because of the growing market described in paragraph 45 and because Defendants  
 24 know consumers rely on representations about the presence of real ginger in beverages,  
 25 Defendants have an incentive to continue to make such false representations. In addition, other  
 26 trends suggest that Defendants have no incentive to change their labeling practices.

27 51. For example, ginger ale is a particularly strong growing flavor in the healthy soda  
 28 category. In December 2015, a brand manager for a competing brand, Schweppes, described



1 ginger as a “growing flavor trend.” See [http://www.prnewswire.com/news-releases/schweppes-](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html)  
2 [introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html](http://www.prnewswire.com/news-releases/schweppes-introduces-new-dark-ginger-ale-packed-with-a-refreshing-bolder-taste-300188635.html).

3 52. To capitalize on the market, Defendants may not only continue to misleading  
4 advertise the Product, but they could seek to replicate the misrepresentation in other ways. For  
5 example, Defendant currently markets a Diet Ginger Ale, but does not advertise it as being made  
6 with real ginger. Given the trends in the market, Defendant could decide it to be more profitable  
7 to start doing so. Defendants also recently purchased the small soda brands of Blue Sky and  
8 Hansen’s, which both make ginger ales, and Defendants could decide to start falsely advertising  
9 those Product. Finally, Defendants own other brands of soda, such as Coca Cola, Barq’s, Fanta,  
10 and for which there are a variety of flavors. While Defendant does not currently sell any ginger  
11 ale under these brand names, the booming market for ginger ales creates an incentive to do so.

12 53. Defendants are also likely seeking to diversity their beverage portfolio in response  
13 to the changing market, the booming craft soda market, and the decreased demand for traditional  
14 sodas from big manufacturers. Defendants, who have in the past acquired smaller companies that  
15 compete with their bigger brands (e.g. acquiring Blue Sky despite selling sodas under the Coca  
16 Cola and Sprite brand names), will likely desire to do the same to maintain their competitive edge  
17 and ensure they are offering ginger ales at all segments of the market.

#### 18 **PLAINTIFF’S EXPERIENCES**

19 54. Plaintiff has purchased several cases of the Product from Safeway, located in Santa  
20 Cruz, CA, and a Lucky, located in Capitola, CA. Over the last two years, Plaintiff purchased  
21 approximately one case each year. For the two years prior to that, she purchased approximately  
22 two cases of the Product every month.

23 55. Plaintiff made each of her purchases of the Product after reading and relying on  
24 the truthfulness of Defendants’ product labels that promised that the Product were “MADE WITH  
25 REAL GINGER.”

26 56. At the time of each purchase, Plaintiff saw, read and relied on the “MADE WITH  
27 REAL GINGER” statement on the front of the package of the ginger ale. She was attracted to the  
28 Product because, when given a choice, she prefers to consume soft drinks made with real ginger

1 for health benefits, namely stomach calming or relaxation. But on each of the Product purchased  
2 by Fitzhenry-Russell, Defendants misrepresented the contents of the product as being "MADE  
3 WITH REAL GINGER" when they were not. Plaintiff believed that the statement meant that each  
4 of the Product that she purchased was made with, and contained, real ginger. She reasonably  
5 relied on the labels and advertising Defendants placed on the primary display panel of the  
6 product.

7 57. At the time of each purchase of the Product, Plaintiff did not know that the Product  
8 that she purchased were not made with real ginger, but instead were made with a chemical  
9 flavoring compound derived from ginger and manufactured to mimic the flavor of ginger and  
10 which does not contain any of the health benefits of real ginger. As a result of Defendants'  
11 misrepresentations and omissions, the Product has no, or, at, a minimum, a much lower, value to  
12 Plaintiff.

13 58. Plaintiff not only purchased the Product because their label said that they were  
14 "MADE WITH REAL GINGER," but she also paid more money for the ginger ales than she  
15 would have paid for other a similar soft drink that was not labeled as containing real ginger.

16 59. Had Defendants not misrepresented (by omission and commission) the true nature  
17 of the Product, Plaintiff would not have purchased them or, at a very minimum, she would have  
18 paid less for the soft drink.

19 60. Plaintiff and members of the Class have been economically damaged by their  
20 purchase of the Product because the advertising for the Product was and is untrue and/or  
21 misleading under California law; therefore, the Product is worth less than what Plaintiffs and  
22 members of the Class paid for them and/or Plaintiff and members of the Class did not receive  
23 what they reasonably intended to receive.

24 61. As a direct and proximate result of Defendants' unfair and wrongful conduct, as  
25 set forth herein, Plaintiffs and the class members: (1) were misled into purchasing the Product; (2)  
26 received a product that failed to meet their reasonable expectations and Defendants' promises; (3)  
27 paid a premium sum of money for a product that was not as represented and, thus, were deprived  
28 of the benefit of the bargain because the purchased ginger ale had less value than what was

1 represented by Defendants; and (4) ingested a substance that was other than what was represented  
2 by Defendants and that Plaintiffs and class members did not expect.

3 62. Plaintiff continues to desire to purchase ginger ale made with real ginger root,  
4 including brands marketed and sold by Defendants. Plaintiff regularly visits stores such as  
5 Safeway where Defendants' Product and other ginger ale beverages are sold. Because of changes  
6 in the market, Plaintiff does not know at any given time, which brands are owned by Defendants  
7 and whether their representations as to the presence of ginger are truthful. Thus, Plaintiff is likely  
8 to be repeatedly presented with false or misleading information when shopping for ginger ale,  
9 making it difficult to make informed purchasing decisions. Should Defendants begin to market  
10 and sell a new brand of ginger ale, Plaintiff could be at risk for buying another one of Defendants'  
11 Product in reliance on the same or similar misrepresentation.

#### 12 CLASS ALLEGATIONS

13 63. Plaintiff brings this action against Defendants, on behalf of herself and all others  
14 similarly situated, as a class action pursuant to section 1781 of the California Civil Code.  
15 Plaintiff seek to represent the following groups of similarly situated persons, defined as follows:

16 All persons who, between December 23, 2012 and the present, purchased any  
17 of Defendants' the Product.

18 64. This action has been brought and may properly be maintained as a class action  
19 against Defendants because there is a well-defined community of interest in the litigation and the  
20 proposed class is easily ascertainable.

21 65. Numerosity: Plaintiff does not know the exact size the Class, but they are  
22 estimated that it is composed of more than 100 persons. The persons in the Class are so numerous  
23 that the joinder of all such persons is impracticable and the disposition of their claims in a class  
24 action rather than in individual actions will benefit the parties and the courts.

25 66. Common Questions Predominate: This action involves common questions of law  
26 and fact to the potential classes because each class member's claim derives from the deceptive,  
27 unlawful and/or unfair statements and omissions that led consumers to believe that the Product  
28 was made with, and contained, real ginger. The common questions of law and fact predominate  
over individual questions, as proof of a common or single set of facts will establish the right of

1 each member of the Class to recover. The questions of law and fact common to the Class are:

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

26 67. Typicality: Plaintiff's claims are typical of the Class because she purchased at least  
 27 eight cases of the Product – in reliance on Defendants' misrepresentations and omissions that they  
 28 were "MADE WITH REAL GINGER." Thus, Plaintiff and the class members sustained the same

1 injuries and damages arising out of Defendants' conduct in violation of the law. The injuries and  
2 damages of each class member were caused directly by Defendants' wrongful conduct in  
3 violation of law as alleged.

4       68.     Adequacy: Plaintiff will fairly and adequately protect the interests of all class  
5 members because it is in her best interests to prosecute the claims alleged herein to obtain full  
6 compensation due to her for the unfair and illegal conduct of which she complains. Plaintiff also  
7 has no interests that are in conflict with, or antagonistic to, the interests of class members.  
8 Plaintiff has retained highly competent and experienced class action attorneys to represent her  
9 interests and that of the classes. By prevailing on her own claims, Plaintiff will establish  
10 Defendants' liability to all class members. Plaintiff and her counsel have the necessary financial  
11 resources to adequately and vigorously litigate this class action, and Plaintiff and counsel are  
12 aware of their fiduciary responsibilities to the class members and are determined to diligently  
13 discharge those duties by vigorously seeking the maximum possible recovery for class members.

14       69.     Superiority: There is no plain, speedy, or adequate remedy other than by  
15 maintenance of this class action. The prosecution of individual remedies by members of the  
16 classes will tend to establish inconsistent standards of conduct for Defendants and result in the  
17 impairment of class members' rights and the disposition of their interests through actions to  
18 which they were not parties. Class action treatment will permit a large number of similarly  
19 situated persons to prosecute their common claims in a single forum simultaneously, efficiently,  
20 and without the unnecessary duplication of effort and expense that numerous individual actions  
21 would engender. Furthermore, as the damages suffered by each individual member of the classes  
22 may be relatively small, the expenses and burden of individual litigation would make it difficult  
23 or impossible for individual members of the class to redress the wrongs done to them, while an  
24 important public interest will be served by addressing the matter as a class action.

25       70.     Plaintiffs are unaware of any difficulties that are likely to be encountered in the  
26 management of this action that would preclude its maintenance as a class action.

#### 27                   **CAUSES OF ACTION**

28       Plaintiff does not plead, and hereby disclaims, causes of action under the FDCA and

1 regulations promulgated thereunder by the FDA. Plaintiff relies on the FDCA and FDA  
 2 regulations only to the extent such laws and regulations have been separately enacted as state law  
 3 or regulation or provide a predicate basis of liability under the state and common laws cited in the  
 4 following causes of action.

5 **PLAINTIFF'S FIRST CAUSE OF ACTION**

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

7 **On Behalf of Plaintiff and the Class**

8 71. Plaintiff realleges and incorporate the paragraphs of this Class Action Complaint  
 9 as if set forth herein.

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

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

15 74. The Product that Plaintiff (and other similarly situated class members) purchased  
 16 from Defendants were "goods" within the meaning of California Civil Code § 1761(a).

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

1 §1770(a)(8), Defendants have disparaged the goods, services, or business of another by false or  
 2 misleading representation of fact. In violation of California Civil Code §1770(a)(9), Defendants  
 3 have advertised goods or services with intent not to sell them as advertised. Finally, regarding  
 4 California Civil Code §1770(a)(8), Defendants falsely or deceptively market and advertise that,  
 5 unlike other soft drink manufacturers, it sells ginger ales that are made from "REAL GINGER."

6 76. Plaintiff requests that this Court enjoin Defendants from continuing to employ the  
 7 unlawful methods, acts and practices alleged herein pursuant to California Civil Code  
 8 § 1780(a)(2). If Defendants are not restrained from engaging in these types of practices in the  
 9 future, Plaintiffs and the other members of the Class will continue to suffer harm.

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

19 78. Plaintiff also requests that this Court award her costs and reasonable attorneys'  
 20 fees pursuant to California Civil Code § 1780(d).

21 **PLAINTIFF'S SECOND CAUSE OF ACTION**  
 22 **(False Advertising, Business and Professions Code § 17500, *et seq.* ("FAL"))**  
 23 **On Behalf Plaintiff and the Class**

24 79. Plaintiffs reallege and incorporate by reference the paragraphs of this Class Action  
 25 Complaint as if set forth herein.

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

81. Defendants made representations and statements (by omission and commission)



1 that led reasonable customers to believe that the Product that they were purchasing were made  
2 from, and contained, real ginger root.

3 82. Plaintiff and those similarly situated relied to their detriment on Defendants' false,  
4 misleading and deceptive advertising and marketing practices, including each of the  
5 misrepresentations and omissions set forth in paragraphs 19-22, 29-39, and 50-55 above. Had  
6 Plaintiff and those similarly situated been adequately informed and not intentionally deceived by  
7 Defendants, they would have acted differently by, without limitation, refraining from purchasing  
8 Defendants' ginger ales or paying less for them.

9 83. Defendants' acts and omissions are likely to deceive the general public.

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

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

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

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

26 88. Plaintiff seek, on behalf of herself and those similarly situated, a declaration that  
27 the above-described practices constitute false, misleading and deceptive advertising.

28 89. Plaintiff seeks, on behalf of herself and those similarly situated, an injunction to

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

11 **PLAINTIFF'S THIRD CAUSE OF ACTION**  
 12 **(Fraud, Deceit and/or Misrepresentation)**  
 13 **On Behalf of Plaintiff and the Class**

14 90. Plaintiff realleges and incorporate by reference the paragraphs of this Class Action  
 15 Complaint as if set forth herein.

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

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

93. Plaintiff and those similarly situated relied to their detriment on Defendants'

1 misrepresentations and fraudulent omissions. Had Plaintiffs and those similarly situated been  
 2 adequately informed and not intentionally deceived by Defendants, they would have acted  
 3 differently by, without limitation: (i) declining to purchase the Product, (ii) purchasing less of  
 4 them, or (iii) paying less for the Product.

5 94. By and through such fraud, deceit, misrepresentations and/or omissions,  
 6 Defendants intended to induce Plaintiff and those similarly situated to alter their position to their  
 7 detriment. Specifically, Defendants fraudulently and deceptively induced Plaintiff and those  
 8 similarly situated to, without limitation, to purchase the Product.

9 95. Plaintiff and those similarly situated justifiably and reasonably relied on  
 10 Defendants' misrepresentations and omissions, and, accordingly, were damaged by Defendants.

11 96. As a direct and proximate result of Defendants' misrepresentations and/or  
 12 omissions, Plaintiff and those similarly situated have suffered damages, including, without  
 13 limitation, the amount they paid for the Product.

14 97. Defendants' conduct as described herein was wilful and malicious and was  
 15 designed to maximize Defendants' profits even though Defendants knew that it would cause loss  
 16 and harm to Plaintiff and those similarly situated.

17 **PLAINTIFF'S FOURTH CAUSE OF ACTION**  
 18 **(Unlawful, unfair, and fraudulent trade practices violation of Business and Professions**  
 19 **Code § 17200, *et seq.*)**  
 20 **On Behalf of Plaintiff and the Class**

21 98. Plaintiff realleges and incorporates by reference the paragraphs of this Class  
 22 Action Complaint as if set forth herein.

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

27 100. In particular, Defendants have engaged, and continues to engage, in unlawful  
 28 practices by, without limitation, violating the following state and federal laws: (i) the CLRA as  
 described herein; (ii) the FAL as described herein; (iii) the advertising provisions of the Sherman

1 Law (Article 3), including without limitation, California Health & Safety Code §§ 110390,  
2 110395, 110398 and 110400; (iv) the misbranded food provisions of the Sherman Law (Article  
3 6), including without limitation, California Health & Safety Code §§ 110660, 110665, 110705,  
4 110740, 110760, 110765, and 110770; and (v) and federal laws regulating the advertising and  
5 branding of food in 21 U.S.C. § 343(a), *et seq.* and FDA regulations, including but not limited to  
6 21 C.F.R. 101.3, 101.4, 101.13, 101.14, and 101.22, which are incorporated into the Sherman  
7 Law (California Health & Safety Code §§ 110100(a), 110380, and 110505).

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

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

18 103. Defendants’ acts and omissions are likely to deceive the general public.

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

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

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

1 Among other things, Plaintiffs and the class members lost the amount they paid for the Product.

2 107. As a direct and proximate result of such actions, Defendants have enjoyed, and  
3 continues to enjoy, significant financial gain in an amount which will be proven at trial, but which  
4 is in excess of the jurisdictional minimum of this Court.

5 108. Plaintiff seeks, on behalf of herself and those similarly situated, full restitution of  
6 monies, as necessary and according to proof, to restore any and all monies acquired by  
7 Defendants from Plaintiffs, the general public, or those similarly situated by means of the  
8 deceptive and/or unlawful trade practices complained of herein, plus interest thereon.

9 109. Plaintiff seeks, on behalf of those similarly situated, a declaration that the above-  
10 described trade practices are fraudulent, unfair, and/or unlawful.

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

#### 22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff prays for judgment as follows:

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

28 1. Declaring that Defendants' use of the phrase "Made with Real Ginger" on

1 the Product is unlawful and likely to deceive reasonable consumers;

2 2. Enjoining Defendants, directly or through any corporation, partnership,  
3 subsidiary, division, trade name, or other device, in connection with the  
4 manufacturing, labeling, packaging, advertising, promotion, offering for  
5 sale, sale, or distribution of any ginger beverage from making a “Made  
6 with Real Ginger” claim unless the product contains real ginger;

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

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

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

26 1. For restitution pursuant to, without limitation, the California Business &  
27 Professions Code §§ 17200, *et seq.* and 17500, *et seq.*;

28 2. For injunctive relief pursuant to, without limitation, the California Business

**3. For a declaration that Defendants' above-described trade practices are fraudulent and/or unlawful.**

- 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.**

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.

**Plaintiff hereby demands a trial by jury.**

**GUTRIDE SAFIER LLP**

Heath Co. Inc.

**Attorneys for Plaintiff**



# **EXHIBIT A**

**EXHIBIT A**

1 Jackie Fitzhenry-Russell, declare.

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

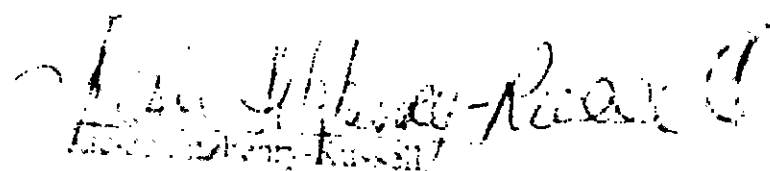
4 I submit this Declaration pursuant to California Code of Civil Procedure section  
5 22 5.5 and California Civil Code section 1780(d).

6 3. As set forth in my complaint, over the last four years, I purchased a number of  
7 cases of Seagram's Ginger Ale from Safeway store in Santa Cruz, California and a Lucky store in  
8 Capitola, California.

9 4. I later learned that the Seagram's Ginger Ale I purchased was not made with real  
10 ginger.

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

13 Executed this 2 day of December 2016, in Santa Cruz, California.

14  
15  
16  
17  
18  
19  
  
Jackie Fitzhenry-Russell

# **EXHIBIT B**

12/22/2016

Seagrams\_GingerAle\_12oz.png (300x514)



12/22/2016

7bb83159-4acc-4fcc-9697-a2a86ab64cf2\_1.327f5f688437019b03fb94361d22949b.jpeg (2000x2000)



CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address). ADAM J. GUTRIDE (#181446) SETH A. SAFIER (#1914271) MARIE A. MCCRARY (#262670) KRISTEN G. SIMPLICIO (#263291) Gutride Safier LLP 110 Pine Street, Suite 1250, San Francisco, CA 94111 TELEPHONE NO.: (415) 271-6469 FAX NO.: (415) 449-6469 ATTORNEY FOR (Name) PLAINTIFF JACKIE FITZHENRY-RUSSELL		FOR COURT USE ONLY FILED 12/28/2016 10:00:20 AM Alex Calvo, Clerk By: Amanda Lucas Deputy Santa Cruz County
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Cruz STREET ADDRESS 701 Ocean Street MAILING ADDRESS: CITY AND ZIP CODE Santa Cruz, CA 95060 BRANCH NAME Santa Cruz Courthouse		
CASE NAME: Fitzhenry-Russell v. The Coca-Cola Company, 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)		CASE NUMBER 16CV03346
Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		JUDGE: DEPT.:

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:

<b>Auto Tort</b> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <b>Other P/DPD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/DPD/WD (23) <b>Non-P/DPD/WD (Other) Tort</b> <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-P/DPD/WD tort (35) <b>Employment</b> <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<b>Contract</b> <input type="checkbox"/> Breach of contract/warranty (06) <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) <b>Real Property</b> <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <b>Unlawful Detainer</b> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) <b>Judicial Review</b> <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 (39)	<b>Provisionally Complex Civil Litigation</b> (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/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) <b>Enforcement of Judgment</b> <input type="checkbox"/> Enforcement of judgment (20) <b>Miscellaneous Civil Complaint</b> <input type="checkbox"/> RICO (27) <input checked="" type="checkbox"/> Other complaint (not specified above) (42) <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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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 Kristen Simplicio

(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.

Page 1 of 2

<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ</b> Santa Cruz Branch 701 Ocean Street, Room 110 Santa Cruz, CA 95060	<b>FILED</b>  12/28/2016  Alex Calvo, Clerk By: Amanda Lucas Deputy, Santa Cruz County
Jackie Fitzhenry-Russell  vs  The Coca-Cola Company	
<b>CASE MANAGEMENT INFORMATION AND SETTING</b>	<b>CASE NO:</b> 16CV03346

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: 04/27/2017**

**Time: 8:30**

**Santa Cruz Department 4**

**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](http://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](http://www.santacruzcourt.org), for hours and workshop options.
4. Watsonville Law Center: 831-722-2845.



# **Exhibit C**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL, ON BEHALF  
OF HERSELF AND ALL OTHERS SIMILARLY  
SITUATED

Plaintiff,

vs.

COCA-COLA COMPANY

Defendant.

Case No.

**DECLARATION OF KEVIN  
HAMILTON**

I, KEVIN HAMILTON, declare under penalty of perjury as follows.

1. I am the Finance Director, Sparkling Category Brands, for The Coca-Cola Company ("Coca-Cola"), which markets the soft drink Seagram's® Ginger Ale. I submit this affidavit based upon my personal knowledge in support of the Notice of Removal filed by Coca-Cola.

2. Seagram's® Ginger Ale is sold across the United States in numerous retail channels, including supermarkets, drug stores, discount chains, and mass market retailers such as Walmart, Kroger, and Dollar General, among others.

